Surviving the Multiplicity/LIO Family Vortex[1]

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I. Introduction

Drafting or reviewing court-martial charges is one of the most important, and maddening, jobs in military justice. Unresolved issues can be fatal to the case several years after trial, and at least four complicated legal doctrines must be applied: multiplicity; lesser included offenses; unreasonable multiplication of charges; and multiplicity for sentencing. Each is marked by hard turns and at least one total reversal. For example, in 2009, lesser included offense doctrine underwent a complete about-face in *United States v. Miller*.[2] Less than a year later, the Court of Appeals for the Armed Forces (CAAF) swept away an important aspect of *Miller* in yet another restructuring of military lesser included offense (LIO) doctrine.[3]

Moreover, each doctrine flows from the common "multiplicity" ancestor so there is a lot of overlap between the four modern doctrines. Well into the 1990s, the word "multiplicity" served as an omnibus term encompassing all four doctrines within the family.[4] A "multiplicity" objection could subsequently trigger a four part analysis.[5] Courts of this period were not always clear on which part of the existing multiplicity doctrine they relied on when deciding cases. This history is reflected in the *Manual for Courts-Martial* (*MCM*), which often illustrates both an incorrect and misleading multiplicity analysis.[6]

It is not surprising that the multiplicity family has been described as "chaos" and the "Sargasso Sea" of military and federal law;[7] or, similar to the Sargasso Sea, a vortex that sucks in all sorts of debris, traps sailors for months, and causes great suffering.[8] At the very least, the four intertwined descendants share an extremely complicated and evolving history that is woven together in a way that even appellate courts find confusing at times.[9]

It's easy to see why. After reviewing the cases and *MCM* provisions, one can fairly conclude that these legal doctrines involve only a difficult series of rules that change every few years. This article, however, takes a more optimistic view, and intends to provide practitioners with a

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[1] This compact analytical framework is not based on any particular fact pattern or case. It is neither an advance ruling in any specific case, or a directive that Coast Guard trial judges adopt a particular view of any of the issues discussed. It is also not a comprehensive guide on how to fully resolve all aspects of these four doctrines. Courts, after struggling with the multiplicity family vortex for decades, have yet to produce such guidance. This framework simply provides some clarity on how to approach, conceptualize, and analyze these intertwined issues.

[2] The *Miller* court overruled prior cases holding that clauses 1 and 2 of Uniform Code of Military Justice (UCMJ) art. 134 (2008) were *per se* included in every enumerated offense and therefore "necessarily included" under Article 79, UCMJ. 67 M.J. 385 (C.A.A.F. 2009). This completed an important transition to a pleading-elements approach in military lesser included offense doctrine. *Infra* note 33.

[3] United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010). *See supra* note 2. The *Jones* case, without any specific comment on rejection of the pleading-elements approach, changed the military to a statutory elements approach for LIOs. *Jones*, at 471.

[4] United States v. Johnson, 26 M.J. 415 (C.M.A. 1988) (multiplicity challenge resolved on the basis that the two charges were multiplicious for sentencing); United States v. Teters, 37 M.J. 370, 373 (C.A.A.F. 1993) (discussing a three-step analysis of multiplicity in terms of charging, findings, and sentencing that was first recognized in United States v. Baker, 14 M.J. 361 (C.M.A. 1983)).

[5] *See Baker*, 14 M.J. 361.

[6] For example, some of the multiplicity language in the discussion of Rule for Court-Martial (RCM) 1003(c)(1)(C) is from a discarded judicial test for unreasonable multiplication of charges. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(c)(1)(C) discussion (2008) [hereinafter MCM]. Michael Breslin & LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed*, 45 A.F. L. REV. 99, 126 (1998). Also, the discussion of RCM 907(b)(3)(B) is partially based on cases, including *United States v. Gibson*, 11 M.J. 435 (C.M.A. 1981), that predate major reversals in multiplicity and lesser included offense doctrine. MCM, *supra*, R.C.M. 907(b)(3)(B) drafters' analysis, at A21-58. Moreover, the lead opinion in the most recent case, *Gibson*, doesn't explicitly focus on any particular legal doctrine by name. *Gibson*, 11 M.J. at 437. As a result, the discussion reflects the pre-1995 equation that "multiplicity" = multiplicity + lesser included offenses (LIO) + unreasonable multiplication of charges + multiplicity for sentencing. MCM, *supra*, R.C.M. 907(b)(3)(B) discussion; *see infra* Parts II and III.A. *Jones*, 68 M.J. at 474 (Baker J. dissenting) (listing additional *MCM* inaccuracies while the main opinion limits the applicability of much of paragraph 3b(1)). MCM, *supra*, pt. IV, para. 3b(1); *Infra* note 51 and accompanying text.

[7] Albernaz v. United States, 450 U.S. 333, 343 (1981); *Baker*, 14 M.J. at 372 (Cook, J., dissenting); United States v. Roberson, 43 M.J. 732, 734 (A.F. Ct. Crim. App. 1995) (*rev'd* on other grounds).

[8] The Sargasso Sea is a region in the middle of the North Atlantic Ocean surrounded by ocean currents. It is the only "sea" without shores. Historically, sailing ships became trapped here for lengthy periods due to the often calm winds. The wait often caused suffering and death. Today, the surrounding surface currents cause the Sargasso to accumulate a high concentration of non-biodegradable plastic waste. Sargasso Sea, *available at* http://en.wikipedia.org/wiki/Sargasso_Sea.

[9] In *United States v. Weymouth*, 43 M.J. 329 (C.A.A.F. 1995), the court considered the question of whether various assault offenses were lesser included offenses of attempted murder. On this issue of law, the court found the trial judge "technically" wrong on the law; however, the majority upheld the trial ruling on the grounds that the military judge did not "abuse his discretion." Of course, matters of law are reviewed *de novo.* Use of the "abuse of discretion" standard indicates that the court may have lost situational awareness and applied the standard of review for unreasonable multiplication of charges. United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004) (unreasonable multiplication of charges ruling is reviewed for abuse of discretion). For a complete discussion of this and other examples of the widespread confusion, see Breslin & Coacher, *supra* note 6, at 102–09.

succinct framework on how to successfully navigate the often confusing multiplicity/LIO "family vortex."

II. Lesser Included Offenses (LIOs): The Core Issue Is Due Process Notice

The court-martial process begins with an allegation contained in a specification. A specification is a plain, concise, and definitive statement of the essential facts constituting the charged offense.[10] A legally sufficient specification must: (1) allege all the elements of the offense; (2) provide notice to the accused of what he must defend against; and (3) give sufficient facts to protect against double jeopardy for the same offense.[11]

The LIO doctrine focuses on providing the required notice to the accused.[12] Adequate notice is critical because an accused may be found guilty of any offense "necessarily included" in the charged offense; an attempt to commit the charged offense; or an attempt to commit an offense that is "necessarily included" in the charged offense.[13] Moreover, reviewing authorities may set aside the trial findings and instead approve or affirm any LIO.[14] As a matter of due process, the accused is entitled to notice of those lesser included offenses applicable to the greater offenses listed on the charge sheet.[15]

The first published 1951 *MCM* appears to take a fairly narrow approach to the LIOs permitted by Article 79, Uniform Code of Military Justice (UCMJ). At the beginning, an offense could only be a LIO if all the elements of the lesser offense were necessary elements of the greater offense charged. [16] The *MCM* further defined an LIO as follows: "An offense found is not included within an offense charged if it requires proof of any element not required in proving the offense charged. . . ."[17] This apparent simplicity, however, was contradicted by an appendix listing various Article 134 general offenses as LIOs of many enumerated offenses such as riot, murder, and rape.[18] The 1951 *MCM* did not explain how the additional elements exclusive to Article 134 offenses—prejudice to good order and discipline or discredit to the armed forces—now became elements of the greater charged offenses.[19]

Given this historical inconsistency, it is not surprising that the LIO doctrine underwent several interpretations of when offenses were "necessarily included" under Article 79. The courts zigzagged through various tests.[20] Lesser included offense doctrine eventually became a confusing "Hydra" analysis involving issues of double jeopardy, double punishment, *sua sponte* instructions, duplicity, and multiplicity.[21] Chief Judge Crawford's Hydra metaphor is particularly apt since, in Greek mythology, cutting off one head of the Hydra in an attempt to kill the monster only caused it to grow two more.[22]

In 1994, the CAAF attempted to kill the monster by adopting the federal statutory elements test for all non-Article 134 LIOs.[23] Under Article 79, the test required that an offense was "necessarily included" if the statutory elements of the greater offense were proof of the lesser

[10] MCM, *supra* note 6, R.C.M. 307(c)(3) & discussion.

