

A Journal For Military Defense Counsel  
**THE ADVOCATE**

U.S. Army Defense  
Appellate Division

SEP 02 1980

**Vol. 12, No. 4**  
**July - August 80**

**Contents**

193

**WITNESS CREDIBILITY AND THE NEW  
MILITARY RULES OF EVIDENCE**

Lieutenant Colonel Francis Gilligan

217

**MILITARY INSPECTIONS UNDER RULE 313**

Captain H. Franklin Young

231

**SIDE BAR**

236

**USCMA WATCH**

242

**CASE NOTES**

250

**FIELD FORUM**

253

**ON THE RECORD**

**NOT TO BE REMOVED  
FROM TJAGSA LIBRARY**

# THE ADVOCATE

Volume 12, Number 4

July-August 1980

## CHIEF, DEFENSE APPELLATE DIVISION

COL Edward S. Adamkewicz, Jr.

## EDITORIAL BOARD

Editor-in-Chief:	CPT Edwin S. Castle
Managing Editor:	CPT Alan W. Schon
Articles Editor:	CPT Edward J. Walinsky
Case Notes Editor:	CPT Robert D. Ganstine
Trial Tactics Editor:	CPT Courtney B. Wheeler
USATDS Representative:	MAJ Malcolm H. Squires, Jr.

## STAFF AND CONTRIBUTORS

### Associate Editors

MAJ Grifton E. Carden  
CPT Robert L. Gallaway  
CPT Charles E. Trant  
CPT Joseph A. Russelburg

### Contributors

LTC Francis Gilligan  
CPT Alan W. Schon  
CPT H. Franklin Young

## ADMINISTRATIVE ASSISTANTS

Ms. Maureen Fountain  
Mr. James M. Brown

THE ADVOCATE (USPS 435370) is published under the provisions of AR 360-81 as an informational media for the defense members of the U.S. Army JAGC and the military legal community. It is a bimonthly publication of The Defense Appellate Division, U.S. Army Legal Services Agency, HQDA (JALS-DA), Nassif Building, Falls Church, VA 22041. Articles represent the opinions of the authors or the Editorial Board and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Controlled circulation postage paid at Falls Church, VA. SUBSCRIPTIONS are available from the Superintendent of Documents, U.S. Government Printing Office, ATTN: Order Editing Section/SSOM, Washington D.C. 20402. POSTMASTER/PRIVATE SUBSCRIBERS: Send address corrections to Superintendent of Documents, U.S. Government Printing Office, ATTN: Change of Address Unit/SSOM, Washington, D.C. 20402. The yearly subscription prices are \$8.00 (domestic) and \$10.00 (foreign). The single issue prices are \$2.00 (domestic) and \$2.25 (foreign).

Cite as: 12 The Advocate [page] (1980)

## BRIEFLY WRIT

### Overview

Our effort to apprise military defense counsel of the most significant aspects of the new Military Rules of Evidence continues with this issue, which culminates our two-part symposium on the provisions. The lead article, written by Lieutenant Colonel Francis Gilligan, updates his previously published analysis of the various legal issues involved in bolstering, impeaching, and rehabilitating witness credibility. In the second article, Captain Frank Young presents an analytic framework designed to assist defense counsel in structuring motions to suppress or objections to evidence acquired through military inspections conducted pursuant to Rule 313.

### Distribution

A staff judge advocate in USAREUR recently requested that his branch offices be appended to the distribution list of The Advocate. Realizing that the geographic isolation of many USAREUR branch offices impinges upon accessibility to The Advocate, we have decided to mail one copy of the journal to all USAREUR branch offices, in addition to the usual distribution to defense counsel and staff judge advocate offices. We thank all our readers for their interest, and are pleased to augment our service to the field.

### Acknowledgment

The staff of The Advocate would like to publicly acknowledge the work and dedication of Kris King, whose efforts as editor-in-chief were instrumental in elevating the journal to its present standard. Kris has departed the service, and is now employed as a civilian attorney in Texas. We also express our appreciation to Major Mac Squires, who served as our TDS representative and authored the USCMA Watch feature until his recent reassignment to Charlottesville, Virginia. We are pleased to announce that Major Ron Howell will replace Mac in that capacity.

### Solicitation

We encourage readers of The Advocate to submit comments and suggestions pertaining to all legal issues which are of particular importance to defense counsel and warrant examination in the pages of this journal; your input can only heighten The Advocate's responsiveness to the problems associated with defending clients before courts-martial.

## WITNESS CREDIBILITY AND THE NEW MILITARY RULES OF EVIDENCE

Lieutenant Colonel Francis Gilligan\*

Although the reported cases might indicate otherwise, the questions which recur most frequently at trial concern the credibility of witnesses. The new Military Rules of Evidence modify the law in this area in several respects, and can best be understood by focusing on those provisions which depart from past practice.<sup>1</sup>

### Bolstering the Witness

The new evidentiary provisions do not specifically incorporate the principle that generally precludes counsel from bolstering the credibility of his witness before the witness is impeached.<sup>2</sup> Rule 101 does state, however, that the "rules of evidence generally recognized in the trial of criminal cases in the United States district courts" and the common law rules of evidence will be applicable in courts-martial "insofar as practicable" and provided they are not "inconsistent with or contrary to" the Uniform Code of Military Justice or Manual for Courts-Martial.<sup>3</sup> Thus, although the general rule will apply, there are exceptions. First, the witness' testimony may be corroborated before his overall credibility is impeached.<sup>4</sup> The Manual recognized this exception.<sup>5</sup> Counsel may indirectly bolster his witness' credibility by presenting additional

---

\*Lieutenant Colonel Gilligan received a B.A. from Alfred University, a J.D. from the State University of New York at Buffalo, and an L.L.M. and S.J.D. from George Washington University. He currently serves as a general court-martial judge in the Fifth Judicial Circuit, Federal Republic of Germany.

1. See Gilligan, Credibility of Witnesses, 11 The Advocate 211 (1979). This article is an update of the author's previous analysis.
2. See Manual For Courts-Martial, United States, paragraph 153a (Rev. ed. 1969) [hereinafter referred to as MCM, 1969].
3. Mil. R. Evid. 101(b)(1).
4. E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Lederer, Criminal Evidence 43-44 (1979).
5. MCM, 1969, para. 153a and 142c.

testimony which is consistent with the original witness' statements about a fact in issue. If, for example, a witness testifies that he saw the defendant enter the building where a murder occurred, the general rule would prevent the prosecution from presenting testimony that the first witness is truthful. The prosecution could, however, indirectly bolster the first witness by presenting the corroborative testimony of a second witness. The Manual also recognized the "fresh complaint"<sup>6</sup> and "pretrial identification"<sup>7</sup> exceptions. The former principle enables the admission of a victim's complaint to law enforcement authorities or other third parties soon after an alleged sexual offense, in order to bolster the victim's testimony. The latter exception permits counsel to bolster the testimony of a witness who identifies a person in the courtroom—for example, the defendant—with evidence of the witness' pretrial identification of that person, if the pretrial showup or lineup was constitutional.<sup>8</sup>

Although the new rules do not specifically recognize the "fresh complaint" exception, three rules may enable the admission of extra-judicial statements from victims of nonconsensual sex crimes. Thus, a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an exception to the proscription of hearsay under Rule 803(2).<sup>9</sup> No extrinsic evidence of the startling event or condition need be proffered; this prerequisite may be established by the declarant. If the defense alleges recent fabrication of, or improper motivation by the victim, evidence of the circumstances surrounding the alleged crime are admissible under Rule 801(d)(1)(B). Finally, Rule 803(3) recognizes the admissibility of 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.<sup>10</sup> The pretrial identification exception is

---

6. Id., para. 142c.

7. Id., para. 153a.

8. Id. Cf., Gilligan, Eyewitness Identification, 58 Mil. L. Rev. 183 (1972). The Supreme Court held in Kirby v. Illinois, 406 U.S. 682 (1972) that a suspect is not entitled to counsel until after the initiation of adversary criminal proceedings. This rule has been codified in military jurisprudence. See Mil. R. Evid. 321(b)(2).

9. Mil. R. Evid. 803(2). Note, however, that a statement not admitted to prove the truth of the matter asserted does not fall within the definition of hearsay. See Mil. R. Evid. 801(c).

10. Mil. R. Evid. 803(3).

preserved in Rules 321(a)(1) and 801 (d)(1)(c). Rule 321(a)(1) codifies the decision in United States v. Burge<sup>12</sup> and is especially important if the identifying witness is senile, has been intimidated, or is unavailable for trial.

### Impeaching the Witness

#### Generally

The common law proceeded from the assumption that a proponent may not impeach his own witness.<sup>12</sup> Thus, the opponent could ordinarily attack the credibility of witnesses called by opposing counsel, the judge, or the jury. The new rules allow a proponent to impeach his own witness, as well as witnesses called by the judge or jury,<sup>13</sup> Rule 607 broadly states that "the credibility of a witness may be attacked by any party, including the party calling the witness."<sup>14</sup> When applied in conjunction with Rule 801(d)(1)(c), this provision could significantly alter trial strategy. While prior military law provided that statements introduced to impeach a witness could not be considered as substantive evidence unless they were otherwise admissible,<sup>15</sup> that restriction is not retained in the new rules.

This revision affects the role of both trial and defense counsel. Assume that during a court-martial involving a transfer of heroin, prosecution witness A testifies that, prior to the alleged transfer, the defendant put his arm around B and said, "If you want any drugs, you will have to deal through my partner, B." To impeach this witness, the defense shows that at the Article 32 investigation, A said that B and the defendant were together in the hall, but that the defendant did not make any statement which indicated that he was a co-conspirator or partner with B. Under the prior Manual rule, A's earlier statement could be considered only for impeachment purposes. Since such statements can now be

11. 1 M.J. 408 (CMA 1976). Cf. Ohio v. Roberts, 27 Cr. L. Rptr. 8234 (Sup. Ct. June 25, 1980).

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

13. MCM, 1969, para. 153b(1). The Military Rules of Evidence permit the judge and the court members to call witnesses. MCM, 1969, para. 54a.

14. Mil. R. Evid. 607.

15. MCM, 1969, para. 153a.

considered as substantive evidence, defense counsel obviously have compelling reasons to preserve a verbatim record of Article 32 proceedings. Although Rule 801(d)(1)(A) only requires that the testimony be given under oath, recording the testimony avoids the potential need for the defense counsel to testify and eliminates any ambiguity regarding the content of the testimony.

### Reputation and Opinion Evidence

As soon as a witness -- including the accused<sup>16</sup> -- testifies, his or her credibility becomes an issue in the case.<sup>17</sup> One method of impeachment involves the introduction of timely reputation or opinion-type evidence about the witness' character trait of truthfulness. Since the court is interested in the witness' credibility under oath at the time of trial, the evidence must consist of a reputation or opinion formed near the time of the court-martial. In the military setting, the concept of "reputation" is relatively broad. An individual has a reputation not only within the military community or unit<sup>18</sup> but also in the civilian community.<sup>19</sup> Because of the transient nature of that community, it is unnecessary to show that the individual resided in the location for a lengthy period of time prior to the trial.<sup>20</sup>

Character witnesses may testify not only about their personal knowledge or observations, but also about what they have heard concerning the witness' character within the community.<sup>21</sup> At common law, only reputation evidence could be introduced, although opinion evidence is generally regarded as a more persuasive indication of a witness' truthfulness. To lay a proper foundation for reputation evidence, the proponent must show

16. MCM, 1969, para. 153b. See Mil. R. Evid. 608(a).

17. Id.

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

19. Id.

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

21. Mil. R. Evid. 405(a). See Mil. R. Evid. 608(a).

that the character witness is ordinarily a resident of the same military or civilian community as the witness, and has lived in the community long enough to become familiar with the witness' reputation in that community.<sup>22</sup> A proper foundation for opinion evidence exists if the proponent can show that the character witness knows the witness personally, and is acquainted with him well enough to have had an opportunity to form a reliable opinion of his trait for truthfulness. When the defendant makes an unsworn statement, the prosecution is not allowed to introduce evidence as to the defendant's character trait for untruthfulness.<sup>23</sup> However, if a defense witness testifies during extenuation and mitigation as to the accused's credibility, the prosecution may introduce evidence to impeach that trait.<sup>24</sup>

### Sexual Offenses

In addition to admitting evidence as to the character trait of untruthfulness, the former Manual provision permitted evidence of lewd character: in sex offenses where consent is an issue, paragraph 153b(2) (a) provided that evidence of the victim's unchaste character is admissible.<sup>25</sup> As to the victims of certain sexual crimes, the rules apply a "shield law." This rule is more comprehensive than the former Manual provision and Federal Rule of Evidence 412. The new evidentiary provisions reflect a greater compassion for the victims of sexual crimes while preserving the accused's constitutional rights; Rule 412 affords the victim a greater degree of protection than its counterpart in the Federal Rules,<sup>26</sup> and alters the prerequisites for admissibility. There

---

22. United States v. Tomchek, 4 M.J. 66, 77 (CMA 1977). The term "community in which he lives" cannot be pegged to an exact geographical location but instead means an area where a person is well-known and has established a reputation. See also United States v. Crowell, 6 M.J. 944, 946 (ACMR 1979).

23. MCM, 1969, para. 75c(2). United States v. Shewmake, 6 M.J. 710, 711 (NCFMR 1978); United States v. McCuirry, 5 M.J. 502, 503 (AFCMR 1978); United States v. Stroud, 44 CMR 480, 484 (ACMR 1971). When the courts determine there is prejudicial error, they are divided as to the appropriate remedy; for example, a rehearing on the sentence or a reassessment of the sentence are two options.

24. United States v. Konarski, 8 M.J. 146 (CMA 1979).

25. MCM, 1969, para. 153b(2)(a).

26. Compare Fed. R. Evid. 412 with Mil. R. Evid. 412.

is no requirement under the military rule for written notice 15 days prior to trial,<sup>27</sup> since many cases, especially those tried aboard ship, may be conducted by a trial team and military judge who fly in shortly before the court is convened. The 15-day written notice requirement would therefore be impractical. Rule 412 also differs from its federal counterpart in that there is no provision for an in camera session, although the military judge may conduct a hearing, which can be closed, in order to determine the admissibility of the impeachment evidence.<sup>28</sup>

The military rule is not limited to "rape or assault" cases, as is Federal Rule of Evidence 412,<sup>29</sup> and instead applies to "nonconsensual sexual offenses," which are defined as those offenses "in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense [including] rape, forcible sodomy, indecent assault, and attempts to commit such offenses."<sup>30</sup> The key test is whether the offered evidence is relevant and whether its probative value "outweighs the danger of unfair prejudice."<sup>31</sup> The constitutional limitation placed on 412(b) will apply with equal force to Rule 412(a). It was probably not expressly stated because it is difficult to imagine when reputation or opinion evidence will outweigh the unfair prejudice to the victim.

