Annual Review of Developments in Instructions

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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 September 2009 term[1] and is written for military trial practitioners. The *Military Judges' Benchbook* (*Benchbook*)[2] remains the primary resource for drafting instructions. During this term, the CAAF decided cases involving evidence of consent in aggravated sexual contact cases;[3] the defenses of obedience to orders and mistake of law; instructions on propensity under Military Rule of Evidence (MRE) 414; inadmissible testimony of expert witnesses; and lesser included offenses.

Defenses

Obedience to Orders

It is well-established that military judges are required to give instructions on affirmative defenses to the panel members when raised by the evidence in a case.[4] In 2000, the question of when an affirmative defense has been raised was resolved by the CAAF in *United States v. Davis*, when it reiterated that the standard is "whether the record contains some evidence to which the court members may attach credit if they so desire."[5] This standard applies to all affirmative defenses, to include the defense of obedience to orders.[6] In *United States v. Smith*,[7] the CAAF considered whether the military judge was required to give an instruction on the affirmative defense of obedience to lawful orders in a maltreatment case involving the abuse of detainees at the Baghdad Central Confinement Facility at Abu Ghraib, Iraq (hereinafter Abu Ghraib).

Army Sergeant (SGT) Smith was a military working dog (MWD) handler working at Abu Ghraib.[8] While serving in this role, SGT Smith participated in an interrogation of a detainee during which he allowed his unmuzzled dog to bark in the detainee's face and also permitted his dog to pull a hood off the detainee's head with its teeth.[9]

Staff Sergeant (SSG) Frederick, the noncomissioned officer in charge told SGT Smith to use his dog during this particular interrogation.[10] Staff Sergeant Fredrick was told, in turn, by a civilian contractor/interrogator at Abu Ghraib that the use of dogs during the interrogation was authorized.[11] The civilian contractor/interrogator's notes indicated that the use of dogs was approved by Colonel (COL) Thomas Pappas[12] for all interrogations, although COL Pappas testified that he did not authorize the general use of MWD for all interrogations, nor did he authorize the use of MWD for this particular interrogation.[13] Further

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[1] The September 2009 term began on 1 September 2009 and ended on 31 August 2010.

[2] U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Jan. 2010) [hereinafter BENCHBOOK].

[3] United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010). A separate article will be published discussing how military judges should instruct regarding consent and mistake of fact as to consent in light of *United States v. Neal* and two Court of Appeals for the Armed Forces (CAAF) cases published in the 2010 term—*United States v. Prather* and *United States v. Medina*.

[4] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 902(e)(3) (2008) [hereinafter MCM]. *Id.* R.C.M. 916(a) and discussion.

[5] 53 M.J. 202, 205 (C.A.A.F. 2000).

[6] *See* MCM, *supra* note 4, R.C.M. 902(e)(3); R.C.M. 916(a).

[7] 68 M.J. 316 (C.A.A.F. 2010).

[8] *Id.* at 318.

[9] *Id.* at 318, 320.

[10] *Id*. at 320.

[11] *Id*.

[12] Commander, 205th Military Intelligence Brigade in Iraq. *Colonel Loses Command for Abuses*, WASH. TIMES (Wash., D.C.), May 12, 2005, at http://www.washingtontimes.com/news/2005/may/12/20050512-11180126-79r/?page=1.

[13] *Smith*, 68 M.J. at 320.

evidence showed that the only person competent to authorize the use of MWD during interrogations was Lieutenant General (LTG) Ricardo Sanchez, the Combined Joint Task Force-7 Commander.[14]

With respect to the defense of obedience to orders, Rule for Court-Martial (RCM) 916(d) states that "[i]t is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful."[15] The *Benchbook* instructions on this defense are subdivided into two separate paragraphs—one dealing with unlawful orders and the other dealing with lawful orders.[16] Whether the order was lawful or unlawful is an interlocutory question for the military judge.[17]

When instructing the panel members on findings as it related to SGT Smith permitting his dog to bark in the detainee's face and pull the hood off the detainee's head, the military judge gave the instruction on obedience to unlawful orders,[18] stating that "[a]n order to use military working dogs to aid in military interrogations, if you find such an order was given, would be an unlawful order."[19] The military judge did not give the instruction on obedience to lawful orders.[20]

The question before the CAAF with respect to the obedience to orders instruction was "whether the military judge erred by failing to instruct on obedience to lawful orders as it pertained to maltreatment by having a MWD bark at a detainee when there was no evidence before the military judge that such an order was illegal."[21] Applying the standards enunciated in *United States v. Davis*, Judge Baker highlighted that before the military judge is required to give an instruction on the defense of obedience to lawful orders, there must be some evidence that the accused was given a lawful order,[22] and that the order must be to engage in the charged conduct.[23] Judge Baker determined that the military judge had not erred in not giving the instruction because neither of the two prongs were met.[24] First, there was no evidence that SSG Fredrick, or any other person, had ordered SGT Smith specifically to allow his dog to bark in the detainee's face or pull the hood off the detainee's head with its teeth.[25] Second, any order regarding the use of MWD during interrogations that did not originate from LTG Sanchez would necessarily be an unlawful order since LTG Sanchez was the only competent authority to give that particular order.[26] Chief Judge Effron, in his concurring opinion, emphasized his agreement that a military judge is not required to give the obedience to lawful orders instruction when the order is unlawful.[27]

