# The Oracle at CAAF: Clear Pronouncements on Manslaughter, and Ambiguous Utterances on the Defense of Necessity

*Major Timothy Grammel*
*Professor, Criminal Law Department*
*The Judge Advocate General's School*
*Charlottesville, Virginia*

## Introduction

In ancient Greece, humans sought divine communication about their public and private problems.[1] At oracles, or shrines, humans asked the gods for guidance.[2] The pronouncements of the gods were often helpful.[3] Sometimes, however, the gods refused to respond to the humans' requests for guidance.[4] Each year, military justice practitioners look to the United States Court of Appeals for the Armed Forces (CAAF) for guidance in the area of substantive criminal law.

During the 1999 term,[5] the CAAF decided four cases that gave clear guidance on different aspects of the crime of manslaughter. In two other cases, however, the CAAF provided ambiguous dicta on whether the defense of necessity exists in the military. This article analyzes those CAAF opinions dealing with manslaughter and necessity. This article also considers the new offense of reckless endangerment under Article 134. Finally, this article discusses two cases in which the Army Court of Criminal Appeals (ACCA) extended and overruled prior case law.

## Manslaughter

In American criminal law, the crime of manslaughter includes "homicides which are not bad enough to be murder but which are too bad to be no crime whatever."[6] In Article 119, Uniform Code of Military Justice (UCMJ), Congress proscribed those homicides that are not bad enough to be considered murder, but involved enough culpability to warrant criminal punishment.[7] The first paragraph of Article 119 proscribes the crime of voluntary manslaughter; the second paragraph proscribes the crime of involuntary manslaughter. Under Article 119(b), involuntary manslaughter is an unlawful killing that either resulted from culpable negligence,[8] or occurred while perpetrating an offense against the person.[9]

### United States v. Wells:[10] *The Hybrid Lesser-Included Offense (LIO) of Voluntary Manslaughter*

Under the UCMJ, voluntary manslaughter occurs when all the elements for premeditated or unpremeditated murder are met, but the accused unlawfully killed the victim "in the heat of sudden passion caused by adequate provocation."[11] The factual issues of "heat of sudden passion" and "adequate provocation" invite litigation.[12] The *Manual for Courts-Martial* (*MCM*) lists

1. Lewis Campbell, Religion in Greek Literature 24 (Books for Library Press 1971) (1898).

2. *See* Joseph Fontenrose, Python: A Study of Delphic Myth and Its Origins 44-45, 102, 105 (1959) (describing how the Delphians, the Temesians, and the Argonites, respectively, went to the Oracle at Delphi to ask Apollo for guidance).

3. *See* Lewis R. Farnell, The Higher Aspects of Greek Religion 97-98 (1912); *see also* Fontenrose, *supra* note 2, at 306-07 (explaining the myth that the city of Thebes was founded at its location because Kadmos, after consulting Apollo at the Oracle at Delphi about where he should settle down, followed the guidance he received, including that he should follow a cow that he would meet until she lie down).

4. *See* Fontenrose, *supra* note 2, at 401 (discussing how Herakles consulted Apollo at the Oracle at Delphi, but Apollo refused to give him a response).

5. The 1999 term began 1 October 1998 and ended 30 September 1999.

6. 2 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 7.9 at 251 (1986).

7. UCMJ art. 119 (LEXIS 2000). Note that the President has taken this one step further by enumerating negligent homicide as an offense under Article 134. Manual for Courts-Martial, United States, pt. IV, ¶ 85 (1998) [hereinafter MCM].

8. UCMJ art. 119(b)(1).

9. *Id*. art. 119(b)(2).

10. 52 M.J. 126 (1999).

11. UCMJ art. 119(a).

12. *See, e.g*., United States v. Henderson, 52 M.J. 14 (1999); United States v. Saulsberry, 43 M.J. 649 (Army Ct. Crim. App. 1995) (*en banc*), *aff'd*, 47 M.J. 493 (1998).

elements for voluntary manslaughter that are virtually identical to the elements for unpremeditated murder.[13] This is because the two proof requirements of "heat of sudden passion" and "adequate provocation" are not elements of voluntary manslaughter. To the contrary, once the evidence raises the lesser-included offense (LIO) of voluntary manslaughter, the prosecution must disprove it beyond a reasonable doubt to convict of the greater offense of either premeditated murder or unpremeditated murder.[14] If the evidence raises the issues of "heat of sudden passion" and "adequate provocation," the military judge has a sua sponte obligation to instruct on voluntary manslaughter.[15] The military judge's failure to give a sua sponte instruction was the issue in *United States v. Wells.*

Aviation Ordnanceman Third Class (AO3) Tyron L. Wells had a verbal altercation with his estranged wife. The victim, a man who AO3 Wells thought was having an affair with his wife, was present and got involved in the argument. Wells grabbed his wife's keys and left. The wife's boyfriend followed AO3 Wells to his car to try to get the keys back and displayed a pistol in his waistband. As AO3 Wells drove away, the boyfriend fired a shot into the air. Wells saw a police officer on the way to his apartment but did not report the incident. Within minutes, however, he did tell a friend about the incident, and he asked his friend to drive him back to his wife's apartment. Wells took his own pistol with him for protection.[16] The trip back to his wife's apartment took only minutes. Wells confronted and argued with his wife's boyfriend. The boyfriend started to back away and was making motions with his hands at chest and shoulder level. Wells claimed he thought the boyfriend was reaching for a pistol, and Wells shot him three times.[17]

The government charged AO3 Wells with premeditated murder. At trial, the defense theory was self-defense. The military judge gave instructions on premeditated murder, the LIO of unpremeditated murder, self-defense, and mutual combat. Neither party requested the instruction on voluntary manslaughter, and the military judge did not give it sua sponte.[18] The members found the accused guilty of premeditated murder.[19]

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) found that the military judge erred by failing to sua sponte give the voluntary manslaughter instruction, but the Navy court affirmed the conviction because the error was harmless.[20] The CAAF agreed that the failure to give the instruction was legal error.[21] Military law requires a trial judge to give instructions on a LIO sua sponte when some evidence reasonably places the LIO in issue.[22] Although not the classic case of voluntary manslaughter, evidence of the heated domestic dispute, the presence of the victim whom the accused suspected of being involved with his estranged wife, the boyfriend's display and use of a pistol, and the final confrontation raised the issues of "heat of sudden passion" and "adequate provocation."[23]

The CAAF disagreed with the Navy court on the issue of prejudice. The Navy court focused on the fact that the members

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13. The elements for unpremeditated murder are:

> [1] That a certain named or described person is dead;
> [2] That the death resulted from the act or omission of the accused;
> [3] That the killing was unlawful; and
> [4] that, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

MCM, *supra* note 7, pt. IV, ¶ 43b(2). The only difference in the elements for voluntary manslaughter is that the last two words of the fourth element, "a person," are replaced with "the person killed." *Id*. ¶ 44b(1).

14. United States v. Schap, 49 M.J. 317, 320 (1998).

15. MCM, *supra* note 7, R.C.M. 920(e)(2).

16. United States v. Wells, 52 M.J. 126, 127 (1999).

17. *Id*. at 128.

18. *Id*.

19. *Id*. at 129. The adjudged sentence was a bad-conduct discharge, confinement for life, forfeiture of $400 pay per month for life, and reduction to E-1. *Id*. at 127. The reason for this unusual sentence is that premeditated murder has a mandatory minimum of imprisonment for life. MCM, *supra* note 7, pt. IV, ¶ 43e(1). The remainder of the sentence, however, is a matter within the discretion of the court-martial. *Id.* R.C.M. 1002.

20. *Wells*, 52 M.J. at 128.

21. *Id*. at 130.

22. *Id*. at 129.