[11] United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953). The requirement that the specification protect against double jeopardy is addressed in the multiplicity section of this article. *Infra* Part III.A.

[12] United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009). Due Process under the Constitution requires that an accused be on notice of the offense that must be defended against, and only lesser included offenses that meet these notice requirements may be affirmed by an appellate court. *Id*. at 388 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).

[13] UCMJ art. 79 (2008).

[14] *Id.* art. 59(b).

[15] *Sell*, 11 C.M.R. at 206; *Miller*, 67 M.J. at 388.

[16] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 158 (1951) [hereinafter 1951 MCM].

[17] *Id*.

[18] *Id*. app. 12 (listing various Article 134 offenses as LIOs of many enumerated offenses). Article 134 contains the additional elements of either prejudice to good order and discipline or discredit to the armed forces.

[19] While subsequent case law didn't squarely address the issue, it indicates that the required due process notice of these Article 134 LIOs is provided by the statutory elements, pleadings, and proof at trial. *Infra* note 33. This is known as a pleading-elements-proof approach to LIOs

[20] United States v. Weymouth, 43 M.J. 329, 332, 334, 335 (C.A.A.F. 1995) (inherent relationship test) (fairly embraced concept). This is only a partial list of the many formulations of the now-discarded tests. For a more complete history discussion of the old tests, see James A. Young III, *Multiplicity and Lesser Included Offenses*, 39 A.F. L. REV. 159 (1996).

[21] *Weymouth*, 43 M.J. at 342 (Crawford, J., concurring in the result).

[22] Lernaean Hydra, http://en.wikipedia.org/wiki/Lernaean_Hydra. One example of the Hydra-like aspect of the law involves the concept of merger within LIO doctrine. The LIO merger doctrine permits lesser-included offenses to be subsumed into the greater offense for purposes of findings. *E.g.*, United States v. Teters, 37 M.J. 370, 375 (C.M.A.1993). As implemented at trial, it is impossible for an accused to be convicted of both the greater and lesser included offense since the members only consider the lesser offense after acquitting on the greater. In other words, the accused cannot be convicted and punished for both offenses. As will be seen later, this sounds a lot like the double jeopardy analysis behind multiplicity. *Infra* Part III.A. A LIO analysis, therefore, sometimes became the first step in a multiplicity analysis. United States v. Johnson, 26 M.J. 415, 418–19 (C.M.A. 1988). Eventually, the merger aspect of LIO doctrine was fully assimilated into double jeopardy doctrine which made it, once again, part of multiplicity. *Teters*, 37 M.J. at 376. Thus, some pre-assimilation cases and *MCM* provisions, apparently about LIO doctrine, actually now apply to multiplicity. This partially explains why many leading multiplicity cases discuss LIO doctrine and vice versa. *See also infra* note 39 and accompanying text (providing a more recent Hydra-like example arising from the 2009 *Miller* decision).

[23] United States v. Foster, 40 M.J. 140, 142 (C.M.A. 1994). In many ways, the court moved military LIO practice back to that of the 1951 *MCM*. *Supra* notes 16–19 and accompanying text.

offense,[24] and therefore the greater offense cannot be committed without also committing the lesser.[25] Because the greater and lesser offenses share common statutory elements, the accused has full notice that he could also be convicted of the lesser offense.[26] This conclusion was based on the military courts' interpretation of Article 79, UCMJ, as informed by the nearly identical Federal Rule of Criminal Procedure 31(c).[27] At this point, both the Federal and Military justice systems employed an elements approach for determining LIOs.

Approximately a year later, in 1995, the CAAF reconsidered its position and adopted a pleading-elements approach to LIOs. Due to the differences between military and federal practice, the "elements" used to determine military LIOs consist not only of statutory elements but also other factors required to be alleged in the specification.[28] Specifically,

> the formal written accusation in court-martial practice consists of two parts, the technical charge and the specification. For offenses in violation of the code, the charge merely indicates the article the accused is alleged to have violated, while the specification sets forth the specific facts and circumstances relied upon as constituting the violation.[29]

As the court continued to largely reject the concept that trial evidence provided proper due process notice to an accused, this trend supports the theory that prior fair notice to the accused is the core issue in LIO doctrine.[30] A military accused receives fair notice through the charge sheet which provides both those elements denoted in the statutes and those necessarily alleged in the specifications.[31]

A military accused also receives fair notice from the President who, pursuant to his rulemaking authority under UCMJ Article 36(a), issues the *MCM*.[32] This notice emphasizes the qualitative aspects of the pleading-elements approach to LIOs. It tells the accused to also prepare to defend against other charges if: (1) all of the elements of the lesser offense are included in the greater, but one or more elements is legally less serious (e.g. housebreaking is a LIO of burglary); (2) all of the elements of the lesser offense are included and necessary parts of the greater, but the mental element is legally less serious (e.g. wrongful appropriation is a LIO of larceny); and (3) not all of the LIO elements are included, but the factual allegations in the specification provide the notice. (for example, assault with a dangerous weapon may be a LIO of robbery).[33]

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[24] *Weymouth*, 43 M.J. at 332, 335. This aspect of LIO doctrine is reflected in paragraph 3b(1)(a). MCM, *supra* note 6, pt. IV, para. 3b(1)(a)..

[25] United States v. Oatney, 45 M.J. 185, 188 (C.A.A.F. 1996) (Even under a much broader and subjective test, now-rejected, the entire lesser offense still had to be contained within the greater offense.).

[26] United States v. Medina, 66 M.J. 21, 27 (C.A.A.F. 2008).

[27] *Weymouth*, 43 M.J. at 331, 333.

[28] *Id.* at 340. The cited differences include the following: the importance of the specification in military practice which provides a great deal of, sometimes critical, information not contained in the statutory charge ("military offenses are not exclusively the product of statutes"); the military policy of bundling all known charges into a single trial; non-multiplicious charges may be separately punished in the military but not in the federal system; unitary sentencing in the military; and there being no federal corollary for the military concept of a "legally less serious" element. *Id*. at 335–36.

Subsequent to the *Weymouth* decision, there was arguably some narrowing of the differences between the military and federal systems—at least with respect to federal courts relying on more than just the statutory elements in some situations. *See* Rutledge v. United States, 517 U.S. 292 (1996) (discussing conspiracy to distribute controlled substances as a lesser included offense of a continuing criminal enterprise).

[29] *Weymouth*, 43 M.J. at 333–34. The *Weymouth* court also noted two potential problems in a pleading-elements approach: (1) prosecutorial abuse by deliberately omitting critical facts from the allegation to keep a related charge separate; and (2) the Government creating an additional LIO by alleging extra, non-essential facts. *Id.* at 334, 337, nn.4, 5.

[30] However, a total break from the pleading-elements-proof approach to Article 134 LIOs was not fully implemented until the 2009 *Miller* case. *See supra* note 2 and *infra* note 33 (discussing United States v. Foster).

