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# THE ADVOCATE

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# TRANSITION

## CREDIBILITY OF WITNESSES

In the recent case of United States v. Rivers, SPCM 13725, \_\_\_ M.J. \_\_\_ (ACMR 24 Aug. 1979), the author judge expressed concern that none of the attorneys involved in the litigation indicated awareness of a fundamental evidentiary principle. At trial, to impeach the accused, the prosecutor made reference to the accused's prior inconsistent statement to the authorities. However, he failed to demonstrate that the statement was rendered voluntarily. The omission resulted in a reversal.

The lead article, written by Judge F. Gilligan, deals with issues such as the one in Rivers and virtually every issue which may arise in the areas of bolstering, impeaching, and rehabilitating witnesses. We trust that the article will prove useful to all trial practitioners.

\* \* \* \* \*

## CONTINUANCE TO OBTAIN COUNSEL

There has been an increase in the number of trials in which detailed counsels' requests for a continuance in order that the accused may obtain individual counsel have been denied. Traditionally, military appellate courts have focused on whether the trial judge abused his discretion in denying the request. Major Lawrence Sandell suggests in his article that, by merely testing for abuse of discretion, perhaps the courts are missing the real issue, i.e., whether the denial of the continuance is tantamount to a denial of the accused's constitutional rights to counsel and due process of law. Additionally, he sets forth ways in which defense counsel can best preserve the issue for appellate review.

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## CREDIBILITY OF WITNESSES

Lieutenant Colonel Francis A. Gilligan, JAGC\*

### I. Introduction

Although the reported cases might indicate otherwise, the most frequent questions at the trial level concern the credibility of witnesses. If that were not enough, the Federal Rules of Evidence have modified the practice in a few areas.<sup>1</sup> The Court of Military Appeals, as it has in the past, has said that it will adopt the Federal Rules of Evidence so long as they are not incompatible with military law or the special circumstances of the military.<sup>2</sup>

Many of these questions are difficult and counsel are asked to change their strategy because of the unexpected testimony of a witness. It may be that counsel will want to impeach or rehabilitate his or her witness. An example of this is when the key prosecution witness has been impeached by showing on cross-examination that soon after the crime, the witness could not identify the accused or stated that the accused did not commit the crime. Can the prosecution seek to rehabilitate the witness? Or, if the key witness has been impeached by the inherent inconsistency of his or her story, can the trial counsel rehabilitate the witness in the eyes of the fact finder? These questions plus others will be answered in this article.

Three basic stages may be examined when discussing the credibility of competent witnesses. First, at times, a witness' testimony may be bolstered before impeachment. Second,

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1. See, e.g., Downen, *The Federal Rules of Evidence: Relevancy and Its Limits*, 10 *The Advocate* 185 (1978); Giannelli & Gilligan, *The Federal Rules of Evidence, The Army Lawyer* (Aug. 1975) at 12.

2. Compare *United States v. Knudson*, 4 USCMA 587, 16 CMR 161 (1954) and *United States v. Fisher*, 4 USCMA 152, 15 CMR 152 (1954), with *United States v. Weaver*, 1 M.J. 111 (1975).

a witness may be impeached. Impeachment is the generic term for all attacks to diminish the witness' credibility in the fact finders' eyes. Third, a witness may be rehabilitated. During this stage, the proponent seeks to increase the witness' credibility in the fact finders' eyes after the opponent has attempted impeachment.

## II. Bolstering Before Impeachment

The general rule is that the proponent may not bolster the witness' credibility before the opponent has attempted to impeach the witness.<sup>3</sup> However, the Manual has recognized exceptions to this rule. First, the witness' testimony may be corroborated before the opponent has attempted to impeach him.<sup>4</sup> Corroboration occurs when other witnesses support the testimony of the witness about a fact in issue. Suppose that the witness testifies that he saw the defendant enter the building where a murder occurred. The general rule against bolstering would prevent the prosecution from calling another witness to testify that the first witness is a truthful person, but the prosecution could corroborate the first witness by having a second witness testify to the same fact, namely, that the defendant entered the building.

Second, the Manual recognizes the fresh complaint exception.<sup>5</sup> This doctrine holds that if the defendant is charged with a sex offense, the victim's complaint to the authorities or to other third parties soon after the alleged crime is admissible to bolster the testimony of the alleged victim.

The third method of bolstering a witness' credibility is the pretrial identification exception.<sup>6</sup> Under this exception, if the witness identifies a person in the courtroom (for example, the defendant), evidence of the witness' pretrial

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3. Manual for Courts-Martial, United States, 1969 (Revised edition), para. 153a [hereinafter cited as MCM, 1969].

4. Id. See also para. 142c.

5. MCM, 1969, para. 153a. See, e.g., United States v. Thompson, 3 M.J. 168 (CMA 1977).

6. MCM, 1969, para. 153a.

identification of that same person is admissible to bolster the witness' credibility, provided that the pretrial showup or lineup violated neither due process nor right to counsel.<sup>7</sup> The Court of Military Appeals has approved the admission of a police blotter report as substantive evidence when it was proof of a spontaneous exclamation, even though no prior in-court identification was made by the witness.<sup>8</sup> Some courts have permitted evidence of the pretrial identification as substantive evidence, even though there is no prior in-court identification.<sup>9</sup> This rule may prove especially important to the prosecution if the witness is senile, has been intimidated, or is unavailable for trial.

### III. Impeachment -- Who May Be Impeached

#### A. Impeaching the Opponent's Witness

The common law began with the assumption that the opponent may impeach the proponent's witnesses, but not the witness the opponent himself called.<sup>10</sup> Thus, at common law the opponent may ordinarily attack the credibility of any witness called by the proponent, the judge, or the jury. The Manual recognizes these rules, including the one that the opponent may impeach a witness called by the judge or the members.<sup>11</sup>

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7. Id. Cf. Gilligan, Eyewitness Identification, 58 Mil. L. Rev. 182 (1972). See also United States v. McCutchins, 41 CMR 442 (ACMR 1969) (in-court identification required before there is evidence of an out-of-court identification); MCM, 1969, para. 153a.

8. United States v. Burge, 1 M.J. 408 (CMA 1976).

9. Virgin Islands v. Petersen, 507 F.2d 898, 902 (3d Cir. 1975); United States v. Puco, 476 F.2d 1099, 1101 (2d Cir. 1973); United States v. Anderson, 406 F.2d 719 (4th Cir. 1969); State v. Draughn, 121 N.J.Super. 64, 296 A.2d 79 (1972); People v. Nival, 33 N.Y.2d 391, 308 N.E.2d 883, 353 N.Y.S.2d 409 (1974); Fed. R. Evid. 801(d)(1).

10. Ladd, Impeaching One's Own Witness -- New Developments, 4 U. Chi. L. Rev. 69, 70 (1936).

11. MCM, 1969, para. 153b.

## B. Impeaching Your Own Witness

Although the Manual permits the opponent to impeach the proponent's witnesses, it generally prohibits the proponent from impeaching his own witnesses.<sup>12</sup> This rule of law prevents the proponent from directly attacking his or her witness' credibility, but it does not prevent the proponent from introducing extrinsic evidence to contradict his witness' testimony on the merits.<sup>13</sup> Suppose that, to the defense's surprise, defense witness #1 testified that he saw the defendant enter the building where the murder occurred. The Manual rule would prohibit the defense from calling witness #2 to testify that witness #1 is an untruthful person. However, the defense could specifically contradict witness #1's testimony by eliciting witness #2's testimony that the defendant was in another state at the time of the murder, or claim true surprise and impeach with a prior inconsistent statement, as explained infra.

The Manual creates two exceptions<sup>14</sup> to the above rule, and the Federal Rules of Evidence state that the "credibility of a witness may be attacked by any party, including the party calling him."<sup>15</sup> The Court of Military Appeals has not adopted the Federal Rules of Evidence in total, but has indicated that "federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment."<sup>16</sup> It may be that the Federal Rule is "incompatible" with military law.

One exception to the voucher rule is that the proponent of a witness could impeach a witness made indispensable,

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12. MCM, 1969, para. 153b.

13. United States v. Kauth, 11 USCMA 261, 29 CMR 77 (1960) (contradiction is not impeachment).

14. MCM, 1969, para. 153b. See Department of the Army Pamphlet 27-2, Analysis of the Contents, Manual for Courts-Martial, United States, 1969 (Revised edition), (July 1970), p. 27-44 [hereinafter referred to as Analysis].

15. Fed. R. Evid. 609.

16. United States v. Weaver, supra at 117.

either by law or the facts,<sup>17</sup> as when there is only one eyewitness to a crime. The second exception is that the proponent may impeach a witness who, to the proponent's surprise, gives testimony affirmatively damaging to the proponent's case.<sup>18</sup> To invoke this exception, the proponent must show that the witness' testimony is both surprising<sup>19</sup> and affirmatively damaging.

The party must have had an honest belief that the witness would testify as expected. Further, if surprise is the only reason for permitting a party to impeach its own witness, that party may only attack credibility of that witness by (1) proof of prejudice, bias, or other motive to misrepresent or (2) proof of inconsistent prior statements or conduct of that witness.<sup>20</sup>

This second exception is inapplicable if the witness simply fails to give expected favorable testimony. Assume that the defense expected the witness to testify to an alibi. The exception would not apply if the witness testified negatively

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17. MCM, 1969, para. 153b. Cf. *United States v. Reid*, 8 USCMA 4, 8-9, 23 CMR 228, 232-33 (1957) (witness' testimony concerning an automobile accident involving the defendant is not indispensable when there were at least two other witnesses (dictum)); *United States v. Butler*, 41 CMR 620 (ACMR 1969) (government informer who had participated in investigation and purchased drugs forming the basis of one sale charge was an indispensable defense witness as to the entrapment issue).

18. MCM, 1969, para. 153b.

19. *United States v. Reid*, 8 USCMA 4, 8, 23 CMR 228, 232 (1957). It is within the discretion of the judge to accept counsel's word as to surprise, but the judge must guard against the introduction of otherwise inadmissible evidence.

20. *United States v. Bradley*, 50 CMR 608, 622 (NCMR 1975). The accused was charged with the wrongful possession and distribution of LSD. A witness changed his unequivocal testimony that he bought LSD from the defendant by denying knowing the person who gave him the LSD.

that he or she cannot recall seeing the defendant on the day in question. However, the exception would apply if the witness gave the affirmatively damaging testimony that he or she saw the defendant near the crime scene.

Finally, even when the witness' testimony is surprising and affirmatively damaging, the party calling the witness may impeach the witness only to the extent necessary to repair the party's case.<sup>21</sup> In the above hypothetical, defense counsel could impeach the witness not only with a prior inconsistent statement tending to establish the alibi, but also by extrinsic evidence of bias.<sup>22</sup>

In United States v. Miller,<sup>23</sup> the Court of Military Appeals held that a criminal laboratory report is admissible as a business entry without an in-court statement of the chemist. But, the court explained, this does not bar the accused from subpoenaing the chemist and cross-examining him or her as to competency and the accuracy of the lab report,<sup>24</sup> citing Federal Rule 806.<sup>25</sup> Cross-examining this expert is an example of permissibly impeaching the proponent's own witness, even without demonstrating surprise.

