17 January 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Cross-Appellee,

v.

RYAN D. HUMPHRIES,
SENIOR AIRMAN (E-4)
UNITED STATES AIR FORCE,
Cross-Appellant.

Crim. App. No. ACM 37491 (rem)

USCA Dkt. No. 10-5004/AF

CROSS-APPELLANT'S BRIEF

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

Issue Presented

WHETHER A CONTESTED ADULTERY SPECIFICATION THAT FAILS TO EXPRESSLY ALLEGE AN ARTICLE 134 TERMINAL ELEMENT BUT THAT WAS NOT CHALLENGED AT TRIAL STATES AN OFFENSE.

Statement of Statutory Jurisdiction

Appellant's approved court-martial sentence included a bad-conduct discharge, which brought his case within the Air Force Court of Criminal Appeals' Article 66 jurisdiction. *See* Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006). On August 3, 2011, the Air Force Court of Criminal Appeals affirmed the findings. *United States v. Humphries*, No. ACM 37491 (rem) (A.F. Ct. Crim. App. Aug. 3, 2011) [J.A. 1]. This Court has jurisdiction to review the Air Force Court's opinion. Article 67(b)(3), UCMJ, 10 U.S.C. § 867(b)(3) (2006).

Statement of the Case

On March 24 through 26 and April 28 through May 1, 2009, Appellant was tried by a general court-martial composed of officer and enlisted members convened by the Commander, Twelfth Air Force (ACC). Contrary to his pleas, Appellant was found guilty of one specification of adultery in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2006), and one specification of committing consensual sodomy on divers occasions in violation of Article 125, UCMJ, 10 U.S.C. § 925 (2006). The adjudged and approved sentence consisted of reduction to E-1 and a bad-conduct discharge. With the exception of the bad-conduct discharge, the convening authority ordered the sentence executed.

On May 24, 2010, the Air Force Court of Criminal Appeals issued its first decision in this case. *United States v. Humphries*, No. ACM 37491 (A.F. Ct. Crim. App. May 24, 2010) [J.A. 5]. That decision set aside the convening authority's action and remanded the case for a new action by the convening authority, who "may approve an adjudged sentence no greater than one including a suspended bad-conduct discharge." *Id*., J.A. 9. In that decision, the Air Force Court expressly declined to affirm the findings. *Id*.

The Judge Advocate General of the Air Force filed a certificate for review with this Court. *United States v. Humphries*, 69 M.J. 199 (C.A.A.F. 2010). This Court subsequently remanded the case to the Air Force Court to take action on the

findings. *United States v. Humphries*, 69 M.J. 491 (C.A.A.F. 2011) (summary disposition). On August 3, 2011, the Air Force Court issued its second decision in this case. *United States v. Humphries*, No. ACM 37491 (rem) (A.F. Ct. Crim. App. Aug. 3, 2011) [J.A. 1]. On September 15, 2011, the Judge Advocate General of the Air Force recertified the previously certified issue. *United States v. Humphries*, 70 M.J. 350 (C.A.A.F. 2011).

A copy of the Air Force Court's decision was mailed to Appellant on September 7, 2011. He filed a timely petition for grant of review on September 30, 2011. *United States v. Humphries*, 70 M.J. 365 (C.A.A.F. 2011). This Honorable Court granted review on December 15, 2011.

Statement of Facts

One of the two specifications of which Appellant was convicted alleged a violation of Article 134. Charge Sheet, Charge II, Specification 1 [J.A. 28]. The specification alleged that Appellant, "a married man, did, at or near Dyess Air Force Base, Texas, on or about 2 February 2005, wrongfully have sexual intercourse with [AEH], a woman not his wife." *Id*. The specification did not allege that the charged conduct was prejudicial to good order and discipline, was service discrediting, or violated a non-capital federal criminal statute. *Id*.

Appellant pleaded not guilty to all of the charges and specifications, including the Article 134 charge and the adultery

specification. J.A. 32, 33. The members convicted him of, *inter alia*, the Article 134 charge and the adultery specification. J.A. 39.

The military judge instructed the members that an element of adultery was that the conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces. J.A. 35. He also defined those terms for the members. J.A. 35-36.

Summary of Argument

In a fully contested court-martial, Appellant was found guilty of an Article 134 specification that failed to allege any of Article 134's elements. This case involves the same offense – adultery – as that at issue in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Charge II, Specification 1 neither expressly alleged any of Article 134's three elements nor necessarily implied any such element.

