IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Granted Issue

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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

Statement of the Case

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas,[3] of rape of a child who had not attained the age of 12 years in violation of Articles 120, Uniform Code of Military Justice (UCMJ).[4] The panel sentenced appellant to reduction to Private (E-1) and

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[1] Joint Appendix (JA) 1; UCMJ, art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3).
[3] JA 18.
[4] JA 171; JA 11 (Charge Sheet).

confinement for 20 years.[5] The convening authority approved 238 months confinement and the remainder of the sentence.[6]

The Army Court affirmed the findings and sentence on 17 August 2012.[7] This Court granted appellant's petition for grant of review on 10 January 2013.

Summary of Argument

SL's statements to Dr. Montgomery and Dr. Hyden are not testimonial hearsay. The statements were elicited and made in the context of those doctors taking a medical history of SL. The primary purpose of those medical histories was to assist in diagnosing and treating SL. The doctors were not acting on behalf of law enforcement. SL did not make and the doctors did not procure these statements with the primary purpose of creating an out-of-court substitute for trial testimony.

However, any error is harmless beyond a reasonable doubt due to the overwhelming evidence of appellant's guilt - including his confession and the presence of his semen and DNA inside the eight year-old victim's vagina.

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[5] JA 172.
[6] JA 173.
[7] JA 1-10.

Statement of Facts[8]

Appellant's Trial Objection to SL's Statements

Appellant was convicted of raping eight year-old SL.[9] The Government's evidence against appellant included statements from SL to Doctor Montgomery and Doctor Hyden.[10] The doctors elicited these statements while taking medical histories of SL.[11] The Government's considerable evidence against appellant included appellant's confession to CID[12] and the presence of appellant's semen inside SL's vagina and on her underwear.[13] SL did not testify, although she attended the trial. Trial defense counsel noted "I've seen her here and she is available to testify."[14]

Appellant objected on hearsay and confrontation grounds to SL's statements to the doctors.[15] In considering these claims, the military judge held Article 39(a) sessions and heard

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[8] Dr. Montgomery and Dr. Hyden each testified twice: at respective Article 39(a) sessions to determine the admissibility of their testimony and then before the members. The military judge supplemented her oral rulings (JA 50-51, 87) with written findings of fact and conclusions of law when she authenticated the record. *See* JA 192-194.

[9] JA 171.

[10] JA 93 ("What she reported to me was that [appellant] put his penis in her privates"); 104 ("I'm quoting what she said, 'he then put his wee wee inside me and it hurt. I told him no and pushed him away.'").

[11] JA 92-93, 104.

[12] JA 114 ("He told me that if his DNA was found on or in the victim, then his penis did penetrate her, but it was accidental not deliberate.").

[13] *See* JA 147-154.

[14] *See* Record at 68.

[15] JA 48-50, 84-86.

testimony from Dr. Montgomery and Dr. Hyden.[16] She admitted those statements into evidence.[17] She made findings of fact and conclusions of law, attaching them to the record.[18]

SL's Statements to Dr. Montgomery and Dr. Hyden

On the afternoon of September 16, 2008, Staff Sergeant (SSG) Pamela Whitlock brought her 8 year-old daughter, SL, to Tripler Army Medical Center.[19] SSG Whitlock initially took SL to Tripler Family Practice, where she indicated that SL had possibly been molested.[20] SSG Whitlock stated that SL "needed to get checked out."[21] The alleged molestation had occurred earlier that morning.[22] SSG Whitlock was sent to the emergency room (ER) at Tripler Army Medical Center.[23] SSG Whitlock had not contacted the police to report what she had learned from her daughter.[24]

There, Dr. Mary Montgomery was working as an emergency room physician in the ER.[25] In that capacity, she was seeing and treating patients that day.[26] Dr. Montgomery testified that she

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[16] Doctors Montgomery and Hyden each testified twice: once at the evidentiary hearing and once before the members.
[17] *See* JA 194.
[18] JA 192-194
[19] JA 52-53; for SL's age, *see* JA 177.
[20] JA 53.
[21] JA 173.
[22] *See* JA 23-24.
[23] JA 53.
[24] JA 52.
[25] JA 34, 90.
[26] JA 34.