23. *Id*. at 130.

received the instruction on the LIO of unpremeditated murder, which has the same elements as voluntary manslaughter, but the members still convicted him of the premeditated murder.[24] The CAAF rejected this argument for two reasons. First, although unpremeditated murder and voluntary manslaughter have the same elements, voluntary manslaughter is distinguished from both premeditated murder and unpremeditated murder by two additional proof requirements. The military judge never instructed the members on these two factual issues. The trier-of-fact did not consider whether AO3 Wells acted in the heat of sudden passion caused by adequate provocation.[25]

Second, the Navy court erroneously relied on the finding of premeditation and the minimal direct evidence of heat of sudden passion and adequate provocation to determine if the members would not have found the accused guilty of only the LIO of voluntary manslaughter.[26] The CAAF pointed out that the finding of premeditation did not logically preclude heat of sudden passion or adequate provocation. The military judge did not give the specific instruction in the Military Judges' Benchbook explaining the effect of sudden passion on premeditation,[27] which might permit a rational inference that the members rejected heat of sudden passion and adequate provocation.[28] Also, the CAAF stated that "[a]n appellate court does not normally evaluate the credibility of the evidence presented in a case to determine harmless error, especially in a case like appellant's, where evidence on the disputed matters is not overwhelming."[29] Also, the CAAF quickly rejected the argument that the self-defense instruction rendered the erroneous omission of the voluntary manslaughter instruction harmless, because the issues involved in the two instructions are different.[30]

The CAAF held that the Navy court did not use the correct standard for prejudice.[31] When the evidence at trial is such that a rational court-martial panel could acquit on the charged offense but convict on the LIO, then the appellate court must reverse the conviction.[32] In applying that standard, the CAAF found that there was "ample evidence in this case from which the members could reasonably find that appellant committed this lesser offense of manslaughter, but not the greater charged offense of premeditated murder."[33] Accordingly, the CAAF found that the error was not harmless and reversed the conviction of premeditated murder.[34]

*Wells* is significant to practitioners for two reasons. Of general significance, it provides the correct standard for prejudice when a military judge erroneously omits an instruction for a LIO. Also, the CAAF provided guidance on the definition of voluntary manslaughter. Lesser included offenses are usually quantitatively or qualitatively lesser than the greater offense.[35] With voluntary manslaughter, however, the LIO exists when two additional facts exist. Once the evidence raises those two factual issues, the prosecution has the burden to disprove the existence of those two facts beyond a reasonable doubt. That dynamic is similar to the prosecution's burden to disprove most special defenses raised by the evidence.[36] Practitioners should think of voluntary manslaughter as a hybrid between a LIO and a special defense to appreciate the unique nature of the offense.

### United States v. Martinez:[37] *Involuntary Manslaughter for Failing to Provide Medical Assistance for a Child*

One theory of culpability under involuntary manslaughter is culpable negligence. In *United States v. Martinez*, the CAAF

24. *Id.*

25. *Id.* at 130-31.

26. *Id.* at 131.

27. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ¶ 3-43-1, n.5 (30 Sept. 1996).

28. *Wells*, 52 M.J. at 131.

29. *Id.*

30. *Id.*

31. *Id.* at 130.

32. *Id.*

33. *Id.* at 131.

34. *Id.* The CAAF sent the case back to the Navy court, which could affirm a conviction of voluntary manslaughter or order a rehearing. *Id.* at 131-32.

35. *See* MCM, *supra* note 7, pt. IV, ¶ 3b(1) (providing the examples of larceny as a quantitatively lesser offense of robbery and wrongful appropriation as a qualitatively lesser offense of larceny).

36. *See id.* R.C.M. 916(b).

37. 52 M.J. 22 (1999).

provided clear guidance on the definition of "culpable negligence."

Sergeant (SGT) Jose M. Martinez was stationed at Fort Campbell, Kentucky. The victim, Niko Martinez, was born to SGT Martinez's wife, as the result of an affair she had while SGT Martinez was deployed overseas. Although SGT Martinez wanted to put the child up for adoption, Mrs. Martinez kept her son. Sergeant Martinez concealed Niko's status by claiming that Niko was his wife's nephew, and he never enrolled Niko as a dependent within the military benefits system.[38] At the age of sixteen months, Niko died as a result of severe physical abuse by his mother over a period of four months. Mrs. Martinez admitted hitting Niko and slamming his head into the wall so hard it left indentations in the wallboard. The child had bruises from head to foot.[39] Sergeant Martinez noticed the injuries and was "mad" at his wife. Niko started to show signs of physical distress—listlessness and a fever. Sergeant Martinez claimed that he counseled his wife to bring the child to the hospital and she assured him that she would, but she never did.[40] The next day, Niko died.[41]

A court-martial convicted SGT Martinez of involuntary manslaughter for failing to provide medical attention.[42] On appeal, SGT Martinez argued that the evidence was legally insufficient for a conviction of involuntary manslaughter. Specifically, he challenged the sufficiency of the evidence of culpable negligence. The CAAF held that the evidence was legally sufficient.[43]

Culpable negligence has two components: (1) negligent act or omission, and (2) culpable disregard for the foreseeable consequences to others.[44] The first component requires the existence of a legal duty and negligence in the performance of that duty.

Sergeant Martinez argued that the evidence did not show that he had a duty to take Niko to the hospital for injuries inflicted by his wife. According to the *MCM*, "[w]hen there is no legal duty to act there can be no neglect."[45] For example, suppose you go for a walk to clear your head, after reading this article. You walk past a lake and see a child drowning. You know you could save the child, but you decide against it because you do not want to wrinkle your clothes. Although you are morally challenged, you did not commit a crime, because you had no legal duty to act to save the drowning child.[46]

The CAAF agreed with this general proposition. Under the facts of this case, however, the CAAF found the accused did have a legal duty to provide medical care to Niko.[47] Under the law, parents have a duty to provide medical assistance to their children. In this case, Niko was the biological child of SGT Martinez's wife, lived with his family, and looked to SGT Martinez as his father. The birth certificate listed SGT Martinez as the father, and he assumed the responsibilities of being a parent to Niko.[48] The CAAF held, under those facts, the members could reasonably find that the accused had "a parental duty as co-head of household to provide medical assistance to this child."[49]

Sergeant Martinez also argued that there was no evidence of unreasonable or negligent conduct on his part in failing to provide medical care to Niko. He argued that he acted reasonably in counseling his wife to take the child to the hospital and relying on her assurances. He argued that his choice to trust his wife was the wrong choice, but it was not negligent.[50] The

38. *Id*. at 23.

39. *Id*.

40. *Id*.

41. The death was due to bleeding over the course of several days from the traumatic rupture of blood vessels connected to his digestive tract. *Id*.

42. The accused was charged with and convicted of accessory after the fact to assault, involuntary manslaughter, child neglect, and misprison of a serious offense. The members adjudged a sentence of a dishonorable discharge, confinement for 13 years, forfeiture of $854 pay per month for 156 months, and reduction to the lowest enlisted grade. The ACCA found the child neglect and misprison offenses to be multiplicious, set aside those convictions, and decreased the confinement and forfeitures by two years. *Id*. at 22.

43. *Id*. at 23.

44. MCM, *supra* note 7, pt. IV, ¶ 44c(2)(a)(i).

45. *Id*. ¶ 44c(2)(a)(ii).

46. *Id*.

47. *Martinez*, 52 M.J. at 24.

48. *Id*. at 25.

49. *Id*.

50. *Id*.

CAAF held, in light of the physical symptoms that the accused observed in the week prior to death, the members could reasonably find that SGT Martinez's "reliance on a suspected child abuser's assurances was an unreasonable response to his duty to provide medical care to this child."[51]

The second component of culpable negligence is recklessness—the culpable disregard for the foreseeable consequences to others. In an involuntary manslaughter case, death must be reasonably foreseeable. The standard is objective, and it is not a defense that the accused did not intend or foresee death.[52] Sergeant Martinez argued that there was no showing that a reasonable person would have foreseen death as a consequence of his failure to take Niko to the hospital.[53] The court disagreed and focused on the expert medical testimony about the symptoms Niko would have displayed between the time of his abdominal injury and his death. The evidence also showed that SGT Martinez was aware of the intentional battering. On this evidence, the court concluded that the members could find that a reasonable person would have foreseen the substantial danger of death in the absence of medical care.[54] Accordingly, the CAAF affirmed the conviction for involuntary manslaughter.[55]

*Martinez* has two important lessons for practitioners. First, the case provides guidance on the legal duty of a parent, or a person in the position of a parent, to provide medical assistance for his child. Holding the "nonabusing" parent who is aware of the abuse criminally liable may have a significant impact on child abuse. Second, the practitioner gains a clearer understanding of the definition of culpable negligence. Culpable negligence is comprised of the two components of negligence and recklessness. Negligence requires a legal duty and a breach of that duty. Disregard for the foreseeable consequences to others, also known as recklessness, is an objective standard—whether a reasonable person would have realized the substantial and unjustified danger of death.

### United States v. Riley:[56] *Limitation on Appellate Courts in Affirming LIO*

Another case discussed involuntary manslaughter based on withholding of medical care. Whereas *Martinez* looks at the substantive definition of the crime of involuntary manslaughter, *United States v. Riley* looks at a procedural issue. Under military law, appellate courts have the authority to set aside a conviction and affirm a LIO.[57] The issue in *Riley* was whether the Air Force Court of Criminal Appeals, after setting aside the conviction for unpremeditated murder as factually insufficient,[58] could affirm the LIO of involuntary manslaughter on a theory not presented to the members. The facts of the case are important to understanding the CAAF's opinion.

