



October 10, 2014

Statement for the Judicial Proceedings Panel on Victims' Privacy in the  
Military Justice System

Miranda Petersen, Policy Director

Thank you for the opportunity to speak today about the vital issue of victims' privacy rights—a central component of a fair and effective justice system. While the military justice system has rules in place designed to protect victims' privacy rights to a degree, in practice the protections of these rules have proven wholly inadequate.

I will begin by addressing Military Rule of Evidence 412, the “rape shield rule.” MRE 412 was adopted with the hope of shielding victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. Recently, the President signed an Executive Order altering Rules for Court Martial 405(i) to explicitly allow the consideration of a victims' prior sexual history at Article 32 preliminary hearings.

Prior to this Executive Order, RCM 405(i) prohibited the admission of evidence of a victim's prior sexual behavior during Article 32 hearings. Nevertheless, most Investigating Officers (IOs) permitted consideration of such evidence, leading to an onslaught of attacks against victims' privacy prior to trial. While advocates and attorneys fought this practice, the President acted to codify the right to admit such evidence at Article 32.

This move undermines the rape shield rule and undercuts Article 32 reforms passed in the wake of the Naval Academy case, where the victim was subjected to humiliating and degrading questions that had no evidentiary value, but were instead intended to intimidate and punish her—a practice we see permitted all too often. Although defense will no longer be able to compel a victim to testify during the Article 32 hearing, under the Executive Order, they will be able to call witnesses regarding the victim's sexual history in order to attack the victims' reputation.

Supporters of the Executive Order argue that, because MRE 412 evidence will be considered under seal, victims' privacy will be protected. However, the Executive Order expressly permits the Convening Authority to review the entire Article 32 record, including MRE 412 evidence deemed “inadmissible.” This incentivizes the accused to drum up as much potential MRE 412 evidence as possible, knowing that even if it is irrelevant or inadmissible at trial, it will still be available for review by the Convening Authority in deciding whether to refer a case to court martial.

A victim's prior sexual behavior or predisposition is never constitutionally required at an Article 32 investigation because the investigation itself is not required by the constitution. Instead of enabling the use of victims' prior sexual history, which is completely irrelevant to the determination of probable cause, evidence under MRE 412 should be limited to review by a judge during a closed hearing at a court-martial only, and should be barred from Article 32 pretrial hearings.

Unfortunately, we encounter similar issues for MRE 513, the psychotherapist-patient “privilege.” MRE 513 was designed to prevent disclosure of confidential communications between a patient and his or her therapist, except in extremely limited circumstances. This was done to allow victims to receive appropriate care and to prevent fishing expeditions of the type we now see. In the military, the

“constitutionally required” exception to the rule has been utilized by judges to justify automatic *in camera* review of all mental health records, often leading to the disclosure of large chunks of a victims’ therapy records. This practice undermines the very core and intent of the privilege.

The mother of a civilian victim recently described her daughter’s experience in the military justice process in the following way: *“Imagine the fear and intense feeling of betrayal, being a high school kid who finally agreed to go to counseling after a rape because of assurances that her conversations with her therapist could not be released to anyone for any reason, only to be told her rapist’s rights outweigh her patient-psychotherapist privilege and HIPAA-assured privacy rights. She in fact, under MRE 513, does not have privacy rights and the right to work through the damage her rapist inflicted upon her emotionally and mentally if his “constitutional rights” are asserted... She felt raped and betrayed all over again.”*

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. As a result of this widespread practice, we have heard from SVCs that they feel compelled to advise their clients not to seek mental health care if they want their assailant brought to justice, or not to report if they plan to seek treatment, because private conversations with mental health providers can and will be used to intimidate, silence, and undermine their client’s credibility in court. To counter this, MRE 513 should be re-written to give communications between patients and mental health professionals the same level of protection as those under the attorney-client privilege, in alignment with other privileges under the UCMJ.

A member of the American Psychoanalyst Association recently summed up the issue well, saying, “... attempts to search sexual assault victims’ psychotherapy records to ‘expose inconsistencies’ demonstrate an appalling misunderstanding of psychotherapy and the narratives that emerge from it,” and continues, “To consider as evidence records based on these tentative descriptions ... seems to me to require a denial of everything we have learned in the past 50 years about how people experience trauma.”

Sexual assault victims must be able to rely on this privilege; it is unjust and counterproductive to promise victims their privacy is protected when they seek help, only to revoke it once they come forward and report the crime.

Finally, in order to adequately protect victims’ privacy and ensure their privilege is not infringed upon, victims must be given the right to interlocutory appeal for rulings that violate their rights, as is afforded to civilian victims under the federal Crime Victims Rights Act. Without the ability to appeal adverse rulings, victims have no mechanism to challenge these unilateral decisions and enforce their rights, and judges lack guidance from senior jurists on how to properly interpret and apply the rules.

