New Developments: Crop Circles in the Field of Evidence[1]

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

Introduction

In the darkness of the night, on a schedule understood by no man and with no one watching, giant geometric formations appear throughout the crop fields of the world.[2] They are mysterious, alluring, and for some, they call into question our solitary existence within the universe.[3] Others see them as the acts and pranks of a few peculiar individuals. Movies have been made,[4] books have been written, and people have wondered how to interpret the sudden appearance of the unexplained in their daily lives.

Some trial lawyers in the military have viewed the recent evidentiary decisions of the Court of Appeals for the Armed Forces (CAAF) with the same sense of questioning wonder others reserve for the appearance of crop circles. Others have attempted to see behind the decisions, looking for the alien in the pantry.[5] We need only turn our faces on high toward the decisions themselves to properly interpret the mystical signs that appeared in our evidentiary field over the last year. The contortions of the rule of completeness, the admissibility of appropriate rebuttal evidence, and an understanding of the impact of privileges are all present in the circles, squares, and geometric lines of the crop circles found in the fields of evidence.

While some counsel feel bewildered and confused by the plethora and breadth of the "signs" that have appeared recently, there is no reason to feel that way. The decisions of the CAAF are not mystic symbols from above, but rather constitute a careful, reasoned, and fair application of the driving policy issues and concerns that the military rules of evidence were drafted to address. This article analyzes those issues and comments on the underlying reasons behind the court's decisions, while offering practical advice to the counsel and military judges who must apply these decisions throughout the coming year.

To that end, this article addresses each development of evidentiary law sequentially as they appear in the Military Rules of Evidence (MRE). Subjects include: (1) applying the rule of completeness under MRE 106[6] and MRE 304;[7] (2) determining when evidence is relevant under MRE 401[8] and MRE 402;[9] (3) the proper application of the attorney-client privilege,[10] the spousal privilege,[11]and the priest-penitent privilege;[12] (4) the

1. The rules of evidence form the bones—the foundation, if you will—of everything else that takes place within the confines of a courtroom. This responsibility is best illuminated by Mark Twain, who wrote,

> It was not my opinion; I think there is no sense in forming an opinion when there is no evidence to form it on. If you build a person without any bones in him he may look fair enough to the eye, but he will be limber and cannot stand up; and I consider that evidence is the bones of an opinion.

MARK TWAIN, PERSONAL RECOLLECTIONS OF JOAN OF ARC 4-5, *reprinted in* THE COMPLETE NOVELS OF MARK TWAIN (Nelson Doubleday Inc. ed. 1969).

2. For a documentary treatment of this subject, see Open Edge Media, *Crop Circles: Quest for Truth*, *at* http://www.cropcirclesthemovie.com (last visited Feb. 11, 2003).

3. For an interesting scientific analysis on the creation of crop circles, see Brian Hussey, *Theories on the Formation of Crop Circles*, *at* http://www.paradigm-shift.com/theories.html (last visited Feb. 11, 2003).

4. *See* Touchstone Pictures, *Signs*, *at* http://bventertainment.go.com/movies/signs (last visited Feb. 11, 2003).

5. *Id*. In *Signs*, the main character, played by Mel Gibson, confronts an alien trapped in a neighbor's pantry. He reacts with fear, violence, and inadvertent humor, much as some counsel react to evidentiary rulings that they do not substantively agree with. *Id*.

6. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 106 (2002) [hereinafter MCM].

7. *Id*. MIL. R. EVID. 304(h)(2).

8. *Id*. MIL. R. EVID. 401.

9. *Id*. MIL. R. EVID. 402.

10. *Id*. MIL. R. EVID. 502.

11. *Id*. MIL. R. EVID. 503.

requirements for the medical hearsay exception under MRE 803(4);[13] and (5) the intersection of the business records exception[14] and the urinalysis program. The ultimate goal is to remove the mystery behind the crop circles, allowing the farmers of the fields of justice to get on with planting, tending, and harvesting their crops.

Recent Developments in Evidence

The Rule of Completeness

The CAAF has wrestled with the dilemma presented by the presence of multiple statements made by the accused on more than one occasion,[15] particularly when investigating agent request that suspects reduce earlier oral confessions to writing. As often happens in such instances, the accused either remembers or inserts information that was not present in the oral confession. This sets the stage for trial counsel to argue that the written confession contains inadmissible exculpatory hearsay, and for the defense counsel to respond that such evidence is admissible under MRE 106 and MRE 304(h)(2). The CAAF has addressed the interplay between MRE 106 and MRE 304(h)(2) in a series of cases including *United States v. Goldwire*,[16] *United State v. Rodriguez*,[17] and *United States v. Gilbride*.[18] Taken together, these cases create a template that counsel can rely on when arguing the admissibility of subsequent written or oral statements. Understanding the contours of this template begins with a review of the CAAF's decision in *Goldwire* last year.

In *Goldwire*[19] the CAAF addressed the intersection of MRE 106,[20] Federal Rule of Evidence (FRE) 106,[21] the common law rule of completeness,[22] MRE 304 (h)(2),[23] and their interactions with the admissibility of hearsay statements at trial. As noted last year, the court's reasoning was convoluted and difficult to understand. Some members of the court indicated a willingness to accept and apply the common law rule of completeness to the military rule of completeness, while others were more inclined to parse the difference between the written rule of completeness vis-à-vis written or recorded statements, and the common law rule of completeness for oral statements. The court discussed the differences between these doctrines at length, but ultimately decided the case based upon MRE 304(h)(2). The court's decision to apply MRE 304(h)(2) created a bright-line rule that is much easier to understand and apply from a trial practitioner's perspective.[24]

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12. *Id.* MIL. R. EVID. 504.

13. *Id.* MIL. R. EVID. 803(4).

14. *Id.* MIL. R. EVID. 803(6).

15. *See* Major Charles H. Rose III, *New Developments in Evidence: Counsel, Half-Right Face, Front Leaning Rest Position—Move!*, ARMY LAW., Apr. 2002, at 69.

16. 55 M.J. 139 (2001).

17. 56 M.J. 336 (2002).

18. 56 M.J. 428 (2002).

19. 55 M.J. at 142-43.

20. Military Rule of Evidence 106 states:

> Rule 106. Remainder of or related writings or recorded statements. 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 6, MIL. R. EVID. 106.

21. Federal Rule of Evidence 106 is virtually identical to the military rule and states:

> Rule 106. Remainder of or Related Writings or Recorded Statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

FED. R. EVID. 106.

22. *Goldwire*, 55 M.J. at 142. Unlike both the federal and military rules, 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)).

23. Military Rule of Evidence 304(h)(2) states: "(2) *Completeness.* 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 6, MIL. R. EVID. 304(h)(2).

24. *See* Rose, *supra* note 15, at 69.

The CAAF continued to develop military jurisprudence for the rule of completeness this year, clarifying its interpretation of these rules in both *Rodriguez* and *Gilbride*. In *United States v. Rodriguez*,[25] the CAAF considered whether the military rule of completeness applied to a series of statements made over several days. The appellant argued that under the rule of completeness, once the trial court admitted the first statement, it should have admitted a series of statements he made over several days. The CAAF disagreed.[26] The court began its opinion by discussing the facts in chronological order. On 3 January 1998, someone strangled the appellant's wife. On 5 January 1998, the appellant called his mother-in-law from a pay phone.[27] This phone conversation became the first in a series of seven statements the appellant made to other individuals. He told his mother-in-law that burglars had abducted him and his wife. His mother-in-law stated that he appeared excited and disoriented. He also told his mother-in-law that someone had hit him on the head, and that the last time he saw his wife, she was bound and gagged in the car. After hanging up the phone with his mother-in-law, the appellant dialed 911. The call to the 911 operator became the appellant's second statement. He told the 911 operator that he was disoriented, that a burglar had attacked the appellant and his wife and abducted them, and that he had only recently been able to escape. The 911 operator dispatched members of the Honolulu Police Department to the pay phone where Rodriguez was located.[28]

The appellant next made a series of statements to the Honolulu Police Department. He made his first statement immediately after the 911 call. He repeated the gist of his 911 story to the Police Department. Later that same day, the Honolulu Police Department formally interviewed the appellant for the first time. In that interview, he told the police that two males had attacked him and his wife while burglarizing their home. He claimed they had placed a bag over his head, bound his arms, and struck him. The appellant told the police that he kept slipping in and out of consciousness. Eventually, he described being able to get away from his kidnappers. He remembered kicking his captors and escaping while they tried to shoot him. During that first formal interview, the appellant told the Honolulu Police Department that the last time he heard his wife, she was upstairs in their home screaming while under attack by the intruders. Shortly after this first formal interview, the Honolulu Police Department found the body of the appellant's wife in a car about one mile from the pay phone the appellant used to call both his mother-in-law and the 911 operator.[29]

The Honolulu Police Department continued to investigate. They compared the appellant's statements to the evidence from the crime scene and determined that the statements did not match the physical evidence.[30] On 6 January 1998, they called the appellant back for a second formal interview. That interview was custodial in nature, and the Honolulu Police Department videotaped it. When confronted with the inconsistencies in his story, the appellant confessed to killing his wife and fabricating the story about the burglary and kidnapping. On 7 January 1998, the Honolulu Police Department interviewed the appellant a third time. During this interview, he reiterated his 6 January 1998 confession, but stated that his wife's death was the accidental result of a spousal dispute.[31]

During the trial, the prosecution chose not to offer the appellant's last two statements to the Honolulu Police Department. They relied on the earlier statements, including the call to his mother-in-law, the 911 call, and the original statement given to the police. The government then called an expert witness, the Honolulu Police Department medical examiner. The expert testified that the nature of the wife's injuries was consistent with an individual who had been choked to death. The expert witness reviewed all of the appellant's statements, including the last two confessions that the police had videotaped, before forming his opinion. At no time during its case-in-chief did the prosecution introduce the appellant's fifth, sixth, or seventh statement into evidence.[32]

The defense built its theory of the case around the idea that the accused had inadvertently choked his wife during a spousal dispute. From a defense perspective, the last two statements contained exculpatory information explaining how the offense occurred, statements that mitigated or contradicted evidence of the appellant's intent to commit murder.[33] If the prosecution had offered portions of the last two statements through the testimony of an appropriate witness, the defense would have been able to use MRE 106 to force the government to offer the remainder of the statements. When the prosecution chose not to offer any portion of those statements, they denied the defense

25. 56 M.J. 336 (2002).