In *Smith*, the CAAF reiterates the standards for giving instructions on affirmative defenses, and specifically on the defense of obedience to orders. Additionally, the CAAF reminds practitioners that before the obedience to orders instruction is given, there must be some evidence that ties the order to the specific acts committed by the accused. In this case, the CAAF found that although there was some evidence that SGT Smith may have been given an order to use his MWD during an interrogation, there was no evidence that he was ordered to use the dog in the manner he did by unmuzzling it and allowing it to approach the detainee in violation of the standards and policies in place concerning the use of MWD.[28] Finally, the CAAF confirms that the military judge is not required to give the obedience to lawful orders instruction when he determines that the order is unlawful.[29]

Mistake of Law

In *United States v. Maynulet*,[30] the CAAF addressed the issue of what evidence raises the affirmative defense of mistake of law.

Army Captain (CPT) Maynulet commanded an armor company in Iraq with the mission of capturing or killing a high-value target (HVT).[31] When a vehicle containing the HVT sped past a traffic control point manned by members of CPT Maynulet's company, the unit initiated a high-speed pursuit which resulted in the vehicle carrying the HVT colliding with a wall and a house.[32] Captain Maynulet and several of his Soldiers approached the vehicle and

[14] *Id*. at 321. Per Combined Joint Task Force-7 (CJTF-7) policy, Lieutenant General (LTG) Sanchez expressly withheld approval authority to use "the presence of" military working dogs (MWDs) for interrogations. *Id*. at 320.

[15] MCM, *supra* note 4, R.C.M. 916(d).

[16] BENCHBOOK, *supra* note 2, ¶¶ 5-8-1, 5-8-2.

[17] MCM, *supra* note 4, R.C.M. 916(d) discussion.

[18] *See* BENCHBOOK, *supra* note 2, ¶ 5-8-1.

[19] *Smith*, 68 M.J. at 319.

[20] *Id*. at 320.

[21] *Id*. at 318.

[22] *Id*. at 320.

[23] *Id*.

[24] *See id*. at 321.

[25] *Id*. at 320. Even in the instances in which LTG Sanchez expressly approved the presence of working dogs, CJTF-7 policy still "required that MWDs be muzzled and under control of a MWD handler at all times." *Id*. at 321.

[26] *Id*. at 321.

[27] *Id*. at 324.

[28] *Id*. at 320.

[29] *Id*. at 321.

[30] 68 M.J. 374 (2010).

[31] *Id*. at 375.

[32] *Id*.

discovered that the driver of the vehicle had a serious head wound and, according to the unit's medic, appeared to have been mortally wounded.[33] As CPT Maynulet watched, the driver made gurgling sounds and flapped his arm.[34] Without attempting to assist the driver, CPT Maynulet fired two shots at the driver's head, ultimately killing him.[35]

Captain Maynulet testified that he shot the driver to "put him out of his misery."[36] Additionally, the defense presented evidence that CPT Maynulet had received training on rules of engagement and the law of war which indicated that Soldiers should avoid causing unnecessary suffering.[37] Based on this evidence, the defense counsel requested the mistake of law instruction, arguing that CPT Maynulet mistakenly believed that the unnecessary suffering provision of the law of war allowed him to commit this mercy killing.[38]

Rule for Court-Martial 916(l)(1) makes it clear that mistake of law is not ordinarily a special defense.[39] An exception to this general rule is carved out in the discussion to the rule: "mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency."[40] The discussion further clarifies that reliance on advice of counsel is not equivalent to reliance on a pronouncement of an authorized public official or agency, and as such, does not raise a defense.[41]

Relying on the standard from *United States v. Davis*,[42] the CAAF determined that no evidence had been raised that would require the military judge to instruct on the defense of mistake of law.[43] Specifically, the court found that CPT Maynulet had been instructed on all aspects of the law of war, such that it should have been clear to him that he had a duty to collect and care for the wounded, rather than to kill them.[44] Further, the CAAF found that CPT Maynulet's subjective belief of the law was irrelevant, as the defense would only apply if there were evidence that (1) an authorized public official or agency had disseminated erroneous information about the law of war (which evidence did not exist in this case) and (2) CPT Maynulet had relied on this erroneous information.[45]

In evaluating the defense of mistake of law, the CAAF observed that while the exception to the general rule against the defense is well-grounded in law, it has never heard a case in which the exception applied.[46] Given the rarity of the exception, practitioners should ensure that they carefully evaluate the facts of a case before instructing on mistake of law as an affirmative defense.

Evidence

Propensity Evidence under MRE 414

Military Rule of Evidence 414 provides that "[i]n a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant."[47] The CAAF provided guidance governing the admission of evidence under MRE 414 in numerous cases over the past ten years,[48] to include *United States v. Wright*[49] and *United States v. Bare*.[50] In *United States v. Ediger*,[51] the CAAF not only applied the standards from *Wright* and *Bare* to determine whether evidence of prior child molestation was properly admitted under MRE 414, but also specifically reviewed and commented on the adequacy of the military judge's instruction to the panel members concerning the use of this propensity evidence.[52]

Among other charges, Army Private First Class (PFC) Ediger was charged with raping his stepdaughter (MA),

[33] *Id*.