In April, Airman Leslie D. Riley complained to her military supervisor about cramping, spotting, and the absence of menstrual cycle. She went to the emergency room (ER). The doctor conducted abdominal and pelvic exams and gave her a pain-reliever. Later that month, Airman Riley took a home pregnancy test, which indicated she was pregnant. A friend told her the result could be from stress or something she ate. Riley made an obstetrician/gynecologist appointment at the end of April, but she cancelled it after working late the night before.[59]

In the beginning of July, Airman Riley was in great pain after a racquetball game. Early the next morning, she went to the ER. She was holding her back and crying, and the pain was coming in waves.[60] A contract physician at the end of his shift examined Airman Riley. She told him that she hurt her back playing racquetball the day before. He gave her a pain-reliever and released her.[61] The ER technicians were concerned when they saw her doubled-over and crying. They asked the incoming doctor to look at her. He looked at her charts, asked questions, and ordered a pregnancy test.[62]

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51. *Id*.

52. *Id*. at 25-26.

53. *Id*. at 25.

54. *Id*. at 26.

55. *Id*.

56. 50 M.J. 410 (1999).

57. UCMJ art. 59(b) (LEXIS 2000).

58. The service courts have the mandate to review for factual sufficiency in addition to legal sufficiency. UCMJ art. 66(c).

59. *Riley*, 50 M.J. at 411-12.

60. *Id*. at 412.

61. *Id*.

62. *Id*.

After giving blood for the pregnancy test, Airman Riley went to the restroom. After she was in the restroom for a while, one of the technicians knocked on the door. Airman Riley said she would be out in a few minutes. Another technician knocked, and she said "yes, sir." The technician knocked again, and Airman Riley said she got sick and needed a mop.[63] After a total of about thirty to forty-five minutes in the restroom, Airman Riley walked out with blood on her leg, which she said was from her menstruating.[64] She was anxious to go home. The pregnancy test was positive. During a pelvic exam, the doctor saw fresh lacerations and hematomas, which Airman Riley stated were from a rollerblading accident.[65] While Airman Riley was in the examination room, a housekeeper found an infant girl among wads of paper towels in the ER restroom trash can.[66]

At trial, the prosecution theory was that Airman Riley killed her unwanted baby with premeditation.[67] The defense theory was that Airman Riley sat on the toilet and instinctively began to push. Due to no fault of the accused, the baby "squirted out" and suffered a fatal head injury from the fall to the floor. According to the defense, Airman Riley thought the baby was already dead when the technicians knocked on the door.[68]

The defense objected to an instruction on culpable negligence by a failure to act, because the failure to act was not alleged or implied in the specification. The prosecution stated that it did not intend to argue that Airman Riley's culpability stemmed from failure to summon medical assistance. The military judge deleted the reference to failure to summon medical assistance from the instruction on the LIO of involuntary manslaughter, but retained the description of culpable negligence by failing to prevent the fracture of the baby's skull.[69] The members found her guilty of premeditated murder. During the presentencing proceeding, however, they reconsidered and found her guilty of unpremeditated murder.[70]

The Air Force Court of Criminal Appeals found the evidence factually insufficient for unpremeditated murder. The Air Force court, however, held that the accused's refusing and impeding medical assistance was culpable negligence and was the proximate cause of the child's death.[71] The Air Force court acknowledged that the military judge did not instruct on failure to provide medical care, but it found that Airman Riley did more than fail to seek medical care—she obstructed it with a culpable disregard.[72] Thus, the Air Force court affirmed a conviction of the LIO of involuntary manslaughter.[73]

The CAAF considered whether the Air Force court erred by affirming a conviction of involuntary manslaughter on a theory of refusing medical assistance. Appellate courts have the authority to affirm a conviction on a LIO, even if the members were not instructed on the LIO.[74] The CAAF, however, focused on a due process limitation to that authority,[75] which the Supreme Court explained in *Dunn v. United States*.[76]

Although the CAAF did not discuss *Dunn* in detail, the facts and rationale of that case are helpful in appreciating the due process right involved. In June 1976, Robert Dunn testified before a grand jury implicating Phillip Musgrave in drug-related offenses. In September 1976, he recanted his testimony in an oral statement under oath in Musgrave's attorney's office.

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63. *Id*. at 412-13.

64. *Id*. at 413.

65. *Id*.

66. *Id*.

67. *Id*. at 414.

68. *Id*.

69. *Id*. As for the instruction on the LIO of negligent homicide, the military judge instructed on failure to act, but instructed that her failure to summon medical assistance may not, as a matter of law, constitute the negligent act or failure to act. *Id*.

70. *Id*. at 415. The adjudged and approved sentence was a dishonorable discharge, confinement for 25 years, total forfeitures, and reduction to the lowest enlisted grade. *Id*. at 411.

71. United States v. Riley, 47 M.J. 603, 608 (A.F. Ct. Crim. App. 1997).

72. *Id*.

73. *Id*. The Air Force court reassessed the sentence and affirmed a sentence that included 10 years instead of 25 years of confinement. *Id*. at 609.

74. United States v. LaFontant, 16 M.J. 236 (C.M.A. 1983) (holding that the appellate court could affirm LIO of attempted possession of LSD, even though members were never instructed thereon).

75. *Riley*, 50 M.J. at 415.

76. 442 U.S. 100 (1979). The CAAF also cited *Chiarella v. United States*, 445 U.S. 222, and *United States v. Standifer*, 40 M.J. 440, 445 (C.M.A. 1994).

In October, at an evidentiary hearing for Musgrave's motion to dismiss, Dunn adopted his September recantation and testified that only a small part of his grand jury testimony was true.[77]

Dunn was charged with violating 18 U.S.C. § 1623, which prohibits false declarations made under oath in any proceeding before or ancillary to any court or grand jury. The indictment mentioned the September statement under oath in the attorney's office.[78] During the trial, the testimony at the October evidentiary hearing was admitted into evidence.[79] The judge, however, instructed the jury to render its verdict on the charges alleged in the indictment, which specified the September statement.[80] The jury found him guilty. On appeal, Dunn argued that the statement under oath in the attorney's office was not "ancillary to any court or grand jury."[81] The Court of Appeals for the Tenth Circuit agreed that it was not an ancillary proceeding. The Court of Appeals affirmed, however, because Dunn adopted his September statement in his October testimony at the evidentiary hearing, which was a proceeding ancillary to a court. The Court of Appeals acknowledged that the indictment specified the September statement, but found it to be nonprejudicial variance between the indictment and proof at trial.[82]

The Supreme Court pointed out that "a variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment."[83] Instead of a discrepancy between the indictment and the proof at trial, this was a discrepancy between the basis on which the jury rendered its verdict and the basis on which the Court of Appeals sustained the conviction.[84] The Court discussed the firmly rooted right to be heard on the specific charges of which one is accused. "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process."[85] Although the jury might well have reached the same conclusion as the Court of Appeals, the appellate court is "not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."[86]

Relying on *Dunn*, the CAAF held that the Air Force court could not affirm Airman Riley's conviction for involuntary manslaughter on a theory of failure to summon medical assistance.[87] The government conceded that the Air Force court could not affirm a conviction based on failure to act, but it argued that the conviction was affirmed on a theory of intentional prevention of medical intervention rather than failure to summon medical assistance.[88] The CAAF pointed out, however, that neither theory was submitted to the members. Airman Riley did not have the opportunity to defend herself against the factual issues involved in those theories. Therefore, affirming the conviction on such a theory would violate due process.[89] Accordingly, the CAAF reversed the decision of the Air Force court and remanded the case for further consideration consistent with these principles of due process.[90]

The dissenting opinion stated that reversing the conviction for involuntary manslaughter would be a true "miscarriage" of justice.[91] The dissent focused on the law-of-the-case doctrine,[92]

77. *Dunn*, 442 U.S. at 102-03.

78. *Id*. at 103-04.

79. *Id*. at 104.

80. *Id*. at 106.

81. *Id*. at 104.

82. *Id*. at 104-05.

83. *Id*. at 105.

84. *Id*. at 106.

85. *Id*.

86. *Id*. at 107.

87. United States v. Riley, 50 M.J. 410 (1999).

88. *Id*. at 415-16.

89. *Id*. at 416.

90. *Id*. The Air Force court had already found the evidence factually insufficient for unpremeditated murder, but it could still consider whether the evidence is factually sufficient to support a conviction of a LIO based on negligent infliction of the fatal injuries to the baby. *Id*.

91. *Id*. at 416 (Crawford, J., dissenting). This apparent play on the word "miscarriage" is used not only in the first paragraph of the dissenting opinion but also in its last sentence. *Id*. at 425.

