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.	)	USCA Dkt. No. 13-0602/AR
Specialist (E-4) **THOMAS C. FLESHER,** United States Army, Appellant	)	Crim. App. Dkt. No. 20110449

DANIEL H. KARNA
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
9275 Gunston Road, Suite 2000
Fort Belvoir, VA 22060
(703) 693-0771
daniel.h.karna.mil@mail.mil
U.S.C.A.A.F. Bar No. 35547
Lead Counsel for Appellee

ROBERT A. RODRIGUES
Major, U.S. Army
Branch Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 35723

JAMES L. VARLEY
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 31031

JOHN P. CARRELL
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 36047

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Granted Issue:

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED THE TESTIMONY OF A PUTATIVE EXPERT WITNESS IN VIOLATION OF THE MILITARY RULES OF EVIDENCE AND CASE LAW ON BOLSTERING, EXPERT QUALIFICATIONS, RELEVANCE, AND THE APPROPRIATE CONTENT AND SCOPE OF EXPERT TESTIMONY

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

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ].[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A military judge sitting as a general court-martial, convicted appellant, pursuant to his pleas, of two specifications of an assimilated offense of furnishing alcohol to minors, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006).[3] Contrary to his plea, an enlisted panel convicted appellant of one specification of aggravated sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2006).[4] The enlisted panel sentenced appellant to be reduced to the grade of E-1, forfeiture of all pay and allowances, confinement for seven

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[1] 10 U.S.C. § 934.
[2] 10 U.S.C. § 920.
[3] JA 5, 12.
[4] JA 12, 313.

years, and a dishonorable discharge.[5] The convening authority deferred automatic and adjudged forfeitures from 9 June to 22 September 2011, waived automatic forfeitures for a period of six months after action, and approved the findings and remainder of the adjudged sentence.[6] On 30 May 2013, the Army Court affirmed the findings and sentence in a summary decision.[7] On 31 October 2013, this Honorable Court granted appellant's petition for review of the above assignment of error.

Statement of Facts

A. Pretrial Motions

On 19 May 2011, the government submitted a witness list which included Ms. Sarah Falk, a Sexual Assault Response Coordinator (SARC); however, the witness list only noted her place of employment.[8] The defense made contact with Ms. Falk, and based on their questioning, defense suspected that the government was calling her as an expert witness on counter-intuitive behaviors of alleged sexual assault victims.[9] Several days later on 23 May 2011, the defense confirmed that the government intended to call her as an expert.[10] As a result, defense counsel filed a motion with the trial court that same

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[5] JA 314.
[6] JA 337.
[7] JA 9.
[8] JA 18-19, 111.
[9] JA 24-25.
[10] JA 111, 113.

day requesting a continuance based on their lack of notice of the government's intent to call an expert witness.[11]

The government responded via an email to the military judge opposing any delay request arguing the following:

> The witness at issue is a former SARC with sexual-assault-victim advocacy experience. She is not a psychologist and has not reviewed, nor will she review, any material from this case. She will be testifying to the common behaviors and responses she has experienced with sexual assault victims. She will not testify to the psychology of trauma.
>
> The government does not agree that this mandates that defense must have an expert of their own. The cross of this witness is simple: You are an advocate, correct? Your job is not to evaluate the truth of the victim's statement, only to believe and help, correct? You have no way of knowing if this victim in this case was sexually assaulted, do you?[12]

On 24 May 2011, the defense filed a reply to the government's response, and requested both their own expert and an Article 39(a), UCMJ, session to determine Ms. Falk's qualifications to testify as an expert under *Daubert*.[13] Additionally, appellant asserted that Ms. Falk's anticipated testimony was irrelevant because it was unrelated to any persons or evidence in the case.[14]

The next day, 26 May 2011, the military judge emailed both government and defense trial counsel the following message:

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[11] JA 14.
[12] JA 32.
[13] JA 20-23. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
[14] JA 22.

> As I understand the issue, Ms. Falk is going to testify she has seen lots of alleged sexual assault victims. Some act this way, some act that way, and the way some alleged victims act is not consistent with how one would think they would act. Is this correct Gov't? If so Defense, I would guess that Ms. Falk will agree on cross that there is no usual way that alleged victims react. Each alleged victim is different. I would also think you could get any SANE (for example) between now and next week to come in and testify to that. It doesn't take any preparation. If I am correct in all of this, why do you need a delay?[15]

The defense responded by stating:

> Regarding Ms. Falk, the Defense maintains that her testimony regarding anecdotal evidence of people she has treated on behalf of the Government is not proper expert testimony. Therefore, the Defense requests a *Daubert* hearing regarding her methodology before she be allowed to testify as an expert on the behaviors of alleged raped victims. To prepare for that hearing, the Defense will need the assistance of its own expert, which it has already requested.[16]

Defense also requested eight categories of discovery they deemed necessary in regards to Ms. Falk's experience and qualifications for purposes of a *Daubert* hearing.[17] Later that same day, the convening authority disapproved the defense request for their specifically-requested expert, Dr. Greiger, but "authorized the appointment of Ms. Christina Thomas, Sexual Assault Nurse Examiner, Reynolds Army Community Hospital, Fort Sill Oklahoma, as a member of the defense team" instead.[18]

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[15] JA 60-61.
[16] JA 59.
[17] JA 59-60.
[18] JA 42.

On 27 May 2011, the military judge responded to counsel articulating an alternative solution:

> Regarding Ms. Falk: Defense, you can interview her for that [*Daubert*] information. I will consider any motions or arguments you present, but it is unlikely we will have a *Daubert* hearing. The Gov't confirmed my understanding of her testimony. She is simply going to say she has seen the different ways alleged victims react.[19]

On 28 May 2011, the defense filed a motion to compel the production of their requested expert or to exclude expert testimony of the government's witness.[20] In the alternative to appointing their requested expert Dr. Greiger, the defense requested that "the Court deem any and all Counter Intuitive Behavior/Rape Trauma Syndrome testimony as irrelevant pursuant to Military Rule of Evidence [hereinafter MRE] 402, and if the court deemed it relevant that it be excluded under MRE 403."[21]

B. Article 39(a) session

Eventually, the military judge held an Article 39(a), UCMJ session during which he considered a number of issues concerning expert testimony that had been raised in advance of trial. First, regarding his denial of the defense motion for a

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[19] JA 58.
[20] JA 24. Defense characterized Ms. Falk as being "trained in the behavioral, social work and psychological aspects of alleged rape/sexual assault victims [that] ... [s]he counsels alleged rape/sexual assault victims and will be testifying on her observations of the behavioral aspects, not of the physical aspects, specifically [] dealing with Counter Intuitive behaviors."
[21] JA 30.

continuance and refusal to compel the production of Dr. Greiger, the following exchange occurred between judge and counsel:

> MJ: Okay. Regarding the defense's motion for a continuance so they could get an expert, and obviously, this is also connected with the defense's motion to compel an expert and that was Dr. Thomas Greiger. The way all this happened was that when the government provided the witness list to the defense, obviously, the defense saw that the government was going to call an expert witness, and so, therefore, the defense felt that they needed an expert to counter what the government's expert was going to say. I wrote back to the counsel and stated - Let me make sure I have this right. My understanding from the email traffic was that the government was going to call this expert who is a former SARC. Is that right, Government?
>
> ATC: That is correct, Your Honor.
>
> MJ: And to discuss - my understanding is they were going to ask several things. "Have you observed alleged victims? How many in the past?" And, "Some act this way, some act that way." And, "No two victims are the same." When I sent back the email saying "Is that correct, Counsel?" they confirmed that is correct. And what I indicated to the Defense at that time was, based on that, I was not inclined to grant a continuance because - and I gave them an example that anyone who has dealt with alleged sexual assault victims extensively could testify to that. Some delay reporting; some don't delay reporting. Some do what would be counter-intuitive behavior; for example, showering after an alleged attack. So anyway, what I said was that, "You can get anybody, for example, a SANE to testify about that." What happened was the defense put in a request for an expert to the convening authority, and government gave the defense the SANE that is here at Fort Sill. And I was told during the 802 conference, this morning, by trial counsel is that they didn't necessarily do that because I suggested that and was just throwing out a possibility here. But, apparently, the government did go to the SARC here first to see if they would - if that person would have sufficient experience in these

