IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

L.C. Midshipman U.S. Navy *Appellant,*	PROPOSED BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS IN SUPPORT OF APPELLANT L.C.'s PETITION FOR EXTRAORDINARY RELIEF
v.	
Daniel J. Daugherty Colonel U.S.M.C. (in his official capacity as Military Judge) *Appellee,*	Crim.App. Misc. Dkt. No. 201400044
&	USCAAF Misc. Dkt. No. 14-8010/NA
Joshua L. Tate Midshipman U.S. Navy *Real Party In Interest.*	Dated 13 February 2014

PROPOSED BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS

Jonathan D. Herbst, Esq.*
Attorney for Amicus Curiae
Protect Our Defenders

Margolis Edelstein
The Curtis Center
170 S. Independence Mall W., Suite 400E
Philadelphia, PA 19106-3337
jherbst@margolisedelstein.com
Phone: (215) 922.1100

* Application for Admission to Practice before the Court of Appeals for the Armed Forces will be submitted in accordance with Rule 38(b).

INDEX OF BRIEF

TABLE OF AUTHORITIES

CASES **PAGE(S)**

RULES AND REGULATIONS

STATUTES

OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

L.C. Midshipman U.S. Navy *Appellant,*	)	PROPOSED BRIEF OF *AMICUS CURIAE* PROTECT OUR DEFENDERS IN SUPPORT OF APPELLANT L.C.'s PETITION FOR EXTRAORDINARY RELIEF
v.	)	
Daniel J. Daugherty Colonel U.S.M.C. (in his official capacity as Military Judge) *Appellee,*	)	Crim.App. Misc. Dkt. No. 201400044
&	)	USCAAF Misc. Dkt. No. 14-8010/NA
Joshua L. Tate Midshipman U.S. Navy *Real Party In Interest.*	)	Dated 13 February 2014

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

PREAMBLE

All the king's horses

And all the king's men

Couldn't put Humpty

Together again.

Protect Our Defenders files this *amicus* brief to plead that this Honorable Court review and reverse Military Judge Colonel Daniel J. Daugherty's order requiring the disclosure of Midshipman L.C's privileged psychotherapy records. Colonel

Daugherty's order is clearly erroneous under military and constitutional case law, and must be reversed to prevent irreparable harm to Midshipman L.C. and thousands of other victims of military sexual assault.

ISSUE PRESENTED:

WHETHER A MILITARY JUDGE CAN, ON THE BASIS OF *BRADY* AND *GIGLIO*, ORDER DISCLOSURE OF PRIVILEGED PSYCHOTHERAPY RECORDS

STATEMENT OF THE CASE

Amicus Curiae Protect Our Defenders accepts the History of the Case, Jurisdictional Statement, and the Relief Sought as set forth in the Petition of Appellant Midshipman L.C.

STATEMENT OF FACTS

Amicus Curiae Protect Our Defenders accepts Statement of Facts as set forth in the Petition of Appellant Midshipman L.C.

SUMMARY OF ARGUMENT

This Honorable Court should accept for review Appellant Midshipman L.C.'s Petition for Extraordinary Relief because in the 15 years since the President promulgated Mil.R.Evid. 513, this Court has never provided guidance on the "constitutionally required" exception of the privilege. The lack of guidance has caused military judges to routinely order the disclosure of privileged communications, inflicting irreparable harm to thousands of victims.

The Court should also accept the Petition for review because it has a duty to inform sexual assault victims of their privilege rights so that they can make decisions as to whether they will seek needed counseling or participate in the military justice process. Without any decision from this Court, victims will continue to rely upon the promise of a privilege made to them by Mil.R.Evid. 513.

Colonel Daugherty's Order is clearly erroneous because the 6th Amendment's Right to Confront Witnesses is not a right to discovery, the 5th Amendment Due Process Rights under *Brady* and *Giglio* do not apply to evidence that is not in the possession of the government, and there is no constitutional right to any discovery in a criminal case.

This Court should defer to the President's constitutional power to exercise his judgment concerning the need to protect confidential communications between psychotherapists and patients.

If this Court permits Colonel Daugherty's Order to stand, all military privileges, Mil.R.Evid. 502-509 and 514, are in jeopardy because there is no constitutional basis to distinguish between Mil.R.Evid. 513 and the other privileges recognized by the Military Rules of Evidence.

