New Developments in Evidence: Counsel, Half-Right Face, Front Leaning Rest Position-Move!

Major Charles H. Rose III
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

Introduction

Mist rises off the warm, red Georgia clay in the early morning hours. The hammering of woodpeckers resounds through the pine trees on Sand Hill.[1] Drill sergeants sip coffee as they wait for a busload of new recruits bound for the home of the Infantry, Queen of Battle.[2] The bus pulls up, and young men fall out onto the pavement, eager, committed, and terrified of the unknown experience that awaits them. The voices of the drill sergeants drown out the morning's stillness, beginning the indoctrination and training process that creates a soldier. It isn't long before the drill sergeants initiate the new recruits with one of the educational and motivational tools of which every soldier has intimate knowledge—the push up. Used by drill sergeants from time immemorial to impress upon new soldiers their duties and responsibilities, the requirement to "assume the position" quickly reinforces what young soldiers should or should not do in a particular situation. As muscles fail and arms burn, young recruits resolve not to make that mistake again.

Over the last year, in its rulings concerning the Military Rules of Evidence (MRE), the Court of Appeals for the Armed Forces (CAAF) reinforced the need for counsel at the trial level to assume the correct position in evidentiary matters. Counsel who fail to take into account the court's clear instructions will not prevail at the trial or appellate level. The decisions of the court have particular value for focusing counsel on the potential impact of their trial strategy decisions. Successful counsel will heed the call of the court and "assume the position." Unsuccessful counsel will experience the pain and remedial training suffered by new soldiers learning the requirements of service. This article reviews recent developments in evidentiary law to assist trial counsel and defense counsel with identifying correct evidentiary positions and then using those positions at trial.

The CAAF addressed several substantive issues affecting the use of the rules of evidence during courts-martial over the last year. It was a year of definitive instruction on how things are supposed to be done, with counsel, and ultimately the accused, bearing the impact for failing to understand and use fully the rules of evidence during trial. This article addresses each development of evidentiary law sequentially as they appear in the MRE. Subjects include: (1) the admissibility of prior bad acts evidence and post-offense misconduct under MRE 404(b),[3] (2) the proper use of reputation and opinion testimony under MRE 405,[4] (3) the proper use of military records for aggravation purposes under MRE 410,[5] (4) proper impeachment under MRE 613,[6] (5) requests for expert assistance and expert witnesses under MRE 702,[7] (6) the marriage of character evidence and expert testimony, and (7) the adoption of the silent witness theory for VHS tapes under MRE 901(b)(9).[8]

Recent Developments in Evidence

The Admissibility of Prior Bad Acts and Post-Offense Uncharged Misconduct

Over the last two years, the CAAF has begun to address the admissibility of post-offense uncharged misconduct in a variety of settings. To a great extent, these have been cases of first impression for the CAAF. While other federal jurisdictions have addressed this issue with varying results,[9] the Supreme Court has never ruled directly on the admissibility of post-

1. Fort Benning Infantry Training Brigade, Commander's Welcome Letter (initial Web-based welcome letter to all new infantry recruits), *at* http://www-benning.army.mil/itb/cdrwelcome-newsol.htm (last visited Feb. 20, 2002).

2. Fort Benning MWR Web Site, National Infantry Museum (describing the history of the Infantry), *at* http://www.benningmwr.com/museum.cfm (last visited Feb. 20, 2002).

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (2000) [hereinafter MCM].

4. *Id.* MIL. R. EVID. 405(a).

5. *Id.* MIL. R. EVID. 410.

6. *Id.* MIL. R. EVID. 613.

7. *Id.* MIL. R. EVID. 702.

8. *Id.* MIL. R. EVID. 901(b)(9).

offense uncharged misconduct.[10] The CAAF has addressed the potential admissibility of post-offense uncharged misconduct under MRE 404(b) with what appear to be, at least on their face, diametrically opposed opinions. A careful reading of the decisions, however, provides some guidance through the thicket of legal brambles that have grown around the post-offense misconduct decisions of the court over the last two years.

The cases have created two differing views on the potential admissibility of post-offense misconduct, while further blurring the lines regarding the general admissibility of evidence under MRE 404(b). In cases involving post-offense positive urinalysis results, the CAAF has clearly limited the ability of the government to admit such evidence.[11] Other types of post-offense misconduct may be admissible,[12] depending upon the charged offense, the uncharged post-offense misconduct, the way the government attempts to admit evidence of the post-offense misconduct at trial, and its potential impact under the MRE 403 balancing test.[13] The resulting confusion makes it difficult for counsel to determine when such evidence may come in. Given that this type of evidence is usually quite prejudicial and may have a tremendous impact on the potential outcome at trial, it behooves counsel to wade carefully through these CAAF opinions and form a template suggesting when the trial court may admit such evidence. This section looks at a case from last year, *United States v. Matthews*,[14] and juxtaposes it with two cases the CAAF decided this year, *United States v. Tyndale*[15] and *United States v. Young*.[16] It then suggests ways for counsel to reconcile these opinions when attempting to admit post-offense misconduct. The goal is to provide counsel with a means for admitting or suppressing evidence of prior bad acts or post-offense misconduct at trial.

In *United States v. Matthews*,[17] the CAAF addressed the use of post-offense uncharged misconduct in the context of multiple urinalysis tests. In *Matthews*, the CAAF held that evidence of an unlawful substance in the accused's urine after the date of the charged offense, and not connected to the charged offense, may not be used to prove knowing use on the date of the charged offense.[18] The CAAF ruled that the military judge abused his discretion when he allowed the government to introduce extrinsic evidence of a post-offense positive urinalysis under MRE 404(b)[19] after the trial counsel raised the issue through cross-examination of the accused under MRE 405(a).[20]

In *Matthews*, the CAAF agreed with renowned scholars of military evidentiary law,[21] holding that extrinsic evidence of post-offense misconduct that might otherwise be admissible

9. *See generally* I STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 387 (7th ed. 1998). Professor Saltzburg provides an overview of this issue delineating various federal courts of appeals cases in which such evidence has either been admitted or denied. He specifically pointed out that the language within the rule of "prior bad act" is a misnomer because it indicates that the acts in question must have proceeded the trial. *Id*. Case law supports the general contention that the admissibility of bad acts committed after the offense in question should be decided on a case-by-case basis. *Id*. Factors that should be considered are the intervening time period, similarities to the charged offense, and whether the bad acts in question are relevant to prove something other than the accused's character, which is clearly not admissible under Federal Rule of Evidence (FRE) 404(b) or MRE 404(b).

10. In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court had an opportunity to directly address the admissibility of post-offense misconduct and chose not to do so. Instead, the Court focused on whether FRE 404(b) required a preliminary finding by the trial court under FRE 104(a). *See id* at 687-89. The Court held that it did not. *Id*. at 689. The Court's opinion goes on to narrowly decide the admissibility of the post-offense misconduct in question by focusing on the ability of this evidence to establish the knowledge requirement under FRE 404(b) and the relationship between certain facts of the charged offenses and the post-charged offense misconduct. *See id*. at 690-91. The Court's choice not to adopt a per se rule regarding the admissibility of post-offense bad acts in and of itself should be a lesson to both trial and appellate counsel. The subsequent jurisprudence of the circuit courts on this issue has followed a general standard of narrowly tailored decisions tied to the language in FRE 404(b), with some tinkering around the edges concerning how the proffered evidence should relate to the charged offense.

11. *See* United States v. Matthews, 53 M.J. 465 (2000). In *Matthews*, an Air Force sergeant assigned to the information management section of an Office of Special Investigations (OSI) detachment tested positive for marijuana. At her trial for violating Article 112a, she presented a good soldier defense and denied knowing ingestion of marijuana between 1 and 29 April of that year. At trial, the government cross-examined the accused on her subsequent positive urinalysis that experts testified was not related to the earlier presence of THC in her urine. The military judge then allowed the government to admit extrinsic evidence of the post-offense urinalysis upon which the trial counsel based his cross-examination. *Id*. at 467-68.

12. *See* United States v. Young, 55 M.J. 193 (2001). This case involved a corporal in the Marine Corps who conspired to distribute marijuana and then distributed marijuana. After the charged offenses, an undercover source discussed making additional purchases of marijuana from the accused. During these discussions, the accused admitted to the previous sale and made arrangements for subsequent sales, thereby entering into an additional conspiracy to distribute marijuana. At trial, the military judge allowed the trial counsel to admit evidence of the accused's admission and evidence of the subsequent post-offense misconduct—the additional conspiracy to distribute. *Id*. at 194-95.

