UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	USCA Dkt. No. 11-0515/MC
v.	)	
	)	Crim. App. No. 201000495
Benny NORWOOD, First Sergeant (E-8) U.S. Marine Corps Appellant	)	

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

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Issues Presented

I.

WHETHER IN LIGHT OF *UNITED STATES V. FOSLER*, 70 M.J. 225 (C.A.A.F. 2011), THE SPECIFICATIONS ALLEGING ATTEMPTED ADULTERY AND CONSPIRACY TO OBSTRUCT JUSTICE STATE OFFENSES.

II.

WHETHER, IN ORDER TO STATE AN OFFENSE OF ATTEMPT OR CONSPIRACY UNDER ARTICLES 80 AND 81, THE SPECIFICATION IS REQUIRED TO EXPRESSLY ALLEGE EACH ELEMENT OF THE PREDICATE OFFENSE.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellant's approved sentence included a bad-conduct discharge and one year or more of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of attempted adultery, one specification of conspiracy to obstruct justice, and one specification of making a false official statement in violation of Articles 80, 81, and 107, UCMJ, 10 U.S.C. §§ 880, 881, and 907 (2006). Contrary to his

pleas, the Military Judge also convicted Appellant of one specification of conspiracy to commit an indecent act and indecent acts in violation of Articles 80 and 120, UCMJ, 10 U.S.C. §§ 881 and 920. The Military Judge sentenced Appellant to fourteen months confinement, reduction to pay grade E-5, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On May 5, 2011, the lower court affirmed the findings and the sentence. *United States v. Norwood*, No. 201000495, 2011 CCA LEXIS 85 (N-M. Ct. Crim. App. May 5, 2011). This Court granted Appellant's Petition for Review on February 29, 2012.

Statement of Facts

On April 17, 2009, Appellant, the Company First Sergeant for Ammunition Company, Third Supply Battalion, went with his Company to a unit function at Okuma, a military resort in Okinawa, Japan. (Joint Appendix (J.A.) 63.) One of his Marines, Corporal (Cpl) Hancock, rented a cabana room at the resort. (J.A. 68.) Another member of the Company, Private First Class (PFC) B, joined him in the room and they engaged in sexual activity. (J.A. 70.) Cpl Hancock subsequently left the room and went to the Enlisted Club. (J.A. 69.) He returned later with Appellant and Staff Sergeant (SSgt) Keys, one of the Company Platoon Sergeants. (J.A. 65, 71.) When the three men

entered the room, PFC B was still lying on the bed with no clothing on, underneath a blanket. (J.A. 72.)

Appellant engaged in conversation with PFC B and eventually the blanket came off. (J.A. 73.) Appellant began to touch PFC B and then turned around to Cpl Hancock and told him to get "involved" so that PFC B would be more willing and open to his advances. (J.A. 73.) Cpl Hancock then began to engage in sexual activity with PFC B while Appellant and SSgt Keys watched. (J.A. 74.) Appellant touched PFC B's breasts and vagina, then attempted to have intercourse with her before being interrupted by a knock at the door. (J.A. 74-76.)

On Sunday, April 19, 2009, PFC B reported the incident to the Naval Criminal Investigative Service (NCIS). (J.A. 64.) Appellant, learning that PFC B was at the hospital and believing an investigation would ensue, called a meeting with SSgt Keys and Cpl Hancock at an on-base gym to get a story straight that the three could give to investigators. (J.A. 49-51.) They planned to each falsely tell the investigators that PFC B had never been in the cabana room with them. (J.A. 51-52.) Appellant followed through: when questioned by an NCIS agent, he falsely told the agent that PFC B had never been in the cabana room while he was there. (J.A. 53.) The agent, however, had learned of the meeting at the gym from SSgt Keys and confronted Appellant with this. (J.A. 87.) Appellant initially denied the

meeting until the agent obtained and confronted Appellant with video footage of the meeting. (J.A. 87-88, 91.)

At trial, Appellant unconditionally pled guilty to a violation of Article 80, UCMJ. (J.A. 15, 29-30.) The specification read:

> In that First Sergeant Benny Norwood Jr., U.S. Marine Corps, a married man, on active duty, did, at Okinawa, Japan, on or about 17 April 2009, attempt to commit adultery with Private First Class [B], U.S. Marine Corps, a woman not his wife, by trying to place his penis inside of her vagina and have sexual intercourse with her.

