IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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III. Statement of Statutory Jurisdiction

This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 because it is a case reviewed by the Coast Guard Court of Criminal Appeals (CGCCA) in which this Court has granted Appellant's petition for review. The CGCCA had jurisdiction over this case under Article 66, UCMJ, 10 U.S.C. § 866.

IV. Statement of the Case

Appellant entered mixed pleas before a court-martial consisting of military judge alone, resulting in the following findings:

CH	ART	ALLEGATION	PLEA	DISP
I	107	Specification 1: False official statement to law enforcement that accused had never been alone with victim EV	NG	G
		Specification 2 & 3: False official statements to law enforcement about drug use.	G	G
II	112a	Specifications 1-4: Use, possession, and distribution of marijuana	G	G
III	120b	Specification 1: Rape of EV by pentetrating EV's anus with his finger	NG	NG
		Specification 3**:** Sexual abuse of EV by touching his EV's penis with accused's hand	NG	G
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AC	134	Specification: Making a statement to EV that if EV told anyone what the accused had done to him, that the accused and his wife would go to jail, which conduct was of a nature to bring discredit upon the armed forces	NG	G

On November 20, 2014, the military judge sentenced Appellant to confinement for five years, dishonorable discharge, and reduction to pay grade E-1. The convening authority approved the adjudged sentence on March 19, 2015. The CGCCA reviewed the case and issued a decision on August 22, 2016. The CGCCA addressed the four errors assigned by Appellant and also an issue raised

sua sponte addressing whether the specification of the Additional Charge was deficient. The CGCCA affirmed the findings and sentence. J.A. 1. On December 22, 2016, this Court granted Appellant's petition for review.

V. Statement of Facts

A. Facts Related to Granted Issue I (post-referral change).

On February 14, 2014, charges were preferred against the accused. J.A. 16. The charges centered around two types of misconduct: drug use and sexual abuse of a four-year old boy, EV. J.A. 18-20. Five specifications under Article 120b alleged that Appellant had raped and sexually abused EV in a variety of ways between on or about January 2013 and May 2013. *Id.*

This case arose after EV's parents became concerned about sexual comments and gestures their son was making. After being separately questioned by his mother and father, EV revealed that something had happened between himself and the accused, whom he called "Uncle Shane." EV made a variety of disclosures to his parents, and some limited disclosures to a forensic interviewer from June 12, 2013 to October 28, 2013. J.A. 152-153. On April 23, 2014 the preferred charges were investigated under Article 32, UCMJ, 10 U.S.C. §832. At the investigation, EV's parents described in detail physical gestures and verbal statements EV had made consistent with Appellant touching EV's penis. J.A. 145, 204. EV's mother testified, among other things, that EV had grabbed his own penis and made slicing

and chopping motions while moving his head towards his penis and saying, "this is what Uncle Shane does to me." J.A. 147, 160. The mother also testified that she asked EV where Appellant had touched him, and EV touched his groin in response. J.A. 160.

On July 22, 2014, the accused was arraigned, followed by an extensive motions hearing covering, among other things, the admissibility of statements made by EV to his parents. J.A. 205. On November 4, 2014, the military judge issued an order denying the government's motion to admit hearsay statements made by EV to his parents. J.A. 181. On November 11, 2014, the day before trial was scheduled to begin, EV was deposed with both government and defense counsel present. EV's parents had not previously permitted counsel to speak directly to EV about the allegations. At the deposition, EV testified that Appellant had touched EV's penis with Appellant's hand, but denied other types of contact. J.A. 205. On November 12, 2014, Appellant changed his forum selection to military judge alone. *Id.* Trial on the merits began immediately afterwards. On November 14, 2014, the government called EV, who testified that Appellant had touched EV's penis with his hand. J.A. 52-53. On cross-examination, EV denied Appellant had placed his lips or tongue on EV's penis, and denied other forms of contact. J.A. 54. The court-martial recessed over the weekend. The following Monday, the government brought a motion under R.C.M. 603(c) to make a minor

change to Charge III, Specification 3, by substituting "touching" for "licking" and "hand" for "tongue." J.A. 66, 191. The military judge allowed time for the defense to prepare a written motion articulating objection to the change. J.A. 72. After considering oral argument and written pleadings from both sides, the military judge ruled that the requested change was a minor, permissible change and allowed the government to make it. J.A. 73. In her ruling on the record, the military judge explained why she had determined the change to be minor and permitted it:

- No party was added;
- The change does not change or add an offense;
- The date, time and subject matter of the offense remains the same;
- No substantial matter that was not fairly included was added;
- All parties were alerted to the possibility that a variance could occur because they were present at the pretrial deposition;
- The record does not show that the accused was surprised by the discrepancy in proof preceding the government's motion due to previous witness testimony, EV's forensic interviews, and EV's deposition; and
- The conduct in the amended specification was necessarily included in the original specification because "it would be a highly unusual and impracticable circumstance where the accused could lick the penis of a complaining witness without some form of initial touch."

J.A. 73; see also J.A. 205-8 for written ruling. The military judge also permitted the defense to recall any witnesses based on the ruling. J.A. 77. In accordance with the ruling, the government modified the specification as follows:

> In that [AMT1 Reese], did, at or near Haleiwa, Hawaii . . . between on or about January 2013 and May 2013, commit a lewd act upon [EV], a child who had not attained the age of 12 years, by ~~**licking**~~ **touching**

> the penis of [EV] with his ~~**tongue**~~ **hand**, with an intent to gratify the sexual desire of [AMT1 Reese].

