

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.A. MAKSYM, L.T. BOOKER, D.O. HARRIS  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**PHILLIP J. APODACA  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100008  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 30 August 2010.

**Military Judge:** LtCol Stephen Keane, USMC.

**Convening Authority:** Commanding Officer, Regimental Combat Team 2, 1st Marine Division (FWD) - Afghanistan, Task Force Leatherneck, Afghanistan.

**Staff Judge Advocate's Recommendation:** Maj M.J. Kent, USMC.

**Addendum:** Capt K.T. Lyster, USMC.

**For Appellant:** LtCol Richard Belliss, USMCR.

**For Appellee:** LT Kevin Shea, JAGC, USN.

**13 September 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

HARRIS, Judge:

Pursuant to his pleas, a special court-martial composed of a military judge alone convicted the appellant of wrongful use and possession of hashish and misbehavior by a sentinel, in violation of Articles 112a and 113 of the Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 913. The military judge sentenced the appellant to confinement for nine months, forfeiture of \$892.00 pay per month for nine months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. Pursuant to a pretrial agreement, all

confinement in excess of six months was suspended for twelve months from the date of trial.

The case was originally submitted to the court on its merits. On 9 April 2011, this court specified the following issue:

DID THE MILITARY JUDGE ERR BY ACCEPTING THE APPELLANT'S PLEA OF GUILTY TO MISBEHAVIOR BY A SENTINEL, WHERE THE APPELLANT WAS IMPAIRED BY A SUBSTANCE OTHER THAN ALCOHOL AT THE TIME OF THE OFFENSE? COMPARE MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 ED.), PART IV, PARA. 35c(3) AND 38c(5), WITH MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ED.), PARA. 35c(6) AND 38c(5).

After carefully considering the record of trial and the briefs of counsel on the specified issue, we find the appellant's plea of guilty to Charge II (misbehavior by a sentinel) must be set aside, and we will provide appropriate relief in our decretal paragraph. The remaining findings and sentence, as modified, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **Facts**

The facts in this case are undisputed. The appellant was serving guard duty on board Camp Delaram II in Afghanistan. The various posts on the perimeter were manned by one U.S. Marine and one Afghan National Army (ANA) soldier, typically for eight-hour watch periods. While standing duty on 8 August 2010, the appellant bought a small amount of hashish from his ANA counterpart and smoked it. Almost immediately, the appellant felt strong physiological effects from the hashish and became concerned about his safety. He called the Commander of the Guard (COG) for assistance. The COG responded to the appellant's position shortly thereafter, and relieved the appellant of his duties. There was no indication that the appellant consumed any other intoxicant before assuming duty or while on post.

### **Analysis**

#### **A. Misbehavior of a Sentinel or Lookout**

Article 113, UCMJ provides as follows:

Any sentinel or lookout who is found drunk or sleeping upon his post or leaves it before being 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 at any other time, by such punishment other than death as a court-martial may direct.

10 U.S.C. § 913. Originally, the drafters of the Code intended the word "drunk" to encompass any type of intoxication, whether from alcohol or some other drug, sufficient to impair an individual's mental and physical faculties. See *United States v. Scranton*, 30 M.J. 322, 325 (C.M.A. 1990)(citation omitted). The 1969 version of the Manual for Courts-Martial also reflected this expansive definition of the word "drunk." See MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 ed.), Chapter XXVIII, ¶¶ 191 and 192.<sup>1</sup>

The current version of the Manual, however, employs a much narrower definition of "drunk." The section of the Manual addressing misbehavior of a sentinel now cross-references the definitions regarding Article 111, drunken or reckless operation of a vehicle. See MCM (2008 ed.), Part IV, ¶¶ 38c(5)<sup>2</sup> and 35c(6). This current definition sets forth two different types of intoxication. The term "drunk" refers only to intoxication by alcohol, while the term "impaired" refers to intoxication by any substance prohibited under Article 112a, UCMJ. See MCM, Part IV, ¶ 35c(6). Hashish, a form of marijuana, is one such substance encompassed by Article 112a. See generally *United States v. Alexander*, 63 M.J. 269, 270 (C.A.A.F. 2006); *United States v. McMahon*, 861 F.2d 8, 11 (1st Cir. 1988).

