

Narrowing the Doorway: What Constitutes a *Crimen Falsi* Conviction under Revised Military Rule of Evidence 609(a)(2)?

Major Christopher E. Martin*

I. Introduction

Experienced trial practitioners know that when it comes to courtroom testimony, the credibility of a testifying witness is often as important as the substance of the testimony itself.¹ Although witnesses with prior military or civilian convictions are less common in military practice,² the ability to impeach a witness who does have a conviction is a powerful weapon when the opportunity arises. American jurisprudence has long allowed parties to introduce evidence of a testifying witness's prior convictions in order to impeach the credibility of that witness.³ However, some types of convictions are considered more telling of credibility than others. In particular, convictions for *crimina falsi*,⁴ or crimes of dishonesty or deceit, are considered so relevant to credibility that both federal and military rules of evidence mandate their automatic admission for impeachment, without the need to apply any balancing test.⁵ But while the automatic admissibility of *crimen falsi* convictions is largely unchallenged in practice,⁶ defining

exactly what constitutes a *crimen falsi* conviction in the first place is often confusing and contested.

The Supreme Court and Congress tried to reign in this definitional confusion by amending Federal Rule of Evidence (FRE) 609 effective 1 December 2006.⁷ This federal rule, like its military counterpart, Military Rule of Evidence (MRE) 609, governs the use of a prior conviction to impeach a witness testifying at trial. The revision to subsection (a)(2) of FRE 609, in particular, limited automatically admissible *crimen falsi* convictions to those crimes for which “the *elements* of the crime required proof or admission of an act of dishonesty or false statement by the witness.”⁸ By operation of law, the federal changes automatically modified MRE 609 as of 1 June 2008.⁹

The practical differences between the old and new rules are, in some cases, deceptively subtle. Prior to the 2006 revision, FRE 609(a)(2), as well as MRE 609(a)(2), allowed automatic admissibility of a conviction simply if it “involved dishonesty or false statement.”¹⁰ When weighing the admissibility of convictions, federal and military courts embraced this ambiguity by regularly “looking beyond” the elements of offenses to consider whether the circumstances of a crime—not just the crime itself—involved dishonesty or false statement.¹¹ However, by tying an elemental analysis

* Judge Advocate, U.S. Army. Currently assigned as Senior Defense Counsel, Fort Hood, Texas. Many thanks to Major Tyesha Lowery for her invaluable advice and assistance in completing this article.

¹ A witness who testifies makes his credibility a relevant issue at trial. See THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, at D-1 (2008) [hereinafter ADVOCACY TRAINER].

² As the *Advocacy Trainer* notes, “Counsel are more likely to use this skill with civilian witnesses, since few soldiers enlist with civilian convictions in their records and few are retained following a military conviction.” *Id.* at D-3-1.

³ See, e.g., ROTHSTEIN ET AL., EVIDENCE: CASES, MATERIALS AND PROBLEMS 408–17 (2d. ed. 1998) (discussing federal court rulings on the use of prior convictions to impeach, both before and after the implementation of FRE 609).

⁴ *Crimina falsi* are, essentially, crimes of fraud. See BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (“An offense characterized by fraud through concealment, untruthfulness, false weights, forgery, etc. An offense involving untruthfulness so glaring as to affect the administration of justice injuriously.”); THE LAW DICTIONARY (2002) (“a flexible term for forgery, perjury, counterfeiting, alteration of instruments, and other frauds.”).

⁵ The current Federal Rule of Evidence (FRE) 609 provides, in relevant part, “For the purpose of attacking the character for truthfulness of a witness . . . evidence that any witness has been convicted of a crime shall be admitted . . . if it can readily be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.” FED. R. EVID. 609(a) (emphasis added). Although neither the federal nor military version of rule 609 specifically uses the term “*crimen falsi*,” commentators have generally applied this term to the types of crimes described within subsection (a)(2) of the rule. This article will likewise use the term *crimen falsi* to refer to the crimes addressed in the new FRE 609(a)(2) and MRE 609(a)(2).

⁶ Although the prevailing federal and military practice is to admit *crimen falsi* convictions without FRE (or MRE) 403 balancing, the issue is not entirely resolved. See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES MIL. R. EVID. analysis, at A22-47 (2008) [hereinafter MCM] (“The

application of Rule 403 is unclear.”); see also James Moody & LeEllen Coacher, *A Primer on Methods of Impeachment*, 45 A.F. L. REV. 161, 170–71 (1998) (“Several courts have rule that Rule 609(a)(2) does not require a balancing of probative value against prejudicial effect . . . [but] [a]t least one commentator has an opposite view, reasoning that the admission of *crimen falsi* convictions must be balanced against questions of constitutional problems, military due process, and fundamental fairness.”).

