Articles

Credibility of Witnesses Under the Military Rules of Evidence

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I. Introduction

Although reported cases might indicate otherwise, evidentiary questions most frequently raised at trials concern admissibility of evidence relevant to witness credibility. Effective trial advocates employ three types of credibility evidence: bolstering, impeachment, and rehabilitation. Bolstering occurs when the proponent attempts to increase the witness's credibility in the eyes of the factfinder. Impeachment comprises all attacks aimed at diminishing witness credibility. Rehabilitation occurs when the proponent attempts to restore the witness after the opponent has attempted impeachment.

This Note will discuss impeachment under the Military Rules of Evidence, taking account of permissible modes of impeachment, and will present and analyze trial strategies for both attacking and protecting witness credibility.

II. Bolstering Before Impeachment

Under common law, the proponent generally cannot bolster a witness's credibility before the opponent attempts to impeach the witness.[1] The new Military Rules of Evidence are silent on this general rule. Rule 101, however, states that courts-martial will apply the "rules of evidence generally recognized in the trial of criminal cases in the United States district courts"[2] and the common law evidence rules "insofar as practicable and not inconsistent with or contrary to the . . . Code . . . or this Manual."[3] Thus, the general rule prohibiting bolstering before impeachment applies.

Exceptions exist, however. For example, additional testimony may corroborate the witness's testimony even before the opponent has attempted to impeach the witness.[4] This exception was recognized by the 1969 Manual for Courts-Martial.[5] But the present rules, adopted in 1980, are silent. A traditional exception to the rule against bolstering, the "fresh complaint" exception,[6] does not appear in the Military Rules.[7] However, two rules operate to admit an extrajudicial statement by a victim of a nonconsensual sex crime as substantive proof, thus incidentally bolstering the witness's credibility. Rule 803(2) permits evidence of a "statement relating to a startling event or condition made while the declarant was under the stress of

1. *See, e.g.*, United States v. Edwards, 631 F.2d 1049 (2d Cir. 1980); State v. Cullen, 506 S.W.2d 22 (Mo. App. 1974). *See also* United States v. Watson, 11 M.J. 483, 485 (C.M.A. 1981). When an undisclosed informant does not testify, it is error to allow the informant's credibility to be bolstered at the trial on the issue of guilt or innocence. However, the court specifically noted that bolstering may occur at a Uniform Code of Military Justice (U.C.M.J.) Article 39(a) session. *Id.* at 485 n.3.

2. Mil. R. Evid. 101(b)(1). The Military Rules of Evidence are similar to the Federal Rules of Evidence. Because decisions of civilian courts are authoritative in military law cases, civilian cases will be cited throughout this paper for support of the military rules.

3. Mil. R. Evid. 101(b)(2).

4. E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Lederer, Criminal Evidence 43–44 (1979) [hereinafter cited as Criminal Evidence]. *Cf.* United States v. Boone, 17 M.J. 567, 569 (A.F.C.M.R. 1983) (holding that it was proper for the prosecution on direct examination to bolster a prisoner witness who bought drugs from the accused by having him testify that his motive for testifying was not to have a bad conduct discharge commuted).

5. Manual for Courts-Martial, United States, ¶ 153*a* (rev. ed. 1969) [hereinafter cited as M.C.M., 1969].

6. For a discussion of the fresh complaint exception, see 4 J. Wigmore, Evidence § 1135 (Chadbourn ed. 1972).

7. *But see* Mil. R. Evid. 608(c) Analysis. "[E]vidence of fresh complaint is admissible to the extent permitted by Rules 801 and 803."

excitement caused by the event or condition."[8] In *United States v. Urbina*,[9] the court noted that the five-year-old victim's mother could testify regarding the victim's statements about sexual abuse by the accused and the child's state of mind immediately following the incident. Extrinsic evidence that the startling event occurred or the condition existed is not required. Rule 803(3) admits a "statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as . . . mental feeling, pain, and bodily health)" even though the declarant is available.

Another possible exception to the rule against bolstering is set forth in Military Rule of Evidence 801(d)(1)(C): "A statement is not hearsay if: . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person." If a witness identifies a person in the courtroom, evidence of the witness's pretrial identification of that same person is admissible to bolster the witness's credibility, provided that the pretrial showup or lineup violated neither due process nor the right to counsel.[10] Logically, the reliability of eyewitness testimony is greater the closer it occurs to the event in question.[11] When, during a trial months after the offense, *A* identifies *D* as the person who committed the offense, many court members may question this suggestive identification. Military Rule of Evidence 801(d)(1)(C) allows the prosecution to ask *A* if he or she had identified *D* at the crime scene, at a corporeal lineup, or at a photographic spread.[12] It also allows *A* to testify that a sketch resembles the perpetrator of the offense.[13] If *A* cannot remember at the time of trial the identity of the person who committed the offense, Rule 801 allows a police officer or another person observing the pretrial identification to testify to the pretrial identification.[14] For example, the police officer could indicate that *A* identified *D* earlier, or that *A* assisted in making a particular sketch resembling *D*.

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8. MIL. R. EVID. 803(2). Also, residual hearsay exceptions, such as MIL. R. EVID. 803(24) and 804(b)(5), may be employed. *See, e.g.*, United States v. Hines, 18 M.J. 729 (A.F.C.M.R. 1984). *See generally*, Childs, *Effective Case of the Residual Hearsay Exceptions*, TRIAL COUNS. F., Sept. 1984, at 2; Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239 (1978).

9. 14 M.J. 962 (A.C.M.R. 1982).

10. MIL. R. EVID. 801(d)(1)(C). *Cf.* Gilligan, *Eyewitness Identification*, 58 MIL. L. REV. 183 (1972). In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court held that the suspect was not entitled to counsel until after initiation of adversary criminal proceedings. This rule has been codified in MIL. R. EVID. 321(b)(2).

11. Out-of-court identifications are generally more reliable [than in-court identifications]. They take place relatively soon after the offense, while the incidence is still reasonably fresh in the witness' mind. Out-of-court identifications are particularly important in jurisdictions where there may be a long delay between arrest or indictment and trial. As time goes by a witness's memory will fade and his identification will become less reliable.

> Report of House Committee on Judiciary (reporting on FED. R. EVID. 801(d)(1)(C)).

12. *Cf.* United States v. Cueto, 611 F.2d 1056, 1059 (5th Cir. 1980). Three neutral witnesses testified they had been able to identify a photograph shown them by the FBI, but did not indicate who the photograph depicted. The court held that an FBI agent could testify that the person identified by the witnesses was the accused. *See also* United States v. Marchand, 564 F.2d 983 (2d Cir. 1977).

13. *Cf., e.g.*, United States v. Moskowitz, 581 F.2d 14 (2d Cir. 1978).

14. *Cf., e.g.*, United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977); United States v. Marchand, 564 F.2d 983, 985 (2d Cir. 1977). Testimony by a third party raises an issue of violation of the sixth amendment right of confrontation and cross-examination. In United States v. Gordon, 18 M.J. 463 (C.M.A. 1984), the court stated in dictum, "However, Mil. R. Evid. 801(d)(1) applies only when the person who made the prior identification 'testifies at the trial or hearing and is subject to cross-examination concerning the statement' of identification." *Id.* at 466 n.2.

III. IMPEACHMENT

While witness credibility may be enhanced by various bolstering techniques, it may be diminished by impeachment. This section discusses the appropriateness of impeaching two kinds of witnesses and gives methods of impeachment under the Military Rules of Evidence.

A. *Who May Be Impeached*

1. *Impeaching the Opponent's Witness*

The common law assumed that an opponent could impeach the proponent's witnesses but could not impeach his or her own witnesses.[15] Thus, an opponent ordinarily could attack the credibility of any witness called by the proponent, judge, or jury. The new Rules recognize these common law rules, including the proposition that an opponent may impeach witnesses called by the judge or jury.[16]

2. *Impeaching Your Own Witness*

The Military Rules of Evidence changed the rule prohibiting a party from impeaching the witnesses he or she calls. Rule 607 states that "credibility of a witness may be attacked by any party, including the party calling the witness." This rule when considered with Rule 801(d)(1)(A) could alter trial strategy drastically. Under the 1969 Manual, a statement introduced for impeachment could not be considered as substantive evidence unless otherwise admissible.[17] That rule has been changed to allow prior inconsistent statements of the proponent's witness to be admitted as substantive evidence if the prerequisites of Rule 801(d)(1)(A) have been met. This may effect a key change in defense strategy at Uniform Code of Military Justice (U.C.M.J.) Article 32 investigations.[18] Assume a defendant is charged with the transfer of heroin. At trial, prosecution witness *B* testifies that, prior to the alleged transfer in a hallway, the defendant put his arm around *A* and said, "If you want any drugs, you will have to deal through my partner, *A*." The defense, to impeach *B*, may show that at the Article 32 investigation, *B* testified, "*A* and the defendant were together in the hall; the defendant did not make any statement that indicated he was a co-conspirator or partner of *A*." Under the prior rule, *B*'s statement made at the Article 32 investigation could be considered for impeachment purposes only. Now that it can be considered as substantive evidence, the strategy of the defense regarding verbatim Article 32 investigations, even if recorded on the defense counsel's own tape recorder, is obvious.[19] Rule 801(d)(1)(A) does not require that the testimony be

15. Ladd, *Impeaching One's Own Witness - New Developments*, 4 U. CHI. L. REV. 69, 70 (1936); *see also* United States v. Newman, 14 M.J. 474, 481 (C.M.A. 1983). The court, relying on MIL. R. EVID. 607, explicitly repudiated the notion that a party who calls witnesses and offers their testimony vouches for their credibility.

16. *See* MIL. R. EVID. 614(a).

17. M.C.M., 1969, *supra* note 5, at ¶ 153*a*.

18. *See* Uniform Code of Military Justice, art. 32(c), 10 U.S.C. § 832 (1982) [hereinafter cited as U.C.M.J.].

19. *See* United States v. Curtin, SPCM 14313 (A.C.M.R. Oct. 2, 1980) (government has a duty to preserve tapes even though a verbatim transcript was not ordered by the convening authority); United States v. Scott, 6 M.J. 547

verbatim, as long as it is under oath.[20] If the testimony is recorded, however, the problem of proving what was said, or of having the defense counsel become a witness, is avoided.

It is practice for some offices to record Article 32 investigations verbatim. If recorded testimony exists, the authentication of the recorded testimony becomes an issue, not the defense counsel's being a witness. Recorded testimony alleviates the dispute over what was said, assuming the machine is working properly and produces an audible record.

A developing line of case law addresses whether, on direct examination, the prosecution may elicit details of an accomplice's pretrial agreement,[21] such as a provision requiring truthful testimony or noting that the witness agreed to submit to a polygraph examination.[22] A number of courts will allow the prosecution on direct examination to elicit the pretrial agreement, including an agreement as to testimonial immunity, provided there is no implication that the government vouches for the witness or possesses special knowledge of the witness's veracity.[23] This inside knowledge may come from placing a detective in a spectator's section or from obtaining access to polygraph examination results.[24] The government could take advantage of an agreement by implying that, by placing pressure on the witness to tell the absolute truth, it has prevented the witness from fabricating the story. Perhaps for this reason the Second Circuit Court of Appeals has taken the view that the government may not introduce an entire pretrial agreement, including a cooperation agreement or a provision relating to a polygraph examination, as part of its direct examination.[25]

Although Rules 607 and 801(d)(1)(A) can alter trial strategy, they may not be used primarily to parade out-of-court hearsay statements before the jury under an impeachment theory. One may not use a statement under the guise of impeachment primarily for the purpose of placing before the jury substantive evidence that is not otherwise admissible.[26] In *United States v. Fay*,[27] the defendant sought to admit a statement the victim made to her mother that she was going to go to another person's house and "fight like hell."[28] At trial the defense, knowing she would deny it, sought to ask the mother whether her daughter had made the statement—anticipating that the

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(A.F.C.M.R. 1977) (if recorded, defense counsel can demand the production of the record of an Article 32 investigation under Air Force Manual 12-50(C 16), Part Two, Table 111-1, Rule 34, Page 10-374, 18 July 1977). *See also* United States v. Thomas, 7 M.J. 655 (A.C.M.R. 1979). The court held that unintentional destruction of the verbatim tapes by the government did not require reversal. *Id.* at 658-59. The court noted that there was no duty requiring the Army to retain tapes at the time of the decision. *Id.* at 658.

20. MIL. R. EVID. 801(d)(1)(A) and Analysis.

21. *See, e.g.*, United States v. Brown, 720 F.2d 1059 (9th Cir. 1983); United States v. Edwards, 631 F.2d 1049 (2d Cir. 1980); United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980).

22. United States v. Brown, 720 F.2d 1059, 1070 (9th Cir. 1983).

23. *See, e.g.*, United States v. Hedman, 630 F.2d 1184, 1198-99 (7th Cir. 1980). *But see* United States v. Edwards, 631 F.2d 1049, 1052 (2d Cir. 1980).

24. *See, e.g.*, United States v. Roberts, 618 F.2d 530 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981).

25. *See, e.g.*, United States v. Edwards, 631 F.2d 1049, 1052 (2d Cir. 1980).

26. *Cf.* United States v. Fay, 668 F.2d 375, 379 (8th Cir. 1981); United States v. Miller, 664 F.2d 94, 97 (5th Cir. 1981).

27. 668 F.2d 375 (8th Cir. 1981).

28. *Id.* at 378.

mother would deny it, the defense intended to call a third party to testify that the mother had repeated to her the statement allegedly made by the daughter. The appellate court upheld the lower court's exclusion of the mother's testimony, indicating that the defense, knowing the mother would deny making the statement, could not call her in order to impeach her with the third party testimony. Calling the third party was merely a subterfuge to admit hearsay which may not have been otherwise admissible.

B. *Methods of Impeachment*

1. *Character Trait for Untruthfulness*

As soon as a witness, including the accused,[29] testifies, his or her credibility becomes an issue in the case.[30] One method of impeachment is to attack a witness's character for truthfulness. The opponent may introduce timely reputation or opinion evidence about the witness's character trait for untruthfulness.[31]

When the defendant takes the stand to give an unsworn statement, the prosecutor may not introduce evidence about the defendant's character for untruthfulness.[32] If, however, during extenuation and mitigation a defense witness testifies that the accused is a reliable person, the "door is opened" for the prosecution to introduce evidence rebutting the defendant's credibility.[33]

At issue is the witness's credibility under oath at the time of trial. The evidence introduced, therefore, must consist either of a reputation arising in the community or an opinion[34] formed near the time of trial. The concept of community includes the military community,[35] or unit, and the civilian community,[36] when the witness is a member of both. Because of the transient nature of the military community, it is unnecessary to show that the individual resided in the community for a long period of time before the trial.[37]

Because character evidence consists of reputation[38] or opinion evidence,[39] the witness is permitted to testify not only about his own personal knowledge or observations but also about information received secondhand. To lay a proper foundation for reputation evidence, the proponent must show that the character

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29. MIL. R. EVID. 608(a).
30. *Id.; see also* Analysis to MIL. R. EVID. 608(a).
31. *See* Michelson v. United States, 335 U.S. 469 (1948).
32. M.C.M., 1969, *supra* note 5, at ¶ 75c(2) (C6, 1982). *See* United States v. Shewmake, 6 M.J. 710, 711 (N.C.M.R. 1978); United States v. McCurry, 5 M.J. 502, 503 (A.F.C.M.R. 1978); United States v. Stroud, 44 C.M.R. 480, 484 (A.C.M.R. 1971). Courts that have found prejudicial error are divided whether measures such as requiring a rehearing on the sentence or reassessing the sentence are the appropriate remedies.
33. United States v. Konarski, 8 M.J. 146, 148 (C.M.A. 1979).
34. At common law, only reputation evidence could be introduced, despite the greater persuasiveness of opinion evidence concerning truthfulness. *See* Michelson v. United States, 335 U.S. 469, 475–78 (1948).
35. United States v. Johnson, 3 C.M.A. 709, 712, 14 C.M.R. 127, 130 (1954).
36. *Id.*
37. *Cf.* United States v. Tomchek, 4 M.J. 66, 70 (C.M.A. 1977) (This evidence was not admissible when the witness specifically testified that he was not familiar with the defendant's reputation in the civilian community.)
38. MIL. R. EVID. 405(a).
39. *Id.*

witness (1) resides or works in the same military or civilian community as the witness, and (2) has lived or worked in the community long enough to be familiar with the witness's reputation in that community.[40] To lay a proper foundation for opinion evidence, the proponent must show that the character witness (1) knows the witness personally, or (2) is acquainted with the witness well enough to have had an opportunity to form an opinion of the witness's character for untruthfulness.[41] The witness may testify that he or she would not believe the other witness under oath.