The psychotherapist privilege is a constitutionally protected privilege because of the important social benefit of

confidential counseling, and because of the 4th Amendment right to be free of unreasonable government searches and seizures.

ARGUMENT

I. WHY THIS HONORABLE COURT SHOULD ACCEPT THIS CASE FOR REVIEW.

A. THIS HONORABLE COURT HAS NEVER PROVIDED GUIDANCE ON THE "CONSTITUTIONALLY REQUIRED" EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.

Protect Our Defenders knows of numerous victims of sexual assault who have had military judges order the disclosure of their psychotherapy records. This is unfortunately a commonplace occurrence that violates the Military Rules of Evidence, Rules for Courts-Martial and the United States Constitution. In the 15 years since the Psychotherapist-Patient Privilege, Mil.R.Evid. 513 was promulgated by the Commander in Chief, the Court of Appeals for the Armed Forces has never provided military judges or the service courts any guidance on applying the "constitutionally required" exception of the privilege. Not in one case.[1]

[1] Two lower service courts have skirted around Mil.R.Evid. 513 issues without ever addressing the privilege's "constitutionally required" exception. *U.S. v. Trigueros*, 69 M.J. 604 (A.Ct.Crim.App. 2010); and *U.S. v. Nixon*, 2012 CCA LEXIS 438 (A.F.Ct.Crim.App. 2012). In each of these cases the psychotherapy records were reviewed *in camera* and then disclosed to trial and defense counsel without any discussion or analysis as to whether disclosure was "constitutionally required." Protect Our Defenders knows of numerous victims who have had their privileged communications disclosed without any constitutional analysis. Sometimes the military judge will order disclosure without any prior notice to the patient or even conducting a Mil.R.Evid. 513

The absence of any guidance by the Court of Appeals for the Armed Forces during this 15-year period is not because this Court has refused to review Mil.R.Evid. 513 cases, rather it results from the perverse incentive that military judges have to rule in favor of disclosure. Defendants appeal virtually every conviction, but there is not a single reported case where a defendant has appealed the constitutionality of a military judge's order denying disclosure of a victim's psychotherapy records. The absence of Mil.R.Evid. 513 cases in the Military Justice Reporter can only be explained by the fact that military judges routinely disclose victims' records, and they do so with complete confidence that their orders will never be reversed. When full disclosure is ordered, convicted defendants have no basis for appeal, prosecutors cannot appeal under 10 U.S.C.A. §862 because the judge is not *excluding* evidence, and defendants' double jeopardy rights prevent any government appeal after an acquittal. Military judges disclosing psychotherapy records have never been reversed, and the Court of Appeals for the Armed Forces has never had an opportunity to provide its guidance.[2]

---

hearing. This must stop. The lack of any guidance from this Court encourages such lawless practices by military judges.

[2] Victims were unable able to challenge a military judge's order to disclose privileged records because they were not permitted to be represented by counsel until *L.R.M. v. Kastenburg*, 72 M.J. 364

Guidance from the Court of Appeals for the Armed Forces is sorely needed because military judges and the service courts need to understand that they can in fact be reversed for disclosing privileged information, and that they must apply Mil.R.Evid. 513 as promulgated by the President.

B. THIS HONORABLE COURT HAS A DUTY TO INFORM SEXUAL ASSAULT VICTIMS OF THEIR PRIVILEGE RIGHTS SO THAT THEY CAN MAKE DECISIONS AS TO WHETHER TO SEEK NEEDED COUNSELING OR TO PARTICIPATE IN THE MILITARY JUSTICE PROCESS.

Sexual assault is a traumatizing event, and many victims seek solace through counseling from not only psychotherapists, but also from their spouses, clergy and victim advocates. Victims may also want to seek advice from an attorney before they decide whether to report the assault. Sexual assault victims must balance their desire for justice and preventing their rapist from assaulting others with their desire to maintain their privacy and dignity.

Sexual assault is a significant problem that destroys unit cohesion and threatens the good order and discipline of our armed forces.[3] Congress, the Commander in Chief, the Secretaries

---

(C.A.A.F. 2013). Victims advised of their rights under Mil.R.Evid. 513 and represented by counsel are now filing petitions under the All Writs Act to enforce their rights. This Court now has its first opportunity to provide guidance to military judges and the service courts.

