IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Granted Issue:

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

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

Granted Issue

WHETHER THERE IS A FATAL VARIANCE AND A VIOLATION OF SERGEANT TREAT'S DUE PROCESS RIGHT TO NOTICE WHEN THE GOVERNMENT ALLEGED THAT SERGEANT TREAT 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 (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ].[1] This Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A military judge sitting as a special court-martial, convicted appellant, contrary to his pleas, of one specification of missing movement through design and one specification of false official statement in violation of Articles 87 and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 887, and 907 (2006).[3] The military judge sentenced appellant to confinement for three months, to be reduced to the grade of E-1, and to be discharged from the service with a bad-conduct discharge.[4] The convening authority approved the adjudged sentence.[5] On October

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[1] 10 U.S.C. § 866.
[2] 10 U.S.C. § 867(a)(3).
[3] 10 U.S.C. §§ 887, 907. JA 13, 179.
[4] JA 180.
[5] JA 181.

25, 2013, in a published opinion, the Army Court affirmed the findings and sentence.[6] On February 27, 2014, this Honorable Court granted appellant's petition for review of the above assignment of error.

Statement of Facts

The government charged appellant with missing the movement of Flight TA4B702 as follows:

> 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.[7]

The military judge, acting as the fact-finder, convicted appellant of missing movement by excepting the words "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."[8] As such, the modified specification read as follows:

> 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 *the flight dedicated to transport Main Body 1 of 54th Engineer Battalion from Ramstein Air Base, Germany, to Manas Air Base, Kyrgyzstan* with which he was required in the course of duty to move.[9]

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[6] JA 1-7.
[7] JA 8.
[8] JA 179.
[9] JA 8, 179 (emphasis added).

The defense counsel did not object to these exceptions and substitutions by the military judge at the court-martial.[10] It was only after trial in appellant's post-trial matters that appellant first raised the issue of variance.[11]

At the beginning of trial, appellant's trial defense counsel made an opening statement that focused solely on a defense theory of impossibility contending that it was impossible for appellant to make the flight that deployed the rest of his unit to Afghanistan (via Kyrgyzstan) because he was abducted and held against his will by unknown individuals during the time period that he missed movement.[12] Appellant's counsel stated that the "[e]vidence will show that [appellant] did not intend to miss ... his deployment to Afghanistan, he did not intend to miss the movement, but he was prevented from going with his unit that he had transferred into to deploy with, because of what happened to him."[13] While his defense counsel described at length appellant's alleged kidnapping ordeal, the defense counsel made absolutely no mention of discrepancies between aircraft flight numbers or the lack of evidence regarding which flight appellant missed when his unit deployed.[14]

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[10] JA 179.
[11] JA 200-01.
[12] Defense counsel's chosen theme was "the truth is stranger than fiction." JA 16-19.
[13] JA 18.
[14] JA 16-19.

The facts developed at trial showed that appellant was a combat engineer squad leader assigned to the 370th Sapper Company, 54th Engineer Battalion, in Bamberg, Germany.[15] Appellant was informed that he would be deploying to Afghanistan on or about 19 November 2010 as part of "Main Body 1" of his unit.[16] Appellant's leadership testified that appellant was aware of this deployment date and that the actual deployment could be moved forward or delayed by forty-eight to seventy two hours from that date.[17] After completing deployment training and preparations, appellant and the rest of his unit were initially told that they were going to deploy on 17 November 2010.[18] However, that initial flight was called off and the movement was pushed back by two days.[19] On 19 November 2010, "Main Body 1" of appellant's unit boarded a flight that took off for Kyrgyzstan.[20] Appellant was not present and missed the movement of his unit.[21] While the government established that a movement/flight did occur and transported appellant's unit to Kyrgyzstan, the government had significant difficulty in establishing that the aircraft's flight number was "TA4B702."[22]

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[15] JA 22.
[16] JA 36-38, 54-55.
[17] JA 36-38, 62-63, 87-88.
[18] JA 88-89.
[19] JA 38-40.
[20] JA 44.
[21] JA 40, 42-44, 67.
[22] JA 46-47, 64-65.

