IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20100654
Private E1 **DARRIAN S. NEALY,** United States Army, Appellant	)	USCA Dkt. No. 11-0615/AR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States, Appellee	) FINAL BRIEF ON BEHALF OF) APPELLANT
v.	)
	) Crim. App. Dkt. No. 20100654
Private (E-1) DARRIAN S. NEALY, United States Army, Appellant	))) USCA Dkt. No. 11-0615/AR)

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

ISSUE PRESENTED

APPELLANT WAS CHARGED WITH COMMUNICATING A THREAT UNDER ARTICLE 134, BUT WAS CONVICTED PURSUANT TO HIS PLEA OF USING PROVOKING SPEECH IN VIOLATION OF ARTICLE 117. IN LIGHT OF *UNITED STATES V. JONES*, 68 M.J. 465 (2010) CAN THE CONVICTION BE SUSTAINED?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2008) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On August 6, 2010, Private (E-1) Darrian S. Nealy [hereinafter appellant], was tried at Baumholder, Germany, before a military judge sitting as a general court-martial.

Pursuant to his pleas, appellant was found guilty of disobeying a lawful order, aggravated assault, provoking speech, and communicating a threat, in violation of Articles 91, 117, 128, and 134, UCMJ, 10 U.S.C. §§ 891, 917, 928, and 934 [2008]. The military judge sentenced appellant to a reduction to the grade of E-1, confinement for five months, and a bad-conduct discharge. The convening authority approved the adjudged sentence.

The Army Court affirmed the findings and the sentence on May 16, 2011. Appellant petitioned this Court for Review on July 15, 2011. On August 15, 2011, this Court granted review.

Statement of Facts

Appellant was charged, among other things, with two violations of Article 134, communicating a threat. Specifically, Specification 1 of Charge III alleged the following:

> In that Private (E-2) Darrian S. Nealy, U.S Army, did, at or near Camp Algiers, Grafenwoehr, Germany, on or about 21 April 2010, wrongfully communicate to SSG Arvelle Fearn a threat, to wit: "I have an ammo round with SSG Fearn's name on it" or words to that effect, to injure or kill him.

(R. at Charge Sheet.)

Upon the entering of pleas, appellant pled not guilty to Specification 1 of Charge III, "but guilty of provoking speech, a violation of Article 117." (R. at 15.) Appellant had not

entered into a pretrial agreement with the convening authority but rather entered a "naked" plea of guilty to the offenses. *Id.* During the providence inquiry, the military judge advised appellant of the elements of Article 117, provoking speech, but he did not advise appellant that Article 117, UCMJ, may not be a lesser-included offense of the charged offense, communicating a threat under Article 134, UCMJ. (R. at 21.) Following the providence inquiry and pursuant to appellant's plea, the military judge found appellant guilty of provoking speech, in violation of Article 117, UCMJ. (R. at 73.)

Summary of Argument

During appellant's providence inquiry, the military judge advised appellant of the elements necessary to be found guilty of an offense under Article 117, UCMJ. However, the military judge failed to advise appellant that, by pleading guilty to provoking speech under Article 117, UCMJ, he was pleading guilty to an offense that was not "necessarily included" in a charged offense and therefore was not charged against him. As a result, appellant's plea of guilty cannot be deemed knowing and voluntary because the military judge failed to ensure appellant understood the law and the nature of the charge for which he ultimately pled guilty.

Additionally, because Article 117, provoking speech, is not a lesser-included offense of communicating a threat, under

Article 134, UCMJ, appellant's court-martial lacked jurisdiction over the offense to which he ultimately pled guilty.

Argument

A. Article 117, provoking speech, is not a lesser-included offense of communicating a threat under Article 134, UCMJ.

Law

"Whether an offense is a lesser included offense [hereinafter LIO] is a question of law we review *de novo*." *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009).

Article 79, UCMJ, provides, "an accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein." To determine whether an offense is necessarily included requires a comparison of the elements of the two offenses. *Schmuck v. United States*, 489 U.S. 705, 716 (1989). One offense is "necessarily included" in another if the elements of the lesser offense are a subset of the elements of the charged offense. *Id.* at 716. "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *Id.* at 719 (citations and internal quotations omitted.)

