Recent Developments in the Substantive Criminal Law Under the Uniform Code of Military Justice

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Introduction

In a typical year, the military appellate courts[1] will grapple with issues relating to the substantive criminal law in a substantial portion of their reported opinions.[2] The past year was no different; in 1996, the military appellate courts considered issues involving crimes and defenses in almost one-third of all their reported decisions.[3] This high level of activity by the military courts in the substantive criminal law is generally consistent over time[4] and reflects the fundamental importance of issues involving the judicial determination of what conduct is criminal and thereby subject to punishment.[5]

This article analyzes selected recent decisions by the military appellate courts in this area of the law. Not every recent case is discussed; only those developments that resolve or create uncertainties in the law are considered.[6] To the extent possible, the practical ramifications for the practitioner in the field are identified and discussed. The article reflects the major divisions of the substantive criminal law; I will first consider inchoate offenses,[7] and then examine crimes against persons,[8] property,[9] and military order.[10] The article concludes with a review of new developments in the law of defenses.[11]

Inchoate Offenses

Attempted Conspiracy

In *United States v. Anzalone*,[12] the Court of Appeals for the Armed Forces (CAAF) held that "the UCMJ does not prohibit

1. On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Court of Military Appeals and Courts of Military Review to the United States Court of Appeals for the Armed Forces and Courts of Criminal Appeals, respectively. For the purpose of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision. *See* United States v. Loving, 41 M.J. 213, 229 n.* (C.M.A. 1994), *aff'd*, 116 S. Ct. 1737 (1996).

2. For example, almost 44% of the 694 reported decisions by the military appellate courts from 1993 until 1995 dealt with substantive criminal law issues.

3. At the time of the writing of this article, there were 130 reported decisions of the military appellate courts that were decided in 1996 *and* available on electronic databases; 42 involved issues of substantive criminal law.

4. From 1991-95, just over 30% of the reported decisions of the military appellate courts involved issues of substantive criminal law. The service courts remain slightly more likely than the Court of Appeals for the Armed Forces (CAAF) to address these issues; in 1996, 34% of service court opinions contained substantive criminal law issues, while 30% of CAAF opinions dealt with similar issues. This difference between the tiers of the military appellate courts is steadily diminishing. For example, the service courts in 1993 considered issues relating to substantive criminal law in 67% of their published opinions, while the Court of Military Appeals (COMA) dealt with similar issues in just 34% of their published opinions. By comparison, the service courts in 1996 dealt with these issues in 34% of their published opinions, a level very close to the 30% of all published CAAF opinions that tackled issues relating to crimes and defenses during the same period.

5. The proportion of all reported opinions containing issues of substantive criminal law has been even higher in recent years; in 1995, 47% of all published opinions by the military appellate courts contained substantive criminal law issues, while in 1996, this percentage dropped to 32%.

6. Since 1993, the CAAF has published more opinions each year than all those published by the service courts combined. As such, and in the interest of academic economy, this article will focus upon decisions of the CAAF rather than those of the service courts. However, only 66 opinions by the CAAF decided in 1996 were available in either official reporters or electronic databases at the time this article was written. While 20 of those decisions dealt with substantive criminal law issues, seven were actually concerned with the specific issue of whether the military judge had elicited sufficient factual basis for a guilty plea. Given the limited precedential value of such opinions, *see, e.g.*, United States v. Byrd, 24 M.J. 286, 293 (C.M.A. 1987) (Cox, J., concurring in the result) (expressing "reservations about making law on a guilty-plea record"), this article will focus instead upon issues arising in contested cases reviewed by the CAAF.

7. *See infra* notes 12-43 and accompanying text.

8. *See infra* notes 44-103 and accompanying text.

9. *See infra* notes 104-128 and accompanying text.

10. *See infra* notes 129-185 and accompanying text.

11. *See infra* notes 186-250 and accompanying text.

12. 43 M.J. 322 (1995).

a charge of attempted conspiracy where there is a purported agreement between a service member and an undercover government agent to commit an offense."[13] The court disagreed, however, as to the legal basis for such an offense. Judge Crawford and the late Judge Wiss agreed that a person who purposely engages in conduct that would constitute a conspiracy if the attendant circumstances were as that person believed them to be is guilty of an attempted conspiracy;[14] the fact that an actual conspiracy between Anzalone and the undercover agent was impossible did not therefore preclude a conviction for attempted conspiracy because "in his own mind the accused thought there was an agreement."[15] Judge Gierke, joined by Judge Cox, concurred in the result, but asserted "doubts whether there is such a crime as attempted conspiracy."[16] Judge Sullivan wrote separately concurring in the result, but asserted that "[a] plain reading of the applicable statutes furnishes the answer in this case."[17] He observed that Article 80, UCMJ, prohibits attempts to commit *any* offense punishable under the Code; since conspiracy is an offense punishable under Article 81, UCMJ, attempted conspiracy is therefore an offense prohibited by operation of Article 80, UCMJ.[18] Thus, no single theory concerning the basis for this double inchoate offense enjoyed the support of a majority of the CAAF after *Anzalone*.

The opinion of the court in *United States v. Riddle*[19] added some certainty to this area of the law. In *Riddle*, a majority of the CAAF held that attempted conspiracy is an offense under the UCMJ and adopted the textualist rationale advanced by Judge Sullivan in *Anzalone*.[20] Judge Sullivan, also writing for the majority in *Riddle*, refined the reasoning from his opinion concurring in the result in *Anzalone* and offered three points in support of his conclusion that attempted conspiracy is an offense under military law. He wrote as follows:

> Clearly, the language of [Article 80, UCMJ] is broad and makes no distinction between a conspiracy or other inchoate offense and any other type of military offense as the lawful subject of an attempt offense. In addition, no other statute or case law from this court precludes application of Article 80 to a conspiracy offense as prohibited in Article 81. Finally, conviction of an attempt under Article 80 is particularly appropriate where there is no general solicitation statute in the jurisdiction or a conspiracy statute embodying the unilateral theory of conspiracy. Accordingly, we reject appellant's argument that he was not found guilty of a crime under the Uniform Code of Military Justice.[21]

Chief Judge Cox and Judge Gierke both dissented on this issue.[22] Chief Judge Cox asserted that attempted conspiracy is a "nonsensical charge" that confuses the law of conspiracy,[23] while Judge Gierke simply restated his position from *Anzalone* that "there is no such crime as attempted conspiracy."[24]

The *Riddle* decision has a number of practical ramifications for the practitioner in the field. By grounding the offense of attempted conspiracy in the text of Article 80, UCMJ, the CAAF expands the potential applicability of the offense to situations other than those where there is a purported agreement between a service member and an undercover government agent to commit an offense.[25] Likewise, the textualist rationale

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13. *Id.* at 323.

14. *See* MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 4.c.(3) (1995 ed.) [hereinafter MCM]; *Anzalone*, 43 M.J. at 325, 328.

15. *Anzalone*, 43 M.J. at 325.

16. *Id.* at 326.

17. *Id.* at 327.

18. *Id.*

19. 44 M.J. 282 (1996).

20. *Id*. at 284-85. The CAAF also held that the evidence sufficiently established the accused's intent to conspire with his putative wife to steal military pay entitlements and to make false official statements. The evidence supported accused's convictions of attempting to conspire to commit larceny and attempting to make false official statements, even if the accused was legally married by virtue of a subsequently obtained state judicial decree. The investigator had testified that both the accused and his putative wife admitted during the initial investigation that they were not married, and the wife had admitted that the accused "doctored" her brother's marriage certificate to produce a phony certificate to secure increased pay entitlements, which was evidence of the accused's knowledge that pay entitlements could not be paid without a marriage certificate or license. *Id*. at 285-87.

21. *Id.* at 285 (citations omitted). Judge Sullivan asserts that "[t]here is no general solicitation statute in the military," but then cites the *Manual for Courts-Martial* provision describing the offense arising under Article 134, UCMJ, of soliciting another to commit an offense. *Id.* at 285 n.* (citations omitted).

22. *See id*. at 287-89.

23. *Id.* at 288-89 (Cox, C.J., concurring in part and dissenting in part).

24. *Id.* at 289 (Gierke, J., concurring in part and dissenting in part).

of the majority would also appear to open the door to other double inchoate offenses such as attempted solicitation: "Clearly, the language of [Article 80, UCMJ] is broad and makes no distinction between a conspiracy *or other inchoate offense* and any other type of military offense as the lawful subject of an attempt offense."[26] In sum, the court in *Riddle* expands the universe of conduct by soldiers that may constitute an inchoate offense under the UCMJ.[27]

Trial counsel and military justice supervisors should nevertheless exercise restraint in charging the offense of attempted conspiracy. The legal recognition of the offense by the CAAF does not make it any easier to explain to a trier of fact,[28] and most cases in which a trial counsel would be tempted to charge an attempted conspiracy could be more effectively presented as a solicitation.[29] The primary utility of a charge of attempted conspiracy will therefore be in those cases involving "a purported agreement between a service member and an undercover government agent to commit an offense."[30]

Riddle is unlikely to be the end of the debate concerning double inchoate crimes. The CAAF remains divided concerning the viability of these offenses[31] and it is not commonly known how Judge Efron stands on this issue. As such, defense counsel should continue to challenge these offenses at trial and on appeal until the *current* court rules on this issue. In any event, the defense should continue to attack such charges using conventional means; in cases not involving the doctrine of factual impossibility, the government must still establish beyond a reasonable doubt that the overt act by the accused went beyond mere preparation and was a direct movement toward the commission of the offense.[32] This may be a difficult hurdle for prosecutors to jump in the ethereal world of double inchoate offenses.

Attempted Escape, Conspiracy, and Principals

The juncture of the law of inchoate offenses and that of principals presents an intellectual challenge to counsel similar to that presented by double inchoate offenses; it is sometimes difficult to understand how one who does not perpetrate a criminal offense himself can be liable for an *attempt* to commit an offense by others. It is nevertheless well-settled that one who knowingly and willfully participates in an attempt to commit an offense, and does so in a manner that indicates an intent to make the attempt succeed, is a principal.[33] The issue often encountered in these uncommon cases is whether there was sufficient evidence of knowing and willful participation by the accused that at least encourages the perpetrator to commit the offense.[34] The infrequency of reported decisions in this area makes every new case concerning aider or abettor liability for an attempt by another an important one.

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25. *Cf.* United States v. Anzalone, 43 M.J. 322, 323 (1995) (holding that "the UCMJ does not prohibit a charge of attempted conspiracy where there is a purported agreement between a service member and an undercover government agent to commit an offense").

26. United States v. Riddle, 44 M.J. 282, 285 (1996) (citations omitted); *cf.* MCM, *supra* note 14, pt. IV, para. 105.d. (describing attempts in violation of Article 80, UCMJ, as a lesser-included offense of soliciting another to commit an offense). *But cf.* United States v. Anzalone, 41 M.J. 142, 147 (C.M.A. 1994) (citing with approval authorities that posit there can be no attempt to commit an attempt offense).