92. The practice that courts generally should not reopen what a court has already decided. *Id*. at 420.

and explained that it is a discretionary policy rather than a limitation on authority. Also, the egregious facts of this case warrant the "manifest injustice" exception to that doctrine.[93] The dissent would have applied the fatal variance test to determine if there was prejudice: (1) was the accused misled to the extent that she was unable to adequately prepare for trial; and (2) was the accused fully protected from another prosecution for the same offense.[94] According to the dissent, the variance in this case was not fatal. Airman Riley "was on notice of what misconduct she was charged with and she was able to prepare an adequate defense."[95] Also, the government could not prosecute her again for homicide after a conviction for involuntary manslaughter.[96]

The majority opinion is more persuasive than the dissenting opinion. The majority did not rely on the law-of-the-case doctrine discussed by the dissent. It focused on the due process right to present a defense before the trier-of-fact. The facts of *Riley* appear indistinguishable from the facts of *Dunn*. Also, the dissent's reliance on the fatal variance test is misdirected. As stated in *Dunn*, variance deals with a discrepancy between the pleadings and the proof at trial. Here, as in *Dunn*, the discrepancy is between the basis on which the trier-of-fact rendered its verdict and the basis on which the appellate court affirmed the conviction.

The *Riley* case is significant for practitioners, especially appellate counsel and judges. An appellate court may not affirm a conviction of a LIO on a theory of culpability never submitted to the trier-of-fact. As a matter of due process, the accused cannot be convicted of a charge against which she did not have the opportunity to defend herself.

United States v. Robbins:[97] *When is Involuntary Manslaughter Not Involuntary Manslaughter?*

In certain circumstances, a court-martial has subject-matter jurisdiction over violations of state criminal statutes. In areas within federal jurisdiction, the federal Assimilative Crimes Act (ACA) fills the gaps for offenses not covered by federal law by adopting offenses of the state in which the area of federal jurisdiction is situated.[98] Clause 3 of Article 134 of the UCMJ incorporates federal crimes into military criminal law.[99] The military uses a two-step process to acquire subject matter jurisdiction over state crimes. First, the ACA assimilates the state crime into federal law, and then Article 134 incorporates that federal law into the UCMJ. There are, however, significant limitations on both of those steps. The "preemption doctrine" precludes the application of Article 134 to conduct covered by Articles 80 through 132 of the UCMJ. Similarly, the ACA only assimilates state crimes if Congress has not already addressed the act or omission in a federal criminal statute. The applicability of those limitations, however, is often unclear.

The "preemption doctrine" is almost as old as the UCMJ. In 1953, the Court of Military Appeals (CMA) stated, in *United States v. Norris*,[100] that Article 134 is generally limited to offenses "not specifically delineated by the punitive articles."[101] In *Norris*, the court-martial convicted the accused of wrongful appropriation under Article 121, but the Army Board of Review changed the conviction to "wrongful taking" under Article 134.[102] The CMA found that there was no offense of "wrongful taking" under Article 134, because Congress had covered the entire field of criminal conversion in Article 121. The CMA stated that it could not "grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134."[103]

Five years later, the CMA created a two-part test for preemption. In *United States v. Wright*,[104] the court-martial convicted the accused for violating the Texas automobile burglary stat-

93. *Id*. at 420-22.

94. *Id*. at 423.

95. *Id*.

96. *Id*.

97. 52 M.J. 159 (1999).

98. 18 U.S.C.S. § 13(a) (LEXIS 2000).

99. UCMJ art. 134 (LEXIS 2000). The offense must occur in a place where the federal law in question applies. *See* United States v. Williams, 17 M.J. 207 (C.M.A. 1984). Also, the crime cannot be *punishable* by death. *See* United States v. French, 27 C.M.R. 245 (C.M.A. 1959).

100. 8 C.M.R. 36 (C.M.A. 1953).

101. *Id.* at 39.

102. *Id.* at 37-38.

103. *Id*.

104. 5 M.J. 106 (C.M.A. 1978).

ute.[105] The accused argued that Articles 129 and 130 for burglary and housebreaking preempted assimilation of the Texas statute. The CMA stated that preemption applied if: (1) Congress intended to limit prosecution for wrongful conduct within a particular field to offenses defined in specific articles of the UCMJ, and (2) the offense charged is composed of a "residuum of elements" of those specific articles.[106] The court found that Congress did not manifest an intent to limit the prosecution for unlawful entry with a criminal purpose to the offenses defined in Articles 129 and 130.[107] The court held that the preemption doctrine did not preclude assimilation of the Texas automobile burglary statute.[108]

In 1984, the President codified the "preemption doctrine" in the *MCM*.[109] Previously, the *MCM* had simply stated that if the "conduct is specifically made punishable by another article, it should be charged as a violation of that article."[110] The *1984 MCM* provided that "[t]he preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132."[111] The language in the 1998 edition of the *MCM* is identical.[112]

The ACA has an even longer history. Congress enacted the ACA in the early nineteenth century to fill the gaps left by the federal criminal statutes for areas under exclusive or concurrent federal jurisdiction. The ACA has a limitation similar to the "preemption doctrine." The language of the ACA provides that for a state crime to be assimilated, the act or omission cannot be "made punishable by any enactment of Congress."[113] The purpose of the ACA, as interpreted by the Supreme Court, is to cover crimes on which Congress has not legislated and not to enlarge or otherwise redefine existing federal crimes.[114] The Supreme Court most recently analyzed the ACA in 1998, in *Lewis v. United States*.[115]

In *Lewis*, the defendant was the civilian wife of a soldier at Fort Polk, Louisiana. In federal district court, a jury convicted her of beating and killing her four-year-old daughter, under Louisiana's first-degree murder statute. The Louisiana statute, unlike the federal first-degree murder statute, did not require premeditation. Also, it included acts done with the specific intent to kill *or* to inflict great bodily harm, if the victim was under the age of twelve.[116] The defendant argued that the federal murder statute already punished the act as second-degree murder, so the ACA did not assimilate the Louisiana first-degree murder statute.

The Court used a two-step analysis to determine if the ACA assimilates a state criminal statute into federal law. First, is the defendant's act or omission made punishable by any enactment of Congress? If not, then assimilation is presumably proper. If so, then ask whether the federal statute precludes the application of state law.[117] A federal statute could preclude assimilation if, for example, the state statute would interfere with the achievement of a federal policy, the state statute would effectively rewrite an offense that Congress carefully defined, or the federal statute reveals a congressional intent to occupy the entire field of misconduct under consideration.[118]

The Court held that the federal murder statute precluded the assimilation of the child victim provision of Louisiana's first-degree murder statute.[119] Using the above two-step analysis, the Court answered the first question in the affirmative, because the act was made punishable by the federal murder statute, 18

105. *Id.* at 107.

106. *Id.* at 110-11.

107. *Id.* at 111.

108. *Id.*

109. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(5)(a) (1984).

110. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 213a (1969).

111. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(5)(a) (1984).

112. MCM, *supra* note 7, pt. IV, ¶ 60c(5)(a).

113. 18 U.S.C.S. § 13(a) (LEXIS 2000).

114. United States v. Williams, 327 U.S. 711, 723 (1946).

115. 523 U.S. 155 (1998).

116. *Id.* at 167-68.

117. *Id.* at 164-65.

118. *Id.*

119. *Id.* at 171.

U.S.C. § 1111, as second-degree murder.[120] As for the second question, the federal statute demonstrated Congress's intent to cover all types of murder in areas under federal jurisdiction. The federal statutory framework was detailed, and the provisions covering first-degree and second-degree murder were "linguistically interwoven." Also, the federal statute contained a detailed first-degree list that is of the same level of generality as the Louisiana statute. In an area involving the death penalty, it is certain that Congress gave great consideration to the distinction between first-degree and second-degree murder.[121] The Court held that there was no gap to fill.[122]

The issue in *United States v. Robbins* was whether a provision in the Ohio involuntary manslaughter statute, which proscribed the unlawful termination of another's pregnancy as a result of a felony, was cognizable by a court-martial. At Wright-Patterson Air Force Base, Ohio, Airman Gregory L. Robbins severely beat his thirty-four-week pregnant wife with his fists. He broke her nose and gave her a black eye. His punches to her body ruptured her uterus and tore the placenta from the wall of the uterus. The trauma killed the otherwise healthy fetus.[123]

Airman Robbins pled guilty to assault consummated by a battery on his wife on divers occasions, aggravated assault with the intent to inflict grievous bodily harm on his wife on divers occasions, and involuntary manslaughter by terminating the pregnancy of his wife in violation of Ohio Revised Code § 2903.04.[124] The Ohio statute provided that whoever "shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony" is guilty of involuntary manslaughter.[125] The military judge sentenced Airman Robbins to a dishonorable discharge, confinement for eight years, and reduction to the lowest enlisted grade.[126] On appeal, Airman Robbins argued that his guilty plea was improvident because the "preemption doctrine" applied to the charge brought under the ACA.[127]

After providing a thorough background on the preemption doctrine and the ACA,[128] the court analyzed the relevant provision in the Ohio involuntary manslaughter statute.[129] The court stated that the Ohio legislature's decision to place the offense of unlawful termination of another's pregnancy within the general classification of involuntary manslaughter was not dispositive.[130] The court looked at the plain language of the Ohio statutory provision to determine the nature of the offense. Also, it found that both the UCMJ and the United States Code (U.S.C.) require an infant be "born alive" to be considered a "human being" and protected under the statute.[131]

The court applied the two-step ACA analysis and the two-step preemption test. For the *Lewis* analysis, the court answered the first question negatively.[132] Neither the UCMJ nor the U.S.C. proscribed the unlawful termination of another's pregnancy.[133] As stated in *Lewis*, that ended the analysis and assimilation was presumably proper. The court dealt with the preemption test in an equally swift manner. In one sentence, the

120. *Id.* at 168.