2. *Nonconsensual Sexual Crimes Shield Law*

Because many examiners have felt that they are limited to post-Rules cases, it is important to make the distinction between pre- and post-1980 law regarding the character of the victim in non-consensual sex crimes. In addition to admitting evidence about character for untruthfulness, the old Manual provision permitted evidence of lewd character. Paragraph 153*b*(2)(*a*) provided that in sex offenses where consent was at issue, evidence of unchaste character of the victim was admissible.[42] It was commonly thought that if a witness had loose moral character, then he or she was not to be believed. This assumption of a nexus between promiscuity and credibility certainly is no longer accepted. Military Rule 412 now rejects the idea that unchaste behavior is indicative of untruthfulness.[43] The Rules apply a shield law that is more comprehensive than either the former Manual provision or Federal Rule of Evidence 412. Except when the witness is a victim of a sex crime, the Military Rules of Evidence made only minimal changes to this rule.

While the protection for the victim is greater than that afforded under the 1969 Manual, the requirements placed upon military defense counsel differ from those in Federal Rule of Evidence 412.[44] Unlike Federal Rule 412, Military Rule 412 contains no requirement for written notice fifteen days before trial.[45] This requirement was eliminated because many cases, especially those held aboard ship, may be tried by a trial team and military judge who fly in to try the case approximately one day prior to the convening of the court, making fifteen days written notice impractical. Military Rule 412 further differs from Federal Rule 412 in that it contains no provision for an *in camera* session. However, the Rule requires the military judge to conduct a hearing, which may be closed, to determine if the impeachment evidence of specific instances of the victim's past sexual behavior would be admissible.[46] The military rule

40. United States v. Tomchek, 4 M.J. 66, 77 (C.M.A. 1977) (Cook, J., dissenting). The term "community in which he lives" does not define to an exact geographical location but rather an area where a person is well known and has an established reputation. *See also* United States v. Crowell, 6 M.J. 944, 946 (A.C.M.R. 1979).

41. United States v. Perner, 14 M.J. 181, 185 (C.M.A. 1982). The court held that an enlisted psychiatric technician who had seen the accused's wife professionally on three occasions did not enjoy a sufficiently close relationship with her as to be able to express an opinion of her untruthfulness.

42. M.C.M., 1969, *supra* note 5 at ¶ 153*b*(2)(*a*).

43. Support for this modern view can be found in Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977).

44. *Compare* FED. R. EVID. 412 *with* MIL. R. EVID. 412.

45. MIL. R. EVID. 412(c).

46. MIL. R. EVID. 412(c)(2).

is not limited to "rape or assault" as is Federal Rule 412.[47] The military rule applies to "nonconsensual sexual offenses," defined in Rule 412(e) as "a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses."[48] Because of an apparent oversight in drafting, the federal rule does not apply to forcible sodomy and indecent acts.

Both the federal and military rules absolutely prohibit introducing "reputation or opinion evidence of the past sexual behavior of an alleged victim."[49] Strict application of this rule may violate the right of confrontation guaranteed by the sixth amendment to the Constitution[50] when a court decides that the accused's right is paramount to the rights of the alleged victim.[51] However, specific instances of the victim's past sexual behavior are admissible under Rule 412(b) when the evidence, like reputation or opinion evidence, is constitutionally required or offered to show the following conduct:

> a. past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
> b. past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.[52]

Thus the question under Rule 412 is whether relevant cross-examination has been excluded. In *Alford v. United States*,[53] the Court held it error to forbid the opponent from asking the key prosecution witness where he lived. The Court stated:

> 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.[54]
>
> 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.[55]

The Court recognized that the defense had an additional reason to ask the question: Was the witness in the custody of federal authorities? The Court recognized that this fact suggested that the witness's testimony was "affected by fear or favor

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47. *Compare* FED. R. EVID. 412 *with* MIL. R. EVID. 412.
48. MIL. R. EVID. 412(e).
49. FED. R. EVID. 412(b); MIL. R. EVID. 412(b).
50. United States v. Hollimon, 16 M.J. 164, 166 (C.M.A. 1983). In some circumstances, "The Fifth and Sixth Amendments would require admission of the evidence despite the purported absolute bar contained in Mil. R. Evid. 412(a)." *Id.* at 166.
51. *Cf.* Davis v. Alaska, 415 U.S. 308, 315 (1974) (the Court held that defendant's right of confrontation outweighs the state's policy of protecting juvenile offenders). *See infra* notes 60–61 and accompanying text.
52. MIL. R. EVID. 412(b)(2).
53. 282 U.S. 687 (1931).
54. *Id.* at 692.
55. *Id.* at 693.

growing out of his detention," something the witness was "entitled to show by cross-examination."[56]

In *Smith v. Illinois*,[57] the Court held as error the prohibition of questions concerning the name and address of the prosecution's key witness. Justice White, in a concurring opinion joined by Justice Marshall,[58] opined that *Alford* recognized that questions tending merely to harass or humiliate a witness may go beyond the proper bounds of cross-examination, and he suggested that inquiries tending to endanger personal safety of the witness should be placed in that same category when the state or witness does not explain why the witness should be excused from answering the question.[59]

Davis v. Alaska[60] is the landmark case upholding the right to confrontation. In *Davis*, the United States Supreme Court held that a defendant's right of confrontation through impeachment of the key prosecution witness was paramount to a state policy against revealing juvenile adjudications. The Court stressed that cross-examination revealing that the witness was on probation and feared becoming a suspect in the crime charged would show bias of the witness and was therefore permissible.[61]

Before admissibility of the evidence can be determined, certain procedural requirements, such as offer of proof and the timely filing of a motion, must be met.[62] It is not abuse of discretion to exclude evidence of the victim's past sexual behavior when the defense has not laid a proper foundation.[63] In all cases the judge is required to weigh the "probative value of such evidence."[64] The offered evidence may be constitutionally required to be admitted to show a motive for fabricating a rape charge;[65] for example, to explain the pregnancy of the victim[66] or, in the case of a minor, her all-night absence from home.[67] The accused has the right to contradict evidence of sexual behavior elicited by the prosecution, such as whether the victim is a virgin,[68] but Rule 412 bars evidence of past sexual history regardless of the party offering it and, ordinarily, the defendant has no right to compound the error.[69] On the other hand, evidence of prior sexual behavior may be relevant to rebut testimony not itself inadmissible under Rule 412. When the proposed contradiction is itself evidence

56. *Id.*

57. 390 U.S. 129 (1968).

58. *Id.* at 133 (White, J., concurring).

59. *Id.* at 133–34.

60. 415 U.S. 308 (1974). *Cf.* MIL. R. EVID. 609(d).

61. *Id.* at 311–15.

62. Federal Rule of Evidence 412(c) provides for a written offer of proof and allows the judge to make a determination as to the admissibility of the evidence in chambers outside of the hearing of any spectators or jurors. *See also* United States v. Hollimon, 16 M.J. 164, 166–67 (C.M.A. 1983) (the court "suggested" that the judge make findings of fact as to the admissibility or exclusion based on Military Rule of Evidence 412(c)(2)). *See supra* note 46 and accompanying text.

63. United States v. Holy Bear, 624 F.2d 853, 856 (8th Cir. 1980).

64. FED. R. EVID. 412(c)(3).

65. United States v. Ferguson, 14 M.J. 804, 844 (A.C.M.R. 1982); State v. DeLawder, 28 Md. App. 212, 215, 344 A.2d 446, 448 (Md. Ct. Spec. App. 1975); State v. Jalo, 27 Or. App. 845, 850, 557 P.2d 1359, 1362 (Or. Ct. App. 1976).

66. State v. DeLawder, 28 Md. App. 212, 226, 344 A.2d 446, 454 (Md. Ct. Spec. App. 1975).

67. 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5382 (1980) [hereinafter cited as WRIGHT].

68. *See* WRIGHT, *supra* note 67, § 5387 at 577 n.90.

69. *Id.* at 581.

of past sexual acts, the defense might be tempted to ask the victim about an irrelevant fact solely to impeach the witness with evidence of the past acts.[70] For example, to counter the claim that the rape has left the victim debilitated, evidence that she later engaged in strenuous sexual activity might be offered.[71] Or, when the victim denies hating men (which would show pre-existing bias against the accused), episodes of lesbian activities might be submitted as a contradiction.[72] The propriety of submitting this evidence to impeach by contradiction is questionable at best.

Challenges to the victim's credibility may implicitly involve proof of prior sexual behavior, for example, mental defects caused by tertiary syphilis. Evidence of a disease or physical condition is not by itself rendered inadmissible by Rule 412. But the policy behind the rule may prohibit ordering psychiatric examination of the victim.[73]

Finally, the defendant might wish to impeach the victim with evidence of past convictions. While Rule 609 applies to prior convictions, difficult cases arise when the impeachment is by convictions for past sex-related crimes such as prostitution or obscenity. Thus, a prostitution conviction might be used to show that the victim had reason to accuse the defendant of rape, not merely to impeach the victim's veracity. Defense attorneys seek ingenious ways to introduce past sexual conduct of the victim, hoping that exposing this past sexual behavior early in the proceeding will induce the victim not to testify or to withdraw charges. When the victim is not subject to a military order, a judge may have to order the victim to cooperate.

Other examples of evidence the defense may seek to offer are set forth in *United States v. Pickens*.[74]

> The evidence of specific instances of the victim's past sexual behavior was offered by the defense to show her unchaste sexual character and, thus, to justify inferences that she had consented to sexual relations with appellant and that she lacked credibility as a witness. As to the first inference, we observe that none of her prior sexual behavior involved Pickens, and it was not similar in circumstance to either the victim's or the appellant's version of the events which led to the charges against him. In this context, the evidence failed the threshold test of relevance insofar as it was proffered to prove consent. . . . As to the second inference, none of the evidence was relevant to undermine the victim's credibility.
>
> The evidence that the victim appeared to one prospective witness to be "generally a teasing type of individual" seems to have been offered only to establish the victim's sexual reputation. However, because that reputation was not a material issue in this case, the military judge did not abuse his discretion in excluding this evidence. . . . Indeed, in view

70. *Id.* at 576–77.

71. *Id.* at 577 n.90.

72. *Id.*

73. Government of Virgin Islands v. Scuito, 623 F.2d 869, 874 (3d Cir. 1980). *But see* Doe v. United States, 666 F.2d 43, 48 (4th Cir. 1981) (Rule 412 does not exclude telephone conversations the accused had with the victim and with other men about victim's prior sexual history to show the accused's mental state and intent).

74. 17 M.J. 391 (C.M.A. 1984). *See also* United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983).

> Proof that a woman had sexual intercourse in her room with one male has little tendency to establish that she would also have intercourse willingly in her room with some other male—especially when, as here, there is no indication that Hollimon's encounter with the victim was under circumstances similar to those under which she had previously engaged in sexual activity with others.

Id. at 166.

of the lack of evidence and materiality of any of the evidence of sexual behavior offered by the defense, the judge's exclusion thereof comported fully with our decisions addressing Mil. R. Evid. 412.[75]

Permissible uses of past sexual behavior evidence are illustrated by the following situations. When the defendant has denied knowing the victim or having sex with the victim, past sexual behavior of the victim is inadmissible. When the evidence indicates the presence of semen on the night of the assault, evidence that the victim had sex one to three days earlier could be relevant. Likewise, when there is evidence of a violent struggle, evidence of the physical condition of the victim would enhance reputation or opinion evidence as to the victim. Sexual history might also be relevant where the victim has engaged in a prior pattern clearly similar to the conduct immediately in issue. If prostitution is legal, for example, as in Nevada and some foreign countries, the need for protecting the reputation of the victim by excluding evidence of prostitution is greatly diminished.[76] Thus, the constitutionality of Rule 412 will depend on its application on an ad hoc basis.

A judge may protect the privacy of the victim of a nonconsensual sex crime by limiting the evidence introduced by the prosecution. For example, for tactical reasons the defense may not object to evidence introduced by the prosecution that the victim was affected mentally by the experience. The curative admissibility doctrine[77] allows the defense to introduce now-relevant evidence by cross-examining the victim as to the specific effects; then, after a series of questions, by asking whether this effect was the result of sexual conduct with the victim's fiance. When asked for an offer of proof as to relevance, the defense would set forth as the sole basis the evidence introduced by the prosecution on direct examination. Under these circumstances it would be proper to instruct the court to disregard the evidence of the mental effect of the alleged crime. If objection is not forthcoming the court may *sua sponte* exclude improper evidence.

3. *Prior Convictions*

A third valid method of impeachment is to prove that an opposing witness has been convicted of certain offenses. Arrests, indictments, informations, or Article 15s[78] are not admissible as prior convictions. In addition, the Rules require proponents of prior conviction evidence to satisfy criteria of validity, finality, and timing.

The first requirement of prior conviction evidence is validity. A conviction which has been disapproved or set aside may not be used for impeachment purposes.[79]

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75. United States v. Pickens, 17 M.J. 391, 392–94 (C.M.A. 1984).

76. United States v. Collins, CM 441787 (A.C.M.R., December 28, 1982) (the alleged victim's reputation as a prostitute is admissible in evidence where the defense theory suggests that it was not a rape but a dispute over the financial arrangements). *See also* United States v. Garcia, 15 M.J. 685 (A.C.M.R. 1983). "The fact that Miss L. was pregnant at the time of the rape was of doubtful probative value considering the totality of the evidence which included the accused's admission that he had broken into her apartment and had sexual intercourse with her while she struggled." *Id.* at 688.

77. *See* 1 J. Wigmore, Evidence § 15 (Tillers rev. ed. 1983). *See also* United States v. Luce, 17 M.J. 754, 756 (A.C.M.R. 1984). *See infra* note 239.

78. U.C.M.J. *supra* note 18, at art. 15, 10 U.S.C. § 815 (1982). *See* United States v. Domenech, 18 C.M.A. 314, 320, 40 C.M.R. 26, 32 (1969). An Article 15 is nonjudicial punishment for criminal conduct.

