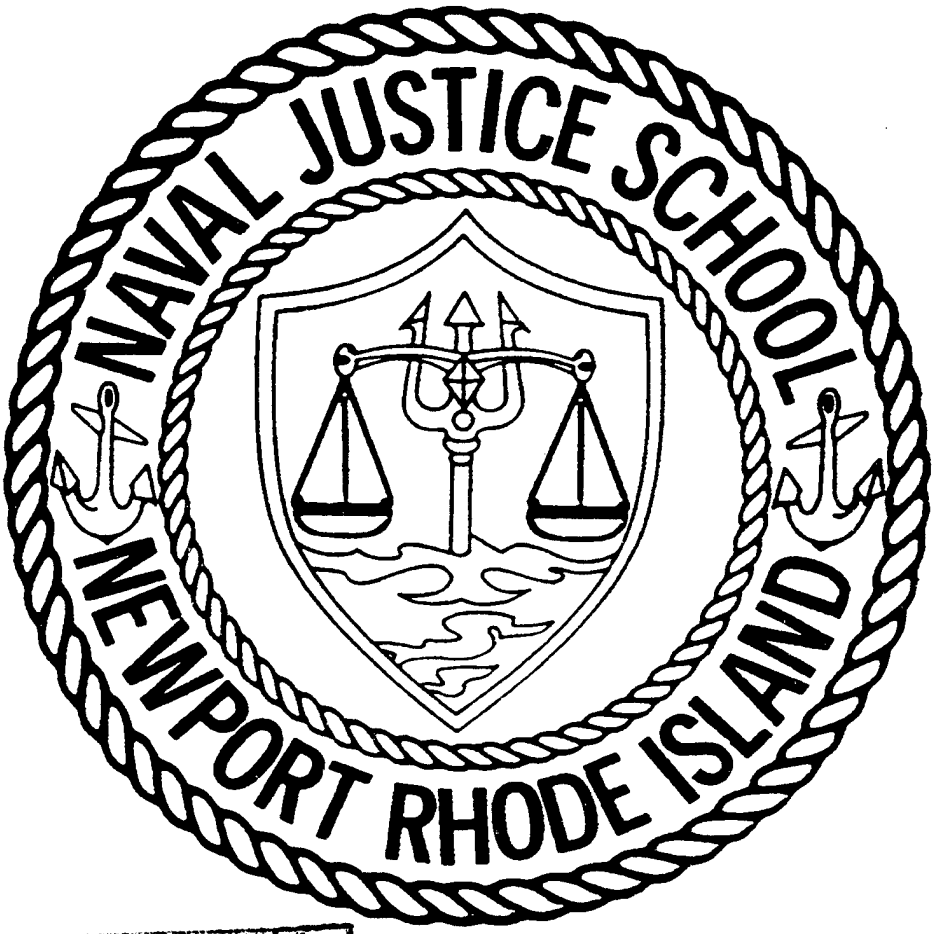
CRIMINAL LAW



DISTRIBUTION STATEMENT A
Approved for public release;
Distribution Unlimited

19980817 009

STUDY GUIDE

Rev. 8/98

DTIC QUALITY INSPECTED 1

CRIMINAL LAW STUDY GUIDE

Table of Contents

CHAPTER I	BASIC CONCEPTS OF CRIMINAL LIABILITY
CHAPTER II	PLEADING
CHAPTER III	ABSENCE OFFENSES
CHAPTER IV	OFFENSES AGAINST AUTHORITY
CHAPTER V	ARTICLE 133 & 134 -- THE GENERAL ARTICLE
CHAPTER VI	DRUG OFFENSES
CHAPTER VII	MISCELLANEOUS GROUPS OF OFFENSES
CHAPTER VIII	OFFENSES AGAINST THE PERSON
CHAPTER IX	OFFENSES AGAINST PROPERTY
CHAPTER X	DEFENSES
CHAPTER XI	INSTRUCTIONS
CHAPTER XII	FRATERNIZATION

CHAPTER I

BASIC CONCEPTS OF CRIMINAL LIABILITY

0101 NATURE AND PURPOSE OF MILITARY CRIMINAL LAW 1-1
A. Purpose of military criminal law 1-1
B. "Crime" defined 1-1
1. Social harm 1-1
2. Defined and made punishable by law 1-1

0102 GENERAL REQUIREMENTS FOR CRIMINAL LIABILITY 1-2
A. Overview 1-2
B. The act 1-2
1. Requirement of an act 1-2
2. Nature of the act of commission or omission 1-2
C. The mental element 1-3
1. General concept 1-3
2. Types of mens rea 1-3
D. Motive 1-9
E. Elements of the offense 1-9

0103 PRINCIPALS 1-13
A. Parties at common law 1-13
1. Principal, first degree 1-13
2. Principal, second degree 1-13
3. Accessory before the fact 1-13
4. Accessory after the fact 1-13
B. Parties under the UCMJ 1-13
1. Principals 1-13
2. Accessory after the fact 1-13
3. Purpose of Article 77, UCMJ 1-13
C. Accomplice 1-14
D. Text of Article 77, UCMJ 1-14
E. Article 77, a nonpunitive article 1-14
F. Perpetrator 1-14
1. Definition 1-14
2. Two types of perpetrator 1-14

G. Aider and abettor 1-16
1. Definition 1-16
2. Examples 1-16
3. Requirements 1-16
4. Liability of aider and abettor 1-20
H. Accessory before the fact 1-20
1. Definition 1-20
2. Counseling 1-20
3. Commanding 1-21
4. Procuring 1-21
5. Causes another to commit an offense 1-21
I. Special rules applying to principals 1-21
1. Responsibility for other crimes 1-21
2. Withdrawal 1-22
3. Lesser included offenses 1-22
4. Attempts 1-23
5. Guilt of other principals 1-23
6. Proof of perpetrator's crime at accomplice's trial 1-23
J. Instructions 1-23
K. Pleading 1-24
1. Example 1-24
2. Sample pleading 1-24

0104 ACCESSORY AFTER THE FACT 1-24
A. Text 1-24
B. General concept 1-24
C. Elements of the offense 1-25
D. An offense punishable by the code was committed (first element) 1-25
1. An offense was committed 1-25
2. Offenses "punishable by the code." 1-26
E. Accused's knowledge (second element) 1-26
F. Accused's assistance to principal (third element) 1-27
G. Accused's intent (fourth element) 1-27
1. Specific intent 1-27
2. Effectiveness 1-28
H. Principals as Assessories After the Face 1-28
I. Accessory after the fact as an LIO 1-28
J. Pleading 1-28
1. General considerations 1-28
2. Sample pleading 1-28
K. Instructions 1-29
L. Providency inquiry 1-29
M. Punishment 1-29

0105 REQUESTING COMMISSION OF AN OFFENSE 1-29
A. Background 1-29
B. Current law 1-29

0106 SOLICITATION 1-30
A. Article 82 solicitations 1-30
1. Form of solicitation 1-30
2. Instantaneous offense 1-30
3. Punishment 1-30
B. Article 134 solicitations 1-30
1. Form of solicitation 1-30
2. Instantaneous offense 1-30
3. Example of article 134 solicitation 1-30
4. Punishment 1-30
C. Specific intent offenses 1-31
D. Related offenses 1-31
E. Pleading. 1-31
1. General considerations 1-31
2. Sample pleadings 1-31
F. Instructions 1-32

0107 CONSPIRACY 1-32
A. Text 1-32
B. Elements of the offense. 1-33
C. Agreement with two or more persons (first element) 1-33
1. Agreement 1-33
2. Form of the agreement 1-33
3. Co-conspirators. 1-33
4. Contents of agreement 1-35
5. Proving the agreement 1-35
D. Object of the agreement (second element). 1-35
1. Object offense 1-36
2. Offenses requiring a concert of action. 1-36
E. Overt act (third element) 1-37
1. Requirement of overt act 1-38
2. Withdrawal (abandonment). 1-40
F. Duration of conspiracy 1-43
1. Rule 1-43
2. Inception of conspiracy 1-43
3. "During the course of the conspiracy." 1-43
4. "In furtherance of the conspiracy." 1-43
5. Termination of conspiracy 1-43
G. Corroboration of the co-conspirator's statement 1-43
H. Statute of limitations 1-44
I. Single conspiracy to commit several different offenses 1-44

J. Special conspiracies under article 134 1-44
1. Conspiracy to impede or injure any Federal officer in the discharge of his duties 1-44
2. Conspiracies against civil rights 1-44
K. Pleading 1-44
L. Instructions 1-45

0108 **ATTEMPTS** 1-45
A. Text of Article 80, UCMJ. 1-45
B. Scope 1-45
C. Elements of the offense. 1-46
D. Accused's act (first element) 1-46
E. Accused's intent (second element). 1-46
1. Specific intent offense 1-46
2. Proving intent 1-47
F. Nature of the overt act (third element) 1-47
1. More than mere preparation 1-47
2. Apparently tended to effect the commission of the intended offense 1-51
3. Factors in determining whether a sufficient overt act has been committed 1-52
4. Defense of impossibility 1-52
G. Effect of completion of attempted crime 1-55
H. Voluntary abandonment 1-55
I. Lesser included offense 1-56
J. Pleading. 1-56
1. General considerations 1-56
2. Sample pleading 1-56
K. Instructions 1-56
L. Punishment 1-56

0109 **REVIEW OF RELATIONSHIP BETWEEN CRIMINAL CONDUCT AND PARTIES TO CRIMES** 1-57
A. In general 1-57
B. The spectrum of crime 1-57

CHAPTER I

BASIC CONCEPTS OF CRIMINAL LIABILITY

0101 NATURE AND PURPOSE OF MILITARY CRIMINAL LAW (Key Number 801)

A. ***Purpose of military criminal law.*** The purpose of any system of criminal law is to define and minimize socially intolerable conduct. The needs of society ultimately determine what conduct will be outlawed. The military has long been recognized as a society that is separate and distinct from American civilian society. [For an extensive discussion, see *Parker v. Levy*, 417 U.S. 733 (1974)]. Therefore, military needs for preparedness, security, discipline, and morale may require criminalization of conduct which is tolerated in civilian society. Thus, military criminal law includes not only common law crimes (such as larceny and assault), but also purely military offenses (such as disrespect and unauthorized absence).

B. ***"Crime" defined*** A crime is any social harm defined by law and made punishable by the government in a judicial proceeding in its own name. *See* Perkins, ch. I, sec. 1.

1. ***Social harm*** Acts or omissions, by themselves, do not constitute criminality. It is the consequences which make conduct criminal. The accused's acts or omissions must impair a social interest.

> ***Example.*** A rock is thrown for the malicious purpose of putting out another's eye. The intended victim (a) dodges successfully, (b) moves enough so that the rock strikes a glancing blow, (c) loses an eye, or (d) is killed by the rock. In each case the act is the same, but the crime committed is respectively (a) assault, (b) battery, (c) maiming, and (d) murder.

2. ***Defined and made punishable by law.*** Basic to the American theory of justice is the principle that there can be no punishment for harmful conduct unless it was prohibited by some law in existence at the time. Thus, some social harms are not crimes. In the military, conduct which is harmful to military society has been defined by Congress in its enactment of a Federal statute, the Uniform Code of Military Justice (UCMJ). These offenses are further defined by the President of the United States in an Executive order, MCM, 1995.

0102 GENERAL REQUIREMENTS FOR CRIMINAL LIABILITY (Key Numbers 801,550)

A. ***Overview***This section presents a legal analysis of the concept of crime. Every crime has two components: (1) an act or omission—or actus reus, and (2) a mental state—or mens rea. *United States v. Langley*, 33 M.J. 278 (C.M.A. 1991); *United States v. Brown*, 19 M.J. 63 (C.M.A. 1984); and *United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983).

B. ***The act***

1. ***Requirement of an act.*** In the field of ethics, guilt depends upon the state of mind alone. It is impossible, however, to fathom the intentions of the mind except as they are demonstrated by outward actions, overt acts. Accordingly, evidence of a prohibited act or omission is a necessary requisite to criminal liability. *See* Perkins, ch. 7, sec. 3; 1 Wharton sec. 25; *see also United States v. Doyle*, 3 C.M.A. 585, 14 C.M.R. 3 (1954).

a. ***More than evil thinking.*** While evil thought alone is no crime, the law has defined as socially harmful and made punishable certain activity not far removed from mere evil thinking. For example, solicitation (requesting another to commit a crime) and communicating a threat are not much more than verbalized thought; but, the verbalization of such thought is an act which the law considers more than merely thinking about a crime. The making of such activity punishable is based upon the rationale that imposing a penalty at the early stage prevents the ultimate harm which such threats foretell. *United States v. Rutherford*, 4 C.M.A. 461, 462, 16 C.M.R. 35, 36 (1954).

b. ***Acts short of completed crimes.*** In other instances, acts of preparation and acts tending to effectuate a criminal objective are sufficient to qualify as "acts" for purposes of criminal liability even though the criminal objective is not achieved.

(1) For example, an act that is merely preparatory to committing a crime is sufficient to constitute the offense of conspiracy when the act is committed pursuant to an agreement to commit a crime.

(2) Likewise, an act that falls short of a completed crime, but would usually result in a crime being completed, can constitute a criminal attempt when the act is committed with the intent to commit a crime.

2. ***Nature of the act of commission or omission.*** It is essential that the act be either a willed movement or the omission of a possible, legally required performance. There is no legal duty, however, absent assigned duty such as that of a military policeman or guard, requiring an individual to stop a crime in which he is not criminally involved. *United States v. Fuller*, 25 M.J. 514 (A.C.M.R. 1987), *review denied*, 27 M.J. 290 (1988). The fact that the consequences of the act or omission were unintentional, or that the act or omission was done under the stress and strain of difficult circumstances, does not render it less an

"act" for purposes of criminal responsibility. The circumstances surrounding the commission or omission, however, may be sufficient to negate the required mental element and thus legally excuse criminal liability. (*See* discussion of general intent below.)

a. ***Example***. Smith shoots a gun at Jones to scare him, but with no intent to hit him. The bullet expended by the gun kills Jones. The intentional shooting of the gun was an ***act*** of commission. The unintended result may reduce or eliminate mens rea which will be discussed below.

b. ***Example***. Smith has no means of escaping death other than by punching Jones, an innocent person. Even though Smith did not want to punch Jones, and only did so under extreme stress, Smith nonetheless intended to commit an ***act*** of punching Jones. (No criminal liability because the assault and battery was due to conditions amounting to duress.)

c. ***Example***. Brown is ordered by his commanding officer to get a regulation haircut. Brown fails to do so because he does not believe the regulation haircut requirements are appropriate. Brown has intentionally omitted to do a legally required act and is criminally liable for that omission.

d. ***Example***. Garcia, a soldier not performing police or guard duties, fails to put out a fire started by his companion. His omission to act does not make him criminally liable where he had no duty to act.

C. ***The mental element.***

1. ***General concept***. Crime requires a certain mens rea, or "mind at fault."

2. ***Types of mens rea***. Military law, based on the UCMJ, recognizes five types of mens rea: (1) general intent; (2) specific intent; (3) negligence; (4) willfulness; and (5) knowledge. The type of mens rea varies with different offenses and affects the manner of proving guilt and the availability of certain defenses. (*See* chart, *infra*, p. 1-12.)

a. ***General intent offenses***. General intent is defined as an intent to do or fail to do the act, the actus reus. *See United States v. Bryant*, 39 C.M.R. 380, 383 (A.B.R.), *petition denied*, 38 C.M.R. 441 (1968); *United States v. Brown*, 19 M.J. 63 (C.M.A. 1984). For example, in assault and battery, the actus reus is an offensive touching. Because there is a general intent to do the actus reus, the mere fact of commission or omission of a required act permits the prosecution to rely on inference to prove general intent. Thus, by merely proving the actus reus, the prosecution has established prima facie the required mens rea in general intent offenses. *See United States v. O'Brien*, 9 C.M.R. 201 (A.B.R. 1952), *aff'd*, 3 C.M.A. 105, 11 C.M.R. 105 (1953).

b. ***Specific intent offenses.*** Specific intent has been defined as something which "involves a further or ulterior purpose beyond the mere commission of the act." *United States v. Bryant*, 39 C.M.R. 380, 383 (A.B.R.), *petition denied*, 38 C.M.R. 441 (1968). A specific intent offense requires, as an element of the offense, proof of an intent particularized by the offense. The prosecution cannot rely on the inference that is permitted to find general intent. Rather, the specific mental state must be proven beyond a reasonable doubt. It is important to note several peculiarities with regard to specific intent. First, more than one offense may involve the same general intent, but may or may not have the same specific intent, or a specific intent may not be present at all. Second, a specific intent offense can be a lesser included offense (LIO) of a general intent offense. Third, an actus reus may be the same in any two offenses, but the presence or absence of specific intent is what differentiates the crimes. Examples of specific intent and its peculiarities follow.

(1) ***Example.*** Larceny has both a general intent and a specific intent. Because it has a specific intent element, it has been labeled a specific intent offense. The general intent in larceny is the taking of property. The specific intent, that is, the "further or ulterior purpose" beyond the mere taking of property, is the intent to deprive the owner of the property permanently.

(2) ***Example.*** Desertion is a specific intent offense. The specific intent element required to be proven is the individual's intent to remain away from his unit or organization permanently. The general intent is to remain away from one's unit or organization, the same general intent as the offense of unauthorized absence (UA).

(3) ***Example.*** Larceny and desertion can also serve as examples of the first peculiarity discussed above. Both larceny and wrongful appropriation have the same general intent; that is, the taking of property, but the specific intents of each offense differs. In larceny, the specific intent is to deprive the owner of his property permanently; while, in wrongful appropriation, the specific intent is to deprive the owner of his property temporarily. In desertion and UA, the general intent is to be absent from one's unit or organization. While desertion has a specific intent, UA does not have any specific intent.

(4) ***Example.*** Assault with the intent to commit sodomy, a specific intent offense, is an LIO of the general intent offense of sodomy. *United States v. Morgan*, 8 C.M.A. 341, 24 C.M.R. 151 (1957). Similarly, assault with the intent to commit rape is an LIO of the general intent offense of rape. *See United States v. King*, 10 C.M.A. 465, 28 C.M.R. 31 (1959).

c. ***Negligence offenses.*** Some of the offenses under the UCMJ require only a negligent act. The degree of negligence required varies. Some offenses, such as assault and UA, are both general intent and negligence offenses because they may be committed either through intentional or negligent acts. Therefore, in one case, an assault may be prosecuted as a general intent offense and, in another case, another assault may be treated as a negligence offense.

(1) ***Negligence defined.*** Negligence has been defined as ". . . any conduct, except conduct intentionally or wantonly and willfully disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm." Perkins at 753.

(2) ***Causal relationship required.*** In all crimes involving a negligent state of mind, there must exist a causal relationship between the negligent act or omission and the harm prohibited by the statute. There are therefore two questions which must be answered: (1) Is the accused guilty of negligence; and (2) was that negligence the proximate cause of the alleged harm or injury? In determining proximate cause, the test applied is whether or not the negligent conduct played a "material role" in the criminal result. *United States v. Romero*, 1 M.J. 227 (C.M.A. 1975). *See United States v. Gordon*, 31 M.J. 30 (C.M.A. 1990); *United States v. Lingenfelter*, 30 M.J. 302 (C.M.A. 1990).

(3) ***Degrees of negligence.*** There are three degrees of negligence recognized by the UCMJ: (1) simple negligence; (2) culpable negligence; and (3) wantonness. The ability to distinguish between degrees of negligence is important in determining whether the prosecution has met its burden of proving the element of negligence required by a particular offense. For example, the offenses of negligent homicide (article 134) and involuntary manslaughter (article 119) have negligence as an element to be proven by the prosecution. In the former, the degree of negligence required is simple negligence; whereas, in the latter, the degree of negligence required is culpable negligence.

(a) ***Simple negligence.*** Simple negligence is defined as ". . .the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably careful person would have exercised under the same or similar circumstances." Part IV, para. 85(c)(2), MCM, 1995. *United States v. Greenfeather*, 13 C.M.A. 151, 32 C.M.R. 151 (1962); *United States v. Russell*, 3 C.M.A. 696, 14 C.M.R. 114 (1954). It is ". . . the lack of due diligence or of due care or the failure to use or exercise ordinary care," *United States v. Ritcheson*, 3 C.M.R. 759, 762 (A.B.R. 1952), "so as to avoid injury to others." *United States v. Cuthbertson*, 46 C.M.R. 977, 980 (A.C.M.R. 1972).

-1- ***Example.*** Negligent homicide (article 134). *Greenfeather, supra*: Accused was convicted of causing the deaths of three persons when the car he was driving crossed over the center line and collided head-on with another vehicle. Due to weather conditions, the curve in the road, the intersection located in the area, and the speed the accused was traveling, the court concluded that the accused, who was familiar with these facts, failed to exercise, a degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances. *Id.* at 157.

-2- ***Example.*** Negligent homicide (article 134). *Gordon, supra*: Accused rented a small rowboat with two other servicemembers, one of whom was the victim. The victim asked for a life preserver, but none were available. The boat was moved onto the lake. The accused and one of the other servicemembers, not the victim, preceded to dive from the boat, which caused the boat to take on water. The victim did not participate. The accused and other servicemember then started to splash each other, which caused the boat to take on additional water and begin sinking. A suggestion was made to swim ashore and the victim responded that he could not swim. At that time the boat capsized and as a result the victim drowned. The court held that, because the accused testified that he observed the victim unsuccessfully request a floatation device, he heard the victim state he could not swim, he observed that the victim took no part in the splashing which led to the boat capsizing, and because he personally knew the approximate depth of the lake from his own swimming in the lake, his conduct, at the very least, could be found to be simple negligence. *Id.* at 35.

-3- ***Example.*** Negligent destruction, damage, or loss of military property of the United States (article 108). *United States v. Donnelly*, 19 C.M.R. 549 (N.B.R. 1955): Accused operated a military vehicle while intoxicated and collided with another vehicle. The military vehicle was damaged. The court held that drunkenness does not per se constitute negligence, but ". . . a reasonable man of ordinary prudence does not drive while drunk . . . . The prosecution therefore made out a case of simple negligence against this accused by showing that he operated the jeep while intoxicated and with his physical and mental ability to control it impaired." The court went on to use the proximate cause doctrine to show the causal relationship of the accused's negligence and the damage to the vehicle. *Id.* at 551.

-4- ***Example.*** Hazarding a vessel (article 110). *United States v. Day*, 23 C.M.R. 651 (N.B.R. 1957): Commanding officer failed to exercise that degree of ordinary care which a commanding officer would exercise under the circumstances and, as a result, his ship grounded.

(b) ***Culpable negligence.*** Culpable negligence is defined as that ". . . degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." Part IV, para. 44c(2)(a)(i), MCM, 1995. Culpable negligence has also been defined as recklessness. Recklessness is defined in Part IV, para. 35c(4), MCM, 1995 (see discussion of article 111), as the exhibiting of "a culpable disregard of foreseeable consequences to others from the act or omission involved."

(c) ***Wantonness offenses.*** Wantonness is a callous disregard for the ***probable*** consequences of an act. The U.S. Court of Military Appeals has defined wantonness as a legal equivalent to general intent in *United States v. Craig*, 2 C.M.A. 650, 10 C.M.R. 148 (1953). In *Craig*, the court, with regard to the concept of the intent required for murder, one of the two offenses under the UCMJ which refers to wantonness,

stated: ". . . [P]remeditated murder only requires a specific intent to kill and that the other intents may be inferred from the nature and probable consequences of the act if purposely done. This amounts to a general criminal intent." *Id.* at 659, 10 C.M.R. at 156; *see United States v. Cook*, 12 C.M.A. 173, 30 C.M.R. 173 (1961). Part IV, para. 43c(4)(a), MCM, 1995, defines *wanton* as "the wanton disregard of human life. . . . Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm." In defining wanton, the MCM states that it includes the lesser degree of "reckless" and further states that, if motor vehicles are involved, it may connote "willfulness." Part IV, para. 35c(5), MCM, 1995. The *Manual* does recognize, however, that offenses involving wantonness are aggravated offenses. In fact, in situations where death occurs, malice may be implied from wanton conduct such that a charge of murder could result. *United States v. Judd*, 10 C.M.A. 113, 27 C.M.R. 187 (1959); Part IV, para. 43c(4)(a), MCM, (1995 Edition).

d. ***Knowledge offenses.*** Knowledge is closely related to, and often confused with, the concept of intent. In fact, the courts have recognized that offenses which have knowledge as an element are equivalent to specific intent offenses. *United States v. Joyner*, 6 C.M.R. 854 (A.F.B.R. 1952); *United States v. Stone*, 13 C.M.R. 906 (A.F.B.R. 1953); *see United States v. Curtin*, 9 C.M.A. 427, 26 C.M.R. 207 (1958). Many offenses require that the accused possess a certain specific knowledge at the time he commits the offense as an element of the offense. In such offenses, the prosecution must present evidence of the accused's knowledge in order to establish a prima facie case. In other offenses, knowledge is not an element of proof, but the lack of knowledge is an affirmative defense. When the affirmative defense of lack of knowledge is raised in such cases, the burden is then placed upon the prosecution to prove the accused's knowledge beyond a reasonable doubt. Finally, in still other offenses, the accused's knowledge is irrelevant; that is, knowledge is not an element the prosecution is required to prove, and lack of knowledge is not available as an affirmative defense.

(1) Knowledge has been defined as the "mental capability to entertain conscious thought." It is the same mental capability which is the prerequisite for specific intent. *United States v. Stone*, 13 C.M.R. 906, 910 n. 1 (A.F.B.R. 1953). It is important to note, when discussing knowledge as an issue in current military law, that constructive knowledge is almost ***never*** the test. Case law and revisions in the *Manual* have almost completely eliminated references to constructive knowledge. *See, e.g., United States v. Chandler*, 23 C.M.A. 193, 48 C.M.R. 945 (1974); *United States v. Zammit*, 16 M.J. 330 (C.M.A. 1983); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985). The only exception to this is the offense of dereliction of duty, a violation of Article 92, UCMJ. The 1995 *Manual* states that the accused must have known or "reasonably should have known" of the duty he was derelict in performing before he may be convicted. Part IV, para. 16c, MCM, (1995 Edition).

(2) The three contexts in which knowledge can arise are further illustrated:

(a) Knowledge required as an element of the offense; lack of knowledge as an affirmative defense. The prosecution must present evidence of the accused's knowledge in order to establish a prima facie case. The accused may either present no evidence—thus putting the prosecution to the test of meeting its burden of proof—or the defense may present evidence of the accused's lack of the requisite knowledge—thus negating an element of the offense. For example, disobedience of a lawful order which is not a general order requires, as an element of the offense, that the accused know of the order. The prosecution's failure to prove that the accused knew about the order will result in a finding of not guilty to any one of these types of orders violations. Likewise, assuming the prosecution established a prima facie case of disobedience, presentation of evidence tending to show lack of knowledge of that order by the defense may tend to negate the prosecution's evidence such that proof beyond a reasonable doubt may not be found. Therefore, while knowledge and intent are generally independent concepts, it is in this context that knowledge is functionally indistinguishable from a specific intent. Accordingly, offenses which require certain specific knowledge as an element of proof should be considered specific intent offenses. *Joyner, supra*. With regard to orders violations under articles 90 and 91, there are two types of knowledge. There is knowledge that an order was given and understood—referred to by the courts as "comprehension"—and there is knowledge that the order was given by a commissioned officer superior to the receiver of the order, or by a warrant, noncommissioned, or petty officer—referred to by the courts as "recognition." *Compare United States v. Simmons*, 1 C.M.A. 691, 5 C.M.R. 119 (1952) *with Joyner, supra*. (*See* discussions on willfulness, *infra*, and Chapter IV, *infra*, OFFENSES AGAINST AUTHORITY.)

(b) Knowledge not required as an element; lack of knowledge an affirmative defense. In offenses not requiring knowledge as an element of proof, the prosecution need not present evidence of an accused's knowledge in order to establish a prima facie case. If the defense raises the issue that the accused was ignorant—that is, lacked knowledge—the prosecution must prove the accused's knowledge beyond a reasonable doubt. Because knowledge has been equated to specific intent, honest lack of knowledge or honest ignorance would be an affirmative defense. *United States v. Lampkins*, 4 C.M.A. 31, 15 C.M.R. 31 (1954). For example, in *Lampkins*, the accused was charged with the wrongful possession of marijuana. Knowledge is not an element of the offense of wrongful possession of marijuana which the prosecution is required to prove. The accused, however, raised the affirmative defense of lack of knowledge; that is, lack of knowledge that he possessed the substance as opposed to knowledge he possessed the substance but lacked knowledge that it was marijuana. The prosecution then had the burden of proving that the accused was aware of its presence, or had knowledge of its presence, beyond a reasonable doubt. The court found that such a defense was proper and the court should have been instructed that the accused should be found not guilty if it found that his lack of knowledge was honest. Thus, the affirmative defense of lack of knowledge is equatable to the affirmative defense of mistake of fact. (*See* discussion in Chapter X, AFFIRMATIVE DEFENSES.)

(c) Knowledge not required as an element; lack of knowledge not a possible defense. This issue is most often discussed as ignorance (or mistake) of law or facts.

-1- ***Ignorance of fact.*** In most instances, a mistake or ignorance of fact will give rise to a defense. Some offenses, however, in reflecting society's desire to provide special protection against a particular harm, impose strict criminal liability wherein the accused's lack of knowledge, no matter how honest or reasonable, will not constitute a defense. *See* R.C.M. 916(j).

-2- ***Ignorance of law.*** "Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense." R.C.M. 916(l)(1).

-3- ***Deliberate ignorance.*** While finding the principle inapplicable on the facts before it, the Court of Military Appeals appeared to agree that deliberate ignorance may, in a proper case, be the equivalent of actual knowledge. *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). As applied in the Federal courts, deliberate ignorance requires something more than "mere negligence, foolishness, or stupidity" of the accused, but must be based on a purposeful avoidance of truth, an awareness of the "high probability" of the fact in issue, and absence of an actual belief by the accused of the nonexistence of that fact. *Id.* at 478 (citing authority). Whether this principle is simply a form of circumstantial evidence, or whether it will be applied in the military, remains to be developed.

e. ***Willfulness offenses.*** Generally speaking, willfulness and specific intent are synonymous. Certain UCMJ offenses use the term willful in a slightly more complicated manner. For example, Articles 90 and 91, UCMJ, prohibit ***willful*** disobedience of superiors. In these offenses, willful has been defined not just as an intentional act, but as an act which was intentionally defiant of authority. Part IV, para. 14c(2)(f), MCM, 1995. It should also be noted that, although Article 126, UCMJ, uses the term "willfully and maliciously" in defining arson, it has recently been held that arson is not an offense requiring specific intent. *United States v. Acevedo-Velez*, 17 M.J. 1 (C.M.A. 1983).

D. ***Motive.*** Motive is not a type of mens rea, nor is it an element of any offense. An evil motive will not, by itself, make an act criminal; nor will a good motive, not amounting to a defense, exonerate an individual from criminal liability. *United States v. Simmelkjaer*, 18 C.M.A. 406, 40 C.M.R. 118 (1969); *United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983). Evidence of the accused's motives, however, is often admissible as circumstantial evidence of intent. Sometimes, as a practical matter, the distinction between motive and intent becomes unclear; however, the two concepts should not be confused.

E. ***Elements of the offense.***

1. ***Concept.*** Each specific offense is defined in terms of specific facts about which the prosecution must present evidence in order to make a prima facie case, and which the prosecution must prove beyond reasonable doubt in order to convict. Such essential facts constitute the elements of the offense. Thus, each crime is defined not in vague, abstract terms, but in terms of what the accused allegedly did.

2. As part of its discussion on each offense, this study guide lists the elements of each offense. Another generally reliable source of the elements of offenses is Part IV, MCM, 1995, which provides a discussion of most of the offenses under the code. Caution is necessary when using Part IV of the *Manual*. The *Manual* does not discuss all of the offenses under the code. Also, it may not reflect recent judicial interpretations of substantive law which would take precedence over the *Manual*'s provisions. A third ***generally*** reliable reference concerning elements of the offenses is the current edition of the *Military Judge's Benchbook*, DA Pam 27-9 (1996) with change 1, which lists the elements of each offense in the form that they would be discussed during instructions on findings.

CHART I

Mens Rea	Offense	Act ± State of Mind Actus Reus ± (Mens Rea)	Affirmative Defense	Standard
NEGLIGENCE				
(1) Simple	(1) a. UA b. Negligent Homicide	(1) a. Failure to go. b. Drive through red light.	(1) a. Thought set alarm. b. Thought light was green.	No Defense
(2) Culpable	(2) Involuntary Manslaughter	(2) Fast draw with loaded pistol.	(2) Thought safety was on.	(General Defense)
(3) Wantonness	(3) Unpremeditated Murder	(3) Fired loaded pistol through door into room knowing room occupied w/ people.	(3) Thought door would stop bullet.	Honest and reasonable
GENERAL INTENT	(1) UA	(1) Left work.	(1) Thought had permission to leave when job was finished.	Honest and reasonable
	(2) Aggravated Assault	(2) Pointed pistol at individual and fired, but missed.	(2) Thought pistol was unloaded.	
SPECIFIC INTENT	(1) Desertion	(1) Left organization never to return.	(1) Thought discharged when 1stSgt told him he was no longer in USMC.	Honest
	(2) Larceny	(2) Took property of another to keep.	(2) Thought it was his own.	
	(3) Premeditated Murder	(3) Pointed pistol at another w / intent to kill, and fired.	(3) Thought victim was enemy.	
KNOWLEDGE	Disrespect	Told individual to "Shut Up."	Didn't know individual was superior.	Honest
WILLFULNESS	Disobedience of superior's orders	Failed to obey order to get regulation haircut.	Didn't know giver of order was superior.	Honest

0103 PRINCIPALS. Article 77, UCMJ, and Part IV, para. 1, MCM, 1995. (Key Numbers 806, 811, 812, 816)

A. ***Parties at common law.*** At common law, there were four categories of parties to a crime.

1. ***Principal, first degree.*** The actual perpetrator of the crime, the chief actor in the commission of a crime.

2. ***Principal, second degree.*** One who was not the chief actor, but who participated in the crime by assisting (e.g., the lookout or the driver of the get-away car).

3. ***Accessory before the fact.*** One who did not participate in the actual commission of the crime, but who, prior to the commission of the crime, did counsel, command, procure, or cause the crime to be done (e.g., the mastermind).

4. ***Accessory after the fact.*** One who did not participate in the commission of the crime, but who, ***after*** the crime was committed, rendered aid to the principals in first or second degree or to the accessory before the fact, by receiving, harboring, comforting, or assisting them with the intent to prevent their punishment.

B. ***Parties under the UCMJ.*** There are no "degrees of principals" in military law. There are simply two categories of parties to crimes under the code: principals (article 77) and accessories after the fact (article 78).

1. ***Principals.*** Article 77 combines three of the common law parties into one class:

a. Perpetrator;

b. aider and abettor; and

c. accessory before the fact.

2. ***Accessory after the fact.*** Article 78 provides that one who is an accessory after the fact has committed an ***independent*** crime under the UCMJ.

3. ***Purpose of Article 77, UCMJ.*** Congress enacted this statutory scheme in order to eliminate difficulties in pleading due to subtle distinctions among the parties at common law. Although the pleadings have been greatly simplified, it is still necessary to be familiar with the common law background since the trial counsel must still adopt a particular theory to establish the accused's liability as a principal. The military judge, in turn, will instruct the court members on the law governing the particular theory of liability as a principal. *See United States v. Wooten*, 1 C.M.A. 358, 3 C.M.R. 92 (1952); *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983).

C. ***Accomplice.*** An accomplice is not a defined party under the UCMJ. The term is, however, used to describe "all persons who participate in the commission of a crime to an associate who knowingly and voluntarily cooperates, aids, or assists in its commission. . . ." *United States v. Scoles*, 14 C.M.A. 14, 18, 19, 33 C.M.R. 226, 230, 231 (1963). One must be "culpably" involved. *United States v. McCue*, 3 M.J. 509 (A.F.C.M.R. 1977); *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R. 1985). It is most frequently used in the instructions given by the military judge to court members when individuals falling within the above description testify at trial and their credibility becomes an issue. *See United States v. Bey*, 4 C.M.A. 665, 16 C.M.R. 239 (1954); *Scoles, supra*. The term is to be read broadly, but care must be taken to ensure the witness really is an accomplice. *United States v. Garcia*, 22 C.M.A. 8, 46 C.M.R. 8 (1972); *United States v. Allison*, 8 M.J. 143 (C.M.A. 1979). The military judge's instruction can be found in *Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. No. 7-10. "Accomplice" is also relevant to the application of the discussion portion of R.C.M. 918(c), MCM, 1995, concerning the determination of the guilt of an accused based solely on the self-contradictory, improbable, or uncertain testimony of an accomplice.

D. ***Text of Article 77, UCMJ.*** "Any person punishable under this chapter who—

1. commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or

2. causes an act to be done which if directly performed by him would be punishable by this chapter, is a principal."

E. ***Article 77, a nonpunitive article.*** Article 77 is not a punitive article, it merely defines the principals to crimes. Each principal, regardless of type, is criminally liable for the acts of the perpetrator in the same degree as the perpetrator, except where the liability requires the formation of a specific intent. In the offenses requiring such specific intent, the principals, regardless of degree, are criminally liable only for the offense for which their own individual intent can be proven by the prosecution. Part IV, para. 1b(4), MCM, 1995. Therefore, once the prosecution proves that a person is a principal in the commission of a crime, and if the crime involves an element of specific intent and that element has been established, that person is liable as a principal; is charged under the appropriate punitive article; and is liable for the same punishment as if he had been the actual perpetrator.

F. ***Perpetrator.*** (Common Law principal, first degree).

1. ***Definition.*** A perpetrator is one who "commits an offense"; that is, who actually commits the crime—either by his own hand, or "causes an act to be done"; that is, by an animate or inanimate agency or by an innocent human agent.

2. ***Two types of perpetrator.*** Note that the article 77 concept of perpetrator is split into two parts: "commits" [article 77(1)], and "causes . . . to be done" [article 77(2)].

a. ***"Commits the offense."*** The accused actually does the deed which constitutes the crime. For example, the accused personally strikes another individual with his fist without that individual's consent and the individual is injured; the accused is guilty of assault and battery.

b. ***"Causes an act to be done."*** The accused does the deed which constitutes the crime through an indirect means. In this regard, it is not necessary that the accused do the act by his / her own hand in order to be a perpetrator. Nor is physical presence at the scene of the crime required. *United States v. Banks*, 20 M.J. 166 (C.M.A. 1985). Two basic means of causing an act to be done are:

(1) ***Animate or inanimate agency.*** The individual uses something other than his own body to commit the crime. For example:

(a) Using a bludgeon or firing a weapon;

(b) placing a poisonous snake in victim's bed; or

(c) planting a bomb in an airplane, rigged to explode by decreased air pressure.

(2) ***Innocent human agent.*** The accused gets another person to do an act which constitutes a crime. For example, in *United States v. Tirado*, NCM 68-3284 (15 Aug 1969), *petition denied*, 19 C.M.A. 597 (1970), a troop handler was found guilty of committing lewd and lascivious acts in violation of Article 134, UCMJ. Two recruits, disenchanted with military life, had falsely claimed to be homosexuals in order to be discharged. The accused punched one of the recruits and ordered him to "prove" his claim, whereupon the recruit performed an act of fellatio on the other recruit. At his trial, the accused, who claimed to have been shocked and surprised by the conduct of the recruits, unsuccessfully requested an instruction that the court would have to find that he specifically intended that fellatio be performed in order to find him guilty. On appeal, the Navy Court of Military Review reasoned that, under article 77(2), the accused could be found guilty as if he had committed the act himself. If he had committed the act himself, no finding of intent would be necessary. Therefore, said the court, it was not necessary to find intent where the accused is charged with causing the act to be done. *See United States v. Mayville*, 15 C.M.A. 420, 35 C.M.R. 392 (1965); *United States v. Piatt*, 17 M.J. 442 (C.M.A. 1984).

c. ***Relationship to Federal statutes.*** This structure parallels that of the Federal Principals Statute, 18 U.S.C. Sec. 2. The Revisor's Note to 18 U.S.C. Sec. 2 explains that the "causes . . . to be done" language was added to express

> . . . the legislative intent to punish as a principal not only one who directly commits an offense . . . but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense . . . .

> It removes all doubt that one who . . . causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

Wooten, supra, at 362, 3 C.M.R. at 96.

d. ***Relationship to common law.*** Thus, articles 77(1) and 77(2) together restate the common law definition of a principal in the first degree. At least one court has held that this statutory bifurcated handling of the perpetrator concept does not create any criminal liability that did not already exist at common law. *See Wooten, supra.*

G. ***Aider and abettor.*** (Common law principal, second degree).

1. ***Definition.*** An aider and abettor is one who, although not the perpetrator of the crime, is present, shares the criminal purpose, and participates in its commission, by doing some act in order to render aid to, and which does aid, the perpetrator when the crime is committed. *United States v. McCarthy*, 11 C.M.A. 758, 29 C.M.R. 574 (1960); *United States v. Ford*, 12 C.M.A. 31, 30 C.M.R. 31 (1960). In order for an accused to be guilty as an aider and abettor, the perpetrator must have committed a crime punishable under the Uniform Code of Military Justice. *United States v. Jones*, 37 M.J. 459, 460 (C.M.A. 1993); *United States v. Hill*, 25 M.J. 411, 412 (C.M.A. 1988).

2. ***Examples.***

a. ***A*** commits a housebreaking while ***B*** waits outside the building acting as lookout. ***B*** is "aiding and abetting," and both ***A*** and ***B*** are "principals." *United States v. Cox*, 14 C.M.R. 706 (A.F.B.R. 1954).

b. ***A*** robs a bank. ***B***, the driver of the get-away car, never enters the bank. ***B*** is guilty of robbery as an "aider and abettor," and both ***A*** and ***B*** are principals.

c. ***A*** takes ***B*** as a passenger when he purchases marijuana. Low on cash, he asks ***B*** to "pitch in." ***A*** then distributes the marijuana. ***B*** is an aider and abettor of seller. *United States v. Hill*, 25 M.J. 411 (C.M.A. 1988).

3. ***Requirements.*** To prove an individual guilty on the theory of aiding and abetting, the prosecution must show that the alleged aider and abettor did in some way associate himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his actions to make it successful. Assisting, encouraging, or inciting may be manifested by acts, words, signs, motions, or any conduct which

unmistakably evinces a design to encourage, incite, or approve of the crime. *Ford, supra; McCarthy, supra; United States v. Knudson*, 14 M.J. 13 (C.M.A. 1982). In addition, the aider and abettor must share the criminal intent, or purpose, of the active perpetrator of the crime [*United States v. Seberg*, 5 M.J. 895 (A.F.C.M.R. 1978)] and must by his presence aid, encourage, or incite the major actor to commit it. *United States v. Jackson*, 6 C.M.A. 193, 19 C.M.R. 319 (1955). *United States v. Outlaw*, 2 M.J. 814, 816 (A.C.M.R.), *petition denied*, 5 M.J. 1104 (C.M.A. 1976). From this, it can be seen that there are three basic requirements which must be met before an individual can be found guilty as a principal to a crime on the theory of aiding and abetting: presence, participation, and intent.

a. ***Presence.*** The aider and abettor must be present at the scene of the crime or where he needs to be to aid the perpetrator when the crime is committed. More than inactive presence is required. "The aider and abettor must . . . encourage, or incite the major actor to commit (the crime). . . ." *United States v. Jacobs*, 1 C.M.A. 209, 2 C.M.R. 115, 117 (1952); *McCarthy, supra*. One who is so situated as to be able to aid the perpetrator and thereby help ensure successful completion of the crime is "present" for purposes of being an aider and abettor. Distance from the exact scene of the crime is not controlling. What is required is that the aider and abettor be located where he or she can assist in some significant way. "The standard of relationship to the offense by which conviction as an aider and abettor must be measured, therefore, lies somewhat between proof of participation as a paramount agent, on the one hand, and speculative inference based on mere presence at the scene of the crime, on the other . . . ." *Jacobs, supra*, at 211, 2 C.M.R. at 117. *See United States v. Pritchett*, 31 M.J. 213 (C.M.A. 1990). Thus, the concept of aiding and abetting does not provide for "a dragnet theory of complicity. Mere inactive presence at the scene of the crime does not establish guilt. . . ." *Jackson, supra*, at 201, 19 C.M.R. at 327 (1955); *United States v. Johnson*, 6 C.M.A. 20, 19 C.M.R. 146 (1955). *See* Part IV, para. 1b(3)(b), MCM, 1995. However, in *United States v. Dunn*, 27 M.J. 624 (A.F.C.M.R. 1988), an accused who accompanied a friend to the Exchange for the purpose of watching a demonstration of how to shoplift was convicted of larceny as an aider and abettor.

b. ***Participation.*** An aider and abettor must participate by aiding, inciting, counseling, or encouraging the perpetrator in the commission of the offense. *Outlaw, supra*. The accused was properly convicted of wrongful sale of marijuana, on an aider and abettor theory, where the evidence showed that he had directed the buyer to seller, made change so the deal could be consummated, and received $400 as part of the proceeds. *United States v. Burroughs*, 12 M.J. 380 (C.M.A. 1982). Mere inactive presence and mental approval are not enough, nor is approval subsequent to the act sufficient to constitute participation. *Jackson, supra*. A concert of action is required. *United States v. Ford*, 12 C.M.A. 31, 30 C.M.R. 31 (1960); *see United States v. Buchana*, 19 C.M.A. 394, 41 C.M.R. 394 (1970).

(1) Thus, a bystander does not become an aider or abettor merely by being present at the commission of a crime. *Johnson, supra*. Also, it has been held that, where all that was proven was that a guard agreed to "see nothing" in return for a

bribe, the evidence was insufficient to hold that guard liable as an aider and abettor. The court reasoned that the guard's agreement to "see nothing" could have been related to any criminal activity and that it would be "no more than sheerest speculation to contend there is sufficient showing that he participated in the venture as something he desired to bring about" when no other evidence of his participation or intent was shown. *United States v. Lyons*, 11 C.M.A. 68, 71, 28 C.M.R. 292, 295 (1959). Even knowing presence, a "going along for the ride" situation in a drug transaction, has been without a showing of more, insufficient to make one an aider and abettor. *See United States v. Pope*, 3 M.J. 1037 (A.F.C.M.R. 1977). If, however, a person has a legal duty to interfere and fails to do so because of one's specific intent to encourage or protect the perpetrator, that person is an aider and abettor. *Ford, supra*. The existence of the duty to interfere, as well as the accused's knowledge that he had this duty, must be clearly established by the evidence. Thus, proving that the accused was the senior occupant in a military vehicle at the time the driver wrongfully appropriated it was not sufficient by itself to establish that the accused aided and abetted the wrongful appropriation. *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985).

Even one with special ability (such as a firefighter) is under no legal duty to stop a crime (involving fire) in which he is not criminally involved. *United States v. Fuller*, 25 M.J. 514 (A.C.M.R. 1987). However, it is often difficult to determine whether there is a duty to interfere. *United States v. Lomax*, 12 M.J. 1001 (A.C.M.R. 1982).

Examples. (a) ***A***, a friend of ***B***, walking along with B, but with no special duty with regard to ***B***, and having no prior knowledge of ***B***'s intentions, has no legal duty to interfere when ***B*** knocks a girl to the ground and assaults her. *United States v. Sanders*, 14 C.M.A. 524, 34 C.M.R. 304 (1964).

(b) The failure of air policemen to act, in accordance with their duty, to prevent a homicide did not render them aiders and abettors in homicide, but constituted them, at most, only accessories after the fact. *See United States v. McCarthy*, 11 C.M.A. 758, 29 C.M.R. 574 (1960) *citing United States v. Schreiber*, 5 C.M.A. 602, 18 C.M.R. 226 (1955) (collateral determination).

(c) ***A***, ***B***'s roommate, has no legal obligation to stop the larceny of ***B***'s money by another servicemember. *United States v. Epps*, 25 M.J. 319 (C.M.A. 1987).

(2) Notice that the prosecution will often be forced to prove the participation of the alleged aider and abettor by means of the testimony of the perpetrator, which will often be given under a grant of immunity and therefore subject to impeachment. On such occasions, the presence or absence of evidence to corroborate the perpetrator's testimony can be critical. Where an immunized perpetrator testified that the accused aided and abetted the perpetrator's larceny by accepting some of the stolen goods,

the failure of the perpetrator to mention this fact in either of his two pretrial statements to law enforcement authorities, combined with the grant of immunity, effectively impeached his testimony. Since the remaining evidence of participation by the accused was deemed vague and ambiguous, the evidence was insufficient as a matter of law to sustain the accused's conviction for larceny on a theory of aiding and abetting. *United States v. Nakamura*, 21 M.J. 741 (N.M.C.M.R. 1985).

(3) In the context of larceny, the aiding and abetting may even occur after the taking, so long as it occurs during the asportation phase of the offense. Thus, where a thief took another serviceman's paycheck and several hours later asked the accused to forge the owner's endorsement on the check so the thief would be able to cash it, the accused's forgery of the signature made him an aider and abettor to the larceny of the check even though the taking had occurred hours earlier. *United States v. Wright*, 22 M.J. 25 (C.M.A. 1986).

c. ***Intent.*** It is not enough to show that there was presence, participation, or a duty to interfere in order to support a conviction based on the theory of aiding and abetting. The unlawful intent of the aider and abettor must be shown to be the same as the perpetrator. *United States v. Speer*, 36 M.J. 997, 1001 (A.C.M.R. 1993) (following *United States v. Perez*, 922 F.2d 782, (11th Cir. 1991), *cert. denied*, 501 U.S. 1223, 111 S.Ct. 2840, 115 L.Ed.2d 1008 (1991)). This is done by establishing that the aider and abettor intended to aid or encourage the perpetrator in the commission of the crime. *United States v. Jackson*, 6 C.M.A. 193, 19 C.M.R. 319 (1955); *United States v. McLeary*, 2 M.J. 660 (A.F.C.M.R. 1976), *petition denied*, 2 M.J. 199 (1977). In *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985), the government failed to show the accused had any knowledge that the jeep in which he was a passenger was wrongfully appropriated or that he shared any criminal purpose.

(1) Although it may be proved by direct evidence, the intent to aid must ordinarily be proved by circumstantial evidence. Such an intent may be inferred from all the circumstances accompanying the doing of the act and from the accused's conduct subsequent to the act. *See United States v. Speer*, 36 M.J. 997; *United States v. Ford*, 12 C.M.A. 31, 30 C.M.R. 31 (1960).

(2) In *Buchana, supra*, C.M.A. held that, on the facts of that case, it was error to instruct the court that evidence of flight from the scene of an assault and robbery would support an inference of a common purpose to rob. Flight is evidence of some consciousness of guilt, though not necessarily evidence of a concert of purpose to rob. *See also United States v. Papenheim*, 19 C.M.A. 203, 41 C.M.R. 203 (1970), where C.M.A. held that departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt.

(3) In the case where the guard accepted a $1,000.00 bribe to ride a truck and "see nothing." ***Held***: The mere acceptance of the bribe was not sufficient to establish a conscious sharing of the alleged intent of the perpetrators to commit larceny

where it was not shown that the guard was informed of the purpose of the bribe, nor were any details of the plan brought to his attention. His agreement to "see nothing" could have been related to any criminal activity. *United States v. Lyons*, 11 C.M.A. 68, 28 C.M.R. 292 (1959).

4. ***Liability of aider and abettor.*** As a general rule, the aider and abettor will suffer the same criminal liabilities (including the natural and probable results of the crime committed) as the perpetrator. *United States v. Wooten*, 1 C.M.A. 358, 3 C.M.R. 92 (1952). One need not agree to or even know all details, minor or otherwise, of the planned crime in order to aid and abet the commission of that crime. *United States v. Herrick*, 12 M.J. 858 (A.F.C.M.R. 1981). Sometimes, however, the aider and abettor's criminal liability will be quite different because of the circumstances of the case. *United States v. Craney*, 1 M.J. 142 (C.M.A. 1975). For example, an aider and abettor in an assault may not realize that the perpetrator had a knife and would be inclined to use it rather than his fists; the perpetrator may be guilty of murder, while the aider and abettor may only be guilty of involuntary manslaughter. *United States v. Jackson*, 6 C.M.A. 193, 19 C.M.R. 319 (1955).

> ***Example.*** ***A*** helps ***B*** assault ***O***, who is an officer. ***B*** does not know ***O*** is an officer, but ***A*** does. ***B*** is guilty of the LIO of assault; ***A*** is guilty of assault upon an officer, which calls for a more severe sentence. On the other hand, where the aider and abettor understands that a certain factor must be fulfilled to accomplish the crime and agrees, then the manner in which that factor is accomplished is irrelevant and the aider and abettor is equally liable with the perpetrator. For example, ***A*** understands that, for ***B*** to rob the victim, some kind of force will be required to be used. ***B***, without ***A***'s knowledge, hits the victim with a pipe. ***A*** is equally guilty with ***B*** for the robbery, even though he would not have used any kind of a weapon. *United States v. Fullen*, 1 M.J. 853 (A.F.C.M.R. 1976).

H. ***Accessory before the fact.***

1. ***Definition.*** An accessory before the fact is:

a. One who "counsels, commands, or procures" [art. 77(1)], or who "causes" [art. 77(2)] another to commit an offense; and

b. that offense (or one closely related) is committed pursuant to such counseling, commanding, procuring, or causing.

2. ***Counseling.*** The accessory before the fact advises that the crime be committed or the manner in which it is to be accomplished. The counseling may include ". . . any specific contribution of advice, afterwards acted on, constitutes the offense. . . . The amount of advice or encouragement rendered is not material if it has effect in inducing the commission of the crime." *Wooten, supra*, at 363; *United States v. Cowan*, 12 C.M.R. 374 (A.B.R. 1953).

a. ***Intent.*** The advice must be given with the intent to encourage and promote the crime. *Wooten, supra*; *Cowan, supra*. For example, an ensign asks the chief engineer how to scuttle the ship. The chief engineer tells the ensign how, and the ensign does it. The chief engineer is not an accessory before the fact if he is not aware that the ensign actually intended to scuttle the ship, and did not himself intend that the ensign do so.

b. ***Manner of commission of the crime.*** The fact that the crime was actually committed in a manner different from that counseled is not a defense. The counselor is still an accessory before the fact and is ". . . considered equally as guilty as the actual perpetrator of offenses incidental to or in execution of that offense which is counselled, or which are among its probable consequences. . . ." *Cowan, supra*, at 381; *Wooten, supra*. Thus, where instead of administering poison to the victim as planned, the perpetrator changes his mind and shoots the victim, the person who counseled the crime is an accessory before the fact.

3. ***Commanding.*** Any demanding of another that an act be done toward the commission of a crime is "commanding." While it is not limited to its technical meaning in the military, "(t)he word 'command', as applied to the case of principal and accessory, is where the person having control over another as a master over a servant, orders a thing to be done." 7A *Words and Phrases* 396. Furthermore, if the offense commanded is committed, but by different means than those commanded, the one who commanded the crime is still guilty as an accessory before the fact.

4. ***Procuring.*** The accessory before the fact "hires" another to commit a crime. It also means "to obtain, to bring about, and may be synonymous with 'aid' or 'abet'." 34 *Words and Phrases* 281.

5. ***Causes another to commit an offense.*** This language was discussed with respect to perpetrators and incorporates the common law concept of an accessory before the fact as well as that of a perpetrator.

6. The crime about which the accessory before the fact counsels must actually occur, or the accused is only a solicitor and not a principal.

l. ***Special rules applying to principals.***

1. ***Responsibility for other crimes.*** A principal can be convicted of other crimes committed by another principal if they are the natural and probable consequence of the common design, as long as those offenses are not "purely collateral offenses." *United States v. Cowan*, 12 C.M.R. 374, 381 (A.B.R. 1953). *See United States v. Jefferson*, 22 M.J. (C.M.A. 1986). Part IV, para. 1b(5), MCM, 1995.

a. ***Example.*** Rollo, the mastermind, plans a burglary and remains in the hideout waiting to count the loot. Rollo is guilty of murder if Willy, the perpetrator, kills the homeowner while carrying out the burglary. A natural and probable consequence of burglary is violence, which may result in death. Burglary involves an invasion of another's "castle." Even though the conspirators had agreed not to resort to violence in any event, if violence incidentally results, all principals are responsible therefor because it can be reasonably expected to occur, in spite of the "agreement."

b. ***Contra-example.*** Rollo and Willy enter into a common purpose for a purse snatching, to be accomplished in the middle of Grand Central Station at midnight. Willy waits outside in a get-away car while Rollo enters to do the job. After snatching the purse, monetary greed gives way to a strong urge and Rollo attempts to rape the victim. Willy may be convicted of larceny, but not of attempted rape. The rape was not an incidental result of the commission of the crime of larceny, nor could it reasonably be expected to occur. In short, it was not a natural and probable consequence.

2. ***Withdrawal.*** A principal other than the perpetrator may repent and withdraw from the common venture before commission of a substantive offense, and thus escape responsibility for any further acts committed by the perpetrator. There are three basic factors to which the courts look to determine whether the withdrawal is effective in absolving an accessory before the fact, or an aider and abettor, of guilt of the substantive offense if committed. Part IV, para. 1b(7), MCM, 1995. Those three factors are:

a. Withdrawal must occur before the crime is completed—that is, it must be a timely withdrawal;

b. the intent to withdraw must be communicated by words or acts to the perpetrator or to law enforcement authorities; and

c. the withdrawal must effectively countermand or negate the prior acts of the accessory before the fact or aider and abettor.

Thus, a mere change of mind, or mere disapproval without further effort to prevent the commission of the substantive offense, will not suffice as a withdrawal.

3. ***Lesser included offenses.*** Aiders and abettors and accessories before the fact may be found guilty of LIO's to the same extent as the perpetrator. Of course, the aider and abettor or the accessory before the fact may be found guilty of the LIO while the perpetrator is found guilty of the offense charged, and vice versa. This is particularly true, as previously noted, where an offense requires a specific mental element and the LIO does not. *See United States v. Desroe*, 6 C.M.A. 681, 21 C.M.R. 3 (1956).

4. ***Attempts.*** If the perpetrator commits an attempt, the aider and abettor or accessory before the fact may be charged as a principal to the crime of attempt (article 80), even though the crime contemplated was not in fact committed.

5. ***Guilt of other principals.***

a. ***Common law.*** Common law requires that the perpetrator be convicted before, or tried simultaneously with, the accessory in order for the accessory before the fact to be tried as a principal. Now, in almost all American jurisdictions, this requirement has been eliminated by statute.

b. ***Military law.*** In military law, there is no requirement that the perpetrator be convicted or even tried before trying the accessory. Even though the perpetrator is acquitted, the aider and abettor or accessory before the fact can be convicted. *See United States v. Duffy*, 47 C.M.R. 658 (A.C.M.R. 1973). Articles 77 and 78 are adopted from 18 U.S.C. §§ 2 and 3 respectively. *United States v. Marsh*, 13 C.M.A 252, 32 C.M.R. 252 (1962). In 1980, the Supreme Court held that trial of anyone who falls within section 2 (art. 77 for military) is triable as a principal, regardless of the trial or acquittal of the perpetrator. *Standefer v. United States*, 447 U.S. 10 (1980).

6. ***Proof of perpetrator's crime at accomplice's trial.*** In a prosecution of ***A*** under a theory that he is guilty as an accessory before the fact, or an aider and abettor, the prosecution must prove that ***B*** in fact committed the crime. For this purpose, the prosecution ***cannot*** introduce into evidence a record of the prior conviction of ***B***, but would have to prove the fact of ***B***'s crime by other evidence, such as testimony by witnesses that ***B*** committed the crime. Part IV, para. 3c(5), MCM, 1995. *United States v. Nix*, 11 C.M.A. 691, 29 C.M.R. 507 (1960).

J. ***Instructions.*** The military judge must know the theory of principals under which the prosecution is proceeding in order to instruct the members properly. *Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. No. 7-1. *United States v. Bretz*, 19 M.J. 224 (C.M.A. 1985). Where the state of the evidence is such that the members might reasonably find the accused guilty either as a perpetrator or as an aider and abettor, however, it is proper for the military judge to instruct the members on ***both*** theories. Moreover, the accused may properly be found guilty even though the individual members may themselves disagree on which of the two theories of guilt is the correct one. Thus, one-third of the members may vote for a finding of guilty because they are convinced the accused was the perpetrator (and ***not*** the aider and abettor), another third of the members may vote for a finding of guilty because they are convinced that the accused was the aider and abettor (and ***not*** the perpetrator), and the remaining one-third of the members may vote for a finding of not guilty, yet the finding of guilty stands and is perfectly proper since two-thirds of the members were convinced beyond a reasonable doubt that the accused is guilty even though they may have disagreed on the theory. *United States v. Vidal*, 23 M.J. 319 (C.M.A. 1987), *cert. denied*, 481 U.S. 1052, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987).

K. ***Pleading.*** A person who is not a perpetrator of an offense, but is liable as a principal under article 77, is charged just as though he or she had committed the acts. Indeed, this is the purpose of article 77: To eliminate the difficulties in pleading due to the subtle distinctions among accessory before the fact, aider and abettor, and perpetrator. In drafting the specification, it normally is not necessary to plead the facts which describe the accused as a principal. Where the specification would be contradictory on its face or otherwise misleading, however, the specification should explain the theory which makes the accused a principal. *United States v. Petree*, 8 C.M.A. 9, 12-13, 23 C.M.R. 233, 236-237 (1957).

1. ***Example.*** ***A*** and ***B*** get into an argument with ***V***. ***A*** and ***B*** together produce knives and make jabbing motions at ***V***, resulting in two wounds—one of which proves fatal. Under these circumstances, ***A*** may be charged as if he were the perpetrator of the fatal blow. It will not be necessary to determine who actually delivered the fatal blow. If it were ***A***, his guilt as a principal would be clear; and, if it were ***B***, the evidence is sufficient to show A's guilt as an aider and abettor. *United States v. Crocker*, 35 C.M.R. 725 (A.F.B.R. 1964), *petition denied*, 15 C.M.A. 677, 37 C.M.R. 471 (1965).

2. ***Sample pleading.*** In the stabbing example discussed immediately above, both ***A*** and ***B*** would be charged as follows:

Charge. Violation of the Uniform Code of Military Justice, Article 118.

Specification. In that (***A or B***), did, at (***place***), on or about (***date***), murder ***V*** by stabbing him in the back with a knife.

0104 ACCESSORY AFTER THE FACT. Article 78, UCMJ, and Part IV, para. 3, MCM, 1995. (Key Numbers 821-823)

A. ***Text.*** "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct."

B. ***General concept.*** "Accessory after the fact" is a separate, distinct crime under the Uniform Code of Military Justice. Note that the accessory after the fact does not help the offender commit the principal offense, but merely aids or assists the principal after the crime has been committed. Mere failure to report a known offense will not make an individual an accessory after the fact [Part IV, para. 3c(2), MCM, 1995; *United States v. Smith*, 5 M.J. 129 (C.M.A. 1978)], but it may constitute the offense of misprision of a serious offense under

article 134. It may also constitute a violation of general orders, such as Article 1137, *U.S. Navy Regulations*, which requires naval servicemembers to report known offenses to proper authority and, thus, may constitute an offense under article 92(1) of the code.

C. ***Elements of the offense.*** The prosecution must prove beyond reasonable doubt that:

1. An offense punishable by the Uniform Code of Military Justice was committed;

2. the accused knew that the person aided had committed the offense;

3. the accused received, comforted, or assisted the offender; and

4. the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

D. ***An offense punishable by the code was committed (first element).***

1. ***An offense was committed.***

a. ***"Trial within a trial."*** The prosecution must prove beyond reasonable doubt that the alleged principal, the person the alleged accessory aided, did in fact commit the offense. *United States v. Nix*, 11 C.M.A. 691, 29 C.M.R. 507 (1960). The principal's offense must be a completed offense at the time the accessory after the fact renders the principal assistance.

> ***Example.*** ***A*** shoots ***B***. ***C*** knows ***A*** shot ***B*** and helps ***A*** conceal the weapon. ***B*** dies shortly thereafter. ***A*** is guilty of murder; ***C*** is guilty of accessory after the fact to assault with the intent to commit murder. ***C*** is not guilty of being an accessory after the fact to murder because ***B*** had not yet died at the time ***C*** rendered ***A*** assistance. *See United States v. Wilson*, 7 M.J. 997 (A.C.M.R.), *petition denied*, 8 M.J. 181 (1979).

Thus, the trial of an accessory after the fact must encompass proof of:

(1) The principal's crime; and

(2) the accessory's crime of unlawfully assisting the principal. *United States v. McConnico*, 7 M.J. 302 (C.M.A. 1979); *United States v. Cline*, 20 C.M.R. 785 (A.F.B.R.), *petition denied*, 20 C.M.R. 398 (C.M.A. 1955).

b. ***Effect of not trying principal.*** Article 78, as an independent punitive article enacted by Congress, abrogates the common law rule that principals must be tried before the accessory after the fact. *United States v. Marsh*, 13 C.M.A. 252, 32 C.M.R. 252 (1962). Therefore, regardless of whether any of the principals are tried for the commission of the crime, the accessory after the fact can be tried for his role.

c. ***Effect of principal's extrajudicial confession.*** The fact that the principal's confession is an exception to the hearsay rule as an admission against penal interest [Mil.R.Evid. 804(b)(3)] does not permit admission of that confession into evidence at the accessory's court-martial. The confrontation clause of the sixth amendment must first be overcome. *McConnico, supra*. This confrontation problem preventing admission of a principal's extrajudicial confession is overcome when the principal testifies in person at the accessory's trial, since the accessory has thus been afforded the opportunity to confront and cross-examine the principal.

d. ***Effect of principal's conviction.*** Part IV, para. 3c(5), MCM, 1995, specifically prohibits the use of evidence of the principal's conviction to establish the element of an offense having been committed. Additionally, the prosecution may not elicit testimony from a principal that the principal has been previously convicted for the offense. *Nix, supra; United States v. Humble*, 11 C.M.A. 38, 28 C.M.R. 262 (1959).

e. ***Effect of principal's acquittal.*** Despite the fact that the principal was previously tried and acquitted of the alleged crime, the accessory after the fact may still be tried and, if the prosecution can prove the commission of the crime by the alleged principal, the accessory after the fact may be convicted. Part IV, para. 3c(5), MCM, 1995. *Marsh, supra; Standefer v. United States*, 447 U.S. 10, 100 S.Ct. 1999 (1980).

2. ***Offenses "punishable by the code."***. "Punishable by the code" means ***any*** offense "described by the code"; that is, the gravamen is the nature of the offense rather than the status of the principal. Thus, the principal who committed the offense need not be subject to the code. *United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977). Hence, a person subject to the code who hides stolen loot for a civilian violates article 78 since larceny is "described by the code" in article 121.

E. ***Accused's knowledge (second element).*** As previously noted, article 78 is the military equivalent to 18 U.S.C. § 3. The elements of both offenses are the same. There has been no military court decision interpreting the knowledge element of article 78. There have been, however, Federal cases holding that the knowledge that the government must prove is ***actual*** knowledge. *United States v. Rux*, 412 F.2d 331 (9th Cir. 1969); *Hiram v. United States*, 354 F.2d 4 (9th Cir. 1965). These decisions, as well as the decisions in *United States v. Bissonette*, 586 F.2d 73 (8th Cir. 1978) and *United States v. Nystrom*, 39 M.J. 698 (N.M.C.M.R. 1993), hold that actual knowledge can be proven by circumstantial evidence since it is most unlikely that the government would have direct evidence of actual knowledge of an accused. Because the United States Court of Military Appeals has

previously analogized the Federal statute with the military law on accessory after the fact (*Marsh, supra*), it can be assumed that the knowledge required for accessory after the fact in military law is also actual knowledge.

Another issue relating to the knowledge of the accused for this offense should be addressed. In *United States v. Foushee*, 13 M.J. 833 (A.C.M.R. 1982), the accused was convicted as an accessory after the fact to assault with intent to commit murder. The perpetrator of the crime had stabbed the victim with a knife, and the accused did assist the perpetrator by concealing him in the former's room. The court concluded that the accused could only be found guilty of being an accessory after the fact to assault with a dangerous weapon because the evidence did not establish that the accused knew that the perpetrator had intended to kill the victim or even to inflict grievous bodily harm on him. Thus, it appears that the knowledge of an accused must include knowledge of the intent of the perpetrators.

F. ***Accused's assistance to principal (third element).*** Assistance to the principal includes direct or indirect assistance. *United States v. Wilson*, 7 M.J. 997 (A.C.M.R. 1979). It is not limited to concealing or harboring the principal to effect his personal escape. *United States v. Tamas*, 6 C.M.A. 502, 20 C.M.R. 218 (1955). Examples of such direct and indirect unlawful assistance include:

1. Hiding the offender;

2. giving the principal clothing, money, or a means of transportation to escape;

3. suppressing evidence;

4. tampering with evidence;

5. giving false information at an investigation or inquest to mislead the authorities, *See United States v. Davis*, 42 M.J. 453 (1995); and

6. manufacturing an alibi or defense for the offender.

There must be a person to be assisted, however, in order for the offense of accessory after the fact to be committed. Where the assistance cannot be rendered because the person to be assisted died prior to the rendering of assistance, the accessory after the fact charge was not viable although an attempted accessoryship under article 80 was. *Wilson, supra.*

G. ***Accused's intent (fourth element).***

1. ***Specific intent.*** The accessory after the fact must specifically intend to assist the principal to avoid apprehension, prosecution, or punishment. *Tamas, supra.* Merely receiving stolen goods, therefore, would not, by itself, make one an accessory after the fact of larceny. *United States v. Blevins*, 34 C.M.R. 967, *petition denied*, 15 C.M.A. 669,

35 C.M.R. 478 (A.F.B.R. 1964); *United States v. Burke*, 16 C.M.R. 703 (A.F.B.R. 1954). If the goods are concealed by the receiver for the purpose of hindering the apprehension or prosecution of the thief, however, then the receiver would also become an accessory after the fact. *See Tamas, supra*. Likewise, giving first aid at the scene of a crime, knowing full well that the one aided had just violated the code, is not a violation of article 78 unless the first aid was rendered for the purpose of hindering apprehension, trial, or punishment. The key issue in determining when aid within the meaning of article 78 is rendered, therefore, is the intent of the person furnishing the assistance.

2. ***Effectiveness.*** It is not necessary that the aid rendered actually accomplish its purpose. All that is required is that the accused, with the requisite knowledge, aided the offender with the requisite intent.

Example. Willy steals a typewriter from Classroom B. He advises Joe, a good friend, of the theft. Joe immediately destroys the plant property account card and alters the command's typewriter inventory record in order to conceal the crime and aid Willy. Willy, however, is caught going through the gate with the typewriter. Joe is still guilty of being an accessory after the fact.

H. ***Principals as accessories after the fact.*** While an accessory before the fact may also, under certain circumstances, appear to be an accessory after the fact to the same crime, it is generally recognized that a principal cannot also be an accessory after the fact. *United States v. McCrea*, 50 C.M.R. 194 (A.F.C.M.R.), *petition denied*, 23 C.M.A. 658, 50 C.M.R. 904 (1975); *United States v. Smith*, 17 C.M.R. 458 (N.B.R. 1954); *United States v. Contreras*, NMCM 85-3133 (24 March 1986); *United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982).

I. ***Accessory after the fact as an LIO.*** The offense of being an accessory after the fact to an offense is ***not*** an LIO of the primary offense. *United States v. London*, 4 C.M.A. 90, 15 C.M.R. 90 (1954).

J. ***Pleading.***

1. ***General considerations.*** *See* sample specification Part IV, para. 3f, MCM, 1995. The specification must allege both the principal's offense and the manner in which the accused aided, received, comforted, or assisted the principal. This offense is always alleged under article 78, regardless of what offense to which the accused was an accessory after the fact.

2. ***Sample pleading.***

Charge. Violation of the Uniform Code of Military Justice, Article 78.

Specification. In that Seaman John S. Doe, U.S. Navy, Fleet Training Center, San Diego, California, on active duty, knowing that, at Fleet Training Center, San Diego, California, on or about 1 April 19CY, Fireman William K. Felonious, U.S. Navy, had committed an offense punishable by the Uniform Code of Military Justice, to wit: Larceny of a radio, of a value of about $52.00, the property of Jonas A. Panasonic, did, at Fleet Training Center, San Diego, California, on or about 1 April 19CY, in order to prevent the apprehension of the said Fireman Felonious, assist the said Fireman Felonious by hiding him under a lifeboat cover.

K. ***Instructions.*** *See Military Judges' Benchbook,* DA Pam 27-9 (1996), Inst. No. 3-1.

L. ***Providency inquiry.*** On a plea of guilty, the military judge must explain to the accused and must question the accused on the elements of article 78 ***and*** the elements of the principal offense. *United States v. Williams,* 6 M.J. 611 (A.C.M.R. 1978), *petition denied,* 6 M.J. 290 (1979).

M. ***Punishment.*** Part IV, para. 3e, MCM, 1995, provides in part, that:

> Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for the principal offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

0105 REQUESTING COMMISSION OF AN OFFENSE. Article 134, UCMJ, and Part IV, para. 101, MCM, 1995. (Key Number 754)

A. ***Background.*** At one time, Article 134, UCMJ, and Part IV, para. 101, MCM, 1995, listed an offense known as "requesting the commission of an offense." This offense had its origins in the case of *United States v. Benton,* 7 M.J. 606 (N.C.M.R. 1979), *petition denied,* 8 M.J. 227 (C.M.A. 1980).

B. ***Current law.*** C.M.A. has since held that the offense of "requesting the commission of an offense" does not exist under article 134. *United States v. Taylor,* 23 M.J. 314 (C.M.A. 1987).

0106 SOLICITATION. Article 82, UCMJ, and Part IV, paras. 6 and 105, MCM, 1995. (Key Numbers 765-770)

A. ***Article 82 solicitations.*** Article 82 provides that a person who requests another to commit desertion, mutiny, an act of misbehavior before the enemy, or sedition is guilty of the offense of solicitation.

1. ***Form of solicitation.*** Solicitation may be accomplished by a verbal request, letter, or other means; and the accused may act alone or in concert with others. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the offenses listed in article 82 constitutes solicitation in violation of article 82. Part IV, para. 6, MCM, 1995.

2. ***Instantaneous offense.*** The offense is complete the moment the request is made or the advice given. It is not necessary that the person solicited act upon the advice. Indeed, it is not even necessary that the person solicited agree to the request. *United States v. Morris*, 21 C.M.R. 535 (N.B.R. 1956). But, the request made or the advice given must be a serious request or advice. *United States v. Bachman*, 20 C.M.R. 700 (A.B.R. 1955); *United States v. Linnear*, 16 M.J. 628 (A.F.C.M.R. 1983), in which the conviction to solicit another to commit prostitution was overturned because the accused's act was considered to be a suggestion and not a serious request to commit a crime.

3. ***Punishment.*** The maximum punishment for solicitation under article 82 varies depending on the act solicited and whether the act was attempted or committed. Art. 82, UCMJ; Part IV, para. 6e, MCM, 1995.

B. ***Article 134 solicitations.*** Solicitations to commit offenses other than the violation of the articles enumerated in article 82, may be charged as violations of article 134. Part IV, para. 105, MCM, 1995. *United States v. Oakley*, 7 C.M.A. 733, 23 C.M.R. 197 (1957). *United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987).

1. ***Form of solicitation.*** Same as for article 82. *See* above.

2. ***Instantaneous offense.*** Same as for article 82. *See* above.

3. ***Example of article 134 solicitation.*** ***A***'s recruiter, ***B***, requests that ***A***, the recruit, undergo a hernia examination so that ***B*** could fondle ***A***'s genitals. This request is a solicitation of indecent acts, in violation of article 134. *United States v. Brantner*, 28 M.J. 941 (N.M.C.M.R. 1989).

4. ***Punishment.*** Part IV, para. 105e, MCM, 1995, provides that article 134

solicitations carry the same punishment as is provided for the offense solicited except that in no case can the punishment extend to death or confinement in excess of five years. Note, however, that the maximum punishment for solicitation to commit espionage is any punishment other than death which a court-martial may direct. For example, a person found guilty of soliciting another to commit larceny is subject to the punishment impassable for the offense of larceny. Additionally, where soliciting is charged, but the offense is really a separate and distinct substantive offense, the maximum punishment is that impassable for the closely related offense. *United States v. Brown*, 8 C.M.A. 255, 24 C.M.R. 65 (1957), wherein the court found that the solicitation of others to engage in sexual intercourse with prostitutes was really pandering, a separate offense was already provided for in article 134, and therefore, the solicitation for which the accused was found guilty was punishable in accordance with the closely related offense of pandering.

C. ***Specific intent offenses.*** Solicitation is a specific intent offense. It requires that the accused entertain the specific intent that the offense actually be committed. *United States v. Davis*, 39 M.J. 1110 (A.F.C.M.R. 1994); *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990). *United States v. Benton*, 7 M.J. 606 (N.C.M.R. 1979), *petition denied*, 8 M.J. 227 (1980); *United States v. Mitchell*, 15 M.J. 214 (C.M.A. 1983) (instruction in error where there was a failure to require a finding of specific intent in soliciting another to violate a lawful general regulation). *See also United States v. Kauble*, 15 M.J. 591 (A.C.M.R. 1983). *Taylor, supra*. Interestingly, should an accused not have made the solicitation with the specific intent that the solicited offense be committed, he still may be convicted and punished for an LIO requiring only general intent, which amounts to a simple disorder and which the Navy Court of Military Review has called wrongfully requesting another to commit an offense. *See Benton, supra*; Part IV, para. 101, MCM, 1995.

D. ***Related offenses.*** Some crimes require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under articles 82 and 134. For example, in *United States v. Wysong*, 9 C.M.A. 249, 26 C.M.R. 29 (1958), the court held that soliciting another to wrongfully refuse to testify was a separate and distinct substantive offense of obstruction of justice *See also United States v. Irving*, 3 M.J. 6 (C.M.A. 1977) (solicitation to sell heroin was separate and distinct from the subsequent sale). Solicitation, however, is a substantive offense which is different from the offense of attempt. *United States v. Oakley*, 7 C.M.A. 733, 23 C.M.R. 197 (1957).

E. ***Pleading.***

1. ***General considerations.*** Pleading formats under articles 82 and 134 are essentially similar. *See* Part IV, paras. 6f and 105f, MCM, 1995. In article 82 pleadings, the intended offense is merely cited; in article 134 pleadings, the intended offense is described more specifically.

2. ***Sample pleadings.***

a. ***Charge.*** Violation of the Uniform Code of Military Justice, Article 134.

Specification. In that Seaman John Q. Requestor, U.S. Navy, Naval Station, Guam, on active duty, did, at Naval Station, Guam, on or about 1 April 19CY, wrongfully solicit Seaman Innocent Dupe, U.S. Navy, to steal one 1951 Hudson sedan, of a value of about $200.00, the property of Ensign Andrew K. Teek, U.S. Navy, by saying to said Seaman Dupe, "If you'll steal Teek's old Hudson for me, I'll give you fifty bucks," or words to that effect.

b. ***Charge.*** Violation of the Uniform Code of Military Justice, Article 82.

Specification. In that Private First Class John F. Defect, U.S. Marine Corps, Headquarters Company, Headquarters Battalion, Marine Corps Base, Camp Lejeune, North Carolina, on active duty, did, in the Republic of Vietnam, on several occasions during the period from about March 1968 until about October 1969, by approaching the perimeter of front lines near American fire support bases in an area then known as the "I" Corps Area, and speaking through a bullhorn / megaphone requesting United States combat forces to throw down their weapons and to refuse to fight during combat operations against a hostile force, and by appealing to United States troops in the field urging them to defect; solicit those forces to commit an act of misbehavior before the enemy in violation of Article 99, Uniform Code of Military Justice.

F. ***Instructions.*** *See* generally Military Judges' Benchbook, DA Pam 27-9 (1996), Inst. No. 3-178 (article 134); Inst. No. 3-34 (article 82).

0107 CONSPIRACY. Article 81, UCMJ, and Part IV, para. 5, MCM, 1995. (Key Numbers 826, 831)

A. ***Text.*** "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."

Note: Conspiracy as defined by article 81 differs from the conspiracy defined by common law in that the element requiring proof of an overt act has been added by

Congress. "The only exceptions to this rule are those conspiracies in Title 18 of the United States Code which do not require any overt act and which may be charged under Article 134 . . . ." *United States v. Chapman*, 10 C.M.R. 306, 308 (A.B.R. 1953). The purpose of requiring an overt act is to ensure that a criminal undertaking is in fact being pursued.

B. ***Elements of the offense.***

1. That the accused entered into an agreement with one or more persons;

2. that the object of the agreement was to commit an offense under the code; and

3. that, thereafter, the accused or at least one of the co-conspirators performed an overt act to effect the object of the conspiracy.

C. ***Agreement with two or more persons (first element).*** For general discussion of law of conspiracy, see *New Developments in the Law of Conspiracy*, 72 Harv. L. Rev. 920 (1959).

1. ***Agreement.*** Agreement refers to a meeting of the minds by the parties involved. Once there is a meeting of the minds as to a scheme, the agreement exists. There is not an agreement in existence where there is conversation ". . . directed solely toward the formation of the alleged conspiracy." *United States v. LaBossiere*, 13 C.M.A. 337, 340, 32 C.M.R. 337, 340 (1962).

2. ***Form of the agreement.*** The agreement in a conspiracy ". . . need not take any 'particular form or be manifested in any formal words.'" *United States v. Matias*, 25 M.J. 356, 362 (C.M.A. 1987), *cert. denied* 485 U.S. 968, 108 S.Ct. 1242, 99 L.Ed.2d 441 (1988), (*quoting United States v. Jackson*, 20 M.J. 68, 69 (C.M.A. 1985)), *cert. denied* in *Matias v. United States*, 485 U.S. 968, 99 L.Ed.2d 441 (1988). *See also United States v. Barnes*, 38 M.J. 72 (C.M.A. 1993) (following *Matias* in determining that an agreement existed). The agreement may be formal or informal, written or oral, expressed or implied. "Acts of the parties, a course of conduct, speak louder than words." *United States v. Coker*, 13 C.M.R. 459, 464 (A.B.R. 1953); Part IV, para. 5c(2), MCM, 1995.

3. ***Co-conspirators.***

a. ***Who can conspire?*** The accused must be subject to the code, but the co-conspirators need not be. Thus, an accused can conspire with a civilian not subject to the code as long as the object offense is a substantive offense punishable by the code. The fact that an accused may even be physically or legally incapable of perpetrating the intended substantive offense does not limit his liability for conspiracy. For example, a bedridden conspirator, who knowingly furnished an automobile to be used in a robbery, and a prison guard, who agrees with prisoners he is guarding to effect their escape from confinement, are both guilty of conspiracy. Part IV, para. 5c(1), MCM, 1995.

b. ***Two conspirators required.*** By definition, two or more people must participate. *United States v. Kidd*, 13 C.M.A. 184, 32 C.M.R. 184 (1962).

(1) The offense of conspiracy exists even when one of the co-conspirators is an undercover government agent. Although a "meeting of the minds" does not occur when conspiring with a government agent, this factual impossibility does not negate the existence of the conspiracy. Under the unilateral theory of conspiracy, each individual's culpability is determined independent of the other actors. *United States v. Anzalone*, 43 M.J. 322 (1995).

(2) The possible mental incapacity of a co-conspirator is irrelevant to the accused's culpability. Conspiracy is defined only in terms of the conduct of the individual on trial. *United States v. Tuck*, 28 M.J. 520 (A.C.M.R. 1989), *review denied* 28 M.J. 457 (1989).

(3) The previous "rule of consistency" where, if one of two conspirators is acquitted, the other must be acquitted [para. 160, MCM, 1969 (Rev.)] is no longer valid. *See* App. 21, para. 5, MCM, 1995. If a conspirator is convicted in a separate trial, the evidence will be carefully scrutinized to determine that it supports his complicity; an acquittal of a co-conspirator, however, will not in itself serve to overturn conviction of the other conspirator, absent some compelling evidentiary reason. *United States v. Garcia*, 16 M.J. 52 (C.M.A. 1983).

c. ***Adoption of the conspiracy.*** One may join a conspiracy after its formulation, as well as participate in its formation, with the same legal consequences. One who knows of the agreement between the others and cooperates in affecting the object of the conspiracy, such as by committing an overt act, can be found guilty as a co-conspirator. *United States v. Jackson*, 20 M.J. 68 (C.M.A. 1985) and *United States v. Kinder*, 14 C.M.R. 742 (A.F.B.R. 1954). If the accused joins the conspiracy ***after*** the occurrence of an overt act, however, and the objectives of the conspiracy are accomplished, the overt act which occurred prior to the accused's joining the conspiracy are ***not*** attributable to the accused. The overt act must occur ***after*** the accused joined the conspiracy and the accused cannot be held criminally liable for any acts that occurred prior to the accused's joining the conspiracy. *United States v. Johnson*, 25 M.J. 878 (N.M.C.M.R. 1988). *But see Kinder, supra*, to the contrary. The accused could, however, be guilty as an accessory after the fact. *United States v. Keen*, 30 M.J. 1108 (N.M.C.M.R. 1989). *See* discussions on accessory after the fact, *supra*, § 0104).

d. ***Mere presence insufficient.*** The mere presence of a person at the time an agreement is reached by other parties is not sufficient, standing alone, to establish participation in a conspiracy. *See United States v. Downs*, 46 C.M.R. 1227 (N.C.M.R. 1973).

In *United States v. Mahoney*, 19 C.M.A. 495, 42 C.M.R. 97 (1970), for example, the accused was charged inter alia with conspiracy with ***A*** to wrongfully transfer marijuana. The evidence showed that the accused, in ***A***'s presence, told ***B*** that he (the accused) would take ***B*** to the supplier's house, where the accused, again in ***A***'s presence, took money from ***B*** and gave it to the supplier. The supplier thereafter delivered marijuana directly to ***B***. It was held that the evidence was insufficient to establish a conspiracy between ***A*** and the accused.

4. ***Contents of agreement.*** It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy by concerted action. *Downs, supra*; *United States v. Graalum*, 19 C.M.R. 667 (A.F.B.R.), *petition denied*, 19 C.M.R. 413 (1955); *Kinder, supra*. The agreement need not:

a. Be in detail;

b. state the means by which the conspiracy is to be accomplished;

c. identify ***all*** co-conspirators; or

d. state what part each conspirator is to play.

Additionally, the prosecution is not required to prove that the accused conspirator participated in or had knowledge of all of the details of the execution of the conspiracy (*Graalum, supra*, at 698) nor must it establish that the accused conspirator knew the identity of all co-conspirators and their particular connection with the criminal purpose. *United States v. Rhodes*, 11 C.M.A. 735, 29 C.M.R. 551 (1960).

5. ***Proving the agreement.*** The agreement can seldom be proved by direct evidence. The agreement or common understanding to accomplish the object of the conspiracy may be inferred from "the conduct of the parties, or from their declarations to each other or in the presence of each other, or from other circumstantial evidence." *Graalum, supra*, at 697. *See also United States v. Jacobs*, 451 F.2d 530, (5th Cir. 1971), *cert. denied*, 405 U.S. 955, 92 S.Ct. 1170, 31 L.Ed.2d 231 (1972); *United States v. Barnes*, 38 M.J. at 75; *Matias, supra*, 25 M.J. at 362. For example: ***A***, ***B***, and ***C*** approached ***V*** as a group and, in unison, assault ***V***. ***Held***: Readily inferable that an agreement existed among them to accomplish, by concerted action, the assault. *United States v. Perry*, 20 C.M.R. 638 (A.F.B.R. 1955). *See United States v. Downs*, 46 C.M.R. 1227 (N.C.M.R. 1973). "The conduct and attitudes of known conspirators in an established conspiracy toward a third person have probative value in determining whether the latter is connected with the conspiracy." *Rhodes, supra*, at 740.

D. ***Object of the agreement (second element).***

1. ***Object offense***. The object of the agreement must, at least in part, involve the commission of some offense under the code. Thus, any given offense of conspiracy will involve at least one other offense under the code, and may include more than one. Counsel must be aware of the elements of the object offenses and the court must be instructed on the elements of such object offenses. *United States v. Gentry*, 8 C.M.A. 14, 23 C.M.R. 238 (1957). To establish the providency of the plea, both the elements of conspiracy and the elements of the object offense must be explained to the accused. *United States v. Pretlow*, 13 M.J. 85 (C.M.A. 1982).

a. ***A separate offense.*** Conspiracy and the substantive offense which is the object of the agreement are separate offenses and are separately punishable. *United States v. Grubb*, 34 M.J. 532 (A.F.C.M.R. 1991); *United States v. Washington*, 1 M.J. 473 (C.M.A. 1976); *United States v. Yarborough*, 1 C.M.A. 678, 5 C.M.R. 106 (1952); Part IV, para. 5c(8), MCM, 1995. The completed offense and the conspiracy to commit it should, therefore, be charged separately.

b. ***Conspiracy to commit several offenses.*** An agreement to commit several offenses is but a single conspiracy. *United States v. Kidd*, 13 C.M.A. 184, 32 C.M.R. 184 (1962) (wherein the Court of Military Appeals held that there was only one conspiracy even though it was a conspiracy to extort from several persons, with each victim the object of a different specification); *United States v. Crusoe*, 3 C.M.A. 793, 14 C.M.R. 211 (1954) (wherein the Court of Military Appeals held that a conspiracy to commit several different offenses against the code was still only one conspiracy); *United States v. Grubb*, 34 M.J. 532 (wherein the Air Force Court of Military Review stated that it is the agreement of partnership in crime that is punishable by the offense of conspiracy, not each separate violation of article of Code that occurs during the agreement).

2. ***Offenses requiring a concert of action.***

a. ***Not prosecuted as conspiracy.*** "A charge of conspiracy will not lie where the substantive offense itself involves concert of action." *United States v. Yarborough*, 1 C.M.A. 678, 688, 5 C.M.R. 106, 116 (1952). This rule, known as Wharton's Rule [the Supreme Court has called it an exception to the general rule in *Iannelli et al. v. United States*, 420 U.S. 770 (1975)], has been consistently applied to such offenses as dueling, bigamy, incest, and adultery—with bribery also being added more recently. Hence, if only the principal actors are involved, there is no conspiracy in such offenses. Where the offense is capable of commission by a single individual, however, this rule, or exception to the rule, does not apply. *Yarborough, supra*. An exception to Wharton's Rule was announced in *United States v. Osthoff*, 8 M.J. 629 (A.C.M.R. 1979), *petition denied*, 8 M.J. 250 (1980), wherein the Army Court of Military Review held that the offense of conspiracy to transfer marijuana did not merge with the substantive offense of transfer of marijuana even though the latter required a duality of action between the transferor and the transferee. The rationale given for the decision was similar to that announced by the Supreme Court in *Iannelli v. United States, supra*, in that transfer of marijuana and the conspiracy to transfer

pose a potentially greater threat to the public than do the crimes excepted by Wharton's Rule, and therefore should not merge, and should be separately punished. *See United States v. Bommarito*, 524 F.2d 140 (2d Cir. 1975) ***and*** *United States v. Earhart*, 14 M.J. 511 (A.F.C.M.R. 1982). In *United States v. Crocker*, 18 M.J. 33 (C.M.A. 1984), the Court of Military Appeals specifically refused to apply Wharton's Rule to a charge of conspiracy to possess and transfer cocaine since possession did not require concerted action. Dicta in the decision indicated that prosecutors should not use this exception to the Wharton Rule as a way to unreasonably multiply charges. *Id.* at 40. *United States v. Sorrell*, 20 M.J. 684 (A.C.M.R. 1985) demonstrates how drugs could be distributed without the recipient being criminally involved.

b. ***Conspiracy with a third party.*** Where a substantive crime requires a concert of action (such as bribery), a third party, not necessary to the concert of action, can be found to have conspired with one of the principal actors. For example, ***A*** and ***B*** conspire to accept bribes from ***C***. ***B*** is guilty of conspiracy to commit bribery even though the offense of bribery only requires the participation of ***A*** and ***C***, and, under Wharton's Rule, conspiracy to commit bribery and the substantive offense of bribery would merge. *Crocker, supra*, at 39.

E. ***Overt act (third element).***

1. ***Requirement of overt act.*** At some time after the agreement or understanding, the accused, or at least one of the other parties to the agreement, must have performed some act which tended to effect the object of the conspiracy or agreement. *United States v. Kidd*, 13 C.M.A. 184, 32 C.M.R. 184 (1962); *United States v. Thomas*, 13 C.M.A. 278, 32 C.M.R. 278 (1962). Therefore, without the occurrence of an overt act in furtherance of accomplishing the substantive offense, the offense of conspiracy is not complete, and no criminal liability for conspiracy is available. *United States v. Black*, 1 M.J. 340 (C.M.A. 1976).

a. ***Nature of act.***

(1) The "overt act" is "an open, manifest act"; "an outward act done in pursuance and manifestation of intent or design." *Black's Law Dictionary* 1955 (5th ed. 1979).

(2) It must be an act that is independent of the agreement itself. *United States v. Kauffman*, 14 C.M.A. 283, 34 C.M.R. 63 (1963), para. 5c(4), MCM, 1995.

(3) It must follow the agreement or take place at the time of the agreement. *Kauffman, supra*. *See United States v. Barnes*, 38 M.J. at 75, *citing Matias, supra*, 25 M.J. at 362.

(4) It must be done by one or more of the conspirators (i.e., parties to the agreement), but not necessarily the accused. *United States v. Graalum*, 19 C.M.R. 667 (A.F.B.R.), *petition denied*, 19 C.M.R. 413 (C.M.A. 1955).

(5) The accused does not have to consent to, or participate in, the overt act, nor even have knowledge of the overt act or any other detail of the execution of the agreement. *Graalum, supra.*

(6) "The offense of conspiracy is continuous so long as overt acts in furtherance of its purpose are done, as every overt act is deemed to be a renewal of the unlawful agreement. *United States v. Mixson*, 3 M.J. 886 (A.C.M.R. 1977).

(7) As long as the conspiracy continues, an overt act in furtherance of the agreement committed by one conspirator becomes the act of all without any new agreement specifically directed to that act [*United States v. Rhodes*, 11 C.M.A. 735, 29 C.M.R. 551 (1960)]; and each conspirator is equally guilty although he does not participate in or have knowledge of all of the details of the execution of the conspiracy. *Graalum, supra.* As long as the acts done by the co-conspirators are acts ". . . which follow incidentally as probable and natural consequences in the execution of the common scheme," all of the conspirators are guilty of those acts as well as the substantive offense if committed. *United States v. Seberg*, 5 M.J. 895, 900 n. 4 (A.F.C.M.R. 1978), *petition denied*, 6 M.J. 282 (C.M.A. 1979); *Rhodes, supra; United States v. Salisbury*, 14 C.M.A. 171, 33 C.M.R. 383 (1963). Such continuing criminal liability does not apply, however, to a conspirator who has effectively withdrawn from the conspiracy. (*See* discussions on withdrawal (abandonment), *infra*, same section.)

(8) The overt act must be done to effectuate the object of the agreement. *United States v. Choat*, 7 C.M.A. 187, 21 C.M.R. 313 (1956). If an act is done prior to an agreement, it will not be sufficient to constitute the overt act required for a conspiracy conviction. *United States v. Farkas*, 21 M.J. 458 (C.M.A.), *cert. denied*, 479 U.S. 857, 107 S.Ct. 200, 93 L.Ed.2d 131 (1986).

(9) It must be a manifestation that the agreement is being executed, that the conspiracy is at work. *Kauffman, supra; Choat, supra.*

(10) The overt act need not be in itself criminal. *Choat, supra; Rhodes, supra.* It can be as innocent as a telephone call, mailing a letter, or simply standing in a location favorable to committing the intended or object offense. These innocent acts may, under the circumstances, manifest that the conspiracy has proceeded beyond mere agreement. Part IV, para. 5c(4), MCM, 1995; *Choat, supra. See United States v. Collier*, 14 M.J. 377 (C.M.A. 1983), where the court upheld a conspiracy conviction when the overt act consisted of the accused's departure from a squad bay with his co-conspirators. The crime of conspiracy to possess and distribute cocaine was complete once the three co-conspirators pooled their money to purchase the cocaine which was to be divided among themselves. *United States v. Figueroa*, 28 M.J. 570 (N.M.C.M.R. 1989).

(11) But the overt act may well be a criminal act and can be the commission of the intended offense itself. Although committing the intended offense

may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough. *Choat, supra.*

(12) ". . . [o]ne need not share in the original formation of a conspiracy, but if he joins the conspiracy after its formation and prior to its consummation with knowledge of the agreement or assent of minds between the original parties to accomplish by concerted action an unlawful purpose and commits an overt act to effect the unlawful purpose of the conspiracy, he is guilty as a co-conspirator . . . ." *United States v. Kinder*, 14 C.M.R. 742, 780 (A.F.B.R. 1954). Entrance of a new member, therefore, does not create a new conspiracy. *See Marino v. United States*, 91 F.2d 691 (9th Cir. 1937), *cert. denied*, 302 U.S. 764 (1938).

(13) Can the overt act be a ***failure*** to act? Possibly, depending on the nature of the object offense. In a prosecution for violation of article 133 by conspiracy to commit extortion, a specification sufficiently stated an offense where it alleged that the overt act done to effect the object of the conspiracy was the act of withholding the possession of a diamond ring from its owner. *United States v. Farkas*, 21 M.J. 458 (C.M.A. 1986) (the nature of the extortion being a threat to sell the ring if a specified sum of money was not paid for it).

(14) The overt act must be alleged and proved (*Kauffman, supra*) although, where more than one overt act is alleged, all of the alleged overt acts need not be proved. *United States v. Reid*, 12 C.M.A. 497, 31 C.M.R. 83 (1961); *United States v. Yarborough*, 1 C.M.A. 678, 5 C.M.R. 106 (1952); *see United States v. Moore*, 22 C.M.R. 756 (A.F.B.R.), *petition denied*, 22 C.M.R. 331 (C.M.A. 1956), wherein the Air Force Board of Review found that failure to allege the date of an overt act was not fatal because the gravamen of the offense of conspiracy is (1) an unlawful agreement to accomplish an offense, and (2) commission of an overt act to effect the purpose of the agreement and the specification was "complete, clear, and unambiguous in all regards."

(a) *Yarborough* cites no authority for the proposition that the overt act alleged in the specification must be the one proved at trial in order to establish the conspiracy. *Reid*, in reiterating this proposition, relies on *Yarborough* and the 9th Circuit case of *Fredericks v. United States*, 292 F. 856 (9th Cir. 1923). *See Reid, supra*, at 91. In *Brulay v. United States*, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986, 88 S.Ct. 469, 19 L.Ed.2d 478 (1967), however, the 9th Circuit rejected the rule of *Fredericks* and adopted the general Federal rule that a conspiracy conviction may rest on proof of an overt act not charged in the indictment, with the provision that such proof of an unalleged overt act must not come as a surprise to the defendant. *See United States v. Armone*, 363 F.2d 385 (2nd Cir.), *cert. denied*, 385 U.S. 957, 87 S.Ct. 391 (1966), and cases cited therein.

(b) Although *Reid* still appears to control, it is difficult to predict how C.M.A. would rule if the question were presented again. Thus, if the trial counsel has doubts as to what overt act can be established, as many acts as are necessary in order to meet the contingencies of proof should be alleged. *But see United States v. Perez,*

36 M.J. 583 (A.F.C.M.R. 1992) (wherein the court held that an overt act found by the fact-finders need not be exactly the same as the overt act charged, so long as it is substantially similar to the overt act alleged).

(c) "It is not necessary that the overt act or acts should appear on their face to have been acts which would necessarily have aided in the commission of the crime." *Kauffman, supra*, at 282, 34 C.M.R. at 72.

b. The "overt act" is generally a question of fact which may be proven by circumstantial evidence. *See United States v. Salisbury*, 14 C.M.A. 171, 33 C.M.R. 383 (1963). What is sufficient to constitute an overt act is a question of fact to be determined by the fact-finder. *See Salisbury, supra*, and *Kauffman, supra*.

c. ***Distinguishing "overt acts" in attempts.***

(1) Unfortunately, the law has adopted the same term "overt act" for the act required in both the offenses of attempt (article 80) and conspiracy (article 81). These acts, however, are different in degree. (See the discussion of attempts, section 0108, in this study guide).

(2) In attempts, the overt act must directly tend to effectuate the intended crime and must be more than mere preparation to commit the offense. Part IV, para. 4c, MCM, 1995.

(3) In conspiracy, it matters not how preliminary or preparatory in nature the overt act is, as long as it is a manifestation that the agreement is being executed. *United States v. Collier*, 14 M.J. 377 (C.M.A. 1983) (wherein the act of the co-conspirators to the robbery was leaving the squad bay after discussing where to look for victims). For another example, suppose a conspirator calls the intended victim and invites him to the scene of a planned robbery. The call would constitute the overt act necessary to complete the offense of conspiracy, even though it is clearly not sufficient to support attempted robbery.

2. ***Withdrawal (abandonment).***

a. ***Continuing nature of conspiracy.*** A conspiracy, once established, may be inferred to continue until the contrary is established. *United States v. Graalum*, 19 C.M.R. 667 (A.F.B.R.), *petition denied*, 19 C.M.R. 413 (C.M.A. 1955). A conspiracy continues over into a subsequent enlistment only if the commission of one or more overt acts occurs during that subsequent enlistment; the fact of discharge and reenlistment does not constitute a withdrawal nor eliminate an accused's criminal liability. *United States v. Gladue*, 4 M.J. 1 (C.M.A. 1977); *United States v. Rhodes*, 11 C.M.A. 735, 29 C.M.R. 551 (1960).

b. ***Time of withdrawal.*** One or all of the parties to a conspiracy may, ***before*** the performance of an overt act to effect the object of the conspiracy, abandon the design and withdraw from the conspiracy and thereby escape conviction for conspiracy. A conspirator who abandons or withdraws from the conspiracy ***after*** the overt act has been performed, remains guilty of conspiracy and all offenses committed pursuant thereto occurring prior to the withdrawal, but not for offenses committed thereafter. *Salisbury, supra.*

c. ***Status of remaining conspirators.*** Neither the withdrawal from a conspiracy nor the joining of a conspiracy by a new person creates a new conspiracy, nor affects the status of the remaining members. Part IV, para. 5c(6), MCM, 1995.

d. ***What constitutes withdrawal.*** Part IV, para. 5c(6), MCM, 1995, states that, in order for a withdrawal to be effective, it must consist of affirmative conduct which is ". . . wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy." *See United States v. Hubble,* 36 M.J. 780 (A.C.M.R. 1993). The *Manual* does not provide any examples to illustrate what would constitute affirmative conduct adequate to constitute an effective withdrawal, however, case law is very concise on what does ***not*** amount to a withdrawal. (*See* example cases, *infra.*)

e. ***Factors constituting withdrawal.*** In 1978, the Supreme Court announced its decision in *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978), in which it suggested at least three factors which should be considered in determining whether or not withdrawal from a conspiracy had been effective. Those factors were: (1) accused's affirmative notification to each other member of the conspiracy that he will no longer participate in the undertaking such that they understand that they can no longer expect his participation or acquiescence; (2) accused's disclosures of the illegal scheme to law enforcement officials; or, (3) accused does affirmative acts inconsistent with the object of the conspiracy and communicates in a manner reasonably calculated to reach co-conspirators. While disclosure to a government agent of the existence of a continuing conspiracy by a co-conspirator may be sufficient to constitute effective withdrawal, such disclosure must be complete. There must be no acquiescence to subsequent acts of the remaining co-conspirators by the co-conspirator desiring to have an effective withdrawal. *See Hyde and Schneider v. United States,* 225 U.S. 347 (1912).

(1) In *Hubble, supra,* the court stated that the law is very specific on what must be done to withdraw from a conspiracy. First, the withdrawal must be done before the commission of an overt act by any conspirator. Second, it must consist of affirmative conduct and demonstrate that the party has severed all connection with the conspiracy and is imposed, in part, in the hopes of dissuading the other co-conspirators from committing the crime. *Id.* at 784. In *Hubble,* the accused stole two blasting caps to make grenades to commit robbery of an armored car. He later decided, unilaterally, to quietly avoid being in a position to assist in the overt act of stealing explosives to be used in the robbery, but did not communicate this to the co-conspirators. He also did not report the co-conspirators' plans to law enforcement authorities or participate in any affirmative acts

inconsistent with the conspiracy. Therefore, the court held his actions were not enough to constitute withdrawal from the conspiracy.

(2) In *United States v. Miasel*, 8 C.M.A. 374, 24 C.M.R. 184, 188 (1957), C.M.A. found conduct "wholly inconsistent with the theory of continuing adherence" to a conspiracy to commit sodomy where the accused (before acts of sodomy were committed on the victim) walked away from the group and stated he was unable to continue.

(3) Two Boards of Review have indicated that there must be (1) an abandonment of the design to commit the substantive offense, and (2) communication of that abandonment to the co-conspirators before an effective withdrawal can be found. *United States v. Erven*, 9 C.M.R. 759 (A.F.B.R. 1953) and *Graalum, supra*. For example, in *Erven*, the court found that there had not been an effective withdrawal from the conspiracy by the accused where the extrajudicial admission of the accused revealed that "he and the other two airmen 'walked up to the Base Exchange at about 11:30 or 12:00 o'clock with the idea of breaking into the Base Exchange' and then 'talked about going into the Base Exchange' . . . (this) clearly evidences the existence of an agreement between the accused and the other two airmen to accomplish by concerted action, the larceny from the Exchange." The fact that the extrajudicial admission further stated that, at the time the substantive offense was to be committed, he (the accused) "was ready to forget about breaking into the Base Exchange that night because several fellows from the 77th Maintenance Squadron had seen us when we went to look for McGrath" and that this decision was "made just before he separated from the two who perpetrated the offense, as evidencing abandonment of design or an affirmative act of withdrawal from the conspiracy, but . . . (was) nothing more than a desire or willingness on accused's part to postpone the planned offense. Furthermore, there is nothing in the record that shows he communicated his thoughts in this respect to the other two parties to the conspiracy." In fact, their subsequent actions of seeking out the accused, placing the fruits of the crime in his custody, enlisting his aid in disposing of the fruit of the crime, and sharing the proceeds negated any finding of his communicating his intent to withdraw to them. *Id.* at 762-763.

(4) In *United States v. Kelly*, 38 C.M.R. 722 (N.B.R. 1967), the conviction of conspiracy to assault with intent to commit robbery, based upon a plea of guilty, was affirmed. While a group was standing around the victim, the accused told the member of the group who was to strike the victim to "Okay, let's forget it. Drop the stick." There was no evidence that the accused communicated his intent to abandon the scheme to the other members of the group, nor did he attempt to leave the scene; and, within about 30 seconds, another member of the group struck the victim. The law officer, after an extensive providency examination of the accused on the issue of withdrawal, determined, and the Board of Review agreed, that the accused's statement to the originally intended perpetrator was no more than a suggestion to abandon the scheme. The suggestion without more was insufficient to constitute an effective withdrawal.

F. ***Duration of conspiracy.*** It is generally difficult to establish precisely when a conspiracy begins or ends. It becomes important to establish the beginning and ending of a conspiracy when a determination must be made as to the admissibility of statements and acts of an alleged co-conspirator of the accused at the accused's court-martial. Under the present rules of evidence [Mil.R.Evid. 801(d)(2)(E)], it appears that, for purposes of determining the admissibility of statements and acts of co-conspirators at the accused's court-martial, it is solely a determination for the military judge as to whether a conspiracy existed at the time the statement or act was made. Thus, extreme care must be taken, both by the prosecution to prevent reversal and by the defense to prevent prejudice to the accused, in determining the inception, duration, and termination of a conspiracy because case law interpreting military application of the new rule has not yet developed. *See* Naval Justice School Evidence Study Guide, section 0803.

1. ***Rule.*** Acts and declarations of a conspirator or co-actor, pursuant to, and in furtherance of, an unlawful combination or crime, are admissible against all co-conspirators or co-actors during the existence of the conspiracy and as such are not hearsay. Mil.R.Evid. 801(d)(2)(E); *Miasel, supra.*

2. ***Inception of conspiracy.*** Before the acts or declarations of a conspirator are admissible, the prosecution must prove that a conspiracy existed. *United States v. LaBossiere,* 13 C.M.A. 337, 32 C.M.R. 337 (1962).

3. ***"During the course of the conspiracy."*** Mil.R.Evid. 801(d)(2)(E) states that, before a co-conspirator's statement is admissible against an accused at the accused's court-martial, it must be made during "the course . . . of the conspiracy." This seems to mean that the statement was made while the plan was in existence and before its complete execution or other termination. *United States v. Hooper,* 4 M.J. 830 (A.F.C.M.R. 1978).

4. ***"In furtherance of the conspiracy."*** Under the furtherance requirement, the declaration not only must occur before the termination of the conspiracy and after the formation of the agreement, and relate in content to the conspiracy, but also must be made with the intent to advance the objects of the conspiracy. If the government fails to show that the statement of the co-conspirator was made in furtherance of the conspiracy, the statement could still be admissible ***if*** the government could establish that the statement was made in the presence of the accused or was authorized to be made by the accused. *United States v. Beverly,* 14 C.M.A. 468, 34 C.M.R. 248 (1964).

5. ***Termination of conspiracy.*** Once the joint enterprise underlying the conspiracy is ended, either as a result of the accomplishment of the objective, abandonment, or withdrawal of members of the groups, subsequent acts and declarations can only affect the actor or declarant. *Miasel, supra.*

G. ***Corroboration of the co-conspirator's statement.*** Unlike the old military rule of evidence [para. 140b, MCM, 1969 (Rev.)] upon which all military case law prior to 1 September 1980 was based, the present military rules of evidence do not appear to require

corroboration of the co-conspirator's statement prior to its admission into evidence. Mil.R.Evid. 801(d)(2)(E). This is consistent with Federal practice. Before admitting a co-conspirator's statement, however, the trial judge must be satisfied by a preponderance of the evidence that a conspiracy existed. In reaching that decision, the trial judge may consider any nonprivileged evidence whatsoever, including the proffered hearsay statements themselves. There is no requirement that there be independent indicia of reliability for admission of the statements. *Bourjaily v. United States*, 483 U.S. 171 (1987). *See also United States v. Ward*, 16 M.J. 341 (C.M.A. 1983) and *United States v. Scott*, 24 M.J. 578 (N.M.C.M.R. 1987).

H. ***Statute of limitations.*** Because it is difficult to determine when the conspiracy was initiated with regard to each co-conspirator, it has been held that the last overt act establishes the time for the running of the statute of limitations. *United States v. Rhodes*, 11 C.M.A. 735, 742, 29 C.M.R. 551, 558 (1960). The "last overt act" is the most recent act alleged and proved committed during the conspiracy. *Rhodes, supra.*

I. ***Single conspiracy to commit several different offenses.*** "The object of the conspiracy may be a number of wrongful acts, rather than a single wrongful act. Still the conspiracy remains the same unlawful combination. Even though the allegations charge different overt acts to different defendants, the question remains whether there was a single agreement to combine to commit all of the overt acts. If there is but one agreement to combine there is only one conspiracy even though there be many objects thereof." *United States v. Kidd*, 13 C.M.A. 184, 190, 32 C.M.R. 184, 190 (1962); *see United States v. Crusoe*, 3 C.M.A. 793, 14 C.M.R. 211 (1954); *and United States v. Thompson*, 21 M.J. 94 (C.M.A. 1985) (summary disposition).

J. ***Special conspiracies under article 134.*** The U.S. Code, Title 18, prohibits certain specific conspiracies which require no proof of an overt act. Such conspiracies should be prosecuted in military courts under Article 134, UCMJ, but only if there is no similar offense under the code. Part IV, para. 5c(9), MCM, 1995; *see* Chapter V of this study guide for further discussion. For example:

1. ***Conspiracy to impede or injure any Federal officer in the discharge of his duties.*** 18 U.S.C. § 372. A specification under this provision was held sufficient without an overt act being alleged in *United States v. Chapman*, 10 C.M.R. 306 (A.B.R. 1953).

2. ***Conspiracies against civil rights.*** Conspiracy to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured him by the Constitution or laws of the United States is prohibited by 18 U.S.C. § 241.

K. ***Pleading.*** When there is one agreement to commit several different offenses, a separate conspiracy specification may be pleaded for each offense. Where there is "sufficient doubt as to the facts or the law . . . to warrant making one transaction the basis for charging two or more offenses." *United States v. Crusoe*, 3 C.M.A. 793, 14 C.M.R. 211 (1954). For

example, in *Crusoe*, the accused conspired with four other persons to unlawfully enter the PX and commit larceny therein. The accused was charged with one charge and two separate specifications of conspiracy: one specification being conspiracy to commit unlawful entry, and the other alleging conspiracy to commit larceny. ***Held***: Such pleading was proper to allow for the contingencies of proof. The separate specifications will be treated as one crime for purposes of sentencing. *See* the sample specification, Part IV, para. 5f, MCM, 1995.

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 81.
>
> ***Specification.*** In that Fireman Apprentice Slip Ree Finger, U.S. Navy, USS DANGER, on active duty, did, at Naval Station, Norfolk, Virginia, on or about 5 November 19CY, conspire with Seaman Constantine L. Spirator, U.S. Navy, to commit an offense under the Uniform Code of Military Justice, to wit: larceny of one rubber duck, of a value of $3.00, the property of Commander Tyrus Phoon, U.S. Navy, and, in order to effect the object of the conspiracy, the said Seaman Spirator did make a wax impression of the key to said Commander Phoon's quarters.

L. ***Instructions.*** *See* Military Judges' Benchbook, DA Pam 27-9 (1996), Inst. No. 3-3. The military judge is required to instruct the members on the elements of conspiracy ***as well as*** those of the contemplated offense. During providency, the military judge must lay out both sets of elements on the record. *United States v. Pretlow*, 13 M.J. 85 (C.M.A. 1982).

0108 ATTEMPTS. Article 80, UCMJ, and Part IV, para. 4, MCM, 1995. (Key Numbers 795-800)

A. ***Text of Article 80, UCMJ.***

> (a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.
>
> (b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.
>
> (c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

B. ***Scope.*** Article 80 provides for the substantive offense of attempt, and all attempts to commit various offenses under the code, other than the exceptions noted hereafter, should be charged as violations of article 80. Each of the exceptions has an

attempt to commit the offense provided for within the body of the article itself. Hence, attempted desertion, mutiny, etc., are charged as violations of article 85 or 94, etc., rather than under article 80. The exceptions are:

1. Article 85 – Desertion;

2. Article 94 – Mutiny or Sedition;

3. Article 100 – Subordinate compelling surrender;

4. Article 104 – Aiding the enemy;

5. Article 106a – Espionage; and

6. Article 128 – Assault.

C. ***Elements of the offense.***

1. That the accused did a certain overt act;

2. that the act was done with the specific intent to commit a certain offense under the code, and;

3. that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense.

In *United States v. Thomas and McClellan*, 13 C.M.A. 278, 286, 32 C.M.R. 278, 286 (1962), the Court of Military Appeals reduced these elements to simplified language. "The elements of the offense denounced are: (1) an overt act, (2) specific intent, (3) more than mere preparation, (4) tending to effect the commission of the offense, and (5) failure to effect its commission."

D. ***Accused's act (first element).*** An overt act is an outward act done in pursuance and manifestation of an intent or desire. *Black's Law Dictionary, supra*, at 995.

E. ***Accused's intent (second element).***

1. ***Specific intent offense.*** The accused must specifically intend to commit the offense he is charged with attempting. *United States v. Carroll*, 10 C.M.A. 16, 27 C.M.R. 90 (1958). This is not an "intent to attempt," but rather an intent to commit the object of one's criminal purpose or, simply stated, to commit the object, the substantive, crime. *United States v. Gonzalez-Rodriguez*, 7 M.J. 633 (A.C.M.R.), *petition denied*, 7 M.J. 263 (C.M.A. 1979); *United States v. Schreiner*, 40 C.M.R. 379 (A.B.R. 1968). Thus, the offense of attempt is a specific intent crime. While crimes sounding in negligence are ruled

out—there are no such crimes as attempted negligent homicide, attempted missing movement through neglect, attempted involuntary manslaughter, or attempted reckless driving—one can attempt to commit a general intent crime. General intent crimes can be, and often are, specifically intended. For example, unauthorized absence is a general intent crime. If the accused specifically intended to "go UA" and committed the required overt act, he would be guilty of attempted UA. In *United States v. Foster*, 14 M.J. 246 (C.M.A. 1982), the accused was charged with an attempted violation of a general regulation (prohibiting drug sales). The accused contended that he would have to have actual knowledge of the regulation before he could be found guilty. The court disagreed, and held that the specific intent that must be proved is an intent to commit the criminal act and not an intent to violate a particular regulation. *See also United States v. Davis*, 16 M.J. 225 (C.M.A. 1983). The accused need not know exactly what criminal act he is attempting to be guilty of an attempt. In *United States v. Guevara*, 26 M.J. 779 (A.F.C.M.R. 1988), the accused snorted a white powder that he thought was an illegal substance although he didn't know which one. Although the identification of the powder was never determined, the court held that the accused's intent to commit a crime, coupled with his belief that his actions are achieving that intent, will suffice.

2. ***Proving intent.*** Quite often, there may be no direct evidence of the accused's intent. The intent must then be inferred from the available circumstantial evidence. This evidence must be such that, according to common human experience, it is reasonable to draw such an inference. *United States v. Stewart*, 19 C.M.A. 417, 42 C.M.R. 19 (1970). Evidently, common human experience did not permit drawing an inference that the accused had a specific intent to commit rape where the accused, at 0240 hours, undressed outside the victim's home, crept into her house in the nude, entered the victim's bathroom where she was standing nude after taking a shower, looked at her with a leering smile, and then leaned toward her, reaching in the direction of her neck and shoulder with his hand, and only stopped and ran away when the victim began screaming. *United States v. Sampson*, 7 M.J. 513 (A.C.M.R. 1979).

F. ***Nature of the overt act (third element).*** The overt act must be an act which goes beyond mere preparation and tends to effect the commission of the intended offense regardless of whether it is or is not successful. *United States v. Johnson*, 7 C.M.A. 488, 22 C.M.R. 278 (1957); *United States v. Cascio*, 16 C.M.R. 799 (A.F.B.R. 1954), *petition denied*, 18 C.M.R. 333 (1955). *See United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993). The perpetrator must take a substantial step towards accomplishing the offense. *United States v. Jones*, 37 M.J. 459 (C.M.A. 1993).

1. ***More than mere preparation.*** In *Cascio*, the Air Force Board of Review stated:

> The rule is that: "Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it . . ., for there must be some act moving

> directly toward the commission of the offense after the preparations are made . . . ." It seems obvious that there will always be an area between mere acts of preparation and the final step in its commission which cannot be delineated . . . .
>
> . . . Holmes, J. said: "Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a *locus poenitentiae*, in the need of a further exertion of the will to complete the crime. . . .

Cascio, supra, at 821. "The line of demarcation between preparation and a direct movement toward the offense . . . is one of fact, not of law." *United States v. Choat,* 7 C.M.A. 187, 191, 21 C.M.R. 313, 317 (1956). The *Manual for Courts-Martial* defines preparation as the "devising or arranging the means or measures necessary for the commission of the offense." Part IV, para. 4c(2), MCM, 1995. For example, in *United States v. Gonzalez-Rodriguez, 7* M.J. 633 (A.C.M.R. 1979), the accused was convicted of wrongfully possessing cocaine and attempting to sell the drug. He appealed, asserting that his acts amounted at most to mere preparation and did not constitute an attempt. The Army Court of Military Review, having reaffirmed the rule that "(a)n act does not constitute an attempt unless it is accompanied by the specific intent to complete the ultimate offense—in this case, the sale of cocaine," stated:

> Possessing a small quantity of cocaine does not alone manifest an intent to sell it. Each successive act, however, (becomes) . . . increasingly indicative of an intent to sell and (moves) . . . closer to exceeding the bounds of mere preparation. We (now) . . . focus on the final act (returning to the car, . . . still in possession of cocaine, where the buyer was waiting as instructed), calling it *the* overt act, safe in the knowledge that we (are) . . . not inferring intent from the overt act alone, but from the entire sequence of events.

Id. at 636.

The sequence of events which the court was referring to, and which the court found as acts going beyond mere preparation and constituting a direct movement towards the sale of cocaine, were: That the appellant

> . . . possessed the drug in question; Nelms (the informant) was introduced to him as a prospective buyer; in reaching agreement

> with Nelms, appellant resolved significant details such as quantity, price, and the time and place of the sale; appellant waited for Nelms, who ostensibly had gone to the car, appellant joined him there still possessing the cocaine.

Id. at 635.

These events the court found to be directed toward completion of the ultimate offense and near to the consummation of the intended offense. Restating the rule "in terms of its factual context," the court concluded that

> . . . the greater the specificity of intent required for an attempt, the more unequivocal must be the acts alleged to constitute the attempt. In the present case, acknowledging the presence of a marketable quantity of cocaine to begin with, there is nothing the least bit equivocal about the series of acts that were leading inexorably to the completed sale only to be prevented, so the appellant thought, by the police.

Id. at 637.

"The overt act need not be the last act essential to the consummation of the offense." Part IV, para. 4c(2), MCM, 1995. For example, ***X*** intends to burn down his neighbor's house. With this intent in mind, he buys a box of matches and gasoline for use in igniting the blaze. The act of buying the gas and matches is mere preparation. If ***X*** goes further and pours gasoline on the house and lights the match, this is certainly more than preparation. *See United States v. Choat*, 7 C.M.A. 187, 21 C.M.R. 313 (1956). If a match is thrown onto the gasoline, attempted arson has clearly occurred even though the match immediately goes out without igniting any of the house. Thus, while mere preparation does not constitute the offense of attempt, what evidence is sufficient to support a finding of more than mere preparation and sufficient to support an attempt is a matter of degree and a factual issue to be resolved in each case by the fact-finder. *United States v. Reid*, 12 C.M.A. 497, 31 C.M.R. 83 (1961). In *United States v. Rios*, 32 M.J. 501 (A.C.M.R. 1990), *rev'd in part*, 33 M.J. 436 (1991), the Army Court of Military Review analyzed what constitutes an overt act necessary for the offense of attempt. The court here looked at all the steps taken in an attempted robbery charge and concluded that "conceiving" a note to the cashier was planning; "writing" it was preparation; and "displaying" it to the cashier was an overt act beyond mere preparation constituting the offense of attempted robbery. *Rios, supra*, at 502.

Two cases which appear to be inapposite, but which provide prime examples of fact-finder latitude, are the Army Court of Military Review decisions of *United States v. Goff*, 5 M.J. 817 (A.C.M.R. 1978) and *United States v. Williams*, 4 M.J. 507 (A.C.M.R. 1977). Both cases were faced with "near identical factual situation(s)." The facts were essentially as follows: Accused, acting on behalf of a third party, took money from the third party to

purchase heroin. He went off-base to a civilian source, was unsuccessful in obtaining the heroin, returned to base empty-handed and gave the money back to the third party. In *Williams*, the court held that the accused's actions "did not go beyond mere preparation and therefore did not constitute an attempt to sell heroin." *Goff, supra*, at 819. In *Goff*, the court held that ". . . the appellant's culpable comments and actions clearly evidence willing and knowing participation in a criminal venture. His acts of receiving money from the intended deliveree and driving off-post to his standing drug source constitute, . . . a vital and substantial step in his effort to deliver heroin. The fact that the appellant's actions were thwarted by conditions over which he had no control does not change the quality of his wrongful acts. Those overt acts leave no doubt concerning the firmness of appellant's criminal intent to complete the crime." *Goff, supra*, at 820. The *Goff* court adopted the judicial analysis of attempt set forth in *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S. Ct. 792, 42 L.Ed.2d 812 (1975). In *Mandujano*, the court offered two factors to be applied to a factual situation which will determine the existence of attempt. "First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. (Citation omitted) . . . . Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime." *Mandujano, supra*, at 376 and *Goff, supra*, at 819. It seems clear, however, that, where an undercover informant approaches a suspected drug dealer with a view towards purchasing drugs from him and the dealer does nothing more than phone his supplier to see if he can obtain the drugs, no attempt to sell drugs has occurred since the act did not amount to more than mere preparation. *United States v. Presto*, 24 M.J. 350 (C.M.A. 1987).

There are, however, occasions where a solicitation to commit an offense may amount to a criminal attempt. In *United States v. Jones*, 32 M.J. 430 (C.M.A. 1991), the Court of Military Appeals held that accused's solicitation of fellow soldier to destroy his car, his making plans to destroy it, and his giving the car and its keys to the soldier constituted the substantial step toward the commission of the intended crime, larceny, necessary to find him guilty of attempted larceny. But, where there is only mere preparation, there may be, in certain circumstances, sufficient evidence to sustain a violation of solicitation (article 134). *United States v. Jackson*, 5 M.J. 765 (A.C.M.R.), *petition denied*, 6 M.J. 27 (C.M.A. 1978). (Accused was charged with attempted sale of marijuana in violation of article 80. The court found that his soliciting buyers for the marijuana was mere preparation not amounting to attempt, but that such was sufficient to be a violation of the solicitation article.) Assault with intent to commit the subject offense under article 134 may also be pled when the act fails to go beyond mere preparation. Part IV, para. 64, MCM, 1995.

The Navy-Marine Corps Court of Military Review decided, sua sponte, whether mere words could constitute the overt act required to sustain a conviction for attempt. *United States v. Brantner*, 28 M.J. 941 (N.M.C.M.R. 1989), *petition denied*, 29 M.J. 314 (C.M.A. 1990). At trial, appellant was convicted of, among other offenses, attempt to commit an indecent assault. Appellant, a recruiter in rural Oregon, sought to fondle the genitals of a recruit. Appellant had asked the recruit to submit to a hernia examination as a requirement

for enlistment. The recruit refused. N.M.C.M.R. found ". . . appellant's request, made under the color of authority, . . . sufficient to constitute the overt act necessary for appellant to plead providently to an attempt to commit an indecent assault." *Id.* at 944.

In arriving at the decision, the court had to decide "whether appellant's request of the recruit to submit to a hernia examination was a direct movement toward the commission of an indecent assault." In answering that question affirmatively, the court recognized two prevailing views on whether solicitation could constitute an attempt under certain circumstances.

The court took note of Professor Perkins' view "recognizing solicitation as 'an attempt' only if the overt acts have proceeded beyond what would constitute preparation if the solicitor himself planned to commit the offense." *Brantner, supra,* at 945. Another view says a solicitor may never be guilty of an attempt since he has no intention of committing the offense himself.

The court, of course, adopted the former view and the reasoning applied in *State v. Otto,* 102 Idaho 250, 629 P.2d 646 (1981). The *Otto* court distinguished between acts of preparation and perpetration. The difference is based on the nearness of the act, "both spatially and temporally," to the culmination of the criminal design. One must also recognize, the court said, that solicitation involves inciting or encouraging another to commit a crime in the future. In distinguishing between solicitation and attempt, "when there is a dangerous proximity to success, the line of solicitation ends, and an attempt begins because there exists a direct movement toward the commission of the offense." *Id.* at 647.

The court, in concluding, pointed out that a verbal request is not a necessary element to indecent assault; and, under certain circumstances, words would not amount to an attempt to commit that crime. Here, however, there was a dangerous proximity between the request to commit the crime and the completion of the crime, such that the solicitation amounted to an attempt.

This proximity standard should provide prosecutors with a workable method by which to determine whether to charge a solicitation or an attempt. For instance, had appellant's request of the recruit occurred over the telephone, the entreaty would lack the "dangerous proximity" required between request and commission necessary to support an attempt conviction. *See also United States v. Church,* 32 M.J. 70 (C.M.A. 1991), *cert. denied,* 501 U.S. 1231, 111 S.Ct. 2853, 115 L.Ed.2d 1021 (1991), where the court held that an accused's request to have his wife murdered by a person he mistakenly thought was a hired killer went far enough to constitute a criminal attempt, as opposed to a mere solicitation.

2. ***Apparently tended to effect the commission of the intended offense.*** Note the language of Part IV, para. 4b, MCM, 1995, on this aspect: "an act [which] apparently tended to effect commission of the intended offense." The act tends to effect commission of the intended crime ". . . if a reasonable [person] . . . in the same

circumstances as the defendant might expect the intended criminal consequence to result from the defendant's acts." Sayre, *Criminal Attempts*," 41 Harv. L. Rev. 821, 859 (1928); *see generally United States v. Thomas and McClellan*, 13 C.M.A. 278, 32 C.M.R. 278 (1962).

a. ***Substantial step toward the intended crime.*** It is not necessary that every act essential to consummation of the object crime be performed. Stated otherwise, it is not necessary that the last act in the chain be accomplished. *United States v. Johnson*, 7 C.M.A. 488, 22 C.M.R. 278 (1957); *United States v. Choat*, 7 C.M.A. 187, 21 C.M.R. 313 (1956); *United States v. Le Prowse*, 26 M.J. 652 (A.C.M.R. 1988). In *Choat*, the court offered one indication for testing whether the overt act in question was sufficient to constitute more than mere preparation; under the circumstances, an accused goes beyond mere preparation when the offense would have been committed ***but for*** some intervening event. For example, ***A*** and ***B*** agree to burglarize a house. They wear sneakers and gloves and have a crowbar for gaining entry. Just prior to entry, they are apprehended by the police. But for the intervention of the police, they would have committed the offense of burglary. They are guilty of attempted burglary. *See Choat, supra; United States v. Schreiner*, 40 C.M.R. 379 (A.C.M.R. 1968).

b. ***Accused's absurd belief.*** Where it would be patently absurd for the accused to consider that the act would tend to effect the commission of the intended offense, then, despite the accused's belief, there is no attempt. It would not be an act which "apparently would result" in commission of the offense. It obviously could not succeed. For example, an accused believes that, by invoking the rites of witchcraft, he can cause his division officer's death. Distinguish this situation, however, from a reasonable mistake of fact by the accused, which is discussed in section 0108.F.4 ("Defense of impossibility"), *infra*.

3. ***Factors in determining whether a sufficient overt act has been committed.*** In *United States v. Johnson*, 7 C.M.A. 488, 22 C.M.R. 278 (1957), the United States Court of Military Appeals has listed the following factors for consideration in determining whether an attempt has been committed, even though the object offense is not consummated:

a. The character of the interruption;

b. the nearness of the consummation of the offense; and

c. the nature of the intended offense.

4. ***Defense of impossibility.*** In *Thomas and McClellan, supra*, at 283, 32 C.M.R. at 283, the leading military case on attempts, the Court of Military Appeals stated the following with regard to the defense of impossibility:

> The two reasons for "impossibility" are . . . (1) If the intended act is not criminal, there can be no criminal liability for an

attempt to commit the act. This is sometimes described as "legal impossibility". (2) If the intended substantive crime is impossible of accomplishment because of some physical impossibility unknown to the accused, the elements of a criminal attempt are present. This is sometimes described as "impossibility in fact".

a. ***Factual impossibility.*** Short of the patently absurd limitation already discussed, it generally is ***not*** a defense that the intended offense, though proscribed by law, was, under the circumstances, factually impossible to commit. The American Law Institute's Model Penal Code, § 5.01, adopted by C.M.A. in *Thomas and McClellan*, states that a person is guilty of criminal attempt if he ". . . purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believed them to be. . . ."

(1) In *United States v. Thomas and McClellan*, the accused believed that they were raping an unconscious woman; in fact, she was dead. The court held that the accused could not be convicted of rape because a corpse cannot be the victim of a rape. Because Thomas and McClellan reasonably believed that their victim was alive, however, their conviction for attempted rape was affirmed. *See United States v. Gray*, 41 C.M.R. 756 (N.C.M.R. 1969), *rev'd on other grounds*, 20 C.M.A. 63, 42 C.M.R. 255 (1970).

(2) ***Counterfeit drugs.*** The issue of factual impossibility or mistake of fact frequently comes up where the accused has been charged with possession or distribution of a controlled substance. In *United States v. Davis*, 16 M.J. 225 (C.M.A. 1983), an airman first class was charged with distributing what he honestly believed to be Quaaludes. The substance actually was glycerin suppositories. The court held the true nature of the substance is no defense to attempted distribution or possession. *United States v. Henderson*, 20 M.J. 87 (C.M.A. 1985) is in agreement. It is recommended, however, that, if the government is uncertain whether the accused knew the drug was fake, that attempt be charged in the alternative with larceny (by false pretenses) in violation of Article 121, UCMJ.

(3) ***Other examples.***

(a) ***X*** reaches into ***Y***'s pocket with intent to steal ***Y***'s wallet. Unknown to ***X***, the pocket is empty. Attempted larceny has occurred. Part IV, para. 4c(3), MCM, 1995.

(b) ***X*** fires a pistol at ***Y*** with intent to kill ***Y***. ***X*** is not aware that ***Y*** wears a bullet-proof vest and the bullets bounce off harmlessly. ***X*** is guilty of attempted murder.

(c) At night, ***X*** fires into an empty bed in a dark tent,

thinking his sergeant is in it. ***X*** is guilty of attempted murder.

(d) Using a substance which is intended and believed to be a habit-forming narcotic drug, but which turned out to be white talcum powder, is attempted use of a narcotic. In *United States v. Dominguez*, 7 C.M.A. 485, 22 C.M.R. 275 (1957), C.M.A. stated:

> . . . [W]hether the accused attempted to use a narcotic drug does not depend upon the true nature of the substance which he used intravenously. It is clear that he intended to commit the crime of using a habit-forming drug, that he did an overt act toward its commission, that the crime was *apparently* possible of commission in that the substance used seemed apparently adaptable to that end . . . .

Id. at 487, 22 C.M.R. at 277. *See also United States v. Henderson*, 20 M.J. 87 (C.M.A. 1985), wherein the court, *citing Dominguez*, held that a finding of guilty to attempted use of Lysergic Acid Diethylamide (LSD) is not at all dependent on proof that, among other things, appellant believes the substance he consumed was LSD.

(e) ***Y*** is apparently asleep; ***X*** stabs him in the heart, intending to kill him. Later, it appears that ***Y*** was dead ***before X*** stabbed him. Although not murder, it is ***attempted*** murder, if ***X***'s belief that the victim was still living was, under all the circumstances, a natural and reasonable one. *Accord Thomas and McClellan, supra.*

b. ***Legal impossibility.*** If what the accused believed to be a substantive offense is actually no crime at all, the accused cannot be convicted of a criminal attempt. *United States v. Roberts*, 33 M.J. 819 (N.M.C.M.R. 1991); *United States v. Clark*, 19 C.M.A. 82, 41 C.M.R. 82 (1969). For a scholarly discussion of legal impossibility and the occasional conceptual difficulties distinguishing it from factual impossibility, read Judge Kilday's opinion in *Thomas and McClellan, supra*, at 32 C.M.R. 282-92. Examples of cases of legal impossibility include:

(1) *United States v. Keenan*, 18 C.M.A. 108, 39 C.M.R. 108 (1969), wherein the accused saw the victim being shot for the third time. Several seconds later, the accused "finished off" the victim, but believed that the victim was dead already. The lower court had specifically refused to find that the victim was alive when the accused shot. Therefore, C.M.A. held that the accused was guilty of neither murder nor attempted murder.

(2) *United States v. Clark*, 19 C.M.A. 82, 41 C.M.R. 82 (1969), wherein the specification alleged that the accused: ". . . did, at DaNang Air Base, DaNang, Republic of Vietnam, on or about 9 February 1968, attempt by threats of force and

violence and with wrongful intent, to exercise control of an aircraft in flight in air commerce to wit: A Pan American Airways DC-6B aircraft transporting United States Military Personnel to R&R leave in Hong Kong, British Crown Colony."

The specification was intended to state the offense of air piracy as prohibited by 49 U.S.C. § 1472(i). The evidence showed that the accused attempted to take over the aircraft while it was still on the ground waiting to take on passengers. ***Held***: Conviction reversed: In the absence of 49 U.S.C. § 1472(i), there was no offense of air piracy. Section 1472(i) described an offense only for aircraft in flight. It was therefore legally impossible to attempt to commit air piracy on an aircraft not in flight. ***Note***: Section 1472(i) has been subsequently amended to delete the "in flight" provision.

G. ***Effect of completion of attempted crime***. Article 80(c), UCMJ, provides that a person subject to the code may be ". . . convicted of an attempt to commit an offense although it appears at the trial that the offense was consummated." For example, suppose an accused is charged with attempted larceny. At trial, it is proved the larceny was actually committed. The accused may still be convicted of attempted larceny. The accused may not be convicted of larceny unless a larceny charge was preferred and referred for trial. *See United States v. Gray*, 41 C.M.R. 756 (N.C.M.R. 1969), *rev'd on other grounds*, 20 C.M.A. 63, 42 C.M.R. 255 (1970). The accused may ***not*** be convicted of both the attempt and the completed crime. In *United States v. Hyska*, 29 M.J. 122 (C.M.A. 1989), the accused's attempt to distribute marijuana on one day merged into the actual distribution which occurred the following day.

H. ***Voluntary abandonment***. Pursuant to Part IV, para. 4c(4), MCM, 1995, voluntary abandonment is an affirmative defense when the perpetrator completely and voluntarily abandons the intended crime prior to completion, "... solely because of the person's own sense that it was wrong ..." In *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987), an accused's plea of guilty to attempted distribution of marijuana was held to be improvident where, during the providency inquiry, the accused indicated that a prospective buyer of marijuana (who later, of course, turned out to be an undercover informant) approached the accused and asked the accused if he could get some marijuana for him. The accused indicated that he thereupon made two attempts on successive days to meet with a cab driver who was his regular supplier. The first effort failed, but the second succeeded. The accused then took the money provided by the buyer for the purchase and rode with the cab driver to an off-base liquor store where he was to obtain the marijuana. The accused further indicated in the providency inquiry that, when he arrived at the liquor store, he decided not to go through with it because he was afraid he would be caught bringing the marijuana back on post. ***Held***: The accused's account reasonably raised the affirmative defense of voluntary abandonment and his plea of guilty was improvident. Notice that *Byrd* also stands for the proposition that voluntary abandonment will ***not*** be a defense when the abandonment occurs because of a fear of immediate detection or apprehension. Of course, whether the accused ceased his efforts to commit an offense because of a sincere change of heart or because of a fear of immediate detection or apprehension is a matter which will be determined by the facts of each case. However, voluntary abandonment of an attempted

offense is not a defense when the accused's actions have progressed into their last stages and the victim has already suffered substantial harm. *United States v. Smauley*, 42 M.J. 449 (1995). In *United States v. Jones*, 37 M.J. 459 (C.M.A. 1993), the Court had an opportunity to analyze the facts and make this determination. The accused in the case procured rock cocaine for distribution but did not actually distribute it. The Court here found that where accused had procured the cocaine, and her only reason for not going through with the distribution was her fear that she would get caught, did nothing to alter her liability for the completed attempt offense. *Jones, supra*, at 461. *See United States v. Rios*, 33 M.J. 436 (C.M.A. 1991), for further discussion of voluntary abandonment.

I. ***Lesser included offense.*** Article 80 is always an LIO of a substantive offense charged [Article 79, UCMJ], except where the offense cannot be specifically intended (e.g., negligent homicide).

J. ***Pleading.***

1. ***General considerations.*** *See* form specifications 2 at para. 4f (article 80 attempts), 9f (attempted desertion), 18f (attempted sedition and attempted mutiny), 24f (attempting to compel surrender), 28f (attempting to aid the enemy), and 54f (attempt-type assaults), MCM, 1995. With the exception of the attempt-type assault pleadings (see Chapter VI of this study guide), attempt pleadings follow the general format illustrated below in the sample article 80 pleading. Note that, unlike article 81 (conspiracy), the overt act is not alleged. *United States v. Garner*, 28 M.J. 634 (A.F.C.M.R. 1989).

2. ***Sample pleading.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 80.
>
> ***Specification.*** In that Seaman John M. Ovey, U.S. Navy, USS NEVERSAIL, on active duty, did, at Naval Station, Honolulu, Hawaii, on or about 1 April 19CY, attempt to steal a wristwatch, of a value of about $150.00, the property of Seaman Jon Z. Marque, U.S. Navy.

K. ***Instructions.*** *See* Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. No. 3-2. Notice that, similar to the situation with conspiracy, the military judge must instruct on two sets of elements; those of attempt as well as the elements of the attempted offense.

L. ***Punishment.*** Part IV, para. 4e, MCM, 1995, provides that an attempt to commit an offense carries a punishment exactly the same as if the offense intended had been consummated, except that death or confinement in excess of 20 years may not be adjudged.

0109 REVIEW OF RELATIONSHIP BETWEEN CRIMINAL CONDUCT AND PARTIES TO CRIMES

A. ***In general.*** From previous discussion it can be seen that, in any given set of circumstances, elements of solicitation, conspiracy, principals and attempts may coexist. These concepts do not always stand alone, but are frequently intermingled. In assessing what offenses are involved in a given set of facts, never forget that in addition to, or in lieu of, a completed object offense, solicitation, conspiracy, and attempts may also be charged. Likewise, careful thought must be given to the relationship of "parties" (i.e., principals and accessories after the fact).

B. ***The spectrum of crime.*** The various levels of criminal conduct range from solicitation to commit a crime, through the actual commission of the crime, to being an accessory after the fact to the crime. Criminal activity may therefore be envisioned as a spectrum of progression through time.

THE SPECTRUM OF CRIME

Solicitation	Conspiracy	Attempt	Object Crime	Accessory After The Fact

1. ***Solicitation.*** If committed, solicitation occurs at the very outset of a criminal venture. It is the first criminal step after the birth of the venture in the accused's mind (i.e., the first act of putting the evil scheme to work). It consists simply of requesting, seriously and in any manner, another person to commit an offense. Nothing more is needed. Note that the solicitor is also "counseling" the commission of an offense and thus may become a principal and a conspirator if the object offense is committed or attempted.

2. ***Conspiracy.*** If committed, conspiracy is the second criminal step outside the sanctuary of the mind and upon the stairway to completion of the object offense. When the person solicited agrees to participate in a concerted action with the "solicitor" to commit a crime, then a conspiracy agreement is formed. When an overt act is committed by any of the conspirators, the crime of conspiracy is complete. The overt act need only manifest that the conspiracy is at work. A conspirator, like a solicitor, may become a principal to the commission or attempted commission of the object crime.

3. ***Attempt.*** If committed, an attempt occurs on the very threshold of completion of the object crime. When an overt act amounting to more than mere preparation, and which apparently tends to effect the object offense, is committed, an attempt has been committed—provided that the person intended to commit a crime.

a. ***Overt act.*** An overt act for an attempt would constitute an overt act for conspiracy. The overt act in conspiracy, however, can be far removed from the threshold of the object crime; it can be simply a preparatory act, which would not be sufficient for an attempt.

b. ***Specific intent.*** The overt act must be done with the specific intent to commit the object offense. Therefore, one cannot be guilty of an "attempt" to commit a crime based solely on negligence (e.g., negligent homicide).

4. ***Relationship between preparatory offenses and object offenses.***

a. ***Negligent offenses.*** It should be apparent that purely negligent crimes are completed without any accompanying offenses of solicitation, conspiracy, or attempt.

b. ***General intent offenses.*** It should also be apparent that, although some crimes involving "general intent" can be specifically intended, and hence attempted, they can be committed without an intervening "attempt" (e.g., unauthorized absence caused by over-sleeping).

c. ***Specific intent offenses.*** Crimes requiring a specific intent always involve an attempt. For example, larceny is a wrongful taking with intent permanently to deprive another of personal property of some value. It always includes an overt act with specific intent, the act being more than mere preparation and apparently tending to effect commission of the larceny. The only difference between the completed larceny and the defined attempted larceny is that, in the "attempt," the overt act failed. Article 80 permits conviction of such an "attempt," however, even though the evidence shows that it in fact did not fail. Even in crimes involving a required specific intent, it should be apparent that they can be and frequently are committed without the crimes of solicitation and conspiracy having also been committed. Thus, larceny can be committed by an individual working alone; no solicitation or conspiracy need occur.

5. ***Accessory after the fact.*** If committed, this crime occurs after a preceding offense has been committed. So long as some offense is committed, it is not necessary that an intended offense actually be committed, although that probably is the usual case. Thus, one may be guilty of being an accessory after the fact to an attempt.

C. ***The spectrum of criminals.*** Each of the levels of criminal conduct corresponds to a specific type of criminal party. When the object crime is attempted or committed, all parties to that crime or its attempt are divided into two categories: principals and accessories after the fact. For example, one who solicits a crime becomes an accessory before the fact (and therefore a principal) if the crime is attempted or committed pursuant to the solicitation. Likewise, one who attempts a crime becomes a perpetrator (and therefore a principal) of a criminal attempt.

THE SPECTRUM OF CRIMINALS

Solicitor	Conspirator	Attempter	Accessory Before The Fact	Aider And Abettor	Perpetrator	Accessory After The Fact

* ***Note***: Solicitors, conspirators, and attemptors may become principals if the object crime is attempted or committed.

1. ***Principal.***

a. ***Included parties.*** Under article 77, a principal is one who:

(1) commits the object offense;

(2) aids in its commission;

(3) abets (encourages) its commission;

(4) counsels (advises) its commission;

(5) commands (requests) its commission;

(6) procures (hires) its commission; or

(7) causes an act to be done which, if directly performed, would be punishable by the code.

b. ***Relationship of parties to conduct short of the completed crime.*** Any one of the seven specific acts which make one a principal can also be committed by a solicitor, conspirator, or attempter. For example, one who conspires with others to commit a crime is guilty as a principal if the crime is committed pursuant to the unlawful agreement. The conspirator becomes at least an accessory before the fact, and, depending on the role the conspirator played in the actual commission of the crime, may also be an aider and abettor or the actual perpetrator.

2. ***Accessory after the fact.*** The accessory after the fact aids or assists a person known to have committed a crime, with the intent of assisting the criminal to evade apprehension, prosecution, or punishment. A perpetrator and an aider and abettor cannot also be accessories after the fact to their own crimes.

