New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice (1997)

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Ignorance of the law excuses no man from practicing it.[1]
—Addison Mizner

Introduction

A thorough understanding of the substantive criminal law[2] is the foundation of both effective trial advocacy and, more broadly, the practice of military criminal law. The law of crimes and defenses exerts an obvious influence on charging decisions, proof analysis, and instructions. It also defines the baseline for an adequate providence inquiry and is central to the analysis of a variety of issues, such as multiplicity, preemption, and legal sufficiency of the evidence in appellate review. Unfortunately, too many judge advocates neglect the systematic study of substantive criminal law, preferring instead a learn-as-you-go approach that results in an incomplete and outdated knowledge of crimes and defenses. This "substantive criminal law attention deficit disorder" leaves Army lawyers ill-equipped to anticipate or to recognize defenses, to respond to motions, and skillfully to use the law in argument. Until a drug is developed to manage this condition, practitioners will have to read case law, articles like this, and even the *Manual for Courts-Martial* (*MCM*).

One of the leading causes of neglect in this area is a belief that substantive criminal law is a relatively stable mass of law requiring little effort on the part of the practitioner to stay current. After all, substantive criminal law is derived primarily from statute,[3] and statutory amendments to the punitive articles have been relatively few in number.[4] Practitioners might seem justified in expecting little change in substantive criminal law since they completed their rigorous studies in the Judge Advocate Officer Basic Course. This expectation is reinforced by several general principles woven into the fabric of American criminal jurisprudence. The principle of fair notice[5] holds that citizens are entitled to know in advance what conduct is criminal. Courts are not in the business of creating new offenses in the process of appellate review and, in theory, should not be the primary source of change in the criminal law.[6] Fair notice is provided by statutes and regulations, which are prospective in application. One corollary of the fair notice principle is that courts should strictly construe criminal statutes in favor of the accused.[7] Together, these principles exert a conservative influence on the development of substantive criminal law under the Uniform Code of Military Justice (UCMJ).

Yet, despite the expectation of stability, a large percentage of military justice cases reported each year are devoted to "new developments" in substantive criminal law.[8] Working against

1. *Quoted in* MICHAEL SHOOK & JEFFREY MEYER, LEGAL BRIEFS 156 (1995).

2. Substantive criminal law includes the law of crimes and defenses. A recognized authority gives a somewhat more formal definition: "The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct. It includes the definition of specific offenses and general principles of liability." 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.2, at 8 (1986).

3. Of course, only a few defenses are expressly defined in the Uniform Code of Military Justice (UCMJ) (for example, lack of mental responsibility under Article 50a, mistake of fact as to the victim's age under Article 120(d), and the non-exculpatory statute of limitations defense under Article 43). Other defenses are derived from the elements of the statutory offenses or developed by judicial decision from common law sources. The *MCM* contains a relatively complete list of special defenses available in courts-martial. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 916 (1996) [hereinafter MCM].

4. In the past 20 years, there have been only three amendments to the UCMJ that directly affect the punitive articles: Article 112a was created by the Military Justice Act of 1983; Article 120(a) was amended in 1993 to make the offense of rape gender neutral and to remove the spousal exemption; and Article 120(d) was added in 1996 to create a mistake of fact defense as to the age of the victim for carnal knowledge.

5. The principle of fair notice is rooted in the constitutional standard of due process.

6. *See* United States v. Joseph, 37 M.J. 392, 401 (C.M.A. 1993) ("Most judges—including those on this court—profess to reject lawmaking as an appropriate aspect of their judicial role. The propriety of such judicial restraint surely is no more clear, in terms of both sound government and constitutional principles, than in the context of substantive criminal law.").

7. *See infra* notes 176-177 and accompanying text. *See also* Crandon v. United States, 494 U.S. 152, 160 (1990) (stating, "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text"); United States v. Roa, 12 M.J. 210, 212 (C.M.A. 1982) ("[E]specially in light of the canon of strict construction of penal statutes, Article 118(3) cannot be taken to mean that for all purposes wanton disregard of life has been equated to intent to kill.").

the conservative posture of the law is the pressure of time and the boundless ingenuity of prosecutors, defense counsel, and appellate counsel in asserting and defending novel theories and applications of old statutes. The net result is a steady stream of incremental changes, extensions, and clarifications in the law of crimes and defenses.

This article reviews recent significant decisions in the law of crimes and defenses by the Court of Appeals for the Armed Forces (CAAF). Not every decision analyzed here contains "new law." Some merely raise new issues or create uncertainties that will require more definitive resolution in subsequent cases. A number of cases this year explore arcane corners of substantive criminal law, such as the transferred intent doctrine, the crime of pandering, and the viability of the "exculpatory no" defense to a charge of false official statement. Several major decisions introduce important clarifications in the law of aggravated assault, larceny of pay and allowances, and misuse of government credit cards. Finally, this article addresses developments in the exciting law of pleadings, multiplicity, and lesser-included offenses. Consider this reading therapy and a first step toward recovery.

Conventional Offenses: Attempted Murder and Transferred Intent

The venerable common law doctrine of transferred intent[9] has long been recognized in military case law[10] and is expressly adopted by the 1984 *Manual for Courts-Martial*.[11] Transferred intent is a legal fiction used by courts to prevent an accused from escaping the full measure of criminal responsibility for the homicide of an unintended victim.[12] Thus, if the accused shot at a certain person with the intent to kill, but missed his intended victim and killed a bystander, the doctrine of transferred intent may hold the accused liable for the murder of the bystander.[13] Even if the accused were only negligent toward the unintended victim as a matter of fact, he may be held liable for intentional or premeditated murder as a matter of law.[14]

In the case of *United States v. Willis*,[15] the CAAF suggests that the doctrine of transferred intent may also be applied to hold the perpetrator of an attempted murder liable for the attempted murder of bystanders who are endangered but not harmed in the attempt. This novel application of the transferred intent doctrine to cases of attempted murder is legally and conceptually problematic. Although *Willis* is a guilty plea case, the CAAF missed the opportunity to state an important limitation on the transferred intent doctrine.[16]

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8. *See* Major William T. Barto, *Recent Developments in the Substantive Criminal Law Under the Uniform Code of Military Justice*, ARMY LAW., Apr. 1997, at 50 (observing that from 1991-1995 over 30% of reported decisions of military appellate courts included issues of substantive criminal law).

9. *See* 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 200-01 (Cooley ed., 3d ed. 1884) ("Thus if one shoots at A. and misses him, but kills B., this is murder; because of the previous felonious intent, which the law transfers from one to the other."), *cited in* Ford v. State, 625 A.2d 984, 998 (1993).

10. *See, e.g.*, United States v. Gravitt, 17 C.M.R. 249 (C.M.A. 1954); United States v. Black, 11 C.M.R. 57 (C.M.A. 1953).

11. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 43c(2)(b) (1984). The current version of the *MCM* expressly applies and discusses transferred intent in relation to premeditated murder under UCMJ, art. 118(1). The explanation includes this definition:

> *Transferred premeditation.* When an accused with a premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim.

MCM, *supra* note 3, pt. IV, ¶ 43c(2)(b). The *MCM* reference to transferred intent in the case of unpremeditated murder is less explicit, stating elliptically, "The intent need not be directed toward the person killed . . . ." *Id*. ¶ 43c(3)(a).

12. *See generally* LAFAVE & SCOTT, *supra* note 2, § 12, at 399-402 (referring to the doctrine of transferred intent as "pure fiction").

13. Professors LaFave and Scott observe that the modern approach to transferred intent, exemplified by the *Model Penal Code*, avoids the use of a fiction by viewing the issue as one of simple causation.

> Actually it is probably more correct to say that the crime merely requires an intent to kill another, so that there is no problem as to mental state, and no need to resort to the fiction of "transferred intent." Rather, the question is whether the fact that a different person was killed somehow makes it unfair to impose criminal liability on A, a problem which is more appropriately dealt with as a matter of causation.

Id. 310-11.

14. *See* United States v. Black, 11 C.M.R 57 (C.M.A. 1953) (holding that the accused had been properly convicted of intentional murder of his friend who was fatally wounded by a bullet which passed through the intended victim of a premeditated murder).

15. 46 M.J. 258 (1997).

The accused in *Willis* premeditated the murder of his estranged wife and his aunt, who were scheduled to testify against him at an Article 32 investigation.[17] On the day of the hearing, he went to the base legal office, found his wife, and shot her to death. After killing his wife, he sought his aunt in a nearby office. When he tried to enter the office, his uncle blocked the door, and the accused was only able to force the door open approximately six inches. The accused reached around the partially open door and fired three shots in the small area behind the door where he knew his aunt and uncle were located. No one in the office was injured.[18]

The accused pleaded guilty to the attempted murder of both his aunt and uncle.[19] During the providence inquiry, however, the accused was ambivalent regarding his intent to kill his uncle, stating,"[I]f my 9mm had not jammed, I probably would have shot [my uncle] as well. I didn't have the intent, but I did endanger him at that time."[20] Although he acknowledged his guilt to each element of the offense, the accused did not further clarify his intent toward his uncle. Nonetheless, the military judge accepted his plea to the attempted murder of his uncle by relying on the doctrine of transferred intent.[21]

The Air Force Court of Criminal Appeals affirmed the conviction, reasoning that the accused's intent to kill his uncle could be inferred from the nature and scope of the attack against his aunt.[22] The court erroneously labeled this factual inference as an application of the transferred intent doctrine.[23] As noted above, transferred intent is not based on a factual inference, but a legal fiction.

The CAAF compounded the conceptual confusion of the service court when it held that the appellant's plea of guilty to the attempted murder of his uncle was provident "under either a transferred intent or concurrent intent theory."[24] The court defined concurrent intent by quoting from a recent opinion of the Maryland Supreme Court: "[I]ntent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity."[25] Despite the impressive title, practitioners will recognize the "concurrent intent theory" as simply a specific application of the familiar permissive inference that a person "intends the natural and probable consequences of his acts."[26]

Both the CAAF and the service court fall into error by confusing the operation of a permissive factual inference with the purely legal doctrine of transferred intent. Thus, at one point in the CAAF's majority opinion, the court states a conclusion as to the accused's actual intent: "Appellant's admitted actions are sufficient to establish that he had the concurrent intent to kill both his aunt and his uncle."[27] The court then offers an alternative rationale that employs the transferred intent doctrine: "Thus, we conclude that appellant's shooting into the occupied room together with the necessary intent to kill [his aunt] was

16. While it is generally recognized that opinions affirming guilty plea convictions have less precedential value than those opinions based on a legal sufficiency review of a full record, the CAAF occasionally uses a guilty plea review to announce important legal conclusions. *See, e.g.*, United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (recognizing the defense of voluntary abandonment under UCMJ art. 80). Judge Cox refused to join the majority opinion in *Byrd*, expressing "reservations about making substantive law on a guilty plea record." *Id.* at 293.

17. United States v. Willis, 43 M.J. 889, 891 (A.F. Ct. Crim. App. 1996).

18. *Id.*

19. *Id.* The accused also pleaded guilty to attempted murder of Captain Hatch, whom the accused shot at before shooting at his aunt behind the blocked door. The accused was also convicted, contrary to his pleas, of the premeditated murder of his wife, desertion, escape from confinement, wrongful appropriation, and other various offenses and was sentenced to a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1. *Id.*

20. *Willis*, 46 M.J. at 260.

21. *Willis*, 43 M.J. at 895.

22. *See id.* at 896.

