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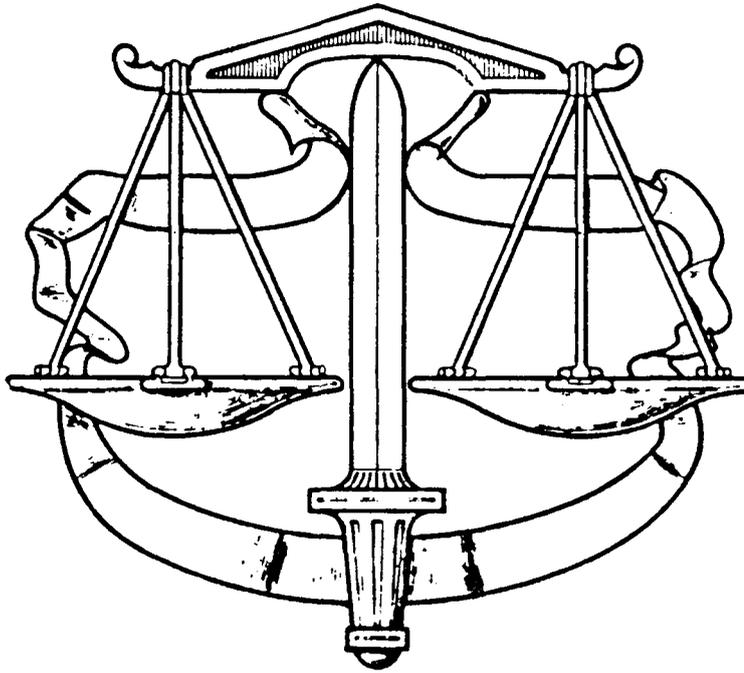


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LITIGATING THE RESIDUAL EXCEPTIONS TO THE HEARSAY RULE

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MRE 404(b) AND IDENTITY EVIDENCE

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OPENING STATEMENTS

Preview of Coming Issues

The next two issues of The Advocate will explore the changes wrought by the Manual for Courts-Martial, 1984 and the Military Justice Act of 1983. Military practice now even more closely resembles civilian federal practice as a result of the new changes. The last vestiges of paternalism which formerly protected military accused from defense counsel's lapses have vanished. Defense counsel must be vigilant to protect the rights of their clients and to preclude waiver of those rights on appeal. The next issue of The Advocate will address suggested defense tactics for litigation under the Manual for Courts-Martial, 1984.

* * *

Staff Changes

The Editorial Board has undergone significant changes in composition since the last issue. Captain Marcus C. McCarty, Editor-in-Chief, has departed Defense Appellate Division for civilian practice. He has joined the firm of Bryan, Cave, McPheeters & McRoberts in St. Louis, Missouri. Prior to serving as Editor-in-Chief, he was an Associate Editor. The Advocate thanks Captain McCarty for his years of dedicated effort. The Managing Editor and Articles Editor, Captain Gunther O. Carrle and Captain Kenneth G. Gale have also left their respective longtime positions as they, too, make the transition to civilian practice. Captain William T. Wilson, Associate Editor, has also departed for civilian practice. Their hard work for The Advocate and their presence at Defense Appellate Division will be sorely missed. Captain Joel R. Maillie has also left the Editorial Board, although he continues to contribute to The Advocate. The Advocate welcomes Captains Peter L. Yee, Robert S. Johnson, Jr., David L. Carrier, Karen S. Davis and Craig E. Teller to the Board. Remaining Board members, Captain Donna Chapin Maizel and Captain Michael D. Graham assume new positions as Editor-in-Chief and Articles Editor.



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DISTRIBUTION

1. This issue of The Advocate is devoted to an analysis of two areas of the Military Rules of Evidence which are often employed to admit evidence resounding to an accused's great detriment. The first article, by CPT Michael Kelly and CPT Karen Davis, considers hearsay evidence admissible under Mil. R. Evid. 803(24) and 804(b)(5). The second article, by CPT John Morris, examines other crimes, wrongs or acts evidence admissible under Mil. R. Evid. 404(b).

2. The authors of these articles have practiced as trial or defense counsel for active jurisdictions. They have performed the valuable function of providing an analytic framework against which defense counsel can strictly scrutinize proposed government evidence to determine if evidence which at first glance appears to be admissible does in fact carry sufficient indicia of admissibility.

3. The Advocate is especially pleased to publish practical articles based upon in-court experiences such as CPT Morris', and upon appellate practice such as CPT Davis' and CPT Kelly's. Our mission is to "recycle" the acquired expertise of trial and appellate defense counsel for the benefit of the entire defense bar. Experts on trial evidentiary matters are encouraged to submit an article in their areas of specialization and share their knowledge and experience with the defense bar.

A handwritten signature in black ink, reading "Wm G Eckhardt".

WILLIAM G. ECKHARDT
Colonel, JAGC
Chief, Defense Appellate Division

LITIGATING THE RESIDUAL
EXCEPTIONS TO THE HEARSAY RULE

by

*Captain Michael T. Kelly**

and

*Captain Karen S. Davis***

I. Introduction

This article is intended to assist trial defense counsel in understanding and applying the residual exceptions to the hearsay rule embodied in Military Rules of Evidence [hereinafter M.R.E.] 803(24) and 804(b)(5). Defense counsel should be familiar with these exceptions in order to anticipate and narrow their use by the government, as well as to support the admission of defense evidence falling within their parameters. Evidence offered within the residual exceptions should be examined for consistency with the purpose and history of the rules, the substantive and procedural requirements of the exceptions, and the confrontation clause of the Sixth Amendment.¹

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The authors would like to express their appreciation to Captain Mark W. Harvey Senior Defense Counsel, Fort Sam Houston, Texas, formerly of the Defense Appellate Division, for his assistance in researching this article.

1. For a comprehensive treatment of the residual hearsay exceptions based upon cases decided prior to 1981, the reader is referred to Holmes, *The Residual Hearsay Exceptions: A Primer for Military Use*, 94 Mil. L. Rev. 15 (1981) [hereinafter cited as Holmes].

II. Purpose and History of the Residual Hearsay Exceptions

Military Rule of Evidence 802 provides that hearsay evidence² is inadmissible "except as provided by these rules or by any Act of Congress applicable in trials by court-martial." Specific exceptions to the hearsay rule are enumerated in M.R.E. 803³ and M.R.E. 804.⁴ In addition, M.R.E. 803(24) creates a residual "catch-all" exception and makes admissible:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstances that guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is

2. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(c). Statements may be oral or written, or may consist of nonverbal conduct if intended by the actor as an assertion.

3. M.R.E. 803 excludes from the hearsay rule evidence of statements (or the absence thereof) in the following categories: (1) present sense impressions; (2) excited utterances; (3) then existing mental, emotional, or physical conditions; (4) statements for purposes of medical diagnosis or treatment; (5) recorded recollections; (6) records of regularly conducted activity; (7) absence of entries kept in accordance with subsection (6); (8) public records and reports; (9) records of vital statistics; (10) absence of public record or entries; (11) records of religious organizations; (12) marriage, baptismal, and similar certificates; (13) family records; (14) records of documents affecting an interest in property; (15) statements in documents affecting an interest in property; (16) statements in ancient documents; (17) market reports and commercial publications; (18) learned treatises; (19) reputation concerning personal or family history; (20) reputation concerning boundaries or general history; (21) reputation as to character; (22) judgment of previous conviction; and (23) judgment as to personal, family, or general history, or boundaries.

4. M.R.E. 804(b) excludes from the hearsay rule evidence of statements falling into the following categories, provided the declarant is "unavailable": (1) former testimony; (2) statements under belief of impending death; (3) statements against interest; and (4) statements of personal or family history.

more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

M.R.E. 804(b)(5) states an identical exception which applies only when the declarant is unavailable⁵ as a witness at the trial where the statement is offered.

Military Rules of Evidence 803 and 804 are identical to Federal Rules of Evidence [hereinafter F.R.E.] 803 and 804. Military adoption of the Federal Rules of Evidence is in accordance with the mandate of Article 36 of the Uniform Code of Military Justice, which requires that courts-martial follow the procedures and modes of proof utilized by the federal district courts in criminal cases to the extent practicable and not otherwise contrary to or inconsistent with the Code.⁶ As the Analysis of the Military Rules of Evidence states:

It should be noted ... that a significant policy consideration in adopting the Federal Rules of Evidence was to ensure, where possible, common evidentiary law.⁷

5. M.R.E. 804(a) defines "unavailability" of a declarant. See section III F of text, infra.

6. In addition, M.R.E. 101(b) provides that courts-martial shall utilize the rules of evidence followed in criminal cases in federal district court the rules of evidence at common law when practicable and not inconsistent with the Manual for Courts-Martial or federal evidentiary practice.

7. Analysis of the 1980 Amendments to the Manual for Courts-Martial, Appendix 18, Rule 101(a), at A18-2, Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969],
(Continued)

Another purpose of the rules is stated in M.R.E. 102:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.⁸

With respect to the residual hearsay exceptions, the Analysis provides:

Rule 803(24) is taken from the Federal Rule without change. It has no express equivalent in the present Manual as it establishes a general exception to the hearsay rule. The Rule implements the general policy behind the Rules of permitting admission of probative and reliable evidence.... The Article III courts have divided as to whether the exception may be used only in extraordinary cases or whether it may have more general application. It is the intent of the committee that the Rule be employed in the same manner as it is generally applied in the Article III courts.⁹

The drafters of the military rules did not simply engage in a wholesale adoption of the federal rules. Some of the federal rules were modified, while others were not adopted in any form. There are a number of military rules, e.g., Rules 304 and 305, which have no parallel in the federal rules. Consequently, the fact that the drafters of the military rules chose to adopt the federal residual hearsay exceptions verbatim evinces a strong intent to accept the "baggage" of their legislative history and federal judicial interpretations, at least that existing at the time of their adoption on 12 March 1980. In addition, as noted in the Analysis, federal

7. Continued.

[hereinafter cited as Analysis]. This analysis was prepared under the guidance of the Department of Defense and represents "the intent of the drafting committee." It is not part of Executive Order No. 12198 (1980), which adopted the Military Rules of Evidence, and does not necessarily reflect the views of the Department of Defense. See Analysis at A18-1.

8. M.R.E. 102 is identical to F.R.E. 102.

9. Analysis, Rule 803(24), MCM, 1969 at A18-107.

court interpretations of the federal rules after 12 March 1980 are very persuasive, if not controlling:

While specific decisions of the Article III courts involving rules which are common to both...should be considered very persuasive, they are not binding.¹⁰

Thus, trial defense counsel should point to this history whenever urging a military court to adopt a particular federal court's construction of the residual hearsay exceptions.

The residual hearsay exceptions in the federal rules were intended to retain flexibility and to permit recognition of new exceptions in circumstances, unanticipated by the drafters, which demonstrate a high degree of trustworthiness.¹¹ The legislative history reflects Congressional concern that the residual exceptions be not so broad as to "emasculate" the hearsay rule and its recognized exceptions.¹² The Senate rejected a proposed exception which would have admitted hearsay evidence having "comparable" circumstantial guarantees of trustworthiness, and insisted that these guarantees be "equivalent" to the guarantees of

10. Analysis, supra note 7.

11. The Advisory Committee on the Proposed Federal Rules stated:

It would...be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system.... They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102.

As quoted in S. Saltzburg and K. Redden, Federal Rules of Evidence Manual 557 (2d ed. 1977) (citations omitted).

12. Notes, Senate Committee on the Judiciary, S. Rep. No. 1277, 93d Cong., 2d Sess. 19 (1974), reprinted in [1974] U.S. Code Cong. & Ad. News 7065 [hereinafter cited as S. Rep. No. 1277].

trustworthiness in the stated exceptions.¹³ The Senate Judiciary Committee Report stated:

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.¹⁴

The House of Representatives, which at first rejected any residual exception to the hearsay rule, insisted that the rule include the advance notice requirements stated in its last sentence.¹⁵ Thus, defense counsel, faced with government attempts to introduce evidence within the ambit of the residual exception, should cite its legislative history in urging a strict construction of the exception by the military judge.

In applying the residual exceptions to the hearsay rule, the federal courts frequently refer to the legislative intent that new hearsay exceptions be recognized with caution. They emphasize that while the residual exceptions are meant to provide flexibility, the courts cannot sacrifice the demanding spirit of trustworthiness which underlies all exceptions to the hearsay rule. As the Court of Appeals for the Fifth Circuit noted in United States v. Mathis:¹⁶

13. Id. at 20.

14. Id.

15. Notes of Conference Committee, H. Conf. Rep. No. 1597, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Ad. News 7051, 7106.

16. 559 F.2d 294, 299 (5th Cir. 1977).

Rule 803(24) was designed to encourage the progressive growth and development of federal evidentiary law by giving courts the flexibility to deal with new evidentiary situations which may not be pigeon-holed elsewhere. Yet tight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules.

The Fifth Circuit reiterated this position in United States v. Cain.¹⁷

In United States v. Kim,¹⁸ the District of Columbia Circuit applied a "narrow construction" to F.R.E. 803(24), stating that "[t]he legislative history of this exception makes it very clear that it was intended to be a narrow exception to the hearsay rule, applied only in exceptional cases."¹⁹ The Ninth Circuit, citing Kim, has stated that the residual hearsay exception "is not to be used as a new and broad hearsay exception, but rather is to be used rarely and in exceptional circumstances."²⁰

The Court of Appeals for the Second Circuit has adopted a narrow construction of the residual hearsay rule in a number of cases. In United States v. Medico,²¹ for example, it reviewed the legislative history and stated that the residual hearsay exceptions

are not intended as a "broad license" to trial judges to admit hearsay but for use under rare and exceptional circumstances with the trial judge being admonished to "exercise no less care, reflection and caution than the courts did under common law in establishing the now-recognized exceptions to the hearsay rule."²²

17. 587 F.2d 678, 681-682 (5th Cir. 1979).

18. 595 F.2d 755 (D.C. Cir. 1979).

19. Id. at 765.

20. Fong v. American Airlines, Inc., 626 F.2d 759, 763 (9th Cir. 1980).

21. 557 F.2d 309 (2d Cir. 1977).

