IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201000242
Anthony P. BALLAN, Machinist's Mate Second Class Petty Officer (E-5) U.S. Navy, Appellant	)	USCA Dkt. No. 11-0413/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Specified Issue

ALTHOUGH THE CRIME OF INDECENT ACTS WITH A CHILD TO WHICH APPELLANT PLEADED GUILTY WAS NOT A LESSER INCLUDED OFFENSE OF THE CHARGED CRIME OF RAPE OF [A] CHILD AND THUS HAD NOT BEEN FORMALLY REFERRED TO TRIAL BY COURT-MARTIAL BY THE CONVENING AUTHORITY, WHETHER APPELLANT WAIVED SUCH IRREGULARITY BY PLEADING GUILTY UNDER A PRETRIAL AGREEMENT TO INDECENT ACTS WITH A CHILD IN VIOLATION OF ARTICLE 134, WHERE NEITHER THE PRETRIAL AGREEMENT NOR APPELLANT'S PLEA AT ARRAIGNMENT EXPRESSLY SET FORTH EITHER POTENTIAL ELEMENT FOR AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION, BUT BOTH ELEMENTS WERE DISCUSSED AND ADMITTED DURING THE PROVIDENCE INQUIRY.[1]

[1] The Court granted Appellant's petition and ordered briefs on the specified issue stated above. The Court also granted Appellant's petition on the following specified issue:

WHETHER AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION THAT FAILS TO EXPRESSLY ALLEGE EITHER POTENTIAL TERMINAL ELEMENT STATES AN OFFENSE UNDER THE SUPREME COURT'S HOLDINGS IN UNITED STATES v. RESENDIZ-PONCE AND RUSSELL v. UNITED STATES, AND THIS COURT'S RECENT OPINIONS IN MEDINA, MILLER, AND JONES.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006). Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006), provides the Court with jurisdiction over this case.

Statement of the Case

The military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of indecent acts with a child, one specification of sodomy with a child under the age of twelve, and eight specifications of indecent acts with another, in violation of Articles 125 and 134, UCMJ, 10 U.S.C. § 925 and 934 (2006). Members sentenced Appellant to twenty-five years of confinement, forfeitures of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

In accordance with a pretrial agreement, the Convening Authority suspended all confinement in excess of twenty years for the period of confinement served plus twelve months, at which time, unless sooner vacated, the suspended portion will be remitted without further action. On January 27, 2011, the lower court set aside and dismissed three specifications that alleged indecent liberties with a child and otherwise affirmed the

remaining findings. *United States v. Ballan*, No. 201000242, slip op. (N-M. Ct. Crim. App. Jan. 27, 2011). The court affirmed the punitive discharge and the forfeitures, and after reassessing the sentence the court affirmed that much of the sentence as extends to twenty-four years of confinement. Appellant then filed a petition for grant of review with this Court, which this Court granted on June 2, 2011.

Statement of Facts

Appellant committed various sexual based offenses with or witnessed by his three young children: his son "D", his son "S", and his daughter "M." (J.A. 6.) Among other offenses, the Government originally charged Appellant with violating Article 120, UCMJ, by raping a person under the age of twelve. (J.A. 6.) The Convening Authority and Appellant reached an agreement whereby Appellant would plead guilty to the "LIO of indecent acts with a child" in "violation of Article 134" instead of the charged Article 120 offense. (J.A. 8).

In support of this agreement and prior to trial, Appellant stipulated that he committed indecent acts with a child in violation of Article 134 and that his conduct violated the terminal element:

> I fully believe that my actions were prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces.

(J.A. 37-38.)

Accordingly, Appellant pled guilty "to the charge of indecent acts with a child," which violated "Article 134." (J.A. 15.) Based on this plea, the Military Judge explained the elements of the offense including the terminal element——"that under the circumstances, your 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." (J.A. 28.) The Military Judge also defined this element. (J.A. 28.)

Appellant agreed that these elements correctly described his actions. (J.A. 29.) Appellant admitted that if the public knew of his crime, this type of conduct would harm the reputation of the naval service and it would damage the public's opinion of the Navy. (J.A. 34-35.) And he expressly explained how his conduct was service discrediting: "[I]f the actions were to be discovered by other people they could possible [sic] assume that everyone in the military is a pervert." (J.A. 34.)