> The comparison to be drawn is between offenses. Since offenses are statutorily defined, that comparison is appropriately

> conducted by reference to the statutory elements of the offenses in question, and not, as the inherent relationship approach would mandate, by reference to conduct proved at trial regardless of the statutory definitions.

Id. at 716-17. "If indeed an LIO is a subset of the greater charged offense, the constituent parts of the greater and lesser offenses should be transparent, discernible *ex ante*, and extant in every instance." *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

This Court has held that Article 79 requires application of the elements test to determine whether one offense is an LIO of a charged offense. *Id.* at 470. Under the elements test, "one offense is 'not necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given. . . ." *Id.* at 469-70 (quoting *Schmuck*, 489 U.S. at 716).

In engaging in this comparison,

> One compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all the elements of offense X along with one or more additional elements.

Id.; see also Miller, 67 M.J. at 389 (holding a service court cannot affirm an Article 134 offense solely based upon an enumerated offense being charged at a court-martial); *United States v. Thompson*, 67 M.J. 106, 109 (C.A.A.F. 2009)(reckless endangerment is not a necessarily included offense of kidnapping).

Argument

In this case, appellant was charged with communicating a threat under Article 134, UCMJ. The elements of an offense charged under Clause 1 or Clause 2 of Article 134 include:

> (1) That the accused did or failed to do a certain act; and
>
> (2) That, under the circumstances, the accused's 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

MCM, Part IV, para. 60.b.(1); *see also Miller*, 67 M.J. at 387. The President further defined the elements of communicating a threat, charged under Article 134, UCMJ, as follows:

> (1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
>
> (2) That the communication was made known to that person or to a third person;

(3) That the communication was wrongful; and

(4) 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

MCM, Part IV, para. 110.b.; *see also United States v. Brown*, 65 M.J. 227, 229 (C.A.A.F. 2007).

Appellant, however, entered a plea of "not guilty" to communicating a threat, under Article 134, UCMJ, but guilty of provoking speech under Article 117, UCMJ. Article 117, UCMJ, requires that "any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct." 10 U.S.C. § 917 [2008]; *see also United States v. Adams*, 49 M.J. 182, 184 (C.A.A.F. 1999.) The elements of the offense, as set forth in the *MCM*, are as follows:

(1) That the accused wrongfully used words or gestures towards a certain person;

(2) That the words or gestures used were provoking or reproachful;

(3) That, the person toward whom the words or gestures were used was a person subject to the code.

MCM, Part IV, para. 42.b.

Although both offenses require that the accused perform an act, i.e., communicate certain language[1], provoking speech, under Article 117, contains an element that is not an element of communicating a threat, the alleged greater offense. Specifically, the offense of provoking speech requires "that the person toward whom the words or gestures were used was a person subject to the code." *MCM*, Part IV, para. 110.b.42.b.(3). Thus, even if an individual uses language which may be deemed "provoking," he or she may not be convicted under Article 117, UCMJ, if such language was directed at an individual not subject to the UCMJ. Communicating a threat, under Article 134, UCMJ, requires only that the alleged threat be made known to the person to whom it is directed or a third party. It does not require that the threat be made to another individual subject to the code.

Therefore, in comparing the statutory elements of the two offenses, the offense of provoking speech is not necessarily included in the offense of communicating a threat because it requires an additional element that is not included in the offense of communicating a threat under Article 134, UCMJ. As a result of the additional element in Article 117, UCMJ, one could

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[1] Provoking Speech, under Article 117, UCMJ, also criminalizes certain gestures if they are deemed to be "provoking or reproachful." Communicating a threat, under Article 134, UCMJ, does not encompass gestures and only criminalizes "certain language."

commit the greater offense of communicating a threat without having first committed the LIO of provoking speech. Accordingly, pursuant to the elements test, provoking speech is not a lesser included offense of communicating a threat. "[W]here the lesser offense requires an element not required for the greater offense, no instruction is to be given. . . ." *Jones*, 68 M.J. at 469-70 (quoting *Schmuck*, 489 U.S. at 716).

