

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee

v.

SALVADOR JACINTO,
Aviation Structural Mechanic First Class, (E-6)
United States Navy,
Appellant

USCA Dkt. No. 20-0359/NA

Crim. App. No. 201800325

**AMICUS CURIAE PROTECT OUR DEFENDERS'
MOTION TO FILE MEMORANDUM
IN SUPPORT OF PETITION FOR RECONSIDERATION
FILED BY APPELLEE UNITED STATES**

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August 3, 2021

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES**

Amicus curiae Protect Our Defenders, pursuant to Rules 26(a)(3) and 33 of the Court’s Rules for Practice and Procedure, moves for leave to file this amicus curiae memorandum in support of the Appellee United States’ Petition for Reconsideration that was filed July 26, 2021 (“Petition”). The Appellant filed an Answer on July 27, 2021 (“Answer”). Amicus curiae Protect Our Defenders was unaware of the Petition or Answer until the Court provided copies of the pleadings on July 28, 2021.

Protect Our Defenders recognizes that the Rules do not address the ability of amicus curiae to file memoranda and counsel is uncertain with how to proceed. Protect Our Defenders respectfully asks this Court to treat it fairly and respectfully by suspending the Rules pursuant to Rule 33 and allowing it to file this Memorandum. The good causes for suspending the Rules are: (1) this Court’s Rules do not address this situation; (2) amicus curiae Protect Our Defenders presents relevant matters that have not been presented by the parties and may be of considerable help to the Court; and (3) upon receiving the pleadings, Protect Our Defenders has diligently labored to assert prepare this motion and memorandum. This Court has previously granted an amicus curiae’s motion under Rules 26 and 33 to file a memorandum in support of a petition for reconsideration. *United States v. Barry*, 78 M.J. 160 (C.A.A.F. 2018).

Protect Our Defenders honors, supports, and gives voice to the brave men and women in uniform who have been raped, assaulted, or harassed by fellow service members. Military victims of sexual assault are affected by the production and disclosure of mental health records in violation of Mil. R. Evid. 513.

Inadvertent or improper disclosure of psychotherapy records affects not only the victim in this case but affects many victims of military sexual assault. If this Court gets this decision wrong, many victims may lose their privilege despite the plain and clear language in the Manual for Courts-Martial.

The parties have not presented applicable rules and argument, and this amicus brief will bring relevant matter that may be of considerable help to the Court.

On behalf of military sexual assault victims, Protect Our Defenders asks to be heard. In the interests of justice and fairness, this Court should accept and consider Protect Our Defenders' Memorandum in Support of Appellee's Petition for Reconsideration.

ISSUE PRESENTED BY PETITION FOR RECONSIDERATION

Appellee United States presents the following issue in its Petition for Reconsideration:

WHETHER THIS COURT'S JULY 15, 2021 OPINION PERMITS THE NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS TO REVIEW ON REMAND PRIVILEGED COMMUNICATIONS BETWEEN THE VICTIM AND HER PSYCHOTHERAPIST.

Privileged communications were improperly produced pursuant to a June 8, 2018 order by the court-martial to produce only diagnoses and medications.

The Appellant Jacinto opposes the Appellee's Petition for reconsideration primarily because of his argument that the privileged communications should have been included in the record of trial.

ARGUMENT

1. The Victim's Privileged Records Were Not and Should Not Have Been Included in the Record of Trial.

The Appellant argues that records of privileged communications improperly produced pursuant to the court-martial's June 8, 2018 order should have been included in the record of trial. Answer at 3-5. The Appellant relies upon M.C.M. 1103A.

Appellant argues that records must be placed in the record of trial if they are sealed. The Appellant has the cart before the horse because R.C.M. 1103A does not speak to what is in the record of trial. It only provides the procedure to be followed *if* the record of trial includes sealed materials ("If the . . . record of trial contains exhibits, proceedings, or other matter ordered sealed by the . . . military judge, . . . trial counsel shall cause such materials to be sealed").

R.C.M. 1103(b)(2) identifies the contents of the record of trial. R.C.M. 1103(b)(2)(D)(v) states that exhibits that were received in evidence must be

included in the record of trial. Although not part of the record of trial, exhibits that were marked for the record but not received in evidence are attached to the record. R.C.M. 1103(b)(3)(B).

