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Military Law - Non-Violent Mutiny - Concert of Intent and Concert of Action Equally Essential Elements

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MILITARY LAW—NON-VIOLENT MUTINY—CONCERT OF INTENT AND CONCERT OF ACTION EQUALLY ESSENTIAL ELEMENTS

On October 11, 1968, Richard Bunch and three other prisoners at the Presidio Stockade were sent out on a shotgun work detail.[1] After twice asking the guard what would happen if he ran away, each time getting a vague response, Bunch broke from the group, turning back momentarily to give the guard "the finger." The other prisoners began to laugh, but, to their horror, they were cut short by the report of the guard's shotgun; Bunch was dead. No warning had been given.

The prisoners in the stockade were terribly shaken by the death of Bunch. The next day, some of the prisoners, not including all of the defendents, caused a disturbance, smashing windows and throwing tooth powder cans. That afternoon, the prisoners, frought with rumor and dazed with incredulous fear, showed up at formation wearing black armbands, which were ripped off by the Provost Sergeant. At the end of this formation, the prisoners asked the stockade commander, Captain Lamont, if they could hold a memorial service, and permission was given.

The memorial service was held the next day, and the prisoners called it a joke. The officers sat in front, laughing, and the chaplain who conducted the service intimated that the shooting was justifiable. This upset the prisoners even more. On Sunday night, the prisoners met and discussed their many grievances: prejudice by the guards, complaints about food, shotgun details, harassment, denial of constitutional rights, the right to petition grievances, confinement without charge, sanitary and medical deficiencies—especially overcrowding[2]—and correction of violation of army regulations. The result was a decision to sit down on the lawn and demand to see the commanders of the stockade and post, and present their grievances.

On Monday morning, October 14, 1968, a work-call formation was held outside the main stockade building. As the first name was called, a

1. A shotgun detail is one in which prisoners are assigned work outside the stockade area and are guarded by one soldier armed with a shotgun. Brief for Appellant at 17, United States v. Rowland, — C.M.R. — (ACMR 30 June 1970) (CM 421750).

2. Standard capacity of the stockade was eighty-eight. At the time of the alleged mutiny it was one-hundred forty. *Id.* at 13.

group of twenty-eight[3] prisoners walked over and sat on the grass in front of the building. They sang and chanted freedom songs, and asked to see the commanding officers, a lawyer, and the press.

Captain Lamont arrived shortly thereafter, apprised himself of the situation, and called in military police support, fire trucks, and a photographer. A company of military police soon arrived, armed with pistols and nightsticks, and these were joined by the fire trucks and the photographer. Captain Lamont had Captain Morris position himself on the opposite side of the group to insure proof that the defendants could hear any order which was given. Captain Lamont then attempted to read the mutiny article, but was interrupted by prisoner Pawlowski, who read a list of grievances. The Captain tried to drown him out, but was in turn drowned out by the shouting prisoners.

Captain Morris was unable to hear the order, and thereafter Captain Lamont went outside the stockade. Using a loudspeaker mounted in a military police vehicle, he again read the mutiny article, followed by a direct order to get up and go inside the building. This time Captain Morris was able to hear the order, but the men kept on singing.

Immediately after the order was given, military police moved in and began to carry the prisoners to the building. No resistance was offered by the group, and several of them walked into the building on their own after being tapped on the shoulder by the policemen. The demonstration had lasted less than an hour.

All of the protesters were subsequently charged with mutiny. However, many improvements were made in stockade conditions, and the prisoner population was reduced within a short time after the incident.[4]

Twenty-seven participants in the incident were tried by general court-martial convened by Headquarters, Sixth United States Army.[5] All of the

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3. Twenty-four of those tried appealed. One prisoner left the group because he feared getting wet when the fire trucks appeared. *Id.* at 23.

4. *Id.* The Appellant's Brief in *Rowland* contains a more detailed fact situation than any of the opinions in the Presidio cases.

5. The mutiny incident came to the Court of Military review in seven cases: United States v. Rowland, *supra* note 1; United States v. Dodd, — C.M.R. — (ACMR 29 June 1970) (CM 421117); United States v. Murphy, — C.M.R. — (ACMR 26 June 1970) (CM 421558); United States v. Colip, — C.M.R. — (ACMR 17 June 1970) (CM 420896); United States v. Osczepinski, — C.M.R. — (ACMR 17 June 1970) (CM 420444); United States v. Sood, — C.M.R. — (ACMR 16 June 1970) (CM 420276); and United States v. Sales, — C.M.R. — (ACMR 22 May 1970) (CM 421750). *Sales* was tried along with *Rowland* but was severed on appeal to settle the question of sanity. He was found not mentally responsible for the offense.