27. In his opinion in *Riddle*, Chief Judge Cox asks whether "we will soon be seeing charges of conspiring to attempt to conspire to commit an offense--to be followed by attempting to conspire to attempt to conspire to commit an offense, *ad infinitum*?" *Riddle*, 44 M.J. at 289 (Cox, C.J., concurring in part and dissenting in part).

28. *Cf. id.* (Cox, C.J., concurring in part and dissenting in part) (calling the charge of attempted conspiracy "nonsensical").

29. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 2 SUBSTANTIVE CRIMINAL LAW § 6.1(b), at 6 (1986) [hereinafter LAFAVE & SCOTT], *cited in* United States v. Anzalone, 43 M.J. 322, 326 (1995) (Gierke, J., concurring in the result). One reason counsel might prefer to charge an offense as an attempted conspiracy rather than a solicitation is that the maximum punishment may be higher for the attempted conspiracy than for a solicitation. A soldier found guilty of solicitation arising under Article 134, UCMJ, "shall be subject to the maximum punishment authorized for the offense solicited or advised, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years." MCM, *supra* note 14, pt. IV, para. 105.e.

30. *See Anzalone*, 43 M.J. at 323; *cf.* United States v. Baker, 43 M.J. 736 (A.F. Ct. Crim. App. 1995) (holding that accused attempted to conspire to manufacture crack cocaine by agreeing with informant to manufacture crack cocaine, and by acting in furtherance of that agreement by purchasing the cocaine, discussing the need for one-third baking soda in the manufacturing process, indicating that he would be back, and leaving a portion of the drug with informant to complete the manufacturing process at a later time).

31. In *Riddle*, Judge Crawford joined the opinion of the court by Judge Sullivan, while Chief Judge Cox and Judge Gierke dissented with the majority's disposition of the attempted conspiracy offense.

32. *See* MCM, *supra* note 14, pt. IV, para. 4.c.(2). The difficulty in describing an attempted conspiracy in situations other than those involving the factually impossible conspiracy was pointed out by Chief Judge Cox in his opinion in *Riddle*: "How does one attempt to conspire? Since the essence of conspiracy is a criminal agreement, is it that one strains to reach an agreement with somebody, but fails?" *Riddle*, 44 M.J. at 288. This sardonic question could actually form the basis for closing argument by defense counsel in an appropriate case.

33. *See* United States v. Jones, 37 M.J. 459, 460-61 (C.M.A. 1993); United States v. Pritchett, 31 M.J. 213, 217 (C.M.A. 1990); MCM, *supra* note 14, pt. IV, para. 1.b.(2)(b).

34. *See Pritchett*, 31 M.J. at 216.

In *United States v. Davis*,[35] the CAAF considered whether the evidence was legally sufficient to establish that the accused conspired with two fellow inmates in the United States Disciplinary Barracks to escape and whether he subsequently aided or abetted their escape attempt.[36] At trial, a prison informant testified that he observed numerous unauthorized meetings between the accused and inmates Waldron and Goff and also noticed, during certain times when the three inmates were missing or unable to be located, that he heard strange noises coming from an off-limits area above the tier where the accused lived.[37] The informant further testified that when he confronted Davis with his suspicions concerning the escape, Davis implicitly acknowledged the plan to escape and showed the informant scratches on his body that may have been caused while working on the escape route.[38] Additional evidence in the record of trial revealed that shoeprints belonging to Davis were found in the tunnel and passageways used by Waldron and Goff for their attempted escape and that access to these tunnels and passageways was gained through a broken screen vent in the ceiling near Davis's cell.[39] Although Davis was eating in the prison mess hall during the escape attempt by Waldron and Goff, the CAAF found the evidence legally sufficient to establish that Davis "purposely associated with Waldron and Goff for the purpose of escaping from the disciplinary barracks . . . [and] voluntarily participated in Inmates Waldron and Goff's escape attempt."[40]

Davis is a useful reminder to counsel concerning at least two aspects of the law of inchoate offenses and the law of principals. As a fundamental matter, the decision reinforces the well-established rule that one need not be present at the scene of an attempted crime to be liable as a principal to the offense.[41] Moreover, the CAAF's opinion also shows us how easy it is to make the law of inchoate offenses and principals more difficult than needed. The reported decision makes no mention of the principle that a "conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it."[42] Likewise, it is important to remember that "[a] principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design."[43] These principles of vicarious liability can, if applied in appropriate cases, greatly simplify the government's burden at trial and on appeal, but might be overlooked by inexperienced counsel relying exclusively upon the opinion in *Davis* for an exposition of the relevant law.

Conventional Offenses: Crimes Against Persons

Homicide: Distinguishing Premeditation and Intent to Kill

The Uniform Code of Military Justice (UCMJ) expressly prohibits seven forms of homicide,[44] including those murders committed by an accused with a premeditated design to kill[45] as well as those committed with an intent to kill or inflict great bodily harm upon a person.[46] These two offenses differ only in the mental state required of each,[47] a distinction that has been called "too vague and obscure for any jury to understand."[48] The CAAF nevertheless held in *United States v. Loving*[49] "that

35. 44 M.J. 13 (1996).

36. *Id.* at 17-18.

37. *Id.* at 18.

38. *Id.* at 17-18.

39. *Id.* at 19.

40. *Id.*

41. *See* MCM, *supra* note 14, pt. IV, para. 1.b.(3)(a).

42. *See id.*, pt. IV, para. 5.c.(5).

43. *See id.*, pt. IV, para. 1.b.(5).

44. *See* UCMJ arts. 118-19 (1988); *cf.* MCM, *supra* note 14, pt. IV, para. 85 (describing negligent homicide as an offense arising under UCMJ art. 134).

45. UCMJ art. 118(1) (1988).

46. UCMJ art. 118(2) (1988).

47. *Compare* MCM, *supra* note 14, pt. IV, para. 43.b.(1) *with id.* para. 43.b.(2).

48. LaFave & Scott, *supra* note 29, § 7.7(a), at 240-41 (citing Benjamin Cardozo, Law And Literature and Other Essays 99-100 (1931)); *cf.* United States v. Loving, 41 M.J. 213, 279 (1994) (considering whether requiring premeditation genuinely narrows the class of persons eligible for the death penalty), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

49. 41 M.J. 213 (1994), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

there is a meaningful distinction between premeditated and unpremeditated murder sufficient to pass constitutional muster."[50] The court reasoned that the offenses are distinct because premeditated murder requires proof of the element of a premeditated design to kill, an element not required for other forms of murder, and further observed that premeditation and its associated terms were "commonly employed . . . and are readily understandable by court members."[51]

In the aftermath of *Loving*, attention has shifted from litigating the constitutional significance of the distinction between the two offenses to the task of describing this distinction to the trier of fact.[52] The pattern instruction contained in the *Military Judges' Benchbook*[53] provides, in relevant part:

> The term "premeditated design to kill" means the formation of a specific intent to kill and the consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the killing.[54]

In *United States v. Eby,*[55] the defense requested that the military judge give this additional instruction:

> Having a premeditated design to kill requires that one with a cool mind did, in fact, reflect before killing. It has been suggested that, in order to find premeditation, you must find that AT1 Eby asked himself the question, "Shall I kill her?" The intent to kill aspect of the crime is found in the answer, "Yes, I shall." The deliberation part of the crime requires a thought like, "Wait, what about the consequences? Well, I'll do it anyway." Intent to kill alone is insufficient to sustain a conviction for premeditated murder.[56]

The military judge incorporated the substance of the first and last sentence of the requested instruction, but declined to adopt the remainder.[57] On appeal from his conviction for premeditated murder, Eby asserted that the military judge erred by refusing to give the relevant portion of the requested instruction;[58] the requested language had been cited with approval by the Court of Military Appeals (COMA) in *United States v. Hoskins*[59] and was taken from *Substantive Criminal Law*, a respected treatise by Professors Wayne LaFave and Austin Scott, Jr.[60]

The CAAF nevertheless concluded that the military judge did not abuse his discretion by refusing to give the requested instruction.[61] The unanimous opinion of the court emphasized "that no particular length of time is needed for premeditation, and no specific questions need be asked."[62] To the extent that the requested instruction implies such requirements, it "runs the risk of confusing . . . [or] misleading the jury."[63] As such, the military judge "correctly declined" to give the requested instruction.[64]

Decisions like those in *Loving* and *Eby* send an ambivalent message to the trial practitioner. On the one hand, the military

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50. *Id.* at 279-80. *But see infra* notes 65-67 and accompanying text.

51. *Loving*, 41 M.J. at 280 (citations omitted).

52. *See, e.g.*, United States v. Levell, 43 M.J. 847 (N.M.Ct.Crim.App. 1996) (considering the form of instructions to the trier of fact concerning premeditation).

53. DEP'T OF ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (30 Sept. 1996) [hereinafter BENCHBOOK].

54. *Id.* para. 3-43-1.d.

55. 44 M.J. 425 (1996).

56. *Id*. at 427; *cf. Levell*, 43 M.J. at 849-50 (considering denial of request for instruction that "the government must prove to you beyond a reasonable doubt that the killing was committed by the accused 'after reflection by a cool mind'").

57. *Eby*, 44 M.J. at 427-28.

58. *See id*. at 426.

59. 36 M.J. 343 (C.M.A. 1993).

60. *Eby*, 44 M.J. at 428.

61. *Id.*

62. *Id.*

63. *See id*.

64. *Id.*

appellate courts are vigorously asserting that "[t]here is critical distinction between a premeditated design to kill and an intent to kill."[65] However that may be, these same courts have repeatedly held that a military judge does not err by refusing to depart from a pattern instruction that could be said to minimize the difference between the two offenses,[66] even when the requested instruction is an accurate statement of the law.[67] This apparent inconsistency could be confusing unless two lessons from *Eby* are kept in mind.