13. *See* United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989). The CAAF has referenced its seminal holding regarding the MRE 403 balancing test in *Reynolds* on multiple occasions during the last two years. *See, e.g*., United States v. Tyndale, 56 M.J. 209, 213 (2001); United States v. Young, 55 M.J. 193, 196 (2001).

14. 53 M.J. 465 (2000).

15. 56 M.J. 209 (2001).

16. 55 M.J. 193 (2001).

17. 53 M.J. at 465.

18. *Id*. at 470.

under the MRE is not admissible as extrinsic evidence tied to the cross-examination of the accused under MRE 405(a).[22] The fact that the evidence may have been admissible for another purpose does not cure the trial court's decision to admit the evidence under the rubric of MREs 405(a) and 404(b). This is especially true given that the evidentiary balancing concerns found in MRE 403[23] and the seminal case of *Reynolds*[24] were not met in *Matthews*. The basis of admissibility cannot rest upon impeaching cross-examination evidence of specific acts not admissible under MRE 405(a). Some scholars question the position of the CAAF, pointing out that reliance upon a learned treatise does not, in and of itself, mean that the court's opinion is based upon anything other than a circular argument.[25]

Commentators have also speculated on the degree of applicability of *Matthews* in light of the CAAF's jaundiced view toward urinalysis testing and procedures.[26] Cases from both 2000 and 2001 support the contention that *Matthews* should be viewed through the cloudy waters of the urinalysis program, including the CAAF's recent murky treatment of urinalysis testing in *United States v. Campbell*[27] and *United States v. Green*.[28] While the court frowned upon the admissibility of a post-offense urinalysis under MRE 404(b), the CAAF reached a different result in *United States v. Tyndale*,[29] in which the urinalysis occurred before the charged offense,[30] and *United States v. Young*,[31] in which the post-offense misconduct was conspiracy to distribute and distribution of marijuana.[32]

Tyndale addresses the circumstances under which the trial courts will admit evidence of a prior positive urinalysis at a court-martial for a subsequent positive urinalysis. While the CAAF's analysis in *Tyndale* is not directly on point concerning post-offense misconduct, it does address the admissibility of urinalysis testing under a MRE 404(b) analysis, paying particular attention to the application of the *Reynolds* test under MRE 403 in urinalysis cases. While the court mentioned *Reynolds* only briefly in *Matthews*, its use of *Reynolds* as a template for addressing uncharged misconduct in *Tyndale* lead to an entirely different result. The thought process of the court is enlightening. Considering the facts of *Tyndale*, the CAAF may apply this same type of reasoning in the next urinalysis case dealing with post-offense misconduct.

In *Tyndale*, the appellant was a staff sergeant in the Marine Corps. In January 1994 the appellant's urine tested positive for methamphetamine. He was tried by a special court-martial consisting of officer members. The appellant did not contest the presence of the metabolite in his urine; instead, he presented an innocent ingestion defense. At trial, he stated that "someone had, without his knowledge, placed the drug in the coffee he was served while playing guitar with his brother and other indi-

19. 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 3, MIL. R. EVID. 404(b).

20. *Matthews*, 53 M.J. at 470. 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 may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." MCM, *supra* note 3, MIL. R. EVID. 405(a).

21. *See, e.g.*, STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 572 (4th ed. 1997).

22. *Matthews*, 53 M.J. at 470.

23. Military Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of *unfair* prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MCM, *supra* note 3, MIL. R. EVID. 403 (emphasis added).

24. 29 M.J. 105 (C.M.A. 1989). The Court of Military Appeals adopted the following three-pronged test for the admissibility of "other crimes, wrongs, or acts" when viewed through the lenses of potential admissibility under MRE 403: (1) the evidence must reasonably support a finding that the appellant committed the crime, wrong, or act; (2) it must make a fact of consequence more or less probable; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *Id.* at 109.

25. *See* Major Victor M. Hansen, *New Developments in Evidence 2000*, ARMY LAW., Apr. 2001, at 44.

26. *Id.* at 45.

27. 52 M.J. 386 (2000).

28. 55 M.J. 76 (2001).

29. 56 M.J. 209 (2001).

30. *Id*. at 211.

31. 55 M.J. 193 (2001).

32. *Id*. at 194-95.

viduals at a residence near Ocean Beach in San Diego."[33] At his trial in 1994, the appellant was unable to identify the persons living in the apartment because they had moved out, and he could not give an address for the apartment where he had been playing guitar. He was acquitted at his first court-martial.[34]

In October of 1996, the appellant's urine sample again tested positive for methamphetamine. At his subsequent court-martial, he testified about his activities leading up to the second urinalysis. He told the court that he played guitar at various local venues. On the Saturday night before the urinalysis, he agreed to play a private party in Dana Point, California, for seventy-five dollars. Appellant and his brother showed up at the party, which had a crowd of about forty-five to sixty "fairly radical people."[35] He played halfway through the night, and was paid by a person whose name he never got. At some point during the evening, his brother told him that drug use was going on in another part of the party. The appellant chose to remain at the party, and consumed about a case of beer over the course of the evening.[36]

At the beginning of the second court-martial, the trial counsel requested a preliminary ruling from the military judge to admit evidence of the appellant's 1994 urinalysis, as well as the appellant's explanation about the innocent ingestion surrounding the 1994 urinalysis. The government intended to present evidence through the testimony of the prosecuting attorney for the first court-martial. The defense objected, categorizing the government's attempt to admit the evidence as an attempt to place propensity evidence before the panel; pointing out the danger of unfair prejudice if the evidence was admitted; and claiming that from a logical relevance perspective, admission of the first urinalysis provided no proof that the appellant had committed the charged act.[37] The military judge ruled that the evidence of the 1994 urinalysis could only be admitted in rebuttal to a defense of innocent ingestion.[38] This forced the defense to make a Hobson's choice.[39] They could present a defense of innocent ingestion and risk admission of the prior positive urinalysis, or limit their defense and risk a conviction in the face of a valid urinalysis result from the January 1996 test. The CAAF's opinion does not address the conundrum the defense faced.

Eventually the appellant testified, and at the close of the defense case the trial counsel again moved to admit into evidence the appellant's 1994 positive urinalysis result and attendant explanation of innocent ingestion. The trial counsel focused on the element of knowing use, relating the requirement of knowledge to the MRE 404(b) exception allowing for admissibility of evidence related to knowledge. This time the military judge agreed with the government and allowed them to call the trial counsel from the first case. The former trial counsel testified concerning the previous positive urinalysis and the innocent ingestion defense offered by the appellant during his first trial.[40] Thus, the *Tyndale* decision provides a possible framework for admitting former positive urinalyses in future cases.

The CAAF began their analysis in *Tyndale* by stating that evidence of a previous drug use is not per se inadmissible at a court-martial.[41] This required a small degree of mental gymnastics given the CAAF's recent history in *United States v. Graham*[42] and *Matthews*. The court stated that for such evidence to be admissible, counsel must tie the reason for admissibility to some purpose other than to show the accused's predisposition to commit the charged offense.[43] The CAAF noted that MRE 404(b) is designed to function as a rule of inclusion. The court went on to draw specific attention to the standard for applying MRE 403 as delineated by the court in *Reynolds*:

> Evidence offered under [MRE] 404(b) must meet three criteria for admissibility. First, the evidence must reasonably support a finding by the court members that appellant committed the prior crimes, wrongs, or acts. Second, the evidence must make a fact of

33. *Tyndale*, 56 M.J. at 211.

34. *Id*.

35. *Id*.

36. *Id*.

37. *Id*. The opinion notes that the government had no burden to provide a verbatim record of trial because the first court-martial resulted in an acquittal. *Id*. at 211 n.1.

38. *Id*.

39. Random House Webster's Unabridged Dictionary (2d ed. 1987) defines Hobson's choice as "the choice of taking either that which is offered or nothing; the absence of a real alternative." *Id*. at 909.

40. *Tyndale*, 56 M.J. at 212.

41. *Id*.

42. 50 M.J. 56 (1999).

43. *Tyndale*, 56 M.J. at 212 (quoting United States v. Taylor, 53 M.J. 195, 199 (2000)).

