CONFESSIONS OF A CONVICTED SEX OFFENDER IN TREATMENT: SHOULD THEY BE ADMISSIBLE AT A REHEARING?

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The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.[1]

I. Introduction

In the last three years, there has been a dramatic increase in the number of cases sent back by military appellate courts for a full rehearing on the merits. For comparison, in the ten-year period between 1999 and 2009, the Court of Appeals for the Armed Forces (C.A.A.F.) and the Army Court of Criminal Appeals (A.C.C.A.) sent back ninety-six cases to the trial level for a rehearing.[2] However, in the less than three year period since June 27, 2016, based on C.A.A.F.'s landmark decision in *United States v. Hills*[3]

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[1] McGautha v. California, 402 U.S. 183, 213 (1971) (internal quotation omitted).

[2] *See* Major Grace M.W. Gallagher, *Don't Panic! Rehearings and* DuBays *Are Not the End of the World*, ARMY LAW., June 2009, at 1, 2.

[3] 75 M.J. 350 (C.A.A.F. 2016). *Hills* established the rule that Military Rules of Evidence 413 and 414, which generally allow propensity evidence in sexual offense cases, can only be used for uncharged misconduct and not multiple charged offenses. This is true even for judge alone cases. *See* United States v. Hukill, 76 M.J. 219 (C.A.A.F. 2017).

alone, military appellate courts have overturned sexual offense convictions in at least fifty-one cases, with a rehearing authorized in forty-five of those cases (including child sex offense cases).[4]

A rehearing is defined as "a proceeding ordered by an appellate or reviewing authority on the findings and the sentence or on the sentence only."[5] Under Rule for Courts-Martial (RCM) 810, three types of rehearings are authorized. A "rehearing on sentence only" requires a reevaluation of the accused's sentence based on appellate action, it does not require any new findings.[6] A "rehearing in full" means that new findings are required for all of the offenses that the accused was convicted of at the original trial.[7] And a "combined rehearing" involves a situation where some convictions are overturned on appeal, but other convictions are upheld. A combined rehearing proceeds first with a trial on the merits for the overturned convictions, which is then followed by an overall reassessment of the sentence.[8] Both rehearings in full and combined rehearings involve a new trial on the merits for at least one overturned conviction.[9]

When a rehearing is authorized by a military appellate court, either the same or a different convening authority can order the rehearing.[10] The appellate court generally sends the case back either to the General Court-Martial Convening Authority (GCMCA) that originally convened the

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[4] The cases that have been overturned by *United States v. Hills* are listed in Appendix A. In six of the fifty-one cases, the appellate court did not authorize a rehearing and instead reevaluated the sentence based on the remaining convictions.

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 810(a)(2)(A) discussion (2019) [hereinafter MCM]. Rehearings are distinguished from other new proceedings like new trials, other trials, and remands.

[6] *See id.* at R.C.M. 810(a)(2). The accused cannot receive a more severe sentence than what was adjudged at the original trial. *See id.* R.C.M. 801(d).

[7] *See id.* R.C.M. 810(a)(1); *see also* United States v. Rosendahl, 53 M.J. 344, 347 (C.A.A.F. 2000) (explaining that double jeopardy prevents new findings on any offense that the accused was acquitted of at the original trial).

[8] *See id.* R.C.M. 810(a)(3).

[9] A convening authority is not required to conduct a rehearing simply because an appellate court has authorized one. *See* Gallagher, *supra* note 2, at 8. Further, sometimes an appellate court does not authorize a rehearing and chooses to reassess the sentence itself. *See e.g.* United States v. Moynihan, No. 20130855, 2017 CCA Lexis 743, at *11 (A. Ct. Crim. App. Nov. 30, 2017).

[10] *See e.g.* United States v. Long, No. 20150160, 2018 CCA Lexis 512, at *33 (A. Ct. Crim. App. Oct. 26, 2018) (stating that a rehearing can be ordered by the "same or a different convening authority"); *see also* Captain Susan S. Gibson, *Conducting Courts-Martial Rehearings*, ARMY LAW., 1991, at 9.

case, or to the GCMCA where the accused is confined.[11] A local Office of the Staff Judge Advocate (OSJA) is normally contacted by the A.C.C.A Clerk notifying the OSJA that it has been selected to conduct the rehearing.[12] The decision of the appellate court triggers the speedy trial clock, and the Government has 120 days after being notified of the decision to conduct the rehearing.[13] A rehearing can be challenging for an OSJA because the office may have little appellate experience and no prior knowledge of the case.[14] With the speedy trial clock in mind, the OSJA must review a lengthy record of the previous trial, reinvestigate, and prepare the case.[15]

Rehearings are not only challenging for the OSJA, and the thought of repeating the trial for a second time is daunting for all parties involved. For the accused, the greatest risk may be that the Government adds new charges to the original charge sheet.[16] In this situation, not only does the accused have to defend against new offenses, but his sentence is no longer capped by what he received at the original trial.[17] The Government also faces many challenges at a rehearing. At least at the outset, prosecutors may be reticent to add an older and unfamiliar case to their workload which will take time away from their other courts-martial.[18] Additionally, evidence may be lost or damaged, key witnesses may be uncooperative or difficult to locate, and the victim must testify and may be cross-examined again while facing the possibility that the accused may be acquitted.[19] But despite these difficulties for the Government, there may be a hidden advantage that prosecutors can use the second time around; powerful evidence that was not available at the original trial but could help lead to a conviction at the rehearing.

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[11] *See* Gallagher, *supra* note 2, at 2.
[12] *See* DAD Notes, *Rehearings: Move 'Em on Out*, ARMY LAW., July 1987, at 32.
[13] *See* United States v. McFarlin, 24 M.J. 631, 635 (A.C.M.R. 1987).
[14] *See* Gallagher, *supra* note 2, at 1.
[15] *See id.*
[16] Notwithstanding the possibility of additional charges, for the accused, a rehearing is usually a good thing. It means that one or more of the accused's convictions were overturned on appeal, and he gets a second chance to be acquitted of these offenses. At the very least, the accused may be entitled to a sentence reassessment which may reduce his sentence. *But see* United States v. Moreno, 63 M.J. 129, 138–139 (C.A.A.F. 2006) (noting that the passage of time, particularly if there is delay in post-trial processing, may hinder the ability to effectively present a defense).
[17] *See* MCM, *supra* note 5, R.C.M. 810(a)(4), 810(d)(2); *see also* Adams v. Cook, No. 20170581, 2018 CCA Lexis 30, at *8 (A. Ct. Crim. App. Jan. 23, 2018).
[18] *See* DAD Notes, *supra* note 12, at 32.
[19] *See* Major Timothy Thomas, *Sometimes, They Come Back! How to Navigate the World of Court-Martial Rehearings*, ARMY LAW., July 2015, at 34, 38–39.

For those convicted of sexual offenses, there are strong incentives to enter sex offender treatment while in confinement. Inmates are unlikely to receive parole and may lose time credits against their sentence if they do not enter treatment.[20] Inmates may also lose confinement privileges like visitation rights, work opportunities, and improved living conditions.[21] But entering sex offender treatment does not come without a cost. If inmates choose to enter treatment, they lose the ability to maintain their innocence.

Almost all sex offender treatment programs require participants to first take responsibility for their crimes, often in writing, as a precondition of treatment.[22] This is true for military prisoners who want to enter sex offender treatment at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, or the Naval Consolidated Brigs.[23] The decision to accept responsibility and enter treatment has practical risks. There is the possibility that incriminating statements made by inmates during sex offender treatment might be used against them at a rehearing if they are successful on appeal. Inmates, and the attorneys who represent and advise them, face the difficult choice of either accepting responsibility and potentially shortening their sentence, or maintaining their innocence and hoping that their appeal will be successful.[24]

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[20] *See e.g.* United States v. Gonzalez-Gomez, No. 20121100, 2018 CCA Lexis 109, at *3 (A. Ct. Crim. App. Mar. 1, 2018) ("The Disposition Board and Commander at the USDB did not recommend approval of appellant's parole request. Among other observations, appellant would not accept responsibility for offenses, which made him ineligible for sex offender treatment."); *see also* Entzi v. Redman, 485 F.3d 998, 1000–01 (8th Cir. 2007) ("Because of Entzi's refusal to attend the court-ordered treatment sessions, prison officials suspended performance-based sentence reductions that would have shortened Entzi's prison term.").

[21] *See* McKune v. Lile, 536 U.S. 24, 30–31 (2002).

[22] *See* Jayson Ware & Ruth E. Mann, *How Should "Acceptance of Responsibility" Be Addressed in Sexual Offending Treatment Programs*, 17 AGGRESSION AND VIOLENT BEHAV. 279, 280 (2012); Seth A. Grossman, Note, *A Thin Line Between Concurrence and Dissent: Rehabilitating Sex Offenders in the Wake of* McKune v. Lile, 25 CARDOZO L. REV. 1111, 1113 (2004) ("Sex offenders present a unique and serious threat to society. Rehabilitating these individuals is a paramount goal of the justice system, and a task that experts almost universally acknowledge to be possible only when the offender accepts responsibility for his past crimes.").

[23] *See* United States v. Coker, 67 M.J. 571, 576 (C.G. Ct. Crim. App. 2008); *see also* Tina M. Marin & Deborah L. Bell, *Navy Sex Offender Treatment: Promoting Community Safety*, CORRECTIONS TODAY, Dec. 2003, at 84 ("The offender also must admit a degree of responsibility for the confining offense(s) and be willing to discuss his sexually deviant behavior in detail.").

[24] *See* United States v. Bolander, 722 F.3d 199, 223 (4th Cir. 2013) (referring to the choice faced by inmates as a "Hobson's choice" where there are no good options).

This article argues that incriminating statements made by inmates during prison sex offender treatment should be admissible against them in a subsequent criminal proceeding. The analysis is divided into three primary legal issues: the psychotherapist-patient privilege, the Fifth Amendment right against compelled self-incrimination, and the application of Military Rule of Evidence (MRE) 403's balancing test when the statements are offered at a rehearing. Section II argues that even though the psychotherapist-patient privilege under MRE 513 applies to these statements, enumerated exceptions in the rule and waiver allow the privilege to be pierced. Section III explains why the statements are not improperly compelled self-incrimination, and also makes recommendations for the military confinement system on how to avoid Fifth Amendment issues. Section IV analyzes the probative value of the statements against the danger of unfair prejudice under MRE 403, and also explores the unique danger at a rehearing of alerting the factfinder to the previous overturned conviction. Although the requirements of prison sex offender treatment force inmates to make a difficult choice, there is a compelling argument that those who choose to enter treatment and accept responsibility for their offenses should be held accountable for these incriminating statements at a rehearing if their case is overturned on appeal.

II. The MRE 513 Psychotherapist-Patient Privilege

The first major legal issue when analyzing the admissibility of statements made during prison sex offender treatment is whether these statements are privileged as part of mental health treatment. A privilege prevents the disclosure of communications that could otherwise be discoverable to the parties during a court-martial.[25] The Supreme Court established a federal psychotherapist-patient privilege in 1996 to protect the confidentiality of mental health treatment, with the purpose of encouraging full and frank discussions and facilitating effective treatment for those with mental health issues.[26] A more limited version of this

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[25] *See* LK v. Acosta, 76 M.J. 611, 614 (A. Ct. Crim. App. 2017).

[26] *See* Jaffee v. Redmond, 518 U.S. 1, 11 (1996) ("The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.").

privilege exists for courts-martial as articulated in MRE 513.[27] The privilege is more limited in the military system because the goal of encouraging effective mental health treatment must be balanced against military readiness and national security.[28] Under MRE 513, a patient has the right to prevent the disclosure of a confidential communication made to a psychotherapist or their assistant if the statement was made for the purpose of diagnosing or treating a mental or emotional condition, subject to seven enumerated exceptions where the privilege does not apply.[29] The rule defines the term "psychotherapist" as including clinical social workers and licensed mental health professionals.[30] This section analyzes whether the MRE 513 privilege applies to statements of responsibility made by inmates in prison sex offender treatment, and whether any exceptions might make the privilege inapplicable. The MRE 513 analysis is significantly different depending on whether the statements concern sexual offenses committed against adults or against children. For statements about crimes against children, an enumerated exception in the rule likely makes the privilege inapplicable.[31] For statements about crimes against adults, no enumerated exception applies, and it is necessary to determine whether the inmate has waived the privilege.

