

State of New York
Court of Appeals

People of the State of New York,
Respondent,

- versus -

Shawn Kennedy,
Defendant - Appellant.

On Appeal from the Appellate Division, Fourth Department, KA 04-02732
and
Monroe County Court, Index # 2003-7211

Amicus Curiae Brief
On Behalf of the

New York State Association of Criminal Defense Lawyers

In Support of Defendant- Appellant

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CORPORATE DISCLOSURE STATEMENT
Rule 500.1(c), Rules of Practice

Amicus Curiae herein, the New York State Association of Criminal Defense Lawyers [NYSACDL], is a not-for-profit corporation organized and incorporated under New York Not For Profit laws. There is no corporate stock or shares.

The NYSACDL is a recognized State Affiliate of the National Association of Criminal Defense Lawyers [NACDL], which is also a duly incorporated, not-for-profit corporation.

Neither NYSACDL nor NACDL have any parent or subsidiary organizations or other corporate entities.

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QUESTIONS PRESENTED

- I. WHETHER, *AS APPLIED* TO APPELLANT UNDER THE CIRCUMSTANCES OF THIS CASE, HE WAS DENIED THE CONSTITUTIONAL PROCESS THAT HE WAS DUE IN DETERMINING:
 - A. Whether as a Matter of Law, it Was Possible on the State of the Record Herein for the Courts below to Find That His Underlying Court-martial Conviction Properly Constituted a Qualifying Conviction for Purposes of “Sora”; and
 - B. Whether, as a Matter of *Fact* on the State of the Record Herein, for the “Sora” Evaluator and County Court to Have Properly Awarded Appellant 85 Points on His Risk Assessment Evaluation, Thus Making Him a Level 2 Offender?

ANSWER: The failure of the SORA Evaluator and County Court below to have the necessary and proper documentation relevant to Appellant’s court-martial denied Appellant his right to procedural due process as the SORA process was *applied* to him in a fundamentally unfair way.

- II. WHETHER THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY AND REMAND THIS CASE TO COUNTY COURT WITH INSTRUCTIONS TO SUPPLEMENT THE RECORD WITH THE NECESSARY DOCUMENTATION TO DECIDE THIS CASE IN A FUNDAMENTALLY FAIR WAY, SO AS TO PROVIDE NECESSARY AND APPROPRIATE GUIDANCE FOR COURTS AND COUNSEL IN CASES INVOLVING MILITARY CONVICTIONS?

ANSWER: To insure fundamental fairness and a just and reliable result herein, this Court should remand the case with appropriate instructions to provide guidance not only in the matter *sub judice*, but for future SORA cases involving courts-martial convictions.

GLOSSARY

Accused	The Defendant in military practice
BdRev	Board of Review - when the UCMJ was enacted in 1950, the intermediate, service appellate courts were called a Board of Review, <i>e.g.</i> , Army BdRev. Later renamed CMR and then CCA.
CA	Convening Authority - the commander who initially convenes the court-martial and who thereafter approves, modifies or disapproves the results.
CAAF	U.S. Court of Appeals for the Armed Forces
CCA	Court of Criminal Appeals - intermediate service appellate court, <i>e.g.</i> , Navy CCA
CMA	U.S. Court of Military Appeals, since renamed the U.S. Court of Appeals for the Armed Forces [CAAF]
C.M.R.	<i>Court-Martial Reports</i> - pre-1977 reports of military appellate decisions.
CMR	Court of Military Review - formerly BdRev and now CCA, intermediate service appellate court, <i>e.g.</i> , AF CMR
Members	The “voting” members of a court-martial, the military equivalent of a jury.
M.J.	<i>Military Justice</i> Reporter [Thompson / West].
Record of Trial	The record of the court-martial proceedings, [transcript] to include all exhibits and allied papers.
Trial Counsel	Military parlance for “prosecutor”
UCMJ	<i>Uniform Code of Military Justice</i> , 10 U.S.C. § 801, <i>et seq.</i>

INTERESTS OF AMICUS CURIAE

The *New York State Association of Criminal Defense Lawyers* [NYSACDL], is a not-for-profit corporation with a subscribed membership of approximately 1,000 attorneys, which include private practitioners, public defenders, legal aid, and law professors, to include members with significant military law experience. It is a recognized State Affiliate of the *National Association of Criminal Defense Lawyers*.

The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. NYSACDL's stated goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging the integrity, independence and expertise of defense lawyers in criminal cases; to protect individual rights and improve the practice of criminal law; to enlighten the public on such issues; and to promote the exchange of ideas and research, to include appearing as *Amicus Curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

The interests of *Amici Curiae* in this case arises due to the fundamental nature of the statutory and constitutional issues presented. The correct and proper application of the SORA registration requirements is of both societal importance and of professional concern for NYSACDL's members, many of whom represent defendants/respondents in SORA proceedings. Proper application of United States *military* jurisprudence implicated by this case is essential for a fair, just and legal

resolution of the SORA issues herein. Our interests transcend this case, as we respectfully submit that both the Judiciary and practitioners involved in SORA litigation need to insure that when they step into a somewhat arcane but specialized area of the law - military jurisprudence - where not all attorneys have familiarity, that *Amicus Curiae* participation can, and hopefully will assist this Court (and lower courts) in insuring that not only will justice be done, but that the precedents of this Court continue to reflect the highest caliber of jurisprudence.