After the government's case-in-chief, appellant's defense counsel failed to raise a R.C.M. 917 motion based on the lack of evidence in regards to the flight number that moved appellant's unit.[23] Instead, the defense counsel presented testimony by three witnesses which focused solely on a theory of impossibility.[24] The defense first called SSG Lynn to establish that appellant actively chose to deploy with 54th Engineer Battalion instead of being relocated from Germany to Fort Leonard Wood, thereby inferring that appellant had actually wanted to deploy with his unit.[25] Next, the defense called SGT Schneider to introduce evidence that he, like appellant, was forced into a car and robbed by unknown assailants after drinking at an off-post German club frequented by American soldiers.[26] Lastly, defense presented testimony from a German Police Detective about shoe prints and a rope found at the scene where appellant said he was dropped off by his captors.[27] Appellant's defense counsel presented no evidence related to flight numbers.

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[23] JA 146.
[24] This testimony had the dual purpose of also countering evidence that appellant gave a false official statement detailing his alleged kidnapping which formed the basis of the Specification of Charge IV. JA 194-95.
[25] JA 146-48.
[26] JA 150-54. SGT Schneider's story differs from appellant's in that SGT Schneider woke up five hours later "next to the river downtown," whereas appellant was reportedly held captive for five days, and then was later dropped off on the side of the road loosely bound in rope. JA 113, 153, 161.
[27] JA 158, 161-63.

During closing arguments, trial defense counsel spent the large majority of her time trying to blunt the government's attacks on appellant's account of his alleged abduction arguing that: 1) appellant wanted to deploy and was all "packed up and ready to go," 2) appellant completed all the pre-deployment training and would have found an easier way not to deploy had he really wanted to, 3) the fact that appellant did not smell or have significant facial hair when he was picked up was inconsequential, and 4) the government essentially rushed to judgment by treating appellant's story as "fantasy ... from the beginning."[28] It was only after all these points were argued that defense counsel decided to also attack the November 17th date:

> And what happened on the 17th that is important? Well, the government has charged that [appellant] 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 [appellant] and said, "We're not leaving today. Stand down."
>
> There is simply no evidence with which to convict [appellant] 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.*[29]

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[28] JA 170-75.

[29] JA 173-74 (emphasis added).

Near the end of her closing argument, defense counsel again attacked the November 17 movement date arguing that the government has "actually proven the movement that they alleged [appellant] missed never happened, and the soldiers were told, 'You're not going on it.'"[30] Appellant's defense counsel never questioned the evidence presented by the government that established appellant's unit moved via aircraft on 19 November.[31]

During rebuttal, while government counsel acknowledged that "the movement did not occur on the 17th of November [that] instead it occurred on the 19th," they correctly pointed out that the "violation as charged has the movement occurring *on or about* the 17th of November."[32] The government then went on to address the issue of the flight number:

> Ma'am, we did hear testimony that the flight number was addressed. You got a witness that says, yes, this was the flight number. The government would direct the court's attention though to the element of this offense. Article 87, missing movement, the first element is that the accused was required in the course of duty to move with a ship, aircraft or unit. That element does not spell out a specific requirement to name the aircraft or the flight number.[33]

After deliberating on the evidence, the military judge convicted appellant of missing movement.[34]

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[30] JA 175.
[31] JA 174.
[32] JA 176.
[33] JA 178.
[34] JA 179.

Summary of Argument

The military judge did not commit plain error by changing the method of movement in the charge, as such a change does not go to the "core of the offense." Therefore, the variance in this case was not material. Even assuming *arguendo* that the variance was material, appellant has failed to demonstrate prejudice as the record sufficiently protects appellant from double jeopardy, and appellant was never misled or denied an opportunity to defend himself against the charge as the appellant's "primary defense" centered on his alleged abduction and his resulting inability to be present for the movement of his unit.

Standard of Review

Where defense counsel does not object to the exceptions and substitutions at trial, this failure "constitutes waiver of that issue," and it "can only be reviewed by establishing plain error."[35] This court set forth the three elements for the plain error test: (1) that there was an error, (2) that the error was plain, that is, clear or obvious, and (3) the error affected the appellant's substantial rights.[36] "To prevail on a fatal-variance claim, appellant must show that the variance was material and that it substantially prejudiced him."[37]

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[35] *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006).
[36] *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998).
[37] *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993).