> matters and the SARC is new and didn't. And so the government said "Here, take the SANE instead."[22]

The military judge then asked the government what topics it anticipated their expert would testify about.[23] The trial counsel responded that the topics included "scream, non-stranger, and not reporting to law enforcement."[24] The military judge responded by asking the defense "if the government is only limiting their examination to those three things, how could an expert consultant ... possibly have helped you?"[25] The defense responded by stating:

> What I am getting from the government is right, is that [Ms. Falk] is going to be talking about that in the cases she's seen people have acted in a certain way. An expert for us would be able to help us by saying, you know, maybe there's data out there and studies out there that show a different thing that what the expert is going to say; would be able to help us cross-examine the expert better. And it goes to the - basically, we are talking about the actions of the victim in this case and what she did and why she would have done that. That is going to be counter-intuitive. Whether or not she has a degree in psychology or not, the government is trying to explain away behavior by the victim in something that they believe the panel will not be able to decide for themselves.[26]

The military judge then asked the government:

> And my understanding, Government, [is] you are not going to ask your expert about why say, for example, she didn't scream. My understanding was you were just

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[22] JA 111-12.
[23] JA 115.
[24] JA 115.
[25] JA 115-16.
[26] JA 116.

> going to ask [Ms. Falk]: How many have you done? I have seen a hundred. Is it unusual for an alleged victim not to scream? No, that is not unusual.[27]

The trial counsel confirmed this prospective line of questioning to the military judge.[28] The defense counsel then asserted that if the government witness was not going to explain why victims may or may not scream during an alleged assault - but would instead limit her testimony to what people she has interviewed on other cases have reported to her - then her testimony was irrelevant because it was limited only to events unrelated to the appellant's case.[29] The government responded by arguing that if:

> [T]he defense case comes up and [Miss SA] didn't scream for her mother or she didn't call 911 immediately, you know, without that testimony, we are kind of lost. Our case in chief is deficit [sic][30] without that testimony coming in.[31]

Next, the military judge proceeded to describe what the defense expert could testify to:

> And, Defense, based on my experience all these experts will say some scream, some don't, some delay reporting, some report immediately, and I would think that the government's expert would admit all that on cross-examination. Say, yeah, some people scream, some don't, some delay reporting, and some don't.

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[27] JA 116.
[28] JA 116-17.
[29] JA 117.
[30] This typographical error was most likely meant to be "deficient," not "deficit."
[31] JA 117.

> And then you have your SANE to say however many people she has treated an how many times in her experience based on the history that they do with an alleged victim, you know, what kind of fight did you put up? I didn't do anything. I just sat there. So some don't fight, some do.[32]

The defense responded that they did not believe that Ms. Thomas would be able to give an opinion about the behavior of victims.[33] The military judge responded that he was confident that "any SANE" would testify that assault victims react differently, and that "I just don't think that is in dispute that some people do that and some people don't."[34]

The defense replied that "the important issues here for the defense that the government is trying to counter, is the behavior of the victim [that is] [h]ow she claims she reacted during this alleged rape or sexual assault."[35] The military judge then asked the government, "but again, Government, your expert is not going to testify about this is why she wouldn't have screamed, or this is why some victims don't scream."[36] The government replied in the negative.[37]

The military judge then opined on the government's need for an expert to discuss victim responses to sexual assault:

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[32] JA 117.
[33] JA 118.
[34] JA 118.
[35] JA 118.
[36] JA 118.
[37] JA 118.

> Let me put something else on the record too that I told counsel in the 802 conference is that where I have seen this in the past it is to me it is almost common knowledge, but I understand that everyone wouldn't agree with that. Some people report right away, some people don't; some people take a shower, some people don't; some people wash the sheets, some people don't. But where I have seen this, is that the government [] usually feels compelled to present that evidence so when they stand up and argue to the panel that's not unusual for someone not to scream or it is not unusual for someone to wait several hours to report. They feel compelled to present that evidence so that they don't get the objection from the defense saying, hey, those are facts not in evidence.[38]

The military judge then made his ruling denying Dr. Greiger:

> So based on all that, I am not convinced that an expert, specifically Dr. Greiger and that is an expert consultant, could have helped the defense any more than what they couldn't do on their own; investigate these things; ask different witnesses; say, yeah, that is true. They all do different things. And there was never an actual motion to compel Dr. Greiger as an expert witness. I know that the motion had expert consultant, slash, and then I believe it was possible witness.[39] So my ruling is that the SANE - who has done 80 exams alleged, if that is true, can testify to the same thing that the government's expert can testify to regarding some do this, some do that. There is nothing consistent about alleged victims. So that is my ruling.[40]

The defense also provided an additional objection to the government's proposed expert, asserting that all her testimony

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[38] Coincidentally, defense counsel later on made such an objection during government's closing argument for an unrelated issue. JA 121, 297.

[39] The military judge was correct in that the defense's memorandum request for expert addressed to the convening authority characterized Dr. Greiger as "an Expert Assistant/Consultant and *possible* witness" and "expert consultant and *possible* witness." JA 70-71 (emphasis added).

[40] JA 121-22.

would be concerning other victim reactions would consist of inadmissible hearsay.[41] The military judge responded that because these out-of-court statements were the basis for an opinion, they were not being offered for the truth of the matter asserted and that it was "perfectly permissible under the rules" to "form an opinion based on evidence that is not admissible in court."[42] Appellant offered no further objection on this matter.

C. Voir Dire of Ms. Falk

As previously promised by the military judge, defense was permitted to question Ms. Falk outside the presence of the panel.[43] The defense proceeded to question Ms. Falk for seven pages of transcript which covered topics such as 1) her educational background, 2) her work experience, 3) her on-the-job training, 4) the approximate number of victims she worked with, 5) the types of alleged sexual assault victims encountered, 6) approximately how many cases resulted in a court-martial or civilian trial, 7) approximately how many cases resulted in a conviction, 8) the various ways and methods she receives information about the alleged assault, and 9) how she makes a determination whether an assault actually took place.[44] The military judge then directed the government counsel to list

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[41] JA 122.
[42] JA 122.
[43] JA 211.
[44] JA 212-18.

the questions that they wanted to ask Ms. Falk, to which the government said they intended to ask 1) "how often does a victim scream or not scream ...," 2) "how many fight back or don't fight," 3) "how many involve a stranger versus a non-stranger ...," and 4) "how many she's seen where the first report or the first outcry is to law enforcement as opposed to anyone else ..."[45] The defense said they objected to the stranger versus non-stranger question based on relevancy.[46] The government then began to voir dire Ms. Falk, asking how many times could she know whether or not a victim was actually assaulted; however, the military judge cut that line of questioning off, stating that Ms. Falk "is not going to testify about how many times that she knew somebody was guilty or not ... I am not going to let either side get even close to that."[47] The military judge then clarified "the point that [] defense was trying to make" that Ms. Falk cannot have personal knowledge whether or not the victim was actually assaulted, and asked Ms. Falk whether or not she still has "opinions on whether or not they [] really were ... based on all the other evidence that [she] see[s]."[48] The witness affirmed the military judge's characterization.[49]

The military judge then permitted defense counsel to conduct

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[45] JA 218-19.
[46] JA 119.
[47] JA 220.
[48] JA 220-21.
[49] JA 221.

further voir dire of Ms. Falk and the defense counsel asked "who are the people that are part of the investigation" from who "you are basing your opinions off [] of...?"[50] Ms. Falk responded that besides interacting obviously with the victim "you deal with their chain of command; you deal with medical professionals, legal, law enforcement, both civilian and military, you deal with civilian nonprofit agencies and support agencies, mental health providers ... a large group of people."[51] The defense attorney then got Ms. Falk to admit that besides receiving most of her information from the victim, she receives more information from law enforcement than she does defense attorneys.[52]

After Ms. Falk was told to exit the courtroom the military judge made his ruling and held that the government could ask three out of their four questions, but would not be able to ask about "whether or not most [sexual assault] cases [the perpetrator] is a stranger or not."[53] The military judge then permitted the defense to renew its previous relevancy objection to Ms. Falk.[54] Defense did not raise or renew any objections based on grounds such as other *Daubert, Houser,* or M.R.E. 702

