New Developments in Evidence 1999

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Introduction

This past year's cases addressing the rules of evidence presented some very intriguing issues. This article focuses primarily on cases from the Court of Appeals for the Armed Forces (CAAF). The article also discusses significant federal circuit cases, one important Supreme Court case, and a few service court cases. Some of the most interesting trends this year focus on the relevance of uncharged misconduct in drug cases, the new psychotherapist-patient privilege, and the Supreme Courts framework for evaluating the reliability of nonscientific expert evidence. These cases and trends serve as a reminder that "evidence law" is a dynamic and ever-changing area of criminal law.

Relevancy and Uncharged Drug Use

Military Rule of Evidence (MRE) 401 sets out the definition for logical relevance as evidence that has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence.[1] This is a low standard of admissibility.[2] In spite of this liberal standard, MRE 403 places some limits on relevant evidence by stating that even relevant evidence can be excluded if the probative value is substantially outweighed by the risk of unfair prejudice, confusion, delay, or cumulativeness.[3]

Three recent opinions, one from the CAAF, one from the Air Force Court of Criminal Appeals, and one from the Navy-Marine Court of Criminal Appeals address these concepts of logical and legal relevance in the context of the wrongful use of drugs. The outcome of these cases is that the CAAF seems to establish a higher standard of logical relevance for the admission of uncharged drug use than has been required in the past. Both the Air Force and Navy-Marine Corps courts seem to be resisting that trend.

Logical Relevance of a Past Positive Urinalysis

In *United States v. Graham*,[4] the CAAF held that evidence that the accused tested positive for marijuana four years earlier was not admissible in the accused's present trial for wrongful use. In this case, the accused was convicted of one specification of wrongful use of marijuana in violation of Article 112(a) Uniform Code of Military Justice (UCMJ)[5] based on a positive urinalysis.[6] At his trial, the accused put on a good soldier defense. To bolster his claim, the accused testified that there is no way he would knowingly use marijuana. He also testified that he was "shocked, upset, and flabbergasted" when he was notified of the urinalysis results.[7]

To rebut the accused's claims, the military judge allowed the trial counsel to ask the accused one question about a prior positive urinalysis four years earlier for marijuana. The accused had been tried and acquitted of the previous incident. In that case, the accused presented an innocent ingestion defense. The military judge did not allow the government to ask any questions about the prior case or introduce any testimony about the prior trial.[8] The trial counsel was only allowed to ask the accused if he had a previous positive urinalysis result.[9] The military judge ruled that the probative value of this question

1. Military Rule of Evidence 401 provides: "'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. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (1998) [hereinafter MCM].

2. STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § IV, at 473 (4th ed. 1997).

3. MCM, *supra* note 1, MIL. R. EVID. 403.

4. 50 M.J. 56 (1999).

5. UCMJ art. 112(a) (LEXIS 2000).

6. *Graham*, 50 M.J. at 57.

7. *Id.*

8. *Id.*

9. *Id.*

was not outweighed by the risk of unfair prejudice under MRE 403.[10]

The accused responded that he had previously tested positive and then spontaneously added that he had been acquitted of any misconduct.[11] The military judge followed up the question with a limiting instruction. The judge instructed the members that they could only consider this prior positive test result for the limited purpose of the likelihood that the accused would test positive twice for unknowing ingestion and for the likelihood that the accused was flabbergasted when he was told he tested positive a second time. The judge specifically instructed the members that this evidence was no indication that the accused knowingly used marijuana on either the occasion four years ago or the occasion for which the accused stood charged.[12]

The CAAF ruled that the military judge abused his discretion by allowing this question and reversed the conviction.[13] The court questioned the logical relevance of the prior positive urinalysis on the issues it was offered to rebut. The court looked at logical relevance through the rules they had established in an earlier line of cases[14] that allow the factfinders to infer knowing and wrongful use of a controlled substance from the mere presence of the substance in the accused's system. These cases set out three requirements. First, the seizure of the urine sample must be lawful. Second, the lab results must be admissible, including proof of the chain of custody. Third, there must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful.[15] Here the court said none of these requirements was met with regard to the four-year-old test result.[16] Because these foundational requirements were not met, the court intimates that the prior urinalysis was irrelevant and inadmissible.

The court also said that this evidence was not logically relevant on the likelihood that the accused would unknowingly test positive twice for marijuana. The CAAF said that there was simply no evidence on the record of such a statistical probability.[17] Without such evidence, perhaps in the form of expert testimony, this evidence is not relevant to rebut the accused's claim that he would never knowingly use marijuana. The court also said that there was no evidence to show the likelihood of someone testing positive twice in a four-year period because of innocent ingestion.[18] Absent any statistics, the evidence is not logically relevant.

The CAAF also rejected the government's claim that this evidence rebutted the accused's statement that he was "shocked, upset, and flabbergasted" when he got word of the test results. The CAAF said that while some may argue that if a person tested positive twice in a four-year period, he would not be surprised with the second positive result, the opposite is just as likely. The accused may be even more upset and surprised if he had innocently ingested marijuana on the first incident, and then come up positive yet again four years later.[19]

Finally, the court rejected the argument that this evidence is admissible to rebut the accused's claim of innocent ingestion. According to the court, the accused did not proffer an innocent ingestion defense. He offered a good soldier defense, coupled with a general denial of the charges. Because this was the thrust of the accused's defense, the court held that there is simply no fact of consequence that a positive result on a previous urinalysis could rebut.[20] In spite of a limiting instruction, the court was concerned that this evidence was really being offered to show the accused acted in conformity with a prior bad act, something that MRE 404(b) specifically precludes.[21]

Judges Sullivan and Crawford dissented from the majority opinion. In his dissent, Judge Sullivan attacks the weaknesses

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10. *Id*. at 58.

11. *Id*.

12. *Id*.

13. *Id*. at 60.

14. *See* United States v. Ford, 23 M.J. 331 (1987); United States v. Murphy, 23 M.J. 310 (1987); United States v. Harper, 22 M.J. 157 (1986).

15. *Graham*, 50 M.J. at 58.

16. *Id*. at 59.

17. *Id*.

18. *Id*.

19. *Id*.

20. *Id*.

21. Military Rule of Evidence 404(b) provides in part: "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." MCM, *supra* note 1, MIL. R. EVID. 404(b).

of the majority opinion on both logical and legal relevancy grounds. According to Judge Sullivan, the accused's testimony raised an unknowing ingestion defense,[22] and the government's rebuttal evidence must be viewed in light of the purpose for which the evidence was offered. Questioning the accused about a prior positive test is fair rebuttal of the accused assertions that he never knowingly used drugs. The accused's unequivocal denial suggested a total non-involvement with illegal drugs. The government's rebuttal evidence was therefore relevant to show that the accused had tested positive not once, but twice during his claimed drug-free life.[23] This is the type of rebuttal evidence that the CAAF had previously approved.[24]

Judge Sullivan also said this evidence was relevant to rebut the accused's testimony that he was "shocked, upset, [and] flabbergasted." According to Judge Sullivan, the inference that the accused made with this claim is that his agitated state suggested that he had never tested positive before, and his current positive test should be attributed to an unknowing ingestion.[25] Here again, Judge Sullivan contends that the government's evidence was logically relevant to rebut this claim. The government is entitled to contradict this claim by showing that the accused had tested positive before and his testimony of agitation was either exaggerated or false.[26]

On the issue of legal relevance, Judge Sullivan contends that the majority's reliance on the *Murphy* line of cases is misplaced.[27] The *Murphy* line of cases applies when the government is trying to prove the accused guilty beyond a reasonable doubt. In this case, however, the government was introducing this as uncharged misconduct evidence for the specific purpose of rebutting the accused's testimony. The standard for uncharged misconduct evidence to be admitted is not proof beyond a reasonable doubt, but a far lower standard.[28] The majority, according to Judge Sullivan is creating a higher standard of proof for this type of uncharged misconduct evidence than the law requires.[29]

Judge Crawford joined in this dissent and also made the additional point that this evidence is relevant under the doctrine of chances. In other words, what are the odds of the same set of facts occurring more than once to the same person.[30] According to Judge Crawford, the panel members should have the opportunity to determine the accused's credibility, and whether he would mistakenly test positive twice for drugs in four years.[31]

One point not addressed in the dissenting opinion but perhaps another theory of admissibility is MRE 404(a)(1).[32] The majority stressed that the accused's defense was a good soldier defense. By putting on this defense, the accused opened the door to attack with relevant evidence of bad character. Under MRE 405(a),[33] specific instances can be inquired into on cross-examination. The prior positive urinalysis arguably falls under this type of rebuttal evidence.

Guidance

Graham has important implications in any drug case where the government is seeking to introduce evidence of an

22. *Graham*, 50 M.J. at 62 (Sullivan, J., dissenting).

23. *Id*. (Sullivan, J., dissenting).