As a threshold matter, the court reinforces the point that parties to courts-martial are *not* entitled to a requested instruction unless it is a correct statement of the law, necessary to address a matter not substantially covered in the standard instruction, and critical in that a failure to give the requested instruction would deprive the accused of a defense or seriously impair its effective presentation.[68] Being correct is not enough; counsel must also be prepared to demonstrate to the military judge that the requested instruction addresses matters not substantially covered in the pattern instruction and how the failure to give the requested instruction will seriously impair the effective presentation of a defense. In any event, military judges always have "substantial discretionary power in deciding on the instructions to give," and their decisions in this regard are reviewed only for an abuse of discretion.[69]

Eby also makes clear that material inappropriate as a requested instruction may, in some circumstances, be properly delivered as argument to the trier of fact.[70] For example, the court in *Eby* held that the military judge did not abuse his discretion by refusing to give the requested instruction, but also observed that the requested instruction "marshals questions that would be an appropriate vehicle for argument to the factfinders."[71] Such a rule, however, does not apply to requested instructions that are declined because they are *inaccurate* statements of the law, but instead applies only to those requested instructions that, while correct, were found by the military judge to be either unnecessary or inconsequential.[72]

Homicide: Premeditation and Heat of Passion

The scenarios that typically give rise to allegations of premeditated murder can occasionally raise the issue of whether the killing was done in the heat of sudden passion.[73] Evidence of this passion can be relevant to the charge in at least two ways: the passion may affect the ability of the accused to premeditate,[74] or it may place the lesser-included offense of voluntary manslaughter in issue.[75] If the military judge determines that either of these matters is in issue,[76] then "[t]he military judge shall give the members appropriate instructions on findings."[77]

The decision by the military judge that a matter is "in issue," as well as the form of any instruction ultimately given, are both subject, in appropriate circumstances, to appellate review.[78] Both these issues are considered in the latest CAAF opinion in *United States v. Curtis*.[79] The accused was charged with a vari-

65. United States v. Curtis, 44 M.J. 106, 147 (1996); United States v. Loving, 41 M.J. 213, 279 (describing the distinction as "meaningful"), *aff'd on other grounds*, 116 S. Ct. 1737 (1996).

66. For example, the pattern instruction concerning premeditation in the *Benchbook* does provide that premeditation requires "the formation of a specific intent to kill and the consideration of the act intended to bring about death," but then goes on to reduce the significance of this requirement by providing that "[t]he 'premeditated design to kill' does not have to exist for any measurable or particular length of time. The *only* requirement is that it must precede the killing." BENCHBOOK, *supra* note 53, para. 3-43-1.d. (emphasis added). No further explanation of premeditation or the critical distinction between premeditated and unpremeditated murder is provided.

67. *E.g.*, United States v. Levell, 43 M.J. 847, 851 (N.M.Ct.Crim.App. 1996) (holding military judge did not err in refusing to give "cool mind" instruction even though it "was not an incorrect statement of the law").

68. *See Eby*, 44 M.J. at 428 (observing defense not entitled to requested instruction unless "correct, necessary, and critical") (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 2760 (1994)).

69. 44 M.J. at 428 (citation omitted).

70. *Id.*

71. *Id.*; *But cf. Levell*, 43 M.J. at 852 (asserting without citation to authority that accused "was not free to use" the language from the requested instruction in argument).

72. *See supra* note 68 and accompanying text.

73. *E.g.*, United States v. Curtis, 44 M.J. 106 (1996). The *Benchbook* provides that "[p]assion means a degree of anger, rage, pain, or fear which prevents cool reflection." BENCHBOOK, *supra* note 53, para. 3-43-1.d., at 401 n.5; *cf.* MCM, *supra* note 14, pt. IV, para. 44.c.(1)(a) ("Heat of passion may result from fear or rage.").

74. BENCHBOOK, *supra* note 53, para. 3-43-1.d. n.5.

75. *Id.* n.6.

76. MCM, *supra* note 14, R.C.M. 920(e) discussion.

77. *Id.* at 920(a).

ety of offenses, including two specifications of premeditated murder in violation of Article 118(1), UCMJ.[80] At approximately midnight on 13 April 1987, the accused gained entry to the home of his supervisor, First Lieutenant James Lotz, by telling Lotz that "one of his friends needed help because he had been in an accident."[81] The accused had in his possession a knife with an eight-inch blade that he had stolen from the unit supply room earlier that evening.[82] The opinion of the court tells what happened next:

> When LT Lotz tried to telephone for help, appellant "plunged" the knife into Lotz' chest. Although at this time Lotz was still alive, this wound turned out to be the fatal injury because it punctured the victim's heart. LT Lotz struggled and picked up a chair to defend himself. Appellant then went around the chair and stabbed Lotz a second time. During this struggle, LT Lotz called for his wife, Joan. She appeared on the scene, ran up to her husband, and then turned to appellant and called out his name. She started kicking him, albeit with her bare feet. Then appellant stabbed her eight times, the fatal wound being a heart puncture. Appellant grabbed Joan by the legs as she was dying, pulled her toward him, "ripped off her panties," and fondled her genitalia.[83]

According to the court, "[t]he strategy of the defense both at trial and at sentencing was to present appellant as a young man adopted at age 2 1/2 and raised in a good Christian home whose dignity and self-worth had been systematically destroyed by LT Lotz' racist treatment of him."[84] In light of this defense, the military judge gave a tailored instruction on voluntary manslaughter as to the killing of Lieutenant Lotz; no such instruction was given with regard to the killing of Ms. Lotz.[85] The accused was convicted of the premeditated murder of both victims, sentenced to death, and the convening authority approved the sentence.[86] On appeal, the accused alleged that the military judge erred by failing to instruct the members on voluntary manslaughter with regard to the killing of Ms. Lotz.[87] The defense apparently asserted that the rage that the accused testified that he possessed toward Lieutenant Lotz could be transferred to Ms. Lotz, thereby justifying an instruction on voluntary manslaughter for the killing of *each* victim.[88] The CAAF held that no such instruction was required, reasoning that "[i]n this instance, there was no adequate provocation by Joan Lotz, and a transfer of rage would not be adequate provocation."[89]

The opinion of the court in *Curtis* raises a number of issues of concern to practitioners, especially in the law of instructions. The most important issue in this area concerns the concept of "transferred rage," which is explained in neither the court's opinion in *Curtis*[90] nor the *Manual for Courts-Martial*;[91] no pattern instruction on the topic is found in the *Military Judges' Benchbook*,[92] and no discussion of the theory is found in mili-

78. *E.g.*, United States v. Mance, 26 M.J. 244, 255 (C.M.A.) (describing standards for appellate review of instructions relating to elements of offense), *cert. denied*, 488 U.S. 942 (1988). *But cf.* MCM, *supra* note 14, R.C.M. 920(f) ("Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error.").

79. 44 M.J. 106 (1996). The appellant actually raised these and 74 additional issues that were considered by the court in this opinion. *See id.* at 113-16.

80. *Id.* at 116.

81. *Id.* at 117.

82. *Id.*

83. *Id.*

84. *Id.* at 120.

85. *See id*. at 151.

86. *Id.* at 116.

87. *Id.* at 151. The accused also challenged the form of the voluntary manslaughter instruction given concerning the killing of Lieutenant Lotz, but the court found waiver and, in any event, no error. *Id.*

88. *See id*.

89. *Id.* The CAAF also held that the evidence was legally sufficient to support the conviction for the premeditated murder of Ms. Lotz. *Id*. at 146-49.

90. *See id*. at 151.

91. *See* MCM, *supra* note 14, pt. IV, para. 44.

92. *See* BENCHBOOK, *supra* note 53, paras. 3-43-1, -2, & 3-44-1. The notion of transferred *intent* is discussed in the instructions cited, but this is a distinct legal concept from transferred rage or passion. *See infra* notes 95-98 and accompanying text.

tary precedent.[93] The CAAF nonetheless asserted that "a transfer of rage would not be adequate provocation" to warrant an instruction on voluntary manslaughter,[94] a conclusion that is potentially confusing to the practitioner and may be a problematic statement of the law in this area.

In their treatise *Substantive Criminal Law*,[95] Professors LaFave and Scott make the following observation concerning provocation by one other than the victim of a homicide:

> It sometimes happens that the source of the provocation is a person other than the individual killed by the defendant while in a heat of passion. This may happen (1) because the defendant is mistaken as to the person responsible for the acts of provocation; (2) because the defendant attempts to kill his provoker but instead kills an innocent bystander; or (3) because the defendant strikes out in a rage at a third party.[96]

Military law provides that the first two examples offered by LaFave and Scott may still be voluntary manslaughter rather than some other form of homicide.[97] The third example describes the concept of transferred rage, and it is less clear what type of homicide has been committed in this circumstance. The majority of jurisdictions that have considered the issue hold that "[i]f one who has received adequate provocation is so enraged that he intentionally vents his wrath upon an innocent bystander, causing his death, he will be guilty of murder."[98]

However, some statutory systems do not so limit provocation; the Model Penal Code, for example, provides that "[c]riminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[99] This form of the offense is broader than that of the majority of jurisdictions in that "the provocation need not have come from the victim."[100] Article 119(a), UCMJ, is very similar to the Model Penal Code provision, and provides that "[a]ny person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter."[101] Like the Model Penal Code, the text of Article 119(a), UCMJ, does not limit the offense to those circumstances in which the accused was provoked by the homicide victim.[102] As such, the assertion that "a transfer of rage would not be adequate provocation" cannot be grounded in the plain text of the statute, and its source should therefore be explained to the practitioner in the field to allow the crafting of appropriate instructions in this regard.[103]

Conventional Offenses: Crimes Against Property

Check Offenses

It is a long-standing characteristic of Anglo-American law that certain gambling debts are unenforceable in the courts.[104] The COMA described the military rule on this matter in *United*

93. Electronic search of the relevant military justice databases revealed that the instant case is the only military decision to explicitly use the phrase "transferred rage."

94. *Curtis*, 44 M.J. at 151.

95. LAFAVE & SCOTT, *supra* note 29.

96. *Id.* § 7.10(g), at 268 (footnotes omitted).

97. *See* BENCHBOOK, *supra* note 53, para. 3-44-1.d. n.4. Interestingly, some civil jurisdictions have limited by statute the availability of voluntary manslaughter to instances when the defendant can show provocation by the homicide victim. LAFAVE & SCOTT, *supra* note 29, § 7.10, at 269 n.103.

98. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 102 (3d ed. 1982) [hereinafter PERKINS & BOYCE]; *see* LAFAVE & SCOTT, *supra* note 29, § 7.10(g).

99. MODEL PENAL CODE § 210.3(1)(b), *cited in* LAFAVE & SCOTT, *supra* note 29, § 7.10(g), at 269 & n.105.

100. PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 102(a), at 482 (1986) [hereinafter ROBINSON].

101. UCMJ art. 119(a) (1988).

102. By reference to the statutory text, the victim need only be "a human being," and the provocation need only be "adequate." *See id*. *But cf*. Foster v. State, 444 S.E.2d 296, 297 (Ga. 1994) (observing that similar language in civil voluntary manslaughter statute "should be construed so as to authorize a conviction for that form of homicide only where the defendant can show provocation by the homicide victim"), *cited in* LAFAVE & SCOTT, *supra* note 29, § 7.10 n.103 (Supp. 1996).