The Supreme Court has held that it is error for the trial court to forbid a relevant line of cross-examination. Thus, the question under Rule 412 is whether there has been an exclusion of relevant cross-examination. In Alford v. United States,<sup>32</sup> the lower court held that it was improper for a defense counsel to ask the key prosecution witness where he lived. In overruling this decision, the Court stated:

---

27. See Mil. R. Evid. 412.

28. Id.

29. Compare Fed. R. Evid: 412 with Mil. R. Evid. 412.

30. Mil. R. Evid. 412(e). The federal rule will not apply to forcible sodomy and indecent acts because of an apparent oversight in drafting.

31. Mil. R. Evid. 412(c)(3).

32. 282 U.S. 687 (1931).

It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. The question "Where do you live?" was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.<sup>33</sup>

The Court also recognized an additional defense motive for asking the question, since the accused was in the custody of federal authorities. This fact might have suggested that the witness' testimony was "affected by fear or favor growing out of his detention,"<sup>34</sup> a factor the counsel was entitled to reveal through cross-examination.

In Smith v. Illinois,<sup>35</sup> the Court held that the trial judge erred by prohibiting counsel from asking the prosecution's key witness his name and address. In a concurring opinion in which Justice Marshall joined, Justice White asserted that the Court in Alford recognized that questions which merely tend to harass or humiliate a witness may exceed the bounds of cross-examination. Justice White suggested that inquiries which tend to endanger the safety of the witness should be placed in the same category.<sup>36</sup> In Davis v. Alaska,<sup>37</sup> the Court held that the defendant's right of confrontation was more compelling than the state's interest in protecting the confidentiality of juvenile adjudications. As a result of juvenile proceedings, the key prosecution witness was on probation for burglary. Since Davis was also accused of burglary, and since evidence had been discovered near the witness' residence, his prior conviction was a crucial factor in the defense's attempt to show bias.

---

33. Id., at 692-93.

34. Id., at 693.

35. 390 U.S. 129 (1968).

36. Id.

37. 415 U.S. 308 (1974).

In determining the relevance of the victim's unchaste character or past sexual behavior, the judge should consider the nature of the proffered evidence, and whether it reflects specific acts, reputation or opinion evidence; the timeliness of the information; prevailing societal mores; the strength of the prosecution case; whether the evidence explains a physical fact, such as the presence of semen or the victim's physical condition; the situs of the alleged crime and the prior acts of sexual relations; the complainant's relationship with prior sexual partners; and the victim's occupation. Only after weighing all of these factors can the rights of the defendant and the victim be properly balanced. When the defendant denies familiarity with the victim, the latter's past sexual behavior is inadmissible. When the physical examination of the victim reveals semen, evidence of whether the victim had intercourse two or three days earlier may be relevant.

Where there are indications that the offense involved a violent struggle, evidence of the victim's physical condition may enhance reputation or opinion evidence as to the victim. Sexual history might also be relevant where the victim engaged in a pattern of behavior clearly similar to the conduct immediately in issue. Two other examples might be helpful. The fact that a senior in high school engaged in consensual sexual relations with her boyfriend is not probative of consent in a case involving intercourse with a stranger. Finally, the fact that an unmarried 22-year old complainant engaged in sexual intercourse in her car with a 25-year old soldier two days before the offense is probative in a case involving intercourse with a 25-year old soldier she met in the same bar. Thus, the constitutionality of Rule 412 must be determined on an ad hoc basis.

#### Evidence of Prior Convictions

Rule 609 modifies the law governing the admissibility of prior convictions in two respects. The rule alters the concept of finality and recognizes a new basis for excluding evidence of prior convictions. The opponent may prove that the witness suffered a valid, recent conviction for certain types of offenses. A conviction may not be used for impeachment purposes if it has been disapproved or set aside,<sup>38</sup> or if it was

38. MCM, 1969, para. 153b(2)(b). United States v. Heflin, 23 USCMA 505, 50 CMR 644, 1 M.J. 131 (1975). If the DA Form 20B indicates that the case is still undergoing review, it may not be used for impeachment. Likewise, if the DA Form 20B does not reflect the completion of supervisory review as required by the regulation, the conviction is not admissible in evidence as a prior conviction.

obtained in violation of due process or the witness' right to counsel under the Sixth Amendment.<sup>39</sup> However, most courts allow counsel to present evidence only of the denial of a right to counsel when they attack a prior conviction offered by opposing counsel. These courts will not sustain collateral attacks which are based on the contention that reliable evidence supporting the conviction was obtained in violation of the Fourth Amendment.<sup>40</sup> A conviction by a civilian court carries with it the presumption that the defendant was either afforded counsel or waived that right; the defendant attacking the conviction bears the burden of demonstrating the contrary. Testimony which establishes the absence of the foregoing criteria would ordinarily overcome this presumption. However, in United States v. Weaver,<sup>41</sup> the defendant did not prevail. Weaver testified that he had an apparent lack of memory as to his representation by counsel and possible waiver of that guarantee, and he failed to establish that he was statutorily qualified for representation due to indigency at the time of the proceedings. In United States v. Booker,<sup>42</sup> the court held that a summary court-martial conviction may not be used to trigger the escalator clause if there is no showing of representation by counsel or a valid waiver of that right. The principles applied in that case may bar the use of summary court-martial convictions for impeachment unless the prosecution establishes that the defendant was represented by counsel or that he waived that right.

Paragraph 153b of the Manual provided that if a conviction is undergoing appellate review or the time for an appeal has not expired, the conviction may not be used for impeachment.<sup>43</sup> The same paragraph also stated that it is immaterial that a request to vacate or modify the findings and the sentence has been submitted under Article 69 or that there has been a motion for a new trial.<sup>44</sup> The concept of finality now only applies to summary and special courts-martial conducted without a military

---

39. Loper v. Beto, 405 U.S. 473 (1972). The Court held that a conviction obtained in violation of the right to counsel may not be used to impeach the defendant.

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

41. 1 M.J. 111 (1975).

42. 5 M.J. 238, reconsidered on other grounds, 5 M.J. 246 (CMA 1978).

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

44. Id.

judge. Rule 609(e) provides that a conviction by either is inadmissible until review has been completed pursuant to Article 65(c) or Article 66.<sup>45</sup> Other convictions are inadmissible even if the appeal is pending, but evidence of the appeal is admissible. Rule 609 comports with United States v. Weaver.<sup>46</sup> Subpart (a) of the Rule provides that convictions are admissible if they are for crimes which are (1) punishable by death, dishonorable discharge, or imprisonment in excess of one year, or (2) entail dishonesty or a false statement, regardless of the punishment. The Federal Rules of Evidence Advisory Committee Notes indicate that the rule embraces such crimes as fraud, embezzlement, and deceit.<sup>47</sup>

If the proffered evidence of a conviction is otherwise proper, does the military judge have the discretion to exclude it? Rule 609(a) provides that if the prior conviction is punishable by death, dishonorable discharge, or imprisonment in excess of one year, it "shall" be admitted. But Rules 609(a) and 403 provide for the exercise of discretion. The judge must consider the purpose underlying the use of the prior conviction. In weighing the probative value of a prior conviction vis-a-vis its prejudicial effect, the military judge must assess the degree to which the conviction bears on veracity, as well as its age, its propensity to influence the jury, the need for its admission into evidence, and the general circumstances of the trial in which the prior conviction is introduced.

The table of maximum punishment is only one factor used in determining the impact of the conviction on credibility.<sup>48</sup> The Court of Military Appeals has stated:

Acts of perjury, subornation of perjury, false statement or criminal fraud, embezzlement or false pretense are . . . generally regarded as conduct reflecting adversely on an accused's

---

45. Mil. R. Evid. 609(e). This requirement does not apply to other courts-martial. Annotations should indicate that there was a trial with a military judge. Some services only show trial by military judge alone on the promulgating orders. In any event, the pendency of an appeal is admissible.

46. 1 M.J. 111 (1975).

47. Advisory Committee Notes, Fed. R. Evid. 609.

48. See United States v. Johnson, 23 USCMA 534, 50 CMR 705, 1 M.J. 152 (1975); United States v. Weaver, 1 M.J. 111 (1975).

honesty and integrity. Acts or violations or crimes purely military in nature, on the other hand, generally have little or no direct bearing on honesty and integrity.<sup>49</sup>

As to the age of the conviction, it should be noted that records of offenses which are nearly ten years old, "particularly if they occurred during the minority of an accused who has not been convicted of a subsequent crime involving moral turpitude or otherwise affecting his credibility, may not be a meaningful index of a propensity to lie."<sup>50</sup> If more than ten years have elapsed, the prosecution must give notice of the prior conviction in accordance with Rule 609(b), and the military judge must make a factual finding that the conviction's probative value substantially outweighs its prejudicial effect.

With regard to convictions no more than ten years old, the accused must show that "the prejudicial effect of impeachment outweighs the probative value of the prior conviction to the issue of credibility," and once this issue is raised by the defense, "either preliminarily or by motion at an Article 39(a) session or by objection when the prosecution seeks introduction, the military judge should allow the accused the opportunity to show why judicial discretion should be exercised in favor of exclusion."<sup>51</sup> In assessing the prejudicial impact of the conviction, the military judge must realize that using "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 . . . potentially damaging effect they may have upon the mind of the jury."<sup>52</sup>

To determine the importance of the accused's testimony on his own behalf, military judges should ascertain "whether the cause of truth would be helped more by letting the jury hear the accused's testimony than by the accused's foregoing that opportunity because of the fear or prejudice founded upon a prior conviction;" thus, "where an instruction relative to inferences arising from the unexplained possession of recently stolen property is permissible, the importance of an accused's testimony becomes more acute."<sup>53</sup> If an issue of fact devolves to a question

---

49. *United States v. Weaver*, 1 M.J. 111, 118 n.6 (CMA 1975).

50. *Id.*

51. 1 M.J. at 117.

52. 1 M.J. at 118 n.8.

53. 1 M.J. at 118 n.9.

of credibility between the accused and his accuser, "there is a greater, not lesser, compelling reason for exploring all avenues which would shed light on which of the two witnesses is to be believed."<sup>54</sup> The prior conviction of either witness may certainly be relevant in this situation.

An arrest, indictment, information, or record of nonjudicial punishment<sup>55</sup> may not be used as a prior conviction, but evidence of these actions may be important to the next method of impeachment. Where there has been a "certificate of rehabilitation" under 609(c), the conviction is inadmissible. Certificates issued to graduates of the Retraining Brigade at Fort Riley should qualify as indicia of rehabilitation under this rule. Convictions may be shown by an admissible record of conviction, or a copy of such a record.<sup>56</sup> The witness may be cross-examined about the conviction.<sup>57</sup> Rule 609 does not prohibit the cross-examiner from asking about the general nature of the crime and the sentence. The witness may explain the surrounding circumstances.<sup>58</sup>

Under 609(d), adjudications of juvenile delinquency are not convictions for impeachment purposes. The military judge, however, may permit impeachment of a witness other than the accused if he is "satisfied that admission in evidence is necessary for a fair determination of the issue of guilty or innocence."<sup>59</sup> The Sixth Amendment enables the defense counsel to impeach a prosecution witness by revealing a motive to testify falsely. Rule 609(d) also allows the judge to permit impeachment of a defense witness. Thus, Davis v. Alaska is treated as a "two-way street."

---

54. 1 M.J. at 118 n.10.

55. Cf. United States v. Domenech, 18 USCMA 314, 40 CMR 26 (1969).

56. See Mil. R. Evid. 803(8). See also Mil. R. Evid. 901 and 902 as to authentication.

57. See Mil. R. Evid. 609(a).

58. This would be permissible under the rule of completeness, which is generally applicable in the federal district courts.

59. See Mil. R. Evid. 609(d).

## Specific Incidents of Misconduct

The opponent may impeach a witness by questioning the witness, in good faith, about specific incidents relevant to his character for truthfulness. Paragraph 138g of the Manual permitted the opponent to impeach a witness other than the accused by questioning the witness about certain acts of misconduct. Rule 608(b) changes prior law in two respects. First, impeachment may be effected by referring to incidents of noncriminal behavior. Second, the impeachment of the accused is restricted only by the judge's discretion. In addition to Rule 608(b), there are at least two other instances when evidence of the accused's misconduct is admissible. The opponent may prove acts of misconduct directly related to the case, such as the attempted perjury by a witness testifying in the court-martial. Second, the opponent may question the witness regarding specific acts<sup>60</sup> if, during direct examination, the latter disavows any misconduct. Thus, where the defendant on direct examination states that he never possessed drugs, the prosecutor could cross-examine him and introduce independent evidence of his drug possession on prior occasions.

The opponent must genuinely believe that the witness committed the offense,<sup>61</sup> although good faith is not explicitly required by Rule 608(b). The opponent is bound by the witness' negative response to his questions about specific instances of conduct, and extrinsic evidence is inadmissible. This rule does not preclude the introduction of otherwise admissible evidence which demonstrates an opportunity to implicate the accused.<sup>62</sup>

Specific instances of conduct must be probative of the witness' character for truthfulness.<sup>63</sup> These specific instances may include an arrest or other conduct which affects credibility.<sup>64</sup> Again, the trial judge must exercise discretion in determining whether to permit this type

---

60. See, e.g., United States v. Kindler, 14 USCMA 394, 34 CMR 174 (1964).

61. United States v. Britt, 10 USCMA 557, 28 CMR 123 (1959).

62. Cf. United States v. Barnes, 8 M.J. 115 (CMA 1979).

63. Id.

64. But see Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978).

of impeachment.<sup>65</sup> If the government calls witnesses known to the defendant so that it may impeach them under Rules 608(b) or 609(a), the judge should prohibit cross-examination under Rule 403.