The appellant contends, and the Government concedes, that the appellant's plea of guilty to Article 113 is improvident. Government Brief of 2 Jun 2011 at 5. We agree. We will not speculate as to the reasons why the President chose to narrow the scope of Article 113 to exclude intoxicants other than alcohol, but the plain language in the current version of the Manual clearly manifests that intent. It is the President's prerogative to provide servicemembers with greater rights or protections in the Manual for Courts-Martial than might otherwise be constitutionally or statutorily required. See *United States v. Armstrong*, 54 M.J. 51, 54-55 (C.A.A.F. 2000). We also note that this discrepancy between the prior and current versions of the Manual was identified by our Air Force brethren fifteen years ago, with an express invitation to Congress and the President to alter the language at issue. See *United States v. Augustini*, 1996 CCA LEXIS 381 (A.F.Ct.Crim.App. 10 Dec 1996). The language has remained unchanged since that time.

As both appellate counsel correctly point out, the current version of the Military Judges' Benchbook does not accurately

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<sup>1</sup> The specified issue in the Court's Order of 9 April 11 contained an error in its reference to the 1969 Manual provision. We express our appreciation to appellate counsel for noting that mistake and correctly citing the provision at issue.

<sup>2</sup> We note that this provision in the current Manual actually cross-references the definition of "aircraft," rather than "drunk," but we assume that is merely an oversight. Compare MCM, Part IV, ¶35c(3) and ¶35c(6). The court would strongly recommend the correction of that error when the Manual is next amended.

reflect the Manual's distinction between "drunk" and "impaired." See Military Judge's Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 3-38-1(d)(Ch-2, 1 Jul 2003).<sup>3</sup> Instead, that publication uses the terms interchangeably, with both drugs and alcohol referenced in the definition. *Id.* It appears that the military judge in this case used that Benchbook definition in advising the appellant of the elements of the offense. Record at 37.<sup>4</sup> Unless the text of Article 113 or the corresponding provisions in the Manual for Courts-Martial are broadened to address conduct such as that committed by the appellant, we advise military judges to proceed with great caution when using the Benchbook paragraphs regarding Articles 112 and 113. To the extent those paragraphs are inconsistent with the Manual for Courts-Martial, they should not be employed for guilty plea advisories or instructions to members. We likewise urge the drafters of that Army publication, which is used routinely by all branches of the armed forces, to correct this discrepancy.

## B. Dereliction of Duty

The Government, while conceding the improvidence of the appellant's plea, asks this court to approve a finding of guilty to the lesser included offense of dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892. Whether an offense is a lesser included offense is a question of law we review *de novo*. See *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009).

"The Constitution requires that an accused be on notice as to the offense that must be defended against, and that only lesser included offenses that meet these notice requirements may be affirmed by an appellate court." *Id.* at 388 (citing *Jackson v. Virginia*, 443 U.S. 307, 314 (1979)). This principle is likewise embodied in the Uniform Code of Military Justice, which states that an accused "may be found guilty of an offense necessarily included in the offense charged[.]" Art. 79, UCMJ; *Miller*, 67 M.J. at 388. The Manual for Courts-Martial further provides that "[a] lesser included 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." MCM, Part IV, para. 3b(1); *Miller*, 68 M.J. at 388.

To determine whether one offense is a lesser included offense of the charged offense, we must apply the "elements test". See *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011)(citing *United*

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<sup>3</sup> It appears that the paragraph defining "drunk" for purposes of Article 112 (Drunk on Duty) is similarly inconsistent with the language in the Manual. See Benchbook at ¶ 3-36-1.

<sup>4</sup> The military judge also appeared to use a portion of the definitional language for a charge of sleeping on post, which was irrelevant to the appellant's situation. No error has been asserted on that basis, and our resolution of the specified issue negates any possibility of prejudice as a result.

*States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010)). Under the elements test, we determine whether the elements of the lesser offense are a "subset" of the elements of the greater offense. *Id.* If the lesser offense requires an element not required for the greater offense, then the former is not a proper lesser included offense of the latter. *Id.* (quoting *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010)).

The U.S. Court of Appeals for the Armed Forces (CAAF) has issued several decisions in recent years on the subject of lesser included offenses. None of those decisions addressed the relationship between Articles 92 and 113 at issue here, but we will apply their analytical framework to these two articles. We also note that the Manual for Courts-Martial specifically lists dereliction of duty as a lesser included offense to all three varieties of Article 113 offenses. See MCM, Part IV, ¶ 38d. Although enumeration in the Manual is not dispositive of whether an offense is a lesser included offense, it is persuasive authority to be considered in light of applicable court precedent. See *United States v. Miller*, 67 M.J. 87, 89 (C.A.A.F. 2008).