> [W]e find compelling Chief Judge Everett's conclusion in [*United States v. Roa*, 12 M.J. 210 (C.M.A. 1982)] . . . that, as a factual matter, tossing a grenade into a crowded room, knowing the complete lethality of an operable grenade, was sufficient to infer an intent to kill, *notwithstanding that nobody was, in fact, killed.* In this case, appellant pulled the trigger three times at nearly point-blank range. The pistol was unaimed, in the sense that he could not see to distinguish which of the two people he knew to be there would be struck. He moved the pistol between each attempted shot, with the evident idea of covering the small area occupied by the Plybons.

Id.

23. *Id.*

24. *Willis*, 46 M.J. at 261.

25. *Id.* at 261, *quoting* Ford v. State, 625 A.2d 984 (1993).

26. MCM, *supra* note 3, pt. IV, ¶ 43c(3)(a).

sufficient for the military judge to accept his guilty plea to the attempted murder of [his uncle]."[28] In this alternative approach, only the actual intent to kill the aunt is considered a "necessary" predicate for the assertion of liability for the attempted murder of the uncle.

If *Willis* had been a contested case, the court might have reasonably inferred that the accused actually intended to kill both his aunt and his uncle when he fired multiple rounds in a random pattern into the small area behind the door. In reviewing a guilty plea, however, the court is not free to disregard the accused's statements during the providence hearing by substituting its own inferences.[29] The correct inquiry in this appeal is whether the apparent inconsistency between Willis' plea and his disavowal of the specific intent to kill his uncle constitutes a "substantial basis" for questioning the guilty plea.[30] The court circumvents that issue by invoking a permissive inference and the transferred intent theory.

Judge Sullivan recognized the mistake of employing a factual inference to circumvent the problem of an arguably defective providence inquiry. Writing separately, he voted to affirm the conviction on the firmer ground that the accused's apparent denial of the requisite intent to kill his uncle was simply ambiguous and insufficient to undermine confidence in the guilty plea.[31]

Unlike the theory of concurrent intent, transferred intent is not a rule of inference; rather, it is a legal policy designed to prevent an accused from escaping responsibility for harm actually inflicted on an unintended victim.[32] As the Supreme Court of Maryland explained, "[t]he purpose of transferred intent is to link the mental state directed towards an intended victim . . . with the actual harm caused to another person. In effect, transferred intent makes a whole crime out of two component halves."[33] When *A* shoots at *B* with the intent to kill *B*, but the bullet misses *B* and kills *C*, the doctrine of transferred intent holds *A* fully liable for the unintended harm to *C* as a simple matter of policy. The doctrine of transferred intent is not used to infer that *A* actually intended to kill *C*; rather, it "transfers" the intent to kill to the actual victim of harm. That is not a factual inference but an assertion of legal responsibility contrary to the facts. In *Willis*, if the accused actually intended to kill both victims, there is no need to rely on the fiction of transferred intent. On the other hand, if he actually intended to kill only his aunt, the fundamental rationale behind the transferred intent doctrine—to make "a whole crime out of two component halves"—does not require its application either. The accused completed the whole crime of attempted murder of his aunt. He may be held fully liable for that offense. He may also be held fully liable for the assault on his uncle. For that assault, he may be liable for an aggravated assault or an attempted murder, depending on his actual mental state.

In *Willis*, the CAAF does not simply "transfer" the intent from an intended victim to an unintended victim; rather, it multiplies the accused's liability for *unharmed* bystanders in the proximity of the attack. There is no precedent in military law for this application of the doctrine of transferred intent. The Maryland Supreme Court opinion from which the CAAF borrows the concurrent intent theory expressly rejects the use of transferred intent to hold an accused liable for attempted murder of unharmed bystanders.[34] This limitation on the application of the doctrine is also implicit in the *MCM*'s explanation of the rule, which requires an actual killing of an unintended victim as a predicate for the application of the rule.[35] This is a sensible limitation; otherwise, an accused would be subject to liability for the attempted murder of everyone in the proximity of a bullet's path, whether or not it finds its intended target. The court's approach in *Willis* also raises a more fundamental due process concern: using the doctrine of transferred intent to multiply liability for attempted murder gives the government a free ride by relieving it of its constitutional burden of proving the accused's guilt on every element of the offense beyond a reasonable doubt.[36]

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27. *Willis*, 46 M.J. at 261.

28. *Id*. at 262.

29. *See* UCMJ art. 45 (West 1995); MCM, *supra* note 3, R.C.M. 910.

30. *See* United States v. Prater, 32 M.J. 433 (C.M.A. 1991) (reviewing the development of the "substantial basis" test). *See generally* FRANCIS GILLIGAN & FREDRIC LEDERER, COURT-MARTIAL PROCEDURE § 19-24.00 (1991) (discussing standards of review of military judge's decision to accept a guilty plea following an incomplete or defective providence inquiry).

31. *Willis*, 46 M.J. at 262 (Sullivan, J., concurring).

32. *See* LAFAVE & SCOTT, *supra* note 2, § 3.5, at 311.

33. Ford v. State, 625 A.2d 984, 997 (1993).

34. *See id*. at 999-1000 (holding that the doctrine of transferred intent is inapplicable to attempted murder).

35. *See supra* note 11.

Willis holds several lessons for the practitioner. On the most basic level, it serves as a reminder of trial counsel's duty to pay attention during providence inquiry and to ask the military judge to clarify any statements by the accused that are inconsistent with guilt on each element of the charged offense. The case also introduces the concept of "concurrent intent" into the military justice lexicon. This is a useful theory of culpability in cases where the nature of the attack indicates an intent to commit multiple homicides. Finally, the case demonstrates one of the conceptual pitfalls lurking in the use of the transferred intent doctrine. Where an attempted murder of a single victim is carried out in a manner that endangers bystanders, the perpetrator may be liable for multiple assaults on those bystanders. If someone other than the intended victim is actually killed, the doctrine of transferred intent applies, but, unless the accused intended to kill more than one victim, there is only one attempted murder.

Conventional Offenses: Assault

Article 128 sets forth the law of assaults under the UCMJ. Assault is one of the basic building block offenses, serving as a component or predicate offense for many other offenses under the UCMJ.[37] Doctrinal developments in the law of assaults, therefore, have broad significance in the substantive criminal law. Despite the fundamental significance of assault, military courts continue to define and refine the law of assaults under Article 128 more than forty-five years since the enactment of the UCMJ. This section reviews several of the more significant and interesting cases of assault recently decided.[38]

HIV-Infected Semen as a "Means or Force Likely"

There are several well-settled ways to charge HIV-related misconduct. The two most common approaches are to charge a violation of Article 90 for willful disobedience of the "safe-sex" order[39] or to charge a violation of Article 128(b) for aggravated assault with a means likely to inflict death or grievous bodily harm.[40] The military justice system was one of the first American jurisdictions to explore the application of aggravated assault statutes to HIV-related misconduct.[41] The court continued to explore the ramifications of that application in three significant cases in 1996 and 1997.

The HIV-assault cases created some confusion regarding the proper standard for determining whether a particular means of assault was a "means likely to inflict death or grievous bodily harm" under Article 128(b). The confusion was manifested by a split in the Navy-Marine Corps Court of Criminal Appeals in *United States v. Outhier*.[42] Private First Class Outhier went AWOL from his duty station at Camp Pendleton, California and appeared incognito at the U.S. Naval Academy as a Navy SEAL recruiter under the pseudonym "Jonathan Valjean."[43] One officer candidate, named Avila, took advantage of "Jon's" visit to obtain advanced water survival training. Jon subjected the enthusiastic trainee to a potentially dangerous exercise in which Avila was bound hand and foot and cast into the deep end of the pool. Although Avila was not injured in any way, PFC Outhier subsequently pleaded guilty to assault with a means likely to inflict death or grievous bodily harm.[44] The Navy-Marine Corps court affirmed his conviction. Citing the leading HIV cases, the majority defined "likely" in the statutory phrase "other force or means likely to inflict death or grievous bodily harm"[45] as "more than merely a fanciful, speculative, or remote

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36. The government would be relieved of its burden to prove the mens rea element of each attempted homicide once it proves that element with regard to the intended victim. While the proper application of the transferred intent doctrine also is subject to this "two for the price of one" criticism, the government in those cases must still prove that a killing occurred and that the accused caused that killing by a specific act or omission.

37. *See, e.g.*, UCMJ arts. 90 (assaulting a superior commissioned officer); 122 (robbery); 134 (indecent assault) (West 1995).

38. This article does not discuss the significant case of *United States v. Davis*, 45 M.J. 681 (N.M. Ct. Crim. App. 1997), which holds that an unloaded or non-functioning firearm is a "dangerous weapon" under UCMJ art. 128(b). That decision conflicts with the holding of the Army Court of Criminal Appeals in *United States v. Turner*, 42 M.J. 689 (Army Ct. Crim. App. 1995). *Davis* is currently pending decision by the CAAF, which is likely to announce its decision before or shortly after this article is published.

39. *See, e.g.*, United States v. Pritchard, 45 M.J. 126 (1996).

40. *See infra* notes 54-59 and accompanying text. Although attempted murder (art. 80) and assault with intentional infliction of grievous bodily harm (art. 128(b)) are also theoretically possible charges, military appeals courts have not been presented with such a case. *See generally* Elizabeth Beard McLaughlin, *A "Society Apart?" The Military's Response to the Threat of AIDS*, ARMY LAW., Oct. 1993, at 3 (discussing various charging options in HIV cases).

41. *See* Richard Lacayo, *Assault with a Deadly Virus*, TIME, July 20, 1987, at 63 ("[M]ilitary prosecutors are now among the first lawmen in the country to see the AIDS virus as a weapon and its willful transmission as a crime."). *See, e.g.*, United States v. Stewart, 29 M.J. 92 (C.M.A. 1989); United States v. Morris, 30 M.J. 1221 (A.C.M.R. 1990).

42. 45 M.J. 326 (1996).

43. *Id.* at 327.

44. *Id.*

possibility."[46] Judge DiCiccio, dissenting in part, agreed that the majority accurately defined the standard applied in HIV assault cases.[47] He argued, however, that the Court of Military Appeals had adopted that standard in view of the unique public threat posed by the spread of the HIV virus and that the standard should not be extended to cases outside of that context.[48]

On appeal, the CAAF emphatically rejected the Navy-Marine Corps court's conclusion that it had established a different standard for aggravated assault in the HIV cases and held that only one standard applies to assault with a "means likely," regardless of the particular means used in a given case.[49] The court held that a "means likely to inflict death or grievous bodily harm" includes any means that has "the natural and probable" tendency to inflict such harm.[50] Applying that standard to the facts of the case, the court held that the plea was improvident in view of the extensive safety precautions that Outhier had employed in the water survival training exercise.[51]

In the HIV cases, the court was required to determine whether an assault with HIV-infected semen could be a "means likely" to inflict death or grievous bodily harm.[52] The court analyzed this question by distinguishing between several links in the causal chain.[53] The first link is the invasion of the victim's body by the HIV virus; the second link is the development of AIDS from the HIV infection. The court held that the likelihood of invasion by the virus need only be "more than merely a fanciful, speculative, or remote possibility."[54] If that standard is met, the issue becomes whether HIV infection is a means likely to cause the debilitating and ultimately fatal condition known as AIDS. Since the natural and probable consequence of HIV infection is the development of AIDS, it may be said that HIV infection is a means likely to inflict death or grievous bodily harm. In other words, the "natural and probable consequences" standard is applied to the second link in the causal chain.

