22 December 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee,

v.

Airman First Class (E-3)
JOSEPH A. HAYES, USAF
Appellant.

USCA Dkt. No. /AF
Crim. App. No. 37588

GRANT BRIEF

SHANE A. McCAMMON, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33983
Air Force Legal Operations Agency
1500 Perimeter Road
JB Andrews NAF, MD 20762
(240) 612-4770

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE, WHERE THE SPECIFICATION OMITTED REFERENCE TO A REQUIRED ELEMENT UNDER STATE LAW FOR A FINDING OF GUILTY FOR WRONGFUL CONSUMPTION OF ALCOHOL WHILE UNDER AGE 21.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ. This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ.

Statement of the Case

Appellant was tried on 21-25 September 2009 by a general court-martial composed of officer members at Nellis Air Force Base, Nevada. Contrary to his pleas, Appellant was convicted of one specification of dereliction of duty by willfully failing to refrain from drinking alcohol while under the age of 21, in violation of Article 92, UCMJ, and six specifications of

wrongfully distributing controlled substances (marijuana and cocaine), in violation of Article 112a, UCMJ. Joint Appendix (J.A.) 8-12, 19. In accordance with his plea, Appellant was found guilty of one specification of wrongfully using marijuana. J.A. 18. The members sentenced Appellant to a bad-conduct discharge, two years' confinement, reduction to the grade of E-1, and forfeiture of all pay and allowances. J.A. 20. On 4 December 2009, the convening authority approved the sentence as adjudged.

On 15 August 2011, the Air Force Court of Criminal Appeals determined that the specification alleging dereliction of duty did not fail to state an offense. *United States v. Hayes*, No. ACM 37588 (A.F. Ct. Crim. App. Aug. 15, 2011)(J.A. 1-4). The Court further explained that, even assuming *arguendo* that the specification was deficient, the error was harmless as the members would have imposed the same sentence as the sentence adjudged. J.A. 3. Appellant's petition for grant of review was filed with this Court on 11 October 2011, and was granted on 30 November 2011.

Statement of Facts

1. Article 32 hearing

The Government alleged that Appellant was derelict in the performance of his duties "in that he willfully failed to refrain from drinking alcohol while under the age of 21, as it

was his duty to do." J.A. 8. During Appellant's Article 32 hearing, several witnesses testified that they had observed Appellant -- who was not yet 21 years old -- consume alcohol at various locations in or near Las Vegas, Nevada, including an apartment, a public street, and the Luxor hotel and resort. J.A. 100, 111-123. In her report, the Investigating Officer (I.O.) specifically noted that "there is no evidence of [Appellant's] duty to refrain from drinking alcohol while under the age of 21." J.A. 100. The I.O. reopened the Article 32 hearing and allowed the Government to provide Nevada Revised Statute (N.R.S.) 202.020 for her consideration. J.A. 103. As noted by the I.O., N.R.S. 202.020 does not *per se* prohibit any person under 21 years of age from consuming alcoholic beverages; rather, the law prohibits any person under the age of 21 from consuming "any alcoholic beverage in any saloon, resort or premises where spirituous, malt or fermented liquors or wines are sold . . . ." *Id.*; *see also* J.A. 65. The I.O. further stated that N.R.S. 202.020 was inapplicable to Appellant's case "[a]s none of the alleged incidents where the [Appellant] consumed alcohol were in a saloon, resort, or premises where spirituous, malt or fermented liquors are sold . . . ." J.A. 103. Despite the I.O.'s finding that Charge I's specification was deficient, the convening authority referred the charge and

specification to a general court-martial without any modification. J.A. 8-12.

2. Motion to Dismiss

Appellant's defense counsel filed a pretrial motion to dismiss the specification for failure to state an offense. J.A. 21-32. Defense counsel specifically noted that "[t]he evidence presented during the Article 32 hearing was that [Appellant] was observed drinking alcohol in his private residence or the residences of others." J.A. 21. In its response, the Government argued that "[i]t was the intent of the Government to charge [Appellant] with dereliction of duty for his consumption of alcohol in a public place in violation of Nevada State law." J.A. 34. The Government then claimed that N.R.S. 202.020 imposed a duty upon Appellant because he consumed alcohol while under the age of 21 at the following public locations: (1) Las Vegas Boulevard, (2) Fremont Street, (3) a pool at an apartment complex, and (4) the casino floor of the Luxor Hotel. J.A. 33-34.