Argument

A COMPETENT AUTHORITY MUST REFER A CHARGE TO A COURT-MARTIAL AND THE CHARGE AND SPECIFICATION MUST ALLEGE EVERY ELEMENT EXPRESSLY OR BY IMPLICATION. THIS COURT REVIEWS A CHARGE AND SPECIFICATION WITH GREATER TOLERANCE WHEN THE SUFFICIENCY IS FIRST QUESTIONED ON APPEAL. IN THIS LIGHT, THE SPECIFICATION CHARGED UNDER ARTICLE 134 STATES AN OFFENSE. THERE IS NO ERROR. MOREOVER, ANY ERROR, *ARGUENDO*, WAS NOT PLAIN, DID NOT MATERIALLY PREJUDICE APPELLANT'S SUBSTANTIAL RIGHTS, AND DID NOT SERIOUSLY AFFECT THE FAIRNESS OR INTEGRITY OF THE PROCEEDING.

A. If an appellant does not object at trial, then potential error is either waived or forfeited. This Court reviews forfeited error for plain error.

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732-33 (1993). Waiver is the "intentional relinquishment or abandonment of a known right," which extinguishes the error. *Id*. at 733-34 (citations omitted). On the other hand, if a potential error is neither waived nor objected to, then it is forfeited. *Id*. at 731-32; *see also United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008). Forfeited errors are reviewed for plain error. *Olano*, 507 U.S. at 731 (discussing appellate review in Article III Courts under Fed. Rule Crim. Proc. 52(b)); *Harcrow*, 66 M.J. at 156 (discussing appellate review in Article I courts under Rule for Courts-Martial (R.C.M.) 920(f) and Mil. R. Evid. 103(d)); *see also* Article 59(a).

The Government submits that there is no error in this case, and, therefore, the plain error analysis is not triggered. Nonetheless, the first prong of the plain error test is whether there is error. To avoid redundancy or circular logic, the Government couched the error argument solely under plain error's first prong, as discussed below.

B. In testing for plain error, this Court should apply the Supreme Court's four-prong plain error analysis that requires (1) error, (2) that the error was plain or obvious, (3) that the error materially prejudiced Appellant's substantial rights, and (4) that the Court exercise its discretion to remedy an error "only if the error seriously affects the fairness, integrity or public reputation of public proceedings."

Applying the plain error framework, an appellate court can only correct a potential error that was not raised at trial if there is (1) error, (2) that is plain, and (3) that materially prejudices the appellant's substantial rights.[2] *United States v. Cotton*, 535 U.S. 625, 631 (2002) (citation and internal quotations marks omitted); Art. 59(a), UCMJ. The appellant bears the burden of persuasion for all three prongs. *Olano*, 507 U.S. at 734-35; *but see United States v. Powell*, 49 M.J. 460,

[2] The third plain-error prong under *Olano* is that the error "affects substantial rights." *Olano*, 507 U.S. at 732. Military jurisprudence requires a heightened standard relative to the Federal Rules of Criminal Procedure: "A finding or sentence may not be held incorrect on the ground or an error of law unless the error *materially prejudices the substantial rights of the accused*." Article 59(a), UCMJ (emphasis added). This accounts for the slightly different standard under prong three. *Cf. Powell*, 49 M.J. at 465.

464-65 (1998) (whereas *Olano* states that the defendant bears the burden for all three prongs, and *Powell* cites to that portion of *Olano*, *Powell* states that the burden shifts to the Government for the third prong).

If all three requisites are satisfied, the court has the discretion to remedy the error——"discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of public proceedings." *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009). Only if this heightened standard is met, may the court exercise its discretion and remedy the error.[3] Courts sometimes refer to this requirement as the fourth prong of the plain error analysis: "Meeting all four prongs is difficult."

The Government recognizes that this Court has not applied the fourth prong——that the error seriously affects the fairness, integrity or public reputation of public proceedings——and that the Court has shifted the burden to the Government under the third prong in some recent case law. *See, e.g., United States v. McMurrin*, 70 M.J. 15, 18 n.2 (C.A.A.F. 2011) (discussing the Court's disagreement concerning whether to require that the error "seriously affect[ed] the fairness, integrity or public

[3] Putting aside the issue of whether a criminal court of appeals that does not exercise discretionary review is bound by this standard as discussed in *Powell*, this Court exercises discretionary authority and is bound by this standard. *See Powell*, 49 M.J. at 464.

reputation of judicial proceedings"); *see also United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (shifting the prejudice burden to the Government).

