16 February 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Cross-Appellee,*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
Senior Airman (E-4) RYAN D. HUMPHRIES, USAF, *Cross-Appellant.*	)	USCA Dkt. No. 10-5004/AF ACM 37491

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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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

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ. Unlike Cross-Appellant (hereinafter referred to as Appellant), who has suggested this Court has no jurisdiction to consider the issue certified by The Judge Advocate General (TJAG) but does have jurisdiction to review Appellant's issue, the United States maintains that this Court has jurisdiction to review both the TJAG-certified issue under Article 67(a)(2) and the issue raised by Appellant under Article 67(a)(3).[1]

1 Appellant mistakenly cites Article 67(b)(3) as the source of jurisdiction to review his issue. (App. Br. at 1.)

STATEMENT OF THE CASE

On 1 May 2009, a panel of officer and enlisted members sitting as a general court-martial convicted Appellant of one specification of adultery and one specification of divers sodomy, in violation of Articles 134 and 125, UCMJ; the members acquitted Appellant of the corresponding rape and forcible sodomy allegations involving the same victim. (JA at 38-39.) The panel sentenced Appellant to a bad conduct discharge and reduction to the grade of E-1. (JA at 40.) The convening authority approved the adjudged findings and sentence. (JA at 42.)

Appellant raised the following assignments of error to the lower Court:

I.

WHETHER THE MILITARY JUDGE ERRED BY EXCLUDING RELEVANT EVIDENCE OF A PRIOR SEXUAL RELATIONSHIP BETWEEN APPELLANT AND THE COMPLAINING GOVERNMENT WITNESS, WHERE APPELLANT WAS CHARGED WITH ADULTERY AND CONSENSUAL SODOMY.

II.

WHETHER THAT PORTION OF THE SENTENCE WHICH PROVIDES FOR A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE.

III.

WHETHER UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE THE FINDINGS OF GUILTY TO ADULTERY AND CONSENSUAL SODOMY SHOULD BE SET ASIDE BY THIS COURT PURSUANT TO ITS POWERS UNDER ARTICLE 66(c), UCMJ.

At trial, during clemency, and before the Air Force Court of Criminal Appeals, Appellant never raised a claim or objection that his adultery specification failed to state an offense based upon a premise that it did not include the terminal element on the charge sheet, or based upon any other premise. On 24 May 2010, the Air Force Court of Criminal Appeals issued a decision that "[t]he findings are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred." However, the Court declined to affirm the findings at that time and found that portion of the sentence which provides for an unsuspended bad conduct discharge inappropriately severe. United States v. Humphries, ACM 37491 (A.F. Ct. Crim. App. 24 May 2010) (unpub. op.) The Court set aside the convening authority's action and returned the record to The Judge Advocate General for remand to the convening authority for reconsideration on the sentence with direction that he may approve a sentence no greater than a suspended bad-conduct discharge and a reduction to E-1. On 25 June 2010, the Air Force Court denied the government's Motion for Reconsideration *En Banc*.

The Judge Advocate General, United States Air Force, certified the following issue under Article 67(a)(2), UCMJ:

> WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN FINDING APPELLEE'S SENTENCE INAPPROPRIATELY SEVERE UNDER THE UNIQUE

> CIRCUMSTANCES OF THIS CASE AND ERRED IN AN ATTEMPT AT EXERCISING APPELLATE CLEMENCY BY REMANDING THE CASE TO THE CONVENING AUTHORITY WITH INSTRUCTIONS THAT THE CONVENING AUTHORITY MAY APPROVE AN ADJUDGED SENTENCE NO GREATER THAN A SUSPENDED BAD CONDUCT DISCHARGE AND A REDUCTION TO THE GRADE OF E-1.

On 17 August 2010, this Court rejected Appellant's claim that it had no authority to consider the TJAG-certified issue and denied his motion to dismiss the certificate of review.

On 11 January 2011, this Court heard oral argument upon the certified issue. On 10 February 2011, this Court remanded the case back to the Air Force Court because the lower Court "acted on the sentence without acting on the findings. This has resulted in having a case before us for review that does not have a complete decision on all findings and the sentence by the Court of Criminal Appeals as required by Article 67(c)."

On 3 August 2011, the Air Force Court issued a new decision in which the lower Court affirmed the findings as correct in law and fact. (JA at 1.) On 15 September 2011, The Judge Advocate General of the Air Force recertified the above issue. On a petition for cross-appeal, the Court granted review of Appellant's issue on 15 December 2011.