[3] In 2012, there were an estimated 26,000 sexual assaults in the military. See Department of Defense Fiscal Year 2012 Annual Report on

of Defense and each of the services, the Joint Chiefs of Staff, and the entire military chain of command have made eliminating sexual assault a top priority. They see sexual assault for what it is: a profound injustice to the men and women who serve our country.

Congress, the Commander in Chief, and the military chain of command have devoted significant resources to prevent sexual assaults and to help victims heal. They provide specially trained psychotherapists to counsel victims. They have developed protocols to provide confidential and effective medical care. They train their chaplains of all faiths on how to best assist victims. They provide Victim Advocates who assist with the many problems faced by sexual assault victims ranging from retaliation by other servicemen to protection from their assailant. They provide Special Victim Counsel who advise victims of their rights and represent them in courts-martial proceedings. They have made a sincere and substantial effort to

---

Sexual Assault in the Military (the "2012 Annual Report"), at 12. The 2012 Annual Report may be found at: http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf Of the 26,000 assaults, only 3,374 were reported to military authorities. *Id.* at 24. Only 2,558 reports of assault were able to be investigated because the victim filed restricted reports in 816 cases. *Id.* at 58. In fiscal year 2012, only 594 subjects had court-martial charges for sexual assault preferred against them, only 302 subjects proceeded to trial, and only 238 subjects were convicted. *Id.* at 68 and73. Convictions in fiscal year 2012 were less than 1% of the 26,000 sexual assaults that occurred in fiscal year 2012.

eliminate sexual assault and help victims. This effort is for naught if the military justice system continues its hostility to victims of sexual assault. All of the resources applied to prevent sexual assault and help victims heal are wasted if the military justice system does not follow its own rules and the law concerning victims.

Sexual assault victims are encouraged to use these resources. The psychotherapists, clergy, Victim Advocates and Special Victim Counsel all induce the victims to discuss their assaults by promising that their communications will be never be disclosed to anyone else. Victims rely on these promises. They trust in these promises.

Victims trust in these promises because they are told that the Military Rules of Evidence protect not only these communications, but also communications with certain others. Indeed, they can read the scope of each of these promised privileges in Section V of the Military Rules of Evidence. Victims' communications with their Special Victim Counsel are protected by Mil.R.Evid. 502, with their clergy by Mil.R.Evid. 503, with their spouses by Mil.R.Evid. 504, with their psychotherapist by Mil.R.Evid. 513, and with their Victim Advocate by Mil.R.Evid. 514.

If they were still unsure whether their privileged communications would remain confidential, they could search the

entire Military Justice Reporter and Supreme Court Reporter and they would not find a single case in which any court found disclosure of privileged communications was required by the Constitution. Not one.

Sexual assault victims, and every other privilege holder, should be able to trust the promises made by the Military Rules of Evidence especially since neither this Court nor the Supreme Court has ever held otherwise. Another profound injustice is visited upon victims when military judges, in unpublished orders that are not generally accessible because they are often filed under seal, order disclosure of the privileged communications between the victims and their psychotherapists. The military justice system is betraying the victims serving our country.[4]

Even if this Court were to ultimately rule that Mil.R.Evid. 513 does not protect confidential communications from disclosure (which it should not), this Court's review of Midshipman L.C.'s petition would at least clearly inform victims (and their Special Victim Counsel) that they cannot expect confidentiality.[5]

---

[4] "[I]f the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996).

[5] As discussed below, this Court's guidance on Mil.R.Evid. 513 will also provide guidance on the limitations of Mil.R.Evid. 502, 503, 504

II. WHY COLONEL DAUGHERTY'S ORDER IS CLEARLY ERRONEOUS.

A. 6th AMENDMENT CONFRONTATION RIGHT IS A TRIAL RIGHT AND NOT A RIGHT TO DISCOVERY.

Military Judge Colonel Daugherty's order is clearly erroneous.[6] Without making any factual showing or legal justification, Defendant Tate conclusively asserted only that his 6th Amendment Confrontation Rights required disclosure of the records. Colonel Daugherty did not address Defendant Tate's 6th Amendment argument probably because military and Supreme Court case law clearly preclude any right to discovery under the Confrontation Clause. As discussed in Midshipman L.C.'s petition, the Confrontation Clause is a trial right, and not a right to discovery. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Military courts have likewise limited the Confrontation Clause to the right to physically face those who testify against a defendant and the right to conduct cross-examination. *U.S. v. Abrams*, 50 M.J. 361 (C.A.A.F. 1999) (quoting *Ritchie*); *U.S. v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990); and *U.S. v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (the confrontation right does not require the cross-examiner have all the information he would like).