[31] *Weymouth*, 43 M.J. at 334.

[32] *Id.* at 333–34. The President has traditionally exercised the power to make rules for governing the military, including rules for courts-martial, as commander-in-chief. Explicit statutory authority has been provided since around 1813 and currently resides in Article 36, UCMJ. MCM, *supra* note 6, drafters' analysis of Rules for Courts-Martial, at A21-1. For more on how the President exercises the rulemaking authority, see Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the* Manual for Courts-Martial *Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1 (2000). Captain Barry's reply immediately follows.

[33] MCM, *supra* note 6, pt. IV, para. 3b(1) (excluding subsection 3b(1)(a) which mostly reflects the common statutory elements test discussed at *supra* note 26 and accompanying text). Paragraph 3b(1) and (2) are based on paragraph 158 of the 1969 *MCM*. MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. 1969). MCM, *supra* note 6, para. 3, at A23-2 (drafters' analysis of the punitive articles). *See also Weymouth*, 43 M.J. at 333. The *Weymouth* court appeared to emphasize two separate sources for the required Due Process notice: the statutory elements and the separate *MCM* language. Prior to 1995, the Court of Appeals for the Armed Force (CAAF) had primarily pointed at Article 79's "necessarily included" language. For example, in *United States v. Foster*, 40 M.J. 140 (C.A.A.F. 1994), *rev'd* United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009), the court stated that Article 79 permitted elements to be implied for realistic or rational derivative offenses under Article 134. *Foster*, 40 M.J. at 143. This approach depended "upon the facts of the case." *Id*. Thus, until at least the early 1990s, offenses were "necessarily included" under Article 79 based on the statutory elements, pleadings, and proof at trial of the greater offense. *Id*. at 148 (Sullivan, C.J., concurring); United States v. Teters, 37 M.J. 370, 376 (C.M.A.1993).

The CAAF partially changed course in *Weymouth* when it rejected its prior construction of Article 79 (elements plus pleadings plus proof all required by Article 79). The *Weymouth* court clearly substituted an elements approach for non-Article 134 LIOs consistent with *Schmuck v. United States*, 489 U.S. 705 (1989). Use of the *Schmuck* test, however, created a potential conflict with some existing *MCM* language that went well beyond the statutory elements and, in some ways, reflected the earlier CAAF tests for LIOs. The *Weymouth* court put renewed emphasis on Part IV of the *MCM* as reflecting some unique aspects of military law. This

The President also provided very specific, offense-by-offense LIO listings throughout Part IV of the *MCM*.[34] Not surprisingly, courts held that this listing adequately notified an accused of the additional charges against which he must be prepared to defend against—at least in a guilty plea.[35]

After a period of relative stability, in 2009 the CAAF fully implemented the pleading-elements approach for all LIOs by revoking the special exemption it created for LIOs under Article 134.[36] In *Miller*, the court explicitly overruled prior cases holding that clauses 1 and 2 of Article 134 UCMJ were *per se* included in every enumerated offense, and that this *per se* inclusion satisfied the definition of "necessarily included" under UCMJ Article 79.[37]

At the same time, the *MCM*'s LIO listings still reflected the prior rules—including the qualitative approach to statutory elements that permitted additional elements to be created by the pleadings.[38] This raised several new issues about the presidential power to list offenses as LIOs.[39] While these regulatory lists were certainly useful and logically provided notice to the accused, did Article 79 and due process permit the President to provide the required notice in this manner?[40]

In *United States v. Jones*, the CAAF emphatically answered "no" and, with sweeping language, adopted the statutory elements test for LIOs that it had declined to fully implement in 1994 and 1995.[41] Under this language, there is only one way for an accused to receive the required notice in a contested case—"with reference to the elements defined by Congress for the greater offense."[42]

This appears to make LIO doctrine very simple. "If *all* of the elements of offense X are also elements of offense Y, then X is a LIO of Y."[43] Or, in pictorial form:

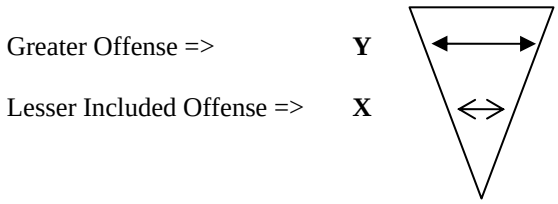

Diagram 1

Therefore, "Offense Y is called the greater offense because it contains *all* of the elements of offense X along with one or more additional elements."[44] In pictorial form, all of X must be within the inverted triangle in diagram 1. Surprisingly, the court did not even mention the discarded pleading-elements approach by name.[45] This, along with the fact that *Jones* involved a LIO arising under Article 134, coupled with a vague statement by the court on which prior cases were now overruled, still permits future flexibility.[46]

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preserved the *MCM* without reviving the very "inherent relationship" test rejected in *Teters*. It also distanced LIO doctrine, a bit, from multiplicity doctrine and highlighted that notice to the accused is the core LIO issue.

In the end, the *Weymouth* court ratified the federal statutory elements test but then pointed to the *MCM* and some unique aspects of military law as expanding the traditional understanding of elements. ("in the military, those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test."). *Weymouth*, 43 M.J. at 340. Thus, the military had a pleading-elements approach for all non-Article 134 LIOs. The *Miller* court completed implementation of the pleading-elements approach in 2009 by prohibiting implied elements to permit an un-pled Article 134 LIO. *Miller*, 67 M.J. at 389. Less than a year later, the CAAF discarded the pleading-elements approach for LIOs. United States v. Jones, 68 M.J. 465, 470 (C.A.A.F. 2010).

[34] The 1951 *MCM* contained a table of commonly included offenses in an appendix. 1951 MCM, *supra* note 16, app. 12. The information in the table was eventually broken up and the LIOs listed by each individual offense.

[35] United States v. Holland, 68 M.J. 576 (C.G. Ct. Crim. App. 2009); *Weymouth*, 43 M.J. at 342 (Crawford, C.J., concurring). The CAAF appears to have ratified this approach in *Jones*. 68 M.J. at 473. In *United States v Conliffe*, the majority gave significant weight to the notice provided by the *MCM*'s explicit LIO listing. 67 M.J. 127, 133 (C.A.A.F. 2009).

[36] *Supra* notes 2, 28–29 and accompanying text.

[37] *Miller*, 67 M.J. at 389.

[38] MCM, *supra* note 6, pt. IV, para. 3b(1) (excluding the text not contained in parenthesis in subsection 3b(1)(a), which reflects the common statutory elements test discussed at *supra* note 24 and accompanying text).

[39] United States v. McCracken, 67 M.J. 467, 468, 469 n.2 (C.A.A.F. 2009) (Baker, J., concurring in the result). For example, can the President make an Article 134 offense with different elements a LIO of an enumerated offense by simply listing it as such in the *MCM*? *Id.* Also, (1) "Whether the elements test articulated in *Schmuck v. United States*, 489 U.S. 705, 716 (1989), precludes the President from delineating certain Article 134, UCMJ, offenses as lesser included offenses of enumerated offenses absent a statutory change to the enumerated offense; (2) Whether the due process principles advanced in *Schmuck* can, as a matter of law, be satisfied through mechanisms of fair notice other than the elements test; and (3) What appellate effect, if any, does an agreement by the parties at trial that an offense is a lesser included offense have on the greater offense being considered on appeal." *McCracken*, 67 M.J. at 469 (Baker, J., concurring in the result).

[40] *Id*.

[41] *Supra* notes 28, 30, and 33 (discussing *Foster* and *Weymouth*) and accompanying text.

[42] United States v. Jones, 68 M.J. 465, 471 (C.A.A.F. 2010). This is partially a rule of statutory interpretation to determine congressional intent for Article 79. It may, for some offenses, therefore, be supplanted by more direct evidence of congressional intent.