If the Court of Military Appeals were to adopt the federal rule allowing a party to impeach its own witness in all cases,<sup>26</sup> regardless of the Manual exceptions, the change would be very significant. Paragraph 153b(2)(c) allows the opponent to introduce a prior inconsistent statement for impeachment purposes. Under certain circumstances,

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21. MCM, 1969, para. 153b.

22. Id.

23. 23 USCMA 247, 49 CMR 380 (1974). See also United States v. Strangstalien, 7 M.J. 225 (CMA 1979), which reaffirms the Miller rule.

24. Id.

25. Fed. R. Evid. 806, "Attacking and Supporting Credibility of Declarant."

26. Fed. R. Evid. at 607.

the statement may be admitted for its truth. Thus, when the relationship between the two is considered, trial strategy could be drastically altered.<sup>27</sup>

#### IV. Methods of Impeachment

The second stage in the analysis of credibility is impeachment. The following is a discussion of the principal methods or techniques of impeaching witnesses in the military.

##### A. Character Trait of Untruthfulness

As soon as a witness, including the accused,<sup>28</sup> testifies, his or her credibility becomes an issue in the case.<sup>29</sup> One method of impeachment is, therefore, an attack on the witness' character trait of truthfulness. In brief, the opponent may introduce timely reputation or opinion-type evidence about the witness' character trait of untruthfulness.

1. Timely. We are interested in the witness' credibility at the time of trial. The evidence introduced must consist of a reputation arising, or an opinion formed near, the time of trial. The concept of reputation in the military is very broad, in that an individual not only has a reputation in the military community<sup>30</sup> or unit but also in the civilian community,<sup>31</sup> if he is a member of both. Because of the transient nature of the military community, it is not necessary

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27. Compare Fed. R. Evid. 607 with MCM, 1969, para. 153b(2)(c).

28. MCM, 1969, para. 153b.

29. Id. para. 153b(1). This portion of the 1951 Manual was not changed. Analysis, page 27-44. The portion of this section that was changed dealt with rehabilitation. Id.

30. United States v. Johnson, 3 USCMA 709, 14 CMR 127 (1954) (defendant who lives off post may, if proper foundation is laid, introduce evidence as to reputation in military or civilian community).

31. Id.

to show that the individual resided in the community for a long period of time before the trial.<sup>32</sup>

2. Reputation or opinion-type evidence. The character evidence may be reputation<sup>33</sup> or personal opinion-type evidence.<sup>34</sup> Thus, the witness is not only permitted to testify about his own personal knowledge or observation, but may also testify as to what he or she has heard concerning the witness' character within the community. At common law, only reputation evidence could be introduced, despite the fact that the more persuasive evidence concerning truthfulness is opinion. To lay a proper foundation for reputation evidence, the proponent must show that the character witness is (1) ordinarily a resident of the same military or civilian community as the witness, and (2) has lived in the community long enough to have become familiar with the witness' reputation in that community.<sup>35</sup> To lay a proper foundation for opinion evidence, the proponent must show that the character witness (1) knows the witness personally, and (2) is acquainted with the witness well enough to have had an opportunity to form a reliable opinion of the witness' trait for truthfulness.

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32. Cf. United States v. Tomchek, 4 M.J. 66 (CMA 1977) (such evidence not admissible if the witness specifically testifies that he is not familiar with defendant's reputation in the unit).

33. MCM, 1969, para. 138f(1); Fed. R. Evid. 405a.

34. Id.

35. United States v. Tomcheck, supra. The term "community in which he lives" is not subject to an exact geographical location, but means an area where a person is well known and has established a reputation, citing a number of authorities. See also United States v. Crowell, 6 M.J. 944, 946 (ACMR 1979) (company commander may testify as to accused's reputation). See generally Boller, Proof of the Defendant's Character, 64 Mil. L. Rev. 37 (1974).

3. Character trait of untruthfulness and sex offenses. The Manual<sup>36</sup> and the federal rules<sup>37</sup> limit the testimony to the trait for untruthfulness. But in sex offense prosecutions, where consent is in issue, evidence of the lewd character of the prosecuting or complaining witness is admissible for impeachment.<sup>38</sup> Whether the military courts will follow the lead of some states which forbids for impeachment the use of evidence about the alleged rape victim's past sexual conduct remains to be seen.<sup>39</sup>

The Manual provides that in cases where lack of consent is an element,

any evidence, otherwise competent, tending to show the unchaste character of the alleged victim is admissible on the issue of the probability of consent by the alleged victim to the act charged (whether or not the alleged victim has testified as a witness) and on the question of credibility of the alleged victim . . . unless the military judge . . . determines as a matter of discretion that the particular evidence would be so remote with respect to the question of consent or credibility as to be irrelevant.<sup>40</sup>

36. MCM, 1969, para. 153**b**(2)(a).

37. Fed. R. Evid. 608b.

38. MCM, 1969, para. 153**b**(2)(a) and (b).

39. See 17 Crim. L. Rptr. 2203 (Ohio); 17 Crim. L. Rptr. 2243 (Hawaii).

40. MCM, 1969, para. 153**b**. See United States v. Lewis, 6 M.J. 581 (ACMR 1978).

4. Relevancy. The Supreme Court has held that it is error for the trial court to forbid a relevant line of cross-examination. In Alford v. United States,<sup>41</sup> the court held it error to forbid the defense from asking the key prosecution witness where he lived:

It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.

The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.<sup>42</sup>

The court also recognized that the defense had an additional reason to ask the question, i.e., the witness was in the custody of federal authorities. The court recognized that this fact might have suggested that the witness' testimony was "affected by fear or favor growing out of his detention," something the defendant was "entitled to show by cross-examination."<sup>43</sup>

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41. 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). Accord, Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968) (error to prohibit questioning prosecution witness as to name and address).

42. Alford, supra, 282 U.S. at 692-93, 51 S.Ct. at 219-220, 75 L.Ed. at 628-29.

43. Id. at 693, 51 S.Ct. at 220, 75 L.Ed. at 628-29.

In Davis v. Alaska,<sup>44</sup> the court held that the defendant's right of confrontation was paramount to a state policy of not revealing juvenile adjudications through impeachment of the key prosecution witness. This witness, who was on probation for burglary as the result of juvenile proceedings, allegedly observed the defendant near the location of the disposition of the fruits of the burglary close to the witness' home and 26 miles from the place of the burglary.

#### B. Prior Conviction

The opponent may prove that the witness has suffered a valid, final, recent conviction for certain types of offenses.

1. Valid. Any conviction which has been disapproved or set aside may not be used for impeachment purposes.<sup>45</sup> The same is true if a conviction has been obtained in violation of due process of law or the witness' right to counsel under the Sixth Amendment.<sup>46</sup> However, most courts limit the attack on a prior conviction used for impeachment to evidence of the denial of a right affecting the fairness of the trial, especially the constitutional right to counsel. These courts will not sustain collateral attacks based on the fact that reliable evidence supporting the conviction was obtained in violation of the Fourth Amendment.<sup>47</sup>

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44. 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

45. United States v. Heflin, 1 M.J. 131 (1975); para. 153b(2)(b), MCM, 1969. If the DA Form 20B (Record of Court-Martial Conviction) indicates that the case is still undergoing review, it may not be used for impeachment. Likewise, if the document does not reflect the completion of supervisory review as required by the regulation, the conviction is not admissible as a prior conviction. The failure to object does not constitute a waiver.

46. See Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), where the Court held that a conviction obtained in violation of the right to counsel may not be used for impeachment of the defendant.

47. See, e.g., United States v. Penta, 475 F.2d 92 (1st Cir. 1973).

The judgment of a civilian court carries with it a presumption that the defendant was either afforded counsel or waived the right to a lawyer. Thus, the burden is on the defendant who seeks to attack the conviction to show the lack of regularity. Ordinarily, the defendant's testimony, which establishes the lack of each of the foregoing criteria, would be sufficient to overcome the presumption. However, in United States v. Weaver, supra, the defendant did not overcome this presumption by testifying that he had an apparent lack of memory as to the possible representation or the question of waiver. Moreover, he failed to establish that he was indigent at the time of the proceedings.

In United States v. Booker,<sup>48</sup> the Court of Military Appeals held that a conviction by summary court, where there was no showing of representation by counsel or a valid waiver, may not be used to effectuate the escalator clause. The same reasoning used in that case would probably prevent a summary court-martial conviction of the defendant being used for impeachment, unless the prosecution establishes that the defendant was represented by counsel or that there was a valid waiver.

2. Final. The Manual provides that if the conviction is undergoing appellate review or the time for an appeal has not expired, the conviction may not be used for impeachment.<sup>49</sup> The same provision goes on to explain that it is immaterial that a request to vacate or modify the findings in the sentence has been made under Article 69 or that there has been a motion for a new trial.

3. Recent. The Manual sets no time limit upon the use of a conviction for the purpose of impeachment.<sup>50</sup> Rule 609 of the Federal Rules of Evidence does indicate that a previous conviction becomes stale for the purpose of attacking credibility by placing a ten year limitation upon its use, absent certain procedural rules. Adopting the federal rule

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48. 5 M.J. 238 (CMA 1977), reconsidered on other grounds, 5 M.J. 246 (CMA 1978).

49. MCM, 1969, para. 153b(2)(b).

50. Id.

as not being incompatible with military law or the special requirements, the Court of Military Appeals stated:

Where more than ten years have elapsed, however, evidence of a prior conviction is not admissible unless the prosecution, after giving the required notice, can show, and the military judge determines, that the probative value of the conviction, supported by specific facts and circumstances substantially outweighs its prejudicial effect.<sup>51</sup>

4. For certain types of offenses. For a prior conviction, military or civilian, to be admissible, it must involve moral turpitude or otherwise affect credibility.<sup>52</sup> The Manual defines such an offense as a conviction by court-martial in which the maximum punishment includes a dishonorable discharge or confinement at hard labor in excess of one year; a conviction by a federal civilian court in which the maximum punishment includes confinement at hard labor in excess of one year; a conviction by any other court of an offense similar to an offense punishable by the United States Code as a felony or an offense characterized by the jurisdiction in question as a felony or as an offense of comparable gravity; or a conviction of any offense involving fraud, deceit, larceny, wrongful appropriation, or the making of a false statement.<sup>53</sup>

The Federal Rules of Evidence provide that the conviction is admissible if it is for a crime punishable by death or imprisonment in excess of one year, or if the crime entails dishonesty or a false statement regardless of the punishment.<sup>54</sup> The Advisory Committee Notes indicate that the rule includes such crimes as fraud, embezzlement, and deceit.<sup>55</sup>

51. United States v. Weaver, supra at 117 (emphasis in original).

52. MCM, 1969, para. 153b(2)(b).

53. Id.

54. Fed. R. Evid. 609(a).

55. See Advisory Committee Notes accompanying Fed. R. Evid. 609.

In requiring the military judge to exercise judicial discretion, the Court of Military Appeals does not mention the maximum punishment as a factor, except to indicate that if the punishment or offense does not fall within one of the aforementioned rules, the prior conviction is inadmissible.<sup>56</sup>

5. Discretion to exclude. In some jurisdictions no discretion is left to the trial judge to exclude evidence of a conviction which is otherwise properly admissible.<sup>57</sup> However, the Manual provides that a witness "may" be impeached by an otherwise valid final conviction.<sup>58</sup> This, together with an examination of the Federal Rules of Evidence, has been interpreted as permitting the military judge to exercise discretion. See United States v. Weaver, supra. The judge must consider the purpose of the use of the prior conviction. The military judge, in weighing the probative value of a prior conviction vis-a-vis its prejudicial effect, must examine the nature of the conviction in terms of its bearing on veracity, its age, its propensity to influence the minds of the jury, the necessity for the testimony of the accused and the interest of justice, and the circumstances of the trial in which the prior conviction is sought to be introduced.