24. *See* United States v. Trimper, 28 M.J. 460 (C.M.A. 1989). In *Trimper*, the accused, an Air Force judge advocate was charged with several specifications of wrongful use of marijuana and cocaine in violation of Article 112(a), UCMJ. In his defense, the accused testified that he had never used drugs. To rebut that claim, the government was allowed to introduce the test results of a urine sample submitted by the accused to a civilian hospital. The testing occurred outside of the charged incidents and it revealed that the accused urine tested positive for cocaine. The then Court of Military Appeals held that the accused, by his own testimony and sweeping denials, opened the way for the prosecution to use the test results, even though the results would have otherwise been inadmissible. *Trimper*, 28 M.J. at 461.

25. *Graham*, 50 M.J. at 63 (Sullivan, J., dissenting).

26. *Id*.

27. *Id*.

28. *Id*. (Sullivan, J., dissenting) (citing United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) (holding that the standard of proof for uncharged misconduct evidence is whether the evidence reasonably supports a finding by the court members that the accused committed the prior acts).

29. *Id*. (Sullivan, J., dissenting).

30. *Id*. at 64 (Crawford, J., dissenting).

31. *Id.*

32. Military Rule of Evidence 404(a)(1) provides that the following character evidence is admissible: "Evidence of a pertinent trait of character of the accused offered by an accused, or by the prosecution to rebut the same." MCM, *supra* note 1, MIL. R. EVID. 404(a)(1).

33. Military Rule of Evidence 405(a) provides: "In all cases in which evidence of character or a trait of character of a person is admissible, proof my 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*. at 405(a).

uncharged positive urinalysis. Although MRE 401 sets forth a low standard for admissibility, a majority of the CAAF believes that a past positive urinalysis may fail even this low standard of logical relevance when that evidence is offered in rebuttal of the accused's claims. The court clearly raises the bar for the admissibility for this type of evidence. The dissenting opinions do a good job of pointing out the weaknesses in the majority opinion as well as the majority's inconsistency with previous case law.

In light of these weaknesses, the majority would have been on stronger legal ground if they would have focused more on the legal relevance issues. Had the majority stressed more clearly that the probative value of this evidence was substantially outweighed by the risk of unfair prejudice confusion of the issues, misleading of the members, and the like, the dissent would have little to attack. But to hold that this evidence is not logically relevant, is difficult to understand.

Practitioners, however, should pay close attention to one of the concluding paragraphs of the majority opinion. It is very telling and clearly sets out how a majority of the court feels about urinalysis cases in general and the use of uncharged positive test results in particular. The court says:

> Our dissenting colleagues seem to forget, once again, that our service personnel, who are called upon to defend our Constitution with their very lives, are sometimes subject to searches and seizures of their bodies, without probable cause, for evidence of a crime. We should zealously guard the uses of these results and hold the Government to the highest standards of proof required by law.[34]

Logical Relevance of a Post Positive Urinalysis

The Air Force court decided a similar drug case just a week after *Graham*. In *United States v. Matthews*,[35] the Air Force court held that the military judge did not err in allowing the government to introduce evidence that the accused tested positive for marijuana twenty-three days after her initial sample detected the presence of marijuana. The court attempted to draft a very precise opinion to avoid the pitfalls that the majority identified in *Graham*. After *Graham*, however, *Matthews*' future is very much in doubt.[36]

In *Matthews*, the accused, an Air Force Office of Special Investigations (OSI) agent was randomly selected to provide a urine sample. She provided the sample on 29 April 1996.[37] That sample tested positive for marijuana. Twenty-three days after she submitted the first sample, the accused was tested again as part of a command directed urinalysis. She again tested positive for marijuana. The accused was charged with one specification of wrongfully using marijuana in violation of Article 112(a) UCMJ.[38] She was not charged with the second use. At trial, the government said that it would not introduce evidence of the second urinalysis unless the defense "opened the door."[39]

The accused began her defense with several affidavits from former commanders and supervisors who testified about her good duty performance and professionalism. The accused also testified in her own defense.[40] On direct examination, she testified that she had not used marijuana between 1 and 29 April. She also testified that at the time of the urinalysis, she was comfortable with the collection process of the first test. Finally, she testified that she had no idea how the sample could have tested positive for marijuana.[41] At the conclusion of the accused's direct testimony, the government moved to introduce the results of the command directed urinalysis.

The military judge first heard expert testimony that established that the second test result was from a separate incident of use. The military judge then allowed the government to introduce evidence of the second positive urinalysis. The judge admitted this evidence as rebuttal evidence under MRE 404(b)[42] to show the accused's knowledge and opportunity.[43]

At trial and on appeal, the defense contended that this was not proper rebuttal evidence because the accused had done nothing more than deny the elements of the offense. The Air Force court disagreed. First, the court said that the accused asserted an innocent ingestion defense by testifying that she had no qualms with the collection and testing procedure, and that she had no idea of how the marijuana got into her system.[44] Moreover, the court noted that by putting on a good solder defense, she opened the door under MRE 404(a) to allow the

34. *Graham*, 50 M.J. at 60.

35. 50 M.J. 584 (A.F. Ct. Crim. App. 1999).

36. The CAAF granted a petition for review, and oral arguments were heard on the case on 16 December 1999.

37. *Matthews*, 50 M.J. at 585.

38. UCMJ art. 112(a) (LEXIS 2000).

39. *Matthews*, 50 M.J. at 585.

40. *Id.*

41. *Id.*

government to introduce bad character evidence in rebuttal. The court analogized this case to *United States v. Trimper*[45] and held that a date specific denial coupled with a good soldier defense is analogous to a sweeping denial that allows the government to impeach with contradictory facts.[46]

The court also paused briefly to note that just because the uncharged misconduct occurred after the charged offense, that did not render the evidence inadmissible.[47] Consistent with the CAAF's opinion in *United States v. Brewer*,[48] the court rejected the notion that good military character should create a reasonable doubt "in your mind that [the accused] knowingly used marijuana between 1 and 29 April 1996, but all bets are off after that date."[49]

Ultimately, the court held that this evidence was admissible rebuttal evidence for two purposes. First, by putting on good soldier evidence from witnesses other than the accused, the command directed urinalysis was proper rebuttal evidence within the confines of MRE 405 and 608(b). Second, when the accused denied ingesting an illicit drug and also testified to her good military character, the results of a command directed urinalysis are admissible in rebuttal under MRE 404(b) and 403.[50]

Advice

In summing up its holding, the Air Force court used very precise language "so that this case [would not be] misapplied."[51] Unfortunately, the court's language at the end of the opinion creates some confusion and may serve as the basis for the CAAF to reverse. The confusion comes from the court's statement that good military character evidence offered by witnesses other than the accused, opens the door for the results of the command directed urinalysis under MRE 405 and 608(b).[52] It is unclear how MRE 608(b) applies to this situation.

Military Rule of Evidence 608(b) allows for inquiry into specific instances of conduct if probative of truthfulness or untruthfulness and prohibits the introduction of extrinsic evidence.[53] How then can the *results* of a command directed urinalysis be admitted under this rule? First, the results of a urinalysis are not particularly probative of truthfulness or untruthfulness. Second, the results of the urinalysis are extrinsic evidence, which the rule specifically excludes.

The summation of the opinion would have been more accurate if it had cited to MRE 404(a)(1) and 405. Military Rule of Evidence 404(a)(1) specifically allows the government to introduce character evidence to rebut the accused's evidence of a favorable pertinent character trait.[54] By putting on a good soldier defense, the accused opened the door to this rebuttal and MRE 405 permitted the government to both call character witnesses and cross-examine defense character witnesses with relevant specific instances of conduct. In this case, an uncharged positive urinalysis certainly rebuts the accused's good military character defense.

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42. Military Rule of Evidence 404(b) provides in part:

> 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.

MCM, *supra* note 1, MIL. R. EVID. 404(b).

43. *Matthews*, 50 M.J. at 586.

44. *Id*. at 588.

45. 28 M.J. 460 (C.M.A. 1989).

46. *Matthews*, 50 M.J. at 589.

47. *Id*.

48. 43 M.J. 43 (1995). In *Brewer* the CAAF held that the accused's conduct during the time between period underlying the witness's opinion on accused's character and the time of the offense was relevant to the question of whether the accused had the same character traits when the crime occurred.

49. *Matthews*, 50 M.J. at 589.

50. *Id.* at 591.

51. *Id*.

52. *Id*.

53. MCM, *supra* note 1, MIL R. EVID. 608(b).

54. *Id.* 404(a)(1).

The court's summation of their opinion may serve as the basis for the CAAF's reversal because the court held that when an accused denies ingesting an illegal substance and testifies to his good military character in support of that claim, the results of the command directed urinalysis are admissible under MRE 404(b). The CAAF did address this issue in *Graham* and reached the opposite result.

It is true that the cases can be distinguished factually on a couple of important points. First, in *Matthews* the accused conceded the accuracy of the test results and that the urine tested was hers. In *Graham*, there was no such concession and the innocent ingestion defense was less direct. Also in *Matthews*, the second test occurred twenty-three days after the first test, and an expert was able to testify that the second test result had to be from a separate use. In *Graham*, the test was four-years old and the accused had already been acquitted of that use. Finally, the second test in *Matthews* was a command directed urinalysis and there was little doubt about the source of the sample and the accuracy of the collection procedures. The Air Force court stressed this point in the summation of their opinion. In *Graham*, however, there was little or no evidence about how the prior test was conducted and whether the collection and chain of custody remained in tact.

