IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	BRIEF ON BEHALF OF APPELLANT
v.	Crim. App. Dkt. No. 1422
Shane E. REESE Aviation Maintenance Technician First Class (E-6), United States Coast Guard, Appellant	USCA Dkt. No. 17-0028/CG

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

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Statement of Statutory Jurisdiction

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

Statement of the Case

On July 22-23 and November 13, 14, and 17-20, 2014, Air Maintenance Technician First Class [hereinafter AMT1] Shane E. Reese [hereinafter appellant] was tried at Honolulu, Hawaii, before a military judge sitting as a general court-martial. Contrary to his pleas, appellant was convicted of false official statement, sexual abuse of a child, and conduct of a nature to bring discredit upon the armed forces, in violation of Articles 107, 120b, and 134 of the Uniform Code of Military Justice [hereinafter UCMJ]; 10 U.S.C. § 907, 920b, and 934.[1] Additionally, in accordance with his pleas, the military judge convicted appellant of false official statement (two specifications), wrongful use of a controlled substance (two specifications), wrongful possession of a controlled substance, and wrongful

[1] The military judge acquitted appellant of rape of a child, sexual abuse of a child, (two specifications), sodomy of a child, indecent language, and communicating a threat (two specifications). Additionally, before the entry of pleas the military judge granted the government's unopposed motion to withdraw Specification 4 of Charge I (false official statement), Specification 2 of Charge III (rape of a child), Specification 1 of Charge V (child endangerment), and Specification 4 of Charge V (communicating a threat). (JA at 26-31).

distribution of a controlled substance, in violation of Articles 107 and 112a of the UCMJ, 10 U.S.C. § 907 and 912a.

On March 19, 2015, the convening authority approved the adjudged sentence of reduction to E-1, confinement for five years, and a dishonorable discharge.

Appellant filed a brief with the Coast Guard Court with the following assignments of error:

I.

> THE GOVERNMENT MAY NOT, OVER DEFENSE OBJECTIONS MAKE A MAJOR CHANGE TO A SPECIFICATION AFTER ARRAIGNMENT. HERE, THE MILITARY JUDGE PERMMITTED THE GOVERNMENT TO MODIFY SPECIFICATION 3 OF CHARGE III SO THAT IT CHARGED A NEW ACTUS REUS AFTER THE GOVERNMENT ADMITTED SUBSTANTIAL EVIDENCE ON THE MERITS. THIS WAS A MAJOR CHANGE.

II.

> THIS COURT HAS A DUTY TO ENSURE THAT THE FACTS AND LAW SUPPORT A CONVICTION. THE MILITARY JUDGE CONVICTED AMT1 REESE BASED SOLELY ON THE TESTIMONY OF A CHILD WHO MADE MULTIPLE CONFLICTING STATEMENTS RELATED TO THE FACTS OF THE GRAVAMEN OFFENSE, PROVIDED NO CONTEXT FROM WHICH A SEXUAL INTENT CAN BE INFERRED, AND WHOSE PARENTS INFLUENCED HIS TESTIMONY. THE CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT.

III.

AN INDIVIDUAL WHO HAS ACTED AS A TRIAL COUNSEL IS DISQUALIFIED FROM PREPARING THE SJAR REGARDLESS OF WHETHER OR NOT HE IS DETAILED AS A TRIAL COUNSEL. IN THIS CASE, COMMANDER DEWEY WAS SEATED BEHIND THE TRIAL COUNSEL TABLE AND ACTIVELY CONSULTED WITH THE TRIAL COUNSEL THROUGHOUT THE TRIAL. DUE TO HIS PARTICIPATION IN THE PROSECUTION OF AMT1 REESE, HE WAS DISQUALIFIED FROM ACTING AS THE SJA.

IV.

UNDER R.C.M. 1106, THE SJA MUST ADDRESS LEGAL ERRORS RAISED BY THE ACCUSED IN THE SJAR OR AN ADDENDUM. HERE, THE ACCUSED RAISED LEGAL ERRORS IN HIS CLEMENCY REQUEST, YET THE SJAR DID NOT ADDRESS THEM AND NO ADDENDUM WAS ISSUED. THIS WAS ERROR.

