Written Statement

To the Committee on Veterans' Affairs

Subcommittee on Disability Assistance and Memorial Affairs

Submitted for the Hearing: "Ensuring Access to Disability Benefits for Veterans Survivors of Military Sexual Trauma (MST)."

"The Servicemembers and Veterans Empowerment and Support Act of 2019" (H.R. 1092)

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I would like to begin by thanking the Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs for inviting me to speak on this important issue.

I currently serve as a staff attorney and adjunct professor at the Lewis B. Puller, Jr. Veterans Benefits Clinic at William and Mary Law School and I am submitting this testimony in my individual capacity. The clinic assists veterans in filing and appealing disability claims and focuses on complex claims involving Post Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI), as well as mental health claims based on Military Sexual Trauma (MST). I regularly work with veterans to gather evidence in support of MST-related claims, and appeal decisions that deny them benefits.

I support H.R. 1092 because it would put veterans who have experienced MST on equal footing with other veterans who have non-personal trauma PTSD claims. The VA's own internal manual sets forth the following: "If a claimed stressor is *not* related to combat, experience as a former prisoner of war, fear of hostile military or terrorist activity, or drone aircraft crew member duties, *a claimant's lay testimony regarding in-service stressors is not sufficient, by itself to establish the occurrence of the stressor*, and must be corroborated by credible supporting evidence."[1] This creates an unfair burden on veteran survivors of MST that many other veterans who suffer from PTSD do not bear.

The VA has repeatedly said that it has "lowered the burden" of evidence required to substantiate a claim for PTSD related to personal trauma, which includes MST claims. The current standard allows for the submission of "markers" to be submitted as supporting evidence that the in-service stressor occurred. The VA allowed for the use of additional evidence starting in 2002, and it

[1] VA ADJUDICATION PROCEDURE MANUAL M21-1, Pt. III(iv), Ch. 4, § O(g), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000076270/M21-1,-Part-III,-Subpart-iv,-Chapter-4,-Section-O---Mental-Disorders#4f (last updated Oct. 19, 2018) (emphasis added).

issued a description of markers that could be used as evidence in 2012. But the supposed lowered burden is not much different from the previous standard because documentation is still required. H.R. 1092 would allow a veteran's own testimony to be used to establish the occurrence of a stressor and would not require the additional burden of markers from records that may no longer exist.

Markers divide into two major categories: (1) alternative sources of evidence, and (2) behavioral changes. Alternative sources of evidence can include records of visits to medical facilities, police reports, or statements from chaplains. Behavioral changes can include substance abuse issues, episodes of depression and anxiety, and changes in performance while in the military.[2]

With the current standard, the VA acknowledges that records of assaults and harassment are often unavailable because of barriers veterans face in reporting during service. Even so, the VA requires veterans to produce other documentation, such as medical records, to show proof of behavioral changes that may indicate that an MST event occurred. Indeed, multiple studies have shown that there are many barriers faced by veterans not only to reporting MST in service, but also seeking health-care, or discussing the sexual assault or harassment post-service. [3]

In addition to the reluctance of veterans to report or discuss sexual assault or harassment, the absence of records and the passage of time adds to the difficulty of finding evidence of markers. In my practice, it is not uncommon for my veteran clients to wait years, sometimes decades before filing MST/PTSD claims. Private medical records are usually destroyed after only 5 to 10 years and when military records *do* exist, it can take veterans—or those helping them—over a year just to receive a copy of those records. Further, those in-service medical and personnel records often contain thousands of pages and can include handwritten, hard to read medical notes. Sifting through these records to determine what may be considered a marker is difficult, confusing, and time intensive.

Older veterans, who may not have electronic access to records, are additionally burdened. The stigma of military sexual trauma, while it is now lessening, is still salient. This is even more true for veterans of past eras. Requiring veterans, who may never before have disclosed trauma, to provide documentation of markers is unreasonable and infeasible for many, especially because that documentation may no longer exist.[4]

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[2] VA ADJUDICATION PROCEDURE MANUAL M21-1, Pt. III(iv), Ch. 4, § O(d)-(e), https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000076270/M21-1,-Part-III,-Subpart-iv,-Chapter-4,-Section-O---Mental-Disorders#3d (last updated Oct. 19, 2018).

[3] J. A. Turchik, C. McLean, S. Rafie, T. Hoyt, C. S. Rosen, & R. Kimerling, *Perceived barriers to care and provider gender preferences among veteran men who have experienced military sexual trauma: A qualitative analysis*, 10 PSYCHOLOGICAL SERVICES, 213 (2013) (available at http://dx.doi.org/10.1037/a0029959).

