7 September 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

Airman (E-2)
MICHAEL S. TUNSTALL
USAF,
Appellant.

USCA Dkt. No. 12-0516/AF

Crim. App. No. 37592

BRIEF IN SUPPORT OF PETITION GRANTED

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

Issues Granted

I.

WHETHER APPELLANT'S CONVICTION FOR INDECENT ACTS MUST BE SET ASIDE BECAUSE THE MILITARY JUDGE ERRED IN INSTRUCTING THE MEMBERS THAT INDECENT ACTS IS A LESSER INCLUDED OFFENSE OF AGGRAVATED SEXUAL ASSAULT.

II.

WHETHER THE FINDING OF GUILTY TO ADULTERY MUST BE DISMISSED IN ACCORDANCE WITH RULE FOR COURTS-MARTIAL 907(b)(1) BECAUSE IT FAILS TO STATE AN OFFENSE.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866. This Court has jurisdiction to review this case pursuant to Article 67, UCMJ, 10 U.S.C. § 867.

Statement of the Case

On 16-19 November 2009, Appellant was tried at a general court-martial by a panel of officers at Hurlburt Field.

Contrary to his pleas, he was found guilty of engaging in a sexual act and adultery, in violation of Articles 120, aggravated sexual assault, and 134 respectively. He was found not guilty of a second aggravated sexual assault but guilty of a purported lesser included offense (indecent act), in violation of Article 120. J.A. 393. Appellant was sentenced to a reduction to E-1, 6 months' confinement, and a bad-conduct discharge. J.A. 394. On 8 January 2010, the convening authority approved the adjudged sentence. J.A. 26

On 28 March 2012, the Air Force Court of Criminal Appeals affirmed the approved findings and sentence. J.A. 1. On 24 May 2012, Appellant filed a timely petition for grant of review. On 8 August 2012, this Court granted review on the issues presented.

Statement of Facts

Appellant was charged with two counts of aggravated sexual assault in violation of Article 120 of the UCMJ, one count of adultery in violation of Article 134 and one count of false official statement in violation of Article 107. J.A. 15-20. Charge II, Violation of the UCMJ, Article 134 states, "In that Airman Michael S. Tunstall, United States Air Force, 1st Special Operations Equipment Squadron, Hurlburt Field, Florida, a married man, did, at or near Hurlburt Field, Florida, on or

about 17 April 2009, wrongfully have sexual intercourse with Airman First Class KAS, a woman not his wife." J.A. 18 Appellant's adultery charge did not contain the terminal element in the specification. *Id.* Nor was Appellant charged with indecent acts in the alternative to aggravated sexual assault. J.A. 15-20.

On 14 August, 2009, following Appellant's 11 August 2009, Article 32 hearing, the investigating officer (IO) authored a DD Form 457, "Investigating Officer's Report". J.A. 31, 39 In the report, the IO summarized her investigation and specifically discussed potential issues in the evidence presented. J.A. 37. In item 21c.(1), the IO specifically discussed potential issues regaring Charge I, Specifications 1 and 2. *Id.* The IO noted, "[t]he only issue I see is to the voluntary intoxication of A1C KAS." *Id.* However, the IO concluded, "I believe that the government should be able to prove she was substantially incapacitated. Thus, I believe they government will be successful in proving Charge I, Specifications 1 and 2." *Id.* The IO's report does not address possible lesser included offenses. J.A. 31-45

The IO addressed the Charge II in item 21c(2). J.A. 37 The IO determined Appellant was married leaving the issue to "hinge

on whether the accused's act of adultery was conduct prejudicial to good order and discipline." *Id.*

On 17 August 2009, Appellant was served a copy of the Article 32 Report. J.A. 45

Testimony of A1C Timothy Jones

A1C Jones testified that KAS and Appellant had been "all over each other throughout the night." J.A. 80. At some point after playing cards in A1C Jones's room, KAS stood up, took off all her clothes, went over to Appellant, sat on his lap, and started to "make out" with him while straddling him. J.A. 80. A1C Jones testified that the Appellant was embarrassed by KAS's conduct and pulled away from her a little bit. J.A. 107.

A1C Jones testified Appellant asked A1C Jones and SrA Newman for privacy. J.A. 107. A1C Jones responded, "This is my room. If you want privacy, you can go to her [KAS's] room." J.A. 108. Eventually, Appellant digitally penetrated KAS for 10 minutes while SrA Newman and A1C Jones were in the room. J.A. 80-81. A1C Jones said KAS was moaning in ecstasy and that it appeared consensual. J.A. 109. Then KAS stood up and said she was going to be sick, got down on her knees, and vomited. J.A. 82, 109.