CHAPTER II

PLEADING

0201 CHARGE AND SPECIFICATION. R.C.M. 307, 601-604; Part IV, MCM (1995 Edition) 2-1
A. General format of military pleading 2-1
B. The charge 2-1
C. The specification 2-1
D. Each specification a separate offense 2-1

0202 NUMBERING OF CHARGES AND SPECIFICATIONS 2-1
A. Terms 2-1
1. Charge 2-2
2. Specification 2-2
B. Numbering 2-2
1. One only 2-2
2. Multiple 2-2
3. Multiple specifications under one charge 2-2
4. Example 2-3
5. Article subdivisions 2-3

0203 SPECIFIC CONTENTS OF SPECIFICATIONS 2-4
A. Overview 2-4
1. Allegations about the alleged offense 2-4
2. Jurisdictional allegations 2-4
B. Description of the accused 2-5
1. Identification 2-5
2. Pleading jurisdiction over the accused 2-5
C. Description of time of offense 2-6
1. Use of "on or about." 2-6
2. Hour 2-7
3. Extended periods 2-7
4. Practical suggestions 2-7
D. Description of the place of offense 2-8
E. Description of type of principal 2-8
1. Article 77 rule 2-8
2. Exception 2-8

F. Description of victim 2-8
1. General rule 2-8
2. Rank-related offenses 2-8
3. Status-related offenses 2-9
4. Name unknown 2-9
G. Description of value 2-9
H. Description of property 2-9
1. Generic terms 2-9
2. Sufficient identity 2-10
I. Description of written instruments, orders, and oral expressions 2-10
1. Written instruments 2-10
2. Orders 2-11
J. Amendments to specification: R.C.M. 603 2-11
1. Prior to arraignment 2-11
2. After arraignment 2-11
3. Minor changes defined 2-12

0204 SUFFICIENCY OF A SPECIFICATION 2-12

A. Sufficiency 2-12
1. Pleading elements 2-12
2. Words importing criminality 2- 12
3. Matters in aggravation 2- 14
4. Specificity 2-15
5. Duplicity 2-15
B. The test for legal sufficiency of a specification 2-17
1. The test 2-17
2. Flexible application 2-17
3. Three-pronged test 2-17
4. Application of the three-pronged test 2-18

0205 DEFECTS IN PLEADING 2-24
A. Misdesignation 2-24
1 Ordinarily harmless error 2-24
2. Governed by the specification 2-25
3. Incorrect citations of statutes, orders, or regulations 2-25
B. Failure to state an offense 2-25
C. Lack of specificity 2-26
1. No request at trial for relief 2-27
D. Duplicity 2-28
1. Continuing course of similar conduct 2-28
2. Distinct offense 2-28

E. Variance 2-28
1. Defined 2-28
2. Examples 2-28

0206 LESSER INCLUDED OFFENSES (LIO). Article 79, UCMJ; Part IV, para. 2, MCM (1995 Edition) 2-30
A. Text of article 79 2-30
B. Manual definition of lesser included offense 2-30
C. Historical perspective 2-31
D. "Necessarily included" doctrine 2-31
E. Current law 2-31
1. The rule – "strict elements test." 2-32
2. General vs. specific intent 2-32
F. Significance of the LIO determination 2-33
G. Instructions on LIO's 2-33
1. Instructions on elements of LIO's 2-33
2. "Reasonably" raised by the evidence 3-34
3. Express defense waiver of LIO instruction 2-34
H. Multiple LIO's 2-35
I. Is one offense an LIO of another? 2-35
J. Findings of guilty to an LIO 2-36

0207 MULTIPLICITY AND JOINDER 2-36
A. General concept 2-36
B. Rationale 2-37
1. Joinder 2-37
2. Multiplicity 2-37
C. Multiplicity defined 2-38
1. The test of reasonableness 2-38
2. Congressional intent 2-38
3. Teter's strict elements test 2-38
D. Multiplicity for sentencing 2-39

0208 CHARGING LESSER INCLUDED OFFENSES 2-39
A. Electronic viewpoint 13-93 2-39
B. C.A.A.F. and a new rule for LIO's 2-48

CHAPTER II

PLEADING

0201 CHARGE AND SPECIFICATION. R.C.M. 307, 601-604; Part IV, MCM (1995 Edition). (Key Numbers 552, 950-971)

A. ***General format of military pleading.*** Pleadings in military criminal cases follow a traditional format of charge and specification. Together, the charge and specification, much like criminal information in civilian prosecutions, set forth the statutory authority for the prosecution and the specific factual averments which constitute the alleged offense. Military pleadings tend to be shorter than most civilian information or indictments.

B. ***The charge.*** The charge portion of the military pleading is merely a citation of the article of the Uniform Code of Military Justice which the accused allegedly violated. Corresponding citations to the U.S. Code are not used; the article of the code is sufficient. For example, in a larceny case, the charge would be as follows:

Charge: Violation of the Uniform Code of Military Justice, Article 121

C. ***The specification.*** The specification contains allegations of facts constituting the offense charged. Part IV, subparagraph (f) of each punitive article, MCM (1995 Edition), contains sample formats for specifications for most of the common offenses under the code. Care is necessary when using the MCM samples, however. Each sample must be tailored to the facts in each case. Although the samples in the MCM (1995 Edition), appear to be correct, subsequent cases must be constantly examined to ensure that any case-law modifications are followed.

D. ***Each specification a separate offense.*** Each specification alleges a distinct, separate offense. Thus, each specification is similar to a count in civilian criminal pleadings to which pleas must be entered and for which findings must be returned.

0202 NUMBERING OF CHARGES AND SPECIFICATIONS

A. ***Terms.***

1. ***Charge.*** An "original" charge (i.e., one alleged when the charge sheet was prepared) is simply labeled "Charge." Where other allegations arise subsequent to the preferral of the initial charge, an "additional" charge (i.e., one preferred at a later time and added to the original charge sheet) is labeled "Additional Charge."

2. ***Specification.*** All specifications, whether original or additional, are simply labeled "Specification" and, if necessary, given a number; there is no such thing as "Additional Specification."

B. ***Numbering.***

1. ***One only.*** If there is only one charge, it is referred to simply as "the charge" and is ***not*** numbered. Likewise, if there is only one specification under a particular charge, it is called "the specification" and is ***not*** numbered.

2. ***Multiple.***

a. ***Charge.*** If there is more than one charge, number the first one with a Roman numeral "I," the second "II," etc. It is traditional and customary to list the charges in the order of their normal numerical sequence in the UCMJ (i.e., an article 86 is listed before an article 121 charge); trial counsel may, however, desire charges to be arranged in a different sequence in order to make the order of proof more logical or for other actual reasons.

b. ***Specification.*** If there is more than one specification under a particular charge, number the first one with an Arabic numeral "1," the second "2," etc.

c. ***Additional charges and specifications.*** Use the same numbering and listing system (i.e., Roman numerals for the charges—if more than one—and Arabic numerals for the specifications—if more than one under that charge). List additional charges in sequence set forth above, but after all original charges.

3. ***Multiple specifications under one charge.*** All specifications alleging violations of a particular article of the code are listed as separate specifications under a single charge. See the examples immediately below. An additional charge, however, must be pleaded separately from original specifications alleging violations of the same code article.

4. ***Example.*** Charge I: Violation of the Uniform Code of Military Justice, Article 85

Specification 1: --- (words alleging desertion)
Specification 2: --- (words alleging another offense of desertion)

Charge II: Violation of the Uniform Code of Military Justice, Article 86

Specification 1: --- (words alleging an unauthorized absence)
Specification 2: --- (words alleging another unauthorized absence)
Specification 3: --- (words alleging a third unauthorized absence)

Charge III: Violation of the Uniform Code of Military Justice, Article 121

Specification: --- (words alleging a larceny)

Additional Charge I: Violation of the Uniform Code of Military Justice, Article 86

Specification 1: --- (words alleging yet another unauthorized absence)
Specification 2: --- (words alleging still another unauthorized absence)

Additional Charge II: Violation of the Uniform Code of Military Justice, Article 108

Specification: --- (words alleging an offense of wrongful disposition of government property).

5. ***Article subdivisions.*** The particular ***subdivision*** of an article of the code is not cited in the charge. For example:

a. "Article 86," ***not*** 86(2) nor 86(3).

b. "Article 85," ***not*** 85(a), nor 85(b), nor 85(c), nor 85(a)(1).

c. The only exceptions are articles 106a (espionage), 112a (drugs), and 123a (bad checks).

0203 SPECIFIC CONTENTS OF SPECIFICATIONS (Key Numbers 552-853)

A. ***Overview.*** The purpose of this section is to provide a detailed guide to drafting specifications. Specifications contain factual allegations about two matters: (1) The alleged offense; and (2) jurisdiction. Much of the material in this section is relevant when ascertaining if a specification adequately informs the accused of the allegations which he must defend against. Also relevant is the doctrine of variance which is more fully discussed in section 0205.E of this chapter. Also, consult the discussion to R.C.M. 307c.

1. ***Allegations about the alleged offense.*** The specification must allege, either expressly or by fair implication, all the elements of the alleged offense and all necessary words importing criminality (e.g., "wrongfully," "unlawfully," "without authority"). Part IV, MCM (1995 Edition),, is a generally reliable guide to pleading the offense, subject to the caveats discussed in section 0201.C of this chapter.

2. ***Jurisdictional allegations.*** In *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977), the Court of Military Appeals mandated that the prosecution must "affirmatively . . . demonstrate through sworn charges / indictment, the jurisdictional basis for trial of the accused . . . ." *Id.* at 419. Thus, each specification was required not only to allege an offense under the code, it was also necessary to recite the facts upon which court-martial jurisdiction over the offense was predicated. This is no longer necessary. In the U.S. Supreme Court decision in *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), the Court held that court-martial jurisdiction exists over every offense committed by military personnel simply by virtue of their status as members of the military. It therefore no longer matters whether the offense is "service connected." It should also be noted at least one court has held that *Solorio* applies to offenses committed prior to the date of that decision. *United States v. Starks*, 24 M.J. 857 (A.C.M.R. 1987).

B. ***Description of the accused.***

1. ***Identification.***

a. ***Name.*** Recite the accused's full name: first name, middle name or initial, last name. If the accused is known by an alias, the accused should be charged under his / her true name. If the accused does not admit which name is his / her true name, the accused should be charged under the name appearing on his / her enlistment contract, with the alias also recited (e.g., "Seaman John P. Jones, U.S. Navy, USS Neversail, alias Rear Admiral Raymond P. Johnson, U.S. Navy, Fourth Naval District. . . .").

b. ***Military association.*** The specification should recite the accused's rank or grade, armed force, and unit or organization. If the accused's rank or grade has changed since the date of the alleged offense, the accused should be identified by his / her present grade, followed by his / her grade at the time of the offense (e.g., "Seaman John P. Jones, U.S. Navy, then Seaman Apprentice, U.S. Navy, USS Neversail. . . .").

c. ***Examples.***

(1) "In that Seaman Waldo Thurdgrinder Smeen, U.S. Navy, USS Woonsocket, . . ."

(2) "In that Yeoman Third Class Vincent R. Lightningtyper, U.S. Navy, Naval Justice School, Newport, Rhode Island, . . ."

(3) "In that Staff Sergeant John X. Ropeadope, U.S. Marine Corps, Marine Fighter Attack Squadron 314, Marine Aircraft Group 11, Third Marine Aircraft Wing, Fleet Marine Force Pacific, . . ."

2. ***Pleading jurisdiction over the accused.***

a. ***Basic format.*** A court-martial generally has jurisdiction to try only military members on active duty. Therefore, each specification should clearly recite the accused's active duty status. One way of pleading jurisdiction over the accused is to use the words "on active duty" immediately after the description of the accused. For example:

> "In that Ensign Bertha D. Blooze, U.S. Navy, USS Vulcan, on active duty, did, . . ."

It should be noted, however, that in *United States v. Hatley*, 14 M.J. 890 (N.M.C.M.R. 1982), the court held that the omission of the words "on active duty" from a specification did not prevent it from stating an offense. It is still recommended that "on active duty" be alleged in

every specification.

b. ***Special problems***. Sometimes more than just "on active duty" will be necessary. When special circumstances cause court-martial jurisdiction to be asserted or retained over one who would not normally be subject to such jurisdiction, those circumstances should be pleaded. For example:

(1) ***Jurisdiction retained after expiration of enlistment*** . Suppose that the accused is not tried until after the expiration of his or her current enlistment, but charges were ***preferred*** before the expiration. The specification should recite:

> "In that Seaman Fritz D. Katz, U.S. Navy, Naval Air Station, Willow Grove, Pennsylvania, on active duty, over whom court-martial jurisdiction is asserted by virtue of the preferral of this specification, on 29 December 19CY(-1), before the expiration of his enlistment on 1 January 19CY, did . . ."

(2) ***Reservist failing to report for active duty***. Suppose that a reservist failed to report for active duty for training. The resulting unauthorized absence (UA) specification should allege the facts surrounding the activation:

> "In that Boatswain's Mate Third Class Jacob D. Snake, U.S. Naval Reserve, Naval Support Activity, Philadelphia, Pennsylvania, on active duty, who was lawfully ordered on 11 January 19CY to a period of forty-five days active duty for training to commence on 2 February 19CY, did . . ."

C. ***Description of time of offense***. The time and place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission alleged. *United States v. Sell*, 3 C.M.A. 202, 11 C.M.R. 202 (1953).

1. ***Use of "on or about."*** In alleging the time of an offense, it is proper and usually advisable to allege it as "on or about" a specified day. This phrase must be construed reasonably in the light of the circumstances of the particular case. *United States v. Nunn*, 5 C.M.R. 334 (N.B.R. 1952) (within narrow limits); *United States v. Squirrell*, 2 C.M.A. 146, 7 C.M.R. 22 (1953); and *United States v. Brown*, 4 C.M.A. 683, 16 C.M.R. 257 (1954). Where time ***is*** of the essence of the crime, an allegation concerning the date of the offense becomes a matter of substance. For example, the date of the offense would doubtless be of substance in a prosecution for violating a Sunday Blue Law, or possibly a prosecution for statutory rape. Otherwise, allegation of the time is not a matter of substance, and an approximation of the date of occurrence is sufficient unless it is so inaccurate or vague as to prevent the accused from preparing a defense. *Brown, supra* (three-month variation held ***not*** fatal).

2. ***Hour***. The exact hour of the offense is ordinarily not alleged except in certain absence offenses (e.g., failure to go to appointed place of duty, Article 86(1), UCMJ). However, if the exact hour of the offense is alleged, use the 24-hour clock system.

3. ***Extended periods***. When the accused's alleged conduct extends over a period of time, or when the exact date of the alleged conduct cannot be precisely stated, it is proper to allege that the offense occurred over a period of time (e.g., from about 15 January 19CY to about 22 February 19CY). When the accused has committed a series of acts which are parts of a continuous course of action, such as conspiracy, such may be alleged as a single continuing offense over a period of time. Other examples of such continuous courses of action would include:

a. Embezzlement—*United States v. Maynazarian*, 12 C.M.A. 484, 31 C.M.R. 70 (1961);

b. continuing adultery with one woman—*United States v. Frayer*, 11 C.M.A. 600, 29 C.M.R. 416 (1960); and

c. several acts of sodomy—*United States v. Lovejoy*, 20 C.M.A. 18, 42 C.M.R. 210 (1970).

4. ***Practical suggestions***. As a general rule, it is wiser to allege "on or about" a specific date rather than pleading that a single offense occurred sometime during an extended period. Should the date proven at trial vary from that alleged, fatal variance will result only if the discrepancy in dates has misled the accused. Pleading an extended period of time is useful, however, when the offense consisted of separate acts committed over a period of time, such as conspiracy or embezzlement. Combining several instances of use of marijuana into only one specification alleging wrongful use of marijuana over a period of time is permissible, so long as the accused is not misled. *United States v. Means*, 12 C.M.A. 290, 30 C.M.R. 290 (1961). Instead of being liable for punishment for several separate, distinct offenses, the accused is subject to punishment as if he or she had committed only one offense. Accordingly, attempts to combine separate, distinct crimes into a single continuing offense are generally unwise.

D. ***Description of the place of offense.*** It is usually unnecessary to go into such details as the name of the street or the number of the building, if any, in which the offense takes place. *Means, supra.* However, some acts are offenses only if committed in a particular place. In that event, it may be necessary in a given case to identify the street, building, or location. For example, a specification alleged that the accused violated a lawful general order by appearing "at Frankfurt am Main, Germany . . . in a public establishment in a field uniform." The order prohibited wearing of such a uniform "outside military installations." C.M.A. held that the specification did not contain sufficient averment that the public establishment was outside of a military installation and concluded that the specification did not show sufficient facts to show an order violation. *United States v. Crooks,* 12 C.M.A. 667, 31 C.M.R. 263 (1962). *See also United States v. Rowe,* 13 C.M.A. 302, 32 C.M.R. 302 (1962); *United States v. Van Valkenberg,* 42 C.M.R. 403 (A.C.M.R. 1970); and *United States v. Williams,* 17 M.J. 207 (C.M.A. 1984).

E. ***Description of type of principal.***

1. ***Article 77 rule.*** All principals are charged as if each was the actual perpetrator. For example, if ***A*** is an accessory before the fact to ***B***'s larceny, the specification against ***A*** would nonetheless allege: "In that ***A*** . . . did steal . . ."

2. ***Exception.*** Notwithstanding the provisions of article 77, it occasionally may be wise to specify the role the accused played in the criminal enterprise. An example of such a rare exception is *United States v. Petree,* 8 C.M.A. 9, 23 C.M.R. 233 (1957), wherein the specification did not charge the accused as the driver but merely as a passenger. "Thus, in the absence of any allegation that the accused was the driver of the vehicle, or that as a passenger he aided and abetted the driver in unlawfully fleeing the scene of an accident, the specification wholly fails to allege an offense." The court also held the specification to be "fatally defective" under the doctrine of the military superior-subordinate relationship ". . . because of the failure to allege that the accused as a passenger was senior in rank and command under conditions which would permit him to issue orders to the driver." *Id.* at 13, 23 C.M.R. at 237.

F. ***Description of victim.***

1. ***General rule.*** If the offense alleged constitutes an offense against the person or property of an individual, that person should be described as follows—i.e., first name, middle initial, and last name. If a military person, the victim's rank or grade and armed force should also be alleged. This will identify that individual more specifically.

2. ***Rank-related offenses.*** Some offenses ***require*** that the rank or grade of a victim be alleged in order to set forth an offense. For example, in disobedience of a superior officer, in violation of article 90, rank may be essential to establish the element of "superiority."

3. ***Status-related offenses.*** Some offenses require that the victim's status as a person subject to the code be alleged and proven. For example, using provoking words (article 117) is an offense only if the person toward whom the words were used is one subject to the Uniform Code of Military Justice. *See* sample specification, Part IV, para. 42f, MCM (1995 Edition), which identifies the victim as: ". . . towards Sergeant _____, U.S. Air Force . . ." If the victim were a reservist, it would be necessary to add active duty status (e.g.: ". . . towards Lieutenant Junior Grade Harold R. Brown, U.S. Naval Reserve, on active duty").

4. ***Name unknown.*** Occasionally the exact identity of the victim may be uncertain. For example, in *United States v. Suggs*, 20 C.M.A. 196, 43 C.M.R. 36 (1970), assault victims were described merely as "armed forces policemen." C.M.A. held that, under the circumstances, such pleading was sufficiently particular. The court noted that the specification provided further identifying information in its allegations of date, time, and place. Moreover, the accused had pleaded guilty and had not moved for appropriate relief in the nature of a bill of particulars. There was no risk that the allegation of the victims' identity was so vague as to risk misleading the accused. *See also United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973), in which murder specifications alleging numbers of "Oriental human beings whose names are unknown" formed the basis of conviction. Vague descriptions of the victim are unwise, because they invite defense assertions that the pleading is fatally defective. Thus, when the exact identity of the victim is unknown, he / she should be described as accurately as possible, such as by any alias or by a general physical description (e.g., "a Caucasian adult male of unknown identity").

G. ***Description of value.*** In property offenses, such as larceny, the value of the property determines the authorized maximum punishment. Whenever value is an aggravating matter, it must be specifically alleged. Exact value should be alleged if known. If only an approximate value is known, it may be alleged as "of a value of about. . . ." If several items are the subject of the offense, the value of each item should be stated, followed by a statement of aggregate value—e.g., ". . . one shirt, value $3.50; one pair of shoes, value $14.00; one camera, value $220.00; one package of chewing gum, value $0.20; of a total value of $337.70."

H. ***Description of property.***

1. ***Generic terms.*** In describing property, generic terms should be used, such as "a watch" or "a knife," and descriptive details such as make, color, and serial number usually should be omitted. However, in some instances, details may be essential to the offense. For example, the length of a knife may be important in prosecuting a violation of a general regulation or in a carrying concealed weapons case, in order to establish its dangerous nature.

2. ***Sufficient identity***. Specifications should sufficiently identify property in order to inform the accused of what he / she must defend against and in order to protect the accused from a second prosecution for the same offense. The courts are usually tolerant of somewhat vague descriptions of property when the record clearly establishes that the accused was not misled by the lack of specificity in pleading. Thus, in *United States v. Krebs*, 20 C.M.A. 487, 43 C.M.R. 327 (1971), C.M.A. upheld a larceny specification which alleged "goods, of a value of about $1,678.00. . . ." C.M.A. noted that the accused had pleaded guilty to the specification. Moreover, the military judge specifically inquired into the defense's understanding of what specific property was involved. On the record, the defense counsel stated the various items that comprised the alleged "goods," and also stated that there was no possibility that the accused had been misled. In *United States v. Alcantara*, 18 C.M.A. 372, 40 C.M.R. 84 (1969), C.M.A. reluctantly upheld a larceny specification which alleged that the accused stole "foodstuffs." C.M.A. held that there was no risk of the accused having been misled, but that the individual items were known and, for sake of precision, should have been alleged. In *United States v. Kinard*, 15 M.J. 1052 (N.M.C.M.R. 1983), the Court of Review determined that a specification which, in describing the subject of a larceny, did not contain the words "property of the U.S. Navy" was not fatally defective.

l. ***Description of written instruments, orders, and oral expressions.***

1. ***Written instruments***. When a written instrument or a part of it forms the gist of the offense, the specification should set forth the writing, preferably verbatim. R.C.M. 307, MCM (1995 Edition) (discussion).

a. ***Example***. A is charged with forgery of a check. A verbatim copy of the check (photocopy if possible) should be inserted in the specification. *See* sample specification, Part IV, para. 49f, MCM (1995 Edition).

b. ***Example***. A is charged with wrongful possession of a pass. A copy of the pass should be inserted in the specification. *See* sample specification, Part IV, para. 77f, MCM (1995 Edition).

b. ***Other orders (Article 92(2), UCMJ).*** When the order allegedly violated is other than a general order or regulation, such an "other lawful order" (Art. 92(2), UCMJ) should be quoted verbatim or described exactly in the specification. This fully apprises the accused of the specific misconduct allegedly committed. When the order is an oral order, not only should it be quoted verbatim, but the phrase "or words to that effect" should be added after the quotation. "Or words to that effect" will provide for the possibility of a minor variance in proof of the exact words used in the order. *See* sample specification, Part IV, para. 16f, MCM (1995 Edition). Where the written order is not quoted verbatim or may be violated in more than one way, the specification must also allege the manner in which it was violated.

c. ***Negating exceptions.*** If the order contains exceptions, it is generally not necessary that the specification contain an allegation negating the exceptions. For example, in *United States v. Gohagen*, 2 C.M.A. 175, 7 C.M.R. 51 (1953), the accused was charged with violation of a Far Eastern Command regulation by wrongfully possessing a hypodermic needle and syringe. The regulation prohibited possession of hypodermic needles and syringes except for treatment of disease or household use; but the specification did not allege that the accused's possession was not for treatment of disease or household use. C.M.A. held that such a negation of the regulation's exceptions was unnecessary in the pleadings. *See also United States v. Blau*, 5 C.M.A. 232, 17 C.M.R. 232 (1954); *United States v. Tee*, 20 C.M.A. 406, 43 C.M.R. 246 (1971).

J. ***Amendments to specifications: R.C.M. 603.***

1. ***Prior to arraignment.*** R.C.M. 603(b), MCM (1995 Edition), permits minor changes to the charges and specifications prior to arraignment by "Any person forwarding, acting upon or prosecuting charges on behalf of the United States except an [Article 32] investigating officer . . ." This would allow a legal / discipline officer, legal clerk, or trial counsel to make appropriate pen-and-ink changes.

2. ***After arraignment.*** The military judge may, under R.C.M. 603, grant

2. ***Orders.***

a. ***General orders (Article 92(1), UCMJ).*** A specification alleging a violation of a general order or regulation, under Article 92(1), UCMJ, must clearly identify the specific order or regulation allegedly violated. The general order or regulation should be cited by its identifying title or number, section or paragraph, and effective date. It is not necessary to recite the text of the general order or regulation verbatim. For example, a specification alleging a violation of the general regulation prohibiting possession of ***alcoholic beverages*** aboard a ship will cite the applicable general regulation as "... Article 1162, U.S. Navy Regulations, dated 14 September 1990. . . ." It is *Crooks*, 12 C.M.A. 677, 31 C.M.R. 263 (1962); *see* sample specification, Part IV, para. 16f, MCM (1995 Edition) (e.g., "by wrongfully possessing beer aboard ship. . . .").

motions to permit minor changes in the charges and specifications at any time after arraignment, but prior to findings. *Accord United States v. Krutsinger*, 15 C.M.A. 235, 35 C.M.R. 207 (1965).

3. ***Minor changes defined.*** " . . . [A] specification may be amended if the change does not result (1) in a different offense or in the allegation of an additional or more serious offense, or (2) in raising a substantial question as to the statute of limitations, or (3) in misleading the accused." *United States v. Johnson*, 12 C.M.A. 710, 711, 31 C.M.R. 296, 297 (1962); *United States v. Brown*, 4 C.M.A. 683, 16 C.M.R. 257 (1954). Minor changes include those necessary to correct inartfully drafted specifications or those which reduce the seriousness of the offense. Additionally, should the defense object to the sufficiency of the jurisdictional language alleged, there is authority for the proposition that the specification can be amended at any time prior to the announcement of findings. *See United States v. Graham*, 9 M.J. 556 (N.C.M.R. 1980) (Dunbar, J., concurring).

0204 SUFFICIENCY OF A SPECIFICATION (Key Number 552)

A. ***Sufficiency.*** Each specification must usually include, either expressly or by fair implication, allegations of all the facts that constitute elements of the offense charged, as well as all necessary words importing criminality. Thus, when the specification is read, it must describe acts that are clearly and unequivocally an offense. *United States v. McCollum*, 13 M.J. 127 (C.M.A. 1982).

1. ***Pleading elements.*** As a general rule, all of the elements of the offense alleged must be pleaded, either expressly or by fair implication, or it is fatally defective. *United States v. Fleig*, 16 C.M.A. 444, 37 C.M.R. 64 (1966); *United States v. Petree*, 8 C.M.A. 9, 23 C.M.R. 233 (1957). The sample specifications in Part IV, MCM (1995 Edition), are generally reliable forms that include all the elements of each offense. If a specific intent or state of mind is an element of the offense, it must be alleged. *See, e.g., United States v. Wade*, 14 C.M.A. 507, 34 C.M.R. 287 (1964), which held that "intent to defraud" and "intent to deceive" under Article 123***a***, UCMJ (bad check law) are separate and distinct elements. Pleading "intent to deceive" does not adequately allege the requisite "intent to defraud."

2. ***Words importing criminality.*** If the alleged act is ***not*** itself an offense, but is made an offense either by applicable statute (including articles 133 and 134) or regulation or custom having the effect of law, then words importing criminality—such as "wrongfully," "unlawfully," "without authority," or "dishonorably" (depending upon the nature of the particular offense involved)— should be used to describe the accused's acts. *United States v. Hoskins*, 17 M.J. 134 (C.M.A. 1984) ("burglariously enter" fatally insufficient); *compare United States v. Lee*, 19 M.J. 587 (N.M.C.M.R. 1984) ("without authority" not essential to desertion specification).

a. ***Example***. Assaults. Sample specification, Part IV, para. 54f(2), MCM (1995 Edition), alleges assault consummated by a battery, describing the accused's acts as " . . . did . . . unlawfully strike. . . ." "Unlawfully" is a necessary word importing criminality; without it, the specification would describe an act (i.e., " . . . did . . . strike . . .") which might or might not be an offense. Not all strikings of another person are criminal; the accused, for example, may have struck in self-defense. Without "unlawfully," the battery sample specification would be fatally defective for failure to state an offense. Compare, however, sample specification, Part IV, para. 54f(1), MCM (1995 Edition), which alleges simple assault and describes the accused's conduct as " . . . did . . . assault. . . ." The word "assault" itself denotes a criminal act; therefore, other words such as "unlawfully" are unnecessary.

b. ***Example***. Possession of marijuana. A specification which alleged that the accused ". . . did . . . have in his possession marijuana... " was held in *United States v. Brice*, 17 C.M.A. 336, 38 C.M.R. 134 (1967), to be fatally defective for failure to allege an offense. Under some circumstances, possession of marijuana can be lawful; therefore, a word importing criminality, such as "wrongfully" or "unlawfully," is necessary. *See also United States v. Showers*, 45 C.M.R. 647 (A.C.M.R. 1972), *petition denied*, 45 C.M.R. 929 (attempted sale of heroin) and *United States v. DeStefano*, 5 M.J. 824 (A.C.M.R. 1978) (possession and use of marijuana as conduct unbecoming an officer). However, in *United States v. Brecheen*, 27 M.J. 67 (C.M.A. 1988), the court held that, although a specification alleging attempted distribution of LSD did not allege that the attempt was "wrongful," the specification could be reasonably construed to fairly embrace an element of wrongfulness since the LSD was alleged to be a controlled substance. *See also United States v. Bryant*, 28 M.J. 504 (A.C.M.R. 1989).

c. ***Example***. Jumping from a ship. A specification that the accused "did, wrongfully and unlawfully, . . . through design jump from USS Intrepid (CVS 11) into the sea," is sufficient to state an offense in violation of article 134 since the pleading eliminates any possibility that the accused was pushed or slipped, or that the incident otherwise resulted from misfortune, accident, or negligence. It also makes clear that the accused did not jump overboard in the course of his legitimate duties or for some purpose which might be completely innocent. Such conduct could not possibly have any result other than the disruption of good order and discipline. *United States v. Sadinsky*, 14 C.M.A. 563, 34 C.M.R. 343 (1964).

d. ***Example***. Striking noncommissioned officer. A specification alleging that the accused did strike his superior noncommissioned officer who was then in the execution of his office stated an offense despite the lack of a specific averment of wrongfulness or unlawfulness, as a striking properly alleged as a violation, of an article relating to striking a noncommissioned officer is implicitly unlawful. *United States v.*

Jones, 12 M.J. 893 (A.C.M.R. 1982).

e. ***Caveat.*** The mere addition of a word, or many words "importing criminality," however, will not always result in alleging an offense. If the alleged act of the accused would not under any circumstances be an offense, the mere addition to the specification of words importing criminality will not convert the act into an offense. For example: " . . . Rollo . . . did, with deliberate premeditation unlawfully, wrongfully, maliciously and willfully entertain thoughts with intent to rape Sophia Doren," alleges no offense. Thought alone, no matter how evil, is no crime.

3. ***Matters in aggravation.*** Aggravating circumstances which increase the maximum authorized punishment ***must*** be alleged in order to permit the possible increased punishment. Other matters in aggravation may be pleaded to a reasonable extent, but extensive recitations of aggravating circumstances is usually unwise. Thus, failure to allege matters in aggravation does not render the specification fatally defective because of insufficiency, but it does prevent imposition of more severe punishment. *United States v. Beninate*, 4 C.M.A. 98, 15 C.M.R. 98 (1954); *United States v. May*, 3 .C.M.A. 703, 14 C.M.R. 121 (1954).

a. ***Required matters in aggravation.*** If the maximum punishment authorized is based upon a particular aggravating fact or circumstance, that aggravating matter must be pleaded in order to permit use of the increased maximum punishment.

(1) ***Example.*** Unauthorized absence (UA). The maximum authorized punishment for UA depends upon the length of the absence. Thus, the duration of the UA must be pleaded. *See United States v. Lovell*, 7 C.M.A. 445, 22 C.M.R. 235 (1956) and *United States v. Crumley*, 40 C.M.R. 912 (N.B.R. 1969).

(2) ***Example.*** Drunken driving. A drunken driving specification did not allege that the accident resulted in personal injury. Although the evidence established that a personal injury did result, the aggravated punishment for drunken driving resulting in personal injury was not authorized because the aggravated circumstances were not pleaded. *United States v. Grossman*, 2 C.M.A. 406, 9 C.M.R. 36 (1953).

(3) ***Example.*** Desertion. In order to trigger the increased maximum confinement sentence (three years vice two) for desertion terminated by apprehension, the apprehension must be pleaded. *United States v. Nickaboine*, 3 C.M.A. 152, 11 C.M.R. 152 (1953); *United States v. Beninate*, 4 C.M.A. 98, 15 C.M.R. 98 (1954).

b. ***Nonessential matters in aggravation.*** There is no legal

prohibition against including aggravating facts which do not affect the authorized maximum punishment. For example, the quantity of drugs is frequently alleged in a specification alleging distribution of drugs. Quantity does not affect the authorized maximum punishment in most drug offenses, but it is a factor which may be important in determining an appropriate sentence in each case. Value does not have to be alleged in a robbery specification, but it is a good idea. ***Extensive*** additions to specifications are usually unwise, however. Although not impermissible, such additional nonessential aggravating matters are not favored. For example, C.M.A. allowed the addition of the words ". . . as a result of said absence missed said ship when she sailed . . ." to a UA specification, but clearly indicated a strong disapproval of such pleading. *United States v. Venerable*, 19 C.M.A. 174, 41 C.M.R. 174 (1970). In *United States v. Bobadilla*, 19 C.M.A. 178, 41 C.M.R. 178 (1970), C.M.A. indicated that the only correct matter to be pled in aggravation is that which is functional in determining the maximum punishment. However, C.M.A. declined to disapprove the conviction because the accused was not misled by the pleadings.

4. ***Specificity***. The specification must be sufficiently specific, detailed, and precise to notify the accused of the specific conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Specificity must not be confused with elaborate detail. Only the basic operative facts that make the accused's conduct criminal should be pleaded. Specific evidence supporting the factual allegations should not be included in the specification. Detailed pleading of evidence only invites confusion and variance at trial.

a. ***Example. Proper pleading.*** ". . . did . . . steal one camera, of a value of $350.00, the property of the Navy Exchange, Naval Education and Training Center, Newport, Rhode Island. . . ."

b. ***Example. Improper pleading.*** ". . . did . . . wrongfully take, with intent to deprive the owner permanently thereof, one Bigbux CV-8E camera, serial number 8E-9018787, of a value of $350.00, the property of the Navy Exchange, Naval Education and Training Center, Newport, Rhode Island, by entering said Navy Exchange, removing said camera from its shelf, and concealing said camera under said accused's coat, and thereby removing said camera from the premises of said Navy Exchange."

5. ***Duplicity***.

a. ***Rule***. One specification should not allege more than one offense, either conjunctively or in the alternative. R.C.M. 307 (discussion G), MCM (1995 Edition). In *United States v. Harris*, 4 C.M.R. 444, 447 (N.B.R. 1952), the Navy Board of Review defined duplicity as "the joining in one count of two or more *distinct offenses*."

– ***Example***. A specification should not allege that the

accused "lost and destroyed" or "lost or destroyed" certain property.

b. ***Apparent exceptions.***

(1) If two acts or a series of acts constitute one offense, they may, of course, be alleged conjunctively.

(2) ***Example.*** Burglary requires two acts—breaking and entering—to constitute the one offense. *See United States v. Hoskins*, 17 M.J. 134 (C.M.A. 1984)

(3) ***Series of acts constituting a continuing course of conduct.*** United States v. Means, 12 C.M.A. 290, 30 C.M.R. 290 (1961); *United States v. Voudren*, 33 C.M.R. 722 (A.F.B.R. 1963), *petition denied*, 33 C.M.R. 436.

(a) ***Example.*** Wrongful use of marijuana over a period of time. *Means, supra.*

(b) ***Example.*** Commission of adultery on several occasions. *United States v. Frayer*, 11 C.M.A. 600, 29 C.M.R. 416 (1960).

(c) ***Example.*** Negotiating a series of bad checks. *United States v. Carter*, 21 M.J. 665 (A.C.M.R. 1985).

c. ***Liberal application.*** Case law has been quite liberal in permitting duplicity (i.e., pleading several offenses in one specification).

(1) ***Example.*** In *Means, supra*, the specification alleged use of marijuana at two different places during a period of six months. Upon arraignment, the accused unsuccessfully moved for relief for several reasons, including duplicity. C.M.A. expressly approved ". . . the practice of pleading a series of acts of the same kind which can be considered part of a course of action . . . [because] 'where but a single statutory prohibition is involved . . . the effect of joining several violations as one redounds to the benefit of the defendant.'" 12 C.M.A. at 293, 30 C.M.R. at 293. (*Quoting Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959), *cert. denied*, 361 U.S. 929 (1959) with approval). *Cf. United States v. Paulk*, 13 C.M.A. 456, 32 C.M.R. 456 (1963).

(2) ***Example.*** In *United States v. Lovejoy*, 20 C.M.A. 18, 42 C.M.R. 210 (1970), one specification alleged several acts of sodomy. The court used the following language in upholding the pleading: ". . . a continuous series of acts extending over a period of time and motivated by a single impulse may properly be alleged as a single offense. . . . In these circumstances it was both reasonable and fair for the Government to forgo measurement of the separateness of each act to charge all as a

single offense." 42 C.M.R. at 212. *See also United States v. Hall*, 6 C.M.A. 562, 20 C.M.R. 278 (1955).

B. ***The test for legal sufficiency of a specification.***

1. ***The test.*** The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Furthermore, when the pleadings have not been attacked prior to findings and sentence, it is enough to withstand a broadside charge that they do not state an offense, if the necessary facts appear in any form or by fair construction can be found within the terms of the specification. *United States v. Sell*, 3 C.M.A. 202, 11 C.M.R. 202, 206 (1953); *United States v. Petree*, 8 C.M.A. 9, 23 C.M.R. 233 (1957); *see also United States v. Suggs*, 20 C.M.A. 196, 43 C.M.R. 36 (1970); *United States v. McCollum*, 13 M.J. 127 (C.M.A. 1982); *United States v. Ermitano*, 19 M.J. 626 (N.M.C.M.R. 1984).

2. ***Flexible application.***

a. ***Liberal application where unquestioned.*** If the accused does not question the sufficiency of the specification prior to completion of the trial (e.g., by a motion for appropriate relief), this test is liberally applied: Do ". . . the necessary facts appear in *any form*, or by fair construction . . . within the terms of the specification?" *Sell, supra* at 206. If the specification is not attacked until after trial, it is clearly not enough for the accused to argue that the specification could have been made more definite and certain. In fact, absent a showing of prejudice, the specification must be so defective that it "cannot within reason be construed to charge a crime." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986).

b. ***Strict scrutiny where challenged.*** On the other hand, if the accused asks for clarification or further particularity at the trial, reviewing authorities will be much more exacting in testing the sufficiency of the specification.

3. ***Three-pronged test.***

a. Are all of the elements stated?

b. Does it adequately inform the accused of what allegations must be met?

c. Will the specification and the record protect the accused against double jeopardy?

4. ***Application of the three-pronged test.***

a. ***All elements stated.*** As a general rule, all the elements of the alleged offense must be stated, expressly or by fair implication, in the specification. Failure to allege the essential elements of the offense can result in the specification being found fatally defective as can be seen by some of the examples below. Military appellate courts, applying the three-pronged test, have occasionally permitted variations and exceptions to the "all elements stated" rule. It must be remembered, however, that such deviations were allowed only after many months of appellate litigation of such a basic issue, and, in many cases, only because of the factual or procedural context of each specific case. The best practice is to follow the format in the sample pleadings in this study guide and the MCM sample specifications and to stay abreast of any changes mandated by new appellate decisions.

(1) ***Unauthorized absence.*** Previously, C.M.A. held that a specification which alleged absence but failed to allege without authority was so defective that it could not withstand even post-trial attack. *United States v. Fout*, 3 C.M.A. 565, 13 C.M.R. 121, (1953). However, this portion of the *Fout* holding was recently overruled by *Watkins, supra. See also United States v. Miller*, 48 C.M.R. 446 (N.C.M.R. 1973), where the judge permitted inclusion of "without authority" by amendment with the express consent of the defense after arraignment. *Accord United States v. Lee*, 19 M.J. 587 (N.M.C.M.R. 1984). The Navy-Marine Corps Court of Military Review has held that the element "without authority" is necessarily implied in a specification alleging all the remaining elements of desertion (article 85). *United States v. Ermitano*, 19 M.J. 626 (N.M.C.M.R. 1984).

(2) ***Robbery.*** A specification alleged an offense of robbery, ***except*** that it failed to allege that the property was stolen ***from the person or in the presence of*** the victim, an essential element of robbery. ***Held***: Robbery was not alleged. The government argued that it was implied by several parts of the specification, and especially since the offense was charged as a violation of article 122. C.M.A. stated: ". . . mention of the Article which forms the statutory basis for the imposition of criminal liability can assist at times in relieving possible ambiguities in the statement of an offense. . . . Constantly, however, this Court has looked primarily to the words of the specification, rather than to the designation of the Article alleged to have been violated, in determining what offense, if any, has been alleged." *United States v. Rios*, 4 C.M.A. 203, 206, 15 C.M.R. 203, 206 (1954).

(3) ***Disrespect.*** The specification alleged disrespect towards an NCO in violation of article 91, but failed to allege that the NCO was then in the execution of his office. ***Held***: The specification was fatally defective. *United States v. Tucker*, 9 C.M.A. 587, 26 C.M.R. 367 (1958).

(4) ***Document alteration***. The specification alleged that accused "knowingly and willfully" attempted to alter an official correspondence by attempting to erase certain words. ***Held***: No offense. C.M.A. stated:

> The absence of an allegation of criminality in the above specification is immediately apparent. . . . The act . . . does not constitute criminal conduct without an allegation that the attempt was made without authority or was otherwise wrongful. . . . While a plea of guilt admits the facts alleged, that does not cure a specification which does not exclude all hypotheses of innocence. Since within the terms of the specification there is room to find that the accused was acting under proper authority—and this would be consistent with innocence . . . the facts set out are not sufficient, in and of themselves, to state an offense.

United States v. Julius, 8 C.M.A. 523, 524, 25 C.M.R. 27, 28 (1957).

(5) ***Mail tampering***. A specification alleged that the accused wrongfully opened a package addressed to another person before it was received by the other person, in violation of article 134. ***Held***: No offense, due to failure to allege it was "mail matter." *United States v. Lorenzen*, 6 C.M.A. 512, 20 C.M.R. 228 (1955).

(6) ***Forgery***. A "forgery" specification alleging an "intent to deceive" instead of an "intent to defraud" was fatally defective. These intents ***are not*** the same. The same specification also fatally failed to allege that the forgery would apparently operate to the legal prejudice of another. *United States v. Wilson*, 13 C.M.A. 670, 33 C.M.R. 202 (1963).

(7) ***Forgery***. A specification alleging a forgery of a check omitted the customary words "which check would, if genuine, apparently operate to the legal prejudice of another." However, a photographic copy of the check was contained within the specification. ***Held***: This fairly ***implied*** that he had forged an instrument "which would, if genuine, apparently operate to the legal prejudice of another." C.M.A. distinguished *Wilson, supra*, in that *Wilson* involved forgery of a credit reference, not a check. C.M.A. cited 23 *Am. Jur.* Forgery sec. 46: "If the instrument on its face shows its legal efficacy, there is no necessity for an allegation of any extrinsic matter to give the instrument alleged to have been forged any force and effect beyond what appears on its face." Nonetheless, C.M.A. admonished prosecutors to observe approved forms and thus not imperil the prosecution by raising avoidable questions about the sufficiency of the pleadings. *United States v. Granberry*, 14 C.M.A. 512, 34 C.M.R. 292 (1964). *See also United States v. Schwarz*, 15 M.J. 109 (C.M.A. 1983).

(8) ***Misbehavior before enemy***. Under a charge of violating article 99, misbehavior before the enemy, the specification failed to ***expressly*** allege "before" or "in the presence of the enemy," an essential element of this offense, but it did allege that he was cowardly "while being transported from the rear area to the front lines." ***Held***: This did adequately allege an offense in violation of article 99. C.M.A. stated: "The charge and specification, by alleging the act, the cowardice, and the article charged, informed the accused of the precise offense involved. The use of the words 'to the front lines' in the specification certainly carry some connotation of the presence of enemy units. . . . While not condoning the carelessness with which this specification was drafted, we hold it to be sufficient as a matter of law." *United States v. Smith*, 2 C.M.A. 197, 7 C.M.R. 73, 74 (1953).

(9) ***General order***. In *United States v. Bunch*, 3 C.M.A. 186, 11 C.M.R. 186 (1953), a specification alleging that the accused did "violate a lawful order . . .," previously held fatally defective because it did not contain words importing criminality (i.e., that he "wrongfully" violated the order), was held by C.M.A. to state an offense. The Court of Military Appeals stated that "(a)n allegation charging the violation of a lawful general order ***implicitly*** contains a charge that the act committed by the accused was itself an offense and therefore unlawful. . . . Further words . . . would be repetitious. . . ." *Id.* at 188. (Note also that C.M.A. also held that the order involved was not a general order). Additionally, the fact that the order allegedly violated was promulgated by one with the authority to issue a general regulation does not cure the pleading defect of failure to allege that the order violated was a ***general*** order. Also, since the specification failed to allege knowledge of the order on the part of the accused, it failed to state an offense under article 92(2), another lawful regulation. *United States v. Koepke*, 18 C.M.A. 100, 39 C.M.R. 100 (1969). The *Koepke* decision reaffirmed the decision in *United States v. Baker*, 17 C.M.A. 346, 38 C.M.R. 144 (1967), wherein the court stated:

> The count in question purports to allege the accused failed to obey a lawful order, set forth as "Division Order 5050.4". . . . It, however, fails to state the essential element of knowledge. *United States v. Tinker*, 10 C.M.A. 292, 27 C.M.R. 366. The staff legal officer and board of review, . . . opined that characterization of the order as a "Division" order was sufficient to imply the order was a "general" directive and, hence, to eliminate the requirement for allegation and proof of knowledge. *See United States v. Tinker, supra*. We disagree, for it is obvious that divisions publish many kinds of orders, which may or may not be general in nature.

Id. at 345, 38 C.M.R. at 145.

(10) ***Article 85a(2) desertion***. A specification alleged unauthorized absence with intent to prevent completion of basic training and useful service

in violation of article 134. ***Held***: This adequately alleged the offense of "desertion with intent to shirk important service" under article 85a(2), even though these words were not expressly alleged. "Desertion is desertion by whatever name described if its factual ingredients are specified on the charge sheet." The accused could not have possibly been misled. *United States v. Deller*, 3 C.M.A. 409, 414, 12 C.M.R. 165, 170 (1953).

(11) ***Accused as person to whom order applies.*** A specification alleged that the accused violated a brig order which order applied only to prisoners. The specification failed to expressly allege that the accused was a prisoner. ***Held***: The specification implied that the accused was a prisoner by quoting him as telling a chaser on duty that he was not performing his duty and, hence, it stated an offense. *United States v. Sell*, 3 C.M.A. 202, 11 C.M.R. 202 (1953).

(12) ***Article 134 - lewd acts.*** A specification alleged that the accused "wrongfully committed an indecent, lewd and lascivious act with Lee Kap Yong by forcefully grabbing Lee and trying to embrace him." ***Held***: This alleged an offense under article 134. The word "embrace" could mean an innocent act or one of the intimacies of love. "What meaning was intended by the pleader is apparent from the further allegation that the act charged was 'indecent, lewd and lascivious;' in other words, what was done by the accused was done in a manner repugnant to common propriety, and in a way which was designated to excite lust or sexual impurity. The additional allegation 'defines the character of the accused's act' and excludes the possibility that the act was innocent." *United States v. Annal*, 13 C.M.A. 427, 429, 32 C.M.R. 427, 429 (1963).

(13) ***Article 133 - indecent acts.*** A specification alleged that the accused (an officer) did "wrongfully and indecently induce an enlisted man to disrobe in his presence and to pose in various stages of undress." A Board of Review held that this averment was insufficient to show "how or in what manner" the act charged was indecent. C.M.A. reversed. The specification stated an offense under article 133. "[T]he allegation actually defines the character of the accused's act." It properly alleged conduct unbecoming an officer and a gentleman. *United States v. Holland*, 12 C.M.A. 444, 445, 31 C.M.R. 30, 31 (1961).

(14) ***Mere blank-filling insufficient.*** While the drafters of the 1984 *Manual* took great pains to ensure the correctness of sample specifications, merely completing the blanks in a particular form of a specification set out in the *Manual for Courts-Martial, 1984*, does not guarantee a legally unassailable charge. The specification must set out every essential element of the offense, either directly or by necessary implication. *United States v. Strand*, 6 C.M.A. 297, 20 C.M.R. 13 (1955); *United States v. Fout*, 3 C.M.A. 565, 13 C.M.R. 121 (1953). In *Strand*, the specification alleged that the accused caused to be issued a naval speedletter which informed the accused's wife of his death and which was signed by a false signature. ***Held***: The specification failed to allege an offense, even though the MCM sample specification for forgery had been carefully followed. The instrument allegedly

forged was not the proper subject of a forgery. It did not have apparent legal efficacy. *See also United States v. Brice*, 48 C.M.R. 368 (N.C.M.R. 1973) and *United States v. Randolph*, 49 C.M.R. 336 (N.C.M.R. 1974) for a discussion of the fatally defective use of the sample specification for riot.

(15) ***Pleading violations of Federal statutes.*** Even following precisely the words of a statute may not suffice if the language quoted from the statute fails to allege all the elements of the offense prohibited by the statute. *United States v. Doyle*, 3 C.M.A. 585, 14 C.M.R. 3 (1954), wherein the accused was prosecuted under Article 134, UCMJ, for a violation of 18 U.S.C. § 643, failure of a government custodian to account for funds. The specification cited the Federal statute and used its language to describe the accused's conduct. Nonetheless, C.M.A. held that the specification failed to state an offense because it did not allege that the failure to account was willful. Although the statute did not use the word "willful," willfulness was found by the court to be an element of the offense. In another case, the court held that the specification was defective because it failed to allege the use of a telephone or other instrument of commerce in communicating a bomb threat, an allegation essential to the legal sufficiency of a specification charging a violation of a Federal statute proscribing such threats [18 U.S.C. § 844(e)]. *United States v. Mayo*, 12 M.J. 286 (C.M.A 1982).

(16) ***Article 129 - burglary.*** In *United States v. Hoskins*, 17 M.J. 134 (C.M.A. 1984), a burglary specification failed to include the word "break," substituting instead the word "burglariously." C.M.A. held that the specification was fatally defective. The words "break and enter" are essential and cannot be replaced by the word "burglariously" which is used to imply the intent with which a breaking and entering is committed.

b. ***Adequately informs the accused of what allegations must be met.*** The specification must be specific enough to identify the particular incident or conduct giving rise to the charge against the accused. After reviewing all the factual and procedural circumstances of the case, appellate courts will evaluate the specification in terms of whether it contains sufficient information about the alleged offense not to mislead the accused and thus enable him to prepare a defense. *See United States v. Karl*, 3 C.M.A. 427, 12 C.M.R. 183 (1953).

(1) ***Specific dates.*** Failure to allege the specific date of an offense is ordinarily not prejudicial, unless it misleads the accused. In *United States v. Marker*, 1 C.M.A. 393, 3 C.M.R. 127 (1952), a specification alleged that the accused wrongfully constructed and unlawfully occupied a house from August 1950 to about March 1951. This was held to be specific enough not to mislead the accused. An exception to this general rule is the offense of unauthorized absence. Failure to allege the specific duration of the offense may affect the permissible maximum punishment authorized to be imposed. *United States v. Krutsinger*, 15 C.M.A. 235, 35 C.M.R. 207 (1965).

(2) ***Failure to name purchasers.*** A specification alleged ". . . did . . . wrongfully sell to four military personnel on board . . . certain instruments (described). . . ." At trial, the accused pleaded guilty and made no request for further information. The Board of Review held it not to be specific enough to apprise the accused of what he must defend against because the purchasers were not identified. C.M.A. reversed. ". . . An insertion of the names of the individuals to whom the sales were made would have rendered the specification more definite and certain . . . " but, ". . . (t)he period was identified, the place of sales was mentioned, and every necessary ingredient was included except the names of the four purchasers. These could have been identified readily had the Government been required to prove the allegations, and, had the accused wanted more specific information, a motion could have been made." *United States v. Karl*, 3 C.M.A. 427, 12 C.M.R. 183, 185 (1953).

(3) ***Description of stolen property.*** A specification alleged ". . . did . . . attempt to steal personal property of some value, the property of Kenneth R. Clowdus." Upon arraignment, the defense counsel requested further particularity of the specification as to the nature of the personal property involved. The law officer denied the request. ***Held***: This was prejudicial error. C.M.A. stated:

> The modern tendency has been toward allowing the pleading of legal conclusions and the elimination of detailed factual allegations from counts charging misconduct. . . . In light of this trend, use of no descriptive averment beyond 'personal property' may well suffice to allege the subject of an attempted larceny. . . . But resort to such pleading is always subject to a motion for further particularization. . . . It was well within its (the Government's) power to allege that the accused had sought to steal a footlocker, a footlocker and its contents, or the contents of a footlocker.

United States v. Williams, 12 C.M.A. 683, 685, 31 C.M.R. 269, 271 (1962). *But see United States v. Krebs*, 20 C.M.A. 487, 43 C.M.R. 327 (1971), in which C.M.A. upheld a specification which alleged "goods of a value of about $1,768.00," and *United States v. Alcantara*, 18 C.M.A. 372, 40 C.M.R. 84 (1969) (larceny of "foodstuffs").

(4) ***Disjunctive pleading.*** A specification alleged "did . . . wrongfully appropriate, lawful money and / or property of a value of about $755.51. . . ." ***Held***: Even though accused pleaded guilty, this disjunctive specification is too vague as to permit affirming a conviction. *United States v. Autrey*, 12 C.M.A. 252, 30 C.M.R. 252 (1961).

c. ***Will the specification and record protect the accused against***

former jeopardy? A person has the right to refuse to be tried a second time for the ***same*** offense. For example, unless the specification and record are sufficiently detailed to identify a particular theft, an accused could be tried a second time for the same theft, without being able to establish that he or she had already been tried for that theft. Thus, by specifically identifying the incident or conduct with which the accused has been charged, the specification protects against former jeopardy.

(1) ***Example***. A specification alleged that the accused did at ". . . Austin, Texas, and Bergstrom Air Force Base, Texas, from on or about 1 April 1959 to on or about 30 September 1959, wrongfully use marijuana. . . ." ***Held***: Sufficient. "The allegations of place and time are general, but they can be considered with the evidence in the record of trial; together they would be entirely sufficient to protect the accused against another prosecution for the same acts." Furthermore, the court found that denial of the defense motion for relief in the nature of a bill of particulars lacked merit because the defense presumably had a copy of the article 32 investigation and the substance of the evidence recorded therein provided the defense with the information it requested on the motion. *United States v. Means*, 12 C.M.A. 290, 294, 30 C.M.R. 290, 294 (1961). Of course, such a general allegation of time is usually unwise. Means could probably have successfully asserted former jeopardy against a subsequent prosecution for ***any*** marijuana use at Austin, Texas, or Bergstrom Air Force Base during the period of 1 April 1959 to 30 September 1959.

(2) ***Example***. A specification alleged, ". . . did . . . during the period from 11 August 1952 to 11 September 1952, wrongfully sell to four military persons on board . . . certain . . . military permits (described). . . ." ***Held***: Sufficient. There is ". . . no substantial reason to hold that the record would not prevent a second prosecution for the same offense. If perchance there were other sales between the two dates, the accused does not stand to be prejudiced as his conduct in selling unauthorized passes is the source of the disorder and the sales during the particular period involved are grouped into one offense. Any other sales not mentioned could not be the predicate for another disorder as a plea of once in jeopardy would bar any prosecution for similar acts during the same period." *Karl, supra*, at 430, 12 C.M.R. at 185.

0205 DEFECTS IN PLEADING (Key Numbers 953-964, 971)

A. ***Misdesignation.***

1. ***Ordinarily harmless error.*** Ordinarily, a misdesignation in the charge

of the article of the code violated constitutes ***harmless*** error. *See United States v. Hutcheson*, 312 U.S. 219 (1941). For example, in *United States v. Deller*, 3 C.M.A. 409, 12 C.M.R. 165 (1953), a specification actually alleged an offense of desertion with intent to shirk important service, but was charged as a violation of Article 134, UCMJ, instead of Article 85, UCMJ. ***Held***: Harmless error. Reviewing authorities could correct the error by approving the conviction as a violation of article 85. C.M.A. stated: "The offense alleged at the trial of any case depends, not primarily on the particular statute under which it is laid, but rather on the *facts* which are alleged. This is true despite the perfectly sound assertion that in unusual cases a statutory reference may be necessary to a proper understanding of the charge." *Id.* at 413, 12 C.M.R. at 169.

2. ***Governed by the specification***. Thus, ***criminality*** is governed by the contents of the specification and not by the article under which it is charged. *United States v. Fout*, 3 C.M.A. 565, 13 C.M.R. 121 (1953); *Deller, supra; United States v. Rios*, 4 C.M.A. 203, 15 C.M.R. 203 (1954); *United States v. Julius*, 8 C.M.A. 523, 25 C.M.R. 27 (1957). In *United States v. Olson*, 7 C.M.A. 460, 22 C.M.R. 250 (1957), a violation of Article 104, UCMJ, was charged when a violation of Article of War 81 should have been charged, since the offense occurred prior to the effective date of the UCMJ (although it was tried after the UCMJ was effective). ***Held***: The two articles were quite similar and the accused was not misled by this misdesignation in the charge. Hence, the error was not prejudicial.

3. ***Incorrect citations of statutes, orders, or regulations***. If the specification incorrectly cites a statute, order, or regulation allegedly violated by the accused, such misdesignation is harmless error ***unless*** the accused has been misled. *See, e.g., United States v. Ekenstam*, 7 C.M.A. 168, 171, 21 C.M.R. 294, 297 (1956), in which C.M.A. stated:

> . . . (A)n incorrect designation of a statute or regulation violated by the accused does not invalidate the specification of a charge. If the conduct is proscribed by another regulation and no "additional or different principle of law is required to support the conviction; and the accused has no burden of defense which he did not have at trial," he is not harmed by the incorrect designation.

In *Ekenstam*, C.M.A. held that the conduct alleged in the specification might have violated two different regulations (a statute and a Navy custom) and the defenses available to the accused would vary depending on the statute, regulation, or custom in issue. Accordingly, the court held that the lack of specificity was misleading to the accused and fatal.

B. ***Failure to state an offense***. A court-martial has no jurisdiction to try a specification which fails to allege an offense. The proceedings are a nullity with respect to such a defective specification. Regardless of plea, evidence, failure to move for appropriate relief or to dismiss, or attempted waiver at trial, a specification which fails to state an offense

can be attacked for the first time on appeal. *United States v. Karl*, 3 C.M.A. 427, 12 C.M.R. 183 (1953); *Julius, supra*. However, when a specification is attacked for the first time on appeal, construction is extremely liberal. *See United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986).

C. ***Lack of specificity***. A specification lacks specificity when, even though it sufficiently alleges an offense, it is vague or ambiguous in a material allegation. The extent of appellate relief will be largely determined by whether or not relief was requested at trial and whether the specification states an offense. *United States v. Steele*, 2 C.M.A. 379, 9 C.M.R. 9 (1953).

1. Relief requested at trial. If the accused requests further particularity at trial and it is not granted, it may be held that prejudicial error was committed.

a. ***Example.*** A specification alleged that the accused did " . . . attempt to steal ***personal property of some value***, the property of . . . Clowdus." Upon arraignment, the accused requested, but was denied, further particularity as to the ***nature*** of the "personal property" allegedly stolen. ***Held***: Denial of the request for further particularity was prejudicial error and C.M.A. reversed the conviction, stating: "A rehearing may be held upon a properly amended specification. . . ." *United States v. Williams*, 12 C.M.A. 683, 686, 31 C.M.R. 269, 272 (1962) (emphasis from case).

b. ***Contra-example***. In *United States v. Means*, 12 C.M.A. 290, 30 C.M.R. 290 (1961), the specification alleged wrongful use of marijuana at two different places and during a six-month period, and the accused requested, but was denied, further particularity upon arraignment. C.M.A. held the defect to be harmless error since the record of the article 32 investigation showed the circumstances of the charge, including the dates and places of the separate acts by the accused. Hence, "denial of the motion did not deprive the accused of any information required to assist him in preparation of his defense." In *United States v. Paulk*, 13 C.M.A. 456, 32 C.M.R. 456 (1963), however, the specification on its face was sufficient, but the defense counsel was aware that it might be duplicitous and requested clarification at trial. The accused was denied particularization and was

> . . . merely informed orally that the Government intended to rely on one or all of the various theories which it had embodied in the count. A generalized reply of this nature, under the circumstances depicted in this record, does not discharge the burden of the United States to particularize a general averment of criminal conduct, especially when the count in question is so phrased as to permit the prosecution to range widely through proof of different offenses in order to satisfy the fact finders of accused's guilt. In short, the purpose of a bill of particulars is to narrow the scope of the pleadings and not to enlarge it.

Id. at 458. Denial of the defense's motion for appropriate relief was deemed prejudicial error.

2. ***No request at trial for relief.*** If the accused does not request further particularity at trial, the deficiency will ordinarily be deemed waived and nonprejudicial. *See United States v. Sell*, 3 C.M.A. 202, 11 C.M.R. 202 1953); *United States v. Reid*, 12 C.M.A. 497, 31 C.M.R. 83 (1961); *United States v. Simpson*, 2 C.M.A. 493, 9 C.M.R. 123 (1953); *United States v. Steele*, 2 C.M.A. 379, 9 C.M.R. 9 (1953); *United States v. Marker*, 1 C.M.A. 393, 3 C.M.R. 127 (1952); *United States v. Lawrence*, 3 C.M.A. 628, 14 C.M.R. 46

(1954); *United States v. Schumacher*, 2 C.M.A. 134, 7 C.M.R. 10 (1953); and *United States v. Karl*, 3 C.M.A. 427, 12 C.M.R. 183 (1953).

D. ***Duplicity***. If the specification is duplicitous, but the accused does not move at trial for appropriate relief, it usually will ***not*** be deemed prejudicial error.

1. ***Continuing course of similar conduct***. If the duplicity is merely a continuing course of similar conduct [e.g., repeated use of marijuana as in *United States v. Means*, 12 C.M.A. 290, 30 C.M.R. 290 (1961)], denial of relief at trial will usually be held nonprejudicial. The duplicity redounds to the accused's benefit because, instead of being prosecuted for several separate specifications, the accused is criminally liable for only one.

2. ***Distinct offenses***. When the duplicity consists of different types of offenses (e.g., housebreaking and larceny), denial of appropriate relief, such as election, will usually be held to have been prejudicial. *United States v. Luckey*, 18 C.M.R. 604 (A.F.B.R. 1954), *petition denied*, 18 C.M.R. 333 (C.M.A. 1955). *See United States v. Harris*, 4 C.M.R. 444 (1952). Denial of relief may also be prejudicial when the specification alleges several distinct, but similar, crimes which are not part of a continuing course of conduct (e.g., larceny of a watch from ***A***, a radio from ***B***, and money from ***C*** at separate times). *See United States v. Paulk*, 13 C.M.A. 456, 32 C.M.R. 456 (1963).

E. ***Variance***.

1. ***Defined***. A variance consists of a difference between the pleadings and the proof, and may be fatal or immaterial. A variance is fatal if the evidence establishes a different offense than that which was pleaded, or if the accused was misled by the variance from the pleading, or if it disables the accused from later effectively asserting former jeopardy. *United States v. Hopf*, 1 C.M.A. 584, 5 C.M.R. 12 (1952). ***Thus***, C.M.A. has established a dual test to determine whether the accused has suffered substantial prejudice such that the variance is fatal: "(1) has the accused been mislead to the extent that he has been unable to prepare for trial, and (2) is the accused fully protected against another prosecution for the same crime." *Id.* at 586, 5 C.M.R. at 14.

2. ***Examples***.

a. ***Identity of victim***. In *Hopf, supra*, the specification alleged that the accused did, at a certain place and date, with intent to do bodily harm, commit an assault on Han Sun U, a Korean male, by striking him on the body with a dangerous weapon, to wit: a .30 caliber carbine. The accused was found guilty, except for the words "Han Sun U," substituting therefor the words "an unknown." ***Held***: Variance not fatal. This was the same offense, the accused was not misled, and the evidence in the record was sufficiently descriptive of the victim to protect the accused against being tried again for the same offense. A variance is fatal only when it operates to substantially prejudice the accused's rights.

b. ***Identity of owners of property.*** In *United States v. Craig*, 8 C.M.A. 281, 24 C.M.R. 28 (1957), the specification stated that accused stole certain sums of money alleged to be the property of certain individuals. Evidence showed that the property belonged to the U.S. Government. Accused was Unit Savings Officer (Army) and the individuals named were owners in the Army Savings Plan. But the sums of money became government property on delivery to accused. ***Held***: The variance was not fatal since the accused, under the circumstances, could not have been surprised by the evidence at trial and was adequately protected by the record against double jeopardy. *See also United States v. Lee*, 23 C.M.A. 384, 50 C.M.R. 161, 1 M.J. 15 (1975). In *United States v. Turner*, 27 M.J. 217 (C.M.A. 1988), the court held that nonfatal variance may occur when the government proves that a person other than the one alleged in the specification owned or possessed the property which was stolen.

c. ***Identity of authority issuing order.*** In *United States v. Marsh*, 3 C.M.A. 48, 11 C.M.R. 48 (1953), the specification alleged that accused willfully disobeyed an order of Captain ***S***. Evidence showed that the order violated was issued "by command of LtGen ***H***." ***Held***: This constituted a fatal variance between the pleading and the proof. C.M.A. stated: "Undoubtedly, under a proper factual situation an intermediate may, by placing his authority behind the order, become the one whose order is violated. But to do this, the intermediate officer must have authority to issue such an order in his own name and it must be issued as his, not as the representative of the superior." *Id.* at 51. *Compare United States v. Johnson*, 12 C.M.A. 710, 31 C.M.R. 296 (1962), where accused agreed to the amendment of the specification and "stipulated" to the change.

d. ***Substance of accused's statement.*** In *United States v. Dotson*, 17 C.M.A. 352, 38 C.M.R. 150 (1968), the accused was charged with perjury for allegedly falsely saying he never had a tool in his hand when ***A*** and ***B*** were in his room. At trial, the proof established that his false testimony was to the effect that he did not use a tool in the fight with ***C*** (while ***A*** and ***B*** were present). ***Held***: Fatal variance. C.M.A. stated: "It is fundamental . . . that the allegation of criminality and proof must correspond; that regardless of what is disclosed by the evidence, proof, in order to be effectual, must correspond substantially with the allegations of the pleadings." *Id.* at 354, 38 C.M.R. at 152.

e. ***Unit in unauthorized absence cases.*** Specification alleged accused was unauthorized absentee from his assigned unit. Evidence showed he was absent from place of confinement in another location. ***Held***: Not a fatal variance because an individual can be temporarily assigned to another activity for administrative reasons and still be absent from parent unit if absent from temporary unit. Additionally, the defense failed to object or move for relief, and there was no evidence that the accused was misled. *United States v. Mitchell*, 7 C.M.A. 238, 22 C.M.R. 28 (1956). *Compare United States v. Ivory*, 9 C.M.A. 516, 26 C.M.R. 296 (1958), where accused was charged with desertion from 5th Regiment, Overseas Replacement Draft. The trial counsel moved to amend the unit but the defense objected, arguing it was a fatal variance, and that it could not be amended at trial, but that the charge could be dismissed and the accused retried on a different specification. The convening authority withdrew the charges, had them redrafted, and referred them to another court for trial. At second trial, same defense counsel moved to dismiss because of former jeopardy. ***Held***: No former jeopardy. Whatever error occurred was deliberately induced by the defense. (See opinion of Judge Ferguson dealing with fatal variance). *But cf. United States v. Pounds*, 23 C.M.A. 153, 48 C.M.R. 769 (1974), which distinguished *Ivory*.

0206 LESSER INCLUDED OFFENSES (LIO). Article 79, UCMJ; Part IV, para. 2, MCM (1995 Edition). (Key Numbers 551, 950, 957-961, 965, 966)

A. ***Text of article 79.*** "An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."

B. ***Manual definition of lesser included offense.*** A lesser included offense is:

1. An offense necessarily included in the offense charged;

2. an attempt to commit the offense charged; or

3. an attempt to commit an LIO of the offense charged.

4. ***Example.*** The accused is charged with desertion, but may be found guilty of the following lesser included offenses:

   a. Unauthorized absence (article 86);

   b. attempted desertion (article 85); or

   c. attempted unauthorized absence (article 80).

C. ***Historical perspective***. Article 79, UCMJ, is virtually identical to the language of Fed. R. Crim. P. 31(c):

> Conviction of Less[er] Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

In fact, the legislative history of article 79 indicates that the military statute was patterned on the federal rule. *See Hearings on H.R. 2498 before a Subcommittee of the House Armed Services Committee, 81st Congress, 1st Session*, at 1224 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

In the past, C.A.A.F. had consistently construed Article 79, UCMJ, and its "necessarily included" language to mean offenses which are included in the pleadings and proof of the greater offense in accordance with the "fairly embraced" doctrine of *United States v. Baker*, 14 M.J. 361, 368 (C.M.A. 1983). In 1989, the Supreme Court, in *Schmuck v. United States*, 489 U.S. 705, 716 (1989), held that Fed. R. Crim. P. 31(c) should be construed to include only lesser LIO's as established by their statutory elements. In view of the identity of language of article 79 and Fed. R. Crim. P., C.A.A.F. currently applies the holding in *Schmuck, supra*, and abandoned the "fairly embraced" test for determining LIO's as a matter of military law as set forth in *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919, 127 L. Ed. 2d (1994).

D. ***"Necessarily included" doctrine***. A lesser offense is necessarily included in a greater offense, if all of the elements of the lesser offense are necessary elements of the greater offense. In other words,

> (i)f the specification neither expressly contains an averment of the element of an offense nor fairly implies its existence, it cannot be said to be included within the actual crime charged, for, although proven by the evidence, it is not then "stated." . . . Put differently, the standard for determining if one violation of the Code is included in another is whether, considering the allegations and the proof, "each requires proof of an element not required to prove the other."

United States v. Maginley, 13 C.M.A. 445, 447, 32 C.M.R. 445, 447 (1963).

E. ***Current law***. C.A.A.F., in *Teters, supra*, abandoned the "fairly embraced" test of *Baker, supra*, to prevent multiplicious specifications. (*See* section 0207 of this study guide. The concepts of LIO's and multiplicity must be studied together for a complete understanding of the issues involved.)

A component of the abandoned "fairly embraced" test is the concept of merger which permits LIO's to be subsumed into the greater offense for purposes of findings. *Hall v. United States*, 343 A.2d 35 (D.C. App. 1975). C.A.A.F., in *Teters— citing Ball v. United States*, 470 U.S. 856 (1985)-held that the question is one of double jeopardy, and 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. *Teters, supra* at 373. "[T]he assimilation of this relatively ancient doctrine of merger into the modern law of double jeopardy seems long overdue." *Teters, supra* at 376.

1. ***The rule—"strict elements test."*** In *Teters*, C.A.A.F. adopted the rule of construction to discern congressional intent with reference to multiplicity as set forth by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). This narrowly defined bright-line rule is as follows:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 304, 525 S.Ct. at 182. Therefore, in deciding whether an offense charged in one specification is "necessarily included" in that charged in another, so as to merge into the greater offense, the court is concerned only with the statutory elements and not with pleadings and proof. C.A.A.F. now applies the "strict elements" test of *Blockburger v. United States, supra.*

In comparing the elements of the offenses, however, the language of the common statutory elements need not be identical. One or more of the common elements may be legally less serious than the greater offense. *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994)(Indecent acts is an LIO of forcible sodomy even though the actus reus is a less serious sexual act than sodomy). Also, those elements required to be alleged in the specification, along with the statutory elements, are considered elements of the offense for purposes of the strict elements test. *United States v. Weymouth*, 43 M.J. 329 (1995)(e.g., specification alleging voluntary manslaughter by stabbing the victim with a knife includes as a lesser offense assault with a dangerous weapon).

2. ***General vs. specific intent.*** In *United States v. Douglas*, 2 M.J. 470 (A.C.M.R. 1975), the Army Court of Military Review reaffirmed the position taken by the Court of Military Appeals in 1959 in finding that a specific intent offense may be an LIO of a general intent offense. *United States v. King*, 10 C.M.A. 465, 28 C.M.R. 31 (1959). For

example, assault with the intent to rape is a specific intent offense which is an LIO of the general intent offense of rape.

F. ***Significance of the LIO determination.*** R.C.M. 307c(4) says what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. Therefore, LIO's should not be pleaded when the greater offense is also charged if the strict elements test of *Teters, supra,* is met. R.C.M. 907(b)(3)(B) indicates that the proper remedy for pleading an LIO is the dismissal before pleas are entered unless it is necessary to enable the prosecution to meet contingencies of proof through trial, review, and appellate action. *United States v. Jennings,* 20 M.J. 223 (C.M.A. 1985). *See* section 0207 of this study guide.

1. Identification of LIO's within a charged offense allows defense counsel to plead an accused guilty by exceptions and substitutions. R.C.M. 910(a)(1). The government still has the option of proceeding on the greater offense.

2. A military judge or members may find an accused guilty of any LIO reasonably raised by the evidence admitted on the greater offense (*see* section 0206.G.2 below). This may be accomplished by exceptions and substitutions. R.C.M. 918(a)(1) and (2); Appendix 10-1, MCM (1995 Edition). Where members are involved, findings of an LIO requires a carefully tailored findings worksheet. *Military Judges' Benchbook,* DA Pam 27-9 (1996), appendix B-1.

3. Distinguishing which LIO's are raised by evidence on the greater offense impacts on both instructions and defenses, such as the statute of limitations. *See* section 0206.G below.

G. ***Instructions on LIO's.*** The military judge must sua sponte instruct on elements of any LIO that is reasonably raised by the evidence. This sua sponte obligation exists even in the absence of a request by the defense counsel for such instructions. *United States v. Moore,* 12 C.M.A. 696, 31 C.M.R. 282 (1962); *United States v. Jackson,* 6 M.J. 261 (C.M.A. 1979); *United States v. Staten,* 6 M.J. 275 (C.M.A. 1979). *United States v. Davis,* ____ M.J. ____, No. 32243, (A.F.Ct.Crim.App. Apr.22, 1997).

1. ***Instructions on elements of LIO's.*** The judge must not only mention LIO's, but must also give complete instructions on the elements of each LIO raised by the evidence. *United States v. Clark,* 1 C.M.A. 201, 2 C.M.R. 107 (1952). (Law officer mentioned that negligent homicide was LIO of voluntary manslaughter, but did not instruct on elements of negligent homicide. ***Held***: Prejudicial error.) *See also United States v. Richardson,* 2 C.M.A. 88, 6 C.M.R. 88 (1952); *Moore, supra;* and *Jackson, supra.* R.C.M. 920(e)(2), MCM (1995 Edition); DA Pam 27-9 (1982), para. 2-28 Note 2 and preceding paragraph.

2. ***"Reasonably" raised by the evidence.*** The military judge does not judge the credibility of the evidence raising the LIO since that is the province of the court members. For example, the accused, during the Dominican Republic intervention of 1965, allegedly murdered a civilian. At his trial, the accused testified that he believed the victim was a "rebel" and that he fired in front of the victim to prevent his escape, not meaning to hit him. The law officer refused to instruct the members on the LIO of involuntary manslaughter, although he did instruct on voluntary manslaughter. C.A.A.F. held that failure to instruct on involuntary manslaughter was prejudicial error. Although the accused's theory was, in light of the other evidence, at best implausible, C.A.A.F. stated that it was up to the triers of fact to make that determination upon properly drawn instructions. *United States v. Moore*, 16 C.M.A. 375, 36 C.M.R. 531 (1966); *United States v. Rodwell*, 20 M.J. 264 (C.M.A. 1985). The possibility of an LIO may be raised by the testimony of prosecution or defense witnesses, including solely the testimony of the accused. *United States v. Staten*, 6 M.J. 275 (C.M.A. 1979); *United States v. McCray*, 19 M.J. 528 (A.C.M.R. 1984) (credibility of witnesses does not raise LIO's).

3. ***Express defense waiver of LIO instruction.*** The Court of Appeals for the Armed Forces has indicated that "[t]he doctrine of waiver would be invoked if the record demonstrated 'an affirmative, calculated, and designed course of action by a defense counsel before a general court-martial' to the end that he led the presiding law officer to believe he did not desire instructions on lesser included offenses." The court went on to state that "only the rare case will fall into the exceptional class . . . (which) discloses . . . an express request for lack of instructions regarding lesser degrees . . . (or) "deluding" tactics which might . . . (lead) the law officer to conclude that the defense counsel consented to such an omission." *Moore, supra*, at 700 and 701, 31 C.M.R. at 286 and 287 *citing United States v. Mundy*, 2 C.M.A. 500, 9 C.M.R. 130 (1953). It is, however, uncertain whether the defense can expressly waive an LIO instruction when the LIO is nonetheless reasonably raised by the evidence. *United States v. Staten*, 6 M.J. 275 (C.M.A. 1979). In fact, the court ruled in *United States v. Jackson*, 6 M.J. 261 (C.M.A. 1979), that a military judge had a sua sponte obligation to instruct and, at footnote 5, the court reemphasized the importance of the trial judge instructing on "all factual issues and offenses raised . . . in the evidence" out of a "desire that the factfinding function be exercised to the fullest by the jury—the essence of a fair trial. *See United States v. McGee*, 1 M.J. 193 (C.M.A. 1975)." When *Jackson* is read in conjunction with *Staten*, the court appears to be saying that the military judge, despite requests or objections by the defense, must sua sponte instruct on all LIO's he, in his discretion, deems appropriate. Just prior to the *Staten* and *Jackson* cases, the Navy Court of Military Review decided *United States v. Head*, 6 M.J. 840 (N.C.M.R. 1979). In *Head*, the Navy court held that mere failure to object to proposed instructions or to request instructions on lesser included offenses does not constitute a waiver of such instructions. A waiver may be invoked, however, where there is the intent to mislead the military judge as described in the *Moore* and *Mundy* cases, *supra*. (***Note***: It is opined that the issue of LIO instructions is not analogous to the misconduct not charged instruction discussed in *United States v. Wray*, 9 M.J. 361 (C.M.A. 1980), wherein C.A.A.F. decided that acceding to a defense request not

to give an instruction on such a collateral issue was not error by the military judge.) Similarly, where the defense counsel objects to the giving of instructions on LIO's, but the military judge exercises his discretion and refuses to accede to the defense objections, his failure to instruct on ***all*** of the LIO's raised by the evidence is error and cannot be considered as a desire of the defense such that those LIO's not instructed upon are considered waived. *United States v. Johnson*, 1 M.J. 137 (C.M.A. 1975). In *United States v. Duggan*, 4 C.M.A. 396, 15 C.M.R. 396 (1954), however, C.A.A.F. did recognize an effective express waiver of an LIO instruction in appropriate tactical situations, such as where the defense was presenting an "all-or-nothing" defense, such as alibi, or where the defense contended that the prosecution's case was too weak to convict the accused of anything. In such situations, the defense would assert that an LIO instruction would be tantamount to an invitation to the members to return a compromise verdict. Allowing the members to make findings as to an LIO not reasonably raised is tantamount to a finding of not guilty. *United States v. Waldron*, 11 M.J. 36 (C.M.A. 1981).

H. ***Multiple LIO's.*** Some offenses consist of two or more LIO's. In such a case, if the LIO's are reasonably raised by the evidence and properly instructed upon, the court ***can*** convict the accused of more than one LIO—instead of the greater compound offense charged. For example: Accused was charged with robbery "by means of force and violence, stealing from the presence of Lehr, against his will, seventy Deutsche Marks and a Volkswagen taxi of a value of about . . . the property of Kuchta." The Court found the accused not guilty of robbery, but guilty of: (1) Wrongful appropriation of the alleged items; and (2) assault and battery on Lehr. ***Held***: The findings were permissible. These two offenses were LIO's of robbery, were raised by evidence and instructed upon. Even though they were merged in the one specification, they can be treated as though they were separately alleged. *United States v. Calhoun*, 5 C.M.A. 428, 18 C.M.R. 52 (1955). This is, of course, a rather rare occurrence. This type of duplicitous finding should be carefully distinguished from duplicitous pleading which is prohibited. Duplicitous findings, therefore, are permitted while duplicitous pleading is not. *United States v. Francis*, 15 M.J. 424 (C.M.A. 1983); Part IV, para. 10c(11), MCM (1995 Edition).

I. ***Is one offense an LIO of another?*** In most cases, it is rather simple to determine if one offense is an LIO of another. After carefully evaluating the factual context of the charges, the following method will be helpful:

1. ***Examine the Manual for Courts-Martial.*** Part IV, MCM (1995 Edition), lists the common LIO's for most of the offenses under the code. If the offense is listed as an LIO of the other, it is probably an LIO. However, test it against the rules in Part IV, para. 2, MCM (1995 Edition), and examine the cases and other sources to be certain. If the offense is not listed as an LIO of the other, it nevertheless may actually be an LIO of the other. It is never safe to assume that it is not an LIO merely because it is not listed as an LIO in the MCM. The MCM is intended as a guide only and was not designed to be all-inclusive.

2. If not listed in Part IV, MCM (1995 Edition), and if research fails to help, apply the concepts of the "necessarily included doctrine" and argue the facts of the case.

J. ***Findings of guilty to an LIO.*** When a court finds an accused not guilty of the offense charged, but guilty of an LIO, this is done by the process of exception and substitution. The court deletes (i.e., excepts) the words in the specification that pertain to the offense charged and substitutes language appropriate to the LIO. For example, the accused is charged with burglary but found guilty of housebreaking. The charge sheet might read:

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 129.
>
> ***Specification.*** In that Seaman Buster G. Force, U.S. Navy, USS Neversail, on active duty, did, onboard Naval Education and Training Center, Newport, Rhode Island, on or about 10 April 19CY, in the nighttime, unlawfully break and enter the dwelling house of Captain Arnold (NMN) Hab, U.S. Navy, with intent to commit rape therein.

The court, in returning its findings, would announce that it found the accused:

> Of the Specification of the Charge: GUILTY, except for the words "unlawfully break and enter," and "rape," substituting therefore the words "unlawfully enter" and "a criminal offense, to wit: communicating a threat, respectively; of the excepted words, NOT GUILTY: of the substituted words, GUILTY. Of the charge: NOT GUILTY, but GUILTY of a violation of Article 130, UCMJ.

0207 MULTIPLICITY AND JOINDER (Key Numbers 957-960)

A. ***General concept.*** "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4) (Discussion), MCM (1995 Edition). *See United States v. Posnick*, 8 C.M.A. 201, 24 C.M.R. 11 (1957). The unreasonable multiplication of charges is known in military law as "multiplicity." Competing with the rule against multiplicity is the rule on joinder which, although giving the convening authority broad discretion, advises: "[o]rdinarily all known charges should be referred to a single court-martial." R.C.M. 601(e)(2) (Discussion), MCM (1995 Edition). Compounding the joinder problem was the prohibition in the MCM, 1969 (Rev.), against the joinder of major and minor offenses. Part IV, para. 26c, MCM, 1969 (Rev.). This major / minor prohibition is conspicuously and purposefully absent from the MCM (1995 Edition). *See* appendix 21, MCM (1995 Edition), analysis to R.C.M. 601(e). Accordingly, to satisfy the multiplicity and joinder requirements of the 1984 *Manual*, the

government should refer all known charges to trial and yet avoid an unreasonable multiplication of charges.

B. ***Rationale.***

1. ***Joinder*** - The policy behind the requirement that all known offenses be tried together is to protect the accused from a succession of prosecutions, and possibly a succession of federal convictions. "Being called upon to defend himself in a number of trials may be harassing to a defendant and be a disadvantage far outweighing the prejudice which may result from a joinder." Remington & Joseph, *Charging, Convicting, and Sentencing the Multiple Criminal Offender*, Wis. L. Rev. 528, 538 (1961). *See Ciucci v. Illinois*, 356 U.S. 571 (1958), where the accused argued unsuccessfully that his four separate trials for the murders of his wife and three children on the same occasion were motivated by a prosecutorial desire to keep prosecuting until the death penalty was achieved. (The death penalty was adjudged in the third trial.) Another policy favoring the joinder of all known offenses is the economy of a single trial. It should be recognized, however, that the joinder of offenses may also operate to the detriment of an accused. This may be so for several reasons:

> . . . (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of various crimes charged and find guilt when, if considered separately, it would not so find.

Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). Although *Drew* was decided on the basis of statutory interpretation, there is authority for the proposition that an improper joinder can be violative of due process. *See United States ex rel Evans v. Follette*, 364 F.2d 305 (2d Cir. 1966). Accordingly, it would appear that defense counsel who fear any of the evils described in *Drew, supra*, might object on due process grounds to the referral of all known charges to a single court-martial.

2. ***Multiplicity.*** The policy supporting the prohibition against the unreasonable multiplication of charges is essentially the policy against improper joinder discussed in *Drew, supra*. Additionally, there is the danger that a multitude of similar and / or interrelated charges may overcomplicate the task of sorting and evaluating the evidence and applying the reasonable doubt standard. The resulting confusion could lead to an unjust acquittal ("This much confusion must mean reasonable doubt.") or an unjust conviction ("It's unclear what really happened, but where there's smoke there's fire, so the accused must be guilty of something."). Also, overcharging can be abused as an improper vehicle for

encouraging harsher sentences. *See United States v. Hughes*, 1 M.J. 346, n.3 (C.M.A. 1976). Based on these rationales, the current charging practice is to refer to a single court-martial all known, nonmultiplicious offenses. The balance of this chapter will discuss multiplicity in its various forms and applications.

C. ***Multiplicity defined.*** The question of multiplicity involves an examination of the charges to determine if they describe separate offenses. Offenses which are separate are separately chargeable and punishable. The courts have used several tests to determine whether offenses are separate. R.C.M. 1003c(1)(C).

1. ***The test of reasonableness.*** The basis for all of the multiplicity tests is the test of reasonableness. The basic rule is against the ***unreasonable*** multiplication of charges. What is reasonable will depend upon the particular facts of each case and is very largely a matter of judgment. Trial counsel and convening authorities must use good common sense and not try to carve out every possible specification. The classic example of unreasonableness is *United States v. Sturdivant*, 13 M.J. 323 (C.M.A. 1982), where the findings and sentence were set aside when the government referred ten separate drug specifications arising out of one incident in which the accused agreed to purchase drugs. *United States v. Sheffield*, 20 M.J. 957 (A.F.C.M.R. 1985) (one collision causing the instantaneous death of two people is separately chargeable).

2. ***Congressional intent.*** The most recent decisions in this area have focused much more on congressional intent than prior decisions have. For example, in *Ball v. United States*, 470 U.S. 856 (1985), the Supreme Court held that an accused found in possession of an illegal firearm could not be convicted of both possessing and receiving that same firearm. After scrutinizing the legislative history of the two statutes in question, the Supreme Court ascertained that Congress did not intend such a result, citing *Blockburger* approvingly as a statutory rule of construction to aid in determining Congress' intent. In *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986), the Court of Military Appeals considered the impact of *Blockburger* and *Ball* in a prosecution for rape and adultery arising from one act of intercourse. While reaching different conclusions on the issue, both Chief Judge Everett and Judge Cox focused on the intent of Congress, suggesting this may be the key to multiplicity disputes in the future.

3. ***Teter's strict elements test.***

In *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919, 127 L. Ed. 2d 213 (1994), the Court of Military Appeals essentially adopted the federal multiplicity (double jeopardy) analysis articulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932), or the so-called "elements test" of multiplicity. *See* section 0206 for a thorough analysis of *Teters, supra*, and the "strict elements test."

D. ***Multiplicity for sentencing***. When an accused is found guilty of more than one offense, the maximum allowable punishment may be imposed for each ***separate*** offense. R.C.M. 1003(c)(1)(C), MCM (1995 Edition). Offenses which are not separate for the purposes of computing the maximum punishment are referred to as being multiplicious for sentencing. The discussion to R.C.M. 1003(c)(1)(C) indicates that the test for determining multiplicity for sentencing is broader than the previously discussed *Teters* "strict elements" multiplicity test. The discussion points out that, even if each offense requires proof of an element not required to prove the other, they may not be separate for punishment purposes if the offenses were committed as the result of a ***single impulse or intent***. For example, in a prosecution for larceny and unlawfully opening the mail in which the evidence shows that the mail was opened in order to commit the larceny, the offenses would be multiplicious for sentencing and therefore not separately punishable. R.C.M. 1003(c)(1)(C), ***discussion***, MCM (1995 Edition). However, C.A.A.F. abandoned the single impulse test in *United States v. Traeder,* 32 M.J. 455 (C.M.A. 1991). There now appears to be no distinction between the multiplicity analysis for findings and sentencing. Also, *United States v. Oatney*, 45 M.J. 185 (C.A.A.F. 1996) affirmed an earlier N.M.C.M.R. 1994 decision indicating that in applying the "Teters strict elements test" that in the absence of Congressional intent to the contrary, offenses that are separate for findings are also separate for sentencing. In *United States v. Morrison,* 41 M.J. 482, 483 (1995) the Court held that Congressional intent to permit "conviction *and punishment*" for two offenses is presumed when the strict elements test is satisfied. *See also United States v. Oatney*, 41 M.J. 619 (N.M.C.M.R. 1994)(holding that where offenses are separate for findngs purposes under the strict elements test they are also necessarily separate for sentencing).

0208 CHARGING LESSER INCLUDED OFFENSES

A. The following is reprinted from the publication *Electronic Viewpoint*, which is prepared by the Appellate Government Division, Navy-Marine Corps Appellate Review Activity, to discuss court-martial issues of interest to Navy and Marine Corps trial counsel and staff judge advocates.

Subj: *ELECTRONIC VIEWPOINT* 13-93 – LIST OF LESSER INCLUDED OFFENSES THAT DO NOT SURVIVE THE STRICT ELEMENTS TEST OF *UNITED STATES V. TETERS*, 37 M.J. 370 (C.M.A. 1993)

1. ***Summary***. In *Teters*, the Court of Military Appeals abandoned the "fairly embraced" multiplicity-for-findings test of *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983). In *Teters*, the Court of Military Appeals essentially adopted the Federal multiplicity (double jeopardy) analysis articulated by the Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932), or the so-called "elements test" of multiplicity. After *Teters*, the same act or conduct which violates two distinct statutory provisions are not multiplicious for

findings if each offense requires proof of an additional element (fact) not contained in the other offense. While *Teters* simplifies multiplicity analysis, it requires personnel involved in the charging process to rely on a strict elements test for determining lesser included offenses. *See Electronic Viewpoint* 3-92.

2. *United States v. Browner*, 937 F.2d. 165 (5th Cir. 1991), highlights the potential danger that application of a strict elements test poses for the unwary prosecutor. In *Browner*, the accused was charged with voluntary manslaughter but was convicted of the lesser included offense of assault with a dangerous weapon. The *Browner* Court, *citing Schmuck v. United States*, 489 U.S. 705 (1989), adopted the strict elements approach for determining lesser included offenses and held that assault with a dangerous weapon is not a lesser included offense of voluntary manslaughter. As a result of applying a strict elements approach in *Browner*, the accused's conviction for assault with a dangerous weapon was overturned. In *United States v. Littles*, 35 M.J. 644 (N.M.C.M.R. 1992), the Navy-Marine Corps Court of Military Review applied a strict elements approach for determining lesser included offenses and reached a similar result.

Browner, in particular, poses an interesting question for military practitioners because the *Manual For Courts-Martial, United States*, 1984, Part IV, paragraph 44 d(1) specifically recognizes assault with a dangerous weapon (aggravated assault) as a lesser included offense of voluntary manslaughter. This is but ***one example, of many***, where a lesser included offense listed in the *Manual* does not satisfy a strict elements test. Of course, it can be argued that there ought to be a different test for lesser included offenses when the question is whether an accused may be convicted of a lesser offense. But, until such a test is established, great care must be taken to specifically charge any lesser offense which might be raised by the evidence when it does not meet the strict elements test, ***even if such an offense is listed as a lesser included offense in the Manual.***

3. As an aid to personnel making the charging decisions, we have prepared the following ***nonexclusive*** list of common greater offenses and listed lesser included offenses (LIOs) that ***do not satisfy a strict elements test. Note***: (*) reflects an offense listed in the *Manual* as a lesser included offense but which does not satisfy a strict elements test.

Article 85, Desertion

* Only absence from unit, organization or place of duty under Article 86 remains an LIO

Article 87, Missing movement

* Going from appointed place of duty, Article 86

* Abandoning watch or guard, Article 86

* Absence from unit, organization or place of duty with intent to avoid maneuvers or field exercises, Article 86

Article 89, Disrespect toward a superior commissioned officer

* Provoking speeches or gestures, Article 117

Article 90, Assaulting or willfully disobeying superior commissioned officer

A) Striking superior commissioned officer in execution of office

    * Assault with a dangerous weapon, Article 128

B) Drawing or lifting up a weapon or offering violence to a superior commissioned officer

    * Assault with a dangerous weapon, Article 128

C) Willfully disobeying lawful order of superior commissioned officer

    * Disrespect to superior commissioned officer, Article 89

Article 91, Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

A) Striking or assaulting warrant or noncommissioned officer

    * Assault with a dangerous weapon, Article 128

B) Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer

    * Using provoking or reproachful speech, Article 117

Article 95, Resistance, breach of arrest, and escape

* Simple assault, Article 128

* Assault consummated by battery, Article 128

Article 108, Military property of the United States—sale, loss, damage, destruction, or wrongful disposition

* Sale or disposition of non-military property, Article 134

Article 111, Drunken or reckless driving

* Drunk on duty, Article 112

* Drunk on station, Article 134

Article 112, Drunk on duty

* Drunk on station, Article 134

Article 113, Misbehavior of sentinel or lookout

* Drunk on station, Article 134

* Loitering or wrongfully sitting down on post, Article 134

Article 115, Malingering

* Self-injury without intent to avoid service, Article 134

Article 116, Riot or breach of peace

* Disorderly conduct

Article 118, Murder

A) Premeditated

* Murder by act inherently dangerous to others, Article 118

* Involuntary manslaughter, Article 119

* Simple assault, Article 128

* Assault consummated by battery, Article 128
* Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily injury

* Assault in which grievous bodily harm is intentionally inflicted, Article 128

B) Murder with intent to kill or inflict great bodily harm

* Involuntary manslaughter, Article 119

* None of the various assaults under Article 128 are LIOs

C) Murder by act inherently dangerous to others

* Voluntary manslaughter, Article 119

* Involuntary manslaughter, Article 119

* None of the assaults under Article 128 are LIOs

* Assault with intent to commit murder, Article 134

* Assault with intent to commit voluntary manslaughter, Article 134

* Negligent homicide, Article 134

D) Murder during certain offenses

* None of the offenses listed in the *Manual* remains an LIO except Article 80 (attempts)

Article 119, Manslaughter

A) Voluntary manslaughter

* None of the offenses listed in the *Manual* remains an LIO with the exception of Article 80

B) Involuntary manslaughter

* None of the offenses listed in the Manual remains an LIO

Article 120, Rape and carnal knowledge

A) Rape

* Assault with intent to commit rape, Article 134

* Indecent assault

B) Carnal Knowledge

* Indecent acts or liberties with a person under 16, Article 134

Article 122, Robbery

* Assault consummated by battery, Article 128

* Assault with a dangerous weapon, Article 128

* Assault, intentionally inflicting grievous bodily harm, Article 128

* Assault with intent to rob, Article 134

Article 123a, Making, drawing or uttering check, draft, or order without sufficient funds

* Making, drawing or uttering a check or draft and thereafter wrongfully and dishonorably failing to maintain sufficient funds, Article 134

Article 124, Maiming

* Assault with a dangerous weapon, Article 128

* Assault, intentionally inflicting grievous bodily harm, Article 128

Article 125, Sodomy

A) Sodomy with a child under the age of 16

* Forcible sodomy, Article 125
* Assault with intent to commit sodomy, Article 134
* Indecent assault, Article 134
* Indecent acts with another, Article 134
* Indecent acts with a child under 16, Article 134

B) Forcible sodomy

* Indecent acts with another, Article 134
* Assault with intent to commit sodomy, Article 134
* Indecent assault, Article 134

C) Sodomy

* Indecent acts with another, Article 134

Article 127, Extortion

* Communicating a threat, Article 134

Article 128, Assault / Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm

* Assault in which grievous bodily harm is intentionally inflicted

Article 129, Burglary

* Unlawful entry, Article 134

Article 130, Housebreaking

* Unlawful entry, Article 134

Article 131 Perjury

A) Giving false testimony

* False swearing, Article 134

B) Subscribing false statements

* False swearing, Article 134

Article 134, Assault-indecent

* Indecent acts, Article 134

Article 134, Assault with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking

A) Assault with intent to commit murder

* Assault consummated by battery, Article 128

* Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, Article 128

* Assault intentionally inflicting grievous bodily harm, Article 128

* Willful or careless discharge of a firearm, Article 134

B) Assault with intent to commit voluntary manslaughter

* Assault consummated by battery, Article 128

* Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, Article 128

* Assault intentionally inflicting grievous bodily harm, Article 128

* Willful or careless discharge of a firearm, Article 134

C) Assault with intent to commit rape

* Assault consummated by battery, Article 128

* Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, Article 128

* Indecent assault, Article 134

D) Assault with intent to commit sodomy

* Assault consummated by battery, Article 128

* Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, Article 128

* Indecent assault, Article 134

E) Assault with intent to commit burglary

* Assault consummated by battery, Article 128

* Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, Article 128

F) Assault with intent to commit robbery

* Assault consummated by battery, Article 128

* Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, Article 128

Article 134, Bribery and graft (asking, accepting receiving / promising offering or giving)

* Graft, Article 134

4. Keep in mind that, if the evidence at trial falls short of proving the charged offense, a lesser included offense instruction may be denied by a military judge based upon application of a strict elements analysis, even if the evidence at trial supports such an instruction under application of the traditional lesser included offense approach—i.e., reasonably raised by the evidence or "fairly embraced." *See United States v. Sneezer*, 900 F.2d. 177 (9th Cir. 1990). By charging appropriate LIOs, you will know prior to trial what offenses you may fall back on should the evidence at trial fall short of proving the greater offense. Of course, trial counsel and staff judge advocates should never use this development in the law as a license for overcharging.

B. ***C.A.A.F. and a new rule for LIO's.***

As noted in the above article, until C.A.A.F. establishes a different test for LIO's (when the question is whether an accused may be convicted of a lesser offense), great care must be taken to specifically charge any lesser offense which might be raised by the evidence when it does not meet the "strict elements" test. As of the date of print of this study guide, C.A.A.F. is considering a different test for LIO's, but one has not been adopted. A word to the wise is sufficient: research and stay current with the case law in this area.

CHAPTER III

ABSENCE OFFENSES

0300 INTRODUCTION 3-1

0301 UNAUTHORIZED ABSENCE 3-1
A. Text of Article 86, UCMJ 3-1
B. General 3-1

0302 FAILURE TO GO TO APPOINTED PLACE OF DUTY 3-2
A. Elements 3-2
B. Element 1 3-2
C. Element 2 3-3
D. Element 3 3-4
E. Element 4 3-4
1. Requirements 3-4
2. Proving "without authority." 3-4
F. Lesser included offenses (LIO's) 3-5
G. Pleading problems 3-5
1. General requirements 3-5
2. Recommended provisions 3-5
3. Sample specification 3-5
H. Instruction 3-5

0303 GOING FROM APPOINTED PLACE OF DUTY 3-5
A. Elements 3-5
B. Similarities with Article 86(1) 3-6
1. Elements 3-6
2. Instantaneous offenses 3-6
3. General intent offenses 3-6
C. Element 3 3-6
1. Requirements 3-6
2. Failure to perform the duty 3-6
D. Lesser included offenses 3-7
E. Pleading problems 3-7
1. General requirements 3-7
2. Recommended provisions 3-7
3. Sample specification 3-7
F. Instruction 3-7

0304 ABSENCE FROM UNIT, ORGANIZATION, OR PLACE OF DUTY 3-7
A. Elements 3-7
B. Element 1 3-8
1. The accused must be absent 3-8
2. Unit, organization, or place of duty 3-8
C. Element 2 3-10
1. Requirements 3-10
D. Element 3 3-11
1. Instantaneous offense 3-11
2. The "one-day" rule 3-11
E. General Intent 3-12
F. Lesser included offenses 3-12
G. Pleading problems 3-12
1. General requirements 3-12
2. Recommended provisions 3-12
3. Sample specification 3-12
H. Instruction 3-12

0305 AGGRAVATING FACTORS 3-13
A. Categories of aggravation 3-13
B. Specific aggravation 3-13
1. Duration of the absence 3-13
2. Special type of duty from which the accused absents himself 3-13
3. Specific intent which accompanies the absence 3-13
4. Manner in which the absence was terminated 3-14
C. Special considerations 3-14
1. Matters must be stated in the pleading 3-14
2. Not essential elements 3-14

0306 PROVING ABSENCE OFFENSES 3-14
A. Proving military status of the accused 3-14
B. Proof of absence 3-14

0307 TERMINATION PROBLEMS 3-15
A. Methods of termination 3-15
1. Surrender to military authority 3-15
2. Apprehension 3-16
3. Delivery to military authority 3-16
B. Location of termination 3-16
C. Casual presence is insufficient to terminate an absence 3-16
1. Example 3-16
2. Some of the more common examples of casual presence 3-17
D. Apprehension by civil authorities without prior military request 3-17

E. Evidentiary problems 3-18
1. Early termination date 3-18
2. Later inception date 3-18
3. Single absence instead of multiple absences 3-18
4. Early termination and subsequent absence 3-18
5. Former jeopardy 3-18

0308 AFFIRMATIVE DEFENSES 3-19
A. Generally 3-19
B. Types of affirmative defenses 3-19
1. Mistake of fact 3-19
2. Ignorance of fact 3-19
3. Impossibility 3-19
4. Other defenses 3-23

0309 DESERTION 3-25
A. Text of Article 85(a), UCMJ 3-25
B. Generally 3-25
C. Unauthorized absence with the intent to remain away permanently 3-25
1. Elements 3-25
2. Generally 3-26
3. Requisite intent 3-26
4. Duration of intent 3-26
5. Evidence of the intent to remain away permanently 3-26
6. Totality of the circumstances 3-27
D. Unauthorized absence with the intent to shirk important service or to avoid hazardous duty 3-27
1. Elements 3-27
2. Generally 3-28
3. Terminology 3-28
4. Factual issue 3-29
E. Attempted desertion 3-29
1. Elements 3-29
2. Generally 3-29
3. Lesser included offenses 3-29
F. Defenses 3-30
G. Pleadings and instructions 3-30
1. General rules 3-30
2. Desertion with intent to remain away permanently, terminated by apprehension 3-30
3. Desertion with intent to remain away permanently, "terminated otherwise" 3-30

0310 MISSING MOVEMENT 3-31

A. Text of Article 87, UCMJ 3-31
B. Generally 3-31
C. Elements 3-31
D. Element 1 3-32
1. Generally 3-32
2. Duty to move 3-32
3. What is a "unit"? 3-32
4. Ship or aircraft 3-33
E. Element 2 3-34
1. Generally 3-34
F. Element 3 3-34
G. Element 4 3-35
1. "That he missed the movement through design." 3-35
2. "That the accused missed the movement through neglect." 3-36
H. Multiple movements 3-36
I. Defenses 3-36
J. Pleadings and instructions. 3-36
1. Sample specification 3-36
2. Sample Instruction 3-37

ADMINISTRATIVE REMARKS 3-38

OFFENSES AND PUNISHMENTS 3-39

NAVY UNAUTHORIZED ABSENCES 3-40
A. Policy 3-40
B. Procedures 3-40
C. Checklist. 3-40

MARINE CORPS UNAUTHORIZED ABSENCES 3-43
A. References 3-43
B. Checklist 3-43

SAMPLE 10-DAY UA NOTIFICATION LETTER FOR NEXT OF KIN 3-46

SAMPLE LETTER NOTIFYING NEXT OF KIN OF RETURN FROM UA

CHAPTER III

ABSENCE OFFENSES

0300 INTRODUCTION

This chapter discusses absence offenses. It includes an analysis of the three types of unauthorized absence offenses under Article 86, UCMJ; desertion under Article 85, UCMJ; and missing movement offenses under Article 87, UCMJ.

0301 UNAUTHORIZED ABSENCE (UA) (Key Numbers 667-672)

A. ***Text of Article 86, UCMJ.***

Any member of the armed forces who, without authority —

1. fails to go to his appointed place of duty at the time prescribed;

2. goes from that place; or

3. absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct.

B. ***General.*** Article 86 was created to address "every case not elsewhere provided for in which any member . . . is through the member's own fault not at the place where the member is required to be . . ." Part IV, para. 10c(1), MCM (1995 Edition). There are essentially three types of Article 86 offenses. They are:

1. Article 86(1) – failure to go to an appointed place of duty;

2. Article 86(2) – going from an appointed place of duty; and

3. Article 86(3) – UA from unit, organization, or place of duty.

Each of these offenses is an independent and distinct crime. The initial portion of this chapter shall discuss them individually.

0302 FAILURE TO GO TO APPOINTED PLACE OF DUTY

A. ***Elements.***

1. That a certain authority appointed a certain time and place of duty for the accused;

2. that the accused knew of that time and place;

3. that the accused failed to go to his appointed place of duty at the prescribed time; and

4. that the accused's failure to go to his appointed place of duty was without authority.

B. ***Element 1.*** A certain authority appointed a time and place for duty.

1. The first element assumes that some type of order was given to the service member. Specifically, the order directed the member to appear for duty at a particular place and time. Accordingly, many of the issues relating to orders offenses (Chapter IV) will be applicable to this first element. For example, if the person appointing the place for duty had no lawful authority to do so, the accused would have a defense relating to the lawfulness of the order.

2. ***A "certain time."*** There must be a certain time of duty appointed by the authority. Without this precise time, the service member will be unaware of the exact nature of his/her obligation. Additionally, without this time it will be impossible to claim that the service member failed to go to his appointed duty. In order to obtain a conviction, trial counsel will have to prove that a specific time was appointed.

> – ***Example.*** Accused is awarded extra duty as a result of a summary courts-martial conviction. Extra duty customarily begins between 1800 and 1830. The accused does not show up during these time periods. Accused charged at a special courts-martial with violating Article 86(1), failure to go. ***Held:*** Not Guilty. The evidence failed to establish that a specified time was appointed for these duties. Moreover, there was no indication that the accused was ever aware of the customary times for extra duty. Accordingly, no specific time for duty had been appointed. *United States v. Van Lierop*, 4 C.M.R. 758 (A.B.R. 1952).

3. ***A "certain place".***

a. ***Defined.*** In order for the evidence to support this element, the accused must have been ordered to a ***specifically*** appointed place of duty. Historically, the *Manual for Courts-Martial* contemplated that a place of duty for an Article 86(1) and Article 86(2) violation, to be a precise location such as a ship's compartment. Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, page 254. In an attempt to be more exact, courts have stated that this appointed place of duty "refers to a specifically appointed place of duty such as kitchen police, reveille formation, or first floor of a barracks rather than a broader general place of duty such as a command, a post, or a unit. *United States v. Coleman*, 34 M.J. 1020 (A.C.M.R. 1992); *United States v. Scardina*, 18 M.J. 571 (N.M.C.M.R. 1984); *United States v. Sturkey*, 50 C.M.R. 110, 111 (A.C.M.R. 1975). Courts have referred to this requirement as "far more demanding" than the broader, general place of duty required for an Article 86(3) offense. *See United States v. Price*, 1 M.J. 552 (A.F.C.M.R. 1975).

– ***Example.*** Accused is charged with, among other things, violating Article 86(1)—failing to report to his appointed place of duty. The specification alleges 3d Platoon, Company C, 3d Battalion, 6th Infantry as his place of duty. ***Held***: Not Guilty. A specific place of duty must be assigned. The location of this order is very general. Certainly, it is no different than report to NETC, Newport, RI. *United States v. Sturkey*, 50 C.M.R. 111 (A.C.M.R. 1975).

Coast Guard accused was told to report to "USCG Lightship (WAL-531)." At the designated time of duty, he fails to report to the vessel. Accused charged with violating Article 86(1), failure to go. ***Held***: Not Guilty. Order calls for the accused to report to a general place of duty vice a specific place of duty. Article 86(1) "contemplates only a specific place of duty such as muster, the No. 1 fireroom, etc . . ." *United States v. Skipper*, 1 C.M.R. 581, 584 (C.G.B.R. 1951).

b. ***Specific requirements.*** The place of duty need not be on a military base. As long as there is a military purpose to the appointed place of duty, the obligation is satisfied. For example: Duty driver is ordered to pick up the commanding officer—who is returning from TAD—at Gate 17, Boston Airport at 1600. Although the place of duty is not a military reservation, the duty driver is still obligated to comply with the order. Additionally, the place of duty may be a rendezvous for several persons or just for one individual. Examples of this would include muster for restricted men and duty as helmsman on the bridge.

C. ***Element 2.*** The accused knew of the time and place.

The *Manual for Courts-Martial* requires that ***actual***, rather than constructive,

knowledge exists in order to affect an Article 86(1) offense. Proof of actual knowledge, however, can be demonstrated by the use of direct or circumstantial evidence. *See United States v. Zammit*, 16 M.J. 330 (C.M.A. 1983) (evidence of accused's attendance at 93 musters prior to his absences was proper evidence to prove actual knowledge of muster times).

D. ***Element 3***. That the accused failed to go to his appointed place of duty.

Article 86 is an instantaneous offense. The offense is complete at the moment that the accused fails to appear at his appointed place of duty at the prescribed time. The fact that the accused later went to his appointed place of duty is ***not*** a defense. His late arrival, however, can be used as evidence in extenuation and mitigation for purposes of sentencing.

E. ***Element 4***. The absence was "without authority."

1. ***Requirements***. The failure of the accused to go to his appointed place of duty at the time prescribed is not, in and of itself, criminal. Military personnel are frequently absent from duty without being in violation of Article 86 (e.g., leave, liberty, sick call). Criminal liability attaches only when the failure to go is without the permission to be absent from some authority competent to give that permission. In *United States v. Urban*, 45 M.J. 528 (N.M.Ct.Crim.App. 1996), an accused was found not guilty of UA when he received special liberty from his command to face a civilian criminal traffic charge; because of legal complications he was subsequently placed in civilian confinement for two days. The Court held that the accused's appearance at the civilian trial was with the knowledge and approval of his command, and circumstances beyond his control prevented him from returning to his unit.

2. ***Proving "without authority."*** In order to obtain a conviction, the government must prove, beyond a reasonable doubt, that the absence was not authorized by anyone competent to authorize it. In the ordinary Article 86(3) absence case, the UA is proved by introducing a page from the accused's service record. In the Marine Corps, no service record entries are required for absences less than 24 hours. Accordingly, no records would exist for Article 86(1) and (2) offenses. In the Navy, absences of less than one day are recorded on page 13 of the service record. In the absence of such records, it becomes necessary to prove the negative fact—that the absence was not authorized. Usually, there are witnesses who can testify as to the absence itself. In *United States v. Neff*, 9 C.M.R. 332 (A.B.R. 1953), the government's evidence consisted only of testimony displaying that the accused was absent. The government failed to present any evidence that anyone gave him authority to be absent at the respective musters. Accordingly, the accused's conviction was reversed. This problem could have been avoided had the trial counsel called the supervisors of the accused as witnesses. During direct examination, trial counsel should have then asked questions such as: "Did you give the accused permission to be absent?" and "To your knowledge, did anyone else in authority give the accused permission to be absent?"

F. ***Lesser included offenses (LIO's).*** An attempt under Article 80, UCMJ, is the only LIO of this UA offense.. Unauthorized absences under both Article 86(2) and 86(3) are not LIO's of Article 86(1). *United States v. Reese*, 7 C.M.R. 292 (A.B.R. 1953); *United States v. Sheehan*, 1 C.M.A. 532, 4 C.M.R. 124 (1952). Accordingly, when an accused is improperly charged with failing to report to a general place of duty vice a specific place of duty, the accused will not be found guilty of an Article 86(3) violation. *See Sheehan, supra.*

G. ***Pleading problems.***

1. ***General requirements.*** The specific place of duty, as well as the words "without authority," must be alleged. *United States v. Skipper*, 1 C.M.R. 581 (C.G.B.R. 1951). *But see United States v. Mervine*, 23 M.J. 801 (N.M.C.M.R. 1986), *rev'd on other grounds*, 26 M.J. 482 (C.M.A. 1988).

2. ***Recommended provisions.*** It is not necessary to state the specific time that the accused was to be at his place of duty. However, it is generally good practice to include this information in the specification. Additionally, because it is an instantaneous offense, the duration of the absence is usually ***not*** alleged.

3. ***Sample specification.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 86.
>
> ***Specification.*** In that Ensign Ernest E. Eveready, U.S. Navy, USS NOTAWAKE, on active duty, did, on board USS NOTAWAKE, at sea, on or about 30 January 19CY, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: 0800 junior officer of the deck watch on the bridge of USS NOTAWAKE.

H. ***Instruction.*** *See* Military Judges' Benchbook, DA Pam. 27-9 (1996), Inst. No. 3-10-1 at p. 191.

0303 GOING FROM APPOINTED PLACE OF DUTY

A. ***Elements.***

1. That a certain authority appointed a certain time and place of duty for the accused;

2. that the accused knew of that time and place;

3. that the accused went from his appointed place of duty; and

4. that the accused's failure to go to his appointed place of duty was without authority.

B. ***Similarities with Article 86(1).***

1. ***Elements.*** Elements (1), (2), and (4) are the same as those required for an Article 86(1) offense. (*See* section 0302, *supra*.) Element (1) requires a lawful order to go to a specific place at a certain time. Element (2) requires actual vice constructive knowledge of that order. Element (4) requires that the conduct be committed without proper authority. The only element which differs from the two offenses is element (3). In an Article 86(1) offense, the accused never reports to his appointed place of duty. In an Article 86(2) offense, element (3) requires that the accused report to his place of duty and then subsequently depart from that area.

2. ***Instantaneous offenses.*** Both crimes, Article 86(1) and 86(2), are instantaneous offenses. In the case of an Article 86(2) offense, the crime is complete when the accused ***goes from*** his appointed place of duty. Therefore, the fact that the accused returned to his place of duty after he has already left does not operate as a defense. This evidence would only be relevant as a matter of mitigation during sentencing.

3. ***General intent offenses.*** Article 86(1) and (2) are general intent or negligence type offenses. Accordingly, the accused need not specifically intend to leave his place of duty. As a result, if a service member assumes his watch as a lookout, begins drinking out of the excitement associated with his next liberty port, and then falls into the ocean due to the alcohol, he would still be guilty of violating Article 86(2).

C. ***Element 3.*** The accused went from his appointed place of duty.

1. ***Requirements.*** The third element of Article 86(2) requires proof of two different facts. First, the government must show that the accused reported for or assumed the duty he was required to perform. Second, it must be proven that, after reporting for his duties, he left the place of duty.

– ***Example.*** Accused is assigned as a Barracks Guard from 1200 to 1800. The Barracks Chief calls the barracks at 1530 and 1810, but the accused is nowhere to be found. Accused is charged with violating Article 86(2), going from his place of duty. ***Held***: Not Guilty. The record of trial was "devoid of any evidence establishing that, on the date alleged, the accused reported for and entered upon the duty to which he was assigned." Since there is no evidence that he did in fact report, he cannot be found guilty of violating Article 86(2), UCMJ. *United States v. McKittrick*, 8 C.M.R. 848, 849 (A.B.R. 1953).

2. ***Failure to perform the duty.*** If the accused arrives and assumes his duty—yet refuses to work—he is not guilty of violating Articles 86(1) or 86(2). Under those

circumstances, he has neither failed to go or left from his duty. Accordingly, the accused would be probably be violating Article 92(3), dereliction of duty.

D. ***Lesser included offenses.*** Articles 86(1) and 86(3) are not LIO's of Article 86(2). Accordingly, a finding of not guilty to Article 86(2) cannot result in a finding of guilty to another absence offense which has not been charged. *United States v. Sears*, 22 C.M.R. 744 (C.G.B.R. 1956).

E. ***Pleading problems.***

1. ***General requirements.*** Similar to an Article 86(1) offense, the specific place of duty, as well as the words "without authority," must be alleged.

2. ***Recommended provisions.*** Unlike an Article 86(1) offense, the exact time at which the offense occurred is generally unknown. Accordingly, the specific time is generally not alleged within the specification.

3. ***Sample specification.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 86.
>
> ***Specification.*** In that Signalman Third Class Wana I. Sign, U.S. Navy, USS FRANKENSTEIN, on active duty, did, on the signal bridge on board USS FRANKENSTEIN, at sea, without authority, go from his appointed place of duty, to wit: 0800 to 1200 signal bridge watch.

F. ***Instruction.*** *See* Military Judges' Benchbook, DA Pam. 27-9 (1996), Inst. No. 3-10-1 at p. 191.

0304 ABSENCE FROM UNIT, ORGANIZATION, OR PLACE OF DUTY

A. ***Elements.***

1. That the accused absented himself from his unit, organization, or place of duty at which he was required to be;

2. that the absence was without authority from anyone competent to give leave; and

3. that the absence was for a certain period of time.

B. ***Element 1.*** That the accused absented himself from his unit, organization, or place of duty

1. ***The accused must be absent.***

a. ***Absence generally.*** In order to be "absent," the accused must have failed to be present at his unit, organization, or place of duty. There is no requirement that the accused remain completely outside of naval jurisdiction in order to be in a UA status. For example, in *United States v. Phillips*, 28 M.J. 599 (N.M.C.M.R. 1989), the accused was assigned to Naval Technical Training Center, Meridian, Mississippi (NTTC). NTTC was located on board Naval Air Station (NAS), Meridian. Instead of going to work at NTTC, the accused remained in his barracks at NAS, Meridian. The court held that his failure to go to NTTC, and not his presence on board NAS, Meridian, was dispositive of the absence issue. Accordingly, the court found that the accused had been absent from his unit. *See also United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993) and *United States v. Wargo*, 11 M.J. 501 (N.M.C.M.R. 1981).

b. ***Commencement of an unauthorized absence.*** Generally, a UA commences in one of three ways:

(1) When the accused simply gets up and leaves his unit, organization, or place of duty;

(2) when the accused fails to return at the proper time from authorized leave or liberty; or

(3) when the accused is not where he is supposed to be at the time he is required to be there.

2. ***Unit, organization, or place of duty.*** Unlike Article 86(1) or 86(2) offenses, an absence in violation of Article 86(3) relates to a general place of duty. *See United States v. Horton*, 36 M.J. 1039 (N.M.C.M.R. 1993) and *United States v. Scardino*, 18 M.J. 571 (N.M.C.M.R. 1984). The customs of the U.S. Navy and Marine Corps have created the individual definitions for each of the terms: unit, organization, and place of duty. They are, however, not precisely defined. For example, certain commands, such as Naval Air Station, Lemoore, California, may be properly considered as either an "organization" or "place of duty."

a. ***Organization.*** This term usually connotes a larger command or mid-level military activity. For example: a shore command in the Navy or a Marine air group.

b. ***Unit.*** The term "unit" is normally used to connote a lower level military entity such as a ship or air squadron in the Navy or a company, squadron, or battery

in the Marine Corps.

c. ***Place of duty.*** The term "place of duty" under Article 86(3) follows the general terms of "unit" and "organization." Accordingly, courts have concluded that the "place of duty" referred to in Article 86(3) is a general place of duty. In short, the requirements for this "place of duty" are significantly broader than the specific place of duty required in Article 86(1) and (2). When alleging a violation of Article 86(3), therefore, one ***is not limited to a specific place***, but may instead allege a general place of duty.

d. ***Determining the unit, organization, or place of duty.***

(1) ***Generally.*** A service member is generally attached or assigned to a specific unit or organization. The unit, organization, or place of duty of an accused is an administrative determination made in accordance with the regulations of the particular armed service. The general rule is that a member is attached to the ship or station to which he is administratively assigned for accounting purposes. Ordinarily, this can be identified by the ship or station which holds his service record. However, in some circumstances, service records are retained in central administrative offices. Alleging the central administrative office would be incorrect—and fatal. *See United States v. Walls*, 1 M.J. 734 (A.F.C.M.R. 1975).

(2) ***Recommended methods.*** Perhaps one of the safest ways to ensure that the appropriate unit or organization is alleged is to look at the personnel record of the accused. When the individual joined his unit or organization, an entry was made within his service record book. This entry will most likely be dispositive of the accused's unit or organization. For example, look for the page 5 entry in a Navy service record—or a page 3 entry in a Marine Corps service record.

(3) ***Permanent change of station (PCS).*** A person en route pursuant to a PCS order is considered to be attached to the activity to which he is ordered to report. Part IV, para. 10c(7), MCM (1995 Edition); *United States v. Pounds*, 23 C.M.A. 153, 48 C.M.R. 769 (1974); *United States v. Kepple*, 27 M.J. 773 (A.F.C.M.R. 1988), *aff'd*, 30 M.J. 213 (C.M.A. 1990). *But see United States v. Stroud*, 27 M.J. 765 (A.F.C.M.R.), *petition denied*, 28 M.J. 335 (C.M.A. 1988). To determine the unit, organization, or place of duty to which the accused has been ordered to report, examine the wording of the PCS orders.

(4) ***Temporary additional duty (TAD).*** When a service member is TAD, he is actually attached to two different commands. He has not detached from his permanent duty assignment while actually attaching to a temporary command. Absence of a service member from his TAD command makes him also absent from his parent command; therefore, "a specification could allege an accused absent from either unit without running the hazards of fatal variance or, because of the dates alleged in the specifications, subject the accused to the possibility of double jeopardy." *See United States v. Atkinson*, 39

M.J. 462 (C.O.M.A. 1994) and *United States v. Mitchell*, 7 C.M.A. 238, 240, 22 C.M.R. 28, 30 (1956).

e. ***Misdesignation of the term "unit," "organization," or "place of duty."*** Misdesignation of a unit as an organization, or an organization as a place of duty, ***is not a fatal error***. *United States v. Jack*, 7 C.M.A. 232, 22 C.M.R. 25 (1956); *United States v. Horton*, 36 M.J. 1039 (N.M.C.M.R. 1993); *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993). However, when a specific unit is alleged and the evidence proves that the accused was absent from an entirely different unit, ***the defect is fatal***. *United States v. Walls*, 1 M.J. 734 (A.F.C.M.R. 1975); *United States v. Rosen*, 45 C.M.R. 728 (A.F.C.M.R. 1972).

For example, if the specification mistakenly alleges Naval Air Station, Miramar, as a unit, the defect is nonfatal. Yet, if the evidence subsequently proves that the accused was actually absent from Naval Station, San Diego, the specification would be fatally defective.

C. ***Element 2.*** That the absence was without authority from anyone competent to give leave

1. ***Requirements.*** The requirement of proving "without authority" is generally the same for Article 86(1) and (2) offenses as it is in an Article 86(3) offense. However, since Article 86(3) offenses are generally of a longer duration, the reporting requirements assist the government in prosecuting such an offense. A service record entry is prepared in all cases of absences over 24 hours (page 6 entry in the Navy; page 12 entry for Marine Corps service records). As such, the government may simply choose to present this documentation to show, among other things, that the absence was "without authority." In the event that witnesses testify on behalf of the government, refer to section 0302.E, *supra*.

2. Service record documentation of an absence only creates an inference of "without authority." It is critical, therefore, to ensure that an agent of the U.S. Government has not instructed the accused not to return to his place of duty.

(a) ***Example.*** Accused was scheduled to transfer from Fort Gordon, Georgia, to Vietnam during the war. In July of 1969, he was told to "go home and wait for orders." He never received his orders and finally reported to Fort Lewis, Washington, in December 1971. ***Held***: Not Guilty. An agent of the U.S. Government informed the accused to return home and await orders. The order was never countermanded. The accused was "at all times . . . where he was required to be by the order." His absence was authorized. The accused, therefore, could not be found guilty of violating Article 86, UCMJ. The court noted that the accused's actual misconduct came when he left home and reported to Fort Lewis in 1971. *United States v. Davis*, 22 U.S.C.M.A. 241, 46 C.M.R. 241 (1973).

(b) ***Example.*** Accused, an Army Second Lieutenant, received orders to report to Vietnam. He was sent home and told to remain there until he received a port call in the mail. One year later, the accused had not received a port call. He finally reported to Fort Hood 15 months after being sent home. ***Held:*** Not Guilty. The accused was authorized to return home and await his port call. Although the accused's conduct may appear inappropriate or "contrary to good conscience," his actions were authorized. The accused could not, therefore, be found guilty of violating Article 86, UCMJ. *United States v. Hale*, 20 U.S.C.M.A. 150, 42 C.M.R. 342 (1970).

D. ***Element 3.*** That the absence was for a certain period of time

1. ***Instantaneous offense.*** Article 86(3) is an instantaneous offense. It is committed at the instant the accused absents himself without authority. *United States v. Kimbrell*, 28 M.J. 542 (A.F.C.M.R. 1989), *petition denied*, 28 M.J. 352; *United States v. Newton*, 11 M.J. 580 (N.C.M.R. 1980). The duration of the absence, however, is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense. The duration of the absence is not, in itself, an essential element of an Article 86(3) offense. *Kimbrell, supra*; *United States v. Morsfield*, 3 M.J. 691 (N.C.M.R. 1977).

2. ***The "one-day" rule.*** If the termination date of the absence is ***not*** alleged, ***or*** is alleged but not proven, the accused can only be convicted of, and punished for, a one-day absence.

Similarly, if the government proves the termination date, but fails to show any prior inception date, the accused may only be convicted of a one-day UA, the date of termination. *United States v. Harris*, 21 C.M.A. 590, 45 C.M.R. 364 (1972). In *Harris*, the court faced a situation where no ***inception*** date was shown, the opposite of the situation in *United States v. Lovell, infra*. The trial court in *Harris* returned a guilty finding to the alleged UA of 3 December 1969 to 1 April 1977, even though there was considerable evidence that the accused was still present at his unit until about 1 January 1970. In taking his action on the record of trial, the convening authority approved only a UA from 2 January 1970 to 1 April 1971 by an action he termed one of "clemency" (though it actually appeared to be an attempt to eliminate appellate review difficulties). The Court of Military Appeals held that proof of an inception date was essential to a successful UA prosecution, and thus the convening authority had acted improperly in approving a date for commencement where there had been no evidence at trial that the UA commenced on that date. However, the court ***did*** find a commencement date of 9 January 1970, since a record book entry introduced at trial indicated that the accused had been dropped from the rolls of his unit on that date because of his UA. The court further stated that, had ***no*** inception been found, only a one-day UA, the date of the alleged termination, could have been upheld.

– ***Example.*** Government alleges that the accused was absent

without authority for two months. At trial, the government presented evidence of the date of the inception, however, failed to admit admissible evidence of a termination date. ***Held***: Accused was only guilty of a one-day UA vice a two-month absence. *United States v. Lovell*, 7 C.M.A. 445, 22 C.M.R. 235 (1956).

E. ***General intent***. A simple (i.e. ***nonaggravated***) UA offense under Article 86(3), like the Article 86(1) and (2) offense, is a ***general*** intent offense. The accused need not have specifically intended to be UA. Indeed, he might have specifically intended the exact opposite. For example, the accused fully intends to go to work on time. To assist him, he sets three alarm clocks. Nevertheless, he oversleeps and doesn't get there on time. He is still UA, though he may have a good case in mitigation.

F. ***Lesser included offenses***. An attempt offense under Article 80 is the only LIO to a violation of article 86(3). Article 86(1) and 86(2) are not LIO's of Article 86(3). Accordingly, a finding of not guilty to Article 86(3) cannot result in a finding of guilty to another absence offense which has not been charged.

G. ***Pleading problems***.

1. ***General requirements***. As with all Article 86 offenses, the specification should state that the accused's absence was "without authority." Additionally, in the event that there are any aggravating factors associated with this absence (*see* section 0305, *infra*), those must be alleged within the specification in order to qualify for the greater sentence.

2. ***Recommended provisions***. The specific time of the absence, as well as the time of termination, is generally not alleged in an Article 86(3) specification. Identifying the time would only be appropriate for short-term absences when the time periods would qualify the offense for an aggravated sentence. For example, if the time frames identify the absence as one in excess of 72 hours, it would be better to state the times than simply the dates. *See* Part IV, para. 10c(9), MCM (1995 Edition).

3. ***Sample specification***.

Charge. Violation of the Uniform Code of Military Justice, Article 86.

Specification. In that Hull Technician Third Class Will B. Seedy, U.S. Navy, USS SLEEZEBALL, on active duty, did, on or about 1 April 19CY, without authority, absent himself from his unit, to wit: USS SLEEZEBALL, located at Newport, Rhode Island, and did remain so absent until on or about 13 August 19CY.

H. ***Instruction***. *See Military Judge's Benchbook*, DA Pam. 27-9 (1996), Inst. No. 3-10-2 at p. 192. It is important to note, however, that the instruction appears to identify the

specific termination date as an element of the absence offense. This is incorrect. UA is an instantaneous offense. Accordingly, the termination date is only necessary as a form of aggravation. *See Kimbrell, supra.*

0305 AGGRAVATING FACTORS

A. ***Categories of aggravation.***

In addition to the three types of absence offenses delineated by Article 86, there are a variety of aggravating circumstances which would make an Article 86(3) offense more significant. These aggravating circumstances fall into four main categories:

1. Duration of the absence;

2. special type of duty from which the accused absents himself;

3. specific intent which accompanies the absence; and

4. manner in which the absence was terminated.

B. ***Specific aggravation.***

1. ***Duration of the absence.***

a. UA of more than three (3) days will authorize a maximum sentence to include six (6) months' confinement and forfeiture of 2/3 pay per month for three (3) months.

b. UA of more than thirty (30) days will authorize a maximum sentence to include a Dishonorable Discharge, confinement for a period of one (1) year, and total forfeiture of pay.

2. ***Special type of duty from which the accused absents himself.*** UA from responsibilities as a guard—on watch or on duty—will authorize a maximum sentence to include three (3) months' confinement and forfeiture of 2/3 pay per month for three (3) months.

3. ***Specific intent which accompanies the absence.***

a. UA from the responsibilities as a guard—on watch or on duty—with the specific intent to abandon it will authorize a maximum sentence to include a bad-conduct discharge, confinement for six (6) months, and total forfeiture of pay.

b. UA, with the specific intent to avoid maneuvers or field exercises, authorizes the maximum sentence of a bad-conduct discharge, confinement for a period of six (6) months, and forfeiture of 2/3 pay for a period of six (6) months.

4. ***Manner in which the absence was terminated.*** UA for more than (30) thirty days, terminated by apprehension, will authorize a maximum sentence of a dishonorable discharge, confinement for eighteen (18) months, and total forfeiture of pay.

C. ***Special considerations.***

1. ***Matters must be stated in the pleading.*** In order to use the higher or aggravated scales of punishment provided in these absence offenses, the special matter in aggravation must be plead, proven, and instructed upon.

2. ***Not essential elements.*** The aggravating elements of these more serious absence offenses are not essential elements to an absence offense. Instead, they simply constitute special matters in aggravation which must be established beyond a reasonable doubt in order to increase the authorized maximum punishment. If the aggravating element is not proven, but the basic elements of the absence offense are proven, the court-martial may still convict for the basic UA offense. The finding of guilty would come through exceptions and substitutions to the original specification and charge.

0306 PROVING ABSENCE OFFENSES

A. ***Proving military status of the accused.*** In a case involving UA, the accused's status as a member of the military could in fact become a contested issue. The military status could be challenged by the defense in two ways:

1. First, the defense can make a motion to dismiss the charges on the grounds that the court-martial lacks jurisdiction over the person. In addressing this motion, the standard of proof is the "preponderance of the evidence." *United States v. Bailey*, 6 M.J. 965 (N.C.M.R. 1979).

2. Second, in the event that the military judge rules against the defense on the motion, the issue can be raised on the case-in-chief. If the issue is raised on the merits, the government would have to prove "beyond a reasonable doubt" that the accused was on active duty. *Bailey, supra.*

B. ***Proof of absence.*** In the ordinary UA case, the inception of, termination of, and lack of authority for the absence are usually proved by putting in evidence the appropriate entry from the accused's service record, which contains the words "on unauthorized absence." This is a hearsay document which, if properly prepared and

authenticated, is admissible under the "public records" exception to the hearsay rule. *See* Mil.R.Evid. 803(8). Thus, it usually is easy to present a prima facie case of an 86(3) offense. *See United States v. Demings*, 22 C.M.A. 483, 47 C.M.R. 732 (1973) (properly authenticated copies of entries in official records are competent evidence of the facts they recite and are sufficient in law to sustain a conviction of UA). If proper service record entries are not available, however, trial counsel will have to call witnesses to establish inception, termination, and lack of authority. For the Navy, any UA should be noted on page 13 of the service record as an administrative remark. An OCR document, the present page 6 of the enlisted service record was created to record UA's that ***exceed*** 24 hours—since those absences affect the unauthorized absentee's pay status. Accordingly, once an accused initially absents himself, that absence is recorded via a page 13 entry. As soon as the absence exceeds 24 hours, a page 6 entry is also made. *See* MILPERSMAN, arts. 5030310, 5030420; DFAS Pay/Procedures Manual (Navy), Volume 2, Part B, Section 90435. For Marines, no service record entries are made for UA's of less than 24 hours. UA's in excess of 24 hours are recorded on page 12, Offenses and Punishments, of the service record. *See* IRAM para. 4013.2a(a). For samples of Navy (Page 6 and 13) and Marine Corps (Page 12) service record entries, as well as a UA checklist, please see the end of this chapter. Note that there may be other documents, such as muster chits, morning reports, and even other service record pages for Marines, which may be admissible under Mil.R.Evid. 803(6) and (8) as records of regularly conducted business activities or public records to establish the offense. These other nontestimonial sources of evidence concerning a UA offense may help to save or streamline prosecution of an offense where the main service record entries usually relied upon are inadmissible for some reason. It must be remembered that public records are admissible as exceptions to the hearsay rule only if they are prepared in accordance with applicable regulations. *United States v. Fowler*, 48 C.M.R. 94 (A.C.M.R. 1973). In *Fowler*, the offered documents were not admitted because they had not been signed by the proper official. They thus constituted incompetent hearsay, even though there had been no objection by the defense. However, where a document is not admissible as an official (public) record, it often may be admitted as a business entry (a record of regularly conducted business activity). *E.g., United States v. Mullins*, 47 C.M.R. 828 (N.C.M.R. 1973) (a service record entry inadmissible as an official record due to an unauthorized signature was held admissible as a business entry).

0307 TERMINATION PROBLEMS

A. ***Methods of termination***. The status of an individual's UA terminates upon the accused's ***return to military control***. Generally, there are four ways in which an absence can be terminated.

1. ***Surrender to military authority***. If a person intends to surrender, submits himself to military authority, ***and*** discloses to that authority his status as an unauthorized absentee, such authority is bound to exercise control over him. This exercise

of control is considered to be a "surrender." MILPERSMAN, art. 3430100; IRAM, para. 4004.2a(2)(c). Note, however, if an accused discloses his status to military authority—but does so without the intent to terminate his absence—or subsequently frustrates efforts by the military to exercise control over him, it is not a proper surrender. Additionally, surrender requires that the accused turn himself in to a military authority. As such, surrender to civilian police would not constitute an appropriate surrender.

2. ***Apprehension.*** The term apprehension means the absentee's return to military control was involuntary. *See United States v. Evans*, 35 M.J. 754 (N.M.C.M.R. 1992) and *United States v. Williams*, 29 M.J. 504 (A.C.M.R. 1989).

a. ***Apprehension by military authorities.*** Apprehension by military authority of a known absentee terminates a UA. *United States v. Jackson,* 1 C.M.A. 190, 2 C.M.R. 96 (1952); MILPERSMAN, art. 3430100.

b. ***Apprehension by civilian authorities on behalf of the military.*** A UA may also be terminated by apprehension when a known absentee is taken into custody by civilian authorities who are acting on behalf of the military. Generally, this occurs when the military issues a DD Form 553 (Absentee Wanted by the Armed Forces) and the civilian authorities arrest the accused ***only due to the existence of the DD Form 553.*** *United States v. Garner*, 7 C.M.A. 578, 23 C.M.R. 42 (1957) and *United States v. Asbury*, 28 M.J. 595 (N.M.C.M.R. 1989), *review denied*, 28 M.J. 356 (C.M.A. 1989).

3. ***Delivery to military authority.*** If a known absentee is delivered by anyone to military authority, this will terminate the UA.

B. ***Location of termination.*** An unauthorized absentee need not return to his own duty station in order to terminate the absence; the accused need only return to military control. For example, it is sufficient for a Navy absentee—who is apprehended by civilians and delivered to an Air Force Base—to legally terminate a UA. *United States v. Coates*, 2 C.M.A. 625, 10 C.M.R. 123 (1953). The accused, however, must be returned to military authorities. *See United States v. Hart*, 47 C.M.R. 686 (A.C.M.R. 1973) (surrender to civilian officials at the VA Hospital was insufficient to terminate the absence).

C. ***Casual presence is insufficient to terminate an absence.*** The accused must inform the military of his status as an unauthorized absentee. *United States v. Williams*, 29 M.J. 504 (A.C.M.R. 1989). Accordingly, if his presence is known—but his UA status is unknown to competent authority—his absence is not terminated.

1. ***Example.*** Accused is absent without authority from his unit in Korea. While away, he is apprehended by another command for other offenses, tried and punished at summary courts-martial. Later he is apprehended and tried for the entire period of absence, including the period in which the summary courts-martial occurred.

Held: Guilty. The accused's presence at the other command was not done with the intent to terminate his absence and was certainly a casual undertaking. There was no cause for military authorities to know of his absence and, therefore, it was never terminated. *Jackson, supra.*

2. ***Some of the more common examples of casual presence are***:

a. Returning to the office temporarily for one's own purposes is insufficient to terminate the absence. *United States v. Norman*, 9 C.M.R. 496 (A.B.R. 1953).

b. While overseas, reporting to the American Vice Counsel to obtain a passport. A simple visit to the U.S. Legation cannot be construed as a return to military control. *United States v. Morris*, 11 C.M.A. 16, 28 C.M.R. 240 (1959).

c. The accused's mere presence in his barracks on the host base was not the equivalent of presence with his unit. *United States v. Phillips*, 28 M.J. 599 (N.M.C.M.R. 1989).

d. Apprehension on other offenses when the accused fails to mention his status, or conceals critical information regarding unit or organization, does not terminate the absence. *United States v. Coglin*, 10 M.J. 670 (A.C.M.R. 1981), *petition denied*, 11 M.J. 173 (C.M.A. 1981); *United States v. Ziglinski*, 4 C.M.R. 209 (A.B.R. 1952); *Jackson, supra.*

e. Telephone calls to military authorities does not terminate the absence. The accused must take an affirmative action beyond the phone call in order to terminate the absence. *United States v. Fritz*, 31 M.J. 661 (N.M.C.M.R. 1983); *United States v. Dubry*, 12 M.J. 36 (C.M.A. 1981); *United States v. Baughman*, 8 M.J. 545 (C.G.C.M.R. 1979); *United States v. Anderson*, 1 M.J. 688 (N.C.M.R. 1975).

f. Consultation with Navy chaplain was insufficient to terminate absence. *United States v. Claussen*, 15 M.J. 660 (N.M.C.M.R.), *petition denied*, 17 M.J. 197 (C.M.A. 1983); *but see United States v. Rayle*, 6 M.J. 836 (N.C.M.R. 1979) (disclosure of status and willingness to surrender to military physician sufficient, despite the fact that the physician did not exercise any control over the accused).

It is important to note that the doctrine of casual presence, applicable in determining the termination of an unauthorized absence does not have an application to the inception of the absence. *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993).

D. ***Apprehension by civil authorities without prior military request.*** Unless the servicemember is being apprehended due to a DD Form 553 request, a UA terminates when civil authorities notify military authority that they are holding the accused and that he is available for return to military control. Part IV, para. 10c(10)(e), MCM (1995 Edition). If the

accused is apprehended by civilian authorities, the accused's UA status does not terminate until military authorities are notified that the accused is available for return to military control in the absence of a DD 553— regardless of the disposition of the civilian case. *United States v. Lamphear*, 23 C.M.A. 338, 49 C.M.R. 742 (1975).

E. ***Evidentiary problems.***

1. ***Early termination date.*** If the government proves the inception date alleged—however, the evidence indicates that the absence terminated a date earlier than the one alleged in the specification—the accused may be properly convicted of the lesser period of time. *Fritz, supra; United States v. Reeder*, 22 C.M.A. 11, 46 C.M.R. 11 (1972).

2. ***Later inception date.*** If the government proves an inception date later than the one alleged, and a termination date as alleged, the accused may be properly convicted of the lesser period. *United States v. Harris*, 21 C.M.A. 590, 45 C.M.R. 364 (1972).

3. ***Single absence instead of multiple absences.*** If the government alleges two distinct periods of UA, but the proof shows only one continuous absence encompassing both time periods, the accused can be properly convicted only of the specification containing the proven inception date. *United States v. Moore*, 1 M.J. 940 (N.C.M.R. 1976); *see also Fritz, supra.*

4. ***Early termination and subsequent absence.*** If the government alleges one absence, but the evidence proves two distinct periods of UA which fall within the period alleged, the accused can be convicted of both. The maximum punishment, however, will be limited to the maximum for the offense charged. *United States v. Francis*, 15 M.J. 424 (C.M.A. 1983). For example, if Seaman A is charged with an absence from 1 January 19CY to 1 August 19CY, but the defense presents evidence that the accused surrendered to authorities on 10 January and then absented himself again, the accused could be convicted of two periods of absence. (1 specification from 1-10 January 19CY, and 1 specification from 10 January to 1 August 19CY). The punishment, however, would be limited to the maximum punishment allowable for an absence from 1 January until 1 August.

5. ***Former jeopardy.*** If the court-martial convicts the accused of a lesser period, he may not be tried again upon the original time periods. Former jeopardy would prevent such a prosecution. *United States v. Lynch*, 47 C.M.R. 143 (A.C.M.R. 1973), *aff'd*, 22 C.M.A. 457, 47 C.M.R. 498 (1973); *Francis, supra.*

0308 AFFIRMATIVE DEFENSES

A. ***Generally.*** Affirmative defenses to UA are generally based upon the theory that an absence which is due to no fault of the absentee is not a crime and should be excused. Part IV, para. 10c(6), MCM (1995 Edition), provides: "When, however, a person or [sic] authorized leave, without fault, is unable to return at the expiration thereof, that person has not committed the offense of absence without leave."

B. ***Types of affirmative defenses.*** There are generally three types of affirmative defenses to UA offenses: mistake of fact; ignorance of fact; and impossibility.

1. ***Mistake of fact.***

a. ***Article 86(1), 86(2), and nonaggravated 86(3) offenses.*** These offenses are general intent crimes. No specific intent is necessary to convict an accused of these offenses. In order to constitute an offense, therefore, any mistake of fact must be honest and reasonable. *United States v. Holder*, 7 C.M.A. 213, 22 C.M.R. 3 (1956); *United States v. Graham*, 3 M.J. 962 (N.C.M.R.), *petition denied*, 4 M.J. 124 (C.M.A. 1977). The honest and reasonable standard is significant because it places a higher standard upon the accused. For example, an accused who honestly believes that he does not have duty, yet intentionally fails to check the roster, would not be entitled to a mistake of fact defense because his conduct would be unreasonable.

b. ***Aggravated Article 86(3) offenses.*** Many aggravated Article 86(3) offenses are specific intent crimes. Accordingly, a mistake of fact defense would only require that the mistake be an honest one instead of an honest and reasonable mistake.

2. ***Ignorance of fact.***

a. ***Article 86(1) and 86(2) offenses.*** Knowledge is an affirmative element which must be established by the government in order to prove an Article 86(1) or 86(2) offense. Accordingly, a claim of ignorance or lack of knowledge would simply be a general defense and not an affirmative defense.

b. ***Article 86(3) offenses.*** Knowledge is not an element of an Article 86(3) offense. Presumably, therefore, the lack of knowledge, or ignorance of the accused regarding his need to be at his unit or organization, would raise an affirmative defense. There is no case law addressing this area, yet, this logic appears consistent with the language of the Court of Military Appeals in *Holder, supra*. The most likely time that this issue would arise would come when someone is on authorized leave and the command attempts to notify them of the cancellation of that leave.

3. ***Impossibility.*** If a servicemember is unable to return to his unit prior to

the expiration of leave or liberty due entirely to the existence of a mishap, he may have a valid impossibility defense. The defense only exists if the mishap is neither foreseeable or due to the service members own fault. *United States v. Williams*, 21 M.J. 360 (C.M.A. 1986). Thus, if the problem could have been foreseen—or it was due to the accused own negligence—no valid defense exists. Additionally, the defense only exists if the impossibility arose before the accused's absence became unauthorized. Part IV, para. 10c(6), MCM (1995 Edition); *United States v. Moore*, 6 M.J. 644 (N.C.M.R. 1978).

a. ***Some examples of foreseen mishaps.***

(1) An accused who missed the train, but needed to return to his duty station, had no valid defense. *United States v. Cliette*, 7 C.M.R. 406 (A.B.R. 1952).

(2) An accused who got on the wrong airplane did so due to his own negligence and, as such, had no valid defense. *United States v. Mann*, 12 C.M.R. 367 (A.B.R. 1953).

(3) An individual who remained at the scene of an accident only to assist was absent not due to an impossibility, but as a convenience to others. Accordingly, the accused had no valid defense. *United States v. Scott*, 9 C.M.R. 241 (A.B.R. 1952).

(4) An accused who voluntarily remained with his car as it was being repaired did not have a valid defense. *United States v. Kessinger*, 9 C.M.R. 261 (A.B.R. 1952). *But see United States v. Lee*, 16 M.J. 278 (C.M.A. 1983). (It is incumbent upon the military judge to thoroughly inquire into the specifics of the accused's potential defense during the providence inquiry. Failure to perform this inquiry will lead to a reversal of the findings.)

(5) An accused's need to pick up his children and take them home, preventing him from returning to work at the appointed time, did not rise to the level of a valid defense. *United States v. Smith*, 34 M.J. 1002 (A.C.M.R. 1992).

b. ***Three general categories of occurrences that are not foreseeable.*** There are three general categories of unforeseeable mishaps: (1) impossibility due to acts of God; (2) impossibility due to acts of a third party; and (3) impossibility due to physical disability / inability.

(1) ***Impossibility due to acts of God.*** An unexpected, sudden natural occurrence which is the sole cause of the accused's absence would amount to a defense (e.g., an unexpected flood, snowstorm, hurricane, or earthquake). If the particular occurrence is expected to occur, however, it is not a defense because it is foreseeable. For example, in the area where snowstorms customarily occur during a particular season, one must anticipate an ordinary snowfall to occur and take appropriate

action to ensure timely arrival. In the event that a particularly severe storm is forecasted, one must act accordingly.