was seeing patients in a medical capacity.[27] Dr. Montgomery was wearing scrub tops and scrub pants that day.[28]

At approximately 1445, Dr. Montgomery met SL and SSG Whitlock in a treatment room inside the ER.[29] Dr. Montgomery identified herself to SL as a doctor and said "I'm there to take care of them for the day."[30] Dr. Montgomery elaborated that she would "ask them what they are there for, perform a history, and then...perform a physical exam, order any appropriate lab studies that are needed and then make a disposition on their care which would be to see where they need to go next."[31]

Dr. Montgomery was aware that the chief complaint was alleged sexual abuse.[32] Dr. Montgomery began taking a history from SL.[33] She asked them what happened and why they came to the emergency department.[34] SL reported that Chris had his penis in her privates.[35] During cross-examination, defense counsel conceded "that this was a sexual abuse allegation, *even though it was not your primary purpose*, you would [know] you were generating information and potential evidence that could be

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[27] JA 34.
[28] JA 34.
[29] JA 35, 91.
[30] JA 35.
[31] JA 36.
[32] JA 92.
[33] JA 36, 92.
[34] JA 36, 93.
[35] JA 36, 93.

utilized in a criminal trial, correct?"[36] Dr. Montgomery answered, "Potentially. Yes, sir."[37]

As she did for all patients who suffer alleged abuse, Dr. Montgomery then performed a head-to-toe physical examination of SL.[38] Dr. Montgomery examined SL's head, ears, throat, chest, back, abdomen, and extremities.[39] With SSG Whitlock's permission, Dr. Montgomery performed an external examination of SL's genitals looking for blood or obvious trauma.[40]

Dr. Montgomery did not do an internal genital exam because there was no evidence of bleeding, SL seemed stable, and did not have the requisite expertise to perform that exam.[41] After consulting with the hospital's pediatric sexual abuse expert, Dr. Montgomery referred SL and her mother to Kapiolani Medical Center so SL could have a complete genital examination.[42]

SSG Whitlock then took SL to the Kapiolani Medical Center.[43] There, they met Dr. Philip Hyden. Dr. Hyden was the medical director of the Kapiolani Medical Center for Women and Children, the Sex Abuse Treatment Center, assistant professor of

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[36] JA 43-44 (emphasis added).
[37] JA 44.
[38] JA 36, 94.
[39] JA 36-37, 94.
[40] JA 37, 94.
[41] JA 37.
[42] JA 37.
[43] JA 53-54. SSG Whitlock authorized Kapiolani Medical Center to release medical findings and evidentiary specimens to law enforcement. JA 191.

pediatrics, and attending physician at Kapiolani Medical Center.[44]

Dr. Hyden introduced himself as either Doctor Hyden or Doctor Phil.[45] He then took a medical history from SL.[46] Dr. Hyden always takes a medical history first. The medical history "is the most important and always first."[47] Dr. Hyden takes the medical history because he needs "to have a basis of information in order to best ascertain what diagnosis they may have and what treatment that they may need in order for their best interest of health and welfare."[48]

SL reported that she "had pain when she peed."[49] SL told Doctor Hyden that "that morning, she had been lying in her bed watching T.V. and that the mom's boyfriend...came into the room and she was lying down and he asked her if he could lie down next to her. She said yes. So, he then removed his pants and laid down on the bed, asked her to remove her underclothes and laid down next to her. She then said, and I'm quoting, 'he put

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[44] JA 55.
[45] JA 61.
[46] JA 62.
[47] JA 102, *see also* JA 81 ("The medical history is always first.").
[48] JA 72.
[49] JA 62, *see also* JA 104.

his wee wee inside me and it hurt. I told him no and pushed him away.'"[50]

After obtaining a medical history from SL, Dr. Hyden conducted a physical examination of SL.[51] He also conducted a "rape kit," which Dr. Hyden acknowledged could possibly be used in a prosecution.[52] Dr. Hyden swabbed SL's vagina twice: once for the rape kit and once to diagnose possible sexually transmitted diseases.[53] Dr. Hyden prescribed SL antibiotics because he was concerned that SL would have a sexually-transmitted disease.[54]