In spite of these factual differences, the majority of the CAAF is likely to see them as distinctions without a difference because the majority of the CAAF believes that the uncharged urinalysis is simply not relevant to any issue at trial when the accused asserts a good soldier defense. While the Air Force court provided a better explanation of why this evidence is logically relevant, a majority of the CAAF is not likely to be persuaded.

Graham II

An even more difficult case to square with *Graham* is the Navy-Marine Corps court's opinion in *United States v. Tyndale*.[55] In *Tyndale* the accused was tried and found guilty of one specification of wrongful use of methamphetamine in violation of Article 112a, UCMJ.[56] On Monday, 7 October 1996, the accused submitted a urine sample as part of a random drug test and the sample tested positive.[57] In his defense, the accused testified and asserted an innocent ingestion defense. The accused claimed that he worked as a professional musician on the Saturday night before the drug test and that someone at the party where he was working may have slipped drugs into his drinks without his knowledge.[58]

In rebuttal, the government offered evidence that the accused had tested positive two years earlier for methanphetamine. This evidence was offered under MRE 404(b) to rebut the accused's claim of innocent ingestion because it showed the accused's knowledge and intent to wrongfully use illegal drugs. The accused was in fact tried and acquitted of this earlier use, and the government introduced evidence that in the prior court-martial the accused asserted a very similar innocent ingestion defense.[59]

At trial and on appeal, the defense objected to this evidence. The Navy-Marine Corps court held that the trial judge did not err in admitting this evidence.[60] First, the court said that by asserting an innocent ingestion defense the accused made knowledge and intent issues in controversy because this defense challenges the permissive inference of wrongfulness that arises from the positive urinalysis result.[61]

The court then looked to the question of whether the probative value of this evidence was substantially outweighed by the risk of unfair prejudice. The court discussed and differentiated the CAAF's opinion in *Graham* based on three reasons. First, in *Graham*, the uncharged misconduct was not admitted to show knowledge and intent, but only to show the accused lack of surprise. In *Tyndale*, the court said that knowledge and intent were in controversy because of the innocent ingestion defense, and this prior positive urinalysis was clearly relevant.

The Navy-Marine Corps court said the second point that makes this case different from *Graham* is that here the focus of the prior incident was really on the accused's story about a possible innocent ingestion. The witness who testified about the prior incident provided details about the accused explanation of how he could have innocently ingested drugs. Because that story was so similar to his defense in this case, "the significance of the evidence lies not so much in the urinalysis result itself, as in the comparison of the earlier story to the story that the appellant is now using."[62]

55. 51 M.J. 616 (N.M. Ct. Crim. App. 1999).

56. UCMJ art. 112(a) (LEXIS 2000).

57. *Tyndale*, 51 M.J. at 618.

58. *Id*.

59. *Id*. at 619-20.

60. *Id*. at 621.

61. *Id*. at 620.

62. *Id*. at 621.

Finally, the court said that this case was different than *Graham* because the accused testified that he was acquitted of the prior incident. The panel members were, therefore, able to put this evidence in proper context. The court concluded that the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice, and the military judge did not abuse his discretion.[63]

Advice

It is doubtful whether the Navy-Marine Corps court's attempts to distinguish *Tyndale* from *Graham* will be successful, or whether this case will have much value as precedent. The court clearly tried to avoid the issue that the CAAF raised in *Graham* regarding the inadequacy of the foundation for the prior urinalysis. In *Tyndale*, as in *Graham*, there was no expert testimony that would allow the members to make a permissive inference of wrongfulness from the prior positive urinalysis. Nonetheless, the court tried to make a distinction by stressing that what was important about the prior use was the similarity of the accused's stories and not the test results themselves. This distinction may not be all that convincing since ultimately what was important was the positive test results. Otherwise, the prior incident would not have had any relevance. Whether this case will have much value depends on how the CAAF decides *Matthews*. If the CAAF reverses *Matthews*, then the courts holding in *Tyndale* will have little value. On the other hand, if *Matthews* is affirmed by the CAAF, then *Tyndale* will serve as a method for prior positive urinalysis to continue to be admitted in courts-martial.

Until CAAF decides *Matthews*, trial counsel should be wary of admitting uncharged positive urinalysis, even when the uncharged urinalysis was command directed and even when the evidence is offered in rebuttal to a good soldier defense. Defense counsel on the other hand, may be able to use *Graham* to exclude most uncharged positive urinalysis results from the trial, arguing that this evidence is neither logically nor legally relevant. Unless the government is willing to accept the high burden of proof that the majority in *Graham* seems to require, they are unlikely to get this evidence before the fact finder.

404(b) Evidence and Sexual Orientation

One CAAF case this term addressed MRE 404(b) evidence in the area of the accused's sexual orientation.[64] Military Rule of Evidence 404(b) allows uncharged misconduct or bad acts evidence to be admitted against a person, usually the accused, if there is a non-character use for the evidence.[65] The case is significant primarily because it highlights a trend that allows sexual orientation of the accused into court, even though MRE 412[66] may keep sexual orientation of the victim out of the courtroom.

In *Whitner*, the accused was convicted of consensual sodomy and indecent acts with another male soldier.[67] At trial, the government introduced homosexual magazines, videotapes and pamphlets found in the accused's room. The sexual material depicted men engaging in homosexual oral sex. Some of the sexual activity was portrayed in a military setting.[68] The trial judge admitted this evidence over defense objection. The judge found that the evidence was relevant to show the accused's sexual desire, motive, and intent under MRE 404(b). The military judge also ruled that the probative value of this evidence was not outweighed by the risk of unfair prejudice. The judge did order portions of the tape redacted that portrayed anal sex because they were unrelated to the type of misconduct alleged in this case.[69]

The CAAF affirmed the military judge's ruling. The court first looked at the question of relevance under MRE 401. Writing for the majority, Judge Sullivan said that the court has routinely held that magazines, videos, and other pornographic material concerning a particular sex partner or sexual act found near the scene of the alleged crime may be relevant evidence of the accused's intent or state of mind.[70] The court also stated that

63. *Id*.

64. United States v. Whitner, 51 M.J. 457 (1999).

65. MCM, *supra* note 1, MIL. R. EVID. 404(b).

66. Military Rule of Evidence 412 provides in part:

> (a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
>
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
>
> (2) Evidence offered to prove any alleged victim's sexual predisposition.

MCM, *supra* note 1, MIL. R. EVID. 412(a).

67. *Whitner*, 51 M.J. at 458.

68. *Id*. at 459.

69. *Id*.

this evidence was relevant to show the accused's motive. According to the court, this evidence "reasonably suggests an emotional need for his committing the charged homosexual-related misconduct, [that is] his sexual desire for junior enlisted men."[71]

Next the CAAF analyzed the evidence for legal relevance under MRE 403. The defense claimed that this evidence had a low probative value because the accused's theory of the case was that he was a bi-sexual and any sexual contact was consensual.[72] The court rejected this argument for two reasons. First, the court said the defense's theory was not so much consent as a claim by the accused that he had no memory of what occurred on the night in question, coupled with an attack on the victim's credibility.[73] More importantly, the court held that simply because the defense did not specifically contest the intent elements of the offense, that did not relieve the government of the burden of proving intent.[74] Accordingly, the court ruled that the military judge did not abuse his discretion in admitting this evidence to prove intent.

Guidance

This case is interesting for two reasons. The court's statement that the government is not relieved of the burden of proving an element of the offense simply because the defense is not contesting that element is consistent with the Supreme Court's holding in *Old Chief v. United States*,[75] and other federal court cases.[76] However, in another opinion this term,[77] the CAAF muddies the water on this issue. This point is discussed in detail below.

The other significant aspect of the opinion is that it reveals the disparate way the rules and the court view the sexual orientation of the accused and the victim. In a case last term, *United States v. Grant*,[78] the accused was convicted of forcible sodomy and indecent assault of another male airman. In that case, the accused admitted to fondling the victim's genitals, but claimed that this was consensual.[79] The accused denied performing oral sodomy on the victim. At trial, the defense sought to elicit testimony from another witness that the victim was a homosexual. The defense contended that the victim's sexual orientation was relevant on the issue of consent in this case. The government objected and the military judge ruled that evidence of the victim's sexual orientation was inadmissible under MRE 412.[80]

On appeal, the defense argued that evidence of the victim's sexual orientation was constitutionally required as an exception to MRE 412.[81] The CAAF rejected that argument and affirmed the military judge's ruling. The court held that evidence of the victim's sexual orientation, without a showing that the conduct is so particularly unusual and distinctive as to verify the accused's version of the events, is not relevant.[82] According to the CAAF, a victim's homosexual orientation is not so unusual or distinctive that it would verify an accused's claim that the homosexual contact was consensual.[83]

Contrast the court's opinion in *Grant* with their holding this year in *Whitner*. It seems that if pornographic homosexual magazines are relevant to prove the accused's intent, and motive, in a forcible sodomy case, the sexual orientation of a victim is relevant to show that it is more likely that the victim consented to the homosexual conduct. Under the CAAF's jurisprudence, however, the same evidence may be relevant and admissible against the accused under MRE 404(b), but not admissible against the victim under MRE 412.