Additionally, the requirement under Article 117, UCMJ, that the words be "provoking or reproachful" is not subsumed within "a threat." The *MCM* defines "provoking or reproachful" as "those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances." *MCM*, Part. IV, *MCM*, Part IV, para. 110.b. 42.c.(1). *See also Adams*, 49 M.J. at 183 (affirming lower court's holding that appellant's words were not provoking because the words alleged would not provoke a reasonable policeman to violence); *United States v. Thompson*, 46 C.M.R. 88 (A.C.M.R. 1972) (holding appellant's words were not provoking because they were not "fighting words" and would not provoke a guard to violence); *United States v. Holiday*, 4 U.S.C.M.A. 454, 458, 16 C.M.R. 28, 32 (1954) ("Article 117 is designed to prevent the use of violence by the one to whom such speeches and gestures were directed, and to forestall the commission of an

offense by an otherwise innocent party."). Thus, to prove provoking speech one must demonstrate a reasonable person would expect that the uttered words would incite some form of physical or verbal response, i.e. breach of the peace.

In contrast, "threat", as it relates to the charge appellant faced, requires only that the accused communicated certain language "expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future." *MCM*, Part IV, para. 110.b. Communicating a threat does not require that the words incite some form of response on the part of the individual threatened. *See Brown*, 65 M.J. at 229; *see also United States v. Shropshire*, 20 C.M.A. 374, 375, 43 C.M.R. 214, 215 (1971) ("[S]o long as the words uttered could cause a reasonable person to believe he was wrongfully threatened," there exists a communication of a threat.).

Based on the definitions of the two separate offenses, it is possible that one could communicate a threat without anticipating a response from the individual to whom the threat was directed. Thus, provoking speech is not a subset of a "threat" and the definitions illustrate the gulf between the original charge, for which appellant was placed on notice, and the charge for which appellant ultimately pled guilty. Each requires proof not required by the other. Provoking speech is

not "necessarily included" in communicating a threat because the elements of the lesser offense are not a subset of the elements of the charged offense. *Schmuck*, 489 U.S. at 716.

B. Appellant's plea of guilty to Article 117, UCMJ, is improvident because the military judge failed to advise appellant that he was pleading guilty to an offense not charged.

During appellant's providence inquiry, the military judge advised appellant of the elements necessary to be found guilty of an offense under Article 117, UCMJ. (R. at 25-26.) However, the military judge failed to advise appellant that, by pleading guilty to provoking speech under Article 117, UCMJ, he was pleading guilty to an offense that was not "necessarily included" in a charged offense and therefore was not charged against him. *Id.*

"An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or not guilty." Rules For Court Martial 910(a) [hereinafter R.C.M.]. An LIO is defined in Article 79, UCMJ, as "an offense necessarily included in the offense charged."

A Court reviews a military judge's acceptance of an accused's guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge

abuses his discretion if he either fails to obtain from the accused an adequate factual basis to support the plea, or if his ruling is based on an erroneous view of the law. *Inabinette,* 66 M.J. at 321-22. While an appellate court reviews questions of law de novo, military judges are afforded broad discretion in whether or not to accept a plea. *Id.* This discretion is reflected in appellate application of the substantial basis test: "Does the record as a whole show 'a substantial basis in law or fact for questioning the guilty plea.' " *Id.* (quoting *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991).

Because provoking speech is not a LIO of the charged offense and the military judge failed to advise appellant that he was pleading to an offense not charged, appellant's plea cannot be deemed knowing and voluntary. The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts. *United States v. Care,* 18 C.M.R. 535, 538-39, (C.M.A. 1969). A voluntary and knowing relinquishment of the constitutional rights an accused waives in pleading guilty is not possible without knowledge of the nature of the charges brought against him or her. This includes, by implication, whether he had a right to plead not guilty to an offense because it was not a LIO. *Id.; Johnson v. Zerbst,* 304 U.S. 458, 464, (1938).