In *United States v. Joseph*,[55] the court drew an analogy to an assault by firearm to illustrate this analysis. If the means used in an assault is a high velocity projectile, the issue is whether the projectile is likely to cause death or great bodily harm *if* it hits the victim.[56] The bullet need not actually hit the victim to constitute an assault by a means likely.[57] There must, however, be some possibility that the bullet could hit the victim. That possibility must be more than "fanciful, speculative, or remote." The government must introduce expert testimony to prove the requisite probabilities at each stage of the causal analysis.

Informed Consent of the Victim Is No Defense

In *United States v. Bygrave*,[58] the court confronted two previously unresolved challenges to the prosecution of HIV-posi-

45. UCMJ art. 128(b) (West 1995).

> (b) Any person subject to this chapter who—
> (1) commits an assault with a dangerous weapon *or other means or force likely to produce death or grievous bodily harm*; or
> (2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-martial may direct.

Id. (emphasis added).

46. United States v. Outhier, 42 M.J. 626, 632 (N.M. Ct. Crim. App. 1995).

47. *Id*. at 635 (agreeing that HIV assaults are treated as a "special category").

48. *Id*.

49. *Outhier*, 45 M.J. at 328.

50. *Id*. at 329.

51. *Id*. at 330. Judge Sullivan, joined by Judge Crawford, dissented as to the result only. *Id.* at 332-33.

52. *See* United States v. Schoolfield, 40 M.J. 132 (C.M.A. 1994) (accused did not ejaculate); United States v. Joseph, 37 M.J. 392 (C.M.A. 1993) (accused wore a condom); United States v. Johnson, 30 M.J. 53 (C.M.A. 1990) (attempted anal intercourse).

53. *See Joseph*, 37 M.J. 392, 396 (C.M.A. 1993).

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*.

58. 46 M.J. 491 (1997).

tive soldiers who engage in sexual intercourse. In *Bygrave*, the accused was convicted of assault with a means likely to cause death or grievous bodily harm on two victims.[59] The case is unique because one of the victims consented to unprotected sexual intercourse after the accused informed her of his HIV-positive condition.[60] On appeal, the accused challenged his conviction as to the consenting victim on both statutory and constitutional grounds. The appellant argued that consent negates the element of assault that requires proof of "unlawful force or violence" against the victim.[61] The court held that, for public policy reasons, informed consent is not a valid defense to assaults that are likely to result in death or grievous bodily harm.[62] The court reserved judgment about the viability of an informed consent defense in cases where the accused also wears a condom or the putative victim is already HIV-positive. In either of those cases, the risk of transmission or marginal health risk may be so small that the public interest in protecting the victim might be insufficient to preclude the consent defense.[63]

The appellant in *Bygrave* also argued that his conviction violated his asserted constitutional "right to engage in sexual intercourse."[64] The court was unable to find any "generalized constitutional right to sexual intimacy between consenting adults" in existing precedent.[65] Private acts of consensual heterosexual intercourse between unmarried adults are not proscribed by the UCMJ, and case law offers no conclusive answer as to whether such acts are protected by the "right to privacy" as defined by the Supreme Court.[66] The court declined the invitation to determine whether such a right exists. Instead, it held that, even if there is a fundamental right at stake, it is outweighed by the government's compelling interest in protecting the life and safety of members of the armed forces.[67] The accused's consenting partner in *Bygrave* was also a sailor. The court found that the Navy has a compelling interest in maintaining her readiness for duty, avoiding the costs of medical care associated with HIV, and preventing the further spread of the disease to other members of the military community.[68] The court expressly reserved judgment on whether the government's interests would be sufficiently compelling if the victim was a civilian or married to the accused at the time of the offense.[69]

Mere Use of a Condom Is No Defense

In *United States v. Klauck*,[70] the court reaffirmed its holding in *United States v. Joseph*[71] that use of a condom by a male accused does not preclude conviction for assault by HIV-infected semen. In *Klauck*, the victim was not informed of the accused's HIV-positive condition, but the accused did use a condom.[72] At trial, the government offered expert testimony concerning the unreliability of condoms due to faulty produc-

59. *Id*. at 492. The accused was sentenced to a bad conduct discharge, confinement for four years, total forfeitures, and reduction to the grade of E-1.

60. *Id*. The consenting victim subsequently married the accused after testing positive for HIV.

61. *Id*. at 493.

62. *Id*. The court elaborated on this conclusion in a footnote.

> In this respect, aggravated assault is like numerous other crimes under the Uniform Code of Military Justice in which the consent of the immediate "victim" is irrelevant because of the broad military and societal interests in deterring the criminalized conduct. *See*, *e.g.*, Arts. 114 (dueling), 120 (carnal knowledge), and 134 (bigamy).

Id. at 493.

63. *Id*. at 493-94, nn.5, 6.

64. *Id*. at 494.

65. *Id*. at 495.

66. Courts have hinted at the possible marital exception for consensual sodomy in many decisions. *See*, *e.g.*, United States v. Scoby, 5 M.J. 160 (C.M.A. 1983). The CAAF recently implied the possibility, holding that an accused was not denied any constitutional right of privacy when his abused spouse sought to terminate an assault by engaging him in an act of consensual sodomy. *See* United States v. Thompson, 47 M.J. 378 (1997).

67. *Bygrave*, 46 M.J. at 496.

68. *Id*.

69. *Id*.

70. 47 M.J. 24 (1997).

71. 37 M.J. 392 (C.M.A. 1993).

72. *Klauck*, 47 M.J. at 25.

tion, permeability, and improper use.[73] The CAAF held that the evidence was legally sufficient to sustain a conviction.[74]

Klauck is significant because it goes beyond *Joseph* in two ways. First, the condom in this case apparently was worn properly and remained intact throughout the intercourse, whereas in *Joseph*, there was evidence that the condom had broken during intercourse.[75] Additionally, in *Klauck*, the sexual intercourse was interrupted before the accused ejaculated. This case combines the lack of ejaculation with the use of a condom and still meets the legal sufficiency standard, because the government expert also testified that HIV may be transmitted through pre-ejaculatory fluids.[76]

Bygrave and *Klauck* consolidate the law of HIV-related assaults and highlight possible limitations on future applications. Practitioners must carefully observe what the court did and did not hold. First, the CAAF has never held that sexual contact with an HIV-infected person is a means likely to inflict death or grievous bodily harm *as a matter of law.*[77] The government bears the burden of presenting expert testimony concerning the risk of exposure to HIV under the circumstances of the case and the likelihood of HIV to cause AIDS. Meeting this burden in a given case may require proof of the conveyance of the virus in pre-ejaculatory seminal fluid or other bodily fluids; the risk of transmission through oral, anal, or genital contact; or the risk of transmission by a female carrier.[78] Second, the court has not yet decided certain issues of statutory and constitutional significance. The court has not been presented with a case that combines the informed consent of the victim and the use of a condom. Such a case raises the possibility of both a consent defense and a constitutional challenge on the basis of due process under the fair notice principle.[79] It is also unclear whether sex between two HIV positive partners would constitute a means likely to cause death or grievous bodily harm, though it still would probably violate a safe sex order. Finally, the court has not decided whether the constitutional "right of privacy" precludes prosecution in a case involving a civilian victim or a victim who is married to the accused at the time of the alleged assault.

Assault by Offer: Words Alone?

Under most circumstances, words alone are insufficient to constitute an assault under Article 128. The *MCM* states: "The use of threatening words alone does not constitute an assault. However, if the threatening words are accompanied by a menacing act or gesture, there may be an assault, since the combination constitutes a demonstration of violence."[80] In *United States v. Milton*,[81] the CAAF explored the limits of that rule and held that verbal threats accompanied by the display of a concealed firearm may constitute an assault under Article 128, even though the weapon is not pointed at the victim or brandished in any manner.[82]

The accused in *Milton* sought out a soldier whom he suspected of having a sexual interest in his wife.[83] Unaware of Milton's identity, the victim began to describe his adulterous intentions in lusty detail. At some point in the monologue, Milton lifted his shirt, revealing a pistol in his waistband, and said: "I want you to stay away from my wife or me and you are going to have serious problems and when I say serious problems I mean we're going to have serious problems."[84] Although Milton did not brandish the pistol or even express an intent to use the weapon at that time, the victim feared imminent violence and fled. Milton was apprehended at his quarters a short time later, and the pistol was found with a loaded clip and a round in

73. *Id.*

74. *Id.* at 26.

75. *Joseph*, 37 M.J. at 397.

76. *Klauck*, 47 M.J. at 25.

77. *See* United States v. Bygrave, 46 M.J. 491, 493 (1997) ("Although we have previously held that, in certain circumstances, a court may find that protected sex is an act likely to result in grievous bodily harm or death . . . we have never held that protected sex with an HIV-positive partner must be so found as a matter of law.").

78. There are no reported military cases of prosecution of a female accused for assault by exposing a sex partner to HIV.

79. In *Bygrave*, the court cautioned the government in *Bygrave* that "the prosecution of an HIV-positive service member for having safe sex after providing appropriate notice of his status to his or her partner might conceivably raise constitutional due process concerns." *Bygrave*, 46 M.J. at 495. The fair notice concern is based on the content of the safe-sex order, which implicitly authorizes sexual intercourse if the subject wears a condom and informs his partner that he has HIV. It would be anomalous if the government were to authorize sex under these conditions and then prosecute the subject for complying with the conditions.

80. MCM, *supra* note 3, pt. IV, ¶ 54c(1)(c)(ii).

81. 46 M.J. 317 (1997).

82. *Id.* at 318.

83. *Id.*

84. *Id.*

the chamber. The accused pleaded guilty to simple assault by offer.[85]

Although *Milton* is a guilty plea case, it offers a useful illustration of the problems that can arise in this corner of the law of assaults. The focus of the court in cases of assault by offer is the victim's reasonable apprehension of immediate harm.[86] The court concludes that, under the totality of the circumstances in this case, Milton's victim had reasonable grounds to fear imminent harm.[87] In order to reverse a conviction based on a guilty plea, the court must find a "substantial basis" in law and fact for questioning the plea.[88] Given the limited factual record in a guilty plea, the appellate court accepts the accused's admissions regarding the existence of certain crucial elements, such as the victim's reasonable apprehension.

The conclusion in *Milton* is nonetheless troubling. The accused did not express an intent to use immediate violence. His threat was explicitly conditional. Moreover, the accused did not brandish or remove the pistol from his belt at any time. At what point was there a "demonstration of violence," as required by Article 128? The court stresses the fact that Milton intended to frighten the victim and that he apparently succeeded.[89] However, while the victim's perception of imminent harm is the proper focus of an offer-type assault, both the *MCM* and the court insist on an independent showing of some overt physical act beyond mere words. Judge Sullivan, in a concurring opinion, was unwilling to find a sufficient demonstration in the mere disclosure of the concealed firearm.[90] He voted to affirm on the totality of the facts, which included a brief foot pursuit by the accused.[91]

The CAAF has construed the term "offer" in Article 128 to require some physical demonstration of violence.[92] In *Milton*, the court asserted that "words alone, or threats of violence to occur at some future date, are insufficient" to constitute an offer-type assault.[93] Thus, if Milton had simply informed the victim that he had a pistol and did not display the weapon, the court could not find a demonstration of violence, even if the victim fled in fear. Similarly, if Milton had approached the victim in the dark or from behind and uttered his intent to shoot the victim, there would be no assault under Article 128, according to the court's "mere words" limitation.[94]

While the presence of the weapon certainly shows the potential for violence, the law requires a demonstration or an "offer" to use violence immediately.[95] Under the court's approach in *Milton*, any threatening words by an individual with a holstered firearm or access to a nearby deadly weapon could be sufficient to constitute an assault, if the putative victim is aware of the availability of a weapon. Under the court's approach in *Milton*, the requirement for a physical offer becomes nearly illusory.

