

Annual Review of Developments in Instructions

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Introduction

This annual installment of developments on instructions covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its September 2008 term,¹ and it is written for military trial practitioners. The *Military Judges' Benchbook (Benchbook)*² remains the primary resource for drafting instructions. During this term, the CAAF decided cases involving the definition of "child pornography" for conduct unbecoming an officer and a gentleman; the definition of "criminal proceedings" for obstruction of justice; variance; lesser included offenses; and the mistake of fact defense.

Crimes

Possession of Virtual Child Pornography as Conduct Unbecoming an Officer and a Gentleman

In 1996, the U.S. Congress passed the Child Pornography Prevention Act (CPPA), which implemented the *Ferber* standard³ and criminalized the possession of a broad range of materials that sexually depicted minors. Included among the proscriptions was the mere possession of any matter that "is or appears to be" a sexual depiction of a minor.⁴ In 2002, the *Ashcroft v. Free Speech Coalition*⁵

decision struck down provisions of the act that criminalized the possession of so-called "virtual child pornography," apparent depictions created by computer morphing or other means that did not depict actual children.

The *Free Speech Coalition* decision required the CAAF to revisit Uniform Code of Military Justice (UCMJ) Article 134, clause 3, child pornography prosecutions that relied on the CPPA, as parts of the underlying statute had been held unconstitutional. It set aside such prosecutions in the *United States v. Cendajas* decision.⁶ However, it held in the *United States v. Mason*⁷ and subsequent *United States v. Brisbane*⁸ decisions that the possession of even "virtual" child pornography could be punished under clause 1 and clause 2 of Article 134 as service-discrediting or conduct prejudicial to good order and discipline.

In *United States v. Forney*,⁹ the CAAF confronted the related issue of whether possession of even "virtual" child pornography could, in line with *Mason* and *Brisbane*, constitute conduct unbecoming an officer. At issue in the case were the proper instructions in light of the *Free Speech Coalition* and *Cendajas* decisions.

Prior to *Free Speech Coalition*, Lieutenant Junior Grade Forney was accused and found guilty of two specifications in violation of Article 134 for possessing child pornography in his stateroom and work area computers in violation of the CPPA.¹⁰ He was also accused and convicted of one

¹ The September 2008 term began on 1 September 2008 and ended on 31 August 2009.

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

³ The Supreme Court, in *New York v. Ferber*, unanimously held that the First Amendment did not protect the sale of materials depicting minors engaged in sexual activity. 458 U.S. 747, 765 (1982). In *Osborne v. Ohio*, the Court further held that the mere possession of child pornography was not protected by the First Amendment. 495 U.S. 103 (1990).

⁴ 18 U.S.C. § 2252A (2006) provides, in part:

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in

interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

⁵ 535 U.S. 234 (2002).

⁶ 62 M.J. 334 (C.A.A.F. 2006) (setting aside an Article 134 prosecution for possession of child pornography based on the incorporated 18 U.S.C. § 2252A).

⁷ 60 M.J. 15, 18 (C.A.A.F. 2004).

⁸ 63 M.J. 106, 116–17 (C.A.A.F. 2006).

⁹ 67 M.J. 271 (C.A.A.F. 2009).

¹⁰ *Id.* at 273; *see also* 18 U.S.C. § 2256(8)(D) (2006).

specification of conduct unbecoming an officer in violation of UCMJ Article 133 for receiving and possessing child pornography as defined by 18 U.S.C. § 2256.¹¹

The military judge instructed the court members that in order to convict the accused they had to be convinced beyond a reasonable doubt that he had received and possessed child pornography, he knew that he had done so, he knew that it was child pornography, that his receipt and possession were wrongful, and that under the circumstances the conduct was unbecoming an officer and a gentleman.¹²

At trial, the court merged the three offenses for sentencing purposes, and a general court-martial with members sentenced the naval officer to twelve months confinement and a dismissal.¹³ After his trial concluded, the Supreme Court held part of the CPPA unconstitutional.¹⁴ There was no proof at his trial that the images he possessed were not virtual, and accordingly, his two convictions for violations of Article 134 were overturned by the Navy and Marine Corps Court of Criminal Appeals (NMCCA); the NMCCA affirmed his conviction for violating Article 133 and affirmed the sentence.¹⁵

At issue before the CAAF was whether the accused's conviction under Article 133 should stand, given that it rested on conduct that was arguably constitutionally protected in a civilian context. In a plurality decision, all five judges agreed that the conviction should stand.¹⁶ The court recounted the Supreme Court's holding in *Parker v. Levy* in pointing out that "[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected [in a military context]."¹⁷

¹¹ *Id.* The Supreme Court found the provisions of 18 U.S.C. § 2256(8)(B), (D) unconstitutional. Those sections defined child pornography to include "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct," § 2256(8)(B), and any sexually explicit image that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct."

¹² *Forney*, 67 M.J. at 273.

¹³ *Id.* at 272.

¹⁴ *Ashcroft*, 535 U.S. 234, 235 (2002).

¹⁵ *Forney*, 67 M.J. at 272.

¹⁶ *United States v. Forney*, 2005 CCA LEXIS 235, at *23 (N-M. Ct. Crim. App. 2005). Judge Stucky delivered the judgment of the court which Baker joined. Chief Judge Effron concurred in the result but not the opinion's finding that there was no instructional error. Judge Erdmann dissented which Judge Ryan joined. All three opinions opined that the possession of "virtual" child pornography could constitute conduct unbecoming an officer. *Forney*, 67 M.J. at 271.