> consequence more or less probable. Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.[44]

The CAAF then applied the facts in *Tyndale* to the *Reynolds* standard. While informed minds may differ as to the final result of such an analysis, even the dissent in this case agreed with the overall framework of the application of *Reynolds* to a case dealing with the results of urine testing.[45] This is a landmark case because the CAAF departed from a history of extreme skepticism regarding the admissibility of urinalysis tests in general and the admissibility of prior urinalysis tests in particular at courts-martial. This application of a regular MRE 404(b) analysis to a urinalysis case is important for trial practitioners.

Counsel should take care at the trial level to couch the potential admissibility of prior positive tests in light of the stated exceptions to MRE 404(b). They should then apply the *Reynolds* 403 balancing test analysis to the specific facts of their cases. In *Tyndale*, the question of knowledge was particularly important. Knowledge is often an extremely important factor in urinalysis cases in which the government bears some burden, however unclear in light of *Campbell* and *Green*, to establish knowing use of the controlled substance by the accused. Because the case often turns on this issue of knowledge, counsel should be able to rely upon the court's analysis in *Tyndale* when making the argument that prior positive urinalyses may be admissible to establish the knowing use requirement for an Article 112a violation.[46] Both *Matthews* and *Tyndale* must be viewed with some skepticism as a general guideline for applying 404(b) to admissibility requirements, however, because both of these cases deal with urinalysis results.

The CAAF had an opportunity to clarify or support its holding in *Matthews* when the court decided *United States v. Young*.[47] It did neither. Instead, *Young* calls into question any application of *Matthews* that goes beyond the specific urinalysis-based offenses charged in a particular case. To understand why the CAAF addressed the admissibility of post-offense charged misconduct so differently in *Young*, one must first understand the facts of the case and the issues directly before the CAAF.

The command charged Marine Corps Corporal (Cpl) Anthony Young with conspiracy to distribute marijuana and distribution of marijuana. The charged offenses resulted from a controlled sale of marijuana from Young to a Naval Investigative Service (NIS) informant on 27 December 1995.[48] On 26 December 1995, Marine Private Frank Smith approached Cpl Young and asked him to store some marijuana at Cpl Young's home. On 27 December the informant approached both Smith and Young in the barracks and asked Smith if Smith could get him some marijuana. Smith agreed. Young and Smith went to Young's apartment where they retrieved the marijuana and agreed to split the proceeds of the sale. They then returned to base and sold the marijuana to the informant.[49]

The informant went back to Smith on 3 January 1996 and complained that he did not get all of the marijuana for which he had paid two days after Christmas. Smith blamed any problems on Cpl Young. He told the informant that Young had weighed and bagged the marijuana, and suggested that Young had probably smoked some of it while it was kept in Young's apartment. The informant relayed this information to NIS. On 17 January 1996, the informant approached Young directly and asked Young to sell him some more marijuana. During that conversation, the informant wore a recording device. While Young and the informant discussed the possibility of another sale of marijuana, they also discussed Young's involvement in the prior sale of marijuana on 27 December 1995.[50]

At trial, the government sought to introduce the tape of the conversation between the informant and the appellant on 17 January 1996. The defense agreed that the portions of the tape containing alleged admissions about the drug deal on 27 December 1995 were admissible; however, the defense counsel objected to the other portions of the tape as uncharged misconduct under MRE 404(b), arguing that the government sought to introduce this evidence for the purpose of showing that the accused was a bad man—as propensity evidence. The trial counsel argued that the tape would not be understandable if the panel did not hear the portions the defense sought to suppress. The trial counsel further argued for completeness, stating that the panel would not be able to understand the terms used on the tape and the references made without access to the statements admitting to the uncharged misconduct. The military judge agreed with the trial counsel and admitted the entire taped con-

---

44. *Id*. (citing United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989); MCM, *supra* note 3, MIL. R. EVID. 401, 403 (2000)).

45. *Id*. at 219-20.

46. *See* MCM, *supra* note 3, pt. IV, ¶ 37(a)-(c).

47. 55 M.J. 193 (2001).

48. *Id*. at 194. While the CAAF opinion initially addresses the date of the controlled sale as 26 December 1997, the additional dates provided in the opinion lead one to believe that the first reference to 26 December 1997 is a clerical error. *See id*. at 194-97.

49. *Id*. at 194.

50. *Id*.

versation.[51] Immediately after the introduction of the tape, the military judge gave a limiting instruction to the panel.[52] The panel convicted the appellant, sentencing him to a bad-conduct discharge, reduction to the lowest enlisted grade, and thirty-six months' confinement.[53]

The CAAF began by identifying the issue as the admissibility of MRE 404(b) evidence. The court focused upon the reasons that the government proffered this evidence, carefully pointing out that the purpose behind admitting the evidence must be based in one of the 404(b) exceptions. The CAAF then turned to the *Reynolds* case as a framework for deciding the correctness of the military judge's decision to admit the evidence in *Young*. Before engaging in the *Reynolds* analysis, the court first addressed the applicability of *Reynolds* to post-offense misconduct as opposed to misconduct that occurred prior to the charged offense.[54] The CAAF noted that most cases, including *Reynolds*, had addressed misconduct that had occurred before the charged offense. The court then stated that it had previously applied the *Reynolds* test to post-offense misconduct.[55] The CAAF specifically noted that applying a 403-balancing test to the admissibility of post-offense misconduct was consistent with prevailing federal practice. After pointing out the applicability of *Reynolds* to post-offense misconduct, the CAAF held that it did not need to apply the *Reynolds* test to *Young* because the evidence "was admissible for a separate limited purpose, to show the subject matter and context of conversation in which appellant admitted the conspiracy."[56] Under that analysis, the CAAF held that the military judge did not abuse his discretion in admitting the evidence.[57]

When read together, *Matthews*, *Tyndale*, and *Young* clearly indicate the willingness of the CAAF to grapple with the potential admissibility of post-offense misconduct. This is a relatively new issue from a military justice standpoint. While *Matthews* and *Tyndale* must be viewed in a limited manner given their focus on the particular difficulties experienced by the CAAF with urinalysis-based prosecutions, counsel should pay particular attention to the language of the court in *Young* when facing this issue at trial. That case does not involve the potential complicating factor of a urinalysis test.

When approaching the admissibility of post-offense misconduct under MRE 404(b), counsel should begin by following the notice requirements of 404(b). Counsel should carefully analyze the reason under the exceptions to 404(b) that allows admission of the evidence. This requires an in-depth factual analysis of the case. These are not the types of motions that counsel should attempt to argue "off the top of their heads." The reason for admissibility must be tied to the facts and fall within one of the exceptions allowed under 404(b). Once counsel have done that, they should focus the military judge on the requirements of *Reynolds*. At a minimum, *Young* stands for the concept that military judges can and should use a *Reynolds* test when weighing the potential admissibility of post-offense misconduct under MRE 403. Counsel that follow this template will ensure appropriate rulings by the military judge that will withstand appellate review.

The Proper Use of Reputation and Opinion Testimony Under MRE 405

In *United States v. Goldwire*,[58] the CAAF identified a potential area for the admissibility of reputation and opinion evidence concerning the accused's character. The majority

51. *Id*. at 195.

52. *Id.*

> Now, members of the court, before we proceed, there's a matter I want to bring to your attention. Based on a reading of Prosecution Exhibit 6 for Identification that we just retrieved [the transcript], and listening to Prosecution Exhibit 5 [the tape], this evidence may suggest to you that Berrian was attempting to set up another drug transaction with the accused, and that the accused may have tentatively agreed to do so. Now this evidence may be considered by you for its limited purpose of its tendency to show that the accused intended to join in a conspiracy, and that is the conspiracy that he is charged with . . . . Secondly, this information or this evidence has been provided to you to show the context in which the statements were made about the transaction that Berrian testified took place on 27 December 1995. Now the accused has not been charged with participating in or attempting to participate in a second drug transaction. It will be unfair in the extreme to punish him for that. We're only here to concern ourselves with the charged offenses. You may not consider this evidence *for any other purpose*, other than whatever his *original intent* may have been on the alleged conspiracy or *for the context of conversation* and you may not conclude from this evidence that the accused is a bad person or his criminal tendency and he, therefore, committed the charged offenses.

Id. (emphasis added).

53. *Id*. at 194.

54. *Id*. at 196.

55. *Id*. (citing United States v. Dorsey, 38 M.J. 244 (C.M.A. 1993)).

56. *Id*.

57. *Id*. at 197.