79. Mil. R. Evid. 609(c) and Analysis.

The same is true if a conviction has been obtained in violation of due process of law or the witness's right to counsel under the sixth amendment.[80] However, most courts limit the attack on a prior conviction used for impeachment to evidence of the denial of a right to counsel. These courts will not sustain collateral attacks based on the theory that reliable evidence supporting the conviction was obtained in violation of the fourth amendment.[81]

The judgment of a civilian court carries with it a presumption that the defendant either was afforded counsel or waived the right to a lawyer. Thus, the burden is on the defendant who seeks to attack the conviction to show irregularity. Ordinarily the defendant's testimony establishing a violation of the right to counsel would be sufficient to overcome the presumption. However, in *United States v. Weaver*,[82] the defendant failed to overcome this presumption. Weaver testified that he lacked memory about prior representation and waiver, and he failed to establish that he was indigent at the time of the proceedings.[83]

In the case of a summary court-martial conviction, it is questionable whether a conviction in the absence of either counsel or a valid waiver of the right to counsel may be used for impeachment without violating due process. In *United States v. Booker*,[84] the court held that a conviction by summary court, when the prosecution has not shown that the defendant was represented by counsel or waived the right to counsel, may not be used in an effort to increase the maximum punishment. The same argument used by analogy would probably prevent a summary court-martial conviction's use for impeachment, unless the prosecution establishes that the defendant was represented by counsel or waived the right. Clearly, in most cases the use of summary courts-martial convictions to impeach an accused ought to be prohibited.[85]

A prior conviction must be final to be admissible as impeachment evidence. The 1969 Manual provided that if the conviction is undergoing appellate review or the time of an appeal has not expired, the conviction may not be used for impeachment.[86] The Manual also stated that it is immaterial that a request to vacate or modify the findings in the sentence has been made under Article 69 of the U.C.M.J or that there

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80. *See* Loper v. Beto, 405 U.S. 473, 476–77 (1972) (convicting court violated defendant's right to counsel).

81. *See, e.g.*, United States v. Penta, 475 F.2d 92, 95 (1st Cir. 1973).

82. 1 M.J. 111 (C.M.A. 1975).

83. *Id.* at 113–14.

84. 5 M.J. 246 (C.M.A. 1978). *See* United States v. Mack, 9 M.J. 300, 313 (C.M.A. 1980) (three separate opinions).

85. United States v. Cofield, 11 M.J. 422, 432 (C.M.A. 1981). *See also* United States v. Rogers, 17 M.J. 990, 992 (A.C.M.R. 1984). The court held that a "summary court-martial where the accused was not represented by counsel cannot be used for impeachment purposes . . . ." *Id.* at 992. "Our holding does not apply if the accused affirmatively waived his right to be represented by counsel at the summary court-martial." *Id.*

> For example, even if we ruled that usually a conviction by summary court-martial is inadmissible to impeach an accused after he has testified on direct examination, there may be extraordinary circumstances when such a conviction would be admissible—for example, if an accused uses inadmissibility as a sword, rather than a shield, by testifying on direct examination that he has never been convicted of an offense by any kind of court-martial.

United States v. Cofield, 11 M.J. 422, 426–27 (C.M.A. 1981).

86. M.C.M., 1969, *supra* note 5, at ¶ 153*b*(2)(b).

has been a motion for a new trial.[87] In any event, the fact that an appeal is pending is admissible.[88]

Under the Rules, the concept of finality still applies to a conviction by summary court-martial or by special court-martial *without* a military judge. Rule 609(e) provides that a conviction by either court is not admissible until review has been completed pursuant to Article 65(c) or Article 66.[89] The requirement of finality does not apply to other courts-martial. In order to simplify decisions on the admissibility of convictions, the promulgating order should include an annotation indicating that a military judge presided over the earlier trial.

Finally, a prior conviction becomes inadmissible for the purpose of attacking credibility if it violates the ten-year limitation of Rule 609(b):

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.[90]

If more than ten years have elapsed, the prosecution must give notice of intent to offer the prior conviction in accordance with Rule 609(b), and the military judge must make a finding of fact that the probative value of the conviction outweighs its prejudicial effect.

> For those prior convictions where a period of 10 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 of impeachment outweighs the probative value of the prior conviction to the issue of credibility. Once raised by the defense, either preliminary 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.[91]

Once a prior conviction has satisfied the above requisites of admissibility, it may be introduced by an admissible record of conviction or an admissible copy of the record.[92] Rule 609 allows the examiner to cross-examine the witness about the conviction, and does not prohibit the cross-examiner from inquiring into the general nature of the crime and the resulting sentence.[93]

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87. *Id.*
88. MIL. R. EVID. 609(e).
89. MIL. R. EVID. 609(e). *Cf.* United States v. Stafford, 15 M.J. 866, 868–69 (A.C.M.R. 1983). There is no requirement of finality for using a prior civilian conviction for impeachment under Military Rule of Evidence 609.
90. MIL. R. EVID. 609(b).
91. United States v. Weaver, 1 M.J. 111, 117 (C.M.A. 1975).
92. MIL. R. EVID. 803(8). *See* MIL. R. EVID. 901, 902 regarding authentication.
93. MIL. R. EVID. 609(a).

An otherwise admissible prior conviction, that is, a conviction satisfying the criteria of validity, finality, and timeliness, is not admissible when a certificate of rehabilitation has been granted under Rule 609(c). A certificate of completion from the Retraining Brigade at Fort Riley appears to have the effect of rendering a prior conviction inadmissible.[94]

Generally, a juvenile adjudication is not considered a conviction for the purpose of impeachment by prior conviction under Rule 609(d).[95] But, in his or her discretion, the military judge may permit impeachment of a witness other than the accused "if the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence."[96] In *Davis v. Alaska*[97] it was held a violation of the sixth amendment to forbid the defense to impeach a prosecution witness by showing a motive to testify falsely, because the juvenile witness was on probation for burglary, the same crime for which the defendant was being prosecuted.[98] Since Rule 609(d) also allows the judge to permit impeachment of a defense witness,[99] *Davis v. Alaska* acts as a two-way street.

In determining whether the prior conviction is admissible, a controversy has arisen regarding the scope of the evidence which is properly admissible as pertaining to the earlier offense. In *United States v. Lipscomb*[100] the court indicated that at a minimum the prosecution must provide the name of the offense and the date of the conviction. The court also examined the legislative history of Rule 609, which indicated that the rule reflects the belief of Congress that all felonies have some probative value on the issue of witness credibility. Prior felony convictions are not presumptively admissible.[101]

4. *Judicial Discretion to Exclude Otherwise Admissible Prior Conviction Evidence*

Rule 609(a) provides that a conviction for a crime shall be admissible if the crime:

> (1) was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, *and* the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, or
> (2) involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge,

94. MIL. R. EVID. 609(c) Analysis. "[I]t is probable that successful completion of such a program [e.g., Retraining Brigade] is 'an equivalent procedure based on the finding of the rehabilitation of the person convicted' within the meaning of the Rule." *Id. But see* United States v. Rogers, 17 M.J. 990, 992–93 (A.C.M.R. 1984) (completion of the Retraining Brigade program and return to duty are not the equivalent procedure based on a finding of rehabilitation of the convicted person).

95. MIL. R. EVID. 609(d).

96. *Id.*

97. 415 U.S. 308 (1974).

98. *Id.*

99. MIL. R. EVID. 609(d) Analysis.

100. 702 F.2d 1049 (D.C. Cir. 1983).

101. *Id.* at 1064–66.

or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.[102]

The advisory committee notes to Federal Rule 609 indicate that Rule 609(a)(2) includes such crimes as fraud, embezzlement, and deceit.[103]

Rule 609(a)(2) provides that the conviction "shall" be admitted, whereas Rule 609(a)(1) requires the exercise of discretion. In *United States v. Frazier*[104] the court held that the accused's prior convictions for housebreaking and grand larceny were "automatically" admissible under Rule 609(a)(2). Balancing probative value and prejudicial impact was unnecessary.[105] "[W]e do agree with the wisdom of the position that encourages trial judges to make an on-the-record exposition of the factors considered in their probative/prejudicial balancing test. However, where Rule 609(a)(1) is not invoked, the military judge's balancing will be presumed to be correct."[106] In support of its holding, the court delved at length into the legislative history of Rule 609(a)(2) and examined the treatment of convictions for housebreaking, larceny, and narcotics offenses.[107] Additionally, the court noted the trial counsel's failure to make a timely objection at trial.[108] The accused's prior conviction for the possession of marijuana was inadmissible, however, under either Rule 609(a)(1) or Rule 609(a)(2).[109]

In contrast, Rule 609(a)(2), when read with Rule 403, seems to provide for the exercise of discretion.[110] Using an approach similar to that of Rule 609(a)(1), a judge must consider the purpose of the prior conviction, be it to impeach the credibility of the witness or the defendant, or to show that the defendant is a bad person. Rule 609(a)(1) and (2) have different burdens. Rule 403 passively allocates the burden to the opponent, but Rule 609(a)(1) actively allocates the burden to the government, which must show in an out-of-court hearing that the probative value outweighs the danger of prejudice to the defendant. The military judge, in weighing probative value against prejudicial effect, must examine the conviction's bearing on veracity, its age, its propensity to influence the minds of the jury, the necessity for the testimony of the

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102. MIL. R. EVID. 609(a) (emphasis added).

103. FED. R. EVID. 609 advisory committee note. In United States v. Jenkins, 18 M.J. 583, 584 n.3 (A.C.M.R. 1984), the court stated that Military Rule of Evidence 609(a)(2) "allows the admission of a conviction for a crime involving dishonesty or false statement. Forgery falls within this category of offenses." *See* United States v. Field, 625 F.2d 862, 871 (9th Cir. 1980). *Cf.* United States v. Huettenrauch, 16 M.J. 638, 640 (A.F.C.M.R. 1983). "It has been routinely held that shoplifting is not such an offense as to qualify as one involving dishonesty." Nor is shoplifting punishable by imprisonment for more than one year.

104. 14 M.J. 773 (A.C.M.R. 1982).

105. *Id.* at 777.

106. *Id.* at 779.

107. *Id.* at 777–78.

108. *Id.* at 779.

109. *Id.*

110. *Cf.* MIL. R. EVID. 609(a) Analysis. "The application of Rule 403 is unclear."

See United States v. Dixon, 547 F.2d 1079, 1083 n.4 (9th Cir. 1976). In dictum the court stated that it is "conceivable that in some cases, Rule 403 might afford the trial court discretion to exclude evidence of a prior conviction even where the defendant in the criminal case might not be the party prejudiced."

A number of cases indicate that Rule 403's balancing test does not apply to Rule 609(a)(2). *E.g.*, United States v. Toney, 615 F.2d 277, 279 (5th Cir. 1980); United States v. Ortega, 561 F.2d 803, 806 (9th Cir. 1977); United States v. Martin, 562 F.2d 673, 680–81, 681 n.16 (D.C. Cir. 1977); United States v. Nevitt, 563 F.2d 406, 409 (9th Cir. 1977).

accused, fairness, and the circumstances of the trial in which the prior conviction is sought to be introduced.[111]

Prior conviction evidence is damaging to witness credibility by degree, depending on several considerations. One criterion is the table of maximum punishments.[112] In addition, 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.[113]

The rationale seems to be the *crimen falsi* concept, that is, when a witness lies about one event, the witness is assumed to have lied about others.

The age of the conviction is another factor in determining its effect on witness veracity. "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."[114] In addition,

> [c]onsideration 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 of prejudice founded upon a prior conviction. For instance, when 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.[115]

The court must also consider circumstances under which the prior conviction is sought to be introduced. "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."[116] Finally, care should be taken to avoid the improper inference by the jury that a conviction for a crime similar to the one for which the accused now stands trial indicates a propensity of the defendant to commit the crime charged. The Court of Military Appeals has said, "[T]he 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."[117]

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111. *Cf.* United States v. Frazier, 14 M.J. 773, 779 (A.C.M.R. 1982).

112. United States v. Johnson, 1 M.J. 152 (C.M.A. 1975); United States v. Weaver, 1 M.J. 111, 117–18 (C.M.A. 1975). *See* U.C.M.J., *supra* note 18, at art. 56 and M.C.M., 1969, *supra* note 5, at ¶ 76*a*.

113. United States v. Weaver, 1 M.J. 111, 118 n.6 (C.M.A. 1975). *Compare with supra* note 103 and accompanying text.

114. United States v. Weaver, 1 M.J. 111, 118 n.6 (C.M.A. 1975).

115. *Id.* at 118 n.9.

116. *Id.* at 118 n.10.

117. *Id.* at 118 n.8.

5. *Specific Instances of Conduct*

The opponent may impeach a witness by good faith questioning of the witness about specific instances of conduct reflecting on the character of the witness for untruthfulness. Paragraph 138*g* of the 1969 Manual permitted the opponent to impeach a witness other than the accused by good faith questioning about certain acts of misconduct. Rule 608(b) changes the Manual rule in two main areas. First, impeachment is not limited to uncharged acts of misconduct; the rule allows impeachment for conduct "probative of truthfulness or untruthfulness" whether or not criminal.[118] Second, impeachment of the accused is restricted only by the military judge's discretion.[119]

Even though not explicitly mandated by Rule 608(b), the opponent must have a good faith belief that the witness committed the act.[120] To show that there is a factual basis for introducing a past bad act the opponent might ask for an Article 39(a) session outside the hearing of the court members. In any event, the opponent is bound by the witness's negative answers regarding specific instances of conduct.[121] Extrinsic evidence is inadmissible. The purpose for excluding collateral facts is to prevent confusion of the issues and undue consumption of time. This would not preclude the introduction of otherwise admissible evidence, such as showing prior drug usage by the prosecution's key witness in order to show the witness had opportunity to frame the accused,[122] demonstrating specific contradiction of the accused regarding a material fact,[123] or using extrinsic evidence to show bias or motive.

A source of conflict in the area of impeachment by specific instances of conduct is the question whether the prosecution may present documentary evidence during the prosecutor's cross-examination of the accused. This evidence is technically extrinsic, but it does not violate the judicial economy rationale behind the collateral fact rule. The prosecution introduced such evidence in *Carter v. Hewitt*,[124] a civil rights action

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118. MIL. R. EVID. 608(b). *See also* Analysis.

119. MIL. R. EVID. 608(b). *See* United States v. Pierce, 14 M.J. 738 (A.F.C.M.R. 1982). The accused, after pleading guilty, was convicted of wrongful sale of marijuana. Near the end of his cross-examination, the trial counsel was permitted to elicit, over defense objection, the fact the accused had used marijuana on three or four occasions. The court held that this impeachment was improper since the accused's direct examination was limited to his family background, marital status, and his financial inability to keep his wife and child with him at Okinawa. "Under those circumstances, past usage of marijuana had little, if any, probative value as to the proof in this period." *Id.* at 740. The court held that there was not prejudicial error.

120. United States v. Britt, 10 C.M.A. 557, 561, 28 C.M.R. 123, 127 (1959). *See also* MIL. R. EVID. 608(b) Analysis:

> Although Rule 608(b) allows examination into specific acts, counsel should not, as a matter of ethics, attempt to elicit evidence of misconduct unless there is a reasonable basis for the question. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Prosecution Function §5.7(d); Defense Functions §7.6(d) (Approved draft 1971).

121. MIL. R. EVID. 608(b). *See* United States v. Cohen, 631 F.2d 1223, 1226 (5th Cir. 1980); United States v. Cottle, 14 M.J. 260 (C.M.A. 1982) (The court prohibited the introduction of extrinsic evidence, saying that such evidence would "confuse the finder of fact with an infinite number of collateral issues." *Id.* at 264.).