[34] *Id*.

[35] *Id*.

[36] *Id*.

[37] *Id*. at 377.

[38] *Id*.

[39] MCM, *supra* note 4, R.C.M. 916(l)(1).

[40] *Id*. R.C.M. 916(1)(1) discussion.

[41] *Id*.

[42] 53 M.J. 202, 205 (C.A.A.F. 2000).

[43] *Maynulet*, 68 M.J. at 376.

[44] *Id*. at 377.

[45] *Id*. at 376, 377.

[46] *Id*. at 376.

[47] MCM, *supra* note 4, MIL. R. EVID. 414(a).

[48] *See* OPINION DIGEST BEGINNING WITH 1999 TERM OF COURT, OCT 2, 1998—CURRENT TERM ¶¶ III.C.4 and III.C.34 (last updated Oct. 4, 2010), *available* at http://www.armfor.uscourts.gov/ConsolidatedDigestOutline.htm.

[49] 53 M.J. 476 (C.A.A.F. 2000). This case provides a list of non-exclusive factors that a military judge may use to conduct a balancing test under both MRE 414 and MRE 413. *Id.*

[50] 65 M.J. 35 (C.A.A.F. 2007). This case lays out a two-step analysis for admission of evidence under Military Rule of Evidence (MRE) 414. The first step requires the military judge to determine: "(1) whether the accused is charged with an act of child molestation as defined by M.R.E. 414(a); (2) whether the proffered evidence is evidence of his commission of another offense of child molestation as defined by the rule; and (3) whether the evidence is relevant under M.R.E. 401 and M.R.E. 402." The second step requires the military judge to then apply a balancing test under MRE 403. United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010) (citing *Bare*, 65 M.J. at 36).

[51] 68 M.J. 243 (C.A.A.F. 2010).

[52] *Id.*

taking indecent liberties with MA by masturbating while MA posed on the bed on her hands and knees with her naked lower torso exposed to PFC Ediger, and making false official statements that he never raped MA and that he did not masturbate in MA's presence.[53] Prior to trial, the military judge ruled that evidence that PFC Ediger sexually assaulted another young girl (TG) when she was between the ages of nine and eleven was admissible under MRE 414. [54] After the military judge's ruling on the MRE 414 evidence, but before trial, the Government dismissed the indecent liberties charge.[55] At that point, the defense requested a new military judge detailed to the case to reconsider the prior ruling by the previous judge concerning the admissibility of TG's testimony.[56] The new military judge affirmed the prior ruling and permitted the testimony under MRE 414.[57] At trial, TG testified that when PFC Ediger was dating her mother, he licked and fondled her genital area while forcing her to pose on the bed on her hands and knees with her naked lower torso exposed to PFC Ediger, he frequently spanked and fondled her, and forced her to perform oral sex on him.[58]

After TG's testimony, the military judge gave the following limiting instruction:

> You've heard evidence through the testimony of [TG] that the accused may have previously committed other offenses of child molestation. You may consider the evidence of such other acts of child molestation for their tendency, if any, to show the accused's propensity to engage in child molestation, as well as their tendency, if any, to identify the accused as the person that committed offenses alleged in [Charge] I[59] . . . to prove a plan or design of the accused to molest [MA] and to determine whether the accused had a motive to commit those offenses.
>
> You may not, however, convict the accused merely because you believe he committed these other offenses or merely because you believe he has a propensity to engage in child molestation. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged.[60]

The military judge repeated the instruction prior to deliberations.[61]

On appeal, PFC Ediger argued that the military judge should have expressly instructed the members that they could only consider TG's testimony for the rape charge (Charge I), but not for any other offense.[62] The CAAF disagreed, noting that "once evidence is admitted under MRE 414, that evidence 'may be considered for any matter to which it is relevant.'"[63] The CAAF determined that the members could have considered TG's testimony in their evaluation of any of the charged offenses, as long as it was relevant.[64] For example, TG's testimony may have been relevant to the panel in determining whether PFC Ediger made a false official statement when he denied masturbating in MA's presence.

Further, the CAAF reiterated the requirements for proper instructions on the use of propensity evidence as originally stated in *United States v. Schroder*[65]:

> [I]t is essential that . . . the members are instructed that M.R.E. 414 evidence may be considered for its bearing on an accused's propensity to commit the charged crime, the members must also be instructed that the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone.[66]

In the instant case, the court found that the military judge's limiting instruction on TG's testimony had complied with the requirements of *Schroder*.[67]

The *Benchbook* instruction for the proper use of propensity evidence under MRE 414 is found at paragraph 7-13-1, note 3.[68] The instruction is similar to that given by

[53] *Id*. at 245.

[54] *Id*.

[55] *Id*. at 246.

[56] *Id*. at 247.

[57] *Id*.

[58] *Id*.

[59] It is apparent from the CAAF opinion that Charge I concerned the rape of MA. *See id*.

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] *Id*. at 249 (citing MCM, *supra* note 4, MIL. R. EVID. 414(a)).

[64] *Id*.

[65] 65 M.J. 49 (C.A.A.F. 2007).

[66] *Id*. at 56.

[67] *Ediger*, 68 M.J. at 249.

