IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201000684
Jeremy L. RAUSCHER, Machinist's Mate Second Class (E-5) United States Navy Appellant	)	USCA Dkt. No. 12-0172/NA

TO 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 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 sentence included a punitive discharge. 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 panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of disobeying a lawful order, three specifications of wrongful use of provoking words, five specifications of assault, one specification of communicating a threat, and one specification of aggravated assault with a dangerous weapon in violation of Articles 91, 117, 128, and 134, UCMJ, 10 U.S.C. §§ 891, 917, 928, and 934.

With regard to the assigned error, for specification 1 under Charge IV, the Members found Appellant not guilty of the offense of assault with intent to commit murder under Article 134, but guilty of the enumerated lesser-included offense of assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm, referred to as aggravated assault under paragraph (b)(4)(a) of Article 128.

The Members sentenced Appellant to nine months of confinement, reduction to pay grade E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On September 27, 2011, the lower court affirmed the findings and sentence. *United States v. Rauscher*, No. 201100684, 2011 CCA LEXIS 165 (N-M. Ct. Crim. App. Sept. 27, 2011). Appellant then filed a timely petition for grant of review with this Court, which this Court granted on February 15, 2012.

Statement of Facts

A. Background.

On March 28, 2010, Appellant found himself on liberty in the area around Souda Bay, Crete. Appellant began drinking as soon as he got off the liberty bus at about 1600 hours. (J.A. 22.) Between 1600 and 2330, Appellant consumed the equivalent of a dozen beers and an unknown amount of “rocky [sic],” a

locally produced hard liquor. (J.A. 36-37.) Appellant got back on the bus at about 2330 hours to return to his submarine, USS FLORIDA (SSGN-728). (J.A. 22, 24, 35.)

While on that bus back to the pier, Appellant was involved in an altercation. (J.A. 27.) Appellant attempted to smoke on the bus which was prohibited. (J.A. 27.) When Petty Officer PE attempted to take Appellant's cigarettes away, Appellant punched him. (J.A. 27.) In the ensuing struggle, Appellant punched other shipmates and even bit Fireman Apprentice RS on the face. (J.A. 27-29.)

Once pier side, Appellant ended up smoking in an area of the submarine where smoking is not allowed. (J.A. 44.) Machinist's Mate Second Class (MM2) JD, a person of Mexican descent, asked Appellant if he was smoking and Appellant replied, "Shut up, wetback, or you'll end up bloody like the nukes." (J.A. 47-48.) When admonished about smoking by Petty Officer KC, Appellant responded with racial slurs and eventually flicked a lit cigarette into the face of Petty Officer KC, and called Petty Officer KC a racial slur. (J.A. 44-45.) This escalated matters and Petty Officer JD stepped in to defuse the situation. (J.A. 45, 52-53.)

Appellant pulled out a knife, (J.A. 110), and told MM2 JD, "I ain't afraid to stab a spic." (J.A. 53-54.) Appellant then lunged at MM2 JD with the knife. (J.A. 54-55.) Appellant

stabbed MM2 JD in his left hand and the blade went through MM2 JD's thumb, through his clothes, and into his left, upper chest. (J.A. 55, 108-09.) Appellant continued to push the blade into MM2 JD, so MM2 JD grabbed the blade to pull it out and Appellant sliced his left palm. (J.A. 55, 106-07.) Petty Officer Bolin tackled Appellant to end the attack. (J.A. 56.)

B. Charges.

Appellant was charged under Article 134, UCMJ, with assault with intent to commit murder. (J.A. 16.) The charge stated that Appellant: "did . . . on or about 29 March 2010, with the intent to commit murder, commit an assault upon [MM2 JD], Jr., U.S. Navy, by stabbing him in the hand and chest with a knife." (J.A. 16.)

C. Appellant argued for a conviction of assault with a dangerous weapon under Article 128, UCMJ, so he would not be convicted of assault with intent to commit murder under Article 134, UCMJ.