122. United States v. Barnes, 8 M.J. 115, 116 (C.M.A. 1979).

123. United States v. Green, 648 F.2d 587, 589–90 (9th Cir. 1981). The trial court held that it was permissible to contradict the defendant charged with a conspiracy to obstruct justice who had testified that he had never seen LSD or delivered LSD to any individual. The prosecution called two witnesses to contradict these assertions. The Court of Appeals reversed, citing Federal Rule of Evidence 608(b). The result likely would have been different if the accused were charged with the possession of LSD.

124. 617 F.2d 961 (3d Cir. 1980).

brought by prisoner Carter. The court held it permissible to cross-examine the accused through the use of a letter written by one "Abdullah" to a fellow inmate at a correctional facility. The accused admitted writing the letter, but earlier had denied it at a prison disciplinary proceeding. Counsel for the government sought to show by the use of this letter that Carter was trying to encourage false complaints against the prison officials. *Carter* is an example of pressing a witness to admit a fact in a document without violating the judicial economy rule.[125]

Although a denial precludes further questioning, a forgetful or unscrupulous cross-examiner may nevertheless try to convey extrinsic information to the factfinder. Assume that a chief defense counsel is examining a witness about a prior written admission of conduct which the witness has denied. After what appears to be the completion of cross-examination, an associate counsel holds up a document to the chief defense counsel, a document having nothing to do with the witness's testimony, or even about the case. Nevertheless, this conduct suggests inaccurately that the document held up is the prior written admission of conduct which the witness has just denied. When such action occurs, the prosecution should ask that the record reflect that the assistant has shown a document to the defense counsel. The prosecution then could move for a mistrial or ask that curative instructions be given to the jury.

In order to be admissible, the specific instance must concern the character of the witness for untruthfulness.[126] Examples of instances relevant to untruthfulness are: forgery, false official statement, false claim, cheating, embezzlement, signing a false record, feigning illness, perjury, burning with the intent to defraud, false pass, and false swearing. The conduct may involve an arrest or other conduct which affects

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125. *See* J. WEINSTEIN AND M. BERGER, EVIDENCE, ¶ 608[05], at 608–22 to –23 (1978) (footnote omitted).

> Courts often summarize the no extrinsic evidence rule by stating that "the examiner must take his [the witness's] answer." This phrase is descriptive of federal practice in the sense that the cross-examiner cannot call other witnesses to prove the misconduct after the witness's denial; it is misleading insofar as it suggests that the cross-examiner cannot continue pressing for an admission—a procedure specifically authorized by the second sentence of Rule 608(b).

Id.

126. MIL. R. EVID. 608(b). *See, e.g.*, United States v. Leake, 642 F.2d 715, 719–20 (4th Cir. 1981) (improper for the trial judge to preclude the defense from cross-examining the key prosecution witness about defrauding an innkeeper and a default judgment for failure to repay loans); United States v. Cohen, 631 F.2d 1223, 1226 (5th Cir. 1980) (drug trafficking unrelated to character for truthfulness); United States v. Feagans, 15 M.J. 667, 668 (A.F.C.M.R. 1983) (permissible to cross-examine the accused about his falsifying an officer candidate application); United States v. Aubin, 13 M.J. 623, 625 (A.F.C.M.R. 1982) (proper to impeach a witness by asking about a prior theft, but extrinsic evidence may not be introduced); United States v. Bartlett, 12 M.J. 880, 881 (A.F.C.M.R. 1981) (proper for the prosecution to cross-examine the accused concerning two prior instances of larceny which were the basis for Article 15 punishment); Divanovich v. State, 607 S.W.2d 383, 386 (Ark. 1980) (breaking a car window and striking an individual with a crowbar are unrelated to propensity for truthfulness). *Cf.* United States v. Abel, 105 S. Ct. 465 (1984) (Evidence of membership in an organization sworn to perjury and self-protection is admissible to prove bias, but whether it would be a specific instance of conduct that could be used for impeachment under Rule 608(b) was a question the Court specifically declined to address.).

A good example of the difference between Rule 608 and Rule 609 can be found in United States v. Wilson, 12 M.J. 652 (A.C.M.R. 1981). The accused had received an Article 15 for making a false statement and another for larceny. "If the Government merely intended to ask the accused if he had made a false official statement and the facts surrounding the misconduct it would have been admissible under Rule 608(b)." *Id.* at 653. The court said it would express no opinion whether the accused could be asked if he had committed a larceny. While these questions by the government might have been proper, the government went further and introduced the two Article 15s. The court held this was impermissible. *Id.* at 653–54.

credibility.[127] The trial judge must exercise discretion in determining whether to permit this type of impeachment.[128] Certainly, if the government calls witnesses that the defendant knows, in order to impeach them under Rule 608(b) or Rule 609(a), the judge should prohibit extensive cross-examination under Rule 403. For example, the government might try to prove guilt by association by revealing that individuals with whom the accused associated have been arrested or committed bad acts. The government might call these witnesses to testify to minor facts in order to expose the defendant's friends as not worthy of belief, thus raising questions about the accused's own veracity.

6. *Demonstrated Incompetence*

At common law, in order to be a competent witness a person must possess testimonial capacities of sincerity, perception, memory, and narrative.[129] Because these capacities are crucial to witness credibility, an opponent may impeach a witness by casting doubt on these capacities. Although the Military Rules of Evidence do not address this rule, it is generally recognized in criminal trials in United States district courts. Thus, witness competency is subject to cross-examination in military courts.[130]

Perception, an important capacity, can be impaired by numerous causes.[131] Physical defects and drug use hinder sensory capacities of sight, hearing, and smell. Heightened emotions often make accurate perception impossible. Because accurate perception is vital to witness credibility, a witness's capacity to perceive can be demonstrated by the use of extrinsic evidence.[132]

Additionally, perception, as well as memory and narrative, can be altered by a person's own ability to comprehend facts and events. Thus, a witness's intelligence is a proper subject of cross-examination.[133] However, absent evidence of either genius or moronism, or of the effect of intelligence on testimonial capacities,[134] extrinsic evidence of intelligence generally is inadmissible; evidence of intelligence normally may be deduced by skillful examination.[135]

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127. *Cf.* Watkins v. Foster, 570 F.2d 501, 506 (4th Cir. 1978) (accused charged with burglary; improper for prosecution to ask detailed questions about six other burglaries when questions unsupported by facts).

128. MIL. R. EVID. 608(b).

129. CRIMINAL EVIDENCE, *supra* note 4, at 50–51.

130. *See* MIL. R. EVID. 101(b); *see supra* note 2. *But see* United States v. Moore, 12 M.J. 854 (A.F.C.M.R. 1981). The court held that the judge properly prevented the defense from cross-examining a key government witness regarding her mental health examination four years earlier. In addition to being too remote, the contents of the evaluation were irrelevant to the matter at issue. *Id.* at 855.

131. *See* Levine & Tapp, *The Psychology of Criminal Identification: The Gap From* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1089–1123 (1973); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977).

132. CRIMINAL EVIDENCE, *supra* note 4, at 43–44.

133. CRIMINAL EVIDENCE, *supra* note 4, at 50–51. *Cf.* United States v. West, 670 F.2d 675, 682 (7th Cir. 1982). The court held that evidence of low intelligence was not a character trait within the meaning of Rule 404(a)(1). But this evidence is available for impeachment purposes under Rule 607.

134. CRIMINAL EVIDENCE, *supra* note 4, at 50–51.

135. *Id.*

7. *Prior Inconsistent Statement*

Two major changes have been made in the rules regarding admissibility of prior inconsistent statements. Military Rule 613 eliminates the 1969 Manual foundation requirement[136] which dated from an 1820 English opinion.[137] Rule 801(d)(1) changes the 1969 Manual regarding the admissibility of prior inconsistent statements as substantive evidence.[138]

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 the prior inconsistent statement. If the proffered impeaching statement is not inconsistent with the testimony of the witness, there is nothing to impeach and the prior statement may not be proved.[139] A statement is sufficiently inconsistent if the witness's pretrial statement omits a material fact he or she would not reasonably have omitted,[140] if the witness's testimony appears to be a recent fabrication,[141] or if the witness alters a material fact in his or her testimony.[142]

In addition to cross-examining the witness about the prior inconsistent statement, the opponent may sometimes introduce extrinsic evidence to prove the statement.[143] If admitted, it may be considered by the factfinder in determining which statement is accurate. Extrinsic evidence is admissible when the following conditions are satisfied: (1) The opponent has laid a proper foundation on cross-examination; (2) the witness's statement relates to a material fact in the case rather than a collateral fact; and (3) the statement does not violate the rights of the defendant under Article 31,[144] if applicable.

It is no longer necessary to direct the witness's attention to the time and place of the statement and the identity of the person to whom it was made, and then to ask the witness if he or she made the statement. It is only necessary to ask the witness if he or she made a certain statement.[145] If the statement is not out of the ordinary and the time, place, and audience of the statement are unclear, the witness might deny making the statement. Subsequent examination of the witness by the opponent or the proponent may refresh the witness's memory. Thus, strategically, counsel may want to be specific regarding the time, place, and identity of the person to whom the statement was made. Otherwise the jury may empathize with the witness and feel that counsel is trying to trick the witness. The lack of a requirement to disclose is important because it may discourage collusion between witnesses. If counsel is required to disclose the time, place, and name of the party to whom inconsistent

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136. M.C.M., 1969, *supra* note 5, at ¶ 153*b*(2)(c). *Cf.* MIL. R. EVID. 613(b).

137. The Queen's Case, 2 Brod. & B. 284, 129 Eng. Rep. 976 (1820).

138. M.C.M., 1969, *supra* note 5, at ¶ 153*a*. *Cf.* MIL. R. EVID. 801(d)(1).

139. United States v. Johnson, 18 C.M.A. 241, 245, 39 C.M.R. 241, 245 (1969). The fact that the victim of an assault invoked his rights and refused to testify at an Article 32 investigation is not inconsistent with his testifying at trial.

140. United States v. Mason, 40 C.M.R. 1010, 1012 (A.F.B.R. 1969).

141. United States v. Kellum, 1 C.M.A. 482, 485, 4 C.M.R. 74, 77 (1952).

142. *Id.*

143. MIL. R. EVID. 801(d)(1)(A).

144. U.C.M.J. art. 31, 10 U.S.C. § 831 (1982). *See generally* Lederer, *Rights Warnings in the Armed Services*, 72 MIL L. REV. 1, 9–35 (1976).

145. MIL. R. EVID. 613(a).

statements were made, the witness may be able to coerce that party or to explain in detail why that party was lying. This action has taken place in the past regardless of sequestering instructions to witnesses. Also, the Rule will not preclude impeachment because the opponent inadvertently neglected to lay a proper foundation.

In addition, there is no longer a requirement that the witness deny, refuse to testify, or fail to remember the inconsistent statement. Rule 613(b) says the statement "is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Defense counsel could apply this rule by asking the witness if he or she made a specific statement. Regardless of the answer, if the witness is then permanently excused, the defense as part of its case in chief may want to authenticate the statement and introduce it. The "interests of justice" might be such that a statement would be admissible without the witness being able to explain or deny the statement.[146] This being possible, the judge will not want to excuse all witnesses unless the judge is ready to instruct the jury or, in a bench trial, to reach findings. This is the practice of many judges; otherwise, the attempted impeachment by prior inconsistent statement would raise a red flag under Rule 613(b). An alternative would be for the military judge to give the witness an opportunity under Rule 611 to explain the statement prior to excusal. This would relieve the witness from being present or on call throughout the trial.

The changes in Rule 801(d)(1)(A) apply to statements made at Article 32 investigations. If a witness makes a statement during an Article 32 and later at trial changes his or her testimony, the Article 32 statement is admissible, if authenticated, under Rule 801(d)(1)(A) if it is "inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at the . . . hearing . . . ."[147]

Finally, the defendant may not be cross-examined or impeached by a statement which does not satisfy the traditional voluntariness doctrine[148] and U.C.M.J. Article 31 pertaining to rights warnings.[149] However, Rule 304(b) permits a statement to be used for impeachment "[w]here the statement is involuntary only in terms of noncompliance with the requirements concerning counsel under Rule 305(d)–(e)."[150]

For example, in *United States v. Holley*,[151] as part of the defense case, three psychiatrists testified that the accused lacked mental responsibility at the time of the alleged offenses. In rebuttal, three psychiatrists testified that the accused was mentally responsible and had told them that he remembered the events that resulted

146. Mil. R. Evid. 613(b).

147. Mil. R. Evid. 801(d)(1)(A).

148. Brown v. Mississippi, 297 U.S. 278 (1936). *See*, Criminal Evidence, *supra* note 4, at 309–21.

149. United States v. Rivers, 7 M.J. 992 (A.C.M.R. 1979) (reversible error to cross-examine accused on prior inconsistent statement to a criminal investigation detachment without establishing voluntariness). *See also* New Jersey v. Portash, 440 U.S. 450, 459–60 (1979) (regardless of reliability, testimony of the accused given at grand jury hearing in accordance with grant of immunity could not be used to impeach the accused at subsequent trial).

The Court of Military Appeals has not addressed the issue of whether a failure to object might constitute a waiver. *See* United States v. Kelley, 8 M.J. 84, 85–88 (C.M.A. 1979) (Cook, J., concurring); United States v. Annis, 5 M.J. 351 (C.M.A. 1978). *See also* Mil. R. Evid. 304(b) Analysis.

150. This rule is taken from Harris v. New York, 401 U.S. 222 (1971). *See also* Mincey v. Arizona, 437 U.S. 785 (1978).

151. 17 M.J. 361 (C.M.A. 1984).

in the offenses for which he was charged. Judge Fletcher, speaking for the majority, stated, "Since the appellant chose to raise the insanity defense in this manner, the testimony of the three government psychiatrists was not inadmissible in rebuttal on this question [mental responsibility] because of any perceived failure to comply with Article 31."[152]

Similarly, in *United States v. Parker*,[153] Chief Judge Everett, concurring, stated, "I see no bar to the cross-examination of a defense psychiatrist about statements made to him by the accused and the unrestricted condition of such statements by the trier of fact."[154] This would not violate Article 31 or the fifth amendment, even though there were no warnings.

The inconsistent statement may be one made by the accused at an Article 39(a) session to suppress evidence claimed to have been illegally obtained. The Supreme Court in *United States v. Salvucci*[155] "broadly hint[ed]" it would be proper to use this statement for impeachment.[156] But if the Military Rules unambiguously set forth a rule more stringent than constitutionally required, that rule must be followed.[157] Concerning the exclusionary rule, Rule 311(f) states, "Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in prosecution for perjury, false swearing, or the making of a false official statement."[158] The Analysis to Rule 311(f) explains that this rule "shelter[s] from any case at trial . . . a statement made while challenging a search or seizure."[159] Comparable rules address suppressing statements by the accused[160] and issues concerning eyewitness identification.[161] Thus, these comparable rules might also be more stringent than constitutionally required.[162]

According to Rule 410, a "statement made in the course of plea discussions with a convening authority, staff judge advocate, trial counsel, or other counsel for the government which does not result in a plea of guilty, or which results in a plea of guilty later withdrawn" may not be used to impeach the accused.[163] "A 'statement

152. *Id.* at 369.

153. 15 M.J. 146 (C.M.A. 1983).

154. United States v. Parker, 15 M.J. 146, 153–54 (C.M.A. 1983) (Everett, C.J., concurring). Military Rule of Evidence 302(a) (concerning privilege) "does not by its terms purport to apply a mental examination conducted by the accused's own psychiatrist. . . . [Military Rule of Evidence] 302(b)(2) deals only with an expert witness for the prosecution." *Id.* at 154 n.3.

155. 448 U.S. 83 (1980).

