

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

UNITED STATES,)	
)	AMICUS CURIAE BRIEF OF
Appellee)	FORDHAM UNIVERSITY
)	SCHOOL OF LAW IN
v.)	SUPPORT OF APPELLEE
)	
Specialist (E-4))	
ANDREW J. CRISWELL,)	Crim. App. Dkt. No. 20150530
United States Army,)	
Appellant)	USCA Dkt No. 18-0091/AR
)	

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Index of Brief

TABLE OF CASES AND OTHER AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE iv

ISSUE PRESENTED iv

SUMMARY OF ARGUMENT1

ARGUMENT.....2

**I. A REVERSAL OF THE MILITARY JUDGE’S DECISION WOULD
HAVE CHILLING EFFECTS ON THE WILLINGNESS OF SEXUAL
ASSAULT SURVIVORS TO REPORT THE CRIMES AGAINST THEM. 2**

A. A comprehensive legal framework already exists to guide the factfinder in
evaluating eyewitness evidence.3

B. Suppressing evidence of a survivor’s identification of his or her assailant
will deter survivors of sexual assault from reporting the crimes against them. .5

 i. Underreporting of sexual assault is a serious problem within the military
 and beyond.....5

 ii. Suppression of SPC AM’s identification of her assailant will undermine
 the military’s progress in encouraging reporting of sexual assaults.8

C. An identification of an assailant by a sexual assault survivor can be crucial
to his or her ability to prove and vindicate a claim.....9

CONCLUSION.....11

TABLE OF CASES AND OTHER AUTHORITIES

Cases

<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).	10
<i>Manson v. Brathwaite</i> , 432 U.S. 98 (1977).....	1
<i>Neil v. Biggers</i> , 409 U.S. 188 (1972).	1, 3, 9
<i>Perry v. New Hampshire</i> , 565 U.S. 228 (2012).	3, 4, 10

Other Authorities

Amelia Gentleman, <i>Prosecuting Sexual Assault: ‘Raped All Over Again’</i> , <i>The Guardian</i> (Apr. 13, 2013).	9
Department of Defense, <i>Appendix B: Statistical Data on Sexual Assault</i> (2018), available at http://www.sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf , (hereinafter, <i>Appendix B: Statistical Data on Sexual Assault</i> (2018)).	7
Major Paul M. Schimpf, <i>Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military</i> , 185 <i>Mil. L. Rev.</i> 149 (2005).....	6
<i>National Sexual Violence Resource Center: Statistics</i> , https://www.nsvrc.org/statistics	6
Richard A. Wise et al., <i>How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case</i> , 42 <i>Conn. L. Rev.</i> 435 (2009).	4
Secretary Chuck Hagel, <i>Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy from the Pentagon</i> (May 7, 2013).	5, 6
Stella Cernak, <i>Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Lines</i> , 22 <i>Mich. J. Gender & L.</i> 207 (2015).	7

INTEREST OF THE AMICUS CURIAE

Fordham University School of Law benefits from a safe learning environment and a diverse student body, comprised of women, racial minorities, and servicemembers. As a collective of diverse students, we submit this amicus brief to advocate on behalf of survivors of sexual assault, to foster safety at academic institutions, and to empower survivors to speak out regarding the crimes committed against them. While we are mindful of the potential for inherent bias in eyewitness identifications, our interests are dedicated to advocating for the proper application of legal standards in a manner that does not re-victimize survivors of sexual assault as they seek justice in the legal system.

ISSUE PRESENTED

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE MOTION TO SUPPRESS THE ACCUSING WITNESS' IN-COURT IDENTIFICATION OF APPELLANT.

SUMMARY OF ARGUMENT

The military judge correctly admitted the in-court identification of the Appellant in this case. Reversing the military judge's decision will silence survivors of sexual assault and deter them from reporting assaults in the future.