58. 55 M.J. 139 (2001).

opinion is somewhat convoluted, but taken in conjunction with the concurring opinion, the holding of the court clearly identifies fertile opportunities for trial counsel, while raising a large red flag for defense counsel who attempt to try their case through the cross-examination of government witnesses. To understand how the door to character evidence of the accused has been further propped open by the CAAF, one must first consider the facts in *Goldwire*.

In *Goldwire*, the appellant and two of his friends invited the victim to attend a party at an off-post residence on 6 July 1996. The next morning, the victim met the appellant and his two friends for a day of drinking, music, cards, and dominos. The appellant drank to excess, eventually becoming physically ill. The other three members of the party, to include the victim, found the appellant lying on the bathroom floor. They took him to the bedroom, and then they played a drinking game with shots of vodka and orange juice. Eventually, they all fell asleep while the appellant was still in the bedroom.[59]

The next thing that the victim remembered about that evening was waking up on the bed in the bedroom with the appellant on top of her. Someone else was holding her arms, and she was naked from the waist down. The appellant had sexual intercourse with the victim for about one minute, and then he jumped off the bed. The victim got dressed and fled the apartment. She returned to her dorm room, told her roommate what happened, and went to the base hospital. The appellant gave an oral statement to an Office of Special Investigations (OSI) agent five months after the incident. Portions of that statement were inculpatory, and other parts were exculpatory.[60]

The appellant chose not to testify at his court-martial. The OSI agent who had interviewed the appellant testified during the government's case-in-chief. The trial counsel asked the OSI agent questions about the portions of the appellant's oral statement that admitted to acts supporting the charged rape. The trial counsel did not ask, and the OSI agent did not volunteer, any of the exculpatory information contained in the appellant's oral statement. On cross-examination, the defense counsel elicited the exculpatory information from the OSI agent. Later in the court-martial, the trial counsel called the appellant's first sergeant as a witness to testify concerning the appellant's character for truthfulness. The military judge allowed the testimony over defense objection.[61]

The CAAF addressed the facts in *Goldwire* in an interesting manner. The majority and concurring opinions both agree that the defense counsel's questioning of the OSI agent was an attempt by the defense counsel to get the appellant's version of events before the finder of fact without the appellant taking the witness stand.[62] The defense counsel wished to use the out of court statements of his client to prove that the sexual contact between the victim and the appellant was consensual. The decision to do so placed the truthfulness of the appellant at issue, even though he had never taken the stand to testify.[63] Where the majority and concurring opinions differ, however, is the path of legal reasoning that the court should take to arrive at the conclusion that the accused opened the door to his character for truthfulness.

The majority opinion begins by analyzing MRE 106[64] and the common law rule of completeness.[65] Military Rule of Evidence 106 allows an opposing party to introduce the remainder of a written or recorded statement once the other side has introduced a portion of it into evidence.[66] The CAAF noted that while MRE 106 applies only to recorded or written statements, the military judge has the discretion under MRE 611(a) to apply the common law rule of completeness that allows completion of oral statements.[67] The CAAF then concluded that either method would still place the character of the accused that made the oral statement at issue under MRE 806.[68] The court analogized the hearsay exception of admission by a party opponent to MRE 806 and determined that "when the defense affirmatively introduces the accused's statement in response to the prosecution's direct examination, the prosecution is not prohibited from impeaching the declarant under MRE 806."[69] The majority walked all the way to the edge of the precipice of adopting the common law rule of completeness and then stepped back, relying instead upon MRE 304(h)(2).[70]

---

59. *Id.* at 140.

60. *Id.* at 141.

61. *Id*.

62. *Id.* at 142, 147-48.

63. *Id.* at 142.

64. Military Rule of Evidence 106 states: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." MCM, *supra* note 3, MIL. R. EVID. 106 (2000).

65. *Goldwire*, 55 M.J. at 142. Unlike both the federal and military rule, the common law rule of completeness allows for completing oral as well as written or recorded statements. *Id*. (citing Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988)).

66. *See* MCM, *supra* note 3, MIL. R. EVID. 106.

Military Rule of Evidence 304(h)(2) allows the defense counsel, after the trial counsel has admitted part of an accused's admission or confession into evidence, to admit all or part of the remaining portions.[71] The court then applied the same reasoning to statements admitted under MRE 304(h)(2), concluding that admission of such statements by the defense in response to the prosecution's direct examination opened the door to evidence concerning the accused's truthfulness.[72] The concurring opinion notes this analysis, disagreeing with the use of the common law and MRE 106 doctrine of completeness, but agreeing with the MRE 304(h)(2) analysis and subsequent opening of the door to character evidence for truthfulness under MRE 806 and MRE 405.[73]

Counsel at the trial level should take note of this opinion. Trial counsel may, to a certain extent, limit examinations of witnesses concerning the substance of statements made by the accused and force the defense to make a difficult choice: attempt to complete the statements made and place the character of the accused for truthfulness at issue, or forgo the opportunity to present the evidence, thereby potentially weakening the defense case, perhaps fatally. The potential exists for trial counsel to manipulate this factor and deny pertinent evidence to the finder of fact. Defense counsel must be cognizant of the danger that they now run if they attempt to try their case through cross-examination of the government's witnesses. Whenever defense counsel attempt to get out their client's "version" or "story" through cross-examination designed to show exculpatory statements by the accused, they are opening the door to reputation and opinion evidence concerning the accused's character for truthfulness. Defense counsel must proceed warily as a result of *Goldwire*.

Admissibility of Administrative Separation Actions Under MRE 410

In *United States v. Vasquez*[74] the CAAF gave definitive guidance on whether administrative separation actions in lieu of courts-martial could be construed as personnel records for purposes of Rule for Courts-Martial (RCM) 1001(b)(2).[75] Rule for Courts-Martial 1001(b)(2) allows trial counsel to admit personnel records of the accused during sentencing.[76] At issue before the court last year was whether requests for discharge in lieu of court-martial were the type of personnel records that could be admitted under the rubric of RCM 1001(b)(2), or would their admission violate the restrictions of MRE 410.[77] Military Rule of Evidence 410 allows for full and open negotiations concerning pleas and pre-trial agreements by guaranteeing that documents prepared in furtherance of those activities will not be admissible for any other purpose.[78] The *Vasquez* court held that

67. *Goldwire*, 55 M.J. at 142. Military Rule of Evidence 611(a) states:

> *Control by the military judge.* The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

MCM, *supra* note 3, MIL. R. EVID. 611(a).

68. *Goldwire*, 55 M.J. at 143-44. Military Rule of Evidence 806 provides in part:

> When a hearsay statement, or a statement defined in MRE 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness.

MCM, *supra* note 3, MIL. R. EVID. 806.

69. *Goldwire*, 55 M.J. at 144.

70. Military Rule of Evidence 304(h)(2) provides: "If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement." MCM, *supra* note 3, MIL. R. EVID. 304(h)(2).

71. *See id*.

72. *Goldwire*, 55 M.J. at 144.

73. *Id*. at 146 (Sullivan, J., concurring in the result). Military Rule of Evidence 405(a) provides:

> *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

MCM, *supra* note 3, MIL. R. EVID. 405(a).

74. 54 M.J. 303 (2001).

75. *See id.* at 305-06.

trial counsel cannot use the language in RCM 1001(b)(2) to circumvent the clear purpose of MRE 410.[79]

Seaman Vasquez absented himself without leave from his unit for 212 days. When Vasquez returned to his unit, the command initiated court-martial proceedings for the unauthorized absence. The appellant, with the advice of counsel, submitted a request for an other than honorable discharge in lieu of court-martial. While waiting for the command to take action on his request, the appellant engaged in additional misconduct by acting as a lookout for a fellow seaman attempting to steal merchandise from the Navy Exchange. They were caught.[80]

The appellant pled guilty at his court-martial for the misconduct surrounding the thefts at the Navy Exchange. After the military judge accepted the appellant's guilty plea, the trial counsel attempted to offer into evidence copies of the appellant's request for discharge in lieu of court-martial for the 212-day absence. The trial counsel argued that the discharge request constituted a personnel record of the accused that was admissible under RCM 1001(b)(2). Over defense objection, the military judge accepted into evidence copies of the request for discharge in lieu of court-martial.[81] The trial counsel subsequently referred to the 212-day absence as an aggravating factor during his sentencing argument. The Navy and Marine Corps Court of Criminal Appeals (NMCCA) affirmed the appellant's conviction, holding that MRE 410 was not applicable because it only applies to pending charges. The NMCCA reasoned that after the convening authority approved the appellant's request for discharge in lieu of court-martial for the unauthorized absence, the administrative action was no longer pending for purposes of MRE 410.[82] The CAAF, however, did not agree with the NMCCA's analysis.