⁷ FED. R. EVID. 609. The U.S. Supreme Court has statutory authority to prescribe the federal rules, subject to a waiting period. 28 U.S.C. § 2072 (2006). If a rule is submitted by 1 May and Congress does not reject, modify, or defer the rule by 1 December, the rule takes effect as a matter of law on 1 December of that year. *Id.* § 2074.

⁸ FED. R. EVID. 609(a)(2) (emphasis added). Before the 2006 FRE revision, Military Rule of Evidence (MRE) 609(a)(2) like the federal rule read in pertinent part: “[E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” MCM, *supra* note 6, MIL. R. EVID. 609(a)(2). The 2008 print edition of the MCM still reflects this old rule. *Id.*

⁹ Military Rule of Evidence 1102 provides that “Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.” MCM, *supra* note 6, MIL. R. EVID. 1102.

¹⁰ FED. R. EVID. 609 (amended Dec. 1, 2006). See also discussion of the former version of MRE 609(a)(2), *supra* note 8.

¹¹ See, e.g., United States v. Frazier, 14 M.J. 773 (A.C.M.R. 1982) (explaining that admissibility under MRE 609(a)(2) “may be found in the underlying circumstances involved in the offense which resulted in the conviction.”). *Id.* at 778. See also Moody & Coacher, *supra* note 6, at 171; WEINSTEIN'S FEDERAL EVIDENCE § 609.04(3)(c) (2009) [hereinafter

to *crimen falsi* determinations under the revised rule, Congress has apparently tried to narrow the doorway of automatic admissibility.¹²

In light of the revised MRE 609, this article suggests a framework for determining what convictions under the Uniform Code of Military Justice (UCMJ) fall under *crimina falsi* for purposes of MRE 609(a)(2), meaning they are automatically admissible for impeachment without requiring an MRE 403 balancing.¹³ After laying out an analytical framework, this article then suggests a step-by-step guide practitioners can use to consider potential *crimen falsi* convictions.

II. Analyzing *Crimen Falsi* Convictions

A. Two-Layered Analysis

Delineating which offenses are *crimen falsi* or non-*crimen falsi* is sometimes less obvious than it first seems. The required analysis could, under the revised MRE 609(a)(2), be considered a two-layered review process. On the first layer are convictions that are facially or traditionally held in jurisprudence to be *crimina falsi*. This is determined by looking at the elements of the charged offense itself.¹⁴ Crimes in this category, as regularly held by federal courts, include counterfeiting, forgery, fraud, fraudulent passing of worthless checks, and perjury.¹⁵ A military court, citing federal cases, recounted a very similar list, including “perjury, subornation of perjury, false statement, fraud, swindling, forgery, bribery, false pretenses, and embezzlement.”¹⁶

Because the revised MRE 609(a)(2) mirrors the federal rule, the notes of the Advisory Committee to the 2006 FRE revisions are a useful interpretive guide. The Committee recognized that “[h]istorically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit.”¹⁷ The proponent must be ready to prove that “the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement.”¹⁸ Analysis of crimes should also consciously regard the narrowing policy behind the amendment to FRE 609(a)(2).¹⁹ Precisely because *crimen falsi* convictions must be automatically admitted, these categories of crimes must be narrowly construed to avoid “swallowing up” the more restrictive admissibility rules for non-*crimina falsi* under FRE 609(a)(1).²⁰

Federal and military courts have for the most part consistently identified the facially-evident *crimen falsi* offenses.²¹ But as the 2006 Advisory Committee explicitly recognized,²² some crimes may not facially be *crimina falsi* but may, nonetheless, fall under this category because they require “proof or admission of an act of dishonesty or false statement.”²³ These crimes are “in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the propensity to testify truthfully.”²⁴ As the Committee notes, “Evidence in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged.”²⁵ Sorting out those qualifying crimes that are not facially *crimina falsi* is what could be called the second layer of analysis. As one commentator explains, even if the statutory elements of the conviction at issue do

WEINSTEIN] (“The Advisory Committee [to the 1990 amendments to FRE 609] chided courts that admitted convictions ‘such as bank robbery or bank larceny’ for taking an unduly broad view of ‘dishonesty.’”). *Id.*

¹² As the Notes to the Advisory Committee for the 2006 amendment state, other than crimes containing an element of dishonesty or false statement, “Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

¹³ MILITARY RULES OF EVIDENCE MANUAL § 609.02 (25th ed. 2006) [hereinafter MRE MANUAL]. Military Rule of Evidence 403 provides that, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MCM, *supra* note 6, MIL. R. EVID. 403 (2008).