On August 22, 2016, the Coast Guard Court addressed the assigned errors, *sua sponte* considered whether The Specification of The Additional Charge was deficient, and affirmed the findings and sentence. (JA at 1).

Appellant petitioned this Honorable Court for a Grant of Review and filed the Supplement to his Petition on November 7, 2016. On December 22, 2016, this Court ordered briefs filed under Rule 25 of this Court's Rules of Practice and Procedure.

Statement of the Facts

Those facts necessary to support the issues granted are contained in the arguments below.

Summary of Argument

The major change allowed by the military judge created an allegation of criminal behavior wholly separate from what was originally alleged. By permitting the change after the testimony of the government's main witness, it prejudiced appellant in the exercise of his rights to receive notice of the charges and specifications against him, enter a plea, and select a forum. Consequently, the military judge's remedy of additional cross-examination was insufficient to rectify the prejudice suffered.

For the second issue, the novel Article 134, UCMJ, specification did not state an offense under the Code. Since the specification involved speech, it needed words of criminality that alleged a criminal mind. Without such words, appellant stands convicted for innocent conduct.

Argument

I.

WHETHER THE MILITARY JUDGE ERRED IN ALLOWING THE GOVERNMENT TO MAKE A MAJOR CHANGE TO A SPECIFICATION AFTER THE COMPLAINING WITNESS'S TESTIMONY DID NOT SUPPORT THE OFFENSE AS ORIGINALLY CHARGED.

A. Facts

On February 18, 2014, the government preferred the original charges against appellant. (JA at 16). In Specification 3 of Charge III the government charged appellant with sexual abuse of a child, in violation of Article 120b of the UCMJ:

> In that Aviation Maintenance Technician First Class Shane E. Reese, U.S. Coast Guard, Air Station Barbers Point, on active duty, did, at or near Haleiwa, Hawaii on the Island of Oahu, Hawaii, between on or about January 2013 and May 2013, commit a lewd act upon [EV], a child who has not attained the age of 12 years, by licking the penis of [EV] with his tongue, with an intent to arouse or gratify the sexual desires of Aviation Maintenance Technician First Class Shane E. Reese.

(JA at 19).

In June 2013, EV's parents reported to the Hawaii Police Department [hereinafter HPD] that they suspected appellant of inappropriately touching their four year old son at appellant's home. (JA at 42). At a pretrial Article 39(a) session to litigate the government motion to admit residual hearsay statements from EV to his parents, EV's mother testified that in June 2013 EV tapped his butt and used two fingers to indicate an "in-and-out motion towards his butt" and that he indicated that appellant had licked his penis. (JA at 40-41). In a July 2013 forensic interview EV frequently stated that he did not remember anything other than appellant had "bothered" him in a bedroom and told him to "get naked." (JA at 169, 204). In an October 2013 forensic interview EV stated that Appellant had

touched him on his "tushie" with his hand. (JA at 169-70, 204). EV did not testify at the April 23, 2014, Article 32, UCMJ, hearing. (JA at 205). The military judge denied the government's motion to pre-admit EV's hearsay statements to his parents. (JA at 181).

At a November 11, 2014, deposition conducted two days before appellant's court-martial commenced, EV denied that appellant had committed any of the charged acts. (JA at 188). EV testified that appellant had touched his penis with appellant's hand. (JA at 188). The trial counsel [hereinafter TC] never interviewed EV before the deposition, nor had any investigator from the Coast Guard Investigative Service [hereinafter CGIS]. (JA at 189).

Appellant's court-martial commenced on November 13, 2014. On the first day of trial the military judge heard evidence from a CGIS investigator and two of appellant's supervisors. The next day EV testified only that appellant had used his hand to touch EV's penis and that it was a "really quick touching." (JA at 51-61). EV denied that appellant had placed his lips or mouth on EV's penis. (JA at 56).

Detective Mark Matsusaka of HPD briefly testified after EV. Following the investigator's testimony, the court-martial recessed from Friday afternoon until Monday morning, November 17, 2014. (JA at 65).