The CAAF began their analysis in *Vasquez* by noting the language of MRE 410 that specifically identifies statements made by the accused solely for the purpose of receiving an administrative discharge in lieu of court-martial.[83] While the CAAF could have decided the case solely on the language contained in MRE 410, the court went on to provide an overall view of how it interpreted the language of the rule. The CAAF noted that in previous cases it had chosen not to adopt an "excessively formalistic or technical" application of MRE 410 in favor of a broad application of the rule.[84]

Specifically, the *Vasquez* court addressed whether the administrative action was "pending" as defined by MRE 410.[85] The CAAF noted that requests for discharge in lieu of court-martial are pending until the discharge has been executed.[86] Under the CAAF's definition, requests for separation will

---

76. *See* MCM, *supra* note 3, R.C.M. 1001(b)(2). Rule for Courts-Martial 1001(b)(2) states:

> *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

Id.

77. Military Rule of Evidence 410 provides:

> "[S]tatement[s] made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

Id. MIL. R. EVID. 410.

78. *See id*.

79. *Vasquez*, 54 M.J. at 305.

80. *Id*. at 304.

81. *Id*.

82. *Id*. at 305.

83. *Id*.

84. *Id.* (citing United States v. Barunas, 23 M.J. 71, 75-76 (C.M.A. 1986)).

85. *Id*. at 306.

86. *Id*.

always be pending as to potential admissibility under RCM 1001(b)(2) because once they have been executed, the court no longer has jurisdiction over the former service member. The message from CAAF is clear: trial counsel should not attempt to circumvent the spirit of MRE 410 through the use of RCM 1001(b)(2), and defense counsel should ensure that they preserve this issue by objecting on the record to any attempts by the government to admit otherwise inadmissible documents under cover of the personnel records theory.

Applying the Wright *Factors to MRE 413 and 414*

The CAAF continued to develop and refine the appropriate MRE 403[87] balancing test for cases involving either MRE 413[88] or MRE 414[89] over the last year. Previous CAAF cases addressing MRE 413 and MRE 414 established the constitutionality of these new rules[90] and the balancing test that ensures their fairness and continued viability. The seminal case in this area is *United States v. Wright*.[91] In *Wright*, the court established factors the military judge must consider when conducting a balancing test in cases involving the admissibility of this evidence. Those factors include: (1) strength of proof of the prior act—conviction versus gossip, (2) probative weight of the evidence, (3) potential for less prejudicial evidence, (4) distraction of the factfinder, (5) temporal proximity, (6) frequency of the acts, (7) presence or lack of presence of intervening circumstances, and (8) relationships between the parties. [92] The CAAF further refined the proper procedures for addressing the *Wright* factors in *United States v. Bailey*[93] and *United States v. Dewrell*.[94]

In *Bailey*, the appellant was convicted of rape, forcible sodomy, aggravated assault and battery, making false official statements, kidnapping, communicating threats, obstructing justice, disorderly conduct, and unlawful entry.[95] At trial, the government presented propensity evidence under MRE 413 that included forcible anal sodomy with two other individuals. Neither of these instances were charged offenses. One involved anal sodomy with a former spouse, and the other sodomy occurred between the appellant and a former girlfriend. The government proffered this evidence under the theory that it assisted in proving that the appellant had committed the charged forcible sodomy offenses.[96]

The CAAF began their analysis by reiterating the court's decision in *Wright*, carefully stating that the factors delineated in *Wright* were nonexclusive. The court noted that *Wright* had not been decided when the *Bailey* court-martial took place.[97] The court then looked to the balancing test performed by the military judge and held that it met the standards set by the court in *Wright*. Interestingly, the military judge's ruling in *Bailey* substantively addressed many of the *Wright* factors. The CAAF applied the *Wright* factors and two additional factors concerning similarities to the event charged and time needed for proof of the prior act.[98] The court noted that the military judge used an appropriate limiting instruction, and that instruction, taken in conjunction with the balancing factors he considered, resulted in the CAAF affirming the decision of the Air Force Court of Criminal Appeals (AFCCA).[99]

In *Dewrell*,[100] the CAAF looked at the factors applied by the military judge during his MRE 403 balancing test of MRE 413

87. Military Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MCM, *supra* note 3, MIL. R. EVID. 403.

88. Military Rule of Evidence 413(a) states: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." *Id*. MIL. R. EVID. 413(a).

89. Military Rule of Evidence 414(a) states: "In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant." *Id*. MIL. R. EVID. 414(a).

90. Hansen, *supra* note 25, at 49.

91. 53 M.J. 476 (2000).

92. *Id*. at 482.

93. 55 M.J. 38 (2001).

94. 55 M.J. 131 (2001).

95. *Bailey*, 55 M.J. at 38.

96. *Id.* at 39.

97. *Id*. at 40.

98. *Id*. at 41.

99. *See id*.

evidence at trial. The CAAF described the balancing test applied by the military judge as one of "careful and reasoned analysis on the record."[101] The court relied upon the balancing test performed by the military judge and the limiting instruction he provided to the panel in affirming the decision of the AFCCA.[102]

Trial counsel, defense counsel, and military judges can use the court's decisions in *Wright, Bailey,* and *Dewrell* to navigate carefully and successfully potential admissibility issues surrounding propensity evidence under MRE 413 and MRE 414. Future battles over the admissibility of this evidence will turn on the ability of counsel to provide the military judge with an interpretation of the facts surrounding the propensity evidence that "dovetails" with the *Wright* factors. Unsettled now is the significance of the CAAF's determination in *Bailey* that the *Wright* factors are not exclusive. This room for maneuvering benefits creative trial counsel and military judges faced with situations and facts that do not clearly fall within the *Wright* factors, but are nonetheless probative as to the propensity evidence's viability. The task for defense counsel in cases involving these types of offenses is much more difficult. The potential for eliminating MRE 413 evidence under a constitutional theory is moribund at this point.[103] The CAAF's guidance on the MRE 403 balancing test that the trial court must apply is sufficiently general to admit most evidence of this type. Given that the CAAF's position follows closely the jurisprudence of most federal jurisdictions, it is doubtful that this standard will shift to one more onerous for the government.

One area that the courts have not yet addressed is whether MRE 413 and MRE 414, when applied in conjunction with MRE 412, violate the constitutional rights of the accused. This area is one of potential litigation as the courts continue to expand on their interpretation and understanding of these powerful and far-reaching rules of evidence.

What Is Proper Impeachment Under MRE 613

In *United States v. Palmer*,[104] the CAAF reiterated that the appellate court will not peer past the veil of the trial to interpret evidentiary objections and decisions when counsel do not clearly inform the trial court of the basis for their objection. *Palmer* reminds counsel that the CAAF will not reward counsel on appeal for their failure to properly object and make the record, or to give the military judge at least some understanding of the legal issues upon which they base their objections. The issue in *Palmer* involves trial decisions made by the defense counsel in which the defense counsel failed to properly state an objection to the military judge's ruling.[105]

Palmer was on trial in 1998 for unlawful possession, distribution, and use of marijuana. He was first identified as a potential drug user when a civilian police officer stopped to assist him after his vehicle became stuck in a ditch around 3:00 a.m. on 26 January 1998. Palmer failed several field sobriety tests, and the police seized marijuana they found while conducting an inventory of his car subsequent to his arrest. During the court-martial, the trial counsel called three different witnesses to provide evidence of Palmer's possession, distribution, and use of marijuana. One of those witnesses, Private First Class (PFC) Sean Boggs, testified that he had purchased marijuana from Palmer seven or eight times and that after each purchase he had smoked marijuana with Palmer. The defense counsel cross-examined PFC Boggs, but did not address any inconsistent out of court statements. The military judge then permanently excused PFC Boggs as a witness without objection by the defense counsel.[106]

During his case in chief, the defense counsel asked Specialist (SPC) Timothy Sauls to relate a conversation Sauls had overheard between PFC Boggs and the appellant. The trial counsel made a hearsay objection to Sauls's testimony. The defense counsel then made an offer of proof that he was offering the hearsay statement to show the state of mind of Boggs, not for the truth of the matter asserted.[107] The military judge sustained the government's objection. He specifically ruled that the statement offered by the defense counsel did not fall within the gambit of MRE 803(3).[108] The military judge informed the defense counsel that the defense was clearly attempting to admit the hearsay statement for some other reason. The defense counsel did not offer an alternate basis for admissibility, and the evidence was excluded.[109]

On appeal, counsel for the appellant argued that the statement in question was clearly admissible under MRE 613.[110] This rule allows for cross-examination of a witness with a prior inconsistent statement. A fair reading of the case supports the appellate defense counsel's position.[111] While the CAAF

100. 55 M.J. 131 (2001).