Nonetheless, if this Court reviews for plain error in this case, the Government respectfully requests that this Court recognize and apply the Supreme Court's fourth prong in its analysis. Additionally, the Government submits that Appellant bears the burden throughout the first three prongs, and whether to grant relief under the fourth prong is in the Court's discretion. *See United States v. Benitez*, 542 U.S. 74, 82 (2004) (defendant bears burden of establishing plain error); *see also Flores*, 69 M.J. at 374 (Stucky, J., dissenting in part and concurring in result).

This will align the Court's plain error analysis with Supreme Court precedent. *See, e.g.*, *Johnson v. United States*, 520 U.S. 461, 467 (1997) (court may "only" exercise its discretion if the fourth prong is met); *Cotton*, 535 U.S. at 631 (court may "only" exercise its discretion if the fourth prong is met); *Olano*, 507 U.S. at 732 ("court should not exercise [its] discretion unless the error" meets the fourth prong).

Similarly, this will engender stability and predictability in the application of plain error analysis. *Compare Flores*, 69 M.J. at 369 (third prong is that "the error results in material prejudice," shifting the burden under the third prong to the

Government, not noting a fourth prong), *with United States v. Girouard*, 70 M.J. 5, 11 n.7 (C.A.A.F. 2011) (third prong is that "the error materially prejudices a substantial right of the accused," appellant bears the burden throughout, noting disagreement about the fourth prong's application), *with Powell*, 49 M.J. at 464-65 (shifting the burden to the Government under the third prong to show that the error was not prejudicial, noting a fourth prong), *with United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009) (appellant bears the burden for the first three prongs, then burden shifts to the Government to disprove prong three beyond a reasonable doubt), *with United States v. Godshalk*, 44 M.J. 487, 490 (C.A.A.F. 1996) (merging waiver and forfeiture and discussing the fourth prong), and *United States v. Causey*, 37 M.J. 308, 311 (C.A.A.F. 1993) (applying the fourth prong). The Government seeks clarity.

And, most importantly, this will protect the judicial system. The plain error doctrine's rigorously high bar is purposeful because the doctrine is in itself an exception to the contemporaneous-objection rule, to be used only in the most exceptional circumstances. *United States v. Atkinson*, 297 U.S. 157, 159-60 (1936). To that end, the Supreme Court criticized the doctrine's unwarranted expansion as "extravagant protection." *United States v. Young*, 470 U.S. 1, 15 (1985) (*citing Henderson v. Kibbe*, 431 U.S. 145, 154 n.12 (1977)).

Indeed, omitting the fourth prong in the plain error analysis elevates a forfeited error nearly to the level of an error that the appellant objected to at trial. This is detrimental to the judicial system and should not be endured:

> Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.

Johnson, 520 U.S. at 470 (citation omitted).

1. Reviewing for error: a competent authority must refer the charge, and the charge and specification must provide fair notice and protect the appellant from double jeopardy. If the appellant does not object at trial, the appellate court views the charge and specification with maximum liberality.

Competent authority must refer each charge before a court-martial. R.C.M. 201(b)(3). Although this is a jurisdictional prerequisite, "the form of the order [to refer charges] is not jurisdictional." *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990). Additionally, after arraignment, major changes or amendments may be made to a charge or specification absent the objection of the accused. R.C.M. 603(d); *see also Girouard*, 70 M.J. at 8 n.4. So if a competent authority issues the order—"however informal, oral or written"—to refer a charge to a court-martial, then the court has jurisdiction to enter findings on the charge. *Wilkins*, 29 M.J. at 424.

Whether the referred charge and specification states an offense is analyzed under modern notice-pleading prescriptions,

which purged the common-law requirement of detailed allegations. Now, "[a] specification is a plain, concise, and definite statement of the essential facts constituting the offense charged." R.C.M. 307(c)(3). The Rule continues, "A specification is sufficient if it alleges every element of the charged offense either expressly or by necessary implication." *Id*. Similarly, the Supreme Court identified the constitutional requirements to state an offense in an indictment: (1) that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend; and, (2) that the charge protects the defendant against double jeopardy for the same offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Meeting these threshold requirements is the key, regardless of whether the indictment "could have been made more definite and certain." *United States v. Debrow*, 346 U.S. 374, 376 (1953).