[43] *Id*. at 470 (emphasis added). Of course, *Jones* involved a LIO arising under Article 134 so the language is dicta for other LIOs.

[44] *Id*. The court's recent decisions, therefore, basically returned military law to the original 1951 *MCM* while also correcting the original illogic that permitted LIOs to arise under Article 134 even though these offenses had at least one additional element. *Supra* notes 16–18 and accompanying text.

[45] The CAAF established the pleading-elements approach to LIOs in *Weymouth*. *Supra* notes 28–31 and accompanying text. Yet, only Judge Crawford's comment in *Weymouth* equating LIO doctrine to a Hydra is explicitly mentioned in *Jones*. *Jones*, 68 M.J. at 468.

[46] "To the extent any of our post-*Teters* cases have deviated from the elements test, they are overruled." *Jones*, 68 M.J. at 472. This intentional

Of course, few things are straightforward in the LIO/multiplicity family vortex. In footnote 9 of *Jones*, the court states that "the elements defined by Congress for the greater offense" also include the elements established by the President in the *MCM* for the enumerated Article 134 offenses.[47] Moreover, the CAAF subsequently held that the elements test does not require the use of identical statutory language. Instead, the relationship between two offenses is determined by applying the "normal principles of statutory construction."[48] In other words, the predictable bright lines of *Jones* are not yet so predictable and the *MCM* still matters.

However, the *MCM*'s LIO listings that go beyond the statutory elements approach receive little or no deference. They provide guidance to the judge advocates under the President's command regarding potential violations of Article 134, and perhaps, persuasive authority to the courts.[49] They may also be useful in a guilty plea since the accused is always free to plead not guilty to the charged offense but guilty of a named lesser included offense or guilty by exceptions and substitutions.[50] Beyond this, some parts of the *MCM* are now very misleading since the greater charged offense must contain all of the statutory elements of each LIO.[51]

The *MCM*'s explicit LIO listings may also throw the government an occasional curveball. The prosecution must charge or lose any related offenses that are not LIOs.[52] Rule for Court-Martial 307(c)(4)'s discussion section states that "[i]n no case should both an offense and lesser included offense be separately charged."[53] The question then is, does this language apply to the *MCM*'s LIOs that are no longer "necessarily included" as a matter of law? Until the *MCM* is

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vagueness may be designed to preserve future flexibility. Lesser included offenses doctrine has historically migrated between the poles of a predictable objective test and realistic flexibility. *See* United States v. Neblock, 45 M.J. 191, 201 (C.A.A.F. 1996) (Cox, C.J., concurring). It is possible, therefore, that the Jones case announced arrival at one pole before the court continues back toward the other.

In a recent update, the CAAF interpreted the relevant statutes to conclude that assault consummated by a battery, Article 128, UCMJ, is a LIO of wrongful sexual contact under Article 120, UCMJ. United States v. Bonner 70 M.J. 1 (C.A.A.F. 2011). The CAAF appears to be maintaining the strict discipline of *Jones* for LIOs arising under Article 134 while using statutory interpretation to preserve flexibility for other LIOs.

[47] *Jones* cites three specific cases as examples of the proper application of the elements test in the multiplicity context. One, *United States v. Wheeler*, treats the elements created by the President for specific Article 134 offenses as the equivalent of statutory elements. 40 M.J. 242, 246–47 (C.M.A. 1994). Neither *Wheeler* nor *Jones* explains why the elements established by the President for specific Article 134 offenses are the equivalent of statutory elements in a multiplicity analysis. However, it is probably under a theory of congressional delegation.

[48] United States v. Alston, 69 M.J. 214, 216 (C.A.A.F. 2010) (internal citation omitted). *Alston* presented the nearly ideal situation of two well-defined offenses within a statute recently enacted by the same Congress. The court easily concluded that "bodily harm" was a subset of "force." *Id.* (comparing Article 120(t)(8), UCMJ with Article 120(t)(5)(c), UCMJ). This makes aggravated sexual assault a LIO of rape by force.

[49] *Jones*, 68 M.J. at 471–72. While the court was specifically addressing Article 134 LIOs, it is obvious that offenses under Article 134 contain at least one additional statutory element than the enumerated offenses in Articles 81–132. In other words, it would normally be pointless for the President to say that any Article 134 offense is a LIO of an enumerated offense. Pleading extra words in a charged Articles 81–132 offense to reflect prejudice to good order and discipline, as suggested by *Medina*, should not be effective since only the statutory elements should matter when identifying LIOs. United States v. Medina, 66 M.J. 21, 27 (C.A.A.F. 2008). Therefore, until the next clarifications, the *Jones* language should apply to all LIOs listed in the *MCM*. This has potential implications for both the defense and prosecution since a failure to list an offense as a LIO in the *MCM* does not mean it is not a LIO under the new elements test. *Alston*, 69 M.J. at 216.

[50] *Jones*, 68 M.J. at 473. It is not entirely clear from *Jones* if a *MCM* LIO listing that exceeds the boundaries of the statutory elements approach is considered a "named" LIO. However, "an accused may choose, with convening authority approval, to plead guilty to any amended specification as long as the plea inquiry establishes that such a plea is knowing and voluntary and the plea is accepted by the military judge." United States v. Morton, 69 M.J. 12, 16 (C.A.A.F. 2010). A key practice point is that the accused must plead guilty to the other offense as opposed to being found guilty of it based on an improvident attempt to plead guilty to some other offense.

[51] *Jones*, 68 M.J at 471. Under *Jones*, all of the statutory elements of the lesser offense must be included in the greater. As discussed in *supra* note 44, the court has returned LIO doctrine to its roots in the 1951 *MCM* while also curing the original sin of permitting LIOs to arise under Article 134 even though these offenses have at least one additional element. In other words, some longstanding *MCM* language is invalid under *Jones.*

For example, housebreaking was listed as a LIO of burglary in the 1951 *MCM*. This legacy carried forward into Part IV of the 2008 *MCM*. Contrary to this language, however, housebreaking *should not* be a LIO of burglary. Housebreaking, the purported LIO, has two elements not fully contained within burglary (intent to commit *any* criminal offense therein for housebreaking as opposed to the intent to commit only certain specified offenses for burglary; and unlawful entry *at any time* for housebreaking as opposed to a *nighttime* entry for burglary). The purported LIO has elemental language that extends outside of the inverted triangle in *supra* diagram 1. It should not, therefore, be a LIO, at least under the *Jones* language. United States v. Arriaga, No. 10-0572/AF, _ M.J. _ (C.A.A.F. Feb. 7, 2011) will resolve this specific LIO question. The case's oral argument at CAAF suggested some willingness to move toward a more flexible approach to notice that might ultimately resemble the discarded pleadings-elements approach to LIOs.

Wrongful appropriation is another legacy LIO. It, on the other hand, *should* still be a LIO of larceny if courts conclude that the intent to permanently deprive or defraud fully contains the lesser intent to temporarily deprive or defraud. This would appear to be a "common sense" or "flexible" reading of the statutory elements since a permanent deprivation is forever. Forever fully includes any temporary period that is less than forever.

Yet, this is fairly close to the qualitative approach to the elements in the rejected pleading-elements doctrine. The *Jones* case, moreover, explicitly criticized "liberal standards," the "fairly embraced" test, and the "inherent relationship approach." *Jones*, 68 M.J. at 469. It also rejected LIOs "by fair implication," and the "extremely generous standard" for LIOs used by earlier courts. *Id*. It, therefore, remains to be seen if future courts will take a flexible approach based on necessity or stick with the predictable simplicity established in *Jones*. Until such guidance is provided, caution should be used when relying on the qualitative LIOs described in paragraph 3b(1)(b) & (c). MCM, *supra* note 6, pt. IV, para. 3b(1)(b) & (c).