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."[38] The Manual for Courts-Martial [hereinafter *MCM*] anticipates the potential for a variance by authorizing findings by exceptions and substitutions.[39] Findings by exceptions and substitutions may not be used to 1) substantially change the nature of the offense, 2) to increase the seriousness of the offense or 3) the maximum punishment for it.[40] Certain minor variances, such as the location of the offense, the date upon which an offense is allegedly committed, the name of a foreign national murder victim, the exact language used to make a false official statement, or the exact name of a unit do not necessarily change the nature of the offense and are not necessarily fatal.[41]

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[38] *United States v. Teffeau*, 58 M.J. 62, 66 (C.A.A.F. 2003) (citing *United States v. Allen*, 50 M.J. 84, 86 (C.A.A.F. 1999); *United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975)).

[39] *See* Rule for Courts-Martial [*hereinafter* R.C.M.] 918(a)(1). *See also Teffeau*, 58 M.J. at 66.

[40] *See id* (citing *United States v. Wray*, 17 M.J. 375, 376 (C.M.A. 1984)).

[41] *Id. See, e.g., Hunt, 37* M.J. at 347-48 (date of rape charged as "on or about"); *United States v. Willis*, 50 M.J. 841 (Army Ct. Crim. App. 1999) (change in language alleged to be false under Article 107, UCMJ, violation not material); *United States v. Hopf*, 5 C.M.R. 12 (C.M.A. 1952) (actual name of Korean murder victim immaterial); *United States v. Baumgardner*, 42 C.M.R. 829 (A.C.M.R. 1970) (precise unit name immaterial).

"From the earliest days of this court, we have held that to prevail on a fatal variance claim, an appellant must show *both* that the variance was material and that he was substantially prejudiced thereby."[42] "When applying this two-part test, this court has placed an increased emphasis on the prejudice prong, noting that '[e]ven where there is a variance in fact, the critical question is one of prejudice.'"[43] The federal circuits have adopted the guidance announced long ago in *Berger v. United States* which noted two ways in which a defendant may be substantially prejudiced by a variance: "[they] may receive inadequate notice of the charges against him and thus be taken by surprise at trial, or [they] may be twice subject to prosecution for the same offense."[44] In *Lee*, this court echoed *Berger*'s two-part analysis: "(1) has the accused been misled to the extent that he has been unable adequately to prepare for trial; and (2) is the accused fully protected against another prosecution for the same offense?"[45]

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[42] *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009) (emphasis added) (citations omitted).
[43] *Id.* (citing *Lee*, 1 M.J. at 16; *United States v. Craig*, 24 C.M.R. 28 (C.M.A. 1957); *Hopf*, 5 C.M.R. at 12. *See also Berger v. United States*, 295 U.S. 78, 82 (1935) ("The true inquiry ... is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused.").
[44] *See e.g. United States v. Sutherland*, 929 F.2d 765, 772-73 (1st Cir. 1991) (quoting *Berger*, 295 at 82).
[45] *Lee*, 1 M.J. at 16

It has been well-settled for over half a century that in regards to Article 87, UCMJ, the "gist of the offense ... is missing movement ... [t]he terms 'ship,' 'aircraft,' and 'unit,' are merely descriptive of a particular means of movement."[46] Thirty years ago, this court re-emphasized this legal assertion stating that the "clear implication from [Article 87, UCMJ] and the Manual is that it is the word 'movement' that is controlling and the descriptions of means of 'movement' are included for explanation and definition."[47] This court went further in its explanation noting that a "'movement' may be of 'a ship,' an 'aircraft,' or a 'unit' ... [t]he use of the disjunctive 'or' indicates that missing the movement of any one of the enumerated words is sufficient to constitute the offense: i.e., *it is the missed "move," not the mode of moving*, that is significant."[48]

This court also recently held that the critical factor in deciding whether the fact-finder's exceptions and substitutions "substantially change[d] the nature or seriousness of the offense" thereby constituting a material or "major" variance is whether the altered element is considered "the core of the offense."[49]

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[46] *United States v. Johnson*, 11 C.M.R. 174, 176 (C.M.A. 1953).
[47] *United States v. Graham*, 16 M.J. 460, 461 (C.M.A. 1983).
[48] *Id.* (emphasis added).
[49] *See Marshall*, 67 M.J. at 420-21, (quoting *Finch*, 64 M.J. at 122).