22. Id. at 315.

The Second Circuit has also noted that the residual exceptions were meant to be "invoked sparingly."²³ Likewise, in United States v. Bailey,²⁴ the Third Circuit, in interpreting F.R.E. 804(b)(5), noted that the residual hearsay exceptions are rules of "limited scope as intended by Congress."²⁵

The Army Court of Military Review has also examined the legislative history of the residual hearsay exceptions. In United States v. Whalen,²⁶ the Army Court stated that "a case need only be 'exceptional' in the sense that it was not anticipated by the drafters and that it meets the same guarantees of trustworthiness established by the Federal Rules of Evidence and the Military Rules of Evidence for other types of hearsay evidence."²⁷ Citing United States v. Medico,²⁸ the Army Court in Whalen stated:

Evidence which is not covered by other exceptions but which meets the same "exceptional guarantees of trustworthiness" falls "within the spirit of the specifically stated exceptions," and may be received in evidence.²⁹

But in United States v. Thornton,³⁰ the Army Court's review of the legislative history led it to express greater reservations about the admission of residual hearsay evidence:

23. Robinson v. Shapiro, 646 F.2d 734, 742 (2d Cir. 1981).

24. 581 F.2d 341 (3d Cir. 1978).

25. Id. at 347.

26. 15 M.J. 872 (ACMR 1983).

27. Id. at 877. Among the authorities cited by the court are United States v. Bailey, 581 F.2d 341 (3d Cir. 1978); Zenith Radio Corp. v. Matsushita Elec. Indust. Co., Ltd., 505 F. Supp. 1125 (E.D. Pa. 1980); and United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977).

28. 557 F.2d 309 at 315.

29. 15 M.J. at 877-878.

30. 16 M.J. 1011 (ACMR 1983).

The Joint Service Committee on Military Justice intended for this rule of evidence to be employed in the same manner as it is generally applied in Article III courts.... Congress "intended that the residual hearsay exception . . . be used very rarely, and only in exceptional circumstances."³¹

There are few military cases on the residual hearsay exception. Consequently, the trial defense counsel is challenged to help forge the law in this area by alerting military judges to the legislative history of the rules, and by vigilantly guarding against government efforts to create a "mack truck" exception to the hearsay rule under the guise of its residual exceptions. To recognize such efforts, defense counsel should be thoroughly familiar with the substantive requirements of Rules 803(24) and 804(b)(5).

III. Elements of the Residual Hearsay Exceptions

Whether offering or opposing evidence within the residual hearsay exceptions, the trial defense counsel must determine whether the evidence satisfies each of the substantive and procedural requirements of the applicable exception. The exceptions are identical, except that M.R.E. 804(b)(5) also requires that the declarant be unavailable as a witness. Counsel should remember that the Army Court of Military Review, citing the Senate Judiciary Committee Report, has expressly stated that the substantive "requirements of the rule must be strictly construed."³²

A. Equivalent circumstantial guarantees of trustworthiness.

Hearsay is admissible under the residual exceptions only if it possesses circumstantial guarantees of trustworthiness equivalent to or greater than the guarantees of trustworthiness which inhere in the stated exceptions.³³ In determining whether this requirement has been satisfied, counsel should first ascertain the extent to which the evidence is vitiated by the "four traditional considerations usually invoked to exclude hearsay

31. Id. at 1013.

32. United States v. Thornton, 16 M.J. 1011, 1013 (ACMR 1983).

33. Congress refused to accept "comparable" guarantees of trustworthiness and insisted upon strict equivalence. See S. Rep. No. 1277, supra note 12 and accompanying text.

testimony":³⁴ How truthful was the original declarant? To what extent were his powers of observation adequate? Was the declaration truthful? Was the original declarant able to adequately communicate the statement? Next, counsel should examine the type of evidence required to satisfy the specified exception or exceptions, if any, admitting statements most similar to the proffered statement. Finally, counsel should examine the case law to determine whether the courts have found equivalent guarantees of trustworthiness in cases involving similar fact patterns.

The federal courts have provided considerable guidance on the "equivalent trustworthiness" required to admit a statement offered under the residual hearsay exceptions. In United States v. White,³⁵ the Fifth Circuit ruled that the trial judge in a forgery case did not abuse his discretion by admitting a Treasury claim form executed by the payee, who was deceased at the time of trial. On the claim form, the payee declared that he had never received the social security check which became the subject of White's prosecution for larceny. The payee also stated that he had never authorized anyone to negotiate the check on his behalf. The Fifth Circuit cited these factors in determining that the claim form had been properly admitted:³⁶ the claim form had been executed three months after the payee's social security check should have arrived; the payee, in signing the claim form, acknowledged that a false claim could result in criminal prosecution; testimony that the payee had \$44,000.00 in the bank at the time he signed the claim form made it "highly improbable" that he would file a false claim for a \$373.80 social security check; the payee's statements on the form were corroborated by the official who helped him to complete the form; and the official was available as a witness for cross-examination concerning the circumstances surrounding execution and filing of the claim form.

In United States v. Gonzalez,³⁷ on the other hand, the Fifth Circuit reversed the admission of the grand jury testimony of the defendant's coconspirator under F.R.E. 804(b)(5). The court noted the existence of a number of factors which made the coconspirator's grand jury testimony untrustworthy: he was subject to considerable pressure from the prosecutor

34. Analysis, M.R.E. 803(24), MCM, 1969 at A18-107.

35. 611 F.2d 531 (5th Cir. 1980).

36. Id. at 538.

37. 559 F.2d 1271 (5th Cir. 1977).

and grand jury; his testimony was in response to leading questions which would not have been permitted at trial; it was readily accepted and not subject to cross-examination; it was general and unsupported by detailed facts; and he had expressed fears that telling the truth might result in harm to himself or his family.

Another Fifth Circuit case, United States v. Van Lufkins,³⁸ is problematic for defense counsel. Van Lufkins was convicted of assaulting Raymond Bear while the two were confined in a Sioux tribal jail. Bear died of unrelated causes prior to trial. Under Rule 804(b)(5), the trial court admitted two statements which Bear made after the assault to his sister, who worked in the jail, and to an FBI agent. Bear had described the incident to his sister shortly after it occurred on 1 April 1980. His interview with the FBI agent, however, did not take place until 27 October 1980, some seven months later. In upholding the trial judge's determination that the two statements were sufficiently trustworthy because they were corroborated by "other evidence,"³⁹ the Fifth Circuit stated:

The district court has wide discretion in determining the trustworthiness of a statement for purposes of Rule 804(b)(5). United States v. Carlson, 546 F.2d 1346, 1354 (8th Cir. 1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977). The court's conclusions were supported by the record, so we affirm its decision to admit the statements.⁴⁰

The Court in Van Lufkins did not engage in an extensive analysis of factors which guarantee trustworthiness. The decision focused, instead, upon the wide discretion of the trial judge in determining whether equivalent guarantees of trustworthiness exist. Defense counsel should request that the military judge articulate on the record the factors relied upon in concluding that sufficient indicia of reliability exist. Since appellate courts may not be willing to presume an abuse of discretion, specifically listing the factors which guarantee trustworthiness will reveal whether or not the military judge abused his discretion.

38. 676 F.2d 1189 (5th Cir. 1982).

39. Id. at 1192.

40. Id.

In United States v. Atkins,⁴¹ however, the Fifth Circuit found no abuse of discretion in the trial judge's refusal to admit letters from a previously convicted coconspirator which tended to exculpate the accused. The appellate court held that the defense had failed to give the notice required by the rule, that the letters did not qualify as a statement against penal interest, and that they lacked "circumstantial guarantees of trustworthiness equivalent to the specific hearsay exceptions listed in Rules 803 and 804."⁴² In examining the trustworthiness element, the court noted that the coconspirator's avowed friendship with the accused could have motivated him to fabricate exculpatory evidence on his behalf. The court found that the reliability of the letters was also undermined by the one-year delay between the author's trial and his preparation of the exculpatory letters.⁴³

In deciding that the grand jury testimony of a government witness named Tindall was admissible under F.R.E. 804(b)(5), the Eighth Circuit in United States v. Carlson⁴⁴ set forth a number of factors providing "strong indication of the reliability of Tindall's testimony."⁴⁵ The statements were made under oath, with penalties for perjury. Tindall's grand jury testimony related the factual circumstances of a crime about which he, as a participant, had firsthand knowledge. He had never recanted or expressed reservations about the accuracy of his grand jury testimony. He testified at trial and reiterated that his grand jury testimony was true.

In United States v. Lyon,⁴⁶ the Eighth Circuit upheld the admission of an FBI agent's notes of an interview with the accused's landlady, who testified that she could not remember the details of the underlying incident, which occurred in 1966. Lyon was charged with placing a dynamite

41. 618 F.2d 366 (5th Cir. 1980).

42. Id. at 372.

43. Id. at 373.

44. 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

45. Id. at 1354.

46. 567 F.2d 777 (8th Cir. 1977).

bomb in the St. Louis Municipal Airport terminal. The bomb, which was concealed in a shoe box, exploded shortly after its discovery. The agent's interview notes, which were read to the jury, stated that Lyon's landlady said that Lyon had asked her for a shoe box three days before the explosion, and that she had given him a gray box labelled Brown Shoe Company and bearing the name "Pedwin" on one end. One end of the box was broken and had been taped together. During the interview, the accused's landlady gave the agent a shoe box similar to the one which she stated she had given to Lyon. The Eighth Circuit found the necessary guarantees of trustworthiness in the detailed description given and the extent to which it was corroborated by the shoe box which the landlady gave to the FBI agent, which was introduced at Lyon's trial.⁴⁷

The corroboration aspect of the equivalent guarantees of trustworthiness deserves special attention. The Air Force Court of Military Review addressed this issue in United States v. Ruffin.⁴⁸ The accused was charged with assaulting one of his minor step-daughters, and committing sodomy and lewd and lascivious acts with another. The Air Force Court of Military Review upheld the admission of an out-of-court statement by the sodomy victim, who refused to testify at the trial. The Court found an adequate guarantee of trustworthiness in the fact that the girl had clearly made the statement and that there was some circumstantial evidence which tended to support the statement. This corroborating "evidence" was simply that the statement was made under oath two days after one of the alleged incidents, that the family had lived in California (in her statement, the declarant stated that the accused had abused her in California), and that "we can only conclude that [the girl's] refusal to testify on behalf of the Government was motivated by a desire to help her step-father."⁴⁹

47. Id. at 784.

48. 12 M.J. 952 (AFCMR 1982), pet. denied, 13 M.J. 495 (CMA 1982).

49. Id. at 955.

This type of flimsy "corroboration" is precisely the type which trial defense counsel should seek to attack. If the government attempts to rely upon Ruffin, defense counsel should cite United States v. Bailey,⁵⁰ in which the Third Circuit makes clear that the existence of isolated facts corroborating a hearsay statement is insufficient to establish its trustworthiness. In Bailey, the court refused to find sufficient corroboration to admit an accomplice's confession under F.R.E. 804(b)(5). The court examined the legislative history of the residual hearsay exceptions and noted that they were intended to have a "narrow focus."⁵¹ Pursuant to a pretrial agreement, the accomplice in Bailey provided oral and written statements which implicated Bailey, then refused to testify at Bailey's trial. The trial court admitted the accomplice's statements under Rule 804(b)(5) over defense objection. Bailey's counsel cross-examined the agent whose testimony provided the foundation for admission of the accomplice's statements and brought out evidence of the accomplice's prior convictions. The Third Circuit held that this was not enough to justify admission of the statements.

The Third Circuit in Bailey noted these factors which did "not inspire confidence" in the reliability of the declarant's statements: the statements were made while the declarant was negotiating a plea bargain; they were made in a face-to-face meeting with two FBI agents; they were not made under oath; and their truthfulness was never tested by cross-examination.⁵²

In discussing corroboration, the Third Circuit noted:

We do not feel that the trustworthiness of a statement offered pursuant to the rule should be analyzed solely on the basis of the facts corroborating the authenticity of the statement. Since the rule is designed to come into play when there is a need for

50. 581 F.2d 341 (3d Cir. 1978).

51. Id. at 346.

52. Id. at 350.

the evidence in order to ascertain the truth in a case, it would make little sense for a judge, in determining whether the hearsay is admissible, to examine only facts corroborating the substance of the declaration. Such an analysis in effect might increase the likelihood of admissibility when corroborating circumstances indicate a reduced need for the introduction of the hearsay statement. We do not believe that Congress intended that "trustworthiness" be analyzed in this manner. Rather, the trustworthiness of a statement should be analyzed by evaluating not only the facts corroborating the veracity of the statement, but also the circumstances in which the declarant made the statements and the incentive he had to speak truthfully or falsely. Further, consideration should be given to factors bearing on the reliability of the reporting of the hearsay by the witness.⁵³

In a more recent case, United States v. Crayton,⁵⁴ the Air Force Court of Military Review retreated substantially from its expansive position in Ruffin. Crayton was charged with sodomy and assault upon his 16-year old stepdaughter. His stepdaughter made a pretrial statement to the Office of Special Investigations (OSI) alleging that the two had engaged in oral sodomy. At trial, however, she recanted her statement, asserting that she had lied to the OSI in order to get attention from her mother. Both her mother and brother testified that the declarant was untruthful and that she lied to get attention. The Air Force Court of Military Review held that the military judge abused his discretion in admitting the stepdaughter's pretrial statement under MRE 803(24). The Air Force Court, noting that there was no testimony or physical evidence to corroborate the out-of-court statement, held that it lacked the necessary circumstantial guarantees of trustworthiness.

53. Id. at 349.

54. 17 M.J. 932 (AFCMR 1984).

In United States v. King,⁵⁵ the Army Court of Military Review stated that corroboration is a factor to be considered in determining whether the necessary equivalent circumstantial guarantees of trustworthiness are present:

In United States v. Whalen...the existence of corroborating physical evidence allowed this Court to independently determine that a crime had occurred and that the accused was the perpetrator. While corroboration is not an absolute requirement, it is a factor to be examined. The federal courts have recognized that the presence or absence of corroborating evidence may be a critical factor.⁵⁶

In King, the Army Court upheld the conviction of an Army psychologist for sexual misconduct and conduct unbecoming an officer. King was charged, *inter alia*, with sodomy and carnal knowledge of his 15-year-old fiancée. His fiancée's three sworn statements to the CID provided the only evidence supporting these charges. At the trial, she acknowledged that she had made the statements but asserted that she did so to protect her father, who had sexually abused her and who was responsible for her pregnancy. She testified that she had reported this abuse to military authorities, but to no avail. The government did not rebut these assertions. The Army Court of Military Review held that the girl's out-of-court statements lacked the equivalent circumstantial guarantees of trustworthiness necessary to justify their admission.