(2) ***Impossibility due to acts of a third party.***

(a) ***Wrongful acts of another.*** If the accused's failure to arrive back from leave or liberty is due entirely to the wrongful acts of another, a valid defense would exist. For example, if the accused is returning to work with plenty of time to spare and is involved in an accident not due to his own fault, a valid defense exists. The accused must, however, exert sufficient effort to overcome this inability and attempt to report at the appropriate time and place. *Williams, supra.*

(b) ***Detention by civilian authorities.*** If the absentee is on leave or liberty, and is held beyond that period by civilian authorities due to no fault of his own, he will have a valid defense to an absence offense due to impossibility.

-1- ***Tried by civilians and acquitted of the offense for which he was detained.*** If the accused is found to be not guilty of the civilian charges, he was detained by civilian authorities and unable to return due to no fault of his own. In this circumstance, the accused has a valid defense. Part IV, para. 10c(6), MCM (1995 Edition).

-2- ***Tried by civilians and convicted of the offense for which he was detained.*** If the accused is found guilty, his absence was caused by his own fault and is not excused. *United States v. Myhre*, 9 C.M.A. 32, 25 C.M.R. 294 (1958). In such a situation, the UA period begins at the time his leave or liberty was due to expire.

-3- ***Not tried by civilians (or tried, but no verdict was returned).*** In the event that there is no finding as to the accused's guilt or innocence regarding the offense for which he was detained, the military may choose to litigate the issue. The accused will only be guilty of the absence if the prosecution can prove that he is guilty of the offense for which he was detained. *United States v. Sprague*, 25 M.J. 743 (A.C.M.R. 1987). Therefore, in the event that the government intends to prosecute the accused for the absence offense, there are two options:

-a- Charge the accused with the UA offense. Present prima facie case in the case-in-chief and allow the defense to raise the affirmative defense of impossibility. If this defense is raised, then prove that the accused actually committed the crime for which the civilian authorities detained him—thus establishing that his absence was through his own fault.

-b- Charge the accused with the

absence offense **and** the offense for which he was detained. Only if he is found guilty of the later offense can he be guilty of the absence. *But see* JAGMAN, § 0124 (limitations upon retrying a case previously adjudicated in another forum.)

(c) ***Impossibility must occur while the accused is in a leave / liberty status.*** If the accused is an unauthorized absentee when he is picked up and detained, his detention will not constitute a valid defense for any period of his detention. He is an unauthorized absentee for the entire period. The accused's UA status does not change due to the creation of an impossibility. Part IV, para. 10c(6), MCM (1995 Edition). *But see United States v. Grover*, 10 C.M.A. 91, 94, 27 C.M.R. 165, 168 (1958), in the event that the accused makes efforts to terminate his absence while in condition of impossibility.

(d) ***Delivery to civilian authorities pursuant to Article 14, UCMJ.*** A member of the armed forces who has been turned over to civil authorities upon their request is not absent without authority. Part IV, para. 10c(5), MCM (1995 Edition).

> ***Example.*** Commanding officer gives accused permission to attend a civilian court session. Accused attends session and is immediately taken to jail and imprisoned. Accused pleads guilty to a period of unauthorized absence while in civilian confinement. ***Held:*** Not Guilty. Conviction is reversed because accused's plea is improvident. The commanding officer authorized the accused's absence from the command. *See, e.g., Urban, supra.*

(e) ***General rules regarding detention by civilian authorities.***

Result of Civilian Trial	Accused UA When Detained	Accused on Leave or Liberty when Detained
Acquittal	Guilty of UA	Not Guilty of UA
Conviction	Guilty of UA	Guilty of UA
Release without completed trial	Guilty of UA	Guilt of UA depends on determination by court-martial of his guilt of offense for which he was detained.

(3) ***Impossibility due to physical disability.***

(a) ***Generally.*** If a service member is on leave or liberty and fails to return to his unit because of a physical inability, not due to his own fault, a defense to the absence exists.

(b) ***Must not be due to the accused own fault.*** In order for the defense to be valid, the accused cannot be responsible for creating the disability. For example, if the accused cannot report to work because he is still intoxicated from the previous night's overindulgence, he does not have a valid defense. Similarly, he cannot claim a physical inability defense when he has been apprehended for breaking the law. The disability or inability must be to the accused and not a third party. Thus, an individual whose wife has taken ill cannot use that to support this type of defense.

(c) ***Examples of a valid defense to physical disability:***

-1- While on leave, the accused was stricken with a recurring illness which forced his absence. *United States v. Phillips*, 14 C.M.R. 472 (N.B.R. 1953).

-2- Accused was on liberty when he was struck on the head and robbed. Due to his head injury, he was unable to return to his unit. *United States v. Mills*, 17 C.M.R. 480 (N.B.R. 1954).

-3- While on leave, the accused became too sick to travel. This illness made it impossible for him to return to his duty station. *United States v. Edwards*, 18 C.M.R. 830 (A.B.R. 1955).

4. ***Other defenses.*** Most of the defenses discussed in Chapter 10 of this Study Guide may be applied to absence offenses. Three additional defenses, however, are highlighted below.

a. ***Drunkenness.*** Voluntary intoxication can be a defense to a specific intent offense. Accordingly, if the accused is charged with an aggravated Article 86(3) offense, evidence of intoxication may be relevant. Evidence of intoxication, however, may also be relevant in determining the termination date of an absence. *See United States v. Coleman*, 34 M.J. 1020 (A.C.M.R. 1992) (court reduced absence to one day vice four days when evidence reflected the accused returned to the barracks over the weekend—after a one-day overindulgence).

b. ***Duress.*** The duress defense has been used successfully in absence offense cases. The defense is allowed when an individual possesses a reasonably-grounded fear that they would suffer serious bodily injury, and this fear compelled their

absence. In *United States v. Roberts and Sutek*, 14 M.J. 671 (N.M.C.M.R. 1982), *rev'd in part*, 15 M.J. 106 (C.M.A. 1983), the Navy-Marine Corps Court of Military Review considered the duress defense and reversed the conviction of a woman who claimed to have absented herself in order to avoid bodily harm (hazing) aboard her ship. Notwithstanding, the Court upheld the husband's UA conviction when he absented himself to assist his wife. *But see United States v. Roberts*, 15 M.J. 106 (C.M.A. 1983)(the Court of Military Appeals reversed the husband's previous UA conviction and allowed the duress defense). *See also United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983) for a discussion of the racial harassment duress defense.

c. ***Statute of limitations.*** Article 43, UCMJ, creates the statute of limitations for all military offenses. In 1986, Article 43 was rewritten— creating a different statute of limitations. The new statute of limitations applies to all UA's commencing ***on*** or ***after*** 14 November 1986. Accordingly, one must first determine which statute of limitations applies to the case.

(1) ***Absences commencing before 14 November 1986.*** The old Article 43 provides for a three-year limitation for desertion and a two-year limitation for unauthorized absence. In the event that the absence occurs during a time of war, there is no statute of limitations. Below are a few special considerations when dealing with the older statute of limitations:

(a) ***Tolling the statute.*** The only way that the statute of limitations may be properly tolled is when sworn charges have been received by an officer exercising summary court-martial jurisdiction. *United States v. Tunnell*, 23 M.J. 110 (C.M.A. 1986).

(b) ***Reducing the days.*** It may be possible to not count the days in which the United States had no authority to apprehend the accused (i.e. when in a foreign country) [*United States v. Wallen*, NCM 77-0682 (N.C.M.R. 1 June 1977)] or when the accused was in civilian custody [*United States v. Robinson*, NCM 76-0477 (N.C.M.R. 12 April 1976).

(c) ***Manipulation of dates is impermissible.*** Any attempt to subvert the statute of limitations through the pleading process will be closely scrutinized. *United States v. Newton*, 11 M.J. 580 (N.M.C.M.R. 1980); *United States v. Dufour*, 15 M.J. 1016 (A.F.C.M.R. 1983) (five-year UA was charged as a two-year absence in an attempt to resurrect the charges which were never tolled).

(2) ***Absences commencing after 14 November 1986.*** The new Article 43 eliminates a statute of limitations for any absence offenses. Additionally, all periods of UA are excluded from computing the statute of limitations for all other offenses.

0309 DESERTION (Key Numbers 655-666)

A. ***Text of Article 85(a), UCMJ.***

(a) Any member of the armed forces who –

(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently;

(2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or

. . . is guilty of desertion.

B. ***Generally.*** There are three separate offenses created by Article 85. These offenses are:

1. Unauthorized absence with the specific intent to remain away from one's unit, organization, or place of duty permanently;

2. unauthorized absence with the intent to shirk important service or avoid hazardous duty; and

3. attempted desertion.

Each of these offenses is an independent and distinct crime. This portion of the chapter shall discuss each of these crimes individually.

C. ***Unauthorized absence with the intent to remain away permanently.***

1. ***Elements.***

a. That the accused absented himself from his unit, organization, or place of duty;

b. that such absence was without authority;

c. that the accused, at the time the absence began or at some time during the absence, intended to remain away from his unit, organization, or place of duty permanently; and

d. that the accused remained absent until the date alleged.

2. ***Generally.*** The elements indicate that this offense is simply a UA when the accused has the specific intent to remain away from his unit, organization, or place of duty permanently. This is a specific intent offense. The specific intent aspect of the offense is the most difficult to prove.

3. ***Requisite intent.*** The intent required for this offense is that the accused intended to permanently remain away from his unit, organization, or place of duty. It does not require that the accused intended to remain away from the U.S. Navy or his particular armed service. An accused's claim that he wants to stay in the Navy, but leave his unit, is not a defense to this crime. Part IV, para. 9c, MCM (1995 Edition).

4. ***Duration of intent.*** The intent to remain away permanently does not have to exist throughout the entire period of the absence. Instead, it is only necessary that the accused formulate this specific intent at some time during the absence. Desertion is an instantaneous offense. Any time the accused attains this intent, the crime is complete. An accused who changes his mind does not have a defense. Part IV, para. 9c, MCM (1995 Edition).

5. ***Evidence of the intent to remain away permanently.*** The intent to remain away permanently is very difficult to prove. It may, however, be established by direct or circumstantial evidence. In determining the accused's intent, all the evidence in the case must be carefully weighed. No single factor will be determinative of the issue of intent. The following examples may, when considered with all of the other evidence in a case, support an inference of an intent to remain away permanently:

a. Reenlistment in the same or another armed service [Article 85a(3), UCMJ; *United States v. Huff*, 7 C.M.A. 247, 22 C.M.R. 37 (1956)];

b. a prolonged absence;

c. disposal of the accused's military uniforms or military identification;

d. purchase of a one-way ticket to a distant place, especially when the new location is not the servicemember's home of record;

e. changing name, assuming an alias or a new identity;

f. obtaining civilian employment;

g. failing to surrender when in the vicinity of military authority;

h. leaving the country;

i. commencing an absence while awaiting trial on other charges;

j. terminating the absence by apprehension [*United States v. Krause*, 8 C.M.A. 746, 25 C.M.R. 250 (1958)]; or

k. history of prior UA's [*United States v. Wallace*, 19 C.M.A. 146, 41 C.M.R. 146 (1969)].

6. ***Totality of the Circumstances.*** None of these factors is determinative of the intent to remain away permanently. Each, in conjunction with other factors, could be sufficient to prove the requisite intent. In *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969), for example, the Court of Military Appeals emphasized that the length of the accused's absence, standing alone, was insufficient to establish the intent required for desertion. However, the court concluded that the length—in conjunction with the fact that the accused was apprehended 3,000 miles from his duty station—supported an inference of an intent to remain away permanently. *See also Krause, supra*; *United States v. Horner*, 32 M.J. 576 (C.G.C.M.R. 1991).

D. ***Unauthorized absence with the intent to shirk important service or to avoid hazardous duty.***

1. ***Elements.***

a. That, at the time and place alleged, the accused absented himself from his unit, organization, or place of duty;

b. that such absence was without authority;

c. that the accused had, at the time of the absence, an impending duty which was hazardous or impending service which was important;

d. that the accused knew of the impending duty or service at the time of the absence; and

e. that the accused absented himself from his unit, organization, or place of duty with the intent of avoiding the duty or shirking the service.

2. ***Generally.*** The gravamen of this offense is that the accused absented himself with the specific intent to avoid hazardous duty or important service. Accordingly, the government must prove that the accused had actual knowledge of the hazardous duty or important service. Part IV, para. 9c(2)(c), MCM (1995 Edition). Avoiding hazardous duty must be the specific intent for, rather than a consequence of, the absence. *United States v. Stewart*, 19 C.M.A. 58, 41 C.M.R. 58 (1969). The accused's intent may be shown by acts or declarations of the accused before and during the absence. *United States v. Huet-Vaughn*, 39 M.J. 545 (A.C.M.R. 1994).

3. ***Terminology.***

a. "Hazardous duty" includes duty in a combat area or any duty performed before—or in the presence of—the enemy, a rebellious mob, or a band of renegades. It is not limited to actual front-line combat. Part IV, para. 9c(1)(a), MCM (1995 Edition); *United States v. Smith*, 18 C.M.A. 46, 39 C.M.R. 46 (1968) (hazardous duty can exist in peace or wartime).

b. "Important service" is service above and beyond ordinary service. *United States v. Gonzalez*, 39 M.J. 742 (N.M.C.M.R. 1994). There must be a "critical quality" to the duty to make it "important." *United States v. Deller*, 3 M.J. 409, 412, 12 C.M.R. 165, 168 (1953). Examples of "important service" are:

(1) Attending basic training [*Deller, supra*];

(2) member of a rifle company in a war zone [*United States v. Gaines*, 17 C.M.A. 481, 38 C.M.R. 279 (1968) (Vietnam); *but see United States v. McKenzie*, 14 C.M.A. 361, 34 C.M.R. 141 (1964) (infantryman ordered to duty in Korea in 1962 was not assigned to "important service" as required by Article 85)];

(3) cook aboard an icebreaker operating in the Antarctic [*United States v. Merrow*, 14 C.M.A. 265, 34 C.M.R. 45 (1963)];

(4) servicemember assigned to a Coast Guard vessel performing surveillance of foreign fishing trawlers [*United States v. Tiller*, 48 C.M.R. 583 (C.G.C.M.R. 1974)]; and

(5) collecting military intelligence for a unit about to be deployed to a combat area. *United States v. Pruner*, 37 M.J. 573 (A.C.M.R. 1993), *review denied* 39 M.J. 389 (C.M.A. 1993).

The following have been found not to be areas of "important service" for purposes of Article 85:

(a) Attending ones own court-martial [*United States*

v. Walker, 26 M.J. 886 (A.F.C.M.R.), *petition denied*, 27 M.J. 463 (C.M.A. 1988)]; and

(b) accused attempting to avoid brig time was not considered to be "important service" for purposes of Article 85 [*United States v. Wolff*, 25 M.J. 752 (N.M.C.M.R. 1987)].

c. "Quits" within the statute refers to when an accused "goes absent without authority." *United States v. Bondar*, 2 C.M.A. 357, 8 C.M.R. 157 (1953). It is not necessary that the accused report to the place of hazardous duty or important service in order to "quit" it. The gravamen of the offense is deliberately avoiding the hazardous duty or important service.

4. ***Factual issue***. The question of whether the duty constitutes "important service" or "hazardous duty" is an **objective** question of fact dependent on evidence of circumstances surrounding the service to be performed. *United States v. Gonzales*, 42 M.J. 469 (C.A.A.F. 1995); Part IV, para. 9c(2)(a), MCM (1995 Edition); *United States v. Kim*, 35 M.J. 553 (A.C.M.R. 1992). Whether an intent to avoid some particular service existed is a **subjective** question of fact depending on proof of his direct statements or circumstances reflective of his state of mind. *Gonzalez, supra* at 472. Notwithstanding, intent to avoid hazardous duty or to shirk important service is usually inferred by the fact finder from circumstances surrounding the absence. *United States v. Gonzalez*, 39 M.J. 742 (N.M.C.M.R. 1994).

E. ***Attempted desertion***.

1. ***Elements***.

a. That the accused did a certain overt act;

b. that the act was done with the specific intent to desert;

c. that the act amounted to more than mere preparation; and

d. that the act apparently tended to effect the commission of the offense of desertion.

2. ***Generally***. Article 85 is one of five punitive articles that contain the offense of attempt as an offense in addition to the principal offense. Therefore, an attempt to desert is charged as an offense under Article 85 and not under Article 80. *See United States v. Johnson*, 7 C.M.A. 488, 22 C.M.R. 278 (1957).

3. ***Lesser included offenses***. Article 85 does not encompass attempted UA. However, attempted UA under Article 80 can be an LIO to desertion or attempted

desertion under Article 85. *United States v. Evans*, 28 M.J. 753 (A.F.C.M.R.), *petition denied*, 29 M.J. 332 (C.M.A.).

F. ***Defenses.*** The same affirmative defenses are available for desertion as were discussed earlier regarding UA's under Article 86. Desertion is a specific intent offense. Accordingly, any mistake of fact defense need only show that the mistake was honest, vice honest and reasonable. *United States v. Holder*, 7 C.M.A. 213, 22 C.M.R. 3 (1956). The Rules for Courts-Martial also provide for a novel motion to dismiss in desertion cases—entitled "constructive condonation of desertion." It would behoove counsel to review R.C.M. 907(b)(2)(D)(iii), MCM (1995 Edition), and *United States v. Scott*, 6 C.M.A. 650, 20 C.M.R. 366 (1956) when faced with a desertion charge.

G. ***Pleadings and instructions.***

1. ***General rules.*** A specification should state that the absence was "without authority." However, the words "absent in desertion" have been found to be sufficient in the event that "without authority" is not placed into the specification. *United States v. Ermitano*, 19 M.J. 626 (N.M.C.M.R. 1984); *United States v. Lee*, 19 M.J. 587 (N.M.C.M.R. 1984), *petition denied*, 20 M.J. 322 (C.M.A. 1985). Counsel should avoid creativity in the creation of a specification. Excessive language could result in failing to state an offense. *United States v. Galloway*, 34 M.J. 1017 (A.C.M.R. 1992) (language that the accused deserted by "fleeing prosecution" with the intent to remain therefrom permanently created new offense—Article 85 conviction reversed).

2. ***Desertion with intent to remain away permanently, terminated by apprehension.***

a. ***Sample specification.*** Part IV, para. 9f(1), MCM (1995 Edition).

> ***Charge***: Violation of the Uniform Code of Military Justice, Article 85.
>
> ***Specification***: In that Seaman Recruit Jonathan B. Rollo, U.S. Navy, USS NEVERSINK, on active duty, did, on or about 1 January 19CY, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: USS NEVERSINK, located at Newport, Rhode Island, and did remain so absent in desertion until he was apprehended on or about 22 February 19CY.

b. ***Sample instruction.*** *Military Judges' Benchbook*, DA Pam. 27-9 (1996), Inst. No. 3-9-1, p. 182.

3. ***Desertion with intent to remain away permanently, "terminated otherwise"*** (i.e., other than by apprehension)

a. ***Sample specification.*** Part IV, para. 9f(1), MCM (1995 Edition).

> ***Charge***: Violation of the Uniform Code of Military Justice, Article 86.
>
> ***Specification***: In that Seaman Recruit Jonathan B. Rollo, U.S. Navy, USS NEVERSINK, on active duty, did, on or about 1 January 19CY, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: USS NEVERSINK, located at Newport, Rhode Island, and did so remain absent in desertion until on or about 22 February 19CY.

b. ***Sample instruction.*** The same instruction as above applies except that, since it is not alleged, the military judge could not instruct upon apprehension—nor can the accused be convicted of or punished for it.

0310 MISSING MOVEMENT (Key Numbers 673-678)

A. ***Text of Article 87, UCMJ.***

> Any person subject to this chapter who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

B. ***Generally.*** Article 87 was designed to address all incidents when the accused is scheduled to move with his ship, aircraft, or unit and fails to do so. There are two offenses created by Article 87. These offenses are:

1. Missing movement through design; and

2. missing movement through neglect.

C. ***Elements.*** The two offenses are identical, but for the intent element. One crime, the more severe offense, addresses the servicemember who misses a movement through his own design (intentionally). The other offense addresses a movement which is negligently missed. The elements for each offense are:

1. That the accused was required in the course of duty to move with a ship, aircraft, or unit;

2. that the accused knew of the prospective movement;

3. that the accused missed the movement; and

4. that the accused missed the movement through design or neglect.

D. ***Element 1***. That the accused was required in the course of duty to move with a ship, aircraft, or unit.

1. ***Generally***. Article 87, UCMJ, indicates that guilt under this article is predicated upon the duty to move with a ship, aircraft, or unit. As such, two questions must be addressed. Initially, whether the accused is required to move. Secondarily, whether the accused must move with something that can be considered a ship, aircraft, or unit.

2. ***Duty to move***. This element requires the same proof necessary in order to show an Article 86 absence offense. Proof of a UA at the time that the ship, aircraft, or unit moved would also prove that the accused should have moved with the unit and had no authority to miss the movement. *United States v. Posnick*, 8 C.M.A. 201, 24 C.M.R. 11 (1957).

3. ***What is a "unit"***?

a. The term "unit" is not limited to any specific technical category such as those listed in a Table of Organization and Equipment. "Unit" only requires that there is an "integrity of organization" at the time of the move. *United States v. Smith*, 26 M.J. 276 (C.M.A. 1988); *United States v. Burke*, 6 C.M.R. 588 (A.F.B.R. 1952).

b. Permanent change of station or standard transfer orders—involving only one or several men—would not constitute the movement of a "unit." Rather, this is a transfer from one unit to another unit. *United States v. Jackson*, 5 C.M.R. 429 (A.F.B.R. 1952).

c. Once it is shown that there was a "unit" involved in the movement, the mode of transportation is not important. It could be either military or commercial and would include travel by ship, plane, truck, bus, or even forced march. Part IV, para. 11c(2)(a), MCM (1995 Edition); *United States v. Smith*, 34 M.J. 1004 (A.C.M.R. 1992); *see United States v. Pender*, 5 C.M.R. 741 (A.F.B.R. 1952) (railroad as an appropriate means of movement).

Example. Accused's unit (an artillery battery) was transferred from CONUS to West Germany. Accused was authorized to travel individually. Accused failed to travel at designated time. ***Held***: Accused guilty of UA. The court stated that a servicemember who is "transferred incident to the relocation of a unit and who willfully

absents himself incident to or in conjunction with the transfer is guilty of `missing movement.'" *United States v. Smith*, 26 M.J. 276 (C.M.A. 1988).

4. ***Ship or aircraft.*** In the event that the accused is to travel individually (i.e. not with his "unit"), it will be necessary to show that the accused missed the movement of a ship or aircraft.

a. ***Military vessel or aircraft.*** Evidence that the accused was to travel aboard a military vessel or aircraft would certainly be sufficient to fall within this provision. In the event that it is a military mode of transportation, the accused need not be assigned to the ship or aircraft. It is sufficient if the accused is merely assigned as a passenger. *See United States v. Graham*, 12 M.J. 1026 (A.C.M.R. 1982), *aff'd*, 16 M.J. 460 (C.M.A. 1983).

b. ***Military contracted vessel or aircraft.*** A person who is required to travel individually aboard a military contracted vessel may also be guilty of missing movement. Military Sealift Command (MSC) ships, for example, are considered military ships. While travel by MSC ships is no longer common, a person required to travel individually aboard one wrongfully misses its movement has violated Article 87. *United States v. Gallagher*, 15 C.M.R. 911 (A.F.B.R. 1954).

c. ***Civilian aircraft.*** If the servicemember is ordered to move individually on a commercial aircraft, he will only be guilty of missing movement if there is a nexus between missing the civilian flight, and the "foreseeable disruption to naval operations caused by missing the particular flight." *United States v. Gibson*, 17 M.J. 143, 144 (C.M.A. 1984).

– ***Examples of nexus issue.***

(1) Corpsman sent to Camp Lejeune, North Carolina, in support of Operation Desert Shield. Court found nexus between accused's absence and a foreseeable disruption to naval operations. *United States v. Ray*, 37 M.J. 1052 (N.M.C.M.R. 1993).

(2) Moving to and from an overseas duty station on PCS orders. *United States v. Blair*, 24 M.J. 879 (A.C.M.R. 1987), *aff'd*, 27 M.J. 438 (C.M.A. 1988).

(3) Accused given a commercial airline ticket to return to his command after period of UA. Court finds that there is no nexus with a foreseeable disruption to naval operations in that case. *United States v. Gibson*, 17 M.J. 143 (C.M.A. 1984).

E. ***Element 2.*** That the accused knew of the prospective movement.

1. ***Generally.*** In order to be found guilty of a missing movement offense, the accused must have had ***actual*** knowledge that the movement was going to occur. Part IV, para. 11c(5), MCM (1995 Edition). The knowledge need not be of the exact hour or date of the scheduled movement. Instead, it is sufficient if the accused is aware of the approximate date of the movement. *Id.; United States v. Balthazor,* 9 C.M.R. 549 (N.C.M.R. 1953).

2. Whether, through circumstantial or direct evidence, it must be proven that the accused had actually been informed of the prospective movement. Evidence that the accused had an "opportunity to know" of the movement is insufficient. *United States v. Chandler,* 22 C.M.A. 193, 48 C.M.R. 945 (1974) (publication in the plan of the day is insufficient evidence of knowledge); *United States v. Wahnon,* 49 C.M.R. 484 (C.G.C.M.R. 1974), *rev'd on other grounds,* 1 M.J. 144 (C.M.A. 1975) (proof merely that a chart listing future ship movements had been posted while accused was aboard was not sufficient to establish actual knowledge). Some examples of evidence which would be sufficient are:

a. Testimony that the accused was personally informed or present at quarters when the word was passed [*United States v. Bathazor,* 9 C.M.R. 549 (N.B.R. 1953)];

b. evidence that the scheduled movement was published in the plan of the day and had been brought to the attention of the accused [*United States v. Posnick,* 22 C.M.R. 681 (N.B.R. 1956)]; or

c. evidence of personal actions on the part of the accused which are apparently in response to knowledge of the scheduled movement [*United States v. Gallagher,* 15 C.M.R. 911 (A.F.B.R. 1954) (evidence of the accused preparing himself and his family for a return to the United States, attending a medical examination formation, and getting on board a bus which was designated to take the accused and his family to the ship was sufficient evidence of actual knowledge).

F. ***Element 3.*** That the accused missed the movement. In proving that the accused missed the movement, the government must address three issues. These issues are:

1. That the "movement" was a significant change of location;

2. that the "movement" actually did occur; and

3. that the accused actually missed the movement.

a. The government must first prove that the "movement" was a

significant change of location. "Movement," as used in Article 87, is a term of art, and failure of the military judge to define it in his instructions to the court is error. *United States v. Jones*, 1 C.M.A. 276, 3 C.M.R. 10 (1952). "Movement" contemplates a major transfer of a ship, aircraft, or unit involving a substantial distance and period of time. There are no specific times and distances which would make one movement more significant than another. Instead, a determination of whether a movement is substantial is a question to be determined by reviewing the duration, distance, and overall mission of the change of location. *United States v. Jones*, 1 C.M.A. 276, 3 C.M.R. 10 (1952); *United States v. Jones*, 37 M.J. 571 (A.C.M.R. 1993) (two-week exercise, five miles away was, under the facts and circumstances, a significant movement for purposes of Article 87).

b. Second, the government must prove that the "movement" actually did occur- if no movement took place, there is nothing to miss. *United States v. Kapple*, 36 M.J. 1119 (A.F.C.M.R. 1993), *rev'd on other grounds*, 40 M.J. 472 (C.M.A. 1994). If the scheduled movement is canceled, the offense of missing movement is not committed— regardless of the accused's purpose and absence at the scheduled time.

c. Third, the government would need to present evidence that the accused actually missed the movement. The fact that the ship was to depart at some particular time—and the accused was absent from his unit at that time—will not be sufficient to prove a missing movement offense. If the ship departs late and, due to the late departure, the accused, though late, arrived in time to depart with the ship, there would be no crime. A guilty plea to another specification alleging a UA covering the same period of time as alleged in a missing movement specification cannot be used to prove that the accused missed the movement. Independent evidence must be introduced to prove that he missed the movement. *United States v. Dorrell*, 18 C.M.A. 424 (N.B.R. 1954).

G. ***Element 4***. That the accused missed the movement through design or neglect.

1. "***That he missed the movement through design***."

a. Design means on purpose, intentionally, or according to plan and not merely carelessness or accident. *United States v. Clifton*, 5 C.M.R. 342 (N.B.R. 1952). "Design" implies premeditation and constitutes "specific intent."

b. Proving design. As in most cases involving specific intent (except where there is a statement by the accused that he intended to miss the movement), the government will have to prove the intent (design) to miss the movement by circumstantial evidence; that is, by proof of facts from which an inference of the specific intent to miss the movement may be drawn. Examples of the circumstantial evidence tending to show design to miss movement: Failure to get inoculations where the unit was scheduled for foreign duty; dislike of a particular duty station where the unit was scheduled for deployment; distaste for air travel.

2. ***"That the accused missed the movement through neglect."***

a. This Article 87 offense is intended to cover those situations where the accused does ***not*** consciously intend to avoid the scheduled movement, but through a negligent act or omission on his part fails to be present at the time of a scheduled movement. *United States v. Thompson*, 2 C.M.A. 460, 9 C.M.R. 90 (1953).

b. "Through neglect" means the omission by a person to take such measures as are appropriate under the circumstances to assure that he will be present with his ship, aircraft, or unit at the time of a scheduled movement, or the commission of some act without giving attention to its probable consequences in connection with the prospective movement.

c. In the ordinary missing movement case, the simple act of being UA at the time the ship is to sail, the aircraft to depart, or the unit to move, meets the requirement of this element and, if knowledge is proven, makes out a prima facie case of missing movement through neglect.

H. ***Multiple movements***. If the unit has arranged multiple movements in order to transfer the entire command, the accused may be convicted of multiple specifications of missing movement for missing each of the moves. *United States v. Bisser*, 27 M.J. 692 (N.M.C.M.R. 1988).

I. ***Defenses***. Since missing movement is an absence offense, the same affirmative defenses available to UA are available to this offense. Additionally, it is important to note that, if the accused is ordered to move, the order itself must be lawful. If the order is unlawful, the accused cannot be convicted of missing movement. *United States v. Wiley*, 37 M.J. 885 (A.C.M.R. 1993).

J. ***Pleadings and instructions***.

1. ***Sample specification***. Part IV, para. 11f, MCM (1995 Edition).

Charge: Violation of the Uniform Code of Military Justice, Article 87. ***Specification***: In that Fireman Henry Z. Voodoo, U.S. Naval Reserve, USS ZOMBIE, on active duty, did, at Kingston, Jamaica, on or about 23 September 19CY, through design, miss the movement of USS ZOMBIE with which he was required in the course of duty to move. (Note: Substitute "neglect" for "design" when appropriate.)

2. ***Sample Instruction.*** *Military Judges' Benchbook,* DA Pam. 27-9 (1996), Inst. No. 3-11-1.

ADMINISTRATIVE REMARKS
NAVPERS 1070/613 (Rev. 1-76)
S/N 0106-LF-010-6990

E-32
See BUPERSMAN 5030420

Error!----------
Error!SHIP OR STATION

USS NEVERSAIL (DD 838)

---

01 July 19CY: **On unauthorized absence from 0800, 01 July 19CY. Intentions unknown.**

/s/ J. D. BLOCKER
J. D. BLOCKER
Personnel Officer
By direction of
the Commanding Officer

NAME (Last, First, Middle)	SSN	BRANCH AND CLASS
BRANCH, Alvin Robert	**001-01-0001**	**USN**

OFFENSES AND PUNISHMENTS

840116:MARCORADMINDET, NETC, NPT, RI: UA(AWOL) fr this org since 0915, 840112. Abs reported on UD# 007-84 dtd 840116.

By dir

840122:MARCORADMINDET, NETC, NPT, RI: Fr UA(AWOL) at 2020, 840120 apprehended by civil auth at Johnston, RI and was del to this org at 2330, 840120. Termination of abs reported on UD# 012-84 dtd 840122.

By dir

840130:MARCORADMINDET, NETC, NPT, RI 02841

"I certify that I was given the opportunity to consult with a lawyer, provided by the government at no cost to me, in regard to the NJP held on 840130. I understand that I have the right to refuse that NJP, but I choose not to exercise that right."

840130:MARCORADMINDET, NETC, NPT, RI: Viol Art 86, UCMJ: Spec: UA(AWOL) fr 0915, 840112 to 2020, 840120. Awd Red to E-1, forf $100.00 pay per month for one month, restr for 30 days to the limits of NETC, NPT, and 30 days extra duties. Eff date of RED is 840130. Forf of $100.00 pay per month for one month is suspended for a period of three months, at which time, unless sooner vacated, will be remitted without further action. Awd at OIC's OH on 840130. Reported on UD# 016-84 dtd 840130. Not Appealed.

By dir

850409:MARCORADMINDET, NETC, NPT, RI: UA(AWOL) fr this org since 1330, 850408. Abs reported on UD# 096-85 dtd 850409.

By dir

850508:MARCORADMINDET, NETC, NPT, RI: UA(AWOL) fr this org since 1330, 850408. Declared deserter this date as of 0001, 850508, and dropped from the rolls this org on UD# 106-85 dtd 850508. DD 553 published this date.

By dir

GOOD CONDUCT MEDAL PERIOD COMMENCES:	ORGANIZED MARINE CORPS RESERVE MEDAL PERIOD COMMENCES:
EMBOSSED PLATE IMPRESSION	
MARINO DAN 000 11 2222	
Name (Last) (First) (Middle) SERVICE NO.	

NAVMC 118 (12) (Rev. 8/67) (PREVIOUS EDITIONS WILL NOT BE USED) OFFENSES AND PUNISHMENTS

NAVY UNAUTHORIZED ABSENCES

A. ***Policy***. The policies and procedures regarding UAs and desertion of enlisted members are found in MILPERSMAN, arts. 3020220, 3430100, 3430150, 3430200, 3430250, 3430300, 3430350, 3640450. Additionally, NAVADMIN 004/96 has modified where you send the forms, messages, and records until the changes contained therein are reflected in the next revision of the MILPERSMAN. Consult these sections for further amplification of the checklist given below.

B. ***Procedures***. The procedures for completing the service record entries can be found in the MILPERSMAN sections above and the DFAS Pay/Personnel Procedures Manual (Navy), Volume 2, Part B, Section 90435.

C. ***Checklist***.

1. When a member's period of unauthorized absence is 24 hours or less, immediately prepare a NAVPERS 1070/613, Administrative Remarks (Page 13) entry to the service record with the exact hour and date(s) of the UA's beginning and end, and circumstances of the UA.

2. When a member has been UA over 24 hours, prepare and distribute the NAVPERS 1070/606, Record of Unauthorized Absence (Page 6), in accordance with DFAS Pay/Personnel Procedures Manual, Part B, Section 90435. This will stop the servicemember's pay.

3. If the member misses movement, make a Page 13 entry to the absentee's service record, in accordance with MILPERSMAN 3430150, including details whether the absentee had knowledge of the time scheduled for the movement, whether the absentee knew of the ship's destination, and whether the movement was substantial as distinguished from a mere shifting of berths in the same harbor, or other minor movement.

4. On the 10th day of absence, notify the absentee member's next-of-kin, in accordance with MILPERSMAN 3430150, with a copy provided to the Staff Chaplain at the appropriate Naval Reserve Readiness Command within the geographical location of the addressee. The member's personal effects should be collected, inventoried, and placed in safekeeping. Additionally, the disbursing officer should stop all allotments by preparing a NAVCOMPT 3060.

5. On the 31st day of a member's unauthorized absence, prepare and submit the DD Form 553, Deserter/Absentee Wanted by the Armed Forces. The administrative date of desertion is the 30th day. In accordance with NAVADMIN 004/96, send this form to Chief Petty Officer-in-Charge, Navy Absentee Collection and Information Center Great Lakes, Naval Training Center, Building 2, Great Lakes, IL 60088-5702, along

with a copy of the member's NAVPERS 1070/602, Dependency Application/Record of Emergency Data (Page 2); DD 1966, Record of Military Processing-Armed Forces of the United States, 1 through 8 (Enlistment Forms); and any recent leave papers. This form may be submitted on an earlier date if the command believes that the member has expressed an intent to remain away permanently.

6. On the 31st day of a member's unauthorized absence, prepare and submit the Declaration of Desertion message to NACIC GREAT LAKES IL//JJJ//, in accordance with MILPERSMAN 3430250 and NAVADMIN 004/96. This message may be submitted on an earlier date if the command believes the member has expressed an intent to remain away permanently. Additionally, prepare a Page 13 service record entry containing all the information in the Declaration of Desertion message.

7. In numerous cases, deserters have not been brought to trial or have not been convicted due to a lack of sufficient documentary evidence to establish commission of the offense. Commands should not only ensure the complete and timely submission of documents, but should gather all evidence of the alleged desertion, such as witness statements, pending incident complaint reports, restriction orders, any relevant message traffic, and any documentation of other pending disciplinary action.

8. After 180 days of unauthorized absence, send the service record, personal financial record (PFR), and health and dental records to NACIC Great Lakes, IL, in accordance with NAVADMIN 004/96, in an envelope marked "DESERTER–DO NOT OPEN IN THE MAIL ROOM". Ensure that the following documents are complete, accurate, and included in the service record when it is forwarded: (1) NAVPERS 1070/606, Record of Unauthorized Absence; (2) Any applicable NAVPERS 1070/613 (Page 13); (3) Copy of NAVSUP 29, Inventory of Personal Effects (Lost-Abandoned-Unclaimed); (4) Copy of DD 553, Deserter/Absentee Wanted by the Armed Forces. The command will retain copies of the above documents, as well as a copy of the declaration of desertion message.

9. After 180 days, send the personal effects to Cheatham Annex, Naval Supply Center, Norfolk, VA, or to Naval Supply Center, Oakland, CA, per NAVSUP p-485, Transportation of Personal Property Afloat.

10. A deserter file should be retained by the command. It should include the following:

a. Copy of the NAVPERS 1070/606, Record of Unauthorized Absence;

b. Copy of any applicable NAVPERS 1070/613, Administrative Remarks

c. Copy of NAVSUP 29, Inventory of Personal Effects

d. Copy of DD 553;

e. Copy of Declaration of Desertion Message;

f. Copy of any statements taken regarding intent to desert, Incident Complaint Reports;

g. Copy of Enlisted Performance Evaluations;

h. Copy of last Leave and Earning Statement (LES);

i. Copy of any other relevant information/messages.

11. Upon return of a member from UA over 24 hours, but less than 10 days, complete Page 6, sending fourth copy to disbursing. This starts member's pay. Additionally, decide what type, if any, disciplinary action should be taken.

12. Upon return of a member from UA over 10 days, but less than 30 days, complete Page 6, sending fourth copy to disbursing to start member's pay. Prepare letter to next-of-kin notifying them of member's return. Additionally, decide what type, if any, disciplinary action should be taken.

13. Upon return of a member from UA over 30 days, complete Page 6, sending fourth copy to disbursing to start member's pay. Prepare letter to next-of-kin notifying them of member's return. Prepare Return of Deserter Message in accordance with MILPERSMAN 3430300 and NAVADMIN 004/96 if not done by an intermediate command. Additionally, decide what type, if any, disciplinary action should be taken.

MARINE CORPS UNAUTHORIZED ABSENCES

A. ***References***

1. MCO P5800.8, *Marine Corps Manual for Legal Administration* (LEGADMINMAN), Chapter 5

2. MCO P1080.35 (PRIM)

3. MCO P4050.38, *Marine Corps Personal Effects and Baggage Manual*

4. MCO P1070.12, *Marine Corps Individual Records and Administration Manual* (IRAM)

B. ***Checklist***

1. UA entry (in excess of 24 hours) run on unit diary.

2. Page 12 SRB "from UA" entry made (IRAM 4014).

3. Inventory of government and personal property of absentee accomplished within 24 hours.

4. After 48th hour of absence, ensure the CO telephoned NOK (if not in CONUS, only if dependents reside locally).

5. Prior to 10th day of UA, letter mailed to NOK and copy filed on document side of SRB (fig. 5-1, LEGADMINMAN).

6. Unit diary entry run declaring deserter status and dropping from roles to desertion on 31st day.

7. SRB pages 3, 12, and 23 completed per IRAM:

   a. Chronological record (page 3);

   b. offenses and punishments (page 12) administratively declaring deserter status and dropping from rolls; and

   c. markings page (page 23).

8. DD 553 prepared and distributed (per para. 5002 of LEGADMINMAN):

a. Date published matches that of page 12 entry date (normally 31st day of UA);

b. if insufficient information, priority message sent to MMRB-10;

c. if incomplete information, permission requested from MHL-30; and

d. original sent to CMC (MHL-30) (Report Symbol MC-5800-01) within seven days of administrative declaration of desertion on page 12.

9. DD 553 distributed properly (para. 5002.2e(4) LEGADMINMAN):

a. Copy on document side of SRB;

b. copy to NOK and all known associates; and

c. copy to units assigned admin responsibility and appropriate area police (*see* MCO 5800.10).

10. If deserter has dependents, see para. 5004 of LEGADMINMAN:

a. Retrieved dependent ID cards;

b. if ***not*** surrendered, notify local medical facilities and military activities;

c. a ***terminate*** DD 1172 submitted to DEERS; and

d. dependents directed to vacate quarters.

11. Return of deserter within 91 days:

a. "To UA" entry made in diary;

b. page 12 entry recording date, hour, and circumstances of return to military control (*see* 4014 of IRAM);

c. page 12 SRB entry made removing mark of desertion (not removed if apprehended and / or convicted by civil authorities except as per LEGADMINMAN); and

d. if mark of desertion removed, notify disbursing office in writing of removal per LEGADMINMAN.

12. If no return by 91st day of absence:

a. Audit of SRB, pages 3, 12, and 23 completed and entries correct; and

b. forward SRB along with health and dental records to CMC (MHL-30).

SAMPLE 10-DAY UA NOTIFICATION LETTER FOR NEXT OF KIN

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

I regret the necessity of informing you that your son, Yeoman Third Class Fred Paul Jones, who enlisted in the Navy on June 24, 19CY-2, and was attached to USS NEVERSAIL (AS 00), has been on unauthorized absence since June 25, 19CY. Should you know of his whereabouts, please urge him to surrender to the nearest naval or other military activity immediately since the gravity of the offense increases with each day of absence. At this time, all pay and allowances, including allotments, have been suspended pending return to Navy jurisdiction. Should he remain absent for 30 days, we will declare him a deserter and a federal warrant will be issued. Information will be provided to the National Crime Information Center wanted person's file, which is available to all federal, state, and local law enforcement agencies.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
(Apply name and address of Reserve chaplain nearest the absentee's home of record, according to NAVMILPERSCOMNOTE 1600)
Example:
Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

SAMPLE LETTER NOTIFYING NEXT OF KIN OF RETURN FROM UA

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

Please be advised that your son, Yeoman Third Class Fred Paul Jones, was returned to USS NEVERSAIL (AS 00), on December 24, 19CY. You may write to your son at the above address.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
(Include name and address of Reserve chaplain who was originally notified in the Letter of Notification sent out on 10th day)
Example:
Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

[UPON RETURN OF ABSENTEE TO PARENT COMMAND, PREPARE A LETTER NOTIFYING NOK OF MEMBER'S RETURN - NO SPECIFIC LANGUAGE IS DICTATED BY MILPERSMAN. LANGUAGE OF LETTER IS LEFT TO DISCRETION OF PARENT COMMAND. WE RECOMMEND THAT THIS LETTER NOT BE SENT UNTIL THE ABSENTEE IS PHYSICALLY BACK ON BOARD THE COMMAND. *SEE* MILPERSMAN 3430200.1.c]

CHAPTER IV

OFFENSES AGAINST AUTHORITY

0400 INTRODUCTION 4-1

SECTION ONE 4-1

0401 CONCEPTS COMMON TO ALL ORDERS OFFENSES 4-1
A. Lawfulness. 4-1
B. Specificity. 4-10
C. Redundancy. 4-12
D. Duty to obey. 4-13

0402 VIOLATION OF GENERAL ORDERS OR REGULATIONS 4-15
A. "Any person subject to this chapter who violates or fails to obey any lawful general order or regulation" 4-15
B. Essential elements 4-15
C. First element 4-16
D. Second element 4-18
E. Third element 4-19
F. Knowledge 4-20
G. Pleading 4-21
H. Sample specification 4-22
I. Sample Instructions 4-22

0403 VIOLATION OF AN "OTHER LAWFUL ORDER" 4-22
A. Text of Article 92(2), UCMJ 4-22
B. Essential elements of an article 92(2) offense 4-22
C. First element 4-22
D. Second element 4-23
E. Third element 4-24
F. Fourth element 4-24
G. Pleading, sample specifications, and instructions 4-25

0404 WILLFUL DISOBEDIENCE OF AN ORDER 4-27
A. Text of Article 90(2), UCMJ 4-27
B. Elements 4-27
C. First element 4-28
D. Second element 4-29
E. Third element 4-30
F. Fourth element 4-31
G. Pleading and instruction 4-32

H. Text of Article 91(2), UCMJ 4-32
I. Elements 4-32
J. First element 4-33
K. Second element 4-33
L. Third element 4-33
M. Fourth element 4-33
N. Fifth element 4-34
O. Pleading and instructions 4-34
P. LIO's of 90(2) and 91(2) 4-35
Q. The "ultimate offense" doctrine 4-35

SECTION TWO 4-37

0405 DERELICTION IN THE PERFORMACE OF DUTY 4-37
A. Text of Article 92(3), UCMJ 4-37
B. Dereliction 4-38
C. Elements 4-38
D. First element 4-38
E. Second element 4-39
F. Third element 4-40
G. Pleading 4-42
H. Sample instructions 4-43

0406 DISRESPECT TO SUPERIORS 4-43
A. Text of Article 89, UCMJ 4-43
B. Text of Article 91(3), UCMJ 4-43
C. Elements of article 89 4-43
D. Elements of article 91(3) 4-43
E. Superior commissioned officer 4-44
F. Knowledge of the status of the victim 4-44
G. The disrespect 4-44
H. Presence of the superior 4-46
I. Duty status of the victim at time of the disrespectful behavior 4-48
J. Pleadings 4-48
K. Disrespect as a lesser included offense to other offenses 4-49
L. Military Judge's Instructions 4-50

SECTION THREE 4-50

0407 COMPARISON AND RELATIONSHIP OF OFFENSES AGAINST AUTHORITY 4-50
A. Orders offenses 4-50
B. Dereliction in the performance of duty 4-52
C. Disrespect 4-52

0408 **DEFENSES TO OFFENSES AGAINST AUTHORITY** 4-54
A. Abandonment of rank 4-54
B. Impossibility of compliance with orders 4-54
C. Noncompliance because of a subsequent conflicting order. 4-56
D. The accused can raise the existence of an exception to an order as an affirmative defense. 4-56

CHAPTER IV

OFFENSES AGAINST AUTHORITY

0400 INTRODUCTION

This chapter analyzes different types of misconduct that involve offenses against authority. It discusses Articles 89 through 92 of the Uniform Code of Military Justice. The chapter is divided into three sections: The first will address orders offenses (violations of "general" and "other lawful" orders, and willful disobedience of orders from superiors); the second will analyze the offenses of dereliction of duty and disrespect; and the last will examine the relationship between these offenses and discuss certain defenses commonly encountered in this area of the law. As noted before, this chapter is about offenses against authority; other offenses which may be characterized as such, but which are also substantive crimes in and of themselves, are discussed in other sections of this study guide.

SECTION ONE

0401 CONCEPTS COMMON TO ALL ORDERS OFFENSES

Despite the wide variety of orders offenses, all of them possess certain common concepts. For example, all orders must be lawful if they are to be enforceable in a punitive forum. Some of these common indicia may be more easily understood in terms of defenses available to an accused charged with a particular orders offense. Thus, an accused charged with the willful disobedience of his superior commissioned officer has a defense to the charge if it is shown that the order was unlawful. This section discusses some of these common concepts.

A. ***Lawfulness.*** (Key Numbers 507-509, 527-529, 532-534, 679-686, 841). The determination of lawfulness of an order may be a question of law; in which case, the military judge rules finally. However, the question of lawfulness may rest on a factual issue; in which case, the question should be submitted to the court. *United States v. Avila*, 41 C.M.R. 654 (A.C.M.R. 1969). For example, the question whether or not the person who issued an order occupied a position which would authorize issuance is a factual determination. *United States v. Cassell*, NMCM 85-2178 (24 Jan 1986).

1. Inference of lawfulness.

a. "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate." Part IV, para. 14c(2)(a)(i), MCM (1995 Edition); *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986); *United States v. Smith*, 21 C.M.A. 231, 45 C.M.R. 5 (1972); *United States v. Hawkins*, 30 M.J. 682 (A.F.C.M.R. 1990); *United States v. Lusk*, 21 M.J. 695 (A.C.M.R. 1985).

b. The inference of lawfulness thus created by the MCM makes it unnecessary for the prosecution to introduce evidence to establish the lawfulness of an order. The accused has the burden of rebutting the inference; however, once rebutted, the prosecution must prove beyond a reasonable doubt that the order was lawful. *See United States v. Stewart*, 33 M.J. 519 (A.F.C.M.R. 1991); *United States v. Wine*, 28 M.J. 688 (A.F.C.M.R. 1989).

c. The inference of lawfulness does not apply to a patently illegal order (i.e., an order which a reasonable man would know is a demand to commit an obviously illegal act). *See* Part IV, para. 14c(2)(a)(i), MCM (1995 Edition); *United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973). However, the duty to disobey an unlawful order applies only to positive acts that constitute crimes and that are so manifestly beyond the legal power or discretion of the commander as to preclude rational doubt about their unlawfulness. *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). The order from an E-4 to an E-1 to continue driving a 2 1/2-ton truck with failing brakes was patently illegal and not a defense to the resulting death of a civilian. *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986).

2. The person issuing the order must have authority to give such an order. Authorization may arise by law, regulation, or custom of the service. *See United States v. Marsh*, 3 C.M.A. 48, 11 C.M.R. 48 (1953) and Part IV, para. 14c(2)(a)(ii), MCM (1995 Edition).

a. A commander has plenary power over his subordinate officers regarding command functions. In the ordinary course of his authority he can enlarge or restrict the powers of particular subordinates. *United States v. Gray*, 6 C.M.A. 615, 20 C.M.R. 331 (1956). In *Gray*, the Division Commanding General issued an order that "no personnel will be placed in pretrial confinement without prior approval of the division's SJA." The accused was placed in pretrial confinement by his company commander without such prior approval. He escaped and was charged with the offense of escape from confinement. ***Held***: The confinement was unlawful and, hence, he was not guilty of this offense. The Court of Military Appeals held, in *United States v. Young*, 1 M.J. 433 (C.M.A. 1976), that a subordinate commander may not impose haircut standards more stringent than promulgated by general regulations. *United States v. Garcia*, 21 M.J. 127 (C.M.A. 1985) (to the extent apparently conflicting orders can be read as compatible, the subordinate's order is also enforceable). A civilian DoD policeman cannot issue an order to a servicemember which can be enforced under 92(2) or 92(3). *United States v. Cassell*, NMCM 85-2178 (24 Jan 1986).

b. Subordinates may be empowered to give lawful orders to superiors. For example, sentinels or members of the armed forces police in the execution of their duties may lawfully issue orders to their superiors. *United States v. Stovall*, 44 C.M.R. 576 (A.F.C.M.R. 1971). *See also* Arts. 0842, 1004, 1025, 1038, and 1039, *U.S. Navy Regulations, 1990*, for other circumstances under which a subordinate may be empowered to give a lawful order to a superior.

c. Whether the issuance of a certain order is authorized may depend on the circumstances under which it is given. Winthrop, *Military Law* 576 (2d ed. 1926); *United States v. Robinson*, 6 C.M.A. 347, 20 C.M.R. 63 (1955). *See United States v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989).

(1) An order given during an emergency might be lawful, while the same order given under normal circumstances might not be lawful. For example: While flying over the Atlantic, a plane commander orders personnel to jettison all personal property including baggage, etc. Is this order lawful? Like all orders, it is inferred to be lawful. But, assume the reasons for the order are shown to be as follows:

(a) The plane commander wants the plane to go faster so he won't be late for a date. ***Order is unlawful.*** It is an order ". . . which has for its sole object the attainment of some private end . . . ." Part IV, para. 14c(2)(a)(iii), MCM (1995 Edition). The inference is rebutted. *Robinson, supra.*

(b) Two of the plane's four engines have quit and the plane is losing altitude. The ordered action may lighten the plane enough to enable it to return to base. ***Order is lawful.*** Evidence does ***not*** rebut; rather, it fully supports the inference.

(2) Geographical, political, or economic circumstances may have a bearing on whether a particular order is authorized.

(a) Activities of American military personnel in foreign countries may have different consequences as compared to the same activities performed in the United States. *United States v. Wheeler*, 12 C.M.A. 387, 30 C.M.R. 387 (1961) (marriage); *United States v. Manos*, 17 C.M.A. 10, 37 C.M.R. 274 (1967) (drinking age). *But see United States v. Nation*, 9 C.M.A. 724, 26 C.M.R. 504 (1958).

(b) In *United States v. Martin*, 1 C.M.A. 674, 5 C.M.R. 102 (1952), the accused was ordered by the XO not to barter cigarettes to the natives in a foreign port. American cigarettes were scarce and black markets flourished in the port. He was convicted of a violation of this order. ***Held***: Order was lawful. In view of the disorders created by such undercover transactions, and the difficulty in controlling them, the authority of the XO could reasonably include any order or regulation which would tend to discourage participation in such activities. Under the circumstances, the fact that the order prohibited the disposition of personal property owned by the accused does not render it unlawful. *See United States v. Lehman*, 5 M.J. 740 (A.F.C.M.R. 1978).

3. Orders which do not relate to a military duty are unlawful. Part IV, para. 14c(2)(a)(iii), MCM (1995 Edition); *United States v. Musguire*, 9 C.M.A. 67, 25 C.M.R. 329 (1958). To establish the illegality of the order, the accused must show that there is no rational connection between the order and proper military service objections and responsibilities. *Wine, supra.*

a. The term "military duty" includes not only those activities usually thought of as military duties, but also includes all activities which are reasonably necessary to safeguard or promote the morale, discipline, and usefulness of the members of any particular command and which are directly connected with the maintenance of good order. *United States v. Smith*, 25 M.J. 545 (N.M.C.M.R. 1987); *United States v. Sargeant*, 29 M.J. 812 (A.C.M.R. 1989). An order may not interfere with private rights or personal affairs absent a valid military purpose. *United States v. Stewart*, No. NMCM 9500960 (N.M. Ct. Crim App., Feb. 16, 1996).

b. Examples of orders which ***do*** relate to military duties:

(1) First sergeant's order directing accused to disassociate himself from his friend's dependent wife was lawful; marriage had not ended, several domestic disturbances had occurred at on-base quarters involving friend, friend's wife, and accused; and order was limited to the time during which the wife was married to the friend. *Wine, supra.*

(2) Order to "shut up" from superior petty officer immediately on heels of disrespectful language by subordinate towards superior commissioned officer, given to preclude additional disrespectful language, was a lawful order relating to maintenance of good order and discipline. *United States v. Claytor*, 34 M.J. 1030 (N.M.C.M.R. 1992).

(3) Order directing servicemember not to engage in sexual activity without informing his partner that he was infected with Human Immunodeficiency Virus (HIV) and to take precautions against spreading the virus, thereby preventing him from spreading the infection to the civilian population, was a public duty of the highest order and, thus, was a valid military objective. *United States v. Dumford*,

30 M.J. 137 (C.M.A. 1990), *cert. denied*, 498 U.S. 854, 111 S.Ct. 150, 112 L.Ed.2d 116 (1990).

c. Examples of orders which ***do not*** relate to military duties:

(1) Order to accused, who works in the paint shop, to paint the Admiral's privately owned automobile. Reason: Sole object is a private end. *United States v. Smith*, 1 M.J. 156 (C.M.A. 1975).

(2) An order not to consume alcoholic beverages could not properly be used as a diagnostic tool to see whether the individual involved was an alcoholic, as he would be identified if he disobeyed the order not to drink alcohol, and an order not to drink alcoholic beverages until the next alcoholic rehabilitation committee meeting was accordingly unlawful. *Stewart, supra*.

(3) Order to accused to donate money to charity. Reason: Donation is necessarily a matter of personal decision. If an order ***serves a military purpose***, however, the fact that an accused will have to expend funds to carry out the order will not render it unlawful. For example: An order to get a regulation haircut or to have a uniform cleaned relates to a military duty (proper appearance) and would be lawful, notwithstanding the fact that in carrying out the order the accused will be required to spend his own money. *See United States v. Gordon*, 3 C.M.R. 603, n.1 (A.F.B.R. 1952). However, if an accused has no funds when the order is given, this may constitute the defense of impossibility of compliance. *United States v. Pinkston*, 6 C.M.A. 700, 21 C.M.R. 22 (1956).

d. The fact that an ordered act will accomplish both a military and a private objective will not render the order unlawful. *United States v. Smith*, 25 M.J. 545 (N.M.C.M.R. 1987).

(1) Part IV, para. 14c(2)(a)(iii), MCM (1995 Edition), provides that an order which has for its ***sole*** object the attainment of some private end is unlawful.

(2) ***Example***. The accused was ordered to perform certain work in an Officers' Mess. He refused to comply, contending that the work he had been ordered to do was for the private benefit of the officers of the mess. ***Held***: Messing of officers at Fort McNair is a military necessity. While the individuals would benefit from his services, the work would also be performed for the benefit of the military command. *United States v. Robinson*, 6 C.M.A. 347, 20 C.M.R. 63 (1955).

e. *United States v. Dykes*, 6 M.J. 744 (N.C.M.R. 1978), contains an extensive discussion of the relationship between an order and military duty. After examining the circumstances, the military interest and the infringement on personal rights or interests of

the accused, the Navy court held that a general order prohibiting the possession of rolling papers and pipes was legal.

4. Orders that are contrary to the Constitution, provisions of an act of Congress are unlawful. Part IV, para. 14c(2)(a)(iv), MCM (1995 Edition).

a. ***Contrary to Article 31, UCMJ.*** Orders which have allegedly compelled the accused to incriminate him / herself in violation of article 31's mandate that "No person subject to this Chapter (the UCMJ) may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him" have generated much litigation in the past. In *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986), the court held that the accused could not be convicted of dereliction of duty for failure to report drug abuse by others on those occasions when the accused was also a principal to the same drug use. The privilege against self-incrimination excuses his compliance. *See United States v. Tyson*, 2 M.J. 583 (N.C.M.R. 1976). An accused may be excused from reporting an offense by another even when the accused is not himself a principal. In *United States v. Reed*, 24 M.J. 80 (C.M.A. 1987), the accused was charged with failure to obey Article 1139, *U.S. Navy Regulations (1973)*, which states: "Persons in the Department of the Navy shall report to the proper authority offenses committed by persons in the Department of the Navy which come under this [sic] observation." In dicta, a plurality of the court found the regulation unconstitutionally vague and overbroad in reversing a conviction pursuant to the accused's guilty pleas for failing to report drug use and transfer by a fellow servicemember. The majority opinion stated that the regulation did not put the accused on notice as to what constitutes an offense, or whom the proper authority is to report it to.

(1) Many "old" cases have held that orders to an accused to do or submit to any number of tests amounted to orders to incriminate himself, and consequently were illegal. For example, *United States v. Rosato*, 3 C.M.A. 143, 11 C.M.R. 143 (1953) held that an order to submit a handwriting sample was illegal because it violated article 31. *United States v. Musguire*, 9 C.M.A. 67, 25 C.M.R. 329 (1958), held an order to submit to a blood test was unlawful. *United States v. Jordan*, 7 C.M.A. 452, 22 C.M.R. 242 (1957); *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (1974); and *United States v. Jackson*, 1 M.J. 606 (A.C.M.R. 1975) all held that an order to produce a urine specimen was unlawful.

In *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989), Lieutenant Unger, a female, refused to obey an order to provide a urine sample while being observed from a distance of about 18 inches by a female enlisted person. The court held that, while an order is presumed to be lawful, that presumption may be rebutted if the order provided for the collection of the sample under degrading or humiliating conditions. In this case, the court agreed that the order was not illegal as a matter of law. If the issue of legality of the order is raised by the evidence at trial, however, the finder of fact would have to determine whether the order given to Lieutenant Unger required her to provide a urine sample under conditions that were humiliating and degrading.

(2) Subsequent cases have held that such tests need not be preceded by article 31 warnings. Hence, an accused need not be advised of his article 31 rights prior to requesting him to submit to such tests. It would seem then that an order to so submit could be enforced against an accused who refuses to participate. It must be remembered that oral self-incrimination and "verbal acts" that incriminate may not be legally ordered. In *United States v. Lee*, 25 M.J. 457 (C.M.A. 1988), the accused was convicted of violating a lawful general regulation which required him to show continued possession or lawful disposition of duty-free or controlled items. On appeal, the court held that, while the regulation dealt with a legitimate administrative inquiry, it could not be used in a way to subvert the constitutional or statutory rights of a person suspected of a crime. Therefore, one suspected of violating the regulation had to be informed of his rights under article 31 before he could be interrogated.

b. ***Contrary to Article 15, UCMJ, or other orders .***

(1) In *United States v. McCoy*, 12 C.M.A. 68, 30 C.M.R. 68 (1960), the accused was awarded 14 hours extra duty at mast (NJP). After the 19th hour, he refused to go on, despite a direct order by the CMAA to continue. He was convicted of willful disobedience of the order of the CMAA. ***Held***: The CMAA's order violated both the terms of the NJP imposed by the accused's CO and article 15. Consequently, the order was unlawful.

(2) Pretrial confinement restricted by higher authority. *United States v. Gray*, 6 C.M.A. 615, 20 C.M.R. 331 (1956).

c. While military authorities are authorized to issue orders, they may not use this authority perversely to hamper an accused in military justice proceedings. An accused and his counsel are entitled to ample opportunity to prepare a defense, and an order which prohibits contacts with witnesses against the accused is unlawful and unenforceable. *United States v. Aycock*, 15 C.M.A. 158, 35 C.M.R. 130 (1964); *United States v. Wysong*, 9 C.M.A. 249, 26 C.M.R. 29 (1958). An order to have no contact with witnesses is too broad to be enforceable. *United States v. Merriweather*, NMCM 85-1790 (8 Jul 1985).

5. While an order may reasonably limit the exercise of a person's rights, if it constitutes an arbitrary or unreasonable interference with the private rights or personal affairs of individuals, it is unlawful. In *United States v. Womack*, 27 M.J. 630 (A.F.C.M.R. 1988), *aff'd*, 29 M.J. 88 (C.M.A. 1989), the accused was convicted of willful disobedience of a lawful order requiring him to inform his future sexual partners that he was infected with the AIDS virus and to protect his sexual partners from any contact with his bodily fluids and excretions. ***Held***: The order was a lawful exercise of the superior's command authority in that it helped to safeguard the overall health of the organization, and helped to insure unit readiness and the ability of the unit to accomplish its mission. Note that the order in the *Womack* case only required the accused to warn other servicemembers of his medical condition. In *Dumford, supra*, the court extended the warning requirement to include

civilians, as well as other servicemembers. The accused argued that, as applied to consensual, nondeviant, sexual intercourse with a female civilian, the order restricted his personal rights. The court held that, when a servicemember is capable of exposing another person to an infectious disease, the military has a legitimate interest in limiting his contact with others, including civilians, and otherwise preventing the spread of that condition.

a. The accused was convicted of violating an order not to drink alcoholic beverages. ***Held***: In the absence of circumstances tending to show its connection to military needs, an order prohibiting the use of alcoholic beverages without limitation as to time or place is so broadly restrictive of the private rights of an individual as to be arbitrary and unlawful. *United States v. Wilson*, 12 C.M.A. 165, 30 C.M.R. 165 (1961); *United States v. Kochan*, 27 M.J. 574 (N.M.C.M.R. 1988). Of similar import, *United States v. Smith*, 1 M.J. 156 (C.M.A. 1975), which held that a naval regulation prohibiting all loans between naval personnel could not be upheld. *United States v. Manos*, 17 C.M.A. 10, 37 C.M.R. 274 (1967) (order establishing minimum drinking age for all Navy personnel in Japan is lawful). *See United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986) (order restricting soldiers from having any alcohol in their system during working hours is arbitrary, unreasonable, and standardless).

In *United States v. Roach*, 29 M.J. 33 (C.M.A. 1989), the court again considered the issue of whether a military order could be lawfully used to control alcohol use. Seaman Roach had been involved in numerous alcohol incidents, one of which involved a civilian arrest for assaulting a police officer. He was also absent without authority for four days prior to sailing on deployment. The CO at NJP awarded 30 days' restriction—suspended for 3 months. In addition, the CO told Seaman Roach that he would be permitted to go on liberty during a one-day layover in port, but that he was forbidden to consume any alcohol while on liberty. He went on liberty and consumed alcohol and, upon returning to the ship, set fire to the paint locker. The fire was eventually extinguished with relatively minor damage. The Coast Guard Court of Military Review set aside a conviction for willful disobedience. They held that there was no valid military need for the order and that it was in violation of regulations promulgated by the Commandant of the Coast Guard for dealing with incidents of alcohol abuse, and therefore illegal. On appeal, pursuant to Article 67(b)(2), UCMJ, the Court of Military Appeals deferred to the judgment of the Coast Guard court in construing Coast Guard regulations. In dicta, however, the court recognized that an appropriate military order could be used to control alcohol or drug abuse. *Id.* at fn. 2. In his dissent, Judge Cox found a valid military nexus for the order in the safety of the vessel and crew.

In *United States v. Blye*, 37 M.J. 92 (C.M.A. 1993), the court held that a military order not to drink alcoholic beverages was lawful. Here, a second lieutenant was given an order "not to drink any alcoholic beverages" as a part of an order given to him subsequent to his release from pretrial confinement and placement in pretrial restriction. The court found it to be a valid order where the second lieutenant was suspected of committing several offenses while under the influence of alcohol, and the order was given to protect potential victims from assault.

b. In *United States v. Alexander*, 26 M.J. 796 (A.F.C.M.R. 1988), the accused was convicted of failing to obey a lawful order from his first sergeant "not to write any checks." ***Held***: The order was so broad in duration and words that it was not sufficiently connected with the morale, discipline, and usefulness of the military service.

c. A regulation, promulgated by an overseas commander, which established a six-month waiting period before an application for permission to marry by a member of that command would even be considered, was held to be unreasonable and, hence, unlawful.

> For a commander to restrain the free exercise of a serviceman's right to marry the woman of his choice for six months just so he might better reconsider his decision is an arbitrary and unreasonable interference with the latter's personal affairs which cannot be supported by the claim that the morale, discipline, and good order of the command require control of overseas marriages.

United States v. Nation, 9 C.M.A. 724, 727, 26 C.M.R. 504, 507 (1958). However, a military commander, at least in foreign areas, may impose reasonable restrictions on the right to marry, such as requiring an applicant to meet with a military chaplain, to present medical certificates, and to obtain consent from a parent or guardian if the applicant is under 21 years of age. *United States v. Wheeler*, 12 C.M.A. 387, 30 C.M.R. 387 (1961); *United States v. Parker*, 5 M.J. 922 (N.C.M.R. 1978).

d. The dictates of the accused's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Part IV, para. 14c(2)(a)(iii), MCM (1995 Edition). *United States v. Lenox*, 21 C.M.A. 314, 45 C.M.R. 88 (1972); *United States v. Stewart*, 20 C.M.A. 272, 43 C.M.R. 112 (1971). *United States v. Wilson*, 19 C.M.A. 100, 41 C.M.R. 100 (1969); *United States v. Noyd*, 18 C.M.A. 483, 40 C.M.R. 195 (1969). Regulatory provisions of the services limit the type of duty to which one may be assigned while an application for conscientious objector status is pending. An order which contravenes one of these regulations would be illegal. *Stewart, supra*, at 276 n.1, 43 C.M.R. at 116 n.1; *United States v. Austin*, 27 M.J. 227 (C.M.A. 1988).

6. An order which imposes a punishment is unlawful unless issued under article 15, or pursuant to a court-martial sentence.

– Whether an order is issued for the purpose of punishment, or merely for training, will have to be determined in each case by a careful examination of the circumstances, including the nature of the duty to be performed and the relationship between the duty and the deficiency sought to be corrected. *United States v. Trani*, 1 C.M.A. 293, 3 C.M.R. 27 (1952). Some examples:

(1) The accused placed two parachutes on the deck in a manner which a petty officer considered improper. He initially stated that he would put the accused on report, but he then ordered the accused to pick up the parachutes, take them from shop to shop, put them down in the proper manner, and announce to all present that this was the correct way to handle and carry parachutes. The accused refused, stating that he would not make a laughing stock of himself. The Navy Board of Review ***held***:

> It is our opinion . . . that Holler's order to the accused was issued as a punitive action for disciplinary purposes and that it was not designed nor expected or intended to advance accused's skill in handling parachutes or the instruction of possible spectators in the proper manner to handle parachutes. Consequently, the order, although seemingly legal on its face, was in fact under the circumstances illegal, ...

United States v. Raneri, 22 C.M.R. 694, 695 (N.B.R. 1956).

(2) The accused, while in pretrial confinement, was ordered to work in a rock quarry with sentenced prisoners. He refused to obey the order. ***Held***: An unsentenced prisoner may be required to perform useful military duties to the same extent as a man who is not a prisoner. An unsentenced prisoner, however, cannot be given a punitive work assignment. Whether it was a punitive work order depended upon all the circumstances. Here, the accused was compelled to perform the same work and under identical conditions as sentenced prisoners. He wore the same prisoner uniform and was mingled on the job with sentenced prisoners. The stockade policy was to govern all by one set of working standards. This commingling constituted identical treatment requiring an unsentenced prisoner to serve a sentence before conviction. Therefore, the order was for punishment and was unlawful. *United States v. Bayhand*, 6 C.M.A. 762, 21 C.M.R. 84 (1956).

(3) Accused was convicted of a violation of article 92. He was transferred from a rear area to a fire base "because he had been in some trouble" at the rear area. Accused was ordered to remain at the fire base, but returned to the rear area instead. Accused argued that the order was illegal because it imposed punishment or, alternatively, was void because it was merely an order to obey the law (i.e., not to go UA from the fire base). ***Held***: "Arduous as two days' duty at a forward fire base may be, it is not per se punishment, restriction, nor unnecessarily broad," conviction affirmed. *United States v. Nelson*, 42 C.M.R. 877, 878 (A.C.M.R. 1970); *United States v. Peoples*, 6 M.J. 904 (A.C.M.R. 1979).

B. ***Specificity*** (Key numbers 679-681; 686). A military order must be a clear and specific mandate. It needs to be definite and certain in describing a thing or act to be done or omitted. *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989); *United States v. Flynn*, 34

M.J. 1183 (A.F.C.M.R. 1992); *Wine, supra*. An exhortation to "obey the law" or to "do your duty" has no specific subject and consequently does not constitute an order, as contemplated by articles 90, 91, or 92. *United States v. Bratcher*, 19 C.M.A. 125, 39 C.M.R. 125 (1969). On the other hand, if the order is a positive command, the form in which it is expressed is immaterial. *United States v. Mitchell*, 6 C.M.A. 579, 20 C.M.R. 295 (1955); *United States v. Mantilla*, 36 M.J. 621 (A.C.M.R. 1992).

1. In order to be a specific mandate, an order must particularize the conduct expected. An exhortation to obey the law or perform one's duties does not meet the specificity requirement. An order which does ". . . not contemplate definite performance of any particular part of appellant's duties . . ." is not a specific mandate. *United States v. Oldaker*, 41 C.M.R. 497, 498 (A.C.M.R. 1969).

2. Very often the requirement of specificity will raise close factual questions. Examples: A number of military appellate courts have held unenforceable an order "to train" as lacking specificity. *Oldaker, supra* (order "to train"); *United States v. Orozco*, 42 C.M.R. 408 (A.C.M.R. 1970) (order "to start training with his unit"). *See United States v. Stallings*, 42 C.M.R. 425 (A.C.M.R. 1970); *United States v. Wohletz*, 41 C.M.R. 728 (A.C.M.R. 1970); *United States v. Gifford*, 41 C.M.R. 537 (A.C.M.R. 1969). When the courts have been able to find some element of specificity (e.g., to go to a particular place or do a particular act) they have upheld the order, notwithstanding the fact that the order called for a performance which the accused was already under a duty to fulfill, provided the order was not for the purpose of increasing punishment. *United States v. Bagby*, 41 C.M.R. 729 (A.C.M.R. 1970) (order "to attend training," i.e., go to the area where training was being conducted); *United States v. Patten*, 43 C.M.R. 820 (A.C.M.R. 1971) (order "to put on his equipment and go to training"). *See United States v. Couser*, 3 M.J. 561 (A.C.M.R. 1977), where an order to "resume training" was held to contain sufficient specificity. An order ". . . to perform your normal dental care duties and see and treat such patients as may be assigned . . ." was upheld in *United States v. Yarbrough*, 9 M.J. 882 (A.F.C.M.R. 1980), as was an order to an unauthorized absentee to return to base in *United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983) and to return to work in *United States v. Landwehr*, 18 M.J. 355 (C.M.A. 1984).

3. While the form of the order is immaterial, it must amount to a positive command in order for it to impose a duty to obey. *United States v. Glaze*, 3 C.M.A. 168, 11 C.M.R. 168 (1953); *United States v. Thomas*, 43 C.M.R. 691 (A.C.M.R. 1971). A regulation may, however, combine advisory with mandatory provisions without losing legal effect. *United States v. Brooks*, 20 C.M.A. 28, 42 C.M.R. 220 (1970). *United States v. Blanchard*, 19 M.J. 196 (C.M.A. 1985).

a. If the meaning of a communication is uncertain, or if it is merely advisory or permissive, then it is ***not*** a positive mandate and the accused has no duty to obey it. *United States v. Hogsett*, 8 C.M.A. 681, 25 C.M.R. 185 (1958); *United States v. Warren*, 13 M.J. 160 (C.M.A. 1982).

Examples.

(1) "Jones, meet me in my office in five minutes." This is a ***positive*** command.

(2) "Jones, if you can, meet me in my office in five minutes." This gives the recipient a choice of action. It is a request and not a positive mandate. *United States v. Pauley*, 3 C.M.R. 827 (A.F.B.R. 1952).

b. Expressing an order in a courteous manner rather than in a peremptory form does not change its nature. *United States v. Gallagher*, 15 C.M.R. 911 (A.F.B.R. 1954).

Example. "Jones, please meet me in my office in five minutes." *See United States v. McLaughlin*, 14 M.J. 908 (N.M.C.M.R. 1982). In this case, the court held that an order from an enlisted club manager to the accused containing the word "please" was still a positive mandate to carry out an order. Additionally, the court held that the delayed compliance defense was not available to the accused who argued with the club manager for five minutes before complying with the order by turning over her ID card.

c. On the contrary, verbal abuse, standing alone, has been held insufficient to vitiate a legitimate work order which was issued in an abusive manner. *United States v. Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971).

C. ***Redundancy*** (Key numbers 679-681; 686). An order which merely restates an existing general order, while it may be lawful on its face, will not be enforced as a violation of article 90 where the "ultimate offense committed" is the violation of another order [article 92(1) or article 92(2)]. *United States v. Wartsbaugh*, 21 C.M.A. 535, 45 C.M.R. 309 (1972). In *Wartsbaugh*, the accused disobeyed an order from his company commander to remove a silver bracelet that he was wearing on his wrist. A violation of article 90 was charged. C.M.A. stated:

> . . . [T]he Captain acknowledged that he was simply telling the appellant to obey an existing battalion directive relative to matters of wearing apparel, a directive which he was duty bound to obey . . . . [T]he offense should have been brought under Article 92(2), Code, *supra*, the "ultimate offense committed" . . . [*citing United States v. Bratcher, supra*, at 128]. Since, as noted, the battalion directive was not introduced at trial, the appellant's conviction cannot be sustained.

Wartsbaugh, supra, at 540. *See United States v. Sidney*, 23 C.M.A. 185, 48 C.M.R. 801 (1974). *Wartsbaugh* is an unusual case since the court held that an accused could not be ***convicted*** for the underlying offense. In most instances, the issue is whether the accused

should be ***punished*** for the charged or the "ultimate" offense. In determining this, a number of factors are examined: the intent of the officer giving the order; whether the order was merely exhortation to obey the law; whether there has been "express defiance" of the military; and whether the order was issued in the performance of proper military function. *United States v. Mitchell*, 34 M.J. 1252, 1255 (A.C.M.R. 1992), *citing United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983). For example, in *Mitchell*, the court found the accused's "ultimate offense" was disobedience of a commissioned officer's order to deploy, rather than missing movement through design and, thus, the maximum possible confinement was based on the disobedience offense; the accused had a preexisting duty to deploy with his unit at the time of the order, the order was an attempt by the commander to motivate the accused to voluntarily deploy with his unit, and there was evidence that the accused had repeatedly expressed his intent to defy the movement orders. *Mitchell*, 34 M.J. at 1255. *See also United States v. Quarles*, 1 M.J. 231 (C.M.A. 1975), where the court held that a conviction for disobeying the lawful order of a superior to "go to colors" was not subject to being set aside on the grounds that the accused was not charged with his "ultimate offense," failure to go to his appointed place of duty, although the punishment would be so limited. *See United States v. Chronister*, 8 M.J. 533 (N.C.M.R. 1979) and *United States v. Greene*, 8 M.J. 796 (N.C.M.R. 1980). *See* note to Part IV, para. 16e, MCM (1995 Edition).

1. If the sole purpose of repeated personal orders is to increase the punishment for an offense, disobedience of the repeated order is not a separate offense. In *United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983), however, an accused, who was UA, refused to return to his duty when ordered to do so at his home by senior personnel. It was held that the accused could be punished both for the willful disobedience and the absence offense where there was no evidence that the order was given to increase the potential punishment of the accused. The court focused on the need to punish direct defiance of an order so as to enhance military discipline. *See also Landwehr, supra* (accused told to report back to work by superior after being on "break" for over 20 minutes; court allowed punishment for both disobedience and failure to go to his unit).

2. Repeated personal orders are legitimate if given for the purpose of bolstering the persuasiveness of the first command. *United States v. Bethea*, 2 M.J. 892 (A.C.M.R. 1976).

3. Repeated orders are multiplicious for sentencing purposes. *United States v. Bivins*, 34 C.M.R. 527 (A.B.R. 1964).

D. ***Duty to obey*** (Key numbers 514, 515, 679-682, 686). In order to convict an accused of any order offense, it must be shown that he had a duty to obey the order.

1. ***The order must apply to the accused.*** A particular order may apply to all persons within an armed force or within a particular command, or it may apply merely to a specified class of persons within an armed force or within a particular command, or it may apply only to a particular person.

Examples.

a. "All personnel will _____." (Everyone);

b. "All nonrated personnel will _____." (A class);

c. "All OOD's upon being relieved will _____." (A class);

d. "Any person involved in an automobile accident will _____." (A class);

e. "ENS Joe Blow will _____." (A specified person).

2. ***If, by its terms, an order is not applicable to the accused, he has no duty to obey it.*** In *United States v. Alexander*, 22 C.M.A. 485, 47 C.M.R. 786 (1973), the Court of Military Appeals applied the strict construction rule applicable to all penal regulations. For example, in *United States v. Webber*, 13 C.M.A. 536, 33 C.M.R. 68 (1963), the accused, an airman third class, appropriated a C-47 aircraft and took off for a two-hour flight. He was charged with a violation of an Air Force regulation for taxiing onto a runway without clearance, by taking off without prior clearance from the control tower, and by operating the plane with less than the prescribed minimum crew. ***Held***: The regulation applied to qualified pilots in Air Force planes on ordinary flights and did not apply to one who was not a pilot and who took the plane without authority. On the other hand, *United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980) held that a command relationship in the organizational sense is not fundamental to the application of a general regulation to an individual member of the service; accordingly, an accused who knowingly enters a military installation to which he is not assigned has a duty to obey regulations governing that installation.

– While the prosecution must show that the accused had a duty to obey the order or regulation in question, the accused has the burden of production if he asserts that he falls within the purview of an exception to the order's regulatory scheme. *United States v. Cuffee*, 10 M.J. 381 (C.M.A. 1981).

3. ***The order must be punitive in nature.***

a. A regulation issued by higher authority directed to major commanders—which merely states certain ***policy criteria*** for the guidance of major commanders and which is not intended to operate immediately upon personnel generally, but instead requires implementing directives to be issued by the major commanders—is not enforceable against an individual. *United States v. Nardell*, 21 C.M.A. 327, 45 C.M.R. 101 (1972); *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990); *compare United States v. Baker*, 18 C.M.A. 504, 40 C.M.R. 216 (1969) (holding that a MACV directive was informational only and did not apply punitively to the accused) *with United States v. Benway*, 19 C.M.A. 345, 41 C.M.R. 345 (1970) (finding that a similar MACV directive was basically regulatory and violations were punishable). *See also United States v. Tassos*, 18 C.M.A. 12, 39 C.M.R. 12 (1968); *United States v. Wilson*, 12 C.M.A. 690, 31 C.M.R. 276 (1962); *United States v. Farley*, 11 C.M.A. 730, 29 C.M.R. 546 (1960); *United States v. Ekenstam*, 7 C.M.A. 168, 21 C.M.R. 294 (1956); *United States v. Brunson*, 30 M.J. 766 (A.C.M.R. 1990); *United States v. Gonzalez*, 12 M.J. 747 (A.F.C.M.R. 1981); *United States v. Grey*, 1 M.J. 874 (A.F.C.M.R. 1976).

b. *United States v. Whitcomb*, 1 M.J. 230 (C.M.A. 1975) and *United States v. Wright*, 48 C.M.R. 319 (A.C.M.R. 1974) provide good discussions of *Nardell, Baker, Benway*, and *United States v. Scott*, 22 C.M.A. 25, 46 C.M.R. 25 (1972). The *Wright* case stresses the requirement that a general regulation, which can result in a penal sanction, must be clearly punitive on its face. However, *United States v. Kennedy*, 11 M.J. 669 (C.G.C.M.R. 1981), held that the failure of an order to warn explicitly that its violation may subject violators to criminal sanctions does not foreclose prosecution if the prohibited conduct is described clearly. Further, appellate courts are willing to dissect written orders and regulations and to hold that some parts are punitive and some administrative in nature. *United States v. Blanchard*, 19 M.J. 196 (C.M.A. 1985); *United States v. Bright*, 20 M.J. 661 (N.M.C.M.R. 1985).

0402 VIOLATION OF GENERAL ORDERS OR REGULATIONS (Key Numbers 507-509, 679-686)

A. "Any person subject to this chapter who – (1) violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial may direct." Article 92(1), UCMJ.

B. ***Essential elements***. Part IV, para. 16(b)(1), MCM (1995 Edition).

1. That there was in effect a certain lawful general order or regulation;
2. that the accused had a duty to obey it; and

3. that the accused violated or failed to obey the general order or regulation.

C. ***First element.*** That there was in effect a certain lawful general order or regulation.

1. "In effect" means operative at the time of the alleged offense.

a. Generally, an order is effective as of the date it is published. The date "published" has been defined by the Court of Military Appeals as the date that the general order is received by the official repository for such publications on a base. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982). Part IV, para. 16c(1)(a), MCM (1995 Edition).

b. In drafting a specification under article 92(1) and (2), be sure to allege the ***particular*** regulation or order—including its effective date (e.g., *U.S. Navy Regulations*, dated 14 September 1990) which was in effect at the time of the violation, even if it has since been canceled or superseded.

c. The fact that the specific alleged regulation was superseded before the accused's act is no defense if the same criminal prohibition was contained in a successor regulation, and the latter was in force at the time of the accused's crime. *United States v. Grublak*, 47 C.M.R. 371 (A.C.M.R. 1973).

2. ***Lawfulness.*** *See* section 0401, *supra*.

3. ***Authority to issue "general orders and regulations".***

a. The ***1951*** MCM provided: "A general order or regulation is one which is promulgated by the authority of a Secretary of a Department and which applies generally to an armed force or one promulgated by a commander which applies generally to his command." Para. 171a, MCM, 1951.

b. The earliest C.M.A. cases interpreted article 92(1) and paragraph 171a very liberally and held that a post, station, and even a ship commander could issue general orders and regulations. *See United States v. Snyder*, 1 C.M.A. 423, 4 C.M.R. 15 (1952); *United States v. Wade*, 1 C.M.A. 459, 4 C.M.R. 51 (1952). *But see United States v. Bunch*, 3 C.M.A. 186, 11 C.M.R. 186 (1953).

c. In subsequent cases, however, C.M.A. greatly restricted the classes of "commander" who may issue general orders and regulations. The term "commander," as used in paragraph 171a, MCM, 1951, was defined as meaning a "major commander" who occupies a substantial position in effectuating the mission of the service. *United States v. Brown*, 8 C.M.A. 516, 25 C.M.R. 20 (1957); *United States v. Ochoa*, 10 C.M.A. 602, 28 C.M.R. 168 (1959).

– The holding of flag or general rank and the possession of GCM authority are some indications of a substantial position in the military establishment.

United States v. Tinker, 10 C.M.A. 292, 27 C.M.R. 366 (1959); *United States v. Keeler*, 10 C.M.A. 319, 27 C.M.R. 393 (1959).

d. Commanders who have been held to have authority to issue general orders: Commanding General, Marine Corps Base, Camp Lejeune, North Carolina—*Snyder, supra* (Although *Snyder* was decided prior to the restrictive line of decisions, it is probably still valid. That command appears to meet all the tests announced.); Headquarters, U.S. Army Forces Far East—*United States v. Stone*, 9 C.M.A. 191, 25 C.M.R. 453 (1958); Headquarters, U.S. Army Europe—*United States v. Statham*, 9 C.M.A. 200, 25 C.M.R. 462 (1958); U.S. Air Forces Europe—*United States v. Silva*, 9 C.M.A. 420, 26 C.M.R. 200 (1958); Commander, U.S. Forces, Azores—*United States v. Tinker*, 10 C.M.A. 292, 27 C.M.R. 366 (1959); U.S. Army Electronic Proving Ground, Fort Huachuca, Arizona—*United States v. Porter*, 11 C.M.A. 170, 28 C.M.R. 394 (1960); Commander, U.S. Naval Base, Subic Bay, Philippines—*United States v. Chunn*, 15 C.M.A. 550, 36 C.M.R. 48 (1965).

e. Commanders who have been held not to have authority to issue general orders: Commanding Officer, Tachikawa Air Force Base, Japan, a colonel who did not have GCM authority—*United States v. Keeler*, 10 C.M.A. 319, 27 C.M.R. 393 (1959); Commanding Officer, Naval Air Technical Training Center Memphis, Millington, Tennessee, a Navy captain who did not have GCM authority; further, C.M.A. said it was only a service school—*Ochoa, supra*; Commander U.S. Fleet Activities, Yokosuka, Japan—*United States v. Lair*, NCM 74-2853 (30 Jan 1976); Commanding Officer, Naval Hospital, Portsmouth, Virginia—*United States v. Wedge*, NCM 72-1323 (31 July 1976).

f. Some conclusions which can be drawn from case decisions

(1) While the law remains unsettled, C.M.A. has clearly interpreted article 92(1) to mean that only a major commander has the authority to issue general orders and regulations. In deciding if a commander is a major commander, most of the following criteria must be met:

(a) Occupies a substantial position in effecting the mission of the service;

(b) of flag or general rank;

(c) possesses GCM authority; and

(d) not many steps removed from department level.

g. The authority to issue general orders and regulations has been granted to a narrow group of individuals:

(1) An officer having GCM jurisdiction;

(2) a flag or general officer in command; or

(3) a commander superior to those in (1) and (2). Part IV, para. 16c(1)(a), MCM (1995 Edition).

h. It remains to be seen whether C.M.A. will accept this bestowal as a matter within the power and authority of the President as Commander-in-Chief. In this connection, it is noted that C.M.A.—in *Ochoa, supra*—held that, while possession of GCM jurisdiction is an indication that a commander can issue general orders and regulations, that fact alone is not controlling.

4. ***Proof.***

a. The existence of the order or regulation in question is usually proved through the use of judicial notice. Mil.R.Evid. 201 permits a military judge to take judicial notice, whether requested or not, of an "adjudicative fact" that is "either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Example. An orders violation can exist where government communication equipment is improperly utilized. Use/misuse of computers and communication systems is contained in the Joint Ethics Regulations and a violation of this regulation can subject the offender to an Article 92, UCMJ violation. A military judge can take judicial notice of the following DOD Directive in the appropriate case: " Federal government communication equipment including government owned telephones, facsimile machines, electronic mail, Internet systems, and commercial systems when use is paid for by the Federal Government shall be for official use and authorized purposes only." DOD Directive 5500.7-R, sec. 2-301, change 2 (1996).

b. Prior case law was unclear whether a military judge could take judicial notice without being asked, and whether the findings could be affirmed in absence of any indication that he did take notice. *Compare United States v. Hayes*, 45 C.M.R. 669 (A.C.M.R. 1972) *with United States v. Levesque*, 47 C.M.R. 285 (A.F.C.M.R.), *petition denied*, 48 C.M.R. 1000 (C.M.A. 1973); *United States v. Atherton*, 1 M.J. 581 (A.C.M.R. 1975). C.M.A., however, in the case of *United States v. Williams*, 3 M.J. 155 (C.M.A. 1977), held that the existence and content of the regulations could not be presumed but must be established expressly by judicial notice or other evidence. It now appears that the military judge can take judicial notice without being asked, so long as it is made a part of the record. Mil.R.Evid. 201(c).

D. ***Second element.*** That the accused had a duty to obey the order. *See* section 0401.D *supra*.

E. ***Third element***. That the accused violated or failed to obey the general order or regulation.

1. An order is ***violated*** when the infraction involves an act of commission on the part of the accused.

> ***Example***. Article 1162, *U.S. Navy Regulations, 1990*, prohibits the possession of alcoholic beverages aboard ship for beverage purposes (except under certain conditions). Seaman Eli has a bottle of VO in his locker. By his act of commission, he has violated the regulation.

2. An accused has ***failed to obey*** an order when the infraction involves an act of omission on his part.

> ***Example***. A regulation requires the OOD to make certain log entries every time the ship changes course. If the OOD does not make the appropriate entries, then his omission is a failure to obey.

3. The terms "violate or fail to obey" are almost synonymous and, although the pleader should try to be precise, misuse of these two terms will not result in error.

4. As previously noted, sometimes an order or regulation prohibits certain acts, but provides certain exceptions under specified conditions. Generally, it is not necessary for the prosecution to establish prima facie that the accused was not within any of the exceptions stated in the order. *United States v. Cuffee*, 10 M.J. 381 (C.M.A. 1981).

a. The accused has the burden of proceeding in this area. Stated otherwise, it is for the accused to raise such an issue by some evidence indicating that his acts fall within one of the exceptions stated in the order or regulations. *United States v. Mallow*, 7 C.M.A. 116, 21 C.M.R. 242 (1956). If he does raise such an issue, then the government must overcome it by evidence beyond a reasonable doubt (i.e., that the accused was not within that exception). *Cuffee, supra*, and *United States v. Pollack*, 9 M.J. 577 (A.F.C.M.R. 1980).

b. For a good discussion regarding the problem of a regulation where the exception must be negated in the government's case-in-chief, see *United States v. LaCour*, 17 C.M.R. 559 (A.F.B.R. 1954). In *LaCour, supra*, an Air Force general regulation designed to control black market operations in Korea prohibited the possession (in excess of any amount reasonably necessary for personal use) of goods, wares, merchandise, and property of any kind and from any source, except goods manufactured, in whole or in part, in Korea, or introduced into Korea by an importer licensed by the Republic of Korea. Issue: Must the specification negate this exception? ***Held***: Yes. The specification must allege that the exceptive facts do not exist where the exception is embodied in the language of the

enacting clause and is an integral part of the verbal description of the offense. *Id.* at 566. In this particular case, the possession of excessive quantities of any property may have been innocent or culpable, depending upon the source of the property and the manner of its entry into the country. Therefore, the exceptions defined characteristics which determined the essence of the offense. The pleading must aver that the exceptive facts do not exist; it must negate the exception.

c. Of course, the government must prove, as part of its case-in-chief, that the accused's conduct is covered by the regulation in question. For example, in *United States v. Lewis*, 8 M.J. 838 (A.C.M.R. 1980), it was held that, absent proof in the record that questioned loans were to be repaid, or were in fact repaid, within the time period bringing it within the regulation, a conviction for violating regulations prohibiting usurious loans could not be upheld.

F. ***Knowledge***. Knowledge of a general order need not be alleged or proved. Knowledge is not an element of this offense, and a lack of knowledge does not constitute a defense. Part IV, para. 16c(1)(d), MCM (1995 Edition); *United States v. Tinker*, 10 C.M.A. 292, 27 C.M.R. 366 (1959). *See United States v. Reynolds*, 36 M.J. 1128 (A.C.M.R. 1993). Although the accused does not have to have knowledge of the article 92 regulation violated, there must be some proper form of publication before knowledge is presumed or there will be a violation of constitutional due process. The court held that "publication" occurs when a general regulation is received by the official repository for such publications on a base, such as the master publications library. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982).

1. Note, however, that due process requires that, when the requirements of a challenged regulatory scheme are "purely passive," there must be some showing of the probability of knowledge. *Lambert v. California*, 355 U.S. 225 (1957). *See United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980).

2. Occasionally, the accused must be shown to have actual knowledge of some underlying fact in order to convict him of an orders violation. For example, in order to prosecute someone for a conflict of interest in violation of SECNAVINST 5370.2, it must be shown that they had actual knowledge of the existence of the interest.

3. In *United States v. Foster*, 14 M.J. 246 (C.M.A. 1982), the court held that, to be guilty of ***attempted*** violation of a general regulation (as opposed to a violation of a general regulation), the accused does not have to have actual knowledge of the regulation in issue. *Foster* overruled earlier C.M.R. decisions holding that, since attempts required specific intent, an attempt to violate an order would require specific knowledge of the order. *See, e.g., United States v. Silvas*, 11 M.J. 510 (N.C.M.R. 1981). The specific intent necessary is only to do the act.

G. ***Pleading*** (See Part IV, para. 16f(1), MCM (1995 Edition)

1. The general order or regulation need not be quoted verbatim

– It is sufficient to identify it by article number, section or paragraph, title, and date.

Example. Article 1151, *U.S. Navy Regulations, 1990.*

2. Failure to allege that the order was a "general" order renders the specification fatally defective. Additionally, an LIO of violating "an other lawful order" [92(2)] ***cannot*** be made out if knowledge has not been alleged. *United States v. Koepke*, 18 C.M.A. 100, 39 C.M.R. 100 (1969); *United States v. Baker*, 17 C.M.A. 346, 38 C.M.R. 144 (1967). *But see United States v. Watson*, 40 C.M.R. 571 (A.B.R. 1969) (Army Regulation, by its nature and applicability, fairly implies that it is a general order).

3. The manner in which the accused violated or failed to obey the order should be alleged.

> ***Example***. Accused did, on or about a specified date and at a certain place, violate a lawful general order, paragraph 2, Far East Command Circular No. 38, dated 27 August 1951, "by wrongfully having in his possession one (1) hypodermic syringe and one (1) needle." *United States v. Gohagen*, 2 C.M.A. 175, 7 C.M.R. 51 (1953).

4. When an order prohibits certain acts ***except*** under specified conditions, generally it is ***not*** necessary to allege that the accused does not come within the terms of the exceptions. *Gohagen, supra; Cuffee, supra.* Caveat: It may be necessary when alleging a violation of ***some unusual*** general regulation to negate the exception. *LaCour, supra.*

5. It is not absolutely necessary to allege that an accused "wrongfully" violated a lawful general regulation or order, since merely alleging a violation implies the unlawful nature of the conduct. *United States v. Torrey*, 10 M.J. 508 (A.F.C.M.R. 1980).

H. ***Sample specification.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 92
>
> ***Specification.*** In that Personnelman Third Class Jane E. Seymour, U.S. Navy, USS GHOSTTOWN, on active duty, did, on board USS GHOSTTOWN, at sea, on or about 15 December 19CY, violate a lawful general regulation, to wit: Article 1162, U.S. Navy Regulations, dated 14 September 1990, by wrongfully possessing alcoholic liquors for beverage purposes aboard a United States Navy ship, to wit: USS GHOSTTOWN.

I. ***Sample Instructions.*** *See Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. 3-16-1.

0403 VIOLATION OF AN "OTHER LAWFUL ORDER" (OTHER THAN "GENERAL" ORDERS) (Key numbers: 507-509, 679-686)

A. ***Text of Article 92(2), UCMJ.***

> Any person subject to this chapter who . . . having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order . . . shall be punished as a court-martial may direct.

B. ***Essential elements of an article 92(2) offense.*** Part IV, para. 16b(2), MCM (1995 Edition). *See United States v. Estrella*, 35 M.J. 836 (A.C.M.R. 1992).

1. That a member of the armed forces issued a certain lawful order;

2. that the accused had knowledge of the order;

3. that the accused had a duty to obey the order; and

4. that the accused failed to obey the order.

C. ***First element.*** That a lawful order was issued by a member of the armed forces.

1. ***Lawfulness.*** *See* section 0401, *supra.*

a. Orders issued by a superior officer, or a superior warrant, noncommissioned, or petty officer in the execution of his office may be inferred to be lawful. *See United States v. Keenan,* 18 C.M.A. 108, 39 C.M.R. 108 (1969); *United States v. Schultz,* 18 C.M.A. 133, 39 C.M.R. 133 (1969); *United States v. Hawkins,* 30 M.J. 682 (A.F.C.M.R. 1990).

b. What if the order was issued by one not a superior? In certain situations, subordinates are authorized to give orders to superiors. Such orders are lawful and the superior must obey them. *United States v. Stovall,* 44 C.M.R. 576 (A.F.C.M.R. 1971).

Examples.

(1) Sentry—Art. 1038, *U.S. Navy Regulations, 1990.*

(2) Shore Patrol—Art. 1039, *U.S. Navy Regulations, 1990.*

(3) CO has authority over all persons in his command, whatever their rank—Art. 1025, *U.S. Navy Regulations, 1990.*

c. ***Query.*** May an order to a superior by a subordinate be inferred to be lawful? The MCM is silent. The prosecution must affirmatively establish legality in such a case. Trial counsel may establish lawfulness by showing the status of the persons giving and receiving the order, the surrounding circumstances, and the specific authority of the person giving the order. *Stovall, supra.*

2. ***Issuance.*** Same as previously discussed; that is, the order must have been issued by a member of the armed forces. *United States v. Cassell,* NMCM 85-2178 (24 Jan 1986). The order may be either oral or written. No particular form is required.

3. ***In effect.*** Same as previously discussed; that is, the order must be in effect at the time of the alleged violation.

D. ***Second element.*** The prosecution must prove in its case-in-chief that the accused had ***actual*** knowledge of the order. *See United States v. Henderson,* 32 M.J. 941 (N.M.C.M.R.), *aff'd,* 34 M.J. 174 (C.M.A. 1992); *United States v. Brown,* 25 M.J. 793 (N.M.C.M.R. 1987).

1. Actual knowledge may be proved either by direct or circumstantial evidence.

a. ***Example of direct evidence.*** Statements by accused admitting knowledge.

b. ***Examples of circumstantial evidence of knowledge.*** Testimony that the order was read at quarters which was attended by the accused; testimony that the order was clearly posted on the bulletin board where accused passed daily. In *United States v. Jack*, 10 M.J. 572 (A.F.C.M.R. 1980), however, the accused's conviction for unlawfully entering a female barracks during nonvisiting hours in violation of a local regulation was set aside even though the authorized visiting hours were noted on a sign at the building's entrance. The court held that the accused lacked the actual knowledge required because the sign did not designate the authority issuing the order.

2. ***Constructive v. actual knowledge.*** The distinction between constructive knowledge and actual knowledge proved by circumstantial evidence is often troublesome. One way to draw the distinction is as follows. Since constructive knowledge is equivalent to saying that the accused ***should*** have known, it would not be a complete defense for the accused to prove that he did not ***in fact*** know. On the other hand, where actual knowledge is required and circumstantial evidence is offered to prove actual knowledge, it is open to the accused to offer evidence that he did ***not*** have actual knowledge. Thus, in the latter case, where an order was announced at quarters (or formation) at which the accused was in attendance, there was circumstantial evidence to prove actual knowledge. However, the accused could put lack of actual knowledge in issue by evidence that he could not hear (perhaps because of where he was standing or because of loud background noise). The trier(s) of fact would then have to decide the issue in light of the evidence presented at trial. One may not, however, willfully and intentionally remain ignorant of a fact material to the accused's conduct in order to escape the consequences of criminal law. Deliberate avoidance of positive knowledge is the equivalent of actual knowledge. *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983).

E. ***Third element.*** That it was the duty of the accused to obey the order. If the order is lawful and issued by a person authorized under the circumstances to issue such an order, and if it is applicable to the accused, then he has a duty to obey the order. *See* section 0401.D, *supra*.

F. ***Fourth element.*** That the accused failed to obey the order.

1. "Failure to obey," as the term is used in article 92(2), includes both acts of commission and acts of omission.

2. The "failure to obey" may be willful, but it is sufficient to constitute an offense if the failure is the result of forgetfulness or simple negligence. *United States v. Pinkston*, 6 C.M.A. 700, 21 C.M.R. 22 (1956); *United States v. Jordan*, 21 C.M.R. 627 (A.F.B.R. 1955), *petition for review granted*, 21 C.M.R. 339 (1956).

G. ***Pleading, sample specifications, and instructions.*** *See* Part IV, paras. 16f(2) and (3), MCM (1995 Edition).

1. The particular order, or specific portion thereof, the accused is charged with having violated should be set forth in the specification. Discussion, R.C.M. 307c. But, a comparison between Part IV in paras. 16f(2) and (3), MCM (1995 Edition), suggests that a verbatim quotation of the article 92(2) order allegedly violated is required only in the case of oral orders. However, it is recommended that the particular order, or the specific portion thereof allegedly violated, including both oral and written orders, be set forth verbatim in article 92(2) specifications. The allegation of the language of an oral or written order should always be qualified by the phrases "or words to that effect."

2. Knowledge of the order must be alleged. A specification which alleges violation of any order other than a general order, but fails to include an allegation of ***knowledge***, results in a fatally defective specification (i.e., it does not allege an offense). *United States v. Tinker*, 10 C.M.A. 292, 27 C.M.R. 366 (1959). *United States v. Bunch*, 3 C.M.A. 186, 11 C.M.R. 186 (1953); *United States v. Meekins*, 26 C.M.R. 875 (A.F.B.R.), *petition denied*, 26 C.M.R. 516 (C.M.A. 1958).

3. The specification must include an allegation that it was "an order which it was his / her (accused's) duty to obey." *Bunch, supra.*

4. The specification should expressly allege the ultimate fact (i.e., that the accused did "fail to obey the same"). Although it is very poor practice to fail to allege this expressly, such failure does not necessarily render the specification fatally defective.

> ***Example***. A specification alleged that, "having knowledge of a certain lawful order which it was his duty to obey, (accused) did transfer . . . Military Payment Certificates to a Korean National, a person not authorized to receive them." ***Held***: This sufficiently implied that he failed to obey the order. "Since no objection was made at the trial and it clearly appears that the accused was not misled, we find no material prejudice to the substantial rights of the accused. . . ." *United States v. Haney*, 9 C.M.R. 386, 390 (A.B.R.), *petition denied*, 9 C.M.R. 139 (C.M.A. 1953).

5. Ordinarily, the manner in which the order was violated need not be alleged, unless the order can be violated in more than one way or the specific language of the order is not quoted verbatim.

a. Since the order has previously been quoted verbatim, the statement that the accused did "fail to obey the same" is sufficient to appraise him of his act of commission or omission. Compare the earlier discussion of general orders, where it is necessary to allege the manner in which the accused violated or failed to obey the order since the general order or regulation has not previously been quoted in the specification.

b. Even when the article 92(2) order has been quoted in the specification, if the order as quoted regulates more than one kind of conduct, or, if the order could be violated in more than one way, then the specific manner in which it was violated should be alleged.

Example. An order prohibited the possession, use, transfer, disposition, or sale of several kinds of items. When alleging violation of such an order, the particular method by which it was violated should be alleged. Simply add the appropriate additional allegation at the end of the form in para. 16(f)(3) specification (e.g., "fail to obey the same by wrongfully having in his possession one hypodermic syringe and one needle"). *Compare United States v. Gohagen*, 2 C.M.A. 175, 7 C.M.R. 51 (1953) *with United States v. Blau*, 5 C.M.A. 232, 17 C.M.R. 232 (1954).

6. ***Sample specification.***

Charge. Violation of the Uniform Code of Military Justice, Article 92

Specification 1. In that Lance Corporal Frederick K. Goodley, U.S. Marine Corps, Marine Barracks, Naval Station, Norfolk, Virginia, on active duty, having knowledge of a lawful order issued by Lance Corporal Stanley N. Kowalski, U.S. Marine Corps, in the execution of his office as a military policeman, to "stop the car," or words to that effect, an order which it was his duty to obey, did, on board Naval Station, Norfolk, Virginia, on or about 6 June 19CY, fail to obey the same. (oral order).

Specification 2. In that Seaman Joshua A. Slobb, U.S. Navy, USS TUBB, on active duty, having knowledge of a lawful order issued by the Commanding Officer, USS TUBB, to wit: Paragraph 3.d(3), USS TUBB Instruction 1020.3E, dated 2 January 19CY, an order which it was his duty to obey, did, on board USS TUBB, at sea, on or about 2 March 19CY, fail to obey the same by wrongfully possessing food in a berthing space (written order).

7. ***Sample instruction.*** *See Military Judges' Benchbook,* DA-Pam 27-9 (1996), Inst. 3-16-3.

0404 WILLFUL DISOBEDIENCE OF AN ORDER (Key numbers 679-686)

A. ***Text of Article 90(2), UCMJ.***

> Any person subject to this chapter who . . . willfully disobeys a lawful command of his superior commissioned officer shall be punished . . . as a court-martial may direct.

B. ***Elements.***

1. That the accused received a lawful command from a certain commissioned officer;

2. that this officer was the superior commissioned officer of the accused;

3. that the accused then knew that this officer was the accused's superior commissioned officer; and

4. that the accused willfully disobeyed the lawful command.

C. ***First element***. That the accused received a lawful command from a certain commissioned officer.

1. ***Lawfulness***. Discussed in section 0401.A, *supra*, and Part IV, para. 14c(2)(a).

2. There is no distinction between "command" and "order." The terms are synonymous. Winthrop, *Military Law and Precedents* 571 and 473 (2nd ed. 1920).

3. The order must be directed to the subordinate personally. It does ***not*** include violations of regulations, standing orders, or routine duties. *See United States v. Wartsbaugh*, 21 C.M.A. 535, 45 C.M.R. 309 (1972); Part IV, para. 14c(2)(b), MCM (1995 Edition).

a. ***Example***. "Jones, report to the OOD at once."

b. ***Contra example***. Division officer announces at quarters, which Seaman (E-3) Jones attended: "All nonrated personnel will report for a physical exam tomorrow." This is not an order directed to a subordinate (Seaman Jones) personally; however, it is a lawful order to a class of persons, of which Seaman Jones is a member. Hence, although Seaman Jones cannot be convicted of violating article 90(2), even though he willfully failed to report for the physical, he could be convicted of violating article 92(2), failing to obey "an other lawful order."

c. ***Example***. Division officer at quarters states: "The following named men will report immediately to the Executive Officer: Jones, Brown, Smith, Jackson, etc." Jones deliberately failed to report. ***Query***: Can Jones properly be charged with violation of article 90? ***Answer***: Yes. This order was directed to him personally, as well as to the others.

d. ***Example***. Petty Officer Brown tells Seaman Jones, per order of the division officer: "Jones, the division officer told me to tell you, Smith, and Jackson to report to him at once." ***Query***: Is this order directed to Jones personally, rather than to him simply as a member of a class? Yes.

– Note that the accused in the above example is guilty of violating the order of the division officer, not the petty officer. *United States v. Marsh*, 3 C.M.A. 48, 11 C.M.R. 48 (1953). However, an intermediate may, by placing his authority behind the order, become the one whose order is violated; but, to do this, the intermediate must have the authority to issue such an order in his own name and it must be issued as his order, not as the representative of the superior. *Marsh, supra; United States v. Sellers*, 12

C.M.A. 262, 30 C.M.R. 262 (1961).

4. Even a ***deliberate*** failure to comply with a general order or regulation or with a standing order of a command is ***not*** a violation of article 90(2) nor 91(2), but it is an offense under article 92. Such orders cannot be directed to the subordinate personally. *Wartsbaugh, supra.*

5. Nonperformance by a subordinate of a mere routine duty is not a violation of article 90(2) or article 91(2). The willful disobedience contemplated is such as shows an intentional defiance of authority, as when an enlisted person is given a lawful command by a commissioned officer to do or cease doing a particular thing at once and refuses or deliberately omits to do what is ordered. Part IV, para. 14c(2)(f), MCM (1995 Edition). However, the fact that the act so ordered is of a "routine" nature would not give rise to a defense to the willful disobedience of a personally communicated order to be complied with immediately. *United States v. Stout,* 1 C.M.A. 639, 5 C.M.R. 67 (1952); *Wartsbaugh, supra.*

6. ***Received order.***

a. Actual knowledge of the order is required; *see* discussion at section 0403.D, *supra.*

b. The form of the order is immaterial so long as it amounts to a positive mandate and is understood as such by the interested parties. Section 0401.B, *supra.*

D. ***Second element.*** That the person who issued the order was the superior commissioned officer of the accused.

1. ***Superior commissioned officer.*** Defined as one who is superior either in rank or command. Article 1(5), UCMJ; Part IV, para. 13c(1)(a), MCM (1995 Edition).

a. ***Superior in rank.*** An officer is superior in rank to an accused for the purpose of this offense if he is senior by one or more paygrades ***and*** is a member of the ***same*** armed force as the accused.

(1) Personnel of the Navy and Marine Corps are of the same armed force. Article 1(2), UCMJ. Therefore, willful disobedience by a Marine private of an order issued by a Navy ensign is a violation of article 90(2).

(2) Personnel of the Coast Guard are of the same armed force as the Navy and Marine Corps ***only*** when operating as a service in the Navy. Article 1(2), UCMJ.

(3) ***Note:*** 10 U.S.C. 101(19) (1976), as amended, provides: "'Rank' means the order of precedence among members of the armed force." If this

definition of rank were applied to the term as found in the MCM (1995 Edition), then "rank" would depend on precedence as provided in *U.S. Navy Regulations* and in the *Naval Military Personnel Manual* (NAVMILPERSMAN) and the *Marine Corps Promotional Manual* (MARCORPROMAN), and in the publications of the other armed forces. The title 10 definition of "rank" was promulgated after the 1951 MCM definition, the same as the current definition, was published; it does ***not*** purport to interpret the MCM provision. The term "***rank***" does not appear in Article 90, UCMJ. Instead, article 90 uses the term "superior." It is believed that the term "rank," as it is used in the MCM (1995 Edition), is synonymous with the term "grade" (i.e., ensign, commander, major, lieutenant colonel, sergeant, seaman, etc.) also defined in title 10 101(18): "'Grade' means a step or degree, in a graduated scale of officer or military rank . . . ." While there appears to be no definite answer to this question, it is submitted that this is the safest approach.

b. ***Superior in command.*** An officer is "superior in command" to an accused if he is superior in the chain of command.

(1) An officer may be superior in command and, hence, be one's "superior" even though he is a member of another armed force (e.g., a Navy / Marine officer serving on the staff of a joint command).

(2) The "command" concept takes precedence over the "rank" concept (i.e., one who is superior in command is the superior of a person under his command, even though that other person is higher in grade).

> ***Example.*** CO of a ship is a Navy commander and the medical officer is a Navy captain. The CO is ***superior*** in the chain of command. Disobedience of the CO's order by the Navy captain could be disobedience of the order of a superior officer, a violation of article 90.

(3) The victim is the accused's "superior commissioned officer" if the victim, not being a medical officer or chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented. Part IV, para. 13c(1)(b), MCM (1995 Edition).

c. ***An officer normally has no authority over members of another service—absent the "command" concept.*** In such cases, a charge cannot be brought under article 90 because the victim of any disobedience would not be "superior"; nor would 92(2) be available since the duty to obey the order could not be shown. Part IV, para. 16c(2)(c), MCM (1995 Edition).

E. ***Third element.*** That the accused knew that the order was from his superior commissioned officer. Part IV, para. 14b(2), MCM (1995 Edition), includes actual knowledge of the status of the victim as an element of proof. Prior to the promulgation of the *Manual*, however, much controversy existed in this area. Consequently, do not be misled by old case

law. Knowledge is now clearly an element.

F. ***Fourth element.*** That the accused willfully disobeyed the (command) or (order).

1. "Willful" connotes a "specific intent," a deliberate flouting of authority. *United States v. Miller*, 2 C.M.A. 194, 7 C.M.R. 70 (1953); *United States v. Young*, 18 C.M.A. 324, 40 C.M.R. 36 (1969). A discussion of willfulness is provided in chapter I.

2. The "'willful disobedience' is an intentional defiance of authority." Part IV, para. 14c(2)(f), MCM (1995 Edition). A failure to comply with an order through heedlessness, remissness, or forgetfulness is not willful disobedience; however, it is an offense under article 92(2). On the other hand, so long as the disobedience is willful, it matters not what motivated the disobedience unless the motivation amounts to a defense. The disobedience need not be accompanied by disrespect. *United States v. Ferenczi*, 10 C.M.A. 3, 27 C.M.R. 77 (1958).

3. Willful disobedience may be manifested by deliberately omitting to do that which is ordered, by expressly refusing to obey, or by doing the opposite of what is ordered.

4. Disobedience is a failure to comply at the time performance is required, not a declaration of future intent. If the order is to be executed in the future, a statement by the accused that he intends to disobey it is not disobedience. *United States v. Squire*, 47 C.M.R. 214 (N.C.M.R. 1973). An order cannot be disobeyed until the time for performance has arrived. *United States v. Stout*, 1 C.M.A. 639, 5 C.M.R. 67 (1952); *United States v. Williams*, 18 C.M.A. 78, 39 C.M.R. 78 (1968). In *United States v. Jordan*, 21 C.M.R. 627 (A.F.B.R. 1955), *petition granted*, 21 C.M.R. 339, the accused was convicted of willful disobedience of the order of his CO, "the next time you have to urinate you are to give the OSI a specimen . . . . " Accused immediately refused. Defense argued that the order was one to be executed in the future. Board held that immediate compliance was indicated. Three ***types*** of orders were discussed:

a. Those intended for, and those capable of, immediate execution in full;

b. those not capable of being fully and immediately executed, but requiring certain preparatory steps capable of being commenced immediately; and

c. those not intended to require any action until some specified future time—regardless of whether present action is possible or not.

As to (a) and (b), refusal evincing intentional defiance is a violation of article 90. As to (c), the offense is not complete until the expressed intention to disobey is carried out; if there is ultimate obedience at the prescribed time, regardless of prior expression of intent to disobey,

the offense is not complete. *United States v. Jordan*, 7 C.M.A. 452, 22 C.M.R. 242 (1957). The time in which compliance is required is a question of fact. *United States v. Woodley*, 20 C.M.A. 357, 43 C.M.R. 197 (1971). If an order does not indicate the time within which it is to be complied, either expressly or by implication, then a "reasonable" delay in compliance is not a crime. *United States v. Bartee*, 50 C.M.R. 51 (N.C.M.R. 1974); *United States v. Dellarosa*, 27 M.J. 860 (A.F.C.M.R. 1989); *United States v. Clowser*, 16 C.M.R. 543 (A.F.B.R. 1954).

G. ***Pleading and instructions.***

1. ***Sample specification for an article 90(2) offense.*** willful disobedience of superior officer. Part IV, para. 14f(4), MCM (1995 Edition):

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 90
>
> ***Specification:*** In that Private Mo E. Hoe, U.S. Marine Corps, Marine Corps Security Force Company, Naval Station, Rota, Spain, on active duty, having received a lawful command from Captain John R. Bones, U.S. Marine Corps, his superior commissioned officer, and known by the said Jones to be his superior commissioned officer, to "get into that truck," or words to that effect, did, at Naval Station, Rota, Spain, on or about 6 February 19CY, willfully disobey the same.

2. Recitation of the entire order which the accused is charged with disobeying is not required. *United States v. Yarbrough*, 9 M.J. 882 (A.F.C.M.R. 1980).

3. Willful disobedience is a separate offense and is not multiplicious with missing movement, which was the subject of the original order. *United States v. Morrison*, 41 M.J. 482 (1995).

4. ***Sample instruction.*** *See Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. 3-16-4.

H. ***Text of Article 91(2), UCMJ.***

> Any warrant officer or enlisted member who . . . willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer . . . shall be punished as a court-martial may direct.

I. ***Elements.***

1. That the accused was a warrant officer or enlisted member;

2. that the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer;

3. that the accused then knew that the person giving the order was a warrant, noncommissioned, or petty officer;

4. that the accused had a duty to obey the order; and

5. that the accused willfully disobeyed the order.

J. ***First element***. That the accused was a warrant officer or enlisted member.

– By its terms, article 91 can only be violated by a warrant officer or an enlisted member. "Warrant Officer," as used in this article, means a warrant officer (W-1) who is not a commissioned warrant officer. Enlisted member includes any person in paygrades E-1 through E-9.

K. ***Second element***. That the accused received a lawful order from a certain WO, NCO, or PO.

1. ***Lawfulness***. Discussed in section 0401, *supra*.

2. The discussion of form, transmission, personal nature, and knowledge of the order at section 0404.C, *supra*, applies equally to this offense.

3. This article does not protect "acting" NCO's or "frocked" PO's. Part IV, para. 15c(1), MCM (1995 Edition). *United States v. Lumbus*, 23 C.M.A. 231, 49 C.M.R. 248 (1974).

L. ***Third element***. That the accused knew that the order was from a WO, NCO, or PO. Part IV, para. 15b(2), MCM (1995 Edition), includes actual knowledge of the status of the victim as an element of proof. Do not be misled by case law preceding the effective date of the *1969 Manual* (1 August 1969). Knowledge is now clearly an element. *See United States v. Payne*, 29 M.J. 899 (A.C.M.R. 1989).

M. ***Fourth element***. That the accused had a duty to obey the order.

1. Notice that article 91 has no element of superiority. Accordingly, the victim of willful disobedience under article 91 may be junior in rank and command to the accused. Remember, however, that the accused must have a duty to obey the order. It is difficult, though not impossible, to imagine a situation in which the accused would have a duty to obey and yet be senior in both rank and command. One example is provided as an illustration:

– ***Example.*** BM3 Smith is standing duty as a gate guard at NETC. LN1 Shultz, attached to the Naval Justice School, is driving onto the base. Petty Officer Smith tells Petty Officer Shultz to show his ID card. Shultz refuses and drives on to work. Has Petty Officer Shultz violated article 91?

The answer is yes, even though Smith is not senior in rank or command. Smith (an E-4) is junior in rank to Shultz (an E-6). Smith is not senior in command since Shultz is not a member of the same command. Shultz does have a duty to obey all lawful orders of military law enforcement personnel, regardless of rank. Accordingly, Shultz is guilty of willful disobedience of a petty officer under article 91. A petty officer acting as coxswain in a boat would have authority to issue necessary orders to more senior personnel.

2. This concern over the absence of an element of superiority in article 91 is an undeveloped area of law due to the fact that, in the MCM 1969 (Rev.), the drafters included superiority as an element. Paragraph 170a, MCM, 1969 (Rev.), provided: "The offenses denounced by this article [91] are those committed by a subordinate in his relations to one *senior* to him." (Emphasis added.) The drafters of the 1984 MCM noted that seniority is not mentioned at all in the text of article 91 in the UCMJ. Therefore, in the explanatory section of the 1984 MCM (Part IV, para. 15), all references to superiority and seniority were deleted. Under the law as described in the 1969 MCM, Petty Officer Shultz, in our example, would not have been charged under article 91 due to the absence of superiority. Instead, he would have been charged under article 92(2) for a violation of an other lawful order. This distinction is of great importance to Shultz since, if charged under article 92(2), his maximum permissible punishment is reduced from a BCD and 1 year confinement to a BCD and 6 months' confinement.

N. ***Fifth element.*** That the accused willfully disobeyed the order. This element is identical to the willful disobedience concepts under article 90, and is fully discussed at sections 0404.F and 0102.C.2.e.

O. ***Pleading and instructions.***

1. ***Sample specification for an article 91(2) offense.*** willful disobedience of WO, NCO, or PO. Part IV, para. 15f(2), MCM (1995 Edition).

Charge. Violation of the Uniform Code of Military Justice, Article 91

Specification. In that Fireman Jill S. Scott, U.S. Navy, USS DECOM, on active duty, having received a lawful order from Yeoman Third Class John B. Smith, U.S. Navy, a petty officer, then known by the said Scott to be a petty officer, to "empty that waste basket," or words to that effect, did, on board USS DECOM, located at Naval Station, Guam, on or about 11 April 19CY, willfully disobey the same.

2. ***Sample instruction.*** *See Military Judges' Benchbook,* DA Pam 27-9, Inst. 3-16-4 (1996).

P. ***LIO's of 90(2) and 91(2).***

1. ***Article 92(2)***—Failure to obey an "other" lawful order. This LIO exists when:

a. Evidence indicates that the failure to obey was ***not*** willful, but was through neglect [*see United States v. Darden,* 1 M.J. 574 (A.C.M.R. 1975)];

b. evidence indicates that the accused lacked knowledge of the status of the person giving the order; or

c. evidence indicates that the order was not personally directed toward the accused.

2. ***Part IV, paras. 14d(3) and 15d(2) include attempted willful disobedience as LIO's.*** The Navy Court of Military Review was questioned whether such offenses actually exist. *United States v. Pickens,* 8 M.J. 556 (N.C.M.R. 1979).

Q. ***The "ultimate offense" doctrine.***

1. One of the principles of military justice commonly encountered in willful disobedience cases is that of the "ultimate offense." In general, this concept means that an accused should be ***punished*** for underlying misconduct if there was a pre-existing order or duty, even though he / she may have simultaneously disobeyed an order of a superior. For example, if the accused is under a pre-existing obligation to appear in a correct uniform, failure to do so should be punished as a violation of that obligation, if, when the superior ordered the accused to comply, he / she was merely relying on the pre-existing duty. *United States v. Wartsbaugh,* 21 C.M.A. 535, 45 C.M.R. 309 (1972); *United States v. Sidney,* 48 C.M.R. 801 (A.C.M.R. 1974). *See* section 0401, *Redundancy, supra.*

2. Under these facts, the accused may be ***convicted*** of the orders

violation, but may only be ***punished*** for the "ultimate offense." *United States v. Quarles*, 1 M.J. 231 (C.M.A. 1975). ***Note*** to paragraph 16e, maximum punishment provisions.

3. ***Some common examples.***

a. ***Orders reinforcing article 86.*** *United States v. Moorer*, A.C.M. 12938 (A.C.M.R. 1978) (Unpublished); *United States v. Barnes*, 49 C.M.R. 108 (N.C.M.R. 1974); *United States v. Chronister*, 8 M.J. 533 (N.C.M.R. 1979). *But see United States v. Rector*, 49 C.M.R. 117 (N.C.M.R. 1974). (An order to return to a previous assignment was not a mere reminder or admonition to obey the law, but an ***independent exercise*** of the NCO's authority and punishable under article 91.)

b. ***Orders imposing the condition of restraint.*** *United States v. Nixon*, 21 C.M.A. 480, 45 C.M.R. 254 (1972) (Officer's order to proceed to stockade was the first step of apprehension. Disobedience should have been prosecuted under article 95 rather than article 90.); *United States v. Burroughs*, 49 C.M.R. 404 (A.C.M.R. 1974); *United States v. Jessie*, 2 M.J. 573 (A.C.M.R. 1977).

4. ***What is left of the "ultimate offense" doctrine?*** In *United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983), C.M.A. upheld the separate convictions of the accused for UA and for refusing to obey an NCO's order to return from UA. The court held that the two offenses were separately punishable. The language of the case indicates that the court will apply the ultimate offense doctrine in future cases where it appears that the subsequent order is given only for the purpose of increasing the maximum punishment.

> The issuance of a direct order to return to the base was within the legal authority of Master Sergeant Shonk and represented a measured attempt to secure compliance with those pre-existing obligations. There is no evidence of any intent to issue the orders for the purpose of increasing the potential punishment of the accused . . . . While we must insure that the use of orders in not improperly designed to increase punishment in a given instance, we also must not erode the command structure upon which the military organization is based.

Pettersen, at 72 (footnotes and citations omitted).

5. In *United States v. Landwehr*, 18 M.J. 355 (C.M.A. 1984), C.M.A. stated that the ultimate offense doctrine was never intended to limit punishment for willful disobedience; it was only meant to apply to article 92 violations and no authority or power exists to extend it to other articles. Therefore, where the accused's company commander ordered the accused to return to his appointed place of duty, the accused could be punished for both the willful disobedience and the UA. The court looked at the following factors:

a. The order was an independent exercise of authority;

b. there was no express reliance or reminder of a pre-existing order; and

c. the order was not given to aggravate punishment.

Compare this result to *United States v. Peaches*, 25 M.J. 364 (C.M.A. 1987), where the accused was prosecuted for willful disobedience of an order to report for duty on the morning following his release from detention. The court held that this was a mere failure to report for routine duties as prescribed by routine orders punishable under article 86(1). Here, there was no ". . . environment of defiance. . ." (*Id.* at 366) nor was the person giving the order making a measured attempt to secure compliance with a previously defied routine order. In this case, the court applied the ultimate offense doctrine to reverse the conviction of the accused for willful disobedience. *See United States v. Mitchell*, 34 M.J. 1252 (A.C.M.R. 1992). The ultimate offense doctrine is alive and well and may be used to set aside findings of guilty as well!

SECTION TWO

0405 DERELICTION IN THE PERFORMANCE OF DUTY (Key numbers 687-692)

A. ***Text of Article 92(3), UCMJ.*** "Any person subject to this chapter who . . . is derelict in the performance of his duties . . . shall be punished as a court-martial may direct."

B. ***Dereliction.***

> The term, dereliction, is so broad that it literally covers the whole field of infractions of duties, and must be interpreted, in its setting in Article 92(3) of the Code, to cover only those delinquencies not covered by other articles which deal with specific offenses relating to duties. Thus, where the accused has not only failed to perform his duty but has either not appeared at all or has appeared tardily at his place of duty, his offense should be charged as absence without leave under Article 86; where he inefficiently performs his duty as a sentinel or lookout because he is drunk or falls asleep or leaves before being relieved, his offense should be charged as misbehavior of a sentinel or lookout under Article 113; and where he fails to obey or disobeys a duty imposed by a lawful order, his offense should be charged under Articles 90(2), 91(2), 92(1), or 92(2), as the nature of the order and the qualification of the person giving the order may indicate, unless the duty is of a routine character or it becomes impracticable to allege the specific order of a superior.

Snedeker, *Military Justice Under the Uniform Code* 617 (1953).

C. ***Elements.***

1. That the accused had certain prescribed duties;

2. that the accused knew, or reasonably should have known, of the duties; and

3. that the accused (willfully) (through neglect or culpable inefficiency) was derelict in the performance of those duties.

D. ***First element.*** That the accused had certain prescribed duties.

1. "A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." Part IV, para. 16c(3)(a), MCM (1995 Edition). A directive that sets forth general standards of performance may impose a duty even though the order is not so specific that a failure to follow its terms could be charged as a violation of the order. *United States v. Moore*, 21 C.M.R. 544 (N.B.R. 1956); *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986).

2. The "duty" contemplated by article 92(3) is any military duty either assigned or incidental to a military assignment. The term does not include tasks voluntarily performed for additional pay after regular working hours. For example: Accused was

secretary-treasurer of a commissioned officers' open mess. He performed this work after regular hours for extra pay. ***Held***: This was not a military duty in the sense of article 92(3). *United States v. Garrison*, 14 C.M.R. 359 (A.B.R. 1954).

3. A general regulation, which requires a servicemember to report drug abuse of which he / she is aware, can create a duty and is not a violation of the fifth amendment. Where the witness to the offenses is already a principal or accessory to the drug abuse, however, the privilege against compelled self-incrimination excuses noncompliance—and such failure is not dereliction. *United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986); *Heyward, supra*. It has been held, for example, that an accused could not be found guilty of dereliction of duty in failing to report drug use by prisoners in his custody where the evidence showed that the accused was involved in smoking marijuana with the prisoners and his own misconduct was therefore so intertwined with that of the prisoners that his right against self-incrimination excused him from any duty to report the prisoners' misconduct. *United States v. Dupree*, 24 M.J. 319 (C.M.A. 1987).

E. ***Second element***. That the accused had knowledge of the duties.

1. Change 2 to the 1984 MCM made constructive knowledge of the duties the second element of the offense. Part IV, para. 16c(3)(b), MCM (1995 Edition).

2. Article 92, UCMJ, does not, in its text, contain any language suggesting knowledge as an element. Both the 1951 and 1969 *Manuals for Courts-Martial* list only two elements of the offense. Paragraph 171c, MCM, 1969 (Rev.) says: a) that the accused had certain duties; and b) that he was derelict in the performance of them. Constructive knowledge was generally considered sufficient proof of knowledge. On 1 August 1984, the new *Manual* clearly required actual knowledge to be proven in every offense where knowledge was an element or in issue. *See* Note 4 to Instruction 3-16-3, *Military Judges' Benchbook*, DA Pam 27-9 (1996). The Analysis in Part IV, para. 16c(3)(b), MCM (1995 Edition), cites *United States v. Curtin*, 9 C.M.A. 427, 26 C.M.R. 207 (1958), as the authority for this actual knowledge requirement. On 15 May 1986, Change 2 to MCM, 1984, added the objective standard of constructive knowledge to the dereliction offense. The current analysis explains that this change is appropriate, since the drafters' reliance upon *Curtin, supra*, was misplaced. *Curtin* is an orders violation. Change 3 to the *Benchbook* also reflects this change.

a. Article 92(3), discussed at para. 16c(3)(b), is one of only two places in the *Manual* where constructive knowledge is sufficient. The other is article 102, forcing a safeguard at Part IV, para. 26, MCM (1995 Edition).

b. It now appears possible to convict a person for willful dereliction of a duty of which he / she was only constructively aware. If the prosecution can show that the accused deliberately failed to perform some duty of which (s)he should have known, conviction is now appropriate, though logically difficult to accept. *But see United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (where duties are imposed by unit order, the

accused must have actual knowledge of the directive). *Heyward, supra.*

F. ***Third element.*** That the accused was derelict in the performance of his duties.

1. ***Derelict.*** "A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner." Part IV, para. 16c(3)(c), MCM (1995 Edition).

a. "'Willfully' means intentionally. It refers to the doing of an act knowingly and purposefully, specifically intending the natural and probable consequences of the act." Part IV, para. 16c(3)(c), MCM (1995 Edition).

b. "'Negligently' means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." Part IV, para. 16c(3)(c), MCM (1995 Edition). *See United States v. Dellarosa*, 30 M.J. 255 (C.M.A. 1990).

(1) "The standard to be applied is whether the conduct of the accused was adequate and proper in the light of circumstances prevailing at the time of the incident. In testing for negligence, the law does not substitute hindsight for foresight." *United States v. Ferguson*, 12 C.M.R. 570, 576 (A.B.R. 1953).

(2) An accused cannot be convicted of dereliction in the performance of duty based upon the negligence of another under his control if the accused has not been negligent himself.

> ***Example.*** Accused, riding as a passenger, was the NCO in charge of a truck. He did not know how to drive and, from where he was sitting, he could not see the speedometer. When the truck was about three-fourths of the way down a hill, he realized that it was going too fast and told the driver to slow down. It was too late. The vehicle went out of control and crashed into a bridge. ***Held:*** The driver may have been negligent when starting down the hill, but there was no evidence that the accused was aware of this until it was too late. There was no evidence that the accused was negligent. *United States v. Flaherty*, 12 C.M.R. 466 (A.B.R. 1953).

c. "'Culpable inefficiency' is inefficiency for which there is no reasonable or just excuse." Part IV, para. 16c(3)(c), MCM (1995 Edition). If an accused has the ability and the opportunity to perform his duties efficiently and does not, he is culpably inefficient.

2. ***Dereliction distinguished from ineptitude.***

a. If the accused's failure in the performance of his duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, then he is not guilty of this offense. Part IV, para. 16c(3)(d), MCM (1995 Edition).

b. Ineptitude is a genuine lack of ability properly to perform the duty despite diligent efforts to do so. In determining whether ineptitude exists, it requires looking at the duty imposed, the abilities and training of the accused upon whom duty is imposed, and the surrounding circumstances in which the individual is called upon to perform the duty. *United States v. Powell*, 32 M.J. 117 (C.M.A. 1991). For example: A recruit earnestly applies himself during rifle training, but fails to qualify. Since his failure is due to ineptitude, he is not derelict in the performance of his duties. Part IV, para. 16c(3)(d), MCM (1995 Edition).

3. ***Examples of dereliction in the performance of duty.***

a. The accused, a commanding officer, was required by Army regulations to forward efficiency reports on his officers on certain specific dates. He failed to do so until about three months after an investigation was started. ***Held***: He was derelict in the performance of his duties. It was the accused's failure to complete the efficiency reports of the officers named which caused the unreasonable delay in their transmittal. "In the absence of any evidence that the failure was unavoidable or was caused by ineptitude rather than by negligence, we conclude that the record supports the finding of guilty. . . ." *United States v. Neville*, 7 C.M.R. 180, 189 (A.B.R. 1952).

b. Air Force staff sergeant, having custody of postal clerks' fund as part of his job, is charged with negligent dereliction in fiscal control, resulting in loss of $3,000.00. On appeal, he argued that he repaid the funds before being charged, and, therefore, could not be punished since there was no loss to the government. ***Held***: actual loss is not an element. *United States v. Nickels*, 20 M.J. 225 (C.M.A. 1985).

c. In September 1988, a Marine officer, in the performance of desert exercises, posts road guides singularly and at incorrect locations without keeping a roster of where he posted them, in violation of a specific instruction that states to post road guides in pairs at designated checkpoints and to keep a roster of the individuals posted. During the recovery operations, one lance corporal was not found. His body was discovered in December 1988. He died from exposure. ***Held***: Simple negligence resulted in dereliction of duty. *United States v. Lawson*, 36 M.J. 415 (C.M.A. 1993).

4. ***Examples where evidence held insufficient to support dereliction of duty charges.***

a. *Flaherty, supra.*

b. *United States v. Cansdale*, 1 M.J. 894 (A.F.C.M.R. 1976).

Evidence, which only showed accused in possession of property stolen from a "no lone" zone, was insufficient to prove that the accused was derelict in his duty not to enter the zone alone.

c. *Shelly, supra.*

d. *United States v. Tanksley*, 36 M.J. 428 (C.M.A. 1993). Where the accused (an electronics maintenance sergeant) did not have any responsibility (duty) for acquiring light sticks and bayonets, he could not be convicted of dereliction of duty for acquiring those items without proper authority.

G. ***Pleading.***

1. Generally, the specification need not set forth the particular regulation, order, or custom which the accused violated [*United States v. Moore*, 21 C.M.R. 544 (N.B.R. 1956)]; nor must it assert that the accused was responsible for performing a certain duty [*United States v. Thacker*, 36 C.M.R. 954 (A.F.B.R. 1966)]; but, it must detail the nature of the inadequate performance [*United States v. Kelchner*, 16 C.M.A. 27, 36 C.M.R. 183 (1966)].

2. The inadequacy of performance proved at trial must be substantially identical to that alleged in the specification. *United States v. Smith*, 18 C.M.A. 604, 40 C.M.R. 316 (1969); *United States v. Swanson*, 20 C.M.R. 416 (A.B.R. 1955).

3. Do not forget to plead at least constructive knowledge.

4. *Sample specification*. Part IV, para. 16f(4), MCM (1995 Edition).

> ***Charge***. Violation of the Uniform Code of Military Justice, Article 92
>
> ***Specification***. In that Engineman Second Class Marsha A. Reese, U.S. Navy, USS FLATBOTTOM, on active duty, who should have known of her duties on board USS FLAT-BOTTOM, located at San Diego, California, on or about 23 July 19CY, was derelict in the performance of those duties, in that she negligently failed to wind and compare all chronometers aboard USS FLATBOTTOM, as it was her duty to do.

Note: A specification under 92(3) can allege either willfulness, negligence, or culpable inefficiency.

H. ***Sample instructions***. *Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. 3-16-4. Remember that actual knowledge is ***not*** required in all cases despite the language of

the instruction.

0406 DISRESPECT TO SUPERIORS (Key Number 693-698)

A. ***Text of Article 89, UCMJ.***

> Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct.

B. ***Text of Article 91(3), UCMJ.***

> Any warrant officer or enlisted member who . . . treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office . . . shall be punished as a court-martial may direct.

C. ***Elements of article 89.*** Part IV, para. 13b, MCM (1995 Edition):

1. That the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer;

2. that such behavior or language was directed toward that officer;

3. that the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;

4. that the accused then knew that the commissioned officer toward whom the acts, omissions, words were directed was the accused's superior commissioned officer; and

5. that, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

D. ***Elements of article 91(3).*** Part IV, para. 15b(3), MCM (1995 Edition):

1. That the accused was a warrant officer or enlisted member;

2. that the accused did or omitted certain acts, or used certain language;

3. that such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

4. that the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

5. that the victim was then in the execution of office; and

6. that, under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

Note: If the victim was the superior noncommissioned, or petty officer of the accused, add the following elements:

7. That the victim was the superior noncommissioned, or petty officer of the accused; and

8. that the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned, or petty officer.

E. ***Superior commissioned officer of the accused or a WO, NCO, or PO.*** Generally, the same as previously discussed under articles 90(2) and 91(2) regarding willful disobedience. *See United States v. Merriweather*, 13 M.J. 605 (A.F.C.M.R. 1982). (Cannot convict Air Force enlisted man of disrespect to two Navy officers, since different services, but could find him guilty of LIO of disorderly conduct.)

1. Note the distinction in the text of the two articles with regard to this element. Article 89 requires the victim to be a superior, but article 91(3) does not. Note also, however, that superiority of the victim under article 91 will increase the maximum punishment for disrespectful conduct.

2. "Acting" (frocked) commissioned officers, WO's, NCO's, and PO's are not "superior" within the meaning of these two articles. *United States v. Lumbus*, 23 C.M.A. 231, 49 C.M.R. 248 (1974).

F. ***Knowledge of the status of the victim.*** Same as previously discussed regarding willful disobedience under articles 90(2) and 91(2). The accused's knowledge of the victim's status is usually proved by circumstantial evidence. For example, in *United States v. Fetherson*, 8 M.J. 607 (N.C.M.R. 1979), the court held that evidence that the victim was attired in his uniform and was from the same company as the accused was sufficient to show knowledge.

G. ***The disrespect.***

1. Article 89 proscribes "disrespect" and article 91(3) proscribes "disrespect" and "contempt." "Contempt" includes "disrespect" and also connotes "scorn." Hence, in this regard, there is no real difference between articles 89 and 91(3); in effect, they

both prohibit the same thing. *Military Judges' Benchbook*, DA Pam 27-9 (1996), Insts. 3-13-1 and 3-15-3.

2. The disrespectful behavior or language contemplated is that which detracts from the respect which is due to the authority and person of the superior.

3. ***Disrespect may consist of words, acts, or a failure to act.***

a. "Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language." Part IV, para. 13c(3), MCM (1995 Edition). *United States v. Lewis*, 12 M.J. 205 (C.M.A. 1982), where the court held that a statement made by the accused that he did not have to respect the flag was disrespectful to an officer who asked the accused why he did not stand at attention during colors. The remark, "Hi sweetheart," to a female officer is disrespectful, absent extraordinary circumstances tending to negate implied sexist familiarity from an enlisted person to an officer. *United States v. Dornick*, 16 M.J. 642 (A.F.C.M.R. 1983).

b. ***Disrespect by acts*** (e.g., subordinate contemptuously turns and walks away from a superior while he is talking to him). *United States v. Ferenczi*, 10 C.M.A. 3, 27 C.M.R. 77 (1958)].

c. ***Disrespect by failure to act*** (e.g., purposely or intentionally failing to give the customary salute). Part IV, para. 13c(3), MCM (1995 Edition).

4. ***The disrespect may refer to the victim as an officer (WO, NCO, or PO) or as a private individual.*** Part IV, para. 13c(3), MCM (1995 Edition).

a. ***Official capacity***. "As a man you are 4.0, but as a gunnery officer you stink." – An offense.

b. ***Individual capacity***. "As a gunnery officer you are 4.0, but as a man you stink." – An offense.

5. ***Whether the behavior in question is disrespectful will depend upon all the circumstances of the particular case.***

a. Under certain circumstances, one may be privileged to engage in a greater degree of familiarity than is usually the rule; but, this privilege must not be abused.

– ***Example***. Several officers are playing poker. While

the subordinate may be somewhat more familiar than is usually the rule, he may not use obscene and abusive language towards a fellow player who is his superior. *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953); *United States v. Barber*, 8 M.J. 153 (C.M.A. 1979). ("If you have something to say about me, say it to my face.")

b. The fact that no disrespect was intended by the accused, or so understood by the superior, is a circumstance to be considered in applying this test. *United States v. Noriega*, 7 C.M.A. 196, 21 C.M.R. 322 (1956); *United States v. Ransome*, 1 M.J. 1005 (N.C.M.R. 1976).

6. ***Truth is no defense.***

– ***Example.*** Accused tells his superior officer, "You are a dirty, fat bastard." At his trial, the accused proves that the officer was at the time caked with dirt, grossly obese, and the son of an unwed mother. It is nevertheless disrespectful for a subordinate to so state.

H. ***Presence of the superior.***

1. ***Disrespect to a superior commissioned officer.*** Article 89, UCMJ.

a. It is immaterial whether or not the disrespectful behavior occurred within the presence of the superior officer.

Example. Seaman Rollo returns from leave and, at morning quarters, learns that his division officer, who is now on leave at his home, has received orders to Outer Mongolia. In his exuberance, Rollo yells, "Hurray! At last I'm free of that S.O.B." He is guilty of disrespect, even though the officer was not present and didn't hear it.

b. In general, it is considered objectionable and inappropriate to hold one accountable under this article for what was said or done by him in a purely private conversation. Part IV, para. 13c(4), MCM (1995 Edition). A purely private conversation is believed to be one carried on privately, and not publicly, between the accused and some person other than the superior officer concerned and not made during the conduct of government business.

Examples.

(1) Two sailors are conducting a personal gripe session in low voices in a bar. One says, "If brains were ink, Ensign Jones wouldn't have enough to dot an 'i'." This is a purely private conversation and should not be prosecuted.

(2) Same situation as above, except that the sailors talk in loud voices so that others in the bar hear them. This would not be a purely private conversation.

(3) Accused, trying to collect travel money, tells a chief yeoman in the disbursing office, "Your stupid disbursing officer is cheating me out of $60.00." No one else hears him. This is not a purely private conversation.

(The difference between example (1) and examples (2) and (3) is that, in the latter, parties with whom the accused is unacquainted and share no expectation of privacy are made aware of the communication.)

(4) Accused, a first lieutenant, was in a poker game with several other officers. During the course of the game, the accused failed to adhere to certain rules and, upon being corrected by another player, a major, he replied with abusive and disrespectful language. ***Held***: While a poker game cannot be considered a public affair, it does not have the characteristics of a private transaction as the term is used in the *Manual*. This was not a purely private conversation. *Montgomery, supra*.

2. ***Disrespect to a warrant officer, noncommissioned officer, or petty officer. Article 91(3), UCMJ.***

a. To constitute an offense under article 91(3), disrespect to a WO, NCO, or PO, the disrespectful behavior or language must be within the sight or hearing of the WO, NCO, or PO. It is in this regard that article 91(3) differs from article 89 (i.e., the disrespect does not have to occur within the sight or hearing of a commissioned officer). *United States v. Van Beek*, 47 C.M.R. 98 (A.C.M.R. 1973).

b. Therefore, if the WO, NCO, or PO does not actually see or hear the disrespectful behavior or language, an offense has not been committed under article 91(3).

Example. A superior NCO gave an order to an accused, turned and walked away. Accused mutters a disrespectful remark in a low voice when the superior NCO is 30-40 feet away. The superior NCO did not hear the remark, but it is overheard by another NCO standing near the subordinate. ***Held***: Not an offense under article 91(3). *United States v. Pippins*, No. 6391173 (N.B.R. 18 Oct 1963) (Unpublished).

c. In *United States v. Whitaker*, 5 C.M.R. 539, 556 (A.B.R. 1952), the board stated: ". . . [T]he words used, '. . . to Hell with *it*,' definitely excludes any reference to Corporal Van Alstyne personally and indicates, rather, a reference to the act, the accused's act of signing [a shipping questionnaire]. If the accused had intended to refer to Corporal Van Alstyne personally it would at least normally be expected that he would have

said . . . 'to hell with *you*.' . . . The language could reasonably be construed as not being directed 'toward' anyone at all. . . ." *Compare United States v. Alexander*, 11 M.J. 726 (A.C.M.R. 1981), which held act of throwing clothing at feet of NCO was disrespectful, *with United States v. Sorrells*, 49 C.M.R. 44 (A.C.M.R. 1974).

I. ***Duty status of the victim at time of the disrespectful behavior.***

1. ***Disrespect to a superior commissioned officer.*** Article 89. To constitute this offense, the superior commissioned officer need ***not*** be in the execution of his office at the time of the disrespectful behavior. *Montgomery, supra.*

2. ***Disrespect to a WO, NCO, or PO.*** Article 91(3). It ***is*** an essential element of this offense that the WO, NCO, or PO be in the execution of his office at the time of the disrespectful behavior.

a. In this regard, article 91(3) differs from article 89 (i.e., as to a commissioned officer, the disrespect does not have to occur while he is in the execution of his office). Indeed, it does not even have to occur within the commissioned officer's presence to constitute this offense.

b. The WO, NCO, or PO is ordinarily in the execution of his office if he is on duty or is performing some military function. *United States v. Brooks*, 44 C.M.R. 873 (A.C.M.R. 1971); *United States v. Jackson*, 8 M.J. 602 (A.C.M.R. 1979); *Fetherson, supra.*

3. *See* discussion of "abandonment of rank" in section three of this chapter.

J. ***Pleadings.***

1. ***The disrespectful behavior or language must be alleged.*** If the words or acts which constitute the disrespectful conduct are innocuous, the pleadings will be fatally defective unless circumstances surrounding the behavior are alleged to detail the nature of the insubordination. *United States v. Sutton*, 48 C.M.R. 609 (C.M.R. 1974); *United States v. Smith*, 43 C.M.R. 796 (A.C.M.R. 1971).

2. ***Failure to allege victim's status as "his superior commissioned officer" may be fatal.*** The omission of the pronouns "his" or "her" may also affect the validity of a specification. *United States v. Showers*, 48 C.M.R. 837 (C.M.R. 1974); *United States v. Carter*, 42 C.M.R. 898 (A.C.M.R. 1970). *But see United States v. Ransome*, 1 M.J. 1005 (N.C.M.R. 1976) and *United States v. Ashby*, 50 C.M.R. 37 (N.C.M.R. 1974).