### Deficiencies in Elements of Competency

At common law, a witness was competent to testify if he possessed the testimonial capacities of sincerity, perception, memory, and narrative.<sup>66</sup> These qualities are appropriate subjects of cross-examination since they relate to the witness' credibility. This method nevertheless applies since it is generally recognized in the trial of criminal cases in the United States district courts.<sup>67</sup> The intelligence of a witness is also a proper subject of cross-examination,<sup>68</sup> but unless evidence that the witness' intelligence falls at either end of the spectrum bears on the aforementioned capacities, it should not be admitted.<sup>69</sup> Extrinsic evidence of intelligence, however, is generally inadmissible since evidence of intelligence normally may be deduced by skillful examination of the witness.<sup>70</sup> Several factors bear on perception, including the manner in which the information was obtained; the presence of sensory or intellectual defects; and the physical and emotional conditions which existed during the observation.

### Prior Inconsistent Statements

Rule 801(d) changes paragraph 153b(2)(c) of the Manual with regard to the admissibility of prior inconsistent statements as substantive evidence. If the witness made a written or oral statement before trial which is inconsistent with his subsequent testimony, the opponent may cross-examine the witness about the prior inconsistent statement.<sup>71</sup>

65. See Mil. R. Evid. 608(b).

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

67. See Mil. R. Evid. 101(b).

68. See E. Imwinkelried, P. Giannelli, F. Gilligan, and F. Lederer, Criminal Evidence 51 (1979).

69. Id.

70. Id.

71. See Mil. R. Evid. 613(a).

Testimony is sufficiently inconsistent if it alters<sup>72</sup> or unreasonably omits a material fact,<sup>73</sup> or appears to be a recent fabrication.<sup>74</sup> In addition to cross-examining the witness about the prior inconsistent statement, the opponent may sometimes introduce extrinsic evidence to prove the statement.<sup>75</sup> If the prior statement is admitted, the fact-finder must reconcile the conflict. Extrinsic evidence is admissible if the opponent lays a proper foundation on cross-examination and if the witness' statement relates to a material fact in issue and does not violate any rights the defendant may possess under Article 31, UCMJ.

In laying a proper foundation, counsel does not need to question the witness as to the time and place of the statement and the identity of the individuals involved; it is only necessary to ask the witness whether he made a certain statement. Further examination of the witness may refresh his memory, and this may be conducted by either counsel.<sup>76</sup> As a tactical matter, counsel may thus want to be candid about the specific circumstances under which the statement was made. Otherwise, the jury may empathize with the witness if it senses that counsel is trying to trick him. The requirement not to disclose is important when there may be collusion as to a joint prior inconsistent statement. Also, the new rule will not preclude impeachment on the basis of the opponent's inadvertent negligence in laying a proper foundation.

According to Rule 613(b), the statement is inadmissible "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."<sup>77</sup> Thus, the defense counsel might ask the witness if he made a specific statement. Counsel may be referring to a critical statement made to a paralegal

---

72. *United States v. Kellum*, 1 USCMA 182, 4 CMR 74 (1952). 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. See *United States v. Johnson*, 18 USCMA 241, 39 CMR 241 (1969).

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

74. *United States v. Kellum*, 1 USCMA 182, 4 CMR 74 (1952).

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

76. Id.

77. Id.

working for the attorney. Regardless of his answer, the defense may want to authenticate and introduce the statement. The interests of justice might support the admissibility of such a statement even if the witness is unable to explain or deny it.<sup>78</sup> In light of this possibility, the judge will not want to excuse all witnesses unless he is ready to instruct the jury or reach findings.

The interplay between Article 32 proceedings and Rule 801(d) should be explored at this juncture. If a law enforcement agent states during the proceedings that he had no reliable evidence that the defendant was selling heroin in the past and subsequently denies this at trial, Rule 801(d) may enable the admission of the earlier statement if it was authenticated, since it is "inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at the . . . hearing."<sup>79</sup> Statements admitted for impeachment purposes may not relate to a collateral fact; this condition is merely an application of the collateral fact rule.<sup>80</sup>

Finally, the defendant may not be cross-examined on or impeached by a statement which does not satisfy the traditional voluntariness doctrine and Article 31, UCMJ.<sup>81</sup> However, Rule 304(b) permits a statement to be used for impeachment of in-court testimony "[w]here the statement is involuntary only in terms of noncompliance with the requirements

---

78. Id.

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

80. *United States v. Waller*, 11 USCMA 295, 29 CMR 111 (1960). A trial judge's ban on impeachment by cross-examination about a complaint six days earlier concerning another rape is not abuse of discretion when the first complaint was determined to be unfounded. In *United States v. Weaver*, 9 USCMA 13, 19-20, 25 CMR 275, 280-81 (1958), the defendant introduced evidence of good character and good reputation as to trustworthiness. On cross-examination, the defendant denied he had told his commander that he loaned his car to another servicemember on the date of the search. The court held it was improper, over objection, to permit evidence that this statement was false as it was immaterial to the case.

81. *United States v. Rivers*, 7 M.J. 992 (ACMR 1979) (reversible error to cross-examine accused on prior inconsistent statement to CID without showing of voluntariness). The Court of Military Appeals has not addressed the issue of whether there might be a waiver because of the failure to object. Cf. *United States v. Annis*, 5 M.J. 351 (CMA 1978);

concerning counsel under Rule 305(d)(e).<sup>82</sup> Witnesses may explain apparently inconsistent statements, and if they are excused from the stand they may be recalled for that purpose. The rule of completeness applies to prior inconsistent statement whether written or oral.<sup>83</sup>

### Prior Inconsistent Acts

Like prior inconsistent statements, prior inconsistent acts are admissible for impeachment purposes, but the judge must exercise discretion.<sup>84</sup> If, in an embezzlement prosecution, the government offers testimony that the defendant is an untrustworthy person, the defense could elicit testimony that the witness made an unsecured signature loan to the defendant. A person who truly believed the defendant to be untrustworthy would probably not make such a loan. If the defendant's exculpatory testimony is first offered at trial, some courts treat his silence during pretrial interrogation as an inconsistent act. The Supreme Court has held that silence at the time of arrest is not inconsistent with subsequent protestations of innocence if the individual was warned in accordance with Miranda v. Arizona,<sup>85</sup> since the Miranda warnings include the right to remain silent.<sup>86</sup>

The Court of Military Appeals stated in dicta that such impeachment is not permissible under Article 31(b), regardless of whether Miranda or

---

#### 81. Continued.

United States v. Kelley, 8 M.J. 84, 85-88 (CMA 1979) (Cooke, J., concurring); United States v. Jordan, 20 USCMA 614, 44 CMR 44 (1971); United States v. White, 19 USCMA 338, 41 CMR 338 (1970) (psychiatrist who examined defendant at request of commander, may not testify concerning defendant's unwarned statements); United States v. Hall, 50 CMR 720 (CMA 1975) (reversible error notwithstanding other evidence of guilt).

82. Mil. R. Evid. 304(b).

83. Mil. R. Evid. 613(b); United States v. Stubbs, 48 CMR 719 (AFCMR 1974).

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

85. 384 U.S. 436 (1966).

86. Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975).

Article 31 warnings were given.<sup>87</sup> That Court has also stated that the prosecution may not cross-examine the defendant during the sentencing stage about his submission of a request for administrative discharge in lieu of court-martial, at least when the defendant did not indicate a desire to stay in the service.<sup>88</sup> Nor can the defendant be impeached because of his failure to present witnesses during the pretrial investigation.<sup>89</sup>

When a defendant testifies in extenuation and mitigation that he would like to remain in the service, may the prosecution impeach by showing a request for administrative discharge in lieu of trial by court-martial? If the defendant has a family, he may believe that their interests can best be protected by securing an administrative discharge rather than serving a period of confinement at hard labor. He might feel that he faces a dilemma, and that in light of the alternatives it would be better to accept an administrative discharge than risk the imposition of the maximum punishment for the offense. Finally, the request for administrative discharge may be part of the plea bargaining process. Thus, while the first two factors suggest that the statement may not necessarily be an inconsistent act, the last factor is controlling, since it is against public policy to admit evidence of the plea bargaining process.<sup>90</sup>

#### Extrinsic Evidence of Bias

Rule 608(c) does not change prior law as to the admissibility of extrinsic evidence to prove bias. A witness may be impeached by a showing of bias, interest, or hostility, because these qualities have a bearing on the credibility of his testimony. Because bias is never a

---

87. United States v. Noel, 3 M.J. 328 (CMA 1977). See also United States v. Ross, 7 M.J. 174 (CMA 1979). When the prosecution questions the defendant about the exercise of the right to remain silent, it is error for "the military judge not to stop the proceedings, inquire into the purpose of the introduction of such testimony, and appropriately instruct the members of the propriety, if any, of its use at the court-martial." Id. at 176. See Mil. R. Evid. 304(h)(3) (silence may be admissible for impeachment).

88. United States v. Pinkey, 22 USCMA 595, 48 CMR 219 (1974).

89. United States v. Hughes, 6 M.J. 783 (ACMR 1978).

90. United States v. Jackson, 31 CMR 654 (AFBR 1961); see Mil. R. Evid. 410.

collateral fact, courts are quite liberal in accepting testimony that demonstrates it. Such evidence may be admitted even after the witness' disavowal of partiality.<sup>91</sup> The courts sometimes state that proof of bias must be direct and positive. However, as a practical matter, the standard is quite lax.

Bias in favor of the defendant may be explored through questions about the witness' family ties,<sup>92</sup> friendship,<sup>93</sup> romantic involvement,<sup>94</sup> employment,<sup>95</sup> financial ties,<sup>96</sup> enmity<sup>97</sup> or fear.<sup>98</sup> Some courts<sup>99</sup> admit proof that the witness and the defendant were members of the same criminal conspiracy as evidence of bias in the defendant's favor.<sup>100</sup> Factors reflecting a bias against the defendant include a showing that the witness is a paid informer,<sup>101</sup> or that a material witness is in

---

91. Mil. R. Evid. 608(c).

92. Mil. R. Evid. 608(c).

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

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

95. Cf. Mil. R. Evid. 608(c).

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

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

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

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

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

101. Cf. United States v. Peterson, 48 CMR 126 (CGCMR 1973).

protective custody, is a co-indictee,<sup>102</sup> or has been promised immunity,<sup>103</sup> clemency,<sup>104</sup> probation,<sup>105</sup> or a reduced sentence through plea bargaining,<sup>106</sup> or demonstrated hostility toward the accused.<sup>107</sup> Although some states require a foundation to be laid on cross-examination, the Manual does not follow that practice and allows the information to be elicited on cross-examination or through extrinsic evidence.<sup>108</sup> Evidence of perjury is not required before extrinsic evidence of bias is introduced.<sup>109</sup> The probationary status of the defendant does

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

103. Mil. R. Evid. 301(c)(2). The defense shall be notified in writing prior to arraignment of grants of immunity or promises of leniency in exchange for testimony. This rule "codifies" United States v. Webster 1 M.J. 216 (CMA 1975). See, e.g., United States v. Dickens, 417 F.2d 58 (8th Cir. 1969).

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

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

106. United States v. Polito, 23 CMR 644 (ABR 1957). See also United States v. Welling, 49 CMR 609 (ACMR 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).

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

108. United States v. Streeter, 22 CMR 363 (ABR 1956).

109. United States v. Doney, 1 M.J. 169 (CMA 1975). It was error for the military judge to forbid the introduction of 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.

not constitute a motive to testify falsely, and it cannot be disclosed for that purpose.<sup>110</sup>

### Rehabilitating the Witness

#### Extrinsic Evidence on Merits

After the witness' testimony has been attacked, it may be rehabilitated, although generally the witness must have been impeached previously.<sup>111</sup> A witness may not be rehabilitated when he has been impeached by specific contradiction.<sup>112</sup> Except as to denial, explanation, or corroboration, the method of rehabilitation must correspond to the type of impeachment employed by the opponent. In effect, the opponent chooses the weapons. Once the witness' testimony has been attacked, it is possible, on direct examination, for the proponent to afford the witness an opportunity to explain or deny the basis for the impeachment.<sup>113</sup> In this connection, the proponent may introduce extrinsic evidence, subject to the judge's discretion to curtail evidence which is unnecessarily confusing or time consuming.<sup>114</sup> The proponent may corroborate his witness' testimony after impeachment in the same ways available to him prior to impeachment. This evidence is not directly relevant to credibility; it is evidence on the merits which incidentally rehabilitates the witness' credibility.

---

110. United States v. O'Berry, 3 M.J. 334 (CMA 1977) (probationary status of defendant may not be shown as giving the defendant a motive to testify falsely). Judge Perry said, "This position [of admissibility] utterly disregards the principle that an acquittal of an offense does not preclude that same offense from providing the basis for revocation of probation." Id. at 336. Compare Davis v. Alaska, 415 U.S. 308 (1974).

111. 4 Wigmore, Evidence para. 1104 (Chadbourn ed. 1972).

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

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

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

## Opinion and Reputation Evidence

When an opponent used evidence of a character trait for untruthfulness at common law (e.g., bad reputation, prior conviction, specific act of misconduct, or corrupt act showing bias), the proponent could introduce character evidence to rehabilitate the witness.<sup>115</sup> However, if the opponent's evidence did not reflect a corrupt act bearing on truthfulness, it could not be introduced.<sup>116</sup> Where the method of impeachment is self-contradiction or contradiction by a third party, evidence supporting the witness' truthfulness is generally inadmissible.<sup>117</sup>

Under the new evidentiary rules, counsel may introduce opinion or reputation evidence in support of the witness' truthfulness when the latter's credibility has been attacked through the use of prior convictions or acts of misconduct.<sup>118</sup> If, during cross-examination, the witness denies prior acts of misconduct which did not result in a conviction, and if the judge believes that this denial has not erased the matter in the minds of the jury, the judge may permit rehabilitative evidence in the form of character evidence as to truthfulness.<sup>119</sup>

The courts are divided as to whether impeachment by evidence of a prior inconsistent statement constitutes an attack on the witness' character for truthfulness.<sup>120</sup> The rules do not resolve this issue. If the prior statement has been introduced, most courts permit counsel to rehabilitate the witness through character evidence. However, if the

---

115. Rodriguez v. State, 165 Tex. Crim. R. 179, 305 S.W.2d 350 (1950); Maguire, Weinstein, et. al., Cases on Evidence 295 (5th ed. 1965). See United States v. Hoxworth, CM 438490 (ACMR 31 January 1980). The court held that when the defense attempts to impeach the key government witness by using acts of misconduct and prior inconsistent statements, it is within the discretion of the military judge to permit the government to introduce evidence as to the truthfulness of the witness.