6. Bearing on veracity. The table of maximum punishments<sup>59</sup> is only one factor to be used in determining the impact of

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56. "Suffice it for present purposes to refer to the general guideline for an offense involving moral turpitude, namely, does the authorized punishment include a dishonorable discharge or confinement at hard labor for a year [sic] or more." United States v. Johnson, 1 M.J. 152, 154 (CMA 1975).

57. Howard v. State, 480 S.W.2d 191 (Tex. 1972); State v. Adams, 50 N.J. 1, 231 A.2d 605 (1967).

58. MCM, 1969, para. 153b(2)(b). As to the revision of this portion of the Manual, see Analysis.

59. MCM, 1969, para. 127c.

the conviction on credibility.<sup>60</sup> The Court of Military Appeals has stated:

Acts of perjury, subornation of perjury, false statement, or criminal fraud, embezzlement or false pretense are, for example, generally regarded as conduct reflecting adversely on an accused's honesty and integrity. Acts of violence or crimes purely military in nature, on the other hand, generally have little or no direct bearing on honesty and integrity.<sup>61</sup>

7. Age. As to their age, convictions,

near or approaching the ten year prohibition against their use, particularly if they occurred during the minority of an accused who has not been convicted of a subsequent crime involving moral turpitude or otherwise affecting his credibility, may not be a meaningful index of a propensity to lie.<sup>62</sup>

If more than ten years have elapsed, the prosecution must give notice of the prior conviction in accordance with the Federal Rules of Evidence, and the military judge must make a finding of fact that the probative value of the conviction substantially outweighs its prejudicial effect.

For those prior convictions where a period of ten years or less has elapsed since the date of conviction or the release of the witness from confinement imposed for that conviction, the accused has the burden of persuasion to show the prejudicial effect

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60. See United States v. Johnson; United States v. Weaver, both supra.

61. United States v. Weaver, supra at 118, n. 6 (1975).

62. Id. at 118, n. 7.

of impeachment outweighs the probative value of the prior conviction to the issue of credibility. Once raised by the defense, either preliminarily by motion at an Article 39(a) session or by objection when the prosecution seeks introduction, the military judge should allow the accused the opportunity to show why judicial discretion should be exercised in favor of exclusion.<sup>63</sup>

8. Propensity to improperly influence the jury.

The use of convictions for a crime the same as or similar to the one for which the accused is presently on trial requires a particularly careful consideration and showing of probative value because of the very potentially damaging effect they may have upon the mind of the jury.<sup>64</sup>

9. Necessity for the testimony of the accused.

Consideration must be given to whether the cause of truth would be helped more by letting the jury hear the accused's testimony than by the accused's foregoing that opportunity because of the fear or prejudice founded upon a prior conviction. For instance, where an instruction relative to inferences arising from the unexplained possession of recently stolen property is permissible, the importance of an accused's testimony becomes more acute.<sup>65</sup>

10. Circumstances under which prior conviction is sought to be introduced.

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63. Id. at 117.

64. Id. at 118, n. 8.

65. Id. at 118, n. 9.

Where a factual issue in the case on trial has narrowed to a question of credibility between the accused and his accuser, there is a greater, not lesser, compelling reason for exploring all avenues which would shed light on which of the two witnesses is to be believed.<sup>66</sup>

11. Conviction. There must be a conviction. An arrest, indictment or information, or Article 15 punishment<sup>67</sup> may not be used for impeachment as a prior conviction.

12. Method of Proof. The conviction may be shown by an admissible record of conviction, an admissible copy of such record, or by taking judicial notice of court-martial orders.<sup>68</sup> Also, the witness may be cross-examined about such conviction. If the witness admits the conviction, "other proof of the conviction is unnecessary."<sup>69</sup> The Manual does not prohibit the cross-examiner to ask the general nature of the crime and the sentence imposed. However,<sup>70</sup> the witness may, if he so desires, explain the circumstances.

13. Juvenile adjudicates. Adopting case law prior to 1969,<sup>71</sup> the Manual provides that a juvenile adjudication as a delinquent is not a conviction for the purpose of impeachment by a prior conviction.<sup>72</sup> However, while an accused

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66. Id. at 118, n. 10.

67. See United States v. Domenech, 18 USCMA 314, 40 CMR 26 (1969).

68. MCM, 1969, para. 153b(2)(b).

69. Id.

70. Id.

71. See also United States v. Yanuski, 16 USCMA 170, 36 CMR 326 (1966); United States v. Liscar, 11 USCMA 708, 29 CMR 524 (1960); United States v. Roark, 8 USCMA 279, 24 CMR 89 (1957) (improper to cross-examine defendant about being adjudicated a juvenile delinquent at eight years of age).

72. MCM, 1969, para. 153b(2)(b).

may not be so impeached, any other witness may be impeached by proof of other acts of misconduct which might have resulted in a juvenile adjudication, as a delinquent, provided the other rules are satisfied.<sup>73</sup> It is a violation of the Sixth Amendment to forbid the defense from impeaching a prosecution witness by showing a motive to testify falsely, where the witness was on probation for a juvenile adjudication for burglary, the basis of prosecuting the defendant.<sup>74</sup>

### C. Other Acts Not Amounting to a Conviction

The opponent may impeach a witness other than the accused<sup>75</sup> by good faith questioning of the witness about certain acts of misconduct.

1. Witness other than the accused. The Manual permits the use of misconduct involving moral turpitude or otherwise affecting credibility to impeach a witness other than the accused.<sup>76</sup> It seems that there are two exceptions to this limitation of impeaching the accused. First, the opponent may prove acts of misconduct directly related to the case--for example, attempted subornation of perjury in the case by the accused.<sup>77</sup>

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73. United States v. Yanuski, supra.

74. Davis v. Alaska, supra. The cross-examination is permissible to probe the witness' bias and prejudice and not generally to call the witness' good character into question. The court did not deal with the admissibility of extrinsic evidence of juvenile adjudication.

75. An Article 15 punishment for assault with a dangerous weapon may be a basis for impeaching a witness not the accused. Again, it is discretionary with the trial judge based on the factors mentioned earlier. United States v. Domenech, supra. See also United States v. Robertson, 14 USCMA 371, 34 CMR 108 (1963); United States v. Krokroskia, 13 USCMA 371, 32 CMR 371 (1962); United States v. Berthiaume, 5 USCMA 669, 18 CMR 293 (1955); United States v. Long, 2 USCMA 60, 6 CMR 60 (1952); United States v. Crawford, 44 CMR 541 (AFCMR 1971).

76. MCM, 1969, para. 153b(2)(b).

77. MCM, 1969, para. 138g. Cf. Fed. R. Evid. 608b.

Second, if on direct-examination the accused makes a sweeping claim disavowing any misconduct, the opponent may question the accused regarding specific acts.<sup>78</sup> Thus, where the defendant on direct-examination has stated that he or she had never had drugs in his or her possession, the prosecutor could impeach the defendant's statements by conducting cross-examination and introducing independent evidence of the defendant's possession of drugs on prior occasions.

2. Good faith. The opponent must have a genuine belief that the witness committed the offense.<sup>79</sup>

3. Questioning the witness. The opponent is bound by negative answers<sup>80</sup> as to uncharged misconduct; thus extrinsic evidence is not admissible. This would not preclude the introduction of evidence if otherwise admissible, however.

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78. See e.g., *United States v. Kindler*, 14 USCMA 394, 34 CMR 174 (1964). The accused testified that he was a normal human being at the time of testifying and at the time of the offense; that he had not engaged in homosexual activities since joining the Air Force; and considered a homosexual act to be a sin. The court permitted cross-examination of the defendant about homosexual activity during the time he was 12 and 14 years of age. See also *United States v. Hayes*, 48 CMR 67 (AFCMR 1973) (statement by the defendant that he had not engaged "in a fight like this before in the service" is not such a broad disclaimer); *United States v. Penrose*, 48 CMR 173 (AFCMR 1974) (When, during the sentencing stage, the defendant denied planning with an accomplice the larceny for which he was convicted, he opened the door for rebuttal by cross-examining him about other offenses planned by the defendant and the accomplice). Cf. *United States v. Harris*, 9 USCMA 493, 26 CMR 273 (1958) (Defendant, charged with taking indecent liberties with two young girls, testified he was prompted by his feelings of fatherly tenderness. The court held adultery admissible to show that the defendant had an adulterous relationship which lead to illegitimate offspring. Judge Ferguson dissented).

79. *United States v. Britt*, 10 USCMA 557, 28 CMR 123 (1959); MCM, 1969, para. 153b(2)(b).

80. MCM, 1969, para. 153b(2)(b).

4. Certain acts of misconduct. The act of misconduct must involve moral turpitude or otherwise affect credibility. The same rules that apply to a prior conviction as to the nature of the act and the discretion of the trial judge are applied to this type of impeachment.<sup>81</sup>

D. Deficiencies in Elements of Competency

For a witness to be held competent at common law, he must possess the testimonial capacities of sincerity, perception, memory, and narrative.<sup>82</sup> Since these capacities relate to the credibility of a witness, an opponent may question the witness about them.

Setting aside the question of sincerity as it relates to the witness' understanding of the oath or affirmation, intelligence has a bearing on the other capacities, and is, therefore, a proper subject of cross-examination.<sup>83</sup> Absent evidence of intelligence at either end of the moron/genius spectrum, its bearing on this outcome is questionable. To heighten the relevancy of this evidence, an expert witness might be called to testify as to the bearing of intelligence on the aforementioned capacities.<sup>84</sup> Extrinsic evidence of intelligence is generally not admissible, however, since evidence of intelligence normally may be deduced by skillful examination of the witness.<sup>85</sup>

A number of factors bear on perception, such as how the information was obtained; sensory defects as to sight, hearing, and smell; the physical and emotional conditions under which the

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81. See nn. 69-81, supra. See also United States v. Johnson, supra; United States v. Brinkley, 7 M.J. 588 (NCMR 1979) (trial judge did not abuse discretion in allowing defense witness to be cross-examined about his loss of employment to avoid larceny charges); Fed. R. Evid. 608(b).

82. E. Imwinkelried, P. Giannelli, F. Gilligan, and F. Lederer, Criminal Evidence at 50-51 (1979).

83. Id. at 51.

84. Id.

85. Id.

information was obtained, such as darkness, fright, and excitement; and the witness' understanding and comprehension of facts.