On November 17, 2014, the third day of appellant's court-martial, the government moved pursuant to Rule for Courts-Martial [hereinafter RCM] 603 to

amend Specification 3 of Charge III to change the language of the specification to conform with EV's testimony from Friday. (JA at 66). The TC stated that the government wanted to amend the specification "in response to the ruling we received yesterday" in which the military judge denied the government motion to admit several of EV's statements as residual hearsay. (JA at 71). The defense objected to the amendment as a major change and a fatal variance from the charged act which had prejudiced appellant because he had made certain decisions regarding forum, pleas, and cross-examination based on the incongruity between the charged act and EV's testimony at the deposition and at trial. (JA at 67, 70-71, 196). The military judge announced a roughly four hour recess for the defense to respond to the government motion. (JA at 73). During the recess the defense submitted a responsive brief. (JA at 196). The military judge granted the government motion to change the language to "by touching the penis of [EV] with his hand." (JA at 73-74).

In ruling that the government's amendment constituted a minor change rather than a major change the military judge issued written findings of fact and conclusions of law. (JA at 204). Among other things, the military judge concluded that, pursuant to *United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995) (internal citations omitted), "there is no additional or different offense alleged" because the elements of the offense "remain the same with the minor

change of substituted words"; that EV "has always alleged only one incident of sexual abuse with the accused"; that "any body part of the accused used with the requisite intent will satisfy the first element of Article 120b[,] UCMJ"; that "proof of a particular body part used to accomplish the 'sexual contact' does not compromise the offense but merely serves as proof that a body part of the accused was used to affect the 'sexual contact"; and that the "proposed changes do not substantially change the nature of the charge, increase its seriousness or increase the punishment for the offense." (JA at 206-208). Additionally, the military judge concluded that "the record does not show that the accused was surprised by the discrepancy in proof preceding the government motion" because previous witness testimony, EV's forensic interviews, and EV's deposition made the variance "foreseeable based on pre-trial [sic] proceedings." (JA at 206-207). The military judge noted that "it would be a highly unusual and impracticable circumstance where the accused could lick the penis of a complaining witness without some initial form of touch." (JA at 208). The military judge granted appellant an overnight continuance and granted the defense the opportunity to recall EV. (JA at 77).

The Coast Guard Court affirmed the military judge's ruling that the government's mid-trial amendment constituted a minor change. The lower court concluded:

> We agree with the military judge. After the change, the specification alleged an act that was essentially included in the original act alleged. *See United States v. Wilkins*, 71 M.J. 410, 413 (C.A.A.F. 2012) (abusive sexual contact is a lesser included offense of aggravated sexual assault in some instances). As the military judge said, evidence of a touch by the hand was foreseeable based on prior information and proceedings. Appellant's decisions as to forum and pleas were made after the deposition testimony that was at variance with the specification and in consonance with the specification as amended. With all of that information, he cannot fairly complain of a lack of notice. We agree with the military judge that the defense choices did not convert a minor change into a major change. Any prejudice that might have ensued was obviated by the continuance granted after the ruling and the opportunity to recall witnesses, of which Appellant took advantage.

(JA at 5).

B. Standard of Review

Whether a change in a specification is a minor change or a major change is a question of law this Court reviews *de novo*. *See United States v. Sullivan*, 42 M.J. 360, 364-66 (C.A.A.F. 1995).

C. Law

After arraignment the military judge may permit a minor change upon motion if no substantial right of the accused is prejudiced. RCM 603(c). Changes are minor unless they "add a party, offenses, or substantial matter not fairly included in those previously preferred or are likely to mislead the accused as to the

offenses charged." RCM 603(a). The parallel federal provision is Fed. R. Crim. P. 7(e).[2]

The government may not make a major change to the charges or specifications after arraignment and over defense objection unless the charge or specification is preferred anew. RCM 603(d). The Discussion to RCM 603(a) states:

> Minor changes include those necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors. Minor charges also include those which reduce the seriousness of an offense, as when the value of an allegedly stolen item in a larceny specification is reduced, or when a desertion specification is amended to allege only unauthorized absence.