---

and 514 since there is no discernible basis for treating these other privileges differently.

[6] Protect Our Defenders has not seen Colonel Daugherty's Order because it is under seal. The content of his order is surmised from the petition filed by Midshipman L.C. and discussions with Midshipman L.C.'s counsel.

B. 5TH AMENDMENT *BRADY* AND *GIGLIO* RIGHTS DO NOT APPLY TO EVIDENCE THAT IS NOT IN THE POSSESSION, CUSTODY OR CONTROL OF THE GOVERNMENT.

Although Colonel Daugherty ignored Defendant Tate's 6th Amendment argument, he *sua sponte*, without any factual showing or legal argument, ruled that *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. U.S.*, 405 U.S. 150 (1972) required review and perhaps disclosure of Midshipman L.C.'s privileged psychotherapy records. *Brady* and *Giglio* and the military appellate courts' interpretations of these two cases clearly demonstrate that they do not apply to evidence that is not in the possession, custody or control of the government or anyone acting on the government's behalf. *U.S. v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004); *U.S. v. Mahoney*, 58 M.J. 346, 348 (C.A.A.F. 2003) (duty to disclose information known to *anyone acting on government's behalf*); *U.S. v. Williams*, 50 M.J. 436 (C.A.A.F. 1999); *U.S. v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1983) (duty extends to "*military investigative authorities*"); *U.S. v. Figueroa*, 55 M.J. 525 (A.F.Ct.Crim.App. 2001); *U.S. v. Sebring*, 44 M.J. 805 (N-M.Ct.Crim.App. 1996); *U.S. v. Nixon*, CCA LEXIS 438 (A.F.Ct.Crim.App. 2012).

"There can be no discovery of documents or things not in the Government's possession." *U.S. v. Birbeck*, 35 M.J. 519, 522 (A.F.Ct.Crim.App. 1992).

Rulings by appellate federal courts are consistent with the rulings by the Supreme Court and military appellate courts. *U.S. v. Hach*, 162 F.3 937 (7th Cir. 1998) (the Due Process Clause does not entitle defendant to an *in camera* review of the witness's mental records because "if the documents are not in the government's possession, there can be no 'state action' and consequently, no violation of [*Brady*]"); *see also United States v. Hall*, 434 F.3d 42, 55 (1st Cir. 2006) (*Brady* applies only to information in the government's "possession, custody, or control"); *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (defendant's *Brady* claim "fails . . . because he has not shown any withholding of evidence within the control of the Government"); *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) (*Brady* "applies only to information possessed by the prosecutor or [investigative or prosecutorial personnel] over whom he has authority").

The records that are the subject of Colonel Daugherty's order are in the hands of a private non-military psychotherapy provider. The trial counsel does not have, or have access to, these records, and the private provider is not "closely aligned with" the trial counsel. *U.S. v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). Midshipman L.C.'s psychotherapy records are not *Brady* or *Giglio* materials, and Defendant Tate has no 5th

Amendment right to the records.[7] Colonel Daugherty found no other constitutional basis for disclosing the records; therefore, this Court should reverse Colonel Daugherty's order.

C. THERE IS NO GENERAL CONSTITUTIONAL RIGHT TO DISCOVERY.

"The Supreme Court has clearly held that no general constitutional right to discovery exists in a criminal case." . *U.S. v. Lucas*, 5 M.J. 167, 170 (C.M.A. 1978). See also *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S.