(J.A. 8.) Appellant also pled guilty unconditionally to a violation of Article 81, UCMJ. (J.A. 15, 38-44.) The specification as amended by Appellant's pleas read:

> In that First Sergeant Benny Norwood Jr., U.S. Marine Corps, on active duty, did, at Okinawa, Japan, on or about 20 April 2009, conspire with Staff Sergeant Griffin A. Keys, U.S. Marine Corps, and Corporal Marchello K. Hancock, U.S. Marine Corps, to commit an offense under the Uniform Code of Military Justice, to wit: obstruction of justice in the investigation into the alleged sexual assault of Private First Class [B], U.S. Marine Corps, and in order to effect the object of the conspiracy, First Sergeant Norwood did make false statements to Special Agent Joe Garcia, Naval Criminal Investigative Service, concerning his involvement and knowledge of the investigation into allegations of the sexual assault of Private First Class [B].

(J.A. 8.)

During the providence inquiry into Appellant's plea of guilty to the attempt specification, the Military Judge recited to Appellant the elements of the underlying offense of adultery,

explaining that he "must have intended" all the elements. (J.A. 31.) This expressly included the terminal element: that an element of the underlying offense of adultery is that "under the circumstances, your 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." (J.A. 31-32.) The Military Judge went on to define the terms "conduct prejudicial to good order and discipline" and "service discrediting." (J.A. 32.) To illustrate the concepts of the terminal element, the Military Judge explained circumstances in which this element might be lacking and delineated factors surrounding the circumstances of Appellant's conduct that might make his conduct prejudicial to good order and discipline or service-discrediting. (J.A. 33-34.)

The Military Judge asked Appellant to explain the circumstances of his offense, which he did. (J.A. 34-36.) The Military Judge then asked Appellant if he intended each of the elements of the offense of adultery when he was attempting to have intercourse with PFC B. (J.A. 36.) Appellant responded, "Yes, Your Honor." (J.A. 36.)

Moving to the conspiracy specification, the Military Judge listed the elements of conspiracy, taking the time to address Appellant's concerns regarding the overt act he had recited and to modify the language of the overt act element to Appellant's satisfaction. (J.A. 38-44.) The Military Judge explained that

proof that the offense of obstructing justice actually occurred was not required, but that the agreement needed to include every element of the offense of the underlying offense, obstructing justice. (J.A. 43.) He then read the elements of obstructing justice, including "that under the circumstances, your conduct was prejudicial to good order and discipline in the Armed Forces or was of a nature to bring discredit upon the Armed Forces." (J.A. 43-44.)

While providing definitions, the Military Judge said, "I've already defined conduct prejudicial to good order and discipline and service discrediting conduct. Do you need me to repeat it?" Appellant responded, "No, Your Honor." (J.A. 47.) The Military Judge asked Appellant if he had the intent to violate all of the elements of obstructing justice as he had just explained them. (J.A. 48.) Appellant answered, "Yes, Your Honor." (J.A. 48.)

Other facts necessary for a resolution of the assigned errors are included in the Argument below.

Summary of Argument

Particularly when viewed with maximum liberality, as is militated by the posture of this case, the attempt and conspiracy specifications state offenses because they: (1) allege all elements of the charged offenses——attempt and conspiracy——as required by R.C.M. 307; (2) afford constitutionally-required notice by apprising Appellant of the offenses he attempted and conspired to commit and by fairly informing him of the charges against which he must defend; and (3) protect Appellant from double jeopardy.

These are the standards for when an inchoate offense specification states an offense, not whether it alleges all elements of the offense that was the object of the solicitation, attempt, or agreement. Courts have long recognized the difference between inchoate and completed offenses. Following long-standing and undisturbed Supreme Court precedent, they have uniformly held that charging documents alleging inchoate offenses do not need to allege essential elements of the target offense with the same precision required when charging completed substantive offenses.

While a small minority holds otherwise, a significant majority of U.S. Courts of Appeals, this one included, are in accord that an inchoate offense indictment or specification may be sufficient without alleging all essential elements of the

underlying substantive offense. This majority view is well-supported by law and logic and there is no reason to abandon it.