As a parenthetical remark, the issue of sanity was raised as to all defendants, but

accused pleaded not guilty to the charge of mutiny, but a finding of guilty was entered against all defendants.[6] The accused were sentenced to dishonorable discharges, forfeitures of pay and allowances, and terms of confinement at hard labor. The convening authority reduced the sentence of one prisoner by reinstating pay,[7] and the Judge Advocate General of the Army, invoking his statutory authority under 10 U.S.C. § 874 (1964), also reduced some sentences by shortening the period of confinement.[8] The cases came to the Court of Military Review on automatic appellate review under Article 66, Uniform Code of Military Justice (hereinafter referred to as U.C.M.J.), 10 U.S.C. § 866 (1964). The Court of Military Review examined the record of the court-martial and reversed as to mutiny in all cases.[9] *United States v. Sood*, ____C.M.R.____ (ACMR 16 June 1970) (CM 420276).

United States v. Sood takes into consideration the elements of the non-violent mutiny and defines them in the first truly non-violent factual situation presented to the military courts.[10] This case note will be directed to the purpose of lending an understanding of the criminal offense of mutiny, with specific attention to non-violent mutiny and its requisite intent.

In order to understand the recent developments in the law of mutiny fully, it is necessary to explain the elements of the offense, with reference to there historical development. The basic elements of mutiny are three: 1.) the intent to usurp or override lawful military authority; 2.) the violent act or disturbance; or 3.) the non-violent occurrence.[11] Intent must always be present with one or both of the latter two elements.

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found only in *Sales*. The Brief for Appellant in *Rowland* points out that of the thirteen defendants tried in that case, only one had finished high school, and all were suffering from mental disorders. Almost all had come from broken homes, and most were high school drop-outs. They truly were a sad lot of people. Several attempted suicide after the court-martial, one successfully. Brief for Appellant, *supra* note 1, at 3-13, 16.

For a rather biased analysis *see* GARDNER, THE UNLAWFUL CONCERT (1970). For a critique of that volume *see* Spak, Book Review, 19 DEPAUL L. REV. 640 (1970).

6. Defendant Seals was acquitted of the mutiny charge but found guilty of the lesser included offense of willful disobedience in violation of UNIFORM CODE OF MILITARY JUSTICE art. 90, 10 U.S.C. § 890 (1964). United States v. Rowland, *supra* note 1.

7. United States v. Sood, *supra* note 5.

8. United States v. Sood, *supra* note 5; United States v. Osczepinski, *supra* note 5; United States v. Dodd, *supra* note 5; and United States v. Colip, *supra* note 5.

9. United States v. Rowland, *supra* note 1; United States v. Dodd, *supra* note 5; United States v. Murphy, *supra* note 5; United States v. Colip, *supra* note 5; United States v. Osczepinski, *supra* note 5; United States v. Sood, *supra* note 5; United States v. Sales, *supra* note 5.

10. United States v. Sood, *supra* note 5.

11. U.C.M.J. art. 94, 10 U.S.C. § 894 (1964).

Although most people, tainted by an overdose of late-late television movies, think of mutiny as an act committed by avarice-crazed pirates or desperate sailors, mutiny has long been proscribed as a criminal offense for forces on land.[12] As far back as the days of the Crusades, there was written law forbidding mutiny.[13] In his Articles of War of 1385, King Richard II forbade mutiny, and set the punishment for this offense as the loss of the best horse, if committed by mounted troops, and if committed by foot soldiers, the loss of the left ear.[14] It is obvious from this that riding was safer. Articles fourteen and fifteen of the Prince Rupert Code of 1673 forbade mutiny, and authorized the death penalty, or any other penalty which a general court-maritial might authorize for the commission of the offense.[15] The Prince Rupert Code was reiterated in the Articles of War of James II in 1688. Once again, the rules for governing the King's Army forbade mutiny and authorized the death penalty.[16] Undoubtedly prompted by fear of counter-movements to the Glorious Revolution, the first statutory act relating solely to mutiny was enacted in 1689.[17] The act provided authorization for the death penalty upon conviction of mutiny, but only upon the vote of nine out of thirteen members of the court.[18] The less-than-unanimous verdict requirement may have stemmed from fear of loyalties to the deposed Catholic King, since the mutiny articles included such things as disrespect to the Crown.[19] For many years thereafter, the mutiny laws were renewed on an almost annual basis. At the time of the Revolutionary War, the British mutiny law was contained in section II of the Articles of War.[20] Included in this section were the offenses of traitorous words against the King and disrespect toward officers. These were punishable by such penalties as a court-martial might decide. Also under the scope of this section were mutiny, failure to supress mutiny, and striking a superior officer. The penalty for these latter three included death.[21]

Having been raised as British subjects, and in many instances having served in British armies, the American colonists were versed in the laws governing the English military. Thus, when the first colonial armies were organized, and were in need of rules to govern the conduct of troops, they

12. WINTHROP, MILITARY LAW AND PRECEDENTS 905 (2d ed. 1920).
13. *Id.*
14. *Id.*
15. DAVIS, MILITARY LAW 570 (3d ed. 1915).
16. WINTHROP, *supra* note 12, at 921.
17. British Mutiny Act of 1689, 1 W. & M. c.5; WINTHROP, *supra* note 12, at 929.
18. WINTHROP, *supra* note 12, at 929.
19. WINTHROP, *supra* note 12, at 929.
20. WINTHROP, *supra* note 12, at 932.
21. WINTHROP, *supra* note 12, at 932.

