Recent Developments in Substantive Criminal Law: Broadening Crimes and Limiting Convictions

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Introduction

Lost is our old simplicity of times,
the world abounds with laws, and teems with crimes.[1]

The decisions of the Court of Appeals for the Armed Forces (CAAF) during the 2001 term[2] reflect two intriguing trends. First, the CAAF indicated a willingness to expand the government's ability to characterize conduct as criminal by broadening the reach of many offenses and by narrowing a number of defenses. In a competing trend, the CAAF signaled its growing dislike for overcharging. While supporting the use of the criminal justice system to proscribe misconduct, the court showed a distinct reluctance to allow the government to pile on convictions. The CAAF appears ready to combat criminality by expanding the reach of criminal statutes, while striving for simplicity and reasonableness by strictly limiting the government to one conviction for each act of misconduct.

This article analyzes both trends in detail. The analysis of the first trend starts with a discussion of two cases[3] involving the CAAF's interpretation of federal statutes regarding threats against the President[4] and child pornography.[5] In both cases the court affirmed convictions by interpreting the statutes in a manner broad enough to include the accused's misconduct. Then the article discusses three cases in which the CAAF affirmed convictions by narrowing or limiting the scope of possible defenses. In these cases, the court narrowed the scope of the parental discipline defense,[6] expanded limits on the defense of impossibility,[7] and narrowly defined what constitutes reasonable force when ejecting a trespasser.[8] The article completes the analysis of the first trend by examining how the CAAF solidified commanders' ability to maintain discipline by affirming a conviction against a soldier for disobeying an order to wear United Nations insignia on his uniform.[9] In the case, the court held that military judges should properly decide issues regarding the lawfulness of orders as interlocutory questions of law.[10] The majority then reaffirmed the principle that "an order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate."[11]

The analysis of the second trend, toward limiting the number of convictions the government may secure against an accused, begins with a case of first impression for the CAAF.[12] The court held that the robbery of property belonging to one entity from multiple persons constitutes only one offense chargeable under Article 122, Uniform Code of Military Justice (UCMJ).[13] In another case, the CAAF provided a clear message to the field

1. Anonymous, *On the Proceedings Against America*, The Pennsylvania Gazette, Feb. 8, 1775, *reprinted in* John Bartlett, Familiar Quotations 779:4 (1968).

2. The 2001 term began 1 October 2000 and ended 30 September 2001.

3. United States v. Ogren, 54 M.J. 481 (2001); United States v. James, 55 M.J. 297 (2001).

4. 18 U.S.C.A. § 871 (West 2002).

5. *Id.* § 2252A.

6. United States v. Rivera, 54 M.J. 489 (2001).

7. United States v. Roeseler, 55 M.J. 286 (2001).

8. United States v. Marbury, 56 M.J. 12 (2001).

9. United States v. New, 55 M.J. 95 (2001).

10. *Id*. at 100.

11. Manual for Courts-Martial, United States, pt. IV, ¶ 14c(2)(a)(i) (2000) [hereinafter MCM].

12. United States v. Szentmiklosi, 55 M.J. 487, 489 (2001).

13. UCMJ art. 122 (2000).

by restricting the government from obtaining multiplicious convictions under Article 133, UCMJ,[14] and another substantive offense for the same underlying misconduct.[15] Finally, the article discusses the CAAF's opinion that multiplicity and unreasonable multiplication of charges represent two separate and distinct legal concepts.[16] By affirming the distinction between legal theories, the court unmistakably signaled its preference for reasonableness and restraint in the charging process.

Broadening the Scope of Criminal Offenses: Crimes and Offenses Not Capital

United States v. Ogren: *The CAAF Adopts an Objective Test for Willfulness When Considering Threats Against the President Under 18 U.S.C. § 871(a)*

Seaman Recruit Ogren was in pretrial confinement when he made threats against the President of the United States on two separate occasions. On the first occasion, he told a guard, "Hell, **** the President too . . . . [As] a matter of fact, if I could get out of here right now, I would get a gun and kill that bastard."[17] Later in the day, Ogren told a second guard, "I can't wait to get out of here, Man . . . . Because I'm going to find the President, and I'm going to shove a gun up his ***, and I'm going to blow his ******* brains out . . . . Clinton, Man. I'm going to find Clinton and blow his ******* brains out."[18] The guards took the statements seriously and telephoned the Secret Service.[19]

The next day, Special Agent Cohen of the Secret Service interviewed Seaman Recruit Ogren. Ogren admitted to making the threats but did not reaffirm that he would carry them out. He responded to questioning about whether he owned guns with the statement, "No, but I can get them."[20] He also told Special Agent Cohen "that he was just blowing off steam and was expressing displeasure at his incarceration."[21] At the prompting of the Secret Service Agent, Seaman Recruit Ogren wrote a sworn apology to the President.[22] Among other findings at trial, a military judge sitting alone convicted the accused of two specifications of communicating a threat under Article 134, UCMJ. One specification involved a violation of 18 U.S.C. § 871, Threats Against the President.[23]

As interpreted by the Supreme Court and other federal courts, 18 U.S.C. § 871(a)[24] requires the government to prove two elements beyond a reasonable doubt. The threat must be: (1) "true" and (2) made knowingly and willfully.[25] In *United States v. Watts*,[26] the Supreme Court emphasized the importance of carefully interpreting § 871(a) consistent with the limitations of the First Amendment.[27] The Court expressed a three-part test

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14. *Id.* art. 133.

15. United States v. Frelix-Vann, 55 M.J. 329 (2001).

16. United States v. Quiroz, 55 M.J. 334 (2001).

17. United States v. Ogren, 54 M.J. 481, 482 (2001).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* Article 134, UCMJ, proscribes noncapital offenses that violate federal law, including law made applicable through the Federal Assimilative Crimes Act. MCM, *supra* note 11, pt. IV, ¶ 60c(1).

24. 18 U.S.C. § 871(a) provides:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of the President of the United States, or the Vice President-elect, or knowing and willfully otherwise makes any such threat against the President, President-elect, Vice President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

Id.

25. *Ogren*, 54 M.J. at 484.

26. United States v. Watts, 394 U.S. 705 (1969).

27. U.S. CONST. amend. I. The First Amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech." *Id.*

to distinguish "true threats" from protected speech. To determine whether a true threat exists, the court must examine: "(1) the 'context;' (2) 'the expressly conditional nature of the statement;' and (3) 'the reaction of the listeners.'"[28] In *Ogren*, the CAAF held that the statements were "true threats" because they were not conditioned on a future event. Also, in judging the context of the words and the reaction of listeners, the guards took the threats seriously enough to contact the Secret Service.[29]

The issue that required more in-depth analysis by the CAAF concerned the willfulness element. As discussed in the opinion, a majority of the federal circuits apply an objective test to measure the willfulness of threatening statements.[30]

> The objective test requires "only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President."[31]

A minority of federal circuits use a subjective test that requires an actual intention to do injury to the President.[32] Also, the Supreme Court in *Watts* "expressed 'grave doubts about' an objective test of willfulness based on 'an apparent determination to carry . . . [a threat] into execution.'"[33] The Court emphasized the importance of protecting "debate on public issues" that is "uninhibited, robust, and wide-open;"[34] however, the Supreme Court did not reach the second element of the offense in deciding the case and elected not to resolve the split between the circuits.[35]

In *Ogren*, the CAAF followed the majority view. By adopting the objective test, the court decided to follow a more expansive reading of § 871(a). The CAAF interpreted congressional intent "based on the plain language of the statute, its legislative history, and [a] review of federal case law."[36] The objective test proscribes a greater scope of conduct because it not only reaches statements reflecting an actual intent to threaten, but also statements reflecting an apparent intent to threaten. The court found that Congress intended the statute to protect against "harms associated with the threat itself," as well as the President's life.[37] The CAAF also supported its decision to adopt the objective test by stating that it is "consistent with the maintenance of good order and discipline in the armed forces and serves to promote the proper relationship between the military force and its commander in chief."[38]

In applying the objective test and affirming the legal and factual sufficiency of Ogren's conviction under § 871(a), the CAAF again focused on the reactions of the guards. The court also relied on the statements made to Special Agent Cohen after Ogren had the benefit of an evening to reflect on his threatening words.[39] The court held that although the statements may have resulted from frustration at being incarcerated, Ogren "should have reasonably foreseen that his threats would be understood to be more than a crude method of responding to confinement."[40]

In evaluating whether to charge threatening statements involving the President or Vice President of the United States, trial counsel should focus not only on the actual intent of the offender, but also on the foreseeable results. Both may form the

28. *Ogren*, 54 M.J. at 484 (quoting *Watts*, 394 U.S. at 707-08).

29. *Id*. at 487.

30. *Id*. at 485 (citing Rodgers v. United States, 422 U.S. 35, (1975); United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997); United States v. Johnson, 14 F.3d 766 (2d Cir. 1994); United States v. Miller, 115 F.3d 361 (6th Cir. 1997); Roy v. United States 416 F.2d 874 (9th Cir. 1969)).

31. *Id*. (quoting *Roy*, 416 F.2d at 877).

32. *Id*. at 486 (citing United States v. Frederickson, 601 F.2d 1358, 1363 (8th Cir. 1979); United States v. Patillo, 431 F.2d 293, 297-98 (4th Cir. 1970)).

33. *Id*. (quoting *Watts*, 394 U.S. at 707-08).

34. *Id*. at 487 (quoting *Watts*, 394 U.S. at 708).

35. *Id*. at 486.

36. *Ogren*, 54 M.J. at 486.

37. *Id*.

38. *Id*. at 487.

39. *Id*. at 487-88.

40. *Id*. at 487.

basis for a charge under § 871(a). Defense counsel should remain aware that the Supreme Court has expressed grave doubts about application of an objective standard under the statute. Although the Supreme Court denied *certiorari* in Seaman Recruit Ogren's case in December 2001,[41] the split in the circuits remains unresolved. Defense counsel should challenge any attempt to apply the objective standard on First Amendment grounds. Doing so will not only preserve the issue for appeal, but also focus the military judge's attention on the tests and limits to § 871(a) expressed by the Supreme Court. Forcing the military judge and trial counsel to distinguish between "true and willful" threats and protected speech at the trial level may pay dividends for clients even under the CAAF's broadly defined interpretation of the statute.