26. *Id.* at 342-43.

27. *Id*. at 337.

28. *Id.* at 337-38.

29. *Id*. at 338.

30. *Id*.

31. *Id.* at 339. The exculpatory statements made by the appellant in this last interview appear to have driven several trial decisions. The existence of this potentially exculpatory, or self-serving, statement impacted directly on the manner the parties presented evidence at trial, as well as the type of evidence they presented. *See id.*

32. *Id*.

the opportunity to get substantive evidence concerning their theory before the panel without placing the accused on the stand and subjecting him to cross-examination. By choosing to not offer the last two statements, the prosecution forced the defense counsel to make a difficult choice. The defense could either have the appellant testify or offer his statements under the appropriate hearsay exception or exemption. Unfortunately for the defense, no hearsay exemption or exception applied, and the multiple statements of the accused created an opportunity for an effective government cross-examination. The defense counsel argued to the military judge that all of the statements should be considered as a single admission over a period of time and that the rule of completeness allowed the defense to introduce the last three statements because the government had already introduced the accused's first four statements. The trial judge disagreed.[34]

As previously discussed, the expert witness who testified during the government's case-in-chief had reviewed the last two statements containing the exculpatory information before she testified. The trial defense counsel cross-examined the expert witness, establishing that the expert had reviewed all of the accused's statements before forming her opinion.[35] The defense counsel then chose not to cross-examine her on the information in those last two statements, or to offer those statements independently under MRE 106 or MRE 304(h)(2). This was a fatal error.

The CAAF began its analysis by noting that there are two distinct rules of completeness in military practice. The first rule of completeness is found in the combination of MRE 106, FRE 106, and the common-law doctrine of completeness. The court noted that each of these rules is primarily concerned with the order of proof.[36] They allow an opposing party to force the adverse party to admit evidence during its case-in-chief. The rule is structured in this way to ensure that the finder of fact does not take the evidence out of context. Military Rule of Evidence 106 is concerned with written or recorded statements. The rule, however, does not address what should happen if the evidence in question is otherwise inadmissible.[37] As noted previously, the accused could potentially open the door to his character for truthfulness by using the rule of completeness to get his own statements before the finder of fact without testifying.[38]

The court next discussed how MRE 304(h)(2) deals with statements by the accused. The court began by noting that there is no FRE counterpart to MRE 304(h)(2), explaining that the rule reflects a long-standing military practice concerning statements by the accused. This practice ensures that the court will always consider any statement by the accused in its entirety. The court noted that such a specific rule is necessary, given the dual nature of the military justice system as both a system of justice and a tool for discipline. Under the rule, whenever a trial counsel admits a portion of an admission or confession by the accused, the defense counsel has the ability to introduce the remainder of the statement through cross-examination or otherwise under MRE 304(h)(2). The purpose behind the rule is to ensure that the court can consider the complete substance of the statement in question. The question is one of fairness, and long-standing military practice demands it.[39]

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33. *Id*. The opinion stated,

> The defense sought to convince the panel that the death was the result of an accident during a domestic dispute that escalated into a physical confrontation in which appellant's wife was the aggressor. Although appellant did not testify, the defense attempted to introduce his testimony through appellant's sixth and seventh statements, the taped custodial interviews conducted on January 6 and 7 by Detectives Tamarshiro and Wiese.

Id.

34. *Id*.

35. *Id*. at 343.

36. *Id*. at 339. The "primary concern of Rule 106 is the order of proof," permitting an adverse party to compel the introduction of favorable evidence during the opponent's case. *Id*. at 340 (citing 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 106.02[2], at 106-11 (Joseph M. McLaughlin ed., 2d ed. 2001)).

37. *Id*. The court noted that the jurisdictions are split upon whether invocation of the rule of completeness allows for the introduction of evidence that is otherwise inadmissible. The court noted that such evidence, to the extent that it does come in, comes in at the insistence of the adverse party, who may waive the benefit of the rule. (citing STEPHEN A. SALTZBURG, LEE D. SCHINASI, & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 92-93 (4th ed. 1997)).

38. Rose, *supra* note 15, at 69-70.

39. The opinion in *Rodriguez* states as follows:

> It would be manifestly unfair to an accused to permit the prosecution to pick out the incriminating words in the statement or discussion and put them in evidence while at the same time excluding the remainder of the statement or conversation, in which the accused seeks to explain the incriminating passages.

Rodriguez, 56 M.J. at 341 (citing United States v. Harvey, 25 C.M.R. 42, 50 (C.M.A. 1957)).

There are four primary differences between MRE 106 and MRE 304(h)(2). The first difference is who holds the power to invoke the rules. Either the government or the defense can use MRE 106 to force the opposing side to complete the statement in question during its case-in-chief.[40] Military Rule of Evidence 304(h)(2), on the other hand, is a rule specifically written for the use of the accused through counsel.[41] The defense is the only party that may invoke MRE 304(h)(2), to force the court to admit the remaining substance of the statement in question. As the court noted in *Rodriguez*, if the defense fails to exercise that ability under MRE 304(h)(2), the military judge does not have a sua sponte duty to do it for them.[42] The second difference deals with the types of statements that the rules are designed to address. Military Rule of Evidence 106 and FRE 106 are written specifically to address written or recorded statements. Military Rule of Evidence 304(h)(2) is broader in application; it also applies to oral statements. The third difference between the two rules is their primary purpose. Military Rule of Evidence 106 is concerned with the timing of when the evidence is presented, while MRE 304(h)(2) is concerned with the substance of the information that is presented. Military Rule of Evidence 304(h)(1) is based on a commitment to fairness.[43] Finally, under MRE 106, the military judge has discretion, based upon his determination of fairness, to decide whether the rule requires admission of the remaining portions of the statement. That discretion is not available under MRE 304(h)(2). Military Rule of Evidence 304(h)(2) requires the military judge to admit the evidence when the defense counsel establishes the predicate facts under the rule.[44]

While the court spent considerable time analyzing the interplay between MRE 106 and MRE 304(h)(2), it ultimately avoided deciding the case based upon this reasoning. Instead, it focused on the decision of the defense counsel not to cross-examine the expert witness regarding the exculpatory information in the last two recorded statements. The court held that because the defense counsel chose to not introduce that evidence through cross-examination, he waived the issue on appeal. The court went on to say that absent a defense request to admit the statements, there was no requirement that the military judge rule on these statements' potential admissibility. The court found no error and affirmed[45] without deciding the ultimate question of whether a series of statements made to a police entity or a commander could be admissible under the doctrine of completeness.[46]

The court's analysis suggests that an argument to admit multiple statements as one under the rule of completeness will not be successful unless the defense counsel can meet the court's requirements for contemporaneous statements.[47] Those requirements include showing whether the accused was precluded from completing the content of his statements. The defense counsel must also show that the statements were not made at a different time, different place, or to a different set of persons. When statements of the accused are separated in time, the CAAF is unlikely to allow the defense counsel to use the doctrine of completeness to require admission of subsequent statements.[48]

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40. MCM, *supra* note 6, MIL. R. EVID. 106.

41. *Id*. MIL. R. EVID. 304(h)(1)-(2).

42. As the opinion in *Rodriguez* explains,

> [t]he rule of completeness under Rule 304(h)(2) is a tool that is available to the defense if the defense chooses to use it. In the absence of a defense request, the military judge was not called upon to decide whether the rule of completeness applied after references to appellant's confessions were elicited by the defense during cross-examination, and, if so, which statements by appellant were covered by the rule of completeness.

Rodriguez, 56 M.J. at 343.

43. *Id.* at 342.

44. MCM, *supra* note 6, MIL. R. EVID. 304(h)(1)-(2); *cf. id*. MIL. R. EVID. 106.

45. *Rodriguez*, 56 M.J. at 342-43.

46. *See id*.

47. The court stated,

> Appellant has not shown, with respect to any of these communications, that he was somehow precluded from completing the content of his statements. Appellant's subsequent statements, which he sought to introduce at trial under the rule of completeness, were made at a different time, at a different place, and to a different set of persons. Although the latter statements may rebut, explain, or modify the content of his earlier statements, they are not admissible under the rule of completeness because they were not part of the same transaction or course of action.

Id. at 342.

48. *See id*. at 343; United States v. Goldwire, 55 M.J. 139, 142-43 (2001).