The factors the Army Court examined in King included: (1) the declarant's availability for cross-examination; (2) the recantation of her statement at trial; (3) the similarity of all three of the out-of-court statements; (4) the length of time between the making of the statements and their recantation; (5) the CID agent's testimony as to the declarant's positive demeanor and willingness to make the statements; (6) the detailed nature of the out-of-court statements; (7) the declarant's motivation to speak the truth, or to falsify; (8) the similarity of the declaration to any of the long-recognized hearsay exceptions; and (9) the extent to which the out-of-court statements were not corroborated by other evidence in the case. In King, the Army Court noted that evidence that the accused may have had a surreptitious romance with the declarant was not relevant to prove that acts of carnal knowledge and sodomy had

55. 16 M.J. 990 (ACMR 1983).

56. Id. at 993 (footnote and citations omitted).

occurred between them, and did not provide the "circumstantial equivalent guarantees of trustworthiness" necessary to admit the declarant's out-of-court statement that such acts had occurred.⁵⁷

United States v. Whalen⁵⁸ was the Army Court of Military Review's first published opinion addressing the "trustworthiness" requirement of the residual hearsay exceptions. The declarant, Rodriguez, was present and testified at Whalen's trial. Over defense objection, the military judge admitted a sworn statement by Rodriguez indicating that just prior to their apprehension in a van containing marijuana, plastic bags, and methaqualone pills, Whalen had sold Rodriguez a bag of marijuana and the two had smoked marijuana. Rodriguez had recanted this statement prior to trial. At Whalen's trial, Rodriguez testified that there had been no marijuana in the van when the officer entered. On cross-examination, he testified that his initial sworn statement was untrue and was the product of CID pressure and his own illness. The Army Court of Military Review found the equivalent circumstantial guarantees of trustworthiness necessary to admit Rodriguez' sworn statement under M.R.E. 803(24), noting that the declarant and the agent to whom he made the statement were both subject to extensive cross-examination; that Rodriguez' statement was similar to statements against penal interest, which are admitted under the hearsay exception for statements against interest; and that the circumstances under which the statement was taken, shortly after the incident, in a written and sworn form rendered only after Rodriguez waived his rights, tended to show that the statement was reliable.⁵⁹

In United States v. Thornton,⁶⁰ an aggravated assault case, the Army Court of Military Review found error, albeit harmless, in the admission of a sworn statement by the victim under M.R.E. 804(b)(5). Noting that the residual hearsay exceptions must be strictly construed, the Army Court held that the statement lacked the necessary guarantees of trustworthiness. Although the declarant testified at the Article 32 investigation, she did not testify at the trial. The Army Court further noted that the trial defense counsel may not have had the same motive to cross-examine the declarant at the Article 32 investigation as he had at the trial. Moreover, four months had passed between the time of the alleged

57. Id. at 994.

58. 15 M.J. 872 (ACMR 1983).

59. Id. at 878.

60. 16 M.J. 1011 (ACMR 1983).

incident and the time of the out-of-court declaration. Finally, the statement lacked similarity to any of the recognized hearsay exceptions, and was arguably the type of statement which the drafters of the Rules had rejected as unreliable, since it was prepared at the request of the staff judge advocate for the purpose of prosecution.⁶¹

United States v. Powell⁶² is similar to Whalen and King in that it involves a declarant whose trial testimony recanted a prior sworn statement. Powell was charged with transferring heroin to Hernandez. Two days after she was hospitalized for a heroin overdose, Hernandez gave the CID a written sworn statement identifying Powell as the source of the heroin. At trial, she admitted making the statement but testified that the CID had pressured her into doing so and that she had lied to persuade them that this was her first use of heroin. The Army Court of Military Review upheld the admission of Hernandez' statement under Rule 803(24), finding sufficient guarantees of trustworthiness in its corroboration by another witness, who testified that Powell admitted to him that he had given Hernandez "the stuff;" by the extensive cross-examination of Hernandez by Powell's defense counsel; and by the similarity of the statement to those permitted by the recognized hearsay exceptions (the court did not identify these). The presence of corroboration of the declarant's statement appears to be the factor which best distinguishes Powell from King.

In United States v. Garrett,⁶³ an indecent assault case, the Air Force Court of Military Review held that an out-of-court statement by the accused's coactor which described the events in a manner which tended to inculcate the accused and to minimize the declarant's own culpability did not possess that degree of trustworthiness necessary to admit the statement under M.R.E. 804(b)(5).

The following list, though not exhaustive, suggests some important factors which affect the trustworthiness of an out-of-court statement:

- The relationship of the declarant to parties in the case. These relationships may reveal a motive to fabricate;

61. Id. at 1013-1014.

62. 17 M.J. 975 (ACMR 1984).

63. 17 M.J. 907 (AFCMR 1984).

- The age and maturity of the declarant. Extreme youth alone may make the statement untrustworthy;
- The timing of the out-of-court statement in relation to its subject matter;
- The factual context in which the statement was made. For example, the following circumstances may make the statement unreliable:
 - A particularly coercive atmosphere;
 - An atmosphere of jest, or of seriousness;
 - The audience: an authority figure, a trusted adult, a parent, and a peer might all get different stories from the same child;
- The declarant's record, reputation, and standing in the community;
- The absence or presence of an oath. Oaths are not necessarily indicia of reliability. In some cases, they may be merely neutral; in others, they may be a coercive factor tending to negate reliability;
- The existence or lack of corroborating circumstances and any facts which might bolster, counter, limit, or negate the probative nature of those circumstances;
- The extent of interrogation, if any, involved in producing the statement and the nature and number of the interrogators;
- The declarant's motive to be truthful or to falsify, whether rational or irrational;
- The nature and quality of the declarant's ability to observe the matters stated;
- Any intervening communication problems - for example, distance, noise, or language barriers between the declarant and a third party relating the statement in court;

- Subsequent recantation of the statement by the declarant, and the reasons therefor;⁶⁴
- Counsel's opportunity or lack of opportunity to cross-examine a declarant who is unavailable at trial;
- Similarity or dissimilarity between the proffered statements and long-recognized hearsay exceptions;

and

- Similarity or dissimilarity between the proffered statement and other statements previously rejected or admitted under the residual exception.⁶⁵

64. In United States v. Hinkson, 632 F.2d 382 (4th Cir. 1980), unlike the Army Court of Military Review in Whalen, supra note 57, and Powell, supra note 61, the Fourth Circuit noted that recantation of a statement by the declarant has a strong impact on its trustworthiness. In Hinkson, the court rejected as untrustworthy the uncorroborated and subsequently recanted confession of a third party. See also United States v. Crayton, 17 M.J. 932 (AFCMR 1984), in which the Air Force Court of Military Review found an abuse of discretion by the trial judge in admitting a pretrial statement to law enforcement authorities which the declarant recanted at trial.

65. See, e.g., Moffett v. McCauley, 724 F.2d 581, 584 (7th Cir. 1984), which found adequate trustworthiness in a prison report concerning a strip search which "fell nearly within the terms of the business records exception to the hearsay rule." The courts have rejected, however, attempts to put the residual exceptions into a "straitjacket" of similarity with the recognized exceptions. See In re Japanese Electronic Products, 723 F.2d 238, 302 (3d Cir. 1983): "the residual exceptions are not dependent on the other exceptions for their meaning...the appropriate limitations on the residual exceptions should be found in the rules themselves and their legislative history."

As the Fifth Circuit noted in Herdman v. Smith,⁶⁶ the residual exception requires:

a balancing of need and trustworthiness....
In determining reliability, the court must assess 'the nature -- written or oral -- and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which it was made.... Also significant are the knowledge and qualifications of the declarant.'⁶⁷

B. The statement must provide evidence of a material fact.

The federal courts have interpreted this requirement as simply restating the relevancy requirements of F.R.E.s 401 and 402.⁶⁸ In United States v. Powell,⁶⁹ the Army Court of Military Review noted that the declarant's statement was "material" because it "tended to prove the ultimate material fact in issue" -- that Powell had transferred heroin.

C. The statement offered must be more probative than any other evidence which the proponent can procure through reasonable efforts.

What other types of evidence are more or less probative than the statement being offered? Certainly the statement offered is "most probative" if there is no other evidence available to establish the same fact. In United States v. Powell,⁷⁰ the Army Court noted that a statement by the only eyewitness to the alleged offense was more probative than any other evidence available to the government. Direct evidence is normally more probative than circumstantial evidence of the same matter. Hearsay evidence which is specific and detailed may be more probative than general nonhearsay evidence on the same point.

66. 707 F.2d 839 (5th Cir. 1983).

67. Id. at 842.

68. United States v. Iaconetti, 406 F. Supp. 554, 559 (E.D.N.Y. 1976), affirmed, 540 F.2d 574, 578 (2d Cir. 1976); Huff v. White Motor Corp., 609 F.2d 286, 294 (7th Cir. 1979).

69. 17 M.J. 975 (ACMR 1984).

70. Id.

In United States v. Heyward,⁷¹ the defendant in a prosecution for tax evasion maintained that a deceased person named Horan had given him a loan of \$175,000. In support of this assertion, he offered a memorandum from the files of Horan's attorney, who was also deceased. The Fourth Circuit held that this memorandum was inadmissible under Rule 804(b)(5) because a statement from an officer of Horan's bank could have been obtained by Heyward and would have been more probative. The court noted:

Other courts have been equally loath to apply the residual hearsay exception when it would not be difficult to go behind the proffered hearsay to reach more solid evidence. In United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979), for example, defendant attempted to introduce a telex from his bank in Korea regarding \$400,000.00 which he had on deposit there. Defendant's aim was to prove that he had other sources of funds and would not have accepted money to bribe members of Congress. The court refused to apply the residual hearsay exception, stating 'much stronger evidence would be the actual business records...' "72

Some courts have held that the declarant's unavailability at the time of trial is necessary to meet the "most probative" requirement, since live testimony subject to cross-examination would be more probative than an out-of-court statement.⁷³ Such an interpretation would appear to violate a fundamental rule of statutory construction by making Rules 803(24) and 804(b)(5) redundant. Moreover, even if the declarant can remember the subject matter so as to be "available" within the meaning of M.R.E. 804(a)(3),⁷⁴ it is possible that his out-of-court statement closer in time to the underlying events would tend to be fresher and thus more accurate and complete.

71. 729 F.2d 297 (4th Cir. 1984).

72. Id. at 300.

73. See, e.g., United States v. Mathis, 559 F.2d 294, 298-99 (5th Cir.), cert. denied, 412 U.S. 1107 (1977). Cf. United States v. Arnold, 18 M.J. 559 (ACMR 1984), infra note 98 recognizing constitutional importance of unavailability where residual hearsay is offered against an accused).

74. M.R.E. 804(a)(3) states that a declarant is unavailable if he "testifies to a lack of memory of the subject matter" of his out-of-court statement.

The testimony of other eyewitnesses to the events may be more probative than the declarant's out-of-court statement.⁷⁵ It is likely, however, that the declarant's statement is being offered because it includes details not available from his testimony or the testimony of other witnesses at the trial.

When the accused offers the statement, the court should not consider the fact that his personal testimony might be more probative than the out-of-court declaration, because the accused has an absolute privilege not to testify.⁷⁶ For this reason, the trial defense counsel should seek a ruling on the admissibility of the proffered statement before the accused testifies, should he elect to do so.

What "reasonable efforts" should be made to obtain otherwise admissible evidence? The federal courts are prone to interpret this element with a view toward what is reasonable at the time of trial, as opposed to the time when the proponent gives notice of the intent to offer the statement. Reasonableness is considered in terms of relative time and expense in obtaining other evidence, and the importance of the subject matter to the overall litigation. The extent to which the statement tends to be cumulative of other evidence may also affect the reasonableness of seeking such evidence.

The conclusions which may be drawn from these cases: a rule of reasonableness applies. In offering evidence within the exception, defense counsel should make good faith efforts to obtain other, more probative evidence on the point, and document those efforts. In opposing the admission of such evidence, counsel should suggest efforts which should have been, but were not, undertaken by the prosecution to obtain otherwise admissible and probative evidence. Whether counsel is offering or opposing the hearsay, it is essential to state on the record a specific and detailed basis for the defense position.

75. *United States v. Fredericks*, 599 F.2d 262, 275 (8th Cir. 1979); *Workman v. Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562 (N.D. Ohio 1975).

76. *United States v. Kim*, 595 F.2d 755, 766 n. 53 (D.C. Cir. 1979). But see *United States v. Weisman*, 624 F.2d 1118, 1128-1129 (2d Cir. 1980).

D. Admission of the Statement will Serve the Interests of Justice and the General Purposes of the Rules.

The general purposes of the rules are stated in Rule 102:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

The courts have construed the general purposes of the rules as maximizing the relevant, noncumulative, reliable and otherwise admissible evidence considered by the factfinder, so that the truth may be ascertained from the conflicting evidence.⁷⁷ In holding a declarant's subsequently recanted statement to be admissible under Rule 803(24), the Army Court of Military Review noted:

In light of the sudden, total, and wholly incredible revision of her story at trial and the apparently unaffected tenor of the pretrial statement, admission will not frustrate the purposes of the rules and will serve the interests of justice.⁷⁸

Holmes suggests that when the defense offers residual hearsay, it may be possible "to elevate to an issue of constitutional dimensions the discretionary admission of residual hearsay which is critical to the defense case."⁷⁹ He suggests that this be accomplished by reliance upon the Supreme Court's decision in Chambers v. Mississippi⁸⁰ and the Court of Military Appeals' application of Chambers in United States v.

77. For an excellent discussion of the federal courts' treatment of this element, see Holmes, supra note 1, at 68-72.

78. United States v. Powell, 17 M.J. 975, 977 (ACMR 1984).

79. Holmes, supra note 1 at 72.

80. 410 U.S. 284 (1973).