United States v. James: *Constitutionality of Child Pornography Statute*

From February 1998 through April 1998, Machinist's Mate First Class James used his roommate's computer to download, view, and save pornographic images of minors. Then in April 1998, he entered a chat room to discuss "Dad and daughter sex." While in the chat room, he engaged in a conversation with a U.S. Customs Service agent who was using the name "Fast Girl." James uploaded and sent pornographic images of minors to Fast Girl.[42]

At trial, James pled guilty to "one specification of possessing child pornography and two specifications of transporting child pornography in interstate commerce, in violation of 18 U.S.C. § 2252A as assimilated by Article 134, UCMJ."[43] On appeal, he asked the CAAF to set aside his convictions under 18 U.S.C. § 2252A because the Child Pornography Prevention Act of 1996 (CPPA) violated the First Amendment.[44] In particular, James argued that the statute was unconstitutionally overbroad because it proscribed both sexually explicit pictures of actual minors and similar depictions of virtual or apparent children.[45] The CAAF rejected the appellant's arguments in *James* and affirmed the convictions.[46]

The CAAF joined a majority of federal circuits in holding that the CPPA was constitutional.[47] The court showed its willingness to expand definitions of proscribed conduct when it specifically adopted the First Circuit's rationale in *United States v. Hilton*.[48] The First Circuit held that "suppressing the 'virtual' or apparent child-pornography trade constituted a compelling government interest that justified the expanded definition of 'child pornography' found in the federal statute."[49] The First Circuit also held that Congress narrowly tailored the CPPA in such a way that it was not unconstitutional.[50]

In justifying its opinion that the statute was animated by a compelling state interest and narrowly tailored to fulfill that concern, the circuit court looked primarily to the legislative history surrounding the adoption of the CPPA. In *Hilton*, the court recounted Congress's reasons for broadening the statute. First, child molesters use virtual child pornography to stimulate their sexual appetites.[51] Second, "Congress sought to ban computer-generated images that are 'virtually indistinguishable' from those of real children."[52] Thus, the narrowly tailored aim of the statute was computer-generated images. Third, Congress desired to protect the privacy of actual children whose images could be altered to create sexually explicit pictures.[53] Fourth, Congress wanted "to deprive child abusers of a 'criminal tool' frequently used to facilitate the sexual abuse of children."[54]

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41. United States v. Ogren, 122 S. Ct. 644 (2001).

42. United States v. James, 55 M.J. 297, 298 (2001).

43. *Id*. at 297.

44. *Id*.

45. *Id*. at 298. In 1996, Congress passed the Child Pornography Prevention Act, Pub. L. No. 104-208, div. A, tit. I, § 101(a), 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251-2252A, 2256 (2000)). The Act broadened existing federal legislation prohibiting the sexual exploitation of children by including the phrases "appears to be" and "conveys the impression" that the depiction portrays a minor. *Id*. (codified as amended at 18 U.S.C. 2256(8)(B), (D)).

46. *James*, 55 M.J. at 298.

47. *Id*. at 299-300 (citing United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999)).

48. *Id*. at 300.

49. *Id*. (quoting *Hilton*, 167 F.3d at 69).

50. *Hilton*, 167 F.3d at 66.

51. *Id*. (citing S. REP. 104-358, pt. IV(B) (1996)).

52. *Id*. (quoting S. REP. 104-358, pt. IV(B)).

53. *Id*. at 66-67 (citing S. REP. 104-358, § 2(7)).

In *Free Speech Coalition v. Reno*,[55] the Court of Appeals for the Ninth Circuit expressed a minority viewpoint that the CPPA constituted "censorship through the enactment of criminal laws intended to control an evil idea."[56] The Ninth Circuit found no compelling state interest in regulating virtual child pornography. The court struck the phrases "appears to be" and "conveys the impression" from the statute.[57] The circuit court focused its analysis around the theme that the original federal statutes prohibiting sexual exploitation of children "always acted to prevent harm to real children."[58] The court opined that by regulating virtual child pornography, the CPPA attempted "to criminalize disavowed impulses of the mind."[59]

Although the CAAF adopted the First Circuit's rationale when upholding the constitutionality of the CPPA's virtual image language, the court expressly found that James's convictions would stand even under the Ninth Circuit's narrow construction of the statute.[60] The CAAF pointed out that James admitted during his guilty plea inquiry that the pictures he possessed and transported were depictions of actual minors. Also, the pictures attached as exhibits to the record objectively supported the accused's admissions.[61]

On 16 April 2002, the Supreme Court affirmed the Ninth Circuit.[62] The Court specifically held that the virtual image prohibitions in §§ 2256(8)(B) and 2256(8)(D) of the CPPA were overbroad and unconstitutional.[63] Therefore, military practitioners should disregard the CAAF's pronouncements in *James* regarding the constitutionality of prohibiting virtual child pornography. Because Congress included a severability clause in the CPPA,[64] the Supreme Court's actions should not discourage trial counsel from continuing to use § 2252A to charge crimes involving depictions of *actual* children. Section 2256(8)(A) prohibits conduct involving pornographic images made using minors.[65] Additionally, Congress included in §§ 2256(8)(C) and 2256(9) of the CPPA a freestanding prohibition against use of "identifiable minors" in visual depictions of sexually explicit conduct.[66] Therefore, charging service members for crimes involving images of real children that are "morphed"

54. *Id*. at 67 (quoting S. REP. 104-358, § 2(3)).

55. 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom.*, Holder v. Free Speech Coalition, 531 U.S. 1124 (2001).

56. *Id*. at 1086

57. *Id*.

58. *Id*. at 1089.

59. *Id*. at 1094.

60. *James*, 55 M.J. at 300.

61. *Id*. at 301.

62. Ashcroft v. Free Speech Coalition, 2002 U.S. LEXIS 2789, at *45 (Apr. 16, 2002).

63. *Id.* 18 U.S.C. § 2256 states, in pertinent part:

> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct;
> (9) "identifiable minor"—
> (A) means a person—
> (i)
> (I) who was a minor at the time the visual depiction was created, adapted, or modified; or
> (II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
> (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature.

18 U.S.C. § 2256 (2000).

64. S. REP. 104-358, § 8 (1996).

65. 18 U.S.C. § 2256(8)(A).

66. *Id*. § 2256(8)(C).

or collaged to make them appear sexually explicit remains a viable alternative for trial counsel.

Narrowing the Scope of Defenses

United States v. Rivera:
One Closed-Fist Punch Sufficient to Overcome Parental Discipline Defense

Sergeant Rivera's thirteen-year-old stepson, Edward, brought home a report card with several Ds and Fs. Sergeant Rivera became angry, screamed at his son, and punched him once in the stomach. Edward fell down. He stayed on the ground until his stepfather stopped talking and left. At trial, Sergeant Rivera argued that he had a proper purpose and used reasonable force to discipline his stepson. As evidence, he pointed to the fact that his punch did not cause substantial risk of bodily injury.[67]

> Edward did not receive any welts, bruises, or other marks, and he did not go to a doctor or to the hospital. The record does not reflect any mental distress. Edward did not visit a mental health professional, advise his friends of mental trauma, or convey to the trier of fact mental distress at the time he testified that he was punched in the stomach and fell down.[68]

The military judge found Sergeant Rivera guilty of assault consummated by a battery in violation of Article 128, UCMJ.[69] On appeal, Sergeant Rivera argued "no reasonable factfinder could find beyond a reasonable doubt that the purpose and degree of force used . . . moved on a continuum from reasonable parental discipline to criminal conduct."[70] The CAAF held that even in the absence of actual physical harm, one closed-fist punch could overcome the parental discipline defense.[71]

The CAAF explicitly recognized that the case "tests anew the scope of the parental discipline defense."[72] Previous cases decided by the CAAF relied on evidence of numerous blows and physical harm to overcome the affirmative defense.[73] The court also referred to its consideration of the "inherent tension between the privacy and sanctity of the family, including freedom to raise children as parents see fit, and the interest of the state in the safety and well being of children."[74] Because of its recognition of the inherent tension, the court elected to reject a per se rule regarding closed fists as followed by some states.[75] However, the court discussed the fact that using a closed fist bears certain burdens. Using a closed fist allows the factfinder to more readily infer ill motive, and it undermines an accused's claim of proper intent. Also, "a fist amplifies force magnifying the likelihood that a punch will be found to create a substantial risk of serious bodily injury."[76]

While the CAAF's ruling in *Rivera* clearly narrowed the scope of the parental discipline defense, it also reaffirmed the court's reliance upon the standards expressed in the Model Penal Code.[77] The court used the two-pronged test expressed in the code to conduct its analysis. First, the court evaluated whether or not Sergeant Rivera possessed a proper parental purpose. Using this subjective test, the CAAF found that a bad report card was an appropriate reason for parental intervention. Second, the court examined whether Sergeant Rivera acted with reasonable force—not intended to cause or known to cause serious bodily injury. Under this objective test, the court determined that the force he used was unreasonable. Judge Baker listed three critical facts that led to the court's determination that a reasonable factfinder could conclude beyond a reasonable doubt that Sergeant Rivera was guilty of assault consummated by battery. First, Sergeant Rivera punched his son with

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67. United States v. Rivera, 54 M.J. 489, 490 (2001).

68. *Id*. at 491.

69. *Id*. at 489. The elements for assault consummated by battery under Article 128, UCMJ, are

> [1] That the accused did bodily harm to a certain person; and
> [2] That the bodily harm was done with unlawful force or violence.

MCM, *supra* note 11, pt. IV, ¶ 54b(2).

70. *Rivera*, 54 M.J. at 490.

71. *Id*.

72. *Id*. at 491.

