IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| U N I T E D S T A T E S, Appellee | FINAL BRIEF ON BEHALF OF APPELLANT |
| v. | |
| | Army Misc. Dkt. No. 20110402 |
| Sergeant (E-5) **MICHAEL L. TREAT,** United States Army, Appellant | USCA Dkt. No. 14-0280/AR |

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| v. | ) | |
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| Sergeant (E-5)<br>**Michael L. Treat,**<br>United States Army,<br>Appellant | ) | USCA Dkt. No. 14-0280/AR |

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

## Issue Granted

**WHETHER THERE IS A FATAL VARIANCE AND A VIOLATION OF APPELLANT'S DUE PROCESS RIGHT TO NOTICE WHEN THE GOVERNMENT ALLEGED THAT APPELLANT MISSED THE MOVEMENT OF A PARTICULAR AIRCRAFT BUT THE PROOF ESTABLISHED THAT HE MISSED THE MOVEMENT OF A PARTICULAR UNIT.**

## Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

## Statement of the Case

On March 30 and May 19, 2011, a military judge sitting as a special court-martial convicted Sergeant (SGT) Michael L. Treat, contrary to his pleas, of missing movement through design and

false official statement, in violation of Articles 87 and 107, UCMJ, 10 U.S.C. § 887, 907 (2006). The military judge sentenced SGT Treat to reduction to Private E1, confinement for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On October 25, 2013, the Army Court affirmed the findings and the sentence. (JA 1-7). On February 27, 2014, this Honorable Court granted SGT Treat's petition for review.

**Statement of Facts**

The government charged SGT Treat with missing the movement of a particular aircraft—Flight TA4B702. (JA 8).

> Charge II. The Specification: In that Sergeant Michael L. Treat, U.S. Army, did, at or near Bamberg, Germany, on or about 17 November 2010, through design, miss the movement of Flight TA4B702 with which he was required in the course of duty to move.

*Id.* At findings, the military judge convicted SGT Treat of missing the movement of a unit by excepting "Flight TA4B707" and substituting the words—"the flight dedicated to transport Main Body 1 of 54th Engineer Battalion from Ramstein Air Base, Germany, to Manas Air Base, Kyrgyzstan." (JA 179).

The defense counsel did not object at trial. However, in her post-trial matters, the defense counsel raised the issue of fatal variance and requested that the specification be disapproved because of the legal error. (JA 200). The defense

counsel stated that the defense team successfully defended against missing the flight alleged on or about November 17, 2010, and it was improper for the military judge to substitute the language and convict when there was no evidence that Flight TA4B702 existed or that any flight existed before November 19, 2010. *Id.*

**Summary of the Argument**

The government charged SGT Treat with missing the movement of a particular aircraft. Under that theory of violating Article 87, UCMJ, the government was required to prove that SGT Treat missed the particular flight charged. The government failed to do that. As a result, the military judge convicted SGT Treat of a broader and non-charged theory of Article 87, UCMJ—missing the movement of a particular unit.

The military judge's findings caused a material variance because she convicted SGT Treat of an offense not charged after he successfully defended himself on the charged offense. This finding is contrary to the statute, the President's explanation in the Manual for Courts-Martial, and this Court's opinions concerning lesser included-offenses. Sergeant Treat thus suffered prejudice because the military judge substantially changed the nature of the offense and denied him the right to prepare and defend against the specification as convicted.

## Argument

**WHETHER THERE IS A FATAL VARIANCE AND A VIOLATION OF APPELLANT'S DUE PROCESS RIGHT TO NOTICE WHEN THE GOVERNMENT ALLEGED THAT APPELLANT MISSED THE MOVEMENT OF A PARTICULAR AIRCRAFT BUT THE PROOF ESTABLISHED THAT HE MISSED THE MOVEMENT OF A PARTICULAR UNIT.**

Law

"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. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003)(internal citations and quotations omitted). "'To prevail on a fatal-variance claim, appellant must show that the variance was material and that it substantially prejudiced him.'" *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006)(quoting *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993)).