In *United States v. Gilbride*,[49] the CAAF addressed whether both an oral and written statement should be considered together for purposes of the rule of completeness. In *Gilbride*, a physician in a local hospital examined the leg injury of the appellant's stepson. The doctor determined that the child had a severe spiral fracture of the left femur and suspected that the injury was the result of child abuse. The physician later testified that the appellant told him that the boy had been injured when he fell from the sofa, and that the child had been able to walk without any problem after the fall. The physician believed this type of injury usually resulted from a child twisting his leg, and that in his opinion, such an injury would have made the child unable to walk without assistance. The doctor reported the suspected abuse to the Air Force Office of Special Investigation (AFOSI).[50]

The AFOSI interviewed the appellant, who waived his rights and answered their questions. He told the agent several different versions of what had happened, but he eventually admitted that his son's leg was injured when the appellant twisted it while trying to dress the child. This admission included a demonstration on a doll the agents provided. After the appellant admitted injuring his stepson, the agent asked him to provide a written statement. The appellant agreed, and his written statement was similar to his verbal statement, except for the following additional information:

> I'm telling the truth when I say that I didn't mean to hurt [JB]. I couldn't ever imagine hurting a little child on purpose and I truly didn't mean to hurt him. I'm not some psychopath child beater. I didn't mean to hurt him, I just wanted to get his pants put back on him.[51]

The appellant was in the AFOSI office for about six hours. The entire interrogation from beginning to end took place during this time. During that six-hour period, the appellant gave both oral and written statements, and no significant break occurred between the statements.[52] The AFOSI agent testified about the substance of the appellant's oral confession. The trial counsel deliberately avoided asking about the written statement. After his direct examination of the AFOSI agent, the trial counsel requested an Article 39(a) session.[53]

During the hearing, the trial counsel tried to prevent the defense from presenting the written statement through cross-examination. The defense counsel argued that the written statement was admissible under both MRE 106 and 304(h)(2). The military judge disagreed, holding that the statement was inadmissible exculpatory hearsay and that it was not needed to complete the statement. The judge did indicate, however, that he would reconsider his decision if the written statement became admissible for some other purpose.[54]

Later during the government's case-in-chief, the trial counsel presented an expert witness to testify about the child's injuries. During cross-examination, the defense counsel asked the expert if he had considered the written statement of the accused before testifying. The doctor admitted that he reviewed the statement. The military judge then allowed the defense counsel to introduce the written statement into evidence. The defense counsel argued that the statement negated the specific intent element of the charged offense, intentional infliction of bodily harm on a child under sixteen years of age. The panel agreed, and instead found the accused guilty of the lesser-included offense of aggravated assault.[55]

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49. 56 M.J. 428 (2002).

50. *Id*. at 429.

51. *Id*.

52. *Id.*

53. Article 39(a), UCMJ states:

> At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty; (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court; (3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and (4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court. These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).

UCMJ art. 39(a) (2002).

54. *Gilbride*, 56 M.J. at 429.

55. *Id*. at 428.

On appeal, the CAAF focused on whether the written statement was separate and unrelated to the oral confession, or part of the same transaction or course of action. They considered the following facts about MRE 304(h)(2) when making that determination: (1) it applies to both written and oral statements; (2) it controls when the defense may introduce applicable evidence; (3) it allows the defense to introduce the remainder of a statement when the remaining matter is partly a confession or admission, or otherwise is explanatory of or relevant to the confession or admission, even when the remaining portions would otherwise constitute inadmissible hearsay, and; (4) it requires a case-by-case determination of whether a series of statements should be treated as part of the original confession or omission or as a separate transaction or course of action for purposes of the rule. Based on these factors, as the court outlined them in *Rodriguez*, the CAAF determined that the trial judge abused his discretion when he excluded the accused's written statement.[56] The CAAF determined, however, that the judge's error did not materially prejudice a substantial right of the accused under Article 59 (a), UCMJ,[57] because the panel acquitted him of the specific intent offense.[58]

This case provides counsel a list of factors they should apply to cases when the accused has made a combination of written and oral statements. While the opinion in *Gilbride* does not make clear whether these factors are exclusive,[59] counsel should be prepared to argue them in light of the facts in their particular cases. Defense counsel seeking to admit their clients' written statements should carefully tie their particular facts to the factors laid out in *Gilbride*, while trial counsel must delineate the differences between their cases and the court's interpretation of the *Gilbride* factors when they argue to exclude such statements. Trial judges should pay particular attention to the factual circumstances surrounding any series or combinations of statements.

The analysis and factors the CAAF provided in Rodriguez—and reiterated in Gilbride—provide defense counsel with a template for arguing that the court must admit such evidence.[60] The weight of recent CAAF authority concerning the rule of completeness, however, suggests that a defense counsel faces an uphill battle when attempting to admit the statements of the accused through the rule of completeness. The CAAF seems particularly reluctant to allow the accused to provide the equivalent of testimony without undergoing the crucible of cross-examination. Defense counsel should also remember that if they successfully introduce this type of information into evidence, they are opening the door to evidence impeaching the accused's character for truthfulness.[61] Trial counsel must take the time to understand these cases to ensure that the defense does not place impermissible evidence before the finder of fact. Defense counsel choosing to use the rule of completeness under MRE 106 or MRE 304(h)(2) will at a minimum place the character of their client for truthfulness squarely in issue. Trial counsel must be prepared to attack the credibility of the accused successfully when that happens.[62]

Hair Analysis and Relevance

United States v. Will[63] is an unreported case that provides insight into potential uses for hair analysis evidence at trial, while addressing the potential relevance of such evidence. The appellant's command charged him with two specifications of wrongful use of methamphetamine in violation of Article 112a, UCMJ.[64] Appellate defense counsel alleged a number of errors at trial, including the military judge's exclusion of a negative hair analysis. The Navy and Marine Corps Court of Criminal Appeals (NMCCA) ruled that the military judge's refusal to conduct a *Daubert* hearing to determine if the defense could introduce evidence of a negative hair analysis was prejudicial error and overturned the case.[65] The court began by noting that

56. *Id.* at 430 (citing United States v. Rodriguez, 56 M.J. 336, 341-42 (2002)).

57. *See* UCMJ art. 59(a) ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.").

58. *Gilbride*, 56 M.J. at 430.

59. *See id*.

60. *See id*.

61. *See* MCM, *supra* note 6, MIL. R. EVID. 608(a).

62. *See id*.

63. No. 9802134, 2002 CCA LEXIS 218 (Army Ct. Crim. App. Sept. 27, 2002) (unpublished). While this unpublished opinion does not serve as precedent, it is a thorough and impartial analysis of the appropriate way to apply *Daubert* and *Houser* factors when determining the admissibility of scientific evidence. It also provides an excellent template for defense counsel who wish to lay the foundation for admissibility or to preserve the issue for appeal.

64. *Id.* at *1. "Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct." MCM, *supra* note 6, pt. IV, ¶ 37(a)-(c).

65. *Will*, 2002 CCA LEXIS 218, at *15. The court noted that the military judge applied the inappropriate standard under MRE 401 for relevance. *Id.*

the standard for review of a trial judge's decision to exclude expert testimony is an abuse of discretion,[66] an interesting backdrop to the analysis of this case.

The appellant was charged with two separate specifications of methamphetamine use, one occurring on 31 December 1996,and the other on 8 December 1997.[67] The government's case relied on the testimony of an expert witness from the Navy drug laboratory to explain the results of the urinalysis reports. The defense presented evidence of the appellant's good character and an alternative theory that prescription drugs caused a false positive screening for methamphetamine, and argued that the appellant's urine specimen may have been the subject of tampering. As part of his theory that the 8 December 1997 urine sample had been tampered with, the appellant had his hair tested at a private lab in February 1998. The laboratory results were negative for methamphetamine.[68] If this testimony was admissible, the appellant had substantive expert evidence refuting the government's 8 December 1997 specification.

The defense made an oral proffer of the expert evidence it expected to introduce and offered the mass spectrometry analysis laboratory report to support its request for a *Daubert*[69] hearing, where the military judge could determine the admissibility of hair analysis testing. The defense counsel attached this laboratory report to the record of trial as an appellate exhibit,[70] and argued that *United States v. Bush*[71] established that evidence of hair analysis is sufficiently reliable for admission on a case-by-case basis. The defense then offered to make a more formal proffer in a question-and-answer form. The government argued that this type of evidence did not meet the *Daubert* standard and opposed its introduction. The military judge agreed with the government and made an initial ruling that the evidence was not relevant.[72] He never held a *Daubert* hearing to determine if the evidence was reliable. More importantly—and contrary to CAAF precedent—he did not address the *Houser* factors that form the military version of *Daubert.* The military judge used his initial lack of relevance determination under MRE 401 to obviate the need for a *Daubert* hearing. The price of this key error was reversal on appeal.

The defense informed the military judge that it intended to call its expert during the defense case-in-chief to lay a foundation for the admissibility of the hair test. When questioned by the military judge, the defense counsel indicated that he was calling the expert witness to qualify him. The military judge refused to allow the defense to call the expert witness. The military judge stated, "I'll stand by my previous rulings. I still think that the testimony of an expert witness would be irrelevant and, if not just irrelevant, I don't want a trial within a trial here."[73] The military judge went on to make specific findings of fact supporting the basis for his ruling that evidence of hair analysis was not admissible.[74]

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66. *Id*. at *4 (citing United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993)). The court described the contents of a sufficient proffer of expert testimony:

> An adequate proffer includes: (1) qualifications of the expert; (2) subject matter of the expert testimony; (3) basis for the expert's opinion; (4) legal relevance of the evidence; (5) reliability of the evidence; and (6) probative value of the testimony.