¹⁷ *Forney*, 67 M.J. at 275 (citing *United States v. Gray*, 42 C.M.R. 255 (C.M.A. 1970); *Parker v. Levy*, 417 U.S. 733, 759 (1974)).

The court then confronted the contention that the military judge erred by not requiring the members to find that the images appellant possessed were of actual children.¹⁸ That issue was prompted by the dismissal of the two Article 134 offenses occasioned by the *Free Speech Coalition* decision and the trial court's reliance on the unconstitutional definition of child pornography in 18 U.S.C. § 2256.¹⁹ Judges Stucky and Baker held that because the judge's instructions for the Article 133 offense were not based on an incorporated offense, the judge's instructions were proper.²⁰ The lead opinion pointed out the absence of a definition of child pornography in the UCMJ and that the Article 133 offense only relied on the civilian statute for a definition.²¹ Judge Stucky further pointed out that there would have been no issue if the specification alleged that the officer possessed "images of children engaged in sexually explicit conduct" and avoided reference to the statute.²² Judge Stucky rejected the appellant's argument that he should have had an opportunity to present the defense that his conduct was arguably legal in civilian society. He relied on the absence of jurisprudence requiring instructions on the state of the civilian law even in cases raising explicit First Amendment issues.²³ Judge Stucky noted that even if the military judge's reliance on the unconstitutional statute contained some (ultimately incorrect) suggestion to the members that the appellant's conduct violated civilian law and that it was thereby instructional error, the error was harmless beyond a reasonable doubt because of the significant evidence of military-specific ramifications of the alleged misconduct.²⁴ The two justice "majority" upheld the ruling of the Navy Court.²⁵

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 276 n.2.

Even if it were error for the military judge to reference the federal statute in the instruction—arguably suggesting that the possession of virtual child pornography was illegal in civilian society—we are confident such error was harmless beyond a reasonable doubt. There is no reasonable possibility that any such error might have contributed to Appellant's conviction. In light of the totality of the circumstances—his receiving and possessing such images on government computers on a Navy ship underway, the discovery of the misconduct by an enlisted person in the performance of his duties, and the focus of the offense and the military judge's instructions on the military nature of the offense—any such error would have been unimportant in relation to everything else the jury considered on the issue in question

Id. (internal citations omitted).

²⁵ *Id.*

Chief Judge Effron concurred in the result that the possession of “virtual” child pornography could be charged as conduct unbecoming, but he took issue with the fact that the instructions relied on a provision of a statute that was later held unconstitutional.²⁶ The Chief Judge’s concurrence pointed out that, in Article 133 prosecutions, “the nature of the standard—whether the act or omission violated a military-specific norm or a generally applicable civilian law—is important.”²⁷ The concurrence went on to explain that, while the possession of “virtual” child pornography might constitute a military-specific offense, this accused was tried with the understanding that his conduct also violated a civilian statute.²⁸ Chief Judge Effron stated that, in Article 133 and 134 prosecutions when the conduct is alleged to have violated a civilian criminal statute, the accused may often offer evidence that the charged conduct does not violate the civilian criminal statute.²⁹ Chief Judge Effron’s concurrence concludes by holding that it was error for the judge’s instruction to rely on a violation of a civil norm that was later held to be unconstitutional.³⁰ The concurrence found that the instructional error was harmless beyond a reasonable doubt and thereby concurred in the result.³¹ The concurrence also noted that a three-judge majority of the court agreed that reliance on the overturned statute was instructional error.³²

The three-judge majority Chief Judge Effron alluded to was composed of his concurrence and Judge Erdmann’s dissent, which was joined by Judge Ryan. The dissent also found that the instructions were error in that it was impossible to separate the violation of the civil norm from the purely military misconduct.³³ The dissent held that Forney was entitled to an opportunity to argue to the members that his conduct was constitutionally protected in that there was no evidence that his images depicted real children.³⁴

It is clear that *Forney* establishes that the possession of sexually explicit images of children may constitute a violation of Article 133 even if the images are “virtual” or otherwise not actual children.³⁵ It seems equally clear that such a prosecution must focus solely on how possession of the images detracted from the possessor’s fitness to lead as

an officer and not rely on an inference that such images are illegal under civilian law.³⁶

Obstruction of Justice in Foreign Criminal Proceedings

In *United States v. Ashby*,³⁷ the CAAF revisited a high profile tragedy from the late 1990s. Captain (Capt.) Ashby, U.S. Marine Corps, flew an EA-6B Prowler aircraft on a routine training mission in the Italian Alps that culminated in the aircraft striking weight bearing cables causing a gondola with twenty international passengers to fall over 300 feet to their death.³⁸ Capt. Ashby was tried in two separate courts-martial. In the first, he was acquitted of all charged offenses, including dereliction of duty, negligently suffering military property to be damaged, recklessly damaging nonmilitary property, involuntary manslaughter, and negligent homicide.³⁹ In his second court-martial, he was convicted of conduct unbecoming an officer for conspiring to obstruct justice.⁴⁰ The court considered the issue of whether the military judge properly instructed the members that they could consider the obstruction of foreign criminal proceedings as qualifying conduct for obstruction of justice.⁴¹ The defense moved in limine to prevent the Government from arguing that obstructing foreign criminal proceedings violated the UCMJ.⁴² The defense argument flowed from the absence of foreign proceedings in the enumerated investigations in the *Manual for Courts-Martial (MCM)* and the lack of clear precedent in case law.⁴³ The judge denied the defense’s motion but imposed a requirement that the obstruction of any foreign criminal proceeding must be directly prejudicial to good order and discipline or service-discrediting.⁴⁴ The judge instructed the panel that criminal proceedings included

obstruction of foreign criminal proceedings or investigations when such obstruction of the criminal proceedings or investigation have a direct impact upon the efficacy of the United States criminal justice system by being directly prejudicial

²⁶ *Id.* at 277 (Effron, C.J., concurring).

