

## New Developments in Evidence for the 2004 Term of Court

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### Introduction

Past commentators have noted the apparent difficulty of harmonizing the Court of Appeals for the Armed Forces' (CAAF) evidentiary opinions.<sup>1</sup> Indeed, given the wide variety of evidentiary issues faced by the CAAF and the unique needs of the military justice system, it is virtually impossible to find a universal unifying principle in the court's decisions in any given year. The 2004 term of court was no exception. For example, the CAAF continued its recent trend of holding the line on the improper admission of uncharged misconduct evidence,<sup>2</sup> even as it stretched the rule requiring corroboration of an accused's confession almost beyond recognizable limits.<sup>3</sup>

This article will discuss and analyze the CAAF's cases from the 2004 term of court, proceeding sequentially throughout the military rules of evidence. This year's term addressed cases concerning the following: the objection and waiver doctrine of Military Rule of Evidence (MRE) 103;<sup>4</sup> the corroboration rule for confessions of MRE 304(g);<sup>5</sup> uncharged misconduct and MRE 404(b);<sup>6</sup> the rape shield rule of MRE 412;<sup>7</sup> the waiver and improper disclosure provisions related to privileges under Section V of the MRE;<sup>8</sup> classified evidence and MRE 505;<sup>9</sup> the interplay between impeachment evidence under MRE 608(c)<sup>10</sup> and the MRE 403<sup>11</sup> balancing test; mode and order of interrogation and presentation under MRE 611;<sup>12</sup> an issue of first impression regarding lay opinion testimony and MRE 701;<sup>13</sup> the permissible limits of and basis for expert opinion testimony in child abuse cases under MRE 702<sup>14</sup> and 703;<sup>15</sup> and authentication of audio recording transcripts under MRE 901.<sup>16</sup>

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<sup>1</sup> See, e.g., Major Charles H. Rose, *New Developments: Crop Circles in the Field of Evidence*, ARMY LAW., Apr./May 2003, at 43 (comparing evidentiary decisions to the mysterious crop circles that sometimes appear without apparent explanation at various locations throughout the world).

<sup>2</sup> See *infra* notes 62-79 and accompanying text.

<sup>3</sup> See *infra* notes 42-60 and accompanying text.

<sup>4</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 103 (2002) [hereinafter MCM].

<sup>5</sup> *Id.* MIL. R. EVID. 304(g).

<sup>6</sup> *Id.* MIL. R. EVID. 404(b).

<sup>7</sup> *Id.* MIL. R. EVID. 412.

<sup>8</sup> *Id.* MIL. R. EVID. 510 and 511.

<sup>9</sup> *Id.* MIL. R. EVID. 505.

<sup>10</sup> *Id.* MIL. R. EVID. 608(c).

<sup>11</sup> *Id.* MIL. R. EVID. 403.

<sup>12</sup> *Id.* MIL. R. EVID. 611.

<sup>13</sup> *Id.* MIL. R. EVID. 701.

<sup>14</sup> *Id.* MIL. R. EVID. 702.

<sup>15</sup> *Id.* MIL. R. EVID. 703.

<sup>16</sup> *Id.* MIL. R. EVID. 901.

## Cases from the 2004 Term of Court

### Rule 103: Ruling on Evidence

One of the key aspects of MRE 103 is the objection and waiver doctrine, which requires a party to make timely objections to evidentiary rulings or risk waiving the issue on appeal.<sup>17</sup> *United States v. Kahmann*<sup>18</sup> presents the issue of whether the objection and waiver doctrine of MRE 103 applies to the admission at sentencing of non-judicial punishment or summary-court martial records.

The appellant in *Kahmann* was convicted at a special court martial (SPCM) of unauthorized absence.<sup>19</sup> During the pre-sentencing proceedings, the government introduced a summary court-martial conviction for unauthorized absence from the appellant's personnel records.<sup>20</sup> The document did not expressly state whether the appellant had been provided with an opportunity to consult with counsel prior to electing trial by summary court-martial,<sup>21</sup> nor did it expressly state that a required legal review had been completed under Uniform Code of Military Justice (UCMJ), Art. 64.<sup>22</sup> Defense counsel did not object at trial to the admissibility of the document.<sup>23</sup> The Navy-Marine Court of Criminal Appeals (NMCCA) affirmed the conviction, relying on the objection and waiver doctrine of MRE 103,<sup>24</sup> and the CAAF granted review.<sup>25</sup>

In affirming, the CAAF held that the military judge did not commit plain error in admitting the summary court-martial conviction.<sup>26</sup> The CAAF focused on two allegations of error: first, whether the record of conviction was inadmissible because it did not state expressly that the appellant had been afforded the right to consult with counsel prior to accepting trial by summary court-martial; and second, whether the record was inadmissible because of its failure to state expressly on its face that the required legal review under Art. 64 had been conducted.<sup>27</sup>

The CAAF began its analysis with a review of the objection and waiver provisions of MRE 103, noting that in the absence of plain error, a ruling admitting evidence will not be reversed on appeal unless there was an appropriate objection at trial.<sup>28</sup> Although the CAAF had merely suggested it in the past,<sup>29</sup> it expressly held for the first time in *Kahmann* that MRE 103 governs admissibility of records of non-judicial punishment (NJP) and summary courts-martial.<sup>30</sup> While *United States v.*

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<sup>17</sup> See *id.* MIL. R. EVID. 103. The rule states:

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 . . . .

*Id.* The rule preserves the ability of an appellate court to identify and rule on plain error. *Id.* MRE 103(d).

<sup>18</sup> 59 M.J. 309 (2004).

<sup>19</sup> *Id.* at 312.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 313. UCMJ art. 20 and Rule for Court-Martial (RCM) 1303 grant an accused the right to refuse trial by summary court-martial. UCMJ art. 20 (2002); MCM, *supra* note 4, R.C.M. 1303. In a background section of the *Kahmann* opinion, the CAAF noted that the servicemember's decision whether to refuse trial by summary court-martial is important. "In recognition of the key role that counsel can play in advising a service member at that point," stated the CAAF, "our Court has limited the admissibility of such records when the accused has not had the opportunity to consult with counsel." *Kahmann*, 59 M.J. at 311 (citations omitted).

<sup>22</sup> *Kahmann*, 59 M.J. at 313. Article 64 of the UCMJ provides for review by a judge advocate of "[e]ach case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (art. 66 or 69(a))." UCMJ art. 64.

<sup>23</sup> *Kahmann*, 59 M.J. at 312.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 314.

<sup>27</sup> *Id.* at 313.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (citing *United States v. Dyke*, 16 M.J. 426, 427 (C.M.A. 1983)).

<sup>30</sup> *Id.*

*Booker*<sup>31</sup> requires that an accused receive the opportunity to consult with counsel prior to accepting non-judicial punishment or trial by summary court-martial,<sup>32</sup> proof of opportunity to consult with counsel is not an evidentiary requirement for admissibility of NJP or summary court-martial records at sentencing.<sup>33</sup> It is preferable for a summary court-martial record to state on its face that the accused had the opportunity to consult with counsel, but the admissibility of the record does not depend on such a statement; the government can present other evidence that the accused was afforded an opportunity to consult with counsel.<sup>34</sup>

The CAAF rejected appellant's argument that administrative irregularities in the summary court-martial record constituted plain error, reasoning that the government's failure to comply with non-binding regulatory provisions does not constitute prejudicial plain error.<sup>35</sup> The CAAF distinguished *Kahmann* from *United States v. Dyke*,<sup>36</sup> in which the Court of Military Appeals (COMA) held that a military judge should have excluded on his own motion a document that was prejudicially incomplete on its face because it was blank in four places where the signature of either the appellant or his commander should have appeared.<sup>37</sup>

The CAAF made short work of the second issue, whether there was plain error in the absence of a facial indication on the summary court record that an Art. 64 review had been conducted. The appellant failed to identify "any statutory, regulatory, or judicial requirement to place such a notation on a document summarizing a conviction by a summary court-martial."<sup>38</sup> The appellant's right to ensure that a conviction entered into evidence meets the requirements of R.C.M. 1001(b)(3) is sufficiently protected by the opportunity to object provided by MRE 103.<sup>39</sup>

Then-Chief Judge Crawford concurred with the result, agreeing that the appellant had waived the issue in this case, but she excoriated the majority for "misapplying" the Supreme Court case of *Middendorf v. Henry*, which held that the right to counsel does not apply at summary courts-martial.<sup>40</sup> She wrote that it was time for the CAAF to stop imposing "by judicial decree a right to counsel prior to accepting Article 15s and summary courts-martial."<sup>41</sup>

*Kahmann* reinforces the significance of the objection and waiver doctrine for counsel. At sentencing, no less than on the merits, defense counsel have a duty to identify errors and object to them. Documents that contain minor administrative irregularities may still be admissible, and a counsel who fails to object to the underlying defects (for example, failure to actually provide *Booker* rights or conduct a required Art. 64 review of a summary court-martial conviction) will waive on appeal the issue of whether the sentencing authority should have considered the evidence.

#### *Military Rule of Evidence 304. Confessions and Admissions*

Military Rule of Evidence 304(g), the corroboration rule, provides that an accused's admission or confession may only be admitted against him on the question of guilt or innocence if "independent evidence, either direct or circumstantial, has

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<sup>31</sup> 5 M.J. 238 (C.M.A. 1977)

<sup>32</sup> In *Kahmann*, the majority opinion stated that "[t]he point at which a service member must decide whether to object to an informal proceeding is an important stage in the military justice process," *Kahmann*, 59 M.J. at 311, an analysis that then-Chief Judge Crawford faulted in her concurring opinion. *See id.* at 315-16 (Crawford, C.J., concurring in the result).

<sup>33</sup> *Kahmann*, 59 M.J. at 313.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 314.

<sup>36</sup> 16 M.J. 426 (C.M.A. 1983).

<sup>37</sup> *Kahmann*, 59 M.J. at 313-14.

<sup>38</sup> *Id.* at 314.

<sup>39</sup> *Id.* Rule for Court-Martial 1001(b)(3) permits the government to introduce evidence of either military or civilian convictions against the accused. Rule for Court-Martial 1001(b)(3)(B) provides that a summary court-martial conviction may not be admitted under the rule unless Article 64 review "has been completed." MCM, *supra* note 4, R.C.M. 1001(b).