Id. at *12-13 (citing United States v. Dimberio, 56 M.J. 20, 26-27 (2001); *Houser,* 36 M.J. at 397).

67. *Id.* at *5-10.

68. *Id.* at *5.

69. *See* Kumho Tire v. Charmichael, 526 U.S. 137 (1999); Gen. Elect. v. Joiner, 522 U.S. 136 (1997); Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993).

70. *See Will*, 2002 CCA LEXIS 218, at *12.

71. 47 M.J. 305 (1997).

72. *Will*, 2002 CCA LEXIS 218, at *5.

73. *Id.* at *10 (quoting the Record of Trial at 413).

74. *Id.* The military judge's findings were as follows:

> 1. Request for services of Mr. Velasco is denied. No adequate showing of necessity or relevance. That hair analysis conducted 2 months after the positive test of December 1997 has little, if any probative, value.
>
> 2. Proffered testimony from civilian defense counsel, that Mr. Velasco would testify that "negative test cannot rule out the possibility of use," and proffered testimony from trial counsel, LT Frank, that Mr. Velasco told him that "negative result is not probative of an occasional user" supports court's [sic] finding that Mr. Velasco has no relevant testimony with respect to any hair analysis.
>
> 3. Inasmuch as this court finds Mr. Velasco's proffered testimony to be irrelevant and defense has not attempted [sic] establish the reliability of hair analysis, a legal analysis on hair testing in accordance with *Daubert* . . . is unnecessary. A ruling on admissibility of hair testing is not required in this case.

Id. (quoting the Record of Trial at 413) (citing *Daubert*, 509 U.S. at 579; *Bush*, 47 M.J. at 305).

The NMCCA began its analysis of the military judge's decision by reviewing the rules of evidence concerning relevance. The court noted that all relevant evidence is generally admissible under MRE 402.[75] When determining whether evidence is relevant, the trial judge must make an MRE 401[76] determination. Under MRE 401, evidence is relevant if it has a tendency to make more or less probable a "fact that is of consequence to the determination of the action."[77] The court noted that once the military judge determines that evidence is relevant and generally admissible, he should apply MRE 403, balancing the competing interests for and against admission of the evidence. Military Rule of Evidence 403 allows the exclusion of evidence 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."[78] The NMCCA took issue with the trial judge's MRE 401 determination; it held that the military judge placed an undue burden on the defense through his improper application of MRE 401. This unnecessarily high burden resulted in the exclusion of potentially relevant evidence. The court held that the trial judge's misapplication of MRE 401 was an abuse of discretion.[79]

The court reiterated that the proponent of expert evidence must make an adequate proffer as required under MRE 103[80] and MRE 702.[81] The court cited to the *Houser* factors,[82] including the qualifications of the expert, the subject matter of the testimony, the basis for the opinion, the legal relevance and reliability of the evidence, and the probative value of the testimony.[83] The court specifically noted that the civilian defense counsel had done a more than adequate job of laying the predicate foundation requiring a *Daubert* hearing.[84]

The trial judge found that the hair analysis expert and the results of his testing did not meet the minimally relevant standard required by MRE 401. The appellate court disagreed with the trial judge, holding that the trial judge's decision requiring the defense to show that the evidence they proffered would conclusively negate the government's evidence was an incorrect standard.[85] The appellate court held that the military judge should have held a *Daubert* hearing if the defense showed that the evidence it proffered had a tendency to make an issue of consequence in the case more or less probable than it would be without the proffered evidence. The NMCCA, noting that the threshold for logical relevance is extremely low,[86] held that the defense met that threshold burden, and it was an abuse of dis-

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75. MCM, *supra* note 6, MIL. R. EVID. 402.

76. *Id.* MIL. R. EVID. 401.

77. *Id*. Military Rule of Evidence 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

Id. MIL. R. EVID. 402.

78. 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.

Id. MIL. R. EVID. 403 (emphasis added).

79. *Will*, 2002 CCA LEXIS 218, at *14-15.

80. Military Rule of Evidence 103 states in part:

> (a) 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 (1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .

MCM, *supra*, note 6, MIL. R. EVID. 103(a).

81. Military Rule of Evidence 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.* MIL. R. EVID. 702.

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

83. *Id.* at 397.

84. *Will*, 2002 CCA LEXIS 218, at *15-16.

85. *Id*.

cretion for the military judge not to conduct a *Daubert* hearing.[87]

The court next addressed the issue of an improper spillover instruction regarding the 8 December 1997 and 31 December 1996 specifications. During a preliminary Article 39(a) hearing, the defense moved to sever the two specifications under Article 112(a) and try them separately. The defense team based its motion on the fact that the charged offenses were similar in nature. The military judge denied that request.[88] This meant that the NMCCA could not test his erroneous ruling on the hair analysis issue for prejudice because the court had tried the two drug specifications—one of them potentially rebuttable by the hair analysis—together. The court held that the military judge failed to provide an adequate spillover instruction concerning the 31 December 1996 and 8 December 1997 specifications. It noted that the *Benchbook* has changed the spillover instruction to ensure that judges do not make such mistakes. The court presumed that the panel followed the instructions of the military judge; accordingly, it was impossible for the appellate court to determine the validity of the conviction for the specification that the hair analysis testimony would not have potentially rebutted.[89]

Defense counsel should use *Will* as a template for preserving any issues regarding the admissibility of expert testimony on appeal. The defense made an appropriate proffer under MRE 103, provided the military judge with substantive evidence, offered to make a more in-depth proffer through the preliminary testimony of the expert witness, and attempted, after the military judge ruled against them, to call the expert witness at trial. The defense was careful to tie its proffer to relevant case law, making certain that the type of testimony it sought to introduce met the *Houser* standards to the extent that the military judge would allow during these preliminary issues. The defense counsel's carefully crafted series of proffers, arguments, and substantive case law placed the military judge in a difficult position. He could either grant the *Daubert* hearing and make an adequate determination as to the admissibility of the evidence, or summarily deny the defense the opportunity to show that the evidence was reliable and relevant. The military judge made the wrong call, and the NMCCA overturned the case.

In *United States vs. Cravens*,[90] the CAAF dealt with hair analysis evidence from a different perspective. The appellant was a Staff Sergeant in the Air Force. On 1 April 1998, civilian law enforcement personnel initially stopped him for driving his vehicle in violation of the California Vehicle Code.[91] During the traffic stop, they saw that the appellant had a firearm. One of the law enforcement personnel also thought that the appellant was acting in a manner consistent with someone who had used a stimulant.[92] The officer conducted a variety of field tests and determined that the appellant was under the influence of a stimulant. During the light accommodation test, the appellant volunteered the following, "If you want to know if I did some dope, I did a line earlier," or words to that effect. They arrested the appellant for driving under the influence of an illegal stimulant and locked him up in the county jail. During booking, they offered him the opportunity to provide a urine sample to prove or disprove the presence of the stimulant or legal narcotic in his system. He declined.[93]

The AFOSI learned of the appellant's arrest on 4 April 1997. Based on their experience, the AFOSI agents determined that it was too late to take a relevant urine sample from the appellant, but their training materials indicated it might be possible to identify drug use with a hair sample. Using proper procedures, the agents procured a search warrant and obtained hair samples from the appellant. The samples tested positive for the presence of methamphetamine metabolites. At trial, the military judge allowed the government to admit the results of the hair analysis over defense objection. The government used the results of the hair analysis to corroborate the appellant's admission.[94]

The CAAF addressed the defense arguments that the result of the hair analysis was not admissible under MRE 401 and 403. The appellant argued that the failure of the drug expert to

86. *Id*. at *14 (citing United States v. Schlammer, 52 M.J. 80 (1999)).

87. *Id* at *15.

88. *Id*. The military judge was well within his rights to deny this request. Normally charges are handled in one court-martial. *See* MCM, *supra* note 6, R.C.M. 906(b)(10) and discussion. The fact that the specifications were similar in nature does not require severance. By failing to allow the defense to present evidence rebutting the December 1997 charge, however, the military judge incurred an obligation to properly instruct the members on the impermissible spillover between the two specifications. *See Will*, 2002 CCA LEXIS 218, at *14.

89. *Will*, 2002 CCA LEXIS 218, at *14.

90. 56 M.J. 370 (2002).

91. *Id.* at 370.

92. *Id.* at 371.

93. *Id*. at 372.