When assessing whether these requirements are met, an appellate court views a charge and specification "with greater tolerance" if it is attacked for the first time on appeal. *United States v. Whyte*, 1 M.J. 163 (C.M.A. 1975). That is, courts "liberally constru[e] specifications in favor of validity when they are challenged for the first time on appeal." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). And Federal

courts view indictments and informations with "maximum liberality" when there is no objection at trial. *United States v. Edrington*, 726 F.2d 1029, 1032 (5th Cir. Tex. 1984); *United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. Cal. 1976). As the Court noted in *Watkins*, rather than mere passivity, appellate courts are actively hostile to technical defect claims first raised on appeal:

> [T]he courts of the United States long ago withdrew their hospitality toward technical claims of invalidity of an indictment first raised after trial, absent a clear showing of substantial prejudice to the accused——such as a showing that the indictment is "so obviously defective that by no reasonable construction can it be said to charge the offense for which the conviction was had."

Watkins, 21 M.J. at 209-10 (quoting *United States v. Thompson*, 356 F.2d 216, 225 (2d Cir. 1965), *cert. denied*, 384 U.S. 964 (1966)).

a. There is no error: Charge I, Rape of a Child, was properly referred. Subsequently, the Convening Authority and Appellant agreed to a major change, resulting in the referral of the amended Charge I, alleging indecent acts with a child under Article 134; therefore, the amended charge was properly before the court-martial.

Although the Convening Authority originally referred an Article 120, rape of a child, charge, the Convening Authority later agreed to a major change through the pretrial agreement with Appellant, which amended the Article 120 offense to a properly referred Article 134 offense. Although the change is

not expressly noted on the charge sheet, the change occurred nonetheless, and the Article 134 offense was referred to the court-martial.

Similarly, the Court in *Wilkins* held that the convening authority referred charges to the court-martial through a pretrial agreement with the appellant:

> [W]e conclude that the convening authority's entry into the pretrial agreement, which provided for pleas of guilty ... was the functional equivalent of an order by the convening authority that the charges be referred to the court-martial for trial.

29 M.J. at 424. The Court continued, "any such irregularity was waived by the defense" because he affirmatively consented to the change through the agreement. *Id*. at 424-25.

The express referral——with the consent of Appellant and prior to his pleas——separates this case from the facts in *Girouard* and *McMurrin*, where the appellants were convicted of offenses that were not referred to the court-martial prior to trial. In both cases, the appellants were convicted of an offense that was not on the charge sheet through an outdated interpretation of lesser included offenses. *See Girouard*, 70 M.J. at 10; *McMurrin*, 70 M.J. at 19.

Here, however, the pretrial agreement expressly changed the offense to a referred Article 134 charge and specification. *See Wilkins*, 29 M.J. at 424. Whether Article 134 was a lesser included offense of Article 120——it was not——is irrelevant.

Moreover, Appellant waived any irregularity in this referral procedure through his express agreement to the change. In short, R.C.M. 201(b)(3)'s jurisdictional requirement was satisfied and the Article 134 charge and specification was properly referred.

b. There is no error: Appellant did not object at trial, therefore, viewed with maximum liberality, the charge and specification state an offense because Appellant had fair notice of the elements and the charge, and he is protected from double jeopardy.

Since the Article 134, indecent acts with a child, charge was referred to the court-martial, the only issue is whether the amended Article 134 charge and specification stated an offense when reviewed with maximum liberality. In light of the pretrial agreement and therefore lack of objection at trial, and when read with the historical gloss of an Article 134 charge, the charge and specification stated an offense. (J.A. 6, 8.)

In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), this Court revisited whether the terminal element of Article 134——that the conduct was prejudicial to good order and discipline or service discrediting——could be implied in a specification charged under Article 134 but not reciting the element itself. The Court agreed that elements could be implied. *Id*. at 232. But after rejecting arguments that previously supported the terminal element's implication in Article 134

cases, the Court held that under the facts of *Fosler,* the charge and specification did not necessarily imply the terminal element:

> In this case, at the end of the Government's case-in-chief, defense counsel made a motion to dismiss the specification of adultery under Charge II because the Government "failed to allege [the terminal element in the charge sheet," and therefore "it's a failure to state an offense...." Construing the text of the charge and specification narrowly, as we must based on the posture of the case, they fail to allege the terminal element expressly or by necessary implication.