Even if Milton's threat is viewed as undesirable, that does not ineluctably lead to the conclusion that the threat violated Article 128. Circumstances similar to *Milton* often include sufficient demonstrations of violence to justify an assault charge. But when a physical offer is missing, practitioners should consider alternative ways to address the type of misconduct found

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85. *Id.* The accused was sentenced to a bad conduct discharge, confinement and forfeitures for four months, and reduction to the grade of E-1.

86. MCM, *supra* note 3, pt. IV, ¶ 54c(1)(b)(ii). "An offer type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm." *Id.*

87. *Milton*, 46 M.J. at 319.

88. *See* United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991).

89. *Milton*, 46 M.J. at 319. The flight of the victim in this case calls to mind the biblical proverb: "The wicked flee when no one pursues, but the righteous are bold as a lion." *Proverbs* 28:1.

90. *Milton*, 46 M.J. at 318 (Sullivan, J., concurring).

91. *Id.*

92. *See id.*

93. *Id.* at 319.

94. *See* LaFave & Scott, *supra* note 2, § 7.16, at 317.

95. The *MCM* illustrates this requirement by comparing the following hypotheticals:

> Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of an intention not to strike, there is no assault. For example, if Doe raises a stick and shakes it at Roe within striking distance saying, "If you weren't an old man, I would knock you down," Doe has committed no assault. However, an offer to inflict bodily injury upon another instantly if that person does not comply with a demand which the assailant has no lawful right to make is an assault. Thus, if Doe points a pistol at Roe and says, "If you don't hand over your watch, I will shoot you," Doe has committed an assault upon Roe.

MCM, supra note 3, pt. IV, ¶ 54c(1)(c)(iii).

in *Milton*. First, there are several options for charging verbal threats under the UCMJ. Article 117 proscribes "provoking speeches or gestures" that are likely to incite immediate retaliation.[96] Article 134 proscribes the communication of "certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently *or in the future*."[97] Additionally, Milton may have violated Article 134 or Article 92 by carrying the concealed weapon.[98] There are many ways to address this kind of misconduct without stretching the definition of criminal assault to the point of distortion.

Regardless of the strain placed on the doctrine of assault by offer, *Milton* sends this message: soldiers who take it upon themselves to utter conditional threats backed by displays of the capability to inflict harm may run afoul of Article 128. "Saber rattling," even in the name of chivalry, may be an assault if the victim reasonably apprehends immediate bodily harm.

Assault Consummated By X-Ray?

Assault consummated by a battery is one of three types of simple assault under Article 128(a).[99] Unlike an attempt or offer, battery requires proof that the accused "did bodily harm" to the victim.[100] The *MCM* defines bodily harm very broadly, to include "any offensive touching, however slight."[101] The touching need not be direct to support a battery. Military courts have held, for example, that deliberate or negligent exposure of a victim to smoke[102] or CS gas[103] can constitute a battery.

In *United States v. Madigar*,[104] the Coast Guard Court of Criminal Appeals explores the outer limits of indirect battery by holding that unauthorized X-rays may constitute a sufficient touching to satisfy Article 128. The accused, an X-ray technician, subjected female patients to unnecessary and unauthorized X-rays, apparently to gratify his sexual desires.[105] Victims were told to remove certain articles of clothing and to assume certain compromising positions as part of the unauthorized X-rays.[106] The accused pleaded guilty to battery and various other charges.[107] At trial, the judge took notice, with the express consent of the accused, that "in passing through the body, the X-ray radiation can damage parts of cells of the body, so that if a great many such exposures are suffered by the body, eventually disease or deterioration of the body can result."[108] There was no evidence in the case that individual victims were exposed more than one time or that any measurable physical injury was inflicted. The court was unable to find a single precedent involving a criminal prosecution for exposure to X-ray radiation, but it found numerous tort cases from the early days of X-ray technology when burns were not uncommon.[109]

The issue in this appeal was specifically limited to whether the touching by X-rays was substantial enough to satisfy Article 128. The court was not asked to resolve whether the consent of the victims was a valid defense to the crime charged. Even if a single, brief exposure to X-ray radiation is found to be a "harmful or offensive touching" for purposes of Article 128, the question remains whether the fraudulently obtained consent of the victims is valid consent.

Consent goes to the issue of lawfulness. A battery is unlawful when it is done "without legal justification or excuse and without the lawful consent of the person affected."[110] Consent, therefore, is a defense to an assault which does not entail the risk of serious bodily harm or breach of public peace.[111] Since

96. *See* United States v. Thompson, 46 C.M.R. 88 (C.M.A. 1972) (construing Article 117 to require "fighting words" within the meaning of existing Supreme Court precedents).

97. MCM, *supra* note 3, pt. IV, ¶ 110b(1) (communicating a threat).

98. *Id*. ¶ 112 (carrying a concealed weapon).

99. *See id*. ¶ 54c(1), (2) (discussing two distinct theories of simple assault and assault consummated by battery).

100. *Id*. ¶ 54c(2)(a).

101. *Id*. ¶ 54c(1)(a).

102. *See* United States v. Banks, 39 M.J. 571 (N.M.C.M.R. 1993).

103. *See* United States v. Schroder, 47 C.M.R. 430 (A.C.M.R. 1973).

104. 46 M.J. 802 (C.G. Ct. Crim. App. 1997).

105. *Id.* at 802.

106. *Id.* at 804.

107. *Id.* at 802. The accused was sentenced to a dishonorable discharge, confinement for seven years, total forfeitures, and reduction to the grade of E-1.

108. *Id.* at 803.

109. *Id.* at 803-04.

it is unlikely that a single exposure to X-rays could be deemed serious injury, consent may be a defense.

Madigar is very similar to *United States v. Brantner*,[112] in which a recruiter committed various indecent assaults on recruits under the pretense of performing necessary pre-induction examinations. The Navy-Marine Corps court held that, because the recruiter was not authorized to perform such examinations, the touching was not "lawful," and that his fraudulently induced consent could not transform them into lawful acts.[113]

Practitioners should recognize that *Madigar* was a guilty plea, in which the judge took judicial notice of the harmful nature of X-ray radiation. In a contested case, the government would bear the burden of proving the harmful or offensive nature of the touching. The issue of consent would also be front and center in a contested case.

As in *Milton*, the real lesson in this case may be a reminder to carefully consider charging alternatives. The UCMJ is flexible enough to permit charging this sort of misconduct without testing the limits of the assault statute. The essence of Madigar's crimes is two-fold: he abused the victims, and he abused his position. The physical abuse of the victims can be fully reflected in charges of indecent assault,[114] indecent acts,[115] maltreatment,[116] or battery[117] stemming from any physical contact that occurred as the accused posed victims for the X-rays. The abuse of his position and violation of trust of putative medical patients could be fully reflected in charges alleging derelictions of duty[118] or violations of the general article (Article 134).[119] In the wake of *Madigar*, some zealous prosecutors will likely speculate about other assaults consummated by exposure to various bands on the electromagnetic spectrum. Bright lights or lasers that inflict retinal burns may be a fertile field for the bored and under-worked prosecutor with a background in science—or science fiction.

Conventional Offenses: Larceny of Pay and Allowances

In the popular board game "Monopoly," if the bank makes an accounting error in a player's favor, he is free to retain the windfall and to use it for his personal benefit without incurring any civil or criminal liability. Soldiers who apply that lesson to real-life finance errors resulting in direct deposits of unauthorized pay or allowances may need a real-life "get-out-of-jail-free" card when the error is discovered. In *United States v. Helms*,[120] the CAAF unanimously ruled that a service member who receives unauthorized pay or allowances as a result of a government error may be convicted of larceny if he discovers the error, fails to inform the government, and forms the intent to steal the unauthorized payments.

The scenario in *Helms* is now a familiar one to military courts: Airman First Class Helms received basic allowance for quarters (BAQ) and overseas housing allowance (OHA) for eleven months after moving into government quarters in Germany.[121] As a result, he was overpaid more than $11,000. There was no evidence that Helms did anything to initiate the unauthorized allowances, to ensure their continued payment, or to frustrate government attempts to recoup the money.[122] The government offered evidence that the accused was present when his spouse had a casual conversation about the BAQ/OHA payments with a finance NCO at some point during the eleven-month period.[123] The NCO advised Helms to visit his

110. MCM, *supra* note 3, ¶ 54c(1)(a).

111. *See id.* pt. IV, ¶ 54c(1)(a) (requiring proof that the assault was done without the "lawful consent" of the victim). An important limitation on the lawfulness of consent is discussed in *United States v. Bygrave*, 46 M.J. 491 (1997). *See supra* notes 58-69 and accompanying text.

112. 28 M.J. 941 (N.M.C.M.R. 1989).

113. *Id.* at 943. *See generally* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1079-83 (3d ed. 1982) (discussing the defense of consent in cases of battery and indecent assault).

114. UCMJ art. 134 (West 1995).

115. *Id*.

116. *Id*. art. 93.

117. *Id*. art. 128.

118. *Id*. art. 92(3).

119. Such conduct might be charged as a general disorder or neglect under clauses one and two of UCMJ art. 134.

120. 47 M.J. 1 (1997).

121. *Id.* at 2.

122. There was no evidence that the accused attempted to defraud the government by any affirmative act. Despite some language to the contrary in the unreported service court opinion, the CAAF makes it clear that the accused's culpable act was one of "inaction" only. *Id.* at 3.

finance office to ascertain whether he was entitled to the payments. Helms did not follow that advice or inform the government of the overpayments at any time.[124]

Helms was convicted of larceny of the full amount of the overpayments.[125] The conviction was affirmed by the Air Force Court of Criminal Appeals in an unpublished opinion. The CAAF found the evidence legally sufficient to support a larceny conviction and announced a new, simplified rule for cases involving larceny of pay or allowances. "We now hold that once a service member realizes that he or she is erroneously receiving pay or allowances and forms the intent to steal that property, the service member has committed larceny."[126] This definitive holding appears to resolve any lingering doubts about the legal basis of prosecuting service members under Article 121 when they try to keep money received as a result of a government error. The precise doctrinal basis for this ruling, however, remains problematic and portends further confusion for unwary courts and counsel.

In *United States v. Antonelli*,[127] the CAAF held that a wrongful withholding arises when the accused does some affirmative act to frustrate government attempts to account for mistaken payments.[128] In reaching that conclusion, a majority of the court reaffirmed its view that Article 121 merged and codified the three common law offenses of larceny, obtaining by false pretenses, and embezzlement.[129] While Article 121 simplified the pleading of these various forms of theft, it did not enlarge the scope of liability under any of the component common law offenses.[130] Thus, in order to be liable under Article 121, one must be guilty of one of the common law offenses that are combined in that statute.

In a concurring opinion that foreshadowed *Helms*, Judge Crawford expressed skepticism toward the majority's view that criminal liability under Article 121 must be strictly limited to the common law definitions of larceny and embezzlement.[131] Writing for the unanimous court in *Helms*, Judge Crawford nonetheless relies on two alternative common law theories to support liability in the case. According to the court, Helms is guilty of either a wrongful taking based on the common law doctrine of "mistaken delivery"[132] or a wrongful withholding based on the "fictional notion of continuing trespass."[133]

At common law, the recipient of mistakenly delivered goods was guilty of larceny if he had both actual knowledge of the mistake and the intent to steal the goods *at the time they were delivered*.[134] Thus, the crucial issue of fact under the mistaken delivery doctrine is the accused's intent at the time of delivery. If, at the time of the delivery, the accused is unaware of the mistake or intends to return the property, there is no larceny at common law, even if the recipient later decides to keep the property permanently.[135] Applying this doctrine to the facts in *Helms*, it would be critical to determine when the intent to steal arose during the eleven-month period of monthly or bimonthly overpayments.[136] Under the mistaken delivery doctrine, the accused is only liable for the larceny of erroneous payments that are received after he discovers the error and decides to steal the

123. *Id.* at 2.