103. This is not to suggest that the doctrine of transferred rage should be recognized by the military appellate courts, but simply suggests that it is unclear whether the basis for CAAF's assertion in *Curtis* was legal (i.e., rage can never be transferred to an innocent victim), or factual (i.e., the failure to instruct in this particular factual scenario was not error). The ramifications are significant; if the doctrine of transferred rage is inapplicable as a matter of law, then the *Manual*, if not Article 119, UCMJ, itself, should be amended to reflect that construction. If the specific facts of *Curtis* simply do not raise the issue, then that would seem to indicate that the doctrine is recognized as a matter of military law; explanation of the doctrine in the *Manual* and pattern instructions in the *Benchbook* would therefore be appropriate, as it does not currently exist in either.

104. *See* United States v. Allbery, 44 M.J. 226, 229 (1996).

States v. Wallace:[105] "Whether gaming is legal or illegal, transactions involving the same or designed to facilitate it are against public policy, and the courts will not lend their offices to enforcement of obligations arising therefrom."[106] The Air Force Court of Criminal Appeals recently challenged the vitality of this precedent, however, with its decision in *United States v. Allbery.*[107] The accused was convicted of writing and uttering "worthless checks to the Ramstein Enlisted Club in exchange for rolls of quarters that, then, he used to play slot machines in the club."[108] In its opinion affirming the accused's convictions, the service court stated that they no longer believed legal gambling was against public policy, and consequently "it no longer makes sense to follow *Wallace*."[109]

A divided CAAF reversed the Air Force court; Senior Judge Everett wrote the plurality opinion for the court, and stated as follows:

> We hold that the public-policy basis of a precedent of this Court does not somehow diminish its binding effect on a case that the court below acknowledged was legally and factually indistinguishable from that precedent. Additionally, we are unconvinced that the public policy in question has changed discernibly since *Wallace* was announced, so we decline, ourselves, to overrule that decision.[110]

The CAAF set aside the findings and sentence in the case, and dismissed the charge against Allbery.[111]

The precedential value of the CAAF decision in *Allbery* is diminished, however, because only Chief Judge Cox joined Senior Judge Everett's opinion.[112] Judges Crawford, Gierke, and Sullivan each wrote separate opinions, but all agreed that principles of stare decisis rather than substantive criminal law mandated the result in this case.[113] As such, the opinions in *Allbery* reveal that only one regularly sitting judge of the CAAF unambiguously concurs in the continued vitality of *Wallace* as an accurate statement of the law.[114]

There is a very important point for courts and counsel alike that is made separately by Senior Judge Everett and Judges Crawford and Gierke in their opinions in *Allbery.* The Constitution provides that "[n]o ex post facto Law shall be passed,"[115] and this prohibition against the retrospective change to the legal consequences of an act[116] is applicable to the courts as well as Congress.[117] Even if the courts in this case were in agreement that public policy toward gambling had changed, Allbery would still be entitled to rely upon *Wallace*; to affirm a conviction under those circumstances would amount to an ex post facto law by judicial construction and is thereby prohibited by the Constitution.[118] The practical effect of this observation is that trial counsel at courts-martial are limited in their ability to make "a good faith argument for an extension, modification, or reversal of existing law"[119] in situations where such a change would amount to the retroactive criminalization of an act of the accused.[120]

A further lesson for all practitioners is that whatever vitality *Wallace* still enjoys may be limited to factual scenarios similar to those in the original case.[121] Judge Sullivan wrote in *Allbery* that he reads the decision in *Wallace* narrowly and believes its

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105. 36 C.M.R. 148 (1966).

106. *Id.* at 149.

107. 41 M.J. 501 (A.F. Ct. Crim. App. 1994), *rev'd*, 44 M.J. 226 (1996).

108. *Allbery,* 44 M.J. at 227.

109. *Allbery,* 41 M.J. at 502. This challenge by the Air Force court to the CAAF was strictly a legal one; writing for the court, Judge Young noted that while the facts in *Allbery* were different from those in *Wallace*, "we believe the Court of Military Appeals' edict in *Wallace* is so broad that we are unable to sufficiently distinguish the facts such as to justify a different result and still comply with *Wallace*." *Id.*

110. *Allbery,* 44 M.J. at 227.

111. *Id.* at 230.

112. *Id.*

113. *See id.* at 230-31. Judge Sullivan even went so far as to state that he would prospectively overrule *Wallace*, but reasoned that "[t]he Court of Criminal Appeals was bound to follow our decision until we or a higher court change it or the lower court distinguishes it." *Id.* at 230 (Sullivan, J., concurring in part and dissenting in part). Judge Crawford opined that the CAAF "could take judicial notice that 'gambling is one of the fastest growing industries in the United States today' . . . [and] decide the issue of whether there has been a change in public policy toward gambling or return the case to the court below to more fully analyze the case for a change in public policy." *Id.* at 231 (Crawford, J., concurring in part and dissenting in part). Judge Gierke stated that the substantive criminal law issue was not properly before the court, and declined to join the plurality in "upholding the policy underlying *Wallace*." *Id.* (Gierke, J., concurring in the result).

114. *See id.* at 230.

115. U.S. CONST. art. I, sec. 9.

116. *See* BLACK'S LAW DICTIONARY 520 (5th ed. 1979).

application is properly "limited to cases where a service club knowingly and implicitly encourages a servicemember to gamble and accrue substantial financial losses."[122] Similarly, the Army Court of Criminal Appeals recently observed in *United States v. Green*[123] that check offenses arising from gambling debts "are punishable under the UCMJ if the facts show no *direct* connection between the check cashing service and the gambling activity;"[124] an indirect connection between the check cashing service and the gambling activity would therefore appear to be no bar to prosecution.[125] The Army court also defined "gambling debts" narrowly, stating that "a worthless check is a 'gambling debt' if it is accepted from a soldier by a government check cashing facility for the purpose of supplying that soldier with money to gamble in an on-site gambling enterprise legally operated by the government."[126] Assuming this to be an accurate description of the law, the license granted by *Wallace* and *Allbery* is small indeed.

A final point is of particular concern to military judges and military justice supervisors. There is no mention of any limits on punishing soldiers for check offenses arising from gambling debts in the *Manual for Courts-Martial*,[127] nor is there a pattern instruction on this topic in the *Benchbook*.[128] These unaccountable omissions make this area of the law a productive topic for officer professional development programs within a legal office and necessitate special effort from counsel and judges alike in crafting instructions for the trier of fact in appropriate cases.

Military Offenses

Disobedience and Unauthorized Absence

An order must be a specific mandate to do or not to do a specific act, and an exhortation to merely "obey the law" or to perform one's military duty may not be an enforceable order.[129] Likewise, a personal order to perform previously established duties may also be unenforceable.[130] Orders such as these can ordinarily "have no validity beyond the limit of the ultimate offense committed."[131] A superior may nevertheless support a routine or otherwise preexistent duty by issuing a personal order as "a measured attempt to secure compliance with those pre-existing obligations,"[132] thereby lifting the duty "above the common ruck,"[133] and allowing the disobedience of the personal order to be separately charged and punished from any other offense that may have been committed.[134]

These rules of law are commonly implicated in courts-martial involving charges that allege unauthorized absence and disobedience stemming from the same absence, and such was the

117. *Allbery*, 44 M.J. at 231 (Crawford, J., concurring in part and dissenting in part) (citing Bouie v. City of Columbia, 378 U.S. 347 (1964)).

118. *See id.*

119. Dep't of Army, Pamphlet 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 3.1 (1 May 1992).

120. *See supra* notes 115-118 and accompanying text.

121. For a description of the facts in *Wallace*, see 36 C.M.R. at 148.

122. *Allbery*, 44 M.J. at 230 (Sullivan, J., concurring in part and dissenting in part).

123. 44 M.J. 828 (Army Ct. Crim. App. 1996).

124. *Id.* at 829 (emphasis added).

125. *See id.* at 829-30.

126. *Id.* at 829.

127. *See id.*

128. *See* Benchbook, *supra* note 53, paras. 3-49-1, -2, & 3-68-1.

129. *See* MCM, *supra* note 14, pt. IV, para. 14.c.(2)(d); *cf.* United States v. Bratcher, 39 C.M.R. 125, 128 (C.M.A. 1969) (observing that "an order to obey the law can have no validity beyond the limit of the ultimate offense committed").

130. *See* United States v. Peaches, 25 M.J. 364, 366 (C.M.A. 1987).

131. *Bratcher*, 39 C.M.R. at 128; *cf.* United States v. Buckmiller, 4 C.M.R. 96, 98 (C.M.A. 1952) (requiring "a comparison of the gravamen of the offense set out in the specification with the charge it is laid under and other articles under which it might have been laid"). The Court of Military Appeals described their concern in this circumstance as being "that the giving of an order, and the subsequent disobedience of same, not be permitted thereby to escalate the *punishment* to which an accused otherwise would be subject for the ultimate offense involved." United States v. Quarles, 1 M.J. 231, 232 (C.M.A. 1975).

132. United States v. Pettersen, 17 M.J. 69, 72 (C.M.A. 1983).

133. United States v. Loos, 16 C.M.R. 52, 54 (C.M.A. 1954).

case in *United States v. Henderson*.[135] The CAAF described the facts as follows:

> [O]n Friday, October 4, 1991, at 7:30 a.m., appellant's platoon sergeant, Staff Sergeant (SSGT) Jones, observed appellant in his barracks. SSGT Jones testified that he ordered appellant to get into a uniform and report to the platoon's regularly scheduled Friday formation at 8:00 a.m. There was other evidence that appellant's commanding officer, Lieutenant Colonel (LCOL) Kelly, had a "standing order" for a formation at 8:15 a.m. on Fridays. Appellant did not report to the formation, but commenced an unauthorized absence that was terminated later that day when he was apprehended by another NCO.[136]

The accused was charged with, inter alia, disobedience of a lawful order in violation of Article 91(2), UCMJ, and unauthorized absence in violation of Article 86, UCMJ.[137] Henderson appealed his convictions for these offenses, asserting that the evidence admitted at trial merely established a failure to report for a routine formation rather than disobedience.[138] The CAAF agreed, and held "that the Government failed to establish that the order by SSG Jones 'represented a measured attempt to secure compliance' with the 'pre-existing' duty to be at formation."[139] The findings of guilty to the disobedience specification were set aside and the specification dismissed.[140]

There is surprisingly much of value to practitioners in the court's brief *per curiam* opinion in *Henderson*. The wording of the holding itself is informative: "the Government *failed to establish* that the order . . . 'represented a measured attempt to secure compliance.'"[141] This would seem to imply that in cases involving disobedience and other offenses based upon the same act of disobedience, the government bears some burden of proof that the order was an effort to support the performance of a routine or preexistent duty with the full authority of the superior issuing the order.[142] The exact nature of this burden is not expressly described in either the instant case or other precedent,[143] but the CAAF in *Henderson* does identify at least two factors that are relevant to the evaluation of the government's effort: the nature of the duty at issue, and the actions of the accused prior to the issuance of the order in question. The court reasoned that under these facts "[t]he order does not go to an extremely important duty, and . . . . there is no indication . . . of open defiance by appellant."[144] A third factor identified in other precedent is the purpose of the order itself; an order that is formulated solely for the purpose of enhancing the punitive consequences of a possible violation is unlawful and may not be enforced.[145] Counsel and military judges involved in the litigation of these issues should be alert to these factors, as well as

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134. *Pettersen*, 17 M.J. at 72; *cf.* United States v. Quarles, 1 M.J. 231, 232 (C.M.A. 1975) (asserting that so-called "ultimate offense" doctrine allows separate convictions for the relevant offenses and merely limits the maximum punishment to which the accused may be sentenced). *But cf.* MCM, *supra* note 14, pt. IV, para. 14.c.(2)(a)(iii) ("Disobedience of an order . . . which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.").

