Postcards from the Edge[1]: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence

Major Stephen R. Henley
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

For followers of the Military and Federal Rules of Evidence, the last year has been, in a word, productive. From recognition of a psychotherapist-patient privilege in federal practice to the use of dysfunctional family "profile" evidence in military child abuse cases, from the defense's use of exculpatory polygraph evidence in courts-martial to the government's use of inculpatory hair analysis to prove drug use, recent military and civilian cases provide significant evidentiary tools for the aggressive trial practitioner. This article addresses these and other developments in evidentiary law, focusing on selected decisions by the military and civilian appellate courts during the last year.

Partially Closing the Open Door-- Limitations on Rebutting Defense Character Testimony

The Military Rules of Evidence (MRE) exclude the circumstantial use of a person's character.[2] Generally speaking, the prosecution cannot, in the first instance, introduce character evidence to show that the accused acted in accordance with a particular character trait; in other words, that he committed the charged offense because he is a certain type of person.[3] The prosecution, however, can introduce character evidence responsively.[4] If the defense introduces[5] evidence of a "pertinent"[6] character trait, the trial counsel may rebut it by cross-examining that witness with respect to specific instances of misconduct or other bad acts engaged in by the accused.[7] In *United States v. Pruitt*,[8] the Air Force Court of Criminal Appeals (AFCCA)[9] partially closed the character door by reaffirming existing limitations on the use of extrinsic evidence offered solely to rebut a good soldier defense.

Airman First Class Martell Pruitt was a postal clerk charged with under-reporting the sale of two money orders for $1000 less than their actual value and falsifying documents to cover it up.[10] Pruitt admitted to falsifying one of the money orders with the aid of his then-girlfriend Sarah, but contended it was meant as a paperwork joke on his supervisor.[11] As evidence of his innocence, Pruitt called several witnesses who testified regard-

1. POSTCARDS FROM THE EDGE (Columbia Pictures 1990) (a witty exposé of life in the Hollywood fast lane starring Meryl Streep and Shirley MacLaine).

2. MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 404 (1995 ed.) [hereinafter MCM].

3. GLEN WEISSENBERGER, FEDERAL EVIDENCE--1996 COURTROOM MANUAL 48 (1996); s*ee also* United States v. Reed, 44 M.J. 825 (A.F. Ct. Crim. App. 1996) (trial counsel cannot *initiate* evidence of the accused's character by simply cross-examining the accused regarding a pertinent character trait not already placed in issue by the defense).

4. STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 320 (6th ed. 1994). "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Michelson v. United States, 335 U.S. 469, 492 (1948).

5. Mil. R. Evid. 405(a) recognizes three devices to prove the accused's character: reputation within a pertinent community, opinion of a witness familiar with the character, and specific instances of conduct if character is an element of the charge or defense.

6. Whether a trait is pertinent depends on the relationship between the charged offense and the accused's defense. *See, e.g.*, United States v. Gagan, 43 M.J. 200 (1995) (accused's heterosexuality is a pertinent character trait when offered to disprove homosexual sodomy and indecent assault offenses).

7. *See* United States v. Brewer, 43 M.J. 43 (1996) (trial counsel can test the soundness of opinion testimony through inquiry into relevant specific instances of conduct even though they may not be within the time period upon which the witness bases his or her opinion).

8. 43 M.J. 864 (A.F. Ct. Crim. App.), *review granted*, 45 M.J. 42 (1996).

9. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals (codified at 10 U.S.C. § 866 n. (1995) and 10 U.S.C. § 941 n. (1995)), respectively. The new names are the: Army Court of Criminal Appeals, Navy-Marine Court of Criminal Appeals, Air Force Court of Criminal Appeals, Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces. In this article, the name of the court that was in place when the decision was published will be used.

10. *Pruitt*, 43 M.J. at 866.

11. *Id.* at 867.

ing their high opinion of his military character. On cross-examination, the trial counsel asked the witnesses whether they were aware that Pruitt had taped a sexual act with Sarah without her consent and had threatened to send the tape to her mother, that Pruitt had assaulted Sarah on occasion, and that he had also been caught driving while intoxicated (DWI).[12]

While the witnesses conceded that these acts would tend to show poor military character, they testified they did not know whether Pruitt had actually committed them.[13] Not satisfied with these responses, the trial counsel called Sarah to authenticate the tape and corroborate the assault, and introduced a copy of an Article 15 Pruitt received for the DWI. The AFCCA found error, though harmless under the circumstances.[14]

When challenging a good soldier defense, the trial counsel can either call her own reputation and opinion character witness in rebuttal or *inquire* on cross-examination as to the defense witness's familiarity with specific instances of the accused's conduct.[15] She may not, however, introduce independent proof that the acts or events actually occurred,[16] unless the extrinsic proof is offered for a purpose other than to rebut character testimony.[17] Here, while the trial counsel properly asked whether the witnesses were aware of the prior acts, the military judge erred by permitting her to call Sarah to corroborate both the assault and videotaping and by permitting her to introduce extrinsic proof of the DWI.

The Air Force court cautioned practitioners that, when cross-examining a defense character witness with pertinent specific acts, the trial counsel must have a good faith belief that the report or fact she is asking about is true.[18] While the military judge can assume counsel has sufficient proof in hand, the better practice is to voir dire her to determine the good faith basis for the allegations before allowing cross-examination to proceed.[19]

In addition, even if trial counsel are allowed to ask questions regarding pertinent acts of misconduct, defense counsel should realize that the focus of cross-examination is on the *accused's* conduct and not on the disciplinary action taken by the command against him.[20] Here, the trial counsel should have focused on the conduct underlying the arrest for the assault on Sarah and not on the arrest itself;[21] the focus should have been on the act of driving while intoxicated and not on the imposition of Article 15 punishment. As the court illustrated, other disciplinary actions in the accused's personnel files, such as bars to reenlistment, letters of reprimand and counseling statements, can be similarly characterized. If used to challenge the opinion of a good military character witness, trial counsel must focus on the underlying facts and circumstances that brought about the discipline and not on the actual record of any subsequent punishment.[22]

Pruitt provides an excellent overview of the methods used to prove and rebut character evidence in courts-martial and is highly recommended as essential reading for all counsel.

Do We Have the Right Man? Child Victims, Recall, and Military Rule of Evidence 412[23]

12. *Id.*

13. *Id.*

14. *Id.* at 870.

15. "In all cases in which evidence of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." MCM, *supra* note 2, MIL. R. EVID. 405(a).

16. For example, a character witness who offers an opinion as to the accused's character for peacefulness may be asked whether they knew the accused had assaulted his first sergeant three months before the charged offense. If the witness did not know, the implication is that he or she is not sufficiently qualified to attest to the accused's peacefulness. Similarly, if he or she did know, and still had a favorable opinion, then the witness himself is suspect. However, the trial counsel is still bound by the witness' response and could not call the first sergeant to prove the assault actually happened.

17. For example, Mil. R. Evid. 608(c) permits a witness to be impeached with evidence of bias, prejudice or motive to misrepresent. As this evidence may be introduced through the examination of witnesses, or "by evidence otherwise adduced," extrinsic evidence is plainly allowed. SALZBURG, *supra* note 4, at 647.

18. *Pruitt*, 43 M.J. at 868.

19. *Id; see also* EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE 230 (2d ed. 1993).

20. *See* United States v. Robertson, 39 M.J. 211 (C.M.A. 1994), *cert. denied*, 115 S. Ct. 721 (1995).

21. *Pruitt*, 43 M.J. at 868.

22. *Id.*

23. As a consequence of Mil. R. Evid. 1102, Mil. R. Evid. 412 was amended by the Violent Crime Control and Law Enforcement Act of 1994, effective 29 May 1995. The new rule broadens the trial protections afforded victims in cases involving sexual misconduct. For an overview of the differences between the new and old versions of Mil. R. Evid. 412, see Stephen Henley, *Caveat Criminale: The Impact of the New Military Rules of Evidence in Sexual Assault and Child Molestation Cases*, ARMY LAW., Mar. 1996, at 82-89.

Evidence of a sexual assault victim's past sexual behavior or sexual predisposition is legally irrelevant to the determination of whether a sexual assault occurred,[24] subject to three limited exceptions.[25] In *United States v. Buenaventura*,[26] the CAAF examined the scope of two of these exceptions in a case involving evidence of sexual abuse by a child victim's grandfather and expert testimony regarding a phenomenon known as "memory transference."[27]

A general court-martial convicted Specialist Ricardo Buenaventura of, among other offenses, rape, indecent acts and indecent liberties committed upon his eight-year-old niece, AD.[28] The allegations forming the basis for the charges came to light when AD told a school counselor that she had been sexually abused by her uncle in her home and that she had also been abused by her grandfather when he was living in the house during the same time. These accusations were later repeated to a therapist and a clinical psychologist. At trial, the defense informed the court it intended to call AD's father, who would testify he suspected AD's grandfather of abuse.[29] The defense also had evidence that the grandfather would tell AD "you stink;" and then abuse her while she bathed. When speaking with the school counselor, AD described the accused's abuse similarly--he would come into the bathroom, tell her to take a shower with him, and then abuse her while she bathed.

The defense theory was that AD had been abused by her grandfather and was simply substituting Buenaventura in her recall of the events, someone much more acceptable emotionally and psychologically.[30] The military judge refused to permit cross-examination about sexual abuse by the grandfather, because it was not favorable to the defense.[31]

In reversing the Army Court of Criminal Appeals (ACCA), the CAAF declared that the issue was not whether Buenaventura had committed any of the offenses, but whether he had committed all the offenses of which he was charged.[32] Here, the grandfather's abuse arguably was the source of AD's trauma. It was also evidence that she was mistaken about the identity of her abuser, which went directly to the credibility of AD's claims, and called into question whether her memory was clear and accurate on critical details about the allegations regarding Buenaventura's assaults as contrasted with incidents of abuse by the grandfather.[33] The court also concluded that the evidence was relevant as it showed that someone else was the source of injury,[34] explained how AD acquired knowledge beyond her years, and corroborated Buenaventura's version of the events.[35]

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24. Rule 412 reads in pertinent part:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any . . . criminal proceeding involving alleged sexual misconduct . . .
> (1) Evidence offered to prove that any alleged victim engaged in sexual behavior.
> (2) Evidence offered to prove any alleged victim's sexual predisposition.

MCM, *supra* note 2, MIL. R. EVID. 412.

25. Mil. R. Evid. 412(b) provides exceptions to the general exclusionary rule. First, evidence of specific instances of the alleged victim's sexual behavior is permitted when the accused is trying to prove that someone else was the source of semen, injury, or other physical evidence. Second, evidence of specific instances of sexual behavior between the alleged victim and the accused is allowed to prove consent on the part of the victim. Third, evidence may be constitutionally required to be admitted. MCM, *supra* note 2, MIL. R. EVID. 412(b)(1)(a-c).

26. 45 M.J. 72 (1996).

27. Normalization, or memory transference, involves transferring emotions that an individual has toward a significant person in his life onto a trusted figure, such as a child-victim substituting the abuser with a parent or teacher in his recall of the assault. SIGMUND FREUD, AN OUTLINE OF PSYCHO-ANALYSIS 65-70 (1949).

28. His approved sentence included a dishonorable discharge, confinement for twelve years and forfeiture of all pay and allowances. *Buenaventura*, 45 M.J. at 72-73.

29. He had found AD naked in bed with her grandfather. He saw his children watching pornographic movies in their grandfather's room. He would wake up in the morning and find AD in her grandfather's room. Once when asked why she was not wearing underwear, AD said "Grandpa took them off me last night." Despite the existence of this seemingly overwhelming evidence of sexual abuse, the father apparently did nothing. *Id.* at 74. Several days after the court-martial, a man sold him the Brooklyn Bridge.

30. *Id.* at 73-74.

31. *Id.* at 79. The military judge accepted the argument that abuse by the grandfather made it no less likely that Buenaventura had also molested the victim.

32. *Id.*

33. *Id.* at 79-80.