124. *Id.*

125. *Id.* at 1. The accused was sentenced to a bad conduct discharge, confinement for 10 months, reduction to the grade of E-1, and a reprimand. *Id.*

126. *Id.* at 3.

127. 35 M.J. 122 (C.M.A. 1992), *aff'd following remand*, 43 M.J. 183 (1995).

128. *Antonelli*, 43 M.J. at 185. The accused in *Antonelli* submitted BAQ certification forms in which he falsely stated that he had been providing support to his dependents as a basis for receipt of BAQ. *Id.* at 184.

129. *Antonelli*, 35 M.J. at 124-27 (reviewing precedents).

130. *Id.* at 125.

> The consolidation of these crimes, however, did not enlarge the scope of the statutory crime of "larceny" to include more than its components previously encompassed . . . . [T]hat which did not constitute common law larceny, embezzlement, or false pretenses, prior to the adoption of Article 121(a), was not thereafter punishable as a violation thereof.

Id. (quoting United States v. Buck, 12 C.M.R. 97, 99 (C.M.A. 1953)).

131. *Id.* at 131 (Crawford, J., concurring). Judge Crawford expressed dissatisfaction with this rigid adherence to common law technicalities and suggested that the language of Article 121, a "*newly crafted* statute," might offer a more direct route to finding liability in cases of overpayments of allowances. *Id.* (emphasis in original).

132. United States v. Helms, 47 M.J. 1, 3 (1997).

133. *Id.*

134. LaFave & Scott, *supra* note 2, § 8.2(g), at 342-43.

135. *Id.*

payments. For example, if the evidence showed that Airman Helms received unauthorized OHA/BAQ payments for eleven months, but only discovered the error and decided to steal the payments during the seventh month of that period, he could only be guilty of larceny for the remaining four months of the period. He will be civilly indebted to the government for the whole period, but his criminal liability attaches no earlier than his actual knowledge and specific intent to steal. The court does not acknowledge this important limitation on the application of the mistaken delivery theory. If the evidence does not show when the intent to steal arose, however, the prosecution may still establish a larceny of the cumulative amount of the overpayments by relying on a theory of wrongful withholding.

In *Helms*, the court holds that when a service member receives mistaken overpayments but forms the intent to steal at a later date he may be guilty of larceny by wrongful withholding, even if there is no evidence of a specific duty to inform the government of the error.[137] This is the most significant aspect of the court's holding. The current edition of the *Military Judges Benchbook*[138] identifies this as an unsettled point of law and states, "[t]he mere failure to inform authorities of an overpayment of an allowance does not of itself constitute a wrongful withholding of that property."[139] According to the *MCM*, in order to establish a wrongful withholding, the government must prove that the accused failed "to return, [to] account for, or [to] deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property."[140]

In *Antonelli*, the court held that the government retains ownership of erroneous payments to service members.[141] In *Helms*, the court takes the final doctrinal step and holds that a service member's failure to inform the government of the error after he has discovered it constitutes wrongful withholding.[142] In effect, the court imputes a duty to inform the government of mistakes in pay. The accused's failure to perform that duty is the actus reus of this type of larceny. Unlike the mistaken delivery doctrine, this theory of larceny avoids the necessity of showing the intent to steal at the time the funds are transferred to the accused. Since the duty to inform presumably continues as long as the accused possesses the funds, the accused may be liable for money received before the intent to steal arises.

Unfortunately, the court relies on the common law doctrine of "continuing trespass" to support the wrongful withholding theory of larceny in *Helms*. At common law, the doctrine of continuing trespass was used to establish liability where the thief forms the intent to steal sometime after an original *unlawful* taking of the property is completed.[143] Since there could be no larceny unless the taking and the intent to steal concurred in time, the thief might escape criminal liability on technical grounds if he could show that the intent to steal arose after the taking occurred. The fiction of continuing trespass solves the problem of concurrence in such cases by declaring that the trespass continues as long as the property remains in the thief's possession. The continuing trespass doctrine, however, applies only if there is a trespass in the original taking of the property.[144] That is not the case in circumstances where the government freely transfers funds into the service member's account.

The attempt to justify this new theory of wrongful withholding on the basis of the common law only creates doctrinal confusion. The court could have avoided these doctrinal complications by embracing Judge Crawford's suggestion in *Antonelli* that Article 121 was enacted to address the needs of a modern military establishment and should not be limited by a common law straightjacket.[145] Wrongful withholding is a descendant of the offense of embezzlement, which was originally a statutory offense created to fill gaps left in the common law of larceny. Determination of the precise scope of a modern embezzlement statute must be based on the canons of statutory interpretation, not common law doctrines.[146] The common law

136. None of the existing model instructions in the *Military Judge's Benchbook* are adequate to explain the wrongful taking under the theory of mistaken delivery. The gravamen of such an instruction would be the concurrence in time of the receipt of the payments and the knowledge of the mistake and intent to steal. *See* U.S. DEP'T OF THE ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGE'S BENCHBOOK (30 Sept. 1996) [hereinafter BENCHBOOK].

137. This holding is implicit in the facts of the case as recited in the court's opinion. The court is unable to cite any evidence in the record that suggests the precise point during the 11-month period of payments when an intent to steal arose or any evidence that the accused had a legal duty to inform authorities of the mistaken overpayments. Implicitly, these facts are not necessary to the court's holding that Helms is guilty of wrongfully withholding the entire amount of the mistaken payments.

138. BENCHBOOK, *supra* note 136.

139. *Id.* at 448.

140. MCM, *supra* note 3, pt. IV, ¶ 46c(1)(b).

141. United States v. Antonelli, 43 M.J. 183, 184 (1995).

142. United States v. Helms, 47 M.J. 1, 3 (1997).

143. *See* LAFAVE & SCOTT, *supra* note 2, § 8.5(f), at 365-67 (discussing the common law doctrine of continuing trespass).

144. *See id.* at 366-67.

145. *See supra* note 131 and accompanying text.

did not contemplate the peculiar circumstances of overpayments by the government to personnel in its military service, who are bound by oath and duty to a position of trust. The federal courts have held that a larceny occurs when a civilian retains possession of unauthorized tax refunds or other moneys drawn on the U.S. Treasury when the recipient knows of the mistake.[147] Article 121 could likewise be held to reach such misconduct as a simple matter of statutory interpretation.

Cases such as *Helms* present significant advocacy challenges to both government and defense counsel. First, the government has the difficult burden of proving actual knowledge and specific intent. The actual knowledge and specific intent elements of the offense make an honest mistake of fact an applicable defense.[148] This further complicates the government's task. Evidence that a soldier attempted to correct pay errors may be proof of actual knowledge, but it is also strong evidence that there was no intent to steal. Likewise, spending the money is equivocal evidence. It may be circumstantial evidence of an intent to steal, or it may simply be evidence that the accused honestly thought it was his. Second, the military judge will have to instruct members in accordance with these new theories of prosecution under Article 121. As indicated above, the *Military Judges Benchbook* does not currently offer instructions that reflect the doctrinal breakthrough in *Helms*. Finally, because of the difficulties of proof and the frequency of finance errors, prosecutors should be cautious in pursuing criminal charges in such cases. Involuntary recoupment of the debt and administrative actions may be a more appropriate way of protecting the government's interests in many cases.

Military Offenses

Misuse of Government Credit Cards

The primary purpose of the government credit card program is to increase the efficiency of military finance operations by eliminating the need for paying advanced travel expenses and issuing travelers checks.[149] The program also provides service members with a convenient way to pay for expenses related to official travel. The success of the program depends in part on the proper use of the credit cards entrusted to individual service members. When cardholders use government credit cards to pay for unofficial expenses, commanders look increasingly to the military justice system for disciplinary options. Two decisions this year illustrate the two leading approaches to charging misuse of government credit cards.[150]

In *United States v. Long*,[151] the accused used his government American Express card to withdraw cash for personal use on seven occasions. He pleaded guilty to willful dereliction of duty for failing to use his government card "only for expenses related to official government travel."[152] In his appeal to the Army Court of Criminal Appeals, the accused argued that the charge of violating Article 92(3) failed to state an offense because it alleged acts which went beyond the scope of his duties instead of alleging a failure to perform certain duties. The accused argued that a dereliction of duty can only arise from the nonperformance or faulty performance of a duty.[153] The court disposed of this challenge by noting that the specification alleged a particular duty to use the government credit card for expenses related to official travel only and clearly alleged the nonperformance of that duty.[154] The court found this case to be no different than prior cases of dereliction involving a failure to follow fund accountability procedures.[155]

146. *See* LaFave & Scott, *supra* note 2, § 8.6(e)(3) at 378 (observing that the common law does not provide a clear answer to whether a wrongful withholding of mistakenly delivered goods can constitute an embezzlement and noting that the determination of that question depends on the precise wording and intent of modern statutes).

147. *See* United States v. McRee, 7 F.3d 976 (11th Cir. 1993) (en banc) (holding that the alleged failure of the recipient to do anything to induce the issuance of an erroneous IRS refund check did not prevent the check from remaining government property or prevent the accused's conviction for conversion of government property under 18 U.S.C. § 641); *accord* United States v. Irvin, 67 F.3d 670 (8th Cir. 1995).

148. *See* MCM, *supra* note 3, R.C.M. 916(j) ("If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused.")

149. *See* 9 U.S. Dep't of Defense, Reg. 7000.14R, DoD Financial Management Regulation, app. A, para. A (Dec. 1996) [hereinafter DOD Reg. 7000.14R].

150. Larceny generally is unavailable as a charge for misuse under current government credit card programs that set up a private contract between the card issuer and the individual soldier. The use of the credit card incurs a debt, which may not be the object of a larceny. *See* United States v. Mervine, 26 M.J. 482 (C.M.A. 1988); *but see* United States v. Schaper, 42 M.J. 737 (A.F. Ct. Crim. App. 1995) (holding that prior contractual agreement with credit card issuer authorizing cash withdrawals for limited official purposes did not preclude larceny conviction of cash used for personal expenses under circumstances of the case); United States v. Christy, 18 M.J. 688 (N.M.C.M.R. 1984) (larceny conviction upheld where personal expenses charged to a government credit card were billed directly to the U.S. government).

151. 46 M.J. 783 (Army Ct. Crim. App. 1997).

152. *Id.* at 784.

153. *Id.*

154. *Id.* at 785.

155. *Id.*

The opinion affirms this approach to charging the misuse of government credit cards but does not explore any other aspects of this application of the law.

Long is the first reported case to uphold a conviction for dereliction in the use of a government credit card. Prosecutors should recognize the potential difficulties in proving a case of dereliction in these circumstances. In order to prove a case of dereliction, the government must prove that a duty exists, that the accused had actual knowledge of the duty, and that the accused violated the duty.[156] The existence of the duty may be established by regulations that create the government credit card program.[157] The more difficult element to prove will often be the actual knowledge of the duty. In *Long*, the accused pleaded guilty and therefore admitted knowledge of the duty. In a contested case, the trial counsel will normally have to look to the local procedures for issuing the credit card to establish notice. Such procedures should include written notice of restrictions on the card's use and should require that the accused acknowledge these restrictions by signing a standard form.[158]

In *United States v. Hughey*,[159] the CAAF reviewed a conviction for violation of a lawful general regulation arising out of the unauthorized use of a government credit card. In *Hughey*, a local general regulation, issued by an Air Force major general, specified restrictions on the use of the government credit card and imposed time limits on repayment of charges that were more strict than limits imposed by American Express.[160] The accused violated the regulation by incurring over $11,000 in charges for personal expenses during a three-month period and failing to repay the charges within the specified time limit.[161] The CAAF rejected the accused's challenges to the lawfulness of the regulation and affirmed the conviction.