Id. at 233.

The Court viewed the language of the adultery charge and specification narrowly due to the defense motion to dismiss, and therefore rejected the "historical gloss on the meaning of 'Article 134' when that phrase exists in the charge ...." *Id*. at 232. But without objection, the "historical gloss" on the meaning of Article 134 applies——that is, an offense charged under Article 134 and tracking one of the President's listed offenses continues to imply the terminal element. *Id*.

Here, indecent acts with a child was a specifically listed Article 134, UCMJ, offense in the MCM. MCM pt. IV, para. 87 (2005 ed.); (J.A. 6, 8). And the language is the epitome of criminal activity that is prejudicial to good order and discipline and——particularly in this case——service discrediting. This is in contrast to the language in *Fosler*, which alleged that the accused engaged in sexual intercourse with a woman not his wife: "Because adultery, standing alone, does not constitute

an offense under Article 134, the mere allegation that an accused has engaged in adulterous conduct cannot imply the terminal element." *Fosler*, 70 M.J. at 230.

Conversely, here, the mere allegation that Appellant engaged in indecent sexual acts with a child under the age of 12, which was charged as an Article 134 offense, connotes criminal activity that violates the terminal element. When this language is read with maximum liberality and in light of the historical gloss, the elements, including terminal element, were necessarily implied. Recent case law does not hold otherwise.

Additionally, the specification fairly informed Appellant of the charge against which he must defend because it provided a specific allegation of the date and act: "on or about February 2007," Appellant "rape[d] ... a person under the age of 12." (J.A. 6.) The alleged criminal conduct was not in question. Finally, the charge and specification protects Appellant against double jeopardy. *See, e.g., Resendiz-Ponce*, 549 U.S. at 108 ("[T]he time-and-date specification in respondent's indictment provided ample protection against the risk of multiple prosecutions for the same crime."). And of course, the Record of Trial itself protects Appellant from double jeopardy. *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (quoting *United States v. Williams*, 21 M.J. 330, 332 (C.M.A. 1986)).

Therefore, the charge was referred to the court-martial and——when viewed liberally and in light of the historical gloss of Article 134——Appellant had fair notice of the elements and the charge that he must defend against, and he is protected from double jeopardy. Nothing more is required. The referral and charging may have been irregular, but it was not in error. Since there is not error, additional analysis is not needed.

2. Reviewing for plain and obvious error: if the law at the time of the trial was unsettled and the appellant did not object, then the error was not plain or obvious.

Even so, any error was not plain or obvious. Although an accused need not object at trial when the law is clearly to the contrary, *see, e.g., Harcrow*, 66 M.J. at 159 (if the law was settled at the time of trial and clearly contrary to the law during appeal, then whether the error is plain is viewed at the time of appeal), when the law is unsettled at the time of trial and the accused does not object, any error cannot be said to be "plain." *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997). That is, if the law is unsettled then the error was not clear: "such an error is not plain." *Id*.; *see also United States v. David*, 83 F.3d 638 (4th Cir. 1996), *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994), *cert. denied*, 513 U.S. 1196 (1995), *United States v. Dupaquier*, 74 F.3d 615, 619 (5th Cir. 1996), *United States v. Washington*, 12 F.3d 1128 (D.C. Cir.

1994), *cert. denied*, 513 U.S. 828 (1994) (all holding that if the law was unsettled at the time of trial but only later clarified while on appeal, then while error, it is nonetheless not plain).

a. Any error was neither plain nor obvious because the law was unsettled at the time of trial.

Here, the law was unsettled at the time of trial due to the Court's shift away from its prior holdings in lesser included offense case law and its shift away from the necessary implication of Article 134's terminal element; changes that took place before Appellant's trial in December 2009. *See Fosler*, 70 M.J. at 228 ("In a line of recent cases drawing on *Schmuck*, we have concluded that the historical practice of implying Article 134's terminal element in every enumerated offense was no longer permissible." (citations omitted)). The tide was ever-murky but changing——the "hydra" this Court described in *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010), but declined to embrace——in both pleading and lesser included offense case law long before *Jones* swept ashore in April 2010. *See Schmuck v. United States*, 489 U.S. 705 (1989); *United States v. Medina*, 66 M.J. 21, 24 (C.A.A.F. 2008) (applying the elements test derived from *Schmuck*); *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009) (overruling the *per se* inclusion of Article 134's terminal element in every offense).

