

New Developments in Evidence 2003

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Introduction

During the 2003 court term, military appellate courts approached the Military Rules of Evidence (MRE) with a combination of firmness and flexibility. The service appellate courts and the Court of Appeals for the Armed Forces (CAAF), relying on precedent and strict textual interpretation, applied a firm approach to rules involving uncharged misconduct, privileges, character evidence, expert testimony, the scope of appellate review of a military judge's characterization of evidence, and the procedural notice requirements of certain evidentiary rules. Yet, the courts demonstrated a willingness to stretch traditional concepts of time as applied to hearsay exceptions and uses of uncharged misconduct evidence. In virtually every case, whether applying firmness or flexibility to evidentiary issues, the courts granted substantial deference to the military judge's findings of fact and conclusions of law.

This article is organized according to the framework of the MRE in the *Manual for Courts-Martial (MCM)*. Accordingly, the following evidentiary issues and rules of evidence are addressed: uncharged misconduct and MRE 404(b);¹ the spousal privilege and MRE 504;² human lie detector testimony and

MRE 608;³ opinion testimony by lay and expert witnesses and MREs 701,⁴ 702,⁵ and 704;⁶ prior consistent statements under MRE 801(d)(1)(B);⁷ the nexus between hearsay under MRE 802⁸ and impeachment by contradiction; excited utterances under MRE 803(2);⁹ then existing mental, emotional, or physical condition and MRE 803(3);¹⁰ statements for the purpose of medical treatment or diagnosis and MRE 803(4);¹¹ the substantive and procedural aspects of MRE 807,¹² the residual hearsay rule; and authentication requirements under MRE 901.¹³

Uncharged Misconduct

Military Rule of Evidence 404 generally prohibits the use of character evidence for propensity purposes.¹⁴ Subsection (b) of the rule, however, contains an exception that permits evidence of other crimes, wrongs, or acts for non-character purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."¹⁵ The use of other crimes evidence is heavily litigated both in the federal and military justice systems,¹⁶ primarily because of the danger that jurors or panel members will misuse the evidence and decide against the accused because of his bad character.¹⁷

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (2002) [hereinafter MCM].

2. *Id.* MIL. R. EVID. 504(b).

3. *Id.* MIL. R. EVID. 608(b).

4. *Id.* MIL. R. EVID. 701.

5. *Id.* MIL. R. EVID. 702.

6. *Id.* MIL. R. EVID. 704.

7. *Id.* MIL. R. EVID. 801(d)(1)(B).

8. *Id.* MIL. R. EVID. 802.

9. *Id.* MIL. R. EVID. 803(2).

10. *Id.* MIL. R. EVID. 803(3).

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

12. *Id.* MIL. R. EVID. 807.

13. *Id.* MIL. R. EVID. 901.

14. *Id.* MIL. R. EVID. 404(a). The rule reads as follows: "(a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . ." *Id.*

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

In order to protect the accused from the improper use of character evidence, the Court of Military Appeals (COMA) established a three-part test for admissibility in *United States v. Reynolds*:¹⁸ (1) the evidence must reasonably support a finding that the appellant committed the prior acts of uncharged misconduct; (2) a fact of consequence in the proceeding must be made more or less probable by the existence of the evidence; and (3) the evidence must withstand an MRE 403 balancing test for prejudice.¹⁹ The *Reynolds* factors provide a useful template for counsel and military judges to use when evaluating uncharged misconduct evidence, and the CAAF has continued to rely on these factors in recent years.²⁰

In *United States v. Diaz*,²¹ the appellant was convicted of the unpremeditated murder of his infant daughter, Nicole, and assault upon a child under sixteen of age against his other infant daughter, Jasmine, for incidents that occurred during an eighteen-month period between January 1993 and July 1995.²² The Army Court of Criminal Appeals (ACCA) affirmed the conviction.²³ The CAAF, however, reversed, holding that the military judge improperly admitted evidence of uncharged misconduct pertaining to injuries suffered by Nicole,²⁴ failed to grant a mistrial after government experts improperly opined that Nicole's death was a homicide and the appellant was the perpetrator,²⁵ and erred in denying a motion for a mistrial with respect to the assault charges against Jasmine because of the combined prejudicial effect of improper expert testimony and uncharged misconduct evidence.²⁶

During her short life, Nicole Diaz suffered several appalling injuries. When she was four-months old, the appellant took her

to the Reynolds Army Community Hospital at Fort Sill with facial burns from a steam vaporizer the family had been using to treat her cold symptoms. The appellant had been alone with Nicole and initially claimed that he had held her face over the vaporizer to help her breathe.²⁷ Because she had second-degree burns, Nicole had to be evacuated to Children's Hospital in Oklahoma City. Doctors at the hospital noted other injuries, including chest and facial bruising, leg and rib fractures, all of which were unexplained yet consistent with child abuse. These injuries triggered a report of abuse and neglect to the Oklahoma social services department, which took Nicole into protective custody and placed her into foster care.²⁸

Nicole remained in protective custody for about eight months. During that time, she thrived, and her health was excellent. In November 1993, when she was approximately one-year old, the state returned her to her parents. She died under suspicious circumstances in February 1994. The appellant claimed that he removed her from her crib during the night because she was coughing, gave her some cough medicine, and laid her on his lap while he was watching television. When he took her back to her crib a few minutes later, he noticed that she was limp and not breathing. He attempted unsuccessfully to resuscitate her, and then, after waking his wife, the two of them took Nicole to Reynolds Army Community Hospital at Fort Sill. Medical personnel made futile attempts to resuscitate her. The appellant claimed that Nicole had shown no signs of distress before she went limp.²⁹

An autopsy revealed no obvious cause of death. There were two small, subcutaneous bruises to her scalp and a dark area on

16. 1 STEPHEN A. SALZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* § 404.02[3][b], at 4-88 (5th ed. 2003).

17. *See id.*

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

19. *See id.*

20. *See* Major Charles H. Rose III, *New Developments: Crop Circles in the Field of Evidence*, *ARMY LAW.*, Apr./May 2003, at 55 (discussing the CAAF's consistent reliance on the *Reynolds* test).

21. 59 M.J. 79 (2003), *aff'd*, 56 M.J. 795 (Army Ct. Crim. App. 2002).

22. *See id.* at 80-81.

23. *Diaz*, 56 M.J. at 795.

24. *Diaz*, 59 M.J. at 95-96.

25. *Id.* at 92-93.

26. *Id.* at 97.

27. *Id.* at 81-82. Over the next few days, the appellant gave several different versions of how Nicole received her injuries. He claimed that the steamer had fallen and splashed hot water on her face, that he had held her face over the vaporizer for three to four seconds, and, alternatively, that he had held her face over the vaporizer for eight to ten seconds. *Id.* He also changed his story about holding her over the vaporizer three times. *See id.*

28. *Id.*

29. *Id.* at 83.

her left cheek under her left eye. There was not, however, any evidence of internal injury or hemorrhages, nor did the toxicology screen show sufficient amounts of any medications or drugs that would have contributed to her death.³⁰ Because of Nicole's past history of unexplained or inadequately explained injuries, the medical examiner noted the death as suspicious. He opined that the autopsy findings were consistent with death by suffocation. He could not rule out Sudden Infant Death Syndrome (SIDS), but he declined to use that diagnosis because of Nicole's injuries. Ultimately, he listed the cause of death as unknown and the manner of death as undetermined.³¹

Two subsequent events led to the appellant's eventual prosecution. The first was a burn injury the appellant inflicted on his infant child, Jasmine, in Hawaii in 1995.³² The second was the 1996 finding of a mandatory child-death-review board in Oklahoma that Nicole's death was a homicide and the appellant was the perpetrator.³³

At trial, Nicole's unexplained injuries formed a major part of the government's case. The appellant made a general denial to the charge of murdering Nicole, asserting that he had no idea what had caused her death. There was no direct forensic evidence, and there were no eyewitnesses; Mrs. Diaz had been asleep when Nicole died. The government's strategy—successful at trial and at the ACCA—was to use the appellant's pattern of abuse against his daughters to establish both the cause of Nicole's death and the identity of the appellant as the perpetrator. The uncharged misconduct pertaining to Nicole's facial burns, broken limbs, and fractured ribs was critical in establishing the pattern of abuse the government needed to sustain its theory of the case.³⁴

The CAAF strictly applied the three-part *Reynolds* test in holding that the military judge abused his discretion in admitting uncharged misconduct evidence of the fractures, bruises, and facial burns that Nicole suffered. The first *Reynolds* factor is that the evidence must reasonably support a finding that the appellant committed the prior acts of uncharged misconduct. In *Diaz*, the CAAF found that the government did not meet the "low" standard for linking the appellant to Nicole's injuries.³⁵ While recognizing that the pattern-of-abuse strategy may sometimes be the only evidence to prove a case of infanticide or child abuse, the CAAF stated, "Each alleged incident of uncharged misconduct must pass through the *Reynolds* filter."³⁶

There was little evidence to establish either when or how Nicole suffered the fractures and bruising. Moreover, there was no evidence establishing who inflicted the injuries; in fact, trial testimony revealed that several people, including the appellant's spouse and several babysitters, had access to Nicole during the time frame the injuries would have occurred. The government conceded that the link between the appellant and the injuries was tenuous, stating in a response to a defense motion, "Evidence of the broken bones and bruises is not being offered to show that the accused actually caused these injuries, but to explain the reasoning behind [Death Review Board member] Dr. Stuenkel's opinion that Nicole was an abused child."³⁷ In short, the unexplained injuries that helped trigger suspicion as to the cause of Nicole's death remained unexplained in the government's case and could not be "lump[ed] together as a series of incidents . . . [to] establish Appellant committed each act of abuse."³⁸

But what of the evidence of Nicole's facial burns from the vaporizer? The appellant had admitted involvement in the burn but claimed it was an accident.³⁹ It would seem that the govern-

30. *Id.* The toxicology screen did show small amounts of an over-the-counter drug medication and also the presence of drugs used in the resuscitation attempts. These amounts, however, were insignificant and, according to the medical examiner, were negative in having any relation to the cause of death. *See id.*

31. *Id.*

32. *See id.* at 82-83. Jasmine was born approximately eleven months after Nicole died. *See id.* The Army had, in the meantime, transferred the appellant to Hawaii. *Id.* at 83. When Jasmine was approximately seven-months old, her mother took her to the hospital to have a burn treated on her leg. The appellant claimed he had been trying to burn a centipede that was in his daughter's crib when he accidentally dropped his lighter on her leg. The burn, however, exhibited classic branding characteristics, indicating that an accident was unlikely. *See id.* at 83-84. The Hawaii Child Protective Services took Jasmine away from her parents' custody. *Id.* at 84.

33. *Id.* According to the CAAF, Oklahoma's Death Review Board conducts a multi-disciplinary review of all deaths of children under the age of eighteen. The Board collects all agency and medical records and reports in making its determination. *Id.* The Death Review Board contacted the military to ensure that military investigators knew about Nicole's death and her previous injuries. *Id.*

34. *Id.* at 93-96.

35. *See id.* at 94.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 95. In fact, the appellant presented evidence by stipulation from the CEO of the vaporizer manufacturer concerning complaints from consumers who had accidentally burned themselves in the vaporizer steam. The CEO also said that he had accidentally burned himself several times. *Id.*

ment was on firm ground in introducing evidence of the facial burn and the appellant's claim of accident, rebutting it with evidence of the branding burn to Jasmine's thigh and the appellant's claim of accident for *that* incident, and then using the facial burn incident to help establish that the appellant was the source of Nicole's other injuries. This would surely help establish the pattern of abuse that the CAAF implicitly recognized as being valid in infanticide or child abuse cases.⁴⁰

In the most confusing section of the opinion,⁴¹ the CAAF found that the facial burn evidence did not meet the second *Reynolds* prong because the evidence did not make a fact of consequence in the trial more or less probable. The appellant's chosen theory of defense was the key to this part of the opinion. The appellant never claimed that Nicole suffered an accidental death at his hands; rather, he made a general denial as to any involvement at all in her death. Accordingly, there was no claim of accident to rebut. The CAAF claimed that the government had, in essence, "created an act" by the appellant (the accidental burn) and then rebutted it with uncharged misconduct (the fractures and bruises). As the CAAF stated, "the prosecution cannot introduce uncharged misconduct to rebut a defense that was never raised or presented by the defense."⁴² Thus, the CAAF permitted the appellant's defense theory to control the relevance of the uncharged misconduct evidence the government would be permitted to introduce at trial.