73. *Id*; *see* United States v. Robertson, 36 M.J. 190 (1992); United States v. Brown, 26 M.J. 148 (1988).

74. *Rivera*, 54 M.J. at 491.

75. *Id*.

76. *Id*. at 492.

a closed fist. Second, he hit him in the stomach. Third, the blow was hard enough that Edward fell down, indicating that the punch possessed sufficient force to cause a substantial risk of serious bodily injury.[78]

The *Rivera* opinion provides a good review of the standards applied in military practice when the affirmative defense of parental discipline arises in a case. Both trial and defense counsel must be familiar with the scope of the defense. Although the closed fist in *Rivera* makes the case a little easier, the tension described by the CAAF between protecting the safety of children and respecting family privacy can be troublesome. Although trial counsel should not read *Rivera* as providing a license to prosecute questionable child abuse cases, the court's opinion shows a willingness to proscribe a wider range of misconduct than in previous cases.[79]

United States v. Roeseler:
Impossibility Not a Defense to Attempted Conspiracy

Specialist (SPC) David Roeseler and Private First Class (PFC) Toni Bell were members of the same platoon in Germany. Private First Class Bell had two children by different fathers. The children lived with PFC Bell's parents in Iowa. Private First Class Bell was never married; however, she told SPC Roeseler that one of the fathers was her deceased husband. Then she lied again to SPC Roeseler, telling him that her in-laws (Joyce and Jerry Bell) were attempting to take custody of her children. Joyce and Jerry Bell did not actually exist.[80] Private First Class Bell also told SPC Roeseler that "she 'wished [the Bells] were dead' and would pay somebody to 'take care of them.'"[81]

Specialist Roeseler introduced PFC Bell to Private (PVT) Armann, also a member of their platoon. Private Armann bragged on numerous occasions that he was an assassin. Specialist Roeseler, PVT Armann, and PFC Bell discussed how they could kill the fictitious Bells. Eventually, SPC Roeseler and PVT Armann agreed to kill the Bells in exchange for $55,000 ($5000 of which was a deposit). The "would-be-assassins" drew up a contract containing a "reversion clause." If PFC Bell refused to comply with the contract, the assassins would kill her. Private First Class Bell signed the contract.[82] Specialist Roeseler and PVT Armann began making preparations to carry out the killing, including submitting leave papers to travel from Germany to Iowa. As the two assassins began making preparations, they demanded the $5000 deposit from PFC Bell. She made excuses for not providing the money, and when she realized that her lie had gone far enough, she told PVT Armann that she no longer needed the Bells killed.[83]

Because they were frustrated with PFC Bell for backing out of the contract, SPC Roeseler and PVT Armann elected to make good on the reversion clause. Specialist Roeseler persuaded PFC Bell to name him as guardian for her children and beneficiary of $200,000 under her Servicemembers' Group Life Insurance (SGLI) plan. The assassins then attempted numerous methods of killing her. Their last attempt involved enlisting an accomplice who designed and built a sniper rifle for PVT Armann to use. While PFC Bell was standing guard duty, PVT Armann shot her. The shot pierced her neck, 0.5 cm from her spine. She recovered after surgery.[84]

Among many other offenses, the government charged SPC Roeseler with attempting to conspire with PFC Bell and PVT Armann to commit murder.[85] Specialist Roeseler pled guilty to the charged offense under Article 80, UCMJ.[86] On appeal, he argued that his plea was not provident because the military

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77. *Id.* at 491 (citing MODEL PENAL CODE § 3.08(1) (ALI 1985), *reprinted in* ALI MODEL PENAL CODE AND COMMENTARIES 136 (1985)). The Model Penal Code states, in pertinent part:

> (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
> (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation . . . .

MODEL PENAL CODE § 3.08(1)(a)-(b).

78. *Rivera*, 54 M.J. at 492.

79. *See, e.g.*, United States v. Robertson, 36 M.J. 190 (1992); United States v. Brown, 26 M.J. 148 (1988).

80. United States v. Roeseler, 55 M.J. 286, 287 (2001).

81. *Id.* (quoting Respondent's Brief at 36, 39).

82. *Id.*

83. *Id.* at 288.

84. *Id*.

85. *Id.* at 286.

judge did not explain to him the difference between conspiracy and attempted conspiracy. Specifically, he alleged that the judge should have informed him that "because PFC Bell knew Joyce and Jerry Bell were fictitious persons, she did not legally share his intent to kill them as required for a conspiracy conviction."[87] Specialist Roeseler also challenged the providency of his plea based on the military judge's failure to explain the defense of impossibility to him.[88]

The CAAF dismissed the first issue in fairly short order by showing that the military judge properly explained the offense of attempted conspiracy to SPC Roeseler. The judge correctly explained that it was SPC Roeseler's state of mind, not a co-conspirator's belief, that was critical to establish guilt for an attempt offense.[89] The court also pointed out that the judge did explain the difference between conspiracy and attempted conspiracy at an earlier stage of the inquiry.[90]

The CAAF then made equally short work of SPC Roeseler's second issue regarding the impossibility defense. The court looked to its decision in *United States v. Riddle*[91] to conclude that Article 80 "provides for no defense that the crime attempted could not factually or legally be committed . . . . [The] general rule is that an accused should be treated in accordance with the facts as he or she supposed them to be."[92] Additionally, the CAAF cited a case from last year, *United States v. Valigura*,[93] in which the court reiterated its view that "impossibility—whether in law or fact—is no defense in a prosecution for conspiracy or attempt."[94] Because impossibility was not a cognizable defense to either an attempt or conspiracy charge, the CAAF simply extended the limitation to the double-inchoate offense of attempted conspiracy.[95] Again, the court continued this year's trend of broadening the scope of proscribed conduct. Here, as in *Rivera*, the vehicle for expansion was the limiting or narrowing of a possible defense.

Perhaps the most valuable trend for practitioners to note in *Roeseler* is the court's affirmation of the crime of attempted conspiracy. In *Valigura*, the CAAF specifically rejected the "unilateral theory" of conspiracy in favor of the traditional "bilateral theory" of conspiracy.[96] The bilateral theory requires an agreement between at least two criminally culpable minds.[97]

The unilateral theory, adopted by the Model Penal Code and a number of states, requires only one culpable mind. The culpability of other parties to the agreement is immaterial.[98] Although the CAAF did not discuss which theory it preferred from a policy perspective, the Army Court of Criminal Appeals did express its policy-based opinion that it was unnecessary to adopt a unilateral theory of conspiracy.[99] The lower court reasoned that "[w]ith a 'solo conspirator' there is no 'group' criminal activity, so there is no increased danger in a feigned conspiracy. Also, other inchoate offenses, such as attempted conspiracy and solicitation, will usually cover such misconduct."[100] Although unnecessary to reach its holding in *Roeseler*, the CAAF explicitly defended its decision in *Riddle*, finding that attempted conspiracy could constitute a crime under the UCMJ.[101] Before *Riddle*, in *United States v. Anzalone*,[102] the

86. *Id.* Article 80, UCMJ, states, in pertinent part: "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 its commission, is an attempt to commit that offense." UCMJ art. 80 (2000).

87. *Roeseler*, 55 M.J. at 289.

88. *Id*. at 288.

89. *Id.* at 289.

90. *Id*. at 290.

91. 44 M.J. 282 (1996).

92. *Roeseler*, 55 M.J. at 291 (quoting *Riddle*, 44 M.J. at 286).

93. 54 M.J. 187 (2000).

94. *Roeseler*, 55 M.J. at 291 (quoting *Valigura*, 54 M.J. at 189).

95. *Id.*

96. *Valigura*, 54 M.J. at 188. *See generally* Major Timothy Grammel, *Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW., Apr. 2001, at 79-84, (discussing the bilateral theory of conspiracy).

97. 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 6.5 (1986); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 694 (3d ed. 1982).

98. LAFAVE & SCOTT, *supra* note 97, § 6.5 (1986); PERKINS & BOYCE, *supra* note 97, 694.

99. United States v. Valigura, 50 M.J. 844, 848 (Army Ct. Crim. App. 1999); *see also* Grammel, *supra* note 96, at 81.

100. Grammel, *supra* note 96, at 81 (citing *Valigura*, 50 M.J. at 847).

101. United States v. Roeseler, 55 M.J. 286, 291 (2001).

CAAF found that an agreement with an undercover agent to commit espionage also constituted attempted conspiracy.[103]

In citing to *Riddle*, the CAAF applied traditional tools of statutory interpretation.[104] However, the court also expressed the policy-based argument that "conviction of an attempt under Article 80 is particularly appropriate where there is no general solicitation statute in the jurisdiction or a conspiracy statute embodying the unilateral theory of conspiracy."[105] The CAAF restrained itself last year from entering the "the policy-making prerogative that belongs to Congress"[106] with regard to adopting the bilateral theory of conspiracy. Then in *Roeseler*, the court entered the arena of policy-based reasoning by using that very theory of conspiracy to reaffirm its commitment to the double-inchoate offense of attempted conspiracy.

Perhaps Judge Gierke's concurring opinion in *Roeseler* provided the impetus for the majority's "dicta-defense" of attempted conspiracy. As in *Anzalone*, Judge Gierke expressed his opinion that there is no crime of attempted conspiracy.[107] He would affirm the attempted conspiracy conviction in *Roeseler* "as a mislabeled solicitation to commit premeditated murder."[108] He points to the fact that SPC Roeseler clearly solicited PVT Armann to murder the fictitious in-laws. His argument points out a minor fallacy in the majority's policy-based defense of attempted conspiracy. Although the UCMJ does not statutorily proscribe solicitation except in limited circumstances under Article 82, UCMJ,[109] the President has in fact enumerated an offense under Article 134 to address solicitation.[110] However, Judge Gierke's reliance on solicitation will not fill all possible gaps left in a system adopting the bilateral theory of conspiracy. For instance, any time a person with a "non-culpable" state of mind approaches a service member and an agreement is struck to commit a crime, the government is left without a charging option in the absence of attempted conspiracy. Solicitation is only sufficient when the service member approaches the non-culpable individual.