The accused in *Hughey* argued that the regulation in issue was not a lawful regulation because it interfered with a private voluntary agreement between the accused and the credit card company and was not sufficiently related to any military duty. The court agreed with the findings of the trial judge that the regulation was a valid means of implementing a military program that served the "public military purpose" of "facilitating government business and deployment activities."[162] Moreover, because the regulation was issued by a proper authority, it was presumed to be lawful.[163] The accused failed to overcome that presumption. In assessing the lawfulness of the regulation, the court refused to consider the existence of alternative funding methods that might have a lesser impact on the personal finances of service members. The court found that "military officials have broad authority to structure, test, and restructure finance and accounting activities in an effort to obtain improved efficiencies and economies in the conduct of military affairs."[164]

The accused also argued that the regulation was unlawful because its only purpose was to increase the maximum punishment for failure to pay just debts, an offense already defined in the UCMJ.[165] The court noted that the regulation imposed much narrower restrictions than those available under the Article 134 offense and was applicable to only a specific type of debt arising out of a military credit card program. In finding the regulation to be lawful, the court cautioned that deficiencies in the program that affect the individual's ability to comply or that deny him notice of the program rules may provide a defense to prosecution for violating a regulation designed to reinforce the credit card program.[166] The court's concern with notice of program restrictions is not based in Article 92(1), which does not require proof of actual knowledge of a lawful general regulation. Instead, the court appears to be raising a due process notice issue in circumstances that "sucker punch" soldiers by issuing them credit cards without adequately briefing them on the proper use of the cards.[167]

Practitioners can take a giant stride toward simplifying the prosecution of cases of credit card abuse by helping command-

156. *See* MCM, *supra* note 3, pt. IV, ¶ 16c(3)(b).

157. *See, e.g.*, U.S. Dep't of Army Letter 37-97-1, subject: Government Travel Charge Card Program (14 Aug. 1997) [hereinafter DA Letter 37-97-1].

158. *See id.* (containing a sample format for a "Statement of Understanding" to be signed by the cardholder). Trial counsel should review the local procedures to ensure compliance with this policy and adequacy of the notice of card restrictions given to cardholders.

159. 46 M.J. 152 (1997).

160. *Id.* at 153.

161. *Id.*

162. *Id.* at 155.

163. *Id.* at 154.

164. *Id.*

165. *Id.* at 154. *See generally* MCM, *supra* note 3, pt. IV, ¶ 14c(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.").

166. *Hughey*, 46 M.J. at 155.

ers to implement regulations that meet the criteria of Article 92(1). This is a superior method of charging misuse of government credit cards, because of its simplicity of proof and greater maximum punishment. Currently, there is no explicitly punitive Department of the Army or Department of Defense regulation for this purpose.[168]

Pandering

The *MCM* prohibits two forms of pandering: (1) pandering by compelling, inducing, enticing, or procuring an act of prostitution; and (2) pandering by arranging or receiving consideration for sexual intercourse or sodomy.[169] In *United States v. Miller*,[170] the accused was convicted of the former type of pandering by wrongfully enticing women to engage in sexual acts in exchange for cigarettes and other tempting inducements.[171] None of the ladies accepted the accused's offers, but they did inform his military superiors of his propositions. The accused had greater success with the appellate courts following his court-martial convictions for pandering. He convinced the Air Force Court of Criminal Appeals that pandering, as defined in the *MCM*, requires a transaction with at least three parties.[172] The service court dismissed the pandering conviction and affirmed a conviction for solicitation to commit prostitution under art 134.[173]

The CAAF also found the appellant's arguments irresistible and held that the offense of pandering requires the participation of at least three parties.[174] First, the court noted that if pandering requires only two parties, it is essentially no different from solicitation of another to commit prostitution, which carries a maximum punishment of a dishonorable discharge and confinement for five years. Solicitation to prostitute oneself, on the other hand, provides for a maximum punishment of a dishonorable discharge and only one year of confinement.[175] The court reasoned that it is unlikely that the president would have intended such disparity in punishments for such closely related misconduct. Second, the court relied on the canon that "criminal laws are strictly construed in favor of the defendant."[176] Also called the "rule of lenity," this canon of construction compels a court to resolve ambiguities in criminal statutes in favor of the accused.[177] Since the court found the text of the pandering offense to be ambiguous, it ruled in favor of the accused and held that pandering requires at least three parties.[178]

This ruling clarifies proper charging options in cases of prostitution. In cases involving only the accused and one other person, the correct charge is prostitution or solicitation for prostitution. Pandering only arises when the accused arranges for or receives valuable consideration for arranging an act of sexual intercourse or sodomy between two other people. While it only takes two to tango, it takes at least three to pander under the UCMJ.

Defenses: "Exculpatory-No" Doctrine

The "exculpatory-no" doctrine holds that a person who gives a "mere denial" of criminal misconduct to law enforcement officials cannot be prosecuted under Article 107 if that denial turns out to be false.[179] The doctrine originated in the federal courts as a special defense to the false statement statute in the federal criminal code at 18 U.S.C. § 1001.[180] In fashioning a

167. *See id.*

168. *See* DOD REG. 7000.14R, *supra* note 149, app. A; DA Letter 37-97-1, *supra* note 157. At least one Army installation has implemented a local general regulation on the *Hughey* model since that case was decided. *See* U.S. ARMY AIR DEFENSE CENTER AND FT. BLISS, REG. 27-4, PROHIBITED AND REGULATED CONDUCT, Interim Change No. IO3 (19 Aug. 1997).

169. *See* MCM, *supra* note 3, pt. IV, ¶ 97b.

170. 47 M.J. 352 (1997).

171. *Id.* at 356.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id. See supra* note 7.

178. *Miller*, 47 M.J. at 357.

179. United States v. Solis, 46 M.J. 31, 32 (1997).

180. *Id.*

military version of the exculpatory-no defense, the CAAF has drawn upon federal precedents. Although the CAAF has assumed the existence of the exculpatory-no defense in a long line of cases,[181] it has never found it applicable to a single case it has decided.[182] In *United States v. Solis*,[183] however, the CAAF joined a growing majority of federal circuit courts which have concluded that the doctrine rested on faulty grounds. In the lead opinion, Judge Effron announced that the military's tentative courtship with the exculpatory-no defense is absolutely over—maybe.

Judge Effron's plurality opinion in *Solis* concluded that the exculpatory-no doctrine has no basis in the text or legislative history of Article 107 and is "not compelled by any self-incrimination concerns."[184] This ruling anticipated the recent decision of the United States Supreme Court in *Brogan v. United States*,[185] which formally declared the death of the exculpatory-no defense under 18 U.S.C. § 1001. The Supreme Court held that the exculpatory-no defense had no legitimate statutory or constitutional basis.[186] *Brogan* ends the debate over any asserted constitutional basis for the defense.

In *Solis*, Judge Effron found no support for the defense in the text or legislative history of Article 107. "There simply is no indication that Congress intended that persons accused or suspected of offenses should have a license to lie to military investigative organizations, while witnesses who give false statements about the same events should be punished."[187]

Even though the court found no basis for the defense in Article 107, Article 31, or the Fifth Amendment, it still could not clearly and finally declare an end to the inquiry. Judge Effron entertains the possibility that the *MCM* may impose an independent limit on the use of Article 107 against an "accused or suspect if they did not have an independent duty or obligation to speak."[188] Judge Effron states that this "guidance" is not based on the statutory elements of the offense, and proof of an "independent duty or obligation" to speak is not required for a conviction under Article 107.[189] The meaning and effect of the *MCM* provision is, therefore, an open question. According to Judge Effron, it could be viewed as nothing more than the President's attempt to summarize the court's dicta in decisions that predate the 1984 *MCM*. Alternatively, the plurality suggests that this provision could constitute a presidential regulation on government charging discretion under Article 107 or may confer a procedural right on the accused which courts are bound to enforce.[190]

Chief Judge Cox, writing separately, agrees that the doctrine "does not provide a defense to a prosecution for making a false official statement under Article 107."[191] He further agrees with Judge Effron that the exculpatory-no doctrine may have an independent regulatory basis in the *MCM*. Judges Gierke and Sullivan concur in the result in separate opinions and maintain that the case can be decided on the basis of existing precedents without reaching the broader statutory and constitutional questions addressed in the lead opinion.[192] Judge Gierke is unwilling to rule out a statutory basis for the defense and expresses doubt that "Congress intended to criminalize a suspect's exclamation, 'I didn't do anything wrong!' as he or she is being apprehended."[193]

The CAAF returned to the exculpatory-no doctrine later in the 1997 term in *United States v. Black*.[194] In *Black*, the appellant was convicted for making a false official statement by falsely denying memory of certain events. He relied on the

181. *See, e.g.*, United States v. Dorsey, 38 M.J. 244 (C.M.A. 1993); United States v. Frazier, 34 M.J. 135 (C.M.A. 1992); United States v. Prater, 32 M.J. 433 (C.M.A. 1991).

182. This observation is made by Judge Effron in *United States v. Solis*. *See* 46 M.J. 31, 34 (1997).

183. *Id.*

184. *Id.*

185. 118 S. Ct. 805 (1998). The U.S. Supreme Court decided *Brogan* after the CAAF decided *Solis*. In *Brogan*, the Court ruled that there is not an "exculpatory-no" defense under federal law. *See id.*

186. *Id.*

187. *Solis*, 46 M.J. at 33.

188. *Id.* at 35.

189. *Id.*

190. *Id.* at 35-36.

191. *Id.* at 36 (Cox, C.J., concurring).

192. *Id.*

193. *Id.* (Gierke, J., concurring in the result).

194. 47 M.J. 146 (1997).

exculpatory-no defense on appeal. The lead opinion by Judge Effron cites *Solis* for the proposition that the exculpatory-no doctrine is not a defense under Article 107.[195] In dissent, Judge Sullivan takes issue with that interpretation of the holding in *Solis*, asserting that Chief Judge Cox's concurring opinion in *Solis* "possibly raises some doubt in my view about extinction of the exculpatory-no doctrine or its *Manual* equivalent."[196] Chief Judge Cox closes the door on Judge Sullivan's objection and retorts that Judge Sullivan "does not accurately characterize my opinion there."[197] Judge Gierke expressly adheres to his separate opinion in *Solis*.[198]

So, is the exculpatory-no defense dead or not? A clear majority of the CAAF has held that the defense has no statutory or constitutional basis. The court has not, however, completely ruled out an exculpatory-no defense based on Part IV, paragraph 31c(6) of the *MCM*.[199] This dicta leaves the exculpatory-no defense on artificial life support for the time being. The CAAF should, and probably will, pull the plug eventually for several reasons.

