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LAPD letter to Derrick Rose's accuser confirms two key points

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- An LAPD letter confirmed there is an open criminal sexual assault investigation into Derrick Rose. This revelation could affect the Knicks point guard in two ways.

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MICHAEL MCCANN

Monday September 26th, 2016

In an important development in the Derrick Rose case, Judd Legum of *ThinkProgress.org* has **obtained** a Sept. 22, 2016, letter from Los Angeles Police Department detective Nadine Hernandez to an attorney for Rose's accuser. The letter confirms two key points: (1) there is a **current and open investigation** into the alleged rape that took place on Aug. 23, 2013; and (2) the LAPD will honor the accuser's **request to remain anonymous** during the criminal investigation.

Rose's accuser is currently known by the pseudonym "Jane Doe," but per a Sept. 21 **order** by U.S. District Judge Michael Fitzgerald, Doe's name will become public if the two sides proceed to trial on Oct. 4. Doe has sued Rose and two of his associates, Randall Hampton and Ryan Allen, for \$21.5 million. She accuses the three men of sexual battery and other civil offenses stemming from a sexual incident at her Los Angeles apartment. The parties agree that sex occurred but disagree about whether she consented. They also disagree about her level of intoxication, with Doe insisting that she was too inebriated to provide consent. For additional details on the incident, see previous SI.com **legal articles**.

As explained below, Detective Hernandez's letter impacts the Rose case in at least two important ways.



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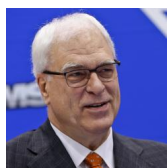
Derrick Rose on rape investigation: 'I will be proven innocent'

First, the price for Rose to settle the lawsuit prior to trial probably goes up . . .

Hernandez's letter makes clear that Rose, who under California law could be criminally charged for the incident until the statute of limitations expire in 2019, should view going to trial with trepidation about its potential criminal ramifications. In her letter, Hernandez seeks to "clarify any misconception" that Rose is in the clear as it relates to potential criminal charges. Indeed, Hernandez expressly notes that the investigation is not closed and that none of the "suspects" have been cleared. Given that the LAPD's investigation remains open, Hernandez and other LAPD detectives will certainly avail themselves of any developments—whether they be new and damning evidence or unexpected witness testimony—that surface in the civil case against Rose.

Along those lines, if Rose goes to trial on Oct. 4 and testifies in a way that corroborates Doe's contention that he raped her or that suggests that he is untruthful while under oath, the odds of him being charged with a crime—including the crime of sexual assault or the crime of perjury—increase. Keep in mind, Rose has already encountered problems while testifying in this case. This was particularly evident when Rose testified during pretrial discovery that he **does not understand the meaning of the word “consent.”**

Rose's attorneys are likely concerned about how Rose might fare while under a cross-examination directed by Doe's attorneys, **Waukeen McCoy** and **Brandon Anand**, both of whom are experienced and skilled advocates. Rose can avoid the accompanying risks of testifying by reaching a financial settlement with Doe prior to Oct. 4. Such a settlement, which would entail Rose paying Doe an amount of money in exchange for Doe dropping her lawsuit, could also ensure that Doe will not cooperate in any further criminal investigation into Rose.



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But Rose's attorneys would argue not by much

Rose and his attorneys could dismiss the warning I articulated in the preceding section as overstated and unrealistic. They could highlight that a letter by a detective stating that an investigation is “current and open” should not be read more broadly than what it actually states. “Current and open” does not mean that charges are expected or that the LAPD is investing considerable time and energy into this particular investigation. It simply means that the case is not closed.

Rose's attorneys also know that more than three years have passed since the incident. With that in mind, they can reasonably assert that it is unlikely that Rose would face criminal charges at this point. To bolster that view, Rose's attorneys would contend that all of the key evidence and witness testimony from this incident have already been found and have not led to charges. They would also stress the factual record, and particularly that Doe neither reported the incident to the police nor sought medical attention. Further, some of Doe's texts messages to Rose in the hours following the incident concerned reimbursement for expenses and other conventional topics. Rose's attorneys believe that those type of ordinary exchanges do not support the theory that Rose had just raped Doe.