²⁷ *Id.*

²⁸ *Id.* at 279.

²⁹ *Id.*

³⁰ *Forney*, 67 M.J. at 280.

³¹ *Id.*

³² *Id.* at 280 n.1.

³³ *Id.* at 281 (Erdmann, J., dissenting).

³⁴ *Id.* at 282.

³⁵ *Id.* at 275.

³⁶ *Id.* at 276.

³⁷ 68 M.J. 108 (C.A.A.F. 2009).

³⁸ *Id.* at 112.

³⁹ *Id.*

⁴⁰ *Id.* at 113.

⁴¹ *Id.* at 117–18.

⁴² *Id.* at 117; see also MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 96.b.(2) (2008) [hereinafter MCM]. The MCM does not define criminal proceedings but enumerates only military investigations and investigations “relating to a violation of any criminal statute of the United States” as examples of investigations whose obstruction is criminally proscribed.

⁴³ *Ashby*, 68 M.J. at 118.

⁴⁴ *Id.* at 117.

to good order and discipline or being directly discreditable to the Armed Forces.⁴⁵

The court held that the *MCM*'s omission of foreign criminal proceedings was not dispositive as the examples in the *MCM* are "illustrative, not exclusive."⁴⁶ The court pointed out that, under Article 133 and clauses 1 or 2 of Article 134, an accused could be charged with obstruction of a foreign criminal proceeding.⁴⁷ That narrowed the inquiry to whether Capt. Ashby was sufficiently on notice in his prosecution under Article 133 to defend himself. The court concluded he was and pointed to the public, international nature of the investigation, the NATO Status of Forces Agreement, and the inherent dishonesty of the alleged act to support the idea that he was clearly on notice that destroying a piece of evidence in an international investigation "would reflect poorly on him as an officer and would be service discrediting."⁴⁸

The court then reviewed the assignments of error, including another one involving instructions. The court found that the military judge's curative instruction, after the trial counsel mentioned appellant's invocation of his right to silence in her opening statement, was sufficient to cure any prejudice.⁴⁹ The court pointed out that a mistrial was a drastic remedy necessary only to prevent "manifest injustice," and despite the clear error of trial counsel's comments, they were harmless beyond a reasonable doubt.⁵⁰

⁴⁵ *Id.* at 117–18.

⁴⁶ *Id.* at 118.

⁴⁷ *Id.*

⁴⁸ *Id.* at 118–19.

⁴⁹ *Id.* at 121–23. The military judge instructed the members:

I want to just remind you that Captain Ashby has an absolute right to remain silent at all times. I want to remind you that you will not draw any inference adverse to Captain Ashby from any comment by the Trial Counsel in her opening statement that might suggest that Captain Ashby invoked his right to remain silent. You are directed to disregard any comment by trial counsel that may have alluded to any silence by Captain Ashby. You must not hold this against Captain Ashby for any reason, or speculate as to this matter. You are not permitted to consider that Captain Ashby may have exercised his absolute right to remain silent, at any time, as evidence for any purpose.

As you know, we spent a great deal of time yesterday talking about the accused's right to remain silent. Accordingly, Captain Ashby was not required to speak to anyone about the video tape. Again, to the extent that the trial counsel may have implied that he was required to speak to anyone about the tape, that was incorrect.

Id. The military judge polled each member and each assured the court he or she would not consider trial counsel's comments. The military judge reiterated the instructions at the conclusion of findings.

⁵⁰ *Id.* at 123.

Ashby clarifies that prosecutions for obstructing foreign criminal proceedings may proceed if the conduct is service-discrediting or prejudicial to good order and discipline. *Ashby* also reminds practitioners to be careful to avoid references to the accused's exercise of a fundamental right—in *Ashby*'s case, the right to remain silent. Military judges must be prepared to give curative instructions in the event that counsel comment on the exercise of fundamental rights.

Variance and Escape from Custody

In *United States v. Marshall*,⁵¹ the CAAF confronted the issue of whether it was a fatal variance to find that an accused escaped from the custody of a person different than the one identified in the charged offense.⁵² Captain (CPT) Kreitman directed Staff Sergeant (SSG) Fleming to collect Private (PVT) Marshall from a local police station.⁵³ Staff Sergeant Fleming did so and escorted PVT Marshall back to his unit area.⁵⁴ Staff Sergeant Fleming informed the appellant to stay put while pretrial confinement orders were drafted.⁵⁵ Private Marshall left during an authorized smoke break.⁵⁶ Private Marshall was charged with, inter alia, escaping "from the custody of CPT Kelvin K. Kreitman, a person authorized to apprehend the accused" in violation of Article 95, UCMJ.⁵⁷ At PVT Marshall's trial, the defense asserted there was no evidence of CPT Kreitman having custody of the accused.⁵⁸

The military judge found PVT Marshall guilty of escaping from the custody of SSG Fleming by exceptions and substitutions.⁵⁹ The four-judge majority held that the issue was not waived despite counsel's failure to object to the military judge's finding.⁶⁰ They held that counsel's motion for a finding of not guilty placed the issue squarely before the military judge, and to object to the findings would have been an "empty exercise."⁶¹ The court then reviewed standards for variance, looking first at the decision in *United States v. Hopf*.⁶² In *Hopf*, appellant was convicted of an

⁵¹ 67 M.J. 418, 419 (C.A.A.F. 2009).