156. *Id.* at 96. But Justice Rehnquist, writing for the majority of seven, stated, "A number of courts considering the question have held that such testimony is admissible as evidence of impeachment." *Id.* at 93 n.8. "This Court had held that 'the protective shield of *Simmons* is not to be converted into a license for false representations . . . .'" *Id.* at 94 n.9.

157. *See* United States v. Jordan, 20 C.M.A. 614, 617, 44 C.M.R. 44, 47 (1971). Interpreting M.C.M. former paragraph 140*a*(2), the Court of Military Appeals held, contrary to the decision of the Supreme Court in Harris v. New York, 401 U.S. 222 (1971), that a statement obtained in violation of the right to counsel warning set forth in *Miranda* could not be used to impeach the accused on the merits. *But see* United States v. Clark, 22 C.M.A. 570, 48 C.M.R. 77 (1973).

158. MIL. R. EVID. 311(f).

159. MIL. R. EVID. 311(f) Analysis.

160. MIL. R. EVID. 304(f).

161. MIL. R. EVID. 321.

162. Other possible limitations might be the good faith exception to the exclusionary rule and the prior notice to counsel requirement. MIL. R. EVID. 305(e).

163. MIL. R. EVID. 410(a)(4).

made in the course of plea discussions' includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial."[164] The purpose of Rule 410 is to encourage plea negotiations with the individuals indicated in the Rule, not with law enforcement officials. In the military, law enforcement officials have neither implied nor express authority to enter into plea negotiations.[165] This dictate was reinforced when Federal Rule of Evidence 410 was modified in 1980 to prevent the defense from arguing that the accused reasonably expected that law enforcement officials could negotiate on behalf of the government.[166] Although the purpose of the amendment to Federal Rule 410 was to prevent courts from excluding statements to law enforcement officials,[167] in *United States v. Babat*[168] the court indicated that when a law enforcement official makes an express or implied promise of confidentiality, statements to that official are inadmissible.[169]

A military judge might postpone ruling on the admissibility of an Article 39(a) statement until after the defense case so that the defendant can decide whether or not to take the witness stand. To require the trial judge to decide the suppression motion at the outset "would permit [the defendant] to use the Article 31/[*Miranda*] protection in the manner expressly disavowed by the Supreme Court."[170]

8. *Prior Inconsistent Acts*

The Military Rules of Evidence made no changes to this rule. Like prior inconsistent statements, prior inconsistent acts are admissible for impeachment purposes in the judge's discretion.[171] An example of an inconsistent act would be when a character witness testifies that the defendant is an untrustworthy person. The defense could impeach the witness by proving that the witness had made an unsecured signature loan to the defendant, an act inconsistent with the witness's professed belief in the defendent's untrustworthiness. If at trial a defendant testifies to exculpatory facts, some courts have treated his or her earlier silence during pretrial interrogation as an inconsistent act. The Supreme Court in *Doyle v. Ohio*[172] held that silence at the time of arrest is not inconsistent if the individual has been warned under *Miranda v. Arizona*,[173] since one element of the warnings is the right to remain silent.[174]

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164. MIL. R. EVID. 410(b).
165. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(4) (1984).
166. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 410.1 at 270–71 (1981).
167. *Id.*
168. 18 M.J. 316 (C.M.A. 1984).
169. *Id.* at 326.
170. United States v. Kelly, 4 M.J. 845, 847 (A.C.M.R. 1978) (referring to Harris v. New York, 401 U.S. 222 (1971)).
171. United States v. Dutey, 13 C.M.R. 884, 886 (A.F.B.R. 1953).
172. 426 U.S. 610 (1976).
173. 384 U.S. 436 (1966).
174. Doyle v. Ohio, 426 U.S. 610 (1976). Justice Stevens, joined by Justices Blackmun and Rehnquist, dissented:

Indeed, there is irony in the fact that the *Miranda* warning provides the only plausible explanation for their silence. If it were the true explanation, I should think that they would have responded to the questions on cross-examination about why they relied on their understanding of the advice given by the arresting officers.

While the prosecution may not cross-examine defendants about the prior invocation of fifth or sixth amendment rights, it is proper to investigate into their possible opportunities to fabricate after listening to testimony by government witnesses both at trial and at Article 32 investigations. In *United States v. Fields*,[175] the court stated:

> The Government had no knowledge of what the theory of the defense would be at trial. . . . [H]owever, appellant had learned at the Article 32 investigation precisely what the prosecution theory would be and what the Government witnesses would say in support of that theory. . . . [A]ppellant had ample opportunity to consider the prosecution's position and to tailor his own testimony to best fit that theory. . . . [and] had weighty reasons for doing so—namely, the degree of punishment he would receive if found guilty. . . . [N]one of the Government's witnesses had any self-interest motive for tailoring his testimony.[176]

The court further supported the result by the fact that there was no timely objection at trial.[177] The prosecutor in *Fields* had asked whether the accused had talked to trial counsel previously and was present at the Article 32 investigation, whether the accused heard most of the evidence presented at trial at the earlier investigation, and how much time the accused had to prepare the case.[178]

While the Supreme Court in *Doyle* held that allowing the prosecutor to impeach the accused by calling attention to silence at the time of arrest violates due process if there has been a *Miranda* warning, the Court did not address the issue of impeachment by prearrest silence. In addition, the Court expressly declined to state whether, absent a warning, silence at the time of arrest could be utilized for impeachment purposes.

When confronted with the issue of prearrest silence in *Jenkins v. Anderson*,[179] the Court held that if the accused is not warned of *Miranda* rights and elects to testify to self-defense, the accused's failure to report the victim's death for over two weeks prior to his arrest is admissible.[180] The Court held that admitting such evidence does not violate the self-incrimination or due process clauses, saying that "prior silence cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to the defendant might result."[181] To prevent the prosecutor from using either method of impeachment, the defense may rely on Rule 403.[182] The defense may employ other arguments. First, counsel may argue that this

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> Instead, however, they gave quite a different jumble of responses [which] negate the Court's presumption that their silence was induced by reliance on deceptive advice.

Id. at 622–23 (Stevens, J., dissenting).

175. 15 M.J. 34 (C.M.A. 1983).

176. *Id.* at 36–37. *See also* United States v. Reiner, 15 M.J. 38, 40 (C.M.A. 1983).

177. United States v. Fields, 15 M.J. 34, 37 (C.M.A. 1983).

178. *Id.* at 36–37.

179. 447 U.S. 231 (1980).

180. *Id.*

181. *Id.* at 239 (citing United States v. Hale, 422 U.S. 171, 180–81 (1975) and other cases); *see* MIL. R. EVID. 403. The defense may argue that all service personnel are instructed in their Article 31 rights and thus silence would not be probative of the accused's credibility. But this argument assumes that a service person remembers a small fraction of the instruction in a new environment, an assumption which is generally false. The Court dropped the other shoe in Fletcher v. Weir, 455 U.S. 603, 606 (1982). It held postarrest silence could be used for impeachment if there have been no warnings. The holding does not mandate the admission of silence. A judge should consider Rule 403 before admitting such evidence.

182. *But see* MIL. R. EVID. 301(f)(3) and 304(b).

type of impeachment violates the U.C.M.J., specifically Article 31. Second, counsel may rely on the pre-*Jenkins* decision in *United States v. Noel*[183] by the Court of Military Appeals that such impeachment is impermissible when cross-examination addresses the defendant's silence both before and after *Miranda* warnings.[184] An additional argument was presented in *United States v. Ross*[185] when the court stated that the probative value of the silence of the accused was outweighed by a significant potential for prejudice.

Finally, the defense could argue that *Jenkins* is limited to prearrest silence. Otherwise, prosecutors might advise law enforcement officials to postpone advising suspects of their rights. The officials would only book a suspect and not attempt to take a statement. Thus, if a suspect volunteered a statement during the booking process, it would be admissible. Likewise, if the individual remains silent yet elects to testify at trial, the fact that the defendant was silent earlier is admissible under *Jenkins* for impeachment, unless the court rejects the tactic as fundamentally unfair. The possibility of unscrupulous behavior on the part of the government was not discounted in *Jenkins*, "In this case, no government actions induced the petitioner to remain silent before arrest."[186]

An accused also may not be impeached by evidence showing the defense's failure to call witnesses at a pretrial investigation.[187] Similar to calling attention to an accused's prearrest silence, showing failure to present witnesses can be an unfair impeachment tactic.

Evidence of an inconsistent act can become an issue during extenuation and mitigation when a defendant testifies that he or she would like to remain in the service, but has earlier requested a discharge in lieu of trial by court-martial. A number of factors would suggest that the seemingly inconsistent act should not be admitted. First, the defendant may have a family and feel that it would be better for the family to have the defendant at home with an administrative discharge rather than in jail. Second, the defendant might prefer taking an administrative discharge to risking maximum punishment. The final consideration is most convincing: the request for an administrative discharge may be part of the plea bargaining process and thus would be inadmissible as against public policy.[188]

Silence until trial of an alibi witness may also be considered an inconsistent act. The Eleventh Circuit rejected a per se rule that the probative value of such evidence would always be outweighed by other considerations.[189] A defense witness "might have many reasons for failing to come forward, such as instructions by defense lawyers . . . , lack of acquaintance with law enforcement officers, or physical

183. 3 M.J. 328 (C.M.A. 1977).

184. *Id.* at 330–31.

185. 7 M.J. 174, 176 (C.M.A. 1979).

186. Jenkins v. Anderson, 447 U.S. 231, 240 (1980).

187. United States v. Hughes, 6 M.J. 783, 784–85 (A.C.M.R. 1978).

188. MIL. R. EVID. 410 Analysis. "Subsection (b) was added to [Military Rule 410] in recognition of the unique possibility of administrative disposition, usually separation in lieu of court-martial." The rule does not make any distinction whether or not the accused expressed a desire to remain in the service. *Compare* United States v. Pinkney, 22 C.M.A. 595, 48 C.M.R. 219 (1974) *with* United States v. Jackson, 31 C.M.R. 654 (A.F.B.R. 1961).

189. United States v. Johns, 734 F.2d 657 (11th Cir. 1984).

remoteness from the investigation site."[190] In deciding whether to admit the evidence, a judge can weigh these factors at an out-of-court hearing. The witness's proximity to the investigation, delay in coming forward after finding out about the arrest, and the options that were available to the witness are important in determining the strength of the alibi. On appeal the test is whether the trial judge abused his or her discretion in admitting the evidence.[191]

9. *Bias*

Rule 608(c) does not change the rule on admissibility of extrinsic evidence to prove bias, prejudice, or motive.[192] A witness may be impeached by a showing of bias, interest, or hostility because these qualities affect witness credibility. 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 a witness denies partiality.[193] The possibility that extrinsic evidence admitted to show bias might establish instances of misconduct by the accused does not preclude its introduction:

> [T]here is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was none the less inadmissible because it also tended to show that the witness was a liar.[194]

Some federal courts, before the enactment of the federal rules, required a foundation for the introduction of extrinsic evidence of bias.[195] At least one earlier military case did not require such a foundation.[196] Under the military rules, it seems if a foundation is required under Rule 613(a) it would have been set forth as it was in Rule 613(b). But the trial judge may in his or her discretion require such a foundation to preserve fairness or to avoid needless recall of the witness.[197]

Some courts will impose a heavy burden on the impeaching party. In *United States v. Weeks*,[198] Sergeant H, an undercover informant, allegedly bought controlled substances from the accused on three occasions. The accused attempted to prove, through cross-examination and extrinsic evidence, that Sergeant H was extensively

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190. *Id.* at 664.

191. *Id.*

192. MIL. R. EVID. 608(c). This rule is taken from a prior Manual provision and is not found in the Federal Rules of Evidence. In United States v. Abel, 105 S. Ct. 465 (1984) , the Court held even though bias does not appear in the federal rule, it is still applicable in federal trials. *Id. See also* United States v. Gonzalez, 16 M.J. 423, 425 (C.M.A. 1983). The court noted that the evidence must support the bias being set forth by the opponent.

193. MIL. R. EVID. 608(c) and Analysis.

194. United States v. Abel, 105 S. Ct. 465, 471 (1984).

195. J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE ¶ 607[03] (1978).

196. United States v. Streeter, 22 C.M.R. 363 (A.B.R. 1956).

197. United States v. Doney, 1 M.J. 169, 170 (C.M.A. 1975). It was error for the military judge to exclude extrinsic evidence that a prosecution witness stated that he would like to see the defendant "fried" or "taken care of." Reversal was mandated because the witness was crucial to the prosecution.

198. 17 M.J. 613 (N.M.C.M.R. 1983).

involved with other drugs. The accused's counsel maintained that because the sergeant's urinalysis had shown a positive reading for marijuana, H was lying to ingratiate himself with his commander. The theory of the defense was that the accused had not sold the drugs but that they had been hidden outside his premises and given to the investigators as if they were bought from the accused. Defense counsel did not indicate that he wanted to introduce the evidence in order to show access to drugs by H. The court narrowly examined counsel's theories:

> As far as appellant's "motive" or "bias" theory under Rule 608(c) is concerned, we agree with the military judge that only [the specific] drug incidents [involving Sergeant H of which he] believed the military authorities were aware" . . . would be relevant, and hence admissible, to the issue of whether he was telling the truth.[199]

This ruling puts an unreasonable burden on the defense to show what the "lying witnesses" think the government knows about their activity.[200] These witnesses are not going to admit more than is necessary to receive a benefit from the government.[201]

Apart from *Weeks* and occasional judicial comment that proof of bias must be direct and positive, as a practical matter, the standard for admitting extrinsic evidence to prove bias is lax. Bias in favor of the defendant may be explored through questions about the witness's family ties,[202] friendships,[203] romantic involvements,[204] employment,[205] financial ties,[206] enmity,[207] organizational memberships,[208] or fear.[209] Some courts admit proof that the witness and the defendant have been members of the same criminal conspiracy as evidence of bias in favor of the defendant.[210] Facts evidencing bias against the defendant include showings that the witness is a paid informer;[211] is a material witness in protective custody or a co-indictee;[212] has been granted or

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199. *Id.* at 615.

200. *See id.*

201. *See id.*

202. M.C.M., 1969, *supra* note 5, at ¶ 153*b*(2)(d).

203. *See* United States v. Day, 2 C.M.A. 416, 426, 9 C.M.R. 46, 56 (1953).

204. United States v. Grady, 13 C.M.A. 242, 244, 32 C.M.R. 242, 244 (1962).

205. M.C.M., 1969, *supra* note 5, at ¶ 153*b*(2)(d).

206. United States v. Howard, 23 C.M.A. 187, 189–90, 48 C.M.R. 939, 941–42 (1974) (witness sold heroin to the defendant).

207. Wynn v. United States, 397 F.2d 621, 623 (D.C. Cir. 1967).

208. United States v. Abel, 105 S. Ct. 465 (1984).

> A witness's and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets [sworn to perjury in self-protection], is certainly probative of bias . . . . For purposes of the law of evidence the jury may be permitted to draw an inference of subscription to the tenets of the organization from membership alone, even though such an inference would not be sufficient to convict beyond a reasonable doubt in a criminal prosecution . . . ."

Id. at 469–70.

209. United States v. Cerone, 452 F.2d 274, 288 (7th Cir. 1971).

210. United States v. Robertson, 14 C.M.A. 328, 335–36, 34 C.M.R. 108, 115–16 (1963) (permissible to ask wife of accused if she threatened victim and other witnesses with prosecution for perjury unless they changed their testimony). *Cf.* United States v. Musgrave, 483 F.2d 327 (5th Cir. 1973).