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[50] JA 221.
[51] JA 221.
[52] JA 222.
[53] JA 223.
[54] JA 223.

factors.[55] Based on the military judge's previous exchanges with defense counsel on this matter, he "noted" the objection and proceeded with the court-martial.[56]

D. Government Case-in-Chief

Later on during the government's case-in-chief, the then sixteen-year-old victim, Miss S.A., testified that on the night of the sexual assault she consumed a considerable amount of alcohol and stumbled home with the assistance of her brother.[57] She stated that after vomiting in the bathroom, she fell asleep in her bed.[58] Miss S.A. then explained that she awoke to appellant in her room attempting to remove her clothes while pinning her down by holding her wrists.[59] Appellant pulled down his pants and pinned her with his weight.[60] Miss S.A. testified that he sexually assaulted her for approximately fifteen to twenty-five minutes.[61] Miss S.A. also testified that multiple times appellant used his mouth to cover her mouth after she "kept telling him no."[62]

The trial counsel then asked Miss S.A. whether her parents

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[55] JA 223. Defense's objection - on relevance grounds - only implicates *Houser* factor four. *See generally United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993); Mil. R. Evid. 702.
[56] JA 117-18, 121-22, 186.
[57] JA 145-58.
[58] JA 158.
[59] JA 158, 160.
[60] JA 160-62.
[61] JA 164.
[62] JA 160.

were in the house during the attack and she answered in the affirmative.[63] Next, the trial counsel asked Miss S.A. if she had "explained what happened, have people questioned you or want to know why you didn't scream?"[64] This prompted the following exchange between Miss S.A. and the trial counsel:

> Q. Can you explain for the panel what was going on and what were you feeling and what was going on in your mind while this was going on?
> A. Scared, embarrassed. I don't know. I just didn't know what to do.
>
> Q. Let's talk about "scared." Obviously, what was happening was scary in itself but was there anything that was more scary than what was actually happening?
> A. Just him being there. I didn't - it was scary because I didn't like comprehend what was going on. Like I knew it was going - because I was drunk and didn't have all my strength. I didn't know it was going to happen. I was scared.
>
> Q. Tell us a little bit about the embarrassment you were feeling.
> A. I didn't want people to walk in and see it and be embarrassed.
>
> Q. Is that what you expected would happen if you screamed?
> A. Uh-huh.
>
> Q. Tell us what that would be so bad?
> A. Just having my parents see me like that. I just didn't want it and it was - it would be embarrassing to have my brothers walk in, especially my younger brothers. I wouldn't want that.
>
> Q. Did you feel at that time you had all your wits about you?
> A. No. I was still pretty drunk. I was still spinning and dizzy

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[63] JA 164.
[64] JA 164.

> Q. Did you think you could fully appreciate what was going on?
> A. I knew it was going on but I just didn't like figure out what to do or what I should do. I just didn't know.[65]

Next, during cross-examination, Miss S.A. testified that her younger brother, who had brought her home from appellant's home that evening, sometimes slept on the couch in the living room near her room.[66] In addition, she testified that on the night of the alleged assault, she recalled her bedroom door being open, and that it would have remained open unless her brother closed it.[67] On cross-examination of Miss S.A.'s brother, Mr. D.A. testified that while he was indeed on the couch in the living room during the assault, he was asleep at the time.[68] As such, he did not hear the window "open or close," hear a struggle, nor hear anyone say "no."[69] He went on to testify that his sister's bedroom door was open, stating that it was "a little open, not all the way open, but kind of cracked open."[70]

During its case-in-chief, the government called Ms. Falk to

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[65] JA 165.
[66] JA 171.
[67] JA 171.
[68] JA 207.
[69] JA 208.
[70] JA 208.

the witness stand.[71] Ms. Falk testified that she was employed as a "victim advocate" and that she had a "bachelor's degree in law and society," was pursuing a "graduate certificate in public policy," and had "extensive training in victim services."[72] Ms. Falk testified that she had previously worked as a SARC at Fort Carson, Colorado.[73] She stated that as a SARC, "you make contact with the victim upon a report of sexual assault ... [and] walk them through the medical, legal, investigative processes."[74] She further testified that she routinely interacted with sexual assault victims.[75] Ms. Falk then listed a number of other agencies she had worked for and the additional training from the Army on "victim responses to trauma."[76] Ms. Falk stated that she had personally worked with thousands of victims.[77]

The government then moved to have Ms. Falk recognized as an "expert in sexual assault victim responses."[78] At this point, the defense raised its prior objection to recognition of Ms. Falk as an expert.[79] The military judge responded by stating "Ms. Falk will be recognized as an expert in sexual assault - as a *sexual assault response coordinator* ... not in sexual assault

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[71] JA 224.
[72] JA 224.
[73] JA 225.
[74] JA 225.
[75] JA 227.
[76] JA 227.
[77] JA 227.
[78] JA 228.
[79] JA 228.

victim responses or however [the trial counsel] put it."[80]

After establishing that Ms. Falk had no prior involvement with Miss S.A., the government asked her the three previously-agreed-upon questions regarding the reactions of sexual assault victims:

> Q. Okay. Just establishing where you are coming from. In your experience in dealing with victims, how often have you had a sexual assault victim who has fought back against her attacker?
> A. Almost never. And it's generally with an unknown subject, with somebody that person isn't familiar with; it's a stranger.
>
> Q. In your experience in dealing with victims, how often have you had a sexual assault victim who at the time of the assault screamed or called for help?
> A. Again, almost never. And, you know, they report afterwards that generally there is the fear of escalating the violence or fear that they are going to be harmed even worse than they are already are if they yell or scream for help or upset the individual.
>
> Q. Okay. In your experience, how often does a victim report first to law enforcement? The first person they call is law enforcement.
> A. I can't think of a specific case where they do report specifically to law enforcement. It's just not something common. They generally are going to go to a friend or a family member.[81]

Defense raised no objection to any of Ms. Falk's responses.[82]

During cross-examination, Ms. Falk agreed that her job as a victim advocate was not to question alleged victims about the

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[80] JA 228 (emphasis added).
[81] JA 229-30.
[82] JA 229-30.

validity of their claims, and conceded that she would "go in with the assumption that every person [she] advocated for was [an actual sexual assault] victim."[83] Ms. Falk also admitted that she does not investigate the victim's claims to "determine if they are valid or invalid."[84] After asking a series of leading questions, trial defense counsel then asked: "How many cases have you had where a person was being assaulted with somebody almost immediately next to them or within the same—practically the same room and they don't ask for help?" When Ms. Falk stated that it is common for alleged victims not to ask for help from nearby individuals the defense counsel then followed up by asking how many of those cases actually resulted in a court-martial conviction.[85] The government objected and the military judge sustained the objection.[86] Defense counsel changed his approach and got Ms. Falk to admit that "of the thousands and thousands of cases that [she was] basing [her]

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[83] JA 231.
[84] JA 231.
[85] JA 231.
[86] Defense counsel asked this question despite the military judge's prior admonition that he would not allow "either side get *even close*" to testifying "about how many times she knew somebody was guilty or not." JA 220, 231 (emphasis added). This is similar to the same "human lie detector" testimony appellant complains of in *United States v. Mullins*. *See United States v. Mullins*, 69 M.J. 113, 115 (C.A.A.F. 2010). Appellant's Brief 32. Appellant's thinly-veiled attempt at inviting error should not be looked favorably by this court. *See United States v. Raya*, 45 M.J. 251, 254 (1996) ("Appellant cannot create error and then take advantage of a situation of his own making.")

opinion off of" she had no personal knowledge of the alleged assaults.[87]