Argument

1. The Military Judge did not Commit Plain Error as the Variance is not Material

> It is certainly true that, at a time in the development of the common law, extreme emphasis was placed by the courts on the use of precise and technical language in both indictments and verdicts. As a result of this elevation of form over substance, the doctrine of variance was widely and strictly applied. Today, however, the rule is otherwise.[50]

Despite being resolved over sixty years ago, appellant calls for a return to an extremely strict application of the doctrine of variance.[51] Specifically, appellant asks this court to elevate "form over substance" by suggesting that Article 87, UCMJ, is actually split into "two distinct and separate" offenses: namely that a soldier may violate the article either by "(1) by missing the movement of a unit ... or (2) by missing the movement of a particular ship or aircraft."[52] Appellant asserts that the military judge committed plain error through her exceptions and substitutions, creating a fatal variance when she "changed the identity" and "the core of the offense."[53] However, appellant's arguments lack merit as the current state of the law does not support such a dichotomous interpretation of Article 87, UCMJ.

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[50] *Hopf*, 5 C.M.R. at 14 (citations omitted).
[51] *Id.* Appellant's Brief 5-8.
[52] Appellant's Brief 5-6. Appellant offers no explanation as to why Article 87, UCMJ, should not be separated into three offenses (i.e. unit, aircraft, and ship).
[53] Appellant's Brief 7. *See Marshall*, 67 M.J. at 420-21 (quoting *Finch*, 64 M.J. at 122).

Just as it is well-settled that such a strict application of the doctrine of variance is no longer the rule, so too has it been well-settled that "[t]he gist of the offense proscribed by [] Article [87, UCMJ] is missing *movement*."[54] This court in *Johnson* noted that the "gist of" (i.e. the "core of") Article 87, UCMJ, is the missed movement itself, *not the means* of travel of the missed movement.[55] Specifically, the *Johnson* opinion explained that the "terms 'ship,' 'aircraft,' and 'unit,' are *merely descriptive of a particular means of movement*."[56] This premise was more recently reaffirmed in *Graham*, where that opinion stated "it is the missed 'move,' not the mode of moving, that is significant."[57] As such, "the core of the offense" remains in the movement itself, not the descriptive means of moving via aircraft, ship, or as part of a unit (or any combination thereof).[58]

Despite this well-established case law, appellant nevertheless posits that the "core of the offense" lies in the mode of transport.[59] Thus, appellant argues that when the military judge "replaced the core of the offense" by changing "a particular flight charged" to "a particular unit" charged, this

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[54] *Johnson*, 11 C.M.R. at 175 (emphasis added).
[55] *Id.*
[56] *Id.* (emphasis added).
[57] *Graham*, 16 M.J. at 461.
[58] *See Marshall*, 67 M.J. at 421-22 (citing *Finch*, 64 M.J. at 122).
[59] *See id.* Appellant's Brief 6-7.

created an impermissible and fatal variance.[60] It is telling that appellate defense counsel characterizes such a newly-created "distinction between missing movement of a unit versus a particular aircraft" as "a matter of first impression for military courts."[61] The very reason it may appear to be "a matter of first impression" to the defense is because no military court has ever considered the "core of the offense" to exist within the descriptive means of transport and not the movement itself.[62]

Similar "sleight of hand" arguments have previously attempted to convince this court to shift the focus, "gist," or "core of the offense" from the move itself to the mode of moving. Such a similar tactic was attempted in *United States v. Graham*.[63] While the appellant in that case may have made a more sophisticated and logically appealing argument, it was still found to be ultimately unpersuasive:

> It is undisputed that [PFC Graham] missed his port call and was absent without leave. Appellant contends, however, that he is not guilty of missing a movement. Appellant's syllogism is simple. He argues *that the significant element of proof of missing movement is the requirement to move with "a ship, aircraft, or unit."* ... In this case, appellant was allowed to proceed individually; therefore, he was not required to move "with ... a unit." He was not assigned to a specific ship or aircraft; therefore, he was not required to move with "a[n] ... aircraft."

