Developments in Evidence III—The Final Chapter

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Introduction

Like Sylvester Stallone,[1] my life appears to revolve around sequels. For example, I've driven five different Japanese cars, endured two "Inside the Beltway" assignments, and indulged four super-model marriages.[2] Continuing the trend, this article is the third in a series detailing developments in the law of evidence.[3] Granted, evidence is the purest of the trial arts,[4] so one cannot help but get excited about the subject. For those practitioners who rely on these symposiums for their annual fix of criminal law, 1997 was a very good year for evidence junkies.

Back to the Future: Taking Advantage of the Accused's Post-Offense Misconduct

Most cases decided under Military Rule of Evidence (MRE) 404(b)[5] concern activities that occurred before the crime charged.[6] What about crimes, wrongs, or acts committed after the accused has allegedly committed the charged offense; does this make the evidence especially suspect? In other words, does Rule 404(b) exclude acts subsequent to the incident giving rise to the charge(s)? This was precisely the question posed in *United States v. Latney.*[7]

In September 1994, a two-hour undercover videotape captured Gregory Latney driving a blue Lincoln Continental to and from his mother's house. A passenger in the car eventually sold crack cocaine to a police informant.[8]

In May 1995, more than eight months later, the police found crack, baggies, and money in the car, and Latney was arrested for aiding and abetting the earlier distribution. Over defense objection, the trial court admitted this evidence to show Latney's intent and knowledge in September 1994.[9] In appealing his conviction, Latney argued that evidence of crack-related activities occurring after the charged offense was not relevant. The U.S. Court of Appeals for the D.C. Circuit disagreed.

The court noted that Rule 404(b) itself draws no distinction between bad acts committed before and bad acts committed after a charged offense.[10] In each case, the question the rule poses is whether the evidence is relevant to something other than the accused's character. The fact that Latney used his Lin-

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1. Hollywood screen legend, dilettante, and star of such cinematic tours de force as: *Stop! Or My Mother Will Shoot, Tango and Cash, Italian Stallion, The Lords of Flatbush, Rhinestone, Death Race 2000,* and *F.I.S.T.* Alright, so film noir it's not, but his movies have grossed over two billion dollars.

2. Wait, that's where our lives differ.

3. *See* Major Stephen R. Henley, *Postcards From the Edge: Privileges, Profiles, Polygraphs, and Other Developments in the Military Rules of Evidence*, ARMY LAW., Apr. 1997, at 92; Major Stephen R. Henley, *Developments in Evidence Law,* ARMY LAW., Mar. 1996, at 96.

4. With due deference to my learned colleagues in the Criminal Law Department, past and present, who have taught the Fourth, Fifth, and Sixth Amendments, if you can't get it in, it just doesn't matter.

5. Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action 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.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (1995) [hereinafter MCM].

6. *See, e.g.*, United States v. Miller, 46 M.J. 63 (1997) (admitting multiple prior sexual contacts with another child to show intent to molest present victim); United States v. Lake, 36 M.J. 317 (C.M.A. 1993) (admitting ten previous incidents of drug sales to show intent to distribute); United States v. Ryder, 31 M.J. 718 (A.F.C.M.R. 1990) (admitting threat two months before charged maiming to show intent and absence of mistake).

7. 108 F.3d 1446 (D.C. Cir. 1997). Though a federal circuit court decision, the case has some precedential value for the military practitioner because MRE 101 provides that, "[i]f 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 . . . the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." MCM, *supra* note 5, MIL. R. EVID. 101(b)(1).

8. *Latney,* 108 F.3d at 1448.

9. *Id.*

coln in May 1995 to facilitate drug trafficking made it more likely that he was doing the same thing eight months earlier.[11] In other words, it was more likely with the evidence that Latney was knowledgeable about the drug trade in September 1994 than without it. As the court noted, it is true that knowledge could have been gained after September, but that possibility went to the strength and weight of the evidence, not its relevancy.[12] So long as an item of evidence has *any* tendency to make the existence of a fact of consequence more or less probable, it is relevant.[13] "[W]hen it comes to relevancy, there is no sliding scale;"[14] the evidence is either relevant or not, and relevant evidence is admissible.[15]

Latney's value to trial counsel goes well beyond the use of uncharged misconduct offered under MRE 404(b). Consider the court's rationale when the defense injects the issue of the accused's character into the case. If, for example, the defense has introduced opinion or reputation evidence of the accused's good military character,[16] the trial counsel may well be able to impeach that evidence with evidence of specific instances of post-offense misconduct. Like MRE 404(b), nothing in MRE 405(a) limits evidence to acts which occurred before the date of the charged offense.[17] Similar to the issue in *Latney*, the question regarding cross-examination of character witnesses with post-offense misconduct is one of relevancy.[18] If, for example, the accused was a bad soldier or a poor duty performer after the date of the charged offense, it is more likely that he was a bad soldier or a poor duty performer on the date of the charged offense.[19] As such, an accused's post-offense misconduct is relevant to testing the knowledge and qualifications of a witness who gives a good character opinion, as well as the credibility of his testimony. Of course, depending on the circumstances of the case, the defense can, and should, argue that the probative value of using post-offense misconduct to challenge a character witness' opinion is substantially outweighed by the danger of unfair prejudice to the accused.[20]

"No Mas!! No Mas!!"[21] Defense Concessions to Uncharged Misconduct Evidence

It is a legal truism that relevant evidence is admissible; irrelevant evidence is not.[22] However, otherwise relevant evidence may still be excluded if its probative value is substantially outweighed by its unfair prejudicial effect.[23] In balancing the probative value of a piece of evidence against the danger of unfair prejudice, the military judge considers any number of factors,[24] to include the availability of alternative modes of proof, such as

10. *Id.* at 1449.

11. *Id.*

12. *Id.* at 1448.

13. MCM, *supra* note 5, MIL. R. EVID. 401. "Relevant evidence means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* (emphasis added).

14. *Latney*, 108 F.3d at 1449.

15. *See* MCM, *supra* note 5, MIL. R. EVID. 402. *See also* United States v. Olivo, 69 F.3d 1057 (10th Cir. 1995) (observing that evidence of subsequent acts is highly probative when the disputed issue is intent, even though the accused engaged in the conduct one year after the charged offense); United States v. Corona, 34 F.3d 876 (9th Cir. 1994) (concluding that a drug customer list found in a wallet 11 months after the arrest cast doubt on asserted ignorance of drug transactions).

16. *See* MCM, *supra* note 5, MIL. R. EVID. 404(a)(1) (indicating that the accused is entitled to introduce evidence of his own pertinent character traits to show that it is less likely that he committed the charged offense).

17. "In all cases in which evidence of character or a trait 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.*" *Id.* MIL. R. EVID. 405(a) (emphasis added). Likewise, Rules 413 and 414 now permit the government, in cases in which the accused is charged with sexual assault or child molestation, to introduce evidence of the accused's commission of other offenses of sexual assault or child molestation for consideration on any matter to which they are relevant. *Id.* MIL. R. EVID. 413, 414. There is no requirement that the other acts precede the date of the charged offense. *See id.*

18. *See* United States v. Brewer, 43 M.J. 43, 47 (1995) (holding that cross-examination of defense character witness is limited to "relevant" instances of conduct).

19. Similarly, if an accused who is charged with aggravated assault has introduced character testimony regarding his peaceful nature, cross-examination regarding specific instances of post-offense violence offered to challenge the credibility of the witness' opinion would be relevant.

20. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MCM, *supra* note 5, MIL. R. EVID. 403.

21. In November 1980, "Sugar" Ray Charles Leonard regained the WBC welterweight championship of the world when Roberto "Hands of Stone" Duran quit in the middle of the eighth round of a scheduled 15 round boxing match, by raising his hands and crying "No Mas!! No Mas!!" (No More!! No More!!).

22. "All relevant evidence is admissible. Evidence which is not relevant is not admissible." MCM, *supra* note 5, MIL. R. EVID. 402.

23. *Id.* MIL. R. EVID. 403.

defense stipulations and concessions to elements of the crime. Last year's evidence article discussed the case of *United States v. Crowder*[25] and queried whether an accused could concede elements of the charged offense and thereby preclude the government from introducing uncharged misconduct evidence under MRE 404(b).[26]

In *Crowder*, the United States Court of Appeals for the D.C. Circuit reversed the convictions of the two defendants and issued a narrow exception to Rules 404(b) and 403, holding that an accused may effectively remove from consideration evidence of other crimes, wrongs, or acts that is relevant to the intent element of a charged offense by unequivocally conceding that element at trial.[27] The court held that concession, coupled with an explicit instruction that the government need not prove that element,[28] gave the government everything it was looking for—arguably making the evidence devoid of any probative value.[29] However, as the court noted, even if the evidence retained some degree of probative value, it certainly was now substantially outweighed by the potential for the jury to unfairly rely on the evidence's tendency to show propensity.[30]

Since last April's year-in-review article, the Supreme Court summarily vacated the judgment in *Crowder* and remanded[31] the case for further consideration in light of *Old Chief v. United States*.[32] Though this action may be the death knell for defense concessions,[33] the Court's holding in *Old Chief* was limited to an unrelated issue regarding exclusion of the names and nature of prior offenses in cases involving prosecutions under 18 U.S.C. § 922(g)(1)[34] and not uncharged misconduct offered under Rule 404(b), the issue in *Crowder*. Unfortunately for the defense, Justice Souter, in writing for the majority, observed that "when a court balances the probative value against the unfair prejudicial effect of evidentiary alternatives, the court must be cognizant of and consider the [government's] need for evidentiary richness and narrative integrity in presenting a case."[35] He further acknowledged that "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good

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24. 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* MICHAEL GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 176-78 (3d ed. 1991).

25. 87 F.3d 1405 (D.C. Cir. 1996) (en banc). The case was a consolidated review of two separate cases in which both defendants, Crowder and Davis, were convicted of various drug distribution offenses.

