Alleged military sex assault victims seek to block use of counseling records

By Annys ShinThe sexual assault case at the U.S. Naval Academy that began at an off-campus party nearly two years ago

has turned a microscope on otherwise routine aspects of military legal procedure. Both the broad authority of commanders to charge and to punish and the cross-examination of alleged victims before trial has become fodder for critics of the military's handling of sexual assault claims.Now, another standard practice in military sexual assault cases is quietly being challenged in courtrooms across the country: the review and release of an accuser's mental health records.

Over the past several months, lawyers for the alleged victim in the Naval Academy case have been trying to block a judge from reviewing years of counseling records. Their latest appeal is still pending, but Col. Daniel Daugherty, the judge in the trial of defendant Joshua Tate, has already reviewed some of them, and agreed to release portions to the defense.

Advocates for sexual assault victims say the practice of going after mental health records undercuts the military's efforts to get more victims to come forward and thwarts their treatment."The victim needs to be assured of confidentiality to effectively be treated and to be effectively diagnosed," said Nikki Charles, who directs therapy and case management for the Network for Victim Recovery of DC

. "If you chip away at that…their chances of recovery diminish."(The Senate is expected to vote soon on a proposal by Sen. Kirsten Gillibrand (D-NY) to remove sexual assault cases from the military chain of command. Gillibrand says she has the votes to overcome a filibuster threat from Sen. Clare McCaskill (D-Missouri), who has an alternative proposal. The fight comes as critical reports about the prosecution of sexual assault cases

continue to surface.)

The alleged victim in the Naval Academy case stopped going to therapy once she learned that her records could be used against her in court, her attorneys said at a hearing in January. They also tried to limit the scope of records that could be sought to the alleged April 2012 assault. But the judge ruled that the defense could ask for records generated between July 2011 and January 21, 2014, said Ryan Guilds, an attorney representing the accuser, a female midshipman. (The Washington Post does not generally identify alleged victims of sexual assault.)

Fueling the outrage among victims' rights advocates is a perception — confirmed by both civilian and military lawyers — that requests for victims' records are far more routine in military courts than in civilian ones. Some advocates cast the situation in military courts as a disturbing throwback to an era before the advent of rape crisis centers and the victim's rights movement.

Georgetown University law professor Paul Rothstein likened going after an alleged victim's

therapy records in criminal cases to “playing dirty pool.”

Federal and state courts recognize the right of patients not to disclose confidential communications with psychotherapists and other mental health counselors. Some states are stricter than others in how they apply that rule. Maryland, where the Naval Academy is located, allows access to mental health records in court cases only in very limited circumstances, such as when they are important to placing the patient in mental health treatment. As a result, defense attorneys there request them in about a third of sexual assault cases, estimated Lisae Jordan, executive director of the Maryland Coalition Against Sexual Assault

, which represents victims in legal proceedings.

Therapy records are not protected from disclosure in civil or criminal cases where the patient introduces them as part of their case, such as in a civil lawsuit seeking compensation for mental distress.

Military defense lawyers said asking to see counseling records is standard procedure in sexual assault cases. The mostly commonly cited reason is to undermine the credibility of accusers. Greg Rinckey, a former military prosecutor now in private practice, said they can help expose inconsistencies in an alleged victim’s statements.

Gary Myers

, who has been practicing military law for 40 years, said therapy records can also help show bias, such as “an intense dislike of men.”Defense attorneys noted that just because they ask for something, that doesn’t mean they get it. A judge has to first review therapy records to determine which parts, if any, are relevant to the defense, before handing anything over. States follow the same procedure. But in practice, victims rights lawyers said, civilian judges are far more reluctant to look at the records unless the defendant can demonstrate the counseling records are likely to contain evidence key to their case. They can’t go on “fishing expeditions.” In military courts, by contrast, defense attorneys say such reviews are commonplace.The divergent approaches to protecting mental health records stem from both law and custom, experts said. One crucial difference is an exception in military law that allows disclosure if it is “constitutionally required.” That exception can be broadly interpreted, said Rothstein, to the point where it nearly defeats the purpose of the rule.

Fredric Lederer, a law professor at William & Mary, who helped draft other portions of the military code of justice, said the protections for mental health records are crafted more broadly than in some civilian courts because it “recognizes some of the special problems within the armed forces.” He said civilian judges are also governed by legal precedents that don’t exist in the military.

Each system is dealing in its own way with the same problem: how to balance the societal need to get people to seek mental health treatment with a defendant’s right to a fair trial.

“It is a clash of social policies,” Lederer said.

Military defense attorneys said concerns about violating an alleged victim’s privacy are overblown, since judges alone see most of the records and they are extremely selective about what they disclose.

”The judges are pretty tight about what they give out,” said Andrew Cherkasky, a former top sex crimes prosecutor in the Air Force, now in private practice. ”If you are looking for past evidence of alcohol use or abuse, they will give you that one line.”

Randy K. Otto, a former chair of the American Psychological Association’s legal issues said for the alleged victim, a judge is still a stranger who is given access to ”intimate, incredibly personal information.”The accuser in another military sexual assault case in Norfolk said, she

would have been more hesitant to seek treatment had she known her counseling records could be used against her in court. She said the thought of having a judge look at her therapy records makes her uncomfortable. The only thing worse would be if the defense got hold of them, she said.“It would upset me,” she said, “to have other people, especially the perpetrators, see the damage that’s been done.”