A1C Jones testified he and Appellant helped KAS to a sink. J.A. 83. He testified that while she was leaning over the sink,

she was dry heaving. J.A. 84. According to A1C Jones, Appellant continued to digitally penetrate KAS until A1C Jones told Appellant to stop. J.A. 85. KAS was having trouble standing so A1C Jones and Appellant helped her to the bathroom where she sat on her knees with her arms around the toilet. J.A. 85. A1C Jones then left the room for about two minutes. J.A. 87. When he returned, Appellant was in the bathroom with KAS, and the bathroom door was locked. J.A. 87. Appellant did not come out of the bathroom for about 10-15 minutes. J.A. 88.

A1C Jones said that after Appellant left the bathroom, KAS (who was still naked) was lying in the tub, nonresponsive, and groaning, her eyes "kind of rolling back in her head." J.A. 88.

A1C Jones believed Appellant to be divorced at the time of the incident. J.A. 114.

Testimony of A1C Warren C. Danford

A1C Danford believed the Appellant was in the process of getting a divorce but that the divorce was not finalized. J.A. 169

Testimony of KAS

KAS testified that after a day at the beach, she, appellant and two other airmen decided to go back to the dorms and meet in A1C Jones's dorm room where they drank and played cards. J.A. 185. The next memory she has was waking up the next morning in

her bed. J.A. 186. KAS testified that she did not know if she actively participated in sex in the bathroom with Appellant. J.A. 201.

Testimony of A1C Tyler Elmore

A1C Tyler Noel was not aware of Appellent's marital status on 17 April 2009. J.A. 259

Testimony of SrA Brandon Newman

SrA Newman testified that on 17 April 2009, he went to A1C Jones's room to drink and play cards. J.A. 216. According to SrA Newman, KAS and Appellant were flirting, kissing, and making out. J.A. 218. At one point, KAS got on Appellant's lap, straddling him. J.A. 218. She undid his pants while the others watched. J.A. 218. KAS, who had already removed her shirt and bra, then took off her pants. J. A. 228.

He never saw Appellant digitally penetrate KAS. J.A. 230.

SrA Newman was not aware of the Appellant's marital status. J.A. 231.

Testimony of A1C Alan Noel

A1C Alan Noel assisted Appellant move into the dorms at Hurlburt Field. J.A 240 A1C Noel was not aware of Appellent's marital status in April 2009. J.A. 241

Testimony of SrA Harrison Danforth

SrA Danforth was A1C Jones's suitemate. J.A. 243. SrA Danforth was using the shared bathroom when he saw A1C Jones, SrA Newman, KAS, and Appellant in A1C Jones's room playing cards. J.A. 245. About an hour later, he used the bathroom again and noticed KAS was topless. J.A. 245. A short time later he heard sexual noises from A1C Jones's room. J.A. 247.

SrA Danforth entered the room and told Appellant to clean up KAS, he gave him a towel, and Appellant took the towel into the bathroom with KAS and closed the door. J.A. 261. Some time later, SrA Danforth went back to the bathroom to see what was taking so long and the door was locked. J.A. 262-63. He became angry and pounded on the door until Appellant opened the door wearing nothing but a towel. J.A. 263.

SrA Danforth carried KAS out of the bathroom and got her dressed. J.A. 267. A1C Jones and Appellant were unable to assist KAS because they were too drunk. J.A. 265.

SrA Danforth had no knowledge of Appellant marital status on 17 April 2009. J. A. 268

Findings Instructions

Just before the military judge issued his findings instructions to the court members, an Article 39(a) session was held to discuss instructions. J.A. 292. Neither Trial Counsel

nor Defense Counsel requested a lesser included offense instruction. J.A. 294. Specification 2 of Charge I alleged:

> In that Airman Michael S. Tunstall, United States Air Force, 1st Special Operations Equipment Maintenance Squadron, Hurlburt Field, Florida, did at or near Hurlburt Field Florida, on or about 17 April 2009, engage in a sexual act, to wit: digital penetration by Airman Michael S. Tunstall of the vagina, with Airman First Class KAS, who was substantially incapable of declining participation in the sexual act.

J.A. 15-20.

There was no prior express notice of an indecent acts allegation as a separate or lesser-included offense. *Id.*

The military judge instructed the court members on indecent acts with another as follows:

> Indecent act under Article 120. You are advised a lesser included offense of the offense alleged in Specification 2 of Charge I is the offense of indecent acts, also a violation of Article 120. In order for you to find the accused guilty of this lesser included offense, you must be convinced by legal and competent evidence beyond a reasonable doubt:
>
> One, that on or about 17 April 2009, at or near Hurlburt Field, Florida, the accused engaged in certain wrongful conduct, to wit: digital penetration of the vagina of Airman First Class KAS; and
>
> Two, that the conduct was indecent.

J.A. 302.

After the findings instructions, the military judge provided the court members with a written copy of his findings instructions and a findings worksheet. J.A. 296, 406-412, 414.