After the Government rested, Appellant moved the Military Judge under Rule for Courts-Martial (R.C.M.) 917 to dismiss the charge of assault with intent to commit murder, Specification 1 of Charge IV. (J.A. 68.) Trial Defense Counsel simply argued that no evidence of intent to murder had been presented, and did not suggest the specification failed to state an offense. (J.A. 73.) In making his argument, Trial Defense Counsel conceded that there was evidence of the lesser-included offense of

assault with a dangerous weapon: "the defense does believe there is a——there is evidence of the LIO of assault with a means likely to produce death or grievous bodily injury——or——or assault with a dangerous weapon, whatever that LIO is, but the defense does not believe there is evidence of the intent to commit murder." (J.A. 73.) The Military Judge denied the Defense motion. (J.A. 76.)

Both Trial Counsel and Trial Defense Counsel proposed the instruction for aggravated assault with a dangerous weapon. (J.A. 112, 114.) Trial Counsel specifically listed the instruction as a lesser-included offense to assault with intent to commit murder charge (J.A. 112), and Trial Defense Counsel merely listed his proposed instructions. (J.A. 114.)

At the conclusion of the evidence, the Military Judge instructed the Members on the charge of assault with intent to commit murder under the Article 134. (J.A. 82.) When the Military Judge instructed on this offense, he instructed the Members on the terminal element, stating that to convict Appellant of this offense, they must find "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." (J.A. 82.)

The Military Judge also instructed the Members that aggravated assault with a dangerous weapon or other means likely

to produce death or grievous bodily harm under Article 128, UCMJ, is a lesser-included offense of the assault with intent to commit murder charge. (J.A. 85.) And the Military Judge explained the elements of Article 128. (J.A. 85-87.) Both Trial Counsel and Trial Defense Counsel had proposed the instruction for aggravated assault with a dangerous weapon. (J.A. 112, 114.)

In his closing, Trial Defense Counsel acknowledged that there were two lesser-included offenses to the assault with intent to commit murder charge (J.A. 93), and directed the Members' attention to one of them:

> the Petty Officer Rauscher that everybody knows never wanted to injure anyone, certainly never wanted to kill anyone, and we ask that you dismiss the reckless endangerment and the assault on Petty Officer [B], and that you find him not guilty of the assault with intent to commit murder and closely look at that aggravated assault with a means likely——with a means likely to produce grievous bodily harm with a dangerous a weapon, and you will see that that's much more aligned with what happened here tonight——or with what happened on the evening of March 28th.

(J.A. 101-02.)

The Members found Appellant not guilty of assault with intent to commit murder, but found him guilty of the lesser-included offense of assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm under Article 128, UCMJ. (J.A. 104.)

D. The lower court affirmed the findings and sentence in Appellant's case.

Upon review at the lower court, Appellant argued that the conviction for aggravated assault should be set aside in light of *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), because it is not a lesser-included offense of the Article 134, UCMJ, offense for which he originally stood trial. (J.A. 2.) The lower court did not address whether Appellant was prejudiced by a *Fosler* charging error, and addressed only whether the specification as charged provided Appellant sufficient notice of the lesser-included offense of aggravated assault. (J.A. 3.) The lower court conducted a statutory comparison between Articles 128 and 134 pursuant to *Jones*, and determined that the lesser offense was in fact included in the greater. (J.A. 3.) Consequently, the lower court affirmed the findings and sentence in Appellant's case. (J.A. 5.)

Summary of the Argument

Despite the single assignment of error, there are two issues raised in Appellant's brief: first, whether the lesser-included offense was properly referred to the court-martial under *Jones*; and second, whether the defective Article 134 specification was plain error, where Appellant was convicted not of the Article 134 specification but of the lesser-included Article 128(b) offense. Under this Court's decisions in *Jones*

and *United States v. Nealy*, No. 11-0615/AR (C.A.A.F. Mar. 30, 2012), the Article 128(b) offense of which Appellant was found guilty was a lesser-included offense of the Article 134 offense for which he stood trial, because all elements of the lesser offense were included within the greater offense. Appellant does not demonstrate that the defective specification was plain error, because the law concerning the requirement to expressly allege the terminal element was unsettled at the time of trial. Appellant does not demonstrate material prejudice to a substantial right, because he had actual notice of the terminal element, and he was ultimately not convicted of the Article 134 offense.