Finally, the CAAF applied the third prong of the *Reynolds* test in concluding that the uncharged misconduct evidence was overly prejudicial. In this section of the opinion, the CAAF measured the overall impact of the uncharged misconduct evidence when aggregated with improper expert testimony that had been introduced at trial.⁴³ A social worker testified about confronting the appellant with her belief that he had killed Nicole, and a doctor from the Death Review Board testified that in his opinion, the death was a homicide and the appellant was the perpetrator. According to the CAAF, the improper expert testimony on the charged misconduct was inextricably intertwined with testimony on the incidents of uncharged misconduct,

making it impossible for the members to differentiate between proper and improper uses of the evidence. The CAAF found that the "panel's hearing [the expert's] testimony so fueled the prejudicial impact of the uncharged misconduct that it rendered it inadmissible for the purpose of showing a pattern of abuse."⁴⁴

The CAAF's opinion in *Diaz* emphasizes the importance of the *Reynolds* factors in using uncharged misconduct evidence. Government counsel must ensure that each act of uncharged misconduct, standing alone, meets each of the three *Reynolds* factors. Government counsel must resist the temptation to take evidentiary shortcuts when introducing uncharged misconduct evidence. *Diaz* makes clear that it is unacceptable to throw an "unformed mass" of uncharged acts into the courtroom in the hope that some will stick to the accused. Counsel and military judges should take careful note of the substance of the accused's plea at trial. In child abuse cases, at least, a general denial of wrongdoing may preclude the government from certain logically reasonable uses of uncharged misconduct evidence. Finally, *Diaz* confers a great benefit to the defense in evaluating the prejudicial effects of uncharged misconduct evidence—while the government must ensure that each act stands alone, *Diaz* permits the defense to aggregate all evidence introduced at trial in determining the prejudicial impact of the government's uncharged misconduct evidence.

In *United States v. McDonald*,⁴⁵ the Navy-Marine Court of Criminal Appeals (NMCCA) addressed the temporal limits of uncharged misconduct evidence in a case involving misconduct the appellant had committed as a juvenile some twenty years before trial. Although by no means a bright-line rule, "temporal remoteness depreciates or reduces the probative value of [uncharged acts] evidence."⁴⁶ A lengthy time lapse can render evidence "legally irrelevant,"⁴⁷ particularly if the uncharged misconduct occurred when the accused was a juvenile.⁴⁸

The appellant in *McDonald* was charged with two specifications of taking indecent liberties with his twelve-year-old

40. *See id.* at 94.

41. In the alternative, the section might be so clear that even a child could understand it. As the inimitable Groucho Marx once said, "A child of five could understand this. Fetch me a child of five." *See* Wikiquote, *Groucho Marx*, at http://wikiquote.org/wiki/Groucho_Marx (last visited May 4, 2004).

42. *Diaz*, 59 M.J. at 95.

43. For a more thorough discussion of the expert testimony, *see infra* notes 134-51 and accompanying text.

44. *Diaz*, 59 M.J. at 95-96.

45. 57 M.J. 747 (N-M. Ct. Crim. App. 2003), *review granted*, 2003 CAAF LEXIS 802 (Aug. 4, 2003).

46. 2 EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT ¶ 8:08, at 8-26 (1999).

47. *See id.* ¶ 8:08, at 8-27.

48. *See id.* Imwinkelreid gives an example of a defendant committing uncharged misconduct as a sixteen-year-old teenager and notes that "intervening years may have brought reformation, maturity, and responsibility." *Id.* He notes that the significance of the time lapse relates to and is dependent on the purpose for which the uncharged misconduct is offered; if the uncharged misconduct is offered to prove *modus operandi* and the uncharged act is nearly identical to the charged act, "the courts tolerate substantial time lapses." *Id.*

adopted daughter, communicating indecent language to her, and soliciting her to commit carnal knowledge with him. The appellant's wife had been involved in a serious automobile accident that made it impossible for the couple to engage in sexual intercourse for several months. During that time period, the appellant gave condoms to his adopted daughter, went into the bathroom and photographed her while she was bathing, and attempted on another occasion to photograph her in the bathroom. He left a book in her bathroom entitled "Daddy and Me," which glorified father-daughter sexual relations. Finally, he wrote a note informing her that he wanted to provide her first sexual experience. Nonetheless, he never actually touched his daughter in a sexual manner. He was charged for each of these offenses except for the act of giving his adopted daughter the "Daddy and Me" book.⁴⁹

At trial, the government introduced two items of uncharged misconduct. The first of them, the "Daddy and Me" book, was introduced to show the appellant's intent and plan to have sexual intercourse with his adopted daughter.⁵⁰ The second involved the appellant's sexual abuse of his stepsister some twenty years earlier, when the appellant was thirteen-years old and his stepsister was eight. The evidence was that the appellant had exposed himself to his stepsister, showed her a pornographic magazine in which a fairy was masturbating a man, and expressed to her his fantasy that she would perform a similar act on him. In addition, the appellant made his stepsister masturbate him on several occasions, removed her clothing below the waist, and touched her private parts. The trial counsel offered this evidence to show the appellant's intent and plan to condition his adopted daughter to have sexual intercourse with him.⁵¹

Both the military judge and the NMCCA applied the *Reynolds* test to determine that the evidence was admissible. In an Article 39(a) session, the trial counsel made an evidentiary proffer concerning the twenty-year-old misconduct. The

NMCCA found that the military judge had ample information from the proffer to determine that the evidence would reasonably support a finding that the appellant had committed the uncharged misconduct with his stepsister twenty years earlier.⁵² As for the second prong of the *Reynolds* test, both the military judge and the NMCCA apparently accepted the trial counsel's explanation that the uncharged misconduct was highly probative of the appellant's intent and plan to condition his stepdaughter to have sexual intercourse with him. The military judge found (and the NMCCA neither disturbed nor questioned the finding) that there were several similarities between the appellant's uncharged acts with his stepsister and the charged acts with his adopted daughter. This evidence satisfied the second *Reynolds* prong by making a fact of consequence in the proceeding more probable.⁵³

The MRE 403 balancing test—the third prong of the *Reynolds* test—formed the largest part of the NMCCA's analysis in *McDonald*. The defense counsel argued that admission of the twenty-year-old misconduct would prejudice the members against the appellant on sentencing by causing them to consider the appellant's activities as a teenager.⁵⁴ The military judge, however, found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, and the NMCCA agreed.⁵⁵

The NMCCA cited an earlier CAAF case, *United States v. Tanksley*,⁵⁶ for the proposition that MRE 404(b) does not have a temporal yardstick.⁵⁷ The NMCCA noted several differences between the facts in *Tanksley* and those in *McDonald*,⁵⁸ but found persuasive the CAAF's reasoning that "[t]he nub of the matter is whether the evidence is offered for a purpose other than to show an accused's predisposition to commit an offense."⁵⁹

49. *McDonald*, 57 M.J. at 748-49.

50. *Id.* at 754-55. Although the appellant objected at trial and on appeal to the introduction of the "Daddy and Me" book, the NMCCA applied the abuse of discretion standard of review and upheld the military judge's decision to admit the evidence. The military judge's findings of fact met the three-pronged *Reynolds* test, and the NMCCA found that the evidence was probative as to the appellant's intent and plan to condition his adopted daughter to have sexual intercourse with him. *Id.*

51. *Id.*

52. *Id.* It should be noted that the defense counsel concurred in the use of an evidentiary proffer, rather than a witness or some other form of proof, at the Article 39(a) session. *See id.*; UCMJ. art. 39(a) (2002).

53. *See McDonald*, 57 M.J. at 755.

54. *Id.*

55. *Id.*

56. 54 M.J. 169 (2000). In *Tanksley*, the appellant was charged with taking indecent liberties in the shower with the six-year-old daughter of his second marriage. He was also charged with making false official statements pertaining to sexual abuse of the daughters of his first marriage nearly thirty years earlier. At trial, one of his adult daughters testified that the appellant had begun bathing her when she was three or four-years old, had digitally penetrated her, and eventually began raping her. This testimony was admitted for two purposes: (1) in proof of the false official statements charge for his denial that these events ever occurred; and (2) as MRE 404(b) evidence to show his intent to gain arousal or gratification by showering with his six-year-old daughter. *See id.* at 174.

57. *McDonald*, 57 M.J. at 756.

The NMCCA took a further step in its opinion, conducting a harmless-error analysis. Although neither party briefed the issue, the NMCCA proceeded *sua sponte* to determine that any potential error was not of a constitutional magnitude. Because of the overwhelming nature of the government's case, including the appellant's written statement, his oral admission to his wife, the testimony of his adopted daughter, and corroborating testimony from the victim's brother and a doctor, the NMCCA found that the twenty-year-old evidence likely had little impact on the panel's findings.⁶⁰ This, of course, begs the question— if the evidence was overwhelming, why did the government introduce additional uncharged misconduct evidence at trial?

McDonald provides a strong incentive for trial counsel to widen the net in their pretrial investigations of the accused. Distant acts of juvenile misconduct may potentially be admissible at trial and are worth exploring, particularly in sexual misconduct cases when they may bolster the government's theory concerning the accused's intent or plan to commit the offense. Defense counsel should be aware of the ramifications of *McDonald* and seek full disclosure from their clients concerning past acts of misconduct and be prepared to contest government assertions as to the admissibility of the evidence.⁶¹ Finally, the NMCCA opinion demonstrates that if a military judge makes strong findings of fact based on the *Reynolds* factors, an appellate court is unlikely to disturb or overturn the findings.

Note: As this article was in the final stages of preparation for publication, the CAAF reversed the NMCCA's holding in

McDonald.⁶² The CAAF held that the evidence was not logically relevant under the second *Reynolds* prong. It did not demonstrate a common plan because, in the CAAF's view, the acts between the appellant and his stepsister were so different from the offenses charged against his daughter. The CAAF also held that the evidence did not establish intent. There was no evidence at trial comparing the appellant's state of mind as a thirteen-year-old juvenile as compared to his state of mind as a thirty-three-year-old married adult.⁶³ The CAAF did not, however, specifically address the NMCCA's analysis of the temporal limits of MRE 404(b), holding instead that the military judge abused his discretion in finding a common plan and intent.

Marital Communications Privilege

In *United States v. McCollum*,⁶⁴ the CAAF continued its recent trend of strictly construing the marital communications privilege against the government in favor of protecting marital communications, even when the communications involve the sexual abuse of a child.⁶⁵ The marital communications privilege, codified at MRE 504,⁶⁶ is based on the common-law marital confidences privilege, which allows witnesses "to refuse to reveal their own confidential marital communications and to prevent their spouse from doing so."⁶⁷ The privilege does not apply if the communication was not intended to be confidential or when one spouse is charged with committing a crime against "the person or property of the other spouse or a child of either."⁶⁸ In *McCollum*, the CAAF clarified that the govern-

58. The acts in *Tanksley* were charged misconduct that were required to prove a false official statements charge, whereas the misconduct in *McDonald* was uncharged and arguably not required to prove the government's case. The acts in *Tanksley* all involved the abuse of parental authority, whereas the uncharged misconduct in *McDonald* involved two minors separated by only five years in age. See *id.* at 755. In addition, the acts in *Tanksley* all occurred as part of a clearly identifiable pattern of grooming and conditioning a child by sexually abusing the child during bathing, whereas the pattern similarities between the charged and uncharged misconduct in *McDonald* are not necessarily readily apparent. Most importantly, the appellant in *Tanksley* was a parent and an adult when all acts of misconduct occurred, whereas the appellant in *McDonald* was only thirteen-years old when the uncharged misconduct occurred. Compare *Tanksley*, 54 M.J. at 169, with *McDonald*, 57 M.J. at 747.

59. *McDonald*, 57 M.J. at 756 (quoting *Tanksley*, 54 M.J. at 175).

60. *Id.*

61. Defense counsel should also consider making specific requests of the government for discovery of such matters under the Rules for Courts-Martial (RCM). MCM, *supra* note 1, R.C.M. 703(e)(3).

62. *United States v. McDonald*, 59 M.J. 426 (2004).

63. *Id.*

64. 58 M.J. 323 (2003).

65. See *Rose*, *supra* note 20, at 59 (discussing the CAAF's recent treatment of the marital communications privilege).

66. MCM, *supra* note 1, MIL. R. EVID. 504(b)(1). The rule defines the husband-wife privilege as follows:

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

Id.

67. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 396 (3d ed. 2003).

ment bears the burden of overcoming the presumption of confidentiality in marital communications. The CAAF also addressed the definitional limits of “child of either,” determining that the so-called “de facto child” exception to the privilege does not apply at courts-martial.⁶⁹

The appellant in *McCollum* was convicted of raping his wife’s mildly retarded, fourteen-year-old sister, who had come to stay with the couple for a month during the summer. The appellant’s wife entered the living room between 0200 and 0300 to discover the appellant and her sister lying on the floor. The sister’s nightgown was up above her waist, and the appellant was rubbing her stomach. The appellant’s wife did not, however, immediately confront him; although the incident disturbed her, she waited until later in the morning to discuss it.

In response to pointed questioning from his wife, the appellant admitted that he had sexual intercourse with her fourteen-year-old sister. During a later conversation, the appellant’s wife expressed her fear that her sister might be pregnant. In response, the appellant told her that he did not ejaculate. Nevertheless, the appellant’s wife took her sister to a clinic for a pregnancy test. Not long afterwards, the appellant deployed to Saudi Arabia for several months, where he experienced a religious awakening of sorts. When he returned, he told his wife that he needed to take responsibility for things he had done in the past, and that he might want to tell their families about the incident with his wife’s sister. His wife told him that she did not want him to tell her family.⁷⁰

At trial, the defense counsel moved to suppress all of the appellant’s statements to his wife on the grounds that the marital privilege protected them. In opposition, the government argued that the “child of either” exception to the privilege applied because the wife stood *in loco parentis* to her sister during the visit. The judge declined to construe the exception so broadly and ruled that the privilege clearly covered the appellant’s first statement to his wife, in which he admitted the act of sexual intercourse, and should be suppressed. Conversely, the

judge did admit the appellant’s statement claiming he did not ejaculate, determining that the defense had failed to establish the confidential nature of the communication. The judge also admitted the appellant’s post-deployment statements in which he talked about telling family members about the incident, ruling that the statements were never intended to be confidential.⁷¹

The CAAF reviewed the military judge’s decision to admit the appellant’s statements to his wife under the abuse of discretion standard. The CAAF began its opinion by noting the long history of the marital communications privilege, both at common law and by statute. Citing *United States v. McElhaney*,⁷² the CAAF observed the marital communication privilege has three prerequisites: (1) there must be a communication; (2) the communication must have been intended to be confidential; and (3) the communication must have been made between married persons not separated at the time of the communication.⁷³ The appellant met two of these prerequisites by establishing that certain communications took place between himself and his spouse during their marriage.⁷⁴ The issue was whether the communications were intended to be confidential.

The CAAF’s analysis of whether the appellant intended his communications to his spouse to be confidential provides a useful template for counsel and military judges alike. The CAAF referred to the two-part test it promulgated in *United States v. Peterson*⁷⁵ for measuring confidentiality. First, there must be physical privacy between the individuals—in other words, the communication is not made in a public forum. Second, there must be an intent to maintain secrecy.⁷⁶ Because most marital communications occur orally and in private, it can be difficult for an individual to prove his intent to keep a communication confidential; thus, long-standing precedent has established that marital communications are presumptively privileged.⁷⁷ The party asserting the marital communications privilege has only to establish that the communication occurred in private between married spouses who were not separated. Then, the burden of production shifts to the opposing party to overcome the presumption of confidentiality.⁷⁸ The CAAF listed several

68. MCM, *supra* note 1, MIL. R. EVID. 504(c)(2)(A).

69. A “de facto child” is “a child who is under the care of custody of one of the spouses, regardless of the existence of a formal legal parent-child relationship.” *McCollum*, 58 M.J. at 340.

70. *Id.* at 334-35.

71. *Id.*

72. 54 M.J. 120 (2000).

73. *McCollum*, 58 M.J. at 336.

74. *See id.* at 338-39.

75. 48 M.J. 81 (1998).

76. *McCollum*, 58 M.J. at 336.

77. *Id.* at 337 (citing *Pereira v. United States*, 347 U.S. 1, 6 (1954); *Blau v. United States*, 340 U.S. 332, 333 (1951); *United States v. Byrd*, 750 F.2d 585, 590 (7th Cir. 1984); *In re Grand Jury Investigation*, 603 F.2d 786, 788 (9th Cir. 1979); *Caplan v. Fellheimer*, 162 F.R.D. 490, 491 (E.D. Penn. 1995)).

factors that would be relevant in overcoming a presumption of confidentiality: (1) the nature of the circumstances under which the communication was made (for example, a statement made in the presence of third parties would lose its presumptive confidentiality); (2) the substance of the communication (for example, a discussion of a timeline or plan for disclosure may reveal an intent to disclose information); and (3) whether the statement is actually shared with a third party.⁷⁹

The appellant in *McColum* met his initial burden by establishing that the communications were made in private during his marriage. The CAAF held that the military judge erred by shifting the burden of production from the government to the appellant. Instead of the government having to prove that the appellant did not intend the statements to be confidential, the military judge's ruling forced the appellant to prove that he *did* intend for them to be confidential.⁸⁰

Looking at the facts and circumstances surrounding the statements, the CAAF determined that the government did not overcome the presumption of confidentiality for either of them. The statement about not ejaculating, said the CAAF, "is not the kind of statement a person generally intends to share openly."⁸¹ The statement was of the type that, if disclosed, carried the risk of criminal sanctions. Furthermore, there was no evidence supporting the military judge's determination that the appellant intended for the statement to be shared with medical authorities—the appellant's wife was unsure whether she even told the appellant she intended to take her sister to the clinic for a pregnancy test. Finally, the fact that neither spouse shared the statement until the investigation indicated an intent for it to be kept confidential.

The post-deployment statement, in which the appellant talked about disclosing the incident to family members, was different. The Air Force Court of Criminal Appeals (AFCCA) held that the appellant had waived his privilege by giving his wife consent to disclose the statement under MRE 510(a). Military Rule of Evidence 510(a) states that a person waives his privilege if he "voluntarily . . . consents to disclosure of any significant part of the matter or communication."⁸² However, the CAAF found no evidence that the appellant elected to share a

substantial portion of these communications outside the marriage. At best, the comments "reflect a marital discussion about telling the families about [a]ppellant's conduct . . . not necessarily a decision to do so."⁸³ Having determined that the waiver doctrine of MRE 510(a) did not apply, the CAAF next addressed whether the government overcame the presumption of confidentiality. While the statements could have been interpreted as expressing an intent to disclose the information to their families, the CAAF viewed it more likely that it was merely aspirational.⁸⁴ The CAAF found it significant that the statement did not contain a timeline for disclosure. The statement contained information traditionally maintained as confidential—disclosure could have resulted in criminal or civil liability or could have traumatized family members. Finally, the appellant's spouse counseled him not to disclose the conduct, and neither party actually disclosed the information to family members. On balance, the CAAF found that the government failed to carry its burden.⁸⁵

The final section of the CAAF's opinion staked out the definitional limits of the "child of either" exception at courts-martial. The government argued that "child of either" should be broadly read to include the so-called "de facto child," or a child who is under the custodial care of one of the spouses, independent of a formal parent-child arrangement. The CAAF first looked at the plain language of MRE 504(c)(2)(A) and determined that a biological or legal relationship is necessary in order to trigger the "child of either" exception to the marital communications privilege.⁸⁶ Although the CAAF recognized that "child of either" could be broadly construed to include custodial arrangements, it declined to construe the phrase so broadly at courts-martial. The CAAF applied the rule of interpretation contained in MRE 101(b), which instructs military courts to look to federal laws and the common law for evidentiary guidance when practicable and not inconsistent with the UCMJ or the *MCM*.⁸⁷ Only one federal circuit and five state jurisdictions have recognized a "de facto child" exception for offenses against children who are neither the biological nor adopted children of one of the spouses.⁸⁸

Despite the CAAF's holding that the military judge improperly admitted statements covered by the marital communica-

78. *Id.*

79. *Id.* at 337-38.

80. *Id.* at 338.

81. *Id.*

82. *MCM*, *supra* note 1, MIL. R. EVID. 510(a).

83. *McColum*, 58 M.J. at 339 (emphasis added).

84. *Id.* at 339.

85. *Id.*

86. *See id.* at 340.

tions privilege, the appellant in *McCullum* did not receive any relief. The CAAF found that the erroneous introduction of privileged material was a non-constitutional error, and applied a harmless error analysis to the evidence. Weighing the strength of the government's case, the strength of the defense case, the materiality of the evidence in question, and the quality of the evidence, the CAAF determined that the admission of the evidence was harmless error.⁸⁹

Nevertheless, *McCullum* is an excellent case for practitioners. Trial counsel and military judges must be aware of the shifting burden of production for the marital communications privilege. Once an accused establishes that a communication was made in private during a marriage, the burden shifts to the government to overcome the presumption of confidentiality. *McCullum* provides a useful list of factors for determining whether the presumption of confidentiality has been overcome. Defense counsel must assert the privilege early and often and use the common-sense arguments from *McCullum* in attacking government efforts to overcome the presumption of confidentiality.

Human Lie Detector Testimony

In *United States v. Kasper*,⁹⁰ the CAAF held that the authority to introduce opinion evidence regarding a person's character for truthfulness under MRE 608(a)⁹¹ does not extend to "human lie detector" testimony by an Office of Special Investigations

(OSI) agent.⁹² The case provides a good primer for counsel on the limitations and pitfalls of character evidence and serves as an admonition for military judges to take an active role in issuing *sua sponte* limiting instructions in certain instances even when counsel fail to timely object or to request instructions.

In *Kasper*, an Air Force general court-martial convicted the appellant of wrongfully using ecstasy during a visit to Florida.⁹³ The government had two primary witnesses. First, the appellant's ex-boyfriend, also an Air Force airman, testified that he and the appellant had used ecstasy while they were visiting friends in Florida. Second, an OSI agent testified that the appellant had confessed to ecstasy use during an interrogation. The OSI agent testified that the appellant began crying during the interrogation, and in response to the question, "did you use ecstasy in Florida," the appellant held up one finger and began crying some more; the agent interpreted this to mean that the appellant had confessed to using ecstasy once during a visit to Florida.⁹⁴ The appellant, in contrast, testified at trial that when she held up the finger, it meant that she had visited Florida once, not that she had used ecstasy in Florida.⁹⁵ Thus, the case hinged on the interpretation of ambiguous non-verbal conduct.

With this evidence, the Air Force took the appellant to trial. During opening statements, defense counsel placed the confession's validity before the members, telling them that the appellant repeatedly denied using ecstasy, and that the OSI agents merely believed they had obtained a confession from her. Defense counsel promised the members that they would not see

87. *See id.* at 341. The rule of interpretation the CAAF cited is contained in MRE 101(b):

- (b) *Secondary Sources.* If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply:
- (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and
 - (2) Second, when not inconsistent with subsection (b)(1), the rules of evidence at common law.

MCM, *supra* note 1, MIL. R. EVID. 101(b).

88. *McCullum*, 58 M.J. at 341.

89. *See id.* at 342-43.

90. 58 M.J. 314 (2003).

91. MCM, *supra* note 1, MIL. R. EVID. 608(a). Military Rule of Evidence 608(a) states the following:

- (a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Id.

92. *Kasper*, 58 M.J. at 314.

93. *Id.*

94. *See id.* at 316.

95. *See id.* at 318. The appellant also testified that she had been at a party and had been given an ecstasy pill, which she palmed and flushed down a toilet. She accepted the pill, she claimed, because she did not want the other partygoers to think she was an undercover agent. *See id.*

believable evidence that the appellant had used ecstasy. During the government's case-in-chief, the OSI agent testified that the appellant initially denied using ecstasy. The agent also said that she did not believe the appellant's denial: "We decided she wasn't telling the truth. She wasn't being honest with us . . ."96 The defense did not object. Eventually, the agent testified that the appellant began crying and held up a finger in confession. Without objection from the defense, the trial counsel asked whether there was "anything about what she said or the way she behaved that made you believe at that time that she was falsely confessing to you?"97

Matters worsened for the defense on cross-examination. The OSI agent testified that she was trained to assess through body language and other indicators whether an individual was being truthful or not. The agent also testified that she had believed the appellant's boyfriend when he testified that the appellant had used drugs because he displayed indicators of truthfulness. On re-direct, without defense objection, the trial counsel asked why the OSI agent believed the boyfriend. The agent replied that the boyfriend "gave all verbal and physical indicators of truthfulness."98 When the trial counsel began to ask about the *appellant's* verbal indicators of deception, defense counsel finally objected. The military judge sustained the objection, but permitted the OSI agent to testify that when a suspect shows signs of being untruthful in his or her denial of wrongdoing, the agents continue the interrogation.99

This line of questioning impacted the members. One of them submitted a written question to the OSI agent asking what indicators the appellant had displayed that made the agent believe she was deceptive when denying ecstasy use. The defense counsel objected to the question and the judge sustained it, advising the members that the question could not be asked because it would, in effect, turn the OSI agent into a human lie detector. The military judge gave no instructions concerning the testimony that the OSI agent had already given on the issue of the appellant's credibility.100

Applying the waiver doctrine, the AFCCA affirmed the conviction in an unpublished opinion, holding that because the defense counsel not only failed to object to the testimony on direct, but opened the door to additional damaging testimony on cross-examination, the issue had been waived.101 The CAAF reversed, holding that the military judge abused his discretion by permitting the OSI agent to give human lie detector testimony and by failing to give prompt corrective instructions to the members.