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

117. 4 Wigmore, Evidence §§1108-09 (Chadbourn ed. 1972).

118. See Mil. R. Evid. 608(b).

119. 4 Wigmore, Evidence §1104 (3d ed. 1940).

120. Outlaw v. United States, 81 F.2d 805 (5th Cir. 1936), sets forth various views.

opponent merely introduces facts denying the witness' testimony, many courts will not permit the introduction of rehabilitative evidence. One court suggested that a more sensible view would be to examine the facts to determine whether the evidence amounts to an attack on the character of the witness; if it does the court would permit the introduction of character evidence as to truthfulness.<sup>121</sup>

### Prior Consistent Statements

The military rules do not change the method of rehabilitating a witness by introducing a prior consistent statement. A prior statement may not be introduced for support when the method of impeachment involves the introduction of evidence pertaining to a character trait for untruthfulness, a prior conviction, or an act of misconduct not resulting in a conviction.<sup>122</sup>

At common law, a number of circumstances enabled the proponent to support his witness by introducing prior consistent statements. Thus, if the opponent imputed some bias or improper motive to the witness and the prior statement was made before the alleged bias, interest, or motive arose, it was admissible.<sup>123</sup> Conversely, if the motive arose before the issuance of the statement, rehabilitation was not permitted.<sup>124</sup> Prior consistent statements were also admissible if the opponent suggested that the witness' memory was faulty.<sup>125</sup> The rationale supporting admissibility is that the prior statement was made when the event was fresh.

For example, when the defense attempts to impeach eyewitness identification by showing faulty memory, the prosecutor may introduce evidence that the witness identified the defendant soon after the event.<sup>126</sup> A

---

121. Id.

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

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

124. United States v. Kauth, 1 USCMA 482, 4 CMR 74 (1952); United States v. Brunious, 49 CMR 102 (NCOMR 1974).

125. United States v. Kellum, supra.

126. United States v. Kellum, supra; United States v. Brunious, 49 CMR 102 (NCOMR 1974); see also Mil. R. Evid. 321 and 801(d)(1)(c).

prior consistent statement may also be admitted when the opponent expressly or impliedly charges that the witness fabricated his testimony, if the witness made the prior statement before the alleged fabrication.<sup>127</sup> Finally, prior statements are admissible when the opponent alleges that the witness is incapable of remembering or observing, if the statement was issued before the incapacity arose.<sup>128</sup>

Some courts have proposed a flexible rule which would recognize the admissibility of evidence of a prior consistent statement when, under the circumstances of the particular case, the statement would have probative value.<sup>129</sup> The courts could determine whether there is a dispute among counsel as to the contents of a prior statement, or the time its admission would consume; the judge should also assess the importance of the witness and the impeachment and rehabilitation of his testimony. This practice is consistent with Rule 401, which states that relevancy depends upon the facts of each case. It would also be consistent with Rule 801(d), which provides for the admissibility of prior statements which do not necessarily meet common law requirements.

Such a result could be achieved under Rule 801(d)(1)(A). Rule 801(d)(1)(B) would be applicable to the victim of a nonconsensual sex crime or a witness to such a crime. If, in a case involving use of heroin, the defense counsel attempts to impeach a criminal investigator by attacking his testimony that the accused's pupils were constricted when he was apprehended, the prosecution could introduce the investigator's earlier comment that the pupils were dilated. Rule 608(b) provides that specific instances of conduct may not be introduced to support credibility. Specific acts may be inquired into on cross-examination of the witness, however, if they bear on the witness' character for truthfulness. Arguably, specific instances may also be examined under Rule 608(a) when a witness' character for truthfulness has been attacked by "opinion or reputation evidence or otherwise."<sup>130</sup>

---

127. *United States v. Kauth*, 11 USCMA 261, 29 CMR 77 (1960); *United States v. Kellum*, 1 USCMA 482, 4 CMR 74 (1952).

128. *United States v. Mason*, 40 CMR 1010 (AFBR 1969); *United States v. Brunious*, 49 CMR 102 (NCOMR 1974).

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

130. Mil. R. Evid. 609(a).

## MILITARY INSPECTIONS UNDER RULE 313

by Captain H. Franklin Young\*

This article is designed to acquaint defense counsel with the new military rule of evidence dealing with inspections and to provide a framework upon which motions or objections to evidence offered under that rule may be structured. The admissibility of evidence obtained as a result of inspections obviously involves complex and relatively unsettled legal issues. Although this article will not dispel the controversy, it will hopefully provide a useful method of analysis for addressing the threshold inspection issues which arise under Rule 313(b).<sup>1</sup>

\*Captain Young received his Bachelor of Arts degree from Wofford College and his Juris Doctor degree from the University of South Carolina. He formerly served as a trial and defense counsel (USATDS) at Fort Gordon, Georgia. He is currently serving as an action attorney at the Defense Appellate Division.

1. Mil. R. Evid. 313 provides that:

### Rule 313. Inspections and Inventories in the Armed Forces

(a) General rule. Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) Inspections. An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband when such property would

Pursuant to Presidential order, the new Military Rules of Evidence will apply in courts-martial on 1 September 1980. With few modifications, these rules adopt the provisions in the Federal Rules of Evidence. Consequently, military counsel can resolve many evidentiary questions by referring to the large body of applicable civilian case law. However, the legislative committee responsible for drafting the new military rules tailored certain provisions in order to meet the unique needs of the military environment. Rule 313, Inspections and Inventories in the Armed Forces, is an example: it has no counterpart in the Federal Rules of Evidence.<sup>2</sup> The Rule will probably generate a great deal of controversy; accordingly, defense counsel must be prepared to present objections in a manner that will focus the military judge's deliberation on

---

1. Continued.

affect adversely the security, military fitness, or good order and discipline of the command and when (1) there is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Rule 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) Inventories. Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Rule 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

2. There may be one caveat to this statement. Under Mil. R. Evid. 311(c)(2), inspections conducted by civilian agents of the federal government appear to be governed by federal civilian law.

the appropriate issues, and adequately preserve the matter for appellate review.<sup>3</sup>

Rule 313 consists of three subparts. Sections (b) and (c) deal with military inspections and inventories, respectively, while subpart (a) provides for the admission of any relevant evidence discovered in compliance with the remainder of the Rule. The Rule abandons terms such as "shakedown inspection" or "gate search"; indeed, even the physical acts of "inspecting" or "inventorying" have been renamed. These acts are now collectively referred to as "examinations."<sup>4</sup> Additionally, the spacial limits of an inventory are not specifically delimited in Rule 313(c); the provision broadly states that a commander may inspect "the whole or [any elemental] part" of his command, to include entrance and exit points.<sup>5</sup>

A comparison of the definitions of "inspection" in Rule 313(b) with "inventory" in subsection (c) reveals that the primary purpose of the latter is "administrative" in nature, while an inspection must be designed primarily to "determine and ensure the security, military fitness or good order and discipline" of the persons or property examined.<sup>6</sup> When an "examination [is] made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceedings,"

---

3. Counsel should review the law of military inspections and reacquaint themselves with its recent development. In this regard, see Hunt, Comments, Inspections, 54 Mil. L. Rev. 225 (1971); Cooke, The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System, 76 Mil. L. Rev. 43, 156-161 (1977).

4. Analysis of the 1980 Amendments to the Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969], Appendix 18, MCM, 1969, Rule 313(b) and (c) [hereinafter cited as Analysis]. The Analysis continues to adopt the position that only the commander exercising authority over the person or place to be examined can order an inspection. See United States v. Ezell, 6 M.J. 307 (CMA 1979); United States v. Hartsook, 15 USCMA 291, 35 CMR 263 (1965).

5. Mil. R. Evid. 313(b) and (c) [hereinafter cited as Rule].

6. Counsel should note that the 12 September 1979 draft of the rules only mentioned "military fitness" as the primary purpose of an inspection. This language was subsequently revised to include "security, military fitness or good order and discipline." The Analysis does not address the source of the phrase "good order and discipline." It does, however, bear close resemblance to Article 134, Uniform Code of Military Justice, 10 U.S.C. §934 (1976) [hereinafter cited as UCMJ].

it is not a proper inventory or inspection.<sup>7</sup> According to the Analysis, a commander's desire to prosecute may constitute a proper secondary motive for ordering an inspection, and contraband discovered pursuant to that examination is admissible, providing the remaining requirements of Rule 313(b) are satisfied.<sup>8</sup>

Thus, Rule 313(b) specifically sanctions an inspection procedure which enables commanders to "locate and confiscate" contraband. In contrast to the inspection for contraband described in Rule 313(b), subparagraph (c) addresses the seizure of contraband "in the process" of a valid inventory. In order to uncover contraband by means of an inspection, commanders can conduct regularly scheduled or unscheduled examinations. However, regardless of whether the inspection is scheduled, there must be a demonstration that the presence of contraband adversely affects military fitness within the command. Additionally, in the case of unscheduled inspections, the commander must base the examination on the "reasonable suspicion" that contraband is present in the command.<sup>9</sup> The rule sanctions the use of any "reasonable natural or technological aid" in conducting an inspection. Thus, drug detection dogs, used in a reasonable fashion, are legitimate inspection tools.

The committee's analysis of Rule 313(b) further develops the justification and authority for inspections. Rule 313(b) is clearly a reaction to the lack of judicial agreement as expressed by four separate judges in United States v. Roberts<sup>10</sup> and United States v. Thomas.<sup>11</sup> The drafters are reluctant to recognize the need for any express authorization for inspections.<sup>12</sup> They nevertheless state that authorization does exist under the President's rule-making authority defined in Article 36, UCMJ and his inherent powers as commander-in-chief. Proceeding from

7. Mil. R. Evid. 313(b) and (c).

8. Mil. R. Evid. 313(b) and (c) [Analysis].

9. Mil. R. Evid. 313(b).

10. 2 M.J. 31 (CMA 1976).

11. 1 M.J. 397 (CMA 1976).

12. The drafters' opinion seems to be that the creation of the armed forces was originally authorized by the Constitution. Because inspections have been historically necessary to maintain military readiness, they are an adjunct to the constitutional creation of the military.

this authority, the drafters posit three rationales which purportedly demonstrate the constitutionality of military inspections:

1. Military inspections are an adjunct of military society, which is peculiarly different from its civilian counterpart. Because of this and the manner in which the Bill of Rights applies to service personnel, inspections fall outside the scope of the Fourth Amendment's definition of searches.<sup>13</sup>

2. Supreme Court decisions in analogous cases uphold warrantless inspections of regulated and specialized industries. Likewise, the military is subject to an equally important regulatory scheme which reduces the soldier's expectations of privacy.<sup>14</sup>

3. Those analogous Supreme Court decisions which require the civilian inspector to obtain a warrant prior to an administrative health and safety

13. Brown v. Glines, \_\_\_ U.S. \_\_\_, 100 S.Ct. \_\_\_, 62 L.Ed.2d 540 (1980); Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); Air Pollution Variance Board v. Western Alfalfa Corps., 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974); Hester v. United States, 256 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924). Although the two rationales that follow assume that inspections are "searches" within the meaning of the Fourth Amendment, this first rationale does not postulate that a service-member has a recognizable expectation of privacy during an inspection. See note 14, infra.

14. United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975). According to this rationale, "all personnel entering the armed forces are presumed to know" that their expectations of privacy are minimal. This seems incongruous with Parker v. Levy, supra, where the Court did not presume more than Article 137, UCMJ required. There the Court empirically examined the uniqueness of Article 137, UCMJ, and its requirement to instruct enlisted personnel on the provisions of the Uniform Code of Military Justice. Consequently, this was one of the significant factors in military law which gave Captain Levy notice of criminal sanctions under Articles 133 and 134, UCMJ.

inspection are concerned with giving adequate and fair notice of the inspector's authority for, and the limits of, an inspection. These concerns are satisfied in military society by the well-recognized office and function of the commander who orders the inspection.<sup>15</sup>

The initial hurdle facing defense counsel is the requirement that motions or objections be stated with specificity.<sup>16</sup> Counsel should generally proceed from the three theories that are outlined in the Analysis as descriptions of the interrelationship between the Fourth Amendment and military inspections. The first argument emphasizes the limited applicability of the Fourth Amendment to members of the armed forces. The drafters contend that when the restricted compass of Fourth Amendment protection is balanced against the need to search, inspections conducted in accordance with the Rule will pass constitutional muster. This rationale implicitly leads to the conclusion that the servicemember has no expectation of privacy during a 313(b) inspection.<sup>17</sup> This

---

15. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *United States v. Ezell*, 6 M.J. 307 (CMA 1979).

16. A general statement of the motion or objection is no longer permitted unless counsel seeks leave from the court, and can demonstrate that his attempts to discover the underlying facts have been futile. Consequently, if these pretrial efforts frustrate his ability at court-martial to make more than a general objection, the court may allow counsel to make a general motion or objection. *Mil. R. Evid.* 311(d)(3). Upon a proper defense showing, the government must demonstrate the lawfulness of a 313(b) inspection by a preponderance of the evidence. *Mil. R. Evid.* 313(b) [Analysis].

17. Although they support their first rationale by citing the uniqueness of military society, the drafters also rely on two civilian cases, *Air Pollution Board v. Western Alfalfa*, supra, and *Hester v. United States*, supra, which apply the "open fields" doctrine to the Fourth Amendment. If this doctrine is applied to inspections it is questionable whether an accused would have standing, since the Fourth Amendment protects only persons, papers and effects, not open fields. Nonetheless, it should be argued that a justifiable expectation of privacy limits the application of this doctrine. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Furthermore, if this first rationale is valid, then

poses two separate, but related problems: standing,<sup>18</sup> and equating the intrusion with a search capable of triggering constitutional safeguards.

The defense counsel should contend that an inspection is an intrusion into an area in which the accused has a justifiable expectation of privacy. If the accused does possess a reasonable expectation of privacy in the person, place, or property searched, he has standing to object.<sup>19</sup> The problem, of course, is in isolating and justifying the expectations of privacy. Inspections conducted pursuant to Rule 313(b) will probably be directed at living areas. At least two principles appear to support the notion that a servicemember's expectation of privacy would be impinged under such circumstances:

(1) The servicemember inherently retains certain justifiable expectations of privacy and cannot be said to have shed his Fourth Amendment protections by entering the armed forces.