Argument

> THE LOWER COURT CORRECTLY DETERMINED THAT THE LESSER-INCLUDED OFFENSE OF AGGRAVATED ASSAULT WAS NECESSARILY INCLUDED IN THE ARTICLE 134 SPECIFICATION OF ASSAULT WITH INTENT TO MURDER. THAT THE ARTICLE 134 SPECIFICATION DID NOT EXPRESSLY ALLEGE THE TERMINAL ELEMENT DOES NOT UPSET THIS OUTCOME, BECAUSE THE DEFECTIVE SPECIFICATION WAS NOT PLAIN ERROR IN LIGHT OF THIS COURT'S DECISION IN *UNITED STATES V. BALLAN*, 71 M.J. 28, 2012 CAAF LEXIS 238 (C.A.A.F. 2012).

A. This issue is reviewed *de novo*.

The jurisdiction of a court-martial is a legal question reviewed *de novo*. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006); *United States v. Henderson*, 59 M.J. 350, 351 (C.A.A.F. 2004). "Whether a specification is defective and the

remedy for such error are questions of law, which [the court] review[s] de novo." *United States v. Ballan*, 71 M.J. 28, 2012 CAAF LEXIS 238 at *12 (C.A.A.F. Mar. 1, 2012).

B. As a threshold matter, the court-martial had jurisdiction to find Appellant guilty of assault with a deadly weapon under Article 128, UCMJ.

Appellant does not directly challenge the jurisdiction of Appellant's general court-martial, but does allege the lower court erred, and questions "whether the offense of 'assault with a deadly weapon' was properly before the trial court." (Appellant's Br. at 4.) As a threshold matter, therefore, this Court must determine whether the court-martial that considered the charges referred to it by the Convening Authority, including the Article 134 specification alleging assault with intent to commit murder, had proper jurisdiction to return a finding of guilty on the lesser-included offense of aggravated assault with a dangerous weapon under Article 128(b).

1. Appellant's court-martial had jurisdiction to consider the greater, Article 134, UCMJ, offense, despite the fact that the charging document omitted the terminal element.

Appellant's argument reduces to a basic syllogism: "The military judge erred by failing to dismiss the charge . . . under Article 134," and instructing the Members to consider "aggravated assault under Article 128 as an LIO. As a result,

Appellant was convicted for an offense that was never before the court." (Appellant's Br. at 9-10.)

The premise of this argument is flawed. On the contrary, as the Supreme Court affirmed in *United States v. Cotton*, 535 U.S. 625 (2002), "[D]efects in an indictment do not deprive a court of its power to adjudicate a case." 535 U.S. at 630.

Importantly, in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), as well as in *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011), and *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011), this Court explained at great lengths that its decisions were based on whether the accused had notice of Article 134's terminal element:

> The rights at issue . . . are constitutional in nature. The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law," and the Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation." Both amendments ensure the right of an accused to receive fair notice of what he is being charged with.

Girouard, 70 M.J. at 10 (citations omitted). Nothing in these cases suggests that a defective charge——even one that prejudices the accused——deprives a court of jurisdiction over the offense.

Rather, as this Court noted in *United States v. Ballan*, 71 M.J. 28, 2012 CAAF LEXIS 238 (C.A.A.F. 2012), "[A]ction by the convening authority showing an intent to refer a particular charge to trial is sufficient to satisfy the jurisdictional

requirements of the Rules for Courts-Martial." *Id*. at *4. This Court recently reaffirmed this principle in *United States v. Nealy*, No. 11-0615/AR (C.A.A.F. Mar. 30, 2012), refusing to find jurisdictional defect, because "[i]t is the convening authority's *intent* that controls for purposes of [referral under] R.C.M. 201(b)(3)." *Nealy,* slip op. at 10 (emphasis added). Thus, regardless of any defects that existed in the Article 134 specification at issue, it nonetheless was properly referred and therefore properly before the court-martial.