¹⁴ WEINSTEIN, *supra* note 11, § 609.04(2)(b).

¹⁵ *Id.* § 609.04(3)(a).

¹⁶ *United States v. Cantu*, 22 M.J. 819, 823–24 (N.M.C.M.R. 1986). *But see United States v. Lee*, 48 M.J. 756, 759 (Army Ct. Crim. App. 1998) (declining to adopt a rule that “categorically includes or excludes bribery as an instance of misconduct that is clearly probative of truthfulness or untruthfulness”). *Id.* at 759.

¹⁷ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes); *see also* WEINSTEIN, *supra* note 11, § 609.04(3)(a) n.13.

¹⁸ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

¹⁹ STEPHEN. A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL R. 609, at 9 (2006) (Commentary to 2006 Committee Notes).

²⁰ *Id.* Under FRE 609(a)(1), a conviction for a crime punishable by death or over one year confinement is admissible for impeachment purposes, subject to the appropriate balancing test as specified in the rule. For a witness other than the accused, the balancing test under FRE 403 must be applied. When the accused is the witness, the conviction is admissible only if the probative value of the evidence outweighs its prejudicial effect. FED. R. EVID 609 (a)(1). Military Rule of Evidence 609(a)(1) is identical to the federal rule, except it also expands the eligible types of convictions to those punishable by a dishonorable discharge. MCM, *supra* note 6, MIL. R. EVID. 609(a)(1).

²¹ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes). *See also United States v. Williams*, 642 F.2d 136 (5th Cir. 1981) (conviction for bribery); *United States v. Kuecker*, 740 F.2d 496 (7th Cir. 1984) (conviction for mail fraud); *United States v. Payton*, 159 F.3d 49 (2d. Cir. 1998) (conviction for false statement to government official under oath); *United States v. Williams*, 2003 CCA LEXIS 141 (A.F. Ct. Crim. App. 2003) (conviction for uttering a worthless check with intent to defraud).

²² FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

²³ *Id.* FED. R. EVID. 609(a)(2).

²⁴ *Id.* FED. R. EVID. R. 609, at 7 (emphasis added).

²⁵ *Id.*

not include “dishonesty or false statement,” the underlying crime will still fall under FRE 609(a)(2) “if the government has to prove deceit or dishonesty to obtain the conviction.”²⁶

The 2006 Advisory Committee’s own example illustrates the subtlety of this analysis. The Committee explains that a conviction for “making a false claim to a federal agent” could be admissible as a *crimen falsi* conviction, regardless of whether the crime was charged under 18 U.S.C. § 1001,²⁷ Material Misrepresentation to the Federal Government, or under 18 U.S.C. § 1503,²⁸ Influencing or Injuring Office or Juror Generally (or “Obstruction of Justice”).²⁹ Whereas 18 U.S.C. § 1001 “expressly references deceit,” 18 U.S.C. § 1503 does not.³⁰

²⁶ WEINSTEIN, *supra* note 11, § 609.04(2)(b).

²⁷ 18 U.S.C. § 1001 (2006) provides in relevant part:

Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism . . . imprisoned not more than 8 years, or both.

Id. § 1001.

²⁸ *Id.* § 1503 provides in relevant part:

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

Id. § 1503.

²⁹ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

³⁰ *Id.*

Obstruction of justice, which statutorily involves influencing, intimidating, or impeding a witness either corruptly or by the use of threats,³¹ does not necessarily always involve “dishonesty or false statement.” But in the Committee’s example, *crimen falsi* admissibility would turn on whether the *elements* of obstruction of justice under the circumstances at issue required proof of dishonesty or false statement—in this case, making a false claim to a federal agent. Courts have taken a similar view of this crime.³²

As the Advisory Committee’s own example shows, courts may encounter practical difficulty in applying the new MRE 609(a)(2). Courts should no longer look *beyond* an offense at the factual circumstances surrounding its commission to determine whether it qualifies as *crimen falsi*. Clearly, however, courts must still look *behind* the plain language of the crime to determine whether the elements required “proof or admission of an act of dishonesty or false statement.” As the Committee explains, “where the deceitful nature of the crime is not apparent from the statute and face of the judgment,” a proponent may offer “information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted.”³³ At the same time, the inquiry must be reasonably limited. As the Committee states, “[T]he amendment does not contemplate a ‘mini-trial’ in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.”³⁴ A practical approach may help clarify the analysis: If the facts of deceit were removed and the accused could still be convicted of the offense, the offense is not *crimen falsi*—the prosecutor did not have to prove that the accused acted deceitfully in order to sustain the conviction.