Johnson.⁸¹ Those cases recognized a due process right for the defense to present trustworthy exculpatory evidence which may not otherwise be admissible under applicable evidentiary rules. In Johnson, the Court of Military Appeals emphasized that the keystone to the admission of such evidence is its trustworthiness.⁸² As Holmes concludes, residual hearsay evidence offered by the defense which fails to meet all of the criteria of Rules 803(24) or 804(b)(5) may nonetheless be admissible under Chambers and Johnson if it is trustworthy:

While Chambers and Johnson were decided before the F.R.E. and M.R.E., respectively, were controlling, both decisions may influence the admissibility of residual hearsay offered by the defense. The defense can argue with some persuasiveness that Chambers and Johnson have found a measure of statutory expression in subsection (C) of the residual exceptions. Defense counsel should be prepared to argue that even if admission of hearsay offered by the defense would not otherwise meet the requirements of Military Rule 803(24) or Rule 804(b)(5)(C), Chambers and Johnson may nevertheless mandate its admission "in the interests of justice."⁸³

In offering such evidence and in establishing that it has met the threshold requirements of the residual exceptions, the defense should argue that admitting the statement will increase the court's ability to ascertain the truth; that the Rules embody a preference for admission, rather than exclusion, of evidence which is relevant and trustworthy; and that the proffered evidence is necessary for a complete presentation of the case and fair deliberation by the court.

81. 3 M.J. 143 (CMA 1977).

82. Id. at 147.

83. Holmes, supra note 1 at 71.

E. Notice Requirements.

The residual hearsay exceptions provide:

[A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

As Holmes acknowledged:

Neither the rules themselves nor their legislative history reveal how much notice should be given, what physical form the notice must take, what sanctions, if any, should be applied for failure to give notice, and, finally, how strictly the notice requirements should be enforced. Concerning the last issue, the courts are, not surprisingly, divided into two schools of thought, one requiring strict compliance, and the other permitting a more liberal flexibility.⁸⁴

⁸⁴. Holmes, supra note 1, at 28. He lists as stricter courts the Second Circuit in United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978) (Congress intended rigid application of the notice requirements); the Fifth Circuit in United States v. Atkins, 618 F.2d 366 (5th Cir. 1980) (trial judge properly refused admission of letters offered by the defense when it failed to notify the government of its intent to introduce the letters); and the Fourth Circuit in United States v. Mandel, 591 F.2d 1347, vacated, 602 F.2d 653 (4th Cir. 1979), cert. denied, 100 S.Ct. 1647 (1980). More lenient with notice requirements have been the Eighth Circuit in United States v. Lyon, 567 F.2d 777 (8th Cir. 1977), cert. denied, 435 U.S. 918 (1978) (statement, but not notice of intent to introduce it, was provided prior to trial); the Third Circuit in United States v. Bailey, 567 F.2d 341 (3d Cir. 1978) (notice after trial commenced was proper, where government not at fault for delay and defense received a continuance); and the First Circuit in Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), a civil case; and United States v. Heyward, 729 F.2d 297, n.1 (4th Cir. 1984) (citations omitted).

Continued

He suggests that the notice requirements be construed liberally to require only that notice reasonably necessary to avoid surprise and to provide the opponent an opportunity to counter the admissibility arguments.⁸⁵

As with the substantive elements of the residual exceptions, a timely, specific defense objection is necessary when the government fails to provide adequate notice of its intent to offer residual hearsay. In objecting to admission of government hearsay for lack of notice, the defense should set forth on the record when and if notice was given, the form and content of the notice, and how the lack of notice is prejudicial to the defense. As a remedy, the defense should first seek exclusion of the proffered statement. If the court refuses to exclude the statement on that basis, the defense should then request a continuance of specific length adequate to prepare an opposition on substantive grounds, and to counter the statement if it is ultimately admitted. The more compelling the defense portrayal of the prejudice resulting from lack of notice, the greater the likelihood of appellate relief.

There is little authority concerning the acceptable manner of giving notice under the rules.⁸⁶ Wherever possible, written notice be given in advance of trial.

While the rules specifically require advising opposing counsel of the name and address of the hearsay declarant, there are no cases in which the failure to provide this information resulted in exclusion of the statement. The government's failure to provide this data should, however, be cited as a factor in the overall defense argument against

84. Continued

The Court of Appeals for the Fourth Circuit in *United States v. Heyward*, 729 F.2d 297, n.1 (4th Cir. 1984), recently commented that: "Courts have generally construed the notice requirements of 804(b)(5) and its companion rule 803(24) strictly." In *United States v. Cowley*, 720 F.2d 1087 (9th Cir. 1983), the Ninth Circuit held that the government, which had failed to give the defendants notice of its intent to introduce evidence of a postmark against them, could not have it admitted under F.R.E. 803(24).

85. *Holmes*, supra note 1, at 34-35.

86. See *Holmes*, supra note 1, at 35-36.

admission. Counsel should point out that the drafters intended for the rules to be strictly construed and that the lack of this data makes it difficult or impossible for the defense to determine whether the hearsay meets the "trustworthiness" or "most probative" requirements.

Sanctions for failure to provide notice have included a refusal to admit the statements⁸⁷ and the granting of delays in the proceedings to provide the opponent an opportunity to argue against admission of the hearsay or to meet it with other evidence.⁸⁸ While such sanctions are possible, and should be sought wherever the defense is surprised by government reliance upon the residual hearsay rule, it behooves the defense to identify and prepare to meet residual hearsay issues as early as possible, preferably prior to trial. It is essential that the defense object to the lack or form of the notice provided, if it is inadequate. The failure to object may result in a finding that the notice requirement was waived, or that the lack of notice did not prejudice the accused.⁸⁹

F. Unavailability of the Declarant.

In addition to meeting the foregoing requirements, the proponent of residual hearsay under M.R.E. 804(b)(5) must show that the declarant is "unavailable." Rule 804(a) provides that a declarant is "unavailable" when he or she:

- (1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

87. See, e.g., United States v. Mandel, 591 F.2d 134, vacated, 602 F.2d 653 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980); United States v. Ruffin, 575 F.2d 346 (2d Cir. 1978).

88. See, e.g., United States v. Medico, 557 F.2d 309 (2d Cir.), cert. denied, 434 U.S. 986 (1977).

89. See, e.g., United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976).

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance...by process or other reasonable means; or

(6) is unavailable within the meaning of Article 49(d)(2).

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent... for the purpose of preventing the witness from attending or testifying.

When the government is the proponent of the hearsay, the confrontation clause of the Sixth Amendment may also require unavailability of the declarant, whether the statement is offered under Rule 804(b)(5) or Rule 803(24). See the discussion of the confrontation issue, infra, at IV.

Military Rule 804(a) differs from the federal rules in incorporating the definition of unavailability found in Article 49(d)(2) of the Uniform Code of Military Justice. Article 49(d)(2) unavailability includes certain criteria also stated in the federal rules -- death, sickness or infirmity, refusal to appear or to testify -- and adds others not expressed in the federal rules -- age, imprisonment, military necessity, and non-amenability to process. The Analysis of the Military Rules of Evidence states that the "military necessity" criterion "is not intended to be a general escape clause, but must be limited to the limited circumstances that would permit use of a deposition."⁹⁰ This definition is of little

90. Article 49(d)(1) of the UCMJ provides that depositions may be admitted at a court-martial if the witness is more than one hundred miles from the place of trial.

value, as the Court of Military Appeals has held that actual unavailability of a military witness must be established before a deposition may be used at court-martial, regardless of the witness' distance from the place of trial.⁹¹

The federal courts have strictly construed Rule 804's requirement of unavailability. The declarant must be unavailable at the time of the trial itself.⁹² The proponent must use reasonable means to ensure the declarant's presence at trial.⁹³ A witness may not be deemed "unavailable" absent good faith efforts by the proponent to obtain his or her presence.⁹⁴ Subpoenas and bench warrants, where the government is the proponent, are insufficient efforts.⁹⁵ In United States v. Mathis,⁹⁶ the Fifth Circuit, in setting aside a conviction, held that unavailability of the declarant in a criminal case must be demonstrated before the government may introduce his statement, whether it offers the evidence under Rule 804(b)(5) or Rule 803(24). The Court noted:

91. United States v. Mohr, 21 USCMA 360, 45 CMR 134 (1972); United States v. Gaines, 20 USCMA 557, 43 CMR 397 (1971); United States v. Davis, 19 USCMA 217, 41 CMR 217 (1970).

92. Government of the Canal Zone v. P., 590 F.2d 1344 (5th Cir. 1979).

93. United States v. Mann, 590 F.2d 361, 368 (1st Cir. 1978); United States v. Gaines, 20 USCMA 557, 559, 43 CMR 397 (1977).

94. United States v. Thornton, 16 M.J. 1011, 1013 (ACMR 1983) (finding good faith efforts by the government in using a subpoena, seeking assistance in locating the declarant through her mother, friends, and the German police, and searching for her at her home and her "hangouts"); United States v. Arnold, 18 M.J. 559 (ACMR 1984) (finding "the government failed utterly to show unavailability" where there was "no evidence that the government used any of the normal prosecutorial or judicial means available to secure the presence of the witness"); Valenzuela v. Griffin, 654 F.2d 707 (10th Cir. 1981). Proof of service of a bench warrant and subpoena and prosecutorial comment that the government was "looking for" the declarant were inadequate for confrontation clause purposes in Ohio v. Roberts, 448 U.S. 56 (1980).

95. Valenzuela v. Griffin, supra note 96.

96. 559 F.2d 294 (5th Cir.), cert. denied, 429 U.S. 1107 (1977).

Although the introductory clause of Rule 803 appears to dispense with availability, this condition re-enters the analysis of whether or not to admit statements under the last subsection of Rule 803 because of the requirement that the proponent use reasonable efforts to procure the most probative evidence on the points sought to be proved. Rule 803(24), thus, has a built-in requirement of necessity. Here there was no necessity to use the statements when the witness was in the courthouse. The trial court erred in overlooking this condition of admissibility under Rule 803(24).⁹⁷

The Army Court of Military Review has adopted a similar construction of Rule 803(24). In United States v. Arnold,⁹⁸ the defendant was charged, *inter alia*, with committing indecent liberties upon and attempted carnal knowledge of his thirteen-year-old daughter. On the morning after the incident, the girl reported it to a school counselor and the school nurse and executed a written, sworn statement for the CID. She was not called as a witness at trial, and the military judge admitted all three of her statements. The Army Court of Military Review held that the statements to the school nurse and the CID were inadmissible:

The statement to the CID does not fall within the meaning or intent of Rule 803(24), Mil. R. Evid. Initially, the Court questions whether the written out-of-court statement of a victim-witness, who is available, is admissible under any circumstances under Rule 803(24), Mil. R. Evid. The general heading of Rule 803, states that the unavailability of the declarant is not a prerequisite for admissibility. Yet, fifteen of the exceptions pertain to some type of records and not the personal testimony of a declarant-witness. Three pertain to reputation testimony where the declarant must be present and subject to cross-examination as to their opinion. Three pertain to impressions, intent and memory and the declarant again must be present and subject to

97. Id., 559 F.2d at 298-299.

98. 18 M.J. 559 (ACMR 1984).

cross-examination as to the basis of their testimony. Only two, excited utterances and medical diagnosis, permit the use of a declarant's personal out-of-court statement. Both recognize the peculiarity of circumstances surrounding such declarations provide strong circumstantial guarantees of trustworthiness. The requirements in Rule 803(24), Mil. R. Evid., as to notice, particularities, and reasonable efforts, when considered in the context of the total rule, militate strongly against the government position that mere absence, as opposed to unavailability, of a declarant is sufficient to admit the personal and out-of-court statement of such a declarant. The rule, in context, requires either the in-court testimony of the declarant to provide a basis for admissibility, peculiar circumstances that guarantee trustworthiness, or the unavailability of the witness. The specific language of Rule 803(24)(B), Mil. R. Evid., does indicate some necessity concerning availability. To accept the further government argument that a sworn, contemporaneous statement to the police is automatically more probative and trustworthy than in-court testimony would be a rejection of the American system of criminal justice as embodied in the fourth, fifth, and sixth amendments.

In the opinion of the Court, the only basis for the admissibility of the daughter's statement to the CID, under the facts and circumstances of this case, was Rule 804(b)(5), Mil. R. Evid. This exception to the Hearsay Rule appears specifically designed to address the problem of family members who are witnesses to an intra-family criminal offense. This rule requires a governmental showing of unavailability of the witness.⁹⁹

As the courts have recognized, there is also an interdependence between the requirements of unavailability and trustworthiness:

99. Id., 18 M.J. at 561.

[T]he degree of reliability necessary for admission is greatly reduced where, as here, the declarant is testifying and is available for cross-examination, thereby satisfying the central concern of the hearsay rule.¹⁰⁰

Why should the proponent of hearsay ever attempt to offer it under Rule 804(b)(5), rather than Rule 803(24), if they differ only in the unavailability requirement? Holmes suggests:

In evaluating whether the declarant's unavailability is required, counsel may find it helpful to analogize the residual hearsay in question to those foregoing exceptions in Rules 803 and 804. Ultimately, if Rule 803(24) is utilized, the proponent should give serious thought to not offering the residual hearsay if the declarant is available to testify.¹⁰¹

This "pigeon-holing" is consistent with United States v. Arnold, *supra*, and the federal practice. As the Fifth Circuit noted in United States v. Young Brothers,¹⁰² "the reported federal circuit court cases which have admitted grand jury testimony of an unavailable witness have all done so under Rule 804(b)(5)."¹⁰³

Unavailability may, in any event, be required by the confrontation clause of the Sixth Amendment in all criminal cases in which the government is the proponent of the hearsay, unless the accused has expressly or by misconduct waived his right to confrontation.

100. United States v. McPartlin, 595 F.2d 1321, 1350-51 (7th Cir. 1979).

101. Holmes, *supra* note 1, at 79.

102. 728 F.2d 682 (5th Cir. 1984).

103. *Id.* at 692, note 11, *citing* United States v. West, 574 F.2d 1131, 1134 (4th Cir. 1978); United States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); United States v. Boulahanis, 677 F.2d 586, 588 (7th Cir.), *cert. denied*, 103 S.Ct. 375 (1982); United States v. Barlow, 693 F.2d 954, 961 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 2124 (1983); United States v. Garner, 574 F.2d 1141, 1144 (4th Cir.), *cert. denied*, 439 U.S. 936 (1982).

IV. The Constitutional Dimension: The Accused's Right to Confront and Cross-Examine the Declarant.

The confrontation clause of the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right...to be confronted by the witnesses against him.

A. U.S. Supreme Court Interpretations.

The confrontation clause could be read to prohibit the use of hearsay against an accused. The Supreme Court, however, has recognized the practical difficulties with such an approach.¹⁰⁴ In Ohio v. Roberts,¹⁰⁵

104. The court has considered the relationship between the hearsay rule and the confrontation clause in a number of cases. In Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892), the Court upheld the use of a dying declaration made by a person deceased at the time of trial. An unrelated case, also denominated Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), involved introduction of the transcript of a witness from an earlier trial. The Court upheld the use of the transcript, but emphasized the importance of the cross-examination at the previous trial.