For these reasons, even if the Article 134, UCMJ, offense was defective, the court-martial properly had jurisdiction over the offense.

2. The court-martial had jurisdiction over the Article 128, UCMJ, offense, because under the *Jones* elements test, it was a lesser-included offense of the Article 134, UCMJ, offense with which Appellant was charged.

A competent authority must refer each charge to a court-martial. R.C.M. 201(b)(3). Although this is a jurisdictional prerequisite, "the form of the order [to refer charges] is not jurisdictional." *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990). "When a convening authority refers a charge to a court-martial, any LIOs of that charge are referred with it, and need not be separately charged and referred." *United States v. Nealy*, No. 11-0615/AR, slip op. at 8-9 (C.A.A.F. Mar. 30, 2012)(*citing United States v. Virgilito*, 22 C.M.A. 394, 396

(C.M.A. 1973)). Here, the Article 128 offense of which the Members found Appellant guilty was an lesser-included offense of the greater Article 134 specification with which Appellant was charged.

In *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), this Court reaffirmed the vitality of the *Teters* elements test for determining whether, in the military justice system, one offense is a lesser-included offense of another:

> Under the elements test, one compares the elements of each offense. If all 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 of the elements of offense X along with one or more additional elements.

68 M.J. at 470.

Here, Appellant was charged with violating Article 134, UCMJ, and more specifically with committing an assault with intent to murder; the specification at issue read, "In that [Appellant] did, on board USS FLORIDA (SSGN 728), 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." (J.A. 16.)

a. Statutory comparison.

As this Court made clear in *Jones*, Congress——and not the President——exercises the authority to articulate matters of

substantive military criminal law, and "federal crimes are solely creatures of statute." 68 M.J. at 471. "It stands to reason, then, that an LIO . . . must be determined with reference to the elements *defined by Congress* for the greater offense." *Id*. (emphasis added).

Here, the statutory text of the "greater offense," Article 134, UCMJ, states in pertinent part:

> Though not specifically mentioned in this chapter, *all disorders and neglects* to the prejudice of good order and discipline, [and] *all conduct* of a nature to bring discredit upon the armed forces . . . shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (2006) (emphasis added). The lesser offense, Article 128(b), UCMJ, states that "[a]ny person subject to this chapter who [] commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm . . . is guilty of aggravated assault and shall be punished as a court-martial may direct." 10 U.S.C. § 928 (2006).

Comparing the lesser statute with the greater, it is clear that Article 128(b) proscribes some type of "disorder or neglect," as well as "conduct," as those words are used in Article 134. The lower court arrived at precisely this conclusion, (J.A. 3-4), and correctly applied this Court's lesser-included offense jurisprudence in doing so. Therefore,

as the two statutes were defined by Congress, Article 128(b) is a lesser-included offense of Article 134.

b. Presidential elements comparison.

This Court in *Jones* also stated that the "President's listing of offenses under Article 134, UCMJ, is *persuasive* authority to the courts . . . and offers guidance to judge advocates under his command regarding potential violations of this article." 68 M.J. at 471-72 (emphasis in original). Similarly, as noted in *Jones*, Manual for Courts-Martial explanations of offenses are not binding on this Court, and instead are treated as persuasive authority. *Id*. (*citing United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009)).

As outlined by the President, and as charged in this case, the elements of the Article 134 specification at issue here were that: (1) Appellant committed an assault upon MM2 JD; (2) Appellant did so by stabbing MM2 JD in the hand and chest with a knife; (3) the bodily harm was done with unlawful force or violence; (4) that at the time Appellant intended to commit murder; and, (5) because it is an Article 134 offense, that under the circumstances, Appellant'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. *See* Manual for Courts-Martial, Part IV, ¶ 64.b.; (J.A. 83).