At trial, Appellant's defense counsel again objected to the charge on the grounds that it failed to state an offense. J.A. 41. During the Article 39(a) session to address the motion to dismiss, Airman Basic Daniel Young testified that he observed Appellant consume what he assumed was alcohol in a hotel room at the Luxor and on the Luxor's gaming floor. J.A. 49-52. No

other witnesses testified during the Article 39(a) session. *See* J.A. 41-64.

In response to the military judge's questions, trial counsel said that the source of the duty imposed upon Appellant was N.R.S. 202.020. J.A. 57. Trial counsel further stated that "[t]he government concedes that if there was only evidence that he had been consuming alcohol in his private residence in an apartment, that would fail to state an offense because that's not a crime under Nevada law. . . . So what it really narrows down to is whether or not the members believe that he was drinking at the Luxor . . . ." J.A. 58.

During the Article 39(a) session, Appellant's trial defense counsel noted that the I.O. "is a magistrate judge in the State of Nevada" and that she had

> specifically stated in her report that the evidence presented in the case was that [Appellant] was observed drinking alcohol in his private residence or private residences of others. And specifically, the only other testimony regarding a public place was from Airman Fleming who stated he saw him carrying a beer; never stated he actually saw him drinking beer in a public place.

J.A. 60.

The military judge denied the motion to dismiss, finding the specification stated an offense. J.A. 63. In so ruling, the judge explained that it is a custom of the service to follow state law, and that "as a matter of law, the Luxor Hotel,

including any part of its premises, the gaming floor, the bar areas, any lodging room, constitutes a public place." J.A. 64.

3. Findings and Sentencing

Airman Young testified during findings that he had observed Appellant consume what appeared to be alcohol at the Luxor -- both in a hotel room and on the casino floor. J.A. 69-70, 75-78. The Government also introduced into evidence Appellant's statement to Air Force law-enforcement officials that he had been "drinking" and gambling at the Luxor, and that there was alcohol in the hotel room. J.A. 84-90.

At the conclusion of the presentation of evidence, the military judge instructed the members on the elements of dereliction of duty. J.A. 79-80. He specifically instructed the members that the "duty may be imposed by regulation, lawful order, or custom of the service." J.A. 79. The judge also informed the members that he had taken judicial notice of N.R.S. 202.020 and that "you are now permitted to recognize and consider this fact without proof." J.A. 82.

During findings argument, the Government highlighted N.R.S. 202.020 and said Appellant was guilty of Charge I because

> you have him talking about drinking and gambling all night at the Luxor. You have an eye-witness [sic], and you have a confession. There's overwhelming evidence that he was drinking underage. . . . And that's not the only evidence that he was drinking underage, but that's the one he confessed to, and the eye-witness [sic], and he talks about all the bottles

> of hard liquor that are in there, just like Airman Young talked about, in his confession.

J.A. 83.

The members found Appellant guilty of Charge I and its specification. J.A. 19. During sentencing proceedings, the Government specifically argued to the members that Appellant deserved a bad-conduct discharge because he "wasn't thinking about [losing benefits] when he was drinking underage." J.A. 93.

Summary of Argument

The Government failed to specifically allege that Appellant's consumption of alcohol while under the age of 21 was illegal under Nevada state law. Because Appellant challenged the specification before and during his court-martial, this Court must narrowly construe the specification and adopt only those interpretations that closely hew to the plain text. By the Government's own implicit admissions, Charge I and its specification fails to allege, either expressly or by necessary implication, that Appellant consumed alcohol in a location prohibited by Nevada state law. In denying Appellant's motion to dismiss, the military judge and the Air Force Court of Criminal Appeals erred by (1) misapplying this Court's analysis for reviewing the sufficiency of a specification and (2) attempting to cure the deficient specification through an

analysis of the evidence presented at trial. As a result of these errors, the Government violated Appellant's constitutional rights to due process -- a violation that was not harmless as Appellant was convicted of an uncharged crime.