The CAAF's opinion first reviewed the limits of opinion testimony on a person's character for truthfulness. Military Rule of Evidence 608 permits evidence of a person's general character for truthfulness, but the rule does not permit human lie detector testimony, which the CAAF defined as "an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case."102 The CAAF listed several reasons for restricting such testimony: (1) determining whether a person is truthful exceeds the scope of a witness's expertise; (2) it violates the limits on character evidence in MRE 608(a) because it offers an opinion on the declarant's truthfulness on a particular occasion rather than the declarant's reputation for truthfulness in the community; and (3) it places an improper stamp of truthfulness on the witness's own testimony in a manner that usurps the panel's exclusive function to weigh and determine credibility.103

The CAAF then turned its attention to the OSI agent's testimony in *Kasper*. It rejected the AFCCA's waiver analysis and noted that the government—not the defense—initiated the human lie detector testimony as part of its case-in-chief.104 Even before the defense counsel's ill-fated cross-examination, the trial counsel had elicited two opinions from the OSI agent on the appellant's credibility.105 The central issue in the case was the appellant's credibility, and the members had to decide whether she was lying when she denied ecstasy use or was lying when she allegedly confessed to it. Permitting the OSI agent to testify that it was a physiological fact that the appellant was lying materially prejudiced the appellant's ability to present a defense.106 The panel member's written question regarding the

96. *Id.* at 316.

97. *Id.*

98. *Id.* at 317.

99. *See id.*

100. *Id.*

101. *See United States v. Kasper*, 2001 CCA LEXIS 351, *6 (A.F. Ct. Crim. App. Dec. 28, 2001).

102. *Kasper*, 58 M.J. at 315; *see MCM, supra* note 1, MIL. R. EVID. 608.

103. *See Kasper*, 58 M.J. at 315.

104. *Id.* at 319.

105. *Id.*

indicators of deception demonstrated the impact this testimony had on the panel. The defense's failure to offer a timely objection or to request a limiting instruction did not change the military judge's *sua sponte* duty to stop the testimony, and issue effective limiting instructions.¹⁰⁷

Kasper provides a message and a warning for trial counsel, military judges, and defense counsel. Trial counsel should avoid any efforts or subterfuges to introduce human lie detector testimony at trial. Evidence from a trained police investigator can be powerful and unduly prejudicial to the defense. *Kasper* also imposes an additional burden on military judges, who now must consider paternalistic intervention on evidentiary matters even when a defense counsel seemingly opens the door to improper testimony or fails to object to it. For defense counsel, *Kasper* presents a textbook example of a defense counsel failing to protect a client by lodging objections or recognizing the ramifications of certain cross-examination questions. By the time the defense counsel in *Kasper* began protecting the client, the damage had already been done.

United States v. Caley,¹⁰⁸ an unreported NMCCA case, is an interesting holding on credibility evidence. In a judge-alone general court-martial, the appellant was convicted of raping a female sailor. At trial, the government presented testimony from a Navy Criminal Investigation Services (NCIS) agent on the victim's demeanor during her police interview. Trial counsel asked the NCIS agent to describe the victim's demeanor during his interview of her. The NCIS agent replied that the victim appeared to be forthcoming and honest. This drew an objection for improper bolstering, which the judge sustained. The trial counsel, however, continued to ask questions about the victim's demeanor, and the judge permitted the NCIS agent to testify that the victim's demeanor had been "open, forthcoming, much more cooperative, et cetera."¹⁰⁹ After a few more questions and answers, the military judge sustained a second bolstering objection and directed the trial counsel to move on.¹¹⁰

The NMCCA affirmed the introduction of this evidence. The court held that the NCIS agent used the word "forthcoming" only as a description of the victim's demeanor and not as a description of her honesty or credibility.¹¹¹ In a footnote, the

NMCCA noted that in its search of case law, it had been able to find only one other appellate decision on point, from Arizona, addressing demeanor testimony, and the Arizona court had affirmed the introduction of the evidence.¹¹² The NMCCA also observed that there was no danger of members being improperly influenced by the evidence because this was a judge-alone case.¹¹³

Caley demonstrates that not all so-called credibility evidence is off-limits. So long as the opinions and conclusions on truthfulness and credibility are left to the finder of fact, counsel may be able to call witnesses to describe an individual's demeanor. This evidence is potentially valuable at trial because it can permit a trier of fact to draw appropriate conclusions on credibility based on the demeanor observations of trained witnesses. For example, the fact finder might be interested to know that a complaining witness never looked the police officer in the eye, talked quickly, was evasive in response to questioning, and the like. *Caley* leaves open the issue of whether this type of evidence would be limited to a judge-alone trial or would be permissible in a members trial. Counsel who desire to introduce demeanor evidence in a members trial would be well advised to file a motion in limine and have the military judge address the admissibility of the evidence under MRE 104 at a pre-trial 39(a) session.

Opinion Testimony

Lay Opinion Testimony

In *United States v. Schnable*,¹¹⁴ the NMCCA addressed the issue of lay opinion testimony under MRE 701.¹¹⁵ The appellant in *Schnable* was convicted of committing indecent acts with and communicating a threat to his mildly retarded, thirteen-year-daughter. The appellant committed several indecent acts with his daughter. On one occasion, he cornered her in the garage, forced her to wrap her legs around him, fondled her, and French-kissed her. Another time, he took her into the master bedroom, unzipped his pants, masturbated, touched her genitals, and made her fondle his penis. On a third occasion, he took her for a drive in his truck, parked by the side of a road, fondled

106. *See id.*

107. *See id.* at 319-20.

108. 2003 CCA LEXIS 70 (N-M. Ct. Crim. App. Mar. 11, 2003).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* n.2.

113. *Id.* at *8.

114. 58 M.J. 643 (N-M. Ct. Crim. App. 2003).

and digitally penetrated her, and then masturbated until he ejaculated.¹¹⁶

The victim in *Schnable* was both mentally challenged and physically underdeveloped. When she testified at trial, the members saw a “small and short” child who did not appear to be thirteen-years old.¹¹⁷ Moreover, she used terms less sophisticated than one might expect from a teenager: for example, she told the members that “yellow stuff” came out of the appellant’s “dingle” when they “rubbed it.”¹¹⁸ The government called the victim’s mother to the stand, who testified that the victim suffered from a mild degree of mental retardation.¹¹⁹

The NMCCA affirmed the military judge’s decision to permit this line of questioning. In its analysis, the NMCCA examined the plain language of MRE 701 and stated that there are just two requirements for lay opinion testimony: the testimony must be rationally based on the perception of the witness, and it must be helpful to the fact finder.¹²⁰ Mrs. Schnable’s opinion was rationally based on her perception as a witness. She was the mother of six children, she was familiar with the victim’s physical and mental development, and she had home-schooled the victim for several years. She was able to testify both as a mother and as an educator that the victim lagged behind her other children in math and reading skills.¹²¹ The testimony was also helpful to the members, who had heard testimony from a thirteen-year old who was physically underdeveloped and who was not able to provide information at the same level one might expect from a young teenager. The mother’s opinion testimony

helped the members place the victim’s testimony in its proper perspective, understand her testimony, and weigh the victim’s overall credibility.¹²² The NMCCA rejected arguments that testimony related to retardation is the exclusive province of experts. Mrs. Schnable had not testified as to the level of the victim’s impairment, nor had she attempted to answer questions about how a mentally retarded person would react under certain types of questioning; she merely gave an opinion drawn directly from her observations as a mother and an educator.¹²³

Schnable provides a clear example of the appropriate limits of lay opinion testimony at courts-martial. Trial and defense counsel alike may want to consider introducing appropriate lay opinion testimony at trial as an alternative to expert testimony. If a witness can rationally base her opinion on her perceptions as a witness in a manner helpful to a panel, she will meet the qualifications of MRE 701.¹²⁴

Expert Testimony

In *United States v. Billings*,¹²⁵ the ACCA affirmed a creative use of expert testimony that helped the government link the appellant to a robbery. The appellant was the leader of a criminal gang called the Gangster Disciples. Among other crimes,¹²⁶ gang members robbed the manager of an apartment complex and took cash and a Cartier Tank Francaise watch worth about \$15,000. Although the watch itself was never recovered, investigators recovered photographs of the appellant

115. MCM, *supra* note 1, MIL. R. EVID. 701. Military Rule of Evidence 701 permits lay witnesses to give opinion testimony within certain constraints. *Id.* The rule states:

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

Id.

116. *See Schnable*, 58 M.J. at 646-47.

117. *Id.* at 652.

118. *Id.* at 648.

119. *Id.* at 651.

120. *Id.*

121. *Id.* at 651-52.

122. *Id.* at 651.

123. *See id.* at 652 (distinguishing the *Schnable* case from other cases in which experts might be called to testify on the issue of retardation).

124. MCM, *supra* note 1, MIL. R. EVID. 701.

125. 58 M.J. 861 (Army Ct. Crim. App. 2003).

126. *See id.* The appellant ordered a hit on a local businessman that led to the deaths of two people. The appellant was tried for murder and conspiracy to commit murder, but was convicted of assault consummated by a battery and conspiracy to commit assault. She was also convicted of conspiracy to commit robbery and robbery with a firearm. *See id.*

wearing a watch that appeared similar to the stolen watch. The government sought to use these photographs to link the appellant to the robbery of the apartment complex manager.¹²⁷

The government called a local jeweler to testify as an expert witness to help the panel determine whether the watch in the photograph shared characteristics with Cartier Tank Francaise watches. The military judge permitted the jeweler to testify, but he did not permit the jeweler to draw the ultimate conclusion that the watch in the photograph was, in fact, a Cartier Tank Francaise watch. Interestingly, the jeweler had never actually seen a Cartier Tank Francaise watch in real life. The jeweler testified that he was familiar with the characteristics of Cartier watches, and that he was able to tell from looking at a photograph whether a piece of jewelry was made of solid gold or was merely gold-plated metal. He had over twenty-five years of experience in the jewelry business, had experience appraising gold jewelry, and was a member of the National Jewelers Association of Appraisers. The jeweler was able to tell the members that the watch bore many characteristics of a Cartier watch, that it was made of real gold, that the pattern of the links in the watchband would be difficult to duplicate, and that he had never seen a copy or replica of a Cartier watch made out of solid gold.¹²⁸

The ACCA applied a straightforward analysis under MRE 702¹²⁹ and the *Daubert/Kumho Tire* line of cases in affirming the military judge's decision to permit the jeweler to testify as an expert. The ACCA noted that the trial judge is required to assume a gate-keeping function both for scientific and technical experts, assessing whether the reasoning or methodology underlying the expert's testimony is sound, and whether that

reasoning or methodology has been properly applied to the facts in issue.¹³⁰

In this case, the jeweler focused on matters that were within his expertise. His testimony was based on personal knowledge and twenty-five years of experience, and it was relevant, reliable, and probative. Accordingly, the military judge did not abuse his discretion in admitting the evidence.¹³¹

Billings provides a superb example to practitioners of the clever use of an unconventional expert to help prove a critical element of the case. The government needed the photograph of the watch to link the appellant to the robbery. Without an expert, there would have been no way to establish the common characteristics between the watch in the photograph and a Cartier Tank Francaise watch. Counsel and military judges alike can use *Billings* for guidance in evaluating novel uses for technical experts in courts-martial.

Ultimate Opinion Testimony

On its face, MRE 704 does not prohibit expert testimony on ultimate issues in a case such as the guilt or innocence of the accused; the rule simply states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."¹³² Following the drafter's analysis in the *MCM*, however, MRE 704 does not permit a witness to give an opinion as to the guilt or innocence of the accused.¹³³ In *United States v. Diaz*,¹³⁴ the CAAF held the line on the permissible limits of opinion testimony under MRE 704, holding that the military

127. *Id.* at 866.