(2) By providing a living area and the means of securing personal belongings, the government has fostered expectations of privacy.

Under the first principle, counsel should argue that the Fourth Amendment's application to all persons, including members of the armed forces,

---

17. Continued.

there would be no need to explicitly cite Presidential power as the authority for inspections; for until a government agent intrudes into an area where there is a justifiable expectation of privacy, there is no need to question his authority to do so. *United States v. Thomas*, 1 M.J. 397, 400 (CMA 1976) (Cook, J.).

18. Mil. R. Evid. 311(a)(2) states that an accused must have an "adequate interest" in the person, place or property that is searched, seized or presumably "examined." Counsel should be aware of the recent demise of the "automatic standing" rule. *United States v. Salvucci*, 27 Crim. L. Rptr. 3241 (Sup. Ct. 25 June 1980); see also *Rawlings v. Kentucky*, 27 Crim. L. Rptr. 3245 (Sup. Ct. 25 June 1980).

19. *Id.*; see also *Katz v. United States*, supra; *United States v. Simmons*, 22 USCMA 288, 46 CMR 288 (1973).

is clear beyond cavil.<sup>20</sup> Although the United States Supreme Court may recognize a relaxed application of the Bill of Rights to servicemembers,<sup>21</sup> the military courts continue to recognize justifiable expectations of privacy.<sup>22</sup> Furthermore, the government must establish that military exigencies justify a different application of constitutional protections.<sup>23</sup> Counsel should submit that the sacrifice of all justifiable expectations of privacy is too high a price to pay for the privilege of serving one's country.<sup>24</sup>

The second proposed argument focuses upon the manner in which governmental actions foster expectations of privacy. The opinion in United States v. Katz, *supra*, indicates the difficulty in determining whether an expectation of privacy in a particular area is justifiable. However, defense counsel can employ Justice Harlan's two-pronged test,<sup>25</sup> and

20. See United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960); United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959); United States v. Florence, 1 USCMA 620, 5 CMR 48 (1952). It also seems clear that the first rationale expounded in the Analysis does not question the Fourth Amendment's application to military personnel. The first rationale would simply put inspections outside the scope of the Fourth Amendment's protection altogether.

21. See Parker v. Levy, *supra*; Middendorf v. Henry, 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976); Schlesinger v. Councilman, 420 U.S. 738, 95 S.Ct. 1300, 43 L.Ed.2d 591 (1975).

22. The Army Court of Military Review continues to recognize the accused's expectations of privacy in his living area even though it may thereafter find the intrusion to be reasonable. See United States v. Lopez, 6 M.J. 981 (ACMR 1979); United States v. Hines, 5 M.J. 917 (ACMR 1978).

23. Courtney v. Williams, 1 M.J. 267 (CMA 1976).

24. See United States v. Kinane, 1 M.J. 309 (1976); United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959). On this same basis, the first rationale in the Analysis is questionable because it equates inspection in highly regulated industries with intrusions upon individual expectations of privacy. The Army Court of Military Review commented on two of these regulated industries cases in United States v. Tate, 50 CMR 505 (ACMR 1975) and stated that "it would be hollow to speak of consent even in a Volunteer Army."

25. See United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971).

catalogue the ways in which the military organization nurtures individual privacy expectations; the provision of semi-private living quarters for service personnel is one example.<sup>26</sup> The physical characteristics of the accused's living area will presumably be relevant to the court's assessment of the reasonableness of a privacy expectation in a particular case. The soldier's expectation of privacy will certainly be greater in a private, one-man room than in an open bay area shared with three other soldiers.<sup>27</sup> Moreover, items which are not intended for purely personal use are probably more susceptible to examination by the government.<sup>28</sup> Nonetheless, it is precisely those areas reserved for the individual's private use which create an expectation of privacy.<sup>29</sup>

Once counsel has established a basis for the accused's expectations of privacy, he should contest whether Rule 313(b) is a valid "procedure" or "mode of proof" under the Presidential powers granted by Article 36,

---

26. As noted by dicta in *United States v. Adams*, 5 USCMA 563, 570, 18 CMR 187, 194 (1955): "[g]enerally a military person's place of abode is the place where he bunks and keeps his few private possessions. His home is the particular place where the necessities of the service force him to live. This may be a barracks, a tent, or even a fox hole. Whatever the name of his place or abode, it is his sanctuary against unlawful intrusion; it is his 'castle.'" See *United States v. Lopez*, *supra*; *United States v. Hines*, *supra*; but see *United States v. Miller*, 1 M.J. 367 (CMA 1976) (Cook, J., dissenting).

27. Counsel should closely examine how courts have approached the manner in which living arrangements affect expectations of privacy. See *United States v. Miller*, *supra*; *United States v. Webb*, 4 M.J. 616 (NCOMR 1977). Furthermore, the proximity of the unit to the battle area or the particular mission of the unit may have a significant impact on reducing expectations of privacy. See, e.g., *United States v. Mitchell*, 3 M.J. 641 (ACMR 1977); *United States v. Webb*, 4 M.J. 616 (NCOMR 1977).

28. *United States v. Simmons*, *supra* (gas can mounted on a jeep); *United States v. Weshenfelder*, 20 USCMA 416, 43 CMR 256 (1971) (government desk); *United States v. McClelland*, 49 CMR 557 (ACMR 1974) (government-issued briefcase).

29. See *United States v. Adams*, *supra*; *United States v. Roberts*, *supra* (Perry, J.).

UCMJ.<sup>30</sup> Thus, Article 36, UCMJ, is not a blanket grant of authority for the President to enact matters of substantive law or rules which would limit the application of matters of substantive law to military members.<sup>31</sup> Moreover, the President, in the exercise of his authority, cannot contravene either the Constitution or the UCMJ.<sup>32</sup> Therefore, insofar as Rule 313(b) is a Presidential attempt to limit the boundaries of the Fourth Amendment's application to service members, it is ultra vires.

Counsel should then argue that the Fourth Amendment's protections apply to governmental intrusions regardless of whether the intrusion is motivated by prosecutorial<sup>33</sup> or purely administrative purposes.<sup>34</sup> This is not to say that the commander's motivation in ordering an inspection will have no impact on the outcome of a defense motion. This rationale does recognize, however, that motivation alone is merely one factor in a

---

30. It is well settled that a valid provision in the Manual for Courts-Martial has the force and effect of law. See United States v. Kinane, 1 M.J. 309 (CMA 1976); United States v. Montgomery, 20 USCMA 35, 42 CMR 227 (1970).

31. See United States v. Washington, 1 M.J. 473, 475 n.6 (CMA 1976) (Perry, J.)

32. Article 36(a), UCMJ. See also United States v. Kelson, 3 M.J. 139, 141 (CMA 1977); United States v. Worley, 19 USCMA 444, 42 CMR 46 (CMA 1970).

33. Camara v. Municipal Court, supra; See v. City of Seattle, supra; compare Wyman v. James, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971).

34. United States v. Lange, 15 USCMA 486, 35 CMR 458 (1965) and United States v. Grace, 19 USCMA 409, 42 CMR 11 (1970) point out precisely how a commander's purpose can alter an inspection's characteristics. If the commander's "purpose" was to determine the fitness of persons, property or equipment, the inspection need not be premised on probable cause. On the other hand, if the commander sought to discover evidence of crime by means of inspection, the inspection was regarded as a "search." United States v. Lange, supra. Furthermore, the discovery that a particular soldier was in possession of drugs during the search would not necessarily alter the bona fides of the original inspection. United States v. Grace, supra.

very complex and as yet uncertain rule.<sup>35</sup> Thus, counsel must urge the court not to endorse the view that a regularly-scheduled inspection, with drug-detection dogs, of open lockers in a barracks with semi-private rooms, will necessarily satisfy the Fourth Amendment.

Under the proper test, the court must balance the nature and scope of the intrusion against the need to search.<sup>36</sup> The potential detriment to the unit, the manner in which the examination was scheduled, and the presence of "reasonable suspicion" are factors which can interplay in an equation to determine the reasonableness of the intrusion.<sup>37</sup> Admittedly, this type of balancing test does not precisely follow Rule 313(b)'s rules for admissibility of drugs or other evidence of crime sought in a contraband inspection. A strict interpretation of Rule 313(b) would require the government to demonstrate either a detriment to the unit in combination with a regularly-scheduled inspection for contraband or an unscheduled contraband inspection based on reasonable suspicion.<sup>38</sup> However, careful reading of the case law cited in the Analysis shows that courts are applying a balancing test, and are not rigidly relying on the commander's

35. Id. A number of cases indicate that a commander's motivations for ordering an inspection are usually mixed; See, e.g., United States v. Tate, supra; United States v. Smith, 48 CMR 155 (ACMR 1974); United States v. Ramirez, 50 CMR 68 (NCOMR 1974). By contrast, the Analysis postulates that "commanders are ordinarily more concerned with removal of contraband from units . . . than with prosecution." Certainly this aspect of the Rule will not promote any greater candor from commanders who testify as to the nature and priority of their motivations. See United States v. Thomas, supra (Fletcher, J., concurring in the result).

36. Camara v. Municipal Court, supra; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

37. Id.

38. According to the Analysis, "reasonable suspicion" is a minimal requirement; it appears self-explanatory. Reasonable suspicion is a prerequisite only when the contraband inspection has not been previously scheduled. The lack of scheduling and the presence of reasonable suspicion may be two factors which indicate that the inspection was primarily motivated by a prosecutorial aim. See United States v. Hayes, 3 M.J. 672 (ACMR 1977).

motivations or the scheduling of the inspection.<sup>39</sup> Moreover, following the fragmented decisions in Roberts and Thomas, the Army Court of Review apparently remains devoted to a balancing test.<sup>40</sup>

Therefore, given the framework of Rule 313(b) and the test which must be applied by the court, defense counsel should first demonstrate his client's expectations of privacy. He must then be prepared to effectively cross-examine government witnesses who are called to establish the parameters for a contraband inspection under Rule 313(b). In either scheduled or unscheduled examinations, the trial counsel must demonstrate how the presence of contraband adversely affects the security, military fitness or good order and discipline of the unit. Here, the size of the unit, its mission and readiness capabilities, the number of personnel suspected of possessing the contraband, and the suspected quantity of contraband are important factors.<sup>41</sup> Depending on these and other considerations, the government may be presented with a difficult burden of showing how the off-duty use of marijuana is more detrimental to the unit's capabilities than off-duty use of alcohol, particularly where the defense can document wide-spread alcohol abuse.<sup>42</sup> If the inspection is scheduled

---

39. Of the three rationales used by the drafters to support the constitutionality of Rule 313(b), the last two assume that an inspection may be a search within the meaning of the Fourth Amendment. The drafters then posit that these "searches" are reasonable under either of two rationales. The first rationale is heavily reliant on Committee for GI Rights v. Callaway, supra, which employed the balancing approach recommended here. The second rationale is also dependent upon case law which adopts a balancing test. Camara v. Municipal Court, supra; see also United States v. Roberts, supra (Cook, J., dissenting). Examinations at entry and exit points have been treated in the same fashion. See United States v. Poundstone, 22 USCMA 277, 46 CMR 277 (1973).

40. See United States v. Hayes, supra; United States v. Hay, 6 M.J. 654 (ACMR 1977); United States v. Mitchell, 3 M.J. 641 (ACMR 1977).

41. The Analysis specifically treats the testimony of those "within the chain of command" as "worthy of great weight." See Mil. R. Evid. 313 [Analysis].

42. In this regard, the Analysis recognizes that the type of drug involved may be relevant in demonstrating the "user's ability to perform duties without impaired efficiency." Furthermore, the presence or absence of unit regulations governing the possession of alcoholic beverages, firearms, etc. in the barracks may have a significant impact on the viability of this type of argument.

to coincide with a recurring event (e.g. "reasonable suspicion" need not be shown), counsel should determine when it was initially scheduled and whether a pattern of previous inspections verifies its "regularity."

Preparing a challenge to the "reasonable suspicion" standard for unscheduled inspections will probably be difficult. It is suggested that counsel closely investigate the source of the information which gives rise to the suspicion. Thus a challenge may be raised against information obtained from an informant,<sup>43</sup> or drug detection dog<sup>44</sup> or as a result of weak circumstantial factors. If the commander himself has been involved in garnering the facts giving rise to the suspicion, he may be disqualified from ordering the contraband inspection.<sup>45</sup> It is unlikely that arguing a commander's subjective motivations or priorities will prove productive;<sup>46</sup> however, other objective facts may belie a primarily prosecutorial goal.<sup>47</sup>

---

43. *Spinelli v. United States*, 394 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

44. The courts have yet to decide whether use of a drug detection dog is merely a tool which extends the human senses, see *Mil. R. Evid.* 313(b) [Analysis]; *United States v. Roberts* (Cook, J., dissenting); cf.: *United States v. Unrue*, 22 USCMA 466, 47 CMR 556 (1973), but see *United States v. Katz*, supra; whether the use of a dog is a search to which the reasonableness standard will apply, cf.: *United States v. Unrue*, supra; *United States v. Bronstein*, 521 F.2d 459 (2d Cir. 1975) (Mansfield, J., concurring); or whether the use of the dog is a search per se which requires a showing of probable cause. *United States v. Thomas*, supra (Ferguson, J., dissenting). Despite this difference of judicial opinion, the courts also will have to decide whether the drug detection dog must demonstrate its reliability prior to an examination for contraband. See *United States v. Ponder*, 45 CMR 428 (ACMR 1972).

45. *Camara v. Municipal Court*, supra; *United States v. Ezell*, supra.

