

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

U N I T E D S T A T E S,	)	FINAL BRIEF ON BEHALF OF
Appellee	)	APPELLANT
	)	
v.	)	Crim. App. No. 20091106
	)	
Sergeant First Class (E-7)	)	USCA Dkt. No. 13-0061/AR
<b>TED C. SQUIRE,</b>	)	
United States Army,	)	
Appellant	)	

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Sergeant First Class (E-7),	)	ACCA Dkt. No. 20091106
United States Army,	)	USCAAF Dkt. No. 13-0061-AR
Appellant	)	

**TO THE JUDGES OF THE UNITED STATES COURT OF  
APPEALS FOR THE ARMED FORCES:**

**ISSUE PRESENTED**

**I. WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE PERMITTED TESTIMONIAL HEARSAY IN THE FORM OF SL'S STATEMENT TO A PHYSICIAN.**

**STATEMENT OF STATUTORY JURISDICTION**

The statutory basis for the jurisdiction of the Army Court of Criminal Appeals was 10 U.S.C. § 866(b), Article 66(b), UCMJ. The statutory basis for the jurisdiction of this Court's review is 10 U.S.C. § 867(a)(3), Article 67(a)(3), UCMJ.

**STATEMENT OF THE CASE**

Appellant was tried at Wheeler Army Airfield, Hawaii, on July 21 and December 7-9, 2009 before a general court-martial convened by Commander, Headquarters, 8th Theater Sustainment Command. Appellant was charged with one specification of engaging in a sexual act with a child (Specification 1 of the Charge); and two specifications of engaging in a lewd act with a

child (Specifications 2 and 3 of the Charge). Specifications 2 and 3 of the Charge were withdrawn on 30 November 2009. Appellant elected to be tried by a panel of enlisted members; he pleaded not guilty. (JA at 17, 18). Appellant was found guilty of the Charge and its Specification. (JA at 171). He was sentenced to reduction to E-1, and confinement for twenty years. (JA at 172). Appellant appealed to the Army Court of Criminal Appeals; the findings and sentence were affirmed on August 17, 2012. This Court granted Appellant's petition for review on January 10, 2013.

#### **STATEMENT OF THE FACTS**

The facts necessary for the resolution of the issues can be found Appellant's pleadings before the Army Court of Criminal Appeals, and in the argument below.

#### **SUMMARY OF THE ARGUMENT**

Appellant was denied his right to confront his accuser when the military judge admitted testimonial hearsay statements his accuser made to physicians during the course of two sexual assault examinations. The statements were more than a routine and objective cataloging of unambiguous factors, and the primary purpose for eliciting the statements was the production of evidence with an eye toward trial.

## ARGUMENT

### I. WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER WHEN THE MILITARY JUDGE PERMITTED TESTIMONIAL HEARSAY IN THE FORM OF SL'S STATEMENT TO A PHYSICIAN.

#### Standard of Review

Whether a statement made to a physician during the course of an examination following an allegation of sexual abuse is inadmissible hearsay is a question of law that is reviewed de novo.<sup>1</sup>

#### Argument

SL made an allegation of sexual abuse against Appellant to her mother on the morning of September 16, 2008. She was subsequently seen by Dr. Mary Montgomery at Tripler Army Medical Center, and Dr. Philip Hyden at Kapiolani Medical Center in Honolulu. SL made statements to both that were used against Appellant at trial. SL did not testify.

Before Dr. Montgomery ever evaluated SL, she had reviewed the nursing chart, and understood that SL was there for a possible sexual assault.<sup>2</sup> The form that Dr. Montgomery used to evaluate SL is titled "EMERGENCY PHYSICIAN RECORD, Pediatric Alleged Physical Abuse."<sup>3</sup> It provides a space to record what the "child reports," and in which Dr. Montgomery wrote "having 'Chris' put his penis in her 'privates.'" Just below that is a

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<sup>1</sup> United States v. Gardinier, 65 M.J. 60 (C.A.A.F. 2007).

<sup>2</sup> JA at 41.