121. *Id.* at 169.

122. *Id.*

123. United States v. Robbins, 52 M.J. 159, 160 (1999).

124. OHIO REV. CODE ANN. § 2903.04 (Anderson 1999).

125. *Id.* Six days before the assault, an amendment to the Ohio statute took effect that added the language "or the unlawful termination of another's pregnancy." *Robbins*, 52 M.J. at 162.

126. *Robbins*, 52 M.J. at 159.

127. *Id.* at 160.

128. *Id.* at 160-62.

129. *Id.* at 162-63. Before getting into the merits of the appellant's preemption argument, the CAAF held that the accused's guilty plea did not waive the issue. As the court stated, if the preemption argument was correct, then the court-martial lacked subject-matter jurisdiction. *Id.* at 160. Jurisdiction is never waived by failure to raise the issue. MCM, *supra* note 7, R.C.M. 905(e). Lack of jurisdiction cannot even be affirmatively waived through bargaining in a pretrial agreement. *Id.* R.C.M. 705(c)(1)(B).

130. *Robbins*, 52 M.J. at 163.

131. *Id.*

132. *Id.*

133. In the Senate, there is currently a bill, which passed the House of Representatives on 30 September 1999, that would add Article 119a to the UCMJ. Article 119a would proscribe the killing or injury, during the commission of one of eight UCMJ offenses, of a child in utero. Unborn Victims of Violence Act of 1999, H.R. 2436, 106th Cong. § 3.

court skipped to the second prong and concluded that the offense to which the accused pled guilty was not a residuum of elements of a specific offense, "but instead [was] a separate offense proscribed by the Ohio Revised Code."[134]

The court supported its conclusion by discussing the other prong of both tests—congressional intent. The court explained how the Ohio statute did not conflict with the intent of Congress. Congress has traditionally left the area of termination of pregnancy to the states.[135]

The court addressed the argument that assimilation would effectively redefine "human being," which Congress already defined in its involuntary manslaughter statutes. In the same bill that had recently added unlawful termination of another's pregnancy to the involuntary manslaughter statute, the Ohio legislature also amended the separate statutory definition of "human being" to include *viable* fetuses. The state legislative history reflected that the statutory provision assimilated in this case did not attempt to redefine "human being," because it included *all* fetuses.[136] Instead of redefining "human being," it created a new offense distinct from assault against the mother and distinct from the homicide of a viable fetus. As the court noted, by drafting this statute in the disjunctive, the Ohio legislature clearly distinguished this offense from traditional manslaughter.[137] At the end of the opinion, the court made an interesting amendment to the specification. To clarify that the assimilated offense was not a "homicide," the court struck the words "involuntary manslaughter" from the specification.[138]

Judge Gierke did a masterful job in the opinion by making a very contentious issue look simple. He made two points that clarified the law. First, the focus is the act or omission prohibited in the assimilated statute rather than its title. Second, the preemption test under Article 134 and the analysis of whether existing federal law precludes assimilation under the ACA are distinct tests.

Critical to the CAAF's analysis was the observation that the classifications that *state* legislatures give offenses are not dispositive under either the ACA or the preemption doctrine. The Ohio legislature chose to place the offense of unlawful termination of another's pregnancy into § 2903.04 of the Ohio Revised Code and to classify it as involuntary manslaughter. The Ohio legislature could have chosen to place it into a different statute, such as the child abuse statute, or to place it by itself in a new statutory section. If the legislature had done so, as the Air Force court pointed out in its comprehensive opinion, "the question of assimilation would be almost rhetorical."[139] The Ohio legislature's decision of how to classify the offense was not relevant to the issue before the court.

The CAAF properly focused on the language of the statute. This freed the court to explain how the unlawful termination of another's pregnancy was, under military law, not considered within the category of involuntary manslaughter. It was neither a "residuum of elements" nor a redefinition of involuntary manslaughter. Instead, it was a different offense that filled a gap in military law. Fortunately, the court was alert to the misperception that its holding could create. Someone not reading the whole opinion might come away with the mistaken belief that all state involuntary manslaughter statutes are properly assimilated and not preempted by Article 119. To avoid this misunderstanding, the court took the extra precaution of amending the specification by deleting the words "involuntary manslaughter." The court did not consider this act a homicide.

The court also clarified that, despite the significant overlap, the tests under the preemption doctrine and the ACA are distinct. Analyzing these two issues separately assists in their proper application. It is possible that a state offense is properly assimilated under the ACA but precluded by the preemption doctrine[140] and vice-versa.[141]

As beneficial as the opinion is in clarifying this area of the law, the opinion's brief, one-sentence application of the preemption doctrine can be misleading. The court stated that the

134. *Robbins*, 52 M.J. at 163.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 163-64.

139. United States v. Robbins, 48 M.J. 745, 752 (A.F. Ct. Crim. App. 1998).

140. For example, consider the hypothetical of a service member charged with violating a state larceny-type crime that requires only general intent rather than the specific intent required under Article 121. Under the *Lewis* analysis, the ACA assimilates the state crime, because the first question would be answered negatively. The act or omission is not punishable by any enactment of Congress. Article 121, however, would preempt the incorporation of the state crime under Article 134.

141. In the lower court's opinion, Senior Judge Snyder stated that *even if* the ACA did not assimilate the Ohio offense, the preemption doctrine did not preclude a conviction of the misconduct as a service disorder or discredit under clause 1 or 2 of Article 134. *Robbins*, 48 M.J. at 752-53. Similarly, in his concurring opinion, Judge Sullivan stated that he could not distinguish *Lewis*, because Article 119 covered involuntary manslaughter; but he would have sustained the conviction as a service disorder or discredit, without mention of the Ohio statute. *Robbins*, 52 M.J. at 164-65 (Sullivan, J. concurring).

offense was "not 'a residuum of elements of a specific offense,' but instead [was] a separate offense proscribed by the Ohio Revised Code."[142] This statement suggests that the two clauses are mutually exclusive.[143] The fact that an offense is charged as a violation of a specific state criminal statute does not necessarily mean that the offense is not a "residuum of elements" of one of the punitive articles.

The CAAF held that the Ohio offense of unlawfully terminating another's pregnancy was cognizable by a court-martial. Just as importantly, *Robbins* provides guidance to the practitioner in this contentious area of law. The court explicitly stated that classifications of offenses by state legislatures are not dispositive. Counsel should look at the underlying language of the statutes. Also, the court explained how counsel should analyze the preemption doctrine and the ACA separately. Although *Robbins* clarifies the law, the area still demands skillful advocacy by counsel. A court's ruling could depend on how broadly or narrowly the court defines the accused's "act or omission" and the "field" over which Congress has already legislated. The trial counsel should define the accused's act and the preempted field very narrowly. The defense counsel should define the accused's act and the preempted field very broadly. As state legislatures expand their criminal codes and trial counsel increasingly assimilate state crimes and incorporate them under Article 134, practitioners must understand the law and its rationale. Skillful advocacy can make a difference in the application of the analyses.

**The Defense of Necessity**

The defense of necessity is recognized in the common law. According to the Supreme Court, "the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of [two] evils."[144] The aim of the criminal law is to prevent harm to society.[145] Accordingly, the law ought to encourage, as a matter of public policy, conduct that is aimed at minimizing the overall harm to society.[146] When assessing criminal liability, some commentators focus on dangerousness and culpability, in addition to harm.[147] A person who, in accord with the moral norms of society, pursues higher values at the expense of lesser values is usually neither dangerous nor deserving of punishment.

The common law defense of necessity has several limitations. The accused must have acted with the intention of avoiding the greater harm.[148] The harm done by the accused's chosen course of action must be less than the harm that would have been done if he had chosen to obey the law.[149] If there is an alternative available that will cause less harm than violating the law, then the necessity defense does not apply.[150] If the accused was at fault in creating the dilemma, he may be criminally liable to some degree.[151] Lastly, if the legislature has already weighed the evils, the defense of necessity is "preempted."[152]

If you look for the special defense of necessity in R.C.M. 916, you will not find it. You will, however, find the somewhat similar defense of duress.[153] Traditionally, the courts have distinguished the defenses of duress and necessity by the fact that

142. *Robbins*, 52 M.J. at 163.

143. This language of the opinion is similar to language in a prior Court of Military Appeals opinion that is even more misleading. "The second question posed in *Wright* is likewise answered in the negative. Appellant was not charged with the 'residuum' of another punitive article but, rather, with a violation of a specific penal statute codified as 18 U.S.C. § 793(e)." United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992).