Counsel herein for *Amicus*, is a Vice President of NYSACDL and the Co-Chair of the NACDL's *Military Law Committee*. He is a former Judge Advocate [JAG] in our military, with over 27 years combined active duty and active reserves as a JAG, achieving the rank of Lieutenant Colonel. He has tried (both prosecution and defense) approximately 200 courts-martial and maintains an active military law practice. No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *Amicus Curiae* made a monetary contribution to the preparation and submission of this Brief or to counsel.

STATEMENT OF FACTS

A. General Background.

While assigned to a Naval Base in Maine, in 1999 Kennedy an enlisted Sailor, was charged by the Navy with three offenses: (1) Driving While Intoxicated, in Violation of Article 111, *Uniform Code of Military Justice* [“UCMJ”], 10 U.S.C. § 911; (2) Rape, in Violation of Article 120, UCMJ, 10 U.S.C. § 920; and (3) Adultery, in Violation of Article 134, UCMJ, 10 U.S.C. § 934 [R.47-49]. After a trial by General Court-Martial on April 25-28, 2000 [R. 38, ¶ 1], he was found *not guilty* of the offenses charged. [R. 38, ¶ 2].

Mr. Kennedy was however, found guilty of an alleged lesser included offense, to Charge II, Rape. *Amicus Curiae* represents to this Court that on the record before this Court, it is *impossible* to ascertain with any degree of precision or certainty, just what this lesser included offense was.¹ In the context of this case, that determination is crucial to a proper resolution of the issues herein.

First, in an official Navy Document, commonly referred to as the “Results of Trial” report [R.38], prepared by the actual prosecutor in Kennedy’s court-martial, LT

¹*Amicus* would note that neither counsel for Mr. Kennedy nor the People at the *trial* court level [not his appellate counsel], appear to have made any effort to obtain the necessary and correct documentation to resolve this basic and fundamental question; the Trial Court lacked the relevant *military* documentation to address this issue; and no one addressed the many and significant factual discrepancies within the record - as convoluted as it is - before the Trial Court.

Belsky,² (and dated the same date [28 April 2000] that the court-martial ended), it states that Kennedy was convicted of a lesser included offense under Article 128, UCMJ [10 U.S.C. § 928], which is the military’s penal “assault” statute. That law has *no* sexual component period. Presumably, the person who actually prosecuted Kennedy at the court-martial, and who signed the “Results of Trial” report [R. 39 - (*Amicus* would note that this document does not appear to be a “form” document)] would be aware of just what the military “members” [R. 38, ¶ 3]³ found the Accused guilty of earlier that same day.

However, in another document, “General Court-Martial Order No. 1-01,” dated 4 June 2001 (13 months *after* Kennedy’s trial), it shows that under Charge II (Rape), that Kennedy was convicted of “indecent assault [under UCMJ] Article 134,” [R. 47] [versus Article 128, in the “Results of Trial” report]. While both the Trial Court [R. 9] and the Appellate Division [R. 2], adopted the “indecent assault” conclusion, *Amicus Curiae* would note that there can be no confidence in the correctness of those findings based upon the record provided to the Trial Court and on appeal before this Court. The requisite documentation - documentation that *Amicus Curiae* notes is

²In American military practice, a prosecutor is referred to as the “Trial Counsel.”

³The “members” of a court-martial are the equivalent of a jury. If the court-martial forum is “members,” [versus a Bench Trial], and there is a finding of guilty, the members after a mandatory evidentiary “sentencing” hearing and instructions/charges by the Military Judge on the permissible sentence range and options, sentence the defendant.

mandatory where courts-martial result in a conviction of any sort - to make a *bona fide* determination of the actual crime Kennedy was convicted of, simply was not before the Trial Court below and thus, is not in the record herein.

B. The “Risk Assessment Instrument”

The Form used to assess Mr. Kennedy’s purported risk is at R.16. Numerous “conclusions” set forth therein are highly suspect based upon other documentation in the record and because of “missing” documentation.⁴ *Amicus* would note that, Section I, Item # 1, concluded that Kennedy “Used forcible compulsion” and added ten (10) points to his assessment. There simply is no *evidence* of any such forcible compulsion in the record. The conclusions of the SORA⁵ Evaluator [R.17], *appear* to be based on a *preliminary* (or interim) Naval Criminal Investigative Services [NCIS] Report dated 23 September 1999 [R. 31], compiled some five (5) months *prior* to the conclusion of the Article 32, UCMJ, 10 U.S.C. § 832, formal pretrial investigation wherein the complainant⁶ testified under oath. [R.41 *et seq.*, dated 25 January 2000]. Furthermore, without evidence of just what the court-martial members

⁴The premise of *Amicus* herein is simply that the “record” before County Court below was so barren of *minimally* necessary documentation, that *any* conclusions and findings are and were inherently suspect under Due Process considerations. We will address that *infra*.

⁵*Sex Offender Registration Act*, NY Correction Law § 168 *et seq.*, hereinafter “SORA”

⁶In an abundance of caution, *Amicus* observes that the actual name of the complainant is repeatedly mentioned in the Record herein, at pp. 31-37 and 41-48. *See generally*, NY Civil Rights Law § 50-b(1). Whether or not § 50-b applies, Counsel for *Amicus* has not used the name herein and will appropriately safeguard our copy of the Record on Appeal herein on the assumption that it does.

specifically found Kennedy guilty of, it is simply rank speculation for anyone to *infer* compulsion. There is however, credible evidence in the record that clearly *refutes* any compulsion, forcible or otherwise.