A. The Privilege Generally Applies to Statements Made in Sex Offender Treatment

As a preliminary matter, MRE 513 likely applies to statements of responsibility made by inmates during sex offender treatment because these statements are part of the diagnosing and treating process. In fact, one study found that "91% of both residential and community based programs for adult offenders in the United States included 'offender responsibility' as a treatment target."[32] The therapeutic purpose behind requiring inmates to take responsibility is the idea that treatment can only be successful after inmates have moved past denial and taken ownership of their crimes.[33] It also allows treatment professionals to effectively

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[27] *See* United States v. Rodriguez, 54 M.J. 156, 161 (C.A.A.F. 2000) ("When the President promulgated Mil.R.Evid. 513, he did not simply adopt *Jaffee*; rather, he created a limited psychotherapist privilege for the military.").
[28] *See* United States v. Jenkins, 63 M.J. 426, 430 (C.A.A.F. 2006).
[29] MCM, *supra* note 5, MIL. R. EVID.513.
[30] *See id.* at 513(b)(2).
[31] *See id.* at 513(d)(2).
[32] Ware & Mann, *supra* note 22, at 280.
[33] *See id.*

establish group therapy sessions, because the inmates who have taken responsibility for their crimes and want to receive treatment can be separated from the inmates who deny that they have a problem.[34] The people receiving the statements and administering the mental health treatment are clinical psychologists, licensed social workers, and other mental health specialists,[35] who would almost certainly be covered under MRE 513. Since the psychotherapist-patient privilege under MRE 513 clearly applies to statements made during sex offender treatment, we must next analyze whether any of the enumerated exceptions apply, or whether the inmates waive the privilege when they enter treatment.

B. The "Child Abuse" Exception Nullifies the Privilege for Child Sex Offenses

Under MRE 513(d), there are seven exceptions listed where the psychotherapist-patient privilege does not exist. Unlike in the civilian federal system where exceptions to privileges are established through case law, exceptions to privileges in the military are explicitly stated in the rules of evidence.[36] Previously, there had been eight enumerated exceptions, but the "Constitutional" exception was removed in order to further strengthen the privilege.[37] The second exception to MRE 513, known as the "child abuse" exception, states that the psychotherapist-patient privilege does not exist "when the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse."[38]

Thus, the "child abuse" exception actually contains two different exceptions, one based on the content of the communication, and the other based on the offenses on the charge sheet and the relationship between the parties. For the first part of the exception, when the content of the communication is evidence of child abuse, the communication is not privileged in order to allow mental health providers to tell military

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[34] *See* UNITED STATES DISCIPLINARY BARRACKS, REG. 15-3, INMATE CLASSIFICATION/DISPOSITION para. 5-1 (7 Nov. 2018).
[35] *See* Marin & Bell, *supra* note 23, at 84.
[36] *See* United States v. Custis, 65 M.J. 366, 370–371 (C.A.A.F. 2007).
[37] *See generally* J.M. v. Payton-O'Brien, 76 M.J. 782 (N-M. Ct. Crim. App. 2017) (explaining that the removal of the Constitutional exception strengthened the privilege but the Constitution still applies to the rule).
[38] MCM, *supra* note 5, at MIL. R. EVID. 513(d)(2); *see also* Lk v. Acosta, 76 M.J. 611, 618 (A. Ct. Crim. App. 2017).

commanders about child abuse.[39] The drafters of the rule made the policy determination that a commander's need to know about child abuse committed by his or her Soldiers is more important than the confidentiality of mental health treatment. The second part of the exception, concerning a proceeding in which one spouse is charged with a crime against a child of either spouse, is more limited. For this exception to apply, there must be a crime against a child victim on the charge sheet, and there must be a marital relationship between the accused and the victim. Additionally, courts have interpreted this part of the exception even more narrowly, finding that it only applies to statements of the accused, and explicitly rejecting it as a way for defense counsel to access the mental health records of children, even though the plain language of the exception is not so limited.[40]

The existence of the "child abuse" exception under MRE 513(d)(2) means that inmates convicted of child sexual offenses may not be protected by the psychotherapist-patient privilege when discussing their crimes in sex offender treatment. When those inmates accept responsibility for their crimes as part of treatment, it is highly likely that the content of their statements will contain evidence of child sexual abuse. Thus, under the first part of the exception alone, an accused's statements accepting responsibility would arguably trigger the exception and the privilege would not apply. The second part of the "child abuse" exception might apply as well in cases where the inmate has offended against his own child or the child of his spouse. However, it is likely unnecessary to reach this analysis since the content-based part of the exception would cover virtually all child sex offenders.

Defense counsel could argue that the "child abuse" exception should not be applied in this situation because there is no imminent risk of harm to children. As mentioned above, part of the rationale behind the exception is that military commanders need to know about child abuse committed by their Soldiers so that they can stop it. For inmates who are incarcerated, they are likely not a current risk to children. However, the defense argument is problematic for two reasons. First, the plain language of the exception does not contain any requirement of future harm or

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[39] *See Acosta*, 76 M.J. at 617–18 ("the exception allows military mental healthcare providers to communicate to military commanders evidence of child abuse" because the drafters of the rule determined that military commanders have a need for this knowledge to preserve good order and discipline).

[40] *See id*. at 618–19.

imminent danger. Second, the part of the exception based on "a proceeding in which one spouse is charged with a crime against a child of either spouse"[41] applies to a situation where the accused is already facing a "proceeding" for offenses against children. This part of the exception suggests that the drafters of the rule wanted the "child abuse" exception not just for safety reasons, but as an evidentiary tool. Because of an enumerated exception in the rule, child sex offenders are likely unable to claim the psychotherapist-patient privilege to protect conversations about their past crimes in sex offender treatment.

C. Adult Sexual Offenders Waive the Privilege When They Begin Treatment

Although the "child abuse" exception to the psychotherapist-patient privilege clearly applies to child sex offenders, the more difficult analytical situation is when inmates in treatment accept responsibility for sexual offenses committed against adults. In these cases, it is unlikely that any of the enumerated exceptions apply. The first exception requires that the patient be deceased, which is clearly inapplicable.[42] The second exception, the "child abuse" exception discussed above, is inapplicable because the crimes do not involve children. The third through sixth exceptions all address situations where there is a tangible risk of future harm. These exceptions state that the privilege does not exist when there is a mandatory reporting requirement, where the therapist believes that the patient may be a danger to himself or others, where the patient is planning a future crime, or where disclosure is necessary to protect "the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission."[43] Although these exceptions seem broad, statements of responsibility made in prison sex offender treatment likely do not trigger these exceptions for two reasons. First, the statements concern past crimes, so there is unlikely to be a future danger. Second, the inmates are confined, so it is unlikely that they pose an imminent threat to anyone.[44]

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[41] MCM, *supra* note 5, at MIL. R. EVID. 513(d)(2).

[42] If the inmate has died in prison after making statements in sex offender treatment, then there would be no need to conduct a rehearing, and the admissibility of the statements at a new trial is irrelevant.

[43] MCM, *supra* note 5, at MIL. R. EVID.513(d).

[44] In *United States v. Jenkins*, the Court held that there was an imminent danger exception to the privilege when an accused was referred by the command to receive a mental health evaluation to determine, among other things, whether he should be placed

The seventh and final exception involves a situation where the accused affirmatively "offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation."[45] The accused holds the key to this exception, and can choose whether or not to open the door to statements made in treatment. If statements made in prison sex offender treatment are harmful to the accused, it is unlikely that defense counsel would pursue a trial strategy at the rehearing (like an insanity or lack of mental responsibility defense) that would open the door to these statements.[46] Because none of the seven enumerated exceptions apply to statements about adult sexual offenses, we must next analyze whether inmates waive the privilege when they enter prison sex offender treatment.

MRE 510 states that a privilege can be waived if the "holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege."[47] Rule 513 itself does not address how or under what circumstances the psychotherapist-patient privilege can be waived. Military case law addresses victims who voluntarily waive the psychotherapist-patient privilege during the court-martial process, but it does not address how an accused might waive the privilege prior to entering mental health treatment,[48] although there is precedent to suggest that an accused waives the privilege if he does not raise the issue at trial.[49]

Military courts tend to broadly construe the waiver of a privilege. Because privileges are not constitutionally required and tend to limit otherwise admissible evidence, military courts have found waiver even in cases where the holder was not aware of the privilege and where the holder failed to take adequate steps to protect confidentiality.[50] The presence of third parties can break the confidentiality of communications and destroy

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in pre-trial confinement. 63 M.J. 426 (C.A.A.F. 2006). Unlike in *Jenkins*, when the accused is already in post-trial confinement, he is likely no longer a danger.

[45] MCM, *supra* note 5, at MIL. R. EVID.513(d)(7).

[46] *See* United States v. Clark, 62 M.J. 195, 199 (C.A.A.F. 2005) ("Because Appellant presented an insanity defense, he could not have claimed a psychotherapist-patient privilege under M.R.E. 513.").

[47] *See* MCM, *supra* note 5, at MIL. R. EVID. 510(a).

[48] *See Payton-O'Brien*, 76 M.J. at 790.

[49] *See* United States v. Demmings, 46 M.J. 877 (A. Ct. Crim. App. 1997).

[50] *See* United States v. Jasper, 72 M.J. 276, 280-81 (C.A.A.F. 2013).

a privilege.[51] A privilege can also be nullified when information is disclosed to a third party outside of the privileged relationship.[52] However, the presence of third parties does not necessarily nullify a privilege if the third parties have a "commonality of interest", like in a group therapy session where all participants are receiving treatment.[53] There is no requirement that a waiver of a privilege be knowing and intelligent.[54]

Many prison sex offender treatment programs require inmates to first sign a form acknowledging that their statements can be disclosed outside of treatment.[55] Although the forms differ based on the confinement facility, they tend to contain some common provisions. Almost all of the forms have provisions that allow disclosure for safety reasons, and almost all of the forms notify inmates that information they provide can be shared with prison administrators and parole boards. At the Joint Regional Correctional Facility (JRCF) at Fort Leavenworth, for example, inmates must sign JRCF Form 307-1 acknowledging the limits of confidentiality for statements made during sex offender treatment.[56] This form states that, "[i]nformation disclosed by patients to Army Medical Department health personnel is not privileged communication" and that access to this information "is allowed when required by law, regulation, or judicial proceedings."[57] The form goes on to list six examples of the limits of confidentiality, including: disclosure to prison administrators and parole boards, disclosure to prevent harm to the inmate or others, disclosure to protect the security of the facility, disclosure in response to a subpoena

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[51] *See* United States v. Harpole, 77 M.J. 231, 235 (C.A.A.F. 2018) (discussing third parties destroying confidentiality in the context of the MRE 514 victim advocate privilege when the third party is only present for "moral support").

[52] *See* United States v. McElhaney, 54 M.J. 120, 131-32 (C.A.A.F. 2000).

[53] United States v. Shelton, 64 M.J. 32, 39 (C.A.A.F. 2006) (discussing the effect of third parties on the clergy privilege); *see also* Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002) (stating that disclosure to third parties does not nullify the attorney-client privilege when the third parties are agents of the attorney).

[54] *See id.* at 281.

[55] *See* United States v. Bolander, 722 F.3d 199, 204 (4th Cir. 2013) (noting that the federal facility at Butner requires inmates to first sign an informed consent form before entering sex offender treatment); United States v. Wiggins, No. 6:13-00183, 2014 U.S. Dist. Lexis 23586, at *2 (S.D.W.V. Feb. 25, 2014) (explaining that inmates in West Virginia's prison sex offender treatment program were first required to sign a form titled "Informed Consent and Statement Regarding Limited Confidentiality").