46. See footnote 29, supra.

47. Thus, counsel should investigate the manner of inspection and determine if all buildings, persons, living areas, equipment and belongings were inspected in the same fashion. Often there are command briefings prior to inspections or standard operating procedures which describe inspection techniques. It is also important to determine what control

## Conclusion

In conclusion, defense counsel should argue that all inspections for contraband are intrusive searches for evidence of crime.<sup>48</sup> Counsel should maintain that the "security, military fitness or good order and discipline" of a unit is a function which invariably produces evidence of crime; in the case of Rule 313b, the inspection is an explicit examination for that evidence. Hence, the underlying purpose of all contraband inspections is to deter or prevent possessory violations by means of criminal sanction. Insofar as it establishes the commander's motivations as the only limitation on the exercise of his power to inspect, Rule 313(b) arguably misconstrues the Fourth Amendment. Thus, in order to protect individual's expectation of privacy, the Fourth Amendment acts as an "independent limitation on the exercise of federal power"<sup>49</sup> and supports an exclusionary rule to deter unreasonable intrusions into privacy.<sup>50</sup> Therefore, in order to limit the potential for abuse, the commander's power to inspect for evidence of crime should be considered a function of his ability to demonstrate a significant adverse impact upon his unit caused by the presence of the contraband. If this formula is followed, the burden of demonstrating either a sufficiently adverse impact or the existence of reasonable suspicion will increase in proportion to the severity of the intrusion into privacy. This, then, should be the defense counsel's paramount purpose: to require the government to justify all such inspections, instead of allowing the broad language of the rule to serve as an automatic imprimatur upon such practices.

---

47. Continued.

was placed on inspecting personnel and to discover whether the individuals were required to open their lockers beforehand. Furthermore, the utilization or presence of military police during the inspection may be extremely important. See United States v. Goldfinch, 41 CMR 500 (ACMR 1969).

48. United States v. Roberts, supra (Perry, J.); cf. United States v. Lange, supra; United States v. Grace, supra; United States v. Coleman, 32 CMR 522 (ABR 1962).

49. Hunt, Comments, Inspections, supra note 3, at 242-243.

50. Bivens v. Six Unknown Agents, 403 U.S. 338, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

## "SIDE BAR"

or

### Points to Ponder

#### 1. ACCEPTANCE OF NONJUDICIAL PUNISHMENT.

Defense counsel should consider the constitutionality of government attempts to change the nature (and often increase the severity) of the charges referred to trial after an accused declines nonjudicial punishment. Defense counsel sometimes indirectly foster this practice by encouraging servicemembers to accept nonjudicial punishment since the charges at trial could be significantly different, more serious, or more numerous than those alleged on the DA Form 2627. Consequently, an accused who would otherwise exercise his right to trial may, in some cases, be deterred from doing so. Conversely, a soldier who does exercise his right to trial may face different and more serious charges as a result. In such cases, counsel should consider assuming an aggressive posture at trial and attempt to eliminate such practices.

Three areas to explore include the accused's right to due process, the proscription of vindictive government action, and the invalidity of a coerced waiver of the right to trial. The argument that a waiver was coerced might be raised to exclude a technically correct DA Form 2627. Several federal court decisions support the argument that changes in the nature of charges cannot be constitutionally effected subsequent to a demand for trial.<sup>1</sup> The cases hold that an accused's due process rights are violated by governmental action which chills his opportunity to exercise legal rights. In North Carolina v. Pearce, the Supreme Court noted that fear of vindictiveness may deter a defendant from exercising his right to appeal or collaterally attack his conviction,<sup>2</sup> when a

---

1. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 128 (1974), United States v. Jamison, 505 F.2d 407 (D.C. 1974) and United States v. D'Alo, 27 Cr.L.Rptr. 2105 (D.C. RI 1980). See also United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977); Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1977).

2. The Court held that an accused could not be subjected to a sentence greater than adjudged in his initial trial when he successfully argued for a new trial on appeal and was retried.

retrial may well entail a more severe sentence than that originally adjudged. The Supreme Court's decision in Blackledge may be useful to defense counsel who are addressing this issue. In Blackledge, the accused was convicted of misdemeanor assault in a North Carolina district court. When the accused exercised his statutory right to a trial de novo in the superior court, he was charged with felony assault and was convicted.<sup>3</sup> The Supreme Court stated that, notwithstanding the absence of governmental vindictiveness in substituting the more serious charge, the accused's right to due process was abridged because such action deters the exercise of a statutory right.

In Jamison, the court held that the accused's due process rights were violated by the government's amendment of the charge from second to first degree murder following a successful defense motion for a mistrial. In D'Alo, a recently decided case, a court again applied the due process rationale and dismissed the accused's information, holding that the government unconstitutionally amended the charge against the accused from manufacture to sale of counterfeit slugs in a superseding information<sup>4</sup> after the accused was granted a mistrial.<sup>5</sup> The court stated that victimizing a defendant for successfully pursuing a legitimate trial tactic abridges the constitutional guarantee of due process, which protects a defendant from apprehensiveness over retaliatory measures. The defendant cannot be penalized for exercising his constitutional right to trial.

Since an accused cannot be punished by the government for exercising a legal or statutory right, the military practice of "uping the ante" when an accused refuses nonjudicial punishment may be unconstitutional; that action arguably dissuades servicemen from exercising their statutory rights. However, these decisions do not affect the government's right to bring additional charges for subsequent acts of misconduct or acts unknown or unsubstantiated to the commander at the time nonjudicial

---

3. District courts in North Carolina are comprised only of a judge; they operate under a statutory limitation as to the maximum imposable punishment, and no record of trial is prepared, since no court reporter is present. North Carolina statutes provide that an accused convicted in a district court has an absolute right to a trial de novo in the Superior Court. See N.C. Gen. Stat. §§7A-290, 15-177.1.

4. The slugs were designed to be used in place of lawful coin in vending machines.

5. In granting the mistrial, the judge also opined that the government's case showed sale but not manufacture of slugs.

punishment is offered. Moreover, acts of misconduct which are known to the commander and upon which he initially refrains from acting appear to fall within the constitutional prohibition.

In United States v. Griffin, 27 Cr. L. Rptr. 2052 (9 CA 1980). The court stated that where there is an appearance of vindictiveness in bringing charges the burden is upon the government to show that its decisions were justified by independent reasons. Further, the court stated that the trial judge should rule on such motions, in order to preclude an improperly motivated prosecution.

This issue is presently pending before the Army Court of Military Review in United States v. Bass, CM 438898 (ADC: CPT Nagle). In that case the accused, who was initially charged with rape, was offered an Article 15 for wrongfully taking a woman into his barracks after the staff judge advocate and the brigade commander determined that the rape charge could not be substantiated. The accused declined the Article 15. Without any additional evidence, the rape charge was reinstated, and the accused was tried and convicted of that offense by general court-martial. The defense counsel testified that the staff judge advocate told him the decision to refer the case to a general court-martial was prompted by Bass' refusal to accept the command's offer of nonjudicial punishment. Defense counsel who pursue this issue at trial should ensure that all pertinent facts are set forth on the record, in order to preserve the matter for appeal in the event of a conviction. In this connection, counsel should ascertain the commander's motive for altering the charges.

## 2. COUNSEL ADEQUACY AND RULE 103.

Adequate representation is an ever-present concern of defense counsel and should become increasingly compelling with the adoption of the Military Rules of Evidence. For example, Rule 103 states that failure to object to the admission or exclusion of evidence waives any error, unless the error involves constitutionally imposed requirements. Under prior military law as interpreted by the Court of Military Appeals, the responsibility of insuring adequate representation for an accused ultimately rested with the military judge. United States v. Graves, 1 M.J. 50 (CMA 1975). Accordingly, in many instances where counsel faltered and the judge failed to intervene, the latter was alleged to have erred. The new rules relieve the trial judge of this onerous burden, and return it to the defense counsel, where it arguably belongs. The shift in military law will be attended by a greater scrutiny of defense counsel's actions at trial and a correspondingly greater potential for allegations of inadequate representation.

In United States v. Brown, 48 U.S.L.W. 2698 (D.C.C.A. 1980), the Circuit Court of Appeals for the District of Columbia rendered a significant decision which establishes three prerequisites for meeting the constitutional error requirement necessary to raise, on appeal, motions or objections not raised at trial. First, the evidence of record must suggest the validity of the absent motion or objection. Second, counsel's failure to raise the issue must amount to an error affecting substantial constitutional rights. Finally, the error must be prejudicial. With regard to the first factor, the court concluded that determining the validity of the unwaived motion or objection involves an application of the "some evidence" rule. If the evidence of record suggests alternate interpretations which are not clearly erroneous and could have resulted in a sustained objection or exclusion of an item of evidence, the test is met. From Brown, it appears that the alternate conclusions need not be more persuasive or probable than the theory advanced for the admission of the questionable testimony or evidence at trial; if the alternative theory amounts to little more than a mere possibility, the requirement is met.

A judicial determination that substantial constitutional error exists is, in reality, an assessment of counsel's adequacy. The court, noting that assistance of counsel is a necessary safeguard for insuring fundamental rights of life and liberty,<sup>6</sup> stated that, notwithstanding a generally competent performance, counsel may fail to present a substantial constitutional claim through oversight or ignorance. The court concluded that binding the defendant to the materially deficient judgment of his attorney was a senseless penalty, since most defendants lack the legal sophistication to monitor their attorneys' performance.<sup>7</sup> The court attached great significance to counsel's inability to demonstrate tactical reasons for failing to raise a motion which would not jeopardize the defense strategy.<sup>8</sup> In short, if a motion has validity and counsel fails to raise it without a tactical justification, a charge of inadequate representation may lie and the constitutional error requirement will be

---

6. Johnson v. Zerbst, 304 U.S. 458 (1937).

7. The Court of Military Appeals in United States v. Rivas, 3 M.J. 282 (CMA 1977) announced the same standard for evaluating counsel adequacy.

8. The defendant in Brown suggested a suppression motion to preclude admission of the heroin for which he was convicted. Counsel did not make the motion, concluding on the basis of research completed in connection with another case that it was spurious.

met. The court concluded that prejudice exists if there is a reasonable possibility that the disputed evidence or procedure affected the trial's outcome. According to the court in Brown, a "reasonable possibility" of prejudice exists if a motion or objection might have been successful; it is not necessary to show that it would have been sustained.

Because the accused may no longer be able to rely upon judicial responsibility for insuring a fair trial, his search for relief may necessarily include an attack upon his counsel. Our experience at DAD has been that an accused will most frequently make allegations of inadequacy against his trial defense counsel in the following areas: refusal or failure to call witnesses requested by the client; failure to investigate or present a defense or objection suggested by the client; failure to permit the client to testify in his own behalf; and coercing the client to plead guilty. It is important, therefore, that counsel take precautionary measures to insure competent representation and preserve documentation capable of proving it. Counsel should recognize that each case presents different factual patterns and requires individualized research, and emphasize issues suggested by the client. The courts appear to be much less forgiving of those attorneys who fail to raise arguably meritorious issues suggested by an accused. See United States v. Oakley, 25 CMR 624 (ABR 1957). Counsel should maintain case files and pay particular attention to discussions with the client and research on motions and objections, since a well-maintained system of record keeping constitutes the best defense against subsequent client attacks on adequacy.

## USCMA WATCH

While the Court of Military Appeals continues to grant a large number of cases for review, the variety of granted issues decreased in June. Three cases, two of which involve Fourth Amendment problems, are of particular interest and are reported below.

### COMPELLING THE ATTENDANCE OF WITNESSES

United States v. Roberts, pet. granted, 9 M.J. 122 (CMA 1980), gives the Court another opportunity to examine the parameters of Article 46, UCMJ, and the holding in United States v. Boone, 49 CMR 709 (ACMR 1975) that civilian witnesses in the United States cannot be compelled to attend a court-martial in Europe. Sergeant Roberts was convicted of aggravated assault by intentionally inflicting grievous bodily harm on his wife. The government contended that after disarming his knife-wielding spouse, SGT Roberts intentionally slashed her throat. Mrs. Roberts gave the CID an oral statement, but refused to sign it when it was reduced to writing, and subsequently she departed the Federal Republic of Germany for the United States. All attempts to have Mrs. Roberts make a sworn statement, depose her, and return her to Germany for trial were unsuccessful. The military judge also denied the defense counsel's motion for a change of venue to the United States where Mrs. Roberts could be subpoenaed. The defendant maintained in two pretrial statements that after he wrested the knife from his wife, he swung it at her. However, he didn't know if he actually cut her. There were no other eyewitnesses to the incident. Since she was the alleged victim, the defense contended that her testimony was material and, based on subsequent conversations with her husband, it might prove to be exculpatory.

Also at issue in Roberts is the admissibility of Mrs. Roberts' out-of-court statements to the effect that she had been cut by her husband. After the affray, Mrs. Roberts went to a neighbor's apartment for help. The neighbor administered first aid and called the military police and local dispensary, and then asked Mrs. Roberts "who had done this to her." The military judge allowed her response to this question into evidence as an "excited utterance" exception to the hearsay rule.

### SEARCH AND SEIZURE

United States v. Wallace, pet. granted, 9 M.J. \_\_\_\_ (CMA 26 June 1980), presents three Fourth Amendment problems in a typical factual setting. Pursuant to information from a reliable informant that the

accused had been seen with drugs in the barracks, the company commander proceeded to search Specialist Four Wallace. Finding Wallace and a companion walking down the barrack stairs, he directed them back to their room. There the commander informed the two that they were suspected of possessing drugs and announced that he was going to search their person, clothing, and wall lockers. He then asked for and received their consent to search. Methamphetamine was found in the vest of a suit which Wallace was carrying over his shoulder.

Defense counsel at trial and on appeal argued that the consent was coerced since it was given only after the commander announced his intention to search. At trial, the judge ruled that the consent was valid. On appeal, the Army Court of Military Review found it unnecessary to address the validity of the consent. United States v. Wallace, SPCM 14075 (ACMR 1979), memo opinion at p.2. Additionally, both the trial and appellate courts determined that the search of Wallace was valid since it was incident to his apprehension. Defense appellate counsel contend on further appeal to the Court of Military Appeals that the apprehension was unlawful. While the informant previously had provided correct information, he had also given erroneous tips. Since the company commander had no personal knowledge of Wallace's alleged criminal activity, the apprehension was not based on probable cause.

The serviceperson's right of privacy in his barrack room will again be examined in United States v. Lewis, 8 M.J. 754 (ACMR 1979), cert. filed, 8 M.J. 241 (CMA 1980), pet. granted, 9 M.J. 147 (CMA 1980). Specialist Four Lewis was convicted of possessing heroin. His conviction was reversed by the Army Court of Military Review because the government failed to establish a proper chain of custody over the heroin, which was seized incident to Lewis' apprehension. In reaching this holding, ACMR found United States v. Porter, 7 M.J. 32 (CMA 1979), controlling, and its application retroactive to the date of the Court of Military Appeals decision in United States v. Nault, 4 M.J. 318 (CMA 1978). The Judge Advocate General certified Lewis to CMA on the question of Porter's retroactivity.