The military justice system under the UCMJ, does not utilize a “grand jury” system to ascertain “probable cause” for allegations of serious “offenses.”⁷ Rather, Congress created a system that uses a modified preliminary hearing concept, set out in Article 32, UCMJ, 10 U.S.C. § 832. These hearings serve in theory, two fundamental purposes, discovery for the accused and a protection against baseless charges. *United States v. Samuels*, 27 C.M.R. 280, 286 (CMA 1959).

The Record herein contains portions of the Article 32, UCMJ’s Investigating Officer’s report [R. 41-46]. Notably, the mandatory *exhibits* to that Report are not appended and it appears were not available to County Court. But, what appears to counter the Risk Assessment Evaluator’s conclusion of “forcible compulsion” is the

⁷The UCMJ deliberately did not incorporate the distinction between “felonies” and “misdemeanors.” Indeed those terms are not at all used. The *punitive articles* of the UCMJ are Articles 87-134, UCMJ, 10 U.S.C. §§ 867-934. Because the military justice system is driven by the concept of “good order and discipline” and the decision to prosecute is made by a *Commander* with court-martial authority (versus the prosecuting judge advocates), certain anomalies sometimes appear. A commander with the authority to convene a court-martial [referred to as the Convening Authority], can refer [called the “referral process”] a given case, regardless of the charge(s), to one of three *levels* of courts-martial, *viz.*, a *General* Court-Martial [unlimited criminal jurisdiction and punishments, to include the death penalty]; a *Special* Court-Martial [maximum punishments is a Bad Conduct Discharge and one (1) year of confinement]; and a *Summary* Court-Martial [maximum confinement of one (1) month and traditionally used for very minor infractions because of its “summary” nature]. Thus, a homicide could be sent to a Special Court-Martial, and a Failure to Salute could go to a General Court-Martial.

military Investigating Officer's Report at R. 45, where (after summarizing the evidence adduced at the hearing), he makes absolutely no mention of "force" in his discussion of such, and concluded that "there exists a permissible inference that consent did exist." There are no "facts" in the Record that contradict the Investigating Officer who had the opportunity to observe the demeanor and credibility of all of the witnesses.

Section I, Item # 2, concluded that there was "Sexual intercourse, deviate sexual intercourse, or aggravated sexual abuse." The problem *Amicus* would note is that as discussed above, Kennedy was *acquitted* at trial of the rape and adultery allegations and there is simply nothing in the record that adequately or accurately indicates what *conduct* the court-martial actually found that constituted whatever lesser included offense that he was found guilty of.

Amicus would note that in all courts-martial where there is *either* a discharge or a sentence including one year or more confinement, a *verbatim* "Record of Trial" [transcript] is mandatory⁸ because there is also a mandatory, automatic appeal. Article 66, UCMJ, 10 U.S.C. § 866. A court-martial is required to prepare a written "findings worksheet [verdict sheet in civilian parlance] and announce their findings / verdict *on the record* in open court. Thus, without that portion of the transcript and

⁸See, Article 54, UCMJ, 10 U.S.C. § 854.

the Findings Worksheet, it is pure speculation based upon the Record herein, as to the actual conduct the court-martial concluded Kennedy engaged in, to specifically include “forcible compulsion” and specifically what “sexual contact,” *if any*, they concluded he engaged in. As noted above [p.5], if as the *Results of Trial* document [R. 38] shows, Kennedy was actually convicted under Article 128, UCMJ, there is simply no “sexual” component to that crime and the entire SORA process may be inapplicable to Kennedy! But, again, without the actual documentation this is all pure speculation. But, to Kennedy, the SORA Evaluator gave him 25 points for unknown “sexual contact.”

Section I, Item # 6, concluded that the complainant suffered from some unspecified and unknown “incapacity or physical helplessness,” causing Kennedy to be awarded 20 additional points. However, according to the *Investigating Officer’s Report* [R. 45], the complainant testified that she was “aware of what was happening, and specifically, she was alert clearly before the genital penetration took place.[⁹] Accordingly, from my review of the evidence, [complainant] was in possession of her mental faculties, and thereby able to consent or resist. *By her own testimony*, she was *not so intoxicated* that she did not have possession of her mental faculties.” [emphasis

⁹*Amicus* would again note that this testimony comes from the *pretrial* investigation / hearing in Kennedy’s court-martial process and without the actual *trial* testimony, no one can know what the complainant actually testified to where it counted, at trial. The fact that the court-martial *acquitted* Kennedy of the rape and adultery allegations, calls into question both the Evaluator’s assessment here and whether or not any “genital penetration” actually took place.

added]. It does not appear from the record that the SORA Evaluator or the Courts below considered that evidence and thus the Evaluator's conclusion, "Due to her intoxicated state, she said that she was physically unable to resist the assault" [based upon the aforementioned NCIS Report] was actually repudiated by the complainant herself. The Record is devoid of either her Article 32, UCMJ, Investigation testimony or her trial testimony, as well as the "findings" evidence discussed above.