Adultery and obstructing justice are offenses under the Code and, accordingly, may be the target of an attempt or conspiracy. The President as Commander-in-Chief has, for decades, expressly listed adultery and obstructing justice as Article 134 offenses in the Manual for Courts-Martial (MCM); based on his authority as Commander-in-Chief and on military custom and usage, they are offenses which Congress incorporated into the Code through Article 134, UCMJ.

Yet even if this Court finds error, Appellant is entitled to no relief. He forfeited any defect in the specifications by failing to object unless he can demonstrate plain error. He cannot carry this burden because he suffered no prejudice: he was on actual notice of all elements of the underlying substantive offenses and there is no indication the outcome would have been any different if the attempt and conspiracy specifications had alleged the terminal element of the target offenses.

Argument

I.

TO STATE OFFENSES, ATTEMPT AND CONSPIRACY SPECIFICATIONS DO NOT NECESSARILY NEED TO ALLEGE EACH ELEMENT OF THE UNDERLYING SUBSTANTIVE OFFENSE.

A. A specification is sufficient if it alleges the elements of the charged offense, fairly informs the accused of the charges against which he must defend, and protects him from double jeopardy.

Whether a specification states an offense is a question of law this Court reviews *de novo*. *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010); *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

The military is a notice pleading jurisdiction. "The rigor of old common-law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded." *United States v. Sell*, 3 C.M.A. 202, 206 (C.M.A. 1953). The test of the validity of a specification is not whether it "could have been made more definite and certain," *United States v. Debrow*, 346 U.S. 374, 376 (1953), or "whether the indictment could have been framed in a more satisfactory manner," *United States v. Webb*, 747 F.2d 278, 284 (5th Cir. 1984), but "whether it conforms to minimal constitutional standards." *Id.*

A specification is sufficient if it: (1) contains the elements of the offense charged and fairly informs the accused

of the charge against which he must defend; and, (2) protects the accused against double jeopardy for the same offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)); *see, also, United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994).

Implementing these requirements, the Rules for Courts-Martial (R.C.M.) provide that a "specification is a plain, concise, and definite statement of the essential facts constituting the offense charged" and is sufficient "if it alleges every element of the charged offense either expressly or by necessary implication." R.C.M. 307(c)(3).

When a specification is challenged for the first time on appeal, appellate courts view it with "maximum liberality" in favor of validity. *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986). More than mere passivity, appellate courts are actively hostile to technical defect claims first raised on appeal. *Id.* at 209-10 (internal citation omitted).

B. Attempt and conspiracy specifications are not required to allege all essential elements of the target offense as long as they otherwise provide constitutional and regulatory notice.

1. Federal and military courts uniformly hold that charges of inchoate offenses need not allege the elements of the underlying offense with the same technical precision as charges of completed offenses.

The U.S. Supreme Court over a century ago cited the differences between inchoate and completed offenses in rejecting an argument much like Appellant's——that an indictment for conspiracy to commit subornation of perjury was fatally defective because it failed to allege essential elements of the underlying offenses of subornation of perjury and perjury:

> This [argument] is based upon the assumption that an indictment alleging a conspiracy to suborn perjury must describe not only the conspiracy relied upon, but also must, with technical precision, state all the elements essential to the commission of the crimes of subornation of perjury and perjury which, it is alleged, is not done in the indictment under consideration. But in a charge of conspiracy the conspiracy is the gist of the crime, a certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit, *is all that is requisite* in stating the object of the conspiracy.

Williamson v. United States, 207 U.S. 425, 447 (1908) (emphasis added).

The Supreme Court returned to this theme in *Wong Tai v. United States*, 273 U.S. 77 (1927), declaring it "well settled" that an indictment for conspiracy is not required to "allege with technical precision all the elements essential to the

Commission of the offense which is the object of the conspiracy, or to state such object with the detail which would be required in an indictment for committing the substantive offense." *Wong Tai*, 273 U.S. at 81 (internal citation omitted).

While Appellant erroneously interprets *Wong Tai* as requiring that an indictment "at least allege the basic elements of the offense underlying the alleged conspiracy," Appellant's Br. at 5, a closer reading reveals that the Supreme Court said nothing of the sort. Instead, it echoed its language from *Williamson* that in charging conspiracy, "certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, *is all that is necessary*." *Wong Tai*, 273 U.S. at 81 (emphasis added) (internal citations omitted).