⁵² *Id.* at 419.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* Defense moved for a finding of not guilty, which was denied, and argued that while there was evidence of custody regarding SSG Fleming, there was none regarding CPT Kreitman.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 420.

⁶² *Id.*; *United States v. Hopf*, 5 C.M.R. 12 (C.M.A. 1952).

aggravated assault on a named Korean male but was found guilty by exceptions and substitutions of an assault on an “unnamed Korean male.”⁶³ The victim in that case was unable to testify, and two U.S. eyewitnesses did not know the victim’s name.⁶⁴ The court held the variance was not fatal because the nature and identity of the victim did not change. The appellant was convicted of the charged assault, and the defense preparations were unaffected.⁶⁵

The court also distinguished the case of *United States v. Finch*.⁶⁶ In *Finch*, the appellant was charged with conspiracy to provide alcohol to a person in the delayed entry program, in violation of a general order.⁶⁷ The court found the appellant guilty by substituting a different location for the overt act in furtherance of the conspiracy.⁶⁸ The CAAF noted that while the overt act was an element, it was not the “core of the offense” and “did not substantially change the nature or seriousness of the offense or increase the punishment” the accused was subject to.⁶⁹ In *Marshall*, the court held that the substitution was material in that, while the nature of the offense was the same, the identity of the offense the accused had prepared for was different.⁷⁰ The four-judge majority found prejudice in that the accused prepared to defend against a charge involving CPT Kreitman but was instead required to refute a de facto agency theory of liability for escaping from SSG Fleming.⁷¹

Judge Ryan concurred in the judgment but differed in her evaluation of the waiver issue.⁷² Judge Ryan found the issue was waived by failure to object to the findings absent plain error.⁷³ She then found that the judge’s findings constituted plain error and was thereby suitable for review and reversal.⁷⁴

Marshall establishes that changing the identity of the person from whose custody the accused allegedly escaped is usually a fatal variance.⁷⁵ Likewise attempts to change the identity of such a person are best treated as major changes requiring the consent of the accused or re-preferral.⁷⁶

⁶³ *Hopf*, 5 C.M.R. at 13.

⁶⁴ *Id.* at 14.

⁶⁵ *Id.* at 14–15.

⁶⁶ 64 M.J. 118, 121 (C.A.A.F. 2006).

⁶⁷ *United States v. Marshall*, 67 M.J. 419, 420 (C.A.A.F. 2009).

⁶⁸ *Id.* at 420.

⁶⁹ *Id.* (citing *Finch*, 64 M.J. at 122).

⁷⁰ *Id.* at 421.

⁷¹ *Id.*

⁷² *Id.* at 422 (Ryan, J., concurring).

⁷³ *Id.* at 423 (citing *Finch*, 64 M.J. at 121).

⁷⁴ *Id.*

⁷⁵ *Id.* at 421.

⁷⁶ *Id.*; see also MCM, *supra* note 42, R.C.M. 603(d).

Lesser Included Offenses

When drafting instructions, the military judge must determine all lesser included offenses at issue because the military judge has a sua sponte duty to instruct the court members on them. During this term, in three separate cases, the CAAF reversed the conviction of an offense because it was not a lesser included offense of the charged offense under Article 79.⁷⁷ Each of these cases involved a court of criminal appeals finding the evidence insufficient for a greater offense and affirming a supposedly lesser included offense. However, these cases are still helpful in drafting instructions during trial because Article 79 applies at both the trial level and the appellate level.⁷⁸

In *United States v. Thompson*,⁷⁹ Private Thompson was convicted of, inter alia, kidnapping his wife.⁸⁰ On appeal, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found the evidence to be factually and legally insufficient for kidnapping because the detention was de minimis.⁸¹ However, the NMCCA affirmed a conviction to the “closely related” offense of reckless endangerment.⁸² The CAAF quickly found that reckless endangerment was not a lesser included offense under Article 79 because it required proof of elements not required for kidnapping.⁸³ When comparing the elements, it is clear that reckless endangerment requires that the accused’s conduct was likely to produce death or grievous bodily harm to another person,⁸⁴ which is not required for kidnapping.⁸⁵ Because it was not a lesser included offense, the NMCCA could not affirm a conviction of reckless endangerment under Article 59.⁸⁶

While *Thompson* reiterated existing law on lesser included offenses, in the second lesser included offense case, *United States v. Miller*,⁸⁷ the CAAF changed the existing law by overruling its precedent. In 1994, after a period of confusion and uncertainty over whether offenses were lesser included offenses, the Court of Military Appeals (CMA), in

⁷⁷ “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.” UCMJ art. 79 (2008).

⁷⁸ *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009).

⁷⁹ 67 M.J. 106 (C.A.A.F. 2009).

⁸⁰ *Id.* at 106–07.

⁸¹ *Id.* at 109.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*; see MCM, *supra* note 42, pt. IV, ¶ 100b(3).

⁸⁵ See MCM, *supra* note 42, pt. IV, ¶ 92b.

⁸⁶ “Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.” UCMJ art. 59(b) (2008).

⁸⁷ 67 M.J. 385 (C.A.A.F. 2009).

United States v. Foster,⁸⁸ adopted the elements test for determining whether an offense is a lesser included offense.⁸⁹ This elements test came from *Schmuck v. United States*, in which the Supreme Court stated that “one offense is not ‘necessarily included’ in another unless the elements of the lesser-offense are a subset of the elements of the charged offense.”⁹⁰ The elements test brought predictability to the law on lesser included offenses. However, the CMA further explained two important aspects in which the elements test would be applied less rigidly in the military. First, the elements of the lesser included offense can be either a quantitative subset or a qualitative subset of the greater offense.⁹¹ A “qualitative” subset is when the elements of the lesser offense, although not in the greater offense, are rationally derived from or legally less serious than those in the greater offense.⁹² Second, the court held that “an offense arising under the general article may, depending upon the facts of the case, stand either as a greater or lesser offense of an offense arising under an enumerated article.”⁹³ The court explained that “[t]he enumerated articles are rooted in the principle that such conduct per se is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles.”⁹⁴ *Foster* has been cited frequently for both of these aspects of the application of the elements test.