A variance is material if it "substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense." *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009); *see also* Rule for Courts-Martial [hereinafter R.C.M.] 918(a)(1). "A variance can prejudice an appellant by (1) putting him at risk of another prosecution for the same conduct, (2) misleading him to the extent that he has been unable adequately to prepare for trial,

or (3) denying him the opportunity to defend against the charge." *Marshall*, 67 M.J. at 420 (citation and internal quotation marks omitted). Due process "mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted . . . ." *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010)(quoting *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008)). Any ambiguity in a specification must be resolved in favor of the accused. *Cf. United States v. Thomas*, 65 M.J. 132, 135 (C.A.A.F. 2007) (citation omitted).

When counsel fails to object at trial, this Court reviews the military judge's findings by exceptions and substitutions for plain error. *Finch*, 64 M.J. at 121 (citing *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)); *see also Marshall*, 67 M.J. at 421-22 (Ryan, J., concurring). The three part test for plain error is: "(1) that there was an error; (2) that the error was plain, that is, clear or, equivalently, obvious; and (3) the plain error affected [the] substantial rights [of the accused]." *Finch*, 64 M.J. at 121.

Argument

**1. The military judge injected material variance by convicting Sergeant Treat of a theory of liability not charged.**

A soldier can miss movement in one of two distinct and separate ways: (1) by missing the movement of a unit whose mode

of travel may be made by ship, train, aircraft, truck, bus, or walking; or (2) by missing the movement of a particular ship or aircraft. *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 11.c(2)(a)-(b). A variance that substantially changes the nature of the offense is material. *See, e.g., Marshall*, 67 M.J. at 420 (majority opinion). The nature of the offense can be fatally altered when the accused is found guilty of an alternative theory of liability that the government did not charge. *See United States v. Ellsey*, 16 U.S.C.M.A. 455, 458-59, 37 C.M.R. 75, 78-79 (1966)(finding a fatal variance when Ellsey was convicted of breach of lawful custody of his guard but charged with escape from confinement), *cited in Marshall*, 67 M.J. at 421 n.3.

The government charged SGT Treat with missing a specific aircraft—Flight TA4B702—as defined by *MCM*, pt. IV, ¶ 11.c(2)(b). When a soldier is "ordered to move as a passenger aboard a particular . . . aircraft, . . . then *missing the particular . . . flight is essential* to establish the offense of missing movement." *Id.* (emphasis added). In SGT Treat's case, the core of the offense is missing a particular aircraft identified as Flight TA4B702. The government did not prove the first three elements of the offense as they each dealt with Flight TA4B702: (1) that the accused was required to move with Flight TA4B702, (2) that the accused knew of the prospective movement of Flight

TA4B702, and (3) that the accused missed the movement of Flight TA4B702. *See MCM*, pt. IV, ¶ 11.b. The military judge properly excepted this language because the government failed to even prove that this flight ever existed.[1]

However, the military judge made a clear and obvious error when she substituted language that changed the nature of the offense by broadening the offense to one of missing movement of a particular unit whose mode of travel happened to be by aircraft. *Compare MCM*, pt. IV, para. 11.c(2)(b), *with MCM*, pt. IV, ¶ 11.c(2)(a); *see also Teffeau*, 58 M.J. at 67 (reversing conviction for broadened failure to obey a general lawful order specification). The military judge substituted and convicted SGT Treat of the language—"the flight dedicated to transport Main Body 1 of 54th Engineer Battalion from Ramstein Air Base, Germany, to Manas Air Base, Kyrgyzstan." (JA 179). This language changed the identity of the offense from a particular flight charged (TA4B702), and replaced the core of the offense with missing the movement of a particular unit—the Main Body 1 portion of SGT Treat's unit, 54th Engineer Battalion. The