Under the Government's theory of the case, the elements of the Article 113 offense (misbehavior by a sentinel or lookout) are as follows:

1. That the accused was posted or on post as a sentinel or lookout;
2. That the accused was found drunk while on post; and
3. That the offense was committed while the accused was receiving special pay under 37 U.S.C. § 310.

MCM, Part IV, ¶ 38b.

The elements of the proposed Article 92 offense (dereliction of duty) are as follows:

1. That the accused had certain duties;
2. That the accused knew or reasonably should have known of the duties; and
3. That the accused was willfully derelict in the performance of those duties.<sup>5</sup>

MCM, Part IV, Para. 16b(3).

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<sup>5</sup> The Government did not expressly state under which theory of dereliction of duty it advanced: willfulness, negligence, or culpable inefficiency. As the alleged act of consuming a controlled substance was intentional, we analyze the elements of willful dereliction of duty.

Applying the elements test, the first and third elements of dereliction of duty are necessarily included in the charged offense. The "certain duties" required for the Article 92 offense are the "posted or on post as a sentinel or lookout" under Article 113. Similarly, we have no difficulty in holding as a matter of law that an act of voluntary intoxication constitutes but one specific example of how to be willfully derelict in the performance of those duties. The respective elements of the greater and lesser offenses do not need to utilize identical language in order to provide adequate notice to the accused. See *Bonner*, 70 M.J. at 2 (quoting *Alston*, 69 M.J. at 216.).

The second element of dereliction of duty, however, is a closer call. There is no explicit "knowledge" requirement contained within Article 113's elements. CAAF has repudiated the concept of implied elements in its recent decisions. See *United States v. McMurrin*, 70 M.J. 15, 18 (C.A.A.F. 2011); *Jones*, 68 M.J. at 470; *Miller*, 67 M.J. at 388.<sup>6</sup> Nonetheless, we are convinced that dereliction of duty is a proper lesser included offense of misbehavior by a sentinel for several reasons.

First, we note that the knowledge element listed above is contained within the President's explanation of the offense, rather than in the text of the Code itself. Cf. *Bonner*, 70 M.J. at 3. Article 92 merely states that "[a]ny person subject to this chapter who . . . is derelict in the performance of his duties; shall be punished as a court-martial may direct." Similarly, Article 113's text provides that "[a]ny sentinel or look-out who is found drunk . . . shall be punished . . . as a court-martial may direct." Thus, the "statutory elements" are in no way inconsistent with each other. Cf. *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011); *Alston*, 69 M.J. at 216. Instead, we find Article 113 to be a more specific type of dereliction of duty, with the focus on a particular duty and a particular conduct by which the accused fails to carry out that duty.

Second, the Manual provisions explaining the two articles make clear that knowledge of the assigned duties is required for both offenses. The explanation of "on post" provides:

A sentinel or lookout becomes "on post" after having been given a lawful order to go "on post" . . . being formally or informally posted. . . . It is sufficient, for example, if the sentinel or lookout has taken the post in accordance with proper instruction, whether or not formally given.

MCM, Part IV, Para. 38c(3). This language is mirrored by the explanation of knowledge for purposes of a dereliction of duty charge:

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<sup>6</sup> CAAF candidly admitted that it had "drifted significantly" from the elements test in the past, and overruled some of its earlier decisions in setting its current course. See *Jones*, 68 M.J. at 470.

Actual knowledge of duties may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating manuals, customs of the service . . . or similar evidence.

MCM, Part IV, Para. 16c(3)(b). Comparing these two provisions, we find that proper knowledge by the appellant that he was "on post" or serving as a sentinel is the functional equivalent of the knowledge required for a dereliction of duty charge.

Finally, we note that much of CAAF's recent case law has focused on lesser included offenses within Article 134, UCMJ. See *McMurrin*, 70 M.J. at 17-18, and cases cited therein. As that court held in *Miller*, a line of prior decisions had made the "prejudice to good order and discipline" and "of a nature to bring discredit upon the armed forces" implicit elements in every enumerated offense. 67 M.J. at 389. Those concerns expressed in *Miller* and *McMurrin* are not present here. We find Articles 113 and 92 to be more analogous to the situations in *Bonner*, 70 M.J. at 3 (holding assault consummated by a battery is a lesser included offense of wrongful sexual contact) and *Arriaga*, 70 M.J. at 55 (holding housebreaking is a lesser included offense of burglary). As CAAF held in *Arriaga*, "it is impossible to prove a burglary without also proving a housebreaking." *Id.* We likewise find it would be impossible to prove that a lookout was drunk on post without also proving that the member had been derelict in the performance of his duties. Therefore, we hold that dereliction of duty is a lesser included offense of misbehavior of a sentinel or lookout.