144. United States v. Bailey, 444 U.S. 394, 410 (1980).

145. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.2(e), 14 (1986).

146. *Id.* § 5.4, at 629.

147. Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on which Our Criminal Law Is Predicated*, 66 N.C. L. REV. 283 (1988).

148. 1 LAFAVE & SCOTT, *supra* note 141, § 5.4(d)(3), at 635.

149. *Id.* § 5.4(d)(4), at 636.

150. *Id.* § 5.4(d)(5), at 638-39.

151. *Id.* § 5.4(d)(6), at 640.

152. *Id.* § 5.4(a), at 629-30.

153. MCM, *supra* note 7, R.C.M. 916(h). This rule provides:

> It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. . . . If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

the situation is caused by another human being for duress, and the situation is caused by natural forces for necessity.[154]

Because R.C.M. 916 does not include necessity, does it mean that the military does not recognize necessity as a defense? No, the CAAF or the military courts may recognize a defense at common law.[155] In two cases this year, the CAAF addressed the issue of whether the defense of necessity exists in the military. Unfortunately, the court did not have to decide the issue, and we are left only with dicta. Furthermore, there appears to be a subtle shift in the CAAF's position from the dictum in the first case to the dictum in the second case. The first case, *United States v. Olinger*,[156] emphasized the dangers of a necessity defense in the military.

Quartermaster Second Class (QM2) Lester E. Olinger IV was scheduled to deploy for five months with his ship. On the day the deployment began, QM2 Olinger failed to return from authorized leave. He missed the movement, remained absent for over five months, and then surrendered to military authorities.[157] He pled guilty to unauthorized absence and missing movement. During his unsworn statement, he stated that his wife previously had an operation, which caused stress to be a risk to her health. A few months before the deployment, she learned that she could not have children. She suffered from depression and took the anti-depressant Prozac. At the time of the unauthorized absence, he "felt that her depression might kill her from the stress if [he] went on the UNITAS deployment."[158] On appeal, he argued that his guilty plea was improvident, because this statement reasonably raised the defense of necessity.[159]

This case raised the issue of whether duress applies only to situations in which the source of the threat is another human being. If duress is so limited, then the case raised the issue of whether military law should recognize the defense of necessity.[160] The CAAF acknowledged that federal and state courts generally recognize necessity, but military law has not yet recognized it. The CAAF noted that this issue addresses "some of the most fundamental principles in the military justice system."[161] It agreed with the lower court's assertion that the ramifications of a necessity defense in the military are drastically different from those in the civilian context. "In civilian life, innocent individuals may be adversely affected by the commission of the illegal act. In the military, however, the consequences may be much greater. Such a decision affects an individual's shipmates, the safety and efficiency of the ship, as well as the effectiveness of the mission."[162] The CAAF also quoted even stronger language from an Army Court opinion. "[R]ejecting the necessity defense goes to the core of discipline within a military organization. In no other segment of our society is it more important to have a single enforceable set of standards."[163]

The court, however, decided the case without resolving the contentious necessity issue. The court saw the ultimate issue as whether there was a substantial basis in law and fact to reject the plea of guilty. It found that, even if either duress or necessity applied to this type of situation in the military, the appellant did not provide enough details to support immediate threat of death or serious bodily harm or the lack of alternative sources of assistance for his wife.[164] Therefore, it would be inappropriate to resolve these weighty questions on the basis of the record before the court. Although only dictum, the opinion indicates a reluctance to recognize the necessity defense in the military.[165]

In his concurring opinion, Judge Sullivan states, in his view, that military law recognizes the defense of necessity.[166] He points out that R.C.M. 916(h) "does not limit the defense to instances where the source of the threat is a third person as opposed to other natural or physical occurrences."[167] Therefore, despite the label of "duress," the rule permits a defense of necessity. Judge Sullivan joined in affirming the conviction,

154. United States v. Bailey, 444 U.S. 394, 409-10 (1980). One commentator has asserted that this is not universally true, and the more salient distinction is that necessity "is a justification and not merely an excuse." ARNOLD H. LOEWY, CRIMINAL LAW: CASES AND MATERIALS 491 (2000). Although this distinction of justification versus excuse may have jurisprudential ramifications, it is not significant at the practical level.

155. United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (recognizing the special defense of voluntary abandonment, which was not included in the MCM).

156. 50 M.J. 365 (1999).

157. *Id.* at 366.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* (quoting United States v. Olinger, 47 M.J. 545 (N.M. Ct. Crim. App. 1997)).

163. *Id.* at 367 (quoting United States v. Banks, 37 M.J. 700, 702 (A.C.M.R. 1993)).

164. *Id.* at 367.

because the evidence in the record was insufficient to trigger the necessity defense after a guilty plea.[168]

After *Olinger*, it appeared that if the CAAF had to decide whether the necessity defense applies in the military, the court probably would refuse to recognize it. The next CAAF opinion that addressed the issue, however, indicated a subtle shift in that position. In dictum in *United States v. Rockwood*,[169] the CAAF indicated that it would consider the necessity defense, under the appropriate circumstances.

Captain (CPT) Rockwood deployed with the 10th Mountain Division for the peaceful entry into Haiti, during Operation Uphold Democracy. He was a counter-intelligence officer. He was concerned that the deplorable conditions at the penitentiary in Port Au Prince violated human rights. He attempted to raise the issue to superiors so that the joint task force (JTF) would inspect the penitentiary, but the command's focus at the time was force protection. He disagreed with the command's priorities. He thought the President's intent and international law required the JTF to intervene. Captain Rockwood decided to conduct the inspection on his own. Instead of going to his appointed place of duty, he went without authorization to inspect the penitentiary.[170]

At his court-martial, CPT Rockwood's defenses included justification,[171] duress, and necessity. At trial, the military judge assessed that the evidence did not raise duress in its traditional sense, but he tailored the duress instruction to the facts of the case. The instruction did not limit the defense to human agency sources.[172] The court-martial found CPT Rockwood guilty of failure to go to his appointed place of duty and conduct unbecoming an officer for his unauthorized trip to the penitentiary, along with other military offenses for later misconduct.[173]

On appeal, one of CPT Rockwood's arguments was that the military judge erred by not giving a necessity instruction. The CAAF found, however, that the military judge's tailored instruction adequately covered the necessity defense, as recognized in civilian criminal law.[174] Therefore, the court found that the court-martial members received an adequate necessity instruction, and the issue of whether such a defense exists in the military was moot.[175] The members rejected the necessity defense. The evidence showed no immediate threat of death or grievous bodily harm to innocent civilians. The court found that, under the circumstances, the members' rejection of the defense was rational.[176] The CAAF affirmed the conviction.[177]

Although the issue was moot, the court did discuss whether military law recognized the defense of necessity. First, the opinion quoted one commentator as saying that necessity has never been recognized in the military, possibly because of a concern that "private moral codes" will override the rule of law.[178] In a footnote, Chief Judge Cox stated:

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165. The reluctance was even more evident in the earlier case of *United States v. Rankins*, 34 M.J. 326 (C.M.A. 1992). "Military courts, likewise, have been reluctant to apply the necessity defense by judicial fiat. As with the case at bar, military courts have instead analyzed such criminal acts under the rubric of the duress defense." In *Rankins*, the appellant alleged that she missed movement because she feared her husband might suffer a heart attack. *Id.* at 327. The court, left open the issue of whether R.C.M. 916(h) is limited to coercion from third party agencies or whether it includes pressure from any physical or natural forces, because the injury that she feared was neither reasonable nor imminent. *Rankins*, 34 M.J. at 329-30. In *Rankins*, two judges opined that the necessity defense does not exist in the military; two judges opined that it does; and one judge reserved judgement. *Olinger*, 50 M.J. at 368 (Sullivan, J. concurring).

166. *Olinger*, 50 M.J. at 367 (Sullivan, J. concurring).

167. *Id.* at 368 (Sullivan, J. concurring).

168. *Id.* at 368-9 (Sullivan, J. concurring) (distinguishing triggering the defense after a guilty plea versus during a contested case; if this had a been a contested case before members, the evidence might have been sufficient to warrant an instruction on the defense).

169. 52 M.J. 98 (1999).

170. *Id.* at 100-01. Later in the opinion, the CAAF notes that a senior military police officer later inspected the penitentiary and found the conditions terrible. He did not, however, report any torture or physical abuse. *Id.* at 109-11.

171. *See* Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275 (1995) (explaining why the justification defense did not apply under the facts of the case).

172. *Rockwood*, 52 M.J. at 113. The standard duress instruction does not limit the source of the threat to human agency. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ¶ 5-5 (30 Sept. 1996). Likewise, the language of R.C.M. 916(h) does not contain that common law limitation.