128. *Id.* at 867.

129. *MCM*, *supra* note 1, MIL. R. EVID. 702. Military Rule of Evidence 702 provides for expert testimony. The version in force during *Billings* stated:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Id. In December 2000, Federal Rule of Evidence (FRE) 702 was amended to reflect the Supreme Court's guidance in *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). See 2000 Amendment Committee Note, *reprinted in* 3 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 702.04 [2], at 702-249 (8th ed. 2002). The new FRE 702 states as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts of data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id. § 702.01, at 702-7 (emphasis added). By operation of law under MRE 1102, amendments to the FRE apply to the MRE eighteen months after their effective date, unless the President takes action to the contrary. See *MCM*, *supra* note 1, MIL. R. EVID. 1102. Accordingly, the changes to FRE 702 took effect in the MREs on 1 June 2002. Those changes have not yet, however, appeared in the *Manual*. See *MCM*, *supra* note 1.

130. See *Billings*, 58 M.J. at 867.

131. *Id.*

132. *MCM*, *supra* note 1, MIL. R. EVID. 704.

133. See *id.* app. 22, at A22-50.

judge erred in denying a mistrial after a government expert testified that the death of Nicole Diaz was a homicide and the appellant was the perpetrator.¹³⁵

The appellant in *Diaz* was charged, among other things, with the murder of his infant daughter Nicole.¹³⁶ At issue on appeal was the opinion testimony of two government witnesses, a social worker who testified that she had confronted the appellant with her belief that he had killed his daughter,¹³⁷ and a pediatric child abuse expert. The pediatric child abuse expert testified—contrary to the military judge’s ruling on a defense motion in limine—that Nicole’s death was a homicide and the appellant was the perpetrator.¹³⁸ Following the social worker’s testimony, the defense counsel expressed concern with the improper opinion, and the military judge gave a limiting instruction.¹³⁹ After the pediatrician’s testimony, the defense counsel moved for a mistrial. Before denying the motion for a mistrial, the military judge gave extensive limiting instructions to the members, conducted group voir dire of the members, and individually questioned each of them about their ability to comply with his instructions.¹⁴⁰

In holding that the military judge erred in denying the mistrial, the CAAF’s analysis focused on the permissible limits of opinion testimony and the combined prejudicial effect of the improper opinion testimony and acts of uncharged misconduct that the government introduced against the appellant. The CAAF observed that MREs 702-705 establish a liberal standard for admissibility of expert testimony. Combined with MRE

403, these rules create a four-part standard for admissibility: (1) is the witness qualified to testify as an expert; (2) is the testimony within the limits of the witness’s expertise; (3) was the opinion based on sufficient factual basis to render it relevant; and (4) can the evidence survive an MRE 403 balancing test.¹⁴¹ “These rules, stated the CAAF, “reflect the intuitive idea that experts are neither omnipotent nor omniscient.”¹⁴²

The CAAF then cited MRE 704 and its own precedent for the proposition that an expert “may not opine concerning the guilt or innocence of an accused.”¹⁴³ The court specifically referred to the Drafter’s Analysis of MRE 704 to support this assertion.¹⁴⁴ The CAAF agreed with the military judge that the opinion testimony of the social worker and the expert opinion testimony of the pediatrician violated the permissible limits of opinion testimony on the guilt or innocence of the accused.¹⁴⁵

The CAAF next examined the military judge’s remedy. The military judge gave curative instructions and conducted individual voir dire rather than granting a mistrial, an action that the CAAF found to be an abuse of discretion.¹⁴⁶ The CAAF based this conclusion on its assessment that the members would not be able to put aside the inadmissible evidence.¹⁴⁷ Several factors combined to make a mere instructional remedy insufficient. First, because the two key issues in the case were the cause of Nicole’s death and the identity of the perpetrator, the pediatrician’s testimony had an ineradicably prejudicial impact on the members. The government relied extensively on the pediatrician’s experience and testimony from opening state-

134. 59 M.J. 79 (2003), *aff’d*, 56 M.J. 795 (Army Ct. Crim. App. 2002).

135. *Id.* at 91.

136. *See id.* at 79; *supra* notes 21 through 33 and accompanying text (setting out the facts of *Diaz*).

137. *Diaz*, 59 M.J. at 84-85. It is not entirely clear from the opinion whether the social worker testified as an expert or not. She did, however, testify that she interviewed the appellant on several occasions, and during one particular interview, she told him that she believed he had killed Nicole. The appellant replied, “You don’t know the half of it.” *Id.*

138. *See id.* at 86-87. The pediatrician, Dr. Stuemky, was a member of Oklahoma’s Death Review Board. Because of the unexplained past injuries to Nicole, the Death Review Board concluded that Nicole’s death was a homicide and the appellant was the perpetrator. During a motion in limine, the military judge ruled that Dr. Stuemky could testify that the injuries were consistent with a child abuse death, but he could not say, “Specialist Diaz murdered his daughter.” *See id.* at 86-87. Dr. Stuemky testified, however, that the death was caused by physical abuse and the appellant was the perpetrator. *Id.* at 87.

139. *Id.* at 85-86.

140. *Id.* at 87-89.

141. *Id.* at 89. In essence, the first three elements of this test are quite similar to the language in the newest version of MRE 702. *See* MCM, *supra* note 1, MIL. R. EVID. 702; *supra* note 129.

142. *Diaz*, 59 M.J. at 89.

143. *Id.*

144. *Id.*

145. *Id.* at 90.

146. *Id.* at 91.

147. *See id.*

Hearsay

Impeachment by Contradiction vs. Hearsay

ments through rebuttal arguments.¹⁴⁸ Second, the context of the pediatrician's opinion was important. His opinion came after the social worker testified of her belief the appellant had killed his daughter. The juxtaposition of these two witnesses made a "cumulative prejudicial impact" on the members.¹⁴⁹ In the CAAF's opinion, the military judge's instructions were not only unclear, but also unworkable; there was no way to "unring the bell."¹⁵⁰ Finally, the CAAF looked at the trial as a whole and measured the impact of the opinion testimony in the light of uncharged misconduct evidence that it declared had been improperly admitted.¹⁵¹

Diaz appears to lower the bar for the mistrial remedy in courts-martial. Trial counsel should be wary of introducing anything that looks like opinion testimony on the guilt or innocence of an accused because such testimony could ultimately result in a mistrial or reversal. If such testimony is introduced, the defense counsel should move for a mistrial, using the CAAF's approach in *Diaz* to convince the military judge that the evidence is improper in form and unduly prejudicial in context when combined with other evidence introduced at trial. *Diaz* puts military judges in a difficult position because after *Diaz* extensive limiting instructions may not be enough. If the witness offering the opinion is sufficiently credible and the other evidence in the case hotly contested, the CAAF has indicated a willingness to second-guess a military judge's efforts to salvage the trial. In the end, military judges may be more readily tempted to declare mistrials than risk reversals and rehearings.

Impeachment by contradiction is one of the five primary recognized modes of impeachment.¹⁵² An attorney can impeach a witness by showing either on cross-examination or through the use of extrinsic evidence that something the witness said was wrong.¹⁵³ *United States v. Hall*¹⁵⁴ presents an example in which the rules governing impeachment clash¹⁵⁵ with the general prohibition against the use of hearsay¹⁵⁶ at trial.

The appellant in *Hall* was convicted of cocaine use based on the results of a urinalysis test and the testimony of a forensic toxicology expert. She presented an innocent ingestion defense in which she claimed that she had ingested Trimate tea—made from de-cocainized coca leaves—that her mother had sent her to help with weight control. She also introduced testimony from an expert witness that de-cocainized teas can produce positive cocaine metabolites above the Department of Defense's nanogram cut-off level.¹⁵⁷

On rebuttal, the government called a U.S. Army Criminal Investigation Command (CID) agent to testify about an interview he had with the appellant's mother. The CID agent testified that the appellant's mother told him she had never given the appellant any herbal teas. The appellant's mother did not attend the trial because the government failed to perfect its subpoena by providing travel funds for her.¹⁵⁸ The government sought to introduce the statement under MRE 803(2),¹⁵⁹ the excited utterance exception to the hearsay rule.¹⁶⁰ The military judge refused to admit the statement for its truth as an excited utter-

148. *See id.*

149. *Id.* at 92.

150. *See id.* at 92-93.

151. *See id.* at 93-94.

152. *See* MUELLER & KIRKPATRICK, *supra* note 67, § 6.18, at 464-65. According to Mueller & Kirkpatrick, the five modes of impeachment are as follows: (1) showing the bias or motivation of a witness; (2) showing defects in the witness's mental or sensory capacity; (3) showing character for untruthfulness of a witness; (4) showing that the witness has made prior inconsistent statements; and (5) contradiction of the witness's testimony, either on cross-examination or by extrinsic evidence. *See id.*

153. *See id.* at 465.

154. 58 M.J. 90 (2003).

155. Neither the FRE nor the MRE specifically provide for impeachment by contradiction. *See* MUELLER & KIRKPATRICK, *supra* note 67, § 6.18, at 465. Impeachment by contradiction, however, is regulated by Rules 403 and 611. Rule 403 permits a judge to exclude evidence if it is prejudicial, misleading, confusing, or a waste of time. Rule 611 gives judges the discretion to control the examination of witnesses. *Id.*; *see* MCM, *supra* note 1, MIL. R. EVID. 403, 611.

156. *See* MCM, *supra* note 1, MIL. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial.").

157. *Hall*, 58 M.J. at 90-91.

158. *Id.*

159. MCM, *supra* note 1, MIL. R. EVID. 803(2). The excited utterance exception permits the introduction of "[a] statement relating to a startling event or declaration made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

ance, but he did admit it as a statement of impeachment by contradiction.¹⁶¹ The military judge instructed the members that they could not consider the statement for its truth, but only “for the limited purpose to determine what impeachment value it has only concerning the accused’s testimony that her mother sent her the tea.”¹⁶²

The CAAF reversed and set aside the findings and sentencing. The CAAF began its analysis by noting the constitutional underpinnings of the hearsay rule: admitting hearsay can deprive the party against whom it is offered the opportunity to test the evidence by cross-examination, a right that is “at the core of the confrontation clause.”¹⁶³ Because the appellant was deprived of the opportunity to cross-examine the declarant, it was a constitutional error to improperly admit the statement.¹⁶⁴ In holding that the statement of the appellant’s mother was hearsay, the CAAF took a practical approach. The manner in which the evidence was introduced made it virtually inevitable that the members would consider it for its truth.¹⁶⁵ The members could not have found contradiction of the appellant’s statement without considering the mother’s statement as a fact contrary to the appellant’s in-court testimony.¹⁶⁶ The judge’s limiting instruction “was impossible to apply and could only confound the error.”¹⁶⁷

The error was not harmless. Given the evidentiary backdrop of the case, the hearsay statement from the appellant’s mother went to the heart of the appellant’s innocent ingestion defense. Both the government and the defense expert had agreed that decaffeinated teas could produce positive urinalysis results. The appellant testified she had ingested tea obtained from her

mother. As the CAAF stated, “Short of repudiating her own testimony, it is difficult to imagine anything that could more decimate this defense.”¹⁶⁸ Thus, the CAAF found it impossible to determine beyond a reasonable doubt—the standard required for constitutional errors—that the improper admission of this hearsay statement did not contribute to the finding of guilt.¹⁶⁹

Hall provides a practical template for analyzing out-of-court statements. The “arid doctrinal logic”¹⁷⁰ that might permit the admission of a statement for non-hearsay purposes must be measured against the likely effect the statement will have on a fact-finder. Examined against the evidentiary backdrop of the case, even a carefully crafted limiting instruction may not be enough to overcome the impact of the out-of-court statement on the members. If a statement would inevitably be considered for its truth and does not fit within a hearsay exception, prudence would suggest that excluding the statement might be the better course.

Excited Utterance

The excited utterance exception to the hearsay rule, codified in MRE 803(2),¹⁷¹ “rests on the idea that spontaneous reaction is powerful enough to overcome reflective capacity.”¹⁷² Reactive statements are considered trustworthy for two primary reasons: (1) the stimulus of a startling event leaves the declarant momentarily incapable of fabrication; and (2) the declarant’s memory is fresh because the impression remains in her mind.¹⁷³ Time plays an important—albeit not dispositive—role in helping to determine whether a statement is an excited utterance. In

160. *Hall*, 58 M.J. at 92.