[56] *See* Joint Regional Correctional Facility, JRCF Form 307-1, Limits of Confidentiality of Directorate of Treatment Programs Information (Aug. 23, 2010).

[57] *Id.*

related to a legal action or proceeding, and disclosures to other health care professionals or for "clinical investigation purposes." Inmates at the JRCF must sign this acknowledgment form before entering treatment. It makes sense that treatment information is shared with prison administrators and parole boards. The goal of prison sex offender treatment is not only to treat the inmate, but also to assess individual risk and to determine who is a good candidate for parole. If an inmate is making progress in a sex offender treatment program, he may be a reduced risk to the prison population and a much more attractive candidate for parole.

When inmates sign forms like JRCF Form 307-1, they are affirmatively waiving their psychotherapist-patient privilege. Under MRE 510(a), a person waives a privilege who, "voluntarily discloses or consents to disclosure of any significant part of the matter or communication." By signing the form, inmates are consenting to the disclosure of information they provide in sex offender treatment. JRCF Form 307-1 explicitly tells inmates that the information they provide is not privileged communication. It also tells them that information they provide can be disclosed to prison officials and parole boards. A waiver of a privilege occurs when information is disclosed to third parties.[58] In this context, prison officials and parole board members are third parties because they are not licensed mental health professionals and they are not involved in the mental health treatment of the inmate.

D. The Psychotherapist-Patient Privilege Should Not Be a Barrier to Admission for Statements of Responsibility Made in Prison Sex Offender Treatment

As a general rule, the psychotherapist-patient privilege under MRE 513 applies to statements made by inmates in prison sex offender treatment. The inmates are receiving treatment from licensed mental health professionals for the mental condition or disease that led to their crimes. Despite the general applicability of the privilege, it should not be a bar to the admission of statements of responsibility at a rehearing. For those inmates who have been convicted of child sexual offenses, the content of their statements likely triggers the "child abuse" exception which makes the privilege inapplicable. For those inmates who have been

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[58] *See* United States v. McElhaney, 54 M.J. 120, 132 (C.A.A.F. 2000) ("We have held, in harmony with federal civilian law, that communications made in the presence of third parties, or revealed to third parties, are not privileged.").

convicted of adult sexual offenses, they have likely already waived the privilege prior to entering treatment.

For statements concerning adult sexual offenses, defense counsel can argue that the limited waiver signed at the beginning of treatment should not waive the privilege at a rehearing. In the context of other privileges, military courts have found limited waivers in certain situations. A limited waiver means that the accused is allowing the release of some privileged material, but is not completely waiving a privilege. For example, when an accused raises an ineffective assistance of counsel (IAC) claim on appeal, the accused is partially waiving the attorney-client privilege, but the waiver is limited to the information necessary for defense counsel to respond to the IAC claim.[59]

There are also limited waivers for the privilege against self-incrimination. In a mixed plea case, the accused waives his privilege against self-incrimination during the providence inquiry, but this waiver usually extends only to the offenses to which he is pleading guilty.[60] Similarly, an accused who chooses to testify in his own defense waives the privilege against self-incrimination only for matters that he testifies about.[61] For example, if there are two offenses on the charge sheet and the accused only testifies about one, he cannot be cross-examined about the other offense because he has not waived his privilege against self-incrimination for that offense.[62] There is also a federal case which suggests that limited waiver can apply to the psychotherapist-patient privilege, although the case law in this area is not well developed.[63]

Defense counsel should further argue that the limited waiver signed by their client at the beginning of treatment was not intended to waive the privilege for future criminal proceedings. The waiver serves two primary purposes for the confinement facility. It allows the facility to be notified about a particularly dangerous inmate, and it provides prison administrators with information about whether an inmate should receive

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[59] *See* United States v. Gatto, No. 37246, 2010 CCA Lexis 363, at *29 (A.F. Ct. Crim. App. Oct. 22, 2010).
[60] *See* United States v. Ramelb, 44 M.J. 625, 630 (A. Ct. Crim. App. 1996).
[61] *See* MCM, *supra* note 5, at MIL. R. EVID. 301(c).
[62] *See id.*
[63] *See* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976). Although this case recognizes a limited waiver of the psychotherapist-patient privilege, it predates the Supreme Court's decision in *Jaffee* by twenty years, and primarily concerns a dispute over a state statute.

parole or sentence credits. The purpose of the waiver is not to generate additional evidence for the Government on the chance that the inmate's case is overturned on appeal.[64] Most inmates who sign the waiver likely either want to treat their illness or want to receive a reduced sentence, but it is doubtful that they contemplate the risk they are taking if their case is overturned on appeal. Defense counsel should argue that the waiver signed by their client only allows the limited release of information within the confinement system, and that the waiver does not extend to new judicial proceedings.

Although it is logically compelling, the limited waiver argument likely fails for one major reason. When inmates acknowledge that information they provide in treatment can be shared with prison administrators and parole boards, the inmates are consenting to the disclosure of their statements outside the scope of the psychotherapist-patient relationship. This consent to disclosure to third parties who are not part of the mental health treatment and do not have a "commonality of interest" likely waives the privilege. Prison sex offender treatment offers great potential benefit to inmates.

In addition to treating their mental health problems and beginning the rehabilitation process, inmates who make progress in treatment can earn increased prison privileges and even early release. But the inmates acknowledge, at the outset, that in order to earn these benefits, the information they provide in the program will be shared beyond mental health professionals. If an inmate is successful on appeal and his conviction is overturned, he should not then be permitted to hide behind the MRE 513 privilege to shield his statements, especially considering that he was initially willing to waive this privilege at the beginning of treatment.

III. The Fifth Amendment Prohibition on Compulsory Self-Incrimination

The second major legal issue for incriminating statements made during prison sex offender treatment is whether they violate the Fifth Amendment's prohibition on compelled self-incrimination. The Fifth Amendment states that no person "shall be compelled in any criminal case

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[64] As explained in the next Section, this kind of subterfuge to generate evidence is impermissible and could result in a Fifth Amendment violation.

to be a witness against himself."[65] This provision is interpreted to mean that people cannot be forced to answer questions that might incriminate them in future criminal proceedings,[66] and that people have the "right to remain silent."[67] As a general rule, the privilege against self-incrimination is normally not self-executing, meaning that it must be asserted by the person being questioned.[68] One exception to this rule is the "penalty" cases, where someone is threatened with economic consequences or other harm if they choose to remain silent.[69] In these cases, it is not necessary to exercise the right to remain silent, because the constitutional violation comes from the threatened penalty. On the other hand, the choice to remain silent can often carry permissible consequences that do not violate the Fifth Amendment.[70] The central question is whether the potential penalty is severe enough to compel self-incrimination in violation of the Fifth Amendment.[71]

A. Analysis of *McKune v. Lile* Plurality, Concurring, and Dissenting Opinions

In 2002, in *McKune v. Lile*, the Supreme Court addressed the issue of whether inmates could be forced to accept responsibility for their crimes as a prerequisite for entering prison sex offender treatment, or whether this amounted to improper compulsion under the Fifth Amendment.[72] In *McKune*, the defendant refused to enter sex offender treatment in Kansas state prison and argued that the required disclosure of his past crimes was impermissibly compelled self-incrimination.[73] In order to enter sex offender treatment, the defendant was required to sign an "Admission of

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[65] U.S. CONST. amend. V.
[66] *See* Minnesota v. Murphy, 465 U.S. 420, 426 (1984).
[67] Miranda v. Arizona, 384 U.S. 436 (1966).
[68] *See id.* at 428.
[69] *See id.* at 434.
[70] *See e.g.* Jenkins v. Anderson, 447 U.S. 231 (1980) (holding that a defendant's initial silence with police could be used to impeach him when he testified at trial).
[71] *See* Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977) ("These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true, as appellant points out, that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.").
[72] 536 U.S. 24 (2002).
[73] *See id.* at 31.

Responsibility" form where he admitted to his convicted offenses and described all of his sexual history (including uncharged misconduct), and he was required to take a polygraph test to verify the accuracy of his statements.[74] By refusing to disclose his past crimes and enter treatment, the defendant lost prison privileges like "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television" and he was even transferred to a maximum-security unit.[75] The Court held that denying the defendant these privileges based on the refusal to enter treatment did not violate his Fifth Amendment rights. However, the nine justices split three different ways; with a four justice plurality opinion, a four justice dissenting opinion, and with Justice Sandra Day O'Connor's concurring opinion controlling because it was the narrowest. Below, the plurality, concurring, and dissenting opinions are explained.

1. *The Plurality Opinion*

Justice Anthony Kennedy delivered the plurality opinion and was joined by three other justices. The plurality opinion held that there was no Fifth Amendment violation, and it focused on Kansas's strong interest in rehabilitating sex offenders versus the reduced constitutional rights of prisoners.[76] To support the strong governmental interest, using statistics from 1983, Justice Kennedy stated that convicted sex offenders were "much more likely than any other type of offender to be rearrested for a new rape or sexual assault."[77] And although he noted that there was some difference of opinion among experts, Justice Kennedy explained that prison officials across the United States believed that an inmate must admit to and confront past crimes as a critical first step of treatment.[78] In Justice Kennedy's view, compared to this strong governmental interest, the only thing at stake for the defendant was a relatively miniscule denial of prison

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[74] *See id.* at 30.
[75] *Id.*
[76] *See id.* at 36 ("The fact that these consequences are imposed on prisoners, rather than ordinary citizens, moreover, is important in weighing respondent's constitutional claim.").
[77] *Id.* at 33. Although this is a commonly held societal belief, many experts dispute the idea that sexual offenders have a higher recidivism rate than other criminals.
[78] *See id.* at 29 ("While there appears to be some difference of opinion among experts in the field Kansas officials and officials who administer the United States prison system have made the determination that it is of considerable importance for the program participant to admit having committed the crime for which he is being treated and other past offenses. The first and in many ways most crucial step in the Kansas rehabilitation program thus requires the participant to confront his past crimes so that he can begin to understand his own motivations and weaknesses.").

privileges. The defendant's refusal to enter sex offender treatment did not result in more severe penalties; it "did not extend his term of incarceration. Nor did his decision affect his eligibility for good-time credits or parole."[79]

The plurality opinion also addressed whether information provided by inmates in prison sex offender treatment could be used against them in a future criminal proceeding. Justice Kennedy explained that Kansas left open the possibility of using information in a future proceeding, however no inmate had ever been charged or prosecuted based on an offense disclosed during treatment.[80] Even though information was not used in subsequent proceedings, Kansas refused to make the information disclosed during treatment privileged or to provide inmates with immunity for two reasons. First, it helped the inmates understand that their actions had consequences and the threat of additional punishment reinforced the gravity of their crimes.[81] Second, Kansas had a "valid interest in deterrence by keeping open the option to prosecute a particularly dangerous sex offender."[82] In finding no Fifth Amendment violation in this case, Justice Kennedy focused heavily on the reduced constitutional rights of prisoners in the face of the government's strong need to manage prisons and rehabilitate offenders.[83] The plurality opinion did not answer the question of whether inmates could be explicitly denied parole or sentence credits for refusing to take responsibility for their crimes, but it hinted that this might be impermissible.[84]

2. *The Concurring and Controlling Opinion*

Justice O'Connor's concurring and controlling opinion further muddied the waters. She felt that the plurality opinion went too far in reducing the constitutional rights of prisoners, and she rejected the due process test established in *United States v. Sandin* where the government action was only improper if it "impose[d] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[85] Although she rejected the test used by the plurality opinion, Justice

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[79] *Id.* at 38.
[80] *See id.* at 30.
[81] *See id.* at 34.
[82] *Id.* at 35
[83] *See id.* at 37 ("The compulsion inquiry must consider the significant restraints already inherent in prison life and the State's own vital interests in rehabilitation goals and procedures within the prison system.").
[84] *See supra* note 79 and accompanying text.
[85] 515 U.S. 472, 484 (1995).