logically adopted the familiar British articles, with necessary modifications.[22] Additions to the American Articles of War were made in November of 1775,[23] and were then repealed on September 30, 1776.[24] Further modifications were made on April 4, 1777,[25] May 31, 1786,[26] and again on September 29, 1789.[27] In 1806, Congress reenacted the Articles as statute law.[28] The Articles of War for the Army were again changed in late 1873[29] and finally in 1920.[30] The 1920 Articles remained in effect, as amended, until the enactment of the U.C.M.J. in 1950.[31]

Article 94(a)(1) of the U.C.M.J. is the current mutiny article.[32] It is a major change from prior mutiny law in that it defines the crime specifically. Article 94(a)(1) states:

> Any person subject to this code who with intent to usurp or override military authority refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or distrubance is guilty of mutiny. . . .[33]

This represents a major change over prior mutiny laws, which rendered mutiny a crime punishable by death without bothering to define it.[34] It is clear by the definitive terms of Article 94 that mutiny under the U.C.M.J. has three essential elements: intent, coupled with either or both of a refusal to obey orders or to do one's duty and violence or disturbance.

Intent is the most essential element of mutiny. The necessary intent must be an intent to usurp or override lawful military authority.[35] The early writers did not consider intent, as such, to be the paramount element of mutiny. Lieutenant O'Brien considered mutiny to be a crime "completed by a combined or simultaneous resistance, whether active or passive, to lawful military authority."[36] Although the elements of violence or passive refusal are present, no intent is mentioned. Nor is Lieutenant O'Brien unsupported in his views. General Davis, professor of military law at West Point, described mutiny as ". . . a revolt against, or in forcible

22. DAVIS, *supra* note 15, at 342.
23. DAVIS, *supra* note 15, at 343.
24. DAVIS, *supra* note 15, at 343.
25. DAVIS, *supra* note 15, at 343.
26. DAVIS, *supra* note 15, at 343.
27. DAVIS, *supra* note 15, at 343.
28. Act of April 10, 1806, ch. 20, tit. XIV, 2 Stat. 359.
29. Act of December 1, 1873, ch. 5, tit. XIV, 18 Stat. 337.
30. Act of June 4, 1920, ch. 2, § 1, 41 Stat. 787.
31. U.C.M.J. arts. 1-140, 10 U.S.C. §§ 801-940 (1964).
32. U.C.M.J. art. 94(a)(1), 10 U.S.C. § 894(a)(1) (1964).
33. U.C.M.J. art. 94(a)(1), 10 U.S.C. § 894(a)(1) (1964).
34. *See, e.g.*, Act of June 4, 1920, ch. 2, § 3, 41 Stat. 801.
35. U.C.M.J. art. 94, 10 U.S.C. § 894 (1964); MANUAL FOR COURTS-MARTIAL ¶ 173(a) (1968).
36. O'BRIEN, TREATISE ON AMERICAN MILITARY LAW 70 (1846).

resistance or opposition to, constituted military authority."[37] However, other writers observed mutiny as a crime characterized and differentiated from others by its intent. Most notable of these was Colonel Winthrop, who wrote of mutiny:

> It is the intent which distinguishes it from the other offenses with which, to the embarrassment of the student, it has been confused both in treatise and General Orders.[38]

Colonel Winthrop, and later Colonel Dudley, pointed out that mutiny, especially with regard to the element of intent, was not defined in the Articles of War: Such definition came from the courts.[39]

Mutiny on ships of the merchant fleet was a federal court matter, and the courts-martial most probably looked to federal cases to determine whether mutiny had occurred as charged. The Supreme Court had defined mutiny in terms of maritime law in the case of *United States v. Kelly*.[40] In that case the Court stated:

> The offence [*sic*] consists in the endeavour [*sic*] of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, *with intent to remove him from his command,* or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.[41]

Thereafter, the federal district court in *Thompson v. The Stacey Clarke*[42] further defined mutiny as

> attempts to usurp the command from the master, or to deprive him of it for any purpose by violence or in resisting him in the free and lawful exercise of his authority; the overthrowing of the legal authority of the master, with an intent to remove him against his will.[43]

Note that both statements define mutiny in terms of violence or resistance to lawful authority, coupled with the intent to remove the master from his position of authority. This is quite similar to the definition of mutiny contained in the U.C.M.J., especially as to the element of intent.