On appeal to the military's high court, the defense contended that SP4 Lewis' apprehension was fatally tainted by evidence of wrongdoing obtained in contravention of the soldier's right to privacy. In an attempt to locate a fellow soldier and inform him about guard duty, a SGT Chestnut went to SP4 Lewis' barrack room. When there was no response to Chestnut's knock, he became suspicious

since he heard conversation within the room and, despite a unit SOP to the contrary, the door was locked. SGT Chestnut proceeded to a vantage point outside the building where he could peer through the room's window and observe any activity in the room. Although the curtains to the room were fully drawn, there were open spaces approximately two inches wide at the sides and bottom where the curtains failed to meet with the window. Through these cracks, SGT Chestnut observed three people cutting, dividing, and packaging a white powdery substance. The sergeant immediately reported his observation to his chain of command. After the battery commander and four other officers and NCOs peered through the curtained window and observed the suspected drug operation, the commander entered the room and apprehended the occupants. When the accused was escorted into the hallway, he attempted to throw a packet containing heroin into a trash can. The packet fell to the floor, and was immediately retrieved by the investigating military policeman. There is no question that if the apprehension were lawful, the seizure of the suspected heroin, found in plain view, was also permissible.

At trial, the military judge found no invasion of the accused's right of privacy, and denied the defense motion to suppress. He opined that if Specialist Lewis wanted more privacy than that afforded by the drawn curtain, he should have put a blanket over the window to close the sides and bottom from public view. On appeal, the defense contends otherwise, and maintains that by locking his door and drawing the curtain, the accused did everything that was reasonably expected in order to maintain the privacy of his "home." Since Sergeant Chestnut testified that his decision to peer into the room was prompted by suspicion and was not inadvertent, and since his testimony revealed that one had to be within three feet of the window before it was possible to see what was transpiring in the room, the defense maintains that the sighting cannot be subsumed under the plain view exception to the Fourth Amendment; because the soldier's expectation of privacy was violated, the fruits of this conduct must be suppressed.

#### REPORTED ARGUMENTS

##### Self - Incrimination; Search and Seizure

The manner in which Article 31, UCMJ, affects the admissibility of blood alcohol tests received renewed attention in United States v. Armstrong, pet. granted, 7 M.J. 41 (CMA 1979), argued 10 June 1980. In the month's liveliest and perhaps most far-reaching argument, appellate counsel addressed the issue under present law as well as the

future effect of Rule 312(d), MRE. Specialist Five Armstrong was convicted of reckless driving resulting in injury, involuntary manslaughter, and possession of marijuana. After the car which he was driving struck a parked truck trailer, the accused was taken to a hospital. He was informed that he was suspected of driving under the influence of alcohol and that he had a right to remain silent. The accused was then told that if he did not submit to a blood alcohol test, German police could take him to a medical facility where blood could be extracted by force, if necessary. At trial, the military judge ruled that SP5 Armstrong had not waived his Article 31 rights, but determined that there is no requirement to give Article 31 warnings prior to obtaining a blood sample. The test results, admitted at trial, showed 1.1 milligrams per deciliter of alcohol in his blood. After the accused's automobile was towed by German police to a guarded impoundment lot, the car and its contents were subjected to a joint "inspection" by military policeman and the German impound lot custodian. Specialist Armstrong's jacket was removed from underneath a seat. The investigating officials discovered a foil cube containing marijuana in the pocket.

During argument, defense appellate counsel pointed out that the warnings administered to the accused were clearly inadequate because SP5 Armstrong was not advised of his right to counsel, and because of the threat to have blood extracted by the Germans if he withheld his consent. Both government and defense counsel recognized that United States v. Musquire, 9 USCMA 67, 25 CMR 329 (1958) requires that Article 31 standards be met prior to the admission of evidence derived from bodily fluids. Government counsel asked that Musquire be overruled. In response to a bench question concerning the effect of the new military rules of evidence, defense counsel opined that Rule 312(d) would overrule Musquire. However, the defense posited that Article 31 is broader than the Fifth Amendment; that the giving of blood is a statement within the meaning of that Article; that Presidential power does not extend to a statutory revision of Article 31, and that Rule 312(d), MRE, is inconsistent with the UCMJ and therefore invalid.

The effect of the admission of the blood alcohol test results was of particular interest to the judges. Government counsel argued that the presumption expressed in Army Regulation 190-5 that an individual is under the influence of alcohol if the level in his blood is above 0.10 percent applied in the case at bar even though the regulation was not introduced at trial. The government's argument was that the military judge was certainly aware of this regulation and therefore realized the presumptive effect that accompanied the appellant's

blood alcohol level. Appellate defense counsel concurred, believing such an argument showed the appellant was prejudiced by the introduction of the test. It is unclear, however, as appellate defense counsel pointed out, whether an Army regulation can create a presumption of law in courts-martial. Since the lab data was incorrectly entered on the report, and no witness gave an opinion based on the lab report, the Court may avoid resolving the issue by finding that other evidence of reckless driving sufficiently supports the findings.

Argument on the confiscation of the marijuana from Armstrong's field jacket centered on whether the military police participation was sufficient to trigger the accused's entitlement to Fourth Amendment safeguards. Defense appellate counsel contended that constitutional protections were applicable since the military police searched for evidence. Furthermore, the military police had no responsibility for a vehicle impounded by the Germans, and the procedures employed in the joint "inventory" were not in accordance with routine Bremerhaven police policy.

Contrarily, government counsel contended that the German lot custodian would have inventoried the contents of the car eventually and the arrival of the MPs at the impoundment lot did not prompt his "inspection." When the military police opened the tin foil packet, it was subsequent to a proper seizure of the jacket and its contents by the German lot custodian, pursuant to a valid inventory. Both sides argued that South Dakota v. Opperman, 428 U.S. 364 (1976), supported their respective positions.

#### ADMISSIBILITY OF NONJUDICIAL PUNISHMENTS

On 12 June 1980, oral argument was heard in United States v. Mack, pet. granted, 9 M.J. 42 (CMA 1980) and United States v. Cox, pet. granted, 9 M.J. 42 (CMA 1980). In Mack, the Article 15 record was admitted without objection. In Cox, the trial defense counsel raised objection to the admissibility of three records of nonjudicial punishment introduced during aggravation. Appellate defense counsel in both cases focused their argument on the fact that the records admitted into evidence did not facially comply with the mandate of United States v. Booker, 5 M.J. 238 (CMA 1977). Absent any showing of compliance with Booker, the documents were inadmissible, whether or not counsel objected. In closing, counsel suggested that the Court adopt Senior Judge Ferguson's concurring opinion in United States v. Johnson, 19 USCMA 464, 42 CMR 71 (1970), and rule that records of Article 15 punishment are inadmissible in any court-martial proceeding. Government counsel contended that United States v. Syro, 7

M.J. 431 (CMA 1979) suggested that a person merely be advised of his right to confer with counsel prior to accepting or declining nonjudicial punishment. In this regard, the Article 15 form itself sufficiently establishes the fact that the individual was so advised.

Arguments in United States v. Spivey, pet. granted, 9 M.J. 16 (CMA 1980) and United States v. Turrentine, pet. granted, 9 M.J. 17 (CMA 1980), previously docketed for June, were postponed. Defense counsel should object to any questioning of the defendant until the Court resolves the issues associated with a Mathews - type inquiry conducted by the military judge prior to admission of records of nonjudicial punishment and summary court-martial convictions.

The United States Court of Military Appeals recently denied petitions for reconsideration in several cases, the most notable of which is United States v. Fimmano, 8 M.J. 197 (CMA 1980). The petitions for reconsideration were denied because the two remaining judges who participated in the initial decision were divided on the issue. Chief Judge Everett declined to participate in the decision to reconsider in cases in which he had not joined in the initial decision, and in which Judges Cook and Fletcher had disagreed.

In a memorandum attached to the order of the Court denying the government's petition for reconsideration in United States v. Fimmano, 9 M.J. \_\_\_\_ (CMA 31 July 1980), Chief Judge Everett stated that the denial of a petition for reconsideration by an equally divided court leaves the original decision intact as the law of the case but not as a precedent for other cases. Chief Judge Everett's decision not to participate in the reconsideration decisions will enable the Court, as it is presently constituted, to consider anew the constitutional requirement for an oath or affirmation as a condition precedent to the issuance of military warrants or authorizations to search. The language of Chief Judge Everett's memorandum also calls into question the precedential value of other opinions of the Court decided by the votes of Judges Fletcher and Perry in which Judge Cook dissented, when Judge Perry participated, yet left the Court before the decisions were finalized.

# CASE NOTES

## SUPREME COURT DECISIONS

### CONFESSIONS - "INTERROGATION" DEFINED

Rhode Island v. Innis, 48 U.S.L.W. 4506 (U.S. Sup. Ct. 12 May 1980).

In a case involving circumstances faintly reminiscent of the "christian burial speech" condemned in Brewer v. Williams, 430 U.S. 387 (1977), the Supreme Court has further defined the concept of "interrogation" as that term is used in Miranda v. Arizona, 384 U.S. 436 (1966). A majority of the court held that the procedural safeguards of Miranda apply only when an accused in custody is subjected to official questioning which reflects a measure of compulsion above and beyond that inherent in custody itself. The Court stated that Miranda safeguards will therefore apply whenever an accused is subjected to express questioning or its functional equivalent. The Miranda warnings must be administered, regardless of the technique of persuasion, whenever the words or actions of the police are likely to elicit an incriminating response from an accused in custody. An incriminating response was defined by the Court to include any response, inculpatory or exculpatory, that the prosecution may seek to introduce at trial.

### STANDING TO OBJECT

United States v. Salvucci, 48 U.S.L.W. 4881 (U.S. Sup. Ct. 25 June 1980).

The Supreme Court has again narrowed the class of persons who may properly question the legality of a search and move to suppress the fruits of that search. In Rakas v. Illinois, 439 U.S. 128 (1978), the Court held that the legitimacy of the accused's presence on the searched premises (see Jones v. United States, 362 U.S. 257 (1960)) is an improper consideration in determining whether the accused may object to the admissibility of the fruits of a search. The Court in Rakas, however, left open the question as to whether the "automatic standing" rule of Jones was still viable. In Salvucci, the Court answered that question by expressly overruling Jones. Finding that the Fourth Amendment protection against unreasonable searches is a "personal" right, a majority of the Court held that only a person who has a "legitimate expectation of privacy" in the place or thing searched may object to the admissibility of the fruits of that search. The accused bears the burden of establishing this "legitimate expectation" as a threshold to any motion to suppress. See also Rawlings v. Kentucky, 48 U.S.L.W. 4885 (U.S. Sup. Ct. 25 June 1980).

COURT OF MILITARY REVIEW DECISIONS

INSTRUCTIONS - RAPE

United States v. Burns, 9 M.J. 706 (NCMR 1980).  
(ADC: LCDR Muschamp, USN)

During his instructions on findings, the military judge, over vigorous objections by defense counsel, informed the members that, inter alia, a rape victim's oral protestations are sufficient to show lack of consent. The Navy court found the instruction to be erroneous. Noting that the most recent revisions of the Manual omitted language to the effect that mere oral protestations and a pretense of resistance are insufficient to show lack of consent, the court found that it was not the intent of the drafters of the revised MCM to change the law in this regard. The court further determined that oral protestations are sufficient to show lack of consent only in the presence of threats of serious or fatal injury or under circumstances where any or all resistance is either impossible or pointless. The question of whether sufficient threats or circumstances are present is a matter for the finder of fact to determine.

LARCENY - IMPROVIDENT PLEA

United States v. Beattie, NCM 79-1437 (NCMR 30 May 1980) (unpub.).  
(ADC: LT Curlee, USNR)

The accused pled guilty, inter alia, to larceny of a surfboard. During the providence inquiry, he indicated that he had originally intended only to temporarily deprive the owner of the property. When the surfboard was accidentally destroyed, he withheld the remnants of the property because it was impossible to return them; he did not intend to reimburse the owner for the cost of the property. The defense counsel believed that the requisite intent to permanently deprive was present when the accused failed to return the remnants. The appellate court held that the providency inquiry was inadequate because the military judge failed to explore the areas of impossibility and lack of value.

CONVENING AUTHORITY - FAILURE TO AGREE WITH SJA

United States v. Harris, NCM 80-0231 (NCMR 30 May 1980) (unpub.).  
(ADC: LCDR Muschamp, USN)

As part of his post-trial advice to the supervisory authority, the staff judge advocate recommended the suspension of the accused's punitive discharge, as well as portions of the sentence relating to confinement,

forfeitures, and reduction. In his action, the supervisory authority acknowledged the recommendation, but declined to follow it. The court stated that more than a mere recitation of matters considered in taking the action and a concluding statement are required to comply with paragraph 85c, MCM, 1969, and that the supervisory authority should present some rationalization for the non-conforming action.

#### EXTENUATION AND MITIGATION - CIVILIAN CONVICTION

United States v. Cobb, 9 M.J. \_\_\_\_ (ACMR 24 June 1980).  
(ADC: CPT Walinsky)

At trial, the government attempted to introduce into evidence, as a matter in aggravation, a record of civilian conviction showing that the accused had been convicted of burglary. The military judge refused to admit the record into evidence (see para. 75b(2), MCM, 1969). Subsequently, the accused took the stand in his own behalf. During cross-examination, government counsel, without objection, asked appellant whether he had ever been convicted of an "offense involving dishonesty where the maximum sentence . . . would be over a year [of] . . . confinement at hard labor." The accused replied that he had. Thereafter, the military judge asked the accused, without objection, to describe the nature of the civilian offense. The court found that paragraphs 138g and 153b, MCM, 1969, applied equally to pre-findings and pre-sentence testimony of an accused, and that the conviction, though not admissible into evidence by itself, was therefore proper material for use in impeaching the credibility of an accused who testifies. See McLeod, Opening the Door: Scope of Government Evidence on Sentencing, 12 The Advocate 77, 80 (1980). Citing United States v. Weaver, 1 M.J. 111, 117 (CMA 1975), the appellate court determined that the accused has the burden of showing that the "prejudicial effect of impeachment outweighs the probative value of the prior conviction to the issue of credibility." In this case the reviewing court believed that such a showing was not made at trial or on appeal.

