Trial Judiciary Note

A View from the Bench: Prohibition on Disjunctive Charging Using "Or"

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Charge I: Violation of the UCMJ Article 121.

Specification: In that Sergeant (E-5) John Q. Public did, at or near Camp Snuffy, Oklahoma, on or about 1 January 2012, steal cash or property of a value of about $200, the property of the U.S Government.

Charge II: Violation of the UCMJ Article 134.

Specification: In that Sergeant (E-5) John Q. Public, a married man, did, at or near Camp Snuffy, Oklahoma, on or about 1 January 2012, wrongfully have sexual intercourse with Mary Roe, a woman not his wife, such conduct being to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces.

Military practitioners are familiar with charges containing the word "or." The term "on or about" may be used to describe the date an offense occurred[1] and the term "at or near" may be used to describe the place of the offense.[2] However, it is generally improper to use the disjunctive "or" in other parts of the specification, because it leads to ambiguity.[3] The charges listed above both violate this prohibition against disjunctive charging. The first improperly alleges theft of cash "or" property, causing confusion as to what the accused allegedly stole. The second improperly alleges prejudice to good order and discipline "or" service discrediting conduct, leading to a similar ambiguity.

The Manual for Courts-Martial specifically cautions against disjunctive charging.[4] The rule stems from the requirement to ensure specifications are sufficiently specific to inform the accused of the misconduct allegedly committed, to enable the accused to prepare a defense, and to protect the accused against double jeopardy.[5]

Several cases have dealt with this issue. In *United States v. Autrey*, the Court of Military Appeals held that it is improper to find an accused guilty of wrongful appropriation of "money and/or property" because the charge makes it impossible to determine what the accused appropriated.[6] In *United States v. WoodeI*, the Navy-Marine Court of Military Review held that is improper to allege that an accused introduced drugs onto a military installation "for the purpose of use and/or distribution" because the charge provided "no clue to the offense with which [the accused] was charged."[7] In *United States v. Gonzalez*, the same court held that it is improper to charge an accused with desertion with the intent to "avoid hazardous duty or shirk important service."[8] The

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307(c)(3), discussion, para. (D)(ii) (2012) [hereinafter MCM].

[2] *Id.* R.C.M. 307(c)(3), para. (E), discussion.

[3] The Confiscation Cases, Slidell's Land, 87 U.S. 92, 104 (1874) ("an indictment or criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences [sic], would be destitute of the necessary certainty, and would be wholly insufficient"; the Court went on to hold that this prohibition did not apply to non-criminal real property condemnation proceedings).

[4] MCM, *supra* note 1, R.C.M. 307(c)(3), para. (G)(iv), discussion. The rule is contained in the discussion of duplicitous charges: "[o]ne specification should not allege more than one offense, either conjunctively (the accused 'lost and destroyed') or alternatively (the accused 'lost or destroyed'). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively."

[5] *Id.* R.C.M. 307(c)(3), para. (G)(iii) discussion.

[6] United States v. Autrey, 30 C.M.R. 252, 254–55 (C.M.A. 1961) (accused was charged with larceny and found guilty, pursuant to his plea, of the lesser included offense of wrongful appropriation of "money and/or property"; the appellate court held the specification void for uncertainty and found that the accused's guilty plea at a special court-martial, where he was not represented by an attorney, did not constitute waiver).

[7] United States v. Woode, 18 M.J. 640, 641 (N.M.C.M.R 1984) (accused was found guilty, contrary to his plea, of introduction of cocaine onto a military base "for the purpose of use and/or distribution"; as a result of ambiguity, the finding of guilty as to the aggravating factor—the intent to distribute—was disapproved). *But see* United States v. Cook, 44 C.M.R. 788, 789 (N.C.M.R. 1971) (charge alleged conspiracy to sell "dangerous depressant, stimulant or hallucinogenic drugs" and also alleged actual sale of "dangerous depressant, stimulant, or hallucinogenic drug"—court held that the conspiracy charge was sufficient as written, and the additional language did not violate the rule against disjunctive charging where accused did not question the charge at trial).

