**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br><br>Appellee<br>v.<br><br>Benny Norwood, Jr.<br>First Sergeant (E-8)<br>U.S. Marine Corps,<br><br>Appellant | **REPLY BRIEF ON BEHALF OF APPELLANT**<br><br>Crim.App. No. 201000495<br><br>USCA Dkt. No. 11-0515/MC |

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

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## Reply Argument

### I. When Article 134 is the basis of an attempt or conspiracy charge, every element of Article 134 must be alleged.

In its answer, the Government asks this Court to ignore the reasoning of *Fosler* and *Jones* by arguing that adultery and obstruction of justice are defined UCMJ offenses, just like drug distribution (Article 112a), murder (Article 118), larceny (Article 121), and perjury (Article 131).[1] Yet *Fosler* and *Jones* say otherwise.

Indeed, the Government compares apples to oranges when it equates murder, larceny, etc., to adultery and obstruction of justice. Although murder and larceny, without more, are made criminal under military law via congressional statute, adultery and obstruction of justice are not. As this Court explained in *Fosler*, clauses 1 and 2 of Article 134 criminalize acts that are prejudicial or service discrediting, nothing more.[2] And adultery and obstruction of justice are listed because they are examples of conduct that *could* satisfy clause 1 or 2 of Article 134 under certain circumstances.[3]

Thus, when the Government charged Appellant with attempted adultery and conspiracy to obstruct justice, it did not actually charge him with attempting or conspiring to do anything illegal. But the same is not true of, for example, an attempted murder

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[1] Gov't Br. at 11, 13, 14, 20.

[2] *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011).

[3] *Id.*; *see also United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010).

specification. On its face, murder is a UCMJ offense, so such a specification would at least convey to an accused that he attempted to do something that, on its own, is criminal.

Still, in Appellant's initial brief, he did argue that *all* attempt and conspiracy charges were required to allege every element of the underlying offense.[4] In retrospect, this argument goes beyond what this Court needs to decide here. What is important here is that an attempt or conspiracy charge that has *Article 134 as the underlying offense*, must always include all of the 134 elements: an allegation of (1) an act, and (2) the terminal element. There are two reasons for this.

First, a specification that omitted the act and merely alleged that the accused attempted to engage in prejudicial or service discrediting conduct, would obviously fail to provide adequate notice of what needed to be defended against.[5] Second, this Court's precedents make clear that acts alleged under Article 134 – standing alone – are not offenses under Article 134 – they must also be prejudicial or service discrediting.

In sum, this Court need only rule that because Article 134 is unique in that the act alleged is not itself criminal (unlike murder, larceny, etc.), every element of Article 134 – both the act and the reason the act is criminal (i.e., the terminal element) – must be alleged to properly charge an attempt or conspiracy to violate Article 134. Because that was not done

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[4] Appellant's Br. of Mar. 30, 2012 at 5-8.

[5] *See United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007).

here, the specifications are defective.

**A. Per *United States v. Ballan* and *United States v. Medina*, Appellant was prejudiced by the defective specifications.**

In Appellant's initial brief, he relied on this Court's decisions in *Ballan*[6] and *Medina*[7] to show how he was prejudiced by the error here.[8] That is, because *Medina* says that he had a "right" to know whether he was pleading guilty to attempting and conspiring to engage in prejudicial conduct, or service discrediting conduct, under *Ballan* he was prejudiced (1) by the violation of that right (the military judge did not establish whether the guilty pleas were to clause 1, or clause 2), and (2) because his convictions may therefore rest on one point and the affirmance of those convictions on another.[9]

Since the Government's answer does not address those two points, Appellant has no additional presentation on that portion of his argument.

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[6] *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012).
[7] *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).
[8] Appellant's Br. of Mar. 30, 2012 at 10-11.
[9] *Id.*

**Certificate of Filing and Service**

I certify that on May 7, 2012, a copy of the foregoing was hand-delivered to this Court, opposing counsel, and to Code 40.

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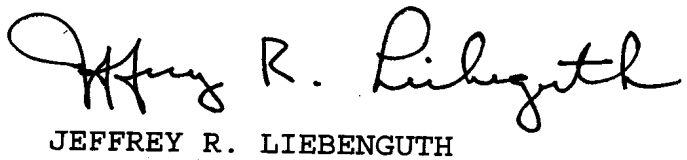

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