

Substantive Crimes and Defenses
Lesser Included Offenses Update: *United States v. Jones*

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Article 79 of the Uniform Code of Military Justice (UCMJ) provides the basic rule for lesser included offenses (LIOs): “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.”¹ In April 2010, the Court of Appeals for the Armed Forces (CAAF) issued a landmark decision governing the interpretation of Article 79. In *United States v. Jones*, the CAAF returned to the basic “elements test” for determining which offenses are necessarily included in other offenses under the UCMJ.² While this fundamental shift appears to greatly simplify the doctrine, application of the holding generates significant questions that will challenge practitioners and military judges until subsequent decisions offer more clarification. The purpose of this note is to alert practitioners to this important decision and its implications for court-martial practice.

In *Jones*, the CAAF stated the “elements test” as follows:

Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.³

The basic source of this test is *United States v. Schmuck*, a 1989 Supreme Court case analyzing Federal Rule of Criminal Procedure (FRCP) 31(c), which, for a time, was substantially similar to the language of Article 79.⁴ In *Schmuck*, the Supreme Court held that, for FRCP 31(c), “one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is

to be given”⁵ In 1993, in *United States v. Teters*, the Court of Military Appeals (CMA) adopted this “elements test” for lesser included offenses under Article 79, UCMJ.⁶

About a year later, in *United States v. Foster*,⁷ the CMA found it necessary to soften this basic elements test when actually applying it to military offenses. First, the court had to account for those offenses in the *Manual for Courts-Martial (MCM)* listed under Article 134, which contains an element that the enumerated articles (Articles 80 through 133) do not: “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.”⁸ To ensure that listed Article 134 offenses would be “necessarily included” in the enumerated articles, the CMA held

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. Our rationale is simple. The enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles.⁹

The court then departed from a strict elements test even further, stating, “[D]ismissal or resurrection of charges based upon ‘lesser-included’ claims can only be resolved by lining up elements *realistically* and determining whether *each* element of the supposed ‘lesser’ offense is *rationally* derivative of one or more elements of the other offense—and *vice versa*.”¹⁰ A year later, the elements test was refined once again. In *United States v. Weymouth*, the CAAF adopted a pleadings-elements approach to LIOs, declaring, “[I]n the military, the *specification*, in combination with the statute, provides notice of the essential elements of the offense.”¹¹ For more than a decade, these three cases

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¹ UCMJ art. 79 (2008).

² 68 M.J. 465 (C.A.A.F. 2010).

³ *Id.* at 470.

⁴ 489 U.S. 705 (1989); *United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993).

⁵ *Schmuck*, 489 U.S. at 716.

⁶ *Teters*, 37 M.J. at 376.

⁷ 40 M.J. 140 (C.M.A. 1994).

⁸ UCMJ art. 134 (2008); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60(b)(2) (2008) [hereinafter MCM].

⁹ *Foster*, 40 M.J. at 143 (emphasis in original).

¹⁰ *Id.* at 146 (emphasis in original).

provided the fundamental principles for LIO doctrine in the military.

In 2008, with *United States v. Medina*,¹² the CAAF began tightening the military LIO doctrine, especially as it applies to Article 134 offenses.¹³ In *Jones*, the CAAF definitively declared, “We return to the elements test”¹⁴ In doing so, the court specifically overruled those portions of the opinions after *Teters* that adopted rules for LIOs that varied from the basic elements analysis, including *Foster* and *Weymouth*.¹⁵

In addition to returning to a strict elements test for LIOs, the *Jones* opinion announced another key principle for military practitioners, declaring that the lists of LIOs provided in the *MCM* are not binding on the courts.¹⁶ The offenses listed as LIOs in the *MCM* are necessarily included only if they satisfy the elements test.¹⁷ The court found that “Congress has not delegated to the President a general authority to determine whether an offense is necessarily included in the charged offense under Article 79, UCMJ.”¹⁸ The CAAF rejected the notion that the President has the power to make one offense an LIO of another by simply listing it as such in the *MCM*.¹⁹ Lesser included offenses are “determined with reference to the elements defined by Congress for the greater offense.”²⁰ As such, practitioners should not rely on the LIOs listed under each punitive article in Part IV of the *MCM*, but should use the list as a suggestion of a relationship and then apply the elements test to ensure that the lesser offense is indeed “necessarily included.”