This case is distinguishable from *Fosler* in that the adultery specification was not challenged at trial. That distinction requires a liberal construction in favor of validity in this case, as opposed to the narrow construction of the specification employed in *Fosler*. But even when liberally construed, Charge II, Specification 1 fails to allege any of Article 134's three disjunctive elements. The specification, therefore, fails to state an offense.

Argument

A CONTESTED ADULTERY SPECIFICATION THAT INCLUDES NONE OF ARTICLE 134'S ELEMENTS FAILS TO STATE AN OFFENSE.

A. The decisional issue is whether, if liberally construed in favor of validity, an Article 134 adultery specification that fails to allege any of Article 134's three disjunctive elements fails to state an offense.

In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), this Court held that an adultery specification that did not include any of Article 134's terminal elements failed to allege an offense. *Fosler* was a contested case in which the defense challenged the specification at trial. *See id*. at 227. *Fosler* twice cited a previous decision of this Court observing that specifications are liberally construed "in favor of validity when they are challenged for the first time on appeal." *United States v. Watkins*, 21 M.J. 208, 209 (C.A.A.F. 1986).

The central question in this case is whether, if liberally construed in favor of validity, an Article 134 adultery specification that fails to allege any of Article 134's elements states an offense. It does not.

Article 134, the "General Article," criminalizes three categories of conduct "not specifically mentioned in this chapter": (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces"; (2) "all conduct of a nature to bring discredit upon the armed forces"; and (3) "crimes and offenses not capital." Article 134, UCMJ, 10 U.S.C. § 934 (2006). While prejudice to good order and discipline and

service discrediting conduct are sometimes referred to as Article 134's "terminal elements," in reality, they – along with "crimes and offenses not capital" – are Article 134's *only* elements. Charge II, Specification 1 alleges none of those three elements.

B. A de novo standard of review applies.

Even though not raised at trial, the issue of whether Charge II, Specification 1 fails to state an offense is not subject to a plain error analysis. The *Manual for Courts-Martial* permits an accused to raise a failure to state an offense challenge for the first time on appeal. *See* Rules for Courts-Martial 905(e), 907(b)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Whether a specification fails to state an offense is a question of law; it is, therefore, subject to de novo review. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). Accordingly, this Court must determine de novo whether Specification 1 of Charge II, as liberally construed in favor of validity, fails to expressly or by necessary implication allege any of Article 134's three elements. *See Watkins*, 21 M.J. at 209. The specification fails that test.

C. Under *Fosler*, an allegation that a married man wrongfully had sexual intercourse with a woman not his wife cannot imply any of Article 134's three disjunctive elements.

Just as in *Fosler*, "the terminal element was not expressly alleged." 70 M.J. at 230. And even if liberally construed, the adultery specification did not necessarily imply any of Article 134's three elements. As this Court held in *Fosler*, "[a]n

allegation of adulterous conduct *cannot* imply the terminal element." *Id*. (emphasis added). That conclusion would be the same under either a narrow or liberal interpretation of the statute.

"Because adultery, standing alone, does not constitute an offense under Article 134, the mere allegation that an accused had engaged in adulterous conduct *cannot* imply the terminal element." *Id*. (emphasis added). This Court also held that "the word 'wrongfully' *cannot* itself imply the terminal element." *Id*. (emphasis added). This Court explained that "wrongfully" is a word of criminality that speaks "to mens rea and the lack of defense or justification, not to the elements of an offense." *Id*. at 230-31. This Court reasoned that the word "wrongfully" cannot "be read to mean or be defined as, for example, a 'disorder[or] neglect[] to the prejudice of good order and discipline." *Id*. at 231 (alterations in original). The word "wrongfully," therefore, does "not imply the terminal element." *Id*.

D. Under *Fosler*, the charge sheet's reference to "Violation of the UCMJ, Article 134" does not imply any of Article 134's three disjunctive elements.

A charge sheet's allegation of a violation of "Article 134" is insufficient to suggest which of the three elements is being alleged. Such an allegation does not even differentiate between clause 3 and clauses 1 and 2 of Article 134 – a distinction fraught with significance under this Court's case law. This

Court has held that the clause 1 and clause 2 terminal elements are not implied by clause 3. *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008). The charge sheet's reference to "Article 134" could contemplate adultery as a non-capital federal offense, perhaps under the Assimilated Crimes Act, 18 U.S.C. § 13 (2006). It could also contemplate an act to the prejudice of good order and discipline. Finally, it could contemplate an act of a nature to discredit the armed forces. So the mere allegation of "Article 134" does not necessarily imply any terminal element.