[7] The records at issue in Colonel Daugherty's Order are in the hands of a private psychotherapist. Colonel Daugherty has already obtained records from Naval Academy psychotherapists. Protect Our Defenders asks this Court to recognize that a patient's psychotherapy records, regardless of whether they are in the hands of military or private therapists, are not in the possession, custody or control of the government. Military psychotherapists treating patients are not "closely aligned with" trial counsel. In fact, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") P.L. No. 104-191, 110 Stat. 1938 (1996), prohibits trial counsel from obtaining health records. DoD 6025.18-R (DoD Health Information Privacy Policy) (the Department of Defense's regulation that implements HIPAA) permits disclosure of a victim's protected health information in response to a law enforcement official's request only if the victim agrees to the disclosure or the victim is incapacitated. DoD 6025.18-R, C7.6.3. Patient information may be disclosed for judicial and administrative proceedings in response to a subpoena only if the patient receives notice of the subpoena and has been provided an opportunity to raise an objection to the court. DoD 6025.18-R, C5.2-4. Therefore, the records of government psychotherapists are not in the possession, custody or control of the prosecutor for *Brady* purposes.

Protect Our Defenders has seen a military judge ask trial counsel in an email to "see if you can obtain [psychotherapy records] via subpoena." This military judge's instruction to trial counsel violated DoD 6025.18-R, C5.2. When the military psychotherapist refused to honor the subpoena because it did not comply with C5.2, the military judge issued an order without notifying the victim or holding a Mil.R.Evid. 513 hearing. Protect Our Defenders respectfully asks this Court to remind military judges and counsel that they must comply with the law regardless of how inconvenient it may be.

545, 559 (1977) (*Brady* did not create a right to discovery); and *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

Although the Uniform Code of Military Justice provides greater discovery by an accused than is normally available in civilian courts (*U.S. v. Santos*, 59 M.J.317, 321 (C.A.A.F. 2004); *U.S. v. Williams*, 50 M.J. 436, 439-40 (C.A.A.F. 1999); and *U.S. v. Reece* 25 M.J. 93, 94 (C.M.A.1987)), the military's highest court recognizes that there is no constitutional right to discovery in a criminal case. *U.S. v. Lucas*, 5 M.J. 167, 170 (C.M.A. 1978); *U.S. v. Schmidt*, 59 M.J. 841, 856 (A.F.Ct.Crim.App. 2004). The principle that there is no constitutional right to discovery must be remembered when analyzing the interplay among R.C.M. 701 (Discovery), R.C.M. 703 (Production of Witnesses and Evidence) and Mil.R.Evid. 513 (Psychotherapist-Patient Privilege). Colonel Daugherty referenced R.C.M. 701 and 703 in his order.

10 U.S.C.A. §846 provides: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence *in accordance with such regulations as the President may prescribe."* (Emphasis supplied). Acting pursuant to this delegation, the President promulgated R.C.M. 701 and 703. *U.S. v. Figueroa*, 55 M.J. 525, 527 (A.F.Ct.Crim.App. 2001). The President also promulgated Mil.R.Evid. 513. Exec. Order No. 13,140, *64 Fed. Reg. 55,155*

(Oct. 12, 1999). The broader discovery mandated by R.C.M. 701 and 703 is cut back to and limited by the "constitutionally required" exception in Mil.R.Evid. 513. If the president wanted to permit broader discovery of privileged communications, Mil.R.Evid. 513 would have referenced R.C.M. 701 and 703 instead of stating, "constitutionally required." "Constitutionally required" means just that- required by the constitution. Nothing less.

The "constitutionally required" exception in Mil.R.Evid. 513 does not necessarily mean that disclosure will ever be constitutionally required. Mil.R.Evid. 513 was promulgated in 1999, shortly after the Supreme Court recognized in *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (1996) and *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998) that privileges could possibly be limited in "exceptional circumstances implicating a criminal defendant's constitutional rights." *Swidler & Berlin*, at 409. The Supreme Court has never found such exceptional circumstances. Like Mil.R.Evid. 513's "constitutionally required" exception, the Supreme Court was unwilling to state that the privileges were absolute, and was simply holding out the possibility that under some hypothetical fact pattern the privilege may have to bow to a defendant's constitutional rights. Defendant Tate's request for Midshipman L.C.'s records is not the fact pattern that could possibly meet the "constitutionally required" standard.

Applying broad discovery under R.C.M. 701 and 703 is clearly erroneous because Defendant Tate has no constitutional right to the psychotherapy records, and R.C.M. 701 and 703 do not take precedence over the limitation in Mil.R.Evid. 513. There is no constitutional right to discovery in a criminal trial; therefore, Mil.R.Evid. 513 prohibits disclosure regardless of R.C.M. 701 or 703.