161. *Id.*

162. *Id.* The military judge’s ruling illustrates what Mueller & Kirkpatrick call the “arid doctrinal logic” that can occur when a court admits “otherwise excludable evidence as counterproof tending to contradict initial testimony.” MUELLER & KIRKPATRICK, *supra* note 67, § 6.45, at 537. They use the example of a defendant charged with auto theft who testifies on direct he has never committed a crime. Character evidence rules would not permit proof that he stole cars on four prior occasions, but the testimony would likely be admitted for its tendency to contradict his broad claim. The defendant would be entitled to a limiting instruction because doctrinally, the evidence could not be considered as proof of the defendant’s guilt. *See id.* at 537-38. “This doctrinal consequence does not often make a practical difference.” *Id.* at 538.

163. *Hall*, 58 M.J. at 93.

164. *See id.*

165. *Id.* at 94.

166. *Id.*

167. *Id.*

168. *Id.* at 95.

169. *Id.*

170. *See supra* note 162.

171. MCM, *supra* note 1, MIL. R. EVID. 803(2); *see supra* note 159.

172. MUELLER & KIRKPATRICK, *supra* note 67, § 8.36, at 807.

general, statements that occur immediately after or within a few minutes of a startling event will meet the exception.¹⁷⁴ Even when there has been a time lapse greater than a few minutes, the exception will apply if the proponent of the evidence can demonstrate that the declarant was still under the stress of the event when he made the statement.¹⁷⁵

The CAAF decided two excited utterance cases this term, *United States v. Feltham*¹⁷⁶ and *United States v. Donaldson*.¹⁷⁷ In each case, the CAAF demonstrated a willingness to stretch time, eschewing a strict temporal connection between event and statement and placing heavy reliance on the military judge's findings that the hearsay declarants were still under the stress of a startling event.

In *United States v. Feltham*, the victim, a male sailor, had too much to drink at a local bar. The appellant, also a male sailor, offered to let the victim sleep at his nearby apartment until morning, when the victim would be sober enough to drive home. The victim agreed, and after arriving at the appellant's apartment, went to sleep on the couch. During the night, the victim, in the middle of a sexual dream, woke up to discover that he was ejaculating into the appellant's mouth as the appellant performed fellatio on him.¹⁷⁸ The two men jumped away from each other. The victim demanded to know what was going on and told the appellant it "wasn't cool." The appellant agreed that it was "messed up," but then asked the victim if he had enjoyed it.¹⁷⁹ The appellant left the living room and went back to bed. Meanwhile, in a self-described state of shock, the victim sat in the living room for about five minutes, then got into his truck to drive home. He began to cry. He drove ten to fifteen minutes back to his barracks, still crying, and woke up his roommate to tell him what had happened, beginning at the bar and ending with the sodomy.¹⁸⁰

At trial, the victim's testimony was the lynchpin of the government's case. The defense attacked the victim's credibility. To bolster the victim's credibility, the government offered his statements to his roommate under the excited utterance and residual hearsay exceptions to the hearsay rule. The military judge admitted the statements as excited utterances, specifically finding that no more than one hour had passed, and the victim was still under the stress of the startling event of waking up to discover the appellant performing oral sodomy on him.¹⁸¹

On appeal, the CAAF affirmed the admission of the evidence, holding that the military judge did not abuse his discretion in admitting the statements under the excited utterance exception.¹⁸² The CAAF's analysis focused on the heart of the excited utterance exception—that such statements are reliable because a person who is still under the stress of a startling event or condition will speak truthfully because there is no opportunity for fabrication.¹⁸³ The CAAF examined the statements under the three-pronged test first articulated by the COMA in *United States v. Arnold*:¹⁸⁴ (1) the statement must be spontaneous, excited, or impulsive rather than the product of reflection or deliberation; (2) the event prompting the utterance must be startling; and (3) the declarant must be under the stress of excitement caused by the event.¹⁸⁵

In the instant case, the CAAF relied almost exclusively on the military judge's findings of fact in applying the *Arnold* test. The military judge found that the statements met the first *Arnold* prong because they were "spontaneous, unrehearsed, and not given in response to any interrogation . . . [while the victim was] in a state of shock and was not thinking clearly."¹⁸⁶ There was little doubt that the event was startling, thus meeting the second prong of the *Arnold* test.¹⁸⁷

173. *See id.*

174. *Cf. id.* at 810-11 (discussing the differences between the present sense impression exception, which requires immediacy, and the excited utterance exception, which does not).

175. *See id.* at 811 (giving several examples of utterances following a lapse of time).

176. 58 M.J. 470 (2003).

177. 58 M.J. 477 (2003).

178. *Feltham*, 58 M.J. at 471-72.

179. *Id.* at 472.

180. *Id.*

181. *Id.* at 473.

182. *Id.* at 475.

183. *See id.* at 474.

184. 25 M.J. 129 (C.M.A. 1987).

185. *Feltham*, 58 M.J. at 474.

The third *Arnold* factor—that the declarant must be under the stress of excitement caused by the event—occupied most of the CAAF’s analysis. As with the other *Arnold* factors, the military judge had made a specific finding that the victim was, in fact, under the stress of the event. The CAAF noted that elapsed time between the event and the statement is one factor to consider in determining whether the statement is an excited utterance, and the CAAF cited several examples involving rather lengthy passages of time between the event and utterance. The CAAF acknowledged that a lapse of time between the event and the utterance creates a strong presumption against admissibility, citing *United States v. Jones*.¹⁸⁸ In *Jones*, the COMA rejected a statement made twelve hours after the event, in response to a question, and after the declarant had missed an opportunity to comment on the event.¹⁸⁹ Conversely, in *Feltham*, less than one hour had elapsed between the event and the statement, the victim made the statements at his first opportunity, and the statements were not made in response to interrogation.¹⁹⁰ The CAAF concluded its analysis with two observations. First, the critical determination of the excited utterance exception is whether the declarant was under the stress of the startling event, not the lapse of time. Second (and perhaps of greater significance in this case), the military judge made a specific finding in this case that the declarant was under the stress of the event.¹⁹¹

In *United States v. Donaldson*,¹⁹² the appellant committed indecent acts with the victim, a three-year-girl, early one morning and threatened to kill her family if she told anyone. The victim and her mother spent the day shopping and in the company of either the mother’s adult friends or the victim’s brother. Throughout the day, the victim behaved in an uncharacteristically quiet, withdrawn way and would not let her mother out of her sight. That evening, nearly twelve hours after the incident with the accused, the mother gave the victim a bath. This was the first time all day the mother and victim were alone together. The victim became hysterical. The mother noticed irritation in

the victim’s vaginal area, and when the mother asked what was the matter, the victim told her, “Him touched me,” then explained that “him” was the appellant. In response to a question, the victim also told her mother that the appellant had threatened to kill her family if she told anyone.¹⁹³ The military judge denied a pre-trial defense motion in limine and admitted the statements as excited utterances under MRE 803(2), or in the alternative, as residual hearsay under MRE 807.¹⁹⁴

The CAAF affirmed, holding that the military judge did not abuse his discretion in admitting the statements to the mother as excited utterances. The CAAF applied the three-prong *Arnold/Feltham* test in evaluating the evidence. There was little doubt that sexual abuse accompanied by the threat of harm constituted a startling event. Thus, the statements met the first prong of the test. The appellant argued that the statements could not meet the second and third prongs of the test because they were not spontaneous statements made under the stress or excitement of a startling event. The appellant focused on the lapse of nearly twelve hours from the startling event to the statement, arguing that the victim had time to calm down and reflect on the event. Therefore, any later excitement was the result of trauma on reflection and not an excited utterance. The appellant also argued that because the victim spent the entire day with her mother, she had ample opportunity to report the incident earlier.¹⁹⁵

In rejecting the appellant’s argument, the CAAF noted that it is an unsettled legal question whether statements made after one has actually calmed down can be excited utterances.¹⁹⁶ The CAAF declined to address that issue in this case, however, because it was convinced that there was sufficient evidence for the military judge to conclude that the victim was under the stress of excitement caused by the event when she made the statements to her mother.¹⁹⁷ Although a lapse of time between the startling event and the statement creates a strong presumption against admissibility, courts tend to be more flexible in

186. *Id.* at 475.

187. *Id.*

188. 30 M.J. 127, 128 (C.M.A. 1990).

189. *See Feltham*, 58 M.J. at 475 (construing the facts of *Jones*).

190. *Id.* at 475.

191. *Id.*

192. 58 M.J. 477 (2003).

193. *Id.* at 479-80.

194. *Id.*

195. *Id.* at 483.

196. *See id.*

197. *Id.*

cases in which the statement was made during the child's "first opportunity alone with a trusted adult."¹⁹⁸ Furthermore, the CAAF examined the evidence supporting the judge's finding. The declarant was three-years old. She was able to demonstrate where the appellant touched her. Her behavior throughout the day had been abnormal, and she became hysterical when her mother attempted to wash her vaginal area. The lapse in time was rendered less significant because the appellant had threatened to kill the victim and her family. Therefore, it was not clearly erroneous for the judge to find that the victim was still under the stress of a startling event.¹⁹⁹

Both *Feltham* and *Donaldson* illustrate the importance of developing the record in the admission of hearsay statements. The party seeking admission of statements under the excited utterance exception should follow the example of government counsel in *Feltham*, who managed to overcome nearly an hour's lapse in time by focusing on the state of the declarant's mind. During cross-examination, the party seeking to exclude the statements will need to focus not on the lapse of time, but on the opportunities such a lapse provides for reflection and deliberation. In *Feltham*, the victim had five minutes alone in the appellant's apartment, followed by a walk to his vehicle, a fifteen-minute drive to his barracks, and a walk from the vehicle to the barracks. Each of these time segments potentially provided an opportunity to reflect on the event. In child cases in which there is a substantial delay between the startling event and the statement, *Donaldson* teaches counsel to focus on what the child did during the intervening time. The child's behavior, opportunities to talk alone to a trusted adult, and the child's demeanor when making the statement are all significant factors to develop on the record. Finally, *Feltham* and *Donaldson* show that the CAAF grants substantial deference to the findings of the military judge in these matters. To avoid reversal, military judges should ensure that the evidence in the record supports their findings, and they should follow the *Arnold/Feltham* template in drafting the findings.

Then Existing Mental, Emotional, or Physical Condition

In *United States v. Holt*,²⁰⁰ the appellant pled guilty to fifty-eight specifications of dishonorable failure to maintain sufficient funds for the payment of checks, and a court of officer members sentenced him to a bad-conduct discharge, one year confinement, total forfeitures, and reduction to E1. During the pre-sentencing case, the trial counsel entered eighteen exhibits into evidence. Exhibits seventeen to thirty-two and thirty-four were copies of cancelled checks with markings on their backs, debt collection documents, a pawn ticket, and bad check notification documents. The markings on the checks and the other documents were all written by third parties and not by the appellant. The military judge admitted the exhibits into evidence as non-hearsay evidence in aggravation to show the complete set of circumstances surrounding the offenses, the accused's state of mind when the offenses were committed, and impact on the victims. The judge specifically instructed the members that they could not consider the exhibits for the truthfulness of the matters asserted therein.²⁰¹

On appeal to the AFCCA, the appellant argued that the exhibits had been improperly admitted into evidence for a number of reasons ranging from improper authentication to the fact that the rules of evidence had not been relaxed at sentencing to hearsay.²⁰² The AFCCA ruled that exhibits eighteen to thirty-four were admissible for the truth of the matters asserted under MRE 803(3)²⁰³ as evidence of the appellant's state of mind.²⁰⁴

The CAAF set aside the decision of the AFCCA. The government conceded on appeal to the CAAF that MRE 803(3) did not properly apply to the exhibits because the markings and documents were created by third parties, not the appellant. The CAAF held that documents and markings created by third parties could not be used to reflect the appellant's state of mind.²⁰⁵ Relevant state of mind can be proven by "the person's own, out-of-court, uncross-examined, concurrent statements as to its existence."²⁰⁶ The CAAF also held that the AFCCA exceeded the proper bounds of review under UCMJ, Article 66²⁰⁷ when it

198. *Id.* at 484.

199. *Id.*

200. 58 M.J. 227 (2003).

201. *Id.* at 229.

202. *See id.* at 230.

203. MCM, *supra* note 1, MIL. R. EVID. 803(3). The rule reads as follows:

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

Id.

204. *Holt*, 58 M.J. at 230.