The year after *Foster*, the CAAF further explained another important circumstance in which the application of the elements test in the military would diverge from its application in civilian federal practice. In *United States v. Weymouth*,⁹⁵ the CAAF pointed out that, in the military, both the statute and the specification provide notice to the accused of the essential elements of the offense.⁹⁶ It held that, for the elements test, the elements include both the elements in the statute and those necessarily alleged in the specification.⁹⁷

This year the CAAF reversed the trend of its less rigid application of the elements test by overruling part of its

holding in *Foster*.⁹⁸ In *Miller*, Private Miller was convicted of, inter alia, resisting apprehension under Article 95.⁹⁹ On appeal, the Army Court of Criminal Appeals (ACCA) found the evidence to be factually insufficient for resisting apprehension, because Private Miller was already in custody when the military police arrived at the scene.¹⁰⁰ However, ACCA found him guilty of a simple disorder under Article 134, as a lesser included offense.¹⁰¹ Although the elements test reveals that clauses 1 and 2 of Article 134 require an element not required for resisting apprehension under Article 95, ACCA cited to *Foster* in support of the proposition that the elements of prejudicial to good order and discipline or service-discrediting are implicit in every enumerated article under the UCMJ.¹⁰²

In considering whether a simple disorder under Article 134 is a lesser included offense of resisting apprehension under Article 95, the CAAF discussed both the constitutional requirements in the due process clause and the statutory requirements in Article 79. Both require notice to the accused of the offense against which the accused must defend.¹⁰³ The allegations in the specification may put the accused on notice explicitly or by fair implication.¹⁰⁴ This case called into question the validity of that part of *Foster* that stands for the proposition that the elements of prejudicial to good order and discipline or service-discrediting are implicit in the offenses in Articles 80 through 132. In *Miller*, the CAAF acknowledged that language it used in *Foster* and the line of cases following it support this proposition, but such language is at odds with the due process principle of fair notice.¹⁰⁵ Due to this conflict and without lengthy explanation, the court overruled that part of *Foster*. “To the extent [*Foster* and its progeny] support the proposition that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense, they are overruled.”¹⁰⁶

In the third lesser included offense case this term, the CAAF held that the offense of open and notorious indecent

⁸⁸ 40 M.J. 140 (C.M.A. 1994).

⁸⁹ *Id.* at 142. The court had recently adopted the *Schmuck* elements test for determining multiplicity. *United States v. Teters*, 37 M.J. 370, 376–77 (C.M.A. 1993).

⁹⁰ 409 U.S. 705, 716 (1989).

⁹¹ *Foster*, 40 M.J. at 144.

⁹² *Id.* at 144–46.

⁹³ *Id.* at 143.

⁹⁴ *Id.*

⁹⁵ 43 M.J. 329 (C.A.A.F. 1995).

⁹⁶ *Id.* at 333.

⁹⁷ *Id.* at 340.

⁹⁸ The reversal of this trend was foreshadowed in *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (holding that clauses 1 and 2 are not necessarily lesser included offenses of offenses alleged under clause 3, although they may be, depending on the drafting of the specification”).

⁹⁹ *United States v. Miller*, 67 M.J. 385, 386 (C.A.A.F. 2009).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 387.

¹⁰² *Id.*

¹⁰³ *Id.* at 388.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 388–89.

¹⁰⁶ *Id.* at 389. In a footnote, the court noted, as it did in *Medina*, that when a comparison of the elements of two offenses shows that one is not necessarily a lesser included offense of the other, allegations in the specification, which make the accused aware of any alternative theory of guilt, may satisfy the requirement for notice. *Id.* at 389 n.6.

acts was not expressly nor inherently a lesser included offense of rape. In *United States v. McCracken*,¹⁰⁷ Sergeant McCracken was charged with, inter alia, rape.¹⁰⁸ During the trial, both parties agreed that indecent assault and indecent acts were lesser included offenses of rape. In regard to indecent acts, the military judge instructed the members that, in order to find the accused guilty of this lesser included offense, they had to find that “the accused committed a certain wrongful act with Corporal [KM] . . . by fondling her breasts and vagina.”¹⁰⁹ The members were not instructed on a theory that the acts were indecent because of their open and notorious nature.¹¹⁰ The court members found the accused guilty of, inter alia, indecent assault as a lesser included offense of rape.¹¹¹ On appeal, the NMCCA affirmed only so much of that finding of guilty as included the offense of open and notorious indecent acts.¹¹² However, the CAAF stated that an appellate court may not affirm a lesser included offense on a theory not presented to the trier of fact.¹¹³ It also cited to *Miller* as holding that a court of criminal appeals may not affirm an Article 134 offense based solely on the charging of an enumerated offense.¹¹⁴ In its short opinion, the CAAF concluded that, under the circumstances of this case, open and notorious indecent acts under Article 134 was not expressly nor inherently a lesser included offense of rape, and it reversed the conviction.¹¹⁵

The court left unresolved two related issues concerning Article 134 lesser included offenses. In a footnote, the opinion specifically “reserved for another day” the issues of whether an Article 134 offense that includes elements not in the greater offense may be affirmed either when the lesser included offense is listed in the *MCM* as a lesser included offense or when there is no objection to the lesser included offense at trial and the military judge instructs the members on it.¹¹⁶ Because these two situations are relatively common, it should not be long before that other day comes.