[8] United States v. Gonzalez, 39 M.J. 742, 749 (N.M.C.M.R. 1994) (accused was convicted, contrary to his plea, of desertion with "intent to avoid hazardous duty and/or to shirk important service;" the court found the disjunctive charging to be error but held that the error was waived by failure to object at trial, at least in the absence of demonstrable prejudice). Desertion with intent to remain away permanently is a separate crime and should not be charged either conjunctively or disjunctively in the same specification as either kind of desertion with intent to shirk. *See* United

most recent military case dealing with this issue is *United States v. Crane*, an unreported opinion from the Army Court of Criminal Appeals.[9] In *Crane* the accused was charged with and pled guilty to conspiracy to "introduce and/or distribute cocaine and/or ecstasy." The Army court held that the disjunctive charging was error, but that the error was waived by failure to raise the issue at trial.[10] The court went on to "strongly discourage disjunctive pleadings."[11]

Federal district courts prohibit disjunctive charging. When a federal criminal statute uses the word "or" to specify several means by which an offense may be committed, federal district courts require prosecutors to charge the offenses in the conjunctive using the word "and."[12] Improper use of the word "or" in federal criminal indictments can be a fatal error,[13] but failure to object to disjunctive charges at trial can waive the issue.[14] Federal district courts also permit prosecutors to prove offenses in the disjunctive even though they are charged in the conjunctive.[15] For example, if an accused is charged with money laundering (1) with the intent to promote unlawful activity "and" (2) knowing it will conceal unlawful activity, proof of either theory will sustain a conviction.[16]

The rule against disjunctive charging should be observed when alleging the "terminal element" of offenses under Article 134 of the Uniform Code of Military Justice. This article is a catch-all provision that prohibits offenses, such as adultery and false swearing, that are not specifically defined by Congress in other punitive articles.[17] Article 134 criminalizes (1) "all disorders and neglects to the prejudice of good order and discipline," (2) "all conduct of a nature to bring discredit upon the armed forces," and (3) "crimes and offenses not capital"—offenses under other sections of the federal criminal code.[18] For offenses charged under the first two clauses, the "terminal element" is listed in the Manual as follows: "That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces OR was of a nature to bring discredit upon the armed forces."[19] Although the terminal element is not listed in most of the sample specifications under Article 134,[20] the Court of Appeals for the Armed Forces recently required that it be expressly included in the specification.[21]

States v. Kim, 35 M.J. 553, 554 (A.C.M.R. 1992); *see also* Captain Joseph D. Wilkinson II, *Custom Instructions for Desertion with Intent to Shirk*, ARMY LAW., Jan. 2012, at 57 n.9.

[9] No. 20080469, 2009 WL 6832590, at *1 (A. Ct. Crim. App. Aug. 18, 2009).

[10] *Id.* at *1.

[11] "Such pleadings serve no discernable purpose and unnecessarily create avoidable appellate issues." *Id.* at *2.

[12] United States v. Poffenbarger, 20 F.2d 42, 44 (8th Cir. 1927) (accused was convicted with theft of mail; court held that prosecutor's substitution of the word "and" in the indictment for the word "or" in the criminal statute was not only proper but required; "[t]o recite that the defendant did the one thing or another makes the indictment bad for uncertainty"); United States v. Heflin, 223 F.2d 371, 373 (5th Cir. 1955) (accused was convicted of bank robbery from "person and presence" of victim; court upheld this language, stating that "where a statute specifies several means or ways by which an offense may be committed in alternative, it is bad pleading to allege the means in the alternative; the proper way is to connect the allegations . . . with the conjunctive 'and,' and not with the word 'or') (quoting 42 C.J.S., *Indictments and Informations* § 101 (1955)).

[13] United States v. MacKenzie, 170 F. Supp. 797, 798–99 (D. Me. 1959) (accused was charged with violation of alcohol tax laws by having in his "possession or custody or under his control" an unregistered still and distilling apparatus; court dismissed this count, holding that the use of the disjunctive in indictment lacked the necessary certainty and was wholly insufficient); United States v. Vann, 660 F.3d 771, 774 n.4 (4th Cir. 2011) (court stated in dicta that "a disjunctive charge in an indictment contravenes an accused's constitutional rights;" court held that accused's plea of guilty to a state offense charged in the conjunctive did not necessarily mean that he was found guilty of both offenses for purposes of federal sentence enhancement provisions for violent felonies).

[14] United States v. Laverick, 348 F.2d 708, 714 (3d Cir. 1965) (where accused was convicted of bribery and did not raise a specific objection to the use of the disjunctive in the indictment, this issue was waived on appeal).

[15] United States v. Coughlin, 610 F.3d 89, 106-07 & n.10 (D.C. Cir. 2010) ("as the Supreme Court has repeatedly held, the government is entitled to prove criminal acts in the disjunctive, notwithstanding that the indictment charges them in the conjunctive") (citing Griffin v. United States, 502 U.S. 46, 56–60 (1991)).

