



**AIR FORCE LEGAL OPERATIONS AGENCY
SPECIAL VICTIMS' COUNSEL
ROBINS AFB, GEORGIA**

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WRITTEN REMARKS TO THE JUDICIAL PROCEEDINGS PANEL

Captain September R. Foy, USAF

I am Captain September Foy. I am currently serving as an Air Force Special Victims' Counsel, stationed at Robins AFB, GA. I have served in the Air Force for over six years. In my first assignment, I was the Chief of Military Justice and a prosecutor at Andersen AFB, Guam. In 2013 I moved to Robins AFB, GA where I spent two years as the Area Defense Counsel before moving to my current position as a Special Victims' Counsel in July of 2015. In my time in the Air Force, I have prosecuted, defended or advocated for victims in over 30 courts-martial, and represented over 500 defense clients and over 40 special victims. I would like to address three issues that I have seen in my time working in military justice. As an initial matter, I would like to state that I can only speak from my own personal experience, I cannot speak for the Air Force as a whole.

The current Article 32 hearing structure protects victims' and is not a "rubber stamp" hearing. I was a defense counsel when the law regarding Article 32 hearings changed. Initially, the feeling on the ground was that there was no point for the hearing and they would all just be "paper cases," with no opportunity for discovery or advocacy. This viewpoint was wrong. I have participated in 14 Article 32 hearings, either as defense or special victims' counsel, since the change. It has also been my experience in the past several years, that the Defense usually at least receives a copy of the Air Force Office of Special Investigations report of investigation ahead of the Article 32 hearing. As an SVC, I have had three victims testify at Article 32 hearings, because this was what was in the best interest of their case and what they wanted to do. I have had four clients attend Article 32s, but did not testify. Also as a SVC, I have been able to advocate for my clients' interests at Article 32 hearings with great success. For the most part, Preliminary Hearings Offices, PHOs, have allowed me to stand and object in the middle of witness testimony and at other times during the hearing. I have not been hindered in my ability to present argument or file objections on MRE 412, 513 or matters that implicate my client's rights. Because a PHO cannot compel production of mental health records, I have been able to protect my clients' mental health at the Article 32 stage. Finally, almost all of my requests to seal records have been granted.

The most common practice in the Article 32s I have attended in the past two years in a case where my client is not testifying, is for the Government to introduce as a PHO Exhibit the recorded interview of my client by law enforcement. For my clients, those interviews have typically run between two to three hours. In almost every Article 32 hearing since I came in the Air Force, the PHO has granted Defense and Government counsel the chance to present argument at the end of the hearing. Defense has the chance to argue their theory of the case, citing to certain points in my client's recorded interview. Defense still has the ability to call witnesses of their own, and they have been doing this. Indeed, in reading the PHO reports in the past two years, it is not the case that an Article 32 hearing is merely a formality. I have had four

cases where the PHO has not recommended proceeding on one or more of the charges, and I've had two cases where the PHO has recommended dismissing the case altogether. In conclusion, my clients have been generally happy with the Article 32 process, and the ability of me to advocate for their rights. I have also seen the defense community zealously defend their clients, to the point where cases have been dismissed or charges dropped. The Article 32 process does seem to be working, from my perspective.

Victims' Counsel need the ability to make speaking objections during trial. In contrast to an Article 32 hearing, under the current Air Force Rules, I am not allowed to stand and say "objection" during trial -- which would stop the proceeding in its tracks until the military judge makes a ruling. At trial, I am only allowed to stand and wait to be recognized by the military judge. Because testimony in a trial happens so rapidly, simply standing and waiting to be recognized is sometimes not enough to prevent testimony which would violate my client's MRE 412 and 513 rights. The simple ability to stand and say, "objection" would truly allow my client to be heard, while not affecting the rights of the Government or the Accused.