O'Connor declined to offer her own test. Because she believed that the denial of privileges in this case clearly did not amount to compulsion, she felt it was unnecessary to answer the larger constitutional question of how much could be taken from an inmate based on the refusal to incriminate himself.[86] Justice O'Connor's opinion is controlling because it provides the narrowest rationale that five justices support.[87] But because her controlling opinion failed to articulate a clear test, it was left for the lower courts to determine how much an inmate could be incentivized or punished based on the refusal to take responsibility and enter sex offender treatment.

3. *The Dissenting Opinion*

The dissenting opinion, authored by Justice John Paul Stevens, felt that the Kansas sex offender treatment program clearly violated the Fifth Amendment's bar on compelled self-incrimination. The dissent argued that the statements of responsibility sought by the program were undoubtedly incriminating and could be used against the inmates in a future proceeding.[88] After citing to multiple cases that involved improper compelled self-incrimination, the dissent stated that, "[n]one of our opinions contains any suggestion that compulsion should have a different meaning in the prison context."[89] The dissent also rejected the idea that the loss of privileges in this case was minor, and focused on the myriad ways that the inmate's living conditions and quality of life were reduced by a refusal to incriminate himself.[90] The dissent recognized that the prison had a valid goal in rehabilitating sex offenders, and even in potentially requiring them to accept responsibility. But there were ways

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[86] *See McKune*, 536 U.S. at 53-54 (O'Connor, J., concurring) ("I find the plurality's failure to set forth a comprehensive theory of the Fifth Amendment privilege against self-incrimination troubling. But because this case indisputably involves burdens rather than benefits, and because I do not believe the penalties assessed against respondent in response to his failure to incriminate himself are compulsive on any reasonable test, I need not resolve this dilemma to make my judgment in this case.").

[87] *See* Marks v. United States, 430 U.S. 188, 193 (1977). Although the *Marks* rule seems relatively simple on its face, it has proved difficult in many cases for the lower courts to apply. *See* Kevin M. Lewis, *What Happens When Five Supreme Court Justices Can't Agree?*, CONGRESSIONAL RESEARCH SERVICE (Jun. 4, 2018), https://fas.org/sgp/crs/misc/LSB10113.pdf.

[88] *See Mckune*, 536 U.S. at 55 (Stevens, J., dissenting) ("It is undisputed that respondent's statements on the admission of responsibility and sexual history forms could incriminate him in a future prosecution for perjury or any other offense to which he is forced to confess.").

[89] *Id.* at 58.

[90] *See id.* at 67 ("What is perfectly clear, however, is that it is the aggregate effect of those penalties that creates compulsion.").

to achieve these goals without violating the 5th Amendment, "[t]he most obvious alternative is to grant participants use immunity." [91] The dissenting opinion ended with a cautionary statement:

> Particularly in a case like this one, in which respondent has protested his innocence all along and is being compelled to confess to a crime that he still insists he did not commit, we ought to ask ourselves, what if this is one of those rare cases in which the jury made a mistake and he is actually innocent?[92]

B. The Post-*McKune* Absence of Military Case Law

Since the Supreme Court's decision in *McKune v. Lile*, only two military appellate cases have addressed similar issues. First, just one year after *McKune* in *United States v. McDowell*, the Air Force Court of Criminal Appeals decided whether an inmate at Miramar Naval Brig could be denied certain confinement privileges for refusing to incriminate himself as a condition of entering sex offender treatment.[93] In finding no Fifth Amendment violation, the court's ruling was fairly predictable, given that the privileges denied the inmate in this case were less severe than those upheld in *McKune*.[94] In *McDowell*, the only consequences the inmate faced for refusing to incriminate himself were that he was not allowed to have a watch or a Walkman radio.[95] He was still entitled to a plethora of other privileges that improved life in confinement.[96]

Over fifteen years after *McDowell*, the A.C.C.A. decided *United States v. Jessie*, where an inmate was denied visitation rights with his biological children based on his refusal to take responsibility for his convicting offenses and enter prison sex offender treatment.[97] The inmate asked A.C.C.A. to reduce the length of his sentence based on this alleged constitutional violation. In a divided decision, the majority opinion

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[91] *Id.* at 69.
[92] *Id.* at 71-72.
[93] 59 M.J. 662 (A.F. Ct. Crim. App. 2003).
[94] *See id.* at 665 ("Since the Supreme Court did not find an unconstitutional compulsion under the facts of the *McKune* case, we do not find one here.").
[95] *See id.* at 664.
[96] *See id.* ("the inmate may still be permitted to participate in Yard Call, Gym Call, Library Call, and Movie Call, play table games, use the computers in the dormitory, and make phone calls during designated hours").
[97] No. 20160187, 2018 CCA Lexis 609 (A. Ct. Crim. App. Dec. 28, 2018).

declined to address the inmate's claim on the merits, stating that, "[t]his court has no authority to direct change to the policies of military confinement facilities."[98] The majority opinion stated that this case should be handled by the civilian federal district courts,[99] and thus failed to conduct any substantive Fifth Amendment analysis. The decision not to address this issue on the merits seems ripe for reconsideration (either by A.C.C.A. itself or a higher court),[100] given a strong dissenting opinion from four judges, and the majority's own statement that, "[o]ur decision today is case specific, and should not be understood as prohibiting or disincentivizing similar (or dissimilar) requests."[101]

Unfortunately, *McDowell* and *Jessie* are the only cases where military appellate courts have addressed this issue. Because the denial of privileges in *McDowell* was so miniscule, and paled in comparison even to the privileges denied in *McKune*, *McDowell* has very limited precedential value. Similarly, the *Jessie* case has limited precedential value because A.C.C.A. declined to address the Fifth Amendment issue on the merits. Because military appellate courts have never substantively addressed the issue, it is currently unclear what penalties beyond the denial of a watch or a Walkman radio, if any, would cause a military court to find a Fifth Amendment violation. Some of these greater penalties might include the denial of parole, the loss of sentence credits, the revocation of probation and supervised release, or the denial of visitation rights with family members like in the *Jessie* case.

C. The Post-*McKune* Disagreement Among the Federal Circuit Courts

Unlike military appellate courts, federal civilian appellate courts have grappled with the constitutionality of these greater penalties. The problem they face is that Justice O'Connor's controlling opinion in *McKune* failed to articulate a clear legal standard for determining how much can be taken from prisoners based on their refusal to take responsibility. As a result,

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[98] *Id.* at *6.

[99] See *id.* at *18 ("[T]o the extent that appellant's claims are meritorious, there exists a court that has the authority to order actual (i.e., injunctive) relief. The Tenth Circuit has determined that military prisoners at Fort Leavenworth may file suit in U.S. District Court seeking injunctive and declaratory relief for oppressive prison conditions.").

[100] Army Court of Criminal Appeal's decision in the *Jessie* case is in the process of being appealed higher to Court of Appeals for the Armed Forces. *See* United States v. Jessie, No. 19-0192, 2019 C.A.A.F. Lexis 145 (Feb. 26, 2019).

[101] *Id.* at *19.

lower courts have struggled to apply *McKune* outside the specific facts of that case.[102] Despite the confusion and uncertainty, as lower courts have struggled with this issue, some consistent themes and legal principles have emerged.

First, denying inmates certain privileges related to prison living conditions for a refusal to take responsibility and enter sex offender treatment does not violate the Fifth Amendment. This includes privileges like work opportunities and access to entertainment and recreation.[103] It even includes transferring the inmate to a higher security ward or facility. Because both the plurality and concurring opinions in *McKune* found no issue with withholding these privileges, lower courts have treated this as well settled law.[104] Courts show strong deference to prison administrators when determining what policies and practices should be implemented in their prisons.[105]

One penalty that might be more problematic is the denial of an inmate's right to visit with his own biological children, given that the Supreme Court has established a "fundamental liberty interest of natural parents in the care, custody, and management of their child."[106] The Supreme Court has held that some limitations on an inmate's visitation rights are permissible, but it is unclear whether this extends to members of the inmate's immediate family.[107] Visitation rights are an issue for

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[102] *See* Roman v. Diguglielmo, 675 F.3d 204, 213 (3d Cir. 2012) ("Thus, in light of the lack of clear consensus from other circuits and because Justice O'Connor's controlling opinion in *McKune* stops short of articulating its own test, we are tasked with the responsibility of distilling the core principles of that decision."); Ainsworth v. Stanley, 317 F.3d 1, 4 (1st Cir. 2002) ("The difficulty presented by this interpretive precept is that Justice O'Connor does not purport to lay out any abstract analysis or unifying theory that would prefigure her views regarding the constitutionality of New Hampshire's program. Taken together, the O'Connor and plurality opinions do not clearly foreshadow how the court would decide our case.").

[103] *See e.g.* Aruanno v. Spagnuolo, 292 Fed. Appx. 184, 186 (3d Cir. 2008).

[104] *See* Searcy v. Simmons, 299 F.3d 1220, 1225 (10th Cir. 2002) ("Had the only consequences Mr. Searcy suffered for his refusal to provide his sexual history been the reduction in his privilege level and a concomitant transfer to a maximum security prison, *McKune* would clearly call for affirming the district court's decision.").

[105] *See e.g.* Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

[106] Santosky v. Kramer, 455 U.S. 745, 753 (1982).

[107] *See* Overton v. Bazzetta, 539 U.S. 126, 131 (2003) ("We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners.").

inmates who are convicted of child sex offenses, because confinement facilities will often block all access to children until they make progress in a sex offender treatment program.[108] Until recently, the JRCF at Fort Leavenworth did not allow child sex offenders to have any contact with children (including their own biological children who they did not offend against) without an exception to policy, but they could not get an exception to policy unless they took responsibility for their crimes and entered treatment.[109] The JRCF has recently changed its policy (possibly in response to appellate litigation), but a child sex offender still cannot have contact with children without an individualized assessment of risk.[110] However, even for a seemingly severe penalty like blocking an inmate's access to his biological children, courts have still found no Fifth Amendment violation.[111] Similarly, in the *Jessie* case, the dissenting opinion found a First Amendment violation, but not a Fifth Amendment violation because of the legal framework established by *McKune* and the subsequent decisions of the federal circuit courts.[112]

Second, although taking away privileges may be legitimate, the penalties cannot be so severe as to violate the due process standard established in *Sandin*. This standard forbids penalties that constitute "an atypical and significant hardship on the [defendant's] prison conditions."[113] It is currently unclear what denial of privileges, if any, would amount to a due process violation under *Sandin.* To date, no court has found a Fifth Amendment violation based solely on a change in prison living conditions. The only other guidance from the courts is that the threatened consequence cannot be so "grave" as to give the inmate no choice but to incriminate himself.[114]

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[108] *See* United States v. Jessie, No. 20160187, 2018 CCA Lexis 609, at *26–29 (A. Ct. Crim. App. Dec. 28, 2018) (Schasberger, J., dissenting).

[109] *See id.*

[110] *See id* at *5.

[111] *See* Wirsching v. Colorado, 360 F.3d 1191 (10th Cir. 2004).

[112] *See Jessie*, 2018 CCA Lexis at *26 n. 16 (Schasberger, J., dissenting) ("I would find that appellant's First Amendment rights were violated. I would not, however, find that the policy violated appellant's Fifth Amendment rights. . . . Given that courts have found no Fifth Amendment violation in policies that are stricter than the one in question here, I would conclude that appellant's Fifth Amendment rights were not violated.").

[113] Roman v. Diguglielmo, 675 F.3d 204, 213–214 (3d Cir. 2012).

[114] *See id.* at 211 ("Though drawing the distinction between a lawful condition of confinement and a condition that impermissibly encumbers a prisoner's rights can be challenging, it is a distinction that rests on the difference between merely pressuring or encouraging an inmate to incriminate himself, and compelling him to do so through the threat of consequences so grave as to leave him no choice at all.") (internal quotation omitted).

