Protect Our Defenders
Strengthen our Military. Prosecute Rape. Support Survivors.

January 27, 2014

President Barack Obama
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President,

On behalf of survivors I would like to thank you for your attention to the crisis of rape and sexual assault in the military, and your stated intention to hold the military accountable for this profound injustice to the men and women who serve our country.

Today, we are writing to you about an urgent matter pertaining to victims' privacy rights.

While much public attention has been drawn to the military justice system in the past year, there has been little discussion of the treatment of Military Rules of Evidence pertaining to victims' rights to privacy by the military courts. The misapplication of these rules has a profound impact on victims' experience within the military justice system. Unnecessary violation of victims' privacy has a chilling effect on victims, and serves as an extreme disincentive from participating in the prosecution of their perpetrators. We believe this is an issue that requires presidential leadership, as it directly impacts the ability to protect victims' rights and prevent sexual assault. Additionally, this has implications for the success of DOD's Special Victims' Counsel programs, as the ability of victims' counsel to effectively represent victims to protect their rights depends largely on the ability to adequately enforce these evidentiary privileges.

Judges throughout the military are ordering the disclosure of sensitive and confidential psychotherapy records of sexual assault victims in violation of the rules of evidence that have been established to protect their rights.

Military Rule of Evidence ("MRE") 513 gives a patient the privilege and right to prevent the disclosure of any confidential communication made between the patient and his or her psychotherapist. Sexual assault victims must be able to rely upon this privilege when deciding whether to seek counseling or to report their assault. There are eight exceptions to MRE 513. Unfortunately, the eighth exception, when "constitutionally required", is unlawfully being used by military judges to effectively eliminate the privilege in its entirety. Military judges incorrectly balance the materiality and probative value of the evidence against the unfair prejudice caused by disclosure.

A current example of these unlawful disclosures is in the ongoing case of *US v. Midshipman Joshua Tate*, which involves the sexual assault of Midshipmen L.C. by three Naval Academy

football players. The abuse suffered by L.C. at the hands of defense counsel prompted Congress to change how Article 32 investigations are conducted. In this case, military judge COL Daniel Daugherty has ordered the disclosure of L.C.'s psychotherapy records for an *in camera* review even though defense counsel has not made any showing of how disclosure could be constitutionally required. L.C. has petitioned (for extraordinary relief under the All Writs Act) the Navy-Marine Corps Court of Criminal Appeals ("CCA") to reverse COL Daugherty's order (brief enclosed). It is anticipated that the CCA will deny L.C.s petition without a hearing or even requiring a response brief by COL Daugherty or the defendant. Upon the CCA's denial of relief, L.C. will petition the Court of Appeals for the Armed Forces ("CAAF"). CAAF has discretion to decide whether it will review the CCA's denial. L.C.'s petition does not obligate CAAF to review the CCA, and it is our concern that CAAF will choose not to grant review.

However, CAAF would be obligated to review the CCA's denial of relief if the Navy Judge Advocate General ("JAG") VADM Nanette DeRenzi orders a review. UCMJ Art. 67, *LRM v. Kastenberg*, 72 MJ 364 (CAAF 2013). We anticipate the CCA will deny L.C.'s petition as soon as the end of this week. In the event that L.C. is left with no other option than to petition CAAF, we ask that you, as Commander in Chief, request that VADM DeRenzi order the CAAF to review CCA's denial. VADM DeRenzi should act immediately upon CCA's denial.

The entire Department of Defense, and VADM DeRenzi in particular, has a vital interest in getting CAAF's review. VADM DeRenzi has stated before Congress, "Victim response is critical to enable a victim to begin the healing process. The Navy is dedicated to ensuring victims of sexual assault receive proper and timely support, to include medical treatment, counseling, and legal assistance."

We know that victims will not seek treatment or participate in the prosecution of their rapist if they know that the contents of their personal counseling sessions will be aired publicly and used against them in court.