[68] MCM, *supra* note 4, ¶ 7-13-1 n.3. This instruction is based on the U.S. Army Court of Criminal Appeals' decision in *United States v. Dacosta*. 63 M.J. 575 (A. Ct. Crim. App. 2006).

the military judge in *Ediger*; however it is more detailed in that it reminds the members of their requirement to first determine by a preponderance of the evidence whether the other act of child molestation occurred before considering it for any purpose.[69] Additionally, the *Benchbook* instruction places extra emphasis on the prosecution's burden to prove each element beyond a reasonable doubt.[70] Given the CAAF's ruling in *Ediger*, it is clear that the *Benchbook* instruction is a proper instruction that complies with *Schroder*. As such, *Ediger* serves as a reminder that practitioners would be wise to follow the *Benchbook* instruction when admitting propensity evidence under MRE 414.

Ediger also emphasizes that military judges are not required to instruct members that propensity evidence is limited to certain specifications, as it may be considered for "any of the charges . . . for which it [is] relevant."[71] With respect to this ruling, it would appear that the *Benchbook* instruction may limit the member's consideration of propensity evidence under MRE 414 in a way which is not required by the CAAF. Specifically, the instruction states, "If you determine by a preponderance of the evidence (this)(these) other uncharged offenses(s) occurred, you may then consider the evidence of (that)(those) offenses(s) for its bearing on any matter to which it is relevant *only in relation to (list the specifications(s) for which the members may consider the evidence)*."[72] Applying the CAAF's ruling in *Ediger*, it would appear that the last portion of this instruction is unnecessary, as the propensity evidence may be considered for all charges for which it is relevant. Regardless, in cases in which the charged offenses are clearly separated between those involving child molestation and those that do not, an instruction that restricts the panel's consideration of propensity evidence to certain specifications helps ensure that members are not using the evidence for the improper purpose of convicting the accused of an unrelated offense solely because they find that the accused has a propensity to engage in child molestation. Practitioners should consider the charges and evidence carefully when determining whether to instruct the members that their consideration of propensity evidence is limited to certain specifications.

Experts as Human Lie Detectors—A Cautionary Tale

In *United States v. Mullins*,[73] the CAAF addressed the perennial issue of experts overstepping their testimonial boundaries and providing human lie detector testimony. Master-at-Arms First Class Mullins, U.S. Navy, was brought before a general court-martial charged with the rape of a child, forced sodomy of a child, two specifications of indecent acts and two specifications of possession of child pornography.[74] During his court-martial the Government called Ms. Cynthia Conrad, a forensic child interviewer from the local prosecutor's office, to testify about the types of interviews she performed on the alleged victim.[75]

Ms. Conrad testified that a normal child of the alleged victim's age "might understand sexual intercourse but would not understand oral or anal sex, male masturbation, or ejaculation."[76] She also testified that the alleged victim's characteristics during interviews were "consistent . . . with a child who may have been sexually abused."[77] In response to her testimony the military judge provided the following *sua sponte* instruction to the panel on the testimony they had just heard:

> [N]o witness is a human lie detector. That is no one—no one who testifies in this courtroom can know if someone else is telling the truth or lying. You are advised that only you, the members of this court, can determine the credibility of the witnesses and what the ultimate facts of this case are. No witness, including an expert witness, can testify that someone else's account of what happened is true or credible, that a person believes the alleged victim or that, in fact, a sexual encounter actually occurred.[78]

After being cross examined by the defense, the Government conducted re-direct examination of Ms. Conrad about the frequency of children lying about sexual abuse.[79] In response to the trial counsel's question, Ms. Conrad testified that children lied about sexual abuse in less than "1 out of 100 or 1 out of 200" cases.[80] Hearing no objection from the defense, the military judge asked Ms. Conrad:

> [D]o you have any forensic, that is, scientifically accurate way of proving whether the child is telling the truth or not? In other words . . . the only way that you typically could know that is if the child later comes forth and says 'Yes, I

[69] BENCHBOOK, *supra* note 2, ¶ 7-13-1n.42.

[70] *Id*.

[71] *Ediger*, 68 M.J. at 249 (citing MCM, *supra* note 4, MIL. R. EVID. 414).

[72] BENCHBOOK, *supra* note 2, ¶ 7-13-1 n.3 (emphasis added).

[73] 69 M.J. 113 (C.A.A.F. 2010).

[74] *Id*. at 114.

[75] *Id*. at 115.

[76] *Id*.

[77] *Id*.

[78] *Id.*

[79] *Id.*

[80] *Id*.