#### E. Prior Inconsistent Statements

If, prior to trial, the witness made a written or oral statement inconsistent with his or her testimony, the opponent may cross-examine the witness about that statement. A statement is sufficiently inconsistent if the witness' pretrial statement omits a material fact which he or she would not reasonably have omitted,<sup>86</sup> if the witness' testimony appears to be a recent fabrication,<sup>87</sup> or if the witness alters a material fact in his or her testimony.<sup>88</sup> However, a witness' inability to recall certain events does not provide a basis for the introduction of a prior inconsistent statement.<sup>89</sup> If the proffered impeaching statement is not in fact inconsistent with the testimony of the witness, there is, of course, nothing to impeach and the prior statement may not be proved.<sup>90</sup>

In addition to cross-examining the witness about the prior inconsistent statement, the opponent may sometimes introduce extrinsic evidence to prove the statement. If admitted, it may be considered for the fact finders to determine which statement is accurate. Extrinsic evidence is permissible when the following conditions are satisfied: (1) the opponent has laid a proper foundation on cross-examination; (2) the witness has denied, refused to testify, or cannot remember making the inconsistent statement; (3) the statement relates to a material, rather than a collateral,

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86. *United States v. Mason*, 40 CMR 1010 (AFBR 1969).

87. *United States v. Kellum*, 1 USCMA 482, 4 CMR 74 (1952).

88. *Id.*

89. *United States v. Foster*, 49 CMR 421 (ACMR 1974).

90. For example, the fact that the victim of an assault invoked his rights and refused to testify at an Article 32 investigation was held not inconsistent with his testifying at trial in *United States v. Johnson*, 18 USCMA 241, 39 CMR 241 (1969).

fact in the case; and (4) the statement does not violate the rights of the defendant under Article 31, if applicable.

As to the first condition of laying a proper foundation, it is necessary to direct the witness' attention to the time and place of the statement and the identity of the person to whom it was made, and then ask the witness if he or she made the statement.<sup>91</sup> It is not necessary for the proponent to lay the foundation if that has been done by the opponent.<sup>92</sup> It may be that the opponent has laid part of the foundation and any further testimony would be fruitless as the result of the prior testimony of the witness. When the inconsistent statement is contained in a writing apparently signed or written by a witness, a sufficient foundation may be laid by showing the writing to the witness and asking whether the signature is that of the witness or whether the witness was the author.<sup>93</sup>

The second condition is that the witness deny, refuse to testify, or cannot remember the inconsistent statement.<sup>94</sup> Whether or not the witness admits making the inconsistent statement, the substance of the statement is admissible if there is competent evidence that the witness made the statement.<sup>95</sup> As to a writing, if the witness admits signing

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91. MCM, 1969, para. 153a.

92. *United States v. Howard*, 23 USCMA 187, 48 CMR 939 (1974). See also *United States v. Veilleux*, 1 M.J. 811 (AFCMR 1976), where, because a witness denied any involvement with heroin, it was permissible to have a third party testify that the witness had admitted earlier use. "In light of such a blanket disclaimer, it is patently obvious it would have been a futile exertion of energy for the trial counsel to further pursue the matter by asking the witness if he ever told [the third party] a different story." *Id.* at 813.

93. MCM, 1969, para. 153a.

94. *Id.*

95. *Id.* The prior rule was that, if the witness admitted the prior inconsistent statement, it was not admissible. *United States v. Brown*, 7 USCMA 251, 22 CMR 41 (1956).

the document, it is admissible provided the other conditions are met.<sup>96</sup> Likewise, if the witness does not make such an admission as to a writing, but such fact is proved, the writing will then become admissible in evidence for purposes of impeachment.<sup>97</sup>

A common factual scenario is the impeachment of a witness by use of Article 32 testimony. If the witness admits signing the statement or such is proved, the statement is admissible for impeachment. If the statement is oral and competent evidence of the statement is received, the statement is also admissible. But if the statement is unsigned and there is an offer of proof<sup>98</sup> of a tape recording, the best evidence rule would apply.<sup>98</sup> Once the tape has been authenticated, it is admissible for impeachment purposes.

The third condition of admissibility for impeachment is that the statement does not relate to a collateral fact. This condition is merely<sup>99</sup> an application of the general collateral fact rule.

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96. MCM, 1969, para. 153a.

97. Id.

98. MCM, 1969, para. 143a.

99. It is not an abuse of discretion for the trial judge to forbid impeachment by cross-examination about a complaint made sixty days earlier, concerning another rape. United States v. Waller, 11 USCMA 295, 29 CMR 111 (1960) (first complaint was determined to be unfounded). In United States v. Weaver, supra, after the defendant introduced evidence of good character and good reputation as to trustworthiness, he denied on trial counsel's cross-examination that he had told his commander that he loaned his car to another servicemember on the date of the search. The court held it was improper, over objection, to permit evidence that this statement was false, as it was immaterial to the case.

Lastly, the accused may not be cross-examined or impeached by a statement which does not satisfy the traditional voluntariness doctrine and Article 31.<sup>100</sup>

A witness has a right to explain any apparent inconsistent statement and, if excused from the witness stand, may be recalled for that purpose. The rule of completeness applies to prior inconsistent statements whether written or oral.<sup>101</sup>

It is not error for the military judge to refuse to litigate the admissibility of the defendant's statement at an Article 39(a) session so that the defendant might decide whether to take the witness stand. To require the trial judge to litigate the suppression motion at the outset, "would permit him [the accused] to use the Article 31/Miranda protection in the manner expressly disavowed by the Supreme Court in Harris."<sup>102</sup>

#### F. Inconsistent Acts

As with prior inconsistent statements, prior inconsistent acts are admissible to impeach, but the judge must exercise discretion.<sup>103</sup> If the defendant testifies at trial to

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100. United States v. Hall, 23 USCMA 550, 50 CMR 720 (CMA 1975) (reversible error notwithstanding other evidence of guilt); United States v. Jordan, 20 USCMA 614, 44 CMR 44 (1971); United States v. White, 19 USCMA 338, 41 CMR 338 (1970) (psychiatrist who examined defendant at request of commander may not testify concerning defendant's unwarned statements); United States v. Rivers, SPCM 13725, \_\_\_ M.J. \_\_\_ (ACMR 24 Aug. 79) (reversible error to cross-examine accused on prior inconsistent statement to CID without showing of voluntariness).

101. United States v. Stubbs, 48 CMR 719 (AFCMR 1974); MCM, 1969, para. 153a.

102. United States v. Kelly, 4 M.J. 845, 847 (ACMR 1978).

103. United States v. Dutey, 13 CMR 884 (AFBR 1953).

exculpatory facts, some courts have treated his silence during the pretrial interrogation as an inconsistent act. The Supreme Court has held that silence at the time of arrest is not inconsistent if the individual has been warned under Miranda v. Arizona,<sup>104</sup> since one element of the warnings is the right to remain silent.<sup>105</sup> The Court of Military Appeals has held that such impeachment is not permissible under Article 31(b) regardless of whether Miranda or Article 31 warnings were given.<sup>106</sup> Military courts have also stated that the prosecution, during the sentencing stage, may not cross-examine the defendant about submitting a request for administrative discharge in lieu of court-martial, whether or not the accused made mention of desiring to stay in the service.<sup>107</sup> It is against public policy to admit evidence of the plea bargaining process.<sup>108</sup> Nor can the accused be impeached because he did not testify or call witnesses at the pretrial investigation.<sup>109</sup>

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104. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

105. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975).

106. United States v. Noel, 3 M.J. 328 (CMA 1977). See also United States v. Ross, 7 M.J. 174, 176 (CMA 1979) (When the prosecution questions the defendant about the exercise of the right to remain silent it is error "for the military judge not to stop the proceedings, inquire into the purpose of the introduction of such testimony, and appropriately instruct the members of the propriety, if any, of its use at the court-martial.").

107. United States v. Pinkey, 22 USCMA 595, 48 CMR 219 (1974). United States v. Hughes, 6 M.J. 783 (ACMR 1978).

108. Id. Cf. Gunsby v. Wainwright, 596 F.2d 654 (5th Cir. 1979) (Statements even remotely connected to a vacated plea bargain are inadmissible).

109. United States v. Jackson, 31 CMR 654 (AFBR 1961).

## G. Bias

A witness may also be impeached by showing bias, interest, or hostility, for these qualities have a bearing on credibility of the witness' testimony. Because bias is never a collateral fact, the courts are quite liberal in accepting testimony that demonstrates bias. Such evidence may be admitted even after the witness' disavowal of partiality toward one side.<sup>110</sup> The courts sometimes say that proof of bias must be direct and positive. However, as a practical matter, the standard is quite lax. Bias in favor of the defendant may be explored through questions about the witness' family ties,<sup>111</sup> friendship,<sup>112</sup> romantic involvement,<sup>113</sup> employment,<sup>114</sup> financial ties,<sup>115</sup> enmity,<sup>116</sup> or fear.<sup>117</sup> Some courts<sup>118</sup> admit proof that the witness and the defendant have been members of the same criminal conspiracy as evidence of bias in the

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110. MCM, 1969, para. 153**b**(2)(d).

111. Id.

112. Id. See also United States v. Day, 2 USCMA 416, 9 CMR 46 (1953).

113. United States v. Grady, 13 USCMA 242, 32 CMR 242 (1962).

114. MCM, 1969, para. 153**b**(2)(d).

115. United States v. Howard, 23 USCMA 187, 48 CMR 939 (1974) (witness sold heroin to the defendant).

116. Wynn v. United States, 397 F.2d 621 (D.C.Cir. 1967).

117. United States v. Cerone, 452 F.2d 274 (7th Cir. 1971).

118. United States v. Robertson, 14 USCMA 328, 335-36, 34 CMR 108, 115-16 (1963) (permissible to ask wife if she threatened victim and other witnesses with prosecution for perjury unless they changed their testimony).

defendant's favor.<sup>119</sup> Factors evidencing bias against the defendant are a showing that the witness is a paid informer,<sup>120</sup> a material witness in protective custody, a co-indictee,<sup>121</sup> granted immunity,<sup>122</sup> clemency,<sup>123</sup> promised a probation,<sup>124</sup> or a reduced sentence through plea bargaining,<sup>125</sup> or has demonstrated hostility.<sup>126</sup>

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119. Cf. United States v. Musgrave, 483 F.2d 327 (5th Cir. 1973) (acquitted coindictee having personal interest in defendant's trial).

120. Cf. United States v. Peterson, 48 CMR 126 (CGCMR 1973) (reason that prosecution witness is helping the authorities proper subject of cross-examination).

121. United States v. Musgrave, supra.

122. See e.g., United States v. Dickens, 417 F.2d 958 (8th Cir. 1969).

123. United States v. Ryals, 49 CMR 826 (ACMR 1975).

124. Davis v. Alaska, supra.

125. United States v. Polito, 23 CMR 644 (ABR 1957). See also United States v. Welling, 49 CMR 609, 612 (ACMR 1974) (reversal required when the Government fails to disclose to the defense a promise of leniency made to a key prosecution witness in return for his testimony, even though witness did not lie about the promise) (dicta).