In Section III, Item # 12, the SORA Evaluator assessed Mr. Kennedy 10 additional points for purportedly his having "Not accepted responsibility." *Amicus Curiae* respectfully, but forcibly notes that this is rank speculation and there is absolutely no evidence one way or the other in the instant Record. This also graphically demonstrates the difficulty of civilian practitioners (and SORA evaluators) dealing with military jurisprudence issues, without prior military law training or experience. In all courts-martial where an accused is found guilty of any offense, there is a sentencing hearing. If one is tried by a court-martial composed of "members" [jurors] as Kennedy was [R. 38, ¶ 3], those same members then decide upon the sentence.¹⁰

Pursuant to Rule 1001(a)(3), *Presentencing Procedure*, Rules for Courts-

¹⁰See, Article 52(b)(3), UCMJ, 10 U.S.C. § 853(b)(3).

Martial [RCM],¹¹ and Rule 1001(c)(2)(A), RCM,¹² there is a specific procedure for the accused in a court-martial to address the court members prior to sentencing. That would be the time and the place where an accused would “accept responsibility” and express remorse.¹³ In the record *sub judice* and the courts below, there is a total *lack of evidence* to ascertain whether or not Kennedy exercised his rights to make such a presentencing statement, and if so, what if anything (to include acceptance of responsibility) he said or testified to. *Amicus* respectfully submits that the SORA Evaluator’s conclusion here is nothing but rank speculation as there is no evidence in the record to even *infer* that conclusion.

Lastly, *Amicus* would note that the Risk Assessment Instrument [R. 16], at

¹¹These are contained in the *Manual for Courts-Martial (2005)*. *Amicus* would note that the rule in effect at the time of Kennedy’s court-martial was the same. The Rule reads as follows:

The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

¹²This Rule reads in relevant part as follows:

The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty.

¹³Anecdotally, Counsel for *Amicus Curiae* in thirty years of military practice has never seen a court-martial where an accused did not exercise the liberal rights to make a sentencing statement in some format. Obviously, that is not to say that such has never occurred, but is an extremely rare event. Not doing so, especially when it can be unsworn and limited, is tantamount to ineffective assistance of counsel.

Section IV, Item # 14, assessed Mr. Kennedy 15 points for having been “release[d] without supervision..” Again, *Amicus* would point out that while the Record does not specifically address this, the superficial effort by the SORA Evaluator is simply false when it notes “He was released from custody without the benefit of community supervision.” [R. 17, ¶ 2]. Mr. Kennedy was *never in custody* - he was sentenced *solely* to a “Bad Conduct Discharge” - there was no “custody” [confinement] adjudged. [R. 38-39, ¶’s 4 and 7]. *Amicus* thus has grave concerns about the reliability of the entire SORA evaluation.¹⁴

With respect to “supervision,” it must be noted that Kennedy’s court-martial took place between 25-28 April 2000. [R. 38, ¶ 1]. Kennedy was separated from the U.S. Navy more than a year later, in 2001 [Appellant’s Brief, at 3 (page unnumbered)].¹⁵ Since the Trial Counsel “reported” the results of the trial on the same day that it concluded, 28 April 2000, [R. 38], Kennedy’s chain of command obviously was aware of both his conviction and his sentence. While the Record is

¹⁴*Amicus* is aware of the statement by Kennedy’s counsel in County Court [R. 97, lines 6-8]; apparently conceding the “release without supervision” issue. However, it is not at all clear whether or not counsel was referring to Kennedy’s release from the non-existent confinement, or release from the Navy, a year *after* the court-martial. No one specifically addressed the issue of “supervision” during the intervening time from the court-martial’s sentence in April of 2000, and Kennedy’s release from the Navy in June of 2001.

¹⁵While the exact date is not specified, *Amicus* would note that separation could not normally occur *prior to* the time that the Convening Authority [the Commander with appropriate court-martial jurisdiction] had “acted” upon the record. Article 60, UCMJ, 10 U.S.C. § 860. The Record reflects that the Convening Authority, Rear Admiral Tracy, took his “action” on 4 June 2001. [R. 48-49].

absolutely barren of any information about this period of time, *Amicus* respectfully submits that an enlisted member of the United States military, especially one who has just been convicted by a court-martial, is subject to military supervision and control on a day-to-day (if not hour-to-hour) basis normally, and no doubt especially so during this post-trial period until he or she actually separates from the military. According to the Record herein, this appears to have been approximately thirteen (13) months. Thus, there was no factual basis to have concluded that Kennedy had been released from “custody” [as he had never been in custody] *without* supervision.

Amicus Curiae, in the interests of justice, notes that Kennedy’s SORA Evaluation, as confirmed by Monroe County Court and affirmed by the Fourth Department, assessed him as a Level 2, offender based upon his point total of 85. But 80 of those points, as discussed above, are significantly in dispute thus calling into question both the accuracy of the SORA evaluation and the fundamental fairness of the process afforded Mr. Kennedy below. We will address the Due Process concerns *infra* in our “Argument” section.

C. County Court’s “Findings of Fact.”

County Court entered numerous “Findings of Fact” [R. 9], which with due respect to that Court, were clearly and fundamentally erroneous. First, County Court found that Kennedy “was convicted of Indecent Assault in violation of Article 134-c1

of the United States Military Code of Justice.” (*sic*).¹⁶ As noted above [p. 5-6], there is an *irreconcilable* conflict in the record herein as to what offense Kennedy’s court-martial convicted him of. Was it “assault” under Article 128, UCMJ, 10 U.S.C. § 928, as the Trial Counsel’s “Results of Trial” report indicates [R. 38], or was it “indecent assault” as noted in “General Court-Martial Order No. 1-01?” The documentation necessary to resolve that conflict is not in the record and was not apparently available to the Court and counsel below.