In order to establish that a mutiny has been committed, it is necessary to prove that the intent to usurp or override lawful military authority existed at the time the accused committed the act of violence or resistance.[44]

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37. DAVIS, *supra* note 15, at 392.
38. WINTHROP, *supra* note 12, at 578.
39. DUDLEY, MILITARY LAW 348 (1907); *supra* note 12, at 578.
40. 24 U.S. (11 Wheat.) 184 (1826).
41. *Id.* at 185 (emphasis added).
42. 54 F. Supp. 533 (S.D. Ala. 1892).
43. *Id.* at 534. *Accord,* Hamilton v. United States, 268 F. 15 (4th Cir.), *cert. denied,* 254 U.S. 645 (1920). *Compare with* United States v. Huff, 13 F. Supp. 630 (W.D. Tenn. 1882) and United States v. Bladen, 24 F. Cas. 1161 (No. 14,606) (D. Pa. 1816). *See* 18 U.S.C. § 2193 (1964).
44. MANUAL FOR COURTS-MARTIAL, *supra* note 35.

While the definition of the crime is more clear under the present code than at any time before, it still fails succinctly to define intent to usurp or override authority. This problem is left to the courts-martial. Although the lack of precise definition poses no gargantuan problem in the case of actual violence, *e.g.*, the seizing of a headquarters building (because the act itself shows an intent to usurp lawful authority), "[t]he intent may be declared in words, inferred from acts done, or inferred from the surrounding circumstances."[45] It is from this that the problem arises. Since intent must be inferred in many cases, if the act itself is not lucid in its presentation of the element, it must be declared or shown by the circumstances. In the case of passive or non-violent mutiny, absent declaration of intent, it is often difficult to determine whether the act shows intent to override authority or merely to resist it.

The intent to override lawful military authority, while essential to the offense,[46] does not constitute mutiny absent some type of overt act, since intent is merely a form of thought. Mutiny has been called ". . . a crime of the greatest magnitude . . . , the most heinous known to military law."[47] It might therefore be expected that a crime which is described as heinous would normally require a serious act in furtherance of the intent to commit that crime. So it is with the crime of mutiny,[48] and what act could be more serious than an act of violence? Violent acts being of the type which can create a mutiny,[49] an examination of mutinous incidents involving violent acts is appropriate.

One of the first mutiny cases decided by the United States Court of Military Appeals was *United States v. O'Briski.*[50] In that case, the acts in question were exhortation not to work, refusal to work, and rioting. The the court-martial instruction was that the elements of mutiny were

> that the accused created violence or a disturbance, or that he refused in concert with another person or persons to obey orders or otherwise do his duty and . . . that he did so with intent to usurp or override lawful military authority.[51]

This seems innocuous at first glance, but the crime of mutiny requires that the intent be present concurrent with the act. However, the court held that even though this separation of instruction was error, the total instruction defined the crime.[52] It becomes immediately evident that intent is the essential element.

45. MANUAL FOR COURTS-MARTIAL, *supra* note 35.
46. U.C.M.J. art. 94, 10 U.S.C. § 894 (1964).
47. O'BRIEN, *supra* note 36.
48. U.C.M.J. art. 94, 10 U.S.C. § 894 (1964).
49. U.C.M.J. art. 94, 10 U.S.C. § 894 (1964).
50. 2 U.S.C.M.A. 361, 8 C.M.R. 161 (1953).
51. *Id.* at 363, 8 C.M.R. at 163.
52. *Id.*

In the case of a violent mutiny, however, it is not difficult to show the presence of intent by the act itself. In another incident,[53] the court examined the situation of a riot which forced guards away from the stockade and led to a revolt in which stockade facilities were destroyed. Here, the court stated that when intent is shown to be present in one acting to create violence, he is guilty of mutiny.[54] Furthermore, the court pointed out that intent may be shown to exist by the circumstances when no other reason is given for the violence than that of overthrowing lawful military authority.[55]

Violent mutiny can be shown to exist from many different types of acts. It may be shown from shattering windows, throwing rocks, ripping plumbing fixtures out of walls, tearing off doors, and starting fires,[56] or from riot.[57] In other cases, violent mutiny consisted of threatening an officer with a pistol,[58] threatening other prisoners with bodily harm if they marched properly after a shakedown by prison guards,[59] or theatening beating with bunk posts to any prisoner who refused to join in a work stoppage.[60] Even in these cases, although the act was sufficient to prove intent, the accused were not always found guilty, usually on the grounds of improper instructions.

The violent act must tend to show an intent to usurp or override authority; it is not enough to show simply that the act was committed. In *United States v. Bachman*,[61] the court found that the mere handing of steel bed adapters to other prisoners without some act or declaration showing intent was insufficient to prove the intent necessary to sustain a charge of solicitation to mutiny.[62] The court pointed out that a disruptive act alone would not sustain the charge, nor would it show intent if not directed to the purpose to which the intent requisite to mutiny must be directed, *i.e.*, the usurpation of authority.

It must also be noted that although the acts committed by defendants are such that they might show intent to override lawful military authority, it is equally possible to infer from them an intent merely *to defy* authority.

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53. United States v. Duggan, 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954), and its companion case, United States v. Mendiola, 4 U.S.C.M.A. 403, 15 C.M.R. 403 (1954).