173. *Rockwood*, 52 M.J. at 102. The other charges were unlawfully departing a combat support hospital, disrespect, and disobedience after the initial incident. The convening authority disapproved the finding of guilty on the Article 133 charge. *Id.*

174. *Id.* at 114.

175. *Id.*

176. *Id.*

177. *Id.*

> To the extent [the commentator] is referring to situations not involving the flouting of military authority, he surely goes too far. There is, for example, no reason why the [trespassing to save a drowning person] situation would not provide a defense. However, "it was necessary for me to leave my post or disobey your lawful order in order to perform some more important function" could be another matter, one which the instant facts do not require us to resolve.[179]

Also, towards the end of the opinion, Chief Judge Cox commented further on the possibility of a necessity defense in military law. "There may be unusual situations in which an assigned military duty is so mundane, and the threat of death or grievous bodily harm to civilians is so clearly defined and immediate, that consideration might be given to a duress or necessity defense."[180]

For military justice practitioners, the dicta in *Rockwood* suggests that a limited necessity defense, or an extended duress defense, might apply in the military. Defense counsel can refer to this dicta, together with the rationale for the defense in common law, to support its application in the military. Trial counsel, on the other hand, can refer to the strong language in *Olinger* and other cases to support the argument that the unique needs of the military require the military to reject the necessity defense. If recognized in the military, the necessity defense clearly should not permit the second-guessing of military authority. In such a case, the need for military discipline would weigh heavily when the opposing evils are balanced.

### New Article 134 Offense: Reckless Endangerment

In 1999, the President added paragraph 100a to part IV of the *MCM*.[181] This paragraph enumerates "reckless endangerment" as an offense under Article 134.[182] As defined by the President, reckless endangerment has four elements: (1) the accused engaged in conduct; (2) the conduct was wrongful and reckless or wanton; (3) the conduct was likely to produce death or grievous bodily harm to another person; and (4) under the circumstances, the conduct was prejudicial to good order and discipline or service-discrediting.[183] The new *MCM* paragraph also provides practitioners with an explanation of the offense and a model specification.[184] The maximum punishment includes a bad-conduct discharge, total forfeitures of all pay and allowances, and confinement for one year.[185]

The addition of reckless endangerment as an enumerated offense under Article 134 assists the government in prosecuting crimes against persons. This offense is unique in that it requires neither specific intent nor consummated harm. The prosecution must prove, however, that the conduct was reckless and likely to produce death or grievous bodily harm. This offense is an effort to deter misconduct before injury or death actually occurs. The offense may apply in different types of cases, such as child neglect and unprotected sex by an HIV-positive service member. In cases involving the operation of vehicles, aircraft, and vessels, however, Article 111 will preempt a charge under Article 134.[186]

### ACCA Extends the *Mincey* Rule to Forged-Checks "Mega-Spec"

When dealing with property offenses, the value of property is often important because, besides being an element, it can also be an aggravating factor that enhances the maximum punishment.[187] Trial counsel, therefore, may want to charge several stolen items in one specification and aggregate their values to get a higher maximum punishment. This practice is permissible if the items were taken at substantially the same time and place, which would constitute a single larceny.[188] If the items were not stolen at substantially the same time and place, then the maximum punishment for the specification is the maximum punishment for the greatest offense in the specification.[189]

178. *Id.* at 113.

179. *Id.* at 113 n.17.

180. *Id.* at 114.

181. Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,119 (1999).

182. *Id.* The basis of this addition is *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989), in which the CMA held that unprotected sexual intercourse with another service member, while HIV-positive and after being counseled that the virus is deadly and can be transmitted sexually, stated an offense under article 134. Changes to the Analysis Accompanying the Manual for Courts-Martial, United States, 64 Fed. Reg. 55,115, 55,123 (1999).

183. Exec. Order No. 13,140, 64 Fed. Reg. 55,115, 55,119.

184. *Id.*

185. *Id.*

186. *See* MCM, *supra* note 7, pt. IV, ¶ 60c(5)(a) (explaining the preemption doctrine).

187. *See id.* pt. IV, ¶ 46e (providing a significantly greater maximum punishment if stolen property is of a value of more than $100).

A specification should allege only one offense.[190] If a specification alleges two or more offenses, it is duplicitous. The defense may object to a duplicitous specification; the remedy is severance into separate specifications.[191] Trial counsel commonly draft intentionally duplicitous specifications, and the defense often does not object. For example, if the accused allegedly wrote twenty-four bad checks over a two month period, the trial counsel may charge all twenty-four checks in one specification to make the case more manageable. This type of specification is commonly known as a "mega-spec." Typically, the defense counsel does not object because the remedy of severance only increases the number of possible convictions for the accused. If the defense does not object, what is the maximum punishment for a "mega-spec"? In *United States v. Mincey*,[192] the CAAF set forth the rule for bad-check "mega-specs."

Airman Mincey wrote, at different times and places, seventeen bad checks for $100 or less. Ten of the checks were charged in the first specification.[193] During the accused's guilty plea, the military judge calculated the maximum punishment for the first specification by aggregating the value of the checks. Because the aggregate value of the checks was over $100, he calculated its maximum punishment to include a dishonorable discharge and five years confinement.[194] On appeal, the defense argued that the maximum punishment for that specification should have included only a bad-conduct discharge (BCD) and six months confinement.[195] The CAAF reasoned that the *Manual* authorizes punishment "for each *offense*, not for each specification," and in reality the appellant was convicted of seventeen offenses.[196] The maximum punishment for each of the charged bad-check offenses included a BCD and six months confinement. Therefore, the maximum punishment for that specification was a BCD and five years (10 x 6 months) confinement.[197] At the end of its opinion, the CAAF emphasized that its holding was limited to bad-check offenses:

> We now only hold that in bad-check cases, the maximum punishment is calculated by the number and amount of the checks as if they had been charged separately, regardless whether the Government correctly pleads only one offense in each specification or whether the Government joins them in a single specification as they have here.[198]

In *United States v. Dawkins*,[199] the ACCA applied the *Mincey* rule to a forged-check case. Specialist Daryl J. Dawkins forged seven checks in a check-kiting scheme.[200] He pled guilty to forgery and other offenses. All seven forgeries were in one specification, a "mega-spec." During the providency inquiry, the military judge informed the accused that the maximum punishment included thirty-five years of confinement for the forgery specification. The military judge calculated the maximum punishment for the "mega-spec" by multiplying the maximum punishment for forgery (five years) by the number of forgeries in the "mega-spec."[201] On appeal, SPC Dawkins argued that his plea was improvident because the maximum punishment for the forgery specification included only five years.[202]

The ACCA followed the CAAF's "well-reasoned analysis in *Mincey.*"[203] The *MCM*'s maximum punishments are for each

188. *Id.* pt. IV, ¶ 46c(1)(h)(ii).

189. United States v. Rupert, 25 M.J. 531, 532 (A.C.M.R. 1987).

190. MCM, *supra* note 7, R.C.M. 307(c)(4).

191. *Id.* R.C.M. 906(b)(5).

192. 42 M.J. 376 (1995).

193. *Id.* at 377.

194. *Id.* The maximum punishment for a bad check for $100 or less, under Article 123a, includes a bad-conduct discharge and six months confinement. MCM, *supra* note 7, pt. IV, ¶ 49e(1)(a). If the face amount of the check is over $100, however, the maximum punishment includes a dishonorable discharge and five years confinement. *Id.* pt. IV, ¶ 49e(1)(b).

195. *Mincey*, 42 M.J. at 377.

196. *Id.* at 378 (quoting MCM, *supra* note 7, R.C.M. 1003(c)(1)(a)(i)) (emphasis in original).

197. *Id.*

198. *Id.*

199. 51 M.J. 601 (Army Ct. Crim. App. 1999).

200. Specialist Dawkins's friend, PFC Brittenum, had some stolen checks and devised the plan. Specialist Dawkins opened a savings account with $110, deposited two forged checks, cashed five forged checks for a total of $2750, and then withdrew $2400 of the $2410 left in the account. *Id.* at 602-03.

201. *Id.* at 603.

offense, not each specification. With respect to calculating maximum punishment for a "mega-spec," the court found no logical basis on which to distinguish multiple forgeries of checks from multiple bad checks. The ACCA held that the military judge properly applied the *Mincey* rule in calculating the maximum punishment of the forged-check specification.[204]

The trend is to extend the *Mincey* rule. By applying it to check forgery cases, the Army Court joined the Air Force Court, which made a similar extension two years prior.[205] Therefore, in the Air Force and the Army, practitioners should calculate the maximum punishment for a forged-check "mega-spec" as if each of the forged checks had been charged in a separate specification.