135. 44 M.J. 232 (1996) (per curiam).

136. *Id.* at 233.

137. *Id.* at 232-33.

138. *Id.* at 232.

139. *Id.* at 233. The court went on to characterize the sergeant's order as nothing more "than a reminder . . . to get dressed quickly or he would miss formation." *Id.* at 233-34.

140. *Id.* at 234.

141. *Id.* at 233.

142. *Cf.* United States v. Loos, 16 C.M.R. 52, 54 (C.M.A. 1954).

143. In *United States v. Hawkins*, 30 M.J. 682 (A.F.C.M.R. 1990), the Air Force Court of Military Review described the conventional understanding of the burdens relating to the litigation of the lawfulness of orders as follows:

> The person accused of violating an order has the burden of showing that the order is not lawful. Determinations of lawfulness of orders are interlocutory questions of law to be resolved by the military judge upon proper motion made at trial. Failure to raise the question of lawfulness of an order by motion during the trial constitutes waiver of the issue.

Id. at 684 (citations omitted). It is unclear how this methodology interacts with the assertion of a government "burden of proof" in these cases.

144. *Henderson*, 44 M.J. at 233-34. The court further reasoned that "[t]he order was given some 45 minutes prior to the formation, and no immediate response was required. Thus, the circumstances were not such that appellant's failure to report amounted to a serious, direct flouting of military authority." *Id.* at 233; *cf.* United States v. Pettersen, 17 M.J. 69, 72 (C.M.A. 1983) (holding continued unauthorized absence after order to return to military control "a direct attack on the integrity of any military system").

any other potentially relevant matters that could be incorporated into the analytical framework used by the courts in these cases.

A second aspect of *Henderson* worth noting is the disposition of the disobedience charge by the court; the CAAF set aside the finding of guilty, and dismissed the specification.[146] This disposition differs somewhat from the court's actions in similar cases. For example, the COMA observed in *United States v. Quarles*[147] that in such circumstances the conviction for the disobedience offense "remains firm and may not be dismissed; only the *sentence* potentially is affected."[148] The court in *Quarles* was dealing with the ultimate offense doctrine in the context of an alleged violation of Article 92, UCMJ,[149] but the rationale for that presidentially-created rule is very similar to that applicable to other disobedience offenses: to prevent the intentional escalation of punishment facing a potential accused through the use of personal orders delivered merely to increase the punitive consequences of conduct already prohibited elsewhere in the UCMJ.[150] As such, one could contend that the appropriate disposition in *Henderson* would have involved a reassessment of the sentence, but left the conviction for disobedience in place.

At the trial level, this would mean that in most cases involving disobedience and unauthorized absence offenses that stem from a single act, the military judge should allow both offenses to go to the trier of fact for findings.[151] If convictions are returned on both offenses, then the military judge should analyze the relevant evidence in light of the factors described above to determine the maximum punishment to which the accused may be sentenced.[152] If the military judge then concludes the government failed to meet its burden to prove that the order represented a measured attempt to secure compliance with a routine or preexistent duty, then the maximum punishment facing the accused should not include the punishment authorized for the disobedience offense in question.[153]

Orders Prohibiting Contact with Individuals

To be lawful, a command must relate to a military duty.[154] The *Manual for Courts-Martial* provides that military duty "includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service."[155] A command with such a valid military purpose may even interfere with the private rights and personal affairs of the soldier receiving the order.[156] As such, orders to have no contact with specified individuals have in some cases been held by the military appellate courts to be lawful orders.[157]

The CAAF recently addressed the lawfulness of such an order in *United States v. Nieves*.[158] Captain Nieves was under investigation concerning allegations that he had fraternized and had sexual relations with women in his battalion.[159] The order

145. *E.g.*, United States v. Traxler, 39 M.J. 476, 479 (C.M.A. 1994).

146. *Henderson*, 44 M.J. at 234.

147. 1 M.J. 231 (C.M.A. 1975).

148. *Id.* at 233 (emphasis in original).

149. *See* MCM, *supra* note 14, pt. IV, para. 16.e.(2).

150. *See Quarles*, 1 M.J. at 232-33. For the limits of this argument, see *Pettersen*, 17 M.J. at 70 n.4.

151. A possible exception to this general rule include circumstances in which the military judge rules that the charging of both disobedience and unauthorized absence offenses stemming from what is substantially a single act or transaction constitutes an unreasonable multiplication of charges. *See* MCM, *supra* note 14, R.C.M. 307(c)(4) discussion. Another possible exception is when the order in question "is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit;" such an order would not be punishable under the Code. *See id.* pt. IV, para. 14.c.(2)(a)(iii); *cf.* Rutledge v. United States, 116 S. Ct. 1241, 1248 (1996) (observing that punishment includes conviction as well as sentence).

152. *See supra* notes 144-145 and accompanying text.

153. *See Henderson*, 44 M.J. at 233.

154. MCM, *supra* note 14, pt. IV, para. 14.c.(2)(a)(iii).

155. *Id.*

156. *Id. But cf.* United States v. Dykes, 6 M.J. 744, 747-48 (N.M.C.M.R. 1978) ("It is beyond cavil that such an order . . . may not arbitrarily or unreasonably interfere with the private rights or personal affairs of . . . military members.").

157. *See, e.g.*, United States v. Hawkins, 30 M.J. 682, 684 (A.F.C.M.R. 1990) (observing in dicta that an order to have no contact with three named individuals unless such contact was arranged by defense counsel was lawful); United States v. Wine, 28 M.J. 688, 690-91 (A.F.C.M.R. 1989) (holding order to disassociate from wife of fellow sergeant was not unlawful as a matter of law).

158. 44 M.J. 96 (1996).

at issue in the case was a verbal one issued by his battalion commander "not to have any discussions with members of . . . [his company], relative to the investigation," or to "discuss it with anybody in the battalion who becomes a member of the investigation."[160] The accused violated the order by subsequently contacting a member of his company and attempting to discuss the ongoing investigation.[161] The accused was convicted at court-martial of disobeying the no-contact order issued by his battalion commander, but alleged on appeal that the order was unlawful, overbroad, and violated his right to prepare a defense.[162]

The CAAF held that the no-contact order was lawful, reasoning that the order did not prohibit all speech by the accused with his company, did not interfere with the accused's right to prepare and present a defense, and was in any event limited to the duration of the administrative investigation.[163] The court also observed that "[i]t logically follows that, if physical restraint to prevent obstruction of justice is permissible, lesser moral restraint in the form of a superior's order would also be permissible."[164] The accused's conviction for willful disobedience of the no-contact order of a superior commissioned officer was affirmed.[165]

The most troubling aspect of the opinion in *Nieves* is the attempt by the court to distinguish the instant order from that found in *United States v. Wysong*.[166] In *Wysong*, the accused was also the subject of an investigation and was ordered by his company commander "not to talk to or speak with any of the men in the company concerned with this investigation except in the line of duty."[167] On appeal from his conviction for disobedience of this order, the COMA concluded that "it is clear beyond peradventure that the order in question was so broad in nature and all-inclusive as to render it illegal."[168] The court also stated that "[a]nother defect in the order is that of vagueness and indefiniteness in failing to specify the particular persons 'concerned' with the investigation. *Such an order might well have extended to the entire company.*"[169] The COMA held the order in *Wysong* to be "illegal and consequently unenforceable."[170]

The CAAF's opinion in *Nieves* asserts that the order in that case differed from that in *Wysong* because it "did not prohibit *all* speech, but only 'discussions with members of Alpha Company, relative to the investigation.'"[171] This implication that the order in *Wysong* prohibited all speech is difficult to reconcile with the reported facts of the case; the order prohibited only unofficial conversations with the men in the company who were "concerned with this investigation."[172] One could even conclude that the order in *Wysong* was *more* narrowly and tightly drawn than that in *Nieves*; the order to Captain Nieves facially applied to his entire company, and extended to anyone in the *battalion* who became "a member of this investigation."[173] As such, a practitioner could conclude that the attempt by the court to distinguish the order in *Nieves* from that in *Wysong* is less than compelling.

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159. *Id.* at 97.

160. *Id.* The battalion commander subsequently issued another order to the accused, similar to the first, but allowing the accused and counsel to request contact with relevant parties through the battalion commander, and further specifying that the "order would remain in effect 'during the period of the investigation.'" *Id*. at 97-98. This subsequent order was not the subject of the court's decision in *Nieves*. *Id*. at 98.

161. *Id.* at 97.

162. *Id.* at 96-98.

163. *Id.* at 99.

164. *Id.* at 98-99 (relying upon United States v. Moore, 32 M.J. 56 (C.M.A. 1991)) (other citations omitted).

165. *Id.* at 99.

166. 26 C.M.R. 29 (C.M.A. 1958).

167. *Id.* at 30.

168. *Id.*

169. *Id.* at 31 (emphasis added). It is interesting to note that the order in *Nieves* may have extended not only to the entire company, but to anyone in the *battalion* who became "concerned with this investigation." *Cf*. *Nieves*, 44 M.J. at 97 (describing no-contact order as extending to "members of Alpha Company, relative to the investigation," and "anybody within the battalion who becomes a member of the investigation").

170. *Id.*

171. *Nieves*, 44 M.J. at 99 (emphasis added).

172. *See Wysong*, 26 C.M.R. at 30.

173. The COMA in *Wysong* stated that "[a]nother defect in the order is that of vagueness and indefiniteness in failing to specify the particular persons 'concerned' with the investigation." *Id*. at 31. Likewise, the same may be said of the order in *Nieves*; who is a "*member* of this investigation"? *See* 44 M.J. at 97.