54. United States v. Duggan, *supra* note 53, at 397-98, 15 C.M.R. at 398.

55. United States v. Duggan, *supra* note 53, at 402, 15 C.M.R. at 402.

56. United States v. Duggan, *supra* note 53; United States v. Mendiola, *supra* note 53.

57. *Supra* note 50.

58. United States v. Watson, 4 U.S.C.M.A. 557, 16 C.M.R. 131 (1954).

59. United States v. Morris, 21 C.M.R. 535 (1956).

60. United States v. Turner, 10 C.M.R. 394 (1953).

61. 20 C.M.R. 700 (1956).

62. *Id.* at 702-703.

Without devoting any greater discussion to the point, virtually all military law charges contain what are known as lesser included offenses, elements of which are contained in the major charges: For example, elements of aggravated battery are included in the charge of murder. This has been construed as raising a reasonable hypothesis of innocence of the major charge, and if the major charge cannot be proven conclusively, the appellate court must affirm only the lesser offense as to which there is no reasonable hypothesis of innocence, or if no lesser offense is reasonably charged, they must dismiss.[63] The effect of this is that some cases of violent mutiny have been reversed simply because of procedural errors in instruction as to lesser included offenses, even though the facts tended to show intent to usurp lawful military authority.[64]

Facts constituting violence often tend to show intent necessary to sustain a conviction for mutiny. But other facts in the same transaction may overcome the showing of intent. In *United States v. Anderson*,[65] a major riot took place over a period of two and one-half days. Although several of the defendants were charged with mutiny as a result of their violent acts of seizing the stockade, this charge was not sustained because the facts showed that these same prisoners aided stockade authorities in quieting down the tumult.[66] When viewing a situation of violence, it must be remembered that the entire transaction must be considered, because the intent to commit a mutinous act may be shown to be lacking rather than existing.

Violent mutiny is by far the type of mutiny which is most familiarly comprehended by the law and public. From times even beyond *H.M.S. Bounty*, the violent mutiny has been present in military law. There is, however, a second type of mutiny defined in the U.C.M.J. This is the non-violent, or resistance type of mutiny, defined as refusal ". . . in concert with any other person or persons, to obey orders or otherwise do his duty. . . ."[67] This type of mutiny is more difficult to prove, since by its very nature the acts in question could show intent either to defy military authority or to usurp it, and, therefore, it requires an even more stringent proof of intent than the violent mutiny.

One of the earliest cases arising on a charge of non-violent mutiny was *United States v. Verdone*.[68] In *Verdone*, a group of prisoners were trans-

63. United States v. O'Neal, 1 U.S.C.M.A. 138, 2 C.M.R. 144 (1952).
64. United States v. Grady, 13 C.M.R. 357 (1953).
65. 4 C.M.R. 178 (1951).
66. *Id.* at 181-82.
67. U.C.M.J. art. 94, 10 U.S.C. § 894 (1964).
68. 13 C.M.R. 468 (1953).

ferred from the Fort Dix Stockade to a training company, there to complete basic training. The prisoners, individually and as a group, refused to train. After being given a direct order to do close order drill, they again refused, and were returned to the stockade. There was no violent act on the part of the prisoners, not even so much as shouting,[69] yet they were convicted of mutiny. The Court of Military Review reversed as to the mutiny charge on the grounds that there was no instruction on the lesser included offense of disobedience of a lawful order.[70] As in many mutiny cases, this court likewise reversed for failure to instruct properly.[71] The court did not consider the main point: whether or not mutiny had been committed. They merely stated that ". . . only one order was given . . . and . . . each accused willfully disobeyed the order. The evidence outlined . . . clearly supports that view and places in issue the offense of willful disobedience as distinct from mutiny."[72] The court then considered the instructional error and did not further discuss non-violent mutiny. This case would appear to offer an excellent opportunity to clarify the elements necessary to prove mutiny rather than a lesser offense, but the court preferred to stand on the procedural question.

One year later, however in *United States v. Duggan*,[73] the Court of Military Appeals discussed the elements and types of mutiny more concisely. There the court pointed out that there are two types of mutiny, not differing in degree, but only on technical bases. Mutiny by violence may be committed by one or more persons, alone or in concert with others, with the intent to override or usurp lawful military authority. The court stated that non-violent mutiny is proved by collective insubordination, necessarily implying acts or refusals by two or more persons in concert, plus the requisite intent. The intent, stated the court, need not be preconceived.[74]

What the court had stated was basically a reiteration of the Manual for Courts-Martial (hereinafter referred to as *M.C.M.*) para. 173(a).[75] However, M.C.M. para. 173(a), while serving as an important guideline to military, is neither statute nor case law. It is a guide for counsel, especially trial counsel, and carries only as much weight as would similar guidelines. By its decision in *Duggan*, the court has given much greater effect to this

69. *Id.*
70. *Id.* at 471.
71. *Cf. supra* note 64, at 359.
72. *Supra* note 68, at 470.
73. United States v. Duggan, *supra* note 53.
74. United States v. Duggan, *supra* note 53, at 398; 15 C.M.R. at 398.
75. MANUAL FOR COURTS-MARTIAL, *supra* note 35.

definition of mutiny. But M.C.M. para. 173(a) and *Duggan* still do not go to the question of intent in non-violent mutiny cases. Is the intent required to establish mutiny also to be shared with the co-actors who of necessity must participate in the act? Or is it sufficient that the accused alone have the intent to usurp lawful military authority, regardless of the intent of the other participants? These questions were left unanswered.