The Supreme Court recently readdressed this critical distinction between inchoate and completed, substantive offenses. In *Resendiz-Ponce*, the Court held that it was "enough," i.e., sufficient, for an attempt indictment "to point to the relevant criminal statute" and allege that the defendant attempted on a given date to commit the prohibited act (in that case, enter the U.S. illegally). 549 U.S. at 107-108.

2. The majority of U.S. Courts of Appeal, to include this Court, have applied *Wong Tai* to hold that inchoate offense specifications may state offenses even when they fail to allege all elements of the underlying substantive offense.

In *United States v. Bryant*, 30 M.J. 72 (C.M.A. 1990), this Court considered whether a specification alleging conspiracy to distribute drugs was sufficient despite its omission of an essential element of the underlying offense: that the distribution was "wrongful." After acknowledging that the Federal Circuits are "in disagreement as to whether failure to state every element of an offense in an indictment renders it constitutionally defective," *id.* at 74 n.2, it held that the conspiracy specification was not required to allege every essential element of the underlying substantive offense. Despite the specification being challenged at trial, leading to a narrower reading on appeal, and irrespective of its omission of an essential element of the underlying offense, it found it stated an offense, explaining that "we have recognized, particularly for a charge of conspiracy, that *it is not essential to the validity of the charge that the offense that is the object of the agreement be described with technical precision*." *Id.* at 73-74 (citing *United States v. Irwin,* 22 C.M.A. 168, 169 (C.M.A. 1973)) (emphasis in original).

The majority of Federal Circuits agree. For instance, the Third Circuit in *United States v. Werme*, 939 F.2d 108 (3d Cir.

1991) analyzed whether an indictment alleging conspiracy to violate the Travel Act was sufficient despite not containing all elements of the underlying Travel Act. *Id.* at 111. It found the indictment legally sufficient even in light of the omission, explaining, "A conspiracy indictment need not allege every element of the underlying offense, but need only put defendants on notice that they are being charged with a conspiracy to violate the underlying substantive offense." *Id.* at 112.

Likewise, in *United States v. Graves*, 669 F.2d 964 (5th Cir. 1982), the Fifth Circuit found no error in an indictment alleging a conspiracy to transport stolen property even though it omitted an essential element of the underlying offense: that the defendant knew that the property was stolen. The Court, emphasizing that Graves was charged not with violating the statute itself but with a conspiracy to do so, articulated that it "has consistently rejected the argument that a conspiracy charge must spell out the elements of the substantive offense the accused conspired to commit." *Id.* at 968. Several other Circuits are also in accord.[1]

[1] *See, e.g., United States v. Eirby*, 262 F.3d 31 (1st Cir. 2001) ("In an indictment for conspiring to commit an offense, [] the conspiracy is the gist of the crime, and it is therefore unnecessary to allege all the elements essential to the commission of the offense which is the object of the conspiracy.") (internal citations omitted); *United States v. Wydermyer*, 51 F.3d 319, 325 (2d Cir. 1995) ("The indictment need only put the defendants on notice that they are being charged

It appears that only two Federal Circuits adhere to the minority position that, despite the Supreme Court's guidance in *Williamson* and *Wong Tai*, conspiracy indictments must allege the essential elements of the underlying substantive offense (although not with the specificity required of an indictment alleging a completed substantive offense). *See*, *United States v. Kingrea*, 573 F.3d 186, 192-94 (4th Cir. 2009); *United States v. Bedford*, 536 F.3d 1148, 1156 (10th Cir. 2008).

