Uncharged Misconduct: The Edge is Never Dull

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Introduction

The Court of Appeals for the Armed Forces (CAAF), during the last few terms, has taken the opportunity to closely scrutinize the admission of evidence under Military Rule of Evidence (MRE) 404(b).[1] Traditionally the darling of every trial counsel, MRE 404(b) provides for the admission of evidence of other crimes, wrongs, or acts (uncharged acts) as long as the evidence is admitted for some purpose other than to prove propensity.[2] Until recently, it seemed that counsel were able to take advantage of MRE 404(b) by simply performing a talismanic chant involving any one of the noncharacter purposes provided under the rule.[3] The CAAF's crackdown on the admission of uncharged misconduct at courts-martial coincides with the opening of the propensity flood gates in cases involving sexual assault and child molestation under MRE 413 and 414.[4] This article discusses five cases of significance from the 2006 term. Three of the cases deal with the admission of uncharged misconduct under MRE 404(b), and the other two discuss the ongoing expansion and clarification of MRE 413 and 414.

Uncharged Misconduct and the *Reynolds* Three-Prong-Test

Military Rule of Evidence 404(b) begins by stating "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[5] The prohibition is a reflection of common sense. Propensity evidence is not excluded because it lacks relevance, but because it is too relevant in the minds of panel members.[6] In everyday associations, we judge others based upon their actions. Past actions of a person are generally considered to be a good indicator of their future conduct. This common sense approach to judging the character of a person does not change for a panel member just because they are now part of a court-martial. However, a person does not always act in conformity with their past actions. As such, admission of this evidence in a court-martial may lead to a wrong outcome. Additionally, this type of propensity evidence almost always caries a risk of unfair prejudice since the panel member may give undue weight to it. Military Rule of Evidence 404(b) seeks to avoid these dangers, especially on behalf of an accused,[7] by repeating the propensity prohibition of MRE 404(a).[8]

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (2005) [hereinafter MCM].

[2] *Id*. Military Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Id.

[3] *See* United States v. Diaz, 59 M.J. 79 (2003) (holding the military judge abused his discretion in admitting evidence of several other injuries the appellant had allegedly inflicted on his daughter to establish a "pattern of abuse" that would help establish that the death of his daughter was a homicide and appellant was the perpetrator); United States v. McDonald, 59 M.J. 426, 429-30 (2004) (holding that a military judge abused his discretion in admitting twenty-year-old acts of uncharged misconduct committed when the appellant was thirteen years old to establish a common plan to commit charged acts of sexual misconduct against the appellant's daughter); United States v. Rhodes, 61 M.J. 445, 453 (2005) (holding the military judge abused his discretion in admitting evidence of a meeting between a key government witness and the appellant to show the appellant's consciousness of guilt); United States v. Bresnahan, 62 M.J. 137 (2005) (military judge abused his discretion by admitting uncharged misconduct evidence).

[4] MCM, *supra* note 1, MIL. R. EVID. 413, 414.

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

[6] *Id.* Military Rule of Evidence 404(b) determinations are amongst the most frequently appealed of all evidentiary rulings, and erroneous admission of other acts evidence is one of the largest causes of reversal. *See* IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:04, at 20 (2006).

[7] This article discusses MRE 404(b) as it relates to admission of uncharged acts against the accused. It is important to understand that MRE 404(b) is not limited to use against the accused. Instead, it applies equally to the government and defense. Defense use of MRE 404(b) is commonly referred to as "reverse 404(b)" evidence. The accused, as the government, would have to satisfy the requirements of the rule before being permitted to admit evidence of uncharged acts against another person. The most common example is that of co-conspirator. In such an example, the accused is seeking to admit evidence of past actions by a co-conspirator to suggest that co-conspirator acted alone or without the accused.

Despite the general prohibition, MRE 404(b) does allow for the admission of uncharged misconduct as a means to prove the accused's knowledge, intent, plan, preparation, opportunity, motive, identity, or absence of mistake.[9] The examples provided under MRE 404(b), however, are not intended to be an exhaustive list.[10] Instead, it is important to understand that as long as the proponent can show that the evidence is being offered for some purpose "other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses" the prohibition on the uncharged acts will not apply.[11]

To determine whether the proponent is truly offering the uncharged acts for a proper purpose, military courts use the three-part test announced by *United States v. Reynolds*.[12] The first prong of the *Reynolds* test asks whether the evidence reasonably supports a determination by the factfinder that the accused committed the prior crimes, wrongs, or acts.[13] This question is one of conditional relevancy. Such questions are governed by MRE 104(b).[14] Under MRE 104(b), the military judge neither weighs credibility nor makes a finding that the government has proven the conditional fact by a preponderance of the evidence. Instead, the court simply examines all the evidence in the case and decides whether the panel members could reasonably find the conditional fact.[15] The second prong asks whether the evidence makes a fact of consequence in the case more or less probable.[16] This prong is a standard question of logical relevancy under MRE 401.[17] Under this part of the *Reynolds* test, the court should examine what inferences and conclusions can be drawn from the evidence. If the inference intended includes the accused's character as a necessary link, the uncharged act should be excluded. The final prong of the *Reynolds* test calls for balancing under MRE 403.[18] Here, the court asks whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice.[19]

Although the *Reynolds* test dates back to 1989, it was not until relatively recently that it became a hurdle for the government.[20] Starting in 2003, the CAAF began to focus more intensely upon the admission of uncharged acts under MRE 404(b).[21] The 2006 term of the court continues this trend. The CAAF decided two cases during this term concerning the admission of uncharged misconduct.[22] In both, the CAAF found error.

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[8] MCM, *supra* note 1, MIL. R. EVID. 404(a).

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

[10] United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989) (holding that "[i]t is unnecessary . . . that relevant evidence fit snugly into a pigeon hole provided by . . . 404(b)).

[11] *Id.*

[12] 29 M.J. 105, 109 (C.M.A. 1989). The CAAF decided *Reynolds* after the Supreme Court decided *Huddleston v. United States*, 485 U.S. 681 (1988). Although the *Reynolds* three-part test is identical in all material respects to the three-part test announced in *Huddleston*, CAAF did not cite *Huddleston*.

[13] *Reynolds*, 29 M.J. at 109.

[14] MCM, *supra* note 1, MIL. R EVID. 104(b). This Rule states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge.

Id.