STATEMENT OF FACTS

On 18 November 2008, a variety of charges and specifications were preferred against Appellant, including one

specification of adultery that is the subject of Appellant's petition. (JA at 28.) Appellant was also charged with raping and forcibly sodomizing the same victim. (Id.) An Article 32 investigation was held on 2 December 2008, and the investigating officer listed all the elements of adultery in the Article 32 report including the terminal element: "(3) That, 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." (JA at 17.) The investigating officer noted in his report when analyzing the evidence presented at the Article 32 hearing, "Finally, [Appellant's] act of engaging in sexual intercourse with a woman married to fellow military member, while that member is deployed, can be found to be prejudicial to good order and discipline." (Id.) Appellant and his defense counsel were served a copy of the Article 32 report.

Appellant's trial was convened from 24 to 26 March 2009 and from 28 April to 1 May 2009. (JA at 21.) Appellant pled not guilty to all charges and specifications and raised no motion asserting that his adultery specification failed to state an offense. (JA at 32-33.) The military judge provided proper instructions in findings for Appellant's adultery offenses, including the terminal element, and he delivered appropriate definitions of the terminal element. (JA at 34-37.) For the

victim related to the granted issue, the court members acquitted Appellant of rape and forcible sodomy but convicted Appellant of the separately charged adultery and the lesser included offense of consensual sodomy (JA at 38-39), and sentenced him to a bad conduct discharge and reduction to E-1. (JA at 40.) The convening authority approved the sentence as adjudged.

ARGUMENT

FOSLER DOES NOT APPLY, APPELLANT'S ADULTERY SPECIFICATION MUST BE LIBERALLY CONSTRUED IN FAVOR OF VALIDITY, APPELLANT'S ADULTERY SPECIFICATION PROPERLY ALLEGES AN OFFENSE UNDER ARTICLE 134, AND APPELLANT SUFFERED NO PREJUDICE.[2]

Standard of Review

The question of whether a specification states an offense is a question of law that is reviewed *de novo*. United States v. Crafter, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted).

Law and Analysis

The Fifth Amendment to the United States Constitution commands that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property without due process of

2 After years of trial and appellate proceedings, Appellant raises this issue here for the very first time. Although "[t]his Court has never ruled that [it] would not consider an issue raised for the first time on petition for review," Murphy v. Judges of the United States Army Court of Military Review, 34 M.J. 310, 311 n.3 (C.M.A. 1992), appellate courts "oppose the untimely consideration of issues which should have been raised when appellant first stood before that court, but were not. Piecemeal appellate litigation. . .in any case, is counterproductive to the fair, orderly judicial process created by Congress. . . ." Id.

law." U.S. CONST. Amend. V, cls. 2, 3. Fundamental to these mandates are the principles that an accused must receive "notice of the specific charge." Cole v. Arkansas, 333 U.S. 196, 201 (1948). The Sixth Amendment also requires notice, prescribing that an accused shall "be informed of the nature and cause of the accusation." U.S. CONST. Amend. VI, cl. 1. Thus, both the Fifth and the Sixth Amendments "ensure the right of an accused to receive fair notice of what he is being charged with." Green v. United States, 355 U.S. 184, 187-88 (1957).

"A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." Crafter, 64 M.J. at 211 (citing United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994) (citing R.C.M. 307(c)(3))). Rules for Courts Martial 307(c)(3) states "a specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." "Failure to object does not waive the issue of a specification's legal sufficiency. R.C.M. 905(e). If, however, a specification has not been challenged prior to findings and a sentence, the sufficiency of the specification may be sustained 'if the necessary facts appear in any form or by fair construction can be found within the terms of the specification.'" Crafter, 64 M.J. at 211 (citing United States v. Mayo, 12 M.J. 286, 288 (C.M.A. 1982)).

Challenges to the validity of a specification raised for the first time on appeal are disfavored "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 conviction was had." United States v. Watkins, 21 M.J. 208, 209-10 (C.M.A. 1986) (citations and internal quotations omitted).

The United States fully embraces Appellant's powerful concession, which is justly based upon his failure to object to the specification at trial and greatly magnified by his continued failure to object to the specification on appeal before the lower Court:

> 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.*

(App. Br. at 4.)