The findings worksheet contained pre-printed language for the court members to select in order to find Appellant guilty of the lesser-included offense of indecent acts with another under Charge I and Specification 2 thereunder:

> Of Specification 2 of Charge I: (Not Guilty) (Guilty) (Not Guilty, but Guilty of the lesser included offense of Indecent Acts).

J.A. 414. The findings worksheet did not have separate lines or options for the court members to choose different language, or make exceptions and substitutions to the pre-printed language for the indecent acts with another offense.

Defense Findings Case

On 2 January 2009, Appellant and Appellant's wife filed with the First Judicial Circuit Court in Okaloosa County, Florida, a petition for simplified dissolution of marriage. J.A. 400-02

Trial Counsel's Findings Argument

Following instructions, Trial Counsel presented his findings argument. J.A. 314-30.

Trial Counsel in arguing for the lesser included offense of indecent acts in the alternative to aggravated sexual assault stated, "[b]oth those penetrations are in front of people. They are open and notorious under the definition. . . They are right

there. So you have the sexual act, you have the indecent conduct, obvious what the conclusion is there." J. A. 329-30

In arguing for the terminal element of adultery in Article 134, Trial Counsel states:

> Look at the instructions. Consider all of those factors. Think about what happened that night. Consider all the involvement from all the unit members who had to get involved in this. What do you think is going to happen to that unit in terms of their ability to work effectively, to work as a team? But more than that, consider the statement by the accused to Airman KAS the next day. "We're not going to tell anybody about last night. We're not going to tell anybody about last night." What kind of effect does that have? Is that service discrediting? Members, use your common sense. You're there on element three easily beyond a reasonable doubt.

J.A 378

At the conclusion of their deliberations, the court members returned a verdict of guilty of the lesser-included offense of indecent acts with another and adultery. J.A. 393.

Summary of the Argument

Appellant's conviction for indecent acts must be set aside because the military judge improperly instructed that this uncharged offense was a lesser-included offense of aggravated sexual assault. Indecent act's element of open and notorious is manifestly absent from the greater charge of aggravated sexual assault causing a failure of notice to Appellant in both the way

it was charged and in the manner in which the government pursued its case.

The adultery specification failed to state an offense because it failed to allege any of Article 134's elements either expressly or by necessary implication. The key issue is whether that failure to state an offense requires that the finding of guilty to adultery be set aside. It must for two reasons. First, under the prejudice test established by *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), Appellant had insufficient notice of which of Article 134's disjunctive terminal elements the Government was relying upon. Second, this Court should revisit its prejudice analysis in *Humphries* and instead follow Rule for Courts-Martial 907(b)(1)'s plain language that a "specification shall be dismissed at any stage of the proceedings if" it "fails to state an offense."

Argument

I.

APPELLANT'S CONVICTION FOR INDECENT ACTS MUST BE SET ASIDE BECAUSE THE MILITARY JUDGE ERRED IN INSTRUCTING THE MEMBERS THAT INDECENT ACTS IS A LESSER INCLUDED OFFENSE OF AGGRAVATED SEXUAL ASSAULT.

Standard of Review

"This Court reviews a military judge's decision to give an instruction, as well as the substance of an instruction, *de novo*." *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999)

(citing *United States v. Maxwell*, 45 M.J. 406, 424-25 (C.A.A.F. 1996)). Whether the findings of the court members constitute a fatal variance and/or a specification fails to state an offense is reviewed *de novo*. *United States v. Lovett*, 59 M.J. 230 (C.A.A.F. 2004).

Law and Analysis

A. Fatal Variance and Prejudice

The Constitution requires that an accused be put on sufficient notice to defend against charged offenses and properly considered lesser-included offenses. "It is axiomatic that a conviction upon a charge not made or a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). "No principle of procedural due process is more clearly established than notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge...." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

"[A] variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge." *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999). "To prevail on a variance claim, appellant must show that the variance was material and that it

substantially prejudiced him." *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993). A variance that is "material" is one that, for instance, substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense. *See United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003); R.C.M. 918(a)(1). This Honorable Court has emphasized that "[e]ven where there is a variance in fact, the critical question is one of prejudice." *United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975) (citing *United States v. Craig*, 8 C.M.A. 218, 24 C.M.R. 28 (1957)). Prejudice can arise from a material variance in several ways:

> An appellant may show that the variance puts him at risk of another prosecution for the same conduct. An appellant may [alternatively] show that his due process protections have been violated where he was "misled to the extent that he has been unable adequately to prepare for trial," or where the variance at issue changes the nature or identity of the offense and he has been denied the opportunity to defend against the charge.

Id. at 67 (quoting *United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975)).

The variance between what Appellant was charged with and what he was convicted of was fatal: Appellant was charged with aggravated sexual assault based on the allegation that he engaged in a sexual act with KAS when she was substantially incapable of declining participation in the sexual act.