94. *Id*. at 373.

segment the hair properly resulted in evidence that could not support the charge of methamphetamine use on or about 1 April 1997. The CAAF disagreed, holding that such evidence was relevant for purposes of corroborating the appellant's confession.[95] The CAAF also addressed the appellant's contention that the nature of such scientific evidence rendered it too confusing for admissibility under the MRE 403 standard. The court noted that the defense cited no legal authority for a *Daubert* attack on the admissibility of hair analysis evidence, and then refused to second-guess the decision of the trial judge in this particular instance to admit such evidence. The CAAF then affirmed the case.[96]

Trial counsel should take note of this application of hair analysis results. When the accused has admitted drug use but too much time has elapsed to conduct a urinalysis, hair analysis may potentially provide enough corroboration for the confession. The difficulty from a proof perspective is that hair analysis will not always give a positive result for an occasional user. When a urine or blood test is impractical, hair analysis is a good way to obtain corroborating evidence. Defense counsel should research and clearly understand the limitations of hair analysis so that from a relevancy standpoint they can exclude this type of evidence when possible.[97]

Reputation and Opinion Evidence—Character Counts

In *United States v. Lowe*,[98] the appellant engaged in a pattern of misconduct from May 2000 through August 2000. He pled guilty at trial, and the military judge found his pleas provident. During the sentencing case, the appellant's defense counsel requested that the military judge relax the rules of evidence.[99] The military judge did so, and the defense counsel then introduced a letter from a Navy psychologist.[100]

In response to the letter by the Navy psychologist, the trial counsel introduced, over defense objection, a seventeen-page incident report with twenty-eight pages of attached statements. The trial counsel offered this sentencing evidence to rebut the information in the Navy psychologist's letter. On appeal, the appellant asserted that the trial counsel's rebuttal evidence constituted impermissible aggravation evidence. The government appellate counsel argued that the evidence was proper aggravation evidence, and in the alternative, that the defense's request to relax the rules of evidence for sentencing allowed the government to admit the type of evidence on rebuttal that would otherwise not be admissible.[101]

The court first considered whether the trial counsel's evidence constituted proper aggravation evidence.[102] If so, then it would be the type of evidence clearly admissible under RCM 1001(b)(4), without the need for classifying it as rebuttal evidence. The court noted that it would have to be evidence concerning a continuous course of conduct involving similar crimes and the same victims. The court determined that in this particular case this evidence did not meet that standard and was not proper aggravation evidence. It next turned to whether it was proper rebuttal evidence.[103]

To determine whether the document was proper rebuttal evidence, the court looked at the impact that MRE 405[104] reputation and opinion evidence has when considered in concert with the relaxation of evidentiary standards contemplated by RCM 1001(c)(3) and RCM 1001(d).[105] The court determined that the requirements of these rules deal with authenticity and reliabil-

95. *Id.* at 374.

96. *Id*. at 376.

97. *See* United States v. Bush, 47 M.J. 305 (1997).

98. 56 M.J. 914 (2002).

99. *See* MCM, *supra* note 6, R.C.M. 1001(c)(3) ("*Rules of evidence relaxed.* The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.").

100. *Lowe*, 56 M.J. at 915 ("During the presentencing phase of Appellant's court-martial, trial defense counsel requested that the evidentiary rules for the court be relaxed, pursuant to [R.C.M. 1001(c)(3)].").

101. *Id.* at 916.

102. Rule for Courts-Martial 1001(b)(4) states in part:

> *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and *immediately resulting from the accused's offense*.

MCM, *supra* note 6, R.C.M. 1001(b)(4) (emphasis added.).

103. *Lowe*, 56 M.J. at 917.

ity, rather than the scope of the evidence presented. The court noted that the governing rule for the admission of reputation or opinion evidence is MRE 405, and remarked that "the Government, under [MRE] 405(c), could have presented a written opinion from another expert to rebut [the psychologist, but] it could not rely upon [MRE] 405(c) as authority permitting extrinsic evidence of specific instances of misconduct to rebut an opinion."[106] The court was not persuaded by the government's argument regarding the relaxation of the rules of evidence, noting that the government was clearly on notice regarding the letter by the Navy psychologist and had ample opportunity to prepare appropriate rebuttal evidence. Their decision not to do so was to the government's detriment.[107]

United States v. Humpherys[108] is a classic character evidence case pitting the testimony of difficult trainees against the word of a lecherous drill sergeant. The government accused the appellant of misconduct with a number of trainees. During a pretrial session, the defense counsel moved to exclude portions of the anticipated testimony of two privates because it contained inadmissible evidence of uncharged misconduct.[109] The military judge ruled that the anticipated testimony was admissible to show intent under MRE 404(b)[110] and conditionally admitted the evidence, subject to review if it did not emerge as anticipated at trial.[111] The witnesses testified as anticipated. The military judge allowed the testimony concerning the uncharged misconduct, but later gave a limiting instruction concerning the use of the uncharged misconduct evidence.[112]

At the close of the government's case-in-chief, the prosecution attempted to offer the appellant's pretrial statement into evidence. The defense counsel objected to the first page of the statement because it also contained evidence of uncharged misconduct.[113] The trial counsel argued that the first page was admissible to show the appellant's course of conduct in violating local regulations, and as rebuttal evidence to the good soldier testimony elicited by the defense through the cross-examination of government witnesses. The military judge admitted the entire sworn statement as proper rebuttal evidence

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104. *Id.*; *see* MCM, *supra* note 6, R.C.M. 405(a). This provision states,

> *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.

Id.

105. *Lowe*, 56 M.J. at 917; *see* MCM, *supra* note 6, R.C.M. 1001(d). This provision states,

> (d) *Rebuttal and surrebuttal.* The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

Id.

106. *Lowe*, 56 M.J. at 917 (citing Únited States v. Wingart, 27 M.J. 128, 134 (C.M.A. 1988)).

107. *Id*.

108. 57 M.J. 83 (2002).

109. *Id.* at 86.

110. *Id*. at 91. 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 6, MIL. R. EVID. 404(b).

111. *Humpherys*, 57 M.J. at 86.

112. *Id*. at 91.

113. *Id*. at 92. Referring to the appellant's statement, the court noted,

> On that page, appellant answered questions about why he took four female trainees, including PVTs Q and F, with him in a van at 12:10 a.m. to go to the hospital to pick up two other soldiers, in violation of local installation regulations. The defense argued that this evidence of misconduct was not relevant to any of the charges or, alternatively, that the danger of unfair prejudice substantially outweighed its probative value.

Id. (citing MCM, *supra* note 6, MIL. R. EVID. 402, 403).

on the issue of whether the accused complied with the Fort McClellan regulation.[114]

The issue raised by these facts is contentious and unsettled. What happens when a court admits otherwise impermissible character evidence? Does the other side then have the ability to admit the same type of impermissible evidence in rebuttal? Some jurisdictions argue that the defense opens the door for admission of this type of rebuttal evidence when it offers improper use of extrinsic acts under the guise of reputation or opinion testimony.[115] In *Humpherys*, the defense counsel arguably used extrinsic acts evidence when he asked a government witness on cross-examination if the accused followed Fort McClellan regulations in his training methods.[116]

The CAAF agreed with the military judge's application of MRE 404(b). It applied the *Reynolds* analysis and determined that the military judge did not abuse his discretion in admitting the evidence.[117] This case serves as another example of the court's reliance upon the factors laid out in *United States v. Reynolds*.[118]

The application of MRE 403 to MRE 404(b) was not the only important issue in *Humpherys*. A more significant development is the CAAF's application of MRE 405 to rebuttal evidence. The majority of the court found this type of evidence to be within the range of appropriate reputation and opinion testimony. The court also noted that even if it had been evidence of impermissible extrinsic acts, the acts in question did not relate to the charged offenses, and still would not have opened the door to improper government rebuttal evidence. The CAAF did not reach the issue of whether improper use evidence opened the door to improper rebuttal evidence. The separate opinion of the concurrence, however, argued for just such a position.[119]

After the military judge ruled that the written statement of the accused was admissible as rebuttal evidence, the trial counsel offered the testimony of two privates to testify about what happened immediately before the events described in the first page of the appellant's sworn statement. When the first private started to testify, the defense counsel objected for lack of relevance. Trial counsel responded that the evidence was offered to rebut the accused's assertion then he did not treat female trainees differently than male trainees. The military judge then allowed the witness to testify over the objection of the defense.[120]

Defense appellant counsel argued that the admission of this evidence violated the restrictions of MRE 404(b). The CAAF disagreed, noting that the military judge admitted this evidence under the theory that it was rebuttal evidence in response to the appellant's good soldier defense.[121] The court reiterated the right of a soldier to present a good soldier defense under MRE 404(a)(1)[122] when evidence of good military character is pertinent to the charged offense. The court recognized that although the government may rebut this type of evidence, case law does not allow for rebuttal evidence to circumvent the restrictions of MRE 405.[123]

The court noted that the error in this case was the form of the rebuttal evidence. The court began by re-establishing that extrinsic evidence of prior acts misconduct is not admissible to rebut opinion evidence of good military character. Those specific acts should form the basis of cross-examination questions for reputation and opinion witnesses. The government may not call other witnesses to testify about those acts. Although the

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114. *Id*.

115. *Id*. ("The separate opinion suggests that appellant 'opened the door' for admission of this evidence. There is a split in authority as to whether an improper use of extrinsic acts by the defense in such circumstances opens the door to rebuttal by the prosecution."); *see also* MCM, *supra* note 6, MIL. R. EVID. 401; United States v. Reed, 44 M.J. 825, 826 (A.F. Ct. Crim. App. 1996). The federal circuit courts of appeal are split regarding this question. *Compare* United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1977) (holding that rebuttal evidence is not permitted), *with* Ryan v. Bd. of Police Comm'rs, 96 F.3d 1076, 1082 n.1 (8th Cir. 1996) (holding that similar rebuttal evidence is permitted).

116. *Humpherys*, 57 M.J. at 92.

117. *Id.*

118. *See* United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989). The CAAF continues to reference its seminal holding regarding the MRE 403 balancing test in *Reynolds*. *See, e.g.*, United States v. Tyndale, 56 M.J. 209, 213 (2001); United States v. Young, 55 M.J. 193, 196 (2001).