Given the court's commitment to the double-inchoate offense of attempted conspiracy, practitioners should remain aware of its existence. Although trial counsel should certainly never overuse offenses that are difficult to explain to panel members, attempted conspiracy may often be the only way to adequately address particular acts of misconduct. Defense counsel need to familiarize themselves with Judge Gierke's well-reasoned arguments to continue the battle over the controversial double-inchoate offense.

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102. 43 M.J. 322 (1995).

103. *Id.* at 323.

104. *Roeseler*, 55 M.J. at 288-89 (citing *Riddle*, 44 M.J. at 285). The CAAF relied specifically on the text of Article 80, UCMJ, and the fact that no other statute or case law precludes application of Article 80 to a conspiracy offense under Article 81, UCMJ. *See id.*

105. *Id.* (citing *Riddle*, 44 M.J. at 285 (citing Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 91 (1989))).

106. Grammel, *supra* note 96, at 81.

107. *Anzalone*, 43 M.J. at 326 (Gierke, J., concurring).

108. *Roeseler*, 55 M.J. at 292 (Gierke, J., concurring in the result).

109. UCMJ art. 82 (2000). Article 82 states:

> (a) Any person subject to this chapter who solicits or advises another or other to desert in violation of section 885 of this title (Article 85) or mutiny in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.
> (b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (Article 99) or sedition in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

Id.

110. *Id.* art. 134. The elements of "[s]oliciting another to commit an offense" under Article 134 are as follows:

> [a] That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than the four offenses named in Article 82;
> [b] That the accused did so with the intent that the offense actually be committed; and
> [c] That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

United States v. Marbury:
Brandishing a Knife Not Reasonably Necessary to Eject a Trespasser

Staff Sergeant (SSG) Marbury lived in a "hooch" on Camp Kyle, Korea. Her hooch contained four private rooms and a common area. One evening, a group of about twelve senior noncommissioned officers gathered at the hooch for a farewell party. During the party, SSG Marbury left the common area and entered her own room to get ready to go to a club for the rest of the evening. Sergeant First Class (SFC) Pitts followed her into the room and attempted to persuade her that she should remain at the party because she was too drunk to leave the barracks. An argument ensued, and eventually SFC Pitts, a martial arts expert, hit SSG Marbury in the mouth. Staff Sergeant Marbury left the room and asked one of the guests, SFC Beanum, to help her remove SFC Pitts. Sergeant First Class Beanum laughed at her. [111]

Staff Sergeant Marbury then retrieved a steak knife from the kitchen and went back into her room. She "walked past SFC Pitts to the back corner of the room, stood 'four or five feet away,' held the knife 'nonchalantly' in front of her, and told SFC Pitts to 'get out of my room now.'"[112] Instead of leaving the room, SFC Pitts attacked SSG Marbury in order to take the knife away from her. They struggled and fell backward onto the bed. Sergeant First Class Pitts pinned SSG Marbury on her back and held her hands over her head. During the altercation, SFC Pitts suffered a "glancing, relatively superficial" two-centimeter wound over the rib.[113] Some other NCOs then separated the two soldiers, and SFC Pitts kicked SSG Marbury in the chest, "lifting her off the ground and sending her flying across the room."[114] At trial, "SFC Pitts testified that he was drinking on the night in question and did not know how he was cut but believed it was an accident, stating, 'I didn't see her come at me with no knife.'"[115]

An officer and enlisted panel convicted SSG Marbury of intentional infliction of grievous bodily harm under Article 128, UCMJ.[116] The court sentenced SSG Marbury to a bad-conduct discharge and reduction to the lowest enlisted grade. The Army Court of Criminal Appeals rejected SSG Marbury's accident and self-defense claims, but made a factual finding that she did not possess the requisite specific intent to inflict grievous bodily harm. The court affirmed the lesser-included offense of aggravated assault with a dangerous weapon and authorized a sentence rehearing. The convening authority determined that a sentence rehearing was impracticable, and after approving the finding of guilty to the assault with a dangerous weapon, approved a sentence of no punishment.[117] The Army court characterized SSG Marbury's offense as an offer-type assault with a dangerous weapon based on a culpably negligent act. The court found negligence in her "brandishing a large knife in front of an intoxicated martial arts expert in close quarters."[118]

Staff Sergeant Marbury argued to the CAAF that the Army court erred by finding that her threatening conduct was unlawful. She contended that she could lawfully use reasonable force to eject a trespasser and protect her property.[119] While the CAAF specifically acknowledged that service members possess the right to eject trespassers from their military bedrooms and protect their personal property, the court emphasized that the individuals must act reasonably.[120] The majority found SSG Marbury's actions unreasonable.[121]

The CAAF's decision focused on SSG Marbury's failure to call the military police to have SFC Pitts removed from her room. The court characterized SSG Marbury's return to her

111. United States v. Marbury, 56 M.J. 12, 13 (2001) (citing United States v. Marbury, 50 M.J. 526, 527-28 (Army Ct. Crim. App. 1999)).

112. *Id.* at 18 (Gierke, J., dissenting).

113. *Id.* at 14 (citing *Marbury*, 50 M.J. at 527-28).

114. *Id.* at 18 (Gierke, J., dissenting).

115. *Id.*

116. *Id*. Article 128, UCMJ, states:

> (a) Any person subject to this chapter *who attempts or offers with unlawful force or violence to do bodily harm to another person*, whether or not the attempt or offer is consummated, *is guilty of assault* and shall be punished as a court-martial may direct.
> (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.

UCMJ art. 128 (2000) (emphasis added).

117. *Marbury*, 56 M.J. at 13.

118. *Id*. at 15.

119. *Id.*

room with a knife as unreasonable and excessive.[122] The CAAF's ruling seemingly establishes a clear limit in military jurisprudence on one's ability to act with reasonable force to defend personal property or to eject a trespasser. No actions apparently constitute reasonable force if contacting law enforcement personnel for help is also available to the service member. The court cited to Lafave and Scott's *Substantive Criminal Law*[123] as support for its contention that the unreasonable force ruling is in "general accord with civilian law."[124] By expressing the limitation, the CAAF essentially broadens the scope of proscribed conduct chargeable under Article 128, UCMJ. Although the expanded reach will arguably only apply in a limited number of circumstances, the court remained consistent with its tendency this year to extend the scope of criminal statutes.

Judge Gierke took particular exception with the majority opinion in *Marbury*, characterizing SSG Marbury's conviction as a "gross injustice."[125] First, his dissent focused on the reasonableness of SSG Marbury's conduct given the circumstances. Judge Gierke argued that "[w]hile summoning the military police might have been a 'reasonable' course of action, it was not the only reasonable course of action."[126] He specifically contended that SSG Marbury "was entitled to display a knife in an effort to persuade SFC Pitts to leave."[127] He pointed to the reasonableness of taking the precautionary step of protecting herself before approaching SFC Pitts a second time. He also emphasized that SSG Marbury did not endanger SFC Pitts upon reentry, and she gave him a clear path to leave.[128] Judge Gierke's dissent offers some well-reasoned arguments against establishing a bright-line rule requiring a first resort to law enforcement assistance as the only reasonable way to eject trespassers or protect property.

After dealing with the lawfulness of the force used by SSG Marbury, Judge Gierke focused on the most basic element necessary in an offer-type assault—reasonable apprehension of harm. An assault by offer requires "an act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm."[129] The focus in an assault by offer is on the alleged victim's state of mind. Judge Gierke critiqued the majority opinion by showing how SFC Pitts's actions were completely inconsistent with someone possessing a reasonable apprehension of receiving immediate bodily harm. Sergeant First Class Pitts responded to SSG Marbury's request to vacate the room by attacking her instead of leaving. He testified that he did not know exactly how the injury happened. He also testified that he "didn't see Sergeant Marbury come at me with no knife."[130] Additionally, Judge Gierke pointed to "SFC Pitts' confidence that his physical strength and martial arts prowess would protect him from bodily harm."[131] Other witnesses who observed SSG Marbury also testified that they did not take her actions seriously because she was not carrying the knife in an aggressive manner.[132] Not only does Judge Gierke attack the majority for its limitation on reasonable force, but he also presented a good case that affirming the offer-type offense itself was faulty.

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120. *Id; see* United States v. Richey, 20 M.J. 251 (C.M.A. 1985); United States v. Regalado, 33 C.M.R. 12 (C.M.A. 1963). The current instruction provided in the *Military Judges' Benchbook* regarding the right to eject trespassers states, in pertinent part:

> Note 3: "*Ejecting someone from the premises.*" A person, who is lawfully in possession or in charge of premises, and who requests another to leave whom he or she has a right to request to leave, may lawfully use as much force as is reasonably necessary to remove the person, after allowing a reasonable time for the person to leave. The person who refuses to leave after being asked to do so, becomes a trespasser and the trespasser may not resist if only reasonable force is employed in ejecting him or her. *United States v. Regalado*, 33 C.M.R. 12 (C.M.A. 1963).

U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, ¶ 5-7 n.3 (1 Apr. 2001) [hereinafter BENCHBOOK].

121. *Marbury*, 56 M.J. at 16.

122. *Id.*

123. *Id. See generally* 1 WAYNE R. LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.9(a) (1986).

124. *Marbury*, 56 M.J. at 16.

125. *Id.* at 19 (Gierke, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.*

129. MCM, *supra* note 11, pt. IV, ¶ 54c(1)(b)(ii).

130. *Marbury*, 56 M.J. at 18 (Gierke, J., dissenting).

131. *Id.* at 19.

132. *Id.*

The value for practitioners in examining *Marbury* lies in understanding the CAAF's apparent standard for evaluating when reasonable force may be used to defend property or eject a trespasser. Although the court reemphasized the right of service members to use force in both scenarios, the majority indicated that it will require them to resort to law enforcement personnel first or risk running afoul of the UCMJ. The CAAF may not have intended to draw such a bright line. The court's only objective may have been to find a way to affirm SSG Marbury's conviction because the particular fact pattern indicated that she should have called the military police. If the court intended the latter, then the opinion fell short of making that intention clear. The majority's message to the field is that whenever possible, service members must first resort to law enforcement when attempting to eject a trespasser from their barracks room or protecting their personal property.

