"The Future Ain't What It Used to Be":[1] New Developments in Evidence for the 2005 Term of Court

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Relevance is at the conceptual core of the Federal Rules of Evidence (FRE) and the Military Rules of Evidence (MRE). As expressed in Rules 401,[2] 402,[3] and 403,[4] evidence that is logically relevant[5] is admissible at trial, unless other rules prohibit its admission[6] or its probative value is substantially outweighed by the danger of unfair prejudice or other damage to the fact-finding process.[7] What seems simple on its face, however, is often complicated by caselaw interpretations that expand or contract the limits of relevance according to the philosophical preferences of appellate judges.

The strongest evidentiary trend in the 2005 term of court was the Court of Appeals for the Armed Forces' (CAAF) struggle to establish the boundaries of logical and legal relevance in trials by court-martial. The CAAF wrestled with issues involving the basic definition of logical relevance,[8] the limits of legal relevance,[9] and whether specific evidentiary prohibitions should prevent logically relevant evidence from being admitted at trial.[10] The CAAF appears to be ideologically fractured and inconsistent on issues of relevance, making it very difficult for practitioners and military judges to apply the plain language of the MRE in making admissibility determinations.

Relevance, however, was not the only evidentiary subject tackled by the CAAF and the service appellate courts during the 2005 term of court. This article will discuss and analyze significant evidentiary military appellate cases from the CAAF and the service appellate courts, proceeding sequentially through other military rules of evidence. This year's term addressed cases concerning the proper preservation of objections under MRE 103,[11] the independent source rule for the corroboration of a confession under MRE 304(g),[12] logical and legal relevance under MREs 401[13] and 403,[14] uncharged misconduct under MRE 404(b),[15] sexual propensity evidence under MRE 413,[16] the joint-participant exception to the marital communications

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[1] Yogi Berra, Yogi-isms, http://www.yogiberra.com/yogi-isms.html (last visited Apr. 6, 2006).

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2005) [hereinafter MCM].

[3] *Id.* MIL. R. EVID. 402.

[4] *Id.* MIL. R. EVID. 403.

[5] Military Rule of Evidence 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* MIL. R. EVID. 401.

[6] According to MRE 402, evidence that is logically relevant is admissible at trial unless "otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces." *Id.* MIL. R. EVID. 402.

[7] According to MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* MIL. R. EVID. 403.

[8] For example, in United States v. Berry, 61 M.J. 91 (2005), a majority of the CAAF found the appellant's uncharged acts of sexual misconduct logically relevant under MREs 401 and 402 but not legally relevant for the purposes of MRE 403 and 413. *See infra* notes 189-218 and accompanying text. A concurring opinion argued, however, that the evidence could not be logically relevant unless it was also legally relevant. *Berry*, 61 M.J. at 98-99 (Crawford, J., concurring).

[9] *Compare* United States v. Rhodes, 61 M.J. 445 (2005) (holding that evidence a key government witness suddenly forgot his testimony shortly after meeting with appellant and his attorney was more prejudicial than probative when admitted as uncharged misconduct evidence to show appellant's consciousness of guilt), *with* United States v. Hays, 62 M.J. 158 (2005) (affirming the admission of numerous pornographic pictures and e-mails against the appellant in a solicitation case and asserting that the evidence, while highly prejudicial, was extremely probative on the issue of intent to solicit another person to have sex with a child in order to create pornographic images of it).

[10] In *United States v. Brewer*, 61 M.J. 425 (2005), the majority held (and a blistering dissent excoriated them for so holding) that logical relevance and the Due Process Clause of the Fifth Amendment trumped the plain language of MREs 404 and 405 in drug cases involving the permissive inference of wrongful use.

[11] MCM, *supra* note 2, MIL. R. EVID. 103.

[12] *Id.* MIL. R. EVID. 304(g).

[13] *Id.* MIL. R. EVID. 401.

[14] *Id.* MIL. R. EVID. 403.

[15] *Id.* MIL. R. EVID. 404(b).

[16] *Id.* MIL. R. EVID. 413.

privilege of MRE 504,[17] impeachment under MRE 613,[18] expert testimony under MREs 702[19] and 704,[20] adoptive admissions and MRE 801(d)(2)(B),[21] the public records exception to the hearsay rule of MRE 803(8),[22] and statements against interest under MRE 804.[23]

Cases from the 2005 Term of Court

Rule 103: Preserving Objections for Appellate Review

Military Rule of Evidence 103 requires counsel to make objections in order to preserve evidentiary issues for later appellate review. The objections must be timely and specific, and counsel must be prepared to preserve objections through offers of proof.[24] In the absence of plain error, evidentiary issues are forfeited if counsel fail to comply with the requirements of MRE 103.[25] In *United States v. Datz*,[26] the CAAF addressed MRE 103's requirements to preserve evidentiary issues for later appellate review.

The appellant in *Datz* was convicted of raping a female member of his crew after unlawfully entering her civilian quarters.[27] He conceded at trial that he and the alleged victim had participated in sexual intercourse, but he claimed it was consensual.[28]

The government's case consisted of testimony from the alleged victim and a police investigator, Special Agent (SA) Van Arsdale, who had interrogated the appellant.[29] Special Agent Van Arsdale testified that Datz had nodded affirmatively in response to the agent's statement that Datz knew he did not have consent to engage in sexual intercourse with the victim.[30] The government introduced evidence of the nod as an adoptive admission by the appellant.[31]

Special Agent Van Arsdale, however, was not the most reliable of witnesses. Testifying from memory, he could not recall the exact wording of the questions he had posed to the appellant. Instead, he testified about questions he "would have" asked the appellant.[32] As for the critical question in the case—the one that led to the appellant's alleged adoptive admission—SA Arsdale had this to say: "Again, it was something to the effect—this whole line of questioning was around the same time, and it would have been, 'She didn't in fact agree to have sex with you, did she?' or something to that effect."[33] In other words, SA Van Arsdale had observed the appellant nod affirmatively in response to a compound and ambiguous question.[34]

Defense counsel objected on grounds of relevance and prejudice and in argument to the military judge during an Article 39(a) session, questioned whether the appellant had actually manifested his adoption of or belief in the statements or was

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[17] *Id.* MIL. R. EVID. 504.

[18] *Id.* MIL. R. EVID. 613.

[19] *Id.* MIL. R. EVID. 702.

[20] *Id.* MIL. R. EVID. 704.

[21] *Id.* MIL. R. EVID. 801(d)(2)(B).

[22] *Id.* MIL. R. EVID. 803(8).

[23] *Id.* MIL. R. EVID. 804.

[24] *Id.* MIL. R. EVID. 103.

[25] *See id.*

[26] 61 M.J. 37 (2005).

[27] *Id.* at 39.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 40.

[31] *Id*. at 40-41.

[32] *See id.* at 39-40 (quoting the record of trial concerning SA Van Arsdale's testimony about what he "would have asked" the appellant in several critical factual issues in the case).

[33] *Id.* at 39.

[34] *See id*. at 41 (discussing appellant's arguments on appeal that the questions were ambiguous).

merely nodding in anger or frustration.[35] Defense counsel, however, never cited MRE 801(d), the rule governing adoptive admissions,[36] to the military judge. The military judge admitted the evidence and stated that defense counsel's arguments would go to the weight but not the admissibility of the statements.[37]

On appeal, the CAAF addressed the issue of whether defense counsel waived the adoptive admissions issue by failing to properly preserve the objection under MRE 103.[38] Adopting a common-sense approach, the CAAF held that defense counsel had adequately preserved the adoptive admissions issue for appeal.[39] Military Rule of Evidence 103 requires an accused to make a timely objection, stating the specific grounds for the objection if not apparent from the context.[40] There is no requirement to cite a particular rule by number.[41] In this case, appellant's defense counsel initially objected on grounds of relevance and prejudice, but presented sufficient argument on the adoptive admissions issue to make known to the military judge the basis for his objection.[42] The CAAF rejected the government's argument on appeal—the appellant would be required to raise every possible argument in support of an objection to avoid forfeiting the issue—stating, "[i]n the heat of trial, where counsel face numerous tactical decisions and operate under time pressure, we do not require such elaboration to preserve error on appeal."[43]

The CAAF then turned to the substantive issue of whether the appellant's act of nodding his head qualified as an adoptive admission within the meaning of MRE 801(d)(2).[44] Adopting a three-element foundational analysis employed both in the federal circuit courts and in the Army and Navy service courts,[45] the CAAF held that the military judge abused his discretion in admitting the appellant's nod as an adoptive admission.[46] The test adopted by the CAAF requires a military judge to make three predicate findings before admitting evidence of an adoptive admission.[47] First, the party against whom the statement is admitted must be present when it is made. Second, the party must understand the statement. Third, the party's actions, words, or both must unequivocally acknowledge the statement he is adopting as his own.[48]

In the instant case, there were two fatal ambiguities pertaining to SA Ansdale's question: first, the agent could not remember exactly what the question was; and second, the question he asked was not only ambiguous, it was compound.[49] It was therefore impossible to know whether the appellant had understood the question or what the nodding gesture meant.[50] The CAAF further held that the military judge's error in admitting the gesture as an adoptive admission was prejudicial. The CAAF reversed and set aside the findings and sentence for the rape and unlawful entry charges.[51]

Datz is an excellent common-sense application of MRE 103. When counsel sense error but cannot remember a specific rule number, *Datz* teaches that one can preserve the issue for later appellate review by making a timely objection and making an argument that is specific enough for the military judge and the reviewing court to identify the issue. In other words, counsel should get up on their feet and start talking! Provided that all parties are discussing the same issue, any evidentiary error will be preserved for appeal. Military judges, of course, can clarify matters by asking counsel specific questions oriented on the actual written provisions of the MRE.

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[35] *See id.* at 40-41.

[36] *See* MCM, *supra* note 2, MIL. R. EVID. 801(d).

[37] *Datz*, 61 M.J. at 40-41.

[38] *Id.* at 41.

[39] *See id.* at 42-43.

[40] *See* MCM, *supra* note 2, MIL. R. EVID. 103.

[41] *Datz*, 61 M.J. at 42.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See id*. (citing cases from five circuit courts of appeal and the Army and Navy courts of military review).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See id*.

[51] *Id.*

The CAAF's new approach for adoptive admissions provides counsel with a clear framework for analyzing adoptive admissions issues. In addition, *Datz* serves as a warning to trial counsel about the dangers of "gesture confessions." The questions asked must be clear and unambiguous and the gesture unequivocal before it will pass muster as an adoptive admission. Counsel facing issues involving gesture confessions should carefully read the *Datz* case as well as a CAAF case from the 2003 term of court, *United States v. Kaspers*.[52]

Military Rule of Evidence 304(g): Corroboration of Confessions and Admissions

Military Rule of Evidence 304(g) codifies the common-law principle that a criminal defendant's confession should not be admitted against him unless there is independent corroborating evidence of guilt.[53] In practice, the rule is not always easy to apply, and the CAAF's jurisprudence on corroboration has historically tended to muddy the waters rather than clarify the issues.[54] *United States v. Arnold*[55] continues the CAAF trend of shedding darkness on the corroboration rule.