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[60] Appellant's Brief 7.
[61] Appellant's Brief 8.
[62] Appellant's Brief 8. See *Johnson*, 11 C.M.R. at 175; *Graham*, 16 M.J. at 461.
[63] *Graham*, 16 M.J. at 461.

> While his argument has appeal in logical analysis, we nevertheless reject it. It is undisputed that appellant was assigned to C Battery ... that C Battery was "move[d]" from Fort Bliss to Bad Kreuznach and that, incident thereto, appellant was ordered "to move" to Germany. His duty was with C Battery before and after the "move." Movement with a unit requires only that there be integrity of the organization being moved before and after. There is no question that appellant's unit was to be present in Germany functioning under its chain of command on August 4.
>
> Any person subject to the Uniform Code who is transferred incident to the relocation of a unit and who willfully absents himself incident to, or in conjunction with, that transfer is guilty of "missing movement." It is not of consequence that he may be allowed to proceed separately. *"[I]t is the missed 'move,' not the mode of moving, that is significant."*[64]

Comparing the two cases, it is undisputed that in this case 1) appellant was assigned to the 54th Engineer Battalion, 2) appellant, along with the rest of his unit was ordered to move from Germany to Kyrgyzstan, 3) appellant's duty was with his unit before and after the move, and 4) there was integrity of his unit's organization before and after the move.[65] Moreover, in this case appellant is in a less legally tenable position than PFC Graham was; unlike PFC Graham, appellant was not individually "transferred incident to the relocation of [his] unit," but rather was ordered to depart along with the rest of his unit.[66]

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[64] *Id.* (emphasis added).
[65] *Id.*
[66] *Id.*

Contrary to what appellant avers, it was not plain error for the military judge to find appellant guilty excepting the words "Flight TA4B707" and substituting it with "the flight dedicated to transport Main Body 1 of 54th Engineer Battalion from Ramstein Air Base, Germany, to Manas Air Base, Kyrgyzstan."[67] Such a change properly kept the focus on the "core of the offense," not the "particular means of movement."[68] It was uncontested at trial that appellant belonged to a unit that was deploying to Afghanistan via aircraft by way of Kyrgyzstan and that he missed the movement he was supposed to be a part of.[69] The fact that the government could not prove beyond a reasonable doubt that the flight number "TA4B707" was, in fact, the flight number of the scheduled movement "on or about 17 November 2010" is ultimately immaterial.[70] Again, "it is the missed "move," not the mode of moving, that is significant."[71]

Additionally, even assuming for the sake of argument that appellant's theory is legally valid (i.e. that Article 87, UCMJ, forces government into charging one of two distinct theories of liability), the military judges' exceptions and substitutions did not even cross this artificial line in the sand. The military judge kept the language as close as possible to the

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[67] JA 179.
[68] *See Johnson*, 11 C.M.R. at 176.
[69] JA 170-71.
[70] JA 45-47, 58, 180-81.
[71] *Graham*, 16 M.J. at 461.

original by continuing to reference a flight and not a generic movement of a unit.[72] The only way for appellant's novel argument to make sense is for this court to ignore the following language included by the military judge: "*the flight dedicated to transport* Main Body 1 of 54th Engineer Battalion."[73] Appellant's attempts to ignore the language describing the flight as "mere[] surplusage for the mode of travel for the particular unit" illustrates the inherent weakness of his position.[74] This is especially so considering that, on one hand, appellant's theory calls for "the mode of travel" to be the "core of the offense" and yet, on the other hand, he later labels this "core of the offense" as "mere surplusage."[75]

Despite appellant's assertions to the contrary, this is not a case of appellant being "found guilty of an alternative theory of liability" as found in such cases as *United States v. Ellsey* or *United States v. Marshall*.[76] In both of those cases the appellants were found guilty on an "alternative theory of

