Annual Review of Developments in Instructions—2008

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Introduction

This annual installment of developments on instructions covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2008 term,[1] and it focuses on crimes and defenses. It is written for military trial practitioners and frequently refers to the relevant paragraphs in the *Military Judges' Benchbook* (*Benchbook*).[2] The *Benchbook* remains the primary resource for drafting instructions.

Crimes

Attempted Voluntary Manslaughter as a Lesser Included Offense

The first three cases deal with lesser included offenses. In *United States v. Miergrimado*, CAAF addressed the standard for determining whether the military judge should instruct the members on a particular lesser included offense.[3] Although the case reiterates the standard that already existed, a discussion of this common issue is beneficial for trial practitioners. In addition, the elements for the offense of attempted voluntary manslaughter will be discussed, because an understanding of the unique offense of voluntary manslaughter is crucial to correctly instructing the members.

Marine Corporal (Cpl) Miergrimado got into several verbal and physical altercations with Cpl Eichenberger over keys to a military vehicle in Kuwait.[4] Corporal Miergrimado testified that, towards the end of the fight, he felt the hardest hit he had ever felt in his life and he was "terrified for his life."[5] He "automatically switched" into preservation mode and pointed his rifle at Cpl Eichenberger who had struck him.[6] Corporal Eichenberger pushed the rifle away and gave Cpl Miergrimado another hard throw.[7] Corporal Miergrimado regained his balance, saw Cpl Eichenberger coming at him and shot him.[8]

Corporal Miergrimado was charged with attempted premeditated murder.[9] At trial, the defense counsel planned to use an "all or nothing" approach and objected when the trial counsel tried to elicit testimony relevant to the lesser included offense of attempted unpremeditated murder.[10] The defense counsel argued that, because the defense waived any instruction on lesser included offenses, it was inappropriate to instruct the members on any lesser included offense.[11] The military judge

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[1] The 2008 term began on 1 October 2007 and ended on 31 August 2008. *See* U.S. Court of Appeals for the Armed Forces, 2008 Term of Court Opinions, http://www.armfor.uscourts.gov/2008Term.htm (last visited Mar. 5, 2009). This term was only eleven months long, because the Court of Appeals for the Armed Forces changed the end date of the term from 30 September to 31 August, beginning in 2008.

[2] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK].

[3] 66 M.J. 34 (C.A.A.F. 2008).

[4] *Id*. at 35.

[5] *Id*. at 37.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 35.

[10] *Id*.

[11] *Id*.

overruled the objection and indicated he would instruct on lesser included offenses.[12] After receiving all the evidence, the military judge instructed on the lesser included offenses of attempted unpremeditated murder, attempted voluntary manslaughter, and aggravated assault with intent to inflict grievous bodily harm with a loaded firearm.[13] The members found the accused guilty of the lesser included offense of attempted voluntary manslaughter.[14]

On appeal, Cpl Miergrimado's written brief was not based on the trial defense counsel's nonmeritorious argument that the defense's "all or nothing" strategy and waiving instructions on lesser included offenses rendered instructions on lesser included offenses inappropriate.[15] Instead, he argued that the military judge should not have given the instruction on attempted voluntary manslaughter as a lesser included offense, because none of the factual elements that distinguish attempted premeditated murder from attempted voluntary manslaughter were in dispute.[16] During oral argument, Cpl Miergrimado's argument, which changed again, was that the evidence was legally insufficient to support a finding that the crime was committed in the heat of sudden passion caused by adequate provocation.[17]

The military judge has a sua sponte duty to instruct the members on all lesser included offenses reasonably raised by the evidence.[18] A lesser included offense is reasonably raised by the evidence if "the greater offense requires the members to find a disputed factual element which is not required for conviction of the lesser violation."[19] This standard applies equally to lesser included offenses requested by the Government as well as the defense.[20]

Attempted premeditated murder requires the element of a premeditated design to kill, which is not required for attempted voluntary manslaughter.[21] In *Miergrimado*, the CAAF stated that it had no difficulty concluding that that element was disputed in the evidence presented at trial.[22] During the trial, the defense counsel even moved for a finding of not guilty because the Government had not presented sufficient evidence of premeditation, arguing that it "might be attempted voluntary manslaughter but it clearly isn't an attempted premeditated murder."[23] Based on the evidence, including the testimony of the accused, premeditation was disputed at trial. Therefore, the lesser included offense of attempted voluntary manslaughter was raised by the evidence.

The CAAF also addressed Cpl Miergrimado's argument that the evidence was legally insufficient to find beyond a reasonable doubt that the crime was committed in the heat of sudden passion caused by adequate provocation.[24] After considering the evidence presented at trial, the court held that the evidence was legally sufficient for the trier of fact to find beyond a reasonable doubt that the crime was committed in the heat of sudden passion caused by adequate provocation.[25] However, the court did not even need to address that argument, because it lacks merit. The heat of sudden passion caused by adequate provocation is not an element of voluntary manslaughter.[26] Therefore, it is not an element of attempted voluntary manslaughter. The elements of attempt are:

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[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*. at 36.

[16] *Id*.

[17] *Id*.

[18] *See* United States v. Wells, 52 M.J. 126, 129 (C.A.A.F. 1999) (reversing conviction for premeditated murder, because the military judge did not give instruction on lesser included offense of voluntary manslaughter, even though neither party requested the instruction); MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 920(e)(2) (2008) [hereinafter MCM].

[19] *Miergrimado*, 66 M.J. at 36.

[20] *Id*.

[21] BENCHBOOK, *supra* note 2, ¶ 3-4-2.

[22] *Miergrimado*, 66 M.J. at 37.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] United States v. Schap, 49 M.J. 317, 320 (C.A.A.F. 1998) ("[H]eat of sudden passion caused by adequate provocation], though part of the statutory definition of the offense, is neither an element that the Government must prove nor an affirmative defense that the defense must prove.").

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.[27]

The elements of the intended offense, voluntary manslaughter, are:

(1) That a certain named or described person is dead;

(2) That the death resulted from the act or omission of the accused;

(3) That the killing was unlawful; and

(4) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the person killed.[28]

The elements for voluntary manslaughter are virtually identical to the elements of unpremeditated murder.[29] However, conduct that would otherwise constitute murder, if committed in the heat of sudden passion caused by adequate provocation, is mitigated to voluntary manslaughter.[30] The only burden of proof applicable to the heat of sudden passion caused by adequate provocation is that, when murder is charged and sudden passion caused by adequate provocation is raised by the evidence, the Government must disprove it beyond a reasonable doubt for a conviction of the greater offense of murder.[31] The Government does not need to prove sudden passion caused by adequate provocation to convict the accused of voluntary manslaughter or attempted voluntary manslaughter.