[15] *See Huddleston*, 485 U.S. at 689 (preliminary finding by the court that the government has proven the act by a preponderance of the evidence is not required by Federal Rule of Evidence (FRE) 104(a)); *Castillo*, 29 M.J. at 151.

[16] *Reynolds*, 29 M.J. at 109.

[17] MCM, *supra* note 1, MIL. R. EVID. 401 (stating: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

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

[19] *Reynolds*, 29 M.J. at 109.

[20] *See* Major Bruce D. Landrum, *Military Rule of Evidence 404(b): Toothless Giant of the Evidence World*, 150 MIL. L. REV. 271 (Fall 1995).

[21] *See, e.g.*, cases cited *supra* note 3.

[22] United States v. Barnett, 63 M.J. 388 (2006); United States v. Thompson, 63 M.J. 228 (2006).

United States v. Barnett[23]

In the first, *United States v. Barnett*, the CAAF held that the military judge abused his discretion by admitting evidence of uncharged misconduct involving an incident of previous sexual misconduct.[24] Sergeant (SGT) Ronald Barnett Jr. was an instructor at Aberdeen Proving Ground (APG), Maryland.[25] The charges in his case stemmed from alleged incidents of unwanted physical and verbal advances by him toward four female Army trainees at APG.[26] At trial, SGT Barnett proceeded on a theory that the physical interactions between him and the four trainees were consensual.[27] During pretrial motions, the government sought to introduce the testimony of RB, a former Marine Lance Corporal, as well as a discrimination/sexual harassment incident report detailing the investigation of RB's allegations and the actions taken against SGT Barnett as a result.[28] The government offered both pieces of evidence under MRE 404(b) to show intent[29] and plan,[30] and to rebut appellant's mistake of fact defense.[31] The defense objected to the introduction of the evidence on multiple grounds.[32] After considering the perspective of both sides, the military judge overruled the defense objection as to the testimony of RB.[33] Although the military judge admitted the testimony of RB under MRE 404(b) to rebut SGT Barnett's claim that the four trainees consented to his advances, he did rule that the sexual harassment report was not admissible because it was cumulative and unfairly prejudicial.[34]

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[23] 63 M.J. 388 (2006).

[24] *Id.* at 397. Although MRE 413 permits evidence is similar crimes in sexual assault cases, the CAAF did not apply MRE 413 for two reasons: "First, M.R.E. 413 was not in effect at the time of Appellant's court-martial. Second, Appellant's uncharged misconduct does not qualify as sexual assault under M.R.E. 413." *Id*. at 394 n.2 (citation omitted).

[25] *Id*. at 390.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] When pressed by the military judge, the trial counsel offered the following explanation on the theory of intent:

> [C]ertainly we do believe that it impacts on his intent to gratify his sexual desire. The acts that [RB] will testify, the statements that he made, the repeated nature of the statements, the complete ignorance of [his] comments, please stop, leave me alone, just the complete roll over and you'll see how that and what has happened in the instance with these four victims, how that segues and we'll be able to show the members the intent of the accused here.

Id. at 394.

[30] The trial counsel offered the following explanation on the theory of plan: "[A]nd third to show the accused's plan, if you will, to sexually harass, dominate and touch subordinate females that he's able to separate from the pack . . . ." *Id.*

[31] The military judge admitted the evidence over the defense counsel's objection as relevant to rebut SGT Barnett's claim that the four trainees consented to his advances. The military judge stated that RB's testimony was "relevant in that it shows that on a prior occasion . . . the accused was informed in what appear to be very clear terms that his conduct wasn't welcomed, and, hence, not consented to under similar circumstances." *Id*.

[32] The defense counsel succinctly stated his objection as follows:

> I would ask how the government is going to link up [RB]'s testimony with Sergeant Barnett's intent? He's made -- Major Bowe has made some general propositions but there's a total lack of specificity here as to how whatever she says is going to prove either intent, plan, or defeat the claim of consent to Sergeant Barnett. I would state that these things are so temporally removed that there is no logical nexus in either times, place, or space between what happened in 1994 and what happened in 1997. . . . I believe what you're going to hear is no allegations of an indecent assault by [RB] at all. Basically they are the nature of repeated comments. She's going to say that she told him to stop a bunch of times and he didn't, whereas the allegations from Aberdeen once told to stop, Sergeant Barnett apparently did stop. In Aberdeen the allegations involved being [sic] one on one contact, being alone and trying to ensure that they're alone and in a closed space. Whereas, [RB] is going to say whenever one instance of touching occurred, occurred [sic] with a couple of other Marines in the room. There was no actual one on one contact with him, just a series of phone calls and comments . . . .
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> That being said . . . this is definitely going to fail the 403 legal relevancy test, definitely a substantial risk of unfair prejudice to the accused, confusion of the issues, and a great propensity to mislead the members, sir.

Id. at 391.

[33] *Id*.

[34] *Id*. at 392.

Sergeant Barnett was subsequently convicted at a general court-martial by an enlisted panel of violating a lawful order, maltreatment, indecent assault, and indecent acts. The panel sentenced him to a bad-conduct discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to E-1.[35] The convening authority approved the sentence.[36] The Navy-Marine Court of Criminal Appeals (NMCCA), after setting aside the guilty findings of violating a lawful order and maltreatment as an unreasonable multiplication of charges, affirmed the remaining findings and the sentence in an unpublished opinion.[37]

The CAAF, determining that the military judge abused his discretion in admitting the uncharged misconduct, found error.[38] In evaluating whether the military judge should have admitted the uncharged misconduct, the court conducted a detailed three-prong *Reynolds* analysis.[39]

There was no dispute as to the first prong of the *Reynolds* test that the evidence reasonably supported a determination by the factfinder that the accused committed the prior crimes, wrongs, or acts.[40] The evidence was sufficient for the military judge to conclude SGT Barnett committed the prior uncharged acts involving RB given RB's testimony and the documentation of the subsequent investigation into her allegations.[41]

The court's resolution of this case, instead, centered on the second and third prongs of the *Reynolds* test.[42] As the court noted, the second prong was a question of logical relevance (whether the evidence makes a fact of consequence in the case more or less probable), and the third prong was a question of legal relevance (whether any unfair prejudice created by the evidence outweighed its probative value).[43] The court took the two issues in turn.