The appellant in *Arnold* was convicted of one specification of wrongful distribution of ecstasy.[56] The charge arose from a September 2000 incident at a rave club involving the appellant and a group of fellow Soldiers. One of the Soldiers, Guisti, obtained ecstasy and distributed it to the others.[57] When the group's supply ran low, the appellant obtained more ecstasy and again distributed it to the group.[58] Guisti later became the subject of a Criminal Investigation Division (CID) investigation, in which he implicated the appellant in a variety of drug offenses but did not mention the appellant distributing ecstasy.[59] The appellant made a statement to CID admitting to distribution of ecstasy and also lysergic acid diethylamide **(**LSD).[60]

The government brought charges against the appellant for conspiracy to distribute LSD and distribution of LSD.[61] During an Article 32 investigation, the investigating officer determined that the LSD charges were not supported by sufficient evidence. The investigating officer, however, concluded that reasonable grounds existed to charge the appellant with conspiracy to distribute ecstasy and distribution of ecstasy.[62] The government withdrew the charge for conspiracy to distribute LSD, but went forward on charges for distribution of LSD and distribution of ecstasy. Following arraignment on those charges, the military judge granted a defense motion to reopen the Article 32 investigation to properly investigate the charge of ecstasy distribution; the subsequent reinvestigation determined that reasonable grounds existed to support the ecstasy distribution charge.[63] Guisti said nothing under oath about the appellant's ecstasy distribution at either of the Article 32 investigations.[64]

The appellant's confession was admitted against him at his court-martial.[65] Guisti testified for the government, and for the first time since the incident, stated under oath that the appellant had distributed ecstasy to him.[66] This was the only evidence corroborating the appellant's confession. On cross-examination, Guisti admitted that he had reviewed the

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[52] 58 M.J. 314 (2003). *Kaspers* featured a confession that consisted of the appellant holding up one finger in response to an Office of Special Investigations agent's question about whether the appellant had gone to Florida and used ecstasy on one occasion. At trial, the parties differed on the meaning of the gesture: the government said it amounted to a confession, and the appellant said it simply meant she had been to Florida once. *See id*. at 316. Clearly, gesture confessions are much more open to interpretation than a solid confession that has been reduced to writing and signed by the accused.

[53] *See* MCM, *supra* note 2, MIL. R. EVID. 304(g). According to rule 304(g), "An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." *Id.*

[54] For a superb commentary on the CAAF's struggles with the corroboration rule, see Major Lance Miller, *Wrestling with MRE 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1 (2003).

[55] 61 M.J. 254 (2005).

[56] *Id.*

[57] *Id.* at 255.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See id.* at 256.

[65] *Id.* at 255.

[66] *Id.* at 256.

appellant's statements with the trial counsel prior to trial.[67] Questioned by the military judge, he stated that the subject had not come up in any previous official questioning. The military judge then asked, "So is today, in court, the first time you told that to anybody?"[68] Guisti replied that it was the first time he had done so "on the record," and, when pressed further by the military judge as to what he meant by "on the record," Guisti replied, "I told the defense attorney when she was questioning me before the Article 32."[69] Subsequent questioning established that the conversation with the defense counsel took place immediately before the reopened Article 32 investigation and about two weeks prior to trial.[70]

The defense counsel objected to Guisti's testimony on the grounds that it was inadequate corroboration for the appellant's confession; the defense did not, however, claim at trial that Guisti's testimony was not derived independent of the confession.[71] On appeal, appellant argued that Guisti's testimony was derived exclusively from reading the appellant's confession prior to the trial.[72]

The CAAF held that the military judge did not err in ruling that Guisti's testimony provided independent corroboration of the appellant's confession.[73] As a threshold matter, the court noted that the law requires that a confession be corroborated by independent evidence, which cannot be solely derived from the accused's own confession.[74] In the instant case, the CAAF found it significant that Guisti implicated the appellant for wrongful distribution of ecstasy in a private conversation with the appellant's defense counsel prior to the government's reopening of the Article 32 investigation, and prior to Guisti ever reading the appellant's confession.[75] This, according to the CAAF, was enough to demonstrate that Guisti's corroboration of the confession was independent of the confession itself. The CAAF held that the military judge did not err in admitting Guisti's testimony in corroboration of the appellant's confession.[76]

A pretrial conversation between the chief government witness and the accused's defense counsel is a slender thread upon which to hang a confession. If such a conversation represents the only independent source to corroborate the accused's confession, the CAAF's decision in *Arnold* puts defense counsel in a tenuous position when interviewing government witnesses. To avoid running afoul of the prohibition against acting as a witness and counsel in the same proceeding,[77] defense counsel may want to include third parties when interviewing government witnesses. More troubling still is the government practice in *Arnold* of showing a witness the accused's confession prior to trial;[78] had the trial counsel refrained from such activity, the independent source issue might never have arisen at trial. While it remains true that a confession is among the strongest forms of proof known to the law,[79] *Arnold* continues a disturbing trend of weakening what is required to corroborate the confession.

Military Rules of Evidence 401 and 403: Logical and Legal Relevance

In *United States v. Barnes*,[80] the Navy-Marine Court of Criminal Appeals (NMCCA) dealt with the constitutional right of a criminal accused to present logically and legally relevant evidence in his defense. The appellant in *Barnes* was an enlisted man assigned to the forward propulsion room of the USS John F. Kennedy. He was subjected to multiple incidents

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *See id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 257.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 3-7 (1 May 1992).

[78] In an unrelated case, a government lawyer recently created a veritable firestorm of controversy by engaging in similar pretrial preparation practices. Among other things, she showed government witnesses trial transcripts, prepared witnesses in groups, and gave specific e-mail instructions to witnesses on what to say and to whom they should speak. *See Feds Probe Lawyer's Conduct in 9/11 Trial: TSA Lawyer Allegedly Coached Witnesses in Moussaoui Case*, CNN.COM, Mar. 30, 2006, http://www.cnn.com/2006/LAW/03/30/carla.martin.ap/.

[79] As the CAAF recently stated, "[A] voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession." United States v. Ellis, 57 M.J. 375, 381 (2005) (quoting Hopt v. Utah, 110 U.S. 574 (1884)).

[80] 60 M.J. 950 (N-M. Ct. Crim. App. 2005).

of severe physical abuse from his shipmates.[81] When his complaints went unheeded, he went absent without leave (AWOL).[82] Relatives persuaded him to return to the ship, where he was assigned to work in exactly the same location with the same individuals as before. Upon his return, his shipmates told him "tomorrow is a whole new day," which he interpreted to mean that he would be beaten worse than before.[83] He went AWOL again and remained absent for fifty-two months.[84]

At trial, he attempted to raise the defense of duress by introducing evidence of the abuse he suffered at the hands of his shipmates.[85] The government, however, prevailed in a pretrial motion in limine to prevent the appellant from testifying about his reasonable apprehension of death or serious bodily injury. The military judge ruled that the offenses of desertion and unauthorized absence terminated by apprehension are continuing offenses.[86] Since the appellant did not continually fear for his safety throughout the entire period of his absence, the military judge ruled that the appellant had failed to establish a necessary element of the affirmative defense of duress.[87] Accordingly, the military judge did not permit the testimony concerning the beatings and abuse aboard the ship. The military judge ruled that the issue of duress would be preserved for appeal, and the appellant pled guilty to the lesser included offense of unauthorized absence terminated by apprehension.[88]

The NMCCA held that the military judge erred by ruling that the offenses of desertion and unauthorized absence terminated by apprehension were continuing in nature; case law makes it clear they are instantaneous, not continuing offenses.[89] Thus, the appellant's state of mind at the time of his absence was critical to evaluating the affirmative defense of duress.[90] The NMCCA observed that a criminal accused has a constitutional right to present logically and legally relevant evidence at trial.[91] In this case, the appellant's evidence, if believed, could support a defense of duress and was therefore both logically and legally relevant.[92] The military judge's ruling effectively denied the appellant the right to constitutional due process and to a fair and impartial trial.[93] Accordingly, the NMCCA reversed and set aside the findings and the sentence.[94]

The NMCCA's opinion in *Barnes* confirms the basic admissibility standards of MREs 401, 402 and 403: legally and logically relevant evidence is admissible at trial unless precluded by other specific rules of evidence.[95] When a criminal accused is legally entitled to present a defense, he also has the right to present relevant evidence to support the defense. *Barnes* is a good reminder of the symbiotic relationship between the theory of the case and relevance under the rules.

In *United States v. Johnson*,[96] the CAAF examined the relevance of a criminal accused's bank records to help show motive to wrongfully distribute marijuana. The appellant in *Johnson* gave consent for police officers to search his vehicle when he was pulled over for a traffic violation while driving home on leave. The police discovered a sealed box that

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[81] *Id.* at 953-54. The abuse included beatings severe enough to leave him badly bruised and, on one occasion, caused him to urinate blood. *Id.* at 954.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 955.

[87] *Id.*

[88] *Id.* The effect of this ruling was to permit the appellant to introduce the issue on appeal; normally, his plea of guilty would have waived any affirmative defense of duress. *Id.*

[89] *Id.* at 956.

[90] *See id.* at 955-56 (discussing the affirmative defense of duress, the military judge's erroneous ruling that desertion is a continuing offense, and the ruling's effect on the appellant's ability to raise a defense).

[91] *Id.* at 955.

[92] *Id.*

[93] *Id.* at 955-56.

[94] *Id.* at 959.

[95] *See* MCM, *supra* note 2, MIL. R. EVID. 401 (defining logical relevance); *id.* MIL. R. EVID. 402 (stating that relevant evidence is admissible unless otherwise prohibited by the Rules); *id.* MIL. R. EVID. 403 (establishing the "legal relevance" balancing test that weighs probative value against prejudicial effect of the evidence).