211. *Cf.* United States v. Peterson, 48 C.M.R. 126, 128 (C.G.C.M.R. 1973).

212. United States v. Musgrave, 483 F.2d 327 (5th Cir. 1973).

promised immunity,[213] clemency,[214] probation,[215] or a reduced sentence through plea bargaining;[216] has a personal anti-drug crusade;[217] owes an obligation to the accused;[218] or has evidenced hostility toward the accused.[219] Evidence of a defendant's probationary status, however, is altogether inadmissible to show a motive to testify falsely.[220]

Recently, in *United States v. Abel,*[221] the Supreme Court discounted the prejudicial effect of evidence showing that a witness belonged to an antisocial organization. Defendant Abel was indicted and tried for robbing a savings and loan association. Abel's cohort Ehle elected to plead guilty and testify against Abel at trial and to identify him as a participant in the robbery. At trial Ehle implicated Abel, who then called Mills. Mills testified that Ehle had told him in prison that Ehle had planned to implicate Abel falsely at trial. The trial court permitted the prosecutor to ask Mills if he and the accused were members of a "secret type of prison organization" which had a creed requiring members to deny its existence and lie for each other. Mills denied knowledge of such an organization.

To impeach Mills, the prosecutor in rebuttal called Ehle who testified that the accused and Mills were indeed members of the Aryan Brotherhood—a secret prison organization whose tenets required its members to deny its existence and "lie, cheat, steal [and] kill" to protect each other. In applying the Rule 403 balancing test the Court rejected the argument that the testimony "about the gang inflamed the jury against respondent, and the chance that he would be convicted by his mere association

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213. *See, e.g.*, United States v. Dickens, 417 F.2d 958 (8th Cir. 1969). *See also* MIL. R. EVID. 301(c)(2) and Analysis. Rule 301(c)(2) states that prior to arraignment the defense shall be given written notice of grants of immunity or promises of leniency in exchange for testimony. This rule codifies United States v. Webster, 1 M.J. 216 (C.M.A. 1975). "In principle, an accused has no right to disclosure of the reasons deemed sufficient by the Government to justify a grant of immunity to obtain the testimony of the witness." *Id.* at 220. The terms of the grant are important since they may induce false testimony and thus violate the accused's due process rights. United States v. Garcia, 1 M.J. 26, 30 (C.M.A. 1975). Under the circumstances in United States v. Rojas, 15 M.J. 902 (N.C.M.R. 1983), it was not an abuse of discretion for the trial judge to prohibit the defense counsel from asking a prosecution witness whether he had a pretrial agreement by which he would testify in exchange for more lenient treatment of his own case. *Id.* at 909–12.

214. United States v. Ryals, 49 C.M.R. 826, 827 (A.C.M.R. 1975). *See also* United States v. Colcol, 16 M.J. 479, 483 (C.M.A. 1983). "Under these circumstances defense counsel was entitled to cross-examine [the accomplice] about the promised administrative discharge." *Id.* at 483. The court rejected the argument that "since the discharge already had been approved, [the accomplice] knew that he would receive the benefit of separation from the Air Force without being tried by court-martial . . . ." *Id.*

215. Davis v. Alaska, 415 U.S. 308 (1974).

216. United States v. Polito, 23 C.M.R. 644 (A.B.R. 1957). *See also* United States v. Welling, 49 C.M.R. 609, 611–12 (A.C.M.R. 1974) (reversal required when the government omits to disclose to the defense a promise of leniency made to a key prosecution witness in return for his testimony, even though he does not lie about the promise).

217. United States v. Banker, 15 M.J. 207, 212–13 (C.M.A. 1983). When the undercover informant indicated that his motive for testifying was his anti-drug crusade, it was error not to allow the defense to introduce extrinsic evidence that the witness had attempted to purchase drugs two days prior to the last charge against the accused. The court held that the exclusion was harmless, partly because the defense counsel failed to make a sufficient offer of proof that the theory for introducing the evidence was to contradict the witness's purported motive for testifying.

218. *Id.* at 212 (informant owed the accused $390.00).

219. United States v. Thompson, 25 C.M.R. 806, 810–11 (A.F.B.R. 1957) (statement of prosecution witness, "I'm going to hang him [the defendant]," or "I've got him hung," is admissible by cross-examination or extrinsic evidence as to bias); United States v. Streeter, 22 C.M.R. 363, 365 (A.B.R. 1956) (defendant implicated witness in another offense).

220. United States v. O'Berry, 3 M.J. 334 (C.M.A. 1977) Judge Perry's opinion stated, "This position [of admissibility] utterly disregards the principle that acquittal of an offense does not preclude that same offense from providing the basis for revocation of probation." *Id.* at 336. *But cf.* Davis v. Alaska, 415 U.S. 308 (1974).

221. 105 S. Ct. 465 (1984).

with the organization outweighed any probative value the testimony may have had on Mills' bias."[222] The Court also rejected the argument that the evidence should have been limited to the fact that Mills and Ehle knew each other and may have belonged to a common organization.[223]

> This argument ignores the fact that the *type* of organization in which a witness and a party share membership may be relevant to show bias. If the organization is a loosely knit group having nothing to do with the subject matter of the litigation, the inference of bias arising from common membership may be small or non-existent. If the prosecutor had elicited that both respondent and Mills belong to the Book of the Month Club, the jury probably would not have incurred bias. . . . The attributes of the Aryan Brotherhood . . . bore directly not only on the *fact* of bias but also on the *source* and *strength* of Mills' bias.[224]

Broad standards for introducing extrinsic evidence are not without limits. The military court in *United States v. Hunter*[225] restricted discovery of impeachment evidence. At trial, the defense hoped to impeach the government's informant Jones, whom the defense alleged to be a drug dealer, by showing Jones had a motive to fabricate in order to inculpate the defendant, a "competing" drug dealer.[226] The Army Court of Military Review upheld the trial court's ruling that the defense could not cross-examine the informant about his possible drug dealings, saying that there must be more "than a bare assertion that because Jones was a drug dealer and a thief" he would be hostile to the accused and therefore more inclined to distort his testimony.[227] "Resolution of this issue is governed by Military Rule of Evidence 608(c), and depends on whether appellant, in his offer of proof, sufficiently established that Jones' alleged illicit activities rendered his testimony suspect of fabrication for bias, prejudice, or motive to misrepresent."[228] The court denied the defense's request for the production of the witness's CID file in spite of the defense's claim that it contained impeachment information and exculpatory matter. "We find, as did the military judge, that the information in the file amounted, at best, only to extrinsic evidence of Jones' alleged drug dealings and diversion of Government funds and, as such, was not admissible for the purpose of attacking his credibility."[229]

10. *Specific Contradiction*

Another method of impeachment is to contradict specifically what the witness has said.[230] A witness who has been contradicted regarding a material fact may seem less credible to the factfinder, but when a collateral fact is contradicted, extrinsic evidence proving that fact is not as relevant to credibility and may be excluded.[231]

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222. *Id.* at 470.
223. *Id.*
224. *Id.* at 470–71 (emphasis in original).
225. 17 M.J. 738 (A.C.M.R. 1983).
226. *Id.* at 739.
227. *Id.*
228. *Id.*
229. *Id.*
230. MIL. R. EVID. 608(c) Analysis.
231. MIL. R. EVID. 403.

Likewise, when the evidence will confuse the factfinder or waste time, the judge has discretion to exclude it.[232] The introduction of extrinsic evidence to impeach a witness through contradiction may be based on alternate theories such as impeachment by instances of misconduct,[233] impeachment by prior convictions,[234] and substantive evidence of uncharged misconduct.[235] Additionally, it may tie in with the rebuttal of the defendant's character witnesses.[236] Extrinsic evidence must be logically and legally relevant, as mandated by Rule 403.

The introduction of extrinsic evidence will depend upon whether the matter to be contradicted was raised on direct testimony or cross-examination. When the matter sought to be contradicted is brought out on direct examination, the trial judge has broad discretion to admit extrinsic evidence that contradicts the statement, even if the evidence is collateral in the case. In *United States v. Benedetto*,[237] the accused, a federal meat inspector, was charged with accepting bribes from certain meat processors. The accused and other witnesses testified that he had never accepted bribes. In rebuttal, the prosecution presented witnesses who testified that the defendant had accepted similar bribes. The defense objected on the ground that the evidence was collateral to the case because the bribes to which the rebuttal witnesses testified were not charged. The government countered that the accused had "opened the door" by presenting good character evidence.[238] The court explained, "Once a witness (especially a defendant-witness) testifies as to any specific facts on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict a specific statement, even if such statement concerns a collateral matter in the case."[239]

Extrinsic evidence presented on cross-examination must fall within the scope of the direct examination. In *United States v. Armstrong*[240] testimony regarding accused's poor soldierly performance and misconduct was inadmissible for the sole purpose of contradicting the accused's assertion, relevant upon sentencing, that he liked the Army and wished to remain in the service.[241]

In *United States v. Gambini*[242] the court held that, on cross-examination, testimony introducing extrinsic evidence of uncharged misconduct[243] was not relevant to contradict accused's evidence that he had cooperated with investigators upon his

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232. *Id.*

233. *See* United States v. Owens, 16 M.J. 999 (A.C.M.R. 1983), *petition granted*, 18 M.J. 284 (C.M.A. 1984).

234. MIL. R. EVID. 609.

235. *See generally* E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (1984).

236. *See* United States v. West, 460 F.2d 374 (5th Cir. 1972); United States v. Donnelly, 13 M.J. 79, 82–83 (C.M.A. 1982).

237. 571 F.2d 1246 (2d Cir. 1978).

238. *Id.* at 1249.

239. *Id.* at 1250. The "open door" doctrine allows the admission of otherwise excludable evidence. This sometimes has been called curative admissibility. Even so, the rebuttal testimony is subject to Rule 403. *See id.* at 1248 n.2; *see also* United States v. Beno, 324 F.2d 582, 588 (2d Cir. 1963) ("[I]t makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by opening the door so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors."). Further discussion of this doctrine can be found *infra* at notes 244–48 and accompanying text.

240. 12 M.J. 766 (A.C.M.R. 1981).

241. *Id.* at 767.

242. 13 M.J. 423 (C.M.A. 1982).

243. *See infra* notes 255–59 and accompanying text for cases discussing the problem of uncharged misconduct.

arrest. The court added that the extent of defendant's cooperation, elicited on cross-examination, could be considered relevant during sentencing.[244] Even evidence presented on cross-examination that does not fall specifically within the scope of direct is admissible if the direct examiner "opened the door" for its introduction. In *United States v. Stark*[245] the accused introduced in mitigation evidence of his good performance.

> The obvious adverse effects upon duty performance attendant to marihuana usage while engaged in the same is indisputably relevant to character of duty performance. . . . *Ergo*, the government's rebuttal evidence of on duty marihuana usage was admissible for the limited purpose of rebutting otherwise mitigating evidence of outstanding duty performance.[246]

In *United States v. Jeffries*[247] the accused stated during the sentencing procedure that he would like to complete his enlistment and indicated that he had intended to "do better" ever since the date of being charged with the offense. The court held that trial counsel had opened the door to further cross-examination, in detail, concerning the accused's violations of military standards following the date of the offense as charged.[248]

The scope of evidence admissible for contradiction may also be determined by court member examination. In *United States v. Mansel*[249] two military witnesses testified on behalf of the defendant that his off-duty employment performance as a waiter was excellent.

> Disclaiming any knowledge of his duty performance, both [witnesses] maintained that the accused was of value and should remain in the Air Force. Thereafter, the accused testified. In his testimony, he described his upbringing and background, explained why he joined the Air Force and described his duty performance during technical training. While admitting mistakes, the accused expressed a desire to remain in the Air Force. He did not testify about his current or immediate past duty performance.[250]

A member of the court requested evidence relating to accused's duty performance as a security policeman. The court held that it was permissible for the military judge to admit such evidence, including damaging testimony that the accused wanted out of the security police, did only what he could to get by, and regarded the court-martial proceedings as a joke. The court noted, "[T]he defense opened the door for speculation about his recent duty performance; they cannot complain because the members were permitted to look inside."[251]

Impeachment by contradiction is not limited to the specific facts introduced by the opponent. Implications or impressions from that evidence may also be contradicted. During questioning, counsel may create the impression of full cooperation by

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244. *Id.* at 428.
245. 17 M.J. 778 (A.F.C.M.R. 1983).
246. *Id.* at 780.
247. 47 C.M.R. 699 (A.C.M.R. 1973). *See also* United States v. Britt, 16 M.J. 971 (A.F.C.M.R. 1983).
248. United States v. Jeffries, 47 C.M.R. 699, 700–01 (A.C.M.R. 1973).
249. 12 M.J. 641 (A.F.C.M.R. 1981).
250. *Id.* at 642.
251. *Id.* at 643.

the accused with the police. The prosecution may contradict that impression by showing that the accused kept silent following a *Miranda* warning.[252] In *United States v. Strong*[253] the court held it was not an abuse of discretion for the military judge to allow the prosecutor to cross-examine the accused about an inadmissible Article 15 received in June 1979. The accused testified about certain of his achievements during the time he was in Germany: he had received a good conduct medal for the period of September 1978 through September 1983 and an honorable discharge at the termination of his prior enlistment, and he had re-enlisted in March 1982.

> There is no doubt that trial counsel's question would have been proper if the accused had testified that he had never been disciplined during his prior enlistment; however, defense counsel was astute enough to avoid such testimony. The whole tenor of the evidence introduced by the accused [, however,] was that he had been an exemplary soldier during that time period.
>
> The defense must accept responsibility not only for the specific evidence it offers in mitigation, but also for the reasonable inferences which must be drawn from it.[254]

The broad rule allowing extrinsic evidence to prove contradiction extends to evidence of past misconduct for which an accused has not been charged. In *United States v. Feagans*[255] the accused testified that he had never been arrested or put in jail. The court held that trial counsel was permitted to contradict this testimony by asking the accused about uncharged misconduct; specifically, the fact that he falsified an Air Force drug abuse certificate prior to active duty. Under Rule 608(b), trial counsel also was permitted to introduce a portion of the accused's pretrial statement in which he admitted using marijuana for nine years.[256]

The stage of the proceedings may be a factor in deciding whether to introduce extrinsic evidence, since the rules of evidence are relaxed during sentencing. In *United States v. Rodgers*[257] a defendant accused of possession and distribution of marijuana testified under oath during sentencing that he had never used drugs regularly. The court held it was proper to admit the accused's prior statement that he had sold hashish on eight occasions and had smoked hashish nine or ten times during a one-year period. The court stated, "His pretrial admission of prior drug use tended to contradict his in-court assertion that he had not regularly used drugs in the past. Furthermore, appellant's pretrial statement was relevant rebuttal because of its tendency to undermine the probative value of the opinions of two of the sergeants as to the appellant's rehabilitative potential . . . ."[258] The admission of the pretrial statement was consistent with Rule 403.[259]

An important sidelight of the extrinsic evidence problem is the introduction on cross-examination of illegally obtained evidence in order to impeach the accused. In

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252. *See* United States v. Fairchild, 505 F.2d 1378, 1382–83 (5th Cir. 1975).
253. 17 M.J. 263 (C.M.A. 1984).
254. *Id.* at 266–67.
255. 15 M.J. 667 (A.F.C.M.R. 1983).
256. *Id.* at 670.
257. 18 M.J. 565 (A.C.M.R. 1984).
258. *Id.* at 566.
259. *Id.*

Agnello v. United States,[260] Agnello on direct examination did not testify concerning a can of cocaine that had been illegally seized from his house, yet on cross-examination the prosecution asked the accused if he had seen narcotics before. After the expected denial, the prosecution then produced the can of cocaine and asked whether he had ever seen it. In rebuttal, evidence of the search and seizure of the can from Agnello's room was allowed into evidence. The Court held that the evidence was impermissible since the accused "did nothing . . . to justify cross-examination in respect of the evidence claimed to have been obtained by the search."[261]

In contrast, the Supreme Court in *Walder v. United States*[262] permitted impeachment of the accused by the use of illegally seized evidence relating to a collateral matter. Charges of purchasing and possessing heroin were dismissed after the trial court granted a motion to suppress the evidence obtained as a result of an illegal search and seizure. Nearly two years later, the accused was again charged with illicit transactions in narcotics. On direct examination the defendant testified that he had never dealt in or possessed narcotics. The prosecution was allowed to cross-examine the accused about the evidence suppressed at the prior trial, although the jury was given a limiting instruction. The Court upheld the cross-examination:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths . . . .
>
> . . . Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics.[263]

Recently, in *United States v. Havens*,[264] Havens was convicted of importing, conspiring to import, and possessing cocaine. Havens and his traveling companion McLeroth boarded a flight from Lima, Peru to Miami, Florida. In Miami, a customs officer searched McLeroth and found cocaine in makeshift pockets sewn into a T-shirt he was wearing under his outer clothing. McLeroth implicated Havens, who had cleared customs. Havens was arrested, and his luggage was seized and searched without a warrant. The customs officer found no drugs but seized a T-shirt from which pieces had been cut that matched the pieces sewn into McLeroth's shirt. A successful pretrial motion suppressed the T-shirt and other evidence. McLeroth pleaded guilty and testified that Havens had supplied him with the altered T-shirt and had sewn the makeshift pockets shut.