In *Jones* this Court held that it was "plain and obvious" error to convict the appellant of an offense under Article 134 when he was charged under Article 120. 68 M.J. at 473 n.11. The error here is different, however, and does not deal with a straightforward application of the strict elements test; rather any error centers on the implication Article 134's terminal element following an amendment and irregular referral. Because the law was unsettled and the accused did not object, the error cannot be plain in this case.

3. Reviewing for material prejudice to substantial rights: If there is notice error that is plain and obvious, courts look to whether the appellant suffered from "unfair surprise, inadequate notice or insufficient opportunity to defend."

In order to assess whether there is material prejudice to a substantial right, it is first necessary to define the constitutional interest infringed by the error. *See generally Strickland v. Washington*, 466 U.S. 668, 687 (1984) (assessing prejudice in light of the constitutional right to a fair trial). "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment ...." *Id.* at 684-85. The constitutional interest protected under the Sixth Amendment notice requirement is the due process "apprisal" function, essential to a fair trial.

Cole v. Arkansas, 333 U.S. 196, 201 (1948). This function is generally served through the charge sheet:

> The purpose of charges and specifications is to provide notice to an accused as to the matters against which he must defend and to protect him against double jeopardy.

Wilkins, 29 M.J. at 424.

Yet, regardless of the method of notice, due process is satisfied if the accused receives "adequate notice of the charges against him so that he has a fair opportunity to defend himself." *Bae v. Peters*, 950 F.2d 469, 478 (7th Cir. 1991). The issue is whether the accused suffered any prejudice from "unfair surprise, inadequate notice or insufficient opportunity to defend." *Carter v. Smith*, 2007 U.S. Dist LEXIS 6943, at *10-13 (E.D. Mich. Jan. 31, 2007); *see, e.g., Combs v. Tennessee*, 530 F.2d 695, 699 (6th Cir. 1976) (finding no due process violation where the defendant was "neither surprised, misled nor prejudiced" by the indictment or statutes).

In order to assess whether the accused was unfairly surprised or deprived of adequate notice to defend, federal courts have, under certain circumstances, looked beyond the indictment or charging document to gauge prejudice. *See, e.g., Gautt v. Lewis*, 489 F.3d 993, 1014 (9th Cir. 2007) (assuming the court can consider "sources beyond the charging document" when deciding whether accused was provided "constitutionally

sufficient notice"); *Stroud v. Po*lk, 466 F.3d 291, 296-97 (4th Cir. 2006) (notice was satisfied through the commonplace nature of the charge); *Moreno v. Hedgepeth*, 2010 U.S. Dist. LEXIS 71164, at *26 (C.D. Cal. May 11, 2010) ("Thus, it is readily apparent that, as embodied both in state law and constitutional guarantees of adequate notice, the issue of prejudice may be evaluated by looking at factors other than the original charging document."); *Jones v. Smith*, 231 F.3d 1227, 1238 (9th Cir. 2000) (finding no prejudice due to missing element of charge because accused had actual notice of "the nature and cause of the accusation against him").

Similarly, in *Watkins*, this Court held that where "the specification is not so defective that 'it cannot within reason be construed to charge a crime,' the accused does not challenge the specification at trial, pleads guilty, has a pretrial agreement, satisfactorily completes the providence inquiry, and has suffered no prejudice, the conviction will not be reversed on the basis of defects in the specification." *Watkins*, 21 M.J. at 210 (citing and quoting *Thompson*, 356 F.2d at 226 (appellant must show that indictment is "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.")). Thus, actual notice can obviate a claim of constitutional error arising from a defective charging document and undermine a claim of prejudice.

Moreover, in assessing material prejudice under the plain error analysis, the error and conviction alone cannot be the harm:

> Any trial error can be said to impair substantial rights if the harm is defined as "being convicted at a trial tainted with [fill-in-the-blank] error." Nor does the fact that there is a "protected liberty interest" at stake render this case different ....

Puckett, 129 S. Ct. at 1433.

a. Appellant suffered no material prejudice to his substantial rights: Appellant was not misled, he pled guilty pursuant to a pretrial agreement, he consented to the amendment to the charge, he had actual notice of the charge and specification, the elements were correctly explained to him during the providence inquiry, he admitted to the terminal element in the stipulation of fact, and he admitted that he understood the offense to contain the terminal element.