E. The charge sheet's failure to expressly or by necessary implication allege an offense is constitutional error.

In *Fosler*, this Court emphasized the constitutional rights at issue when a charge and specification fail to state an offense: "The Constitution protects against conviction of uncharged offenses through the Fifth and Sixth Amendments." *Fosler*, 70 M.J. at 229. "The Fifth Amendment provides that no person shall be 'deprived of life, liberty, or property, without due process of law,' U.S. Const. amend. V, and the Sixth Amendment provides that an accused shall 'be informed of the nature and cause of the accusation,' U.S. Const. amend. VI." *Id.* (quoting *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011)). As this Court has noted, "[T]he 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." *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (quoting *Medina*, 66 M.J. at 26-27); *see also United States v. Miller*, 67

M.J. 385, 389 (C.A.A.F. 2009). And in *Russell v. United States*, the Supreme Court held 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).

Those constitutional provisions were violated here, where Appellant was not on notice as to which of Article 134's three disjunctive elements to defend against. The Article 32 investigating officer's report did note that an element of an Article 134 adultery offense is "[t]hat, under the circumstances, the conduct of the accused 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. 17. But that disjunctive formulation did not inform Appellant of which of the two theories to defend against. Nor was that formulation binding on either the convening authority or the prosecution. Indeed, the non-binding nature of the investigating officer's report was demonstrated by the convening authority's referral of two specifications that the investigating officer concluded were not supported by the evidence. *See* J.A. 15, 18 (concluding that Charge I, Specification 1 and Charge II, Specification 2 were not supported by the evidence). Nor did the investigating officer's report preclude the government from shifting mid-trial from one theory of criminality to another, including possibly even one based on Article 134's clause 3. Only language in the

specification could fulfill those notice and limiting functions. But such language was absent.

F. Appellant was prejudiced by the charge sheet's failure to allege an offense.

Where, as here, a specification is challenged for the first time on appeal, the appellant "must show substantial prejudice, demonstrating that the charge was 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" *United States v. Bryant,* 30 M.J. 72, 73 (C.M.A. 1990) (quoting *Watkins*, 21 M.J. at 210). Specification 1, Charge II cannot be reasonably construed in a manner that states an Article 134 offense. Article 134 contains three disjunctive elements; Specification 1, Charge II neither expressly nor by necessary implication alleges any of those disjunctive elements. The concepts of prejudice to good order and discipline, discredit to the armed forces, and violation of another federal statute are absent. The specification is thus obviously defective.

Appellant was prejudiced by being convicted of a legally defective specification. "[T]he Due Process Clause of the Fifth Amendment . . . does not permit convicting an accused of an offense with which he has not been charged." *Girouard*, 70 M.J. at 10. Appellant was not charged with violating Article 134 clause 1, 2, or 3. Accordingly, he has a due process right not to be convicted of violating any of those clauses. And if he

cannot be convicted of violating any of those clauses, then he cannot be convicted of an Article 134 offense.

Article 134 clauses 1 and 2 are military-specific offenses. Yet the record of Appellant's court-martial conviction recites a specification that fails to reveal the military nature of the offense. J.A. 41. The gravamen of an Article 134 clause 1 or 2 offense is harm to the military, either because of harm to military effectiveness or harm to the armed forces' reputation. Yet the specification as reflected on the record of Appellant's court-martial conviction suggests a moral delict rather than a military lapse. The record of Appellant's court-martial conviction could not suggest the true nature of an Article 134 clause 1 or 2 offense because Appellant was neither charged with nor convicted of violating either of those clauses. He is harmed by the resulting misleading description of the nature of the offense of which he was actually convicted.

Conclusion

For the foregoing reasons, this Honorable Court should hold that Specification 1 of Charge II does not state an offense, set aside the findings of guilty to that charge and specification, and dismiss that charge and specification. This Court should also set aside the sentence and remand the case to the convening authority to either order a rehearing on the sentence or approve a sentence of no punishment for the remaining offense of consensual sodomy.

Respectfully Submitted,

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