In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), the Supreme Court held that the confrontation clause of the Sixth Amendment applied to the states through the due process clause of the Fourteenth Amendment. The Court found that Pointer's right of confrontation had been violated by the introduction of the preliminary hearing testimony of a witness who was not available at trial. Pointer had no counsel at the preliminary hearing, and thus had been deprived of the right effectively to cross-examine the adverse witness. As Justice Black's opinion for seven members of the Court noted, "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Id.* at 407. Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), involved an accomplice whose confession, which implicated Douglas, was presented to the jury. The accomplice was present at the trial but repeatedly invoked his privilege against self-incrimination. Under the guise of cross-examination, and over defense objection, the government read the accomplice's confession to him. The prosecutor
(Continued)

105. 448 U.S. 56.

the Court identified two constitutional criteria which the government must satisfy before it may introduce the statement of an unavailable declarant against an accused:

104. Continued.

paused every few seconds to ask the accomplice if he had made the confession, but the accomplice maintained his silence. The confession itself was not introduced, but law enforcement officials testified that the document which the prosecutor had read was the accomplice's confession. The confession described the offense and surrounding circumstances in detail, and identified Douglas as the individual who fired a shotgun blast which injured the victim. The Court held that the confrontation clause had been violated because Douglas was unable to cross-examine the accomplice. In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), Bruton and Evans were jointly tried for armed postal robbery. Evans had confessed that he and Bruton committed the robbery. This confession was admitted into evidence against Evans, and the jury was instructed to disregard the confession as it applied to Bruton. The Court found that this instruction was insufficient to protect Bruton and also found a violation of the right to confrontation. *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), involved the introduction of the preliminary hearing testimony of a government witness. The Court held that the admission of the testimony did not violate Green's right to confrontation, although at the trial the witness maintained that he could not remember the events. The Court cited a number of factors which made the preliminary hearing analogous to a trial: the pretrial statement was made under oath, cross-examination was conducted by the counsel who represented Green at trial, and the tribunal was equipped to provide a judicial record of the proceedings. In *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), Evans' co-accused, Williams, made a statement to his cellmate which incriminated Evans. At Evans' trial, the cellmate testified that Williams had stated, "If it hadn't been for that dirty son-of-a-bitch Alex Evans we wouldn't be in this now." The Court upheld the admission of that statement against Evans. It noted these factors indicating reliability: (1) the statement did not expressly state the defendant's guilt; (2) the out-of-court declarant had firsthand knowledge; (3) the declarant's recollection could not have been faulty; and (4) the declarant had spoken spontaneously and against his own interest. The plurality opinion also surveyed the weight of other adverse evidence against Evans and determined that the cellmate's testimony was of "peripheral significance at most." In *Barber*

(Continued)

The government must demonstrate that the declarant was unavailable; and

The government must show that the proffered statement is reliable by demonstrating "particularized guarantees of trustworthiness."¹⁰⁶

These requirements are not coextensive with the similarly worded requirements of Rules 803(24) and 804(b)(5).

104. Continued.

v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), the Court concluded that Page had been denied his right to confrontation where the principal evidence against him consisted of the reading of a transcript of the preliminary hearing testimony of a witness who at the time of trial was incarcerated in a federal prison in Texas, and where the state had made absolutely no effort to obtain the declarant, other than to ascertain that he was incarcerated. It noted:

In short, a witness is not "unavailable" for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial. The State made no such effort here and, so far as this record reveals, the sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence. The right of confrontation may not be dispensed with so lightly. Id. at 724-25.

The Court indicated that the extent to which Page had utilized or failed to utilize cross-examination at the preliminary hearing was irrelevant. In Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1974), the Court decided, inter alia, that there was no confrontation clause violation where the trial court admitted the prior recorded testimony of a government witness from a previous trial of the appellant for the same offense. Yet the Court scrutinized the declarant's testimony and the circumstances under which it was rendered to determine whether there were satisfactory "indicia of reliability" and a "satisfactory basis for evaluating the truth" of that testimony. Id., 408 U.S. at 213.

106. Id. at 66.

Ohio v. Roberts¹⁰⁷ upheld the use of the preliminary hearing testimony of an unavailable witness against the defendant. Roberts had been charged with forgery of a check in the name of Bernard Isaacs and possession of stolen credit cards belonging to Isaacs and his wife. At the preliminary hearing, Roberts' counsel called the Isaacs' daughter as a defense witness and questioned her on direct examination. She refused to admit that she had given the checkbook and credit cards to Roberts without informing him that she did not have permission to use them. At trial, Roberts testified that the Isaacs' daughter had in fact given him the checkbook and credit cards and led him to believe that he could use them. In rebuttal, the state introduced a transcript of the daughter's testimony from the preliminary hearing. In upholding Roberts' conviction, the Supreme Court stated:

Counsel's questioning [at the preliminary hearing] clearly partook of cross-examination as a matter of form. His presentation was replete with leading questions, the principal tool and hallmark of cross-examination. In addition, counsel's questioning comported with the principal purpose of cross-examination: to challenge "whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's meaning is adequately conveyed by the language employed."¹⁰⁸

The Court summarized its holding as follows:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the

107. 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

108. 448 U.S. at 70-71, 100 S.Ct. at 2541 (citation omitted; emphasis in original).

evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.¹⁰⁹

B. Other Federal Precedents.

In United States v. Fielding,¹¹⁰ the Ninth Circuit interpreted Roberts' unavailability criteria as establishing a "rule of necessity":

Although the Supreme Court has thus far refused to "map out a theory of the Confrontation Clause that would undermine the validity of all hearsay 'exceptions,'" [citation omitted]...a general rule of necessity may be distilled. Unless the "utility of trial confrontation" is remote, or the evidence is of only "peripheral significance," [citation omitted]...the prosecution must either produce the declarant, or demonstrate on the record that the declarant is unavailable despite the prosecution's good faith efforts to obtain the declarant's presence at trial.¹¹¹

In Fielding, the court reversed admission of out-of-court statements by coconspirators who were not called as witnesses by the government where the record was silent as to their availability to testify at trial. The court also found an absence of the reliability mandated by Ohio v. Roberts, noting that the statements were motivated in part by a desire to impress an informant who was posing as a large-scale drug dealer; that the declarants had only a passing relation with the defendant and thus little opportunity to be aware of his activities; and that there was a lack of corroboration of their assertions that the defendant was part of a conspiracy.

^{109.} 448 U.S. at 66, 100 S.Ct. at 2539.

^{110.} 630 F.2d 1357 (9th Cir. 1980).

^{111.} Id., 630 F.2d at 1368 (emphasis in original).

In United States v. Thevis,¹¹² the Fifth Circuit held that the grand jury testimony of a deceased declarant could be introduced against the defendant, who had waived his confrontation rights and any hearsay objections to the testimony by murdering the declarant. The Tenth Circuit in United States v. Balano,¹¹³ on a similar note, found that the defendant had waived his confrontation rights by intimidating the declarant into refusing to testify.

C. Military Precedents

As Holmes has stated:

The Court of Military Appeals has repeatedly recognized that a military accused is entitled "to be confronted by witnesses against him" and "to cross-examine witnesses for the government." A military accused is also entitled to be present with counsel during the taking of depositions. Moreover, military due process requires that a witness be actually unavailable at trial before his deposition or former testimony may be admitted against the accused at his court-martial....¹¹⁴

While Article 32 testimony may be admitted against an accused who had the opportunity to confront and cross-examine the declarant, the Court of Military Appeals has emphasized that the court must weigh the significance of the witness' testimony against the difficulty of securing his attendance at trial.¹¹⁵

112. 665 F.2d 616 (5th Cir.), cert. denied, 103 S.Ct. 57 (1982).

113. 618 F.2d 624 (10th Cir.), cert. denied, 101 S.Ct. 118 (1980).

114. Supra note 76 at 87, citing United States v. McConnico, 7 M.J. 302 (CMA 1979); United States v. Conley, 4 M.J. 327 (CMA 1978); United States v. Cook, 20 USCMA 504, 43 CMR 344 (1971); and United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951). While these cases precede adoption of the Military Rules of Evidence, it should be remembered that "the decisions of the United States Court of Military Appeals and of the Courts of Military Review must be utilized in interpreting these rules." Analysis, supra, notes 7 and 9.

115. United States v. Ledbetter, 2 M.J. 37 (CMA 1976).

In United States v. Chestnut,¹¹⁶ the Court reversed the conviction of a soldier who was denied the opportunity to confront and cross-examine a rape victim at the Article 32 hearing, even though his counsel had interviewed the witness and cross-examined her at trial. In United States v. Jackson,¹¹⁷ the court noted that the same rule applies if the government witness testifies at the Article 32 hearing but asserts the privilege against self-incrimination when the defense attempts to cross-examine. From these authorities, Holmes concludes:

It can readily be seen that hearsay which satisfies the statutory requirements of the residual exceptions and meets the constitutional requirements of the confrontation clause may not fully satisfy the more stringent limitations of military law. This is particularly true of statements obtained during an Article 32 investigation. Moreover, the military appellate courts have applied the "unavailability" requirements of confrontation more stringently than their federal counterparts. In litigating the admissibility of hearsay under the residual exceptions, counsel and the military judge should therefore be careful not to overlook the more rigorous peculiarities of military law and to make an adequate factual record replete with preliminary findings of fact and law.¹¹⁸

While there are as yet no Court of Military Appeals decisions interpreting Ohio v. Roberts or the residual exception to the hearsay rule, the courts of military review have had occasion to apply the reliability criterion of Roberts to exclude hearsay statements as violative of the right to confrontation. In United States v. Robinson,¹¹⁹ the Army Court of Military Review held that an accomplice's sworn, written confession implicating the accused of larceny, offered as a statement against

116. 2 M.J. 84 (CMA 1976). See also United States v. Jackson, *infra* note 117.

117. 3 M.J. 597, 599 (NCMR), affirmed, 3 M.J. 206 (CMA 1977).

118. Holmes, supra note 77 at 89.

119. 16 M.J. 766 (ACMR 1983).

penal interest under M.R.E. 804(b)(3), was inadmissible because there was no independent corroborating evidence of trustworthiness. The court noted:

[T]he drafters and Congress recognized that the requirements of the confrontation clause of the sixth amendment must be met before a statement against the penal interest of a third-party declarant may be admitted against the accused. These constitutional requirements are met only if there is evidence indicating the trustworthiness of the statement.¹²⁰

In Robinson, the government argued that the defendant had waived his confrontation rights by not asserting them at trial. The court rejected this argument, finding plain error in the admission of the statement.

In United States v. Garrett,¹²¹ the Air Force Court of Military Review set aside the findings and sentence in a case where the military judge had admitted the statement of an accomplice which tended to inculcate the accused in an indecent assault while minimizing the declarant's own criminal culpability. The accomplice, when called as a witness at the trial, had asserted a lack of memory about the offenses and the military judge admitted the accomplice's signed, sworn statement which was made to investigators rendered shortly after the alleged offenses. The military judge found the declarant "unavailable" within the meaning of Rule 804(b)(5). In reversing the conviction, the Air Force Court of Military Review noted:

It has been consistently held that a statement given by a suspect after advisement of rights wherein he seeks to describe the events in such a manner so as to minimize his criminal involvement and, at the same time, inculcate the accused, does not possess that degree of reliability necessary to satisfy the confrontation requirements of the Sixth Amendment.¹²²

120. Id., 16 M.J. at 768.

121. 17 M.J. 907 (AFCMR 1984).

122. Id., 17 M.J. at 911 (citations omitted.)

D. Practice Tips for Confrontation Problems.

In applying these precedents, counsel should examine closely the facts of the particular case, looking at: (1) time lapses between the statement and the events it purports to describe; (2) the declarant's age, intelligence, and maturity; (3) the declarant's character and reputation; (4) the declarant's motive to fabricate or to tell the truth; (5) other facts which corroborate or fail to corroborate the statement; (6) the factual circumstances under which the statement was rendered, including, e.g., the nature of the audience, the physical environment, the degree of official authority, if any, inserted, and the formality or informality of the atmosphere in which the statement was given; (7) the pressures or lack of pressures which were present or perceived by the declarant; and (8) the declarant's demeanor when the statement was taken. The defense must be prepared to explain, with reference to the particular facts, why Roberts' "particularized guarantees of trustworthiness" have not been satisfied.

Under Roberts, the government has the burden of proving both trustworthiness and unavailability. Where applicable, the defense should be prepared to show how the government has failed to meet its burden of showing that the declarant was unavailable despite its good faith efforts to obtain his presence. The defense may find helpful in this regard cases discussing the reasonable efforts required to obtain "more probative" evidence under Rules 803(24) and 804(b)(5).

V. Checklist for Defense Counsel

In offering or opposing residual hearsay evidence, defense counsel should bear in mind that, with the exception of confrontation clause violations which are plain error,¹²³ the admission of residual hearsay evidence is within the sound discretion of the military judge.¹²⁴ Thus, counsel must build a persuasive and detailed case both for purposes of persuading the trial judge and for creating an adequate record to show an abuse of discretion upon appeal. The following checklist is offered to assist counsel in this undertaking.

123. See United States v. Powell, 16 M.J. 975 (ACMR 1984).

124. See M.R.E. 104.

A. Opposing residual hearsay. In the majority of cases, the defense will be seeking to exclude residual hearsay offered by the government. Counsel should:

1. Make a timely, specific objection to the evidence as hearsay, citing Rule 802's general proscription. If the declarant is unavailable, also object on the grounds of lack of confrontation.
2. When the government sets forth the residual hearsay rule as its basis for admitting the statement, counsel should set forth explicit facts showing why the substantive requirements of the rule have not been satisfied:
 - a. The evidence lacks circumstantial guarantees of trustworthiness equivalent to or greater than those in the recognized exceptions. Explain how the statement fails to factor out motive to fabricate, self-interest, and time/opportunity for calculation.
 - b. The evidence is not material to the facts at issue.
 - c. There is other, more probative evidence on the same point which the government can obtain with reasonable efforts. Wherever possible, specify what other evidence is available, why it would be more probative, the steps the government could take to obtain that evidence, and why it is reasonable to expect the government to take those steps.
 - d. The interests of justice and general purposes of the rules will not be furthered by admission of this evidence.
 - e. Whenever the evidence is similar to evidence admissible under Rule 804 exceptions, the government must prove that the declarant is in fact unavailable at the time of trial and must show the specific steps taken to attempt to obtain his/her presence.