3. ***The accused's knowledge of the superiority or status of***

victim need not be alleged. *Ashby, supra*; *United States v. Sell*, 3 C.M.A. 202, 11 C.M.R. 202 (1953); *United States v. McGrath*, NMCM 77-1617 (16 Oct 1978); *United States v. Anderson*, NMCM 73-1145 (10 Jul 1973). Nonetheless, it is recommended that knowledge be alleged in order to avoid any challenges.

4. ***Note that superiority is not an essential element of article 91.*** If the superiority is pled and proved, however, it will increase the maximum authorized punishment. Disrespect to a ***superior*** WO, NCO, or PO carries a maximum punishment of a BCD and six months' confinement. If superiority is not pled and proved, the maximum is three months' confinement. Part IV, paras. 15e(7) and (8), MCM (1995 Edition).

5. ***Sample specifications.***

Charge. Violation of the Uniform Code of Military Justice, Article 89

Specification. In that Corporal Lance C. Gomez, U.S. Marine Corps, Marine Barracks, Naval Air Station North Island, Coronado, California, on active duty, did, at Naval Air Station North Island, Coronado, California, on or about 1 September 19CY, behave himself with disrespect towards Captain Cynthia E. Benton, U.S. Marine Corps Reserve, his superior commissioned officer, and known by said Gomez to be his superior commissioned officer, by saying to her "You are even more stupid than the last captain," or words to that effect.

Charge. Violation of the Uniform Code of Military Justice, Article 91

Specification. In that Boatswain's Mate Third Class Sarah L. Fester, U.S. Navy, USS SINK, on active duty, on board USS SINK, in Naples, Italy, on or about 18 May 19CY, was disrespectful in deportment towards Boatswain's Mate First Class John H. Small, U.S. Navy, her superior petty officer, and known by the said Fester to be her superior petty officer, who was then in the execution of his office, by contemptuously turning from and leaving him while he, the said Boatswain's Mate First Class Small, was talking to the said accused.

K. ***Disrespect as a lesser included offense to other offenses.***

1. ***To disobedience of a superior.*** *United States v. Lirgilito*, 22 C.M.A. 394, 47 C.M.R. 331 (1973). In some instances, disrespect and disobedience may be separate offenses. *United States v. Cahill*, 22 M.J. 548 (N.M.C.M.R. 1986).

2. ***To assault.*** *United States v. Van Beek*, 47 C.M.R. 98 (A.C.M.R. 1973).

3. ***To communicating a threat.*** *United States v. Ross*, 40 C.M.R. 718 (A.B.R. 1969).

4. ***Provoking speeches and gestures.*** Disrespect toward NCO is a separate offense from provoking speeches and gestures and may be charged and punished separately. *United States v. McHerrin*, 42 M.J. 672 (Army Ct. Crim. App. 1995).

L. ***Military Judge's Instructions.***

1. ***Article 89.*** *Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. 3-13-1.

2. ***Article 91.*** *Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. 3-15-3.

SECTION THREE

0407 COMPARISON AND RELATIONSHIP OF OFFENSES AGAINST AUTHORITY

A. ***Orders offenses.***

1. ***General order or regulation.*** Article 92(1).

a. To be a general order or regulation, the commander must have the authority to issue such an order and it must be applicable generally to an armed force or throughout the command.

b. The violation or failure to obey may be willful or merely the result of negligence, carelessness, or forgetfulness.

2. ***Any other lawful order.*** Article 92(2).

a. This covers any lawful order which is not a general order, which the accused had a duty to obey but which he failed to obey.

b. The failure to obey may be willful or a result of negligence, carelessness, or forgetfulness.

c. Knowledge is an element and must be proved. In this respect, it differs from a general order.

d. Knowledge must be expressly alleged. As to general orders, knowledge need not be alleged—since lack of knowledge is wholly immaterial.

e. The maximum punishment for violation of an other lawful order is a BCD, confinement for 6 months, etc. Whereas, the maximum punishment for violation of a general order is DD, confinement for 2 years, etc. Part IV, para. 16e, MCM (1995 Edition).

f. Article 92(2) may be an LIO of the willful disobedience offenses, articles 90(2) and 91(2), if there is a lack of proof of "knowledge of status" or "willfulness" or "a personally directed order." "Knowledge of the order" and "duty to obey" are sufficiently implied in the form specifications of the higher disobedience offenses to permit a finding of the LIO, article 92(2).

g. However, these two elements, "knowledge of the order" and "duty to obey," are apparently not sufficiently implied within the form specification found at Part IV, para. 16f(1), MCM (1995 Edition). Furthermore, since article 92(2) is not listed as an LIO of article 92(1), it must be plead in the alternative.

3. ***Willful disobedience***. Articles 90(2) and 91(2).

a. ***Victim***. Under article 90(2), the victim is a superior commissioned officer; whereas, under article 91(2), the victim is any WO, NCO, or PO.

b. ***Accused***. Under article 90(2), the accused can be any person subject to the UCMJ; whereas, under article 91(2), the accused must be a WO or enlisted person.

c. ***Superiority***.

(1) Under article 90(2), a commissioned officer is "superior" if—

(a) He is higher by at least one grade and is a member of the same armed force as the accused; or

(b) he is in command of the accused, regardless if they are of the same armed force and who is higher in grade.

(2) Article 91(2) refers to a WO, NCO, or PO and does not contain the "his superior" language.

c. Under articles 90(2) and 91(2), the order must be directed to the accused personally; whereas, under article 92(2), it may be directed to him personally or as a member of a class. Under article 92(1), it must never be personally directed.

B. ***Dereliction in the performance of duty***. Article 92(3).

– The act which constitutes a dereliction of duty may also constitute an article 92(1) or (2) offense.

a. It is not necessary to establish a specific violation of a particular order to prove the offense of dereliction of duty.

b. Article 92(3) is primarily intended to cover those instances when it appears that the accused had a duty, usually a general or routine duty to perform, and he either failed to perform it (willfully or negligently) or he performed it in a culpably inefficient manner.

C. ***Disrespect***. Articles 89 and 91(3).

1. ***Victim***. Under article 89, the victim is a superior commissioned officer; whereas, under article 91(3), the victim is a WO, NCO, or PO.

2. ***Accused***. Same as for articles 91(2) and 90(2).

3. "***Superiority***." For article 89, same as for article 90(2). For article 91(3), superiority is not an essential element, but is an aggravating fact if pled and proved.

4. ***Presence***. Under article 91(3), the disrespect must occur within the sight or hearing of the victim; whereas, under article 89, the victim need not know about or be present at the time of the disrespect.

5. ***Execution of his office***. Under article 91(3), the victim must be in the execution of his office; whereas, this is not required for an article 89 offense.

OFFENSES AGAINST AUTHORITY

		Article	Offense	Perpetrator	Victim	Knowledge
DISRESPECT		89	Disrespect to superior comm'd off'r	Anyone junior to the victim	Need not be present nor in execution of office	Of superior status
		91(3) (superior = aggravation)	Disrespect to WO, NCO, PO	Enlisted or WO	Must be present and in execution of office	Of status
ORDERS	VIOLATIONS	92(1)	General order	Anyone		Need not be pleaded nor proved
		92(2)	Other lawful order	Anyone		Must be pleaded and proved
		92(3)	Dereliction of duty	Anyone		Must plead and prove that accused knew of duty
WILLFUL	DISOBEDIENCE	90(2)	Willful disobedience of superior comm'd off'r	Anyone junior to the victim	Commissioned Officer	Of superior status of victim and of order
		91(2)	Willful disobedience of WO, NCO, PO	Enlisted or WO	WO, NCO, PO	Of status of victim and of order
ASSAULT		90(1)	Assault on superior comm'd off'r	Anyone junior to the victim	Must be in execution of office	Of superior status
		91(1) (superior = aggravation)	Assault on WO, NCO, PO	Enlisted or WO	Must be in execution of office	Of status
		128	Assault on commissioned officer, WO, PO	Anyone	Need not be in execution of office or superior	Of command, WO, NCO, PO status

0408 DEFENSES TO OFFENSES AGAINST AUTHORITY (Key numbers: 34, 679-682, 686-688, 693-695, 832-835, 837-841)

A. ***Abandonment of rank.***

– "A superior can abandon his rank and position of authority in dealing with subordinates." *United States v. Richardson*, 7 M.J. 320 (C.M.A. 1979). The concept of abandonment of rank applies to disrespect, disobedience, and assault where rank is an aggravating factor.

a. ***Held to be abandonment.***

(1) Invitation to "put me on my back" defense to assault upon a superior commissioned officer in the execution of his office in violation of article 90. *United States v. Struckman*, 20 C.M.A. 493, 43 C.M.R. 333 (1971).

(2) ***Use of racial slurs.*** *United States v. Richardson, supra.*

(3) ***Excessive profanity towards accused.*** *United States v. Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971).

(4) ***Illegal arrest.*** *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976).

(5) ***Encouraging the accused to get drunk and acting as a bartender.*** *United States v. Noriega*, 7 C.M.A. 196, 21 C.M.R. 322 (1956).

b. ***Held not to be abandonment.***

(1) ***Physically placing accused in his cubicle to quiet barracks disturbance.*** *United States v. Vallenthine*, 2 M.J. 1170 (N.C.M.R. 1975).

(2) ***Dousing a drunk in a cold shower.*** *United States v. McDaniel*, 7 M.J. 522 (A.C.M.R. 1979).

(3) ***Improperly or irregularly conducted searches.*** *United States v. Lewis*, 7 M.J. 348 (C.M.A. 1979).

(4) ***Use of term "boy" when not used as racial slur (victim and accused were of same race).*** *United States v. Allen*, 10 M.J. 576 (A.C.M.R. 1980).

B. ***Impossibility of compliance with orders.*** R.C.M. 916(i), MCM (1995 Edition).

1. Impossibility, referred to as "inability" in R.C.M. 916(i), MCM (1995

Edition), of compliance is an affirmative defense in the nature of a legal excuse. The impossibility may be a physical incapacity, in which event it may be caused by a temporary or permanent physical inability, or it may be the result of outside physical interference. Impossibility of compliance may also be due to financial incapacity. Regardless of the cause, if the condition rendering it impossible existed at the time when the order was given, that condition is a legal excuse for noncompliance with any order. *United States v. Pinkston*, 6 C.M.A. 700, 21 C.M.R. 22 (1956).

2. If the condition arose through his own fault after the order was given, however, such a condition is not a valid defense to a charge of failure to obey under article 92. Reason: Failure to obey under article 92 ***may*** be simply the result of negligence. Therefore, if the impossibility arises through the accused's negligence, he has, nevertheless, violated article 92 by failing to obey as a result of his own fault (i.e., negligence).

3. Impossibility, arising due to negligence after the order, is a valid defense to an article 90 and article 91 disobedience offense even though the condition arose through his own fault. Reason: It is essential to an article 90 and article 91 disobedience offense that the noncompliance be willful. Nothing less, including negligence, will suffice to constitute this offense. On the other hand, if the "impossibility" is deliberately created by the accused for the purpose of avoiding compliance, such a condition is not a valid defense; in fact, it is the means of accomplishing the offense.

4. Physical inability to carry out an order is a valid affirmative defense. R.C.M. 916(i), MCM (1995 Edition). For example, accused, who had received a substantial injury to his hand 8 days before, was ordered to tie sandbags. At his trial, accused maintained that he was unable to perform the assigned task. Held: The issue of physical incapacity was reasonably raised by the evidence and required, sua sponte, an instruction on the affirmative defense of impossibility of compliance. *United States v. Heims*, 3 C.M.A. 418, 12 C.M.R. 174 (1953). *See United States v. King*, 5 C.M.A. 3, 17 C.M.R. 3 (1954).

5. An accused who, through no fault of his own, was physically prevented from complying with the order may assert impossibility of compliance as a defense.

– ***Example***. In *United States v. Clowser*, 16 C.M.R. 543 (A.B.R. 1954), the accused was ordered to go to his barracks; but, before he could comply with the order, through no fault of his own, while waiting for a bus, he was taken into custody by the Air Force Police. ***Held***: Under the circumstances, the failure to obey was excused.

6. ***Financial incapacity***. There are many situations in which a person can be given a lawful order which involves the expenditure of his personal funds (e.g., get a haircut, get uniform cleaned, replace worn-out uniforms); however, if, at the time such an order is given, the accused is financially incapacitated (i.e., he neither has sufficient funds nor

is able to obtain them), then the affirmative defense of impossibility is raised. R.C.M. 916(i), MCM (1995 Edition). Examples: *Pinkston, supra. See United States v. Gordon*, 3 C.M.R. 603 (A.F.B.R. 1952).

7. ***Delayed compliance***. *United States v. Thompson*, 47 C.M.R. 565 (N.C.M.R. 1973) and *United States v. Williams*, 18 C.M.A. 78, 39 C.M.R. 78 (1968) discuss this defense.

C. ***Noncompliance because of a subsequent conflicting order.***

1. What should a subordinate do when he receives an order from a superior officer which amends, suspends, or modifies a previous order received from another superior or a pre-existing duty? ***Answer***: Fully inform the last superior of the requirements of the original order or duty and, if the last superior insists upon execution of his order, carry out that (last) order. Then report the circumstances ASAP to the superior who issued the original order. *See* Article 1024, *U.S. Navy Regulations, 1990.*

2. ***Query***: Is the failure to carry out the original order a violation of the UCMJ? ***Answer***: No. Noncompliance as a result of a subsequent, apparently lawful order is an affirmative defense constituting a legal excuse. Failure to comply with either order, however, is no defense. In *United States v. Hill*, 26 M.J. 876 (N.M.C.M.R. 1988), the accused was required to be in two places at the same time; the enlisted dining facility for routine daily assignment and the quarterdeck for a restricted mens' muster. His decision to go to neither place, but to remain in his rack instead, amounted to a violation of both responsibilities.

3. ***Example***. Accused carried out an order which involved violation of an Air Force Regulation, for which he was tried and convicted. He requested, but was denied, an instruction that obedience to an order which was not palpably illegal is justification for acts done in compliance with that order. ***Held***: Failure to instruct was prejudicial error. *United States v. Whatley*, 20 C.M.R. 614 (A.F.B.R. 1955).

D. ***The accused can raise the existence of an exception to an order as an affirmative defense.***

– ***Example***. Order prohibits possession of hypodermic needles except for the treatment of diseases. The prosecution has established issuance and knowledge of the order and accused's possession of one hypodermic needle—a prima facie case of violation of article 92. Accused introduced substantial evidence indicating that he had a disease requiring treatment by frequent injections, which he administered to himself pursuant to a doctor's instructions, and that this was the reason for his possession. His theory of defense then is that his possession comes within an exception to the prohibition. The prosecution must now establish beyond a reasonable doubt that he did not possess the syringe for the treatment of a disease. *See United States v. Jenkins*, 22 C.M.A. 365, 47

C.M.R. 120 (1973); *United States v. Mallow*, 7 C.M.A. 116, 21 C.M.R. 242 (1956); *United States v. Blau*, 5 C.M.A. 232, 17 C.M.R. 232 (1954); *United States v. Gohagen*, 2 C.M.A. 175, 7 C.M.R. 51 (1953).

CHAPTER V

ARTICLE 133 & 134 — THE GENERAL ARTICLES

0500 **INTRODUCTION** 5-1
A. Study points. 5-1
B. Text of Article 134, UCMJ. 5-1
C. Categories of Article 134 offenses. 5-2
D. Scope. 5-2
E. Challenges to the article's specificity. 5-4

0501 **DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE - CLAUSE 1** 5-4
A. General discussion. 5-4
B. Discussion of some specific offenses under clause 1, Article 134 5-7
1. Impersonating an officer. 5-7
2. False or unauthorized passes, permits, discharge certificates, and military identification cards. 5-10

0502 **SERVICE DISCREDITING CONDUCT—CLAUSE 2** 5-16
A. General discussion. 5-16
B. Analysis of some specific offenses under Article 134, clause (2). 5-18
1. Dishonorable failure to pay just debts. 5-18
2. Carrying a concealed weapon. 5-20
3. Violations of local law (domestic or foreign). 5-22
4. Negligent homicide. 5-23

0503 **NOVEL SPECIFICATIONS UNDER CLAUSES 1 AND 2 OF ARTICLE 134** 5-25

0504 **CRIMES AND OFFENSES NOT CAPITAL (CONC)–CLAUSE 3** 5-29
A. Text of article (clause 3). 5-29
B. MCM interpretation of clauses. 5-29
C. There are two groups of Federal "crimes and offenses not capital" 5-30
1. Crimes and offenses of unlimited application. 5-30
2. Crimes and offenses of local application. 5-30

D. Federal Assimilative Crimes Act (FACA). 5-30
1. Text of the act 5-30
2. Discussion 5-31
3. The doctrine of preemption and FACA. 5-31
4. Basis for FACA prosecutions. 5-32
5. Constitutionality. 5-33
E. General considerations regarding the use of clause 3 5-33
F. More on pleading. 5-34

0505 ARTICLE 134'S LIMITATIONS 5-36
A. The doctrine of preemption. 5-36
B. A capital offense may not be tried under Article 134. 5-39

0506 ARTICLE 133 AND ITS LIMITATIONS 5-40
A. Serious dereliction. 5-40
B. Vagueness. 5-41
C. Preemption 5-41
D. Multiplicity 5-41
E. Punishment 5-42

CHAPTER V

ARTICLE 133 & 134 — THE GENERAL ARTICLES

0500 INTRODUCTION (Key Numbers 753-764, 771-776)

Articles 133 and 134 are referred to as the "General Articles." They are statutes which encompass many different types of offenses. Time and space do not permit all of the acts that could potentially violate these articles to be discussed fully, but the more common forms of misconduct that run afoul of Article 133 and of Article 134's three "clauses" will be examined. In addition to analyzing certain specific offenses, this chapter will also illustrate practical application of the "General Articles."

A. ***Study points.*** Various cases which have held certain conduct to be beyond the scope of Article 134 (and 133) will be examined. These cases will help to clarify the limits of Article 134.

1. Other chapters of this text also discuss Article 134 offenses. For example, each group in Chapter VII, *Miscellaneous Groups of Offenses,* contains a discussion of at least one Article 134 offense.

2. As used in this chapter, the word "listed" refers to those offenses which were specifically delineated as Article 134 offenses by the drafters of the *Manual for Courts-Martial,* in Part IV, paras. 61-113, MCM, (1995 Edition). Similarly, the word "established" refers to either a listed offense or to one which has been approved in the case law. Conversely, "unestablished" or "unlisted" offenses are those which might be prosecuted under Article 134, but which are not delineated in the MCM or discussed in case law. Whether these types of offenses will be upheld by reviewing authorities as constitutional is an unanswered question. This chapter will also discuss unsuccessful attempts to create offenses under Article 134.

B. ***Text of Article 134, UCMJ.***

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

C. ***Categories of Article 134 offenses.*** Article 134 proscribes three distinct categories of offenses, which are often referred to as "Clauses 1, 2, and 3":

> ***Clause 1:*** ***Prejudice of good order.*** Disorders and neglects to the prejudice of good order and discipline in the armed forces. (Abbreviated as "C to P" in this text.)
>
> ***Clause 2:*** ***Service discrediting.*** Conduct of a nature to bring discredit upon the armed forces. (Abbreviated as "SD," or "service discrediting conduct," in this text.)
>
> ***Clause 3:*** ***Other Federal noncapital crimes.*** Crimes and offenses not capital, not otherwise proscribed by the UCMJ, but which are ***federal*** crimes. (Abbreviated as CONC in this text.)

Note: While the following examples are offered as illustrations of conduct which is prejudicial to good order and discipline, it should be noted that the same conduct could well be "service discrediting"—depending on the circumstances. There is no definitive line delineating the two types of misconduct. What constitutes one often defines the other. Consequently, one should not attempt to determine specific categories of exclusive "C to P" or "SD" conduct.

D. ***Scope.*** To whom does the General Articles apply?

1. The phrase "persons subject to this chapter" includes all armed forces personnel, both officer and enlisted, over whom a court-martial can assert jurisdiction. Article 133, which states that "[A]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct," applies only to officers and officer candidates (midshipmen, cadets). Article 134, on the other hand, has no such limitation. Often, the same misconduct is prohibited by both articles. If the accused is an officer, he / she would probably be prosecuted under Article 133. *But see United States v. Scott,* 21 M.J. 345 (C.M.A. 1986).

2. A civilian serving in the field with the armed forces may be convicted of offenses in violation of the General Article ***if*** the court has jurisdiction over his person. (***Note:*** In most instances, there will be no jurisdiction over the civilian.) *See* Article 2, UCMJ.

a. ***Example.*** Marker was a civilian employed by the Army in Japan. He abused his position by obtaining gifts from a corporation doing business with the Army. He was charged with such misconduct in violation of the General Article. C.M.A. stated: "In view of the nature and peculiar circumstances of his employment . . . [he is] held to a similar high standard of conduct. Although not in uniform, . . . and was certainly well known to the people with whom he was dealing – that petitioner was serving with the Army, and that in his official capacity he represented that service and the Department of the Army. Any improper acts of his – and particularly those related to his official duties – would therefore reflect directly on the military service." *United States v. Marker*, 1 C.M.A. 393, 398, 3 C.M.R. 127, 132 (1952).

b. In *United States v. Averette*, 19 C.M.A. 363, 41 C.M.R. 363 (1970), however, it was held that a civilian employee of the Army in Vietnam was not amenable to trial by court-martial. The charges in *Averette* were not laid under Article 134, but the case does give guidance for this particular type of circumstance which helps define who is a person subject to the UCMJ. A number of decisions have upheld the validity of trials by court-martial of civilians performing services for the armed forces ***in the field during time of war***. For an excellent discussion of these cases, see *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Robertson*, 5 C.M.A. 806, 19 C.M.R. 102 (1955). Certain of these decisions have construed the words "in the field" to embrace all military operations with a view towards action taken, indirectly or directly, against an enemy. For example, domestic staging operations and merchant shipping to a battle zone have been discussed in the case of *Hines v. Mikell*, 259 F. 28 (4th Cir. 1919), *cert. denied*, 250 U.S. 645 (1919). *See also In re Berue*, 54 F. Supp. 252 (D. Ohio, 1944). The Supreme Court strongly suggests, however, that the permissible limits of military jurisdiction over civilians "in the field" extends no further than the actual area of battle "in the face of the enemy." *Reid v. Covert, supra*, at 33. For further discussion of this issue, see the *Procedure Study Guide*.

3. A prisoner in the custody of the armed forces, serving a sentence ***after*** the execution of his punitive discharge, may violate Article 134. For example: The accused was convicted of an assault on a person in the execution of MP duties in violation of Article 134. He had already been given a DD and was confined in the Army's Disciplinary Barracks serving out his sentence. ***Held***: Affirmed. "[S]ome conduct to the prejudice of good order and discipline does not depend upon the existence of a military relationship between the actor and the armed services. What is important is the effect of the act upon the service. If the accused's conduct has a direct and palpable prejudicial impact upon good order and discipline, it constitutes a violation of Article 134." *United States v. Ragan*, 14 C.M.A. 119, 122, 33 C.M.R. 331, 334 (1963). ***Note***: A prisoner serving a sentence imposed by a court-martial who is in the custody of the armed forces is still subject to the UCMJ. Also note that *Ragan* was prosecuted under Article 134 for an assault. In this regard, see the *Ragan* opinion at page 335 (C.M.R.). *See also Peebles v. Froehlke*, 22 C.M.A. 266, 46 C.M.R. 266 (1973).

E. ***Challenges to the article's specificity.***

In the important case of *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547 (1974), the Supreme Court ruled that articles 133 and 134 were not unconstitutionally vague or imprecise. The Court ruled the same way in another case decided the same term: *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974). In both of these cases, the Court held that the articles were not violative of the due process clause of the fifth amendment and were capable of withstanding such assaults because of the narrowing interpretations placed upon the scope of the articles by military legal authorities and traditions.

0501 DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE - CLAUSE 1 (Key Numbers 759-764)

A. ***General discussion.***

1. The "disorders and neglects" punishable under clause (1) of Article 134 include those acts or omissions to the prejudice of good order and discipline not specifically mentioned in other articles of the UCMJ.

> "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. . . .

Part IV, para. 60c(2)(a), MCM, (1995 Edition). It is this type of "narrowing" that the Supreme Court alluded to in the *Parker v. Levy* decision, which caused it to uphold Article 134 despite attacks against its purported overbreadth and imprecision.

2. ***Military case law is to the same effect.*** "Suffice it to say that the article contemplates only the punishment of that type of misconduct which is directly and palpably, as distinguished from indirectly and remotely, prejudicial to good order and discipline." *United States v. Holiday*, 4 C.M.A. 454, 456, 16 C.M.R. 28, 30 (1954); *see also United States v. Snyder*, 1 C.M.A. 423, 4 C.M.R. 15 (1952); *United States v. Frantz*, 2 C.M.A. 161, 7 C.M.R. 37 (1953); *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979); *United States v. Davis*, 4 M.J. 752 (A.F.C.M.R. 1978); *United States v. Seeger*, 2 M.J. 249 (A.F.C.M.R. 1976); *United States v. Cuevas-Ovalle*, 6 M.J. 909 (A.C.M.R. 1979); *United States v. King*, 4 M.J. 785

(N.C.M.R. 1977); *United States v. Sadinsky*, 14 C.M.A. 563, 34 C.M.R. 343 (1964).

3. Prosecutions under this clause require the terminal element of "to the prejudice of good order and discipline" to be proved beyond a reasonable doubt. This element is an essential one and must be instructed upon as such. Failure to do so constitutes error. *United States v. Gittens*, 8 C.M.A. 673, 25 C.M.R. 177 (1958); *United States v. Lawrence*, 8 C.M.A. 732, 25 C.M.R. 236 (1958); and *United States v. Carter*, 28 C.M.R. 631 (N.B.R. 1959). *See United States v. Long*, 20 M.J. 657 (N.M.C.M.R. 1985), where failure to ***advise*** accused of terminal element was error, but not reversible, as judge is presumed to know the terminal element. Facts stated by accused determine prejudice to good order and not just parroting words by the accused. *See also United States v. Finn*, 20 M.J. 696 (N.M.C.M.R. 1985), failure to advise of terminal element in drug distribution case not fatal as "C to P" inherent in basic elements of drug offense. In *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986), the court held it was permissible to infer the prejudice to good order and discipline if the wrongfulness of the conduct was proven beyond a reasonable doubt.

4. While the terminal element must be proved by the prosecution, it need not be pleaded. In the case of *United States v. Marker*, 1 C.M.A. 393, 400, 3 C.M.R. 127, 134 (1952), the Court of Military Appeals said, ". . . we find no reason for the inclusion in the specifications of the words 'conduct of a nature to bring discredit upon the military service'. In truth, we believe the suggested language to be nothing more than traditionally permissible surplusage in specifications. . . ." The one exception to this rule is in drunk and disorderly offenses. To get the benefit of the aggravated punishment, "C to P" or "SD" must be expressly pled. Part IV, para. 73c(3), MCM, (1995 Edition).

5. There is no requirement that the conduct be prohibited by some order, regulation, or statute in order to fall within proscription against disorders and neglects to prejudice of good order and discipline. *United States v. Tatum*, 34 M.J. 1115 (N.M.C.M.R 1992).

6. The following are examples of offenses which have been held to involve conduct to the prejudice of good order and discipline:

a. Appearing in improper uniform [*United States v. Jackson*, 16 C.M.A. 509, 37 C.M.R. 129 (1967)];

b. careless discharge of firearms [*United States v. Hand*, 46 C.M.R. 440 (A.C.M.R. 1972); *United States v. Potter*, 15 C.M.A. 271, 35 C.M.R. 243 (1965)];

c. impersonating an officer (see further discussion below) [*United States v. Lane*, 28 C.M.R. 749 (A.F.B.R. 1959)];

d. impersonating a noncommissioned officer [*United States v. Wesley*, 12 M.J. 664 (A.C.M.R. 1981); *United States v. Pasha*, 24 M.J. 87 (C.M.A. 1987)];

e. impersonating an OSI agent [*United States v. Cagle*, 12 M.J. 736 (A.F.C.M.R. 1981)];

f. jumping into the sea from a vessel [*Sadinsky, supra*];

g. a breach of a custom of the service, such as fraternizing with enlisted personnel by an officer [*United States v. McCreight*, 43 M.J. 483 (C.A.A.F. 1996); *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953); *United States v. Jefferson*, 14 M.J. 806 (A.C.M.R. 1982) (*see* Chapter 12 for a further discussion of fraternization)];

h. receiving, buying, or concealing stolen property [*United States v. Gluch*, 30 C.M.R. 534 (A.B.R. 1960)];

i. negligent homicide [*United States v. Martinez*, 42 M.J. 327 (C.A.A.F. 1995); *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979); *United States v. Reitz*, 12 M.J. 784 (A.C.M.R. 1982); *United States v. Perez*, 15 M.J. 585 (A.C.M.R. 1983)];

j. falsely making an identification card [*United States v. Davis*, 4 M.J. 752 (A.F.C.M.R. 1978)];

k. making an obscene phone call [*United States v. Respess*, 7 M.J. 566 (A.F.C.M.R. 1979)];

l. voyeurism [*United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978)];

m. obstruction of justice [*United States v. Lennette*, 41 M.J. 488 (C.A.A.F. 1995), 41 M.J. 619 (N.M.Ct.Crim.App. 1994); *United States v. Caudill*, 10 M.J. 787 (A.F.C.M.R. 1981); *United States v. Jones*, 20 M.J. 38 (C.M.A. 1985); *United States v. Kellough*, 19 M.J. 871 (A.F.C.M.R. 1985)];

n. indecent assault [*United States v. Parini*, 12 M.J. 679 (A.C.M.R. 1981); *United States v. Wilson*, 14 M.J. 680 (A.F.C.M.R. 1982)];

o. cross-dressing [*United States v. Davis (previously known as Charles W. Marks)*, 26 M.J. 445 (C.M.A. 1988); *United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991), *cert. denied*, 502 U.S. 1096 (1992); *United States v. Modesto*, 39 M.J. 1055 (A.C.M.R.), *petition for review granted in part*, 42 M.J. 46 (C.M.A. 1994)]; and

p. indecent exposure [*United States v. Choate*, 32 M.J. 423 (C.M.A. 1991)].

q. Also, see other chapters of this Study Guide for discussion of the following "C to P" offenses:

(1) Breaking restriction (Ch. VII);

(2) incapacitation for duty as the result of prior indulgence in intoxicating liquor (Ch. VII);

(3) drunk on station (Ch. VII);

(4) communication of a threat (Ch. VIII);

(5) false swearing (Ch. VII); and

(6) Solicitation (Ch. I).

7. In the case of *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989), the Court of Military Appeals decided that a specification alleging conduct prejudicial to good order and discipline stated an offense, under a reckless endangerment theory, for engaging in unprotected sexual intercourse after having been diagnosed as having the AIDS virus. *See also United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990).

The court found that the specification was not fatally defective though there was no allegation of lack of consent by the accused's sex partner and despite an absence of traditional words of criminality (such as "wrongfully"); however, the court expressed a preference for such words in a "novel" specification.

B. ***Discussion of some specific offenses under clause 1, Article 134.***

1. ***Impersonating an officer.***

a. ***Elements.*** Part IV, para. 86b, MCM, (1995 Edition).

(1) That the accused wrongfully, willfully, and unlawfully impersonated a commissioned officer, WO, NCO, PO, an agent of a superior authority, or an official of a government in the manner alleged.

(2) "C to P." (The standard instruction to the court on all of these offenses is generally stated in the alternative: "C to P" ***or*** service discrediting.")

(3) An aggravated form of this offense may be alleged by including the element of "with intent to defraud"; in which case, it must also be instructed upon. If a more serious offense (i.e., impersonation with the intent to defraud) is charged, but simple impersonation is proved, the accused may be found guilty of the latter. *United States v. Gillispie*, 9 C.M.R. 299 (A.B.R. 1953).

(4) If the nonaggravated form of impersonation (no intent to defraud) is alleged, the final element is that the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have.

b. ***Discussion.***

(1) In *United States v. Messenger*, 2 C.M.A. 21, 24, 6 C.M.R. 21, 24 (1952), the Court of Military Appeals said the following about this particular offense:

> [W]e here hold that the offense charged [impersonating an officer] falls under disorders to the prejudice of good order and discipline of the armed forces. . . . The gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces. It requires little imagination to conclude that a spirit of confusion and disorder and lack of discipline in the military would result if enlisted personnel were permitted to assume the roles of officers and masquerade as persons of high rank.

The case of *United States v. Kupchik*, 6 M.J. 766 (A.C.M.R. 1978), *petition denied*, 7 M.J. 41 (C.M.A. 1979) is to the same effect.

(2) Prior law assumed that the military offense of impersonation was different than its civilian counterpart, impersonating an officer of the United States (18 U.S.C. § 912): ". . . it can be seen that in the military, the offense can be committed by falsely assuming the role or pretending to be a commissioned officer, whereas in order to violate the federal statute prohibiting impersonation of an officer of the United States, one must not only falsely assume the role or pretend to be an officer but one must also act in the pretended capacity." *United States v. Lane*, 28 C.M.R. 749, 751 (A.B.R. 1959). The Court of Military Appeals adopted a middle ground in the case of *United States v. Yum*, 10 M.J. 1 (C.M.A. 1980), and followed the District of Columbia circuit's lead in

doing so. The D.C. Circuit said, in the case of *United States v. Rosser*, 528 F.2d 652, 656 (D.C. Cir. 1976):

> The crime . . . has two elements: falsely pretending to be an officer or employee of the United States, and acting "as such." If acting "as such" is understood to mean performing an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold, the concerns of both the Fifth and Fourth Circuits can be accommodated. Attempting to exercise pretended authority is far more offense (sic) to the interests of the United States than "mere bravado." Moreover, it seems reasonable for Congress to have concluded that virtually everyone who pretends to be an officer or employee of the United States and in some manner asserts authority by acting "as such" seeks to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.

The Court of Military Appeals adopted this language as its own and held that ". . . both law and logic compel not only an allegation and a showing of the pretense of authority, but also an allegation and a showing of an act which 'must be something more than merely an act in keeping with the falsely assumed character.'" *Yum, supra*, at 4. The court held that a bare allegation of false representation was deficient and failed to state an offense. In *Cagle*, 12 M.J. 736 (A.F.C.M.R. 1981), a specification alleging impersonation of an OSI agent was deemed to be sufficient. In that particular specification, there was an allegation of more than a "'bare false representation'; it contains an assertion that the accused used an OSI business card to further his false impersonation and questioned a named individual in his assumed capacity as an OSI agent." *Id.* at 739. Consequently, care must be taken when drafting a specification alleging impersonation without the intent to defraud, for the *Yum* case holds that some act beyond mere false impersonation is required if an offense is to be stated. This requirement has been adopted in Part IV, para. 86b, MCM, (1995 Edition).

c. ***Pleading.*** A sample specification is found in Part IV, para. 86f, MCM, (1995 Edition).

d. ***Instructions.*** A sample instruction regarding this offense is found at paragraph 3-86-1 of the *Military Judges' Benchbook*, DA Pam 27-9 (1996), which conforms with the requirements of the *Yum* decision, and Part IV, para. 86b, MCM, (1995 Edition), as noted above.

2. ***False or unauthorized passes, permits, discharge certificates, and military identification cards.*** *See generally* Part IV, para. 77, MCM, (1995 Edition).

a. False pass, permit, discharge, and ID card offenses are among the more commonly committed crimes in the military. Passes and ID cards are altered, forged, or wrongfully used in order to achieve a variety of illegal objectives.

b. Part IV, para. 77, MCM, (1995 Edition), lists four categories of pass, permit, etc. offenses:

(1) Wrongful making, altering, counterfeiting, or tampering;

(2) wrongful sale, gift, loan, or disposition;

(3) wrongful use or possession; and

(4) wrongful use or possession with intent to defraud or deceive.

c. ***Wrongful making, altering, counterfeiting, or tampering.***

(1) ***Elements.***

(a) Wrongfully and falsely ***making***, ***altering***, ***counterfeiting***, or ***tampering with*** a certain military or official pass (etc.); and

(b) that, under the circumstances, the conduct was "C to P" or "SD."

(2) ***Discussion.***

(a) Unlike the "use," "possession," "sale," or "disposition" offense, knowledge is ***not*** an element in the "making" or "altering" offenses. It would seem, however, that lack of knowledge of its falsity or of its being unauthorized would be at least an affirmative ***defense***, if raised by the evidence, and would necessitate sua sponte instructions to the court. *See* language in *United States v. Karl*, 3 C.M.A. 427, 12 C.M.R. 183 (1953) and *United States v. Warthen*, 11 C.M.A. 93, 28 C.M.R. 317 (1959); *see also Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. 3-77-1; *United States v. Mabes*, 47 C.M.R. 28 (N.C.M.R. 1973).

(b) Part IV, para. 77e(1), MCM, (1995 Edition), sets the punishment limitation for the "making" or "altering" offenses at DD and three years'

confinement.

(c) Forged armed forces ID cards are not writings which would on their faces, if genuine, apparently operate to the legal prejudice of another; thus, an allegation that they would do so in a forgery specification is defective in the absence of an allegation of extrinsic facts to show how the cards could be or were used to affect the legal rights of others. *Davis, supra.* The same case held that a falsely made ID card was properly chargeable under Article 134.

d. ***Wrongful sale, gift, loan, or disposition.***

(1) ***Elements.***

(a) Wrongfully ***sold***, ***gave***, ***loaned***, or ***disposed*** of a certain military or official pass (etc.);

(b) that the pass (etc.) was false or unauthorized;

(c) that the accused ***knew*** that the pass (etc.) was false or unauthorized; and

(d) that, under the circumstances, the conduct was "C to P" or of a nature to bring discredit upon the armed services.

(2) ***Discussion.***

– The term "dispose," as used in this offense, includes all forms of disposition other than "sale." Part IV, para. 77e, MCM, (1995 Edition), provides the following punishment limitations:

-1- "Selling"—DD and three years' confinement; and

-2- "other cases" (disposition other than sale)—BCD and six months' confinement.

(3) It is interesting to note that the MCM prescribes a maximum punishment of a DD and three years' confinement for the sale of a false or unauthorized pass or ID card under Article 134, UCMJ, but also promulgates a maximum punishment of only a BCD and one year confinement for sale of military property worth less than $100.00 under Article 108. Part IV, para. 32e, MCM, (1995 Edition). Since most military ID cards are worth considerably less than $100.00, the ability of the government to

subject the accused to a greater punishment by merely charging the offense under Article 134 is suspect. *See United States v. Courtney*, 1 M.J. 438 (C.M.A. 1976). For a case in which the sale of ID cards was prosecuted under Article 108, see *United States v. Burgin*, 30 C.M.R. 525 (A.B.R. 1961).

e. Wrongful use or ***possession*** (with intent to deceive or defraud)

(1) ***Elements.***

(a) That the accused wrongfully ***used*** or ***possessed*** a certain military or official pass, (etc.);

(b) that the pass (etc.) was ***false*** or ***unauthorized***;

(c) that the accused ***knew*** the pass (etc.) was false or unauthorized;

(d) that, under the circumstances, the conduct was "C to P" or of a nature to bring discredit upon the armed forces; and (if alleged)

(e) that the use or possession was with the intent to deceive or defraud.

(2) ***Discussion.***

(a) The element of intent to deceive or defraud, when alleged, constitutes an aggravated circumstance and authorizes a more severe punishment. Part IV, para. 77e, MCM, (1995 Edition), provides for the following maximum punishments:

-1- Possessing or using ***with*** intent to defraud or deceive . . . DD and three years CONF; and

-2- "other cases" (i.e., possessing or using ***without*** intent to deceive or defraud) . . . BCD and six months CONF.

(b) In *United States v. Fortenberry*, 14 M.J. 505 (A.F.C.M.R. 1982), jurisdiction was found concerning a specification of wrongful possession of an ID card where the accused found a wallet containing the card in an apartment complex parking lot close to the base and where the accused knew the owner to be a member of the same organization. The accused also attempted to use the card to negotiate a money order found in the wallet. Jurisdiction was predicated on the military's interest in the control and use of service ID cards.

(c) An element of the offense of wrongful possession or use is that the accused knew the pass, etc., was false. *United States v. Blue*, 3 C.M.A. 550, 13 C.M.R. 106 (1953). It has been held to be error if the members are instructed instead that the accused must have known that the possession was unauthorized. *United States v. Espinoza*, 31 C.M.R. 705 (A.F.B.R. 1962).

(d) What if the accused has a genuine card which belongs to another in his possession? That situation arose in the case of *United States v. Chism*, 31 C.M.R. 421, 425 (N.B.R. 1961) and the court said that "a true means of identification in the possession of one to whom it is properly issued becomes a false means of identification when wrongfully used by another."

f. ***Pass offenses under 18 U.S.C. § 499.***

(1) In *Warthen, supra*, the court pointed out that pass offenses in the military spring from a Federal statute (18 U.S.C. § 499). All three judges considered that statute for the purpose of determining the nature of the offenses now provided for in Part IV, para. 77, MCM, (1995 Edition).

(2) Although ***nearly*** all pass offenses contained in 18 U.S.C. § 499 are incorporated in the MCM, there are several that are not included. These omitted offenses could also be charged under Article 134, clause 3, and, hence, would not require the terminal element (i.e., "C to P" or "SD"). Charging under clause 3 of Article 134 is discussed in section 0505, *infra*.

– Apparently omitted offenses contained in 18 U.S.C. § 499 are:

-1- Impersonating or falsely representing to be or not to be the person to whom such a pass has been issued. There would seem to be little need to charge this in such a case, however, since "wrongful possession with intent to deceive" would almost invariably be chargeable.

-2- Willfully allowing any other person to have or use any such pass or permit issued for his use alone. This one is also partly, at least, included in the MCM [see paragraph (d)-1-, above, concerning the sale or disposition of a pass (etc.)]. *See Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. 3-77-2, p. 607.

g. ***Pleading pass offenses.***

(1) Examine the facts closely and utilize precisely the

language for the selected offense as found in the sample specifications in Part IV, para. 77f, MCM, (1995 Edition).

(2) Utilize a variation of the pass offenses under 18 U.S.C. § 499 only when necessary.

(3) The sample specifications indicate that the pass should be set forth verbatim within the specification. This may be accomplished by placing a copy of the document on the charge sheet at the appropriate place.

(a) In *United States v. DuPass*, 11 C.M.R. 750 (A.F.B.R. 1953), the specification alleged that the accused did wrongfully possess at a certain time and place "a certain written instrument purporting to be an official Armed Forces Liberty Pass . . . knowing the same to be unauthorized."

-1- The board held that the failure to set forth the pass verbatim or to describe it further rendered it fatally defective because it did not inform the accused of the particular pass offense.

-2- In view of the many C.M.A. cases upholding the validity of analogous specifications which were similarly defective (*i.e.*, as to particularity of the offense alleged), the opinion in *DuPass, supra*, is ***probably*** unsound. *See Karl, supra*; *United States v. Williams*, 12 C.M.A. 683, 31 C.M.R. 269 (1962); *United States v. Autrey*, 12 C.M.A. 252, 30 C.M.R. 252 (1961); and *United States v. Bunch*, 3 C.M.A. 186, 11 C.M.R. 186 (1953).

(b) Conclusion: Adhere to the best practice in drafting such specifications (i.e., set out the pass verbatim in the specification).

(4) For a sample of a tailored pass specification, see *Karl, supra*.

(a) Be sure to follow the sample specification carefully. Also make sure that applicable knowledge requirements are pleaded.

(b) Insert a photographic copy of the pass or permit within the specification.

h. ***Instructions.***

(1) In a wrongful use, possession, sale, or disposition of a pass (etc.) case, knowledge of the unauthorized or false character of the item is an element which must be instructed upon as well as pleaded and proved. *See United States v. McIntosh*, 12 C.M.A. 474, 31 C.M.R. 60 (1961); *Blue, supra*; and *Military Judges' Benchbook*, DA Pam. 27-9 (1996), Inst. 3-77-2, and 3-77-3. An instruction that the card possessed or used by the accused was unauthorized, rather than false, may not be defective. *See United States v. Peoples*, 43 C.M.R. 656 (A.C.M.R. 1971).

(2) As noted earlier, it has been held to be error for the members to be instructed that the accused must have known that the possession was unauthorized instead of being told that the accused must have known that the card, etc., was false. *Espinoza, supra*. On the other hand, it is probably sufficient if the members determine that the accused intended to use the false card in the future. *United States v. Forster*, 13 C.M.A. 162, 32 C.M.R. 162 (1962).

(3) See the following cases with regard to the sufficiency of evidence and the instructions required in "intent to deceive cases": *United States v. Tamas*, 6 C.M.A. 502, 20 C.M.R. 218 (1955); *United States v. Alberico*, 7 C.M.A. 757, 23 C.M.R. 221 (1957); *United States v. Burton*, 13 C.M.A. 645, 33 C.M.R. 177 (1963); *Espinoza, supra; United States v. Nugent*, 33 C.M.R. 664 (C.G.B.R. 1963); and *United States v. Rolands*, 39 C.M.R. 571 (A.B.R.), *petition denied*, 39 C.M.R. 293 (1968).

(4) On a charge of wrongful possession with intent to deceive, mere wrongful possession (without that intent) is a lesser included offense (LIO). *See* discussion above and Part IV, para. 77d, MCM, (1995 Edition). If there is ***some evidence*** in the record which reasonably places this LIO in issue, it must be instructed upon. *See Burton, supra*, where the accused requested liberty which was denied. He went UA and, while UA, was asked by SP to produce his liberty card and ID card. Accused only gave ID card and was taken in custody to SP Headquarters. Later, a forged liberty pass bearing accused's name and service number was found in the patrol vehicle's rear seat on which accused had ridden. Accused later confessed that he had a forged liberty pass on his person when apprehended and knew it was forged. ***Held***: This evidence raised issue of LIO. The accused only admitted wrongful possession and, when faced with an obvious opportunity to use the card in order to deceive the shore patrol, he did not produce it. Failure to instruct on LIO was prejudicial.

(5) On a charge of wrongful ***sale*** of a pass, a wrongful ***disposition other than by sale*** might be an LIO. However, the argument that such is not the case may be just as strong. Applying traditional property concepts, it appears evident that one could act as a seller without having possession of the card or pass. There appear to be

no cases either accepting or rejecting this approach insofar as pass and ID card offenses are concerned. However, note the case of *United States v. Burgin*, 30 C.M.R. 525 (A.B.R. 1961), which dealt with a "sale of" ID cards charged under Article 108 of the UCMJ. There, the accused had delivered some cards to a third party with instructions that the cards were to be sold in the future, and any cards not thus sold were to be returned to the accused. The court held that this was a transfer and not a sale, and dismissed the charge without discussing whether the transfer was an LIO . (Article 108 also makes wrongful disposition of military property illegal.)

0502 SERVICE DISCREDITING CONDUCT—CLAUSE 2 (Key Numbers 753-758)

A. ***General discussion***. Clause 2 of Article 134, proscribes "all conduct of a nature to bring discredit upon the armed forces."

1. Part IV, para. 60c(3), MCM, (1995 Edition), defines "discredit" to mean "to injure the reputation of" and states that, "this clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem."

2. To be punishable under this clause, the discrediting potential must be direct and substantial. *United States v. Holt*, 7 C.M.A. 617, 23 C.M.R. 81 (1957). But, it is not necessary that actual discredit result from the accused's actions in order to constitute this offense. It is sufficient if, under the circumstances, the conduct was of a nature to bring direct and substantial discredit. *United States v. Berry and Mitchell*, 6 C.M.A. 609, 20 C.M.R. 325 (1956).

> ***Example***. Accused was charged with publicly associating with persons known to be sexual deviates, to the disgrace of the armed forces. The defense contended that, since the association was solely in the presence of sexual deviates, the element of disgrace to the service is necessarily lacking. ***Held***: The defense argument meritless, and the evidence sufficient. *United States v. Hooper*, 9 C.M.A. 637, 26 C.M.R. 417 (1958).

3. Clauses 1 and 2 frequently overlap; that is, acts which have a direct and palpable tendency to prejudice good order and discipline often are also committed under circumstances which have a direct and substantial tendency to injure the reputation of the armed forces.

a. In actual practice, most cases are tried and reviewed under this dual approach.

(1) Part IV, para. 60c(6)(a), MCM, (1995 Edition), specifically provides "The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces."

– In *United States v. Holt*, 7 C.M.A. 617, 622, 23 C.M.R. 81, 86 (1957), C.M.A. held that conducting a rigged bingo game in an Airmen's Open Mess was an offense under Article 134, and stated: "We find in this case that the accused's behavior was not only prejudicial to good order and discipline, but it further reflected discredit on the armed forces. Open messes of officers and enlisted personnel are semi-public and perform valuable functions for the service. The bingo games and entertainment have a direct impact upon the morale of our forces overseas. We cannot but conclude, therefore, that patent dishonesty by an employee in one of these organizations constituted improper acts and conduct which directly and substantially affected adversely the good order and discipline in the armed forces of the United States and did directly and substantially bring discredit upon the armed forces."

(2) The dual approach may ***not*** be ***discussed*** in every case.

– In *United States v. Snyder*, 1 C.M.A. 423, 4 C.M.R. 15 (1952), C.M.A. considered the particular misconduct involved to come under clause 1 because it had occurred in the ***semi-privacy*** of a ***military reservation***, and concluded that enticing another to have intercourse with a female constituted a ***disorder prejudicial to good order and discipline***. However, even in this case, where the court concentrated on a single vice dual approach, it did not go so far as to specifically ***hold*** that the conduct was not service discrediting. Rather, it simply analyzed the offense under clause 1 and stated that clause 2 "need not detain us" because the misconduct occurred on the military reservation.

b. ***Standard instruction on final element***. The standard instruction on the ***final element*** of ***every offense*** tried under clauses 1 and 2 of Article 134 is stated in the ***alternative***. *Military Judges' Benchbook*, DA Pam 27-9 (1996), Inst. 3-61-1, et. seq. *See also* Part IV, para. 60b(2), MCM, (1995 Edition): "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." C.M.A. has never questioned the propriety of this alternative form of instruction on the ***final element*** of clauses 1 and 2, Article 134 offenses. Nevertheless, it is important to recognize that these two concepts—"C to P" and "SD"—are distinct even though one act may constitute a violation of both.

B. ***Analysis of some specific offenses under Article 134, clause (2).***

1. ***Dishonorable failure to pay just debts.*** Part IV, para. 71, MCM, (1995 Edition).

a. ***Elements.***

(1) That the accused was indebted to a certain person or entity in a certain sum;

(2) that this debt became due and payable on or about a certain date;

(3) that, while the debt was still due and payable, the accused dishonorably failed to pay this debt; and

(4) that, under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. (Or "C to P.")

b. ***The debt must be a sum certain which is due and payable.***

(1) If there is a genuine dispute as to whether the debt is due and payable, the dispute will constitute a defense to the charge. In the case of *United States v. Webb*, 10 C.M.A. 422, 27 C.M.R. 496 (1959), the accused was a manager of a club which showed a shortage in funds as a result of an audit. The accused signed an acknowledgment of indebtedness to make up the shortage from his own funds and attempted to make a monthly allotment to pay it off. His attempt was unsuccessful, however, and he did not make further efforts to make good on the note. At his later trial, he claimed that the shortage was not a "just" debt and that he had signed the acknowledgment because he was upset, although he admitted that he was not forced to sign it. The court held that his argument was without merit and that there was no genuine dispute as to the legality or the amount of the obligation; consequently, the accused had no defense.

(2) The courts have held that gambling losses are not "debts." Even a deliberate refusal to pay a gambling debt is not an offense under Article 134 because the courts consider the enforcement of such obligations to be in conflict with "the welfare and morals of society." *United States v. Lenton*, 8 C.M.A. 690, 25 C.M.R. 194 (1958). In appropriate circumstances, however, the fact that the accused has incurred gambling debts may bear upon the question of whether the accused's failure to pay his ***other*** obligations was dishonorable. *See United States v. Swanson*, 9 C.M.A. 711, 26 C.M.R. 491 (1958).

(3) In most instances, there must be a demand for payment by the creditor before the debt can be considered to have matured. *See United States v. Rusterholz*, 39 C.M.R. 903 (A.F.B.R 1968). Because "[t]he law does not require the doing of a useless act," no such demand is required if the accused has made clear his intent to defraud the creditor. *United States v. DeLancey*, 34 C.M.R. 845, 848 (A.F.B.R. 1964).

c. ***Wrongful and dishonorable failure to pay the debt is required.***

(1) "Wrongful" means without justification or excuse.

(a) A discharge in bankruptcy may constitute a defense to this charge because a subsequent refusal to pay would not then be wrongful. ". . . a discharge in bankruptcy, before a dishonorable failure to pay has occurred can do away with the basis for a later charge of a violation of the Uniform Code." *United States v. Swanson*, 9 C.M.A. 711, 715, 26 C.M.R. 491, 495 (1958).

(b) Part IV, para. 71c, MCM, (1995 Edition), provides that, "[f]or a debt to form the basis for this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, *either in fact or according to the accused's belief*, at the time alleged." (Emphasis added). Thus, if the accused honestly believed that he was not under any legal and moral duty to pay the debt, his failure to do so should not be characterized as "dishonorable."

(2) "Dishonorable" means that the failure to pay the debt was characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. Part IV, para. 71e, MCM, (1995 Edition); *United States v. Bonar*, 40 C.M.R. 482 (A.B.R. 1969); *United States v. Savinovich*, 25 M.J. 905 (A.C.M.R. 1988).

– A mere negligent failure to pay a just debt is not an offense under the UCMJ. *United States v. Kirksey*, 6 C.M.A. 556, 20 C.M.R. 272 (1955); *United States v. Stevenson*, 30 C.M.R. 769 (A.F.B.R. 1960); *United States v. Bethea*, 3 M.J. 526 (A.F.C.M.R. 1977); *United State v. Gardner*, 35 M.J. 300 (C.M.A. 1992).

(3) Mere inability to pay or the failure to pay over a long period of time, without more, has been held insufficient to support a charge of dishonorable failure to pay a just debt. *United States v. Cummins*, 9 C.M.A. 669, 26 C.M.R. 449 (1958). On the other hand, failure to pay over a lengthy period of time, coupled with false denials of the existence of the debt, is sufficient to support a conviction. *United States v. Atkinson*, 10 C.M.A. 60, 27 C.M.R. 134 (1958); *United States v. Smith*, 1 M.J. 703 (A.F.C.M.R. 1975).

– Along this same line of reasoning, the mere

failure to keep a promise to pay a debt is not itself dishonorable unless the promise was made with a fraudulent or deceitful purpose in order to evade responsibility for payment. *United States v. Gibson*, 1 M.J. 714 (A.F.C.M.R. 1975); *United States v. Brown-Austin*, 34 M.J. 578 (A.C.M.R. 1992). There must be some proof of a fraudulent or deceitful purpose in order to support a conviction. *Rusterholz, supra.*

d. ***Terminal element.*** Since this offense is charged under Article 134, the "terminal element" of conduct to the prejudice of good order and discipline or service discrediting conduct is required. If the dishonorable failure to pay a just debt occurs in the civilian community, it is more appropriately described as conduct that is service discrediting.

e. ***Case illustrations.***

(1) The accused was requested a number of times over a period of several months to pay each of his debts; the evidence indicated that he was able to pay, but he evaded payment. ***Held***: Evidence sufficient for conviction. *Swanson, supra.*

(2) Accused made a number of late payments on a loan; some were by checks which were returned for insufficient funds, but he finally made all payments good and the manager of the finance company testified that the accused's account was "satisfactory." ***Held***: Evidence ***not*** sufficient. "The public nature of the offense has its source in a private relationship. If the private relationship is entirely satisfactory to the parties, there is no ill effect upon the civilian or military community. In other words, if the creditor is satisfied with the conduct of the debtor, there is no basis for concluding that the conduct of the debtor discredits the military service." *Cummins, supra; see also United States v. Schneiderman*, 12 C.M.A. 494, 31 C.M.R. 80 (1961). This view is now reflected in Part IV, para. 71c, MCM, (1995 Edition), which provides that: "The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment."

f. ***Pleading.*** Use sample specification at Part IV, para. 71f, MCM, (1995 Edition).

2. ***Carrying a concealed weapon.*** Part IV, para. 112, MCM, (1995 Edition).

a. ***Elements.***

(1) That the accused carried a certain weapon concealed on or about the accused's person;

(2) that the carrying was unlawful;

(3) that the weapon was a dangerous weapon; and

(4) "C to P" or "SD."

b. "A weapon is concealed when it is carried by a person and intentionally covered or kept from sight." *Military Judges' Benchbook*, DA Pam. 27-9 (1996), Inst. 3-112-1, p. 695. This instruction has been approved in the case of *United States v. Tobin*, 17 C.M.A. 625, 38 C.M.R. 423 (1968). The weapon does not have to be concealed on the accused's person, concealment in an automobile at "a place where it is readily available to him" is sufficient to support a conviction. *United States v. Detuccio*, 29 C.M.R. 879 (A.F.B.R. 1960). Carrying a loaded weapon in a locked briefcase in the cab of the accused's pick-up truck was held to have met the element of being "on or about his person" in *United States v. Ballesteros*, 29 M.J. 14 (C.M.A. 1989).

c. The particular thing allegedly concealed may be found to be dangerous if it was designed for the purpose of doing grievous bodily harm or was used or intended to be used by the accused to do grievous bodily harm. *Military Judges' Benchbook*, DA Pam. 27-9 (1996), Inst. 3-112-1. *See also United States v. Bussard*, 31 C.M.R. 448 (N.B.R. 1961).

– Some examples of items held to be dangerous weapons for this purpose include:

(a) ***Straight razors.*** Accused was charged with unlawfully carrying a "concealed weapon, to wit: a straight razor" at the USO building. C.M.A. held: "Carrying a concealed weapon under circum-stances to the discredit of the armed services is a violation of Article 134, . . . [a] straight razor is, of course, not designed for use as a weapon. However, it is 'naturally considered a dangerous instrument'. . . . And it is readily capable of use as a weapon. Its character as a dangerous but innocent instrument, or as a weapon, depends upon the surrounding circumstances. In other words, whether a particular object is a weapon is often a question of fact. . . . The specification . . . alleges that the razor was carried 'unlawfully' as a 'concealed weapon.'" The specification states an offense. *United States v. Bluel*, 10 C.M.A. 67, 68, 27 C.M.R. 141, 142 (1958).

(b) ***Carbine bayonet with a seven-inch blade.***

United States v. Bryant, 17 C.M.R. 896 (A.F.B.R. 1954), *petition denied*, 18 C.M.R. 333 (1955).

(c) ***Unloaded pistol.*** *United States v. Ramsey*, 18 C.M.R. 588 (A.F.B.R. 1954). *See United States v. Brungs*, 14 C.M.R. 851 (A.F.B.R. 1954), which is in accord with *Ramsey* and indicates that an unloaded pistol is dangerous when it can be readily transformed into an effective lethal weapon.

d. ***Pleading.*** See Part IV, para. 112f, MCM, (1995 Edition). Both the Army *Military Judges' Benchbook*, DA Pam. 27-9 (1996), and the sample specification in the MCM indicate that "unlawfully" is an element of the offense. Several cases have held that failure to allege that the carrying of the concealed weapon was "unlawful" results in a failure of the specification to state an offense since there may be occasion when it is authorized or otherwise proper to carry a concealed weapon. *United States v. McCoy*, 37 C.M.R. 579 (A.B.R. 1966), *petition denied*, 37 C.M.R. 471 (C.M.A. 1967); *Detuccio, supra.* The *McCoy* case also held that the failure to object did not waive the error. *See also United States v. Lyons*, 33 M.J. 88 (C.M.A. 1991), where the court held that unlawfulness of the carrying is an essential element of the offense of carrying a concealed weapon under Article 134 and that such unlawfulness may be inferred, absent some evidence to the contrary, from the fact of the carrying.

3. ***Violations of local law (domestic or foreign).***

a. ***General.*** In discussing what constitutes "conduct of a nature to bring discredit upon the armed forces," Part IV, para. 60c(3), MCM, (1995 Edition), states: "Acts in violation of a local civil law . . . may be punished if they are of a nature to bring discredit upon the armed forces."

(1) This includes the local law of foreign countries as well as the local law of the states.

(2) However, "[A] violation of a state statute does not by itself constitute a violation of Article 134, UCMJ. The violation must, in fact, and in law, amount to conduct to the discredit of the Armed Forces. Not every violation of a state statute is discrediting conduct." *United States v. Grosso*, 7 C.M.A. 566, 23 C.M.R. 30 (1957).

(3) The holding in *Grosso*, which ***required*** an ***instruction*** on the ***terminal element*** in every case tried under clause 1 or clause 2, has been consistently reaffirmed by C.M.A. *See United States v. Williams*, 8 C.M.A. 325, 24 C.M.R. 135 (1957); *United States v. Gittens*, 8 C.M.A. 673, 25 C.M.R. 177 (1958); and *United States v. Leach*, 7 C.M.A. 388, 22 C.M.R. 178 (1956). *See also United States v. Parrish*, 20 M.J. 665

(N.M.C.M.R. 1985); *United States v. Long*, 20 M.J. 657 (N.M.C.M.R. 1985).

b. ***Case example.*** In the case of *United States v. Grose*, 26 C.M.R. 740 (N.B.R. 1958), the accused, a minor, was charged with possessing and drinking alcoholic beverages in a public place in violation of a state law which prohibited such conduct by minors unless accompanied by an adult. The specification merely alleged that the accused had been in possession and consumed alcoholic beverages as a minor in a public place. The court held that (1) the state statute did not prohibit a minor's drinking or possessing alcoholic beverages per se but prohibited such conduct ***unless*** accompanied by a parent, adult spouse, or guardian; and (2) since the "misconduct charged . . . has not been specifically denounced as a crime or offense by Congress, the third class of offenses [clause 3] mentioned in Article 134, *supra*, is of no concern. . . ." *Id.* at 742. It went on to note that, even if the conduct had amounted to a violation of state law, it still must be "C to P" or "SD" in order to be prosecuted under clause (1) or clause (2) of Article 134. The court held that there "was an absence of facts alleged" which would meet this last requirement and held that the specification failed to state an offense.

c. Though it is rare that an act, illegal under state law, is prosecuted under clause 2 of Article 134, that was what occurred in *United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990). In *Sadler*, the accused was charged with contributing to the delinquency of a minor and sexual exploitation of a minor in violation of New Mexico law. As this conduct occurred off base, the Federal Assimilative Crimes Act was inapplicable. The government's theory was that the conduct was service discrediting. In reversing the conviction as to these specifications, the court held that the military judge should have instructed the members that they could not convict the accused solely because he had violated New Mexico law, though they could consider the violation to determine whether the accused's conduct was service discrediting. Further, the judge should have instructed the members on the elements of the crimes prohibited by New Mexico law.

4. ***Negligent homicide.*** Part IV, para. 85, MCM, (1995 Edition).

a. ***Elements.***

(1) That a certain person is dead;

(2) that this death resulted from the act or failure to act of the accused;

(3) that the killing by the accused was unlawful;

(4) that the act or failure to act of the accused which caused the death amounted to simple negligence; and

(5) "C to P" or "SD."

b. "In light of past court-martial practices" with respect to the prosecution of negligent homicide and the "special need in the military" to make the killing of another as a result of simple negligence a criminal act, homicide by simple negligence is an offense under the UCMJ, and its prosecution under the UCMJ is not rendered unlawful by civilian case law which requires a higher degree of negligence in order to punish a civilian for the same offense in civil courts. *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979). In the *Kick* case, the court also rejected a claim that the offense of negligent homicide had been preempted in the military since Congress had specially created the offense of manslaughter and murder in other articles of the UCMJ. *See United States v. King*, 4 M.J. 785 (N.C.M.R. 1977), where the Navy court held that negligent homicide occurred when an automobile driven by the accused, who was intoxicated at the time, weaved across the center line of a highway and struck another vehicle, killing the driver. The court found that such conduct was "C to P" under the circumstances. It could also be construed as service discrediting. In *United States v. Martinez*, 42 M.J. 327 (1995), the Court of Appeals for the Armed Forces held that an accused who negligently allowed a fellow servicemember to drive the accused's vehicle while under the influence of alcohol, resulting in the intoxicated driver's death is guilty of negligent homicide. In *United States v. Reitz*, 12 M.J. 784 (A.C.M.R. 1982), the Army Court of Military Review approved a negligent homicide conviction. The accused was driving his vehicle at a high rate of speed while intoxicated. He lost control of the vehicle; it rolled over; and his military passenger was killed. The court determined that operating a vehicle through a civilian community in such a manner as to result in the death of a fellow soldier demonstrated sufficient prejudice to good order and discipline as to sustain a conviction under Article 134. In *United States v. Perez*, 15 M.J. 585 (A.C.M.R.1983), a conviction for negligent homicide was affirmed when a woman left her baby in the care of her brutal boyfriend (who subsequently killed the baby) after being warned that her boyfriend had previously abused the child. By leaving the baby with her boyfriend, in spite of the warnings, her action played a material role in the baby's death and was a proximate cause of the child's death. Finally, in *United States v. Zukrigl*, 15 M.J. 798 (A.C.M.R. 1983), the accused was in charge of a water-crossing exercise and failed to ensure that appropriate safety measures were in effect. Such a failure was the proximate cause of the death of an Army private, thereby supporting a conviction for negligent homicide.

c. In the case of *United States v. Billig*, 26 M.J. 744 (N.M.C.M.R. 1988), the Navy-Marine Corps Court of Military Review extensively used their fact-finding power to overturn the accused's conviction for, inter alia, negligent homicide based on alleged medical malpractice in the performance of heart bypass surgery. Although the court decided this case on its facts, it indicated, in dicta, an unwillingness to find a physician

criminally liable for simple negligence.

0503 NOVEL SPECIFICATIONS UNDER CLAUSES 1 AND 2 OF ARTICLE 134 (Key Numbers 550-552, 756, 762, 953)

A. As a general rule, the creation of "unestablished offenses" under the first and second clauses of Article 134 should be avoided whenever possible. They are generally frowned upon by the courts, although it is difficult to predict what action they will take when confronted by any given specification since the cases on point deal with allegations tailored to specific types of misconduct. Nonetheless, a review of some of these cases is helpful in gaining some insight into the problem.

B. The courts have refused to uphold convictions for "new" Article 134 offenses in the following cases.

1. A charge of wrongfully and unlawfully opening a package addressed to another before the package was received by the addressee was held not to state an offense in the case of *United States v. Lorenzen*, 6 C.M.A. 512, 20 C.M.R. 228 (1955). The following points from the opinion are noteworthy:

a. The specification did not fairly imply that the package was "mail matter"; hence, it did not state the offense "of interference with the mail" which is a "recognized" Article 134 offense.

b. To the extent that such an act amounted to wrongful appropriation or larceny, Article 134 has been preempted (*see* below for a discussion of the doctrine of preemption) by Article 121. The specification, however, failed to state an offense under Article 121 because it did not allege an intent to deprive, either permanently or temporarily ("steal" or "wrongfully appropriate").

c. The alleged act did not have the required impact on good order and discipline nor was it service discrediting.

2. Willful indecent exposure is an offense under Article 134, but negligent indecent exposure is not. In *United States v. Manos*, 8 C.M.A. 734, 25 C.M.R. 238 (1958), the Court of Military Appeals mentioned the following factors in reaching that conclusion:

a. An act that results from simple negligence does not give rise to criminal liability in the absence of an express statute or "ancient usage" to the contrary.

b. Negligent exposure is not mentioned as an LIO in the MCM.

c. The services may not eliminate vital elements of recognized offenses and then punish "the remainder" as a violation of Article 134.

3. In *United States v. Jackson*, 16 C.M.A. 509, 37 C.M.R. 129 (1967), the specification alleged that the accused wrongfully appeared on board his ship wearing white socks. C.M.A. held that the specification failed to allege the offense of wearing an improper uniform under Article 134.

4. In *United States v. Day*, 11 C.M.A. 549, 29 C.M.R. 365 (1960), the accused was convicted of lending money at a usurious and unconscionable rate of interest, to wit: $30.00 to be repaid at the end of one month with $30.00 interest. C.M.A. held that this did not state an offense even though it ostensibly had been recognized as an offense in military law for 150 years, was listed in TMP, and there was a sample specification for it in Appendix 6c, MCM, 1951. C.M.A. stated: ". . . [W]hether a particular rate of interest is usurious depends upon a statute. . . . Without some definite provision limiting the rate which the lender may receive, the rate charged cannot be called usurious. . . . [S]ince military law in general, and Army regulations in particular, provide no legal rate of interest, the exaction of any given rate cannot be described as illegal and, therefore, usurious. The interest alleged in the specification here may indeed be unconscionable but it is not unlawful." The 1969 MCM deleted all reference to usury from the TMP and from the Appendix 6c sample specifications. *Id.* at 550, 29 C.M.R. at 366. *Cf. United States v. Smith*, 1 M.J. 156 (C.M.A. 1975); *see also United States v. Brown*, 7 M.J. 586 (N.C.M.R. 1979). (***Note***: Lending money at a rate in excess of eighteen percent per year simple interest is now prohibited by Art. 1112, *U.S. Navy Regulations, 1990*, violation of which can be prosecuted under Article 92, UCMJ.)

5. Air Force officer engaging in mutual, voluntary, private, nondeviate sexual intercourse with enlisted member is not "C to P" or "SD," as it was not a violation of any Air Force policy or against Air Force customs. *United States v. Johanns*, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985). *See also United States v. Stocken*, 17 M.J. 826 (A.C.M.R. 1984).

6. *United States v. Seda*, N.M.C.M. 84-4114 (3 May 1985), wrongfully concealing a prophylactic filled with urine with the intent to deceive is not an offense under Article 134. An Air Force captain (O-3) catheterizing herself and communicating to enlisted person how to conceal use of marijuana by catheterization constituted two violations of Article 133 for conduct unbecoming an officer. *United States v. Norvell*, 26 M.J. 477 (C.M.A. 1988).

7. Act of sexual intercourse consummated on public beach after midnight where it was unlikely to be discovered did not constitute indecent acts by fornicating in

public, an act proscribed by Article 134. *United States v. Carr*, 28 M.J. 661 (N.M.C.M.R. 1989).

8. In *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991), *aff'd*, 34 M.J. 174 (C.M.A. 1992), the court held that, given that under Article 134 many forms of sex offenses have been delineated, it was not within the court's jurisdiction to add private heterosexual, consensual, nondeviate intercourse to that list—particularly in the absence of evidence that the accused knew that sexual intercourse with potential USMC recruits by a recruiter was prohibited by the Marine Corps.

9. In *United States v. Davis*, 32 M.J. 951 (N.M.C.M.R. 1991), the court reversed the conviction of the accused for wrongful possession of tetracycline, holding that the situation was too remote to be considered a violation of either Article 134(1) or 134(2).

C. In certain instances the validity of prosecutions for particular violations of Article 134 have been recognized by the courts, but expansion of these offenses to cover novel fact situations has been resisted. That is, while a particular offense may be considered an "established" offense, its limitations are considered to be defined by the nature of its traditional application.

1. ***Unlawful entry*** into property ***without*** intent to commit an offense therein is an offense under Article 134. However, there is no offense of unlawful entry into property other than a building, structure, real property, or such form of personal property as is usually used for storage or habitation.

– This is based upon a most peculiar limitation. Article 130, ***Housebreaking***, defines the places which may be the subject of unlawful entry with intent to commit a crime therein as a "building or structure." The types of property subject to Article 134 unlawful entry are deemed to be extended from the Article 130 limitations and do not extend so far as to include an automobile. *United States v. Gillin*, 8 C.M.A. 669, 25 C.M.R. 173 (1958); (*but see United States v. Wright*, 5 M.J. 106 (C.M.A. 1978), which held that the government could assimilate a state law which prohibited unlawful entry into an automobile by utilizing the Federal Assimilated Crimes Control Act) or a locker; *United States v. Breen*, 15 C.M.A. 658, 36 C.M.R. 156 (1966). *See also United States v. Wickersham*, 14 M.J. 404 (C.M.A. 1983) (a fenced-in storage area of the Air Force may be the subject of an unlawful entry); *United States v. Love*, 4 C.M.A. 260, 15 C.M.R. 260 (1954) (a tent may be the subject of unlawful entry).

2. Glue sniffing "with intent to become intoxicated" has been held to be an Article 134 offense if the intent is so alleged. *United States v. Limardo*, 39 C.M.R. 866 (N.B.R. 1969). In *Limardo*, the specific substance inhaled was not alleged and the court

strongly suggested that it should have been. Other cases have struck down seemingly similar specifications. An allegation that the accused did wrongfully sniff glue, such conduct being to the prejudice of good order and discipline in the Armed Forces" was held insufficient in *United States v. Santo Menta*, 39 C.M.R. 956 (A.F.B.R. 1968). In *United States v. Mielke*, No. 69-3552 (N.C.M.R. 1970), a specification which alleged that the accused did "wrongfully use an intoxicating chemical, to wit: Toluene," was held to be insufficient.

D. Occasionally, the courts will uphold the creation of a "new" offense under Article 134. In each of the following cases the offense prosecuted had not been "established" previously, but was considered to be viable by the reviewing court.

1. ***Wrongfully, unlawfully, and through design jumping from a ship into the sea.*** *United States v. Sadinsky*, 14 C.M.A. 563, 34 C.M.R. 343 (1964). This offense is now "established" in Part IV, para. 91, MCM, (1995 Edition).

2. ***Submission of a forged (false and unauthorized) loan recommendation to a credit union with intent to deceive.*** *United States v. Winton*, 15 C.M.A. 222, 35 C.M.R. 194 (1965). *See also United States v. Wilson*, 13 C.M.A. 670, 33 C.M.R. 202 (1963) and *United States v. Rusterholz*, 39 C.M.R. 903 (A.F.B.R. 1968), in which the inducement of a private concern to extend credit through a false and wrongful statement made with the intent to deceive was found to be "service discrediting" and an offense under Article 134.

3. ***Keeping a disorderly house (house of prostitution) in government quarters.*** *United States v. Mardis*, 6 C.M.A. 624, 20 C.M.R. 340 (1956). (***Note:*** C.M.A. herein considered District of Columbia law to establish the elements of the offense in a "C to P" case.) *See also United States v. Butler*, 11 C.M.R. 445 (A.B.R. 1953).

4. ***Disrespect to a superior airman (not an NCO) who was then in the execution of his office.*** *United States v. Spigner*, 16 C.M.R. 604 (A.F.B.R. 1954). *But see United States v. Lumbus and Sutton*, 23 C.M.A. 231, 49 C.M.R. 248 (1974), which held that assault upon an acting NCO was not an offense under Article 134.

5. ***Wrongfully, unlawfully, and knowingly affiliating with a group which advocates the overthrow of the U.S. Government.*** *United States v. Blevens*, 5 C.M.A. 480, 18 C.M.R. 104 (1955).

6. ***Willfully, wrongfully, and intentionally placing foreign objects into intake ducts of jet engines with knowledge of the destructive effects of foreign object injection, thereby endangering the engines and aircraft.*** *United States v. Martinson*, 21 C.M.A. 109, 44 C.M.R. 163 (1971). The court found this to be an LIO of a charge under

article 80, attempting to damage military property. The language of C.M.A. is instructive here: "In general we discourage the use of specifically formulated specifications under Article 134 as lesser included offenses of ones charged under specific punitive articles. But we are satisfied that the existing language of Article 134 supports the validation of the offense found in this instance. Since the acts of the appellant constituted a military offense and since they were directly and palpably prejudicial to good order and discipline, we affirm. . . ." *Id.* at 112, 44 C.M.R. at 166.

7. ***Communicating indecent, insulting, and obscene language (obscene telephone calls) was held to be more than simple disorderly conduct and hence properly chargeable as a more serious offense under Article 134.*** *United States v. Respess*, 7 M.J. 566 (A.C.M.R.), *petition denied*, 7 M.J. 249 (C.M.A. 1979). *See also United States v. Linyear*, 3 M.J. 1027 (N.C.M.R. 1977), *petition denied*, 5 M.J. 269 (C.M.A. 1978).

8. ***Obtaining services by false pretenses by using another's phone to make long-distance calls is an offense under Article 134.*** *United States v. Flowerday*, 28 M.J. 705 (A.F.C.M.R. 1989).

9. ***Voyeurism may be charged under Article 134 and is similar to a simple disorder.*** *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978).

10. ***Indecent acts with a dead body has been held to be an offense under Article 134.*** *United States v. Mabie*, 24 M.J. 711 (A.C.M.R.), *petition denied*, 25 M.J. 260 (C.M.A. 1987).

E. ***Conclusion.*** It is difficult to ascertain which Article 134 offenses the appellate courts will reject although, on balance, it would appear they have upheld more "novel" Article 134 offenses than they have disallowed. It is clear that using the MCM model specifications is the safe and prudent course and that the creation of "new, novel" specifications is risky. Likewise, the use of a case-established offense without carefully noting its discussion of the specification's contents and the elements of the offense is pure folly.

0504 CRIMES AND OFFENSES NOT CAPITAL (CONC)–CLAUSE 3 (Key Numbers 771-776)

A. ***Text of article (clause 3).*** "Though not specifically mentioned in this chapter . . . crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial. . . ."

B. ***MCM interpretation of clauses.*** Part IV, para. 60c(1), MCM, (1995 Edition),

states: "Clause 3 offenses involve noncapital crimes or offenses which violate Federal law. . . . If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article." Part IV, para. 60c(4)(a) further explains: "State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 . . . except when State law becomes Federal law of local application under section 13 of title 18 of the United States Code (Federal Assimilative Crimes Act)."

C. ***There are two groups of Federal "crimes and offenses not capital".***

1. ***Crimes and offenses of unlimited application.*** (i.e., crimes which are punishable regardless of where they may be committed). For example: counterfeiting and murder.

2. ***Crimes and offenses of local application.*** (i.e., crimes which are punishable only if they are committed in areas of Federal jurisdiction). This group consists of ***two types*** of congressional enactments.

a. ***Specific*** Federal statutes defining ***particular*** crimes:

– ***Examples.*** 18 U.S.C. § 2198: seducing a female passenger on board an American vessel by a master, officer, or seaman; *United States v. Santistevan*, 22 M.J. 538 (N.M.C.M.R. 1986), *aff'd*, 25 M.J. 123 (C.M.A. 1987); *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984) 18 U.S.C. § 1201: kidnapping.

b. A Federal statute, 18 U.S.C. § 13, which simply ***"adopts" certain state criminal laws.*** This is commonly known as the ***Federal Assimilative Crimes Act*** (hereinafter FACA).

D. ***Federal Assimilative Crimes Act (FACA).***

1. ***Text of the act***: "Laws of states adopted for areas within Federal jurisdiction."

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title [special maritime and territorial jurisdiction of the United States defined], is guilty of any act or omission which, although not made punishable by any enactment of Congress, should be punishable if committed or omitted within the jurisdiction of the

> State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Id. 18 U.S.C. § 13 (1982).

2. ***Discussion.*** FACA constitutes a limited adoption by Congress of state criminal laws in areas of Federal jurisdiction located in the state concerned. It also adopts the criminal law of territories, possessions, and districts. It does ***not*** adopt the law of local authority, such as counties, cities, etc. State law is not adopted if other Federal law has defined an applicable offense for the misconduct involved. "This provision of the Code is a valid exercise of congressional authority and constitutes an adoption by Congress for Federal enclaves, of state criminal laws in those areas where Federal criminal law has not defined a certain offense or provided for its punishment." *United States v. Rowe*, 13 C.M.A. 302, 309, 32 C.M.R. 302, 309 (1962). A violation or infraction of a state's **traffic code** can be charged using FACA even if the state does not regard the traffic code as part of its **criminal law.** *United States v. White*, 39 M.J. 796 (N.M.C.M.R. 1994).

a. ***Example.*** If ***A*** were to commit a certain act aboard the Naval Education and Training Center, Newport, Rhode Island, which did not constitute an offense specifically defined by Federal law, ***A*** could nonetheless be tried for committing that act by a court-martial if that act constituted a noncapital offense under Rhode Island law. This is so because FACA, under these circumstances, ***adopts*** the criminal law of the state where the Federal enclave is located and applies it just as though it were Federal law. *United States v. Craig*, 19 M.J. 166 (C.M.A. 1985).

b. FACA applies to valid state laws that were in existence at the time of the alleged offense, without regard to whether they were enacted before or after the passage of FACA or the acquisition of the Federal enclave in question. The law also incorporates into Federal law all additions, repeals, modifications, and amendments of the pertinent state law. *Rowe, supra.*

3. ***The doctrine of preemption and FACA.***

a. Only those offenses which have not already been defined by Federal law are assimilated by FACA. For example, in *United States v. Williams*, 327 U.S. 711 (1946) (which dealt with the predecessor of the current FACA statute), the accused had consensual sexual intercourse with an Indian maid, who was over 16 but under 18 years of age, within the Colorado Indian Reservation—a Federal enclave in Arizona. Federal law set

the statutory rape age at 16, but Arizona law set it at 18. The Court held that Congress intended to assimilate crimes, not acts, and since at the time there were Federal statutes that covered statutory rape, the doctrine of preemption precluded resort to the state law.

– Of similar import is the case of *United States v. Jones*, 5 M.J. 579 (A.C.M.R. 1978), which held that, since prosecution of the accused under a specific article of the UCMJ was possible on charges of making false reports of armed robberies, the accused could not be tried under an assimilated Texas statute. *See United States v. Irwin*, 21 M.J. 184 (C.M.A. 1986) (the accused cannot be convicted under the Assimilated Crimes Act where child abuse consisted only of assaults on a child which are recognized under Article 128).

b. On the other hand, if an actual void in Federal law exists, FACA fills the gap with state law. *Williams, supra; Rowe, supra.* Thus, the Court of Military Appeals held, in the case of *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978), that such a void existed in military law with respect to unauthorized entry into an automobile and that state law on the subject could be assimilated and prosecuted under FACA. Furthermore, in *United States v. Kline*, 15 M.J. 805 (A.C.M.R. 1983), *aff'd*, 21 M.J. 366 (C.M.A. 1986), it was determined that the offense of resisting apprehension, pursuant to Article 95, UCMJ, did not preempt charging the accused with eluding the police under the Maryland Code. Congress did not intend to limit the prosecution of resisting authority offenses to article 95, nor was the offense of eluding a Maryland police officer a residuum of elements of Article 95, UCMJ.

4. ***Basis for FACA prosecutions***. A trial based upon FACA is not for the enforcement of the underlying state statute, but of the Federal law. *Williams, supra; Rowe, supra; United States v. Musick*, 3 C.M.A. 440, 30 C.M.R. 196 (1953); *United States v. Harkcom*, 12 C.M.A. 257, 30 C.M.R. 257 (1961).

– ***Example***. Accused was driving a car at 30 mph on MCAS, Cherry Point, North Carolina, when his wife jumped out. He put her (nose bleeding and unconscious) back in the car, took her home, and put her to bed. The next morning she was dead. He was charged under Article 134 with violation of Section 20 - 166 of General Statutes of North Carolina, in that, while a driver of a vehicle involved in an accident resulting in injuries to Mrs. Rowe (wife), he wrongfully and unlawfully failed to render reasonable assistance to her, etc., and that such conduct was of a nature to bring discredit upon the armed forces. TC, from the start and throughout the trial, asserted that he was proceeding under FACA. The court was instructed strictly on this theory (i.e., clause 3, Article 134, based on FACA). The accused was convicted. ***Held***: The evidence established an offense under the alleged North Carolina statute, which was assimilated. Affirmed. *Rowe, supra.* [Note the manner in which C.M.A. indicated that the state statute should be construed as an independent Federal determination.]

But see United States v. Seeger, 2 M.J. 249 (A.F.C.M.R. 1976), which was not considering a FACA issue, but rather a prosecution under clauses 1 and 2 of Article 134 for the same basic offense (failure to report an accident). The court there held that the offense of leaving the scene of an accident without making one's identity known was not intended to extend to a situation in which the only property damaged was the driver's vehicle and the only personal injury was to a passenger in the driver's vehicle.

5. ***Constitutionality.***

a. The constitutionality of FACA (or its predecessors) was considered by the Supreme Court in *United States v. Sharpnack*, 355 U.S. 286 (1958). The Court held that the statute was not an unconstitutional delegation to the states of Congress' legislative authority, but was rather a ". . . continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put into effect by the respective States. . . ." *Id.* at 294, 78 S.Ct. at 296. The claim of unconstitutional delegation of congressional authority was rejected even earlier in the case of *Franklin v. United States*, 216 U.S. 559 (1910), in which the Court said that such a claim was "clearly unfounded." *Hemans v. United States*, 163 F.2d. 228 (6th Cir. 1947), *cert. denied*, 332 U.S. 801 (1947).

b. On the other hand, if the specification with which the accused is charged is ambiguous as to exactly what misconduct is proscribed under which state law, it may fail to pass constitutional muster in other respects. For example, in the case of *United States v. Robinson*, 495 F.2d 30 (1974), the accused was charged with "disorderly conduct-abusive language" under Virginia law, while he was in Washington National Airport, a Federal enclave. His conduct could have been proscribed under any of three different Virginia statutes, yet the charge against him failed to cite specifically which statute he had allegedly violated. This caused the court to conclude that the charge was so vague and ambiguous that it violated due process and, consequently, it overturned the accused's conviction.

E. ***General considerations regarding the use of clause 3.***

1. Drafting clause 3 specifications can be quite complex. It would seem that the better practice is to set out all of the essential elements and also specify the name and number of the statute which defines the offense. However, failure to add the latter is not always defective. For example, in *United States v. Hogsett*, 8 C.M.A. 681, 686, 25 C.M.R. 185, 190 (1958), the court, *citing United States v. Doyle*, 3 C.M.A. 585, 14 C.M.R. 3 (1954) and *United States v. Long*, 2 C.M.A. 60, 6 C.M.R. 60 (1952), said: "It is well settled that if a specification sets out the essential elements of an offense it need not also specify the name or the number of the statute defining the offense, unless the designation is necessary to a proper

understanding of the charge." The *Hogsett* case also shows that precision drafting is required when writing a specification under this clause of Article 134. The court dismissed the specification then under review because it failed specifically to define the criminal conduct prohibited by the underlying statute.

2. Even though the specification may be correctly drawn, it may still be of no use to the prosecution because the underlying statute may not be effective in the area at which the court-martial is located. Many "noncapital" Federal statutes are effective only within the limits of the United States. Ordinarily this is not a problem but, since a great number of courts-martial are convened overseas, this limitation may preclude use of the statute. *See, e.g., United States v. Cuevas-Ovalle*, 6 M.J. 909 (A.C.M.R. 1979). On the other hand, *United States v. Wilmot*, 11 C.M.A. 698, 29 C.M.R. 514 (1960), reveals that the courts will sometimes "stretch" the literal language of the statute in order to uphold a prosecution. In that case, the statute (Narcotic Drugs Import and Export Act, 21 U.S.C. §§ 171-185) applied to any territory "under the control" of the United States. The court looked to provisions of the applicable Status of Forces Agreement to conclude that the statute had effect over conduct that occurred at Yokota Air Base, Japan, since it was "under the control" of the United States.

3. Another area that causes some difficulty is the determination of the maximum punishment. R.C.M. 1003(c)(1)(B)(ii), MCM, (1995 Edition), indicates that the maximum punishment in such cases should be determined by reference to the United States Code: "When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances." If state law is assimilated under the provisions of FACA, the state prescribed maximum punishment is also assimilated. *Picotte, supra. See also United States v. Irvin*, 13 M.J. 749 (A.F.C.M.R. 1982), *rev'd on other grounds*, 21 M.J. 184 (C.M.A. 1986), which determined that a sentence of sixteen years' confinement for child abuse was unlawful since the maximum penalty for child abuse under applicable Colorado state law was limited to eight years.

4. Further guidance regarding the use of the FACA can be found in *United States v. Sadler*, 29 M.J. 370 (C.M.A. 1990) and *United States v. Irvin*, 21 M.J. 184 (C.M.A. 1986), *cert. denied*, 479 U.S. 852 (1986).

F. ***More on pleading.***

1. Part IV, para. 60, MCM, (1995 Edition), does not contain any sample specifications specifically designed for pleading clause 3 offenses under Article 134.

2. The only guidance, therefore, comes from the case law. As noted above, while it is not absolutely necessary to plead the particular Federal or state statute concerned when alleging a CONC, it is advisable to do so. Part IV, para. 60c(6)(b), MCM, (1995 Edition). *Hogsett, supra,* and *United States v. Harbaugh,* 28 C.M.R. 711 (C.G.B.R. 1959). An example of this procedure is found in *United States v. Rowe,* 13 C.M.A. 302, 32 C.M.R. 302 (1962). Note, however, that the *Rowe* specification was a combination of clause 3 and clause 2; that is, it mentioned the state statute and also alleged "service discrediting conduct." C.M.A. focused on the former. The same combination pleading was used in *United States v. Bartole,* 21 M.J. 234 (C.M.A. 1986) (the court affirmed the conviction on a clause 1 or 2 theory despite the fact that the MJ failed to instruct properly on the clause 3 theory under which the specification was pled). The case of *United States v. Green,* N.M.C.M. 79-0464 (12 Feb 73), provides a good example of the care that is required in this area. Green was charged with violating Section 11555 of the California Health and Safety Code, as a violation of Article 134. This statute provides: "It is unlawful to possess . . . any device, contrivance, instrument, or paraphernalia used for unlawfully injecting or smoking a narcotic." The court held the specification to be fatally defective because it failed to allege that the hypodermic needle and syringe involved were used for the unlawful purposes specified by the statute, thus omitting an element of the offense. *See also United States v. Perry,* 12 M.J. 112 (A.F.C.M.R. 1981), which noted that, when FACA is relied on, it is generally "helpful" to allege the basis of jurisdiction in the specification. In *Perry,* a specification alleging a wrongful supplying of intoxicating liquor to persons under 21 years of age in violation of "section 311.310 of the Vernon's Annotated Missouri Statutes" was set aside since, during the trial, the applicability of FACA was neither established through judicial notice nor stipulation, but only through a providency inquiry. The A.F.C.M.R. did not utilize judicial notice at its level because the accused's guilt as to this specification did not play "an appreciable role in the adjudication of the accused's punishment."

3. It is necessary to set forth all of the essential elements of the underlying Federal law when drafting a specification involving a "crime and offense not capital." *United States v. Johnson,* 48 C.M.R. 282 (A.C.M.R. 1974). With respect to such elements as knowledge, intent, or willfulness, the general rule is that, if these elements are expressed in the statute, they should be specifically alleged in the "indictment or the charge" either expressly or by implication. Where knowledge is only implied in the statute, it need not be alleged. *Johnson, supra. But see United States v. Evans,* 33 M.J. 309 (C.M.A. 1991), where the court held that specifications alleging that accused used firearm during commission of drug trafficking offenses, as defined under the UCMJ, were sufficient to put accused on notice that he could be tried by court-martial under the general article, even though the specifications did not allege the particular Federal penal statutes that prohibited the same misconduct.

4. Under FACA, the misconduct must occur in a place over which the

Federal Government exercises exclusive or current jurisdiction. *See* 18 U.S.C. § 13; *United States v. Geary*, 30 M.J. 855 (N.M.C.M.R. 1990) and *United States v. Roberts*, 32 M.J. 681 (A.F.C.M.R. 1991). This geographic requirement becomes an element of the offense which must be pled and proved beyond a reasonable doubt—usually by judicial notice. *Bartole, supra; United States v. Irvin*, 21 M.J. 184 (C.M.A. 1986) (applicability of the FACA cannot be established without evidence at trial or by judicial notice, and this oversight cannot be rectified by a *DuBay* hearing). It is error for the military judge to fail to instruct on the jurisdictional element. *Bartole, supra*. In uncontested cases, however, a guilty plea admits the requisite element of jurisdiction over the situs of the crime. *United States v. Kline*, 21 M.J. 366 (C.M.A. 1986).

5. As a practical matter, seldom does a situation arise that necessitates recourse to clause 3 of Article 134. Invariably the pleader is able to proceed using an allegation specifically described by the UCMJ and the MCM. However, it is preferable to avoid the creation of "new" clause 1 ("C to P") or clause 2 ("SD") offenses if a viable CONC approach is available. If clause 3 is used, and if there is any doubt as to the law or the facts, it would be well to consider the advisability of pleading two similar specifications to provide for the contingencies of proof:

a. One specification should clearly express the offense under a clause 3, Article 134, premise (i.e., fully identify the Federal statute (or the assimilated state statute) within the specification, but do not allege that it was "C to P" or "SD").

b. The second specification should clearly express the offense under a clause 1 or 2 premise (i.e., do not mention the Federal or state statute within the specification and, at the conclusion of the specification, allege expressly that it was "C to P" or "SD," or both in the alternative, whichever is more appropriate).

c. The court should be instructed that these two specifications have been provided to allow for the contingencies of proof. *United States v. Strand*, 6 C.M.A. 297, 20 C.M.R. 13 (1955); *United States v. Littlepage*, 10 C.M.A. 245, 27 C.M.R. 319 (1959); and *United States v. Middleton*, 12 C.M.A. 54, 30 C.M.R. 54 (1960).

0505 ARTICLE 134'S LIMITATIONS (Key Numbers 753, 754, 755)

A. ***The doctrine of preemption***. Although described as the "general article," Article 134 (and its officer counterpart, Article 133) are limited in scope and effect. It was this restricted nature of the article that the Supreme Court focused upon in declaring it constitutional in the case of *Parker v. Levy*, 417 U.S. 733, 754 (1974): "The effect of these constructions . . . has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of

examples of the conduct which they cover." One of the "constructions" alluded to is the "doctrine of preemption." This concept was explained in *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979): "Simply stated, preemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element." *United States v. Irvin*, 21 M.J. 184 (C.M.A. 1986).

1. This doctrine was first applied by C.M.A. in *United States v. Norris*, 2 C.M.A. 236, 8 C.M.R. 36 (1953). The accused therein was charged with larceny, was convicted of wrongful appropriation, and the Board of Review affirmed an offense of "wrongful taking" (without any intent) under Article 134. ***Held***: "Wrongful taking" is not an offense under the code.

> . . . Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive Articles. . . . [T]here is scarcely an irregular or improper act conceivable which may not be regarded as in some indirect or remote sense prejudicing military discipline under Article 134. . . . We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134. . . . We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law. We are not disposed to add a third conversion offense to those specifically defined.

Id. at 239, 8 C.M.R. at 39. In *United States v. McCormick*, 12 C.M.A. 26, 30 C.M.R. 26 (1960), the court equally disparaged the addition of an element to create an Article 134 offense. *See also United States v. Geppert*, 7 C.M.A. 741, 23 C.M.R. 205 (1957), in which "wrongful withholding," without intent, was held not to be an offense.

a. The Court of Military Appeals has held, however, that the doctrine of preemption does not preclude prosecution for the crime of burglary of an automobile. *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978). The court noted that automobiles were not among the "protected" structures into which unlawful entry was proscribed by other articles of the UCMJ and concluded that the government was free to assimilate a state law which prohibited unlawful entry into an automobile. A "void" in military criminal law existed according to the court and the prosecution was at liberty to fill it with state law under FACA.

b. In *United States v. Canatelli*, 5 M.J. 838 (A.C.M.R.), *petition denied*, 6 M.J 93 (C.M.A. 1978), the Army Court of Military Review held that articles 108, 121, and 134 (1) and (2) did not preempt a prosecution under Article 134 (3) for the unlawful storage and disposal of explosive material in violation of a Federal statute.

c. The offense of eluding police, under the Maryland Code, is not preempted by the offense of resisting apprehension pursuant to Article 95, UCMJ. *See United States v. Kline*, 15 M.J. 805 (A.C.M.R. 1983), *aff'd*, 21 M.J. 366 (C.M.A. 1986). Likewise, the offense of flight from detention by post exchange detective to avoid apprehension by MP's is not preempted by article 95. *United States v. Williams*, 26 M.J. 606 (A.C.M.R. 1988).

2. "***Absence***" offenses constitute the next area in which the doctrine was applied. An accused was charged under Article 134 "without proper authority and with wrongful intent of permanently preventing completion of his basic training and useful service as a soldier" by absenting himself for a specified period. ***Held***: No such offense under Article 134 because ***offenses sounding in UA*** may be reached ***only*** under ***articles 85, 86, and 87*** (but the factual allegation stated desertion with intent to shirk important service under article 85). *United States v. Deller*, 3 C.M.A. 409, 12 C.M.R. 165 (1953).

3. Another area in which the doctrine of preemption has been applied is that of "misbehavior before the enemy," all forms of which must be charged under article 99.

– ***Example***. The accused was charged with misbehaving before the enemy under article 99. The trial court excepted the words, "cowardly conduct," and found him guilty under Article 134. ***Held***: It was not an offense under Article 134 because it was preempted by article 99. However, the specification did allege the offense of "UA" under article 86, and C.M.A. so affirmed. *United States v. Hallett*, 4 C.M.A. 378, 15 C.M.R. 378 (1954).

4. C.M.A. has held that offenses sounding in graft, bribery, cheating, and fraudulent misrepresentation may be prosecuted under Article 134. They are not preempted by Article 121 nor by any other specific article of the UCMJ. *United States v. Holt*, 7 C.M.A. 617, 23 C.M.R. 81 (1957); *United States v. Leach*, 7 C.M.A. 388, 22 C.M.R. 178 (1956); *United States v. Marker*, 1 C.M.A. 393, 3 C.M.R. 127 (1952); *United States v. Alexander*, 3 C.M.A. 346, 12 C.M.R. 102 (1953); and *United States v. Bey*, 4 C.M.A. 665, 16 C.M.R. 239 (1954).

5. A prosecution for unlawfully altering a public record is cognizable under Article 123, forgery. *United States v. Maze*, 21 C.M.A. 260, 45 C.M.R. 34 (1972).

6. ***Fraudulent burning*** of a building under Article 134 has been held to be an offense and ***not*** preempted by Article 126, arson. These two distinct offenses have a different purpose. Arson is to protect the security of the habitation or other property, whereas the purpose of fraudulent burning is to protect against fraud. *United States v. Fuller*, 9 C.M.A. 143, 25 C.M.R. 405 (1958); *United States v. Freeman*, 15 C.M.R. 639 (A.F.B.R. 1954).

7. Stealing from the mail has been held to be an offense under Article 134 and is not preempted by Article 121. Distinct purposes are involved. Article 121 is designed to protect possession of personal property, whereas the mail theft offense is designed to protect the sanctity of the mail (i.e., to protect our mail system). "Value" is an element in the former, but not the latter. *See United States v. Gaudet*, 11 C.M.A. 672, 29 C.M.R. 488 (1960); *United States v. Thurman*, 10 C.M.A. 377, 27 C.M.R. 451 (1959); *United States v. Manausa*, 12 C.M.A. 37, 30 C.M.R. 37 (1960).

8. An injury self-inflicted without the intent to avoid service was held not to be preempted by Article 115 (malingering). *United States v. Taylor*, 17 C.M.A. 595, 38 C.M.R. 393 (1968).

9. It has been held that the existence of articles 83 (fraudulent enlistment) and 107 (false official statement) do not preempt prosecution of an individual servicemember for the offense of "fraudulent extension of an enlistment by means of a false official statement." *United States v. Wiegand*, 23 M.J. 644 (A.C.M.R. 1986), *petition denied*, 25 M.J. 197 (C.M.A. 1987).

10. The offense of negligent homicide may be prosecuted under Article 134 and has not been preempted by the articles dealing with murder or manslaughter. *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979). There, the court said that "special reasons" existed for "not mentioning or treating negligent homicide in conjunction with murder or manslaughter. . . ." Among the reasons cited were that, under prior military law, negligent homicide had been considered a lesser included offense of murder and manslaughter and was prosecuted as a "general neglect or disorder."

B. ***A capital offense may not be tried under Article 134.***

– In *United States v. French*, 10 C.M.A. 171, 27 C.M.R. 245 (1959), C.M.A. was confronted with a specification under Article 134 alleging that the accused, "having reason to believe it would be used to the advantage of a foreign nation, to wit: . . . [Russia] did, in . . . [Washington, D.C.] and . . . [New York City] during and about the period 5 April 1957 to 6 April 1957, wrongfully and unlawfully attempt to communicate information relating to national defense of the United States contained in six . . . [described]

documents, to a foreign nation, to wit: . . . [Russia]."

a. This specification in fact alleged an offense made capital by Congress by the 1954 Espionage Act. It followed the wording of the Espionage Act and alleged every element of that offense. However, the government, on appeal, took the position that the specification could be supported under clause 2 (service discrediting) and there is an indication in the C.M.A. opinion that the case was tried under that approach.

b. C.M.A. found that the specification ". . . [s]tates an offense which is rooted in criminal misconduct of a nature to bring discredit upon the Air Force . . .", but ***held*** that a court-martial had no jurisdiction over the offense. The historical background of Article 134 compels "a holding that Congress intended not to permit the prosecution of any capital offense in a military court under any guise except when specifically authorized by statutory enactments. . . ." *Id.* at 176, 27 C.M.R. at 250. Therefore, no capital offense can be tried under any part of Article 134. It is suggested that, for these same reasons, no capital offense can be tried under Article 133 (conduct unbecoming an officer and a gentleman).

0506 ARTICLE 133 AND ITS LIMITATIONS (Key Numbers 777-782)

A. ***Serious dereliction.*** A prosecution under Article 133, conduct unbecoming an officer and a gentleman, should be reserved for those offenses seriously compromising an individual's character as a gentleman and standing as an officer. *United States v. Sheehan,* 15 M.J. 724 (A.C.M.R. 1983). In *Sheehan, supra,* the accused's failure to meet a suspense date in performing a required duty, as well as a three-day period of unauthorized absence, were minor offenses not coming under the ambit of conduct unbecoming an officer / gentleman and should not have been separately charged pursuant to Article 133, UCMJ. His intentional deception of his superior, however, could legitimately be so charged. In *United States v. Clark,* 15 M.J. 594 (A.C.M.R. 1983), the court held that two minor derelictions of failure to go and failure to repair should not have been separately charged under Article 133 since this article is reserved for more serious violations. *See United States v. Johanns,* 20 M.J. 155 (C.M.A. 1985), *cert. denied,* 474 U.S. 850 (1985) (Cox, J., concurring) (fraternization between officers and enlisted which also constitutes adultery may be charged under Article 133). *But see United States v. Baker,* N.M.C.M. 84-4043 (30 Aug 85) (female officer in a drunken sleep next to an enlisted man not disgraceful enough for Article 133, but sufficiently prejudicial for Article 134 fraternization).

The conduct complained of should expose the offender to "public opprobrium." *United States v. Shober,* 26 M.J. 501 (A.F.C.M.R. 1986). In *Shober,* the court found that an unmarried lieutenant colonel's sexual exploitation of an unmarried civilian waitress, who was supervised by the accused, was conduct unbecoming, particularly because the affair was well-known. However, the accused's actions in taking nude photographs of

the waitress were not conduct unbecoming since the photo session was consensual. In *United States v. Modesto*, 43 M.J. 315 (C.A.A.F. 1995), an 0-6 who engaged in off-duty cross-dressing and performing as a female impersonator at a gay bar was guilty of conduct unbecoming. *See also, United States v. Bryant*, ___M.J.___, No. 32494, 1997 CCA Lexis 439 (A.F.Ct.Crim.App., Jul. 31, 1997)(placing condom over head and blowing it up like a balloon at two separate command functions was morally unfitting and unworthy, thus conduct unbecoming). Soliciting someone to violate a federal statute, writing a suggestive letter to a child, making indecent remarks to a sexual partner in an abusive relationship, failing to report child abuse by spouse, and publicly associating with a known drug smuggler have been held to constitute conduct unbecoming an officer. *United States v. Bilby*, 39 M.J. 467 (C.M.A. 1994); *United States v. Hartwig*, 39 M.J. 125 (C.M.A. 1994); *United States v. Moore*, 38 M.J. 490 (C.M.A. 1994); *United States v. Miller*, 37 M.J. 133 (C.M.A. 1993); and *United States v. Maderia*, 38 M.J. 494 (C.M.A. 1994).

B. ***Vagueness.*** A charge under Article 133 for charging a fellow officer $2,000.00 for tutoring in leadership skills was held not to be constitutionally vague in the case of *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989). An Article 133 specification alleging an unprofessional close personal relationship, including sexual intercourse, with an enlisted person not under accused's supervision, was not void for vagueness where accused had received training that such conduct violated service custom and had been counseled by superiors against fraternizing. *United States v. Boyett*, 42 M.J. 150 (1995). *Cf. United States v. Kroop*, 38 M.J. 470 (C.M.A. 1993) (Everett, S.J.) (holding allegations of "undue familiarity" and "excessive social contacts" with married female servicemembers, without more, were insufficient to allege conduct unbecoming as officer).

C. ***Preemption.*** Article 133 offenses are ***not*** preempted by the existence of a specific article prohibiting the misconduct of the officer, cadet, or midshipman. Accordingly, an officer who forges travel vouchers may be prosecuted under Article 133 for conduct unbecoming an officer, even though the conduct would be a violation of Article 123. *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984). Similarly, an officer guilty of drug offenses punishable under Article 134 may be prosecuted instead under Article 133. *United States v. Rodriquez*, 18 M.J. 363 (C.M.A. 1984). These results are consistent with the language of Part IV, para. 59c(2), which states: "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and gentleman." *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986).

D. ***Multiplicity.*** Although prosecution under Article 133 is not preempted by the existence of a specific article prohibiting the officer's conduct, the rules of multiplicity prohibit charging both articles as separate offenses. *But see United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), where the court abandoned the "fairly embraced" multiplicity-for-findings test of *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983), and adopted the "elements test" of multiplicity articulated by the U.S. Supreme Court in *Blockburger v.*

United States, 284 U.S. 299 (1932).

E. ***Punishment***. The maximum punishment for an offense under Article 133 not listed in the Table of Maximum Punishments is the punishment for the most closely related offense in the Table. *See* Part IV, para. 59e, MCM, (1995 Edition). In *United States v. Ramirez*, 21 M.J. 353 (C.M.A. 1986), *cert. denied*, 479 U.S. 831 (1986), the court found that the charged offense of masturbating in the presence of two children under Article 133 was more similar to indecent liberties than indecent exposure. This raised the maximum permissible punishment from six-months and a BCD to seven years' confinement and a DD.

CHAPTER VI

DRUG OFFENSES

0600 **HISTORICAL OVERVIEW** 6-1
A Prior theories of drug prosecution 6-1

0601 **THEORIES OF PROSECUTION** 6-2
A. Article 112a, UCMJ 6-2
1. The statute 6-2
2. Elements of the offenses 6-2
3. Wrongfulness 6-2
4. Prohibited substances 6-4
5. Prohibited acts 6-8
6. Sentencing 6-19
7. Pleading 6-19
B. Article 134, UCMJ 6-20
C. Prosecution of possession of drug paraphernalia under Article 92, UCMJ 6-21

0602 **REFERENCE TO OTHER AREAS** 6-22

CHAPTER VI

DRUG OFFENSES

0600 HISTORICAL OVERVIEW (Key Number 783)

A. ***Prior theories of drug prosecution.***

On 1 August 1984, Article 112a, UCMJ, became effective as the statutory basis for the prosecution of military drug offenses. Prior to the adoption of article 112a, military practitioners used different theories of prosecution. In the Navy, most drug offenses had been prosecuted under Article 92, UCMJ, as a violation of Article 1151, *U.S. Navy Regulations (1973)*. The Army had prosecuted most drug cases under article 134 as conduct prejudicial to good order and discipline or service-discrediting conduct. The services would occasionally be forced to resort to clause 3 of article 134 and charge certain offenses not covered by service regulations or listed under article 134 as crimes and offenses not capital. In these instances, violations would be charged under Federal civilian statutes or under state statutes assimilated through the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (1982). These theories of prosecution were less than satisfactory and, on 23 September 1982, the President, by Executive Order 12383, amended paragraph 127c, *Manual for Courts-Martial*, 1969 (Rev.) to provide standardized prosecution punishments for drug offenses under article 134. The purpose of this change was to ensure uniformity among the services in the basis and punishment for all drug prosecutions. Article 134 was the primary source for military drug prosecution from 23 September 1982 until 1 August 1984, the effective date of article 112a. Article 112a will be utilized for all enumerated drug offenses occurring on or after 1 August 1984. Offenses occurring prior to 1 August 1984 must be prosecuted under the law in effect at the time of the offense.

B. The adoption of article 112a has created a uniform statutory basis of prosecution for most military drug offenses. Since there are drug offenses which are not provided for in article 112a, however, there will be occasions when it will be necessary to resort to alternative theories of prosecution, such as article 134. This chapter will discuss individually these theories of prosecution.

0601 THEORIES OF PROSECUTION (Key Numbers 784, 787)

A. ***Article 112a, UCMJ.***

1. ***The statute.*** Article 112a, UCMJ, states:

> a. Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.
>
> b. The substances referred to in subsection (a) are the following:
>
> (1) opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana, and any compound or derivative of any such substance.
>
> (2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.
>
> (3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in Schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. § 812).

2. ***Elements of the offenses.*** Part IV, para. 37b, MCM, (1995 Edition), implements article 112a and provides a list of the elements of each of the seven offenses prohibited by the statute. In addition to the listed elements, the Court of Military Appeals has stated that two types of knowledge are necessary to establish the offenses of use and possession: first, knowledge of the presence of the substance; and second, knowledge of its contraband nature. *See United States v. Mance*, 26 M.J. 244 (C.M.A. 1988), *cert. denied*, 488 U.S. 942, 109 S.Ct. 367, 102 L.Ed.2d 356 (1988) and *United States v. Brown*, 26 M.J. 266 (C.M.A. 1988).

3. ***Wrongfulness.*** A common element to all article 112a offenses is that the accused's acts must be wrongful as defined in Part IV, para. 37c(5), MCM, (1995 Edition):

> To be punishable under Article 112a, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful. Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization. Possession, use, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

See United States v. Lancaster, 36 M.J. 1115 (A.F.C.M.R. 1993), in which the court held use of leftover prescription drugs for a different ailment does not necessarily constitute wrongful use as a matter of law and that it was not harmless error to give an instruction that necessarily implied such use was wrongful as a matter of law. *See United States v. West*, 15 C.M.A. 3, 34 C.M.R. 449 (1964) (accused, a pharmacist who, with approval of his supervisors, kept a supply of narcotics arising from overages to make up for possible shortages, testified that he took the narcotics from his pharmacy only to safeguard them when he was unable to open the safe where the extra narcotics were usually kept). This inference does not operate to deprive an accused of the defense of lack of knowledge of the physical presence of the drugs.

The government has the burden to prove beyond a reasonable doubt that the accused wrongfully used the contraband substance. *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991). However, the permissible inference of wrongfulness in a urinalysis case is raised after the prosecution proves use of a contraband drug. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). *See also United States v. Douglas*, 22 M.J. 891 (A.C.M.R. 1986), *cert. denied*, 484 U.S. 822, 108 S.Ct. 83, 98 L.Ed.2d 45 (1987) and discussion *supra*, at 5.a(2)(b). The inference may be drawn even if the accused testifies that he or she has no knowledge of why their urine sample tested positive. Whether or not to draw the permissive inference of wrongfulness is for the trier-of-fact to decide, based upon the available evidence. *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987) and *United States v. Pabon*, 42 M.J. 404 (1995). *See also United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992), in which experts testified that the drug element "BZE" could be produced either by metabolic processes within the body, or by hydrolysis outside the body by "spiking" the sample with cocaine, although the sample tested negative for raw cocaine. The accused argued that the government did not prove ingestion, vice "spiking," so the inference of wrongfulness could not lawfully be drawn. ***Held***: there was sufficient proof of the predicate fact of ingestion from which a properly instructed court could find ingestion and infer wrongfulness. Further illustrative of the court's focus on the sample and the inferences therein is the case of *United States v. Mack*, 33 M.J. 251 (C.M.A. 1991), in which the court held the record not legally sufficient to sustain the accused's conviction for wrongful use of cocaine. One government lab tested the urine sample and found presence of metabolite indicating presence of cocaine. A different government lab tested the urine sample and found absence of a different metabolite indicating no cocaine in the urine sample. *See also United States v. Manuel*, 43 M.J. 282 (1995).

4. ***Prohibited substances.***

a. ***Marijuana.*** Marijuana is one of several substances specifically prohibited by article 112a. Marijuana is defined at 21 U.S.C. § 802(15). Although it is argued that there is more than one species of marijuana (e.g., Cannabis indica Lam.), and that not all marijuana is therefore prohibited, this "species argument" has been almost universally rejected. *See United States v. Dinapoli*, 519 F.2d 104 (6th Cir. 1975) (no valid defense, even though statute refers solely to Cannabis sativa L. and evidence showed presence of three species); *United States v. Gavic*, 520 F.2d 1346 (8th Cir. 1975); *United States v. Walton*, 514 F.2d 201 (D.C. Cir. 1975). Although the Court of Military Appeals has never squarely ruled on the issue, in *United States v. Lee*, 1 M.J. 15 (C.M.A. 1975) (***Held***: No fatal variance where specification alleged possession of marijuana in hashish form, but evidence showed possession of growing marijuana plants). Judge Cook clearly indicated in the opinion of the court that C.M.A. would reject the "species argument."

b. ***Other specific statutory prohibitions.*** Article 112a also specifically prohibits opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and any compound or derivative of such

substances. This allows these named substances to be pled without mention of the Federal Schedule upon which each is listed.

c. ***Substances incorporated by reference.*** Article 112a also prohibits any substance that is included in Schedules I through V established by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. 21 U.S.C. § 812 establishes five schedules of controlled substances, designated I, II, III, IV, and V. Under the Comprehensive Drug Abuse Prevention and Control Act, the significance of these five schedules is that the act provides different regulations and penalties based upon the schedule in which a certain substance is listed. The most dangerous, and most strictly regulated, drugs are in Schedule I; the least dangerous in Schedule V. In addition to the schedules included in the text of the act, the Attorney General may delete or add substances, or may transfer a substance from one schedule to another. 21 U.S.C. § 811. Anabolic steroids were added to Schedule III. Anabolic Steroids Control Act of 1990, § 1902, Public Law No. 101-647. The updated schedules are published in the *Federal Register* and in the *Code of Federal Regulations* at 21 C.F.R. § 1308 *et seq.* Particular care should be exercised when using materials outside the actual schedules. *See United States v. Commander*, 39 M.J. 972 (A.F.C.M.R. 1994).

In *United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989), the court discussed the prosecution of offenses for drugs not yet listed on the schedules. The case involved an airman convicted in a general courts-martial for drug charges involving ECTASY. The court held that, before ECTASY was listed on Schedule I as a controlled substance rather than as a controlled substance analogue, a servicemember could be prosecuted under the general article for violations of sections of the Controlled Substances Act governing substance analogues. In *United States v. Waggoner*, 22 M.J. 692 (A.F.C.M.R. 1986), the court held it was not error to admit extracts of Drug Enforcement Administration pamphlets to assist the court in identifying substances; the court noted that such materials must be carefully edited to eliminate prejudicial materials. The characteristics of substances in each schedule are briefly summarized as follows:

(1) ***Schedule I: 21 U.S.C. § 812(b)(1).***

(a) ***Characteristics.***

-1- High potential for abuse;

-2- no currently accepted medical use in the United States; and

-3- unsafe even under medical supervision.

(b) ***Examples.*** Heroin, LSD, marijuana.

(2) ***Schedule II: 21 U.S.C. § 812(b)(2).***

(a) ***Characteristics.***

-1- High potential for abuse;

-2- currently accepted medical use in the United States; and

-3- potential for severe psychological or physical dependence.

(b) ***Examples.*** Opium, cocaine, methadone.

(3) ***Schedule III: 21 U.S.C. § 812(b)(3).***

(a) ***Characteristics.***

-1- Less abuse potential than that of drugs in Schedules I and II;

-2- currently accepted medical use in the United States; and

-3- potential for high degree of psycho-logical dependence, or for low to moderate degree of physical dependence.

(b) ***Examples.*** Nalorphine, secobarbital, barbiturates, anabolic steroids.

(4) ***Schedule IV: 21 U.S.C. § 812(b)(4).***

(a) ***Characteristics.***

-1- Less abuse potential than that of drugs in Schedules I, II, and III;

-2- currently accepted medical use in the United States; and

-3- less potential for limited physical or psychological dependence than that of Schedule III drugs.

(b) ***Examples.*** Phenobarbital, meprobamate, chloral hydrate.

(5) ***Schedule V: 21 U.S.C. § 812(b)(5).***

(a) ***Characteristics.***

-1- Less abuse potential than that of drugs in Schedules I, II, III, and IV;

-2- currently accepted medical use in the United States; and

-3- less potential for limited physical or psychological dependence than that of Schedule IV drugs.

(b) ***Examples.*** Compounds containing small quantities of narcotics, such as codeine, combined with non-narcotic ingredients.

d. ***Additional substances prohibited by the President.*** Article 112a clause 2 contemplates that the President may publish a list of controlled substances specifically for the purpose of article 112a. The President has not used this power, but obviously may do so in the future in the form of an Executive order.

e. ***Designer drugs.*** Designer drugs such as "Ecstacy" and "China White" are synthetic substitutes for existing drugs. The concept has been called "diabolically simple":

> [T]he underground chemist makes a simple molecular alteration to an existing drug. The original is a controlled substance, but because illegal drugs are defined and classified in the United States by their precise molecular structure, the new chemical cousin, or analog . . . is, in effect, as legal as powdered milk.

United States v. Tyhurst, 28 M.J. 671, 673 (A.F.C.M.R. 1989) (*quoting* Burden & Burden, Student Lawyer, May 1986, p. 42). As soon as one version is discovered and added to the controlled substances list, the chemist goes back to the lab, makes a few changes, and stays one step ahead of the law.

To combat this problem, Congress passed the Controlled Substance Analogue Act of 1986, 21 U.S.C. § 813, which prohibits all permutations of existing illegal drugs—whether known or unknown. In *United States v. Loftin*, 28 M.J. 677

(A.F.C.M.R. 1989), the court suggested an approach practitioners should take when faced with offenses involving designer drugs. First, check to see if the substance appears on Schedules I through V. If so, charge it under 112a. If the substance is not listed in any of the five schedules, charge it under article 134, clause 3. *United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989).

5. ***Prohibited acts.***

a. ***Possession.***

(1) ***Definition.*** Part IV, para. 37c(2), MCM, (1995 Edition), provides:

> "Possess" means to exercise control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item. An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

Thus, two or more persons may have "exclusive" possession where one holds the property for another. *See United States v. Aloyian*, 16 C.M.A. 333, 36 C.M.R. 489 (1966) (***Held***: Sufficient evidence to find possession of marijuana stored in accused's roommate's locker where evidence showed accused had access to the locker and the container in which the marijuana was found was like the one the accused had possessed earlier); *United States v. Courts*, 4 M.J. 518 (C.G.C.M.R. 1977) (***Held***: One who assists others in weighing and packaging drug has possession of drug). *See also United States v. Wilson*, 7 M.J. 290 (C.M.A. 1979) (where a person is in nonexclusive possession of premises, it cannot be inferred that he knows of presence of drugs or had control of them unless there are other incriminating statements or circumstances; however, presence, proximity, or association may

establish a prima facie case of drug possession when colored by evidence linking accused to an ongoing criminal operation of which that possession is a part); *United States v. Keithan*, 1 M.J. 1056 (N.C.M.R. 1976) (***Held***: Evidence that accused was driving an automobile and knew that one of the passengers was in possession of marijuana was insufficient to sustain accused's conviction for possession). *But see United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990), *cert. denied*, 498 U.S. 942, 111 S.Ct. 350, 112 L.Ed.2d 314 (1990) in which the court ruled possession of contraband may be established by circumstantial evidence. In *McKnight*, the evidence supported a conviction for wrongful possession of drug paraphernalia based on finding marijuana pipes in the house the accused shared. It is completely unnecessary for an accused to have actual possession of a drug to be found in wrongful possession of it. *Wilson, supra*. The theory of constructive possession is not based on ownership or actual physical control of the contraband. Instead, the government must show that the accused was knowingly in a position or had the right to exercise dominion and control over an item either directly or through others. *United States v. Traveler*, 20 M.J. 35 (C.M.A. 1985) (items found in plain view in accused's house, along with other drug-related items over which the accused acknowledged control). *But see United States v. Richardson*, 21 M.J. 313 (C.M.A. 1985) (court dismissed a specification of possession that was based only on evidence that the appellant shared a hotel room where the odor of marijuana was detected and several "roaches" and some marijuana were found).

(2) ***Lack of knowledge.***

(a) ***Context.*** Lack of knowledge can become an issue in all types of drug offenses, although it most frequently is raised in possession cases. The accused's lack of knowledge may arise in one of three contexts:

-1- The accused doesn't know that possession of the substance is unlawful. This is simply ignorance of law. This is not a defense.

-2- The accused doesn't know that he or she possesses the substance. This is a defense.

-3- The accused is aware that he or she possesses the substance, but is unaware of its composition. This is also a defense.

(b) ***Raising the issue.*** Prior to 1988, it had been held that, when an issue is raised by evidence that the accused's possession was without the accused's knowledge of the presence or nature of the substance, the prosecution must prove knowing, conscious possession beyond a reasonable doubt. When the issue is ***not*** raised, knowledge is not an affirmative element of proof that must be established by the prosecution in order to make a prima facie case. *See, e.g., United States v. Alvarez*, 10 C.M.A. 24, 27 C.M.R. 98 (1958) (knowledge may be inferred from the fact of possession). *United States v. Ashworth*, 47 C.M.R. 702 (A.F.C.M.R. 1973). *See also United States v. Smith*, 34 M.J. 200

(C.M.A. 1992)

(c) In *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988) and *United States v. Brown*, 26 M.J. 266 (C.M.A. 1988), the Court of Military Appeals determined that two types of knowledge were necessary to establish the offenses of use and possession: first, knowledge of the presence of the substance; and second, knowledge of its contraband nature. This requirement was extended to drug distribution cases by *United States v. Crumley*, 31 M.J. 21 (C.M.A. 1990).

– ***How much knowledge is required?*** Knowledge includes awareness only of the presence of a substance and the nature of that substance as a controlled substance. Knowledge of the specific pharmacological identity of the drug is not required. *United States v. Stringfellow*, 31 M.J. 697 (N.M.C.M.R. 1990). It is not necessary that the accused be aware of the precise identity of the controlled substance, so long as he / she is aware that it is a controlled substance. *United States v. Myles*, 31 M.J. 7 (C.M.A. 1990). In *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990), the court held that it was not necessary that the accused know that he used and distributed heroin. His mistaken belief that the white powdery substance he used and distributed was cocaine, which is a controlled substance, was sufficient to allow him to be convicted of use and distribution of heroin because he had knowledge of the presence of a controlled substance adequate to establish wrongfulness. Similarly, in *Stringfellow, supra*, the court held that the accused's pleas of guilty to the wrongful simultaneous use of cocaine and amphetamine / methamphetamine were provident, even though the accused stated during providency that he was not aware of the presence of amphetamine / methamphetamine at the time he used the cocaine. Likewise, in *Myles, supra*, the court found a fatal flaw in the defense theory that the accused was not guilty of cocaine use because he believed that he was smoking marijuana. And, in *United States v. Alexander*, 32 M.J. 664 (A.F.C.M.R. 1991), the court held that the accused had been properly convicted of possessing cocaine where he was aware that he possessed a contraband substance and the substance possessed in fact contained cocaine, even though the accused testified that he had purchased methamphetamine and denied any knowing use of cocaine. The court indicated that, in order to prove the wrongful possession of cocaine, the government merely had to show that the accused knowingly possessed a controlled substance.

(d) ***Inference of knowing use or possession.*** In *Mance* and *Brown*, both *supra*, C.M.A. indicated that knowledge was an element of the offenses of use and possession.

(e) ***Proving knowledge***. The accused's knowledge is usually proven, despite his or her assertions of ignorance, by circumstantial evidence. *See, e.g., United States v. Griggs*, 13 C.M.A. 57, 32 C.M.R. 57 (1962) (***Held***: Evidence, although of dubious weight, that accused frequented a bar that had a reputation as a place where marijuana was offered for sale was admissible to show accused's knowledge); *Alvarez, supra* (***Held***: Admission of pretrial statement by accused that he had possessed and smoked marijuana for a period of time ending several months prior to the charged offense strengthened inference raised by exclusive possession); *United States v. Young*, 5 M.J. 797 (N.C.M.R. 1978) (***Held***: After accused had stipulated that drugs and marijuana were found in his jacket, he testified that he didn't know that the marijuana was in his pocket. It was not prejudicial error for trial counsel to ask why he had a water pipe and cigarette papers in his locker). *United States v. Gardner*, 29 M.J. 673 (A.F.C.M.R. 1989) (***Held***: Minuteness of quantity of cocaine found in accused's car relevant as to whether accused knew the cocaine was there). Note that, while the accused's own assertions about the composition of the substance may be sufficient to establish knowledge, such assertions, standing alone, may be insufficient proof of the actual nature of the substance. *United States v. Jenkins*, 5 M.J. 905 (A.C.M.R. 1978) (where a faulty chain of custody prohibited use of laboratory test results to establish that the substance was marijuana, an uncorroborated assertion by the accused that he was selling marijuana was insufficient to prove that the substance he possessed was in fact marijuana). *But see United States v. Weinstein*, 19 C.M.A. 29, 41 C.M.R. 29 (1969); *United States v. Guzman*, 3 M.J. 1062 (A.F.C.M.R. 1977); *United States v. Coen*, 46 C.M.R. 1201 (N.C.M.R. 1972); *United States v. Day*, 20 M.J. 213 (C.M.A. 1985) (accused's own remark that he had heroin and referred to hashish as "dope" was sufficient to show knowledge and sustain conviction).

(f) ***Instructions***. Both *Mance* and *Brown, supra*, mandate that the jury be specifically instructed with regard to the "two types of knowledge" (e.g., presence and nature) which are "required to establish criminal liability." 26 M.J. at 254 and 267.

(g) ***Resolution of the issue***. Lack of knowledge of either the presence of the drug or of the composition of the substance gives rise to a failure of proof on an essential element of the offense. Such a lack of knowledge need only be honest (i.e., not feigned) for purposes of evading criminal liability. It need not be honest ***and*** reasonable. To require that such a lack of knowledge also be reasonable would permit conviction based on negligence rather than knowledge. *United States v. Lampkins*, 4 C.M.A. 31, 15 C.M.R. 31 (1954) (instruction that the defense of ignorance of fact of possession must be honest and reasonable was incorrect and required reversal); *United States v. Hansen*, 6 C.M.A. 582, 20 C.M.R. 298 (1955).

(3) Mere suspicion that a controlled substance may be present is insufficient to prove knowledge of the presence of a drug by an accused. *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983) (under some circumstances, "deliberate

ignorance" of a fact can create the same criminal liability as actual knowledge thereof). While "should have known" will not be sufficient in courts, proof of knowledge by circumstantial evidence is nothing more than piecing together enough "should have known" factors until knowledge in fact, beyond a reasonable doubt, is found. The decision of exactly where "should have known" ends and "knew" turns on the facts presented in each case.

(4) As with ignorance of a controlled substance's presence, when the accused honestly does not know of the substance's composition, such ignorance or mistake of fact is a defense. *Greenwood, supra; Ashworth, supra* (insufficient evidence to establish knowledge where government could only show accused acted nervous when questioned about a box of "better brownies" he received through the mail). Knowledge of the name of a substance will not necessarily defeat this defense. To be guilty, the accused must know the illicit or "narcotic quality" of the substance. *See Myles, supra; Alston, supra; Stringfellow, supra; Alexander, supra.* There is an intricate relationship between the issue of knowledge and the inference of wrongfulness relating to a defense of lack of mens rea. The inference of wrongfulness which flows from possession of a controlled substance does not operate to deprive the accused of the defense of lack of knowledge. *Greenwood, supra.* However, once the issue of lack of knowledge is raised, especially when raised by the accused's testimony, the court may properly decide to disregard the accused's explanation and find knowledge based on all the circumstances—including the accused's physical possession. *United States v. Branch,* 41 C.M.R. 545 (A.C.M.R. 1969) (although the mere tendering of an explanation concerning possession raises an issue as to its wrongful possession, the determination of whether the inference of wrongful possession that arises from accused's possession is successfully rebutted is a question strictly for the court's determination).

(5) ***Lack of mens rea.*** Prohibited drug acts include possession, use, manufacture, distribution, introduction, and possession, manufacture, and introduction with intent to distribute controlled substances. Therefore, wrongfulness, while it must be pled, is not an essential element which the prosecution must establish in order to make a prima facie case. A lack of wrongful intent, or mens rea, however, may be an affirmative defense. This defense most commonly arises in possession cases. Once lack of mens rea is raised, the prosecution must prove beyond a reasonable doubt that the accused's acts were wrongful. Examples of the defense of lack of mens rea fall into two categories: innocent possession and other.

(a) ***Innocent possession.*** When an individual possesses a controlled substance with the intent of turning that substance over to the authorities, or with the intent of destroying the substance, that individual may have the affirmative defense of innocent possession. These cases result from an involuntary possession followed by an apprehension prior to turning over or destroying the controlled substance. The government must establish beyond a reasonable doubt that the accused's possession was wrongful. This is achieved by showing that the accused's intent was other

than to turn over or destroy the substance. The length of time between initial possession and discovery is circumstantial evidence of intent; longer elapsed periods are more indicative of an intent to do something other than turn over or destroy the controlled substance. An intent to return the substance to its "true owner" is not innocent possession. The key to an innocent possession defense is an intent to take action that removes the controlled substance from the drug market."

-1- Following a party, accused found controlled substance in his apartment. Knowing the substance to be controlled, the accused put it in his pocket with the intent to return it to its "owner." The accused was found in possession of the controlled substance 90 minutes later. In *United States v. Kunkle*, 23 M.J. 213 (C.M.A. 1987), the court held these facts did not raise an innocent possession issue during the providency inquiry because of the lapse of time and intent to reintroduce the substance into the drug market. This case overruled *United States v. Thompson*, 21 C.M.A. 526, 45 C.M.R. 300 (1972). *See also United States v. Floyd*, 31 M.J. 755 (A.C.M.R. 1990).

-2- Accused's assertion that someone else had stored drugs in his diving gear, and that he was unaware of their location until the day before they were discovered in a search, did not raise the defense of "innocent possession" where he made no attempt to turn the drugs in to authorities or to dispose of the drugs. *United States v. Neely*, 15 M.J. 505 (A.F.C.M.R. 1982). ***Note***: This decision is particularly well-reasoned and follows the Federal law in the area.

(b) ***Other.*** Lack of mens rea cases, other than innocent possession cases, involve voluntary possession of a controlled substance. This possession is for a lawful purpose.

-1- An enlisted pharmacy specialist, pursuant to his understanding of local practice, maintained an overstock of narcotics in order to supply sudden pharmacy needs or fill an inventory shortfall. Note that "local practice" was contrary to published regulations. *United States v. West*, 15 C.M.A. 3, 34 C.M.R. 449 (1964). The court held it was error to fail to instruct the members on innocent possession. The conviction for possession was overturned.

-2- Accused acted on his commander's suggestion and bought drugs in order to further a drug investigation. *United States v. Russell*, 2 M.J. 433 (A.C.M.R. 1975). The military judge failed to inquire or resolve the possibility of lawful possession and the accused's plea was held improvident. *See United States v. Chambers*, 24 M.J. 586 (N.M.C.M.R. 1987) (Accused testified the cocaine distribution to an NCIS source resulted from the source's request that the accused assist

him in an undercover drug operation. Citing Federal case law, the court held the issue is mistake of law vice fact, but adopted a hybrid mistake-of-fact defense requiring an "objectively reasonable" standard).

b. ***Use***. Neither the U.S. Code nor case law defines "use." In the context of drug offenses, "use" means the voluntary introduction of the drug into the body for the purpose of obtaining the substance's chemical or pharmacological effects. "Use," therefore, would include ingestion, injection, and inhalation.

(1) In *United States v. Cordero*, 21 M.J. 714 (A.F.C.M.R. 1985), the court held that evidence of THC metabolite in urine does prove wrongful use of marijuana. *See also United States v. Pinkston*, 32 M.J. 555 (A.C.M.R. 1991).

(2) The Court of Military Appeals reviewed the standard of proof in *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). Hearing extensive medical and scientific testimony on the laboratory and the urinalysis test, the court made several rulings. First, the court found that the combined laboratory results, along with the expert testimony, was enough to find that the appellant used marijuana beyond a reasonable doubt. The court next stated that a permissive inference of wrongfulness could be drawn, based on the finding of marijuana use. The court noted that there was expert testimony that the chemical compound THC does not naturally occur in the body. The court specifically declined to rule whether a simple laboratory report, without expert explanation, would be sufficient proof beyond a reasonable doubt. This case raises the question of what would happen if an expert witness was not available. Would a medical doctor alone suffice? Could reference be made to learned articles or treatises, such as the one cited in *Harper*? Certainly, the *Harper* approach of test results, coupled with in-court testimony, has judicial approval; but, the unavailability of a laboratory officer should not stop prosecution. A qualified expert witness could assist in proving (a) that the metabolite is not naturally produced by the body, (b) that the reported level indicates a knowing ingestion, and (c) that unknowing inhalation or ingestion is not reasonable. The best method is actual expert or stipulated testimony; however, other methods to show THC does not occur naturally in the body could include (a) learned treatises—utilizing Mil.R.Evid. 803(18), (b) asking the court to take judicial notice under Mil.R.Evid. 201, and (c) using other competent evidence or exhibits. When using learned treatises, prosecutors need a witness to testify about the contents and reliability of the studies and to respond to possible defense theories. This witness need not be the laboratory director, but should be someone whose background allows him or her to understand the material. *See also United States v. Alford*, 31 M.J. 814 (A.F.C.M.R. 1990), where the court held that the presence of cocaine metabolite found in proper laboratory testing of a properly obtained urine sample led to a permissible inference that the accused knowingly consumed cocaine and, therefore, supported the accused's conviction for wrongful use of cocaine.

(3) In *United States v. Van Horn*, 26 M.J. 434 (C.M.A. 1988), the Court of Military Appeals held that it was reversible error to deny accused's request for

employment of an expert witness who would have testified that the government had not followed proper testing procedures in analyzing accused's urine specimen for cocaine metabolites that formed basis of charge of wrongful use of cocaine. *See United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991), in which the court held the government's proof to be legally defective in that it did not present the actual scientific test on, nor nexus to, the appellant's urine.

(4) ***Knowledge***. Lack of knowledge can be an issue in wrongful use cases as well as wrongful possession cases; this is particularly true in cases supported by urinalysis evidence. Here, the accused claims not to have known the controlled substance was present, or did know the substance was present but did not know what it was. The knowledge issue is handled the same as in possession cases. *See* section 0601A.5a(2), *supra*.

c. ***Distribution***. Distribution embraces the concepts of transfer and sale. Part IV, para. 37c(3), MCM, (1995 Edition), defines distribution as: "Distribute means to deliver to the possession of another. Deliver means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship."

(1) Distribution, therefore, encompasses both transfer and sale. Transfer was defined as the transfer of ownership for consideration. Actual possession need not be transferred, nor must the accused have possession of the substance in order to sell it. *Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-145. Additionally, the Court of Military Appeals has stated that the term "distribution" includes the transfer of drugs between conspirators as part of the conspiracy to distribute the same drugs. Therefore, it is possible to distribute to someone who already constructively possesses the same drugs. *United States v. Tuero*, 26 M.J. 106 (C.M.A. 1988). The term "distribution" also includes the transfer of drugs between simultaneous users of the drug. *United States v. Herring*, 31 M.J. 637 (N.M.C.M.R. 1990) (where the court held that accused's passing of the cocaine back to the original supplier during the course of ingesting it constituted the offense of distribution). In *United States v. Bender*, 33 M.J. 111 (C.M.A. 1991), the court held the evidence was sufficient to establish that accused aided and abetted the distribution of LSD where: accused informed undercover agent of availability of LSD; accused boasted of getting a good price if he could find a certain seller; accused sought the seller out; accused initiated conversation with the seller and vouched for his reliability; and accused acted as a lookout, warning of a surveillance car's presence. Likewise, in *United States v. Ratleff*, 34 M.J. 80 (C.M.A. 1992), the facts showed that the accused accompanied a friend while the friend retrieved a can containing hashish which the friend took to his room. There the accused took the can, opened it, and handed the hash inside to his friend. Both then smoked the hash. The accused pled guilty to drug distribution but, on review, maintained that the facts showed joint possession—not distribution. The court held (without expressly adopting or rejecting the rule of *United States v. Swiderski*, 548 F.2d 445 (2d. Cir. 1977), that there can be no distribution between those in joint possession) that, when the accused handed the drug to his

friend, there was a distribution. All it took was the passing of the drug. In addition, an accused who dispatches a controlled substance in the mail or via Federal Express can be found guilty of distribution of the drug within the meaning of the MCM. *United States v. Lorenc*, 32 M.J. 660 (A.F.C.M.R. 1991). It is not necessary that the person to whom the accused distributed drugs know that he or she has received the contraband. *United States v. Sorrell*, 20 M.J. 684 (A.C.M.R. 1985).

(2) ***Agency defense.*** This particular defense is no longer relevant in view of the use of the general term "distribution."

(3) ***Entrapment*** (Key Number 847, 848). The affirmative defense of entrapment is also discussed in Chapter X of this study guide. When the unlawful inducement by a government agent causes an accused (who had no unlawful predisposition) to distribute drugs, entrapment will be a defense. There must be government overreaching amounting almost to coercion. *See United States v. Bell*, 38 M.J. 358 (C.M.A. 1993).

(a) ***Examples.***

-1- *United States v. Cooper*, 33 M.J. 356 (C.M.A. 1991), *cert. denied*, 507 U.S. 985, 113 S.Ct. 1580, 123 L.Ed.2d 148 (1993). The accused was a recovering cocaine addict enrolled in the Army's Drug Abuse Prevention and Control Program (ADAPCP). A CID informant contacted the accused and talked the accused into obtaining cocaine for another CID agent. The court rejected the accused's argument that he was denied due process because the government's agents solicited him to obtain cocaine while he was in ADAPCP and that he was entrapped into committing his offenses.

-2- *United States v. Walker*, 47 C.M.R. 797 (N.C.M.R. 1973). Government agents had no reasonable suspicion that the accused was selling LSD or was about to do so. Nonetheless, they approached the accused on five occasions in one month to urge him to sell drugs to them. The accused finally relented, due to one agent's claim that he "was in a bad way" and "needed" the LSD. ***Held:*** Entrapment.

-3- *United States v. Skrzek*, 47 C.M.R. 314 (A.C.M.R. 1973). Government agent feigned withdrawal symptoms in order to induce the accused to sell him heroin on several occasions. A.C.M.R. held that, not only was there unlawful inducement at the first sale, but that the influence of the initial unlawful inducement would be presumed to continue into subsequent sales, absent prosecution proof beyond reasonable doubt to the contrary.

(b) ***Accused's predisposition.*** Entrapment will not

apply where the accused had a predisposition or intent to commit the crime. Both prior and subsequent acts of misconduct are admissible to show such a predisposition. Mil.R.Evid. 404b. *United States v. Henry*, 23 C.M.A. 70, 48 C.M.R. 541 (1974) (no error in permitting cross-exam of accused on an uncharged sale of drugs occurring five days after the charged sale). *See also United States v. Bailey*, 21 M.J. 244 (C.M.A. 1986). The government is entitled to great latitude in showing predisposition, but the military judge must use sound discretion in admitting evidence of uncharged misconduct. It must be probative, and its probative value must outweigh the risk of undue prejudice. Possession or use of a controlled substance does not establish predisposition to distribute. *United States v. Dayton*, 29 M.J. 6 (C.M.A. 1989). The court should not admit evidence on why the police suspected the accused [held error in *United States v. Eason*, 21 M.J. 79 (C.M.A. 1985)]. The military judge should instruct on the limited purpose of such evidence. (Mil.R.Evid. 105 requires the military judge, ***upon request***, to restrict to its proper scope evidence admitted for a limited purpose and to instruct the members accordingly.) *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977). Finally, the misconduct must be reasonably contemporaneous with the charged offense. *See United States v. Rodriguez*, 474 F.2d 587 (5th Cir. 1973) (introduction of evidence of a drug transfer 20 days after the charged possession with intent to distribute not abuse of discretion by the judge in light of entrapment defense). *See Sorrells v. United States*, 287 U.S. 435 (1932) and *United States v. Meyers*, 21 M.J. 1007 (A.C.M.R. 1986) for general discussions of the entrapment defense. An excellent discussion of the law of entrapment as applied to military practice is found in *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982). The *Benchbook* instruction on entrapment, at DA Pam 27-9 para 5-6, is helpful in understanding the defense.

– ***Subjective test.*** In military law, the entrapment defense is concerned with the subjective intent of the accused rather than the tactics employed by government agents. If an accused has a predisposition to engage in a crime, then he cannot successfully claim that he was entrapped into committing it. *Vanzandt, supra*; *United States v. Clark*, 28 M.J. 401 (C.M.A. 1989); *United States v. Eckhoff*, 23 M.J. 875 (N.M.C.M.R. 1987), *rev'd granted in part*, 25 M.J. 224, *rev'd in part*, 27 M.J. 142 (C.M.A. 1988).

(c) When the military judge is alerted to the possibility that an entrapment defense might be available, he is required to discover the accused's attitude concerning the defense. *United States v. DeJong*, 13 M.J. 721 (N.M.C.M.R. 1982) (***Held***: No defense available in this case where accused entered into transaction to satisfy his own profit motive).

(d) Defense counsel must scrutinize all alleged offenses for the possibility of entrapment. (The fact that second sale of drugs occurred almost a month after the first did not preclude invocation of the entrapment defense. The defense applies not only to the original crime induced by the government agent, but also to subsequent acts which are part of a course of conduct which was a product of the

inducement.) This is the concept of "continuing entrapment." *United States v. Bailey*, 21 M.J. 244 (C.M.A. 1986).

(4) ***Good military character.*** The defense of good military character is also discussed in Chapter X of this study guide. ***It is clear that good military character is admissible in all drug cases.*** *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985); *United States v. Vandelinder*, 20 M.J. 41 (C.M.A. 1985). The test to determine prejudice when the military judge fails to admit or instruct on character evidence is the strength of the government's case as opposed to the quality, strength, and relevance of the defense's evidence. What standard of harm the court will use (harmless beyond reasonable doubt or a lesser one) has not been announced. Courts have resolved the issue based on the overwhelming strength of the government's case. *United States v. Weeks*, 21 M.J. 1025 (N.M.C.M.R. 1986). Defense counsel should be alert to the government's ability to present acts of bad character to rebut the defense. *See United States v. Walton, summary disposition*, 21 M.J. 148 (C.M.A. 1985) (evidence of on-going drug enterprise properly admitted to rebut testimony on good military character).

(5) **Addiction.** The fact that an accused is addicted to a drug is not a viable defense. *United States v. Wilson*, 44 M.J. 223 (1996).

d. ***Intent to distribute.*** Part IV, para. 37c(6), MCM, (1995 Edition), provides clarification with respect to intent to distribute as follows:

> Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

e. ***Manufacture.*** Part IV, para. 37c(4), MCM, (1995 Edition), proscribes the manufacture of a controlled substance. This is a new offense, and manufacture is defined as follows:

> "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes

> any packaging or repackaging of such substance or labeling or relabeling of its container. "Production," as used in this subparagraph, includes the planting, cultivating, growing, or harvesting of a drug or other substance.

f. ***Introduction.*** Introduction is bringing a controlled substance aboard a military installation, vessel, or aircraft. This definition also includes "causing" the drug to be introduced. *See United States v. Banks*, 20 M.J. 166 (C.M.A. 1985) (accused could not find supplier on base and took clients off-base, where he located another supplier; transaction and exchange completed off-base does not absolve accused of criminal liability for immediately subsequent introduction). *See also United States v. Barber*, 23 M.J. 761 (N.M.C.M.R. 1986) (evidence of attempted introduction with intent to distribute insufficient as a matter of law).

6. ***Sentencing.*** Part IV, para. 37e, MCM, (1995 Edition), now provides for standardized punishments under article 112a. Such punishments are increased when an offense proscribed is committed while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; in a hostile fire pay zone; or in time of war.

7. ***Pleading.***

a. ***General considerations.*** When possession of marijuana is alleged, the amount possessed ***must*** be included in the specification if it is thirty grams or more. By pleading and proving possession of thirty or more grams of marijuana, the government will be able to increase the maximum confinement from two to five years. Except in "use" specifications, it is always proper to allege the approximate amounts of drugs. Metric amounts are preferable because most laboratory reports indicate weight in grams. With the exception of marijuana possession, the quantity of drugs will not affect the maximum authorized punishment. The amount can, however, be an important consideration in determining an appropriate sentence. Accordingly, Part IV, para. 37c(7), MCM, (1995 Edition), provides the following guidance:

> *Certain amount.* When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. It is not necessary to allege a specific amount, however, and a specification is sufficient if it alleges that an accused possessed, distributed, introduced, or manufactured "some," "traces of," or "an unknown quantity of" a controlled substance.

If the offense involves distribution, the specification should identify the other persons involved. In cases involving more than one distribution, this will make it easier for all parties to the trial to relate a witness' testimony to a particular specification. The sample specifications require that all drug abuse specifications be alleged as "wrongful." Failure to allege "wrongful" had been held a fatal defect in *United States v. Lesch*, N.M.C.M. 85-3830 (17 Dec 85); yet, some cases can be salvaged. In *United States v. Richardson*, N.M.C.M. 85-3022 (23 Jan 86), the word wrongful was stated in the charge but not the actual specification. The court elected to read the charge and specification together and upheld the specification. Though it is not required that drugs named in article 112a, clause 1, be named as listed on a schedule, it is advisable for ease in referencing the maximum sentencing provisions.

b. ***Sample pleadings***. *See* Part IV, para. 37f, MCM, (1995 Edition).

B. ***Article 134, UCMJ***. Although the great majority of military drug offenses will be prosecuted under article 112a, prosecutors must be alert to the fact that there are instances when article 134 should be charged.

1. ***Example***. The accused is apprehended after selling what he purports to be cocaine to an undercover agent. The substance sold is chemically analyzed and turns out to be ephedrine. The distribution takes place on a Federal reservation in the state of Washington. The drug ephedrine is not listed in article 112a, nor is it included in the schedules of the Drug Abuse Prevention and Control Act of 1970. Ephedrine is, however, a prohibited substance under the laws of the state of Washington.