On cross-examination, Dr. Hyden repeatedly contested defense counsel's premise that the doctor's primary purpose was evidence collection with an eye toward trial. "That's your interpretation. Mine is that I'm taking a medical history as a pediatrician which I would do for any patient I see before I perform a physical exam. If any of that information happens to be considered evidence by any legal proceedings, I'm glad I was able to take it."[55] When asked about the "Hawaii State Medical-

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[50] JA 62 (testimony before the military judge), *see also* JA 104 (testimony before the members).
[51] JA 77, 105.
[52] JA 65.
[53] JA 106.
[54] JA 77.
[55] JA 66.

Legal Record and Sexual Assault Information Form,"[56] Dr. Hyden explained "it is a medical form first before it's a legal form. It says medical in front of legal....I take that to mean what the position is. There's not someone else doing that exam. It's a doctor doing that exam....It's not a lawyer and it's not a nurse."[57]

Law enforcement only made contact with Kapiolani Medical Center after Dr. Hyden examined SL.[58] The military judge found "[l]aw enforcement was not involved at all in sending [SL] over to Kapiolani. In fact at this point neither [SL] nor her mother had even spoken to law enforcement."[59]

The Government's Other Evidence: Appellant's Confession and Appellant's Semen Found in the 8 Year-Old SL's Vagina

Appellant confessed to a CID agent. Special Agent Quinn testified that he interviewed appellant.[60] Special Agent Quinn advised appellant of his rights.[61] Appellant waived those rights.[62]

After talking to Special Agent Quinn, appellant said "he was not 100% certain if the incident didn't take place as

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[56] JA 178 (ALLCAPS altered). Both Dr. Hyden and Dr. Montgomery had a duty to report "child abuse or neglect" to law enforcement or Social Services. JA 197-198, 71.
[57] JA 80.
[58] JA 109 ("It was after the examination, sir.").
[59] JA 194.
[60] JA 110.
[61] JA 111.
[62] JA 112.

reported."[63] Appellant "wanted to explain some things."[64] Appellant stated that "if his DNA was found on or in the victim, then his penis did penetrate her, but it was accidental not deliberate."[65]

Just as appellant predicted, his DNA was found "on or in the victim." Dr. Jeffrey Fletcher examined a vaginal swab from SL.[66] That vaginal swab contained semen with microscopic identification of spermazoa.[67] Dr. Fletcher found at least two DNA profiles on those swabs.[68] The non-semen DNA profile belonged to SL.[69]

Appellant was "included as a possible contributor to the semen DNA profile obtain. It is estimated that the following unrelated individuals selected at random from the U.S. population are included as possible contributes is 1 in 26 trillion in the Caucasian population; 1 in 71 trillion in the Black population; and 1 in 4 trillion in the Hispanic population."[70]

Similarly, appellant's semen and DNA were present on SL's underwear. Dr. Fletcher identified at least two DNA profiles

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[63] JA 114.
[64] JA 114.
[65] JA 114.
[66] JA 147.
[67] JA 147.
[68] JA 147.
[69] JA 150-151.
[70] JA 151

from one portion of the underwear.[71] "The semen DNA profile matches that of [appellant]. The frequency of occurrence of this profile among unrelated individuals selected at random in the U.S. population is estimated to be 1 in 1 septillion in the Caucasian population; 1 in 210 sextillion in the Black population; and 1 in 160 sextillion in the Hispanic population."[72]

In Dr. Fletcher's opinion, the semen on the vaginal swabs and underwear came from appellant.[73]

GRANTED ISSUE

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

Appellate courts review a military judge's decision to admit evidence for an abuse of discretion.[74] However, the antecedent question here – whether that admitted evidence constitutes testimonial hearsay – is a question of law reviewed

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[71] JA 153.
[72] JA 153.
[73] JA 157.
[74] *United States v. Blazier* (*Blazier I*), 68 M.J. 439, 441-442 (C.A.A.F. 2010); *see also United States v. Smith*, 68 M.J. 445, 448 (C.A.A.F. 2010) ("We have also applied the abuse of discretion standard to alleged violations of the Sixth Amendment Confrontation Clause.").