Exclusions of identification evidence would have a serious negative impact on sexual assault cases without solving the risk of eyewitness misidentifications. Courts have acknowledged the risk of misidentifications, and, rather than exclude all identifications that may have been tainted by an unnecessarily suggestive pretrial identification, they have established a comprehensive legal framework to evaluate an eyewitness' identification evidence. The two-part test established in *Manson v. Brathwaite*, 432 U.S. 98 (1977) and the five factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972) allow trial judges to evaluate the reliability of a witness's identification under the totality of the circumstances. Based on the appropriate case law and credibility determinations made after hearing evidence, the military judge determined by clear and convincing evidence that Specialist AM's identification of the Appellate was admissible.

Suppressing SPC AM's identification of her assailant would have a strong deterrent effect on future reports of assault. Underreporting of sexual assaults plagues the military and the country generally. Suppressing SPC AM's testimony would disempower survivors from speaking out, discourage them from even

bringing a claim in the first place, and undermine any efforts made by the military to combat this problem. Sexual assaults will increasingly go unreported, and survivors will experience the re-victimization that results from being disbelieved.

Finally, suppressing the in-court identification will be detrimental to sexual assault cases in which no physical or forensic evidence exists. In such situations, successful prosecution depends on the survivor's testimony identifying his or her attacker. Excluding such key pieces of evidence would severely weaken any survivor's ability to successfully prosecute his or her attacker. A ruling that the military judge erred in admitting the in-court identification evidence would limit the ability of sexual assault survivors to seek justice for the crimes committed against them.

ARGUMENT

I. A REVERSAL OF THE MILITARY JUDGE'S DECISION WOULD HAVE CHILLING EFFECTS ON THE WILLINGNESS OF SEXUAL ASSAULT SURVIVORS TO REPORT THE CRIMES AGAINST THEM.

The military judge correctly admitted SPC AM's in-court identification of her assailant after reviewing the facts of the case and under the appropriate law. Although misidentification is a serious risk, survivors of sexual assault should be given the opportunity to describe the crimes they suffered and the appearance of their attacker. Recognizing that misidentification is a problem, courts consider

several factors under a totality of circumstance standard to assess an eyewitness' identification testimony. Suppression of eyewitness identification evidence would deter victims from reporting assaults and undermine efforts made to address underreporting. Particularly in cases lacking physical and forensic evidence, the exclusion of eyewitness evidence may entirely devastate the ability of a victim to obtain recourse through the legal system.

A. A comprehensive legal framework already exists to guide the factfinder in evaluating eyewitness evidence.

Courts possess a comprehensive legal framework that allows trial judges to evaluate the reliability of eyewitness identifications and account for unreliability due to a variety of factors. Courts should be cognizant of the risks of misidentification, but it is neither practical nor necessary under the Constitution or law to suppress all evidence that may have been vulnerable to suggestion. *See Perry v. New Hampshire*, 565 U.S. 228, 245 (2012).

The decision to believe or disbelieve an eyewitness's identification of his or her assailant is reserved for the finder of fact. Given the fact finder's role in assessing the eyewitness' credibility, the Supreme Court noted that an external suggestion does not mandate the exclusion of identifications in all circumstances. *See id.* Instead, courts evaluate the reliability of an identification that may have been tainted by suggestion through a totality of circumstances test using the five factors articulated in *Neil v. Biggers*, 409 U.S. 188 (1972). The five criteria set

forth by the Supreme Court create a comprehensive approach that evaluates the eyewitness' ability to testify and recall the event at issue. The five factors are: (1) the eyewitness's certainty; (2) degree of attention; (3) opportunity to view the assailant; (4) the accuracy of a prior description; and (5) the time elapsed between the event and the identification. *See id.* In addition to these factors, the completeness and accuracy of the eyewitness testimony has been noted as one of the most important determinants in preventing wrongful convictions. *See Richard A. Wise et al., How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 Conn. L. Rev. 435, 470 (2009).

The potential for a misidentification should not lead appellate courts to intrude on the role of fact finders, especially given the high degree of deference this Court accords to the court below on mixed questions of law and fact. The risk of misidentification does not automatically mandate a reversal of a military judge's finding. *See Perry*, 565 U.S. at 245 ("The fallibility of eyewitness evidence does not . . . warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness."). Here, the military judge found that SPC AM provided specific details about the Appellant to SPC Al-Shamesi before she was shown the photograph of the Appellant. The military judge made detailed findings based on SPC AM's testimony and thoroughly considered each of the *Biggers* factors before concluding that the in-

court identification of the Appellant was permissible. To discredit SPC AM's testimony would usurp the role of the court martial who found that the identification was admissible by clear and convincing evidence.