2. *United States v. Reyes-Ruiz*, 16 M.J. 784 (A.C.M.R. 1983) was a case in which the facts were identical to the ephedrine example. The astute prosecutor charged the offense of delivery of ephedrine as a crime and offense not capital under clause 3 of article 134. Here, it was necessary to use the Federal Assimilative Crimes Act, 18 U.S.C. § 13, to properly charge the misconduct of the accused. (The defense argument that existing Federal law preempted the use of FACA was rejected by the Army Court of Military Review.) This may be useful in the prosecution of "designer" drugs. *See also United States v. Reichenbach*, 29 M.J. 128 (C.M.A. 1989).

3. Any substance abuse offense which involves otherwise legal substances, such as glue, paint or aerosol propellants, should be charged as a "simple disorder" under clause 1 of article 134. In *United States v. Deserano*, 41 M.J. 678 (A.F. Ct. Crim. App. 1995), the court held that the prosecution of such cases is twofold. First, any substance abuse offense not covered by article 112a may be charged as a violation of clause 1, article 134. Secondly, the specification does not have to allege that the substance was intoxicating or that the accused's intent was to become intoxicated. However, the prosecution must present evidence beyond a reasonable doubt that the accused's conduct was in fact prejudicial to good order and discipline.

4. Alternative charging for contingencies of proof under both article 80 (attempted distribution of cocaine) and under article 121 (larceny by trick of the purchase price) would also have been possible and indeed necessary if the distribution had taken place off-base (outside the reach of 18 U.S.C. § 13).

C. ***Prosecution of possession of drug paraphernalia under Article 92, UCMJ.*** Possession of drug paraphernalia is not prohibited by article 112a, and it may not be charged under either clause 1 or 2 of article 134. *United States v. Caballero*, 23 C.M.A. 304, 49 C.M.R. 594 (1975). Article 1138, *U.S. Navy Regulations, 1990*, does not prohibit possession of paraphernalia. Therefore, until recently, such possession had to be prosecuted either under Article 92, UCMJ, as a violation of a locally promulgated lawful order regulating paraphernalia, or under clause 3 of Article 134, UCMJ, as a violation of a state paraphernalia statute adopted through the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See, e.g., United States v. Tee*, 20 C.M.A. 406, 43 C.M.R. 246 (1971) (local order prohibited possession of syringes); *United States v. Sweeney*, 48 C.M.R. 476 (1974) (local order prohibited possession of bottle caps used to administer heroin); *United States v. Dykes*, 6 M.J. 744 (N.C.M.R. 1978) (discusses lawfulness of orders prohibiting possession of paraphernalia).

A Navy service-wide paraphernalia regulation was promulgated in SECNAVINST 5300.28B, dated 11 July 1990, which provided: "Except for authorized medicinal purposes, the use, possession, or distribution of drug abuse paraphernalia by persons in the Naval Service is hereby prohibited. A violation of this prohibition may result in punitive action under the UCMJ or adverse administrative action or both." Enclosure (1) to the instruction defines drug abuse paraphernalia in greater detail, and notes that it is the intent of the persons in possession of the paraphernalia which separates innocent possession from a criminal offense. For example, under the instruction, cigarette papers may be safely possessed if the intent of the possession is to roll tobacco cigarettes, but their possession constitutes an offense if they are to be used to roll marijuana cigarettes. The enclosure lists "evidentiary factors" to consider in making a determination as to intent. Such factors include statements by the person in possession or anyone in control concerning use; instructions provided with the object concerning its use; and descriptive materials with the object explaining its use.

In *United States v. Thompson*, NMCM 96 01368, (N.M.Ct.Crim.App., Jul. 30, 1997), (Unpublished Decision), the court held that possession of twenty-six plastic bags, many of which contained marijuana, did not constitute possession of drug paraphernalia in violation of SECNAVINST 5300.2B. *See also United States v. Pevehouse*, __M.J.__, No. 9500802 (N.M.Ct.Crim.App. Mar. 31, 1997). In prosecutions for possession of drug paraphernalia, the government must prove beyond a reasonable doubt that the glass pipe was used for, or its design purpose was for introducing drugs into the body in violation of the law.

In *United States v. Painter*, 39 M.J. 578 (N.M.C.M.R. 1993), the court overturned the appellant's conviction for possessing drug paraphernalia in violation of SECNAVINST 5300.28B. The accused possessed a plastic glass containing a folded paper bindle, a second folded paper bindle, two plastic zip-lock bags, a plastic scale, a piece of aluminum foil and a metal scale. The court stated, "But by defining drug abuse paraphernalia only as objects used, intended for use, or designed for use in *injecting, ingesting, inhaling or otherwise introducing* illegal drugs into the human body, the Secretary had specifically limited such paraphernalia to objects used, intended for use or designed for use for only those purposes." *Id.* at 580. The court opined that the objects held by the accused were associated with drug distribution and not drug use, therefore they did not fall within the drug paraphernalia definition contained in SECNAVINST 5300.28B. *See also United States v. Coombs*, 40 M.J. 612 (N.M.C.M.R. 1994).

0602 REFERENCE TO OTHER AREAS

Note that, as a practical matter, many of the most common problems that arise with regard to drug offenses do ***not*** involve the substantive law. The problem issues include:

– Establishing a proper chain of custody and identifying the substance in court. *See United States v. Day*, 20 M.J. 213 (C.M.A. 1985).

– Proof of drug use using extracted bodily fluids.

– Failure to report personal use of drugs excused by privilege against self-incrimination. *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) (dereliction of duty charge dismissed). However, in *United States v. Medley*, 33 M.J. 75 (C.M.A. 1991), *cert. denied*, 503 U.S. 936, 112 S.Ct. 1473, 117 L.Ed.2d 617 (1992), the court refused to extend the *Heyward* rule in which a servicemember cannot be convicted of both using drugs and failing to report or apprehend others joining in the same use. The accused, in *Medley*, had argued that her drug activities occurred in a social context such that reporting others for abusing drugs when she did not participate would incriminate her on those occasions in which she did participate.

These problems are the ones that often cause the practicing trial and defense counsel the most difficulty and are the issues raised most frequently on appeal.

These areas are discussed in-depth, as appropriate, in the Naval Justice School Procedure and Evidence Study Guides. A careful examination of *United States v. Littles*, 35 M.J. 644 (N.M.C.M.R. 1992), *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), and *United States v. Wilson*, 45 M.J. 512 (ArmyCt.Crim.App. 1996), their progeny should be undertaken prior to determining LIOs and charging such offenses.

CHAPTER VII

MISCELLANEOUS GROUPS OF OFFENSES

0700 **INTRODUCTION** 7-1
A. Resistance, flight, escape, and breach of restraint 7-1
B. Drunkenness offenses 7-1
C. Sentinel, lookout, and watch misbehavior 7-1
D. Falsification 7-1

SECTION A: RESISTANCE, FLIGHT, ESCAPE, AND BREACH OF RESTRAINT OFFENSES 7-2

0701 **INTRODUCTION** 7-2
A. Article 95 states: 7-2
B. Article 134 is the general article. 7-2

0702 **DEFINITIONS** 7-3
A. Apprehension. 7-3
B. Arrest 7-3
1. General discussion. 7-3
2. Nonpunitive "arrest" 7-3
3. "Arrest in quarters." 7-4
C. "Restriction in lieu of arrest." 7-4
D. Confinement. 7-4
E. Custody. 7-4

0703 **RESISTING OR FLIGHT FROM APPREHENSION** 7-4
A. Essential elements. 7-4
B. First element. 7-5
C. Second element. 7-5
D. Third element. 7-7
1. Resisting apprehension. 7-7
2. Flight from apprehension. 7-7
E. Mistake of fact defense. 7-8
1. Mistake regarding the status of the person attempting to apprehend the accused. 7-8

2. Mistake regarding the basis for apprehension. 7-8
F. Pleading. 7-8

0704 ESCAPE FROM CUSTODY 7-9
A. Essential elements. 7-9
B. First element. 7-10
C. Second element. 7-10
D. Third element. 7-11
E. Pleading. 7-11

0705 ESCAPE FROM CONFINEMENT. 7-12
A. Essential elements. 7-12
B. First element. 7-12
C. Second element. 7-12
D. Third element. 7-13
E. Custody vice confinement. 7-13
F. Defenses. 7-15
G. Pleading. 7-15

0706 BREAKING ARREST 7-16
A. Essential elements. 7-16
B. First element. 7-16
1. Procedure. 7-16
2. Pretrial arrest. 7-16
C. Second element. 7-16
D. Defenses. 7-16
E. Pleading. 7-17

0707 BREAKING RESTRICTION 7-17
A. General discussion. 7-17
B. Essential elements. 7-17
C. First element. 7-17
1. Administrative. 7-18
2. Punitive. 7-18
D. Second element. 7-18
1. Restriction in lieu of arrest. 7-18
2. Punitive restriction. 7-19
E. Third element. 7-19
F. Fourth element. 7-19
G. Last element. 7-19
H. Pleading. 7-19

0708 ESCAPE FROM CORRECTIONAL CUSTODY 7-19
A. General discussion. 7-19
B. Essential elements. 7-20

C. Pleading. 7-20
D. Related offenses. 7-20

0709 BREACH OF RESTRAINT DURING CORRECTIONAL CUSTODY 7-21
A. General discussion. 7-21
B. Essential elements. 7-21
C. Distinction between this offense and "escape from correctional custody." 7-21
D. Pleading. 7-21

0710 RELATIONSHIP BETWEEN RESISTANCE, ESCAPE, AND BREACH 7-22

SECTION B: DRUNKENNESS OFFENSES 7-24

0711 INTRODUCTION 7-24

0712 DRUNK ON DUTY 7-24
A. Text of Article 112, UCMJ. 7-24
B. Elements. 7-24
C. First element. 7-24
D. Second element. 7-26
E. Pleading. 7-28

0713 DRUNK ON BOARD SHIP OR IN SOME OTHER PLACE 7-28
A. Introduction. 7-28
B. Essential elements. 7-28
C. "Drunk" has the same definition previously discussed. 7-29
D. Aggravating factor. 7-29
E. Related offenses. 7-29
F. Special defense. 7-29
G. Proof note. 7-29
H. Pleading. 7-29

0714 INCAPACITATION FOR DUTY THROUGH PRIOR INDULGENCE IN LIQUOR OR ANY DRUG 7-30
A. Introduction. 7-30
B. Essential elements. 7-30
C. Additional element. 7-30
D. "Duty" was previously discussed in section 0712.C 7-31
E. "Incapacitated" 7-31
F. Pleading. 7-31

0715 DRUNKEN, RECKLESS, OR WANTON DRIVING 7-32
A. Text of Article 111, UCMJ 7-32
B. Essential elements. 7-32

C. Definitions. 7-32
1. Vehicle. 7-32
2. Operating. 7-32
3. Reckless. 7-33
4. Wanton. 7-33
D. The aggravated offense. 7-33
E. Proof. 7-34
1. Drunkenness. 7-34
2. Recklessness. 7-34
F. Pleading. 7-34
G. Relationship between "drunken driving" and "reckless or wanton driving". 7-34
H. Relationship between drunk driving and involuntary manslaughter. 7-35
I. Relationship between drunk driving and negligent destruction of government property. 7-35

0716 RELATIONSHIP BETWEEN DRUNKENNESS OFFENSES 7-35

SECTION C: MISBEHAVIOR BY SENTINEL, LOOKOUT, AND WATCHSTANDER 7-38

0717 SENTINEL AND LOOKOUT OFFENSES UNDER ARTICLE 113, UCMJ 7-38
A. Text of Article 113, UCMJ. 7-38
B. Scope. 7-38
C. Essential elements. 7-38
D. Discussion. 7-38
1. First element. 7-38
2. Second element. 7-40
3. Element in aggravation. 7-42
E. Lesser included offenses (LIO's). 7-43
1. As to drunk on post. 7-43
2. As to sleeping on post. 7-43
3. As to leaving post before regularly relieved. 7-43
F. Pleading. 7-43

0718 SENTINEL AND LOOKOUT OFFENSES UNDER ARTICLE 134 LOITERING AND WRONGFULLY SITTING DOWN 7-44
A. Essential elements. 7-44
B. Definition. 7-44
C. Example 7-44
D. Defense. 7-44
E. Pleading. 7-44

0719 RELATIONSHIP BETWEEN THE SENTINEL AND LOOKOUT OFFENSES 7-45

0720 MISBEHAVIOR BY WATCHSTANDERS 7-46
A. General discussion. 7-46
B. Many possible offenses by watchstanders. 7-46
C. Special problem. 7-47

SECTION D: FALSIFYING OFFENSES 7-48

0721 INTRODUCTION 7-48

0722 FALSE OFFICIAL STATEMENT 7-48
A. Text of the article 7-48
B. Essential elements. 7-48
C. Discussion. 7-49
1. Official document or statement. 7-49
2. Knowledge that the document or statement was false. 7-50
3. Intent to deceive. 7-50
D. Pleading. 7-51

0723 FALSE SWEARING. 7-51
A. General discussion. 7-51
B. Essential elements. 7-52
C. Discussion. 7-52
1. Oath or its equivalent. 7-52
2. Administered in a matter required or authorized by law. 7-52
3. Administered by a person having authority 7-53
4. Statement must in fact be false. 7-53
5. "Exculpatory no." 7-53
D. Pleading. 7-53

0724 MAJOR DISTINCTIONS BETWEEN FALSE OFFICIAL STATEMENTS 7-54

CHAPTER VII

MISCELLANEOUS GROUPS OF OFFENSES

0700 INTRODUCTION

This chapter considers several groups of common, related offenses. Each group is composed of violations of independent articles of the UCMJ, and at least one offense under the general article. Some offenses are examined in detail, but major emphasis is placed upon the relationship that the offenses within the groups have to one another.

A. ***Resistance, flight, escape, and breach of restraint*** (Key Numbers 619-630, 754 and 935). Resisting apprehension; flight; escape from custody, confinement, and correctional custody; and breaking arrest, restriction, and correctional restraint. These offenses are violations of Article 95 or Article 134, UCMJ.

B. ***Drunkenness offenses*** (Key Numbers 754, 783-788). Drunkenness in camp, aboard ship, in public, and incapacitation for duty as a result of prior drinking are violations of article 134; drunk and reckless driving and drunk on duty are violations of articles 111 and 112, respectively.

C. ***Sentinel, lookout, and watch misbehavior*** (Key Numbers 687, 753-754, 789). Offenses by sentinels, lookouts, and watchstanders are violations of articles 92, 113, and 134.

D. ***Falsification*** (Key Numbers 577-582, 753-754). False official statements are violations of article 107, while false swearing is a violation of article 134.

SECTION A: RESISTANCE, FLIGHT, ESCAPE, AND BREACH OF RESTRAINT OFFENSES

0701 INTRODUCTION

This section discusses offenses involving resistance to, escape from, and breach of restraint. Such offenses are prosecuted under Articles 95 and 134 of the Uniform Code of Military Justice.

A. ***Article 95 states***: "Any person subject to this chapter who-

1. resists apprehension;

2. flees from apprehension;

3. breaks arrest; or

4. escapes from custody or confinement; shall be punished as a court-martial may direct."

Thus, it punishes five separate but related offenses:

1. Resisting apprehension;

2. Fleeing from apprehension;

3. escape from custody;

4. escape from confinement; and

5. breaking arrest.

B. ***Article 134 is the general article.*** It includes within its prohibitions breaches of correctional custody, escape from correctional custody, and the more common offense of breaking restriction. Thus, it punishes three separate but related offenses:

1. Breaking restriction;

2. escape from correctional custody; and

3. breach of restraint during correctional custody.

0702 DEFINITIONS

A. ***Apprehension***. The taking of a person into custody. Article 7a, UCMJ; R.C.M. 302(a)(1); and Part IV, para. 19c, MCM, (1995 Edition). "Apprehensions" in the military are synonymous to "arrests" in the civilian world. R.C.M. 302(a)(1) Discussion. An apprehension may take place in a variety of ways, as shown by the following examples:

1. An MP approaches Seaman Wiley and says to him, "I'm taking you into custody." Wiley does not resist and complies with the MP's orders. The apprehension is complete even though the word "apprehend" was not used and Wiley was not subjected to physical restraint.

2. An MP grabs Seaman Nogood's arm and says, "Come with me you turkey, I'm taking you in." Seaman Nogood is reluctant, but submits and allows himself to be directed physically by the MP. The apprehension is complete.

3. An MP steps in front of Seaman Dasher and announces, "You're under arrest." Seaman Dasher bolts for the door. The apprehension, as we shall see, is not complete. If, however, the MP gives chase and subdues Dasher, it will be complete.

B. ***Arrest.***

1. ***General discussion***. In military law, there are two types of "arrest." One is nonpunitive in nature and is provided for in Article 9, UCMJ, and R.C.M. 304(a)(3). The other, called "arrest in quarters," is punitive and may be imposed as nonjudicial punishment (NJP) only upon commissioned and warrant officers by general court-martial authorities, or flag and general officers under the provisions of Article 15, UCMJ.

2. ***Nonpunitive "arrest"***. Nonpunitive arrest is the moral restraint of a servicemember that is imposed by an order, but is not punishment for a particular offense. The order directs the individual to remain within the limits of a certain area during the term of the "arrest." Article 9, UCMJ; R.C.M. 304, MCM, (1995 Edition). Nonpunitive arrest is similar to pretrial restriction. The major difference between the two types of restraint are:

a. The person ordered into arrest cannot be required to perform regular military duties, while one who is restricted may be expected to perform all regular military duties.

– ***Example***. If Seaman Wiley has been ordered into arrest by his commanding officer, he cannot be required to bear arms, stand watch, etc. On the other hand, a person ordered into arrest may be required to perform routine cleaning and training duties. *United States v. Hunt*, 3 C.M.R. 573 (A.F.B.R. 1952); R.C.M. 304(a)(3), MCM, (1995 Edition).

b. If assigned duties inconsistent with the status of arrest by the authority that imposed it, the arrest status is thereby terminated. *Hunt, supra*. R.C.M. 304(a)(3), MCM, (1995 Edition).

3. ***"Arrest in quarters."*** Arrest in quarters is imposed as an NJP upon officers. It is a moral type of restraint which requires the officer upon whom the punishment is imposed to remain within the limits of his / her quarters. It is seldom imposed, but is authorized by Article 15, UCMJ, and Part V, para. 5c(3), MCM, (1995 Edition).

C. ***"Restriction in lieu of arrest."*** This type of restraint is similar to "arrest," as discussed above. It is authorized by R.C.M. 304(a)(2), MCM, (1995 Edition). Unlike "arrest," however, an individual ordered into "restriction in lieu of arrest" shall, unless otherwise directed, perform his / her full military duties.

D. ***Confinement***. The physical restraint of a person. Article 9(a), UCMJ; R.C.M. 304(a)(4), MCM, (1995 Edition).

E. ***Custody***. The restraint of free movement imposed by lawful apprehension. Part IV, para. 19c(3)(a), MCM, (1995 Edition).

1. The restraint may be corporeal and forcible (e.g., handcuffs or an armlock).

2. After submission to apprehension or a forcible taking into custody, the restraint may consist of control exercised over the prisoner by official acts or orders while the ordering authority remains in the prisoner's presence (e.g., Rollo peacefully submits to the MP and accompanies him as directed; he's now in the MP's custody). (***Caveat***: As discussed below, a prisoner is deemed to be in confinement vice custody in some circumstances.)

0703 RESISTING OR FLIGHT FROM APPREHENSION. Article 95, UCMJ; Part IV, para. 19c(1) and (2), MCM, (1995 Edition).

A. ***Essential elements.***

1. That a certain person attempted to apprehend the accused;

2. that said person was authorized to apprehend the accused; and

3. that the accused actively resisted the apprehension or fled from the apprehension.

B. ***First element***. That a certain person attempted to apprehend the accused.

– The first element requires that an overt act with the intent to take the accused into custody be made. The type of act can be as basic as an oral or written declaration of an intent to place one under arrest. *See United States v. Burgess*, 32 M.J. 446 (C.M.A. 1991) (CID agent yelling, "Police, you're under arrest!" sufficient to meet the requirements of the first element of resisting apprehension). More likely, however, the finder of fact is going to be forced to determine whether the totality of circumstances reasonably indicate that both the accused and those possessing the power to apprehend are aware that the accused's personal liberty is being restrained. *United States v. Kinane*, 1 M.J. 309, 313 (C.M.A. 1976). One court has suggested that this determination should be made using a "reasonable man" approach. *United States v. Noble*, 2 M.J. 672 (A.F.C.M.R.), *petition denied*, 2 M.J. 187 (C.M.A. 1976).

– ***Example***. Military policemen inform the accused that they would like to talk to him outside of the bar. The police hover over the accused while he finishes his beer. The police do not allow the accused to move while he is sitting at the bar. ***Held***: The facts supported a determination that the policemen attempted to apprehend the accused. The accused did not have any freedom at that point in time. *United States v. Ramirez*, 4 C.M.R. 543 (A.F.B.R. 1952).

C. ***Second element***. That the person was authorized to apprehend the accused. Article 7, UCMJ; Part IV, para. 19c(1)(b), MCM, (1995 Edition).

1. ***General***. The following persons are authorized to apprehend upon reasonable belief that an offense has been committed and that the person apprehended committed it:

a. Officer, warrant officer (WO), petty officer (PO), noncommissioned officer (NCO); and

b. when in the execution of their guard or police duties:

(1) air police (AP), military police (MP), shore patrol (SP), master at arms (MAA);

(2) personnel designated by proper authority to perform guard or police duties, including duties as criminal investigators. This includes Naval Criminal Investigative Service (NCIS) agents under certain circumstances (JAGMAN, § 0147) and other civilian police or investigators designated by proper authority. R.C.M. 302(b), MCM, (1995 Edition).

2. Additionally, Article 7(c), UCMJ, authorizes commissioned officers, WO's, NCO's, and PO's to apprehend anyone subject to the Code who takes part in

"quarrels, frays, and disorders."

3. ***Deserters***. R.C.M. 302(b)(3), MCM, (1995 Edition).

a. Any civil officer having authority to apprehend under the laws of the United States, or of a state, may apprehend summarily a deserter and deliver him / her into the custody of the armed forces. Article 8, UCMJ.

b. Other civilians may apprehend deserters only if specifically requested by a military officer. A DD Form 553 (Absentee Wanted by the Armed Forces) is sufficient.

4. ***Policy regarding apprehending officers and WO's***. R.C.M. 302(b)(2) (Discussion) states that NCO's and PO's not performing police duties ***should*** apprehend officers and WO's ***only***:

a. Pursuant to specific orders of a commissioned officer;

b. to prevent disgrace to the service; or

c. to prevent escape of one who has committed a serious offense.

5. Resisting apprehension by ***foreign*** police officers who are not agents of the United States is not a violation of article 95 because the second element is lacking. *United States v. Seymore*, 19 M.J. 608 (A.C.M.R. 1984). The offense may be charged under article 134. *See United States v. Williams*, 26 M.J. 606 (A.C.M.R. 1988) (flight from detention by post exchange detective violated article 134).

6. ***Illegal apprehension***. The accused cannot be found guilty in the event that the apprehension is illegal. The *Manual for Courts-Martial* provides that a person may not be convicted of resisting apprehension if the attempted apprehension is illegal. Part IV, para. 19c(1)(e), MCM, (1995 Edition). The *Manual* discussion of this point emphasizes that the existence of probable cause to apprehend is an affirmative defense which may be raised by the accused. Part IV, para. 19c(1) and analysis thereto, MCM, (1995 Edition).

7. ***Alternative offenses***. It is important to note that the *Manual* provision clearly suggests that the accused who resists apprehension ***forcibly*** can probably be convicted of assault, regardless of whether probable cause to apprehend existed or not. Part IV, para. 19c(1)(e), MCM, (1995 Edition). And, indeed, several cases have so held. *United States v. Lewis*, 7 M.J. 348 (C.M.A. 1979); *United States v. Wilson*, 7 M.J. 997 (A.C.M.R.), *petition denied*, 8 M.J. 181 (C.M.A. 1979). Arguably inconsistent with *Lewis* and *Wilson* is the case of *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976), in which C.M.A. overturned the accused's conviction for violating Articles 89, 90, and 91, UCMJ, on the ground that the apprehending officers lacked probable cause. But, it seems more likely that *Rozier* can be distinguished from *Lewis* and *Wilson* in three respects: (1) *Lewis* and *Wilson* both dealt with

assault charges, whereas *Rozier* dealt with charges of disrespect and disobedience; (2) the law enforcement authorities in *Lewis* and *Wilson* appear to have acted in a good-faith (though mistaken) belief that probable cause existed, whereas the authorities in *Rozier* seemed not even to care; and (3) the degree of force used by the law enforcement authorities in *Rozier* was so extreme that C.M.A. declared it was "shocked by the unwarranted physical abuse perpetrated upon the (accused). . . ." *Rozier, supra*, at 471.

D. ***Third element***. That the accused actively resisted or fled the apprehension.

1. ***Resisting apprehension***. In order for the accused to be guilty of resisting apprehension, the resistance "must be active, such as assaulting the person attempting to apprehend." Part IV, para. 19c(1)(c), MCM, (1995 Edition). Mere words are insufficient to qualify as resistance under Article 95, UCMJ. Resistance must consist of a physical, overt act—such as an assault upon the apprehending officer. *Noble, supra*; *United States v. Chavez*, 6 M.J. 615 (A.C.M.R. 1978).

The Court of Military Appeals has concluded that mere flight from the scene of an attempted apprehension is insufficient to sustain a conviction for resisting apprehension. *United States v. Harris*, 29 M.J. 169 (C.M.A. 1989). Instead, the evidence must indicate that the accused confronted the pursuers or endangered others. *United States v. Burgess*, 32 M.J. 446 (C.M.A. 1991); *United States v. Webb*, 37 M.J. 540 (A.C.M.R. 1993).

- ***Example***. Government agents interrupt undercover drug purchase and attempt to arrest the accused. Accused flees the scene, forcing the officers into a multiple vehicle chase with sirens blaring and lights flashing. ***Held***: Not Guilty of resisting apprehension. The evidence proved only that the accused fled the scene. The evidence failed to show any type of active resistance. *Burgess, supra*.

- ***Example***. Police signal for accused to pull over in his automobile. The accused accelerates, drives around a police barricade, swerves to avoid another police vehicle set up to block the car of the accused. ***Held***: Guilty of resisting apprehension. Accused's conduct endangered the lives of the police / sentries who attempted to apprehend him. *United States v. Malone*, 34 M.J. 213 (C.M.A. 1992).

- ***Example***. Accused attempts to leave area in lieu of turning over his military ID card. When he begins to walk away, a struggle ensues. The accused is wrestled to the ground, and is eventually brought into custody. ***Held***: Guilty of resisting apprehension. Accused's efforts of fighting away were sufficient to qualify as "active resistance." *United States v. Kersh*, 34 M.J. 913 (N.M.C.M.R. 1992).

2. ***Flight from apprehension***. Congress responded to the U.S. Court of Appeals for the Armed Forces decisions in *Harris* and *Burgess, supra*, by passing legislation

specifically stating that flight constitutes a violation of article 95. This change is in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106 (1996) signed into law by the President on 10 February 1996. In order for the accused to be guilty of flight from apprehension, the resistance "must be active, such as running or driving away." Part IV, para. 19c(2), MCM, (1995 Edition).

E. ***Mistake of fact defense***. There are two types of mistakes which could be considered by the accused. One entails a reasonable belief that the arresting officer is not empowered to apprehend. The second type of mistake is when the accused believes that there is no valid basis for the apprehension. Only the first of these mistakes would constitute a valid defense.

1. ***Mistake regarding the status of the person attempting to apprehend the accused***. Part IV, para. 19c(1)(d), MCM, (1995 Edition), provides: "It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so." Further guidance is provided within the *Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-36. Although it is incorrectly listed as a fourth element to a resisting apprehension offense, the *Benchbook* states: "That the accused had reason to believe that the person attempting to apprehend him was empowered to do so." It indicates further that this element must be instructed upon "if there is any evidence from which it may justifiably be inferred that the accused may have had no reason to believe that the person attempting to apprehend him was empowered to do so."

2. ***Mistake regarding the basis for apprehension***. Part IV, para. 19c(1)(d) also provides that ". . . the accused's belief at the time that no basis exists for the apprehension is not a defense." Therefore, an accused who honestly and reasonably believes that the person apprehending him has no probable cause to do so is in much the same position as one who is confronted by an order he believes to be unlawful—he resists the apprehension at his peril. If, at his trial, the court agrees that no probable cause existed, the accused will be acquitted on the affirmative defense of lack of probable cause. If, however, the court disagrees and finds that probable cause existed, the accused will be found ***guilty despite*** his good-faith belief. It should be noted that the *Manual* rule in this regard is contrary to a dictum in *United States v. Nelson*, 17 C.M.A. 620, 38 C.M.R. 418 (1968).

F. ***Pleading***. Part IV, para. 19f(1), MCM, (1995 Edition).

1. Identify the apprehending person by rank, name, and status.

2. Allege the acts which constituted the resistance. Even though the sample specification for this offense found in Part IV, para. 19f(1), MCM, (1995 Edition), does not indicate the method by which the accused resisted the apprehension, it should be alleged. Omission of this particular may invite a bill of particulars to be filed by the defense and, at worst, might result in a defective specification. Consequently, it is recommended that the exact method of the resistance be alleged in the specification.

3. ***Sample specifications.***

a. ***Resisting apprehension.***

Charge. Violation of the Uniform Code of Military Justice, Article 95

Specification. In that Seaman Patty B. Noodle, U.S. Navy, USS RANGER, on active duty, did, on board USS RANGER, then located at Newport, Rhode Island, on or about 18 December 19CY, resist being apprehended by Chief Boatswain's Mate William I. Nail, U.S. Navy, a person authorized to apprehend the accused.

b. ***Flight from apprehension.***

Charge. Violation of the Uniform Code of Military Justice, Article 95

Specification. In that Seaman Larry L. Cooljay, U.S. Navy, USS CONSTELLATION, on active duty, did, aboard USS CONSTELLATION, then located at San Diego, California, on or about 19 December 19CY, flee apprehension by Electrician's Mate First Class Douglas D. Snoop, U.S. Navy, a person authorized to apprehend the accused.

0704 ESCAPE FROM CUSTODY. Article 95, UCMJ; Part IV, para. 19c(3), MCM, (1995 Edition).

A. ***Essential elements.***

1. That a certain person apprehended the accused;

2. that said person was authorized to apprehend the accused; and

3. that the accused freed himself or herself from custody before being released by proper authority.

The primary distinction between this offense and the offense of resisting apprehension is whether the apprehension has been completed. If the apprehension is completed at the time of the accused's escape, the crime is an escape from custody. If, however, the accused flees prior to being placed under control, the offense is resisting apprehension.

B. ***First element***. That a certain person apprehended the accused.

– The gravamen of this offense is that the accused had been taken into custody. Therefore, the government must first prove that the accused's freedom of movement has been infringed. Merely informing an individual that he/ she is being apprehended is insufficient. There must be a physical or moral restraint upon his / her freedom of movement imposed by physical means or by submission to the apprehending official. The moral restraint is effective as long as an apprehending official is capable of imposing physical restraint should it become necessary. *United States v. Mobley*, 12 M.J. 1029 (A.C.M.R.), *aff'd*, 14 M.J. 134 (C.M.A. 1982). There is no requirement that the restraint exist for a significant period of time; a minimal period of restraint has been deemed sufficient. *United States v. Watkins*, 35 M.J. 709 (N.M.C.M.R. 1992) (accused temporarily stopped by NCO as he flees crime scene).

– Accused was driving an automobile on base. MP's order him to stop the vehicle. Accused stops vehicle for 20 to 30 minutes; then drives away. ***Held***: Guilty of escape from custody. The apprehension was completed when the vehicle was pulled over. ***Note***: Accused could not be convicted of resisting apprehension because the apprehension was complete. *United States v. Chavez*, 6 M.J. 615 (A.C.M.R. 1978).

C. ***Second element***. That the person was authorized to apprehend the accused.

1. The authority to apprehend for purposes of this offense is exactly the same as for the offense of resisting apprehension. *See* the discussion at section 0703.C, *supra*.

2. The basis for the apprehension must be lawful. The totality of the circumstances test will be applied to determine whether the accused was aware that he / she was in a custody situation. *United States v. Garcia-Lopez*, 16 M.J. 229 (C.M.A. 1983) (where accused was not clearly notified that he was being taken into custody, and the surrounding circumstances did not support the conclusion that he had been apprehended prior to his flight, he could not be found guilty of escape from custody); *United States v. Stewart*, 37 M.J. 523 (A.C.M.R. 1993) (where accused was informed that undercover agent was not a government agent, he had no reason to believe that he was in custody; accordingly, a conviction for escape from custody could not be sustained). Mistake concerning the existence of custody is a valid defense. Note, however, that the *Benchbook* provides that a fourth element to this offense is: "That the accused had reason to believe that the person from whose custody the accused allegedly escaped was empowered to hold him in his custody . . ." This is not an element to the offense; however, the members should be instructed upon this information if evidence exists upon which it may be inferred that an accused may have had no reason to believe that the person from whose custody he allegedly escaped was empowered to hold him in custody.

3. The absence of probable cause is an affirmative defense which may be raised by the accused. It should be noted, however, that the *Manual* discussion of this offense does not include the discussion relating to mistake found under the discussion of resisting apprehension at Part IV, para. 19c(1)(d), MCM, (1995 Edition). It is at least arguable, therefore, that an honest and reasonable (though mistaken) belief by the accused that the person apprehending him / her had no probable cause to do so may be a viable defense to the charge of escape from custody.

D. ***Third element***. That the accused freed him / herself from custody before being released by proper authority.

1. The "custody" status continues as long as long as the accused is in the "presence" of the apprehending officer. "Presence" for purposes of this offense includes being within the sight or call of the custodian. *United States v. Royal*, 2 M.J. 591 (N.C.M.R. 1976). The definition of "presence" has even been extended to cover an accused who is given permission to go to the head while the custodian remains outside of the door. *Mobley, supra*.

2. If the accused procures his / her own release from custody through some fraud or deceit on his / her part, the fraud or deceit will vitiate his / her release. In *United States v. Felty*, 12 M.J. 438 (C.M.A. 1982), the accused obtained his release from custody by a ruse when he told the chaser that a magistrate had ordered his release from confinement when, in actuality, the magistrate had ordered that confinement be continued. In that case, the accused was guilty of escape from confinement vice escape from custody.

E. ***Pleading***. Part IV, para. 19f(3), MCM, (1995 Edition).

1. Review the pleading requirements for a resisting apprehension offense and apply them to these specification.

2. If the specification alleges that the accused perpetrated an assault or battery in escaping from the custody of the custodian, allege the assault or battery as a separate offense.

3. ***Sample specification***.

> ***Charge***. Violation of the Uniform Code of Military Justice, Article 95
>
> ***Specification***. In that Seaman Patty B. Noodle, U.S. Navy, USS RANGER, on active duty, did, aboard USS RANGER, then located at Newport, Rhode Island, on or about 18 December 19CY, escape from the custody of Lieutenant Leonard M. Gable, U.S. Navy, a person authorized to apprehend the accused.

0705 ESCAPE FROM CONFINEMENT. Article 95, UCMJ; Part IV, para. 19c(4), MCM, (1995 Edition).

A. ***Essential elements.***

1. That a certain person ordered the accused into confinement;

2. that said person was authorized to order the accused into confinement; and

3. that the accused freed him / herself from the restraint of confinement before being released from confinement by proper authority.

B. ***First element.*** A certain person ordered the accused into confinement.

1. Confinement is the continual physical restraint depriving the person of freedom. The Air Force Court of Military Review has indicated that physical restraint can include a temporary level of moral restraint or suasion when it is used as a substitute for physical restraint. *See United States v. Standifer*, 35 M.J. 615, 617 (A.F.C.M.R. 1992).

2. Confinement may be ordered in two situations:

a. As pretrial confinement to assure the presence of the accused for trial or prevent serious misconduct; or

b. as punishment imposed by court-martial or three days' confinement on bread and water imposed at court-martial or at NJP.

C. ***Second element.*** Said person was authorized to order the accused into confinement.

1. R.C.M. 304(b) describes who may order pretrial confinement as follows:

a. An officer, WO, or civilian may be confined only by a commanding officer (CO) who has authority over the individual.

b. An enlisted person may be confined by:

(1) Any commissioned officer; or

(2) WO's, PO's, or NCO's if the CO has delegated that authority to them, but only if the person to be confined is attached to that CO's command or temporarily within his / her jurisdiction.

2. Punitive confinement may be imposed by the CO of the accused who may, in the case of confinement awarded by court-martial, delegate confinement authority to the trial counsel. R.C.M. 1101(b)(2), MCM, (1995 Edition). Note that only CO's of vessels may impose confinement at NJP, and this confinement is limited to three days' bread and water or diminished rations. Part V, para. 5b(2)(A)(i), MCM, (1995 Edition).

D. ***Third element.*** The accused freed him / herself from the confinement before being released by proper authority.

– The third element requires that the accused cast himself "off of the restraint of confinement." Part IV, para 19c(4)(c), MCM, (1995 Edition). When the accused violates the limitations of the confinement order, he / she does not automatically "cast" off the restraint. In *United States v. Anderson*, 36 M.J. 963 (A.F.C.M.R. 1993), the accused convinced his escort to take him home to see his wife. When the escort left the accused at the residence, the court concluded that the accused did not escape from confinement. Instead, the court found that the escort abandoned his prisoner. *See also United States v. Standifer*, 35 M.J. 615 (A.F.C.M.R. 1992).

E. ***Custody vice confinement.***

1. C.M.A. has held that escape from confinement and escape from custody are entirely different in nature and, if one is pleaded and the other proven, a fatal variance results. *United States v. Ellsey*, 16 C.M.A. 455, 37 C.M.R. 75 (1966). In *Ellsey, supra*, the court held that escape from custody, not confinement, was involved where the accused escaped from a guard after he had been properly ordered into confinement, but before he had been delivered to the confinement facility.

2. ***Background.*** One critical factor, then, is to accurately determine the accused's status. The language of C.M.A. in the often-cited *Ellsey* case, *supra*, at 458 - 59 (37 C.M.R. at 78 - 79 is helpful). With regard to custody, the court said:

> [W]hile custody may of necessity be maintained by physical restraint, it also suffices to utilize no more than moral suasion. Hence, far from being identical to confinement, it is an altogether different condition .... What was intended by custody was the temporary form of restraint imposed on an individual subject to the Code by his lawful apprehension. . . . It was to continue until "proper authority may be notified" [citing MCM] . . . 'Such status [custody] thereafter may be altered by the arrest, confinement, restriction, or release of the individual.

With regard to confinement, the court said:

> . . . [Confinement's] execution before and after trial is subjected

> to strict control .... [After apprehension and custody] "a screening out process will occur here in reference to a more permanent status. . . ." After confinement has been effected in a lawful manner .... such confinement is not a continuation of custody but a new and different form of restraint. Nor does confinement include custody in this sense, because confinement may be imposed in cases where there has been no apprehension and resultant custody. [*Citing United States v. West*, 1 C.M.R. 770 (A.F.B.R. 1951).]

3. ***Confinement through physical restraint.*** A prisoner who has been duly placed in confinement, and who is thereafter removed from the confinement facility while under guard, continues to remain in a status of confinement as long as he / she is under ***physical*** restraint. In this regard, both the guard's ***duty*** to use physical restraint and ***possession of means*** to exercise it were considered critical factors.

a. ***Duty.*** The escort must have a duty to restrain the accused. In *United States v. Sines*, 34 C.M.R. 716 (N.B.R. 1964), the accused was sent on a work detail outside of the brig. His chaser was not armed and had been instructed not to attempt, physically, to stop an escaping prisoner. The guard's instructions were to shout "Halt," to blow his whistle, and to get help from nonprisoner personnel. The accused took advantage of this policy and escaped. ***Held***: There was no duty upon the escort to create a restraint and, therefore, accused did not escape from confinement. *See also United States v. Hamilton*, 41 C.M.R. 724 (A.C.M.R. 1970). Where a guard is instructed to try to "talk" the prisoner out of leaving, but is not to physically restrain him, the prisoner's status is not one of confinement. *United States v. Ramsey*, 33 C.M.R. 566 (A.B.R. 1963). When the escort is under a duty to continue the accused's restraint, however, the accused will remain in confinement regardless of whether the escort is armed. *United States v. Jones*, 36 M.J. 1154 (A.C.M.R. 1993); *United States v. Haddox*, 12 C.M.R. 675 (A.F.B.R.), *petition denied*, 13 C.M.R. 142 (1953).

b. ***Confinement is confinement until released by proper authority.*** In *United States v. Maslanich*, 13 M.J. 611 (A.F.C.M.R.), *petition denied*, 14 M.J. 236 (C.M.A. 1982), an accused had been placed in pretrial confinement for aggravated assault. While still in a confinement status, he was turned over to his first sergeant who was assigned the duty of escorting the accused to his defense counsel's office. The accused was to confer with his defense counsel concerning an upcoming hearing on his pretrial confinement. While the accused was meeting with his counsel, the first sergeant left for lunch. Subsequently, the accused left his defense counsel's office—ostensibly to get a drink of water—at which time he proceeded to leave the building and the base. It was held that the accused escaped from confinement when he left the building, in spite of the lack of effectiveness of his restraint. The departure of the first sergeant for lunch could not be construed as setting the accused at liberty. The court of review focused not on the "duty" and "means" test, but rather on the feeling that an accused once placed in confinement remains in that status until released by proper authority. The court pointed to the difficulty in

reconciling precedent which followed the "duty" and "means" analysis, and specifically overruled Air Force cases which found no confinement due to a strict application of the "duty" and "means" tests. *Id.* at 614.

c. ***Is "duty" and "means" still the test?*** Despite the attractive logic of *Maslanich, supra,* the "duty" and "means" test still seems viable. The conviction in *Maslanich* could have been upheld using the "duty" and "means" analysis. *Maslanich*'s guard arguably had both the duty and means to prevent the accused's escape; he merely failed to properly execute them. In *United States v. Felty,* 12 M.J. 438 (C.M.A. 1982), the guard allowed the accused to go free because the accused falsely informed the guard that the magistrate had ordered his release. The Court of Military Appeals cited with approval cases which applied the "duty" and "means" test and found that the guard's negligence did not negate his duty or means to prevent escape.

F. ***Defenses.*** Part IV, para. 19c(4)(e), MCM, (1995 Edition), indicates that a person may not be convicted of escape from confinement if the confinement is illegal. The section provides that confinement ordered by one authorized to do so is presumed lawful and that legality of confinement is ordinarily a question of law. The legality of confinement is a question of law. Accordingly, most issues related to the legality of confinement will be litigated by a motion to dismiss rather than as a defense on the merits. The one issue related to the legality of confinement which can clearly be presented to the fact-finder is whether the person ordering the confinement was legally empowered to do so. This is an element of the offense and is therefore clearly a proper matter of defense. *United States v. Carson,* 15 C.M.A. 407, 35 C.M.R. 379 (1965); *United States v. Gray,* 6 C.M.A. 615, 20 C.M.R. 331 (1956).

G. ***Pleading.*** Part IV, para. 19f(4), MCM, (1995 Edition).

– ***Sample specification.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 95
>
> ***Specification.*** In that Seaman Robert Thomas, U.S. Navy, USS PILE, on active duty, having been placed in confinement in the Navy Brig, Naval Education and Training Center, Newport, Rhode Island, by a person authorized to order the accused into confinement, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 25 December 19CY, escape from confinement.

0706 BREAKING ARREST. Article 95, UCMJ; Part IV, para. 19, MCM, (1995 Edition).

A. ***Essential elements.***

1. That a certain person ordered the accused into arrest;

2. that said person was authorized to order the accused into arrest; and

3. that the accused went beyond the limits of arrest before being released from that arrest by proper authority.

B. ***First element.*** That a certain person ordered the accused into arrest. Ordering a person into arrest must be accomplished in accordance with the MCM and any local directives.

1. ***Procedure.*** Arrest is imposed by notifying the person to be placed in arrest that they are under arrest and by informing them of the limits of the arrest. Such notification may be oral or written. R.C.M. 304(a)(3), MCM, (1995 Edition).

2. ***Pretrial arrest.*** When pretrial arrest is imposed, immediate steps shall be taken to inform an accused of the offense suspected and to try him / her or dismiss the charges against him / her. Article 10, UCMJ.

C. ***Second element.*** That said person was authorized to order the accused into arrest.

– A flag or general officer exercising general court-martial jurisdiction may impose as NJP upon commissioned or warrant officers only arrest in quarters for not more than 30 consecutive days. Part V, para. 5b(1)(B), MCM, (1995 Edition).

D. ***Defenses.*** Although the *Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-37, indicates that a fourth element exists—"That the accused knew of his arrest and its limits"—it is not evident from the President's analysis that such a requirement is necessary. The *Benchbook* continues to state that this instruction must be provided to the members "if there is any evidence from which it may justifiably be inferred that the accused may not have known of his arrest and its limits." There is no case law which has addressed this requirement.

E. ***Pleading***. Part IV, para. 19f(2), MCM, (1995 Edition).

– ***Sample specification***.

> ***Charge***. Violation of the Uniform Code of Military Justice, Article 95
>
> ***Specification***. In that Ensign John B. Smith, U.S. Navy, USS NEVERSAIL, on active duty, having been placed in arrest in quarters by a person authorized to order the accused into arrest, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 31 December 19CY, break said arrest.

0707 BREAKING RESTRICTION. Article 134, UCMJ; Part IV, para. 102, MCM, (1995 Edition).

A. ***General discussion***. Breaking restriction is a violation of Article 134, UCMJ. It is a common offense—since various forms of restriction are imposed for a variety of reasons including punishment, administrative requirements, medical needs, etc. (***Note***: Breaking medical quarantine is a separate offense under article 134.)

B. ***Essential elements***.

1. That a certain person ordered the accused to be restricted to certain limits;

2. that said person was authorized to order said restriction;

3. that the accused knew of the restriction and the limits thereof;

4. that the accused went beyond the limits of the restriction before being released by proper authority; and

5. that, under the circumstances, the conduct of the accused was conduct to the prejudice of good order and discipline ("C to P") or service-discrediting ("SD").

Notice that the knowledge element is clearly a listed element of the offense. Consequently, it must be proved by the government beyond a reasonable doubt.

C. ***First element***. "Restricted to certain limits." Restriction is the moral restraint of a person imposed by an order directing him / her to remain within certain specified limits. There are two types:

1. ***Administrative***. This is called restriction in lieu of arrest. It is used pending investigation and disposition of charges, or both, or pending review. R.C.M. 304(a)(2), MCM, (1995 Edition).

2. ***Punitive*** may be awarded by:

a. ***NJP***, or

b. court-martial sentence.

(1) The sentence should specify limits.

(2) Unlike confinement, however, restriction is not effective until actually ordered executed by the convening authority (CA) after review and action.

D. ***Second element***. "Person authorized to order said restriction." Who may lawfully restrict? This depends upon the type of restriction.

1. ***Restriction in lieu of arrest.***

a. Same authority as for "arrest." *See* R.C.M. 304(b), MCM, (1995 Edition).

b. Generally, any commissioned officer can order an enlisted member into restriction; however, enlisted personnel cannot order other enlisted members into restriction unless they have been authorized to do so by the CO. This authority cannot extend to enlisted members not subject to the CO's command. *United States v. Smith*, 21 C.M.A. 231, 45 C.M.R. 5 (1972) (***Held***: An enlisted member could not restrict another enlisted member in the absence of the authorization required by the MCM). The *Smith* court did conclude, however, that the NCO's order to the accused to remain overnight in a specified room was not unlawful as a matter of law, given the presumption that all orders are lawful and the facts that the sergeant who issued the order had a valid reason for doing so and that the accused did not contest the lawfulness of the order at trial. The court's decision was based upon the relative shortness of the order's intended effect (one night) and the immediate need to preserve order within the unit (which the order was intended to enforce). The authority need not be specific. Hence, the restriction order of a senior NCO was upheld where the CO testified that, while he had not specifically authorized the NCO to place personnel in restriction, he had left the NCO in charge and intended to "grant him all authority necessary to act in his behalf." *United States v. Collins*, 33 C.M.R. 486 (A.B.R. 1963); *United States v. Swanson*, 38 C.M.R. 803 (A.F.B.R. 1967); *United States v. Bigleggins*, 12 M.J. 901 (A.C.M.R.), *petition denied*, 14 M.J. 237 (C.M.A. 1982) (breaking restriction was dismissed where there was no evidence that the command sergeant major who imposed restriction had been delegated such authority by any commander).

2. ***Punitive restriction.***

a. ***NJP.*** Authority to impose punitive restriction as a result of NJP derives from Article 15, UCMJ, and is exercised by the officer who imposes the NJP. *See* Part V, para. 2, MCM, (1995 Edition).

b. ***Court-martial.*** Restriction may be imposed as a court-martial sentence (or part of it) under the authorization found in R.C.M. 1003(b)(6), MCM, (1995 Edition). The CA exercises this authority by ordering the sentence executed.

E. ***Third element.*** Knowledge. The accused must have actual knowledge of the restriction and of its geographical limits. While no cases have decided the issue directly, it is safe to assume that actual vice constructive knowledge is required. *United States v. Wake*, 32 C.M.R. 536 (A.B.R.), *petition denied*, 32 C.M.R. 472 (1962). Actual knowledge may be proved by circumstantial evidence, however. The accused is usually informed of restricted status in writing by use of a document called "restriction orders." This need not be in writing, however, as long as the accused has actual knowledge of his / her status and of the geographical limits of the restriction.

F. ***Fourth element.*** Before the accused was set at liberty by proper authority, he / she went beyond the limits of the restriction.

1. The actual "breaking" consists of the going beyond the geographical limits.

2. Failing to comply with another provision of the order establishing the restriction, such as muster, ***does not*** constitute breaking restriction; it could, however, be prosecuted as a violation of articles 92 or 86. *But see United States v. Miller*, 16 M.J. 858 (N.M.C.M.R. 1983) (specification alleging breaking restriction by consuming alcoholic beverages which was prohibited by restriction order does state an offense).

G. ***Last element.*** Conduct to the prejudice of good order and discipline or service-discrediting. Not every departure from the limits of the area of restriction constitutes a "breach" of restriction. *See United States v. Modesett*, 9 C.M.A. 152, 25 C.M.R. 414 (1958).

H. ***Pleading.*** Part IV, para. 102f, MCM, (1995 Edition).

0708 ESCAPE FROM CORRECTIONAL CUSTODY. Article 134, UCMJ; Part IV, para. 70, MCM, (1995 Edition).

A. ***General discussion.***

1. Part V, para. 5c(4), MCM, (1995 Edition), states, in pertinent part,

"correctional custody is the physical restraint of a person, during duty or nonduty hours, or both, imposed as a punishment, under Article 15, and may include extra duties, fatigue duties or hard labor as an incident of correctional custody."

2. Part IV, para. 70c(1), MCM, (1995 Edition), provides:

> Escape from correctional custody is the act of a person undergoing the punishment of correctional custody . . . who, before being set at liberty by proper authority, casts off any physical restraint imposed by his custodian or by the place or conditions of custody.

B. ***Essential elements.***

1. That the accused was placed in correctional custody by a person authorized to do so;

2. that, while in such correctional custody, the accused was under physical restraint;

3. that the accused freed him / herself from the physical restraint of this correctional custody before being released by proper authority; and

4. that such conduct was to the prejudice of good order and discipline or service-discrediting.

5. The *Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-135, adds knowledge as an additional element. Specifically, the *Benchbook* requires:

> That the accused knew of this correctional custody, and the limits of the physical restraint imposed upon him.

The *Benchbook* states that this element must be instructed upon sua sponte

> . . . if there is any evidence from which it may justifiably be inferred that the accused may not have known of his correctional custody and its limits.

C. ***Pleading***. *See* Part IV, para. 70f(1), MCM, (1995 Edition).

D. ***Related offenses.*** Note the similarity to "Escape from Confinement" under article 95 (discussed above) and "Breach of Restraint During Correctional Custody" under article 134, which is discussed in the next section.

0709 BREACH OF RESTRAINT DURING CORRECTIONAL CUSTODY, Article 134, UCMJ; Part IV, para. 70, MCM, (1995 Edition).

A. ***General discussion.*** Part IV, para. 70c(2), MCM, (1995 Edition), states that:

> Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period.

B. ***Essential elements.***

1. That the accused was placed in correctional custody by a person authorized to do so;

2. that, while in such correctional custody, a certain restraint was imposed upon the accused;

3. * that the accused knew of this correctional custody and the limits of the restraint thereby;

* The *Military Judges' Benchbook, supra,* at paragraph 3-136, states that this element must be instructed upon if "there is any evidence from which it may justifiably be inferred that the accused may not have known of his correctional custody and its limits or of the restraint and its limits."

4. that the accused went beyond the limits of the restraint before having been released (or relieved of the restraint) by proper authority; and

5. that the conduct was to the prejudice of good order and discipline.

C. ***Distinction between this offense and "escape from correctional custody."*** The primary distinction between the offense of breach of restraint during correctional custody and the offense of escape from correctional custody discussed in the preceding paragraph is that the restraint involved in this offense is a moral offense only. Thus, it is similar to a breach of restriction. The restraint involved in the escape offense is physical and, hence, it is more like escape from confinement. In most circumstances, breach of restraint during correctional custody is not an LIO of escape from correctional custody. *United States v. Whitmire,* 13 M.J. 587 (N.M.C.M.R. 1982).

D. ***Pleading.*** *See* Part IV, para. 70f(2), MCM, (1995 Edition).

0710 RELATIONSHIP BETWEEN RESISTANCE, ESCAPE, AND BREACH

A. There are two resistance offense:

1. Resisting apprehension (article 95); and

2. flight from apprehension (article 95).

B. There are three escape offenses:

1. Escape from custody (article 95);

2. escape from confinement (article 95); and

3. escape from physical restraint of correctional custody (article 134).

C. There are three breach offenses:

1. Breach of arrest (article 95);

2. breach of restriction (article 134); and

3. breach of restraint during correctional custody (article 134).

D. The escapes all involve an element of ***physical restraint***.

1. Custody involves the personal, bodily control by the apprehending official. It may consist of forcible and corporeal restraint or simply peaceable submission.

2. Confinement (article 95) and correctional custody with physical restraint (article 134) both involve a control by means of a physical enclosure or the presence of physical force to prevent escape.

E. The breaches all involve a mere moral restraint (i.e., restraint imposed by a moral obligation to obey the order directing the accused to remain within a certain area).

1. Arrest (article 95) is nonpunitive in nature.

2. Arrest-in-quarters is punitive (NJP).

3. Restriction may be nonpunitive (i.e., restriction in lieu of arrest or administrative restriction—e.g., quarantine). However, it may also be punitive (i.e., imposed by NJP or court-martial).

F. The escapes are complete upon the casting-off of the physical restraint before

being set at liberty by proper authority.

G. The breaches are complete upon unauthorized departure from the limited area within which the individual is morally obligated to remain.

H. The resisting apprehension and flight from apprehension offenses are different from all others in this group.

1. Both occur prior to the achievement of control over the accused.

2. Both consist of a physical overt act in opposition to the attempt to take the individual into custody. The act may be:

a. An assault (resistance);

b. an assault or battery, coupled with flight (resistance); or

c. mere flight (flight).

3. Once custody has been effected, any further resistance is not a resisting apprehension. It may be:

a. An attempt to escape from custody;

b. an attempt to escape from confinement;

c. an escape from custody or an escape from confinement, if the accused was successful in casting off the physical restraint and pursuit, if any; or

d. an assault or a battery, which would generally be an article 128 offense, if there is no intent to escape.

I. It is important to understand these distinctions precisely and to analyze the facts carefully prior to pleading these offenses, particularly in a resisting apprehension or escape from custody situation.

– If there is any doubt as to whether or not the apprehension was completed, provide for any reasonable alternative.

Example. ***A*** sat in a bar making a loud noise. ***B***, an MP, walked up to ***A*** and said, "Come with me. You're under arrest." ***A*** stood up, looked at ***B***, then dashed out the door with ***B*** in hot pursuit. ***A*** ran through several alleys, was out of ***B***'s sight for five minutes; but, after fifteen minutes of chasing, ***B*** caught ***A***, put handcuffs on him, and turned him in at the base.

a. ***Query***. What should be pleaded?

b. ***Answer***. Provide for the contingencies of proof and allege both flight from apprehension and escape from custody. In that manner, the court will be able to resolve the factual question and convict on the proper allegation.

SECTION B: DRUNKENNESS OFFENSES

0711 INTRODUCTION

This section discusses offenses pertaining to drunkenness. It is not a crime in the military to be drunk. It is a crime to be drunk in certain places, while in a certain duty status, or to do certain things while intoxicated. While the standard by which drunkenness is determined does not change from offense-to-offense, the maximum punishment which may be awarded varies considerably.

0712 DRUNK ON DUTY. Article 112, UCMJ; Part IV, para. 36, MCM, (1995 Edition).

A. ***Text of Article 112, UCMJ.***

> Any person subject to this chapter *other than a sentinel or lookout*, who is found drunk on duty, shall be punished as a court-martial may direct. (Emphasis added.)

B. ***Elements.***

1. That the accused was on duty as alleged (other than as a sentinel or lookout); and

2. that the accused was found drunk while on duty.

C. ***First element.*** That the accused was on duty as alleged.

1. Duty includes:

a. Duties of routine or detail, in garrison, at station, or in the field (Part IV, para. 36c(2), MCM);

b. duties which are of an anticipatory nature, such as a standby for a flight crew or guard duty (Part IV, para. 36c(3), MCM); and

c. every duty which an officer or enlisted member may legally be required by superior authority to execute (Part IV, para. 36c(2), MCM).

2. "On duty" does not relate to periods when no duty is required, such as when a person is on liberty or on leave.

a. A CO of a ship is constantly on duty when on board ship. Part IV, para. 36c(2), MCM, (1995 Edition).

b. When exercising command, a CO of a post, command, or of a detachment in the field is on constant duty. Part IV, para. 36c(2), MCM, (1995 Edition).

c. "In a region of active hostilities," the circumstances may be such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. Part IV, para. 36c(2), MCM, (1995 Edition).

3. To commit this offense, the accused must have undertaken the responsibility or entered upon the duty. Part IV, para. 36c(3), MCM, (1995 Edition), states: "[T]he fact the accused became drunk before going on duty . . . does not affect the question of guilt." If, however, the accused is known by superior authorities to be intoxicated at the time the duty is assigned, a defense may exist if the authorities allow him / her to assume that duty. Part IV, para. 36c(3). *United States v. Burroughs*, 37 C.M.R. 775 (C.G.B.R. 1966); *but see United States v. Burke*, 5 C.M.A. 56, 17 C.M.R. 56 (1954) (an article 113 case, where the authorities were ***not*** held accountable for the accused assuming duty while drunk). If the accused is too intoxicated to assume the duty, he / she may be charged with article 134—incapacitation for duty. *See United States v. Hoskins*, 29 M.J. 402 (C.M.A. 1990) (reporting for duty in a drunken state does not constitute drunk on duty, but incapacitation).

a. Commencement of the duty status requires an affirmative act, such as:

(1) Relieving someone of the duty—*United States v. York*, 11 C.M.R. 422 (A.B.R. 1953);

(2) performing the duties required even though there has not been an identifiable act of relieving—*United States v. Roberts*, 9 C.M.R. 278 (A.B.R. 1953); or

(3) mustering with the duty section to which assigned, signing the log book, reporting to a senior, etc.

b. The duty status may be terminated by:

(1) Being relieved;

(2) dismissal;

(3) expiration of the period of duty; or

(4) abandonment of the duty. *But see York, supra*, in which OOD left the post in an official car and got drunk in a civilian club. He then returned to his post before the time at which he was to be relieved. ***Held***: Conviction of being under the influence of alcohol while acting as duty officer, in violation of article 134, affirmed.

D. ***Second element***. That the accused was found drunk while on duty.

1. ***Drunk defined***. Part IV, para. 35c(3), MCM, (1995 Edition).

a. "[A]ny intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties."

(1) Drunkenness may be caused by liquor or drugs.

(2) This definition applies to drunk on duty (article 112), drunk driving (article 111), and drunk in camp, aboard ship, and in public (article 134).

b. ". . . [A] sensible impairment of the faculties is an impairment capable of being perceived by the senses. If the accused's conduct is not such as to create the impression within the minds of observers that he is unable to 'act like a normal rational person,' there can be no sensible impairment of his faculties. If, because of intoxicating liquors [or drugs], there was a perceptible lessening of accused's ability to act like a normal rational person, then it may be said that accused's faculties were sensibly impaired." *United States v. Bull*, 3 C.M.A. 635, 638, 14 C.M.R. 53 (1954). *See also United States v. Gossett*, 14 C.M.A. 305, 34 C.M.R. 85 (1963) (where conviction was overturned for lack of evidence regarding impairments).

c. Compare the approach of the *Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-76, in defining drunkenness:

> A person is drunk who is under the influence of an intoxicant so that the use of his faculties is materially impaired. Such impairment did not exist unless the accused's conduct . . . was such as to create the impression within the minds of observers that he was unable to act like a normal rational person.

2. It must appear that the person was drunk while on duty. Drunkenness

before or after duty is not sufficient. A hangover is also insufficient to constitute a violation of article 112, but may satisfy the elements of incapacitation.

3. Drunkenness can be the result of alcohol or drugs consumed before or while on duty. *United States v. Dreschnack*, 1 C.M.R. 193 (A.B.R. 1951).

4. Proof of drunkenness.

a. ***By nonexpert witness.***

(1) Rule 701 of the Military Rules of Evidence states:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

One commentary has said that the first requirement is really composed of two qualifications:

> The first is that the witness has perceived that which the witness testifies about. This may mean that the witness has seen something; it may mean that the witness has heard something; or in some cases it may mean that the witness has felt or touched something. All of these would qualify as perceptions of the witness. The second requirement is that the perceptions be rationally based.

Saltzburg, Schinasi, & Schlueter, *Military Rules of Evidence Manual* 322-23 (1981).

(2) Thus, it would appear that any witness who has observed the accused could testify as to their observations; and, if these observations were sufficient to form an opinion, the witness could also testify as to the opinions concerning the accused's drunkenness. The underlying observations could include such things as the manner in which the accused walked, talked, appeared, smelled, etc.

(3) *United States v. Pratt*, 34 C.M.R. 731 (C.G.B.R. 1963) is an example of a case in which lay witnesses testified about the condition of the accused under the former rules of evidence.

b. ***By expert witness.***

(1) Rule 702 of the Military Rules of Evidence concerns testimony by an expert witness. It is generally considered ***broader*** than the previous rules.

An expert should have no difficulty testifying about his / her opinion of the accused's state of drunkenness under its terms. Rule 703 indicates that the expert may base said opinion on facts which are not themselves admissible in evidence if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

(2) Experts may also testify about the results of tests which they performed in order to form their opinion. Thus, blood and other medical tests can be utilized to aid in resolving the drunkenness question.

c. Drunk on duty is a general intent offense. The trial counsel need not prove that the accused's drunkenness was intentional or resulted from culpable or ordinary negligence.

(1) However, it must be the result of a voluntary act. Involuntary intoxication, coercion, and duress are viable defenses. *See* R.C.M. 916, MCM, (1995 Edition).

(2) Furthermore, involuntary intoxication as a result of an accidental overdose administered for medicinal purposes is a valid defense. *United States v. Gossett*, 14 C.M.A. 305, 34 C.M.R. 85 (1963).

d. Although Part IV, para. 36e, MCM, (1995 Edition), prescribes a maximum punishment of a BCD and CONF for 9 months for this offense, there is authority for the proposition that this is not a ***minor*** offense. In *United States v. Fretwell*, 11 C.M.A. 377, 29 C.M.R. 193 (1960), the accused was an officer of the deck aboard an aircraft carrier. After assuming the duty, he was found drunk in uniform, "lying unconscious in a passageway." The court held that trial was not precluded by the previous administration of NJP for the same offense because, under the circumstances, the offense could not be considered a minor one. Whether a less egregious set of facts would yield the same result is a question that has not yet been decided.

E. ***Pleading.***

1. A sample specification is provided in Part IV, para. 36f, MCM, (1995 Edition).

2. The specification should allege the specific duty of the accused.

0713 DRUNK ON BOARD SHIP OR IN SOME OTHER PLACE

A. ***Introduction.*** These offenses are violations of Articles 133 and 134, UCMJ

B. ***Essential elements.***

1. That the accused, at the time and place alleged, was drunk on board ship or in some other place; and

2. that, under the circumstances, the conduct was conduct to the prejudice of good order or service-discrediting.

C. ***"Drunk" has the same definition previously discussed.*** "Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties is drunkenness. . . ." Part IV, para. 35c(3), MCM, (1995 Edtion). *See United States v. Straub*, 12 C.M.A. 156, 30 C.M.R. 156 (1961).

D. ***Aggravating factor.*** Disorderly conduct, drunkenness, and drunk and disorderly conduct can be aggravated if the behavior is under service-discrediting conditions. This aggravating element authorizes enhanced punishment and must be both pled and proven. Part IV, para. 73c(3), MCM, (1995 Edition); *United States v. Hein*, 23 M.J. 610 (A.F.C.M.R. 1986) (guilty plea to service-discrediting drunkenness improvident where MJ informed accused terminal element was "C to P" or "SD").

E. ***Related offenses.***

1. Disorderly conduct under article 134. *See Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-140.

2. Drunk and disorderly conduct, article 134. *See Military Judges' Benchbook, supra.*

F. ***Special defense.*** If the accused was involuntarily brought to the camp, station, etc. after already being intoxicated, he has a defense to this charge. *United States v. Bailey*, 10 C.M.A. 95, 27 C.M.R. 169 (1958); *United States v. Patterson*, 14 C.M.A. 441, 34 C.M.R. 221 (1964). However, the court may still find the accused guilty of being disorderly on station, etc., if he has been charged with being drunk ***and*** disorderly. *Patterson, supra.* The fact that the drunkenness occurs under semi-private conditions does not preclude findings that such conduct is service-discrediting. *United States v. McArdle*, 27 C.M.R. 1006 (A.F.B.R. 1959).

G. ***Proof note.*** Proof of uncharged misconduct is inadmissible to support a conviction of this offense. However, if the conduct consists of acts of erratic behavior committed immediately prior to the time that the accused is alleged to have been drunk on station, etc., it will be admissible. *United States v. Thacker*, 36 C.M.R. 954 (A.F.B.R. 1966).

H. ***Pleading.*** *See* Part IV, para. 73f, MCM, (1995 Edition). This sample specification covers a wide range of drunkenness offenses under article 134. Care must be exercised to select the desired allegation. Jurisdictional facts should be added when appropriate.

0714 INCAPACITATION FOR DUTY THROUGH PRIOR INDULGENCE IN LIQUOR OR ANY DRUG

A. ***Introduction.*** This is a violation of Article 134, UCMJ

B. ***Essential elements.***

1. That the accused had certain assigned duties to perform;

2. that the accused was incapacitated for the proper performance of such duties;

3. that such incapacitation was the result of previous wrongful indulgence in intoxicating liquor or any drug; and

4. that conduct was to the prejudice of good order and discipline or service-discrediting.

C. ***Additional element.*** The *Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-143, claims that the government must also prove that the accused knew he / she would have duties to perform. The *Benchbook* notes that this element must be instructed upon "if there is any evidence from which it may justifiably be inferred that the accused did not have knowledge, prior to the time of his incapacitation, that he had duties to perform." *Id.* at n.3. There is no law supporting this extra evidentiary requirement.

1. *United States v. Roebuck*, 8 C.M.R. 786 (A.F.B.R. 1953) indicates that lack of knowledge is an affirmative defense, but that failure to instruct upon it is not error unless the question of knowledge was at issue. The court went on to say: "Even if he had been without a specific assigned duty, but was required to be on duty, available for a specific assignment, if any, his lack of knowledge of the specific assignment would not be a defense to the offense. . . ." The court also concluded, "Lack of knowledge—relative to the offense here under discussion—if a result of an accused's own neglect or misconduct is not a defense." *Id.* at 789.

2. The *Roebuck* case seems to clash with *United States v. Pratt*, 34 C.M.R. 731 (C.G.B.R. 1963). The *Pratt* case involved a dereliction of duty charge in which the accused was on duty at a life-saving station. A boat was found to be in extremis, but the accused was drunk and asleep in his rack. Efforts to awaken him and tell him of the boat's peril proved unsuccessful. The *Pratt* court stated:

> While it is clear enough as a general proposition of law, that the accused had a legal duty to render assistance to a boat in distress in the area, it is not so clear, under the evidence here adduced that a criminally punishable omission to act was

> established. For while the general duty to undertake a rescue plainly existed, the duty of a particular person to go to the rescue of a particular boat in distress at a particular time could exist only if the person had been made aware of the occasion for action on his part.

Id. at 734.

D. ***"Duty" was previously discussed in section 0712.C*** above and has the same meaning here.

E. ***"Incapacitated"*** means rendered unfit or unable to perform the required duties properly. Part IV, para. 76c(2), MCM, (1995 Edition).

1. Incapacitation can be the result of the accused's drunkenness at the time he / she is required to perform. Thus, if the accused cannot perform military duties properly because of drunkenness, he / she is "incapacitated."

2. However, incapacitation can also be the result of a hangover— even if the accused was no longer intoxicated at the time he / she was required to perform. Part IV, para. 76c(3), MCM, (1995 Edition). For example, if Private Sluggo is assigned duty as a sentinel at 0800 tomorrow morning and gets drunk, he is guilty of being incapacitated for duty if, tomorrow, he does not or cannot assume his duties because he is too drunk ***or*** because he is hung over.

3. Suppose the accused is incapacitated at the time he arrives to perform his duties. If he then assumes his duties, is he guilty or not guilty of incapacitation? Neither the *Manual* nor the case law speaks to this issue. The aggressive defense counsel might argue that the act of assuming the duty in question negates any criminal liability for incapacitation. The better view, however, would appear to be that assumption of the duty is ***not*** a defense to an incapacitation charge. After all, the accused was clearly guilty of incapacitation when he first arrived at his duty. It would seem anomalous to permit an accused to acquire a defense to his incapacitation offense because he took the additional step of assuming the duty he was unfit to perform. This is a circumstance which would appears to aggravate the offense, not mitigate it.

F. ***Pleading***. *See* Part IV, para. 76f, MCM, (1995 Edition).

– The sample specification does not provide for the specific duty of the accused to be alleged; but, in light of the instructions usually given, it is suggested that drafted specifications include an allegation of the accused's specific duty. *See Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-143.

0715 DRUNKEN, RECKLESS, OR WANTON DRIVING. Article 111, UCMJ; Part IV, para. 35, MCM, (1995 Edition).

A. ***Text of Article 111, UCMJ*** (amended to read as follows):

> Art. 111. Drunken or reckless operation of a vehicle, aircraft, or vessel
>
> Any person subject to this chapter who –
>
> (1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (article 112a(b)), or (2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis, shall be punished as a court-martial may direct.

B. ***Essential elements.***

1. That the accused was operating a vehicle, aircraft, or vessel;

2. that the accused was operating it in a reckless or wanton manner while drunk or when their alcohol concentration is 0.10 grams per 100 milliliters or blood, or 0.10 grams alcohol per 210 liters of breath; and, ***in aggravated cases***

3. that the accused thereby caused the vehicle, aircraft, or vessel to injure a person.

The last element is a factor in aggravation and authorizes an increased punishment if pled and proved by the prosecution.

C. ***Definitions.***

1. ***Vehicle.*** The word "vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used as a means of transportation on land. 1 U.S.C. §4.

2. ***Operating.*** "Operating" includes not only driving or guiding a vehicle while in motion, either in person or through the agency of another, but also the setting of its motive power into action or the manipulation of its controls so as to cause the particular vehicle to move. Part IV, para. 35c(2), MCM, (1995 Edition).

3. ***Reckless.***

a. "Reckless" means "a culpable disregard of foreseeable consequences to others." Part IV, para. 35c(4), MCM, (1995 Edition). *See United States v. Driver*, 36 M.J. 1020 (N.M.C.M.R. 1993); *United States v. Fuller*, 27 C.M.R. 540 (A.B.R. 1958).

b. The MCM also indicates: "The accused's manner of operation was of that heedless nature which made it actually or imminently dangerous to the occupants or to the rights or safety of others." Part IV, para. 35c(4), MCM. (1995 Edition).

c. *See United States v. Eagleson*, 3 C.M.A. 685, 14 C.M.R. 103 (1954); *United States v. Lawrence*, 18 C.M.R. 855 ((A.F.B.R. 1955). Drunken driving is not the equivalent of culpable negligence or recklessness. However, drunkenness is some evidence of culpable negligence. *United States v. Beardsley*, 9 C.M.R. 458 (A.B.R.), *petition denied*, 11 C.M.R. 248 (1953); *see also United States v. Bull*, 9 C.M.R. 520 (A.B.R. 1953), *aff'd*, 14 C.M.R. 53 (1954).

4. ***Wanton.*** "Wanton" includes "reckless" but, in describing the operation of a vehicle, it may, in a proper case, connote willfulness or a disregard of probable consequences, and thus describe a more aggravated offense. Part IV, para. 35c(5), MCM, (1995 Edition).

D. ***The aggravated offense.***

1. Drunken or reckless or wanton driving that results in an injury is an aggravated form of the basic offense. Thus, the maximum punishment that may be imposed increases from a BCD and 6 months' CONF to a DD and 18 months' CONF. A court composed of members must be instructed on this element if a conviction is to be affirmed. *United States v. Bernard*, 10 C.M.R. 718 (A.F.B.R. 1953).

2. Although it does not appear to have been decided, it is safe to assume that the injury alleged must have been the proximate result of the accused's drunken or reckless driving in order to constitute an aggravating factor.

3. What if the accused alone is injured? Because the effect on the military service (i.e., loss of the accused's services) may be the same or even worse than if another individual were injured, it would appear that injury to the accused alone would permit the enhanced punishment to be imposed. *See* Part IV, para. 35 drafters' analysis, MCM, (1995 Edition), app. 21-93. *But cf. United States v. Seeger*, 2 M.J. 249 (A.F.C.M.R 1976), in which the Air Force Court of Military Review held, with regard to the similar offense of leaving the scene of an accident without making one's identity known, that, if the accused's car was the only one damaged, no requirement to report the driver's identity existed. (Note that the driver in *Seeger, supra*, was injured.)

E. ***Proof.***

1. ***Drunkenness.*** *See* the discussion in 0712.D above. The manner in which the accused operated the vehicle, his appearance, his ability to speak with clarity, or lack thereof, etc. may all be considered on the question. In *United States v. Ward,* 34 C.M.R. 506 (A.B.R. 1963), it was held that evidence that the accused's vehicle weaved from curb to center line while being operated at an estimated speed of 15 miles per hour, and two witnesses expressed the opinion that the accused was intoxicated, based on the way he looked—his "bloodshot" eyes, unstable gait, and slurred speech—was sufficient to uphold a conviction of the accused even though three other witnesses testified to the contrary.

2. ***Recklessness.*** "Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant. . . ." Part IV, para. 35c(4), MCM, (1995 Edition). *See United States v. Lawrence,* 18 C.M.R. 855 (A.F.B.R. 1955), for a good discussion of this problem.

F. ***Pleading.*** *See* Part IV, para. 35f, MCM, (1995 Edition).

G. ***Relationship between "drunken driving" and "reckless or wanton driving".***

1. Part IV, para. 35c(6), MCM, (1995 Edition), states: "While the same course of conduct may constitute both drunken and reckless driving, this article proscribes these as separate offenses, and both offenses may be charged." In *United States v. Grossman,* 2 C.M.A. 406, 9 C.M.R. 36 (1953), the court members were instructed on both reckless and drunken driving where only drunken driving was charged. This was held to be prejudicial error.

2. It is common for these offenses to occur simultaneously.

a. "Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one aspect of the recklessness . . . ." Part IV, para. 35c(6), MCM, (1995 Edition).

b. Indeed, evidence of one tends to establish the other.

(1) Evidence of drunkenness tends to show a disregard for the safety of others.

(2) Likewise, evidence of the reckless or wanton method of operation may, together with other evidence, tend to indicate a lack of sobriety.

3. Since they are mutually supporting, it is usually advisable to plead both to provide for the contingencies of proof. *See Grossman, supra,* and *United States v. Beene,* 4 C.M.A. 177, 15 C.M.R. 177 (1954).

H. ***Relationship between drunk driving and involuntary manslaughter.*** In the case of *Beene, supra,* the accused was charged under article 111 (drunk driving resulting in injury) and under article 119 (involuntary manslaughter). The Court of Military Appeals held that the accused could be punished for both—since the crimes were separately punishable—even though the same victim was the subject of both charges and the injuries alleged in the former caused the death of the victim alleged in the latter. Recent C.M.A. opinions concerning multiplicity place the continued vitality of *Beene* in some doubt. *United States v. Driver,* 36 M.J. 1020 (N.M.C.M.R. 1993); *United States v. Anderson,* 25 M.J. 342 (C.M.A. 1987) (drunk driving, which was alleged to have caused injury to the accused and his assistant driver, was not multiplicious with involuntary manslaughter where person outside the accused's vehicle was killed in the same accident); *United States v. Brett,* 25 M.J. 720 (A.C.M.R. 1987) (negligent homicide involving death of one passenger was not multiplicious with drunken and reckless driving arising out of same accident where latter alleged injuries to other passengers).

I. ***Relationship between drunk driving and negligent destruction of government property.*** In *United States v. Schwarz,* 24 M.J. 823 (A.C.M.R. 1987), the accused was found guilty of both drunk driving and negligently destroying the Army ambulance he was driving while drunk. The court found the two offenses to be multiplicious for findings and amended the drunk driving specification to include the negligent destruction of government property charge. This opinion is unusual for two reasons. First, the two offenses are rarely considered multiplicious for findings, making this ruling an exception to the rule. *Id.* at 827 *citing United States v. Straughan,* 19 M.J. 991, 993 (A.C.M.R. 1984), *petition denied,* 19 M.J. 322 (C.M.A. 1985). Second, headnote no. 4 and the opinion's opening paragraph misstate the court's ruling as finding multiplicity for sentencing. *Schwarz,* 24 M.J. at 824. The rationale of *Schwarz* and *Straughan* may be applied to drunk driving combined with any other offense when evidence establishing the second offense is also used to establish the drunk driving.

0716 RELATIONSHIP BETWEEN DRUNKENNESS OFFENSES

A. Just about every situation in which public intoxication occurs is prohibited by the code. The primary difficulty is in determining precisely what the facts are and then selecting the most appropriate article with which to charge the accused.

B. With two exceptions, all of the offenses in this group have a common element of drunkenness on the part of the accused.

1. Reckless and wanton driving is one exception. It is frequently accompanied by drunkenness on the part of the accused, but the accused need ***not*** be drunk in order to be convicted.

2. Incapacitation for duty by prior indulgence in intoxicating liquor is the other exception. It is not necessary to prove that the accused was drunk at the time duty was to commence, nor even that he / she was drunk previous to that time. It is sufficient to show that accused was in fact unfit for or unable to perform duty properly, and that this unfitness or inability was due to previous indulgence in intoxicating liquor or drugs. Of course, if accused is incapacitated, he / she may still be drunk, but this circumstance is not essential to constitute this offense.

C. With the exceptions of drunken, reckless, or wanton driving and drunk on duty, all of the drunkenness offenses are chargeable under article 134 and, hence, have an essential terminal element of conduct to the prejudice of good order and discipline or service-discrediting.

D. Drunkenness offenses frequently overlap.

1. ***Example***. The accused was the NJS duty driver. Before reporting for duty, accused drank a fifth of whiskey. Accused staggered to NJS and ***assumed*** the duty by crawling into the vehicle after falling down three times and breaking the window while trying to enter the car. Then, pursuant to an order received the previous day, accused meandered to Newport, drove down Thames Street at high noon at 65 mph, went through two red lights, and narrowly missed twelve pedestrians and six cars.

a. This conduct clearly constitutes a violation of article 111 (i.e., drunken and reckless driving). It also may amount to wanton driving.

b. It is also a violation of article 112, drunk on duty.

c. Accused was clearly incapacitated for duty by previous indulgence, which was conduct prejudicial to good order and discipline or service-discrediting.

d. Additionally, accused's conduct was "service-discrediting" in that he was "drunk in uniform in a public place," to wit: Thames Street, Newport.

e. Accused was also "drunk and disorderly on station," which was conduct prejudicial to good order and discipline.

f. ***Query***. With what should the accused be charged?

Answer. While it is largely a matter of judgment, a reasonable solution would be to charge the accused with:

(1) ***Reckless driving (article 111)***. Maximum punishment—BCD and six months' CONF.

(2) ***Drunken driving (article 111).*** Maximum punishment—BCD and six months' CONF.

(3) ***Drunk on duty (as NJS driver) (article 112).*** Maximum punishment—BCD and nine months' CONF.

These cover the most serious aspects of the accused's misconduct while allowing for the contingencies of proof. *See* section 0714, *supra*.

2. ***Example.*** Accused, a flight crewman, was scheduled to fly at 0800. Pursuant to an order received the previous day, accused reported to his / her superior NCO at 0730, but, immediately upon reporting, requested release from the assignment. Accused stated that he / she was "in no condition" to make the flight. The request was granted. Accused was later tried for being drunk on duty under article 112. The NCO testified to all of the above and added that the accused was definitely drunk.

a. ***Query.*** Conviction valid?

Answer. No. Accused was drunk, but not on duty. . Appearing at the aircraft and requesting relief from the assignment was not an assumption of duty.

b. ***Query.*** With what should accused have been charged?

Answer. ***Incapacitation*** for duty by prior indulgence in intoxicating liquor (article 134).

3. ***Example.*** Accused, a flight crewman, was scheduled to fly at 0800. The night before, accused becomes intoxicated and—upon arrival to fly the next morning—is suffering from a ferocious hangover. Accused goes ahead and starts to fly at 0800 as scheduled, but is unable to complete the mission and has to return because his head is pounding so badly from the hangover.

a. ***Query.*** With what should the accused be charged?

b. ***Answer.*** Incapacitation for duty by prior indulgence in intoxicating liquor (article 134).

SECTION C: MISBEHAVIOR BY SENTINEL, LOOKOUT, AND WATCHSTANDER

Articles 92, 113, and 134 (also 86 and 112)

0717 SENTINEL AND LOOKOUT OFFENSES UNDER ARTICLE 113, UCMJ. Part IV, para. 38, MCM, (1995 Edition).

A. ***Text of Article 113, UCMJ.***

> Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.

B. ***Scope.*** This article proscribes three types of misbehavior by sentinels and lookouts:

1. Being found drunk on post;

2. sleeping on post; and

3. leaving post before being regularly relieved.

C. ***Essential elements.***

1. That the accused was posted or on post as a sentinel or lookout;

2. that the accused was found drunk or sleeping while on post, or that the accused left post before being regularly relieved; and, if applicable

3. that the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C § 310.

D. ***Discussion.***

1. ***First element.*** That the accused was posted or on post as a sentinel or lookout.

a. ***"Post"—defined.*** The area where the sentinel or lookout is required to be for the performance of duties. A post is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary

for proper performance of the duties for which the sentinel or lookout was posted. Part IV, para. 38c(2), MCM, (1995 Edition). *United States v. Seeser*, 5 C.M.A. 472, 18 C.M.R. 96 (1955); *United States v. Reynolds*, 6 C.M.A. 535, 20 C.M.R. 251 (1955); *United States v. Getman*, 2 M.J. 279 (A.F.C.M.R. 1976), *petition denied*, 2 M.J. 200 (C.M.A. 1977); *United States v. Bogdan*, 30 C.M.R. 679 (N.B.R. 1960).

b. ***"Sentinel or lookout"—defined.*** The terms "sentinel" and "lookout" are used interchangeably and are defined as an observer whose duties include the requirement that he / she maintain constant alertness. *United States v. Seeser, supra*; Part IV, para. 38c(4), MCM, (1995 Edition). Exactly what is to be observed is often a difficult question to answer. In *Seeser, supra*, C.M.A. spoke of the accused's duties to "be vigilant, remain awake, observe for possible approach of the enemy, and sound an alert, if necessary." *Id.* at 474, 18 C.M.R. at 98.

(1) This article does not include a person whose duties as a watchman or attendant do not require being constantly alert. Part IV, para. 38c(1), MCM, (1995 Edition).

(2) ***Examples of persons who are sentinels or lookouts.***

(a) Soldier in front lines who has been stationed in observation against approach of the enemy. *Seeser, supra.* This case is informative because it demonstrates that, in some instances, an accused can be considered a sentinel or lookout even though his entire unit is "100% on alert." This fact alone was not deemed controlling, but it was considered by the court. Together with the accused's duty to observe and warn of the approach of the enemy, it was sufficient to show that he was a sentinel within the meaning of article 113.

(b) Persons detailed to use any equipment designed to locate friend, foe, or possible danger (e.g., radar, sonar, and radio operators, when required to perform the duty in order to detect possible danger). *United States v. Harris*, 25 C.M.R. 766 (A.F.B.R. 1957).

(c) Persons stationed to preserve internal security or discipline (e.g., warehouse sentry, restricted area sentry, brig guards, and chasers). *See also Getman, supra*, where the court held that a security policeman assigned duties as "base patrol" (which included the "general security of the base" and "law enforcement") was posted as a sentinel for purposes of Article 113, UCMJ.

(d) Underway lookouts.

(3) ***Examples of persons who are not sentinels or lookouts.***

(a) A command telephone watch, not posted as an observer. (But, if the accused was acting as a telephone operator with the duty of watching and reporting hostile planes, he is a sentinel. *Harris, supra.*)

(b) A person who is merely in a standby status (e.g., supernumerary of the guard). Reason: Not required to stay alert; not yet an observer; not yet on post.

(c) Captain's orderly. Reason: Not an observer.

c. ***"On post"—defined.*** A sentinel or lookout gets "on post" by:

(1) Being given a lawful order to go "on post" as a sentinel or lookout (*Seeser, supra*); and

(2) being formally or informally posted. The fact that the sentinel or lookout is not posted in the regular way is not a defense. It is sufficient if the sentinel or lookout has taken his / her post in accordance with proper instructions—whether or not formally given. *See* Part IV, para. 38c(3), MCM, (1995 Edition).

2. ***Second element.*** The accused was found drunk while on post, sleeping while on post, or left his /her post before being regularly relieved. Although the *Manual* does not define the term "found," the one court to address the issue has concluded that the "manner in which a sentinel is discovered" is not an element of article 113. *United States v. Wiggins*, 35 M.J. 597 (N.M.C.M.R. 1992) (accused not discovered sleeping on post; instead, accused awoke and turned himself in).

a. ***First offense - sleeping while on post.***

(1) ***"Sleeping"—defined.*** That "condition of insentience which is sufficient sensibly to impair the full exercise of the mental and physical faculties of the sentinel. . . . [T]his requirement is not met by a mere dulling of the perceptions through, say, physical exhaustion not amounting to slumber." *United States v. Williams*, 4 C.M.A. 69, 74, 15 C.M.R. 69, 74 (1954); *United States v. Muldrow*, 48 C.M.R. 63 (A.F.C.M.R. 1973). It is not necessary to show that the accused was in a "wholly comatose condition." *Williams, supra*, at 74. Part IV, para. 38c(6), MCM, (1995 Edition).

(2) ***Proving the accused was sleeping.***

(a) "Fact" testimony of a person who directly witnessed the accused's condition with his own eyes and ears is admissible to prove sleep. *See, e.g., United States v. Muldrow*, 48 C.M.R. 63 (A.F.C.M.R. 1973).

(b) "Opinion" testimony of a person who directly witnessed the accused's condition with his own eyes and ears may also be utilized. *United*

States v. Johnson, 9 C.M.A. 178, 25 C.M.R. 440 (1958), sets forth an example of compelling evidence of sleep and a discussion on proving sleep.

(3) Sleeping on post is a general intent offense.

(a) The prosecution need not prove that the accused's sleeping was intentional nor that it resulted from culpable or ordinary negligence.

(b) The fact that the accused's sleeping resulted from a physical incapacity caused by disease or accident, however, is an affirmative defense. *United States v. Cook*, 31 C.M.R. 550 (A.F.B.R. 1961). The question in such a case is not one of reasonableness.

> The case, however, is different when one's physical condition is such as actually to prevent compliance with the orders or, as here, to cause the commission of the offense. Upon such a showing, the question is not one of reasonableness vis-a-vis willfulness, but whether the accused's illness was the proximate cause of his crime.

United States v. Cooley, 16 C.M.A. 24, 27, 36 C.M.R. 180, 183 (1966).

(c) Another possible affirmative defense is that the accused's superiors knew that he was in no condition to assume the duty as a sentinel at the time that they posted him. *United States v. Burke*, 5 C.M.A. 56, 17 C.M.R. 56 (1954); *United States v. McGowan*, 21 C.M.R. 902 (A.F.B.R. 1956).

b. ***Second offense - being drunk while on post.***

– ***"Drunk"—defined.*** Any intoxication, by liquor ***or*** drugs, which impairs sensibly the rational and full exercise of the mental or physical faculties. Part IV, para. 35c(3), MCM, (1995 Edition).

c. ***Third offense - leaving post before being regularly relieved.***

(1) When has the sentinel or lookout left his post?

(a) When his ability fully to perform the duty for which he was posted is impaired. Part IV, para. 38c(2), MCM, (1995 Edition). *See Bodgan, Seeser,* and *Reynolds (all supra).*

(b) The exact distance required for leaving post depends upon the nature of the post and other circumstances of the case. *United States v. Reynolds*, 6 C.M.A. 535, 20 C.M.R. 251 (1955); *United States v. Foster*, 48 C.M.R. 414 (N.C.M.R. 1973).

(c) ***Examples.***

-1- ***H*** was manning a machine-gun post which commanded an avenue of approach. During his tour his telephone went out of order, so he moved his gun to a point near another machine-gun post some 100 feet away. However, he could not guard the particular draw assigned to him with machine-gun fire from that new point. ***Held:*** Left his post. *United States v. Hattley*, 3 C.M.A. 114, 11 C.M.R. 114 (1953).

-2- A radar operator might move only a few inches and have left his post because he would no longer be able properly to observe the scope. *United States v. Harris*, 25 C.M.R. 766 (A.F.B.R. 1957).

-3- A roving sentinel or lookout, such as a security guard at a brig, may move hundreds of feet throughout his patrol area and remain on post. *Reynolds, supra.*

(d) The sentinel or lookout has not left his post when he has gone beyond the defined area for the purpose of carrying out some duty for which he was posted.

(2) When is the sentinel "regularly relieved"?

(a) When relieved by another sentinel or lookout authorized to relieve him;

(b) when the tour of duty has expired and orders permit the sentinel to leave without relief (e.g., if told to stand guard until sunrise, then the sentinel may lawfully leave the post when the sun rises); or

(c) when relieved by competent superior authority (e.g., if accused is a bow lookout, becomes ill, and asks OOD by telephone for permission to go to sick bay at once and receives that permission, the lookout will be considered relieved).

3. ***Element in aggravation.***

a. If it is alleged and proved that the offense was committed while the accused was serving in a capacity authorizing entitlement to special pay for duty subject to hostile file, a higher scale of punishment (ten years' confinement vice one year) is authorized. Part IV, para. 38e(2), MCM, (1995 Edition).

b. The text of the article indicates that, if the misbehavior occurs during time of war, it is a capital offense. Determining whether capital punishment applies

to a particular offense is not difficult if Congress has formally declared war; however, such a declaration seldom occurs. In considering the question in the context of article 113, the Court of Military Appeals has held that a formal declaration of war is not necessary to make an accused liable to the increased punishment. *United States v. Gann*, 3 C.M.A. 12, 11 C.M.R. 12 (1953); *United States v. Bancroft*, 3 C.M.A. 3, 11 C.M.R. 3 (1953); *United States v. Aldridge*, 4 C.M.A. 107, 15 C.M.R. 107 (1954). Although all of these cases dealt with the Korean War, the court has also reached the same result when dealing with a similar question in the context of the Vietnam War. *United States v. Anderson*, 17 C.M.A. 588, 38 C.M.R. 386 (1968); *see United States v. Michaud*, 48 C.M.R. 379 (N.C.M.R. 1973).

E. ***Lesser included offenses (LIO's).***

1. ***As to drunk on post.***

a. Drunk on board ship or other place (depending on the allegations and proof of the particular case—Article 134, UCMJ).

b. Drunk and disorderly (depending on the allegations and proof of the particular case—Article 134, UCMJ).

2. ***As to sleeping on post.*** Loitering or wrongfully sitting down on post while a sentinel or lookout in violation of Article 134, UCMJ; *United States v. Muldrow*, 48 C.M.R. 63 (A.F.C.M.R. 1973).

3. ***As to leaving post before regularly relieved.***

a. Going from appointed place of duty. Article 86(2), UCMJ. It is not proper, however, to allege failure to assume a security watch on a ship (or other place) as a failure to go to (or going from) an appointed place of duty where the security watch is a roving watch and there is no proof of any particular place, smaller than the whole ship, where the accused was to stand the watch. *United States v. Little*, 33 C.M.R. 655 (C.G.B.R. 1963).

b. Absence from unit, organization, or other place of duty. Article 86(3). *Little, supra.*

c. It is improper, however, to find an accused guilty of lying down on post when charged with leaving the post as a sentinel because the former is not an LIO of the latter. *United States v. Jones*, 43 C.M.R. 663 (A.C.M.R. 1971).

4. Depending upon the allegations and facts of a case, dereliction of duty under article 92 might be an LIO of any of the misbehavior offenses. *See Little, supra.*

F. ***Pleading.*** Part IV, para. 38f, MCM, (1995 Edition).

0718 SENTINEL AND LOOKOUT OFFENSES UNDER ARTICLE 134. LOITERING AND WRONGFULLY SITTING DOWN. Part IV, para. 104, MCM, (1995 Edition).

A. ***Essential elements.***

1. That the accused was posted as a sentinel or lookout;

2. that, while posted, the accused loitered or wrongfully sat down on post; and

3. that the conduct was prejudicial to good order and discipline or service-discrediting.

B. ***Definition.*** "Loiter" means to stand around, to move about slowly, to spend time idly, to saunter, to linger, or to lag behind when such conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty. Part IV, para. 104c(2)(b), MCM, (1995 Edition).

C. ***Example.*** Accused was a gate guard. He was observed standing with his back to incoming traffic and his eyes closed for a "count of 10." ***Held:*** Loitering on post. *United States v. Muldrow*, 48 C.M.R. 63 (A.F.C.M.R. 1973).

D. ***Defense.*** If the accused was physically incapable of standing on his feet when he sat down, he has a defense. *United States v. Woltmann*, 22 C.M.R. 737 (C.G.B.R. 1956).

E. ***Pleading.***

1. Part IV, para. 104f(2), MCM, (1995 Edition).

2. When alleging and instructing on "sitting on post" offenses, be sure to include expressly the word "wrongfully" before the words "sat down." Omission of "wrongfully" results in a failure to state an offense because some sentinels may properly sit on post (e.g., in a foxhole in combat).

3. Note that, similar to article 113, these offenses are aggravated if they occur in time of war or in a hostile pay environment. These aggravating elements must be pled and proved.

0719 RELATIONSHIP BETWEEN THE SENTINEL AND LOOKOUT OFFENSES. Articles 113 and 134.

A. ***General.*** There are five recognized "sentinel and lookout" offenses. Three are proscribed by article 113—***drunk*** on post, ***sleeping*** on post, and ***leaving*** post; two are charged under article 134—***loitering*** on post and ***wrongfully sitting on post.***

B. There are ***two factors common*** to all of these offenses.

1. The accused must be a sentinel or lookout (One who is expected to remain alert, whose primary duty is to observe the possible approach of the enemy or for any other danger, and to sound a warning is a sentinel or lookout. *Seeser, supra.*); and

2. the accused must have assumed his post.

C. With only one exception. It is not enough that the accused was a sentinel or lookout, and that he assumed his post, but he must also have actually been on post at the time of the commission of the offense.

1. ***Example.*** ***A,*** a sentinel, assumed his post; but, 15 minutes later, he departed without authority, sat down, loitered, got drunk, and finally fell asleep in his rack (not in his post area).

a. ***Query.*** With what offense(s) could he properly be charged?

b. ***Answer.*** Leaving his post, under article 113. All of the other offenses require the accused to be on post. (Article 86, UA with intent to abandon guard or watch may also be a possibility).

2. Suppose, in the preceding example, that the accused was assigned as a sentinel to patrol continuously the outside and inside of the tent where his rack was located.

a. ***Query.*** With what offense(s) could he properly be charged?

b. ***Answer.*** Drunk and sleeping on the post, under article 113; and loitering and sitting on post, under article 134. But, he has not left his post.

3. Suppose, in the preceding example, the accused was simply assigned to patrol outside the tent.

a. ***Query.*** Did he leave his post if he entered the tent?

b. ***Answer.*** This is a difficult question. Look at all the circumstances, including the purpose of the patrol, any specific instructions on limits and

duties of the post, the size of the tent and relative location of the rack within the tent, plus the purpose and circumstance of his initial entry. Weigh all factors carefully; then, if in doubt, provide for contingencies of proof by pleading both alternatives (i.e., he left the post, and he was drunk, sleeping, sitting, and loitering on post).

4. In the preceding example, could he properly be charged with drunk on duty under article 112? ***Answer***. No. Article 112 expressly excepts sentinels and lookouts from its scope.

0720 MISBEHAVIOR BY WATCHSTANDERS

A. ***General discussion***.

1. The term "watchstander" is used here in the sense of one who is on watch, but does not qualify as a sentinel or lookout.

– There are two reasons that could disqualify one who is on a watch from the category of sentinel or lookout:

(1) Not required to remain constantly alert; or

(2) not posted primarily as an observer.

2. Some watchstanders may not be required to observe or remain alert (e.g., personnel in a standby status, such as the next relief of the guard, who are permitted to sleep but are nevertheless considered "on watch" for the entire 24 hours that they are in such a status).

B. ***Many possible offenses by watchstanders***.

1. Articles to consider: 86, 92, 112, 133, and 134

2. Suppose a watchstander has a duty to be alert (e.g., a telephone switchboard operator falls asleep). What offense has been committed? ***Answer***. Dereliction of duty, article 92(3).

3. Suppose a watchstander has no duty to be alert (e.g., the supernumerary of the guard, but he gets drunk while on watch). What offense has been committed? ***Answer***. Drunk on duty, article 112.

4. Suppose the admiral's orderly, without permission, leaves his post and sneaks down to the "gedunk" where he is seen by the admiral's chief yeoman. What offense? ***Answer***. Going from appointed place of duty without authority, article 86(2).

5. Suppose an officer of the deck drinks while on duty, but does not get drunk. Any offense? ***Answer***. Violation of a lawful general regulation, Article 1162, *U.S. Navy Regulations*, possessing and using alcoholic beverages on board ship. Articles 133 and 134 could possibly be employed, but Navy Regulations via article 92 would cover this situation.

C. ***Special problem***. Accused is charged under article 92 as follows:

> ***Charge***. Violation of the Uniform Code of Military Justice, Article 92
>
> ***Specification***. In that Seaman Recruit James Arnold McCall, U.S. Navy, USS BUTNER, on board USS BUTNER, on or about 0145, 19 May 19CY, was derelict in the performance of his duties, in that he was found lying down and asleep while on watch in the aft steering compartment.

1. ***Query***. Does this state an offense?

2. ***Answer***. Yes. The allegation that he was derelict fairly implies that he had a duty to be alert. Furthermore, the allegation of his particular assignment (i.e., watch in the aft steering compartment) clearly implies a duty to be alert in the event an emergency arose requiring immediate action. *United States v. McCall*, 11 C.M.A. 270, 29 C.M.R. 86 (1960).

3. ***Caveat***. If the watch requires alertness, and the accused was derelict in that respect, it is safer and better to allege this requirement expressly. ADD - "and thereby failed to remain alert, as it was his duty to do." *See* Part IV, para. 16f(4), MCM, (1995 Edition), and review the section on dereliction of duty in Chapter IV of this text.

SECTION D: FALSIFYING OFFENSES

Articles 107 and 134

0721 INTRODUCTION

There are several offenses in the military that involve falsification: False official statements (article 107); false swearing (article 134); fraudulent enlistment or appointment (articles 83 and 84); malingering (article 115); forgery (article 123); making, etc. worthless checks with intent to deceive or defraud (article 123a); perjury (article 131); false claims (article 132), etc. Only the first two, false official statements and false swearing, will be discussed in this section.

0722 FALSE OFFICIAL STATEMENT. Article 107, UCMJ; Part IV, para. 31, MCM, (1995 Edition).

A. ***Text of the article.***

> Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order or other official document, knowing it be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

B. ***Essential elements.***

1. That the accused signed a certain official document or made a certain official statement;

2. that the document or statement was false in certain particulars;

3. that the accused knew it to be false at the time of signing it or making it; and

4. that the accused signed the document or made the statement with an intent to deceive. *See United States v. Hutchins*, 5 C.M.A. 422, 18 C.M.R. 46 (1955); *United States v. DeWayne*, 7 M.J. 755 (A.C.M.R.), *petition denied*, 8 MJ 25 (C.M.A. 1979).

C. ***Discussion.***

1. ***Official document or statement.***

a. ***General.*** "Official documents and official statements include all documents and statements made in the line of duty." Part IV, para. 31c(1), MCM, (1995 Edition); *United States v. Thomas*, 10 C.M.A. 54, 27 C.M.R. 128 (1958); *United States v. Rhodes*, 28 C.M.R. 427 (A.B.R. 1959); *United States v. Lile*, 42 C.M.R. 852 (A.C.M.R. 1970); *United States v. Caballero*, 37 M.J. 422 (C.M.A. 1993) (oral statement is sufficient for article 107 offense). Even such matters as one's personal history may constitute official statements. For example, in the case of *United States v. Flowers*, 7 M.J. 659 (A.C.M.R.), *petition denied*, 8 M.J. 36 (C.M.A. 1979), the court held that a false statement in the accused's Statement of Personal History (DD Form 398) was an official document for purposes of article 107 since the accused was under a duty to make the statement. However, "official" as used in article 107 is the substantial equivalent of the phrase "any matter within the jurisdiction of any department or agency of the United States" as found in 18 U.S.C. § 1001 (the Federal statute dealing with false or fraudulent statements). *United States Aronson*, 8 C.M.A. 525, 25 C.M.R. 29 (1957).

b. ***Statement to criminal investigators.*** The *Manual for Courts-Martial* provides that, in order to decide whether a statement made to criminal investigators is "official," one must first determine whether the accused had a duty to speak to the investigators. Part IV, para. 31c(6)(a). This provision concluded that, if the accused were a suspect, he would have no duty to speak to investigators. Accordingly, he could not be found guilty of false official statement made during the interrogation. *Id.* The Court of Military Appeals, however, has now explicitly rejected this analysis. *United States v. Jackson*, 26 M.J. 377 (C.M.A. 1988); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). An interviewee who is a suspect has no obligation to talk to investigators; however, if the person chooses to talk, they are obligated to tell the truth. *Jackson, supra*; *United States v. Watkins*, 35 M.J. 709 (N.M.C.M.R. 1992).

c. The false statement does not necessarily have to be given to the government in order for the statement to be official. *United States v. Hagee*, 37 M.J. 484 (C.M.A. 1993) (false official statement charge upheld against servicemember who prepared false military orders circumventing base obligations and civilian landlord). For example, in *United States v. Ragins*, 11 M.J. 42 (C.M.A. 1981), C.M.A. held that the accused violated article 107 when, in his capacity as a commissary official, he gave false invoices to a bakery which overstated the amount of bread delivered to the commissary. The fact that the false invoices enabled the bakery to bill the government for bread it never received made the false statements official, in the sense that they constituted matters within the jurisdiction of a department or agency of the United States. In *United States v. Azevedo*, 24 M.J. 559 (C.G.C.M.R. 1987), the accused's statement concerning his duties as a worker for the Coast Guard's equivalent of Navy Relief was held to be official. *United States v. Simms*, 35 M.J. 902 (A.C.M.R. 1992) (Army Emergency Relief Society is an official government agency). *Contra United States v. Lauderdale*, 19 M.J. 582 (N.M.C.M.R. 1984) (accused's false

statements in a Navy Relief Society casework form held not official).

d. ***"Exculpatory no" doctrine.*** The "exculpatory no" doctrine states that, when a person merely gives a negative response to a law enforcement agent's question, he / she should not be prosecuted under 18 U.S.C. § 1001. *United States v. Davenport*, 9 M.J. 364, 370 (C.M.A. 1980). The rationale here is that a simple negative response, without more, falls outside the type of statement contemplated by the statute; that is, statements that subvert or frustrate government administrative programs. *United States v. Gay*, 24 M.J. 304, 305 (C.M.A. 1987). Given the general analogy between 18 U.S.C. § 1001 and Article 107, UCMJ, the "exculpatory no" doctrine can be a defense in certain false official statement prosecutions. *Id.* ***But see*** *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991) for limitations on the use of the "exculpatory no" defense, **and** *United States v. Solis*, 46 M.J. 31 (C.A.A.F. 1997) which has held that the "exculpatory no" doctrine no longer applies to false official statement cases and is not compelled by any self-incrimination concerns.

2. ***Knowledge that the document or statement was false.***

a. To be guilty of the offense, the accused must know that the statement or document was false. Actual knowledge may be established by circumstantial evidence. Part IV, para. 31c(5), MCM, (1995 Edition).

b. An honest, albeit erroneous, belief that a statement made was true is a defense. Part IV, para. 31c(5), MCM, (1995 Edition). Extreme caution must be used in framing instructions in this area. *United States v. Acosta*, 19 C.M.A. 341, 41 C.M.R. 341 (1970).

3. ***Intent to deceive.***

a. "Intent to deceive" means an intent to mislead, to cheat, to trick another, or to cause to believe as true that which is false. *Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-65.

b. The government must prove that the accused signed the document or made the statement with an intent to deceive. Evidence that the accused actually knew an official document or statement signed or made by him was false is circumstantial evidence that the accused had an intent to deceive. *United States v. Young*, 9 C.M.A. 452, 26 C.M.R. 232 (1958). A court can also consider whether the act violated any law, regulation, or code which establishes standards of conduct reasonably related to the specific issues in the case. *United States v. DeWayne*, 7 M.J. 755 (A.C.M.R.), *petition denied*, 8 M.J. 25 (C.M.A. 1979).

c. It is not necessary, however, that the "victim" be, in fact, deceived. Moreover, the "victim" can be either junior or senior to the accused. Part IV, para. 31c(2), MCM, (1995 Edition).

d. It is not necessary that the false statement be material to the issue under inquiry. Part IV, para. 31c(3), MCM, (1995 Edition). If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the necessary intent to deceive, while immateriality may tend to show an absence of this intent. *United States v. Hutchins*, 5 C.M.A. 422, 18 C.M.R. 46 (1955).

e. Whether the accused had any expectation of material gain from his false document or statement is also immaterial. *See United States v. Lile*, 42 C.M.R. 852 (A.C.M.R. 1970). "The expectation of material gain is not an element of this offense." Part IV, para. 31c(4), MCM, (1995 Edition). However, such expectation or lack of it is circumstantial evidence bearing on the element of "intent to deceive."

f. The fact that the accused signed the name of another to a document does not remove the offense from the ambit of article 107. *United States v. Anderson*, 12 M.J. 539 (A.F.C.M.R. 1981), *petition denied*, 12 M.J. 397 (C.M.A. 1982).

D. ***Pleading***. Part IV, para. 31f, MCM, (1995 Edition).

1. If the act can be charged as a violation of article 107, it is improper to charge an accused with a violation of a statute assimilated under the provisions of the Federal Assimilative Crimes Control Act, 18 U.S.C. § 13, under article 134. For example, the accused, in the case of *United States v. Heil*, 5 M.J. 581 (A.C.M.R. 1978), was convicted under article 134 for a violation of a Texas statute assimilated under the Federal Assimilative Crimes Control Act. His specific misconduct was to make false reports of robberies. The court held that, since such conduct was chargeable as making false official statements, use of the Federal Assimilative Crimes Control Act was prohibited.

2. It is not erroneous if the specification fails to indicate that the statement was made to a particular person. *United States v. Flowers*, 7 M.J. 659 (A.C.M.R.), *petition denied*, 8 M.J. 36 (C.M.A. 1979).

3. The specification must, however, allege that the statement was false. *United States v. Montgomery*, 43 C.M.R. 813 (A.C.M.R. 1971). Although the accused's knowledge of the statement's falsity is an essential element of the offense, failure to allege it may not be fatal (at least where the issue is first raised by the accused on appeal). *United States v. Cooley*, 21 M.J. 968 (A.C.M.R. 1986). The Army court was able to find the necessary knowledge fairly implied in the allegation that the false document was made with intent to deceive.

0723 FALSE SWEARING. Article 134, UCMJ; Part IV, para. 79, MCM, (1995 Edition).

A. ***General discussion***. Part IV, para. 79c(1), MCM, (1995 Edition), describes the offense of false swearing as "the making under a lawful oath or equivalent of any false

statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding . . ." This definition is discussed in *United States v. Smith*, 9 C.M.A. 236, 26 C.M.R. 16 (1958); *United States v. McCarthy*, 11 C.M.A. 758, 29 C.M.R. 574 (1960); and *United States v. Claypool*, 27 C.M.R. 533 (A.B.R. 1958).

B. ***Essential elements.***

1. That the accused took an oath or its equivalent;

2. that the oath, or its equivalent, which was administered to the accused was required or authorized by law;

3. that the oath, or its equivalent, was administered by a person having authority to do so;

4. that, upon this oath or equivalent, the accused made or subscribed a certain statement;

5. that the statement was false;

6. that the accused did not then believe the statement to be true; and

7. that the conduct was prejudicial to good order and discipline or service-discrediting.

C. ***Discussion.***

1. ***Oath or its equivalent.***

a. As noted above, this offense cannot be committed in judicial proceeding or course of justice. Article 131, perjury, covers the offense of making a false statement under oath in a judicial proceeding. Article 131, therefore, preempts the use of article 134 to prosecute false swearing offenses in such settings. Article 131 not only requires that the false statement be made in a judicial proceeding, but it must be material to the issue as well. There are no such requirements for the offense of false swearing. *United States v. Smith*, 9 C.M.A. 236, 26 C.M.R. 16 (1958).

b. An "oath" includes an affirmation where authorized. Part IV, para. 79c(2), MCM, (1995 Edition).

2. ***Administered in a matter required or authorized by law.***

a. Article 136(b), UCMJ, provides: "The following persons on active duty or performing inactive-duty training may administer oaths necessary in the performance of their duties:- - -(4) all persons detailed to conduct an investigation." *See also*

JAGMAN, § 0902, for a list of personnel authorized to administer oaths in the Department of the Navy.

b. C.M.A. has interpreted the word "necessary" in the above quoted section to mean "essential to a desirable end." Therefore, it held that an oath administered by an investigator to a suspect making a statement was authorized since it is clearly desirable for a criminal investigator to obtain a sworn statement from persons being questioned. *United States v. Lunsford*, 34 M.J. 268 (C.M.A. 1992); *United States v. Claypool*, 10 C.M.A. 302, 27 C.M.R. 376 (1959); *United States v. Whitaker*, 13 C.M.A. 341, 32 C.M.R. 341 (1962).

c. ***Example***. The accused was the chief suspect in a crime of attempted housebreaking. He was placed under oath by an MP investigator prior to asking him if he had attempted to break into the building. He replied, falsely, that he did not. This would constitute the offense of false swearing. Since it did not occur in a "judicial proceeding," it did not constitute perjury.

3. ***Administered by a person having authority***. *See* Article 136, UCMJ, and JAGMAN, § 0902, for authorization; *Whitaker, supra,* and *United States v. Savoy*, 13 C.M.A. 419, 32 C.M.R. 419 (1962). Evidence of this authorization should come in the form of testimony or the use of judicial notice. *See United States v. Hill*, 31 M.J. 543 (N.M.C.M.R. 1990); *contra United States v. Halley*, 34 M.J. 1071 (A.C.M.R. 1992).

4. ***Statement must in fact be false***. *See United States v. McCarthy*, 11 C.M.A. 758, 29 C.M.R. 574 (1960); *United States v. Purgess*, 13 C.M.A. 565, 33 C.M.R. 97 (1963). Proof of falsity involves special rules regarding proof. *See Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-149; *United States v. Tunstall*, 24 M.J. 235 (C.M.A. 1987) (two-witness rule); *United States v. Boykin*, 36 M.J. 655 (A.C.M.R. 1992).

– Even though a statement may be misleading, if it is literally, technically, or legally true, it cannot serve as the basis for a conviction of false swearing. In the *Purgess* case, *supra*, the court held that the evidence was insufficient to support a conviction when the accused made a statement under oath that the seat covers in his car "came from a German concern," even though they had been stolen from government stock, since the government had in fact purchased them from a German company. *See also United States v. Arondel de Hayes*, 22 M.J. 54 (C.M.A. 1986).

5. ***"Exculpatory no."*** The "exculpatory no" defense, potentially available in false official statement cases, is not available in false swearing cases. *United States v. Gay*, 24 M.J. 304 (C.M.A. 1987). In fact, an "exculpatory no" statement during an interrogation could turn a potential false official statement into false swearing because the statement would be an "unofficial" false statement made under oath.

D. ***Pleading***. *See* Part IV, para. 79f, MCM, (1995 Edition). If the specification fails

to allege that the statement made under oath was false, it is fatally defective. *United States v. Goldman*, 14 C.M.A. 598, 34 C.M.R. 378 (1964); *United States v. McCarthy*, 11 C.M.A. 758, 29 C.M.R. 574 (1960); and *United States v. Daminger*, 30 C.M.R. 826 (A.B.R. 1960).

0724 MAJOR DISTINCTIONS BETWEEN FALSE OFFICIAL STATEMENTS (ARTICLE 107) AND FALSE SWEARING (ARTICLE 134)

A. False official statements, article 107, must be made with the intent to deceive; whereas false swearing, article 134, need not be made with such an intent.

B. A false official statement, article 107, must be official; whereas false swearing, article 134, need not be.

C. A false official statement, article 107, need not be under oath; whereas false swearing, article 134, must be under oath.

CHAPTER VIII

OFFENSES AGAINST THE PERSON

0800 INTRODUCTION 8-1

0801 ARTICLE 128, UCMJ. 8-1
A. Text of Article 128, UCMJ. 8-1
B. Definitions. 8-2
C. Offenses under article 128 8-2

0802 SIMPLE ASSAULT 8-3
A. Elements 8-3
B. First element 8-3
1. Distinction between "offer" and "attempt" 8-3
2. Discussion of the attempt-type assault. 8-4
3. Discussion of the offer-type assault. 8-5
C. Second element 8-8
D. Pleading simple assault 8-9

0803 ASSAULT CONSUMMATED BY A BATTERY 8-10
A. Elements 8-10
B. First element 8-10
C. Second element 8-11
D. Pleading. 8-11

0804 ASSAULT WITH A DANGEROUS WEAPON OR OTHER MEANS OR FORCE LIKELY TO PRODUCE DEATH OR GRIEVOUS BODILY HARM 8-12
A. Elements 8-12
B. General discussion of the elements. 8-12
C. Dangerous weapon or other means or force likely to produce death or grievous bodily harm 8-12
D. LIO's of assault with a dangerous weapon, etc 8-16
1. Attempted assault with a dangerous weapon, etc. 8-16
2. Simple assault of either the offer- or attempt-type. 8-16
3. Assault consummated by a battery if a touching is alleged and proved 8-16

4. Disrespect. 8-17
E. Multiplicity with other offenses. 8-17
F. Pleading an assault with a dangerous weapon, etc. 8-17

0805 INTENTIONAL INFLICTION OF GRIEVOUS BODILY HARM 8-18
A. Elements. 8-18
B. Intentionally inflicted. 8-18
1. This is a specific-intent offense. 8-18
2. Proving intent. 8-19
C. LIO's. 8-20
1. Assault with a dangerous weapon or other means or force likely to produce grievous bodily harm 8-20
2. Assault consummated by a battery 8-20
3. Simple assault. 8-20
D. Sample specification. 8-21

0806 ARTICLE 128 OFFENSES AGGRAVATED BY THE STATUS OF THE VICTIM 8-21
A. Assaults upon commissioned officers, warrant officers, noncommissioned officers, or petty officers 8-21
B. Assaults upon sentinels or lookouts in the execution of their duty or upon persons in the execution of law enforcement duties... 8-22
C. Assault, consummated by a battery, upon a child under 16 years of age. 8-23
1. Elements. 8-23
2. Knowledge of the age of the victim is not an element of this offense 8-23
3. This is a battery only. 8-23
4. Sample specification. 8-23

0807 ASSAULTS UPON SUPERIOR COMMISSIONED OFFICERS AND WO'S, NCO'S, AND PO'S IN THE EXECUTION OF THEIR OFFICE 8-24
A. Text of Article 90(1), UCMJ. 8-24
B. Text of Article 91(1), UCMJ. 8-24
C. Discussion. 8-24
1. Article 90(1) describes three varieties of assault. 8-24
2. Article 91(1) describes two varieties of assault. 8-25
D. Elements. 8-25
1. Assault upon a superior commissioned officer. 8-25
2. Assault upon a WO, NCO, or PO. 8-25
E. Superior. 8-26
F. Knowledge of the status of the victim. 8-26
G. Analysis of the several "types" of "assault" covered in articles 90(1) and 91(1). 8-26
1. Against a superior commissioned officer—article 90(1). 8-26

2. Against a WO, NCO, or PO—article 91(1). 8-27
H. In the execution of office. 8-27
I. LIO's. 8-28
J. Pleading. 8-29
1. Sample specification of an article 90(1) offense. 8-29
2. Sample specification for an article 91(1) offense. 8-29

0808 MAIMING 8-30
A. Text of Article 124, UCMJ. 8-30
B. Elements. 8-30
C. Discussion. 8-30
D. LIO's. 8-31
E. Sample specification. 8-31

0809 ARTICLE 134 ASSAULTS 8-31
A. Article 134, UCMJ, makes punishable two types of assaults. 8-31
B. Discussion of the assaults with the intent to commit other offenses. 8-32

0810 AFFIRMATIVE DEFENSES TO ALL FORMS OF ASSAULT 8-33
A. Scope of discussion. 8-33
B. In general, the affirmative defenses to assault are based upon the following concepts: 8-33
C. Legal justification. 8-33
D. Legal excuse. 8-34
1. Acts of force or violence are legally excused if done: 8-34
2. Accident or misadventure. 8-34
3. Self-defense. 8-35
4. Defense of others. 8-39
5. Special privilege. 8-40
6. Coercion or duress. 8-42
E. Lawful consent. 8-42
1. General rule. 8-43
2. Implied consent to certain touchings. 8-43
F. Voluntary abandonment. 8-43
G. Character. 8-44

0811 SEX OFFENSES 8-44
A. Rape 8-44
B. Carnal knowledge 8-48
C. Sodomy 8-48
D. Indecent assault 8-49
E. Assault with intent to commit rape, sodomy, or other specified felony. Article 134, UCMJ. 8-50
F. Adultery. 8-50

G. Indecent acts with another 8-50
H. Indecent acts or liberties with a child under 16 8-51
I. Indecent exposure 8-52
1. Negligent exposure is insufficient. 8-52
2. "Public" exposure 8-52
3. Exposure must be "indecent." 8-53
J. Wrongful cohabitation 8-53
K. Fornication. 8-53
L. Voyeurism. 8-53
M. AIDS-related cases. 8-53
1. General Article. 8-53
2. Aggravated assault. 8-54
3. Violation of a safe sex order. 8-54

0812 DISTURBANCE OFFENSES 8-54

0813 PROVOKING SPEECHES AND GESTURES 8-55
A. Text of Article 117, UCMJ. 8-55
B. Essential elements. 8-55
C. Scope of article 117. 8-55
D. Constitutionality of article 117. 8-56
E. Definitions. 8-56
F. Sufficiency and the evidence. 8-57
G. Defenses. 8-58
H. Related offenses. 8-58
I. Pleading. 8-58
1. Sample specification. 8-58
2. Other possible allegations. 8-59

0814 COMMUNICATING A THREAT 8-59
A. Essential elements. 8-59
B. "Threat"—defined. 8-59
C. Required intent. 8-61
1. This is a general intent offense. 8-61
2. A statement made in jest or idle banter is not a threat. 8-61
D. Communication. 8-61
E. Wrongful communication. 8-62
F. Preemption. 8-62
G. Protected expression. 8-62
H. Pleading. 8-62
I. Lesser included offenses. 8-63

0815 **BREACH OF THE PEACE** 8-65
A. Text of Article 116, UCMJ. 8-65
B. Scope of the article. 8-65
C. Essential elements. 8-65
D. Examples of prohibited acts. 8-65
E. "The peace of the community" 8-66
F. Meaning of community. 8-66
G. "Unlawfully" means without justification or excuse. 8-67
H. Pleading. 8-68
I. Lesser included offense. 8-68

0816 **DISORDERLY CONDUCT.** 8-68
B. Essential elements. 8-68
C. "Disorderly" defined. 8-69
D. Examples of disorderly conduct. 8-69
E. Disorderly conduct and breach of peace. 8-69
F. Special defense 8-69
G. Pleading. 8-69

0817 **RIOT.** 8-70
A. Text of Article 116, UCMJ. 8-70
B. Essential elements. 8-70
C. Interpretation. 8-71
D. "Three or more persons." 8-71
E. "Common purpose" 8-71
F. Public alarm or terror 8-72
G. Pleading. 8-72
H. Lesser included offenses (LIO). 8-73

0818 **RELATIONSHIP BETWEEN DISTURBANCE OFFENSES** 8-73
A. General. 8-73
B. "Provoking" vis-a-vis "threat." 8-73
C. "Breach of peace" vis-a-vis "riot." 8-73
1. Number participating. 8-73
2. Breach of peace is a general intent offense. 8-73
D. "Threat" vis-a-vis "breach of peace." 8-74
E. "Assault" vis-a-vis "disturbance" offenses. 8-74

CHAPTER VIII

OFFENSES AGAINST THE PERSON

0800 INTRODUCTION

This chapter discusses offenses against the person. The chapter's primary emphasis is on the four basic types of assault offenses encountered in military practice: simple assault, assault consummated by a battery, assault with a deadly weapon or means likely to produce grievous bodily injury, and assault with the intentional infliction of grievous bodily harm. These four offenses are the foundation upon which all other types of assaults are built and are all chargeable under Article 128, UCMJ. Although article 128 is the article of the UCMJ which deals directly with assaults, a number of other assault offenses are found in other articles and are discussed separately in this chapter. For example, assaults upon superiors in the execution of their offices are charged under articles 90 or 91. Several different types of assault (e.g., indecent assaults and assaults with the intent to commit certain other offenses) fall under article 134. These offenses are examined only briefly, since their basic assault element is identical to that discussed under article 128. The offense of robbery is addressed in chapter IX, since it is a composite of both larceny and assault. Maiming is also a subject of brief examination. Defenses commonly asserted in assault cases are covered. Sexual offenses are surveyed, since they usually involve assaultive acts. The concluding sections discuss offenses against the peace of the community—otherwise known as disturbance offenses.

0801 ARTICLE 128, UCMJ. Part IV, para. 54, MCM (1995 Edition). (Key Numbers 589-600, 693-698)

A. ***Text of Article 128, UCMJ.***

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

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

B. ***Definitions.***

1. ***"Assault"*** is an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. Part IV, para. 54c(1)(a), MCM (1995 Edition). Thus, an assault can be committed in any one of three separate ways: attempt, offer, or battery.

2. ***"Battery"*** is an unlawful and intentional or culpably negligent application of force to the person of another by a material agency used directly or indirectly. A "battery" is an assault in which the attempt or offer to do bodily harm is consummated. Part IV, para. 54c(2), MCM (1995 Edition).

C. ***Offenses under article 128.***

1. There are four separate offenses specifically defined by Article 128, UCMJ:

a. Simple assault—subsection (a);

b. assault consummated by a battery—subsection (a);

c. assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm—subsection (b); and

d. intentional infliction of grievous bodily harm—subsection (b).

2. In addition to these four offenses, Part IV, para. 54c(3), MCM (1995 Edition), lists three types of assault under article 128 which allow increased punishment because of the status of the victim:

a. Assault upon a commissioned officer, warrant officer (WO), noncommissioned officer (NCO), or petty officer (PO);

b. assault upon a sentinel or lookout in the execution of his duty or upon a person in the execution of law enforcement duties; and

c. assault consummated by a battery upon a child under 16 years of age.

0802 SIMPLE ASSAULT (Key Numbers 595-600)

A. ***Elements***. Part IV, para. 54b(1), MCM (1995 Edition).

1. That the accused attempted or offered to do bodily harm to a certain person; and

2. that the attempt or offer was done with unlawful force or violence.

B. ***First element***. Attempted or offered to do bodily harm

1. ***Distinction between "offer" and "attempt"***.

a. If the assailant actually intends to do bodily harm to the victim, the assault is of the attempt-type.

b. If the act puts the victim in reasonable fear that force will at once be applied to his / her person, it is an offer-type assault, even though the accused did not intend to inflict bodily harm.

Note: "Fear" does not mean only "afraid" or "frightened," it includes "apprehension" or "expectation of danger." *United States v. Piatt*, 17 M.J. 442 (C.M.A. 1984).

c. ***Illustrations.***

(1) If the accused swings his fist in the vicinity of another's head, intending to hit it but misses, the accused is guilty of an attempt-type assault whether or not the victim is aware of the attempt. ***Note***: the victim's awareness is not determinative.

(2) If the accused should do the same thing for the purpose of frightening the victim rather than hitting him, and the victim sees the blow coming and is thus placed in fear, the accused is guilty of an offer-type assault.

(3) If the accused swings at the victim intending to hit him, and the victim sees the blow coming and is thus put in fear of being struck, the accused has committed a single assault that may be characterized as ***both*** an offer and an attempt.

(4) If the accused does an act simply to frighten the victim intending not to hit him, and the victim does not see what was done and so is not placed in fear, then no assault has been committed. The accused's intent is determinative.

2. ***Discussion of the attempt-type assault.***

a. If an accused intentionally performs an overt act which amounts to more than mere preparation, and it is done with the apparent ability to inflict bodily harm, an attempt-type assault has been committed. Part IV, para. 54c(1)(b)(i), MCM (1995 Edition).

(1) The overt act must apparently tend to effect the intended bodily harm; that is, the accused must have the apparent ability to inflict bodily harm. *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993). However, the accused does not have to be within actual striking distance of the victim. *United States v. Smith*, 4 C.M.A. 41, 15 C.M.R. 41 (1955). It is not necessary for the victim to be aware of the accused's actions.

b. ***Required state of mind.*** An attempt-type assault requires a specific intent to inflict bodily harm. *See United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990). *See also United States v. Hand*, 46 C.M.R. 1323 (A.C.M.R. 1972) (accused's denial of any intent to inflict bodily harm on anyone rendered plea improvident where MJ examined the accused only as to the attempt theory of assault).

c. ***Overt act.*** The overt act necessary to constitute an attempt-type

assault, as in the case of an attempt to commit any other offense, must amount to more than mere preparation. Part IV, para. 54c(1)(c)(i), MCM (1995 Edition), states: "Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault. . . ." *United States v. Acosta-Vargas*, 13 C.M.A. 388, 32 C.M.R. 388 (1962); *United States v. Berry*, 6 C.M.A. 638, 20 C.M.R. 354 (1956); *United States v. Crocker*, 35 C.M.R. 725 (A.F.B.R. 1964).

3. ***Discussion of the offer-type assault.***

a. If an accused makes an intentional or culpably negligent and unlawful demonstration of violence which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm, he has committed an offer-type assault. Part IV, para. 54c(1)(b)(ii), MCM (1995 Edition). *See United States v. Jones*, 30 M.J. 127 (C.M.A. 1990). *See also United States v. Parker*, 11 M.J. 757 (N.M.C.M.R. 1981) for a "classic example of an offer-type assault."

(1) Under this theory of assault, a specific intent to do bodily harm is not required. This is not a specific-intent offense.

(a) The act or omission may be intentional or the result of culpable negligence.

(b) Culpable negligence defined: "It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." Part IV, para. 44c(2)(a)(i), MCM (1995 Edition). It is a gross, reckless, deliberate, or wanton disregard for the safety of others. Simple negligence is the absence of due care. It is an act or omission of a person who is under a duty to use due care. The act or omission must lack the degree of care for the safety of others which a reasonably prudent person would have exercised under the circumstances. Culpable negligence thus exhibits a greater lack of care than simple negligence. Chapter I of this text provides further discussion of negligence.

In *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986), the accused argued that his conduct when driving a 2 1/2-ton truck did not constitute culpable negligence. The court found culpable negligence when the accused did not inspect his truck as required, failed to follow the safety instructions when his brakes failed, and continued to drive without his brakes in a congested area, rather than pull over when he had several opportunities to do so. In *United States v. Brown*, 22 M.J. 448 (C.M.A. 1986), the accused pled guilty to involuntary manslaughter, then sought reversal. While the accused admitted during the providency inquiry that turning over the keys to his car to an intoxicated person was culpable negligence, he argued on appeal that he did not actually know of the risk he caused. The court rejected the appeal, noting that negligence involves conduct a reasonable person would be aware of under the circumstances. For a further discussion, see

United States v. Leach, 22 M.J. 738 (N.M.C.M.R. 1986), wherein the accused cut a petty officer with an open knife, but denied any ill will or intent to harm. Both the accused and the petty officer testified that they engaged in friendly bantering and both described the incident as an accident. The court disagreed, holding that waving an open knife in the direction of another while in close quarters was culpable negligence.

(2) The victim's required state of mind;

(a) The victim must reasonably apprehend immediate bodily harm. That is, the victim must apprehend upon reasonable grounds that force will at once be applied to his person. The victim need not be "afraid." It is sufficient if he realizes that unlawful force is about to be applied to his person. *United States v. Norton*, 1 C.M.A. 411, 4 C.M.R. 3 (1952). A "reasonable person" limitation is applied here. If a reasonable person under the same conditions would have been put in fear, then it is an offer-type assault.

(b) Although actual present ability is not required, it must reasonably appear to the victim that the accused has the ***apparent*** present ability to inflict the injury. This does not require that the accused be within actual striking distance of the victim. A demonstration of violence which reasonably causes one to retreat to secure his safety from impending danger is an assault, even though the accused never reached actual striking distance of the victim. Part IV, para. 54c(1)(d)(ii), MCM (1995 Edition). *See United States v. Smith*, 4 C.M.A. 41, 15 C.M.R. 41 (1955); *United States v. Thompson*, 13 C.M.A. 395, 32 C.M.R. 395 (1962); *United States v. Bush*, 47 C.M.R. 532 (C.G.C.M.R. 1973).

b. ***Mere preparation does not constitute an offer assault.***

(1) ***Example.*** Picking up a stone without any attempt or offer to throw it is not an assault. Part IV, para. 54c(1)(c)(i), MCM (1995 Edition).

(2) ***Contra example.*** ***X*** entered a room, created a disturbance and was told by Cpl ***Z*** to leave. ***X*** refused, and ***Z*** got out of bed to enforce the order and was cut by ***X***'s knife. ***X*** testified that he merely drew the knife, opened it and held it in his hand, and ***Z*** impaled himself during the scuffle.

Held: An assault. ". . . [M]ere preparation for an assault does not complete the offense, but holding an open knife in the hand, at the time of an impending affray, within reasonable striking distance, amounts to more than preparation. . . . It is an act in partial execution of the use of the knife, and completes the offense." *United States v. Berry*, 6 C.M.A. 638, 646, 20 C.M.R. 354, 362 (1956); *United States v. Acosta-Vargas, supra; United States v. Flowers*, 26 M.J. 463 (C.M.A. 1988); *United States v. Hernandez*, 44 C.M.R. 500 (A.C.M.R. 1971).

(3) The court, in *United States v. Hines*, 7 C.M.A. 75, 21 C.M.R. 201 (1956), held that working the bolt of a loaded weapon so that it was ready for instant firing, coupled with a statement indicating a present intent to use the weapon, was more than mere preparation and hence constituted an assault. *See also United States v. McGinty*, 38 M.J. 131 (C.M.A. 1993).

c. ***Conditional offer of violence.***

(1) An offer to inflict bodily injury upon another instantly, if he does not comply with a demand which the assailant has no right to make, is an assault. Part IV, para. 54c(1)(c)(iii), MCM (1995 Edition).

- ***Example.*** ***A*** draws a pistol and says to ***B***, "If you don't give me your watch, I will shoot you." *See United States v. Berry, supra.*

(2) However, if the known circumstances clearly negate an intent to do bodily harm, there is no assault. Part IV, para. 54c(1)(c)(iii), MCM (1995 Edition).

- ***Example.*** ***A***, holding a whip within striking distance of ***B***—an old man—says, "If you weren't an old man, I would knock you down." No assault. This is a conditional offer of violence. It is not an attempt because there clearly is no intent to injure. Nor is it an offer because there is no reasonable ground to apprehend harm.

d. ***Words alone do not constitute an assault.***

(1) The mere use of threatening words does not constitute an assault. Part IV, para. 54c(1)(c)(ii), MCM (1995 Edition).

– ***Example.*** Bully shouts through a window of his barracks to Meek who is in the adjoining barracks, "You weakling, I'm going to punch you in the nose."

(2) Threats are not sufficient to constitute an assault; there must be evidence of violence actually offered. A threat of future violence is insufficient for an assault because it is neither an attempt to commit a battery nor should it place the victim in reasonable apprehension of receiving an immediate battery. *United States v. Jessie*, 2 M.J. 573 (A.C.M.R. 1977).

(3) If, however, the threatening words are accompanied by a menacing act or gesture, there is an assault—since the combination constitutes a demonstration of violence.

– ***Example.*** Accused's CO was notified that there was a disturbance in the accused's quarters. CO and others went there and, as they approached the house, a light flashed on and they saw a man inside with a carbine. The light went off. The CO went up to the door and, as he reached for the door handle, he heard the bolt action of a rifle and a statement, "Don't move." ***Held***: An assault. Although the overt act must be more than mere preparation and though words alone are insufficient, "Working the bolt of a loaded weapon so that it is ready for instant firing, coupled with a statement indicating a present intent to use the weapon, certainly is more than mere preparation. It is a part of the use of the weapon itself, and such behavior constituted the overt act of the assault." *Hines, supra.*

e. ***"Bodily harm" to another person.*** Any "attempt" or "offer" to touch, however slightly, another person or something closely associated with his person (e.g., briefcase, cane, hat, coat) is the "bodily harm" required for this offense. *United States v. Van Beck*, 47 C.M.R. 98, 99 (A.C.M.R. 1973); *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990). Touching another for an innocent purpose, however, such as gaining his or her attention, does not constitute assault. *United States v. Henley*, 9 M.J. 780 (A.F.C.M.R. 1980).

C. ***Second element.*** Unlawful force or violence

1. The terms "force" and "violence" include ***any*** application of force, even though it entails no physical pain and leaves no mark.

2. "Unlawful." Generally, any force applied to another person will be unlawful, if without:

a. Legal justification (e.g., lawful apprehension of another, shooting an enemy); or

b. legal excuse (e.g., acts done in self-defense); or

c. legal consent (actual or implied) (e.g., football game).

Note: *See* the discussion of these concepts as defenses at the end of this chapter.

D. ***Pleading simple assault.***

1. The specification need not indicate whether the assault was of the offer or attempt variety. It should merely allege that the accused did "assault" the victim.

a. Under this allegation, the prosecution can prove either or both varieties.

b. The word "assault" is a word of art importing criminality. *See United States v. Priester*, 4 C.M.R. 830 (A.F.B.R. 1952).

2. The specific act constituting the assault must be alleged. For example:

a. "By striking at him with his fist."

b. "By throwing a knife at him."

3. ***Sample specification.*** Part IV, para. 54f(1), MCM (1995 Edition).

Charge.	Violation of the Uniform Code of Military Justice, Article 128
Specification.	In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], assault Seaman Thomas P. Smith, U.S. Navy, by throwing a bottle at him.

0803 ASSAULT CONSUMMATED BY A BATTERY (Key Numbers 595-600)

A. ***Elements.*** Part IV, para. 54b(2), MCM (1995 Edition).

1. The accused did bodily harm to a certain person; and

2. the bodily harm was done with unlawful force or violence.

B. ***First element.*** Did bodily harm to another person.

1. The slightest unlawful touching of another person will constitute the "bodily harm" required. *United States v. Van Beck*, 47 C.M.R. 98 (A.C.M.R. 1973). In fact, "bodily harm" can be accomplished without actually touching the body. If the victim's clothes or anything closely attached to his body is touched, the offense is completed.

– ***Example.***

a. Cutting the clothing which the victim is wearing;

b. spitting on the tie which the victim is wearing; and

c. knocking a box out of the victim's hand, or a pipe out of his mouth. Again, touching another for an innocent purpose, such as to gain another's attention, does not constitute a battery. *United States v. Henley*, 9 M.J. 780 (A.F.C.M.R. 1980).

2. ***Means of perpetration.*** The force may be applied to another person by a material agency, either:

a. Directly (e.g., by the aggressor's hands, feet, or other part of his body, including spitting on another); or

b. indirectly (e.g., by some action / agency which the aggressor puts in motion—such as by throwing a stone, shooting a gun, sending a dog to attack another, or by causing the victim to take poison or drugs). Part IV, para. 54c(2)(b), MCM (1995 Edition).

3. ***Required state of mind.*** Assault consummated by a battery is a general intent crime which is committed if bodily harm is inflicted either intentionally or through

culpable negligence. *United States v. Turner*, 11 M.J. 784, 787 (A.C.M.R. 1981); *United States v. Pittman*, 42 C.M.R. 720 (A.C.M.R. 1970).

a. "Intentionally" means a specific intent to inflict bodily harm upon another. It is not necessary that the intent be to inflict any particular type of bodily harm.

b. "Through culpable negligence" means a culpable disregard for the foreseeable consequences to others. Part IV, para. 44c(2)(a)(i), MCM (1995 Edition). *See* discussion, *infra*.

4. Note that the distinction between attempt and offer which is made in a simple assault is not necessary in a battery because of the actual infliction of bodily harm.

C. ***Second element***. With unlawful force or violence. *See* discussion above.

D. ***Pleading***.

1. The word "***unlawfully***" must be alleged. The striking of another is a battery ***only*** if it is unlawful. Merely alleging that the accused did "strike" another is not sufficient, as that word alone does not import criminality. *United States v. Priester*, 4 C.M.R. 830 (A.F.B.R. 1952). An allegation that he did "strike" another does not exclude the reasonable hypothesis of innocence that the striking was legally justified or legally excused. The addition of the word "unlawfully" before "strike" does exclude these and all other reasonable hypotheses of innocence.

2. The victim should be identified by first and surname (if known). If the victim is military, he / she should also be identified by grade and armed force.

3. The specific act constituting the battery must be alleged, including the specific part of the victim touched.

4. ***Sample specification***. Part IV, para. 54f(2), MCM (1995 Edition).

Charge.	Violation of the Uniform Code of Military Justice, Article 128
Specification.	In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], unlawfully strike Seaman John D. Smith, U.S. Navy, in the face with his fist.

0804 ASSAULT WITH A DANGEROUS WEAPON OR OTHER MEANS OR FORCE LIKELY TO PRODUCE DEATH OR GRIEVOUS BODILY HARM (Key Numbers 595-600)

A. ***Elements.*** Part IV, para. 54b(4), MCM (1995 Edition).

1. That the accused attempted to do, offered to do, or did bodily harm to a certain person;

2. that the accused did so with a certain weapon, means, or force;

3. that the attempt, offer, or bodily harm was done with unlawful force or violence; and

4. that the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

B. ***General discussion of the elements.*** All of the definitions and rules discussed with respect to simple assault or battery are applicable to the first and third elements of this offense which is an aggravated assault or an aggravated battery. The second element describes with specificity the weapon, means, or force alleged. The fourth element describes how the weapon was used. The aggravating circumstances are presented in the second and third elements.

C. ***Dangerous weapon or other means or force likely to produce death or grievous bodily harm.***

1. This aggravated form of assault includes not only those assaults accomplished by means or instrumentalities normally considered to be weapons but also by any means which, according to their use, are potentially dangerous. *United States v. Johnson*, 30 M.J. 53 (C.M.A. 1990), *cert. denied,* 498 U.S. 919 (1990) (means likely to

produce death or grievous bodily harm is Human Immunodeficiency Virus (HIV)); *United States v. Vigil*, 3 C.M.A. 474, 13 C.M.R. 30 (1953) (use of fists as a means of force likely to produce grievous bodily harm).

2. If the instrumentality used is a weapon, it must, to constitute this offense, be a dangerous weapon ***in fact***. Part IV, para. 54c(4)(a)(i), MCM (1995 Edition). A weapon is dangerous when used in such a manner that it is likely to produce death or grievous bodily harm. Id. *See* United States v. Davis 47 M.J. 484 (C.A.A.F. 1998) (the weapon must be loaded before it can be considered a dangerous weapon).

a. Under this definition, an unloaded pistol, when presented as a firearm, would not be a dangerous weapon; but, if presented as a bludgeon, it might be a dangerous weapon or other means or force likely to produce death or grievous bodily harm. *See United States v. Turner*, 42 M.J. 689 (A.Ct.Crim.App. 1995). The weapon need not have a round in its chamber, if it is loaded, in order to be considered dangerous. *United States v. Lamp*, 44 C.M.R. 504, 507 (A.C.M.R. 1971). This definition of a dangerous weapon may be broadened for ***other*** offenses, such as carrying a concealed dangerous weapon in violation of article 134. *United States v. Powell*, 22 M.J. 835 (N.M.C.M.R. 1986). *See also United States v. Henry*, 35 M.J. 136 (C.M.A. 1992), *citing United States v. Mance*, 26 M.J. 244 (C.M.A. 1988), holding that, although a "firearm" must be operable and loaded for purposes of the substantive definition of the offense of aggravated assault, a "firearm,"for purposes of sentencing enhancement when used in commission of a robbery, need only satisfy the definition in R.C.M. 103(12): "any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive."

3. The weapon or other means or force must have been used in a specific manner (i.e., likely to produce death or grievous bodily harm).

a. ***Grievous bodily harm***. This means a serious bodily injury, such as fractured or dislocated bones, deep cuts, torn members of the body, or serious damage to internal organs.

(1) It does ***not*** include minor injuries such as a black eye or a bloody nose. Part IV, para. 54c(4)(b)(iii), MCM (1995 Edition).

(2) "Light pain, minor wounds, and temporary impairment of some organ of the body do not ordinarily, (individually) (or) (collectively) establish 'grievous bodily harm.' The results are common to most ordinary assault and battery cases. In making the determination of whether grievous bodily harm resulted, the absence or presence and extent of (the injury and its adverse effects) (degree of pain or suffering) (time of hospitalization or confinement to bed or room) (length and degree of unconsciousness) (amount of force or violence used) (interference with normal activities), may be taken into consideration." *Military Judges' Benchbook*, DA Pam 27-9 (1982), para. 3-110.

(3) In *United States v. Spearman*, 23 C.M.A. 31, 48 C.M.R. 405 (1974), the court provides a full discussion of this element, including the facts that the knife used had a pointed, 4-inch blade; that the victim was stabbed four times; and that there were three wounds in the area of vital organs which required stitches.

b. ***Used in a manner likely to produce.***

(1) "When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means or force is 'likely' to produce that result." Part IV, para. 54c(4)(a)(ii), MCM (1995 Edition). The use to which the particular instrumentality is usually put is immaterial.

(2) Examples of objects that could be used in a manner likely to produce death or grievous bodily harm:

(a) Bottle—*United States v. Straub*, 12 C.M.A. 156, 30 C.M.R. 156 (1961);

(b) rock—Part IV, para. 54c(4)(a)(ii), MCM (1995 Edition);

(c) boiling water—*id.*;

(d) drug—*id.*;

(e) beer can opener—*United States v. Holley*, 5 C.M.A. 661, 18 C.M.R. 285 (1955);

(f) heavy belt buckle—*United States v. Patterson*, 7 C.M.A. 9, 21 C.M.R. 135 (1956);

(g) a fist or foot—*United States v. Whitfield*, 35 M.J. 535 (A.C.M.R. 1992), *cert. denied*, 114 S. Ct. 919, 127 l. Ed. 2d 213 (1994);

(h) CS grenade—*United States v. Schroeder*, 47 C.M.R. 430, 474 (A.C.M.R. 1973); *United States v. Van Beck*, 47 C.M.R. 98 (A.C.M.R. 1973), *aff'd.*, 37 M.J. 392 (C.M.A. 1993).

(i) motor vehicle—*United States v. Yoakum*, 8 M.J. 763 (A.C.M.R. 1980); and

(j) bodily fluids containing HIV—*United States v. Stewart*, 29 M.J. 92 (C.M.A. 1989); *United States v. Joseph*, 33 M.J. 960 (N.M.C.M.R. 1991) *aff'd.*, 37 M.J. 392 (C.M.A. 1993); *United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994).

(3) It makes no difference in this aggravated form of article 128 whether or not the victim actually received any harm; a battery is not required. An assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm is sufficient. Indeed, this offense may be committed even if the victim remains completely unaware of his "close shave" (i.e., an attempt-type assault with the aggravated means). In *United States v. Vigil*, 3 C.M.A. 474, 13 C.M.R. 30 (1953), C.M.A. stated:

> The crucial question is whether its use, under the circumstances of the case, is likely to result in death or grievous bodily harm .... Persuasive evidence upon this question is found in the nature of the means or force itself, the manner of its use, the parts of the body toward which it is directed, and, where applicable, the extent of the injuries actually inflicted.

Id. at 474-475, 13 C.M.R. at 32-33. Note that, in the situation in which bodily harm does not result, the accused's action must at least amount to an assault, either of the offer (mind of the victim in fear) or the attempt (intended by the accused) type.

(4) Offense of assault with a means likely to produce grievous bodily harm does not require specific intent and may be committed through culpable negligence. *United States v. Yoakum*, 8 M.J. 763 (A.C.M.R. 1980).

In other words, the minimum state of mind is the same as that required for a battery and, where injury is actually inflicted, the existence of the attempt or offer situation required in simple assault is not a prerequisite to the commission of the aggravated crime of assault with a dangerous weapon or means or force likely to produce death or grievous bodily harm. *United States v. Redding*, 14 C.M.A. 242, 34 C.M.R. 22 (1963); *United States v. Santiago-Vargas*, 5 M.J. 41 (C.M.A. 1978).

D. ***LIO's of assault with a dangerous weapon, etc.***

1. ***Attempted assault with a dangerous weapon, etc.*** *See United States v. Polk*, 1 M.J. 1019 (N.C.M.R. 1976); *United States v. Locke*, 16 M.J. 763 (A.C.M.R. 1983).

2. ***Simple assault of either the offer- or attempt-type.***

3. ***Assault consummated by a battery if a touching is alleged and proved.*** *See United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993). *Compare United States v. Clay*, 9 C.M.A. 582, 26 C.M.R. 362 (1958) *with United States v. Hamilton*, 10 C.M.A. 130, 27 C.M.R. 204 (1959).

4. ***Disrespect.*** *United States v. Van Beck*, 47 C.M.R. 98 (A.C.M.R. 1973). This is an isolated holding not supported by any C.M.A. decision on this point. *But cf. United States v. Virgilito*, 22 C.M.A. 394, 47 C.M.R. 331 (1973).