34. In dissent, Judge Crawford argued the majority's theory that post-traumatic stress disorder is an "injury" as used in Mil. R. Evid. 412(b)(2)(A) is contrary to congressional intent; "injury" is a physical injury, not an emotional one. *Id.* at 80.

35. *Id.* at 79.

Buenaventura was not the only CAAF decision this last year involving evidence of memory transference. The court reviewed two other cases with a similar issue, reaching, however, different conclusions as to the admissibility of the evidence.

In *United States v. Gober*,[36] the accused was charged with rape, sodomy and indecent acts with his eight and thirteen-year-old stepdaughters between 1987 and 1990. The defense theorized that the girl's biological father sexually abused his daughters prior to 1985, when Gober married the mother of the victims.[37] At the time of the second marriage, there was evidence of significant family trauma, including an acrimonious divorce and several instances of the natural father kidnapping the girls and hiding them for months at a time.[38] The only defense evidence of sexual abuse, however, came from one expert[39] who would testify that, based on family history interviews, the victims possibly suffered from sexual abuse and attributed it to Gober by memory transference;[40] this testimony was eventually excluded by the military judge. The CAAF affirmed the conviction concluding the proffered evidence was too remote in time, occurring two years before Gober even entered the picture, and the expert's proposed testimony was not based on actual interviews and psychological testing of the victims.[41]

In *United States v. Pagel*,[42] the accused was charged with attempted carnal knowledge, sodomy and indecent acts with his daughter. To show she must have confused him with someone else, the accused wanted to introduce evidence of a one-time assault in a Montana trailer park by a molester named "Jerry." "Jerry" allegedly fondled, kissed and attempted to get on top of the victim several years before Pagel's two-year period of abuse in the family home.[43] The military judge excluded the evidence, and the CAAF affirmed. Even assuming the allegations were true, the court concluded that the prior single incident of abuse was too remote in time and location and not supported by expert testimony.[44]

Can the three cases be reconciled? Unlike the evidence in *Gober* and *Pagel*, the victim's description of her uncle's and grandfather's sexual assaults in *Buenaventura* was strikingly similar. The instances of abuse were preceded by pornographic movies, took place in the family home, were associated with bathing, and occurred during a period in which both men were living in the house. The defense counsel in *Buenaventura* also had expert testimony based on personal interviews and testing that the victim could have transferred the identity of the perpetrator in her recall of the abuse.[45]

In many child sexual abuse cases, the accused, a trusted authority figure in the victim's life, concedes the abuse occurred but argues that someone else did it. If faced with a similar scenario and there is evidence of a similar abuser committing similar acts close in time and location, coupled with expert testimony based on interviews of the parties, the accused may be able to successfully argue the child is substituting him for the true abuser in his or her recall of the traumatic events.

I Didn't Do It, But If I Did . . . . Unequivocal Defense Concessions May Bar Government's Use of Uncharged Misconduct

The Government's use of "bad acts" evidence, offered solely to show the accused is a bad person, is contrary to the character ban in MRE 404(a).[46] The government typically gets around this evidentiary obstacle by arguing a non-character theory of relevance under MRE 404(b).[47] In balancing the probative value of the evidence against the danger of unfair prejudice to the accused,[48] the military judge considers any number of fac-

36. 43 M.J. 52 (1995).

37. *Id.* at 53-54.

38. *Id.* at 53.

39. For almost 100 years, expert witnesses have been accurately described by the courts as "the mere paid advocates or partisans of those who employ and pay them, as much as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'expert.'" Chaulk By Murphy v. Volkswagen of America, Inc., 808 F.2d 639, 644 (7th Cir. 1986) (quoting Keegan v. Minneapolis & St. Louis R.R., 78 N.W. 965, 966 (Minn. 1899)).

40. *Gober*, 43 M.J. at 55.

41. *Id.* at 58-59.

42. 45 M.J. 64 (1996).

43. *Id.* at 68.

44. *Id.* at 70.

45. *Buenaventura*, 45 M.J. at 80.

46. "Evidence of a person's character or trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion." MCM, *supra* note 2, MIL. R. EVID. 404(a).

tors.[49] From a defense perspective, one of the most important is whether there are alternative means of accomplishing the same evidentiary goal. The accused's unequivocal offer to concede an element of the offense may help in this regard.

In *Crowder v. United States*,[50] the United States Court of Appeals for the District of Columbia Circuit held that, when a defendant unequivocally concedes an element of the charged offense, the government may not introduce uncharged misconduct evidence under Rule 404(b) if intended to prove that same element.[51]

Three police officers in a marked car observed Rochelle Ardall Crowder exchange a small object for cash with another man. They motioned to Crowder, who ran away. One of the pursuing policemen saw Crowder throw down a brown paper bag as he scaled a fence; the bag contained ninety-three zip lock bags of crack and thirty-eight packets of heroin. In a search incident to arrest, a pager and $988 in cash were seized. Crowder denied ever possessing the bag, and his first trial ended in a hung jury.[52] At the second trial, the Assistant United States Attorney (AUSA) informed the court and the defense he intended to offer evidence that Crowder had sold drugs previously to an undercover officer. This evidence was offered to show knowledge of drug dealing and to prove the "intent to distribute" element of the offense.[53] Crowder offered to concede every element of the crime, except whether he possessed the drugs on the day of the arrest.[54] The judge refused to bind the government's hands and admitted the evidence over defense objection.

In the second case, an undercover police officer wanting to buy crack walked up to a man standing on a D.C. street corner. The cop handed over $20, and the man walked over to another man sitting in a nearby car, an alleged drug dealer named Horace Davis.[55] The cash was exchanged for a small packet, and the man walked back towards the undercover officer. The man placed the packet on a window ledge and motioned for the undercover officer to retrieve it. The officer complied and subsequently radioed descriptions for both men. Davis was arrested coming out of a nearby grocery store minutes later.[56] At trial, Davis intended to raise a mistaken identity defense and subpoenaed the store owner as an alibi witness. The AUSA provided notice he intended to introduce evidence that Davis had sold cocaine three times before the charged offense, evidence offered to show knowledge of drug dealing and to prove the intent to distribute element of the charged offense.[57] Davis offered to concede that the person who possessed the drugs knew they were drugs and intended to sell them. He claimed, however, that it was not he. The judge admitted the evidence over defense objection.

On appeal, the D.C. Circuit held that a defendant's unequivocal offer to concede an element of the offense, combined with an explicit jury instruction that the government no longer needs to prove the element, makes evidence of uncharged misconduct under Rule 404(b) inadmissible if offered to prove that same element.[58] In the court's mind, this offer to concede, combined with the jury instruction,[59] gives the government everything the evidence could show with respect to the element and does so without risk that the jury will consider the uncharged misconduct for an impermissible propensity purpose. "In the absence

47. "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." MCM, *supra* note 2, MIL. R. EVID. 404(b).

48. Where the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or undue consumption of time, the evidence may be excluded even though it is relevant. MCM, *supra* note 2, MIL. R. EVID. 403.

49. These factors may include: the degree of similarity between the charged offense and the uncharged act, the importance of the fact to be considered, the importance of hearing from the accused, and the ability of the panel to adhere to a limiting instruction. *See* GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 176-78 (3d ed. 1991).

50. 87 F.3d 1405 (D.C. Cir. 1996) (en banc), *vacated and remanded*, 65 U.S.L.W. 3505 (U.S. Jan. 21, 1997). The case was a consolidated review of two separate appeals in which both defendants were convicted of various drug distribution offenses.

51. *Id.* at 1407.

52. Crowder claimed that when he refused to talk to the police about an unrelated murder, they beat him and falsely accused him of possessing the drugs. To refute the government's claim he was selling drugs, defense witnesses testified the object Crowder passed was actually a cigarette. The large amount of cash was for some home repairs and the beeper was to communicate with the mother of Crowder's daughter, since he had no phone. *Id.* at 1408.

53. Rule 404(b) now requires the government to provide the defense with reasonable notice in advance of trial if it intends to introduce extrinsic offense evidence.

54. *Crowder*, 87 F.3d at 1409.

55. *Id.* at 1407-08.

56. *Id.* at 1408.

57. *Id.*

58. *Id.* at 1410.

of any other non-propensity purpose for the bad acts evidence, the evidence is therefore inadmissible because its only purpose could (sic) be to prove the character of a person in order to show action in conformity therewith, precisely what Rule 404(b)'s first sentence prohibits."[60]

In a strongly worded dissent, the minority argued that the prosecution's burden to prove every element of the offense is not relieved by the accused's tactical decision not to contest an essential element of the offense.[61] Criminal defendants should not be able to block the government's evidence and dictate trial strategy by conceding, admitting, refuting, not contesting or stipulating to what the evidence will tend to prove.[62] It is the government's evidence that must show that *this* defendant knew the substance was drugs and that *this* defendant intended to distribute the drugs--not that *someone* may have intended to distribute.[63] A defendant's offer to concede should simply be one factor the judge takes into consideration when balancing the probative value of the evidence against the danger of unfair prejudice to the accused.[64]

Does *Crowder* have any application to military practice? Consider the case of *United States v. Orsburn*.[65] Staff Sergeant Steven Orsburn was charged with, *inter alia*, indecent acts with his eight-year-old daughter. The trial counsel wanted to introduce pornographic books found in Orsburn's bedroom as evidence of his intent to gratify his lust or sexual desires, an element of the charged offense.[66] Orsburn objected to the admissibility of the books, arguing that the offenses never happened but if they did, by their very nature, whoever did them must have done so with the intent to gratify his lust or sexual desires. To Orsburn, then, the only reason the trial counsel was offering the books was to show his character as a sexual pervert, predator or molester, which violates the general character ban found in MRE 404.[67] The military judge admitted the books over defense objection. In writing for the majority in affirming the conviction, then Chief Judge Sullivan held that the military judge did not abuse his discretion in balancing the probative value of the evidence against the danger of unfair prejudice to the accused. Importantly, Sullivan noted that Orsburn "had refused to commit himself on the issue of intent or provide any assurances that he would not dispute intent."[68] If he had, under the rationale set forth by the majority in *Crowder*, would the evidence have been suppressed and a different result reached?[69]

Of course, the current albatrosses around the necks of the accused are the new Military Rules of Evidence, 413 and 414,[70] putatively permitting trial counsel to introduce evidence of

59. The court included a sample instruction which would follow the judge's instructions on the elements of the offense: "By Davis's agreement, the Government need not prove either knowledge or intent. Your job is thus limited to the possession element of the crime. Therefore, in order to meet its burden of proof, the Government must prove beyond a reasonable doubt only one element of the crime, that Horace Davis was in possession of the cocaine base charged in the indictment." *Id.* at 1411. "You must find Horace Davis guilty if you find the government has proven beyond a reasonable doubt that Horace Davis possessed the drugs." *Id.* at 1417.

60. *Id.* at 1410.

61. *Id.* at 1421.

62. CHARLES A. WRIGHT & KENNETH W. GRAHAM JR., FEDERAL PRACTICE AND PROCEDURE 198-99 (1978).

63. *Crowder*, 87 F.3d at 1427-28.

64. Of course, if the balancing test favors the accused, the military judge may have the inherent authority to compel the prosecution to accept a defense tendered concession or abate the proceedings. *See, e.g.*, United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979), *vacated*, 448 U.S. 902, *on remand*, 626 F.2d 444 (5th Cir. 1980), *cert. denied*, 450 U.S. 956 (1981).

65. 31 M.J. 182 (C.M.A. 1990), *cert. denied*, 498 U.S. 1120 (1991).

66. The three paperback books were entitled *Degraded, Delighted Daughter*; *Chained Youth: Girls in Bondage*; and *The Whore Makers*. *Id*. at 183.

67. *Id.* at 187.

68. *Id.* at 188.

69. In *Old Chief v. United States*, 117 S. Ct. 644 (1997), the Supreme Court recently looked at the issue of defense concessions in the context of a case in which the defendant is charged with possession of a firearm by a felon and offers to concede the predicate felony.