de novo.[75] Courts accept the military judge's findings of fact "unless they are clearly erroneous or unsupported by the record."[76] "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[77]

Law

The Sixth Amendment's Confrontation Clause gives the accused "[i]n all criminal prosecutions,...the right...to be confronted with the witnesses against him." In *Crawford v. Washington*, the Supreme Court held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[78] Thus, the Confrontation Clause "applies to 'witnesses' against the accused - in other words, those who 'bear testimony.'"[79] "'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[80]

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[75] *Blazier I*, 68 M.J. at 442.
[76] *United States v. Foerster*, 65 M.J. 120, 123 (C.A.A.F. 2007).
[77] *Anderson v. City of Bessemer City*, 470 US 564, 574 (1985).
[78] 541 U.S. 36, 53-54 (2004).
[79] *Id.* at 51, citing 1 N. Webster, An American Dictionary of the English Language (1828).
[80] *Id.*

The Supreme Court has not established a comprehensive definition of "testimonial."[81] "The language used by the Supreme Court to describe whether and why a statement is testimonial is far from fixed."[82] However, the Court has used variations of the primary purpose test to determine whether a statement is testimonial. For example, in *Davis v. Washington*, the Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is ***to establish or prove past events potentially relevant to later criminal prosecution.***[83]

More recently, in *Michigan v. Bryant*,[84] the Court further explained the primary purpose test:

> Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial. When, as in *Davis*, the primary purpose of an

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[81] *See Crawford*, 541 U.S. at 68 ("We leave for another day any effort to spell out a comprehensive definition of "testimonial."); *Davis v. Washington*, 547 U.S. 813, 822 (2006) (declining to "produce an exhaustive classification of all conceivable statements...as either testimonial or nontestimonial...").

[82] *United States v. Tearman*, __ M.J. ___, (slip op. at 12) (C.A.A.F. 2013) (*see* cases cited therein).

[83] 547 U.S. 813, 822 (2006) (emphasis added).

[84] 131 S. Ct. 1143 (2011).

> interrogation is to respond to an "ongoing emergency," its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a ***primary purpose of creating an out-of-court substitute for trial testimony.***[85]

Courts must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties."[86] Both *Davis* and *Bryant* addressed police interrogations.[87]

In *United States v. Rankin*, this Court identified several non-exhaustive factors to determine whether statements are testimonial or nontestimonial hearsay:[88]

1) Was the statement elicited by or made in response to law enforcement or prosecutorial inquiry?

2) Did the statement involve more than a routine and objective cataloguing of unambiguous factual matters?

3) Was the primary purpose for making, or eliciting, the statement the production of evidence with an eye toward trial?[89]

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[85] 131 S. Ct. at 1155 (emphasis added).
[86] *Id.* at 1156.
[87] The Supreme Court's most recent post-*Crawford* case, *Williams v. Illinois*, 132 S. Ct. 2221 (2012) (plurality opinion), produced several opinions – none of them constituting a majority, except in the result. In *Tearman,* this Court noted that it does not view *Williams* "as altering either the Supreme Court's or this Court's Confrontation Clause jurisprudence." (slip op. at 15, fn.6).
[88] 64 M.J. 348, 352 (C.A.A.F. 2007).
[89] *Id.*

In undertaking this factors approach, this Court's goal is "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."[90]

The Supreme Court has not squarely addressed a case involving statements from a child patient to a doctor since *Crawford*.[91] However, in *Bryant*, the Court listed "Statements for Purposes of Medical Diagnosis or Treatment" under Federal Rule of Evidence 803(4) as an example of statements that are "by their nature, made for a purpose other than use in a prosecution."[92] In *Melendez-Diaz v. Massachusetts*, the Court noted that "medical reports created for treatment purposes...would not be testimonial under our decision today."[93] And, in *Giles v. California*, the Court observed that "statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules."[94]

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[90] *United States v. Gardinier* (*Gardinier II*), 65 M.J. 60, 65 (C.A.A.F. 2007). (This case had a lengthy appellate history, resulting in several published and unpublished decisions).
[91] *See White v. Illinois*, 502 U.S. 346 (1992). *Crawford* questions the portion of *White* where the child spoke to police officers. 541 U.S. at 58, fn.8. *Crawford* does not question that child's statements to medical personnel, which is the context in the instant case.
[92] 131 S. Ct. at 1157, fn.9.
[93] 557 U.S. 305, 312, fn.2 (2009).
[94] 554 U.S. 353, 376 (2008).