The elements of an Article 128(b) offense, as listed in the Manual for Courts-Martial and explained in this case, are: (1) that the accused committed an assault upon another person; (2) that the assault was committed with a dangerous weapon, or other means or force; (3) the bodily harm was done with unlawful force or violence; and (4) that the weapon, means, or force was likely to produce death or grievous bodily harm. *See* Manual for Courts-Martial, Part IV, ¶ 54.b.(4); (J.A. 85-86).

Here, all Presidentially-defined elements of the lesser-included offense, Article 128, are included in the Presidentially-defined elements of the greater offense, Article 134. Some argument could be made that the Article 134 specification, as charged, did not include the fourth Article 128(b) element——that the weapon, means, or force was likely to produce death or grievous bodily harm. As charged here, however, the specification included the phrase, "by stabbing him in the hands and chest with a knife." (J.A. 16.) Stabbing a person in the chest with a knife is likely to produce death or grievous bodily harm. Therefore, the fourth Article 128(b) Presidentially-defined element is met here.

For these reasons, Article 128(b) is a lesser-included offense of the Article 134 specification that was alleged against Appellant. Accordingly, there is no jurisdictional issue here.

3. Alternatively, the court-martial had jurisdiction because the Article 128 offense was listed in the Manual for Courts-Martial as a lesser-included offense of the Article 134, UCMJ, offense with which Appellant was charged. *See United States v. Nealy*, No. 11-0615/AR (C.A.A.F. Mar. 30, 2012).

Even if, *arguendo*, the two offenses do not meet the *Jones* elements test, here the entire Record suggests that everyone involved in the case believed that the Article 128(b), UCMJ, offense was in fact a lesser-included offense of the Article 134, UCMJ, offense, and that when the Convening Authority referred the charge and specification at issue he also, by implication, intended to refer any offense listed as a lesser-included offense in the Manual for Courts-Martial. *Cf*. *Nealy*, slip op. at 10.

Article 128 is expressly listed in the Manual for Courts-Martial as a lesser-included offense of the Article 134 offense of assault with intent to murder. Manual for Courts-Martial, Part IV, ¶ 64.d.(1)(a). Even though this case differs from *Nealy* in that the instant case was a contested trial before a panel of Members, the Record shows that, like *Nealy*, all parties here operated under the belief that Article 128(b) was included in the Article 134 offense: both Trial and Defense Counsel requested an instruction on the lesser-included offense; Defense Counsel openly advocated for the Members to consider the lesser-

included offense during his argument on findings; and the Military Judge instructed the Members on the included offense.

Therefore, as in *Nealy*, the Record reflects that the Convening Authority "intended to, and did, refer any listed LIO when he referred the Article 134, UCMJ, offense." *Nealy*, slip op. at 10-11. As a result, there is no jurisdictional issue here, and Appellant's court-martial had the jurisdiction to return a finding of guilty to the included offense, assault with a dangerous weapon.

C. The Article 134, UCMJ, specification alleging assault with intent to commit murder was defective because it did not allege the terminal element. But Appellant does not demonstrate plain error because the specification includes all elements of aggravated assault with a dangerous weapon.

1. Appellant must show that the failure to allege the terminal element constituted plain error.

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). "[R]egardless of context, it is error to fail to allege the terminal element of Article 134, UCMJ, expressly or by necessary implication." *Ballan*, slip op. at 13.

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." *Ballan*, 2012 CAAF LEXIS 238 at *16, *18 n.8; *United States v. Cotton*, 535 U.S. 625, 631 (2002). Here, Appellant made a R.C.M. 917 motion to dismiss, arguing that no evidence of intent to murder had been presented. (J.A. 73.) Unlike the appellant in *Fosler*, however, Appellant did not suggest the specification failed to state an offense; therefore it cannot "be considered as a motion to dismiss under R.C.M. 907." 70 M.J. at 227 (internal quotation marks omitted). Therefore, the issue of the defective charge was not raised at trial, and as in *Ballan*, must be tested for plain error.