126. United States v. Thompson, 25 CMR 806 (AFBR 1957) (statement of prosecution witness that "I'm going to hang him [the defendant]," or "I've got him hung," admissible by cross-examination or extrinsic evidence as to bias); United States v. Streeter, 22 CMR 363 (ABR 1956) (defendant implicated witness in another offense).

Although some jurisdictions require a foundation to be laid on cross-examination, the Manual does not follow that practice and allows the information to be brought out on cross-examination or through extrinsic evidence.<sup>127</sup> Evidence of perjury is not required before extrinsic evidence of bias is introduced.<sup>128</sup> The probationary status of the defendant may not be shown as giving the defendant a motive to testify falsely.<sup>129</sup>

#### V. Rehabilitation

The third stage in the analysis of credibility is rehabilitation. After the witness' testimony has been attacked, it is possible to rehabilitate that testimony. However, except for bolstering, supra, such support may not take place in the absence of an attack,<sup>130</sup> nor when the opponent uses specific contradiction to impeach the witness.<sup>131</sup> Except as to denial, explanation, or corroboration, the rehabilitation must respond in kind to the opponent's impeachment. In effect, the opponent chooses the weapons.

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127. MCM, 1969, para. 153b(2)(d). See also United States v. Streeter, supra.

128. In United States v. Doney, 1 M.J. 169 (CMA 1975), it was held erroneous for the military judge to forbid the introduction of extrinsic evidence that a prosecution witness stated he would like to see the defendant "fried" or "taken care of." Reversal was mandated because the witness was crucial to the prosecution.

129. "This position [of admissibility] utterly disregards the principle that an acquittal of an offense does not preclude that same offense from providing the basis for revocation of probation." United States v. O'Berry, 3 M.J. 334, 336 (CMA 1977). Compare with Davis v. Alaska, supra.

130. 4 Wigmore, Evidence §1104 (Chadbourn ed. 1972).

131. Outlaw v. United States, 81 F.2d 805, 807 (5th Cir. 1936) ("Mere contradiction of him by appellant's testimony admittedly did not give occasion to introduce proof of good character.") Arguably, Fed. R. Evid. 401 would permit evidence to support the witness when the impeachment amounts to an attack on the witness' veracity.

### A. Denial or Explanation

Nearly always, once the witness' testimony has been attacked, it is possible for the proponent on redirect examination to give the witness a chance to explain or deny the basis for the impeachment.<sup>132</sup> Also, the proponent may introduce extrinsic evidence, subject to the judge's discretion, to curtail evidence which unnecessarily confuses the issues or results in an undue consumption of time.<sup>133</sup>

### B. Corroboration

Just as the proponent may corroborate before impeachment, the proponent may corroborate after impeachment. This evidence is not directly relevant to credibility, but is evidence of the merits which incidentally rehabilitates the witness' credibility.

### C. Character Trait for Truthfulness

At common law, when the opponent uses evidence of a character trait for untruthfulness, for example, bad reputation, prior conviction, specific act of misconduct, or corrupt act showing bias, the proponent may introduce character evidence to rehabilitate the witness.<sup>134</sup> However, if the bias is other than a corrupt act, such as bias because of family or business ties, character evidence may not be introduced.<sup>135</sup> Where the method of impeachment is self-contradiction or contradiction by a third party, evidence in support of the witness for truthfulness generally is not admissible.<sup>136</sup>

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132. *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972); *United States v. Pritchard*, 458 F.2d 1036 (7th Cir. 1972).

133. *Bracey v. United States*, 142 F.2d 85 (D.C.Cir. 1944).

134. *Rodriguez v. State*, 165 Tex. Crim. R. 179, 305 S.W.2d 350 (Tx. Crim. App. 1950).

135. *Lassiter v. State*, 35 Ala.App. 323, 47 So.2d 230 (Ala. App. 1950).

136. *Wigmore, Evidence, supra*, §§ 1108-09.

Under the Federal Rules of Evidence, when a witness' credibility has been attacked through the use of prior convictions or acts of misconduct, Rule 608(b) allows the introduction of opinion or reputation evidence in support of the witness' truthfulness.

Even where the witness has denied on cross-examination prior acts of misconduct not resulting in a conviction, if the judge believes that this denial has not erased the matter in the minds of the jury, the judge may permit rehabilitation evidence in the form of character evidence as to truthfulness.<sup>137</sup>

When the opponent impeaches the witness by evidence of a prior inconsistent statement, the courts are divided as to whether this is really an attack on the character of the witness for truthfulness.<sup>138</sup> If the prior statement has been introduced, most courts will permit rehabilitation by the use of character evidence. However, if the opponent merely introduces facts denying that to which the witness has testified, a number of courts will not permit the introduction of character evidence. One court has suggested that a more sensible view would be to examine the facts to see whether the evidence amounts to an attack on the character of the witness, and, if it does, to permit the introduction of character evidence as to truthfulness.<sup>139</sup>

#### D. Prior Consistent Statement

Whether a witness may be supported depends on which method of impeachment listed above is employed. When any of the following are used to impeach, a prior consistent statement may not be used for support: character trait for untruthfulness; prior conviction; and an act of misconduct not resulting in a conviction.<sup>140</sup>

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137. 4 Wigmore, Evidence, §1104 (3d Ed. 1940).

138. *Outlaw v. United States*, supra, sets forth various views.

139. Id.

140. *United States v. Griggs*, 13 USCMA 57, 32 CMR 57 (1962); *United States v. Harris*, 9 USCMA 493, 26 CMR 273 (1958).

At common law, the proponent may support the witness by showing the prior consistent statement under a number of circumstances. First, the opponent imputed some bias or improper motive to the witness and the prior statement was made before the alleged bias, interest, or motive arose.<sup>141</sup> Conversely, if the motive arose before the prior statement sought to be admitted, rehabilitation will not be permitted.<sup>142</sup> Second, the opponent has suggested that the witness has a faulty memory.<sup>143</sup> The basis for admitting prior consistent statements is that the prior statement was made when the event was fresh. For example, when the defense attempts to impeach the eyewitness identification by showing faulty memory, the prosecutor may introduce evidence that the witness identified the defendant soon after the event.<sup>144</sup> Third, a prior consistent statement may be introduced when the opponent expressly or impliedly charges that the witness fabricated the story before the trial, and the witness made the prior statement before the alleged fabrication.<sup>145</sup> For example, the prosecutor says, "Isn't it true that you didn't think of that defense until you had consulted your attorney?" Fourth, a prior statement is allowed when the opponent charges incapacity to remember or observe if the statement was made prior to the incapacity arising.<sup>146</sup>

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141. United States v. Kellum, 1 USCMA 482, 4 CMR 74 (1952); MCM, 1969, para. 153a.

142. United States v. Kauth, 11 USCMA 261, 29 CMR 77 (1960); United States v. Kellum, supra; United States v. Brunious, 49 CMR 102 (NCOMR 1974).

143. United States v. Kellum, supra; MCM, 1969, para. 153a.

144. United States v. Kellum; United States v. Brunious, both supra.

145. United States v. Kellum and United States v. Kauth, both supra.

146. United States v. Brunois; United States v. Mason, both supra.

Rather than applying a mechanical rule, some courts have suggested that a more flexible one which would admit evidence of prior consistent statement when, under the circumstances of the case, the statement would have probative value.<sup>147</sup> Some factors to examine are whether there is a dispute as to the prior statement, the consumption of time, the importance of the witness, and the critical nature of the impeachment and rehabilitation. This would be consistent with Federal Rule 401 that relevancy should turn on the facts of each case.

## VI. Conclusion

This article was written as a quick reference for the practicing attorney who must be ready to make instantaneous decisions concerning the credibility of witnesses. If counsel understands the three basic stages of credibility of witnesses, bolstering, methods of impeachment, and rehabilitation, he or she will be a much more effective advocate for his or her client.

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147. *United States v. Bays*, 448 F.2d 977, 979 (5th Cir. 1971); *Hanger v. United States*, 398 F.2d 91 (8th Cir. 1968).

## Securing a Continuance to Obtain Individual Counsel

Major Lawrence J. Sandell, JAGC\*

### Introduction

At the outset of a trial by court-martial, detailed defense counsel may be required to move for a continuance in order to permit the accused to exercise his right to be represented by individual civilian or military counsel. Sometimes the accused has not had time to make the necessary arrangements, or the retained civilian counsel's conflicting schedule prevents him from appearing on the date set for trial. In either case the military judge must rule on the motion for a continuance. If the judge feels the request is reasonable, he will normally grant the motion.

This article suggests several matters which trial defense counsel ought to bring to the military judge's attention, in the form of evidence, in support of the motion. The defense counsel who presents all the available pertinent evidence in support of the motion will accomplish two purposes. First, his motion will probably be granted, if it is supported by a solid factual foundation. Second, if an unenlightened judge should deny the motion, there will be sufficient evidence in the record to permit appellate defense counsel to argue that the accused has been deprived of his Sixth Amendment and Article 38(b)<sup>1</sup> rights to counsel and his Fifth Amendment right to due process.

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1. Uniform Code of Military Justice, Article 38(b), 10 U.S.C. §838(b) [hereinafter cited as UCMJ].

## Right to Personally Selected Counsel

The Sixth Amendment<sup>2</sup> right to the assistance of counsel at trial, enjoyed by private citizens, has been specifically granted to members of the military.<sup>3</sup> Federal and military cases recognize both the value of the right to counsel and the value of the opportunity to exercise that right.<sup>4</sup> The Court of Military Appeals has stated:

[I]t ought to be an extremely unusual case when a man is forced to forego civilian counsel and go to trial with assigned military counsel rejected by him. The right and opportunity of one accused of crime to select individual counsel of his choice, military or civilian, is a most valuable right accorded him by the law.<sup>5</sup>

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2. U.S. Const. Amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

3. Art. 38(b), UCMJ, provides: "The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available . . . ."

4. Crooker v. California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958); Chandler v. Fretag, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); United States v. Kinard, 21 USCMA 300, 45 CMR 74 (1972); United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978), cert. denied \_\_\_ U.S. \_\_\_, 99 S.Ct. 837, \_\_\_ L.Ed.2d \_\_\_ (1979); Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978); Carey v. Rundle, 409 F.2d 1210 (3rd Cir. 1969); United States v. Johnston, 318 F.2d 288 (6th Cir. 1963); Releford v. United States, 288 F.2d 298 (9th Cir. 1961).

5. United States v. Kinard, supra at 303, 45 CMR at 77.

## Continuance and the Courts

Every accused is advised at trial of his right to request military counsel of his own choice or retain civilian counsel at no expense to the Government.<sup>6</sup> The accused's request for a continuance in order to exercise that right often triggers legal problems for trial and appellate defense counsel. Both the Code<sup>7</sup> and the Manual<sup>8</sup> give the judge discretionary authority to grant a continuance. Historically, action taken upon the application for a continuance has been left to the sound discretion of the trial judge.<sup>9</sup> A continuance may be requested for a variety of reasons: to obtain counsel; to obtain a witness or evidence; or simply to have more time to prepare for trial.