Argument

SL's statements are not testimonial hearsay. SL made these statements in the context of providing a medical history. The primary purpose in this context is for medical diagnosis and treatment of a patient seeking medical care. Taking SL's statements to each doctor in turn, the *Rankin* factors and totality of the circumstances weigh in favor of the Government: neither statement is testimonial.

I. Dr. Montgomery

a. *Rankin* I: SL's mother brought SL to the ER without ever contacting law enforcement.

SSG Whitlock took her daughter to the emergency room the same day appellant raped SL.[95] SSG Whitlock brought SL to the emergency room because SL "needed to get checked out."[96] SL did not participate in any previous law enforcement interview or medical examination before SSG Whitlock sought medical attention for her daughter. The military judge specifically found "SSG Whitlock took [SL] to TAMC on her own without any involvement from law enforcement."[97] The record supports this finding. SSG Whitlock testified that she never called the police to report

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[95] JA 52-53.
[96] JA 173.
[97] JA 193.

what she learned from her daughter.[98] As such, the military judge's finding is not clearly erroneous.

Dr. Montgomery's question to SL occurred in the context of taking SL's medical history. At no point did law enforcement ask Dr. Montgomery to examine or conduct a medical history of SL.[99] Dr. Montgomery was not aware of any law enforcement investigation.[100] Dr. Montgomery referred SL to Kapiolani Medical Center because nobody at Tripler had the medical expertise to perform a pediatric sexual assault examination.[101]

b. *Rankin* II: The routine medical history catalogued unambiguous and objective facts.

SL's statement at issue occurred as Dr. Montgomery took SL's medical history. Dr. Montgomery obtained a medical history with every patient, asking every patient why he or she is there.[102] SL's statement "Chris had put his penis in her privates" is objective and unambiguous. A medical history is a cataloguing of symptoms, made for a real medical purpose. Thus, the second *Rankin* factor weighs in favor of the Government.[103]

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[98] JA 52.
[99] JA 46.
[100] JA 83.
[101] JA 47, *see* JA 87 (military judge's finding on that point).
[102] JA 44.
[103] However, some language in *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) might cast doubt on the second *Rankin* factor. The Supreme Court noted that testimonial documents such as police reports record objective facts. 131 S. Ct. at 2714-2715. It is foreseeable that testimonial hearsay can contain "a

c. *Rankin* III: The primary purpose of the medical history was not to obtain an out-of-court substitute for trial testimony.

Dr. Montgomery did not elicit SL's statement for the "primary purpose of obtaining an out-of-court substitute for trial testimony."[104] SL did not make the statement in order to "create a record for trial."[105] Appellant's trial defense counsel conceded as much at trial when he noted that Dr. Montgomery's primary purpose was not "generating information and potential evidence that could be utilized in a criminal trial[.]"[106] An objective view of the parties shows that the primary purpose of those statements was to assist in the medical treatment of SL. Put another way, no one was producing evidence with an eye toward trial.

From the mother's perspective, she brought SL to the ER that first day because SL "needed to get checked out."[107] SSG Whitlock did not contact law enforcement before taking SL to the

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routine and objective cataloguing of unambiguous factual matters." In this case, the first and third *Rankin* factors are more useful in determining whether SL's statements are testimonial or not. In fact, the primary purpose surrounding SL's statements is the essential question; the first and third *Rankin* factors inform this question much more than the second factor.

[104] *Bryant*, 131 S. Ct. at 1155.
[105] *Id.*
[106] JA 43-44.
[107] JA 53.