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[72] JA 179.
[73] JA 179 (emphasis added).
[74] Appellant's Brief 8.
[75] Appellant's Brief 6-8 ("[T]he core of the offense is missing a particular aircraft identified as Flight TA4B702.")
[76] *See generally United States v. Ellsey,* 37 C.M.R. 75, 78-79 (C.M.A. 1966)(finding a fatal variance when that appellant was convicted of breach of lawful custody of his guard but charged by government with escape from confinement); *Marshall*, 67 M.J at 421 (finding a fatal variance where government failed to show appellant was in the custody of the officer named on the charge sheet).

liability" created when "core of the offense" was impermissibly altered.[77] In this case there is but one theory of liability: appellant *missed movement* of a flight that was scheduled "on or about 17 November 2010" to transport him, and his unit to Kyrgyzstan.[78] The record shows that the theory of liability and appellant's defense against that theory never changed; neither the offense itself nor the identity of the offense changed.[79]

Lastly, appellant's attempts to analogize this case to unauthorized absence cases where the government proves absence from a different unit than that which was charged are inapposite.[80] Here, the government did not prove that appellant had missed the movement of *another* unit to which he had no duty to move with, nor did the military judge alter the unit to which appellant was assigned.[81] Rather, the government proved that appellant failed to move with his unit via aircraft.[82] Consequently, it was not plain error for the military judge to make such a change as the move is "the core of the offense."[83]

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[77] *See id* (finding a change in the "*identity* of the offense"); *Ellsey,* 37 C.M.R. at 78-79 (changing the offense entirely from breach of confinement to breach of lawful custody).
[78] JA 8.
[79] *See Ellsey,* 37 C.M.R. at 78-79; *Marshall,* 67 M.J at 421.
[80] Appellant's Brief 8-9.
[81] JA 179.
[82] JA 179.
[83] *See Graham,* 16 M.J. at 461; *Johnson,* 11 C.M.R. at 176.

2. There is no Prejudice to the Substantial Rights of Appellant

> "The true inquiry ... is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused."[84]

Even assuming plain error, appellant nevertheless fails to establish that the military judge's exceptions and substitutions denied him "the right to prepare and defend against the specification as convicted."[85] The record establishes that appellant was well aware that the theory of the case centered on whether the government could prove that 1) appellant missed movement with his unit via aircraft from Germany to Kyrgyzstan on or about 17 November 2010 and 2) he did so through his own design.[86] Defense counsel planned their strategy accordingly.

No part of defense's opening statement or their witness testimony was directed at the flight number issue.[87] It was only after it became apparent that the government was having difficulty establishing the flight's number, did trial defense counsel then seize the opportunity to cross-examine the government's witnesses about it and then later briefly reference this testimony during their closing argument.[88]

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[84] *Berger,* 295 U.S. at 295. *See also Lee,* 1 M.J. at 16.
[85] Appellant's Brief 3.
[86] JA 8, 16-19, 113, 146-48, 150-54, 161-63, 170-75.
[87] JA 16-19, 146-164.
[88] JA. 45-46. It appears that trial defense counsel erroneously believed that the government had to prove the exact day of the flight despite the use of "on or about" language. JA 8.

Appellant's argues now on appeal that he "could not have anticipated being forced to defend against the charge of which he was ultimately convicted because the government did not charge [him] with missing the movement of his unit."[89] Yet the record shows that essentially the entire defense case - except for some opportunistic cross-examination - centered on a strategy of impossibility based on the alleged abduction.[90] Most importantly, if such a strategy were successful, it would have raised a defense *to any type* of movement whether it was unit-based or aircraft-based.