In *Crowder*, three police officers in a marked car observed Rochelle Crowder exchange a small object for cash with another man. They motioned to Crowder, who began to run away. One of the pursuing policemen saw Crowder throw down a brown paper bag as he scaled a fence; the bag contained 93 ziplock bags of crack and 38 packets of heroin. In a search incident to arrest, the officers seized a pager and $988 in cash. Crowder denied ever possessing the bag, and his first trial ended in a hung jury after Crowder testified that the police beat him and falsely accused him of possessing the drugs when he refused to talk with them about an unrelated murder. Defense witnesses thereafter convinced the jury that the object passed was actually a cigarette and the large amount of cash was to purchase some home supplies. The beeper was to communicate with the mother of his daughter, as he had no phone. At the retrial, the prosecutor gave notice that he intended to offer evidence that Crowder had previously sold drugs to an undercover officer, to prove Crowder's knowledge of drug dealing and to prove the intent to distribute element of the charged offense. Crowder responded by offering to concede every element of the crime, except whether he possessed the drugs on the day of the arrest. The judge refused to bind the government's hands and admitted the evidence over defense objection. *Id.* at 1406.

In *Davis*, an undercover officer wanting to buy crack walked up to man standing on a Washington, 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. The cash was exchanged for a small packet, and the man walked back toward 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. At trial, Davis intended to raise a mistaken identification defense and subpoenaed the store owner as an alibi witness. The prosecutor gave notice that he intended to introduce evidence that Davis had sold cocaine three times before the charged offense, evidence intended to show knowledge of drug dealing and to prove the intent to distribute element of the charged offense. Davis then 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. *Id.* at 1407-08.

26. *See* Henley, *Postcards from the Edge*, *supra* note 3, at 96.

27. *Crowder*, 87 F.3d at 1410-11.

28. For example, in a possession with intent to distribute cocaine case where the trial counsel wants to introduce evidence of prior acts on the issues of knowledge and intent, this sample instruction could follow the judge's instructions on the elements of the offense:

> By the accused'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 the accused was in possession of the cocaine alleged in the charge and specification. You must find the accused guilty of possession with intent to distribute cocaine if you find that the government has proven beyond a reasonable doubt that the accused possessed the drugs.

29. *Crowder*, 87 F.3d at 1414.

30. *Id.*

31. *United States v. Crowder*, 117 S. Ct. 760 (1997).

sense."[36] This observation, coupled with the remand in *Crowder*, may lead to the inevitable conclusion that the government will not be bound by defense offers to concede elements for which Rule 404(b) misconduct is offered and may prove each element of a charged offense by any means it chooses. That issue, however, has not yet been specifically addressed by either the Supreme Court or the Court of Appeals for the Armed Forces (CAAF).[37]

Defense counsel should remain vigilant and still debate whether an offer to concede element(s) of the charged offense to preclude the admission of uncharged misconduct is in their clients' best interests. Counsel should at least have the military judge perform the Rule 403 balancing analysis on the record. At worst, she will simply deny the motion.[38] At best, she may exercise some of that judicial discretion inherent in all Rule 403 determinations and grant it, finding that the concession is a legitimate alternative mode of proof.[39]

Methods of Proving Character . . . and More

Character evidence is generally not admissible to show that a person acted in conformity on a particular occasion.[40] There are, however, several important exceptions.[41] One is that the accused is given the right to introduce evidence of his character.[42] The accused also has the option of introducing pertinent character traits of the victim of the charged offense.[43] Additionally, the credibility of any witness may be impeached or reha-

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32. 117 S. Ct. 644 (1997). After a fight in which shots were fired, Johnny Lynn Old Chief was charged with, inter alia, violating 18 U.S.C. § 922 (for being a felon in possession of a firearm) and aggravated assault. Old Chief offered to stipulate to the fact that he had been previously convicted of a felony, arguing that relating the name and nature of the prior conviction, 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 join the stipulation and instead insisted on its right to present evidence of the prior conviction, an element of one of the offenses. The district court agreed with the government's position, and the Ninth Circuit affirmed. The Supreme Court granted certiorari and reversed. *Id*. at 647. The Court held that a district court abuses its discretion under Federal Rule of Evidence 403 if it spurns a defendant's offer to concede a prior conviction and admits the full judgment and record over objection, when the name and nature of the prior offense raise the risk that the jury will improperly consider the evidence and when the purpose of the evidence is solely to prove the prior conviction element of the charged offense. *Id*. at 647-56. As a result of *Old Chief*, if the only reason for introducing the details of a prior felony is to prove the prior conviction element of a prosecution under 18 U.S.C. § 922(g)(1), and the accused fully admits to the existence of the prior conviction, it is an abuse of the trial court's discretion under Rule 403 to reject the accused's offer to substitute the admission in its place. *Old Chief v. United States*, 61 Crim. L. Rep. (BNA) 3117 (Aug. 20, 1997).

33. As of 23 March 1998, the D.C. Circuit has yet to issue an opinion on remand.

34. This statute criminalizes the possession of a firearm by an unauthorized person, and is nominally referred to as "a felon in possession of a firearm."

35. *Old Chief*, 117 S. Ct. at 651.

36. *Id.* at 654.

37. Consider the case of *United States v. Orsburn*, 31 M.J. 182 (C.M.A. 1990), *cert. denied*, 498 U.S. 1120 (1991), in which the accused was charged with indecent acts with his eight-year-old daughter. The trial counsel offered into evidence three pornographic books found in Orsburn's bedroom to show an intent to gratify his lust or sexual desires, an element of the charged offense. Orsburn objected, arguing that the offenses never happened; but if they did, whoever did them, by their very nature, did so with the intent to gratify his lust and sexual desires. The military judge admitted the evidence anyway. Then-Chief Judge Sullivan, writing for the majority in affirming the conviction, held that the military judge did not abuse his discretion in balancing the probative value of the books against the danger of unfair prejudice to the accused. Importantly, Chief Judge Sullivan noted that Orsburn "had refused to commit himself on the issue of intent or provide any assurances that he would not dispute intent." *Id.* at 188.

38. *See* Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL ADVOC. 563 (1997).

39. The substantial impediment facing defense counsel now with regard to evidence of other acts is the impact of Military Rules of Evidence 413 and 414 and the admissibility of evidence of other offenses of sexual assault and child molestation on the issue of the accused's propensity or predisposition to commit such offenses. *See infra* notes 86-130 and accompanying text. It is unclear how an accused could concede the purpose for which the evidence appears to be offered, as this concession may necessarily require an admission that the accused is predisposed to, or has the propensity to engage in, sexual assault or child molestation, not a strategy recommended for most people accused of a crime.

40. The rationale behind the rule is made clear in *Michelson v. United States*:

> The [character] inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.

335 U.S. 469, 482 (1948).

41. STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 318 (6th ed. 1994).

42. Evidence of a person's character is not admissible to prove that the person acted in conformity, except that the accused can offer evidence of a pertinent character trait. MCM, *supra* note 5, MIL. R. EVID. 404(a)(1). *See* United States v. Gagan, 43 M.J. 200 (1996) (defining character as the exhibition of a pattern of repetitive behavior which is either morally praiseworthy or condemnable).

bilitated through the introduction of evidence of the character trait for truthfulness.[44]

While MRE 404(a) delineates the circumstances in which evidence of a person's character is admissible, MRE 405 recognizes the three devices available to prove it:[45] (1) reputation within a pertinent community;[46] (2) opinion of a witness who is familiar with the person's character; and (3) specific instances of conduct, if character is an essential element of the offense or defense.[47] In *United States v. Schelkle*,[48] the CAAF provided some insight, albeit limited, concerning just when character is an essential element of the offense or defense.

Major Kurt Schelkle, an Air Force officer, was charged with using marijuana, an allegation which he denied. At his trial, the military judge prohibited the defense from introducing specific instances of conduct to bolster a good soldier defense.[49] The CAAF affirmed the findings and sentence, finding no abuse of judicial discretion and holding that the observation of general good conduct or duty performance is not probative of an essential element of a good soldier defense.[50] In other words, "character" is not an essential element of a good military character defense such that it may be proven by specific instances of the accused's good conduct.[51] That is, perhaps, a logical result,[52] but the court does not adequately explain why.

Character may itself be an essential element of a charge or defense and thus, in the strict sense, be "at issue." In view of the crucial role of character in these cases, it may be proven by evidence of specific acts.[53] To implement this rule intelligently, however,[54] the courts generally have held that character is "at issue" only when it is an operative fact which determines the rights of the parties.[55] In other words, only when the existence or nonexistence of the trait *itself* establishes guilt or innocence will character qualify as an "essential" element.[56] If it does not, any evidence as to character should be limited to reputation and/or opinion testimony under MRE 405(a).

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43. For example, an accused who is charged with aggravated assault can introduce evidence of the victim's character for violence or aggressive behavior to support a theory of self-defense. The rule also contains a limited exception for the government in homicide or assault cases. The trial counsel can introduce evidence of the character trait of peacefulness of the victim to rebut any evidence introduced by the defense that the victim was an aggressor. MCM, *supra* note 5, MIL. R. EVID. 404(a)(2).

44. *Id.* MIL. R. EVID. 404(a)(3).

45. *See* MICHAEL H. GRAHAM & EDWARD D. OHLBAUM, COURTROOM EVIDENCE: A TEACHING COMMENTARY 312 (1997).

46. *See* United States v. Reveles, 41 M.J. 388 (1995) (interpreting "community" broadly to include patrons at officer's club bar).

47. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 569 (4th ed. 1997). Military Rule of Evidence 405(b) provides that prior instances of conduct may be used to prove or to rebut character where character or a trait of character operates as an essential element of a charge, claim, or defense—in other words, when character is "at issue." MCM, *supra* note 5, MIL. R. EVID. 405(b).

48. 47 M.J. 110 (1997).

