

23 February 2012

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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UNITED STATES,	)	CROSS-APPELLANT'S REPLY BRIEF
Cross-Appellee	)	
	)	
v.	)	Crim. App. No. ACM 37491 (rem)
	)	
	)	
	)	USCA Dkt. No. 10-5004/AF
Ryan D. Humphries	)	
Senior Airman (E-4)	)	
United States Air Force,	)	
Cross-Appellant.	)	

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

COMES NOW Cross-Appellant, pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, and replies to the Government's brief.

A. A specification's failure to state an offense is not subject to forfeiture

The Government objects that "[a]fter years of trial and appellate proceedings, Appellant raises this issue here for the very first time." Government's Brief at 6 n.2. The Government appears to suggest, without expressly saying so, that this Court should consider the granted issue forfeited. *Id.* But the President has provided that a specification "shall be dismissed at any stage of the proceedings if . . . [t]he specification fails to state an offense." Rule for Courts-Martial 907(b)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Thus, there is no

impediment to this Court ruling on the merits of the granted issue.

- B. No Article 134 terminal element is necessarily implied by the adultery specification in this case, which follows the same form as the adultery specification in *Fosler*

The Government argues that "[a]ll elements were expressly pled or necessarily implied." Government's Brief at 16. That argument, however, is irreconcilable with this Court's decision in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Just as in *Fosler*, "the terminal element was not expressly alleged" by the adultery specification in this case. *Id.* at 230. In *Fosler*, this Court also rejected the Government's argument that the adultery specification necessarily implied the terminal element. *Id.* The specification in this case follows the same form as that in *Fosler*, alleging that Appellant, "a married man," did on or near a named military base "wrongfully have sexual intercourse with" a named individual, "a woman not his wife." Compare Charge II, Specification 1 [J.A. 28] with *Fosler*, 70 M.J. at 227. If the specification in *Fosler* did not necessarily imply an Article 134 terminal element, then the specification in this case did not either.

The dictionary definition of "necessarily" is "as a necessary, logical, or inevitable result." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1283 (2d ed. unabridged 1987). So, for

example, a "necessarily included" offense exists where "the greater offense cannot be committed without committing the lesser." BLACK'S LAW DICTIONARY 1020 (6th ed. 1990). As *Fosler* recognizes, adultery can be committed without committing any of Article 134's three disjunctive terminal elements. Accordingly, adultery does not necessarily imply any of those elements.

The conclusion is the same whether the specification is construed strictly or liberally. Either a syllogism is valid or it isn't. Thus, an Article 134 terminal element either is a necessary consequence of the specification's language or it isn't. There may be many varieties of adultery specifications that would necessarily imply an Article 134 terminal element. But *Fosler* holds that the form of adultery specification used in this case does not. Accordingly, no Article 134 terminal element is expressly alleged or necessarily implied by the adultery specification in this case.

- C. Appellant was prejudiced by the adultery specification's failure to allege any of Article 134's terminal elements

The Government denigrates Appellant's prejudice analysis as "circular logic." Government's Brief at 11. That argument misconstrues the concept of circular logic, fails to apply this Court's case law, and ignores one of ways that Appellant's brief demonstrated he was prejudiced.

Appellant's opening brief relied on this Court's opinion in *United States v. Bryant* for the proposition that where an accused

pleads guilty and challenges a specification for the first time on appeal, "an 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 *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986)). So, under this Court's case law, prejudice is found where an accused is convicted of an obviously defective specification. The *Bryant* prejudice standard is not "circular logic," as the Government charges. Circular reasoning is found where two propositions are offered to prove each other. See, e.g., *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (noting illogical circularity of the proposition that *Sinclair v. United States*, 279 U.S. 263 (1929), is supported by the proposition that materiality in perjury cases is a question of law for the judge to decide when the only support for that proposition is *Sinclair*). Thus, circular reasoning is an argument that seeks to prove B's existence by asserting "A therefore B" while simultaneously demonstrating A's existence by asserting "B therefore A." *Bryant* presents no such circularity; prejudice is not used to prove that a specification is obviously defective. Rather, whether a specification is obviously defective is determined independently and a finding of prejudice is a consequence of that determination. *Bryant* thus takes the form of "If A, then B," where the determination of whether A

exists is independent of B. "If A, then B" is a common indicative conditional theorem; it is not, as the Government posits, circular reasoning.

In this case, the adultery specification is obviously defective. It cannot be reasonably construed to allege any of Article 134's three disjunctive elements. Under *Bryant*, substantial prejudice therefore exists. That conclusion is consistent with this Court's recognition that "the Due Process of the Fifth Amendment . . . does not permit convicting an accused of an offense with which he has not been charged." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011). Here, Appellant was charged with none of Article 134's three disjunctive elements. Accordingly, convicting him of violating one or more of those elements is precluded as a matter of due process.

Additionally, as Appellant's brief is explained, Appellant is prejudiced by the misleading nature of the record of his conviction. See Appellant's Brief at 11. He was convicted of violating the General Article, a purely military offense. But the specification as set out on his court-martial promulgating order does not reflect the military nature of that offense. Rather, he appears to be convicted of a moral offense rather than a military offense. The court-martial promulgating order's recitation of the specification cannot be amended to cure the resulting prejudice since, in fact, he was not convicted of violating any of Article 134's terminal elements. The

Government's brief fails to address the prejudice that arises from the misleading record of Appellant's conviction.

#### Conclusion

For the foregoing reasons, as well as those set out in Appellant's opening brief, this Honorable Court should set aside the findings of guilty to Charge II and Specification 1 thereunder, dismiss that charge and specification, 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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