Applying 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). Here, the terminal element was not expressly alleged in the Article 134 specification that was referred by the Convening Authority. This Court stated in *Ballan* that even under such circumstances, which trigger appellate courts to review the specifications with "maximum liberality," this "construction still does not permit us to 'necessarily imply' a separate and distinct element from nothing beyond allegations of the act or failure itself." Thus, there

is error. Nonetheless, in the absence of an objection, this Court evaluates for plain error. *Cf*. *Ballan*, 2012 CAAF LEXIS 238 at *16. Contrary to Appellant's argument, therefore, plain error analysis clearly applies here, because Appellant did not object at trial that the specification failed to state an offense.

2. Appellant does not demonstrate plain error, because the failure to allege the terminal element was not plain or obvious error, and Appellant did not suffer material prejudice to any substantial right.

a. The error was neither plain nor obvious, because the law was unsettled at the time of Appellant's trial.

Any error here in not alleging the terminal element was not plain or obvious. Error can arise in three different scenarios: (1) the law was settled in favor of an appellant at the time of trial; (2) the law was settled against an appellant at the time of trial; and, (3) the law was unsettled at the time of trial.

The first scenario is the standard "plain error" situation, where despite the law in his favor, an appellant does not object at trial. In this case, where the law was settled *in an appellant's favor* at the time of trial, plain or obvious error is "error that is so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection." *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997) (citation omitted). That is, error is "plain" if the "trial

judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163 (1982). Thus, where the law was clearly in appellant's favor at the time of trial, plain error is applied because the error was indisputable at trial and on appeal, regardless of any objection, and no judge should have countenanced the error.

In the second scenario, where the law is settled against an appellant at trial, but becomes settled in her favor during direct appeal, she is given the benefit of this plain error analysis *despite* the fact the judge was not derelict in countenancing the error. Plain error precedent accounts for changes in the law through the following rule: "*where 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." *Johnson v. United States*, 520 U.S. 461, 468 (1997) (emphasis added); *see also United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008). Where the law becomes settled by the time of direct appeal, the appellant receives the benefit of plain error review——but only where the law was clearly against appellant at the time of trial.

In cases where the law is clearly against an appellant at trial, this rule prevents needless objections to every well-settled legal principle at trial in order to preserve review on

appeal. *Johnson*, 520 U.S. at 467-468. Without that rule, appellants would get *no* review on appeal of matters that, at the time of trial, would have been impossible to win. In the second scenario, courts grant such errors the benefit of "plainness" because neither the judge *nor* the parties could reasonably have considered addressing the error at trial.

The third scenario arises in the "special situation" where the law was unsettled, or not clearly decided, at the time of trial. *See United States v. Olano,* 507 U.S. 725, 734 (1993). This third situation is neither the regular plain error situation, where the error is plain because the judge was derelict in countenancing it, nor the second situation. Thus where the law is in flux, or both supports and does not support the appellant's position at the time of trial, the appellant cannot demonstrate the error was "plain." Where precedent supports both sides of an argument in the adversarial system, it was not fruitless to object, and there is no reason to judicially grant appellants the benefits of plain error review.

This specific situation——law unsettled at trial, but settled on appeal——was left unsettled by the Supreme Court in *Olano*: "[w]e need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." *United States v. Olano*, 507 U.S. 725, 734 (1993). Nor has it ever been settled

by this Court. *See, e.g., United States v. Harcrow,* 66 M.J. 154, 159 (C.A.A.F. 2008) (applying, over vigorous dissent, the law at the time of appeal after finding "the law at the time of trial was settled and clearly contrary to the law at the time of appeal"); *United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010) (despite a Government argument that the law was unsettled at trial, thus invoking the *Olano* "special case," holding "related case law at the time of trial also supports the conclusion that the error in this case was plain and obvious" and applying the first plain error test (judge was derelict in countenancing the error)).