119. *Humpherys*, 57 M.J. at 92.

120. *Id*.

121. *Id*.

122. *See* MCM *supra* note 6, MIL. R. EVID. 404(a) ("*Character of the accused.* Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same . . . .").

123. *Humpherys*, 57 M.J. at 93 ("Extrinsic evidence of prior acts of misconduct is not admissible to rebut opinion evidence of good military character. Normally, the prosecution tests such opinion evidence through cross-examination 'into relevant specific instances of conduct.' That procedure was not followed in the present case.") (citations omitted).

CAAF found error, it affirmed based upon a lack of prejudice to the accused. The court noted that the military judge gave a proper limiting instruction concerning this evidence, and that the other evidence of guilt was overwhelming.[124]

Counsel should consider the court's opinions in both *Lowe* and *Humpherys*. Both cases make it clear that MRE 405 does not allow counsel to relax the scope of evidence during sentencing or rebuttal. Counsel should pay particular attention during case development to ensure that evidence offered during the rebuttal phase comports with those evidentiary restrictions. This will normally concern the form of reputation and opinion testimony for a particular character trait of the accused or victim. If both parties are aware of the appropriate format and timing of such evidence, they can properly prepare their case to ensure that the evidence they want to get before the panel gets admitted.

Riding the Privilege Merry-Go-Round

Attorney-Client Privilege

United States v. Pinson[125] dealt with improper disclosure of attorney-client information. The appellant was first tried by court-martial in February 1996. At that court-martial, a witness perjured herself. She later disclosed to civilian police that the appellant forced her to commit perjury by beating and threatening her. She provided several threatening letters to support her allegations. The Naval Criminal Investigative Service (NCIS) and the Icelandic Police initiated separate investigations into her allegations. NCIS obtained a search authorization for the appellant's quarters. During the search, they seized several books containing the appellant's writings and comments about the victim. Some of those writings allegedly contained attorney-client privileged material.[126]

The CAAF noted the following facts when beginning its analysis of this issue: (1) the government did not use any privileged documents as direct evidence at trial; (2) the NCIS seized the documents in question properly; (3) the NCIS temporarily gave the documents to the Icelandic police; (4) at the time the NCIS agents seized the documents, none of the investigators recognized the documents as potentially privileged information; (5) no one recognized that the documents were potentially privileged until the trial counsel discovered this fact, one year after seizure; and (6) with the exception of the superintendent for the Icelandic police, no other individual had read the content of the documents in question. The court then noted that these documents were only used for handwriting exemplars and their comparisons.[127]

The CAAF specifically identified other measures the trial court took to ensure that the attorney-client privilege was protected. Those measures included findings by the military judge that the contents of those documents had been fully disclosed through communications to others, that none of the material was used directly or indirectly against the accused at his second court-martial, and that, as a matter of law, comparing the physical appearance of the accused's lawfully seized handwriting is not protected by the attorney-client privilege. The appellant conceded that the government did not use any privileged information against him at trial, but argued in the alternative that the government indirectly produced privileged documents as exemplars and comparisons. The appellant argued that this required dismissal and a new indictment. The CAAF disagreed.[128]

In its opinion, the CAAF noted that the Supreme Court has addressed the standard for granting a new trial based on violation of the attorney-client privilege. The CAAF pointed out that in *Weatherford v. Bursey*,[129] the Supreme Court refused to adopt a per se rule that any interference with the attorney-client privilege required reversal.[130] The CAAF also considered cases in which agents of the government met with suspects they knew to be represented by counsel.[131] Absent substantial temporary or permanent damage to the quality of the representation, the court noted that this, in and of itself, did not demand reversal of

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124. *Id.*

125. 56 M.J. 489 (2002).

126. *Id.* at 490.

127. *Id.*

128. *Id.* at 491.

129. 429 U.S. 545 (1977). This case involves an undercover agent who was arrested with his co-conspirator for breaking into a Selective Service office. The agent remained undercover before trial, and met with his co-conspirator and their defense attorney on two occasions. The undercover agent was careful to not discuss any information with his superiors or the prosecuting attorney for that case, and never volunteered information for either the defense counsel or his co-conspirator. Although the court held that the government violated the defendant's attorney-client privilege, it also held that the violation did not require reversal in this instance. *Id.* at 551.

130. *Pinson*, 56 M.J. at 492.

131. *See* United States v. Morrison, 449 U.S. 361 (1981). In this case, the DEA agents met with the defendant outside the presence of his attorney, knowing he had counsel. The court looked to see if the defendant could demonstrate any prejudice to the attorney-client relationship. *Id.* at 364.

the conviction.[132] When the appellant cannot show demonstrable prejudice or the substantial threat of prejudice, the remedy for a violation of the attorney-client privilege is to deny the prosecution the fruits of the transgression. The court held that the use of the privileged documents to obtain handwriting examples was not an improper use and ruled that the military judge's decision at trial was not an abuse of discretion.[133]

Priest-Penitent Privilege

In *United States v. Benner*,[134] the CAAF dealt with the intersection of an accused's right against self incrimination and the "priest-penitent," or "communications with clergy," privilege. The appellant was stationed with his wife and stepdaughter in Babenhausen, Germany. In May 1998, the appellant performed sodomy and indecent acts on his four-year-old stepdaughter while his wife was in the hospital. The following month, the stepdaughter told her grandmother about the abuse. Later, when her mother got out of the hospital, the victim told her mother about being abused. The mother confronted the appellant, who confessed to his wife. No member of the family informed the chain of command or told the military police. The grandmother took the child back to her home in the United States. The mother also left Germany and joined her mother and daughter.[135]

In September 1998, the appellant decided to seek counsel from Chaplain (Captain) S. He did so in part at the urging of his wife. When he met with the chaplain for the first time, the appellant was extremely emotional. He confessed to the chaplain that he had had an inappropriate relationship with his stepdaughter. The chaplain told the appellant at the end of their meeting that he might have to report the child abuse. After meeting with the appellant, the chaplain called the Army Family Advocacy office. A representative of the office told the chaplain that he was required to report the abuse.[136] This advice was specifically contrary to MRE 503,[137] the requirements of *Army Regulation* (*AR*) *165-1*,[138] and *AR 608-18*.[139]

The next time he met with the appellant, the chaplain told him that he had to report the earlier admission of child abuse. The appellant then broke down and confessed to even more details about how he sexually abused his daughter.[140] Upon hearing the additional details, the chaplain told the appellant that it would be better for him to confess to the authorities on his own. The chaplain then offered to go with him to the military police station. The chaplain told the appellant how forgiveness included forgiving himself, and that confessing might be a step the appellant could take to begin seeking forgiveness. The appellant did not want to go to the military police station. At trial, the chaplain testified that, in his opinion, if he had not volunteered to go to the station with the appellant, he doubted that the appellant would have reported himself. The chaplain

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132. *Id.*

133. *Pinson*, 56 M.J. at 493.

134. 57 M.J. 210 (2002).

135. *Id.* at 211.

136. *Id*.

137. Military Rule of Evidence 503 states:

> (a) *General rule of privilege.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.
> (b) *Definitions.* As used in this rule—
> (1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.
> (2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.
> (c) *Who may claim the privilege.* The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

MCM, *supra* note 6, MIL. R. EVID. 503.

138. U.S. DEP'T OF ARMY, REG. 165-1, CHAPLAIN ACTIVITIES IN THE UNITED STATES ARMY para. 4-4 (26 May 2000) [hereinafter AR 165-1]. This provision lays out the requirements that any communication that is a formal act of religion or matter of conscience cannot be disclosed to a third person if the individual making the communication does not want it disclosed. Chaplains are directed to not divulge privileged communications without the written consent of the person(s) authorized to claim the privilege. *Id.*

139. U.S. DEP'T OF ARMY, REG. 608-18, THE FAMILY ADVOCACY PROGRAM (1 Sept. 1995) [hereinafter AR 608-18].

140. *Benner*, 57 M.J. at 211.

eventually convinced the appellant to go to the military police station and accompanied him there.[141]

When they got to the station, the chaplain told the Military Police commander that the appellant was there to make a statement about his "improper relationship with his stepdaughter."[142] The commander called CID, and two agents arrived about an hour later. They advised the appellant of his rights under the Fifth Amendment, Article 31(b), UCMJ, and MRE 305(d). The CID agents did not give a "cleansing" warning about the appellant's earlier confession to the chaplain. The appellant waived his rights and eventually produced a detailed, six-page, handwritten confession.[143]

The CAAF began its analysis by reiterating that the prosecution must establish that a confession was voluntary by a preponderance of the evidence to introduce it at trial.[144] The court noted that the question of whether a confession was voluntary is an extremely important one. In accordance with Supreme Court precedent,[145] the CAAF stated that it reviews a military judge's determination that a confession was voluntary de novo. Having established the standard of review and the court's ability to address the issues raised, the court then discussed the history and application of the priest-penitent privilege.[146]

The court next described how confidentiality between a priest and penitent has been recognized as one of the most sacred privileges at common law. The military justice system recognized this in the *1951 Manual for Courts-Martial*,[147] and when the Military Rules of Evidence were promulgated, MRE 503 expressly recognized a "communications to clergy" privilege.[148] The court noted that *AR 165-1* and *AR 608-18* both recognize this privilege.[149]

The dual nature of a chaplain in the military as an officer and a member of the clergy is important to this case. As a member of the clergy, any communication between the chaplain and a penitent that falls under MRE 503 and *AR 165-1* is protected. The chaplain cannot disclose the contents of that communication without the consent of the penitent. When the chaplain is acting solely as an officer, however, he has a duty under *AR 608-18* to report any instance of child abuse to the appropriate authorities.[150] The court noted that in this case, the chaplain became confused between his responsibilities as an officer and as a chaplain. He ultimately acted as an army officer, and that decision violated MRE 503, *AR 165-1*, and *AR 608-18*. The court applied the particular circumstances involved in this violation of the priest-penitent privilege and determined that the confession of the appellant was involuntary. It noted that the actions of the chaplain forced the appellant to confess and violated the privilege, and that the actions of the CID agents in taking his confession did not overcome the appellant's resulting lack of free will. The CAAF noted that under these circumstances, due process was offended, and remanded the case.[151]

Any trial counsel handling a similar issue in the future should concentrate on developing the facts to support an argument that the appellant confessed voluntarily. If the appellant freely chose to make the confession, then he has waived the privilege. Trial counsel who cannot lay that foundation should consider Chief Judge Crawford's dissent in this case. The Chief Judge raises an interesting issue concerning the application of an exclusionary rule based upon the violation of a privilege.