> made it up,' or . . . unless that [defendant] ultimately confesses, you would ultimately never know who was telling the truth and who wasn't, is that correct?[81]

Ms. Conrad replied affirmatively and there was no objection to the judge's question and the defense counsel commented on this last bit of testimony during his closing argument.[82] Prior to allowing the panel to recess for deliberations the military judge reiterated, in generic form, his prior instruction on human lie detectors and the role of the members as the sole authority for determining the facts of a case and the credibility of witnesses.[83]

On appeal the defense argued that, despite the military judge's cautionary instruction on human lie detectors and the follow-up question he asked the expert, allowing the expert's testimony on the improbability of children lying about sexual abuse into evidence amounted to the admission of an expert opinion that there was a 1 in 200 chance that the accused was innocent.[84] Turning first to the law concerning the boundaries of expert opinion in child sexual abuse cases, the CAAF reiterated the well established evidentiary rules that "'[a]n expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms'"[85] but that "an expert may not testify regarding the credibility or believability of a victim, or 'opine as to the guilt or innocence of the accused.'"[86] The court then noted the similarity of the case at hand with the 2007 CAAF decision in *United States v. Brooks.*[87]

In *Brooks*, another child sexual assault case, the Government's child sexual abuse expert testified on re-direct that only "about 5 percent" of all child sexual abuse claims made by children were false.[88] As in *Mullins*, the expert's testimony drew no objection from the defense and the military judge's only gave the standard instructions on credibility and expert witnesses, as well as the following tailored instruction:

> Only you, the members of the court determine the credibility of the witnesses and what the fact[s] of this case are. No expert witness or other witness can testify that the alleged victim's account of what occurred is true or credible, that the expert believes the alleged victim, or that a sexual encounter occurred. To the extent that you believed that Dr. Acklin testified or implied that he believes the alleged victim, that a crime occurred, or that the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible.[89]

Applying the plain error standard in the absence of any defense objection at trial,[90] the court in *Brooks* concluded that allowing the percentage testimony was plain error because the Government expert's "credibility quantification testimony invaded the province of the members"[91] and represented "the functional equivalent of vouching for the credibility or truthfulness of the victim."[92] Looking to whether the plain error had materially prejudiced the substantial rights of the appellant, the court concluded it had and reversed the conviction.

Focusing on the impact of the error, the *Brooks* court noted that the case "hinged on the victim's credibility and medical testimony" as "[t]here were no other direct witnesses, no confession, and no physical evidence to corroborate the victim's sometimes inconsistent testimony."[93] Based upon the error's "particular impact upon the pivotal credibility issue and ultimately the question of guilt" the court concluded that the military judge's error in admitting the testimony cast "substantial doubt about the fairness of the proceeding" and required a reversal of the findings and sentence.[94]

Applying the established law to the facts of *Mullins*, the CAAF ruled that the military judge in *Mullins* committed plain error by allowing the Government's expert to state the "the statistical frequency of children lying about sexual abuse."[95] Reviewing whether the military judge's error materially prejudiced the accused, the CAAF stated that it must review "the erroneous testimony in context to determine if the witness's opinion amounts to prejudicial error."[96] The court then defined "context" to include "such factors as the immediate instruction, the standard instruction, the military judge's question, and the strength of the

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[81] *Id*. at 116.

[82] *Id*.

[83] *Id.* at 117.

[84] *Id*. at 116.

[85] *Id*. (citing United States v. Birdsall, 47 M.J. 404, 409 (C.A.A.F. 1998)).

[86] *Id*. (citing United States v. Cacy, 43 M.J. 214, 217 (C.A.A.F. 1995)).

[87] 64 M.J. 325 (C.A.A.F. 2007).

[88] *Id*. at 327.

[89] *Id.*

[90] To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005).

[91] *Brooks*, 64 M.J. at 330.

[92] *Id*. at 326–27.

[93] *Id*. at 330.

[94] *Id.*

[95] United States v. Mullins, 69 M.J. 113, 117 (C.A.A.F. 2010).

[96] *Id.* (citing United States v. Eggin, 51 M.J. 159, 161 (C.A.A.F. 1999)).

government's case to determine whether there was prejudice."[97]

Based on the context of *Mullins*, the court quickly determined there was no prejudicial error.[98] First, the military judge gave an instruction at the end of Ms. Conrad's direct examination, as well as before deliberations. The CAAF noted that the timing of those instructions, that is, right after Ms. Conrad's testimony and only a few minutes later during the final instructions before deliberations, distinguished *Mullins* from *Brooks*.[99] In *Brooks*, the military judge only instructed the panel members once before they deliberated.[100] The CAAF also noted that the military judge in *Mullins* asked a clarifying question which, despite not being the same as a corrective instruction, reduced the weight the panel members would have given the erroneously admitted testimony.[101] Finally, unlike *Brooks*, the panel in *Mullins* had a substantial amount of corroborating evidence supporting the alleged victim's testimony.[102]

Two important lessons can be drawn from the decision in *Mullins*. First, allowing an expert to state his opinion regarding the statistical probability of a false allegation is error, *per se*. Military judges should be constantly vigilant in their efforts to prevent such testimony from being heard by the panel, even in the absence of an objection by the defense. Military judges should pay particular attention to re-direct examinations of experts by trial counsel, who appear prone to overreaching in their questioning of experts in the aftermath of defense cross-examination and impeachment of their expert's direct testimony. Second, when in doubt, a timely recess to discuss the propriety of a limiting instruction followed by such an instruction can save the day even in the presence of error.