However, the "special situation" has been squarely addressed by several Federal circuits. "[W]here the law is unsettled at the time of trial but has been clarified by the time of appeal, such an error is not plain." *United States v. Turman*, 122 F.3d 1167, 1170 (9th Cir. 1997); *see also United States v. David*, 83 F.3d 638 (4th Cir. 1996), *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994), *cert. denied*, 513 U.S. 1196 (1995), *United States v. Dupaquier*, 74 F.3d 615, 619 (5th Cir. 1996), *United States v. Washington*, 12 F.3d 1128 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 828 (1994) (all holding that if the law was unsettled at the time of trial but only later clarified while on appeal, then while error, it is nonetheless not plain). *But see Turman,* 122 F.3d at 1170-71 (listing cases

from circuits that "have announced apparently different rules," but in fact "all circuits that purport to judge the plainness of the error as of the time of appeal confronted situations where the objections could not, as a practical matter, have been made at trial.")

Here, the law was unsettled at the time of Appellant's trial on August 30-September 2, 2010, due to the Court's shift away from its prior holdings in lesser-included offense case law and its shift away from the necessary implication of Article 134's terminal element; changes that took place before Appellant's trial in October 2009. *See Fosler*, 70 M.J. at 228 ("In a line of recent cases drawing on *Schmuck*, we have concluded that the historical practice of implying Article 134's terminal element in every enumerated offense was no longer permissible." (citations omitted)). Pleading and lesser-included offense case law was murky and changing long before this Court described it as a "hydra" in *United States v. Jones*, 68 M.J. at 468, and declined to embrace it. *See Schmuck v. United States*, 489 U.S. 705 (1989); *United States v. Medina*, 66 M.J. 21, 24 (C.A.A.F. 2008) (applying the elements test derived from *Schmuck*); *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009) (overruling the *per se* inclusion of Article 134's terminal element in every offense).

Only in *Fosler,* on August 8, 2011, decided nearly a year after Appellant's trial, was this unsettled question of law clearly settled as to whether legal specifications state an offense when they omit the Article 134 terminal element. It was not until *Fosler* that the gap was bridged between the diametrically opposed lines of precedent of *Mayo,* supporting the charge sheets stating an offense, and *McMurrin* and *Girouard,* finding Fifth Amendment due process error where a lesser-included offense did not appear on the charge sheet.

In summary, the law was not clearly against Appellant at trial, thus he should not benefit on appeal by calling the error "plain" because no judge or counsel could reasonably have anticipated the changes in the law. Nor was the Military Judge derelict by not *sua sponte* addressing the error at trial; rather, he reasonably allowed trial to proceed, without requiring changes to the charge sheet. Appellant should thus not benefit from the plain error rule, which allows for appellate review of forfeited objections where the errors were "plain." That is, Appellant's failure to object should not be rewarded now deeming the error "plain," when the law pointed in both directions at trial. Rather, relief should be denied; "plain" must mean something; here, the error was *not* plain.

Because the law regarding the requirement to charge the terminal element expressly or by necessary implication was unsettled and not clearly for or against Appellant at the time of trial, failure to allege the terminal element is not "plain." *Cf. Turman*, 112 F.3d at 1170.

b. Appellant suffered no material prejudice to a substantial right, because Appellant had actual notice of the terminal element in the Article 134 specification at issue, and ultimately not convicted of the Article 134 offense but of the lesser-included Article 128(b) offense.

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*, slip. op. at 17 ("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); *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, misled nor prejudiced" by the indictment or statutes).

This Court reiterated these points in *Ballan*. And although this Court noted that in a contested case there is no "cure that would necessarily be present in every properly conducted court-martial" to demonstrate sufficient notice, this Court did not foreclose the possibility. *Ballan*, 2012 CAAF LEXIS 238 at *22. Instead, this Court carefully tailored the opinion to apply to all guilty plea cases infected by this error. *Id*. ("In cases like this one, any notice issues or potential for prejudice are cured ...."). But this Court made clear that contested cases also require a case-by-case prejudice analysis: "Nonetheless, absent objection, in either context the error is tested for prejudice." *Id*. at *19 n.8.

Here, then, the analysis is the same: did the accused know "what he was being charged with and why his conduct was prohibited[?]" *Id*. at *21. 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. First, the historical practice and MCM's guidance provided actual notice to Appellant, albeit outside of the charging document, that the obstructing justice charge and specification implied the terminal element. The fact he did not object to the legal sufficiency of either specification before or during trial, as in *Fosler*, shows Appellant understood the terminal element must be proved against him in order to sustain the charge. Moreover, the Military Judge informed Appellant and the Members of the elements of both the Article 134 offense and the lesser-included Article 128 offense. (J.A. 83, 85.)