101. *Id.* at 138.

102. *Id.*

103. Hansen, *supra* note 25, at 50.

104. 55 M.J. 205 (2001).

105. *See id.* at 208.

106. *Id.* at 206.

acknowledged the potential admissibility of the evidence through MRE 613, the court determined that the trial defense counsel had failed to place the military judge on notice of the grounds for admissibility at trial.[112]

The CAAF looked at the specificity of the offer of proof by the trial defense counsel to determine whether the military judge had been placed on notice. The court relied upon the language of MRE 103(a)(2) to make that decision.[113] This rule provides in pertinent part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and in case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked.[114]

The CAAF held that the military judge had not been placed on notice by the defense counsel's offer of proof. The court reiterated the usual practice of confronting a witness directly with a prior inconsistent statement while on the stand, but acknowledged that for tactical reasons counsel might choose to delay any mention of inconsistent statements until other witnesses are called. Regardless, the CAAF held that none of these possibilities allowed appellate counsel to raise an evidentiary issue on appeal that was not properly placed before the trial court.[115]

---

107. *Id*. The following exchange occurred:

> DC: Well, Your Honor, PFC Boggs—this soldier is privy to a conversation that Boggs had with Specialist Palmer when Boggs told Palmer that Palmer didn't do anything with regards to what he is being charged with. And that statement was made by Boggs and *it goes to his state of mind at the time the statement was made, and it's not going—it's not hearsay.*
>
> M J: So, what you want to do is have this witness testify that on some occasion after the accused was charged, Boggs said to the accused, you didn't do what you are charged with?
>
> DC: Something to that effect, Your Honor. Boggs made a statement after Boggs made his 24 February statement with regards to what's true and what's not true in his statement, and I believe this witness has some information that goes to the actual credibility of Boggs' statements.
>
> MJ: Yes, Captain King? You are standing?
>
> ATC: Yes, thank you, Your Honor. First of all, Your Honor, if the defense wants to attack Boggs' credibility, he certainly could have asked this question of Boggs while he was on the stand. To *offer hearsay under this—under this premise that it goes to some mental state or emotional condition of Boggs* while having Sauls testify about it, the—the government submits it's not authorized, and that is clearly a hearsay case.

Id. (emphasis added).

108. *Id*. Military Rule of Evidence 803(3) defines then existing mental state as follows:

> Then existing mental, emotional or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

MCM, *supra* note 3, MIL. R. EVID. 803(3).

109. *Palmer*, 55 M.J. at 207.

110. *Id.*

111. MCM, *supra* note 3, MIL. R. EVID. 613. Military Rule of Evidence 613 addresses prior statements of a witness. It states that when

> examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel . . . . Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Id.

112. *Palmer*, 55 M.J. at 207.

113. *Id.*

114. MCM, *supra* note 3, MIL. R. EVID. 103(a)(2).

115. *Palmer*, 55 M.J. at 207 (citing United States v. Callara, 21 M.J. 259, 264-65 (C.M.A. 1986) (holding that defense counsel can wait until their case in chief to present a prior inconsistent statement)).

In making that determination, the CAAF held the defense counsel's feet to the fire. *Palmer* reiterates current case law on the preservation of an issue for appeal.[116] When evidence is excluded at trial because it is inadmissible for the purpose cited by the proponent, the proponent cannot challenge the ruling on appeal based upon the fact that the evidence could have been admitted for another purpose.[117] When counsel attempt to raise a valid purpose for proposed evidence for the first time on appeal, they will not get the benefit of their newfound knowledge or earlier mistake. Trial practitioners should pay heed to this decision and make sure that they articulate all relevant and possible grounds for the admissibility of evidence, particularly when the evidence has the potential to be dispositive. The standard on review is abuse of discretion.[118] Given the case law in this area, there is little chance of victory on appeal.

Requesting Expert Assistance and Expert Witnesses

In *United States v. McAllister*,[119] The CAAF addressed the difficulties inherent in expert witness requests and expert assistance requests. The court paid particular attention to how counsel should request expert assistance, and reiterated the standard for requesting and receiving expert witnesses. While the lead opinion determines that the necessity for expert assistance was not at issue in *McAllister*,[120] the dissent disagrees, providing a cogent and applicable template for counsel facing the need to justify expert assistance at trial.[121] Both the dissent and the majority opinions give excellent examples that counsel should apply in future cases when the issue of expert assistance and expert testimony arises. A quick review of the facts and motions hearings in *McAllister* will assist with understanding how to address these problems.

Private First Class Carla Shanklin was choked to death by an unknown assailant on or around 8 July 1995.[122] Two weeks before her murder, McAllister's commander ordered him to stay away from PFC Shanklin's quarters because of a domestic dispute. Before the order, McAllister was living with PFC Shanklin at her quarters at Helemano Military Reservation, Hawaii. Nonetheless, he went to PFC Shanklin's quarters on 7 July 1995. He waited for her, and upon her return they talked for about two hours.[123] Private First Class Shanklin then went out on a date that evening. McAllister called her quarters while she was out and asked to speak with her. Private First Class Shanklin returned from the date around midnight, and her sister, who lived with her, heard a short, cut-off scream around three or four o'clock in the morning. Shanklin's sister later discovered PFC Shanklin's corpse. Other members of the apartment complex heard the scream, and one individual observed a car matching the general description of McAllister's car in the apartment complex area about the time of the murder.[124]

A Criminal Investigation Division (CID) agent interviewed McAllister. During the interview, the CID agent noticed scratches on McAllister's arm and a gouge on his index finger. McAllister volunteered that his current girlfriend, Staff Sergeant (SSG) Rogers, with whom he was living, scratched him. She denied it.[125]

In the course of their investigation, CID took material from underneath PFC Shanklin's fingernails. The DNA of that material and its testing became the turning point in McAllister's trial. The government called an expert to explain the DNA testing process and the results of that testing. The expert testified that the tests conducted by her laboratory excluded everyone from whom DNA samples had been taken as a possible source of the DNA except for McAllister and PFC Shanklin. On cross-examination, the expert admitted that her laboratory had started testing for two additional genetic systems after testing McAllister's sample. The panel members were particularly interested in the DNA evidence; six of the eight members asked questions about the possibility of contaminated samples, the possibility of multiple contributors, the limited readings from PFC Shanklin's right fingernail, the possibility of mistakes in the chain of custody, and the possibility of retesting.[126] McAllister was con-

116. *Id.*

117. *Id.* at 208.

118. *Id.* (citing United States v. Sullivan, 42 M.J. 360, 363 (1995)).

119. 55 M.J. 270 (2001).

120. *Id.* at 275-76.

121. *Id.* at 270.

122. *Id.* at 272.

123. *Id.* at 271.

124. *Id.* at 272.