Too often, victims are forced to balance two basic and fundamental rights: the right to be protected from unreasonable intrusion into the personal, intimate details of their lives, and the right to pursue justice against the person who violated them. This is a choice that no victim should ever have to face, and I urge this panel to recommend changes that eliminate the loopholes that render these so-called protections ineffective, and establish a mechanism of enforcement for when those rules are inappropriately applied.

Thank you.

I spoke with my daughter and asked her to reflect upon what impact 412 and 513 issues being raised in the Article 32 hearing, and now as the court martial draws near have had on her.

An Article 32 hearing, as it stands now, from a victim perspective is more a defense fishing expedition than an analysis of facts to determine if there is enough evidence to refer charges and go forward with a court martial. It seems there is unnecessarily wide latitude given to defense counsel to ask **any question on any issue** as long as they claim "constitutional rights". Conversely, an accused can refuse to speak. Victims, however, can be re-victimized again and again before actually getting to a court martial, seemingly in effort to wear them down and are threatened that if they refuse the interviews, the 32 hearing and in my daughters case a pre-trial deposition, then the case can be thrown out and the rapist walk away without ever facing justice.

Before my daughter even reported her rape, she feared any previous experiences would be used against her, to at the very least embarrass her, and at worst be twisted to show that he had reason to rape her.

Being in high school at the time, she was reluctant to have anyone know she was raped because she is a very private person and she didn't want her personal life made public. She was afraid of being painted as a whore or slut by defense counsel. Once she was assured that she had "rape shield" 412 privileges, she was relieved and agreed to go forward with the investigation, Article 32 hearing and court martial. This relief only lasted until she met with defense counsel who during their pre-Article 32 interview, without counsel or SARC present and only 16 at the time, grilled her on any previous experiences and her past boyfriends. They even went so far as to try and get a subpoena to question a past boyfriend about their relationship completely unrelated to the criminal case. Thankfully the judge stopped this, but the fear and anxiety she faced caused her to have panic attacks and consider not going forward with the case. For a high school kid, the re-victimization she experienced as a result of the legal process made focusing on school work nearly impossible during a critical time of her school career. It has eroded her trust in the legal process and in people who by virtue of their role in society she should be able to trust.

Not satisfied with delving into 412 issues, during the Article 32 hearing, defense counsel requested her mental health records and again claimed that her rapist's "constitutional rights" trumped her 513 rights. After the Article 32 hearing, the judge ordered her therapy records produced, after his review and despite her Special Victim Counsel attorney and Trial counsel invoking her 513 rights, her mental health records were obtained and released to defense counsel with minimal restrictions. To further add to the betrayal, the defense previously indicated they would have her therapist appear and submit to questioning and potentially testify at the court martial hearing. We are told if her therapist does not comply it can be grounds to dismiss the case. So again, she and her therapist must chose to comply with this invasion into her thoughts and healing process or potentially give cause to have the case dismissed.

Imagine the fear and intense feeling of betrayal, being a high school kid who finally agreed to go to counseling after a rape because of assurances that her conversations with her therapist could not be released to anyone for any reason, only to be told her rapist's rights outweigh her patient-psychotherapist privilege and HIPAA-assured privacy rights. She in fact, under MRE 513, does not have privacy rights and the right to work through the damage her rapist inflicted upon her emotionally and mentally if his "constitutional rights" are asserted. She felt raped and betrayed all over again, with the betrayal this time magnified since she had begun to speak through the pain, hurt and confusion the rape caused. In part it was due to her therapy that she had agreed to face the stress of a court martial. Upon

being told her mental health records would be released to the team protecting her rapist, her anxiety attacks increased, she became reclusive and fearful that anyone could be summoned to testify against her. She became reluctant to even speak with her priest for fear that he could be subpoenaed to testify.

My daughter's thoughts and fears were given to people to use against her to protect the very person, her rapist, who had caused the fears in the first place. She became very hesitant to continue therapy and shut everyone out for fear of anyone else being used to hurt her.

As a civilian, when the rape was first reported we were given a copy of victim's rights, known as Marcy's Law that is designed to prevent much of this re-victimization. In civilian criminal law, a rapist does not have access to a victim's mental health records; our military must begin to follow this procedure. It is standard of care to get someone who has been raped/sexually assaulted into therapy and begin a healing process as soon as possible.

By placing a victim's mental health records and conversations with a therapist and/or SARC within the realm of discoverable evidence, you are essentially forcing victims to have to decide between healing or justice – but not both. This does a grave disservice to the women and men of our armed forces who experience sexual assault, as well as civilian victims of military members, as my daughter has experienced. It is a form of re-victimization that must be stopped.

The levels of betrayal, fear and worthlessness victims of rape and sexual assault suffer need not be compounded by having their mental health records released to anyone. Victims are assured they have the same confidentiality with a SARC as they do a therapist. And with the attempts to address the issue of sexual assault/rape, victims are quickly put in contact with a SARC. With that being the case, I sadly must caution any victim of sexual assault by a military member that they should expect no rights or expectation of privacy to their own thoughts and healing process if they seek help from a therapist or a SARC due to rape or sexual assault as the laws now stand in the UCMJ.