<sup>40</sup> *Kahmann*, 59 M.J. at 315 (stating that the court is not at liberty to disregard the Supreme Court holding in *Middendorf v. Henry*, 425 U.S. 25 (1976) that the right to counsel does not apply at summary courts-martial).

<sup>41</sup> *Id.* at 316 (Crawford, C.J., concurring in the result).

been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.”<sup>42</sup> There are two primary approaches to evaluating the evidence admitted in support of the confession. The first, known as the *corpus delicti* rule, requires the prosecution to prove that a crime was committed before permitting a defendant’s confession to be admitted into evidence.<sup>43</sup> The second approach—the trustworthiness doctrine—requires the prosecution to introduce substantial independent evidence that would tend to establish the trustworthiness of the *statement*, rather than the *corpus delicti* itself.<sup>44</sup> Military appellate courts have struggled over the years with the application of the corroboration rule in military practice; as one influential commentary has observed, “[t]he rule has proved easier to state than to apply.”<sup>45</sup> During the 2004 term of court, the CAAF further clouded the murky waters of the corroboration rule with its decision in *United States v. Seay*.<sup>46</sup>

In *Seay*, the appellant and another Soldier conspired to kidnap and murder Private First Class (PFC) Chafin.<sup>47</sup> In a deserted country area, they stabbed him to death with a Gerber knife.<sup>48</sup> After learning that Chafin was thought to have a large amount of cash when he disappeared, they returned to the body later, stole the wallet, removed the cash from it, and threw the wallet away by the side of a highway.<sup>49</sup> After the appellant’s wife became suspicious of his possible involvement in the offense, she reported him to the Colorado Springs police department, which initiated an investigation against him in cooperation with the Fort Carson Criminal Investigation Command (CID).<sup>50</sup> Eventually, the appellant confessed to the murder and the larceny of the wallet, and the government used his confession against him at trial.<sup>51</sup> The wallet was never recovered.<sup>52</sup> A CID agent testified at trial that no wallet was discovered during a postmortem inventory of Chafin’s effects.<sup>53</sup>

The issue at trial and on appeal was whether the government had provided sufficient corroboration under MRE 304(g) of the appellant’s confession to larceny of the wallet.<sup>54</sup> The CAAF affirmed, holding that the corroboration requirement for admission of a confession does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the offense.<sup>55</sup> According to the CAAF, it was not necessary for the members even to conclude that Chafin had carried a wallet; the critical issue was whether all the facts taken together justified an inference of the truth of the essential facts of the *confession* as a whole, and not necessarily the essential fact of the existence of a wallet.<sup>56</sup> The CAAF recited an inferential chain that it claimed would establish the overall truthfulness of the confession to larceny of the wallet: the appellant and another person were seen with the decedent shortly before he disappeared, the victim died as a result of foul play, his body was found in a concealed place, and no wallet was ever found.<sup>57</sup>

Judge Erdmann dissented on the corroboration issue. In his view, the corroboration rule requires independent evidence that establishes the trustworthiness of the confession.<sup>58</sup> Although the quantum of evidence required is slight, he would

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<sup>42</sup> MCM, *supra* note 4, MIL. R. EVID. 304(g).

<sup>43</sup> Major Russell L. Miller, *Wrestling with MRE 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1, 5-6 (2003).

<sup>44</sup> *See id.* at 12-15.

<sup>45</sup> 1 STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 304.02[7] (5th ed. 2003).

<sup>46</sup> 60 M.J. 73 (2004).

<sup>47</sup> *Id.* at 74-75.

<sup>48</sup> *Id.* at 75.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at 77-78.

<sup>52</sup> *Id.* at 80.

<sup>53</sup> *Id.* at 79.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 79.

<sup>56</sup> *See id.* at 80.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 81 (Erdmann, J., dissenting).

require independent evidence that a larceny had been committed, and he faulted the majority for its chain-of-inferences argument.<sup>59</sup> According to Judge Erdmann, “without evidence that Chafin possessed a wallet, we can give no weight to the fact that no wallet was found.”<sup>60</sup>

*Seay* is a boon for prosecutors and a disturbing case for defense counsel. *Seay* evidently grants authority for the government to provide strong corroboration for some offenses in multiple-offense confessions and to rely on the spillover effect of such corroboration to be deemed sufficient for the other offenses. All the government has to do is identify an attenuated string of inferences that could plausibly connect the offenses. When the offenses are closely related in time and place, as they were in *Seay*, there is little a defense counsel can do to contest the validity of the confession as to an offense with no corroboration when there is strong corroboration for the other offenses. Although *Seay* could simply be limited to its facts, its potential as a dangerous prosecutorial weapon cannot be overlooked. In any event, the case does little to clarify the CAAF’s already confusing body of law on the subject of corroboration.

#### *Military Rule of Evidence 404(b). Character Evidence*

Military Rule of Evidence 404(b) states that evidence of other crimes, wrongs, or acts is generally not admissible to prove a person’s character to show propensity, but such evidence may be admissible for other purposes, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”<sup>61</sup> This year, the CAAF continued a trend of aggressively examining government use of uncharged misconduct, demonstrating its willingness to reverse cases,<sup>62</sup> even where the evidence is otherwise strong. The CAAF continued to adhere to the three-part test first established by the COMA in *United States v. Reynolds*: (1) the evidence must reasonably support a finding that the appellant committed uncharged misconduct; (2) a fact of consequence in the proceeding must be made more or less probable by the existence of the evidence; and (3) the evidence must withstand a MRE 403 balancing test.<sup>63</sup> As with last year’s case of *United States v. Diaz*,<sup>64</sup> prong two of the *Reynolds* test proved to be an Achilles’ heel for the government.

In *United States v. McDonald*, the appellant’s wife was injured so severely in a car accident that she could not have sexual relations for several months.<sup>65</sup> The appellant subsequently began making sexual advances towards his twelve-year-old adopted daughter.<sup>66</sup> He gave her condoms, took pictures of her bathing, gave her a story entitled “Daddy and Me” that glorified the supposed virtues of father-daughter sexual relations, and wrote a note expressing his desire to provide her first sexual experience.<sup>67</sup>

At trial, the government introduced testimony from the appellant’s stepsister concerning uncharged misconduct that the appellant had committed some twenty years earlier, when the appellant was thirteen and his stepsister was eight.<sup>68</sup> The uncharged misconduct consisted of the appellant showing pornographic magazines to his stepsister, the stepsister masturbating the appellant, and the appellant attempting to insert his finger into her vagina.<sup>69</sup> Over defense objection, the military judge admitted the evidence under MRE 404(b) as probative of the appellant’s intent and plan. The NMCCA affirmed, holding that MRE 404(b) does not have a temporal element and also holding that even if there was error, it had no effect on the members because of the “overwhelming” nature of the evidence already introduced against the appellant.<sup>70</sup>

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<sup>59</sup> *Id.* at 82.

<sup>60</sup> *Id.*

<sup>61</sup> MCM, *supra* note 4, MIL. R. EVID. 404(b).

<sup>62</sup> For a discussion of this trend in the 2003 term of court, see Major Christopher W. Behan, *New Developments in Evidence 2003*, ARMY LAW., May 2004, at 11-16.

<sup>63</sup> See *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

<sup>64</sup> 59 M.J. 79 (2003).

<sup>65</sup> *United States v. McDonald*, 57 M.J. 747, 749 (N-M. Ct. Crim. App., 2002).

<sup>66</sup> *United States v. McDonald*, 59 M.J. 426, 427 (2004).

<sup>67</sup> *Id.* at 427.

<sup>68</sup> *Id.* at 428.

<sup>69</sup> *Id.*

<sup>70</sup> *McDonald*, 57 M.J. at 756.

The CAAF applied the three-prong *Reynolds* test and reversed, holding that the military judge abused his discretion in admitting the evidence.<sup>71</sup> The CAAF found that the evidence failed prong two of the *Reynolds* test because it was not logically relevant to show either common plan or intent.<sup>72</sup> In holding that the evidence failed to establish a common plan, the CAAF examined the relationship between the victims and the appellant, ages of victims, nature of the acts, situs of the acts, circumstances of the acts, and time span, finding the dissimilarities too great to support a common plan theory.<sup>73</sup> The evidence also failed to establish intent. Absent evidence of the appellant's state of mind as a 13-year-old child compared to his state of mind as a 33-year-old adult, no meaningful comparison could occur.<sup>74</sup>

Having determined that the military judge abused his discretion in admitting the evidence to show plan or intent, the CAAF next examined the effect of admitting the evidence and held that the error was prejudicial to the appellant.<sup>75</sup> The CAAF applied the four-part *Kerr* test, "weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question."<sup>76</sup> The CAAF conceded that the Government had a strong case that the appellant had taken photographs and given his daughter condoms, however, the CAAF found the evidence of the appellant's intent to gratify his own sexual desires was weak.<sup>77</sup> With a weak case on intent, the "irrelevant and highly inflammatory" evidence of the appellant's youthful uncharged misconduct "could not help but be powerful, persuasive, and confusing."<sup>78</sup> In other words, no different from the propensity evidence MRE 404(b) was designed to prohibit.<sup>79</sup>

As previously mentioned, *McDonald* continues a CAAF trend of strictly analyzing the admissibility of uncharged misconduct evidence. *McDonald* sends a strong warning to prosecutors to avoid piling on uncharged misconduct evidence in otherwise strong cases. For defense counsel, *McDonald* provides some encouragement that the government may be vulnerable to attacks on uncharged misconduct evidence using the second prong of the *Reynolds* test. It is not enough for a prosecutor simply to chant the language of MRE 404(b) as if it were a talismanic formula for admission: evidence of plan must actually establish a plan and evidence of intent requires independent evidence of the accused's state of mind. For military judges, *McDonald*, like the *Diaz* case before it, raises the bar high for uncharged misconduct and suggests that military judges ought to examine closely and, perhaps, skeptically, government claims regarding the necessity of uncharged misconduct in a particular case.