It might assist in understanding the unique concept of the burden of proof for sudden passion caused by adequate provocation by thinking of it as a partial defense. Like a defense, when sudden passion caused by adequate provocation is raised by the evidence, the military judge must instruct on it and the Government must disprove it beyond a reasonable doubt to convict of murder. If the Government does not disprove it beyond a reasonable doubt, and if all the elements of murder are otherwise proven beyond a reasonable doubt, then the accused may be found guilty of no more than voluntary manslaughter. However, the Government does not have to prove it beyond a reasonable doubt for a conviction of voluntary manslaughter. The same is true when dealing with attempted voluntary manslaughter.[32]

The main lesson to be gleaned from *Miergrimado* is the standard for determining whether to instruct the members on a certain lesser included offense. It may assist practitioners to break the analysis into two steps: first, whether it is a lesser included offense; and, second, whether it was raised by the evidence. First, after comparing the elements of the greater and lesser offenses, does the greater offense require proof of a factual element that the lesser offense does not require?[33] Second, did the evidence at trial put that element in dispute? In other words, was there some evidence admitted, without regard to its source or credibility, upon which the members could rationally find the accused guilty of the lesser offense and acquit of the

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[27] MCM, *supra* note 18, pt. IV, ¶ 4b.

[28] *Id.* ¶ 44b(1).

[29] In the *MCM*, one difference is that the intent in the last element is toward "the person killed" for voluntary manslaughter and toward "a person" for unpremeditated murder. *Compare id.* ¶ 43b(2), *with* ¶ 44b(1). However, for both offenses, the statute has the same language, which is "a human being." UCMJ art. 118 (2008); *id.* art. 119(a).

[30] *Schap*, 49 M.J. at 320.

[31] *Id*.

[32] *See* MCM, *supra* note 18, pt. IV, ¶ 4d.

[33] *See* United States v. Weymouth, 43 M.J. 329 (C.A.A.F. 1995); United States v. Foster, 40 M.J. 140 (C.A.A.F. 1994); United States v. Teters, 37 M.J. 370 (C.A.A.F. 1993).

greater offense?[34] If the answer to these questions is "yes," then the military judge should instruct the members on that lesser included offense.[35]

An additional lesson from *Miergrimado* is the unique nature of the elements and burden of proof for the offenses of voluntary manslaughter and attempted voluntary manslaughter. As a caveat to the standard for whether to instruct on a lesser included offense, when the evidence raises heat of sudden passion caused by adequate provocation in a murder trial or an attempted murder trial, the military judge should instruct the members on voluntary manslaughter or attempted voluntary manslaughter as a lesser included offense.

Alternate Factual Scenarios for Indecent Assault

In *United States v. Brown*, CAAF considered, in a case where there were multiple acts that could constitute indecent assault, whether the military judge must instruct the members that they must agree on the act or acts by the required concurrence.[36] In this unclear area, any guidance is welcomed. The CAAF provided a standard for determining when the members must agree on the act or acts. However, there will likely be just as much uncertainty in the application of the standard.

Army Staff Sergeant (SSG) Brown, a drill sergeant, was charged with raping a female trainee.[37] Because the alleged offenses predated 1 October 2007, the recent amendments to Article 120 were not applicable. At trial, there was evidence that SSG Brown entered the female trainee's barracks room and started kissing her.[38] He sat in a chair, told her to come to him, "pulled down her pants, sat her on his lap, and inserted his fingers into her vagina."[39] When she stood up to pull up her pants, SSG Brown walked up behind her and inserted his penis into her vagina for fifteen to twenty-one seconds.[40] Staff Sergeant Brown withdrew and then left the barracks room to get a condom.[41] The trainee testified that she felt that she had to have sex with SSG Brown or she might not graduate.[42] When SSG Brown returned, she acquiesced to sexual intercourse with him.[43]

At trial, the defense did not request instructions on lesser included offenses, because the defense theory on the rape was "all or nothing."[44] The Government requested instructions on lesser included offenses, including indecent assault.[45] The military judge found sufficient evidence to instruct on indecent assault, because the members could find that sexual intercourse, insertion of fingers into the vagina, or both constituted indecent assault.[46]

The military judge discussed with counsel whether the findings worksheet should require the members, if they were to find the accused guilty of the lesser included offense of indecent assault, to specify on which one of the three factual scenarios their finding was based.[47] The trial counsel originally wanted the members to specify the separate acts on the

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[34] *See* United States v. Wells, 52 M.J. 126, 129–30 (C.A.A.F. 1999).

[35] The military judge may accept a waiver of the instruction from both parties. An accused may seek to waive an instruction on a lesser included offense in order to pursue an "all or nothing" trial strategy, and the Government may acquiesce in the defense's "all or nothing" strategy. *See* United States v. Upham, 66 M.J. 83, 87 (C.A.A.F. 2008); *cf.* United States v. Gutierrez, 64 M.J. 374 (C.A.A.F. 2007) (holding that defense can affirmatively waive affirmative defense instructions).

[36] 65 M.J. 356 (C.A.A.F. 2007).