Initially, the court addressed the logical relevance of the prior uncharged misconduct involving RB. The CAAF concluded that the military judge admitted the evidence based upon two related implicit findings. First, that since RB did not consent to SGT Barnett's advances, he should have realized that the four trainees also did not consent to his advances. Second, that SGT Barnett should have realized that the four trainees did not consent to his advances because the circumstances were very similar to that of RB.[44]

With regard to the first implicit finding, the CAAF stated that "consent, as a legal matter, and in the context of adult relations, is a fact-specific inquiry that must be made on a case-by-case basis."[45] The CAAF noted that the situation with RB was different factually from that with the four trainees. The primary difference between the four trainees and RB was that the four trainees were subordinates of SGT Barnett and, unlike RB, had never explicitly told SGT Barnett to stop.[46] Ultimately, the CAAF concluded that "[r]egardless of whether Appellant should have known that his advances toward subordinate female trainees were inappropriate, RB's requests that Appellant stop calling her and stop making sexual comments does not show that Appellant could not have mistakenly believed that any of the four trainees consented to his later actions."[47]

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[35] *Id*. at 389.

[36] *Id*.

[37] United States v. Barnett, No. NMCCA 9901313, 2004 CCA LEXIS 285 (N-M. Ct. Crim. App. Dec. 30, 2004) (unpublished).

[38] *Barnett*, 63 M.J. at 390.

[39] *Id*. at 394-97.

[40] *Id*. at 394.

[41] *Id*. at 391.

[42] *Id*. at 394.

[43] *Id*.

[44] *Id*. at 395.

[45] *Id*. (citing United States v. Hibbard, 58 M.J. 71, 75-76 (2003); *see also* MCM, *supra* note 1, pt. IV, ¶ 45.b.(1)(b)).

[46] *Id.*

[47] *Id*.

Turning to the second implicit finding for logical relevance, SGT Barnett should have known the four trainees did not consent because the situation was similar to that involving RB, the court conducted a persnickety[48] comparison by applying the six-part test set forth in *United States v. Morrison*.[49] Applying all but the second criterion of the *Morrison* test, the court found that "RB's explicit instructions to Appellant to stop are not probative of whether Appellant reasonably could have mistaken the four trainees' silence as consent."[50]

The court emphasized that "[u]nlike the four trainees, who were students under Appellant's supervision, RB testified that she had only an administrative relationship with Appellant in which she was not subject to his supervision."[51] This, in the court's opinion, cut against a favorable comparison of the relationship between the victims and SGT Barnett. The court also believed the nature of the acts were dissimilar due to the fact that the only physical contact RB testified to was when SGT Barnett rubbed his arm against hers while they were both seated at the computer in his office.[52] By contrast, the court stated "three of the four trainees testified to repeated overt sexual acts that included kissing and fondling. The fourth trainee testified that Appellant mentioned wanting to kiss her during class one morning and also attempted to tickle her on another occasion."[53]

Additionally, the court pointed out that the situs of the acts were dissimilar.[54] Unlike with RB, where the actions primarily took place over the telephone or in-person when SGT Barnett would stop by her office, SGT Barnett's statements to the four trainees were always in-person.[55] The court placed importance on the fact that SGT Barnett's "comments and actions did not occur in an office setting, but rather, in the context of his teaching duties, in a tank, for example, or in a classroom."[56] Next, with regards to the circumstances of the acts, the court stated "[w]hile there are multiple, notable similarities between the circumstances of Appellant's acts towards the four trainees, as compared to the circumstances of Appellant's largely verbal conduct toward RB, the similarities are few."[57]

Finally, the court felt the need to point out as somehow significant, the fact that the charges against SGT Barnett "stem from incidents occurring in late October 1997 through early November 1997. By contrast, RB testified that her encounters with Appellant were from April 1994 until August of 1994."[58]

The court concluded that SGT Barnett's prior misconduct with RB was of only "marginal logical relevance to the present charged conduct."[59] Additionally, the CAAF did not believe that RB's explicit instructions to SGT Barnett were probative of whether he should have known the four trainees did not consent.[60] The CAAF similarly believed the evidence was only marginally relevant under intent and plan, the other two theories offered by the government.[61] In one sense, this result does not come as a surprise given

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[48] The author chose this word for no other reason than the fact he asked himself how often in life can you use the word "persnickety" in a legal writing. Perhaps, in hindsight, the author will reconsider the decision to do so. "Persnickety 1 a : fussy about small details : FASTIDIOUS <a *persnickety* teacher> b : having the characteristics of a snob. 2 : requiring great precision <a *persnickety* job>." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993).

[49] *Barnett*, 63 M.J. at 395 (citing United States v. Morrison, 52 M.J. 117, 122-23 (1999); United States v. Munoz, 32 M.J. 359, 363 (C.M.A. 1991)). The CAAF identified the following six-part test as relevant to its analysis: (1) the "[r]elationship between victims and appellant"; (2) the "[a]ges of the victims"; (3) the "[n]ature of the acts"; (4) the "[s]itus of the acts"; (5) the "[c]ircumstances of the acts"; and (6) the "[t]ime span." *Id.*

[50] *Id.* at 396

[51] *Id.* at 395.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 395-96.

[58] *Id.* at 396.

[59] *Id.*

[60] *Id.*

[61] *Id.*

the court's detailed factual analysis. However, the fact the court is conducting such a detailed analysis is a surprise since the second prong of *Reynolds* is supposedly based upon MRE 401 and the "any tendency" standard.[62]

Despite concluding the evidence failed the second prong of *Reynolds*, the CAAF assumed the logical relevance of the evidence for purposes of its analysis.[63] The court next considered whether the evidence would pass the test of legal relevance under the third prong of *Reynolds*.[64] In accessing whether the military judge correctly determined that the evidence was legally relevant under MRE 403,[65] the CAAF used the criteria outlined in *United States v. Berry*.[66]

In the opinion of the CAAF, RB's testimony "was, at best, marginally probative" on the issue of whether the four trainees consented to his advances.[67] Additionally, in order to counter RB's testimony, the court pointed out that it was necessary for the defense to call several witness.[68] This undoubtedly raised confusion of the issues and the wasting of time concerns for CAAF. Just as importantly to the court, RB's testimony "portrayed Appellant to the members as not just a noncommissioned officer who abused his authority over trainees, but as a sergeant who made advances toward the Marine wife of another Marine."[69] Furthermore, the CAAF expressed concerns that some of SGT Barnett's comments included racial overtones.[70]

In view of the marginal relevance of RB's testimony, the CAAF concluded that the danger of unfair prejudice from RB's testimony substantially outweighed its probative value.[71] The court discounted the significance of the military judge's limiting instruction in light of the low probative value of the evidence as compared to its prejudicial effect.[72] Therefore, the CAAF held that

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[62] Standard of "Any Tendency"—is the lowest possible standard for relevancy. This standard shifts the emphasis from admissibility to weight. The test for logical relevance is whether the item of evidence has any tendency whatsoever to affect the balance of probabilities of the existence of a fact of consequence. *See* United States v. Schlamer, 52 M.J. 80, 96 (1999) (holding that MRE 401 is a low standard and since the defense was trying to portray the accused as a docile person, this evidence had some tendency to show the darker side that was consistent with his confession); *see also* United States v. Berry, 61 M.J. 91, 95 (2005) (holding relevant evidence under MRE 401 is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence).