After a fight in which shots were fired, Johnny Lynn Old Chief, a felon in possession of a firearm, was charged with, *inter alia*, violating 18 U.S.C. § 922. Old Chief offered to stipulate to the existence of the prior felony conviction, arguing that the nature of the prior offense, aggravated assault, would result in the jury concluding that he was, by propensity, the probable perpetrator of the charged offense. *Id*. at 646. The government refused to stipulate and insisted on its right to present its own evidence of the prior conviction. The district court agreed and the Ninth Circuit affirmed. The Supreme Court granted certiorari and reversed. *Id*. at 647. The Court held that the district court abuses its discretion under Fed. R. Evid. 403 if it spurns a defendant's offer to concede a prior judgment and admits the full judgment and record over objection, when the name and nature of the prior offense raises the risk the jury will improperly consider the evidence and when the purpose of the evidence is solely to prove the element of prior conviction. *Id*. at 647-56. Although the Court made clear that its holding was limited to cases involving proof of felon status, a situation rarely seen in military practice, considering the broad language used in the opinion in incorporating Rule 403, the case may have some precedential value for the military defense counsel in arguing concessions to uncharged misconduct evidence.

70. *See* Henley, *supra* note 23.

other offenses of sexual assault or child molestation on the issue of the accused's propensity or disposition to commit these types of offenses. If this is so,[71] it is difficult to see how the accused could ever concede the purpose for which the evidence is being offered, as the concession would necessarily require an admission that the accused is predisposed to commit child molestation or sexual assault. Regardless, *Crowder* and *Orsburn* provide some precedent for defense counsel to cite in helping stem the expanding government tide in sexual assault and child molestation cases.

Tell Me Your Secrets. A Psychotherapist-Patient Privilege in Military Practice?

In *Jaffee v. Redmond*,[72] the United States Supreme Court held that confidential communications between patients and their psychotherapists made during the course of diagnosis or treatment are now protected from compelled disclosure in federal litigation.[73] The decision brings federal practice into line with those states that already recognize some form of psychotherapist-patient privilege.[74] It is unclear, however, whether this significant decision will result in immediate recognition of a similar privilege in military practice, absent a legislative or executive mandate amending the rules of evidence.[75]

Mary Lu Redmond, a police officer on patrol duty in an Illinois apartment complex, shot and killed Ricky Allen to prevent him from stabbing a man he was chasing.[76] Allen's estate thereafter filed a federal wrongful death suit alleging Redmond violated Allen's constitutional rights by using excessive force during the encounter.[77] During pretrial discovery, the estate's administrator sought access to notes of some fifty counseling sessions between Redmond and Karen Beyer, a clinical social worker licensed by the state and hired by the city.[78] Redmond and Beyer resisted the discovery request, asserting the conversations and notes were privileged communications protected from compelled disclosure. The district court rejected this claim and ordered production of the notes.[79] Neither Redmond nor Beyer complied with the order and the trial judge ultimately instructed the jury that the refusal to hand over the notes had no legal justification and they could presume the content of the notes would have been unfavorable to Redmond.[80] The jury returned a verdict for the estate, awarding $545,000 in damages.[81] The United States Court of Appeals for the Seventh Circuit reversed, finding the trial court erred in ordering production of the confidential communications between Redmond and Beyer.[82] The United States Supreme Court affirmed.[83]

Justice John Paul Stevens, writing for the majority,[84] first noted that Federal Rule of Evidence (FRE) 501 grants federal courts the discretion to define new evidentiary privileges by interpreting "common law principles . . . in the light of reason and experience."[85] Justice Stevens declared that reason and experience justified a privilege protecting confidential communications between psychotherapists and patients because it would promote sufficiently important interests outweighing the need for any probative evidence from that source.[86] Stevens

71. To date, the one published case addressing the scope of the new rules focused on the trial judge's discretion to employ a balancing test under Rule 403. Frank v. County of Hudson, 924 F. Supp. 620 (D. N.J. 1996) (evidence proffered under the new rules must still be legally relevant under Rule 403). In *United States v. Guardia*, 1997 WL 63768 (D. N.M. Jan. 15, 1997) a pending New Mexico district court case in which the defendant is charged with sexual assault, the judge granted the defense's motion *in limine* opposing the government's use of two prior sexual assaults offered under Rule 413. The judge ruled that Rule 403 applied, notwithstanding the elimination of the presumption against use of prior bad acts. The government has appealed the ruling, seeking expedited disposition.

72. 116 S. Ct. 1923 (1996).

73. *Id.* at 1927-32.

74. *See* Anne D. Lamkin, *Should Psychotherapist-Patient Privilege Be Recognized?*, 18 AM. J. TRIAL ADVOC. 721, 723-25 (1995) (asserting forty-nine states and the District of Columbia recognize some form of psychologic or psychiatric-patient privilege).

75. *See infra* notes 91-104 and accompanying text.

76. Jaffee v. Redmond, 51 F.3d 1346, 1349-50 (7th Cir. 1995).

77. *Id.* at 1348.

78. The counseling sessions were intended to help Redmond cope with the pain and anguish caused by the shooting. *Id*. at 1358.

79. The trial judge believed that the psychotherapist-patient privilege recognized in other circuits did not extend to licensed clinical social workers. *Id*. at 1350.

80. *Id.* at 1351.

81. *Id.* at 1352.

82. *Id.* at 1358.

83. Jaffee v. Redmond, 116 S. Ct. 1923, 1932 (1996).

84. Justice Stevens delivered the opinion of the court, in which Justices O'Connor, Kennedy, Souter, Thomas, Ginsberg, and Breyer joined. Justice Scalia filed a dissenting opinion, which Chief Justice Rehnquist joined in part. *Id*. at 1925.

indicated that the mental health of our nation's citizenry, no less than its physical health, is a public good of transcendental importance[87] and that the possibility of exposing intimate discussions of this nature could "impede development of the confidential relationship necessary for successful treatment."[88]

Justice Stevens also had no difficulty in expanding this psychotherapist-patient privilege to include communications made to licensed social workers in the course of psychotherapy. He concluded that the rationale for recognizing a psychologic or psychiatric privilege applies equally to communications made to licensed social workers engaged in mental health counseling.[89] Justice Stevens noted that social workers today "provide a significant amount of mental health treatment and service the large segment of our population that cannot afford a psychiatrist or psychotherapist."[90]

The Supreme Court's recognition of a new privilege protecting confidential communications made not only to psychiatrists and psychotherapists but also to licensed social workers engaged in psychotherapy is grounded in a logical interpretation of FRE 501. This does not necessarily mean that such communications are now automatically protected from compelled disclosure in courts-martial.[91] The law of the particular forum in which the case is litigated determines the applicability of privileges.[92] As such, the nature and scope of evidentiary privileges in military practice[93] are set forth, not in FRE 501,but in the military rules.

Although MRE 101(b)[94] and MRE 501(a)(4)[95] seem to provide authority to adopt testimonial and evidentiary privileges recognized in federal district courts, a substantial impediment

85. *Id*. at 1927. Federal Rule of Evidence 501 provides in part: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FED. R. EVID. 501.

86. The Court noted that the likely evidentiary benefit in denial of a privilege would be modest. If rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances giving rise to the need for treatment would probably result in prosecution. Without a privilege, much of the desirable evidence that the proponent seeks would likely be in existence anyway as such admissions would probably not be made in the first place. *Jaffee*, 116 S. Ct. at 1929.

87. Justice Scalia, in a scathing dissent, chided the majority for, in part, extending a privilege to psychotherapists without first providing adequate justification. He states the following:

> When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, inter alios, parents, siblings, best friends, and bartenders--none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing your psychotherapist or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet, there is no mother-child privilege.

Id. at 1934.

88. *Id.* at 1928.

89. *Id.* at 1931.

90. The Court agreed with the Seventh Circuit that "[d]rawing a distinction between counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose," especially when the latter provide a significant part of the mental health counseling for the poor and those of modest means. *Id*. at 1932.

91. In the military, a quasi-psychotherapist-patient privilege already exists under the limited circumstances where a psychiatrist or psychotherapist is detailed to assist the defense team. United States v. Tharpe, 38 M.J. 8, 15 n.5 (C.M.A. 1993). Communications made to a psychiatrist or psychotherapist who is part of the defense team are protected by the attorney-client privilege under Mil. R. Evid. 502. A second limited privilege may apply to communications made by an accused as part of a sanity inquiry under Mil. R. Evid. 302. United States v. Toledo, 26 M.J. 104 (C.M.A.), *cert. denied*, 488 U.S. 889 (1988).

92. United States v. Johnson, 47 C.M.R. 406 (C.M.A. 1973). "It should be noted that the law of the forum determines the application of [any] privilege. Consequently, even if a service member should consult with a doctor in a jurisdiction with a doctor-patient privilege, for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial." MCM, *supra* note 2, MIL. R. EVID. 501(d), Drafter's Analysis, app. 22, A22-36 to A22-37 (1995 ed.)

93. For an excellent historical overview of the law of privileges under military practice, see Captain Joseph A. Woodruff, *Privileges Under the Military Rules of Evidence*, 92 MIL. L. REV. 5 (1981).

94. Military Rule of Evidence 101(b) declares the following:

> (b) Secondary Sources. If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply:
> (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and
> (2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

MCM, *supra* note 2, MIL. R. EVID. 101, Scope.

exists in MRE 501(d), which states that information not otherwise privileged[96] does not become privileged on the basis that is was acquired by a medical officer or civilian physician.[97] Can *Jaffee* and MRE 501(d) be reconciled? Possibly.

Trial and defense counsel in a position of having to advocate for the recognition of a privilege[98] can argue the phrase "medical officer or civilian physician" as used in MRE 501(d) is limited in scope to military and civilian *medical doctors*. Psychologists, psychiatric social workers, behavioral science specialists, and other non-physicians engaged in mental health counseling should be excluded.[99]

Of course, the contrary argument is that, while *Jaffee* may have recognized a difference,[100] military courts have not, as yet, distinguished between the therapeutic practices of a physician who treats a person's physical ailments and a psychotherapist who treats his largely unmanifested mental health needs.[101] *Jaffee* has limited precedential value for the military practitioner because it was based on an interpretation of FRE 501, which does not include the specific disqualifying language set forth in MRE 501(d).

The questions raised by *Jaffee* are not limited to whether there should be an evidentiary privilege in military practice for communications made by servicemembers, family members, victims, and others to individuals providing therapeutic services, and the notes taken therein. Arguably, such a privilege is justified, because it would protect the privacy of confidential communications and serve the public good by helping to ensure the mental well-being of our soldiers and their families.[102] A more pressing concern, however, is whether something more is required in military practice to recognize a psychotherapist-patient privilege than simply interpreting the rules of evidence to now permit one, a result seemingly in direct contravention to MRE 501(d) and existing case law. While such a privilege is now recognized in federal practice, it was accomplished because of the Supreme Court's direction to construe federal rules in a way permitting the development of a common law of federal privileges.[103] The military rules have no such mandate,

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95. Military Rule of Evidence 501 provides, in pertinent part, as follows:

> (a) A person may not claim a privilege with respect to any matter except as required by or provided for in:
> . . . .
> (4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

MCM, *supra* note 2, MIL. R. EVID. 501.

96. For example, Mil. R. Evid. 502 (Lawyer-Client Privilege) or Mil. R. Evid. 504 (Husband-Wife Privilege) may protect communications between parties even though one may be a physician.

97. Mil. R. Evid. 501(d) provides: "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." MCM, *supra* note 2, MIL. R. EVID. 501(d). *See generally* United States v. Brown, 38 M.J. 696 (A.F.C.M.R. 1993), *rev. denied*, 40 M.J. 287 (C.M.A. 1994) (The military does not recognize the physician-patient privilege, and the court refused to create one concluding it was outside its authority; Congress entrusted the President with the power to adopt rules of evidence, including privileges).

98. For example, a trial counsel would likely want to protect a sexual assault victim's confidential communications revealed to a rape counselor during the course of therapy. Alternatively, a defense counsel may want to limit the government's access to admissions made by a client during psychological interviews and subsequent treatment.