III. WHY THIS COURT SHOULD DEFER TO THE PRESIDENT.

The Constitution, Article II, §2 makes the President the Commander in Chief of the Army and Navy. *Dept. of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). "Unlike courts, it is the primary business of armies and navies to fight." *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). The trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. Military tribunals have not and "probably never can be constituted in such a way that they can have the same kind of qualifications that the constitution has deemed essential to fair trials of civilians in federal courts." *Id.*

Article I, §8 of the Constitution gives Congress authority to regulate the land and naval forces. The Supreme Court recognizes that the tests and limitations of due process may

differ in the military context. *Weiss v.U.S.*, 510 U.S. 163,177 (1994). The Constitution gives Congress plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline. *Id.* "Judicial deference thus 'is at its apogee' when reviewing congressional decisionmaking in this area." *Id. (quoting Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). The deference extends to rules relating to the rights of service members because Congress has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Id.*

Congress granted the President the power to prescribe the Military Rules of Evidence. 10 U.S.C.A. §836; *U.S. v. Davis*, 61 M.J. 530 (2005). Only a "rule-maker" can create and limit privileges. *U.S. v. Stevens*, CCA LEXIS 198, 6 (A.F.Ct.Crim.App. 1999). The President is our rule-maker, and he has provided us with Mil.R.Evid. 513. Military courts must interpret and apply the Military Rules of Evidence as they exist and do not have authority to promulgate new ones or change existing ones to their liking absent constitutional compulsion. *Id.* (refusing to apply psychotherapist privilege prior to the President's promulgation of Mil.R.Evid. 513 in September 1999).

In Schmidt *v. Boone*, 59 M.J. 841 (A.F.Ct.Crim.App. 2004), the Air Force Court of Criminal Appeals stated: "In deference to

the Executive Branch, courts are reluctant to intrude upon the discretionary authority of the Executive in military and national security matters." The President has stated that military sexual assault destroys unit cohesion and threatens our national security, and this Court should defer to the President's judgment on this issue.

The President has given Midshipman L.C. the privilege to refuse to disclose and to prevent any other person from disclosing the confidential communications she had with her therapist. This privilege is subject only to the exceptions in Mil.R.Evid. 513(d), and none of those exceptions, including the "constitutionally required" exception have any possibility of applying in this case. Even if there were some Supreme Court case (but there is none) that held the psychotherapist-patient privilege must bow to a defendant's constitutional due process rights, this Court should still defer to the President's determination and judgment that patients' communications with their psychotherapists shall be privileged. This Court should not find a constitutional right where none exists, and should defer to the President.

IV. WHY THIS COURT'S DECISION ON PSYCHOTHERAPY PRIVILEGE WILL APPLY TO ALL OTHER MILITARY PRIVILEGES.

There is no rational basis to distinguish between a defendant's constitutional right to pierce the victim's

psychotherapy privilege and a defendant's right to pierce the victim's attorney-client privilege, clergy privilege, spousal privilege and Victim Advocate Privilege. In fact, the rationale for piercing the psychotherapist privilege would also apply to the privileges against disclosing classified information, government information other than classified information, identity of informants, deliberations of courts and juries, and how a person voted. Mil.R.Evid. 505, 506, 507, 508 and 509.

It would be especially difficult for this Court to differentiate the psychotherapist privilege from the clergy privilege since this Court has already recognized that the psychotherapist privilege is based upon the social benefit of confidential counseling and *"is similar to the clergy-penitent privilege*." *U.S. v.* Clark, 62 M.J. 195, 199 (C.A.A.F. 2005) (emphasis added); and M.C.M., App. 22, at A22-44. The Supreme Court has favorably compared the psychotherapist privilege to the spousal and attorney-client privileges. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) ("Like the spousal and attorney-client privileges, the psychotherapist privilege is 'rooted in the imperative need for confidence and trust'").

As discussed in Appellant's petition, Mil.R.Evid. 513 has the same "constitutionally required" exception that is in Mil.R.Evid. 514 Victim Advocate Privilege, and the Analysis of Mil.R.Evid. 514 explains that its exceptions were intended to be

interpreted similar to the exceptions to the psychotherapist privilege. If this Court does not reverse Colonel Daugherty's Order, Victim Advocates may soon be required to provide their records to defense counsel and to testify at Article 32 investigations, Article 39(a) hearings and courts-martial.