¹⁰⁷ 67 M.J. 467 (C.A.A.F. 2009).

¹⁰⁸ *Id.* at 467.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 468.

¹¹¹ *Id.* (Baker, J., concurring).

¹¹² *Id.* at 467–68.

¹¹³ *Id.* at 468.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 467–68.

¹¹⁶ *Id.* at 468 n.2. It appears that this footnote was added after Judge Baker wrote his concurring opinion, because Judge Baker stated that it may well be that the majority opinion currently resolves these issues and related issues through implication. *Id.* at 469 (Baker, J., concurring). If the majority opinion already included footnote 2, Judge Baker would not have written that.

This trilogy of cases about lesser included offenses offers many lessons for trial practitioners about instructions. During the trial, when determining the possible lesser included offenses that might be at issue in a case, each potential lesser included offense should be compared to the charged offense using the elements test. As seen in *Thompson*, even if closely related, if the lesser offense has an element not required for the greater offense, then it is not necessarily included in the greater offense. As seen in *Miller* and *McCracken*, this is true even if that element is the prejudicial to good order and discipline or service-discrediting element for clauses 1 or 2 of Article 134. The practice, since *Foster*, of disregarding that element during the elements test has been invalidated by the CAAF in *Miller*. Finally, as seen in *McCracken*, the offense of open and notorious indecent acts is not inherently a lesser included offense of rape.¹¹⁷ In a sexual assault case, if a trial counsel wants the members instructed on the offense of indecent acts under a theory that the indecency of the acts is based on their open and notorious nature, then it should be charged separately and the open and notorious nature of the acts should be explicitly alleged in the specification.

Defenses

Mistake of Fact as to Consent for Indecent Assault

In *United States v. DiPaola*,¹¹⁸ the CAAF addressed the frequently encountered issue of whether the affirmative defense of mistake of fact was raised by the evidence in a nonconsensual sexual offense case. Although the case involved indecent assault when it was still listed as an offense under Article 134,¹¹⁹ the opinion is still helpful for any case involving an affirmative defense. It discusses the legal standard for determining whether an affirmative defense was raised by the evidence, and it touches on the role that the defense theory of the case plays in that determination. A thorough description of the facts is necessary to understand the court’s opinion.

¹¹⁷ In future cases like *McCracken*, the circumstances will be different. For conduct occurring on or after 1 October 2007, the offense of indecent acts with another under Article 134 has been replaced in its entirety by the new offense of indecent act under Article 120. MCM, *supra* note 42, pt. IV, ¶ 45 analysis, at A23-15; see UCMJ art. 120(k) (2008); see National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3257 [hereinafter NDAA 2006] (codified at 10 U.S.C. § 920) (2006) (replacing or superseding certain sexual offenses under Article 120 and Article 134, as of 1 October 2007). The prejudicial to good order and discipline and service-discrediting elements of clauses 1 and 2 of Article 134 will no longer be an issue. Also, indecent act is now listed as an additional lesser included offense in the *MCM* for most of the offenses in Article 120. See MCM, *supra* note 42, pt. IV, ¶ 45e.

¹¹⁸ 67 M.J. 98 (C.A.A.F. 2008).

¹¹⁹ For conduct occurring on or after 1 October 2007, the offense of indecent assault under Article 134 has been replaced by new offenses in the new statutory scheme in Article 120. MCM, *supra* note 42, at A27-1; see NDAA 2006, *supra* note 117 (replacing or superseding certain sexual offenses under Article 120 and Article 134, as of 1 October 2007); see MCM, *supra* note 42, pt. IV, ¶ 45.

Culinary Specialist Third Class DiPaola and Petty Officer ED had a relationship that became sexual for several months, and then it ended because ED did not want to pursue it any further. Later that year, ED let DiPaola into her barracks room. He told her that he wanted to have sex with her, but she responded that she did not want to have sex. He kept saying that he wanted to have sex, and she kept saying “no.”¹²⁰ After consensual kissing, they moved to the bed. ED testified that she kissed him because she still had feelings for him. On the bed, she got on top of DiPaola and allowed him to remove her shirt and they continued kissing. DiPaola kissed her breasts and then started biting them. She told him not to bite them, and he stopped.¹²¹

DiPaola got on top of ED, grabbed her wrists, and held them on the bed above her head. He attempted to unzip her pants, but she got one hand loose and pulled up her zipper. He continued to say, “Let’s have sex,” and she kept saying “no.”¹²² He unsuccessfully begged her, and then he started to offer her marriage, children, and his car. She found that amusing, and they both laughed.¹²³

DiPaola rubbed his hand on ED’s crotch area over her pants.¹²⁴ He put her legs on his shoulders and acted like he was having sex with her. Because this position hurt, she pushed and kneed him.¹²⁵ DiPaola left the bed, exposed himself, and began to touch himself.¹²⁶ ED told him to stop, but he continued and several times asked her for oral sex. She said “no” and told him that if he came any closer she would “bite it off and spit it at him.”¹²⁷ DiPaola laughed. A few minutes later he stopped, and he said he could not believe that it took about an hour and a half of ED saying “no” for him to finally give up. He then left her room.¹²⁸ In a sworn statement to Naval Criminal Investigative Service, DiPaola admitted that he asked ED to have sex with him; she said, “No;” and then he tried to convince her to have sex until he understood that she was not going to change her mind.¹²⁹

Based on this incident, DiPaola was charged with indecent assault against ED, “by holding her down on her bed by her wrists, kissing her, fondling and biting her breasts, sitting and laying on top of her, touching her vaginal

area with his hand, attempting to remove her underwear, and rubbing his erect penis against her vaginal area.”¹³⁰ During the opening statement, the defense counsel talked about the relationship. The defense counsel stated that “there’s often a fine line between seduction and allegations of assault” and that “‘no’ doesn’t always mean ‘no’ in the course of a relationship.”¹³¹ ED was the only one to testify about what happened, because DiPaola exercised his right not to testify.¹³² During the closing argument, the defense counsel returned to the same theme.