99. This interpretation could lead to anomalous results where the psychotherapist is also a physician. For example, consider the situation where a soldier makes identical admissions to both a licensed clinical social worker and a psychiatrist. The statement made to the social worker would be privileged because a social worker is not a doctor. However, the same statements made to the psychiatrist would not be privileged because a psychiatrist, although engaged in mental health counseling, is by training and branch of assignment, a medical officer and physician. A possible resolution of this potential semantic conflict would be to interpret "medical officer and civilian physician" as excluding any individual employed in the mental health professions, including psychiatrists, focusing instead on the nature of the relationship rather than the identity of the counselor. *See* Bruce J. Winnick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence* View, 50 U. MIAMI L. REV. 249, 264 (1996).

100. As Justice Stevens acknowledged, treatment by a physician for physical ailments often may proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends on an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. Jaffee v. Redmond, 116 S. Ct. 1923, 1928 (1996).

101. *See* United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1610 (1994) (no physician-patient or psychotherapist-patient privilege in federal law, including military law).

102. "Confidentiality is the *sine qua non* for successful treatment." Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972).

103. Winnick, *supra* note 99, at 251.

and *Jaffee* should not be construed to permit military courts to "craft it [a psychotherapist privilege] in common-law fashion"[104] as a consequence of judicial (mis)interpretation of MRE 501(d).[105]

That being said, military evidentiary practice should remain consistent with those rules "generally recognized in the trial of criminal cases in the United States district courts," and there is little logical or practical reason not to amend the military rules. The military justice system is now virtually the only jurisdiction not recognizing some form of psychotherapist-patient privilege. Even a compromise creation, such as recognizing a privilege for dependents and other civilians but not for communications between psychotherapists and servicemembers, would be better than staying the course.[106]

Bless Me Father For I Have Sinned. It Has Been . . . . The Clergy Privilege in Military Practice

Though probably not recognized at common law,[107] one of the more widely adopted evidentiary privileges is that protecting communications between members of the clergy and penitents.[108] In *United States v. Napoleon*,[109] the AFCCA examined this privilege in the context of a case alleging ineffective assistance of counsel. The decision is of some practical import for the trial practitioner, as the court took the opportunity to address the scope of this long-recognized, yet infrequently raised, privilege.

Master Sergeant Doris Napoleon was placed in pretrial confinement pending her general court-martial for the stabbing death of Arlyta Renee Harris, a rival for the romantic affections of the night manager at the Vandenberg Air Force Base NCO Club.[110] During her stay in confinement, Napoleon had several visits from a friend, Technical Sergeant Walters, who also happened to be a lay minister at one of the base chapels. During one of these visits, Napoleon made some damning admissions to Walters, which were later introduced at trial by the government, without objection, as direct evidence of premeditation.[111] On appeal, Napoleon alleged ineffective assistance of counsel for not objecting to the introduction of her conversation with Walters on the basis that they were protected by the clergy privilege.[112]

The privilege regarding communications with the clergy "recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[113] Its foundation contains three elements: (1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his or her capacity as a spiritual advisor;[114] and (3) the communication must be intended to be confidential.[115] In this

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104. *Jaffee*, 116 S. Ct. at 1940.

105. Testimonial privileges "are not lightly created nor expansively construed for they are in derogation of the search for the truth." Jaffee v. Redmond, 51 F.3d 1346, 1357 (7th Cir. 1995) (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

106. This is one option being discussed by the Joint Service Committee on Military Justice. Telephone interview with Lieutenant Colonel Frederic L. Borch III, Special Assistant to The Judge Advocate General, U.S. Army (Dec. 17, 1996).

107. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 184 (3d ed. 1984).

108. *See* Comment, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 427 (1994) (asserting all fifty states and the District of Columbia have enacted statutes recognizing the privilege).

109. 44 M.J. 537 (A.F. Ct. Crim. App. 1996).

110. Napoleon followed the victim back to the boyfriend's room where she managed to get her into her car. She drove the victim to a remote part of the club parking lot where she stabbed her in the chest with such force as to produce a six-inch wound with a blade of only five inches long. With the first of four or five blows, the knife penetrated the victim's heart, diaphragm and liver. *Id*. at 545.

111. In talking about the stabbing, Walters testified that Napoleon "realized what had happened and everything that had been done. And she definitely told me at that time that she wasn't angry or enraged or anything when the incident occurred. It kind of just went from there." *Id*. at 542.

112. Mil. R. Evid. 503, Communications to Clergy, provides as follows:

> (a) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

MCM, *supra* note 2, MIL. R. EVID. 503.

113. Trammel v. United States, 445 U.S. 40, 51 (1980).

114. "Clergyman" is defined as a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman. MCM, *supra* note 2, MIL. R. EVID. 503(b)(1).

115. *See, e.g.*, United States v. Moreno, 20 M.J. 623, 626 (A.C.M.R. 1985).

case, the court found that Napoleon failed on two grounds. First, there was no evidence that the conversation with Walters was made as a formal act or religion or as a matter of conscience. Instead, it was apparent from the record that Napoleon was seeking "emotional comfort and perhaps sympathy in speaking . . . about her feelings of not being angry or enraged."[116] Her purpose was thus outside the scope of the privilege. In addition, the court noted that whatever credentials and responsibilities Walters had as a lay minister, he was not operating in the capacity as a spiritual advisor during his visits with Napoleon.[117] Rather, the evidence demonstrated that Walters' visits were borne out of friendship, not piety.

With servicemembers increasingly finding religion when confronted with the possibility of lengthy periods of confinement, defense counsel may find themselves raising the clergy privilege in order to protect inculpatory admissions made by their clients. In *Napoleon*, the Air Force court does a credible job detailing the inherent difficulties in satisfying the privilege's foundational elements.

Hysteria and Skepticism Aside--Are Taint Hearings in Child Sexual Abuse Cases A Good Idea?

Margaret Kelly Michaels, a twenty-two year old aspiring actress, was hired by the Wee Care Nursery School, Maplewood, New Jersey, in September 1984 as a full-time teacher's aide; she worked until her departure on 25 April 1985.[118] On 30 April, one of the Wee Care children revealed to his mother that each day at nap time, Michaels disrobed him and took his temperature rectally.[119] After a two-year investigation by the Essex County Prosecutor's Office, Kelly Michaels was charged with 246 counts of bizarre sexual abuse[120] against thirty-eight children, ages three to five.[121]

The state's case against Michaels consisted almost entirely of the children's testimony, which referred almost exclusively to pretrial statements taken during the course of the state's investigation. Despite the fact there was little physical evidence to support the contention that the children had been molested,[122] Kelly Michaels was convicted of 115 counts and sentenced to forty-seven years in prison.[123]

The focus on appeal was the manner in which the state conducted its investigatory interviews of the children; specifically, whether the interview techniques employed by the investigators undermined the reliability of the children's pretrial statements and subsequent in-court testimony. In *State v. Michaels*,[124] the New Jersey Supreme Court, confronted with investigatory interviews "fraught with the elements of untoward suggestiveness and unreliable evidentiary results,"[125] concluded the interrogations were conducted in a highly improper manner and set aside the convictions.[126]

To ensure Kelly Michaels' right to a fair trial, the court held that a hearing was required to determine whether the children's ability to recall the alleged abuse was affected by the improper interrogation. The hearing would determine whether any in-court testimony would be admissible at any subsequent retrial.[127]

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116. *Napoleon*, 44 M.J. at 544.

117. *Id.*

118. She left in order to take a job closer to home. Robert Rosenthal, *State of New Jersey v. Kelly Michaels: An Overview*, 1 PSYCH., PUB. POL. & LAW 246 (1995).

119. Lana H. Schwartzman, Note, 25 SETON HALL L. REV. 453 (1994).

120. Michaels was alleged to have licked peanut butter off the children's genitals; played the piano while nude; made the children drink her urine and eat her feces; and raped and assaulted them with knives, forks, spoons and Lego blocks. Although Michaels was accused of performing these acts during school hours over a seven-month period, no adult or student ever reported seeing her act inappropriately and no parent noticed any signs of strange behavior or genital soreness. Jean Montoya, *Something Not So Funny Happened On The Way To Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 929 (1993).

121. Lisa Manshel, *The Child Witness and the Presumption of Authenticity After State v. Michaels*, 26 SETON HALL L. Rev. 685, 686 (1996).

122. In fact, Michaels herself passed a polygraph examination a week after the investigation began. Rosenthal, *supra* note 118, at 249.

123. LISA MANSHEL, NAP TIME. THE TRUE STORY OF SEXUAL ABUSE AT A SUBURBAN DAY-CARE CENTER 447-48 (1994).

124. 642 A.2d 1372 (N.J. 1994).

125. *Id*. at 1382.

126. Most of the thirty-eight children interviewed were asked leading questions strongly suggesting that perverse sexual acts had occurred. Seventeen were asked questions involving references to urination, defecation, consumption of human waste and oral sexual contacts. Most of the children in the two years leading up to the trial were subjected to repeated interrogations, most at the urging of their parents. The children were threatened, cajoled and bribed. Positive reinforcement was used when the children made inculpatory statements, negative reinforcement when children denied the abuse. Five of the children were told that Kelly was in jail and she had done bad things to other children; the children were encouraged to keep Kelly in jail. They were told that the investigators needed their help and they could be "little detectives." The children were introduced to the police officer who arrested Kelly and were shown the handcuffs used during the arrest. Mock police badges were given to the children who cooperated. *Michaels*, 642 A.2d at 1380; *see also* Maggie Bruck & Stephen J. Ceci, *Amicus Brief for the Case of State of New Jersey v. Michaels Presented by Committee of Concerned Scientists*, 1 PSYCH., PUB. POL. & LAW 272 (1995).

Likening the inculpatory statements of sexual abuse victims to confessions and identifications, the court insisted that such evidence requires special measures to ensure reliability.[128] Therefore, an accused triggers the requirement for a taint hearing with a threshold showing of "some evidence" that the child was exposed to suggestive or coercive interviewing.[129] The burden then shifts to the government to prove by clear and convincing evidence that the child's statements retain sufficient indicia of reliability to outweigh the suggestive pretrial influences. If the government cannot persuade the court, the judge must exclude the child's pretrial statements and any in-court testimony based on those unreliable statements.[130]

The Army and Air Force courts recently addressed *Michaels'* potential application to military practice in deciding: (1) whether there is a *requirement* for a pretrial taint hearing to determine if coercive or suggestive interview techniques distorted a child's recollection of events thereby undermining the reliability of their in-court testimony; and (2) whether an accused is ever *entitled* to a pretrial hearing, even when there is evidence of suggestive interview techniques.

In *United States v. Kibler*,[131] the accused was charged with various molestation offenses on three child victims. The charges came to light when one victim commented to her mother as she was brushing her hair that she was glad this was the last day of school. When asked why, she asserted it was because the accused had sex with her.[132] Two more girls, one Kibler's daughter and another girl he baby-sat, eventually also made complaints. All three were interviewed by social services caseworkers, CID agents, doctors and the trial counsel.[133]

There was no motion to suppress or objection at trial challenging the reliability of the victim's in-court testimony. On appeal, citing *Michaels*, the accused asserted he was entitled to a pretrial hearing on the issue of the reliability of the children's in-court testimony. The Army court held that the accused waived consideration of this issue. Even assuming waiver should not be applied, the court found that "the pretrial interrogations and investigations had no effect on the reliability of any of the victim's in-court testimony."[134] The ACCA distinguished *Michaels,* finding that the government's case was not primarily made up of the children's statements, nor did the case hinge on evidence derived from the children's statements. In fact, there was significant physical, medical and behavioral evidence to corroborate the children's allegations.[135] Under the circumstances of this case, the court concluded no taint hearing was required.[136]

The same result, though using a different rationale, was reached by the Air Force court in *United States v. Cabral*.[137] Master Sergeant Matthew Cabral was charged with molesting the four-year-old daughter of a friend. The child was unavailable at trial, so the trial counsel moved to admit the videotaped interview Office of Special Investigations (OSI) conducted with the victim.[138] The defense challenged use of the tape, suggesting that the rehearsed answers and use of inappropriate leading questions made the tape inadmissible.[139] The AFCCA affirmed, finding that evidence of the coercive nature of the interview or suggestiveness, if any, went to the weight to be given the evidence and not its admissibility.[140] Cabral was not entitled to a hearing, even if there was evidence of suggestibil-

127. *Michaels*, 642 A.2d at 1382. Margaret Kelly Michaels was released after spending five years in prison; the state eventually declined to retry her.