3. The legislative history of the rules mandates that the residual hearsay exception be narrowly construed and used only in "exceptional circumstances."
4. The government must provide notice, in advance of trial, of its intent to use the hearsay statement, identifying the declarant and the statement and furnishing the declarant's name and current address. If this notice was not provided:
 - a. First, request exclusion of the hearsay for failure to meet this threshold requirement.
 - b. If the military judge refuses to exclude the evidence on that basis, request a delay of specified duration to prepare substantive objections and to seek rebuttal evidence, should the statement be admitted.
 - c. Insure that the record reflects the form, content, and timing of the notice (or the total absence of notice) given to the defense. Articulate how the lack of notice will prejudice the defense.
5. When the declarant does not testify, cite facts demonstrating how the constitutional criteria have not been satisfied:
 - a. The government has failed to show unavailability despite its good faith efforts to secure the declarant's presence at trial.
 - b. The government has failed to show that the evidence contains "particularized guarantees of trustworthiness."
6. If the declarant did not testify at the Article 32 investigation, or if he refused to submit to cross-examination there, his testimony at the trial and his out-of-court statements must be excluded.
7. Request special findings on these factors by the military judge.

B. Offering residual hearsay. On the other hand, defense counsel may seek to introduce residual hearsay to assist his case. Counsel should:

1. State the rule under which the statement is offered.
2. Make a factual showing, on the record, of how the evidence meets the requirements of the rule:
 - a. It possesses equivalent circumstantial guarantees of trustworthiness (it is similar to evidence accepted under the recognized exceptions, for example, it was made under oath or was against the declarant's interests).
 - b. It is material. Lay a foundation showing the declarant's knowledge of the events and his/her opportunity to observe them.
 - c. It is more probative than other evidence reasonably available. Detail your efforts to obtain such evidence. Possible testimony from the accused is not "reasonably available evidence."
 - d. Admission of the evidence will serve the interests of justice and the general purposes of the rules. This evidence will give the factfinder a more complete version of the events -- particularly important if the facts are disputed.
 - e. If unavailability is necessary (remember that the government has no confrontation rights to consider), show how/why the declarant is unavailable.
 - f. State how and when the notice requirements were met; if no notice was given, explain the circumstances justifying lack of notice.
3. Request special findings.

4. Assert the accused's constitutional right, under Chambers v. Mississippi¹²⁵ and United States v. Johnson,¹²⁶ to offer trustworthy exculpatory evidence which does not meet the other requirements of the residual hearsay rule.

VI. Conclusion

There is no "typical" residual hearsay case. Factual peculiarities make each case unique. The defense must know and argue the applicable evidentiary and constitutional principles. Even more importantly, the defense counsel must be prepared, know the facts of the case, weave those facts into the record, and make them speak for themselves. "Fighting the good fight" requires tackling residual hearsay offered by the government from every conceivable standpoint and demonstrating the compelling legal and factual need for residual hearsay offered by the defense.

125. 410 U.S. 284 (1973).

126. 3 M.J. 43 (CMA 1977).

MRE 404(b) AND "IDENTITY EVIDENCE": A CASE STUDY IN "WHODUNIT?"

by Captain John R. Morris*

MRE 404(b): Other crimes, wrongs, or acts - Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

I. Introduction

Sunday, 26 October 1980 (0703 hours). Gretchen[†], a seventeen-year-old German female, was found lying face down, motionless, in dew-moistened grass adjacent to a forest path 88 feet from German State Road 3008, northwest of Hanau in the Federal Republic of Germany [FRG]. The girl was fully clothed and her rings, bracelet, and necklace were still present; however, her purse and umbrella had been taken. Based on physical evidence at the scene, it was determined that Gretchen had been dragged, without resistance, from a motor vehicle parked on the forest path to the spot where she died. Blood was found beneath her face and in the hair on the back of her head. Additional blood and brain matter were spattered on the grass and leaves up to 5.5 feet from her body. In all, Gretchen had been strangled with a rope, belt, or other instrument so severely that a massive bruise had been imprinted on the front of her neck. Her scalp had been lacerated by several blows with an unknown, heavy, semi-sharp instrument, crushing and fracturing the skull casing and penetrating to the brain; and her vertebral column, between the fourth and fifth cervical vertebrae, had been fractured. Based on body temperature, the numerous, smooth, almost cut-like severances of the scalp, the face down, prone position of the body when found, and the lack of "defensive injuries" to the victim's body, the medical examiner concluded that Gretchen was killed

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[†]The names of the victims and the accused in this case study have been changed in the interests of protecting their privacy.

between 0300-0400 hours on 26 October 1980 by the vicious blows to her head as she lay unconscious on the ground.

Friday, 19 December 1980 (1430 hours). Heidi, a seventeen-year-old German female, was hitchhiking home in the daylight after school in an area southeast of Gelnhausen, FRG. Heidi was offered a ride by Private Jones, a U.S. soldier assigned to the Army kaserne at Gelnhausen; she accepted. Private Jones drove his passenger within sight of her home but continued to drive beyond it, stopping shortly thereafter in an isolated, wooded area approximately five miles from his home (about 25 miles from Hanau). Still in the daylight, after grabbing and threatening her if she resisted, Private Jones raped Heidi in the front seat of his beige, 1969 German Ford. After the rape was completed, Private Jones dressed himself and then permitted Heidi to partially dress; he watched as she left his automobile and began walking toward the woods. As she continued toward the woods, Private Jones chased and caught her. Heidi began screaming that she had been raped and that she was going to the police, and Private Jones responded by grabbing her by the throat and choking her. She continued to scream, and they both fell to the ground. Private Jones struck Heidi's head on the ground and with a nearby tree branch/stump. After several blows, Heidi lay motionless in the snow. Private Jones checked for signs of life and, finding none, he returned to his car. There, he threw Heidi's school papers and the clothing he could find into the snow. Unknown to him, her wallet and some of her clothing remained under the seats of his POV. Before driving away, Private Jones returned to Heidi and removed a wristwatch from her arm. Later, Private Jones' wife saw the watch in their automobile, and Private Jones told her that he had found it. He thereupon gave it to his wife as a gift.

21 December 1980. Private Jones was arrested at his home near Gelnhausen for the rape and attempted murder of Heidi. While searching his POV, the German police located Heidi's missing wallet, which still contained an identification card belonging to her, and one of her red mittens. The police also found and confiscated a second, empty, brown wallet.

5 June 1981. Drake Kaserne, 3d Armored Division Courtroom, Frankfurt, FRG. Private Jones pleaded guilty to kidnaping, rape, robbery, and the intentional infliction of grievous bodily harm upon Heidi. Heidi, who survived the attack, did not testify. At this same time, a German judge of the Hanau District Court was issuing a warrant for the arrest of Private Jones for the murder of Gretchen.

II. Rule 404(b): The Law Permits An Exception

A. "Other Acts" in our System of Jurisprudence

In our western system of criminal justice, the law strikes a balance of fairness by requiring the prosecution to prove the accused's guilt beyond a reasonable doubt. The accused, cloaked in a presumption of innocence, need not testify or even offer evidence in his own behalf. In the typical case, the government responds to its burden of proof by utilizing its vast resources to produce an impressive array of evidence and facts, but all evidence must be relevant and material to the issues in the case. In addition, the accused must be tried for what he allegedly did in the case at bar, not for what he has done before, or since, and not for who, or what, he is.¹ In some cases, however, the government may hold a "trump card"-- evidence of other, uncharged acts which it offers to prove specific features of the charges against the accused. If evidence of "other acts" is admitted, both the presumption of innocence as to the charges and, indeed, the very facts of the charges themselves may become lost in a maze of testimony concerning activities which may be factually unrelated to the charged crimes. When the uncharged criminal acts² are especially heinous and superficially similar to the charged crimes, the potential for prejudice to the accused increases dramatically.³ The natural, practical, and inevitable tendency of the trier of fact in such a case is to give excessive weight, despite any limiting instruction, to the vicious record thus exhibited and either allow it to bear too strongly on the present charge or take the proof of it as justifying a condemnation regardless of guilt of the charged crime.⁴

1. United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977); 1 C. Torcia, Wharton's Criminal Evidence § 240 (13th ed. 1972) [hereinafter cited as Wharton].

2. While MRE 404(b) is not limited to matters offered against an accused and does not require that the "other act" be a crime, see note 5 infra, the danger of unfair prejudice to the accused is obviously greater when an uncharged criminal act allegedly perpetrated by him is employed by the government to prove its case against that accused. E. Cleary, McCormick's Handbook of the Law of Evidence § 190 (2d ed. 1972) at 447 [hereinafter cited as McCormick].

3. See United States v. Woolery, 5 M.J. 31, 33 (CMA 1978) (similarity of rape evidence; pre-MRE); United States v. Hubert, 6 M.J. 887, 890 (ACMR 1979) (same).

4. 1 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at the Common Law § 194 (3d ed. 1940) at 646 [hereinafter cited as Wigmore].

Under the current Military Rules of Evidence [hereinafter cited as MRE], evidence of "other acts" is inadmissible as character evidence to prove that a particular accused has a propensity to commit certain types of crimes or crimes in general. Such evidence may be admissible, however, to establish certain, limited matters relevant to the current charges.⁵ Prior to the trial of Private Jones for the murder of Gretchen, the defense was notified that the government intended to prove the identity of Gretchen's murderer by presenting to the triers of fact the events of the afternoon of 19 December 1980 (the rape/attempted murder of Heidi). Recognizing the critical nature of this proffered matter, the defense raised a motion in limine before the military judge, seeking to prohibit the trial counsel from utilizing this evidence or even mentioning it to the triers of fact.⁶ The threshold burden of proof was upon the government to demonstrate that the "identity exception" was clearly applicable in this case.⁷

5. MRE 404(b) states as follows:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

6. See United States v. Cofield, 11 M.J. 422 (CMA 1981) (use of motion in limine to determine admissibility of prior summary court-martial conviction offered to impeach the credibility of the accused under MRE 609(a)).

7. United States v. King, 16 M.J. 990, 995 (ACMR 1983) (proof by government must be "plain, clear and conclusive"); United States v. Hancock, 14 M.J. 998, 999, (ACMR 1982) (same); United States v. Dicupe, 14 M.J. 915, 917 (AFCMR 1982) (same). Accord, United States v. Myers, 550 F.2d. 1036, 1044 (5th Cir. 1977) ("plain, clear and convincing").

B. Elements of Proof of "Identity Evidence"

The development of the parameters of "identity evidence" under the 404(b) exception is largely a recent phenomenon in military law.⁸ However, the United States Courts of Appeals, in reviewing MRE 404(b)'s identical counterpart in the Federal Rules of Evidence, have made significant contributions in this area. As a matter of law, the government, as the party upon whom the burden of proof rests, must prove more than mere similarity between the charged crimes and the "other acts." Rather, there must exist so high a degree of similarity as to mark the charged offense(s) as the "handiwork" of the accused based on his "signature" on both the charged and uncharged acts.⁹ One authority has described the

8. See, e.g., *United States v. Watkins*, 17 M.J. 783 (AFCMR 1983); *United States v. Barus*, 16 M.J. 624 (AFCMR 1983); *United States v. Vilches*, 17 M.J. 851 (NMCMR 1984). Prior military decisions interpreting MRE 404(b) have largely dealt with other exceptions to this Rule. See *United States v. Gambini*, 13 M.J. 423 (CMA 1982) (evidence used to rebut accused's assertion that he had not been involved in any misconduct before); *United States v. Clark*, 15 M.J. 974 (ACMR 1983) (used to explain why accused's daughter was physically unable to resist his sexual advances); *United States v. Ali*, 12 M.J. 1018 (ACMR 1982) (used to demonstrate "plan, motive or intent" and also to rebut accused's assertions that another servicemember was the cause of the sexual misconduct).

9. See, e.g., *Hirst v. Gertzen*, 676 F.2d 1252, 1262 (9th Cir. 1982) (must demonstrate the "unique handiwork" of the murderer); *United States v. Pisari*, 636 F.2d 855, 858-59 (1st Cir. 1981) (conjunction of several identifying characteristics or the presence of some highly distinctive quality resulting in "sufficient signature or trademark" required); *United States v. Woods*, 613 F.2d 629, 635 (6th Cir. 1980) (bank robbery; "other acts" evidence constituted a "device so unusual or distinctive as to be like a signature"); *United States v. Danzey*, 594 F.2d 905, 911 (2nd Cir. 1979) (distinctive robbery evidence; excellent factual analysis); *United States v. Powell*, 587 F.2d 443, 448-49 (9th Cir. 1978) (evidence inadmissible because factual circumstances insufficiently distinct). *United States v. Herman*, 589 F.2d 1191, 1198 (3d Cir. 1978)

Continued

matter to be an issue of whether the factual characteristics relied upon are "sufficiently idiosyncratic" to permit an inference that the accused's "other acts" identify him as the perpetrator of the charged crime(s).¹⁰ The crux of "identity evidence" under Rule 404(b) are facts, both those of the charged offenses and those of the "other acts." Once facts are identified, the process then turns to a three-fold analysis: (1) Are the facts of the charged crimes(s) sufficiently "unique" or "distinct"?

9. Continued

(evidence inadmissible because not sufficiently unusual or distinctive); *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1149 (2d Cir. 1978) ("striking" similarities in cocaine smuggling operating); *United States v. Silva*, 580 F.2d 144, 148 (5th Cir. 1978) (proof insufficient); *United States v. O'Connor*, 580 F.2d 38, 42 (2d Cir. 1978) (same unusual features must be present); *United States v. Myers*, 550 F.2d 1036, 1045-46 (5th Cir. 1977) (similarities must be "peculiar, unique or bizarre;" inference of identity must be "extremely strong"); *United States v. Moody*, 530 F.2d 809, 810 (8th Cir. 1976) (pre-FRE; robbery evidence); *United States v. McCord*, 509 F.2d 891, 895 (7th Cir. 1975) (pre-FRE; "remarkably strong resemblance" shown); See *McCormick* § 190 at 449 ("signature" standard). But see *United States v. Gubelman*, 571 F.2d 1252, 1255 (2d Cir. 1978) (unique signature crimes held not to be required; this minority position has not been cited for its precedential value since the case was decided, and the decision to admit the evidence was clearly proper on the ground that it rebutted the defendant's assertion on direct examination that he had never taken a bride).