We need to create a legal requirement for a "knowing" waiver of mental health privilege. The psychotherapist-patient privilege, addressed in MRE 513, and the procedural rights established by this rule, is one of the most important issues to my clients. For my military clients, there still exists a stigma against seeking mental health services and they do not want the entire base knowing they are seeking counseling. For my civilian clients, some interacting with the military justice system for the first time, it is important for them that their mental health records be kept private. The protections against Courts obtaining and reviewing a victim's mental health records and then using those records during a trial are not absolute. A victim can waive those legal protections. For the most part, until I am detailed to represent a client and have the chance to speak with them, they do not know that they have a privilege not to disclose their mental health information and that if they do disclose any mental health information, this disclosure might open the door to their mental health records being used at a public trial.

MRE 510 address waiver of a privilege. This rule states that a person that holds a privilege, such as the one enumerated in MRE 513, "waives the privilege if the person ... voluntarily discloses or consents to disclosure of any significant part of the matter." *United States v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013), instructs that whether a waiver is valid turns on whether the disclosure was voluntary, regardless of the knowledge of the existence of the privilege. Obviously what is "voluntary" will be determined on a case-by-case basis, however, in reading the full text of the *Jasper* opinion, it is pretty clear that "voluntary" is interpreted very broadly.

In one example, I had a civilian client who spoke with law enforcement before she was granted an SVC. She brought with her to the interview a bag full of her medication, some for mental health conditions, and showed it to OSI. She also talked about certain matters she and her therapist had discussed as well as the diagnosis that she had. When it came time for trial, it was a very difficult conversation to have with the client to explain that because of her waiver of her privilege, the Military Judge, the trial counsel, defense counsel, and very possibly the whole Court, would be able to read through and listen to testimony from her mental health records. Legally, she had waived certain information and while I filed several motions on the subject,

there was little I could do to protect her. Had there been a legal requirement for a knowing and informed waiver, she would not have been in this situation. She was extremely distressed at the prospect of people she didn't know reading her mental health records, even though she did not mind them know about her medication or her diagnosis. She felt victimized again because she did not want the judge, both trial counsel and both defense counsel and expert witnesses on both sides reading the records of her therapy sessions.

For my military clients, the problem sometimes becomes one of the tendency for Airmen to be honest. Our Airmen are taught "integrity first, service before self, excellence in all that we do," so that when a concerned First Sergeant talks to a sexual assault victim about how they are doing in their counseling sessions, that Airman feels the need to answer those questions. Well-meaning Commanders truly concerned about their Airmen can attend treatment team meetings with the provider and the Airmen themselves. These meetings are not privileged, and risk waiving the victims' privilege if there is an upcoming trial. We need to find a way to allow our Airmen to receive treatment and still preserve their privacy rights when it comes to a trial. An informed and knowing waiver can assist in reaching this goal.

I have had three clients decide that they did not want to participate in the case anymore either because there was no legal waiver issues that arose during the investigative phase of the case.

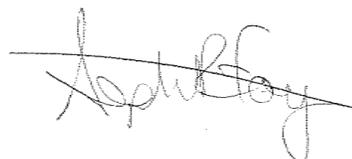
I propose this: incorporate a change in MRE 513 and MRE 510 that requires an informed and knowing waiver of the psychotherapist-patient privilege.

I also argue that this would not impact the Accused's rights at all. The Defense still has the ability to conduct an investigation of their own, for example interviewing the victims' family, friends, and co-workers. The Defense can still bring a motion pursuant to MRE 513 based upon the results of their independent investigation.

The ability for victims of sexual assault to receive mental health treatment is paramount. For our Airmen, the road to recovery can be difficult. A sexual assault truly can impact an entire squadron, the institution of a knowing waiver would go far in allowing our Airmen to seek this treatment and not worry whether the notes and records of their privileged counseling sessions will be revealed in a public court-martial.

This concludes my presentation. Thank you very much for the opportunity to speak to you today.

Very Respectfully,

A handwritten signature in black ink, appearing to read "September R. Foyle". The signature is written in a cursive, somewhat stylized font.

SEPTEMBER R. FOY, Capt, USAF