First, the discussion of punitive articles in Part IV of the *MCM* is expressly denominated as "explanation" of the statute, and the provision at issue here plainly states: "A statement made by an accused or suspect during an interrogation is not an official statement *within the meaning of the article . . . .*"[200] The court has often noted that it is not bound by the statutory interpretations offered by the President in the *MCM*.[201] Second, the drafter's analysis to paragraph 31c(6) cites pre-1984 case law as its source.[202] The cases cited have been overruled by the CAAF since the latest version of the *MCM* was promulgated.[203] It would be anomalous indeed if the court were to find "procedural rights" in a provision based on its own earlier invalid opinions. Finally, the court suggests that the President may have intended that this provision limit prosecutorial discretion in charging.[204] This is at odds with the overtly interpretive purpose of the provision, as already observed. Furthermore, that kind of prosecutorial guidance is found in the Rules for Courts-Martial, which are based on Article 36.[205] In Part I, paragraph 4, the *MCM* itself warns against finding rights in the discussion of the punitive articles.[206] The court's concern with overcharging may be valid, but the President has already addressed that concern elsewhere in the *MCM*.[207] The time has come to let go of the exculpatory-no defense.

Multiplicity and Lesser Included Offenses

The basic law of multiplicity and lesser included offenses seems to have reached a stage of tentative stability, if not relative clarity. Three judges on the CAAF now appear committed to a generally consistent elements-based approach to resolving issues of multiplicity and lesser included offenses.[208] This is good news for practitioners, who can rely on a generally consistent methodology for resolution of multiplicity issues at trial. In 1997, the court continued its unsuccessful quest for the "Grail of Multiplicity," turning its attention to the issue of waiver and several special applications of the law of multiplicity.

195. *Id.* at 147.

196. *Id.* at 151.

197. *Id.*

198. *Id.*

199. *See* United States v. Solis, 46 M.J. 31, 35-36 (1997).

200. MCM, *supra* note 3, pt. IV, ¶ 31c(6)(a) (emphasis added).

201. *See*, *e.g.*, United States v. Gonzalez, 42 M.J. 469, 474 (1995) (stating that "it is beyond cavil that *Manual* explanations of codal offenses are not binding on this court").

202. *See* MCM, *supra* note 3, at A23-8.

203. *See* United States v. Prater, 32 M.J. 433 (C.M.A. 1991); United States v. Sanchez, 39 M.J. 518 (A.C.M.R. 1993).

204. *Solis*, 46 M.J. at 35.

205. *See* UCMJ art. 36 (West 1995) (authorizing the President to promulgate rules of evidence and procedure for courts-martial).

206. *See* MCM, *supra* note 3, pt. I, ¶ 4, discussion (stating that "[t]he supplementary materials do not create rights or responsibilities that are binding on any person, party, or other entity").

207. *See id*. R.C.M. 307(c)(4) discussion, R.C.M. 906(b)(12), R.C.M. 907(b)(3)(B).

208. *See* Barto, *supra* note 8, at 66-68 (discussing United States v. Oatney, 45 M.J. 185 (1996)).

In *United States v. Lloyd*,[209] the Air Force Court of Criminal Appeals held that multiplicity issues never rise to the level of plain error, and, therefore, it embraced a bright line rule that multiplicity claims are always waived unless raised at trial.[210] On further review, the CAAF unanimously rejected the Air Force court's "new bright line rule" and held that, in the absence of an express waiver on the record, the plain error standard of review would be applied to multiplicity claims raised for the first time on appeal.[211] The court, however, imposed a further limitation on appellate review of multiplicity claims raised for the first time on appeal following an unconditional guilty plea.[212]

The CAAF held "that appellate review of multiplicity claims is effectively waived by unconditional guilty pleas, except where the record shows that the challenged offenses are '*facially duplicative.*'"[213] Charges are "facially duplicative" when it is apparent from looking at the specifications that they allege the "exact same conduct"[214] or are "factually the same."[215] This standard is based on the premise that "a guilty plea generally precludes the post-trial litigation of factual questions" because of the limited factual record available to the appellate court.[216] Facially duplicative specifications are a special exception to this rule because "a fact hearing is usually not required to establish a double jeopardy claim when the challenged specifications literally repeat each other as a matter of fact."[217]

In *Lloyd*, the accused pleaded guilty to one specification alleging cunnilingus on divers occasions between 1 August 1988 and 1 December 1991, and another specification alleging a single act of fellatio with the same victim that occurred sometime during the last six months of the same period of time. The appellant claimed that these specifications were multiplicious. The court held that these multiplicity claims could not be considered on appeal because the challenged charges were not facially duplicative. Additionally, the appellant claimed that two other specifications alleging indecent acts were multiplicious with a specification alleging rape of the same victim during the same time period at the same locations. Again, it was not clear from the specifications themselves that the indecent acts were part of a course of action leading to intercourse on every occasion.[218]

The court applied the new "facially duplicative" standard in *United States v. Harwood*.[219] Lieutenant Harwood pleaded guilty to fraternization with a certain airman under her supervision by engaging in "hugging, kissing, and sexual intercourse" with him, in violation of Air Force custom.[220] She also pleaded guilty to a violation of Article 133 for "wrongfully and dishonorably" having a close personal relationship with the same airman during the same time period (about one month) by engaging in hugging, kissing, and sexual intercourse. At trial, defense counsel asserted that the charges were multiplicious for sentencing but did not object to multiple convictions. Comparing the specifications, the court found them to be facially duplicative and proceeded to a plain error review of the multiplicity issue.[221]

In resolving the multiplicity claim in *Harwood*, the CAAF established a categorical exception to the multiplicity rule announced in *United States v. Teters*.[222] Instead of performing a comparison of the elements, the court relied on the general rule that, when the underlying conduct is the same, a charge under clauses one or two of Article 134 is a lesser included offense of a charge under Article 133.[223] Thus, the court con-

209. 46 M.J. 19 (1997).

210. *Id.* at 20.

211. *Id.*

212. *Id.*

213. *Id.* at 23 (emphasis added).

214. *See id.*

215. *See id.*

216. *Id.* at 23.

217. United States v. Harwood, 46 M.J. 26, 28 (1997).

218. *Lloyd*, 46 M.J. at 24.

219. 46 M.J. 26.

220. *Id.* at 27.

221. *Id.*

222. 37 M.J. 370 (C.M.A. 1993). *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 (1996) (containing a concise description of significant developments in the law of multiplicity under *Teters*).

cluded that "an obvious violation of the Double Jeopardy Clause has occurred."[224]

Chief Judge Cox concurred in *Harwood*, expressing an alternative rationale for the same conclusion.[225] He reminded the court that the elements test of *Teters* is only a rule of statutory construction to be employed when legislative intent is not clear. The Chief Judge pointed to the statutory language of Article 134, which begins with the phrase "Though not specifically mentioned in this chapter . . . ." According to Chief Judge Cox, this language shows the clear intent of Congress to preclude conviction under Article 134 for the same conduct under an enumerated article.[226]

In dissent, Judge Crawford rejected the majority's conclusions on both waiver of the issue and resolution of the multiplicity claim.[227] The "facially duplicative" standard applies only to cases of passive waiver.[228] According to Judge Crawford, there was evidence of an express waiver in the record in this case. As to the multiplicity issue, Judge Crawford relied on *United States v. Oatney*[229] and insisted on a comparison of the elements, as required by *Teters*.[230] She further pointed out that the greater and lesser included offense relationship between Articles 133 and 134 relied on by the majority was based on case law which was decided before *Teters*. Judge Crawford concluded that each offense requires proof of a unique element, and, therefore, they are separate offenses for all purposes.[231]

In *United States v. Britton*,[232] the CAAF was again presented with a multiplicity claim raised for the first time on appeal. Unlike the other two cases decided in 1997, however, this was not a guilty plea case. The appellant claimed that his conviction for assault with intent to rape was multiplicious with his conviction for rape arising out of the same course of conduct.[233] Four judges concluded that Congress did not intend to allow an accused to be convicted or punished for both an assault with intent to rape and rape arising out of the same course of conduct.[234] The majority examined legislative history and found that Congress specifically considered a proposed article proscribing felonious assaults, but declined to enact it on the grounds that felonious assaults were nothing more than attempts to commit the contemplated felony.[235] From this premise, the majority inferred that Congress could not have intended to allow convictions for rape and an assault with intent to rape, which it had declined to prohibit in a separate statutory provision. The court also drew upon the general rule set forth in *United States v. Foster*[236] that "with regard to assaultive and sexual crimes . . . Congress could not have intended multiple convictions and multiple punishment for the selfsame act."[237]

In an effort to buttress this tenuous inference of legislative intent, the court also offers a cursory comparison of the elements as a backstop rationale. The court began with the truism that a person who commits rape necessarily commits an assault. It further states that, under *Foster*, Article 134 offenses may be lesser included offenses of the enumerated articles, notwithstanding the unique requirement to prove the prejudicial or service-discrediting nature of the conduct under Article 134.[238] The court then hastily concludes that assault with intent to commit rape is a lesser included offense of rape "because the assault

223. *Harwood*, 46 M.J. at 28.

224. *Id.* at 28-29.

225. *Id.* at 29.

226. *Id.*

227. *Id.* at 29-30.

228. *Id.*

229. 45 M.J. 125 (1996) (holding that communicating a threat and obstruction of justice based on the same threat were not multiplicious under an elements test).

230. United States v. Teters, 37 M.J. 370, 376 (C.M.A. 1993) (adopting the *Blockburger* test for multiplicity).

231. *Harwood*, 46 M.J. at 30.

232. 47 M.J. 195 (1997).

233. *Id.* at 197-98.

234. *Id.* at 196.

235. *Id. See* United States v. Gomez, 46 M.J. 241 (1997). *See also infra* notes 265-278 and accompanying text.

236. 40 M.J. 140, 146 (C.M.A. 1994).

237. *Britton*, 47 M.J. at 197.

is the force required by the second element of rape."[239] The court ignores the fact that each offense requires proof of a unique element which the other offense does not: rape requires proof of vaginal penetration, and assault with intent to rape requires proof of a specific intent to rape. Thus, a correct application of the elements test produces a conclusion that contradicts the conclusion reached by the court.

While the alternative rationales offered are less than compelling, the court undoubtedly reached the correct conclusion. *Britton* is a sound decision in search of a defensible rationale. The court's conclusion on the multiplicity issue could be justified by starting with the undisputed premise that Congress did not intend to permit multiple convictions or punishments for both an attempt and the completed offense arising out of the same act.[240] On that basis, the court could have simply held that when an assault with intent to rape amounts to an attempted rape, the accused may not be convicted of both the assault and the completed rape. An assault with intent to rape comes closer to completion of the offense than the law of attempts requires; therefore, an assault with intent to rape is an alternative way to charge attempted rape. Allowing multiple convictions for rape and the predicate assault with intent to rape would, therefore, clearly contravene the legislative intent expressed in Article 80. This reasoning would not require the court to speculate about possible congressional intent on the basis of ambiguous legislative history. The intent of Congress is stated in Article 80 itself. Under this approach, the elements comparison is simply unnecessary.[241]

A second area of difficulty for the majority in *Britton* is its resolution of the waiver issue and application of the "facially duplicative" test. *Lloyd* held that plain error review was unavailable to an appellant who pleaded guilty and raised multiplicity claims for the first time on appeal, unless the charges in issue are facially duplicative.[242] *Lloyd* makes it quite clear that the facially duplicative standard was a special prerequisite to plain error analysis only in cases of unconditional guilty pleas. Where there is a full record, as in *Britton*, the court may proceed directly to a plain error analysis. Here, the court seems to confuse the threshold finding of facial duplicity with the discretionary judicial conclusion of plain error. Judge Gierke asserts: "Applying the "facially duplicative" test, we conclude that the assault specification in this case facially duplicates the rape specification because it merely describes the force used to commit rape. Accordingly, we hold that appellant's conviction of both offenses was plain error."[243] The "facially duplicative" standard of *Lloyd* and the plain error standard of Article 59 are very different standards and apply to different stages of the analysis.[244]

Even if the facially duplicative test was applicable in *Britton*, the majority applies it in a way that renders it meaningless. The only reason the majority knows that the assault alleged is the same one leading up to the rape is by reference to the record of trial. Otherwise, it would not be possible to determine from the face of the charge sheet that these were part of the same act or transaction. Such "peeking" at the record is contrary to the very definition of the facially duplicative standard. Judge Crawford, in dissent, concluded that the specifications in this case clearly show that they are not facially duplicative.[245] Judge Crawford also correctly asserts that the appropriate inquiry under the plain error doctrine is whether the accused was prejudiced by the separate convictions.[246] She concludes that he was not, and she would affirm his convictions.