5. Current case law should be reviewed prior to relying on LIO's.

E. ***Multiplicity with other offenses.*** Although the question of whether any given offense is mutiplicious with another is basically one of fact. Current case law should be reviewed prior to pleading.

F. ***Pleading an assault with a dangerous weapon, etc.***

1. ***Sample specification.*** Part IV, para. 54f(8), MCM (1995 Edition), provides for alleging the word "assault" in every case, whether or not the assault is consummated (i.e., whether it be an assault or a battery).

2. The manner in which the victim was assaulted must be alleged. If injury was inflicted, allege the specific location of the injury. Try to communicate precisely what accused is alleged to have done.

3. If the instrumentality used is commonly thought of as a "dangerous weapon," use that allegation; otherwise, use the allegation "(means) (force) likely to produce grievous bodily harm." The failure to plead either one or the other of these allegations will obviously result in a failure to state this type of assault offense. *United States v. Locke*, 16 M.J. 763 (A.C.M.R. 1983).

4. ***Sample specification.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 128
>
> ***Specification.*** In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], commit an assault upon Seaman Apprentice Abner Peabody, U.S. Navy, by striking at him with a dangerous weapon, to wit: a knife.

0805 INTENTIONAL INFLICTION OF GRIEVOUS BODILY HARM (Key Numbers 595-600)

A. ***Elements.*** Part IV, para. 54b(4)(b), MCM (1995 Edition).

1. That the accused assaulted a certain person;

2. that grievous bodily harm was thereby inflicted upon such person;

3. that the grievous bodily harm was done with unlawful force or violence; and

4. that the accused, at the time, had the specific intent to inflict grievous bodily harm.

This offense consists of an aggravated ***battery***. Review the rules on battery and add to them the requirement that the bodily harm inflicted was "grievous" (as discussed in section 0804, *supra*) and that will constitute the first three elements of this offense.

B. ***Intentionally inflicted.***

1. ***This is a specific-intent offense.*** *United States v. Berri*, 33 M.J. 337 (C.M.A. 1991); *United States v. Groves*, 2 C.M.A. 541, 10 C.M.R. 39 (1953). Culpable negligence will not suffice. In addition to proving that the accused inflicted grievous bodily harm, it must be proved that the accused's action causing such harm was done with the specific intent of accomplishing that result.

2. ***Proving intent.***

a. The intent can be proved by either direct or circumstantial evidence.

(1) Direct evidence of the specific intent will usually consist of statements or admissions by the accused.

(2) Circumstantial evidence of the specific intent is usually provided by the facts surrounding the assault. When grievous bodily harm has been inflicted by intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. Part IV, para. 54c(4)(b)(ii), MCM (1995 Edition).

(a) Specific intent may not be inferred merely because harm was foreseeable from the action.

(b) To warrant an inference of intent, it must appear that such harm was a natural and probable consequence of the intentional action.

b. ***Examples.***

(1) ***A*** intentionally knocks ***B*** from the roof of a two-story building to the pavement below, causing several broken bones. Grievous bodily harm is certainly a natural and probable consequence of such an act. Such an injury is likely to result from such action. Hence, it may be inferred that ***A*** specifically intended that result.

(2) ***A*** and ***B*** engage in a fist fight and ***A*** lands a solid punch to ***B***'s face, causing a brain concussion. ***Query***: May it be inferred from this that ***A*** specifically intended to inflict grievous bodily harm? ***Answer***: No. A brain concussion is not likely to result from an ordinary fist fight. Although such an injury may be foreseeable, it is not likely or probable.

(3) ***C*** and ***D*** hold ***B***, while ***A*** delivers a series of punches to ***B***'s head with his fist and causes a concussion. ***Query***: May the specific intent be inferred in this situation? ***Answer***: Yes. Repeatedly striking another under these circumstances could be found to be likely to result in "grievous bodily harm." Such an injury is a "natural and probable" result. See Part IV, para. 54c(4)(b)(ii), MCM (1995 Edition).

C. . ***LIO's.***

1. ***Assault with a dangerous weapon or other means or force likely to produce grievous bodily harm.***

– ***Example.*** While ***B*** is asleep in bed, ***A*** punches ***B*** in the head and face with gloved fists. ***B*** loses 11 teeth, both eyes are completely shut, both cheekbones and both his upper and lower jaws are fractured. ***A*** was charged with assault by intentionally inflicting grievous bodily harm. The court-martial found him not guilty of that, but guilty of assault with a means likely to produce grievous bodily harm, to wit: his fists. ***Held***: Affirmed. It was an LIO. *United States v. Vigil*, 3 C.M.A. 474, 13 C.M.R. 30 (1953).

2. ***Assault consummated by a battery.***

3. ***Simple assault.***

4. *United States v. Waldron*, 9 M.J. 811 (N.C.M.R. 1980), *aff'd*, 11 M.J. 36 (C.M.A. 1981) discusses a related issue. The accused in that case was charged with murder, but the trial court found him guilty of the "lesser included offense" of assault with the intentional infliction of grievous bodily harm. The court said that this was error, since the uncontroverted evidence showed that the accused shot the victim and that the victim died as a result. The court said the least offense of which the accused could be convicted was manslaughter. *But see United States v. Rodwell*, 20 M.J. 264 (C.M.A. 1985), where the found error during prosecution on charge of assault with intent to murder when military judge failed to instruct on the LIO of assault with the intentional infliction of grievous bodily harm. On appeal, the court stated that the LIO was reasonably raised by the evidence and fairly alleged by the language in the specification "by repeatedly stabbing . . . [the victim] with a knife."

D. ***Sample specification.*** Part IV, para. 54f(9), MCM (1995 Edition).

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 128
>
> ***Specification.*** In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], commit an assault upon Seaman Abner N. Peabody, U.S. Navy, by repeatedly striking him in the face with his fists and did thereby intentionally inflict grievous bodily harm upon him, to wit: a broken jaw.

0806 ARTICLE 128 OFFENSES AGGRAVATED BY THE STATUS OF THE VICTIM (Key Numbers 595-600)

A. ***Assaults upon commissioned officers, warrant officers, noncommissioned officers, or petty officers.***

1. ***Elements.*** Part IV, para. 54b(3)(a), MCM (1995 Edition).

a. That the accused assaulted the victim as alleged;

b. that the victim of the assault was a commissioned officer, WO, NCO, or PO; and

c. that the accused had actual knowledge that the victim was a commissioned officer, WO, NCO, or PO.

2. It is ***not*** necessary that the victim be superior to the accused, in the same armed force as the accused, or in the execution of his office.

3. This offense is an LIO of articles 90 (assault upon a superior commissioned officer) and 91 (assault upon a WO, NCO, or PO in the execution of office) which are discussed below.

4. ***Sample specification***. Part IV, para. 54f(3), MCM (1995 Edition).

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 128
>
> ***Specification.*** In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], assault Colonel I. M. Arouge, U.S. Army, who then was, and was then known by the accused to be, a commissioned officer of the U.S. Army, by striking the said Colonel Arouge in the face with his fist.

B. ***Assaults upon sentinels or lookouts in the execution of their duty or upon persons in the execution of law enforcement duties.***

1. ***Elements***. Part IV, para. 54b(3)(b), MCM (1995 Edition).

a. That the accused assaulted the victim as alleged;

b. that the victim of the assault was a sentinel or lookout in the execution of his duty or was a person who then had and was in the execution of air police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties [*See United States v. Gholston*, 15 M.J. 582, 584 (A.C.M.R. 1983) (assault upon a sentinel en route to his guard post does not constitute assault upon sentinel in execution of his duty)]; and

c. that the accused knew of the law enforcement duties or status of the victim.

2. ***Note***: Mistreatment by a person executing police duties may divest such person of his cloak of authority. *United States v. Rozier*, 1 M.J. 469, 472 (C.M.A. 1976); *United States v. Garretson*, 42 C.M.R. 472, (A.C.M.R. 1970); *United States v. Meland*, 8 C.M.R. 822 (A.B.R. 1953). *See United States v. Leach*, 22 M.J. 738 (N.M.C.M.R. 1986), in which the court notes the egregions nature of the conduct required to show abandonment of rank.

3. ***Sample specification***. Part IV, para. 54f(6), MCM (1995 Edition).

> ***Charge***. Violation of the Uniform Code of Military Justice, Article 128
>
> ***Specification***. In that [Name, etc. and personal jurisdiction data], did, [at on / on board (location)], on or about [date], assault Patrolman W. E. Earp, Newport Police Department, who then was, and was then known by the accused to be, a person then having and in the execution of civilian law enforcement duties, by kicking the said Patrolman Earp in the shins with his foot.

C. ***Assault, consummated by a battery, upon a child under 16 years of age.***

1. ***Elements***. Part IV, para. 54b(3)(c), MCM (1995 Edition).

a. That the accused, with unlawful force or violence, did bodily harm to the victim as alleged; and

b. that the victim was under 16 years of age.

2. ***Knowledge of the age of the victim is not an element of this offense.***

3. ***This is a battery only***. Offer or attempt assaults do not constitute this form of aggravated assault.

4. ***Sample specification***. Part IV, para. 54f(7), MCM (1995 Edition).

> ***Charge***. Violation of the Uniform Code of Military Justice, Article 128
>
> ***Specification***. In that [Name, etc, and personal jurisdiction data], did, [at / on board (location)], on or about [date], unlawfully strike Thomas R. Sade, a child under the age of sixteen years, on the back with a whip.

5. For a discussion of parental discipline in light of current child abuse law, see *United States v. Robertson*, 36 M.J. 190 (C.M.A. 1992). When the abuse of a child consists solely of assaults, article 128 preempts the field and precludes the use of a state child abuse statute through the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See* Chapter X of this study guide. *United States v. Irvin*, 21 M.J. 184 (C.M.A. 1986) (difference in punishment was 8 years vice 2). On a rehearing of this case, the Air Force Court of Military Review was forced to set aside the finding of guilty. The court noted that, while there was evidence of bruises and injuries, there was no evidence that the accused caused the harm. *United States v. Irvin*, 22 M.J. 559 (A.F.C.M.R. 1986); *United States v. Harrison*, 31 M.J. 330 (C.M.A. 1990).

0807 ASSAULTS UPON SUPERIOR COMMISSIONED OFFICERS AND WO'S, NCO'S, AND PO'S IN THE EXECUTION OF THEIR OFFICE (Key Numbers 589-600, 693-698)

A. ***Text of Article 90(1), UCMJ.***

Any person subject to this chapter who –

(1) Strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office . . . shall be punished . . . as a court-martial may direct.

B. ***Text of Article 91(1), UCMJ.***

Any warrant officer or enlisted person who –

(1) Strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his officer . . . shall be punished as a court-martial may direct.

C. ***Discussion.***

1. ***Article 90(1) describes three varieties of assault.***

a. Striking a superior commissioned officer in the execution of his office (a battery);

b. drawing or lifting up a weapon against a superior commissioned officer in the execution of his office (an assault with a weapon); and

c. offering violence against a superior commissioned officer in the execution of his office (an assault).

2. ***Article 91(1) describes two varieties of assault.***

a. Striking a WO, NCO, or PO in the execution of his office (a battery); and

b. assaulting a WO, NCO, or PO in the execution of his office (an assault).

3. In effect, the article 90(1) and 91(1) offenses are simply assaults aggravated by the status of the victim and the relationship between the accused and the victim. Unlike the offenses set out under article 128, superiority is an essential element under article 90(1) and execution of office is an element under both article 90(1) and 91(1).

D. ***Elements***. Part IV, paras. 14b(1) and 15b(1), MCM (1995 Edition).

1. ***Assault upon a superior commissioned officer***. Article 90, UCMJ; Part IV, para. 14b(1), MCM (1995 Edition).

a. That the accused struck, drew, or lifted up a weapon against, or offered violence against, a certain commissioned officer;

b. that the officer was the superior commissioned officer of the accused;

c. that the accused then knew that the officer was the accused's superior commissioned officer; and

d. that the superior commissioned officer was then in the execution of office.

2. ***Assault upon a WO, NCO, or PO***. Article 91, UCMJ; Part IV, para. 15b(1), MCM (1995 Edition).

a. That the accused was a warrant officer or enlisted member;

b. that the accused struck or assaulted a certain warrant, noncommissioned, or petty officer;

c. that the striking or assault was committed while the victim was in the execution of office; and

d. that the accused then knew that the person struck or assaulted was a warrant, noncommissioned, or petty officer.

Note: If the victim was the superior NCO or PO of the accused, add the following elements in order to increase the maximum punishment:

e. That the victim was the superior noncommissioned or petty officer of the accused; and

f. that the accused then knew that the person struck or assaulted was the accused's superior noncommissioned or petty officer.

E. ***Superior***. The meanings of the terms superior commissioned officer and WO, NCO, or PO are the same as have been previously discussed in connection with the offenses of disobedience and disrespect. *See* Chapter IV of this study guide. ***Acting*** noncommissioned officers cannot be victims of an article 91 assault. *United States v. Lumbus et al.*, 23 C.M.A. 231, 49 C.M.R. 248 (1974).

F. ***Knowledge of the status of the victim***. As in the offenses of disrespect to and disobedience of a superior commissioned officer, WO, NCO or PO, the accused must have had ***actual*** knowledge at the time of the offense that the victim was his superior. Thus, knowledge is an element.

G. ***Analysis of the several "types" of "assault" covered in articles 90(1) and 91(1).***

1. ***Against a superior commissioned officer—article 90(1).***

a. ***Strikes***. "'Strikes' means an intentional blow, and includes any offensive touching of the person of an officer, however slight." Part IV, para. 14c(a)(ii), MCM (1995 Edition).

b. ***Draws or lifts up any weapon against***. "The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of the superior is the sort of act proscribed. The raising in a threatening manner of a firearm, whether or not loaded, or of a club, or of anything by which a serious blow or injury could be given is included in 'lifts up.'" Part IV, para. 14c(a)(iii), MCM (1995 Edition).

c. ***Offers any violence against him.*** This term includes "any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up.'" Part IV, para. 14c(a)(iv), MCM (1995 Edition) [e.g., placing cocaine in an officer's soft drink—*United States v. Butler*, 17 M.J. 222 (C.M.A. 1984)].

d. Mere threatening words do not constitute this offense. Part IV, para. 14c(a)(iv), MCM (1995 Edition).

2. ***Against a WO, NCO, or PO—article 91(1).***

a. ***Strikes.*** A battery as defined in Part IV, para. 54, MCM (1995 Edition). *United States v. Alexander*, 11 M.J. 726 (A.C.M.R. 1981) and *United States v. Curry*, 38 M.J. 77 (C.M.A. 1993) provide examples.

b. ***Assaults.*** This term refers to either the offer or attempt proscribed by article 128. *See* Part IV, para. 54c, MCM (1995 Edition).

H. ***In the execution of office.*** These offenses can be committed only if the victim was in the execution of office at the time of the assault.

1. A person "is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage." Part IV, para. 14c(1)(b), MCM (1995 Edition). A person may be in the execution of office, even though not "on duty." *United States v. Jackson*, 8 M.J. 602, 603 (A.C.M.R. 1979).

2. "The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times." Part IV, para. 14c(1)(b), MCM (1995 Edition).

3. Generally, if the superior has a duty to maintain discipline over another at the time, acts done for this purpose would be in the execution of his office.

– ***Example.*** An Ensign walking down Thames Street sees two sailors about to get into a fight. He steps between them, identifies himself, and orders them to break it up. One of them punches the Ensign in the nose. The Ensign was in the execution of his office at the time. *See Jackson, supra.*

4. A person acting outside the scope of his / her authority or who is engaged in the commission of an offense is not in the execution of office. *United States v. Revels*, 41 C.M.R. 475, 481 (A.C.M.R. 1969).

– ***Example***. A petty officer on guard duty in a brig entered a cell to have a drink of whiskey with the prisoners. While drinking with them, he was assaulted by the accused. ***Held***: He was not in the execution of his office at the time. *United States v. Gallines*, 8 C.M.R. 606, 609 (C.G.B.R. 1963). ***Contra example***: *United States v. Richardson*, 6 M.J. 656 (N.C.M.R. 1978) (no right to assault superiors even though latter addressed accused as "boy"), *aff'd*, 7 M.J. 320 (C.M.A. 1979); *United States v. McDaniel*, 7 M.J. 522 (A.C.M.R. 1979) (administering a cold shower to an intoxicated soldier does not constitute abandonment of rank).

I. ***LIO's.***

1. If it cannot be proved that the victim was "in the execution of office" or was a "superior" commissioned officer, the accused may still be guilty of the LIO of assault or battery upon a commissioned officer, NCO, or PO in violation of article 128. *See* section 0806A, *supra*.

2. If knowledge of the status of the victim is not proved, the accused may still be guilty of a simple assault or battery in violation of article 128. *United States v. Stegall*, 6 M.J. 176, 177 (C.M.A. 1979).

3. If the accused is found guilty of a lesser included article 128 violation, it will be necessary for the court to include by exceptions and substitutions the word "unlawfully" in its findings. This is permissible since an allegation of striking a superior while in the execution of his office fairly implies that it was unlawful. *United States v. Niemic*, 14 C.M.R. 813, 816 (A.B.R. 1954).

J. ***Pleading.***

1. ***Sample specification of an article 90(1) offense.*** Part IV, paras. 14f(2), MCM (1995 Edition).

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 90
>
> ***Specification.*** In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], lift up a weapon, to wit: a crowbar, against Ensign Thomas G. Flubber, U.S. Naval Reserve, on active duty, his superior commissioned officer, and then known by the said Seaman Jones to be his superior commissioned officer, who was then in the execution of his office.

2. ***Sample specification for an article 91(1) offense.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 91
>
> ***Specification.*** In that Seaman Willie N. Jones, U.S. Navy, USS TUBBS, did, on board USS TUBBS, at sea, on or about [date], strike Yeoman Third Class John M. Clump, U.S. Navy, a petty officer, and known by the said Seaman Jones to be a superior petty officer, who was then in the execution of his office, by striking him on the face with a shoe.

a. ***Note***: this sample alleges the aggravating factor of superiority of the victim. While superiority is one essential element of an article 90 assault, it is an optional element under article 91 which, if pled and proved, will increase the maximum available punishment. *See* Part IV, paras. 15e(2) and (3), MCM (1995 Edition).

b. ***Note also*** that, in the above specification, there is no necessity to modify the word "strike" by any words importing criminality (e.g., "unlawfully" or "wrongfully"). The distinction between a specification under article 91 and article 128 is that the mere striking of a WO, NCO, or PO while in the execution of office, coupled with an allegation describing the manner of striking, fairly implies an unlawful act. *United States v. Martin*, 13 C.M.R. 587 (N.B.R. 1953); *United States v. Jones*, 12 M.J. 893 (A.C.M.R. 1982). However, it is not fatal to allege the words of criminality (i.e., "unlawfully" or "wrongfully").

0808 MAIMING (Key Numbers 601-606, 845)

A. ***Text of Article 124, UCMJ.***

> Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which –
>
> 1. seriously disfigures his person by a mutilation thereof;
>
> 2. destroys or disables any member or organ of his body; or
>
> 3. seriously diminishes his physical vigor by the injury of any member or organ;
>
> is guilty of maiming and shall be punished as a court-martial may direct.

B. ***Elements***. Part IV, para. 50b, MCM (1995 Edition).

1. That the accused inflicted a certain injury upon a certain person;

2. that this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished this person's physical vigor by the injury to an organ or member; and

3. that the accused inflicted this injury with an intent to cause some injury to a person.

C. ***Discussion.***

1. This offense requires only a specific intent to injure, not a specific intent to maim. Therefore, it is not a defense to a charge of maiming that the accused intended only a slight injury if in fact he did inflict serious harm. *United States v. Hicks*, 6 C.M.A. 621, 20 C.M.R. 337 (1956); *United States v. Berri*, 33 M.J. 337 (C.M.A. 1991). The *Manual for Courts-Martial, 1969 (Rev.)* contained different language concerning the intent involved in maiming. The 1969 MCM stated that the offense required a general intent to injure rather than a specific intent to maim. Accordingly, in *United States v. Tua*, 4 M.J. 761 (A.C.M.R. 1977), it was held that, since maiming was a general intent offense, the defense of

voluntary intoxication did not exist. Based on the language of Part IV, para. 50c(3), MCM (1995 Edition), it can now be concluded that maiming does require a specific intent to cause some general injury. Accordingly, it would appear that voluntary intoxication could serve as a defense to negate the required specific intent. *See* the discussion of voluntary intoxication as a defense in section 1015, *infra*.

2. The offense is complete if a serious injury is inflicted, even though there is a possibility that the victim may eventually recover the use of the member or organ or the disfigurement may be corrected by surgery. Part IV, para. 50c(1), MCM (1995 Edition); *United States v. Outin,* 42 M.J. 603 (N.M.Ct.Crim.App. 1995); *United States v. Spenhoff,* 41 M.J. 772 (A.F.Ct.Crim.App. 1995) (Second degree burns to a child's buttocks). Maiming is somewhat undercharged and, with supporting medical evidence, relatively easy to prove.

D. ***LIO's.*** Among the offenses which may be included in a particular charge of maiming are aggravated assault, assault and battery, and assault. Part IV, para. 50d, MCM (1995 Edition).

E. ***Sample specification.*** *See* Part IV, para. 50f, MCM (1995 Edition).

0809 ARTICLE 134 ASSAULTS (Key Numbers 595-600, 759-764)

A. ***Article 134, UCMJ, makes punishable two types of assaults.***

1. Indecent assaults, which are discussed below, and

2. assaults with the intent to commit certain serious offenses:

   a. Murder;

   b. voluntary manslaughter;

   c. rape;

   d. robbery;

   e. sodomy;

   f. arson;

   g. burglary; and

h. housebreaking.

B. ***Discussion of the assaults with the intent to commit other offenses.*** *See* Part IV, para. 64, MCM (1995 Edition).

1. ***Sample specification.*** Part IV, para. 64f, MCM (1995 Edition).

2. Closely related to all of these varieties of assault are the attempt offenses. In any given case, there may be little difference between the assault with the intent to commit the underlying offense and an attempt to commit that offense. One significant difference is that the assault offense may be made out even though the attempt would not. The latter would result if the overt act involved did not amount to ***more*** than mere preparation.

– ***Example.*** An assault with the intent to commit arson may occur if the accused assaults a guard posted to protect the target of the intended arson; however, if the accused is apprehended at that point, he might not be convicted of attempted arson since the assault could be viewed as only preparation.

3. Care must be taken to plead, prove, and instruct on the specific intent aspect of these offenses.

– ***Example.*** In *United States v. Henry*, 1 M.J. 155 (C.M.A. 1975), the court held that the military judge erred in his instructions on assault with intent to commit voluntary manslaughter by defining voluntary manslaughter in a manner which permitted the court to find the accused guilty if he intended either to kill the victim or to inflict great bodily harm. Only an intent to kill will suffice to sustain a conviction for assault with intent to commit voluntary manslaughter. *Accord United States v. Barnes*, 15 M.J. 121 (C.M.A. 1983).

4. Whether the assault aspect of the accused's crimes will merge with any other consummated offenses for punishment purposes is a factual question.

– ***Example.*** In *United States v. Douglas*, 2 M.J. 470 (A.C.M.R. 1975), it was held that in a case in which the accused was charged with assault with intent to commit murder, but convicted of aggravated assault in addition to attempted robbery of the same victim, an offense separate from the assault included in the attempted robbery was properly found and used by the panel in reaching its sentence, despite the defense's contention that the attempted robbery and the assault were multiplicious for sentencing purposes.

0810 AFFIRMATIVE DEFENSES TO ALL FORMS OF ASSAULT (Key Numbers 832-842)

A. ***Scope of discussion.*** Defenses to be discussed apply generally to:

1. All of the article 128 offenses;

2. all assaults in violation of article 90(1) and 91(1); and

3. the article 134 assault offenses.

B. ***In general, the affirmative defenses to assault are based upon the following concepts:***

1. Legal justification;

2. legal excuse; or

3. legal consent.

C. ***Legal justification.*** R.C.M. 916(c), MCM (1995 Edition).

1. An act of force or violence committed in the proper performance of a legal duty is justified. *United States v. McDaniel*, 7 M.J. 522 (A.C.M.R. 1979) (no assault for NCO to place drunk and protesting soldier in a cold shower in order to sober him up). *See also United States v. Pratcher*, 14 M.J. 819 (A.C.M.R. 1982) (mere incompetence or poor judgment does not divest an officer of his office where his actions have a military purpose).

a. A duty may be imposed by statute, regulation, or lawful order.

b. However, legal justification is a defense only to that degree of force necessary to carry out the legal duty. If any force is used in excess of that required, the excessive force may constitute a battery. *See United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976). *See also United States v. Robertson*, 36 M.J. 190 (C.M.A. 1992) (discussion of parental discipline as an affirmative defense to assault on a child).

2. The acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable except:

a. When the acts are clearly beyond the scope of his authority;

b. when the order is such that a man of ordinary sense and understanding would know it to be illegal [*see United States v. Keenan*, 18 C.M.A. 108, 39 C.M.R. 108 (1969); *United States v. Schultz*, 18 C.M.A. 133, 39 C.M.R. 133 (1969); *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986) (order to keep driving truck with defective brakes in a congested area patently illegal and person of ordinary sense would know it to be unlawful—accused's actions would not be excused)]; or

c. where the subordinate willfully or through culpable negligence endangers the lives of innocent parties in discharging his duty.

3. Examples of acts of force or violence that would be legally justified:

a. Shooting an enemy in battle;

b. physical contact during a lawful apprehension;

c. physical contact while a guard is subduing an unruly prisoner [*United States v. Acosta-Vargas*, 13 C.M.A. 388, 32 C.M.R. 388 (1962)]; and

d. resisting an unlawful apprehension which is executed in such a manner that self-defense is required or which divests the apprehending officials of their authority. *Rozier, supra*. See discussion, *supra*, in Chapter VII of this study guide.

D. ***Legal excuse.***

1. ***Acts of force or violence are legally excused if done:***

a. Through accident or misadventure;

b. in lawful self-defense;

c. in the lawful defense of another;

d. where a special privilege exists; or

e. under coercion or duress.

2. ***Accident or misadventure.***

a. The defense of accident is not raised by showing that the ultimate consequence of an act is unintended or unforeseen if the act was specifically

intended and directed at another. *United States v. Cohen*, 2 M.J. 350 (A.F.C.M.R. 1976). *See also United States v. Lett*, 9 M.J. 602 (A.F.C.M.R. 1980) and *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983). Accident is an unexpected act, not the unexpected consequences of a deliberate act. *United States v. Leach*, 22 M.J. 738 (N.M.C.M.R. 1986). *See United States v. Curry*, 38 M.J. 77 (C.M.A. 1993) (court held that accident, while loosely called affirmative defense, is more accurately a substantive law defense negating guilt by canceling out the intent).

b. A detailed description of this defense can be found in Chapter X of this text.

3. ***Self-defense.***

a. ***General rule.*** One who is himself free from fault is privileged to use reasonable force to defend himself against immediate bodily harm threatened by the unlawful act of another. *See United States v. Shepherd*, 33 M.J. 66 (C.M.A. 1991).

b. ***Free from fault.*** One who intentionally provokes an altercation or who willingly engages in mutual combat is not free from fault and forfeits the right of self-defense. *United States v. Green*, 13 C.M.A. 545, 33 C.M.R. 77 (1963). Moreover, when the accused is a trespasser, the right of self-defense is limited. In *United States v. Richey*, 20 M.J. 251 (C.M.A. 1985), the court ruled that the accused could only defend himself against excessive force because the lawful occupant was entitled to use reasonable force to eject him as a trespasser.

(1) If one who provokes a fight withdraws in good faith, however, and his adversary follows and renews the fight, the latter becomes the aggressor and the one who originally started the altercation may resort to self-defense. In addition, even a person who starts an affray is entitled to use self-defense when the opposing party escalates the conflict using a greater level of force. *United States v. Cardwell*, 15 M.J. 124 (C.M.A. 1983).

(2) Where an issue of fact exists as to whether the accused or the injured party was the aggressor, the issue is for the finder of fact to decide after receiving proper instructions. *United States v. Campbell*, 14 C.M.A. 383, 34 C.M.R. 163 (1964).

(3) One is not per se deprived of the right to act in self-defense by the fact that he has armed himself with a gun and sought out his eventual victim following a prior violent encounter with such person. The existence of the defense of self-defense depends upon the factual question of the intent of the accused in returning and the provocation he offers the victim upon again contacting him. It is well settled that, where the accused armed himself for possible self-protection and his purpose in seeking out the victim

was conciliatory, he does not become an aggressor and such testimony places self-defense in issue. *United States v. Moore*, 15 C.M.A. 187, 35 C.M.R. 159 (1964).

c. ***Reasonable force.*** The force to which one may resort in self-defense is that which he believes on reasonable grounds to be necessary, in view of all the circumstances of the case, to prevent impending injury. *United States v. Acosta-Vargas*, 13 C.M.A. 388, 32 C.M.R. 388 (1962); *United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988).

(1) The theory of self-defense is ***protection*** and, if excessive force is used against an assailant, the defender becomes the aggressor. *United States v. Straub*, 12 C.M.A. 156, 30 C.M.R. 156 (1961). *See also United States v. Bradford*, 29 M.J. 829 (A.C.M.R. 1989) for a discussion on self-defense theories.

(2) This principle, however, does not restrict one to the precise force threatened by the assailant. The degree of force permitted the defender need not be identical with the means employed by the assailant. *Acosta-Vargas, supra.* The phrase a person may "meet force with like degree of force" has been condemned in several cases as being an unsatisfactory statement of the principle of self-defense. *See United States v. Smith*, 13 C.M.A. 471, 33 C.M.R. 36 (1963) and *United States v. Hayden*, 13 C.M.A. 497, 33 C.M.R. 29 (1963).

d. ***The MCM tests.*** R.C.M. 916(e), MCM (1995 Edition), sets forth three separate tests to be applied in determining the reasonableness of the accused's resort to self-defense when he anticipates impending harm. *United States v. Perry*, 16 C.M.A. 221, 36 C.M.R. 377 (1966); *United States v. Armistead*, 16 C.M.A. 217, 36 C.M.R. 373 (1966); *United States v. Jackson*, 15 C.M.A. 603, 36 C.M.R. 101 (1966); *United States v. Shufford*, 7 M.J. 716 (A.C.M.R. 1979); and *United States v. Whitfield*, 7 M.J. 780 (A.C.M.R. 1979).

(1) ***Self-defense when accused intends to kill or to inflict grievous bodily harm upon the aggressor.*** If the accused resorts to such force as is likely to kill or inflict grievous bodily harm upon the aggressor, he must meet two conditions before the defense of self-defense will be available to him. They are:

(a) The circumstances must be such that a reasonably prudent person would believe that death or grievous bodily harm was to be inflicted upon himself by the aggressor. This is an objective test. The intoxication or emotional instability of the accused is not a relevant consideration. R.C.M. 916(e)(1)(A), MCM (1995 Edition); *United States v. Judkins*, 14 C.M.A. 452, 34 C.M.R. 232 (1964). Detached reflection under pressure or in a fast-moving situation is not, however, demanded. *United States v. Regalado*, 13 C.M.A. 480, 33 C.M.R. 12 (1963).

(b) The accused must believe that the force which he

used was necessary to protect himself from death or grievous bodily harm. R.C.M. 916(e)(1)(B), MCM (1995 Edition). This is a subjective test. The state of the sobriety or emotional stability of the accused is therefore a relevant factor to be examined. Thus, the resort to excessive force is justified if the accused believed that such force was necessary to repel the attack.

(c) R.C.M. 916(e)(1) allows the use of deadly force in cases of "homicide, assault involving deadly force, or battery involving deadly force." Therefore, the defense of self-defense is available whenever the factual circumstances involve deadly force, regardless of the specific assault offense with which the accused is charged.

(2) ***Self-defense when the accused offers to utilize a dangerous weapon or other means likely to produce death or grievous bodily harm.*** If the accused is charged with an offer-type assault with a dangerous weapon, means, or force, he / she may still claim self-defense even though not in fear of death or grievous bodily harm. Two conditions must be met:

(a) The accused, on reasonable grounds, must believe that bodily harm is about to be wrongfully inflicted. R.C.M. 916(e)(2)(A), MCM (1995 Edition). This is an objective reasonable fear of a simple battery.

(b) The accused, in order to deter the assailant, offered but did not actually apply or attempt to apply a means, force, or weapon which, if applied, would be likely to cause death or grievous bodily harm. R.C.M. 916(e)(2)(B), MCM (1995 Edition); *United States v. Lett*, 9 M.J. 602 (A.F.C.M.R. 1980). This is an objective evaluation of the conduct of the accused. This then is an example of a situation in which the accused is not strictly required to meet force with like force. An accused who is facing a nondeadly battery may ***offer*** deadly force to repel the attacker. For example:

-1- ***A*** is confronted by ***B***, an assailant. ***B*** raises his fist in order to strike ***A***. ***A***, in reasonable fear that he may be struck, picks up a tire iron and holds it over his head telling ***B*** that he'd better not come one step closer. ***B*** retreats. ***A*** has a valid claim of self-defense to a charge of assault with the dangerous tire iron.

-2- Assume the same facts, but this time ***A*** swings at ***B***, trying to hit him in the head with the tire iron. ***A*** cannot claim self-defense because this assault with a dangerous weapon in response to nondeadly force was of the attempt-type.

-3- Assume the same facts as in -2- above, but this time also assume that ***A*** reasonably believes ***B*** to be a 7th degree black belt who can kill with one blow. ***A***'s actual application of deadly force is now justified. R.C.M. 916(e)(1), MCM (1995 Edition).

(3) ***Self-defense when the accused uses less than deadly force***. If the accused resorts to the use of force to protect himself against harm from an aggressor, he may use such force as is reasonably necessary to accomplish that result. To determine what is reasonable, the following tests must be applied.

(a) The circumstances must be such that a "reasonably prudent man" would believe that bodily harm was about to be inflicted upon himself. R.C.M. 916(e)(3)(A), MCM (1995 Edition). This is an objective test.

(b) The accused must believe that the force he resorts to using is necessary to repel the attacker. R.C.M. 916(e)(3)(B), MCM (1995 Edition). This is a subjective test.

(c) The force used must be less than that which could reasonably be thought likely to produce grievous bodily harm or death. *Id.* This is an objective test. The "reasonably prudent person" standard would be used.

(4) In order to raise self-defense, "there must be some evidence from which a reasonable inference can be drawn that . . . self-defense was in issue. That evidence need not be compelling" nor must it support only that theory. *United States v. Shufford*, 7 M.J. 716, 719 (A.C.M.R. 1979). The defense may be raised even if an innocent bystander is injured. *United States v. Taliau*, 7 M.J. 845 (A.C.M.R. 1979). If more than one of the tests are reasonably raised, each must be instructed upon. *United States v. Thomas*, 11 M.J. 315 (C.M.A. 1981) and *United States v. Jones*, 3 M.J. 279 (C.M.A. 1977).

(5) ***Retreat***. R.C.M. 916(e)(4), MCM (1995 Edition) (discussion).

(a) *United States v. Smith*, 13 C.M.A. 471, 479, 33 C.M.R. 3, 11 (1963). ***Held***: "The doctrine of 'retreat to the wall' has no place in self-defense. . . . There is no categorical requirement of retreat. Rather, the opportunity to do so safely is only a single factor, to be considered by the triers of fact together with all the circumstances in evaluating the issue of self-defense." In *United States v. Hayden*, 13 C.M.A. 497, 33 C.M.R. 29 (1963), C.M.A. stated: ". . . [T]he opportunity to . . . [retreat] in safety is but one item to be considered with all other circumstances in determining whether the action taken was reasonably necessary." *See also Brown v. United States*, 256 U.S. 335 (1921); *United States v. Hubbard*, 13 C.M.A. 652, 33 C.M.R. 184 (1963); and *United States v. Carmon* 14 C.M.A. 103, 33 C.M.R. 315 (1963). Lack of retreat is still a factor to be considered in determining self-defense. *United States v. Clayborne*, 7 M.J. 528 (A.C.M.R. 1979); *United States v. Johnson*, No. 80-2027 (N.M.C.M.R. 14 August 1981).

(b) The MCM (1995 Edition) provides that available avenues of retreat is one factor to be considered in evaluating the reasonableness of the accused's apprehension and the necessity of the accused's actions. R.C.M. 916(e)(4), discussion, MCM (1995 Edition).

4. ***Defense of others***.

a. ***General rule***. A person may do in defense of another whatever the other could properly do in his own defense. Stated otherwise, a person may lawfully use force to protect another if the person protected would have been excused had he himself used such force to protect himself. *See* R.C.M. 916(e)(5), MCM (1995 Edition).

b. If the person aided was in fact the aggressor, the person aiding him is likewise an aggressor. *United States v. Styron*, 21 C.M.R. 340 (C.M.A. 1956); *United States v. Regalado*, 13 C.M.A. 480, 33 C.M.R. 12 (1963). This puts the "protector" on the same footing as the "protected." The latter can only use force if he believes on reasonable grounds that it is necessary to protect himself from impending bodily injury.

c. ***Exception to general rule***. The rule of common law is that, if a third party commits an assault in coming to the aid of another who is not entitled to commit an assault, then the third party may yet have a defense if he acted honestly and reasonably. *Perkins*, 1018-1022. In discussing defense of another, however, R.C.M. 916(e)(5), MCM (1995 Edition), merely states, ". . . the accused may not use more force than the person defended was lawfully entitled to use under the circumstances." In fact, the discussion following the MCM rule indicates that the accused, in coming to the aid of another, acts strictly at the accused's peril if the facts develop that the person aided had no lawful right to

self-defense. R.C.M. 916(e)(5), (discussion), MCM (1995 Edition).

5. ***Special privilege.*** There are certain situations where a special privilege exists to apply force to the person of another even though this is highly objectionable to the person to whom the force is applied. *See Perkins*, ch. 10, sec. 2.

a. ***Parent.*** A parent has the right to discipline his minor child by means of moderate chastisement. This authority will ***not*** excuse immoderate punishment and, if excessive force is used, it will constitute a battery. *See United States v. Winkler*, 5 M.J. 835 (A.C.M.R. 1978). A standard of reasonableness is the "majority rule," although it has been argued that the "minority" standard of malice has been adopted in the military. *Winkler, supra; United States v. Moore*, 30 C.M.R. 901 (A.F.B.R. 1960), *rev'd on other grounds*, 12 C.M.A. 696, 31 C.M.R. 282 (1962); *United States v. Schiefer*, 28 C.M.R. 417 (A.B.R. 1959). In *United States v. Brown*, 26 M.J. 148 (C.M.A. 1988), the court found the force used by the accused violated both the "improper motive" standard as well as the "reasonableness" standard. The distinction was held to be "academic" under the facts of the *Winkler* case, since the accused therein knew that his acts went beyond the scope of permissible physical discipline and were done with the knowledge that he was inflicting serious injury on his child.

b. ***Custodian.*** Any person entrusted with the care of small children or other incompetent persons may lawfully use reasonable force to accomplish acts necessary and incident to the exercise of their duty to care for such persons.

– ***Example***. Accused Singletary was charged with committing a lewd act upon a 7-year-old girl. He testified that, while serving as baby-sitter, the child was injured by striking the lower part of her body against the arm of a couch. He lowered her pants and saw a spot of blood on her privates. Then, in order to see where the blood was coming from, he inserted his index finger, to approximately the second knuckle, into the private parts of the child, and blood started coming down. The Board of Review set aside a finding of guilty of commission of a lewd act because the child had not been sworn prior to testifying against the accused. The board did consider the accused's testimony, as above-stated, as a judicial confession of assault and battery and affirmed a finding of guilty of that LIO of a lewd act. ***Issue***: Was this a judicial confession of assault and battery? ***Held***: No. C.M.A. stated:

> . . . [A]ssault and assault consummated by a battery involve a general criminal intent, actual or apparent, to inflict violence or harm upon another. . . . [A]ccused admitted the act of touching, but he also declared that he did such acts only for the purpose of examining an apparent injury to the child in order to determine its extent. Accused's stated purpose was beneficent and intended to aid the child rather than to offer it harm.

There was no other evidence before the court to show that the touching was unlawful. *United States v. Singletary*, 14 C.M.A. 146, 33 C.M.R. 358 (1963).

c. ***Rightful occupant of premises***. The rightful occupant of any premises, including the owner of a store as well as a home or other building, has a legal right to control it and to expel forcibly from the premises anyone who abuses the privilege by which he was initially allowed to enter and who fails to depart after being requested to do so and allowed a reasonable time to depart. *Regalado, supra*. When one with the right to do so has ordered another person from the premises, the latter has no right to refuse or resist.

(1) The invitee has no right of self-defense to a lawful expulsion. If he refuses to leave and resists ejection, he is guilty of battery.

(2) If, however, the rightful occupant of the premises, in ejecting another, uses more force than is reasonably necessary under the circumstances, then he is guilty of a battery and the person being ejected can legally use force to protect himself from such violence. *Regalado, supra*, and *United States v. Richey*, 20 M.J. 251 (C.M.A. 1985).

6. ***Coercion or duress.*** An accused may be legally excused from assaultive conduct if accused was acting under circumstances giving rise to the defense of coercion or duress. Such circumstances are usually equivalent to circumstances giving rise to self-defense or defenses of another. For a discussion of the duress defense, see section 1011 of this text.

E. ***Lawful consent.***

1. ***General rule.*** The lawful consent of the victim of an alleged battery is a defense. To be an assault, the act must be done without the lawful consent of the person affected. Part IV, para. 54c(1)(a), MCM (1995 Edition).

a. ***Consent obtained by duress.*** Submission obtained by threat of death or great bodily harm by one apparently able and willing to enforce his threat is ***not*** consent.

b. ***Consent obtained by fraud.*** Submission obtained by misrepresentation is not lawful and, hence, it is not a defense. Perkins, *Criminal Law*, ch. 9, sec. 3, pp. 856-861 (1957); *United States v. Outhier,* 42 M.J. 626 (N.M.Ct.Crim.App. 1995). *United States v. Brantner,* 28 M.J. 941 (N.M.C.M.R. 1989) (recruits' consent to acts of purported medical procedures did not make indecent contacts of recruiter lawful). In *Outhier,* where accused perpetrated fraud by posing as a Navy SEAL and corpsman, convinced victim that he was conducting session to teach drownproofing, bound victim's hands and feet, and caused him to jump into deep water, that fraud vitiated any consent by victim.

c. ***Capacity to consent.*** The consent will not be lawful if the person giving it is not legally capable of doing so. Perkins, *supra,* at 852-54.

(1) Some individuals cannot consent to certain acts because the law surrounds them with a protective status (e.g., infants, insane persons, etc.).

(2) There are some acts to which no one can lawfully consent.

(a) No one can lawfully consent to a battery that is likely to produce death or serious bodily injury. *United States v. Bygrave,* 46 M.J. 491 (C.A.A.F. 1997). Exception: Where the act, though dangerous, is necessary to protect the health or to save the life of the victim (e.g., a person with a defective heart could consent to a dangerous operation that might well result in death).

(b) No one can lawfully consent to an act that

constitutes a breach of the peace.

– ***Example.*** Sally ran out of her house chased by Rollo, who caught her in the street, knocked her down, kicked her, and bruised her mouth and lips with his fist. At Rollo's trial, she testified that she had consented to the beating, saying she "wouldn't even go with a man unless he slapped me around" and that she desired and required physical abuse before engaging in sexual intercourse. ***Held:*** Sally could not lawfully consent to the beating since it was a breach of the peace. *United States v. Holmes*, 24 C.M.R. 762 (A.F.B.R. 1957). *See also United States v. O'Neal*, 16 C.M.A. 33, 36 C.M.R. 189 (1966).

d. ***Scope of the consent.*** If the scope of the consent given is exceeded, then the force or violence will be unlawful.

– ***Example.*** A football player, by entering the contest, consents to such physical contact as is customarily incident to the game. If one player intentionally kicks another in the face, however, this would constitute a battery. Perkins, *supra*, at 852-54.

2. ***Implied consent to certain touchings.*** Certain touchings, which normally occur in the course of everyday living, are considered to be lawful because consent is implied from necessity.

Examples.

a. Grabbing another to prevent his falling;

b. bumping another while in a crowd; or

c. slapping a friend on the back as a greeting.

F. ***Voluntary abandonment.*** The affirmative defense of voluntary abandonment, as adopted in *United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987), may apply to attempt-type assaults. Although the *Byrd* case dealt with an attempted drug distribution, the rationale should apply to all attempt offenses regardless of which UCMJ article they are pled under. *See United States v. Hyska*, 29 M.J. 122 (C.M.A. 1989).

– ***Attempted battery.*** Attempt-type assaults are nothing more than attempted batteries; that is, overt acts beyond mere preparation in furtherance of a specific intent to commit battery. An accused who commits an attempt-type assault that does not result in a battery may be entitled to this defense if the failure to complete the battery was a

result of a voluntary abandonment of the criminal activity.

– ***Example.*** The accused commits an attempt-type assault by swinging a stick at the victim's head with the specific intent of striking the victim. In mid-swing, the accused has a change of heart and diverts the stick away from contact with the victim. Although this is a completed attempt-type assault, the accused voluntarily abandoned the target offense (battery) and is entitled to the voluntary abandonment affirmative defense.

The result differs if the victim sees the accused swing the stick. Here, we have both an attempt-type and an offer-type assault. Voluntary abandonment pertains only to the attempt-type assault. The accused can be found guilty of an offer-type assault even though he abandoned the intent to commit battery. The prosecution may be able to prevent a defense-requested voluntary abandonment instruction by clearly asserting the government's theory as an offer-type assault vice an attempt-type assault.

G. ***Character.*** The accused may offer evidence of a pertinent trait of character to prove that he acted in conformity with his character on the occasion at hand. In the area of assaults, the pertinent trait would be peaceableness. Mil.R.Evid. 404(a)(1) and para. 7-8 of DA Pam 27-9 (1982). *See* Chapter X of this study guide and Chapter VII of the *Evidence Study Guide*.

0811 SEX OFFENSES (Key Numbers 550, 553-576)

What follows is a brief outline of the more commonly encountered sex offenses. This discussion is included here because many, if not most, of these offenses involve assaults against the person of the victim. This section is not intended to be an exhaustive analysis, but rather a brief survey of the offenses noted.

A. ***Rape*** (Key Numbers 559-564). Article 120, UCMJ. Part IV, para. 45, MCM (1995 Edition). Prior to October 1992, a general definition of rape in the military was an accused's act of sexual intercourse with a female not his wife, perpetrated by force and without her consent. However, the 1993 Fiscal Year DOD Authorization Act (Pub. L. No. 102-484) included changes to the UCMJ—specifically Article 120 ***Rape***. The amendment made the offense gender-neutral and eliminated the spousal exception. Article 120(a) now reads: "any person subject to this chapter who commits an act of sexual intercourse . . . by force and without . . . consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct."

1. No specific intent is required by article 120. *United States v. Polk*, 48 C.M.R. 993 (A.F.C.M.R. 1974); *United States v. Pugh*, 9 C.M.R. 536, 542 (A.B.R. 1953) (intoxication not a defense).

2. Any penetration is sufficient to constitute the offense. Article 120, UCMJ; *United States v. Aleman*, 2 C.M.R. 269 (A.B.R. 1951), *petition denied*, 3 C.M.R. 150.

3. The statute's application only to female victims and male perpetrators is not a constitutional defect. *United States v. McCrary*, No. 437500 (A.C.M.R. 29 Dec 1978) (Unpublished).

4. Lack of consent and force as elements

a. "Without her consent" is equivalent to "against her will." *United States v. Short*, 4 C.M.A. 437, 16 C.M.R. 11 (1954).

b. The force required to commit the offense of rape is more than that which is incidental to the commission of the act of sexual intercourse ***unless*** resistance is futile or the victim fears death or grievous bodily harm. The element of force contemplates an application of force to overcome the victim's will and capacity to resist. *United States v. King*, 32 M.J. 558 (A.C.M.R. 1991); *United States v. Clark*, 32 M.J. 606 (A.C.M.R. 1991), *cert. denied*, 113 S. Ct. 1948, 123 L. Ed. 2d 653 (1994). *See also United States v. Palmer* 33 M.J. 7 (C.M.A. 1991), in which the court adopted a "constructive force" theory that a parent or other authority figure can exert a moral, psychological, or intellectual force over a child which is the compulsory equivalent of a threat or intimidation. In *United States v. Mathai*, 34 M.J. 33 (C.M.A. 1992), the court [*citing United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990)], held that ". . . more than the incidental force involved in penetration is required for conviction." Here, C.M.A. found such force where the accused brought an intoxicated female soldier to his office under compulsion of military order, she pushed him away and told him to stop, and there was credible evidence that she passed out and was unconscious when penetrated.

c. A child of tender years is incapable of consent. *Aleman, supra; United States v. Thompson*, 3 M.J. 168 (C.M.A. 1977); *United States v. Huff*, 4 M.J. 816 (A.C.M.R. 1978). (Because victim is under 16, proof of age is proof of nonconsent allowing fresh complaint evidence.)

d. No consent exists where victim is incompetent, unconscious, or sleeping. *United States v. Robertson*, 33 C.M.R. 828 (A.F.B.R. 1963), *petition denied*, 14 C.M.A. 328, 34 C.M.R. 108.

e. Consent is not retroactive. *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994) (Rape victim's failure to resist after discovering it was accused and not another

man who had penetrated her did not amount to consent).

f. Because both force and lack of consent must be shown to prove rape, the question of the degree of resistance may become a central issue. Part IV, para. 45c(1)(b), MCM (1995 Edition). The amount of resistance required is that degree appropriate to the circumstances. This does not require the victim to risk her life to fend off her attacker. In some circumstances, no resistance at all is required. *United States v. Henderson*, 4 C.M.A. 268, 15 C.M.R. 268 (1954). When a victim fails to take measures required under the circumstances, however, it opens the door for a permissible inference that she did consent. *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984) (Miller, J., concurring), *petition denied*, 19 M.J. 46 (C.M.A. 1984). For example, a failure to communicate lack of consent may raise an inference that the victim consented; however, this is a permissive inference only. *United States v. Clark*, 32 M.J. 606 (A.C.M.R. 1991), *cert. denied*, 113 S. Ct. 1948, 123 L. Ed. 2d 653 (1994).

g. A victim's cooperation with her assailant after her resistance is overcome by numbers, threats, or fear of great bodily harm is not consent. *United States v. Burt*, 45 C.M.R. 557 (A.F.C.M.R. 1972), *petition denied*, 45 C.M.R. 928; *United States v. Evans*, 6 M.J. 577 (A.C.M.R. 1978); *United States v. Lewis*, 6 M.J. 581 (A.C.M.R. 1978), *petition denied*, 6 M.J. 194 (1979).

h. Sexual intercourse resulting from fraud in the *factum* is rape because there is no legally recognizable consent.

(1) In *United States v. Booker*, 25 M.J. 114 (C.M.A. 1987), a case of first impression, the Court of Military Appeals addressed the issue of "What is fraud in the *factum* in the context of consensual intercourse?" *Id.* at 116. The court held that "the better view is that the '*factum*' involves both the nature of the act and some knowledge of the identity of the participant." *Id.* That is, "for there to be actual consent, a woman must be agreeable to the penetration of her body by a particular '*membrum virile*'." *Id.* n.2.

In *Booker*, the victim, while in a state of alcohol intoxication and extreme fatigue, consented to and engaged in sexual intercourse with the accused's friend. Subsequently, the accused engaged in sexual intercourse with the victim while the victim believed she was still with her original partner. Applying the court's definition of fraud in the *factum* to these facts, the court upheld the rape conviction holding that, while the victim had consented to sexual intercourse with a particular person, the accused took advantage of the victim's mistaken belief that he was that particular person—resulting in fraud in the *factum*.

(2) Consensual intercourse resulting from fraud in the inducement is not rape. Fraud in the inducement "includes such general ***knavery*** as: 'No,

I'm not married'; 'Of course I'll respect you in the morning'; 'We'll get married as soon as . . .'; 'I'll pay you ___ dollars'; and so on." *Booker, supra,* at 116. Here, the victim consents to penetration by a particular *membrum virile.*

i. An honest and reasonable mistake of fact as to the victim's consent ***is*** an affirmative defense to rape. *United States v. Baran,* 22 M.J. 265 (C.M.A. 1986); *United States v. Carr,* 18 M.J. 297 (C.M.A. 1984); *see also United States v. Booker,* 25 M.J. 114 (C.M.A. 1987) (instruction on mistake of fact to consent in rape case not objected to). Whether the mistake of fact is reasonable hinges on how the consent was communicated (i.e., was it "implied" or "express" consent?). "Implied" consent is communicated through the victim's conduct; "express" consent is communicated through "words or affirmative acts manifesting agreement." *Booker, supra,* at 117; *United States v. King,* 32 M.J. 558 (A.C.M.R. 1991). Both "implied" and "express" consent can be actual consent. *Id.* Mistake of fact will arise most often in "implied" consent cases. Here, the accused mistakenly infers consent from the victim's conduct when the victim did not actually consent. Although the accused's mistaken belief was honest, the real issue is: Would a reasonable man under the circumstances have inferred consent from the victim's behavior? If the answer is yes, then the accused's mistake of fact was both honest and reasonable, and the affirmative defense should prevail. In *United States v. Langley,* 33 M.J. 278 (C.M.A. 1991), the court held, in an assault with intent to commit rape, at some point during the assault the accused must have had the specific intent to commit each element of rape. In such a case, an accused's claimed mistake of fact as to the victim's consent need only be honest.

5. Whether accused should be convicted of rape and other related offenses arising out of same event is largely a question of fact. *See United States v. Gibson,* 11 M.J. 435 (C.M.A. 1981) (accused should not have been convicted of both attempted rape and assault with intent to rape); *United States v. Williams,* 8 M.J. 826 (A.F.C.M.R. 1980) (permissible to convict accused of rape and kidnapping); *United States v. Glover,* 16 M.J. 397 (C.M.A. 1983) (permissible to convict accused of rape and assault with a dangerous weapon); *United States v. Hollimon,* 16 M.J. 164 (C.M.A. 1983) (impermissible to convict accused of rape and communicating a threat); *United States v. Valenzuela,* 16 M.J. 305 (C.M.A. 1983) (impermissible to convict accused of attempted rape and aggravated assault); *United States v. Martin,* 21 M.J. 730 (N.M.C.M.R. 1985) (permissible to acquit accused of rape, but convict of indecent assault involving initial sexual contact when there is no proof of consent to initial touching); *United States v. Watkins,* 21 M.J. 224 (C.M.A. 1986) (assault consummated by battery not multiplicious with rape when facts supporting assault occur before rape and did not constitute actual force used to accomplish rape). *See also United States v. Perry,* 16 C.M.A. 221, 36 C.M.R. 377 (1966) (assaults before rape upheld).

6. The *Manual* seems to authorize the death penalty for rape at Part IV, para. 45(e)(1). The Supreme Court, however, ruled that death was an excessive penalty for the crime of rape. In *Coker v. Georgia,* 433 U.S. 584 (1977), the court noted that only the state of Georgia imposed the death penalty for the rape of an adult woman. The court agreed

that the death penalty was cruel and unusual in most rape cases since the victim was still alive. The *Manual* may avoid these constitutional limitations by imposing a separate hearing procedure in capital cases and precluding the death penalty in rape cases, except when the victim is under 12 or the victim is maimed or also the victim of attempted murder. R.C.M. 1004(c)(9)(A) and (B). *See United States v. Sykes*, 32 M.J. 791 (N.M.C.M.R. 1990), where the court held that rape charges against the accused were "capital" in nature and could not be referred to a special court-martial without the consent of the general court-martial convening authority, regardless of whether the death penalty could actually be imposed on the accused for his alleged rape of an adult woman.

B. ***Carnal knowledge*** (Key Numbers 559-564). Article 120, UCMJ. Part IV, para. 45, MCM (1995 Edition). Prior to February 1996, a general definition of carnal knowledge was an act of sexual intercourse under circumstances not amounting to rape by a person, with a female not his wife who has not attained the age of 16 years. The 1996 Fiscal Year DOD Authorization Act (Pub. L. No. 104-106) included changes to the UCMJ which amended article 120. The amendment made the offense of carnal knowledge gender neutral and created a mistake of fact exception for the age of the victim. Article 120(b) now reads: "any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person... who is not that person's spouse..., and who has not attained the age of sixteen years" is guilty of carnal knowledge.

1. A reasonable belief that the victim had attained the age of sixteen years is an affirmative defense, provided that the victim had actually attained the age of twelve years. The accused has the burden of proving mistake of fact as to age by a preponderance of the evidence. See Article 120(d), R.C.M. 916(b), and R.C.M. (j)(2).

2. The victim is not an "accomplice" for purposes of witness credibility instruction. *United States v. Cameron*, 34 C.M.R. 913, 925-26 (A.F.B.R. 1964).

3. The MCM (1995 Edition) specifically deletes carnal knowledge as an LIO of rape and advises separate pleadings in proper cases. Part IV, para. 45, drafters' analysis, MCM (1995 Edition), app. 21-96.

C. ***Sodomy*** (Key Numbers 565-570). Article 125, UCMJ; Part IV, para. 51, MCM (1995 Edition). The engaging in unnatural carnal copulation, either with another person of the same or opposite sex or with an animal, constitutes the offense of sodomy.

1. The prohibition of "unnatural and carnal copulation" is not unconstitutionally vague. *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978).

2. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court rejected the notion that consensual homosexual sodomy is protected under the Constitution.

In upholding a Georgia sodomy statute, the Court ruled that the Bill of Rights did not protect this form of sexual activity. The Court refused to apply the right of privacy to homosexual acts of sodomy since they lack the ties to family, marriage, or procreation. The Court declined to address consensual acts within the marital relationship. *See Scoby, supra; see also Doe v. Commonwealth's Attorney for Richmond,* 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd,* 425 U.S. 901 (1976) (upholding Virginia's consensual sodomy statute). *See also United States v. Henderson,* 34 M.J. 174 (C.M.A. 1992), in which the court held heterosexual fellatio to be unnatural carnal copulation within the statutory prohibition of Article 125, and that no constitutional right of privacy prevents the criminalization of the act, even in private and between consenting adults. Compare this decision with *United States v. Fagg,* 34 M.J. 179 (C.M.A. 1992), a case which involved a young Airman who, as Judge Cox put it: "cut a rather wide swath through the pubescent female population of Altus, Oklahoma."

3. "Unnatural carnal copulation" includes both fellatio and cunnilingus. *United States v. Harris,* 8 M.J. 52 (C.M.A. 1979).

4. The defense is entitled to an accomplice instruction when the victim participates voluntarily in the offense. *United States v. Goodman,* 13 C.M.A. 663, 33 C.M.R. 195 (1963); *but cf. United States v. Cameron,* 34 C.M.R. 913 (A.F.B.R. 1964).

5. Attempted rape and forcible sodomy arising out of the same transaction are separately punishable. *United States v. Dearman,* 7 M.J. 713 (A.C.M.R. 1979) (Burglary, rape, and sodomy were all separately punishable offenses since different societal norms were violated in each instance. Burglary is a crime against the habitation, rape an offense against the person, and sodomy an offense against morals.); *accord United States v. Rose,* 6 M.J. 754 (N.C.M.R. 1978).

D. ***Indecent assault*** (Key Numbers 553-558, 595-600). Article 134, UCMJ; Part IV, para. 63, MCM (1995 Edition). The taking of indecent, lewd, or lascivious liberties with a person of a female not the spouse of the accused, without consent and against will, with intent to gratify lust or sexual desires, constitutes the offense of indecent assault.

1. The offense is not limited to male accused or to female victims. *See United States v. Gipson,* 16 M.J. 839 (N.M.C.M.R. 1983).

2. It is a nonconsensual offense requiring assault or battery.

3. It requires accused's specific intent to gratify lust or sexual desires. *United States v. Jackson,* 31 C.M.R. 738, 741 (A.F.B.R. 1962).

4. Indecent assault is an LIO of rape. *United States v. Wilson,* 13 M.J. 247 (C.M.A. 1982); *United States v. Sampson,* 7 M.J. 513 (A.C.M.R. 1979).

5. Maximum confinement penalty: 5 years.

E. ***Assault with intent to commit rape, sodomy, or other specified felony. Article 134, UCMJ.*** Part IV, para. 64, MCM (1995 Edition).

1. These are specific intent offenses. *United States v. Rozema*, 33 C.M.R. 694, 698 (A.F.B.R. 1963).

2. *See* discussion on article 134 assaults, section 0809, *supra*.

F. ***Adultery.*** Article 134, UCMJ. Part IV, para. 62, MCM (1995 Edition). Adultery is still an offense under military law, regardless of whether or not it is an offense under the law of the state where the act occurred. *United States v. Johanns*, 20 M.J. 155 (C.M.A. 1985), *cert. denied*, 474 U.S. 850 (1986). In *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986), the appellant argued his plea of guilty to adultery made his conviction of rape legally inconsistent. Chief Judge Everett concluded that people are guilty of adultery if either party is married to another, but that purely private sexual intercourse by unmarried persons is not punishable. The Chief Judge then examined the crimes of rape and adultery. The court concluded that, while adultery is ***not*** an LIO of rape, Congress did not intend an accused to be convicted of both offenses arising out of a single act. The court dismissed the adultery specification. *But see United States v. Ambalada*, 1 M.J. 1132 (N.C.M.R. 1977), *petition denied*, 3 M.J. 164 (C.M.A. 1977).

G. ***Indecent acts with another*** (Key Numbers 571-576). Article 134, UCMJ; Part IV, para. 90, MCM (1995 Edition).

1. Indecent acts are defined as that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations. Part IV, para. 90c, MCM (1995 Edition). It can be difficult to determine exactly what acts meet the above standards. In *United States v. Stocks*, 35 M.J. 366 (C.M.A. 1992), the court held that oral foreplay, not amounting to sodomy, between consenting heterosexual adults in private, is not a criminal offense under the UCMJ.

– ***Example.*** Dancing naked in front of minor children constitutes indecent acts with another. *United States v. Thomas*, 25 M.J. 75 (C.M.A. 1987) (comparing indecent acts with another and indecent exposure).

2. ***No specific intent is required.*** *United States v. Jackson*, 31 C.M.R. 738 (A.F.B.R. 1962).

3. ***Victim's participation is required.*** The offense requires that the victim participate in the act. *United States v. McDaniel,* 39 M.J. 173 (C.M.A. 1994) (Victim participation found when Air Force recruiter directed recruits to disrobe and jump up and down on scales purportedly to get an accurate weight measurement while he clandestinely videotaped them from another room).

4. **Lesser included offenses.**

a. ***Indecent assault.*** *United States v. Carter,* 39 C.M.R. 293 (C.M.A. 1969).

b. ***Attempted rape.*** *United States v. Anderson,* 9 M.J. 530 (A.C.M.R. 1980).

H. ***Indecent acts or liberties with a child under 16*** (Key Numbers 571-576, 753-758). Article 134, UCMJ; Part IV, para. 87, MCM (1995 Edition).

1. Consent is no defense.

2. There must be evidence of a specific intent to gratify the lust or sexual desires of the accused ***or*** victim. *United States v. Johnson,* 35 C.M.R. 478 (C.M.A. 1965).

3. Two theories of misconduct are described in Part IV, para. 87b, MCM (1995 Edition).

a. Indecent acts involve physical contact. *United States v. Payne,* 19 C.M.A. 188, 41 C.M.R. 188 (1970) (accused placed hand between child's legs); *United States v. Sanchez,* 11 C.M.A. 216, 29 C.M.R. 32 (1960) (accused exposed penis to child while cradling child in his arms). The physical contact need not be directly on the victim's genitals. Touching an area in close proximity or the immediate area around the genitals is sufficient to allege this offense. *United States v. Cuellar,* 22 M.J. 529 (N.M.C.M.R. 1986), *cert. denied,* 493 U.S. 811 (1986). *See also United States v. Romey,* 32 M.J. 180 (C.M.A. 1991), *cert. denied,* 502 U.S. 924 (1991).

b. Indecent liberties involve no physical contact, but act must be taken within the physical presence of the child. *United States v. Talbert,* 33 M.J. 244 (C.M.A. 1991) (Air Force major removed sleepwear from three young girls and photographed and videotaped their exposed buttocks and pubic areas); *United States v. Brown,* 3 C.M.A. 454, 13 C.M.R. 10 (1953) (accused's exposure of his penis to two young girls constituted an indecent liberty); *United States v. Scott,* 21 M.J. 345 (C.M.A. 1986) (reaffirming *Brown* decision); *United States v. Ramirez,* 21 M.J. 353 (C.M.A. 1986) (masturbation in presence of 9- and 10-year-old constitutes indecent liberties); *United States v. Orben,* 28 M.J. 172

(C.M.A. 1989) (display of picture of nude persons to young people may constitute taking indecent liberties if prohibited intent exists).

4. There must be some evidence of victim's age and marital status. *United States v. Estrella*, 21 M.J. 782 (A.C.M.R. 1986). (Conviction upheld despite prosecutor's failure to place age and status into evidence. Other evidence such as victim's responses to questions, demeanor on stand, and testimony to certain questions sufficed.)

I. ***Indecent exposure*** (Key Numbers 753-758). Article 134, UCMJ; Part IV, para. 88, MCM (1995 Edition).

1. ***Negligent exposure is insufficient.*** The offense requires a willful exposure to public view. Part IV, para. 88c, MCM (1995 Edition).

a. Charges of indecent exposure were filed against the accused when two air policemen observed him naked and drying himself in the upstairs rear bedroom window of his quarters. His court-martial conviction of negligent exposure was overturned. ***Held***: Negligent exposure not punishable under UCMJ. *United States v. Manos*, 8 C.M.A. 734, 25 C.M.R. 238 (1958).

b. The evidence was insufficient to sustain the accused's conviction of three specifications of indecent exposure where it appeared that, in each instance, the accused was observed nude in his own apartment by passers-by in the hallway looking in the partly open door of the apartment, but in none of the incidents did it appear that the accused made any motions, gestures, spoke, or otherwise indicated he was aware of the presence of persons in the hallway, or sought in any manner to attract their attention. Such evidence is as consistent with negligence as with purposeful action, and negligence is an insufficient basis for a conviction of indecent exposure. *United States v. Stackhouse*, 16 C.M.A. 479, 37 C.M.R. 99 (1967); *accord United States v. Ardell*, 18 C.M.A. 448, 40 C.M.R. 160 (1969).

c. A plea of guilty to indecent exposure was not rendered improvident by stipulated evidence that the accused did nothing to attract attention to himself and may not even have been aware of the presence of the young females who saw him where it was admitted the accused had exposed himself in the children's section of the base library, a place so public an intent to be seen must be presumed. *United States v. Burbank*, 37 C.M.R. 955 (A.F.B.R.), 38 C.M.R. 441 (C.M.A. 1967).

2. ***"Public" exposure***. To be criminal, the exposure need not occur in a public place—but only be in public view. *United States v. Moore*, 33 C.M.R. 667 (C.G.B.R 1963) (accused who exposed his penis and made provocative gestures while joking with fellow seamen on board ship was guilty of indecent exposure).

3. ***Exposure must be "indecent."*** Nudity per se is not indecent; there is nothing lewd or morally offensive about an unclothed male among others of the same sex. *United States v. Caune*, 22 C.M.A. 200, 46 C.M.R. 200 (1973) (accused's conduct in removing all his clothing in the semiprivacy of an office and in the presence of other males, including his military superiors, may have been contemptuous and disrespectful, but did not constitute the offense of indecent exposure).

J. ***Wrongful cohabitation*** (Key Numbers 753-758). Article 134, UCMJ. Part IV, para. 69, MCM (1995 Edition).

1. It is not necessary to prove sexual intercourse. *United States v. Melville*, 8 C.M.A. 597, 25 C.M.R. 101 (1958).

2. The evidence must show that accused was openly and publicly dwelling or living with another as man and wife, but not that one was married to a third party. *Melville, supra.*

K. ***Fornication.*** Not a per se UCMJ violation. *United States v. Snyder*, 1 C.M.A. 423, 4 C.M.R. 15 (1952); *United States v. Shober*, 26 M.J. 501 (A.F.C.M.R. 1986). However, context in which the sex act is committed may constitute an offense (e.g., public fornication, fraternization, etc.). *See United States v. Berry*, 6 C.M.A. 609, 20 C.M.R. 325 (1956), where the court upheld a conviction under article 134 of two soldiers who took two German girls to a Berlin hotel room where each soldier had intercourse with each of the girls in open view. The court found such "open and notorious" conduct to be service-discrediting. *See also Hickson, supra.* Clearly, as the court held in *United States v. King*, 34 M.J. 95 (C.M.A. 1992), simple fornication, without more, is not a military offense. Although there could be such "conditions of publicity or scandal" as might bring a particular case of fornication within the area of conduct given over to the police responsibility of the military establishment, "such circumstances ***must be alleged and proved.***"

L. ***Voyeurism.*** Not really a sex crime, but rather an aggravated form of disorderly conduct punishable under article 134. *See United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978).

M. ***AIDS-related cases.***

1. ***General Article.*** In the case of *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989), the Court of Military Appeals decided that a specification alleging conduct prejudicial to good order and discipline stated an offense, under a reckless endangerment theory, for engaging in unprotected sexual intercourse after having been diagnosed as having the AIDS virus. The court found that the specification was not fatally defective though there was no allegation of lack of consent by the accused's sex partner and despite an absence of

traditional words of criminality (such as "wrongfully"), though the court expressed a preference for such words in a "novel" specification. In the case of *United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990), the court likewise held that the accused's actions in willfully and deliberately exposing another servicemember to the risk of contracting HIV rises to the level of conduct that is prejudicial to good order and discipline. The court held that an act of unprotected sexual intercourse between an HIV-infected accused and another servicemember, alleged as in "wanton disregard of human life" under article 134, states an offense.

2. ***Aggravated assault.*** *United States v. Stewart*, 29 M.J. 92 (C.M.A. 1989) (accused committed aggravated assault by exposing the victim to HIV). Testimony that there was a 30-50 percent chance of death resulting from exposure to the virus was sufficient to infer that the means used was likely to produce death or grievous bodily harm. *See also United States v. Johnson*, 27 M.J. 798 (A.F.C.M.R. 1988), *aff'd*, 30 M.J. 53 (C.M.A. 1990), *cert. denied*, 498 U.S. 919 (1990). Furthermore, in *United States v. Perez*, 33 M.J. 1053 (A.C.M.R. 1991), the court held the evidence insufficient to support a conviction of assault consummated by a battery because the government failed to prove that the accused had the ability to assault the victim by transmitting the HIV virus. In that case, the defense expert testified that the accused's vasectomy rendered his semen acellular and therefore unable to transmit the AIDS virus during intercourse. This evidence was not rebutted by the government. The government lost this case. However, in *United States v. Joseph*, 33 M.J. 960 (N.M.C.M.R. 1991), the evidence was sufficient to support a conviction for aggravated assault where the government proved the accused (1) knew he had tested positive for HIV, but had (protected / condom) sexual intercourse with a female reservist; (2) knew that HIV could be transmitted through sexual intercourse and that a condom was not a guarantee against transmission; and (3) had sexual intercourse without revealing to her that he was HIV-positive.

3. ***Violation of a safe sex order.*** *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) (safe sex order issued by commander to servicemember infected with AIDS did not violate any constitutionally protected privacy interest). *See also United States v. Sargeant*, 29 M.J. 812 (A.C.M.R. 1989) and *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990), *cert. denied*, 498 U.S. 854 (1990).

0812 DISTURBANCE OFFENSES

This section considers offenses that constitute disturbances of the peace. Not only are traditional breach of the peace offenses included, but offenses that do not have a readily identifiable counterpart in civilian law are also encompassed (e.g., provoking words and gestures). All of these offenses have a certain propensity for disruption of the peace of the community. The offenses are: Provoking words and gestures, a violation of article 117;

communication of a threat, a violation of article 134; breach of the peace, a violation of article 116; disorderly conduct, a violation of article 134; and riot, a violation of article 116.

0813 PROVOKING SPEECHES AND GESTURES. Article 117, UCMJ, and Part IV, para. 42, MCM (1995 Edition).

A. ***Text of Article 117, UCMJ.***

> Any person subject to this chapter who used provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.

B. ***Essential elements.***

1. That the accused wrongfully used words or gestures toward a certain person;

2. that the words or gestures were provoking or reproachful; and

3. that the person toward whom the words or gestures were used was a person subject to the code.

4. Note that Part IV, para. 42c(2), MCM (1995 Edition), specifically indicates that knowledge that the victim is a person subject to the code is ***not*** an element. Prior to the adoption of the MCM (1995 Edition), there was conflicting authority on knowledge of the victim's status. *Compare United States v. Bowden*, 24 C.M.R. 540 (A.F.B.R. 1957), *petition denied*, 8 C.M.A. 767, 24 C.M.R. 311 (1957) (knowledge of victim's status is not an element) with *United States v. Lacy*, 10 C.M.A. 164, 27 C.M.R. 238 (1959). (It was "assumed without deciding" that knowledge was an element.) Change 1 to para. 3-85 of the *Military Judges' Benchbook*, DA Pam 27-9 (1982), now specifically excludes knowledge as an element.

C. ***Scope of article 117.***

1. It applies only if the conduct is towards another person subject to the code.

2. It prohibits ***four types*** of ***conduct***:

   a. Provoking words;

   b. provoking gestures;

c. reproachful words; and

d. reproachful gestures.

3. "This Article (117) is designed to prevent the use of violence by the person to whom such speeches and gestures are directed, and to forestall the commission of an offense by an otherwise innocent party." *United States v. Holiday*, 4 C.M.A. 454, 458, 16 C.M.R. 28, 32 (1954); *United States v. Thompson*, 22 C.M.A. 88, 46 C.M.R. 88 (1972). *See United States v. Davis*, 37 M.J. 152 (C.M.A. 1993) for discussion.

D. ***Constitutionality of article 117.*** The text of article 117 is very similar to that of a Georgia statute struck down by a Federal court on grounds of vagueness. *See Wilson v. Gooding*, 303 F. Supp. 952 (N.D. Ga. 1969), *aff'd*, 431 F.2d 855 (5th Cir. 1970). In striking down the Georgia statute, the court said that the requirement that the language must tend to cause a breach of the peace did not save it from being vague. It is noteworthy that the MCM defines "provoking and reproachful" words and gestures as those which are used in the presence of the person to whom they are directed and which tend to induce breaches of the peace. Nonetheless, the Coast Guard Court of Review held, in *United States v. Peak*, 44 C.M.R. 658 (C.G.C.M.R. 1971), that ". . . Article 117 of the Code is distinguishable from the outlawed Georgia statute despite the *Manual*'s utilization of the standard of tending to induce breaches of the peace. The UCMJ offense has roots going back 800 years. . . . As a result of its long history and the large number of cases, the military offense has acquired content and meaning and limitations; it does not 'leave wide open the standard of responsibility.'" *Id.* at 661.

E. ***Definitions.***

1. "Toward" means in the presence of and directed to a certain individual.

a. Words spoken about another, no matter how provoking, do not constitute this offense if that person was not present when they were spoken.

b. However, a gesture made behind another's back and unknown by him, but observed by a third person, may constitute a violation of this article. *United States v. Hughens*, 14 C.M.R. 509 (N.B.R. 1954).

c. The words or gestures need not actually be addressed to the victim so long as they are directed toward him.

> ***Example.*** ***A*** speaking to ***B***, says in the presence of **C**: "I don't talk to persons who are abysmal idiots, such as ***C*** here."

2. "Provoking" means to incite, irritate, or enrage another (e.g., "you yellow-bellied coward").

3. "Reproachful" means to express censure, blame, discredit, or disgrace concerning one's life or character (e.g., an accusation of maternal incest).

F. ***Sufficiency and the evidence.***

1. "Incitement of the victim to immediate action is the evil to be prevented and the crucial inquiry into the sufficiency of the evidence is the extent to which the words or gestures tend to do this." *United States v. Thompson*, 22 C.M.A. 88, 46 C.M.R. 89 (1972). Thus, if the words appear to be provoking on their face, they may nonetheless fail to amount to a violation of the article because of the circumstances under which they were used. For example, in *Thompson*, the accused said, "Don't yell at me or I'll wring your ____ neck." At the time he spoke, however, he was behind bars and was speaking to a guard on the outside of the cell. The court said that "there was no reasonable tendency that the accused's words would provoke a breach of the peace," primarily because it did not believe that a reasonable guard would unlock and enter the cell in order to respond to the accused's words. *Id.* at 90.

2. Whether conditional provoking words fail to amount to an offense has not yet been decided, although it was discussed in *United States v. Rockenbach*, 43 C.M.R. 805 (A.C.M.R. 1971). In that case the accused said to the victim, "If we have to go to court . . . [and] if you say I physically held you back ... I'll rip your head off." The court noted that the accused had not, in fact, physically held the victim back and, consequently, if the victim had so testified, he would have perjured himself. "Thus, it may be argued that the 'words uttered expressed a contingency that neutralized the declaration, since there was not a reasonable possibility that the uncertain even would happen.'" *Id.* at 806, *quoting United States v. Shropshire*, 20 C.M.A. 374, 43 C.M.R. 214 (1971).

3. There is no requirement that the victim be senior or junior to, or in the same armed force as, the accused.

4. The MCM anticipates one potentially awkward situation by providing that this offense does not include "reprimands, censures, reproofs, and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces." Part IV, para. 42c(1), MCM (1995 Edition).

G. ***Defenses.***

1. Since this is a general intent offense [*United States v. Bowden*, 24 C.M.R. 540 (A.F.B.R. 1951), *petition denied*, 8 C.M.A. 767, 24 C.M.R. 311 (1957)], voluntary intoxication would not appear to be a defense. If, however, lack of knowledge is an affirmative defense or an element, then intoxication could be a defense under some circumstances. For example, in the *Lacy* case, *supra*, the accused was intoxicated at the time of the offense. The court intimated that intoxication of the degree which would have "sufficiently dulled" the accused's mental faculties so as to "interfere with his capacity to identify the persons involved" would have been a defense. *Id.* at 240. Remember, however, that the knowledge element appears to have been eliminated by Part IV, para. 42c(2), MCM (1995 Edition). Even the *Bowden* case, *supra*, states that "We have no doubt that there is involved in the offense a scienter, or general criminal intent—or even knowledge—but such matters have to do with the character of the speech or gestures. . . ." *Id.* at 544. Thus, if the accused were so intoxicated that he did not know that his words or actions were provoking, it would appear that he would have a defense.

2. If the circumstances under which the provoking words are uttered reveal that there was no reasonable tendency that the accused's words would provoke a breach of the peace, then the accused will have a defense to the charge. *Thompson, supra.* Therefore, if the accused can show that the circumstances under which he said the words alleged would not have given rise to a likely breach of the peace, he may escape conviction of the offense (e.g., if the accused said the provoking words in the course of a long-distance telephone call, it would be debatable whether the words would have the required "reasonable tendency").

H. ***Related offenses.***

1. ***Communication of a threat is a related offense.*** *See United States v. Reid*, 42 C.M.R. 573 (A.C.M.R. 1970); *United States v. Cooper*, 34 C.M.R. 615 (A.B.R. 1963); and *United States v. Hazard*, 8 C.M.A. 530, 25 C.M.R. 34 (1957).

2. ***Disrespect can also be related to this offense.*** *United States v. Lacy*, 10 C.M.A. 164, 27 C.M.R. 238 (1959).

I. ***Pleading.*** Part IV, para. 42f, MCM (1995 Edition).

1. ***Sample specification.***

Charge. Violation of the Uniform Code of Military Justice, Article 117

Specification. In that [Name, etc, and personal jurisdiction data], did, [at / on board (location)], on or about [date], wrongfully use provoking words, to wit: "You are too much of a coward to step across the line," or words to that effect, towards Seaman Henry P. Howards, U.S. Navy.

2. ***Other possible allegations.***

a. Wrongfully use reproachful words;

b. wrongfully use provoking gestures; and

c. wrongfully use reproachful gestures.

0814 COMMUNICATING A THREAT. Article 134, UCMJ; Part IV, para. 110, MCM (1995 Edition). (Key Numbers 613-618)

A. ***Essential elements.***

1. That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

2. that the communication was made known to that person or to a third person;

3. that the communication was wrongful; and

4. "C to P" or "SD."

B. ***"Threat"—defined.*** A threat is an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. *United States v. Sturmer*, 1 C.M.A. 17, 1 C.M.R. 17 (1951) and *United States v. Kelly*, 9 C.M.A. 26, 25 C.M.R. 288 (1958). *See also United States v. Alford*, 34 M.J. 150 (C.M.A. 1992).

1. Even though the threat is conditional, it is nevertheless an offense unless the condition negated a present determination to injure (presently or in the future) or

unless the condition was one the accused had a right to impose. In *United States v. Shropshire*, 20 C.M.A. 374, 43 C.M.R. 214 (1971), C.M.A. held that the words, "if you take this restraining gear off, I'll show you what I will do to you," were insufficient to state a threat because the threat was conditioned on a variable that would not reasonably occur. In addition, in *United States v. Gately*, 13 M.J. 757 (A.F.C.M.R. 1982), it was held that the words "if this were the civilian world . . . he (accused) would take his .357 magnum and shoot him (victim) six times between the eyes" did not constitute communicating a threat. The conditional words neutralized the threat, particularly in a setting which could never be the "civilian world." (However, an LIO of using provoking words was affirmed.) For a contrary example, consider the case of *United States v. Johnson*, 49 C.M.R. 278 (A.C.M.R. 1974). In that case, the threat was couched in the following terms, "[You'd] better take another cop with you, because I would try to kick the ___ out of you." The accused had just been arrested for a traffic offense by the policeman to whom the words were addressed and the accused had just learned that the same policeman might escort him alone back to the base. The court held that the words evidenced an intent to injure rather than a desire to avoid an altercation since the contingency expressed by the accused would very likely occur. *See also United States v. Reed*, 34 M.J. 282 (C.M.A. 1992), in which the accused stole his roommate's car and left a note stating that, if the roommate tried to track him down, he would "be hit and one morning just might not wake up," and that his sister "might get a visit." The *Reed* court held conditional threats were an offense, provided the condition is one the accused has no right to impose [*citing United States v. Holiday*, 16 C.M.R. 28 (C.M.A. 1954)], and provided that the condition is not hypothetical or impossible (*citing Shropshire, supra*). Likewise, the court, in *United States v. Alford*, 34 M.J. 150 (C.M.A. 1992), examined this issue when the accused told the victim that, if the victim reported the accused's assault upon him to the guard, the accused would kill the victim. The court held the accused had no right to impose such a condition and that the imposition of such a condition did not negate a present intention to injure.

2. A threat to injure property or reputation, as well as a threat of personal injury, constitutes this offense. *United States v. Frayer*, 11 C.M.A. 600, 29 C.M.R. 416 (1960). The accused in *Frayer* threatened his victim by communicating to him a threat to falsely accuse him of having committed unspecified offenses and to get others to make false statements against him. *See United States v. Sulima*, 11 C.M.A. 630, 29 C.M.R. 446 (1960).

a. The threat must constitute a threat to injure as connoted from the word's ordinary meaning or proof of some particular meaning in the environment in which it is made. Hence, if the accused told his victim that "I'm going to pass the word on you," the offense will not be consummated unless the prosecution can offer some evidence of a special meaning in the military environment. *United States v. Bush*, 47 C.M.R. 532 (C.G.C.M.R. 1973).

b. The mere statement of intent to commit an unlawful act not

involving injury to the person, property, or reputation of another does not constitute this offense. Part IV, para. 110c, MCM (1995 Edition). Additionally, it has been held that a mere invitation to fight is not a threat. On the other hand, disclaimers of involvement such as "I am not personally going to do anything to you, but in two days you are going to be in a world of pain. I would suggest you damn well better sleep light," will be looked at in light of the totality of the circumstances, and C.M.A. is not prone to react favorably to such disclaimers. *United States v. Jenkins*, 9 C.M.A. 381, 26 C.M.R. 161 (1958). *United States v. Johnson*, 21 C.M.A. 279, 45 C.M.R. 53 (1972).

c. In *United States v. Hill*, 22 C.M.A. 521, 48 C.M.R. 6 (1973), the court applied the "totality of the circumstances" test to a lovers' quarrel in which the scorned male told his estranged girlfriend that "she'd better not make him mad or he'd hit her." Although this case might have been disposed of on a conditional threat theory, the court looked at the overall facts to reverse the article 134 conviction.

C. ***Required intent.***

1. ***This is a general intent offense.*** The prosecution need not prove that the accused actually entertained the stated intention. *United States v. Humphreys*, 7 C.M.A. 306, 22 C.M.R. 96 (1956). The offense is complete when an avowed determination to injure another is announced or otherwise communicated. *United States v. Holiday*, 4 C.M.A. 454, 16 C.M.R. 28 (1954). The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. The presence or absence of an actual intention to effectuate the injury set out in the declaration does not change the elements of the offense. This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated, and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal that it was made as a mere jest or in idle banter. *United States v. Shropshire*, 20 C.M.A. 374, 43 C.M.R. 214 (1971). *United States v. Moody*, 3 M.J. 729 (A.C.M.R. 1977) and *United States v. Harrigan*, 1 M.J. 550 (A.F.C.M.R. 1975).

2. ***A statement made in jest or idle banter is not a threat.*** If such an issue is reasonably raised, it must be instructed upon. *United States v. Davis*, 6 C.M.A. 34, 19 C.M.R. 160 (1955). One of the factors to consider is the understanding of the persons to whom the statement is made. *United States v. Gilluly*, 13 C.M.A. 458, 32 C.M.R. 458 (1963).

D. ***Communication.*** The threat can be communicated to the person threatened or to a third person. It is not necessary that the threat be communicated to the person threatened. ***A*** has committed this offense if he tells ***B*** that he intends to injure ***C***. *United States v. Rutherford*, 4 C.M.A. 461, 16 C.M.R. 35 (1954); *Gilluly, supra*; and *United States v.*

Harrigan, 1 M.J. 550 (A.F.C.M.R. 1975). "The offense . . . is not rendered more or less serious as a result of the threat being made directly or to a third person." *Harrigan, supra*, at 551.

E. ***Wrongful communication***. The communication must be wrongful and without justification or excuse.

1. ***Example***. If ***A***, a challenger for the All-Navy heavyweight boxing title, says, "I'm going to deck ***B*** (the champ) with one punch," referring to their upcoming bout, no offense has been committed.

2. If the issue of legal justification or excuse is reasonably raised, it must be instructed upon. *See Davis, supra; United States v. O'Neal*, 26 C.M.R. 924 (A.F.B.R. 1958).

F. ***Preemption***. This offense is not preempted by articles 89, 91, 117, 127, or 128 (disrespect to officers, WO's, NCO's, and PO's; provoking words and gestures; extortion; and assaults, respectively). In *United States v. Holiday, supra*, C.M.A. discussed each of the above offenses and concluded that communicating a threat under article 134 was a viable, independent offense.

G. ***Protected expression***. In *United States v. Schmidt*, 16 C.M.A. 57, 36 C.M.R. 213 (1966), C.M.A. reversed the conviction of an accused under a standard of "fairness, integrity, and public reputation of judicial proceedings" where it appeared that the accused informed his CO that he was going to write to newspapers telling of conditions within the unit if proposed disciplinary action was taken against him. The court was cautious and noted the decision was based on the particular facts of the case.

H. ***Pleading***. Part IV, para. 110f, MCM (1995 Edition).

1. ***Sample specifications***.

a. ***To injure the person of another***

. . . did wrongfully communicate to Airman Bronius Satkunas a threat to injure the aforesaid Airman Bronius Satkunas, U.S. Navy, by saying to him, "I'll knock your teeth down your throat," or words to that effect.

United States v. Holiday, 4 C.M.A. 454, 6 C.M.R. 8 (1954).

b. ***To injure the reputation of another***

. . . did wrongfully communicate to Corporal John M. Smith, U.S. Marine Corps, a threat to accuse falsely Sergeant Lill E. White, U.S. Marine Corps, of having committed the offense of pandering.

But see United States v. Frayer, 11 C.M.A. 600, 29 C.M.R. 416 (1960) for another format.

2. ***Variance.***

a. A fatal variance between the pleadings and the proof will result if it is alleged that a threat was communicated to a named person but the evidence shows that the words set out in the specification were communicated to someone else. *United States v. Gray*, 40 C.M.R. 982 (C.G.C.M.R. 1969).

b. If a threat of a lesser degree of violence is proved than the one charged, a fatal variance will not result. *United States v. Rowe*, 47 C.M.R. 717 (A.C.M.R.), 48 C.M.R. 1000 (C.M.A. 1973).

I. ***Lesser included offenses.*** The offense of provoking words can be an LIO of communicating a threat. *See United States v. Hazard*, 8 C.M.A. 530, 25 C.M.R. 34 (1957); *United States v. Reid*, 43 C.M.R. 612 (A.C.M.R. 1970); *United States v. Cooper*, 34 C.M.R. 615 (A.B.R. 1964); and *United States v. Gately*, 13 M.J. 757 (A.F.C.M.R. 1982).

1. ***Example.*** ***H***, a prisoner, while on work detail outside the stockade, gave a guard, ***R***, some difficulty. ***R*** reported the incident to the NCO in charge of the detail. Later, as the work party mounted a truck to return to the stockade, ***H*** said to ***R***, "I'd better not catch you outside." ***H*** was charged with wrongfully communicating to Private ***R*** a threat to injure Private ***R*** by saying to him, "I'd better not catch you outside." This information was introduced into evidence by the prosecution. DC requested that the court-martial be instructed that it could consider the LIO of using provoking speech in violation of article 117. The MJ denied the request. ***Query***: Error? ***Answer***: Yes. "The words used by the accused could easily evoke from the guard an invitation to assume that the parties were already 'outside' and that the accused should proceed with the avowed declaration. Clearly then the words had at least a tendency 'to induce . . . [a breach] of the peace. . . .' The lesser offense, therefore, was in issue and should have been submitted to the courtmartial for its consideration." *United States v. Hazard*, 8 C.M.A. 530, 25 C.M.R. 34 (1957).

2. ***Discussion.***

a. Note that, whereas article 117—provoking speech— requires the victim to be subject to the code, the article 134 threat offense does not.

b. In *Hazard, supra*, this posed no problem since the military status of the victim was sufficiently alleged in the principal charge of communicating a threat and, hence, it fully encompassed the provoking speech offense. Remember this point when pleading a threat under article 134.

c. Absent such special pleading, however, the result in *Hazard* probably would have been the same in view of the defense request for the LIO instruction and in view of C.M.A.'s very liberal view on LIO's. *Compare United States v. Duggan*, 4 C.M.A. 396, 15 C.M.R. 396 (1954); *United States v. Morgan*, 8 C.M.A. 341, 24 C.M.R. 151 (1957); and *United States v. Hobbs*, 7 C.M.A. 693, 23 C.M.R. 157 (1957).

3. It should also be noted that, in *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983), the court determined that, although an aggravated assault and communication of a threat occurred on the same occasion, the two offenses could be charged separately, and the communication of the threat was not, as a matter of law, an LIO of the aggravated assault.

0815 BREACH OF THE PEACE. Article 116, UCMJ; Part IV, para. 41, MCM (1995 Edition).

A. ***Text of Article 116, UCMJ.***

> Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

B. ***Scope of the article.*** Article 116 prohibits the causation of, or participation in, either a riot or a breach of the peace. Riot is discussed in section 0817, *infra*. Breach of the peace has been an LIO of riot and is based on the common law offense. *United States v. Hewson*, 13 C.M.A. 506, 33 C.M.R. 38 (1963); *United States v. Taylor*, 30 M.J. 882 (A.F.C.M.R. 1990).

C. ***Essential elements.***

1. That the accused caused or participated in a certain act of a violent or turbulent nature; and

2. the peace was thereby unlawfully disturbed.

D. ***Examples of prohibited acts.*** "A 'breach of the peace' is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. . . . The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled." *United States v. Haywood*, 41 C.M.R. 939 (A.F.C.M.R. 1969); Part IV, para. 41c, MCM (1995 Edition). In addition to the common street brawl, the following examples of misconduct have been held to be breaches of the peace:

1. Resisting apprehension in a violent manner. *United States v. Tuck*, 29 C.M.R. 750 (C.G.B.R. 1960); *Haywood, supra*.

2. Shouting, striking the bars of a cell, shaking the cell door, and starting a fire in a cell within a brig. *Hewson, supra*.

3. Hammering on a cell door with a wooden bunk, smashing 38 windows with an iron pipe, ripping the shower head from the shower, and twisting out of place two iron bars in a cell within disciplinary barracks. *United States v. Ragan*, 10 C.M.R. 725 (A.B.R. 1953).

4. Part IV, para. 41c(2), MCM (1995 Edition), states: "Engaging in an affray, unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker."

5. Specifications alleging that accused painted a bull's-eye on his torso and wrongfully entered the flight deck of an aircraft carrier, disrupting flight operations and then later wrongfully boarded a plane on the flight deck and pulled the ejection system safety pins while threatening to kill himself, sufficiently alleged a breach of the peace. *United States v. Stevens*, 19 M.J. 284 (C.M.A. 1985).

E. "The ***peace of the community***" means the public tranquility; the peace and good order to which the community is entitled. Part IV, para. 41c(2), MCM (1995 Edition).

F. ***Meaning of community.***

1. The words "'community' and 'public' include a military organization, post, camp, ship, aircraft, or station." Part IV, para. 41c(3), MCM (1995 Edition). The Navy Board of Review noted, however, that "the crew's quarters of a United States man-of-war is not a public place." *United States v. Sullivan*, 3 C.M.R. 457, 459 (N.B.R. 1952). The specification in *Sullivan, supra*, at 458, had alleged that the accused did cause a "breach of the peace by wrongfully shouting and singing in a public place, to wit: the third division head, located on board said ship."

2. The *Sullivan* case notwithstanding, it would appear that the meaning of community in a physical sense is not controlling.

> The commission of a breach of the peace, then, does not depend upon whether an accused's acts occur in surroundings to which members of the public have a right to resort or generally repair. Rather, it depends upon whether his behavior, not otherwise protected or privileged, tends to invade the right of the public or its individual members to enjoy a tranquil existence, secure in the knowledge that they are guarded by law from undue tumult or disturbance. In short, the important consideration is the disturbance of tranquility and not whether the misconduct occurs in a "public place" or one of such limited access as to be deemed unavailable to the citizenry in general.

United States v. Hewson, 13 C.M.A. 506, 33 C.M.R. 38 (1963). The accused in *Hewson* was found guilty of causing a breach of the peace in a brig. *See also United States v. Parks*, 3 M.J. 591 (N.C.M.R. 1977), in which the court held that deliberately and wrongfully jumping from a ship into the sea is a turbulent act which violates the peace and good order to which the shipboard community is entitled.

G. ***"Unlawfully" means without justification or excuse.***

1. Part IV, para. 41c(2), MCM (1995 Edition), states: "The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others."

2. If the accused acts in self-defense, however, his conduct is excused.

3. ***Example.*** ***A*** is attacked and fights back in self-defense. This disturbs the peace. Is ***A*** guilty of breach of peace? No. ***A*** did not unlawfully disturb the peace. *United States v. Kilpatrick*, 8 C.M.R. 555 (N.B.R. 1953).

H. ***Pleading.*** Part IV, para. 41f(2), MCM (1995 Edition).

1. ***Sample specification.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 116
>
> ***Specification.*** In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], cause a breach of the peace by wrongfully engaging in a fistfight in the dayroom with Seaman Recruit John J. Doe, U.S. Navy.

2. A specification alleging that the accused assembled with others in order to disrupt the operation of a stockade is insufficient to charge a breach of the peace since it fails to allege any conduct constituting an outward demonstration resulting in a disturbance of the peace. *United States v. Ludden*, 43 C.M.R. 564 (A.C.M.R. 1970). Of similar import is *United States v. Haywood*, 41 C.M.R. 939 (A.F.B.R. 1969).

I. ***Lesser included offense.*** Disorderly conduct, Article 134, UCMJ. *Cf. United States v. Burrow*, 26 C.M.R. 761 (N.B.R. 1958), wherein it was held that the LIO of disorderly conduct was not reasonably raised by the evidence.

0816 DISORDERLY CONDUCT. Article 134, UCMJ; Part IV, para. 73, MCM (1995 Edition).

A. There is no specific article of the UCMJ which punishes simple disorders; consequently, they are charged under article 134 as conduct which is prejudicial to good order and discipline or which is service discrediting. Disorderly conduct is discussed in Part IV, para. 73, MCM (1995 Edition), which lists two variations.

1. Disorderly conduct under such circumstances as to bring discredit upon the military service.

2. Other cases. (These "other cases" are those which constitute conduct prejudicial to good order and discipline.)

B. ***Essential elements.***

1. That the accused was disorderly onboard ship or in some other place;

and

2. "C to P" or "SD."

C. ***"Disorderly" defined.***

1. Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby. *United States v. Powers*, 5 C.M.R. 206 (A.B.R. 1952); *United States v. McGlone*, 18 C.M.R. 525 (A.F.B.R. 1954); Part IV, para. 73c(2), MCM (1995 Edition).

2. An act such as window peeping, which endangers public morals or outrages public decency, is punishable as disorderly conduct. *United States v. Manos*, 24 C.M.R. 626 (A.F.B.R. 1957); *United States v. Foster*, 13 M.J. 789 (A.C.M.R. 1982).

3. "Disorderly" also refers to any disturbance of a contentious or turbulent character. *Military Judges' Benchbook*, DA Pam 27-9 (1982), Inst. 3-140.

D. ***Examples of disorderly conduct.***

1. Discharging a grenade simulator. *United States v. NcNeil*, 46 C.M.R. 894 (A.C.M.R. 1972).

2. Window peeping. *United States v. Manos*, 24 C.M.R. 626 (A.F.B.R. 1957); *United States v. Foster*, 13 M.J. 789 (A.C.M.R. 1982).

3. Unlawfully assembling for the purpose of resisting apprehension by police officers. *United States v. Haywood*, 41 C.M.R. 939 (A.F.B.R. 1969).

E. ***Disorderly conduct and breach of peace.*** It would appear that breach of the peace contemplates conduct of a more violent nature than that which would support a disorderly conduct specification. *United States v. Burrow*, 26 C.M.R. 761 (N.B.R. 1958); *United States v. Green*, 33 M.J. 918 (A.C.M.R. 1991); and *Haywood, supra* discuss the difference between the two offenses.

F. ***Special defense.*** As with breach of the peace, an accused charged with disorderly conduct can assert self-defense and, if the triers of fact are convinced of the proper use of self-defense, the accused should be acquitted. *United States v. Davis*, 16 C.M.R. 874 (A.F.B.R. 1954).

G. ***Pleading.*** Part IV, para. 73f, MCM (1995 Edition).

1. The allegation simply states that the accused was "disorderly"; no further details need be pled.

2. If this offense is committed by a servicemember who is drunk, the phrase "drunk and disorderly" is then alleged.

3. If the conduct involved is not described as being disorderly, an offense may not be alleged.

– ***Example.*** In *United States v. Regan*, 11 M.J. 745 (A.C.M.R. 1981), the accused was charged with "throwing butter on the ceiling . . ." of the mess hall. The court held that the specification failed to allege an offense because such activity could have been innocent and noted that, if the accused had been charged with "being disorderly on station by throwing butter on the ceiling . . .," an article 134 violation would have been alleged.

4. Since disorderly conduct under service-discrediting circumstances is an aggravated form of the offense (four months' vice one month confinement), this is the one article 134 offense where the service-discrediting element ***must*** be pled. If it is not included in the specification, the maximum punishment will be limited to one month confinement.

0817 RIOT. Article 116, UCMJ; Part IV, para. 41, MCM (1995 Edition).

A. ***Text of Article 116, UCMJ.***

Any person subject to this chapter who causes or participates in any riot . . . shall be punished as a court-martial may direct.

B. ***Essential elements.***

1. That the accused was a member of an assembly of three or more persons;

2. that the accused, and at least two other members of this group, mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;

3. that the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and

4. that these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

C. ***Interpretation***. Part IV, para. 41c(1), MCM (1995 Edition), defines a riot as:

> . . . a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprises of a private nature by concerted action against any who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror.

D. ***"Three or more persons."*** No number less than three can commit a riot; therefore, if less than ***three*** are involved, a breach of the peace, assault, or disorderly conduct may have been committed instead. Numbers alone, however, are insufficient to prove the offense.

– ***Example***. In the case of *United States v. Metcalf*, 16 C.M.A. 153, 36 C.M.R. 309 (1966), the accused was one of four assailants who attacked two couples without provocation at a naval base. The court held this assault was not a riot even though more than three individuals had perpetrated it. Quoting from *People v. Edelson*, 169 Misc. 386, 7 N.Y.S.2d 323 (1938), the court said at 36 C.M.R. 316:

> The underlying element essential to constitute the statutory crime of riot, and distinguishing it from other crimes involving a breach of the peace, is the disturbance of the *public* peace, and that implies the idea of a lawless mob accomplishing or bent on accomplishing some object in such violent and turbulent manner as to create public alarm or consternation or as terrifies or is calculated to terrify people. It is not commonly applied to a brief disturbance even if violence and malicious mischief are involved in the commotion. (Emphasis added.)

See also United States v. Fisher, 30 M.J. 698 (A.C.M.R. 1990).

E. ***"Common purpose"*** means an end, intention, object, plan, or project shared by all. *United States v. Pugh*, 9 C.M.R. 536 (A.B.R.), *petition denied*, 11 C.M.R. 248 (1953); *United States v. Bryson*, 10 C.M.R. 164 (A.B.R.), *petition denied*, 10 C.M.R. 159 (1953). The purpose of plan need not have been made prior to the assembly. It is sufficient if the assemblage actually begins to execute the common purpose formed after it assembled. *United States v. Davis*, 17 C.M.R. 473 (N.B.R. 1954); *United States v. Lawrence*, 10 C.M.R. 767 (A.F.B.R.), *petition denied*, 12 C.M.R. 204 (1953); *see also* Part IV, para. 41c(1), MCM

(1995 Edition), and *United States v. Murphy*, 34 C.M.R. 550 (A.B.R. 1964).

F. ***Public alarm or terror.*** In *United States v. Brice*, 48 C.M.R. 368 (N.C.M.R. 1973), the court held that a specification was fatally defective because it failed to allege this element. Although it may be possible to plead facts which imply "public alarm or terror," the *Brice* case compels a literal pleading of the element. *United States v. Randolph*, 49 C.M.R. 336 (N.C.M.R. 1974) has an exhaustive discussion of this subject.

G. ***Pleading.*** Part IV, para. 41f(1), MCM (1995 Edition).

– ***Sample specification.***

Charge. Violation of the Uniform Code of Military Justice, Article 116

Specification. In that [Name, etc, and personal jurisdiction data], did, on or about [date], [at / on board (location)], participate in a riot by unlawfully assembling with Fireman Ignatius Provoker, U.S. Navy, and Seaman Recruit Jimmy Follower, U.S. Navy, for the purpose of resisting all naval brig authorities and in furtherance of said purpose, did wrongfully break and remain out of his own area of confinement in the naval brig, tear down the cell block fence, destroy and damage military property of the United States Government, and brandish weapons to the terror and disturbance of the naval brig.

H. ***Lesser included offenses (LIO).***

1. Breach of the peace, article 116. *See United States v. Ragan*, 10 C.M.R. 725 (1953), *petition denied*, 11 C.M.R. 248 (1953).

2. Disorderly conduct, article 134. *Metcalf, supra*, and *Haywood, supra*.

0818 RELATIONSHIP BETWEEN DISTURBANCE OFFENSES

A. ***General.*** This group of offenses does not encompass all disturbance offenses (e.g., most of the assaults would come within this category; however, most of these offenses can be committed by mere words alone).

B. ***"Provoking" vis-a-vis "threat."*** Provoking speech, under article 117, is not necessarily a threat; however, a threat is most often provoking (i.e., "threat" may include "provoke" as an LIO).

1. The purpose of article 117, prohibiting provoking speech and gesture offenses, is to inhibit one from inciting another to breach the peace. *United States v. Thompson*, 22 C.M.A. 88, 46 C.M.R. 88 (1972).

2. The purpose of the article 134 threat offense is not merely to protect persons from such wrongful communication, but also to protect them from the greater harm thereby forecasted. *United States v. Holiday*, 4 C.M.A. 454, 6 C.M.R. 28 (1954).

3. The victim in a "provoking" must be a person subject to the code. The victim of a "threat" can be anyone.

4. Both offenses may be committed by mere words alone. "Provoking" offenses may be committed by gestures alone; however, if gestures are involved in the communication of a threat, it would also be proper to charge an offer-type assault. *United States v. Fishwick*, 25 C.M.R. 897 (A.B.R. 1958). *United States v. Thurman*, 42 C.M.R. 916 (N.C.M.R. 1970).

C. ***"Breach of peace" vis-a-vis "riot."*** A riot involves a breach of peace. *United States v. Randolph*, 49 C.M.R. 336 (N.C.M.R. 1974).

1. ***Number participating.*** It takes only one to breach the peace, but at least ***three*** to riot.

2. ***Breach of peace is a general intent offense.*** Riot requires a specific

intent. *United States v. Pugh*, 9 C.M.R. 536 (A.B.R. 1952).

D. ***"Threat" vis-a-vis "breach of peace."*** A threat does not necessarily constitute a breach of the peace, but it may—and commonly does.

1. The threat, which carries a maximum punishment of a DD and three years' CONF, is by far the more serious offense.

2. Both are general intent offenses.

3. Both may be committed by mere words, but breach of peace may and commonly is committed by boisterous conduct.

E. ***"Assault" vis-a-vis "disturbance" offenses.***

1. An assault may involve a provoking gesture, a breach of the peace, a riot, or the communication of a threat.

2. An oral threat alone falls short of an assault. A threat is simply an announcement of an avowed present determination to injure presently or in the future. Mere words cannot constitute an assault. Furthermore, an assault requires an attempt or an offer to do bodily harm immediately.

a. An assault may immediately follow or be contemporaneous with a threat.

b. A threat ***may*** be communicated to someone other than the victim, whereas an assault ***must*** be directed at the victim.

c. A threat includes an avowed determination to injure property or reputation as well as the person, whereas an assault is confined solely to bodily harm.

CHAPTER IX

OFFENSES AGAINST PROPERTY

0900 INTRODUCTION 9-1

0901 LARCENY AND WRONGFUL APPROPRIATION 9-1
A. Text of Article 121, UCMJ. 9-1
B. General. 9-2
C. Elements of larceny and wrongful appropriation (Part IV, para. 46b, MCM (1995 Edition)). 9-2
D. Wrongful taking. 9-2
1. Requirements of a taking. 9-2
2. Larceny as a continuing offense. 9-3
E. Wrongful obtaining. 9-5
1. Requirements of a wrongful obtaining. 9-5
2. Form of representation. 9-6
3. Element 1. 9-7
4. Element 2. 9-7
5. Element 3. 9-8
6. Other considerations regarding wrongful obtaining. 9-9
F. Wrongful withholding. 9-9
1. Taking possession of the property. 9-10
2. Requirements for wrongful withholding. 9-10
3. Failure to return, account for, or deliver property which becomes due. 9-10
4. Diverting property to an unauthorized use. 9-12
G. Property. 9-13
1. Property generally. 9-13
2. Real estate. 9-13
3. The "use" or "services" of property. 9-13
H. Pleading requirements. 9-14
1. Pleading ownership. 9-14
2. Variance between pleading and proof as to ownership. 9-16
I. The property was of some value. 9-16
J. Intent. 9-19

K. Lost, mislaid, and abandoned property as the subject of larceny..... 9-22
1. Lost property..... 9-22
2. Mislaid property..... 9-23
3. Abandoned property..... 9-23
L. Possession of recently stolen property as evidence of theft..... 9-24
M. Common defenses to larceny..... 9-26
1. Absence of intent..... 9-26
2. Impossibility..... 9-26
3. Negligent loss..... 9-26
4. Duress..... 9-26
5. An intention to pay for the property stolen, or to replace it with an equivalent..... 9-27
N. Lesser included offenses (LIO's)..... 9-28
O. Pleading..... 9-30
P. Multiplicity..... 9-32
Q. Instructions..... 9-32
R. Related offenses..... 9-33

0902 ROBBERY..... 9-34
A. Text of Article 122, UCMJ..... 9-34
B. Elements of the offense..... 9-34
F. Sixth element..... 9-37
G. Possible LIO's of robbery..... 9-38
1. Larceny—Article 121..... 9-38
2. Wrongful appropriation—Article 121..... 9-38
3. Attempted larceny or attempted wrongful appropriation..... 9-38
4. Assault and battery—Article 128..... 9-38
5. Assault with a dangerous weapon—Article 128..... 9-38
6. Assault intentionally inflicting grievous bodily harm—Article 128..... 9-38
7. Assault with intent to rob—Article 134..... 9-38
8. Extortion—Article 127..... 9-38
H. Pleading..... 9-38
I. Multiplicity considerations..... 9-39

0903 RECEIVING, BUYING, CONCEALING STOLEN PROPERTY..... 9-39

0904 BAD CHECK LAW..... 9-44
A. Text of Article 123a (enacted in 1961)..... 9-44
B. Elements..... 9-45
C. First element..... 9-45
D. Second element..... 9-46
E. Third element. Intent..... 9-47
F. Lesser included offenses..... 9-50
G. Affirmative defense..... 9-52

H. Pleading. 9-52
1. Worthless check with intent to defraud. 9-52
2. Worthless check with intent to deceive. 9-53
3. Dishonorable failure to maintain funds. 9-53

0905 MILITARY PROPERTY OF THE UNITED STATES 9-54
A. Text of Article 108, UCMJ. 9-54
B. General discussion. 9-54
C. The offense of wrongfully selling or otherwise disposing. 9-56
D. The offenses of damaging, destroying, losing, and suffering to be lost, damaged, destroyed, sold, or otherwise disposed of 9-57
1. Mental element. 9-57
2. Loss, damage 9-58
3. "Suffering" means permitting or allowing. 9-58
4. Value. 9-58
E. LIO's. 9-58
F. Pleading—sample specifications. 9-59
1. Article 108(1)—selling or disposing. 9-59
2. Article 108(2)—damaging, destroying, or losing. 9-59
3. Article 108(3)—suffering. 9-60

0906 WASTING, SPOILING, DAMAGING AND DESTROYING NONMILITARY PROPERTY 9-61
A. Text of Article 109, UCMJ. 9-61
B. Distinction between article 108 and article 109. 9-61
C. Multiplicity. 9-61
D. Pleading. 9-62

0907 UNLAWFUL ENTRY - Article 134, UCMJ; HOUSEBREAKING - Article 130, UCMJ; BURGLARY - Article 129, UCMJ 9-64
A. General comments. 9-64
B. Unlawful entry. 9-64
C. Housebreaking. 9-64
1. Text of Article 130, UCMJ. 9-64
2. Elements of the offense. 9-64
D. Burglary 9-65
1. Text of Article 129, UCMJ. 9-65
2. Elements of the offense. 9-65
E. Comments on the offense of housebreaking and the distinction between it and the offense of unlawful entry. 9-65
1. "Unlawfully" enter. 9-65
2. "Entered" 9-67
3. A certain "building or structure". 9-68
4. "Of a certain other person" 9-70
5. ". . . the intent to commit a criminal offense

therein" 9-70
F. Comments on the offense of burglary. 9-71
1. Burglary is more limited than housebreaking 9-71
2. "Dwelling house". 9-71
3. "Breaking". 9-72
4. "In the nighttime." 9-72
5. Intent. 9-72
G. Multiplicity. 9-73
H. Pleading - sample specifications. 9-74
1. Unlawful entry 9-74
2. Housebreaking 9-74
3. Burglary 9-74

0908 **SPECIFIC POINTS OF SIMILARITY AND DISTINCTION BETWEEN OFFENSES AGAINST PROPERTY** 9-75
A. Larceny and wrongful appropriation. 9-75
1. Similarity. 9-75
2. Distinctions. 9-75
B. Larceny and bad checks. 9-75
1. Similarity. 9-75
2. Distinctions. 9-75
3. Gravamen of article 121 9-76
4. Gravamen of article 123a. 9-76
C. Larceny and receiving, buying, concealing, stolen property 9-76
1. Similarity. 9-76
2. Distinctions. 9-76
D. Larceny and misuse of property. 9-77
1. Similarity. 9-77
2. Distinctions. 9-77
E. Illustrative fact situation. 9-78
F. Summary. 9-80

CHAPTER IX

OFFENSES AGAINST PROPERTY

0900 INTRODUCTION

This chapter discusses offenses against property. It begins with a detailed analysis of common law crimes against property, but it also examines several strictly military offenses as well. Larceny and its lesser included offense, wrongful appropriation, are the subject of the first section and consume approximately one half of the chapter. Robbery is discussed next since it is a combination of larceny and assault. The related but separate crime of receiving stolen property is the subject of the next section. The military's "bad check" law is examined in the section after that, followed by a discussion of the military offenses of wrongful sale, disposition, damage, destruction, and loss of military property. Offenses against nonmilitary property are discussed next. That section is followed by a comparison of the crimes of burglary, housebreaking, and unlawful entry. The last section summarizes points of similarity and distinction for all of the offenses against property.

0901 LARCENY AND WRONGFUL APPROPRIATION (Key Numbers 705-716)

A. ***Text of Article 121, UCMJ.***

> Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—
>
> a. With intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or
>
> b. with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than

the owner, is guilty of wrongful appropriation.

B. ***General.*** Article 121 describes two separate crimes—***Larceny*** and ***Wrongful Appropriation.*** The only difference in the elements of the two offenses is the intent required in each. Both are specific intent offenses. To be guilty of larceny, the accused must specifically intend to ***permanently deprive*** the owner of the property of the use and benefit of that property. Whereas, to be guilty of wrongful appropriation, the accused need only specifically intend to ***temporarily deprive*** the owner of the use and benefit of the property. Since temporary deprivation is less serious than permanent deprivation, wrongful appropriation is not punished as severely as larceny and is considered a lesser included offense (LIO). *See* Part IV, para. 46d, MCM (1995 Edition). This is the only difference between the two offenses.

C. ***Elements of larceny and wrongful appropriation (Part IV, para. 46b, MCM (1995 Edition)).***

1. That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

2. that the property belonged to a certain person;

3. that the property was of a certain value, or of some value; and

4. that the taking, obtaining, or withholding by the accused was with the intent permanently (larceny) or temporarily (wrongful appropriation) to deprive or defraud another person of the use and benefit of the property or permanently (larceny) or temporarily (wrongful appropriation) to appropriate the property for the use and benefit of the accused or for any person other than the owner.

D. ***Wrongful taking.*** The most common form of larceny (or wrongful appropriation) is the wrongful-taking type. It is essentially an offense of ***wrongful*** dispossession (e.g., a customer takes a suit off a rack at the exchange with the intent to keep it, and walks out without paying for it).

1. ***Requirements of a taking.*** Generally, "taking" is accomplished by removing something from the place it was (asportation) and exercising control (dominion) over the item. *United States v. Tamas*, 6 C.M.A. 502, 508, 20 C.M.R. 218, 224 (1955). As such, in order to be guilty of committing a "taking," the evidence must show that the accused took control of the item ***and*** removed it from its original position. If the facts show that the accused took control over certain property, yet did not move the item, he / she cannot be guilty of a "taking" type of larceny.

a. Accused removed a suit from a rack at the exchange and concealed it under his own clothes. The required asportation and dominion have occurred at this point, and, assuming the requisite intent, larceny has been committed. *See Tamas, supra; United States v. Klink*, 14 M.J. 743 (A.F.C.M.R. 1982).

b. Accused removed a suit from a rack and started for the door but, after three steps, he is brought to a halt—the suit is chained to the rack. No taking occurred—even though there was a removal—because no dominion had been exercised over the article. Part IV, para. 46c(1)(b), MCM (1995 Edition).

c. Accused breaks into the exchange in order to steal property. He removes various items from the shelves and places them in a laundry bag. Fearing that he may be detected, accused gets cold feet and runs from the exchange—leaving the items behind. Although he changed his mind, the asportation and dominion have already occurred—a larceny has been committed. *United States v. Watkins*, 35 M.J. 709, 712 (N.M.C.M.R. 1992).

d. Accused took a typewriter from an office on an Air Force base and took it to his own office, also located on the base. He intended to use it for his own and for government use, and he also permitted others to use it. He told other persons that he had purchased it. ***Held***: Guilty of larceny. *United States v. Schocken*, 1 M.J. 511 (A.F.C.M.R. 1975).

e. Withdrawing excess funds from an accused's own account with an automatic teller card held to be a wrongful taking. *United States v. Buswell*, 22 M.J. 617 (A.C.M.R. 1986).

2. ***Larceny as a continuing offense.***

a. Assuming that the perpetrator has taken control over the property, the crime of larceny is perfected once the asportation begins. In short, the original asportation of the property does not have to end before a larceny may be found; however, the crime of larceny continues as long as the original asportation, removal, or "carrying away" of the property continues.

b. The original asportation of the stolen property is not complete until the perpetrator is satisfied with the new location of that property. Many factors may be considered in determining whether the movement of the property is complete. *See United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979); *United States v. Keen*, 30 M.J. 1108 (N.M.C.M.R. 1989). However, as long as the perpetrator appears dissatisfied with the location of the property, and the movement continues with minimal interruption, the original asportation is continuing and the larceny is still occurring. As a result, anyone who

knowingly assists in the movement of the stolen property before the original asportation is complete could be a principal to the larceny. If the original asportation was complete at the time of the assistance, the person would be guilty of being an accessory after the fact in violation of Article 78, UCMJ, and not guilty of the offense of larceny.

c. A person who participated in an ongoing larceny could still be considered an accessory after the fact, as opposed to a principal, if their motive was to assist the perpetrator to escape detection and punishment rather than to secure the fruits of the crime. *United States v. Manuel*, 8 M.J. 822 (A.F.C.M.R. 1980).

d. An accused may instead be guilty of the separate offense of receiving stolen property, as in the case of *United States v. Henderson*, 9 M.J. 845 (A.C.M.R. 1980). There, the court held that the larceny of some field jackets and silverware was complete when a soldier having custody over them moved them, with the required intent, to another part of the central issue facility in which he worked. Consequently, when the accused received the property, his actions did not make him a principal to larceny, but rather a recipient of stolen property in violation of article 134. (*See* section 0904.) Since receiving stolen property is not an LIO of larceny, the facts must be carefully considered when drafting charges.

e. The victim need not realize that a theft has occurred in order for the crime to be completed. *United States v. Tschida*, 1 M.J. 997 (N.C.M.R. 1976).

3. The taking must be ***wrongful*** to constitute an offense. Generally, a taking is wrongful if it is done by one who is not entitled to the immediate possession of the property, and it is done without the consent of the person from whose possession the property is taken. Part IV, para. 46c(1)(d), MCM (1995 Edition). The wrongfulness of a taking, obtaining, or withholding, however, may also depend upon the intent of the accused at the time of his action. The significant factor is that not all takings are wrongful. *United States v. Harville*, 14 M.J. 270 (C.M.A. 1982).

a. ***Taking pursuant to consent.*** If consent for the taking is obtained from a person authorized to give it, the taking is not wrongful. Part IV, para. 46c(1)(d), MCM (1995 Edition). Thus, a drill sergeant who solicited and obtained money from trainees under his command to pay for his personal expenses could not be convicted of larceny under article 121 where such money was obtained with the trainee's consent. *United States v. Tenney*, 15 M.J. 779 (A.C.M.R. 1983). Note, however, that an accused may be guilty of a taking-type larceny of government property, even though the property was released to him by competent authority, if that authority could not consent to the taking. *United States v. Cosby*, 14 M.J. 3 (C.M.A. 1982). *See Buswell, supra*, for a discussion of when a bank may consent de facto to the use of its funds.

b. ***Taking pursuant to lawful order.*** If a taking occurs pursuant to

a lawful order or regulation, it is not wrongful. Part IV, para. 46c(1)(d), MCM (1995 Edition). For example, the following actions would not be wrongful if performed pursuant to a lawful order:

(1) Seizure of a camera in a restricted area;

(2) seizure of contraband found in a locker; or

(3) seizure of contraband as part of a gate search.

It is important to note, however, that the order must be lawful in order to insure that the taking is not wrongful. Accordingly, if an accused is given what is clearly an order to steal, and he chooses to execute the order, he would be guilty of larceny. This is because such an order would clearly be illegal.

– ***Example.*** Accused was told by his company commander to try to make up certain shortages in the inventory by performing "normal scrounging." In order to "scrounge," the accused then broke into various government buildings and made up the shortages. ***Held***: Guilty of larceny. Even though the accused was acting in accordance with the terms of an order from his company commander, he was nonetheless guilty of larceny since he knew the order was illegal. *United States v. Miles*, 11 C.M.A. 622, 29 C.M.R. 438 (1960).

E. ***Wrongful obtaining.*** A wrongful ***obtaining*** type of larceny (or wrongful appropriation) involves acquiring possession of property by false pretenses. Part IV, para. 46c(1)(e), MCM (1995 Edition). Similiar to a taking type of larceny, the accused must take control over property (dominion) and remove it from its original position (asportation). In a wrongful obtaining type of larceny, however, possession is usually transferred to the thief voluntarily by the lawful owner or possessor as the result of a false representation made by the thief. Accordingly, the dominion and asportation of the property need to occur after the misrepresenation. *United States v. Pellegrini*, 24 M.J. 659 (A.F.C.M.R. 1987); *United States v. Mosley*, 35 M.J. 693 (N.M.C.M.R. 1992) (false representation made after receipt of the property is not a larceny by wrongfully obtaining them).

1. ***Requirements of a wrongful obtaining.*** There are three requirements which must be met in order to establish a wrongful obtaining larceny. Part IV, para. 46c(1)(e), MCM (1995 Edition). First, the representation must be false when made; second, the accused must know it is false; and, finally, the representation must be an effective and intentional cause in inducing the victim to deliver possession of the property.

2. ***Form of representation***. A representation may be made in any form. The most common type of representation is where an individual, through the spoken word, misrepresents a particular matter. However, a false representation may be made by actions, symbols, tokens, or even by silence.

a. ***Representation by silence***. Generally, an individual's silence is insufficient to constitute a misrepresentation. However, if the accused precedes this silence by any act or statement, this would override the general rule.

– ***Examples.***

(1) Accused enters NEX and discovers video camera on sale for $1,199.00. In the pile of boxes, he sees a box with an identical camera and a $270.00 price tag. Knowing that the camera is priced incorrectly, accused takes it to the Women's Department in order to purchase the item. His intent is to come back to the NEX in a few days and return the item for the $1,199.00 price. He presents the box to the cashier, makes no statement concerning the price, and then pays the $270.00. ***Held***: No false representation has been made. The court concluded that the misrepresentation of fact "apparently was created by the inattentiveness or carelessness of Exchange employees. . . ." *United States v. Vorda*, 34 M.J. 725 (N.M.C.M.R. 1991). *See also, United States v. Neff*, 34 M.J. 1195 (A.F.C.M.R. 1992) (No false pretense occurred where accused took advantage of Exchange employees mistake).

(2) Accused told the victim that he could get him a car at a cheap price. The victim—on more than one occasion—gave the accused money to apply to the purchase price of the car. Finally, the victim gave the accused a $20.00 gratuity for "services rendered." Surprisingly, the victim never sees a car. ***Held***: In light of his previous conduct, the accused's silence when he received the "gratuity" amounted to false pretense. A false representation may be made implicitly as well as expressly, even though a mere failure to disclose the truth is not generally regarded as a criminally actionable misrepresentation. *United States v. Rodriquez*, 24 C.M.R. 687 (A.B.R. 1957).

b. ***Representation by actions alone***. An individual may make a false representation simply by the way he / she acts—without any spoken words. In these cases, the individual's conduct is considered misrepresentation for purposes of a wrongful-obtaining larceny.

– ***Example***. Accused enters NEX, goes to item, changes the price, and presents the merchandise to the cashier. He says nothing to the cashier about the price. In short, he makes no verbal representations to the cashier about the price of the item. The cashier rings up the merchandise, accepts the cash, and the accused leaves the store with the item at a reduced price. ***Held***: In this scenario, the accused would be guilty of a larceny by false pretense. His actions prior to his silence (i.e., changing the price on the merchandise) were sufficient to create the misrepresentation. *See United States v. Pellegrini*, 24 M.J. 659 (A.F.C.M.R. 1987); *see also United States v. Vorda*, 34 M.J. 725, 727 (N.M.C.M.R. 1991) (dictum).

3. ***Element 1***. The representation must be false when made.

a. ***The false representation must relate to a present or past fact.*** Part IV, para. 46c(1)(e), MCM (1995 Edition). For example, if an accused misrepresents his name, unit, and financial credit rating in obtaining a loan, his representations would relate to a present fact. Accordingly, the false representations would result in a larceny. *United States v. Urso*, 3 C.M.R. 611 (A.F.B.R. 1952); *United States v. Cummins*, 9 C.M.A. 669, 26 C.M.R. 449 (1958). Similarly, if the accused falsely stated that he had never gone through a bankruptcy proceeding, it would be a representation as to a past fact and would also result in a larceny.

b. ***False statements as to future events may be false representations***. Generally, a false statement about a future event is merely an opinion by the individual. Accordingly, no larceny can occur because there has been no representation of fact. For example, when a real estate agent says a particular piece of property is "nicely located," or a car dealer refers to his / her vehicle as a "beautiful car," he is expressing an opinion and not stating a fact. If, however, the person is referring to his state of mind and how he will respond in the future, that can be considered an existing fact.

– ***Example***. While applying for a loan, accused represents that he has a check coming in and would repay the loan in two weeks. In fact, he was due to be transferred in two weeks. At trial, accused conceded that he made a false promise to repay. He argues, however, that he cannot be convicted of wrongful obtaining because he had not made a false representation of an existing fact. ***Held***: Guilty. Accused's false statement as to his present intention was a false representation of an existing fact. *United States v. Culley*, 12 C.M.A. 704, 21 C.M.R. 290 (1962); *Cummins, supra*.

4. ***Element 2***. The accused knew the representation was false.

a. Part IV, para. 46c(1)(e), MCM (1995 Edition), states in part:

"[t]he pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth."

b. If an accused makes a representation knowing that it is false or without an honest belief that it is true, he has the knowledge necessary for larceny by false pretense. *United States v. Bethas*, 11 C.M.A. 389, 29 C.M.R. 205 (1960); *United States v. Jophlin*, 3 M.J. 858 (A.C.M.R. 1977), *petition denied*, 8 M.J. 77 (C.M.A. 1979).

c. There are four relevant states of mind with respect to any given representation:

(1) Maker knows it to be false;

(2) maker believes it to be false;

(3) maker does not know whether it is false or not, ***and*** makes no effort to determine its accuracy; and

(4) maker believes the representation is true.

The test set forth in *Bethas, supra*, makes the first three of these criminal if the representation is in fact false. Even if the maker believes a statement to be true when made, he may be guilty of a larceny by false representation if he finds out otherwise before he receives the property and fails to disclose the real facts when he takes possession of the property. His silence with full knowledge of the falsehood is equivalent to a repetition of the former statement at the moment of acquisition. *Perkins*, p. 311.

5. ***Element 3.*** The false representation was an effective and intentional cause in inducing the victim to deliver possession of the property.

a. ***General requirement.*** "Although the pretense need not be the sole cause inducing the owner to part with his property, it must be an effective and intentional cause of the obtaining." Part IV, para. 46c(1)(e), MCM (1995 Edition). More explicitly, it must be evident from all of the facts that a causal relationship exists between the representation made and the delivery of the property. *United States v. Mosley*, 35 M.J. 693 (N.M.C.M.R. 1992).

Examples.

(1) The accused, an Army personnel clerk, told the victim that, for a fee of $25.00, he could get him $175.00 in advance travel pay. He also said that he kept only $5.00 of the $25.00, and the rest went to his superiors. Since he actually pocketed the entire amount, this was false. ***Held***: The false representation concerning who received the $25.00 did not induce the victim to part with his money and did not constitute larceny by false pretense. *United States v. Hildebrand*, 2 C.M.R. 382 (A.B.R. 1952).

(2) The accused purchased whiskey for black market resale. He advised the seller that he was purchasing for an American base club in Japan, of which he was the manager. Accused's false representation was an effective cause of seller's parting with the liquor. ***Held***: Larceny existed even though the accused had paid for the liquor. The seller would not have made the sale—if he had known the true facts—because he could have lost his license for making bulk sales to individual personnel. Pecuniary loss was not essential because the seller was wrongfully deprived of his property by a false pretense. *United States v. Rubenstein*, 7 C.M.A. 523, 22 C.M.R. 313 (1957).

b. ***Representations made after receipt of property.*** Since a false representation must induce or influence the victim's decision to deliver the property, a false representation made after the property was obtained will not result in larceny. *See Mosley, supra*; Part IV, para. 46c(1)(e), MCM (1995 Edition).

6. ***Other considerations regarding wrongful obtaining.***

a. ***Consent.*** Although the consent of the "victim" has been obtained in a wrongful obtaining type of larceny, it occurs only because the perpetrator used fraud or a false representation to procure it. Accordingly, the law does not recognize this form of "consent" as a defense to a wrongful obtaining type larceny.

b. ***Not an instantaneous offense.*** The nature of this offense is the taking of property. As such, the offense of larceny by wrongful obtaining is not complete when the victim relies and acts upon the misrepresentation. Instead, the offense is perfected after the accused has taken possession of the property. For example, in *United States v. Seivers*, 8 M.J. 63 (C.M.A. 1979), the accused filed a false claim. The claim was processed, approved, and a check was subsequently forwarded to the accused. The court held that the larceny was not complete until the accused received, endorsed, and negotiated the refund check—thus taking possession of the proceeds.

F. ***Wrongful withholding.*** The third type of larceny (or wrongful appropriation) is a wrongful withholding. In this type of larceny, the property has been obtained through what

appears to be a lawful means; yet, its continual possession amounts to larceny. In short, in a withholding larceny, the crime is committed by failing to return the property.

1. ***Taking possession of the property.*** The general rule is that the accused in a withholding larceny lawfully acquires possession of the property. *United States v. McFarland*, 8 C.M.A. 42, 23 C.M.R. 266 (1957); *United States v. Welker*, 8 C.M.A. 647, 25 C.M.R. 151 (1958). This is contrary to a taking or obtaining larceny in which the perpetrator obtains the item through an unlawful means. This general rule, however, appears to have at least two exceptions. Part IV, para. 46c(1)(b), MCM (1995 Edition), indicates that a larcenous withholding may arise "whether the person withholding the property acquired it lawfully or unlawfully." Case law appears to identify two times during a wrongful withholding offense in which the accused may not have lawfully obtained the property. First, when the perpetrator takes the property in order to "teach the person a lesson." *See United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983). While the decision in *Kastner* effectively eliminates the use of the teaching-a-lesson defense, it does make light of the fact that property may be obtained in this fashion yet still be subject to prosecution as a wrongful withholding. Second, possession of what may appear to have been lost or mislaid property has also been used as an exception to the general rule. *See United States v. O'Hara*, 14 C.M.A. 167, 33 C.M.R. 379 (1963). This is done in part to avoid an analysis as to whether the property was actually lost or mislaid and focus the inquiry upon the ultimate issue: whether the accused wrongfully withheld the property after its owner became known.

2. ***Requirements for wrongful withholding.*** A wrongful withholding arises in either of two circumstances. In short, a wrongful withholding larceny occurs when an accused:

a. Fails to "return, account for, or deliver property to its owner" when such is due. Part IV, para. 46c(1)(b), MCM (1995 Edition); *United States v. Bilbo*, 9 M.J. 800 (N.C.M.R. 1980); or

b. devotes property to a use which was not authorized by its owner. Part IV, para. 46c(1)(b), MCM (1995 Edition); *United States v. Gainer*, 7 M.J. 1009 (N.C.M.R. 1979).

3. ***Failure to return, account for, or deliver property which becomes due.*** When property is due to be returned, accounted for, or delivered to its owner, and one wrongfully chooses not to do so, said conduct amounts to a wrongful withholding. Many of these factors are self-explanatory; however, some areas require special emphasis.

a. ***Failure to "account for".***

(1) Many of the embezzlement-type offenses fall within this category. *United States v. McFarland*, 8 C.M.A. 42, 23 C.M.R. 266 (1957). The law provides that, when an individual who has a responsibility to continually account for property wrongfully fails to do so, he can be held criminally liable. Military courts have held that an individual having custody of funds, for example, is held to a higher degree of care in the way they handle those funds. Due to the importance of the proper handling of money, society has chosen to make such a custodian criminally liable when he cannot fully account for any loss at the time an accounting is due. *United States v. Crowell*, 9 C.M.A. 43, 25 C.M.R. 305 (1958); *United States v. Higdon*, 2 M.J. 445 (A.C.M.R. 1975).

(2) ***Inference of misconduct.*** Under certain conditions, the law has created an inference that a larceny has occurred when a failure or inability to account for the funds occurs. *See Crowell, supra.* The mere failure on the part of a custodian to account for entrusted funds does not, in and of itself, constitute larceny. It is when a demand has been made and the custodian refuses to account for the funds, or when the accounting is due yet nothing has been done. In these circumstances, the law will permit an inference that the custodian has wrongfully converted the property to his / her own use. *Lyons, supra; Crowell, supra.* This inference, however, is not mandatory and may be accepted or rejected by the court. *United States v. Keleher*, 14 C.M.A. 125, 33 C.M.R. 337 (1963).

(a) Accused was in charge of the prisoners' deposit fund at the stockade. The fund consisted of money taken from prisoners for safekeeping. An audit discovered that false entries existed in the books. Additionally, the audit found a substantial shortage of funds. ***Held***: Guilty of larceny. The accused was found guilty because he failed to account for the property when the accounting was due. *United States v. Lyons*, 14 C.M.A. 67, 33 C.M.R. 279 (1963).

(b) Accused was in charge of the Air Force Aid Society office. In this job, it was his responsibility to process loans and receive payments. Accused wrongfully withheld available funds from the society by pocketing all of the proceeds. ***Held***: Guilty of larceny. The trial court accepted the inference of larceny based upon the accused's position. The appellate court affirmed because the accused offered no explanation to rebut this inference of misconduct. *United States v. Haskins*, 11 C.M.A. 365, 29 C.M.R. 181 (1960).

b. ***No demand is necessary.*** Larceny by wrongful withholding may occur even though the owner makes no demand for his property. In *United States v. Valencia*, 1 C.M.A. 415, 4 C.M.R. 7 (1952), the accused had been given money to purchase particular items. He failed to make the purchases, yet there was never a specific demand made upon him to turn over the property or the money. The court held that the accused's failure to refund the money or deliver the items at the logical time, together with his false story as to the whereabouts of the items, provided convincing proof of a wrongful withholding / conversion. It is important to note, however, that lack of a specific demand may effect the strength of the evidence in proving the element of wrongfulness.

c. ***A debtor's failure to pay amounts to a wrongful withholding type of larceny.*** When an individual has no other duty to the "victim" than that of a simple "creditor-debtor" relationship, the law will not find him guilty of larceny for failing to pay his debts. Therefore, if an individual receives money he is not entitled to (i.e., VHA with dependents) and does not return it to the government, he cannot be found guilty of a withholding type of larceny. (However, prosecution for violating article 134—dishonorable failure to pay just debts—might be appropriate.)

(1) Accused orders a ring through the mail. Upon receipt of the ring, he refuses to pay for it. Demand is made for either the ring or the money by the seller of the property. ***Held***: Not guilty of larceny. The court reasoned that the relationship between the parties was simply that of creditor-debtor. Accordingly, accused could not be found guilty of a wrongful withholding. *United States v. Searcy*, 24 M.J. 943 (A.C.M.R. 1987).

(2) Accused is receiving BAQ. Suddenly, she decides to move into base housing. She still receives a BAQ allowance in her paycheck. She knows this is wrong and reports it to the housing office on two occasions. The payments continue—she does not report it again, and cashes the checks instead. ***Held***: Not guilty of larceny. Accused had no duty to pay the government back on her own. Failure came when the government agents did not take appropriate collection actions. Accordingly, accused had no duty to repay the money. *United States v. Watkins*, 32 M.J. 527 (A.C.M.R. 1990) ("We doubt that there is such a duty to account where overpayment is not fraudulently induced by the recipient.")

d. ***Must have a duty to return the property.*** Larceny by wrongful withholding requires a fiduciary or custodial relationship between the accused and the owner of the property. *United States v. Neff*, 34 M.J. 1195 (A.F.C.M.R. 1992) (Accused not guilty of larceny when he discovered that a stereo purchased from the Exchange was priced incorrectly and was a much more expensive model than the one that he thought he was purchasing, but failed to return it).

4. ***Diverting property to an unauthorized use.*** The other form of

wrongful withholding is when the property of another is diverted to a use not authorized by its owner. This is specifically designed to address all other situations of conversion—whether or not there is embezzlement.

– Accused was issued a government vehicle to use off base during patrol duties. He used the car to take two of his friends to another town for their own personal business. ***Held***: Guilty of a wrongful appropriation by unauthorized use of a vehicle. *United States v. Greenfeather*, 13 C.M.A. 151, 32 C.M.R. 151 (1962); *Cf. United States v. Taylor*, 21 C.M.A. 220, 44 C.M.R. 274 (1972).

G. ***Property***. Regardless of the type of larceny alleged, the subject of that larceny must be "any money, personal property, or article of value of any kind." Art. 121, UCMJ.

1. ***Property generally***. In order to be the subject of larceny, the "property" must be a tangible item. The court, in *United States v. McCracken*, 19 C.M.R. 876 (A.F.B.R. 1955), concluded that the object must have some form of "corporeal existence." Accordingly, the court indicated that the object must be something with a physical presence, quantity, and quality which can be measured and detected. *McCracken*, 19 C.M.R at 877.

2. ***Real estate***. Real property (land and things attached to land) cannot be the subject of larceny; however, if an item has been severed from the land (e.g., fruit which is removed off of a tree), that object can be the subject of a larceny. Part IV, para. 46c(1)(h)(iii), MCM (1995 Edition).

3. ***The "use" or "services" of property***. Generally, services do not have a "corporeal existence" and cannot be measured. Accordingly, the *Manual* specifically prohibits the taking of a service from being charged as property under article 121. Part IV, para. 46c(1)(h)(iv), MCM (1995 Edition).

a. ***Telephone calls***. Individuals who, one way or another, make unauthorized telephone calls are not subject to prosecution for larceny based upon the illegal calls. *See United States v. Flowerday*, 28 M.J. 705 (A.F.C.M.R. 1989); *United States v. Hitz*, 12 M.J. 695 (N.M.C.M.R. 1981); *United States v. Cornell*, 15 M.J. 932 (N.M.C.M.R. 1983). This misconduct, however, can be charged as obtaining services under false pretenses in violation of article 134.

b. ***Automobiles***. When an individual takes someone's car for a joy ride, they can be charged with wrongfully appropriating the vehicle ***but not*** with larceny of the "use" of the vehicle. *McCracken, supra*.

(1) Accused taps into the electric power lines and connects them to his home. Not intending to pay the power company, he uses the electrical currents to run his home. ***Held***: Guilty of larceny. *See People v. Menagas*, 113 A.L.R. 1276 (1937); *Jones, supra*. In distinguishing electric and gas services from telephone services, the court in *Jones* stated, "[b]oth electricity and gas, although intangible, have a physical presence which may be measured by some mechanical contrivance, both are valuable commodities bought and sold like other pieces of personal property, susceptible of being severed from a mass or larger quantity and of being transported from place to place." *Jones*, 23 C.M.R. at 821.

(2) Accused purchases item from the Navy Exchange on a deferred payment plan. Later, he unsuccessfully tries to deceive the NEX into believing that he has already paid back the money. ***Held***: Not guilty of an attempted larceny. A debt, or the amount thereof, is not the proper subject of a larceny. *United States v. Mervine*, 26 M.J. 482 (C.M.A. 1988).

(3) Accused takes a ride in a taxicab and subsequently refused to pay the fare. At courts-martial, he is charged with the larceny of the taxicab services. ***Held***: Not guilty of larceny. The court held that taxicab services cannot be stolen in violation of article 121. *United States v. Abeyta*, 12 M.J. 507 (A.C.M.R. 1981) [*overruling United States v. Brazil*, 5 M.J. 509 (A.C.M.R. 1978)].

H. ***Pleading requirements.***

1. ***Pleading ownership.*** It must be established that the property was taken, obtained, or withheld from someone with an immediate possessory right superior to the thief's at the time of the theft. Wrongful acquisition often dispossesses several persons, each of whom has an immediate possessory right superior to the accused's.

a. ***Example***. ***A*** borrows ***B***'s car. ***C*** steals ***B***'s car from ***A***. ***B*** is the general owner and has a superior right to possession over ***C***. ***A*** is special owner and also has a superior right over ***C***. Who should be alleged as the "owner" in a larceny specification? Answer: Either ***A*** or ***B*** may be alleged as owner; however, in order to establish that a theft occurred, it will be necessary to prove that ***C*** acquired it from ***A***. Therefore, by pleading ***A*** as the owner, there will ordinarily be no need to establish ***B***'s interest in the car. This will usually be better for both sides since it:

(1) Simplifies the government's case;

(2) pleads the situation as it actually existed and as it was most likely understood by the accused; and

(3) tends to promote simplicity and clarity.

United States v. Schelin, 12 M.J. 575 (A.F.C.M.R. 1981). *See also United States v. Leslie*, 13 M.J. 170 (C.M.A. 1982) (where property is held in bailment, either bailor or bailee may be considered victim of theft).

b. In drafting a larceny or wrongful appropriation specification, the property should, ordinarily, be alleged as having been stolen or wrongfully appropriated from the person who was last in immediate possession before the theft. *Schelin, supra*.

– ***Example***. Willy is issued an M-16 rifle by the Marine Corps. Rollo takes Willy's rifle without his consent and sells it. The specification alleged that Rollo did steal the (described) M-16 of some value, "property of the U.S. Government." Is the specification defective?

(1) No. There is sufficient allegation of larceny. The government did have a superior right to possession than Rollo, and a taking from Willy was also a taking from the government since Willy was merely custodian of the M-16 for the government. In view of the nature of the item, Rollo could not have been misled by the allegation of "stealing from the government."

(2) Generally speaking, however, the best and safest method is simply to allege the person last in possession as the "owner." The indiscriminate practice of alleging the general owner instead of the person last in possession may cause the pleader to overlook the fact that a larceny was not committed.

– **Example.** ***A*** stole a government rifle, told ***B*** that he had done so and that he had hidden the rifle and ***B*** could have it. ***B*** got the rifle. ***B*** was apprehended and charged with larceny from the government (the general owner). ***Held***: No larceny. Had trial counsel followed the rule of determining whether there was a taking, obtaining, or withholding from the person last in possession (***A***), he would have realized that there wasn't a larceny. ***B***, however, was guilty of receiving stolen property. *United States v. Welker*, 8 C.M.A. 647, 25 C.M.R. 151 (1958); *McFarland, supra*.

2. ***Variance between pleading and proof as to ownership.*** Variance between pleading and proof of ownership can arise in surprisingly subtle ways. Careful thought must be given to this issue in order to avoid difficulty at trial.

a. ***Example.*** ***M*** stole property from another Army unit for his own Army unit. It was alleged that he stole "property of the U.S. Government." He pleaded guilty. ***Query***: Plea improvident? ***Answer***: No. But ownership should have been alleged as "property of Company _____," the custodian-unit. ***Reason***: Accused obviously did not intend to deprive the U.S. Government of the property, but he did intend to deprive the other Army unit. However, in view of all the circumstances in the case, the variance was not fatal and the plea was not improvident. *United States v. Miles*, 11 C.M.A. 622, 29 C.M.R. 438 (1960).

b. ***Example.*** Accused received deposits as Savings and Insurance Officer; he was required to deposit the money with the disbursing officer to be placed in the soldiers' savings accounts. He did not do so, and was charged with stealing from the individual depositors. Defense counsel contended larceny should have been alleged as from the U.S. Government. ***Held***: Assuming the funds were government funds and not individual depositors' funds after deposit with the accused (who was the government custodian of such funds), this fact, under these circumstances, was simply an immaterial variance (i.e., the accused was not misled). *United States v. Craig*, 8 C.M.A. 218, 24 C.M.R. 28 (1957).

I. *The property was of some value.*

1. Value is an element of larceny and must be proved. If property has no value, it cannot be the subject of larceny. *United States v. Messenger*, 2 C.M.A. 21, 6 C.M.R. 21 (1952); *United States v. Peterson*, 2 C.M.A. 645, 10 C.M.R. 143 (1953); *United States v. Batiste*, 11 M.J. 791 (A.F.C.M.R. 1981). The fact that the property is of some value must also be alleged expressly, or by clear implication, or the specification will fail to allege an offense. *United States v. May*, 3 C.M.A. 703, 14 C.M.R. 121 (1954). Note, however, that the value need not be monetary; it is sufficient if the property has value to someone. *Batiste, supra*. (The accused was charged with, and convicted of, stealing a urine sample. ***Held***: The sample had a value to someone even though it was subjective and extrinsic.)

2. The specific value of the property should be alleged whenever possible.

a. The actual value of the property is a matter in aggravation for punishment purposes. Part IV, para. 46e(1), provides the maximum punishments for larceny.

b. If several different kinds of articles are the subject of the larceny, the value of each should be stated—followed by a statement of the aggregate value. Part IV, para. 46c(1)(h)(ii), MCM (1995 Edition).

c. Larcenies of property from different locations on different dates cannot be combined into a single specification as a single larceny to aggregate value and thereby reach the maximum possible punishment. *United States v. Rupert,* 25 M.J. 531 (A.C.M.R. 1987).

d. ***Caveat.*** Failure to allege a specific value precludes punishment greater than the least permissible, irrespective of the proven value. *United States v. Tamas,* 6 C.M.A. 502, 20 C.M.R. 218 (1955).

3. The accused need not know that the specific property intended to be stolen is of a particular value. *United States v. Davis,* 6 M.J. 669 (A.C.M.R. 1978).

4. ***Proving value.***

a. ***Items issued by or procured from government sources.*** Official publications which contain price lists of items of government property are competent evidence of the value of such items at the time of theft, and, if the property is shown to have been in substantially the same condition at the time it was stolen, such evidence may be sufficient proof of value. Part IV, para. 46c(1)(g)(ii), MCM (1995 Edition); *United States v. Thompson,* 10 C.M.A. 45, 27 C.M.R. 119 (1958).

- The price list is not conclusive evidence of value. It is entitled to consideration, but it is not binding upon the court-martial. Many other matters may be considered by the court-martial in determining value (e.g., the condition of the property at the time of the theft). Part IV, para. 46c(1)(g)(ii), MCM (1995 Edition).