If one agrees that *Nieves* and *Wysong* are practically indistinguishable, then the rationale of the court in *Nieves* must be grounded elsewhere than in the facts of the two cases; the law must have changed since *Wysong* was decided.[174] This theory is supported by the CAAF's assertion that in the wake of its decision in *United States v. Moore*[175] "it logically follows that, if physical restraint to prevent obstruction of justice is permissible, lesser moral restraint in the form of a superior's order would also be permissible."[176] The same rationale was applied in *United States v. Blye*,[177] where the COMA held that "a military member may be lawfully ordered not to consume alcoholic beverages as a condition of pretrial restriction."[178] The COMA reasoned as follows:

> It is beyond cavil that a pretrial prisoner in a confinement facility may be lawfully denied the use of alcohol. We do not find it unduly restrictive on the personal liberty of any military member to deny the use of alcohol as a condition of being released from pretrial confinement and placed upon restriction.[179]

The COMA in *Blye* acknowledged that this rationale could be construed as a departure from precedent, and stated that such precedent was overruled to the extent that it conflicted with the court's holding in *Blye*.[180] The CAAF should now formally acknowledge that this rationale may also be inconsistent with *Wysong*, and expressly overrule *Wysong* to the extent that decision can be construed to prohibit an order such as that found in *Nieves*.[181]

One unambiguous lesson derived from *Nieves* concerns the lawfulness of an order that could interfere with the accused's right to prepare a defense.[182] While an order that completely bars contact by an accused with the witnesses against him may be unlawful,[183] other orders that merely require the accused or counsel to request the permission of the command prior to contacting specified individuals have been held lawful.[184] Counsel seeking to establish that an order is unlawful because it interfered with the accused's right to prepare a defense should therefore be able to establish not only that the order potentially restricted the ability to prepare, but also that attempts to obtain access to witnesses were made and thwarted by operation of the order or the issuing command, and that such denial of access actually operated to the prejudice of the accused.[185]

Defenses

Causation

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174. *See, e.g.*, United States v. Hawkins, 30 M.J. 682, 685 (A.F.C.M.R. 1990) ("The cases on this issue after *Wysong* were decided primarily on whether the order restricted the accused's ability to prepare for his defense by not allowing him to participate in interviews of witnesses with his counsel.").

175. 32 M.J. 56 (C.M.A. 1991). In *Moore*, the COMA held that it was permissible to place an accused in pretrial confinement "to prevent an accused servicemember from intimidating witnesses or otherwise obstructing justice." *Id.* at 59, *cited in Nieves*, 44 M.J. at 99.

176. *See Nieves*, 44 M.J. at 98-99.

177. 37 M.J. 92 (C.M.A. 1993).

178. *Id.* at 94.

179. *Id.*

180. Judge Cox reasoned: "Given the distinctions between this case and United States v. Wilson . . . it may not be necessary to overrule *Wilson*. Nevertheless, to the extent that *Wilson* can be construed to prohibit an order under the circumstances found here, that aspect of *Wilson* is expressly overruled." *Id.* at 95 n.5.

181. One could also argue the reverse: the rationale is logically defective that says that if the command could *potentially* put an accused in pretrial confinement for *hypothetical* attempts to obstruct justice or other misconduct, then the command could also use personal orders and commands to prevent that which is already prohibited by the UCMJ, i.e., obstruction of justice. *Cf. supra* notes 130-145 and accompanying text (discussing the enforceability of orders concerning preexistent duties). The reported opinion in *Nieves* gives no indication that the accused had actually engaged in obstruction of justice as in *Mason*, or other misconduct related to the subject of the order as in *Blye*; application of the rationale under these facts is especially problematic. *Cf.* United States v. Alexander, 26 M.J. 796, 797 (A.F.C.M.R. 1988) (holding order prohibiting servicemember from ever writing checks unenforceable).

182. Counsel should remember that, although this issue frequently occurs in conjunction with the assertion by the accused through counsel that the order is unlawful or overbroad, the issue of whether an order interferes with the ability of the accused to prepare a defense is ultimately a different issue from the lawfulness or breadth of the order itself. A precise and definite order can be unlawful because it has the effect of interfering with the ability of the accused to prepare a defense, and an overbroad or otherwise unlawful order may have no effect upon the ability of the accused to prepare a defense and still be unenforceable under the UCMJ. *Nieves* deals with the particular circumstance in which the two issues *overlap*; the order in question was challenged by the defense at trial because its overbreadth allegedly prohibited the accused from contacting witnesses against him. United States v. Nieves, 44 M.J. 96, 98 (1996).

183. *See* United States v. Aycock, 35 C.M.R. 130, 132-34 (C.M.A. 1964).

184. *Nieves*, 44 M.J. at 98-99; *e.g., supra* note 157 and cases cited therein. *But cf.* UCMJ art. 46 (guaranteeing defense counsel equal opportunity with trial counsel to obtain witnesses and other evidence).

185. *See Nieves*, 44 M.J. at 99.

It is a basic premise of the substantive criminal law that "where the definition of the crime requires that certain conduct produce a certain result . . . it must be shown that the conduct caused the result."[186] Conduct is said to cause a result "when . . . it is an antecedent but for which the result in question would not have occurred, and . . . the result is not too remote or accidental in its manner of occurrence to have a just bearing on the actor's liability or on the gravity of his offense."[187] In the words of one noted commentator, "[t]he determination here is not a scientific one at all. Whether a remote result is 'too remote' is a relatively subjective determination."[188] The difficulty inherent in proving that an act caused a certain result is exacerbated in cases where the actions of another intervene in the chain of events between the act of the accused and the result, or contribute to the proximate causation of the result in some way.[189] Military law, however, has done much to simplify the rule concerning intervening causation: "To be the proximate cause of the victim's death . . . conduct 'need not be the sole cause of death, nor must it be the immediate cause--the latest in time and space preceding the death.' It must only play 'a material role in the victim's decease.'"[190]

The minimal showing of causation required by this rule of law has led the military appellate courts to conclude that a military judge did not err in a prosecution for drunken driving, reckless driving, and involuntary manslaughter by failing to give a requested instruction on contributory negligence of the victim when that defense was reasonably raised by the evidence in the case.[191] Likewise, the CAAF recently held that it was not error for a military judge to deny the production of an expert to testify concerning the possibility that the victim's death was caused by the negligence of treating medical personnel in a prosecution for involuntary manslaughter; the court reasoned that such an intervening cause of the victim's death,

> would not have constituted a defense in any event . . . . In this case an intervening cause arising from the negligence of the paramedics or the victim herself would be a defense only if 'the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result.' The proffered defense evidence fell short of this standard.[192]

The CAAF recently considered whether evidence of a negligent intervening cause of death would be relevant in a case in which the government could establish that the act of the accused played a material role in the death. In *United States v. Taylor*,[193] the court considered the following facts:

> On March 8, 1991, while conducting water survival training, appellant was in direct supervision of Private Danilo A. Marty, Jr. During the training, PVT Marty experienced extreme difficulty and exhaustion in attempting to swim across a pool wearing his combat gear. Appellant was in position on a flotation device to lift Marty up and, in fact, did lift him up but then released him. When Marty cried for help, appellant told him that he had "to make it on [his] own." After Marty sank three times, appellant ordered the other recruits to pull Marty's body from the pool. Appellant checked Marty who was unconscious and found no pulse or respiration.[194]

The medical response team that arrived at the scene misused their equipment, failed to follow established procedures, and was unsuccessful in resuscitating PVT Marty.[195] The CAAF went on to note that "autopsy revealed that Marty's lungs were almost completely full of water and that he had suffered cardiac arrhythmia."[196]

In response to a motion in limine by the government, the military judge excluded any evidence of medical negligence by the response team because neither of the witnesses to be called

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186. LAFAVE & SCOTT, *supra* note 29, § 1.2(b), at 10 (1986). This requirement of causation is commonly found in homicide statutes. *E.g.*, MCM, *supra* note 14, pt. IV, para. 43.b.(1)(b) (requiring that "the death resulted from the act or omission of the accused" to establish premeditated murder in violation of UCMJ art. 118(1)). *Cf.* ROBINSON, *supra* note 100, § 88(a) ("Homicide, assault, and property destruction are the most common of the result element offenses.").

187. ROBINSON, *supra* note 100, § 88(c).

188. *Id.* § 88(e).

189. *Cf.* United States v. Reveles, 41 M.J. 388 (1995) (considering significance of intervening dependent actions of medical personnel upon victim harmed by accused).

190. *Id*. at 394 (citations omitted).

191. *See* United States v. Cooke, 18 M.J. 152, 155 (C.M.A. 1984).

192. *Reveles*, 41 M.J. at 394-95 (citations omitted).

193. 44 M.J. 254 (1996).

194. *Id.* at 255.

by the defense on this issue would "testify that the medical team's inaction was the 'sole cause' of PVT Marty's death."[197] On appeal from Taylor's subsequent conviction for involuntary manslaughter, the CAAF considered whether the military judge erred in excluding evidence of negligent medical care given to the victim, and concluded that he had committed prejudicial error; the findings of guilty as to the manslaughter charge and its specification and the sentence were set aside.[198] Judge Crawford, writing the opinion of the court, rejected the argument made by the government at trial and on appeal "that medical malpractice only breaks the chain if it is a substantial or sole cause of death."[199] The court asserted instead that the correct rule of law is that negligent medical treatment may be "a superseding cause, completely eliminating the defendant from the field of proximate causation . . . in situations in which the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor."[200] This is a question of fact rather than law, and by excluding evidence of the nature of the care provided by the medical team, the military judge "removed from the factfinder the question of whether there was a sufficient intervening cause to excuse appellant from culpability in the victim's death."[201]

There are several lessons to be learned from the decision in *Taylor.* Judge Crawford proffers that in cases of this type, the military judge should ordinarily "admit expert medical testimony to show the victim's condition on being removed from the water and the type of treatment that was given."[202] On a more subtle level, this case indirectly points out the persistent confusion about causation that is present in the substantive criminal law under the UCMJ. For example, the rule of law announced by the court is not found in the pattern instructions for military judges regarding either intervening cause, causation when the acts or omissions of others are in issue, or situations in which there may be multiple contributors to proximate cause; these instructions simply provide, in relevant part, that "[a]n act or omission is a proximate cause of the death even if it is not the only cause, as long as it is a direct or contributing cause that plays a material role in bringing about the death."[203] Similarly, the *Manual for Courts-Martial* contains no discussion of proximate cause, and merely provides that murder requires proof that the death "must have followed from an injury received by the victim which resulted from the act or omission" of the accused.[204] The lesson to be taken from this is that causation is an area of the law in which military judges and counsel may have to rely, to a greater extent than usual, on sources of instructions and law other than the *Benchbook* and the *Manual*.