#### *Military Rule of Evidence 412: Rape Shield Rule*

Military Rule of Evidence 412, commonly known as the "Rape Shield Rule," actually bears the prolix title, "Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition."<sup>80</sup> The words "nonconsensual sexual offenses" in the title raise questions concerning the scope of the Rule's coverage: should the rule be read narrowly, as its title would suggest, to cover only victims of nonconsensual sexual offenses such as rape, forcible sodomy or indecent assault, or should it be read more broadly, as its legislative history might indicate, to protect anyone who can be classified as the victim of "alleged sexual misconduct"? The issue has been somewhat unsettled in the military courts since 2000, when the Coast Guard Court of Criminal Appeals (CGCCA) held that the rule did not protect a witness in a court-martial from having to discuss instances of consensual sexual conduct in her past because MRE 412 covers only nonconsensual sexual offenses.<sup>81</sup> In *United States v. Banker*,<sup>82</sup> the CAAF settled the issue in favor of a broad reading of MRE 412 that focuses on

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<sup>71</sup> *McDonald*, 59 M.J. at 430.

<sup>72</sup> *Id.* at 429-30.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 430-31.

<sup>76</sup> *Id.* at 430 (applying *United States v. Kerr*, 51 M.J. 401, 405 (1999)).

<sup>77</sup> *Id.* at 431.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> MCM, *supra* note 4, MIL. R. EVID. 412.

<sup>81</sup> See *United States v. Stirewalt*, 53 M.J. 582 (C.G. Ct. Crim. App. 2000).

<sup>82</sup> 60 M.J. 216 (2004).

the presence of a victim of alleged sexual misconduct rather than on the nonconsensual nature of the charged offense.

Over a four-year period, the appellant in *Banker* committed several acts of sexual misconduct with LG, the family's babysitter, including oral and anal sodomy and sexual intercourse.<sup>83</sup> The sexual contact began when the appellant was thirty-four years old and LG was fourteen years old, and it continued for several years.<sup>84</sup> According to LG's trial testimony, the activity was entirely consensual on her part.<sup>85</sup> LG eventually stopped all sexual activity with the appellant after she watched a movie in which the male characters exhibited a callous preoccupation in depriving teenage girls of their virginity, and she learned that the appellant shared the same attitude concerning her virginity; she also stopped babysitting for the family.<sup>86</sup> A friend convinced LG to tell LG's mother about the sexual relationship with the appellant.<sup>87</sup> In turn, LG's mother reported the appellant to the Office of Special Investigations (OSI).<sup>88</sup>

Some eight months after OSI began investigating the appellant for his actions with LG, the appellant's son, MB, began attending counseling because MB had been behaving in sexually inappropriate ways towards his cousins, his sister, and his mother.<sup>89</sup> At the counseling sessions, MB revealed that LG had sexually molested him while babysitting him some sixty times over a period of approximately four years, beginning when he was nine years-old.<sup>90</sup>

At his trial for sodomy, indecent acts, and adultery, the appellant moved to admit evidence that LG had sexually molested MB during the same time period the appellant and LG had engaged in a sexual relationship with each other.<sup>91</sup> The military judge excluded the evidence under MRE 412 on the grounds that it was not relevant.<sup>92</sup> The Air Force Court of Criminal Appeals (AFCCA) affirmed, holding that the 1998 changes to MRE 412 changed the focus "from the nature of the alleged sexual misconduct to the status of the person against whom the evidence is offered."<sup>93</sup> The CAAF affirmed, addressing two issues: first, whether MRE 412 applies to consensual sexual misconduct offenses; and second, whether the military judge abused his discretion in using MRE 412 to exclude evidence of LG's abuse of the appellant's son, when appellant claimed the evidence was constitutionally required.<sup>94</sup>

The CAAF adopted the AFCCA's analysis of the first issue. At the outset of the opinion, the CAAF recounted the history of MRE 412. Military Rule of Evidence 412 is modeled after Federal Rule of Evidence (FRE) 412, which was designed to safeguard alleged victims of sexual offenses from "the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense."<sup>95</sup> Although the title of MRE 412 still refers to "nonconsensual sexual offenses," the body of the rule was amended in 1998 to substitute the language "alleged sexual misconduct" for "nonconsensual sexual offense." This 1998 change shifted the focus of the rule from the nature of the sexual conduct to the "presence and protection of a victim."<sup>96</sup> Thus, the rule no longer requires a nonconsensual sex offense in order for there to be a victim.

The CAAF then turned its attention to whether LG was a victim within the meaning of MRE 412. Despite LG's testimony that sexual activity was consensual, the CAAF focused on the difference between factual and legal consent in

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<sup>83</sup> *Id.* at 218.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 221.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 218.

<sup>92</sup> *Id.* at 221.

<sup>93</sup> *Id.* at 219.

<sup>94</sup> *Id.* at 224-25.

<sup>95</sup> *Id.* at 220.

<sup>96</sup> *Id.* at 220.

children.<sup>97</sup> The CAAF concluded that a child under the age of sixteen cannot legally consent to indecent acts involving penetration, such as sodomy and sexual intercourse.<sup>98</sup> “Based on the facts of this case and the purpose behind M.R.E. 412,” stated the CAAF, LG was a victim within the meaning of MRE 412 and was therefore entitled to the protections of the rule.<sup>99</sup>

On the second issue, concerning whether the appellant had established the relevance and constitutional necessity of the evidence that LG had molested MB, the military judge, the AFCCA, and the CAAF all agreed that the appellant failed to carry his burden.<sup>100</sup> At trial, defense counsel argued that MB’s testimony about the abuse was relevant because it went directly to LG’s credibility, the idea being that LG made sexual allegations against the appellant as a sort of preemptive strike to protect her from the allegations against her that were sure to come from MB.<sup>101</sup>

The CAAF engaged in an exhaustive analysis of admissibility under MRE 412. The CAAF emphasized the exclusionary nature of MRE 412 as compared to other rules of evidence.<sup>102</sup> There are, however, three exceptions to the general rule of exclusion: (1) evidence that someone other than the accused was the source of semen, physical injury, or other evidence; (2) evidence of specific instances of sexual behavior between the accused and the alleged victim; and (3) evidence that is constitutionally required.<sup>103</sup> The CAAF has established a strict test to admit evidence under the “constitutionally required” exception to MRE 412, requiring defense counsel to detail the accused’s theory of the case and the constitutional necessity of the evidence.<sup>104</sup>

For all MRE 412 evidence, the military judge must determine whether the evidence is (1) relevant and (2) more probative than prejudicial.<sup>105</sup> This is almost exactly opposite the standard used in MRE 403—a rule of inclusion under which evidence is admitted unless its probative value is substantially outweighed by prejudicial or other concerns.<sup>106</sup> The “constitutionally required” exception has additional requirements. The military judge must determine that the evidence is relevant, material, and favorable to the defense.<sup>107</sup> For all practical purposes, “favorable” means “vital.”<sup>108</sup> Military Rule of Evidence 412 is a rule of exclusion designed to protect victims.<sup>109</sup> The probative value of the evidence, therefore, must be weighed against the privacy interests of the victim.<sup>110</sup> Because the defense counsel could not articulate a specific theory as to how the victim’s alleged sexual abuse of the appellant’s son (such abuse was not reported until some eight months after the investigation against the appellant began) provided a motive for the victim to fabricate her testimony, the CAAF held that the military judge did not abuse his discretion in determining that the evidence failed the MRE 412 relevancy standard.<sup>111</sup>

Judge Effron concurred in part and in the result.<sup>112</sup> He agreed with the majority’s holding that MRE 412 is not limited to nonconsensual sex offenses, that a military judge must determine the relevance of MRE 412 evidence, that irrelevant evidence is not admissible, and that the military judge properly decided this evidence was not relevant.<sup>113</sup> He cautioned that

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<sup>97</sup> *Id.* at 220.

<sup>98</sup> *Id.* at 220-21.

<sup>99</sup> *Id.* at 221.

<sup>100</sup> *See id.* at 224-25.

<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 221.

<sup>103</sup> *See MCM, supra* note 4, MIL. R. EVID. 412(b).

<sup>104</sup> *Banker*, 60 M.J. at 221.

<sup>105</sup> *MCM, supra* note 4, MIL. R. EVID. 412(c)(3).

<sup>106</sup> *See id.* at 223.

<sup>107</sup> *United States v. Williams*, 37 M.J. 352, 359 (C.M.A. 1993).

<sup>108</sup> *Banker*, 60 M.J. at 222.

<sup>109</sup> *See id.* at 223.

<sup>110</sup> *Id.* at 223.

<sup>111</sup> *Id.* at 224-25.

<sup>112</sup> *Id.* at 225 (Effron, J. concurring in part and in the result).

<sup>113</sup> *Id.*

the majority's discussion of relevance, however, was unnecessarily broad.<sup>114</sup> Because the "constitutionally required" exception to MRE 412 is so fact dependent, he would shy from constraining the efforts of trial judges in this area with an overly broad precedent.<sup>115</sup>

### *Military Rule of Evidence 502. Attorney-Client Privilege*

Military Rule of Evidence 502 provides a testimonial privilege that protects the lawyer-client relationship.<sup>116</sup> Under the rule, a client has the privilege not only to refuse to disclose, but also to prevent any other person from "disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services."<sup>117</sup> The privilege is held by the client.<sup>118</sup> It may be claimed on the client's behalf by the lawyer, and unless contrary evidence is presented, the lawyer's authority to claim the privilege on the client's behalf is presumed.<sup>119</sup> Military Rule of Evidence 510 provides that the privilege may be waived by voluntary disclosure "under such circumstances that it would be inappropriate to allow the claim of privilege."<sup>120</sup> Military Rule of Evidence 511, on the other hand, states that a statement or other disclosure of privileged matter "is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege."<sup>121</sup>

In *United States v. Marcum*,<sup>122</sup> the CAAF addressed the issue of how the privilege works when part of a trial is held in the absence of the accused pursuant to R.C.M. 804(b).<sup>123</sup> The appellant in *Marcum* was convicted of dereliction of duty, consensual sodomy, forcible sodomy, assault consummated by a battery, indecent assault, and indecent acts.<sup>124</sup> The appellant was a noncommissioned officer who held a supervisory position at Offutt Air Force Base.<sup>125</sup> During his off-duty hours, the appellant frequently socialized with his subordinate Airmen at parties, often inviting them to spend the night at his apartment.<sup>126</sup> The charges in the case arose from allegations that the appellant engaged in consensual and nonconsensual sexual activity with these subordinates.<sup>127</sup> The appellant testified at trial and discussed the allegations.<sup>128</sup> After the court members announced findings, the court-martial recessed for the evening, and the appellant went absent without leave (AWOL) before sentencing.<sup>129</sup> Pursuant to R.C.M. 804(b), the sentencing proceedings were held with the appellant *in absentia*.<sup>130</sup>

During the pre-sentencing hearing, appellant's civilian defense counsel introduced as an unsworn statement a twenty page document appellant provided for counsel's use in preparing a defense.<sup>131</sup> The document described the nature of the

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<sup>114</sup> See *id.* at 225.