Appellant was never put on notice that he may be defending against indecent acts. It was clear that the government's theory was aggravated sexual assault and not the grossly vulgar, obscene or repugnant conduct of an indecent act charge. Appellant does note that trial defense counsel failed to object to the indecent acts instruction given by the military judge.[1]

Undoubtedly, had Appellant been put on proper notice of some other criminal offense that he was alleged to have intended to commit, the entire landscape of the trial, particularly Appellant's defense, would have changed to account for the alternate theory of prosecution. Undoubtedly, the defense would have spent more time questioning witnesses about matters not otherwise addressed in this trial.

The significant variation in form and substance of the indecent acts charge with the original sexual assault charge

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[1] Counsel notes that an argument under the plain error standard could be made in light of the fact that the trial defense counsel did not object to the instructions. However, even under a plain error standard, the instruction was improper. The plain error standard is met when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F 2008). Under the first prong, an error was committed for the reasons set forth above. The error was clear in that there were ambiguities between Appellant being acquitted of the underlying offense of sexual assault and convicted of the lesser included offense. With respect to the third prong, conviction of an offense not charged was prejudicial in the context of plain error analysis where the case was not tried on a theory of indecent acts. *See Jones,* 68 M.J. at 473 n.11.

fundamentally violated Appellant's due process rights and was fatally prejudicial.

B. Indecent Acts is Not a Lesser-Included Offense of Sexual Assault.

In determining if one offense is a lesser-included offense of another, one must examine the statutory elements as well as the pleadings. *United States v. Weymouth*, 43 M.J. 329, 340 (C.A.A.F. 1995).

Most recently, this Court adopted the elements test to determine whether a crime is a lesser included offense. "[R]ather than embracing a 'Hydra' we return to the elements test, which is eminently straightforward and has the added appeal of being fully consonant with the Constitution, precedent of the Supreme Court, and another line of our own cases." *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010). "If indeed an LIO is a subset of the greater charged offense, the constituent parts of the greater and lesser offenses should be transparent, discernible *ex ante,* and extant in every instance." *Id.*

> Under the elements test, one compares the elements of each offense. If all of 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.

Id. at 470.

In this case, indecent acts is not a lesser-included offense of the original aggravated sexual assault charge, and the military judge erred in providing the court members with Indecent Acts as a lesser-included offense.

1) Indecent Acts is Not a Lesser-included Offense of Aggravated Sexual Assault

The *Manual for Courts-Martial* (MCM)*, United States* (2008 ed.) does list indecent act as a lesser included offense of aggravated sexual assault. *Manual for Courts-Martial*, Pt IV, ¶45e(3) (2008 ed.). This listing is dependent on "the factual circumstance in each case, to include the type of act and the level of force involved." *Manual for Courts-Martial*, Pt IV, ¶45d(14) (2008 ed.) However, this Court has held that a listing is not enough to make a crime a lesser included offense. "Moreover, suggesting that listing a criminal offense as an LIO within the *MCM* automatically makes it one, irrespective of its elements, ignores the very definition of a crime. Crimes are composed of elements, and they include both a required act (*actus* reus) and a mental state (*mens rea*)." *Jones,* 68 M.J. at 471.

The elements for Aggravated Sexual Assault and Indecent Acts are:

Aggravated Sexual Assault	**Indecent Acts**
(1) That the accused engaged in a sexual act with another person, who is of any age; and	(1) That the accused engaged in certain conduct; and
(2) That the other person was substantially incapable of declining participation in the sexual act	(2) That the conduct was indecent.

Manual for Courts-Martial, Pt IV, ¶45 b.(3)(c), b.(11) (2008 ed.)

The Coast Guard Court considered an almost identical set of facts and issue in *United States v. Clifton*, 69 M.J. 719 (C.G. Ct. Crim. App. 2011), and reached the opposite conclusion as the Air Force Court, setting aside the indecent act conviction.

As Appellant did, in *Clifton*, the accused faced a charge of aggravated sexual assault which he contested. *Id.* at 719. At the conclusion of the findings portion of trial, both Appellant's and *Clifton*'s military judge sua sponte instructed the members, as part of his defining the lesser included offense of indecent acts the following:

> Article 120, UCMJ, is not intended to regulate the wholly private consensual activities of individuals. In the absence of aggravating circumstances, private consensual sexual activity, including sexual intercourse, is not punishable as an indecent act. Among possible aggravating circumstances is that the sexual activity was *open and notorious*. Sexual activity may be open and notorious when the participants know that someone else is present. This presence of someone else may include a person who is present and witnesses the sexual activity, or is present and aware of the sexual activity through senses other than vision. On the other hand, sexual activity that is not performed in the close proximity of someone else, and which passes unnoticed may not be considered open and notorious. Sexual activity may also be considered open and notorious when the act occurs under circumstances in which there is a substantial risk that the acts could be witnessed by someone else, despite the fact that no such discovery occurred.