[1] The government tried to prove the existence of Flight TA4B702 through the testimony of First Sergeant (1SG) Barker and Prosecution Exhibit 3 for Identification. (JA 45-48, 58-59, 196-99). However, 1SG Barker was unable to remember any specific flight numbers and Prosecution Exhibit 3 for Identification was of little use as it was a purported manifest printed nearly a month after the alleged scheduled flight—December 15, 2010. (JA 196-99).

language "the flight dedicated to transport" is merely surplusage for the mode of travel for the particular unit. *See MCM*, pt. IV, ¶ 11.c(2)(a); *cf. Marshall*, 67 M.J. at 421 (finding fatal variance when the identity of the apprehender was changed in an escape from custody charge).

The distinction between missing movement of a particular unit versus a particular aircraft appears to be a matter of first impression for military courts. However, this Article 87, UCMJ, offense is easily analogized to the fatal variance analysis in an unauthorized absence charge where the government proves absence from a different unit than that charged. All three service courts hold that such a variance is material and fatal. *United States v. Toth*, ARMY 20081016, 2009 WL 6835718, at *3 (Army Ct. Crim. App. 30 Oct. 2009)(mem. op.)(citing *United States v. McDowell*, 34 M.J. 719, 721 (N.M.C.M.R. 1990); *United States v. Walls*, 1 M.J. 734 (A.F.C.M.R. 1975)). The rationale of this holding is that the "naming of a particular organization in the pleading both identifies and limits the offense charged." *Id.* The same is true for a missing movement charge that identifies a particular aircraft while omitting any mention of the movement of a particular unit.

In SGT Treat's case, the government identified and limited the offense charged to that of "miss[ing] the movement of Flight TA4B702 . . . ." (JA 8). There is no mention in the charge of

any unit. The Army Court found that the government's charging language was wholly unimportant because the charge was merely "inartfully drafted." (JA 5). The Army Court went on to say, "The important thing is not whether that specific flight number left, but whether the unit's flight took place at all." *Id.* The Army Court's decision completely ignores the statute and the explanation provided in the *MCM*.

First, the statute is worded in the disjunctive—"ship, aircraft, or unit." Art. 87, UCMJ. When the government chose to charge only one theory of liability, missing an aircraft, it limited itself to that theory. The government provided no notice prior to trial that it was proceeding on a different theory not charged. The government tried to prove that SGT Treat missed Flight TA4B702 (JA 45-48, 58-59); it just failed to do it. As the uncharged theory of liability is not a lesser included offense of the charged theory, it cannot support a conviction. *See United States v. Tunstall*, 72 M.J. 191, 195 (C.A.A.F. 2013)("the due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted'" (quoting *Jones*, 68 M.J. at 468; *Medina*, 66 M.J. at 26-27). The Army Court cannot now come in to save the government from either its poor charging decision or its inability to produce evidence to meet the charge under the guise of the charge being "inartfully

drafted." (JA 5). The government is responsible for the clarity, or lack thereof, of all charges referred to courts-martial.

Second, the Army Court's decision completely ignores the explanation promulgated by the President. The *MCM* clearly states, "If a person . . . is ordered to move as a passenger aboard a particular . . . aircraft, . . . then missing the particular . . . flight *is essential* to establish the offense of missing movement." *MCM*, pt. IV, ¶ 11.c(2)(b) (emphasis added). The Army Court quotes this language (JA 5), but it never addresses or explains how it can now affirm the broader and different theory of missing a particular non-charged unit which requires no proof of the mode of travel, *MCM*, pt. IV, ¶ 11.c(2)(a). This is clear error by the Army Court.

The variance effectuated in SGT Treat's missing movement specification amounts to a material change resulting in a conviction that was substantially different than the charge described in the specification upon which SGT Treat was arraigned. The military judge drastically expanded, and completely changed, the identity and limits of the offense as charged by the government by adding language indicating a course of duty to move with a particular unit not charged. This change was plain and obvious error, and thus, as the substitution was material, this Court must test for prejudice.