[96] 62 M.J. 31 (2005).

contained approximately $17,000 worth of compressed marijuana bricks.[97] The appellant claimed he was transporting the box for a friend and had no idea it contained marijuana.[98]

At appellant's trial for wrongful possession of marijuana with intent to distribute, the government introduced appellant's bank records from the previous twelve months to demonstrate a financial motive to distribute marijuana.[99] The military judge admitted the evidence over defense objection.[100]

The CAAF examined two issues: first, whether the evidence of the appellant's financial condition was relevant, and second, whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.[101] As a threshold matter, it is noteworthy that in evaluating these issues of logical and legal relevance, both of which are the subject of specific evidentiary rules,[102] the CAAF did not once cite the MRE.[103]

On the issue of logical relevance, the CAAF held that evidence of poverty, standing alone, is only marginally relevant to demonstrate a motive to sell drugs. In this case, the government did nothing more than show that the appellant struggled financially and lived month-to-month. The CAAF observed that the appellant's financial struggles made him no different from many other servicemembers.[104] The minimal probative value of the evidence was outweighed by the danger of unfair prejudice because it permitted the panel to infer that poverty is itself a motive to commit a crime.[105] Given the strength of the government case and the incredible nature of the appellant's story, however, the error was harmless.[106]

Despite its puzzling failure to cite the MRE in ruling on an evidentiary issue, the CAAF did provide sound guidance to practitioners on evaluating when financial status evidence is relevant at trial. The threshold requirement, of course, is that counsel must show a specific relevant link between the financial status evidence and the charged offense.[107] Citing a number of state and federal cases, the CAAF listed several circumstances under which the evidence would be relevant: to show imminent and dire financial need, to illustrate unexplained wealth or living beyond one's means, or to explain a sudden and drastic change in a bank account balance.[108]

The CAAF's doctrinally sound approach on the relationship between logical relevance and admissibility in *Johnson* stands in stark contrast to *United States v. Brewer*,[109] in which a divided CAAF held that the appellant's due process rights trumped specific rules of evidence that would have prevented the appellant from raising a novel defense at court-martial.

The appellant in *Brewer*, an Air Force master sergeant with over twenty years of service,[110] tested positive for marijuana use during a random urinalysis test.[111] Following the urinalysis, the government obtained a search authorization to test a hair sample from the appellant, which also tested positive for marijuana use. Based on the hair analysis, an Air Force expert

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[97] *Id.* at 33.

[98] *Id* at 36. The appellant claimed that his friend, a fellow named B.J., had asked him to deliver the box to a person named Junior, who lived in the appellant's home town. Unfortunately for the appellant, he did not know the last names of B.J. or Junior, had no way to contact them, and had not heard from them since his arrest. *Id.*

[99] *Id.* at 33-34.

[100] *Id.* at 35.

[101] *Id.* at 34.

[102] Rules 401 and 402 define logical relevance and stand for the proposition that logically relevant evidence is admissible at trial unless otherwise prohibited by the Rules or other legal considerations. *See* MCM, *supra* note 2, MIL. R. EVID. 401, 402. Military Rule of Evidence 403 establishes the principle of legal relevance with its test that balances probative value and prejudice to the fact-finding process. *See id*. MIL. R. EVID. 403.

[103] *See generally Johnson*, 62 M.J. 31.

[104] *Id.* at 34-35.

[105] *Id.* at 35.

[106] *Id.* at 36.

[107] *Id.* at 35.

[108] *Id.*

[109] 61 M.J. 425 (2005).

[110] United States v. Brewer, 2004 CCA LEXIS 136 (A.F. Ct. Crim. App. 2004).

[111] *Brewer*, 61 M.J. at 427.

determined that the appellant had used marijuana at least thirty times during the previous twelve months.[112] The appellant was charged with using marijuana on divers occasions over a one-year period.[113]

The government relied on the testimony of the hair analysis expert and the permissive inference of wrongfulness to establish the element of wrongful use.[114] The appellant countered with a novel defense, a combination of alibi and innocent ingestion.[115] In support of the defense, the appellant offered testimony from five witnesses who had spent significant time with him the previous year and could testify that they had not seen him use marijuana or suffer from the effects of it.[116] The government moved in limine to preclude this testimony, arguing that because the appellant was not charged with marijuana use on specific dates and times, the only relevant alibi evidence he could offer would be a witness who had spent the entire year with him.[117] The military judge granted the motion, excluding the testimony of four of the witnesses, but permitting testimony from the appellant's girlfriend. The military judge also rejected the defense's motion for reconsideration at the close of the trial counsel's case.[118]

At trial, the appellant presented a type of innocent ingestion defense, introducing testimony from his girlfriend concerning the strict "no marijuana" rule the couple had in their home. The appellant also introduced testimony from a friend of his nephew, who stated that he and the nephew (who lived in the appellant's home) often smoked marijuana in the home and had once made a pot of marijuana-laced spaghetti sauce and left it on the stove.[119] Appellant's defense counsel argued in closing that the innocent ingestion probably occurred as a combination of residual smoke inhalation and ingestion of the spaghetti.[120]

On appeal, the appellant argued that the military judge erred in preventing him from using his "mosaic alibi" defense.[121] Citing MRE 401, the majority declared the evidence to be logically relevant. The appellant's witnesses would have testified that they spent a great deal of time with the appellant during the charged time period and had never seen him use drugs or appear under the influence of drugs, which the majority stated would "go to the issue of whether [the appellant] knowingly and wrongfully used drugs at least thirty times during the charged period."[122] The majority also believed that evidence from the excluded witnesses would have bolstered the appellant's innocent ingestion defense.[123] However, the majority agreed with the lower court's analysis that the evidence was not admissible under Rules 404 and 405 because it was testimony of specific instances of conduct as character evidence that did not meet any of the criteria for admissibility under those rules.[124]

Recognizing that Rules 404 and 405 could not provide a vehicle for admitting the evidence at trial, the majority then turned its attention to "the question of whether this type of testimony may be admissible on other grounds."[125] The majority first noted that the government had a tremendous advantage in this case because it was able to rely on the permissive inference of wrongful use without having to allege specific dates and times of use.[126] While accepting the validity of the government's charging decision and method of proof, the majority stated that the government's reliance on the permissive inference of wrongful use "requires that a court allow a defendant some leeway to rebut that inference by using testimony

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See id*. The alibi defense, called the "mosaic alibi" defense by the lower court, *see Brewer*, 2004 CCA LEXIS 136, at *13-14, consisted of testimony from five individuals who would have claimed they had not seen any signs of drug use from the appellant during the charged timeframe. *Id.* The innocent ingestion defense involved testimony from a friend of the appellant's nephew, who would have testified that despite house rules, he and the nephew regularly smoked marijuana in the appellant's home and had once cooked a pot of marijuana-laced spaghetti that they had left on the stove. *Id.*

[116] *Brewer*, 61 M.J. at 427. These witnesses included friends, coworkers, and the appellant's live-in girlfriend. *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *See id.* at 441 (Baker, J., dissenting).

[121] *See id.* at 428.

[122] *Id.* at 429.

[123] *Id.*

[124] *Id.* at 428. Under MRE 404(a)(1), a criminal accused is permitted to raise evidence of his character to show action in conformity therewith. *See* MCM, *supra* note 2, MIL. R. EVID. 404(a)(1). Military Rule of Evidence 405 controls the methods of introducing character evidence at trial. Military Rule of Evidence 405(a) limits a criminal accused to using reputation or opinion testimony to prove his character. *Id.* MIL. R. EVID. 405(a).

[125] *Brewer*, 61 M.J. at 428.

[126] *See id*. at 428-29.

such as that proffered by Brewer in this case."[127] To bridge the gaping chasm between the plain language of MREs 404 and 405, which specifically prohibit evidence of this type, the majority relied on the somewhat amorphous concept of due process, declaring that the military judge's ruling violated the appellant's due process right to present witnesses in his own defense.[128] Accordingly, the majority held that the military judge, who had followed the MRE to the letter, abused his discretion in excluding the evidence.[129]

In separate opinions, two judges dissented from the majority opinion. Judge Crawford argued that the appellant could have introduced his character for law-abidingness or presented good Soldier defense evidence, but he chose not to.[130] She also noted that the Due Process clause requires the observance of basic procedural safeguards but is not a source of evidentiary rules, particularly when other rules of evidence speak to the issue.[131]

Judge Baker argued in dissent that the majority misapplied the abuse of discretion standard. With respect to three of the excluded witnesses, the military judge did not abuse his discretion because the "mosaic alibi" witnesses were not relevant to the defense of innocent ingestion.[132] Judge Baker believed that testimony from the fourth witness was relevant to the defense of innocent ingestion, but any error in excluding that witness's testimony was harmless. First, using other witnesses, the appellant was actually able to present his defense. Second, given the strength of the government's evidence rebutting the defense of innocent ingestion, exclusion of the fourth witness's testimony did not substantially influence the panel's findings.[133]

From an evidentiary standpoint, *Brewer* is a bombshell. Broadly viewed, the majority opinion essentially states that logical relevance and the due process right to present a defense trump the specific modes of proof contained in the MRE. This opens new evidentiary vistas to creative counsel who can paint military judges into constitutional corners. Counsel who believe that the specific language of the Rules inhibits their ability to call witnesses and introduce relevant evidence may consider using *Brewer* to support a more permissive approach to admission. A more narrow view would restrict the majority opinion to drug cases involving the permissive inference of wrongful use, chalking the majority opinion up as another example of the CAAF's antipathy towards the government's ability to employ the permissive inference.[134] Even a narrow interpretation of the case, however, changes the nature of the game in permissive use cases. Military judges cannot simply look at the MRE to evaluate the admissibility of defense evidence in permissive use cases; *Brewer* seems to require not only an evidentiary analysis, but also a constitutional analysis.

Military Rule of Evidence 404(b): Uncharged Misconduct

Although MRE 404(b) prevents the use of specific uncharged acts to prove propensity, the rule permits the introduction of uncharged acts for non-character purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[135] Military courts consistently apply the three-part test from *United States v. Reynolds* in deciding whether to admit evidence of uncharged acts: (1) there must be proof that the accused actually committed the uncharged acts; (2) the acts must make an issue of consequence in the proceedings more or less probable than it would be without the evidence; and (3) the evidence must survive an MRE 403 balancing test.[136] As demonstrated by recent trends in the military appellate courts, application of the *Reynolds* test occasionally proves problematic at the trial level.[137] During the 2005 term of court, the CAAF decided three cases involving uncharged misconduct and the application of the *Reynolds* test.

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[127] *Id.* at 429.

[128] *Id.* at 429-30.

[129] *Id.* at 430.

[130] *Id.* at 433 (Crawford, J., dissenting).

[131] *See id*. at 433-34.

[132] *See id*. at 440 (Baker, J., dissenting).

[133] *Id.* at 442.

[134] *See, e.g.*, United States v. Green, 55 M.J. 76 (2001); United States v. Campbell, 52 M.J. 386 (2000).

[135] MCM, *supra* note 2, MIL. R. EVID. 404(b).

[136] *See* United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).

[137] For a discussion on recent cases involving the application of the *Reynolds* test to uncharged misconduct, see Major Christopher W. Behan, *New Developments in Evidence for the 2004 Term of Court*, ARMY LAW., Apr. 2005, at 8-9 and *New Developments in Evidence 2003*, ARMY LAW., May 2004, at 11-16.

