Dear Mr. President:

I am writing this letter on behalf of my client, Mr. Darin Lopez, who was wrongly convicted of sexual assault in a military Courts-Martial based on the laws defining consent while serving in the United States Navy. This case is but one in a troubling trend of service members convicted of sexual assault based on evidence that would never have led to a conviction in any other forum. Mr. Lopez is innocent factually and therefore should be legally.

In November 2012, a woman who Mr. Lopez had been casually dating invited Mr. Lopez to meet her at a bar outside Fort Huachuca, Arizona. The woman had three alcoholic drinks over a couple of hours while they were at the bar. Later that night they returned to his apartment and had sexual contact. In June 2014, a general court-martial, consisting of a Military Judge alone, convicted Mr. Lopez of sexual assault under the theory that the alleged victim “was incapable of consenting to the sexual act due to her impairment by an intoxicant.” The intoxicant was the three drinks consumed over several hours. There was no other intoxicant, nor any evidence of such. That was the evidence at trial. Mr. Lopez had consensual sexual contact with a woman who later claimed to not remember portions of that evening and the next morning because she had three drinks. I am asking for a pardon on his behalf because Mr. Lopez is innocent: The evidence at trial does not support the finding of guilt. Three drinks cannot and did not make the woman incapable of consenting. For this, Mr. Lopez is on the sex offender registry, and his life has been turned upside down for far too long.

The woman Mr. Lopez had sexual contact with was Lance Corporal EH (I will use her initials out of respect for her privacy). Mr. Lopez met EH in 2012 when he was stationed at Fort Huachuca, Arizona. EH was a Lance Corporal in the Marines and he was an Intelligence Specialist Second Class in the US Navy. They met at a local mall off base. They flirted and exchanged phone numbers during a complementary drive home from the mall by Mr. Lopez. For the next couple of weeks, they talked or texted often. Mr. Lopez was interested in getting to know EH and she was interested in Mr. Lopez. He had no way of knowing how EH would change the trajectory of his life.

On a Saturday in November 2012, EH called Mr. Lopez several times and asked Mr. Lopez to go with her to a bar off base called the Peacock club. It was a little late, but Mr. Lopez agreed. He picked her up at her on base apartment and they drove together to the club. EH was happy to see Mr. Lopez. They flirted and talked. They ordered drinks together while standing at the bar. While they were on the dance floor, she made a gesture mimicking giving Mr. Lopez a blow job. They also joked about EH not wearing any panties that night.

EH was drinking, but she was not drunk. She later testified at his court-martial that she was an experienced drinker and had a total of three drinks the entire evening: “Pineapple juice, Coconut Rum, mixed drinks, two of them, and one shot of Goldschlager.” During her testimony under oath, she was specific about the type and amount of alcohol she drank that night. There was no evidence that EH consumed any other kind of intoxicant before they attempted to have sex.

After several hours at the Peacock club, Mr. Lopez and EH mutually decided to go back to his apartment. EH walked with Mr. Lopez outside the bar. She climbed into his Jeep Wrangler on her own which required some coordination because of the height of the seat. She climbed in and then out again so that she could talk to a friend. She asked Mr. Lopez to wait and said she wanted to go to his apartment with Mr. Lopez. EH then climbed into the Jeep Wrangler again. During the drive they continued talking and flirting. When they arrived at the apartment complex they both jumped out of the car and walked up the three flights of stairs to his apartment. EH was walking and talking normal and had no problems negotiating the three flights of stairs. Once inside his apartment, they kissed and groped each other and then attempted to have sex. They also attempted to have sex the next morning after they both woke up.

Almost eighteen months later, EH testified at Mr. Lopez’s court-martial that she did not remember walking out of the bar, getting in his Jeep Wrangler, talking to her friend, or walking up the stairs to his apartment. EH testified that the last thing she remembers about being at the bar was “just standing there.” She testified that the next thing she remembers is waking up with Mr. Lopez on top of her having sex with her. Her testimony was hard for Mr. Lopez to believe because he was talking and flirting with her during the ride to his apartment and while they climbed the three flights of stairs. He could not believe that she claimed that she woke up with Mr. Lopez on top of her having sex because that did not happen. Mr. Lopez had phone records that proved she was talking and texting with friends during time periods when she later claimed to not be able to function or not remember. EH did not lose consciousness that night after having only the three drinks. EH was awake and a full participant in the sex.