ER.[108] The military judge found as fact that "SSG Whitlock took [SL] to TAMC on her own without any involvement from law enforcement."[109] SSG Whitlock would have taken SL to a police station first had her primary purpose been to collect and preserve evidence. As her primary purpose was to obtain medical care for her daughter, she brought SL to the ER.

From Dr. Montgomery's perspective, her "job as an emergency medicine physician is to make sure the patient is okay … [t]o make sure she is medically stable, hemodynamically stable."[110] Dr. Montgomery affirmed that rationale as her primary purpose in treating SL. Law enforcement did not ask Dr. Montgomery to perform the exam.[111] Dr. Montgomery disavowed that her primary purpose was to collect evidence for a future criminal prosecution.[112]

From SL's perspective, she was in a hospital ER. SL was speaking to a doctor wearing scrub tops and scrub pants.[113] Dr. Montgomery identified herself as a doctor.[114] Dr. Montgomery told SL that she was there to take care of them for the day.[115]

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[108] JA 52.
[109] JA 193.
[110] JA 43.
[111] JA 46.
[112] JA 43.
[113] JA 35.
[114] JA 35.
[115] JA 35.

Dr. Montgomery then asked SL what happened.[116] SL answered that she had been hurt that day and "Chris put his penis in her privates."[117]

Appellant argues that Dr. Montgomery "dutifully elicited the name of the perpetrator."[118] Dr. Montgomery asked what was wrong. She did not ask "who did this to you?" SL told Dr. Montgomery what happened, including appellant's name. Further, that information regarding appellant has a profound medical purpose: a doctor needs to learn the source of the possible harm to prevent future harm.

II. Dr. Hyden

a. *Rankin* I: The military judge found that law enforcement was not involved in sending SL to Kapiolani, and that Dr. Hyden only took enough information to conduct his physical examination.

Law enforcement did not request that Dr. Hyden examine SL.[119] As far as Dr. Hyden knew, law enforcement was not involved in this case when he saw SL.[120] Special Agent Espitia testified that he made contact with the medical providers at Kapiolani Medical Center after Dr. Hyden obtained a medical history from and examined SL.[121] Although law enforcement may

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[116] JA 36.
[117] JA 36.
[118] Appellant's Br. at 12.
[119] JA 74.
[120] JA 63, 74
[121] JA 109.

have arrived at Kapiolani Medical Center after SL's examination, nobody from law enforcement influenced Dr. Hyden when he obtained a medical history from SL, or when he examined her.[122]

The military judge made relevant findings in this regard. SL "was referred to Kapiolani because TAMC had no one available who could conduct a pediatric sexual assault examination."[123] "Law enforcement was not involved at all in sending [SL] to Kapiolani."[124] "Dr. Hyden just took a general history, did not ask probing questions and received only enough information to be able to conduct his physical exam."[125] As a matter of law, the record supports these findings.[126]

b. *Rankin* II: The routine medical history catalogued unambiguous and objective facts.

SL's statement to Dr. Hyden occurred as Dr. Hyden was obtaining a medical history from her. The military judge found that Dr. Hyden always takes a patient's history before any

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[122] JA 74.
[123] JA 194.
[124] JA 194.
[125] JA 194.
[126] Appellant's view of the evidence is quite distinct from the military judge's findings of fact. However, the military judge's findings of fact are not clearly erroneous, even if a court could conclude that appellant's view of the record was objectively correct. Put another way, appellant implicitly is inviting this Court to conduct a *de novo* review of the facts. As a matter of law, the military judge's findings of fact are not clearly erroneous. *See* Article 67(c), UCMJ ("The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.").

physical exam.[127] SL's statements are unambiguous and objective. Thus, as part of his routine procedure for every patient, Dr. Hyden catalogued SL's symptoms. The second *Rankin* factor also weighs in the Government's favor here.

c. *Rankin* III: Dr. Hydens' primary purpose for the medical history was not to obtain an out-of-court substitute for trial testimony.

Dr. Hyden did not elicit SL's statements for the "primary purpose of obtaining an out-of-court substitute for trial testimony."[128] SL did not make the statements in order to "create a record for trial."[129] From SL's perspective, she was answering questions from a doctor in order to seek medical treatment. She was not speaking to produce evidence with an eye toward trial.

