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DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2016–OS–0110]

Manual for Courts-Martial; Publication of Supplementary Materials

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense.

ACTION: Publication of Discussion (Supplementary Materials) accompanying the Manual for Courts-Martial, United States (2012 ed.) (MCM).

SUMMARY: The JSC hereby publishes Supplementary Materials accompanying the MCM as amended by Executive Orders 13643, 13669, 13696, 13730, and 13740. These changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, “Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters and Testimony,” June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency. These Supplementary Materials have been approved by the JSC and the General Counsel of the Department of Defense, and shall be applied in conjunction with the rule with which they are associated. The Discussion is effective insofar as the Rules it supplements are effective, but may not be applied earlier than the date of publication in the Federal Register.

DATES: This Discussion is effective as of **[INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Major Harlye S.M. Carlton, USMC, (703) 963-9299 or harlye.carlton@usmc.mil. The JSC website is located at: <http://jsc.defense.gov>.

SUPPLEMENTARY INFORMATION:

The Discussion to Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Discussion immediately after paragraph 60.c.(6)(a) is amended to read as follows:

“Clauses 1 and 2 are theories of liability that must be expressly alleged in a specification so that the accused will be given notice as to which clause or clauses to defend against. The words “to the prejudice of good order and discipline in the armed forces” encompass both paragraph c.(2)(a), prejudice to good order and discipline, and paragraph c.(2)(b), breach of custom of the Service. A generic sample specification is provided below:

“In that _____, (personal jurisdiction data), did (at/on board location), on or about _____ 20____, (commit elements of Article 134 clause 1 or 2 offense), and that said conduct (was to the prejudice of good order and discipline in the armed forces) (and) (was of a nature to bring discredit upon the armed forces).”

If clauses 1 and 2 are alleged together in the terminal element, the word “and” should be used to separate them. Any clause not proven beyond a reasonable doubt should be excepted from the specification at findings. *See* R.C.M. 918(a)(1). *See also* Appendix 23 of this Manual, Art. 79. Although using the conjunctive “and” to connect the two theories of liability is recommended, a specification connecting the two theories with the disjunctive “or” is sufficient to provide the accused reasonable notice of the charge against him. *See* Appendix 23 of this Manual, Art. 134.

Lesser included offenses are defined and explained under Article 79; however, in 2010, the Court of Appeals for the Armed Forces examined Article 79 and clarified the

legal test for lesser included offenses. *See United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010). Under *Jones*, an offense under Article 79 is “necessarily included” in the offense charged only if the elements of the lesser offense are a subset of the elements of the greater offense alleged. 68 M.J. at 472; *see also* discussion following paragraph 3b(1)(c) in this part and the related analysis in Appendix 23 of this Manual. Practitioners should carefully consider lesser included offenses using the elements test in conformity with *Jones*. *See* paragraph 3b(4) in Appendix 23 of this Manual. If it is uncertain whether an Article 134 offense is included within a charged offense, the government may plead in the alternative or, with the consent of the accused, the government may amend the charge sheet. *Jones*, 68 M.J. at 472-73 (referring to R.C.M. 603(d) for amending a charge sheet).”

Dated: December 2, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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