The *Jones* opinion also provides three more key principles for military practitioners. First, it is now clear that offenses listed in the *MCM* under Article 134 are no longer necessarily included in the enumerated articles

(Articles 80 through 133, UCMJ).²¹ As described above, each listed offense contains an element that the enumerated articles do not: “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.”²² In *United States v. Miller*, decided in 2009, the CAAF specifically overruled the portion of *Foster* that held that this extra element was implied in the enumerated articles.²³ In *Jones*, the court clarified that it is the statutory language, not the pleadings, that makes one offense necessarily included in another.²⁴ As such, the Government cannot create an LIO relationship between an Article 134 offense and an enumerated article by simply adding language to the specification alleging that the conduct was also prejudicial to good order and discipline or service-discrediting.²⁵ The Government must plead the Article 134 offense separately in order to provide the requisite notice. Second, defense agreement or concession that an offense is an LIO does not waive the issue. Conviction of a lesser offense that does not meet the elements test triggers a plain error analysis by the appellate courts.²⁶ Third, practitioners should view with extreme caution any language in the *MCM* that appears to describe a rule for LIOs that varies from the elements test.²⁷ The *Jones* opinion makes clear that the elements test is the law, overruling some of the cited cases and suggesting that some of the *MCM* language has probably been obsolete since *Schmuck* and *Teters*.²⁸

²¹ *Id.* at 474 (Baker, J. dissenting).

²² UCMJ art. 134 (2008); *MCM*, *supra* note 8, pt. IV, ¶ 60(b)(2).

²³ 67 M.J. 385 (C.A.A.F. 2009).

²⁴ *Id.* at 471 (“[A]n LIO—the ‘subset’ ‘necessarily included’ in the greater offense—must be determined with reference to the elements *defined by Congress* for the greater offense.”) (emphasis added).

²⁵ This is different from Article 134 offenses where the Government *can* add clause 1 or 2 language to a clause 3 specification. In *Medina*, the CAAF held that clauses 1 and 2 are not necessarily included in clause 3 of Article 134. *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008). However, the court stated that clauses 1 and 2 are “alternative theories” under Article 134 and the Government could provide notice of this alternative theory through the drafting of this specification. *Id.* at 26–27.

²⁶ *United States v. Jones*, 68 M.J. 465, 467, 473 (C.A.A.F. 2010) (setting aside conviction for indecent acts despite defense agreement at trial that “as a general concept,” indecent acts was an LIO of rape under the state of the law at the time).

²⁷ See, e.g., *MCM*, *supra* note 8, pt. IV, ¶ 3b(1) (“A lesser offense is included in a charged offense when the specification contains allegations which either expressly *or by fair implication* put the accused on notice to be prepared to defend against it in addition to the offense specifically charged.”) (emphasis added); *id.* Analysis of Punitive Articles at 23-15 (“Rather than adopting a literal application of the elements test, the [*Foster*] Court stated that resolution of lesser-included claims ‘can only be resolved by *lining up elements realistically* and determining whether each element of the supposed ‘lesser’ offense is *rationally derivative* of one or more elements of the other offense—and vice versa.”) (quoting *United States v. Foster*, 40 M.J. 140, 143 (C.M.A. 1994)) (emphasis added).

¹¹ 43 M.J. 329, 333 (C.A.A.F. 1995) (emphasis in original).

¹² 66 M.J. 21 (C.A.A.F. 2008) (holding that clauses 1 and 2 of Article 134 are not necessarily included in clause 3).

¹³ See *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009) (overruling *Foster*, 40 M.J. 140, in part, which held, *inter alia*, that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense, and holding that Article 134 “is not an offense necessarily included under Article 79, UCMJ, of the enumerated articles”) (internal quotations omitted); *United States v. McCracken*, 67 M.J. 467, 468 (C.A.A.F. 2010).

¹⁴ *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

¹⁵ *Id.* at 472 (“To the extent any of our post-*Teters* cases have deviated from the elements test, they are overruled.”).