### ACCA: Conspiracy Requires Meeting of the *Criminal* Minds

Congress prohibited criminal conspiracy in Article 81.[206] There are two elements of conspiracy: (1) agreement with one or more person to commit an offense under the UCMJ, and (2) an overt act by any co-conspirator in furtherance of the conspiracy.[207] There are two recognized purposes for the crime of conspiracy. First, as an anticipatory offense, it punishes persons who have the evil intent to commit an offense and agree to its commission, even if they do not complete the offense nor take a substantial step toward its completion.[208] The other purpose is the inherent, increased danger to society of concerted criminal activity.[209]

Conspiracy provides prosecutors some powerful tools. Substantively, as an inchoate crime, the overt act required is much less than that required for the crime of attempt. Also, a court-martial may convict and punish an accused for both the conspiracy and the consummated offense.[210] Furthermore, co-conspirators are vicariously liable for the foreseeable crimes committed by their co-conspirators in furtherance of the conspiracy.[211] Conspiracy also puts several procedural arrows in the prosecutor's quiver. Statements in furtherance of a conspiracy to co-conspirators are exempted from the hearsay rule.[212] Therefore, the definition of conspiracy carries great significance in criminal law. In *United States v. Valigura*, the ACCA delineated the parameters of the crime of conspiracy. The Army Court overruled one of its prior decisions and held that an "agreement" with an undercover agent is not sufficient for conspiracy.

The agreement is the gravamen of the offense. The agreement is the actus reus. The mens rea, which is the intent to accomplish the substantive offense, is also part of the agreement. Traditionally, the co-conspirators must share in the criminal purpose of the conspiracy. At least one other person must have a culpable mind.[213] This is called the "bilateral" theory of conspiracy. A recent trend, seen in the Model Penal Code and a number of states, is toward a "unilateral" theory of conspiracy, in which the culpability of the other parties to the "agreement" is not relevant.[214] The issue in *Valigura* was whether the military followed the traditional "bilateral" theory or the modern "unilateral" theory.

To understand *Valigura*, a review of two CAAF opinions and one ACCA opinion is necessary. In 1983, the CAAF decided the case of *United States v. Garcia*.[215] A court-martial convicted Garcia of conspiracy to commit larceny and several other offenses. One month later, a different court-martial acquitted

202. *Id.* at 602.

203. *Id.* at 604.

204. *Id.*

205. United States v. Towery, 47 M.J. 515 (A.F. Ct. Crim. App. 1997).

206. "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct." UCMJ art. 81 (LEXIS 2000).

207. MCM, *supra* note 7, pt. IV, ¶ 5b.

208. 2 LaFave & Scott, *supra* note 6, § 6.4 at 60.

209. *Id.*

210. MCM, *supra* note 7, pt. IV, ¶ 5c(8).

211. *Id.* pt. IV, ¶ 5c(5).

212. *Id.* Mil. R. Evid. 801(d)(2)(E).

213. 2 LaFave & Scott, *supra* note 6, § 6.5 at 85; Rollin M. Perkins & Ronald N. Boyce, Criminal Law 693 (3d ed. 1982).

214. 2 LaFave & Scott, *supra* note 6, § 6.5 at 85; Perkins & Boyce, *supra* note 213, at 694.

215. 16 M.J. 52 (C.M.A. 1983).

his only co-conspirator of the same conspiracy charge. Under the common law doctrine of "consistency of verdicts," the acquittal of one of two co-conspirators required the acquittal of the other.[216] The CAAF discussed the doctrine's history and rationale, and found that the law does not require such "foolish consistency." The CAAF held that the military does not follow the "consistency of verdicts" doctrine.[217] In its opinion, the CAAF discussed the trend from the "bilateral" to the "unilateral" theory of conspiracy.[218]

In 1989, the ACCA relied on *Garcia* in *United States v. Tuck*.[219] Tuck argued that, because his co-conspirator was insane and incapable to enter into an agreement, his plea of guilty to conspiracy was improvident.[220] The court rejected the argument, because it interpreted *Garcia* as adopting the "unilateral theory" of conspiracy, in which the culpability of the other alleged conspirators is of no consequence.[221] In *Tuck*, the ACCA held that you need two persons, but not two criminals, to conspire.[222]

In 1995, in *United States v. Anzalone*,[223] the CAAF held that an agreement with an undercover agent to commit an offense could constitute the offense of attempted conspiracy.[224] In the opinion, Judge Crawford stated: "In *Garcia* we adopted the American Law Institute's Model Penal Code 'Unilateral Approach' to conspiracy."[225] That pronouncement was only dictum, and a majority of the judges took issue with it. Judge Wiss stated that it was wrong, because a meeting of the minds is required for conspiracy.[226] Judge Gierke, joined by Judge Cox, indicated that he would not invalidate the "bilateral theory" of conspiracy, especially when the issue had not yet been briefed and argued before the court.[227]

In *Valigura*, an undercover agent approached and arranged to purchase marijuana from Private (PV2) Valigura, and they exchanged money for drugs.[228] A court-martial convicted PV2 Valigura of, inter alia, conspiracy to distribute marijuana.[229] The ACCA, however, reversed the conspiracy conviction and affirmed the LIO of attempted conspiracy.[230]

The ACCA acknowledged that, in *Tuck*, it misinterpreted the CAAF opinion in *Garcia* as meaning more than it did.[231] In *Garcia*, the CMA rejected the "consistency of verdicts" doctrine, but it did not adopt the "unilateral theory" of conspiracy. Also, the concurring opinions in *Anzalone* demonstrate that the issue of whether the military still follows the "bilateral theory" of conspiracy is, at most, an open question.[232]

The ACCA explained why the *Tuck* decision was improper judicial activism. "The power to define criminal offenses is entirely legislative."[233] As mentioned above, the gravamen of conspiracy is the agreement. Congress based Article 81 on a federal statute[234] that was, and still is, based on the "bilateral theory" of conspiracy.[235] Also, at the time Congress drafted

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216. 2 LaFave & Scott, *supra* note 6, § 6.5(g)(1) at 112; Perkins & Boyce, *supra* note 213, at 693-94.

217. *Garcia*, 16 M.J. at 57.

218. *Id.* at 54-55.

219. 28 M.J. 520 (A.C.M.R. 1989).

220. *Id.* at 521.

221. *Id.*

222. *Id.*

223. 43 M.J. 322 (1995).

224. *Id.* at 323.

225. *Id.* at 325.

226. *Id.* at 328 (Wiss, J. concurring).

227. *Id.* at 326 (Gierke, J. concurring).

228. United States v. Valigura, 50 M.J. 844, 845 (Army Ct. Crim. App. 1999).

229. *Id.*

230. *Id.* at 849.

231. *Id.* at 848.

232. *Id.* at 847.

233. *Id.*

Article 81, the "unilateral theory" had not yet been formulated, so Congress must have intended that conspiracy was a crime only under the bilateral theory.[236]

The ACCA supported its decision by looking at the purposes of the crime of conspiracy. The anticipatory purpose is satisfied by other offenses, such as solicitation or attempted conspiracy.[237] Also, concerted criminal activity is not a concern in this situation, "because when there is only a solo conspirator, there is perforce no 'group' criminal activity."[238] In this type of scenario, instead of greater danger of success and difficulty of detection, the involvement of an undercover agent makes success unlikely and detection very easy.[239]

The ACCA closed its majority opinion with the now routine preaching against the proliferation of conspiracy charges. This "darling of prosecutors" poses a serious threat to the fairness of the military justice system. The court pointed out that a "unilateral theory" of conspiracy will only encourage overzealous prosecution, at the sacrifice of justice and proportionality.[240]

The lesson for military justice practitioners is clear. Conspiracy requires a "meeting of the criminal minds." Although *Valigura* is binding precedent only in the Army, its impact is wider. In *United States v. Jiles*,[241] the Navy court cited *Valigura* with approval. "We concur with our sister court's holding, adopt it as our own, and conclude that the evidence in this case was legally insufficient to find that the appellant entered into an agreement with another to commit an offense and thereby engaged in a conspiracy."[242] The CAAF heard oral arguments in the *Valigura* case on 16 December 1999, and the court should be issuing its decision this year. The ACCA opinion is well-written and logical. It is very likely that the CAAF will reach the same conclusion.

## Conclusion

Practitioners in the Army have the two new cases of *Dawkins* and *Valigura* to apply at courts-martial. All military justice practitioners have the new Article 134 offense of reckless endangerment. Also, military justice practitioners have the latest pronouncements from the oracle at CAAF to ponder. There is a watershed of guidance on manslaughter, both substantive definitions and procedural standards. Judge advocates are left pondering, however, whether the defense of necessity exists in the military and, if it does, to what extent.

234. 18 U.S.C. § 371 (1948).

235. *Valigura*, 50 M.J. at 847-48.

236. *Id.* at 848.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 848-49.

241. 51 M.J. 583 (N.M. Ct. Crim. App. 1999) (holding that accused could not be convicted of conspiracy to distribute marijuana when his sole co-conspirator was a government informant).

242. *Id.* at 586.