MANUAL FOR COURTS-MARTIAL, United States 2012 [hereinafter MCM], pt. II-54.

In *Sullivan*, this Honorable Court evaluated questions of whether a change is major or minor with a two prong test: 1) a change is minor if "no additional or

[2] Fed. R. Crim. P. 7(e) states:

> (e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

different offense is charged"; and 2) "if substantial rights of the defendant are not prejudiced." 42 M.J. at 365.

Rule for Courts-Martial 918(a)(1) permits variances by exceptions and substitutions, however, "exceptions and substitutions may not be used to substantially change the nature of the offense. . . ." A variance is fatal when it is material and substantially prejudicial to the accused. *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009). A material variance substantially changes the nature of the offense or increases either its seriousness or its punishment. *Id*.; *see also United States v. Lovett*, 59 M.J. 230 (C.A.A.F. 2004) (holding that variance was fatal where the finding of guilty for solicitation to obstruct justice was substantially different from the charged solicitation to murder because the defense team relied on the charged language in pretrial preparation).

The ability to convict an accused by exceptions and substitutions is at odds with an accused's Constitutional right to notice of the offenses with which he is charged. *See United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2013) (citing *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011); *Schmuck v. United States*, 489 U.S. 705, 717 (1989) ("It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him."). An accused is prejudiced by a variance when (1) the variance misled the accused to the extent that he was unable to

adequately prepare for trial; (2) the variance puts the accused at risk of another prosecution for the same offense; or (3) the variance changes the nature or identity of the offense and the accused has been denied the opportunity to defend against the charge. *See United States v. Wray*, 17 M.J. 375 (C.M.A. 1984); *United States v. Lee*, 1 M.J. 15 (C.M.A. 1975).

D. Argument

First, the offense of "touching the penis of [EV] with [appellant's] hand" was not "fairly included in those previously preferred." The government preferred five specifications pursuant to Article 120(b): that appellant (1) penetrated EV's anus with his finger; (2) caused penetration of his mouth with EV's penis; (3) licked EV's penis with his tongue; (4) touched EV's buttocks with his hand; and (5) intentionally removed EV's clothes. (JA at 19). The amended offense was not explicitly or implicitly included in any of the previously preferred offenses.

Additionally, the change was major because changing the *means* of committing an offense adds a substantial matter not included in the preferred charges. *United States v. Murray*, 43 M.J. 507, 511 (A.F. Ct. Crim. App. 1995) (finding an aggravated assault specification amended from using a gun as a club to using as a firearm was a major change); *United States v. Longmire*, 39 M.J. 536 (A.C.M.R. 1994) (finding an amendment to a specification alleging disobedience of orders which changed the date or the order and the person issuing the order was

a major change) (emphasis added). Here, the government changed the means of committing the offense from alleging that appellant used his tongue to alleging that appellant used his hand. The original specification alleged the equivalent of oral sodomy while the amended specification alleges no such thing. Furthermore, the government expected EV to testify that appellant had licked his penis while they were naked in a bedroom at appellant's house. EV actually testified that appellant quickly touched his penis in appellant's living room while EV was clothed. Thus, both the manner of the alleged touching and the surrounding facts dramatically diverged. Accordingly, the military judge erred in concluding that the substitution of words did not change the elements of the offense and in concluding that the subject matter of the offense remained the same.

Next, the military judge permitted the amendment after appellant had announced his choices regarding forum and pleas. Appellant and his counsel made their tactical choices based on EV's deposition which contrasted starkly with the facts alleged in the charged offenses. In total, the military judge permitted the amendment following EV's "outcry," two forensic interviews, the Article 32, UCMJ, hearing, EV's deposition two days before trial, two witnesses' testimony, EV's testimony, another witness' testimony, and a weekend break. In *Sullivan*, the military judge permitted the prosecution to amend four specifications charged as violations of the Assimilative Crimes Act under clause 3 of Article 134 to simple

disorders under clauses 1 and 2 of the same article after arraignment but before trial on the merits. 42 M.J. at 363 (citing *United States v. Sullivan*, 38 M.J. 746, 748-49 (Army Ct. Crim. App. 1993)). Here, the military judge's decision to classify the government's amendment as a minor change at roughly the mid-point of the merits portion of the court-martial prejudiced appellant's substantial rights regarding notice, pleas, and forum selection. Appellant's choices regarding forum and pleas were irreversible and no amount of additional preparation time or cross-examination could change that.