[63] *Barnett*, 63 M.J. at 396.

[64] *Id*.

[65] *See* MCM, *supra* note 1, MIL. R. EVID. 403. The military judge failed to conduct a proper MRE 403 balancing inquiry when ruling on the defense motion in *Barnett*. *Barnett*, 63 M.J. at 396. In such a situation, the military judge does not receive the benefit of the abuse of discretion standard. *Barnett*, 63 M.J. at 396 (citing *Berry*, 61 M.J. at 96) ("Where the military judge is required to do a balancing test under M.R.E. 403 and does not sufficiently articulate his balancing on the record, his evidentiary ruling will receive less deference from this court.").

[66] *Berry*, 61 M.J. 91, 95-96 (2005) (citing United States v. Wright, 53 M.J. 476, 482 (2000)). Under *Berry*, a military judge should consider the following factors when conducting a MRE 403 balancing test: "the strength of the proof of the prior act; the probative weight of the evidence; the potential to present less prejudicial evidence; the possible distraction of the fact-finder; the time needed to prove the prior conduct; the temporal proximity of the prior event; the frequency of the acts; the presence of any intervening circumstances; and the relationship between the parties." *Id*.

[67] *Barnett*, 63 M.J. at 396-97.

[68] *Id*. at 396.

[69] *Id*.

[70] *Id*. at 396-97.

[71] *Id*.

[72] *Id*. The military judge gave the following instruction to the members:

> Evidence that the accused may have made sexually provocative comments to [RB] and may have touched her in a purportedly provocative manner may be considered by you for the limited purpose of its tendency, if any, to rebut the contention of the defense evidence that the accused's participation in the offenses of indecent assault under Charge IV with [PVT SD], [PFC LT], and [PVT SK], and the offenses of maltreatment in the specifications under Charge II with [PVT SD] and [PFC LT], [PVT SK], and [PFC BL] as the result of mistake on the accused's part as to consent on the part of the persons who were in Charge II and IV, which are before you, the object of the accused's alleged sexual touchings and/or comments. You may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that he therefore committed the offenses which are charged and which are before the court.

Id. at 392.

the evidence failed to fulfill not only the second, but also the third prong of *Reynolds*.[73] *Barnett* is an important decision because it demonstrates that the CAAF is prepared to closely scrutinize the military judge's decision to admit MRE 404(b) evidence.[74]

United States v. Thompson[75]

The case of *United States v. Thompson* is another case that higlights the difficulty of the government in meeting the second prong of *Reynolds*. Airman Basic Benjamin Thompson was operating as a confidential informant (CI) for the Air Force Office of Special Investigations (AFOSI).[76] During the four months that he operated as a CI, Airman Thompson provided information only three times in response to over thirty requests to do so by the AFOSI.[77] Due to Airman Thompson's track record, AFOSI called him into its offices to interview him.[78]

During the interview, Airman Thompson admitted that he had inhaled marijuana on two occasions and simulated inhalation on approximately twenty-five other occasions.[79] At his subsequent court-martial, the government offered testimony from a number of witnesses concerning pre-service drug use by Airman Thompson to prove knowledge of marijuana use as well as absence of mistake.[80] The defense objected to the admission of this evidence as inadmissible uncharged misconduct, and claimed that the prejudicial impact of the evidence substantially outweighed its probative value.[81] The military judge admitted the evidence over the defense objection.[82] Subsequently, Airman Thompson was convicted of wrongful use, possession, and distribution of marijuana.[83] The members sentenced him to a bad-conduct discharge and twelve months of confinement.[84] The convening authority approved and the Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence.[85]

The CAAF, after conducting its own *Reynolds* analysis, also believed that the evidence was erroneously admitted.[86] The evidence, according to the CAAF, met the first prong of *Reynolds* since the uncharged misconduct reasonably supported a finding that Airman Thompson used marijuana before he entered the Air Force.[87] However, the evidence failed the second prong of *Reynolds* because the court believed the uncharged misconduct was not relevant to a fact in issue.[88] The military judge erroneously admitted the uncharged misconduct to prove "knowledge of marijuana use" as well as absence of mistake.[89] Airman Thompson did not raise

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[73] *Id.* at 397. Having found error, the court evaluated whether the error materially prejudiced SSG Barnett. *Id*. To conduct the inquiry, the court used the four-part *Kerr* test. *Id*. "We evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Id*. (citing United States v. Kerr, 51 M.J. 401, 405 (1999)).

[74] MCM, *supra* note 1, MIL. R. EVID. 404(b).

[75] 63 M.J. 228 (2006).

[76] *Id*. at 229.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*. Specifically, the defense objected to the admissibility of three pretrial statements: "(1) admissions to Airman JB about Thompson's use of marijuana 'all the time back home'; (2) a statement to a military dependent, DG, about Thompson's preservice practice of selling marijuana; and (3) a statement to DG about Thompson's use of marijuana in high school." *Id*.

[81] *Id*.

[82] *Id*. at 230.

[83] *Id*. at 229.

[84] *Id*. (holding that the military judge erred in admitting the uncharged misconduct, but that this error was harmless).

[85] United States v. Thompson, No. ACM 35274, 2005 CCA LEXIS 145 (A.F. Ct. Crim. App. Apr. 29, 2005) (unpublished).

[86] *Thompson*, 63 M.J. at 231.

[87] *Id*. The court based this finding on the admissions by Airman Thompson to DG and Airman JB.

[88] *Id*.