E. Defense Case-in-Chief

During its case-in-chief, appellant testified that while Miss S.A. was at his house the evening of the alleged assault, they discussed "having sex that night" and that Miss S.A. told him to come over to her room later that evening.[88] This was apparently because there was "a problem" with Miss S.A. staying with appellant that night - "[h]er brother was still [at appellant's home] and she felt uncomfortable with him being around."[89] Both Miss S.A. and her brother left to go back home together.[90] Appellant stated that about an hour after they left he went to Miss S.A.'s home, identified her room, and climbed through her open window.[91] Appellant claimed the two talked initially, and then engaged in consensual sexual intercourse.[92] After the alleged consensual encounter, appellant testified that he spoke to Miss S.A. about his deepening concern over her safety, specifically her drug use, stating that "if she did insist on continuing [the drug use, appellant] was going to

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[87] JA 232.
[88] JA 246-50.
[89] JA 247, 265.
[90] JA 276, 284.
[91] JA 250-51, 284.
[92] JA 250-51.

speak with her parents."[93] Appellant testified this comment "scared" Miss S.A. and that it "possibly" could have been her "motivation to lie" about the sexual assault.[94]

Additionally, the defense called Ms. Christina Thomas, the SANE nurse the convening authority appointed to serve as their alternative expert.[95] Defense made no attempt to qualify Ms. Thomas as an expert and did not even ask her how many sexual assault examinations she has conducted.[96] Instead, the trial defense counsel renewed its request to the military judge for a qualified expert assistant and the military judge responded by asking her: "So, ma'am, your opinion is no two victims - alleged victims act the same way?"[97] The witness responded "yes," and the military judge then noted the defense request for an expert assistant.[98]

F. Instructions & Closing Argument

During instructions to the panel, the military judge provided the following:

> You have heard the testimony of Ms. Falk and Ms. Parish. They are known as "expert witnesses" because their knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You are not required to accept the testimony of an expert witness

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[93] JA 252, 285.
[94] JA 252, 285.
[95] JA 287.
[96] JA 287-88.
[97] JA 289.
[98] JA 289.

> or give it more weight than the testimony of an ordinary witness. You should, however, consider their qualifications as experts.[99]

During government's closing argument, trial counsel did not refer to any of the issues discussed by Ms. Falk or reference Ms. Falk's three-question direct testimony.[100] However, defense counsel during their closing argument, chose to further expound upon their prior cross-examination of Ms. Falk by arguing the following:

> So the government did not investigate the weaknesses in its own case. So let's look at some of those specific weaknesses, gentlemen. Weaknesses that were so strong that even the government believed that it had to fly out a specialist from Colorado, who had no involvement in this case, to come out and talk about – let's see, she can't tell us anything about the case. She can tell us she that she's worked on a lot of cases and that people do different things than we might expect. At the same time she testifies that whatever the people are doing or whatever they are telling her they did, it doesn't really matter to her, because it is not her job to question or, as she said, not her job to judge; not her job to investigate. So the government puts on evidence about somebody who is paid to believe people when they tell them stuff and then she comes in and says, well yeah, people tell me all kinds of different stuff. Gentlemen, we have no way of knowing what really happens with the people that she talked to. We have no way of assessing their credibility.[101]

It was only after defense raised the issue that Miss S.A. did not cry out despite the fact that she had family members nearby,

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[99] JA 292.
[100] JA 293-98.
[101] JA 300.

and her bedroom door was open, that the government referred to the victim behavior for the first time on rebuttal.[102]

On rebuttal, the government referred first to voir dire, then to the testimony of Ms. Falk, to Miss S.A.'s own words, and finally appellant's own actions to counter the trial defense counsel's assertions:

> She never cried out. In voir dire all of you gentlemen were asked whether a victim has to cry out, scream, fight, struggle for a sexual assault to take place and all of you gentlemen agreed that doesn't have to happen. And "the reason that Ms. Falk came was to let you know, in her years of experience, dealing with thousands of victims, *the most common response* is the same that [Miss S.A.] had not to cry out, not to scream, not to fight, but rather to survive. For the record, [Miss S.A.] testified she did say no. Her words were, "I said no five or six times." And, yes, he kept trying to cover her mouth with his mouth and silence her voice.[103]

The government trial counsel did not use the term "almost never" or a similar paraphrase in describing what was the "most common response" in sexual assault victims.[104]

Summary of Argument

The military judge did not abuse his broad "flexible" discretion in deciding how to assess Ms. Falk's testimony under *Daubert* and *Houser*. There is sufficient evidence to show that Ms. Falk was qualified to testify, especially on the narrow, limited basis authorized by the military judge. Furthermore,

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[102] JA 301.
[103] JA 310 (emphasis added).
[104] JA 310.

assuming some of Ms. Falk's testimony went outside the scope of trial counsel's questions and was improper, it was not objected to at trial and appellant cannot establish prejudice.

Standard of Review

The abuse of discretion standard is applied to rulings on admissibility of expert testimony.[105] "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion.[106] The challenged action must be "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'"[107] Once a military judge limits the scope of a witnesses' testimony, it is "incumbent upon the defense to protest transgressions thereof" and any "erroneous testimony [that is] permitted" will be subject to plain error review.[108]

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[105] *See Houser*, 36 M.J. at 397.
[106] *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).
[107] *Id.*
[108] *See United States v. Johnson*, 35 M.J. 17, 21 (C.M.A. 1992) (citing Art. 59(a), UCMJ, 10 USC § 859(a)). *See also United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007) (citing Military Rule of Evidence (Mil. R. Evid.) 103(d)). ("Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error.") *But see United States v. Nelson*, 25 M.J. 110, 113 (C.M.A. 1987) (finding that failure to object to an expert witness' responses to questions is a consideration for this court to weigh in considering whether the military judge abused his discretion); *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 738, 761 (7th Cir. 2010) (holding that if the trial court abused its discretion in not performing their *Daubert* gatekeeping function, the court will look at the admissibility of the expert testimony *de novo*).

Law

Military Rule of Evidence 702 permits expert testimony in the form of opinions "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue ...."[109] The rule provides that an expert may only provide an opinion if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[110] The proponent of the expert testimony is required to demonstrate the expert's qualifications by establishing six factors first articulated in *Houser:* (1) the qualifications of the expert, (2) the subject matter of the expert testimony, (3) the basis for the expert testimony, (4) the legal relevance of the evidence, (5) the reliability of the evidence, and (6) that the probative value of the expert's testimony outweighs the considerations outlined in Mil R. Evid. 403.[111]

In *Daubert*, the Supreme Court appointed the trial judge with the discretionary power as a "gatekeeper" to ensure "an expert's testimony both rests on a reliable foundation and is relevant," applying factors similar to *Houser* to test the

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[109] Mil. R. Evid. 702.
[110] *Id.*
[111] *Houser,* 36 M.J. at 397.

proffered evidence.[112] To this end, the Supreme Court provided six factors to be considered by the trial judge to assist in determining whether scientific evidence meets the requirements for reliability and relevance:

> (1) Whether the theory or technique "can be (and has been) tested;"
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> (2) Whether "the theory or technique has been subjected to peer review and publication;"
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> (3) The "known or potential" error rate;
>
> (4) The "existence and maintenance of standards controlling the technique's operation;"
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> (5) The degree of acceptance within the "relevant scientific community;" and
>
> (6) Whether the "probative value" of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'"[113]

In sum, "[a]n expert may testify about matters within his or her area of expertise where scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" or, to put it another way, the expert must be "qualified and testimony

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[112] *Daubert*, 509 U.S. at 597. *See also Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 149-53 (1999).

