IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 20100654
Private (E-1) **DARRIAN S. NEALY** United States Army, Appellant	)	**USCA Dkt. No. 11-0615/AR**

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Index of Brief

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?

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Supreme Court of the United States

United States Court of Appeals for the Armed Forces

United States Circuit Courts of Appeal

Uniform Code of Military Justice

Manual for Courts-Martial (MCM)

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

Granted Issue

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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. §866(b) (hereinafter UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

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[1] UCMJ, art. 66(b), 10 U.S.C. §866(b).
[2] UCMJ, art. 67(a)(3), 10 U.S.C. §867(a)(3).

Statement of the Case

A military judge, sitting alone as a general court-martial, convicted appellant, pursuant to his pleas, of a violation of a lawful order, assault, provoking speeches or gestures, and communicating a threat, in violation of Articles 91, 117, 128, and 134, UCMJ.[3] The military judge sentenced appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for five (5) months, and to be discharged from the service with a bad-conduct discharge.[4] The convening authority approved the sentence as adjudged.[5]

The Army Court approved the findings and sentence on May 16, 2011.[6] Appellant petitioned this Court for Review on July 15, 2011, which was granted on August 15, 2011.

Statement of Facts

In Charge III, appellant was charged with two specifications of communicating a threat, in violation of Article 134, UCMJ.[7] Appellant plead not guilty to the first specification as charged, but guilty to the listed[8] lesser

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[3] Joint Appendix (JA) at 19.
[4] Record (R.) at 117.
[5] R. at Action.
[6] JA at 1-2. The Army Court credited appellant with 109 days of confinement credit against the sentence to confinement due to the convening authority's action and promulgating order failing to include that language.
[7] JA at 3.
[8] Manual for Courts-Martial (2008 ed.) [hereinafter MCM], part IV, ¶110.d.(1).

included offense of provoking speeches or gestures, in violation of Article 117, UCMJ.[9] Appellant personally submitted to the military judge the language of the replacement specification in violation of Article 117, UCMJ.[10] Following a providence inquiry wherein appellant admitted to all the relevant facts establishing his guilt for a violation of Article 117, UCMJ, the military judge found appellant guilty in accordance with the specification submitted by appellant.[11]

GRANTED ISSUE AND ARGUMENT

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?

Standard of Review

"Whether an offense is a lesser included offense is a question of law we review *de novo*."[12]

However, an appellant may waive a legal error by failing to object at trial. "Waiver is the 'intentional relinquishment of a known right.'"[13] Where the rights involved in a particular

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[9] JA at 5.
[10] JA at 20.
[11] JA at 12-16, 19.
[12] *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011).
[13] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011), *citing United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008).

case are of a constitutional nature, as they are here,[14] "there is a presumption against. . .waiver..., and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege."[15]

Here, appellant knowingly and intelligently waived any argument regarding whether it was error for the military judge to accept appellant's plea to a violation of Article 117, UCMJ, by failing to raise it at trial. Appellant affirmatively chose to plead guilty to Article 117, UCMJ,[16] personally submitted the specification,[17] and admitted to all the relevant facts necessary to support his conviction.[18] Appellant's case is distinguishable from that of *Girouard* where this Court found no waiver.[19] This Court's ruling there focused on the fact that neither *United States v. Miller*[20] nor *United States v. Jones*[21] had been decided yet; thus, "defense counsel's trial strategy could not be considered an intentional relinquishment or abandonment of a known right."[22] Here, however, despite Article 117, UCMJ, being

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[14] *See Girouard*, 70 M.J. at 10 ("[t]he rights at issue in this case are constitutional in nature.").
[15] *Harcrow*, 66 M.J. at 157.
[16] JA at 5.
[17] JA at 20.
[18] JA at 11-16.
[19] *Girouard*, 70 M.J. at 10.
[20] 67 M.J. 385 (C.A.A.F. 2009).
[21] 68 M.J. 465 (C.A.A.F. 2010).
[22] *Girouard*, 70 M.J. at 11, *citing Harcrow*, 66 M.J. at 158.

listed as a lesser included offense of Article 134, UCMJ (communicating a threat),[23] *United States v. Jones* had been decided and would have provided appellant notice that the former was likely not a lesser included offense.