B. An Example: Analysis of an Article 134 Offense

Because it is not always obvious when a conviction falls under *crimen falsi*, it may be helpful to analyze a current military crime. A conviction for the Article 134, UCMJ, offense of “wearing [an] unauthorized insignia, decoration, badge, ribbon, device, or lapel button” requires proof that the accused “wore a certain insignia . . . [or other military item] upon [his] uniform or civilian clothing”; that he was “not authorized to wear the item”; that the “wearing was

³¹ 18 U.S.C. § 1503.

³² *Id.* § 1503 (Interpretive Notes and Decisions) (“18 U.S.C.S. § 1503 makes unlawful any act, committed corruptly, in endeavor to impede or obstruct due administration of justice, and proper criterion to apply to acts is their reasonable tendency to obstruct *honest and fair administration of justice*.”) (emphasis added); see also *Courtney v. United States*, 390 F.2d 521 (9th Cir. 1968).

³³ FED. R. EVID. R. 609, at 7 (U.S.C.S. 2010) (2006 Committee Notes).

³⁴ *Id.*

wrongful”; and that, “under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.”³⁵ Facially, this offense involves no element of deceit inherent in a traditional *crimen falsi* offense. But it is a closer question as to whether this offense is “in the nature of *crimen falsi*.” Whether this offense requires “proof or admission of an act of dishonesty or false statement” should turn on the meaning of “wrongful.” Arguably, wearing an award on a dress uniform is making a statement (e.g., “I earned a Bronze Star.”). “Wrongful” in this instance means a deliberate, as opposed to merely negligent, act. Wearing an improper award could therefore plausibly constitute a “false statement” for purposes of MRE 609(a)(2) admissibility. Recall that the 2006 FRE Advisory Committee, by its remarks, intended for FRE 609(a)(2) to include crimes “the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness’s] propensity to testify truthfully.”³⁶

As this example illustrates, the lines are not clearly drawn for offenses not historically recognized as *crimen falsi*. Admissibility under MRE 609(a)(2) must be weighed on a case-by-case basis, particularly for Article 134 offenses. Appendix 1 of this article offers a running list of potential *crimen falsi* offenses under the UCMJ, by applying the analysis described above.

C. Application in the Military Courts

One tricky area for military (and, analogously, federal) courts is the interplay between impeachment using *crimen falsi* convictions under MRE 609(a)(2) and specific instances of conduct under MRE 608(b).³⁷ For example, the Army Court of Criminal Appeals in *United States v. Lee*³⁸ weighed the admissibility for impeachment purposes of specific *conduct* that was allegedly indicative of attempted bribery, by reference to a federal case, *United States v. Hurst*.³⁹ *Hurst* had weighed the admissibility for

³⁵ MCM, *supra* note 6, pt. IV, ¶ 113.

³⁶ MRE MANUAL, *supra* note 13, § 609.02.

³⁷ Military Rule of Evidence 608(b), which is identical to the federal Rule, states in pertinent part:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . .

MCM, *supra* note 6, MIL. R. EVID. 608(b).

³⁸ *United States v. Lee*, 48 M.J. 756 (A. Ct. Crim. App. 1998).

³⁹ *United States v. Hurst*, 951 F.2d 1490 (6th Cir. 1991).

impeachment purposes of a *conviction* for obstruction of justice, in which the defendant tried to bribe a police officer to falsify a document. The *Lee* court noted approvingly that in *Hurst* “the government was not bound by the nomenclature of the offense (obstruction of justice) and was permitted to cross-examine the defendant with details of the *conduct* (bribery) that was probative of truthfulness or untruthfulness.”⁴⁰ As *Lee* recounts, *Hurst* found that the lower trial judge acted within his discretion when he concluded that the conduct was probative of veracity because “the conduct was not merely bribery . . . but subornation of perjury.”⁴¹

In other words, the *Lee* court found *Hurst*'s “flexible approach”⁴² of looking at the underlying conduct appropriate because it examined specific acts, not a conviction. While this approach probably would have squared with the old version of MRE 609(a)(2),⁴³ it would *not* be appropriate when analyzing convictions under the new version of MRE 609(a)(2), which requires an examination of the underlying elements, not conduct. The distinction between a conduct-based and elemental analysis may seem like mere semantics, but military courts must recognize that the new MRE 609(a)(2) changes the method of analysis. Courts run the risk of mixing standards of admissibility when they cross-reference convictions and specific instances of conduct.⁴⁴

III. A Practitioner’s Checklist for Analyzing *Crimen Falsi* Convictions

Although *crimen falsi* convictions are not the only admissible convictions for impeaching a witness, they are the only *automatically* admissible convictions. They are therefore the practitioner’s first resort when looking to use a conviction for impeachment. This section offers a step-by-step guide for analyzing potential *crimen falsi* convictions.⁴⁵ Appendix 2 presents these steps as a flow chart.