Next, County Court cited “Article 134-c1” Article 134, UCMJ, 10 U.S.C. § 934, reads in its entirety:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

There is no subsection “c1” in Article 134, UCMJ, and if County Court meant that to mean “clause 1,” clause one of that Article refers to “all disorders and neglects to the prejudice of good order and discipline in the armed forces,” *not* “crimes.”

County Court next found that Kennedy “was sentenced to a bad conduct

¹⁶*Amicus* assumes that the Judge was referring to the *Uniform Code of Military Justice*, *supra*, or UCMJ. Without criticizing County Court, this demonstrates its unfamiliarity with the military justice system in the United States by the general Bar.

discharge *and released from custody* without the benefit of community supervision.” Again, as noted above, Kennedy was never in custody, was never sentenced to any confinement, so the finding that he was “released from custody” was and is clearly erroneous herein. With respect to the “community supervision” issue, as we discussed above, it is simply impossible based upon the record and documentation provided, to say what, *if any*, “supervision” was applied to Kennedy in the intervening thirteen (13) months from the end of his court-martial and sentencing until his actually leaving the Navy.

County Court also found that Kennedy had “sexually assaulted a twenty-four year old female who was *physically unable to resist* or give consent *due to her state of intoxication* and fatigue.” [R. 9]. That finding is respectfully nothing more than adopting the clearly erroneous “Case Summary” [R. 17] of the SORA Evaluator, as discussed above. Again, as discussed previously, *Amicus* would point to the Article 32, UCMJ, Investigating Officer’s Report [R. 45], where he “found” that the alleged complainant was “aware,” “alert” and “able to consent or resist.” Since he had the benefit of actually observing the complainant’s actual testimony, County Court’s findings on this issue are inherently suspect and, respectfully, clearly erroneous.

ARGUMENT

- I. AS *APPLIED* TO APPELLANT UNDER THE CIRCUMSTANCES OF THIS CASE, HE WAS DENIED THE CONSTITUTIONAL PROCESS THAT HE WAS DUE IN DETERMINING:
 - A. AS A MATTER OF LAW, THAT IT WAS POSSIBLE ON THE STATE OF THE RECORD HEREIN FOR THE COURTS BELOW TO FIND THAT HIS UNDERLYING COURT-MARTIAL CONVICTION PROPERLY CONSTITUTED A QUALIFYING CONVICTION FOR PURPOSES OF “SORA.”

Correction Law § 168-b(c), requires “A description of the offense for which the sex offender was convicted, the date of conviction and the sentence imposed.” That creates the basic procedural due process “notice” provision for the SORA evaluation and classification. Correction Law § 168-n(3), also amplifies that for specified offenders. *See generally* as to “notice,” *Harner v. County of Tioga*, 5 NY3d 136 (2005); *People v. David W.*, 95 NY2d 130 (2000); and *People v. Brooksvasquez*, 24 AD3d 644 (2nd Dept. 2005).

The SORA evaluator concluded that Mr. Kennedy had been “found guilty of Indecent Assault at a Military General Courts-Martial . . .” (*sic*)[R.17]. That finding was adopted by County Court. As discussed above, that finding - even if true - is not established even by a preponderance of the evidence, as the record herein discloses that the actual prosecutor prepared a document the very day that the court-martial concluded, stating that Kennedy had been found guilty of “assault” under Article 128,

10 U.S.C. § 928 [R.38].

Amicus respectfully submits, that as *applied* to Mr. Kennedy, the SORA process denied him due process because the very fundamental issue, *viz.*, what crime was he convicted of, is impossible to ascertain based upon the lack of proper documentation before both the SORA Evaluator and the County Court. Assuming that they were unfamiliar with the military justice system and its documentation, *Amicus* submits that due process as applied to one affected by governmental action at a minimum, must work in a fundamentally fair way, which in this case, requires that there be clear and convincing proof of the underlying, “triggering” SORA offense. While it is tempting to say that Kennedy’s counsel at the County Court level should have litigated this, he does not appear to have had any more expertise in military law and procedure than the SORA Evaluator and County Court. The fact remains, that without the Findings Worksheet and the transcript of the court-martial where the lesser included offense *findings* were announced on the record, no one in the courts below and herein, can with any degree of confidence, make a conclusion as a matter of fact and as a matter of law, what Kennedy had been convicted of at his court-martial. Due Process respectfully demands that the matter be remitted for further fact finding in this regard.¹⁷

¹⁷*Amicus* notes that Appellant did make a remand request at the Fourth Department [R. 62], which was denied.

County Court below, found that SORA registration “is required here where the underlying act involved a *felony* which also required registration under federal law.” [R. 12, ¶ 5]. County Court referenced a U.S. Navy regulation, *Secretary of the Navy Instruction* [SECNAVINST]¹⁸ 5800.14 [R.65], which cited [referenced] as *federal* legal authority, 42 U.S.C. § 14071. Examining that statute, § 14071(a)(1), shows that it is applicable to two (2) categories of offenders: (1) persons convicted of criminal offenses against *minors* [inapplicable herein]; and (2) those “convicted of a sexually violent offense.” *Amicus* respectfully notes that without knowing just what Article of the UCMJ that Appellant was convicted under and without knowing the specific *conduct* that the court-martial found him guilty of, again, any conclusions are purely speculative, especially as to whether or not it was a “sexually violent offense.”