Appellant attempts to rewrite history by contending on appeal that his primary defense at trial was based on the government's failure to prove the existence of the specific flight charged.[91] Specifically, appellant states in his brief:

> *It is clear* from the record that [appellant] 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.[92]

Despite assurances that the record is "clear" on this point, what is noticeably absent is any mention of appellant's true primary defense strategy: a theory of impossibility based on his

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[89] Appellant's Brief. 13. Appellant does not raise any issue regarding double jeopardy concerns in his brief.
[90] JA 16-19, 45-46, 113, 146-48, 150-54, 161-63, 170-75.
[91] Appellant's Brief 11-13.
[92] Appellant's Brief 11 (emphasis added).

outlandish abduction story.[93] What is also noticeably absent is any citation to the record for this new primary theory.[94] Appellant's brief then immediately moves to an excerpt of trial defense counsel's closing argument stating that that particular excerpt "summarized her defense to that charge," while at the same time conveniently skipping over the previous three and a half pages of argument referencing the abduction and appellant's alleged desire to deploy.[95] Appellant's attempt on appeal to recharacterize his defense theory at trial is understandable, as the record reveals that appellant was neither surprised nor was denied "the right to prepare and defend against the specification as convicted."[96]

It is first important to note that after government's case-in-chief, appellant's defense counsel failed to raise a R.C.M. 917 motion in regards to the flight number.[97] This indicates that appellant did not expect to rely solely upon lack of evidence as to the flight number to raise sufficient reasonable doubt.

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[93] JA 16-19, 113, 146-48, 150-54, 161-63, 170-75. Appellant's Brief 11-13.
[94] This lack of citation to the record is particularly worrisome considering this court's advice in cases such as *Hopf*. That opinion explained "[b]ecause the test of prejudice requires assessment of the offense, the specification, and all the evidence, it is *obvious* that each decision on this question of variance must depend *to a great extent upon the facts of the individual case*. *Hopf*, 5 C.M.R. at 15.
[95] JA 170-75. Appellant's Brief 12.
[96] Appellant's Brief 3.
[97] JA 146.

Unlike appellant's version of the record, the actual record of trial shows that trial defense counsel chosen theme was "the truth is stranger than fiction" and they presented testimony by three witnesses focusing solely on a theory of impossibility.[98] The defense first called SSG Lynn to establish that appellant had actually wanted to deploy with his unit.[99] Next, the defense called SGT Schneider to introduce evidence that he too was forced into a car and robbed by unknown assailants after drinking at an off-post German club frequented by American soldiers.[100] Last, defense presented testimony from the German Police Detective about the shoe prints and a rope found at the scene where appellant said he was released by his imaginary captors.[101] Interestingly enough, appellant's trial defense counsel presented no evidence related to flight numbers. Again contrary to appellant's brief, during closing arguments, trial defense counsel spent the large majority of her time (three and a half pages of transcript) trying to blunt the government's attacks on appellant's account of his alleged abduction.[102] It was only after all these points were argued that defense counsel decided to also attack the November 17th date.[103]

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[98] JA 16-19, 146-164.
[99] JA 146-48.
[100] JA 113, 150-53, 161.
[101] JA 158, 161-63.
[102] JA 170-75.
[103] JA 173-74.

Most importantly, the defense's theory of the case was sufficiently *clear* to the Army Court. So much so that the service court made findings of fact noting that "appellant's *primary defense* was he had been abducted on 17 November 2010" and this "prevented him from being on [the] flight with his unit when it departed during the deployment window."[104] Unless this court determines the service court's finding of fact to be "clearly erroneous," this court must accept it as binding and reject appellant's mischaracterization of the record.[105]

To be fair, a portion of the record seems to indicate that trial defense counsel also attempted to establish a secondary argument that there was no movement for appellant to miss by specifically contrasting the original 17 November date versus the 19 November date.[106] Illustrating this point, appellant's trial defense counsel argued during closing argument that:

> "[t]here was no movement to miss on the 17th of November ... because that flight didn't go anywhere ... [t]here is simply no evidence with which to convict [appellant] of missing a movement under Article 87 since that movement didn't exist.

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[104] JA 2, 6 (emphasis added). The Army Court later paraphrases this finding of fact stating "[t]he *thrust* of appellant's defense at trial was that his 'abduction' prevented him from being on [the] flight ...." JA 6 (emphasis added).
[105] *See generally Teffeau*, 58 M.J. at 66-67 (citing *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000)(Court of Appeals for the Armed Forces will not overturn findings of fact by a Court of Criminal Appeals unless they are clearly erroneous or unsupported by the record).
[106] JA 173-74.