205. *Id.* at 232.

changed the evidentiary nature of the exhibits on appeal from non-hearsay to hearsay. The military judge, not the intermediate appellate court, defines the evidentiary nature of exhibits entered at trial.²⁰⁸

Holt teaches subtle lessons on the uses of state-of-mind evidence. The military judge admitted the exhibits as circumstantial evidence that could help show the full facts and circumstances of the crimes, the impact on the victims, and the appellant's own state of mind. He did not, however, permit the panel to consider the contents of the documents for the truth of the matters asserted therein. Arriving at the appellant's state of mind would require the panel to draw a series of inferences from the evidence: the appellant wrote bad checks and received letters from creditors and notices from the bank; nevertheless, he continued to write bad checks, which led to more letters and notices from the bank; therefore, the panel could infer that he viewed the matter of maintaining sufficient funds in his bank accounts with some indifference. The AFCCA's approach, which converted the exhibits into documents admissible for the truth of the matters asserted, changed the logical chain: the appellant wrote bad checks and received letters from creditors and notices from the bank; the information in the letters and notices was all true; the information directly proved that the appellant had an indifferent state of mind. Missing from the AFCCA's approach, however, was any evidence *directly from the appellant* attesting to his state of mind. Circumstantial evidence may help to prove someone's state of mind through an inferential chain, but unless a statement comes directly from the individual himself, it will not meet the requirements of MRE 803(3).

Holt also teaches how critical it is to establish the evidentiary nature of an exhibit at the trial level. In this case, the military judge admitted the evidence as non-hearsay. No court could thereafter change the evidentiary nature of the exhibits. Counsel should be aware of the final nature of these rulings as they affect appellate review under UCMJ Article 66(c) and should press for definitive rulings under the new change to MRE 103(2).²⁰⁹ Counsel and military judges may also want to consider admitting evidence under alternative theories when it would not be clearly ridiculous to do so. For instance, it would strain credulity to admit evidence both as hearsay and as non-hearsay, but admitting under alternative hearsay exceptions might be a good approach in close cases.

Medical Hearsay Exception

In *United States v. Donaldson*,²¹⁰ the three-year-old victim of a sexual assault made a series of statements about the offense to her mother, a police investigator, and a child psychologist.²¹¹ The victim met with the child psychologist a total of thirteen times over a two-year period, during which she told the psychologist that the appellant had touched her vaginal area and had threatened to kill her and her family.²¹² The military judge admitted these statements to the psychologist as medical hearsay under MRE 803(4),²¹³ and alternatively as residual hearsay under MRE 807, making specific findings that the victim made the statements for the purpose of medical diagnosis with some expectation of receiving a medical benefit.²¹⁴

On appeal, the CAAF affirmed the admission of the statements to the psychologist as medical hearsay. The CAAF noted that MRE 803(4) is not limited to statements made to licensed

206. *Id.* (quoting *Rayborn v. Hayton*, 208 P.2d 133, 136 (1949) (citations omitted)).

207. UCMJ art. 66(c) (2002). In relevant part, Article 66 provides for review by the service courts of criminal appeals as follows:

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weight the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Id.

208. *See Holt*, 58 M.J. at 232-33.

209. On 1 December 2000, an amendment to FRE 103(2) became effective in the federal courts. By operation of law under MRE 1102, the change became effective in the military system eighteen months later on 1 May 2002. It has not yet been published in the *MCM*. The amendment follows:

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence as made known to the court by offer or was apparent from the context within which the questions were asked. *Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.*

See generally *MCM*, *supra* note 1, MIL. R. EVID. 103(2) (emphasis added).

210. 58 M.J. 477 (2003).

211. For a more thorough discussion of the facts, see *supra* notes 192-94 and accompanying text.

212. *Donaldson*, 58 M.J. at 481.

physicians. The exception also contemplates statements made to other health care professionals, including psychologists and social workers.²¹⁵ There are two key requirements for statements to be admissible under MRE 803(4): (1) they must be made for the purpose of medical diagnosis or treatment; and (2) (and most critically), the patient must make the statement with some expectation of receiving a medical benefit.²¹⁶ Because small children are not always able to articulate their expectation of treatment, it can be important for caregivers to explain the importance of the treatment in terms the child can understand.²¹⁷

The CAAF then examined the evidence in *Donaldson* that would support a finding that the child victim had a subjective expectation of treatment. The CAAF first looked at the child's visits with the psychologist and concluded that the visits alone would not have created an expectation of medical treatment. The office was located in a shopping center, the psychologist did not wear a doctor's coat, the psychologist conducted no physical examinations or other tests, and the visits often consisted of the victim and psychologist playing or drawing together.²¹⁸ In addition, the CAAF found the testimony of the doctor somewhat contradictory. She testified on direct that she told the victim she was a doctor, but she admitted on cross that she was not exactly sure what she told the victim, or whether the victim understood she was a doctor or the purpose of the

victim's visits.²¹⁹ The CAAF then turned its attention to the victim's mother, who testified that she told the victim she was taking her to a doctor who would help her get better and help with the nightmares. The mother also said the victim appeared to understand the purpose of the visits.²²⁰ Finally, the CAAF looked at the testimony of the victim and found that it was not conclusive. The victim was only able to nod "yes" to a leading question from the trial counsel on direct, and it was unclear from the victim's testimony that she expected a medical benefit at the time she began her treatment.²²¹

Nevertheless, the CAAF found the evidence met the requirements of MRE 803(4). The key to this determination was the findings of the military judge. The CAAF found that this was a close case, but there was enough testimony supporting the judge's finding of a subjective expectation of treatment that the CAAF was reluctant to hold the military judge committed clear error in reaching it.²²² The CAAF ended the opinion by contrasting the facts of *Donaldson* with those of *United States v. Faciane*²²³ and *United States v. Siroky*,²²⁴ in which the COMA and the CAAF respectively held that the young child victims did not have subjective expectations of medical benefit.²²⁵ There was insufficient evidence in *Faciane* and *Siroky* to conclude that the victims knew they were receiving treatment.²²⁶ In contrast, the victim in *Donaldson* at least appeared to know she was visiting a doctor in order to "feel better."²²⁷

213. MCM, *supra* note 1, MIL. R. EVID. 803(4). Military Rule of Evidence 803(4) is the medical hearsay exception:

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

Id.

214. *Donaldson*, 58 M.J. at 481.

215. *Id.* at 485.

216. *See id.*

217. *Id.*

218. *See id.*

219. *See id.* at 485-86.

220. *Id.*

221. *Id.*

222. *See id.*

223. 40 M.J. 399 (C.M.A. 1994).

224. 44 M.J. 394 (1996).

225. *Donaldson*, 58 M.J. at 486-87.

226. *See generally id.* (discussing the particular facts of each case and focusing on the inability of doctors and caregivers to remember exactly what they had told the child victims).

227. *Id.* at 487.

Donaldson demonstrates that a strong set of findings by the military judge can tip the scales of admissibility in a close case. Trial counsel seeking to introduce the testimony of young children under MRE 803(4) must develop the record by including testimony from the caregivers and doctors concerning what they told the child about the purpose of the treatment. Defense counsel can attack admissibility based on the circumstances surrounding the treatment and can exploit the inability of medical professionals to remember exactly what they told a child victim about treatment. In the end, however, the CAAF has signaled that the military judge's findings will often carry the day.

Residual Hearsay

Military Rule of Evidence 807, the military's residual hearsay exception, permits the admissibility of hearsay statements that are "not specifically covered by Rule 803 or 804 but [that have] equivalent circumstantial guarantees of trustworthiness."²²⁸ The CAAF decided three residual hearsay cases this year, *United States v. Donaldson*,²²⁹ *United States v. Holt*,²³⁰ and *United States v. Wellington*,²³¹ each of which addresses a different aspect of the proper use of residual hearsay evidence at trial.

In *United States v. Donaldson*, the CAAF took a close look at the circumstances surrounding the declarant's statement. After the victim in *Donaldson* informed her mother that the appellant assaulted her, the mother called the police to report the incident. The appellant's girlfriend also arrived at the house, and the victim's mother began arguing with her about the appellant inappropriately touching the victim. Eventually, a trained child abuse investigation specialist from the Fayetteville Police Department arrived and took the victim into the bedroom for a private interview.

During the interview, the victim told the investigator that the appellant had hurt her. The investigator asked how he hurt her, and the victim pointed to her vaginal area and said, "He touched me there." When the investigator followed up by asking whether the appellant had touched the victim on the inside or the outside of her vagina, the victim lay back on the bed, pulled her panties aside, and "stuck her finger . . . real close in her vaginal area." The investigator testified that she had never seen another child abuse victim respond in such a manner.²³²

The military judge admitted this evidence under the excited utterance²³³ and residual hearsay exceptions to the hearsay rule. The ACCA found that the statements to the investigator were not excited utterances because the victim made them in a calm, matter-of-fact manner, indicating that they were the product of recall and reflection. The ACCA, however, did affirm admission of the statements under the residual hearsay exception.²³⁴

The CAAF affirmed, holding that the circumstances surrounding the victim's statement to the investigator provided sufficient circumstantial guarantees of trustworthiness as the enumerated hearsay exceptions. According to the opinion, there are four primary indicia of reliability the CAAF considers: (1) the mental state of the declarant; (2) the spontaneity of the statement; (3) the use of suggestive questioning; and (4) whether the statement can be corroborated.²³⁵ Other indicators include the declarant's age and the circumstances under which the statement was made.²³⁶

The CAAF examined the evidence surrounding the victim's statement to the investigator but did not carefully follow its own analytical template listed above. Instead, the court considered the following factors in favor of admission: the spontaneity of the victim's non-verbal conduct of pulling aside her

228. MCM, *supra* note 1, MIL. R. EVID. 807. In full, MRE 807 states as follows:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Id.

229. 58 M.J. 477 (2003).

230. 58 M.J. 227 (2003).

231. 58 M.J. 420 (2003).

232. *Donaldson*, 58 M.J. at 480.

233. MCM, *supra* note 1, MIL. R. EVID. 803(2).

234. *Donaldson*, 58 M.J. at 482.

235. *Id.* at 488.

236. *Id.*

panties and pointing to her vagina, the degree of specificity in the statements, and the statements the victim made to others that corroborated the story she told to the investigation specialist.²³⁷ Factors mitigating against admission were that the statement was solicited by a police investigator in private, and that it followed several emotionally charged conversations that the victim overheard between her mother and others. Those conversations could have colored the victim's recollection of events.²³⁸ The two factors that seemed most important to the CAAF were the victim's act of pulling aside her panties in response to a question and the hearsay statements she made to her mother and the doctor that corroborated her story to the investigator.²³⁹ Granting great deference to the military judge's findings, the CAAF held that the military judge did not abuse his "considerable discretion" in admitting the statements to the investigator as residual hearsay.²⁴⁰

Practitioners should use *Donaldson* as authority to press for the admission of hearsay evidence under alternative theories, under both an enumerated hearsay exception and the residual hearsay exception. In addition, *Donaldson* provides authority for practitioners to use other hearsay statements of the declarant as corroboration. So long as the declarant has told the same story to others under circumstances that meet one of the enumerated hearsay exceptions, those statements can be used in corroboration. Military judges may want to follow the lead of the trial judge in *Donaldson*, who admitted the evidence under an enumerated exception and the residual hearsay exception, thereby freeing the appellate courts to select the exception they deemed most applicable to the facts at bar.

In *United States v. Holt*,²⁴¹ the government offered a letter from one of the victims on sentencing to show victim impact and the full circumstances of the offenses. The military judge admitted the letter into evidence as non-hearsay and specifically instructed the members they could not consider it for the truth of the matters asserted therein.²⁴² On appeal, the AFCCA

held that the letter was admissible for the truth of the statements therein under MRE 807 because it was "more probative on the issue of victim impact than any other evidence offered by the government."²⁴³

The CAAF disagreed. As previously discussed, the CAAF held that the AFCCA exceeded the bounds of permissible review under UCMJ, Article 66(c) when it changed the evidentiary nature of the exhibit on appeal.²⁴⁴ But the CAAF found additional problems with the AFCCA's approach. First, the AFCCA subtly shifted the requirement of MRE 807 that the evidence be "more probative on the point for which offered than other evidence which the proponent can *procure* through reasonable efforts"²⁴⁵ to a standard much more generous to the government: "more probative on the issue . . . than any other evidence *offered* by the government."²⁴⁶ There was nothing to indicate in the record whether the government could have procured the attendance of the victim who wrote the letter at trial, and the CAAF held that the AFCCA "misapplied this foundational requirement of MRE 807, looking at the evidence that was produced rather than at evidence that could have been produced"²⁴⁷ Second, by *sua sponte* converting the exhibit into MRE 807 residual hearsay evidence, the AFCCA violated the notice provisions of MRE 807, which requires a proponent to give sufficient advance notice for the adverse party to prepare.²⁴⁸

Counsel can benefit from *Holt's* residuary hearsay opinion in two primary ways. First, the CAAF has emphasized that the procedural notice requirements of the rule are not merely window dressing. If counsel intend to use the residual hearsay exception, either as the primary or alternate theory of admissibility, they should comply with notice requirements. Conversely, defense counsel should remain alert for efforts to apply the residual hearsay exception to evidence without proper notice and should lodge objections if either trial counsel or military judges attempt to characterize evidence as residual hear-

237. *See id.*

238. *See id.* at 488-89.

