

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES, )  
 )  
 Appellee ) **APPELLANT'S BRIEF**  
 v. )  
 )  
 ) Crim.App. Dkt. No. 201000684  
 Jeremy L. RAUSCHER ) USCA Dkt. No. 12-0172/NA  
 )  
 Machinist's Mate )  
 )  
 Second Class (E-5) )  
 )  
 U.S. Navy, )  
 )  
 Appellant )

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

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### Issue Presented

APPELLANT WAS CHARGED WITH, *INTER ALIA*, ASSAULT WITH INTENT TO COMMIT MURDER UNDER ARTICLE 134, UCMJ. BUT THE SPECIFICATION FAILED TO ALLEGE THE TERMINAL ELEMENT. THE MEMBERS FOUND APPELLANT NOT GUILTY OF THE CHARGED OFFENSE, BUT GUILTY OF AGGRAVATED ASSAULT UNDER ARTICLE 128, UCMJ, AS A LESSER-INCLUDED OFFENSE. DID THE LOWER COURT ERR IN HOLDING THAT AGGRAVATED ASSAULT IS A LESSER-INCLUDED OFFENSE OF AN ARTICLE 134 SPECIFICATION THAT FAILS TO ALLEGE THE TERMINAL ELEMENT?

### Statement of Statutory Jurisdiction

The lower court reviewed Petty Officer Rauscher's case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1). The statutory basis for this Court's exercise of jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

### Statement of the Case

In a contested general court-martial, a panel of members with enlisted representation convicted Appellant of violating Articles 91, 117, 128, and 134, UCMJ. The members sentenced Appellant to nine months of confinement, reduction to pay grade E-1, and a bad-conduct discharge.<sup>1</sup> The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.<sup>2</sup>

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<sup>1</sup> Joint Appendix (JA) at 105.

<sup>2</sup> Convening Authority's (CA's) Action of 14 December 2010.

The lower court affirmed the findings and the sentence in its opinion of September 27, 2011.<sup>3</sup> Appellant filed a petition for grant of review with this Court on November 27, 2011. This Court granted review on February 15, 2012.

#### Statement of Facts

In March 2010, Appellant was attached to the USS FLORIDA (SSGN 728), an Ohio-class submarine. At that time, the submarine was moored in Souda Bay, Greece. On the night of March 28-29, 2010, Appellant, who had a reputation as a quiet Sailor,<sup>4</sup> committed a series of alcohol-related offenses.<sup>5</sup> Appellant's offenses spanned two separate locations — (1) aboard a liberty bus in Souda Bay and (2) aboard the USS FLORIDA.<sup>6</sup> The most serious offense alleged that Appellant, while aboard the FLORIDA, stabbed a shipmate with a 3-to-4-inch knife, causing a minor, superficial injury to the chest, and cuts on the hand and fingers that required stitches.<sup>7</sup>

As a result of the knife-attack, the Government charged Appellant with "Assault with intent to commit murder" under Article 134, UCMJ. The specification alleged:

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<sup>3</sup> *United States v. Rauscher*, No. 201000684, (N-M. Ct. Crim. App. Sep. 27, 2011) (unpublished).

<sup>4</sup> JA at 38-39, 40, 46, 64.

<sup>5</sup> JA at 23-36, 77-81.

<sup>6</sup> JA at 13-17 (Charge Sheet).

<sup>7</sup> JA at 53-55, 65-66 (describing the attack); JA at 57-63, 67 (describing the injuries).

**Charge IV: Violation of the UCMJ, Article 134**

**Specification 1:** In that Machinist's Mate Second Class Jeremy Rauscher . . . on or about 29 March 2010, with the intent to commit murder, commit an assault upon Machinist's Mate Second Class Petty Officer [JD], Jr., U.S. Navy, by stabbing him in the hand and chest with a knife.<sup>8</sup>

Notably, the charged offense did not allege that Appellant's conduct was prejudicial to good order and discipline or service-discrediting. Because this case occurred prior to this Court's decision in *United States v. Fosler*<sup>9</sup>, Appellant did not object to the defective specification at trial.

During his instructions on findings, the military judge instructed the members that "assault with a deadly weapon" under Article 128, UCMJ, was a lesser-included offense (LIO) of "assault with intent to commit murder."<sup>10</sup> Appellant did not object to the instruction because the original specification ostensibly included all of the elements of assault with intent to commit murder. As a result, the members found Appellant not guilty of the Article 134, UCMJ, offense, but guilty of the Article 128, UCMJ, offense as an LIO.<sup>11</sup>

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<sup>8</sup> See Charge Sheet.