Double Jeopardy & Multiplicity

195. The opinion of the court described the activity of the response team as follows:

> A response team consisting of one doctor, one nurse, and two corpsmen arrived at the scene. The Government's brief describes what happened next as follows: In essence, the combination of one doctor, one nurse, and two corpsmen pushed the wrong buttons on the defibrillator, preventing it from producing an electric shock; the breathing apparatus was missing a necessary valve; the team was unable to intubate Marty because of weak batteries on the laryngoscope; they were unable to locate a stylet which was necessary for proper functioning of an endotracheal tube; they placed Marty backwards on the gurney, reducing the efficacy of manual chest compressions (CPR) because of the spongy surface. Finally, the gurney was placed in the ambulance backwards, where it was unstable, causing the ambulance physician to withhold additional defibrillation out of fear of electrocuting others . . . . Basic CPR was continually administered virtually during the entire time despite the failure of the advanced medical team to achieve any progress. At the hospital, Marty responded to defibrillation with rhythm, indicating that his heart was still capable of electrical activity, but not mechanical activity.

Taylor, 44 M.J. at 255.

196. *Id.*

197. *Id.* at 255-56.

198. *Id*. at 257-58. The accused was also convicted at court-martial of violation of Article 92, UCMJ. As such, the record of trial was returned to The Judge Advocate General of the Navy, and a rehearing was authorized. *Id*. at 255-58.

199. *Id.* at 257.

200. *Id.* (citations omitted); *cf*. LAFAVE & SCOTT, *supra* note 29, § 3.12(f)(5) (asserting that negligent medical treatment to a victim injured by the act of accused will not be a superseding cause "unless the doctor's treatment is so bad as to constitute gross negligence or intentional malpractice").

201. *See id.*

202. *Id.* Judge Crawford also asserted that the rule advanced by the government, namely that medical malpractice breaks the chain of causation only if it is the substantial or sole cause of death, applies only when the defendant inflicts dangerous wounds designed to destroy life. Putting aside the issue of whether this is an accurate statement of *military* law, one could nevertheless conclude that even this seemingly restrictive rule would operate as a rule of decision rather than a rule of admissibility; it is still likely to be a question of *fact* as to whether the intervening medical malpractice was a "substantial or sole cause of death."

203. BENCHBOOK, *supra* note 53, para. 5-19, at 768-69. The language used by the court in its opinion is only found in the pattern instruction concerning contributory negligence by the victim. *Id*. at 770.

204. *See generally* MCM, *supra* note 14, pt. IV, para. 43-44.

The military law concerning double jeopardy, multiplicity, and lesser-included offenses has been very dynamic of late.[205] A source of the continuing confusion and change in this area of the law is that the CAAF itself remains highly divided as to the proper methodology to be used in resolving problems of multiplicity and lesser-included offenses.[206] One school of thought looks to the statutory elements[207] of the relevant offenses when making the determination as to whether they are the same offense,[208] while the alternative camp is willing to look to the pleadings, and even the proof adduced at trial, when making multiplicity and included offense determinations.[209] This ongoing discord has led some to call for dramatic remedies to the multiplicity problem in the military justice system.[210]

Be that as it may, a clear majority of the CAAF recently subscribed to the use of the elements test for resolving multiplicity issues with its opinion in *United States v. Oatney.*[211] In *Oatney*, the CAAF considered whether communicating a threat is a lesser-included offense to obstructing justice and communicating a threat,[212] and concluded that the military judge did not err in treating the offenses as separate.[213] Judge Sullivan, joined by Judges Crawford and Gierke, looked to the elements of each offense and reasoned that one can obstruct justice without communicating a threat and, as such, "[n]o sine qua non relationship exists as a matter of law between" the two offenses.[214] Chief Judge Cox, joined by Senior Judge Everett, vigorously dissented and stated that "we must look at the *pleadings and the facts of the case* to determine the appropriate punishment for an act of misconduct."[215]

Apart from the fact that a majority of the court has once again endorsed the use of the elements test for resolving multiplicity and included offense issues, the opinion of the court in *Oatney* is also notable for its clarification of three points of uncertainly that had previously troubled practitioners. First, the CAAF confirms that the President's description of the elements of an offense arising under the General Article in part IV of the *Manual for Courts-Martial* is the equivalent of a "statute" for the purpose of multiplicity analysis.[216] Furthermore, the court also reminds practitioners that even under the relaxed construction of the elements test announced in *United States v. Foster*,[217] an offense is included in another only if "the greater offense could not possibly be committed without committing the lesser

205. For a concise description of recent developments in the law of multiplicity in the military justice system, see MAJOR WILLIAM T. BARTO, *Alexander the Great, the Gordion Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1, 11-12 (1996) [hereinafter BARTO].

206. *See, e.g.*, United States v. Weymouth, 43 M.J. 329 (1995) (containing four separate opinions, none of which were in dissent).

207. For offenses arising under the General Article, this term includes the elements described by the President in part IV of the *Manual*, assuming that the description of the offense contained therein conforms with relevant judicial precedent. *See* United States v. Oatney, 41 M.J. 619, 628 (N.M.Ct.Crim.App. 1994), *aff'd*, 45 M.J. 185 (1996).

208. *E.g.*, United States v. Carroll, 43 M.J. 487, 488-89 (1996) (Gierke, J.); United States v. Teters, 37 M.J. 370, 377 (C.M.A. 1993) (Sullivan, C.J.) ("It is now unquestionably established that this test is to be applied to the elements of the statutes violated and not to the pleadings and proof of these offenses.").

209. *E.g.*, United States v. Weymouth, 43 M.J. 329, 340 (1995) (Cox, J.) (observing that elements in the military include "those . . . required to be alleged in the specification along with the statutory elements"); United States v. Wheeler, 40 M.J. 242, 243-47 (C.M.A. 1994) (Crawford, J.) (using pleadings and proof to resolve multiplicity issues involving General Article offenses).

210. *Cf.* United States v. Lloyd, 43 M.J. 886 (A.F. Ct. Crim. App. 1995) (holding multiplicity issues are forfeited unless raised at trial because multiplicity issues do not rise to the level of plain error), *pet. rev. granted*, 43 M.J. 480 (1996); BARTO, *supra* note 205, at 25-30 (urging increased presidential role in limiting punishments for offenses arising from what is substantially a single transaction).

211. 45 M.J. 185 (1996).

212. *Id.* at 186.

213. *Id.* at 188-89.

214. *Id.*

215. *Id.* at 190 (Cox, C.J., dissenting) (emphasis added). Chief Judge Cox has consistently voiced his concerns that strict adherence to an elements analysis is inappropriate in a military setting. *E.g.*, United States v. Weymouth, 43 M.J. 329, 333-36 (1995) (citing non-statutory nature of some military offenses). Such adherence may lead to prosecutorial overreaching. *See* United States v. Foster, 40 M.J. 140, 144 n.4 (C.M.A. 1994). This concern persists in *Oatney*, and is apparent in his observation that the charging in the instant facts amounted to "[p]iling on." *Oatney*, 45 M.J. at 190 (Cox, C.J., dissenting) (calling for a "15 yard penalty"). However, the issue of whether charging obstruction of justice and communication of a threat, where the latter is the means of accomplishing the former, is an unreasonable multiplication of charges is a separate issue from whether the offenses are the "same offense" for double jeopardy purposes. *See Foster*, 40 M.J. at 144 n.4. Offenses can be separately punishable and still amount to an unreasonable multiplication of charges in a given scenario. *E.g.*, United States v. Bray, No. 9500944 (Army Ct. Crim. App. Mar. 29, 1996) (observing that charging false official statements and false swearing based upon the same statement was unreasonable notwithstanding the fact that the offenses were separate). Conversely, multiplicious offenses may nevertheless be properly charged if necessary to "enable the prosecution to meet the exigencies of proof through trial, review, and appellate action." *See* MCM, *supra* note 14, R.C.M. 907(b)(3)(B). One could therefore reasonably conclude that if the concern is about "piling on," then the focus of judicial concern should not be on multiplicity, but rather upon the reasonableness of the charging decision. *See id.* R.C.M. 307(c)(4) discussion; *cf.* BARTO, *supra* note 205, at 6, 18-23 (calling for military appellate courts to devote more judicial effort to defining the "unreasonable multiplication of charges").

offense."[218] Finally, the CAAF reinforces the evolving rule of law that a military judge does not err by treating offenses that are separate by reference to their elements as being separate for sentencing, as well.[219] As such, the litigation of multiplicity issues at trial may be more straightforward in the wake of *Oatney*.

Army practitioners should take special note of the CAAF's opinion in *Oatney* because it is at least facially inconsistent with the recent decision of the Army Court of Criminal Appeals in *United States v. Benavides*.[220] In *Benavides*, the service court held that "the less serious offense of communicating a threat was 'necessarily included' in the obstruction of justice charge as alleged."[221] The opinion of the court in *Benavides* expressly declined to follow the reasoning of the Navy court in *Oatney*,[222] and instead looked to the pleadings rather than the elements of the offenses in reaching its conclusion.[223] While inconsistent outcomes such as those found in *Benavides* and *Oatney* are to be expected under a multiplicity methodology that relies upon the pleadings in each case for making such determinations, such outcomes are much more problematic under an elements approach to multiplicity and lesser-included offenses; as a result, the precedential value of *Benavides* after *Oatney* is questionable.

Involuntary Intoxication

The proposition that "[v]oluntary intoxication, whether caused by alcohol or drugs, is not a defense"[224] is well-settled in military law. Evidence of voluntary intoxication may nevertheless be "introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense."[225] Nevertheless, the status of involuntary intoxication as a defense in the military justice system was, until recently, less certain.[226] Most civil jurisdictions recognize a defense of involuntary intoxication,[227] and "[w]here

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216. *See Oatney*, 45 M.J. at 188; *cf.* BARTO, *supra* note 205, at 16-17 (observing "these regulatory elements could be considered by the courts and practitioners the equivalent of statutory elements for multiplicity determinations").

217. 40 M.J. 140 (C.M.A. 1994). In *Foster*, the COMA observed that "dismissal or resurrection of charges based upon 'lesser-included' claims can only be resolved by lining up the elements *realistically* and determining whether *each* element of the supposed 'lesser' offense is *rationally* derivative of one or more elements of the other offense-and vice versa." *Id*. at 146; *cf.* United States v. Standifer, 40 M.J. 440, 445-46 (C.M.A. 1994) (using "rationally derived" test to conclude that obstruction of justice is an included offense of subornation of perjury).

218. *Oatney*, 45 M.J. at 188; *cf.* Schmuck v. United States, 489 U.S. 705 (1989) (adopting "impossibility" test for federal prosecutions); United States v. Foster, 40 M.J 140, 142-43 (C.M.A. 1994). Chief Judge Cox criticizes this formula in his dissenting opinion as follows:

> If we carried the analysis used by the lead opinion to its logical conclusion, we would hold that larceny is not included in robbery because it is theoretically possible to commit the offense of larceny without having committed the offense of robbery. Likewise, one should be convicted of both rape and assault, because it is possible to assault someone without raping them. It is true that one can communicate a threat without obstructing justice, but it cannot be done in this case.