In direct testimony Havens denied involvement in smuggling cocaine, and on cross-examination he denied that the altered T-shirt had been in his luggage. To impeach Havens, a government agent testified that the altered T-shirt was found in Haven's suitcase. The Fifth Circuit held that illegally seized evidence may be used for

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260. 269 U.S. 20 (1925).
261. *Id.* at 35.
262. 347 U.S. 62 (1954).
263. *Id.* at 65.
264. 446 U.S. 620 (1980).

impeachment only if the evidence contradicts a particular statement made by a defendant on direct examination.[265]

In its opinion reversing the Fifth Circuit, the majority of the Court acknowledged that earlier decisions permitted impeachment by illegally seized evidence of the defendant's testimony on direct examination. However, it stated that "a flat rule permitting only statements on direct examination to be impeached misapprehends the underlying rationale of [the earlier cases].[266]

The Court emphasized the truth-seeking purpose of a trial and stated that the constitutional prohibition against illegally obtained evidence could not be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[267] The questions on cross-examination "would have been suggested to a reasonably competent cross-examiner . . . "[268] and were "plainly within the scope of the defendant's direct examination."[269] If the prosecution were not given the opportunity to cross-examine, the "normal function of cross-examination would be severely impeded."[270]

> In terms of a defendant's seemingly false statements with . . . reliable evidence available to the government, we see no difference of constitutional magnitude between the defendant's statements on direct examination and his answers to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination.[271]

Agnello and *Walder* indicate that in appropriate circumstances illegally seized evidence can be used to impeach a statement made during direct examination. In *Havens*, the Court made further inroads on the exclusionary rule by expanding the scope of direct examination to include all reasonable inferences from it, and in doing so made possible the introduction of otherwise inadmissible evidence on rebuttal. This result is not objectionable; impeachment in *Havens* was not to a collateral matter but related directly to a plan between the principal government witness and the accused. The physical evidence found in the accused's suitcase was unquestionably reliable, and the defendant was able to explain any inference from the evidence.

Havens was concerned with the goal of truthfinding while preserving constitutional rights. Situations may arise when the connection between this goal and the impeachment of the accused may be tenuous at best. *Agnello* is an example. If the impeachment in *Agnello* were permitted, it would deter the accused from taking the witness stand on his own behalf. An additional concern is that prosecutors will encourage police to conduct illegal searches, seizures, and arrests. Although this is pure speculation, behavior as this is within the realm of possibility, especially in inspections. In addition, the rationale of the majority in *Havens* would allow admitting illegally seized evidence in the prosecution's case in chief, a result clearly

265. United States v. Havens, 592 F.2d 848 (5th Cir. 1979), *rev'd*, 446 U.S. 620 (1980).
266. United States v. Havens, 446 U.S. 620, 625 (1980).
267. *Id.* at 626.
268. *Id.*
269. *Id.* at 627.
270. *Id.*
271. *Id.*

outside the rule limiting the use of such evidence to impeachment.[272] Practically, however, *Havens* and *Walder* will not often apply, because once a motion to suppress has been granted, most prosecutors would be reluctant to press their case. Finally, the fact that illegal searches on the advice of prosecutors violate Article 98 of the U.C.M.J. and subject the individuals involved to civil liability mitigates the threat to constitutional rights.

Extrinsic evidence may be introduced to contradict assertions volunteered by the witness during cross-examination, unless the extrinsic evidence is not logically or legally relevant. It is questionable whether the contradiction rule should be limited to rebutting what is brought out on direct examination or extended to information volunteered on cross-examination. The trial judge should have flexibility to determine the motivation of counsel, the strengths of the case, and the quantum of probative value, and should prohibit opposing counsel from tricking the witness into opening the door to evidence of uncharged misconduct. As the Third Circuit Court of Appeals stated[273] prior to *Havens*:

> Nothing in the *Walder* decision suggests that it authorizes the government to elicit denials on collateral issues during cross-examination to lay a trap which will be sprung in rebuttal. . . . Indeed the *Walder* Court made extensive approving references to *Agnello v. United States*, . . . where such tactics were expressly disapproved . . . .
>
> While *Walder* and *Agnello* in terms apply only to evidence barred by the exclusionary rule, we think that an analogous principle should apply to evidence that would otherwise be inadmissible under Rule 404 . . . .
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> . . . If we were to construe Rule 611(b) as permitting cross-examination with respect to other crimes solely for the purpose of creating credibility issues we would present a defendant who takes the stand with the Hobson's choice of admitting prior uncharged acts of misconduct or of opening the door to presentation of evidence of such acts in rebuttal. The net effect of such a rule would be to permit the introduction of specific acts of prior misconduct whenever a defendant took the stand. That result could not be squared with the provisions of Rule 404(b). . . . For these reasons federal courts which have considered the question have limited use of otherwise inadmissible evidence for impeachment by contradiction "to contradiction of specific false statements made by defendants on direct examination," . . . or to statements volunteered by the defendant on cross-examination.[274]

While admitting the logic of a flexible approach, the court in *United States v. Bowling*[275] stated:

> Agreeing with the strong denunciation by the Supreme Court of the practice of using cross-examination to trap a witness into opening the door for otherwise inadmissible rebuttal, yet recognizing the danger to the truth-seeking function of our system that is presented by a witness's exhorbitant perjurious claims to bolster his own credibility or case, we hold that the following procedure should be followed when extrinsic evidence of

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272. MIL. R. EVID. 311(b) reads in part: "Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused."

273. United States v. Pantone, 609 F.2d 675 (3d Cir. 1979).

274. *Id.* at 683–84 (citations omitted) (holding that the accused's general denial on direct examination of buying drugs on the base allowed the prosecution to cross-examine the accused about bringing drugs on base and to introduce extrinsic evidence to contradict the accused).

275. 16 M.J. 848 (N.M.C.M.R. 1983).

uncharged misconduct is offered solely to contradict a collateral assertion made by a witness during cross-examination: the military judge should first determine whether the assertion was volunteered by the witness or elicited by the cross-examiner; if the assertion was volunteered, the judge should determine whether the probative value of the proffered extrinsic evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or the possibility of misleading the members, or by considerations of undue delay, waste of time, or needless cumulation of evidence. [Mil. R. Evid. 403.] If the probative value of the proffered evidence is not substantially outweighed by these factors, then the military judge may admit the extrinsic evidence.[276]

IV. Rehabilitation

Once the witness has been impeached, the witness's credibility can be salvaged by using some method of rehabilitation. Except for bolstering and the first two methods discussed below, this support may not take place absent an attack.[277] Generally, a party may not rehabilitate when the opponent has used specific contradiction to impeach the witness.[278] Except for denial, explanation, or corroboration, rehabilitation must respond in kind to the opponent's impeachment. In effect, the impeaching opponent chooses the weapons.

One method of rehabilitation is explanation or denial. Once the witness's testimony has been attacked, the proponent on redirect examination can give the witness a chance to explain or deny the basis for the impeachment.[279] This is not always the case. After the defense's alibi witness was impeached in *United States v. Luce*,[280] the military judge refused to recall the witness to testify that he would not risk his position as an N.C.O. to lie for the accused. Even though the prosecution was allowed to bolster its witness by this method, the court held that the judge properly relied on Rule 403 in denying the defense the right to recall their witness. The witness's explanation for failing to come forward with the alibi would have been of "minimal value" and a waste of the court's time.[281] The court rejected the curative

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276. *Id.* at 854.

277. 4 Wigmore, Evidence § 1104 (Chadbourn ed. 1972). *Cf.* United States v. Smith, 14 M.J. 171 (C.M.A. 1982) (journal entry of order denying petition for review). In dissent, Chief Judge Everett stated, "I would grant review of Issue I in this case to determine to what extent and under what circumstances cross-examination of a witness constitutes such an attack on his credibility that it will justify bolstering that credibility through evidence of his character for truthfulness." *Id. See also* United States v. Morrissey, 14 M.J. 746 (A.C.M.R. 1982):

> There are three situations in which the triers of fact may reject a witness' testimony as unbelievable. First, when the testimony is internally inconsistent or improbable. Second, when it is contradicted by other evidence which is more believable. Third, when the witness is shown to have a bad character for truthfulness. Only the third situation warrants admission of evidence of the witness' good character for truthfulness under Military Rule of Evidence 608(a).

Id. at 749.

278. Outlaw v. United States, 81 F.2d 805, 807 (5th Cir. 1936). "Mere contradiction of [character witness] by appellant's testimony admittedly did not give occasion to introduce proof of good character." Arguably, Military Rule of Evidence 401 would permit evidence to support the witness when the impeachment amounts to an attack on the witness's veracity. An explanation would be "relevant evidence."

279. United States v. Cirillo, 468 F.2d 1233, 1240 (2d Cir. 1972); United States v. Pritchard, 458 F.2d 1036 (7th Cir. 1972). *See* United States v. Boone, 17 M.J. 567, 569 (A.F.C.M.R. 1983) (proper for the prosecution to rehabilitate a prisoner, who was attacked on cross-examination, by allowing him to deny that his motive for testifying was to have his discharge commuted).

280. 17 M.J. 754 (A.M.C.R. 1984).

281. *Id.* at 756. *Cf.* 4 J. Wigmore, Evidence §1119 (Chadbourn ed. 1972).

admissibility theory.[282] "The prior receipt of inadmissible evidence does not require this course of action, but instead places the matter within the discretion of the trial judge."[283] The trial court should weigh probative value of the curing evidence against confusion of the issues and undue consumption of time.[284]

Another method of rehabilitation is corroboration. Corroboration occurs when other witnesses support the witness's testimony about a material fact in issue. Suppose that the witness testified that he or she saw the accused with an undercover agent at the time of the alleged sale of a prohibited substance. 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 the second witness testify to the same fact on the merits, namely, that the accused was with the undercover agent at the same time and place. Corroboration evidence is not directly relevant to credibility but is evidence on the merits which incidentally rehabilitates witness credibility. The proponent may corroborate after, as well as before, impeachment.[285]

At common law, when the opponent impeaches by evidence of a character trait for untruthfulness, the proponent can introduce character evidence to rehabilitate the witness.[286] However, if the evidence is of bias other than a corrupt act, such as bias because of family or business ties, the evidence cannot be introduced.[287] If the method of impeachment is by self-contradiction or contradiction by a third party, evidence of support of the witness for truthfulness generally is not admissible.[288]

Under Military Rule of Evidence 608(a)(2), when a witness's credibility has been attacked "by opinion or reputation evidence or otherwise," opinion or reputation evidence may be introduced in support of the witness's truthfulness.[289] The courts have gone further. When the defense cross-examination sought to impeach two witnesses by showing that one was testifying in order to have charges against him dropped and that the other was testifying for a promotion, it was held proper to rehabilitate the witnesses by introducing evidence of truthfulness.[290] A judge may allow character evidence for truthfulness even when the witness has denied on

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282. *See supra* note 239.

283. United States v. Luce, 17 M.J. 754, 756 (A.C.M.R. 1984).

284. Bracey v. United States, 142 F.2d 85, 89–90 (D.C. Cir. 1944).

285. CRIMINAL EVIDENCE, *supra* note 4, at 43–44. See text accompanying note 4.

286. Rodriguez v. State, 165 Tex. Crim. 179, 305 S.W.2d 350 (1957); J. WEINSTEIN, J. MANSFIELD, N. ABRAMS & M. BERGER, CASES AND MATERIALS ON EVIDENCE 439 (7th ed. 1983).

287. United States v. Medical Therapy Science, Inc., 583 F.2d 36, 41 (2d Cir. 1978).

288. 4 WIGMORE, EVIDENCE §§ 1108–09 (Chadbourn ed. 1972).

289. United States v. Porta, 14 M.J. 622, 623–24 (A.F.C.M.R. 1982). The court held that the meaning of "otherwise" included a vigorous defense cross-examination amounting to an attack on the key government witness's credibility. *See also* United States v. Harvey, 12 M.J. 501, 502–03 (A.F.C.M.R. 1981). This court also held that the defense counsel's cross-examination was such to justify the trial counsel calling a witness to testify about the witness's character for truthfulness. The court recognized that "incidents of past wrongful marijuana usage do not necessarily concern character for untruthfulness." *Id.* at 502. The trial defense counsel characterized his cross-examination as a "total and complete destruction" of the witness's credibility. If there was error, it was found to be not prejudicial. *Id.* at 503. *But see* United States v. Foushee, 13 M.J. 833 (A.C.M.R. 1982); United States v. Halsing, 11 M.J. 920 (A.F.C.M.R. 1981).

290. United States v. Luce, 17 M.J. 754 (A.C.M.R. 1984).

cross-examination prior acts of misconduct not resulting in a conviction, if the judge believes that the denial has not erased the matter in the minds of the jury.[291]

Courts are divided on the question whether impeachment by evidence of prior inconsistent statement is an attack on the character of the witness for truthfulness.[292] The military rules do not resolve this question. If the prior statement has been introduced, most courts will permit rehabilitation by use of character evidence.[293] However, if the opponent merely introduces facts contradicting the witness's testimony, a number of courts will not permit the introduction of character evidence.[294] 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. If so, the introduction of character evidence for truthfulness would be permissible.[295]

Rehabilitation by prior consistent statements is the same under the military and federal rules. Whether a witness may be supported by a prior consistent statement depends on the method of impeachment. A prior statement may not be used for support when the following methods are used: Character trait for untruthfulness, prior conviction, or an act of misconduct not resulting in a conviction.[296]

At common law, the proponent can show prior consistent statements in a number of circumstances. First, if the opponent has imputed some bias or improper motive to the witness, and the prior statement was made before the alleged bias, interest, or motive arose, the statement is admissible.[297] Conversely, if the motive arose before the prior statement, such rehabilitation is not permitted.[298] Second, the prior statement is admissible if the opponent has suggested that the witness has a faulty memory,[299] in which case the basis for its admission is that the prior statement was made soon after the event. For example, when the defense attempts to impeach an eyewitness identification of the defendant by showing that the witness has a faulty memory, the prosecutor may introduce evidence that the witness identified the defendant soon after the event.[300] Third, if the opponent charges that the witness is incapable of remembering or observing the event, a prior statement is allowed if it was made prior to the incapacity arising.[301] Finally, a prior consistent statement also may be introduced when the opponent expressly or impliedly charges that the witness

291. United States v. Hoxworth, C.M. 438490 (A.C.M.R. Jan. 31, 1980).

292. Outlaw v. United States, 81 F.2d 805, 807–08 (5th Cir. 1936).

293. McCormick on Evidence § 49 at 117 n.11 (3d ed. 1984).

294. *Id.* § 117 n.12.