[37] *Id*. at 357.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*.

findings worksheet, but the defense counsel did not.[48] After discussion, the trial counsel agreed that the findings worksheet should be left deliberately vague and should not specify the separate acts.[49]

When instructing the members on the lesser included offense of indecent assault, the military judge instructed them that they could find the accused guilty of indecent assault "by inserting his fingers and penis, or fingers, or penis into [her] vagina."[50] There was no objection to this instruction.[51] The members found the accused guilty of the lesser included offense of indecent assault.[52]

On appeal, SSG Brown argued that the military judge erred by not requiring the members to vote on each factual scenario and specify the factual basis of their findings.[53] First of all, the CAAF addressed whether its holding in *United States v. Walters*[54] applied, and it concluded that it did not.[55] In *Walters*, the CAAF had held that a finding that excepted the words "divers occasions" from a drug use specification, without specifying the one occasion that formed the basis of the conviction, was ambiguous and could not support a factual sufficiency review under Article 66, which required setting aside the conviction.[56] In *Brown*, the court reiterated that the application of its holding in *Walters* is limited to cases where a "divers occasions" specification is converted to a "one occasion" specification through exceptions and substitutions without specifying the one occasion.[57] In *Brown*, the specification alleged one occasion of rape at a specific time and place.[58] The Government treated all the acts in the barracks room as a continuing course of conduct over a short period of time. In this case, CAAF concluded that there was nothing ambiguous about the findings.[59]

The court next addressed the main issue of whether the military judge was correct, based on the evidence and the theories of the parties, by instructing the members that they could find the accused guilty of indecent assault by any of the three different ways at the alleged time and place.[60] This would permit a conviction even if the members did not have a two-thirds concurrence on any one of the factual scenarios. In deciding this issue, the CAAF applied a standard that comes from precedent in federal and military law: "The crux of the issue is whether a fact constitutes an element of the crime charged, or a method of committing it."[61] A court-martial panel normally returns a general verdict, without explaining how the law applies to the facts.[62] The general verdict resolves the issue presented to the members, which is whether the accused committed the charged offense or a lesser included offense beyond a reasonable doubt.[63] In *Griffin v. United States*, the Supreme Court held that a general verdict may be returned, even when the offense could have been committed by two or more means, as long as the evidence supports at least one of the means beyond a reasonable doubt.[64]

In *United States v. Vidal*, the Court of Military Appeals (COMA) held that court-martial panels do not have to have two-thirds agreement on one theory of liability, as long as two-thirds agree that all the elements have been proven.[65] In *Vidal*, there was evidence that Private First Class (PFC) Vidal and another Soldier grabbed a young German woman, dragged her

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[48] *Id*.

[49] *Id*. at 357–58.

[50] *Id*. at 358.

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] 58 M.J. 391 (C.A.A.F. 2003).

[55] *Brown*, 65 M.J. at 358.

[56] *Walters*, 58 M.J. at 396–97.

[57] *Brown*, 65 M.J. at 358.

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] *Id*. at 359.

[62] *Id*.

[63] *Id.*

[64] 502 U.S. 46, 49–51 (1991).

[65] 23 M.J. 319 (C.M.A. 1989).

into a car, struck her, and drove to a wooded area.[66] In the back seat, one of the two Soldiers inserted his penis into her vagina, and then the other Soldier climbed into the back seat and did the same.[67] Private First Class Vidal was charged with one specification of rape.[68] In accordance with the common practice, the specification did not specify whether he was charged as the perpetrator or as an aider and abettor.[69] During the trial, the military judge instructed the members in a manner that allowed them to convict the accused of rape if he was either the perpetrator or an aider and abettor.[70] The military judge did not require the members to consider the two theories separately.[71] The issue on appeal was whether the military judge erred by not requiring the prosecution or the members to elect whether the accused was a perpetrator or an aider and abettor.[72] The COMA held that the military judge properly declined to compel the Government to elect between the theories of liability for the rape.[73]

> If two-thirds of the members of the court-martial were satisfied beyond a reasonable doubt that at the specified time and place, appellant raped [AB]—whether he was the perpetrator or only an aider and abettor—the findings of guilty were proper. It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members.[74]

Although the two acts of penetration were separate offenses and the military judge should normally require the Government to elect which offense is being prosecuted, it is not required when the offenses are so closely connected in time as to constitute a single continuous transaction.[75]

Applying the standard to *Brown*, the CAAF concluded that the elements for the offense of indecent assault do not require the specification of the particular acts.[76] The court held that the military judge correctly instructed the members.[77] Application of the standard in this case warrants further discussion. Because the alleged conduct occurred well before 1 October 2007, indecent assault still fell under Article 134. The President listed the elements for the offense of indecent assault in the MCM:

> (1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;
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> (2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and
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> (3) 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.[78]

The court focused on the second element. It requires that the act was done with the intent to gratify. It does not require specification of the particular act.[79] However, that element concerns the mens rea requirement for the offense. The element at issue is really the first element, which concerns the actus reus requirement for the offense. The Government must prove

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[66] *Id*. at 320.

[67] *Id*. at 320–21.

[68] *Id.* at 322.

[69] *Id*. at 324.

[70] *Id*. at 322.

[71] *Id*.

[72] *Id*. at 320.

[73] *Id*. at 326.

[74] *Id*. at 325.

[75] *Id*.; *see also* United States v. Holt, 33 M.J. 400, 404 (C.M.A. 1991).

[76] United States v. Brown, 65 M.J. 356, 360 (C.A.A.F. 2007).

[77] *Id*.

[78] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 63b (2005) [hereinafter 2005 MCM].

[79] *Brown*, 65 M.J. at 360.

beyond a reasonable doubt that the accused assaulted the victim in a certain manner.[80] The type of assault is not an element, and the particular manner of the assault is not an element. The particular act or acts constituting the assault are merely a method of committing the assault element of indecent assault. Therefore, to convict of indecent assault, two-thirds of the members do not have to agree on the act, as long as two-thirds of the members are satisfied beyond a reasonable doubt that, at the specified time and place, the accused assaulted the alleged victim, along with all the other elements.

Although the indecent assault offense in *Brown* is no longer in effect for conduct on or after 1 October 2007, the lesson from *Brown* can be applied when instructing the members on the elements of other offenses. When there is an issue of whether the members must concur on a certain fact, it will depend on whether the fact is an element or a method of committing an element.[81] With this standard for analysis, the military judge can accurately instruct the members on the elements of the offenses and on the procedures for deliberations and voting.

Aggravated Assault and HIV

In *United States v. Upham*, CAAF looked at two issues involving instructions at the appellate level: whether an appellate court should apply a harmless-error analysis or a structural-type analysis when there is an instructional error of constitutional dimension; and whether an appellate court can affirm a conviction of a lesser included offense where both parties affirmatively waived an instruction on the lesser included offense and the military judge did not instruct the members on the lesser included offense.[82] Those issues will be addressed, but the underlying instructional error in this case will also be discussed because it involves an issue that occasionally arises.