J.A. 303-04 (emphasis added).

These instructions, as in *Clifton*, allowed Appellant to "be convicted based upon voyeuristic conduct or. . . sexual activity when other people were present." *Clifton* 69 M.J. at 721. This element of individuals present differs significantly from the specification with which Appellant was charged. Aggravated sexual assault has no requirement that such conduct be open and notorious as set forth in the standard specification found in the *Manual for Courts-Martial.* See MCM Pt IV, ¶ 45.g(3)(c)(2008 ed.). Nor is open and notorious implied as it is "manifestly absent from the elements of aggravated sexual assault." *Id*. Consequently, the lack of the lesser included offense's open and notorious element from greater charge's

elements fails to put Appellant on notice of the charges he faces and must defend against.

2) The Indecent Acts Instruction Was Not Fairly Raised by the Aggravated Sexual Assualt Charge or the Government's Theory of the Case.

Lesser-included offenses may also be fairly raised by the facts alleged in the pleadings. *See* Article 79, UCMJ; and *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008).

The aggravated sexual assault specification in this case did not fairly reference the element of the act being open and notorious that would have put Appellant on notice of indecent acts as a lesser-included offense. The government's theory of the case was that KAS, at some point during her interaction with Appellant, became so intoxicated she could no longer consent. It was not that the act was open and notorious. This is evidenced by how the government charged the offense in the aggravated sexual assault specification.

Because indecent acts is not a lesser-included offense of aggravated sexual assault and it was not fairly raised in specification as pled on the charge sheet, Appellant's conviction for indecent acts must be set aside. "While people are presumed to know the law, *e.g., Atkins v. Parker,* 472 U.S. 115, 130 (1985), they can hardly be presumed to know that which

is a moving target and dependent on the facts of a particular case." *Jones* at 468.

Based upon the evidence presented at trial and the government's theory of aggravated sexual assualt, the offense of indecent acts was not fairly raised as a lesser-included offense and Appellant's conviction for indecent acts cannot be sustained.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the findings with regard to Specification 2 of Charge I and remand the case to the AFCCA to reassess the sentence or return the case to the convening authority for a rehearing on sentence.

II.

THE PLAIN LANGUAGE OF R.C.M. 907(b)(1) REQUIRES DISMISSAL OF A SPECIFICATION THAT FAILS TO STATE AN OFFENSE WITHOUT ANY REQUIREMENT TO SHOW PREJUDICE.

Standard of Review

Whether a charge and specification state an offense is a question of law reviewed de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

Law and Analysis

"A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); Rule for Courts-Martial 307(c)(3))

In Appellant's case, the specification alleging adultery is defective because it does not expressly allege the terminal element of Article 134, UCMJ; nor is the terminal element necessarily implied as alleged. See *United States v. Fosler*, 70 M.J. 225, (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012).

This Court has held that where the defense fails to object to the sufficiency of the specification at trial, a plain error analysis will be applied on appeal. *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F 2012). Under plain error analysis, the appellant has the burden of demonstrating there was error, that the error was plain and obvious, and that the error materially prejudiced a substantial right. *Id*. at 214 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). The failure of the specification to allege either clause of the terminal element applicable to the offense of adultery was plain and obvious error. *Id*. at 214. Under this Court's case law, however, a finding of error does not alone warrant dismissal. *Id*. at 212 "The question,

then, is whether the defective specification resulted in material prejudice to the [appellant's] substantial right to notice." *Id.* at 215.

A. Appellant Was Prejudiced By the Adultery Specifications's Failure to Place Him on Notice as to Which of Article 134's Disjunctive Terminal Elements the Prosecution Was Relying

Like *Humphries*, this case involved a defective adultery specification. And like Senior Airman Humphries, Appellant was prejudiced by that defect. The government failed to plead the terminal element, and a close reading of the record of trial shows that the government failed during its case-in-chief to reasonably place Appellant on notice of the government's theory as to which clause or clauses of Article 134 Appellant violated.

When conducting a prejudice analysis, a reviewing Court must "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Humphries*, 71 M.J. at 215-16 (quoting *United States v. Cotton*, 523 U.S. 625, 633 (2002)). Where the missing element is Article 134's terminal element, reversal is required where "[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued." *Id*. at 216. A Court must examine: (1) whether the

Government's opening statement discussed how the charged "conduct satisfied either clause 1 or 2 of the terminal element of Article 134, UCMJ," and (2) whether the Government presented "any specific evidence" or called any witness "to testify as to why [the accused's] conduct satisfied either clause 1, clause 2, or both clauses of the terminal element of Article 134, UCMJ." *Id*.