B. Suppressing evidence of a survivor's identification of his or her assailant will deter survivors of sexual assault from reporting the crimes against them.

Suppression of SPC AM's identification will further deter victims of sexual assault from reporting assaults. Underreporting of sexual assault is a serious problem that plagues both the military and society more broadly. The deterrent effect of a reversal in this case will extend beyond the military to ordinary citizens and reinforce fears that survivors of sexual assault will not be believed.

i. Underreporting of sexual assault is a serious problem within the military and beyond.

Former Secretary of Defense Chuck Hagel has expressed grave concern that the frequency of sexual assault and the perception of tolerance of it in the military could "very well undermine [the Department of Defense's] ability to effectively carry out the mission and to recruit and retain the good people we need"

Secretary Chuck Hagel, *Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy from the Pentagon* (May 7, 2013)

<http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5233>. More than 300,000 individuals experience sexual assault in the United States every year and

nearly 19,000 servicemembers reported experiencing unwanted sexual contact in 2014. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010–2014 (2015); Department of Defense, Fiscal Year 2014 Annual Report on Sexual Assault in the Military, (2015). Studies have even suggested that women in the military face a higher risk of sexual assault than their civilian counterparts. See Major Paul M. Schimpf, *Talk the Talk; Now Walk the Walk: Giving an Absolute Privilege to Communications Between a Victim and Victim-Advocate in the Military*, 185 Mil. L. Rev. 149, 154 (2005). For these reasons, sexual assault remains “one of the most serious challenges facing [the Department of Defense.]” Hagel, *supra*.

The military has made great strides in combating sexual assault and increasing reporting rates of sexual assaults, and suppressing eyewitness identification’s like SPC AM’s might discourage future victims from coming forward. Despite the prevalence of sexual assault, the majority of assaults continue to go unreported. More than half of sexual assaults against women and nearly 90% of sexual assaults against men in the military are not reported, Department of Defense, Fiscal Year 2014 Annual Report on Sexual Assault in the Military, (2015). Similarly, the National Sexual Violence Resource Center reports that 63% of sexual assaults of civilians are not reported. National Sexual Violence Resource Center: Statistics. <https://www.nsvrc.org/statistics>.

To combat this issue, the military has worked to encourage victims to bring forth claims of sexual assault. *See* Department of Defense, *Appendix B: Statistical Data on Sexual Assault*, 9 (2018), available at http://www.sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf, (hereinafter, *Appendix B: Statistical Data on Sexual Assault (2018)*); Stella Cernak, *Sexual Assault and Rape in the Military: The Invisible Victims of International Gender Crimes at the Front Lines*, 22 Mich. J. Gender & L. 207, 231 n.131 (2015). This effort has focused on every stage of response to the issue, from encouraging reporting to investigation and adjudication, and has been largely successful. In 2017, military services received an estimated ten percent increase in reports of sexual assault from the prior year. *Appendix B: Statistical Data on Sexual Assault (2018)*, at 8. This continues a trend of increased reporting; the Department of Defense estimates that it received a report from one in three survivors of sexual assault in 2016, compared to one in 14 survivors in 2006.

The decision of whether to report an assault is a difficult one for a survivor to make. Survivors should be encouraged to come forward whether the report is made immediately after the assault or later in time. The Court should avoid a ruling that undermines this progress and further exacerbates the problem of underreporting in the military and in society more broadly.

ii. Suppression of SPC AM's identification of her assailant will undermine the military's progress in encouraging reporting of sexual assaults.

SPC AM's case is an example of a survivor's report leading to a successful adjudication, due in part to her ability to identify and testify against her assailant. Reversal of the decision would erode this progress by discouraging survivors from speaking out and seeking recourse. A rule that makes presumptions about the credibility or reliability of survivors of sexual assault would not only usurp the role of the factfinder, but would deter survivors from reporting sexual assault in the first instance by reinforcing the perception that she will not be believed. Suppressing SPC AM's identification would disempower survivors by categorically discrediting their ability to accurately remember and describe their assault.