While Appellant's proper concession is based upon a correct reading of the law, Appellant is mistaken in its application because instead of then liberally construing his adultery specification in favor of validity as he knows is required, he seeks to strictly construe it by arguing the specification was defective for not listing the terminal element on the charge sheet. Appellant is mistaken in his strict construction of his

adultery specification.

Appellant's case is distinguishable from and not governed by United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). Appellant's call for legal fiction that suggests he was not on notice of the terminal element of his adultery specification under Article 134 should be rejected. Appellant was on full notice of the terminal element prior to trial during his Article 32 investigation and in the Article 32 report. Appellant did not object to the specifications at trial. Appellant and the members were thoroughly instructed by the military judge on all elements of his crimes, including the terminal element of adultery. Further proof of Appellant's notice is found in his failure to object to the specification during clemency and during appeal before the lower Court.

The Fosler majority also concluded that "[i]n a contested case in which *Appellant challenged the charge and specification at trial*" a charge which contains some combination of the words "wrongfully" and "Article 134" also fall short of implying a terminal element. Fosler, 70 M.J. at 230; (emphasis added).[3]

3 This Court repeatedly stated limitations upon the applicability of its holding: *"[i]n contested cases*, when the charge and specification are *first challenged at trial*, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text;" "[b]ecause Appellant made an *R.C.M. 907 motion at trial*, we review the language of the charge and specification more narrowly than we might at later stages;" "[b]ecause an accused must be notified which of the three clauses he must defend against, *to survive an R.C.M. 907 motion to dismiss . . . ;*" "when we read the charge and specification narrowly, *as we must when an R.C.M. 907 motion is made*

Had trial defense counsel not made a R.C.M. 907 motion in Fosler, then there is no reason to believe the majority of this Court would have questioned the adequacy of the government's notice by implication of the terminal element of the Article 134. Id. The move by trial defense counsel convinced the majority to "[c]onstrue[] the text of the charge and specification narrowly." Id. As such, the majority concluded that an adultery charge, which excluded the terminal element, could not be salvaged by implication over trial defense's objection. Id. Thus, the charge and specification were dismissed. These predicates of Fosler are lacking in Appellant's case.

Based upon this record, Appellant cannot reasonably rely upon Fosler to support his freshly-minted claim that he did not have notice about the terminal element. Appellant did not contest the specifications at trial, did not file motions under R.C.M. 907 or 917, was on notice as early as the Article 32 investigation that the offenses included a terminal element, and was instructed by the military judge about the terminal element in both specifications . . . events absent in Fosler. As Appellant agrees, Fosler simply must be distinguished here. Since Fosler does not apply, this Court should deny Appellant's invitation to overturn nearly 60 years of precedent and not

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before the end of trial, the terminal element might be alleged using words with the same meaning."). 70 M.J. at 230, 232, 233 (emphasis added).

extend such abandonment of *stare decisis* beyond the very narrow parameters of Fosler that are absent from Appellant's case.

Appellant's Watkins concession of liberal construction but attempted application of strict construction invites a closer reading of Watkins, where the specification at issue was an Article 86 absence specification that failed to include the element "without authority" in the specification. This Court held that under the liberal construction rule, such a pleading defect did not invalidate the specification, and the same result must apply here.

NO PREJUDICE. Appellant correctly concedes that he "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 the conviction was had.' *United States v. Bryant,* 30 M.J. 72, 73 (C.M.A. 1990) (quoting *Watkins*, 21 M.J. at 210)." (App. Br. at 10.) Although correct on the law, Appellant is again mistaken in its application when he argues with circular logic that because the adultery specification did not contain the terminal element on the charge sheet, he suffered prejudice by an "obviously defective" specification. (Id.) It is Appellant's burden to demonstrate prejudice, and he has failed to meet it.

As noted in Bryant and Watkins, this Court does test for prejudice caused by an allegedly defective specification. Even

assuming errors exist implicating Appellant's right to notice under Sixth Amendment Due Process, the error must be tested for prejudice. The Supreme Court has recognized that "most constitutional errors can be harmless" and thus do not necessarily require reversal. Arizona v. Fulminante, 499 U.S. 279, 306 (1991); *see also* Chapman v. California, 386 U.S. 18, 22 (1967). For non-structural constitutional errors, this Court applies the harmless error test to determine whether the error is harmless beyond a reasonable doubt. United States v. Upham, 66 M.J. 83, 86 (C.A.A.F. 2008); Chapman, 386 U.S. at 22.