One point echoed by most courts is that the threatened penalty cannot be a subterfuge or a surreptitious way for the government to collect additional evidence.[115] The penalty for refusing to take responsibility must be related to a legitimate governmental interest. The weaker the government's interest, the more likely there is to be a Fifth Amendment violation.[116] Some have argued for the application of the Supreme Court's four-part test in *Turner v. Safley*, which is used determine if a prison regulation impermissibly infringes on an inmate's exercise of constitutional rights.[117] However, in the Fifth Amendment context, most courts seem to apply the *Sandin* due process test, which is much more deferential to prison administrators and much less likely to find a constitutional violation.

Third, speculative consequences are unlikely to rise to the level of a Fifth Amendment violation. The penalties for inmates who refuse to incriminate themselves must be concrete and definite. *United States v. Antelope*, one of the only cases where a court actually found a Fifth Amendment violation, illustrates this point.[118] In *Antelope*, both the threat of self-incrimination and the penalty imposed were real and concrete. As part of his sex offender treatment program, the defendant was required to admit to both his charged crimes and uncharged misconduct, and the program often shared patients' admissions with the authorities which led to additional convictions.[119] Further, while the defendant was on probation, he repeatedly refused to incriminate himself in treatment, and the government "twice revoked his conditional liberty and sent him to prison."[120] In this case, the defendant could show that there was an actual threat of future prosecution, and that his silence had real consequences when his freedom was twice taken away.

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[115] *See* Searcy v. Simmons, 299 F.3d 1220, 1227 (10th Cir. 2002).

[116] *See Roman*, 675 F.3d at 213 ("Thus, the statement sought—whether the inmate decides to speak or to remain silent—must be tethered to some independent, legitimate state purpose, such as rehabilitating inmates convicted of certain crimes. The more attenuated the relationship between the two, the greater our concern that the penalty is indicative of a state attempt to wield its power in an impermissible manner.").

[117] 482 U.S. 78 (1987). The four parts of this test are: whether the regulation has a valid and rational connection to a legitimate government interest, whether alternative means exist for the inmate to exercise his rights, what impact the regulation has on other inmates and prison resources, and whether there are any reasonable alternatives to the regulation. *See* United States v. Jessie, No. 20160187, 2018 CCA Lexis 609, at *26–27 (Schasberger, J., dissenting).

[118] 395 F.3d 1128 (9th Cir. 2005).

[119] *See id.* at 1135.

[120] *Id.* at 1130.

In contrast, many courts have rejected Fifth Amendment claims when the penalty faced by the defendant is unclear or speculative.[121] In *Entzi v. Redmann*, the court rejected a Fifth Amendment claim when the only consequence to the defendant was that he faced a probation revocation hearing, but his probation was not actually revoked.[122] Similarly, in *United States v. Lara*, the court rejected the defendant's claim because his probation could not have been revoked automatically based on his decision not to incriminate himself.[123] Additionally, courts have rejected Fifth Amendment claims where the refusal to self-incriminate is only one factor among many considered when deciding whether to impose a penalty.[124] When inmates receive administrative due process, like a parole board or probation hearing, before a penalty is imposed, courts are reluctant to find a Fifth Amendment violation.[125] Unless a defendant can show that a penalty was automatically imposed based solely on his refusal to incriminate himself, he is unlikely to succeed on a Fifth Amendment claim.

Fourth, courts have largely upheld taking away sentence credits based on a refusal to admit responsibility and enter treatment. The premise is that there is no constitutional entitlement to receive a reduced sentence based on good conduct.[126] The decision to award good conduct credit is normally within the sole discretion of prison administrators.[127] The same

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[121] *See* Huschak v. Gray, 642 F.Supp.2d 1268, 1283 (D. Kan. 2009) ("In sum, the loss of liberty and the risk of incrimination were more concrete and less generalized in *Antelope* than in the case now before the court. For these reasons, the court rejects petitioner's final claim for relief.").

[122] 485 F.3d 998, 1002 (8th Cir. 2007); *see also* United States v. Lee, 315 F.3d 206, 212 (3d Cir. 2003) ("There is no evidence that Lee's ability to remain on probation is conditional on his waiving the Fifth Amendment privilege with respect to future criminal prosecution.").

[123] 850 F.3d 686, 692 (4th Cir. 2017); *see also* Minnesota v. Murphy, 465 U.S. 420, 438 (1984) (finding that there was no evidence that defendant's probation would be revoked if he remained silent).

[124] *See* Roman v. Diguglielmo, 675 F.3d 204, 210 (3d Cir. 2012) ("The record before us is not clear as to the extent to which Roman's refusal to participate in the program was the sole or primary cause of the Board's repeated refusal to grant him parole. In each Board letter, it is listed as one among several reasons for denying him parole.").

[125] *See* Field v. Fitzgerald, No. 2:16-cv-97, 2017 U.S. Dist. Lexis 134125, at *16 (N.D.W.V. July 19, 2017) ("If any alleged violation of probation were to occur, Plaintiff would be given the opportunity to appear before the court for a hearing before revocation can occur.").

[126] *See* Searcy v. Simmons, 299 F.3d 1220, 1226 (10th Cir. 2002).

[127] *See Entzi*, 485 F.3d at 1004 ("The North Dakota Department of Corrections has the exclusive discretion to determine whether an offender should be credited with a performance-based sentence reduction."); *see also* Wirsching v. Colorado, 360 F.3d

is true in the military corrections system. The installation commander of the correctional facility has the authority to determine whether an inmate should forfeit earned good time credit.[128] Whether an inmate can earn good time credit is collateral to the court-martial process, and it should not be considered by the factfinder when determining an appropriate sentence.[129] Although it may seem like taking away sentence credit is making an inmate's sentence longer, courts view it as taking away an administrative privilege to which the inmate is not inherently entitled. Thus, courts have not found a Fifth Amendment violation when credit is taken away based on a refusal to take responsibility.

Fifth, courts have even upheld the denial of parole based on an inmate's refusal to take responsibility and enter treatment. Like sentence credits, most courts hold that inmates have no inherent right to parole.[130] At first glance, the denial of parole may seem like lengthening an inmate's sentence based on a refusal to take responsibility, the type of action that Justice Kennedy warned against in the plurality opinion in *McKune*. However, courts view the denial of parole not as extending an inmate's sentence, but as merely forcing the inmate to serve his full lawful sentence.[131] Thus, the denial of parole is not viewed as a punishment which makes a sentence longer, but as the withholding of a privilege that leaves the inmate in no worse position than when he entered confinement. Sixth, whether an inmate is incarcerated or out of confinement on supervised released is important to the Fifth Amendment analysis. Courts are less likely to find a Fifth Amendment violation for prisoners based on their reduced constitutional rights. For example, the Supreme Court held that a death row inmate's silence at a clemency hearing could be used

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1191, 1204 (10th Cir. 2004) ("As in Kansas, the Department of Corrections in Colorado retains discretion in awarding good time credits.").

[128] *See* U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 12-5(a) (15 June 2006); *see also* United States v. Spaustat, 57 M.J. 256, 263 (C.A.A.F. 2002) ("The responsibility for determining how much good time credit, if any, will be awarded is an administrative responsibility, vested in the commander of the confinement facility.").

[129] *See* United States v. McNutt, 62 M.J. 16, 20 (C.A.A.F. 2005).

[130] *See* Roman v. Diguglielmo, 675 F.3d 204, 214 (3d Cir. 2012) ("Roman has no right or entitlement to parole under Pennsylvania law.").

[131] *See* Ainsworth v. Stanley, 371 F.3d 1, 5 (1st Cir. 2002) ("Since parole involves relief from a penalty that has already been imposed -- the full period of incarceration to which appellants were sentenced -- parole can be considered a 'benefit that the state may condition on completion of the program.'") (internal quotation omitted); *see also* Lusik v. Sauers, No. 13-2627, 2014 U.S. Dist. Lexis 104757, at *11 (E.D.P.A. May 16, 2014) ("The denial of parole also does not lengthen a prisoner's sentence.").

against him when deciding whether to stay his execution.[132] The decision in that case hinged on the reduced Fifth Amendment rights of prisoners.

In *Antelope*, one of the only cases where a court found a Fifth Amendment violation, the defendant was on supervised release and was sent back to prison for refusing to incriminate himself. Similarly, in *United States v. Von Behren*, the 10th Circuit Court of Appeals found a Fifth Amendment violation where an inmate on supervised release was threatened with a return to prison if he did not answer incriminating questions during a polygraph.[133] The court found it particularly significant that the inmate was on supervised release and not incarcerated at the time of questioning.[134] In the two cases above, the courts viewed the return to confinement from supervised release as extending the inmate's confinement time. In contrast, courts do not view denying parole or revoking sentence credits as lengthening the sentence of someone who is already confined.

In the military, there are at least three ways that an inmate can be released from confinement before the completion of his full sentence. He can earn good time credit, he can be voluntarily paroled, or he can be involuntarily placed on Mandatory Supervised Release (MSR). [135] Inmates are much more likely to be placed on MSR than they are to be granted parole.[136] Regardless of whether inmates are granted parole or involuntarily placed on MSR, they must comply with the conditions of their release or they can be returned to confinement.[137] For convicted sex offenders, one of the conditions of release often includes participating in sex offender treatment on the outside.[138] Thus, the military may face the same issue where an inmate on supervised release is returned to confinement for refusing to incriminate himself in sex offender treatment.

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[132] *See* Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 286 (1998).
[133] 822 F.3d 1139 (10th Cir. 2016).
[134] *See id.* at 1148.
[135] *See* Huschak v. Gray, 642 F. Supp. 2d. 1268, 1273 (D. Kan. 2009).
[136] *See* Major T. Campbell Warner, *Going Beyond Article 60*, ARMY LAW., June 2017, at 22 ("In recent years, fewer than two percent of clemency requests have been granted, and parole has been granted on average in less than fifteen percent of cases. In contrast, mandatory supervised release is approved at significantly higher rates, increasing from approximately 46% in fiscal year 2012 to approximately 73% in fiscal year 2016.").
[137] *See id.*
[138] *See* United States v. Pena, 64 M.J. 259, 263 (C.A.A.F. 2007).

D. Lessons for the Military to Avoid Fifth Amendment Concerns

Until the Supreme Court decides another case like *McKune* and establishes a clear Fifth Amendment standard for statements of responsibility made during sex offender treatment, there will be differences among the federal circuits and uncertainty in the law. Even with this uncertainty, the military can take certain steps to avoid potentially violating the Fifth Amendment's prohibition on compelled self-incrimination. First, when determining whether to grant or deny parole or sentence credits, the military should use a holistic approach that considers many factors. In other words, parole and sentence credits should not be automatically denied because an inmate refuses to incriminate himself and enter sex offender treatment. Obviously, the refusal of a convicted sex offender to enter treatment is an important factor in determining rehabilitative potential, but it should not be the only factor considered. As long as the military uses a holistic approach, it can avoid the kind of definite and concrete penalty that has caused courts to find a Fifth Amendment violation.[139] More routine prison privileges, like those involving living conditions, can be revoked automatically if an inmate refuses to enter treatment without creating a Fifth Amendment concern. But because parole and sentence credits directly affect how long an inmate will remain in prison, they should not be automatically revoked based on a refusal to take responsibility.

Second, the military should be more cautious in imposing penalties for those on probation and supervised release. It is problematic to drag people back into prison based on their refusal to incriminate themselves in sex offender treatment. This deprivation of liberty is the kind of concrete harm that causes courts to find a Fifth Amendment violation. Acceptance of responsibility is normally one of the first steps of sex offender treatment. The rationale is that an inmate cannot begin treatment until he has overcome denial and admitted to what he has done. Inmates who have already been granted parole or supervised release are presumably further along on the path to reform. If an inmate is deemed fit to be released back into society, then the determination has been made that the inmate is progressing towards rehabilitation. Eliciting statements of responsibility from inmates on parole and supervised release should be far less important

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[139] *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478 (1972) ("It is well established that the privilege protects against real dangers, not remote and speculative possibilities.").

because these inmates should have already accepted responsibility when they began treatment in prison.