¹⁶ *Id.* at 471. For an example of an *MCM* listing of LIOs, see *MCM*, *supra* note 8, pt. IV, ¶ 45d (listing LIOs “based on internal cross-references provided in the statutory text of Article 120.”).

¹⁷ *Id.* (emphasis omitted).

¹⁸ *Id.* at 472.

¹⁹ *Id.* at 471.

Based on the principles described above, *Jones* will significantly impact the charging decision. In general, the Government wants a lesser offense available in case the evidence at trial fails to prove the greater offense beyond a reasonable doubt. An LIO relationship between offenses allows the Government to streamline the charge sheet: if the lesser offense is necessarily included, there is no need to charge the LIO separately. Accordingly, the discussion to R.C.M. 307(c)(4) counsels, “In no case should both an offense and a lesser included offense thereof be separately charged.”²⁹ If a lesser offense is not necessarily included, the Government must charge both the greater and the lesser offenses in order for the fact-finder to consider conviction for the lesser offense. This is generally referred to as “pleading in the alternative.”³⁰ The Government avoids issues concerning multiplicity or unreasonable multiplication of charges because the Government does not intend that the fact-finder convict the accused of both offenses.³¹ For example, after *Jones*, Communicating a Threat under Article 134³² is no longer an LIO of Extortion under Article 127.³³ In a case where the Government has probable cause to charge Extortion but wants to have Communicating a Threat available should the evidence fail to prove the specific intent element, the Government would have to charge both offenses. This charging strategy was suggested in *Foster*,

revitalized in *Medina*, and repeated in several lesser included offense cases since, including *Jones*.³⁴ Counsel are cautioned, however, against excessive use of this tactic. While briefly mentioned in the MCM, “pleading in the alternative” lacks a clear set of procedural rules.³⁵ As such, there is the potential for error in the findings instructions or in the entry of findings.³⁶ Second, pleading too many offenses in the alternative may confuse the fact-finder or create an appearance of overreaching. As such, counsel should limit pleading in the alternative to the most critical offenses in a particular case.

In addition to pleading in the alternative, the CAAF reminded practitioners of two other tools that can address incongruities between pleading and proof. Rule for Courts-Martial (RCM) 603(d) allows the Government, with the consent of the accused, to “amend[] the charge sheet in course of trial to allege a less serious or different offense.”³⁷ Also, under RCM 910, the accused may plead “not guilty to an offense as charged, but guilty of a named lesser included offense,” or guilty by exceptions or by exceptions and substitutions.³⁸

²⁸ *Jones*, 68 M.J. at 470 n.8 (“Although the commentary of the 1968 MCM and each one thereafter has included the vague ‘or by fair implication’ language, that language predates and was effectively if not formally superseded by *Schmuck* and *Teters*.”).

²⁹ MCM, *supra* note 8, R.C.M. 307(c)(4).

³⁰ *Jones*, 68 M.J. at 472.

³¹ This is distinguished from a situation where the Government charges the accused with multiple offenses for one criminal act and intends that the accused be punished for all of the charged offenses. Classic examples include larceny and forgery and rape and adultery. This charging strategy is controlled by multiplicity and unreasonable multiplication of charges.

³² See MCM, *supra* note 8, pt. IV, ¶ 110b. Communicating a threat requires proof of the following 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;
- (4) 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.

Id.

³³ See *id.* pt. IV, ¶ 53b. Extortion requires proof of the following elements:

- (1) That the accused communicated a certain threat to another;
- (2) That the accused intended to unlawfully obtain something of value, or any acquittance, advantage or immunity.

Id.