49. *Id*. at 111. Schelkle offered the evidence not under MRE 405(a) but under MRE 405(b) as evidence of a character trait which was an essential element of his defense—good military character. *Id.* The evidence consisted of several letters in which the authors each professed that the accused never used drugs in their presence, more accurately described by the court as specific instances of nonconduct. *Id*.

In *Michelson v. United States*, Justice Jackson had harsh words regarding the use of character evidence in general:

> To thus digress from evidence as to the offense to hear a contest as to the standing of the accused, at its best opens a tricky line of inquiry as to a shapeless and elusive subject matter. At its worst it opens a veritable Pandora's box of irresponsible gossip, innuendo, and smear.

335 U.S. 469, 478 (1948). He reasoned, however, that reputation and opinion evidence is preferable to evidence of the defendant's specific acts, because it avoids "innumerable collateral issues which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen, and befog the chief issues in the litigation." *Id.* at 480.

50. *Schelkle*, 47 M.J. at 112.

51. This result makes sense when one considers it in the context of existing rules. If character is used circumstantially to prove that a person acted in conformity, proof is limited to reputation and opinion testimony. The logical relevance of the good soldier defense argument in this case was that Major Schelkle was a good soldier at the time the witness knew him, he remained a good soldier thereafter, he was a good soldier on the date of the offense, and good soldiers do not use drugs. Character here is being used circumstantially to prove conduct; a person can use drugs but still be a good duty performer. Proving conduct through the circumstantial use of character is limited to reputation and opinion testimony.

52. *See* United States v. Kahan, 479 F.2d 290, 293 (2d Cir. 1973), *rev'd on other grounds*, 415 U.S. 239 (1974) (holding that evidence of prior performance of official duty without taking bribes is inadmissible in bribery prosecution); United States v. Bono, 324 F.2d 582 (2d Cir. 1963) (holding that specific occasions of accused's honorable conduct are inadmissible to support character for honesty, veracity, and trustworthiness).

53. *See* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 551-52 (3d ed. 1984).

54. So as not to deflect focus of the trial to collateral issues regarding character.

In *Schelkle*, proof that Major Schelkle exhibited the trait of good military character would not, *by itself*, have established that he did not use marijuana on the charged date; it is beyond doubt that a person can be a good duty performer and still abuse drugs. As existence of the trait of good military character would not *by itself* determine guilt or innocence of the parties, but simply be used as circumstantial proof of conduct, each witness was properly limited to offering his opinion relating reputation within the pertinent community regarding Major Schelkle's military character. The military judge was well within his discretion in not allowing the witness on direct examination to relate the specific reasons or conduct forming the basis of his testimony.[57]

In reality, character as an essential element of a charge or defense will rarely arise.[58] For example, consider an accused who is charged with voluntary manslaughter[59] and who has uncovered evidence, of which he was heretofore unaware, that the victim has a checkered past replete with a number of particularly obstreperous and vicious attacks on innocent civilians, evidence certainly helpful to the accused's case. Because a victim's character for violence is not an essential element of self-defense, the military judge would be within his discretion in prohibiting the accused from introducing those specific acts of violence under MRE 405(b).[60] Simply stated, a claim of self-defense can be resolved without evidence of or reliance upon the victim's character. As long as the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon him and the means or force used were necessary for protection against death or grievous bodily harm, a claim of self-defense can be made.[61] Proof of the victim's character for violence, though helpful, would not, *by itself*, determine the ultimate issues in the case, reasonable apprehension and necessary means.[62] Thus, an assault victim's character for violence, or the accused's character for peacefulness for that matter, is not an essential element of self-defense, and proof of that trait is limited to reputation and opinion testimony.[63]

The only realistic circumstance in military practice when character will arguably be "at issue" is when character is offered to prove or to disprove the accused's predisposition to commit the crime following the raising of an entrapment defense.[64] In this situation, the accused typically admits to committing the crime, but the suggestion to do so originated with the government; in other words, the accused was entrapped. Arguably, as proof of the existence or nonexistence of the trait of predisposition to commit the crime would, by itself, determine the efficacy of the entrapment defense,[65] character could be considered an essential element, such that admissibility of specific acts to show a lack of predisposition would be proper.[66]

Speedbumps on the Road to Conviction: Limitations on Rebutting Evidence of Good Military Character

Generally speaking, the government cannot introduce character evidence to show that the accused acted in accordance with a particular character trait on a given occasion—in other words, that the accused must have committed the charged offense because he is a certain type of person.[67] The prosecution can, however, introduce character evidence responsively.[68] If the accused introduces evidence of a pertinent[69] character[70] trait, trial counsel may rebut it by cross-examining the witness with respect to specific instances of conduct or other bad acts in which the accused engaged.[71] In *United States v. Pruitt*,[72] the

55. *See, e.g.*, State v. Lehman, 616 P.2d 63, 66 (Ariz. 1980) (defining "essential" character trait as an operative fact which, under the substantive law, determines the rights and liabilities of the parties); West v. State, 576 S.W.2d 718, 719 (Ark. 1979) (holding that the defendant's peaceful character is not an essential element of self-defense). In a tort case which alleges negligent entrustment of an automobile to an incompetent driver, the plaintiff must show as part of his case that the defendant was aware of the incompetence; proof of specific acts of incompetence is admissible. *See* McClellen v. State, 570 S.W.2d 278 (Ark. 1978).

56. When character is viewed circumstantially to prove that a person acted in conformity with the character trait, only opinion and reputation are acceptable forms of proof, not evidence of specific instances of conduct. *See* Perrin v. Anderson, 784 F.2d 1040, 1045 n.4 (10th Cir. 1986). If, for example, a plaintiff sues for slander because the defendant called him a liar and the defendant defends on the basis that the plaintiff is in fact a liar, the plaintiff's character as a truthful person is an essential element of the defense, such that evidence of specific instances of lies are admissible. *See* WIGMORE, EVIDENCE, §§ 202, 207 (3d ed. 1940).

57. If, however, the trial counsel opens the door and cross-examines a defense character witness concerning awareness of any specific instances of misconduct which are probative of the trait offered, the defense counsel should certainly be able to rehabilitate the witness on redirect by asking the witness to relate the specific reasons which form the basis of his opinion. To do otherwise would mischaracterize the state of the evidence and leave the panel with the impression that the witness' testimony had no basis in fact at all. *See generally* MCM, *supra* note 5, MIL. R. EVID. 401, 611(a).

58. Considering that the Eighth Amendment prohibits the criminalization of a person's status, character will rarely (if ever) be an essential element of an offense. *See* Robinson v. California, 370 U.S. 330 (1962). Two examples where character may be viewed as an essential element of an offense are: (1) when the accused is charged with the common law crime of seduction, the victim's chastity is an element of the offense and (2) in a defamation action, the victim's reputation for honesty is directly at issue when the accused has called him dishonest. *See* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.2 (3d ed. 1991).

59. *See* UCMJ art. 119 (West 1995).

60. *See* United States v. Keiser, 57 F.3d 847 (9th Cir. 1995) (holding that the accused's character for peacefulness is not an essential element of self-defense such that proof can be made by specific acts of conduct under Federal Rule of Evidence 405(b)).

61. MCM, *supra* note 5, R.C.M. 916(e)(1).

62. In more colloquial terms, a Hare Krishna can still be convicted of aggravated assault, and a Hell's Angel biker can still legitimately claim self-defense.

CAAF reaffirmed existing limitations on the methods trial counsel can use to rebut a good soldier defense.

Airman First Class Martell Pruitt was a postal clerk who was charged with under-reporting the sale of two money orders (for $1000 less than their actual value) and falsifying documents to cover it up.[73] Pruitt admitted to falsifying one of the money orders with the help of his then-girlfriend, Sarah, but claimed that it was meant as a paperwork joke on his supervisor.[74] As evidence of his innocence, Pruitt called several witnesses who testified as to their high opinions 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 knowledge and 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).[75]

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63. For example, when introducing evidence of a character trait of the victim in an assault case pursuant to MRE 404(a)(2), the examination would follow something like this:

> Defense Counsel: Do you know the victim in this case, PFC _____?
> Witness: Yes. She's been my next door neighbor for two years, and we work in the same motor pool.
> Defense Counsel: During the time you've known her, have you formed an opinion regarding her character for violence?
> Witness. Yes.
> Defense Counsel: What is that opinion?
> Witness: It is my opinion that PFC _____ is an extremely violent and aggressive woman.
> Defense Counsel: Thank you. No further questions.

Similarly, when introducing evidence of a pertinent character trait of the accused in a larceny case pursuant to MRE 404(a)(1), the examination would follow something like this:

> Defense Counsel: Are you familiar with my client's reputation for honesty and trustworthiness within the Fort Bragg community?
> Witness: Yes I am. I've talked to a number of individuals myself and have heard other people talking as well.
> Defense Counsel: What is his reputation?
> Witness: He has a reputation for being honorable, forthright, and of the highest integrity.

64. When the defense raises entrapment, the accused makes his character an essential trial issue. Trial and defense counsel may thus introduce specific instances of conduct which are probative of predisposition to determine whether criminal intent or design originated with the government. *See* United States v. Thomas, 134 F.3d 975 (9th Cir. 1998). *See* SALTZBURG, *supra* note 47, at 573 (indicating that character might be an element of a defense if entrapment is claimed and the government (or defense) wants to prove (or to disprove) predisposition).

65. If the accused was not predisposed, he is not guilty. If he was predisposed, he is guilty.

66. This evidence could be other specific instances in which the accused was tempted to sell drugs and chose not to do so.

67. *See* GLEN WEISSENBERGER, FEDERAL EVIDENCE—1996 COURTROOM MANUAL 48 (1996); *see also* United States v. Reed, 44 M.J. 825 (A.F. Ct. Crim. App. 1996) (prohibiting trial counsel from initiating evidence of the accused's character by simply cross-examining regarding a pertinent character trait not already placed in issue by the defense). *But see* MCM, *supra* note 5, MIL. R. EVID. 413, 414 (providing that, in cases of sexual assault or child molestation, evidence of the accused's commission of other sexual assault or child molestation offenses is admissible for its bearing on any relevant matter).