128. *Id*. at 1375.

129. *Id*. at 1383.

130. The door apparently remains open, however, for the admission of selected portions of the proposed testimony. The court stated that "if it is determined by the trial court that a child's statements or testimony, or a portion thereof, do retain sufficient reliability for admission at trial, then it is for the jury to determine the probative worth and to assign the weight to be given to such statements or testimony as part of their assessment of credibility." *Id*. at 1384.

131. 43 M.J. 725 (Army Ct. Crim. App. 1995).

132. The victim said it was "so she would not have to run past Kibler's house anymore." "What do you mean?" the mother replied. "It's a secret," the child said. When pressed, the girl finally told her mother it was so she wouldn't have to have sex anymore. *Id.* at 728.

133. *Id.*

134. *Id*. at 727.

135. *Id.*

136. *Id.*

137. 43 M.J. 808 (A.F. Ct. Crim. App. 1996) (review granted by CAAF).

138. The military judge admitted the tape under Mil. R. Evid. 804(b)(5), the residual hearsay exception. MCM, *supra* note 2, MIL. R. EVID. 804(b)(5). *See* Donna M. Wright, *An Old Fashioned Crazy Quilt: New Developments in the Sixth Amendment, Discovery, Mental Responsibility and Nonjudicial Punishment*, ARMY LAW., Apr. 1997, at 72.

139. *Cabral*, 43 M.J. at 810.

ity; a hearing as a predicate for the admission of child testimony is a legislative, not a judicial fix.[141]

While most people would agree that child sexual abuse is a social problem of shameful dimensions,[142] some commentators believe a climate of skepticism and doubt prevails when dealing with the credibility of a child-victim.[143] This skepticism is partly due to the vulnerability of children to inappropriate interview techniques and the notion that the suggestive and coercive nature of the interview techniques undertaken by hysterical parents and overly aggressive police distort the child's memory and recollection of actual events. To ensure a defendant is convicted of offenses he or she actually committed, New Jersey has adopted certain procedures to ensure the reliability of a child sexual abuse victim's pretrial statements and in-court declarations.

While the Army and Air Force courts have held that pretrial taint hearings are not required, results reached albeit by different rationales, *Michaels* may still have some vitality in the military, or at least for the Army practitioner. The accused may be entitled to a pretrial taint hearing when the government's case depends almost exclusively on information elicited from the investigatory interviews of the child-victim and there is little, if any, corroborating physical or behavioral evidence, if the defense can make an initial showing of "some evidence" of suggestiveness or coercion.[144] At this hearing, the Government would be required to prove by clear and convincing evidence the statements retain sufficient indicia of reliability that outweigh the suggestive pretrial influences.[145]

The recent increase in child sexual abuse cases in military practice brings with it an increased opportunity to question the reliability of a child's in-court and out-of-court allegations. While pretrial taint hearings are certainly a novel idea, they appear to be a reasonable accommodation for a difficult problem.[146]

Backing in Through the Front Door--Substantive Consideration of Prior Inconsistent Statements

Although the credibility of any witness can be attacked, even by the party calling the witness,[147] it is improper to call a witness for the primary purpose of placing otherwise inadmissible evidence before the court under the guise of impeachment.[148] While prior inconsistent statements can, in limited circumstances, be used as substantive evidence of guilt,[149] the typical scenario facing trial practitioners involves using inconsistent statements to attack the witness' in-court testimony.[150] The concern is that an unscrupulous judge advocate may call a witness simply to impeach him with an inconsistent statement, hoping that the panel will consider it as substantive evidence, rather than for its legitimate purpose of impeaching the credibility of the witness' in-court testimony.[151] The subtle distinctions between use of a prior inconsistent statement as impeachment or as substantive evidence are understandably

140. *Id.* at 812.

141. *Id.* at 810; s*ee also* United States v. Geiss, 30 M.J. 678 (A.F.C.M.R.), *pet. denied*, 32 M.J. 45 (C.M.A. 1990).

142. *See generally* JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES (2d ed. 1992) (outlining prevalence and effects of child abuse); *see also* Robert J. Marks, *Should We Believe The Children? The Need For a New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. LEGIS. 207 (1995).

143. These range from claims that "the vast majority of children who profess sexual abuse are fabricators," RICHARD A. GARDNER, THE PARENTAL ALIENATION SYNDROME AND THE DIFFERENTIATION BETWEEN FABRICATED AND GENUINE CHILD SEX ABUSE (1987), to "observers who have likened the climate created by [child abuse] laws to that of Salem during the witch hunts, to that of Nazi Germany in 1939, or to that of the McCarthy era in the 1950s." R. Emans, *Abuse in the Name of Protecting Children*, 68 PHI DELTA KAPPA 740 (1987) (cited in John E.B. Myers, *New Era of Skepticism Regarding Children's Credibility,* 1 PSYCH., PUB. POL. & LAW 385, 392 (1995)).

144. A listing of improper influences was comprised by the court and may include the following: (1) whether the inquiry lacked investigatory independence; (2) whether the interviewer pursued a line of questioning indicating a preconceived notion of the child's experiences; (3) whether the interviewer used leading questions; (4) whether the interviewer repeatedly asked the same question after the child already answered; (5) whether the interviewer explicitly vilified or criticized the accused; (6) whether the investigator failed to account for the effect of outside influences on the child's descriptions, such as prior conversations between the victim and his parents or the victim and other child-victims; (7) whether the child did not view the interviewer as a trusted authority figure; and (8) whether the interviewer lacked conviction regarding the presumption of innocence. *Michaels*, 642 A.2d at 1377; *see also* John E. B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination and Impeachment,* 18 PAC. L.J. 801, 889 (1987); John E.B. Myers, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony,* 27 PAC. L.J. 1 (1996).

145. As the court recognized, "the issue we must determine is whether the interview techniques used by the State in this case were so coercive and suggestive that they had the capacity to distort substantially the children's recollections of actual events and thus compromise [their] reliability and testimony based on their recollections." *Michaels*, 642 A.2d at 1377. The author emphasizes that questions concerning the reliability of a child's in-court testimony are distinct from: (a) the child's competency and capacity to testify; and (b) the weight to be given any admitted testimony by the fact-finder.

146. For a contrary view, *see* John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 64 BAYLOR L. REV. 873 (1994).

147. The credibility of a witness may be attacked by any party, including the party calling the witness. MCM, *supra* note 2, MIL. R. EVID. 607.

148. The introduction of an in-court report of an out-of-court statement offered to prove the truth of the statement depends on an analysis of the definition of hearsay and the exceptions to the hearsay rule. *See* IMWINKELRIED, *supra* note 19, at 261. Extrinsic proof of a prior inconsistent statement to impeach a witness's in-court testimony may also be considered by the court as substantive evidence only if it qualifies as either an exemption to the hearsay rule, or if it is otherwise admissible as a hearsay exception under Mil. R. Evid. 803 or 804.

lost on most panel members.[152] As a result, despite the permissive language of MRE 607, when a party knows the witness has recanted a prior inculpatory statement *and would do so in front of the members*, that party cannot call the witness simply to impeach the credibility of the in-court testimony with the prior out-of-court inconsistent statement.[153] In *United States v. Ureta,*[154] the CAAF reviewed the application of this exclusionary rule in the increasingly common scenario of a recanting witness in a sexual abuse prosecution.

K, the 13-year-old daughter of Master Sergeant Jose Ureta, told a close friend that her father "had been messing with her since the age of nine."[155] One week later, Ureta's wife Christina, K's natural mother, made a sworn statement to OSI in which she claimed the accused had admitted to sexually abusing their daughter and placing his fingers in her vagina, but had denied having intercourse.[156] At the Article 32 investigation, Mrs. Ureta testified consistently with her sworn statement, but added that her husband had admitted having sexual intercourse.

At Ureta's general court-martial for rape, carnal knowledge and committing indecent acts, the trial counsel intended to call Christina who was, concededly, something of a "wild card" witness.[157] Christina did testify, but denied that Ureta had ever made any inculpatory admissions.[158]

The trial counsel attempted to impeach Christina's denials by questioning her about the sworn statement to OSI and subsequent Article 32 testimony, which she admitted making, but consistently responded they were lies to get back at her husband for his extra-marital affair the year before. The trial counsel then offered the Article 32 transcript into evidence, which was received by the military judge over defense objection. On appeal, the defense challenged the trial counsel's action in calling Christina simply to impeach her with prior inconsistent statements as well as the admission of the Article 32 transcript, eventually taken back by the members into deliberations.[159]

If the military judge and counsel knew that Christina would recant her statement to OSI in front of the members, it would have been error to call her solely to impeach her with her prior inconsistent statement.[160] Here, however, the CAAF noted that the trial counsel honestly did not know what, if anything, Christina would say.[161] Because the trial counsel had every reason to

149. Mil. R. Evid. 801 provides, in part:

> (d) Statements which are not hearsay. A statement is not hearsay if:
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

MCM, *supra* note 2, MIL. R. EVID. 801(d)(1)(A).

150. Mil. R. Evid. 613 governs use of prior inconsistent statements when offered as impeachment evidence. It states that "in examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel. MCM, *supra* note 2, MIL. R. EVID. 613(a).

151. For example, a trial counsel calls a witness who has made a previous statement implicating the accused in a robbery; that previous statement would likely be excluded as hearsay if offered for the truth. The trial counsel knows the witness has repudiated the statement and, if called, would testify in favor of the accused. Nonetheless, the trial counsel calls the witness for the ostensible purpose of impeaching him with the prior inconsistent statement. Since the "maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer," the trial counsel must have some other purpose in calling the witness. United States v. Crouch, 731 F.2d 621, 623 (9th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985). The only purpose trial counsel has in calling this type of witness must be to bring before the court hearsay evidence that the panel members could not otherwise consider. SALTZBURG, MARTIN AND CAPRA, *supra* note 4, at 800.

152. SALTZBURG, MARTIN AND CAPRA, *supra* note 4, at 801.

153. United States v. Pollard, 38 M.J. 41 (C.M.A. 1993) (unless of course the testimony is admissible in its own right as substantive evidence under Mil. R. Evid. 801(d)(1)A)); s*ee also* United States v. Taylor, 44 M.J. 475, 479-80 (1996).

154. 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

155. *Id.* at 292.

156. *Id*. at 294.

157. The trial counsel informed the military judge that he did not know whether Christina would even testify, much less what she would actually say. *Id*. at 295.

158. *Id.*

159. *Id*. at 298-99.

160. *See Pollard*, 38 M.J. at 50-51.

161. *Ureta,* 44 M.J. at 298.

believe Christina would testify in accordance with her pretrial statements, the military judge did not err in allowing him to call Christina and then impeach her denials with her prior inconsistent statement to OSI and with her testimony during the Article 32 investigation.[162] This, however, was not the end of the court's analysis.