United States v. Rhodes[138] is the first of this term's uncharged misconduct cases. The appellant in *Rhodes* was charged with the use and possession of psilocyn, a hallucinogenic substance found in mushrooms.[139] The government's chief witness was Senior Airman (SrA) John Daugherty, who had provided investigators with a five-page handwritten confession implicating both himself and the appellant in the offenses.[140] At trial, Daugherty claimed loss of memory, and the military judge permitted admission of his statement under MRE 804 as a statement against interest.[141]

Daugherty's memory loss and the appellant's role in his memory loss were hotly contested issues in the case. Daugherty testified that approximately four months after his confession, the appellant approached him and asked him to speak to the appellant's defense counsel.[142] Daugherty spoke to the defense counsel by telephone and later visited the counsel's office, where he signed an affidavit claiming that he no longer remembered the details of the mushroom transaction and that it was likely the appellant never went with Daugherty to purchase mushrooms. Daugherty also testified that neither the appellant nor his defense counsel suggested that he forget what had happened or lie about it.[143] The defense filed an unsuccessful pretrial motion in limine to preclude evidence suggesting that the appellant had obstructed justice by asking Daugherty to change his testimony.[144]

Applying MRE 404(b) and the *Reynolds* test, the military judge permitted the government to introduce evidence that SrA Daugherty's memory loss immediately followed a meeting with the appellant and his attorney in order to demonstrate the appellant's consciousness of guilt.[145] In his opening statement, the trial counsel told the members that Daugherty lost his memory within hours of the appellant's request that Daugherty meet with appellant's lawyer, and the evidence would prove that the appellant encouraged Daugherty to forget appellant's involvement.[146] The military judge instructed the members that evidence the appellant might have contributed to Daugherty's memory loss could be considered for the limited purpose of showing the appellant's consciousness of guilt.[147] He also instructed the members that there was nothing per se improper with the appellant or his attorney meeting with appellant's defense counsel.[148] During closing argument, the trial counsel highlighted the "unscrupulously, unusual visit" between the appellant and Daugherty, after which "Daugherty's memory [went] poof and disappeared," suggesting that the appellant and Daugherty conspired to create "this preposterous memory loss."[149]

The Air Force Court of Criminal Appeals (AFCCA) affirmed, and the CAAF granted review on the issue of whether the military judge abused his discretion in admitting evidence of the meeting between appellant and SrA Daugherty to demonstrate consciousness of guilt under MRE 404(b).[150]

The CAAF analyzed the admissibility of the uncharged misconduct evidence under the third prong of the *Reynolds* test and held that the military judge clearly abused his discretion in admitting the evidence.[151] Citing *Taylor v. Baltimore & Ohio R.R. Co*.,[152] a Second Circuit case from 1965, the CAAF pointed out that a witness's change in memory is insufficient by itself to support an inference of wrongdoing by the party benefiting from the change, an observation buttressed by Daugherty's in-court testimony that the appellant had nothing to do with his memory loss. [153] The CAAF noted the incongruity of the government relying on Daugherty's in-court testimony that his confession was accurate when given, while

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[138] 61 M.J. 445 (2005).

[139] *Id.* at 446.

[140] *Id.* at 447.

[141] *Id.* at 447-48. For a more thorough discussion of the statement against interest, *see infra* notes 333-38 and accompanying text.

[142] *Id.* at 447.

[143] *Id.*

[144] *Id.* at 448.

[145] *Id.*

[146] *Id.*

[147] *Id.* at 448-49.

[148] *Id.*

[149] *Id.* at 449.

[150] *Id.* at 446.

[151] *Id.* at 452.

[152] 344 F.2d 281, 284 (2d. Cir. 1965).

[153] *Rhodes*, 61 M.J. at 452.

at the same time disavowing his in-court testimony that the appellant had nothing to do with his memory loss.[154] The combination of these factors created the risk that the probative value of the memory loss as evidence of the appellant's guilt was substantially outweighed by the danger of unfair prejudice to the appellant.[155]

According to the CAAF, the military judge also erred by admitting the evidence for an improper purpose. It would have been permissible to admit the evidence to evaluate the truthfulness of Daugherty's claim of memory loss, but not to demonstrate appellant's consciousness of guilt.[156]

Finally, the CAAF evaluated the military judge's error for prejudice to the appellant. Where evidence is improperly admitted under MRE 404(b), the test for prejudice is whether the court can say that the judgment was not substantially swayed by the error.[157] In the instant case, the "suggestion that Appellant suborned perjury could have been crucial to the outcome" of an otherwise close case.[158] Accordingly, the CAAF reversed and set aside the findings and sentence pertaining to the psilocyn charges.[159]

Two judges dissented in separate opinions. Judge Crawford argued that all three prongs of the *Reynolds* test were satisfied and that the majority had inappropriately usurped the role of the members in speculating as to alternative explanations for the sudden change in Daugherty's testimony after his meeting with the appellant.[160] She took the majority to task for using the *Taylor* case and omitting from its opinion the inconvenient fact that the witness's memory loss in *Taylor* occurred over a period of five years, not within five months of the incident and immediately following a meeting between the witness and the appellant's defense counsel.[161] Judge Erdmann also dissented on the grounds that the majority had not properly applied the abuse of discretion standard of review to the military judge's ruling.[162] The standard is not whether the appellate court disagrees with the trial judge, but rather whether the military judge acted arbitrarily or reached a clearly untenable conclusion.[163] Given the facts and reasonable inferences arising therefrom, Erdmann would find no abuse of discretion.[164]

Rhodes is significant because it demonstrates the CAAF's continued willingness to closely examine the admission of uncharged misconduct evidence at trial and to readily substitute its judgment for that of a military judge. The "clear abuse of discretion" standard the majority employed in its analysis[165] appears to be nothing more than an announcement of strong disagreement with the facially reasonable findings and ruling of the military judge. The case illustrates the value for defense counsel of filing and litigating motions in limine in order to preserve issues for appeal. With a watered-down "clear abuse of discretion" standard, counsel can feel reasonably confident in prevailing on appeal if not at trial on uncharged misconduct issues. For military judges, *Rhodes* actually reduces the value of the CAAF's prior cases on uncharged misconduct evidence: when an appellate court applies so little deference to a judge's findings of fact, the task of recognizing and applying precedent—as the military judge attempted to do in relying on the *Reynolds* test at trial—becomes manifestly more difficult.

In *United States v. Bresnahan*,[166] another uncharged misconduct case, the CAAF found error in admitting uncharged misconduct but affirmed on grounds that the error was harmless. The appellant in *Bresnahan* was convicted of involuntary manslaughter for the shaken-baby death of his three-month-old son.[167] Evidence at trial suggested that there were just two possible perpetrators: the appellant and his wife.[168] The appellant, however, had confessed to shaking his son.[169] Rejecting a

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[154] *Id.*

[155] *See id.*

[156] *Id.* at 452-53.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See id.* at 453-58 (Crawford, J., dissenting).

[161] *Id.* at 455-56.

[162] *See id.* at 458-59 (Erdmann, J., dissenting).

[163] *Id.* at 458.

[164] *Id.* at 458-59.

[165] *Id.* at 452.

[166] 62 M.J. 137 (2005).

[167] *Id.* at 138.

[168] *Id.* at 145-46.

defense motion in limine, the military judge permitted the government to introduce X-ray and autopsy evidence of non-accidental rib fractures the infant had suffered some four to eight weeks prior to the evening of his death, even though the injuries were not specifically linked to the appellant.[170] The military judge instructed the members that they could consider the evidence as an indicator that the shaken-baby injuries were not accidental.[171] The military judge further instructed the members that they could consider the injuries as bearing on the appellant's intent to shake his son only if the members concluded that the appellant had inflicted the injuries.[172] The Army Court of Criminal Appeals (ACCA) held that the military judge abused his discretion in admitting the evidence because there was no evidence the appellant had actually inflicted the uncharged injuries. Given the strength of the government case, however, the error was harmless.[173]

The CAAF affirmed, holding that it was indeed error to admit the uncharged misconduct evidence, but that it was harmless given the overwhelming strength of the government case against the appellant and the weakness of the defense case.[174] The government's case was strong, consisting of the appellant's admissions and confessions to a criminal investigator and two doctors, as well as testimony from five doctors who concluded that the child had died from being shaken. Furthermore, there was little risk of prejudice against the appellant, because the evidence helped establish at best that the shaken-baby injuries were caused by abuse rather than accident, an issue not even in dispute in the case.[175]

Bresnahan is a fairly straightforward application of the first prong of the *Reynolds* test: the proponent must show that the accused actually committed the uncharged misconduct. Although this concept seems simple, *Bresnahan* is the second child-death case in three years in which the CAAF has found error in a military judge admitting evidence of injuries not actually linked to the appellant; in 2003, the CAAF not only found error, but reversed and set aside the findings and sentence in *United States v. Diaz*, holding that the military judge erred to the prejudice of the appellant by introducing evidence of injuries that were not linked to the appellant.[176] The lesson for counsel and military judges is clear: if counsel cannot provide a clear link between the uncharged misconduct and the accused, the evidence should be excluded from trial.

United States v. Hays[177] is the CAAF's final Rule 404(b) case from the 2005 term of court. In a judge-alone mixed-plea trial, the appellant in *Hays* was convicted of, among other things, possessing child pornography and soliciting another to commit carnal knowledge with a minor.[178] The solicitation charge centered around an e-mail the appellant sent to an on-line acquaintance named J.D., in which the appellant asked J.D. if he had forced a particular nine-year-old girl to have sexual intercourse with him, requested pictures and video of sexual activity between J.D. and the nine-year-old, and promised J.D. pictures and video of the appellant raping a young girl he planned to adopt.[179]

In support of the solicitation charge, the government introduced several items of uncharged misconduct: e-mail containing pictures of minors engaging in sexually explicit conduct; pictures of adults engaging in bestiality; requests from the appellant for pictures and video of children participating in sexual activity with adults; and an e-mail to other members of his e-mail list threatening to remove them from the list if they did not provide "hardcore pix."[180] The defense unsuccessfully objected on grounds of relevance and improper character evidence.[181]

In affirming the military judge's decision to admit the evidence, the CAAF conducted a *Reynolds* analysis, evaluating the evidence in light of all three prongs of the test. The CAAF made short work of the first prong, simply stating the evidence was sufficient to show that the e-mails and images were on the appellant's computer and e-mail accounts.[182] As for the second prong, the CAAF held that the evidence made a fact of consequence in the action more probable than it would be

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[169] *Id.* at 138.

[170] *Id.* at 144.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 145.

[174] *Id.*

[175] *Id.* at 145-46.