[I]t’s even more complicated, because you have someone like [ED] saying yes, yes, yes, no once, yes, yes, yes. And therefore when the government makes the argument, “If you say no, that’s the end of it,” we all know that that’s not the case and that’s an oversimplification of all human behavior.¹³³

The defense counsel requested an instruction on mistake of fact regarding DiPaola’s belief that he had ED’s consent for the acts alleged in the specification, but the military judge declined to give the instruction.¹³⁴ The panel of officer and enlisted members found DiPaola guilty of indecent assault.¹³⁵

In its opinion, the CAAF mentioned many of the legal principles involved in determining whether a defense has been raised. The standard is that, if the record contains “some evidence” of each element of the defense to which the members of the court may attach credit if they so desire, the military judge must instruct on the affirmative defense.¹³⁶ The evidence that raises an affirmative defense can be presented by the defense, the prosecution, or the court-martial.¹³⁷ It is not necessary that the accused testify in order to get a mistake of fact instruction.¹³⁸ Also, “a military

¹²⁰ *Id.*

¹²¹ *DiPaola*, 67 M.J. at 99.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 99 n.2. The accused was also charged with another specification of indecent assault and two specifications of indecent exposure (one involving the exposure during this incident), under Article 134, and one specification of false official statement, under Article 107. He was acquitted of both specifications of indecent exposure and convicted of the remaining offenses. *Id.* at 99 n.1.

¹³¹ *Id.* at 101.

¹³² *Id.* at 99 n.3.

¹³³ *Id.* at 102.

¹³⁴ *Id.*

¹³⁵ *Id.* at 99.

¹³⁶ *Id.*; *United States v. Ferguson*, 15 M.J. 12, 17 (C.M.A. 1983). Also, when determining whether a defense has been raised, the military judge does not weigh the credibility of the evidence. *United States v. Brooks*, 25 M.J. 175, 178–79 (C.M.A. 1987); *United States v. Tulin*, 14 M.J. 695, 698–99 (N.M.C.M.R. 1982); MCM, *supra* note 42, R.C.M. 920(e) discussion.

¹³⁷ *DiPaola*, 67 M.J. at 100; *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998); *United States v. Rose*, 28 M.J. 132, 135–36 (C.M.A. 1989); MCM, *supra* note 42, R.C.M. 916(b) discussion.

¹³⁸ *DiPaola*, 67 M.J. at 100; *Jones*, 49 M.J. at 91.

judge's duty to instruct is not determined by the defense theory; he must instruct if the defense is raised."¹³⁹

The court had no difficulty in deciding that the evidence in this case reasonably raised the affirmative defense of mistake of fact. For indecent assault, a mistake of fact as to consent would require that the accused had an honest belief that the alleged victim consented and that belief must have been reasonable under all the circumstances.¹⁴⁰ The court found that this case did not present a clear dichotomy where the evidence raised and the parties disputed only the question of actual consent.¹⁴¹ "The conduct and conversations of the parties during the encounter, as informed by the 'mixed message' defense theme, provide 'some evidence' that could support an honest (subjective) and reasonable (objective) belief as to consent to some or all of the alleged acts."¹⁴² The court found that "the record reveals a 'mixed message' evidentiary situation which, when considered in conjunction with defense counsel's 'mixed message' theme in his opening and closing statements and his request of a mistake-of-fact instruction, comprises 'some evidence' of a mistake of fact that the panel could attach credit to if it so desired."¹⁴³ Therefore, the court concluded that it was error not to instruct the members on mistake of fact.¹⁴⁴ It also concluded that the error was not harmless beyond a reasonable doubt, and it reversed the conviction.¹⁴⁵

The opinion in *DiPaola* serves as a good reminder that the evidence needed to raise an affirmative defense can come from prosecution witnesses, and the accused does not have to testify for a mistake of fact defense to be raised. On a different point, as indicated in the above quotes, the CAAF considered the defense theory at trial a non-dispositive factor in determining whether the affirmative defense was raised, which the court supported with the following quote from *United States v. Hibbard*:¹⁴⁶ "The defense theory at trial and the nature of the evidence presented by the defense are factors that may be considered in determining whether the accused is entitled to a mistake of fact instruction"¹⁴⁷

¹³⁹ *DiPaola*, 67 M.J. at 101 n.6 (quoting *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995)).

¹⁴⁰ *Id.* at 101.

¹⁴¹ *Id.* A few cases where the evidence did present such a clear dichotomy are *United States v. Brown*, 43 M.J. 187 (C.A.A.F. 1995), *United States v. Willis*, 41 M.J. 435 (C.A.A.F. 1995), and *United States v. Peel*, 29 M.J. 235 (C.M.A. 1989).

¹⁴² *DiPaola*, 67 M.J. at 102.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 58 M.J. 71 (C.A.A.F. 2003).

¹⁴⁷ *DiPaola*, 67 M.J. at 100 (quoting *Hibbard*, 58 M.J. at 73). Although not included in the quotation in *DiPaola*, the remainder of the quoted sentence from *Hibbard* was ". . . but neither factor is dispositive." *Hibbard*, 58 M.J. at 73.