Failure to Obey Lawful Orders

United States v. New:
Order to Wear United Nations Accouterments Lawful

Specialist Michael New's commander ordered him to wear United Nations (UN) accouterments (including a blue beret) as part of his uniform in preparation for and while on deployment to the Former Yugoslavian Republic of Macedonia. During August 1995, SPC New's battalion received orders to deploy as part of the United Nations Preventive Deployment Force in Macedonia. Specialist New expressed concerns about the legality of the UN mission and wearing UN insignia to his chain of command. His father spread these concerns worldwide via the Internet and enlisted support from members of Congress. Before deploying to Macedonia, the unit granted leave to each of the soldiers. Specialist New spent his leave in Washington, D.C. meeting with his father, lawyer, and members of Congress.[133]

On 2 October SPC New's battalion received a briefing by the brigade trial counsel laying out the legal basis for the mission. After the briefing, his battalion commander issued an order to everyone in the battalion to attend a formation at 0900 on 10 October wearing a modified uniform with UN insignia. Specialist New's company commander then issued an order that all soldiers in the company attend a formation at 0845 on 10 October wearing the modified uniform. Specialist New showed up on 10 October in his standard Army Battle Dress Uniform without the proper UN accouterments. His battalion commander called him to his office and offered him a second chance to comply with the order to wear the insignia. Specialist New refused.[134]

At trial, a special court-martial consisting of officer and enlisted members convicted SPC New of failure to obey an order in violation of Article 92(2), UCMJ.[135] The court-martial sentenced him to a bad-conduct discharge.[136] During the trial, SPC New challenged the legality of his commander's order.[137] He first argued that the order violated the Army uniform regulation[138] by transferring his allegiance to the UN.[139] He then challenged the legality of the deployment itself. Specialist New claimed that "President Clinton misrepresented the nature of the deployment to Congress and failed to comply with the United Nations Participation Act."[140] Over SPC New's objection, the military judge elected to rule on the issue of lawfulness himself. The judge decided that the question of the deployment's legality was a nonjusticiable political question. The judge further held that the order to wear the modified uniform with UN insignia was lawful. He later instructed the panel that the order was lawful.[141]

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133. United States v. New, 55 M.J. 95, 98 (2001).

134. *Id.*

135. *Id*. at 97. The elements of UCMJ Article 92(2) are

> [1] That a member of the armed forces issued a certain lawful order;
> [2] That the accused had knowledge of the order;
> [3] That the accused had a duty to obey the order; and
> [4] That the accused failed to obey the order.

UCMJ art. 92(2) (2000).

136. *New*, 55 M.J. at 97.

137. *Id.* at 100.

138. U.S. Dep't of Army, Reg. 670-1, Wear and Appearance of Army Uniforms and Insignia (1 Sept. 1992).

139. *New*, 55 M.J. at 107.

140. *Id.* (citing United States v. New, 50 M.J. 729, 736 (Army Ct. Crim. App. 1999)).

141. *Id*. at 97.

On appeal, SPC New questioned the military judge's authority to rule on the lawfulness of the order. He claimed that the judge denied him the right to have the members determine whether the government proved every element of the crime beyond a reasonable doubt. Specialist New further argued that the military judge erred when he decided that he could not rule on the legality of the deployment itself because it was a nonjusticiable political question. Finally, SPC New challenged the actual ruling that the order was lawful.[142]

The CAAF held that "lawfulness of an order, although an important issue, is not a discrete element of an offense under Article 92."[143] Therefore, the military judge properly considered the issue as a question of law.[144] The CAAF further held that the military judge properly refrained from ruling on the nonjusticiable political question regarding the deployment's legality. Additionally, the court affirmed the decision that the order itself was lawful. The CAAF reviewed the standard for a commander to make uniform modifications under the Army's uniform regulation and ruled that the changes complied with the regulation.[145] The order did not overcome the presumption of lawfulness given to orders that relate to military duty. "If uniform requirements relate to military duty, then an order to comply with a uniform requirement meets the 'military duty' test."[146]

All five CAAF judges either concurred or concurred in the result in *New*; however, Judge Sullivan and Senior Judge Everett's opinions read far more like dissents than concurrences. In fact, both judges rely on the harmless-error doctrine to affirm the case. Judge Effron joins Chief Judge Crawford and Judge Gierke in declining to recognize lawfulness as a distinct element of an offense under Article 92(2), but his concurring opinion indicates some discomfort with the current status of how orders cases are handled in military practice. Sifting through the fairly lengthy and complicated opinions for definitive signals to the field may prove difficult for practitioners. Yet, one new development appears unmistakable. The CAAF has set a bright-line standard for who determines lawfulness in obedience cases.

As discussed by Judge Sullivan[147] and Judge Effron,[148] guidance was not completely clear on whether factual issues regarding the legality of orders belonged to the military judge or to the panel. In fact, the *Military Judge's Benchbook* stood (and stands) in direct contrast to the discussion in Rule for Courts-Martial (RCM) 801(e).[149] The *Manual for Courts-Martial*, in the discussion to RCM 801(e), states that "the legality of an act is normally a question of law."[150] In contrast, the *Benchbook* model instruction specifically contemplates a role for panel members by stating, "If there is a factual dispute as to whether or not the order was lawful, that dispute must be resolved by the members in connection with their determination of guilt or innocence . . . ."[151] Under *New*, lawfulness is not a discrete element and military judges should rule on all questions regarding the legality of orders.[152]

142. *Id.*

143. *Id.* at 100.

144. *Id.*

145. *Id.* at 107.

146. *Id.* The "military duty" test as found in the *MCM* states, in pertinent part:

> (iii) *Relationship to military duty.* The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order.

MCM, *supra* note 11, pt. IV, ¶ 14c(2)(a)(iii).

147. *New*, 55 M.J. at 115 (Sullivan, J., dissenting).

148. *Id.* at 111-14 (Effron, J., concurring).

149. MCM, *supra* note 11, R.C.M. 801(e).

150. *Id.* The conflicting guidance can be seen in the discussion to RCM 801(e) itself. The discussion states, in pertinent part:

> Questions of the applicability of a rule of law to an undisputed set of facts are normally question of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. For example, the question of what warnings, if any were given by an interrogator to a suspect would be a factual question.

Id. discussion.

Judge Sullivan and Senior Judge Everett concurred in the result because they opined that lawfulness was indeed an element of the offense under Article 92. Thus, the military judge should have allowed the panel to decide the issue of lawfulness. They agreed with the majority, however, that the legality of the deployment issue was a political question.[153] Therefore, the only real factual issue for the panel was whether the commander was in compliance with *Army Regulation 670-1* when ordering the uniform modifications. Judge Sullivan wrote that "[t]here was overwhelming evidence presented in this case, uncontroverted by the defense, that the order to wear the UN patches and cap was lawful, that is, it was properly authorized, related to a military duty, and violated no applicable service uniform regulations."[154] Senior Judge Everett claimed that any question regarding whether the uniform regulation promoted safety was "insubstantial."[155] Therefore, both judges found any error by the military judge to be harmless in not submitting the factual issue regarding compliance with *Army Regulation 670-1* to the panel.[156]

Specialist New based his challenge that the panel should have decided lawfulness on the reasoning provided by the Supreme Court in *United States v. Gaudin*.[157] *Gaudin* involves the question of whether a federal district court judge properly ruled on an issue of materiality himself instead of submitting it to the jurors for a decision. Specialist New equated lawfulness to materiality. In *Gaudin*, the charge concerned making material false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001. The defendant allegedly made a number of false statements on loan documents submitted to an agency within the Department of Housing and Urban Development.[158] The Supreme Court noted that materiality was an element of the offense and required findings involving mixed questions of law and fact. The Court held that jurors should decide such mixed questions.[159] Further, "[t]he Constitution gives a criminal defendant a right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right."[160]

The majority in *New* referred to the *Gaudin* principles as not applying to all statutes.[161] Judge Sullivan and Judge Everett relied heavily on the reasoning in *Gaudin* to opine that lawfulness *is* an element of an offense under Article 92(2).[162] Yet, despite their differences on the applicability of *Gaudin* to issues of lawfulness, both camps appear to have drawn from a concurring opinion in the case to help *New* pass muster if reviewed by the high court. In the opinion, Chief Justice Rehnquist, joined by Justices O'Connor and Breyer, pointed out that *Gaudin* became an "easy" case because the government conceded that materiality was an element of the offense.[163] Of course, much of the argument in *New* centered on the element issue, with the majority concluding that lawfulness was not an element. Thus, *New* was not going to present an "easy" case for the Supreme Court. Chief Justice Rehnquist also suggested that had the government argued "harmless error," the Court might have decided differently in *Gaudin*.[164] Interestingly, while Judges Sullivan

151. BENCHBOOK, *supra* note 115, ¶ 3-16-3 n.3. According to note 3, the military judge should give the following instruction if the lawfulness of the order presents an issue of fact for the members:

> An order, to be lawful, must relate to specific military duty and be one that the member of the armed forces is authorized to give. An order is lawful if it is reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and is directly connected with the maintenance of good order in the services . . . . You may find the accused guilty of failing to obey a lawful order only if you are satisfied beyond a reasonable doubt that the order was lawful.

Id.

152. *New*, 55 M.J. at 100.

153. *Id.* at 116 (Sullivan, J., concurring in the result).

154. *Id.* at 128.

155. *Id.* at 130 (Everett, J., concurring in part and in the result).

156. *Id.* at 128, 130.

157. 515 U.S. 506 (1995).

158. *Id.* at 507.

159. *Id.* at 512.

160. *Id.* at 522-23.

161. *New*, 55 M.J. at 104.