[52] *See infra* Part III.A. Charging two offenses that are neither multiplicious nor in a greater-lesser offense relationship is permitted.

[53] MCM, *supra* note 6, R.C.M. 307(c)(4).

changed, a court might hold the government to the *MCM* listing and prohibit the charging of both offenses.[54]

The LIO portion of the Hydra may have been slain. But will it stay dead? [55] Prior courts identified legitimate reasons for the pleadings-elements approach and the multiple tests that preceded it.[56] Bright line tests sometimes produce harsh results, and preserving these tests in the face of severe outcomes requires discipline. If history is any guide, the latest round of clarifications will not be the last word in LIO doctrine.[57]

This new approach to LIOs should generate significantly longer charge sheets. The old rule, despite its faults, produced a larger number of LIOs that previously did not need to be listed on the charge sheet. While somewhat counter-intuitive, a larger number of LIOs benefits both the Government and accused.[58] The Government doesn't have to charge every conceivable theory of criminal liability.[59] The accused is protected from the prosecutor who wants to use "elemental literalism" to slice a single event into the maximum number of charges in an attempt to increase the potential sentence.[60] The old rule protected the accused from what is now called an unreasonable multiplication of charges.[61]

Under the new LIO analysis, this is no longer true since only the statutory elements should matter. How does a court resolve the tension between accurately describing the alleged misconduct and accounting for litigation contingencies, while trying to avoid overcharging? This brings us to the rest of the "family," or the related doctrines of multiplicity, unreasonable multiplication of charges, and multiplicity for sentencing.

III. Multiplicity, Unreasonable Multiplication of Charges, and Multiplicity for Sentencing

Each of these three descendents of "multiplicity" offers an avenue to dispute charging decisions while also recognizing the Government's need to account for exigencies of proof through trial, review, and appellate action.[62] Both the Government and accused have important equities at stake. Overcharging increases punitive exposure and may suggest to the members that the accused has bad character. On the other hand, omitting a closely-related offense that is not a LIO may result in an unjust acquittal. Understanding this tension is one of the keys to successfully navigating this intertwined side of the family.

A. Multiplicity (or Multiplicious for Findings): The Issues Are Normally Legislative Intent and Double Jeopardy

Multiplicity is an issue of law that enforces the Double Jeopardy Clause.[63] It protects an accused from multiple

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[54] *Infra* Part III.B and note 739 (anomaly of a multiplicious offense that is not a LIO).

[55] The challenge of the strict statutory elements approach is illustrated in the 2009 case *United States v. Conliffe*, 67 M.J. 127 (C.A.A.F. 2009). The court had an excellent opportunity to implement a strict statutory elements approach to LIOs. Instead, it showed flexibility, emphasized the fair notice aspect of LIO doctrine, and held that the disorder or discredit element of Article 134 is close enough to the element of disgrace in Article 133 for LIO purposes. *Id.* at 134. As noted by the dissent, this essentially resurrected the inherent elements approach which had supposedly been rejected by the same court in 2008. *Id*. at 135–36 (Erdmann, J. and Ryan, J., dissenting in part). In theory, the *Conliffe* holding should not survive the objective simplicity mandated by *Jones*. It remains to be seen, however, how long the strict discipline of *Jones* will be enforced.

[56] *Supra* note 28.

[57] *See supra* note 51. *United States v. Wheeler* contains an interesting quote about the long-term prognosis for clear boundaries that require discipline to maintain in the face of sometimes harsh or undesirable results: "Our entire profession is trained to attack bright lines the way hounds attack foxes . . . [and] soon breaks down what might have been a bright line into a blurry impressionistic pattern." 40 M.J. 242, 246 (C.M.A. 1994) (internal quotes omitted). To compound matters, some of the important cases overruled by the switch to a statutory elements approach had explicitly claimed to be implementing it! *See* United States v. Foster, 40 M.J. 140, 142 (C.M.A. 1994).

[58] *See generally* United States v. Emmons, 31 M.J. 108, 111 (C.M.A. 1990) ("An instruction on a lesser-included offense, when warranted, serves both the defense and the prosecution. If the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. A defendant, however, is also entitled to a lesser-offense instruction . . . because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.") (internal quotations and citations omitted).

In light of this benefit, it might be prudent for military judges to conduct a brief inquiry whenever the defense objects to an LIO instruction to ensure that the accused understands what he or she is giving up.

[59] This Government action would be partially motivated by the desire to preclude a defense argument that, while the accused is guilty of some other uncharged offense, an acquittal is required due to its omission from the charge sheet.

[60] United States v. Weymouth, 43 M.J. 329, 336 (C.A.A.F. 1995). In a court-martial, a charge that is separate for findings is also normally separate for sentencing. *Id*. It may, in other words, also be punished separately. However, LIOs cannot be charged separately. MCM, *supra* note 6, R.C.M. 307(c)(4) discussion. Thus, having more related offenses considered to be lesser included of the charged offense reduces the maximum number of potential charges. This, in turn, reduces the maximum potential punishment.

[61] *Weymouth*, 43 M.J. at 336. *Infra* Part III.B.

[62] MCM, *supra* note 6, R.C.M. 307(c)(4) discussion; *Weymouth*, 43 M.J. at 338; United States v. Quiroz, 55 M.J. 334, 340 (C.A.A.F. 2001) (Crawford, C.J., dissenting). *See also* MCM, *supra* note 6, R.C.M. 907(b)(3)(B) (A multiplicious charge may be dismissed if unnecessary to enable the prosecution to meet exigencies of proof through trial, review, and appellate action.),

[63] Blockburger v. United States, 284 U.S. 299 (1932); United States v. Teters, 37 M.J. 370 (C.M.A.1993). The double jeopardy clause has a threefold purpose: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

convictions and punishments arising out of a single criminal transaction, or distinct act,[64] unless Congress intended it.[65]

Legislative intent is almost always a disputed issue since only Congress can authorize multiple convictions and punishments. Congress expresses its intent on multiple convictions within normal legislative action: the statutory language; the evolution of the bill's language as it moved through Congress; floor remarks by members; and reports issued after the bill's passage.[66]

In the absence of an express declaration or other guidepost, congressional intent is most frequently inferred through the elements of the offenses.[67] Congress intended to allow multiple convictions under different statutes for one act if each offense requires proof of a statutory element that the other does not.[68] In fact, it is "unquestionably established" that the multiplicity elements test "is to be applied to the elements of the statutes violated and not to the pleadings or proof of these offenses."[69] As such, multiple convictions and punishments are permitted for a distinct act if the two charges each have at least one separate statutory element from the other.

It is extremely difficult to discuss multiplicity without also mentioning LIOs. Both use an elements test and one can often reach the same end result using the other doctrine.[70] Additionally, courts sometimes treat them as interchangeable.[71] However, it is important to conceptualize them separately because a multiplicity analysis should focus on discerning legislative intent in order to enforce the Double Jeopardy Clause. Lesser included offense doctrine ensures that an accused has due process notice of the lesser offenses he must be prepared to defend against, and that the form of this notice complies with other statutory and constitutional requirements.[72] A significant amount of the family vortex can be avoided by keeping these two underlying purposes in mind when approaching the issues in a particular case.