⁴⁰ *Lee*, 48 M.J. at 759 (emphasis in original).

⁴¹ *Id.* (quoting *Hurst*, 951 F.2d at 1501) (internal quotation marks omitted).

⁴² *Id.*

⁴³ Military Rule of Evidence 609(a)(2), like its federal counterpart before the 2006 revision, previously mandated admission of a crime merely if it “involved dishonesty or false statement,” with no reference to the elements of the crime. See *supra* note 8.

⁴⁴ Although federal court opinions have wrestled with the interplay of Rules 608 and 609 more frequently than military courts, they have yet to entirely resolve the issue. See, e.g., *United States v. Osazuwa*, 564 F.3d 1169, 1173 (9th Cir. 2009) (considering whether the plain language of FRE 608 delegates any issues relating to convictions to FRE 609, or rather whether FRE 608 allows extrinsic evidence to be used to prove criminal convictions, and noting that in a survey of 300 federal district judges, opinions were nearly evenly divided on this issue). The Ninth Circuit in *Osazuwa* ultimately held that “evidence relating to a prior conviction is not admissible under Rule 608,” and that “evidence admissible under Rule 609 for impeachment purposes may not include collateral details of the crime of conviction.” *Id.* at 1177.

⁴⁵ See also ADVOCACY TRAINER, *supra* note 1, at D-3-1.

The threshold question for MRE 609(a)(2) admissibility is, is it a conviction? For purposes of MRE 609, a conviction exists when a sentence has been adjudged.⁴⁶ A conviction does not include non-judicial punishment.⁴⁷ A summary court-martial finding constitutes a conviction only if the accused was represented by counsel, or affirmatively waived representation by counsel.⁴⁸ And for trials not presided over by a military judge (such as a “straight” special court-martial), a conviction exists only when reviews under Articles 64 and 66 of the UCMJ are complete.⁴⁹

The second question for admissibility is whether the offense for which the witness was convicted requires “proof or admission of an act of dishonesty or false statement.”⁵⁰ Note that this determination is a federal question, regardless of whether the conviction was secured in federal or state court.⁵¹ The proponent of the evidence has the burden of demonstration.⁵² The proponent should first look to the elements of the crime as defined by the underlying statute. If the outcome is not obvious, the proponent should look to whether the government has to prove deceit or dishonesty to obtain the conviction. It may be helpful to ask the question posed earlier in this article: If the facts were removed as to whether the accused acted deceitfully, could he still have been convicted of the offense at issue?

By a plain reading of MRE 609, *crimen falsi* convictions should be automatically admitted unless a specific restriction in the rule applies. A conviction more than ten years old, for example, is not admissible unless the court determines, “in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect.”⁵³ Convictions are not admissible that have been the subject of a “pardon, annulment, certificate of rehabilitation, or other equivalent procedure”⁵⁴ And, finally, juvenile adjudications are not admissible unless the military judge decides that admission is “necessary for a fair determination of the issue of guilt or innocence.”⁵⁵

⁴⁶ MCM, *supra* note 6, MIL. R. EVID. 609(f).

⁴⁷ United States v. Brown, 23 M.J. 149, 150 (C.M.A. 1987); ADVOCACY TRAINER, *supra* note 1, at D-3-3.

⁴⁸ ADVOCACY TRAINER, *supra* note 1, at D-3-3; *see also* United States v. Rogers, 17 M.J. 990, 992 (C.M.R. 1984).

⁴⁹ *See* UCMJ arts. 64, 66 (2008).

⁵⁰ FED. R. EVID. 609(a)(2).

⁵¹ WEINSTEIN, *supra* note 11, § 609.04(2)(a) (citing United States v. Cameron, 814 F.2d 403, 405 (7th Cir. 1987)).

⁵² *Id.* § 609.04(2)(a) (citing United States v. Papi, 560 F.2d 827, 845-848 (7th Cir. 1977)).

⁵³ MCM, *supra* note 6, MIL. R. EVID. 609(b).

⁵⁴ *Id.* MIL. R. EVID. 609(c).

⁵⁵ *Id.* MIL. R. EVID. 609(d).