[176] *See* United States v. Diaz, 59 M.J. 79 (2003).

[177] 62 M.J. 158 (2005).

[178] *Id.*

[179] *Id.* at 161-62.

[180] *Id.* at 164.

[181] *Id.*

[182] *See id.*

without the evidence. The court rejected appellant's argument that the evidence showed nothing more than that the appellant enjoyed viewing child pornography. Instead, the court focused on the central issue with the solicitation charge—the appellant's intent to solicit another person to commit carnal knowledge with a child—and stated that the evidence was critical to evaluating the appellant's state of mind, an important component of intent evidence.[183] The CAAF also found the evidence to be relevant on the issue of motive.[184] The third prong of the *Reynolds* test was satisfied because the military judge performed an MRE 403 balancing test and ruled that the probative value of the evidence was not substantially outweighed by its prejudicial impact. Furthermore, the danger of unfair prejudice was low because the case was tried before a military judge alone, and the CAAF presumes that when evidence is admitted by a military judge for a limited purpose, the judge will consider it only for that purpose.[185]

Judge Erdmann dissented on the uncharged misconduct issue. In his opinion, the misconduct was relevant to show that the appellant liked to view child pornography, but not to show intent to seriously solicit another person to engage in carnal knowledge with a minor child.[186]

Hays is a classic example of how uncharged misconduct evidence can be used at trial for legitimate non-character purposes. The evidence went beyond merely showing that Hays was a pervert who liked to look at electronic child pornography. The evidence helped establish Hay's state of mind and his intent to not only look at child pornography, but also to participate in sexual acts with young children and to encourage other people to do so in order to satisfy his prurient interests. It was therefore critical to proving the solicitation charge against the appellant. The evidence fit the government's theory of the case in a way that clearly satisfied MRE 404(b)'s prohibition against introducing character evidence for propensity purposes only.

Closely related to uncharged misconduct under MRE 404(b) is sexual propensity evidence under MREs 413 and 414. The 2005 term of court featured two cases of note: *United States v. Berry*,[187] a CAAF case that put significant limits on the government's ability to admit uncharged sexual misconduct committed when the accused was an adolescent, and *United States v. James*,[188] a case in which the AFCCA affirmed the introduction of post-offense uncharged sexual misconduct to prove propensity.

The appellant in *Berry* performed oral sodomy on another male Soldier, SGT T, who was severely intoxicated.[189] In this "he-said/he-said" case,[190] both participants differed on whether the sodomy was consensual or forcible.[191] At trial, the government introduced evidence that when the appellant was thirteen years old, he persuaded a six-year-old boy to participate in oral sodomy with him. The evidence was proffered under MRE 413 to demonstrate that the appellant had a propensity to take sexual advantage of vulnerable victims.[192] The military judge overruled the defense objection to the evidence. Although the military judge made several findings of fact, he did not conduct a thorough MRE 403 balancing test using all the factors the CAAF set out in *United States v. Wright*,[193] a case in which the CAAF held that MRE 413 adequately preserves the accused's constitutional rights if the judge conducts a proper balancing test under MRE 403.[194] The trial counsel referred to the uncharged acts both in opening statement and closing argument, reminding the members that the uncharged acts were relevant "'because [Berry] (sic) took advantage of a person in a vulnerable position just like he did here in the case that you're deciding.'"[195] Following the appellant's conviction, the ACCA reviewed the military judge's ruling and found that the military judge had conducted an adequate balancing test.[196]

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[183] *Id.* at 164-65.

[184] *Id.* at 165.

[185] *Id.*

[186] *Id.* at 170-71.

[187] 61 M.J. 91 (2005).

[188] 60 M.J. 870 (A.F. Ct. Crim. App. 2005), *review granted* 2005 CAAF LEXIS 954 (2005).

[189] *Berry*, 61 M.J. at 93.

[190] The "he said/he said" characterization is the CAAF's own description of the case. *See id.* at 98.

[191] *Id.* at 93.

[192] *Id.*

[193] *See id.* at 93-94.

[194] *See* United States v. Wright, 53 M.J. 476 (2000).

[195] *Berry*, 61 M.J. at 94.

[196] *Id.*

The CAAF granted review on the issue of whether the military judge abused his discretion in admitting evidence of uncharged sexual misconduct committed when the appellant was an adolescent.[197] The CAAF began its opinion by reviewing the threshold requirements for admissibility of uncharged sexual acts under MRE 413: (1) the accused must be charged with an offense of sexual assault; (2) the evidence proffered must be evidence of the defendant's commission of another instance of sexual assault; and (3) the evidence must be relevant under MREs 401 and 402.[198] Logical relevance, however, is not sufficient alone for admitting uncharged sexual acts—the evidence must also pass the legal relevance test of MRE 403.[199] The CAAF cited not only MRE 403, but also the enhanced *Wright* factors a military judge should consider.[200]

Signaling its ultimate holding in the case, the majority noted that where a military judge is required to conduct a balancing test under MRE 403 and "does not sufficiently articulate his balancing on the record," the CAAF will grant less deference to his ruling than otherwise.[201] The majority held that the evidence was logically relevant under MRE 401 and 402 because it could tend to show a propensity to take sexual advantage of a vulnerable victim.[202] The military judge erred to the prejudice of the accused, however, by not conducting a detailed rule 403 balancing test on the record as required by *Wright*.[203] Although the military judge addressed several of the *Wright* factors, he only emphasized those that tended to support admission of the testimony and failed to address the remaining factors.[204] In the majority's view, the differences between the appellant's charged offense and the uncharged misconduct were significant enough to hold that the military judge abused his discretion in admitting the evidence.[205]

One of the most significant differences in the *Berry* case between the charged and uncharged misconduct had to do with the age of the appellant for each incident. The charged incident took place when the appellant was an adult and with an adult victim, but the uncharged incident occurred when the appellant was just thirteen years old with a six-year-old victim.[206] Citing a 2004 case, *United States v. McDonald*,[207] in which the CAAF found evidence of adolescent uncharged sexual misconduct irrelevant for 404(b) plan and intent purposes, the CAAF noted that significant differences exist between adolescents and adults.[208] The court warned that military judges must exercise great caution "[w]hen projecting on a child the mens rea of an adult or extrapolating an adult mens rea from the acts of a child";[209] the differences in time, experience and maturity constitute significant intervening circumstances for *Wright* and MRE 403 purposes.[210]

The CAAF also examined the potential of the uncharged misconduct to distract the fact-finder, another *Wright* factor not specifically addressed by the military judge. In this case, the prosecutor's repeated references to the six-year-old victim "characterized Berry in the eyes of the members as a child molester, one of the most unsympathetic characterizations that can be made."[211] What limited probative value the evidence had was outweighed by the danger that the members would consider the evidence for an improper purpose.[212]

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[197] *Id.*

[198] *Id.* at 95.

[199] *See id.*

[200] *Id.* As listed by the CAAF in *Berry*, those facts include: the strength of proof of the prior act, the probative weight of the evidence, the potential to present less prejudicial evidence, the possible distraction of the fact-finder, the time needed to prove the prior conduct, the temporal proximity of the prior event, the frequency of the acts, the presence of any intervening circumstances, and the relationship between the parties. *Id.*

[201] *See id.* at 96.

[202] *Id.*

[203] *Id.*

[204] The judge found that the proof of the prior act was strong, its proof would not take an excessive amount of time at trial, and the victim of the uncharged act, like the victim in *Berry*, was in a vulnerable position. *Id.* The judge did not address the probative weight of the evidence, the frequency of the acts, the temporal proximity of the prior act, the presence of intervening circumstances, or the distraction of the factfinder. *Id.*

[205] *Id.* at 96-97.

[206] *Id*.

[207] 59 M.J. 426 (2004).

[208] *Berry*, 61 M.J. at 96-97.

[209] *Id.* at 97.

[210] *See id.*

[211] *Id.*

[212] *Id.*

The court held that the military judge abused his discretion in admitting the appellant's uncharged adolescent sexual misconduct against him and that the error materially prejudiced the appellant's substantial rights.[213] Accordingly, the court set aside the appellant's conviction for forcible sodomy.[214]

Judge Crawford concurred in the result and agreed with the majority that the military judge abused his discretion under MRE 403.[215] However, she objected to the majority's conclusion that the appellant's adolescent sexual misconduct was logically relevant to the charged offense. In a rather confusing tautology, her concurring opinion stated that evidence must be logically relevant before it can be legally relevant, but if the evidence is not legally relevant, it cannot be logically relevant.[216] This formula ignores the basic structure of MREs 401 and 403, which certainly suggest that logically relevant evidence under MRE 401 might not be legally relevant for the purposes of MRE 403.[217] In her view, happenstance of similar conduct does not create logical relevance, particularly when the uncharged misconduct was committed by an adolescent.[218]

The majority opinion in *Berry* goes a long way towards resolving potentially unfair applications of MRE 413. Coupled with last year's opinion in the *McDonald* case, it is fair to say that uncharged adolescent sexual misconduct is presumptively inadmissible under the MRE. To overcome the presumption and to bridge the gulf between the adolescent and adult mindset, counsel bear a heavy burden. Expert testimony about the state of mind of the accused as an adolescent and as an adult will almost certainly be required. One can envision circumstances under which adolescent sexual misconduct would be admissible or a continuing course of conduct, misconduct committed in the later teen years if the accused is being tried as a young adult, or compelling factual similarities—but they will be exceptions to a general rule, and under *Berry*, very difficult exceptions to obtain.

But *Berry* goes beyond adolescent sexual misconduct. The opinion ends the almost reflexively automatic admission of uncharged sexual misconduct permitted under a facial analysis of the rules. By making it clear that the *Wright* factors are not a menu, but rather a checklist to be taken seriously, *Berry* increases the burden on military judges to carefully weigh not only similarities between charged and uncharged sexual misconduct, but also to meticulously analyze the differences.

In addition, the differing interpretations by CAAF members concerning such seemingly basic concepts as logical and legal relevance create intriguing opportunities for future litigation. A pure analysis of MRE 401 would suggest that almost anything is logically relevant at trial,[219] but if Judge Crawford's analysis in the concurring opinion gains traction with the court, the legal relevance principles of MRE 403 could potentially play a significant role in evaluating logical relevance under MRE 401.

Less revolutionary than *Berry*, but still significant, is the AFCCA's case of *United States v. James*.[220] The appellant in *James* was a youth leader at the base chapel. He developed a romantic interest in a fifteen-year-old girl that led to sexual activity, including fondling and what the victim called "clothes sex"—simulated sexual intercourse while wearing clothing.[221] These offenses occurred on 17 June and 7 July of 2001.[222] At his trial for indecent acts, the military judge permitted the government to call, over defense objection, another teenage girl who testified that the appellant had participated in similar activities with her *after* the charged offenses: 16 July, 23 July, and 2 August 2001.[223]

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[213] *Id.*

[214] *Id.* at 98.