Although closely related, multiplicity and LIOs are not the same. A LIO is always multiplicious with the greater offense; however, if two charges are multiplicious, it does not necessarily mean that one is the LIO of the other.[73]

Multiplicity's focus on the statutory elements reflects its narrow role as a protection against double jeopardy. In many cases, multiplicity does not significantly limit the Government's charging discretion. For example, taking one pill containing two illegal substances can result in two charges; one for each illegal substance contained in the pill.[74] This is true even if the accused believed the pill contained only one illegal substance. The two specifications each have a different element based on the actual drug consumed, and courts properly infer that Congress intended

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[64] *See* United States v. Paxton, 64 M.J. 484, 490 (C.A.A.F. 2007) (providing an example of the distinction between single and multiple criminal transactions) ("The primary question raised by this issue is whether the indecent acts committed by Paxton and the rape amount to the 'same act or course of conduct' or whether they are distinct and discrete acts, allowing separate convictions.").

[65] *Teters*, 37 M.J. at 373 (citing Ball v. United States, 470 U.S. 856 (1985) and Albernaz v. United States, 450 U.S. 333 (1981)). "A constitutional violation under the Double Jeopardy Clause of the Constitution now occurs only if a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *Id.*

[66] Comparing a law's final language with the original and amended bill that produced the law is a generally recognized form of legislative history since it reflects actual votes by the members of Congress. Members' remarks during floor debate are helpful, but the comments may only reflect the speaker's views. Committee reports or other published "legislative histories" are written by congressional staff, often after the bill becomes law. They are not voted on, or even viewed in many instances, by the members. This form of "legislative history," therefore, normally receives less, or in some cases no, consideration. *See* NORMAN J. SINGER & J.D. SHAMBLE SINGER, THE USE OF LEGISLATIVE HISTORY IN A SYSTEM OF SEPARATED POWERS, SUTHERLAND STATUTORY CONSTRUCTION § 5A:5 (6th ed.).

[67] *Teters*, 37 M.J. at 373.

[68] *E.g.*, United States v. Dillon, 61 M.J. 221 (C.A.A.F. 2005).

[69] *Teters*, 37 M.J. at 377. The multiplicity elements test is about determining congressional intent regarding convictions under different statutes. When drafting legislation, Congress obviously did not consider the allegations or proof in any particular future case. Logically, only the statutory elements can provide insight into Congressional intent regarding punishment under multiple statutes.

[70] *See supra* note 22 (discussing the merger concept within LIO doctrine and describing this from a multiplicity perspective, one would say that a statutory LIO (identical overlapping statutory elements) is, by definition, multiplicious with the greater offense).

[71] The U.S. Supreme Court, for example, has typically resolved one aspect of the multiplicity issue by determining whether or not one offense is a lesser included offense of the other. Rutledge v. United States, 517 U.S. 292, 297 (1996) (discussing application of the *Blockberger* elements test). The military's leading multiplicity case, *Teters*, also has an extensive LIO discussion. *Teters*, 37 M.J. at 374–76. While treating the two doctrines as interchangeable may be highly confusing, it is reasonable. Article 79, UCMJ also reflects congressional intent regarding multiple punishments for one act since an accused cannot be punished for both the greater and lesser included offense. From this perspective, which emphasizes Congressional intent over notice to the accused, the *Teters* elements test for multiplicity should be identical to the elements test for LIOs. *See* United States v. Trew, 68 M.J. 364, 370 (C.A.A.F. 2010) (Stucky, J., concurring in the result).

[72] United States v. Miller, 67 M.J. 385, 388 (C.A.A.F. 2009); *Jones*, 68 M.J. at 471.

[73] *See supra* note 51 (discussing how housebreaking does not appear to be a LIO of burglary since the burglary offense does not contain 100% of the housebreaking elements). A prosecutor might now want to charge both offenses to account for contingencies of proof. However, each offense does not require proof of a fact (element) not contained within the other. They are, therefore, multiplicious for findings. The accused cannot be convicted and punished of both charges for the same event. Should a pretrial defense multiplicity motion be granted? If not, then should preliminary instructions be provided to ensure that the members do not draw a negative inference about the accused from the number of charges? *See infra* note 118. The anomaly of a multiplicious offense that is not a LIO may be one reason for CAAF to eventually relax the strict statutory elements approach in *Jones* and permit more qualitative LIOs.

[74] *Dillon*, 61 M.J. at 223–24.

to punish both acts. Since Congress intended separate punishment, there is no double jeopardy issue.

The courts also treat the elements developed by the President for the specified Article 134 offenses as statutory elements,[75] resulting in wide charging discretion. For example, engaging in sexual intercourse with someone other than a spouse can result in two charges: adultery and indecent acts. This is true even if the identity of the sexual partner is the sole reason the act was indecent.[76] The two specifications each have a different element, so a proper judicial inference is that the President, in his promulgation of Article 134, intended separate punishment for both acts.

Some military courts were dissatisfied with this somewhat harsh simplicity. The judicial response was arguably creation of a new legal right and yet another subjective test.[77] One might more charitably characterize it as the revival of a longstanding military legal doctrine that had been incorrectly discarded because it was entangled in the military's extremely confusing, and now-rejected, multiplicity test. In any event, current military law clearly distinguishes between multiplicity and unreasonable multiplication of charges.

B. Unreasonable Multiplication of Charges (UMC): The Issue Is Abuse of Prosecutorial Discretion

It is uncontroversial that "one transaction should not be made the basis for an unreasonable multiplication of charges against one person."[78] Unreasonable multiplication of charges doctrine (UMC) is a separate policy pronouncement to address abuse of prosecutorial discretion in instances where multiplicity does not exist.[79] It promotes fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress.[80] Unreasonable multiplication of charges, therefore, imposes limits on prosecutorial discretion that Congress did not. It also implements the accepted principle that a person may not be punished twice for what is, in effect, one offense.[81]

Any abuse of prosecutorial discretion, like multiplicity itself, may be remedied by dismissal or consolidation of the appropriate charges, or a limit on the maximum punishment.[82] Like multiplicity, UMC also overlaps with one part of lesser included offense doctrine.[83] This overlap is small, however, since LIO doctrine is about notice to the accused, while UMC is about alleged abuse of prosecutorial discretion. The trial ruling on allegations of prosecutorial discretion is itself reviewed for an abuse of discretion.[84] At the trial level, UMC litigation should emphasize fact-finding.[85]

By its very nature, the proper exercise of prosecutorial discretion cannot be reduced to a formula.[86] Absent direct evidence of abuse, however, a number of *non-exclusive* factors may circumstantially show that the Government abused its discretion and is "piling on."[87] Some questions to consider are as follows: Are the charges and specifications based on one transaction contrary to RCM 307(c)(4)? Do the charges misrepresent or exaggerate the accused's misconduct?[88] Do they unreasonably, or perhaps unfairly, increase the punitive exposure?[89] Do the charges involve a

[75] United States v. Wheeler, 40 M.J. 242, 246–47 (C.M.A. 1994). This older case is still important since the CAAF cited it as a model application of multiplicity doctrine in the 2010 *Jones* case. United States v. Jones, 68 M.J. 465, 470 n.9 (C.A.A.F. 2010).

[76] *Wheeler*, 40 M.J. at 243. Sergeant Wheeler had an adulterous affair with his seventeen-year old stepdaughter and cohabitated with her after she moved out of the family home.

[77] United States v. Quiroz, 55 M.J. 334, 339 & 345 (C.A.A.F. 2001) (Crawford, C.J. and Sullivan, J., dissenting).

[78] MCM, *supra* note 6, R.C.M. 307(c)(4). Prior to *Quiroz*, this language was in the non-binding discussion. *Quiroz*, 55 M.J. at 337. It was moved from the non-binding discussion section to the rule to reflect the *Quiroz* decision. MCM, *supra* note 6, R.C.M. 307(c)(4) drafters' analysis, at A21-23. *See also id.* para. 26b.

[79] *Quiroz*, 55 M.J. at 337–38 ("In short, even if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system."); MCM, *supra* note 6, R.C.M. 905(c)(1) & (c)(2)(A).

[80] *Quiroz*, 55 M.J. at 337.