When the denial of the continuance is raised on appeal, the issue for both federal and military courts has almost universally been, not whether the accused has been denied some constitutional right he was seeking to exercise, but rather simply whether the trial judge abused his discretion by denying the motion.<sup>10</sup> The Court of Military Appeals has

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6. United States v. Donohew, 18 USCMA 149, 39 CMR 149 (1969).

7. Art. 40, UCMJ, authorizes the military judge, for reasonable cause, to grant a continuance to any party for such time as may appear to be just.

8. Manual for Courts-Martial, United States, 1969 (Revised edition), para. 58b [hereinafter cited as MCM, 1969] states that whether a continuance should be granted is a matter of sound discretion.

9. Isaacs v. United States, 159 U.S. 487, 16 S.Ct. 51, 40 L.Ed. 229 (1895).

10. United States v. Kinard, supra at 306, 45 CMR at 80; United States v. Alicea-Baez, CM 437597, \_\_\_ M.J. \_\_\_ (ACMR 23 August 1979); United States v. Livingston, 7 M.J. 638 (ACMR 1979); United States v. Higdon, 2 M.J. 445 (ACMR 1975); United States v. Sutton, 46 CMR 826 (ACMR 1972); United States v. Burton, supra; Holt v. United States, 267 F.2d 497 (8th Cir. 1959); Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1937), cert. denied 301 U.S. 689, 57 S.Ct. 795, 81 L.Ed. 1346 (1937), reh. denied 301 U.S. 715, 57 S.Ct. 937, 81 L.Ed. 1366 (1937).

held that it would reverse a conviction only if the judge abused his discretion by denying the request.<sup>11</sup> The difference is important. Appellate courts have broad discretion in determining whether there has been an abuse of discretion,<sup>12</sup> and will rarely find abuse absent a showing of prejudice to the accused.<sup>13</sup> If an accused has been deprived of his constitutional right to counsel, however, appellate courts will reverse without the necessity of a showing of prejudice.<sup>14</sup> The Supreme Court of the United States puts the right to assistance of counsel on a pedestal:

The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.<sup>15</sup> Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the

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11. Kinard, supra at 306, 45 CMR at 80.

12. United States v. Hampton, 50 CMR 531 (NCOMR 1975).

13. United States v. Furgason, 6 M.J. 844 (NCOMR 1979); United States v. Hampton, supra.

14. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Best, 6 USCMA 39, 19 CMR 165 (1955); United States v. Piggee, 2 M.J. 462 (ACMR 1975); United States v. Burton, supra at 489; Releford v. United States, supra.

15. Citing Glasser, supra at 76.

prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.<sup>16</sup>

#### Denying Continuance as Denial of Due Process

The denial of a continuance may be so arbitrary and so fundamentally unfair as to violate the constitutional principle of due process.<sup>17</sup> Trial defense counsel can greatly enhance their chance of success before the military judge and, if necessary, the appellate tribunal, by presenting, in support of the motion, evidence of all available factors which make the particular request reasonable. The more evidence in the record supporting the reasonableness of the request, the greater the chance that an appellate tribunal will find that refusing the request has resulted in a denial of due process. What follows is a list of factors which appellate courts have considered in determining whether a request for a continuance to obtain counsel was reasonable:

1) Whether the accused was diligent in his search for counsel.<sup>18</sup>

2) Whether the inability to secure counsel was due to any fault of the accused.<sup>19</sup>

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16. Holloway, supra at 489, 98 S.Ct. at 1181, 55 L.Ed.2d at 437-438. This was not a capital case, so the phrase 'at least the prosecution of a capital offense' is dictum and should not qualify the principle. There is also authority holding that a defendant's right to the assistance of counsel of his choice is not unqualified, but must be balanced against the public's right to the effective and efficient administration of justice. See Kelley v. Springett, 527 F.2d 1090 (9th Cir. 1975); Carey v. Rundle, supra.

17. Gandy v. Alabama, supra. See Reynolds v. Cochran, 365 U.S. 525, 81 S.Ct. 723, 5 L.Ed.2d 754 (1961).

18. United States v. Borzellino, 9 CMR 304 (ABR 1953).

19. Id.

3) Whether, in the case of individual civilian counsel, a retainer fee would be forthcoming within a reasonable time.<sup>20</sup>

4) Whether the accused freely elects to proceed with detailed counsel rather than individual counsel.<sup>21</sup>

5) Whether the request is legitimate, or made merely for the purpose of delay.<sup>22</sup>

6) The accused's educational and social background, and his mental history.<sup>23</sup>

7) Whether the accused can articulate reasons for lack of confidence in his assigned counsel.<sup>24</sup>

8) Whether the accused's request is timely.<sup>25</sup> Did he begin searching for counsel as soon as he was advised of a trial date, or did he suddenly decide on the day of trial that he wanted to retain private counsel?

9) Whether the accused is confined.<sup>26</sup> Presumably an accused in confinement would not be interested in unnecessarily delaying his trial.

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20. United States v. Edwards, 13 CMR 322 (ABR 1953).

21. See United States v. Mitchell, 15 USCMA 516, 36 CMR 14 (1965).

22. United States v. Donati, 14 USCMA 235, 34 CMR 15 (1963).

23. Martinez v. Thomas, 526 F.2d 750 (2d Cir. 1975).

24. Id.

25. Id.

26. Id.

10) The length of the requested delay.<sup>27</sup>

11) Whether detailed counsel or an associate of retained civilian counsel is adequately prepared to try the case.<sup>28</sup> This normally applies when retained counsel is unable to attend because of a conflicting trial date in another court.

12) Whether other continuances have been requested and granted.<sup>29</sup>

13) Whether there are other unique factors.<sup>30</sup>

14) Whether a denial will result in identifiable prejudice to the accused's case.<sup>31</sup>

15) Whether the case is simple or complex.<sup>32</sup>

16) Whether a continuance will result in delaying the trial of other cases.<sup>33</sup>

17) Whether the Government will be inconvenienced.<sup>34</sup> Has the Government gone to the expense of bringing witnesses in from other locations, or is all evidence available locally?

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27. Gandy v. Alabama, supra.

28. Id.

29. Id.

30. Id.

31. United States v. Burton, supra.

32. Id.

33. Carey v. Rundle, supra.

34. United States v. Johnston, 318 F.2d 288 (6th Cir. 1963).

United States v. Sutton,<sup>35</sup> is a case in which the accused's unsuccessful attempt to obtain a continuance in order to allow civilian counsel time to prepare for trial was vindicated on appeal. Following Sutton's Article 32 investigation on 1 April 1971 where he was represented by detailed defense counsel, he retained the services of a civilian attorney who represented him at depositions on 17 May and 1 June 1971. Thereafter, civilian counsel withdrew from the case on Sutton's request. In April, May, and June 1971, the accused made timely requests for three different individual military defense counsel, none of whom were reasonably available. At an Article 39(a) session on 18 June 1971, he requested that he be represented by named civilian and individual military defense counsel. The military judge expressed dissatisfaction with Sutton's efforts to secure civilian counsel, but granted a continuance until 8 July 1971, stating "I assure you on 8 July 1971, this case is going to trial...."<sup>36</sup>

On 8 July, the accused was represented by his detailed counsel, whose activities in the case had been limited, and by his requested individual military defense counsel. Individual military counsel requested a continuance of at least two weeks in that the retained civilian defense counsel could not be present because of an appearance at another court-martial, and because he was not adequately prepared, having been made available only two weeks earlier. The Government objected on the grounds that the accused was being dilatory and that one of its witnesses had come to Germany from the United States for the trial. The military judge denied the motion, stating "this case will proceed to trial whether or not counsel is at the table for the accused...."<sup>37</sup>

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35. 46 CMR 826 (ACMR 1972).

36. Id. at 828.

37. Id. at 829.

On appeal, the Army Court of Military Review determined that Sutton had made a showing of reasonable cause for a continuance, and that in the interest of "according substantial justice" to the accused, the motion should have been granted.<sup>38</sup>

#### Summary

When an accused requests a continuance in order to obtain individual counsel, more is involved than merely a question of time. The accused has involved his constitutional and statutory right to have the assistance of counsel. It is incumbent upon trial defense counsel to impress this fact upon the trial judge. Counsel can support his position most effectively by spreading on the record evidence of all factors which make the request a reasonable one. If the trial judge is not persuaded, then the record will contain sufficient facts to enable appellate defense counsel to argue that the accused was deprived of his statutory and constitutional rights to the assistance of counsel and due process of law.

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38. Id. at 832

## CASE NOTES

### SUPREME COURT DECISION

#### MERE SUSPICION INSUFFICIENT FOR ID STOP

Brown v. Texas, 25 Crim.L.Rptr. 3216 (U.S. 1979)

Two El Paso police officers, while cruising in a patrol car, observed appellant and another man walking away from one another in an alley in an area with a high incidence of drug traffic. They stopped and asked the appellant to identify himself and explain what he was doing. One officer testified that he stopped the appellant because the situation "looked suspicious and he had never seen that subject in that area before." However, the officers did not suspect the appellant of any specific misconduct, nor did they have any reason to believe that he was armed. When appellant refused to identify himself, he was arrested for violation of a Texas statute which makes it criminal for a person not to give his name and address to an officer who has lawfully stopped him and requested the information.

Chief Justice Burger, writing for a unanimous court, held that detaining an individual to require him to identify himself constitutes a seizure of his person and, therefore, is subject to the requirement of the Fourth Amendment that the seizure be "reasonable." Absent any basis for suspecting an individual of misconduct, the balance between the public interest of crime prevention and the individual's right to personal security and privacy tilts in favor of freedom from police interference. The Court held that, although the practice of stopping individuals and requiring them to identify themselves is designed to advance the weighty social objective of prevention of crime, when such a stop is not based upon objective criteria the risk of arbitrary and abusive police practices exceeds tolerable limitations. See also Dunaway v. New York, \_\_\_ U.S. \_\_\_, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 45 L.Ed.2d 607 (1975); Davis v. Mississippi,

394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). Cf. United States v. Palmer, 25 Crim.L.Rptr. 2455 (8th Cir. 1979) (random pedestrian stops in troubled neighborhood unconstitutional, citing Brown v. Texas and Delaware v. Prouse, 24 Crim.L.Rptr. 3079).

#### FEDERAL DECISION

##### BURDEN OF PROOF -- ENTRAPMENT INSTRUCTIONS

United States v. Wolffs, 25 Crim.L.Rptr. 2193 (5th Cir. 1979)

It was prejudicial error for a trial judge to imply to a jury that the defendant carried the burden as to the positive elements of his entrapment defense, holds the United States Court of Appeals for the Fifth Circuit. While properly instructing the jury on the proof necessary for the Government to negate entrapment, the trial judge proceeded to instruct that, "on the other hand," if the jury found from the evidence that inducement by government agents was responsible for appellant's behavior, they must acquit.