70. *Id*. at 460.

71. *Id*. at 461.

72. *Id*.

73. *Id*. at 462.

74. *Id*. at 461.

75. 519 U.S. 172 (1997).

76. United States v. Crowder, 87 F.3d 1405 (D.C. Cir. 1996).

77. United States v. Morrison, 52 M.J. 117 (1999).

78. 49 M.J. 295 (1998).

79. *Id*. at 296.

80. *Id*. at 297.

81. *Id*.

82. *Id*. (citing United States v. Sanchez, 44 M.J. 174 (1996)).

83. *Grant*, 49 M.J. at 297.

Whitner reminds counsel of the expansive nature of MRE 404(b). Provided the party offering the evidence can articulate a non-character theory of relevance, the evidence may be admitted, subject to a MRE 403 balancing. Comparing *Whitner* with *Grant* from last term also illustrates that evidence admissible against the accused, may not be admissible against the victim because of the provisions of MRE 412.

Defense Concessions

Whitner is also difficult to reconcile with another CAAF opinion this term on the question of defense concessions. Recall in *Whitner*, the court stated that the government is not relieved of the burden of proving an element of the offense simply because the defense is not contesting that element. Accordingly, the homosexual pornography was admissible against the accused under MRE 404(b) to prove intent, even though the defense did not contest intent.[84] In another opinion this term, [85] however, the CAAF held that because the issues of motive and intent were not in issue, the probative value of the government's 404(b) evidence was outweighed by the danger of unfair prejudice.

In *Morrison*, the accused was convicted, inter alia, of assault consummated by a battery with a child under the age of sixteen and indecent acts.[86] The government alleged that the accused on one occasion assaulted the eight-year old daughter of a friend by touching her vagina. The government also alleged that the accused fondled the breasts, placed his finger in the vagina, and french kissed his fourteen-year-old niece. To prove motive, intent, plan, opportunity, ability, and absence of mistake, the government introduced uncharged misconduct evidence involving numerous incidents of sexual abuse between the accused and his natural daughter.[87] The uncharged misconduct occurred when the accused's daughter was between the ages of six and thirteen. This alleged misconduct was at least eight years old.[88] The military judge admitted this evidence under MRE 404(b).

The CAAF held that it was an abuse of discretion for the military judge to admit this evidence for two reasons.[89] First, the court said that the uncharged misconduct was not so similar to the charged offenses that it was relevant to show the identity of the perpetrator.[90] The court also held that this evidence was not needed to prove motive and intent because these issues were not in dispute. According to the court, the accused's alleged assaults were so overtly sexual that motive and intent were not in issue.[91] The court, therefore, held that the probative value of the evidence to prove motive and intent was outweighed by the risk of unfair prejudice, and reversed the conviction.

Guidance

It is difficult to reconcile this case with *Whitner.* In both cases, the primary thrust of the defense's case was that the victims were untruthful. Both cases also involved alleged conduct that was overtly sexual. In *Whitner,* even though the alleged conduct was overtly sexual, the court said that motive and intent were in issue and the government was allowed to introduce MRE 404(b) evidence. In *Morrison*, however, the court said that because the acts were overtly sexual, motive and intent were not at issue and the government did not need the proffered MRE 404(b) evidence. It is difficult to reconcile these opinions. More importantly it is unclear now to practitioners how to determine when motive and intent are or are not in issue in sexual offenses.

Trial counsel seeking to admit MRE 404(b) evidence to prove motive and intent in sex crime cases should look to *Whitner.* Counsel can argue that simply because the defense is not contesting motive or intent, the government is not relieved of the burden of proof and the probative value of the uncharged misconduct is not substantially outweighed by the risk of unfair prejudice.

Defense counsel should use *Morrison* to keep this uncharged misconduct out. In almost any sex crime, motive and intent are clear from the charge and the probative value of the government's MRE 404(b) evidence is outweighed by the risk of unfair prejudice. The problem is that because both of these cases are from the CAAF, and are difficult to reconcile, they provide little guidance to trial judges on how to resolve this issue. However, because the military has adopted MRE 413 and 414,[92] this issue may become moot in most cases; the gov-

84. United States v. Whitner, 51 M.J. 457, 461 (1999).

85. United States v. Morrison, 52 M.J. 117 (1999).

86. *Id*. at 119.

87. *Id*. at 120.

88. This case was tried before MRE 414 came in to effect and the court expressed no opinion on the admissibility of this evidence under MRE 414. *Morrison*, 52 M.J. at 121 n.4.

89. *Id*. at 123.

90. *Id*.

91. *Id*.

ernment can now use uncharged misconduct to prove propensity in sexual offense cases without identifying the limitations of MRE 404(b).

Placing Limitations on Propensity Evidence

Military Rules of Evidence 413 and 414 represent a significant departure from the longstanding prohibition against using uncharged misconduct to show that the accused is a bad person or has the propensity to commit criminal misconduct. The language of both rules state that in a court-martial for sexual assault and child molestation offenses, evidence that an accused committed other acts of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

Absent from these rules are the familiar limitations found in MRE 404(a) and (b) that specifically prohibit the government from using uncharged misconduct to prove that the accused has a bad character or has the propensity to commit the charged offenses. Last year, a number of federal and service court cases looked at the constitutionally of these new rules.[93] The courts uniformly held that these new rules of evidence did not violate the accused's due process rights because Federal Rule of Evidence (FRE) 403 still required the trial judge to weigh the probative value of this evidence against the risk of unfair prejudice. This term, several cases examined how the balancing test should be conducted.

The first case is from the Tenth Circuit and reviews the adequacy of the balancing test the trial judge must perform before admitting evidence under FRE 414.[94] In *United States v. Charley*,[95] the accused was convicted of seven counts of child abuse largely on the testimony of the two child victims. The government also introduced evidence under FRE 414 of the accused's prior conviction for child abuse.[96] Before admitting this evidence, the trial judge conducted a Rule 403 balancing to test the evidence for unfair prejudice.[97] In conducting the balancing, the judge noted the probative value of the evidence by citing to the discussion section of the rule. In fact, the judge simply quoted the discussion to the rule verbatim and then said, "[s]o I have conducted that balancing test."[98] There was no attempt to discuss the specifics of the case or how the prior incident was specifically probative to an issue at trial.

On appeal, the Tenth Circuit affirmed and held that these on-the-record findings are sufficient to explain the district court's reasons for admitting the evidence.[99] Moreover, the court said that by invoking the stated general reasons for the rule's enactment, the trial judge was implying that those reasons were particularly important in this case. The court held that the judge had not abused his discretion in admitting this evidence.[100]

Guidance

This case is significant because the court tacitly approves a very cursory Rule 403 balancing by the trial judge. Considering what this evidence can be used for and the likely impact it will have on the jury, it seems surprising that the court would sanction such a pro forma balancing. The appellate court inferred that the balancing was more fact specific than the record demonstrates, which could mean that the court was not entirely satisfied with this balancing and was inferring a more fact specific review in order to save the case. The fact remains, however, that the court approved of this minimal balancing. Most of the service courts that have looked at the military counterpart to these rules have looked to the Tenth Circuit for guidance.[101] The question then is whether the service courts or the CAAF will approve of such a cursory MRE 403 balancing.

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92. Military Rule of Evidence 413 states in part: "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 my be considered for its bearing on any matter to which it is relevant." MCM, *supra* note 1, MIL. R. EVID. 413(a).

> Military Rule of Evidence 414 states in part: "In a court-martial in which the accused is charged with an offense of sexual 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." *Id.* MIL R. EVID. 414(a).

93. *See* United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998);United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998).

94. Federal Rules of Evidence 413 and 414 are substantially the same as their military counterparts.

95. United States v. Charley, 189 F.3d 1251 (10th Cir. 1999).

96. *Id.* at 1258.

97. *Id*. at 1260.