Even for admissible *crimen falsi* convictions, military and federal courts limit what specific information about the conviction is admissible in court. Cross-examination of a witness is normally the preferred method for inquiring about a previous conviction.⁵⁶ This cross-examination, however, should be limited to ascertaining the number, date, and nature of each previous conviction.⁵⁷ Greater latitude in cross-examination may be granted if the witness tries to minimize his guilt regarding the prior conviction.⁵⁸ A conviction may also be proved by extrinsic evidence, such as a record of the conviction.⁵⁹ Finally, as a last resort, a prior conviction may be introduced by the testimony of a witness who was present for the announcement of the judgment.⁶⁰

If a conviction does not constitute *crimen falsi* under MRE 609(a)(2), the practitioner should next consider its admissibility under MRE 609(a)(1), subject to the balancing requirements of that rule.⁶¹ And even if no conviction is admissible, specific instances of conduct may be admissible under MRE 608(b).⁶²

IV. Conclusion

The practical effect of the revised MRE 609(a)(2) is to narrow the ability of courts to interpret the underlying facts of *crimen falsi* convictions. But since most UCMJ convictions also qualify for consideration under MRE 609(a)(1), courts still enjoy relatively wide discretion to weigh their admissibility. The recent revisions to FRE 609(a)(2) and MRE 609(a)(2) seem to be a positive step toward limiting the prejudicial effect of automatically admissible convictions, for both witnesses and the accused. Only time and experience will show whether this narrower

⁵⁶ Moody & Coacher, *supra* note 6, at 173. *But see* MCM, *supra* note 6, MIL. R. EVID. analysis, at A22-47 (2008) (“While the language of Rule 609(a) refers only to cross-examination, it would appear that the Rule does refer to direct examination as well.”).

⁵⁷ Moody & Coacher, *supra* note 6, at 173 (citing United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983)); *see also* MRE MANUAL, *supra* note 13, § 609.02(2)(a).

⁵⁸ Moody & Coacher, *supra* note 6, at 174 (citing United States v. Ledford, 1997 U.S. App. LEXIS 29167, at *10 (6th Cir. Tenn. 1997)).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ MCM, *supra* note 6, MIL. R. EVID. 609(a)(1). *See supra* note 20 (discussing the analogous Federal Rule).

⁶² MCM, *supra* note 6, MIL. R. EVID. 608(b) (2008). This rule may only be used, however, to inquire into the underlying conduct, not to prove up an otherwise inadmissible conviction or punishment. *See* United States v. Wilson, 12 M.J. 652, 654 (C.M.R. 1981) (“Evidence of a conviction by summary court-martial or punishment under Article 15 that is inadmissible for impeachment under MRE 609 cannot be elicited from a witness (including the accused) under MRE 608.”); *see also* United States v. Osazuwa, 564 F.3d 1169, 1174 (“We further recognize the unfairness that would result if evidence relating to a conviction is prohibited by Rule 609 but admitted through the ‘back door’ of Rule 608.”).

doorway is labeled clearly enough to guide the courts and practitioners that pass through it.

Appendix A

Crimen Falsi Offenses Under the UCMJ

CF 1: Refers to crimes that are well-established as *crimen falsi*, either because of widely-held judicial recognition or by the facial elements of the crime itself.

Y: The crime is well-established as *crimen falsi*.

N: The crime is not well-established as *crimen falsi*.

CF 2: Refers to all other crimes that are not well-established or facially recognizable as *crimen falsi*. For these crimes:

Y: Military and/or federal courts have previously admitted this crime or an analogous crime as *crimen falsi*.

N: Military and/or federal courts have specifically declined to admit this crime or an analogous crime as *crimen falsi*.

UNK: There is no known federal or military court ruling on *crimen falsi* admissibility of this crime.