162. *Id.* at 115 (Sullivan, J., concurring in the result), 129 (Everett, J., concurring in part and in the result).

163. *Gaudin*, 515 U.S. at 524.

and Everett relied on *Gaudin* to conclude that lawfulness was an element that should have gone to the panel, they held that the error was harmless.[165] Thus, even the opinions that concurred in the result contributed to protecting *New* from review by the Supreme Court by using Chief Justice Rehnquist's reasoning. The Supreme Court denied *certiorari* on 9 October 2001.[166]

An important reason cited by Judge Effron for allowing judges to rule on lawfulness is a concern for consistency and reviewability. "Rather than producing the unity and cohesion that is critical to military operations, appellant's approach could produce a patchwork quilt of decisions, with some courts-martial determining that orders were legal and others determining that the same orders were illegal, without the opportunity for centralized legal review that is available for all other issues of law."[167] The unanimous consent of the five judges on the political question doctrine appears to work in harmony with the majority's concern for consistency and reviewability. The court expressed its unwillingness to allow service members to substitute their personal judgment for that of their superiors or the federal government regarding the legality of an order.[168] An order requiring the performance of a military duty is *inferred* lawful and disobeyed at the peril of the subordinate.[169] By affirming SPC New's conviction, the CAAF indicated a clear desire to support commanders' ability to maintain discipline, particularly with regard to highly publicized and politically questionable deployments. Military justice practitioners should recognize that in reaffirming the principle that all orders are presumed lawful unless they are palpably illegal on their face, the CAAF showed its willingness to support broadly the criminality of military specific offenses to help promote discipline in the ranks.

Limiting the Number of Possible Convictions: Robbery

United States v. Szentmiklosi:
Forcible Taking of Property Belonging to One Entity From Multiple Persons Constitutes One Robbery

Specialist Szentmiklosi conspired to rob the post exchange (PX) money courier. As a military policeman (MP), SPC Szentmiklosi had previously escorted the courier from the bank to the PX. On the morning of 15 March 1997, SPC Szentmiklosi and an accomplice waited behind the PX for the courier and MP escort. The two assailants wore ski masks and gloves. Specialist Szentmiklosi carried a loaded pistol. The accomplice carried a loaded shotgun.[170] When the courier arrived, SPC Szentmiklosi pointed the pistol at him and told him to put down the bag of money. The bag contained $36,724.88. Specialist Szentmiklosi ordered the courier to get down, sprayed his face with mace, and grabbed the bag of money. While SPC Szentmiklosi was dealing with the courier, his accomplice pointed his shotgun at the MP and ordered him to the ground. As the MP was kneeling, the accomplice hit the MP in the back of the head with the shotgun, causing a serious wound. The MP fell to the ground and sustained another injury above his right eye. The accomplice took the MP's pistol, handcuffs, and radio. Specialist Szentmiklosi and his accomplice fled in the MP vehicle.[171]

The government charged SPC Szentmiklosi with two specifications of robbery under Article 122, UCMJ.[172] One specification alleged that he robbed $36,724.88 from the courier. The second specification alleged that he robbed $36,724.88 from the MP escort. The military judge found SPC Szentmiklosi guilty, pursuant to his pleas, of both specifications of robbery. On appeal, the Army Court of Criminal Appeals affirmed the convictions. In doing so, the Army court found that "robbery is

164. *Id.* at 526.

165. *New*, 55 M.J. at 128, 130.

166. New v. United States, 112 S. Ct. 256 (2001).

167. *New*, 55 M.J. at 110 (Effron, J., concurring).

168. *Id.* at 107-08.

169. MCM, *supra* note 11, pt. IV, ¶ 14c(2)(a)(i).

170. United States v. Szentmiklosi, 55 M.J. 487, 488 (2001).

171. *Id.* at 489.

172. *Id.* at 488. Article 122, UCMJ, states:

> Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

UCMJ art. 122 (2000).

preeminently a crime of violence against a person, and in crimes of violence the permissible unit of prosecution is the number of victims (persons) assaulted, rather than the number of larcenies committed."[173]

A robbery of multiple persons possessing one entity's property presented a case of first impression for the CAAF.[174] The court concluded that because both the MP escort and PX courier were jointly or constructively in possession of the money on behalf of one entity, only one robbery occurred. The CAAF reversed the conviction for robbing the MP escort, but affirmed the lesser offense of aggravated assault.[175] Although the opinion refrains from expressing any particular hierarchy, the court appropriately used various canons of interpretation in reaching its conclusion.

The CAAF analyzed the plain text of Article 122 to decipher congressional intent. The court concluded that the phrase "anyone in his company at the time of the robbery"[176] contemplated the presence of multiple victims during a single robbery. The CAAF also examined external sources such as legislative history regarding the punitive articles. The court concluded that because Congress left Article 122 unchanged since enacting the UCMJ in 1950, the legislature intended to permit only one conviction as indicated by the plain text.[177]

Additionally, the CAAF surveyed both state and federal law and found a split of authority;[178] however, the court focused on the federal court decisions, particularly those dealing with the Federal Bank Robbery Act.[179] The court specifically cited *United States v. Canty*,[180] in concluding that Congress never indicated intent to permit more than one conviction for one bank robbery.[181] Next, the court distinguished its own precedent in *United States v. Parker*.[182] In *Parker*, the CAAF upheld two robberies when the assailants took distinct property from each of the victims.[183] Finally, the CAAF applied a principle expressed in its own case law that "[u]nless a statutory intent to permit multiple punishments is stated 'clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses[.]'"[184]

One development, one trend, and one practice tip surface in *Szentmiklosi*. The CAAF resolved for the first time that in a forcible taking of one entity's property from multiple victims, only one robbery conviction will stand.[185] The case also illustrates the CAAF's growing dislike for overcharging. By strictly applying the principle that doubt will be resolved in favor of allowing only one conviction per transaction, the court signaled its apparent intent to limit the number of possible convictions for each act of misconduct committed by an accused. This trend toward limiting charges will become more apparent in the next two sections of this article dealing directly with multiplicity and unreasonable multiplication of charges.

The practice tip involves how to charge robbery in light of the CAAF's decision. In a footnote, the court pointed out the "curious decision on the part of the Government to charge appellant for the wrongful appropriation of the military policeman's pistol, handcuffs, and radio, as opposed to a separate robbery of those items."[186] Although the court's comment offers practitioners an excellent opportunity to contemplate the issue, a simple reading of the Stipulation of Fact reveals that the government's decision was not "curious" in the least. After driving away from the scene of the crime in the MP vehicle, Szentmiklosi and his accomplice left the vehicle behind a chapel on post. They also left the MP's pistol belt, radio, and weapon near the

173. *Szentmiklosi*, 55 M.J. at 488.

174. *Id.* at 489.

175. *Id.* at 491.

176. UCMJ art. 122.

177. *Szentmiklosi*, 55 M.J. at 490.

178. *Id.* at 489.

179. *Id.* at 490 (citing to 18 U.S.C. § 2113).

180. 469 F.2d 114 (D.C. Cir. 1972) (no congressional intent to permit multiple punishments because only one bank robbed; court could only sustain one conviction for back robbery).

181. *Szentmiklosi*, 55 M.J. at 490.

182. 38 C.M.R. 343 (A.C.M.R. 1968).

183. *Szentmiklosi*, 55 M.J. at 490 (construing *Parker*, 38 C.M.R. at 343).

184. *Id.* at 491 (quoting Bell v. United States, 349 U.S. 81, 84 (1955) (brackets in original)). *See* United States v. Miller, 47 M.J. 352, 357 (1997).

185. *Szentmiklosi*, 55 M.J. at 491.

186. *Id.* at 492 n.9.

vehicle.[187] Robbery under the UCMJ requires both an assault and a larceny. Thus, a specific intent to permanently deprive the victim of the property must accompany the taking.[188] Perhaps a zealous trial counsel might have attempted the tenuous argument that specific intent is measured at the time of the taking and tried to get the military judge to divine a permanent intent to deprive on the part of SPC Szentmiklosi. However, the evidence indicated a temporary intent, more in line with wrongful appropriation.[189] Because the items were left on post with the MP vehicle, the government made the appropriate decision not to charge an offense that counsel could not prove. Government counsel should learn from *Szentmiklosi* that they may charge multiple robberies if distinct property (not belonging to one entity) is taken from multiple victims. Wise counsel should also learn to only go forward with charges supported by the evidence.

Multiplicity

United States v. Frelix-Vann:
Conduct Unbecoming and Larceny Multiplicious If Both Refer to the Same Misconduct

Before discussing the *Frelix-Vann* case, a brief survey of the legal landscape surrounding multiplicity and Article 133, UCMJ,[190] is appropriate. In 1984, the Court of Military Appeals (COMA)[191] decided *United States v. Timberlake*.[192] The case dealt with a conviction under Article 133 in which the government also charged the underlying misconduct as forgery under Article 123(2), UCMJ.[193] In the case, the COMA applied the statutory elements test expressed by the Supreme Court in *United States v. Blockburger.*[194] To determine whether Congress intended for an accused to be convicted of two offenses for the same underlying misconduct, the *Blockburger* test asks whether each offense requires proof of a unique fact.[195] The prohibition against convicting an accused of two offenses for the same underlying misconduct, unless Congress allows it, finds its roots in the Double Jeopardy Clause of the Constitution.[196] In *Timberlake*, the COMA found that the only substan-

187. United States v. Szentmiklosi, No. 9701049 (Headquarters, Fort Riley, Kansas, July 1997) (Record of Trial, Prosecution Exhibit #1, Stipulation of Fact).

188. UCMJ art. 122 (2000). The elements of robbery under Article 122, UCMJ, are as follows:

> [1] That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;
> [2] That the taking was against the will of that person;
> [3] That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;
> [4] That the property belonged to a person named or described;
> [5] That the property was of a certain or of some value; and
> [6] *That the taking of the property by the accused was with the intent permanently to deprive the person robbed of the use and benefit of the property.*

MCM, *supra* note 11, pt. IV, ¶ 47b (emphasis added).