Therefore, Appellant had actual notice of the offense and all of its elements, including the terminal element. *See Resendiz-Ponce*, 549 U.S.at 603 (Scalia, J., dissenting) (noting that "traditional" use of terms in an indictment may afford those terms greater meaning and provide actual notice).

Appellant's actual notice and the lack of confusion or surprise was reinforced through the findings instructions. These instructions included the requirement that the Members find the terminal element. (J.A. 83.) Still, Appellant did not object when the Military Judge instructed the Members on the terminal element. (J.A. 83.) Appellant therefore had actual

notice of all elements of the Article 134 specification, including the terminal element.

Additionally, contrary to the circumstance in *Fosler*, there is no prejudice here because Appellant was not found guilty of violating the Article 134, UCMJ, specification at issue. Rather, Appellant was found guilty of the lesser-included offense of aggravated assault under Article 128(b). Contrary to Appellant's argument, he was not "convict[ed] for an uncharged offense." (Appellant's Br. at 8.) Rather, as demonstrated *supra* at 9-12, the specification alleged all essential elements of Article 128(b). Appellant's Trial Defense Counsel demonstrated knowledge and understanding of this lesser-included offense during closing argument, and in fact asked the Members to find Appellant guilty of the lesser-included offenses. (J.A. 89-90.)

In summary, Appellant did not suffer material prejudice to any substantial rights, because he demonstrated actual knowledge of the terminal element, and because he was not convicted of an offense that required proof of a terminal element. Therefore, Appellant has failed to establish plain error.

3. <u>This Court should adopt the fourth prong in its plain error analysis</u>.

The U.S. Supreme Court applies a fourth prong to the plain-error analysis: If all three requisites are satisfied, the court

"has the *discretion* to remedy the error——discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of public proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (emphasis in original). Only if this heightened standard is met may the court exercise its discretion and remedy the error. Courts sometimes refer to this requirement as the fourth prong of the plain error analysis: "Meeting all four prongs is difficult, as it should be." *Id*. at 135.

While not dispositive to this case, the Government has in the past and continues to urge this prong's applicability to military appellate courts. The current plain error analysis, as applied in the military justice system, inadequately differentiates between forfeited and preserved errors.

The Supreme Court's fourth prong is the heart of plain error analysis and pre-dates the remaining three prongs. *See, e.g., United States v. Atkinson*, 297 U.S. 157, 160 (1936). Over time, the Supreme Court simply adorned this central pillar with the other three prongs. *See United States v. Young*, 470 U.S. 1, 15-16 (1985). Hence, failure to apply the fourth prong is to ignore plain error's central tenet.

Without the fourth prong, the only remaining difference in analyzing preserved versus forfeited error is the second prong: that the error was plain or obvious. Exacerbating the situation,

military appellate courts often apply an expansive definition of "plain or obvious." *See*, *e.g.*, *McMurrin*, 70 M.J. at 18-20; *Girouard*, 70 M.J. at 11. More troublesome, a fully litigated record and, often, deference to judicial discretion buttresses a preserved error's analysis while courts review a forfeited error *de novo* based on cold records and under-litigated issues. Applying the fourth prong and reviving the heart of plain error's analysis would ameliorate these concerns and ensure that forfeited error means just that absent extraordinary circumstances.

Here, relief should be denied because the defective specification did not seriously affect the fairness, integrity or public reputation of the proceedings. Appellant beseeched the Members during closing argument to convict him of the lesser-included offense, and the Members did just that. Appellant pled providently in accordance with this agreement. Therefore, this Court should deny Appellant relief under the fourth prong of plain error review.

Conclusion

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

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court on April 12, 2012. I also certify that this brief was electronically served on Appellate Defense Counsel, Capt Michael Berry, USMC, on April 12, 2012.

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