<sup>3</sup> JA at 177.

space for the identity of the "alleged perpetrator" including the relation and the name.<sup>4</sup>

Dr. Montgomery conducted the examination "knowing that with the sex abuse accusation that there could be potential prosecution down the road," "knew that the records [she was] maintaining very well may in fact play a part in a criminal prosecution" and "maintain[ed] those records and collected that information with that in mind."<sup>5</sup> Dr. Montgomery stated that her "primary purpose" was "not to do the sex assault exam," but acknowledged that she "knew [she was] generating information and potential evidence that could potentially be used in a criminal trial," and that she "knew [she] had an obligation to safeguard that evidence."<sup>6</sup> After Dr. Montgomery evaluated SL, she determined that she needed to be seen for a "forensic evaluation," the purpose of which, according to Dr. Montgomery, is "evidence collection."<sup>7</sup>

SL was sent to the Kapiolani Medical Center to see Dr. Hyden, the medical director of the Kapiolani Child Protection Center, the Sex Abuse Treatment Center, and Attending Pediatrician at Kapiolani Medical Center.<sup>8</sup> His duties at the

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<sup>4</sup> Id.

<sup>5</sup> JA at 42-43.

<sup>6</sup> JA at 43-44.

<sup>7</sup> JA at 37.

<sup>8</sup> JA at 55.

Child Protection Center and Sexual Abuse Treatment Center  
include

seeing all the children that come in through CPS, Child Protective Services, or law enforcement in evaluating children that may have been sexually abused as well as . . . physically abused as well as cases that come in, emergency cases of trauma where there's been no report but they want me to evaluate the child.<sup>9</sup>

Dr. Hayden had been informed by the crisis worker "the child had come from Tripler Army Medical Center to be evaluated for forensic exam."<sup>10</sup> Dr. Hyden "did not recall" whether anyone from law enforcement asked him to conduct the exam, and denied that he asked the questions at the behest of law enforcement, but allowed, "I know I'm doing a forensic exam, so, I asked the questions as part of my forensic exam."<sup>11</sup>

In response to civilian defense counsel's question whether the exam was "for forensic purposes, this is for the purpose of collecting possible evidence to be utilized in a prosecution," Dr. Hyden responded, "Well, it's not only that."<sup>12</sup> A rape kit "consists of swabs, slides, directions, paperwork that you fill out, and it has to be initialized and signed in the order of obtaining the appropriate specimens, and then that is closed in a box and labeled, taken by my crisis worker, so, it follows complete chain of custody. . . Who then passes it on to law

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<sup>9</sup> JA at 56.

<sup>10</sup> JA at 59.

<sup>11</sup> JA at 59, 63.

<sup>12</sup> JA at 64.

enforcement or whoever needs it."<sup>13</sup> Dr. Hyden knew the forensic evaluation or rape kits would eventually be passed on to law enforcement, and that at the time he conducted the examination he knew he was "collecting evidence that could possibly [be utilized] in the prosecution," and that he was "collecting evidence that could possibly be submitted to a laboratory for analysis and evaluation."<sup>14</sup>

Dr. Hyden conducted his examination pursuant to an authorization by SL's mother.<sup>15</sup> In that release, SFC Whitlock acknowledged that "medical information gathered by this examination may be used as evidence in a court of law," and specifically authorized release of medical findings and evidence "to law enforcement officials."<sup>16</sup> He conducted the examination in accordance with a "Medical-Legal Record and Sexual Assault Information Form" required by the State of Hawaii for rape kits to ensure all the necessary steps are completed, and understood that the content of the form "is going to be very likely provided to law enforcement personnel."<sup>17</sup> Dr. Hyden testified that all the evidence obtained is going to eventually and potentially be given to law enforcement people.<sup>18</sup> Dr. Hyden agreed that while he had a medical purpose for asking for a

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<sup>13</sup> JA at 65.

<sup>14</sup> Id.

<sup>15</sup> JA at 67.

<sup>16</sup> JA at 191.

<sup>17</sup> JA at 79.