3. The *Bryant* rule is well-supported by law and logic and should not be abandoned.

As demonstrated above, there is ample legal support for this Court's holding in *Bryant* that inchoate offense specifications are not required to allege all essential elements of the target offense. There is no regulatory or constitutional

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with a conspiracy to commit the underlying offense . . . ."); *United States v. Fruehauf Corp.*, 577 F.2d 1038, 1071 (6th Cir. 1978) ("It is well settled that in an indictment for conspiring to commit an offense in which the conspiracy is the gist of the crime it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy[.]"); *United States v. Roman*, 728 F.2d 846, 852 (7th Cir. 1984); *United States v. Starr*, 584 F.2d 235, 237 (8th Cir. 1978); *Stein v. United States*, 313 F.2d 518, 518 (9th Cir. 1962) (conspiracy indictment sufficient despite "want of an allegation" of an element of the substantive offense); *United States v. Ramos*, 666 F.2d 469, 475 (11th Cir. 1982) ("[T]he government need not allege or prove an overt act in a conspiracy prosecution such as this one . . . ."); *United States v. Offutt*, 127 F.2d 336, 347 (D.C. Cir. 1942) ("The offense-object of a conspiracy need not be charged with the same completeness as where an indictment for that crime is drawn, but the indictment, with some precision, must acquaint defendant with the nature of the offense-object.").

requirement that an inchoate offense specification allege all elements of the target offense. *Hamling* and R.C.M. 307 require specifications to allege the elements of the *charged* offense. *Hamling*, 418 U.S. at 117; R.C.M. 307(c)(3). When the charged offense is conspiracy or attempt, the specification therefore must allege, expressly or by necessary implication, the elements of conspiracy or attempt. Neither *Hamling* nor R.C.M. 307 requires alleging essential elements of the target offense.

The Fourth Circuit premised its rule that a conspiracy indictment must allege all essential elements of the underlying offense, even if in a cursory fashion, not on the Sixth Amendment right to notice, which can be satisfied without regurgitating the elements of the underlying offense, but on the Fifth Amendment Indictment Clause. *Kingrea*, 573 F.3d at 193 ("the requirement that all elements of the offense be present in the indictment 'derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present.'") But the Fifth Amendment Indictment Clause, and therefore the Fourth Circuit's rationale for its rule, do not apply to the military. U.S. Constitution, Amendment V; *Solorio v. United States*, 483 U.S. 435, 453 (1987) (Marshall, J., dissenting) (Court's decision rejects right to indictment by grand jury and trial by jury of one's peers, even for non-service-connected offenses).

Finally, the logical underpinning for the majority position is sound. As courts have repeatedly stated, there is a significant difference between inchoate offenses where individuals solicit, attempt, or conspire to commit offenses and completed, substantive offenses. For inchoate offenses, the gist is the request, attempt, or conspiracy——not a completed offense. *See, United States v. Feola*, 420 U.S. 671, 693-694 (1975). Thus, the focus in analyzing whether a specification provides sufficient notice is not on elements of the underlying offense——which after all, by virtue of being inchoate need not have occurred——but on the attempt or agreement to commit some specified offense or offenses with enough particularity that it provides fair notice to the accused so she can defend against the charge.

The specifications in this case further illustrate this point. Were these specifications charged as completed offenses under Article 134, it would have had to been alleged and proven that Appellant's actions were prejudicial to good order and discipline or of a service-discrediting nature. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); Article 134, UCMJ. But Appellant was not charged with completed offenses under Article 134; he was charged with *attempting* and *conspiring* to commit offenses punishable under Article 134. Thus, there was no requirement that the attempted adultery and conspiracy to

obstruct justice actually prejudiced good order and discipline or were of a service-discrediting nature——only that the acts attempted and agreed upon *would have been* prejudicial or of a service-discrediting nature *had they been completed*. This is a critical distinction.

Finally, a broad ruling that inchoate offense specifications must allege all elements of the underlying substantive offense risks a reversion to prolix pleadings. For instance, must a conspiracy to commit murder specification now intone the premeditated design element? This Court should decline such an invitation and instead adhere to its holding in *Bryant*: that an inchoate offense specification is sufficient irrespective of whether it recites the elements of the target offense as long as it: (1) alleges the elements of the offense charged (conspiracy or attempt) and fairly informs the accused of the charge against which he must defend; (2) alleges what underlying substantive offense the accused is alleged to have attempted or conspired to commit; and (3) protects the accused from double jeopardy. *Hamling*, 418 U.S. 87; *Bryant*, 30 M.J. 72; R.C.M. 307(c)(3).

II.