**2. As the military judge substantially changed the nature of the offense, Sergeant Treat suffered prejudice because he was denied the opportunity to prepare and defend against the specification as convicted.**

"To uphold a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Wray*, 17 M.J. at 376 (citations omitted)(reversing conviction for larceny for which Wray was not charged). Substituting language in a specification that broadens the charged offense violates this right to notice and right to due process. *Teffeau*, 58 M.J. at 67 (citing *Wray*, 17 M.J. at 376)(reversing conviction for failure to obey a general lawful order). As a result, SGT Treat suffered material prejudice. *Tunstall*, 72 M.J. at 196.

Sergeant Treat suffered prejudice because he was misled "to the extent that [he was] unable adequately to prepare for trial," and he was denied "the opportunity to defend against the charge." *Marshall*, 67 M.J. at 420. It is clear from the record that SGT Treat premised his defense strategy to the missing movement charge on demonstrating (1) that the government could not prove that Flight TA4B702 existed, and (2) that not only was there no flight on November 17, 2010, SGT Treat knew he was not leaving on November 17, 2010. Sergeant Treat's defense counsel

summarized her defense to this charge during her closing argument:

> And what happened on the 17th that is important? Well, the government has charged that Sergeant Treat missed a flight on that date. A flight that, according to all sources, never existed. It did not take off. There was no movement to miss on the 17th of November, ma'am, because that flight didn't go anywhere. And what happened on the 17th according to Sergeant Mathis? He called Sergeant Treat and said, "We're not leaving today. Stand down."
>
> There is simply no evidence with which to convict Sergeant Treat of missing a movement under Article 87 since that movement didn't exist. We don't even know the flight number for sure. There has been no credible evidence before this court as to what the actual the [sic] flight number was on the 17th of November. None of the witnesses knew the flight number. We don't even know if the flight number would have stayed the same or changed when they actually flew on 19 November.

(JA 173-74).

The defense counsel's argument helped convince the military judge that the government failed to carry its burden of proving that SGT Treat missed Flight TA4B702. However, the military judge changed the nature of the offense that the defense fought against in order to find SGT Treat guilty of an Article 87, UCMJ, violation. This change altered the nature of the Article 87 offense to an alternative theory of liability not charged. *See Marshall*, 67 M.J. at 421 n.3 (citing *Ellsey*, 16 U.S.C.M.A.

at 458-59, 37 C.M.R. at 78-79)("The fact that two alternative theories of a case may both involve criminal conduct does not relieve the government of its due process obligations of notice to the accused and proof beyond a reasonable doubt of the offense alleged."). In addition, this changed the specification to the point that SGT Treat lacked the notice required under due process to defend himself from the charge as convicted. *See Wray*, 17 M.J. at 376; *Teffeau*, 58 M.J. at 67.

As the Army Court reiterated in *Toth*, "'[a]n unauthorized absence offense . . . does not require detailed allegations and is simple to prove. Hence, it is not asking too much of the officials preparing the charges and of those prosecuting them to require them to bottom a conviction on accurate allegations and proof.'" 2009 WL 6835718, at *5 (quoting *United States v. Baumgardner*, 42 C.M.R. 829, 832 (A.C.M.R. 1970))(alterations in original). The same is true for missing movement as the offense is just as simple for the government to charge and prove as is an unauthorized absence offense.

This failure of proof of the charged offense, largely a result of the successful strategy presented by the defense, necessitated a not guilty verdict of the charged offense. The defense could not have anticipated being forced to defend against the charge of which he was ultimately convicted because the government did not charge SGT Treat with missing the

movement of his unit. As a result, SGT Treat suffered prejudice which results in a fatal variance.

**Conclusion**

Wherefore, SGT Treat requests that this Honorable Court set aside and dismiss the Specification of Charge II, set aside the sentence, and order a sentence rehearing.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. Treat, Crim. App. Dkt. No. 20110402, Dkt. No. 14-0280/AR, was delivered to the Court and Government Appellate Division on March 25, 2014.

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