Although the privileges in Mil.R.Evid. 502 through 509 do not contain the "constitutionally required" exception, such exception is implicit because any rule, regulation or statute must bow to constitutional requirements. There is no basis to permit disclosure under Mil.R.Evid. 513 while respecting other confidential communications under the remaining military privileges. All privileges are at risk unless this Court reverses Colonel Daugherty's Order.

V. WHY THE PSYCHOTHERAPIST PRIVILEGE IS CONSTITUTIONALLY PROTECTED.

The *Jaffee* Court explains, "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for

successful treatment." *Jaffee*, 518 U.S. at 10. A psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. *Id.* "[C]onfidentiality is a *sine qua non* for successful psychiatric treatment." *Id.* The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry is a public good of transcendent importance. *Id. at 11*. Uncertainty as to whether the privilege will be honored eviscerates the effectiveness of the privilege. *Id. at 17.*

The *Jaffee* Court's reasoning concerning the importance of the privilege for a police officer applies equally to the victims of military sexual assault. The *Jaffee* Court explained that police officers not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger. "The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job." *Id. at*

11. The entire unit of a sexual assault victim, and thus national security, may suffer if the victim is unable to receive effective treatment after an assault.

The loss of evidence caused by enforcing the privilege is justified, modest and "more apparent than real." *Jaffee*, at 11-12 and in *Swidler & Berlin v. U.S.*, 524 U.S. 399, 408 (1998). Without the privilege, "confidential conversations between psychotherapists and their patients would be chilled," particularly when the need for therapy arises from an event that will probably result in litigation. *Jaffee*, at 11-12. "Without a privilege, much of the desirable evidence . . . is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged." *Id. at 12.*

Midshipman L.C. relied upon the privilege promised by Mil.R.Evid. 513 when she sought counseling. There was no reason to believe, absent guidance from this Court, that the privilege was illusory. This Court should honor the promise made to Midshipman L.C. because without the promise, Midshipman L.C. would have never sought counseling and the records would not

exist. The loss of this evidence caused by honoring the privilege is more apparent than real.[8]

Colonel Daugherty ignored Midshipman L.C.'s right under the 4th Amendment of the Constitution to be secure in her person, house, papers, and effects, against unreasonable searches and seizures by the government. *Soldal v. Cook County*, 506 U.S. 56 (1992); *Church of Scientology v. U.S.*, 506 U.S. 9 (1992); C*amera v. Municipal Court of San Francisco*, 387 U.S. 523 (1967). The Supreme Court has made clear that the protections of the 4th Amendment apply even when the individual is not suspected of criminal behavior. *Soldal*, at 69; *Camera*, at 530. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Soldal*, at 63.; see also, *U.S. v. Jones*, 132 S.Ct. 945, 954-955 (U.S. 2012) ("A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.").

Society's recognition of the reasonableness of privacy in psychotherapy records is evident by the fact that all 50 states and the federal government recognize the psychotherapist

[8] Colonel Daugherty acknowledged the benefit of and need for counseling when he limited the Order to records existing through the date of the Order so that Midshipman L.C. would feel safe in continuing treatment. He may not realize that such a promise rings hollow given his willingness to disclose Midshipman L.C.'s previous records.

privilege (*Jaffee*, at 13), and the President as Commander in Chief has ordered that psychotherapy records shall be privileged (Mil.R.Evid. 513).

Colonel Daugherty's Order to seize and search Midshipman L.C.'s psychotherapy records is unreasonable, and violates the 4th Amendment.

CONCLUSION

Protect Our Defenders asks this Court to understand the true nature of defense counsel requests for disclosure of victims' psychotherapy records. Protect Our Defenders has helped many victims who have had their intimate and deeply personal communications disclosed. When these records are disclosed to the very person who created the need for the victim to seek counseling, the victim feels a violence that often exceeds the violence of the actual assault.