No military judge or court has ever authored a written opinion analyzing the "constitutionally required" exception to MRE 513. An analysis of the "constitutionally required" exception by the CAAF is needed because military judges and courts need guidance to understand and properly implement MRE 513 as the President intended. When drafting MRE 513, the President included the "constitutionally required" exception as an acknowledgement that any rule of evidence is subject to the requirements of the Constitution. While the "constitutionally required" exception is not explicitly included in the language of other privileges such as MRE 502 (Lawyer-Client Privilege), MRE 503 (Clergy Privilege) or MRE 504 (Husband-Wife Privilege), each of these privileges is subject to a "constitutionally required" exception. The Constitution takes precedence over any conflicting law or regulation. There is no basis to apply a lesser standard for "constitutionally required" under MRE 513 than what has long existed under MRE 502, 503 and 504—although that is in effect what has occurred. Further, MRE 514, (the Victim Advocate-Victim Privilege was added to the MREs only last year) includes an identical "constitutionally required" exception. In the appendix of the Manual for Courts-Martial ("MCM"), the Joint Service Committee on Military Justices' analysis indicates the

"constitutionally required" exception would be satisfied only in extraordinary circumstances. The Committee states:

> "The exceptions to Rule 514 are **similar to the exceptions found in Rule 513, and are intended to be applied in the same manner.** . . . In drafting the "constitutionally required" exception, the Committee intended that communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a **fishing expedition** for possible statements made by the victim, nor is it intended to be an exception that effectively **renders the privilege meaningless**."
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> MCM, App. 22, page A22-46 (emphasis added)

Military judges are rendering MRE 513 meaningless by their orders to disclose privileged psychotherapy records without proper consideration of the victims' rights and a showing of constitutional harm. For this reason, we believe the CAAF needs to weigh-in with the proper constitutional analysis. The Constitution does not require disclosure of privileged communications because withholding the communications does not violate a defendant's 6th Amendment right to confront witnesses or his 5th Amendment's right to due process.

The 6th Amendment right to confront witnesses is not applicable because it is a trial right and not a right to discovery. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-53 (1987). Unless the prosecution introduces the records into evidence or puts the therapist on the stand, the defendant has no right to confront and no right to disclosure.

The 5th Amendment right to due process is intended to ensure the defendant has equal access to the information available to the prosecutor. *Brady v. Maryland*, 373 U.S. 83 (1963); and *Ritchie*, 480 US 39. Since the prosecutor does not have access to the therapist's records, the defendant's due process rights are not implicated.

Even if a defendant's 5th or 6th Amendments rights were implicated, these constitutional rights may bow to legitimate governmental interests. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). Failure to recognize the privilege would entirely thwart the purpose of MRE 513: to facilitate and secure the "social benefit of counseling" recognized by *Jaffee v. Redmond*, 518 US 1 (1996). *US v. Klemick*, 65 MJ 576 (NMCCA 2006). See also, UCMJ Art. 6b, Rights of the Victim. In addition to being a legitimate governmental interest, the MRE 513 privilege also enforces the victim's constitutional right to privacy and to be free under the 4th Amendment from an unreasonable governmental search.

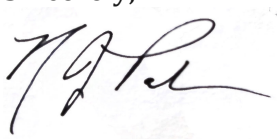
Further, the Supreme Court has acknowledged that in the area of military affairs, courts must give "particular deference" to Congressional (and Presidential) determinations made under its authority to regulate the land and naval forces (or as commander-in-chief). *Weiss v. US*, 510 US 163 (1994). Therefore, the due process analysis may differ in the military context compared to what would be required in a state or Article 3 court. "Judicial

deference thus 'is at its apogee' when reviewing Congressional decision making in this area." *Weiss.* "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Weiss.* Based on Supreme Court precedent, since Congress has enacted the laws under UCMJ and the President has promulgated rules under the RCM and MRE, there should be significant deference. Since the Supreme Court has never held there was a constitutional right to disclosure of privileged psychotherapy records, the military judge has no basis to order disclosure of privileged information absent truly extraordinary circumstances.

CAAF's guidance on MRE 513 is needed to protect victims as they seek to heal, to help the military eradicate sexual assault, and to protect all other privileges under MRE 502, 503, 504 and 514. Continued disclosure of victims' deeply intimate counseling records is wrong, and inflicts another profound injustice to the men and women who serve our country.

We urge you to have VADM DeRenzi order CAAF to review the CCA's denial of L.C.'s rights in L.C. v. COL Daugherty.

Sincerely,



Nancy Parrish
President, Protect Our Defenders

Enclosed: L.C. Petition to CCA in *U.S. v. Tate*
Letter to Navy Judge Advocate General ("JAG") VADM Nanette DeRenzi

CC: Defense Secretary Chuck Hagel
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Washington, D.C. 20301-1000