98. *Id.*

99. *Id.*

100. *Id.*

The Balancing Act and 414

A recent Air Force case may provide the answer. In *United States v. Dewrell*,[102] the court grappled with the question of how the trial judge should conduct the balancing of evidence offered under MRE 414. In *Dewrell*, the accused was convicted of committing an indecent act upon a female under the age of sixteen by fondling her chest and placing her hands on his exposed penis.[103] The trial counsel sought to call a former neighbor of the accused to testify about three incidents that occurred several years prior to the charged offenses where the accused allegedly molested her when she was a young girl.[104] The government moved to admit this evidence under MRE 404(b) and MRE 414. The only theory of admissibility that the trial counsel articulated was propensity.[105]

The defense objected to this evidence. The trial judge allowed the evidence over defense objection ruling that the uncharged misconduct was so similar to the charged offenses that it was admissible under MRE 404(b), 413, and 414. The trial judge did not receive the evidence for any purpose other than propensity.[106]

On appeal the defense alleged that MRE 414 was unconstitutional, and it was an abuse of discretion for the military judge to admit this evidence.[107] Consistent with earlier opinions, the court quickly rejected the constitutional argument and noted that the primary focus for MRE 413 and 414 litigation is on the military judge's application of MRE 403.[108]

The court then looked at how MRE 403 should be applied in the context of MRE 413 and 414. The court said that there is a developing consensus among the federal courts to apply rule 403 in a very broad manner that favors admission.[109] According to the court, a broad application that favors admissibility is necessary to give MRE 413 and 414 any effect. If MRE 403 were applied in the traditional manner, these new rules would be eviscerated because the government would rarely be able to overcome the MRE 403 hurdle.[110]

The court announced the rule applicable to the Air Force. In the context of MRE 413 and 414, the trial judge will "test for whether the prior acts evidence will have a substantial tendency to cause the members to fail to hold the prosecution to its burden of proof beyond a reasonable doubt with respect to the charged offenses."[111] Only if admitting the evidence would run afoul of this test, should the trial judge exclude the evidence as unfairly prejudicial. The court then listed several factors to consider. These factors include: whether the evidence will contribute to the members arriving at a verdict on an improper basis, the potential for delay and confusion, the similarity of the uncharged misconduct to the charged offenses, and the clarity of the witness testimony about the uncharged incidents.[112] Applying the principles to this case, not surprisingly, the court held that the trial judge did not abuse his discretion when he admitted this evidence.[113]

Guidance

Although the court in *Dewrell* tried to clarify the proper relationship between MRE 403 and MRE 413 and 414, the opinion does not shed much new light on the matter. First, the court said that in the context of MRE 413 and 414, MRE 403 should be read in a manner that favors admissibility. The rule, however, already favors admissibility of all types of evidence. Only if the probative value of the evidence is *substantially* outweighed by

101. *See* United States v. Wright, 48 M.J. 896 (A.F. Ct. Crim. App. 1998).

102. 52 M.J. 601 (A.F. Ct. Crim. App. 1999).

103. *Id.* at 605.

104. *Id.* at 607.

105. *Id.* at 608.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 608-609 (citing United States v. Mound, 149 F.3d 799 (8th Cir. 1998); United States v. Enjady, 134 F.3d 1488 (10th Cir. 1998); United States v. LeCompte, 141 F.3d 767 (8th Cir. 1997)).

110. *Id.* at 609.

111. *Id.*

112. *Id.*

113. *Id.* at 609-610.

the danger of unfair prejudice, confusion, and the like, should the trial judge exclude that evidence.

The court also said that the rule should be applied differently and more broadly than with MRE 404(b) evidence. Unfortunately, the opinion does not clarify how trial courts apply MRE 403 in the 404(b) context or specifically how the balancing test for MRE 413 and 414 evidence should be different. Further, the opinion lists the factors that the trial judge should consider for MRE 413 and 414 evidence, which are the same factors that courts routinely consider in the context of MRE 404(b). It is unclear then, how this balancing test will differ or be any more liberal.

From a practical standpoint, the additional concern is that courts are applying MRE 403 differently depending on the rule under which the evidence is being offered. Practitioners will have difficulty knowing and articulating just what balancing test should be applied. This becomes even more confusing when the party offers the evidence under more than one theory. If, for example, the government is offering this evidence under both MRE 404(b) and 414, the judge will have to conduct two separate balancing tests for the same evidence because it is being offered for two different purposes.

The court goes to great lengths to point out to trial judges that MRE 403 should not be much of a hurdle for the government to overcome in admitting evidence under MRE 413 and MRE 414. Even if the court's logic is not clear, the message is undeniable: propensity evidence should be routinely admitted in child molestation and sexual assault cases. *Charley* reinforces that point, and the government should have a relatively easy time admitting evidence under this structure.

The defenses counsel's task, however, is more difficult. Under this structure, unless the defense can show that admission of the uncharged evidence would all but result in a conviction, the judge will admit it. Does this very limited protection sufficiently protect the accused's due process rights? If MRE 403 is the constitutional savior of these congressionally created rules, it seems that courts should not be minimizing the amount of protection that MRE 403 provides.

Your Secret is Safe With Me, Round III

Over the past two years, the military courts have struggled with the question of whether there existed a psychotherapist-patient privilege in the military after the Supreme Court's holding in *Jaffe v. Redmond*.[114] All of the service courts that have addressed the issue have held that until the President created such a privilege none existed.[115] On 7 October 1999, the President signed an executive order[116] implementing the new MRE 513, which recognizes a limited psychotherapist-patient privilege in the military.

A copy of the new rule and the drafter's analysis is at the Appendix. Counsel must understand that the privilege is limited. Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the UCMJ. There is no intent to apply MRE 513 in any proceeding other than those authorized under the UCMJ. Military Rule of Evidence 513 is not a physician-patient privilege; instead it is a separate rule based on the social benefit of confidential counseling. There is still no physician-patient privilege for members of the armed forces.[117]

Two specific exceptions are worth noting. First, there is no privilege when the communication is evidence of spouse abuse, child abuse, or neglect, or in a proceeding in which one spouse is charged with a crime against the other spouse or the child of either spouse. This is a significant exception given the number of domestic abuse cases tried in the military.[118]

The second exception of note states that communications are not privileged when necessary to ensure the safety and security of military personnel, dependants, property, classified information, or to protect the military mission accomplishment. This exception is 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

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114. 518 U.S. 1 (1996).

115. *See* United States v. Paaluhi, 50 M.J. 782 (N.M. Ct. Crim. App. 1999); United States v. Rodriguez, 49 M.J. 528 (Army Ct. Crim. App. 1998).

116. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

117. Military Rule of Evidence 501(d) states: "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." MCM, *supra* note 1, MIL. R. EVID. 501(d).

118. *See, e.g., United States v. Paaluhi*, 50 M.J. 782 (N.M. Ct. Crim. App. 1999), decided a few months before the President signed the executive order. In that case, the accused was convicted of rape, sodomy with a child under sixteen, and two specifications of indecent acts with a child under sixteen. Before trial, the accused, on the advice of counsel, met with a military psychologist. The defense had not asked the convening authority to make the psychologist a part of the defense team before the accused went to see the psychologist. The accused admitted having sex with his daughter over a five-year period to the psychologist. The government introduced this evidence over defense objection. At trial and on appeal the defense argued that *Jaffee* created a privilege in the military. The appellate court rejected that argument. Citing the Army court's holding in a case last term the court was unwilling to create such a privilege absent presidential action. *See* United States v. Rodriguez, 49 M.J. 528 (Army Ct. Crim. App. 1998). The Navy-Marine Corps court, like the Army court held that a psychotherapist employed by the government is a "medical officer' within the meaning of MRE 501(d) and communications under that rule are expressly not privileged. The outcome of this case would be the same even with MRE 513, because of exception 2.

security of military personnel, operations, installations, and equipment. Again, because these terms and concepts are so broad, this exception is potentially very significant.

The privilege now gives the accused's communications some protections. It also allows defense counsel in many cases to refer their clients to a therapist without the danger that the communications will be disclosed to the government. The full impact of the privilege, the breadth of the exceptions, and how the exceptions will apply remains to be seen.

Witness Sequestration: Don't Jump the Gun!

Military Rule of Evidence 615[119] does not typically get much attention from the appellate courts. This year, however, the CAAF decided a case that is significant mainly because it reminds practitioners that the rules of witness sequestration are about to change. In *United States v. Spann*,[120] the accused was convicted of rape. During the rebuttal portion of the government's case, the victim, who had already testified, entered the courtroom.[121] The defense moved to sequester the victim, citing MRE 615. After determining that the victim would be a witness during sentencing, the military judge ruled that 42 U.S.C. § 10606[122] superceded MRE 615, and he allowed the victim to remain in the courtroom.[123] This section of the federal statute states that the government will make their best efforts to ensure that crime victims have the right to be present at all public court proceedings related to the offense.

The CAAF ruled that it was error (harmless) to allow the victim to remain in the courtroom over defense objection.[124] The CAAF held that 42 U.S.C. § 10606 does not clearly supercede MRE 615, as evidenced by additional legislation in the 1997 Victim Rights Clarification Act[125] and a subsequent amendment of FRE 615.[126] The court held that unless the President takes some type of action, FRE 615 amendments allowing victims to remain in the courtroom will not become effective in the military until 1 June 2000.[127]

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119. Military Rule of Evidence 615 provides in part: "At the request of the prosecution of defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the *order sua sponte*." MCM, *supra*. note 1, MIL. R. EVID. 615.

120. 51 M.J. 89 (1999).

121. *Id.* at 90.

122. Section 10606 provides in pertinent part:

> (a) *Best efforts to accord rights*. Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b) of his section.
> (b) *Rights of crime victims*. A crime victim has the following rights:
> (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.

42 U.S.C.S. § 10606 (LEXIS 2000).

123. *Spann*, 51 M.J. at 90.

124. *Id.* at 93.

125. The Victim Rights Clarification Act was codified at 18 U.S.C. § 3510(a) and provides:

> Notwithstanding any statute, rule, or other provision of law, a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, make a statement or present any information in relation to the sentence.