In this case, the victim's privileged records were improperly produced by the medical provider and were not responsive to the court-martial's June 8, 2018 order. The court-martial did not receive the records in evidence, did not mark the records as an exhibit, and did not review or consider the records. J.A. 65. The records were not and should never have been included in the record of trial.

The Appellant acknowledges the records were not marked as an exhibit but incorrectly asserts the military judge should have marked the records because they were "referred to." Answer at 5. The military judge did not mark the privileged records in this case because they were not entered into evidence, were not responsive to the June 8, 2018 order, and were not reviewed or even considered by the military judge. Being "referred to on the record" is insufficient to require marking an exhibit. R.C.M. 1103(b)(3)(B) requires an exhibit to be both marked and referred to. Even if an exhibit satisfies R.C.M. 1103(b)(3)(B), the exhibit would only be attached to the record of trial and would not be included in the record of trial.¹

¹ R.C.M. 1103(b)(2) and (3) are clear and unambiguous. The new rule R.C.M. 1112(b) (2019) is clearer still and consistent with 1103(b) (2016). The

(continued...)

Victims of military sexual assault should not have their privileged records pored over or pawed through by servicemembers who assaulted them just because their records were mistakenly or improperly produced. This Court should follow the rules as they are written and find that the military judge properly did not include in the record of trial the mistakenly produced privileged records.

2. This Court's July 15, 2021 Opinion Prohibits the NMCCA or *DuBay* Judge from Conducting an In Camera Review of the Victim's Privileged Records.

The Appellee United States asks this Court to clarify that "any remainder of the earlier hospital records produced in response to the June 8, 2018, order," refers only to records from the hospital's disclosure on June 13, 2018, and not to any records the hospital erroneously produced on June 11, 2018. Petition at 1.

Although this Court's Opinion is clear that Mil. R. Evid. 513 and other privileges apply on remand and should not require further clarification, amicus curiae Protect Our Defenders supports the Appellee's Petition for Reconsideration because the Appellant's Answer indicates he fundamentally misconstrues the Court's Opinion. The Court should clarify its Opinion to preclude needless litigation on remand.

record of trial under R.C.M. 1112(b) includes "evidence or exhibits considered by the court-martial in determining the findings or sentence." Since the victim's privileged records remained sealed and were not reviewed or considered by the military judge, the records do not belong in the record of trial.

The Court did not decide whether there is a constitutionally required exception to Mil. R. Evid. 513 and is focused solely on whether the defense established a factual basis for its continuance and in camera review motions. *United States v. Jacinto*, No. 20-0359, 2021 CAAF LEXIS 686, at *10, n.10 (C.A.A.F. July 15, 2021). On the issue of whether the defense established a factual basis for an in camera review under an enumeration exception to Mil. R. Evid. 513, the record is fully developed. There is no factual basis for an in camera review based upon any enumerated exception.

Since it did not decide whether there is a constitutionally required exception to Mil. R. Evid. 513, this Court has directed the NMCCA or *DuBay* judge to focus solely on whether the defense has established a factual basis for an in camera review that would assist the Court in deciding the Granted Issue.

The Court further held that Mil. R. Evid. 513 and other privileges would apply to the proceedings on remand. *Id.* at 13. If the Court intended to authorize the NMCCA or *DuBay* judge to conduct an in camera review of privileged records, it would have said so. The Granted Issue, whether the military judge abuse his discretion by denying an in camera review of the records, would become moot by an in camera review on remand. The victim would have her privilege violated without any factual basis for applying an enumerated exception and without this

Court ever deciding the Granted Issue of whether there is a constitutionally required exception.

CONCLUSION

This Court should order that the NMCCA or *DuBay* judge is prohibited from reviewing in camera the victim's privileged psychotherapy records.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter Coote', written in a cursive style.

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 3, 2021 a copy of the foregoing was transmitted by electronic means to the following:

- (1) This Court: efiling@armfor.uscourts.gov
- (2) Counsel for Appellant: Lieutenant Michael W. Wester, JAGC, USN
- (3) Counsel for Appellee: Major Clayton L. Wiggins, JAGC, USN

Respectfully submitted,



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