Rose could also mitigate the risk of being charged with a crime by invoking his Fifth Amendment privilege under the U.S. Constitution. If he did so, he could refuse to answer questions while under oath during the civil trial. Invoking the Fifth Amendment would protect Rose from having to disclose information that he reasonably believes could be used in, or give rise to, a criminal prosecution stemming from the alleged rape. Rose must testify in a civil trial if called to the stand, which is a key difference from a criminal prosecution where Rose would only testify at his own choosing.

The obvious downside for Rose in invoking the Fifth would be that a jury in a civil trial can infer Rose's guilt. As a result, Rose would likely lose the lawsuit and be ordered to pay Doe millions of dollars. In that scenario, Rose would also be more likely to face an NBA suspension and loss of endorsement income, topics that I [previously explained in detail](#).

Second, Hernandez's letter could lead Judge Fitzgerald to reconsider his order to make



To the disappointment of Doe and her attorneys, Judge Fitzgerald on Sept. 21 ruled that he intends to make Doe's real name known during the trial. As I detailed on SI.com, **the ruling was expected**. The Federal Rules of Civil Procedure stipulate that the names of all of the parties in a civil action be known. Judges usually adhere to that stipulation, particularly when all of the parties are adults, as they are in this litigation. Judge Fitzgerald, aware that Rose would petition the U.S. Court of Appeals for the Ninth Circuit on appeal if Rose loses the trial, expressed concern that jurors might be influenced by Doe remaining anonymous while Rose's name is known. Namely, jurors might infer, wrongly, that Judge Fitzgerald believes Doe needs to be protected because she is a victim—a conclusion that might lead jurors to believe that Doe is telling the truth and that Rose is lying. A judge must be completely impartial at all times and failure to do so can be grounds for an appeal.

While Judge Fitzgerald's ruling was expected, it has nonetheless attracted criticism. Doe insists that her name becoming known will lead to harassment of her and her family, and it will also lead to her forever being linked to this case. As an alleged victim of sexual assault, Doe and her attorneys believe that victims' names should remain confidential in order to ensure that victims are willing to forward. However, an argument about protecting victims of sexual violence is stronger in the context of a criminal case—where the focus is on whether a crime occurred—than in a civil litigation, where the focus is on whether one party civilly harmed the other.



Although Hernandez's letter is unlikely to sway Judge Fitzgerald to change his mind about making Doe's name known, there is a chance that the judge changes his mind. Doe's attorneys can stress that if the LAPD is willing to honor Doe's request for anonymity, so too should the U.S. District Court for the Central District of California. In that same vein, Doe's attorneys can highlight Hernandez's statement in her letter that the ability of the LAPD to offer victims of sex crimes anonymity constitutes "an invaluable investigative aid" to the LAPD. By that logic, if Doe's name becomes known, "an invaluable investigative aid" would be lost to the LAPD in its investigation of a possible rape. Judge Fitzgerald, however, might reason that the LAPD has already had more than three years to investigate this incident and that if Doe's name remains anonymous and Rose is found liable, the judge might have unintentionally created a ground for Rose to appeal.

With the trial scheduled for next Tuesday, much can happen—including a settlement that ends the litigation. But time for a pretrial settlement is running out.

Michael McCann, SI's legal analyst, is a Massachusetts attorney and the founding director of the Sports and Entertainment Law Institute at the University of New Hampshire School of Law.