<sup>115</sup> *Id.*

<sup>116</sup> See MCM, *supra* note 4, MIL. R. EVID. 502.

<sup>117</sup> *Id.* MIL. R. EVID. 502(a).

<sup>118</sup> See *id.* MIL. R. EVID. 502(a).

<sup>119</sup> 2 STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 502.02[3] (5th ed. 2003) [hereinafter EVIDENCE MANUAL].

<sup>120</sup> MCM, *supra* note 4, MIL. R. EVID. 510.

<sup>121</sup> *Id.* MIL. R. EVID. 511(a).

<sup>122</sup> 60 M.J. 198 (2004).

<sup>123</sup> MCM, *supra* note 4, R.C.M. 804(b). This rule permits the trial to be held in the absence of the accused if the accused is voluntarily absent after arraignment. *Id.*

<sup>124</sup> *Marcum*, 60 M.J. at 199.

<sup>125</sup> *Id.* at 200.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 200-01.

<sup>128</sup> See *id.*

<sup>129</sup> *Id.* at 208.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

appellant's professional and off-duty relationship with each of six subordinate Airmen, "including details regarding Appellant's level of attraction . . . as well as graphic descriptions of the charged and uncharged sexual contact between Appellant and each [A]irman."<sup>132</sup> The trial counsel referred to this document in sentencing argument, focusing on the appellant's "lack of contrition,"<sup>133</sup> and remarking that through the statement, the appellant "is victimizing those [A]irmen again."<sup>134</sup>

On appeal, the appellant submitted an affidavit in which he expressed his belief that the 20-page statement to his attorney was covered by the attorney-client privilege, invoked the privilege, and expressly stated that he had never authorized his attorney to release this statement to anyone, in or out of court.<sup>135</sup> The CAAF was therefore squarely faced with the issue of whether the disclosure was covered by the privilege, and if so, if it was improperly disclosed under MRE 511 or the privilege was effectively waived under MRE 510.

The CAAF strongly signaled the direction of its analysis by first quoting MRE 511(a), which provides that evidence of a privileged matter is not admissible if disclosure was compelled erroneously or the holder of the privilege did not get the opportunity to claim the privilege.<sup>136</sup> The CAAF next quoted *United States v. Dorman*,<sup>137</sup> a professional responsibility case, for the proposition that a lawyer should not reveal information pertaining to the representation of a client "unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure [is otherwise permitted by this rule]."<sup>138</sup> The CAAF then shifted to a discussion of the unsworn statement in military law. According to the CAAF, the right to make an unsworn statement is a valuable right at military law *that is personal to the accused* and that the CAAF will not permit to be "undercut or eroded."<sup>139</sup> This right cannot be asserted by defense counsel without specific authorization by the accused.<sup>140</sup> Thus, if an accused is absent from trial proceedings without leave, "his right to make an unsworn statement is forfeited unless *prior to his absence*" he authorized counsel to make a particular statement on his behalf.<sup>141</sup>

Despite his AWOL status, appellant did not waive this right.<sup>142</sup> His attorney never asked for permission to use the statement, and appellant never granted it.<sup>143</sup> The CAAF also addressed the issue of whether the appellant waived his privilege of confidentiality because of his trial testimony, which touched on "a great deal" of the information contained within his statement.<sup>144</sup> The CAAF found persuasive the appellant's argument that if he had prepared an unsworn statement, it would have been different than what was ultimately presented by the defense counsel.<sup>145</sup> The CAAF noted that the statement contained sexually explicit details not discussed in appellant's testimony, including observations that were critical of the victims and were specifically cited by trial counsel during sentencing argument.<sup>146</sup> The CAAF affirmed the findings but reversed and set aside the sentence.<sup>147</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 209.

<sup>134</sup> *Id.* at 210.

<sup>135</sup> *Id.* at 208.

<sup>136</sup> *Id.* at 209.

<sup>137</sup> 58 M.J. 295, 298 (2003).

<sup>138</sup> *Marcum*, 60 M.J. at 209 (quoting *Dorman*, 58 M.J. at 298).

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 210 (emphasis added).

<sup>142</sup> *Id.* at 208.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 210.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 211.

Then-Chief Judge Crawford dissented on the attorney-client privilege issue.<sup>148</sup> She would have found that the statement was not privileged in the first place, and that even if it was, the record made it clear that the appellant waived the privilege and “impliedly authorized” his counsel to waive the privilege and release the statement on appellant’s behalf.<sup>149</sup> She noted that Air Force court rules in effect at the time required the defense to give three days’ notice prior to making an unsworn statement, and the defense counsel “presumably” gave the required notice, indicating intent to disclose the statement and establishing that it was not privileged.<sup>150</sup> In addition, defense counsel used appellant’s statement to cross-examine witnesses, and one could therefore assume that appellant knew that defense counsel would use the statement according to his discretion at trial.<sup>151</sup> Finally, even if the statement was privileged, Chief Judge Crawford argued that the defense counsel had implied authority to waive the privilege and submit on appellant’s behalf “otherwise privileged matters in an effort to defend Appellant as successfully as possible.”<sup>152</sup> Chief Judge Crawford concluded her dissent by observing that the appellant had forfeited any right to object to his counsel’s use of the statement by appellant’s own misconduct in going AWOL.<sup>153</sup>

*Marcum* is a unique case whose application may very well be limited to its facts. Nonetheless, it emphasizes the personal nature of the accused’s right to present an unsworn statement. In the rare case that an accused is absent for pre-sentencing proceedings, military judges might be well advised to deny the defense the right to present an unsworn statement unless there is some affirmative indication that the accused granted his counsel the right to make a particular statement on his behalf. The case also underscores the importance of conducting a proper waiver analysis under MRE 510 and 511 before admitting any evidence subject to a privilege, particularly where the holder of the privilege is absent from the proceedings.

#### *Military Rule of Evidence 505. Classified Information*

As the global war on terror (GWOT) continues, MRE 505 may play an increasingly significant role in military justice. The rule is designed to strike a balance between the government’s interest in preserving critical national security information from unauthorized disclosure and the accused’s right to a fair trial. There have been very few reported decisions construing MRE 505, because, “[a]s a practical matter, classified information or evidence is only rarely used.”<sup>154</sup> The GWOT could, however, change the frequency with which classified evidence issues reach the appellate level. Since the September 11 attacks, the military justice system has seen cases involving the alleged mishandling of classified information,<sup>155</sup> violations of classified rules of engagement,<sup>156</sup> or offenses involving evidence that includes classified information or imagery.<sup>157</sup> The 2004 term of court saw significant opinions from both the AFCCA and the CAAF in *United States v. Schmidt*, a case involving classified rules of engagement and an incident from Operation Enduring Freedom (OEF) in Afghanistan.<sup>158</sup> The complicated procedural posture of the case and the different holdings of the two courts mandate that counsel facing similar issues consider both the AFCCA and CAAF opinions in formulating a course of action.

The government charged Major Harry Schmidt, an Illinois Air National Guard F-16 pilot, with dereliction of duty for allegedly failing to exercise appropriate flight discipline or comply with rules of engagement (ROE) and special instructions

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (Crawford, C.J., dissenting).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 212.

<sup>153</sup> *Id.*

<sup>154</sup> See EVIDENCE MANUAL, *supra* note 119, § 505.02.

<sup>155</sup> See, e.g., Neil A. Lewis, *Charges Dropped Against Chaplain*, N.Y. TIMES, Mar. 20, 2004, at A5, available at LEXIS, News Library, The New York Times-Military Justice Stories (discussing the case against Army Chaplain (CPT) James Yee, accused of mishandling classified evidence pertaining to detainees at Guantanamo Bay).

<sup>156</sup> See, e.g., Eric Schmitt, *Inquiry on Canadians' Deaths Says U.S. Pilots Broke Rules*, N.Y. TIMES, June 19, 2002, at A5, available at LEXIS, News Library, The New York Times-Military Justice Stories (discussing allegations that a U.S. Air Force pilot violated rules of engagement when dropping bombs in Afghanistan that killed four Canadian troops and wounded eight others).

<sup>157</sup> See, e.g., Bill Glauber, *GI in Probe Believes in System; Full Court Martial Possible in Death of Iraqi Driver*, CHICAGO TRIBUNE, Sept. 11, 2004, at 3, available at LEXIS, News Library, Chicago Tribune file (discussing a case in which the prosecution and defense litigated the issue of whether a classified section of a tape taken by an unmanned aerial vehicle would be admissible at the trial of an Army captain who allegedly shot and killed a wounded Iraqi).

<sup>158</sup> *Schmidt v. Boone*, 59 M.J. 841 (A.F. Ct. Crim. App. 2004).

(SPINs) in an air-to-ground bombing incident during Operation Enduring Freedom (OEF) in Afghanistan.<sup>159</sup> The ROE and SPINs that pertained to the incident were classified at the Secret level.<sup>160</sup> Major Schmidt retained a civilian defense counsel who did not possess a Secret security clearance.<sup>161</sup> The civilian counsel requested that he be processed for a Secret security clearance in order to represent the accused,<sup>162</sup> but the Air Force denied the request, instead conducting an abbreviated background check in accordance with Air Force security regulations<sup>163</sup> and granting defense counsel access to evidence on a case-by-case basis.<sup>164</sup> The government also required Major Schmidt to submit a written request to trial counsel anytime Schmidt, who had a legitimate Secret security clearance, wanted to discuss classified information pertaining to his case with his defense counsel.<sup>165</sup> Major Schmidt submitted a motion for appropriate relief, asking the military judge to compel the government to provide a security clearance or abate the proceedings.<sup>166</sup> The military judge denied the motion.<sup>167</sup>

Major Schmidt then filed a petition with the AFCCA for extraordinary relief, requesting the AFCCA order the respondents to process defense counsel for a Secret security clearance and requesting a stay of the proceedings until the issue had been resolved.<sup>168</sup> On 15 January 2004, the AFCCA ordered the government to show cause why the petition should not be granted.<sup>169</sup> On 24 February 2004, Schmidt filed a motion with the AFCCA for expedited review and a stay of all proceedings until the AFCCA had reviewed the petition for extraordinary relief.<sup>170</sup> The AFCCA denied the motion for a stay on 26 February 2004, but granted the request for expedited review of the request for extraordinary relief.<sup>171</sup> On 27 February 2004, the CAAF accepted petitioner Schmidt's appeal of the AFCCA's denial of the motion for a stay but denied without prejudice the petitioner's request to the CAAF for a writ of mandamus.<sup>172</sup> Thus, the AFCCA considered the petition for extraordinary relief while the court-martial proceedings were stayed pursuant to the CAAF's order.