<sup>9</sup> 70 M.J. 225 (C.A.A.F. 2011).

<sup>10</sup> JA at 82-86.

<sup>11</sup> JA at 103-04.

## Summary of the Argument

The lower court erred in affirming Appellant's conviction for aggravated assault under Article 128 as an LIO of Article 134. The charged offense under Article 134 failed to expressly allege or necessarily imply the terminal elements of Article 134. Accordingly, the specification failed to state an offense. In the absence of a legally-stated offense, a fact-finder cannot affirm what might otherwise qualify as a lesser-included offense (LIO); without a greater offense, there can be no LIO.

### ARGUMENT

Standard of Review: The question of whether the offense of "assault with a deadly weapon" was properly before the trial court is a question of law reviewed *de novo*.<sup>12</sup>

Discussion:

**A. The lower court failed to apply *Fosler*, as required by *United States v. Harcrow*.**

In *United States v. Harcrow*, this Court held that, in the absence of waiver and an objection, it applies a plain error analysis to errors raised on appeal.<sup>13</sup> In this case, there was no waiver because this Court presumes that appellants do not waive constitutional rights.<sup>14</sup> Waiver is only effective where it is clear that there has been an intentional relinquishment of a

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<sup>12</sup> *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006); *United States v. Davis*, 63 M.J. 171, 173 (C.A.A.F. 2006).

<sup>13</sup> *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008).

<sup>14</sup> *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2010).

known right or privilege.<sup>15</sup> Here, at the time of Appellant's trial, there was no requirement to allege or necessarily imply the terminal element of Article 134. Appellant could not have waived his known rights because *United States v. Fosler*<sup>16</sup> had not yet been decided. And as stated above, Appellant did not object at trial.

Therefore, "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal . . . we consider whether the error is obvious at the time of appeal, not whether it was obvious at the time of the court-martial."<sup>17</sup>

"Such a posture requires [this Court] to accept, and act upon, three fictions: (1) that [Fosler] had been decided at the time of Appellant's trial; (2) that, had Appellant's trial counsel known about [Fosler], he would not have forfeited his objection to the [error]; and (3) that the military judge would have, despite [Fosler], erroneously" failed to correct the error.<sup>18</sup>

Under a plain error analysis, *Harcrow* thus required the lower court to apply the authority that controlled at the time of this appeal – *Fosler*. But the lower court ignored *Harcrow's* mandate and did not apply *Fosler*.<sup>19</sup> Instead, it erroneously

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<sup>15</sup> *Harcrow*, 66 M.J. at 157.

<sup>16</sup> *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).

<sup>17</sup> *Harcrow*, 66 M.J. at 159 (internal citation omitted).

<sup>18</sup> *Id.*, at 161 (Ryan, J., concurring).

<sup>19</sup> *Rauscher*, slip. op. at 3 ("Were we to consider this specification now in light of [CAAF]'s decision [Fosler], we

concluded that "[t]he parties and the military judge could not have known at the time that the General Article specification might have failed to state an offense."<sup>20</sup> This directly contravenes *Harcrow's* mandate. The lower court was obligated to disregard whether the parties or military judge at Appellant's trial could have known about the *Fosler* error. It is enough that the error was obvious at the time of appeal.

**B. Under *Fosler* and its progeny, the failure to state an offense is error.**

Under this Court's decision in *Fosler*, the failure to expressly allege or necessarily imply the terminal element of Article 134, UCMJ, in a contested case resulted in the failure to state an offense.<sup>21</sup> This Court recently extended *Fosler*, holding that the failure to allege or necessarily imply the terminal element is error, "regardless of context."<sup>22</sup> In short, "the terminal element of Article 134, UCMJ, like any element of any criminal offense, must be separately charged and proven."<sup>23</sup>

In this case, the Government attempted to charge Appellant with "assault with intent to commit murder" under Article 134, but failed to expressly allege or necessarily imply the terminal

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might reach the same conclusion [that the general article specification failed to state an offense]".).

<sup>20</sup> *Rauscher*, slip. op. at 3.

<sup>21</sup> *Fosler*, 70 M.J. at 230-31.

<sup>22</sup> *United States v. Ballan*, No. 11-0413/NA, slip. op. at 13 (C.A.A.F. Daily Journal Mar. 1, 2012).