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141. *Id.* at 213.

142. *Id.* at 212.

143. *Id*. Article 31, UCMJ, states,

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

UCMJ art. 31(b) (2002).

144. *See* United States v. Bubonics, 45 M.J. 93, 95 (1996).

145. *See* Arizona v. Fulminante, 499 U.S. 279 (1991).

146. *Benner*, 57 M.J. at 212.

147. *Id.* (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. III, ¶ 151b(2) (1951)) ("Also privileged are communications between a person subject to military law and a chaplain, priest, or clergyman of any denomination made in the relationship of penitent and chaplain, priest, or clergyman, either as a formal act of religion or concerning a matter of conscience.").

148. *See* MCM, *supra* note 6, MIL. R. EVID. 503; *supra* note 137.

149. *Benner*, 57 M.J. at 212 (citing AR 165-1, *supra* note 138, para. 4-4m; AR 608-18, *supra* note 139, para. 3-9).

150. *Id.* at 213 (citing AR 608-18, *supra* note 139, para. 3-9).

151. *Id.* at 214.

She notes that the court has never before excluded evidence based upon a privilege. While this argument is interesting, it does not fully consider the position of the majority. The majority was careful to base its decision to remand this case on the involuntary nature of the appellant's confession, not the mere violation of the privilege.[152] While the effect in this case is to exclude the confession, the court narrowly decided the issue based on the involuntary nature of the appellant's actions. Future cases that lack this degree of specificity are unlikely to have the same result based solely upon a violation of the priest-penitent privilege. Trial counsel should nonetheless consider the arguments in the Chief Judge's dissent when they look for ways to convince a trial judge to not exclude a confession based solely upon a prophylactic violation of the privilege.

In *United States v. Walker*,[153] the Army Court of Criminal Appeals (ACCA) and the CAAF considered whether the trial judge erroneously admitted information protected by the husband-wife privilege.[154] The appellant was charged with sexually abusing his daughter's eleven-year-old friend during a sleepover. The victim testified at trial, and after cross-examination, the trial counsel called an expert rebuttal witness to explain the reasons that victims of abuse often delay reporting. The trial counsel next introduced—over defense objection—a redacted statement the appellant's wife made to a CID agent. That statement read as follows: "Around 17 Aug 97, I returned to Illesheim from Poland. [The appellant] did tell me what happened; however, I do not wish to disclose what he said."[155] The appellant's daughter testified, refuting portions of the victim's testimony. The appellant also testified.[156]

The ACCA reviewed the case and determined that the military judge erred in admitting the wife's statement to the CID agent. The court concluded that the appellant's wife had invoked the spousal privilege in her statement to the CID agent.[157] At trial, the trial counsel had argued that the appellant's statement to his wife was admissible as an admission by a party opponent under MRE 801(d)(2).[158] The trial counsel also argued that the statement was admissible under the residual hearsay exception.[159] The defense counsel countered by arguing that the statement was a "confidential communication" and privileged under MRE 504(b).[160] The court noted that the wife's statement to the CID agent did not constitute an admission by the appellant, but was instead an assertion of privilege.[161] Having determined that the statement by the wife to CID was an assertion of privilege, the court ruled that admission of the statement was error. The court held, however, that

152. *See id*.

153. 54 M.J. 568 (Army Ct. Crim. App. 2000), *rev'd*, 57 M.J. 174 (2002).

154. *Id*.; *see* MCM, *supra* note 6, MIL. R. EVID. 504.

155. *Walker*, 54 M.J. at 570.

156. *Id.*

157. *Id.* at 571.

158. *Id*. at 570. Military Rule of Evidence 801(d)(2) defines admissions of party opponents as follows:

> *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 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 the 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).

MCM, *supra* note 6, MIL R. EVID. 801(d)(2) (emphasis added).

159. *Walker*, 54 M.J. at 570.

160. Military Rule of Evidence 504, the husband-wife privilege, defines the privilege as follows:

> (b) *Confidential communication made during marriage.* (1) General rule of privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

MCM, *supra* note 6, MIL R. EVID. 504(b)(1).

161. *Walker*, 54 M.J. at 571 ("The second phrase, in essence, constitutes Mrs. Walker's invocation of her privilege not to reveal confidential spousal communications, pursuant to MRE 504(b).").

while the military judge may have abused her discretion, the error was harmless. The ACCA affirmed the case.[162]

The CAAF reviewed the ACCA's holding de novo. The CAAF's opinion begins by noting that both parties briefed and argued the issue as a non-constitutional evidentiary error. The court reiterated the test for review of both constitutional and non-constitutional error, and then stated that because the government failed to meet the burden for either standard, the court did not need to decide whether the error was constitutional. The CAAF focused on the nature of this specific trial, noting that in the final analysis, it came down to a credibility contest between the appellant and the victim. The court discussed the erroneous decision of the military judge to admit the alleged statement, and how the trial counsel's impermissible inference argument in closing compounded the earlier error. Given the close nature of the credibility issues at trial, the court was left in grave doubt as to the whether the military judge's erroneous admission of the statement was harmless. Based on these grave doubts, the court concluded that it had no choice but to reverse the case.[163]

It is imperative that trial counsel make clear, cogent, and relevant arguments for the admissibility of evidence. The record indicates that the trial counsel failed to develop the evidentiary issues fully. A parsing of the appellant's wife's actual statement to the CID agent clearly establishes that it never contained a statement by the appellant.[164] A review of MRE 504 and MRE 512 should have shown the trial counsel that the evidence proffered at trial was an invocation of privilege and not admissible. The fact that the trial counsel chose to argue in the alternative for admissibility under the residual hearsay rule[165] clearly indicated the existence of faulty evidentiary logic or admissibility problems.

Military judges should listen carefully to the arguments posited by counsel. When counsel begin to argue residual hearsay in situations that do not involve prior statements by child abuse victims, alarm bells should go off. In this case, no one heard the bells ringing. Defense counsel dealing with similar issues must make certain that they adequately preserve their objections under MRE 103.[166] They must make timely objections and state them with specificity. When the issue is the potential exclusion of evidence, counsel must also make offers of proof. Defense counsel must ensure that military judges rule on their objections; when they lose, they must note the basis for their objections on the record. Finally, the CAAF's treatment of this case is an indication of its continued commitment to fully developing the boundaries of applicable evidentiary rulings at trial.

Out of Court Statements—Hearsay

Medical Treatment Exception

In *United States v. Hollis*,[167] the CAAF expanded the boundaries of MRE 803(4),[168] admitting statements of a child about witnessing her sister's sexual abuse. The child made those statements during a physical examination performed by a doctor, Captain Craig, at the request of the defense counsel. Before the examination, the appellant and his children were stationed in Italy, where one of the daughters told their nanny that her father had sexually abused her. The nanny took the child to her

162. *Id.*

163. United States v. Walker, 57 M.J. 174, 178 (2002).

164. *Walker*, 54 M.J. at 570.

165. *See id*.

166. Military Rule of Evidence 103(a) states as follows:

> Ruling on Evidence. (a) *Effect of erroneous ruling.* 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
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) *Offer of proof.* 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. The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

MCM, *supra* note 6, MIL R. EVID. 103(a).

167. 57 M.J. 74 (2002).