THE SPECIFICATIONS ALLEGING ATTEMPTED ADULTERY AND CONSPIRACY TO OBSTRUCT JUSTICE MET ALL THE ABOVE CRITERIA AND THEREFORE STATE OFFENSES. YET, EVEN IF THIS COURT FINDS OTHERWISE, APPELLANT IS ENTITLED TO NO RELIEF BECAUSE HE CANNOT MEET HIS BURDEN OF SHOWING PREJUDICE UNDER A PLAIN ERROR ANALYSIS.

Appellant did not challenge the attempt and conspiracy specification at trial. Accordingly, this Court views them with "maximum liberality," *Watkins*, 21 M.J. at 209. Under any standard, but particularly under this liberal standard, the specifications state offenses.

A. The specifications allege all elements of attempt and conspiracy.

The offenses charged at issue were attempt and conspiracy under Articles 80 and 81, UCMJ, respectively. Accordingly, the first question is whether the specifications allege all the elements of attempt or conspiracy either expressly or by necessary implication.

The elements of attempt are: (1) the accused did a certain overt act; (2) the act was done with the specific intent to commit a certain offense under the Code; (3) the act amounted to more than mere preparation; and (4) the act apparently tended to effect the commission of the intended offense. MCM, pt. IV, para. 4b (2008 ed.).

The elements of conspiracy are: (1) the accused entered into an agreement with one or more persons to commit an offense under the Code; and (2) while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy. MCM, pt. IV, para 5b (2008 ed.).

The attempt and conspiracy specifications allege all of the above elements either expressly or by necessary implication, *see, Resendiz-Ponce*, 549 U.S. at 107.

B. The specifications expressly allege Appellant attempted and conspired to commit the underlying substantive offenses of adultery and obstructing justice, respectively——both of which *are* offenses under the Code.

The specifications properly informed Appellant that the offense he attempted to commit was adultery and the offense he conspired with others to commit was obstructing justice. Contrary to Appellant's assertion, adultery and obstructing justice *are* offenses punishable under Article 134, UCMJ——as much as larceny is an offense punishable under Article 121, UCMJ.

Article 134, UCMJ——the "general article"——provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken

> cognizance of by a . . . court-martial . . . and shall be punished at the discretion of that court.

Article 134, UCMJ.

Adultery and obstructing justice are both listed in the current Manual for Courts-Martial as offenses under Article 134, UCMJ. MCM, Pt. IV, paras. 62, 96. The President has listed adultery as an Article 134 offense since at least 1951, MCM, Ch. XXV, para 127c (1951 ed.), and obstructing justice since at least 1968. MCM, Ch. XXV, para 127c (1968 ed.). Both offenses, therefore, fall within what the Supreme Court has called "the examples of Art. 134 violations contained in the Manual for Courts-Martial, promulgated by the President by Executive Order." *Parker v. Levy* 417 U.S. 733, 741 (1974); MCM, pt. IV, paras. 62, 96 (2008 ed.). Importantly, the Supreme Court did not say examples of what *might* violate Article 134, but *examples of violations*. As is a running theme in *Parker*, the general article standing alone is broad and vague and provides little notice to service members as to precisely what is prohibited. But "the longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134." *Id.* at 746-747.

The Court quoted one of its decisions from 1857 to explain:

> When *offences and crimes* are not given in terms or by definition, the want of it may be supplied by a

> comprehensive enactment, such as [the Navy's precursor general article], which means that courts martial have jurisdiction of *such crimes as are not specified*, but which *have been recognized to be crimes and offences by the usages* in the navy of all nations…. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for *what those crimes are*, and how they are to be punished, *is well known by practical men in the navy and army* . . . .

Parker, 417 U.S. at 747 (quoting *Dynes v. Hoover*, 61 U.S. 65, 82, 20 How. 65 (1857) (emphasis added). Indisputably, Congress provides the rules for the government and regulation of the armed forces. U.S. Const. art. I, § 8, cl. 14; *United States v. Jones,* 68 M.J. 465, 471 (C.A.A.F. 2010). But in exercising this constitutional prerogative, Congress enacted Article 134 to sweep a category of offenses "not specifically mentioned" elsewhere within the aegis of the UCMJ through Article 134. By listing examples of offenses included within that aegis, the President is——in his capacity as Commander-in-Chief of the Armed Forces, U.S. Const. art. II, § 2, cl. 1, and within the framework Congress provided him——articulating a non-exclusive list of disorders or neglects that *are*, by custom and usage in the U.S. military, offenses made punishable under Article 134. *See, Loving v. United States*, 517 U.S. 748, 767-68 (1996) (Congress "exercises a power of precedence over, not exclusion of, Executive authority" and Congress may delegate authority to define criminal punishments as long as Congress makes the violation of regulations a criminal offense and fixes the

punishment, and the regulations confine themselves within the field covered by the statute.)