Argument

THE MILITARY JUDGE ERRED IN DENYING APPELLANT'S MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE, WHERE THE SPECIFICATION OMITTED REFERENCE TO A REQUIRED ELEMENT UNDER STATE LAW FOR A FINDING OF GUILTY FOR WRONGFUL CONSUMPTION OF ALCOHOL WHILE UNDER AGE 21.

Standard of Review

"The question of whether a specification states an offense is a question of law, which this Court reviews de novo." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

Law and Analysis

The Government failed to specify that Appellant's otherwise legal conduct was prohibited by Nevada state law. As a result of the fatal deficiency in Charge I's specification -- a deficiency first highlighted by the I.O. and then acknowledged by trial counsel during the Article 39(a) session to address the motion to dismiss -- the Government violated Appellant's constitutional right to due process by convicting him of an uncharged offense.

A. The charge and specification must be narrowly construed.

As this Honorable Court has made clear, "[t]he Constitution protects against conviction of uncharged offenses through the

Fifth and Sixth Amendments." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011)(citing *Russell v. United States*, 369 U.S. 749, 761 (1962)). To ensure an accused is not convicted of an uncharged offense, this Court requires the Government to "allege every element expressly or by necessary implication . . . ." *Id.*; *see also Crafter*, 64 M.J. at 211; *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994)).

Importantly, in contested cases where the charge and specification are challenged at trial, this Court will "read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Fosler*, 70 M.J. at 230 (citation omitted). Thus, in *Fosler*, this Court narrowly construed a challenged adultery specification, and held that the Government had failed to allege every element of Article 134. *Id*. at 233.

Here, Appellant contested the Article 92, UCMJ, charge and specification by pleading not guilty. J.A. 18. Further, through his trial defense counsel, Appellant challenged the wording of the specification itself, raising a motion to dismiss pursuant to Rule for Court-Martial (R.C.M.) 907. J.A. 21-32, 41. Given the challenge to the specification made at the trial, this Court should narrowly construe Charge I and its specification to determine whether the Government alleged every element of the offense. *See Fosler*, 70 M.J. at 233.

B. The specification of Charge I fails to allege, either expressly or by necessary implication, that Appellant's consumption of alcohol was criminal.

Even a broad reading of the specification here shows that it is missing the most critical element of Article 92 -- namely, that Appellant's conduct was criminal. In order to convict Appellant of the charged offense, the Government had to prove that he had certain prescribed duties. Those prescribed duties "may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service." MANUAL FOR COURTS-MARTIAL (M.C.M.), UNITED STATES, Pt. IV, ¶16(c)(3)(a) (2008 ed.)(J.A. 5-7). From the re-opening of the Article 32 hearing through Appellant's court-martial, the Government's theory was that N.R.S. 202.020 imposed upon Appellant a duty to refrain from consuming alcohol while under the age of 21. J.A. 57. Importantly, however, as the I.O. noted in her report and as the Government acknowledged at trial, Nevada law does not prohibit persons under the age of 21 from consuming alcohol in all circumstances. J.A. 100. In fact, under Nevada law, Appellant could have legally consumed alcohol in any place that was not a "saloon, resort or premises where spirituous, malt or fermented liquors or wines are sold . . . ." J.A. 65. For example, he could have legally consumed alcohol in a private home, in a friend's apartment, or in any other private setting, as well as any number of public places.

Essentially, the Government here attempted to incorporate a state law without incorporating that law's criminal element into the specification. In order to properly state an offense, the Government needed to allege that Appellant's conduct violated Nevada state law in that he "willfully failed to refrain from consuming alcohol while in a saloon, resort or premises where spirituous, malt or fermented liquors or wines are sold, while under the age of 21, as it was his duty to do." The Government expressly acknowledged this requirement in its response to Appellant's motion to dismiss, stating that "[i]t was the intent of the Government to charge [Appellant] with dereliction of duty for his consumption of alcohol in a public place in violation of Nevada State law." J.A. 34 (emphasis added). Yet, despite being alerted by the I.O. that the specification failed to state an offense -- and despite acknowledging pre-arraignment that it was the public nature of Appellant's behavior that constituted criminal conduct –- the convening authority referred Charge I without including the criminal element.