Miscellaneous Matters: Lesser Included Offenses

United States v. Jones*: Lesser Included Offenses Ain't What They Used to Be*

Since the *United States v. Jones*[103] decision was released by the CAAF on 19 April 2010, there has been a great deal of speculation as to what its full impact would be on charging in the military justice system.[104] Three things are certain in the aftermath of the *Jones* decision. First, the use of Article 134 offenses as "catch-all" lesser included offenses (LIOs) for other enumerated (Articles 80–132) offenses is over. Second, the analytical method for determining which offenses are LIOs has changed and practitioners can rely neither on the LIOs listed in the *Manual for Courts-Martial* (*MCM*) nor the past sixteen years of case law. Finally, resourceful trial counsel will use alternative charging to allege the same conduct under separate enumerated and Article 134 specifications to adapt to a post-*Jones* charging landscape. This will lead to judges confronting instructional issues and decisions on unreasonable multiplication of charges issues arising during the findings and sentencing portions of courts-martial.

The facts of *United States v. Jones* are easy to understand and have arisen in many courts-martial. The accused, Airman Jones, was charged, *inter alia*, with rape in violation of Article 120, UCMJ.[105] Prior to closing for deliberations, the military judge instructed the panel on rape as well as the uncharged LIO of indecent acts with another in violation of Uniform Code of Military Justice (UCMJ) Article 134, UCMJ.[106] While there was an objection to the instruction by the defense, the objection centered on whether the evidence introduced at trial could constitute an indecent act and not whether the offense of indecent acts was an LIO of rape.[107]

Because the offense alleged occurred prior to the 1 October 2007 effective date of the "new" Article 120,[108] indecent acts was still an offense under Article 134[109] and not, as now, an enumerated offense under Article 120.[110] Airman Jones was found guilty of indecent acts, as instructed as an LIO of rape.[111] On appeal, the CAAF granted the issue of whether indecent acts was available as an LIO of rape.[112]

In a ruling that surprised many in the military justice community, the CAAF determined that not only was the offense of indecent acts not an LIO of rape, but no Article 134 offense was an LIO of any enumerated offense.[113] The

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[97] *Id*.

[98] *Id*. at 118.

[99] *Id.* at 117.

[100] *Brooks*, 64 M.J. 325, 330 (C.A.A.F. 2007).

[101] *Mullins*, 69 M.J. at 117–18.

[102] *Id*. at 118. This "corroborating evidence" included two victims' testimony, other witnesses' observations, and Mullins' possession of child pornography and illicit instant messages on his home computer. *Id.*

[103] 68 M.J. 465 (C.A.A.F. 2010).

[104] *See, e.g.*, Major Patrick Pflaum, *Lesser Included Offenses Update:* United States v. Jones, ARMY LAW., July 2010, at 27.

[105] *Jones*, 68 M.J. at 466.

[106] *Id*.

[107] *Id*. at 467.

[108] *See generally* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3256. UCMJ art. 120 (2008).

[109] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 90 (2005).

[110] MCM, *supra* note 4, pt. IV, ¶ 45a(k).

[111] *Jones*, 68 M.J. at 468.

[112] *Id*.

[113] *Id*. at 472–73.

CAAF's ruling in *Jones* included an explicit repudiation of the analysis that had been used since 1994 to determine what constituted an LIO. In the 1994 case of *United States v. Foster*,[114] the Court of Military Appeals (CMA) analyzed whether the "elements test" announced in the Supreme Court case of *United States v. Schmuck*,[115] and adopted by the CMA in *United States v. Teters*,[116] permitted a service member to be found guilty of the LIO of indecent acts in violation of Article 134 when the Government failed to prove the elements of forcible sodomy in violation of Article 125.

The elements test announced in *Schmuck*[117] and adopted in *Teters*[118] defined LIOs in the negative, as described in Federal Rule of Criminal Procedure 31(c). That is, "one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense."[119] If the proposed lesser offense included "an element not required for the greater offense," it was not an LIO.[120] In affirming *Foster's* indecent acts conviction, the CMA paid lip service to adopting the elements test laid out by *Schmuck* and *Teters*, but actually adopted a far more flexible (and subjective) standard to uphold Technical Sergeant Foster's conviction.

In *Foster*, the CMA announced that rather than simply lining up the elements of the greater and lesser offense to determine if the one was an LIO of the other, military practice required that the existence of a potential LIO could only be determined by "lining up elements *realistically* and determining whether *each* element of the supposed "lesser" offense is *rationally* derivative of one or more elements of the other offense-and *vice versa*."[121] By applying this more flexible "inherent relationship approach" to the facts of *Foster*, the CMA upheld his conviction of indecent acts as an "LIO" of the charged offense of forcible sodomy.

Looking at the elements of forcible sodomy and indecent acts, the court found that the first two elements of indecent acts were "rationally," if not literally, included in the elements of forcibly sodomy.[122] The CMA then analyzed away the fact that Article 134 offenses require proof of the element that they are "contrary to good order and discipline or service discrediting" by summarily announcing that:

> The enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles. Although the Government is not required to prove these elements in an enumerated-article prosecution, they are certainly present.[123]

Thus, two years after the Supreme Court's decision in *Schmuck* and one year after the CMA's own decision in *Teters*, the *Foster* court essentially re-adopted, under the guise of "realistically" determining whether each element of the lesser offense was "rationally" a sub-set of the greater offense, the same "inherent relationship," ad hoc, case-by-case determination of lesser included offenses that had been rejected in *Schmuck* and *Teters*. This led to sixteen years of mischief and confusion that ended, in part, with the CAAF's 2009 case *United States v. Miller*[124] and then definitively with the CAAF's 2010 decision in *United States v. Jones*.[125]