Defense counsel seek to obtain psychotherapy records because they want a one-stop shopping roadmap to exploit victims' vulnerabilities and to destroy their willingness to proceed with the case. Protect Our Defenders has seen defense counsel, after obtaining victims' therapy records, use the records to interview every member of her unit that is mentioned in the records. Although none of the communications relate to the assault, the communications often explain who in her unit she trusts as well as who she does not trust or like. After

defense counsel complete these interviews, the victim is ostracized and retaliated against by her peers. She is gossiped about and feels humiliated.

This is the reason so few victims report the sexual assault to authorities. Victims feel the military justice system is being used to destroy them.

Sometimes it does destroy them. However, victims often persevere and continue to seek justice. They believe in the military and love our country. They do not want to see other service men and women experience sexual assault, and they feel obligated to prevent their rapists from assaulting again.

Victims understand their rapists have constitutional rights. They know trial will be difficult and painful, but these strong men and women persevere because it is the right thing to do. They ask this Court to do the right thing by honoring the privilege promised them.

Protect Our Defenders respectfully requests this Honorable Court to (1) accept for review the petition of Midshipman L.C.; and (2) order that Midshipman L.C.'s confidential communications with her psychotherapist are confidential and may not be disclosed.

Date: 13 February 2014

Respectfully submitted,

/ELECTONICALLY SIGNED/

Jonathan D. Herbst, Esq.
Attorney for Amicus Curiae
Protect Our Defenders

Margolis Edelstein
The Curtis Center
170 S. Independence Mall W., Suite 400E
Philadelphia, PA 19106-3337
jherbst@margolisedelstein.com
Phone: (215) 922.1100

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means on February 13, 2014, to the following:

(1) This Court: efiling@armfor.uscourts.gov

(2) The Navy-Marine Corps Court of Criminal Appeals:
Navy-Marine Corps Court of Criminal Appeals(Clerk of the Court)
Troidl, Robert H., CIV OJAG, CODE 51 [Robert.troidl@navy.mil]

(3) The Military Judge:
Daugherty, Daniel J., Colonel, Chief Trial Judge, NDW
[daniel.daugherty@navy.mil]

(4) Counsel for the real party in interest, MIDN Tate:
Taylor, Jon T. LT DSO NORTH, WNYD [jon.t.taylor@navy.mil]
Record, Warren [warren.record@eu.navy.mil]
Ehrenberg, Jason [jhe@becounsel.com]

(5) Counsel for the victim MIDN L.C.:
Guilds, Ryan [ryan.guilds@aporter.com]

(6) Counsel for the United States:
Ervasti, Paul M. Major, U.S. Marine Corps, Navy-Marine Corps Appellate Review Activity [paul.ervasti@navy.mil]
Newman, Stephen C., Colonel, U.S. Marine Corps, Navy-Marine Corps Appellate Review Activity [Stephen.newman@navy.mil]
Keller, Brian K., Navy-Marine Corps Appellate Review Activity [Brian.k.keller@navy.mil]

(7) Trial Counsel:
Hamon, Philip J., LCDR RSLO, NDW [philip.j.hamon@navy.mil]
Stormer, Ryan J., LCDR OJAG, TCAP
[ryan.stormer@navy.mil]

(8) Counsel for *Amicus* Maryland Crime Victims Resource Center:
Butler, Russell P. [rbutler@mdcrimevictims.org

(9)Counsel for *Amicus* National Crime Victims Law Institute:
Garvin, Margaret [garvin@lclark.edu

/ELECTONICALLY SIGNED/

Jonathan D. Herbst, Esq.
Attorney for Amicus Curiae
Protect Our Defenders

Margolis Edelstein
The Curtis Center
170 S. Independence Mall W., Suite 400E
Philadelphia, PA 19106-3337
jherbst@margolisedelstein.com
Phone: (215) 922.1100

CERTIFICATE OF COMPLIANCE WITH RULES

I certify that this brief complies with the maximum length authorized by Rule 26(d) because this brief contains is 6,642 words. This brief complies with the typeface and type style requirements of Rule 37 because it was prepared using Microsoft Word with Courier New 12-point font, a monospaced font.

/ELECTONICALLY SIGNED/

Jonathan D. Herbst, Esq.
Attorney for Amicus Curiae
Protect Our Defenders

Margolis Edelstein
The Curtis Center
170 S. Independence Mall W., Suite 400E
Philadelphia, PA 19106-3337
jherbst@margolisedelstein.com
Phone: (215) 922.1100