Finally, in 1961, the Court of Military Appeals again took up the question of the necessary elements of the offense of mutiny with reference to the non-violent type. In *United States v. Woolbright*,[76] several prisoners were on a work detail enlarging a golf course sand trap in cold, rainy weather. Some of the prisoners were not working, and one of these lit a cigarette. He was told to put it out. At this point the accused stuck his pick into the ground, took out a cigarette and announced that he was not afraid to smoke. He further stated that he would use the pick on anyone who attempted to stop him. He lit his cigarette and refused to put it out. Other prisoners follow suit and all refused to work. The accused did not urge others not to work, and in fact was quiet and passive after leaving the sand trap, although other orders were refused in the events that followed. He was convicted of mutiny.[77] It should be noted that the accused and the other prisoners involved in the alleged mutiny in *Woolbright* committed separate acts of refusal to obey different orders or to do their duty. This factor greatly distinguishes *Woolbright* from the case about which this note is concerned, in which all the prisoners participated in the same act.[78]

However, an even more critical fact distinguishes *Woolbright* from the object case. Woolbright, after announcing that he was going to defy the order against smoking, threatened to use his pick on anyone who tried to stop him. As has been previously shown, threats of violence either to those in lawful authority or to those who would otherwise comply with lawful orders have been considered by the court as the basis of violent mutiny.[79] Yet the decision in *Woolbright* concerns non-violent mutiny. Apparently, since it is never discussed in the facts, the prosecution attempted to charge only the non-violent (refusal to obey orders) type of mutiny, so as to include all the prisoners involved in the incident. The prosecution thus appeared to have forced the court to consider an issue which need not have been raised.

The government contended in *Woolbright* that mutiny is committed when the defendant, with intent to override lawful military authority on his own

76. 12 U.S.C.M.A. 450; 31 C.M.R. 36 (1961).
77. *Id.* at 451-52; 31 C.M.R. at 37-38.
78. United States v. Sood, — C.M.R. — (ACMR 16 June 1970) (CM 420276).
79. *See supra* notes 58-60.

part, engages in joint disobedience of a lawful order with the other prisoners. It was further contended that there was no need of common intent by those involved to set aside the military command over them. The *Woolbright* court, citing *United States v. Duggan*,[80] held that, in order for violent mutiny to exist, there must be both common intent *and* collective action.[81] "This type of mutiny requires concerted action with at least one other person who also shares the accused's intent to usurp or override lawful military authority."[82] If this can be proved, then the accused are necessarily guilty of mutiny.

But in *Woolbright* there was a ". . . sequence of separate disobediences by individual prisoners rather than concert of action and joint intent to usurp or override . . . authority."[83] There was certainly no showing of an intent to usurp authority. The court stated that there was not even enough evidence presented in this case to find a technical mutiny, as the government claimed. What occurred was a series of actions by different persons lacking a common intent.[84]

Non-violent mutiny, under the *Woolbright* definition, requires a common action and a common intent. In that case the charge failed as to both elements. Each accused prisoner did a different act of disobedience at a different time. Aside from Woolbright's threat, there was no more intent shown by the actions of the prisoners than that to defy the orders of the guard as to cigarette smoking, orders which the evidence shows had not been stringently enforced before that time. This is not the "stuff" that non-violent mutiny is made of; it is "a specialized type of conspiracy in which the co-actors must share a common purpose. There must be concert of action and concert of intent."[85] Both elements had failed.

A question is raised as to what remains to be said about non-violent mutiny. *Duggan* gave a preliminary definition, albeit in a case where the action spoke more of violent mutiny, and resulted in a conviction for riot. *Woolbright* clarified the definition, pointing out that intent, as well as action, must be shared. In that case also, the facts pointed more to a violent mutiny, if any at all. The object case differs from these in that, for the first time, the court was squarely presented with a case in which there was concerted action in a mutiny charge: All the actors joined

80. United States v. Duggan, *supra* note 53; United States v. Mendiola, *supra* note 53.
81. *Supra* note 76, at 452, 31 C.M.R. at 38.
82. *Supra* note 76, at 453, 31 C.M.R. at 39.
83. *Supra* note 76, at 453, 31 C.M.R. at 39.
84. *Supra* note 76, at 452, 31 C.M.R. at 39.
85. *Supra* note 76, at 453, 31 C.M.R. at 39.

in the same act. If there was the requisite intent, it would logically follow that mutiny had been proved.

