

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

U N I T E D S T A T E S,	)	REPLY BRIEF ON BEHALF OF
Appellee	)	APPELLANT
	)	
v.	)	
	)	Army Misc. Dkt. No. 20110402
	)	
Sergeant (E-5)	)	USCA Dkt. No. 14-0280/AR
<b>Michael L. Treat,</b>	)	
United States Army,	)	
Appellant	)	

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.**

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**Statement of the Case**

On February 27, 2014, this Honorable Court granted appellant's petition for review. On March 25, 2014, appellant filed his Final Brief with this Court. The government responded on April 24, 2014. Appellant replies herein.

**Argument**

As Sergeant (SGT) Treat explained in his Final Brief to this Court, when the government charges an accused with missing a particular flight, the government is required to prove that the accused missed the particular flight charged. *Manual for*

*Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 11.c(2)(b). Only when the government charges missing the movement of a unit is the "mode of travel . . . . not important . . . ." *Id.*, pt. IV, ¶ 11.c(2)(a). As the government chose not to charge SGT Treat with missing the movement of any unit, the military judge's variance of the charge at findings constituted a material variance when she substituted a particular unit for the specific flight charged. (JA 179).

The government's answer asserts that SGT Treat's position "lack[s] merit" because "the current state of the law does not support such a dichotomous interpretation of Article 87, UCMJ." Appellee's Br. at 12. The government bases nearly its entire argument that the variance in SGT Treat's case was not material on two aged cases—*United States v. Graham*, 16 M.J. 460 (C.M.A. 1983) and *United States v. Johnson*, 3 U.S.C.M.A. 174, 11 C.M.R. 174 (1953). Appellee's Br. at 11-18 (citing both cases no less than seventeen times in eight pages). In making this bold assertion about "the current state of the law," the government fails to explain, or even reference, how the language in the current *MCM* affects the holdings in *Graham* and *Johnson*.

The explanation to Article 87 specifically states that 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." *MCM*

(2008 ed.), pt. IV, ¶ 11.c(2)(b) (emphasis added). The President added this language to the *MCM* in 1984, less than one year *after* the Court of Military Appeals decided *Graham*. Compare *MCM* (1984 ed.), pt. IV, ¶ 11.c(2)(b), with *MCM* (1969 ed.), ¶ 166, and *MCM* (1951 ed.), ¶ 166. While *Graham* answered an altogether different question to the one presented in this case, to the extent that *Graham* would be applicable, it is no longer controlling as it relied on the 1969 version of the *MCM* and *Johnson*, which relied on a now obsolete 1951 version of the *MCM*. *Graham*, 16 M.J. at 461, 461 n.2. These prior versions of the *MCM* did not contain the dichotomy and requirements now engrained in Article 87 for the last thirty years.

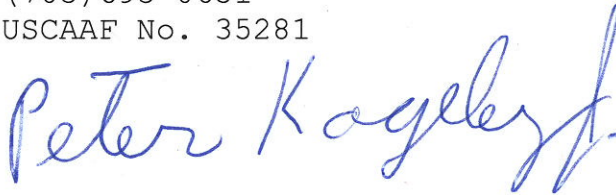
Once the President changed the discussion language to Article 87, the analysis changed. Recent emphasis by this Court on the Due Process implications of convicting an accused only for the offense to which he has been charged highlights the plain error demonstrated in this case. See, e.g., *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011). The government's silence as to both points is telling.

**Conclusion**

Accordingly, 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 May 5, 2014.

  
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