[89] *Id*.

the issues of lack of knowledge or mistake of fact.[90] Although the defense counsel did refer to Airman Thompson as "young" and "naïve" in his opening statement, that description was never tied to marijuana use or knowledge of marijuana by the defense.[91] Instead, the defense focused on the credibility of those who testified against the appellant.[92] "Because the matters to which the military judge admitted the uncharged acts evidence were not in issue, the evidence served no relevant purpose and fails the second prong of the *Reynolds* test."[93] As such, the military judge erred in admitting the evidence. As in *Barnett*, the CAAF concluded the error was harmless.[94]

United States v. Harrow[95]

The final case under this section is *United States v. Harrow*.[96] The potential significance of this cases lies in its dicta rather than its *Reynolds* analysis. The AFCCA, not so subtly, invited the CAAF to specifically acknowledge that MRE 404(b) is more restrictive than its federal counterpart.[97]

In *Harrow*, a panel of officer and enlisted members convicted Airman Basic Ashontia Harrow of unpremeditated murder of her daughter.[98] The approved sentence included a dishonorable discharge, confinement for twenty-five years, and forfeiture of all pay and allowances.[99] At trial, the cause of death was uncontested. Airman Harrow's five-month-old daughter passed away from injuries consistent with shaken baby syndrome.[100] The central evidentiary issue was whether the injuries were caused by Airman Harrow or the child's biological father.[101] The military judge denied a defense motion in limine and permitted three witnesses to testify about previous incidents where Airman Harrow was abusive to her daughter.[102] The AFCCA determined that the military judge correctly applied the *Reynolds* test to determine admissibility of the uncharged misconduct under MRE 404(b).[103] In doing so, AFCCA stated:

> [G]enerally speaking, Mil. R. Evid. 404(b) is interpreted more restrictively in military jurisprudence than its counterpart in other federal courts. In applying this jurisprudence, it is clear that military decisions are very fact specific, often based upon the totality of the circumstances, rather than granting the military judge broad discretion.[104]

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[90] *Id*.

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Compare id*. *with* United States v. Barnett, 63 M.J. 388, 397 (2006). In each case, the main reason the CAAF found that the error was harmless was the fact the government's case was otherwise very strong without the uncharged misconduct. Had the government's case not been so strong, it is likely the CAAF would have found prejudicial error and reversed the findings and sentence. *See generally* United States v. Rhodes, 61 M.J. 445 (2005) (finding prejudical error in the admission of uncharged misconduct due in part to the weakness of the government's case).

[95] 62 M.J. 649 (A.F. Ct. Crim. App. 2006).

[96] *Id.*

[97] *Id*. at 660.

[98] *Id*. at 651.

[99] *Id*.

[100] *Id*. at 652.

[101] *Id.*

[102] *Id*. at 658-59. The first incident involved Airman Harrow biting the hand of her daughter to punish her for doing the same to her. *Id.* at 658. The second incident involved Airman Harrow striking her daughter on the thigh to get her to stop misbehaving. *Id.* In the final incident, Airman Harrow "jerked [the daughter's] arm real tightly and grabbed her face real tightly and squeezed her cheeks and called her stupid and ugly." *Id*. at 658-59.

[103] *Id*. at 660.

[104] *Id*.

On 14 February 2007, the CAAF heard oral argument in the *Harrow* case.[105] Interestingly, the dictum of the AFCCA opinion was not addressed in oral argument.[106] It is unlikely that the CAAF will agree that MRE 404(b) is more restrictive than Federal Rule of Evidence (FRE) 404(b).[107] However, regardless of what the CAAF does, it appears that the AFCCA may be correct when it states, as it did in *Harrow*,[108] that the military judge is given less discretion in MRE 404(b) determinations than in other evidentiary rulings.[109]

A recent case which highlights the lack of discretion given to the military judge is *United States v. Rhodes*.[110] In *Rhodes*, the CAAF set aside the findings and sentence with respect to wrongful use and possession of a psilocin (commonly known as the hallucinogen - magic mushroom).[111] The CAAF held that the military judge clearly abused his discretion in applying the third part of the *Reynolds* test, and did not feel the need to address the other two prongs.[112]

The MRE 404(b) issue in *Rhodes* was whether the government should have been permitted to introduce evidence of alleged witness tampering by Staff Sergeant (SSG) Bradley Rhodes.[113] The government believed SSG Rhodes intimidated Senior Airman (SrA) Daugherty into recanting a previously made hand-written statement to Office of Special Investigations (OSI) implicating SSG Rhodes in illegal drug use and possession.[114] Four-and-a-half months after giving the hand-written statement to OSI, SSG Rhodes personally approached SrA Daugherty at his quarters to supposedly request that SrA Daugherty speak to his defense counsel.[115] On the following day, SrA Daugherty met with SSG Rhodes's defense counsel[116] and claimed to be suffering from memory loss, stating he could no longer attest to the accuracy of his original confession.[117]

In a new affidavit prepared by defense counsel, SrA Daugherty recanted his earlier hand-written statement by stating "[i]t was likely that Brad [SSG Rhodes] never did go with me" to purchase drugs.[118] In response, the government moved to introduce evidence that SSG Rhodes intimidated SrA Daugherty into changing his testimony and that this fact was evidence of a consciousness of guilt.[119] Ultimately, the military judge admitted this evidence pursuant to MRE 404(b).[120] Staff Sergeant Rhodes was subsequently convicted of drug use and possession. The AFCCA, in an unpublished opinion, affirmed the findings and sentence.[121] The CAAF reversed.

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[105] United States v. Harrow, 65 M.J. 190 (2007).

[106] *Id*.

[107] MCM, *supra* note 1, MIL. R. EVID. 404(b) analysis, at A22-34 (stating that MRE 404(b) is "taken without change from the Federal Rule"). Since the two rules are identicial, "*Reynolds* [MRE 404(b)] should not be applied in a manner inconsistent with *Huddleston* [FRE 404(b)]." United States v. Diaz, 59 M.J. 79, 109 n.3 (2003) (Crawford, J., dissenting).

[108] *Harrow*, 62 M.J. at 660.

[109] United States v. Harrow, 65 M.J. 190 (2007) (avoiding the issue of whether it was error to admit the uncharged misconduct under MRE 404(b), the CAAF determined that the question of prejudice was easily decided against the appellant).

[110] 61 M.J. 445 (2005).

[111] *Id*. at 453. The CAAF affirmed the findings of guilty to the offenses involving larceny and disorderly conduct. *Id.* However, due to reversing the findings and sentence with regards to the wrongful use and possession of psilocyn, the court returned the case to the Judge Advocate General of the Air Force. *Id.* The court authorized a rehearing on the reversed findings and sentence. *Id.*

[112] *Id*. at 452.