[113] *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999) (quoting *Daubert*, 509 U.S. at 593-95). (holding that "although *Houser* was decided before *Daubert*, the two decisions are consistent, with *Daubert* providing more detailed guidance on the fourth and fifth *Houser* prongs pertaining to relevance and reliability").

in his or her area of knowledge [will] be helpful" to the fact-finder.[114]

"This Court has often cited the *Daubert* factors, along with those in *Houser* ... as firm ground upon which a military judge may base a decision.[115] "While satisfying every *Daubert* or *Houser* factor is sufficient, it is not necessary;" moreover "[a]s *Daubert* itself states, the test of reliability is 'flexible,' and the factors do not constitute a 'definitive checklist or test.'"[116] "The trial judge 'must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.'"[117] Consequently, the trial court has "the same kind of latitude in deciding how to test an expert's reliability ... as it enjoys when it decides whether that expert's relevant testimony is reliable."[118]

Similarly, the "Supreme Court has emphasized that [federal] district courts 'have the same kind of latitude in deciding how to test an expert's reliability' as they do in deciding 'whether

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[114] *Brooks*, 64 M.J. at 326 (citation omitted); *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005).
[115] *United States v. Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007) (citations omitted).
[116] *Id.* (citing *Daubert*, 509 U.S. at 593-94).
[117] *Id.* (citing *Kumho Tire Co.*, 526 U.S. at 152).
[118] *Id.* (citing *Kumho Tire Co.*, 526 U.S. at 152).

or not that expert's relevant testimony is reliable.'"[119] As such, "[t]here is no requirement that the District Court always hold a *Daubert* hearing prior to qualifying an expert witness."[120] "When a district court is satisfied with an expert's education, training, and experience, and the expert's testimony is reasonably based on that education, training, and experience, the court does not abuse its discretion by admitting the testimony without a preliminary hearing."[121] Federal circuit courts have "reiterated that [their] trial courts retain significant discretion to determine in each instance 'the

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[119] *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir. 2004) (citing *Kumho Tire Co*, 526 U.S. at 152)(holding that there is no abuse of discretion if a trial court dispenses with a *Daubert* hearing if no novel challenge is raised to the admissibility of certain types of evidence). *See also United States v. Pena*, 586 F.3d 105, 110 n.4 (1st Cir. 2009); *United States v. John*, 597 F.3d 263, 274 n.30 (5th Cir. 2010) (citing *United States v. Crisp*, 324 F.3d 261, 268 (4th Cir. 2003) (stating, in the context of fingerprint evidence, that "[u]nder *Daubert*, a trial judge need not expend scarce judicial resources reexamining a familiar form of expertise every time opinion evidence is offered").

[120] *United States v. Solorio-Tafolla*, 324 F.3d 964, 965-66 (8th Cir. 2003) (internal citation omitted); *See e.g. In re TMI Litigation*, 199 F.3d 158, 159 (3d Cir. 2000); *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 249 n.3 (6th Cir. 2001); *United States v. Nacchio*, 555 F.3d 1234, 1255 (10th Cir. 2009) (finding that there is no mandate to hold a hearing "in every instance of *Daubert* Gatekeeping").

[121] *United States v. Kenyon*, 481 F.3d 1054, 1061 (8th Cir. 2007) (quoting *Solorio-Tafolla*, 324 F.3d at 966).

procedure [they] should follow in making preliminary determinations regarding admissibility of evidence.'"[122]

This is especially true in the context of the social sciences.[123] In such cases, "[t]o show that expert testimony is reliable ... the government need not satisfy each *Daubert* factor."[124] Federal courts, such as the Fifth Circuit, have "held expert testimony admissible even though multiple *Daubert* factors were not satisfied."[125] That court further noted that "naturally occurring circumstances, such as the social stigma attached to rape, may preclude ideal experimental conditions and controls."[126] "In such instances, other indicia of reliability are considered under *Daubert*, including professional experience,

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[122] *Oddi v. Ford Motor Co.*, 234 F.3d 136, 151-55 (3d Cir. 2000) (quoting *United States v. Downing*, 753 F.2d 1224, 1241 (3d. Cir. 1985)).

[123] "Obviously, [there] are inherent limitations for such [social science] research. Nevertheless, expert testimony drawing on it is not thereby proscribed by *Daubert*." *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir. 1997) (recognizing inherent methodological limitations in all social-science research, particularly sexual-harassment research; nevertheless, holding such expert testimony admissible).

[124] *United States v. Simmons*, 470 F.3d 1115, 1123 (5th Cir. 2006) (quoting *United States v. Hicks*, 389 F.3d 514, 525 (5th Cir. 2004)).

[125] *Id.* (quoting *United States v. Norris*, 217 F.3d 262, 269-71 (5th Cir. 2000) (testimony admissible under *Daubert* even though "no error rate was known" and "no independent validation" of the expert's testing had occurred)."

[126] *Id.* (citing *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir. 1997) (noting the necessarily diminished methodological precision of "soft" social sciences, particularly in areas involving sexual victimization)).

education, training, and observations."[127] As there are areas of expertise such as the "social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies," trial judges are purposely given broad discretion to determine "whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case".[128]

That being said, "social workers have been recognized as experts."[129] In fact, military courts have been repeatedly recognized social workers as expert witnesses for at least the past thirty years.[130]

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[127] *Id.* (citing *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247 (5th Cir. 2002) (finding expert's testimony reliable under *Daubert* where "based mainly on his personal observations, professional experience, education and training").
[128] *Jenson*, 130 F.3d at 1297; *Kumho Tire Co.*, 526 U.S. at 153.
[129] *See United States v. George*, 52 M.J. 259, 264 (C.A.A.F. 2000) (citation omitted).
[130] *See generally United States v. Anderson*, 51 M.J. 145, 152 (C.A.A.F. 1999) (holding testimony by a government expert in child abuse, was permissible as she "had specialized training and experience which would assist the trier of fact and clearly qualified her as an expert"); *United States v. Cacy*, 43 M.J. 214, 215 (C.A.A.F. 1995)(finding that a social worker and a sexual abuse counselor with no doctorate-level education could qualify as experts); *United States v. Coleman*, 41 M.J. 46, 47 (C.M.A. 1994)(testimony by a family advocacy therapist was permissible as a child sex abuse expert); *United States v. Stinson*, 34 M.J. 233, 335 (C.M.A. 1992)(holding that a family advocacy therapist with a master's degree was qualified to be an expert witness in "the field of social work with a specialty in child sexual abuse"); *Johnson*, 35 M.J. at 17 (finding that a social worker was qualified to give her opinion that child suffered trauma, other testimony admissible without objection); *United States v. Peel*, 29 M.J. 235, 241 (C.M.A. 1989) (holding

Many of these qualified experts were not doctors, nor did they have doctorate degrees in their field, rather the "type of qualification within that field that the [expert] witness possesses goes to the weight to be given the testimony and not its admissibility."[131] Likewise, a social worker's lack of personal interaction with or observation of a victim also goes to the weight and not the admissibility of their testimony.[132] They may base their opinion not only on their own observations, but also upon documents and reports of others.[133]

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that a social worker with doctor of philosophy degree could testify on delayed reporting by rape victim); *United States v. Tomlinson*, 20 M.J. 897, 899-900 (A.C.M.R. 1985) (holding that an Army Captain clinical social worker, who had treated only thirty people before for post-traumatic stress disorder could still testify as an expert on rape trauma syndrome); *United States v. Hammond*, 17 M.J. 218, 220 (C.M.A. 1984)(finding that a director of a women's resource center with a master's degree in counseling, forty hours of training in rape victim counseling, could testify as an expert on rape trauma syndrome).

[131] *See Peel*, 29 M.J. at 241. Conversely, the expert may have higher-level education, but may still lack experience. For example, while the social worker in *Peel* did hold a Ph.D. in social work, she had no formal training in rape victim counseling, had no training in his field for at least five years, and "had practically no experience with [rape] victims who had been raped as adults." *Id.* at 240-41.

[132] *See Raya*, 45 M.J. at 253. *See also Hammond*, 17 M.J. at 220; *Houser*, 36 M.J. at 399; *George*, 52 M.J. at 264.

[133] *Raya*, 45 M.J. at 253. *See also United States v. Prevatte*, 36 M.J. 1075, 1077 (A.C.M.R. 1993) (citing *Johnson*, 35 M.J. at 18). ("Experts may present background testimony about a science or discipline which helps the fact-finders understand the facts at issue, even though [they] may know nothing about the facts of the case.")