Coast Guard Lieutenant (LT) Upham was charged with aggravated assault for engaging in unprotected sexual intercourse with a female officer without informing her that he was infected with the Human Immunodeficiency Virus (HIV).[83] The specification alleged that LT Upham committed "an assault upon a female by wrongfully having unprotected vaginal intercourse with a means likely to produce death or grievous bodily harm, to wit: unprotected vaginal intercourse while knowing he was infected with the Human Immunodeficiency Virus."[84] At trial, the prosecution presented evidence that LT Upham was HIV-positive, that he knew he could transmit the virus through sexual contact, that he had sexual intercourse with the alleged victim on two occasions without informing her of his HIV-positive status, and what the effects of an HIV infection were.[85] During the defense case, LT Upham testified and admitted to engaging in unprotected sex with the alleged victim without informing her of his HIV-positive status, of which he was aware.[86] He admitted that he had no justification for his conduct and that his conduct caused her great mental anguish.[87] However, he denied that this was a means likely to produce death or grievous bodily harm.[88] He testified that his viral load was so low as to be undetectable.[89] He had not

[80] "Assault" is defined in Article 128. "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." UCMJ art. 128(a) (2008).

[81] Although alternate acts that are not elements can be proven in the disjunctive, they cannot be alleged in the disjunctive in the specification. Alternate acts must be alleged in the conjunctive in the specification. "One specification should not allege more than one offense, either conjunctively (the accused 'lost and destroyed') or alternatively (the accused 'lost or destroyed'). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively." MCM, *supra* note 18, R.C.M. 307(c)(3) discussion (G)(iv). Instructing the members on variance and on findings by exception will result in the required concurrence on each act not excepted out. The issue in *Brown* arose because indecent assault was a lesser included offense of rape, so there was no alleged act or acts in a specification. Although the result should be the same whether the offense was a charged offense or a lesser include offense, the rules for drafting specifications that the President put in the Rules for Courts-Martial may cause a different result. When instructing on a lesser included offense in a situation like that in *Brown* but it is close as to whether the fact is an element or a method of committing an element, the military judge can avoid any issues by instructing in the conjunctive and giving a variance instruction.

[82] 66 M.J. 83, *recon. denied*, 66 M.J. 369 (C.A.A.F. 2008).

[83] *Id*. at 84.

[84] *Id.* at 84–85.

[85] *Id*. at 85.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

experienced any symptoms or limitations from his HIV infection.[90] Although not a zero risk, he did not believe that he was going to infect her.[91]

When discussing instructions, the military judge asked the parties if they wanted him to instruct the members on the lesser included offense of assault consummated by a battery, and both parties sides agreed to waive it.[92] When instructing the members on the elements of aggravated assault, the military judge provided the following instruction.

> You are advised that a person who engages in unprotected sexual intercourse with another person, knowing that he is HIV positive, without informing his sexual partner that [he has] HIV and without using a condom has committed an offensive touching of that person. Also a person who willfully and deliberately exposes a person to seminal fluid containing HIV without informing that person of his HIV positive status and without using a condom has acted in a manner likely to produce death or grievous bodily harm.[93]

The defense counsel objected to this instruction, arguing that it stated that LT Upham was per se guilty of aggravated assault.[94] The military judge overruled the objection, on the basis that it accurately stated the law.[95]

On appeal, the Coast Guard Court of Criminal Appeals (CGCCA) concluded that the above instruction was erroneous, because it improperly removed the issues of "offensive touching" and "means likely to result in death or grievous bodily harm" from consideration by the members.[96] It also concluded that the error was prejudicial as to aggravated assault.[97] However, it concluded that the error was not prejudicial as to the lesser included offense of assault consummated by a battery.[98] Because it found that the absence of an instruction on the lesser included offense at trial did not preclude it, the CGCCA affirmed a conviction for the lesser included offense of assault consummated by a battery.[99]

As stated earlier, the CAAF looked at two issues. First of all, the analysis for structural error, which requires mandatory reversal, applies when the error affects the framework in which the trial was conducted, and not just an error within the trial process itself.[100] Otherwise, the harmless error test is applied to determine if the error is harmless beyond a reasonable doubt.[101] The harmless error test can be applied to error in the instructions on the elements, even when the instructions omit elements or incorrectly describe or presume elements.[102] In this case, as pertains to the lesser included offense of assault consummated by a battery, the instruction improperly directed the members to presume offensive toughing, if they found certain predicate facts. The Government still had the burden to prove the predicate facts beyond a reasonable doubt. The court found that this was not so intrinsically harmful to be a structural error and require automatic reversal, so the court applied the harmless error test.[103] In applying the harmless error test, the court looked at two factors: whether the element was contested; and whether the element was supported by overwhelming evidence.[104] Because LT Upham did not contest the offensive touching aspect of the aggravated assault and there was overwhelming evidence of offensive touching, including the testimony of the accused, the CAAF concluded that the error was harmless.[105]

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* (alteration in original).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 86.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 87.

[104] *Id.*

[105] *Id.*

Next the CAAF looked at whether the CGCCA could approve a conviction for the lesser included offense of assault consummated by a battery, when both parties waived it and the military judge did not instruct the members on it.[106] The courts of criminal appeals have the statutory authority to approve only so much of a finding as includes a lesser included offense.[107] Also, the COMA has held that an appellate court "may substitute a lesser-included offense for the disapproved findings. This is true even if the lesser-included offense was neither considered nor instructed upon at the trial of the case."[108] Based on legislation and case law, the CAAF concluded that the CGCCA was not precluded from approving a conviction for the lesser included offense of assault consummated by a battery.[109]

Although it was not necessary for the CAAF to address the underlying instructional error, it warrants discussion, because counsel often request instructions that are similarly erroneous. The instruction apparently came from a long line of cases affirming convictions of aggravated assault for engaging in sexual intercourse while knowingly HIV-positive. However, the language comes from appellate opinions that were considering sufficiency of the evidence or the providence of a guilty plea.[110] The appellate courts were not creating a rule of law or a mandatory presumption. However, the language in those appellate opinions may confuse counsel.