When a witness denies making the prior inconsistent statement, counsel may call another witness to testify about the statement or introduce a document of the prior statement; in otherwords, the denial may be proven by a third party.[163] Under what circumstance should extrinsic proof of the statement not be allowed? The CAAF has held that "extrinsic evidence of a prior inconsistent statement should not be admitted *for impeachment* when: (1) the declarant is available and testifies; (2) the declarant admits making the prior statement; and (3) the declarant acknowledges the specific inconsistencies between the prior statement and his or her in-court testimony."[164] Ureta argued that because his wife testified and admitted the inconsistencies, extrinsic proof of the prior inconsistent statement (the Article 32 transcript) was error. The court disagreed, noting that the limitations on use of impeachment only apply if the statements are not otherwise admissible as substantive evidence.[165]

Out-of-court statements offered for the truth of the matter asserted generally are inadmissible hearsay.[166] However, a statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination concerning the statement, the statement is inconsistent with the declarant's testimony, and the statement was given under oath subject to the penalty of perjury at a trial or other hearing.[167] In reading the two rules together, CAAF held that "the transcript could not be admitted for impeachment under MRE 613(b) but was admissible as substantive evidence in its own right under MRE 801(d)(1)(A)."[168] In *Ureta*, the prior inconsistent statements were admissible as substantive evidence because they were made at the Article 32 investigation. However, trial and defense counsel should carefully scrutinize an opponent's motives in calling witnesses for the limited purpose of impeaching them with prior inconsistent statements. If there is evidence the witness has or will recant the pretrial statement in front of members and the statements are not otherwise independently admissible, a challenge to the witness' testimony should be sustained.

Hair Today, Gone To Jail Tomorrow--Proving Wrongful Drug Use Through Inculpatory Hair Analysis

In 1995, the CAAF addressed the admissibility of hair samples in *United States v. Nimmer*,[169] setting aside a sailor's conviction for wrongful use of cocaine and remanding for a hearing to consider the reliability of exculpatory hair analysis.[170] In 1996, in a case of first impression in federal criminal practice,[171] the AFCCA affirmed the government's use of chemical hair analysis to prove an accused's wrongful use of drugs.

In *United States v. Bush*,[172] the accused was ordered to provide a urine sample as part of a random drug inspection. The sample provided was colorless, odorless, and did not foam when shaken. Although a field test indicated the accused's

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162. *Id.*

163. When offered for impeachment, the prior inconsistent statement is not being offered for the truth of the matter and the proponent of such evidence need not concern himself with the general ban on use of hearsay evidence. United States v. Taylor, 44 M.J. 475, 479 (1996).

164. *Ureta*, 44 M.J. at 298 (quoting United States v. Button, 34 M.J. 129 (C.M.A. 1992) (citations omitted)).

165. *Id.* at 299.

166. The military rules define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MCM, *supra* note 2, Mil. R. Evid. 801(c).

167. MCM, *supra* note 2, MIL. R. EVID. 801(d)(1)A).

168. While the prior inconsistent statement made at the Article 32 investigation could itself be considered as substantive proof of guilt, the military judge erred in allowing the members to bring the actual transcript back into deliberations. *Ureta*, 44 M.J. 299; s*ee also* United States v. Austin, 35 M.J. 271, 276 (C.M.A. 1992).

169. 43 M.J. 252 (1996).

170. Nimmer submitted a urine sample on 27 January 1992, as part of the routine incident to reporting to his new command; the sample tested positive three days later. On 8 February, Nimmer had several strands of hair taken from his head and tested at his own expense at a civilian drug laboratory. At his court-martial for wrongful use of cocaine, the military judge excluded expert testimony that there was no detectable amount of the cocaine metabolite in the hair samples, with the inference being that Nimmer did not use cocaine and the submitted sample was not his or had been adultered. The case was remanded so the military judge could look at the validity of the scientific methodology leading to the expert's conclusion that the absence of the drug metabolite in the hair sample necessarily meant Nimmer did not consume cocaine. For a cursory, though marginally adequate, analysis of the case, see Stephen Henley, *Developments in Evidence Law*, ARMY LAW., Mar. 1996, at 102.

171. Although at least one federal district court has found hair analysis sufficiently reliable to use inculpatory test results in probation revocation proceedings. United States v. Medina, 749 F. Supp. 59 (E.D.N.Y. 1990).

172. 44 M.J. 646 (A.F. Ct. Crim. App. 1996).

specimen was not urine, it was not confirmed by the drug laboratory until approximately one month later.[173] By the time the command learned of the discrepancy, the window of detection had passed making it unlikely that the accused's urine would test positive for cocaine. The command then looked into the possibility of testing the accused's hair for the presence of drugs.

Pursuant to a valid search authorization,[174] about one hundred hairs were subsequently seized from Bush's head, tested, and reported positive for the presence of cocaine and its metabolite, benzoylecgonine.[175] At trial, the military judge admitted the test results and expert testimony regarding hair analysis. Bush was convicted of dereliction of duty for failing to provide a urine specimen and for use of cocaine.[176]

On appeal, Bush argued that hair analysis is unreliable and does not satisfy the test for admissibility of scientific evidence under MRE 702.[177] The AFCCA held that the military judge did not abuse his discretion in permitting qualitative and quantitative analysis of the hair sample to go before the members and affirmed the conviction.[178] The court noted there was no dispute at trial about the foundational principle of hair analysis.[179] There was also no dispute that mass spectrometry, the specific test employed by the laboratory, can reliably and validly detect the presence of cocaine.[180] The only dispute seemed to center around whether the presence of the drug could be explained by other than knowing ingestion, such as passive exposure,[181] which the court held went to the weight to be given the evidence and not its admissibility.

As the court concluded, "with proper controls, chain of custody, scientific methodology and instruments of sufficient sensitivity, cocaine found in hair is strongly indicative that cocaine was at some point ingested by the subject and may be properly considered as evidence of wrongful use."[182] When faced with circumstances similar to those in *Bush*, counsel may consider using hair analysis to prove or corroborate the use of drugs. Test results can also quantify the amount of drug use, which can then be used to bolster or refute an accused's innocent ingestion/passive inhalation defense as well as support or attack claims that "this was my one and only time, sir. You've got to believe me."[183]

Discerning Fact From Fiction. Use of Polygraphs In Courts-Martial

Under the 1969 *Manual for Courts-Martial*, polygraph tests[184] were explicitly declared to be inadmissible.[185] This bar was omitted from the Military Rules of Evidence when promulgated in 1980, leaving admissibility of such evidence subject to the same rules governing the civilian federal courts,[186] which

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173. The government introduced evidence at trial that the accused was capable, as a result of his medical training, of reverse self-catheterization. In otherwords, he was capable of replacing the urine in his bladder with a saline solution. *Id*. at 647. Ouch.

174. Submission of a substituted specimen justifies a subsequent order to submit a valid specimen, and that subsequent order stands on the same legal footing as the original. United States v. Streetman, 43 M.J. 752 (A.F. Ct. Crim. App. 1995).

175. *Bush*, 44 M.J. at 648.

176. *Id.*

177. Military Rule of Evidence 702 provides as follows:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

MCM, *supra* note 2, MIL. R. EVID. 702.

178. *Bush*, 44 M.J. at 652.

179. *See* Samuel J. Rob, *Drug Detection by Hair Analysis*, ARMY LAW., Jan. 1991, at 10-11. The author writes as follows:

> As blood circulates through the hair, it nourishes the hair follicle. If drug metabolites are in the blood, they will be entrapped in the core of the hair in amounts roughly proportional to those ingested. Those traces remain in the hair as it grows out of the head at the rate of approximately one-half inch per month. Because the hair itself contains the drug, the ingester cannot wash them away. The drug metabolites do not diminish with time and will exist until the actual hair is destroyed.

Rob's article provides a superb examination of the advantages and shortcomings of hair testing in relation to urinalysis, its application to courts-martial practice, and is must reading for military counsel.

180. As the court astutely noted, the question of whether the *presence* of the cocaine metabolite in a hair analysis tends to prove that the subject used drugs (*Bush*) is logically and scientifically discrete from whether the *absence* of the cocaine metabolite in a hair sample tends to prove that the subject did not use drugs (*Nimmer*). *Bush*, 44 M.J. at 650.

181. *Id.* at 651.

182. *Id; see also* Karl Warner, *Hair Analysis-Overcoming Urinalysis Shortcomings*, ARMY LAW., Feb. 1990, at 69-70.

essentially require that expert testimony be based on generally accepted scientific principles.[187] In *United States v. Gipson*,[188] the Court of Military Appeals found that *Frye v. United States* had been superseded by the Military Rules and was not an independent standard for admissibility.[189] Rather, the focus on the admissibility of novel scientific evidence in general, and polygraphs in particular, is whether the evidence will "assist the trier of fact to understand the evidence or to determine a fact in issue."[190] After *Gipson*, the trend seemed to point to potential acceptance of polygraph evidence.[191] The impact of *Gipson* was short lived, however, and with the promulgation in 1991 of MRE 707,[192] the military courts "went from being one of the most liberal federal jurisdictions on polygraph evidence to becoming a jurisdiction in which the admission of such evidence was banned totally."[193]

While intended to remove all judicial discretion in weighing the legal and logical relevance of polygraph evidence, MRE 707 has, in recent years, been one of the more frequently disputed provisions of the military rules.[194] Adoption of a per se rule that excludes potentially exculpatory polygraph testimony "was bound to result in any number of constitutional due process[195] and compulsory process[196] claims."[197] In *United States v. Scheffer*,[198] the CAAF finally concluded that wholesale exclusion of polygraph evidence under a per se rule is unwarranted.[199]

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183. Current scientific methods can test for the presence of marijuana, cocaine, opiates, methamphetamines, barbiturates, and PCP. Baumgartner, Hill, & Blahd, *Hair Analysis for Drugs of Abuse*, 34 J. FORENSIC SCI. 1433 (1989). Hair sampling is less invasive than urine testing and is easily collected under close supervision without the embarrassment of providing a urine sample. There is a wider window of detection. Hair analysis can show pattern and magnitude of use. However, no Department of Defense Forensic Toxicology Drug Testing Laboratory is currently performing hair analysis. If counsel want to use hair analysis, they will likely have to send the sample to a civilian laboratory to perform the test, which is relatively expensive at about $60 per test. Telephone interview with Dr. James Jones, Deputy Commander, Ft. Meade Forensic Toxicology Drug Testing Laboratory (Nov. 4, 1996). One such laboratory is Psychemedics Corporation, 1280 Massachusetts Avenue, Suite 200, Cambridge, Massachusetts 02138. Tel. 617-868-7455.

184. The polygraph is a device which objectively measures and records physiological changes in an individual. John J. Canham, Jr., *Military Rule of Evidence 707: A Bright-Line Rule That Needs to be Dimmed*, 140 MIL. L. REV. 65, 68 (1993). The polygraph machine is an electronic instrument comprised of four components: the nomograph chest assembly which measures inhalation/exhalation ratio; the galvanic skin response [graph] which measures skin resistance and perspiration changes; the cardiosimulgraph which measures blood pressure and pulse rate; and the kimograph, which moves the chart paper at a steady rate to permit recordation of the examinee's reactions. United States v. Rodriguez, 34 M.J. 562, 563 (A.C.M.R. 1991).

185. "The conclusions based upon or graphically represented by a polygraph test and the conclusions based upon, and the statements of the person interviewed made during, a drug-induced or hypnosis-induced interview are inadmissible in evidence in a trial by court-martial." MANUAL FOR COURTS-MARTIAL, United States, ¶ 142e (rev. ed. 1969).

186. FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 855 (1991).

187. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (polygraph evidence inadmissible because it is not generally accepted within the scientific community).

188. 24 M.J. 246, 253 (C.M.A. 1987) (accused entitled to attempt to lay a foundation for admissibility of favorable polygraph evidence).

189. *Id.* at 251.

190. MCM, *supra* note 2, MIL. R. EVID. 702.

191. *See, e.g.*, United States v. Rodriquez, 34 M.J. 566 (A.C.M.R. 1991) (polygraph results were relevant to credibility of accused who testified he did not use cocaine), *rev'd*, 37 M.J. 448 (C.M.A. 1993).

192. Rule 707. Polygraph Examinations, provides as follows:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination shall not be admitted into evidence.
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

MCM, *supra* note 2, MIL. R. EVID. 707.

193. Canham, *supra* note 184, at 65 (citations omitted).

194. *See infra* notes 197-229 and accompanying text.

195. U.S. CONST. amend. V, provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; *nor be deprived of life, liberty, or property without due process of law*; nor shall private property be taken for public use, without just compensation. (emphasis added).