Argument

A. *Daubert* Gatekeeper Analysis

Contrary to appellant's assertions, a trial judge is not required to conduct a *Daubert* hearing in every case or even to provide findings of fact or conclusions of law on the record pursuant to *Daubert, Houser,* or Military Rules of Evidence 702.[134] As this court has previously recognized, the *Daubert* opinion - from the very beginning - has noted that "the test of reliability is 'flexible.'" [135] Moreover, the Supreme Court has further reemphasized and clarified this pronouncement stating that a trial judge must be granted "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.'"[136] Consequently, the military judge in this case should be afforded "the same kind of latitude in deciding how to test an expert's reliability ... as [he] enjoys when [he] decides whether that expert's relevant testimony is reliable."[137]

In this case the military judge chose not to direct a full-scale *Daubert* hearing *in limine* to decide the issue of whether Ms. Falk's testimony was sufficiently reliable. Instead, the

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[134] *See generally Daubert,* 509 U.S. at 579; *Houser,* 36 M.J. at 392; Mil. R. Evid. 702.
[135] *Sanchez,* 65 M.J. 145, 149 (C.A.A.F. 2007) (citing *Daubert,* 509 U.S. at 593-94).
[136] *Id.* (citing *Kumho Tire Co.,* 526 U.S. at 152)(emphasis added).
[137] *Id.* (citing *Kumho Tire Co.,* 526 U.S. at 152)(emphasis added).

military judge first allowed counsel to voice their positions via email, then through written motions, next through oral argument, and finally through *voir dire* of the witness herself.[138] Based on all of this, the military judge narrowly tailored the scope of Ms. Falk's testimony.[139] Thus, it cannot be said that the military judge merely made an "off the cuff" conclusory determination that Ms. Falk's testimony was sufficiently reliable.[140]

In fact, the military judge went to great lengths to hear both sides for sizable portions of the record.[141] For example, defense's "motion to compel expert or to exclude expert testimony" alone comprises a total of eighty-five pages: seven of which are argument, ten of which are emails, and fifteen pages of excerpts from three legal publications which essentially explain why social workers - who have not interviewed the victim - are best qualified to testify as

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[138] JA 24-109, 111-22, 212-22. *See generally Oddi,* 234 F.3d at 154 (holding that whether "in the course of [an] *in limine* [*Daubert*] proceeding," or without it, "the trial court may consider, *inter alia*, offers of proof, affidavits, stipulations, or learned treatises, in addition to testimonial or other documentary evidence (and, of course, legal argument).")
[139] *See Billings*, 61 M.J. at 165 (held the military judge did not abuse his discretion for denying defense counsel's request for a full D*aubert* hearing where the military judge conducted an Article 39(a), UCMJ session on the matter and set limits on the scope of the expert's testimony).
[140] Appellant's Brief 21.
[141] JA 111-22, 212-22.

experts in counter-intuitive behavior cases such as this one.[142] Next, there are eleven pages of court-martial transcript which show a military judge actively engaging not only both government and defense counsel, but the Ms. Falk herself in order to help determine what would be the left and right limits of permissible questioning.[143] After all of this, the military judge permitted defense to voir dire Ms. Falk outside the presence of the members which covered eleven additional pages of transcript.[144]

Despite defense's best effort to portray the military judge as already having made up his mind before going through all the pages of emails, written motions, as well as the back-and-forth argument on the record, the fact is that the military judge did not make up his mind until the very end.[145] This is evident by his last-minute decision to not allow counsel to question Ms. Falk about stranger versus non-stranger rape or "how many times she knew somebody was guilty or not."[146] Had the military judge already made up his mind, he would have not wasted judicial resources or the panel member's time just to give an appearance that he was actually considering counsels' arguments.

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[142] JA 24-109. Some of the most persuasive evidence the military judge may have considered for why Ms. Falk should be allowed to testify is found in the fifteen page attachment of three legal article excerpts attached to appellant's motion.
[143] JA 111-22.
[144] JA 212-22.
[145] Appellant's Brief 21-22.
[146] JA 220, 223.

The fact that the military judge chose not to articulate his rationale considering each of the six *Daubert* factors, the six *Houser* prongs or the three factors found in Military Rule of Evidence 702 (or any combination thereof) in written or oral form on the record is not dispositive. No federal civilian court or military court has required such draconian measures to be placed on military judges considering the flexibility afforded by both *Daubert* and *Kumho Tire Co.*[147] Beyond that, it can easily be inferred by the extensive litigation of the issue that the military judge - who is presumed to know the law - weighed all applicable factors before making his ultimate decision.[148] While the military judge did not have an official, formal, *in limine Daubert* hearing, given the extensive evidence of litigation over the issue found in the record, he essentially conducted a *de facto* hearing.

B. *Houser* Factor Analysis[149]

1. Qualifications of the Expert

Ms. Falk was qualified as an expert under the demands of Military Rule of Evidence 702, *Daubert*, and *Houser* as she had

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[147] *See Sanchez*, 65 M.J. 145, 149 (C.A.A.F. 2007) (citing *Daubert*, 509 U.S. at 593-94; *Kumho Tire Co.*, 526 U.S. at 152). *See also Jenson*, 130 F.3d at 1297.

[148] "A military judge is presumed to know the law and to act according to it." *United States v. Longstreath*, 45 M.J. 366, 374 (C.A.A.F. 1996)(internal quotes and citation omitted).

[149] Government believes that the *Houser* factors provide the best framework for analysis of this case.

specialized knowledge based on her experience, knowledge, and training. Ms. Falk is an extremely experienced social worker who worked hands-on with "thousands" of victims and has had numerous hours of training to become a SARC.[150] While she did not receive her specific SARC training at a university, nor did she attain a doctorate in the behavioral sciences, this is not what the law requires.[151] Actual experience is no less of a valid factor than education and Ms. Falk does not have to have a degree in a behavioral science field to be qualified to comment on her observations of the various thousands of victims.[152] Essentially, appellant highlights the point that Ms. Falk "testified that she had no formal training or advanced degrees in behavioral sciences" as if to say that she would not be qualified to speak on generalities of victim behavior vice a brand new, recent behavioral science graduate who lacked any actual experience working with victims.[153] Unquestionably, an

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[150] JA 213, 315.

[151] *See e.g. Cacy*, 43 M.J. at 215 (finding that a social worker and a sexual abuse counselor with no doctorate-level education could qualify as experts); *Stinson*, 34 M.J. at 335 (holding that a family advocacy therapist with a master's degree was qualified to be an expert witness in "the field of social work with a specialty in child sexual abuse").

[152] JA 213. *See e.g. United States v. Harris*, 46 M.J. 221, 223-24 (C.A.A.F. 1997) (held that a Highway Patrol Officer, who "investigated between 1500 and 2000 accidents" could testify as an expert witness on accident scene investigation).

[153] Appellant's Br. 31. *See Maiz v. Virani*, 253 F.3d 641, 669 (11th Cir. 2001)(held "there is no question that an expert may

individual with extensive, actual, hands-on experience can be immensely more helpful to a fact-finder than abstract, textbook-driven commentary from an educated, yet inexperienced person. Yet courts have recognized both types of individuals as appropriate experts.[154] In fact, Military Rule of Evidence 702 permits "[a]nyone who has substantive knowledge in a field beyond the ken of the average court member" to qualify as an expert witness.[155] This court's predecessor court went so far as to say that "[t]he witness need not be 'an outstanding practitioner,' but only someone who can help the jury."[156]

Therefore, the military judge correctly recognized Ms. Falk as an expert on sexual assault based on her specialized knowledge, years of experience, and training in that field.

2. Subject Matter of Expert Testimony

> "[O]ne of the great obstacles to proper adjudication of rape prosecutions is the jury members' (or court-martial members') relative lack of education as to the psychological aspects of the crime of rape and that expert testimony may be properly used to provide that education."[157]

Appellant is correct in his characterization of Ms. Falk's testimony being in the realm of behavioral sciences (social work

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still properly base his testimony on 'professional study or personal experience'").

[154] *Compare Cacy*, 43 M.J. at 215 *with Peel*, 29 M.J. at 240-41.

[155] *United States v. Stark*, 30 M.J. 328, 330 (C.M.A. 1990) (citing Mil. R. Evid. 702).

[156] *United States v. Mustafa*, 22 M.J. 165, 168 (C.M.A. 1986).