In *United States v. Sood*[86] the facts show that the defendants joined in doing the same act at the same time. Together, the group of twenty-seven men broke formation; together, they sat down outside the stockade building; together, they refused to move into it on Captain Lamont's order. There were no violent acts by any one of the group, nor were there even any threats of violence to the guards or to other prisoners. If there was to be any non-violent mutiny conviction under Article 94,[87] it would happen under facts such as these. Unlike *Duggan* and *Woolbright*, in which the court's opinion was either dictum or exceedingly close thereto, *Sood's* definition would be truly dispositive of the issues. Moreover, in *Sood* the court characterized the intent which may be inferred from acts such as occurred at the Presidio.

The appeal in *Sood* alleged eighteen assignments of error.[88] The first of these considered by the court was the contention of instructional error. It is in the instructions that the definition of non-violent mutiny is discussed. The specific error claimed was that there was no instruction given requiring a finding that the appellant's intent must be shared.

The trial judge gave instruction to the effect that, to find the appellant guilty of mutiny, the fact-finders must decide that the accused acted in a concert of action with at least one other person. Furthermore, they must find that the accused acted with the intent to override lawful military authority. Another instruction stated that the term "in concert with" meant ". . . together with another person or persons in accordance with a common intent, design or plan . . . ."[89] The trial judge then admonished the court members that a mere joint disobedience of orders without intent to override authority is not of itself mutiny.[90]

Thus, it appears that no mention was made in the instructions of the requisite shared intent of the *Woolbright* definition of non-violent mutiny. The government contended that the proof of intent in the record, when taken together with the instructional framework, fairly conveyed an instruction on shared intent.[91] To this contention, the court retorted that the correctness of the instructions may not be measured by the quantum of proof of the required intent.[92] The result is that shared intent is so im-

86. *Supra* note 78.
87. U.C.M.J. art. 94, 10 U.S.C. § 894 (1964).
88. *Supra* note 78.
89. *Supra* note 78.
90. *Supra* note 78.
91. *Supra* note 78.
92. *Supra* note 78.

portant an element that it must be specifically treated in the instructions. Without instruction on that element, the factfinders could forseeably find mutiny if the facts of a non-violent mutiny situation showed the requisite intent only on the part of one accused.

The government did not follow the *Woolbright* decision in the *Sood* case. Perhaps, as has been contended herein *Woodbright* was not followed because it was felt to be distinguishable on its facts. Since in *Woolbright* the court felt there was no concert of action or intent, the government may have interpreted that decision as meaning that, in a case where there was the requisite concert of action, the shared intent would be inferred from the acts.

The court, however, adopted the *Duggan-Woolbright* definitions of mutiny, pointing out that both collective action and collective intent to override lawful military authority must be pleaded and proved. "A persistent refusal in concert to obey lawful orders coupled with a specific concerted intent . . . constitut[es] . . . mutiny."[93] If this shared intent were not the requirement, then any joint disobedience of orders or a joint refusal to do duty would be mutiny. Yet such a rule would be contrary to *Woolbright* and even to the trial judge's instructions. In this case, the instruction puts emphasis on a collective intent to disobey orders rather than to override; and this is not the intent which controls in a charge of mutiny.

The lack of instruction on this most essential element of the offense of mutiny creates several problems. It first of all renders a finding of guilt as to mutiny impermissible. Secondly, because of this error in instruction, an instruction that the deeds of co-actors were admissible to prove intent on the part of the appellant was also inadmissible as prejudicial error. The requisite shared intent cannot be imputed in the absence of an instruction on shared intent coupled with proof that it indeed existed. The instructional errors here went so deeply to the foundation of the issue that they required reversal.[94]

From a definitional standpoint, non-violent mutiny requires, as was stated in *Duggan* and *Woolbright*, a collective action and a shared intent. Even if the requisite collective, concerted action is shown by the facts, this alone will not impute the requisite shared intent. Furthermore, even if there is a collective intent *to defy* lawful military authority, the proof of this intent coupled with collective or concerted action on the part of the accused is not sufficient to infer an intent *to override* lawful military authority.

93. *Supra* note 78.
94. *Supra* note 78.

In *Sood*, the court clarified the elements of the offense of non-violent mutiny to a greater degree than in either *Woolbright* or *Duggan*, and did so in a factual situation which cannot be said to be anything other than non-violent.

In additon to solidifying the definition of non-violent mutiny in its treatment of instructional error, the court in *Sood* also examined the factual evidence.[95] As has been shown previously, it seldom ever occurs that a mutinous intent is declared by an accused; thus the prosecution is forced to show that the necessary intent can be inferred from the actions of the accused or from the circumstances, as required under M.C.M. para. 173(a). The court in *Sood* undertook to examine the incidents occurring at the Presidio Stockade to determine whether an intent to override lawful military authority could be shown by such acts.[96]

In a situation concerning non-violent mutiny, the intent element is the same as that required in a violent mutiny. There is little difficulty in showing that intent to override lawful military authority existed when facts show that the accused beat guards in a stockade and forced them to retreat, leaving the prisoners in possession and command of the stockade.[97] In such a situation, it is obvious that the authority of the commander of the stockade has been usurped, for he can no longer exercise his lawful authority over anyone in the stockade. In the absence of violent acts, this intent is harder, if not impossible, to prove.