[215] *Id.* at 98-102 (Crawford, J., concurring).

[216] *Id.* at 98-99.

[217] *See* MCM, *supra* note 2, MIL R. EVID. 401; *id.* MIL R. EVID. 402; *id.* MIL R. EVID. 403; *see also supra* notes 5-7 and accompanying text.

[218] *Berry*, 61 M.J. at 100.

[219] For a though-provoking discussion of this, see David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. LAW REV. 1 (1997) (suggesting that a pure approach to MRE 401 renders almost anything logically relevant under MRE 401).

[220] 60 M.J. 870 (A.F. Ct. Crim. App. 2005), review granted 2005 CAAF LEXIS 954 (2005). The CAAF granted review on the following issue:

> Whether the military judge erred when he admitted evidence that appellant engaged in sexual acts with another female under the age of 16 where (a) the alleged acts occurred subsequent to the charged acts, and (b) the evidence admitted was of such an unfairly prejudicial nature as to contribute to the members arriving at a verdict on an improper basis.

United States v. James, 2005 CAAF LEXIS 954 (2005).

[221] *James*, 60 M.J. at 871.

[222] *Id.*

[223] *Id.*

The AFCCA examined the issue of whether the military judge abused his discretion by permitting the government to introduce post-offense uncharged sexual propensity evidence under MRE 414.[224] As a threshold issue, the AFCCA determined that the admissibility requirements of *United States v. Wright*, a case decided pursuant to MRE 413, also apply to cases decided under MRE 414; the only significant difference between Rules 413 and 414 is the applicability of the latter to offenses of child molestation.[225]

The AFCCA then addressed whether MRE 414 prohibits the introduction of post-offense uncharged misconduct. The appellant argued that the legislative history of Rules 413 and 414 supports the admission of pre-offense uncharged misconduct only. Rejecting appellant's argument, the AFCCA adopted a plain-language approach to interpreting the rule. Nothing in the text of MRE 414 prohibits the introduction of post-offense uncharged sexual misconduct.[226] Further buttressing its position, the AFCCA observed that the *Wright* case itself involved an issue of post-offense uncharged misconduct.[227] Additionally, the weight of authority both in the military and the federal courts permits the admissibility of post-offense uncharged acts under Rule 404(b).[228]

The AFCCA next examined the evidence under the *Wright* factors. The evidence met the threshold requirements for admissibility: (1) the appellant was charged with an offense of child molestation; (2) evidence was proffered of uncharged acts of child molestation; and (3) the evidence was relevant under MRE 401/402.[229] Although the military judge did not make the enhanced *Wright* 403 findings on the record, the AFCCA was satisfied that by permitting both sides to argue prejudice under MRE 403, the military judge properly considered the *Wright* factors.[230] The AFCCA went a step further and briefly addressed each of the *Wright* factors, concluding that the evidence met the *Wright* admissibility standards. Accordingly, the AFCCA held that the military judge did not abuse his discretion in admitting the post-offense uncharged misconduct under MRE 414.[231]

The CAAF has granted review of *James*, and in the light of *Berry*, it will be interesting to see whether the military judge's perfunctory approach to the *Wright* factors will survive further review. The AFCCA, of course, touched on the *Wright* factors, but only briefly. The issue of post-offense uncharged misconduct seems less significant than whether the military judge conducted a thorough review of the evidence under the *Wright* factors. Counsel and military judges should not hesitate to consider the admission of probative post-offense sexual propensity evidence, but the better practice is to adopt the thorough analysis of the evidence suggested in *Berry* than to fail to explicitly address the *Wright* factors or to breeze through them as the military judge and the AFCCA did in *James.*

Privileges

Although the MREs and FREs are identical in most respects, the two systems differ considerably in their approach to the law governing privileges. Privileges under the Federal Rules of Evidence (FRE) are "governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience;"[232] there are no codified privileges in the federal rules. The MRE, in contrast, contain nine codified privileges.[233] In addition, the MRE apply a relatively rigid hierarchy to the development of privilege law in which the *Manual for Courts-Martial* (*MCM*) takes clear precedence over "the principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence.[234]" Any new privileges under FRE 501 must be

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[224] *Id*. at 870.

[225] *Id.* at 871.

[226] *Id.* at 872.

[227] *Id.*

[228] *Id.*

[229] *Id.* at 873.

[230] *Id.*

[231] *Id.*

[232] FED. R. EVID. 501.

[233] *See generally* MCM, *supra* note 2, MIL. R. EVID. 502 (Lawyer-client privilege) 503 (Communications to clergy), 504 (Husband-wife privilege), 505 (Classified information), 506 (Government information other than classified information), 507 (Identity of informant), 508 (Political vote), 509 (Deliberations of courts and juries), 513 (Psychotherapist-patient privilege).

[234] *Id.* MIL. R. EVID. 501.

"practicable" for application in trials by courts-martial, "and not contrary to or inconsistent with the Code, these rules, or this Manual."[235]

Military appellate courts have exercised a great deal of restraint in expanding military privileges. Taking to heart the hierarchy in MRE 501, they have been reluctant to adopt new federal privileges,[236] modify existing privileges,[237] or expand exceptions to privileges.[238] This conservatism is based on the principle that a worldwide system of justice with ad-hoc courts and significant lay involvement requires greater certainty and stability than the Article III courts of the United States.[239]

Military Rule of Evidence 504: Marital Communications Privilege

Military Rule of Evidence 504,[240] the husband-wife privilege, protects confidential communications made between spouses during a marriage.[241] There are several exceptions to the privilege: when the communication involves a crime against the person or property of the other spouse or a child of either, when the parties were involved in a sham marriage, or when the marriage is a vehicle for prostitution or interstate transportation for immoral purposes.[242] In addition, there are two closely related exceptions recognized in many jurisdictions. The first is the crime-fraud exception, which involves communications made between spouses in order to further a crime or fraud; the key to the exception is the intent of the parties at the time the communication was made.[243] The second is the joint-participant exception for "marital confidences that relate to ongoing or future crimes in which the spouses were joint participants at the time of the communication";[244] the key to the joint-participant exception is the status of the parties with respect to the illegal venture at the time the communication was made.[245]

The appellant in *United States v. Davis*,[246] under investigation for possession of child pornography, consented to the search and seizure of his home computer by CID.[247] As a CID agent was enroute to appellant's home, appellant called his wife and ordered her to delete several files from the computer and empty the recycle bin. She complied, but CID was able to recover thousands of images of child pornography.[248] Over defense objection, the military judge permitted the government to elicit testimony from the appellant's wife regarding the order to delete the files. The military judge ruled that appellant's statements to his wife were admissible under a "partnership in crime/crime-fraud exception to the marital communications privilege."[249]

The ACCA reviewed the military judge's decision to admit the evidence for abuse of discretion. The court reviewed the basic structure of MRE 504, including the limits of its exceptions, and then discussed the applicability of the joint-participant and crime-fraud exceptions in Army courts-martial.[250] In *United States v. Martel*,[251] a 1985 case, the Army Court of Military Review (now ACCA) recognized the joint-fraud exception to the marital communications privilege. However, in a confusing

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[235] *Id.*

[236] *See, e.g.*, United States v. Rodriguez, 54 M.J. 156 (2000) (declining to adopt the psychotherapist-patient privilege of Jaffee v. Redmond, 518 U.S. 1 (1996)).

[237] *See, e.g.*, United States v. Napoleon, 46 M.J. 279 (1997) (declining to extend the clergyman privilege to include an NCO who was a lay minister in his off-duty time).

[238] *See, e.g.*, United States v. McCollum, 58 M.J. 323 (2003) (rejecting the "de facto child" exception to the marital communications privilege).

[239] MCM, *supra* note 2, MIL. R. EVID. 501 app., at A22-37.

[240] *Id.* MIL. R. EVID. 504.

[241] *Id.*

[242] *See id.* MIL. R. EVID. 504(c)(2).

[243] STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, AND DANIEL J. CAPRA, 2 FEDERAL RULES OF EVIDENCE MANUAL § 501.02[8], at 501-82 (8th ed. 2003).

[244] CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, EVIDENCE (3d. ed. 2003).

[245] SALTZBURG, *supra* note 243, at 501-82.

[246] 61 M.J. 530 (Army Ct. Crim. App. 2005).

[247] *Id.* at 531.

[248] *Id.* at 531-32.

[249] *Id.* at 532.

[250] *Id.* at 534.

[251] 19 M.J. 917 (A.C.M.R. 1985).

development nearly a decade later, in *United States v. Archuleta*,[252] the court declined to follow *Martel* and held, without expressly overruling *Martel*, that there is no provision in MRE 504 for a joint-participant exception.[253] The ACCA also noted that the Air Force Court of Military Review adopted a crime-fraud exception to the marital communications privilege in 1990[254] in the case of *United States v. Smith*.[255]

The ACCA declined to resolve the apparent conflict between *Archuleta* and *Martel*, simply stating that the statements at issue in *Davis* would be privileged even if *Martel* properly adopted the joint participant exception.[256] The ACCA adopted the military judge's findings that both the appellant and his wife were knowing participants in criminal activity at the point when she began deleting files at the appellant's request. However, the ACCA did not agree that the communications were made in furtherance of a joint criminal venture.[257] Carefully parsing the timeline of the day's events, the ACCA found that the appellant's request to destroy files was made *prior* to the beginning of the joint criminal venture. Accordingly, it was privileged. It would not fall under a joint-participant exception because it preceded the joint criminal venture, which depends on the status of the parties in relation to the criminal enterprise at the time the statement was made.[258]

The ACCA conceded that the appellant's statement would not be protected under a crime-fraud exception to the marital communications privilege, but the court declined to adopt the crime-fraud exception.[259] The court noted that MRE 504 is quite clear in the scope of the marital communications privilege. And where "a military rule promulgated by the President treats of an issue, recourse to Federal law—even though the rule may be similar—is not necessary, and, in fact, is not permitted."[260] Applying the rigid hierarchy of MRE 501 in interpreting the privilege,[261] the ACCA stated, "in the absence of a constitutional, statutory, or regulatory requirement to the contrary, the decision as to whether, when, and to what extent" any crime-fraud exception would apply belongs to the President, not the ACCA.[262]

Accordingly, the ACCA held that the military judge abused his discretion in allowing the wife to testify in contravention of the marital communications privilege. Applying the four-factor test of *United States v. Kerr*,[263] however, the ACCA held that the error was harmless—the strength of the government case was overwhelming; the defense case claim of innocent possession was weak and undermined by other evidence admitted in the case; the statement was material and important for its inculpatory value; and the statement's quality was not significant because it had been repeated to other people and other admissible evidence was available concerning the appellant's possession of child pornography.[264]

The significance of *Davis* lies in its classic approach to interpreting military privilege law. Although federal common law can be a source of military privilege law, it takes a subordinate position to codified military privileges, the MCM, and the purposes of military law. Novel interpretations of privilege law—particularly those that strip a criminal accused of protections—should be narrowly construed at courts-martial.[265] *Davis* is also significant because it establishes that the crime-fraud exception does not exist in Army courts-martial. Although the limits of the joint-participant exception in light of *Martel* and *Archuleta* remain unresolved, *Davis* does clarify that the timing of the communication in relation to the criminal enterprise is critical. If the communication occurs prior to the start of the venture, it will be privileged and not subject to the exception.