Third, military confinement facilities should avoid blanket policies where child sex offenders are banned from having any contact with children until they take responsibility and enter treatment. It is problematic to deny an inmate any contact with his biological children, particularly if he did not offend against those children. As explained above, the Supreme Court has recognized a constitutional right of biological parents to be involved in the lives of their children.[140] If an inmate is denied contact with his biological children solely because he refuses to take responsibility and enter treatment, then the inmate is losing a constitutional right based on the refusal to incriminate himself. This is the type of concrete harm that might constitute improper compulsion under the Fifth Amendment, or even infringe on freedom of association under the First Amendment.[141] Although A.C.C.A.'s majority opinion in *Jessie* failed to address this issue on the merits, it invited the inmate to pursue his constitutional claim in federal district court.[142]

Instead of instituting a blanket policy banning child visitation for sex offenders, a better approach (which the JRCF at Fort Leavenworth is already implementing)[143] involves an individual risk assessment of each inmate. Under this approach, whether or not an inmate is allowed contact with his children depends on his risk level, not solely on whether he has taken responsibility and entered treatment. This avoids the inmate receiving a direct and definite penalty for the refusal to incriminate himself. At the very least, absent a strong risk of danger, confinement facilities should allow inmates some method of maintaining relationships with their biological children. Even if the inmates are not permitted to see their children in person, they should be allowed phone contact, written correspondence, or other means of communication. Providing alternate avenues for inmates to contact their biological children will help the prison's restrictions pass constitutional muster if a court were to apply the test in *Turner v. Safley*.[144]

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[140] *See supra* note 106 and accompanying text.
[141] *See supra* note 112 and accompanying text.
[142] *See* United States v. Jessie, No. 20160187, 2018 CCA Lexis 609, at *18 (A. Ct. Crim. App. Dec. 28, 2018).
[143] *See id.* at *5.
[144] *See supra* note 117 and accompanying text.

Fourth, requiring statements of responsibility must always be tied to a therapeutic purpose, and can never be subterfuge for collecting incriminating evidence for trial. Law enforcement and prosecutors should have no role in the administration of prison sex offender treatment. Mental health providers should only collect statements of responsibility if they truly believe it is necessary for successful treatment. Courts are very deferential to prison officials as long as their programs advance valid penological purposes, but collecting evidence for prosecution is not a valid purpose. If there is any indication that statements of responsibility are being required to generate incriminating evidence, then courts are much more likely to find a constitutional violation.

IV. The MRE 403 Balancing Test

The third major legal issue concerning incriminating statements made during prison sex offender treatment is whether these statements can survive an MRE 403 balancing test when offered as evidence at a rehearing. Although relevant evidence is generally admissible, MRE 403 states that, "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."[145] The central concern of MRE 403 "is that evidence will be used in a way that distorts rather than aids accurate fact finding."[146] Trial judges get "wide discretion" in applying MRE 403 and receive significant deference from appellate courts.[147] As long as the trial judge clearly articulates his or her reasoning on the record, the trial judge's MRE 403 analysis can only be overturned if there is a clear abuse of discretion.[148] Some common types of evidence that trigger MRE 403 are crime scene or injury photographs if they are overly graphic.[149] The balancing test under MRE 403 is also required for uncharged misconduct offered under MRE

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[145] *See* MCM, *supra* note 5, at MIL. R. EVID. 403.

[146] United States v. Stephens, 67 M.J. 233, 236 (C.A.A.F. 2009) (internal quotation omitted).

[147] United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000).

[148] *See* United States v. Solomon, 72 M.J. 176, 180 (C.A.A.F. 2013).

[149] *See* United States v. White, 23 M.J. 84, 88 (C.M.A. 1986) ("We turn next to the photographs which appellant claims were cumulative and introduced only to inflame and arouse the passion of the members of the court. This evidentiary ruling is also governed by Mil.R.Evid. 403. It is well-settled that photographs are not admissible for the illegitimate purpose of inflaming or shocking the court-martial.").

404(b),[150] and for propensity evidence offered under MRE 413 and 414.[151] There is limited military appellate precedent, however, on how MRE 403 should be used to evaluate incriminating statements made by the accused. The rule has been used to exclude portions of a confession related to uncharged misconduct because this information could confuse and distract the factfinder.[152] But there is little guidance on how MRE 403 should be used to evaluate the overall reliability and probative value of incriminating statements based on their surrounding circumstances.

A. The Probative Value Versus the Unfair Prejudice of Admitting the Statements

One might argue that statements made during prison sex offender treatment have a low probative value because of the pressures on an inmate to take responsibility. An inmate may only be confessing in the hopes of receiving a reduced sentence or better living conditions, and not because he is actually guilty. For an inmate who is incarcerated for an extended period of time, there is strong pressure to do anything that will lead to an early release. Thus, it may be difficult to tell whether an inmate is accepting responsibility because he is truly guilty and wants to reform, or if he is only admitting guilt to reduce his confinement time.

But the circumstances surrounding these statements should go to the weight of the evidence, not its admissibility. An accused's statement is "always at issue from the moment it is entered into evidence" and "the credibility of an accused's confession is subject to attack."[153] It is the job of the factfinder to determine the credibility of the accused's confession and how much weight it should receive.[154] The Rules for Courts-Martial specifically allow the Defense to introduce evidence that challenges the voluntariness of a confession, even after the confession has been admitted into evidence.[155]

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[150] *See e.g.* United States v. Mirandes-Gonzales, 26 M.J. 411, 413 (C.M.A. 1988).
[151] *See e.g.* United States v. Berry, 61 M.J. 91 (C.A.A.F. 2005).
[152] *See* United States v. Mack, 25 M.J. 519, 521-22 (C.M.A. 1987); *see also* United States v. Martin, 20 M.J. 227, 230 (C.M.A. 1985).
[153] United States v. Dougherty, No. 201300060, 2013 CCA Lexis 1072, at *13 (N-M. Ct. Crim. App. Dec. 31, 2013).
[154] See United States v. Duvall, 47 M.J. 189, 192 (C.A.A.F. 1997).
[155] *See* MCM, *supra* note 5, at R.C.M. 304(g) ("If a statement is admitted into evidence, the military judge must permit the defense to present relevant evidence with respect to the voluntariness of the statement and must instruct the members to give such weight to the statement as it deserves under all the circumstances.").

If a trial judge were to exclude incriminating statements of the accused made during prison sex offender treatment under MRE 403, the judge would necessarily be making a determination that the statements are not trustworthy. Military appellate courts have explicitly rejected credibility assessments by the trial judge to exclude evidence under MRE 403, since this should be the province of the factfinder.[156]

In the context of MRE 403, unfair prejudice is defined as the "capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."[157] In a typical sexual assault case, the only two witnesses to the charged misconduct are the victim and the accused. Additionally, the accused is the only one who can provide insight into his own mental state at the time of the offense. This is why statements of the accused are highly probative in sexual assault cases, particularly when the statements go against the accused's penal interest. To completely exclude these statements would deprive the factfinder of some of the most probative evidence available. Instead of exclusion, a better course of action is to allow the Government to admit these statements, and then allow defense counsel to present all of the mitigating circumstances and pressures on the accused. This allows the factfinder to evaluate all of the information and to decide the appropriate weight of the statements, instead of completely denying them access to the evidence.

B. The Danger of Alerting the Factfinder of the Previous Conviction

One of the greatest risks of unfair prejudice to the accused when admitting a confession made during sex offender treatment is that it will notify the panel at the rehearing that the accused has been previously convicted of the same offense for which they are now deciding. In a close case, a panel member might improperly use the fact that the accused has been previously convicted as a tiebreaker to reach a guilty verdict. In a

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[156] *See* United States v. Kohlbek, No. 20160427, 2018 CCA Lexis 177, at *8 (A. Ct. Crim. App. Apr. 12, 2018); *see also* United States v. Gonzalez, 16 M.J. 58, 60 (C.M.A. 1983) ("There is no authority for the proposition impliedly advanced by the Government that Mil. R. Evid. 403, or its Federal counterpart, permits a trial judge to 'weed out' evidence on the basis of his or her own view of its credibility. Such a procedure would usurp the function of the fact finder and raise severe due process questions. Nothing could be further from the purpose of Fed. R. Evid. 403.").

[157] United States v. Collier, 67 M.J. 347, 354 (C.A.A.F. 2009) (quoting Old Chief v. United States, 519 U.S. 172, 180 (1997)).

rehearing, "evidence of an earlier conviction for the same offense normally would be inadmissible when the conviction had been set aside on appeal."[158]

The goal of a rehearing on the merits is to "place the United States and the accused in the same position as they were at the beginning of the original trial."[159] After a conviction is overturned and a rehearing is authorized, "no vestiges of the former court-martial should linger" and a rehearing "wipe[s] the slate clean as if no previous conviction and sentence had existed."[160] At a rehearing, the accused is not bound by the forum selection at the original trial and may choose a different forum.[161] The accused is also not bound by previous guilty pleas for convictions that are overturned, and the accused can change his plea to not guilty for these offenses at the retrial.[162]

Rule for Courts-Martial 810 contains various provisions to ensure the fairness of a rehearing. No panel member who served on the original court-martial may serve as a panel member at the rehearing,[163] although the same military judge may preside over the rehearing even if the original trial was judge alone.[164] The purpose of selecting new panel members is to ensure that they are not influenced by the original proceedings.[165] Additionally, no panel member at the rehearing may examine the record from the previous trial unless permitted by the military judge.[166] For combined rehearings, the trial proceeds first on the merits for the overturned convictions, with no reference to the convictions that survived appeal until the sentencing proceedings.[167] The purpose of these provisions is to prevent the new panel members from being tainted by the

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[158] United States v. Giles, 59 M.J. 374, 376 (C.A.A.F. 2004).
[159] United States v. Staten, 45 C.M.R. 267, 269 (C.M.A. 1972).
[160] United States v. Howell, 75 M.J. 386, 392 (C.A.A.F. 2016) (internal citations omitted).
[161] *See* MCM, *supra* note 5, at R.C.M. 801(b)(3).
[162] *See generally* United States v. Stout, No. 20120592, 2018 CCA Lexis 174 (A. Ct. Crim. App. Apr. 9, 2018).
[163] *See* MCM, *supra* note 5, at R.C.M. 801(b)(1); *see also* United States v. Chandler, 74 M.J. 674, 684 (A. Ct. Crim. App. 2015) (stating that the military judge had no authority to order a rehearing with the same members).
[164] *See* MCM, *supra* note 5, at R.C.M. 801(b)(2).
[165] *See* United States v. Mora, 26 M.J. 122, 125 (C.M.A. 1988) (explaining that panel members from the original convening order could serve at a new trial after a judge alone mistrial because those panel members were never assembled and had never heard any of the case).
[166] *See* MCM, *supra* note 5, at R.C.M. 801(c).
[167] *See id.* at R.C.M. 810(a)(3).

original trial, whether that involves evidence presented at the original trial or the results from the original trial.