[157] *Hammond*, 17 M.J. at 220 (citation omitted).

being a part of that broad category) and that her testimony as to "how often" do victims tell her that they have certain responses post-sexual assault goes to what has been traditionally known as counter-intuitive behavior.[158] However, appellant is incorrect in that any testimony as to behavioral sciences (or in this case general observations of counter-intuitive behavior) "necessitate[s] an expert in psychology."[159] The military judge was well aware of both Ms. Falk's qualifications and limitations, and taking into consideration that defense had a SANE for their expert, the military judge prudently narrowed the scope of Ms. Falk's expertise to that of a "sexual assault response coordinator."[160]

Appellant makes a similar argument to the one made by the appellant in *United States v. Raya*.[161] In that case the "[a]ppellant assert[ed] that the social worker, who was not licensed or educated as a psychologist, was not qualified to be an expert in the field of rape trauma."[162] Furthermore, in *Raya* the social worker's experience comprised only fifty rape victims interviewed compared with the thousands that Ms. Falk

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[158] Appellant's Brief 23-24.
[159] Appellant's Brief 25.
[160] The military judge denied government's request to have her qualified as an expert "in sexual assault victim responses" as that would potentially broaden the scope of her expertise to a degree beyond not only what she may be able to explain, but also what the defense's expert might be able to respond to. JA 228.
[161] *See Raya*, 45 M.J. at 252.
[162] *Id.*

interviewed.[163] Given that the appellant's argument in *Raya*'s faltered, so should appellant's even weaker argument here.

Appellant also complains of Ms. Falk's alleged "sweeping opinion" that she gave when she tried to give an explanation as to why victims do not usually fight back or scream.[164] While Ms. Falk went beyond the specific questioning by government counsel as directed by the military judge, the appellant forfeits any objection absent plain error.[165] It is noteworthy that despite appellant's argument on appeal that such added language by Ms. Falk "devastated" appellant's case, at the time it was so unimportant to defense that they neglected to raise an objection.[166] Yet, appellant now infers that the military judge should have acted *sua sponte* to help remedy any statements by Ms. Falk that went beyond the parameters of what was being asked. In sum, there is no evidence to support plain error in this case.

3. Basis for Expert's Testimony

"Experts can testify on several levels ... [t]hey may know nothing about the facts of the case, yet their background testimony about a science or discipline ... may help the fact-

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[163] *Id.* JA 227.
[164] JA 229-30. Appellant's Brief 25.
[165] *See United States v. Olano*, 507 U.S. 725, 733 (1993). *See also Johnson*, 35 M.J. at 21 (finding that once a judge has limited the scope of expert witness testimony it is "incumbent upon the defense to protest transgressions thereof.")
[166] JA 230.

finder understand facts in issue."[167] An expert's testimony "may be based upon personal knowledge" or in this case, Ms. Falk's extensive practical experience.[168] Government counsel went through five pages of transcript establishing Ms. Falk's expertise, experience and ultimately the basis for her testimony on "how often" victims behave in certain ways.[169] Thus, even though Ms. Falk admittedly had no involvement in the case at all, she still had an adequate basis to provide expert testimony under the law.[170] Appellant argues that "without an adequate basis for her opinion, Ms. Falk's testimony arose in a complete vacuum, devoid of any context," however the record shows that the three questions authorized by the military judge were clearly put into the context of her vast experience with sexual assault victim behaviors.[171] Likewise, a social worker's lack of personal interaction with or observation of a victim also goes to the weight and not the admissibility of their testimony.[172]

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[167] *Johnson*, 35 M.J. at 18.
[168] *Houser*, 36 M.J. at 399. *See also Billings*, 61 M.J. at 166 (noting that Mil. R. Evid. 702 "does not require [experts] to have any formal training.")
[169] JA 224-28.
[170] *See e.g. Hammond*, 17 M.J. at 220 (holding that an interview with a person is not a condition precedent to admissibility of testimony about that person); *Houser*, 36 M.J. at 399.
[171] JA 229-30. Appellant's Brief 26.
[172] *See e.g. George*, 52 M.J. at 264; *Raya*, 45 M.J. at 253.

They may base their opinion not only on their own observations, but also upon documents and reports of others.[173]

4. Legal Relevance

"Certain behavioral patterns such as failure to resist or delay in reporting a rape could be confusing to the fact-finders because these may be counterintuitive."[174] "It is logically relevant for an expert to explain that certain behavior patterns occur in a certain percentage of rape cases or child abuse cases ... [t]his is not to say that the offense occurred but, rather, that these events may happen to some victims."[175] This is exactly the type of testimony that the military judge utilized his broad, flexible discretion to allow.[176] Even Ms. Falk's "sweeping opinion" of testifying that "almost all" victims do not scream or fight back falls under the realm of what is permissible under *Houser*.[177] Ms. Falk's testimony was clearly relevant given the facts of this case, where Miss S.A. testified

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[173] *Id. See also United States v. Prevatte*, 36 M.J. 1075, 1077 (A.C.M.R. 1993) (citing *Johnson*, 35 M.J. at 18). ("Experts may present background testimony ... which helps the fact-finders understand the facts at issue, even though [they] may know nothing about the facts of the case.")

[174] *Houser*, 36 M.J. at 399 (citations omitted).

[175] *Id.*

[176] *See Jenson*, 130 F.3d at 1297; *Kumho Tire Co.*, 526 U.S. at 153.

[177] Ms. Falk did not provide "human lie detector" type testimony nor did she directly infer that appellant was guilty of sexual assault. *See Houser*, 36 M.J. at 399 (citations omitted)(" It is logically relevant for an expert to explain that certain behavior patterns occur in a certain percentage of rape cases or child abuse cases"). JA 230. Appellant's Brief 25.

at trial that she did not scream when she was being sexually assaulted by appellant and where appellant would logically seek to use this lack of protest as evidence of consent. Analogously, courts have approved such analysis in regards to counter-intuitive behavior in child abuse cases.[178]

Appellant attempts to distinguish this case from cases such as *Suarez*, *Rynning*, *Pagel*, and *Peel* on grounds that all of those cases had experts that met with the victim or observed the victim's testimony are ultimately futile.[179] Appellant's argument would be more persuasive if these four cases were the universe of case law on the subject. As already cited, there are a large number of cases in military courts that explicitly approve of expert testimony by those who have not reviewed anything in the case.[180]

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[178] "In child sexual-abuse cases, we have acknowledged that there is a sufficient body of 'specialized knowledge' as to the typical behavior patterns of victims to permit certain conclusions to be drawn by experts regarding such patterns." *Cacy*, 43 M.J. at 217 (citing *United States v. Benedict*, 27 M.J. 253, 259 (C.M.A. 1988); *United States v. Tolppa*, 25 M.J. 352, 354 (C.M.A. 1987); *Nelson*, 25 M.J. at 113; *United States v. Snipes*, 18 M.J. 172, 179 (C.M.A. 1984)."

[179] Appellant's Brief 27.

[180] *See e.g. Raya*, 45 M.J. at 253; *Hammond*, 17 M.J. at 220; *Houser*, 36 M.J. at 399; *George*, 52 M.J. at 264. *Prevatte*, 36 M.J. at 1077 (citing *Johnson*, 35 M.J. at 18). ("Experts may present background testimony about a science or discipline which helps the fact-finders understand the facts at issue, even though [they] may know nothing about the facts of the case.")

5. Reliability

Ms. Falk's method of forming her opinion of how often victims report fighting back, screaming and immediately informing the police is sufficiently reliable given the level of expertise of her testimony as narrowly defined by the military judge.[181] Common sense dictates that one does not require an advanced degree in psychology to form an expert opinion through observation of how many victims report one thing versus another.

In this case, defense counsel spent a considerable amount of time during the voir dire of Ms. Falk going over the reliability of her testimony in an attempt to expose the weaknesses of her testimony.[182] Despite what appellant avers, Ms. Falk actually did "discuss how many of these [sexual assault] cases were ultimately investigated or prosecuted."[183] She stated that "[m]ore than a third" resulted in court-martial, and "at least a fourth" of those "ended in a conviction."[184] Additionally, she provided details on the sources from which she received her information and derived her opinion.[185] Beyond the numbers and sources, any "lack of personal interaction with or observation of [Miss S.A.] goes to the weight, and not []

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[181] *See Johnson*, 35 M.J. at 18.
[182] JA 214-18.
[183] Appellant's Brief 31. JA 214-15.
[184] JA 214-15.
[185] JA 215-18, 221-22.

admissibility...."[186] Therefore, it was well within the military judge's discretion to allow Ms. Falk's limited testimony based upon her generalized knowledge to be put in front of the members so that they could determine the amount of weight her testimony deserved.