For example, in *United States v. Schoolfield*, the COMA stated, "Of course, in *United States v. Joseph*, 37 M.J. at 395–96, this Court recently held that protected or unprotected sexual intercourse by an HIV-infected soldier with another person *without informing* that person of the disease constituted an intentional offensive touching under Article 128 (an assault)."[111] In *Joseph*, the COMA had stated, "We hold that a rational fact finder could find, beyond a reasonable doubt, that appellant's conduct amounted to an assault consummated by a battery on Petty Officer W."[112]

Also, in *United States v. Bygrave*, the CAAF stated:

> This Court has made clear on numerous occasions that an HIV-positive servicemember commits an aggravated assault by having unprotected sexual intercourse with an uninformed partner. . . . Accordingly, we have held that any time a servicemember "willfully or deliberately" exposes another person to HIV, that servicemember may be found to have acted in a manner "likely to produce death or grievous bodily harm."[113]

The court cited to *Joseph*, which stated, "Depending on the circumstances of a particular case, we believe a fact finder could rationally find even ostensibly protected intercourse to be a 'means . . . likely to produce death or grievous bodily harm.'"[114]

Taking this language out of context, as counsel sometimes do when requesting instructions, results in an instruction that removes elements from consideration by the court members, if the predicate facts are proven. When counsel request a specific instruction that takes the holding of an appellate court out of context, the military judge should refuse to give the instruction, because it is incorrect.[115]

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[106] *Id.*

[107] *See* UCMJ art. 59(b) (2008).

[108] United States v. McKinley, 27 M.J. 78, 79 (C.M.A. 1988).

[109] *Upham*, 66 M.J. at 88.

[110] *See* United States v. Dacus, 66 M.J. 235 (C.A.A.F. 2008) (holding that the accused's pleas of guilty to aggravated assault for engaging in sexual intercourse with partners without informing them of his HIV-positive condition were provident, even though his low viral low made the risk of transmission low); United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997) (holding evidence of the accused's unprotected sexual intercourse, with partner who knew the accused was infected with the HIV virus and consented, was legally sufficient for aggravated assault with a means likely to cause death or grievous bodily harm); United States v. Klauck, 47 M.J. 24 (C.A.A.F. 1997) (holding that evidence that the accused's sexual intercourse with partner whom he did not inform of his HIV-positive status was legally sufficient for conviction of aggravated assault, despite use of a condom); United States v. Schoolfield, 40 M.J. 132 (C.M.A. 1994) (holding that evidence of unprotected sexual intercourse by accused, who is knowingly infected with the HIV virus is legally sufficient for conviction of aggravated assault); United States v. Joseph, 37 M.J. 392 (C.M.A. 1993) (holding that evidence of ostensibly protected sexual intercourse, without informing partner of HIV infection, was legally sufficient for conviction of aggravated assault with a means likely to cause death or grievous bodily harm).

[111] *Schoolfield*, 40 M.J. at 136.

[112] *Joseph*, 37 M.J. at 396.

[113] 46 M.J. at 492 (quoting *Joseph*, 37 M.J. at 396).

[114] *Id.* (quoting *Joseph*, 37 M.J. at 396).

[115] *See* United States v. Zamberlan, 45 M.J. 491, 492 (C.A.A.F. 1997); United States v. Eby, 44 M.J. 425, 428 (C.A.A.F. 1996); United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993).

Military justice practitioners can learn lessons for both the appellate level and the trial level from *Upham*. On the appellate level, determining the standard to be applied could be critical in deciding whether instructional error requires reversal of the conviction. Also, an appellate court can approve a conviction for a lesser included offense, even if both parties at trial waived an instruction on it and the members never considered it. On the trial level, practitioners need to read appellate opinions in context, and not propose instructions that improperly remove consideration of issues from the court members.

Gambler's Defense

In *United States v. Falcon*,[116] the CAAF considered the viability of the "Gambler's Defense."[117] Postal Clerk Seaman (SN) Falcon pled guilty to three specifications of making and uttering checks without sufficient funds, in violation of Article 123a, UCMJ, and other offenses.[118] In all, SN Falcon wrote forty-nine checks for $4300.00 to two enlisted clubs.[119] After cashing these checks, SN Falcon used the money to play the slot machines located near the cash cages in the clubs.[120] Seaman Falcon did not have enough money in his checking account to cover the checks.[121] The military judge accepted SN Falcon's plea without discussing the "Gambler's Defense" with him.[122] On appeal, SN Falcon claimed his plea was improvident because the judge failed to advise him of this defense.[123]

The COMA has refused to "act as the 'strong arm' of a collection scheme for gamblers within the service in order to intimidate payment by 'debtors' of void gambling debts."[124] The early cases involve illegal gambling; at that time, all gambling was illegal.[125] The "Gambler's Defense" was extended to transactions related to legal gambling in *United States v. Wallace*.[126]

In *United State v. Wallace*, Major (MAJ) Wallace was convicted of wrongfully and dishonorably failing to place and maintain sufficient funds in his checking account to cover checks that he had written, as a violation of Article 134, UCMJ.[127] He was also convicted of a similar offense charged as a violation of Article 133, UCMJ.[128] Major Wallace was a frequent patron of the officers' club, where he played the slot machines.[129] He wrote checks to the club to get rolls of quarters, which he used to play the slot machines.[130] When individual checks were returned, the club would add the amount of the check to Major Wallace's monthly club account.[131] Major Wallace would then pay the monthly bill with another check.[132] If that check bounced, the amount of the check would be added to the next month's balance.[133] Major Wallace was a member of the

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[116] 65 M.J. 386 (C.A.A.F. 2008).

[117] *See* United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966).

[118] *Falcon*, 65 M.J. at 387.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 387.

[123] *Id.* at 387–88.

[124] United States v. Walter, 23 C.M.R. 274, 278 (C.A.A.F. 1957); *see also* United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958).

[125] "There is no doubt that gambling is illegal in the great majority of jurisdictions in the United States either by statute or by judicial interpretation of the public policy." *Walter*, 23 C.M.R. at 276.