United States v. Cherukuri, 53 M.J. 69 (CAAF 2000), provides an example of how the military particularizes “conduct” under its Indecent Assault provisions. Specifically, the Accused in *Cherukuri* was convicted of various Specifications of Indecent Assault under Article 134, UCMJ, that were alleged *inter alia* as (1) “offensively touching her breast and placing her hand on his genitalia. . . .” (2) “offensively touching her breasts. . . .” (3) “offensively grabbing her breasts. . . .” *Id.*, at 70. Ascertaining the actual lesser included offense applicable and Kennedy’s

¹⁸This is the Navy’s nomenclature for “regulation.”

specific *conduct* herein was not an extraordinary task and, for due process purposes, should have been done at the County Court level *when* Appellant challenged his SORA assessment. *See also, United States v. Calamita*, 48 M.J. 917, 920 (AF CCA 1998), where the Accused was convicted of Indecent Assault alleged as follows:

. . . requesting [GD] go with him to his office, closing the door, pinning her back against the partition, kissing her, holding her wrists so that her hands were above her head, then letting go of one of her wrists and placing his hand up her skirt touching her thigh, then turning her around so that the front of her body was pinned against the partition, touching her breasts and pressing his erect penis against her buttocks, then pulling her by one of her arms to a chair on which he sat, attempting to pull her on to his lap, stating "come on, there are many ways we can do this," or words to that effect." He was also convicted of "requesting that [KR] go with him to his office, putting his arm around her, kissing her on her mouth, then locking the door of his office, then again putting his arm around her and kissing her on the mouth.

The military, for due process reasons, has long mandated "notice" in its charging and "findings" documents, so that they "sufficiently apprise[] the defendant of what he must be prepared to meet; and, *in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.*" *United States v. Sells*, 11 C.M.R. 202, 206 (CMA 1953) [emphasis added].

We respectfully note again that there is no such thing as a "felony" under military law to include the UCMJ. Congress deliberately styled crimes in the punitive

articles of the UCMJ as “offenses” eschewing the labels of misdemeanor and felony, as being inconsistent with the disciplinary purposes of the UCMJ. County Court relied on Correction Law § 168-a(2)(d)(ii), which requires SORA registration for:

a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred [emphasis added]

Amicus respectfully represents that irrespective of the UCMJ offense that Appellant was convicted of, it was *not* a “felony” within the military’s criminal jurisdiction. Nor, does the record reflect that *at the time of his conviction* up through his leaving the Navy, Kennedy was ever required to “register as a sex offender” within the military’s jurisdiction.¹⁹ As a matter of general statutory construction by failing to follow the “plain language” of the statute, *i.e.*, a “felony in any *other* jurisdiction,” which Appellant’s offense was not, we respectfully submit County Court erred. *See, e.g., People v. Santi*, 3 NY3d 234, 242 (2004).

WHEREFORE, *Amicus Curiae* respectfully submit that the Courts below erred as a matter of law in determining that Appellant had been convicted of a qualifying offense for SORA purposes, where the record fails to demonstrate the military offense and *misconduct* attributed herein against him.

¹⁹The SECNAVINST referenced *supra*, was promulgated in October, 2001, *after* Kennedy left the Navy, so it was never applicable to him. Once Kennedy was separated from the Navy, the military lost “jurisdiction” over him, and could not retroactively mandate his registration. *See generally, Toth v. Quarles*, 350 U.S. 11 (1955) [discharged serviceman not subject to military jurisdiction].

I. AS APPLIED TO APPELLANT UNDER THE CIRCUMSTANCES OF THIS CASE, HE WAS DENIED THE CONSTITUTIONAL PROCESS THAT HE WAS DUE IN DETERMINING:

* * * * *

B. As a Matter of *Fact* on the State of the Record Herein When the “Sora” Evaluator and County Court Awarded Appellant 85 Points on His Risk Assessment Evaluation, Thus Making Him a Level 2 Offender.

As discussed in detail above, the “Risk Assessment Instrument” [R. 16] is filled with factual errors and assumptions [p. 7, *supra*]. *Amicus* notes preliminarily that this has been a persistent problem with New York’s SORA process for many years. *See, e.g., Doe v. Pataki*, 120 F.3d 1263 (2nd Cir., 1997), *on remand*, 3 F.Supp.2d 456 (S.D. NY 1998). Judge Chin addressed this issue on remand in *Doe, supra*, noting that in Plaintiff Coe’s case, that the SORA Board “had incorrectly described the case . . . [and that the SORA Report] stated, incorrectly, that Coe had been charged with rape.” 3 F.Supp.2d at 460. That Court went on to find that:

A system that permits a convicted sex offender to be classified at a risk level that subjects him to community notifications on the basis of a *perfunctory proceeding or incorrect information* . . . does not pass constitutional muster.” *Id.*, at 461.

Such is the state of affairs herein as to the *application* of the SORA process to Mr. Kennedy.