The fact that the terminal element was identified in the Article 32 investigating officer's report or was the subject of a findings instruction by the military judge is insufficient to provide notice. See *id*. (noting that "the military judge's panel instructions correctly listed and defined the terminal element of Article 134, UCMJ, as an element of the adultery specification"); *Humphries*, 71 M.J. at 222 (Stucky, J., dissenting) (noting that the Article 32 investigating officer's report "spelled out the elements of the offense of adultery, including that such conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces"). Nor does the trial counsel's reference to the terminal element during closing argument satisfy the notice requirement. *Id.* at 216

For the adultery specification in this case, just as for the adultery specification in *Humphries*, "the Government did not

plead the terminal element of Article 134, UCMJ, and, after a close reading of the trial record, there was nothing during its case-in-chief that reasonably placed [the accused] on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated." *Humphries*, 71 M.J. at 216. That element was controverted. As the Supreme Court has stated, "A simple plea of not guilty puts the prosecution to its proof as to all elements of the crime charged[.]" *Mathews v. United States*, 485 U.S. 58, 64-65 (1988) (internal citation omitted). Appellant pleaded not guilty to the adultery specifications, thereby controverting all of the specification's elements. At no time thereafter did the defense enter any stipulations, make any concessions, or take any other action to uncontrovert the adultery specification's terminal element.

The assistant trial counsel discussed the adultery specification during opening statement but did not indicate either that the conduct was prejudicial to good order and discipline or service discrediting. J.A. 67 Just like the trial counsel's closing argument in *Humphries*, the assistant trial counsel's opening statement below "provides the lay definition of adultery, but does not provide constitutional notice of the elements of the Article 134, UCMJ offense of

adultery." 71 M.J. at 216. Here, just as in the *Humphries* closing argument context, "Specifically, it fails to provide Appellant with notice of which clause of the terminal element of Article 134, UCMJ – the element that was missing from the specification and which, in turn, makes the action described criminal – the Government relied on." *Id*.

Nor did the Government present any specific evidence or call any witness to testify as to why Appellant's conduct satisfied either clause 1, clause 2, or both clauses of the terminal element.

The military judge did instruct the members on the terminal element, J.A. 304-5, but *Humphries* demonstrates that is insufficient to provide the required notice. 71 M.J. at 216. That instruction, like the similar instruction in *Humphries*, "came after the close of evidence and, again, did not alert [the accused] to the Government's theory of guilt." *Id*.

Unlike in *Humphries*, the trial counsel did discuss adultery's terminal element during closing argument. J.A 326-327 Thus, this case presents the issue that this Court noted but did not decide in *Humphries*: whether notice provided by closing argument is sufficient. *See Humphries*, 71 M.J. at 216 n.9. This Court should hold that it is not. Like discussion of the findings instructions that *Humphries* demonstrates are

inadequate, discussion of the terminal element during the trial counsel's closing argument comes "after the close of evidence." *Id*. at 216. It thus comes too late to alert the defense to present any evidence it might have to disprove the element. It does not provide the constitutionally required notice.

The prejudice arising from the adultery specification's failure to state an offense was not eliminated by the Article 32 report's inclusion of the Article 134 terminal element or discussion of whether it could be proven in light of Appellant's legally separated status.

In *Humphries*, just as in this case, the Article 32 report noted Article 134's terminal element while discussing the specification under that article. *See Humphries*, 71 M.J. at 222 (Stucky, J., dissenting) (noting that the Article 32 investigating officer's report "spelled out the elements of the offense of adultery, including that such conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces"). Yet in *Humphries*, this Court found insufficient notice despite the Article 32 report. This Court noted in *Humphries* that it conducted a "close review of the trial record." *Humphries*, 71 M.J. at 215. Such a close review could not have missed the Article 32 report. Nor could this Court have overlooked that report, since it was not only

mentioned by Judge Stucky in dissent, but also included in the Joint Appendix and discussed by both parties' briefs.[2]

Despite all of these references to the Article 32 report containing the terminal element, this Court concluded that under the totality of the circumstances, Senior Airman Humphries was prejudiced due to the lack of notice as to which theory of liability under Article 134 the Government was relying on.