[81] *E.g.*, MCM, *supra* note 6, .R.C.M 1003(c)(1)(C) discussion.

[82] United States v. Roderick, 62 M.J. 425, 433 (C.A.A.F. 2006); *Quiroz* 55 M.J at 339; United States v. Balcarczyk, 52 M.J. 809, 813 (N-M. Ct. Crim. App. 2000).

[83] *See supra* notes 70 and 71.

[84] United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004). Of course, a service court of appeals can always apply its separate *de novo* review authority under Article 66(c), UCMJ. A court doing so should, in theory at least, clearly state what standard of review it applied. A *de novo* review of the facts and trial ruling may simply indicate a different perspective based on the written record, consultations with the other appellate judges, and nearly unlimited time to reflect on the issue. It does not, therefore, have the obvious precedential value of a decision that the trial judge misunderstood the applicable law or abused his or her discretion.

[85] On the other hand, multiplicity and whether one offense is a LIO of another are both matters of law which are reviewed *de novo* since there are few, if any, relevant facts in dispute. United States v. Teters, 37 M.J. 370, 376 (C.M.A.1993) (applying the *de novo* review without using the label).

[86] ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, CRIMINAL JUSTICE SECTION STANDARDS commentary to standard 3-3.9 (1992) [hereinafter STANDARDS FOR CRIMINAL JUSTICE], *available at* http://www.abanet.org/crimjust/standards/pfunc_toc.html (discretion in the charging decision).

[87] United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001).

[88] *Id.*

[89] *Id.*; United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (Changing, without comment, the phrasing of this factor from the longstanding "unreasonably increase" to "unfairly increase" punitive exposure.).

unique feature of military law that increases the potential for abuse?[90] Did the Government face some reasonable contingencies of proof or law that justifies the multiple charges?[91] Did the Government's charging strategy, although aggressive, reflect a reasoned approach?[92] Has the Government added non-essential facts to the specification to obtain additional LIOs or omitted some language to keep a related charge separate?[93] Has the Government charged a LIO suggested only by the *MCM*?[94]

Of course, the purpose of all the factors, questions, and circumstantial evidence is to show that the convening authority abused his or her prosecutorial discretion.[95] But what does that really mean? The phrase "abuse of discretion" has a wide variety of definitions and has not been formally defined in this context.[96] Nonetheless, an abuse of discretion normally means much more than a difference of opinion.[97] The convening authority's charging decisions, therefore, receive at least some deference.[98] Unreasonable multiplication of charges is *not* an appropriate tool for the trial judge to simply reduce a prescribed maximum punishment to a level he or she deems reasonable.[99]

For example, in *United States v. LaBean*,[100] the Government increased punitive exposure by charging one eighteen-minute internet session that downloaded child pornography as twenty-five separate acts. This was not an abuse of prosecutorial discretion.[101] The defense, with the burden of persuasion, must therefore show more than a very aggressive charging decision.[102]

There is rarely any direct evidence of prosecutorial abuse. Defense and trial counsel, therefore, almost always seek to infer or refute it using only the non-exclusive factors discussed in *Quiroz* itself.[103] Unfortunately, the ultimate issue of prosecutorial abuse is frequently lost in the focus on the *Quiroz* factors. Both the government and defense counsel frequently fail to marshal evidence to support their positions.[104] Unreasonable multiplication of charges is about the defense proving an abuse of prosecutorial discretion. The facts do matter!

It should be even more difficult to prove "piling on" in light of several recent changes in the law. First, the new LIO doctrine means that far fewer offenses are now included. The government must either list a related charge or forfeit it. Moreover, the courts have made it hazardous to plead "on divers occasions,"[105] thus encouraging the Government to charge each known event separately. Finally, appellate courts may no longer affirm a closely related offense in a guilty plea.[106] This also encourages the Government to plead each reasonable theory of criminal liability to account for the exigencies of proof. In fact, the CAAF explicitly endorses the practice.[107]

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[90] *Quiroz* 55 M.J. at 337; United States v. LaBean, 56 M.J. 587, 588 & 592 (C.G. Ct. Crim. App. 2001).

[91] United States v. Quiroz (*Quiroz IV*), 57 M.J. 583, 586 (N-M. Ct. Crim. App. 2002) (no contingencies of proof in a guilty plea).

[92] United States v. Campbell, 66 M.J. 578, 583 (N-M. Ct. Crim. App. 2008).

[93] United States v. Weymouth, 43 M.J. 329, 334, 337 nn.4, 5 (C.A.A.F. 1995).

[94] *See supra* note 51 and accompanying text.

[95] *Quiroz*, 55 M.J. at 338. The most direct statement of how commanders are supposed to exercise their prosecutorial discretion is contained in RCM 306(b) Discussion. MCM, *supra* note 6, R.C.M. 306(b) discussion. The Criminal Justice Section of the ABA addresses prosecutorial discretion in Standard 3-3.9 "Discretion in the Charging Decision." Standard 3-3.9(f) states "The prosecutor should not bring or seek charges greater in number of degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense." STANDARDS FOR CRIMINAL JUSTICE, *supra* note 86. The commentary adds that the prosecutor should not "pile on" charges to induce a guilty plea.

[96] Abuse of discretion, when applied to a military judge, has a "potpourri" of definitions depending upon the circumstances. United States v. Luster, 55 M.J. 67, 73 (C.A.A.F. 2001) (Crawford, C.J., dissenting).

[97] United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) ("To reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal.") (internal quotations omitted); MCM, *supra* note 6, R.C.M. 305(j)(1) & analysis (initial reviewing officer's decision regarding pretrial confinement entitled to substantial weight when being reviewed for an abuse of discretion.).

[98] At a bare minimum, this deference is reflected in the assignment of the burden of persuasion to the Defense. MCM, *supra* note 6, R.C.M. 905(c)(1) & (c)(2)(A).

[99] United States v. LaBean, 56 M.J. 587, 594 (C.G. Ct. Crim. App. 2001).

[100] *Id.* at 588.

[101] *Id.* at 588 & 592. It was also, obviously, not multiplicious.

[102] *See id.*; United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001); MCM, *supra* note 6, R.C.M. 905(c)(1) & (c)(2)(A).

[103] *Quiroz*, 55 M.J. at 338. The explicitly non-exclusive factors considered in *Quiroz* are less comprehensive that the listing earlier in this section.

[104] For example, the Article 32 officer may have recommended consolidating the charges or even opined that they were excessive. Evidence showing how a key witness's statements have changed over time might be introduced to show the need for two separate charges to account for the contingencies of proof. The convening authority could even offer some direct evidence, in other words testimony, about how he or she made their decision. Of course, testimony always has costs and risks that must be balanced against the benefits.

[105] *E.g.*, United States v. Ross, 68 M.J. 415 (C.A.A.F. 2010).

[106] United States v. Morton, 69 M.J. 12 (C.A.A.F. 2010) (reversing course on the closely related offense doctrine). Prior to *Morton*, an appellate court could "uphold a conviction when the providence inquiry clearly establishes guilt of an offense different from but closely related to the crime to which the accused has pleaded guilty." *Id.* at 14 (citing United States v. Wright, 22 M.J. 25, 27 (C.M.A. 1986)).

[107] *See Morton*, 69 M.J. at 16.

> It is the Government's responsibility to determine what offense to bring against an accused. . . . In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may

These developments should limit the future impact of UMC doctrine. How can attempting to comply with the law and provide due process notice of related offenses be an abuse of prosecutorial discretion? Fortunately, the final member of the multiplicity/LIO family provides a vehicle to address the challenge of much longer charge sheets.