[16] United States v. Van Nguyen, 602 F.3d 886, 900 (8th Cir. 2010) (accused was charged with, among other things, money laundering (1) with the intent to promote illegal activity, (2) knowing it would disguise illegal activity and (3) to avoid reporting requirements; the court upheld the accused's conviction ruling that proof of any of these alternate theories would sustain a conviction).

[17] MCM, *supra* note 1, pt. IV, para. 60. The President has defined a number of offenses which constitute disorders or neglects to the prejudice of good order and discipline or conduct of a nature to bring discredit upon the armed forces. *Id.* paras. 61–113. The offense of adultery is described in paragraph 62 and the offense of false swearing is defined in paragraph 79.

[18] 10 U.S.C. § 934 (2006). Non-capital crimes and offenses include federal crimes of unlimited application, such as counterfeiting under 18 U.S.C. § 471, and crimes of local application committed on federal installations, such as state offenses assimilated into federal law under the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2012). MCM, *supra* note 1, pt. IV, para. 60c(4).

[19] *See* MCM, *supra* note 1, pt. IV, para. 60b (emphasis added).

[20] The definition of adultery includes the following sample specification: "In that ___ (personal jurisdiction data), (a married man/a married woman), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ___ 20__, wrongfully have sexual intercourse with _____, a (married) (woman/man) not (his wife) (her husband)." *Id*. para. 62f. Most other sample specifications for offenses under Article 134 also do not contain the terminal element of prejudice to good order and discipline or discredit to the service. However, the discussion to Article 134 states that practitioners should expressly alleged at least one of the terminal elements. *Id*. para. 60.c(6)(a) discussion.

[21] United States v. Fosler, 70 M.J. 225 (2011) (where the accused was convicted, contrary to the plea, of an adultery specification that did not include the terminal element under Article 134 and the defense specifically objected to this omission at trial, the Court of Appeals for the Armed Forces dismissed the finding on this specification, ruling that an express allegation of the terminal element is constitutionally required). U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Jan. 2010) [hereinafter MJB] (C11–16, 3 Feb. 2012) (addressing this failure in the MCM's sample specifications under Article 134 and including a conjunctive allegation of the terminal elements of clause 1 and clause 2 for those Article 134 offenses).

Prosecutors drafting Article 134 charges should ensure they do not use the disjunctive "or" when including the terminal element, because this violates the rule against disjunctive charging. In drafting charges under the first two clauses of Article 134, prosecutors can use three approaches: (1) charge prejudice to good order and discipline, (2) charge service discrediting conduct, or (3) charge both prejudice to good order and discipline "and" service discrediting conduct.[22] Prosecutors should not charge in the alternative: they should not allege that the accused's conduct was either prejudicial to good order and discipline "or" brought discredit to the service.

The new model specification for child pornography under Article 134 includes the phrase "a minor, or what appears to be a minor, engaging in sexually explicit conduct."[23] Prosecutors and defense counsel should be alert to this use of the disjunctive, since the propriety of this language has not yet been tested by the appellate courts. This issue may be avoided in some cases by simply using the phrase "what appears to be a minor" or the words "a minor" in place of the above phrase.

Prosecutors must be alert to avoid the pitfalls of disjunctive charging. Defense counsel should object to disjunctive charges before entering pleas,[24] since failure to object may lead to waiver of the issue.[25]

[22] These three methods of charging are recommended in the MJB, *supra* note 21, para. 3-60-2A n.2.1. Charges under clause 3 state a separate offense with different elements, and should not be charged in the same specification with the others, as this would be duplicitous pleading. *See* United States v. Moultrie, No. 36372, 2007 WL 1725787, at *2 (A.F. Ct. Crim. App. May 31, 2007) (noting that child pornography charges under clauses 1 and 2 had different elements from child pornography charges under clause 3); MCM, *supra* note 1, R.C.M. 906(b)(5) discussion (noting that each specification may state only one offense, and that severance is the remedy when separate offenses are charged in the same specification).

[23] MCM, *supra* note 1, pt. IV, ¶ 68b.f. This is because the depiction of an actual minor is not an element of the offense, although the "depiction" must be able to convince the ordinary viewer that it is of an actual minor. United States v Beaty, 70 M.J. 39, 40 n.2 (C.A.A.F. 2011).

[24] MCM, *supra* note 1, R.C.M. 905(b)(2) ("objections based on defects in the charges and specifications" must be raised before a plea is entered).

[25] United States v. Gonzalez, 39 M.J. 742, 749 (N.M.C.M.R. 1994) (error was not reversible in the absence of prejudice when the accused failed to object).