Both the Coast Guard Court and the military judge reasoned that the amendment was analogous to or the equivalent of a variance. The Coast Guard Court stated appellant was on notice of a potential variance when EV's deposition testimony differed from the statement he made in his forensic interviews. Additionally, the military judge stated, "The accused was on notice as to the *possible* variance of testimony that would be produced at trial before trial strategy was formulated." (emphasis added). (JA at 208). This reasoning is flawed and places the burden on appellant to prepare for any possible variance at testimony. Rather than focusing on whether appellant should have been prepared for any and all possible differences in EV's testimony, which would have been an insurmountable task, the military judge and the Coast Guard Court should have focused on the government's proverbial Monday morning quarterbacking of its

case when its complaining witness's testimony utterly failed to support the prosecution's theory of the case.

Notably, both the Coast Guard Court and the military judge insisted that the variance was foreseeable based on pre-trial testimony. (JA at 5, 207). If the variance had been foreseeable, then the TC would not have called the amended specification "a new charge that's come up" when opposing the defense recall of EV to testify. (JA at 79). The government clearly saw the amendment specification a new offense rather than a modification of the original offense. Furthermore, if the variance was so foreseeable based on EV's deposition testimony and statements made in the forensic interviews, as contemplated by the military judge and the Coast Guard Court, then the government had ample opportunity to amend the offense ahead of trial rather than after two days of pretrial litigation, two days of trial testimony, and a weekend break.

The military judge's remedies of granting a continuance to permit the defense additional preparation time and granting a recall of EV did not, and could not, put the proverbial toothpaste back in the tube. Appellant's choices regarding forum and pleas were irreversible and no amount of additional preparation time or cross-examination could change that.

Should this Honorable Court affirm the military judge's ruling that the amended specification, which substantially changed the subject matter of the

offense, was a minor change, then the effect will be to allow the government to modify charged offenses every time the government's evidence wholly fails to support the charged offenses through the mid-point of trial.

For the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss Specification 3 of Charge III and reassess the sentence.

II.

WHETHER THE SPECIFICATION OF THE ADDITIONAL CHARGE FAILS TO STATE AN OFFENSE WHERE THE TERMINAL ELEMENT FAILED TO ALLEGE WORDS OF CRIMINALITY AND WHERE THE ALLEGED CONDUCT FELL WITHIN A LISTED OFFENSE OF ARTICLE 134, UCMJ.

A. Facts

The Specification of The Additional Charge alleges:

> In that Aviation Maintenance Technician First Class Shane E. Reese, U.S. Coast Guard, Air Station Barbers Point, on active duty, did, at or near Haleiwa, Hawaii on the Island of Oahu, Hawaii, between on or about January 2013 and May 2013, did make a statement to [EV], a four year old child [DOB January 7, 2009], to wit: "that if he [EV] told anyone what he [Aviation Maintenance Technician First Class Shane E. Reese] had done to him [EV] that Uncle Shane and Aunt [JR] would go to jail" or words to that effect, and that such conduct was of a nature to bring discredit upon the armed forces.

(JA at 21).

The military judge convicted appellant of The Specification of The Additional Charge and made Special Findings. (JA at 209). The military judge reiterated the elements of the offense and listed eighteen pieces of evidence that the court-martial found "particularly persuasive." (JA at 212-14). Only one of those eighteen pieces of evidence addressed the second element of the offense: "[t]he testimony of Mr. and Mrs. [V] that they were aware that the accused was in the U.S. Coast Guard and that the actions of the accused have lowered their opinion of the Coast Guard." (JA at 214).