Just as the Government failed to expressly allege that Appellant's consumption of alcohol occurred in a prohibited place and was therefore illegal, the specification as drafted does not necessarily imply the missing element. Nothing in the language of the specification even hints that Appellant's consumption of alcohol occurred in a place prohibited by Nevada

state law; on the contrary, the specification merely states that his alleged dereliction of duty occurred at or near "Las Vegas, Nevada." J.A. 8. As detailed above, it is not illegal to consume alcohol under the age of 21 in Las Vegas, Nevada.

Further, the mere allegation that Appellant consumed alcohol while under the age of 21 does not necessarily imply the missing element. As this Court made clear in *Fosler*, where an act, standing alone, does not constitute a criminal offense, the "mere allegation that an accused has engaged in [the act] cannot imply the [missing] element." 70 M.J at 230. Thus, in *Fosler*, this Court refused to find that the terminal element of Article 134 was necessarily implied where the Government had simply alleged a wrongful violation of Article 134 for adultery. *Id.* The same principle applies here because Appellant's alleged act of consuming alcohol, standing alone, was not illegal.

Critically, as this Honorable Court has made clear, "unless the specification sets forth an unlawful act, it must be presumed lawful. Where an act is not in itself an offense, being made so only by statute, regulations, or custom, words importing criminality are a requirement and, if lacking, the specification is deficient." *United States v. Brice*, 38 C.M.R. 134, 138 (C.M.A. 1967) (citation omitted) (emphasis added). The *Brice* Court further explained that "if the act charged does not of itself constitute criminal conduct without an allegation of

wrongfulness, the omission thereunder renders the specification legally deficient." *Id.* (citation omitted).

Like the specification at issue in *Brice*, the specification here does not contain the "words importing criminality" -- namely, that Appellant consumed alcohol "in a saloon, resort or premises where spirituous, malt or fermented liquors or wines are sold." As such, Charge I's specification is deficient.

C. The military judge and the Air Force Court of Criminal Appeals erred by attempting to cure the deficient specification through the use of evidence presented at trial.

Rather than apply this Honorable Court's clear guidance that a challenged specification must be narrowly construed and must state every element of the offense, the military judge –- and then the Air Force Court of Criminal Appeals -- erroneously turned the issue into an evidentiary one. Specifically, in explaining his decision to deny the defense motion to dismiss, the military judge incorrectly stated that, "What we are really talking about is whether the government has sufficient evidence to prove beyond a reasonable doubt that the accused was derelict in the performance of those duties." J.A. 63. The Air Force Court of Criminal Appeals compounded this error by explaining "the question was not whether the specification of the charge stated an offense, but whether the government had sufficient evidence to prove that the appellant was guilty of the charge." *Hayes*, No. ACM 37588 (A.F. Ct. Crim. App., August 15, 2011)(J.A.

3). Both the military judge and the Air Force Court are wrong. The correct analysis is to narrowly construe the specification and see whether, as a matter of law, the specification alleged every element of the offense. *Fosler*, 70 M.J. at 230.

As made clear by this Court, "a facially deficient specification cannot be saved by reference to proof at trial . . . ." *Crafter*, 64 M.J. at 211; *see also United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982), *overruled on other grounds by Fosler*, 70 M.J. 225. The military judge here should have focused only on the specification itself, and rather than allow the Government to save the specification through proof at trial, should have dismissed the specification for the failure to state an offense.

D. The Government's failure to state an offense violated Appellant's constitutional rights to due process.

The military judge's error here was not merely academic. As a result of the Government's failure to specifically allege that he consumed alcohol in a prohibited location, Appellant was forced to guess the Government's theory of criminality. When properly applied, the Fifth and Sixth Amendments to the U.S. Constitution prohibit the Government from placing criminal defendants in the same predicament faced by Appellant.