168. Military Rule of Evidence 803(4) states,

> (4) *Statements for purposes of medical diagnosis or treatment.* Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

MCM, *supra* note 6, MIL. R. EVID. 803(4).

pediatrician. The pediatrician saw the child and told her that he would help her and that she should tell the truth. He then took a medical history from the child, who told him of the sexual abuse.[169] At the end of the interview, the pediatrician invited other personnel present—including a special agent—to ask questions. The pediatrician then performed a complete physical exam. Afterwards, the children were removed from the appellant's home, and they went to live with their grandparents in the United States.[170]

Before trial, the appellant's defense attorney contacted the family and asked them to allow Captain Craig to interview the children. The defense's theory was that another perpetrator had committed the abuse when the children lived with their mother. They wanted their own expert to interview the children to determine if this theory was viable. Captain Craig interviewed the children and asked them about their mother's boyfriend, and whether he had abused them. One child said that her mother's boyfriend had done something bad to her but that she did not want to talk about that. When Captain Craig began to ask about Italy, one of the girls told her that something "bad" had happened with her father in Italy in the bedroom. She then told Captain Craig that her father told her not to tell anyone about what they did because he could go to jail.[171] The child was so emotionally upset by telling Captain Craig about the abuse that he terminated the interview. Captain Craig returned later and conducted a physical examination of the abused child and her younger sister. During the examination of the younger sister, she told Captain Craig that she had seen her father doing "yucky" and "bad" things to her older sister.[172]

At trial, the military judge admitted the testimony of the treating pediatrician and Captain Craig, over defense objections. The judge held that the statements of the older sister to both physicians fell under MRE 803(4) and were clearly admissible.[173] The judge ruled that the statements of the younger sister to Captain Craig during her examination were also admissible under MRE 803(4).[174] The CAAF agreed.[175]

The CAAF began its analysis by noting that the state of mind of the individual making the statement to treating medical personnel is a preliminary question of fact under MRE 104(a).[176] The court noted that the testimony of the treating official can establish the patient's state of mind, and that the military judge is responsible for ensuring that the evidence meets both prongs of MRE 803(4). Once a court rules on the admissibility of the evidence at trial, an appellate court will not overturn the decision on appeal unless it is clearly erroneous. Based on this standard and the facts, the CAAF affirmed the case. Judge Effron's concurring opinion, however, indicates that the court is beginning to express some concerns about the expansion of MRE 803(4). Despite his reservations, Judge Effron noted that although his application of the facts to the second prong of MRE 803(4) would have required excluding the statements of the younger girl to Captain Craig, the overwhelming evidence against the appellant rendered that error harmless.[177]

Counsel should consider the concurring opinions of Judge Effron and Judge Sullivan as they prepare to use MRE 803(4) at trial. Trial counsel must ensure they lay adequate foundations for both prongs of MRE 803(4) before offering evidence of this nature. Defense counsel should attack attempts by trial counsel to lay foundations for such evidence, paying particular attention to the patient's state of mind. While the trial counsel can lay the foundation for this kind of testimony by questioning the treating physician, the defense counsel should consider conducting a strenuous voir dire of the physician, supported by testimony from the alleged victim and other individuals present during the medical treatment. The ability to show inconsistencies between different witnesses may be sufficient to keep the evidence out—that is, if the CAAF begins to consider the foundations for admitting this evidence more closely in the future.

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169. *Hollis*, 57 M.J. at 76.

170. *Id.* at 77.

171. *Id.*

172. *Id.* at 78.

173. *Id.*

174. *Id.* at 75.

175. *Id.* at 80.

176. Military Rule of Evidence 104(a) states,

> *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, *the admissibility of evidence*, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

MCM, *supra* note 6, MIL. R. EVID. 104(a) (emphasis added).

177. *Hollis*, 57 M.J. at 81-82 (Effron & Sullivan, JJ., concurring).

Business Record Exception—Corroborating a Confession

In *United States v. Grant*,[178] the CAAF dealt with a question of first impression for the military courts—the requirements for a foundation under the business record exception[179] when the business record in question is created by a third party, the third party is not present before the court, and the record is incorporated into the business records of the testifying party. This issue arose under an interesting set of circumstances. The ruling of the court could have long-term consequences for how the military handles the prosecution of drug cases.

In *Grant*, the appellant was stationed at an Air Force Base in Turkey. He was found unconscious at a club complex and taken to a base hospital. The on-call emergency room doctor followed standard protocol and ordered a screening urinalysis. The hospital released the appellant before it received the urinalysis results. The record of the urinalysis test indicated the presence of cannabinoids.[180] The lab report did not indicate the specific amount, and the record does not indicate that the testing facility used the standard Department of Defense nanogram cutoff levels.[181] The hospital personnel did not make a record of the urine sample's chain of custody or use standard evidence handling procedures when they sent the sample to the laboratory for testing. The hospital forwarded the results of the test to the local AFOSI office. When AFOSI special agents interviewed the appellant, he confessed to using an illegal substance.[182]

At trial, the government offered the results of the urine test as a business record under MRE 803(6). The lab results themselves were self-authenticating under MRE 902(4)(a).[183] The government specifically offered the lab results as a business record for the limited purpose of corroborating the appellant's confession. The government called two witnesses to lay the appropriate business record foundation.[184]

The CAAF addressed the question of whether one business entity could rely upon a third party's preparation of a portion of its business record. In *Grant*, the government introduced the third-party laboratory's test results as a part of the hospital business records, even though the hospital did not have control over the laboratory's testing procedures, and received the results of the report as an e-mail.[185] The court noted that this was a case of first impression for the military and looked to federal courts for guidance on how to apply this fact scenario to MRE 803(6).[186]

Federal jurisdictions consider business records containing portions of another business's records to be admissible if: (1)

178. 56 M.J. 410 (2002).

179. Military Rule of Evidence 803(6) governs the hearsay exception for business records. It states:

> *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilation normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

MCM, *supra* note 6, MIL. R. EVID. 803(6).

180. *Grant*, 56 M.J. at 412.

181. *See generally* Major Walter M. Hudson & Major Patricia A. Ham, United States v. Campbell*: A Major Change for Urinalysis Prosecutions?*, ARMY LAW., May 2000, at 38 (discussing the unique requirements for urinalysis prosecutions which include considerably more foundation than the prosecution laid in *Grant*).

182. *Grant*, 56 M.J. at 412.

183. Military Rule of Evidence 902(4)(a) states:

> *Documents or records of the United States accompanied by attesting certificates.* Documents or records kept under the authority of the United States by any department, bureau, agency, office, or court thereof when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

MCM, *supra* note 6, MIL. R. EVID. 902(4).

184. *Grant*, 56 M.J. at 413-14.

185. *Id.* at 412.

186. *Id.* at 414.

the second business integrates the first business's record into its own record; and (2) the second business relies on such records in the ordinary course of its business. In federal court, a proponent can lay the foundation for admissibility of this type of business record through the testimony of a qualified witness from the incorporating entity.[187] For that testimony to be sufficient, the proponent must satisfy four tests: (1) the incorporating entity received the record in question; (2) the incorporating entity kept the record in the normal course of business; (3) the incorporating entity relies on the incorporated record in its normal course of business; and (4) other circumstances indicate the trustworthiness of the record. The CAAF adopted and applied the federal test to the facts in *Grant*.[188] The court held that the government laid the appropriate foundation, and that the drug test in *Grant* was admissible for the limited purpose of corroborating a confession.[189]

This case could potentially have far-reaching consequences for military practice. It is common for CID agents to bring soldiers in for questioning after positive urinalysis results. Soldiers often admit to illegal drug use when the agents question them. Under *Grant*, the business record exception should permit the government to introduce a laboratory report to corroborate the accused's confession without bringing the technician from the laboratory to testify about the validity of the drug testing. While the defense could request the technician as a witness, the government would not need to do so to prove its case. This would force the defense to call the technician in its own case-in-chief, thereby losing the opportunity to cross-examine him. This presents a much easier way for the government to corroborate confessions.

Trial counsel should be able to use the unit Prevention Leader[190] or the post drug testing and screening office to lay the predicate foundation to admit the results under the rubric of a business record. This could change the way trial counsel prosecute drug cases when the only reason for admitting the results of the urinalysis is to corroborate a confession. Perhaps this case will point the way out of the circular fields of thought that have dominated urinalysis cases over the last two years. While this development is limited to corroboration cases, it simplifies and streamlines the prosecution of cases when a confession exists. It also increases the pressure on defense counsel to justify calling drug experts from the laboratory, and to deal with them as witnesses for the defense.

Conclusion

Each year brings a new crop of evidentiary rulings that further develop the vast field of evidentiary jurisprudence. The reasoned and measured opinions of the CAAF exhibit a continued interest in the proper growth and maturation of evidence law in the military courtroom. The CAAF appears to realize that the most important decisions are made at the trial level. The evidentiary decisions of trial judges have a tremendous impact on the ability of either side to try cases, and the decisions of the CAAF this year provide welcome guidance to members of the judiciary facing difficult and complex evidentiary issues. These decisions have fertilized those fields that needed it while pruning back other overgrown branches of evidentiary law. It remains to be seen what new plants will spring forth from the seeds the court planted during the last year, but as surely as the rain falls, they will grow. With proper attention and application of the law by trial judges and learned counsel, perhaps next year's crop of evidence will not grow in circles.

187. *Id.* (citing Air Land Forwarders, Inc. v. United States, 172 F.3d 1338 (Fed. Cir. 1999); MRT Constr., Inc. v. Hardrives, 158 F.3d 478 (9th Cir. 1998); United States v. Doe, 960 F.2d 221 (1st Cir. 1992); United States v. Jakobetz, 955 F.2d 786 (2d Cir. 1992); United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978); United States v. Carranco, 551 F.2d 1197 (10th Cir. 1977)).

188. *Id.* at 415.

189. *Id.* at 416.

190. The Unit Prevention Leader is formally known as the Unit Drug and Alcohol Coordinator. *See generally* U.S. DEP'T OF ARMY, ARMY CENTER FOR SUBSTANCE ABUSE PROGRAMS (ACSAP), COMMANDER'S GUIDE & UNIT PREVENTION HANDBOOK, at II-1 (1 June 2002).