<sup>23</sup> *Id.*, slip. op. at 13.

elements. As a result, the specification failed to state an offense. This was error in *Fosler* and *Ballan*, and it is error here.

"Assault with intent to commit murder" is not an offense under the Code unless the terminal element is present. Congress did not criminalize "assault with intent to commit murder." Rather, it criminalized disorders and neglects that, under the circumstances, prejudice good order and discipline, discredit the service, or both. And as this Court has made clear, the President – who has no authority to define offenses – merely listed "assault with intent to commit murder" as an example of a "circumstance[] in which the elements of Article 134, UCMJ, could be met."<sup>24</sup> Thus, without an allegation of the terminal element, the specification as written did not state an offense.

Appellant acknowledges that he did not object to the deficient specification. But unlike *Ballan*, Appellant did not request to be prosecuted under an aggravated assault theory. Thus, in the absence of waiver, Appellant's lack of objection must be tested for prejudice in the context of plain error review.

**C. The error prejudiced Appellant's substantial rights.**

Because the error in this case was plain and obvious, the only remaining question is whether it prejudiced Appellant's

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<sup>24</sup> *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010).

substantial rights.<sup>25</sup> The Fifth Amendment to the Constitution ensures "due process of law," and the Sixth Amendment ensures that an accused is "informed of the nature and cause of the allegation." As such, the Fifth Amendment does not permit conviction for an uncharged offense.<sup>26</sup> And "when 'all of the elements [are not] included in the definition of the offense of which the defendant is charged,' then the defendant's due process rights have been compromised."<sup>27</sup> In the context of plain error, rights rooted in the Fifth and Sixth Amendments are substantial.

In *Ballan*, this Court found no prejudice to a substantial right because any "potential for prejudice" was cured due to the fact that *Ballan* was a guilty-plea case.<sup>28</sup> But in this, a contested case, the military judge's instruction on aggravated assault was no cure.

Contrary to the guarantees of the Sixth Amendment, Appellant was not informed of the "nature and cause of the allegation" because all of the elements of Article 134 were not included in the charge. In essence, Appellant was charged with a non-crime. And his conviction for an offense stemming from a

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<sup>25</sup> See *Ballan*, slip. op. at 14-15 (Applying plain error and testing for prejudice in absence of objection).

<sup>26</sup> *Girouard*, 70 M.J. at 10-11.

<sup>27</sup> *Id.* (quoting *Patterson v. New York*, 432 U.S. 197 (U.S. 1977)).

<sup>28</sup> *Ballan*, slip. op. at 18.

non-crime prejudiced his Fifth Amendment rights. Without a "greater offense," there could be no lesser-included offense.

A specification that fails to state an offense "shall be dismissed at any stage of the proceedings."<sup>29</sup> As a non-waivable ground for dismissal, the failure to object does not affect it. Accordingly, the military judge should have dismissed the defective Article 134 specification. If he had, the Government's only avenue to convict Appellant for aggravated assault under Article 128 would have been to allege that offense on the charge sheet. The failure of both the military judge and the lower court to enforce R.C.M. 907(b)(1)(B) denied Appellant the protections guaranteed by the President.

Put simply, because of the Government's omissions and inaction, aggravated assault was not an offense alleged at Appellant's trial. But instead of removing an impermissible avenue to conviction, the military judge created one by instructing on aggravated assault as an LIO. As a result, the members convicted Appellant of an offense that was never properly before the court-martial.

### **Conclusion**

The military judge erred by failing to dismiss the charge of assault with intent to commit murder under Article 134 – as required under the Rules – and instructing on aggravated assault

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<sup>29</sup> Rule for Courts-Martial (RCM) 907(b)(1)(B).

under Article 128 as an LIO. As a result, Appellant was convicted for an offense that was never before the court. The lower court compounded this error by ignoring this Court's mandate in *Harcrow* and failing to apply *Fosler* to Appellant's case.

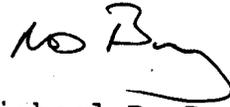
WHEREFORE, Appellant requests this Court set aside his conviction for aggravated assault under Article 128 and authorize a rehearing on the sentence.



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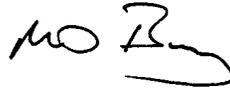
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**Certificate of Filing and Service**

I certify that the foregoing was delivered to the Court,  
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