The Court felt that a lay jury could have interpreted the words "on the other hand" as shifting the burden to the defendant as to the positive elements of his defense. Also improper were the words "find from the evidence," because the jury was required to acquit if it entertained reasonable doubt as to defendant's predisposition. The instruction failed to mention the quantum of proof required (beyond a reasonable doubt) and upon whom this burden fell. For these reasons, it was prejudicially erroneous, and a new trial was ordered.

#### COURTS OF MILITARY REVIEW DECISIONS

##### PRETRIAL ADVICE -- FAILURE TO INCLUDE RECOMMENDATION OF INVESTIGATING OFFICER TO REDUCE CHARGE

United States v. Phillips, CM 437515 (ACMR 28 June 1979)  
(unpub.) (ADC: CPT Nolan)

Contrary to his pleas, appellant was convicted by general court-martial of involuntary manslaughter and wrongfully

possessing and transferring heroin. The defendant moved, at trial, for appropriate relief in the nature of a new pretrial advice. His contention was that the original advice submitted to the convening authority was defective in that the staff judge advocate who prepared it did not advise that the Article 32 investigating officer recommended that the charge of involuntary manslaughter be reduced to negligent homicide. From the record, there was no evidence that the staff judge advocate or the convening authority was ever aware of the recommendation of the Article 32 officer.

The Army Court of Military Review found that the appellant's timely motion for appropriate relief was improperly denied. United States v. Lawson, 16 USCMA 260, 36 CMR 416 (1966); United States v. Porter, 1 M.J. 506 (AFCMR 1975). Finding that the convening authority might have agreed with the recommendations of the investigating officer and reduced the charge, the Army Court of Military Review reduced the findings of guilty to negligent homicide and reassessed the sentence.

#### MULTIPLICITY -- DRUNK AND DISORDERLY CONDUCT v. ASSAULT

United States v. Williams, SPCM 13797 (ACMR 29 June 1979) (unpub.) (ADC: MAJ Vallecillo)

Appellant was convicted of striking a superior commissioned officer, striking a person in the execution of police duty, assault consummated by a battery, and drunk and disorderly conduct. He contended on appeal that the charge of drunk and disorderly was multiplicitious with the other charges. Recognizing that "no one test [for multiplicity] is safe and accurate in all circumstances" [United States v. Burney, 21 USCMA 71, 44 CMR 125, 127 (1971)], the Army Court of Military Review closely examined the evidence of record to determine whether there was any evidence of drunk and disorderly conduct interstitial to the various assaults of which the appellant was found guilty. Finding that there was no independent factual basis for the drunk and disorderly charge other than the previously mentioned assaults and battery, the Court set aside the finding of guilty on that charge.

LARCENY BY WITHHOLDING

United States v. Sanderson, CM 438057 (ACMR 29 June 1979)  
(unpub.) (ADC: CPT Serene)

Appellant was charged with stealing government property and with concealing the same. He pleaded guilty to the larceny with the understanding that the Government would dismiss the concealing charge. His version was that he had received the stolen property from another and withheld it from the rightful owner, the United States. The military judge accepted the guilty plea and granted the defense counsel's motion for a finding of not guilty of the concealing charge when the Government did not present any evidence. Pointing to paragraph 200a(2), Manual for Courts-Martial, United States, 1969 (Revised edition), which reads that "neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on the theory that with knowledge of the identity of the owner he withheld the stolen property from the possession of the owner," United States v. Jones, 13 USCMA 635, 33 CMR 167 (1963), and United States v. O'Hara, 14 USCMA 167, 33 CMR 379 (1963), the Army Court of Military Review set aside the findings of guilty and the sentence.

PROVIDENCY -- MISTAKE AS TO MAXIMUM PUNISHMENT --  
TEST FOR PREJUDICE IN LIGHT OF PRETRIAL AGREEMENT

United States v. Goodlet, CM 437911 (ACMR 29 June 1979)  
(unpub.) (ADC: CPT O'Brien)

At the first Article 39(a) session, pursuant to a defense motion, the trial judge directed that a specification of wrongful possession of marijuana be stricken and merged with another specification also alleging wrongful possession of marijuana. At a subsequent 39(a) session, a successor judge accepted a plea of guilty to all charges and specifications which included the previously dismissed specification.

The Army Court of Military Review found error, but tested for prejudice. Although the trial court sentenced the accused to a dishonorable discharge and four years confinement, he had a pretrial agreement for a dishonorable discharge and one year. The Army Court viewed this pretrial agreement not as the best deal the accused could get under the circumstances, but opined, "absent evidence to the contrary, accused's own proposal

(confinement not to exceed one year) is a reasonable indication of its probable fairness to him," and affirmed the sentence. From the foregoing, it may be concluded that, absent any defense explanation on the record, the courts will consider that a pretrial agreement expresses the accused's belief that the agreed on punishment is fair and appropriate.

#### SENTENCING AGGRAVATION -- SUMMARY COURT-MARTIAL

United States v. Cleveland, CM 438018 (ACMR 31 July 1979)  
(unpub.) (ADC: MAJ Vallecillo)

Appellant, convicted by a military judge sitting as a general court-martial for larceny of government property of a value in excess of \$6,600 and housebreaking, was sentenced to a dishonorable discharge, total forfeitures, and confinement for one year. Pursuant to a pretrial agreement, the convening authority approved a bad-conduct discharge, forfeiture of \$279 pay per month for six months, and confinement for three months. As a matter in aggravation, the trial court admitted a summary court-martial conviction.

Because the record failed to disclose an affirmative showing that the requirements of United States v. Booker, 5 M.J. 238 (CMA 1977) had been satisfied, the Army Court of Review held the summary court-martial to be inadmissible. However, the Court agreed with the Government's contention that the appellant was not prejudiced by the error; in view of the other evidence relating to the appellant's record of conduct found in the record, the adjudged sentence, and the limitation imposed by the pretrial agreement, the Court concluded that there was no fair risk that the appellant was burdened with a more severe sentence than would otherwise be the case.

#### CHALLENGES -- INELASTIC ATTITUDE AS TO SENTENCE

United States v. Brenner, CM 437694 (ACMR 31 August 1979)  
(unpub.) (ADC: CPT T. Lewis)

After pleading guilty to one specification of selling heroin, the accused elected to be sentenced by a court composed of officers and enlisted members. One of the members

was the command's Drug and Alcohol Abuse Control Officer. In response to defense counsel's voir dire, he indicated that there was absolutely no place in the Army for a drug pusher and that there was no place for a drug pusher in any Army regardless of his duty performance. The trial judge denied the defense challenge for cause. The Army Court of Review held the judge's decision to be an abuse of discretion and ordered a rehearing. See United States v. Karnes, 1 M.J. 93 (CMA 1975).

#### DEFENSE COUNSEL -- CONFLICT OF INTEREST

United States v. Chavarria, NCM 78 1246 (NCOMR 25 May 1979)

Two Marine Corps lawyers were detailed to defend the accused. At trial, one of them advised the military judge that he had a conflict of interest because he had also represented, in a companion case, another individual who was a potential witness in the trial of the instant accused. The military judge explained the situation involved and the dangers inherent to the accused, but the accused persisted in his desire to retain both detailed counsel. Nevertheless, the military judge, over the objection of the accused and his counsel, refused to allow both detailed counsel to continue. The Navy Court of Military Review found the judge's excusal of counsel to constitute reversible error, noting that an accused may waive his right to a counsel of undivided loyalty. United States v. Piggee, 2 M.J. 462 (ACMR 1975).

#### DEFENSE COUNSEL -- ARGUMENT NOT CONFORMING TO DESIRES OF CLIENT

United States v. Farr, NCM 79 0555, \_\_\_ M.J. \_\_\_  
(NCOMR 28 June 1979).

The accused, at his general court-martial, rendered an unsworn statement in which he made clear that he did not want to be separated from the Marine Corps, but wished to return to duty after serving whatever period of confinement would be adjudged. However, his defense counsel, in closing argument, urged that the military judge "recommend for punishment; first of all, a bad-conduct discharge but suspended so that he would have an opportunity to return to the Marine Corps and fulfill his time."

The Navy Court of Review, citing United States v. Webb, 5 M.J. 406 (CMA 1978) and United States v. Schwartz, 19 USCMA 431, 42 CMR 33 (1970), held that the record was not sufficiently clear as to what counsel meant by his remarks concerning a suspended bad-conduct discharge, nor was it clear as to exactly what interpretation the military judge ascribed to those remarks in assessing and imposing the punishment. Therefore, the Court, while affirming the findings, returned the case for a rehearing on sentence.

### STATE DECISIONS

#### SCOPE OF SEARCH WARRANT

People v. Miller, 25 Crim.L.Rptr. 2377 (Ill. App. 1979)

Police officers were conducting a search of an apartment pursuant to a properly executed search warrant when some visitors knocked at the door. The police officers forcibly "invited" the visitors into the apartment and searched them also. The Illinois Appellate Court, First District held that the heroin found on one of the individual's forcibly invited into the apartment was inadmissible and should have been suppressed. They indicated that the officers did not have a reasonable or articulable suspicion justifying a search of the late arrivals.

#### INSTRUCTIONS -- INFERENCES

Wells v. People, 25 Crim.L.Rptr. 2194 (Col. 1979)

Defendant was convicted of aggravated robbery and conspiracy to commit aggravated robbery, on the basis of a stolen check that was found in his possession, as well as an in-court identification. The Colorado Supreme Court found imprecision in this jury instruction:

If you believe from the evidence, beyond a reasonable doubt, that the property . . . taken . . . was shortly thereafter found in the exclusive possession of the defendant, then this possession serves to create an inference or incriminating

circumstance that the defendant participated in said robbery and . . . can be sufficient in and of itself to justify a verdict of "Guilty" for the charge of robbery in the absence of any explanation derived from the evidence in the case . . . . Yet, in order to give the circumstance the force of evidence sufficient to sustain a conviction, the possession must be exclusive, recent, and unexplained.

In this case, there was only an inference that the possessor was a robber. An inference merely affords the evidence its natural probative force which the jury is free to accept or reject. The above instruction, however, almost compelled a verdict of guilty, had the jury found the possession to be exclusive, recent, and unexplained. It did not inform the jury that it could accept or reject the inference based on all the circumstances.

Another deficiency in the instruction was its failure to give the jury any evidence as to the interaction between the weight of the inference and the time interval involved. The instruction merely stated that the possession must be "recent" or the property must have been found in the defendant's possession "shortly" after the robbery.

The instruction should have reminded the jury that the burden of proof was with the prosecution to prove beyond a reasonable doubt every essential element of aggravated robbery, and only once this had been done could the jury infer that the defendant had participated. Finally, the instruction should have informed the jury that even if the defendant's possession of the check was unexplained, he may still have been found not guilty if the jury had a reasonable doubt as to his guilt.

#### STOP AND FRISK v. SEARCH

State v. Greenwald, 25 Crim.L.Rptr. 2130 (La. 1979)

A young woman stopped her automobile in front of a police patrol car and notified the officer that her life had been threatened by her passenger, who was probably armed and who had narcotics in his possession. The officer accompanied

the woman back to her car, ordered the defendant out of the car, and frisked him. He found no weapons. The officer then noticed a burlap bag on the floor and ordered the defendant to empty it. Among the bag's contents were two vials of cocaine.