18 U.S.C.S. § 3510(a) (LEXIS 2000).

126. Federal Rule of Evidence 615 provides in part:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case, or (4) *a person whose presence is authorized by statute*.

FED. R. EVID. 615.

127. *See* MCM, *supra* note 1, MIL. R. EVID. 1102 which states: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments unless action to the contrary is taken by the President." MCM, *supra* note 1, MIL. R. EVID. 1102.

Guidance

The most important point about this case is the reminder that the change to MRE 615 will be coming in a few months unless the President takes some other action. This means that victim-witnesses will soon be allowed to remain in the courtroom even if they are likely to testify again during the sentencing proceedings. The statute, however, does not expressly allow the victim to remain in the courtroom throughout the entire trial. The language indicates that the trial judge can still exclude the victim-witness on the basis that he may be testifying later in the findings phase of the trial.

The Department of Defense is also considering a proposed amendment to MRE 615 that does not authorize exclusion for "any victim of an offense from the trial of an accused for that offense because such victim may testify or present any information in relation to the sentence of that offense during the courts-martial presentecing proceeding."[128] Whether the President signs this proposed amendment or not by 1 June of this year, victims will be allowed to remain in the courtroom if the only basis for exclusion is that they may be a sentencing witness.

The Supreme Court Clarifies Daubert

The most significant development in the rules of evidence this year came in the area of expert testimony, specifically, how trial judges should evaluate the reliability of nonscientific expert testimony. In 1993, the Supreme Court, in the case of *Daubert v. Merrill Dow*,[129] held that the *Frye*[130] test of general acceptance was no longer the "be-all end-all" test for evaluating the reliability of scientific evidence. According to the Court, FRE 702 superceded the *Frye* test as the standard for the admissibility of expert testimony.[131] To aid trial courts in conducting this evaluation, the court set out four criteria that trial judges should use to determine reliability. The four criteria are: (1) peer review/publication, (2) error rate, (3) acceptability in the relevant community, and (4) testability.[132] The Court also reiterated that the trial judge must serve as the gatekeeper in applying these factors in order to keep junk science out of the courtroom.[133]

The *Daubert* opinion was limited to scientific evidence or evidence developed using the scientific method.[134] In the years following *Daubert*, courts struggled about whether they could use the *Daubert* factors to evaluate the reliability of nonscientific expert testimony.[135] Some circuits held that the *Daubert* factors apply to all types of expert testimony. Other courts found that the *Daubert* factors do not work well in evaluating the reliability of nonscientific evidence. There was a great deal of confusion and inconsistency over these issues until March of last year when the Supreme Court resolved these questions in the case of *Kumho Tire v. Charmichael*.[136]

On 6 July 1993, the right rear tire of a minivan driven by the plaintiff, Patrick Carmichael, blew out. The minivan crashed and one passenger was killed and several others were injured. Following the accident, Carmichael sued the tire maker, Kumho Tire, alleging that the tire failed because of a design or manufacturing defect.[137]

The plaintiff based much of his case on the testimony of Dennis Carlson, Jr. Mr. Carlson worked for a litigation consulting firm that performs tire failure analysis. Mr. Carlson had a bachelor's and master's degree in mechanical engineering. Before becoming a litigation consultant, Carlson worked for several years at Michelin Tire Company.[138] Mr. Carlson was prepared to testify that, in his opinion, the cause of the tire failure was a manufacturing or design defect.[139] The defendants

128. Notice of Proposed Amendments to Manual for Courts, United States (1998 ed.) 64 Fed. Reg. 27,761 (1999) (proposed May 21, 1999).

129. 509 U.S. 579 (1993).

130. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

131. *Daubert*, 509 U.S. at 589.

132. *Id.* at 593.

133. *Id.* at 592.

134. *Id.* at 579 n.8.

135. *See, e.g.*, United States v. Plunk, 153 F.3d 1011 (9th Cir. 1998) (holding that *Daubert* factors did not apply in evaluating the reliability of an expert in drug dealer codes); United States v. Ruth, 42 M.J. 730 (Army Ct. Crim. App. 1995) (stating that *Daubert* factors do not apply in evaluating a questioned document examiner); Berry v. City of Detroit, 25 F.3d. 1342 (6th Cir. 1994) (applying the *Daubert* factors to evaluate the reliability of an expert on police practices).

136. 119 S. Ct. 1167 (1999). This case will be published in the United States reporter at 526 U.S. 137; however, the final published version has not been released. This article will cite to the Supreme Court reporter for all references to *Kumho Tire v. Carmichael*.

137. *Kumho Tire*, 119 S. Ct. at 1171.

138. Brief for Petitioner at 4-5, Kumho Tire v. Carmichael, 119 S. Ct. 1167 (1999).

disputed the cause of the separation and the method used by Carlson to reach his conclusions.[140]

Carlson claimed that separation of the tread from the inner carcass is caused by either a manufacturing or design defect or under-inflation of the tire. According to Carlson, under-inflation can be detected by looking at four physical symptoms of the tire. If at least two of those four symptoms are not present, Carlson would conclude that a manufacturing or design defect caused the separation.[141]

In this case, Carlson conducted a physical examination of the tire only an hour before he was deposed.[142] Despite finding some evidence of each of the four symptoms that could indicate under-inflation, Carlson did not change his initial opinion that a manufacturing or design defect caused the separation. Carlson testified that in his opinion, none of the symptoms were significant, and that a manufacturing or design defect caused the blowout.[143]

At trial, the defense argued that Mr. Carlson's testimony should be excluded because his methodology for determining the cause of tire separation failed the Rule 702 reliability requirement. The district court judge applied a *Daubert*-type reliability analysis to Carlson's testimony even though it was arguably "technical" rather than "scientific" evidence. Applying the *Daubert* factors, the district court excluded the evidence as unreliable.[144] The plaintiffs appealed the judge's order to the Eleventh Circuit.[145] The Eleventh Circuit held that the judge's decision to apply a *Daubert*-type analysis was legal error because the evidence was nonscientific and *Daubert* only applied to scientific evidence.[146]

The Supreme Court granted *certiorari*[147] to resolve the uncertainty between the lower courts. In its opinion, the Supreme Court addressed two key issues. First, does the trial judge's gatekeeping obligation under Rule 702 apply to all types of expert testimony?[148] Second, can the trial judge use the *Daubert* factors to evaluate the reliability of nonscientific expert testimony?[149] The Court answered yes to both questions.

On the first issue, the Court found that the language of the rule and evidentiary policy all require the judge to serve as a gatekeeper for all types of expert evidence. The Court said that the language of Rule 702 makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. The rule, therefore, creates a reliability standard for all types of expert testimony, regardless of the form.[150]

The more difficult and contentious issue was whether a trial judge could or should use the *Daubert* factors to perform the gatekeeping function required by the rules to nonscientific expert evidence. The Court framed the issue as follows: "Whether a trial judge determining the admissibility of an engineering expert's testimony may consider several more specific factors that *Daubert* said might bear on a judge's gatekeeping determination."[151] The Court held: "Emphasizing the word 'may' in the question, we answer that question yes."[152] The Court then proceeded to make clear what after *Daubert* was very confusing.

First, the Court recognized that there are many different kinds of experts and many kinds of expertise. To account for these differences, the Rule 702 reliability inquiry must be flexible.[153] According to the Court, *Daubert* made clear that the factors they listed do not constitute a definitive list. If that point was not clear in *Daubert*, the Court went to great lengths to

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139. *Kumho Tire*, 119 S. Ct. at 1171.

140. *Id.* at 1172.

141. *Id.*

142. Brief for Petitioner at 6, Kumho Tire v. Carmichael, 119 S. Ct. 1167 (1999).

143. *Kumho Tire*, 119 S. Ct. at 1173.

144. *Id.*

145. Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997).

146. *Id.* at 1436.

147. 118 S. Ct. 2339 (1998).

148. *Kumho Tire*, 119 S. Ct. at 1174.

149. *Id.*

150. *Id.*

151. *Id.* at 1175.

152. *Id.* at 1176.

make the point clear here. Specifically, the Court said they could not rule in or rule out for all cases and for all time the applicability of the *Daubert* factors.[154]

The last aspect of the opinion emphasized the discretion of the trial judge. In deciding whether to apply the *Daubert* factors to a particular type of evidence, what *Daubert* factors to apply, and whether to apply factors not listed in *Daubert*, the trial judge must have considerable leeway and broad latitude.[155] The trial judge's decision should be evaluated on an abuse of discretion standard. The short concurrence written by Justice Scalia further clarifies this point. He stated that the abuse of discretion standard is not discretion to perform the reliability determination inadequately. "Rather, it is discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky."[156]

Guidance

The Court's opinion in *Kumho Tire* was a victory of common sense over formalistic application of evidence rules. The Court recognized the futility of trying to create an inflexible template or formula that can be used for all cases and all types of evidence. Instead, the Court noted that because the type of expert testimony varies widely, the trial judge must have a number of tools available to evaluate the evidence's reliability. Provided the judge uses factors designed to separate unreliable evidence from good evidence, the appellate courts should not second-guess that decision.