Appellant's cite to *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), is to no avail. The Court there was careful to point out that the opinion "does not——and should not be read to——question the President's ability to list examples of offenses with which one could be charged under *Article 134*, UCMJ." *Id.* at 471. *Jones* addressed when an offense under Article 134 is a lesser-included offense of an enumerated offense, not whether adultery and obstructing justice are offenses under the UCMJ. *Id.* at 471-472.

Returning to *Parker v. Levy*: in enacting Article 134, Congress provided the military authority to prosecute a range of activity unprecedented in civilian jurisprudence. This seemingly vague grant of prosecutorial authority is made definite and discernable through what the Supreme Court over a century and a half ago called "customs" and "usage." *Dynes v. Hoover*, 61 U.S. at 75-76. Congress incorporated violations of military custom and usage into the Code through Article 134. Adultery and obstructing justice are but two examples of military common law offenses punishable under Article 134, UCMJ ——as such, they *can* be the target of a conspiracy or attempt.

C. The specifications protect Appellant from double jeopardy.

The Double Jeopardy concern in determining whether a specification states an offense is "in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Crafter*, 64 M.J. at 212. Here, the adultery and conspiracy specifications were detailed in its use of dates, locations, parties involved, as well as the specific and factual conduct charged. Together with the providence inquiry, Appellant's record shows with complete accuracy what he was convicted of. This specificity adequately bars future prosecution for the same conduct.

D. Even assuming error, *arguendo*, Appellant still is entitled to no relief because, failing to object at trial, he cannot carry his burden of demonstrating plain error.

1. Because Appellant failed to object to the specifications at trial, they are tested for plain error.

We noted previously that two minority Circuits require a conspiracy indictment to allege all essential elements of the target offense. Yet, when it comes to appellants who challenge indictments for the first time on appeal, those two Circuits join the others in a unanimous chorus of hostility toward granting relief for conspiracy indictments that fail to allege all elements of the target offense. *See, United States v. Vogt*,

910 F.2d 1184 (4th Cir. 1990) (denying relief for conspiracy indictment that failed to allege essential element of underlying offense because it was not challenged at trial); *United States v. Washington*, 653 F.3d 1251 (10th Cir. 2011) *cert. denied*, 132 S. Ct. 1039 (2012) (denying relief for "late-blooming claim" under plain error standard).

This Court too has held that even a ruling that specifications were defective "alone does not . . . warrant dismissal." *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012). A "charge that is defective because it fails to allege an element of an offense, if not raised at trial, is tested for plain error." *Id.* at 34. Under the plain error framework, the appellant "has the burden of demonstrating that (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

2. The "plain or obvious" prong is met because *Bryant* settled——against Appellant——the question of whether an inchoate offense specification needs to allege all elements of the underlying substantive offense.

The law is now and was at time of trial clearly settled against Appellant that inchoate offense specifications need not allege all elements of the underlying substantive offense. *See*, *Bryant*, 30 M.J. at 74. Accordingly, if this Court announces a new rule to the contrary, not alleging all elements of the

target offense may be said to a "plain or obvious" error. *Johnson v. United States*, 520 U.S. 461, 468 (1997) ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal——it is enough that an error be 'plain' at the time of appellate consideration."); *see, also, United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008).

3. Appellant suffered no material prejudice to a substantial right.

Appellant still must, however, demonstrate that "the error materially prejudiced a substantial right . . . ." *Ballan*, 71 M.J. at 29 n.6 (quoting *Girouard*, 70 M.J. at 11). This burden under Article 59(a) is analogous to the burden under Federal Rule of Criminal Procedure 52(b)——though, notably, Article 59(a)'s burden is higher. But even under Fed. R. Crim. P. 52(b)'s lesser burden, an appellant still must make a significant showing: "To affect 'substantial rights,' an error must have a "substantial and injurious effect or influence in determining . . . the verdict." *United States v. Benitez*, 542 U.S. 74, 81 (2004) (internal citation omitted). (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). That is, an appellant's burden under plain error's third prong is to show "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *Benitez*, 542 U.S. at 74 (quoting *United States v. Bagley*, 473 U.S. 667,

682 (1985)); *United States v. Cotton*, 535 U.S. 625, 632 (2002). Thus, plain error's third prong under Article 59(a), UCMJ should impose a burden at least as weighty, if not heavier, than that required under Fed. R. Crim. P.52(b).