<sup>18</sup> JA at 80.

history from the patient, he also understood that the history is potentially going to be used for legal purposes. He testified he is a "mandated reporter," and that he "understand[s] the child abuse reporting laws and what happens when you investigate and find any symptom or finding of child abuse and how it has to be appropriately recorded in a document."<sup>19</sup>

Citing United States v. Gardinier, the defense objected to the testimony of both Dr. Montgomery and Dr. Hyden. The military judge denied the defense motion.<sup>20</sup> The military judge reduced the findings on the motion to writing in a "Supplemental Ruling."<sup>21</sup>

This Court has "identified several factors that could be considered when distinguishing between testimonial and nontestimonial hearsay" regarding statements made to medical professionals following an allegation of sexual abuse, including (1) whether the statement was elicited or made in response to law enforcement or prosecutorial inquiry; (2) whether the statement involved more than a routine and objective cataloging of unambiguous factual matters; and (3) whether the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial.<sup>22</sup> The Court noted that the "goal is an objective look at the totality of the

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<sup>19</sup> JA at 71.

<sup>20</sup> JA at 50-51.

<sup>21</sup> JA at 192-194.

<sup>22</sup> United States v. Gardinier, 65 M.J. at 65.

circumstances surrounding the statement to determine if the statement was made or elicited to preserve past facts for a criminal trial."<sup>23</sup>

In Gardinier this Court noted that the sexual assault nurse examiner elicited patient history "to determine diagnoses and treatment," and she completed the "treatment" section of the form referring the child for follow-up care. The Court concluded, however, that the sexual assault nurse examiner also testified that "she sees children at the Children's Advocacy Center to conduct forensic evaluations and detailed genital examinations," and "although there is a 'treatment' section on the form, the form itself is entitled a 'Forensic Medical Examination Form' rather than simply a medical exam form."<sup>24</sup>

SL was sent to Kapiolani hospital for the express purpose of a "forensic evaluation," the purpose of which, according to Dr. Montgomery, the doctor who sent her there, was "evidence collection."<sup>25</sup> Nurse Libby Botero said SL was transferred from Tripler "for a forensic examination/sexual assault forensic examination."<sup>26</sup> She was seen by Dr. Hyden, who knew SL was there because there had been an allegation of sexual abuse. As a

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<sup>23</sup> Id. This contextual approach focusing on the "primary purpose" of the interrogation is consistent with the Supreme Court's recent pronouncement, in Michigan v. Bryant, 131 S.Ct. 1143 (2011), in which it concluded that the "primary purpose" of statements made to police interrogators during the course of an ongoing emergency were non-testimonial.

<sup>24</sup> Gardinier, 65 M.J. at 66.

<sup>25</sup> JA at 37.

<sup>26</sup> JA at 108.

"mandated reporter," Dr. Hyden was required by Hawaii law to report the suspected abuse both orally and in writing. The written report must contain, among other things, "any . . . information that the reporter believes might be helpful or relevant to the investigation of the child abuse or neglect."<sup>27</sup> The report was made on the "Hawaii State Medical-Legal Record and Sexual Assault Information Form." At the bottom of the form is a space for a "Police Report #," and a police report number had been assigned.<sup>28</sup>

Appellant disputes that medical diagnosis and treatment was the "primary" purpose of either examination. Although Dr. Hyden testified that he examined SL for the purpose of medical treatment and diagnosis, he did not say that was his only purpose, or even his primary purpose. Dr. Hyden testified that he "can't dismiss the medical . . . even though the legal is definitely part of it," and that although he was conducting a forensic evaluation to be utilized potentially in a criminal prosecution, "that's not [his] sole purpose for being there, but allowed that every single step he was taking he was fully aware of the possibility that the information is going to be presented to law enforcement authorities."<sup>29</sup>

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<sup>27</sup> See Haw. Rev. Stat. § 350-1.1 (JA at 197-198).

<sup>28</sup> See JA at 178.

<sup>29</sup> JA at 80-81.