Because the military rules are patterned after the federal rules, *Kumho Tire* is an important case for military practitioners. Practitioners will feel the greatest impact in the area of nonscientific expert testimony.[157]

First, *Kumho Tire* means that trial judges should consider a number of facts and factors in evaluating the reliability of nonscientific experts. Trial courts often used a hands-off approach to evaluate the reliability of nonscientific experts. If the expert appeared to have the requisite qualifications and the testimony would be helpful, courts admitted it.[158] To make an adequate reliability determination, courts must use a more sophisticated method than merely looking at the expert's qualifications. The focus on the expert's qualifications simply does not go far enough and does not take into consideration that even though the expert may be qualified and the information may be helpful, it may not be reliable. Indeed, after *Kumho Tire*, counsel may have a strong argument to say that a trial judge has abused his discretion if the reliability focused on only these two prongs without considering other relevant factors.

On a closely related point, there may be a greater need for pre-trial motions and motions in limine to evaluate the admissibility of this testimony. Advocates will also have greater responsibility and greater freedom to provide the factors that the trial judge can use to evaluate the reliability of nonscientific expert evidence. Trial judges will also have greater freedom to rule on the admissibility or inadmissibility of nonscientific experts.

Finally, *Kumho Tire* may have the effect of actually precluding some nonscientific evidence that courts had routinely admitted. Many commentators see this as a likely consequence, particularly in the areas of handwriting analysis, fingerprints, arson investigations, psychological testing, accident reconstruction, and other areas of nonscientific expert evidence.[159] A closely related concern is that nonscientific experts may try to "phony up" their qualifications to get past the more rigorous scrutiny that the courts are likely to employ.[160]

This concern is understandable and somewhat justified. The argument is that before *Kumho Tire*, many courts were not performing a proper gatekeeping function for nonscientific expert testimony. *Kumho Tire* changed that and now "all bets are off" as to the reliability of any type of nonscientific expert evidence admitted pre-*Kumho Tire*.

The Court in *Kumho* recognized that a reexamination of the reliability of routinely admitted expert testimony might not be necessary. The Court said that trial judges have a great deal of discretionary authority on how to conduct the reliability analysis. This authority allows them to avoid "unnecessary reliability proceedings in ordinary cases where the reliability of the expert's method is properly taken for granted and to require appropriate proceedings in the less usual or more complex

153. *Id.* at 1175.

154. *Id.*

155. *Id.* at 1176.

156. *Id.* at 1179 (Scalia, J., concurring).

157. Hugh B. Kaplan, *Evidence Speakers Offer Guidance in Combating Bad Science, Misuse of Expert Testimony,* 13 THE CRIM. PRAC. REP. 219 (June 16, 1999) (quoting Prof. Paul C. Gianelli).

158. United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986).

159. Kaplan, *supra* note 157.

160. *Id.*

cases where cause for questioning the expert's reliability arises."[161] The challenge for trial judges and counsel is determining those cases where the reliability of the expert's methods can be properly taken for granted.

One early post-*Kumho Tire* case shows that judges may indeed take a closer look at evidence routinely admitted before *Kumho Tire*. In *United States v. Hines*,[162] a federal district judge excluded portions of a handwriting expert's testimony because it failed the reliability test. In her ruling, the district judge noted that before *Kumho Tire*, this evidence would have been routinely admitted.[163] The judge said that applying *Daubert/ Kumho Tire* rigorously, however, the handwriting testimony has serious problems with such issues as empirical testing, and rate of error. The district judge did not exclude all of the expert's testimony, but she did prohibit the expert from testifying that in his opinion the defendant was the author of the questioned document.[164]

In other areas as well, courts may exclude evidence that would have been admitted prior to *Kumho Tire*. Some areas that are ripe for a closer examination include psychiatric testimony, psychological profiling, syndrome evidence, false identification testimony, and false confession testimony. Some of this testimony was not highly favored by courts even before *Kumho Tire*.[165] Now, trial judges may have more reasons to exclude it without concern over reversal on appeal.

The CAAF also dealt with a number of cases involving expert evidence and expert testimony this term. Some of these cases are significant and may serve as an indication of where the court is going with regard to particular types of expert testimony.

False Confession Experts

One case, *United States v. Griffin*,[166] addresses the admissibility of an expert in false confessions.[167] In *Griffin*, the accused was convicted of making false statements, taking indecent liberties and communicating a threat. In 1991, the accused's wife walked in on the accused and his two-year-old daughter who were in the bathtub and saw the accused's daughter playing with the accused's erect penis. The Air Force investigated the incident and ultimately closed the case as unsubstantiated.[168] Several years later, the accused underwent a security clearance update and he was interviewed about the incident in 1991. He denied the incident again and then was administered a polygraph. After the polygraph examination, the accused signed a statement admitting that his previous statements were not completely correct and that his daughter had in fact touched his erect penis.[169]

At trial, the defense's theory was that the confession was coerced and false. To support their theory, the defense sought to call Dr. Rex Frank a psychologist as an expert on false confessions.[170] At a UCMJ 39(a) session, Dr. Frank testified that he had studied false confessions for the past several years. His research included a study of 350 cases where suspects had confessed but later had been determined to be innocent based on other evidence. The study concluded that forty-nine of those cases involved coerced confessions. Dr. Frank also testified about factors that affect someone's vulnerability to falsely confess.[171] Based on interviews with the accused and his review of the case, Dr. Frank was willing to testify that the accused's confession is consistent with a coerced compliant type of confession.[172] Dr. Frank did acknowledge that he could not testify as to the veracity of the statement, only that the accused was vulnerable to coercion.[173] The military judge ruled that while Dr. Frank was a qualified expert, this was not a proper subject mat-

161. *Kumho Tire*, 119 S. Ct. at 1176.

162. 55 F. Supp. 2d 62 (D. Pa. 1999).

163. *Id.* at 64-65.

164. *Id.*

165. *See* United States v. Griffin, 50 M.J. 278 (1999); United States v. Brown, 49 M.J. 448 (1998); United States v. Rivers, 49 M.J. 232 (1998).

166. 50 M.J. 278 (1999).

167. For an excellent discussion of the admissibility of false confession expert testimony see, Major James R. Agar, II, *The Admissibility of False Confession Expert Testimony*, ARMY LAW., Aug. 1999, at 26.

168. *Griffin*, 50 M.J. at 279.

169. *Id.*

170. *Id.* at 281.

171. *Id.*

172. *Id.* at 282.

ter for expert testimony, and the testimony does not have the necessary reliability to assist the fact finders.[174]

The CAAF affirmed the military judge's ruling. The court found that the trial judge did not abuse his discretion for a number of reasons. First, the court rejected the defense claim that Dr. Frank's testimony would show that the accused's confession was false. The court noted that even Dr. Frank said he was unable to do this, and even if he claimed that he could have, that testimony would be inadmissible because it commented on the credibility of another witness and would therefore, not be helpful.[175]

Second, again in spite of defense counsel's claim, Dr. Frank could not testify that the accused's statement was coerced. According to the court, at best, Dr. Frank could testify that the confession was consistent with a coerced confession. The problem with that testimony was that it was based on the accused version of the events, a version that the trial judge expressly found unreliable based on other facts.[176]

Finally, the CAAF noted that the studies that Dr. Frank referenced involved British prisoners. There was no showing of how these studies could be related to American military personnel and the studies shed little light on whether the accused was coerced to confess.[177]

Guidance

This case is a good illustration of how case-specific the reliability determination should be. Here the court focused not only on the expert's credentials but also what the expert would testify about, what the basis of the expert's opinion was, and how closely tied the expert's studies were to the facts of the case. Although this case was decided before *Kumho Tire*, this is precisely the type of factual determination that the Court in *Kumho Tire* called for. This case is also a good indication of CAAF's view of this kind of expert testimony. While there is no per se exclusion of this type of testimony, it can run afoul of many of the same concerns courts have with polygraph evidence. Of particular concern is the claim that the expert is potentially commenting on the credibility or veracity of another witness.

Comments on Credibility

The problem of experts commenting on the credibility of other witnesses is a reoccurring issue that the CAAF seems to address in some form every year. Last term in *United States v. Birdsall*,[178] the CAAF reversed a conviction because two government experts opined about the credibility of the child victims. The case set out a clear explanation of the law and why this type of evidence is not helpful to the members. This year saw several cases dealing with this issue in a slightly different context, where the defense had opened the door to a witness's credibility, and now the government was introducing rebuttal opinion testimony. In these cases, the court allowed some limited opinion testimony on credibility.

The first case is *United States v. Eggan*.[179] In *Eggan*, the accused was convicted of forcible sodomy with another soldier. The defense theory was that the conduct was consensual and that the victim was lying to cover up his own homosexuality.[180] The victim sought counseling after the incident and the government called the counselor as a witness to testify that the victim had trouble coping after the charged incident, to rebut the defense claim that he was lying.[181] The defense cross-examined the expert about whether the victim could be faking his emotions. The expert said it was possible.[182] On re-direct the expert testified that she saw no evidence of faking.[183] The defense did not object to these question at trial.