189. *See* UCMJ art. 121. The elements of wrongful appropriation under Article 121 are

> [1] That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;
> [2] That the property belonged to a certain person;
> [3] That the property was of a certain value, or of some value; and
> [4] That the taking, obtaining, or withholding by the accused was with the *intent to temporarily deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.*

MCM, *supra* note 11, pt. IV, ¶ 46b(2) (emphasis added).

190. UCMJ art. 133 (2000). Article 133 states: Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct. *Id*.

191. The Court of Military Appeals (COMA) is now referred to as the Court of Appeals for the Armed Forces (CAAF).

192. 18 M.J. 371 (C.M.A. 1984) (when forgery constitutes the underlying conduct required for conduct unbecoming an officer, Congress intended forgery become a lesser included offense of the conduct unbecoming offense); *see also* United States v. Waits, 32 M.J. 274 (C.M.A. 1991); United States v. Taylor 23 M.J. 314 (C.M.A. 1987).

193. UCMJ art. 123(2).

194. 284 U.S. 299 (1932).

195. United States v. Timberlake, 18 M.J. 371, 374 (1984) (quoting *Blockburger*, 284 U.S. at 304).

tial difference between the two offenses was that the charge under Article 133 required a showing of unbecoming conduct. Therefore, only one offense required proof of a unique fact. The court held that in the absence of clearly expressed congressional intent, it must dismiss the lesser offense.[197] The court also specifically held that no per se rule exists "that the same conduct charged as a particular violation of the Code and as a violation under Article 133 constitutes separate offenses for purposes of findings."[198]

In 1993 and 1995, the CAAF decided *United States v. Teters*[199] and *United States v. Weymouth*.[200] The cases and multiplicity law in general have led commentators to liken the "multiplicity conundrum"[201] to "the Gordian Knot, the Sargasso Sea, and being damned to the inner circle of the Inferno to endlessly debate it."[202] In a nutshell, *Teters* and *Weymouth* adopt the *Blockburger*-elements test. When distinguishing lesser-included offenses *Weymouth* adds the requirement that the comparison must be done by examining the elements as factually pled in the specifications.[203] When the government bases an Article 133 charge solely on the misconduct required to prove another substantive offense, only the Article 133 offense requires proof of a unique fact. Article 133 requires an additional showing of unbecoming conduct. Thus, the *Timberlake* holding and reasoning remain good law in the post-*Teters* era. Yet, in practice, counsel continue to charge and courts continue to convict service members of both substantive offenses and offenses under Article 133 for the same underlying misconduct.

As explained by Chief Judge Everett in his concurring opinion in *Timberlake*, duplication of charges against officers began under the Articles of War. Article 133, UCMJ, finds its roots in Article of War 95. Article of War 95 provided for a mandatory dismissal if a court-martial convicted an officer of conduct unbecoming. Thus, the government would often allege that misconduct violated Article of War 95 in addition to other articles to ensure a dismissal from the Army.[204] The UCMJ eliminated the need to charge both offenses. Article 133 allows for a broad range of punishment "as a court-martial may direct."[205] Additionally, other substantive offenses provide adequate opportunity for dismissing officers under the current maximum punishment scheme.

Why then, in situations where charging in the alternative appears unnecessary, have counsel continued to charge both offenses? Perhaps the *Manual for Courts-Martial* itself has caused much of the confusion. In the explanation section for Article 133, the *Manual* states, "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121."[206] The non-binding explanation, provided by the executive branch, appears to contradict established case law directly. Thus, as written, the explanation continues to foster confusion regarding the appropriateness of charging officers under Article 133 and other substantive offenses for the same underlying misconduct.

Last year, the CAAF renewed its effort to delineate clearly its position on how multiplicity standards apply to Article 133. In *United States v. Cherukuri*,[207] the CAAF held that four specifications of indecent assault under Article 134 were multiplicious with an Article 133 specification addressing the same underlying misconduct.[208] The facts in *Cherukuri* and the Article 133 specification's reference to the accused's abuse of the trust placed in him as a medical doctor left some question as to whether the charges, as drafted, actually referred to the same underlying misconduct. Given the CAAF's interpretation that

196. U.S. CONST. amend. V; *see also* UCMJ art. 44.

197. *Timberlake*, 18 M.J. at 375.

198. *Id.* at 377.

199. 37 M.J. 370 (1993).

200. 43 M.J. 329 (1995).

201. United States v. Quiroz, 55 M.J. 334, 339 (2001) (Crawford, J., dissenting).

202. United States v. Quiroz, 53 M.J. 600, 603 (N-M. Ct. Crim. App. 2000) (citing Albernaz v. United States, 450 U.S. 333, 343 (1981); United States v. Baker, 14 M.J. 361, 373 (C.M.A. 1983) (Cook, J., dissenting); United States v. Barnard, 32 M.J. 530, 537 (A.F.C.M.R. 1990); Major William T. Barto, *Alexander the Great, The Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1 (1996)).

203. *Weymouth*, 43 M.J. at 333.

204. United States v. Timberlake, 18 M.J. 371, 377 (C.M.A. 1984).

205. UCMJ art. 133 (2000).

206. MCM, *supra* note 11, pt. IV, ¶ 59c(2).

207. 53 M.J. 68 (2000).

208. *Id.* at 71-72.

both charges only focused on the sexual assaults, however, the court's ruling appears consistent with *Timberlake* and the *Teters/Weymouth* pleadings-elements test.

Chief Judge Crawford dissented in *Cherukuri*. Her opinion suggests that the government should be able to convict officers of both Article 133 and other offenses for the same underlying misconduct.[209] She specifically called upon the majority to send a clear signal to the field, if the court intended to treat charging under Articles 133 and 134 differently than charging under Article 133 and other substantive offenses.[210] In the 2001 term, the CAAF heeded Chief Judge Crawford's advice and sent a clear signal regarding multiplicious charging under Article 133 and other substantive offenses; however, the signal in *United States v. Frelix-Vann*[211] did not reflect Chief Judge Crawford's desired message.

Captain Frelix-Vann shoplifted a package of dog bones, four videocassette tapes, and two compact discs from the PX annex in Kaiserslautern, Germany. She pled guilty and was convicted of one specification of larceny under Article 121 and one specification of conduct unbecoming under Article 133 for the same exact misconduct.[212] Although the defense counsel did not challenge the charges as multiplicious for findings because the case involved a guilty plea, counsel did move to have the offenses considered multiplicious for sentencing.[213] The military judge granted the motion.[214]

On appeal, the CAAF ruled that the issue of multiplicity was not waived at trial because of the facial duplicativeness of the charges. Further, the court held that the offenses were in fact multiplicious for findings. Consistent with *Cherukuri*, the CAAF remanded the case to the Army Court of Criminal Appeals to select which conviction to retain. The CAAF found no further sentence relief was warranted because the military judge had ruled at trial that the offenses were multiplicious for sentencing.[215]

By ruling that larceny under Article 121 is a lesser-included offense of conduct unbecoming under Article 133,[216] the CAAF once again exhibited its clear dislike for overcharging. The court continued the effort begun last term in *Cherukuri* to make its position on duplicative convictions crystal clear. Trial counsel must remain vigilant when charging officers. The government cannot expect to gain convictions under Article 133 and another substantive offense for the same underlying misconduct. Trial counsel must establish a separate factual basis for a charge under Article 133 and draft the specification so as to clearly indicate that basis to the court. If the government desires a conviction under Article 133 for conduct proscribed by another article, then practitioners should draft the charge under Article 133 using language from the other substantive offense. The other offense will then become a lesser-included offense to the Article 133 charge. If the government considers a conviction for the other offense is more important (for instance, the indecent assault convictions in Dr. Cherukuri's case), then trial counsel should refrain from charging Article 133 for the same underlying misconduct.

Although *Frelix-Vann* does not stand for the proposition that trial counsel cannot charge in the alternative, practitioners should remain aware that only one conviction for the same underlying misconduct will withstand scrutiny at the CAAF. Also, the CAAF's holding clearly signals a preference against overcharging in the first place. The CAAF's clear pronouncements on multiplicity and Article 133 should signal defense counsel that multiplicious charging does not increase the government's bargaining power during plea negotiations. Also, defense counsel need to object to any efforts by the government to charge the same misconduct twice using Article 133 and any other substantive offense. *Frelix-Vann* clearly indicates that the CAAF will intensely scrutinize efforts by the government to tack on an extra charge under Article 133 just because the offender is an officer.

Unreasonable Multiplication of Charges

United States v. Quiroz:
Multiplicity and Unreasonable Multiplication of Charges Constitute Two Distinct Legal Theories

The CAAF's signal to discontinue overcharging resonated even more clearly when the court released *United States v. Quiroz*[217] on the same day it released its decision in *United States v. Frelix-Vann*. *Quiroz* involves a Navy-Marine Corps Court of Criminal Appeals (NMCCA) decision that the concept of unreasonable multiplication of charges in military jurispru-

209. *Id*. at 74-75 (Crawford, J., dissenting).

210. *Id.* at 75.

211. 55 M.J. 329 (2001).

212. *Id*. at 330.

213. *See id*. Rule for Courts-Martial 906(b)(12) addresses multiplicity of offenses for sentencing. MCM, *supra* note 11, R.C.M. 906(b)(12).

214. *Frelix-Vann*, 55 M.J. at 330.

215. *Id.* at 333.

216. *Id.*

dence was founded on separate and distinct legal principles from the doctrine of multiplicity. The NMCCA held that a specification under Article 108, UCMJ, for selling C-4 explosive and a specification under Title 18 for "possessing, storing, transporting, and/or selling" the same C-4 explosive,[218] constituted an unreasonable multiplication of charges.[219] The NMCCA heard the challenge based on unreasonable multiplication of charges despite the fact that defense counsel never raised the claim at trial.[220] In making its decision, the NMCCA listed five non-exclusive factors it used in analyzing the unreasonable multiplication of charges issue.