[126] 36 C.M.R. 148.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 149.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

club's Board of Governors, and club personnel were well aware of his routine and character.[134] No one was concerned that the debt would not be paid, but the debt was discovered when the club's records were audited.[135]

In *Falcon*, the CAAF first considered whether the "Gambler's Defense" applied to violations of Article 123a.[136] Earlier cases, like *Wallace*, involved the dishonorable failure to maintain sufficient funds in violation of Article 134. The court noted the difference in the elements of the different bad check offenses. The bad check offense under Article 134 requires that the accused dishonorably fail to maintain funds in his checking account after the check is written.[137] This offense requires only bad faith or gross indifference on the part of the accused, not a specific intent to defraud.[138] The bad check offenses under Article 123a, on the other hand, require knowledge by the accused that he did not or would not have sufficient funds or credit with the bank at the time of the check's presentment, and either the intent to defraud or the intent to deceive.[139] The CAAF used this difference to distinguish *Wallace.* The court compared the bad check offenses and noted that the conduct of the payee could not affect the accused's specific intent, whereas the payee could affect the mens rea required for Article 134 bad check offense, like in *Wallace.*[140] Based on these differences, the court concluded that the defense did not extend to offenses under Article 123a, UCMJ, and the military judge properly accepted Falcon's plea.[141]

The CAAF, however, did not stop there. Even though it was not necessary to decide the issue presented, the CAAF decided to revisit the *Wallace* decision.[142] The Gambler's Defense was initially created to prevent the courts from enforcing debts created by illegal gambling.[143] *Wallace* extended the Gambler's Defense to legal gambling because "[w]hether gaming is legal or illegal, transactions involving the same or designed to facilitate it are against public policy, and the courts will not lend their offices to enforcement of obligations arising therefrom."[144] The CAAF reviewed the change in gambling's popularity and acceptance over the last forty years and came to the conclusion that *Wallace* should be overturned.[145]

The lessons for military justice practitioners are pretty straight-forward. First, the Gambler's Defense was not extended to bad check offenses under Article 123a. Second, the Gambler's Defense is no longer available for bad check offenses under Article 134 if the bad checks were written to pay *legal* gambling debts. This part of the court's decision can be characterized as *dicta,* but it is very clear *dicta.* Finally, the *Falcon* decision does not affect debts created by *illegal* gambling.[146] Counsel should be aware that the impact of *Falcon* has been captured in an approved interim change to the *Benchbook.*[147]

Mistake of Fact Defense

In *United States v. Wilson* the CAAF considered whether the mistake of fact as to age defense is available when the accused is charged with sodomy with a child under sixteen.[148] Private (PVT) Wilson pled guilty to carnal knowledge and

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[134] *Id.*

[135] *Id.* at 148–49.

[136] United States v. Falcon, 65 M.J. 386, 388–89 (C.A.A.F. 2008).

[137] UCMJ art. 134 (2008).

[138] *Id.*

[139] *Id.* art. 123a. Article 123a contains two separate offenses. The first offense proscribes making, drawing, uttering or delivering a bad check for the procurement of any article or thing of value, with the intent to defraud. *Id.* The second offense proscribes making, drawing, uttering or delivering a bad check for the payment of any past due obligation, or for any other purpose, with the intent to deceive. *See id.* It is very important to match the specific intent with the correct purpose. *See* United States v. Hardsaw, 49 M.J. 256 (C.A.A.F. 1998); United States v. Wade, 34 C.M.R. 287 (C.M.A. 1964).

[140] In *Wallace*, the club employees knew MAJ Wallace and his check-writing habits. *Wallace*, 36 C.M.R. at 149. This had an impact on whether MAJ Wallace's conduct was dishonorable. *See supra* note 103 and accompanying text.

[141] *Falcon*, 65 M.J. at 389.

[142] *Id.*

[143] *See* United States v. Walter, 23 C.M.R. 274 (C.M.A. 1957); United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958).

[144] *Wallace*, 36 C.M.R. at 149.

[145] *See Falcon*, 65 M.J. at 390.

[146] *Id.* at 390 n.6.

[147] *See* App.

[148] 66 M.J. 39, 40 (C.A.A.F. 2008).

sodomy with a fifteen-year-old girl. During the providence inquiry, the accused told the military judge that at their first meeting the girl told him that she was eighteen.[149] When explaining the offenses to PVT Wilson, the military judge told him that ignorance or mistake of the girl's true age is not a defense.[150] The Army Court of Criminal Appeals affirmed the military judge's decision to accept the plea.[151]

The court began its analysis with the general rule that a mistake of fact defense is available when the mistaken fact negates a required mental state.[152] The court also noted that even when statutes do not provide a mens rea to a particular element, the court can infer an intent to effectuate the common law rule favoring mens rea.[153] If there is an explicit or implicit intent, Rule for Courts-Martial (RCM) 916(j)(1) allows a mistake of fact of defense.[154] In addition, an appropriate policy-maker can create a mistake of fact defense even when the statute does not explicitly or implicitly require a mens rea for a particular fact.[155]

Noting that sodomy between consenting adults may be constitutionally protected, the court examined the second element of sodomy—that the girl was under the age of sixteen—to determine whether it contained a mens rea requirement, that is, that the accused knew that she was under sixteen.[156] The court points out that this element is not included in the text of Article 125; Congress did not include an explicit intent or knowledge requirement for that offense.[157] The second element was added by the President using his authority under Article 56, UCMJ to provide a factor that may be pled and proven to increase the maximum punishment, but, the court found, the President did not include an explicit mens rea when he added this element.[158]

Moving to the second part of the analysis, the CAAF declined to imply a mens rea for this fact based on the "the age of the child in sexual offenses involving children" exception to the common law rule favoring mens rea.[159] The court surveyed other jurisdictions and noted that "[i]n those jurisdictions that have departed from the historical treatment of sexual offenses involving children and permitted a mistake of fact defense with respect to the age of the child, the changes have almost always been made by the appropriate policymakers, not the judiciary."[160] The CAAF was unwilling to infer a *mens rea* for the age of the child when so many other courts that considered the issue did not.

Finally, the CAAF concluded that neither Congress nor the President created a mistake of fact as to age of the child defense.[161] The court discussed the disparate treatment of this defense created by the differences between Articles 120 and 125, UCMJ.[162] The court also examined executive action and concluded that the President had several opportunities to add a mistake of fact defense for sodomy with a child, but did not.[163] The court rejected the idea that Congress or the President intended to harmonize all sexual offenses, but simply overlooked Article 125.[164]

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[149] The accused must have learned the girl's true age before engaging with sexual intercourse with her because the accused pled guilty to carnal knowledge and mistake of fact as to age was not an issue. *Id.*

[150] *Id.*

[151] *Id.* at 47.

[152] *Id.* at 40.

[153] *Id.*

[154] *Id.*

[155] *Id.* at 40–41.

[156] *Id.* at 41.

[157] *Id.* at 41–42.

[158] *Id.* at 42.