10. 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶404[16] (1982) at 404-94 [hereinafter cited as *Weinstein*]. Weinstein summarized the rationale for the "identity exception" when he wrote,

There are many instances when details of the crime show an individuality that, if repeated, are highly probative of the conclusion that they were committed by the same person. While not rising to the same certainty of chisel marks or rifling marks, they are no different as identifying marks than the fact that the defendant limped or had a scar over his eye. . . . Criminals are not generally highly intelligent and creative artists. They tend easily to fall into detailed patterns serving as "prints" of their crimes.

Id. at 404-92 to 93 (emphasis added; footnotes omitted).

(2) Are the facts of the "other act(s)" sufficiently "unique" or "distinct"? (3) When comparing, either singly or together, the facts of the charged offense(s) with those of the "other act(s)," is the result the requisite conclusion that the facts are so "strikingly similar"¹¹ that the accused's "signature" on the latter identifies his "handiwork" on the former? The role of the defense counsel, therefore, is to challenge the "facts"¹² and alleged similarities of each set of events in order to demonstrate that the government has failed to prove that the present case

11. United States v. Watkins, 17 M.J. 783, 786 (AFCMR 1983) ("strikingly similar" proof); United States v. Barus, 16 M.J. 624, 626-27 (AFCMR 1983) ("close parallel" must exist; evidence was "virtually identical"); United States v. Vilches, 17 M.J. 851, 855 (NMCMR 1984) ("strikingly similar"). See note 9, supra.

12. An issue not fully answered by courts addressing Rule 404(b) evidence is when is a "fact" of the charged crime a fact by which similarities are demonstrated? In the case of Private Jones, for example, the government asserted that one similar feature between each of the crimes was that when apprehended, Private Jones had in his POV the wallets of both Heidi and Gretchen (presumably taken from each at the scenes). With regard to the "other act" (the crime involving Heidi), this was an uncontested truism conceded by the defense. With regard to the charged offense (involving Gretchen), however, the defense stated to the military judge that it vigorously challenged the government's contention and would, at trial, demonstrate that the second wallet was not Gretchen's. The distinction between a "fact" and a fact, especially where the matter involves an aspect of the charged crime, is critical when the trial is before members. See United States v. Myers, 550 F.2d 1036, 1046 (5th Cir. 1977) (improper to assume as "fact" the identity of accused as the perpetrator of the charged crime in order to invoke the "continuing plan or pattern" exception to 404(b)). Cf. McCormick § 190 at 451-52 (discussing standards for proof for the other acts/crimes). While one could argue that it is necessary, in such a context, to assume that the government will prove its allegations of fact regarding the charged offense (and thereby establish "similarities" with the uncharged acts), such logic begs the question by permitting lay triers of fact to receive the prejudicial evidence of "other crimes" and then attempt to sort out the various facts and make the very legal conclusions that must be left to a judicial officer for initial determination. (The procedural addition of a provision for written, special findings by the triers of facts in a trial by members could be one method of compromise on this subject.)

is clearly a proper context for the invocation of this limited 404(b) exception.¹³

C. The Interplay of Rules 403 and 404(b)

In preparing an attack on the government's proffer of evidence of uncharged acts and in readying for legal argument on the 404(b) exception, the defense counsel must not lose sight of the applicability of MRE 403 to the issue of "identity evidence." Even if the evidence itself is initially deemed admissible under Rule 404(b), the military judge must still balance the danger of unfair prejudice to the accused against potential probative value.¹⁴ Such a balance is required not only when requested by the defense, it must also be made sua sponte by the court

13. Of the 404(b) exceptions, proof tending to establish "identity" requires a greater degree of similarity between the charged and uncharged acts than do, for example, the states of mind exceptions. *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977); *McCormick*, § 190 at 452. In addition, it is important to distinguish the "plan" exception from the "identity" exception, both of which are often discussed together under the generic term of "modus operandi" evidence; the true "plan" exception must, as a legal matter, either (1) demonstrate a connected or inseparable transaction used to complete the story of the charged crime by proving its immediate context of happenings near in time or place, or (2) demonstrate a continuing scheme or conspiracy by the accused. 2 *Weinstein*, ¶ 404[16] at 404-85 to 91; *McCormick*, § 190 at 448-49. See *United States v. Barus*, 16 M.J. 624, 627 (AFCMR 1983) ("modus operandi" evidence used to establish "pattern"). In the trial of Private Jones, it would have been improper to assume the key issue in the case (the identity of the murderer) in order to "bootstrap" the presence of a "two-crime, continuing plan" into existence. See *United States v. Myers*, 550 F.2d 1036, 1046 (5th Cir. 1977).

14. MRE 403; Military Rules of Evidence Analysis, MANUAL FOR COURTS-MARTIAL (1969 Rev. ed.) at A18-61; S. Saltzburg, L. Schinasi and D. Schlueter, Military Rules of Evidence Manual (1981) at 178, 183.

before accepting the 404(b) matters into evidence.¹⁵ While the language of Rule 403 requires exclusion only if the danger of unfair prejudice substantially outweighs the potential probative value, some decisions appear to create an even stricter standard for 404(b) evidence in courts-martial.¹⁶ The defense must stress Rule 403 to the military judge as the only practical way of permitting the accused's guilt or innocence to be determined by detached logic and neutral passions, rather than the foreseeably heated emotions generated by the uncharged misconduct.¹⁷

II. Who Killed Gretchen?

A. Government Strategy: Establish the "Facts"

In preparing its case against Private Jones, the government realized that little could be done by the defense to impeach the anticipated testimony of Heidi¹⁸ or the stipulation of fact that had been signed

15. United States v. James, 5 M.J. 382, 383 (CMA 1978) (recognizing need even before MRE); United States v. Janis, 1 M.J. 395, 397 (CMA 1976) (same). Accord, United States v. Myers, 550 F.2d 1036, 1044-45 (5th Cir. 1977) (collecting citations); 2 Weinstein, ¶ 404[16] (1982); Military Rules of Evidence Analysis, MANUAL FOR COURTS-MARTIAL (1969 Rev. ed.) at A18-61. The balancing of probative value against prejudice to the accused in the court-martial of Private Jones was particularly delicate in light of the fact that his previous conviction would be inadmissible during sentencing. MANUAL FOR COURTS-MARTIAL (1969 Rev. ed.), para. 75b(3) (conviction must be final and for an offense occurring within six years preceding an offense for which the accused is presently charged; here, Private Jones' conviction was pending review before the Court of Military Appeals, and the date of the tried offense (19 December 1980) did not precede the date of the charged crime (26 October 1980)).

16. United States v. King, 16 M.J. 990, 995 (ACMR 1983) ("probative value must outweigh its potential prejudicial impact"); United States v. Hancock, 14 M.J. 998, 999 (ACMR 1982) (same).

17. See text accompanying note 4, supra.

18. During the Article 39a sessions held to litigate the 404(b) issue, the government did, indeed, call Heidi as a witness. The appearance of this young girl, together with the shocking testimony she provided, were deemed by the defense to be the one matter (except perhaps for

Continued

by Private Jones at his first court-martial. With this in mind, the trial counsel began by presenting the significant features of this crime:

- (1) THE VICTIM: Heidi was an attractive, young, dark-haired, Caucasian, German female.
- (2) THE AREA INVOLVED AND A RIDE IN THE ACCUSED'S POV: On 19 December 1980, Heidi was given a ride in Private Jones' POV in an area within driving distance of his home near Gelnhausen.
- (3) THE SEXUAL CONTACT: Private Jones had sexual intercourse with Heidi without her consent and against her will.
- (4) THE LOCATION OF THE CRIME: The rape of Heidi occurred in an isolated, wooded area to which Private Jones had driven his female passenger.
- (5) THE STRANGULATION OF THE VICTIM: Private Jones choked Heidi as part of his assault on her, leaving bruises on her neck.
- (6) THE INTENDED DEATH BLOWS: Private Jones tried to kill Heidi, and thought he had, by repeatedly and viciously striking the back of her head against the ground and with a solid, heavy object (a tree stump/limb present at the scene).
- (7) THE VICTIM'S BELONGINGS: Private Jones discarded most of Heidi's possessions at the scene but took her wrist watch from her before he left and, when apprehended two days later, still had some of her clothing and her wallet in his POV.

To parallel the Heidi events, the government offered the following "facts" with regard to the murder of Gretchen:

18. (Continued)

photographs of the decedent) which would emotionalize the triers of fact and tend to cause them to gloss over all evidence which could exonerate the accused. The government was prepared to call Heidi on the merits of its case [under MRE 404(b)] to establish many of the facts of the 19 December 1980 incident.

- (1) THE VICTIM: Gretchen was an attractive, young dark-haired, Caucasian, German female.
- (2) THE AREA INVOLVED AND THE LOCATION OF THE CRIME: On 26 October 1980, Gretchen was driven to an isolated, wooded area (within 25 miles of Gelnhausen) where she was murdered.
- (3) THE SEXUAL CONTACT: Although no traces of spermatozoa or seminal fluid were found during the oral, anal, and vaginal examinations performed on Gretchen as part of the autopsy on 27 October, forensic analysis of her clothing revealed prior sexual contact between Gretchen and an unknown male, as evidenced by the presence of spermatozoa/seminal fluid on her outer jacket and pants and in the crotch area of her panties.
- (4) THE STRANGULATION OF THE VICTIM: Gretchen had been severely strangled prior to her death, resulting in massive bruising of her neck and possible unconsciousness.
- (5) THE DEATH BLOWS: Gretchen was killed while in a face down, prone position by being repeatedly struck on the back of her head with an unknown, heavy, semi-sharp object. (The weapon was never found.)
- (6) THE VICTIM'S BELONGINGS: Some of Gretchen's personal possessions were missing from the scene, and a part of these items (including her cosmetics and identification cards) were located approximately 20 miles away along a German state road about five miles from Private Jones' home (and at a point along a route he could have driven from Hanau to his home on 26 October 1980). In addition, the empty wallet confiscated by the German police from Private Jones' POV on the same day that Heidi's wallet was found there had been identified as Gretchen's missing wallet.
- (7) THE USE OF A MOTOR VEHICLE IN THE CRIME BY THE ACCUSED:
According to an eyewitness account, an automobile fitting the description of Private Jones' POV was seen driving onto German State Road 3008 from the forest path in question at about 0300 hours, 26 October 1980. In addition, a forensic analysis of Private Jones' POV and the clothing worn on 26 October 1980 by Gretchen located fibers "corresponding" and "similar" to those of her clothing on his seatcovers and fibers "corresponding" and "similar" to those of his seatcovers on her clothing.

B. Defense Strategy: Question the "Facts" and "Similarities"

The defense, in response to the government's version of the murder, attempted to scrutinize the known facts, separating speculation and conjecture from true facts, and to demonstrate that, in spite of the purported similarities between each series of events, they were not, in comparison, "strikingly similar." First, the defense offered the following observations:

- (1) THE TIME OF DAY DURING WHICH THE CRIME OCCURRED: The abduction and murder of Gretchen occurred in early morning darkness, while Heidi was kidnaped, raped and assaulted in the light of the afternoon.
- (2) THE AREAS INVOLVED IN THE CRIMES: The rape of Heidi was close to (within five miles of) Private Jones' home, while the murder of Gretchen was some 25 miles away in an area northwest of Hanau.¹⁹
- (3) THE POSSIBILITY OF PRESENCE IN THE ACCUSED'S POV: In light of evidence that Gretchen spoke little, if any, English; that Private Jones spoke no German; that to Heidi, two months later, Private Jones was by his civilian clothing, short hair and manner of speech, "obviously" an American soldier; and that

19. An important difference, the defense argued, in a country the total approximate size of our State of Oregon. Because both crimes were committed in the German State of Hessen, near its border with the State of Bavaria, the defense requested the assistance of both states in assembling statistics for homicides or attempted homicides committed within each between the years 1976-1982. Only the State of Hessen responded. Such statistics, used by the defense during this motion, were directly relevant to the question of the "distinctiveness" of the circumstances surrounding the murder of Gretchen. These statistics, referred to in footnotes 20-24 infra, involved 47 specific homicides (or attempts) all of which had German females as the victims.

Gretchen once told her mother that she was afraid to ride with a stranger, it was mere speculation that Gretchen had accepted a ride from Private Jones on the morning of her death.²⁰

- (4) THE QUESTION OF SEXUAL CONTACT: While Private Jones admittedly raped Heidi, the alleged sexual contact between Gretchen and Private Jones²¹ was unprovable conjecture: Gretchen was walking home alone after a date with an ex-boyfriend (could he have been the source of the sperm traces?), the sperm cells/seminal fluid traces on her clothing were not datable, and no blood grouping of any of the traces linked her to Private Jones.
- (5) THE DEGREE OF STRANGULATION: Private Jones strangled Heidi but only with his hands and only minor bruises resulted, while Gretchen had been strangled with an unknown tool (belt, shoe, tie, etc.) so forcefully that massive imprinting upon her neck, and possible unconsciousness, resulted.²²
- (6) THE NATURE OF THE INTENT TO KILL: There was a feature of release-recapture-screaming-reaction to the attempted murder of Heidi, and a military psychiatrist who had examined Private Jones prior to his first trial would testify that Private Jones's beating of Heidi was a reaction to her crying and screaming that she was going to report the rape, not some predetermined intent to kill. On the other hand, all evidence from 26 October 1980 pointed to the conclusion that Gretchen was dragged, unconscious, from an automobile into the woods and there, defenseless, was beaten to death.

20. 10 (21%) of the 47 Hessen homicides (or attempts) cited in the defense statistics for the years 1976-1982 involved attacks upon female POV passengers (passengers or hitchhikers who accepted rides).

21. 46 (98%) of the 47 recorded Hessen homicides (or attempts) involved evidence of sexual motivation, and 23 (49%) involved female victims between 15 and 21 years of age.

22. 34 (72%) of the 47 recorded Hessen homicides (or attempts) involved strangulation of the female victim.