The Coast Guard Court, *sua sponte*, addressed whether The Specification of The Additional Charge is legally sufficient because it does not contain words of criminality. (JA at 2, 7). The Coast Guard Court concluded:

> We note that this specification lacks words of criminality, such as "wrongfully", other than the terminal element ("of a nature to bring discredit upon the armed forces"). In accordance with *United States v. Tevelein*, 75 M.J. 708 (C.G. Ct. Crim. App. 2016) (citing *United States v. Davis*, 26 M.J. 445 (C.M.A. 1988), this is not a fatal defect. Further, we are inclined to say that such conduct would virtually always be discrediting to the armed forces, in the words of *Davis*, 26 M.J. at 449. Accordingly, we find no deficiency in the specification. We are certain that without this specification, the sentence would not have been different.

(JA at 7).

B. Standard of Review

"Whether a specification is defective and the remedy for such error are questions of law, which we review de novo." *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006); *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011)).

C. Law

Rule for Courts-Martial 907(b)((1)((B) provides that a charge or specification shall be dismissed at any stage of the proceedings if "[t]he specification fails to state an offense." "However, where defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error – which, in most cases, will turn on the question of prejudice. *United States v. Cotton*, 535 U.S. 625, 631-32 2002) (applying plain error review); *United States v. Sinks*, 473 F.3d 1315, 1320-21 (10th Cir. 2007) (applying plain, not harmless, error review); *see also Ballan*, 71 M.J. at 34-36; *United States v. Girouard*, 70 M.J. 5, 10-12 (C.A.A.F. 2011) (footnote and citations omitted).

Regarding a plain error analysis of defective indictments, "[the] [a]ppellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *Girouard*, 70 M.J. at 11 (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)); *see also Cotton*, 535 U.S. at 631-32; *United States v. Paige*, 67

M.J. 442, 449 (C.A.A.F. 2009) (citations omitted). The statutory basis for this Court's standard is Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2006), which states: "A finding or sentence of 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."

Offenses under clause 2 of Article 134, UCMJ, the general article, contain two elements: 1) that the accused did or failed to do certain acts; and 2) that, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces. MCM, pt. IV, para. 60.b; *United States v. Cherukuri*, 53 M.J. 68, 71 (C.A.A.F. 2000).

In *United States v. Saunders*, this Honorable Court explained:

> Article 134, the "General Article," criminalizes service-discrediting conduct by military service members. Certain specified offenses are included under this Article. *See* [MCM 2002 ed.], pt. IV, paras. 61-113. However, "if conduct by an accused does not fall under any of the listed offenses. . . a specification not listed in this Manual may be used to allege the offense." *Id*. at Part IV, para. 60.c.(6)(c).

59 M.J. 1, 6 (C.A.A.F. 2003) (footnote omitted).

D. Argument

The Specification of The Additional Charge, which alleges a novel offense under clause 2 of Article 134, UCMJ, fails to state an offense because the terminal element did not allege words of criminality that sufficiently state the *mens rea*

required to make appellant's speech criminal. The language of The Specification alleges only that appellant made a certain statement and that his conduct itself was service-discrediting. The TC addressed appellant's statement to EV in the opening statement and the closing argument but did not discuss it in the rebuttal argument. (JA at 45, 83). The TC did not explain why the making of the alleged statement was a crime nor why it was service-discrediting. In his dissenting opinion, Judge Bruce ascertained that the government assumed that if appellant's statement itself to EV was service-discrediting, as his parents testified, then the making of the statement was sufficient to make the statement wrongful and a crime. (JA at 11).

In her special findings, the military judge did not address appellant's *mens rea* or explain why appellant's statement was criminal, other than a finding that EV's parents found appellant's "actions" lowered their opinion of the US Coast Guard. As Judge Bruce wrote in his dissent:

> Considering what brief discussion there was at trial about the [sic] specification of the Additional Charge, it appears that the trial participants were under the impression that the Government only needed to prove that Appellant made the alleged statements to EV and that the conduct was service-discrediting. There does not appear to be any recognition that the terminal element ought to impliedly include an allegation of some sort of wrongful mental state, let alone some clear articulation of criminality that would put Appellant on notice of what he had to defend against.