Like the form in Gardinier, neither of the forms in this case was titled simply as a "medical record". The Tripler form was titled "EMERGENCY PHYSICIAN RECORD Pediatric Alleged Physical Abuse." It included a space on the form for the identification of the "alleged perpetrator," and the relationship of the alleged perpetrator to the victim.<sup>30</sup> The Kapiolani form was titled "Medical-Legal Record and Sexual Assault Information Form." The release obtained from SFC Whitlock specifically states that the medical evidence may be used in a court of law, and SFC Whitlock specifically authorized the release to law enforcement of the information and evidence obtained. Dr. Hyden, who had a mandatory duty to report SL's statements to law enforcement, knew when he asked the questions that the statements SL made would be reported to law enforcement. He "unders[tood] the child abuse reporting laws."<sup>31</sup>

And Dr. Hyden also testified that "before [I swabbed for gonorrhea or Chlamydia] I did the forensic kit. I did the vaginal swab."<sup>32</sup> If Dr. Hyden's primary purpose in evaluating SL was for medical treatment, it seems that he would first preserve evidence that would assist him in his diagnosis and treatment. Instead, he first acted to preserve evidence for criminal prosecution. The primary purpose of this examination, and

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<sup>30</sup> JA at 177.

<sup>31</sup> JA at 71.

<sup>32</sup> JA at 106.

eliciting the statements from SL, was for law enforcement, Dr. Hyden's cagey responses notwithstanding.

Like the Sexual Assault Nurse Examiner in Gardinier, Dr. Hyden routinely sees children to conduct forensic examinations. He is the "medical director of the Sex Abuse Treatment Center," responsible for "evaluating all cases that come in with a suspicion or concern about possible nonaccidental trauma" and completed "between 1000 to 1500" examinations in cases of sexual assault.<sup>33</sup>

Applying the Gardinier factors, and taking "an objective look at the totality of the circumstances surrounding the statement to determine if the statement was made or elicited to preserve past facts for a criminal trial," the statements to Dr. Montgomery and Dr. Hyden were made or elicited to preserve past facts for a criminal trial. While it is possible that the statements may not have been made specifically in response to law enforcement or prosecutorial inquiry (a point Appellant does not necessarily concede, particularly since Dr. Hyden "[did not] recall" whether anyone from law enforcement had asked him to conduct the exam),<sup>34</sup> both Dr. Montgomery and Dr. Hyden knew that it was likely that law enforcement would be interested in

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<sup>33</sup> JA at 98-99.

<sup>34</sup> JA at 58.

evidence collected during the examinations, including SL's statements.

The forms that they both filled in reflected the law enforcement purpose behind the examinations. Dr. Montgomery dutifully elicited the name of the "alleged perpetrator" and the "relationship" to SL ("mother's friend). This information is completely irrelevant to the diagnosis and treatment, and Dr. Montgomery never testified that it was necessary for those purposes. The Kapiolani form is obviously intended to be provided to law enforcement, given its title as a "Medical-Legal Record" and the inclusion of a police report number.

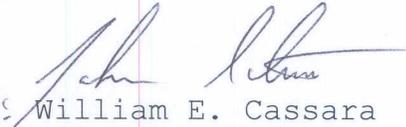
The statements involved "more than a routine and objective cataloging of unambiguous factual matters", and the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial. And particularly with respect to the statements to Dr. Hyden, given his experience in the area of treatment of sexual assault of children and his role as the medical director of the Sexual Assault Treatment Center, it cannot be seriously contended that his is "just a doctor" in this scenario. He knew exactly what he was doing and what would happen with the evidence he obtained.

The military judge erred in admitting the statements SL made to Dr. Montgomery and Dr. Hyden in violation of Appellant's

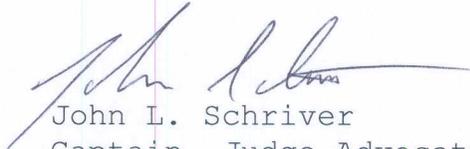
Sixth Amendment right to confrontation. The error was not harmless beyond a reasonable doubt.<sup>35</sup> Although the government presented some physical evidence purporting to link Appellant to the offense, as discussed in more detail below, that evidence is itself suspect and without SL's statement, Appellant may well have been acquitted.

Based on the foregoing, the findings and sentence must be set aside. WHEREFORE Appellant so prays.

Respectfully submitted,

  
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<sup>35</sup> Chapman v. California, 386 U.S. 18 (1967).

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. Squire, Crim. App. Dkt. No. 20091106, Dkt. No. 13-0061/AR, was delivered to the Court and Government Appellate Division on February 21, 2013.



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