This Court has repeatedly emphasized that "the due process principle of fair notice mandates that 'an accused has a right

to know to what offense and under what legal theory' he will be convicted." *E.g.*, *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (quoting *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008)); *United States v. Miller*, 67 M.J. 685, 389 (C.A.A.F. 2009). Further, in *Russell v. United States*, the Supreme Court explained that a charge fails "to inform the defendant of the nature of the accusation against him" if it leaves the prosecution "free to roam" and "shift its theory of criminality" throughout a trial. 369 U.S. 749, 767-68 (1962). Such a charge is fatally deficient and must be dismissed. *Id.* at 772.

Here, the Government did not refine its theory of Appellant's criminality until after the trial began, as evidenced by the shifting analysis at both the Article 32 hearing (where the Government elicited testimony about alcohol consumption in private residences) and the written response to the motion to dismiss (where the Government focused on Appellant's alleged consumption of alcohol on Las Vegas Boulevard, Freemont Street, and a public pool). J.A. 33-34, 100. Without the constitutional benefit of a properly drafted specification, trial defense counsel had to prepare Appellant's case by examining the only sources of particulars provided by the Government prior to arraignment: the Article 32 hearing and the Government's written response to the motion to dismiss. A

close examination of these two sources reveals, however, that the Government sent conflicting messages as to its theory of Appellant's criminality.[1]

As detailed above, the Government elicited testimony at the Article 32 hearing that Appellant consumed alcohol in private locations -- acts that the I.O. specifically noted were not criminalized by N.R.S. 202.020.[2] J.A. 100. Further, the Government presented evidence that Appellant was observed in possession of alcohol in a public place while under the age of 21 -- an act prohibited by N.R.S. 202.020(2). J.A. 103. While

[1] Even if the Government had clearly laid out its theory of Appellant's criminality in the Article 32 hearing or in the response to the motion to dismiss, it is axiomatic that a deficient specification cannot be cured by ancillary documents or pleadings. *See, e.g., Russell*, 369 U.S. at 770 (noting that "it is a settled rule that a bill of particulars cannot save an invalid indictment") (citations omitted). Appellant points to the Article 32 hearing and the Government's response to themotion to dismiss only to illustrate that the Government's theory of his criminality continued to shift throughout the pretrial stages of Appellant's court-martial.

[2] One of those locations was the Luxor Hotel. J.A. 103, 117, 121. Appellant recognizes that a court-martial is not bound by the I.O.'s determination that the Luxor is not a public place for the purposes of N.R.S. 202.020. However, the I.O.'s finding -- coupled with her unique position as a Nevada magistrate judge -- further emphasized the importance of the Government specifically alleging that its theory of Appellant's criminality was that (1) he did indeed consume alcohol at the Luxor; (2) the Luxor is a saloon, resort, or premise that sold liquor and wine; and (3) that the Luxor is appropriately considered a single entity for purposes of N.R.S. 202.020, rather than a collection of entities, some of which may qualify as a liquor seller and some of which may not.

the I.O. specifically noted that the Government had not charged Appellant with possession, the Government further obscured its theory of criminality by suggesting in its written response to the motion to dismiss that it would use evidence of possession to prove public consumption of alcohol. The Government also indicated in its written response that it intended to present evidence at trial that Appellant had consumed alcohol on two public streets and at a pool, in addition to drinking at the Luxor. J.A. 33-34.

Appellant may have reasonably believed that the Government only had evidence of him consuming alcohol in private or non-criminal locations, based on (1) the testimony presented at the Article 32 hearing, (2) the I.O.'s findings, (3) the Government's subsequent failure to redraft Charge I's specification, and (4) the Government's continued emphasis in the written response to the motion to dismiss. Critically, had the Government properly drafted the specification, Appellant would have been on notice that his alleged criminal behavior had nothing to do with drinking alcohol in an apartment, at a pool, or on a public street, but rather was focused on his alleged consumption at a saloon, resort, or other premise that sold alcohol. By not providing constitutionally required notice to Appellant, the Government essentially forced him to flail at a

moving target -- a tactic specifically prohibited by the Supreme Court. *See Russell*, 369 U.S. at 767-68.