295. Outlaw v. United States, 81 F.2d 805, 807–09 (5th Cir. 1936).

296. United States v. Griggs, 13 C.M.A. 57, 59, 32 C.M.R. 57, 59 (1962); United States v. Harris, 9 C.M.A. 493, 496, 26 C.M.R. 273, 276 (1958).

297. United States v. Kellum, 1 C.M.A. 482, 485–86, 4 C.M.R. 74, 77–79 (1952).

298. United States v. Kauth, 11 C.M.A. 261, 201 C.M.R. 77 (1952); United States v. Brunious, 49 C.M.R. 102 (N.C.M.R. 1974).

299. United States v. Kellum, 1 C.M.A. 482, 485–86, 4 C.M.R. 74, 77–79 (1952).

300. *Id.*; United States v. Meyers, 14 M.J. 749 (A.C.M.R. 1982); United States v. Brunious, 49 C.M.R. 102 (N.C.M.R. 1974). The court in *Meyers* held that when the defense counsel's cross-examination raises the issue of fabrication and improper motives for the witness's testimony, a prior statement by the witness as to the identity of the accused committing the offense of sale of a narcotic is admissible under Military Rule of Evidence 801(d)(1)(C). United States v. Meyers, 14 M.J. 749, 751 (A.C.M.R. 1982).

301. United States v. Mason, 40 C.M.R. 1010, 1012 (A.F.B.R. 1969); United States v. Brunious, 49 C.M.R. 102 (N.C.M.R. 1974).

fabricated the story before the trial. The proponent may introduce a statement, consistent with the witness's testimony, made prior to the alleged fabrication.[302] In *United States v. Meyers*[303] the majority indicated that under some circumstances cross-examination may constitute "an express or implied charge . . . of recent fabrication or improper influence or motive" on the part of the witness so that a prior consistent statement was admissible.[304] The court, relying on the fact that defense counsel did not specifically object to the prior consistent statement, found that admitting the statement was not plain error, and review on appeal was thus precluded. The court stated that excluding a prior consistent statement "because no evidence had been offered at the time that [the witness] had made a prior statement inconsistent with his trial testimony . . . was an excessively narrow reading of Mil. R. Evid. 801(d)(1)(B)."[305]

Some courts[306] have suggested that a more flexible rule would be to admit evidence of a prior consistent statement. A fair result would be achieved by weighing relevant factors such as conclusiveness of the prior statement, time constraints, importance of the witness, and the effect of the impeachment and rehabilitation on the case. This balancing test would be consistent with the fairness concerns of Military Rule of Evidence 401. It would also be consistent with Military Rule of Evidence 801(d) providing for the admissibility of prior statements which do not necessarily meet common law requirements. This result could be achieved under Rule 801(d)(1)(A), previously called the Article 32 clause.

Military Rule 608(b) forbids proving specific instances of good conduct to support credibility. However, the proponent, during cross-examination of a witness who has testified to another witness's character for untruthfulness, may ask about instances of good acts by the supposedly untruthful witness. Arguably, specific instances may also be inquired into under Rule 608(a) when a witness's character for truthfulness has been attacked by "opinion or reputation evidence or otherwise." For example, if a key government witness undergoes a brutal cross-examination calculated to show that the witness fabricated testimony because of plea bargaining, it conceivably would be proper to show that after the witness's trial the witness had proven reliable concerning a number of apprehensions and searches.[307]

Regardless of the method of rehabilitation, courts might question the use of expert witnesses. In *United States v. Snipes*[308] the court held that there was no abuse of discretion by the military judge, in a non-jury trial, to admit expert testimony on the behavioral patterns of sexually abused children to rehabilitate the credibility of the

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302. United States v. Kauth, 11 C.M.A. 261, 201 C.M.R. 77 (1952); United States v. Brunious, 49 C.M.R. 102 (N.C.M.R. 1974).

303. 18 M.J. 347 (C.M.A. 1984).

304. *Id.* at 350 (citing Military Rule of Evidence 801(d)(1)(B)).

305. *Id.* at 351.

306. *See, e.g.*, United States v. Bays, 448 F.2d 977, 979 (5th Cir. 1971); Hanger v. United States, 398 F.2d 91, 105 (8th Cir. 1968).

307. S. SALZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 106–07 (Supp. 1978).

308. 18 M.J. 172 (C.M.A. 1984). *See also* United States v. Awkward, 597 F.2d 667, 669 (9th Cir. 1979) (witness bolstered by calling expert witness on hypnosis).

victim.[309] The accused was charged with indecent acts with his step-daughter under 16 years of age. The crucial issue in the case was the credibility of the accused's step-daughter. The defense called a clinical psychologist, an accepted expert in child psychology, who testified that she was not convinced the victim was telling the truth.[310] To substantiate this opinion, the defense called the wife of a neighbor who testified that the victim did not have a good reputation for truthfulness. In rebuttal the government called three witnesses. A social worker indicated that there was no explanation for the victim's personality other than sexual abuse. A second witness, a counselor, believed that the victim had been truthful in her statements, and the third witness, an expert in clinical and forensic psychology and sex offenses, testified that he believed the victim was truthful in her allegations of indecent acts by her step-father and that her personality was consistent with that of a sexually abused child.[311] In holding the rebuttal by the government was proper, Judge Cook, writing for the majority, made several observations.

> First, all the witnesses skirt the "ultimate issue" in giving their opinions as to the victim's reputation for truthfulness. Second, the "door was opened" by the defense with their first witness. Third, there was no objection from defense counsel to this type of testimony,[312] although there were some specific objections to the question.

The court noted that the testimony of the witnesses was consistent with their special training and expertise and did not violate Military Rules of Evidence 702–04.[313] However, Chief Judge Everett, concurring, made an astute observation that the results probably would have been different had there been objection. "In evaluating someone's credibility, 'scientific, technical, or other specialized knowledge' is of limited assistance to the trier of fact."[314]

V. PROCEDURE

Admissibility of evidence may be restricted by a motion *in limine* requesting a pretrial order to enjoin a party from using specific evidence before the factfinder. This device is available only to defense counsel for the purpose of barring introduction of derogatory information, such as prior conviction evidence or specific instances of conduct, for impeachment. Either prosecution or defense counsel, however, may seek a ruling on the application of the sexual offense shield law. The motion *in limine* should be made at an Article 39(a) session.

The timing of the motion is subject to the discretion of the military judge.[315] The Supreme Court has recommended delaying the ruling until a decision is made whether the accused is going to testify. If the judge decides to rule before the accused testifies, the Court of Military Appeals has indicated that it will follow the majority federal rule

309. United States v. Snipes, 18 M.J. 172, 178–79 (C.M.A. 1984).
310. *Id.* at 176.
311. *Id.* at 177.
312. *Id.*
313. *Id.* at 178–79.
314. *Id.* at 180 (Everett, C.J., concurring).
315. *See, e.g.*, United States v. Cofield, 11 M.J. 422, 430 (C.M.A. 1981).

allowing it to review the judge's decision for correctness even though the accused does not testify.[316] In *New Jersey v. Portash*[317] the Supreme Court held that immunized testimony may not be used for impeachment. When the trial judge rules that it can be used and the defendant does not testify, the effect is a violation of the fifth amendment.[318] In a concurring opinion Justice Powell stated:

> The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor were allowed to use the immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions.[319]

Delaying the motion *in limine* risks a mistrial. The judge should caution counsel that the disputed impeachment may not take place until he or she has had a chance to rule at an Article 39(a) session. If an improper conviction is used for impeachment and it has not been litigated in an Article 39(a) session, there will be "a strong basis for urging that a mistrial should be granted upon defense motion."[320]

In *United States v. Jackson*,[321] Judge Weinstein stated that the trial judge

> should rule on the admissibility of prior crimes to impeach as soon as possible after the issue has been raised. . . . It is only after the admissibility of a conviction has been ruled on that defense counsel can make an informed decision whether to put his or her client on the stand. In addition, the court's ruling may have a significant impact on the opening statements and the questioning of the witnesses.[322]

Because of the possibility that granting a motion involving a prior conviction may "unfairly misrepresent . . . an accused's noncriminality," he placed two conditions on his exclusion order. The order would not be applied if the accused testified he or she had never been in trouble with the law, or if the defense attempted to impeach a government witness with a conviction of an offense similar to the excluded offense.[323]

Judge Weinstein put his pen on the issue when he said the ruling should be made as soon as possible. An examination of the factors in *United States v. Weaver*,[324] illustrates the difficulty of early resolution. At least two of the factors may not be evaluated early without a good offer of proof, for example, "necessity of testimony"

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316. *Id.*
317. 440 U.S. 450 (1979) (Blackmun, J., and Burger, C.J., dissenting).
318. *Id.* at 459–60.
319. *Id.* at 462 (Powell, J., concurring).
320. United States v. Cofield, 11 M.J. 422, 431 n.14 (C.M.A. 1981).
321. 405 F. Supp. 938 (S.D.N.Y. 1975).
322. *Id.* at 942.
323. *Id.*
324. 1 M.J. 111 (C.M.A. 1975).

> In weighing the probative value of a previous conviction [a military judge must consider] the nature of the conviction itself in terms of its bearing on veracity, its age, its propensity to influence . . . the jury improperly, the necessity for the testimony, . . . and the circumstances of the trial in which the prior conviction is sought to be introduced.

Id.

and the importance of the accused's credibility.[325] The author's own experience has been that offers of proof are usually made from the perspective of the advocates and not on what the evidence will actually be.

It may be for this reason that some courts have held that the accused is not entitled to a ruling until the issue arises in open court during the accused's testimony. In *United States v. Cofield*,[326] the military judge denied the defense counsel's motion *in limine* that the prior summary court-martial conviction could not be used for impeachment. Subsequently, the accused refused to testify. The court held that it could review the issue of whether the judge's ruling was correct.

> A military judge may hesitate in ruling before trial or early in a trial that a prior conviction will be admissible for impeachment purposes because, when the conviction ultimately is offered in evidence, there will usually be an issue whether "the probative value of admitting this evidence outweighs its prejudicial effect to the accused," . . . and a proper resolution of this issue may be difficult until the judge has heard a substantial amount of evidence.[327]

A compromise view is set forth in *United States v. Cook*.[328]

> In future cases, to preserve the record for review, a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) *sufficiently outline* the nature of his testimony so that the trial court, and the reviewing court can do the necessary balancing contemplated in Rule 609.[329]

The Supreme Court recently recognized in *Luce v. United States*[330] the problem of the timing of the trial court's ruling on a motion *in limine*. The Court held that an accused who did not testify at trial may not challenge on appeal an *in limine* ruling respecting the admissibility of a prior conviction for impeachment under Federal Rule of Evidence 609(a).[331] Luce's attorney had made a motion *in limine* to preclude the government from introducing evidence of his client's prior conviction for possession of a controlled substance, if his client took the stand. Counsel made no commitment that the accused would testify nor did he make a proffer outlining the nature of the testimony. The Court indicated that the *in limine* ruling was not reviewable unless the accused testified. Without such testimony the record is incomplete and a "reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context."[332] It agreed with the trial court that a ruling may have to be changed

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325. United States v. Weaver, 1 M.J. 111, 118 nn. 9–10 (C.M.A. 1975); *see also* United States v. Jackson, 627 F.2d 1198, 1209 (D.C. Cir. 1980); United States v. Barnes, 622 F.2d 107, 109 (5th Cir. 1980).

326. 11 M.J. 422 (C.M.A. 1981).

327. *Id.* at 431 n.15; United States v. Rogers, 17 M.J. 990, 992 (A.C.M.R. 1984).

> In order to preserve a Rule 609 issue for appellate review [motion *in limine*], the appellant must state on the record of trial that he will in fact testify if the conviction is excluded and must "sufficiently outline the nature of the testimony" at the trial and the appellate court can make an informed ruling on the issue.

Id.

328. 608 F.2d 1175 (9th Cir. 1979).

329. *Id.* at 1186 (emphasis added). *But see* United States v. Lutz, 621 F.2d 940 (9th Cir. 1980) (court refused to entertain motion *in limine* as to Rule 404(b)).

330. 105 S. Ct. 460 (1984).

331. *Id.* at 461.

332. *Id.*

as the case unfolds. Also, when the accused does not testify, the reviewing court "has no way of knowing whether the Government would have sought to impeach with a prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by the means, a prosecutor might elect not to use an arguably inadmissible prior conviction."[333] If the accused does not testify, appellate courts have little evidence to determine if there was harmless error. "Were *in limine* rulings under Rule 609(a) reviewable on appeal, almost any error would result in a windfall of automatic reversal . . . ."[334] The Court also noted that its ruling would prevent defense counsel from making motions *in limine* to hedge their bets against an unfavorable trial ruling.[335]

Justice Brennan, with whom Justice Marshall joined, sought to limit the case to its holding. "I understand [the Court] to hold only that a defendant who does not testify at trial may not challenge on appeal an *in limine* ruling respecting admission of a prior conviction for purposes of impeachment under Rule 609(a) of the Federal Rules of Evidence."[336] Justice Brennan noted two reasons. First, the balancing of probative value or prejudicial effect can be done only in the "specific factual context of a trial as it has unfolded."[337] Second, if the accused does not testify, the "reviewing court is handicapped in making the required harmless error determination."[338] However, when the "determinative question turns on legal and not factual considerations, a requirement that the defendant actually testify to preserve the admissibility issue for appeal might not necessarily be appropriate."[339]

The concurring opinion was ambivalent at best. On one hand the Justices sought to limit the rule to cases involving prior conviction evidence under Rule 609, yet at the same time they recognized that when there is solely a legal issue involved, the motion *in limine* should not be reviewable unless the accused testifies. Thus, the rationale of the case would apply to impeachment by specific instances of conduct, specific contradiction of the accused, inconsistent acts by the accused, and prior inconsistent statements by the accused. The rationale of the entire Court would apply to uncharged misconduct by the accused.

VI. CONCLUSION

Thorough knowledge of bolstering, impeachment, and rehabilitation techniques can greatly aid the probability of success of trial counsels in a courtroom or hearing room. The prosecutor who can bolster the testimony of a young child in a sexual abuse case, the defense counsel who can impeach a key government informant, or the opponent who can impeach a witness with prior convictions or prior instances of misconduct will be effective advocates. One area that should not be overlooked under

333. *Id.*
334. *Id.*
335. *Id.* at 464.
336. *Id.* (Brennan, J., and Marshall, J., concurring.)
337. *Id.*
338. *Id.*
339. *Id.*

the federal and military rules is specific contradiction. Specific contradiction overlaps impeachment by prior convictions and instances of misconduct when there has been a denial by a witness. Finally, the most effective counsel is the individual who knows how to rehabilitate a witness after a devastating impeachment.