[113] *Id.* at 451-52.

[114] *Id*. at 447.

[115] *Id*.

[116] *Id.*

[117] *Id*.

[118] *Id*.

[119] *Id*. at 448.

[120] *Id*. at 447-48.

[121] United States v. Rhodes, No. ACM 34697, 2004 CCA LEXIS 42 (A.F. Ct. Crim. App. Feb. 24, 2004) (unpublished).

Judge Crawford dissented, arguing that the majority misapplied the *Reynolds* test. In order to indicate why she dissented, Judge Crawford believed it was necessary to reconsider the *Reynolds* test in full.[122] Judge Crawford began her reassessment by looking at the first prong of the *Reynolds* test, whether the evidence reasonably supported a finding that SSG Rhodes met with SrA Daugherty.[123] Her discussion of the first prong of *Reynolds* quickly became a discussion of the second prong, the logical relevance of the evidence.[124] For Judge Crawford, the coincidental meeting was relevant because of its timing to SrA Daugherty's recantation: "Arguing that such facts are insufficient to support a finding that Appellant influenced SrA Daugherty to recant tests the bounds of coincidence when one considers the details of the events, the timing of the visit, and the subsequent lapse of memory."[125] Judge Crawford chastised the majority for posing alternate explanations for the memory loss other than improper influence by SSG Rhodes.[126] Pointing to MRE 104(b),[127] she argued that the possibility of other alternatives were irrelevant since the trial court is not charged with weighing the credibility of a witness or making a finding regarding whether the government proved a conditional fact by a preponderance of the evidence.[128] Judge Crawford believed that "it is not the place of this court to second-guess the members' findings."[129]

Judge Crawford quickly disposed of the second prong of *Reynolds*. She determined that SSG Rhodes's consciousness of guilt made in more likely that he committed the alleged drug offenses.[130] Judge Crawford pointed out that unlike general propensity evidence, consciousness of guilt is directly related to the charged offenses and it is therefore unlikely "that the members would believe that Appellant used or possessed drugs simply due to a general propensity to obstruct justice."[131] Instead, she believed that the members "would believe that Appellant is guilty of these offenses because influencing SrA Daugherty to recant his original statement is directly indicative of guilt in this particular case."[132] This justification supports not only the logical relevance of the evidence under the second prong of *Reynolds*, but also the fact the evidence was not unfair prejudicial under the third prong of *Reynolds*.

Under the third prong of *Reynolds*, Judge Crawford took the majority to task for second guessing the military judge's MRE 403 decision.[133] She began by pointing out that a military judge's ruling on the admissibility of evidence should not be overturned on appeal absent a clear abuse of discretion.[134] In Judge Crawford's view the issue came down to this: "This Court's split on this issue indicates that reasonable minds can disagree on whether to allow such evidence under these circumstances."[135] Judge Crawford was of the view that a simple disagreement was not sufficient to find that the military judge abused his discretion:

> An abuse of discretion involves far more than a difference in judicial opinion . . . The challenged action must . . . be found to be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous" in order to be

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[122] *Rhodes*, 61 M.J. at 455 (Crawford, J., dissenting).

[123] *Id*.

[124] *Id*. Judge Crawford seems to mix the analysis of prong one and prong two together. Prong one is concerned with only whether the evidence reasonably supports a determination by the factfinder that the accused committed the prior crimes, wrongs, or acts. United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989). Whereas, under prong two the court asks whether the evidence makes a fact of consequence in the case more or less probable. *Id*.

[125] *Rhodes*, 61 M.J. at 455 (Crawford, J., dissenting).

[126] "The majority posits an alternate explanation for the memory loss, noting that the meeting might have induced SrA Daugherty to recant 'due to feelings of remorse over betraying a friend.'" *Id*.

[127] MCM, *supra* note 1, MIL. R. EVID. 104(b) (noting "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.").

[128] *Rhodes*, 61 M.J. at 455.

[129] *Id*.

[130] *Id*. at 456.

[131] *Id*. at 457.

[132] *Id*.

[133] *Id.*

[134] *Id*.

[135] *Id*.

> invalidated on appeal. If, on the other hand, reasonable [minds] could differ as to its propriety, then it cannot be said that the trial judge abused his discretion.[136]

Moreover, Judge Crawford believed the military judge applied the correct legal standard to an undisputed set of facts, determined the evidence passed all three *Reynolds* prongs, and gave an appropriate limiting instruction.[137] As such, "[w]hile the conclusion drawn by the military judge may differ from that of the majority, this is not a basis for overturning the result" according to Judge Crawford.[138]

Although Judge Crawford's dissent might carry the day under other circumstances, it is plain that the majority was bothered by the fact that the entire case against SSG Rhodes rested on the testimony of SrA Dougherty.[139] However, this fact, as Judge Crawford effectively pointed out, was also an important factor in concluding SSG Rhodes's visit to SrA Dougherty was for some purpose other than to arrange a meeting with his defense counsel.[140]

In the end, it is hard to dispute Judge Crawford's argument. The majority simply disagreed with the military judge, and thus concluded that the military judge abused his discretion in admitting the uncharged misconduct.[141] This result lends credence to the dicta of the AFCCA in *Harrow*.[142] It does appear that the military judge is given something less than an abuse of discretion standard in MRE 404(b) rulings.

Accordingly, Government counsel would be well advised to consider whether the "value added" of uncharged misconduct admitted under MRE 404(b) at trial is worth the risk it imposes upon an otherwise valid conviction when it is scrutinized on appeal. Although the *Reynolds* test may appear to set forth a low standard for admissibility, the CAAF has clearly raised the bar.[143] The raising of the bar in uncharged misconduct cases seems to coincide somewhat with the opening of the propensity floodgates in sexual assault and child molestation cases.[144] Given the higher standard applied by the CAAF, practitioners would be wise to avoid relying upon uncharged misconduct unless absolutely necessary. Any decision, however, to do so must ultimately survive a detailed *Reynolds* analysis, a task that is anything but assured on appeal.