> We don't even know the flight number for sure ... [t]here has been no credible evidence before the court as to what the actual the [sic] flight number was ... none of the witnesses knew the flight number ... [w]e don't even know if the flight number would have stayed the same or changed *when they actually flew on 19 November.*[107]

While appellant would now have us believe that this proves that appellant's original and primary strategy was to establish that "government could not prove that Flight TA4B702 existed," at best this only references a secondary argument created "on the fly," most likely based on an erroneous view of the law that the government had to prove the exact date despite the use of "on or about" language in the specification.[108]

The excerpt above does not establish that defense had set up their strategy based on lack of evidence as to the flight number and was taken by surprise when the military judge made her exceptions and substitutions.[109] On the contrary, if there was any surprise to the trial defense team, it was the surprise that none of the government witnesses could remember the flight number and that the attempted introduction of evidence of the flight manifest would be ultimately unsuccessful.[110] While this fortuitous turn of events for defense allowed them to craft a

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[107] JA 173-74 (emphasis added).
[108] Appellant's Brief 9-11; JA 174-74. Alternatively, trial defense counsel may have been aware that the government did not have to prove the exact day, but felt this tactic could still "muddy the waters" sufficiently to raise a reasonable doubt.
[109] Appellant's Brief 11.
[110] JA 43-45, 57-58, 63.

secondary defense in response, this did not change the fact that their primary defense was, and always had been, based solely on appellant's alleged abduction.[111]

Finally, comparing this case to prior case law necessitates a finding by this court that appellant suffered no material prejudice. First, just like in *Johnson*, "it affirmatively appears that [this appellant] was not misled by the defective pleading for he defended against the allegations by" arguing it was impossible for him to make the movement due to his apparent abduction, thereby "demonstrating his appreciation of the full import of the specification."[112] Appellant also argues that any "broadening [of] the offense" violates the due process right to notice, yet this court in *Hopf* still found no material prejudice when government failed to prove the actual name of the Korean national murder victim.[113] Just as in that case, the specification in this case also described the time and place of the flight even if the actual flight number was never proven.[114] This was "sufficient to apprise [appellant] of the offense with which he was charged."[115] Also similar to *Hopf* where it was "extremely doubtful whether ... the assailant will know the name

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[111] JA 16-19, 113, 146-64, 170-75.
[112] *See Johnson*, 11 C.M.R. at 175.
[113] *Hopf*, 5 C.M.R. at 14.
[114] *See also Allen*, 50 M.J. at 86 ("Far from misleading appellant, the specifications ... established a finite time frame, which defense counsel then used to present a defense.")
[115] *Hopf*, 5 C.M.R. at 14.

of his victim," the record here is also "extremely doubtful" that soldiers will remember the flight number of one of the many aircraft they inevitably boarded on route to Afghanistan months prior to having to testify at court-martial.[116]

Substantial evidence from the record proves that appellant prepared his entire defense on a theory of impossibility centered on his alleged abduction and appellant has not shown that he has "been misled to the extent that he has been unable adequately to prepare for trial."[117] Moreover, the military judge's exceptions and substitutions would not have affected the merit of such a defense had it actually been grounded in reality.

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[116] *See id.*
[117] *See Lee*, 1 M.J. at 16.

Conclusion

There was no material variance in this case. The military judge did not commit plain error by changing the method of movement of the charge as such a change does not go to the "core of the offense" which is the movement itself. Even assuming arguendo that the variance was material, appellant has failed to demonstrate prejudice as appellant was never misled or denied an opportunity to defend himself against the charge as the service court found - and the record proves - that appellant's "primary defense" was a defense of impossibility based on his alleged abduction.

WHEREFORE, the Government respectfully requests that this honorable court affirm the findings and sentence.

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April 24, 2014

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I certify that the foregoing BRIEF ON BEHALF OF APPELLEE, *United States v. Treat*, Crim. App. Dkt. No. 20110402, Dkt. No. 14-0280/AR was filed electronically with the Court on the 24th day of April, 2014 and contemporaneously served electronically on military appellate defense counsel, Major Jacob D. Bashore.

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