Dr. Hyden primarily took SL's history in order to diagnose and treat her condition. Despite the fact that Dr. Hyden knew that SL's statements could "possibly" be used at trial, it does not follow that he primarily sought to preserve hearsay for later use at a trial.

Under the totality of the circumstances, SL's statements are not testimonial. Dr. Hyden introduced himself as a doctor and explained that he was going to examine her head-to-toe. He

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[127] JA 192.
[128] *Bryant*, 131 S. Ct. at 1155.
[129] *Id.*

then asked SL questions to learn her medical history. Dr. Hyden takes a patient's medical history to "ascertain what's wrong with the child, what [he] can do about it, what symptoms [he] may find, what symptoms she has in her past medical history that will help [him], and then I do a physical exam to either corroborate or dismiss the history or to corroborate the history and provide appropriate treatment and follow up."[130] SL's statements occurred during this medical history. Although Dr. Hyden nominally referred to his examination as a forensic examination, he began collecting evidence only after finishing his medical history of SL.

That medical history was critical for Dr. Hyden to ascertain which diagnosis to make and what treatments to prescribe.[131] SL did not have any visible external injuries. Thus, Dr. Hyden *had* to ask questions of his patient in order to learn what was ailing her. Dr. Hyden recognized that parts of his examination might possibly be used in a criminal prosecution. However, Dr. Hyden's primary purpose was not collecting evidence for a future trial when he took SL's medical history. Dr. Hyden said that he did not take SL's history with an "eye toward[] potential" prosecution. It's because I'm a

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[130] JA 77.
[131] JA 72.

doctor and she's my patient."[132] Acknowledging the possibility that a statement might be used in some possible trial is not the equivalent to establishing the primary purpose of preserving evidence at a future trial. "While it is true that the statements were admitted into evidence, whether a statement is testimonial is a determination made *ab initio*."[133]

III. This Case is Distinct from *Gardinier*.

This case is far different than *Gardinier*. In *Gardinier*, the victim saw a doctor immediately after she reported inappropriate touching to her mother in December 2001.[134] Later, on 2 January 2002, law enforcement and the Department of Human Services jointly interviewed the victim.[135] Immediately after that joint interview, a sexual assault nurse conducted a forensic examination of the victim.[136] The nurse asked questions such as "Can you tell me what you talked about with Ken the policeman?"[137] The prosecution admitted not just hearsay statements to the sexual assault nurse, but also that nurse's "Forensic Medical Evaluation Form."[138]

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[132] JA 80.
[133] *Tearman*, slip op. at 16.
[134] *Gardinier II*, 65 M.J. at 61.
[135] *Id.*
[136] *Id.* at 61-62.
[137] *Id.* at 66.
[138] *Id.*

Here, SSG Whitlock brought SL to the ER the day of the assault. She did not contact law enforcement. Law enforcement did not set up the meetings with the doctors. CID only arrived at Kapiolani Medical Center after Dr. Hyden finished meeting with SL. The Government only admitted statements elicited and made as the doctors took SL's medical history. Those doctors could not ask SL about her statements to police because she had not yet spoken to police.[139]

IV. The Evidence Was Admissible under Mil. R. Evid. 803(4)

As SL's statements to Dr. Montgomery and Dr. Hyden are not testimonial, the admissibility of those statements is the concern of the Military Rules of Evidence.[140] The military judge did not abuse her discretion in admitting those statements under Mil. R. Evid. 803(4). SL made the statements in question "for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[141]

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[139] *Gardinier* apparently was tried before *Crawford*. In this case, the military judge could consider the evidence in light of *Crawford* and making relevant findings and conclusions. Counsel for both parties could also litigate the issue and create a record at trial.
[140] *See Bryant*, 131 S. Ct. at 1155.
[141] Mil. R. Evid. 803(4).