(JA at 12).

In *United States v. Fosler*, this Honorable Court stated that words of criminality may be required for offenses charged under Article 134, UCMJ, "depending on the nature of the alleged conduct. 70 M.J. 225, 231 (C.A.A.F. 2011). In *United States v. Tevelein*, the Coast Guard Court found that the terminal element in a novel Article 134, UCMJ, specification could supply the required words of criminality when the alleged conduct would not otherwise constitute a crime. 75 M.J. 708 (C.G. Ct. Crim. App. 2016). "What remains elusive in military justice jurisprudence is precisely which circumstances require additional words of criminality." *Id*. at __ n. 21.

The Specification of The Additional Charge is a circumstance which requires additional words of criminality in addition to simply alleging the terminal element because the offense involves speech as the allegedly wrongful conduct. (JA at 13). As Judge Bruce explained in his dissenting opinion:

> The act of speaking to a child is not conduct that is ordinarily criminal. Even saying something to a child that makes the child uncomfortable or fearful would not ordinarily be criminal. Alleging that the conduct was service[-]discrediting . . . is a necessary element, but it does not add much in terms of what about Appellant's conduct was criminal, rather than innocent, or what culpable state of mind the Government is alleging. Words of criminality in the specification would provide some assurance that the court-martial would not convict without considering whether Appellant had a culpable state of mind and whether his conduct might be innocent or justified.

(JA at 13-14).

Where the alleged conduct involves speech, as it does here, the government is required to prove the accused's *mens rea* in order to "prevent the criminalization of otherwise 'innocent conduct.'" *United States v. Rapert*, 75 M.J. 164, 19 (C.A.A.F. 2016) (the element of wrongfulness in the Article 134, UCMJ, offense of communicating a threat met the *mens rea* requirement for a crime).

In short, absent words of criminality, servicemembers accused of committing a similar offense under a novel specification will be convicted without having to prove beyond a reasonable doubt that the speech was unlawful.

The Specification of The Additional Charge is defective for a second reason: the alleged conduct is already addressed by obstructing justice, a listed offense under Article 134, UCMJ. The elements of obstructing justice are:

> 1) That the accused wrongfully did a certain act;
>
> 2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;
>
> 3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and
>
> 4) 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 32).

The Explanation to the offense lists several examples of obstruction of justice, including, wrongfully influencing, intimidating, or impeding a witness by means of intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to a violation of any criminal statute. (JA at 32-33).

The government charged appellant with essentially telling EV that if EV told anyone what appellant did to him, then appellant and his wife would go to jail. The language of The Specification alleges that appellant wrongfully influenced or wrongfully intimidated EV, a four year old child, or by means of intimidation delayed or prevented the communication of information relating to the alleged sexual abuse. In using a novel specification for conduct addressed by a listed offense, the government lightened its burden and only had to prove that appellant did certain acts and that, under the circumstances, his conduct was of a nature to bring discredit upon the armed forces rather than prove the second and third elements of obstructing justice beyond a reasonable doubt.

Appellant did not object to the defective specification at trial or the court below, however, under a plain error analysis, the defective specification was error and the error was plain because it failed to include words of criminality and because the alleged conduct fell under one of the listed offenses in Article 134,

UCMJ. The error prejudiced appellant's substantial rights because he was not on notice as to the *mens rea* required nor can this Honorable Court be certain that appellant was found to have acted with a *mens rea* that would cause the alleged statement to be criminal.

For the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss The Specification of The Additional Charge and The Additional Charge and reassess the sentence.

Conclusion

WHEREFORE, appellant respectfully requests that this Honorable Court grant the requested relief.

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Certificate of Filing and Service

I certify that the foregoing was electronically filed with the Court and served on Appellate Government Counsel on 18 January 2017.

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This brief complies with the page limitations of Rule 24(b) because it contains less than 14,000 words. Using Microsoft Word version 2010 with 12-point-Century Schoolbook font, this brief contains 5,468 words.

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