The Military Judge heard EH’s testimony that all she had to drink was, “Pineapple juice, Coconut Rum, mixed drinks, two of them, and one shot of Goldschlager.” Despite the fact EH testified that she had just those three drinks, the Military Judge found that EH, “was incapable of consenting to the sexual act due to her impairment by an intoxicant.” There was no evidence introduced at the court-martial that EH consumed any kind of intoxicant beyond the three drinks and that was all he saw her drink. Based on the talking and the flirting with EH and after watching her walk up three flights of stairs, Mr. Lopez had absolutely no reason to think that EH was impaired and unable to consent. On the contrary, EH was an eager to get an invitation to Mr. Lopez’s apartment and participant in the sex that night and the next morning.

EH claims that she woke up with Mr. Lopez on top of her and that he said to her, “don’t worry, I used a condom.” The Military Judge made special findings that this claim from EH was, “key in establishing” that EH “was unconscious due to her state of intoxication.” Mr. Lopez was stunned by the Military Judge’s explanation. He never said to EH, “don’t worry I used a condom.” He had no need to say that to her because in the middle of kissing and groping each other, he got up and walked out of the room and came back with a condom. She was alert and saw Mr. Lopez put the condom on. She was awake and interacting with Mr. Lopez in a normal manner before, during, and even after we had sex.

EH’s claim to have no memory of certain details is not credible. For example, months prior to trial she told investigators that she had dinner with Mr. Lopez at Applebee’s, but at trial she claimed no memory of the details of the dinner or even that she was with Mr. Lopez at the Applebee’s. She claimed to have no memory of walking out of the Peacock Club, riding with Mr. Lopez to his apartment complex and walking up the stairs. The next morning Mr. Lopez called a taxi for EH to take her back to base, where in prior statements she claimed to have called the taxi. The taxi driver testified for the prosecution that Mr. Lopez did indeed call for the taxi. The taxi driver testified that she picked up EH outside Mr. Lopez’s apartment and that she and EH had an hour-long conversation. The taxi driver testified she and EH stopped at a 7-Eleven and bought cigarettes and soda. In her testimony, EH claimed to have no memory of the hour-long conversation or stopping at the 7-Eleven to buy cigarettes and soda.

We have no way of knowing if EH is lying about not remembering all those details or if she was experiencing a memory blackout. Either way, EH’s account of what happened that night is unreliable. However, in his special findings, the Military Judge states, “in finding LCpl EH was incapable of consenting to the sexual act due to her impairment by an intoxicant . . . the Court relies upon the credible testimony of LCpl EH.” The decision by the Military Judge to accept EH’s claim that she did not remember and that she “woke up” with Mr. Lopez on top of her sealed Mr. Lopez’s fate. In his special findings the military judge explained that EH’s testimony that he said “don’t worry, I used a condom” was “key in establishing . . . EH was not aware the sexual act was taking place when it began because she was unconscious due to her state of intoxication.” The Military Judge does not address the probability that EH suffered a memory blackout or that she was lying. The military judge chose to believe EH despite EH’s admission that she had only three drinks and subsequent claim that she could not remember any of the events of that evening. Because the military judge found that EH was a credible witness, the Navy-Marine Corps Court of Criminal Appeals also found her to be credible.

Assuming that EH is telling the truth and she cannot remember any of the details from that evening that would prove Mr. Lopez innocence, her lack of memory does not mean she did not consent to the sex. Alcohol induced blackouts can occur among young social drinkers even when only relatively small amounts of alcohol are consumed. During a memory blackout, the decision-making parts of the brain continue to function, but the part of the brain that records memories stops recording. We know that EH was likely experiencing memory blackouts (or lying about not remembering) because of the improbability that Mr. Lopez could have carried her out of the Peacock Club, put her in his car and then carried her up three flights of stairs. At the very least, someone at the club would have seen Mr. Lopez carrying an unconscious woman out of the bar and done something to stop it. EH was conscious when she walked out of the bar and up three flights of stairs. However, the Military Judge ignored all this evidence and found that Mr. Lopez “committed a sexual act upon LCpl E.H. . . .when LCpl E.H. was incapable of consenting to the sexual act due to her impairment by an intoxicant, a condition that was known or reasonably should have been known to the Accused.” However, Mr. Lopez had a reasonable belief that EH consented because he saw her have only three drinks and was with her when she walked out of the bar and up the three flights of stairs. And most important, Mr. Lopez knew that she did consent because she was kissing Mr. Lopez and was an active participant in the attempt of sex even if she does not remember.

Three drinks cannot and did not make EH incapable of consenting. I respectfully request that you grant my request for a pardon because this miscarriage of justice has ruined many aspects of Mr. Lopez’s life for far too long. Thank you for taking the time to read this submission. We would submit that any reasonable person reading the Record of Trial in this case would come to the only logical conclusion: Mr. Lopez was wrongly convicted based on false testimony. We urge you to right this wrong and help Mr. Lopez resume his life.

Sincerely,

William E. Cassara

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Attorney at Law