Assuming appellant has not waived the issue, he has at a minimum forfeited the error.[24] Therefore, this Honorable Court may "grant relief only if there was plain error, which requires (1) that there be error, (2) that the error be plain or obvious, and (3) that the error materially prejudices a substantial right of the accused."[25]

Law and Analysis

Article 79, UCMJ, provides that "[a]n accused may be found guilty of an offense necessarily included in the offense charged. . . ."[26] This Honorable Court reiterated in *United States v. Jones*[27] that, pursuant to the Supreme Court's precedent in *Schmuck v. United States*,[28] the determination of whether one offense was a lesser included offense of another would be made by utilizing the "elements test."[29] "The elements test does not require that the two offenses at issue employ identical statutory language. Instead, the meaning of the offenses is

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[23] MCM, part IV, ¶110.d.(1).
[24] *United States v. McMurrin*, 70 M.J. 15, 18 (C.A.A.F. 2011).
[25] *McMurrin*, 70 M.J. at 18.
[26] UCMJ, art. 79, 10 U.S.C. §879.
[27] 68 M.J. 465 (C.A.A.F. 2010).
[28] 489 U.S. 705, 109 S. Ct. 1443 (1989).
[29] *Jones*, 68 M.J. at 468.

ascertained by applying the 'normal principles of statutory construction.'"[30] Further, "[t]he fact that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.'"[31]

The Government concedes that under the circumstances of this case provoking speeches and gestures, in violation of Article 117, UCMJ, is not a lesser included offense of communicating a threat, in violation of Article 134, UCMJ, and that the military judge's acceptance of appellant's plea constitutes plain error. However, the Government does not concede that the former can never be a lesser included offense of the latter by virtue of the "pleadings-elements" test set forth in *United States v. Weymouth*.[32] Further, because appellant cannot establish prejudice pursuant to *United States v. Girouard*,[33] and *United States v. McMurrin*,[34] he is entitled to no relief.

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[30] *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010), *citing Carter v. United States*, 530 U.S. 255, 263, 120 S. Ct. 2159 (2000).
[31] *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011), *citing United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2004).
[32] 43 M.J. 329 (C.A.A.F. 1995).
[33] 70 M.J. 5 (C.A.A.F. 2011).
[34] 70 M.J. 15 (C.A.A.F. 2011).

I. This Honorable Court should Continue to Follow the "Pleadings-Elements" Test Set Forth in *Weymouth*

This Court in *Weymouth* held that "those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test."[35] The Court noted that it had adopted the "elements test" pursuant to *Schmuck* "for determining whether particular crimes were. . .lesser-included therein."[36] In addressing what composes the "elements" of an offense for the purpose of determining lesser included offenses, the Court made clear that it was not following the rejected "inherent relationship test" nor the "fairly embraced concept."[37]

The Court in *Weymouth* distinguished military practice from federal civilian practice, and held that "in the military, the *specification*, in combination with the statute, provides notice of the essential elements of the offense."[38] The Court pointed out that "unlike federal offenses, military offenses are not exclusively the product of statutes."[39] "Countless military offenses derive their elemental essence from regulations or

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[35] *Weymouth*, 43 M.J. at 340.
[36] *Id.* at 333, *citing United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993), *cert. denied*, 510 U.S. 1091, 114 S. Ct. 919, 127 L.Ed.2d 213 (1994).
[37] *Weymouth*, 43 M.J. at 334. *Cf Jones*, 68 M.J. at 470 (recognizing the rejection of the "inherent relationship test" and the "fairly embraced concept.").
[38] *Weymouth*, 43 M.J. at 333 (emphasis original).
[39] *Weymouth*, 43 M.J. at 335.

orders, from customs of the service, or from traditional military crimes that have emerged from a military common law-like process."[40]

The Court pointed specifically to offenses alleged under Article 134, UCMJ as support for the "pleadings-elements" test. "Mere recitation of statutory elements would provide servicemembers no notice whatever" in cases arising under Article 134, UCMJ, because the Congressionally enacted statutory elements include only (1) that the accused did or failed to do certain acts; 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.[41]