125. *Id.*

126. *Id.* at 273.

victed and sentenced to a dishonorable discharge, reduction to the lowest enlisted grade, and confinement for life.[127]

On appeal, the CAAF focused on the attempts by the defense counsel to get expert assistance, and subsequently, an expert witness. The court noted that the convening authority granted the first defense request for expert assistance. The case involved a new type of DNA testing, and no testing facilities were available in Hawaii.[128] Dr. Conneally, a scientist on the island with an in-depth knowledge of DNA and genetics, was appointed as a defense consultant on DNA evidence under MRE 502, and he consulted with the defense in that capacity on multiple occasions.[129] Afterwards, the defense asked the convening authority on 4 April 1996, to produce Dr. Conneally as a defense expert witness at government expense. The convening authority granted the request. During an Article 39(a) session on 23 April 1996, the defense proffered to the military judge that Dr. Conneally had recommended employing someone else to discuss Polymerase Chain Reaction (PCR) testing at trial. The defense filed a motion asking that the evidence be preserved and that the convening authority provide three to four thousand dollars to pay for independent DNA testing. The military judge issued an order to preserve the evidence for possible retesting, but denied the defense request for additional funds.[130]

During an Article 39(a) session on 15 May 1996, the defense asked the military judge to order the government to make funds available so that the defense could hire Dr. Blake, an expert in PCR testing, as a defense consultant and to conduct another DNA test. During the 39(a) session, the defense eventually asked the military judge to substitute Dr. Blake for Dr. Conneally. The military judge refused, but left the option open to the defense to request such a substitution from the convening authority. The defense made that request, and it was denied. The defense counsel informed the military judge that Dr. Conneally did not have the appropriate knowledge to assist the defense, and that Dr. Blake had the knowledge and a requisite "expertise in forensic and criminology where Dr. Conneally does not."[131] Therefore, during the trial on the merits, the defense did not present any expert testimony.[132]

The CAAF began its analysis in *McAllister* by reminding counsel that the defense is entitled to expert assistance when they demonstrate the necessity for it.[133] The court next pointed out that establishing the necessity for an expert does not guarantee the production of any specific expert.[134] The CAAF noted that the necessity for expert assistance was not at issue in this case, and focused instead on whether the appellant had received competent assistance.[135] The court determined that he had not, and remanded the case back to the Army Court of Criminal Appeals (ACCA) for the appointment of an expert to test the preserved DNA evidence.[136]

The dissent in *McAllister* disagreed with the majority opinion on whether the defense had established the necessity for expert assistance.[137] The dissent points out that the CAAF had adopted a three-prong test in *United States v. Gonzalez*,[138] laying out the requirements for a showing that expert assistance is necessary in a particular case.[139] Under *Gonzalez*, the defense must first show (1) why the expert is needed, (2) what such expert assistance would accomplish for the defendant, and (3) why the defense counsel is unable to gather and present the evidence that the expert assistance would be able to develop.[140] The convening authority must provide expert assistance under *United States v. Garries*[141] only after the defense has met this initial burden.[142]

127. *Id.* at 270.

128. *Id*. at 273.

129. *Id*. Under MRE 502, any communications between the appellant and Dr. Conneally would be protected by privilege and would not be disclosed to the government counsel. *See* MCM, *supra* note 3, MIL. R. EVID. 502 (2000).

130. *McAllister*, 55 M.J. at 273.

131. *Id*. at 274.

132. *Id*.

133. *Id.* at 275. The court drew counsels' attention to *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986), in which the Court of Military Appeals addressed the requirement for a showing of necessity before any requirement to provide expert assistance accrued to the convening authority. *Id*. at 291.

134. *McAllister*, 55 M.J. at 275. *See generally* United States v. Burnette, 29 M.J. 473 (C.M.A. 1990).

135. *McAllister*, 55 M.J. at 275.

136. *Id.* at 276.

137. *Id.* at 277 (Crawford, C.J., dissenting).

138. 39 M.J. 459 (C.M.A. 1994).

139. *McCallister*, 55 M.J. at 277.

Counsel should note that an expert who assists the defense is a member of the defense team, and that the attorney-client privilege includes communications between the expert assistant and the client.[143] The government can only pierce that privilege and interview the expert assistant after the defense requests that the assistant be provided as an expert witness.[144] Defense counsel should consider this when making requests for expert assistance and expert witnesses, taking care to articulate the difference between the two for the convening authority. Such care will assist in preventing the disclosure of privileged information through the metamorphosis of expert assistance into expert testimony.

Defense counsel facing the need for expert assistance and expert witnesses should fashion their requests to the military judge or convening authority in a manner that reflects the requirements of *Gonzalez*. They should identify the reason for the expert, explain why they cannot gather and present that type of evidence without expert assistance, and explain how the expert assistance would assist the defendant. Failure to initially address these issues allows the convening authority or military judge to appropriately deny defense requests for expert witnesses which might otherwise be valid.

Counsel should always begin their requests in a way that satisfies the requirements in *Gonzalez* before they make a request for assistance under *Garries*. Defense counsel should also consider the decision of the CAAF in *United States v. Houser*[145] when developing the reasons that expert assistance or testimony is a necessity. Trial counsel responding to defense requests should either hold the defense's feet to the fire and force them to properly articulate the necessity for such assistance under *Gonzalez*, or in instances where justice would best be served, present the convening authority with the information required under *Garries* and *Gonzalez* sua sponte. The convening authority should then consider that information before acting on a defense request for expert assistance.

The Marriage of Expert Testimony and Character Evidence

In *United States v. Dimberio*[146] the CAAF attempted to address the difficulty created when the defense attempts to proffer evidence at trial under two separate theories of admissibility.[147] The situation in *Dimberio* was exacerbated because one of the theories of admissibility was clearly valid while the other was not.[148] The CAAF, focusing on the inability of the defense to discern accurately between the two theories, affirmed the lower court's decision. The court used the case as a teaching example of how to address requests for experts and the requirements for establishing admissibility of expert testimony under *Houser*, and suggested ways to deal with the particular difficulties encountered when scientific evidence becomes entwined with character evidence.[149] To understand how the CAAF arrived at its decision, one must first review the facts in *Dimberio*.

On 3 February 1997, the wife of Senior Airman Dimberio took their four-week-old son to the emergency room of a nearby civilian hospital. The boy was suffering from injuries consistent with having been violently shaken. The previous evening, the appellant and his wife entertained friends for the first time since the birth of their child. The mother placed the baby on the bed around 10:00 p.m., and checked on him around 12:30 a.m.

140. *Id.* at 277-78 (citing *Gonzalez*, 39 M.J. at 461).

141. 22 M.J. 288 (C.M.A. 1986).

142. *See McCallister*, 55 M.J. at 278.

143. *See* MCM, *supra* note 3, MIL. R. EVID. 502(a).

144. *See id*. MIL. R. EVID. 502(b)(4).

145. 36 M.J. 392 (C.M.A. 1993). The Court of Military Appeals discussed the following factors in *Houser* that counsel should rely upon when making requests for experts: (1) Qualified Expert. To give expert testimony, a witness must qualify as an expert by virtue of his or her "knowledge, skill, experience, training, or education." *Id*. at 398 (quoting MCM, *supra* note 3, MIL. R. EVID. 702). (2) Proper Subject Matter. Expert testimony is appropriate if it would be helpful to the trier of fact. It is essential if the trier of fact could not otherwise be expected to understand the issues and rationally resolve them. *Id.* (construing MCM, *supra* note 3, MIL. R. EVID. 702). (3) Proper Basis. The expert's opinion may be based on admissible evidence "perceived by or made known to the expert at or before the hearing" or inadmissible hearsay if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." MCM, *supra* note 3, MIL. R. EVID. 703. The expert's opinion must have an adequate factual basis and cannot be simply a bare opinion. *See Houser*, 36 M.J. at 398 (construing MCM, *supra* note 3, MIL. R. EVID. 703). (4) Relevant. Expert testimony must be relevant. *Id.* (citing MCM, *supra* note 3, MIL. R. EVID. 402). (5) Reliable. The expert's methodology and conclusions must be reliable. *See id.* (construing MCM, *supra* note 3, MIL. R. EVID. 401). (6) Probative Value. The probative value of the expert's opinion, and the information comprising the basis of the opinion must not be substantially outweighed by any unfair prejudice that could result from the expert's testimony. *Id*. (citing MCM, *supra* note 3, MIL. R. EVID. 403).

146. 56 M.J. 20 (2001).

147. *See id*. at 25-26.

148. *Id.* at 25.