Oatney, slip op. at 17 (Cox, C.J., dissenting). This objection may confuse practitioners because its conclusion does not flow from the reasoning of the majority opinion or the applicable rule of law in these cases. First, the standard is *not* simply whether one offense can be proved without proving the other, but rather that *the proof of the greater offense necessarily proves the lesser offense*. *See* UCMJ art. 79; *Schmuck*, 489 U.S. at 719-20; *Foster*, 40 M.J. at 146-47. Applying this test to Chief Judge Cox's hypothetical, larceny is a lesser-included offense of robbery because it is impossible to commit a robbery without also committing a larceny. Likewise, assault is a lesser-included offense of rape because it is impossible to commit a rape without also committing an assault. The fact that one can commit a larceny or an assault without also committing a robbery or rape, respectively, simply means that the offenses are not identical. *See* BARTO, *supra* note 205, at 29 n.180. Moreover, a majority of the CAAF has never expressly and unambiguously endorsed the modification of the elements test to allow consideration of the pleadings and proof in a particular case; the elements test is, by definition, is based upon "theoretical possibilities" in light of the statutory language defining the relevant offenses.

219. *Oatney*, 45 M.J. at 189-90; *see* United States v. Morrison, 41 M.J. 482, 483-84 (1995); MCM, *supra* note 14, R.C.M. 1003(c)(1)(C).

220. 43 M.J. 725 (Army Ct. Crim. App. 1995).

221. *Id.* at 725.

222. *Id.*

223. *Id.* at 724.

224. MCM, *supra* note 14, R.C.M. 916(l)(2).

225. *Id.*

226. *See* United States v. Hensler, 44 M.J. 184, 187 (1996) (observing that the CAAF had not expressly ruled on this issue). *But cf.* United States v. Santiago-Vargas, 5 M.J. 41, 42-43 (C.M.A. 1978) (assuming without deciding that pathological intoxication is a defense under military law); United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982) (observing in dicta that involuntary intoxication caused by innocent ingestion of intoxicant should be a defense).

227. *See* ROBINSON, *supra* note 100, § 176(a), at 338.

the defense is permitted, it most commonly has a formulation parallel to one of the formulations of the insanity defense."[228] Other jurisdictions, while declining to link involuntary intoxication and insanity, may limit the defense to cases of involuntary intoxication resulting from mistake, duress, or medical advice.[229] Until now, however, neither judge nor counsel could be certain of which form the defense took in the military legal system;[230] this situation may now be remedied.

In *United States v. Hensler*,[231] the CAAF considered the questions of the viability and form of the involuntary intoxication defense in military law. The accused, a commissioned officer, was charged with unbecoming conduct and fraternization, both charges stemming from her social and sexual relationships with subordinates.[232] The defense at trial was that the accused "lacked mental responsibility because of 'a confluence of her drugs, her personality traits, her depression, and the introduction of alcohol.'"[233] Evidence placing this defense in issue was introduced by the defense, and "[t]he military judge provided the members the traditional instruction on the insanity defense."[234] On appeal from her convictions for the charged offenses, Hensler alleged that the military judge erred because the instruction concerning lack of mental responsibility "did not include involuntary intoxication as a basis upon which the members may find that the appellant lacked mental responsibility."[235] The service court found the military judge did not err in giving a general instruction on the defense of mental responsibility because "there was no evidence to support an instruction tailored to involuntary intoxication."[236]

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228. *Id.* at 339.

229. *See* LaFave & Scott, *supra* note 29, § 4.10, at 558-60.

230. *Cf.* United States v. Santiago-Vargas, 5 M.J. 41, 42-43 (C.M.A. 1978) (assuming without deciding that pathological intoxication is a defense under military law); United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982) (observing in dicta that involuntary intoxication caused by innocent ingestion of intoxicant should be a defense).

231. 44 M.J. 184 (1996).

232. *Id.* at 185-86.

233. *Id.* at 187. The accused was apparently intoxicated during some of her misconduct and was taking a number of prescription drugs. United States v. Hensler, 40 M.J. 892, 894-95 (N.M.C.M.R. 1994). At least one defense witness testified that the accused "suffered from decreased liver function, the result of a prior bout with hepatitis. This condition affected her body's ability to process alcohol and drug medication with the result that the effects of those substances may have lasted longer than normal." *Id.* at 895. Even more significant was the expert testimony that "the intoxicating effects of the different prescribed drugs and the alcohol 'potentiated' each other, i.e., that the effect of each was magnified by the presence of the others." *Id.* at 899. The defense theory was that the accused was probably unaware, at least initially, of these effects, and as such her intoxicated state during some of her misconduct was involuntary. *Id.*

234. *Id.* at 895. The service court opinion described the instructions as follows:

> Specifically, he instructed them that they could presume the accused to be sane unless they were persuaded by clear and convincing evidence that she suffered from a severe mental disease or defect and that, as a result of her severe mental disease or defect, she was unable to appreciate the nature and quality or wrongfulness of her acts. He added that the appellant had the burden to establish that she was not mentally responsible. The military judge further instructed the members that intoxication resulting from the compulsion of alcoholism or chemical dependence was not a defense, although voluntary intoxication could raise a reasonable doubt that the appellant knew that the men with whom she was fraternizing were enlisted men. The appellant voiced no objection to the instructions given by the military judge, although she did offer her own version of an insanity instruction which he rejected. The proposed instruction directed the members to find the appellant not criminally responsible only if they found that, as a result of the combination of her decreased liver function, chronic psychological problems, and ingestion of prescription medications, she suffered from a delusion that caused her to believe that her behavior was not criminal or that compelled her to commit the offenses.

Id. at 895-96. The CAAF described the instructions somewhat differently as follows:

> The military judge instructed the members: "An issue before you is the accused's sanity at the time of the offenses." He defined mental responsibility. He advised the members "that the term, 'severe mental disease or defect' can be no better defined in the law than by the use of those terms themselves." He used the term "involuntary intoxication" with respect to the issue whether appellant "knew that she was fraternizing with enlisted personnel." He instructed the members that "alcoholism and chemical dependency is recognized by the medical profession as a disease involving a compulsion towards intoxication." He did not specifically link the term "involuntary intoxication" with lack of mental responsibility.

Hensler, 44 M.J. at 187. The use of quotations from the record of trial in appellate opinions concerning the form of instructions cannot but help the judge and counsel seeking to understand the nature and breadth of the court's holding.

235. *Hensler*, 40 M.J. at 896. The service court also considered whether the military judge had erred by failing "to distinguish between voluntary and involuntary intoxication when discussing the effect of the former on her knowledge of the enlisted status of her fraternizing partners." *Id.* at 896-97. The court concluded that the military judge did not err in the instruction. *Id.* at 900.

236. *Id.* at 900.

The CAAF affirmed the decision of the lower court.[237] The court reasoned that "[i]nvoluntary intoxication is treated like legal insanity. It is defined in terms of lack of mental responsibility."[238] The opinion of the court concluded that "[t]he instructions could have been better tailored to the evidence, but we are satisfied, based on this record, that the question of appellant's mental responsibility was fully presented to the members in a correct legal framework."[239]

The decision in *Hensler* has a number of effects on the practitioner. As a threshold matter, the CAAF confirms that involuntary intoxication is indeed a defense under military law.[240] It is, however, a limited defense; involuntary intoxication excuses misconduct only if it causes a lack of mental responsibility, and "is not available if an accused is aware of his or her reduced tolerance for alcohol but chooses to consume alcohol anyway."[241] Moreover, because the defense is "treated like legal insanity,"[242] the accused has the burden of proving by clear and convincing evidence that she was "not mentally responsible at the time of the alleged offense."[243]

There are also a number of issues that remain unanswered in the wake of *Hensler.* The CAAF's opinion appears to equate involuntary intoxication solely with pathological intoxication,[244] the latter being "defined as grossly excessive intoxication given the amount of the intoxicant, to which the actor does not know he is susceptible."[245] Some military decisions, however, have observed that "[i]nvoluntary intoxication exists when intoxication occurs through force, the fraud or trickery of another, or an actual ignorance of the intoxicating character of a substance."[246] Similarly, the Army Court of Military Review has stated that in cases when an accused asserts involuntary intoxication as a defense, "[t]he question then becomes whether his mental disease or defect was culpably incurred."[247] As such, counsel cannot be certain after *Hensler* whether pathological intoxication is the only form of involuntary intoxication recognized under military law, or if a more general inquiry into whether the intoxication was culpably incurred is appropriate in these cases.

Another issue is raised by the CAAF's observation in *Hensler* that the military judge failed to distinguish between involuntary and voluntary intoxication when instructing the members; as such, the potential defense of involuntary intoxication was "gratuitously extended . . . to all six episodes" that were the subject of the charges in this case, even though the CAAF found involuntary intoxication to be in issue only as to one.[248] Such an outcome can be avoided if military judges simply follow the advice offered by the Navy-Marine Corps Court of Military Review in its decision in *Hensler*: "When evidence of involuntary intoxication is introduced, it is essential to distinguish it from voluntary intoxication through proper instructions and, in particular, to avoid reference to the generic term 'intoxication' without defining it as one term or the other."[249] The problem confronting the military judge is that there is currently no pattern instruction available in the *Benchbook* that distinguishes involuntary from voluntary intoxication; indeed, there cannot be a pattern instruction until the CAAF determines whether pathological intoxication is the only form of involuntary intoxication recognized as a defense under military law, or if some broader formulation of the defense is applicable.[250]

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237. *Hensler,* 44 M.J. at 188.

238. *Id.*

239. *Id.*

240. *See id.* at 187-88.

241. *Id.*

242. *Id.* at 188.

243. MCM, *supra* note 14, R.C.M. 916(k)(3).

244. *Hensler,* 44 M.J. at 187.

245. *Hensler,* 40 M.J. at 897.

246. United States v. Travels, No. 31437, slip op. at 2 (A.F. Ct. Crim. App. June 14, 1996) (citing United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982)).

247. United States v. Ward, 14 M.J. 950, 953 (A.C.M.R. 1982).

248. *Hensler,* 44 M.J. at 188. *But cf. Hensler,* 40 M.J. at 899 (stating "there is no evidence that the appellant suffered from 'pathological intoxication'").

249. *Hensler,* 40 M.J. at 900 n.8.

250. *See supra* notes 244-247 and accompanying text.

Conclusion

In 1996, the military appellate courts devoted a substantial portion of their reported opinions to issues relating to the substantive criminal law.[251] These opinions frequently resolved matters of concern to the military justice practitioner, but sometimes left unanswered significant questions that will give rise to issues in future cases. As such, the problems associated with defining crime are likely to continue to be a substantial portion of the business of the military appellate courts for the years to come.

251. *See supra* note 3 and accompanying text.