68. SALTZBURG, *supra* note 47, at 320. "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).

69. Whether a trait is pertinent depends on the relationship between the trait offered and the charged offense. *See, e.g.*, United States v. Gagan, 43 M.J. 200 (1996) (observing that heterosexual orientation is a character trait in prosecution for homosexual-related assault); United States v. Brown, 41 M.J. 1 (1994) (admitting evidence of the accused's strong opposition to use of drugs and alcohol as a matter of religious principle as character evidence in drug use case); United States v. Clemons, 16 M.J. 44 (C.M.A. 1983) (treating character for lawfulness as pertinent to barracks larceny charges); United States v. Stanley, 15 M.J. 949 (A.F.C.M.R. 1983) (identifying character for morality as pertinent trait in trial for indecent acts and liberties with a child under the age of 16).

70. Character has been defined by the military courts as the exhibition of a pattern of repetitive behavior, which is either morally praiseworthy or condemnable. United States v. Gagan, 43 M.J. 200 (1996).

71. Trial counsel can test the soundness of opinion testimony through inquiry into relevant specific instances of conduct, even though they may fall outside of the time period upon which the witness bases his opinion. *See* United States v. Brewer, 43 M.J. 43 (1996).

72. 43 M.J. 864 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 148 (1997).

73. *Id.* at 149.

74. *Id.*

75. *Id.* at 150.

While the witnesses agreed that all of these acts would tend to show poor military character, they testified that they did not know if the allegations of the trial counsel were in fact true. Not satisfied with these responses, the trial counsel called Sarah to authenticate the tape and to corroborate the assault, and he introduced a copy of an Article 15 Pruitt received for the DWI offense.[76] The CAAF found error, though harmless, under the circumstances.[77]

When challenging a good soldier defense, a trial counsel can either call his own reputation and opinion character witness in rebuttal or *inquire* on cross-examination as to the witness' familiarity with specific instances of the accused's conduct.[78] "Inquiry" means what it says—asking questions of the witness while on the stand. Counsel may not, however, introduce extrinsic proof that the acts or events actually occurred,[79] unless the extrinsic proof is offered for a purpose other than to rebut character testimony.[80] In *Pruitt*, the trial counsel properly asked whether the witnesses were aware of the prior acts, but the military judge erred by permitting him to call Sarah to corroborate both the assault and videotaping and by permitting him to introduce extrinsic proof of the DWI.

As the lower court noted, even though trial counsel are allowed to ask questions on cross-examination regarding familiarity with pertinent acts of misconduct,[81] defense counsel must recognize that the focus should be on the accused's conduct and not on any disciplinary action taken by the command against him.[82] Here, the trial counsel should have focused on the conduct underlying the arrest for assault on Sarah and not on the arrest itself; the focus should have been on the act of driving while intoxicated and not on the imposition of Article 15 punishment.[83] The arrest and the imposition of Article 15 punishment reflect government conduct taken in response to what Pruitt did or may have done, not conduct of Pruitt himself. As the Air Force court intimated, other disciplinary actions in an accused's personnel files, such as bars to reenlistment, letters of reprimand, and counseling statements, can be similarly characterized.[84] If used to challenge the opinion of a defense character witness, trial counsel should focus on the underlying facts and circumstances that brought about the action and not on the actual record of any subsequent punishment.[85]

Scorching the Character Landscape: Propensity Evidence in Sexual Assault and Child Molestation Cases

Representative of election year rhetoric to "get tough on crime,"[86] Congress promulgated Federal Rules of Evidence 413 and 414[87] pursuant to the Violent Crime Control and Law

76. *Id.*

77. *Id.*

78. "In all cases in which evidence of character 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 5, MIL. R. EVID. 405(a).

79. For example, a character witness who offers a favorable opinion as to the accused's good military character may be asked whether she knew that the accused had assaulted his first sergeant three months before the charged offense. If the witness did not know, the implication is that she is not sufficiently qualified to attest to the accused's character. If she did know, but still had a favorable opinion, the witness herself is suspect, and the panel should discount her opinion. If the witness doubts that the assault happened, or denies it outright, however, the trial counsel is still bound by either response and cannot call the first sergeant to prove that the assault actually happened or introduce extrinsic evidence detailing its circumstances.

80. For example, MRE 608(c) permits a witness to be impeached with evidence of bias, prejudice, or motive to misrepresent one's testimony. MCM, *supra* note 5, MIL. R. EVID. 608(c). Because this evidence may be introduced through the examination of witnesses or "by evidence otherwise adduced," extrinsic evidence is plainly allowed. SALTZBURG, *supra* note 47, at 743. For example, assume that the defense character witness testified that the accused was a peaceful person. On cross-examination, the trial counsel asks the witness if he owes the accused $1500 from an unpaid gambling debt. The witness denies the debt. As this evidence goes directly to the witness' bias and motivation to testify favorably in this case, namely to satisfy the unpaid debt, the trial counsel is not stuck with the denial and can introduce independent proof that the debt actually exists. In this case, the evidence is admissible because it is offered under MRE 608(c), not MRE 405(a). *See* United States v. Aycock, 39 M.J. 727 (N.M.C.M.R. 1993) (treating a government witness' loss of $195 to the accused as evidence of bias and motive to testify falsely).

81. Trial counsel must have a good faith belief that the conduct occurred, and the conduct must relate to the trait that was offered on direct examination. *See* United States v. Robertson, 39 M.J. 211 (C.M.A. 1994) (holding that a rap sheet alone is insufficient to furnish a good faith basis, absent underlying facts and circumstances which detail the arrest).

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

83. *Id.*

84. *Id.* at 870.

85. *Id.* at 868.

86. *See Symposium on the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 557 (1995). The Congressional act which promulgated the new rules also authorized billions of dollars for police, crime prevention, and prisons; contained a ban on so-called "assault weapons"; included a federal "three-strikes-and-you're-out" provision; and added dozens of death penalty offenses. *See* Bill McCollum, *The Struggle for Effective Anti-Crime Legislation—An Analysis of the Violent Crime Control and Law Enforcement Act of 1994*, 20 U. DAYTON L. REV. 561-565 (1995).

Enforcement Act of 1994.[88] They became effective for federal courts on 10 July 1995. By operation of MRE 1102,[89] these rules have been part of the military rules since 6 January 1996.[90] In general terms, the new rules liberalize the admissibility of character evidence in cases which involve sexual assault or child molestation offenses. Specifically, trial counsel may now offer evidence of the accused's commission of other sexual assault or child molestation offenses for consideration by the fact finder "on any matter to which it is relevant,"[91] including the accused's propensity to commit the charged crime.[92]

Rules 413 and 414 provide a specific admissibility standard for evidence of other acts in sexual assault and child molestation cases, and the rules are intended to supersede the limiting features of Rules 404(a) and (b), which generally prohibit the use of character evidence to show that the accused has the propensity to commit the charged offense.[93] Rules 413 and 414 now permit evidence of other instances of misconduct as proof of, inter alia, the accused's proclivity, predisposition, or predilection to engage in sexual assault and child molestation.[94] The rules also appear to render admissible what was heretofore excludable—character evidence in the form of specific acts introduced on a theory that a person who has engaged in earlier offenses is more likely to have acted true to form in the instance which underlies the current charge, precisely the inference forbidden by a long tradition of evidence law.[95] There were a number of questions regarding the new rules,[96] and the appellate courts have begun to provide some answers.

Does Military Rule of Evidence 403 Apply?

It was unclear whether the military judge retained the discretion under the new rules to exclude otherwise relevant sexual assault and child molestation evidence as unduly prejudicial. While existing rules provided for such balancing, the new rules contained neither mandatory language[97] nor a special balancing test.[98] Given that the rules simply stated that evidence "is admissible,"[99] scholars initially questioned a trial judge's authority even to apply Rule 403.[100] In a series of recent federal court cases, however, it is clear that evidence otherwise admissible under Rules 413 and 414 may nonetheless be excluded

87. Federal Rule of Evidence 413 pertains to evidence of similar crimes in sexual assault cases. Federal Rule of Evidence 414 pertains to evidence of similar crimes in child molestation cases.

88. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796-2151 (1994).

89. Amendments to the Federal Rules of Evidence automatically become part of the Military Rules of Evidence 180 days after the effective date of such amendments. MCM, *supra* note 5, MIL. R. EVID. 1102. A proposed amendment to MRE 1102 will change the 180-day effective date to 18 months. Telephone Interview with Lieutenant Colonel William M. Mayes, Army Representative, Joint Service Committee on Military Justice Working Group (Jan. 7, 1998).

90. Military Rules of Evidence 413 and 414 were adopted as written; therefore, they are identical to their Federal Rule counterparts. A number of technical modifications have been proposed by the Joint Service Committee to tailor the rules to military practice. The proposed changes would reduce the 15-day notice requirement to 5 days; substitute military offenses under the Uniform Code of Military Justice for federal offenses; and exclude adultery and consensual sodomy as qualifying offenses under Rule 413. The substance of the rules, however, which allow consideration of other offenses of sexual assault and child molestation on the issue of propensity, has not changed. The proposed versions are expected to be adopted without further change. Appendix A to this article contains the text of the proposed versions of Rules 413 and 414. *See* SALTZBURG, *supra* note 47, at 614-23.

91. MCM, *supra* note 5, MIL. R. EVID. 413(a), 414(a).

92. *See* Mary Katherine Danna, *New Federal Rules of Evidence 413-415: The Prejudice of Politics or Just Plain Common Sense*, 41 ST. LOUIS U. L.J. 277, 279 (1996).