Jones did not directly overrule *Weymouth*,[42] and in fact implicitly acknowledges reliance upon the "pleadings-elements" test to ascertain the elements in any particular case. Though *Jones* notes that "an LIO. . .must be determined with reference to the elements defined by Congress for the greater offense,"[43] in addressing the unique attributes of Article 134, UCMJ, it

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[40] *Id.*
[41] *Weymouth*, 43 M.J. at 335; MCM, part IV, ¶60.b; *see also Jones*, 68 M.J. at 475-477 (Baker, J. dissenting).
[42] While *Jones* held that "[t]o the extent any of our post-*Teters* cases have deviated from the elements test, they are overruled," 68 M.J. at 472, *Weymouth* was decided specifically in accordance with the elements test from *Schmuck* and *Teters*.
[43] *Jones*, 68 M.J. at 471.

states that "although the terms Congress chose for the article are broad, what is general is made specific *through the language of the given specification.*"[44] "The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against."[45] This Court indicated again in *United States v. Arriaga*,[46] the continued viability of *Weymouth* when it stated "[r]egardless of whether one looks strictly to the statutory elements *or to the elements as charged*, housebreaking is a lesser included offense of burglary,"[47] and analyzed the specific intent in that case by reference to the language of the specification.[48]

Therefore, based on *Jones'* acknowledgement that the precise "elements" of any offense charged under Article 134 depend upon the language of the specification,[49] the "elements" of any given offense cannot be based solely upon what Congress enacted, but must also include the specific pleading in any particular case. The "pleadings-elements" test still ensures "that one can determine *ex ante* - solely from what one is charged with – all

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[44] *Jones*, 68 M.J. at 472 (internal citations omitted)(emphasis added).
[45] *Jones*, 68 M.J. at 472.
[46] 70 M.J. 51 (C.A.A.F. 2011).
[47] *Arriaga*, 70 M.J. at 55.
[48] *Id.*
[49] *See, e.g., United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

that one may need to defend against,"[50] because "[a]*s alleged*, proof of the greater offense must invariably prove the lesser offense; otherwise, the lesser offense is not included."[51]

II. Provoking Speeches or Gestures may be a Lesser Included Offense of Communicating a Threat, Depending on the Nature of the Allegation

The elements of communicating a threat, in violation of Article 134, UCMJ, are:

> (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.[52]

A "threat" is defined as "an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future."[53]

The elements of provoking speeches or gestures, in violation of Article 117, UCMJ, are:

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[50] *Jones*, 68 M.J. at 472.
[51] *Weymouth*, 43 M.J. at 335 (emphasis original).
[52] MCM, part IV, ¶110.b.
[53] MCM, part IV, ¶109.c.(1).

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

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

(3) That the person toward whom the words or gestures were used was a person subject to the code.[54]

"Provoking" and "reproachful" "describe 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."[55]

There is no question that employing the strict "elements test" based solely on the elements defined by Congress, without reference to the specific pleading, Article 117, UCMJ, can never be a lesser included offense of Article 134, UCMJ (communicating a threat), because the "lesser offense" contains the additional element "[t]hat the person toward whom the words or gestures were used was a person subject to the code."[56] Further, not every conceivable "threat" would constitute "provoking" or "reproachful" speech.[57]

However, as in the case at hand, where the Government charges an accused with a violation of Article 134, UCMJ

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[54] MCM, part IV, ¶42.b.
[55] MCM, part IV, ¶42.c.(1).
[56] MCM, part IV, ¶42.b.(3).
[57] *See United States v. Thompson*, 46 C.M.R. 88 (A.C.M.R. 1972)("threat" made by accused to prison guard found not to be "provoking" or "reproachful," as they would not reasonably incite the guard to violence under the circumstances).

(communicating a threat), and alleges that the person towards whom the threat was made is a person subject to the code, the greater offense would therefore encompass the additional element of Article 117, UCMJ. Here, the charged communication of a threat was specified to be directed towards SSG Arvelle Fearn. By explicitly stating that the person towards whom the threat was made was a Staff Sergeant (SSG), the Government was necessarily required to prove that the subject of the threat was a person subject to the code.[58]

With regard to the nature of the statement made by an accused, the Government acknowledges that the threat alleged in this case does not rise to the level of "provoking" or "reproachful" speech, *per se*.[59] However, this does not foreclose the possibility that certain statements made would be so egregious that they would not only be considered "threats," but that they would also reasonably be expected to induce a breach of the peace, under the circumstances. In that circumstance the terms "provoking or reproachful" would be subsumed within the term "threat."