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[252] 40 M.J. 505 (A.C.M.R. 1994).

[253] *Id.* at 506; *see Davis*, 61 M.J. at 535.

[254] *Id.*

[255] 30 M.J. 1022, 1025-27 (A.F.C.M.R. 1990).

[256] *See Davis*, 61 M.J. at 535.

[257] *Id.* at 536.

[258] *Id.*

[259] *Id.*

[260] *Id.* (quoting United States v. McConnell, 20 M.J. 577, 583 (N.M.C.M.R. 1985)).

[261] *See* MCM, *supra* note 2, MIL. R. EVID. 501.

[262] *Davis*, 61 M.J. at 536.

[263] 51 M.J. 401 (1999).

[264] *Davis*, 61 M.J. at 537.

[265] *See id.* at 537 n.11.

Opinion Testimony

Military Rule of Evidence 702 permits experts to testify concerning scientific, technical, or specialized knowledge that will help a trier of fact better understand the evidence or determine a fact at issue.[266] An expert occupies a unique position in a trial: unlike most other witnesses, the expert is not limited to fact testimony based on personal knowledge of the case[267] but is entitled to testify "in the form of an opinion or otherwise."[268] Because of the expert's special status at trial, the rules require the expert's testimony to be based on "sufficient facts or data" and to be "the product of reliable principles and methods" applied "reliably to the facts of the case."[269] The CAAF decided several cases this term pertaining to the qualifications and reliability of expert testimony, the proper role of the expert at trial, and the scope of expert testimony.

The CAAF addressed expert qualifications and reliability in *United States v. Billings.*[270] The appellant in *Billings* was the leader of the Gangster Disciples, a violent gang at Fort Hood that went on a crime spree in the summer of 1997 that included two killings and numerous other offenses.[271] Members of the gang robbed an apartment owner of cash and a Cartier Tank Francaise watch. The watch was never recovered, but the government did have photographs of the appellant wearing a similar watch that were admitted at trial to link the appellant to the robbery.[272]

The government called a local jeweler to testify as an expert in Cartier watch identification. The jeweler did not sell Cartier watches, nor had he ever actually seen a Cartier Tank Francaise watch. Defense counsel requested a full *Daubert* hearing to examine the qualifications of the expert, but the military judge denied the request.[273] At trial, comparing photographs of the stolen watch with a Cartier Tank Francaise watch advertisement, the jeweler testified that the watch in the photograph had similar characteristics to those found in Cartier watches. He also testified that based on the photograph, the watch appeared to be made of solid gold rather than gold plate.[274]

On appeal, the CAAF examined the qualifications of the expert and the reliability of his methods and testimony. As a threshold matter, the CAAF reiterated that the six-factor test first promulgated by the Court of Military Appeals (CMA) in *United States v. Houser*[275] still applies to expert qualifications and testimony at trial.[276] The first prong of the *Houser* test—the qualifications of the expert—was easily satisfied in *Billings*. Under MRE 702, an expert can be qualified by virtue of specialized knowledge or training.[277] In this case, even though the jeweler had little experience dealing with Cartier watches, he did have twenty-five years of experience as a jeweler, and his expertise was helpful to the panel.[278]

The appellant also argued that by comparing the watch in the photograph with a Cartier watch advertisement, the expert did nothing the panel members could not have done for themselves.[279] The CAAF disagreed, stating that the standard is not whether the jury could reach *any* conclusion without expert assistance, but whether the jury would be able to "determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject."[280] In this case, the expert knew more about Cartier watches than the panel members, and the CAAF held that the military judge did not abuse his discretion in qualifying the jeweler as an expert in Cartier watch identification.[281]

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[266] MCM, *supra* note 2, MIL. R. EVID. 702.

[267] *See id.* MIL. R. EVID. 602.

[268] *Id.* MIL. R. EVID. 702.

[269] *Id.*

[270] 61 M.J. 163 (2005).

[271] *Id.* at 165.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 165-66.

[275] 36 M.J. 392 (C.M.A. 1993). Those factors include: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and (6) the probative value of the evidence must outweigh other considerations under MRE 403. *Id.*

[276] *Billings*, 61 M.J. at 166.

[277] *See* MCM, *supra* note 2, MIL. R. EVID. 702.

[278] *Billings*, 61 M.J. at 167.

[279] *Id.*

[280] *Id.* (quoting *Houser*, 36 M.J. at 398).

[281] *Id.* at 166-67.

The CAAF then addressed the reliability of the expert's method of determining that the watch in the photograph was made of real gold rather than gold plate. Citing *General Electric Co. v. Joiner*,[282] the CAAF noted that an expert's opinion must be connected to the underlying data by more than the *ipse dixit*—or mere assertion—of the expert.[283] Military Rule of Evidence 702 and the controlling Supreme Court cases of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[284] and *Kumho Tire Co. v. Carmichael*[285] require the military judge to exercise a gatekeeping function to determine the reliability of methods employed by expert witnesses.[286] Although the defense requested it, the military judge conducted no such analysis in this case.

The court reminded practitioners and military judges that the *Daubert* reliability factors—(1) whether a theory can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) the known or potential rate of error; and (4) whether the theory or technique is generally accepted—are a baseline for evaluating the reliability of expert testimony.[287] If those factors are not applicable, then it is up to the proponent of the evidence to identify alternative indicia of reliability.[288] In this case, the government failed in its burden to establish the reliability of the jeweler's testimony through the *Daubert* factors or alternative indicia of reliability, and the military judge abused his discretion by permitting the jeweler to identify solid gold in a photograph.[289] Given the circumstances of the case, however, the error was harmless, and the CAAF affirmed.[290]

Billings is an excellent primer for new counsel on the basic principles of expert witness testimony at courts-martial. The case reiterates the value of the six-factor *Houser* test in evaluating the qualifications of expert witnesses. In order to expedite resolution of expert witness issues at trial and on appeal, counsel would be well advised to frame expert witness requests and motions according to the *Houser* factors. By affirming the military judge's decision to qualify as an expert a veteran jeweler with little Cartier watch experience, *Billings* also highlights the generous approach of MRE 702 concerning expert witness qualification—an expert can be qualified on the basis of knowledge, skill, experience, training, or education. So long as the expert can help the panel members make a better, more informed decision than they would make in the absence of the expert, the qualification standards of MRE 702 will be met. Finally, *Billings* emphasizes two critical components of a reliability determination: the proponent's responsibility to demonstrate the reliability of the expert's methods using either the *Daubert* factors or alternative indicia of reliability; and the military judge's function as a gatekeeper to keep unreliable expert methodology away from the panel members.

In another expert witness case this term, the CAAF addressed an issue involving false confession experts. The appellant in *United States v. Bresnahan*[291] confessed to shaking his three-month-old son, an act that led to the child's death. He unsuccessfully sought to suppress the confession both at trial and on appeal, claiming that the interrogation tactics employed by law enforcement personnel rendered his confession involuntary.[292] He also requested the services of an expert assistant, Dr. Richard Leo, to help the defense evaluate a possible false confession defense.[293] According the defense, Dr. Leo would assist in evaluating the vulnerability of the appellant's confession and the interrogation techniques used by investigators.[294] Using enigmatic and circular language, the military judge denied the defense request, stating, "defense counsel is searching for evidence that would assist in her defense of the accused, but with little evidence to indicate such evidence exists."[295] The defense did not present a false confession defense at trial.[296]

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[282] 522 U.S. 136 (1997).

[283] *Billings*, 61 M.J. at 168.

[284] 509 U.S. 579 (1993).

[285] 526 U.S. 137 (1999).

[286] *Billings*, 61 M.J. at 168.

[287] *Id.*

[288] *Id.*

[289] *Id.* at 168-69.

[290] *Id.* at 169-70. Those factors included the fact that the watch photographs were already in evidence, the defense was able thoroughly to explore the issue of the jeweler's competence in voir dire and cross-examination, and the government presented a very strong case against the appellant concerning the theft of the watch by members of a gang that she directed and controlled. *Id.*

[291] 62 M.J. 137 (2005). For a more thorough discussion of the facts of *Bresnahan*, see *supra* notes 166-173 and accompanying text.

[292] *Id.* at 140-42.

[293] *Id.* at 143.

[294] *Id.* at 142.

[295] *Id.*

[296] *Id.*

On appeal, the CAAF addressed whether the military judge abused his discretion in denying the defense's request for a false confession expert consultant. The majority recognized that an accused is entitled to expert assistance on trial, but only on a showing of necessity.[297] Citing past case law, the majority stated that necessity requires more than the mere possibility of assistance from a requested expert, but rather a showing of a reasonable probability that an expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.[298] The majority also referred to the three-prong *Gonzalez* test for evaluating expert assistance requests, which requires counsel to show the following: (1) why the expert assistance is needed, (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel is unable to gather and present the evidence themselves.[299]

The majority found that the primary failure of the defense case was in meeting prong one of the *Gonzalez* test—necessity.[300] The majority conceded that the confession was important evidence in the trial and that Dr. Leo would have benefited the defense in its case preparation.[301] However, adopting the findings of the military judge, the majority held that the defense never established the necessity for expert assistance, because the defense counsel failed to present any evidence of abnormal mental condition, submissive personality, or anything else suggesting that the confession was actually false.[302] Without that evidence, it was not an abuse of discretion for the military judge to deny the request, although the court noted that it would likewise not have been an abuse of discretion to grant the request.[303]

Judges Erdmann and Effron dissented on the denial of the false confession expert consultant.[304] Arguing that the majority opinion now makes it more difficult for defense counsel to request expert consultants to evaluate their cases, the dissent would have found that the appellant met the requirements of *Gonzalez* to justify expert assistance: the defense established why the assistance was needed, what expert assistance would accomplish to help the appellant, and why defense counsel was unable to gather and present the evidence herself.[305] According to the dissent, the circular reasoning of the majority opinion establishes a new standard whereby the defense must first demonstrate that a defense actually exists before obtaining expert assistance in order to evaluate whether the defense is available.[306]

Bresnahan presents an interesting wrinkle to the dilemmas counsel face when trying to obtain expert consultants at trial. The opinion appears to enhance the requirements for proving necessity, at least for novel defenses such as false confession. In all cases involving expert consultant requests, counsel must thoroughly educate themselves on the issues. The defense counsel in *Bresnahan* apparently understood the issues, but did not develop a threshold set of facts sufficient to convince a military judge the expert could be of assistance in this particular case. If the dissent's characterization of *Bresnahan* is correct—and not simply limited to the somewhat difficult area of false confessions—the enhanced factual predicates required to demonstrate necessity for an expert consultant will require defense counsel to jump through yet another hoop when requesting expert assistance. Military Rule of Evidence 104 could potentially be of great utility to counsel and military judges in resolving these issues. The rule permits military judges to determine preliminary questions concerning witness qualifications, existence of privileges, or the admissibility of evidence.[307] The key to MRE 104 is its flexibility: the court is not bound by the rules of evidence in making these preliminary determinations.[308] Accordingly, defense counsel should consider the use of affidavits, hearsay, telephonic communication, and other methods of getting information to a military judge to establish the factual predicates now required in evaluating requests for expert consultants to help evaluate the existence of a defense.