Amicus does not suggest that the SORA statutes at issue herein *facially* denied

Appellant his rights to Due Process - rather, it was the manner in which they were *applied* against him by the SORA Evaluator and in County Court. While Appellant was provided a “hearing” of sorts [R. 82-98], in reality it was merely counsel arguing. Respectfully, Appellant was not provided a hearing conducted in a “meaningful manner” as neither counsel nor the Court had the relevant and material documentation before it necessary to resolve the Risk Assessment issues. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Judge Chin specifically addressed the “Risk of An Erroneous Deprivation” in the context of a SORA *misclassification* and due process. 3 F.Supp.2d at 469-70. He concluded, “. . . the risk of error must weigh in favor of greater procedural safeguards before a final risk level can be assigned and notification can go forward.” *Id.* Here, “greater procedural safeguards” are and were necessary because of the apparent unfamiliarity of the Courts and counsel below with military practice and procedures. And, as Judge Chin also observed:

The state . . . also has an interest in ensuring that its classification and notification system is both fair and accurate. Therefore, it has no interest in . . . making erroneous classifications and overbroad notifications. *Id.* [citations omitted].

Amicus is also cognizant of the requirement that when evaluating Due Process issues, that courts must also apply a balancing test - onerous and marginally relevant procedures are not constitutionally required. However, *Amicus* respectfully submits

that the procedures that we suggest, *i.e.*, “discovery” of the relevant and material documents in a SORA court-martial situation [*cf.*, Judge Chin’s holding, *Id.*, at 472 regarding “discovery”], is necessary, relevant and material. Nor will such be onerous, either to the State herein or, in this case, the U.S. Navy. Notably, in SECNAVINST 5800.14, ¶ 6(e), [R. 69], it requires that the “Judge Advocate General (JAG) of the Navy” “shall provide . . . assistance regarding legal aspects of the Notification Program for military offenders sentenced for sex offenses. . . .”

The Judge Advocates General of the respective military services, will in almost all cases have physical possession of the transcripts and exhibits necessary to make an informed and reliable decision in SORA cases where the underlying conviction is one by court-martial. Article 65(1), UCMJ, 10 U.S.C. § 865(1). It is inconceivable in the opinion of *Amicus Curiae* that the military JAGs would not cooperate in getting copies of the necessary records and documents upon a request by a District Attorney’s Office or pursuant to a Court Order. Indeed, as noted above, the Navy by regulation requires such assistance.

Doe v. Pataki, supra, was not an anomaly as *People v. David W.*, 95 NY2d 130 (2000), demonstrated. There, this Court in a slightly different context looked at New York’s SORA process in the context of Due Process compliance. The Court observed:

The commonsense principle at the heart of the due

process guarantees in the United States and New York Constitutions is that when the State seeks to take life, liberty or property from an individual, the State must provide effective procedures that *guard against an erroneous deprivation*. [citations omitted; emphasis added]. *Id.*, at 138

As did the District Court in *Doe v. Pataki, supra*, this Court also looked at the “fiscal and administrative burdens” that due process compliance would require in *David W.*, and as *Amicus* suggests herein, they are neither prohibitive nor significant. 95 NY2d at 139. More important, we submit, is this Court’s cogent observation in *David W.* “that there is no record to permit adequate judicial review.” *Id.*, at 140. That is precisely the situation herein - the record that was provided to County Court and provided as the Record on Appeal herein, is simply not adequate as we have pointed out, for this or any other Court to have fairly and properly made the necessary factual determinations required in a SORA case. Indeed, there can be no certainty on this record as to whether or not there is even a qualifying conviction for SORA’s applicability herein.

At least 80 out of Appellant’s 85 points assessed by the SORA Evaluator are highly suspect and not supported adequately by the record. Indeed, as we noted above, some assessments are based on pure speculation, while others are directly contradicted by the record. Thus, *Amicus* respectfully suggests that the risk of an “erroneous deprivation” is unusually high herein, so high that Due Process is

offended by the “process” applied to Mr. Kennedy’s case.

WHEREFORE, we respectfully suggest that this Court remit the matter to County Court with instructions to adequately and appropriately supplement the record herein.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY AND REMAND THIS CASE TO COUNTY COURT WITH INSTRUCTIONS TO SUPPLEMENT THE RECORD WITH THE NECESSARY DOCUMENTATION TO DECIDE THIS CASE IN A FUNDAMENTALLY FAIR WAY, SO AS TO PROVIDE NECESSARY AND APPROPRIATE GUIDANCE FOR COURTS AND COUNSEL IN CASES INVOLVING MILITARY CONVICTIONS.

Amicus begins by making it clear that we are not seeking judicial “legislation” herein. Rather, we seek only to have this Court exercise its recognized “supervisory power” over the lower courts of this State. *See, e.g.*, Judiciary Law § 211(1)(b); *compare, Corkum v. Bartlett*, 46 NY2d 424 (1979), and *see generally, McNabb v. United States*, 318 U.S. 332, at 340-41 (1943) [“judicial supervision” of lower courts].

Procedural Due Process is a flexible concept [*cf. Sanford v. Rockefeller*, 35 NY2d 547 at 560 (1974)] and this case demonstrates the need for a flexible approach, both to resolve the matter *sub judice*, but also to provide appropriate guidance to the lower courts and practitioners. Indeed, both this Court’s prior decision in *David W.*, *supra*, and the District Court’s decision in *Doe v. Pataki*, *supra*, applied a flexible

approach in resolving the Due Process issues therein.