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[2] *See* Cross-Appellant's Brief at 9 ("The Article 32 investigating officer's report did note that an element of an Article 134 adultery offense is '[t]hat, 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. 17."), *available at* http://www.armfor.uscourts.gov/newcaaf/briefs/2011Term/Humphries10-5004CrossAppellantBrief.pdf ; Final Brief on Behalf of the United States at 5 ("An Article 32 investigation was held on 2 December 2008, and the investigating officer listed all the elements of adultery in the Article 32 report including the terminal element: '(3) 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.' (JA at 17.) The investigating officer noted in his report when analyzing the evidence presented at the Article 32 hearing, 'Finally, [Appellant's] act of engaging in sexual intercourse with a woman married to fellow military member, while that member is deployed, can be found to be prejudicial to good order and discipline.' (Id.)", *available at* http://www.armfor.uscourts.gov/newcaaf/briefs/2011 Term/Humphries10-5004CrossAppelleeBrief.pdf. The Government's brief also argued, "Appellant was on full notice of the terminal element prior to trial during his Article 32 investigation and in the Article 32 report." *Id*. at 8. The Government subsequently reiterated that Appellant "was on notice as early as the Article 32 investigation that the offenses included a terminal element." *Id*. at 10. It later repeated that "Appellant was on actual notice of the terminal element prior to trial as reflected in his Article 32 report." *Id*. at 15.

Moreover, *Humphries* suggests why the Article 32 report is insufficient to provide the constitutionally required notice. Just like the military judge's correct instructions concerning the adultery specification's terminal element "did not alert Appellee to the Government's theory of guilt," *id*. at 216, the same is true of the Article 32 report; it cannot place the accused "on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated." *Id*.

Accordingly, here, just as in *Humphries*, a totality of the circumstances analysis indicates that Appellant was prejudiced by the adultery specification's failure to state an offense.

B. Dismissal of the adultery specification is required by R.C.M. 907(b)(1)

In the alternative, Appellant maintains that *Humphries*' prejudice analysis approach is inconsistent with a presidentially prescribed rule in the *Manual for Courts-Martial*. Under that rule, dismissal is the required remedy for the adultery specification's failure to state an offense.

When construing the *Manual for Courts-Martial*, this Court applies the rules of statutory construction. *See, e.g., United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). "[A] fundamental canon of statutory construction is that when interpreting statutes, the language of the statute is the

starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear." *Thompson v. Greenwood*, 507 F.3d 416, 419 (6th Cir. 2007) (quoting *United States v. Boucha*, 236 F.3d 768, 774 (6th Cir. 2001)). Where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

R.C.M. 907(b)(1) is a model of clarity. If a specification fails to state an offense, it "shall be dismissed at any stage of the proceedings." R.C.M. 907(b)(1) The President prescribed that rule in the exercise of his statutory authority to prescribe "[p]retrial, trial, and post-trial procedures . . . for courts-martial." Article 36(a), UCMJ, 10 U.S.C. § 836(a) (2006). Congress delegated that power to the President pursuant to its constitutional authority and responsibility "To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14.

In its remedy analysis, *Ballan* cited two Article III court decisions for the proposition that where a specification is challenged for the first time on appeal, a plain error analysis is used. *Ballan*, 71 M.J. at 34. Article III case law is inapposite because R.C.M. 907(b)(1) is different than its Federal Rules of Criminal Procedure counterparts. *See* Fed. R.

Crim. P. 12, 34. In military practice, the President has designated failure to state an offense as a "[n]onwaivable" ground for dismissal. R.C.M. 907(b)(1). And he has provided an exclusive and mandatory remedy: dismissal of the specification. *Id*.

R.C.M. 907(b)(1)'s approach is not compelled by either the Constitution or statute. The President is free to revise that rule if he no longer wishes to mandate dismissal of the specification as the sole remedy for failure to state an offense. But unless and until the President modifies R.C.M. 907(b)(1), it is this Court's duty to enforce it as written. And as written, that rule clearly mandates dismissal of a specification that fails to state an offense.

In *Humphries*, this Court concluded that R.C.M. 907(b)(1) does not "survive the erosion of the legal basis for its existence." *Humphries*, 71 M.J. at 212. A court, however, lacks the authority to rewrite a regulation because it concludes that a different rule would better accord with the current state of the law. Declining to apply an unamended regulation due to changed circumstances is particularly inappropriate in a military context for several reasons. First, the President exercises independent constitutional authority as the Commander in Chief of the Army and Navy when adopting rules for the

military. *See* U.S. Const., art. II, § 2, cl. 1. When he promulgated the 1984 *Manual*, which included R.C.M. 907(b)(1), the President stated that he was acting "[b]y virtue of the authority vested in me as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code (Uniform Code of Military Justice)." Exec. Order no. 12,473 (Apr. 13, 1984), *reprinted at* 49 Fed. Reg. 17,152 (Apr. 23, 1984). Second, the President acted under an express congressional delegation of authority to prescribe regulations not inconsistent with the UCMJ for "[p]retrial trial, and post-trial procedures, including modes of proof, for cases . . . triable in courts-martial." Art 36(a), UCMJ, 10 U.S.C. § 836(a) (2006). That delegation, in turn, derived from Congress's authority to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, § 8, cl. 14. The version of Article 36 in effect when President Reagan issued R.C.M. 907 required that rules enacted under its authority be reported to Congress. *See* 10 U.S.C. § 836(b) (1984), *amended by* Pub. L. No. 101-510, § 1301(4), 104 Stat. 1485, 1668 (1990). Consistent with that requirement, President Reagan directed the Secretary of Defense to transmit the 1984 *Manual for Courts-Martial* to Congress on behalf of the President. Exec. Order No. 12,473 (Apr. 13, 1984), *reprinted at* 49 Fed. Reg. 17,152 (Apr.