In March 1992, Airman Edward Scheffer began working as an OSI operative informing on two alleged drug dealers named Davis and Fink.[200] On 7 April, Scheffer provided a urine specimen as part of the normal procedure for controlled informants. On 10 April, Scheffer submitted to a government polygraph examination in which the examiner concluded that no deception was indicated.[201] At his court-martial for, *inter alia*, wrongful use of methamphetamine, Scheffer testified on his own behalf,[202] denied knowingly using drugs between the time he began working for OSI and the time the sample was provided, and claimed he did not know how his 7 April urine specimen tested positive.[203] The trial counsel cross-examined Scheffer about inconsistencies between his trial testimony and his earlier pretrial statements to OSI. The military judge then denied a defense request to lay a foundation for the admissibility of the exculpatory polygraph examination.[204] Scheffer's credibility was challenged by the trial counsel during closing argument to the members.[205]

The AFCCA affirmed the findings and sentence, but awarded one day credit for lack of a timely pretrial confinement review.[206] The court held that MRE 707 was "designed to assure both fairness and reliability in the ascertainment of guilt and innocence"[207] and that there was no constitutional right to present exculpatory polygraph evidence. The CAAF set aside the decision.[208]

The CAAF first noted that the right of an accused to call witnesses on his behalf[209] and present relevant and material testimony[210] may not be arbitrarily denied. The court said that the "per se exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility, without giving him an opportunity to lay a foundation under Mil. R. Evid. 702 and Daubert [v. Merrell Dow Pharmaceuticals] violates his Sixth Amendment right to present a defense."[211] "A properly qualified expert, relying on a properly administered polygraph examination, may be able to opine that an accused's physiological responses to certain questions did not indicate deception."[212]

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196. U.S. CONST. amend. VI, provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor*; and to have the Assistance of Counsel for his defense. (emphasis added).

197. Canham, *supra* note 184, at 75.

198. 44 M.J. 442 (1996) (petition for cert. filed with the U.S. Supreme Court).

199. *Id*. at 445.

200. *Id*. at 443.

201. The relevant questions were: (1) have you ever used drugs while in the Air Force; (2) have you ever lied in any of the drug information you have given to OSI; and (3) have you ever told anyone other than your parents that you are assisting OSI? *Id.*

202. *See* United States v. Williams, 43 M.J. 348 (1995), *cert. denied*, 116 S. Ct. 925 (1996) (accused has no right to introduce polygraph evidence without first taking the stand, testifying and placing his credibility at issue).

203. Scheffer did testify that he remembered leaving Davis' house around midnight on 6 April and driving back to his quarters on March Air Force Base. The next thing he remembered was waking up in his car the next morning in a remote area, not knowing how he got there. *Scheffer*, 44 M.J. at 443-444.

204. The military judge denied the request without receiving any evidence; he ruled that the Constitution did not prohibit the President from promulgating a rule excluding polygraph evidence in courts-martial. United States v. Scheffer, 41 M.J. 683, 686 (A.F. Ct. Crim. App. 1995).

205. Trial counsel argued, "He lies. He is a liar. He lies at every opportunity he gets and has no credibility. Don't believe him. He knowingly used methamphetamine, and he is guilty of Charge II." *Scheffer*, 44 M.J. at 444.

206. *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991); United States v. Rexroat, 38 M.J. 292 (C.M.A. 1993), *cert. denied*, 510 U.S. 1192 (1994); *see also* Amy M. Frisk, *Walking the Fine Line Between Promptness and Haste: Recent Developments in Speedy Trial and Pretrial Restraint Jurisprudence*, ARMY LAW., Apr. 1997, at 14.

207. *Sheffer*, 41 M.J. at 692 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

208. *Scheffer*, 44 M.J. at 442.

209. Rock v. Arkansas, 483 U.S. 44, 52 (1987).

210. Washington v. Texas, 388 U.S. 14, 23 (1967).

211. *Scheffer*, 44 M.J. at 445.

Despite the broad language used by the court, *Scheffer* does not stand for the proposition that exculpatory polygraph evidence is now automatically admissible in courts-martial. The degree to which the military judge can condition the admissibility of exculpatory polygraph examinations was the subject of two subsequent cases.

In *United States v. Mobley*,[213] the accused was charged with wrongful use of cocaine. At a pretrial hearing, the military judge refused to permit the defense to lay a foundation for the admissibility of three exculpatory polygraph examinations. Mobley thereafter testified it was inconceivable for him to ingest cocaine because he suffered from a seizure disorder for which he was taking prescription medicine. He had been told by his doctors that using illegal drugs would trigger a seizure, risking death.[214] He asserted he did not know how the cocaine got in his system. Several coworkers and supervisors testified on Mobley's behalf that it would be out of character for him to use illegal drugs.[215] The trial counsel attacked Mobley's credibility at length and ultimately argued to the panel that Mobley lied "because he's got everything at stake in his court-martial."[216]

For the reasons stated in *Scheffer*, the CAAF held the military judge erred in applying a per se exclusionary rule to the admissibility of polygraph evidence.[217] The case was remanded for a hearing to provide Mobley with the opportunity to lay a foundation for the admission of his exculpatory polygraph evidence.[218] Assuming the defense was able to lay a satisfactory foundation, the court also indicated that the military judge may condition admissibility of the evidence upon the accused submitting to a government polygraph examination.[219] Similarly, if the trial counsel has evidence the accused was shopping for a favorable examination, the military judge can also condition the admissibility of the exculpatory test by requiring disclosure of the results of all examinations taken by the accused.[220]

Exculpatory polygraphs were again the focus in *United States v. Nash*.[221] Staff Sergeant Chester Nash was also charged with wrongful use of cocaine. Before trial, he underwent a defense administered polygraph examination in which the examiner concluded that no deception was indicated. Nash also agreed to a government administered test; deception was indicated.[222] The military judge ruled that neither side would be permitted to present polygraph evidence because of the existence of a bright-line rule--MRE 707. The judge also indicated that, even without MRE 707, the evidence lacked any probative value because of the anticipated conflict between the two experts.[223]

In setting aside the decision of the AFCCA, the CAAF held the military judge's ruling was wrong on two counts. First, a per se exclusionary rule is unconstitutional.[224] Second, the fact that two experts may disagree does not make their testimony inadmissible or indicate that the evidence lacks probative value. "Conflicting expert opinions are to be resolved by the triers of

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212. *Id*. at 446. The scope of polygraph testimony is properly distinguished from the expert who wants to testify that a declarant is telling the truth, which is prohibited. *See, e.g.*, United States v. Marrie, 43 M.J. 35 (1996) (expert testimony that false allegations from preteen and teenage boys of homosexual assault were extremely rare improperly admitted as comment on victim's credibility); United States v. Cacy, 43 M.J. 214 (1996) (testimony that the expert explained the importance of being truthful and, based on child-victim's responses, recommended further treatment is an affirmation that the expert believed the child, usurping the responsibility of the fact-finder).

213. 44 M.J. 453 (1996).

214. *Id*. at 454.

215. *Id*.

216. *Id.*

217. *Id.* at 455.

218. *Scheffer*, 44 M.J. at 446-47. A proper foundation would include: (1) evidence of the scientific validity upon which the polygraph is based; that conscious lying is stressful and this stress manifests itself in physiological responses which can be recorded and objectively analyzed, *see, e.g.*, United States v. Piccinonna, 885 F.2d 1529, 1537 (11th Cir. 1989); (2) demonstrating the applicability of the theory to the case at hand; (3) evidence the examiner was properly qualified based on ability, experience and education, *see* W. Thomas Halbleib, *U.S. v. Piccinonna: The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 Ky. L.J. 225, 226 (1991); (4) evidence the equipment was functioning properly on the day of the test; (5) evidence supporting the validity of the questioning technique; *see, e.g.*, United States v. Cato, 44 M.J. 82 (1996) (inartful questions posed by examiner called for legal conclusions not underlying facts); and (6) evidence supporting the reliability of the results; *see, e.g.*, United States v. Berg, 44 M.J. 79 (1996) (results unreliable where accused employed countermeasures before and during the examination).

219. *Mobley*, 44 M.J. at 455.

220. *Id*.

221. 44 M.J. 456 (1996).

222. *Id*. at 457.

223. *Id*.

facts after evaluating them in the context of the totality of the evidence and after proper instructions by the military judge."[225]

Where do these polygraph cases leave the trial practitioner? Assuming the accused has testified and his credibility is attacked, he is entitled to lay a foundation for the admission of an exculpatory polygraph examination.[226] If the defense successfully lays the foundation, the military judge can still condition admissibility upon the accused's agreement to submit to a government-administered polygraph. The military judge can also require the admission of all test results if there is evidence the accused has been shopping for a favorable examination. Most importantly, if eventually called as an expert witness, the polygrapher's testimony should be limited to the absence of indicia of deception at the time of the examination,[227] from which the factfinder would then draw any inference concerning the credibility of the accused's in-court testimony.[228]

While *Scheffer* and its progeny have gone far in desiccating the floodwaters of constitutional attacks on MRE 707, the military practitioner should be advised that the issues in these cases were limited to the admissibility of exculpatory polygraph examinations offered by an accused to bolster the credibility of his in-court testimony. Yet to be resolved are questions regarding the admissibility of polygraph examinations of witnesses other than the accused[229] and the government's unilateral use of polygraph results to impeach the credibility of the accused's in-court testimony.[230]

A Rose by Any Other Name is Still a Rose, Unless it is An Abused Rose.[231] Use of Dysfunctional Family "Profile" Evidence In Child Abuse Cases

The Supreme Court has sanctioned the use of "profile" evidence to satisfy the Fourth Amendment requirement for reasonableness in investigatory stops,[232] and military courts have allowed expert testimony regarding characteristics displayed by victims of sex offenses.[233] Testimony about offender profiles or other similar classifications of an accused, however, has almost always been deemed inadmissible.[234] In *United States v. Pagel*,[235] the CAAF has apparently taken a short detour off the narrow "profile path" and affirmed the use of expert testimony concerning the dynamics of an incestuous child sexual abuse situation.

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224. *Id.*

225. *Id*. at 458 (quoting United States v. Dock, 35 M.J. 627, 635 (A.C.M.R 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994)).

226. *But see* United States v. Baker, 45 M.J. 538 (A.F. Ct. Crim. App. 1996) (no constitutional right to present polygraph evidence to support credibility on motion in limine).

227. *Scheffer,* 44 M.J. at 446.

228. As one commentator has noted, "herein lies the danger of polygraph evidence. If the expert is allowed to testify to the specific questions posed to the accused and the responses, this will necessarily lead to a direct inference of guilt or innocence, coming perilously close to answering the ultimate issue in the case. Instead of a fact-specific rendition of the relevant questions, the proponent of the polygraph should be limited to generalized information, specific enough to avoid confusion." For example:

> Defense Counsel: What type of questions did you utilize during the examination?
> Polygrapher: Questions were put to PVT Boone relating to possible acts of misconduct.
> Defense Counsel: What were PVT Boone's responses?
> Polygrapher: The responses reflected a denial of misconduct.
> Defense Counsel: Do you have an opinion as to the credibility of the responses?
> Polygrapher: In my opinion, PVT Boone was non-deceptive in his responses.

Canham, supra note 184, at 98.

229. *Scheffer,* 44 M.J. at 445. For example, can the defense use a co-accused's or a victim's deceptive examination to impeach her in-court testimony?

230. *Id*. For example, the accused fails a polygraph examination in which one of the relevant questions was whether he was at the scene of the crime. At trial, the accused testifies he was somewhere else at the time of the offense. The defense does not introduce any polygraph evidence. Can the government impeach the accused's in-court denials with expert testimony that the accused's responses during the polygraph examination indicated deception?