Here, appellant was not advised by the military judge that he was pleading guilty to an offense that was not charged or "necessarily included" in the original offense. It is clear that the military judge failed to engage in the "elements test" recently reiterated in *United States v. Jones*, *supra*, and erroneously believed that "provoking speech" was a LIO of communicating a threat, under Article 134, UCMJ.[2] *See Inabinette*, 66 M.J. at 321-22 (a military judge abuses his discretion if his ruling is based on an erroneous view of the law). As a result, appellant's plea of guilty cannot be deemed knowing and voluntary because the military judge failed to ensure appellant understood that "provoking speech" was not a lesser included offense of the charged offense and that appellant was pleading guilty to an offense not charged against him. A voluntary and knowing relinquishment of constitutional rights is not possible without the knowledge of the nature of the charge for which appellant ultimately pled guilty. *Care*, 18 C.M.R. at 538-39.

Moreover, while appellant admitted that his language was provoking, as defined by the military judge, it is unclear whether he would have done so with the knowledge that he was not

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[2] "Suggesting that listing a criminal offense as an LIO within the *MCM* automatically makes it one, irrespective of its elements, ignores the very definition of a crime." *Jones*, 68 M.J. at 471.

required to admit his conduct satisfied Article 117, UCMJ. Thus, his plea cannot be deemed knowing and voluntary and the military judge abused his discretion in accepting appellant's plea of guilty to Article 117, UCMJ.

C. Appellant's Court-Martial Lacked Jurisdiction over Specification 1 of Charge III.

As provoking speech is not a LIO of communicating a threat, appellant's court-martial lacked jurisdiction over the offense to which he ultimately plead guilty. R.C.M. 201(b)(3) provides: "Each charge before the court-martial must be referred to it by competent authority." Elaborating on R.C.M. 201, in *United States v. Wilkins*, this Court held that:

> charges are not to be tried by a general court-martial unless a convening authority has referred them to the court-martial for trial. Indeed, upon considering Articles 22, 23, and 24 of the Code, 10 U.S.C. §§ 822, 823, and 824, respectively, in the context of the history of American courts-martial, we are sure that a court-martial—general, special, or summary—may only consider cases referred to it by the officer who convened the court-martial or by his successor in command.

Wilkins, 29 M.J. at 423-24.

In *Wilkins*, the accused entered into a pretrial agreement with the convening authority in which he agreed to plead guilty to several offenses not charged, rather than the charged offenses, in exchange for a reduced sentence to confinement. *Id.* As set forth in his agreement, Wilkins entered pleas of

guilty to several offenses not charged and was ultimately found guilty of those offenses. At the appellate level, Wilkins challenged the validity of his plea arguing that the court-martial lacked jurisdiction over the offenses to which he pled guilty because those offenses had not been referred by the convening authority. This Court ultimately upheld Wilkins' convictions to the separate offenses and determined that "[a]lthough the [referral] order is a jurisdictional prerequisite, the form of the order is not jurisdictional." *Id.* at 424. This Court found that a pretrial agreement signed by the accused and convening authority, implicitly conveyed the convening authority's personal decision that the receiving charge be referred to the general court-martial. *Id.* at 429.

Appellant's case is clearly distinguishable from *Wilkins* because a pretrial agreement did not exist and therefore the charges were never even presented to the convening authority. Thus, the convening authority never intended to refer the Article 117 charge to trial.[3] Here, the offense to which

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[3] Nor can the government argue that appellant consented to a major change to the charge sheet under R.C.M. 603. R.C.M. 603(d) provides that "[c]hanges or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification is preferred anew." Thus, an accused's right to object only arises when trial counsel attempts to make a major amendment to the charge or specification, and an objection, in order to be "timely," must be made then. Here, the trial counsel did not attempt to amend the specification and there is no evidence to

appellant plead guilty was neither referred by the convening authority nor the explicit subject of a pretrial agreement, thus, the court-martial lacked jurisdiction over the offense. *See Id.* at 424.

Accordingly, this Court must vacate the finding of guilty as to Specification 1 of Charge III, and sentence in appellant's case and order a rehearing.

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indicate that the convening authority would have approved of such an amendment. *See United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011) (Baker, J., dissenting.)

Conclusion

WHEREFORE, appellant requests that this Honorable Court disapprove the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Nealy, Crim. App. Dkt. No. 20100654, Dkt. No. 11-0615/AR, was delivered to the Court and Government Appellate Division on September 26, 2011.

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