[159] *Id.* at 43.

[160] *Id.* at 44.

[161] *Id.* at 45–47.

[162] Article 120 includes a limited mistake of fact defense, where Article 125 does not. *See* UCMJ arts. 120, 125 (2008).

[163] *Mitchell*, 66 M.J. at 47.

[164] *Id.*

> We decline to redraft Article 125, UCMJ, to include a defense that Congress might have added, but did not. . . .
>
> . . . .

The lesson for military justice practitioners is simple: "there is no mistake of fact defense as to the child's age for [sodomy with a child under the age of sixteen]."[165] Mistake of fact as to age is a defense to aggravated sexual assault of a child, aggravated sexual abuse of a child, abusive sexual contact with a child and indecent liberty with a child if the accused had an honest and reasonable belief that the child had attained the age of sixteen and the child was over twelve.[166]

Aider and Abettor Liability

In *United States v. Mitchell*, the CAAF addressed a subtle nuance of aider and abettor liability: what mens rea is required for an aider and abettor of a specific intent crime? [167] Corporal (Cpl) Mitchell was convicted of several offenses, including indecent assault as an aider and abettor.[168] He pled guilty to indecent assault, and the military judge explained aider and abettor liability to him using the standard instructions from the *Benchbook*.[169] The judge also advised the accused of the elements of indecent assault, including the element that the act be "done with the intent to gratify lust or sexual desires."[170] The judge did not specify whether Cpl Mitchell had to intend to gratify his lust or sexual desires or the perpetrator's lust or sexual desires.[171] The plea colloquy and the stipulation of fact amply established that Cpl Mitchell acted with the intent to gratify the lust or sexual desires of the perpetrator.[172] On appeal, the defense argued that this was insufficient based on interpretive guidance from the Manual for Courts-Martial that suggests that an aider and abettor must have same specific intent as the perpetrator.[173] The court considered "whether a person can be convicted as a principal by aiding and abetting absent proof that the person possessed the intent required of the actual perpetrator of the offense."[174]

The court pointed out that the military evolution of aiding and abetting is consistent with its common law development.[175] Further, the court made it clear that when interpretive guidance like the MCM conflicts with the court's precedent, the court will follow its precedent unless there is some indication that the President sought to alter the state of the law.[176] The court reminds us that "aiding and abetting requires proof of the following: '(1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of the offense.'"[177] Applying these requirements to the facts of the case, the court found that the plea colloquy and stipulation of fact established each of these requirements, and the court held that the trial judge properly accepted the accused's guilty plea.[178]

> While legislative or executive inaction is not dispositive, the fact that neither Congress nor the President have acted with respect to Article 125, UCMJ, or the *MCM*, while specifically adding, and then maintaining, a mistake of fact defense with respect to the age of the child for Article 120, UCMJ, cuts against the suggestion that either Congress or the President intended to harmonize the legislative scheme.

Id.

[165] *Id*.

[166] UCMJ art. 120(o)(2).

[167] 66 M.J. 176 (C.A.A.F. 2008).

[168] *Id.* at 177.

[169] *Id.* at 178.

> The military judge stated that "an aider and abettor must knowingly and willfully participate in the commission of the crime as something he wishes to bring about and must aid, encourage, or excite the person to commit the criminal act." In addition, the military judge informed Appellant that he must have "consciously share[d] in the perpetrator's actual criminal intent" but did not have to "agree with or even have knowledge of the means by which [the perpetrator] carried out that criminal intent."

Id.

[170] *Id.* at 179.

[171] *Id.*

[172] *Id.* at 179–80.

[173] "When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an 'other party' to crime." *Id.* at 179; *see also* MCM, *supra* note 18, para. 1.b.(4).

[174] *Mitchell*, 66 M.J. at 178.

[175] *Id.* at 179.

[176] *Id.*

[177] *Id.* at 180 (citing United States v. Pritchett, 31 M.J. 213, 217 (C.M.A. 1990)).

[178] *Id.*

The lesson for military justice practitioners is that paragraph 1.b.(4) of Part IV of the *MCM* is not a correct summary of the law on this point. The CAAF precedent does not require that an aider and abettor possess the same specific intent as the perpetrator. An aider and abettor must have the specific intent to facilitate the commission of a crime by the perpetrator. When drafting elements for instructions or a guilty plea, the military judge should draft the elements of the offense committed with the perpetrator's name, including the specific intent element if the offense is a specific intent crime. The judge should then add the additional element or elements for aider and abettor liability drafted with the accused as the subject.[179]

Conclusion

This article will help criminal law practitioners stay current with legal developments that affect instructions. The *Benchbook* remains the primary resource for instructions. The *Benchbook*, however, is only the first step for writing instructions, preparing for providence inquiries, or conducting legal research. As this article illustrates, the law develops and the instructions must keep up.

[179] Instruction 7-1 of the *Benchbook* provides a good example that incorporates all of the requirements of aider and abettor liability into one element. *See* BENCHBOOK, *supra* note 2, instr. 7-1. A judge could, however, add the elements listed in *United States v. Pritchett*, to the elements of the committed offense. *See supra* note 177 and accompanying text.

REPLACE NOTE 4 of Instruction 3-49-1. CHECK, WORTHLESS, WITH INTENT TO DEFRAUD (ARTICLE 123a), with the following new NOTE 4:

NOTE 4: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966), United States v. Allberry, 44 M.J. 226 (C.A.A.F. 1996); United States v. Green, 44 M.J. 828 (Army Ct. Crim. App. 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Falcon, 65 M.J. at 390 n.4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 C.M.R. 275 (C.M.A. 1957), and United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, 65 M.J. at 390 n.6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was)(were) written to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ may not be used to enforce worthless checks used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in specification(s) _____ of Charge(s) _____, you must be convinced beyond reasonable doubt that the check(s) in question (was)(were) not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). Even if the check(s) (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to or did not actively facilitate the illegal gambling, or otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he)(she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced beyond a reasonable doubt was not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting (that)(those) value(s) of which you are convinced beyond a reasonable doubt (was)(were) not used to (pay a debt from gambling illegally)(obtain proceeds to gamble illegally).)