Moreover, the Court analyzes the prejudice prong in the context of the error. A charge and specification provide notice to the accused of the element of the offense. *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990). This preserves the Sixth Amendment notice requirement and the due process "apprisal" function, which are essential to a fair trial. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). Since this is the purpose, actual notice——that is, "apprisal"——of the elements that the accused must defend against can overcome a procedural defect in a charge and specification. *Cf. Ballan*, 71 M.J. at 35 ("We have no doubt that Appellant understood both what he was being charged with and why his conduct was prohibited.").

Thus, regardless of the method of notice, due process is satisfied if the accused receives "adequate notice of the charges against him so that he has a fair opportunity to defend himself." *Bae v. Peters*, 950 F.2d 469, 478 (7th Cir. 1991). The issue is whether the accused suffered any prejudice from "unfair surprise, inadequate notice or insufficient opportunity to defend." *Carter v. Smith*, No. 06-CV-11927, 2007 U.S. Dist LEXIS 6943, at *10-13 (E.D. Mich. Jan. 31, 2007) (quoting *People*

v. Hunt, 442 Mich. 359, 364, 501 N.W.2d 151, 154 (Mich. 1993)); *see, e.g., Combs v. Tennessee*, 530 F.2d 695, 699 (6th Cir. 1976) (finding no due process violation where the defendant was "neither surprised, mislead [sic] nor prejudiced" by the indictment or statutes).

The *Ballan* Court reiterated these points. *Ballan*, 71 M.J. at 35 ("In cases like this one, any notice issues or potential for prejudice are cured . . . ."). The analysis is: did the accused know "what he was being charged with and why his conduct was prohibited." *Id*. To this end, actual notice can overcome a procedural charging defect. *Id*.

Here, any error did not materially prejudice the substantial rights of the accused because he had actual notice of the terminal element of the underlying substantive offenses of the attempt and conspiracy specifications. First, the historical practice and the MCM's explicit guidance provided actual notice to Appellant, albeit outside of the charging document, that the substantive offenses of adultery and obstructing justice include the terminal element.

Second, and more importantly, the Military Judge specifically apprised Appellant of all elements of the underlying substantive offenses during the plea colloquy. (J.A. 31-36, 43-44). Appellant expressed no surprise and did not object during this colloquy (or at any other point at trial) for

a simple reason: he understood the elements of the target offenses before pleading.

Also significant, Appellant cannot show "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." It cannot (credibly) be claimed that a reasonable person in Appellant's position would have pled not guilty had the terminal element of the target offenses been alleged in the conspiracy and attempt specifications. The evidence of the terminal element was overwhelming. Had Appellant completed the offenses of adultery and obstructing justice, there can be no doubt that his actions as the senior enlisted leader in his unit would have been to the prejudice of good order and discipline. Appellant cannot demonstrate what would have been different if the terminal element of the target offenses had been expressly alleged.

The error cannot be the harm. Beyond the error and the conviction, however, Appellant fails to allege material prejudice. It is his burden. Yet in light of Appellant's actual notice here, any prejudice is necessarily just a re-framing of the error. This is not enough.

A charge and specification provide notice, prevent surprise, prevent confusion, and prevent injustice. Despite any deficiency, Appellant had actual notice of the terminal element. He was not surprised, he was not confused, and therefore there

is no injustice. Appellant was tried and convicted of an offense for which he had actual notice——both prior to and throughout the trial——of every element. He expressed his knowledge of the terminal element to the Military Judge and admitted he intended all elements of the underlying offenses, including the terminal element. Only a strained and formulaic approach to these realities could result in prejudice.

In short, Appellant cannot bear his burden to demonstrate plain error.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on April 28, 2012.

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