That rule is not based upon the availability of the declarant, and a child might not testify at trial.[142] This Court has previously held that the "admissibility of an out-of-court statement made to a psychologist by a child declarant need not be based on the testimony of the child."[143]

SL's statements occurred in a hospital and medical center. They were made to doctors. Those doctors identified themselves as doctors. The statements occurred while the doctors were taking SL's medical history. As described above, a medical history has a clear medical purpose. As Rule 803(4) plainly includes statements made in furtherance of diagnoses, medical histories, and giving symptoms, the military judge did not err in admitting those statements.

V. Given Appellant's Confession and the Presence of his Semen inside SL's Vagina, any Error is Harmless Beyond a Reasonable Doubt.

If SL's statements were testimonial or otherwise inadmissible, any error is harmless beyond a reasonable doubt.[144] There is no reasonable probability that the evidence complained

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[142] *United States v. Quigley*, 40 M.J. 64, 65-66 (C.M.A. 1994), *citing White v. Illinois*, 502 U.S. 346 (1992).
[143] *Id.* At 66.
[144] *Tearman*, slip op. at 22 ("Relief for Confrontation Clause errors will be granted only where they are not harmless beyond a reasonable doubt.").

of might have contributed to the verdict.[145] Appellant's confession and the presence of his semen in SL's vagina render any error harmless.

To determine whether a Confrontation Clause error is harmless beyond a reasonable doubt, this Court has adopted the balancing test established in *Van Arsdall*,[146] considering such factors as: "[1] the importance of the unconfronted testimony in the prosecution's case, [2] whether that testimony was cumulative, [3] the existence of corroborating evidence, [4] the extent of confrontation permitted, and [5] the strength of the prosecution's case." This list of factors is not exhaustive, and "'[the] determination is made on the basis of the entire record.'"[147] To conclude that a Confrontation Clause error was harmless beyond a reasonable doubt, we must be convinced that the testimonial hearsay was unimportant in light of everything else the court members considered on the issue in question.[148]

The first two factors are two sides of the same coin. SL's statement to Dr. Hyden is unimportant to the Government's case

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[145] *United States v. Blazier,* (*Blazier II*), 69 M.J. 218, 226-227 (C.A.A.F. 2010), (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).
[146] *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).
[147] *United States v. Sweeney,* 70 M.J. 296, 306 (C.A.A.F. 2011), (quoting *Blazier II*, 69 M.J. at 227).
[148] *United States v. Gardinier* (*Gardinier IV*), 67 M.J. 304, 306 (C.A.A.F. 2009).

because it is cumulative with her statement to Dr. Montgomery.[149] Additionally, the most important evidence in the Government's case was appellant's confession and the presence of appellant's semen in SL's vagina.

That other evidence – SL's statement to Dr. Montgomery, appellant's confession, and the presence of appellant's semen in SL's vagina – overwhelmingly corroborate each other and establish appellant's guilt.

This evidence outweighs the fourth factor. Although SL did not testify, no amount of cross-examination of SL could impeach or weaken such independent, incriminating evidence.

For those reasons, the Government's case against appellant was overwhelming. The Army Court recognized the strength of the evidence against appellant. The Army Court determined the evidence was factually sufficient, even disregarding Dr. Hyden's statement.[150] Confrontation Clause errors can be harmless when an accused confesses.[151] Surely a Confrontation Clause error is

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[149] The Government maintains that SL's statements to Dr. Montgomery are irrefutably nontestimonial. However, if not, the error remains harmless beyond a reasonable doubt. The Government's case was overwhelming, even without SL's statements. In that context, the case's evidentiary posture becomes analogous to a murder trial, where the victim cannot testify. Appellant's confession and his semen in SL's vagina are overwhelming and render any error harmless.

[150] JA 9.

[151] *See United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008).

harmless when an accused confesses *and* his semen is found inside the eight year-old victim's vagina. Ultimately, SL's statements are "unimportant in light of" this other powerful, damning evidence against appellant.[152] Put another way, it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.[153]

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[152] *Gardinier IV*, 67 M.J. at 306.
[153] *Neder v. United States*, 527 U.S. 1, 18 (1999) ("Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?").

Conclusion

The Government respectfully requests this Court affirm the Army Court's decision, and approve the findings and sentence in this case.

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I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on March 25, 2013 and contemporaneously served electronically on appellate defense counsel.

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