### C. Unreasonable Multiplication of Charges

That is not the end of our inquiry, however. The appellant contends that affirming a conviction on the lesser included offense of dereliction of duty would constitute an unreasonable multiplication of charges with Specification 2 under Charge I, alleging wrongful use of hashish while on duty as a sentinel or lookout.<sup>7</sup> We agree.

To determine whether there has been an unreasonable multiplication of charges, we consider five factors: (1) did the appellant object at trial; (2) are the charges aimed at distinctly separate criminal acts; (3) do the charges misrepresent or exaggerate the appellant's criminality; (4) do the charges unreasonably increase the appellant's punitive exposure; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Tovar*, 63 M.J. 637, 642-43 (N.M.Ct.Crim.App. 2006)(citing *United*

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<sup>7</sup> Although not raised as error initially, the argument would appear to apply equally to the greater offense under Article 113.

*States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition)).

We also consider RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL (2008 ed.), which provides the following guidance: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." We will grant appropriate relief if we find that the aggregate of charges is so extreme or unreasonable as to necessitate the invocation of our Article 66(c), UCMJ, authority. *See Tovar*, 63 M.J. at 643.

The appellant pled guilty to wrongful use of hashish under Article 112a, UCMJ. Of particular note here, however, is the sentence enhancement language included in that specification, "while on duty as a sentinel or lookout." Charge Sheet. This language is not mere surplusage, but authorizes a significant increase--five additional years -- to the maximum sentence for any offense under that article. *See* MCM, Part IV, ¶ 37e(2)(b). When such an aggravating factor is included in a specification, it, like an element of the offense must be proven beyond any reasonable doubt. MCM, Part IV, Para. 37b(7)(b).

Applying the non-exclusive *Quiroz* factors and the guidance provided by R.C.M. 307, we conclude that:

1. The appellant did not object at trial to being charged with both offenses;
2. The charges, as pled, are not aimed at distinctly separate criminal acts, because dereliction of duty was necessarily accomplished by use of hashish while serving as a sentinel or lookout;
3. The charges did misrepresent or exaggerate the appellant's criminality, because the record is clear that the wrongful use alleged in Specification 2 under Charge I is the identical conduct alleged as dereliction of duty;
4. The charges did not unreasonably increase the appellant's punitive exposure at his special court-martial because the jurisdictional maximum remained the maximum authorized punishment; and,
5. Charging the appellant with both offenses was not overreaching or abuse in the drafting of the charges and specifications at the time of charging, as it allowed for contingencies of proof.

Weighing these factors in light of the entire record, we conclude that finding the appellant guilty of both wrongful use of hashish while serving as a lookout and dereliction of his duties as a lookout by using hashish constitutes an unreasonable multiplication of charges. We will take remedial action in our decretal paragraph.

## Conclusion

The findings of guilty to Charge II and its sole specification are set aside, and that charge and specification are dismissed. In accordance with *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), and *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), we have reassessed the sentence and find no further relief is warranted. Accordingly, we affirm the remaining findings and the adjudged sentence, as approved by the convening authority.

Senior Judge MAKSYM concurs.

BOOKER, Senior Judge (concurring in the result):

Because the majority sets aside the conviction for misbehavior of a sentinel on multiplicity grounds, I concur in the resolution of this case. While I agree with the sentiments expressed in that portion of the majority opinion regarding the relationship between misbehavior of a sentinel and dereliction in the performance of duty, the state of the law regarding principal offenses and included offenses, as I understand it, does not support the majority's decision to affirm a finding of dereliction on this record, and I respectfully distance myself from that conclusion. I am especially concerned because the majority's discussion suggests exactly the sort of appellate "verdict substitution" criticized in *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2008), and I fear expansion of the *Miller* doctrine on further review.

For the Court

R.H. TROIDL  
Clerk of Court

Senior Judge BOOKER participated in the decision of this case prior to detaching from the court.