Appellant also makes a peculiar argument that tries to analogize Ms. Falk's "statistical statement" that alleged victims "almost never" scream when being sexually assaulted with "human lie detector" testimony found in *United States v. Mullins* that the statistical frequency of children lying about sexual abuse is "1 in 200" chance.[187] However, appellant's analogy is not compelling because Ms. Falk's statement was not claiming or even inferring that alleged sexual assault victims "almost never" falsely report, but rather that they "almost never" scream while being assaulted.[188] If the converse were true that non-victims having consensual sexual relations "almost always" scream, then appellant might have an argument, as such a claim would infer that Miss S.A. was telling the truth. However, assuming what Ms. Falk is saying is true along with a common understanding of the world would mean that both consenting *and non-consenting sexual partners* "almost never" scream which has little bearing on whether or not Miss S.A. is telling the truth.

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[186] *Raya*, 45 M.J. at 253.
[187] *Mullins*, 69 M.J. at 115. Appellant's Brief 32-33.
[188] JA 230.

Thus, appellant's claims that this case is "directly comparable" to such "human lie detector" testimony is not persuasive.

6. Probative Value

"Logically relevant and reliable expert testimony 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.'"[189] "In determining whether the military judge abused his discretion in balancing probative value with the potential for unfair prejudice, we must examine [Ms. Falk's] testimony in the context of the entire case."[190]

Again, there are many cases arising out of both military courts and federal circuits that support the admission of expert testimony as to counter-intuitive behavior with both adult sexual assault and child abuse victims.[191] As previously stated, Ms. Falk's testimony was carefully limited by the military judge to only three "how often" type questions.[192] Moreover, *none* of her answers to these three questions were objected to by defense counsel.[193] Importantly, Ms. Falk did not violate the

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[189] *Houser*, 36 M.J. 399-400 (quoting Mil. R. Evid. 403).
[190] *Id.* at 400.
[191] *See e.g. Stinson*, 34 M.J. at 335; *Johnson*, 35 M.J. at 17; *Peel*, 29 M.J. at 241; *Tomlinson*, 20 M.J. at 899-900 (A.C.M.R. 1985); *Hammond*, 17 M.J. at 220; *Jenson*, 130 F.3d at 1297.
[192] JA 229-30.
[193] JA 229-30.

prohibition against testifying about the credibility of the victim.[194]

Defense counsel conducted an effective cross-examination of Ms. Falk, getting her to admit that she does not question any of the alleged victims she counsels, nor does she investigate their claims to see whether or not they are valid or invalid.[195] Ms. Falk also had to acknowledge that all her opinions are based on what she has been told by others.[196] Defense counsel's closing argument drove this point home with devastating effect, ultimately putting Ms. Falk's testimony in perspective for the members as testimony for which there is no way to verify its credibility given the second-hand nature of her sources.[197]

Yet in the end, even this was not enough to save appellant from himself, as he took the witness stand and provided an implausible story of the night's events as further discussed below.

C. Harmlessness Analysis

Even assuming that the military judge abused his discretion in allowing Ms. Falk to testify or that he committed plain error for not giving a curative instruction or other remedy after certain portions of Ms. Falk's testimony, appellant cannot

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[194] *See e.g., United States v. Harrison*, 31 M.J. 330 (C.M.A. 1990).
[195] JA 231-32.
[196] JA 231-32.
[197] JA 300.

establish prejudice.[198] Despite appellant's characterizations, his case was not "hotly contested" or a close call, particularly considering the implausible reason he gave for why Miss S.A. did not want to have sex at his place, as well as the reason he gave for why she would make up the allegation of sexual assault.[199] Given appellant's incredible explanation and far-fetched story, a short three-question and answer direct examination given by a social worker was not going to be the factor that tipped the scales in the minds of the members.

Appellant took the stand in his own defense and testified that while Miss S.A. was at his house the evening of the alleged assault, they discussed "having sex that night" and that Miss S.A. told him to come over to her room later that evening allegedly because "[h]er brother was still [at appellant's home] and she felt uncomfortable with him being around."[200] Such a proffered reason defies logic in light of the fact that when S.A. left to go home, she went with her brother and S.A. knew that her brother liked to sleep on the couch outside of her

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[198] "We look at the erroneous testimony in context to determine if the witness's opinions amount to prejudicial error. *United States v. Eggen*, 51 M.J. 159, 161 (C.A.A.F. 1999). Context includes such factors as the immediate instruction, the standard instruction, the military judge's question, and the strength of the government's case to determine whether there was prejudice." *Mullins*, 69 M.J. at 117.

[199] JA 252, 285.

[200] JA 247-50, 265.

room.[201] Also unbelievable is appellant's self-professed mentoring session with the underage girl he just engaged in sexual activity with, which appellant states was Miss S.A.'s reason for making a false rape allegation against him. Appellant testified that after the alleged consensual sexual encounter, he spoke to Miss S.A. about his deepening concern over her safety, specifically her drug use, stating that "if she did insist on continuing [the drug use, appellant] was going to speak with her parents."[202] Appellant was apparently not concerned about her parent's response once they learned he was sleeping with their underage daughter. Appellant testified his comments "scared" Miss S.A. and that it "possibly" could have been her "motivation to lie" about the sexual assault.[203] The notion that appellant, while admittedly engaging in sexual activity with a minor, was merely the victim of Miss S.A.'s vindictive lies in response to his attempts to get her back on the path to being a clean and sober is beyond belief.

Lastly, appellant tries to compare this case to *United States v. Dollenete*, the "'hotly' contested case of child abuse involving a recantation by the alleged victim prior to trial"

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[201] JA 170, 207, 284. This inconsistency was picked up by the panel members as they inquired about what time Miss S.A. and her brother left appellant's house, what time the brother went back to return appellant's flip flops and the time when appellant went to Miss S.A.'s window. JA 276.
[202] JA 252, 285.
[203] JA 252, 285.

where it "was conceded by all parties to be essentially a swearing contest between the alleged victim and appellant."[204] While there may be some similarities, in *Dollenete* the judge had totally denied defense an expert witness, the government "was then allowed to introduce inadmissible expert testimony" and "parade expert profile testimony ... circumstantially fingering appellant as the guilty party."[205] None of these facts happened in this case and it cannot be said that anything Ms. Falk said would have tipped the scales in appellant's favor.

Conclusion

In sum, there was little, if any evidence in the record of material prejudice to appellant stemming from Ms. Falk's testimony especially when considering all the surrounding facts of the case. The military judge properly used his "flexible" discretion to act as a "gatekeeper" in deciding how to evaluate Ms. Falk's testimony. He balanced the probative value of Ms. Falk's testimony to assist the members versus the potential for unfair prejudice against appellant and made the decision - in an abundance of caution - to allow Ms. Falk's to testify on a very narrow basis. Considering all the other foregoing reasons, the military judge's decision to allow Ms. Falk's limited testimony

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[204] *United States v. Dollente*, 45 M.J. 234, 237-38 (C.A.A.F. 1996).
[205] *Id.* at 242-43.

was well within his discretion as it was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

WHEREFORE, the Government respectfully requests that this honorable court affirm the findings and sentence.

DANIEL H. KARNA
Captain, JA
Appellate Government Counsel
U.S.C.A.A.F. Bar No. 35547

ROBERT A. RODRIGUES
Major, JA
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 35723

JAMES L. VARLEY
Lieutenant Colonel, JA
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31031

JOHN P. CARRELL
COL, JA
Chief, Government Appellate
Division
U.S.C.A.A.F. Bar No. 36047

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DANIEL H. KARNA
Captain, Judge Advocate
Attorney for Appellee
January 15, 2014

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I certify that the foregoing BRIEF ON BEHALF OF APPELLEE, *United States v. Flesher,* Crim. App. Dkt. No. 20110449, Dkt. No. 13-0602/AR was filed electronically with the Court on the 15th day of January, 2014 and contemporaneously served electronically on military appellate defense counsel, Captain Robert N. Michaels.

ANGELA R. RIDDICK
Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0823