The Louisiana Supreme Court concurred with defendant's contention that the discovery of the cocaine was the product of an unreasonable search and should have been suppressed at trial. The Court stated that, while the officer undoubtedly had reasonable cause to frisk the defendant, the search of the burlap bag was "clearly unrelated to a limited protective search for concealed weapons" since the officer had the situation well under control. Moreover, the search was not incident to a lawful arrest because the arrest had been predicated on the search.

VOLUNTARINESS -- STATEMENT INDUCED  
BY FRIEND AT URGING OF POLICE

State v. McGrew, 25 Crim.L.Rptr. 2127 (Or. Ct. App. 1979)

The Oregon Court of Appeals ordered the suppression of a confession because a detective, after reading the Miranda warnings, urged the emotionally troubled defendant to "come clean" so he could get help. The Court found that the officer's intention was to induce the defendant to give up his rights and confess.

The defendant had a mental acuity of a 12 or 14 year old child. He was relying on his friend's advice and was separated from his friend at the time he signed the waiver card and made the incriminating statements. The police had convinced defendant's friend to talk him into confessing, correctly believing that the defendant would heed his friend's advice. The Court, taking all these facts into consideration, determined that the confession should have been suppressed.

## "SIDE-BAR"

or

### Points to Ponder

1. Model instruction on identification can bolster the defense case. In United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), the defense counsel raised the familiar spectre of a possible misidentification of his client and alleged on appeal that the trial judge should have given a special identification instruction. The appellate court disagreed, finding that the instructions given sufficiently focused the jury's attention on finding that the defendant must be identified as the offender beyond a reasonable doubt. However, the Court recognized a need for instructions on eyewitness identification which would specifically alert the jury's attention to the reasonable doubt standard and provided the following as a model:

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of proving identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later. In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight-but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than

one which results from the presentation of the defendant alone to the witness.]

[(3) You make take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

This instruction is important in that it emphasizes to the jury that the reasonable doubt standard does indeed apply to the identification of the accused as the offender and provides considerations for the jury in reaching that decision. As there is no such instruction prescribed in Dept. of Army Pam. 27-9, Military Judges' Guide, defense counsel should enjoy some success in convincing military judges to give the one suggested by the D.C. Circuit.

2. Don't give up the ship in cases involving jurisdiction over off-post drug sales. The Court of Military Appeals has recently handed down a number of apparently inconsistent decisions regarding jurisdiction over off-post drug sales. The factual settings set forth below were derived from the appellate pleadings.

In United States v. Chambers, 7 M.J. 24 (CMA 1979), on 7 May 1979, the Court concluded that the factual scenario demonstrated a flagrant flouting of military authority in the commission of the offenses sufficient to justify exercise of court-martial jurisdiction. A military police officer and a confidential informant attempted to execute a controlled buy from a third party. When the attempt failed, another party directed them to an off-post trailer park. Neither the MP nor the informant had any idea who the new seller was or whether he was civilian or military. The MP was wearing civilian clothes, had hair down to his eyebrows and over his ears touching his collar, and was possibly wearing beads around his neck. There was no evidence to show that appellant Chambers knew the informant was in the military. Chambers subsequently sold both marijuana and phencyclidine (PCP) to the MP. Prior to and during the sale, the MP advised him that he intended to use and sell the drugs at a barracks party.

Subsequent to Chambers, the Court reversed convictions in four cases on 16 July 1979<sup>1</sup> and two cases on 3 August 1979,<sup>2</sup> all of which involved off-post drug sales, for lack of subject-matter jurisdiction. Two of them, United States v. Davis and United States v. Dingess, appear to be indistinguishable from Chambers.

In Davis, a government informant telephoned appellant at appellant's company and asked if he had a pound of marijuana for sale. Appellant replied that he did and that the informant should meet him at his trailer off post. The informant went to appellant's trailer and purchased marijuana. The transaction

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1. United States v. Davis, 7 M.J. 260 (CMA 1979) (summary disposition); United States v. Bowman, 7 M.J. 260 (CMA 1979) (summary disposition); United States v. Dingess, 7 M.J. 261 (CMA 1979) (summary disposition); United States v. Swalley, 7 M.J. 261 (CMA 1979) (summary disposition).

2. United States v. Garza, 7 M.J. 327 (CMA 1979) (summary disposition); United States v. Smith, 7 M.J. 327 (CMA 1979) (summary disposition), pet. for reconsideration granted (CMA 22 September 1979).

occurred on a duty day, and appellant knew that the informant was a soldier in his own unit.

In Dingess, an informant approached appellant in the battery's on-post motor pool to discuss the purchase of marijuana. A second conversation subsequently took place on post in which the informant specifically requested appellant to get him four pounds of that substance. Appellant advised the informant to call him at a later date. Approximately one week later, the informant placed a telephone call to appellant at his off-post quarters and arranged to go off-post to buy the drug. Accordingly, he went to appellant's quarters and purchased two pounds of marijuana. During this transaction, appellant was informed that the buyer intended to return the marijuana to the installation for distribution.

The Court summarily disposed of Davis and Dingess, citing United States v. Alef, 3 M.J. 414 (CMA 1977) and ordered the charges dismissed. There seems to be no consistency in affirming Chambers yet reversing these cases. The only Relford<sup>3</sup> factors present in Chambers in favor of jurisdiction were the alleged flouting of military authority and the possible threat to the military post. A balancing of the twelve Relford factors, as required by Alef, would seem to mandate a finding of no jurisdiction. The situations in both Davis and Dingess were more favorable to finding military jurisdiction than in Chambers. Both Davis and Dingess involved greater amounts of drugs, and there were preliminary negotiations on post during duty hours. Moreover, in these three cases, the government agents admitted that they specifically advised the appellants that the drugs were to be used on post in an attempt to create military jurisdiction.

Trial defense counsel should not be discouraged from contesting jurisdiction by the published opinion in United States v. Chambers. The issue of jurisdiction over off-post drug sales is not closed even in the face of the Chambers rationale that flouting of authority and purported threat to the military post override the absence of any of the other

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3. Relford v. Commandant, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971).

ten Relford factors.<sup>4</sup> Counsel should vigorously continue to attack jurisdiction and establish on the record the absence of as many Relford factors as possible.

3. Judge's reserving voir dire to himself attracts CMA scrutiny. In two Navy cases, United States v. Bowles, pet. granted, 7 M.J. 328 (CMA 1979) and United States v. Vogel, pet. granted 7 M.J. 330 (CMA 1979), the Court of Military Appeals has granted the following issue:

Whether the Navy Court of Military Review was correct in holding that no prejudice inured to appellant as a result of the military judge's arrogation of voir dire to himself in contravention of the military rule (Paragraph 62b, Manual for Courts-Martial)?

In light of the Court's interest in this issue, trial defense counsel whose voir dire is unduly restricted by a military judge's own policies, are reminded to voice strong objection.

4. More on deferment. In the last issue, we reported that the Army Court of Military Review, in United States v. Alicea-Baez, CM 437597 (ACMR 11 July 1979) (unpub.), had found an abuse of discretion by a convening authority who refused to grant a deferment of confinement request. On

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4. The Court may be taking a new approach. More recently, in United States v. Strangstalien, 7 M.J. 225 (CMA 1979), Chief Judge Fletcher suggested that, in off-post drug transaction cases, the Court may start applying contract principles to the Relford analysis. There, "the formation of a contractual agreement on base, even with terms yet to be completed off base" was deemed sufficient to vest military jurisdiction, albeit the drug sale was completed in a nonmilitary setting. We plan to address the impact of Strangstalien more fully in a future issue.

23 August 1979, the Court reversed itself on reconsideration, reasoning that the accused failed to meet his burden of presenting a "sufficient request" to the convening authority. In light of this rationale, counsel are advised that every fact which supports deferment of punishment should be included in the accused's request, no matter how obvious it may be.

With regard to the Army Court of Military Review's comment in footnote 6 in United States V. Thomas, 7 M.J. 763 (ACMR 1979), that it may be necessary to exhaust the administrative appeal under paragraph 2-30b, AR 27-10, as a precondition to obtaining judicial review of a denial of a deferment request, it has been brought to our attention that at the oral argument in Corley v. Thurman, 3 M.J. 192 (CMA 1977), appellate government counsel agreed that the AR 27-10 provision was not required under the Code or Manual and that failure to exhaust this remedy did not preclude raising the issue during judicial review. The law is clear that military regulations may not establish a condition precedent to a soldier's exercise of his rights under the Code or Manual. United States v. Kelson, 3 M.J. 139 (CMA 1979).

## ON THE RECORD

or

### Quotable Quotes from Actual Records of Trial Received in DAD

(Accused just returned from a 45 day AWOL)

- MJ: What happened then at 1610 hours on 21 September 1978?  
ACC: I walked in through the front gate, Your Honor, and went to the company.  
MJ: And did you tell somebody that you were back. That you were there?  
ACC: Yes, Your Honor. The company at that time was having a football game. The CO was out on the field and I walked up to him.  
MJ: Did he recognize who you were at that time?  
ACC: Yes, Your Honor.  
MJ: Do you know if he said anything?  
ACC: He told me to go get a haircut.

\* \* \* \* \*

- TC: Okay, Have you heard any rumors regarding Mrs. \_\_\_?  
DC: Objection, Your Honor. Counsel wouldn't let me get my rumors in, why should he get his rumors in?  
MJ: Sustained.

\* \* \* \* \*

- MJ: Now in conjunction with your enlistment in The Army, I'm sure you had to take some examinations, placement examinations, and things of that nature. And, I'm going to ask you whether or not the questions that you answered on this examination, did you answer them using your own brain power?  
ACC: Sir, some of them I did. A lot of them I just guessed at.

\* \* \* \* \*

- MJ: Are both sides prepared to argue as to findings?  
DC: I'm willing to give it the college try, Your Honor.

\* \* \* \* \*

(Hero worshipping)

MJ: Now, do you know who this informant was?

ACC: Yes, sir.

MJ: Who was he?

ACC: Bruce Lee, sir.

(A pause)

ACC: Gregory Lee, Your Honor.

\* \* \* \* \*

MJ: Members of The Court, I want to thank you very much for your time, your serious consideration in this case, you certainly worked long and hard and you are entitled to take the rest of the day off. This Court is adjourned. (The court adjourned at 2353 hours).

\* \* \* \* \*

Charge II: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that Private (E-1) [male soldier] U.S. Army Troop B, 1st Squadron, 4th Cavalry, did, on or about 0730, 10 August 1977, wrongfully appear at the Troop B, 1st Squadron, 4th Cavalry morning physical training formation, adjacent to building 7846, Fort Riley, Kansas, in a turquoise dress.

\* \* \* \* \*

DC: Did you feel very close to your brother?

ACC: Yes, sir.

DC: Did you feel put out that you had to help with him?

ACC: Did I like to put out?

\* \* \* \* \*

MJ: [To DC] Where do you draw this last specific sentence from? What is your authority on that - - for that?

DC: Well, just to be honest, Your Honor, it's mostly my imagination.