239. *Id.* at 489.

240. *See id.*

241. 58 M.J. 227 (2003). For a more thorough discussion of the facts, see *supra* notes 200-08 and accompanying text.

242. *Id.* at 229.

243. *Id.* at 230.

244. *See supra* notes 207-08 and accompanying text.

245. *See* MCM, *supra* note 1, MIL. R. EVID. 807.

246. *Holt*, 58 M.J. at 230 (emphasis added).

247. *Id.* at 231.

248. *Id.*

say without first giving the proper notice. Second, the CAAF's opinion reinforces the plain language of the rule. The decisive factor isn't what evidence the proponent actually produces at trial, but rather what evidence could reasonably be procured for trial. Counsel should develop the record to demonstrate why residual hearsay evidence is being offered in lieu of live testimony or some other type of evidence.

In *United States v. Wellington*, the appellant was convicted of indecent assault, attempted rape, and attempted forcible sodomy of his stepdaughter.²⁴⁹ The allegations against him first surfaced during his stepdaughter's hospitalization from a leukemia relapse in 1999. Her physicians believed there was no hope for her recovery. On the night of 17-18 March 1999, the victim began experiencing excruciating abdominal pain and was also suffering from an extremely high fever. Her doctor was summoned to the hospital, and in response to her questions, he told her she was dying. She requested to see her family. In the early morning hours of 18 March, the victim confessed to her mother that she and an aunt had molested the victim's brother. She then told her mother that the appellant had kissed her, touched her breasts, and rubbed his private parts against hers. She also said that the appellant had climbed into her hospital bed with her and "rubbed on her." She said she had not previously told her mother about these incidents for fear her mother would no longer love her.²⁵⁰

Over the next ten days, the victim made several additional statements. Late in the day on 18 March, a state official conducted a videotaped interview of her. A CID agent, the victim's mother, and a doctor were also in attendance. The victim told them that the appellant had begun touching her shortly after her sixteenth birthday. During the family's move to a temporary guest house, the appellant climbed in bed with her and French-kissed her while she pretended to be asleep. An hour or so later, he began rubbing her breasts and touching her vagina and buttocks. When the family moved back to their home, he came to her room at night, sucked her breasts, pulled off her underwear, and attempted to penetrate her. He also removed her underwear and rubbed his penis against her buttocks. The final incident she related in this interview was the appellant's attempt to have sexual intercourse with her one night while her mother was in the hospital having a baby. At this point, the victim began crying uncontrollably and terminated the interview.²⁵¹

249. 58 M.J. 420, 421 (2003).

250. *See id.* at 421-22.

251. *See id.* at 422.

252. *Id.*

253. *Id.* at 422-23.

254. *See id.* at 423.

255. *Id.* at 421.

256. *Id.* at 424.

The next day, a doctor conducted a gynecological interview of the victim in an attempt to determine the source of her multiple infections. The doctor explained to her that the exam was necessary to determine if she had an infection that hadn't been treated. After this explanation, the victim told the doctor that after "he" was done, she would go to the bathroom to get the "yuckie stuff" out, there would be blood on the tissue when she wiped, and she would experience urinary pain. The doctor described her as mentally alert and involved when she made this statement.²⁵²

The final statement occurred on 26 March. Like the interview on the afternoon of the 18th, it was videotaped. This time, two doctors and a CID agent accompanied the state official. During this interview, the victim said that at least one of the incidents had occurred while she was in the hospital. The appellant, who had agreed to watch her overnight, climbed into bed with her and rubbed her vagina, buttocks, and breasts. She also said that the appellant had attempted vaginal intercourse with her, but she told him to stop because it hurt. On another occasion, she was lying on her stomach when the appellant tried to commit anal intercourse with her; she described trying to move away and said, "it would—it—the penis would go in, or something . . ."²⁵³ Like the earlier videotaped interview, this one ended with the victim in tears.²⁵⁴

The victim did not die during this hospitalization. She was, in fact, available to testify at the appellant's trial, although she passed away some four months later.²⁵⁵ At trial, she testified that the appellant had French-kissed her, rubbed her breasts and legs, rubbed his finger on her vagina, and rubbed his penis between her legs near her vagina—conduct she characterized as "fooling around." She testified that she had no recollection of saying that the appellant had ever touched her buttocks with his penis, and she said she remembered nothing that happened in the hospital because of her medication.²⁵⁶

The prosecution offered the two videotaped statements and the statements to the mother and doctor under the residual hearsay exception. The defense argued that the statements were unreliable because the victim was heavily medicated, hallucinating, running a high fever, and in and out of consciousness.²⁵⁷ Nevertheless, the military judge admitted the statements as residual hearsay.

The CAAF affirmed the admission of the evidence, applying a practical approach to the evidence. The CAAF first noted that there is a two-prong test for admitting residual hearsay: (1) the evidence must be highly reliable, and (2) the evidence must be necessary. When the declarant testifies (thereby satisfying the Sixth Amendment Confrontation Clause),²⁵⁸ reliability can be established by the circumstances immediately surrounding the declaration and by external corroborating evidence.²⁵⁹ The CAAF characterized the necessity prong as, in essence, a “best evidence” requirement, which can be satisfied when a witness cannot remember or refuses to testify and there is no other more probative evidence of the fact.²⁶⁰

The CAAF then examined each of the four statements to determine reliability. Each of the statements demonstrated characteristics similar to those required for enumerated hearsay exceptions, a factor that played a major role in both the trial judge’s and the CAAF’s analysis. The victim’s statement to her mother on 18 March, shortly after a physician had informed her she would die, was similar to a dying declaration under MRE 804(b)(2).²⁶¹ The statement was made to someone she loved in a private, non-coercive setting, and the statement contained a confession of wrong-doing on the victim’s part similar to a statement against interest under MRE 804(b)(3).²⁶² The two videotaped statements were also similar to dying declarations because they were given at a time when the victim believed her death was imminent. In addition, the military judge was able to watch the videotape to observe the victim’s demeanor, evaluate

the questioning techniques and the victim’s clarity of thought, and observe the physical surroundings.²⁶³ The statement to the doctor during the gynecological examination was spontaneous, made immediately after the doctor told the victim she was looking for sources of infection, and similar to a statement made for medical diagnosis or treatment under MRE 803(4).²⁶⁴

The military judge also considered a number of other factors for reliability, upon which the CAAF favorably commented: (1) the proximity of the statements in time to the described events; (2) internal consistency of the statements; (3) consistency of the statements with each other; (4) the victim’s apparent intelligence and use of age-appropriate terminology; (5) the victim’s lack of bias or motivation to lie; and (6) the absence of any evidence of efforts to cause her to fabricate, lie, or embellish.²⁶⁵ The CAAF noted that the military judge had heard testimony from witnesses who saw the victim give the statements and had been able to view videotapes to independently evaluate her mental condition. Based on all these factors, the CAAF concluded that the military judge did not abuse his discretion in determining that the statements met the reliability prong of MRE 807.²⁶⁶

The CAAF then turned its attention to the necessity prong. The victim’s testimony at trial corroborated the appellant’s confession to various indecent acts,²⁶⁷ but she could not remember either the sexual abuse in the hospital or the statements she made at the hospital concerning various acts of abuse. Her

257. *Id.*

258. The Confrontation Clause states, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

259. *Wellington*, 58 M.J. at 425.

260. *Id.*

261. MCM, *supra* note 1, MIL. R. EVID. 804(b)(2). Military Rule of Evidence 804(b)(2) states:

(2) *Statement under belief of impending death.* In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant’s impending death.

Id.

262. *See Wellington*, 58 M.J. at 426. Military Rule of Evidence 804(b)(3) contains the following hearsay exception for statements against interest:

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true.

MCM, *supra* note 1, MIL. R. EVID. 804(b)(3).

263. *See Wellington*, 58 M.J. at 426.

264. *Id.* For the text of MRE 803(4), see *supra* note 211.

265. *Wellington*, 58 M.J. at 426.

266. *Id.*

267. Although the appellant did confess to some acts, he was convicted at trial contrary to his pleas. *See id.* at 421, 427.

statements were the only evidence that supported the charges of rape and forcible sodomy and the only evidence corroborating the appellant's confession to committing indecent acts.²⁶⁸ Accordingly, the evidence met the necessity prong, and the military judge did not abuse his discretion in admitting it.²⁶⁹

Although it is doubtful many practitioners will face fact patterns similar to those of *Wellington*, the case is nevertheless a rich vein of residual hearsay information. Counsel should carefully research the enumerated hearsay exceptions to learn why they are presumptively reliable. When evidence is somewhat similar to an enumerated hearsay exception, counsel should consider using *Wellington* to argue that the similarities help support a finding of reliability. For example, the victim's statements to her mother and the videotaped statements in *Wellington* did not strictly qualify as dying declarations because they had nothing to do with the cause of the victim's death. Society, however, traditionally accepts the idea that persons on their deathbeds have little reason to deceive anyone; this belief is at the heart of the dying declaration.²⁷⁰ Counsel who can persuasively argue by analogy to enumerated hearsay exceptions may be able to use the residual hearsay exception to bring valuable and necessary evidence into the courtroom.

Authentication

In *United States v. Schnable*,²⁷¹ the appellant committed indecent acts with his adopted, mildly retarded thirteen-year-old daughter in the cab of his pickup truck parked on the side of a two-lane country highway.²⁷² The appellant's defense counsel had prepared a videotape that purported to show the route the appellant and victim had taken on the day of the incident. The appellant wanted the members to see the videotape to support his theory that he would not have chosen the side of a busy highway as the place to molest a child.²⁷³

The appellant chose not to testify at trial. Instead, civilian defense counsel attempted to introduce the videotape on his own representation that this was the route appellant told him he had driven. The military judge excluded the videotape on the grounds that the appellant had failed to lay a proper foundation

to authenticate the contents of the videotape under MRE 901(a).²⁷⁴

On appeal to the NMCCA, the appellant argued that the military judge erred in excluding the videotape and claimed that he should not have to take the stand in order to have the evidence admitted. The NMCCA, however, affirmed, holding that the military judge committed no error in excluding the videotape, but rather demonstrated a sound understanding of the rules of evidence. A videotape is considered a photograph under the MREs. In order to admit the videotape into evidence, the appellant would have to call a witness who could testify that the contents of the videotape depicted a particular scene. Only two people could do that—the appellant and the victim—and the victim proved unable to testify about specific routes or locations. By exercising his right not to testify, the appellant failed to lay a proper foundation for the evidence.²⁷⁵

Schnable is a good reminder to counsel about the importance of doing their homework on evidentiary foundations before trial. If a videotape, photograph, or other exhibit is important enough to introduce at trial, the proper foundational elements must be met. In some cases, defense counsel will have to present their clients with the difficult choice the appellant in *Schnable* hoped to avoid—testify, or do without the evidence.

Conclusion

If there is one over-arching lesson from this year's crop of military appellate court opinions, it is this: develop the record. The courts dealt with several close cases this year involving evidentiary issues that could have gone either way, and in nearly every case, the courts refused to disturb the military judge's findings. Counsel must be prepared to call the right witnesses and ask the right questions in order ensure that the military judge has the right information to make detailed findings of fact. This year's appellate cases provide a rich storehouse of evidentiary wisdom from which counsel can draw in preparing for the challenging fact patterns and legal issues that arise in courts-martial.

268. *Id.* at 426-27.

269. *Id.*

270. *Cf.* MUELLER & KIRKPATRICK, *supra* note 67, § 8.71, at 926 (citing Shakespeare for the proposition that death removes the temptation to falsehood but also noting instances when the dying have persisted in their viciousness).

271. 58 M.J. 643 (N-M. Ct. Crim. App. 2003).

272. For a more thorough discussion of the facts, *see supra* notes 116-18 and accompanying text.

273. *Id.*

274. *Id.* at 652. Military Rule of Evidence 901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MCM, *supra* note 1, MIL. R. EVID. 901(a).

275. *Schnable*, 48 M.J. at 653.