When the acts of those charged with mutiny consist solely of refusal to do their duty or to obey orders, can that be enough to show the required intent? It would seem that to override or usurp authority, the acts of the accused would of necessity be coupled with some more positive refusal to obey. Thus, were the accused to give orders of his own and the others in volved followed him, or if all the accused refused to do their duty in such circumstances that would render the commander powerless to control them, the intent to override or usurp lawful military authority could very likely be shown, even though no accused committed violence. However, the circumstances necessary for such a hypothetical happening would undoubtedly be such that all those under a given commander joined in concert to refuse to do their lawful duty. If the commander were able to ex-

95. *Supra* note 78. Appellate courts in the military court system are charged with examination of cases on appeal both as to law and fact to determine the correctness of a conviction. U.C.M.J. art. 66, 10 U.S.C. § 866 (1964). Thus the court in *Sood* examined the factual evidence to see whether the facts justified a conviction for non-violent mutiny.

96. Brief for Appellant at 17, United States v. Rowland, — C.M.R. — (ACMR 30 June 1970) (CM 421750).

97. *Supra* note 64; *supra* note 65.

ercise his governance over some of his troops, then it would seem that the others might only be defying authority rather than usurping it.

In *Sood* and the other Presidio mutiny cases, the facts show that the accused prisoners refused to obey one order: the order to return to the main stockade building. Other than this specific act, all that the prisoners did was to present a list of grievances to the stockade commander, and ask to be heard by the base commander, the inspector general, and the press concerning conditions in the prison compound. Captain Lamont, the officer-in-charge, still controlled the guards, the military police, and all the prisoners other than the 27 who broke formation.[98]

In looking upon this situation, the court found the evidence to be lacking to establish a mutiny by reason of a lack of the requisite intent.

> The words and deeds of the appellant and his co-actors do not evince, either singularly or collectively, an intention to usurp or override military authority. Rather, the common thread of evidence throughout this entire voluminous record *demonstrates an intention to implore and invoke the very military authority which they are charged with seeking to override.*[99]

The court again pointed out that there clearly was a collective intent to defy authority. The prisoners had most probably felt than in order to have conditions changed they would have to avoid the channels of authority, since these had not been successful in the past. But this collective intent to defy authority is much less than the intent to usurp or override lawful military authority. "The former is not shorthand for the latter."[100]

The court also pointed out that there was no other involvement by the accused in addition to membership in the group, nor any record that any of the accused attempted to usurp Captain Lamont's authority, although they did defy it. No one overtly resisted the military police, nor did anyone supplant the authority of the commander: He alone gave orders, and no one in the group attempted to do more than to encourage the others to be non-violent. There was no specific leader of the group, and no one told the others what they were to do.[101] "The factual recital clearly shows that Captain Lamont had absolute and unfettered control over the incidents of his command although his specific orders to the inmates were disobeyed."[102]

Thus, the court in *Sood* denies credence to the contention that a collect-

98. *Supra* note 96.
99. *Supra* note 78. (emphasis added)
100. *Supra* note 78.
101. Prisoner Pawlowski, who read the list of grievances, was not among the appellants in any of the seven cases. It may be that he was the prisoner who left the original group when fire trucks arrived. *Supra* note 96, at 23.
102. *Supra* note 78.

ive defiance of authority of lower command levels in order to bring grievances to them and their superiors does not constitute mutiny. It *cannot* be mutiny, because it seeks to *use* the channels of authority above their local command to press complaints, clearly the antithesis of the intent to override that authority.

What then are the ramifications of *Sood*; what will its impact be on military law? The foremost effect of *Sood* is its clarification of the definition of non-violent mutiny. It points out that both collective action and concerted intent are required to prove non-violent mutiny, and in this aspect it reiterates prior decisions. But *Sood* goes one step farther because, unlike the earlier decisions, there was clear-cut collective action of a purely non-violent type. The distinction is not merely academic. *Sood* shows that intent is the paramount requirement in proving non-violent mutiny, and points out that factual situations such as those present there cannot be used to impute such intent.

But there are other aspects to the *Sood* decision. By its narrowing of the types of situations from which intent to override lawful military authrity may be inferred, it would appear that non-violent mutiny in its pristine sense may be more than difficult to prove; it may be impossible, absent a clear-cut declaration by the accused. *Sood* also provides a means, albeit difficult and frought with penalty, for the stockade prisoner to improve his lot when appeals to ordinary channels have failed, because *Sood* provides an outlet through which the prisoner can speak without fear of capital punishment. While this may be a risky and rather last-ditch manner of presenting grievances, such a route may be the only way remaining. What far-reaching effects *Sood* will have on further cases charging non-violent mutiny remains to be seen, but it may be that the Presidio mutiny cases will sound the death knell for the charge of non-violent mutiny.

Terrence J. Benshoof