Any error in Appellant's plea and conviction to a charge that was not expressly on the charge sheet or to a charge and specification that did not include every element did not materially prejudice the substantial rights of the accused. First, the historical practice and the President's guidance in the MCM provided actual notice to Appellant, albeit outside of the charging document, that indecent acts with a child under Article 134 was included as a lesser included offense of Article 120's rape of a child. Even though it is not a lesser included offense in light of the strict elements test, Appellant had

actual notice of the offense and all of its elements, including the terminal elements.

This actual notice is reinforced through the pretrial agreement were Appellant reached a mutual agreement with the Convening Authority to plead guilty to the "LIO of indecent acts with a child" in "violation of Article 134" instead of the charged Article 120 offense. (J.A. 8.) And further through the stipulation of fact that detailed his conduct in trace of each Article 134 indecent acts with a child element, including that his conduct violated Article 134's terminal element:

> I fully believe that my actions were prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces.

(J.A. 37-38.)

Second, with this actual knowledge, Appellant pled guilty in open court "to the charge of indecent acts with a child," which violated "Article 134." (J.A. 15.) Based on this plea, the Military Judge reinforced the elements of the offense including the terminal element——"that under the circumstances, your 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." (J.A. 28.)

Appellant agreed that these elements correctly described his action. (J.A. 29.) And he freely admitted facts in support of each element. (J.A. 34-35.) He explained how his conduct

was service discrediting: "[I]f the actions were to be discovered by other people they could possible assume that everyone in the military is a pervert." (J.A. 34.) As in *Watkins*, this Court should not upset the findings in this context.

Third, unlike in *Girouard* and *McMurrin* where the convictions under Article 134 were separate and distinct from the charged offenses and the focus of the trial——under Article 118 and Article 119 respectively——the charged offense here was amended to an Article 134 offense through the mutual agreement and consent of the Convening Authority and Appellant through the pretrial agreement. This change is not clearly annotated on the charge sheet itself, as a change would normally be, because the parties believed that it was unnecessary——everyone knew that Appellant was pleading to indecent acts with a child under Article 134. There was no confusion.

Fourth, and finally, the error cannot be the harm: it is not enough that Appellant was convicted of an offense that was not charged. This would reduce the third prong to a nullity. *See Puckett*, 129 S. Ct. at 1433. Yet this is exactly Appellant's claim: "MM 2's conviction was prejudicial." (Appellant's Br. at 18.)

Appellant's additional claim that assault consummated by a battery was the proper lesser included offense is irrelevant

relative to whether Appellant was unfairly surprised or deprived of adequate notice to defend. (Appellant's Br. at 18.) Instead of asking to plead to assault consummated by battery, Appellant sought an agreement with the Convening Authority to plead to indecent acts with a child. The Convening Authority agreed and extended certain protections to Appellant through the pretrial agreement. Appellant freely pled to this offense and openly admitted to the Military Judge the facts that support the offense. Simply, in this context and in this case, there was no material prejudice to a substantial right.

4. Any error did not seriously affect the fairness, integrity or public reputation of the public proceedings.

In light of these facts, any error did not seriously affect the fairness, integrity or public reputation of public proceedings. In fact, fairness, integrity and public reputation of public proceedings is best served by upholding the conviction where Appellant pled guilty pursuant to a pretrial agreement——to a charge and specification that stated an offense under the controlling law at the time Appellant was charged——where he entered into a stipulation of fact explaining his guilt, where Appellant had actual notice of the charge and elements against him, where the Military Judge fully explained the elements, and where Appellant knowingly and voluntarily assured the Military Judge that he did indeed committed the offense. *See Young*, 470

U.S. at 20 (the overwhelming evidence of guilt means that the error "cannot be said to undermine the fairness of the trial and contribute to a miscarriage of justice."); *see also Cotton*, 535 U.S. at 634.

Appellant knowingly and voluntarily pled guilty to a heinous offense and received the benefit of a pretrial agreement in exchange. His rights were protected; the public's interest will be protected by upholding this conviction. Any error must succumb to this reality.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court on September 12, 2011. I also certify that this brief was electronically served on appellate defense counsel, LT Toren Mushovic, JAGC, USN, on September 12, 2011.

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