REPLACE NOTE 2 of Instruction 3-49-2. CHECK, WORTHLESS, WITH INTENT TO DECEIVE (ARTICLE 123a), with the following new NOTE 2:

NOTE 2: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's

defense"). See United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966), United States v. Allberry, 44 M.J. 226 (C.A.A.F. 1996); United States v. Green, 44 M.J. 828 (Army Ct. Crim. App. 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Falcon, 65 M.J. at 390 n.4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 C.M.R. 275 (C.M.A. 1957), and United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, 65 M.J. at 390 n.6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was)(were) written to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The Uniform Code of Military Justice may not be used to enforce worthless checks used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in specification(s) _____ of Charge(s) _____, you must be convinced beyond reasonable doubt that the check(s) in question (was)(were) not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). Even if the check(s) (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to or did not actively facilitate the illegal gambling, or otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he)(she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced beyond a reasonable doubt was not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting (that)(those) value(s) of which you are convinced beyond a reasonable doubt (was)(were) not used to (pay a debt from gambling illegally)(obtain proceeds to gamble illegally).)

REPLACE NOTE 1 of Instruction 3-68-1. CHECK—WORTHLESS—MAKING AND UTTERING—BY DISHONORABLY FAILING TO MAINTAIN SUFFICIENT FUNDS (ARTICLE 134), with the following new NOTE 1:

NOTE 1: Gambling debts and checks for gambling funds. In United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966), United States v. Allberry, 44 M.J. 226 (C.A.A.F. 1996); United States v. Green, 44 M.J. 828 (Army Ct. Crim. App. 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable

doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Falcon, 65 M.J. at 390 n.4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 C.M.R. 275 (C.M.A. 1957), and United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, 65 M.J. at 390 n.6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the check was used to pay a debt from illegal gambling or the check was used to obtain funds to gamble illegally, the first paragraph of the instruction below should be given. If there is an issue that some but not all of the check arose from an illegal gambling debt or was used to obtain funds for illegal gambling, the fourth paragraph of the instruction below should also be given.

The evidence has raised the issue whether the check(s) in question (was)(were) written to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ may not be used to enforce worthless checks used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally) when the purported victim (or payee of the check) was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in specification(s) _____ of Charge(s) _____, you must be convinced beyond reasonable doubt that the check(s) in question (was)(were) not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). Even if the check(s) (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally), if you are convinced beyond reasonable doubt that the purported victim (or payee of the check) was not a party to or did not actively facilitate the illegal gambling, or otherwise did not have knowledge of the illegal gambling-related purpose of the check, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(Also, if you find beyond reasonable doubt that the accused intentionally, that is, purposely, avoided the check-cashing facility's efforts to discover that (he)(she) was on a dishonored or "bad check" list, you may find the accused guilty notwithstanding the UCMJ limitation I mentioned, when all other elements of the offense have been proven beyond a reasonable doubt.)

(The evidence has also raised the issue whether all or only part of the check(s) in question (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). The UCMJ limitation I mentioned only extends to that part of the check's(s') proceeds that (was)(were) used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the check(s) which you are convinced beyond a reasonable doubt was not used to (pay a debt from gambling illegally)(obtain funds with which to gamble illegally). You do this by excepting the value(s) alleged in the specification(s) and substituting (that)(those) value(s) of which you are convinced beyond a reasonable doubt (was)(were) not used to (pay a debt from gambling illegally)(obtain proceeds to gamble illegally).)

REPLACE NOTE 1 of Instruction 3-71-1. DEBT, DISHONORABLY FAILING TO PAY (ARTICLE 134), with the following new NOTE 1:

NOTE 1: Gambling debts. In United States v. Falcon, 65 M.J. 386 (C.A.A.F. 2008), the CAAF overruled its historical position that public policy prevents using the UCMJ to enforce debts incurred from legal gambling and checks written to obtain proceeds with which to gamble legally (commonly called the "gambler's defense"). See United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966), United States v. Allberry, 44 M.J. 226 (C.A.A.F. 1996); United States v. Green, 44 M.J. 828 (Army Ct. Crim. App. 1996).

Note that the CAAF in Falcon declined to apply "a sweeping defense based on public policy" to allegations that third-party complicity negates a required element of an offense, stating the issue would be addressed on a case-by-case basis. The CAAF reiterated that the government maintains the burden of proving each element beyond a reasonable doubt and the accused remains free to raise such facts that show his conduct does not satisfy a necessary element. Falcon, 65 M.J. at 390 n.4.

The CAAF also specifically declined to address the ongoing validity of United States v. Walter, 23 C.M.R. 275 (C.M.A. 1957), and United States v. Lenton, 25 C.M.R. 194 (C.M.A. 1958), because Falcon dealt with legal gambling and Walter and Lenton dealt with illegal gambling. Falcon, 65 M.J. at 390 n.6. Until the CAAF specifically addresses the ongoing validity of Walter and Lenton, if there is an issue whether the debt(s) arose from illegal gambling, the first

two paragraphs of the instruction below should be given. If there is an issue that some but not all of the debt(s) arose from illegal gambling, the third paragraph of the instruction below should also be given.
The evidence has raised the issue whether the debt(s) in question (was)(were) from gambling illegally. The UCMJ may not be used to enforce debts from gambling illegally when the purported victim was a party to, or actively facilitated, the gambling.

To find the accused guilty of the offense in specification(s) _____ of Charge(s) _____, you must be convinced beyond reasonable doubt that the debt(s) in question (was)(were) not (a) debt(s) from gambling illegally. Even if the debt(s) (was)(were) from gambling illegally, if you are convinced beyond reasonable doubt that the purported victim was not a party to or did not actively facilitate the illegal gambling, or otherwise did not have knowledge of the illegal gambling-related purpose of the debt, you may find the accused guilty when all other elements of the offense have been proven beyond a reasonable doubt.

(The evidence has also raised the issue whether all or only part of the debt(s) in question (was)(were) (a) debt(s) from gambling illegally. The UCMJ limitation I mentioned only extends to that part of the debt(s) that (was)(were) from gambling illegally. If you find this is the case and all other elements of the offense have been proven beyond a reasonable doubt, you may find the accused guilty by exceptions and substitutions only to that part of the debt(s) which you are convinced beyond a reasonable doubt (was)(were) not from gambling illegally. You do this by excepting the sum(s) alleged in the specification(s) and substituting (that)(those) sum(s) of which you are convinced beyond a reasonable doubt (was)(were) not from gambling illegally.)