In *Miller*, the CAAF disemboweled and overruled *Foster* and the cases that followed its rationale "to the extent those cases support the proposition that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense[.]"[126] The *Jones* court completed the *coup de grace* on *Foster* started in *Miller*. In *Jones*, the CAAF confessed that it had "drifted significantly from the *Teters* application of *Schmuck* with respect to LIOs" and recognized that the inherent relationship test for LIOs originating in-line with the *Foster* decision was "no longer seriously supportable in light of our more recent focus-consonant with the Constitution, precedent of the Supreme Court, and the *Teters* line of cases—on the significance of notice and elements in determining whether an offense is a subset (and thus an LIO) of the greater offense."[127] Going forward, the CAAF summarized the "elements test" for determining an LIO as follows:

> Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called a greater offense because it contains all of the elements of offense X along with the one or more additional elements.[128]

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[114] 40 M.J. 140 (C.M.A. 1994).

[115] 489 U.S. 705 (1989).

[116] 37 M.J. 370 (1993).

[117] *Schmuck*, 489 U.S. at 716–17.

[118] *Teters*, 37 M.J. at 376.

[119] FED. R. CIV.P. 31(c).

[120] *Schmuck*, 489 U.S. at 716.

[121] 40 M.J. 140, 146 (C.M.R. 1994).

[122] *Id.*

[123] *Id.* at 143.

[124] 67 M.J. 385 (C.A.A.F. 2009).

[125] 68 M.J. 465 (C.A.A.F. 2010).

[126] *Miller*, 67 M.J. at 389 (overruling in part United States v. Foster, 40 M.J. 140 (C.M.A. 1994)).

[127] *Jones*, 68 M.J. at 470.

[128] *Id.*

Because *Miller* overruled the proposition that all enumerated offenses silently contain the element that the alleged conduct was "to the prejudice of good order and discipline" or "of a nature to bring discredit upon the armed forces," the elements test announced in *Jones* unequivocally rules out Article 134 offenses as LIOs of enumerated offenses. This means that Article 134 LIOs listed in part IV of the *MCM* and affirmed by case law are no longer LIOs of enumerated offenses because they all contain an element that the enumerated offenses do not. As the listed LIOs in the *MCM* and affirmed in case law between 1994 and 2010 cannot be trusted to determine LIOs going forward, military justice practitioners must apply the elements test announced in *Jones* to the charges in their cases to determine what is, and isn't, an LIO of the charged offense.

In November 2010, the CAAF released *United States v. Alston*,[129] which applied the elements test described in *Jones.* In *Alston*, the question before the court was whether a military judge erred by giving an aggravated sexual assault by causing bodily harm LIO instruction, over defense objection, when the accused was charged with forcible rape under Article 120(a), UCMJ.[130]

Analyzing the trial judge's decision to instruct on aggravated sexual assault as an LIO of rape by force, the court first referred back to *Schmuck's* holding that "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction [regarding a lesser included offense] is to be given."[131] The court noted, however, that "[t]he elements test does not require that the two offenses at issue employ identical statutory language. Instead, the meaning of the offenses is ascertained by applying the "normal principles of statutory construction."[132]

Reviewing the charged offense and the instructed LIO, the CAAF noted that the first element of both offenses was identical in that it required that the accused cause another person "to engage in a sexual act."[133] Turning to the second element of the charged rape, the court noted that the force required was defined in Article 120(t)(5) as "action to compel submission of another or to overcome or prevent another's resistance by . . . physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct."[134] The second element of aggravated sexual assault, on the other hand, only requires "caus[ing] another person of any age to engage in a sexual act . . . causing bodily harm."[135] Bodily harm is defined by Article 120(t)(8) as "any offensive touching, however slight."[136]

The question of whether the judge's LIO instruction was correct turned on whether the bodily harm element of "aggravated sexual assault under Article 120(c), as defined in Article 120(t)(8) as including an offensive touching, however slight, was a subset of the force element in the offense of rape under Article 120(a), as defined in Article 120(t)(5)(C)."[137] Using the ordinary rules of statutory construction, the CAAF determined that the force described in Article 120(t)(5)(C) clearly included the offensive touching described in the bodily harm element of Article 120(t)(8). However, the court cautioned that the same result would not apply to the definitions of force described by Article 120a(t)(5)(A)[138] and Article 120a(t)(5)(B),[139] which do not require an offensive touching.[140] In affirming the military judge's decision to give the LIO instruction, the CAAF emphasized that a careful analysis of the facts of a case and the use of the elements test announced in *Jones* in light of the "common and ordinary understanding of the words" used in the articles mean more than whether a given offense is a listed LIO in the *MCM*.[141]

In many respects the post-*Jones* world of LIO will be simpler for military judges. There is a more objectively clear logic to the elements test required by *Jones* than the subjective test applied under the inherent relationship test that preceded it. On the other hand, the now defunct inherent relationship test had fifteen years of precedent to support what constituted an LIO. The Constitutional basis for the change to determining what is an LIO will also have a potentially case-dispositive impact on cases still pending appeal where the accused was found guilty of what was considered an LIO under the inherent relationship test at trial that is demonstrably not an LIO under the post-*Jones* elements test.[142] Of more immediate interest to judges will

[129] 69 M.J. 214 (C.A.A.F. 2010).