The AFCCA considered two issues on Schmidt's petition for extraordinary relief: (1) whether the petitioner was entitled to a writ of mandamus ordering the government to process his defense counsel for a Secret security clearance and (2) whether the government's requirement that defense counsel channel through trial counsel requests to discuss classified information with the accused interfered with the attorney-client and attorney work-product privileges.<sup>173</sup>

In denying the writ, the AFCCA conducted an exhaustive review of Department of Defense (DoD) and Air Force security regulations pertaining to investigating security clearances and providing access to classified material.<sup>174</sup> The AFCCA held that the procedures for determining who will receive a security clearance are the exclusive province of the Executive Department and that the Air Force had not violated Executive Branch regulations in refusing to conduct a full investigation leading to the grant of a security clearance.<sup>175</sup> A DoD regulation provides for a full investigation and formal

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<sup>159</sup> See *id.* at 844-45.

<sup>160</sup> See *id.* at 842 and 845.

<sup>161</sup> See *id.* at 842.

<sup>162</sup> Petitioner's civilian defense counsel specifically requested a full personnel security investigation (PSI) in accordance with U.S. DEPARTMENT OF DEFENSE, REG.5200.2-R, PERSONNEL SECURITY PROGRAM (Jan. 1987). *Schmidt*, 59 M.J. at 845.

<sup>163</sup> See U.S. DEP'T OF AIR FORCE, INSTR. 31-401, INFORMATION SECURITY PROGRAM MANAGEMENT para. 5.6 (1 Nov 2001) (providing for a streamlined background check and limited access to classified information for persons who did not already have a PSI). See *Schmidt*, 59 M.J. at 846.

<sup>164</sup> *Schmidt*, 59 M.J. at 845.

<sup>165</sup> *Id.* at 854.

<sup>166</sup> *Id.* at 845.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 842.

<sup>169</sup> *Id.* at 842-43.

<sup>170</sup> *Id.* at 843.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 842.

<sup>174</sup> Space does not permit a detailed recounting of the excellent AFCCA analysis of these regulations. Counsel who are dealing with classified information issues, however, would be well advised to read the AFCCA's analysis of the interplay between the regulations.

<sup>175</sup> *Id.* at 844.

adjudication process, but there is also a streamlined process within the regulation for an abbreviated background check and grant of access to specific material.<sup>176</sup> Although the processes in the Air Force Instruction (AFI) differ slightly from those in the DoD directive, the AFCCA found that the AFI is not improper, arbitrary, or unsupported in the law.<sup>177</sup>

The AFCCA found further grounds for denying petitioner's extraordinary writ. Alternative means of relief were available in this case. The Marine Corps, of which the civilian defense counsel was a reserve member, was willing to grant the defense counsel an interim Secret clearance, which the Air Force, in turn, had agreed to honor.<sup>178</sup> The civilian defense counsel had not, however, provided all the information to the Marine Corps necessary for processing his interim Secret clearance.<sup>179</sup> Extraordinary relief is not available where a petitioner has alternative means to obtain the relief.<sup>180</sup>

The AFCCA also denied petitioner's request for relief on the second issue—the government's requirement that petitioner submit written requests to the trial counsel prior to discussing classified information with his defense counsel. Petitioner argued that the process imposed by the government interfered with the attorney work-product and attorney-client privileges, essentially requiring the petitioner to disclose defense work product and strategies to the government in order to discuss classified information legitimately within the petitioner's knowledge and possession.<sup>181</sup> According to the AFCCA, petitioner's argument was misplaced. The AFCCA analogized the requirement to the law of discovery, which frequently requires the defense to go through government counsel to obtain information already in the government's possession; a collateral effect of discovery law is that some discovery requests may in effect reveal defense strategy in the case.<sup>182</sup> Additionally, the national security interests in a classified case require not only that all parties seeking the information have proper security clearances, but that they also have a legitimate "need to know" the information, as determined by an appropriate approval authority. As the AFCCA put it, "it is not up to the petitioner or his counsel to decide whether counsel has a need to know the classified information."<sup>183</sup>

The AFCCA handed down its decision on 31 March 2004, and the petitioner immediately appealed. In *United States v. Schmidt*,<sup>184</sup> the CAAF decided MAJ Schmidt's appeal on 7 June 2004.<sup>185</sup> By the time the CAAF heard the appeal of AFCCA's decision, the appellant's civilian defense counsel obtained an interim security clearance from the Marine Corps, which the Air Force agreed to honor.<sup>186</sup> The first issue, accordingly, was moot, and the CAAF did not address it.

The second issue, however, presented the CAAF with the opportunity to interpret MRE 505(h)(1) in connection with the attorney work-product and attorney-client privileges. Recall that the appellant possessed a current Secret security clearance and wanted to discuss classified information that he had obtained in furtherance of his military duties with his civilian defense counsel for the purpose of preparing for his defense.<sup>187</sup> The government established a procedure that required the appellant to "[i]dentify in an e-mail message . . . the exact materials to which you think the civilian counsel needs access . . ." and also to "contain a full justification of why the civilian counsel needs to be granted access to the additional classified materials."<sup>188</sup> The government based this procedure on MRE 505(h)(1), which states "[i]f the accused reasonably expects to disclose or to cause the disclosure of classified information *in any manner* in connection with a court-martial proceeding, the accused shall notify the trial counsel of such intention . . ."<sup>189</sup>

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<sup>176</sup> *Id.* at 845-47.

<sup>177</sup> *Id.* at 849.

<sup>178</sup> *Id.* at 851.

<sup>179</sup> *See id.* at 851-52.

<sup>180</sup> *Id.* at 852.

<sup>181</sup> *Id.* at 854.

<sup>182</sup> *See id.* at 855-56.

<sup>183</sup> *Id.* at 856.

<sup>184</sup> 60 M.J. 1 (2004).

<sup>185</sup> *Id.* at 1.

<sup>186</sup> *Id.* at 2.

<sup>187</sup> *Id.* at 2 (emphasis added).

<sup>188</sup> *Id.*

<sup>189</sup> MCM, *supra* note 4, MIL. R. EVID. 505(h)(1) (emphasis added).

With respect to the second issue, the CAAF vacated the AFCCA opinion, reversed the ruling of the military judge, and lifted the stay on the trial proceedings.<sup>190</sup> The CAAF adopted a common-sense approach to MRE 505 and struck a balance between the disclosure requirements of MRE 505(h)(1) and the importance of confidentiality in the attorney-client relationship. Military Rule of Evidence 505 permits the government to exercise a privilege against the disclosure of classified information.<sup>191</sup> The rule permits limited disclosure of information and restrictions on disclosure through the use of protective orders.<sup>192</sup> Military Rule of Evidence 505(h)(1), which requires the accused to give notice to the trial counsel of an intention to disclose classified information, applies only when the defense is seeking classified information from the government or when it reasonably expects to disclose classified information during a proceeding.<sup>193</sup>

The CAAF held that the AFCCA erred in holding that the rule comes into play when “the defense is making a preliminary evaluation of the evidence it already possesses to determine what evidence, if any, it may seek to disclose as part of the defense.”<sup>194</sup> Military Rule of Evidence 505(h)(1) does not require an accused to engage in adversarial litigation with the opposing side in order to discuss classified information he already has with his defense counsel.<sup>195</sup> Although the government may establish procedures to protect and restrict access to classified information, it must also respect the “important role of the attorney-client relationship in maintaining the fairness and integrity of the military justice system.”<sup>196</sup> The military judge must balance the government’s interest in protecting national security information with the accused’s right to effective assistance of counsel in preparing a defense and the attorney-client privilege.<sup>197</sup>

The *Schmidt* case teaches several important lessons to counsel involved in classified information cases. The AFCCA opinion establishes that the Executive Branch alone controls access to security clearances and the procedures for obtaining them. The attorney-client relationship does not trump these regulations; an accused cannot demand as a matter of right that the Executive Branch even process his civilian defense counsel’s request for a security clearance investigation. The CAAF opinion, however, demonstrates that MRE 505(h) does not interfere with the attorney-client relationship. Provided that the attorney and client both have a proper security clearance and are discussing information already known to the client as part of the defense preliminary evaluation process, MRE 505(h) will not interfere with that relationship. The CAAF opinion also charges the military judge with the ultimate responsibility of balancing the government’s national security interests with the accused’s sixth amendment and article 27<sup>198</sup> rights to the effective assistance of counsel.

#### *Military Rule of Evidence 608. Character Evidence*

Military Rule of Evidence 608(c) permits a party to use cross-examination or extrinsic evidence to explore the “bias, prejudice, or motive to misrepresent” of any witness.<sup>199</sup> The rule applies at both the findings and pre-sentencing phases of a court-martial.<sup>200</sup> In *United States v. Saferite*,<sup>201</sup> the CAAF addressed the interplay between MRE 608(c), MRE 403,<sup>202</sup> and

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<sup>190</sup> *Schmidt*, 60 M.J. at 3.

<sup>191</sup> See MCM, *supra* note 4, MIL. R. EVID. 505(c).

<sup>192</sup> *Id.* at 2.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See *id.*

<sup>196</sup> *Id.* at 3.

<sup>197</sup> *Id.*

<sup>198</sup> UCMJ art. 27 (2002).

<sup>199</sup> MCM, *supra* note 4, MIL. R. EVID. 608(c).

<sup>200</sup> See *id.* MIL. R. EVID. 1101.

<sup>201</sup> 59 M.J. 270 (2004).

<sup>202</sup> Military Rule of Evidence 403 permits a military judge to exclude evidence the probative value of which is substantially outweighed by unfair prejudice, confusion of the issues, misleading the members, or considerations of undue delay, waste of time, of needless presentation of cumulative evidence. MCM, *supra* note 4, MIL. R. EVID. 403.

RCM 1001(c)(3)<sup>203</sup> during the pre-sentencing phase of the court-martial.