93. *See* United States v. Meachum, 115 F.3d 1488, 1491 (10th Cir. 1997) (indicating that the new rules provide a specific admissibility standard in sexual assault (and child molestation) cases, replacing Federal Rule of Evidence 404(b)'s general criteria). *See also* 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole) ("The new rules will supersede in sex offenses the restrictive aspects of Federal Rule of Evidence 404(b)."). Examples of the restrictive aspects of 404(b) include: the requirement that the uncharged misconduct be offered for a noncharacter purpose (such as motive, identity, intent, or absence of mistake); the fact that the military judge generally defers ruling on 404(b) motions until the government's rebuttal case; and the limiting instruction given to the panel not to consider the evidence for its logical purpose, which is the accused's propensity or predisposition to commit the charged offense.

94. Jason L. McCandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689 (1997).

95. "One of the most deeply rooted and jealously guarded principles of Anglo-American criminal law is the axiom that an accused may not be convicted of being a scoundrel. If the accused is to be convicted, the prosecution must prove that he or she has committed a specific offense." Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, 7 CRIM. JUST. 16 (1992), *citing* A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 232 (1989).

96. *See* Major Stephen R. Henley, *Caveat Criminale: The Impact of the New Rules of Evidence in Sexual Assault and Child Molestation Cases*, ARMY LAW., Mar. 1996, at 86-90 (raising a number of significant unanswered questions concerning the scope and applicability of the new rules).

97. For example, when impeaching the credibility of any witness after testifying, evidence that the witness has a prior conviction which involves dishonesty or a false statement "shall be admitted" without balancing the probative value of the conviction against any unfair prejudice. *See* MCM, *supra* note 5, MIL. R. EVID. 609(a)(2).

98. When impeaching the credibility of the accused after testifying, a felony-type conviction "shall be admitted," if the military judge determines that its probative value outweighs its prejudicial effect (this is not an MRE 403 balancing). *Id*. MIL. R. EVID. 609(a)(1).

pursuant to Rule 403 if the judge determines that its probative value is substantially outweighed by its potential for unfair prejudice.[101] This conclusion is consistent with Congress' intent, as reflected in the legislative history, that Rules 413 and 414 do not mandate the admission of evidence of other acts or eliminate the need for the court to conduct the analysis required under Rule 403.[102]

Are There Any Temporal Proximity Requirements?

Although Rule 403 applies and the trial judge can exclude otherwise relevant evidence upon the proper balancing, the defense may unfortunately realize little practical difference in application. No time limit is imposed on past offenses offered under Rules 413 or 414;[103] in fact, the rules anticipate liberal admission. In *United States v. Meachum*,[104] for example, the accused was charged with two incidents of molesting his now twelve-year-old niece over the previous five years. He testified and categorically denied committing the offenses.[105] Over defense objection, the judge admitted evidence that Meachum had molested his two minor stepdaughters thirty years before.[106] On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed, finding that the judge did not err in his assessment that the probative value of these prior acts of molestation was not substantially outweighed by the danger of unfair prejudice. The court found that, even though Rule 403 applies, the legislative history behind the rules revealed that Congress intended for the temporal scope of Rules 413 and 414 to be broad,[107] and "it should be a rare circumstance in which such evidence is excluded."[108] As a practical matter, therefore, application of Rule 403 may be of little consolation to the defense, as evidence that the accused committed other incidents of sexual assault and child molestation are properly admissible, notwithstanding substantial lapses in time between the charged and uncharged offenses.[109]

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99. *See id.* MIL. R. EVID. 413(a), 414(a). *See also supra* note 90.

100. *See, e.g.*, Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 2 (1996) (asserting that the new rules require a district court to admit propensity evidence without regard to other rules of evidence, including Rule 403); James J. Duane, *The New Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994) (hypothesizing that a judge's authority to apply Rule 403 may be limited). Rules 413 and 414 were added as part of the same 1994 crime bill that also amended Rule 412. Since those amendments provided for balancing tests in Rules 412(c) and 412(b)(1) (for civil and criminal cases respectively), if Congress had intended a balancing test for Rules 413 and 414, they easily could have and would have provided for one. *See* Henley, *supra* note 96, at 88-89.

101. *See* United States v. Sumner, 119 F.3d 658 (8th Cir. 1997) (holding that the admission of evidence of similar crimes under Rule 413 or Rule 414 is subject to Rule 403); United States v. Guardia, 955 F. Supp. 115 (D.N.M. 1997), *aff'd*, No. 97-2053, 1998 WL 37575 (10th Cir. Feb 2, 1998) (excluding Rule 413 evidence as unduly prejudicial under Rule 403); Frank v. County of Hudson, 924 F. Supp. 620 (D.N.J. 1996) (mandating that evidence proffered under the new rules must still be legally relevant under Rule 403).

102. *See* 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (remarks of Sen. Dole) ("The general standards of the rules of evidence will continue to apply, including . . . the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect."). *See also* 140 CONG. REC. H5437 (daily ed. June 29, 1994) (remarks of Rep. Molinari) ("This [new rule] allows, it does not mandate, a judge's discretion . . . when he or she thinks that the cases are similar and relevant enough to introduce prior evidence.").

103. Conversely, convictions over 10 years old offered to attack the credibility of a witness are presumptively inadmissible, absent a finding by the military judge that the probative value of the conviction substantially outweighs its prejudicial impact. MCM, *supra* note 5, MIL. R. EVID. 609(d).

104. 115 F.3d 1488 (10th Cir. 1997).

105. *Id.* at 1491.

106. The judge limited consideration of the other offense to a noncharacter purpose, instructing the jury as follows:

> Ladies and gentlemen, this is being permitted to go into [sic] for a very limited purpose. You can't consider prior acts as evidence that the acts charged in the indictment occurred, and you can't consider those prior acts, if any, to provide a character trait of the defendant. But you can consider it as it may bear upon the intention, preparation, the plan, or absence.

Id. at 1493-94.

107. "No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted notwithstanding substantial lapses of time in relation to the charged offense or offenses." 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole), *quoted in* United States v. Larson, 112 F.3d 600, 605 (2d Cir. 1997). "Notwithstanding very substantial lapses in time," evidence should be admissible. 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

108. *Meachum*, 115 F.3d at 1492 (observing that Rule 403 balancing is applicable, but courts are to liberally admit evidence of prior uncharged sex offenses offered under Rules 413 and 414).

109. While a significant time lapse between the charged and uncharged acts may be insufficient in and of itself to swing the prejudice pendulum in the accused's favor, defense counsel should still consider it as simply one of many factors in arguing against admissibility. Other factors include: (1) the dissimilarity between the charged offense and the extrinsic acts; (2) the differing circumstances surrounding each offense, such as the methods of commission, the ages of the victims, and the locations, manner, and scope of abuse; and (3) the limited number of past incidents. SALZTBURG, *supra* note 47, at 618.

Can the Trial Counsel Introduce the Other Acts As Evidence of Propensity?

Rules 413 and 414 permit evidence of other sexual assault and child molestation offenses to be considered for its bearing on any matter to which it is relevant. Despite scathing criticism to the contrary,[110] Congress considered as relevant the accused's propensity to engage in this type of deviant behavior.[111] However, one of the more persuasive arguments against the use of propensity evidence is that such admission is fundamentally unfair and may violate the Due Process Clause of the U.S. Constitution.[112] Although the category of infractions which violate fundamental fairness is admittedly narrow,[113] it is well established that fundamental fairness requires the government to prove by proof beyond a reasonable doubt every element of the offense, and this principle "prohibits the State from using evidentiary presumptions that have the effect of relieving the State of its burden of persuasion."[114] Admissibility of such propensity evidence comes perilously close in this regard.

Even when courts have admitted evidence of other acts under Rules 413 and 414, it has almost never been solely to show that, by propensity, the accused is the probable perpetrator of the crime. There has nearly always been an alternative non-character theory of admissibility. For example, in *United States v. Larson*,[115] the accused was charged with the interstate transportation of a child with the intent to engage in criminal sexual conduct.[116] Prior to trial, the government served notice that it intended to offer testimony from three other witnesses that they had been similarly molested by Larson when they were minors.[117] Analyzing the admissibility of the testimony under Rules 404(b) and 414, the court held that the testimony was within the scope of both rules.[118] The judge, however, instructed the jury to consider the other acts of molestation only to demonstrate a common plan or scheme or to show Larson's intent or motive to commit the crime and not as evidence of any propensity on his part to engage in child molestation in general.[119] This non-propensity limitation follows existing precedent.[120] While the U.S. Supreme Court has never expressly held that introducing uncharged misconduct only to show the defendant's propensity to commit the charged crime violates due process, it has come close.[121]

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110. *See generally* Anne E. Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659, 663 (1995) (asserting that Anglo-American law has, since the Restoration, preferred judge and jury to try the accused solely on the charges and not on his crimes in the past or inferences about his character that knowledge of those crimes creates); David P. Leonard, *Perspectives on Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305, 333-41 (1995) (noting that, in its zeal to respond to a perceived epidemic of sexual assault and child molestation offenses, Congress has sparked a movement which will be difficult to stop); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 565 (1994) (hypothesizing that jurors will be more willing to convict where the other evidence of guilt is weak); Dale A. Nance, *Symposium on the Admission of Prior Offense Evidence in Sexual Assault Cases: Foreword: Do We Really Want to Know the Defendant?*, 70 CHI.-KENT L. REV. 3, 8 (1994).

111. *See* 140 CONG. REC. H2433 (daily ed. Apr. 19, 1994) (statement of Rep. Molinari).

> The past conduct of a person with a history of rape or child molestation provides evidence that he or she has the combination of aggressiveness and sexual impulse that motivates the commission of such crimes and lacks the inhibitions against acting on these impulses. A charge of rape or child molestation has greater plausibility against such a person.

Id.

112. U.S. CONST. amends. V, XIV, §1. In *Lovely v. United States*, the Court of Appeals for the Fourth Circuit remarked:

> The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused . . . arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed . . . persons accused of crime would be greatly prejudiced.