- (7) THE NATURE OF THE DEATH WEAPONS, BLOWS, AND INJURIES: The head injuries of Heidi were accomplished by the use of a natural object, which was present at the scene, in a blunt-blow manner. The weapon, which was left at the scene after the attack with no attempts to clean or conceal it, caused unconsciousness but neither fractured nor penetrated the skull casing. With regard to Gretchen, however, the blows to her head were so vicious as to fracture, crush, and penetrate through the skull into the brain. In addition, the death weapon itself was a heavy, semi-sharp instrument which was carried to and taken from the scene of the murder. Finally, the additional injuries to Gretchen, including the massive bruising of her neck and the fracturing of her vertebral column, indicated an attack upon this victim done with the intent to render her totally helpless before crushing her skull.²³
- (8) THE POST-ATTACK APPEARANCE OF THE VICTIM AND THE DISPOSAL OF HER BELONGINGS: Private Jones left Heidi only partially clothed after the attack and discarded her possessions at the scene, while the murderer of Gretchen left his victim in the woods²⁴ fully clothed and scattered her possessions along the side of a road many miles from the scene.
- (9) THE ROBBERY "COVER": Private Jones admitted to returning to Heidi and taking her wristwatch in order to make his attack "look like a robbery" (notwithstanding the absence of her wallet from the site already). Gretchen, on the other hand, had all of her jewelry present when she was found.

23. 25 (53%) of the 47 recorded Hessen homicides (or attempts) involved severe blows to the female victim's head region, and 18 (38%) involved both strangulation and blows to the head of the female victim.

24. 16 (34%) of the 47 recorded Hessen homicides (or attempts) were perpetrated in secluded, outdoor areas.

Secondly, the defense addressed the result of comparing the facts of 26 October 1980 with those of 19 December 1980. On this point, the defense argued that the military judge could not legally or logically hold that the facts were "strikingly similar." As one important consideration, the defense noted that Gretchen was murdered two months before Private Jones offered Heidi a ride.²⁵ If Private Jones were, in fact, the murderer of Gretchen, for two months he had gone undetected; for two months his existing modus operandi had proven successful. Why then, the defense argued, would Private Jones suddenly shift his "strategy" and change his m.o.? Assuming Private Jones did commit both crimes, why decide the second murder should look like a robbery? Why use only his hands to strangle Heidi instead of regressing to a tool, shoe, belt, or other instrument as he had with Gretchen? Why not choke Heidi until she, like Gretchen, became unconscious? Why settle for a fortuitous tree stump/branch as the death weapon instead of chasing her with a jack or other semi-sharp object, crushing her skull as he had with Gretchen, and then removing it, too, from the location? Why discard Heidi's possessions at the scene instead of travelling many miles away as he had after killing Gretchen? Why commit this second, later crime so close to him and in the light of day? These questions, together with the Bad Kreuznach homicide evidence, only served to strengthen the

25. Although the sequence of the 404(b) incidents is not a matter affecting admissibility, United States v. Ezzell, 644 F.2d 1304 (9th Cir. 1981) (bank robbery occurring after charged robbery), United States v. Pisari, 636 F.2d 855 (1st Cir. 1981) (use of knife three months before charged robbery); United States v. Myers, 550 F.2d 1036, 1044 n.10 (5th Cir. 1977) (collecting citations); the timing of successful "other acts" vis-a-vis the charged crimes may be extremely important in demonstrating that the "identity inference" is weak. See note 10, supra, for Weinstein's rationale for the very existence of the identity exception under 404(b). The specific issue was not whether Private Jones could have murdered Gretchen, nor whether he could have done so even with a change in his "m.o." between October and December; the question was whether the crimes were so similar as to permit the December crime to be used as substantive evidence to prove the identity of Gretchen's murderer.

defense argument that the government had failed to show clearly that the crimes were "strikingly similar" and, thus, had not met its burden of proof to establish that the inference of identity under MRE 404(b) outweighed the unfair prejudice to Private Jones.

III. Conclusion

In some settings, evidence elicited under an exception to MRE 404(b) may be as totally innocuous as, for example, that offered to establish that some hypothetical accused, two weeks before a certain robbery, purchased a blue and green ski mask similar to that worn by the perpetrator in a charged robbery.²⁶ On the other hand, it can be as damning as the evidence offered here to prove that because Private Jones kidnaped, raped, robbed, and attempted to murder Heidi, he probably murdered Gretchen.²⁷ The trial defense counsel must identify the ultimate ramifications of the government's 404(b) evidence and must vigorously challenge each step, each fact, and each allegation employed by the government. By utilizing the detached, but demanding, legal requirements associated with evidence proffered under Rule 404(b), the defense may be able to win a critical, pretrial victory and set the stage for a trial limited in

26. To show, for example, preparation.

27. Not only would this 404(b) evidence impact on the question of Private Jones' guilt or innocence, it could also affect the sentence by making imposition of the death penalty by the members in this capital case far more likely. See notes 15 and 18, supra.

Secondly, the defense offered the facts of a third, unrelated murder to demonstrate not only that the attack upon Gretchen was not "strikingly similar" to the attack upon Heidi, but also that other documented crimes were arguably even more similar to the murder of Gretchen than Heidi's assault. The third unrelated homicide, which was committed in July 1981 while Private Jones was already in post-trial confinement following his first court-martial, possessed the following significant features:

- (1) THE VICTIM: This third victim was an eighteen-year-old German female.
- (2) THE AREA INVOLVED AND THE LOCATION OF THE CRIME: This murder occurred in an isolated field near Bad Kreuznach (approximately 90 minutes and 65 miles from Hanau).
- (3) THE SEXUAL CONTACT: The victim had sexual intercourse (later determined to be rape) with her assailant prior to her death.
- (4) THE DEATH BLOWS: The victim died as the result of at least two intensive blows to the head with a heavy instrument (such as a carjack or hammer), which had been removed from the scene after the attack. The blows, delivered while the victim was in a bending or prone position, smashed and crushed the left rear region of the skull and penetrated into the victim's brain.
- (5) THE VICTIM'S BELONGINGS: The victim was found fully clothed and still wearing her jewelry, but her purse and wallet were missing.
- (6) THE USE OF A MOTOR VEHICLE IN THE CRIMES: The victim had been the only passenger in her assailant's POV prior to her being murdered by him.

Lastly, the defense argued that certain "facts" offered by the government were actually only questions of fact which the triers of fact alone could determine. These questions of fact, each of which the defense indicated it would challenge at trial, included the government's "proof" that some of Gretchen's possessions were located (1) near Private Jones' home and (2) in Private Jones' POV. Regarding Gretchen's personal items discovered on the side of a road approximately five miles from Private Jones' home, the defense argued, first, that this was dissimilar to the facts of 19 December 1980. In addition, the defense was prepared to

demonstrate (and so indicated to the military judge) that this same area was relatively close to the home of a German male whom the German police initially suspected of the murder and who, in the defense's theory of the case, could have been the murderer.

Likewise, regarding the second wallet found in Private Jones' POV on 21 December 1980, the defense vigorously asserted that at trial it would show that wallet could not have belonged to Gretchen. The defense was prepared to attack the identification of the wallet by friends and relatives seven and one-half months after the murder, as well as the forensic analysis of the fibers from Gretchen's clothing which had allegedly been found in and on the wallet. (The defense was also prepared to refute, by specific evidence to the contrary, the eyewitness and scientific evidence which purportedly placed Gretchen in Private Jones' POV on 26 October 1980).

C. Using Facts and Arguing the Law

The defense, stressing the known facts of the attack on Heidi and contrasting this with the speculative nature of the "facts" of the murder of Gretchen, argued that the government had failed to establish the critical elements of 404(b) "identity evidence." The conclusion, the defense advocated, was that the criminal activity relating to Heidi could not be received into evidence.

First, the only relevant, comparable "facts" of the Gretchen murder were those which had been established by the government at the Article 39a session. Thus, while the eyewitness and scientific evidence proffered by the government to connect Private Jones with Gretchen was independent, non-404(b) evidence of identity which could be offered on the merits to show Private Jones might be the murderer, these matters were premature for inclusion in the 404(b) analysis. Was Gretchen forced into her assailant's POV or did she voluntarily accept a ride? Was she sexually abused by her assailant? How was she strangled, when, and why? Where, and what, was the instrument used to deliver the death blows? The facts were scarce indeed. Could a "distinctive" pattern of the Gretchen murder be discerned? The defense answered no. Did the facts, to the extent they were known, establish a "signature" upon the events on 26 October 1980, particularly in light of the defense evidence regarding homicides in that general area of Germany during four years before and two years after the murder of Gretchen? The defense again answered no. The defense summarized that, in light of all of the actual evidence, the murder of Gretchen was simply not a distinct, unique occurrence.

fact and emotion to the actual charges. In the end, far more than the guilt or innocence of the accused may hang in the balance.²⁸

28. See note 28, supra. In the trial of Private Jones, the military judge deliberated overnight before rendering his special findings and holding that the 404(b) evidence was admissible. Realizing the significance of the court's ruling and that reversal on appeal would occur only if an "abuse of discretion" were found, see United States v. Barus, 16 M.J. 624 (AFCMR 1983) (decision is within the "sound discretion" of the trial judge); McCormick, § 190 at 454; the accused changed his plea to guilty [based solely upon his examination of the evidence and a review of the testimony of the anticipated witnesses, not any independent memory of 26 October 1980 or Gretchen]. Upon being found guilty pursuant to his plea to the lesser included offense of unpremeditated murder, the accused was sentenced to a dishonorable discharge, total forfeiture of all pay and allowances, and confinement at hard labor for life by a panel of officer and enlisted members. [As a final note, the defense was able to preclude the government's use of the "other acts" and Private Jones' prior conviction during sentencing. Although the defense also raised a motion in limine to prohibit the government from impeaching the accused's testimony during sentencing with the prior conviction (under MRE 609), the defense mooted the question when only the unsworn statement method of allocution was utilized.]

SIDEBAR

The Imposition Of A Fine As An Element Of A Sentence

The Court of Military Appeals and the Army Court of Military Review recently decided a number of issues focusing on the propriety of imposing a fine as an element of a court-martial sentence. The primary issues which the Courts have addressed will be discussed below. Trial defense counsel are urged to be sensitive to the possibility that a fine might be adjudged in all cases, even those not involving "unjust enrichment."

A. The Imposition Of A Fine At Any Level of Court-Martial Where, During The "Care" Inquiry, The Military Judge Has Failed To Discuss The Possibility That A Fine Might Be Imposed As Part Of The Sentence.

The plea inquiry required by United States v. Care is intended, in part, to ensure that the accused is fully aware of the punishment to which his plea of guilty exposes him. Recent court decisions hold that this purpose is frustrated when a sentencing authority is permitted to impose a fine that has not been anticipated by or explained to the accused.

In United States v. Polonski, 18 M.J. 621 (ACMR 1984) (en banc), the Army Court of Military Review noted that fines imposed in addition to forfeitures fall under Para. 127c, section B of the Manual for Courts-Martial, United States, 1969 (Revised edition) as an "additional punishment" that is available to general courts-martial. Because Para. 70b(2) of the Manual requires that an accused who has pleaded guilty be advised of the "maximum authorized punishment, including permissible additional punishment (127c, section B)", the court reasoned that it is error for a military judge in a general court-martial to impose a fine in addition to total forfeitures where the judge has failed to advise the accused during the guilty plea inquiry that a fine is an additional permissible punishment. Such a failure on the part of the military judge does not render the guilty plea improvident, but is grounds for setting aside the fine.

It is unclear whether the Army Court of Military Review's analysis will remain valid under the new Manual for Courts-Martial, effective 1 August, 1984. R.C.M. 910(c)(1) corresponds to Para. 70b(2) of the Manual, 1969. It instructs military judges who have received a guilty plea to inform the accused of the "maximum possible penalty." But unlike Para. 70b(2), MCM, it does not go on to mention instructions about permissible additional punishment. This lapse, given the Court's very literal reading of the Manual, calls Polonski's continued validity into question.

Fortunately, the Court of Military Appeals used a different line of reasoning to reach a similar conclusion in United States v. Williams, 18 M.J. 186 (CMA 1984). The Court held that "elemental fair play" demanded that a general court-martial not be allowed to impose a fine in addition to total forfeitures in a guilty plea case, unless the possibility of a fine had been made known to the accused during the providence inquiry.

A fine can be adjudged if the accused was aware that a fine could be imposed, either because this possibility was discussed with him during the providence inquiry or was contained within the terms of his pretrial agreement. Without notice, a fine in addition to total forfeitures of pay may not be imposed in connection with a guilty plea rendered at a general court-martial. However, the court held open the possibility that the notice requirement could be met by "other evidence that the accused was aware that a fine could be imposed." Id. at 189.

Paragraph 126h(3), MCM, 1969, permits both a fine and forfeiture of pay to be adjudged by a general court-martial. The Manual for Courts-Martial does not, however, grant a special court-martial this power. In United States v. Brown, 1 M.J. 465 (CMA 1976), the Court of Military Appeals noted that a special court-martial was limited in its powers to adjudge fines and forfeitures. The Court stated in Brown that, at a special court-martial, a fine may only be imposed instead of forfeitures. However, the Court continued, the total pecuniary impact of the fine may not exceed the total amount of forfeitures which could be adjudged. United States v. Brown, supra at 466.

Counsel should be sensitive to this limitation on the power of a special court-martial to adjudge fines and forfeitures whether the trial forum is a military judge alone or a court with members.

B. The Power Of A Special Court-Martial To Impose A Fine As An Element Of Punishment.

Although the Manual for Courts-Martial presumes that a special court-martial has the power to adjudge a fine, the Court of Military Appeals recently examined the question of whether such a court-martial is so empowered. See United States v. Wilkerson, 17 M.J. 102 (CMA 1983). In support of the issue specified by the Court, counsel have argued that a fine is a more severe penalty than the equivalent amount of forfeitures because of its economic impact. Since Article 19, UCMJ, authorizes no

pecuniary penalty in excess of forfeiture of two-thirds pay per month for six months to be adjudged by a special court-martial, a fine may not be imposed. The thrust of the argument is that the language of Article 19, UCMJ, should be interpreted literally and that therefore a special court-martial may impose no pecuniary penalty other than forfeiture of pay. In a recent unpublished opinion, the ACMR rejected this argument and held that Article 19, UCMJ, prohibits only certain enumerated punishments, not including fines, and those not otherwise forbidden by the UCMJ. Therefore, a literal interpretation of that Article permits imposition of the fine. See United States v. Ortiz-Arroyo, SPCM 20277 (ACMR 10 Apr. 1984) (unpub.)

The Court of Military Appeals in United States v. Sears, 18 M.J. 190 (CMA 1984) approved the argument of defense counsel that a special court-martial has the authority to impose a fine under Article 19, UCMJ, but that the amount of the fine may not exceed the total amount of forfeitures which may be adjudged in a case.