The appellant in *Saferite* escaped from pretrial confinement during trial and was convicted and sentenced *in absentia* at a general court-martial for stealing government computer equipment and selling it on an on-line auction site.<sup>204</sup> During the pre-sentencing proceedings, the defense counsel presented a written unsworn statement from the appellant's wife describing him as a caring father and loving spouse.<sup>205</sup> In the statement, she pled for the compassion of the court in sentencing.<sup>206</sup>

In rebuttal, trial counsel offered two documents in an attempt to discredit the spouse.<sup>207</sup> The first was a sworn statement showing that the appellant had talked to his spouse on the telephone while he was in pretrial confinement.<sup>208</sup> The second was a sworn statement establishing that military authorities stopped the appellant's wife driving away from the military installation where the appellant was confined at a high rate of speed approximately forty minutes after the appellant's escape from custody.<sup>209</sup> The appellant was not in the vehicle with her, and she told the police that she had gone to the military installation to talk to her husband but had not been able to locate him.<sup>210</sup> Over defense objection, the military judge admitted the evidence as bias evidence under MRE 608(c) and ruled that it did not violate MRE 403.<sup>211</sup>

As a threshold matter, the CAAF noted that the military rules of evidence are applicable at sentencing.<sup>212</sup> A military judge may relax the rules of evidence.<sup>213</sup> Relaxation of the rules, however, applies primarily to issues of authentication and does not permit the admission of otherwise inadmissible evidence.<sup>214</sup> Bias is always relevant and may be proven by extrinsic evidence, but extrinsic evidence must still survive a MRE 403 balancing test.<sup>215</sup> The CAAF found that the evidence was logically relevant to prove bias under 608(c), but its probative value was substantially outweighed by the danger of unfair prejudice.<sup>216</sup> The evidence tended to allege uncharged misconduct and suggested that the appellant had conspired with his wife to facilitate his escape.<sup>217</sup> In fact, trial counsel focused his argument on the theory that the appellant's wife had aided the appellant's escape.<sup>218</sup> The CAAF found that the military judge "clearly abused his discretion" in ignoring the danger of unfair prejudice posed by the evidence.<sup>219</sup> Nonetheless, the CAAF held that the error was harmless under the facts of the case and affirmed the decision.<sup>220</sup> The accused was tried in absentia, so the members knew he was not there.<sup>221</sup> The military judge gave careful instructions that the accused was to be punished only for offenses of which he was actually convicted.

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<sup>203</sup> Under RCM 1001(c)(3), a military judge can relax the rules of evidence during pre-sentencing proceedings for admitting letters, affidavits, certificates of military and civil officers, "and other writings of similar authenticity and reliability." MCM, *supra* note 4, R.C.M. 1001(c)(3).

<sup>204</sup> *Saferite*, 59 M.J. at 271.

<sup>205</sup> *Id.* at 271-72.

<sup>206</sup> *Id.* at 272.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 273.

<sup>213</sup> *Id.*

<sup>214</sup> *See id.* at 273.

<sup>215</sup> *See id.* at 274.

<sup>216</sup> *Id.* at 274.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 274-75.

<sup>221</sup> *Id.* at 274.

The maximum sentence was 230 years, the trial counsel asked for sixteen, and the members gave six, indicating they followed the military judge's instructions.<sup>222</sup>

*Saferite* provides a warning to trial counsel about the potential dangers of senseless rebuttal and the pointless impeachment of the accused's family members during pre-sentencing proceedings. Had the members given a higher sentence or the military judge neglected to provide adequate instructions, the military judge's abuse of discretion in admitting the evidence might not have been harmless. Some witnesses at sentencing (whether appearing in person or by affidavit) are so obviously biased that there is little point in risking appellate error by trying to prove the point, particularly if the trial counsel is going to suggest and argue that a witness and the accused participated in uncharged misconduct together. *Saferite* also teaches important lessons about the scope of RCM 1001(c)(3)'s provisions for relaxing the rules of evidence at pre-sentencing proceedings. As the CAAF made clear, relaxation is for the purposes of authentication and foundation, and not for the purpose of admitting otherwise inadmissible or prejudicial evidence. Military judges should use *Saferite* as an example for counsel who ask for relaxation and then act as if the pre-sentencing proceedings have become an evidentiary free-for-all. *Saferite* emphasizes that even at sentencing, the rules still matter.

#### *Military Rule of Evidence 611. Mode and Order of Interrogation and Presentation*

*United States v. Mason* arose from a rehearing of appellant's trial for raping the civilian spouse of a Soldier.<sup>223</sup> The primary issue at trial was identification of the rapist, and the government's case rested almost entirely on DNA evidence.<sup>224</sup> During the trial, defense counsel cross-examined the government's DNA expert and suggested that the confidence level of the DNA test could be increased if the crime lab had requested a second, independent laboratory to conduct a test of the material.<sup>225</sup> On re-direct, trial counsel asked the expert whether either party had requested such a test.<sup>226</sup> Defense counsel objected that the question was outside the scope of cross-examination and that it was an improper attempt to shift the burden of proof to the defense.<sup>227</sup> The military judge overruled both objections without explanation. The Army Court of Criminal Appeals (ACCA) concluded that the question was not outside the scope of cross-examination and that the military judge's instructions to members rendered any error harmless.<sup>228</sup>

The CAAF held that the military judge erred in permitting the question.<sup>229</sup> The question suggested that the appellant might have been obligated to request a retest, which shifted the burden of proof to the appellant.<sup>230</sup> It was constitutional error because the Due Process Clause of the Fifth Amendment requires the government to prove the defendant's guilt beyond a reasonable doubt.<sup>231</sup> Ultimately, however, the CAAF held that the error was harmless beyond a reasonable doubt. The DNA evidence in the case was overwhelming, with the odds of someone other than the appellant being the source of the DNA material 1 in 240 billion.<sup>232</sup> The military judge properly instructed the panel that the burden of proof never shifts to the accused. Furthermore, the government did not argue or suggest anywhere else that the defense should have asked for a retest.<sup>233</sup> The CAAF affirmed the ACCA decision.<sup>234</sup>

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<sup>222</sup> *Id.* at 275.

<sup>223</sup> 59 M.J. 416 (2004).

<sup>224</sup> *See id.* at 417.

<sup>225</sup> *See id.* at 423-24.

<sup>226</sup> *Id.* at 424.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 424.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 424-25.

<sup>233</sup> *Id.* at 425.

<sup>234</sup> *Id.*

*Mason* illustrates the significance of a military judge maintaining control of interrogations and presentation of evidence under MRE 611.<sup>235</sup> Military judges should be alert to questions that subtly shift the burden of proof or could affect the constitutional rights of the accused. Had *Mason* been a close case, the CAAF might have been much less likely to find the constitutional error harmless beyond a reasonable doubt. *Mason* also demonstrates the danger of trial counsel rising to a defense counsel's baited suggestions that the government could have done more to investigate or prove a case. The natural temptation in the heat of battle is to ask why the defense counsel didn't ask for remedial measures if he was so concerned about the investigation or test procedures? It is far better, however, for trial counsel to endure the slings and arrows of defense outrage than to take up arms against such troubles by opposing them in kind.<sup>236</sup>

#### *Military Rule of Evidence 701. Lay Opinion Testimony*

*Military Rule of Evidence 701* permits lay witnesses to offer opinions that are helpful to the trier of fact, rationally based on the perception of the witness, and not based on scientific, technical, or other specialized knowledge.<sup>237</sup> In *United States v. Byrd*, the CAAF considered an issue of first impression in military law: the requirements for using lay opinion testimony to interpret the statements of others.<sup>238</sup>

The appellant in *Byrd* was convicted at a general court-martial of forcible sodomy with his daughter.<sup>239</sup> The defense lost a motion *in limine* at trial to prevent the admission of three letters the appellant had written to his wife and daughter, as well as the wife's opinion testimony interpreting several phrases in the letters for the members.<sup>240</sup> The government used Mrs. Byrd to interpret eight specific passages in the letters.<sup>241</sup> The purpose of her testimony was to demonstrate that the appellant was threatening his wife in order to impede the investigation against him.<sup>242</sup>

Because this was an issue of first impression in military law, the CAAF sought guidance from judicial interpretations of FRE 701, from which MRE 701 was taken without change.<sup>243</sup> The CAAF found the general rule in the federal civilian courts to be that lay witnesses are not normally permitted to testify about their subjective interpretations or conclusions about what has been said or written to them.<sup>244</sup> A lay witness can, however, interpret coded or code-like conversations.<sup>245</sup> The proponent must establish a foundation that the witness has a special basis for determining the speaker's true meaning.<sup>246</sup> The CAAF identified three basic types of conversations or statements upon which a lay witness might offer an interpretive opinion and established the foundational elements required for admitting the opinion testimony.<sup>247</sup>

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<sup>235</sup> See MCM, *supra* note 4, MIL. R. EVID. 611.

<sup>236</sup> Cf. WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1

Whether 'tis nobler in the mind to suffer  
The slings and arrows of outrageous fortune,  
Or to take arms against a sea of troubles,  
And by opposing end them?

<sup>237</sup> EVIDENCE MANUAL, *supra* note 119, § 701.01 (quoting the official text of MRE 701 and the 2002 amendments that have not yet been published in the MCM).

<sup>238</sup> 60 M.J. 4 (2004).

<sup>239</sup> *Id.* at 4.

<sup>240</sup> *Id.* at 5-6.

<sup>241</sup> *Id.* at 6.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 6.

<sup>244</sup> See *id.* at 7.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 7-8.