169 F.2d 386, 389 (4th Cir. 1948).

113. To prove a due process violation, the defendant must show that Rules 413 and 414 fail the fundamental fairness test and violate those fundamental concepts of justice which lie at the base of our civil and political institutions. *See generally* Dowling v. United States, 493 U.S. 342, 352-53 (1990). The Supreme Court has narrowed the infractions which violate fundamental fairness, declaring that "beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Id*. at 352.

114. Francis v. Franklin, 471 U.S. 307, 313 (1985).

115. 112 F.3d 600 (2d Cir. 1997).

116. 18 U.S.C. § 2423 (1994).

117. *Larson*, 112 F.3d at 602. The judge found similarities in the types of sex acts performed, the methodologies used to entice the victims, and the locations where the abuse occurred. *Id.*

118. *Id*. at 603. The trial judge admitted the evidence under both Rules 404(b) and 414 because "it goes to the presence of a common scheme or plan on the part of the defendant and also is relevant to the defendant's intent and motive in the commission of the charged offense." *Id*.

The only decision that expressly upholds the constitutionality of a statute which permits the admission of evidence of prior sexual assault and child molestation offenses solely to prove propensity is a California state court case, *People v. Fitch*.[122] Robert Lee Fitch was charged with rape. As permitted by a recently enacted section of the California Evidence Code,[123] the judge admitted evidence that Fitch had committed another rape. The evidence was admitted to show a propensity to commit the charged crime, and the judge instructed the jury as to its use.[124] On appeal, Fitch argued, inter alia, that the admission of evidence of prior acts only to show propensity violates due process. The court disagreed and affirmed.[125]

Notwithstanding *Fitch*, evidence of prior crimes introduced for no other purpose than to show criminal disposition likely violates the Due Process Clause.[126] Until specifically addressed by either the federal[127] or military appellate courts,[128] trial coun-

119. *Id*. In fact, the trial judge instructed the jury that it could consider the other acts of molestation only for the limited purpose of determining whether the defendant intended to engage in criminal sexual activity with the victim of the charged offense and not as evidence of a general criminal propensity to engage in that type of behavior. *Id.*

120. For example, in *People v. Zackowitz*, Chief Justice Cardozo, writing for the majority, reversed a murder conviction based upon the use of propensity evidence. 172 N.E. 466 (N.Y. 1930). Zackowitz had been charged with murdering a heckler who had propositioned his wife. At trial, the judge permitted evidence that, at the time of the shooting, Zackowitz had a number of firearms in his apartment. In reasoning that the only purpose of the evidence was to show that the accused "was a man of vicious and dangerous propensities, who because of these propensities was more likely to kill with deliberate and premeditated design than a man of irreproachable life and amiable manners," Chief Justice Cardozo held that the evidence should have been excluded. *Id.* at 468. He explained his rationale in an oft-cited passage:

> If a murderous propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away. Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one.

Id.

121. *See* Natali & Stigall, *supra* note 100, at 12-23. *Cf.* Estelle v. McGuire, 502 U.S. 62, 78 (1991) (O'Connor, J., concurring) (suggesting that, in most circumstances, admitting evidence only to show propensity may violate the Due Process Clause); Burnham v. Superior Court of California, 495 U.S. 604 (1990) (acknowledging that the admission of evidence of other crimes raises due process concerns); Huddleston v. United States, 485 U.S. 681, 685-87 (1988) (discussing the admissibility of uncharged acts under a noncharacter theory); Spencer v. Texas, 385 U.S. 554, 570, 573-74 (1967) (Warren, C.J., dissenting) (commenting that the use of prior convictions to show criminal disposition is fundamentally at odds with the policies underlying due process); Brinegar v. United States, 338 U.S. 160, 173-74 (1949) (implying that the prohibition against propensity evidence is embedded in the Due Process Clause); Michelson v. United States, 335 U.S. 469, 475-76 (1948) (asserting that allowing the prosecution to resort to evidence of the defendant's evil character to establish probability of his guilt would deny him a fair opportunity to defend against a particular charge).

122. 63 Cal. Rptr. 2d 753 (Cal. Ct. App. 1997).

123. Evidence Code section 1108, enacted in 1995, is the California equivalent of Federal Rule of Evidence 413 and permits the use of uncharged sex offenses to show a propensity to commit the charged offense unless their probative value is substantially outweighed by the danger of unfair prejudice. CAL. EVID. CODE § 1108(a) (West 1998).

124. *Fitch*, 63 Cal. Rptr. 2d at 760. The trial judge instructed substantially as follows:

> Evidence that the defendant committed a crime other than the one for which he is on trial, if believed, was also admitted and may be considered as evidence that he has the trait of character that predisposes him to commission of certain crimes. Therefore, you may use that evidence that the defendant committed another offense for the [limited] purpose of deciding whether he has a particular character trait that predisposes him to the commission of the charged offense.

Id.

125. *Id.* at 762. Of significance to the court was the "safeguard" written into the rule, which subjected evidence of uncharged sexual misconduct to a balancing test similar to MRE 403. The court held that, with this check, section 1108 did not violate the Due Process Clause. *Id*. Of course, even if the rule is constitutional—and that is a big if—a judge can still abuse his discretion in admitting evidence of other sexual misconduct if its probative value is later determined to be substantially outweighed by the danger of unfair prejudice to the accused. S*ee*, *e.g.*, People v. Harris, 70 Cal. App. 4th 727 (Cal. Ct. App. 1998) (holding that the trial judge abused his discretion in admitting evidence of prior sexual assault).

126. *See* Henry v. Estelle, 33 F.3d 1037 (9th Cir. 1994), *rev'd on other grounds sub nom.*, Duncan v. Henry, 115 S. Ct. 887 (1995) (observing that evidence of prior child molestation violates the Due Process Clause); McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993) (indicating that the use of evidence to show propensity violates the Due Process Clause).

127. In *United States v. Enjady*, the defendant was charged with rape. He admitted having sex, but he claimed that it was consensual. 134 F.3d 1427 (10th Cir. 1998). The government sought to introduce evidence from another woman whom Enjady had raped approximately two years earlier, to show his propensity to rape. The Tenth Circuit affirmed, noting that the evidence in this case had undeniable value in corroborating the victim's claims and in bolstering her credibility, two purposes other than to show the defendant's propensity to rape. *Id.* With the safeguards of Rule 403, the court concluded that Rule 413 was not unconstitutional on its face as a violation of the Due Process Clause. *Id.* The court further held that there was no equal protection violation based on a rational basis test; the congressional objective of enhancing effective prosecution for sexual assaults and child molestation is a legitimate government interest. *Id*.

sel would do well to follow the guidance in *Larson*, articulate a non-propensity theory of admissibility, and resist the urge to argue to the panel, "notwithstanding the evidence, we know he must be guilty of this offense because he has a history of such behavior."

That is not to say that the new rules have no practical value to trial counsel. While Rule 403 does apply, and the military judge can still exclude otherwise relevant evidence upon application of the proper balancing test, it is apparent that Congress anticipated a more liberal admissibility of evidence of prior acts under Rules 413 and 414 than previously realized under Rule 404(b).[129] In other words, trial counsel should find the Rule 403 balancing assessment tilting in their favor almost every time.[130] However, counsel should still step cautiously, proceed as did the prosecutor in *Larson*, and be prepared to articulate a non-character theory of admissibility, even for evidence offered under Rules 413 and 414. In the short-term, counsel would be wise to resist the temptation to use these rules as Congress intended—to show the accused's propensity or predisposition to engage in sexual assault or child molestation. Until the Supreme Court or the military appellate courts have addressed whether a rule that permits evidence *only* to show an accused's propensity to commit the charged offense is constitutional, self-imposed restraint may save a case on appeal.

"Your Secret's Safe With Me, Sergeant. Sorta." The Psychotherapist-Patient Privilege in Military Practice

One of the most important developments in evidence law over the last eighteen months was the Supreme Court's recognition of a psychotherapist-patient privilege. In *Jaffee v. Redmond*,[131] the 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 court. The Supreme Court's recognition of a new privilege that protects confidential communications made not only to psychiatrists and psychotherapists but also to licensed social workers who engage in psychotherapy was, however, grounded in a logical interpretation of Federal Rule of Evidence 501.[132] When last year's year-in-review was printed, it was unclear whether *Jaffee* would result in the immediate recognition of a similar privilege in military practice, absent a legislative or executive mandate amending the military rules.[133] Although MRE 501(a)(4)[134] and 101(b)[135] seemed to provide authority to adopt testimonial and evidentiary privileges that are recognized in federal district court, a substantial impediment appeared to exist in the military rules, namely MRE 501(d).[136] As suggested in last year's evidence article, it would be difficult, though not impossible, to reconcile *Jaffee* and 501(d).[137]

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128. *But see* United States v. Davis, 47 M.J. 707, 711 n.4 (N.M. Ct. Crim. App. 1997) (noting that, with the addition of Rules 413 and 414, uncharged misconduct is now arguably admissible, notwithstanding Rule 404(b), precisely to show propensity to commit the charged offenses).

129. With respect to Rule 403 balancing, one of the bill's sponsors stated that "[t]he presumption is that the evidence admissible pursuant to these rules is typically relevant and probative and that its probative value is not outweighed by any risk of prejudice." 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole). Another of the bill's sponsors stated, "[T]he underlying legislative judgment is that the evidence admissible pursuant to the proposed rules is typically relevant and that its probative value is normally not outweighed by any risk of prejudice or other adverse effects." 140 CONG. REC. H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari), *quoted in* United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997).

130. *See, e.g.*, United States v. LeCompte, 99 F.3d 274 (1996), *rev'd and remanded*, 131 F.3d 767 (8th Cir. 1997) (holding that, in light of the strong legislative judgment that prior sexual offenses are relevant and not unduly prejudicial, evidence of the accused's commission of uncharged acts of sexual abuse against his first wife's niece is admissible under Rule 414 at retrial for abuse of second wife's niece, even though the court had previously held the same evidence inadmissible under Rule 404(b) as unduly prejudicial).

131. 116 S. Ct. 1923 (1996).