C. Multiplicity for Sentencing (MFS): The Issue May Be Discretionary Relief to Fill Gaps in the Other Doctrines

Multiplicity for sentencing (MFS) is an elusive doctrine firmly bound up in the complicated history of the multiplicity "family." It only applies after a conviction when it permits the merger of closely related offenses for sentencing purposes. It is poorly defined, however, and considered somewhat of a "mess."[108] This is due to several factors. (1) Its history is closely intertwined with the conflicting tests for multiplicity used over the years.[109] (2) This connection is so close that MFS is sometimes referred to as multiplicity and analyzed as a multiplicity issue.[110] (3) Multiplicity for sentencing also used to be the remedy for what is now called UMC.[111] (4) Although no longer formally part of a modern multiplicity analysis, treating offenses as MFS can still, under some circumstances, be part of the solution when the issue of multiplicity is raised.[112] Finally, (5) courts have not clearly defined MFS so vestiges of this history remain sprinkled throughout the *MCM* with no clarifying language.[113]

As a result, MFS arguably no longer *really* exists, and one service court of appeals held just that.[114] Normally, a charge that is separate for findings is also separate for sentencing, and the accused as a matter of law may be punished for violating both.[115] It remains unclear why the maximum sentence should be reduced for charges that are neither multiplicious nor an unreasonable multiplication of charges. Nonetheless, the CAAF, while not defining MFS, has clearly stated that it remains a separate doctrine.[116]

So what does the ability to merge closely related offenses for sentencing purposes add to the mix? It eliminates any extra punitive exposure, which is one of the factors in the *Quiroz* analysis. Its continued status as a separate source of relief was affirmed in the same case establishing modern UMC doctrine.[117] At the very least, MFS has a potential role when unreasonable multiplication of charges is raised since it reduces the punitive exposure of the additional charges.[118]

Beyond this use, the application of MFS is unclear; however, case law states that MFS is a separate discretionary tool for the military judge to use in a "prudent and salutary fashion."[119] If MFS is truly a separate doctrine, and not just an adjunct to UMC, then it must do more than provide a way to counter one of the many *Quiroz* factors for UMC.

Two service courts of appeals have characterized MFS as an equitable doctrine; one that permits a military judge to treat certain offenses as identical for sentencing, even if they are neither multiplicious nor an UMC.[120] Multiplicity for sentencing may act as a military trial judge's discretionary tool to reduce the maximum punishment to the amount he or she considers reasonable.[121]

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properly charge both offenses for exigencies of proof, a long accepted practice in military law.

Id. (internal citations omitted).

[108] United States v. Baker, 14 M.J. 361 (C.M.A. 1983) (Everett, C.J., concurring & Cook, J., dissenting).

[109] For a history of the various multiplicity tests, see Breslin & Coacher, *supra* note 6, at 102–09. A detailed historical analysis is also contained in Chief Judge Crawford's *Quiroz* dissent. United States v. Quiroz, 55 M.J. 334, 339–44 (C.A.A.F. 2001).

[110] United States v. Paxton, 64 M.J. 484, 489–90 (C.A.A.F. 2007) (The granted issue was whether the charges were multiplicious for sentencing. The court, however, explicitly conducted a multiplicity analysis.). *See also* RCM 1003(c)(1)(C) and Discussion, which contains the *MCM*'s most complete MFS discussion as part of a "Multiplicity" section. MCM, *supra* note 6, R.C.M. 1003(c)(1)(C) & discussion. Read in isolation, this makes it appear that MFS is the sole remedy for multiplicity. *See supra* note 6.

[111] *Quiroz*, 55 M.J. at 347–48 (Sullivan, J., dissenting).

[112] United States v. Traxler, 39 M.J. 476 (C.M.A. 1994)("conservative approach" taken at trial); MCM, *supra* note 6, R.C.M. 1003(c)(1)(C) and discussion. Also recall that multiplicity enforces the double jeopardy clause which "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[113] *Quiroz*, 55 M.J. at 347–48 (Sullivan, J., dissenting).

[114] *Id.* at 339 (discussing and rejecting the position taken by the Navy Marine Corps Court of Appeals (N-M. Ct. Crim. App.).

[115] United States v. Weymouth, 43 M.J. 329, 336 (C.A.A.F. 1995); United States v. Balcarczyk, 52 M.J. 809, 812 (N-M. Ct. Crim. App. 2000).

[116] *Quiroz*, 55 M.J. at 339 ("[m]ilitary judges have traditionally exercised the power to treat offenses as "multiplicious for sentencing" in a prudent and salutary fashion."). *See also Traxler*, 39 M.J at 480, MCM, *supra* note 6, R.C.M. 906(b)(12) (right of an accused to submit a motion for appropriate relief based on "multiplicity of offenses for sentencing purposes.").

[117] *Quiroz*, 55 M.J. at 339.

[118] Finding some offenses MFS might be combined with an initial instruction to the members explaining which charges are included only to account for various contingencies and to remind them to draw no negative inference from the number of charges and specifications.

[119] *Quiroz*, 55 M.J. at 339. It also appears that MFS is primarily, or perhaps exclusively, a tool for trial judges. *See* United States v. Paxton, 64 M.J. 484, 489–90 (C.A.A.F. 2007) (MFS appeal yet the court conducted a strict multiplicity analysis.); *cf.* United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (comprehensive challenge to the charges yet no mention of MFS).

[120] *Balcarczyk*, 52 M.J. at 813–14; United States v. Molina, 68 M.J. 532, 536 (C.G. Ct. Crim. App. 2009).

[121] *See* United States v. Oatney, 45 M.J. 185, 189–90 (C.A.A.F. 1996). *See also* MCM, *supra* note 6, R.C.M. 1003(c) (1) (C) discussion (Even if charges are not multiplicious, no separate punishment if a single impulse or intent, or a unity of time, or existence of a connected chain of events.). However, some of this language is from a discarded test for multiplicity and, therefore, of only limited value as a general guideline. Breslin &

On balance, MFS is a highly discretionary doctrine to ensure that a person is not punished twice for what is, in effect, one offense. It empowers the military judge with equitable-like authority to address gaps between the multiplicity, UMC, LIO, and other doctrines. These gaps may be even larger under the new test for LIOs.

IV. Conclusion

When flying on a clear day, the view is often best at around 3000 feet above ground. One can still make out individual houses but also see how the neighborhoods fit together. The relationships between lesser included offenses, multiplicity, unreasonable multiplication of charges, and multiplicity for sentencing should initially be viewed at altitude. From there, the doctrines and the largely separate purposes behind each are distinct. One can also see the tension within each. The Government needs flexibility to accurately describe the alleged misconduct in a way that accounts for the many contingencies ahead; while at the same time, the accused must be protected from surprise, double jeopardy, and prosecutorial abuse. At altitude, one can also more easily spot the use of an outcome-based approach or the old omnibus "multiplicity" term: a case or argument so focused on the result that it may have failed to clearly articulate which doctrine within the multiplicity family it used to get there.[122]

With a firm grasp of the mid-level view, one may safely descend into the details of a particular case without getting trapped in the vortex of *MCM* provisions and appellate decisions. During the descent, use precise language to help keep separate issues separate. Keep the primary purpose of each doctrine front and center at all times.[123] If this fails and the Sargasso vortex is about to overwhelm, then return to altitude for fresh bearings.

Coacher, *supra* note 6, at 126. *See also supra* note 99 and accompanying text (UMC is not the tool for the trial judge to simply reduce a prescribed maximum punishment to a level he or she deems reasonable.).

[122] *Supra* note 9 (discussing one such CAAF opinion). *Supra* note 6 (discussing another such case that has become part of the Discussion section of RCM 907).

[123] For example, since LIO law is primarily about due process notice to the accused, an agreement between the parties on a LIO instruction suggests a short inquiry with the accused to establish that he or she had full notice of the agreed LIO and was ready to defend against it at trial. *See* also *supra* note 58.