23, 1984). Congress has apparently expressed no concern with R.C.M. 907(b)(1) in the 28 years since it was notified of its adoption. Third, the President has adopted procedures within the Executive Branch to identify changes in the law that warrant revision of the *Manual for Courts-Martial*. In 1984, by Executive Order, President Reagan provided, "The Secretary of Defense shall cause [the *Manual for Courts-Martial*] to be reviewed annually and shall recommend to the President any appropriate amendments." *Id*. The Secretary of Defense, in turn, has established the Joint Service Committee to carry out that review requirement. *See* Dep't of Defense, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice, DOD Directive No. 5500.17 (May 3, 2003). Despite these means to call any appropriate changes to the *Manual for Courts-Martial* to the President's attention, since President Reagan adopted R.C.M. 907(b)(1) in 1984, it has remained unchanged.

To the extent that the case law that informed R.C.M. 907(b)(1)'s adoption has changed, this Court may call that change to the President's attention. But those changes do not nullify R.C.M. 907(b)(1)'s legal effect.

In its *Humphries* decision, this Court also discussed Article 59(a), which provides that "[a] finding or sentence of a

court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." *Humphries*, 71 M.J. at 214 (quoting Art. 59(a), UCMJ, 10 U.S.C. § 859(a) (2006)). Deference doctrines indicate that this Court should not hold that R.C.M. 907(b)(1) is unenforceable due to any possible conflict with Article 59(a). Courts must give "considerable weight" to "an executive department's construction of a statutory scheme it is entrusted to administer." *Id*. at 844. Such judicial deference should be even greater here, where R.C.M. 907(b)(1) was adopted by the President in an area where he exercises independent constitutional authority as Commander in Chief of the Army and Navy of the United States. U.S. Const., Art. II, § 2, cl. 1. As the Solicitor General argued in *United States v. Scheffer*, any determination as to whether the President's adoption of R.C.M. 907(b)(1) was proper must be made "against the backdrop of the judicial deference that 'is at its apogee' when courts review decisions by the political branches in this area." Reply Brief for the United States, *United States v. Scheffer*, 523 U.S. 303 (1998) (No. 96-1133), 1997 WL 539779, at *15-16 (internal citation omitted) (quoting *Weiss v. United States*, 510 U.S. 163, 177 (1994)). A properly deferential review yields the conclusion that Articles 36(a) and 59(a) did

not preclude the President from adopting Rule for Courts-Martial 907(b)(1). Rather, the adoption of that rule was a proper exercise of independent and delegated rulemaking authority. The rule the President adopted is also consistent with the prevailing rule in the Third Circuit that where an indictment fails to allege an essential element of the crime, vacation of the conviction is required. *See*, *e.g.*, *United States v. Spinner*, 180 F.3d 514 (3d Cir. 1999). A majority of federal circuits apply a different rule.[3] But the President properly acts within his discretion when he chooses to apply to the military the same rule that would govern the outcome of this issue in any Article III court in Delaware, New Jersey, Pennsylvania, or the Virgin Islands.

This Court should revisit its holdings in *Ballan* and *Humphries* and hold that R.C.M. 907(b)(1) requires the dismissal of any specification that fails to state an offense regardless

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[3] *See*, *e.g.*, *United States v. Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc), *cert. denied*, 549 U.S. 1095 (2006); *United States v. Trennell*, 290 F.3d 881, 889-90 (7th Cir. 2002), *cert. denied*, 537 U.S. 1014 (2002); *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-81 (6th Cir. 2002), *cert. denied*, 537 U.S. 880 (2002); *United States v. Robinson*, 367 F.3d 278, 285-86 (5th Cir. 2004), *cert. denied*, 543 U.S. 1005 (2004); *United States v. Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003), *cert. denied*, 543 U.S. 999 (2004); *United States v. Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001), *cert. denied*, 534 U.S. 880 (2001); *United States v. Sinks*, 473 F.3d 1315, 1321 (10th Cir. 2007)

of when the issue is first raised. Because the adultery specification fails to state an offense, the finding of guilty to that specification should be set aside and the specification dismissed, in accordance with R.C.M. 907(b)(1)'s plain language.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the findings with regard to Charge II and its specification and remand the case to the AFCCA to reassess the sentence.

Respectfully Submitted,

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Scott W. Medlyn, Appellate Defense Counsel

Dated: 7 September 2012

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I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 7 September 2012.

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