Art.	Description	CF 1	CF 2	Notes
78	Accessory after-the-fact	N	UNK	
79	Lesser included offenses	--	--	Not applicable; see underlying crime.
80	Attempts	--	--	See underlying crime.
81	Conspiracy	N	UNK	
82	Solicitation	N	UNK	
83	Fraudulent enlistment, appointment, or separation	Y	UNK	Requires knowingly false representation.
84	Effecting unlawful enlistment, appointment, or separation	N	UNK	Likely <i>crimen falsi</i> ; requires knowing misrepresentation
85	Desertion	N	UNK	Likely not <i>crimen falsi</i> .
86	Absence without leave	N	UNK	Likely not <i>crimen falsi</i> .
87	Missing movement	N	UNK	Likely not <i>crimen falsi</i> .
88	Contempt toward officials	N	UNK	Likely not <i>crimen falsi</i> .
89	Disrespect toward a superior commissioned officer	N	UNK	Likely not <i>crimen falsi</i> .
90	Assaulting or willfully disobeying a superior commissioned officer	N	UNK	Likely not <i>crimen falsi</i> .
91	Insubordinate conduct toward warrant officer, NCO, petty officer	N	UNK	Likely not <i>crimen falsi</i> .
92	Failure to obey order or regulation	N	UNK	Likely not <i>crimen falsi</i> .
93	Cruelty and maltreatment	N	UNK	Likely not <i>crimen falsi</i> .
94	Mutiny and sedition	N	UNK	Likely not <i>crimen falsi</i> .
95	Resistance, flight, breach of arrest, and escape	N	UNK	Likely not <i>crimen falsi</i> .
96	Releasing prisoner without proper authority	N	UNK	Likely not <i>crimen falsi</i> .
97	Unlawful detention	N	UNK	Likely not <i>crimen falsi</i> .
98	Noncompliance with procedural rules	N	UNK	Likely not <i>crimen falsi</i> .
99	Misbehavior before the enemy	N	UNK	Likely not <i>crimen falsi</i> .
100	Subordinate compelling surrender	N	UNK	Likely not <i>crimen falsi</i> .
101	Improper use of countersign	N	UNK	Likely not <i>crimen falsi</i> .
102	Forcing a safeguard	N	UNK	Likely not <i>crimen falsi</i> .
103	Captured or abandoned property	N	UNK	Likely not <i>crimen falsi</i> .
104	Aiding the enemy	N	UNK	Likely not <i>crimen falsi</i> .
105	Misconduct as a prisoner	N	UNK	Likely not <i>crimen falsi</i> .
106	Spies	N	UNK	Likely not <i>crimen falsi</i> .
106a	Espionage	N	UNK	Likely not <i>crimen falsi</i> .
107	False official statements	Y	Y	Elements require intent to deceive.
108	Sale, loss, damage, destruction, wrongful disposit. of mil. property	N	UNK	Likely not <i>crimen falsi</i> .
109	Waste, spoilage, destruction of non-	N	UNK	Likely not <i>crimen falsi</i> .

	military property			
110	Improper hazarding of vessel	N	UNK	Likely not <i>crimen falsi</i> .
111	Drunken or reckless operation of vehicle, aircraft, or vessel	N	UNK	Likely not <i>crimen falsi</i> .
112	Drunk on duty	N	UNK	Likely not <i>crimen falsi</i> .
112a	Wrongful use, possession, etc., of controlled substances	N	N	<i>See, e.g.</i> , U.S. v. Frazier, 14 M.J. 773 (1982) (marijuana technically not within concept of <i>crimen falsi</i>).
113	Misbehavior of sentinel or lookout	N	UNK	Likely not <i>crimen falsi</i> .
114	Dueling	N	UNK	Likely not <i>crimen falsi</i> .
115	Malingering	N	UNK	Arguably <i>crimen falsi</i> if feigned illness to intentionally avoid duty.
116	Riot or breach of peace	N	UNK	Likely not <i>crimen falsi</i> .
117	Provoking speeches or gestures	N	UNK	Likely not <i>crimen falsi</i> .
118	Murder	N	UNK	Likely not <i>crimen falsi</i> .
119	Manslaughter	N	UNK	Likely not <i>crimen falsi</i> .
119a	Death or injury of an unborn child	N	UNK	Likely not <i>crimen falsi</i> .
120	Rape, sexual assault, other misconduct	N	N	<i>See, e.g.</i> , Christmas v. Sanders, 759 F.2d 1984 (7th Cir. 1985) (upholding exclusion of rape); Foulk v. Charrier, 262 F.3d 687 (8th Cir. 2001) (upholding exclusion of rape, sodomy).
121	Larceny and wrongful appropriation	N	N	Federal courts divided, but most larcenies excluded. <i>See, e.g.</i> , United States v. Jefferson, 23 M.J. 17 (A.F.C.M.R. 1986) (upholding exclusion of shoplifting).
122	Robbery	N	N	Multiple federal circuits exclude robbery.
123	Forgery	Y	Y	Requires intent to defraud.
123a	Making, drawing, or uttering without sufficient funds	Y	Y	Requires knowing intent to defraud. <i>See, e.g.</i> , U.S. v. Williams, 2003 CCA LEXIS 141 (A.F.C.C.A. 2003).
124	Maiming	N	UNK	Likely not <i>crimen falsi</i> .
125	Sodomy	N	N	<i>See, e.g.</i> , Foulk v. Charrier, 262 F.3d 687 (8th Cir. 2001) (upholding exclusion of rape, sodomy).
126	Arson	N	UNK	Likely not <i>crimen falsi</i> .
127	Extortion	N	UNK	Likely not <i>crimen falsi</i> .
128	Assault	N	N	<i>See, e.g.</i> , Carlsen v. Javurek, 526 F.2d 202 (8th Cir. 1975) (upholding exclusion of assault and battery).
129	Burglary	N	N	Multiple federal circuits exclude burglary.
130	Housebreaking	N	UNK	Likely not <i>crimen falsi</i> .
131	Perjury	Y	Y	Requires willful falsehood.
132	Frauds against the United States	Y	UNK	Requires knowing false claim.
133	Conduct unbecoming an officer and a gentleman	N	UNK	Depends on elements of drafted offense.
134	General Article and following	N	UNK	Depends on elements of drafted offense.
134	Adultery	N	UNK	Likely not <i>crimen falsi</i> .
134	Assault with intent to commit specified crimes	N	UNK	Likely not <i>crimen falsi</i> .
134	Bigamy	N	UNK	Likely not <i>crimen falsi</i> .
134	Bribery and graft	Y	Y	<i>But see</i> U.S. v. Lee, 48 M.J. 756 (A. Ct. Crim. App. 1998)
134	Burning with intent to defraud	N	UNK	Likely not <i>crimen falsi</i> .
134	Worthless check by dishonorably failing to maintain funds.	N	N	Only knowingly uttered worthless checks are <i>crimen falsi</i> .
134	Child endangerment	N	UNK	Likely not <i>crimen falsi</i> .