The United States contends any assumed error in failing to expressly allege the terminal element in this case is a non-structural error. Errors are structural if they "infect the entire trial process," Brecht v. Abrahamson, 507 U.S. 619, 630 (1993); or affect "[t]he entire conduct of the trial from beginning to end" and "the framework within which the trial proceeds." Fulminante, 499 U.S. at 309-10. The Supreme Court has treated a "very limited class" of constitutional errors as so intrinsically harmful that require reversal without a harmless error analysis. Johnson v. United States, 520 U.S. 461, 468 (1997). In Johnson, 520 U.S. at 468-69, and Neder v. United States, 527 U.S. 1 (1999), the Supreme Court identified six examples of structural error: (1) a biased trial judge, Tumey v. Ohio, 273 U.S. 510 (1927); (2) the complete denial of

counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); (3) the denial of self-representation at trial, McKaskle v. Wiggins, 465 U.S. 168 (1984); (4) the denial of a public trial, Waller v. Georgia, 467 U.S. 39 (1984); (5) racial discrimination in the selection of a grand jury, Vasquez v. Hillery, 474 U.S. 254 (1986); and (6) the administration of a defective reasonable doubt instruction, Sullivan v. Louisiana, 508 U.S. 275 (1993).

In Neder, the Supreme Court stated that, "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair" and applied a harmless error analysis. 527 U.S. at 9, 15. Likewise, the omission of the terminal element in the specifications in this case did not "infect the entire trial process" or "necessarily render a trial fundamentally unfair." The type of omission here, where Appellant had actual notice of the terminal element and did not object to the specification at trial, does not rise to the level of the types of structural error laid out by the Supreme Court. Moreover, this Court routinely subjects claims of due process violations to the plain error analysis to determine if the error was harmless beyond a reasonable doubt. *See*, *e.g.*, United States v. Mullins, 69 M.J. 113, 115 (C.A.A.F. 2010) (due process right to speedy trial). In Jones, for example, this Court, faced with a conviction of an uncharged but listed lesser-included offense, applied the three prongs of the plain error

test to assess a constitutionally deficient notice challenge. United States v. Jones, 68 M.J. 465, 473, n. ll. Federal Courts have also applied a plain error, harmless beyond a reasonable doubt standard, to claims of a Sixth Amendment notice defect. *See*, *e.g.*, Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986) (applying plain error, harmless beyond a reasonable doubt standard prescribed by Chapman to deficient pleadings). Likewise, this Court should apply the harmless beyond a reasonable doubt test to any error in this case, and not impose the rarely employed automatic reversal rule.

In order to assess whether an error was harmless beyond a reasonable doubt, 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 constitutional interest protected under the Sixth Amendment notice requirement is "[t]he due process principle of fair notice [that] mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted . . . .'" Jones, 68 M.J. at 473 (citing Medina, 66 M.J. at 26-27). Fair notice resides at the heart of the plea inquiry. United States v. Medina, 66 M.J. 21, 26 (C.A.A.F. 2008).

In determining whether due process has been satisfied, the courts look to whether the accused suffered any prejudice from

unfair surprise or inadequate notice, or whether the error created a risk of double jeopardy. United States v. Leichtnam, 948 F.2d 370, 377 (7th Cir. 1991); *see also* Berger v. United States, 295 U.S. 78, 82 (1935); Combs v. Tennessee, 530 F.2d 695, 699 (6th Cir. 1976) (finding no due process violation where the defendant was "neither surprised, mislead nor prejudiced" by the indictment or statutes).

In this case, Appellant suffered no prejudice or unfair surprise where Appellant had notice of all the elements of his offenses. Appellant did not object to the specification at any point in the trial, during clemency, or during appeal before the lower Court. Nor did he file a pretrial motion for failure to state an offense. Plus, Appellant was on actual notice of the terminal element prior to trial as reflected in his Article 32 report. Appellant had actual notice of the charges against him before, during, and after trial, including the terminal element, and any error was harmless beyond a reasonable doubt. The military judge properly instructed Appellant on all elements at trial, including the terminal element. If actual notice can obviate any claim of constitutional error arising from a defective charging document, actual notice must undermine any claim of prejudice. *See* 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").

In summary, as liberally construed, there was no defect in Appellant's adultery specification. All elements were expressly pled or necessarily implied. In any event, Appellant suffered no prejudice because he had actual notice of the allegation levied against him.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court deny Appellant's claim and affirm his conviction and sentence for adultery and consensual sodomy.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to Appellate Defense Division, on 16 February 2012.

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