Finally, *Britton* is significant because the court's newest member writes a concurring opinion,[247] offering his proposed

238. *Id.*

239. *Id.*

240. "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, *even though failing*, to effect commission, is an attempt to commit that offense." UCMJ art. 80(a) (West 1995) (emphasis added). Thus, attempted rape is a lesser-included offense to rape. *See* MCM, *supra* 3, pt. IV, ¶ 45d(1)(d).

241. In fact, if we were required to rely on the elements comparison to discern the intent of Congress, we would be bound to conclude that attempted rape and rape were separate offenses for multiplicity purposes, since each requires proof of a unique element. Article 80 is an example of a clear expression of legislative intent that precludes the application of the *Teters* test.

242. *See supra* notes 213-219 and accompanying text.

243. *Britton*, 47 M.J. at 199.

244. The plain error doctrine is set forth most clearly in *United States v. Olano*, 507 U.S. 725 (1993). Two distinct conclusions are necessary before a court can grant relief on the basis of plain error. First, there must be a "clear and obvious error" that affects "substantial rights." *Id.* at 734. Second, such error must be prejudicial to the accused; in other words, it must have affected the outcome of the case. *Id.* Finally, the plain error rule is permissive. If the court finds that there is plain error, it has the authority to grant relief but is not required to do so in every case. According to the Supreme Court, this discretion should normally be exercised only in cases where it is necessary to prevent a "miscarriage of justice." *Id.* at 736. *See* United States v. Thomas, 46 M.J. 311 (1997) (citing *Olano* as authoritative for the military justice system).

245. *Britton*, 47 M.J. at 205.

246. *Id.*

solution for reducing the glut of multiplicity litigation in military appellate courts. After an able review of the law of multiplicity, Judge Effron proposes that appellate courts introduce a "conditional dismissal" option in multiplicity cases, which would permit courts to dismiss lesser offenses in cases of "colorably multiplicious" offenses. According to Judge Effron, this would allay the government's concerns on appeal to preserve lesser convictions in the event that the more serious convictions are reversed.[248] Neither the majority nor the dissent commented on this proposal.

Practitioners should take care in interpreting the court's latest rulings in this complex area of the law. In particular, *Britton* should not be permitted to distort the current understanding of the elements test or the facially duplicative standard of *Lloyd*. Also, in applying the holding in *Harwood*, trial counsel should heed the court's advice in *United States v. Foster* to charge Article 134 offenses in the alternative, even if they are technically lesser included offenses of Article 133 or some other enumerated article. This practice answers notice concerns and ensures that the full range of lesser included offenses will be considered on the record at trial.

Pleadings

Amendment and Variance

The rules which govern changes to charges and specifications are set forth in Rule for Courts-Martial (R.C.M.) 603.[249] These rules pertain to changes made by, or at the request of, the government prior to the announcement of findings. Such changes are referred to as "amendments." The operation of the rules depend on whether the proposed change is characterized as a major or minor change, as defined in R.C.M. 603(a).[250] A "variance" occurs when a panel or military judge enters findings of "guilty by exceptions and substitutions," as permitted by R.C.M. 918.[251] The rule governing exceptions and substitutions in findings does not use the categories of major or minor changes. Rather, the rule simply states that "[e]xceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it."[252] Although related by a common concern, the rules of amendment and variance are derived from different procedural rules and operate at different phases of the trial. *United States v. Moreno*[253] is an important case for practitioners who seek to understand how these rules operate in practice.

Technical Sergeant Moreno was charged with conspiracy to sell drugs that he had stolen from the hospital pharmacy where he worked.[254] On the day before trial, trial counsel moved to amend the conspiracy specification by changing the alleged overt act from removing the drugs from the pharmacy to shipping the drugs to a co-conspirator.[255] Defense counsel opposed the amendment on the grounds that it was a "major change." The military judge denied the defense objection and permitted the change. The defense did not request a continuance to prepare to defend against the amended specification.[256]

247. *Id.* at 199-205.

248. *Id.* at 202-03.

249. *See* MCM, *supra* note 3, R.C.M. 603.

250. *Id.*

251. *Id.*

252. *Id*. R.C.M. 918.

253. 46 M.J. 216 (1997).

254. *Id.* at 217.

255. *Id.*

On appeal, the accused maintained that the amendment was a major change; the government characterized the change as a permissible "variance" under existing precedent.[257] The CAAF, however, chose to avoid the categorical formality of the rules by identifying the underlying concern of both R.C.M. 603 and R.C.M. 918—the question of notice and the accused's ability to prepare a defense.[258] The court noted that the overt act is not the essence of the conspiracy offense, but merely serves to show that the conspiracy is alive and in motion.[259] The court held that "[w]hen the basic facts remain unchanged, other overt acts may be substituted or amended" without prejudicing the accused's ability to prepare for trial.[260] Although it may be implied, the majority did not expressly rule that the change in this case was a minor change. Rather, it held that, regardless of the proper characterization of the change, the accused was not unfairly surprised at trial.[261] If the accused was surprised by the change, he could have requested a continuance. Concurring in the result, Judge Sullivan reasoned that the change was a major change under R.C.M. 603, but the error did not prejudice the accused.[262]

Moreno offers several important lessons for the practitioner. First, defense counsel should request a continuance in order to preserve some hope for showing prejudice on appeal. This may place the accused between a rock and a hard place in some cases. In *Moreno*, the court recognized that the accused probably would not have asked for a continuance because of the very real risk of seeing additional charges.[263] Second, the government has a strong precedent to argue that changes to the overt act are never major changes based on this case. Finally, counsel who are arguing a motion regarding amendment or variance must cast their arguments in terms of the accused's ability to prepare an adequate defense. If the formal categories favor counsel's position, he should argue them, but he should always cast the argument in terms of this underlying interest.

Preemption

If an offense is enumerated in Articles 80 through 133, it may not be charged under Article 134. This doctrine of preemption is derived from the statutory text of Article 134 itself, which begins with the phrase "Though not specifically mentioned in this chapter, all disorders and neglects . . . ."[264] In *United States v. Gomez*,[265] the CAAF held that a charge under Article 80 does not preempt charges for assault with intent to commit various felonies under Article 134. This holding resolves a question raised by Chief Judge Cox in the 1995 case *United States v. Weymouth*.[266]

In *Gomez*, the accused was charged with attempted rape.[267] At his contested trial, the military judge sua sponte instructed the members that assault with intent to rape under Article 134 was a lesser included offense.[268] The defense did not object to the instruction. The members found the accused not guilty of attempted rape but guilty of the Article 134 assault with intent to rape. The accused challenged his conviction on grounds of preemption, relying on indications in the legislative history that Congress expressly rejected a proposal for a felonious assault article in the UCMJ on the grounds that such assaults could be charged under either Article 80 or Article 128.[269]

Despite the relatively strong arguments from legislative history, the CAAF unanimously held that felonious assaults are not preempted by Article 80. This conclusion is based on the plain

256. *Id.*

257. *Id.* at 218.

258. *Id.*

259. *Id.*

260. *Id.* at 219.

261. *Id.*

262. *Id.*

263. *Id.*

264. UCMJ art. 134 (West 1995).

265. 46 M.J. 241 (1997).

266. 43 M.J. 329 (1995) (holding, in part, that an accused cannot be convicted of both an attempted murder and an assault with intent to murder arising from the same criminal act or transaction).

267. *Gomez*, 46 M.J. at 242.

268. *Id.* at 246.

269. *Id.* 243-44.

language of Article 134,[270] the President's consistent adherence to the viability of the offense since the promulgation of the 1951 *MCM*, and the doctrine of stare decisis.[271] The crime of assault with intent to commit a felony was among the six offenses originally specified by the President under Article 134 in the 1951 *MCM*.[272] Whatever the merits of the legislative history arguments, it is obvious that the President did not believe that Article 80 preempted this offense. Additionally, the CAAF has recognized the validity of this offense since 1953.[273] The court asserts that, by failing to repudiate these formal interpretations of the law, Congress has implicitly approved of them. The court leaves open the question of whether assault with intent is a lesser included offense of attempted rape, but it does not disturb its holding in *Weymouth* that one may not be convicted of both offenses.[274]

Gomez holds definitively that Article 134 assault with intent to commit a felony is a viable offense.[275] The difficult question for practitioners is when to charge this offense. It is difficult to construct a hypothetical scenario involving an assault with intent to rape that does not amount to an attempted rape. While the court in *Gomez* multiplies hypotheticals of attempts that are not assaults, it is unable to offer any examples of a felonious assault that is not an attempt when the contemplated felony is a crime against the person of the victim.[276] Such a hypothetical belongs in the same category as perpetual motion machines—it does not exist. Thus, in every case where counsel could charge a felonious assault under Article 134, he could also charge an attempt. There is no case in which Article 134 offers a greater maximum punishment.[277] This leaves two potential reasons for charging Article 134 instead of, or in addition to, Article 80. One reason is to ensure that the government has the full range of lesser included offenses available should the attempt charge fail.[278] The second reason is less technical. Counsel should consider whether, in a given case, the title and model specification for assault provides a better and more graphically complete description of the offense. The charge of attempt focuses on the intent of the accused. The assault charge explicitly uses the word "intent" but also adds the more graphic description of an assault. Therefore, when counsel wish to emphasize the assaultive nature of the attack and its evil purpose, they may find that Article 134 offers a more direct way of expressing that emphasis to a panel of laymen.

Conclusion

From the practitioner's standpoint, clarity in the substantive law is desirable, regardless of which side of the "v" one practices on. On the other hand, counsel must be aware of those areas of the law which the courts have identified as open or unresolved questions. These doctrinal interstices become opportunities for advocacy. The crop of decisions reviewed in this article is a mixed bag of clarity and confusion. The CAAF appears committed to a fairly broad and flexible use of Article 128 with several critical caveats for overzealous prosecutors. In the area of larceny, the court at first blush appears to have cut the Gordian knot of *Antonelli*, but may have spawned new legal complications for practitioners. The development of the law can sometimes be a painful process. If practitioners strive to use the law to achieve just results, their discretion will cover a multitude of legal errors in appellate opinions.

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270. *Id.* The plain language argument depends on the view that article 80 does not reach certain assaults with intent to commit a felony. If there are cases in which an article 134 felonious assault could be charged, but article 80 could not, that would be an offense "not specifically mentioned in this chapter," as stated in the text of article 134. *See* UCMJ arts. 80, 134 (West 1995).

271. *Gomez*, 46 M.J. at 246.

272. *Id.*

273. *Id.*

274. *Id.* at 247.

275. *Id*. at 242.

276. *See id.* at 245.

277. *See* MCM, *supra* note 3, pt. IV, ¶ 64e.

278. *See* United States v. Weymouth, 43 M.J. 329 (1995) (suggesting that certain aggravated assaults may not be lesser included offenses of attempted murder, but may be lesser included offenses of assault with intent to kill).

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