#### OFFENSES - RECEIVING STOLEN PROPERTY

United States v. Henderson, 9 M.J. \_\_\_\_ (ACMR 24 June 1980).  
(ADC: MAJ Byler)

The accused was convicted, inter alia, of knowingly receiving stolen property. The evidence at trial showed that he conspired with others to steal and sell government property. The accused's role in the scheme consisted of carrying off the goods which others had stolen from the central issue facility and selling them off-post. The court held that the principle expounded in paragraph 213f(14), MCM, 1969, that an "actual

thief" is not criminally liable for knowingly receiving stolen property, was inapplicable; regardless of whether the accused was a principal, see Pinkerton v. United States, 328 U.S. 640 (1946), or an aider or abettor, see Article 77, UCMJ. He was not the "actual thief" since he did not assist in the actual larcenies nor was he present when they took place. The court specifically rejected the application of United States v. Escobar, 7 M.J. 197 (CMA 1979) (larceny is incomplete until asportation is completed).

#### DEFENSE WITNESS - FAILURE TO FURNISH

United States v. Bright, 9 M.J. \_\_\_\_ (ACMR 25 June 1980).  
(ADC: MAJ Byler)

At trial, the defense counsel moved for a continuance in order to locate and interview a potential witness who could possibly absolve the accused of guilt for several offenses with which he was charged. Evidence before the trial court indicated that the named witness may have been solely responsible for several of the charged offenses. The appellate court found that under these circumstances, the witness was material and that though the defense counsel failed to comply with paragraph 115a, MCM, 1969, the government also possessed the means to locate the witness and was on notice that the defense desired the witness at trial. The trial judge abused his discretion in not granting a continuance; the error could be cured only by a rehearing. See also United States v. Killebrew, 9 M.J. 154 (CMA 1980) (defense entitled to interview government informant).

#### PRETRIAL AGREEMENT - SUBSEQUENT MISCONDUCT PROVISION

United States v. Connell, 9 M.J. \_\_\_\_ (NCOMR 17 June 1980),  
pet. for reconsideration filed 26 June 1980.  
(ADC: LCDR Warden)

A new line of attack on the "subsequent misconduct" provision, which is standard in many pretrial agreements, was introduced in a recent decision by the Navy Court of Military Review. In a concurring opinion, Judge Baum continued his lonely crusade against these provisions; Judge Michel's lead opinion found a Green-King violation when the trial judge failed to explain possible recourses available to an accused charged with a post-trial violation. The court also held that the judge should precisely delineate the nature of an "offense" capable of triggering this provision.

FEDERAL COURT DECISIONS

DRUGS - EXPERT TESTIMONY

Reardon v. Manson, 27 Cr.L.Rptr. 2148 (D.C. Conn. 28 April 1980).

At the trial of two accused, a toxicologist, over defense objection, expressed his expert opinion as to the narcotic content of substances which had been analyzed by two chemists whom he supervised. Relying upon the three-part test established in Rado v. Connecticut, 607 F.2d 572 (2d Cir. 1979), the District Court held that the toxicologist's testimony deprived the defendants of their right to confront the real witnesses against them, who were the two chemists.

CONFESSIONS - ADMISSIBILITY

Harryman v. Estelle, 27 Cr.L.Rptr. 2233 (5th Cir. 9 May 1980) (en banc).

The accused was searched upon his arrest, and law enforcement officers found a condom containing a white powdery substance under the waistband of his trousers. The officer who seized the item asked the accused, "What is this?" to which the accused replied, "Oh, you know what it is. It is heroin." The government at trial contended that the statement was made under circumstances in which Miranda was inapplicable and that the question by the police officer was prompted by surprise rather than an intent to elicit a response. A majority of the Court of Appeals found that the procedural requirements of Miranda rigidly applied to all in-custody questioning. The court ignored the possible motives underlying the question, and instead focused on whether the officer's statement could reasonably have been regarded as interrogative. See Rhode Island v. Innis, 48 U.S.L.W. 4506 (U.S. Sup.Ct. 1980).

EQUAL PROTECTION - CARNAL KNOWLEDGE

United States v. Hicks, 48 U.S.L.W. 2748 (9th Cir. 16 April 1980).

The accused was charged with carnal knowledge of a female Indian under 16 years of age in violation of 18 U.S.C. §§1153 and 2032. The District Court held that the government failed to adequately demonstrate that the gender-based criminal statute, which punished males, regardless of age, for having intercourse with females under the age of 16, served important governmental objectives and was substantially related to the achievement of those objectives. Citing Craig v. Boren, 429 U.S. 190 (1976), the Court of Appeals found the statute to be violative of the right to equal protection under the Fifth Amendment and affirmed the district court's dismissal of the charge.

## DISCHARGES - HOMOSEXUALITY

benShalom v. Sec'y of the Army, 48 U.S.L.W. 2777 (D.C. Wis. 20 May 1980).

A female Army reservist was discharged for covert homosexual "tendencies, desire, or interest." During conversations with fellow reservists, in an interview for her division newspaper, and while teaching drill sergeant candidates, she acknowledged her homosexuality. There was no proof, however, that she had ever engaged in homosexual acts or made advances toward female reservists. The Army did not dispute her qualifications as a soldier. The Eastern District Court of Wisconsin held that the regulation impinged the First Amendment rights of the plaintiff, who had not advocated homosexuality and had caused no disturbance because of it. The court found no legitimate military interest in discharging an individual who merely evidences a homosexual "tendency, desire, or interest." The court also determined that the Army's policy of discharging servicemembers for this reason violates Ninth Amendment privacy rights, as well as the Fifth Amendment. The court refused to enforce such a policy unless the Army could show some nexus between the sexual preference and the plaintiff's military capabilities, or prove actual deviant conduct.

## TRIAL JUDGE - RECUSAL

Butler v. United States, 27 Cr.L.Rptr. 2212 (D.C. C.A. 29 April 1980) (en banc).

At a pretrial hearing convened to resolve a suppression motion, the accused asked the court to appoint a new defense counsel. In response, the accused's current defense counsel explained the advice he had given his client; he also disclosed that the accused might take the stand, against counsel's advice, and commit perjury. Counsel specifically described the substance of the possible perjury. The accused was subsequently tried in a non-jury trial before the same judge who had heard the pretrial motion, and he was convicted as charged. A majority of the Court of Appeals, sitting en banc, held that the trial judge should have recused himself when he was told that the accused intended to commit perjury. The court found that fundamental fairness, as required by due process, demands a judicial neutrality which was lacking in this case. See Lowery v. Caldwell, 575 F.2d 727 (9th Cir. 1978).

## CONFESSIONS - WAIVER OF RIGHTS

United States v. Morris, 27 Cr.L.Rptr. 2195 (D.C. Ga. 14 April 1980).

During the span of one hour and fifteen minutes, the accused was arrested, his home was searched, and he was advised by three different FBI agents, on five separate occasions, of his Miranda rights against self-incrimination. The accused never signed a written waiver of his rights and did not waive them orally. The court held that the accused's subsequent oral confession was inadmissible because his rights had not been "scrupulously honored." The court found that by repeatedly questioning the accused, after having invoked his rights, the police indicated that they "did not mean" what they said, and that this practice constituted a subtle form of coercion. See United States v. Fernandez, 574 F.2d 1362 (5th Cir. 1978).

## STATE COURT DECISIONS

### INSTRUCTIONS - RAPE

State v. Smith, 27 Cr.L.Rptr. 2159 (Mont. 27 March 1980).

The Montana Supreme Court, finding that the evidence at trial clearly demonstrated some possibility of private malice and desire for revenge on the part of the prosecutrix, and that there was no corroboration on the critical matter of consent, held, in accordance with State v. Ballew, 532 P.2d 407 (Mont. 1975), and State v. Just, 602 P.2d 957 (Mont. 1979), that under these circumstances, an instruction to the effect that "rape is a charge easily made but difficult to disprove" was required. In light of established case law, the judge's refusal to so inform the jury constituted error.

### SEARCH AND SEIZURE - AUTOMOBILE

Commonwealth v. Long, 48 U.S.L.W. 2763 (Pa. 2 May 1980).

The accused was stopped by traffic police for failing to obey a stop sign. When the accused and a passenger stepped out of the vehicle, the police detected an odor of alcohol on the accused's breath. When the latter was unable to produce a driver's license or vehicle registration, he was arrested, handcuffed, and searched for weapons. Another officer searched the car and found a revolver and several packets of

heroin under the front seat. The trunk was then opened and the officers discovered more heroin and some marijuana. The Pennsylvania Supreme Court held that the search of the truck was unlawful. See Arkansas v. Sanders, 442 U.S. 753 (1979); and LaFave, Search and Seizure: A Treatise on the Fourth Amendment (1978 and Supp. 1980). Finding that an owner has an expectation of privacy with respect to the trunk of his car; that the police had no warrant; that the trunk was not susceptible to a search incident to arrest, and that no probable cause existed because the evidence indicated that a passenger, rather than the accused, possessed the revolver and heroin, the court concluded that the search was unlawful.

## FIELD FORUM

This feature was created by the Editorial Board of The Advocate to answer questions and solicit comments or suggestions from trial defense counsel and other interested readers. For this issue, a senior defense counsel writes:

My experience indicates that a classic and continuing problem a defense counsel must deal with is the "missing" character witness. The client often remembers that he had a platoon sergeant or platoon leader or even a company commander who would be a good witness. The client remembers the potential witness's rank and his last name and occasionally his first name. However, as an attorney trying to contact that witness, you immediately dead-end against the Army Worldwide Locator System requirement that they must know the social security number of the individual you desire to contact. I ask that you put this into your inquiries from the field section in order that we may find out how defense counsel in other offices are handling this problem.

The Worldwide Locator Service may be contacted by phoning Autovon 699-4211/2/3. Locator officials state, however, that no information concerning military personnel will be given over the telephone. Written inquiries should be sent to Enlisted Records Center, Fort Benjamin Harrison, Indiana, 46249. Inquiries concerning officer personnel should be sent to the same address. There is no requirement that the requestor provide the social security number of the person whose location is being sought, although it obviously would help if it is available. In the absence of a social security number, the requestor should provide as many identifying factors as possible, such as age and rank, and insure that there are no misspellings.

Since this problem involves investigative techniques, we asked an agent from CID command what they do to locate a witness who has disappeared. Their solution is to employ basic footwork, and glean information from likely sources. Start with the unit to which your witness was assigned. Talk with members who might have known your witness and where he might have gone. Check with SIDPERS, personnel, and finance; they may be productive sources of that elusive social security number, as well as any TDY, PCS or REFRAD order. Ask Enlisted Personnel Records in St. Louis to check their "retired" files, in the event your witness has left the service. This file may disclose the individual's home of record.

Finally, you could check the deserter list from Deserter Apprehension at the local Provost Marshal's Office, although if you have to go there your witness will probably not be of much assistance on extenuation and mitigation.

We trust this is of some assistance. Readers who are aware of other techniques are invited to send their suggestions to The Advocate, ATTN: Managing Editor.

\* \* \* \* \*

The Federal Legal Information Through Electronics (FLITE) Service, a DOD-chartered agency that operates a computerized legal information and research facility, may be one of the most effective timesaving devices available to a defense attorney. The service currently has full text retrieval capability on over seven billion characters of Federal law. This law includes United States Code and Organic Laws; Court-Martial Reports/Military Justice Reporter; Federal Supplement; Federal Reporter 2nd Series; United States Reports/Supreme Court Reporter; Board of Contract Appeals Decisions; Decisions of the Comptroller General (published and unpublished), and other data bases of interest to federal attorneys and employees. The Military Justice Reporter and Supreme Court Reporter data bases include the most recent advance sheets. The Federal Reporter Second and Federal Supplement data bases are updated from slip opinions even before advance sheets are published.

When you need information in a hurry, FLITE's five attorneys can help you solve your research problem by promptly dispatching pertinent cases to you. If timeliness is not a major concern, the search will be processed overnight and mailed the next day, but if you indicate your need for a fast turn-around, other options are available:

1. The search can be immediately processed by the FLITE attorney and the result relayed by telephone, typically within 45 minutes.
2. The search can be processed overnight and the results transmitted by telephone or by electrical message the following morning. Overnight searches are usually distributed to the attorneys by 0830 Mountain Time.
3. A FLITE attorney can respond to simple inquiries, such as a request to "Shepardize" a citation, while you wait on the telephone.

To use FLITE, just call Autovon 926-7531, FTS 326-7531, or commercial (303) 370-7531. FLITE attorneys are usually present 0630 MST through 1700 MST. At other times, a recording device will take your message and an attorney will contact you during normal business hours.

# ON THE RECORD

or

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

TC: Was [the accused] rational when he was talking to you that evening?

WIT: No, Sir.

TC: What was he?

WIT: Everybody, you know, was just normal, no one was rational.

\* \* \* \* \*

DC: I will try to do it another way. If we use the north south — the top of the paper being north, — well, I will use top of the paper, or bottom of the paper, right of the paper, left of the paper. Will that suffice, Your Honor?

\* \* \* \* \*

(Accused to military judge during providency)

ACC: Well, now, if, if I figured, you know, like, like, say I didn't know nothing about she was an informant or anything like that, you know, and, well, offering me sex and all that, you know, well, you know, well, you, know, like I say, I'm a man, you know, I'm a male, a man, and, you know, like, most men, enjoy sex, you known. I mean, I figure like you know, most people, like, I can't speak for everybody, you know, I can just speak for a certain percentage of the people, but I feel like, like, a certain percent of the people would you know, kind of be enthused by it like me. ... I can't speak for you, you know, because I don't know if you're much of a, you're much of a man.

\* \* \* \* \*

(First Sergeant testifying on extenuation and mitigation).

WIT: Yes, I would take him. Selling drugs does not mean that he is not a soldier.

\* \* \* \* \*

MJ: Let the record reflect the trial counsel has assumed the prone position on the floor and the defendant has straddled the trial counsel ... .

\* \* \* \* \*

ACC: Your Honor, I don't know what you mean, "Do you understand?"

\* \* \* \* \*

IDC: Your, Honor, I would request your indulgence and refresh me — I have been out of law school for twenty some years, but I cannot recall which one the Fourth Amendment is.

\* \* \* \* \*

TC: Yes, Your Honor, we would contend Specialist \_\_\_ was present at the time he authorized the search, and at that time, she showed him the marijuana that she had purchased earlier that day.

MJ: I don't really see that that adds much to the ...

TC: I was just trying to bolster her credibility.