– ***Example.*** Accused was charged with unlawful purchase of an Army pistol. The weapon was stolen several months before the purchase. This pistol was shown to be defective and missing parts when purchased by the accused. Defense introduced evidence that such pistols were readily obtainable in the local market at a price less than the $53.00 shown in the official Army price list. ***Held:*** Evidence insufficient to prove that the pistol had a value of $53.00. *United States v. Thornton,* 8 C.M.A. 57, 23 C.M.R. 281 (1957); *United States v. Jancauskas,* 3 C.M.R. 702 (A.F.B.R.

1952).

(2) Where there is a conflict between the ***official*** price list and market value, the market value will prevail. *Jancauskas* and *Thompson*, both *supra*.

b. ***Property other than that obtained from government sources.*** "As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft." Part IV, para. 46c(1)(g)(iii), MCM (1995 Edition). *United States v. Stewart*, 1 M.J. 750 (A.F.C.M.R. 1975) (legitimate market value at time and place of theft was face value of airline ticket, which had been issued and not capable of being used without further validation, rather than intrinsic and nominal value of the paper).

(1) If the property, because of its character or the place where it was stolen, has no legitimate value at the time and place of the theft, or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States as of the time of the theft, or by its replacement cost at the time—whichever is less. Part IV, para. 46c(1)(g)(iii), MCM (1995 Edition). *But see United States v. Evanoff*, NMCM 78-0820 (28 Nov 78), which held evidence of value of stolen items in United States inadmissible to prove value at an Okinawa court-martial, since items were from Okinawan pawn shop.

(2) ***Negotiable instruments.*** Writings representing value may be considered to have the value which they represented at the time of the theft. *United States v. Sowards*, 5 M.J. 864 (A.F.C.M.R. 1978); *United States v. Windham*, 15 C.M.A. 523, 36 C.M.R. 21 (1965) (e.g., when a check for $50.00 is stolen, the value of the property stolen is $50.00).

– What happens if the check is not signed? *Compare United States v. Frost*, 22 C.M.A. 233, 46 C.M.R. 233 (1973) (unsigned instrument held to be of no value except for the intrinsic value of the piece of paper) *with United States v. Payne*, 9 M.J. 681 (A.F.C.M.R. 1980) (accounts receivable had nominal value); *United States v. Albrecht*, 38 M.J. 627 (A.F.C.M.R. 1993) (blank checks may be subject of larceny, but their value is nominal); *and United States v. Falcon*, 16 M.J. 528 (A.C.M.R. 1983) (in prosecution for stealing blank check, trial court could find that blank check had "some value"). *But see United States v. Harvey*, 2 M.J. 856 (A.C.M.R. 1976) (money order initialed by issuing clerk on behalf of drawer, fee charged for its presentation, control number and amount payable imprinted thereon, and payee's name inserted but ***not*** signed by purchaser had value of face amount).

(3) Evidence of market value may be established by:

(a) Proof of recent purchase price (Part IV, para. 46c(1)(g)(iii), MCM (1995 Edition));

(b) testimony of any person familiar with market

value as a result of training or experience (e.g., appraiser or dealer) (Mil.R.Evid. 702-703);

(c) the owner or other layman may testify as to value if familiar with its quality and condition (Part IV, para. 46c(1)(g)(iii), MCM (1995 Edition)) [lack of experience in the market goes only to the weight of the testimony (Mil.R.Evid. 701)]; or

(d) a stipulation of value between the parties. *United States v. Upton*, 9 M.J. 586 (A.F.C.M.R. 1980).

c. In *United States v. Lewis*, 13 M.J. 561 (A.F.C.M.R. 1982), the court upheld the accused's conviction for larceny of the entire value of a stereo, even though the accused had switched price tags on the stereo and had partially paid for it.

J. ***Intent.*** The taking, obtaining, or withholding by the accused must be with the intent to deprive or defraud permanently (larceny) or temporarily (wrongful appropriation) another person of the use and benefit of the property.

– ***The accused must specifically intend to deprive.*** This intent is more than that the accused had it in his mind to remove or withhold the property from the possession of another at the time of the taking, obtaining, or withholding; it means that the accused had the specific intent to dispossess another wrongfully. It is in this sense that his intent becomes criminal. *United States v. Bilbo*, 9 M.J. 800 (N.C.M.R. 1980); *United States v. Levitt*, 35 M.J. 108 (C.M.A. 1992).

– ***Example.*** An accused obtains property from another under the honest though mistaken belief that it is his. Although he specifically intends to remove the property from the other person, he is not guilty of larceny because he did not intend to take the property wrongfully. *United States v. Nix*, 11 C.M.A. 691, 29 C.M.R. 507 (1960). *United States v. Pitts*, 12 C.M.A. 106, 30 C.M.R. 106 (1961) ("Cumshaw" may not involve criminal intent where the accused honestly believed it was legal). The specific intent required does ***not*** involve knowledge that the specific property to be stolen is of a particular value.

a. ***Friendly borrowing.*** In situations where the accused borrows property from a friend or acquaintance without the friend's express consent, C.A.A.F. has found no criminal intent and, hence, no larceny or wrongful appropriation.

(1) ***Example.*** ***A*** borrowed a uniform from ***B*** without ***B***'s consent; ***A*** testified that he thought, if ***B*** had been there, ***B*** would have given consent. ***A*** further testified he had left ***B*** a note regarding the whereabouts of his uniform. ***Held***: A plea of guilty was improvident since, if ***A***'s story were believed, he did not possess the requisite criminal intent. *United States v. Thomas*, 14 C.M.A. 223, 34 C.M.R. 3 (1963); *United States v. Caid*, 13 C.M.A. 348, 32 C.M.R. 348 (1962). *See also United States v. Harville*, 14 M.J. 270 (C.M.A. 1982) (accused's conviction for wrongful appropriation of a motor vehicle reversed where accused left a note indicating where he had gone, when he would return, and how the victim could reach him).

(2) ***Example***. ***A*** went to a hotel with ***B*** in ***B***'s car. ***B*** said he was going to leave the car parked at the hotel as he was too drunk to drive. ***A*** took the car and drove off. He stated he was going to drive ***B***'s car back to the base because ***B*** was too drunk to drive. ***A*** had an accident near the base. ***Held***: The failure of the law officer to instruct on the necessity of criminal intent in wrongful appropriation was prejudicial because the court-martial could reasonably have found that the accused lacked the criminal frame of mind necessary for wrongful appropriation. The court noted that ***A*** and ***B*** were friends and that ***B*** stated he would have loaned ***A*** the car if he had asked for it. *United States v. Bridges*, 12 C.M.A. 96, 30 C.M.R. 96 (1961). In these cases, it appears that the court found that there was no criminal intent under circumstances where the accused could reasonably believe that the owner would have consented to the taking if asked.

(3) It is worthy of note that, in these "borrowing" cases, the taking has been from a friend or acquaintance. It appears that this relationship between the parties is significant in determining whether or not criminal intent exists. It may well be that the touchstone underlying the court's decision is that, because of the relationship, the acts of the accused have not impaired the interest of society to the extent that criminal liability should be assessed. Borrowing from strangers might well cause criminal liability to attach. Moreover, one cannot borrow from the U.S. Government. In *United States v. Lewis*, 19 M.J. 623 (A.C.M.R. 1984), the accused used his advance travel and transportation allowance to purchase a car, intending to refund the amount when loans came through. As the money was advanced to the accused for the purpose of the trip, the court held it was wrongfully appropriated when used to buy an automobile.

b. ***Teach a lesson.*** It had previously been held, in *United States v. Roark*, 12 C.M.A. 478, 31 C.M.R. 64 (1961), that, where the intent of the accused in taking the property was simply to teach the victim a lesson, there is no criminal intent and hence no larceny or wrongful appropriation. *United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983) overruled this theory, holding that it is the accused's intent to permanently or temporarily deprive which determines his criminality and not his motive in teaching the victim a lesson.

Kastner has been incorporated into Part IV, para. 46c(1)(f)(iii), MCM (1995 Edition). A further discussion of this objective / subjective test is found in *United States v. Johnson*, 17 M.J. 140 (C.M.A. 1984).

c. Intent to deprive permanently or temporarily will, in most cases, have to be inferred from circumstantial evidence. *See, e.g., United States v. Higdon*, 2 M.J. 445 (A.C.M.R. 1975). In determining whether the intent was to deprive permanently or temporarily, examine all the circumstances surrounding the taking and the accused's conduct thereafter—particularly the manner in which the accused dealt with the property (i.e., whether he dealt with it in such a way as to be likely to cause a permanent or merely a temporary loss to the owner). *See United States v. Brookman*, 7 C.M.A. 729, 23 C.M.R. 193 (1957); *United States v. Vardiman*, 35 M.J. 132 (C.M.A. 1992).

(1) Willful consumption of property clearly establishes intent permanently to deprive. *United States v. Speer*, 2 M.J. 1244 (A.F.C.M.R. 1976).

(2) Concealing property may establish intent to deprive permanently. Part IV, para. 46c(1)(f)(ii), MCM (1995 Edition).

(3) Willful destruction of property shows intent to deprive permanently. *Id.*

(4) Abandoning the property where the victim is likely to recover it may evidence only an intent to deprive temporarily; however, where accused abandons it under such circumstances that it is likely that the victim will not find it, then an intent to deprive permanently may be established. *Brookman, supra. See also United States v. Wooten*, 13 C.M.A. 171, 32 C.M.R. 171 (1962).

(5) Pawning the property, depending on the facts, may indicate either a permanent or temporary intent to deprive. Factors bearing on the determination of intent would include:

(a) Accused still has pawn ticket;

(b) accused no longer has pawn ticket;

(c) accused pawned in his own name; or

(d) accused pawned in false name.

(6) Sale of property indicates an intent to deprive permanently. Part IV, para. 46c(1)(f)(ii), MCM (1995 Edition).

(7) If the evidence shows the intent is to deprive only temporarily instead of permanently, the accused cannot be convicted of larceny but only of wrongful appropriation. *United States v. Davis*, 6 M.J. 669 (A.C.M.R. 1978); *United States v. Diamond*, 5 M.J. 650 (A.F.C.M.R. 1978). Thus, it is the intent element which makes wrongful appropriation an LIO of larceny.

d. ***Alternate intent.*** An intent to appropriate the same to his own use or the use of any person other than the person last in lawful possession, or the true owner, can also be sufficient to make out the offense.

(1) Some civilian jurisdictions require that, in order to commit larceny, there must be an expectation of gain or benefit to the thief. Article 121 does not follow this view and makes it just as much the crime of larceny to steal for the benefit of another as for one's self.

(2) Remember, it is still larceny even though the accused has no intention of benefitting anyone (i.e., it is larceny if he intends simply to deprive the owner of it permanently). For example, Rollo wrongfully takes Will's watch and deliberately throws it in the ocean. A larceny results even though no one benefits.

K. ***Lost, mislaid, and abandoned property as the subject of larceny.*** Whether property is lost, mislaid, or abandoned is significant in determining the criminal liability of the one who finds it. *See United States v. Malone*, 14 M.J. 563 (N.M.C.M.R. 1982); *United States v. Meeks*, 32 M.J. 1033 (A.F.C.M.R. 1991); and *United States v. Wiederkehr*, 33 M.J. 539 (A.F.C.M.R. 1991) for a comprehensive discussion of this area.

1. ***Lost property.*** Property with which the owner has involuntarily parted and does not know where to find or recover it is lost property. The term does ***not*** include property which has been intentionally concealed or deposited in a secret place for safekeeping. *Black's Law Dictionary* (4th ed. 1968).

a. When there is a clue to ownership, a finder who takes possession of lost property acquires lawful possession if his purpose is to restore it to the owner. But, he commits larceny or wrongful appropriation if his intent is to appropriate it to his own use. Part IV, para. 46c(1)(h)(i), MCM (1995 Edition).

b. When there is no clue to ownership, a finder may lawfully take possession even if he intends to appropriate the property to his own use. If the finder later discovers a clue to ownership, he has a duty to take steps to restore the property to the owner if he still has it, or run the risk of being found guilty of a withholding-type larceny or wrongful appropriation.

c. What is a "clue" to ownership? If, under all the facts and

circumstances of the particular case, the finder would have reason to believe the owner and his property could be brought together again, there is a clue to ownership. Such clues may be furnished by the character, location, marketing of the property, or by other circumstances. Part IV, para. 46c(1)(h)(i), MCM (1995 Edition).

(1) Identifying marks, initials, serial number, etc. may provide clues to ownership.

(2) The nature of the property and the locality of the loss may be determining factors (e.g., a bos'n's pipe, a pilot's helmet, a wallet with no identification in it, found in a sleeping compartment for four men). *Malone, supra.*

(3) Value itself may be controlling (e.g., a dime found on the sidewalk in downtown Newport would offer no clue to ownership; a thousand dollar bill found in the Justice School would be property with a clue to ownership—i.e., there would probably be little difficulty in discovering the true owner).

d. To determine the finder's intent where there is a clue, examine his conduct with respect to the property. If he has made a reasonable effort under the circumstances to have the property restored to its owner, it could be determined that his purpose was to restore the property to its owner. However, if he made no reasonable attempt to restore it, a court could find that he wrongfully took the item (i.e., without intent to restore it and with intent to deprive) and, hence, find him guilty of larceny.

2. ***Mislaid property.*** An article that is intentionally put in a certain place for a temporary purpose, and then inadvertently left there when the owner goes away (e.g., a package left at a table in a bank lobby by a depositor who had written a check), is mislaid property. Mislaid property by definition ***always*** has a clue as to its ownership (i.e., there is always a strong probability that the owner could find it). Therefore, anyone who takes possession of mislaid property with the intent to appropriate it to his own use commits larceny or wrongful appropriation.

3. ***Abandoned property.*** Property to which the owner has relinquished all title, possession, or claim without vesting it in any other person (throwing property away) is abandoned property.

a. Abandoned property can never be the subject of larceny since the owner has relinquished all claim to it (e.g., owner throws a broken radio into the trash). Anyone can take it without committing larceny.

b. When a thief "abandons" property, however, possession is deemed to revert to the person wrongfully dispossessed.

L. ***Possession of recently stolen property as evidence of theft.***

1. The ***conscious***, ***exclusive***, and ***unexplained possession*** of ***recently stolen*** property permits the ***inference*** that the person shown to have it in his custody was the individual who stole it. *United States v. Weems*, 11 C.M.A. 652, 29 C.M.R. 468 (1960); *Tot v. United States*, 319 U.S. 463 (1943). The strength of the inference depends upon the nature of the property and the degree of recentness of the offense. *United States v. Irino*, 1 M.J. 513 (A.F.C.M.R. 1975).

a. Such possession does not require the court to find the accused guilty; it merely permits them to do so. *United States v. Boultinghouse*, 11 C.M.A. 721, 29 C.M.R. 537 (1960).

b. Before the inference may be drawn and guilt found, the theft must have been recent and the possession must be conscious, exclusive, and unexplained. *United States v. Ball*, 8 C.M.A. 25, 23 C.M.R. 249 (1957).

(1) Conscious possession means that the accused must be aware that he has the property. It need not be established that he knew it was stolen property. *See United States v. Adaszak*, 13 C.M.R. 640 (A.F.B.R. 1953). All of the property need not be in his possession. "Even possession of part of recently stolen property may reasonably create the inference that the possessor has, or had, the remainder." *Irino, supra*, at 516.

(2) Exclusive possession means that the accused must be shown to have dominion over the property to the exclusion of everyone else.

– ***Example***. Recently stolen fatigues were found hanging on the wall in accused's room. Accused had a roommate. ***Held***: Not exclusive possession. His roommate also had free access to the room and, hence, to the clothing. *Adaszak, supra.*

(3) Unexplained possession.

(a) The purpose of this requirement is "to direct the attention of the triers of fact to the circumstances of the accused's possession and to the fact that they must determine whether the possession is explained or unexplained." *United States v. Hairston*, 9 C.M.A. 554, 556, 26 C.M.R. 334, 336 (1958); *United States v. Ellis*, 2 M.J. 616 (N.C.M.R. 1977).

(b) If there is no explanation for the accused's possession of the property in evidence, the basis for the inference is complete and the triers of fact are justified in finding that the possessor stole it if all the other elements are proved.

"The accused, of course, has an absolute right to remain silent. However, if the prosecution's case contains no evidence of an explanation for his possession which is 'consistent with innocence,' the accused runs the risk of the jury drawing the inference of guilty possession against him." *Hairston, supra*, at 556, 26 C.M.R. at 336; *United States v. McIver*, 4 M.J. 900 (N.C.M.R. 1978). The drawing of this inference by the jury neither shifts the burden of proof to the accused nor denies him the right against self-incrimination. *United States v. Pasha*, 24 M.J. 87 (C.M.A. 1987).

(c) "To avoid the consequences of the absence in the evidence of an explanation, the accused 'naturally carries the duty of explaining' his possession. . . . In other words, he has the burden of going forward with the evidence." *Hairston, supra*, at 556, 26 C.M.R. at 336.

(d) ***Inability to explain.*** The accused's mental condition at the time he came into possession may prohibit his explaining the circumstances of his possession, as where he was drunk or had amnesia. Such a circumstance would go to the weight to be given to the inference of guilt. *See United States v. Boultinghouse*, 11 C.M.A. 721, 29 C.M.R. 537 (1960) and *United States v. Day*, 14 C.M.A. 186, 33 C.M.R. 398 (1963).

(e) To establish the permissive inference of guilt then, the government must establish that the accused was in conscious, exclusive, and recent possession of the stolen property in question. Then, unless the possession is explained by the accused or by other evidence and the explanation is consistent with innocence, the court may find the accused guilty. *See Hairston, Weems*, and *Boultinghouse*, all *supra*.

2. In determining whether there is possession of recently stolen property, all the circumstances must be considered. The character of the goods, their salability, and whether they are cumbersome or portable, are among the factors to be considered. *United States v. Hairston*, 9 C.M.A. 554, 26 C.M.R. 334 (1958). *United States v. Moykkynen*, 1 M.J. 978 (N.C.M.R. 1976). In the case of *United States v. Moten*, 6 C.M.A. 359, 20 C.M.R. 75 (1955), the accused returned a government pistol two months after a theft. It is questionable whether the accused was in possession of recently stolen property. In any event, the weight of such an inference is diminished by the passage of time.

– ***Example.*** The accused, in the case of *United States v. Perkins*, 17 C.M.R. 702 (A.B.R. 1954), was discovered in possession of stolen trousers one year after they were reported missing. ***Held:*** Not in possession of recently stolen property. Thus, it would appear that an accused may be held to be in possession of recently stolen property if the time span between the theft and his possession is, under the circumstances, not so long as to create the reasonable possibility of the goods having been disposed of by the thief and subsequently acquired innocently by the accused. An accused may be found in possession of "hot" goods (e.g., the Hope diamond) a considerable period after the theft and still be in possession of recently stolen property. On the other hand, in the case of readily negotiable items, possession may be "recent" only for a short period after the theft.

M. ***Common defenses to larceny.***

1. ***Absence of intent.***

a. Voluntary intoxication is a defense where it is sufficient to raise a reasonable doubt concerning the accused's mental capacity to entertain the requisite specific intent. *United States v. Shaw*, 13 C.M.A. 144, 32 C.M.R. 144 (1962); *United States v. Backley*, 2 C.M.A. 496, 9 C.M.R. 126 (1953); and *United States v. Ledbetter*, 32 M.J. 272 (C.M.A. 1991).

b. Honest mistake is a defense where a person takes, obtains, or withholds the property of another, believing honestly, although mistakenly and negligently, that he has a legal right to acquire or retain the property. *United States v. Sicley*, 6 C.M.A. 402, 20 C.M.R. 118 (1955); *United States v. Rowan*, 4 C.M.A. 430, 16 C.M.R. 4 (1954); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983) (mistake of fact need only be honest and not both honest and reasonable). *United States v. Buswell*, 22 M.J. 617 (A.C.M.R. 1986). When the defense of mistake is reasonably raised by the evidence, it is incumbent upon the military judge to instruct thereon. There is, however, no necessity for such an instruction when the evidence at trial does not raise the issue. *United States v. Greenfeather*, 13 C.M.A. 151, 32 C.M.R. 151 (1962); *United States v. Pitts*, 12 C.M.A. 106, 30 C.M.R. 106 (1961); and *United States v. Rodriguez-Suarez*, 4 C.M.A. 679, 16 C.M.R. 253 (1954).

2. ***Impossibility.*** Accused, with the intent to steal, takes a coat off the coat rack, thinking that it belongs to someone else—it turns out to be his own peacoat. He has not committed larceny because it is impossible to steal one's own property, but he is guilty of attempted larceny. *See United States v. Thomas and McClellan*, 13 C.M.A. 278, 32 C.M.R. 278 (1962).

3. ***Negligent loss.*** Cases involving withholding-type larcenies have indicated that, where the evidence suggests the possibility that the accused's failure to account for the property in his custody was due to mere negligence, the court must be instructed that negligent loss constitutes a defense to both larceny and wrongful appropriation. *United States v. Gustafson*, 17 C.M.A. 150, 37 C.M.R. 414 (1967) and *United States v. Kuchinsky*, 17 C.M.A. 93, 37 C.M.R. 357 (1967). Negligent loss which occurs after the formulation of an intent to deprive permanently would not be a defense to larceny. Negligent loss which occurs after the formulation of an intent to deprive only temporarily would be a defense to larceny, but would not be a defense to wrongful appropriation.

4. ***Duress.***

– In *United States v. Pinkston*, 18 C.M.A. 261, 39 C.M.R. 261 (1969), the accused pleaded guilty to three specifications of larceny. In examining the accused, the defense counsel alluded to matters that might arise in mitigation and extenuation indicating a possible defense, particularly that the accused ". . . felt he was

unable to withdraw because of his fear of harm to his fiancee and his child." Defense counsel indicated that the defense of duress would not be asserted. ***Held***: The defense of duress is available to an accused who was acting under a well-grounded apprehension of immediate death or serious bodily harm. The legal officer erred in failing to recognize the potential defense to the charges, and further inquiry should have been made regarding the providency of accused's plea.

5. ***An intention to pay for the property stolen, or to replace it with an equivalent.***

a. Even though such an intention existed at the time of the theft, it is ***not*** a defense. Furthermore, the absence of a pecuniary loss to the owner is not a defense. *United States v. Batiste*, 11 M.J. 791 (A.F.C.M.R. 1981). The focus is on the accused's intent as to the original property taken, not that (s)he intends to get similar items to replace the goods taken.

b. Accused, Company CO, took food from a mess because his wife needed it immediately and he did not have the time to go out and buy it. He intended to replace it. ***Held***: No defense. This is larceny. *United States v. Krull*, 3 C.M.A. 129, 11 C.M.R. 129 (1953).

c. The manager of a PX unlawfully sold cigarettes to unauthorized personnel, pocketed the price difference, but paid the exchange for the cigarettes. ***Held***: Larceny despite no material loss. *United States v. Robinson*, 7 C.M.R. 618 (A.F.B.R. 1952).

d. ***Exceptions***. Part IV, para. 46c(1)(f)(iii), MCM (1995 Edition).

(1) ***Money***. Apart from circumstances which may impart special value to a coin or bill as a numismatic item, one dollar bill is the same as another. It is not larceny, for example, to take two five-dollar bills in exchange for a ten-dollar bill without the knowledge or consent of the owner. *United States v. Hayes*, 8 C.M.A. 627, 25 C.M.R. 131 (1958).

(2) ***Endorsed checks***. May be replaced with an equivalent amount of cash and ***not*** be larceny, though it would still be wrongful appropriation. *United States v. Epperson*, 10 C.M.A. 582, 28 C.M.R. 148 (1959).

6. An intent to return the same item taken is a defense to larceny, but no defense to wrongful appropriation. *Epperson, supra.*

7. ***Repentance is no defense***. If the accused wrongfully took, obtained, or withheld property with the intent to deprive permanently, the offense of larceny is complete and a subsequent repentant return is no defense to larceny, but is mitigating for sentencing purposes. Part IV, para. 46c(1)(f)(iii), MCM (1995 Edition).

N. ***Lesser included offenses (LIO's).***

1. Wrongful appropriation is an LIO of larceny. Wrongful appropriation has all the elements of larceny, except that the intent in wrongful appropriation is less serious than the intent in larceny; hence, the offense of wrongful appropriation is lesser and included within larceny. *United States v. Burr*, 2 C.M.A. 182, 7 C.M.R. 58 (1953); *United States v. Haynes*, 8 C.M.A. 627, 25 C.M.R. 131 (1958); *United States v. Jones*, 35 M.J. 143 (C.M.A. 1992).

2. In *United States v. Eggleton*, 22 C.M.A. 503, 47 C.M.R. 920 (1973), the accused took an $800.00 stereo as "security" for a $100.00 debt owed him by the victim. The court held that, even if the accused's "self-help" was condoned, there was a wrongful appropriation of the $700.00 difference.

3. The offenses of receiving stolen goods and accessory after the fact are ***not*** LIO's of larceny. *United States v. McFarland*, 8 C.M.A. 42, 23 C.M.R. 266 (1957); *United States v. Greener*, 1 M.J. 1111 (N.C.M.R. 1977).

4. Wrongful taking, without intent, is ***not*** an LIO; in fact, it is not an offense under the UCMJ. *United States v. Norris*, 2 C.M.A. 236, 8 C.M.R. 36 (1953). Nor is wrongful withholding, without intent, an offense under the code. *United States v. Geppert*, 7 C.M.A. 741, 23 C.M.R. 205 (1957).

5. Hence, larceny has only three LIO's: wrongful appropriation, attempted larceny, and attempted wrongful appropriation. Similarly, wrongful appropriation has only attempted wrongful appropriation as an LIO. Part IV, para. 46d, MCM (1995 Edition).

6. The *Manual for Courts-Martial* contains certain ***aggravated*** forms of larceny that deal with the theft of military property. Part IV, para. 46e(1)(a), lists the maximum punishment for theft of military property with a value under $100.00 as confinement for one year and a bad conduct discharge. Part IV, para. 46e(1)(c), lists the maximum punishment for larceny of military property with a value over $100.00—or of any military vehicle, aircraft, vessel, firearm, or explosive—as confinement for 10 years and a dishonorable discharge. Military property is still defined by Part IV, para. 32(c)(1), MCM (1995 Edition). It is worthy of note that the *Manual for Courts-Martial* does ***not*** contain parallel changes to the LIO of wrongful appropriation. *See United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993).

7. ***Determining whether LIO is reasonably raised by evidence.***

– The general rule is that the lesser crime must be submitted to the fact-finder along with the greater, unless the evidence positively excludes any inference that the lesser crime was committed. *United States v. Clark*, 1 C.M.A. 201, 2 C.M.R. 107 (1952). Ordinarily, any doubt should be resolved in favor of giving an instruction on the LIO. *United States v. McGee*, 1 M.J. 193 (C.M.A. 1975). There are certain circumstances in which it is unnecessary and even improper to instruct on LIO's. *United States v. Johnson*, 1 M.J. 137 (C.M.A. 1975); *United States v. Ricketts*, 1 M.J. 78 (C.M.A. 1975).

– Some examples:

(1) In *United States v. Dison*, 8 C.M.A. 616, 25 C.M.R. 120 (1958), a taking was admitted, and the only question was intent. The evidence showed that the accused was very drunk, but it also permitted the finding that he had the mental capacity to form an intent to deprive, and the facts could be interpreted reasonably as showing that the accused's intent was to retain the money only temporarily. The court held that failure to instruct on the LIO was prejudicial error. C.M.A. cautioned, however, that "in some instances intoxication might pose an all-or-nothing charge." *See Johnson* and *Ricketts*, both *supra*.

(2) In *United States v. Sims*, 5 C.M.A. 115, 17 C.M.R. 115 (1954), the victim discovered that his money was missing. Accused's room was searched and the money was found. Accused was charged with larceny and testified that he found the money and that, since it was Sunday, he was going to turn it in the next day to his company commander. The law officer instructed the court members that no LIO was possible. ***Held***: Instructions correct. Accused's testimony constituted a complete disclaimer of any criminal intent. As the issue was presented by the accused, acquittal was the only alternative to conviction for the offense charged. In short, the evidence presented an "all-or-nothing" theory. *See Johnson* and *Ricketts*, both *supra*.

(3) Accused was charged with larceny of clothing belonging to ***A***. The accused testified that he had loaned ***B*** some money, and ***B*** said that ***A*** could take ***B***'s clothing if ***B*** did not repay. The accused further testified that he took ***A***'s clothing in the belief that it belonged to ***B***. ***Held***: LIO was not fairly raised by this evidence for, if believed, it would constitute a total defense and the accused would be guilty neither of larceny nor wrongful appropriation. *United States v. Smith*, 2 C.M.A. 312, 8 C.M.R. 112 (1953).

(4) The accused and another wrongfully took a car, used it to escape from confinement at Quantico, Virginia, and drove to Washington, DC, where they abandoned it upon running out of gas. Among other things, the accused was charged with larceny of the vehicle. ***Held***: LIO not raised. "It is stating the obvious . . . that neither the accused nor any of his companions intended personally to return it to the owner." *United States v. Brookman*, 7 C.M.A. 729, 732, 23 C.M.R. 193, 196 (1957).

O. ***Pleading.***

1. Describe property in generic terms and omit detailed descriptions (e.g., "automobile," not "19CY purple Chevrolet").

2. Never plead in the disjunctive. An allegation that the accused wrongfully appropriated "lawful money and / or property" of a specified value is not

sufficient. *United States v. Autrey*, 12 C.M.A. 252, 30 C.M.R. 252 (1961).

3. Larceny or wrongful appropriation of a value in excess of $100.00 increases the quantum of punishment available, as does larceny of military property.

4. An allegation that the accused attempted to steal "personal property of some value," while it might meet minimum requirements, is subject to a motion for further particularity and the motion will usually be granted. *Compare United States v. Williams*, 12 C.M.A. 683, 31 C.M.R. 269 (1962) and *United States v. Curtiss*, 19 C.M.A. 402, 42 C.M.R. 4 (1970) *with United States v. Acfalle*, 30 C.M.R. 845 (A.F.B.R. 1960) and *United States v. Durham*, 21 M.J. 232 (C.M.A. 1986) (pleading the theft of "items" sufficient to protect the accused from former jeopardy where property was identified on the record with specificity).

5. The findings must conform to the specification, or a fatal variance may result.

– ***Example.*** In *United States v. Lucero*, 1 M.J. 563 (A.F.C.M.R. 1975), the accused was found not guilty of stealing the items alleged in the specification, but guilty of stealing some "medical equipment." The court held that, since it could not be determined of what the "medical equipment" consisted, the identity of the offense had been changed and the resulting variance was fatal.

6. Thefts which take place on different occasions are separate crimes and should be alleged separately, not under a single specification. *United States v. Paulk*, 13 C.M.A. 456, 32 C.M.R. 456 (1963). Thefts occurring at substantially the same time and place, however, or which evidence a single course of conduct, amount to a single larceny and should be alleged as such, even if the property was taken from different persons. *United States v. Means*, 12 C.M.A. 290, 30 C.M.R. 290 (1961) and cases cited therein. *But see United States v. Ventegeat*, 20 C.M.A. 32, 42 C.M.R. 224 (1970); *United States v. Burney*, 21 C.M.A. 71, 44 C.M.R. 125 (1971) and a synopsis of the subject in *United States v. Clason*, 48 C.M.R. 453 (N.C.M.R. 1974). ***Caveat***: When in doubt, plead multiple thefts under separate specifications to avoid duplicity. Should there be a single course of conduct, the specifications can be treated as multiplicious for sentencing.

7. Although the government must prove that the accused took, obtained, or withheld the property in question, it is only necessary to plead the word "steal." *United States v. Paulk*, 13 C.M.A. 456, 32 C.M.R. 456 (1963).

8. ***Sample specification.*** Part IV, para. 46f, MCM (1995 Edition).

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 121
>
> ***Specification.*** In that [Name, etc. and personal jurisdiction data], did, [at / on board (location], on or about [date], (steal) (wrongfully appropriate) a wristwatch, of a value of about $27.00, the property of Seaman Penurious P. Gullible, U.S. Navy.

P. ***Multiplicity.*** As noted above, multiplicity considerations may affect how the offenses are pled. More often than not, however, the question is one which manifests itself only in sentencing. A discussion of the cases illustrate this point:

1. When larceny of several articles is committed at substantially the same time and place it is a single larceny, even though the articles belong to different persons, but a separate and distinct theft arises with each larcenous taking from a separate locale or structure of different ownership, notwithstanding the fact that multiple takings may occur in the same vicinity and in a single venture under one continuous impulse. *United States v. Wenz*, 1 M.J. 1030 (N.C.M.R. 1976); *United States v. Abendschein*, 19 M.J. 619 (A.C.M.R. 1984); Part IV, para. 46c(1)(h)(ii), MCM (1995 Edition).

2. Larcenous taking of tape recorder in one room not multiplicious with charge of larcenous taking of calculator and checks from another office. *United States v. Gillingham*, 1 M.J. 1193 (N.C.M.R. 1976).

3. For a detailed discussion of multiplicity *see* section 0207, *Supra*.

Q. ***Instructions.*** *See Military Judges' Benchbook*, DA Pam 27-9 (1982) Insts. 3-90, 3-91.

1. Even though the government need only allege that the accused did "steal," the government must prove that the accused wrongfully took, obtained, or withheld the property in question and the military judge should instruct on the basis of the theory under which the government has proceeded. *United States v. Jones*, 13 C.M.A. 635, 33 C.M.R. 167 (1963); *United States v. Antonelli*, 35 M.J. 122 (C.M.A. 1992).

2. An instruction in the alternative (e.g., took, obtained, or withheld), however, will not be objectionable unless it operates to permit the court to convict on an improper theory. *United States v. Smith*, 11 C.M.A. 321, 29 C.M.R. 137 (1960); *United States v. Nix*, 11 C.M.A. 691, 29 C.M.R. 507 (1960). *Compare United States v. McFarland*, 8 C.M.A. 42, 23 C.M.R. 266 (1957) and *United States v. Sicley*, 6 C.M.A. 402, 20 C.M.R. 118 (1955).

– ***Example***. Accused was tried for larceny of meat. He worked in a mess hall which had received a large delivery of packaged meat. Subsequently, his car was searched off base, and the meat was found in his car. Defense introduced evidence that denied the taking by the accused and "explained" his possession of the recently stolen meat, asserting that he got it off base from a civilian, although he did realize it was probably stolen. In short, he defended against the larceny charge by asserting he received stolen goods. The legal officer gave a shotgun instruction, "took, obtained, or withheld." ***Held***: Inclusion of the alternative theory of withholding in the instruction was prejudicial error as the court might then convict of larceny because the accused had received the stolen goods and thereafter withheld them, which is not larceny.

Note: The above is J. Ferguson's approach. J. Kilday said that the use of the word "withheld" was not prejudicial, but concurred in the result because of the legal officer's failure to instruct the court on the effect of accused's explanation of possession upon the permissive inference of guilt from possession of stolen property. C. J. Quinn reverted here to the first C.M.A. position of "nonprejudicial" error where the accused's testimony was "patently incredible." But, Judges Ferguson and Kilday rejected that approach and said, in effect, that it's for the court-martial to decide whether the accused's story was credible. Hence, no matter how absurd the tale is, if there is testimony asserting a defense theory, it must be properly instructed upon. *United States v. Hicks*, 15 C.M.A. 68, 35 C.M.R. 40 (1964) and *United States v. Jones*, 13 C.M.A. 635, 33 C.M.R. 167 (1963).

R. ***Related offenses***. Larceny may be committed in connection with several other offenses. For example:

1. Robbery (violation of article 122);
2. presenting a false claim (violation of article 132);
3. obtaining services under false pretenses (violation of article 134);
4. receiving stolen property (violation of article 134) (an actual thief is not guilty of receiving stolen property);
5. issuing worthless checks (violation of article 123a);
6. forgery (violation of article 123);
7. theft from the mails (value not an element) (violation of article 134) [e.g., *United States v. Gaudet*, 11 C.M.A. 672, 29 C.M.R. 488 (1960)];
8. wrongful disposition or destruction of military property of the United States (violation of article 108);
9. wrongful destruction of nonmilitary property (violation of article 109);
10. burglary (violation of article 129);
11. housebreaking (violation of article 130) [Finding of not guilty as to larceny charge was not tantamount to finding that accused lacked the essential intent to commit larceny included in related housebreaking specification. *United States v. Smith*, 4 M.J. 809 (A.F.C.M.R. 1978)]; and
12. conspiracy to commit larceny. *United States v. Washington*, 1 M.J. 473 (C.M.A. 1976).

0902 ROBBERY (Key Numbers 717-722)

A. ***Text of Article 122, UCMJ.***

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

B. ***Elements of the offense.*** Part IV, para. 47b, MCM (1995 Edition).

1. That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

2. that the taking was against the will of that person;

3. that the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;

4. that the property belonged to a person named or described;

5. that the property was of a certain or some value; and

6. that the taking of the property was with the intent permanently to deprive the person robbed of the use and benefit of the property.

C. These elements which describe the offense of robbery show that robbery is essentially a combination of a larceny of the taking type and an assault or threat. The following is a discussion of some of the key elements of robbery.

D. The accused committed a ***taking***-type larceny of property of some value from the possession and in the presence of a person.

1. Since robbery includes "taking with intent to steal," a larceny by ***taking*** is an integral part of the charge of robbery and must be proved at trial. Larceny by false pretenses or an obtaining-type larceny is not sufficient to satisfy this element of the offense. Part IV, para. 47c, MCM (1995 Edition). *United States v. Brazil,* 5 M.J. 509 (A.C.M.R. 1978) (where a withholding of taxicab fare was the essence of what was proven, the accused could properly be found guilty only of larceny, not robbery). *Brazil,* was overruled in *United States v. Abeyta,* 12 M.J. 507 (A.C.M.R. 1981), which held that taxi services could not be the subject of a larceny.

2. To constitute the offense of robbery, it is not essential that the subject of the taking-type larceny be of any specific value. However, the court must be satisfied that the property taken was of some value, however small or indefinite as to amount, in order to convict the accused of larceny by taking, hence, robbery.

3. For a detailed discussion of larceny, see section 0901 of this chapter.

4. To be in the victim's ***presence***, it is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room and, leaving the owner tied, go into that room and steal the valuables, they have committed robbery. Part IV, para. 47c(1), MCM (1995 Edition). "Presence" means possession or control so immediate that violence or intimidation is essential to remove the property. *United States v. McCray*, 5 M.J. 820 (A.C.M.R. 1978).

a. ***Example***. Victim and her "sleeping companion" drove to a beach area for a picnic. On arriving there, the accused and his friends were occupying the area and the victim started to back up her car to leave. The accused approached the car, snatched the keys from the ignition, dragged the victim from the car, and attempted to undress her. The victim evaded the accused, dropped her purse containing $24.00 on the ground next to the car, and went to the aid of her companion. The accused again accosted her and pushed her against the car. The accused and his friends then drove off leaving the victim and her companion, but taking the $24.00 from victim's purse. ***Held***: It is not necessary in robbery that the taking be directly from the person of another, that is, actually severed from the person. It is enough if it is taken from the ***immediate control of the person***, provided the property is taken by or through the use of force or violence. *United States v. Hamlin*, 33 C.M.R. 707 (A.F.B.R. 1963).

b. ***Example***. Accused held a knife to the throat of a winner in a pool game and forced him to admit where his friend's IOU was located. The friend (the loser) then went to another barracks, obtained the IOU, returned and destroyed it in the presence of the winner. During the entire episode, the accused held a knife to the winner's throat. ***Held***: The taking of the IOU was "from the person in the presence" of the victim. *United States v. Maldonado*, 34 C.M.R. 952 (A.F.B.R. 1964), *rev'd on other grounds*, 15 C.M.A. 285, 35 C.M.R. 257 (1965).

c. ***Example***. Accused obtained the victim's room key from the victim while they were at the victim's work area. The accused then went to the victim's barracks room, opened the door using the key, and took the victim's stereo. ***Held***: Not taken from the "presence" of the victim despite the government's contention that the room key symbolized ownership. *United States v. Cagle*, 12 M.J. 736 (A.F.C.M.R. 1981).

E. ***Second and third elements.*** The taking was against the will of the victim and was ***by force or violence***, or putting the victim in ***fear.***

1. ***By force or violence.***

a. For robbery to be committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against his will. *United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982). It is immaterial that there is no fear engendered in the victim. Any amount of force is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or is sufficient to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. Part IV, para. 47c(2), MCM (1995 Edition). *See United States v. Reynolds*, 20 M.J. 118 (C.M.A. 1985), wherein the accused pretended to be a military policeman placing the victim under apprehension. The accused had the victim "patted down" to divert his attention while his wallet was removed. C.M.A. held this jostling constituted sufficient force for robbery.

(1) Where the evidence established that accused struck the victim in the face and took property from victim, who did not resist because he feared further violence, the findings of guilty of robbery by force or violence were supported by the evidence. The assault and battery was sufficient violence to constitute this element of the offense of robbery. *United States v. Reynolds*, 9 C.M.R. 772 (A.F.B.R. 1953).

(2) The degree of force required is such as is actually sufficient to overcome the victim's resistance. It is not necessary to show a personal injury, or a blow, or force sufficient to overcome any resistance that the victim was capable of offering. In fact, robbery may exist although the victim ***makes no resistance***. *United States v. Hamlin*, 33 C.M.R. 707 (A.F.B.R. 1963).

b. ***Time of application of force.***

(1) Actual force or violence to the person of the victim must precede or accompany the taking. If an accused takes possession of the property without the use of force or violence, but subsequently employs force in order to retain money or to escape, he is guilty only of larceny and not robbery. *But see United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982), which held that, if the threat or violence happens before asportation is completed, a robbery is committed. *See also United States v. Burns*, 5 C.M.A. 707, 19 C.M.R. 3 (1955) (the accused beat the victim unconscious with a furnace handle during a psychotic episode and, upon recovering his full mental faculties, he stole the victim's wallet—robbery was established); *United States v. Dixon*, 19 M.J. 788 (A.C.M.R. 1985) (assault following initial beating accompanied by a taking is separately punishable).

(2) If the accused, before the effect of the force and violence

has been dissipated, steals from the victim, it is robbery; the rationale being that the intent is formed while the effects of the force are still operative and the taking is, for all practical purposes, made possible by the violence employed. *Hamlin, supra, citing Burns, supra; United States v. Washington*, 12 M.J. 1036 (A.C.M.R. 1982). *Also see United States v. Henry*, 35 M.J. 136 (C.M.A. 1992).

(3) In *United States v. Subia*, 12 C.M.A. 23, 30 C.M.R. 23 (1960), the accused came upon an already unconscious victim (drunk) and transported him to another location, where he took money from the victim's person without the victim's knowledge. The court indicated that such acts did not constitute robbery, but only larceny, because no force was employed. *But see Washington, supra.*

2. ***By putting victim in fear.*** For robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be demonstrations of force or menaces by which the victim is placed in such fear that he is warranted in making no resistance. The fear must be reasonably well-founded apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury feared may be death or bodily injury to the person himself or to the person of a relative or member of his family or to anyone in his company at the time, or it may be the destruction of his habitation or other injury to his property or that of a relative or member of his family or of anyone in his company at the time of sufficient gravity to warrant his giving up the property demanded by the assailant. Part IV, para. 47c(3), MCM (1995 Edition).

F. ***Sixth element.*** The taking was with the intent to permanently deprive.

1. A person is not guilty of robbery in forcibly taking property from the person of another if he does so under an honest belief that he is the owner, or is assisting an owner. *United States v. Petrie*, 1 M.J. 332 (C.M.A. 1976); *United States v. Kachoughian*, 7 C.M.A. 150, 21 C.M.R. 276 (1956); *United States v. Mack*, 6 M.J. 598 (A.C.M.R. 1978); *United States v. Smith*, 14 M.J. 68 (C.M.A. 1982).

2. One who forcibly recaptures money lost in a crooked gambling game may not be guilty of robbery because title to money lost in a crooked gambling game does not pass to the winner, and one does not ***steal*** when he effects recapture of such money—but he may be guilty of assault and battery. *United States v. Brown*, 13 C.M.A. 485, 33 C.M.R. 17 (1963); *Maldonado, supra.* It is no defense to robbery, however, for an accused to take money from a victim to recover the value of hashish which he believed the victim had stolen from him because the accused had no right to reassert possession of contraband hashish. *United States v. Petrie*, 1 M.J. 332 (C.M.A. 1976).

3. Robbery is a specific intent crime and mental impairment short of legal insanity is relevant in determining the accused's ability to form requisite intent. *United States v. Thomson*, 3 M.J. 271 (C.M.A. 1977).

G. ***Possible LIO's of robbery.***

1. ***Larceny—Article 121.*** *United States v. Rios*, 4 C.M.A. 203, 15 C.M.R. 203, 205 (1954) (specification failed to allege that property had been taken from person or presence of victim but did allege ". . . did . . . steal . . . property from the victim").

2. ***Wrongful appropriation—Article 121.***

3. ***Attempted larceny or attempted wrongful appropriation.***

4. ***Assault and battery—Article 128.*** *United States v. Mack*, 6 M.J. 598 (A.C.M.R. 1978).

5. ***Assault with a dangerous weapon—Article 128.*** Where, in a trial for robbery, the evidence established that, at a time when the accused may have been too intoxicated to entertain a specific intent, he approached a Korean policeman and, by threatening him with a knife, obtained possession of his carbine, the law officer erred when he failed to instruct with respect to the effect of intoxication on the specific intent. The error was purged by affirmance of the offense of assault with a dangerous weapon. *United States v. Craig*, 2 C.M.A. 650, 10 C.M.R. 148 (1953); *United States v. Douglas*, 2 M.J. 470 (A.C.M.R. 1975).

6. ***Assault intentionally inflicting grievous bodily harm—Article 128.*** The robbery specification was in standard form. ***Held***: The allegation of "force and violence" includes both minor and serious physical injuries and the accused must only be aware of the form of violence used to rob the victim. Having directly or inferentially alleged a criminal intent, the government may, in establishing a lesser offense, show the specific type, providing the accused is not misled in his defense. *United States v. King*, 10 C.M.A. 465, 28 C.M.R. 31 (1959); *Douglas, supra.*

7. ***Assault with intent to rob—Article 134.*** *United States v. Cooper*, 2 C.M.A. 333, 8 C.M.R. 133 (1953).

8. ***Extortion—Article 127.*** *United States v. Jackson*, 8 M.J. 511 (A.C.M.R. 1979).

H. ***Pleading.***

1. A specification that only says "rob," or that fails to aver that the taking was from the person or presence of the victim or was accomplished by force, violence, or fear, does not allege robbery. *United States v. Ferguson*, 2 M.J. 1225 (N.C.M.R. 1976). The same is true for attempted robbery. *United States v. Hunt*, 7 M.J. 985 (A.C.M.R. 1979).

2. ***Sample specification.*** Part IV, para. 47f, MCM (1995 Edition)

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 122
>
> ***Specification.*** In that [Name, etc. and personal jurisdiction data], did, [at / on board (location], on or about [date], by means of force, steal from the person of Seaman Harry W. Marble, U.S. Navy, against his will, a watch, of a value of about $25.00, the property of said Seaman Marble.

I. ***Multiplicity considerations.***

1. Robberies of different victims at the same time and place are separately punishable offenses. *United States v. Richardson*, 2 M.J. 436 (A.C.M.R. 1975); *United States v. Baker*, 2 M.J. 773 (A.C.M.R. 1976).

2. Where intent to inflict grievous bodily harm is shown to have been formulated after robbery was perfected, subsequent beating of same victim is separately punishable. *United States v. Douglas*, 2 M.J. 470 (A.C.M.R. 1975); *United States v. Dixon*, 19 M.J. 788 (A.C.M.R. 1985).

3. Separate charges of robbing victim of his car and of German currency were not unreasonably multiplicious when intent to rob money was formulated after intent to take car. *United States v. Davis*, 18 M.J. 79 (C.M.A. 1984).

0903 RECEIVING, BUYING, CONCEALING STOLEN PROPERTY (Key Numbers 729-734)

A. The UCMJ contains no specific punitive article prohibiting the receiving of stolen property. The offense is charged under article 134 as conduct prejudicial to good order and discipline or service discrediting.

B. ***Elements.*** Part IV, para. 106, MCM (1995 Edition).

1. That the accused wrongfully received, bought, or concealed certain property of some value;

2. that the property belonged to another person;

3. that the property had been stolen;

4. that the accused then knew the property had been stolen; and

5. that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

C. ***Accused wrongfully received, bought, or concealed property.***

1. ***Wrongfully.*** This means that the property was received, bought, or concealed without the consent of the true owner or without justification or excuse. Part IV, para. 106c(3), MCM (1995 Edition).

2. ***Received.***

a. The term "receive" means to acquire possession, care, custody, management, or control of property. Thus, even merely transporting stolen goods may constitute the offense of receipt of stolen goods. *United States v. Price,* 34 C.M.R. 516 (A.B.R. 1963) (Dicta: accused who transported parts of a car he knew to be stolen was not guilty of larceny because he was not connected in any way with the larceny and should have been charged with receiving stolen property). Accused's actions in carrying stolen office machines into pawnshop demonstrated sufficient "possession" for acceptance of guilty plea. *United States v. Graves,* 20 M.J. 344 (C.M.A. 1985). Mere constructive possession ***without*** knowledge that what is received is stolen cannot constitute "receipt" so as to confer criminal liability. *United States v. Rokoski,* 30 C.M.R. 433, 436 (A.B.R. 1960). One who comes into constructive possession of property "without knowledge of its character commits no wrong, and there appears to be no sound reason for converting an innocent act into a criminal offense on the basis of after-acquired information which reaches the accused when it is too late for him to act on it by declining to become involved in the transaction."

b. It is not necessary for the receiver to touch the goods with his own hands. If they are delivered into his control, it is sufficient. Thus, possession may be taken for him by his servant or agent acting under his directions; or he may direct the thief to deposit the goods at a certain place and then lead an innocent "purchaser" to that place, or have the goods sent to him, and complete a "sale" without himself touching them.

c. Sale or transfer for consideration is not necessary for receipt. Therefore, this offense encompasses mere concealing or receiving, as well as buying stolen property. Any exercise of control or dominion over property is probably sufficient.

– ***Example.*** Rollo steals a watch from the local base exchange and, after bragging about how he stole it, gives it to his girlfriend as a gift. If she accepts it, she has received stolen property.

d. The receiving must be with the thief's consent. The offense of receiving stolen goods is not committed by one who takes the goods from a thief without consent. This, as we have seen, is larceny. Perhaps more common is the situation where one thief "stiffs" another.

– ***Example.*** ***A*** pays for stolen goods he receives from ***B*** with a rubber check. ***A*** is ***not*** guilty of receiving stolen property because there is ***no*** valid "consent" by ***B*** in relinquishing the goods to ***A***. (But, ***A*** is guilty of larceny by trick in addition to a bad check offense.)

3. ***Concealed.*** *See United States v. Banworth*, 24 C.M.R. 795 (A.F.B.R. 1957) for a discussion of concealment.

4. ***Personalty.*** As in the crime of larceny, the stolen property must be personal property.

D. ***That the property had been stolen and belonged to the person alleged as the owner.***

1. ***The property must be stolen in fact.***

– ***Query.*** Can an accused be found guilty of this offense when he has received wrongfully appropriated property? While Part IV, para. 106, discusses only "stolen property," receiving misappropriated property would in any event seem to be an LIO, an offense under article 134.

2. ***The property must have been stolen by someone other than the accused.***

a. The actual thief (perpetrator) cannot be held criminally liable for receiving property which he has stolen, for he cannot logically receive property from himself. *See* Part IV, para. 106c(1), MCM (1995 Edition); *United States v. Ford*, 12 C.M.A. 3, 30 C.M.R. 3 (1960); *United States v. Cook*, 7 M.J. 623 (N.C.M.R. 1979) *on reh'g.*, 9 M.J. 763 (N.M.C.M.R. 1980) *rev'd. on other grounds*, 12 M.J. 448 (C.M.A. 1982); *United States v. Finnie*, 18 C.M.R. 700 (A.F.B.R. 1954).

b. In certain cases, however, the same facts may seem to support a

charge of larceny or receiving stolen property. This will occur when accused is liable as a ***statutory*** principal vice ***actual*** thief (i.e., an aider and abettor, or co-conspirator, or accessory before the fact). While earlier cases had held that the accused in such situations could be found guilty of both offenses, C.A.A.F. disavowed such practice and now requires that the accused be found guilty of either larceny ***or*** receipt. *United States v. Cartwright*, 13 M.J. 174 (C.M.A. 1982). *Accord United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982). *See also* Part IV, para. 106c(1), MCM (199).

c. Further, receipt of stolen property has been held ***not*** to be an LIO of larceny. *Cook, supra; United States v. Wilkins*, 29 M.J. 421 (C.M.A. 1990). Thus, whenever there is doubt about whether the accused was the thief, or merely a receiver of stolen property, the savvy prosecutor should charge both offenses to allow for the contingencies of proof.

3. ***Proving that the property was stolen in fact.***

a. The government cannot introduce the conviction of the thief as evidence against the receiver. *See* Part IV, para. 3c(5), MCM (1995 Edition) (prohibits the use of evidence of principal's conviction against an accessory after the fact to establish the fact that the offense was committed).

b. Therefore, the government must in effect prove two crimes at the trial of the receiver: the larceny and the receiving.

c. ***Query***. Suppose the thief is acquitted: Can the receiver be convicted? Yes. *See* Chapter I of this study guide and Part IV, para. 3c(5), MCM (1995 Edition).

E. ***That accused then knew the property had been stolen.***

1. Actual knowledge that the property was stolen is required. Part IV, para. 106c(2), MCM (1995 Edition).

a. There is some conflict in the case law as to just what sort and amount of evidence is required to find the requisite knowledge and whether any inferences are permissible. In *United States v. Gluch*, 30 C.M.R. 534 (A.B.R. 1961), the board stated:

> In the absence of a specific proscription in the Code and Manual or by the United States Court of Military Appeals, and applying the principle adopted in the United States courts, we hold that as to the offense of knowingly receiving stolen property where it reasonably appears from the evidence that the stolen property was

> not stolen by the accused, a justifiable inference may be drawn from his recent, unexplained and exclusive possession that he had some knowledge that the property was stolen.

Id. at 541.

b. In *United States v. Petty*, 3 C.M.A. 87, 11 C.M.R. 87 (1953) and *United States v. Fairless*, 18 C.M.R. 904 (A.F.B.R. 1955), an ***inference*** of knowledge was permitted from the attendant facts and circumstances. In *United States v. Rokoski*, 30 C.M.R. 433 (A.B.R. 1960), however, the board distinguished both *Petty* and *Fairless* on the basis that, in those cases, knowledge was inferred from evidence corroborating confessions. The board stated that a greater quantum of proof is required where no confession is extant: "Here, inference of knowledge from facts and circumstances won't suffice." *Id.* at 435. *But cf. United States v. Tucker*, 1 M.J. 492 (A.F.C.M.R. 1975) *rev'd. on other grounds*, 1 M.J. 463 (C.M.A. 1986) (court found sufficient facts and circumstances to give rise to an inference that the accused knew the items received were stolen); *United States v. Morton*, 15 M.J. 850 (A.F.C.M.R. 1983) (permissive inference regarding accused's possession of recently stolen bicycle is simply a description of a general type of logical, relevant, factual deduction that a juror may draw from the evidence admitted at trial). In summation, whether an inference of knowledge will be permitted will depend upon the totality of the facts and circumstances brought out at trial.

c. Mere negligence in not realizing that the property is stolen will not be sufficient for conviction. *Rokoski, supra; United States v. Werner*, 160 F.2d 438 (2d Cir. 1947).

2. Such knowledge must exist at the time the accused received, bought, or concealed the property. *See Rokoski, supra.*

3. Note that an Article 121, UCMJ, wrongful withholding-type larceny does ***not*** preempt the buying, receiving, or concealing offenses. *United States v. Bonavita*, 21 C.M.A. 407, 45 C.M.R. 181 (1972). Where the accused receives, buys, or conceals the property knowing it to be stolen and with no intent to return the property to the true owner, the subsequent withholding of the property from the true owner cannot amount to larceny. Part IV, para. 46c(1)(b), MCM (1995 Edition). Because there has been no taking or obtaining by the accused, his offense is simply receiving stolen property, unless, of course, the accused is a principal but not the perpetrator in the initial taking. *United States v. Henderson*, 9 M.J. 845 (A.C.M.R. 1980); *United States v. McFarland*, 8 C.M.A. 42, 23 C.M.R. 266 (1957) (the essential elements of proof as to larceny are incompatible with those of receiving stolen property); *United States v. Jones*, 13 C.M.A. 635, 33 C.M.R. 167 (1963); *United States v. Welker*, 8 C.M.A. 647, 25 C.M.R. 151 (1958).

F. ***Value.***

– The same rules apply here as for larceny (i.e., the government must allege and prove some value). Specific value is a matter in aggravation. Part IV, para. 106e, MCM (1995 Edition).

G. ***Pleading.*** Part IV, para. 106f, MCM (1995 Edition).

– ***Sample specification.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 134
>
> ***Specification.*** In that Seaman Ima A. Fence, U.S. Navy, USS STING, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 15 March 19CY, unlawfully buy a wristwatch, of a value of about $130.00, the property of Yeoman Third Class Ibe N. Robbed, U.S. Navy, which property as he, the said Seaman Fence, then knew had been stolen.

0904 BAD CHECK LAW (Key Numbers 50, 58)

A. ***Text of Article 123a (enacted in 1961).***

Any person subject to this chapter who

(1) for the procurement of any article or thing of value, with intent to defraud; or

(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive; makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's

possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the 'credit' means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.

B. ***Elements***. Part IV, para. 49b, MCM (1995 Edition).

1. That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money;

2. that, at the time of the making, etc., the accused knew that the maker or drawer did not ***or*** would not have sufficient funds or credit to pay the instrument in full upon presentment; and

3. that the making, etc., was for the procurement of an article or thing of value with intent to ***defraud, or*** for the payment of a past-due obligation or for any purpose with intent to ***deceive***.

C. ***First element***. That the accused made, drew, uttered, ***or*** delivered a check, draft, or order for the payment of money.

1. Making and drawing are synonymous and refer to the acts of writing and signing or simply signing the instrument. Part IV, para. 49c(3), MCM (1995 Edition).

a. Preparing a worthless check, but not signing it, apparently may not make one a "maker or drawer." *United States v. Teal*, 34 C.M.R. 890 (A.F.B.R. 1964) (making a check and then placing it in one's pocket—i.e., without any attempt to negotiate it—is not a criminal act prohibited by Article 123a, UCMJ).

b. Part IV, para. 49c(3), MCM (1995 Edition), is misleading when it says "writing and signing." If both were required, then a maker or drawer who merely signs an otherwise completed instrument prepared by another would be excluded from liability.

2. Delivering and uttering both mean transferring the instrument to another. Uttering also means offering to transfer (i.e., uttering includes an attempted delivery). Part IV, para. 49c(4), MCM (1995 Edition).

3. Frequently, an accused will have made, uttered, and delivered the

same check; in which case, he / she should be alleged as the maker. The accused need not do all three; any one of them will suffice. Consideration, however, should be given to the contingencies of proof (e.g., by pleading in the alternative where there is doubt about the facts or the law).

4. Check, draft, or order for the payment of money upon any bank or other depository.

a. This is intended to include all negotiable instruments ordering the payments of money by any business regularly, but not necessarily exclusively, engaged in public banking activities. Part IV, para. 49c(1) and (2), MCM (1995 Edition).

b. The bank may be real or nonexistent. Checks have been drawn on such fictitious institutions as "The East Bank of the Mississippi."

c. A post-dated check is a "check" within the meaning of article 123a. *United States v. Hodges*, 35 C.M.R. 867 (A.F.B.R. 1965). (If the requisite intent existed at the time of the making of the check, it is immaterial that legal presentment and dishonor might necessarily be impossible before the date upon which the instrument purports to become due and payable.)

d. A specification that the accused did "wrongfully make a certain savings withdrawal slip for payment of money" with the intent to defraud, in violation of article 123a, did not state an offense because "the instrument is clearly not a 'check' or 'draft' . . . and operated only as a receipt and not as an order to pay." *United States v. Greene*, 43 C.M.R. 737, 739 (A.C.M.R. 1971).

D. ***Second element.*** Knowing at the time he makes, draws, utters, or delivers the check (etc.) that the maker or drawer does not or will not have sufficient funds (etc.) for payment . . . in full upon presentment.

1. "Will not have" covers the situation where the accused, at the time he / she makes, etc., knows that sufficient funds currently are on deposit, but also knows because of outstanding checks there will not be sufficient funds at the time of presentment.

2. Actual knowledge is required.

a. This may be established by circumstantial evidence that the check was drawn on a nonexistent bank, or on a bank at which the accused did not have an account, or the accused signed a fictitious name.

b. Knowledge also may be established by utilizing the statutory rule of evidence provided in article 123a, that knowledge and intent are established prima

facie if payment was refused and the maker did not make good on the check. Part IV, para. 49c(17), MCM (1995 Edition).

(1) However, the statutory rule of evidence establishing knowledge and intent applies ***only*** to makers and drawers. It does ***not*** cover the knowledge and intent element in case of an utterer and deliverer. *United States v. Rosario*, 34 C.M.R. 865 (A.F.B.R. 1964).

(2) If the accused makes good six days after notice, the prima facie evidence of knowledge and intent would not be nullified; however, reasonable doubt might exist. The statutory inference is discussed in detail in section 0905.E.4, below.

E. ***Third element. Intent.*** There are two mutually exclusive intents covered in article 123a: to defraud and to deceive. Which intent is applicable depends on what the accused received or attempted to procure.

1. If the check is made, etc. for the procurement of an article or thing of value, it is with the intent to ***defraud.***

a. ***Intent to defraud*** is an intent to obtain a thing of value by misrepresentation for one's own use ***or*** for use of ***another***, either permanently or temporarily. Part IV, para. 49c(14), MCM (1995 Edition).

b. ***Article or thing of value.*** Part IV, para. 49c(8), MCM (1995 Edition), interprets this to include every kind of right or interest in property or derived from contract, including intangible rights, contingent rights, or those which mature in the future.

(1) The government must allege at a minimum "for procurement of currency or other thing of value." An allegation of intent to defraud for the procurement of money was held insufficient because money could have been a past-due obligation and, hence, intent to deceive—not an intent to do fraud. *United States v. Burke*, 39 C.M.R. 718 (A.B.R. 1968).

(2) Automobile insurance and payment for rental of quarters were held to be things of value within the meaning of article 123a(1). *United States v. Ward*, 35 C.M.R. 834 (A.F.B.R. 1965).

(3) Value of the article is an essential element. A specification that the accused fraudulently made checks to the PX for procurement of an article fairly implies that the article at least had ***some*** value. *United States v. Cordy*, 41 C.M.R. 670 (A.C.M.R. 1969).

c. ***Procurement.*** The government need not establish ***what*** the

accused received; in fact, it need not establish that he received anything at all, so long as it proves the requisite ***intent*** or purpose to procure. *United States v. Martin*, 38 C.M.R. 877 (A.F.B.R. 1968) (article 123a does not make the receipt of something of value a necessary element of this offense). "For the procurement of" some article or thing of value must be alleged, however, and proved. *United States v. Henry*, 41 C.M.R. 946 (A.F.C.M.R. 1969).

2. If the check is made, etc. for payment of a past-due obligation or for any other purpose, it is with the intent to ***deceive***.

a. ***Past-due obligation*** is an obligation to pay money which has legally matured prior to the making, uttering, etc. Part IV, para. 49c(9), MCM (199).

b. ***For any other purpose*** is intended as a catch-all for anything that does not fulfill the requirement of "article or thing of value" or "past- due obligation."

– ***Example***. A bad check in payment for laundry services was held to be properly pleaded under article 123a(2), in that, if past due, then it is expressly covered by article 123a(2), and if not yet due, then it is covered by "for any other purpose." *United States v. Green*, 36 C.M.R. 882 (A.F.B.R. 1966), *petition denied*, 36 C.M.R. 541 (1966).

(1) In *United States v. Wallace*, 15 C.M.A. 650, 36 C.M.R. 148 (1966), the court said that the issuance of a worthless check in a gambling game or as a means of facilitating a gaming transaction cannot be made the basis of a criminal prosecution for allegedly "dishonorable" conduct. Although *Wallace* involved bad check offenses charged under articles 133 and 134, the reasoning appears applicable to article 123a. Thus, it is questionable, notwithstanding the above provision in the *Manual*, that article 123a covers the issuance of bad checks in apparent satisfaction of gambling debts. *See United States v. Williams*, 17 C.M.A. 321, 38 C.M.R. 119, 120 (1967) (forging a check under article 123 ***is*** a valid offense; see also United States v. Allberry, 44 M.J. 226 (1996) (the issuance of worthless checks to facilitate gambling transactions is not a criminal offense)).

(2) ***Query***. Are services to be pleaded under article 123a(1) or (2)? *See Green, supra; Ward, supra*. While most of these cases probably fall under the intent to deceive provision of article 123a(2), they are difficult to categorize with complete assurance, and pleading in the alternative is strongly recommended if there is any doubt.

c. ***Intent to deceive*** is an intent to gain an advantage for one's self ***or*** a third person by a misrepresentation; ***or*** an intent to bring about a disadvantage, by misrepresentation, to the one to whom the misrepresentation is made. Part IV, para. 49c(15), MCM (1995 Edition).

3. ***Distinction*** between articles 123a(1) (defraud) and 123a(2) (deceive).

Defraud connotes obtaining a ***thing*** and, hence, is used in the procurement offense. Deceive does not connote obtaining a thing, but more aptly describes the ***state of mind*** present when one seeks to gain any advantage by a misrepresentation. Deceive is an interest of a lesser degree of seriousness than an intent to defraud. *United States v. Jarrett*, 34 C.M.R. 652 (A.B.R. 1964). The different degrees of seriousness are reflected in the maximum permissible punishments available. Part IV, para. 49e, MCM (1995 Edition).

a. Article 123a(1) covers those situations where the use of a worthless check is:

(1) With the intent to defraud; and

(2) in order to obtain something of value.

b. Article 123a(2) covers those situations where a worthless check is used with the intent to deceive to:

(1) Satisfy a past-due indebtedness; or

(2) for any purpose other than obtaining something of value.

c. Hence, these two intents are separate and distinct and neither is included in the other.

– ***Example***. A specification which alleges the use of a worthless check with the intent to deceive in order to obtain a thing of value does not allege an offense. *United States v. Wade*, 14 C.M.A. 507, 34 C.M.R. 287 (1964).

4. ***Proof of intent***.

a. In most instances, the intent to deceive or defraud will have to be established by circumstantial evidence.

b. Article 123a specifically includes a statutory rule of evidence. It provides that prima facie evidence of (1) the maker's or drawer's intent to defraud or deceive and (2) knowledge of insufficient funds or credit, is established by the drawee's refusal of payment for insufficient funds unless the maker or drawer pays the holder the amount due within five days after notice of nonpayment. *United States v. Crosby*, 22 M.J. 854 (A.F.C.M.R. 1986).

c. The Military Rules of Evidence contain certain evidentiary procedures to facilitate the prosecution of bad check cases [e.g., exceptions to the best evidence rule (Mil.R.Evid. 1003), hearsay exceptions for records of regularly conducted activity and the absence of entries therein (Mil.R.Evid. 803(6) and (7)), and self-authentication for commercial paper (Mil.R.Evid. 902(9)]. *United States v. Brandell*, 35 M.J. 369 (C.M.A. 1992). *See* NJS Evidence Study Guide for further discussion.

d. Note that, as in the question of knowledge of insufficient funds, a failure to make a check good within 5 days after notice of nonpayment is prima facie evidence of the maker's or drawer's intent to deceive or defraud. It is ***not*** evidence of the ***deliverer's*** or ***utterer's*** knowledge or intent, however. *See United States v. Rosario*, 34 C.M.R. 865 (A.F.B.R. 1964).

e. Note also, however, that this inference may be rebutted.

– ***Example.*** An accused cashed worthless checks. On 18 June 19CY, the accused was notified of nonpayment. On that same day he drew $22.00 in pay, but was ordered to pay a mess bill and consequently didn't make good the checks within 5 days. ***Held:*** Reasonable doubt as to intent since the accused could have paid the checks if he hadn't been ordered to pay the mess bill. *United States v. Gerbig*, N.M.C.M. 62-01561 (27 Nov 62); *Crosby, supra* (stipulation as to expiration of five-day period).

f. Remember that, in order to utilize the five-day presumption, it is necessary to show that the accused received ***notice*** of the drawer's refusal to honor the instrument. Since such notices are commonly mailed, the government may often utilize the general presumption that proof of mailing a properly stamped letter raises the presumption of receipt by the addressee. However, mailing the notice to the Commanding Officer, without further proof that the accused was notified is insufficient to raise the statutory presumption. *United States v. Cauley*, 12 M.J. 484 (C.M.A. 1982).

F. ***Lesser included offenses.***

1. Neither article 123a(1) nor article 123a(2) are LIO's of each other. *United States v. Wade*, 14 C.M.A. 507, 34 C.M.R. 287 (1964).

2. Both article 123a(1) and (2), do include as an LIO the offense of "Dishonorable failure to maintain funds for payment of checks," in violation of article 134. *United States v. Margelony*, 14 C.M.A. 55, 33 C.M.R. 267 (1963); Part IV, para. 49d, MCM (1995 Edition).

3. "Dishonorable failure" differs from article 123a in that no intent to deceive or defraud is required at the time of the making, drawing, uttering, or delivery of the

check. Also, it is limited to a failure to place or maintain funds, whereas article 123a punishes knowledge at the time of the making, etc., that there is not or will not be funds available. *See* Part IV, para. 68, MCM (1995 Edition). *See also United States v. Gardner*, 35 M.J. 300 (C.M.A. 1992), in which the court held that the accused could not be convicted of dishonorable failure to pay just debts where evidence showed only failure to make timely payments, but not deliberate nonpayment or grossly indifferent attitude toward debt.

a. ***Note***: The word "dishonorably" in the lesser offense under article 134 does not appear in the greater article 123a offenses. However, the 123a offenses have been held to include a deliberate design or purpose which is equated to "dishonor." *See Margelony, supra*.

b. An article 123a(1) specification alleging "knew he did not have sufficient funds" was held not to include the LIO of dishonorable failure to maintain because there was no direct or clearly implied allegation that the accused knew he would not have sufficient funds at the time of presentment. *United States v. Graham*, 36 C.M.R. 945 (A.F.B.R. 1966).

c. In *United States v. Crosby*, 41 C.M.R. 927 (A.F.C.M.R. 1969), the evidence was insufficient to sustain a conviction either under article 123a or the LIO of article 134 in light of evidence that the bank previously had honored checks on the accused's overdrawn account, and cashed the checks in question without hesitation, even though accused's name was on an overdrawn list. *See also United States v. Kess*, 48 C.M.R. 106 (A.F.C.M.R. 1973) (where an accused's overdrafts have customarily been honored, absent circumstances establishing that the accused's conduct was nonetheless dishonorable, it must be shown that accused knowingly exceeded the limits of a credit arrangement with the bank, or that he knew or should have known that further overdrafts would not be honored).

d. Though intent is not required to prove the LIO under article 134, more than simple negligence in failing to maintain sufficient funds in one's account is necessary. Part IV, para. 68c, MCM (1995 Edition). The offense requires proof that the accused's nonfeasance was characterized by deceit, evasion, or false promises indicating that he acted in bad faith or gross indifference to the state of his account. *See United States v. Moseley*, 35 M.J. 481 (C.M.A. 1992). Evidence which showed only that accused was totally baffled by the mysteries of checking account management was insufficient to show guilt of making and uttering worthless checks or the LIO of dishonorably failing to maintain sufficient funds. *United States v. Elizondo*, 29 M.J. 798 (A.C.M.R. 1989).

G. ***Affirmative defense.***

1. An honest mistake is an affirmative defense to all article 123a offenses and, when raised by the evidence, it must be instructed upon. Part IV, para. 49c(18), MCM (1995 Edition). *United States v. Callaghan*, 14 C.M.A. 231, 34 C.M.R. 11 (1963).

– ***Example.*** Where an accused maintained a joint checking account with his wife, a statement of mitigation and extenuation that he made and uttered checks in the honest belief that he had sufficient funds to cover them, and was only aware of a deficiency when the checks returned, was inconsistent with a plea of guilty to dishonorable failure to maintain sufficient funds. *United States v. Harrell*, 14 C.M.A. 517, 34 C.M.R. 297 (1964).

2. An intent to redeem, at a future time, checks written on an insufficient account is ***not*** a defense to a bad check charge. In *United States v. Jarrett*, 34 C.M.R. 652 (A.B.R. 1964), the accused admitted that he knew when he wrote the checks in issue that his account was insufficient, but he said he intended to redeem the checks "in a five-day period." He was convicted under both articles 123a(1) and 123a(2) (different checks). *Accord United States v. Zajac*, 15 M.J. 845 (A.F.C.M.R. 1983) (intent to redeem worthless checks with anticipated winnings from gambling not a defense).

3. *See United States v. Allbery* 44 M.J. 226 (C.A.A.F. 1996), and *United States v. Thompson* 47 M.J. 611 (Army Ct. Crim. App. 1997) for a defense to bad check offenses when checks are written to facilitate gambling.

H. ***Pleading.***

1. ***Worthless check with intent to defraud.*** Article 123a(1); Part IV, para. 49f(1), MCM (1995 Edition).

– ***Sample specification.***

Charge. Violation of the Uniform Code of Military Justice, Article 123a

Specification. In that Corporal Claude D. Paperhanger, U.S. Marine Corps, Headquarters and Service Battalion, Marine Corps Base, Camp Pendleton, California, on active duty, did, at Marine Corps Base, Camp Pendleton, California, on or about 30 March 19CY, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully make a certain check for the payment of money upon the Bank of America in words and figures as follows, to wit:

Bank of America No. 67
San Diego, California 30 March 19CY

Pay to the
Order of John Jones $25.00

Twenty-five Dollars———————Dollars

/s/ Claude d. Paperhanger

then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such bank for the payment of the said check in full upon its presentment.

** ***Note*** that the words and figures on the check should be set forth verbatim in the specification. The best method to do this is simply to insert a photographic copy of the check. Further note that this sample specification is drawn to cover a case where a worthless check has been given to procure an article or thing of value (i.e., currency).

2. ***Worthless check with intent to deceive.*** Article 123a(2); Part IV, para. 49f(2), MCM (1995 Edition). The same language as in paragraph 1 above would be used, except the words "deceive and for the payment of a past-due obligation" would replace the words "defraud and for the procurement of lawful currency," unless, of course, the check was to pay for any "other purpose."

3. ***Dishonorable failure to maintain funds.*** Article 134, UCMJ; *See* Part IV, para. 68f, MCM (1995 Edition).

0905 MILITARY PROPERTY OF THE UNITED STATES (Wrongful Sale, Disposition, Damage, Destruction, and Loss) (Key Numbers 789-794)

A. ***Text of Article 108, UCMJ.***

Any person subject to this chapter who, without proper authority—

1. sells or otherwise disposes of;

2. willfully or through neglect damages, destroys, or loses; or

3. willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of;

any military property of the United States, shall be punished as a court-martial may direct.

B. ***General discussion.*** Part IV, para. 32, MCM (1995 Edition).

1. Article 108 attaches criminal liability to conduct which may amount to only simple negligence. Moreover, the penalties which may be imposed are quite severe. This article reflects an essential military requirement: that equipment be available and in working order.

2. ***Article 108 is divided into three subsections.***

a. Selling or otherwise disposing of military property of the United States;

b. damaging, destroying, or losing such military property; and

c. suffering such military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.

3. ***Concepts common to all three offenses.***

a. ***Military property.***

(1) In *United States v. Hemingway*, 36 M.J. 349 (C.M.A. 1993), the court held that military property is all property—real or personal—owned, held, or used by one of the armed forces of the United States. The *Hemingway* court determined that appropriated funds belonging to the U.S. Army, even if only being "held" by the Army for immediate disbursement to an individual soldier for duty travel, fell within the meaning of military property of the United States.

(2) The Army and Air Force Courts of Military Review had generally adopted the narrower definition limiting "military property" to property having some unique military nature or function. *See, e.g., United States v. Underwood*, 41 C.M.R. 410 (A.C.M.R. 1969); *United States v. Waddell*, 23 C.M.R. 903 (A.F.B.R. 1957).

(3) The Navy Court of Military Review had adopted a broader definition, interpreting this term to refer to any property belonging to or under the control of the military, including the exchange. *See, e.g., United States v. Harvey*, 6 M.J. 545 (N.C.M.R. 1978); *United States v. Mullins*, 34 C.M.R. 694 (N.B.R. 1964).

(4) *United States v. Schelin*, 15 M.J. 218 (C.M.A. 1983) resolved much of this controversy in ruling that exchange retail merchandise was not "military property of the United States." The court noted that "it is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is 'military property' within the meaning of Article 108." *Id.* at 220. Absent this nexus to national defense, the special protection of article 108 in criminalizing merely negligent conduct is unwarranted.

(5) However, the fact that the property is held for resale is not determinative. In *United States v. Simonds*, 20 M.J. 279 (C.M.A. 1985), the court held that resale merchandise in a ship's store was military property within the meaning of article 108. The store is an appropriated fund activity, and both funds and stock remain functional Navy accounts.

b. ***Without proper authority*** is an essential element to all article 108 offenses.

(1) This simply means that it must be alleged and proved that the accused was not authorized to damage, sell, or otherwise dispose of the property.

(2) Although the phrase "without proper authority" should be alleged, a failure to do so will not result in a fatal defect if the specification fairly implies a

lack of authority. Thus, in *United States v. Reid*, 12 C.M.A. 497, 31 C.M.R. 83 (1961), C.M.A. held that an allegation which stated that the accused sold service examinations for advancement to chief to certain first class boatswain's mates prior to the testing date sufficiently implied that the sale was without authority.

(3) From the *Reid* case, it can be seen that the element "without proper authority" may be alleged by clear implication in the specification and, furthermore, that the proof that the property was damaged, lost, or disposed of without authority may be established by evidence that the conduct of the accused is generally recognized as not permissible. The better practice, of course, is to allege "without proper authority" in the specification.

c. ***Value.***

(1) As in larceny and receiving stolen property, the military property which is lost, damaged, or destroyed must be alleged and proven to be of some value. Part IV, para. 32c(3), MCM (1995 Edition); *United States v. Thornton*, 8 C.M.A. 57, 23 C.M.R. 281 (1957). *But see United States v. Bowen*, NCM 79-1254 (N.C.M.R. 18 Apr 80) (Unpublished) [the value of a .45 pistol, not stated in the specification, may be inferred from its nature and description, *citing United States v. Johnson*, 12 C.M.R. 328 (A.F.B.R. 1953), *aff'd*, 3 C.M.A. 706, 14 C.M.R. 124 (1954)].

(2) The amount of value is a matter in aggravation. *See* Part IV, para. 32e, MCM (1995 Edition).

(3) Value may be established in the same manner as in the case of larceny. *See* Part IV, para. 32c(3), MCM (1995 Edition).

C. ***The offense of wrongfully selling or otherwise disposing.***

1. How the accused came into possession of the property is immaterial. It is only of interest what he did with it. In this connection, the limits of the offense are found in the phrase "otherwise dispose of."

2. "Otherwise dispose of" is not limited, by association, to "sell." It includes the unauthorized surrender of the use or control over, or the ostensible title to, military property. *United States v. Holland*, 25 M.J. 127 (C.M.A. 1987). It covers a surrender which is permanent or temporary. In *United States v. Faylor*, 8 C.M.A. 208, 24 C.M.R. 18 (1957), it was held that abandonment is a form of disposition. In *United States v. Brown*, 8 C.M.A. 18, 23 C.M.R. 242 (1957), C.M.A. held that the pawning of a government parka to cover the costs of a "lady of pleasure" constituted "disposition."

3. The manner of disposition should be alleged. *United States v.*

Emerson, 16 C.M.R. 690 (A.F.B.R. 1954) (specification that did not allege the manner of disposition was minimally sufficient ***in the absence of*** a defense motion for appropriate relief).

4. ***Effect of lack of knowledge***. If the accused lacked knowledge that the property in issue was "military property of the United States" he has an affirmative defense, provided such lack of knowledge was based on an honest ***and*** reasonable mistake (i.e., this is a general intent offense). *United States v. Germak*, 31 C.M.R. 708 (A.F.B.R. 1962); *United States v. Woodfork*, 22 C.M.R. 531 (A.B.R. 1956) (lack of knowledge, both honest and reasonable, was raised by the evidence and should have been instructed upon).

D. ***The offenses of damaging, destroying, losing, and suffering to be lost, damaged, destroyed, sold, or otherwise disposed of.***

1. ***Mental element***. Willfully or through neglect.

a. ***Willfully*** means with specific intent. *United States v. Groves*, 2 C.M.A. 541, 10 C.M.R. 39 (1953) (voluntary intoxication can be a defense to willful destruction of military property since it is a specific intent offense).

b. ***Through neglect*** means simple negligence (i.e., that the actions of the accused were of such a character that a reasonably prudent person endowed with any special knowledge which the accused might possess would have foreseen that damage or destruction or loss might well result from such action). This element is distinctive when compared to the willful destruction required when nonmilitary personal property is the subject under article 109.

(1) ***Example***. Operating a vehicle at a high rate of speed on the wrong side of the road at night is negligence. *United States v. Hirt*, 13 C.M.A. 420, 32 C.M.R. 420 (1962) (C.M.A. held, however, that the government had not established that accused was the operator of the vehicle).

(2) ***Example***. Accused driving struck gatepost. ***Held***: No evidence of negligence. *United States v. Stuck*, 12 C.M.A. 562, 31 C.M.R. 148 (1961).

(3) ***Example***. Guilty plea to negligent destruction of military property by entrusting a military truck to an unlicensed 16-year-old military dependent who subsequently rolled it was held to be provident. The negligence was the proximate cause of the damage. *United States v. Miller*, 12 M.J. 559 (A.F.C.M.R. 1981).

(4) Under certain limited situations, a justifiable inference of negligence arises (i.e., if the property damaged, destroyed, or lost was an item of individual issue to the accused, and there is no explanation for the loss, damage, or

destruction that creates a reasonable doubt as to the accused's negligence, an inference of negligence exists). *See* Part IV, para. 32c(1), MCM (1995 Edition), and *United States v. Ryan*, 3 C.M.A. 735, 14 C.M.R. 153 (1954), where C.M.A. stated that a jeep was held not to be an item of individual issue and res ipsa loquitur is not applicable as such in article 108 offenses.

2. ***Loss, damage.***

a. ***Lost property*** is that which has been unintentionally parted with and cannot be found.

b. ***Damaged property*** is that made less valuable, useful, or desirable.

3. ***"Suffering" means permitting or allowing.*** Part IV, para. 32c(2), MCM (1995 Edition).

a. Before permitting becomes criminal, however, it must be shown:

(1) That the accused had a duty to protect the property;

(2) that there was a failure to perform the duty; and

(3) that the failure to perform the duty was the proximate cause of the loss, destruction, etc.

b. ***Example.*** If the accused, a member of the crew, had inspected the mooring lines as he was required to do, the admiral's barge would not have floated away. The accused suffered the loss of the admiral's barge.

4. ***Value.***

a. In the case of loss, destruction, sale, or disposition, the value of the property so lost, etc., controls the limit of punishment. *See* Part IV, para. 32e, MCM (1995 Edition).

b. In the case of damage, however, the amount of damage sets the limit. *Id.*

E. ***LIO's.*** Part IV, para. 32d, MCM (1995 Edition). For all the article 108 offenses, the negligence offense is an LIO of the willful offense.

F. ***Pleading—sample specifications.***

1. ***Article 108(1)—selling or disposing.*** Part IV, para. 32f(1), MCM (1995 Edition).

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 108
>
> ***Specification.*** In that Private Randy R. Parts, U.S. Marine Corps, Weapons Company, 2d Battalion, 3d Marines, 1st Marine Brigade, Fleet Marine Force, Pacific, on active duty, did, at Honolulu, Hawaii, on or about 20 April 19CY, without proper authority, sell to Wilbur R. Weakeyes one pair of binoculars, of a value of about $45.00, military property of the United States.
>
> ***Note.*** "Disposing of, etc., should be substituted where appropriate.

2. ***Article 108(2)—damaging, destroying, or losing.*** Part IV, para. 32f(2), MCM (1995 Edition).

a. ***Damaged property.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 108
>
> ***Specification.*** In that Seaman Clumse E. Jerk, U.S. Navy, USS BUTTERFINGERS, on active duty, did, on board USS BUTTERFINGERS, located at San Diego, California, on or about 5 June 19CY, without proper authority, through neglect, damage by dropping on the deck one electric typewriter, of a value of about $300.00, military property of the United States, the amount of said damage being in the sum of about $75.00.

(1) Both the specific property damaged and the manner in which it was damaged should be alleged.

(2) Both the value of the property and the amount of the damage are alleged. The amount of the ***damage*** fixes the authorized punishment. *See* Part IV, para. 32e, MCM (1995 Edition).

b. ***Destroyed property.***

> ***Charge.*** Violation of the Uniform Code of Military Justice, Article 108
>
> ***Specification:*** In that [Name, etc. and personal jurisdiction data], did, [at / on board(location)], on or about [date], without proper authority, willfully destroy by burning, one mattress, of a value of about $63.00, military property of the United States.

(1) The sample specification requires that the manner in which the property was destroyed be alleged.

(2) "Through neglect" should be substituted, when appropriate.

c. ***Lost property.***

> ***Charge:*** Violation of the Uniform Code of Military Justice, Article 108
>
> ***Specification:*** In that [Name, etc. and personal jurisdiction data], did, [at / on board (location)], on or about [date], without proper authority, through neglect, lose one compass, of a value of about $25.00, military property of the United States.

3. ***Article 108(3)—suffering.*** Part IV, para. 32f(3), MCM (1995 Edition).

> ***Charge:*** Violation of the Uniform Code of Military Justice, Article 108
>
> ***Specification:*** In that Quartermaster Third Class Bone E. Elbows, U.S. Navy, USS OOPS, on active duty, did, on board USS OOPS, at sea, on or about 10 March 19CY, without proper authority, through neglect, suffer one sextant, of a value of about $75.00, military property of the United States, to be lost by being knocked over the side of the ship into the sea.
>
> ***Note:*** If only damaged, the amount of damage determined by cost of repair or cost of replacement, whichever is lesser, should be alleged.

0906 WASTING, SPOILING, DAMAGING AND DESTROYING NONMILITARY PROPERTY (Key Numbers 550, 789)

A. ***Text of Article 109, UCMJ.***

> Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.

B. ***Distinction between article 108 and article 109.***

1. Article 109 is concerned with all real and personal property ***other than*** military property of the United States, including nonmilitary government property (e.g., a U.S. mail truck) and private property. Article 108 deals solely with military property of the United States.

2. Whereas article 108 provides that loss, sale, damage, destruction, or disposition of military property may be accomplished either willfully or through neglect, under article 109, wasting or spoiling (i.e., destroying or damaging) real property must be either willful or reckless (a disregard for the probable destructive results of a voluntary act) and damage or destruction of personal property must be willful before a criminal liability will attach. Put another way, in order to be criminally liable for destruction of or damage to nonmilitary property, the accused must be more than merely negligent. *See United States v. Rhoads*, 32 M.J. 114 (C.M.A. 1991), where the accused slashed the tires of another soldier in the battery.

a. As to nonmilitary ***personal*** property, the accused's state of mind must be willful and wrongful. *United States v. Bernacki*, 13 C.M.A. 641, 33 C.M.R. 173 (1963); *United States v. Priest*, 7 M.J. 790 (N.C.M.R. 1979). Part IV, para. 33c(2), MCM (1995 Edition).

b. As to nonmilitary ***real*** property, it must be willful or reckless. Part IV, para. 33c(1), MCM (1995 Edition).

c. But, as to military property of the United States, mere negligence will suffice. Part IV, para. 32c, MCM (1995 Edition).

3. Finally, unlike article 108, article 109 does not provide any criminal liability for sale, loss, or other disposition (other than damage or destruction) of the nonmilitary property.

C. ***Multiplicity.*** Article 108 and 109 offenses may be deemed to be separate for

punishment purposes even if they occur as part of the same transaction. *United States v. Clason*, 48 C.M.R. 453 (N.C.M.R. 1974) (accused could be separately punished for vandalizing private and military vehicles after a drinking spree).

D. ***Pleading***. Part IV, para. 33f, MCM (1995 Edition).

1. ***Sample specification***.

> ***Charge***: Violation of the Uniform Code of Military Justice, Article 109
>
> ***Specification***: In that Seaman Recruit Juvenile D. Lenquint, U.S. Navy, USS HOOD, on active duty, did, at Naval Base, Norfolk, Virginia, on or about 20 February 19CY, willfully and wrongfully damage, by breaking the windshield, an automobile, the amount of said damage being in the sum of about $145.00, the property of Yeoman Second Class Ima A. Victim, U.S. Navy.

2. In *United States v. Collins*, 16 C.M.A. 167, 37 C.M.R. 323 (1966), C.M.A. held that the language of article 109 can reasonably be construed to express a purpose to permit all damage inflicted in a single transaction to be combined into a single offense and, as a result, a difference in the ownership of the several articles damaged would make no difference to the prosecution. Therefore, all articles of property damaged in violation of article 109, under circumstances indicating only a single incident or transaction, should be alleged as a single offense—regardless of the ownership of the articles.

If an accused damages or destroys		and the damage or destruction was done	then the accused is
Military Property		Willfully	Guilty of Violating Art. 108
		Recklessly	
		Negligently	
Non-Military Property	and the Property is Realty	Willfully	Guilty of Violating Art. 109
		Recklessly	
		Negligently	Not Guilty
	and the Property is Personalty	Willfully	Guilty of Violating Art. 109
		Recklessly	
		Negligently	Not Guilty

PERTINENT DEFINITIONS

1. "Military property" is ***all*** property owned, held, or used by one of the armed forces of the United States.

2. "Nonmilitary property" means ***any*** property not embraced in definition 1 above.

3. "Realty" means land, buildings, and any fixtures attached thereto such as piers, fences, trees.

4. "Personalty" means ***any*** property not embraced in definition 3 above.

5. "Willfully" means intentionally, i.e., the accused actually ***intended*** to cause the damage or destruction which resulted.

6. "Recklessly" means that the accused damaged or destroyed the property through a culpable disregard for the foreseeable consequences of his acts.

7. "Negligently" means that the accused failed to exercise the due care which a reasonably prudent man would have exercised under the circumstances.

0907 UNLAWFUL ENTRY - Article 134, UCMJ; HOUSEBREAKING - Article 130, UCMJ; BURGLARY - Article 129, UCMJ (Key Numbers 723-728, 753-754)

A. ***General comments.*** These three offenses are related in that each is designed to protect the same basic societal norm; that is, each offense is designed to punish persons who enter places where they are not supposed to be. The offenses of housebreaking and burglary are increasingly more severe and have additional elements, as will be discussed below in detail, that reflect the specific intent to commit criminal offenses once inside the restricted place. Accordingly, both housebreaking and unlawful entry are LIO's of burglary, and unlawful entry is an LIO of housebreaking.

B. ***Unlawful entry.***

1. Unlawful entry is an "established offense" under article 134 and is specifically discussed in Part IV, para. 111, MCM (1995 Edition).

2. ***Elements of the offense.***

a. That the accused entered the real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage;

b. that such entry was unlawful; and

c. "C to P" or "SD."

C. ***Housebreaking.***

1. ***Text of Article 130, UCMJ.***

> Any person subject to this chapter who unlawfully enters the building or structure of another with the intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

2. ***Elements of the offense.*** Part IV, para. 56b, MCM (1995 Edition).

a. That the accused unlawfully entered a certain building or structure of a certain other person; and

b. that the unlawful entry was made with the intent to commit a criminal offense therein.

D. ***Burglary.***

1. ***Text of Article 129, UCMJ.***

> Any person subject to this chapter who, with intent to commit an offense punishable under sections 918-928 of this title (articles 118-128), breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

2. ***Elements of the offense.*** Part IV, para. 55b, MCM (1995 Edition).

a. That the accused unlawfully broke and entered the dwelling house of another;

b. that both the breaking and entering were done in the nighttime; and

c. that the breaking and entering were done with the intent to commit therein the offense of (one of the offenses punishable under articles 118-128, except article 123a).

E. ***Comments on the offense of housebreaking and the distinction between it and the offense of unlawful entry.*** These two offenses are closely related to each other, but there ***are*** distinctions, including the types of structures or enclosures that are protected by each. These distinctions will be discussed below in detail in the section defining "building or structure." Other comments below apply to both offenses, except where specifically noted.

1. ***"Unlawfully" enter.***

a. The legality of the entry in housebreaking must be determined solely from the accused's authorization, express or implied. For the purpose of determining the authority to enter, buildings or structures may be classified into three principal groups:

(1) Those which are ***wholly private*** in character, such as ones' home; every penetration must be regarded as unlawful in the absence of invitation, express or implied.

(2) Those which are ***public***; all unobstructed incursions must be regarded as authorized in the absence of a clear direction to the contrary.

(3) Those which are ***semiprivate***; the following factors, none of which will necessarily control, may be considered:

(a) The nature and function of the building involved;

(b) the character, status, and duties of the entrant;

(c) the conditions of the entry, including time, method, and ostensible purpose;

(d) the presence or absence of a directive of whatever nature seeking to limit or regulate free ingress;

(e) the presence or absence of an explicit invitation to the visitor;

(f) the invitational authority of any purported host; and

(g) the presence or absence of a prior course of dealing, if any, by the entrant with the structure, or its inmates, and its nature.

b. It is not the criminal intent (i.e., the intent to commit a crime once inside the structure) that makes the entry unlawful, but absence of authorization. *United States v. Williams*, 4 C.M.A. 241, 15 C.M.R. 241 (1954) (a lawful entry, even if with a contemporaneous criminal intent, is not sufficient to make out the offense of housebreaking). *But see United States v. Toland*, 19 C.M.R. 570 (N.B.R. 1955) (accused, who was in charge of the ship's store, ***could*** unlawfully enter the store when his purpose for unlocking the door and entering was not to conduct his lawful duties, but was merely to gain entrance to steal some items).

c. When the authority to enter is gained by trick or false pretense, such as falsely representing oneself as a policeman or tendering a bogus identification, the entry is nonetheless unlawful. *United States v. Vance*, 10 C.M.R. 747 (A.F.B.R. 1953).

d. ***Examples where the lawfulness of the entry was questioned.***

(1) In *United States v. Pendleton*, 21 C.M.R. 432 (A.B.R. 1956), the board held that, where an accused entered a store open for business and without provocation assailed the occupant, the evidence did not support housebreaking because the accused's entry was lawful.

(2) When an armed forces policeman entered a room which he was authorized to check, and while therein committed a larceny, housebreaking cannot be made out because there was no unlawful entry. *United States v. Blair*, 18 C.M.R. 581 (A.F.B.R. 1954).

(3) In *United States v. Williams*, 4 C.M.A. 241, 15 C.M.R. 241 (1954), the evidence established that shortly after midnight the accused entered a barracks building assigned to another company. Although the lights had been extinguished at the time, visibility was reasonably good and the accused was seen inspecting the pockets of various fatigue uniforms. One of the occupants of the barracks awoke and yelled. Accused was apprehended by a guard. In affirming a finding of guilty of housebreaking, C.M.A. held that the evidence sufficiently established an illegal entry of the barracks, inasmuch as the accused was under no official duty to enter the building, he was not invited therein, and no authority could be implied to enter late at night a barracks other than his own and in which the lighting had been dimmed for sleeping.

(4) In *United States v. Browder*, 15 C.M.A. 466, 35 C.M.R. 438 (1965), the facts were sufficient to show an unlawful entry where the accused entered the barracks in the company of another who was assigned to the unit quartered therein. It also appeared that both the accused and his companion were absent without authority at the time they returned in the night and, by force, broke into the barracks that had been locked and secured while the unit was away on a field problem. Under these circumstances, the accused's companion had no right to enter and the accused could therefore acquire no rights through him.

2. ***"Entered".***

a. The entry of any part of the body, even a finger, is sufficient. Thus, if a wrongdoer puts his hand inside a window that he is raising, this will constitute an entry. Part IV, para. 55c(3), MCM (1995 Edition).

b. An insertion into the structure of an instrument or object may be sufficient to constitute an entry if the insertion is for the purpose of completing the intended offense.

– ***Example***. There is an entry where a hook is inserted through a window to commit larceny or a pistol to commit murder, even though the hand never enters the window. If the only entry is by an instrument that is merely being used to gain admittance (e.g., if, while jimmying open a window, the crowbar extends through the window opening into the structure), then there has ***not*** been sufficient entry to constitute the offense. *Id.*

3. ***A certain "building or structure".***

a. The word "building" includes a room, shop, store, or apartment in a building. Part IV, para. 56c(4), MCM (1995 Edition).

b. The word "structure," for the offense of ***housebreaking***, refers only to those structures that are in the nature of a building or dwelling. *Id.*

(1) Examples of things held to be a building or structure: A stateroom, hold, or other compartment of a vessel, an inhabitable trailer, a tent, and a houseboat. *United States v. Love*, 4 C.M.A. 260, 15 C.M.R. 260 (1954) (A tent). In *United States v. Vernetti*, 29 C.M.R. 875 (A.F.B.R. 1960), it was held that a vending machine enclosure consisting of a permanent 40-by-16 foot concrete patio with a corrugated aluminum room attached by steel poles and beams imbedded in concrete, and enclosed by strong plywood and plastic panels which are attached to the concrete base by metal beams, and which can be locked, is a building or structure which can be the subject of housebreaking. In *United States v. Scimeca*, 12 M.J. 937 (N.M.C.M.R. 1982), a meat freezer outside an SNCO club was held to be a "building or structure" for housebreaking purposes.

(2) Examples of things held ***not*** to be a building or structure:

(a) A movable footlocker - *United States v. Harris*, 23 C.M.R. 586 (A.B.R. 1957);

(b) an aircraft - *United States v. Taylor*, 12 C.M.A. 44, 30 C.M.R. 44 (1960);

(c) a private automobile - *United States v. Gillin*, 8 C.M.A. 669, 25 C.M.R. 173 (1958); *United States v. Reece*, 12 M.J. 770 (A.C.M.R. 1981);

(d) a military "track" vehicle - *United States v. Sutton*, 21 C.M.A. 344, 45 C.M.R. 118 (1972); and

(e) a locker used for storage of personal items and clothing - *United States v. Bradchulis*, N.M.C.M. 81-0720 (13 Aug 81).

(3) It is not necessary to the offense of housebreaking that the building or structure be in use at the time of the entry. Part IV, para. 56c(4), MCM (1995 Edition); *United States v. Love*, 4 C.M.A. 260, 15 C.M.R. 260 (1954) (accused was discovered in an unoccupied troop tent attempting to steal some clothes); *United States v. Crunk*, 4 C.M.A. 290, 15 C.M.R. 290 (1954).

c. For the offense of unlawful entry, much less of a building or structure is necessary than for the offense of housebreaking. While the restrictions that objects such as aircraft [*United States v. Taylor*, 12 C.M.A. 44, 30 C.M.R. 44 (1960)] and automobiles [*United States v. Wright*, 5 M.J. 106 (C.M.A. 1978)] are ***not*** buildings or structures for purposes of unlawful entry, as they are not for purposes of housebreaking, some question remains as to the status of certain types of restricted ***enclosures***. As will be seen below, these fixed enclosures are definitely ***not*** buildings or structures as discussed above regarding housebreaking, but yet have been held to be the proper subject of an unlawful entry offense.

(1) The broader scope of areas protected by the offense of unlawful entry was first suggested in the case of *Taylor, supra*. There the court said:

> It is clear that the offense of housebreaking and unlawful entry are closely related and may, under certain circumstances, stand in the position of greater and lesser. . . . and, although this Court has never specifically delineated the scope of the crimes one to the other, it is beyond cavil that property not protected against unlawful entry may not properly be the subject of housebreaking.

Id. at 46, 30 C.M.R. at 146. The clear implication of such language is that the converse is not necessarily true (i.e., there may be areas protected against unlawful entry that are ***not*** protected against housebreaking).

(2) The Court of Military Appeals resolved this matter by upholding the conviction of an accused for unlawful entry into a government storage area that was simply an open area surrounded by a chain-link fence. *United States v. Wickersham*, 14 M.J. 404 (C.M.A. 1983). Now it appears that the "building or structure of another" is clearly not the required object of the unlawful entry prohibited by article 134, it remains for further case law to decide whether the presence of a fence is the litmus test for unlawful entry. *See* Everett, C. J., dissenting, *Id.* at 408. The drafters of the 1984 *Manual for Courts-Martial* purport to expand the unlawful entry protection to all real property and any personal property which amounts to a structure used for habitation or storage. Part IV, para. 111c, MCM (1995 Edition).

4. ***"Of a certain other person".***

a. When a specification does not allege the element of ownership in another ***directly*** or by ***implication***, the offense of housebreaking is not made out. *United States v. McCourt* et al, 5 C.M.R. 513 (A.F.B.R. 1952), *petition denied*, 5 C.M.R. 130 (C.M.A. 1952).

b. In *United States v. Wheat*, 5 C.M.R. 494 (A.F.B.R. 1952), the specification alleged that the accused, did, "at Holding and Reconsignment Point, Montgomery, Alabama, on or about 21 November 1951, unlawfully enter Warehouse Number 2, with intent to commit a criminal offense, to wit: larceny, therein." ***Held***: The specification is fatally defective since it contains no averment that the warehouse was the property of another.

c. A specification charging the offense of housebreaking and alleging that the structure entered was the "Unit Supply Room of the 1268th Air Transport Squadron" sufficiently alleges ownership of the supply room in another. The phrase "Unit Supply Room 1268th Air Transport Squadron" is a sufficient averment of fact to allege ***by implication*** that the supply room is the property of the named squadron. *Compare United States v. Mills*, 5 C.M.R. 757 (A.F.B.R. 1952) with *United States v. Jones*, 23 C.M.R. 818 (A.F.B.R. 1956), where a specification alleging "building number 228" at Brooks Air Force Base was held to be fatally defective since ownership was not averred directly or by clear implication.

5. ***". . . the intent to commit a criminal offense therein".***

a. The intent to commit some criminal offense therein is an essential element of housebreaking and must be alleged and proved in order to support a conviction. Housebreaking, therefore, ***is a specific intent offense***. In *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993) *cert. denied,* 114 S. Ct. 1201, 127 L. Ed. 2d 549 (1994), the court held that the intent to commit a criminal offense, which is the element of housebreaking, has to refer to intent to commit the crime stated in the specification, not merely an intent to commit some crime.

b. The elements "unlawful entry" and "concurrent intent to commit a criminal offense therein" are distinctly separate and proof of one does not also constitute proof of the other. *United States v. Cox*, 14 C.M.R. 706 (A.F.B.R. 1954).

c. Any act or omission which is punishable by court-martial, except an act or omission constituting a ***purely military offense***, is a "criminal offense." Part IV, para. 56c(3), MCM (1995 Edition). Therefore, if an accused unlawfully enters a building with the intent to be disrespectful to one of his superiors or with the intent to go UA or with the intent to disobey a lawful order, he has not committed a housebreaking. Has he

committed any offense? Yes, unlawful entry under article 134.

d. The intent to commit such criminal offense "therein" may be inferred from the accused's conduct once inside the building (e.g., where the accused does commit a larceny inside the building).

F. ***Comments on the offense of burglary.***

1. ***Burglary is more limited than housebreaking in that:***

a. The place entered must be a dwelling house;

b. it must be a place that is occupied;

c. it is essential that there be a breaking;

d. the entry must be in the nighttime; and

e. the intent must be to commit one of the offenses made punishable under articles 118 through 128, except article 123a.

2. ***"Dwelling house".***

a. The term "dwelling house" implies a place of habitation for human beings (i.e., the place burglarized must be lived in). The dwelling house must be occupied at the time of the offense, though it is ***not*** necessary that anyone actually be in the dwelling. The fact that the occupant of the dwelling is temporarily absent on leave, vacation, TAD, etc., or even that the dwelling is closed up for the summer, does not deprive the dwelling of its status of being occupied. The dwelling house includes outstructures attached to or within the common enclosure used as a residence (e.g., a garage). Part IV, para. 55c(5), MCM (1995 Edition). While it is not fatally defective for the word "dwelling" not to appear in the specification, it must, at least affirmatively, appear in the specification that the building entered was in fact a dwelling. *United States v. Schwarz*, 20 C.M.R. 497 (N.B.R. 1955) (specification alleging merely "squadron armory" was defective).

b. An individual room in a barracks can be the subject of a burglary, as can individual apartments in a building, etc. *United States v. Green*, 7 M.J. 966 (A.C.M.R. 1979); *United States v. Holder*, N.M.C.M. 76-0145 (12 May 76); *United States v. Norman*, 16 M.J. 937 (A.C.M.R. 1983) (a hotel room may be a "dwelling" within the meaning of the military offense of burglary). Even entry into the barracks building itself, without entry into a particular room, may be sufficient to complete the offense. *United States v. Bailey*, 23 C.M.R. 862 (A.F.B.R. 1957).

3. ***"Breaking".***

a. The term "breaking" is a term of art, meaning that the accused must use some degree of force, however slight, to gain entry. It is not required that there be any damage to or destruction of property, yet there must be more than crossing of some imaginary line. Part IV, para. 55c(2), MCM (1995 Edition). *See United States v. Thompson*, 32 M.J. 65 (C.M.A. 1991), in which the court held that shoving aside an extended venetian blind to enter a dwelling through an open, screenless window was breaking within the meaning of a burglary statute.

– ***Example.*** If the accused merely walks into the dwelling through an open door, there has been no breaking; but, if he must turn the door knob and open a shut door to gain admittance, a breaking has occurred. Merely opening further a partly open door is sufficient force to constitute breaking.

b. ***Examples***

(1) In *United States v. Bailey*, 23 C.M.R. 862 (A.F.B.R. 1957), it was held that, although merely opening a closed door was sufficient to constitute the breaking in burglary, the evidence did not establish that the door to the room was closed.

(2) In *United States v. Handzlik*, 32 C.M.R. 573 (A.B.R. 1962), it was held that the forceful overcoming of pressure by the occupant to close an already open door constituted a breaking.

c. Even where ***no*** force is used, an entry gained by fraud, duress, threats, or trick will constitute a constructive breaking. Part IV, para. 55c(2), MCM (1995 Edition), contains some examples of constructive breaking.

4. ***"In the nighttime." Both*** the breaking and the entering must be in the nighttime. Nighttime is defined by Part IV, para. 55c(4), MCM (1995 Edition), following the common law rule, as that period between sunset and sunrise when there is not sufficient light to discern a person's face. The presence or absence of any artificial lighting is not relevant.

5. ***Intent.***

a. The breaking and entering must be with the intent to commit one of the following offenses: murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. To make out the offense, it is essential that the specific intent alleged exist at the time of the breaking and entering. *United States v. Kluttz*, 9 C.M.A. 20, 25 C.M.R. 282 (1958). An accused's intent may be proved by circumstantial evidence. *United States v. Garcia*, 15 M.J. 685 (A.F.C.M.R. 1983) (breaking and entering with intent to commit rape).

b. It is not necessary that the offense actually be committed. If, after the breaking and entering, the accused does commit one of these offenses though, it may be inferred that he intended to commit it at the time of the breaking and entering. Part IV, para. 55c(6), MCM (1995 Edition).

G. ***Multiplicity.*** Even though they are likely to be a single or integrated transaction or chain of events, housebreaking and burglary are probably ***not*** multiplicious for sentencing purposes with the commission of their intended crime. The rationale made for this lack of multiplicity is that the offenses deal with different societal norms.

1. In *United States v. Rose*, 6 M.J. 754 (N.C.M.R. 1978), *petition denied*, 7 M.J. 56 (C.M.A. 1979), burglary with intent to commit rape and sodomy was held not to be multiplicious with the subsequent rape and sodomy. The court stated:

> Burglary is an offense against habitation, rape is an offense against the person, and sodomy is an "offense against morals" or a "crime against nature." . . . The essence of burglary is the violation of the sanctity of the dwelling. . . . Three more divergent societal norms would be difficult to find.

Id. at 757.

2. In *United States v. Alvarez*, 5 M.J. 762 (A.C.M.R. 1978), *petition denied*, 5 M.J. 369 (C.M.A. 1978), housebreaking and larceny were considered as separate offenses for sentencing purposes.

H. ***Pleading - sample specifications.***

1. ***Unlawful entry***. Part IV, para. 111f, MCM (1995 Edition).

Charge: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Seaman Sneak E. Thief, U.S. Navy, USS SLINKY, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, unlawfully enter Warehouse Building 503, the property of the U.S. Government.

2. ***Housebreaking***. Part IV, para. 56f, MCM (1995 Edition).

Charge: Violation of the Uniform Code of Military Justice, Article 130

Specification: In that Seaman Sneak E. Thief, U.S. Navy, USS SLINKY, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, unlawfully enter Warehouse Building 503, the property of the U.S. Government, with the intent to commit a criminal offense, to wit: larceny, therein.

3. ***Burglary***. Part IV, para. 55f, MCM (1995 Edition).

Charge: Violation of the Uniform Code of Military Justice, Article 129

Specification: In that Seaman Sneak E. Thief, U.S. Navy, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, in the nighttime, unlawfully break and enter the dwelling house of Yeoman Second Class Ima A. Victim, U.S. Navy, with intent to commit larceny therein.

4. Omission of the words "break and enter" is fatal to a specification alleging the offense of burglary. *United States v. Knight*, 15 M.J. 202 (C.M.A. 1983).

0908 SPECIFIC POINTS OF SIMILARITY AND DISTINCTION BETWEEN OFFENSES AGAINST PROPERTY

A. ***Larceny and wrongful appropriation.***

1. ***Similarity.*** Both offenses require a wrongful taking, obtaining, or withholding of personal property of some value from the possession of one with a superior right to possession.

2. ***Distinction.*** Larceny requires a specific intent to deprive permanently. Wrongful appropriation requires only a specific intent to deprive temporarily.

B. ***Larceny and bad checks.***

1. ***Similarity.*** Article 123a (bad checks) prohibits fraud by worthless checks (i.e., the obtaining of a thing of value by a check which cannot successfully be presented for payment). *See* Article 123a(1), UCMJ. This offense can still be charged as a violation of article 121. *See United States v. Barnes*, 14 C.M.A. 567, 34 C.M.R. 347 (1964).

2. ***Distinctions.***

a. Article 123a, however, can also punish the payment of past due obligations by worthless check. This offense is not cognizable as larceny since no tangible property is received when the check is given. *See* Article 123a(2), UCMJ.

b. Larceny requires an intent to deprive permanently, whereas the bad check offense requires merely an intent to defraud [article 123a(1)] which may involve permanent or temporary deprivation, or an intent to deceive [article 123a(2)] which may involve no deprivation at all.

c. Larceny requires a purpose of the accused to possess tangible personal property. The bad check offense (article 123a) makes punishable the issuance of a worthless check for any purpose.

(1) If the purpose was to obtain a thing of value, article 123a(1) is applicable.

(2) If the purpose was anything except a purpose to obtain a thing of value, article 123a(2) is applicable. *See United States v. Wade*, 14 C.M.A. 507, 34 C.M.R. 287 (1964).

(3) Thus, a theft of services, which cannot constitute larceny, can be punished under article 123a if the theft was by means of a worthless check. Whether

the violation is laid under article 123a(1) or article 123a(2) depends on whether the services qualify as a thing of value.

d. In the larceny offense, a failure to acquire the property would simply be an attempt; but, under the bad check offense, the crime is complete even though nothing was gained.

3. ***Gravamen of article 121.*** It is apparent, therefore, that the gravamen of article 121 is deprivation of property. However, "deprivation of property" may or may not be involved in article 123a.

4. ***Gravamen of article 123a.*** The gravamen of the bad check offense is the making or uttering of a worthless check with the intent to defraud (obtain something) or deceive (gain an advantage) whether or not anything is in fact obtained or gained thereby.

C. ***Larceny and receiving, buying, concealing, stolen property.***

1. ***Similarity.*** In both larceny and receiving, buying, or concealing stolen property, the accused comes into possession of property of some value which is not his.

2. ***Distinctions.***

a. In the latter offenses, the accused may or may not come into possession unlawfully.

b. In the withholding-type larceny, original possession of the property is lawful.

c. Further, in larceny, there must be a wrongful taking or obtaining or withholding from the person in possession.

d. In receiving, buying, or concealing stolen property, the receiver, purchaser, or concealer must acquire possession without the consent of the owner. These distinctions have been pointedly demonstrated in *United States v. McFarland,* 8 C.M.A. 42, 23 C.M.R. 266 (1957) and *United States v. Welker,* 8 C.M.A. 647, 25 C.M.R. 151 (1958).

(1) In *McFarland,* the accused was convicted of larceny of $2.00. A close friend of the accused had taken $12.00 from the victim and, the following day, had given $2.00 to the accused, telling him that the money had belonged to the victim. ***Held***: The accused did not commit larceny. C.M.A. stated that, although the accused might have been charged as a receiver of stolen property, there was no wrongful taking, obtaining, or withholding so as to warrant the larceny charge. There was no evidence of taking or obtaining, and a withholding-type larceny required a conversion by a person having lawful

possession in the first instance.

(2) In *Welker*, the accused pleaded guilty to larceny of an M-1 rifle. A stipulation of facts constituting the offense was admitted in evidence. The stipulation stated that the accused was advised by a friend that he (the friend) had found an M-1 rifle leaning against a tree while on maneuvers and had hidden it in a lake, then told the accused that he wanted nothing to do with the rifle and that the accused could have it. The accused got the rifle and took it home with the intent to keep it. ***Held***: His plea of guilty was inconsistent with the stipulation of facts, which indicated that he had merely received stolen property, an offense not charged. C.M.A. reversed his conviction of larceny because the plea of guilty was improvident. The distinguishing principle revealed in the case is between withholding-type larceny and receiving. A larceny by withholding requires initial lawful possession, whereas receiving involves an unlawful possession acquired with consent of the thief.

e. Quite obviously, in receiving, buying, or concealing stolen property, the property must have, in fact, first been stolen. This is not necessary for larceny, although it is possible to steal stolen property (thief #2 takes from thief #1).

f. Receiving, buying, or concealing stolen property has a requirement that the accused know the property to have been stolen. Quite obviously, this is not a requirement in larceny.

D. ***Larceny and misuse of property.***

1. ***Similarity.*** In both types of offenses, the accused takes some improper action with respect to another's property. In the case of a wrongful sale or disposition of military property under article 108, the same act may also constitute a larceny.

2. ***Distinctions.***

a. Articles 108 and 109 deal with offenses against real and personal property. Article 121 is concerned only with personal property.

b. Larceny deals essentially with wrongful deprivation, while articles 108 and 109 also prohibit wrongful damage, waste, etc.

c. Larceny requires a specific intent to deprive. Articles 108 and 109 require no intent to deprive, and the accused's state of mind can be negligent (article 108) or reckless (article 109 - real property).

E. ***Illustrative fact situation.***

1. Seaman ***A*** has always wanted to "own" a .45 automatic. One night, while on liberty, he decides to steal one. He drives to the base, takes a pair of bolt cutters from his car, and snaps off the lock of the door to the small arms cabinet. He places his hand on a .45 automatic U.S. Army pistol.

a. Question: What offense, if any, has ***A*** committed?

b. Answer: Attempted larceny; willful destruction of military property (lock on small arms cabinet).

2. The accused takes a .45, goes to his barracks and conceals it in his locker. The next day he becomes anxious that he might be caught and decides to get rid of the pistol. He takes it out to the woods in back of the barracks and throws it under a bush.

a. Question: Considering all the facts given, what offenses has ***A*** committed in this hypothetical problem?

b. Answer: Larceny of pistol; willful destruction of military property (lock on arms cabinet); wrongful disposition of military property (abandoned pistol).

3. The following day, Seaman ***B*** is in the woods looking for a practice golf ball he has lost and, in thrashing about, he discovers the pistol. He picks it up. He doesn't want anything to do with weapons and puts it back where he found it. Later Seaman ***C*** comes along, sees the pistol and takes it to his barracks—intending to take it home as a trophy if no one claims it.

a. Question: What offense, if any, has ***B*** committed?

b. Answer: Not larceny—no taking with intent to deprive. But, how about wrongful disposition of military property? Was it in his possession? Yes. Was it military property? Yes. Did he abandon it? Yes. Could it be argued in defense that he had no duty with respect to the property? No, not if it's obviously military property. All military personnel have a duty to safeguard military property which comes into their possession.

c. Question: What offense, if any, has ***C*** committed?

d. Answer: Larceny, if, under the circumstances, there was a clue as to ownership, he should have taken steps to return the property.

4. But, suppose ***A*** told ***C*** about stealing the pistol, where he hid it, and that ***C*** could have it. ***C*** goes and gets it with the intent to keep it.

a. Question: Is ***C*** guilty of larceny now?

b. Answer: No, only of receiving stolen property. There has been no wrongful taking, obtaining, or withholding from the person last in possession.

5. Suppose ***A*** tells ***C*** simply that he stole it, decided to get rid of it, and where he put it. ***C*** goes and gets it with the intent to keep it.

a. Question: Has ***C*** committed larceny or been guilty of merely receiving stolen property?

b. Answer: Query: Has ***A*** in effect given it to ***C*** or merely announced his abandonment of it? If the former—***C*** receives stolen property. If the latter—***C*** commits larceny. It would be well to charge both to provide for contingencies of proof. ***Note***: This hypothesis is based on *United States v. Welker*, 8 C.M.A. 647, 25 C.M.R. 151 (1958).

c. Question: Is ***C*** an A.A.F.?

d. Answer: No. There is no showing that he assisted the thief in order to prevent his apprehension, trial, or punishment.

6. Suppose ***C*** now decides to sell the pistol. He takes it to Seaman ***D***, tells him it is stolen military property, and ***D*** gives ***C*** a check for $30.00 in payment for the pistol. The check is drawn on a nonexistent bank.

a. Question: What new offense or offenses are involved?

b. Answer:

(1) Wrongful sale of military property by ***C***.

(2) Making a bad check to defraud in violation of article 123a(1) by ***D***.

(3) Is ***D*** guilty of receiving or buying stolen property? No, his possession was a result of a false pretense and, hence, was not with the consent of ***C***.

(4) ***D*** would also be guilty of larceny by trick (false pretense). *United States v. Barnes*, 14 C.M.A. 567, 34 C.M.R. 347 (1964).

F. ***Summary.***

1. From the foregoing, one should be impressed with the fact that all factual situations must be analyzed carefully, particularly those involving property offenses.

2. Keep in mind the elements of the offenses and their basic differences.

CHAPTER X

DEFENSES

1001 OVERVIEW OF CRIMINAL DEFENSES 10-1

1002 DEFENSES IN BAR OF TRIAL 10-1

1003 DEFENSES ON THE MERITS 10-2
A. General defenses. 10-2
1. Lack of requisite criminal intent. 10-3
2. Alibi. 10-3
3. Character. 10-3
4. Affirmative defenses. 10-4

1004 FORMER JEOPARDY 10-5
A. Basis. 10-5
B. Waiver / consent. 10-5
C. Analysis. 10-6
1. Was the former (first) proceeding a trial? 10-6
2. Has jeopardy attached? 10-8

1005 FORMER PUNISHMENT 10-15

1006 RES JUDICATA 10-18
A. Defined 10-18
B. Who may assert it? 10-19
1. Same parties 10-19
2. Privity of necessary parties 10-19
3. Principals and accessories 10-19
C. What are previously determined matters? 10-19
D. Prior acquittal as res judicata 10-19
E. Finally determined 10-20
F. Parties and courts 10-20
G. Inconsistent findings within the same trial 10-21
H. Relationship between res judicata and former jeopardy 10-21
1. Same offense / same matter. 10-21
2. Assembly / final determination. 10-21

1007 **INSANITY** 10-22
A. The present standard. 10-22
B. Legislative background. 10-23
C. Analysis. 10-23
1. Definition of "mental disease or defect." 10-23
2. The cognitive test. 10-25
3. The volitional test abolished. 10-25
4. Partial mental responsibility ("diminished capacity") eliminated. 10-25
5. Burden of proof now on accused. 10-26
D. Lack of mental capacity to stand trial. 10-26
1. Basis. 10-26
2. Standard. 10-26
E. Procedural aspects of insanity issues. 10-28
1. Inquiry. 10-28
2. Litigation of the issues. 10-29
3. Deliberation and voting. 10-29
4. Action by convening authority. 10-30
5. Guilty plea cases. 10-30
6. Mental evaluations of an accused under the Military Rules of Evidence. 10-30
7. Potential problem areas. 10-33
8. Post-trial incarceration of the criminally insane. 10-34
9. Post-trial execution of the criminally insane. 10-34

1008 **ENTRAPMENT** 10-35
A. General concept. 10-35
B. Subjective analysis. 10-35
C. Conduct not constituting entrapment. 10-35
D. Inducement by an individual acting in a purely private voluntary capacity. 10-36
E. Litigation of entrapment. 10-37
1. Burden of proof on government. 10-37
2. Evidence of predisposition. 10-37
3. Presumption. 10-38
4. Entrapment as an inconsistent defense. 10-38
5. The due process defense. 10-39
6. Instructions on entrapment. 10-39

1009 **IMPOSSIBILITY (INABILITY)** 10-39
A. Defined. 10-39
B. Litigation. 10-39
C. Other examples. 10-41

1010 IGNORANCE OR MISTAKE 10-42
A. Mistake of fact. 10-42
B. Application to specific intent offenses. 10-42
1. Honest mistake. 10-43
2. Knowledge. 10-43
3. Examples. 10-43
C. Application to general intent offenses. 10-44
D. Application to negligence offenses. 10-44
1. Simple negligence. 10-44
2. Higher degree of negligence. 10-44
E. Not applicable to strict liability offenses. 10-45
1. Example: assault with a dangerous weapon 10-45
2. Example: carnal knowledge 10-45
F. Litigation. 10-45
G. Ignorance or mistake of law. 10-45
1. Rule. 10-45
2. Exception. 10-45
H. Mistaken belief. 10-46

1011 DURESS 10-46
A. General concept. 10-46
B. Duress or necessity? 10-47
1. Duress and necessity distinguished. 10-47
2. Examples. 10-47
3. What constitutes *reasonable* fear? 10-48
4. The requirement of immediate death or great bodily harm 10-48
5. Who must be endangered? 10-49
C. Raising the issue. 10-49
D. Rebuttal evidence. 10-50

1012 JUSTIFICATION 10-50
A. Text of R.C.M. 916(c), MCM, (1995 Edition) 10-50
B. Protection of property. 10-50
1. Use of nondeadly force. 10-50
2. Use of deadly force. 10-50
C. Prevention of crime. 10-50
D. Obedience to orders. 10-51
E. The right to resist restraint 10-51
1. Illegal confinement 10-51
2. Illegal apprehension / arrest 10-51
F. Execution of parental duties 10-51

1013 **EXCUSE: ACCIDENT OR MISADVENTURE** 10-52
A. Accident defined. 10-52
B. Lawful act. 10-52
C. Lawful manner. 10-52

1014 **SELF-DEFENSE** 10-52

1015 **VOLUNTARY INTOXICATION** 10-53

1016 **VOLUNTARY ABANDONMENT** 10-53

1017 **GENERAL DENIAL DEFENSES (EXAMPLE: ALIBI)** 10-53
A. Alibi is not an affirmative or special defense. 10-53
B. Raised by evidence 10-53

CHAPTER X

DEFENSES

1001 OVERVIEW OF CRIMINAL DEFENSES (Key Numbers 801, 832-853)

For purposes of analysis, criminal defenses may be divided into two categories: (1) defenses in bar of trial, and (2) defenses on the merits. Defenses on the merits can be further subdivided into general and affirmative (sometimes called special) categories. Some defenses belong exclusively in one category, while others may be properly placed in either (e.g., the defense of insanity may be raised as a bar to trial if it is alleged that the accused lacks the requisite mental capacity to stand trial; or it may be raised as a defense on the merits if it is alleged that the accused was not mentally responsible at the time of the offense). This chapter will discuss separately and in greater detail most of the major defenses in each category.

1002 DEFENSES IN BAR OF TRIAL (Key Numbers 849-853)

Defenses in bar of trial include those that do not directly relate to the accused's guilt or innocence. They are usually raised prior to the entry of pleas by the accused and, if established, bar further proceedings. Defenses in bar of trial are usually framed as motions to dismiss and litigated as interlocutory issues before the military judge alone. The military judge rules finally on all such issues and these rulings are not subject to reversal although either side may request reconsideration of the military judge's ruling. The ability of the government to request reconsideration is limited by Article 62(a) of the UCMJ. This article states in pertinent part, ". . . if a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any appropriate action." The case of *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976) held that the military judge must exercise independent discretion when deciding issues submitted for reconsideration, and that error is committed if the military judge merely accedes to the position of the convening authority. R.C.M. 905f, MCM, (1995 Edition), incorporates the *Ware* holding into the MCM by providing that the military judge ***may*** reconsider any ruling not amounting to a finding of not guilty. A successful defense in bar of trial will usually result in a dismissal of the charges or the granting of other appropriate relief which terminates the proceedings, at least temporarily.

A. Defenses in bar of trial are not defenses in the strict sense of the word, but may be considered as such because their effect on the outcome of the trial is the same when successfully argued. Some examples of the more common defenses in bar of trial include the following:

1. Former jeopardy (commonly known as double jeopardy);
2. former punishment;
3. res judicata;
4. lack of mental capacity to stand trial;
5. lack of jurisdiction over the person or over the offense;
6. statute of limitations expiration;
7. lack of speedy trial;
8. pardon;
9. immunity;
10. constructive condonation of desertion; and
11. failure to allege an offense.

B. Defenses in bar of trial and their equivalents are usually raised either prior to trial (addressed to the convening authority) or by motion to dismiss or for appropriate relief (addressed to the military judge) prior to the entry of pleas. Failure to assert them prior to pleas, however, does not constitute waiver. Failure to assert them prior to the conclusion of trial will generally constitute a waiver except with regard to the defenses of lack of jurisdiction over the person or over the offense, failure to state an offense, insanity (lack of mental capacity to stand trial), and speedy trial where there is a delay equivalent to a denial of due process. For a more thorough discussion of the waiver stand, see R.C.M. 905(e) and 907(b), MCM, (1995 Edition), and *NJS Procedure Study Guide*, Chapter 12.

1003 DEFENSES ON THE MERITS (Key Numbers 834, 836-848)

Defenses on the merits are those that relate directly to the accused's guilt or innocence of the offenses with which he / she is charged. They are presented during the trial on the merits and are decided by the finder of fact. A successful defense on the merits will usually result in a finding of not guilty to the charges and specifications to which the defense relates. As previously mentioned, defenses on the merits may be divided into two subcategories for purposes of analysis: (1) general and (2) affirmative (or special).

A. ***General defenses.*** A general defense denies that the accused committed any or all of the acts that constitute the elements of the offense(s) charged, or it may claim that the

accused did not possess the requisite intent or other required state of mind. Such a defense may arise through the inability of the prosecution to prove the accused's guilt beyond a reasonable doubt. It may also be raised by defense evidence which raises reasonable doubt about one or more of the elements of the offense charged. Throughout this study guide, issues which may give rise to general defenses have been discussed during the analysis of each separate offense. The following is a discussion of additional examples of general defenses:

1. ***Lack of requisite criminal intent.*** This defense is raised by evidence (or the lack thereof) that the accused did not possess a required specific intent or other necessary state of mind. Two examples are: (1) the prosecution may fail to prove that the accused had a premeditated design to kill in a murder case; or (2) the defense may show that the accused did not have the intent to permanently deprive the true owner of the use and possession of his property in a larceny case. In both instances, the defense rests upon the lack of requisite intent—an element which the government is required to prove beyond a reasonable doubt.

2. ***Alibi.*** Proof of alibi is not a defense in the sense that it absolves one of criminal liability for committing certain acts; rather, it is rebuttal evidence which challenges the prosecution's evidence identifying the accused as the person who committed the crime alleged. *United States v. Wright*, 48 C.M.R. 295 (A.F.C.M.R. 1974). The essence of the alibi defense is a showing that it would have been physically impossible for the accused to have committed the crime because he was elsewhere at the time the offense was committed. *United States v. Brooks*, 25 M.J. 175 (C.M.A. 1987). Once an alibi defense is presented, it becomes incumbent upon the prosecution to rebut the defense and prove the accused's presence at the scene of the offense beyond a reasonable doubt if the accused is to be convicted. *Wright, supra*. R.C.M. 701(b)(1) requires the defense to put the government on notice of this defense disclosing the specific details in advance of trial.

3. ***Character.*** Rule 404a of the Military Rules of Evidence provides that evidence of a person's character or a trait of his character is ***not*** admissible for the purpose of proving that person acted in conformity therewith on a particular occasion, with three exceptions: (1) Evidence of a pertinent trait of the character of the accused offered by the accused or by the prosecution to rebut the same (e.g., evidence of accused's reputation for honesty to rebut larceny charge); (2) evidence of a pertinent trait of character of the victim offered by the accused or by the prosecution to rebut the same (e.g., evidence of the trait of peacefulness offered by the prosecution to rebut the defense's portrayal of the victim in a homicide or assault case as the aggressor); and (3) impeaching evidence. Mil.R.Evid. 404a. It would appear then that evidence of the accused's general good character will not be accepted into evidence in order to raise a general defense. The *Analysis* to the rules of evidence suggests that evidence of the accused's general good ***military*** character may still be introduced, particularly if the accused is charged with a uniquely military offense. The admissibility of evidence suggesting the good military character of the accused is currently one of the more frequently litigated appellate issues. It can be argued that C.M.A. is taking a

more expansive approach toward allowing the use of such evidence and, at least in drug cases, has said firmly that good military character ***is*** admissible despite the wording of the rule. *See, e.g., United States v. Smith*, 34 M.J. 341 (C.M.A. 1992); *United States v. Piatt*, 17 M.J. 442 (C.M.A. 1984); and *United States v. McNeill*, 17 M.J. 451 (C.M.A. 1984); *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985); *United States v. Vandelinder*, 20 M.J. 41 (C.M.A. 1985). For a more exhaustive discussion of the character evidence issue, see *NJS Evidence Study Guide*, Chapter 5.

4. ***Affirmative defenses.*** Affirmative defenses, sometimes called special defenses, are in the nature of the traditional "confession and avoidance." Generally, the accused admits all of the elements of the offense charged, but contends that the conduct was not criminal under the circumstances because of the presence of one or more of these affirmative defenses. These defenses are each discussed in detail in sections 1007-1016 of this chapter.

a. ***Examples.*** Some examples of affirmative defenses include:

(1) ***Impossibility.*** The inability of an accused, through no fault of his own, to comply with the terms of an order to perform a military duty constitutes a defense. Most often seen in connection with unauthorized absence and orders violation cases, this defense is usually divided into two subcategories (*see* section 1009 of this chapter):

(a) ***Physical inability***; and

(b) ***financial inability***.

(2) ***ignorance or mistake of fact*** (*see* section 1010);

(3) ***entrapment*** (*see* section 1008);

(4) ***self-defense*** (*see* section 1014);

(5) ***coercion or duress*** (*see* section 1011);

(6) ***accident or misadventure*** (*see* section 1013);

(7) ***justification and obedience to lawful orders*** (*see* section 1012); and

(8) ***lack of mental responsibility*** (*see* section 1007).

b. ***Inconsistent defenses.*** There is no proscription in military law against asserting inconsistent defenses. *United States v. Snyder*, 6 C.M.A. 692, 21 C.M.R. 14 (1956); *United States v. Walker*, 21 C.M.A. 376, 45 C.M.R. 150 (1972); and *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975).

c. ***Procedure.*** By their very nature, affirmative defenses are usually raised during the presentation of the defense case, or, if possible, during cross-examination of the prosecution's witnesses. The burden is generally on the defense to present evidence which raises the defense. Once presented, the burden shifts to the prosecution to prove, beyond a reasonable doubt, that the defense asserted does not exculpate the accused. Of course, the prosecution's own evidence may raise the defense in some cases.

d. ***Instructions.*** When the evidence—whether it be the prosecution's, the defense's, or the court's—reasonably raises an affirmative defense, the military judge must sua sponte instruct the members as to the defense and that they may not find the accused guilty of the offense affected thereby unless they are convinced beyond a reasonable doubt that the basis of the special defense does not exist. R.C.M. 920(e), MCM, (1995 Edition); *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977); *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983); *United States v. Richey*, 20 M.J. 251 (C.M.A. 1985); *see* chapter XI, *infra*.

1004 FORMER JEOPARDY (Key Number 853)

A. ***Basis.*** The fifth amendment states, in pertinent part, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." Article 44(a), UCMJ, similarly provides: "No person shall, without his consent, be tried for a second time for the same offense." The double jeopardy provisions of the fifth amendment apply to the military. *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974 (1949).

B. ***Waiver / consent.*** There is substantial authority for the proposition that the defense of former jeopardy is waived if it is not raised before pleas or before the conclusion of trial. There are two principal cases on point; they were, however, decided by the Court of Military Appeals in the 1950's, and are therefore relatively aged. In both *United States v. Kreitzer*, 2 C.M.A. 284, 8 C.M.R. 84 (1953) and *United States v. Schilling*, 7 C.M.A. 482, 22 C.M.R. 272 (1957), the court held that the defense of former jeopardy was waived if not asserted at trial. R.C.M. 907(b)(2)(C), MCM, (1995 Edition), states that former jeopardy is among those defenses which may be waived by failure to assert it at the trial level. A more recent case is the unpublished decision of *United States v. Hallett*, NCM 78-0498 (N.C.M.R. 26 Mar 79). It held the same way, and cited the *Schilling* decision as its basis for doing so. *See also United States v. Clark*, 28 M.J. 401 (C.M.A. 1989), in which C.M.A. in dicta appears to uphold the principle that double jeopardy is a defense that can be waived citing R.C.M. 907(b)(2)(C). In a published decision, however, the Army Court of Military Review decided

to depart from the strictures laid down by the *Kreitzer* and *Schilling* cases and held that jeopardy is not subject to such waiver, but could be raised for the first time on appeal. *United States v. Johnson*, 2 M.J. 541 (A.C.M.R. 1976). The *Johnson* court relied upon the Supreme Court case of *Henry v. Mississippi*, 379 U.S. 443 (1965), which refused to find a waiver of ***fourth*** amendment objections from counsel's inaction at the trial level. The Court of Military Appeals has indicated that the "passive waiver concept has been restricted to actions of trial defense counsel which leave appellate tribunals with insufficient factual development of an issue necessary to resolve a question of law raised on appeal." *United States v. Graves*, 1 M.J. 50 (C.M.A. 1975).

C. ***Analysis.*** Former jeopardy issues can best be analyzed in terms of two questions: First, was the former proceeding a "trial" for purposes of the rule against former jeopardy; and, second, if it was a "trial," did jeopardy attach?

1. ***Was the former (first) proceeding a trial?*** There are two requirements which must be met in order for this question to be answered properly. First, it must be a criminal judicial proceeding. Second, it must be a proceeding involving the same sovereign.

a. ***Criminal proceeding.*** The former proceeding must have been a criminal or penal proceeding. *Yates v. United States*, 355 U.S. 66 (1957).

(1) In the case of *United States v. Sinigar*, 6 C.M.A. 330, 20 C.M.R. 46 (1955), it was held that a criminal contempt proceeding was not a trial for former jeopardy purposes because of the contempt proceeding's inherently summary and sui generis nature. As noted by the Supreme Court in the case of *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), however, not every contempt proceeding is summary. In that case, the Court held that the accused was entitled to a ***trial*** on his contempt charges. The trial judge had not acted individually on the many instances of contempt during the course of the proceedings, but chose to sentence the accused to between 11 and 22 years confinement for all of the "contempts" at the conclusion of the trial. The Court held that, under these circumstances, a trial was required, although it did note that the judge could have punished each "contempt" as it arose. *Id.* at 464. Consequently, in some instances, contempt proceedings may amount to a trial for former jeopardy purposes.

(2) In the case of *United States v. Cadenhead*, 14 C.M.A. 271, 34 C.M.R. 51 (1963), the court held that a Japanese family court proceeding, which is similar to a U.S. juvenile court proceeding, was not a trial within the meaning of the double jeopardy provision of the relevant Status of Forces Agreement (SOFA).

(3) Consideration of allegations of misconduct by an administrative discharge board proceeding does not allow jeopardy to attach in bar of a subsequent court-martial. *United States v. Blocker*, 33 M.J. 349 (C.M.A. 1991) (other than honorable discharge, approved but not yet executed, did not prevent later court-martial for

same offenses considered by administrative board on grounds of double jeopardy); *United States v. Williams*, 12 M.J. 1038 (A.C.M.R. 1982). *See also United States v. Lynch*, NCM 75-1401 (N.C.M.R. 16 Aug 1976), *petition denied*, 3 M.J. 41 (C.M.A. 1977) and *United States v. Erb*, 12 C.M.A. 524, 31 C.M.R. 110 (1961) (dealing with medical boards).

(4) Prior punishment of an accused under Article 15, UCMJ (nonjudicial punishment), does not raise an issue of former jeopardy since article 15 punishment does not involve judicial proceedings. *United States v. Fretwell*, 11 C.M.A. 377, 29 C.M.R. 193 (1960); *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

(5) The Army Court of Military Review has held that a trial in a U.S. Magistrate Court will foreclose a trial by court-martial for the same offenses. *United States v. Chavez*, 6 M.J. 615 (A.C.M.R. 1978).

b. ***Sovereignty***. In order to constitute a defense, former jeopardy must involve the same sovereign (i.e., the first trial must have been conducted by the same sovereign if it is to be a bar to the second proceeding). This rule may be expanded by agreement or treaty as we shall see in the discussion of foreign court proceedings below.

(1) ***State court proceedings***. The Supreme Court, in *Bartkus v. Illinois*, 359 U.S. 121 (1959), held that every citizen of the United States is also a citizen of a state or territory and may therefore be said to owe allegiance to two sovereigns and is liable for an infraction of the laws of either or both. The Court concluded that, if both the state and Federal governments punish the offender for the same act, he cannot claim that he has been doubly punished for the same offense since he has committed the offenses by his single act, both of which are punishable. *See also Abbate v. United States*, 359 U.S. 187 (1959), which upheld a Federal criminal trial of the accused following his state court prosecution. *See generally* King, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 Stan. L. Rev. 477 (1979).

(2) ***Foreign court proceedings***. In the absence of a treaty to the contrary, an accused can be tried by a foreign country and the United States if his offense violates the laws of both. *United States v. Cadenhead*, 14 C.M.A. 271, 34 C.M.R. 51 (1963). In most situations involving military offenders, however, there will be a treaty to the contrary since most U.S. military personnel stationed in foreign countries are covered by a Status of Forces Agreement (SOFA). Most U.S. SOFA's contain a provision prohibiting dual trials within the country concerned if the accused was acquitted or is serving or has served his sentence from the first trial, although they do permit the United States to try the military offender for disciplinary violations arising from the event. There is, however, no prohibition for a second trial by the other sovereign if the accused received only a suspended sentence (*but see* discussion below), if the foreign appellate court dismissed the charges voiding the entire proceeding [*United States v. Miller*, 16 M.J. 169 (C.M.A. 1983)], or if the foreign jurisdiction "merely took into consideration" the facts of offenses which were later brought to

court-martial. *United States v. Green*, 14 M.J. 461, 473 (C.M.A. 1983). In any event, careful perusal of the pertinent SOFA is required in all such cases. *See*, e.g., *Cadenhead, supra* (Japan); *United States v. Reed*, 33 C.M.R. 932 (A.F.C.M.R. 1963) and *United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982) (Spain).

(3) ***Limitations***. Regardless of the "dual sovereignty" concepts discussed above, it is the policy of the Navy, as expressed in JAGMAN, § 0124a, that:

> When a person in the naval service has been tried in a State or foreign court, whether convicted or acquitted, or when a member's case has been "diverted" out of the regular criminal process for a probationary period, or has been adjudicated by juvenile court authorities, military charges shall not be referred to a court-martial or be the subject of nonjudicial punishment proceedings for the same act or acts, except in those unusual cases where trial by court-martial or the imposition of nonjudicial punishment is considered essential in the interests of justice, discipline, and proper administration within the naval service. Such unusual cases shall not be referred to trial by court-martial or be the subject of nonjudicial punishment proceedings without specific permission as provided below.

Those "unusual cases" require the ***prior*** approval by the general court-martial convening authority for trial by summary court-martial or nonjudicial punishment (NJP) or by the Judge Advocate General for special or general courts-martial. JAGMAN, § 0124a.

2. ***Has jeopardy attached?*** Even if the former proceeding was a trial for purposes of former jeopardy, jeopardy may or may not have attached.

a. The former jeopardy defense precludes trial of an accused by the same sovereign only if the trial is for the ***same*** offense for which he / she has been previously tried. It is sometimes difficult to determine whether the second trial involves the same offense since different offenses may arise from one transaction.

– ***Example***. A servicemember may be prosecuted in a Federal court for interstate transportation of a stolen car, given a suspended sentence, and then returned to military control. The military may then choose to prosecute the servicemember at a court-martial for an unauthorized absence incurred while he was in jail awaiting trial by civilian Federal authorities. The same sovereign may thus prosecute twice if the offenses tried are different.

In *Brown v. Ohio*, 432 U.S. 161 (1977), the Supreme Court set forth the test to be applied in determining how many offenses are involved for double jeopardy purposes. The Court said that there are two offenses "if the underlying statute requires proof of a fact which the other does not." *Id.* at 166. Using this test, the Court held in *Brown* that the accused's prior conviction for the lesser included offense of joyriding prohibited his subsequent prosecution for the offense of auto theft. *See Chavez, supra.*

(1) Acquittal of the greater offense will bar a subsequent trial for a lesser offense; and, as demonstrated by the *Brown* opinion, *supra*, conviction of the lesser offense may bar trial of a greater offense. It may also be concluded that acquittal of an LIO bars a subsequent trial for the greater offense if the greater offense differs from the former in degree only (e.g., if the accused is acquitted of manslaughter, he may not be retried for murder of the same victim). Finally, it is apparent that, if the accused is charged with the greater offense but found guilty only of an LIO, he may not be retried for the greater offense since the finding of guilt of the LIO results in a finding of not guilty of the greater offense. (*See* the comments on mistrial below).

(2) Sometimes careful analysis is needed to determine whether the same offense is involved.

– ***Example.*** In *Chavez, supra*, the accused was tried in Federal magistrate court for negligent driving, and then court-martialed for assaulting a military policeman. The Army Court of Military Review held the "two" offenses to be the same since the essence of both the negligent driving offense and the assault offense was that the car had lightly touched the military policeman as it was being driven away. On the other hand, there appears to be authority for trying conspiracy and obstruction of justice charges at a second trial even though the accused had already been tried for the underlying offenses at an earlier trial. *United States v. Rex*, 3 M.J. 604 (N.C.M.R. 1977). And, in *United States v. Snell*, 550 F.2d 515 (9th Cir. 1977), *cert. denied*, 442 U.S. 944 (1981), the Supreme Court denied certiorari in a case in which the accused had been first tried for extortion, convicted and then had the conviction overturned on appeal, only to find himself in court again a second time on charges of attempted bank robbery, even though both offenses arose out of the same transaction. His claim of double jeopardy was to no avail.

b. ***When does jeopardy attach?*** The *Manual for Courts-Martial* indicates that jeopardy attaches when presentation of evidence on the issue of the guilt or innocence has begun. R.C.M. 907(b)(2)(C)(i), MCM, (1995 Edition). This section of the MCM is founded on the case of *United States v. Wells*, 9 C.M.A. 509, 26 C.M.R. 289 (1958). The *Wells* case noted that there were two "general" rules then in use to determine at what stage of a trial jeopardy attached. After considering the matter, the court concluded: "Apparently Congress intended that jeopardy in the courts-martial system would attach upon

the hearing of evidence and thus conform to one of the alternatives of the general rule." *Id.* at 512, 26 C.M.R. at 292. This rule was followed in *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985), where the court held jeopardy did not attach and the first case was not a "trial" where the judge had dismissed the case during motions because the charge sheet was improper. The MCM provision and the *Wells* case, *supra*, upon which it is based, may be questionable in light of the Supreme Court case of *Crist v. Bretz*, 437 U.S. 28 (1978). Although it should be noted that the drafters of the MCM, (1995 Edition), considered the *Crist* decision and decided that it was inapplicable to courts-martial since, in the military, there is no jury trial. A court-martial composed of members is not a trial by jury. R.C.M. 907 drafters' analysis, MCM, (1995 Edition), app. 21-50. There are several factors to be determined before a conclusion can be reached as to whether jeopardy has attached: (1) the jurisdictional status of the court (i.e., did it, or did it not have jurisdiction to try the case?); and (2) the status of the findings (i.e., was there an acquittal, conviction, no trial, or mistrial?). In *Crist*, the court held that the Federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn is an integral part of the fifth amendment and is applicable to the states through the fourteenth amendment. Application of the *Crist* decision to the military justice system would indicate that jeopardy attaches in a court-martial composed of members when the court is assembled since the members are sworn prior to this time. In trials conducted before military judge alone, the court is assembled when the military judge announces that it is, which generally occurs after the military judge has approved the written request for trial before military judge alone. The *Crist* decision, however, appears to reaffirm that, in nonjury trials (i.e., courts without members or trials before military judge alone), jeopardy does not attach until the first witness is sworn. *Crist v. Bretz, supra*, at n.15; *Serfass v. United States*, 420 U.S. 377, 95 S.Ct. 1055 (1975).

c. ***Acquittal with jurisdiction.*** In the military justice system, an acquittal is final as soon as the findings are announced. The automatic review of courts-martial required by the UCMJ is limited to a determination of whether the court-martial possessed jurisdiction if the accused is acquitted. Articles 61, 64-69, UCMJ. If a rehearing is ordered, the accused ". . . may not be tried for any offense of which he was found not guilty by the first court-martial. . . ." Article 63, UCMJ. This is true even if the legal rulings underlying the acquittal were erroneous. *Sanabria v. United States*, 437 U.S. 54 (1978). In the case of *United States v. Hitchcock*, 6 M.J. 188 (C.M.A. 1979), the military judge granted a defense motion for a finding of not guilty to some of the offenses charged; however, he "reversed" himself when the trial counsel called to his attention during a subsequent recess three cases contrary to the defense's position. The Court of Military Appeals ruled that "[h]owever mistaken or wrong it may be, an acquittal cannot be withdrawn or disapproved," and reversed the case. *Id.* at 189. If a finding of not guilty is made, reprosecution will be barred whether or not evidence has been presented. Thus, in *United States v. Johnson*, 2 M.J. 541 (A.C.M.R. 1976), jeopardy attached during an article 39a session which resulted in a "not guilty" determination even though no evidence had been produced at the session. Note, however, the case of *Lee v. United States*, 432 U.S. 23 (1977), in which the court said that double jeopardy did not occur where the trial court had "expressed its opinion" of the

accused's guilt, but had granted a motion made before trial to dismiss for failure of the indictment to allege a requisite intent, and the government subsequently reinstituted prosecution with a new and corrected indictment.

d. ***Acquittal without jurisdiction.*** At one time it was assumed that, if an accused was acquitted by a court-martial that did not have jurisdiction over the case, the proceedings were a nullity and, hence, jeopardy had never attached. *United States v. Padilla*, 1 C.M.A. 603, 5 C.M.R. 31 (1952). The MCM, (1995 Edition), codifies this principle in R.C.M. 907(b)(2)(C)(iv), which states that a court-martial proceeding which lacks jurisdiction is not a trial within the meaning of the former jeopardy rule. The drafters distinguished the case of *United States v. Culver*, 22 C.M.A. 141, 46 C.M.R. 141 (1973), in which the court held that, despite a jurisdictional defect in the first court (which had acquitted the accused), the accused could not be required to stand trial a second time, by noting that only two (2) of the judges deciding the case did so on jeopardy grounds. *See* R.C.M. 907 drafters' analysis, MCM, (1995 Edition), app. 21-50.

e. ***Conviction.*** Military courts operate under a system of "continuing jeopardy," whereby the accused is considered to have been placed in jeopardy only once throughout the course of the entire review and appellate process. Article 44(b), UCMJ, states: "No proceeding in which an accused has been found guilty by court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed." *See, e.g., United States v. O'Quin*, 16 M.J. 650 (A.F.C.M.R. 1983) (second court-martial following intermediate review determination that accuser problem made proceedings a nullity not barred by double jeopardy).