Suppressing SPC AM's identification would have a negative impact on other servicemember's willing to report sexual assault. Servicemembers may be particularly hesitant to report sexual assaults out of a fear of retaliation or personal attacks and harm to their rank or position. Despite efforts to encourage reporting, 58% of women in the armed forces who reported sexual assaults also reported facing retaliation for their reports. *Id.* Retaliation can take the form of attacks on the survivor's character or credibility, including her ability to accurately remember or describe the assault. Survivors have described challenges to their ability to

remember the assault as feeling like being “assaulted all over again,” and have stated that attacks on survivors’ credibility prevent cases from coming forward. *See* Amelia Gentleman, *Prosecuting Sexual Assault: ‘Raped All Over Again’*, *The Guardian* (Apr. 13, 2013), <https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court>. While the Constitution certainly requires challenges to survivors’ identifications, courts should not suppress all identifications based on broad presumptions about their reliability. By listening to SPC AM and admitting her identification after weighing the relevant evidence, the military judge reinforced the message that survivors of sexual assault will be believed. Suppressing survivors’ identifications of their assailants under these circumstances would rob survivors of their voice and prevent survivors from coming forward in the future out of a fear of being disbelieved or silenced.

C. An identification of an assailant by a sexual assault survivor can be crucial to his or her ability to prove and vindicate a claim.

Identification evidence can be particularly important in cases like this one lacking physical or forensic evidence. As the Supreme Court noted in *Biggers*, these cases can be particularly challenging to prove because the victim is the sole witness to the crime and often has a limited chance to observe the assailant. *Biggers*, 409 U.S. at 200–01. In this case, the assault on SPC AM left behind neither physical nor forensic evidence that could have been collected and used to

identify her attacker. Rather, the key evidence was her identification of her attacker. While this evidence should certainly be tested by a finder of fact, suppression of such evidence can be fatal to a case where a victim's identification of his or her assailant is the chief evidence.

Further, the Constitution provides criminal defendants with means to challenge allegedly erroneous identifications. The Sixth Amendment guarantees criminal defendants the ability to challenge the reliability of evidence presented against them through right to confront witnesses through cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004). Defendants can challenge the witness's credibility through cross-examination regarding the circumstances under which the identification was made, the timeline between identifications, and other factors that bear on the reliability of the evidence. Additionally, defendants may present their own evidence regarding the general unreliability of eyewitness identifications, or request jury instructions to that effect. *Perry*, 565 U.S. at 233. Here, the military judge allowed the defense to "put on whatever evidence [it] need[ed] to" in order to challenge SPC AM's identification of the defendant, and even allowed the defense to go beyond the scope of evidence presented by the prosecution. JA at 33. These measures are sufficient to protect a defendant's Due Process rights against a conviction based on unreliable evidence without denying survivors of sexual assault the opportunity to testify against their assailants.

Precluding in-court identifications will exacerbate underreporting of sexual assaults. The ability to identify and testify against an assailant can shift power back to the survivor of an assault and may be critical to a successful adjudication when, in the absence of DNA evidence, the testimony is the main evidence against the assailant. Excluding the eyewitness' testimony of the assailant's identification could leave a victim with little ability to prosecute the attacker and increase the stigma associated with sexual assault. These steps are simply not necessary when the existing framework allows judges to evaluate the reliability of in-court identifications on a case-by-case basis. This Court should continue to allow the finder of fact to make these determinations and reinforce the message that survivors will receive their day in court.

CONCLUSION

For the foregoing reasons, this Court should affirm the denial of Appellant's motion to suppress and the admission of SPC AM's in-court identification of Appellant.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and was transmitted by electronic means with the consent of the parties to counsel for Appellee CPT Natanyah Ganz, USA, natanyah.ganz.mil@mail.mil, 703-693-0793; counsel for Appellant CPT Steven J. Dray, USA, steven.j.dray.mil@mail.mil, 703-693-0725; and the Clerk of the Court Joseph R. Perlak, efiling@armfor.uscourts.gov, on August 30, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because:

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