On appeal, the defense claimed that this was error because the expert commented on the victim's credibility.[184] The CAAF rejected this argument. The court first said that the defense did not object to these questions at trial and placed in context, the

173. *Id.*

174. *Id.* at 283.

175. *Id.* at 284.

176. *Id*. at 285.

177. *Id*. at 285.

178. 47 M.J. 404 (1998).

179. 51 M.J. 159 (1999).

180. *Id*. at 160.

181. *Id.*

182. *Id.*

183. *Id*. at 161.

question did not amount to prejudicial error. The court also pointed out that the military judge gave cautionary instructions telling the members that they alone could determine the credibility of witnesses.[185] Finally, the court held that any error was invited by the defense based on their cross-examination of the expert and they could not now complain since they opened the door to otherwise inadmissible evidence.[186]

In a second case, *United States v. Schlamer*,[187] the CAAF reached a similar result. The accused was charged with premeditated murder of a female marine. The accused confessed to the crime.[188] At trial, the defense theory was to show that the confession was coerced and unreliable.[189] The government called the investigator who took the confession to testify about what the accused told him. On cross-examination, the defense asked the interrogator questions suggesting that he obtained a false confession because of the intimidating environment and the leading questions he used.[190] Specifically, the defense counsel asked the investigator if he knew what a false confession was and if certain interrogation techniques could lead to a false confession.[191] On re-direct, the trial counsel asked the interrogator if he thought the confession was false. The investigator said no.[192]

On appeal, the defense claimed that this question was improper because it elicited impermissible opinion evidence about the truthfulness of the accused.[193] The CAAF held that the defense opened the door to this questioning on cross-examination and the government's question was really asking whether the agent had employed any of the techniques suggested by the defense.[194]

Guidance

These two cases illustrate how counsel can walk into their own trap by trying to elicit opinion testimony or other information about whether the accused or a witness is telling the truth. While the general rule is that this evidence is inadmissible because it both usurps the role of the fact finder, and is not helpful to the members, there are exceptions. If the counsel push too hard, they may unwittingly open the door to opinion evidence on rebuttal that would otherwise be inadmissible.

Expert Assistance

A final area regarding experts that the CAAF addressed this year is the showing of necessity that the defense must make in order to get expert assistance to help prepare for trial. For the defense to get expert assistance, they must demonstrate why the assistance is necessary and why they cannot accomplish their representation without the help.[195] One case, *United States v. Short*[196] illustrates the importance of this showing.

The accused, Petty Officer, Darrin Short, was convicted of wrongful use of marijuana based on a positive urinalysis. Prior to trial, the defense requested expert assistance from someone not associated with the Navy Drug Lab to help the defense prepare its case.[197] In support of their motion, the defense counsel stated that she had no background in chemistry past high-school, she did not have a knowledge of the drug testing system, and the standard operating procedures from the drug lab are so voluminous and technical that the defense could not develop the required expertise independently.[198]

184. *Id.*

185. *Id.* at 162.

186. *Id.*

187. 52 M.J. 80 (1999).

188. *Id.* at 83.

189. *Id.* at 84.

190. *Id.* at 85.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 86.

195. *See* United States v. Gonzales, 39 M.J. 459 (1994); United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

196. 50 M.J. 370 (1999).

197. *Id.* at 371.

The government agreed that the defense was entitled to expert assistance but claimed that Mr. Hall, the head of the Navy Drug Lab could provide the requested assistance.[199] During an Article 39(a) hearing, the military judge asked the defense counsel if she had consulted with the expert from the Navy lab. She replied that she had not, and did not intend to do so in the future because in her view he was not independent and could not provide the needed assistance.[200] The judge ruled that the expert from the government lab was available to assist the defense and the defense counsel had not demonstrated the need for an independent expert.[201]

The CAAF agreed with the military judge and held that the defense had failed to make an adequate showing of necessity.[202] The court noted that the defense counsel refused to talk to the government's expert witness, she did not seek help from more experienced counsel, and ultimately, at trial, she was successful on cross-examination in eliciting testimony from the government's expert that the urinalysis results were consistent with passive inhalation.[203] The CAAF said that while the government's expert was not an independent expert, he gave the defense the tools she needed to lay the foundation for demonstrating the necessity of an independent expert.[204] Because the defense counsel did not avail herself of these opportunities, she had failed to show why independent expert assistance was necessary.

Judge Sullivan and Judge Effron filed dissenting opinions. Both judges felt that the military judge had abused his discretion by requiring the defense counsel to consult with the head of the government lab.[205] Both judges viewed Mr. Hall as simply being too conflicted to assist the defense because he was ultimately responsible for the reports generated by the lab and it is unlikely that he or one of his subordinates would point out deficiencies in the testing procedures.[206]

Guidance

The majority opinion reaffirms the position that simply asking for an independent expert is not enough, particularly where the government expert is available to the defense for initial consultation. Of course, this requirement may put the defense "between a rock and a hard place." If the defense is forced to consult with the government expert to lay the foundation for their own independent expert, that consultation is not privileged and the government will have access to the information and perhaps be tipped off as to the defense's theory of the case. To prevent this, the defense must be very cautious about the type of information they disclose during these initial consultations. This, however, may prevent the defense from developing the information they need to demonstrate the need for an independent expert. According to a majority of the CAAF, this is simply a risk that the defense counsel must take if they hope to obtain independent assistance.

New Rules

Pursuant to Military Rule of Evidence (MRE) 1102,[207] Military Rules of Evidence 407, 801, 803, 804, and 807 are amended to reflect corresponding changes in the federal rules. The changes to the federal rules became effective on 1 December 1997. The changes to the military rules became effective 1 June 1999. The changes are set forth below with the new language underlined.

Rule 407. Subsequent Remedial Measures

> When, after an injury or harm allegedly caused by an event, measures are taken ~~which~~ that; if taken previously, would have made the ~~event~~ injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction ~~in connection with the event~~. This rule does not require the exclusion of

198. *Id.*

199. *Id.* at 372.

200. *Id.*

201. *Id.*

202. *Id.* at 373.

203. *Id.*

204. *Id.*

205. *Id.* at 379 (Effron, J., dissenting).

206. *Id.* (Effron, J., dissenting).

207. Military Rule of Evidence 1102 states "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is take by the President." MCM, *supra* note 1, MIL. R. EVID. 1102.

evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

There is a typo in the last sentence of MRE 407 of the MCM 1998 Edition ("or feasibility or precautionary measures" should be "or feasibility of precautionary measures").

MRE 801(d)(2) now reads as follows:

(2) *Admission by party-opponent*. The statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

This change responds to three issues raised in *Bourjaily v. United States*.[208] First, the amendment codifies the Court's holding by expressly allowing the trial court to consider the contents of the co-conspirator's statement to determine if a conspiracy existed and the nature of the declarant's involvement. Second, it resolves the issue left unresolved in *Bourjaily* by stating that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the accused participated. Third, the amendment extends the rationale of *Bourjaily* to statements made under Rule 801(d)(2)(C) and (D).

MRE 803(24) now reads as follows:

(24) *[Transferred to Rule 807]*

The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

MRE 804(b)(5) and (6) now read as follows:

(5) *[Transferred to Rule 807]*

(6) *Forfeiture by wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

804(b)(6) states that a party forfeits the right to object to hearsay when that party's wrongdoing caused the declarant to be unavailable.

MRE 807 is new and reads as follows:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Conclusion

The diversity of issues covered in this year's installment of new developments in evidence, reminds practitioners that evidence is truly a challenging and interesting area of the law. The rules are not stagnant; counsel must establish and maintain a good understanding of these tools if they are to be effective advocates.

208. 483 U.S. 171 (1987).

Appendix

"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 between 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 state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds 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 to 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 or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertains to communications by a patient to a psychotherapist, or assistant to the same for the purposes 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 one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) Mandatory reports. When federal law, state 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 believes 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 aid anyone to commit or 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, conservator, or representative of that the filing of the motion has been filed and that the patient has an 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 communication, the military judge shall conduct a hearing. Upon the motion of counsel for either 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 shall 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 a 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."

b. M.R.E 513. The analysis to M.R.E 513 is created as follows:

"1999 Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. MRE Rule 513 clarifies military law in light of the Supreme Court decision in Jaffee v. Redmond, 518 U.S. 1, 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 that must be met to ensure military readiness and national security. See Parker v. Levy, 417 U.S. 733, 743 (1974); U.S. ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955); Dept. of the Navy v. Egan, 484 U.S. 518, 530 (1988). There is no intent to apply ~~the privilege~~ **MRE 513** in any proceeding other than those authorized under the UCMJ. MRE Rule 513 was based in part on proposed Fed. R. Evid. (not adopted) 504 and state rules of evidence.

MRE Rule 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 Mil.R.Evid. 302 and Mil.R.Evid. 501.

(a) General rule of privilege. The words "under the UCMJ" in this rule mean that **~~this privilege~~ MRE 513** applies only to UCMJ proceedings, and does not limit the availability of such information internally to the services, for appropriate purposes.

(d) 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."