³⁴ See *United States v. Foster*, 40 M.J. 140, 143 (C.M.A. 1994) (“[I]t seems clear to us that sound practice would dictate that prosecutors plead not only the principal offense, but also any analogous Article 134 offenses as alternatives.”); *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008) (“[W]here a distinct offense is not inherently a lesser included offense, during the guilty plea inquiry the military judge or the charge sheet must make the accused aware of any alternative theory of guilt to which he is by implication pleading guilty.”); *United States v. Miller*, 67 M.J. 385, 389 n.6 (C.A.A.F. 2009) (“Our opinion in *Medina* also noted that when comparing the elements of two offenses reveals that one offense is not necessarily a lesser included offense of the other, the requirement of notice to an accused may be met if the charge sheet “make[s] the accused aware of any alternative theory of guilt.”) (quoting *Medina*, 66 M.J. at 27); *Jones*, 68 M.J. 465, 472–73 (“Nothing here prevented the Government from charging indecent acts in addition to rape—the government is always free to plead in the alternative.”); *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (“In some instances there may be a genuine question as to whether one offense as opposed to another is sustainable. In such a case, the prosecution may properly charge both offenses for exigencies of proof, a long accepted practice in military law.”) (citing *United States v. Villareal*, 52 M.J. 27, 31 (C.A.A.F. 1999); *United States v. Medley*, 33 M.J. 75, 76 (C.M.A. 1991); *United States v. Heyward*, 22 M.J. 35, 37 (C.M.A. 1986)).

³⁵ See MCM, *supra* note 8, R.C.M. 907(b)(3)(B).

³⁶ It is beyond the scope of this article to describe the varying types of findings instructions necessitated by a particular set of offenses pled in the alternative. However, for an example of favorable appellate treatment of a particular set of instructions, see *United States v. Moore*, 2001 WL 321906 (A.F. Ct. Crim. App. Mar. 22, 2001) (unpub.). See also *Foster*, 40 M.J. at 143 (“The court-martial would then be instructed as to the required elements of each offense and would be further admonished that the accused could not be convicted of both offenses. If he were convicted of the offense, the members would simply announce no findings as to the lesser offense, and it would be dismissed.”) (emphasis added).

³⁷ *Jones*, 68 M.J. at 473 (citing MCM, *supra* note 8, R.C.M. 60).

³⁸ *Id.* (quoting MCM, *supra* note 8, R.C.M. 910(a)).

Practitioners should also be aware that several important questions remain, including whether the concept of a “qualitative lesser included offense” still exists in the UCMJ. This is the type of lesser offense described by the following language in the *MCM*:

- (b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, housebreaking as a lesser included offense of burglary); or
- (c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).³⁹

The CAAF’s formulation of the elements test and the tenor of the opinion cast at least some doubt on the continued viability of this type of LIO in military practice because a lesser mens rea or a “legally less serious” element is technically a *different element*.⁴⁰ Whether the courts will find that a qualitatively lesser offense is necessarily included in a greater offense remains to be seen. However, it seems logical that an accused would be on notice that a lesser mens

rea is included in a greater mens rea or that a legally less serious element is included in a more serious element. Also, as a practical matter, eliminating this type of LIO would eliminate a substantial number of LIOs under the UCMJ. For example, wrongful appropriation would no longer be an LIO of larceny under Article 121 and involuntary manslaughter under Article 119 would no longer be an LIO of intentional murder under Article 118(2). Until the dust settles, trial counsel should rely on the wise employment of “pleading in the alternative” to ensure the charge sheet allows the fact-finder to consider lesser offenses that may not be necessarily included in the greater offense.

With *Jones*, the court has returned to the basic elements test for lesser included offenses. While the court has been slowly chipping away at the holdings of *Foster* and *Weymouth*, *Jones* is the case that clears away past LIO constructions, leaving the fundamental rules announced in *Schmuck* and *Teters*. Perhaps most significant is the court’s conclusions regarding the power of the President to “create” LIO relationships through the listings in the *MCM*. Many offenses traditionally understood to be LIOs of other offenses are not so anymore. Blind reliance on the listing of LIOs in the *MCM* and deviation from the elements test in determining lesser included offenses are fraught with peril, if not outright erroneous.

³⁹ *MCM*, *supra* note 8, pt. IV, ¶ 3(b)(1).

⁴⁰ For example, under Article 121, UCMJ, larceny requires, in general, the intent to *permanently* deprive another of the property, while wrongful appropriation requires that the accused only intend to deprive another of the property *temporarily*. *See id.* pt. IV, ¶ 46b(1) & (2).