Sexual Misconduct

Military Rule of Evidence 413 states that "evidence of the accused's commission of one or more offenses of sexual assault is admissible."[145] Military Rule of Evidence 414 has similar language for child molestation.[146] These rules were based upon the FRE 413 and 414.[147] The federal rules were written[148] to overcome perceived restrictive aspects of FRE 404(a) and (b).[149] Federal Rule of Evidence 413 and 414 represent a rejection of the traditional prohibitions on propensity evidence.[150]

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[136] *Id*. (citing United States v. Glenn, 473 F.2d 191, 196 (D.C. Cir. 1972)) (citations omitted).

[137] *Id*. at 457-58.

[138] *Id*. at 458.

[139] *Id*. at 453. "Additionally, the Government's case concerning the psilocyn mushroom offenses rested almost solely on SrA Daugherty's pretrial statement. So the Government's case was certainly not overwhelming." *Id*.

[140] *Id*. at 456. "Given the convenient and coincidental nature of the memory loss, evidence suggesting that Appellant spoiled SrA Daugherty's statement is very probative and central to the Government's ability to prove guilt." *Id*.

[141] *Id*. at 458. "While the conclusion drawn by the military judge may differ from that of the majority, this is not a basis for overturning the result." *Id*.

[142] United States v. Harrow, 62 M.J. 649, 660 (A.F. Ct. Crim. App. 2006) (stating that the military judge is not given broad discretion in MRE 404(b) rulings).

[143] *See, e.g.*, cases cited *supra* notes 3 and 23.

[144] The majority of the cases involving a detailed *Reynolds* analysis by the CAAF of uncharged misconduct, come within a relatively short time period after the addition of MRE 413 and 414. *See, e.g.*, cases cited *supra* note 3. Military Rules of Evidence 413 and 414 became applicable to military practice in 1996, and were formally adopted in the 1998 amendment to the MCM. *See infra* note 143.

[145] MCM, *supra* note 1, MIL. R. EVID. 413 (stating, "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offense of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.").

[146] *Id.* MIL. R. EVID. 414 (stating, "In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offense of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.").

[147] *See infra* at note 143.

This rejection resulted from three main criticisms of FRE 404(b) in sex offense cases: first, FRE 404(b) requires trial counsel to articulate a nonpropensity purpose; second, the military judge always has discretion under FRE 403 to exclude the evidence; and third, the limiting instruction from the military judge prohibited the government from using the evidence to show a propensity to commit sexual offenses.[151] These same concerns support the logic behind the addition of MRE 413 and 414.

In order to admit evidence under either MRE 413 or 414, three threshold requirements must be met.[152] First, the accused must be charged with an offense of sexual assault/child molestation.[153] Second, the evidence proffered must be evidence of the accused's commission of another offense of sexual assault/child molestation.[154] Finally, the proffered evidence must be relevant under MRE 401.[155]

Once the evidence meets the threshold requirements, a military judge must apply the balancing test of MRE 403.[156] Under MRE 403, the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.[157] A military judge must consider several nonexclusive factors in performing the required balancing of probative value and prejudicial effect.[158] These nonexclusive factors include: "Strength of proof of the prior act--conviction versus gossip; probative weight of the evidence; potential for less prejudicial evidence; distraction of the factfinder; . . . time needed for proof of prior conduct; . . . temporal proximity; frequency of the acts; presence or lack of intervening circumstances; and relationship between the parties."[159]

Two cases from the last term introduce additional wrinkles to this developing area of evidentiary law. The first case is from the Army Court of Criminal Appeals (ACCA) and reviews whether the military judge has a sua sponte duty to instruct the members regarding the appropriate uses of evidence admitted under MRE 413 and 414. In *United States v. Dacosta*,[160] Specialist (SPC) Wagner Dacosta was charged with burglary, based upon breaking into and entering the barracks room of SPC L in the nighttime with the intent to commit rape, and also with the rape of SPC L.[161] Prior to trial on the merits, the defense counsel moved to admit "prior sexually suggestive encounters by the alleged victim" with the appellant pursuant to MRE 412.[162] The government did not object to

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[148] The rules were enacted by Congress on 13 September 1994. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 329035, 108 Stat. 2136. Federal Rule of Evidence 413 and 414 became a part of the MRE eighteen months after they were enacted. *See* MCM, *supra* note 1, MIL. R. EVID. 1102(a). The rules were formally included in the *MCM* by way of the 1998 amendment to the MRE. *See* MCM, *supra* note 1, app. 25, at A25-40 to A25-42 (historical executive orders).

[149] *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § IV, at 4-212 (6th ed. 2006).

> Rule 413 [Rule 414] was written to overcome the restrictive aspects of Rule 404(a) and (b) that generally ban character evidence from being used to show that the accused had a propensity to commit the charged offense. This new Rule authorizes Government counsel to use evidence of the accused's uncharged past sexual assault [child molestations] for the purpose of demonstrating his propensity to commit the charged sexual assault [child molestation].

Id.

[150] *Id*. at 4-213.

[151] *Id*.

[152] United States v. Berry, 61 M.J. 91, 95 (2005).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *See* MCM, *supra* note 1, MIL. R. EVID. 403.

[157] *Id*.

[158] United States v. Wright, 53 M.J. 476, 482 (2000); *Berry*, 61 M.J. at 95-97.

[159] *Wright*, 53 M.J. at 482 (citation omitted).

[160] 63 M.J. 575 (Army Ct. Crim. App. 2006).

[161] *Id*. at 577.

[162] *Id*.

the admissibility of this information, and in fact, wanted to admit the evidence as prior sexual misconduct under MRE 413.[163] The prior sexual activity between SPC L and the appellant was either consensual sexual activity or evidence of prior sexual misconduct depending upon which version of the story the panel chose to believe.[164] At the conclusion of the merits, the military judge inquired whether the defense wanted an instruction on the uncharged misconduct (assuming the panel chose to believe the previous incident was nonconsensual).[165] The defense counsel told the military judge that he did not want the instruction.[166] Despite the defense counsel's request, the military judge chose to instruct on the uncharged misconduct.[167]

The issue on appeal was whether the military judge was correct when she instructed the panel members, over defense objection, regarding evidence of an uncharged sexual assault admitted pursuant to MRE 413.[168] The ACCA answered this question in the affirmative: "[O]nce a military judge properly admits MRE 413 evidence of other sexual assaults, she should provide panel members with findings instructions to guide them regarding the issues in the case, and explain legal standards and procedural requirements which members must use to determine findings."[169]

The ACCA placed a limited sua sponte duty on military judges in all cases to instruct the panel appropriately when MRE 413 evidence is admitted.[170] The decision requires military judges to inform members of the following:

> (1) the accused is not charged with this other sexual assault offense; (2) the Rule 413 evidence should have no bearing on their deliberations unless they determine the other offense occurred; (3) if they make that determination, they may consider the evidence for its bearing on any matter to which it is relevant in relation to the sexual assault offenses charged; (4) the Rule 413 evidence has no bearing on any other offense charged; (5) they may not convict the accused solely because they may believe the accused committed other sexual assault offenses or has a propensity or predisposition to commit sexual assault offenses; (6) they may not use Rule 413 evidenced as substitute evidence to support findings of guilt or to overcome a failure of proof in the government's case, if any; (7) each offense must stand on its own and they must keep the evidence of each offense separate; and (8) the burden is on the prosecution to prove the accused's guilt beyond a reasonable doubt as to each and every element of the offense(s) charged.[171]

The *Dacosta* instruction is now mandatory in the Army.[172] The CAAF denial of the request for review[173] could be read as the CAAF's endorsement of the ACCA's treatment of this issue. However, if the CAAF wanted to send such a message, they could have simply affirmed without opinion. At worst, this opinion should be persuasive authority for the other services. Additionally, although the ACCA did not discuss whether such an instruction would be mandatory when evidence is admitted under MRE 414, there is no reason to think that such an instruction would not be required. Based upon *Dacosta*, counsel should fashion an instruction for the military judge in all cases involving MRE 413 and 414 evidence.[174]

The second opinion is from the CAAF and reviews whether MRE 414 authorizes admission of an accused's child molestation offenses committed after the charged offense of child molestation. In *United States v. James*,[175] Airman Basic Daniel James, a

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[163] *Id*.

[164] *Id* at 577-78.

[165] *Id*. at 578.

[166] *Id*.

[167] *Id*.

[168] *Id*. at 577.

[169] *Id*. at 580-81.

[170] *Id*. at 583.

[171] *Id*.

[172] *Id*. (stating the instruction is mandatory in all cases tried ninety days from the date of the court's opinion).

[173] United States v. Dacosta, 64 M.J. 172 (2006) (denying petition for review).

[174] This instruction should be consistent with the model instruction provided by ACCA in its opinion at *Dacosta*, 63 M.J. at 584, app.

[175] 63 M.J. 217 (2006)

twenty-year-old, met a fifteen-year-old girl while serving as an advisor to her church youth group.[176] Their relationship initially began as a casual friendship, but developed into a dating relationship where they hugged, held hands, and kissed.[177] On two occasions, the hugging and kissing led to Airman James removing the young girl's bra and kissing and touching her exposed breasts.[178] Additionally, at Airman James's suggestion, they engaged in "clothes sex" by rubbing their genital areas against each other with their clothes still on.[179] This conduct resulted in Airman James being charged with engaging in indecent acts with a female under the age of sixteen.[180] The government, over the defense objection, sought to introduce evidence under MRE 414 of a civilian conviction for attempted first degree sexual assault of a child.[181]

The basis of the defense objection was the fact that the civilian conviction occurred after the conduct charged at their client's court-martial.[182] The government argued, and the military judge agreed, that there was no temporal limitation on MRE 414 evidence.[183] As such, the fact the uncharged misconduct occurred after the charged offense was of no import. A general court-martial comprised of officers subsequently convicted Airman James of child molestation and sentenced him to confinement for four months and a bad-conduct discharge.[184] The convening authority approved and AFCCA affirmed the findings and sentence.[185]

The CAAF granted review over the question of whether Airman James's uncharged sexual misconduct should have been admissible.[186] Nothing within the legislative history to the federal rule led the CAAF to believe there was a temporal limitation on the admissibility of evidence under FRE 414.[187] The court also noted that "[a]lthough the historical discussion [to either FRE 413 or 414] speaks in terms of past acts it does not expressly exclude any acts occurring prior to trial."[188] Instead, the CAAF noted, FRE 414 addresses "evidence of the accused's commission of one or more offenses" with absolutely no mention of when the offense(s) might have occurred.[189] Relying upon a fundamental rule of statutory interpretation that "courts must presume that a legislature says in a statue what it means and means in a statute what is says there" the CAAF could find no reason to believe that Congress intended prior misconduct to be probative and subsequent misconduct not under FRE 414.[190] Finally, the CAAF found persuasive the fact that a large body of law interpreting a very similar provision contained in FRE 404(b) held that FRE 404(b) applies to both prior and subsequent bad acts.[191]

These cases also held that the reference to other crimes as "priors" is more a matter of customary usage than a term of art.[192] The CAAF concluded that the "one or more offenses" language of MRE 413 and 414 is no more temporally restrictive than the "other crimes" language of MRE 404(b).[193] Accordingly, practitioners need to be aware that since MRE 413 and 414 is not "temporally

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[176] *Id*. at 218.

[177] *Id*.

[178] *Id*.

[179] *Id*.

[180] *Id*.

[181] *Id*. The uncharged misconduct involved another 15-year-old girl, SB. *Id*. SB was also a member of Airman James's church youth group. United States v. James, 60 M.J. 870, 871 (A.F. Ct. Crim. App. 2005).

[182] *James*, 63 M.J. at 218.

[183] *Id*.

[184] *Id.* at 219.

[185] *Id*.

[186] *Id*.

[187] *Id*. at 220.

[188] *Id*.

[189] *Id*.

[190] *Id*. at 221.

[191] *Id*. at 221-22.

[192] *Id*.

[193] *Id*. at 222.

restrictive" any conduct by the accused prior to trial is potentially admissible. As such, trial counsel might want to conduct a criminal background check on an accused just before trial, especially if there has been a lengthy time period between the charged offense and the date of trial. Likewise, defense counsel need to advise their client that anything they do between the charged offense and trial may come back to haunt them at trial.

Conclusion

The allure of uncharged misconduct is a sweet siren song to the ears of most trial counsel. Even military judges are not immune to its hypnotic sound. However, the rude awaking for those lured into the use of uncharged misconduct usually comes as the case is considered on appeal. Recognizing the significant hurdle presented under the rules of evidence to the use of uncharged misconduct, Congress gave the government a free pass in cases involving sexual misconduct or child molestation. In the military, this free pass seems to have come at a cost. The CAAF is now even more closely scrutinizing the admission of uncharged misconduct under MRE 404(b). What once was a low hurdle to admission is now the steeplechase known as the *Reynolds* test.