[4] U.S. GOV'T ACCOUNTABILITY OFF., GOA-14-477, MILITARY SEXUAL TRAUMA: IMPROVEMENTS MADE BUT VA CAN TO BETTER TO TRACK AND IMPROVE THE CONSISTENCY OF DISABILITY CLAIM DECISIONS, 22 (2014), https://www.gao.gov/assets/670/663964.pdf. ("[R]epresentatives from four of five veteran advocacy organizations we interviewed expressed concern that the requirement to substantiate an MST incident is still difficult to meet for many with valid claims. Some of these representatives said that even markers can be difficult to find or may not exist, since

Not only is this a higher burden for older veterans, male veterans are also negatively affected by the current standard. Men are less likely to report sexual assaults in the military, and they are generally less likely to disclose MST and seek mental health treatment after service.[5] The 2018 Department of Defense annual report on sexual assaults notes that only 17% of men who have experienced sexual assaults report them in the military, compared to 38% of women.[6] Therefore, while the percentage of women who experienced sexual assault in the military, compared to men, has recently increased overall, men are both *more* likely to be forced into depending on the markers standard and *less* likely to have documented post-service medical evidence that could serve as a marker.[7]

By allowing veterans' lay statements to establish the occurrence of the stressor, as it does in cases of PTSD related to combat or fear of hostile military or terrorist activity, the VA would be recognizing the trauma and burden imposed on veterans by the requirement of marker evidence. The current standard reinforces victim-blaming and rape myths and as a result, veterans may be reluctant to reapply for benefits after receiving denials in decision letters that offer little to no explanation. The process can be stressful for veterans because it forces them to relive trauma, and the process of submitting a claim can result in undue stress and confusion.[8] When the VA erroneously denies an MST claim, a veteran is essentially being told that the event did not happen, fulfilling the worst fear of many MST survivors: that they will not be believed.

H.R. 1092 also allows for the expansion of mental health diagnoses, beyond PTSD, to be included in the proposed standard. Trauma manifests in different ways for different people and the effects of conditions such as depression and anxiety can be crippling and harmful to our veterans. Including other mental health conditions in the proposed bill is a much-needed addition and will go a long way in recognizing that veterans are impacted and suffer in different ways beyond just PTSD. The current standard does not even allow for the use of markers for mental health diagnoses other than PTSD. For veterans claiming other mental health conditions related to MST, such as anxiety or depression, this creates an almost impossible standard to meet unless a stressor event was reported in service or they received mental health treatment in service.

Potential fixes within VA employee trainings, while helpful, would still not fully address the heavy burden that the markers standard places on veterans. Even if the VA did in fact address

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veterans may have initially tried to hide their experience due to fear of reprisal or feelings of shame or embarrassment, among other reasons.")

[5] *See Mental Health After Military Sexual Trauma*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.publichealth.va.gov/exposures/publications/oef-oif-ond/post-9-11-vet-fall-2016/mst.asp (last visited June 17, 2019).

[6] This is supported by the most recent data released by the 2018 Department of Defense report on sexual assault. DEP'T OF DEFENSE, ANN. REP. ON SEXUAL ASSAULT IN THE MIL., 3 (2018), https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf. Overall, an estimated 20,500 service members, representing about 13,000 women and 7,500 men, experienced some type of contact or penetrative sexual assault in 2018. *Id.* This is up from approximately 14,900 in 2016. *Id.*

[7] *Id.* at 4.

[8] DEP'T OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL, 17-05248-241, DENIED POSTTRAUMATIC STRESS DISORDER CLAIMS RELATED TO MIL. SEXUAL TRAUMA, 9 (2018), https://www.va.gov/oig/pubs/VAOIG-17-05248-241.pdf

inconsistencies in the adjudication of MST claims, as proposed in the 2014 Government Accountability Office (GAO) report and 2018 Inspector General report, the high amount of subjectivity remains. The 2014 GAO report noted that two VA claims adjudicators could come to entirely opposite conclusions about a marker, and that both could be considered correct under the current VA standard.[9] The burden to find what the VA deems to be credible supporting evidence is difficult enough for professional claims adjudicators, let alone veterans.[10]

By definition, MST includes not only assaults, but harassment as well. MST is defined as "psychological trauma, which in the judgment of a mental health professional employed by the Department, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty or active duty for training."[11]

From this definition, it is clear that there are additional requirements for service-connecting a PTSD claim resulting from MST beyond proving an in-service incident occurred. These additional requirements remain in the proposed changes. Medical evidence must establish a link between a veteran's current symptomatology and the claimed in-service stressor, and a diagnosis by a psychologist or psychiatrist is still required in H.R. 1092. For the VA, however, this is not enough.

Changing the burden of evidence will assist those veterans who do decide to submit a claim and this change would likely expedite the processing of MST claims and lead to fewer appeals. Allowing for the submission of lay evidence from veterans, as proposed by H.R. 1092, would lessen the psychological burden on veterans and create a more streamlined process for claims adjudicators.

In summary, the current standard for proving an MST-related PTSD claim is overly burdensome on veterans. It forces them to determine what a marker could be and to scour records, if they still exist, to prove to the VA that a traumatic event has taken place. The wounds associated with PTSD and MST are not always visible, and many veterans will go decades without disclosing the trauma to anyone, including medical health professionals. While the VA may claim to have "lowered" the standard of proof in MST-related PTSD cases, these changes have had the chief effect of burdening veterans who are submitting these claims. The reforms contained in H.R. 1092 require the VA to listen to veterans and are a much-needed step in the right direction.

[9] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 17-18.

[10] *See id.*

[11] 38 U.S.C. § 1720D (2019)