Amicus Curiae respectfully suggests that at a minimum, where courts-martial convictions form the basis for the qualifying SORA classification and adjudication, that the following documents [present in most courts-martial proceedings], be obtained and utilized by the Parties and judiciary:

1. The “Charge Sheet” - a Department of Defense [DD] Form 458, and any addendums or supplements [these are the sworn charges that commence a court-martial];
2. The Article 32, UCMJ, 10 U.S.C. § 832, Investigating Officers Report DD Form 457 and attachments [the narrative attachment is at R. 41-46 herein], if one exists;²⁰
3. A copy of the court-martial’s “Finding’s Worksheet,” if applicable;²¹
4. An excerpt from the transcript of the court-martial containing the “verdict” of findings of guilty (to include lesser included offenses), as announced on the record;
5. The Accused’s Rule 1001(c)(2)(A), *Rules for Courts-Martial*, sentencing statement(s), in whatever formats presented to the court-martial;²²
6. The “Sentencing Worksheet,” if “members” conducted sentencing;
7. An excerpt from the transcript of the court-martial containing the announcement of the sentence on the record;

²⁰*Amicus* would advise the Court that Special Courts-Martial are not required to have an Article 32, UCMJ, investigation, and that tactically, sometimes an Accused waives his/her right to have such a pretrial investigation, generally as part of a plea-bargain.

²¹These are only used when an Accused is tried by members.

²²*See* text accompanying footnote 12, *supra*.

8. A copy of the post-trial “Court-Martial Order” for the Accused;²³
9. A copy of the DD Form 2791, *Notice of Release/Acknowledgment of Convicted Sex Offender Registration Requirements*, if any [R. 20];²⁴
10. If the Accused’s *approved* sentence²⁵ did *not* include any type of discharge [Dismissal (for Officers only), Dishonorable Discharge, or Bad Conduct Discharge], and did not include a sentence of confinement of one (1) year or more, copies of any review of the conviction required or authorized under Article 69, UCMJ, 10 U.S.C. § 869; or
11. If the Accused was sentenced to a discharge *or* confinement for one year or more, copies of the results of any mandated appellate review under Articles 66 and 67, UCMJ, 10 U.S.C. §§ 866 and 867.
12. If the Accused’s sentence included confinement, records of any “sex offender” programs (or refusals) that were completed.
13. Documentation pertaining to any post-conviction “supervision” imposed as a result of the conviction.²⁶

These documents, at a minimum, would have resolved all of the issues raised in this appeal, would have permitted “adequate judicial review” [*David W., supra*], and would have constituted a significant bulwark against an erroneous classification. Requesting photocopies of those documents is not an onerous or expensive

²³This is necessary to ascertain whether or not the Convening Authority may have disapproved or modified any of the findings or sentence - which is a statutory prerogative as noted above, or granted clemency in any form or fashion to the Accused.

²⁴*Amicus* notes that the current version of this form, is significantly different than the one used herein. It is available at: <http://www.dtic.mil/whs/directives/infomgt/forms/efoms/dd2791.pdf>

²⁵The Convening Authority “approves” the sentence, which is then why that Order, see footnote 23, *supra*, is necessary for an accurate assessment in these cases.

²⁶The parties would of course be free to request additional documentation, beyond what *Amicus* believes is minimally required for Due Process purposes.

proposition, as all of those documents (to the extent that they exist) will be contained in the individual's *Record of Trial*, maintained by the appropriate Judge Advocate General's office.

CONCLUSION

Defendant may or may not deserve a risk level three classification, but . . . the risk level determination made below failed to comport with minimum State and Federal constitutional requirements of due process. *David W., supra*, at 140.

Amicus Curiae respectfully submit, that the process as applied herein to Mr. Kennedy likewise "failed to comport with minimum . . . constitutional requirements of due process." The Court is respectfully urged to reverse the Appellate Division, Fourth Department's decision below and remit the matter to County Court with instructions to obtain the necessary military documentation and to afford Appellant a meaningful opportunity to address his SORA Assessment and Classification.

Amicus respectfully submits that our suggestions for remission with instructions under the Court's supervisory powers are not only prudent to insure that the demonstrated risks of an erroneous determination are minimized herein, but to also insure that lower courts and practitioners have suitable and reliable guidance from this Court in handling future SORA matters involving courts-martial convictions. Perhaps Judge Chin said it best:

I have no doubt that many sex offenders will receive fair hearings before many state court judges. (citation omitted) The point is, however, that the amount of due process afforded an individual sex offender should not turn on the particular practices of a court with respect to . . . the degree of care displayed by an individual judge. *Doe v. Pataki*, 3 F.Supp.2d *supra*, at 476.

The “degree of care” is directly proportional to the level of guidance and supervision provided by this Court, and *Amicus Curiae* respectfully suggest that this is the appropriate case for this Court to provide such guidance with respect to SORA assessments resulting from courts-martial convictions.

Respectfully submitted,

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March ____, 2006

PROOF OF SERVICE

I, DONALD G. REHKOPF, JR., Counsel of Record for *Amicus Curiae*, New York State Association of Criminal Defense Lawyers, hereby certify that I caused three (3) copies of the foregoing *Brief on Behalf of Amicus Curiae* to be served by First Class, U.S. Mail, postage prepaid to:

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