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
> (4) Does the number of charges and specifications *unfairly* increase the appellant's punitive exposure?
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?[221]

A 3-2 majority at the CAAF affirmed the NMCCA's decision that multiplicity and unreasonable multiplication of charges constitute separate and distinct legal theories.[222] The court also affirmed the NMCCA's decision to hear the unreasonable multiplication of charges claim for the first time on appeal.[223] The CAAF did, however, remand the case for further consideration because of its concern that the word *unfairly* in the fourth factor listed by the NMCCA referred to an equitable rather than a legal standard. The CAAF requested clarification that the lower court applied a classic legal test of reasonableness.[224] The CAAF generally affirmed that the approach was well within the discretion provided to the NMCCA by Article 66(c), UCMJ.[225] "Reasonableness, like sentence appropriateness, is a concept that the Courts of Criminal Appeals are fully capable of applying under the broad authority granted them by Congress under Article 66."[226]

The majority opined that the concept of multiplicity is founded on the Double Jeopardy Clause of the Constitution. Multiplicity focuses on the elements of criminal statutes themselves and congressional intent.[227] The concept of unreasonable multiplication of charges only comes into play when charges do not already violate constitutional prohibitions against multiplicity. "[T]he prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion."[228] The CAAF pointed specifically to the discussion accompanying Rule for Courts-Martial 307(c)(4) to support the proposition that unreasonable multiplication of charges exists in military practice separate and apart from the concept of multiplicity. The discussion states, "What is substantially one

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217. 55 M.J. 334 (2001).

218. 18 U.S.C. § 842(h) (2000).

219. United States v. Quiroz, 52 M.J. 510, 513 (N-M. Ct. Crim. App. 1999).

220. *Id.*

221. *Id.* (emphasis added).

222. *Quiroz*, 55 M.J. at 337.

223. *Id.* at 338.

224. *Id.* at 339.

225. *See id*. Article 66(c), UCMJ, states:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

UCMJ art. 66(c) (2000).

226. *Quiroz*, 55 M.J. at 339.

227. *Id.* at 337.

228. *Id.* Two features specifically mentioned by the CAAF are (1) the preference in military practice for trying all known offenses at a single trial, and (2) the existence of broadly worded offenses such as disrespect, disobedience, and dereliction (Articles 89-92), conduct unbecoming (Article 133), and the general article (Article 134). *Id*.

transaction should not be made the basis for an unreasonable multiplication of charges against one person."[229] The court traces similar language back to the 1928 *Manual for Courts-Martial*. The majority also points to William Winthrop's classic treatise on 19th century military law, *Military Law and Precedents*, in which he stated that "[a]n unnecessary multiplication of forms of charges for the same offense is always to be avoided."[230]

Perhaps one of the most controversial sections of the CAAF opinion involves its support of the NMCCA's decision to hear the unreasonable multiplication of charges claim for the first time on appeal. As evidenced by the fact that The Judge Advocate General of the Navy certified the issue to the CAAF, government appellate counsel were concerned that the NMCCA's decision would open "Pandora's box."[231] Appellants could raise unreasonable multiplication of charges in almost every case whether or not a military judge ever considered the issue at trial. Because multiplicity claims are generally waived if not raised at trial, the opportunity to raise unreasonable multiplication of charges for the first time on appeal seemed inconsistent.

The CAAF addressed the government's concerns in *United States v. Butcher*.[232] In *Butcher*, the CAAF affirmed the service courts' authority to consider claims of unreasonable multiplication of charges waived if not raised at trial. The Air Force Court of Criminal Appeals (AFCCA) had held that the appellant forfeited an unreasonable multiplication of charges claim by waiting to raise it for the first time on appeal.[233] The CAAF clearly considers issues regarding unreasonable multiplication of charges to fall within the Article 66(c) authority of the service courts. Practitioners in each of the services need to watch their own appellate courts vigilantly for standards and guidance in the area.

In *Quiroz*, the NMCCA stated that part of its unreasonable multiplication of charges analysis would include whether counsel raised the issue at trial;[234] however, the court indicated that it would not automatically treat failure to raise the issue at trial as waiver. In a post-*Quiroz* decision, *United States v. Deloso*,[235] the AFCCA reiterated its position that failure to raise unreasonable multiplication of charges at trial will normally result in waiver or forfeiture on appeal.[236] The Army Court of Criminal Appeals (ACCA) has not yet published a post-*Quiroz* opinion that directly addresses the issue of waiver.[237] In a pre-*Quiroz* memorandum opinion, the ACCA indicated that failure to raise unreasonable multiplication of charges at trial would constitute waiver.[238] Although the service courts differ on exactly how to apply the doctrine of waiver to unreasonable multiplication of charges, all military defense counsel should remain wary of not raising cognizable claims at the trial level. Failure to raise the issue will likely result in an unsuccessful challenge on appeal. Also, the service courts should recognize their obligation to provide clear guidance to the field on applicable standards.

Chief Judge Crawford and Judge Sullivan wrote stinging dissents in *Quiroz*. Both dissents express dissatisfaction with the majority's sanctioning of a principle grounded in equity. Judge Sullivan claimed that the majority's judicial activism created a "new legal right for a military accused."[239] Chief Judge Crawford claimed, "Today our Court perpetuates the turmoil in the military justice system by sanctioning yet another subjective test, one that smacks of equity, as a way to solve the multiplicity conundrum."[240] Although the majority opinion appears in line with long-standing tradition in military practice and the

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229. MCM, *supra* note 11, R.C.M. 307(c)(4) discussion.

230. *Quiroz*, 55 M.J. at 337 (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 143 (2d ed. 1920 reprint)).

231. Pandora's box refers to "a source of extensive but unforeseen troubles or problems." WEBSTER'S UNABRIDGED DICTIONARY 1401 (Random House 2d ed. 1998).

232. 56 M.J. 87 (2001).

233. *Id*. at 93.

234. United States v. Quiroz, 52 M.J. 510, 513 (N-M. Ct. Crim. App. 1999).

235. 55 M.J. 712 (A.F. Ct. Crim. App. 2001).

236. *Id.* at 715.

237. In *United States v. Carson*, 55 M.J. 656 (Army Ct. Crim. App. 2001), the ACCA declined an opportunity to provide explicit guidance on the issue of waiver and unreasonable multiplication of charges. In the case, defense counsel did not urge the military judge to dismiss any specifications for multiplicity or unreasonable multiplication of charges. The only issue raised at trial was that a maltreatment charge and an indecent exposure charge should be treated as one offense for sentencing purposes (arguably raising unreasonable multiplication). The court declined to accept the government's concession on appeal that the charges constituted an unreasonable multiplication of charges and affirmed the convictions. While mentioning that counsel did not specifically raise unreasonable multiplication at trial, the court did not address waiver in its ruling. *Id*. at 659-60.

238. United States v. McLaurin, No. 9901115 (Army Ct. Crim. App. Apr. 18, 2001) (unpublished).

239. United States v. Quiroz, 55 M.J. 334, 345 (2001) (Sullivan, J., dissenting).

240. *Id.* at 339 (Crawford, J., dissenting).

CAAF's own warnings in *United States v. Foster*[241] to avoid unreasonable "piling on" of charges,[242] the dissenting opinions raise a good point. The theory of unreasonable multiplication of charges clearly finds its roots in equitable principles. When attempting to understand the difference between multiplicity and unreasonable multiplication of charges, practitioners should view one as grounded in the legal protections of the Constitution and the other as grounded in common sense and fairness. By understanding the purposes behind each legal theory, practitioners should not experience any additional turmoil as a result of *Quiroz*.

One practical benefit of *Quiroz* for trial practitioners is the framework for analysis provided by the NMCCA. Certainly, *Quiroz* may have opened the possibility for additional claims. The case may also have officially created a legal right where one did not previously exist.[243] Additionally, as Judge Sullivan's dissenting opinion eloquently articulates, the court did not pick a very deserving case to create a new equitable power.[244] However, down at the level where trial and defense counsel live on a daily basis—the courtroom—military judges have been exercising the power now officially recognized in *Quiroz* for many years. Sometimes judges dismissed charges as multiplicious for sentencing,[245] other times they called it an "unreasonable piling on," and occasionally they actually referred to the government's charging practices as an unreasonable multiplication of charges. Yet, counsel remained without practical guidance for analyzing charges in these situations. *Quiroz* provides a good framework for both trial and defense counsel to structure their arguments. Now that the CAAF has officially sanctioned the distinction between multiplicity and unreasonable multiplication of charges, counsel must learn to articulate arguments in an understandable fashion. The *Quiroz* factors provide an excellent starting point.

Conclusion

During the last term, the CAAF expanded the scope of criminality in a number of areas by broadening the reach of UCMJ articles and by narrowing or limiting possible defenses. The court affirmed convictions under federal statutes regarding threats against the President and child pornography. The court also narrowed the parental discipline defense, the defense of impossibility, and a service member's ability to eject a trespasser. Additionally, the court affirmed the principle that an order is presumed lawful unless palpably illegal on its face.

In a competing trend, the CAAF significantly reduced the ability of the government to pile on convictions. The court limited the number of robbery convictions possible under Article 122, prevented duplicitous convictions under Article 133, and legitimized the doctrine of unreasonable multiplication of charges. Although practitioners may not agree with all the court's decisions this year, the CAAF once again demonstrated its commitment to the integrity of the military justice system. The court appropriately attempted to balance the need to refine substantive crimes and defenses with the necessity of protecting service members against undue prosecutorial overreaching.

241. 40 M.J. 140 (C.M.A. 1994).

242. *Id.* at 144 n.4.

243. *Quiroz*, 55 M.J. at 349 (Sullivan, J., dissenting).

244. *Id.* at 350.

245. MCM, *supra* note 11, R.C.M. 906(b)(12). Practitioners should note that the CAAF specifically decided that the doctrine of "multiplicious for sentencing" remains a valid basis for relief under the *MCM*. *Quiroz*, 55 M.J. at 339.