(1) ***Rehearings.*** If the findings or sentence are set aside on review, a rehearing may be ordered pursuant to articles 63, 66, and 67 of the code. *See United States v. Miller*, 10 C.M.A. 296, 27 C.M.R. 370 (1959), in which the Court of Military Appeals decided that rehearings limited to reconsideration of the sentence were proper proceedings. If a rehearing is ordered, the trial is not considered complete for jeopardy purposes until the rehearing has been completed and reviewed. The accused is protected during this period of "continuing jeopardy" by provisions prohibiting a rehearing if the conviction is set aside for lack of evidence. Articles 63, 66, and 67, UCMJ; *United States v. Ivory*, 9 C.M.A. 516, 26 C.M.R. 296 (1958); *United States v. Perry*, 34 C.M.R. 761 (A.F.B.R. 1963). Any punishment that may be imposed as a result of the rehearing is limited to that awarded at the original proceeding, as reduced by reviewing authorities. Article 63, UCMJ. As noted above, a rehearing may not consider any offense of which the accused was previously acquitted. If the reviewing authorities have reversed the conviction for legal insufficiency of the evidence, the accused may not be retried. That rule was laid down by the Supreme Court in *Burks v. United States*, 437 U.S. 1 (1978). The Court said, ". . . we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient. . . ." *Id.* at 17. The usual rule that the

accused "waives" his double jeopardy protection by appealing a decision was held inapplicable to the situation where the reviewing courts overturned the lower decision because of legally insufficient evidence. The Court held that it mattered not who originated the appeal. This principle would seem to have equal force if the charges were withdrawn after the trial had begun because of insufficient evidence. *See* the discussion on withdrawal of charges, below.

(2) ***Sentence deadlock.*** If the first court-martial cannot agree upon the sentence to be awarded, the case can be referred to a second court-martial for a rehearing on the sentence, and former jeopardy will not be available as a defense at that rehearing. *United States v. Goffe*, 15 C.M.A. 112, 35 C.M.R. 84 (1964). However, do not confuse this deadlock situation with the situation in which a court-martial imposes "no punishment" as the sentence; former jeopardy considerations would preclude a rehearing in the latter instance since "no punishment" is not a deadlock, but a valid sentence.

f. ***Withdrawal of charges.*** As noted above, the Supreme Court case of *Burks v. United States, supra,* probably prevents the retrial of an accused whose case was interrupted by the withdrawal of his charges due to insufficient evidence. Withdrawal of charges due to other reasons may, however, be held not to bar retrial, such as in the case of *Wade v. Hunter, supra,* where the U.S. Supreme Court held that it was proper for a convening authority to withdraw charges from a general court-martial and transmit them to another convening authority in the rear. The double jeopardy clause was held not to bar a retrial where the record showed that the tactical situation caused by the Army's rapid advance had placed the unit a "considerable distance" from the German town where a couple of civilian witnesses requested by the members resided. The fact that the trial had proceeded to such a point that the members had actually closed for deliberations, deliberated for some period of time, and then reopened the court to request the testimony of the two civilian witnesses was held not to bar a retrial.

(1) Article 44 (c), UCMJ, provides that "[a] proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial . . ." for purposes of former jeopardy. The MCM, (1995 Edition), gives more guidance. Charges which are withdrawn after the introduction of evidence on the merits may not be reinstituted unless the withdrawal was ". . . necessitated by urgent and unforeseen military necessity." R.C.M. 604(b), MCM, (1995 Edition). Charges withdrawn prior to the introduction of evidence may be reinstituted ". . . unless the withdrawal was for an improper reason." *Id.*

(2) Case law is to the same effect (i.e., if the charges are withdrawn because of lack of evidence or poor trial preparation on the part of the government, the accused may not be retried for the same offense). *Ivory, supra; United States v. Stringer*, 5 C.M.A. 122, 17 C.M.R. 122 (1954). In the *Stringer* case, trial counsel

had done a poor job of preparing his witnesses. Midway in the trial, the senior member remarked as follows: ". . . apparently this case is not ready for trial . . . I don't think that justice can be done . . . if this is a sample of what we are going to have to hear, I think the case will have to be better prepared. Otherwise, we will hang the man innocently." *Id.* at 127. The same result was reached in the unpublished case of *United States v. Fernandez*, NCM 79-0019 (N.C.M.R. 13 Aug 79). The unpublished decision of *United States v. Shuniak*, NCM 79-1188 (N.C.M.R. 11 Oct 79) held that the accused is protected from double jeopardy as to the specifications that had been "withdrawn with prejudice" pursuant to a pretrial agreement even though the military judge had, correctly, not entered findings as to those specifications.

(3) Note that, where the charges have been ordered dismissed by the military judge due to their failure to state an offense, neither Article 44, UCMJ, nor the Constitution bars a second trial upon properly drafted specifications. *United States v. Sparks*, 15 M.J. 895 (A.C.M.R. 1983).

g. ***Mistrials.*** The general rule is that the declaration of a mistrial will not bar further proceedings unless the declaration was an abuse of discretion and not consented to by the defense, or unless the declaration was the direct result of intentional prosecutorial misconduct. R.C.M. 915(c)(2), MCM, (1995 Edition).

(1) ***Requested by the defense.*** If a mistrial is requested by the defense, and granted by the military judge, jeopardy does not attach or is waived, and the accused may be retried for the same offense. *Ivory, supra.* This will not hold true for the defense-requested mistrial which is caused by prosecutorial misconduct.

(2) If the military judge properly declares a mistrial "in the interest of justice" or due to "manifest necessity," jeopardy does not attach. *United States v. Waldron*, 15 C.M.A. 628, 36 C.M.R. 126 (1966) (5 of the 6 court members had a preformed opinion as to the credibility of a key government witness); *United States v. Keenan*, 18 C.M.A. 108, 39 C.M.R. 108 (1969) (law officer concluded instructions to disregard testimony regarding an uncharged murder would be insufficient); *Schilling, supra* (trial recording device failed); *United States v. Richardson*, 21 C.M.A. 54, 44 C.M.R. 108 (1971) (military judge sitting alone withdrew findings of guilty and declared mistrial as to whole proceedings when he became convinced during presentencing stage that accused was receiving inadequate assistance from counsel); and *United States v. Tubbs*, 2 M.J. 840 (A.C.M.R. 1976) (accused sought to plead guilty, but made statements indicating that he was not, military judge refused to accept pleas and entered mistrial—held former jeopardy did not bar subsequent trial); *see also United States v. Watt*, 32 C.M.R. 504 (A.B.R. 1962), *petition denied*, 32 C.M.R. 472 (C.M.A. 1962); *United States v. Stafford*, 30 C.M.R. 704 (N.B.R. 1961) (defective recording device resulted in declaration of mistrial—held no double jeopardy upon retrial).

(3) ***Abuse of discretion.*** If the military judge abuses his

discretion in declaring the mistrial, jeopardy will attach and prevent retrial of the accused. *Burtt v. Schick*, 23 M.J. 140 (C.M.A. 1986); *Stringer, supra; United States v. Walter*, 14 C.M.A. 142, 33 C.M.R. 354 (1963); *United States v. Rex*, 3 M.J. 604 (N.C.M.R. 1977). These cases were based at least in part upon the decision of *United States v. Jorn*, 400 U.S. 470 (1971), in which the Supreme Court had held that a retrial was prohibited where a trial judge had abused his discretion by declaring a mistrial so that government witnesses could consult with their attorneys. It now appears well settled that the burden of proving that "manifest necessity" existed requiring that a mistrial be declared rests upon the government (i.e. that the trial court did not abuse its discretion in granting a mistrial over defense objection). *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 830, 54 L.Ed.2d 717 (1978); *United States v. Donley*, 33 M.J. 44, 47 (C.M.A. 1991); *Burtt, supra*, at 142.

The *Burtt* case is a good example of a trial court's abuse of discretion in declaring a mistrial over defense objection; the defense counsel inquired into the sentence received by an accomplice and a simple curative instruction would have alleviated the problem. Contrast this to the *Donley* case which involved the unusual situation of the military judge ***not*** declaring a mistrial sua sponte. N.M.C.M.R. reversed the conviction based on their finding that the military judge abused his discretion in not declaring a mistrial—C.M.A. then reversed N.M.C.M.R., emphasizing the fact that the double jeopardy clause gives an accused a valued right to have his trial completed by a particular tribunal. *Donley* at 47, citing *Wade v. Hunter, supra.*

(4) ***Action by the prosecution.*** Where trial counsel's action is held to constitute intentional action designed to provoke the accused's mistrial, reprosecution is barred by the double jeopardy clause. *See United States v. Goodyear*, 14 M.J. 567 (N.M.C.M.R. 1982) (court declined to extend intentional misconduct standard to include gross negligence or bad faith). *See also Oregon v. Kennedy*, 456 U.S. 667 (1982).

(5) ***Functional mistrial.*** A defense motion for relief which, if granted, terminates the proceedings without a finding with regard to guilt, can be considered the functional equivalent of a mistrial and will have the same effect with respect to former jeopardy. That is, a subsequent trial will not be barred since the termination of the proceedings was at the request of the defense. This is true even though the trial court may somehow indicate its belief in the guilt or innocence of the accused. *Lee v. United States*, 432 U.S. 23 (1977), wherein the Supreme Court held that where the trial court had merely "expressed its opinion" of the accused's guilt after hearing the evidence of the prosecution and did not make findings, but granted a motion to dismiss for failure of the indictment to allege the requisite intent, reprosecution did not violate the double jeopardy clause of the Constitution. Such a result was said to be "functionally indistinguishable from a mistrial." This same result would occur in the military setting when the defense moves to dismiss a specification for failure to state an offense (i.e., reprosecution is not barred). *See Sparks, supra.*

– But, dismissal is not always the functional equivalent of mistrial. In the case of *United States v. Kinneer*, 7 M.J. 974 (N.C.M.R. 1979), a defense motion to dismiss was grounded on the unlawfulness of the order which the accused had allegedly disobeyed. The trial military judge deferred ruling on the motion until after he heard the government's case, and then granted it. Even though styled as a motion to dismiss, the court held that the military judge had actually determined the merits of the matter; thus, jeopardy did attach and, hence, subsequent prosecution was barred.

h. ***Multiplicity***. In addition to protecting an accused against multiple prosecutions for the same offense by the same sovereign, the fifth amendment also shields an accused from multiple punishment for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 749, (1989). This protection is embodied in R.C.M. 307(c)(4) and 907(b)(3)(B), MCM, (1995 Edition), and is discussed in different chapters of this study guide (e.g., *Pleadings*, chapter II). For additional discussion, see *NJS Procedure Study Guide*, chapter XIV.

1005 FORMER PUNISHMENT (Key Number 525)

A. Former punishment is a defense altogether separate and apart from that of former jeopardy. Punishment imposed under the authority of articles 13 or 15 has not been awarded as the result of a trial; consequently, former jeopardy will not bar a subsequent court-martial in these cases. However, the accused who has already been punished for a minor offense may, nonetheless, have a valid defense under the "former punishment" provisions of the *Manual*.

1. ***Minor offenses***. The defense of former punishment is ***limited*** to minor offenses. A minor offense usually does not involve moral turpitude and carries a maximum permissible punishment of less than a dishonorable discharge and / or confinement for one year at a general court-martial. Part V, para. 1e, MCM, (1995 Edition). There is, however, no universal standard by which to determine whether an offense is minor. Each case must be evaluated on its own facts (e.g., in determining the issue, the courts have considered such things as the nature of the offense committed, the age and rank of the accused, the time and place of its commission, whether a victim was involved, and the potential for harm to the maintenance of good order and discipline). *Id.*

a. The following cases provide illustrations of situations that the courts have held to involve ***more than*** "minor" offenses:

(1) *United States v. Hollingsworth*, NMCM 91-1351 (31 Jan 92) (Marine E-1 convicted for 20 bad checks with total exceeding $2,500.00; prior NJP for first 7 checks not a bar to court-martial for all of them).

(2) *United States v. Fretwell*, 11 C.M.A. 377, 29 C.M.R. 193 (1960) (Navy lieutenant tried for being drunk on duty while he was OOD of USS Hancock, then in drydock).

(3) *United States v. Harding*, 11 C.M.A. 674, 29 C.M.R. 490 (1960) (assault which resulted in broken jaw and chipped teeth).

(4) *United States v. Vaughan*, 3 C.M.A. 121, 11 C.M.R. 121 (1953) and *United States v. Rosencrons*, 34 C.M.R. 512 (A.B.R. 1963) (escape from confinement).

(5) *United States v. Wharton*, 33 C.M.R. 729 (A.F.B.R. 1963) (involuntary manslaughter and resisting apprehension arising out of an automobile chase and accident).

(6) *United States v. Fisher*, 22 C.M.R. 676 (N.B.R. 1956) (larceny of $36.00). (Caveat: this case was decided under the punish-ment provisions of the MCM, 1951, and it is not known whether larceny of $36.00 would still be considered a nonminor offense for this purpose.)

(7) *United States v. Cross*, 2 M.J. 1057 (A.C.M.R. 1976) (possession of approximately one pound of marijuana).

(8) *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) (theft of an aviator kit bag containing a parachute and personal items belonging to post personnel).

b. The same factors that caused the courts to determine that they were not dealing with a minor offense in the cases cited above convinced the courts of the opposite in the following decisions:

(1) *United States v. Mahoney*, 27 C.M.R. 898 (N.B.R. 1959) (Marine captain was drunk in public and walked through civilian hotel clad only in undershorts).

(2) *United States v. Yray*, 10 C.M.R. 618 (A.F.B.R. 1953) (unauthorized absence for five days).

(3) *United States v. Williams*, 10 C.M.A. 615, 28 C.M.R. 181 (1959) (disrespect to superior noncommissioned officer).

2. ***Punishment imposed during pretrial restraint of the accused.*** As noted above, R.C.M. 907(b)(2)(D)(iv), MCM, (1995 Edition), prohibits a subsequent court-martial for minor offenses previously punished under articles 13 or 15 of the code. Article 13, UCMJ, permits an accused to be punished "for infractions of discipline" while he is being held in pretrial or post-trial restraint. If the accused is punished for such misconduct, he may not be court-martialed for the same offense if the offense in question was minor, as defined above. Cases dealing with this aspect of the former punishment defense may be divided into two categories for purposes of analysis: (1) Those cases in which the punishment was imposed lawfully; and (2) those cases in which the punishment was imposed unlawfully.

a. ***Lawful punishment.*** If the accused is subjected to disciplinary punishment for minor infractions of discipline during a period of pretrial restraint, he may not be subsequently prosecuted at a court-martial for the same offense.

– ***Example.*** In *Williams, supra*, the accused was placed in disciplinary segregation on a reduced diet after being disrespectful to his superior noncommissioned officer. He was later brought to trial on the disrespect charge, among other charges. The court ruled that the disrespect offense had been the subject of a previous punishment and, hence, the accused could not be subjected to court-martial for that violation. Of similar import is *Rosencrons, supra*.

b. ***Illegal pretrial punishment.*** Cases involving illegal pretrial punishment require somewhat more analysis than those noted above. The first issue usually to be resolved is whether the accused has been punished. This is so because at times the "punishment" will be imposed unintentionally by confinement facility officials or command authorities, and because it may or may not be imposed as a result of a disciplinary infraction committed after the accused has been placed in pretrial restraint. Chapter XII of the *Procedure Study Guide* should be carefully reviewed in this area. Remember that the former punishment defense prevents a court-martial only for the same, minor offense. Hence, if the accused has been punished for some offense other than that for which he is being tried by

court-martial, or if the offense for which he is being tried and was previously punished is not minor, then the accused cannot rely on the former punishment defense. *Vaughan, supra.* The accused, however, may be entitled to other relief. *United States v. Larner,* 1 M.J. 371 (C.M.A. 1976). *United States v. Bayhand,* 6 C.M.A. 762, 21 C.M.R. 84 (1956); *United States v. O'Such,* 16 C.M.A. 537, 37 C.M.R. 157 (1967); and *United States v. West,* 12 C.M.A. 670, 31 C.M.R. 256 (1962). In all of these cases, the illegal nature of the pretrial confinement caused the courts to dismiss the charges or to grant other relief because of the peculiar nature of the charges, the severity of the confinement, or its effect upon the accused's ability to defend himself; however, none were decided on the basis of, or even involved, the former punishment defense.

B. R.C.M. 907(b)(2)(D)(iv), MCM, (1995 Edition), indicates that punishment imposed under Article 15 (NJP) or Article 13 (punishment for disciplinary infractions arising while the accused is in pretrial confinement), UCMJ, for ***minor*** offenses will bar a subsequent court-martial for ***those*** offenses. This concept is known as the "former punishment" bar to trial. A ***serious*** offense can be the subject of a subsequent court-martial even if punishment has been previously awarded to the accused under either article. *United States v. Joseph,* 11 M.J. 333 (C.M.A. 1981). *See also United States v. Pierce,* 27 M.J. 367 (C.M.A. 1989) (absent some sinister design, evil motive, or bad faith on the part of military authorities, it is not a violation of military due process to court-martial a servicemember for a serious offense even though he has been punished nonjudicially).

1006 RES JUDICATA (Key Numbers 832, 1266)

A. ***Defined.***

> Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties."

R.C.M. 905(g), MCM, (1995 Edition).

B. ***Who may assert it?*** Res judicata may be asserted only by the defense.

1. ***Same parties.*** In order for the defense to assert res judicata, it must be shown that the same parties were involved in both proceedings. *United States v. Chavez*, 6 M.J. 615 (A.C.M.R. 1978). In *Chavez*, the appellant, charged with assaulting a military policeman by assaulting him with an automobile, claimed that he was entitled to the defense of res judicata because the matter of whom the driver of the automobile was at the time of the assault had been previously decided in proceedings held by a U.S. magistrate. The magistrate had decided beyond a reasonable doubt that the driver was an individual other than the appellant. The Army Court of Military Review, however, rejected the appellant's claim by finding that the appellant was not a party to the magistrate proceeding.

2. ***Privity of necessary parties.*** When a crime is one that, by definition, cannot be committed by only one person, but requires a concert of action or intent by two or more, a determination of an issue in a trial of one of the parties may be pleaded in defense by another person who, although not a party to the former proceeding, was nonetheless a necessary party to the alleged crime. *See, e.g., United States v. Doughty*, 14 C.M.A. 540, 34 C.M.R. 320 (1964).

3. ***Principals and accessories.*** Except when they are necessary parties (*Doughty, supra*), perpetrators, aiders and abettors, and accessories before and after the fact lack privity for res judicata purposes. This is so because the code permits conviction of all principals and accessories, regardless of the conviction or acquittal of the actual perpetrator. *United States v. Marsh*, 13 C.M.A. 252, 32 C.M.R. 252 (1962); *United States v. Hollis*, 16 M.J. 954 (A.F.C.M.R. 1983) (determination of lack of service-connectedness not res judicata in trial of accomplice).

C. ***What are previously determined matters?*** *See* R.C.M. 905(g) discussion, MCM, (1995 Edition), for an excellent compilation of examples. Note that previously determined ***matters of law*** may be contested by the government at a second trial on unrelated charges.

D. ***Prior acquittal as res judicata.*** A finding of not guilty raises the possibility that the accused was acquitted because of a failure of proof of any one or all of the elements of the charged offense. Thus, it is often difficult to determine what factual matters were determined when the accused was acquitted. Military courts will not presume, for purposes of res judicata, that all necessary elements of the offense were decided in favor of the accused by a prior acquittal. Instead, the record of the prior proceeding will be scrutinized, with particular attention paid to the pleadings, the evidence, and argument of counsel. Parol evidence outside the record of the prior proceedings, such as the testimony of court members at the first trial, will not generally be permitted to establish the factual determinations inherent in the acquittal. *United States v. Underwood*, 15 C.M.R. 487 (A.B.R. 1954). Instead, the court will examine the evidence and the logical conclusions to be drawn from it,

including matters such as which witnesses were apparently believed and which ones apparently were found untrustworthy. *United States v. Martin*, 8 C.M.A. 346, 24 C.M.R. 156 (1957). The test, ultimately, is whether, after examining all available evidence, a rational jury could have grounded its verdict upon an issue other than that which the accused seeks to foreclose from relitigation. *Ashe v. Swenson*, 397 U.S. 436 (1970); *see also United States v. Marks*, 21 C.M.A. 281, 45 C.M.R. 55 (1972); and R.C.M. 905(g) discussion, MCM, (1995 Edition).

E. ***Finally determined.*** For res judicata to prevent relitigation of an issue, that issue must have been finally determined at the prior proceeding. Except for a ruling which is, or amounts to, a finding of not guilty, a ruling ordinarily is not final until action on the court-martial is completed. R.C.M. 905(g) discussion, MCM, (1995 Edition). Note the case of *United States v. Saulter*, 5 M.J. 281 (C.M.A. 1978), in which the court noted that a summary dismissal of appellant's petition for writ of habeas corpus by a U.S. District Court was not a final determination since the dismissal had been appealed by the accused to the appropriate Court of Appeals. Also note the case of *United States v. Guzman*, 4 M.J. 115 (C.M.A. 1977). In that case, the convening authority had determined that appellant's enlistment was void because of misconduct by his recruiter and, therefore, the court-martial that had tried him was without jurisdiction over the appellant's person. Apparently, the accused was subsequently convicted at another court-martial for offenses separate from those tried at the first court-martial. That conviction was appealed to C.M.A., who, in a summary disposition, dismissed the charges, holding that the convening authority's determination in the first case was res judicata as to the second.

F. ***Parties and courts.*** As noted above, in order for the defense of res judicata to be successfully asserted, a court of competent jurisdiction must have finally determined the matter in issue between the same parties. R.C.M. 905(g), MCM, (1995 Edition), indicates that any court may have determined the issue in question, including a previous court-martial. As a practical matter, only Federal courts may be looked to since the United States seldom appears in any other type of court as a party. And there is some indication that state court proceedings may not be sufficient to meet the requirements of res judicata. *United States v. Borys*, 39 C.M.R. 608 (A.B.R. 1968). Also recall that, if the convening authority in a given case makes a factual determination, that factual determination may be res judicata if the same matter is put into issue at a subsequent trial involving the same parties (not necessarily the same convening authority). *Guzman, supra.* As we have already seen, the accused is usually one party, although, in certain instances, a co-actor will do just as well. The United States must be the other party. This requirement is satisfied if the United States, or any governmental unit deriving its authority therefrom, was a party to the previous proceeding. R.C.M. 905(g), MCM, (1995 Edition). If a state was the party in the first proceeding, res judicata will not bar the subsequent prosecution. *Borys, supra,* at 612; *see also Serio v. United States*, 203 F.2d. 576 (5th Cir. 1953), *cert. denied*, 346 U.S. 887 (1953) and *Smith v. United States*, 243 F.2d. 877 (6th Cir. 1957).

G. ***Inconsistent findings within the same trial.*** The doctrine of factual res judicata "through" inconsistent findings at the same trial was rejected by the Supreme Court in the case of *Dunn v. United States*, 284 U.S. 390 (1932). The Court there said quite plainly, "consistency in the verdict is not necessary." *Id.* at 393. Another case deciding the same term further illustrates the point. *Borum v. United States*, 284 U.S. 596 (1932). Thus, within one trial, an acquittal of all or part of a specification has no effect on the remainder of the specification or other specification unless, of course, the remainder of the specification fails to state an offense. *United States v. Spivey*, 23 C.M.R. 518 (A.B.R. 1957).

H. ***Relationship between res judicata and former jeopardy.*** Res judicata is "an integral part of the protection against former jeopardy." *United States v. Chavez*, 6 M.J. 615, 621 (A.C.M.R. 1978). Because of the important distinctions between the concepts of res judicata and former jeopardy, however, the doctrine of res judicata may be applied when the former jeopardy defense cannot. The two most salient distinctions are discussed below. It should be noted that, in the Supreme Court case of *Ashe v. Swenson, supra*, the Supreme Court held that the Federal rule of "collateral estoppel" in criminal cases, which is analogous to res judicata for the military justice system (*Saulter, supra*), is embodied in the fifth amendment guarantee against double jeopardy. Thus, res judicata may have constitutional underpinnings just as former jeopardy does. *Chavez, supra.*

1. ***Same offense / same matter.*** Former jeopardy may be claimed as a defense only when the accused was formerly tried on the same offense. Res judicata may be claimed in a second trial for a different offense, so long as the "matter" previously determined was the same and the other necessary require-ments are met.

2. ***Assembly / final determination.*** Jeopardy attaches upon introduction of evidence. R.C.M. 907(b)(2)(C)(i). There need be no final determination of guilt or innocence at the first trial in order for the accused to claim former jeopardy. Res judicata requires final determination of the particular matter as to which it is invoked. It applies whether the previous trial resulted in conviction, acquittal, or something in between. Note that, where it relates to an evidentiary matter or some other collateral issue, a final determination is possible even though jeopardy has not attached.

– ***Example.*** Before assembly of the court, if the military judge dismisses the charges against the accused because of a lack of personal jurisdiction over him due to a void enlistment, that determination will be res judicata at a subsequent court-martial of the same accused. Jeopardy would not attach to the dismissed charges, however, because the motion was granted before the assembly of the court. *United States v. Jackson*, 20 M.J. 83 (C.M.A. 1985).

1007 INSANITY (Key Numbers 843-846, 984, 1246)

A. ***The present standard.*** In 1986, Congress enacted Article 50a of the UCMJ, which provides the insanity standard under military law and applies to all offenses committed on or after 14 November 1986. As enacted by Congress, article 50a provides as follows:

> Art. 50a. Defense of lack of mental responsibility
>
> (a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.
>
> (b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.
>
> (c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge, or the president of a court-martial without a military judge, shall instruct the members of the court as to the defense of lack of mental responsibility under this section and shall charge them to find the accused -
>
> (1) guilty;
>
> (2) not guilty; or
>
> (3) not guilty only by reason of lack of mental responsibility.
>
> (d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused -
>
> (1) guilty;
>
> (2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if -

(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or

(2) in the case of a court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established.

B. ***Legislative background.*** Article 50a was patterned virtually word-for-word after the insanity standard set forth in the Insanity Defense Reform Act, Pub. L. No. 98-473, found at 18 U.S.C. § 17, which became effective 12 October 1984. This rather plainly reflects a congressional intent that the standard for insanity in the military be the same as that set forth in 18 U.S.C. § 17. Accordingly, Federal cases applying and interpreting that statute should be highly persuasive in any dispute over the construction of article 50a.

C. ***Analysis.*** As will be seen below, article 50a marks a radical departure from the *Frederick* standard in several significant respects. But, at least one key term from the *Frederick* standard has been left intact (i.e. the term "mental disease or defect"). Thus, the pre-article 50a case law discussing this term arguably retains its validity. In virtually all other respects, however, article 50a marks a radical departure from *Frederick*.

1. ***Definition of "mental disease or defect."*** Because the *Frederick* decision did not include an interpretation of the ALI standard, several lower counts have attempted to define its terminology for application to the military justice system. *See, e.g., United States v. Martin*, 7 M.J. 613 (N.C.M.R. 1979). Although given the opportunity to rectify this situation, the Court of Military Appeals instead noted that ". . . we can no better define the terms 'mental disease or defect' than by the use of the terms themselves. . . . and . . . that attempts at further definition will be confusing rather than clarifying." *United States v. Cortes-Crespo*, 13 M.J. 420, 422 (C.M.A. 1982). Accordingly, the procedure that trial judges must continue to follow involves the receipt of testimony on the particular disorder of the accused with submission to the trier of fact of the issue of whether such a disorder falls within the parameters of the standard. *See, e.g., United States v. Bush*, 14 M.J. 900 (N.M.C.M.R. 1982); *United States v. Wattenbarger*, 15 M.J. 1069 (N.M.C.M.R. 1983), *aff'd*, 21 M.J. 41 (C.M.A. 1985); *United States v. Ott*, 26 M.J. 542, *review denied*, 27 M.J. 476 (A.F.C.M.R. 1988). [***Note:*** The *Ott* case was decided after enactment of Article 50a, UCMJ.]

a. ***Alcoholism and voluntary intoxication.*** Voluntary intoxication by alcohol or drug, even when combined with an existing mental condition, does not raise the issue of insanity if the mental condition alone is insufficient to raise such an issue; however, this is subject to the proviso that consistent use of an intoxicant may itself cause a mental disease. *United States v. Thomson*, 3 M.J. 271 (C.M.A. 1977). Voluntary intoxication, which does not in itself constitute a mental disease, can negate a requisite specific intent and thereby preclude convictions for specific intent offenses, but it will not absolve one of criminal responsibility where the crime requires no specific intent or other specific state of mind. However, the degree of voluntary intoxication must be such that the mental faculties of the accused are so impaired that the formation of specific intent is not possible. *United States v. Bright*, 20 M.J. 661 (N.M.C.M.R. 1985). *See also United States v. Ledbetter*, 32 M.J. 272 (C.M.A. 1991). Nor is alcoholic-induced amnesia a defense to a crime. *United States v. Riege*, 5 M.J. 938 (N.C.M.R. 1978); *United States v. Sexton*, 1 M.J. 679 (N.C.M.R. 1975); *Martin, supra*; *United States v. Triplett*, 44 C.M.R. 466 (A.C.M.R. 1971), *aff'd*, 21 C.M.A. 497, 45 C.M.R. 271 (1972). Section 2.08(5)(c) of the Model Penal Code recognized "pathological intoxication" as a defense when the intoxication is "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." The Court of Military Appeals has not ruled whether this "pathological intoxication" defense is applicable to military law. *United States v. Santiago-Vargas*, 5 M.J. 41 (C.M.A. 1978). The court "assumed" in *Santiago-Vargas* that the defense did apply, but noted that the accused therein failed to come within its scope since he knew that, "when intoxicated, he behaved in a violent manner." *Id.* at 43. The Navy-Marine Corps Court of Military Review, however, has specifically refused to recognize a defense of "pathological intoxication." *United States v. Gertson*, 15 M.J. 990 (N.M.C.M.R.), *petition denied*, 16 M.J. 309 (C.M.A. 1983).

b. **Drug use.** Drugs are treated the same as alcohol for purposes of mental responsibility. Intoxication, which is the result of voluntary drug ingestion, is not a defense to offenses which are general intent crimes; however, the intoxication may negate the formulation of such an intent and, hence, constitute a defense to offenses requiring a specific state of mind. *See* cases cited above; *United States v. Reitz*, 47 C.M.R. 608 (N.C.M.R. 1973), *rev'd on other grounds*, 22 C.M.A. 584, 48 C.M.R. 178 (1974); *United States v. Brown*, 50 C.M.R. 374 (N.C.M.R. 1975); *United States v. Foley*, 12 M.J. 826 (N.M.C.M.R. 1981) (mental defect resulting from voluntary ingestion of drugs not a defense to general intent offenses).

c. ***Substance within a substance.*** The fact that a substance, itself legally consumable—such as coffee or beer—was adulterated with a dangerous drug may be a defense to criminal liability even for a general intent offense. Where the substance consumed is itself a contraband drug, however, the mental disease or defect will not be held to be "nonculpably incurred" and the accused can be found guilty. *See United States v. Ward*, 14 M.J. 950 (A.C.M.R. 1982) (accused ingested marijuana adulterated with PCP).

d. ***Caveat.*** Note that article 50a says specifically that the "mental disease or defect" must be a ***severe*** mental disease or defect. R.C.M. 706(c)(2)(A) indicates that the term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.

2. ***The cognitive test.*** Whereas the *Frederick* test focused its inquiry on whether the accused lacked substantial capacity to appreciate the criminality of his conduct, article 50a focuses the inquiry on whether the accused was "unable to appreciate the nature and quality or the wrongfulness of the acts." This change appears to be nothing less than an attempt to abolish the ALI standard in *Frederick* altogether and return the insanity standard to the old *M'Naghten* test. The legislative history to 18 U.S.C. § 17, makes it quite clear that this was precisely the intent of Congress in enacting that statute. *See* 1984 U.S. Code Cong. & Admin. News 3404-3413. Note also that article 50a substitutes the word "unable" for the more flexible term "lacks substantial capacity." Arguably, this term means the accused must be ***completely*** unable to appreciate the criminality of his conduct.

3. ***The volitional test abolished.*** The *Frederick* standard contained not only a cognitive test (i.e. "lacks substantial capacity to appreciate the criminality of his conduct"), but also a volitional test (i.e. "lacks substantial capacity to conform his conduct to the requirements of law"). Satisfying ***either*** test provided the accused with a viable insanity defense. Article 50a abolishes the volitional test and leaves only a cognitive test. It therefore no longer matters whether the accused had the capacity to conform his conduct to the requirements of law.

4. ***Partial mental responsibility ("diminished capacity") eliminated.*** The concept of "partial mental responsibility" (sometimes called "diminished capacity") has been abolished by article 50a which explicitly provides that "[m]ental disease or defect does not otherwise constitute a defense." An identical provision exists in 18 U.S.C. § 17, and the legislative history to that provision makes it quite clear that Congress intended to eliminate any such concept as "diminished capacity." *See* 1984 U.S. Code Cong. & Admin. News 3404-3413. However, an accused can, without raising the affirmative defense of lack of mental responsibility under article 50a, present evidence that a mental disease or defect rendered him unable to entertain a required specific intent or possess a required actual knowledge. Both military and civilian courts have held that such evidence does not raise an affirmative defense, but merely goes to the issue of reasonable doubt on an essential element. In *United States v. Berri*, 33 M.J. 337 (C.M.A. 1991), the court reversed an attempted murder conviction because the MJ instructed the members that they could not consider a psychiatrist's testimony on the accused's mental state (which failed to meet level of proof required to find lack of mental responsibility) on the issue of specific intent. *See also United States v. Pohlot*, 827 F.2d 889 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1011, 108 S. Ct. 710, 98 L.Ed.2d 660 (1988); *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988). *Cf.* R.C.M. 916(k)(2).

5. ***Burden of proof now on accused.*** The most radical aspect of article 50a is its reversal of the burden of proof. No longer is the government required to prove beyond a reasonable doubt that the accused was sane. Article 50a places the burden of proving the defense of lack of mental responsibility on the ***accused***. The standard is ***clear*** and ***convincing*** evidence. See also R.C.M. 916(b) (accused has burden of proving lack of mental responsibility by clear and convincing evidence).

D. ***Lack of mental capacity to stand trial.***

1. ***Basis.*** Lack of mental capacity is a defense in bar of trial. By asserting it, the defense seeks to postpone trial until the accused is mentally competent to stand trial—if ever. The law recognizes lack of mental capacity as a bar to trial because it would be fundamentally unfair to try an accused who could not understand the nature of the proceedings or who was incapable of cooperating intelligently in his / her own defense.

2. ***Standard.*** The standard is enunciated in R.C.M. 909, MCM, (1995 Edition):

> No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case.

a. The most explicit amplification of this standard is found in the case of *United States v. Williams*, 5 C.M.A. 197, 17 C.M.R. 197 (1954). The court in that case held that the accused:

> must be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense. . . .

Id. at 204, 17 C.M.R. at 204.

The Supreme Court, in the case of *Dusky v. United States*, 362 U.S. 402 (1960), held that a trial court must not base its determination that the accused is mentally competent to stand trial upon a mere finding that he is oriented to time and place and has some recollection of

events. The test must be "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 402. For a more recent discussion of the issue, see *United States v. Martinez*, 12 M.J. 801 (N.M.C.M.R. 1981); *United States v. Bruce*, 18 M.J. 829 (A.C.M.R. 1984); *United States v. Freeman*, 28 M.J. 789 (N.M.C.M.R. 1989).

(1) ***Amnesia.*** The question of amnesia as it affects the mental capacity to stand trial is an interesting one. As noted above with regard to mental responsibility, amnesia alone, usually of an alcoholic origin, is not a defense on the merits. Similarly, the contention that loss of memory alone constitutes lack of mental capacity has generally been rejected by the courts. *United States v. Olvera*, 4 C.M.A. 134, 15 C.M.R. 134 (1954); *United States v. Lopez-Malave*, 4 C.M.A. 341, 15 C.M.R. 341 (1954); *United States v. Baran*, 23 M.J. 736 (A.F.C.M.R. 1986). In *Olvera, supra*, at 142, the court said, "The accused may well be characterized by a genuine amnesia as to certain events, yet be able to deal rationally with them, to cooperate with his counsel, and to remember the events taking place at the trial." *See also Wilson v. United States*, 391 F.2d 460, 462 (D.C. Cir. 1968). This general rule may vary, however, if it is shown that the amnesia is accompanied by, or is caused by, a mental defect or disease. *Wilson, supra*, and *United States v. Jones*, 147 F. Supp. 265, 267 (C.D. Md. 1956). It should be noted that amnesia does not prevent the accused from testifying in his own behalf, even if he can't recall the events surrounding the alleged crime. This is because, other things being equal, the accused still has the ability to testify that he just "doesn't remember." This is not as unusual as it may sound, for many witnesses often cannot remember specific events and testify accordingly. If the accused possesses the ability to deal rationally with his inability to remember, his inability to recall may be a tactical handicap, but it is not a bar to trial. *See, e.g., United States v. Dunaway*, 39 C.M.R. 908 (A.F.B.R.), *petition denied*, 39 C.M.R. 293 (1968).

(2) It is significant to note that the second part of the test is posed in the disjunctive: "to conduct ***or*** cooperate intelligently in his own defense." Thus, if an accused has such a disorder that he is unable to get along with or accept the advice of any lawyer—that is, to cooperate—he is not immune from trial if he does have the substantial ability to intelligently conduct his own defense ***and*** understand the nature of the proceedings. *United States v. Koch*, 37 C.M.R. 843, 851 (A.F.B.R.), *rev'd.*, 17 C.M.A. 79, 37 C.M.R. 343 (1966); *Jones, supra.*

(3) A higher standard of competence must exist for an accused to waive counsel and proceed pro se. *Massey v. Moore*, 348 U.S. 105, 75 S.Ct. 145, 99 L.Ed. 135 (1954); *Freeman, supra.* An accused may be sufficiently competent to cooperate in his own defense, but may lack capacity to stand trial without the assistance of counsel. In such cases, it must be determined that the accused is competent to understand the disadvantages of self-representation and, in fact, understands such disadvantages. *Freeman, supra.*

b. ***Raised as motion for continuance.*** The defense of lack of capacity is raised as a motion for a continuance and not as a motion to dismiss. *Lopez-Malave, supra; Dunaway, supra; United States v. Schlomann,* 36 C.M.R. 622 (A.B.R. 1966). In addition, it is an interlocutory question upon which the military judge rules finally. R.C.M. 909(c), MCM, (1995 Edition); *Lopez-Malave, supra; United States v. Wisener,* 46 C.M.R. 1100 (C.G.C.M.R. 1973).

c. It is important to note that, unlike mental responsibility issues, to assert a mental defense successfully, the accused need not be suffering from a mental defect or disease. Lack of mental capacity may be based on character disorders and other maladies not generally thought to qualify as mental diseases. *Wisener, supra,* and *Bruce, supra.* Mental capacity is an interlocutory question of fact to be determined by the military judge, and trial may not proceed unless it is established by a preponderance of the evidence that the accused possesses the requisite capacity to understand the proceedings and cooperate in the defense of the case. R.C.M. 909(c)(2), MCM, (1995 Edition).

E. ***Procedural aspects of insanity issues.***

1. ***Inquiry.***

a. ***Before referral of charges.*** If any commanding officer, investigating officer, trial counsel, or defense counsel has reason to believe that an accused may be insane, or may have been insane at the time of the offense, such fact and support for the belief or observations should be reported to the convening authority. R.C.M. 706(a) and (b), MCM, (1995 Edition). If the convening authority determines that a reasonable basis for inquiry exists, a board of one or more persons will be convened to examine the accused and evaluate the accused's present mental capacity to stand trial and his or her mental responsibility at the time of the offense. Each member of the board shall be either a physician or a clinical psychologist. At least one member should be a psychiatrist or a clinical psychologist. R.C.M. 706(c), MCM, (1995 Edition). This examination of the accused has been held not to be a critical phase requiring the assistance of counsel. *United States v. Olah,* 12 M.J. 773 (A.C.M.R. 1981).

b. ***After referral of charges.*** Whether or not the accused has petitioned the convening authority to inquire into the sanity of the accused, once the case has been referred to trial, the defense (or any other party) may request the court to do so. The military judge rules finally as to whether further inquiry should be made. The request for inquiry may be made by trial or defense counsel, any court member, or the military judge on his own motion. The convening authority may order such an inquiry after referral, but before the first session of the court-martial, if the military judge is not reasonably available. R.C.M. 706(b)(2), MCM, (1995 Edition).

c. ***Sanity board requirements.*** Regardless of whether the inquiry was ordered before, during, or after trial, R.C.M. 706(c)(2), MCM, (1995 Edition), requires the sanity board to answer each of the following questions—together with any others that the authority ordering the inquiry may pose:

(1) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?

(2) What is the clinical psychiatric diagnosis?

(3) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of the accused's conduct?

(4) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

2. ***Litigation of the issues.***

a. ***Litigation of mental capacity to stand trial.*** Once the issue is raised at trial as to the present mental capacity of the accused, a ruling must be made. Whether the issue is raised as a result of formal inquiry, by motion for continuance (see *Williams, supra*), or through introduction of evidence at trial, the issue is always an interlocutory question to be ruled upon finally by the military judge. If it is not established by a preponderance of the evidence that the accused is mentally competent to stand trial, the proceedings shall be suspended. Depending on the severity and / or duration of the problem, the case may be continued or the charges withdrawn or dismissed. R.C.M. 909(c)(2) discussion, MCM, (1995 Edition).

b. ***Litigation of mental responsibility.*** The issue of mental responsibility is purely an issue on the merits and cannot be litigated as an interlocutory question. R.C.M. 916(k)(3)(C), MCM, (1995 Edition).

3. ***Deliberation and voting.***

– R.C.M. 921 implements a special voting procedure for members deliberations when mental responsibility is in issue. The members first vote on whether the government has proved the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members vote for a finding of guilty (or if all members vote for a finding of guilty where the death penalty is mandatory), then the members will proceed to a vote to determine whether the accused has met his burden of proving lack of mental responsibility by clear and convincing evidence. If a majority determine that the accused has met his

burden, then a finding of not guilty only by reason of lack of mental responsibility results. But, if an acquittal does not result from this vote, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands. The members determine the issue of lack of mental responsibility on each specification separately when the issue has been raised with regard to more than one specification.

4. ***Action by convening authority.***

a. A finding by a court, that the accused is not guilty only by reason of lack of mental responsibility at the time of the offense, is a finding of not guilty which, like all acquittals, may not be disturbed by the convening authority.

b. When the trial has been suspended due to a finding of lack of mental capacity to stand trial, the convening authority may request reconsideration of the ruling based either on a belief that the ruling was erroneous or that the accused's condition has changed. The convening authority may decide to withdraw the charges and reinstate them at a later date. *Lozinski v. Wetherill*, 21 C.M.A. 52, 44 C.M.R. 106 (1971). If it appears that the incapacity is permanent, the charges may be permanently withdrawn or dismissed. R.C.M. 909(c)(2) discussion, MCM, (1995 Edition).

5. ***Guilty plea cases.*** If there is any indication that the accused is or was insane at the time of the offense, the military judge must inquire into the matter to determine the providency of the plea, even though the defense does not wish to raise insanity as a defense. *See United States v. Leggs*, 18 C.M.A. 245, 39 C.M.R. 245 (1969).

6. ***Mental evaluations of an accused under the Military Rules of Evidence.***

a. ***Mil.R.Evid. 302, Privilege Concerning Mental Examination of an Accused.***

(1) ***The Text of the Rule.***

(a) ***General rule.*** The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil.R.Evid. 305 at the examination.

(b) ***Exceptions.***

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in (1).

(c) ***Release of evidence.*** If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) ***Noncompliance by the accused.*** The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

(e) ***Procedure.*** The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. R. Evid. 304 for an objection or a motion to suppress.

(2) ***Limitations on the application of Mil.R.Evid. 302.***

(a) The protections of Mil.R.Evid. 302 do not apply to mental examinations not ordered under R.C.M. 706. Hence, independently requested examinations are outside the protection of the rule. *United States v. Matthews*, 14 M.J. 656 (A.C.M.R. 1982) (Mil.R.Evid. 302 did not apply to psychiatric examination to determine fitness for administrative separation held prior to commission of the offenses).

(b) Failure to move for suppression, or failure to object, constitutes waiver.

b. ***Operation of Mil.R.Evid. 302.***

(1) It creates a limited testimonial immunity which prohibits the use of any statement made by the accused during any mental examination ordered under R.C.M. 706 of the *Manual*. This immunity is effective even if appropriate warnings have been given to the accused.

(2) It purports to extend to ***any*** statement made by the accused and any derivative evidence obtained through the use of such a statement.

(3) It applies during trial on the merits and during sentencing proceedings.

(4) In conjunction with R.C.M. 706, it creates three different levels of disclosure:

(a) The results of the examination;

(b) the full report of the board less any statements of the accused; and

(c) the specific statements of the accused.

(***Note***: Sometimes these distinctions may be blurred. In *United States v. Fowler*, 30 M.J. 1164 (A.C.M.R.), *petition denied*, 32 M.J. 42 (C.M.A. 1990), the judge allowed a psychiatrist who had served on the accused's sanity board to testify during sentencing as to the ***results*** of the board (i.e. that the accused was a pedophile, not limited to incest). The court held that the board result was not "derivative evidence," but still should not have been admitted because it was based on communications from appellant which were not preceded by a warning that the board results could have an adverse use in sentencing. *Id.* at 1166.)

(5) The results of the sanity board (i.e., the ultimate

conclusions as to the accused's sanity of the board members—number 1, above) are furnished to all interested parties in R.C.M. 706(c)(3)(A), MCM, (1995 Edition). The full investigative report (numbers 2 and 3, which usually appear in one document) is provided immediately to the defense, but to no one else outside medical channels. R.C.M. 706(c)(3)(B), MCM, (1995 Edition). Disclosure (release) of the entire sanity board report to the commanding officer of the accused will be made upon request. *Id.*

(6) If the defense raises the insanity defense by offering expert testimony concerning the accused's mental condition, then the military judge, upon request (motion), ***shall*** order the disclosure (release) of the full report to the prosecution less any specific statements of the accused. Mil.R.Evid. 302(c).

(7) If the defense offers specific statements of the accused, the military judge ***may*** upon motion of the prosecution order the disclosure of the statements "as may be necessary in the interests of justice." *Id.*

c. ***Nonmilitary experts used by the defense.***

(1) If the defense uses civilian experts, the prosecution could seek a continuance and an order from the military judge that the accused submit to an R.C.M. 706 sanity board. *See* Mil.R.Evid. 302(d). The full report, less any specific statements of the accused, would then be releasable to the prosecution. *See United States v. Frederick*, 7 M.J. 791 (N.C.M.R.), *petition denied*, 8 M.J. 42 (C.M.A. 1979).

(2) If the accused is examined by a sanity board, but the defense does not present any expert witnesses, then the prosecution would not get the full report and is barred from even interviewing the members of the board.

7. ***Potential problem areas.***

a. ***Neutral statements.*** Mil.R.Evid. 302 protects ***any*** statement of the accused, but *United States v. Babbidge*, 18 C.M.A. 327, 40 C.M.R. 39 (1969), sought to protect only incriminating statements as do its progeny. Consequently, the rule's breadth is overbroad. Most psychiatric opinions are based upon what the accused tells the psychiatrist as well as how he tells it. So, if the accused lies, the possibility of an inaccurate assessment is great, yet the prosecution may be prohibited from finding out what the accused told the psychiatrists to gauge the validity of their opinions. *See Thomson, supra*, where the Court of Military Appeals said: ". . . psychiatrists cannot reach their conclusion to answer the question of criminal responsibility at a time certain in a acuum, but must rely upon the history supplied both by the person examined and others; if that history is faulty, then the credibility of the conclusion of the psychiatrists may be faulty and must be tested."

b. ***Time of disclosure.*** Mil.R.Evid. 302(c) states that the defense

offer of expert testimony triggers disclosure to the prosecution of the full report. Does this mean that the prosecution must wait until the defense expert is on the stand, mentions the accused's mental condition, or finishes his direct testimony before it is entitled to disclosure? Or, does it mean that the prosecution is entitled to disclosure as soon as the defense puts in a witness request which is granted?

c. ***Civilian experts***. Can the prosecution discover reports written by the defense's civilian experts, including the statements of the accused? *See Frederick, supra*, at 805-806, where the Navy Court of Military Review said: "Discovery in a criminal trial is not a one-way street. Appellant sought to turn the proceedings into a jurisprudential game of hide-and-seek instead of a search for the truth. To this he was not entitled."

d. ***Defense use of lay testimony***. The plain language of Mil.R.Evid. 302 indicates that the government is entitled to call expert witnesses in rebuttal only if the defense utilizes the testimony of psychiatric experts in presenting the insanity issue to the court. This could occasion the successful assertion of such a defense, even though all experts concur that the accused was sane. That judicial application of this provision may rectify this legislative oversight is evident from *Matthews, supra*, at 659.

For a further discussion of the impact of the new Military Rules of Evidence on mental evaluations, see Yustas, *Mental Evaluation of an Accused under the Military Rules of Evidence - An Excellent Balance*, The Army Lawyer (May 1980); Ross, *Rule 302 - An Unfair Balance*, The Army Lawyer (March 1981).

8. ***Post-trial incarceration of the criminally insane***. The Secretaries of several armed forces have been empowered to commit insane service persons and to retain them in medical custody so long as mental disorders persist. *See* 24 U.S.C. § 191; *White v. Treibly*, 19 F.2d 712 (D.C. Cir. 1927); *Overholser v. Treibly*, 147 F.2d. 705 (D.C. Cir.), *cert. denied*, 326 U.S. 730 (1945). There are no mandatory requirements regarding the criminally insane, however, and an accused who is found not guilty because of insanity may be treated, adminis-tratively discharged, or simply sent back to duty. In fact, the military has no medical facilities designed for the long-term treatment of the insane, although the Department of Veteran Affairs (VA) does. *See United States v. Schlomann*, 16 C.M.A. 414, 37 C.M.R. 34 1966). For this reason, the *Schlomann* court rejected a requested instruction that, "[i]f the accused is acquitted by reason of insanity he will be presumed to be insane and may be confined in a hospital for the insane as the public safety and his welfare requires." *Id.* at 37. *See United States v. Gray*, 9 C.M.A. 208, 25 C.M.R. 470 (1958).

9. ***Post-trial execution of the criminally insane***. The U.S. Supreme Court has held that it is unconstitutionally cruel and unusual punishment to execute someone who is insane, regardless of his sanity at the time of trial or at the time of the offense. *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). Whether the standard for insanity under the eighth amendment is necessarily the same as that set forth in article 50a

seems unlikely. Justice Powell indicates, in his concurring opinion, that the type of mental deficiency envisioned by the eighth amendment's bar against execution of the insane is a degree of insanity such that the accused is not aware of the punishment he is about to suffer and why he is about to suffer it. It is clear from *Wainwright* that some type of due process hearing is required for the accused who makes some colorable claim of insanity for eighth amendment purposes. What procedures would be required at such a hearing is not at all clear from *Wainwright* since the majority in that case was split into three separate camps, none of which commanded a majority. It should be noted that the accused's insanity does ***not*** mean that the adjudged death sentence may never be executed. It only means that the execution is postponed until such time as the accused recovers sufficiently that he may be deemed competent for execution.

1008 ENTRAPMENT (Key Numbers 847-848)

A. ***General concept***. The defense of entrapment exists when a person acting for, or on behalf of, the government deliberately instills in the mind of the accused a disposition to commit a criminal offense which the accused had no predisposition to commit. *United States v. Russell*, 411 U.S. 423 (1973); *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982); *United States v. Hebert*, 1 M.J. 84 (C.M.A. 1975); *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975).

B. ***Subjective analysis***. Originally, the sole purpose of the entrapment defense was to prohibit unlawful or otherwise objectionable conduct by law enforcement officials. This objective test has given way to a subjective approach that examines the accused's predisposition to commit the charged offense. *Russell, supra; Hebert, supra*. The defense is "rooted in the concept that Government officers cannot instigate the commission of a crime by one who would otherwise remain law abiding." *Garcia, supra*, at 29; *United States v. Sermons*, 14 M.J. 350 (C.M.A. 1982). *But see* "The due process defense," *infra*.

C. ***Conduct not constituting entrapment***. Entrapment is more than merely setting the stage to discover the guilt of one who has conceived his or her own wrongful plan. *United States v. Jewson*, 1 C.M.A. 652, 5 C.M.R. 80 (1952). Nor is it merely setting out marked money, planting decoys, and engaging in other stratagems and trickery. *United States v. Suter*, 21 C.M.A. 510, 45 C.M.R. 284 (1972); *United States v. Hawkins*, 6 C.M.A. 135, 19 C.M.R. 261 (1955). Merely affording the opportunity or facilities for the commission of a crime conceived by another is not entrapment. *United States v. Choat*, 7 C.M.A. 187, 21 C.M.R. 313 (1956). Targeting an accused for a drug sting operation who is in voluntary treatment for alcoholism in not entrapment. *United States v. Harris*, 41 M.J. 433 (1995). Proof of a profit motive does not by itself negate entrapment. It is merely one factor to consider in deciding whether the accused was predisposed to commit the offense. *United States v. Eckhoff*, 27 M.J. 142 (C.M.A. 1988).

D. ***Inducement by an individual acting in a purely private voluntary capacity.*** Inducement by one acting in a purely private capacity is not entrapment.

– ***Example.*** After an enlisted men's club had been burglarized, Sergeant ***H***, the mess treasurer and member of the Board of Governors of the club, became suspicious of the accused. He befriended the accused, who then admitted the crime. Sergeant ***H*** later proposed a second burglary to the accused, who then agreed to participate. Sergeant ***H*** notified his superiors of the planned crime. The accused subsequently was apprehended, tried, and convicted of the second burglary. C.M.A. held this was not entrapment. "Not every person in uniform is an agent of the Government." The evidence showed that Sergeant ***H*** was acting in an entirely private capacity as a volunteer when he and the accused planned the burglary. *United States v. Wolf*, 9 C.M.A. 137, 139, 25 C.M.R. 399, 401 (1958); *but cf. United States v. Dohle*, 1 M.J. 223 (C.M.A. 1975), as it may apply to the question of "private capacity." Whether the Court of Military Appeals would rule the same way today if presented with the *Wolf* case is an unsettled question. Recent cases have indicated that, if an accused is questioned out of purely "personal motivation," and the accused perceives it as a purely casual conversation, even with a superior, the answers he gives may be used against him. *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981); *United States v. Kirby*, 8 M.J. 8 (C.M.A. 1979). Whether the sergeant in *Wolf* acted in a purely personal capacity is doubtful, although the court found that he did. On the other hand, the analyses of Rules 304 and 305 of the Military Rules of Evidence indicate that decisions such as *United States v. French*, 25 C.M.R. 851 (A.F.B.R. 1958), *aff'd in relevant part*, 10 C.M.A. 171, 27 C.M.R. 245 (1959), are still valid. The *French* case held that statements made to informers are admissible, even if the accused had not been warned of his rights under Article 31, UCMJ.

E. ***Litigation of entrapment.***

1. ***Burden of proof on government.*** Once the issue of entrapment is reasonably raised by the evidence, the prosecution assumes the burden of proving beyond reasonable doubt that the accused was not entrapped. *United States v. Black*, 8 M.J. 843 (A.C.M.R.), *petition denied*, 9 M.J. 253 (C.M.A. 1980); *Vanzandt, supra; United States v. Johnson*, 18 M.J. 76 (C.M.A. 1984). For example, the defense of entrapment was held to have been raised by the accused's unsworn statement, following a guilty plea, that he had been approached by a government informant "relentlessly, 25 times at least, day after day" in the case of *United States v. Daniels*, 39 M.J. 789 (N.M.C.M.R. 1993). In meeting its burden of proof, the government may utilize any competent, admissible evidence, whether acquired prior to or subsequent to the commission of the offense charged, to rebut the defense. *United States v. Henry*, 23 C.M.A. 70, 48 C.M.R. 541 (1974).

2. ***Evidence of predisposition.*** The defense of entrapment will not prevail when there is evidence that the accused was predisposed to commit the crime in the absence of inducement by law-enforcement agents. Thus, the prosecution will generally have wide

latitude to show other acts of misconduct by the accused which manifest a predisposition to commit the offense charged and are "reasonably contemporaneous" therewith. *Sorrells v. United States*, 287 U.S. 435 (1932); *Henry, supra*; *United States v. Howard*, 23 C.M.A. 187, 48 C.M.R. 939 (1974); *United States v. Bryant*, 3 M.J. 9 (C.M.A. 1977). *See also United States v. Dayton*, 29 M.J. 6 (C.M.A. 1989) (military judge properly advised members that possession or use of controlled substance does not establish predisposition to distribute it). Such evidence may still be admissible under Rules 105, 404, and 405 of the Military Rules of Evidence. If its probative value is substantially outweighed by the danger of "unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence," it will be excluded under Mil.R.Evid. 403. With regard to what constitutes "predisposition" or lack thereof, see *United States v. Clark*, 28 M.J. 401 (C.M.A. 1989). There, the court held that where appellant's hesitancy about continuing as a drug dealer stemmed from a fear of apprehension and not from a reluctance to commit more drug offenses, predisposition was established.

– ***Example***. In the case of *Hansford v. United States*, 303 F.2d. 219, 226 (D.C. Cir. 1962), it was held that evidence of prior misconduct must be excluded because of such considerations, even though it was offered to rebut an entrapment defense. A pre-rules case involving the same consideration, but allowing the accused to be cross-examined on other criminal acts to rebut his claim of entrapment, is *United States v. Farrell*, 50 C.M.R. 555 (A.C.M.R. 1975). Such evidence of misconduct, however, will, upon request, require a limiting instruction concerning the limited purpose for which it is offered. Mil.R.Evid. 105.

3. ***Presumption***. There is a presumption that, once an accused is entrapped, all related criminal acts are tainted. The government must prove that any particular subsequent criminal act is not the result of the entrapment if it is to secure a conviction of that subsequent offense. "The question of whether the Government has met its burden in overcoming the presumptive taint of the first transaction is one of fact for determination by the fact-finder, . . ." *United States v. Shanks*, 12 C.M.A. 586, 31 C.M.R. 172 (1961); *United States v. Skrzek*, 47 C.M.R. 314, 318 (A.C.M.R. 1973). *Cf. United States v. Jursnick*, 24 M.J. 504 (A.F.C.M.R. 1987). But, if the "one offense would not necessarily follow from another offense, inducement of the second . . . is not inducement of the first. . . ." *Black, supra*.

4. ***Entrapment as an inconsistent defense***. It appears that one who denies commission of the offense may also claim entrapment (i.e. "I didn't do it; but, if I did, I was entrapped"). Until recently, military law followed the common law rule that entrapment may not be claimed by one who denied commission of the offense charged. *United States v. Bouie*, 9 C.M.A. 228, 26 C.M.R. 8 (1958). In *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975), however, the Court of Military Appeals held that the accused may claim entrapment even though the accused has also presented an alibi defense. Thus, it appears that, when

two or more inconsistent defenses are reasonably raised by the evidence, and that disbelief of one of the defenses does not necessarily disprove the inconsistent defense, even inconsistent defenses must be considered by the triers of fact.

5. ***The due process defense.*** A rebirth of the objective approach to the entrapment defense has recently occurred, based upon the position that government conduct may be so outrageous as to violate fundamental fairness.

– ***Example.*** In one case, even though the accused was predisposed to committing the offense (thus making the defense of entrapment unavailable), he contended that the conduct of the government agent in supplying him with contraband (marijuana) was so egregious as to violate due process. *United States v. Harms*, 14 M.J. 677 (A.F.C.M.R. 1982). While he was unsuccessful, the appellate decision left open the possibility that certain government misconduct could indeed require an accused's acquittal separate from subjective entrapment considerations. *Id. See also Vanzandt, supra; United States v. Simmons*, 14 M.J. 624 (A.F.C.M.R. 1982).

6. ***Instructions on entrapment.*** Following *Vanzandt, supra,* it is clear that the existence of reasonable suspicion of criminal activity is immaterial. Therefore, there is never a need to offer or receive evidence establishing whether or why any suspicion existed. *Id.* at 344. This decision made the instruction in the *Military Judges' Benchbook* (1982) incorrect. Change 1 to DA Pam 27-9 (MJB) of 15 February 1985, paras. 5-6, incorporates this decision and appears to be correct. *Johnson, supra,* also discusses the appropriate entrapment instruction in detail.

1009 IMPOSSIBILITY (INABILITY) (Key Numbers 832, 838, 1266)

A. ***Defined.*** When it is impossible for the accused to perform a legally required act, the accused will not be criminally liable for a failure to perform. The impossibility may be either physical or financial. R.C.M. 916(i). It may be caused by natural phenomena, the accused's own physical disability, or acts of third parties. The inability must not arise through any fault of the accused. R.C.M. 916(i), MCM, (1995 Edition). Impossibility of performance is an affirmative defense in disobedience of orders cases—*see, e.g., United States v. Pinkston*, 6 C.M.A. 700, 21 C.M.R. 22 (1956); *United States v. Borell*, 46 C.M.R. 1108 (A.F.C.M.R. 1973)—as well as UA cases—*see, e.g., United States v. Lee*, 14 M.J. 633 (A.C.M.R. 1982), *rev'd on other grounds*, 16 M.J. 278 (C.M.A. 1983); *United States v. Irving*, 2 M.J. 967 (A.C.M.R. 1976).

B. ***Litigation.*** When the evidence reasonably raises a defense of impossibility / inability, the burden is on the prosecution to prove, beyond a reasonable doubt, that it was not impossible for the accused to perform as required. Whether that burden is met by the

government depends upon the test to be used. The test is one of reasonableness, but a reasonableness with three prongs. First, was the defense reasonably raised? Second, was the order given reasonable? Third, was the accused reasonably justified in doing what he did? However, it is important to note that the question of impossibility of performance, unlike the giving of the order itself, is ***not*** one of reasonableness: "[W]hen one's physical condition is such as actually to prevent compliance with the orders or . . . to cause the commission of the offense . . . the question is not one of reasonableness . . . but whether the accused's illness was the proximate cause of his crime." *United States v. Cooley*, 16 C.M.A. 24, 27, 36 C.M.R. 180, 182 (1966); *United States v. Liggon*, 42 C.M.R. 614 (A.C.M.R. 1970). The first prong of the reasonableness test arises in determining whether the defense has been raised by the facts presented. For instance, in the case of *United States v. Franklin*, 4 M.J. 635, 638 (A.F.C.M.R. 1977), the accused claimed that he had been kidnapped and drugged during his absence. The court held that this tale of woe was so "inherently improbable and uncertain" as not to raise reasonably the defense, and that the military judge did not err in failing to instruct the court on the affirmative defense of physical inability to return. But in *United States v. Barnes*, 39 M.J. 230 (C.M.A. 1994), the defense was raised by testimony that the accused's failure to return was due to his abduction by third parties, the subsequent theft of his automobile, and his eventual trek of forty miles on foot to return to his home. The second prong of the reasonableness test has been previously discussed. Chapters III and IV. The third prong of the test, however, cannot be answered until a distinction is made between physical impossibility and physical inability because reasonableness is not an issue in the former, but is in the latter. *Cooley, supra; Liggon, supra.* The Court of Military Appeals in *Cooley, supra*, at 27, 36 C.M.R. at 183, made the following comments on the differences between physical impossibility and physical inability:

> The question to be determined [is] simply one of reasonable justification for the refusal [to obey], which would augur against the existence of the necessary element of willfulness. . . . The case, however, is different when one's physical condition is such as actually to prevent compliance with the orders or, as here, to cause the commission of the offense. Upon such a showing, the question is not one of reasonableness vis a vis willfulness, but whether the accused's illness was the proximate cause of his crime.
>
> That is the situation here. The case is not one of balancing refusal and reason, but one of physical impossibility to maintain the strict standards required under military law. In such a situation, the accused is excused from the offense if its commission was directly caused by his condition, and the question whether he acted reasonably does not enter into the matter.

Accordingly, the defense, when confronted with a physical disability factual situation, must be able to determine whether the facts constitute an impossibility or an inability because, in the former, the defense must be able to show that the physical disability caused the offense with which the accused is charged; whereas, in the latter, it must be able to show that the accused had reasonable justification for what he did. On the other hand, once the defense bears its burden of raising the issue, the prosecution must rebut it beyond a reasonable doubt. Furthermore, it is important to realize that the two concepts can be raised and argued in the same case.

– An example would be when the defense theory, supported by evidence, is that it was ***physically impossible*** to obey an order, but that even if the court resolved this issue adversely to the accused, the accused's conduct was excusable because of ***reasonable justification due to physical inability*** to comply with the order alleged. *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983).

C. ***Other examples.***

1. Accused failed to tie certain sandbags after being ordered to do so. Accused had a hand injury and was unable to perform the task. The court held that failure of the law officer to instruct on the "legal consequences of physical disability" was error. *United States v. Heims*, 3 C.M.A. 418, 422, 12 C.M.R. 174, 178 (1953).

2. Accused was ordered to proceed to the front line. Accused said he was unable to move. He was suffering from combat anxiety. ***Held***: This was a question of mental responsibility (ability to adhere to the right) not physical impossibility, and the instruction on mental responsibility was sufficient, absent a request for a more particularized instruction. *United States v. Latsis*, 5 C.M.A. 596, 18 C.M.R. 220 (1955).

3. Accused was ordered to get certain required uniforms. Accused did not get them, but presented evidence that he had no money and could not get advance pay or borrow funds. ***Held***: This raised a defense of impossibility (not self-incurred after imposition of the obligation to act). Hence, the failure to instruct on impossibility was prejudicial error. *United States v. Pinkston*, 6 C.M.A. 700, 21 C.M.R. 22 (1956). Notice that the financial inability preceded the order and, if believed, would be a complete defense to any order violation.

4. Accused was home on leave. He became ill, but couldn't see a doctor. Doctor's brother-in-law gave him some pills and recommended that he rest for a few days before returning to camp. He spent four days at home. ***Held***: C.M.A. could ***not*** rule that, as a matter of law, the evidence did ***not*** raise an impossibility defense to the unauthorized absence charge. Therefore, the law officer's failure to instruct sua sponte on impossibility was prejudicial error. *United States v. Amie*, 7 C.M.A. 514, 22 C.M.R. 304

(1957); *Irving, supra.*

5. Accused was found sleeping on post as a sentinel and failing to report for duty at the motor pool as ordered. At trial, the defense evidence showed that the accused suffered from a narcoleptic condition which made it physically impossible for him to stay awake. The reason for the accused's failure to stay awake on post, and to report to the motor pool as ordered, was his narcoleptic condition which he could not control. ***Held***: The accused had raised the physical impossibility defense. *Cooley, supra.*

1010 IGNORANCE OR MISTAKE (Key Numbers 832, 983, 1266)

A. ***Mistake of fact.*** Ignorance or mistake of fact is an affirmative defense when knowledge of a certain fact is necessary to establish the offense charged. R.C.M. 916(j), MCM, (1995 Edition). Although ignorance of a fact and a mistaken belief about a fact are distinct phenomena, the legal consequences of each state of mind are generally identical. *See United States v. Nickson*, 35 C.M.R. 753 (A.F.B.R. 1964); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984); R.C.M. 916(j).

B. ***Application to specific intent offenses.*** An honest ignorance or mistake of fact, even though unreasonable, is a complete defense to a specific intent offense (i.e. one which requires a specific intent or state of mind). *United States v. Tucker*, 14 C.M.A. 376, 34 C.M.R. 156 (1964); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983). Honest mistake is also a defense to offenses requiring premeditation or willfulness. R.C.M. 916(j), MCM, (1995 Edition). The defense of mistake of fact often arises in sexual assault cases with regard to the consent element. A thorough discussion of this issue appears in *United States v. Langley*, 33 M.J. 278 (C.M.A. 1991). There, the court held that the accused's claimed mistake of fact had to be just honest and reasonable in a prosecution for assault with intent to commit rape. Contrast this with a charge of indecent assault situation which arose in *United States v. McFarlin*, 19 M.J. 790 (A.C.M.R.), *petition denied*, 20 M.J. 314 (C.M.A. 1985). The *McFarlin* court held that, because the specific intent requirement in indecent assault goes only to the intent to gratify the lust or sexual desires of the accused and not to the offense as a whole, the claimed mistake of fact must be both honest and reasonable. Whether a defense of mistake of fact must be reasonable in a charge of attempted rape is somewhat unclear. In *United States v. Apilado*, 34 M.J. 773 (A.C.M.R. 1992), the Army court ruled that it was error for the military judge to have instructed that the accused's mistake of fact had to be reasonable based solely on the *Langley* decision. However, they opined that the correct analysis should be that the mistake must be reasonable on the ground that the underlying offense in attempted rape (i.e. rape) is a general intent offense. The court urged that the *Langley* decision be limited to charges of assault with intent to commit rape. For further guidance on this issue, see *Mistake of Fact and Sex Offenses*, TJAGSA Practice Notes, The Army Lawyer 65 (DA Pamphlet 27-50-208) (April 1990).

1. ***Honest mistake***. An honest ignorance or mistake is one which is in good faith and not feigned, it is a subjective factor. *United States v. St. Pierre*, 3 C.M.A. 33, 11 C.M.R. 33 (1953); *United States v. Archibald*, 5 C.M.A. 578, 18 C.M.R. 202 (1955); *United States v. Coleman*, 6 C.M.A. 773, 21 C.M.R. 95 (1956).

2. ***Knowledge***. Some offenses require that the accused possess a certain specific knowledge. An honest ignorance or mistake of fact will be a complete defense to such offenses, even though the ignorance or mistake was unreasonable. *Tucker, supra;* R.C.M. 916(j), MCM, (1995 Edition).

3. ***Examples***.

a. ***Larceny***. Larceny requires that the accused specifically intended to deprive the owner of the property permanently. If the accused honestly but mistakenly believed that he or she owned the property or had permission to take it, such a belief negates the requisite criminal intent, no matter how unreasonable that belief was. *United States v. Rowan*, 4 C.M.A. 430, 16 C.M.R. 4 (1954); *United States v. Greenfeather*, 13 C.M.A. 151, 32 C.M.R. 151 (1962); *United States v. Sicley*, 6 C.M.A. 402, 20 C.M.R. 118 (1955).

b. ***Desertion***. Desertion requires that the accused specifically intend to remain away without authority from the unit permanently. Thus, one who honestly but mistakenly believed that he or she had been discharged from the service could not possibly have a criminal intent to remain away without authority permanently, even though the mistaken belief was unreasonable. *United States v. Holder*, 7 C.M.A. 213, 22 C.M.R. 3 (1956); *United States v. Vance*, 17 C.M.A. 444, 38 C.M.R. 242 (1968); *United States v. Welstead*, 36 C.M.R. 707 (A.B.R. 1966).

c. ***Fraudulent enlistment***. The offense of fraudulent enlistment requires a specific intent to conceal disqualifying facts. Hence, an honest ignorance or mistake concerning the undisclosed facts is a complete defense. One cannot fraudulently conceal what one doesn't know. *United States v. Holloway*, 18 C.M.R. 909 (A.F.B.R. 1955).

d. ***Possession of controlled substances***. Possession of a controlled substance, such as marijuana, must be knowing and conscious. *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). Therefore, if an accused honestly didn't know he or she possessed a controlled substance, such an honest ignorance is a complete defense, no matter how unreasonable. *United States v. Lampkins*, 4 C.M.A. 31, 15 C.M.R. 31 (1954); *United States v. Greenwood*, 6 C.M.A. 209, 19 C.M.R. 335 (1955); *United States v. Wilson*, 7 M.J. 290 (C.M.A. 1979); *United States v. Hughes*, 5 C.M.A. 314, 17 C.M.R. 374 (1954).

C. ***Application to general intent offenses.*** To be a defense to a general intent offense, the accused's ignorance or mistake of fact must be both honest ***and*** reasonable. *United States v. Perruccio*, 4 C.M.A. 28, 15 C.M.R. 28 (1954); *United States v. McCluskey*, 6 C.M.A. 545, 20 C.M.R. 261 (1955); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

1. ***Example.*** The accused is charged with UA. One fact which must be proven is that the accused's absence was without authority. If the accused can show that he / she genuinely believed, on reasonable grounds, that he / she had authority to be absent, the mistake will be a defense. *United States v. Graham*, 3 M.J. 962 (N.C.M.R. 1977); *see United States v. Holder*, 7 C.M.A. 213, 22 C.M.R. 3 (1956) and *United States v. Vance*, 17 C.M.A. 444, 38 C.M.R. 242 (1968).

2. ***Example.*** The accused is charged with bigamy, a general intent offense. Accused's mistaken belief that he was not married (i.e. mistaken as to the existence and validity of a divorce) at the time of the bigamous marriage is a defense only if he had taken such steps as would have been taken by a reasonable man under the circumstances to determine the validity of the belief. *See McCluskey, supra.*

3. ***Example.*** The accused is charged with rape, a general intent offense. Accused's mistaken belief that the victim consented because the victim "would consent to intercourse with anyone" is not reasonable. *United States v. Traylor*, 40 M.J. 248 (C.M.A. 1994).

D. ***Application to negligence offenses.***

1. ***Simple negligence.*** Ignorance or mistake of fact is a defense to an offense requiring only simple negligence only if the ignorance or mistake is both honest and reasonable. *See, e.g., Perruccio, supra.*

2. ***Higher degree of negligence.*** When an offense requires a greater degree of negligence than simple negligence, ignorance or mistake of fact will be a defense only if it was honest and not the result of a degree of negligence required for conviction.

– ***Example.*** The article 134 offense of dishonorable failure to maintain sufficient funds in a checking account requires either an intentional failure or a grossly (culpably) negligent failure by the accused to maintain sufficient funds to cover checks drawn against the accused. Thus, if the accused honestly but mistakenly believed that there were sufficient funds in the account, the accused has a complete defense, provided that the mistake was not the result of gross indifference or culpable negligence in handling the account. In other words, the accused's mistake may be honest and unreasonable, but it cannot be culpably negligent. *United States v. Connell*, 7 C.M.A. 228, 22 C.M.R. 18 (1956); *United States v. Brown*, 14 C.M.A. 633, 34 C.M.R. 413 (1964).

E. ***Not applicable to strict liability offenses.*** Some offenses impose criminal liability notwithstanding the accused's knowledge or belief. Ignorance or mistake of fact, no matter how honest and reasonable, is not a defense to such offenses.

1. ***Example: assault with a dangerous weapon.*** The accused brandishes a loaded pistol in the face of the victim. The accused's honest and reasonable belief that the pistol is merely a toy is no defense because the accused's knowledge or belief concerning the character of the weapon is irrelevant. The accused is guilty of assault with a dangerous weapon, a serious aggravated form of assault under article 128. *See* Part IV, para. 54c(4)(a), MCM, (1995 Edition).

2. ***Example: carnal knowledge.*** The military counterpart to statutory rape is the offense of carnal knowledge with a person, not one's spouse, under age 16. If the victim is under 12 years of age, the accused's knowledge or belief concerning the victim's age, no matter how honest or reasonable, is irrelevant. **But** if the victim is at least 12 years of age, but younger than 16, an honest and reasonable belief that the victim had attained the age of 16 is an affirmative defense. *See* R.C.M. 916(j)(2); Part IV, para. 45(c)(2) and (d)(1), MCM, (1995 Edition). The accused has the burden of proving mistake of fact as to age in a carnal knowledge prosecution by a preponderance of the evidence. *See* R.C.M. 916(b), 916(j)(2), Part IV, para. 45(d)(2), MCM, (1995 Edition)

F. ***Litigation.*** Once evidence raises the affirmative defense of ignorance or mistake of fact, the prosecution assumes the burden of proving beyond reasonable doubt that the accused was not laboring under a misapprehension sufficient to constitute a defense to the charge. The military judge has a sua sponte obligation to instruct. *United States v. Dixon*, 6 C.M.A. 484, 20 C.M.R. 200 (1955).

G. ***Ignorance or mistake of law.***

1. ***Rule.*** In military law, as at common law, ignorance or mistake of law is generally no defense. R.C.M. 916(l), MCM, (1995 Edition). In the military, "law" includes not only statutes, but also general orders and regulations which have the force of law. *See* Chapter IV of this study guide for a detailed analysis of the legal effect of orders. *See also United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982) (while ignorance of the law will not excuse an act in violation thereof regardless of whether the law is statutory or a duly promulgated regulation, some form of proper publication of a regulation is necessary before knowledge will be presumed).

2. ***Exception.*** Notwithstanding the provisions of R.C.M. 916(l), *supra*, ignorance or mistake of law may become extremely relevant and ultimately result in a defense if the effect of the accused's misapprehension was to negate a required mental

element, such as actual knowledge of law or the legal effect of known facts. *See United States v. Bateman*, 8 C.M.A. 88, 23 C.M.R. 312 (C.M.A. 1957); *United States v. Bishop*, 2 M.J. 741 (A.F.C.M.R. 1977).

– ***Example.*** An accused is charged with larceny from the government by obtaining money through a false representation on a travel claim. The accused testifies that he honestly believed he was entitled to reimbursement of dependents' travel before it was actually performed. Although this is clearly a mistake of law rather than fact, it negates the mental element required for a larceny through wrongful obtaining by false pretenses. *Sicley, supra; United States v. McLeod*, 18 C.M.R. 814 (A.F.B.R. 1955).

H. ***Mistaken belief.*** In order for the defense of mistaken belief to be a successful defense, the mistaken belief must be such that would exculpate the accused if the facts upon which that belief was based were true. *Rowan, supra.* Thus, in *United States v. Anderson*, 46 C.M.R. 1073 (A.F.C.M.R. 1973), the Air Force court held that the accused was guilty of sale of LSD despite the fact he believed the substance he sold was mescaline. The court's rationale was that mescaline also was a contraband substance and his conduct still remained unlawful. Other cases discussing the principle that mistaken belief of fact, if true, would make the accused's conduct otherwise lawful are *United States v. Mack*, 6 M.J. 598 (A.C.M.R. 1978) and *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973).

1011 DURESS (Key Number 839)

A. ***General concept.*** The defense of duress is available to any crime less serious than murder, and is founded on the lack of voluntariness necessary for an act to be categorized as criminal. For duress to provide a defense to a crime such as larceny, the duress or coercion must be of such a degree as to cause a reasonable, well-grounded apprehension on the part of the accused that, if he or she did not perform the action, that person, or some other innocent person, would be immediately killed or would immediately suffer serious bodily injury. *See United States v. Margelony*, 14 C.M.A. 55, 33 C.M.R. 267 (1963); *United States v. Figueroa*, 39 C.M.R. 494 (A.B.R. 1968); *United States v. Palus*, 13 M.J. 179 (C.M.A. 1982). *See also United States v. Barnes*, 12 M.J. 779 (A.C.M.R. 1981) (duress not raised by a threat to harm the accused's finances); R.C.M. 916(h); *United States v. Roberts and Sutek*, 14 M.J. 671 (N.M.C.M.R. 1982) (hazing), *rev'd in part*, 15 M.J. 106 (C.M.A. 1983); *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994) (financial hardship does not amount to duress); *United States v. Banks*, 37 M.J. 700 (A.C.M.R. 1993) (duress not raised by serious illness of accused's mother).

B. ***Duress or necessity***?

1. ***Duress and necessity distinguished.*** An accused has available the defense of duress or coercion when another's unlawful threat causes him to commit a proscribed act. Necessity, on the other hand, is available as a defense where either physical forces of nature or the press of circumstances threaten the accused and cause him to take unlawful action to avoid harm. *United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983).

2. ***Examples.*** Under such a definition, necessity has been recognized and applied to the offenses of UA and escape from confinement, but always under the name of duress.

a. *United States v. Blair*, 16 C.M.A. 257, 36 C.M.R. 413 (1966) (error not to instruct on defense raised by accused's flight from cell to avoid a beating by a brig guard).

b. *United States v. Peirce*, 42 C.M.R. 390 (A.C.M.R. 1970) ("duress" to escape from confinement not raised by defense offer of proof regarding stockade conditions, but lacking a showing of imminent danger).

c. In an early case in which a sailor went UA because of death threats by a shipmate, the Navy Board of Review held that the defense of duress was not raised. Noting that the accused was never in danger of imminent harm and that the threatener had never demanded that the accused leave his ship, the board concluded that there is no right to leave a duty station in order to find a place of greater safety. *United States v. Wilson*, 30 C.M.R. 630 (N.B.R. 1960).

d. *United States v. Harrell*, NCM 78-0870 (N.C.M.R. 30 Nov 78) (duress defense not raised where the accused, receiving poor medical treatment for a back injury and fearing that impending shipboard duty would aggravate the condition, went UA to avoid the possible injury). *See also Note, Medical Necessity as a Defense to Criminal Liability*, 46 Geo. Wash. L. Rev. 273 (1978).

e. An escapee is not entitled to a duress or necessity instruction unless he offers evidence that he made a bona fide effort to surrender or return to custody once the coercive force of the alleged duress / necessity has dissipated. *United States v. Bailey*, 444 U.S. 394, 100 S. Ct. 624, 62 L.Ed.2d 575 (1980).

f. ***Sexual abuse.*** Serious bodily harm has been held in one civilian jurisdiction to include sexual abuse, especially when the fear of such abuse causes the accused to escape from prison. For example, in *People v. Lovercamp*, 43 Cal. App. 3d 823, 228 Cal. Rptr. 110 (1974), duress was recognized as a defense where the accused escaped from prison because of his fear of threatened homosexual abuse, had complained to the authorities to no avail, had no time or opportunity to resort to the courts, had escaped without resort to force or violence, and had reported his whereabouts to authorities once he had attained a position of safety. Similar principles may permit duress to be raised in similar circumstances as a defense to unauthorized absence. *See* Gardner, *The Defense of Necessity and the Right to Escape from Prison*, 49 S. Cal. L. Rev. 110 (1975) and *Duress—Defense to Escape*, 3 Am. J. Crim. L. 331 (1975).

3. **What constitutes *reasonable* fear?** Fear sufficient to cause a person of ordinary fortitude and courage to yield. *United States v. Logan*, 22 C.M.A. 349, 47 C.M.R. 1 (1973) (reasonable fear did not exist where accused was in Korea and threats to harm his family in the United States were made by local Korean nationals).

4. ***The requirement of immediate death or great bodily harm.***

a. ***The requirement?*** *United States v. Fleming*, 7 C.M.A. 543, 23 C.M.R. 7 (1957); *United States v. Brookman*, 7 C.M.A. 729, 23 C.M.R. 193 (1957). Even though accused was subjected to great privation as POW, actions of captors did not constitute defense against charge of collaboration with the enemy since accused's resistance had not brought him to the "last ditch." The fear must be of ***immediate***, vice future, harm. *United States v. Jemmings*, 50 C.M.R. 247 (A.F.C.M.R. 1975), *rev'd in part*, 1 M.J. 414 (C.M.A. 1976).

b. ***The new test?*** "The immediacy element of the defense is designed to encourage individuals promptly to report threats rather than breaking the law themselves (citation omitted)." *Jemmings, supra*, at 418 (***Held***: vague threat to inflict harm to children sufficient to activate defense such that plea of guilty improvident). Whether this constitutes a new test is questionable, particularly in light of the court's further statement: "It, therefore, cannot be said that [the accused's] acknowledgement that his children would not be harmed 'that night' ended the threat of immediate grievous bodily harm to them." *Id.* Certainly, it serves to raise sufficient doubt to improvidence a plea due to accused's potential lack of full understanding of his plea, but whether it is sufficient to define "immediate" as including "the future" or such broad terms is debatable.

5. ***Who must be endangered?***

a. ***The obsolete rule.*** The accused personally. *See Jemmings, supra.*

b. ***The expanding rule***

(1) *United States v. Pinkston*, 18 C.M.A. 261, 39 C.M.R. 261 (1969) (threat against fiancee and illegitimate child actuates defense of duress); *United States v. Palus*, 13 M.J. 179 (C.M.A. 1982) (threat against immediate family).

(2) *Jemmings, supra* (threat against accused's children actuates defense of duress).

(3) *Roberts and Sutek, supra* (valid duress defense for wife absenting herself to escape gruesome hazing initiation, as well as for husband who absented himself to save his wife from physical harm).

(4) R.C.M. 916h, MCM, (1995 Edition) (threat against accused or any innocent person).

C. ***Raising the issue.***

1. The defense was raised where the accused stated that he had been "jumped" by 3 to 6 men while on board the base, had suffered a broken bone in his neck, and feared to return to the base because he thought he would be killed. *United States v. Brown*, NCM 77-0642 (N.C.M.R. 29 June 1977); *see United States v. Roby*, 23 C.M.A. 295, 49 C.M.R. 544 (1975).

2. The defense, however, was held not to have been raised where the accused had been cut over his eye, received stitches and a "light duty chit," but was ordered to work in the mess kitchen washing pots and pans where the temperature exceeded 100°F. He did not report, and the court held the evidence failed to show a fear of immediate death or bodily harm. *Guzman, supra; United States v. Talty*, 17 M.J. 1127 (N.M.C.M.R. 1984) (hazardous levels of radiation not defense to willful disobedience).

3. The defense was also not raised where the accused absented himself from his ship after being told that his whereabouts would be reported to another who had previously threatened to kill him. The court said that the accused could have reported the incident to his superiors who had been responsive and cooperative in assisting the accused in similar situations. *United States v. Moon*, NCM 77-1272 (N.C.M.R. 21 Sep 77); *United States v. Sartor*, NCM 78-0656 (N.C.M.R. 13 Dec 78); *United States v. Campfield*, 17 M.J. 715 (N.M.C.M.R. 1983).

4. The accused stated that he always felt "scared and worried." The court held that this did not raise the defense. *United States v. Bradshaw*, NCM 79-1540 (N.C.M.R. 6 Mar 1980). "Vague threats of death" do not amount to a reasonable fear. *United States v. Clark*, NCM 79-1948 (N.C.M.R. 30 May 80).

D. ***Rebuttal evidence***. Accused's use of the duress defense creates an opportunity for the prosecution to introduce evidence of the defendant's other voluntary crimes in order to rebut the defense. *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977).

1012 JUSTIFICATION (Key Number 832)

A. ***Text of R.C.M. 916(c), MCM, (1995 Edition).***

> A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

B. ***Protection of property.***

1. ***Use of nondeadly force***. Reasonable, nondeadly force may be used to protect personal property from trespass or theft. *United States v. Regalado*, 13 C.M.A. 480, 33 C.M.R. 12 (1963) (one lawfully in charge of premises may use reasonable force to eject another if the other has refused an oral request to leave and a reasonable time to depart has been allowed); *United States v. Hines*, 7 C.M.A. 75, 21 C.M.R. 201 (1956) (with regard to on-post quarters, commander on military business is not a trespasser subject to accused's right to eject); *United States v. Gordon*, 33 C.M.R. 489 (A.B.R. 1963) (the necessity to use force in defense of personal property need not be real, but only reasonably apparent); *United States v. Wilson*, 7 M.J. 997 (A.C.M.R. 1979) (accused had no right to resist execution of a search warrant, even though warrant subsequently held to be invalid). *See* Peck, *The Use of Force to Protect Government Property*, 26 Mil. L. Rev. 81 (1964).

2. ***Use of deadly force***. Deadly force may be employed to protect property only if (1) the crime is of a forceful, serious or aggravated nature, (2) the accused honestly believes use of deadly force is necessary to prevent loss of the property, and (3) less severe methods for preventing the loss are not available. *United States v. Lee*, 3 C.M.A 501, 13 C.M.R. 57 (1953).

C. ***Prevention of crime***. Under military law, a private person may use force essential to prevent commission of a felony in his presence, although the degree of force should not exceed that demanded by the circumstances. *United States v. Hamilton*, 10 C.M.A. 130, 27 C.M.R. 204 (1959); *United States v. Person*, 7 C.M.R. 298 (A.B.R. 1953) (soldier on combat patrol justified in killing unknown attacker of another patrol member

where (1) victim was committing a felony in the accused's presence, and (2) the accused attempted to inflict less than deadly force).

D. ***Obedience to orders.*** Orders of military superiors are inferred to be legal. Part IV, para. 16c(1)(c), MCM, (1995 Edition).

– While it is a good defense that the accused committed the act pursuant to an order which (a) appeared legal and which (b) the accused did not know to be illegal [*United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973)], the defense is unavailable if a person of ordinary sense and understanding would know the order to be unlawful. *United States v. Griffen*, 39 C.M.R. 586 (A.B.R. 1968) (no error to refuse request for instruction on defense where accused shot POW pursuant to a superior's order); *United States v. Cherry*, 22 M.J. 284 (C.M.A. 1986); *Calley, supra*. *See* R.C.M. 916(d), MCM, (1995 Edition).

E. ***The right to resist restraint.*** All restraint must be legally imposed by one having authority to do so. *See* Articles 7, 10, 13, UCMJ; Part IV, para. 19, MCM, (1995 Edition); and Analysis of Article 95 at appendix 21.

1. ***Illegal confinement.*** There can be no "escape" from confinement if the confinement itself was illegal. *United States v. Gray*, 6 C.M.A. 615, 20 C.M.R. 331 (1956) (no crime to escape from confinement where accused's incarceration was contrary to orders of a superior commander who had authority); *United States v. Brown*, 15 M.J. 501 (A.F.C.M.R. 1982) (where confinement was not imposed by neutral and detached magistrate, accused could not be convicted of escape).

2. ***Illegal apprehension / arrest.*** An individual is not guilty of having resisted apprehension if that apprehension was without authority. *United States v. Clark*, 37 C.M.R. 621 (A.B.R. 1967) (accused physically detained by private citizen for satisfaction of a debt may, under the standards of self-defense, forcefully resist and seek to escape); *United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976) (by forcibly detaining accused immediately following his illegal apprehension, NCO's involved acted beyond scope of their offices and with excessive force); *but see United States v. Lewis*, 7 M.J. 348 (C.M.A. 1979) (accused cannot assert illegality of apprehension as defense to assault charge although there is a subsequent determination that the apprehension was not based on probable cause where the officers had not exceeded the scope of their office).

F. ***Execution of parental duties.*** For an attempted justification defense based on execution of parental duties, see *United States v. Robertson*, 36 M.J. 190 (C.M.A. 1992) (conviction of soldier for spanking his 7-year-old daughter— evidence of excessive force was sufficient to overcome an affirmative defense of justification). See also *United States v. Gooden*, 37 M.J. 1055 (N.M.C.M.R. 1993) (accused not entitled to parental discipline defense instruction).

1013 EXCUSE: ACCIDENT OR MISADVENTURE (Key Number 840)

A. ***Accident defined.*** R.C.M. 916f, MCM, (1995 Edition), and *United States v. Ferguson*, 15 M.J. 12 (C.M.A. 1983), set forth two requirements for the defense of accident:

1. The accused must be performing a lawful act; and

2. it must be performed in a lawful manner.

B. ***Lawful act.*** *Compare United States v. Sandoval*, 4 C.M.A. 61, 15 C.M.R. 61 (1954) (carrying a weapon in violation of local regulation constitutes an unlawful act so as to prevent accused charged with murder from successfully arguing defense of accident) ***with*** *United States v. Small*, 45 C.M.R. 700 (A.C.M.R. 1972) (where the violation of the general regulation prohibiting carrying a firearm was not the proximate cause of the victim being shot, the accused was entitled to have the court instructed on the defense of accident). *See also United States v. Femmer*, 14 C.M.A. 358, 34 C.M.R. 138 (1964). In an assault case, the accused pushed the victim away while holding a razor. Since the injury resulted from an unlawful act intentionally directed at the victim, the fact that the ultimate consequence was unintended does not raise the defense of accident. N.M.C.M.R. recently affirmed this principle in *United States v. Curry*, No. 90-3343 (N.M.C.M.R. 23 Apr 92). In *Curry*, the helmsman on a ship became irritated when the first lieutenant repeatedly criticized his steering and struck the lieutenant in the face with his elbow. The defense argued the defense of accident, despite the accused's earlier statement to the boatswain's mate that he was going to "elbow the lieutenant in the face!" The court upheld the MJ's instruction that accident was not a defense to a charge of striking a superior commissioned officer since this offense required a specific intent to strike him.

C. ***Lawful manner.*** Performing an act in a lawful manner requires doing so with due care and without simple negligence. R.C.M. 916f, MCM, (1995 Edition). *See United States v. Moyler*, 47 C.M.R. 82 (A.C.M.R. 1973) (carrying a weapon within the base camp with a magazine inserted, a round chambered, the safety off, and the selection on automatic constitutes negligence as a matter of law); and *United States v. Redding*, 14 C.M.A. 242, 34 C.M.R. 22 (1963) (practicing "fast draw" with pistols while armed for sentry duty constitutes negligence precluding accident defense).

1014 SELF-DEFENSE (Key Number 836)

See Chapter VIII, OFFENSES AGAINST THE PERSON

1015 VOLUNTARY INTOXICATION (Key Number 845)

See Insanity, *supra*

1016 VOLUNTARY ABANDONMENT (Key Numbers 832)

See Chapter I, BASIC CONCEPTS OF CRIMINAL LIABILITY

1017 GENERAL DENIAL DEFENSES (EXAMPLE: ALIBI) (Key Numbers 832-834, 842)

A. ***Alibi is not an affirmative or special defense.*** *United States v. Wright*, 48 C.M.R. 295 (A.F.C.M.R. 1974). It is, like misidentification, evidence which tends to deny the commission by the accused of the objective acts charged. R.C.M. 916(a) discussion, MCM, (1995 Edition). Alibi is rebuttal evidence; it is a "showing that it would have been physically impossible for the accused to have committed the crime. . . ." *Wright, supra.*

B. ***Raised by evidence.*** Alibi is raised when some evidence shows that the accused was elsewhere at the time of the commission of a crime. *Wright, supra; United States v. Zayas-Gonzales*, 31 C.M.R. 370 (A.B.R. 1962); *United States v. Brooks*, 25 M.J. 175 (C.M.A. 1987). It is, therefore, essential that the time and date of the commission of the offense charged be established with exactitude. *United States v. Bigger*, 2 C.M.A. 297, 8 C.M.R. 97 (1953); *United States v. Moore*, 15 C.M.A. 345, 35 C.M.R. 317 (1965). Once raised, the government has the burden to disprove the defendants alibi beyond a reasonable doubt. *United States v. Radford*, 14 M.J. 322 (C.M.A. 1982).

CHAPTER XI

INSTRUCTIONS

1100 **INTRODUCTION** 11-1

1101 **INSTRUCTIONS GENERALLY** 11-1

1102 **SOURCES OF INSTRUCTIONS** 11-1
A. Military Judges' Benchbook, DA Pam 27-9 (1982). 11-1
1. Inaccuracies with the Benchbook. 11-2
2. Counsel must update Benchbook instructions. 11-2
3. "Tailor" standard instructions with the facts of the case. 11-3
4. Tailored instruction must be consistent with all other instructions. 11-3
B. Case law. 11-4
C. Rules for Courts-Martial. 11-4
D. Military Rules of Evidence. 11-4

1103 **RESPONSIBILITY OF COUNSEL** 11-4
A. Obligation prior to the Military Rules of Evidence. 11-4
B. Obligations since the adoption of the Military Rules of Evidence. 11-4
C. Sua sponte obligations of the military judge. 11-4
1. Silence by the accused. 11-5
2. Absence of the accused 11-5
3. Sleeping member. 11-5
4. Improper rehabilitation evidence. 11-5
5. Accomplice testimony 11-5

1104 **INSTRUCTIONS ON FINDINGS** 11-5
A. Required instructions. 11-5
1. The elements of all charged specifications. 11-6
2. The elements of all lesser included offenses reasonably raised by the evidence. 11-6
3. Any special or affirmative defenses at issue. 11-6
4. Issues regarding the burden to proof. 11-7

5. Closed trial session 11-7
B. Additional instructions. 11-8
1. Each term having a special legal connotation. 11-8
2. Critical evidentiary issues. 11-8
C. Procedures. 11-9

1105 INSTRUCTIONS ON SENTENCING 11-10
A. Required instructions. 11-10
1. Potential sentences. 11-10
2. Procedural instructions. 11-10
3. Advice to expect no clemency. 11-11
4. Consideration of evidence. 11-11
B. "Tailor" standard instructions. 11-11

CHAPTER XI

INSTRUCTIONS

1100 INTRODUCTION (Key Numbers 1263-1269, 1321)

During a military courts-martial composed of members, it is the military judge's responsibility to instruct the members on the law. There are three types of instructions: preliminary instructions, instructions on findings, and instructions on sentencing. Preliminary instructions are those provided to the members prior to the presentation of any evidence. Instructions on findings and sentencing are provided after evidence has been presented. This chapter focuses only on these last two forms of instructions. The chapter initially addresses the sources of instructions and then identifies significant issues associated with instructions on findings and sentencing.

1101 INSTRUCTIONS GENERALLY

The purpose of instructions is to explain the appropriate law and procedures to the members. The ultimate goal of these instructions is to provide the members with "lucid guideposts" so that "they may knowledgeably apply the law to the facts as they find them." *United States v. Smith*, 13 C.M.A. 471, 474, 33 C.M.R. 3, 6 (1963).

The final instructions delivered by the military judge have a significant impact upon the decisions made by the members of a courts-martial. As such, it is critical for counsel to be well versed in the procedures to follow in preparing appropriate instructions. Counsel should find that familiarity with the law covering instructions and an identification of the appropriate instructions for a particular case are essential aspects of pretrial preparation.

1102 SOURCES OF INSTRUCTIONS

A. ***Military Judges' Benchbook, DA Pam 27-9 (Change 1, 30 January 1998).*** The principal tool used in drafting instructions is the *Military Judges' Benchbook*. The text is essentially a formbook which provides standard sets of instructions required in every case, as well as sample instructions which can be adapted to address various offenses, defenses, and evidentiary concerns.

1. ***Inaccuracies with the Benchbook.*** Some instructions in the *Benchbook*

appear to be inconsistent with corresponding provisions in the *Manual for Courts-Martial, 1995*. Counsel should be aware that the following portions of the *Benchbook* are not supported by current law.

a. ***Paragraph 3-4.*** The 3-2 in the *Benchbook* on attempts suggests, in element four, that the commission of intended crime must be interrupted by an unknown or unforeseeable factor. This is inconsistent with the *Manual* discussion at Part IV, para. 4c(2), MCM, 1995, which only requires the requisite state of mind and the commission of any overt act.

b. ***Paragraph 5-5.*** Paragraph 5-5 of the *Benchbook* on the duress defense states that the intimidation must be directed at the accused or a member of his / her immediate family. This is far more limiting than R.C.M. 916(h), which permits the duress defense to be used by any person when "the accused or another innocent person" is at risk.

c. ***Paragraph 7-6.*** Paragraph 7-6 in the *Benchbook* on judicial notice still contains language that the members may, but are not required to, accept as conclusive matters judicially noticed. Where the matter noticed is a matter of law, the members are required to accept it as conclusive. Mil.R.Evid. 201A. *See United States v. Anderson*, 22 M.J. 885 (A.C.M.R. 1986) as to matters which may properly be noticed.

d. Appellate case law also has identified inconsistencies between the *Benchbook*'s instructions and the requirements of law. *See United States v. Prince*, 14 M.J. 654 (A.C.M.R. 1982) (although the military judge's instruction defining "insulting language" conformed to the sample instruction set forth in the sample form, it was inadequate because of its failure to require that the members find that such language conveyed a libidinous message); *United States v. Mitchell*, 15 M.J. 214 (C.M.A. 1983) (pattern instructions regarding solicitation were fatally defective in failing to require finding of specific intent).

2. ***Counsel must update Benchbook instructions.*** Although the *Benchbook* is intended to be an evolving document, military practitioners should be aware of the fact that the law changes much quicker than the instructions contained within the *Benchbook*. In *United States v. Cotten*, 10 M.J. 260 (C.M.A. 1981), the Court of Military Appeals urged counsel not to rely solely upon the *Benchbook* for instructions. According to the court, "merely because an instruction is standard does not mean that it is either correct or adequate." *Cotten*, 10 M.J. at 261. It is incumbent upon users of the *Benchbook* to verify that the instructions being used are consistent with current appellate court decisions. Neglect in updating an instruction has resulted in reversible error. In *United States v. Ansari*, 15 M.J. 812 (N.M.C.M.R. 1983), the military judge relied upon a pattern instruction which equated "reasonable doubt" with "substantial doubt." The military judge effectively ignored an earlier admonishment by the court regarding his instruction. Accordingly, the court reversed the

finding of guilty. *See also United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982) (to overcome defense of entrapment, government is no longer required to show a reasonable ground to believe the accused was involved in similar criminal conduct as the form instruction indicated). *Id.* at 344, n. 15. *United States v. Eason*, 21 M.J. 79 (C.M.A. 1985). The Supreme Court case of *Francis v. Franklin*, 471 U.S. 307 (1985) struck down form instructions which create mandatory rebuttable presumptions since they effectively relieve the state of its burden. Additionally, the Court of Military Appeals has stated that, to be complete, instruction on wrongful possession or use of a controlled substance should include specific reference to the two types of knowledge which are required to establish criminal liability: knowledge of the presence of the substance and knowledge of the character of the substance. *United States v. Mance*, 26 M.J. 244 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988). The court went on to say, however, that the "knowledge" required to show "possession" or "use" and the "knowledge" required to show "wrongfulness" may, in appropriate circumstances, be inferred from the presence of the controlled substance. *Id.* at 254. *See also United States v. Harper*, 22 M.J. 157 (C.M.A. 1986) and *United States v. Brown*, 26 M.J. 266 (C.M.A. 1988).

3. ***"Tailor" standard instructions with the facts of the case.*** Despite the fact that the *Benchbook* instructions address many of the contingencies of trial, it is critical to "tailor" or modify these instructions to make them consistent with the facts of a particular case. Simply instructing the members from the form instruction provided in the *Benchbook*, without "tailoring" the language to the facts of the case, could be prejudicial.

In *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984), the military judge's use of the form instruction resulted in failing to allege an essential element of the offense. In *United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982), the military judge failed to tailor his instruction to the government's theory of aiding and abetting. As a result, the judge's instruction was deemed to be prejudicial, requiring reversal. *See also United States v. Allison*, 8 M.J. 143 (C.M.A. 1979) (military judge read a pattern cautionary instruction to the members which may not have been appropriate; Court of Military Appeals chose not to address the ultimate issue by finding that the defense was not prejudiced by the use of the instruction); *United States v. Slaton*, 6 M.J. 254 (C.M.A. 1979) (military judge's failure to use instruction tailored to the case was not reversible error).

When an instruction is tailored, however, it must not be changed so as to be in conflict with the intent of Congress or the President. *See United States v. Soriano*, 20 M.J. 337 (C.M.A. 1985) (altering instruction from reading that a BCD "will" be a lifetime stigma to "may" permanently stigmatize was inconsistent with the intent of Congress or the President).

4. ***Tailored instruction must be consistent with all other instructions.*** Once tailored, the instructions must not be inconsistent or contradictory when read as a whole. *See United States v. Harrison*, 19 C.M.A. 179, 41 C.M.R. 179 (1970) (military judge

gave pattern instructions on the offense of malingering and a defense of accident which contained inconsistent mental elements). *United States v. Stafford*, 22 M.J. 825 (N.M.C.M.R. 1986) (improper to instruct that defense of alibi must be proven beyond a reasonable doubt).

B. ***Case law.*** A secondary source of instructions is appellate case law. Military appellate courts have, on occasion, resolved problems associated with defective instructions by recommending model instructions. For example, in *United States v. McLaurin*, 22 M.J. 310 (C.M.A. 1986), the Court of Military Appeals offered an alternate instruction on eyewitness identification. Although there is no formal listing of these judicially proposed instructions, they can easily be discovered by researching the particular area of law.

C. ***Rules for Courts-Martial.*** R.C.M. 920 provides some guidance into the instructions which the military judge is required to provide to the members. Additionally, R.C.M. 920 dictates the procedures regarding when the instructions should be provided and how counsel should request particular instructions.

D. ***Military Rules of Evidence.*** The Military Rules of Evidence provide additional guidance into appropriate instructions. These rules do not offer any model instructions, yet they aid in identifying what information the military judge should provide to the members.

1103 RESPONSIBILITY OF COUNSEL

A. ***Obligation prior to the Military Rules of Evidence.*** Prior to the adoption of the Military Rules of Evidence, the military judge was given total responsibility for ensuring that the court members were properly instructed. Accordingly, the trial defense counsel had no obligation to place before the triers of fact his theory of the case, through requests for or objections to instructions. *See, e.g., United States v. Graves*, 1 M.J. 50 (C.M.A. 1975) and *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

B. ***Obligations since the adoption of the Military Rules of Evidence.*** With the adoption of the new rules of evidence, however, the insistence that the military judge alone is responsible for instructing the court members has been revised. *United States v. Smith*, 34 M.J. 341 (C.M.A. 1992); *United States v. McLaurin*, 22 M.J. 310 (C.M.A. 1986). Now the rules place a greater responsibility upon counsel. For example, Mil.R.Evid. 105 requires counsel to request a limiting instruction on the admissibility of evidence prior to the military judge reading such an instruction. The new rules also require trial defense counsel to elect whether to provide the members with cautionary instructions regarding the accused's exercise of his right not to testify during the proceeding, or to exercise a privilege. *See* Mil.R.Evid. 301(g) and 512, respectively.

C. ***Sua sponte obligations of the military judge.*** The law still obligates the

military judge to instruct upon certain issues regardless of the desires of counsel. Failure to provide these instructions to the members can result in a finding of plain error on appeal. Some of the areas which must be addressed by the military judge are:

1. ***Silence by the accused.*** When the members specifically ask the judge about the accused's failure to testify, the military judge is required to instruct the members on the accused right to remain silent. *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979).

2. ***Absence of the accused.*** The military judge must instruct the members regarding the accused's absence during a proceeding. *United States v. Minter*, 8 M.J. 867 (N.M.C.M.R.), *aff'd*, 9 M.J. 397 (C.M.A. 1980); *United States v. Hardin*, 14 M.J. 880 (N.M.C.M.R. 1982). However, it is important to note that, although the accused's absence cannot be considered as proof of guilt, it may be considered insofar as it demonstrates the accused's rehabilitative potential. *See United States v. Denney*, 28 M.J. 521 (A.C.M.R. 1989).

3. ***Sleeping member.*** The military judge is obligated to take curative action in the form of reinstructing the members when a member falls asleep during his instructions. *United States v. Bishop*, 21 M.J. 541 (A.F.C.M.R. 1985).

4. ***Improper rehabilitation evidence.*** During sentencing, a witness' opinion—that the accused should receive a bad-conduct discharge—is incompetent evidence. When that evidence is presented, regardless of whether counsel objects, the military judge has a sua sponte duty to make a curative instruction. *United States v. Randolph*, 20 M.J. 850 (A.C.M.R. 1985).

5. ***Accomplice testimony.*** The specific instruction regarding the weight the members must give to an accomplice's testimony can be found in paragraph 7-10 of the *Benchbook*. Normally, it is necessary for the defense to request this instruction in order to preserve any error created by the military judge's failure to instruct the members. *United States v. Gillette*, 35 M.J. 468 (C.M.A. 1992); *United States v. Davis*, 32 M.J. 166 (C.M.A. 1991); *United States v. Lee*, 6 M.J. 96 (C.M.A. 1978); *United States v. Jordan*, 24 M.J. 573 (N.M.C.M.R. 1987); *United States v. Oxford*, 21 M.J. 983 (N.M.C.M.R. 1986). However, if the accomplice testimony is uncorroborated, and is either self-contradictory, uncertain, or improbable, the military judge has a sua sponte obligation to read the instruction to the members. *United States v. McKinnie*, 32 M.J. 141 (C.M.A. 1991); *United States v. Devine*, 36 M.J. 673 (N.M.C.M.R. 1992).

1104 INSTRUCTIONS ON FINDINGS

A. ***Required instructions.*** Rule for Courts-Martial 920(e), MCM (1995 Edition), indicates that the military judge must provide the court with certain instructions. Matters

specifically encompassed by this responsibility include instructions on:

1. ***The elements of all charged specifications.*** The military judge must advise the members of all the elements of each specification. *See generally United States v. Berri*, 33 M.J. 337 (C.M.A. 1991); *United States v. Elmore*, 33 M.J. 387 (C.M.A. 1991), *cert. denied*, 504 U.S. 909 (1992). Failure to do so is plain error, requiring reversal. *United States v. Brown*, 26 M.J. 266 (C.M.A. 1988) (failure to instruct on element of knowledge on Article 112a use specification); *United States v. Canter*, 42 C.M.R. 753 (A.C.M.R. 1970) (reversible error for the military judge to fail to instruct on the elements of the substantive offense that was the object of the alleged conspiracy). It is not essential that such instructions follow a particular form or sequence; if a missing element is included with sufficient clarity that the members are fairly informed, the trial judge has adequately covered the subject. *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992); *United States v. McDonald*, 14 M.J. 684 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 171 (C.M.A. 1983).

2. ***The elements of all lesser included offenses reasonably raised by the evidence.*** If the evidence presented at trial reasonably raises the potential of a lesser included offense (LIO), the military judge must instruct the members on the elements of the lesser offense. *See United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988); *United States v. McGee*, 1 M.J. 193 (C.M.A. 1975). If, however, the accused affirmatively waives the instruction by informing the military judge not to instruct the members on the LIO, the military judge is under no obligation to provide this instruction to the members. *United States v. Strachan*, 35 M.J. 362 (C.M.A. 1992), *cert. denied*, 507 U.S. 990 (1993). Any doubt concerning whether the evidence sufficiently raised a defense should be resolved in favor of the accused. *United States v. Clark*, 28 M.J. 401 (C.M.A. 1989). The military judge is also obligated to instruct members on potential affirmative defenses to LIO's which may have been reasonably raised by the evidence. *United States v. Hurko*, 36 M.J. 1176 (N.M.C.M.R. 1993) (mistake of fact defense as LIO of article 123a offense).

3. ***Any special or affirmative defenses at issue.*** When an affirmative defense is "reasonably raised," it is incumbent upon the military judge to instruct the members on that defense. *United States v. Watford*, 32 M.J. 176 (C.M.A. 1991); *United States v. Yandle*, 34 M.J. 890 (N.M.C.M.R. 1992). In order for a defense to be "reasonably raised," there must be "some evidence" to support it. *United States v. Van Syoc*, 36 M.J. 461 (C.M.A. 1993). This evidence can be presented through government witnesses. *United States v. Hunter*, 21 M.J. 240 (C.M.A.), *cert. denied*, 476 U.S. 1142 (1986); *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988) (defense theory at trial is not dispositive in determining what affirmative defense has been reasonably raised by the evidence). A few of the affirmative defenses which have been identified in the case law are:

a. ***Self-defense.*** *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977) (failure to instruct on self-defense was reversible error in light of the trial judge's independent

and paramount duty to ensure that all defenses reasonably raised by the evidence receive his treatment during instructions).

b. ***Alibi.*** *United States v. Jones*, 7 M.J. 441 (C.M.A. 1979) (failure of the military judge to give an instruction regarding the defense of alibi constituted reversible error, particularly in light of the defense counsel's request); *United States v. Stafford*, 22 M.J. 825 (N.M.C.M.R. 1986) (improper instruction on alibi was prejudicial, especially when requested by trial defense counsel).

c. ***Mistake of fact.*** *United States v. Buckley*, 35 M.J. 262 (C.M.A.), *cert. denied*, 507 U.S. 952 (1992) (mixed messages regarding defense-requested instructions led to a waiver); *United States v. Ward*, 16 M.J. 341 (C.M.A. 1983) (military judge's failure to instruct on mistake of fact defense); *United States v. Kauble*, 15 M.J. 591 (A.C.M.R. 1983), *aff'd in part*, 22 M.J. 179 (C.M.A. 1986) (failure of the defense to request an expanded instruction on mistake of fact defense waived issue where instruction was minimally adequate).

d. ***Voluntary intoxication.*** *United States v. Yandle, supra* (evidence reasonably raised potential of intoxication defense); *United States v. Watford, supra* (insufficient evidence presented to justify intoxication defense instruction).

4. ***Issues regarding the burden to proof.***

a. The accused must be presumed innocent until guilt is established by legal and competent evidence beyond a reasonable doubt;

b. in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

c. if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree (the LIO) as to which there is no reasonable doubt; and

d. the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

e. ***Instructions on deliberation and voting procedures.*** *See* R.C.M. 921, MCM (1995 Edition); *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983); *United States v. Wallace*, 35 M.J. 897 (A.C.M.R. 1992) (defense need not object to preserve issue of erroneous procedural instruction given by the military judge).

5. ***Closed trial session.*** Whenever a court-martial, or a portion thereof, is closed to the public for presentation of purportedly classified information, the military judge

has a sua sponte duty to instruct the court members that the security measures taken at trial do not permit any inference of guilt. See *Military Judge's Benchbook*, DA Pam 27-9, change 1 (1998), Section f-23.

B. ***Additional instructions.*** R.C.M. 920(e)(7) is a catch-all provision which requires that the military judge give any other instructions which are deemed necessary. Such additional instructions could include, depending upon the particular case.

1. ***Each term having a special legal connotation.*** If a particular term within the elements of an offense is conventional in it's usage, it will not be necessary for the military judge to define it for the members. If the term is meant to carry a more legalistic definition, however, the military judge should instruct the members on that definition. *See United States v. Dejewski*, 3 C.M.A. 53, 11 C.M.R. 53 (1953) (the term "grievous" in article 128 is used in its conventional sense; therefore, no definition beyond that contained in the MCM is required); *United States v. Sanders*, 14 C.M.A. 524, 34 C.M.R. 304 (1964) (the definition of aider and abettor is required for a proper understanding of the issues involved; it is the responsibility of the military judge to instruct the court members with precision); *United States v. Jett*, 14 M.J. 941 (A.C.M.R. 1982), *petition denied*, 16 M.J. 122 (C.M.A. 1983) (the military judge is not required to define generally known words such as "public record"); *United States v. Brauchler*, 15 M.J. 755 (A.F.C.M.R. 1983) (military judge erred when he failed to instruct as to the meaning of the term "indecent liberties"); *United States v. Fayne*, 26 M.J. 528 (A.F.C.M.R. 1988) (military judge erred when he failed to define the term "harassment"); *United States v. Johnson*, 24 M.J. 101 (C.M.A. 1987) (instructions on sabotage were inadequate where military judge failed to give any definition on the terms "national defense material" or "troops" as used in the statute).

2. ***Critical evidentiary issues.***

a. ***Uncharged misconduct.*** When the military judge allows evidence of uncharged misconduct to be admitted, it is incumbent upon counsel to decide whether the members will be instructed as to the limited uses of the evidence. Mil.R.Evid. 105. If an instruction is to be given, the military judge must carefully tailor it to identify all of the acceptable and unacceptable uses of the evidence. *United States v. Cousins*, 35 M.J. 70 (C.M.A. 1992). These instructions are to be given to the members on two occasions: first, at the time the evidence is admitted; and, second, when all of the instructions are read to the members at the close of the evidence. *United States v. Levitt*, 35 M.J. 114 (C.M.A. 1992). Any potential error is waived if counsel insists on the instruction not being read. *United States v. Wray*, 9 M.J. 361 (C.M.A. 1980) (failure of the military judge to instruct on misconduct not charged was not error in light of his compliance with defense counsel's request); *United States v. Owens*, 21 M.J. 117 (C.M.A. 1985); *United States v. Haywood*, 19 M.J. 675 (A.F.C.M.R. 1984).

b. ***Accused's failure to testify.*** Military Rule of Evidence 301(g) provides that defense counsel's election of whether to give a limiting instruction to the members regarding the failure of the accused to testify is binding upon the military judge. The only exception to this condition is if the failure to instruct the members would be inconsistent with the interests of justice. *United States v. Charette*, 15 M.J. 197 (C.M.A. 1983); *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979).

c. ***Voluntariness of the accused's confession.*** Military Rule of Evidence 304(e)(2) allows the defense to present evidence regarding the voluntariness of a confession. This is true even though the defense may have lost the same legal issue in motions prior to the commencement of trial. If this evidence is presented, the defense can request that the members receive an instruction that allows them to determine the weight to be given such confessions under the circumstances presented. This instruction can be found in paragraph 4-2 of the *Benchbook*.

3. ***A descriptive summary of the evidence.*** R.C.M. 920(e) discussion, MCM (1995 Edition), authorizes the military judge to summarize and comment upon the evidence in the case. In doing so, the judge must not assume as true the existence or nonexistence of a material fact still in issue. *See United States v. Gaiter*, 1 M.J. 54 (C.M.A. 1975) (reversible error for the military judge in instructing on evidence of misconduct not charged to assume as true the controverted fact that the accused had attempted to sell drugs to the person whom he was later charged with robbing). The military judge must also be careful not to depart from the role of an impartial judge and assume the role of a partisan advocate. *United States v. DaMatta-Olivera*, 37 M.J. 474 (C.M.A. 1993), *cert. denied*, 114 S.Ct. 2760, 129 L.Ed. 2d 875 (1994). *See also United States v. Shepard*, 34 M.J. 583 (C.M.A. 1992); *United States v. Grandy*, 11 M.J. 270 (C.M.A. 1981) (failure of the military judge to give equal treatment to the defense case after summarizing the evidence in favor of the prosecution constituted plain error requiring reversal, even in the absence of defense counsel's objection).

C. ***Procedures.***

1. The military judge should recess the proceeding in order to prepare instructions for submission to the members. In this regard, the instructions provided to the members must be the only source of law utilized in their determinations. *See United States v. Rinehart*, 8 C.M.A. 402, 24 C.M.R. 212 (1957) (error for military judge to allow court members to refer to the Manual for Courts-Martial during deliberations). In addition, the military judge may not incorporate previous instructions by reference. *See United States v. Waggoner*, 6 M.J. 77 (C.M.A. 1978) (error for military judge to instruct court members to consider the preliminary instructions given in previous cases in which the court panel had sat). *But cf. United States v. Slubowski*, 7 M.J. 461 (C.M.A. 1979) (not error for military judge in oral instructions to refer specifically to written instructions where defense was made aware of contents of the document; the court members indicated they had no question on the

matter; and no one challenged the accuracy or completeness of this document).

2. R.C.M. 920(c), MCM (1995 Edition), requires that counsel for both sides be given an opportunity to submit and present argument upon proposed instructions. *See United States v. Neal*, 17 C.M.A. 363, 38 C.M.R. 161 (1968) (error for the military judge not to hold a session on instructions in order to act upon requests therefore, hear objections thereon, and inform counsel of his intentions). Normally, argument should be presented during an article 39(a) session which should occur after the close of each side's case and immediately prior to argument on findings.

3. The members are instructed by the military judge after final arguments by counsel. R.C.M. 920(b). The instructions must be given orally. Written verbatim copies of the instructions may be provided to the members. *United States v. Ginter*, 35 M.J. 799 (N.M.C.M.R. 1992). Absent objection by either side, partial written instructions may also be provided. R.C.M. 920(d) and 1005(d), MCM (1995 Edition); *Cf. United States v. Slubowski, supra. United States v. Miller*, 34 M.J. 1175 (A.F.C.M.R. 1992).

1105 INSTRUCTIONS ON SENTENCING

A. ***Required instructions.*** If the accused is convicted of any offense by a court-martial composed of members, the military judge must give appropriate sentence instructions. R.C.M. 1005(a), MCM (1995 Edition). The following instructions are required by R.C.M. 1005(e), MCM (1995 Edition).

1. ***Potential sentences.*** A statement of the maximum authorized punishment and any mandatory minimum punishment. R.C.M. 1003(c)(1)(C); *United States v. Gutierrez*, 8 M.J. 865 (N.C.M.R. 1980), *aff'd*, 11 M.J. 122 (C.M.A. 1981); *United States v. Temple*, 11 M.J. 687 (N.C.M.R. 1981) (the maximum is the single total of all offenses of which the accused is found guilty). *See generally United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992) (member may adjudge form of punishment that the military judge did not advise them on during presentencing instructions); *United States v. Crawford*, 12 U.S.C.M.A. 203, 30 C.M.R. 203 (1961). This should include a discussion of the escalator clause and multiplicity for sentencing where applicable. *United States v. Timmons*, 13 M.J. 431 (C.M.A. 1982); R.C.M. 1003(c)(1)(C).

2. ***Procedural instructions.*** A statement of the deliberation and voting procedures required by R.C.M. 1006, MCM (1995 Edition). These instructions must inform the members that they must vote on proposed sentences, starting with the lowest possible punishment first. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986) and *United States v. Scott*, 22 M.J. 646 (A.C.M.R. 1986), *petition denied*, 24 M.J. 439 (C.M.A. 1987). The military judge should also instruct the members that they must vote on each proposed

sentence in its entirety. *United States v. Wallace*, 35 M.J. 897 (A.C.M.R. 1992); *United States v. Allen*, 21 M.J. 924 (A.C.M.R. 1986).

3. ***Advice to expect no clemency.*** A statement that the members are solely responsible for the sentence and may not rely on the possibility of subsequent mitigating action. *United States v. Keith*, 46 C.M.R. 59 (C.M.A. 1972) and *United States v. Goetz*, 17 M.J. 744 (A.C.M.R. 1983), *petition denied*, 18 M.J. 429 (C.M.A. 1984).

4. ***Consideration of evidence.*** A statement that the members should consider all matters in extenuation, mitigation, and aggravation whether introduced before or after findings. The members must be specifically advised to consider any pretrial restraint in mitigation. *United States v. Balboa*, 33 M.J. 304 (C.M.A. 1991) and *United States v. Davidson*, 14 M.J. 81 (C.M.A. 1982). A guilty plea is also a matter in mitigation to be instructed upon. *United States v. McLeskey*, 15 M.J. 565 (A.F.C.M.R. 1982), *petition denied*, 16 M.J. 102 (C.M.A. 1983). Failure to provide this instruction, however, is not reversible error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); *United States v. Williams*, 26 M.J. 644 (A.F.C.M.R. 1988), *aff'd*, 28 M.J. 911 (C.M.A. 1989) (instruction that plea of guilty is a mitigating factor is not required when the record justifies not giving it).

B. ***"Tailor" standard instructions.*** As with instructions on findings, the military judge must tailor the instructions to the facts of the case and may summarize and comment upon the evidence. R.C.M. 920(e)(4) discussion, MCM (1995 Edition); *United States v. Wheeler*, 17 C.M.A. 274, 38 C.M.R. 72 (1967). *See also United States v. Davidson*, 14 M.J. 81 (C.M.A. 1982) (general instruction to consider matters in extenuation and mitigation properly before the court was inadequate). The military judge should summarize and tailor the extenuation, mitigation, and aggravation instructions to the facts of the case.

General deterrence is a legitimate factor to consider in sentencing. *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980). Consideration as to whether the accused may have lied on the merits can only go to the issue of rehabilitative potential. A carefully worded instruction is necessary when trial counsel argues the accused's mendacity. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992); *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982). The nature and extent of pretrial restraint must be the subject of a specific instruction. *United States v. Davidson, supra* and *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

C. In capital cases, special care must be taken to comply with the constitutional mandates made applicable to the military by the Court of Military Appeals decision in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). These procedures are provided in R.C.M. 1004, MCM (1995 Edition).

D. Procedurally, sentencing instructions are given in the same manner as instructions on findings (see discussion in section 1104.C, *supra*). The military judge must always avoid conclusory statements on appropriateness or relative severity of various

punishments. *United States v. Holland*, 19 M.J. 883 (A.C.M.R. 1985).

E. During sentencing, there are a number of other matters upon which the military judge may instruct the members. These include:

1. A description of lesser forms of punishment [*United States v. Henderson*, 11 M.J. 395 (C.M.A. 1981)];

2. the implications of a bad-conduct discharge [*United States v. Soriano*, 20 M.J. 337 (C.M.A. 1985); *United States v. Longhi*, 36 M.J. 988 (A.F.C.M.R. 1993); *but see United States v. Goodwin*, 33 M.J. 18 (C.M.A. 1991) (instruction on lost entitlement to VA benefits not necessary)];

3. the applicability and proper use of fines as a form of punishment [*United States v. Harris*, 19 M.J. 331 (C.M.A. 1985); *see Motsinger, supra* (propriety of members awarding a fine when the military judge failed to instruct them on that form of punishment)]; and

4. all matters in extenuation, mitigation, and aggravation— including those presented before and after findings [*United States v. Wilson*, 26 M.J. 10 (C.M.A. 1988)].

CHAPTER XII

FRATERNIZATION

1200 **FRATERNIZATION - CLAUSE 1 OR 2** 12-1

A. General discussion. 12-1

B. Definition. 12-2

C. Elements under Art. 134, UCMJ 12-4

1. The accused was a commissioned or warrant officer 12-4

2. The accused fraternized on terms of military equality with one or more enlisted members in a certain manner 12-4

3. The accused then knew the person(s) to be (an) enlisted member(s). 12-5

4. Such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality 12-5

5. Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces 12-7

D. Constitutionality. 12-7

1. Freedom of association. 12-7

2. Vagueness. 12-7

3. Equal protection. 12-7

4. Privacy. 12-8

E. Alternative theories of prosecution. 12-8

F. Pleading. 12-9

CHAPTER XII

FRATERNIZATION

1200 FRATERNIZATION - ARTICLE 134, CLAUSE 1 OR 2 (Key Numbers 533, 754, 759, 760, 763, 778)

A. ***General discussion.*** Fraternization is very much a viable offense under the UCMJ. There is an increasing number of fraternization cases being published by the courts of review and the Court of Military Appeals. Though each service appears to be handling the offense slightly differently, cases have been successfully prosecuted under articles 92 (when there is a lawful order in effect which precludes the conduct), 133, and 134. *United States v. Adams*, 19 M.J. 996 (A.C.M.R. 1985) (Army regulation precludes student-instructor fraternization); *United States v. Moultak*, 21 M.J. 822 (N.M.C.M.R. 1985), *aff'd*, 24 M.J. 316 (C.M.A. 1987) (officer-enlisted sexual relations and financial dealings are conduct unbecoming an officer under article 133); *United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1986) (asking enlisted woman on a date and fondling an enlisted woman is fraternization); *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd*, 34 M.J. 112 (C.M.A. 1992) (supervisor who fraternizes sexually with someone under his command violates article 133). Cases prosecuted as violations of article 134 may have as their essence conduct which is prejudicial to good order and discipline or which is service discrediting. *United States v. Pitasi*, 20 C.M.A. 601, 44 C.M.R. 31 (1971); *United States v. Livingston*, 8 C.M.R. 206 (A.B.R. 1952); *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981), *petition denied*, 13 M.J. 31 (C.M.A. 1982); *United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984); *United States v. Baker*, N.M.C.M. 84-4043 (30 August 1985); *United States v. Tedder*, 24 M.J. 176 (C.M.A. 1987); *United States v. March*, 32 M.J. 740 (A.C.M.R. 1991).

1. Historically, the prohibition against fraternization applied only to relations between officers and enlisted and was based on social distinctions. *United States v. Stocken*, 17 M.J. 826 (A.C.M.R. 1984). Presently, it is the negative effect wrongful fraternization has on discipline and morale that has allowed the proscription to withstand all manner of legal attacks. *Staton v. Froehlke*, 390 F. Supp. 503 (D.D.C. 1975); *Adams, supra*; *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953); *Tedder, supra*; *United States v. Van Steenwyk*, 21 M.J. 795 (N.M.C.M.R. 1985). The courts have held that wrongful fraternization compromises the chain of command, undermines a leader's integrity, and, at the very least, creates the appearance of partiality and favoritism. *Moultak, supra*; and *United States v. Adames*, 21 M.J. 465 (C.M.A. 1986).

2. In the past, fraternization was pled either under article 133 or as an unlisted offense under article 134. The maximum punishment was determined by the

underlying offense. *United States v. Lovejoy*, 42 C.M.R. 210 (C.M.A. 1970); *United States v. Stocken*, 17 M.J. 826 (A.C.M.R. 1984). Fraternization is now a listed offense at paragraph 83 in the MCM, (1995 Edition). **Fraternization may also be charged under article 92** as a violation of OPNAVINST 5370.2A or Art. 1165, *U.S. Navy Regulations, 1990* (as amended 25 Jan 1993). The maximum punishment is two years' confinement and a dismissal or a dishonorable discharge.

B. ***Definition***. Because fraternization has traditionally been a breach of custom, it is more describable than definable. Frequently it is not the acts alone which are wrongful per se, but rather the circumstances under which they are performed. In *Free, supra*, the Navy Board first enunciated the difficulty in defining fraternization:

> Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. As we have said, the surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. Suffice it to say, then, that each case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

Id. at 470. Therefore, it is not every interaction between officers and enlisted that is wrongful. *Tedder, supra* (officer having a drink with enlisted woman not fraternization); *United States v. Johanns*, 20 M.J. 155 (C.M.A.), *cert. denied*, 474 U.S. 850 (1985) (private, nondeviant, voluntary sexual relations between male Air Force officer and enlisted female not fraternization where there is no command or supervisory relationship and no discernible custom against fraternization). *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990); *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R. 1990); and *United States v. Cottrell*, 32 M.J. 675 (A.F.C.M.R. 1991) (private, nondeviate, voluntary sexual relations between Air Force officer and enlisted member is not fraternization where there is no command or supervisory relationship and no discernible custom against fraternization). *United States v. Mayfield*, 21 M.J. 418 (C.M.A. 1986) (young enlisted personnel are at the mercy of officers who supervise them so that the potential for the disruption of good order and discipline is tremendous if superiors take advantage of the opportunities to victimize subordinates). *See also United*

States v. Parrillo, 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd*, 34 M.J. 112 (C.M.A. 1992).

1. Part IV, para. 83c, MCM, (1995 Edition), makes no specific attempt to define fraternization. It expressly adopts the "acts and circumstances" language of *Free, supra*, and describes the offensive acts as those which are in "violation of the custom of the armed forces against fraternization."

2. *United States v. Baker*, N.M.C.M. 84-4043 (30 August 1985) describes fraternization as: ". . . untoward association that demeans the officer, detracts from the respect and regard for authority in the military relationship between officers and enlisted and seriously compromises the officer's standing as such." *Baker* cites with approval *Tedder, supra*, and the *Marine Corps Manual*, para. 1100.4 explanations of fraternization.

3. *Van Steenwyk, supra*, contains an excellent historical analysis of the concept of fraternization. In discussing whether an officer's sharing of marijuana with enlisted personnel and having sexual relations with female members of his staff constituted wrongful fraternization, the Navy court says in footnote 12: "Fraternization . . . in plain civilian usage means associating in a brotherly manner; being on friendly terms. The military usage of the term is very similar . . . fraternization refers to a military superior-subordinate relationship in which mutual respect of grade is ignored."

4. The Court of Military Appeals in *Mayfield, supra*, says "fraternization is any, nonprofessional, social relationship of a personal nature between two or more persons." Included in this definition are relationships between permanent personnel and trainees, NCO's (E-5 and above) and junior enlisted personnel, or officer and enlisted personnel of all grades. Suggestive (but not exhaustive) of the types of conduct addressed by the term fraternization are: drinking alcoholic beverages together, playing cards or gambling together, going to private homes or clubs together, and dating or engaging in sexual activities.

5. OPNAVINST 5370.2A defines fraternization as: ". . . personal relationships that contravene the customary bounds of acceptable senior-subordinate relationships. Although it has most commonly been applied to officer-enlisted relationships, fraternization also includes improper relationships and social interaction **between officer** members as well as **between enlisted** members."

6. Article 1165, *U.S. Navy Regulations, 1990* (as amended 25 Jan 1993) prohibits fraternization in the naval service. Article 1165 provides:

a. Personal relationships between officer and enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. Such relationships are prejudicial to good order and discipline and violate long-standing traditions of the naval service.

b. When prejudicial to good order and discipline or of a nature to bring discredit on the naval service, personal relationships between officer members or between enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. Prejudice to good order and discipline or bring discredit to the naval service may result from, but are not limited to, circumstances which:

(1) Call into question the senior's objectivity;

(2) result in actual or apparent preferential treatment;

(3) undermine the authority of a senior; or

(4) compromise the chain of command.

C. ***Elements under Art. 134, UCMJ.*** Part IV, para. 83b, MCM, (1995 Edition), lists five elements under fraternization. Though this listed offense is quite new, the paragraph appears to be largely a codification of existing case law.

1. ***The accused was a commissioned or warrant officer.***

– There are no enlisted accused's under this paragraph, though there are other theories for prosecuting the enlisted personnel involved (see paragraph 0504.E of this section). According to the analysis to paragraph 83, this article 134 offense does not preempt the creation of a novel 134 specification or an article 92 orders violation to punish the enlisted participant. *See United States v. Carter*, 23 M.J. 683 (N.M.C.M.R. 1986) and *United States v. March*, 32 M.J. 740 (A.C.M.R. 1991). Warrant officers (WO-1) are included as accuseds despite the fact that elsewhere in the UCMJ they are treated as enlisted. Part IV, para. 15a, MCM, (1995 Edition). A midshipman would have to be charged under article 133 since this first element would seem to exclude them. Part IV, para. 59c(1), MCM, (1995 Edition).

2. ***The accused fraternized on terms of military equality with one or more enlisted members in a certain manner.***

a. This element suggests that not every meeting between officers

and enlisted is wrongful. *United States v. DeStefano*, 5 M.J. 824 (A.C.M.R. 1978); *Tedder, supra; United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984); *Johanns, supra*. However, this article does ***not*** require that a command or supervisory relationship exist between the officer and enlisted person. The Army and Air Force have interpreted this more strictly. AR 600-20, para. 5-7f (15 January 1979) as modified by HQDA ltr 600-84-2 dated 23 November 1984 (where the senior member is not in a direct or supervisory position with regard to the lower ranking member, such relationships are not improper); *Johanns, supra* (absent a command or supervisory relationship, consensual nondeviate sexual activity between officers and enlisted in the Air Force does not constitute fraternization). *See also Wales, supra; Arthen, supra;* and *Cottrell, supra. But see United States v. Serino*, 24 M.J. 848 (A.F.C.M.R.), *petition denied*, 25 M.J. 480 (C.M.A. 1987) (there is a custom against fraternization when such conduct occurs within the chain of command) and *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990). The Navy court, in *Van Steenwyk, supra*, said that the damage done by fraternization does not depend on the chain of command. ". . . today's lovers of different commands are tomorrow's senior and subordinate." The Navy in Art. 1165, *U.S. Navy Regulations, 1990* (as amended 25 January 1993) deleted the "senior-subordinate" relationship language. Recently, it appears the Army court may have revised its position on the necessity for an existing senior-subordinate relationship. In *United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986), the court held that, where the accused ***had been*** the victim's supervisor at a ***different duty station***, the relationship was still wrongful.

b. The conduct prohibited need not be sexual in nature, although it often is. *United States v. Livingston*, 8 C.M.R. 206 (A.B.R. 1952) (drinking liquor with enlisted men and sodomy); *United States v. Lovejoy*, 42 C.M.R. 210 (C.M.A. 1970) (sodomy); *United States v. Nelson*, 22 M.J. 550 (A.C.M.R. 1986) (soliciting a male soldier to arrange social engagements with enlisted women); *Adames, supra* (attending private enlisted party); *Mayfield, supra* (asking enlisted woman for dates); *Van Steenwyk, supra* (using marijuana with enlisted personnel). *Serino, supra* (using drugs with enlisted personnel).

3. ***The accused then knew the person(s) to be (an) enlisted member(s).***

– It would appear to be a general defense that the accused honestly did not know the person's enlisted status. The government must show ***actual*** knowledge beyond a reasonable doubt.

4. ***Such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality.***

a. The existence of a custom proscribing the alleged conduct also provides the notice of criminal sanction required by due process. *Johanns, supra. Moultak, supra; Van Steenwyk, supra; Wales, supra; Arthen, supra; Cottrell, supra.* Recent N.M.C.M.R. cases have uniformly held that any reasonable officer of even minimal intelligence is deemed to be on notice that officers cannot associate with enlisted personnel on terms of military equality in the naval service. In *Van Steenwyk,* the court described a "judicially recognizable custom" against sexual relations with enlisted personnel. *See also U.S. v. McCreight,* 43 M.J. 483 (C.A.A.F. 1996) which held that an Air Force First Lieutenant fraternized with an enlisted man on terms of military equality in violation of Air Force custom. The appellant was on a first-name basis with the subordinate, watched TV together, they drank and gambled together, and told the subordinate on at least one occasion that he would be the designated drunk, and the subordinate would be the designated driver.

b. However, the prosecution must prove the existence of a service custom which makes the alleged conduct wrongful. "Custom" is defined at Part IV, para. 60c(2)(b), MCM, (1995 Edition): "In its legal sense, 'custom' means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military . . . ." It is the existence of a custom that makes conduct such as fornication between officers and enlisted wrongful. Absent the existence of the service-wide custom, it is not unlawful. *United States v. Wilson,* 32 C.M.R. 517 (A.B.R. 1962); *United States v. Means,* 10 M.J. 162 (C.M.A. 1981); *Johanns, supra; Wales, supra; Arthen, supra;* and *Cottrell, supra.* The government may rely on written documents such as *U.S. Navy Regulations, 1990* (art. 1165) (as amended 25 Jan 1993) and OPNAVINST 5370.2A (14 March 1994) (fraternization); the *Marine Corps Manual,* para. 1100.4; or NAVMC 2767 (12 March 1984) *User's Guide to Marine Corps Leadership Training* to prove a custom.

c. The existence of a punitive order or regulation would eliminate the need to prove custom was violated and allow the offense to be charged under article 92. *United States v. Hoard,* 12 M.J. 563 (A.C.M.R. 1981), *petition denied,* 13 M.J. 31 (C.M.A. 1982); *United States v. Adams,* 19 M.J. 996 (A.C.M.R. 1985). Such codifications of custom in the form of regulations is also encouraged by the MCM. Part IV, para. 83c(2), MCM, (1995 Edition), specifically suggests that officer-enlisted relations may be governed by orders. The analysis at Appendix 21, para. 83, states that there would be no preemption issue raised with a fraternization prosecution under article 92. Multiplicity would still have to be considered. *United States v. Cantu,* 22 M.J. 819 (N.M.C.M.R. 1986). Navy custom is now codified in Art. 1165, *U.S. Navy Regulations, 1990* (as amended 25 January 1993), and OPNAVINST 5370.2A (14 March 1994).

d. In *United States v. Lowery*, 21 M.J. 998 (A.C.M.R. 1986), *aff'd*, 24 M.J.347 (C.M.A. 1987), the Army court opined that the question as to whether there is custom against fraternization was answered for all of the services on 1 August 1984. The court said that the President created such a custom when he signed the Executive order that effectuated the *Manual for Courts-Martial*. In fact, because of the creation of paragraph 83, said the *Lowery* court, the *Johanns, supra*, case is no longer viable even in the Air Force. If this dicta is correct, the prosecution would still have to prove beyond a reasonable doubt that the alleged misconduct violated the custom. *See Serino, supra*. In *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989), the Army court reemphasized this theory and stated categorically that there is also such a custom precluding certain relationships between NCO's and ***their*** subordinates. The Court of Military Appeals, however, has refused to adopt the Army court's interpretation of Part IV, para. 83, MCM, (1995 Edition). *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990).

5. ***Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.***

– The harm must be direct and palpable. *Tedder, supra*. There is no conduct known as "simple fraternization" that does not prejudice good order and discipline. *Adames, supra*.

D. ***Constitutionality***. All manner of constitutional challenges have been leveled against the concept of fraternization. Since the United States Supreme Court decided *Parker v. Levy* in 1974, all such attacks have largely failed. 417 U.S. 733. In *Parker*, the High Court recognized the military's special need for discipline, against which certain personal liberties may pale.

1. ***Freedom of association***. This right is accorded less weight because of the negative impact fraternization has on discipline. The prohibition is "valid and necessary." *Staton v. Froehlke, supra*.

2. ***Vagueness***. The existence of a long-acknowledged custom, and the circumstances surrounding the misconduct, make the prohibition against fraternization specific. *Pitasi, supra; Van Steenwyk, supra; Moultak, supra; Parker v. Levy, supra*.

3. ***Equal protection***. Officers have always been held to a higher standard of conduct, so it is reasonable to single them out. *United States v. Means*, 10 M.J. 162

(C.M.A. 1981); *Moultak, supra.* Some regulations governing fraternization apply to instructor-student relationships, even when the instructors are also enlisted. Singling out this group of enlisted personnel has also been held to be reasonable because of their temporary special status as teachers. *Hoard, supra.*

4. ***Privacy.*** There is no right to privacy when it compromises discipline. *Adams, supra.* The need for discipline has been called a compelling state interest when weighed against an individual service member's need for sexual privacy. *United States v. McFarlin,* 19 M.J. 790 (A.C.M.R.), *petition denied,* 20 M.J. 314 (C.M.A. 1985).

E. ***Alternative theories of prosecution.*** For cases of overfamiliarity between ranks which do not fit the elements described in Part IV, para. 83, MCM, (1995 Edition), there may be other means of prosecution.

1. Fraternization may now also be charged under article 92(1) as a violation of Art. 1165, *U.S. Navy Regulations, 1990* (as amended 25 January 1993), regardless of whether the accused is an officer or enlisted member. A description of the prohibited conduct under article 1165 is discussed, *infra.*

2. The conduct may also violate "an other lawful order" or regulation (i.e. OPNAVINST 5370.2A) and be punishable under Article 92, UCMJ. Notice that officer-officer and enlisted-enlisted overfamiliarity may have the same detrimental effect on morale and discipline in the appropriate circumstances as officer-enlisted fraternization. As such, the participants may be subject to a lawful written or verbal order to cease and desist. *United States v. Carter,* 23 M.J. 683 (N.M.C.M.R. 1986) (enlisted-enlisted fraternization in the chain of command violated the ship's order); *United States v. Callaway,* 21 M.J. 770 (A.C.M.R. 1986) (officer-officer fraternization in the chain of command is an offense). Failure to terminate the relationship may constitute willful disobedience under Articles 90 or 91, UCMJ.

3. The underlying conduct might itself constitute a separate crime such as adultery, sodomy, drug abuse, or even dereliction. *United States v. Conn,* 6 M.J. 351 (C.M.A. 1979); *United States v. Johanns,* 17 M.J. 862 (A.F.C.M.R. 1983), *aff'd,* 20 M.J. 155 (C.M.A. 1985), *cert. denied,* 474 U.S. 850 (1985); *Lovejoy, supra; Serino, supra.*

4. The conduct may be such that it would constitute conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ. *See* Part IV, para. 59, MCM, (1995 Edition). *United States v. Graham,* 9 M.J. 556 (N.C.M.R. 1980); *United States v. Parini,* 12 M.J. 679 (A.C.M.R. 1981), *petition denied,* 13 M.J. 210 (C.M.A. 1982). *Cf. United States v. Baker,* N.M.C.M. 84-4043 (30 August 1985) (partying with enlisted and passing out

in bed next to an enlisted man does not reach that level of dishonor to be considered "conduct unbecoming"). *Johanns, supra*, at 162, 163; *United States v. Shober*, 26 M.J. 501 (A.F.C.M.R. 1986).

F. ***Pleading***. The sample specification for the listed fraternization offense appears at Part IV, para. 83f, MCM, (1995 Edition).

1. Where fraternization is alleged under Article 134, UCMJ, and the same conduct is alleged under article 133, the offenses will merge for findings with the conduct unbecoming. *United States v. Rodriguez*, 18 M.J. 363 (C.M.A. 1984); *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986). Where fraternization and the underlying misconduct—such as adultery or sodomy—are both alleged, the offenses may merge for punishment purposes. *United States v. Lovejoy*, 42 C.M.R. 210 (C.M.A. 1970). Where there is conduct amounting to fraternization which is different from the underlying offense which is also alleged, the offenses may also be separate for sentencing. *United States v. Smith*, 18 M.J. 786 (N.M.C.M.R. 1984).

2. Pleading the same conduct as fraternization and violation of a local order or regulation is multiplicious charging. *Cantu, supra*.

AVAILABILITY OF NAVAL JUSTICE SCHOOL PUBLICATIONS

Naval Justice School (NJS) publications are readily available to commands in hard copy or on fiche from the Defense Technical Information Center (DTIC) is available at the NJS Web Site at ***http://www.njs.jag.navy.mil***. They are available to individuals in hard copy or on fiche from the National Technical Information Service (NTIS). ***Because of funding restraints, they are not available directly from NJS***.

Defense Technical Information Center

In order for a command to purchase publications from DTIC, the command must be a registered user. Commands not already registered with DTIC may obtain registration forms and information on ordering publications by writing to:

Defense Technical Information Center
Attention: Code DTIC-FDRA
8725 JOHN J. KINGMAN RD STE 0944
FT BELVOIR, VA 22060-6218

or calling commercial (703) 767-8273, DSN 427-8273 or 1-800-CAL-DTIC (225-3842) menu selection 2, option 1. The cost of all hard copy publications is $6.00 for the first 100 pages, with an additional $ .10 per page (over 100 pages), and $4.00 for a microfiche copy. In addition to registering with DTIC, the command normally must establish a deposit account with the National Technical Information Service (NTIS) as the means of funding purchases from DTIC. Information on such a deposit account is supplied by DTIC when a command registers as a DTIC user. When ordering from DTIC, publications should be identified by both title and AD number, if known.

National Technical Information Center

NJS publications are also available to individual purchasers through the Commerce Department's National Technical Information Service (NTIS); however, the purchase price of the publications through NTIS is substantially higher. The cost of all publications from NTIS is $6.95 per microfiche copy, with various prices for paper copy (depending on the number of pages in the publication). Information on ordering publications from NTIS may be obtained by writing to:

U.S. Department of Commerce
National Technical Information Service
5285 Port Royal Road
Springfield, VA 22161