Although one might disagree with that proposition,¹⁴⁸ *Hibbard* and *DiPaola* permit consideration of the defense theory at trial as a factor in determining whether or not a defense has been raised. The court did not explain how it would factor in, either as a positive factor or a negative factor, to the standard of whether there is "some evidence" of every element of the defense to which the members may attach credit if they so desire. In the past, the defense theory at trial has been used to "confirm [the court's] own evaluation of the evidence"¹⁴⁹ and as context in which to view the record.¹⁵⁰ Use of the term "non-dispositive factor" seems to imply a more significant role than confirmation or context, but the exact role of this factor is still unclear.¹⁵¹

At the trial level, practitioners should still follow the appropriate legal standard but also take the cautious approach in close cases. First of all, they should scrutinize the evidence presented at trial for potential affirmative defenses. Without regard to the defense theory at trial, if there is some evidence of each element of a defense to which the members of the court may attach credit, then the military judge should give the instruction,¹⁵² unless the defense

¹⁴⁸ In *Hibbard*, the CAAF cited *United States v. Taylor*, 26 M.J. 127 (C.M.A. 1988), and *United States v. Jones*, 49 M.J. 85 (C.A.A.F. 1998), as supporting that proposition, but neither one supports it. In *Taylor*, when determining whether mistake of fact as to consent was raised in that rape case, the court stated that its scrutiny of the record did not uncover "some evidence" to which the fact finders might attach credit if they so desired. *Taylor*, 26 M.J. at 130. At the end of the opinion, the court stated, "Although the defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised by the evidence the utter absence of any hint of a mistake defense in any of the defense counsel's many sidebar discussions with the military judge or in his lengthy argument to the members on findings confirms our own evaluation of the evidence. *Id.* at 131 (citation omitted) (emphasis added). The court finished by saying that this supported the conclusion that the defense did not simply overlook the availability of the defense but rather recognized that it was not reasonably raised by the evidence presented at trial. *Id.* In *Jones*, when determining whether the affirmative defense of mistake of fact as to consent was raised for the offense of attempted rape, the court again focused on the evidence presented at trial. "Whether an instruction on a possible defense is warranted in a particular case depends upon the legal requirements of that defense and the evidence in the record." *Jones*, 49 M.J. at 90. The court found that there was no evidence whatsoever that the appellant actually believed the victim was consenting to sexual intercourse with him. *Id.* at 91. Although it mentioned a pretrial statement by the accused that there was no penetration because of resistance, the court did not discuss the defense theory or factor the defense theory into the equation for determining whether the defense was raised. *Id.* In *Hibbard*, the court increased the importance of the defense theory of the case when determining whether an affirmative defense has been raised. Unfortunately, it unnecessarily adds confusion to the standard.

¹⁴⁹ *Taylor*, 26 M.J. at 130.

¹⁵⁰ *DiPaola*, 67 M.J. at 102; *United States v. Peel*, 29 M.J. 235, 242 (C.M.A. 1989).

¹⁵¹ This case is not extremely helpful in understanding the role of the defense theory of the case, because, even without considering the defense theory of the case, the evidence clearly raised mistake of fact as to consent for the alleged misconduct.

¹⁵² The military judge has a sua sponte duty to instruct on affirmative defenses raised by the evidence. *DiPaola*, 67 M.J. at 100, *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995), *United States v. McMonagle*, 38

Conclusion

affirmatively waives it.¹⁵³ On the other hand, if it is clear that there is no evidence of one or more of the elements of an affirmative defense, then the military judge need not instruct on it, regardless of the defense theory at trial. However, if the defense theory at trial includes an affirmative defense and there is any doubt as to whether there is some evidence of one or more of the elements of the affirmative defense in the record, then the military judge should resolve it in favor of the accused and give the instruction.¹⁵⁴ The cautious approach is not an attempt to avoid a challenging decision. It is a prudent approach to avoid unnecessary appellate issues by merely giving an accurate instruction to the members and letting them apply the law to the facts.¹⁵⁵

As stated earlier, the issue in *DiPaola* is frequently encountered. The appellate courts have had plenty of opportunity to wrestle with the question of whether or not mistake of fact as to consent has been raised by the evidence in particular nonconsensual sexual offense cases. In 1995, in a footnote of a CAAF opinion, Judge Cox made some observations, including the following one:

In every case where consent is the theory of defense to a charge of rape, the military judge would be well-advised to either give the “honest and reasonable mistake” instruction or discuss on the record with counsel applicability of the defense. Absent this on-the-record consideration of the issue, appellate courts are left to “Monday morning quarterbacking,” a job we are ill-equipped to do. Otherwise, there would be few dissents in these cases.¹⁵⁶

Judge Cox was understandably frustrated, and his advice is still sound.

M.J. 53, 58 (C.M.A. 1993); MCM, *supra* note 42, R.C.M. 920(e)(3) discussion.

¹⁵³ The defense may affirmatively waive an instruction on an affirmative defense. *United States v. Gutierrez*, 64 M.J. 374, 376 (C.A.A.F. 2007).

¹⁵⁴ Any doubt as to whether the evidence is sufficient to raise a defense and to require an instruction should be resolved in favor of the accused. *Brown*, 43 M.J. at 189; *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981).

¹⁵⁵ See *United States v. Buckley*, 35 M.J. 262, 265 (C.M.A. 1992), *cert denied*, 507 U.S. 952 (1993) (Gierke, J., dissenting) (“[It is] the prerogative of the court members to decide, under proper instructions, what the truth is.”).

¹⁵⁶ *Brown*, 43 M.J. at 190 n.3.