149. *Id*. at 22.

when she brought him a bottle. She left the bottle propped up against a pillow so she could return to the party.[150] The appellant went to bed sometime after his wife gave the baby the bottle. The appellant had not been drinking during the evening, but the mother did consume alcohol that night. The appellant had been in the field and was quite tired. Sometime around 5:30 or 6:00 the next morning, the baby cried so loudly and painfully over the monitor system that his mother began to lactate involuntarily, even though she had been given drugs to stop lactation. The mother went upstairs and found dried blood and abrasions on the baby's face. Dimberio told his wife that he had rolled over on the baby. She called the hospital and then took her son to the emergency room. Dimberio later joined her.[151]

In preparation for trial, the defense counsel learned that Mrs. Dimberio had a history of treatment for various mental health issues. The defense counsel requested and received an expert to assist in reviewing Mrs. Dimberio's medical records.[152] The expert concluded that Mrs. Dimberio suffered from an unspecified personality disorder with narcissistic, histrionic, and borderline traits. He also found that she suffered from stress and occasionally would act without thinking. He did not conclude that she had a history of violent behavior or was likely to act violently.[153]

At trial, the defense counsel attempted to link the expert's opinion of Mrs. Dimberio's mental health condition to the baby's injuries under the theory that Mrs. Dimberio shook the baby during a momentary loss of control. Her tendency to act without thinking under stressful situations was evidence of a character trait that made it more likely that Mrs. Dimberio shook her baby. Such evidence was potentially admissible under MRE 404(a) through expert testimony.[154] The military judge decided that the link between the proffered testimony and the accused was that the defense intended to introduce evidence that the appellant was calm in stressful situations and a peaceful person. Counsel also intended to admit the psychological history of Mrs. Dimberio under MRE 404(b) to show that she acted in accordance with her psychological history when she shook the baby.[155] This theory was clearly not appropriate. Just as the government could not admit propensity evidence that violated MRE 404(b) to say that the accused acted in conformity therewith, the accused could not admit propensity evidence to show that an alternate perpetrator acted in conformity therewith.[156]

The CAAF assumed for purposes of their analysis in *Dimberio* that character evidence could potentially include psychiatric diagnoses or evidence of personality disorders. The court held, however, that such evidence would not be admissible under MRE 404(a). The CAAF noted that the evidence was still potentially admissible under a constitutional right to present a defense, if the appellant could establish legal and logical relevance and make an adequate proffer or presentation of the evidence.[157] The court went on to hold, however, that the defense failed to make an adequate proffer. The CAAF laid out the procedure whereby the defense could have adequately informed the military judge as to the substance of their evidence, citing MRE 103(a)(2), which allows the defense to accomplish this through a stipulation, direct testimony, or an appropriate proffer.[158] The court noted that the burden was on the defense to make an adequate proffer.[159]

The *Dimberio* court determined that the defense failed due to a lack of proper foundation for the evidence under MRE 405, and a failure to establish accurately the necessity for expert testimony under the *Houser*[160] factors that incorporate the Supreme Court's *Daubert*[161] analysis regarding expert testimony. The CAAF viewed the defense's failure to offer supporting *Houser* factors at trial fatally defective. The court finally noted that, even if the defense had made an appropriately substantive proffer, the evidence should have been excluded under the MRE 403 balancing test.[162]

---

150. *Id.* at 21.

151. *Id.* at 22.

152. *Id.*

153. *Id.* at 23.

154. *Id.* at 25.

155. *Id.* at 23.

156. *Id.* at 30 (Sullivan, J., concurring in the result).

157. *Id.* at 25.

158. *Id.* at 25-26.

159. *Id.* at 25.

160. United States v. Houser, 36 M.J. 392 (C.M.A. 1993).

161. Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

Defense counsel that wish to admit psychiatric evidence of an alternate perpetrator under a character evidence theory should take special note of the court's holding in *Dimberio*. While difficult to accomplish, it is possible. Counsel should begin by appropriately requesting and receiving an expert in accordance with the procedures discussed above. Once the expert has been assigned, counsel must view the evidence with an eye toward potential admissibility under a character evidence theory. To do this, counsel must initially qualify scientific evidence for potential admissibility under *Houser.* Then, counsel should integrate the now potentially admissible expert testimony with an admissible theory of character evidence. That could include character traits that indicate an alternate perpetrator of the crime.

Counsel must be prepared to address a trial judge's ruling that the expert testimony is not admissible under an MRE 404(a) character theory because a direct reading of that rule could support such a ruling. If that happens, counsel should use *Dimberio* to argue that such evidence, if legally and logically relevant as indicated by the *Houser* factors, is admissible. Remember, counsel must tie the evidence to a constitutional right to present a defense. In other words, it needs to be the only arrow in the defense's quiver. Such decisions at trial are difficult, but a careful reading of *Dimberio* may indicate an area of fertile evidentiary production for savvy defense counsel.

Adoption of the Silent-Witness Theory for VHS Tapes Under MRE 901(b)(9)

In *United States v. Harris,*[163] the CAAF adopted the "silent-witness" theory of authentication for videotapes.[164] Yeoman Seaman Harris stole checks from the coffee mess checking account of Fighter Air Station 101, Naval Air Station Oceana, Virginia Beach, Virginia.[165] He then cashed those checks using a stolen driver's license. During Harris's court-martial, the trial counsel offered into evidence still photographs digitally extracted from the videotape taken from the drive-in window where Yeoman Seaman Harris cashed the stolen checks. The trial counsel called the bank security manager and a teller as witnesses to lay the foundation for the photographs.[166] They testified about their handling of the videotapes from the security cameras, to include discussing how the logs controlling the videotapes were "prepared in the course of the business of the banking center."[167] The witnesses also discussed the procedures for changing tapes and ensuring that the system was working properly after installing each tape. The trial counsel then offered the videotapes under the silent-witness theory of admissibility. The military judge accepted them into evidence, and the appellant was convicted.[168]

The appellant argued on appeal that the photographs derived from the videotape were not properly authenticated and admitted into evidence at trial.[169] The appellant did not contest the use of the silent-witness theory, but instead chose to focus on the validity, or lack thereof, of the authentication process. On appeal he attacked the quantum of evidence about the recording process and recording system. He argued that the testimony offered by the government at trial resulted in the military judge misapplying the silent-witness theory.[170] The CAAF disagreed.

The CAAF held in *Harris* that the silent-witness theory allows the proponent of videotape evidence to satisfy the authentication requirement by allowing the videotape to "speak for itself after the proponent has offered evidence supporting the reliability of the process or system that produced the videotape."[171] The CAAF noted that its adoption of the silent-witness theory came twenty-five years after its initial inception, and well after the ACCA and NMCCA had adopted the theory. The court went on to say that its decision generally reflected decisions in the federal circuits that have examined and adopted the use of the silent-witness theory for the authentication of videotapes.[172] The CAAF then considered whether the quantum of evidence about the recording process and system was sufficient to support a finding that the automated camera footage was authentic under MRE 901(b)(9).[173] The court held that it was and affirmed the case.[174]

162. *Dimberio*, 56 M.J. at 27.

163. 55 M.J. 433 (2001).

164. *Id.* at 438.

165. *Id.* at 435.

166. *Id*.

167. *Id.* at 436.

168. *Id*.

169. *Id.* at 434-35.

170. *Id.* at 436-37.

171. *Id.* at 435.

172. *Id*.

Based upon the court's holding in *Harris*, counsel wishing to proffer videotape evidence must first establish the validity of the process or system in accordance with MRE 901(b)(9). Counsel can establish the validity of the system or process by calling a witness or witnesses to show "the manner in which the film was installed in the camera, how the camera was activated," when the film was removed from the camera, the chain of possession of the film once it was removed from the camera, the fact the film was properly developed or processed, and that any prints produced from the videotape were also properly processed.[175]

Counsel that follow these simple foundational requirements can rely upon the silent-witness theory to overcome any other foundational requirements. This obviates the need to call a witness to testify about the actual filming or any extraction or development process used to create images from the videotape, streamlining the admission of such evidence without sacrificing authenticity or reliability.

Conclusion

Counsel should carefully consider the MRE decisions of the CAAF over the last year. There is a remarkable amount of definitive instruction on how things should be done. Trial practitioners who learn from the court's clear guidance can positively impact their chances of success at trial. Evidentiary decisions made at trial have a phenomenal impact on who succeeds. It is also quite certain that counsel who fail to heed the court and "assume the correct evidentiary position" at the trial level will not receive relief on appeal. The CAAF is clearly acting under the assumption that counsel at the trial level are competent, intelligent, and knowledgeable about the rules of evidence. That assumption, and the CAAF's approach to interpreting the rules of evidence, may very well make the court's belief concerning counsel a self-fulfilling prophecy.

173. *Id*. at 438-39. Military Rule of Evidence 901(b)(9) is an illustration of one of the means by which the requirement of authentication or identification can be met. It states: "Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." MCM, *supra* note 3, MIL. R. EVID. 901(b)(9).

174. *Harris*, 55 M.J. at 439-40.

175. *Id.* at 438 (quoting the threshold case for automated evidence, *United States v. Taylor*, 530 F.2d 639, 641-42 (5th Cir. 1976)). Subsequent cases in federal jurisdictions have followed the thought process laid out in *Taylor*. *See, e.g.*, United States v. Rembert, 863 F.2d 1023, 1027 (D.C. Cir. 1988); United States v. Bynum, 567 F.2d 1167, 1171 (1976).