134	Wrongful cohabitation	N	UNK	Likely not <i>crimen falsi</i> .
134	Correctional custody – offenses	N	UNK	Likely not <i>crimen falsi</i> .
134	Dishonorably failing to pay debt	N	UNK	Likely not <i>crimen falsi</i> .
134	Disloyal statements	N	UNK	Likely not <i>crimen falsi</i> .
134	Disorderly conduct	N	UNK	Likely not <i>crimen falsi</i> .
134	Drinking with prisoner, drunk prisoner	N	UNK	Likely not <i>crimen falsi</i> .
134	Drunkenness, incapacitated	N	UNK	Likely not <i>crimen falsi</i> .
134	False or unauthorized pass	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Obtaining serves by false pretenses	N	Y	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	False swearing	Y	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Negligently discharging firearm	N	UNK	Likely not <i>crimen falsi</i> .
134	Willfully discharging firearm to endanger human life	N	UNK	Likely not <i>crimen falsi</i> .
134	Fleeing scene of accident	N	UNK	Likely not <i>crimen falsi</i> .
134	Fraternization	N	UNK	Likely not <i>crimen falsi</i> .
134	Gambling with subordinate	N	UNK	Likely not <i>crimen falsi</i> .
134	Negligent homicide	N	UNK	Likely not <i>crimen falsi</i> .
134	Impersonating an officer	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Indecent language	N	UNK	Likely not <i>crimen falsi</i> .
134	Jumping from vessel into water	N	UNK	Likely not <i>crimen falsi</i> .
134	Kidnapping	N	UNK	Likely not <i>crimen falsi</i> .
134	Opening, destroying mail	N	UNK	Likely not <i>crimen falsi</i> .
134	Obscene matters in the mail	N	UNK	Likely not <i>crimen falsi</i> .
134	Misprision of serious offense	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Obstructing justice	N	Y	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Wrongful interference with adverse admin proceeding	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Pandering and prostitution	N	UNK	Likely not <i>crimen falsi</i> .
134	Violation of parole	N	UNK	Likely not <i>crimen falsi</i> .
134	Subornation of perjury	Y	UNK	<i>Crimen falsi</i> .
134	Altering public record.	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.
134	Breaking medical quarantine	N	UNK	Likely not <i>crimen falsi</i> .
134	Reckless endangerment	N	UNK	Likely not <i>crimen falsi</i> .
134	Breaking restriction	N	UNK	Likely not <i>crimen falsi</i> .
134	Removal of property to prevent seizure	N	UNK	Likely not <i>crimen falsi</i> .
134	Self-injury without intent to avoid service	N	UNK	Likely not <i>crimen falsi</i> .
134	Offenses by sentinel	N	UNK	Likely not <i>crimen falsi</i> .
134	Soliciting another to commit offense	N	UNK	Likely not <i>crimen falsi</i> .
134	Receiving, etc. stolen property	N	UNK	Likely not <i>crimen falsi</i> .
134	Straggling	N	UNK	Likely not <i>crimen falsi</i> .
134	Wrongful refusal to testify	N	UNK	Likely not <i>crimen falsi</i> .
134	Threat or hoax	N	UNK	Likely not <i>crimen falsi</i> .
134	Communicating threat	N	UNK	Likely not <i>crimen falsi</i> .
134	Wrongful entry	N	UNK	Likely not <i>crimen falsi</i> .
134	Carrying concealed weapon	N	UNK	Likely not <i>crimen falsi</i> .
134	Wearing unauthorized badge, insignia, etc.	N	UNK	<i>Crimen falsi</i> if involves dishonesty or false statement.

Appendix B

Analyzing *Crimen Falsi* Convictions