The first category was facially coherent statements capable of being understood by anyone without explanation.<sup>248</sup> For example, in one letter, the appellant wrote, “[e]ven if I did go away for the rest of my life, I’ll be unable to help financially in prison, but I’ll help mentally.”<sup>249</sup> Mrs. Byrd opined that this statement meant her husband thought he would go to jail if he were found guilty of charges of abuse.<sup>250</sup> Because the statement was plain on its face, Mrs. Byrd’s opinion interpreting it did not meet the helpfulness standard of MRE 701 and was, therefore, inadmissible.<sup>251</sup> In order to admit this type of statement, the government would have to establish a “foundation that called into question the apparent coherence of the conversation so that it no longer seemed clear, coherent, or legitimate.”<sup>252</sup>

The second category was ambiguous statements. One example was a letter in which the appellant wrote, “Well, I will. I won’t strike until you tell me your intentions. My thinking is, you care for me and want to help me get out of this. That’s what I think. I’ll wait till [sic] you decide the other.”<sup>253</sup> Mrs. Byrd interpreted this to mean that the appellant would wait to see whether she continued to resist cooperating with authorities.<sup>254</sup> If she continued resisting, she would continue receiving financial support. The CAAF held that the government failed in its foundational burden to demonstrate that appellant’s spouse had a special basis for determining his true meaning, “that words or phrases used in this passage had some established meaning in the couple’s communication.”<sup>255</sup>

The final category included statements referring to other events or facts. The appellant wrote,

[t]he main reason I told you what I did in the [car] before I left was to gain trust and answer your questions. I also did it because I know if I tell you the deal, there is a chance for our relationship. I mean, you did say so before . . . .<sup>256</sup>

In her testimony, Mrs. Byrd explained that the letter referenced a conversation the two of them had in which he offered to answer truthfully any question she asked, because she had told him that if he told the truth, the family would not leave him.<sup>257</sup> The CAAF held that Mrs. Byrd’s testimony was admissible to provide background references to other facts mentioned in the letters.<sup>258</sup>

The CAAF examined each of the eight statements, ruling on a case-by-case basis whether the military judge properly admitted Mrs. Byrd’s opinion testimony. The court held that the judge properly admitted two statements and erred in admitting the other six. The CAAF then tested the erroneous admissions for prejudice. The CAAF noted that the case was hard-fought, involving “extensive evidence presented by both the Government and the defense.”<sup>259</sup> In the end, the CAAF found no prejudice because the inadmissible testimony was “of limited materiality.”<sup>260</sup> It was not a focal point of the case, and in closing argument, trial counsel emphasized not Mrs. Byrd’s interpretations of the letters, but the appellant’s words.<sup>261</sup> Accordingly, the CAAF affirmed the ACCA.

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<sup>248</sup> *Id.* at 7.

<sup>249</sup> *Id.* at 8.

<sup>250</sup> *Id.*

<sup>251</sup> *See id.*

<sup>252</sup> *Id.* at 7.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 8.

<sup>255</sup> *Id.* at 7..

<sup>256</sup> *Id.* at 9.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 8.

<sup>259</sup> *Id.* at 10.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 11.

Then-Chief Judge Crawford concurred in the result, arguing, however, that the majority was incorrect to find that the military judge abused his discretion in admitting the statements under MRE 701.<sup>262</sup> According to Chief Judge Crawford, the witness's opinion was generally helpful to the fact-finder, thereby satisfying MRE 701. Chief Judge Crawford believed that the appellant demonstrated "a tendency to speak in cryptic, obfuscatory terms" and that Mrs. Byrd's testimony "added significant detail to the setting against which her opinions were offered."<sup>263</sup>

As a case of first impression, *Byrd* is instructive to practitioners seeking to introduce lay opinion testimony interpreting the conversations or statements of others. Laying the proper foundation to establish a base of common knowledge and special modes of communication between the witness and the other participant in the conversations is the key factor. The CAAF's framework of three categories of statements (self-evident, ambiguous, and referential) and its establishment of the differing foundational requirements for each should prove beneficial to counsel seeking to admit or oppose lay opinion testimony interpreting the statements of others. The case also provides a useful look at the way in which the opinions of Article III courts can be used to help shape military law. Counsel should remember to look beyond the military justice reporters when facing novel issues or issues that are rarely addressed in a military court. The opinions of Article III courts on evidentiary matters are not binding at courts-martial, but they can certainly prove persuasive and may carry the day for a diligent counsel who has prepared well for an admissibility argument.

### *Rule 702 and 703. Expert Opinion Testimony and Basis for Opinion*

Under the liberalized approach to expert opinion testimony provided by MRE 702 and the *Daubert* and *Kumho Tire* line of cases, experts can play a significant role in helping the trier of fact understand complex or counterintuitive issues at trial. Military Rule of Evidence 702 permits an expert to testify concerning scientific, technical, or other specialized knowledge provided that the expert is qualified by virtue of knowledge, skill, experience, training or education and if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."<sup>264</sup> Military Rule of Evidence 703 allows experts to base their opinions or inferences upon a wide variety of facts or data, provided that the facts or data are of a type "reasonably relied on by experts in the field."<sup>265</sup> In *United States v. Traum*,<sup>266</sup> the CAAF extended further the already considerable discretion granted to experts in rendering opinions at trial.

The appellant in *Traum* suffocated her 18-month-old daughter, Caitlyn, to death and eventually confessed to an OSI polygrapher.<sup>267</sup> The defense moved unsuccessfully to suppress the confession based on an OSI agent's allegedly improper failure to provide Article 31<sup>268</sup> rights prior to asking the appellant if she would be willing to take a polygraph examination.<sup>269</sup> At trial, the government called a forensic pediatrician, Dr. Cooper, to discuss child abuse and the counterintuitive notion of how a parent can kill her child.<sup>270</sup>

The defense filed a motion in limine to preclude Dr. Cooper from offering inadmissible profile evidence and evidence of parental behavior that the defense thought was more appropriately the subject of eyewitness testimony rather than expert testimony.<sup>271</sup> Pursuant to the motion, the expert's qualifications and scope of testimony were thoroughly litigated at a pretrial hearing. Dr. Cooper testified that she employed a three-part methodology in reaching her conclusions: first, she examined the reported medical history, particularly paying attention to changes in the history reported by the custodial parent over time;

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<sup>262</sup> See generally *id.* at 11-14 (Crawford, C.J., concurring).

<sup>263</sup> *Id.* at 13.

<sup>264</sup> EVIDENCE MANUAL, *supra* note 119, § 702.01 (quoting the official text of the amended MRE 702, which has not yet been published in the *MCM*).

<sup>265</sup> *MCM*, *supra* note 4, MIL. R. EVID. 703.

<sup>266</sup> 60 M.J. 226 (2004).

<sup>267</sup> *Id.* at 228-29.

<sup>268</sup> UCMJ Art. 31 (2000).

<sup>269</sup> *Traum*, 60 M.J. at 229.

<sup>270</sup> *Id.* at 231.

<sup>271</sup> *Id.*

second, she examined the grief behavior of the custodial parent; and third, she evaluated the physical examination of the child.<sup>272</sup> The military judge denied the motion, but limited the expert's testimony.<sup>273</sup>

At trial, pursuant to the military judge's ruling, the expert testified to the following matters: (1) overwhelmingly, the most likely person to kill a child would be his or her biological parent; (2) the most common cause of trauma death for children under four is child maltreatment; (3) for eighty percent of child abuse fatalities, there are no prior instances of reported abuse; (4) Caitlyn died of non-accidental asphyxiation.<sup>274</sup> There was no cross-examination.

The appellant appealed on two grounds. First, the appellant claimed that three of Dr. Cooper's opinions amounted to improper profile evidence.<sup>275</sup> Second, the appellant alleged that Dr. Cooper had an improper basis for her opinion because it was based on her review of the appellant's behavior in the emergency room.<sup>276</sup> The CAAF examined each of the issues, holding that the military judge did not abuse his discretion in admitting the evidence.<sup>277</sup>

The CAAF reviewed the requirements for expert testimony under MRE 702 and *United States v. Houser*,<sup>278</sup> a seminal military case on the admissibility and reliability of expert testimony. The CAAF outlined the general helpfulness standard of MRE 702 and the *Houser* reliability factors, noting that the true test is whether the panel is qualified without the expert testimony to determine "intelligently and to the best possible degree the particular issues without enlightenment from those having a specialized understanding of the subject."<sup>279</sup> The CAAF contrasted the proper use of expert testimony with the danger of profile evidence, which presents a "characteristic profile" of an offender to demonstrate guilt or innocence in a criminal trial.<sup>280</sup> Profile evidence of the offender is impermissible in a court-martial.<sup>281</sup>

In contrast to offender profile evidence, the CAAF explained, expert testimony concerning the victim profiles and characteristics of abused children—for example, battered child syndrome—can be helpful to a trier of fact.<sup>282</sup> The CAAF found that the expert's testimony that the most common cause of trauma death for children under four and that eighty percent of child abuse fatalities involved first-time reports of abuse was related to characteristics of the child victim in the case rather than the appellant.<sup>283</sup> Accordingly, the testimony was properly admitted.

The CAAF found the expert's opinion that "[o]verwhelmingly, the most likely person to kill a child is going to be his or her own biological parent"<sup>284</sup> more troubling, because it reached the characteristics of the victim and of the appellant. The testimony was particularly dangerous because it could leave the members with the impression that if the victim died from abuse, the probability was overwhelming that the appellant committed the offense.<sup>285</sup> The testimony was impermissible offender profile evidence that essentially "placed a statistical probability on the likelihood that Appellant committed the offense."<sup>286</sup> The error, however, was harmless for two reasons. First, in context, the evidence was introduced after appellant's confession had already been admitted in evidence.<sup>287</sup> Second, the issue in the case was not the identity of the

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<sup>272</sup> *Id.* at 231-32.

<sup>273</sup> *Id.* at 231-33.

<sup>274</sup> *Id.* at 233.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 327.

<sup>278</sup> 36 M.J. 392 (C.M.A. 1993).

<sup>279</sup> *Traum*, 60 M.J. at 234 (quoting *Houser*, 36 M.J. at 398).

<sup>280</sup> *Id.*

<sup>281</sup> *See id.* (citing *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992)).

<sup>282</sup> *See id.* at 234-35 (recounting examples and precedents for use of battered child syndrome evidence).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 235.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 235-36.