[130] *Id.* at 215.

[131] *Id.* at 216 (quoting Schmuck v. United States, 530 U.S. 255, 263 (2000)).

[132] *Id.*

[133] *Id.*

[134] MCM, *supra* note 4, pt. IV, ¶ 45a(t)(5).

[135] *Id.* pt. IV ¶ 45a(c)(1).

[136] *Id.* pt. IV ¶ 45a(t)(8).

[137] *Alston*, 69 M.J. at 216.

[138] MCM, *supra* note 4, pt. IV, ¶ 45a(t)(5)(A) ("The use or display of a dangerous weapon or object").

[139] *Id.* pt. IV, ¶ 45a(t)(5)(B) ("The suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object").

[140] *Alston*, 69 M.J. at 216.

[141] *Id.* Given the new post-*Jones* realities of the law of lesser included offenses (LIOs), there is a strong argument to be made that the current listing of LIOs in the manual is probably more misleading than helpful.

[142] *See* United States v. Giroud, 70 M.J. 5 (C.A.A.F. 2011) (holding that negligent homicide is not a LIO of premeditated murder); United States v. McMurrin, 70 M.J. 15 (C.A.A.F. 2011) (holding that negligent homicide is not a LIO of involuntary manslaughter); United States v. Moore, Army 20080795 (A. Ct. Crim. App. Oct. 27, 2010) (unpublished) (holding that assault with intent to commit rape is not a LIO of rape); United States v.

be the impact of the *Jones* opinion on charging decisions in the future.

Going forward, the Government can be expected to charge offenses under several alternative theories. In the aggravated sexual contact example used above, the Government would have at one time been able to charge aggravated sexual contact and reasonably expect to get an instruction on wrongful sexual contact as an LIO. Today, the Government would likely charge both as alternative theories of criminal liability. This will raise the issue of how to instruct on what would have previously been covered under a greater and lesser included offense instruction.

There would appear to be three ways a military judge could deal with this situation. First, the military judge could instruct the panel that the accused could be found guilty of aggravated sexual contact or wrongful sexual contact, but not both. The panel would vote on the more serious offense first, and if there was a finding of guilty to aggravated sexual contact, the panel could be directed to enter a not guilty finding to wrongful sexual contact. The second option would be to allow the panel to vote on both offenses and then, upon a finding of guilty to both, the military judge could dismiss the lesser offense. The third option, if the accused were found guilty of both offenses, would be to merge the two offenses for purposes of sentencing.

The first instructional option would appear to be the most complicated and most susceptible to misinterpretation by the panel. The second option has the benefit of simplicity and the least danger of creating an unreasonable multiplication of charges issue, but has the drawback of removing any safety net for an otherwise successful prosecution in which the greater offense is for some reason found wanting on appeal. In other words, what if the Aggravated Sexual Contact is found to be factually insufficient on appeal? If the military judge dismisses the lesser offense of Wrongful Sexual Contact, the conviction could not be affirmed on that basis and jeopardy would have already attached so the accused could not be re-tried for either offense.

Because of the obvious shortcomings in the first two approaches, the best course of action would appear to be merging the offenses for purposes of sentencing. While this approach risks criticism based upon an argument that it exaggerates the accused's criminality and represents an unreasonable multiplication of charges, the determination of what is "unreasonable" must be interpreted in light of the limited options the Government faces with in the post-*Jones* environment.

Conclusions

During its 2009 term, the CAAF issued relatively few opinions that impacted military judges' instructions. Nonetheless, these opinions cover a wide range of criminal law topics, including offenses, defenses, and evidence. The majority of these opinions share a common theme: they reiterate the law and serve to remind military judges of the advisability of following the proposed instructions within the *Benchbook*. Two of this term's cases, however, deserve special attention as they change the law with respect to instructions. The first notable opinion, and the one that will likely have the most significant and far-reaching effect on military justice practice is *United States v. Jones*. The changes that the CAAF makes to the methodology of determining LIOs erases a significant amount of precedential case law and essentially creates a blank slate in this area of the law. As trial counsel, defense counsel, and military judges all adapt to the changes in charging decisions that are sure to follow *Jones*, practitioners can anticipate a rocky road ahead with respect to LIOs. The second is *United States v. Neal*,[143] which in combination with the recently published CAAF opinions in *United States v. Prather*[144] and *United States v. Medina*,[145] will be addressed in a separate article. Despite challenges that practitioners may face when drafting instructions, the standard practice of considering the evidence, applying the law, and implementing the intent of the law when there is not clear guidance will continue to produce the best and most accurate results.[146]

Honeycutt, Army 20080589 (A. Ct. Crim. App. Sept. 1, 2010) (unpublished) (holding that wrongful sexual contact is not an LIO of rape by force).

[143] 68 M.J. 289 (C.A.A.F. 2010).

[144] 69 M.J. 338 (C.A.A.F. 2011).

[145] 69 M.J. 462 (C.A.A.F. 2011).

[146] *See* Colonel Timothy Grammel & Lieutenant Colonel Kwasi L. Hawks, *Annual Review of Developments in Instructions*, ARMY LAW., Feb. 2010, at 61.