132. Federal Rule of Evidence 501 provides:

> 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, [s]tate, 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.

133. *See* Henley, *Postcards From the Edge*, *supra* note 3, at 98.

134. Military Rule of Evidence 501 provides:

> (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 5, MIL. R. EVID. 501(a)(4).

Two developments have occurred since last April's issue of the year-in-review, one judicial and one executive. In *United States v. Demmings*,[138] the Army Court of Criminal Appeals stated in dicta that the federal psychotherapist-patient privilege recognized in *Jaffee* could possibly protect from compelled disclosure communications between a service member and a mental health professional made during the course of diagnosis or treatment. However, because Demmings failed to assert the privilege at his court-martial, the issue was waived on appeal.[139]

Of more long-term consequence to trial practitioners is the action taken by the Joint Service Committee on Military Justice (JSC)[140] in response to *Jaffee*. The JSC has recently recommended adoption of a new rule of evidence to recognize a limited psychotherapist-patient privilege in courts-martial practice. Proposed MRE 513[141] would establish a psychotherapist-patient privilege for investigations and proceedings authorized under the UCMJ.[142] If the proposed rule is promulgated, a patient can refuse to disclose and prevent others from disclosing confidential communications made to a psychotherapist or assistant, if made for the purpose of facilitating diagnosis or treatment of a mental or emotional condition.[143] However, since the President is not expected to take action on the proposed rule until late 1998,[144] counsel who argue for an immediate recognition of a psychotherapist privilege may be able to rely on the limited precedential value of the Army court's dicta in *Demmings*.

Shopping for Godot.[145] Supplementing the Defense Team

135. Military Rule of Evidence 101(b) declares:

> (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.

Id. MIL. R. EVID. 101(b).

136. "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." *Id.* MIL. R. EVID. 501(d).

137. *But see* SALTZBURG, *supra* note 47, at 630 (stating that MRE 501(d) would not bar psychotherapist-patient privilege in light of an extraordinary need for confidentiality between psychotherapist and patient that is as important in the military as in civilian life).

138. 46 M.J. 877 (Army Ct. Crim. App. 1997) (treating the psychotherapist-patient privilege as not included within the broader physician-patient privilege).

139. *Id*. at 883. Sergeant Robert Demmings had sought mental health counseling at the installation mental health clinic for marital stress and homicidal and suicidal thoughts. Shortly after a subsequent physical altercation with his wife and an attempted suicide, Demmings was taken for an emergency mental evaluation. At his court-martial for offenses related to these incidents, the government called the treating psychiatrist, who testified about what Demmings had said during the treatment sessions and emergency psychiatric evaluation. The defense did not object. On appeal, Demmings argued that his psychiatrist violated the psychotherapist-patient privilege recognized in *Jaffee* by disclosing communications made during the course of diagnosis and treatment. *Id*. at 878-79. The Army court concluded:

> [We] could hold that confidential communications between an accused and mental health professional in the course of diagnosis or treatment are protected from compelled disclosure at a court-martial. We need not decide this issue, however, because we conclude that the appellant waived the issue by failing to assert the privilege at his court-martial.

Id. at 883 (footnote omitted). *But cf.* United States v. English, 47 M.J. 215, 216 (1997) (holding that the *MCM* does not recognize a psychotherapist-patient privilege), *construed in* United States v. Flack, 47 M.J. 415 (1998).

140. The JSC is comprised of senior representatives from the Army, Navy, Air Force, Marine Corps, Coast Guard, the CAAF, and the general public. One of the JSC's stated purposes is to ensure that the *Manual for Courts-Martial* "reflects current military practice and judicial precedent." *See* U.S. DEP'T OF DEFENSE, DIR. 5500.17, REVIEW OF MANUAL FOR COURTS-MARTIAL, para. D.1.b (Jan. 23, 1985). In furtherance of this goal, the JSC suggests revisions to the MCM, staffs proposed changes through the executive branch for detailed review, and eventually forwards them to the White House for action. *See* Criminal Law Div. Note, *Amending the Manual for Courts-Martial*, ARMY LAW., Apr. 1992, at 78.

141. Appendix B to this article contains the text of proposed MRE 513.

142. The privilege should apply in Article 32 investigations, all level courts-martial, courts of inquiry convened under Article 135, pretrial confinement reviews, search and seizure authorizations, and disciplinary proceedings conducted pursuant to Article 15. The privilege would arguably not apply in administrative elimination boards, fitness for duty determinations, family advocacy program meetings, and drug and alcohol abuse counseling sessions.

143. Even with new MRE 513, the doctor-patient privilege would not be broader. *See* United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 1610 (1994) (finding that there is no physician-patient privilege in federal or military law). Further, commanders will still be entitled to confidential information when necessary for the safety and security of military personnel, dependents, military property, classified information, or mission accomplishment. *See* MRE 513(d)(6) in Appendix B to this article.

144. Telephone Interview with Lieutenant Colonel William M. Mayes, Army Representative, Joint Service Committee on Military Justice Working Group (Jan. 9, 1998).

With Expert Assistance

With genetic markers, hair sampling, blood spatter, polygraphs, eyewitness identification, bite mark and dental identification, questioned documents examination, accident reconstruction, psychological autopsies, firearms identification, toxicology, fingerprint and voice-print analyses, recovered and repressed memories, and forensic psychiatry, the modern courtroom has become a veritable minefield of scientific bouncing bettys.[146] Defense counsel encounter any number of practical challenges when faced with such complex issues. Supplementing the defense team with expert assistance can help inexperienced counsel to comprehend, to dissect, and to attack these issues.[147] The CAAF recently reiterated the circumstances when the government must pay for such help and who the defense will get.

It is well established that a military accused has a limited right to expert assistance at government expense to prepare his defense.[148] However, this assistance need only be provided when it is necessary.[149] In *United States v. Gonzalez*,[150] the CAAF articulated the three-step test for determining whether government-funded assistance is necessary.[151] The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish; and (3) why the defense counsel and his staff are unable to gather and to present the evidence the expert assistant would be able to develop. It is generally the third requirement, a showing of inadequacy or unavailability of expert assistance from other sources, where the defense fails.

In *United States v. Ndanyi*,[152] the defense requested that the convening authority pay for a particular named expert of their choosing to assist with analyzing expected DNA evidence.[153] The convening authority denied the request but indicated that the defense could use the services of several experts at the nearby Criminal Investigation Command laboratory who were not involved in the case. The defense rejected this offer on the basis that, because the government itself had utilized civilian experts, they were entitled to the same treatment. The military judge denied the subsequent defense motion to compel production of the named expert.[154] The CAAF affirmed, holding that, absent a showing by the accused that his case is unusual or the

145. With apologies to Samuel Beckett, the following colloquy is taken from the last scene of his 1948 existential masterpiece, WAITING FOR GODOT:

Estragon: Didi.
Valdimir: Yes.
Estragon: I can't go on like this.
Valdimir: That's what you think.
Estragon: If we parted, that might be better for us.
Vladimir: We'll hang ourselves tomorrow (pause) . . . unless Godot comes.
Estragon: And if he comes?
Vladimir: We'll be saved.

146. Which includes all the erstwhile "excuses" offered by criminal defendants to justify evading responsibility for their actions, to include black rage syndrome, superbowl sunday disorder, urban survival syndrome, abused child syndrome, steroid rage, premenstrual dysphoric disorder, XYY chromosomal disorder, mob-mentality syndrome, television addiction, the "twinkie" defense, post-traumatic stress disorder, parental alienation, fetal alcohol syndrome, attention deficit disorder, Cherambault-Kandisky syndrome ("lovesickness"), Munchausen-by-proxy syndrome, and nicotine withdrawal syndrome. *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (1994).

147. Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143 (1996).

148. *See* United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986).

149. United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

150. 39 M.J. 459, 461 (1994), *citing* United States v. Allen, 31 M.J. 572, 623 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

151. An important distinction must be drawn between a request for expert assistance to help prepare for trial and a request for an expert witness to testify at trial. *See, e.g.*, United States v. Langston, 32 M.J. 894 (A.F.C.M.R. 1991) (asserting that the rules differ, as do the foundation requirements for motions to provide the services at government expense, and that different bodies of precedent are used to resolve them). Importantly, the analysis used in determining whether the government has offered an adequate substitute for the requested defense expert witness—one with similar professional qualifications who can testify to the same opinions and conclusions—does not apply to requests for expert assistance. *See, e.g.*, United States v. Guitard, 28 M.J. 952, 955 (N.M.C.M.R. 1989).

152. 45 M.J. 315, 319 (1996).

153. *Id*. *See* Major Edye U. Moran, *Pyrrhic Victories and Permutations: New Developments in the Sixth Amendment, Discovery, and Mental Responsibility*, ARMY LAW., Apr. 1998, at 106.

154. *See* MCM, *supra* note 5, R.C.M. 703. Because of the inherent dangers in having to reveal strategic information in order to obtain the expert, defense counsel usually ask for an ex parte hearing before the military judge to justify the request. However, the defense has no absolute right to an ex parte hearing to demonstrate its need for a defense expert at government expense, and a military judge does not abuse his discretion when requiring a preliminary showing of necessity on the record. *See* United States v. Kaspers, 47 M.J. 176 (1997). *See also* United States v. Ruppel, 45 M.J. 578 (A.F. Ct. Crim. App. 1997) (holding that there is no right to an ex parte hearing). *But see* United States v. Garries, 22 M.J. 280, 291 (C.M.A. 1986) (indicating that the defense may be entitled to an ex parte hearing to demonstrate its need for an expert in "unusual" circumstances, though the court does not define what qualifies as "unusual").

experts proffered by the government are unqualified, incompetent, partial, or unavailable,[155] "the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial."[156] The defense cannot reject an offer of competent military assistance simply because the trial counsel employs civilian expert assistance.