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[58] *See* UCMJ, Article 2(a), 10 U.S.C. §802(a).

[59] While appellant agreed during the providence inquiry that his words were "fighting words" because it would make SSG Fearn "a little upset," based solely on the language of the specification it cannot be said that the threat made would reasonably induce a breach of the peace.

III. Appellant Cannot Establish Material Prejudice

In *United States v. McMurrin*[60] this Honorable Court found that the appellant's Fifth Amendment right "not to be convicted of an offense different than the one appearing on the charge sheet" was violated; however, this Court tested whether such error prejudiced appellant.[61] Despite finding prejudice in that case, this Court noted that "[w]e cannot say that prejudice is always irrelevant in LIO cases like *McMurrin* and *Girouard*, and we cannot say that the effect of such an error is necessarily 'difficult to assess.'"[62]

In evaluating prejudice, because a violation of the Fifth Amendment right to not be convicted of an offense different than the one appearing on the charge sheet is not structural error,[63] the fact that appellant was convicted of an improper lesser included offense, by itself, cannot establish prejudice. In *Girouard*, this Court found prejudice because: (1) the accused "did not agree to, and the military judge did not, amend the

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[60] 70 M.J. 15 (C.A.A.F. 2011).
[61] *McMurrin*, 70 M.J. at 19-20; *see also Girouard*, 70 M.J. at 11-12 (testing for prejudice where appellant was convicted of improperly instructed LIO). While Chief Judge Baker in his dissent to *Girouard* argues that the error was one of a jurisdictional nature based on the lack of a proper referral of the uncharged convicted offense, the majority considered the issue as a major change under R.C.M. 603 where the accused did not object, thus allowing review under plain error. *Girouard*, 70 M.J. at 8, fn. 4.
[62] *Id.* at 19.
[63] *McMurrin*, 70 M.J. at 19.

charge sheet or specification;" (2) the accused did not "defend against the charged offense of premeditated murder on a theory that he was guilty of negligent homicide;" and (3) "the case [was not] tried on a theory of negligent homicide by the Government."[64] Similarly, in *McMurrin*, this Court found prejudice where "the specification was not amended in accordance with Rule for Courts-Martial 603," and appellant did not "defend himself on the theory that while he was not guilty of involuntary manslaughter, Article 119, UCMJ, he was guilty of negligent homicide, Article 134, UCMJ."[65]

In this case, appellant voluntarily plead guilty to a violation of Article 117, UCMJ, as a lesser included offense of Article 134, UCMJ (communicating a threat);[66] personally submitted the specification for the violation of Article 117, UCMJ (in essence submitting a "major change" under R.C.M. 603(d));[67] voluntarily admitted to all the facts in support of his conviction in violation of Article 117, UCMJ;[68] and voluntarily admitted that his conduct violated Article 117, UCMJ.[69] Other than being convicted of an offense that has now been determined to not be a lesser included offense, appellant

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[64] *Girouard*, 70 M.J. at 11.
[65] *McMurrin*, 70 M.J. at 20.
[66] JA at 5.
[67] JA at 8, 20.
[68] JA at 12-16.
[69] JA at 11.

has suffered no prejudice. While in *Girouard* and *McMurrin* this Court noted that "[b]ut for the error Appellant would not have been convicted" of the improper lesser included offense,[70] in this case, but for Appellant's voluntary and unambiguous plea to Article 117, UCMJ, submission of the actual specification, factual recitation in support of his plea, and voluntary agreement that his actions constituted a violation of Article 117, UCMJ, he would not have been convicted. Appellant cannot establish that he was in any way prejudiced by his own decision to plead to, and be found guilty of, a violation of Article 117, UCMJ.

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[70] *Girouard*, 70 M.J. at 11; *McMurrin*, 70 M.J. at 20.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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