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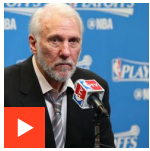




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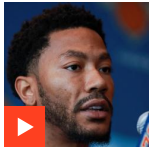
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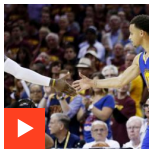
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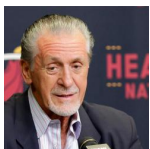
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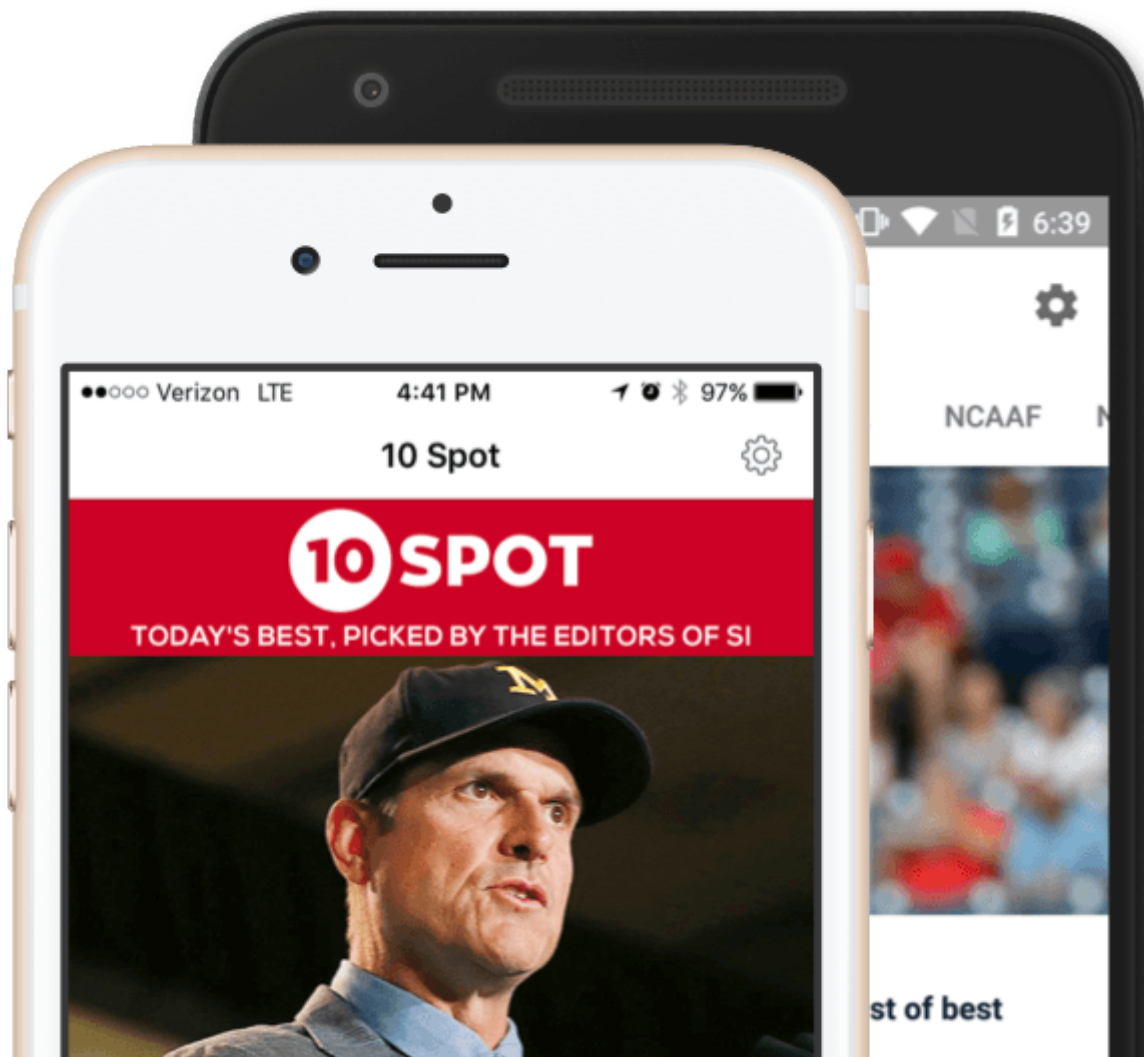
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