The concern about notifying the panel at a rehearing of previously overturned convictions was thoroughly explored in *United States v. Giles*.[168] In *Giles*, the accused was convicted of two drug offenses at the original trial after she testified in her own defense. After the convictions were overturned on appeal, the Government brought the drug offenses back at a rehearing, but also added a perjury charge based on the accused's testimony at the original trial. Given the nature of the perjury offense and the way that the specification was drafted by the Government, it was impossible to prove the perjury offense without introducing evidence of the prior trial and portions of the previous record.[169] The trial judge denied the Defense's motion to sever the perjury charge from the drug offenses, but the judge did make efforts to limit the prejudicial effect of the previous trial. It became clear that the judge's efforts were not successful after questions were submitted by the panel president during deliberations. The panel president asked if the accused had been previously discharged because he knew that verbatim transcripts of courts-martial (which had been admitted into evidence in this case to support the perjury charge) were only produced in cases resulting in a discharge.[170] He also asked whether double jeopardy applied at this rehearing because the accused was being tried for the same drug offenses as at the original trial.[171]

On appeal, C.A.A.F. rejected the trial judge's decision not to sever the perjury charge. Noting that military commanders get extensive training and experience in military law, C.A.A.F. explained that, "[t]he questions posed by the president of the court-martial in this case demonstrated that the senior member of the panel had a reasonable basis for concluding that Appellant had been tried, convicted, and sentenced to a discharge for the same drug-related specifications that were now under consideration."[172] Also, because the panel was not informed about the appellate process, the panel had no reason to believe that there was anything defective in the previous convictions. The *Giles* case illustrates the potential problems at a rehearing when information from the original trial is brought in front of the members of the subsequent rehearing.

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[168] 59 M.J. 374 (C.A.A.F. 2004).
[169] *See id.* at 376.
[170] *See id.* at 377.
[171] *See id.* at 378.
[172] *Id.*

If incriminating statements made during prison sex offender treatment are admitted at a rehearing, there is the potential for similar issues as in the *Giles* case. At the very least, these statements force defense counsel to make a difficult choice. The most effective way to attack these statements is to explain all of the pressures on an inmate to take responsibility and enter sex offender treatment, like losing prison privileges or the possibility for parole. However, by introducing evidence of these pressures, Defense is signaling to the panel that the accused has been previously incarcerated for the same offense that is now being retried. Defense is forced to choose between an uncontested confession of the accused, or alerting the panel that the accused has already been tried and convicted of the same offense.

1. Statements Made During Sex Offender Treatment Should Be Admissible at a Rehearing Because the Government is Allowed to Bring in New Evidence

Although rehearings must be fair and generally place the accused in the same position as at the start of the original trial, the fact that the rehearing is occurring years later sometimes means that new evidence is available. The Supreme Court has stated that, "[i]t is undeniable, of course, that upon appellate reversal of a conviction the Government is not limited at a new trial to the evidence presented at the first trial, but is free to strengthen its case in any way it can by the introduction of new evidence."[173] Statements made during prison sex offender treatment necessarily fall into the category of new evidence not available at the original trial. Without the original trial, the accused would have never been confined and had the opportunity to make these statements. There is one exception to the rule about presenting new evidence at a rehearing. If the appellate court finds that there was insufficient evidence to sustain a conviction, the accused must be acquitted and the Government does not get a second chance to strengthen its case.[174] This exception, however, does not apply to the rehearings generated by *United States v. Hills*, because these rehearings were caused by a legal error based on the improper use of evidentiary rules.[175]

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[173] United States v. Shotwell, 355 U.S. 233, 243 (1957).
[174] *See* United States v. Gallagher, 602 F.2d 1139, 1143 (3d Cir. 1979); *see also* Burks v. United States, 437 U.S. 1 (1978).
[175] *See supra* note 3.

Sometimes the events surrounding the original trial or the appellate process affect the evidence presented at a rehearing. In the murder case of *United States v. Mansfield*, the accused wrote, at the request of his original defense counsel, a "Life Story" which contained incriminating statements in order to support a lack of mental responsibility defense.[176] At the rehearing, the accused's new defense counsel argued that the Government should not be able to use these incriminating statements because they were tainted by the first trial. They also argued that because the accused's original representation was so ineffective, it was impossible for him to receive a fair trial at the rehearing. The court rejected this argument, stating that, "counsel treat the appellant's situation as a two-act play where the scenes in the first act are so important that the play can never be revised to arrive at a different ending before the final curtain. We, on the other hand, view the circumstances as two one-act dramas that, while tangentially connected, need not reach the same conclusion."[177] The court noted that the decisions made by the accused or the defense counsel at the original trial or during the appellate process might necessarily limit the strategy at a rehearing.[178]

Similarly, military courts have held that an accused's testimony at the first trial can be used against him at a rehearing.[179] This is true even if the testimony might have been influenced by a legal error at the first trial, such as evidence obtained from an illegal search.[180] The Supreme Court has echoed this rule, with the caveat that the accused's former testimony cannot be used if it was the product of an involuntary or illegal confession.[181] The use of an accused's former testimony is closely analogous to the use of statements made during sex offender treatment. Neither category of statements made by the accused would have been available to the Government without the first overturned trial. However, this does not mean that they should be inadmissible at the rehearing. Although this may place the accused in a worse position, the law generally

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176 33 M.J. 972 (A.F.C.M.R. 1991).
177 *Id.* at 984.
178 *Id.* at 985 ("Any rehearing can limit trial tactics.").
179 *See* United States v. Wade, 34 C.M.R. 769, 772 (A.F.B.R. 1963) ("It has been generally held that an accused who has voluntarily taken the stand in his own behalf in a criminal prosecution, testifying without asserting his privilege against self-incrimination, has waived the privilege as to the testimony given so that his confessions or admissions contained in such testimony may be used against him in a subsequent trial of the same case.").
180 *See* United States v. Rodison, 15 C.MR. 466, 467–68 (A.B.R. 1954).
181 *See* Harrison v. United States, 392 U.S. 219, 222 (1968).

allows the Government to hold the accused accountable for his own statements.

2. The Risk of Unfair Prejudice from the Original Trial Does Not Justify Excluding Statements Made During Sex Offender Treatment

At a rehearing, it is difficult to avoid all references to the original trial. In *Mansfield*, the court recognized that at a rehearing, references to the original trial were common, but any unfair prejudice could be cured by an instruction to the members at the beginning of the trial.[182] In this case, the instruction given was, "The accused has been tried before. You should not concern yourself with this fact. Your verdict must be based solely on the evidence in the present trial, in accordance with the court's instructions."[183] A similar instruction is also given by federal judges at retrials.[184] In fact, even the model script for a contested rehearing from the Military Judges' Benchbook deliberately tells the panel members that the accused has been tried before.[185]

Additionally, the provisions in RCM 810 which prevent reference to the original trial are not without limits. In *United States v. Ruppel*, C.A.A.F. explained that RCM 810 contains procedural rules for rehearings which can be trumped by the Military Rules of Evidence.[186] In *Ruppel*, C.A.A.F. held that, at a combined rehearing, the underlying conduct behind a conviction that survived appeal could be used under MRE 404(b) to show intent to commit offenses which were being retried on the merits.[187] This contradicted the language of RCM 810(a)(3) at the time, which stated that combined rehearings should first proceed on the merits

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[182] 33 M.J. 972, 987 (A.F.C.M.R. 1991).
[183] *Id.*
[184] *See e.g.* United States v. Hykel, 461 F.2d 721, 726 (3d Cir. 1972).
[185] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, last updated Jan. 7, 2019, available at: https://www.jagcnet.army.mil/ebb/index.html ("There has been a prior trial in this case. This is what is known as a 'rehearing' and is being conducted because the prior trial was conducted improperly. . . . You will not be told of the results of that prior trial; your duty as court members is to determine whether the accused is guilty of any of the offenses on the flyer, and if guilty, adjudge an appropriate sentence, based only on what legal and competent evidence is presented for your consideration in this trial. The fact that there has been a prior trial is not evidence of guilt, nor is it evidence that you can use for sentencing, if sentencing is required. The fact that there has been a prior trial must be totally disregarded by you.").
[186] 49 M.J. 247, 250 (C.A.A.F. 1998).
[187] *See id.*

without reference to the offenses being reheard on sentence only.[188] Although the trial judge in this case allowed the underlying conduct under MRE 404(b), "he specifically ordered the Government to refrain on findings from any mention of the fact that appellant had been convicted of that act during the initial proceedings."[189] This was presumably based on the trial judge's view that although the panel could hear about the underlying conduct, it was too prejudicial for the panel to hear that the accused had been convicted of this conduct at the previous trial.

A military court went even further in *United States v. Rodriguez*, a case where the accused was convicted of child molestation against two victims at the original trial, but one of the convictions was overturned on appeal.[190] At the combined rehearing, evidence related to the upheld child molestation conviction was allowed on the merits under MRE 414 to show the accused's propensity to commit the child molestation offense that was being retried. Unlike in *Ruppel*, the Government was not limited to the underlying conduct and could introduce evidence of the accused's conviction. One reason was that the defense attorney's opening statement blatantly opened the door to the conviction.[191] The defense attorney made the tactical decision to mention the original convictions against both victims, stating on the record that he had "essentially adapted based on the judge's ruling."[192] During motions practice prior to the rehearing, the military judge had hinted that Defense could open the door to the conviction from the first trial by attacking the credibility of the MRE 414 victim at the rehearing.[193] This forced the Defense to make a Hobson's choice. They could either attack the credibility of the MRE 414 victim and open the door to the accused's conviction at the first trial, or they could not attack it and allow evidence of child molestation to come in

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[188] R.C.M. 810(a)(3) now contains an exception that allows reference to these offenses if allowed by the Military Rules of Evidence, basically adopting the holding in *Ruppel*.

[189] *Ruppel*, 49 M.J. at 249.

[190] No. 9900997, 2007 CCA Lexis 251 (N-M. Ct. Crim. App. July 17, 2007).

[191] *See id.* at *12 ("The military judge has instructed you that this is a retrial. . . .Well, members what the judge didn't tell you and what I'm going to tell you now is that at that hearing, at that proceeding, Gunnery Sergeant Rodriguez was found guilty. He was found guilty of committing molestation against [MR] and [JR].")

[192] *Id.* at *15.

[193] *See id.* at *9 ("[T]he record of a prior conviction, assuming there's an otherwise proper purpose for admitting it, is admissible in this court….I think the defense is on fair notice that that's out there, that if they open the door and the government decides to drive the truck through, that they may very well be entitled to. And it would certainly be something that the defense counsel should take into consideration as you're litigating this case. It does seem to me that it's very powerful evidence.").

uncontested. In what was likely an overreaction to this difficult choice, the defense attorney chose to preempt the issue by explaining the entire procedural history of the case in his opening statement, including that the accused had already been convicted of the offense that was now being retried.

The difficult choice that the defense attorney faced in *Rodriguez* is similar to the difficult choices surrounding statements made during sex offender treatment. As explained above, defense attorneys have two undesirable options when facing these statements. The first option is to not attack the circumstances of the confession. Under this option, the panel would only know that the accused made incriminating statements, but not that they were part of a prison sex offender treatment program. This outcome triggers the MRE 403 concern of misleading the factfinder. Without knowing the true circumstances surrounding the incriminating statements, the panel may actually give them more weight than they deserve.

The second option for defense counsel is to conduct a full and vigorous cross-examination of the circumstances surrounding the incriminating statements. The advantage of this option is that the panel is made aware of the many pressures and incentives that might have caused the accused to falsely accept responsibility. This option also has many disadvantages. First, it notifies the panel that the accused has been previously incarcerated, presumably for the misconduct that they are now adjudicating at the rehearing. This creates unfair prejudice because the panel may impermissibly use evidence of the accused's prior conviction and confinement when determining the outcome at the rehearing. Second, it potentially confuses the issues and shifts the focus of the court-martial away from the charged misconduct. It causes a trial within a trial about all of the details surrounding the accused's participation in prison sex offender treatment.[194] Third, it arguably wastes time and could cause undue delay because the focus is shifted away from the merits of the case. But just like in *Rodriguez*, although statements made during sex offender treatment force defense attorneys to make difficult choices, this does not mean that the statements should be excluded.