231. What's in a name? that which we call a rose,
By any other name would smell as sweet;
So Romeo, were he not Romeo call'd

WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

Technical Sergeant Kenneth Pagel was charged with various sex offenses committed on his natural daughter. At trial, the government called an expert witness who testified concerning the common dynamics and characteristics of a family where sex abuse has occurred.[236] After setting forth these factors, the trial counsel then asked the expert, without objection, for a "point-by-point comparison of how [Pagel's] family picture reflected the key elements of that [profile]."[237] The expert then matched the specifics of Pagel's family life to the family where abuse might have occurred.[238] On appeal, Pagel alleged error, claiming that profile evidence of a dysfunctional family is specifically prohibited by *United States v. Banks*.[239]

To the casual observer, it would appear that the expert testimony admitted in *Pagel* was exactly the type of evidence as presented in *Banks*; namely, the trial counsel's presentation of a characteristic profile of child sexual abuse and then relying on the profile to bolster the government's case establishing guilt.[240] The court, however, was able to distinguish the cases in affirming Pagel's conviction.

The risk factors in *Banks* were not being used to support the credibility of the daughter's accusations or to explain her admitted unusual behavior. Instead, the "profile" was offered to present the accused's family in a situation as ripe for child sexual abuse, in effect purporting to present characteristics of a family that included a child sexual abuser. In *Banks*, the "prosecution's strategy of presenting a 'profile' and pursuing a deductive scheme of reasoning[241] and argument to prove Banks' a child abuser was impermissible."[242]

In *Pagel*, the court concluded the evidence was, instead, used to explain the behavior of the victim on the assumption that she had been abused by someone, not necessarily the accused. Using "profile" evidence to explain the counter-intuitive behavioral characteristics of the victim was permissible.[243]

Are these distinctions without substance? As Judge Darden so perceptively concluded in his concurring opinion in *Pagel*, "I am unconvinced that *Banks* is distinguishable; indeed, it seems to me to be entirely on point in every way."[244] Regardless, the court seems to have widened the shoulder of the child sexual abuse evidentiary highway by allowing dysfunctional family "profile" evidence, albeit under the apparent limited circumstances of explaining the victim's counter-intuitive behavior.[245]

In *Pagel*, the court has hopefully stretched the boundaries of permissible "profile" testimony to its rational limits. While the court did reconcile *Pagel* and *Banks*, though somewhat disingenuously, trial counsel should still be cautioned to tread carefully before entering this evidentiary quagmire. A slip of the tongue may turn otherwise admissible testimony focusing on the victim into inadmissible "profile" evidence focusing on the accused, including argument that the dynamics of the accused's family conclusively establish that abuse occurred. A rose by any other name.

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236. These characteristics purportedly include: (a) the child's role includes responsibilities commonly associated with adults; (b) the relationship between mother and daughter is usually strained; (c) the mother is very emotionally passive and dependent on her husband; (d) the father is not setting good limits for the child and is not being a good disciplinarian; (e) the child is running wild; (f) substance abuse is present; (g) marital conflict exists and (h) there are apparent sexual difficulties between the mother and father. United States v. Pagel, 40 M.J. 771, 774 (A.F.C.M.R. 1994).

237. *Pagel*, 45 M.J. at 70 (Darden, S.J., concurring).

238. *Id.*

239. 36 M.J. 150 (C.M.A. 1992). Sergeant Russell Banks was charged with the rape and sodomy of his seven-year old daughter; he denied committing the acts. During its case-in-chief, the government called an expert witness who explained, over defense objection, the profiles of families exhibiting the dysfunction of child sexual abuse and the behavior of a sexually abused child. The expert opined there were several risk factors that increase the risk of a child being a victim. These include: only one biological parent, a stepfather in the family, and marital dysfunction. The Court of Military Appeals rejected the use of a "profile" to show it was more likely than not that Banks abused his daughter; that is, to establish guilt or innocence. The court reversed the conviction.

240. *Id.* at 163.

241. The trial counsel used a syllogism to prove Banks' guilt. The major premise was that families with the profile present an increased risk of child sexual abuse. The minor premise was that Bank's family fit the profile, leading the panel to draw the conclusion that Banks was a child abuser. *Id.* at 162 n.11.

242. *Id.* at 163.

243. Unlike Banks, Pagel did not object to the family profile testimony or to whether the characteristics of his family fit the pattern of that profile. He only objected to counsel's actually comparing the family to the profile point-by-point. As Senior Judge Darden indicated in his concurring opinion, Pagel's objection was forfeited, absent plain error. *Pagel*, 45 M.J. at 71.

244. *Id.*

245. In this regard, *Pagel* is consistent with the belief by some, including this author, that child sexual abuse cases have their own special set of rules. *See, e.g.*, United States v. Johnson, 35 M.J. 17, 18 (C.M.A. 1991) ("Especially in child abuse cases, information is often imprecise, and courts . . . are wrestling with testimonial boundaries").

Tell Me Why It Hurts. The Medical Diagnosis and Treatment Hearsay Exception in Child Abuse Cases

However well a child-victim testifies in court, an aggressive, prepared trial counsel will always want to bolster that testimony with supporting evidence. Although such corroboration may include medical and physical evidence, expert psychological testimony concerning delayed reporting, and even the accused's own admissions, some of the most powerful evidence in child sexual abuse cases lies in the child's prior out-of-court hearsay statements.[246] One of the most common exceptions to the general hearsay ban used in child abuse prosecutions is statements made for purposes of medical diagnosis or treatment.[247]

This exception requires the proponent to show that: (1) any statements were made by the child for the purpose of medical treatment or diagnosis (medical purpose prong); and (2) the child made the statements with some expectation of promoting his or her well-being (expectation of treatment prong).[248] "While the expectation of the treatment prong is generally not a problem with adults and older children who can easily recognize health care practitioners, and intuitively appreciate the incentive to be truthful,"[249] small children typically cannot articulate that they were aware the statements were pertinent to successful treatment and would promote their well-being.[250] While a formal affirmation by the child that he or she expects some benefit is not a per se requirement for admission,[251] how can a proponent of medical diagnosis and treatment statements overcome this challenge? In *United States v. Siroky*,[252] the CAAF set forth some suggestions.

Staff Sergeant James Siroky and his wife, a native Filipina, had, by most accounts, an abusive and contentious marriage.[253] Most of their problems centered around Mrs. Siroky's repeated threats to report the accused to the authorities for abuse if he did not give her money and grant her desire to return to the Philippines with their twenty-nine-month-old daughter, J.[254] Mrs. Siroky eventually filed for divorce, seeking custody of their daughter. Mrs. Siroky's attorney thereafter sent J to a child therapist "experienced with treating psychological trauma associated with sexual abuse."[255] During several of their sessions together, J verbalized and demonstrated sexual abuse. At Siroky's subsequent court martial for, *inter alia*,[256] the rape and sodomy of his daughter, the military judge allowed the therapist to testify to certain admissions made by J, which constituted the government's only evidence of the sodomy charge and the only evidence of penetration supporting the rape charge.[257]

The CAAF affirmed the AFCCA's decision setting aside the findings of guilty as to the sodomy and rape offenses. Although J's statements may have satisfied the medical purpose prong,[258] there was insufficient evidence to show that J made the statements with an expectation of promoting her well-being.[259]

In child sexual abuse cases where counsel are attempting to introduce statements under the medical treatment exception to the hearsay rules, *Siroky* suggests several things to ensure their admission. First, the court suggested that someone, like a

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246. Lucy Berliner and Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 130 (1984).

247. The military rules permit admission of hearsay statements "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." MCM, *supra* note 2, MIL. R. EVID. 803(4).

248. *See, e.g.*, United States v. Faciane, 40 M.J. 399 (C.M.A. 1994); United States v. Armstrong, 36 M.J. 311, 313 (C.M.A. 1993); United States v. Quigley, 35 M.J. 347 (C.M.A. 1992).

249. United States v. Siroky, 42 M.J. 707, 711 (A.F. Ct. Crim. App. 1995).

250. In cases involving small children, who do not themselves seek medical treatment but instead are brought by someone else, there must be some evidence that the child understood the doctor's role in order to trigger the motivation to provide truthful information. *See* United States v. Barrett, 8 F.3d 1296, 1300 (8th Cir. 1993).

251. United States v. Ureta, 44 M.J. 290 (1996), *cert. denied*, 117 S. Ct. 692 (1997).

252. 44 M.J. 394 (1996).

253. Although Mrs. Siroky testified the accused was a heavy drinker who became physically abusive, she was described by most individuals at trial as being dishonest, manipulative, and emotionally abusive to the accused. *Id*. at 395.

254. *Id*.

255. *Siroky*, 42 M.J. at 709.

256. Siroky was also found guilty of two specifications of assault and battery on his wife. The charge and specifications were affirmed on appeal.

257. J did not testify and there was no attempt by either party or the military judge to call her.

258. As the Air Force court noted, "[u]nquestionably, Mrs. Clifton [the therapist] needed J to speak to her in order for J's therapy to progress. We conclude, as did the military judge, that J's statements were for the purpose of medical diagnosis or treatment." *Siroky*, 42 M.J. at 711.

mother or father, explain to the child why he or she is going to see the doctor, the importance of the treatment, and that the child needs to tell what happened in order to feel better.[260] Second, the court recommended that caretakers specifically identify themselves as doctors, nurses or other medical professionals,[261] tell the child the purpose of the examination,[262] and engage in activities that would be construed by the child as treatment.[263] Third, the court implicitly recommended the military judge make express findings of fact as to the evidence submitted on both prongs of the medical diagnosis and treatment hearsay exception.[264]

Due to the reluctance of a child-victim to testify at trial, counsel are inevitably required to rely on exceptions to the hearsay rule. Because medical examinations are conducted as a matter of course in sexual abuse cases, statements made by the child-victim during the course of the examination are usually available for counsel's use as substantive evidence.[265] *Siroky* sets forth several things counsel can do to lay the proper foundation to admit them under the medical diagnosis or treatment exception to the hearsay rules.

Conclusion

It is beyond peradventure that mastery of evidence is a necessary task for the successful military trial practitioner. While not intended as a substitute for a more comprehensive and individualized reading of the cases, this article has attempted to distill the practical import of several of the more interesting developments in evidence during the last year. How the spin actually "plays in Peoria" is left for another day.

259. For example, the court noted the therapist did not present herself as a doctor or was otherwise there to help. In fact, she introduced herself to J as "Ms. Lindy," and asked J if she would like to have some fun playing with her toys. The record did not indicate that the therapist was dressed or otherwise was identified as a medical professional. She did not engage in any activities which J could construe as treatment and the interviews were conducted in a room filled with toys. *Siroky,* 44 M.J. at 399-401.

260. *Id.* at 400-401.

261. *Id.* at 401. The scope of Mil. R. Evid. 803(4) is not limited to doctors, but may include statements to other health care practitioners, or therapists. United States v. Cox, 45 M.J. 153 (1996). Statements made to a family counselor, social worker, clinical psychologist, psychotherapist, or other practitioners of the healing arts may also qualify for admission under Rule 803(4). "It is the purpose of the assertion, i.e., to aid in medical diagnosis or treatment, not the identity of its immediate recipient, that excepts it to the hearsay rule." DAVID F. BINDER, HEARSAY HANDBOOK 176 (3d ed. 1991); *see also* United States v. Morgan, 40 M.J. 405 (C.M.A. 1994), *cert. denied,* 115 S. Ct. 907 (1995) (MRE 803(4) not limited to medical doctors; key factor is motive and perception of patient).

262. The doctor, or other professional, should note the child's understanding in the medical records.

263. *See also,* United States v. Henry, 42 M.J. 593 (Army Ct. Crim. App. 1994). A fifteen year old victim's consent to rape protocol examination because she had been told that "medical evidence had to be gathered in these types of allegations," evidenced a belief that the exam was simply a continuation of the ongoing criminal examination and statements to the doctor implicating her father were not provided with an expectation of treatment or for the purpose of medical diagnosis. The court recommended that any statements obtained from the victim during the course of the investigation be taken after she has been treated and that any law enforcement personnel accompanying the victim to the medical facility remain outside the examining room during the examination.

264. *Siroky,* 44 M.J. at 398.

265. *See also* United States v. Yazzie, 59 F.3d 807 (9th Cir. 1995) (out-of-court statement of child's parent made to medical personnel for purposes of obtaining medical treatment admissible under Fed. R. Evid. 803(4)).