The CAAF went one step further in *United States v. Washington*,[157] holding that the defense is not even entitled to military assistance simply by noting that the prosecution has employed expert assistance to prepare its case.[158] In other words, the fact that the trial counsel employs investigative assistance does not, by itself, establish the defense's inability to gather evidence in its own right, a critical element to any showing of need for such services.[159]

So what is the result of these cases? Defense counsel, in showing the necessity for expert assistance, must be able to articulate specifically why the defense is unable to gather and to present the evidence that the assistant would be able to develop on his own.[160] This showing presumes that defense counsel will try to educate himself to attain the level of competence necessary to defend the particular issues in a given case.[161] Further, there is no absolute right to demand that a particular individual be detailed.[162] Absent a showing that the case is unusual, expert services available in the military will generally be sufficient to permit the defense to prepare for trial.

Supreme Court Affirms Polygraph Ban

On 31 March 1998, the U.S. Supreme Court decided *United States v. Scheffer*.[163] In reversing the CAAF, the Court held that MRE 707,[164] which excludes polygraph evidence in courts-martial, does not unconstitutionally abridge the Sixth Amendment right of a service member to present a defense.[165] Therefore, a testifying accused whose credibility has been

155. *Ndanyi*, 45 M.J. at 319-20.

156. *Id.* at 319 (quoting *Garries*, 22 M.J. at 290-91).

157. 46 M.J. 477 (1997). Washington was charged with various offenses arising from his service as a contracting officer during Operations Desert Shield and Desert Storm. Before trial, the defense counsel submitted a request for investigative assistance, citing a number of reasons why he and his staff could not perform the tasks themselves. The military judge denied the request, finding that the defense had failed to make a plausible showing that the investigator could obtain information that the defense and its staff would not be able to obtain on its own. *Id*. at 479.

158. *Id*.

159. *But see* United States v. Mann, 39 M.J. 639 (N.M.C.M.R. 1990). In *Mann*, the Navy-Marine Corps court observed that, particularly in child abuse cases, where experts provide conclusory opinions (such as the cause of an injury), such opinions are not neutral and non-accusatory and differ in form and kind from a chemist (for example) identifying components of a given substance, and the defense may be entitled to expert assistance in developing its case because the government had similar help. *Id*.

160. In this regard, defense counsel should be prepared to answer a number of questions, to include:

1. What have you done to educate yourself in the requested area of expertise?
2. What experts and government employees having knowledge in this area have you interviewed?
3. If the issue in question involves a laboratory analysis by the CID or the FBI, have you requested the opportunity (using TDS funding) to visit the crime lab and to examine the procedures and quality control standards used in the laboratory in this or any other case?
4. What did you learn from the visit?
5. What do you need to learn that you still do not understand in order to defend the accused in this case?
6. What treatises have you examined?
7. Are there experts other than the one requested who would meet your needs? Have you talked with them? Would providing an Army employee as an expert consultant meet your needs? If not, why?
8. How many other cases involving this issue have you tried? As to military defense counsel with little or no expertise in this area:
   (a) Have you requested that the senior defense counsel or regional defense counsel detail another defense counsel with greater familiarity in the area of expertise to help defend the accused? Have you advised the accused of his right to request an IMC who has greater familiarity in this area?
   (b) Have you requested through TDS channels that CID or other Army organizations provide you and other counsel with training in this area?
   (c) If this area of expertise is common to many cases in your jurisdiction, why have no such requests been made previously?
9. Have you requested through TDS channels any resource material in this area, if not readily obtainable from local sources?

161. *See* United States v. Kelly, 39 M.J. 235 (C.M.A. 1994). *See also* United States v. Thomas, 41 M.J. 873 (N.M. Ct. Crim. App. 1995).

162. *See* United States v. Tornowski, 29 M.J. 578 (A.F.C.M.R. 1989) (indicating that when the defense seeks to have the government provide expert assistance, it has no right to demand that a particular individual be designated); United States v. True, 28 M.J. 1057, 1061 (N.M.C.M.R. 1989) (noting that the defense will be entitled to civilian help only in very unusual circumstances where the government cannot, within its own resources, provide investigative services sufficient to enable the defense to prepare adequately for trial). *See also* Britt v. North Carolina, 404 U.S. 226, 227 (1971) (holding that indigents are not entitled to all the assistance that a wealthier counterpart might buy, but only to the basic and integral tools).

163. 118 S. Ct. 1261 (1998).

attacked is no longer entitled to attempt to lay the foundation for admitting exculpatory polygraph evidence.[166] However, while *Scheffer* resolves the constitutionality of the military's per se ban on the use of polygraph evidence at trial, polygraph results (both inculpatory and exculpatory) can still be used pre-trial and post-trial in assisting the convening authority in determining the appropriate disposition of a particular case. In addition, as the military judge is not bound by the MREs in ruling on the admissibility of evidence,[167] counsel can still offer polygraph testimony during Article 39(a) sessions in support of motions to admit or to exclude evidence.

Conclusion

Fury said to
a mouse, that
he met
in the
house,
'Let us
both go
to law:
I will
prosecute
you.—
Come, I'll
take no
denial;
We must
have a
trial:
For
really
this
morning
I've
nothing
to do.'
Said the
mouse to
the cur,
'Such a
trial,
dear sir,
With no
jury or
judge,
would be
wasting
our breath.'
'I'll be
judge,
I'll be
jury,'
Said
cunning
old Fury:
'I'll try
the whole
cause,
and
condemn
you
to
death.[168]

To help keep "fury" at bay, the military has adopted certain measures to restrict the use of unduly prejudicial evidence in courts-martial—the MREs. Unfortunately, as societies change, rules change. Alter the values and perceptions of a people and their rules will generally follow suit. As recent decisions highlight, the rules prohibiting the use of character and propensity evidence in courts-martial have dramatically changed[169]—a result, good or bad, fraught with uncertainty. In time, we will see which.[170]

164. *See* MCM, *supra* note 5, MIL. R. EVID. 707.

165. *Id.*

166. *See* United States v. Scheffer, 44 M.J. 442 (1996).

167. *See* MCM, *supra* note 5, MIL. R. EVID. 104(a).

168. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND, chap. 3 (1865).

169. *See supra* notes 86-130 and accompanying text.

170. "Nos scimus quia lex bona est, modo quis eâ utatur legitime [We know that the law is good, if a man use it lawfully]." LAW: A TREASURY OF ART AND LITERATURE 107 (Sara Robbins et al. eds., 1990).

Appendix A

Proposed Rule 413. Evidence of Similar Crimes in Sexual Assault Cases.

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the [g]overnment intends to offer evidence under this rule, the [g]overnment shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "offense of sexual assault" means an offense punishable under the Uniform Code of Military Justice, or a crime under [f]ederal law or the law of a [s]tate that involved—

(1) any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, [f]ederal law, or the law of a [s]tate;

(2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;

(3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "[s]tate" includes a [s]tate of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States."

Proposed Rule 414. Evidence of Similar Crimes in Child Molestation Cases.

(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the [g]overnment intends to offer evidence under this rule, the [g]overnment shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "child" means a person below the age of sixteen, and "offense of child molestation" means an offense punishable under the Uniform Code of Military Justice, or a crime under [f]ederal law or the law of a [s]tate that involved—

(1) any sexual act or sexual contact with a child, proscribed by the Uniform Code of Military Justice, [f]ederal law, or the law of a [s]tate;

(2) any sexually explicit conduct with children proscribed by the Uniform Code of Military Justice, [f]ederal law, or the law of a [s]tate;

(3) contact between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of a child;

(4) contact between the genitals or anus of the accused and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "sexually explicit conduct" means actual or simulated:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the

same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse; or

(5) lascivious exhibition of the genitals or pubic area of any person.

(h) For purposes of this rule, the term "[s]tate" includes a [s]tate of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

Appendix B

Proposed Rule 513. Psychotherapist-Patient Privilege.

(a) *General rule of privilege*. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by the patient to a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions*. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any [s]tate, territory, the District of Columbia, or Puerto Rico to perform professional services as such, or who hold[s] credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records of communications" is testimony of a psychotherapist or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purpose of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege*. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule under the following circumstances:

(1) Death of patient. The patient is dead;

(2) Spouse abuse or child abuse or neglect. When the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which the spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) Mandatory reports. When [f]ederal law, [s]tate law, or service regulation imposes a duty to report information contained in a communication;

(4) Patient is dangerous to self or others. When a psychotherapist or assistant to a psychotherapist has a belief that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or [to] aid anyone to commit or [to] plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) Military necessity. When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) Defense, mitigation, or extenuation. When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or M.R.E. 302, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) Constitutionally required. When admission or disclosure of a communication is constitutionally required.

(e) *Procedure to determine admissibility of patient records or communications*.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge, and if practical, notify the patient or the patient's guardian or representative of the filing of the motion and of the opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communications, the military judge shall conduct a hearing. Upon motion of counsel for each party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient will be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings will not be unduly delayed for this purpose. In a case before a court-martial composed of military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

Analysis to Military Rule of Evidence 513.

"199_" Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. MRE 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*, ___U.S.___, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). *Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules when practicable and not inconsistent with the UCMJ or MCM with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns, which must be met to ensure military readiness and national security. *See* Parker v. Levy, 417 U.S. 733, 743 (1974); United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955); Department of the Navy v. Egan, 484 U.S. 518, 530 (1988). There is no intent to apply the privilege in any proceeding other than those authorized under the UCMJ. MRE 513 was based in part on Proposed Fed. R. Evid. (not adopted) 504 and state rules of evidence.

MRE 513 is not a physician-patient privilege; instead, it is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. See the analyses for MRE 302 and MRE 501.

(a) General Rule of Privilege. The words "under the UCMJ" in this rule mean that this privilege applies only to UCMJ proceedings and does not limit the availability of such information internally to the services, for appropriate purposes.

(b) Exceptions. These exceptions are intended to emphasize that military commanders are to have access to all information and that psychotherapists are to readily provide information necessary for the safety and security of military personnel, operations, installations, and equipment.