Further illustrating the danger warned against by *Russell* and *Jones* is the military judge's erroneous conclusions of law. In denying Appellant's motion to dismiss, the military judge incorrectly focused on the distinction between public and private places. J.A. 63-64. Picking up on this, trial counsel twice erroneously referred to the Nevada statute as prohibiting alcohol consumption in a "room" instead of a "saloon" where alcohol is sold. J.A. 62. Importantly, whether a place is "public" or "private" is not an element of wrongful consumption of alcohol by a person under age 21 in Nevada. J.A. 65. Instead, the element is whether the location in which the accused consumes alcohol is a saloon, resort, or premise that sells alcohol. *Id*. Whether a place is "public" or "private" is significant under N.R.S. 202.020 only if the Government is charging an individual with possession of alcohol. *Id.* Because the military judge made conclusions of law relevant only to the possession of alcohol, Appellant still was not on notice of the Government's theory of criminality despite having already been arraigned and having already (unsuccessfully) sought clarification through a motion to dismiss.

Not only did the military judge misinterpret and misapply the Nevada law that purportedly imposed upon Appellant the

charged duty, but the judge's faulty reasoning shows that not even he understood that the Government was attempting to hold Appellant criminally responsible for consuming alcohol in a saloon, resort, or premise that sold alcoholic beverages.[3] It is unreasonable and unfair to expect that Appellant had any better idea of the Government's theory.

The specification of Charge I failed to provide sufficient notice to Appellant that he had to defend against allegations of consuming alcohol in a saloon, resort or premises where alcoholic beverages are sold. The specification also failed to notify him that he needed to defend against an allegation that he consumed alcohol in a public place, as found by the military judge, but not forbidden by any statute or regulation. As a result of these deficiencies, Charge I's specification failed to properly state an offense and must be dismissed. *See Fosler*, 70 M.J. at 233.

E. Appellant was harmed when the Government failed to provide him constitutionally required notice.

[3] This misunderstanding is explainable given the Government's failure to properly draft Charge I's specification. As noted by the Supreme Court, "in addition to informing the defendant, another purpose served by the indictment is to inform the trial judge what the case involves, so that, as he presides and is called upon to make rulings of all sorts, he may be able to do so intelligently." *Russell*, 369 U.S. at 769, n.15 (citation and internal quotation omitted).

The Air Force Court of Criminal Appeals explained that, even if Charge I's specification failed to state an offense, any error was harmless. J.A. 3-4. While Appellant acknowledges he was convicted of additional charges and was sentenced below the maximum punishment imposable by law, the Air Force Court's harmless-error determination ignores the collateral consequences of a federal conviction. As the Supreme Court has made clear, "the collateral consequences of a second conviction [even in the case of concurrent sentences] make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence." *Rutledge v. United States*, 517 U.S. 292, 302 (1996). Further, this Honorable Court has explained that an accused is harmed when the Government deprives him of his due-process right to adequately defend himself. *See United States v. Marshall*, 67 M.J. 418, 421 (C.A.A.F. 2009) (explaining that the accused was materially prejudiced because he was convicted of an offense after fatal variance resulted in him not being given the opportunity to anticipate the Government's theory of his criminality and adequately prepare his defense). Importantly, *Marshall* rejected the same reasoning employed by the Air Force Court here -- namely, that the specification's deficiency was harmless because the resulting fatal variance did not increase the punishment to which the accused was subject. *Id.* This Court should follow its own

precedent and find that Appellant was harmed when he was convicted of an offense after being deprived of his due-process rights.

Conclusion

By failing to allege that Appellant's consumption of alcohol was illegal under Nevada state law, the Government deprived him of his due-process right to adequately prepare his defense. Additionally, by failing to provide him with constitutionally required notice, Appellant was convicted of behavior that is not prohibited by either the Uniform Code of Military Justice or Nevada state law. Further compounding the deficiency of Charge I and its specification, the military judge and the Air Force Court of Criminal Appeals failed to follow this Court's clear analysis for reviewing the sufficiency of a specification.

WHEREFORE, Appellant requests this Honorable Court set aside Charge I and its specification, and order a rehearing on the sentence.

SHANE A. McCAMMON, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33983
Air Force Legal Operations Agency
1500 Perimeter Road
JB Andrews NAF, MD 20762
shane.mccammon@pentagon.af.mil
(240) 612-4770