Similar issues of unfair prejudice also occur at trials for co-conspirators. Just as evidence of an overturned conviction at a rehearing

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[194] See United States v. Solomon, 72 M.J. 176, 181 (C.A.A.F. 2013) (noting that evidence should be excluded under MRE 403 if it creates a "distracting mini-trial") (internal quotation omitted).

could prejudice the panel, evidence of the conviction of a co-conspirator could prejudice the panel against the accused. Knowing that an accomplice has been convicted might make the panel assume that the accused is also guilty. However, in *United States v. Bell*, C.A.A.F. held that the conviction of a co-conspirator was admissible as impeachment evidence if the co-conspirator testified for the defense.[195] This was still subject to an MRE 403 balancing test, and the dissenting opinion argued that the conviction of the co-conspirator was too unfairly prejudicial to the accused.[196]

Unlike civilian juries, which are chosen randomly from the general population, military panels are hand-picked collections of highly intelligent and qualified officers and NCOs. We should trust panels to rationally evaluate evidence, and to follow the instructions of the military trial judge. Panels are fully capable of hearing a confession and all of the surrounding circumstances, and then making a determination on how much weight to afford that confession. If the confession is excluded under MRE 403, the trial judge is withholding probative evidence from the panel, and the judge is substituting his or her own credibility determination for that of the factfinder.

V. Conclusion

When a conviction is overturned on appeal and sent back for a rehearing on the merits, the Government faces significant challenges in proving the case again. This is particularly true for sexual assault cases, which often hinge on witness testimony and credibility. With C.A.A.F.'s decisions in *United States v. Hills* and its progeny, military prosecutors are now frequently facing the daunting prospect of a sexual assault rehearing. Despite the challenges for the Government at a rehearing, there can be some advantages. The Government is not limited to evidence that was available at the original trial, and if new incriminating evidence is discovered, that evidence may be admissible at the rehearing.

An incriminating statement made by an inmate in prison sex offender treatment is powerful evidence that was not available at the original trial. Most sex offender treatment programs require participants to take responsibility for their crimes before they can begin treatment. These

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[195] 44 M.J. 403, 407 (C.A.A.F. 1996).
[196] *See id.* at 408 (Everett, J., dissenting).

statements of responsibility are often done in writing, and are often preserved as part of an inmate's confinement record. This incriminating evidence that was not available at the original trial can help even the playing field and counteract the difficulties of re-proving a case years later. But the Government must overcome the three major legal issues addressed in this article before these incriminating statements can be admitted at a rehearing.

First, the Government must show that these statements are not privileged under MRE 513 as part of the psychotherapist-patient privilege. The purpose of MRE 513 is to protect the confidentiality of communications made during mental health treatment, with the goal of encouraging people to seek treatment. On its face, MRE 513 seems to apply to statements made during prison sex offender treatment. However, for statements concerning sexual offenses committed against children, the "child abuse" exception at MRE 513(d)(2) likely makes the privilege inapplicable. For statements concerning adult sexual offenses, the Government can argue that the inmate waived the privilege at the beginning of treatment. Most prison sex offender programs require inmates to sign written waivers of confidentiality before they begin treatment so that their progress can be shared with prison administrators and parole boards. Although Defense should argue that this waiver is limited and should not extend to a rehearing, courts tend to broadly construe waivers because privileges block access to evidence and impede the truth-seeking function of the court-martial.

Second, the Government must show that these statements were not improperly compelled self-incrimination in violation of the Fifth Amendment. Depending on the confinement facility, inmates who refuse to take responsibility and enter treatment face a range of penalties including: decreased living conditions, reduced work opportunities, transfer to a higher security ward, loss of sentence credits, denial of parole, and even revocation of supervised release. At some point, the penalties become so severe that the inmate has no choice but to incriminate himself, which is improper compulsion. Although courts are very deferential to prison administrators and hesitant to find a constitutional violation, this article recommends four strategies for military confinement facilities to avoid Fifth Amendment concerns.

Third, the Government must show that these statements can survive an MRE 403 balancing test when offered at a rehearing. This test balances the probative value of the statements against the danger of unfair

prejudice. The probative value of a confession is usually high, but Defense can argue that the probative value in this situation is diminished because of the pressures on an inmate to confess. The greatest potential for unfair prejudice likely comes from the risk that the factfinder will improperly consider the accused's overturned conviction as evidence that he is guilty. But it is impossible to avoid all references to the previous trial at a rehearing. The military judge can use limiting instructions and other methods to limit the prejudicial effect of the previous trial.

Prison sex offender treatment programs undoubtedly force inmates to make a difficult choice. Inmates must choose between maintaining their innocence and hoping their appeal will be successful, or accepting responsibility for their crimes and enjoying a higher quality of life and the possibility of a reduced sentence. But the criminal justice system often forces people to make difficult choices. An inmate who confesses in order to earn incentives and early release should not be able to take back that confession if he is successful on appeal. If statements of responsibility are admissible at a rehearing, it allows the factfinder to determine their appropriate weight and importance. Instead of completely withholding potentially powerful and highly probative evidence, it trusts the panel or the military judge to use their common sense and judgment. The Defense is free to present all of the circumstances and the pressures on the inmate to confess, and the factfinder can evaluate all of this information when making a determination on how much weight to give the evidence. Allowing incriminating statements made by inmates during sex offender treatment promotes the truth-seeking function of the court-martial and helps combat the practical difficulties of re-proving a sexual assault case at a rehearing.

Appendix A: Cases Overturned by *United States v. Hills*

Name	Citation	Court	Date	Victim	Remedy
U.S. v. Long	2018 CCA Lexis 512	Army CCA	Oct. 26, 2018	Child	Rehearing Authorized
U.S. v. Clark	2018 CCA Lexis 505	Army CCA	Oct. 12, 2018	Adult	Rehearing Authorized
U.S. v. Wall	2018 CCA Lexis 479	Army CCA	Oct. 5, 2018	Adult	Rehearing Authorized
U.S. v. Medellin	2018 CCA Lexis 412	Navy-Marine CCA	Aug. 28, 2018	Child	Rehearing Authorized
U.S. v. Hernandez	2018 CCA Lexis 389	Army CCA	Aug. 10, 2018	Adult	Rehearing Authorized
U.S. v. Rambharose	2018 CCA Lexis 341	Air Force CCA	July 13, 2018	Adult	Rehearing Authorized
U.S. v. Campbell	2018 CCA Lexis 356	Air Force CCA	July 12, 2018	Adult	Rehearing Authorized
U.S. v. Rice	2018 CCA Lexis 339	Air Force CCA	July 11, 2018	Adult	Rehearing Authorized
U.S. v. Gonzalez	2018 CCA Lexis 327	Army CCA	July 3, 2018	Adult	Rehearing Authorized
U.S. v. Williams	77 M.J. 459	CAAF	June 27, 2018	Adult	Rehearing Authorized
U.S. v. Hopkins	2018 CCA Lexis 254	Army CCA	May 25, 2018	Child	Rehearing Authorized
U.S. v. Hoffman	77 MJ 414	CAAF	May 7, 2018	Child	Rehearing Authorized
U.S. v. Berger	2018 CCA Lexis 218	Navy-Marine CCA	May 3, 2018	Adult	Rehearing Authorized
U.S. v. Lightsey	2018 CCA Lexis 220	Air Force CCA	Apr. 30, 2018	Adult	Rehearing Authorized

U.S. v. Torrealba	2018 CCA Lexis 147	Army CCA	Mar. 20, 2018	Adult	Rehearing Authorized
U.S. v. Hill	2018 CCA Lexis 111	Army CCA	Feb. 27, 2018	Adult	Sentence Reassessment (no change)
U.S. v. Thompson	2018 CCA Lexis 91	Army CCA	Feb. 26, 2018	Adult	Rehearing Authorized
U.S. v. Brown	2018 CCA Lexis 88	Army CCA	Feb. 23, 2018	Adult	Rehearing Authorized
U.S. v. Pflug	2018 CCA Lexis 83	Air Force CCA	Feb. 20, 2018	Adult	Rehearing Authorized
U.S. v. Harris	2018 CCA Lexis 80	Army CCA	Feb. 16, 2018	Child	Sentence Reassessment
U.S. v. Stanton	2018 CCA Lexis 70	Air Force CCA	Feb. 7, 2018	Adult	Rehearing Authorized
U.S. v. Shields	77 M.J. 621	Navy-Marine CCA	Jan. 31, 2018	Adult	Rehearing Authorized
U.S. v. Contreras	2018 CCA Lexis 54	Air Force CCA	Jan. 31, 2018	Adult	Rehearing Authorized
U.S.v. Koch	2018 CCA Lexis 34	Army CCA	Jan. 29, 2018	Child	Sentence Reassessment
U.S. v. Elie	2018 CCA Lexis 17	Army CCA	Jan. 16, 2018	Adult	Rehearing Authorized
U.S. v. Guardado	77 M.J. 90	CAAF	Dec. 12, 2017	Child	Rehearing Authorized
U.S. v. Ramos-Cruz	2017 CCA Lexis 759	Army CCA	Dec. 11, 2017	Adult	Rehearing Authorized
U.S. v. Moynihan	2017 CCA Lexis 743	Army CCA	Nov. 30, 2017	Child	Sentence Reassessment
U.S. v. Degregori	2017 CCA Lexis 741	Army CCA	Nov. 30, 2017	Adult	Rehearing Authorized

U.S. v. Tafoya	2017 CCA Lexis 733	Army CCA	Nov. 28, 2017	Adult	Rehearing Authorized
U.S. v. Reynolds	2017 CCA Lexis 731	Army CCA	Nov. 28, 2017	Adult and Child	Sentence Reassessment
U.S. v. Aguiar-Perez	2017 CCA Lexis 732	Army CCA	Nov. 28, 2017	Adult	Rehearing Authorized
U.S. v. Wilson-Crow	2017 CCA Lexis 716	Air Force CCA	Nov. 16, 2017	Adult and Child	Rehearing Authorized
U.S. v. Morales	2017 CCA Lexis 676	Army CCA	Oct. 31, 2017	Adult	Rehearing Authorized
U.S. v. Covey	2017 CCA Lexis 622	Army CCA	Sep. 21, 2017	Adult	Rehearing Authorized
U.S. v. Prasad	2017 CCA Lexis 610	Air Force CCA	Sep. 5, 2017	Adult	Rehearing Authorized
U.S. v. Santos	2017 CCA Lexis 575	Air Force CCA	Aug. 23, 2017	Adult	Rehearing Authorized
U.S. v. Denson	2017 CCA Lexis 564	Army CCA	Aug. 18, 2017	Adult	Rehearing Authorized
U.S. v. Wiredu	2017 CCA Lexis 555	Navy-Marine CCA	Aug. 17, 2017	Adult	Rehearing Authorized
U.S. v. Silva	2017 CCA Lexis 486	Air Force CCA	July 19, 2017	Adult	Rehearing Authorized
U.S. v. Upshaw	2017 CCA Lexis 363	Navy-Marine CCA	May 31, 2017	Adult	Rehearing Authorized
U.S. v. Bass	2017 CCA Lexis 362	Navy-Marine CCA	May 31, 2017	Adult	Rehearing Authorized
U.S. v. Grant	2017 CCA Lexis 357	Army CCA	May 25, 2017	Adult	Rehearing Authorized
U.S. v. Moore	2017 CCA Lexis 191	Army CCA	Mar. 23, 2017	Child	Rehearing Authorized

U.S. v. Hukill	76 M.J. 219	CAAF	Feb. 28, 2017	Adult	Rehearing Authorized
U.S. v. Gonzales	2017 CCA Lexis 128	Army CCA	Feb. 22, 2017	Child	Rehearing Authorized
U.S. v. Henry	76 M.J. 595	Air Force CCA	Feb. 17, 2017	Adult	Rehearing Authorized
U.S. v. Duarte	2017 CCA Lexis 61	Army CCA	Jan. 30, 2017	Adult	Rehearing Authorized
U.S. v. Adams	2017 CCA Lexis 6	Army CCA	Jan. 6, 2017	Child	Rehearing Authorized
U.S. v. Mancini	2016 CCA Lexis 660	Air Force CCA	Nov. 7, 2016	Adult	Rehearing Authorized
U.S. v. Navarro	2016 CCA Lexis 576	Air Force CCA	Sep. 29, 2016	Child	Sentence Reassessment