The CAAF's final expert case of the 2005 term is *United States v. Hays*,[309] in which the court examined the permissible scope of an expert's opinion on the ultimate issue in the case. During appellant's trial for solicitation of the offense of carnal

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[297] *Id.*

[298] *Id.* 143 (citing United States v. Gunkle, 55 M.J. 26, 31 (2005)).

[299] *Id.* (citing United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994)).

[300] *See id.*

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.* at 147-49 (Erdmann, J., dissenting).

[305] *Id.* at 148-49.

[306] *Id.* at 147-48.

[307] MCM, *supra* note 2, MIL. R. EVID. 401.

[308] *See id.* MIL. R. EVID. 401(a).

[309] 62 M.J. 158 (2005). For additional discussion of the facts of this case, see *supra* notes 177-186 and accompanying text.

knowledge, the government introduced an e-mail written by the appellant to someone known as J.D. In the e-mail, the appellant asked J.D. if he had yet engaged in sexual intercourse with "your 9yo" and requested pictures if J.D. had. The appellant also discussed his plans to adopt a little girl, sexually abuse her, photograph the abuse, and send pictures to J.D. [310]

The government called an FBI expert to testify on the behavioral aspects of individuals who victimize children. The expert testified that the e-mail was an attempt by the appellant to entice J.D. to abuse a child and photograph the acts, with a promise that the appellant would return the favor at a future date.[311] Defense counsel objected that this testimony was impermissible ultimate opinion testimony, but the military judge overruled the objection.[312] On appeal, the CAAF held that the military judge did not abuse her discretion in permitting the expert to testify about the meaning of appellant's e-mail. Although the expert's testimony used words associated with the concept of solicitation, he did not testify that there was a solicitation as a matter of law. The testimony was within his area of expertise.[313] The majority also found it significant that the trial occurred before a military judge alone, who would be presumed to properly use and consider expert testimony.[314] Judge Erdmann dissented, arguing that the expert's opinion did in fact go to the ultimate issue of the case—why the appellant sent the e-mail to J.D.[315]

Hays is perhaps limited in its significance as an evidence case. A military judge could easily grasp the distinction between the factual solicitation and solicitation as a matter of law. The issue might well have been different had the case been tried before a panel of members. Perhaps *Hays'* greatest value to practitioners is its illustration of the outer limits of permissible expert testimony on ultimate issues. In this case, the expert went to the very edge of the line but did not quite cross over. Counsel should always know just where the line of permissible testimony is, and government counsel in particular should ensure their witnesses don't come close to crossing it.

Hearsay

The 2005 term of court was relatively quiet in terms of hearsay. The CAAF clarified the requirements for adoptive admissions in *United States v. Datz*,[316] decided a case under the public records exception of MRE 803(8) in *United States v. Taylor*,[317] and addressed statements against penal interest in *United States v. Rhodes*.[318]

Military Rule of Evidence 803(8): Public Records

The public records exception to the hearsay rule, MRE 803(8),[319] rarely finds its way into the opinions of military appellate courts. But this year, the CAAF decided a case based on the rule in *United States v. Taylor*.[320] At the appellant's trial for desertion, the government introduced two exhibits into evidence to help prove absence from and return to duty. The first exhibit (PE2) was a copy of a declaration of desertion message that also contained additional, undecipherable content at the bottom of the document. It was admitted at trial as a personnel accountability document under MRE 803(8) over defense objection on grounds of relevance, hearsay, improper foundation, and authentication. The exhibit was not authenticated, and the foundation witness had not compared it to the original.[321] The second exhibit (PE3) was an e-mail known as a declaration of return from desertion message. The e-mail was prepared based on information obtained from a deserter warrant (DD 553) and movement orders. Defense counsel objected to the document on the grounds that it was "hearsay within hearsay," but the military judge admitted it under MRE 803(8).[322]

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[310] *Id.* at 161-62.

[311] *Id.* at 165.

[312] *Id.*

[313] *Id.* at 165-66.

[314] *Id.* at 165.

[315] *Id.* at 169, 171-72 (Erdmann, J., dissenting).

[316] 61 M.J. 37 (2005). The adoptive admissions issue has already been discussed in this article at *supra* notes 26-52 and accompanying text.

[317] 61 M.J. 157 (2005).

[318] 61 M.J. 445 (2005).

[319] MCM, *supra* note 2, MIL. R. EVID. 803(8).

[320] *Taylor*, 61 M.J. at 157.

[321] *Id.* at 157-60.

[322] *Id.* at 160-62.

The CAAF granted review on whether the admission of the two documents violated the appellant's confrontation rights under the 2004 Supreme Court case *United States v. Crawford*,[323] and also specified review on two additional issues, including whether, apart from *Crawford*, the military judge abused his discretion in admitting the documents.[324] The court never reached the confrontation clause issue, instead holding that the military judge erred in admitting the documents because they did not satisfy the public records exception to the hearsay rule.

In reaching its holding, the CAAF examined the admissibility determinations of each of the documents in turn. Because of the undecipherable content at the bottom of the message, PE2 (the declaration of desertion message) did not qualify as a personnel accountability document within the meaning of MRE 803(8).[325] Nor was it admissible as "matters observed pursuant by duty imposed by law as to which there was a duty to report," because the government could not explain the undecipherable content at the bottom of the message.[326] Finally, PE2 was not an admissible copy under MRE 1005 because it was not authenticated, had not been compared to an original by the foundation witness, and there was no demonstration that the government had exercised reasonable diligence in finding an attested or compared copy.[327]

In order for PE3 (declaration of return message) to be admissible, the underlying documents that were used to create it would also have been required to be admissible under a hearsay exception.[328] The government provided no information about identity or duties of the person who had created the DD553 and even less information about the production and preparation of the movement orders.[329]

Because the case against *Taylor* relied considerably on the two improperly admitted documents to establish the elements of the offense, their admission was prejudicial to the appellant and likely had a substantial effect on the findings.[330] Accordingly, the CAAF reversed and set aside the findings in this case.[331]

Although the penalty for improper foundations in *Taylor* seems harsh, the case sends an important message to the field: evidentiary foundations, particularly in hearsay cases, are not to be lightly dismissed. The source of a document, the reason it is kept, and what is contained on its face are all critical aspects of admissibility. In addition, the foundational purpose of a hearsay exception—what makes it reliable—is also important. Defense counsel and military judges should pay careful attention to the subtext of the CAAF's holding: the court will seek to avoid ruling on constitutional confrontation issues if there are simpler grounds, such as improper foundation or inadmissible hearsay. Defense counsel should not hesitate to attack hearsay evidence on parallel constitutional and foundational grounds.

Military Rule of Evidence 804: Statements Against Interest

Statements against penal interest can be admissible if the declarant is unavailable and the statement "so far tend[s] to subject the declarant to . . . criminal liability . . . that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true."[332] *United States v. Rhodes*[333] presents the interesting issue of a statement against interest that implicates not only the declarant, but also another person—in this case, the appellant. During the appellant's trial for possession and use of psilocin, a government witness, SrA Daugherty, claimed memory loss concerning the five-page handwritten confession he made that implicated him and the appellant in the misconduct.[334] Daugherty persisted in his claim of memory loss, so the military judge declared him unavailable for the purposes of MRE

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[323] 541 U.S. 36 (2004).

[324] *Taylor*, 61 M.J. at 158.

[325] *Id.* at 160.

[326] *Id.*

[327] *Id.*

[328] *Id.* at 160-61.

[329] *Id.* at 161.

[330] *Id.* at 161-62.

[331] *Id.* at 162.

[332] MCM, *supra* note 2, MIL. R. EVID. 804(b)(3).

[333] 61 M.J. 445 (2005).

[334] *Id.* at 446-47. For a more thorough discussion of the facts of this case, see *supra* notes 138-150 and accompanying text.

804(b)(3) and permitted the government to introduce the statement against the appellant, albeit with strict conditions on its use.[335]

The CAAF held that the military judge did not abuse his discretion in admitting the statement. Daugherty was available for confrontation purposes because he was present at trial and subject to cross-examination.[336] He was unavailable, however, within the meaning of MRE 804 because he persisted in a claim of memory loss.[337] The key to declarations against penal interest is their inculpatory nature. The mere fact that others are implicated in a statement against penal interest does not change its essential inculpatory nature.[338]

Conclusion

In a wide variety of cases, the military appellate courts decided evidentiary issues that will make a difference in the courtroom. Whether counsel are emboldened by *Brewer* to try novel evidentiary arguments based on the due process clause, constrained by *Berry* from introducing instances of uncharged adolescent sexual misconduct, or inspired by *Taylor* to pay attention to hearsay rules and evidentiary foundations, it is no stretch to paraphrase the inimitable Yogi Berra:[339] after the 2005 term of court, the evidentiary future in military courtrooms just ain't what it used to be.

[335] *Id.* at 447-48. The military judge set five conditions for the statement's use: (1) if the government introduced the statement, it also had to introduce Daugherty's affidavit claiming lack of memory and the possibility that the appellant had not accompanied Daugherty to purchase the mushrooms; (2) the government had to introduce the declaration during Daugherty's testimony; (3) the government could not introduce any statements Daugherty made at his interrogation other than those in the handwritten statement; (4) the defense could question either Daugherty or the OSI agent who took the confession about Daugherty's interrogation; (5) if the defense introduced any part of the confession into evidence, the government could introduce the rest of it.

[336] *Id.* at 449-50.

[337] *Id.* at 450.

[338] *Id.* at 451.

[339] *See* Yogi Berra, Yogi-isms, http://www.yogiberra.com/yogi-isms.html (last visited Apr. 6, 2006).