<sup>287</sup> *Id.* at 236.

perpetrator, but whether the asphyxiation was accidental or intentional—there was no dispute that the appellant was alone with the victim at the time of the child’s injury.<sup>288</sup>

The CAAF spent less time on the second issue, the basis for Dr. Cooper’s testimony. Dr. Cooper testified at the Article 39(a) session that in forming her opinion, she considered the fact that appellant had given differing accounts of the event to the 911 operator, paramedics, and emergency room personnel.<sup>289</sup> She also considered statements the appellant made to other witnesses that were inappropriate grief responses (for instance, the appellant told one witness how glad she was that she saved receipts for toys she had given her daughter; and, on another occasion, in response to a comment on how beautiful her daughter had been, she stated that her daughter had been really mean).<sup>290</sup> The expert testified that her evaluation of these statements was part of a three-part methodology she used that was generally accepted as authoritative in the forensic pediatrics field.<sup>291</sup>

The CAAF held that Dr. Cooper’s opinion was based on proper factors. Military Rule of Evidence 703 permits an expert to base her opinion on a variety of sources, including personal knowledge, assumed facts, documents supplied by other experts, and the testimony of other witnesses at trial.<sup>292</sup> The expert’s testimony in this case indicated that she based her opinion not only on the appellant’s inappropriate grieving reaction to her daughter’s death, but also on a three-part methodology generally relied upon by experts in the field of forensic pediatrics.<sup>293</sup>

Judge Erdmann concurred in the result, finding, however, that all the evidence taken together constituted impermissible offender profiling.<sup>294</sup> The expert testified that eighty percent of children who die from child abuse, perish from a one-time event.<sup>295</sup> Because the appellant was alone with Caitlyn prior to her death, it was eighty percent likely that Traum was the case of the death.<sup>296</sup> Next, the expert testified that the most common cause of child trauma death is child mistreatment.<sup>297</sup> According to Judge Erdmann, this statement identified the death as resulting from trauma and the appellant as the only person who could have inflicted it.<sup>298</sup> Furthermore, the statement that a biological parent is overwhelmingly the most likely person to kill a child meant in context that the appellant was overwhelmingly the most likely person to have killed Caitlyn.<sup>299</sup> Finally, the military judge admitted the evidence to help the panel with the “counterintuitive” notion that a parent would kill his or her own child.<sup>300</sup> Thus, the very purpose for admission was to identify the appellant as part of a limited group who would or could have killed the child.<sup>301</sup> Nevertheless, because of the context of the evidence occurring after admission of appellant’s confession, Judge Erdmann would find the error harmless.

*Traum* comes very close to blurring the lines between victim and offender profile evidence. Judge Erdmann’s concurring opinion seems more accurately to capture the likely effect of the testimony on the members than the majority analysis. Essentially, the opinion testimony established a logical and statistical profile from which the appellant never could have distinguished herself, given the circumstances of the case. Perhaps the saving grace of this case is, as the majority and Judge Erdmann observed, the context of the expert’s testimony, which occurred only after the appellant’s confession had been introduced. In a closer case, the analysis of whether the profile evidence followed the logical path laid out by Judge Erdmann might have prevailed. Counsel and military judges alike should employ caution when faced with expert testimony

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<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 231.

<sup>292</sup> *Id.* at 236..

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 237 (Erdmann, J., concurring in part and in the result).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 237-38.

<sup>298</sup> *Id.* at 238.

<sup>299</sup> *Id.* at 238.

<sup>300</sup> *Id.* at 233.

<sup>301</sup> *Id.*

of the type elicited in *Traum*. The use of statistics, probabilities, and victim profiles that are closely related to offender profiles to box in the accused could very well, in a future case without a confession to support its strength, prove ultimately fatal to the government's case.

*Military Rule of Evidence 901. Authentication*

In *United States v. Craig*,<sup>302</sup> the CAAF clarified the foundational and authentication requirements for introducing transcripts of recorded conversations. The case arose from a conspiracy to import and distribute marijuana from Mexico into the United States.<sup>303</sup> The appellant, who was in an extra duty status, could not leave Fort Hood, so his friends made the 1200-mile round trip to El Paso without him and were caught and arrested at the border with two duffel bags full of marijuana.<sup>304</sup> At the direction of a DEA agent, one of the co-conspirators called the accused on the telephone two times and recorded the conversations, in which the accused made several incriminating statements.<sup>305</sup>

At trial, the government sought to introduce the audiotape of the incriminating conversations into evidence. Although the quality of the audiotape was poor, the military judge admitted it into evidence. No one could fully understand the tape, so the military judge called a recess for the government to obtain better playback equipment. During the recess a member of the legal staff accidentally recorded over part of the conversation. The government later produced a transcript of the tape, prepared by a court reporter, and introduced the transcript into evidence. The military judge permitted the members to read the transcript as they listened to the tape, and eventually, he permitted the members to take the transcript with them into the deliberation room.

The issue on appeal was whether the military judge abused his discretion in admitting into evidence a transcript of a poor-quality tape conversation. In affirming, the CAAF examined its own long-standing precedent as well as cases from the federal circuit courts of appeal. The court cited *United States v. Jewson*,<sup>306</sup> in which the COMA stated that it would be irrational to exclude a properly authenticated transcript of a recording.<sup>307</sup> The CAAF stated its continuing belief that where foundational requirements and appropriate procedural safeguards exist, transcripts of audio recordings are admissible to assist the fact finder in following the recordings as they are being played.<sup>308</sup> The poor quality of a recording does not normally render it inadmissible unless the unintelligible portions are so substantial as to render the entire recording untrustworthy.<sup>309</sup> The CAAF adopted a four-part test from the 9th Circuit for ensuring proper procedural protections in admitting a transcript: (1) the judge should review the transcript for accuracy; (2) the defense counsel should be permitted to highlight inaccuracies and introduce an alternative transcript; (3) the fact finder should be instructed that the tape, and not the transcript, is evidence; and (4) the fact finder should be permitted to compare the tape to the transcript and hear counsel's argument.<sup>310</sup> Furthermore, the fact-finder should be instructed to disregard anything in the transcript they did not hear on the tape.<sup>311</sup>

In the instant case, the CAAF held that the military judge sufficiently satisfied each of the four steps, although his efforts were "not a model for executing this four-step process."<sup>312</sup> First, he reviewed the transcript for accuracy, although he never stated on the record the results of that review.<sup>313</sup> Second, he granted the defense the opportunity to challenge the accuracy of

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<sup>302</sup> 60 M.J. 156 (2004).

<sup>303</sup> *Id.* at 157.

<sup>304</sup> *Id.* at 157-58.

<sup>305</sup> *Id.* at 158.

<sup>306</sup> 5 C.M.R. 80 (C.M.A. 1952).

<sup>307</sup> *Craig*, 60 M.J. at 159-60.

<sup>308</sup> *Id.* at 160.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 161 (citing *United States v. Delgado*, 357 F.3d 1-61, 1070 (9th Cir. 2004)).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

the transcript.<sup>314</sup> Third, he gave a cautionary instruction regarding the use of the tape, which “could have been more artfully drafted” but, adequately advised the members how to use the transcript.<sup>315</sup> The CAAF advised that the instruction must inform the panel that the transcript is merely an interpretation of the tape and that the members should disregard anything in the transcript that they do not hear on the recording itself.<sup>316</sup> Finally, he gave the members the chance to compare the tape and the transcript during their deliberations.<sup>317</sup> The last issue the CAAF considered was whether a transcript should be used only as demonstrative evidence in the courtroom or should be admitted into evidence to accompany the members into the deliberation room. The CAAF joined “the majority of the federal courts of appeals in holding that trial judges have considerable discretion in determining whether to allow the fact finder to consider such transcripts during deliberations.”<sup>318</sup> In the instant case, the military judge did not abuse his discretion in allowing the members to take the transcript with them into the deliberation room.<sup>319</sup>

*Craig* is an excellent practical case for trial and defense counsel and military judges. Good planning and compliance with the four procedural protections adopted by the CAAF will ensure the effective use of audio playback and transcripts at courts-martial. Counsel should ensure that they have adequate playback equipment and have tested it in the courtroom prior to trial. In addition, counsel who plan to use audio recordings should prepare a transcript in advance and provide copies to the military judge and opposing counsel. Military judges should consider a pretrial article 39(a) session to permit adequate review of the tape and transcript and development of objections from the opposing side. Finally, although it is a matter of discretion for the military judge, the CAAF has apparently embraced the practical benefits of sending the transcript and the audio recording into the deliberation room with the members as a way of ensuring the members have an adequate opportunity to compare the tape with the transcript.

#### *Change to MRE 608(b)*

Effective 1 December 2003, Federal Rule of Evidence 608(b) was changed to clarify that Rule 608(b)’s absolute prohibition on extrinsic evidence applies only when the *sole reason* for proffering the evidence is to attack or support a witness’s character for truthfulness.<sup>320</sup> The changes will be effective in the Military Rules of Evidence by operation of law under MRE 1102 on 1 June 2005.<sup>321</sup>

The text of MRE 608(b), with the changes underlined, follows:

(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters which that relate only to credibility character for truthfulness.<sup>322</sup>

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<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 161-62.

<sup>316</sup> *Id.* at 161.

<sup>317</sup> *Id.* at 161-62.

<sup>318</sup> *Id.* at 162 (citations omitted).

<sup>319</sup> *Id.* at 157.

<sup>320</sup> See Proposed Amendment to the Federal Rules of Evidence, Advisory Committee Note to Rule 608(b) (Mar. 2003), available at <http://www.uscourts.gov/rules/congress0303.html> [hereinafter Advisory Note].

<sup>321</sup> Military Rules of Evidence 1102 provides that changes to the Federal Rules of Evidence become operative in the MRE eighteen months later, unless the President first takes other action to modify, amend, or refuse to adopt them in the MRE. See MCM, *supra* note 4, MIL. R. EVID. 1102.

<sup>322</sup> Advisory Note, *supra* note 3203.

## Conclusion

The 2004 term of court provides something for almost every trial practitioner. Defense counsel should be delighted by the CAAF's firm stance on the admissibility of uncharged misconduct evidence in *McDonald*, its clarification on the attorney-client privilege and classified evidence in *Schmidt*, its warning against the admission of unfairly prejudicial impeachment evidence in *Saferite*, and the restrictions on lay opinion testimony in *Byrd*. The CAAF didn't leave the government out, however, placing new toys in the prosecutor's playhouse with its relaxing of the corroboration rule for confessions in *Seay* and its blurring of the boundaries between offender and victim profile evidence in *Traum*. A frequent theme in many of the cases is the significant role the military judge plays as an evidentiary gatekeeper, safeguarding the rights of the accused as in *Mason*, protecting the dignity and protection of sexual misconduct victims as in *Banker*, and ensuring that the proper evidentiary foundations are laid and instructions given as in *Craig*. While it is true that no single unifying thread runs through these cases, it is also true that there is method in the CAAF's madness.<sup>323</sup>

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<sup>323</sup> Cf. WILLIAM SHAKESPEARE, *HAMLET*, act 2, sc. 2 ("Though this be madness, yet there is method in 't.").