J.A. 19. The defense availed itself of the military judge's offers of a half-day continuance and the opportunity to recall EV. J.A. 77. Upon recalling EV, defense explored with EV a number of topics, including his memory, whether he knew kids that talked about sexual matters or watched TV shows with sexual content, whether he remembered details of what he would do when he went to Appellant's house and whether he practiced his testimony with his parents. R. 19 Nov at 26-33.

B. Facts related to Granted Issue II (sufficiency of specification).

In addition to Charge III, Specification 3, the military judge convicted Appellant of the following sole specification under an additional charge (hereinafter "the Specifcation"):

> In that [AMT1 Reese] did, at or near Haleiwa, Hawaii. . . between on or about January 2013 and May 2013. . . make a statement to [EV], a four-year old child…to wit: "that if he [EV] told anyone what [Appellant] had done to [EV], that [Appellant and his wife] would go to jail" or words to that effect, and that such conduct was of a nature to bring discredit upon the armed forces.

J.A. 22.

Appellant did not object to this specification at trial or on appeal before the Coast Guard Court of Criminal Appeals (CGCCA). The CGCCA addressed the issue *sua sponte* in its opinion. J.A. 1. In concluding that the

specification was not defective despite lacking words of criminality such as "wrongfully," the majority cited to its recent opinion in *United States v. Tevelein*, 75 M.J. 708 (C. G. Ct. Crim. App. 2016). J.A. 7. Judge Bruce issued a dissenting opinion, arguing that he would have found plain error as to this specification. J.A. 8-15. Appellant petitioned this Court for review on that issue, and review was granted.

VI. Summary of Argument

The military judge did not err in permitting the government to make a minor change to Charge III, Specification 3, where the minor change did not prejudice the substantial rights of Appellant. The Specification under the Additional Charge is sufficient, because when construed liberally, all elements required to allege either the offense of Obstructing Justice are set out expressly or by necessary implication. Any error in the Specification is not plain error, and in any case did not prejudice Appellant. Alternatively, when liberally construed, the Specification also correctly alleges a novel offense under Article 134, because it states the statutory elements, and provided Appellant fair notice both of the elements against which he had to defend and the criminality of the conduct.

VII. Argument: Granted Issue 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 ALLEGED.

A. Standard of Review.

This Court should review *de novo* whether a post-arraignment change to a specification is minor, consistent with its previous treatment of this question, and with its explicit prescription of this standard for the closely-related issue of variance. *United States v. Sullivan,* 42 M.J. 360, 365 (C.A.A.F. 1995); *United States v. Treat,* 73 M.J. 331, 335 (C.A.A.F. 2014).

B. The military judge correctly determined that the change to Charge III, Specification 3 was minor because it did not add a party, an offense, or another substantial matter not fairly included in those previously preferred, nor did it mislead the accused as to the offenses charged.

Rule for Court-Martial (R.C.M.) 603(c), Manual for Courts-Martial, United States (2012), provides that the military judge may, upon motion, permit minor changes to specifications after arraignment, provided that the changes do not prejudice any substantial right of the accused. Minor changes are "any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." *Id.* In *United States v. Sullivan,* this Court analyzed Federal Rule of Criminal Procedure 7(e), on which R.C.M. 603 was modeled, to conclude that the test for whether an amendment is permissible is, quite simply, (1) whether the

amendment adds a new or different offense, and (2) whether the amendment causes unfair surprise. *Sullivan,* 42 M.J. 360. Both parts of the test speak to what is already present in the rule: changes which add a party, an offense, or a substantial matter change the nature of the offense, while changes that are not fairly included in what was previously charged or mislead the accused result in unfair surprise. In this case, the offense and all its essential elements remained the same both before and after the change, and Appellant was not unfairly surprised. As such, the military judge correctly determined that the change was minor.

1. The change to Charge III, Specification 3 does not add a party, offense, or substantial matter not fairly included in those previously preferred.

Both before and after the change, Charge III, Specification 3 alleged the same offense (sexual abuse of a child), by the same accused (Appellant), against the same person (EV) on the same date range (one occasion between on or about January 2013 and May 2013). J.A. 19. The part of EV's body touched by Appellant also remained the same (the penis). *Id.* The only change was the part of Appellant's body that touched EV's penis, which was changed from "tongue" to "hand," and the corresponding change from "licking" to "touching." Neither a party nor an offense was added.

Courts of Criminal Appeals have identified various situations in which a change is deemed major. For example, an amendment is a major change when it

converts a specification which did not state an offense into one that does. *United States v. Garrett,* 17 M.J. 907, 909 (A.F.C.M.R.1984) (before amendment, adultery specification under Article 134, UCMJ, failed to allege that one of the participants was married to another). Changes that increase the accused's punitive exposure have also been deemed major changes. *United States v. Cooper-Tyson*, 37 M.J. 481, 483 (C.M.A. 1993) changing drug that was wrongfully used was major change when it increased maximum punishment). In *United States v. Murray*, the Air Force Court of Criminal Appeals (AFCCA) found a change in the methodology by which the crime was committed to be major when it increased the severity of the offense, and thus, the maximum available confinement. 43 M.J. 507, 511 (A.F. Ct. Crim. App. 1995).

On the other hand, changes to dates have been deemed minor when they did not implicate the statute of limitations *United States v. Brown*, 34 M.J. 105, 109 (C.M.A. 1992). Changes to the methodology by which an offense can be committed may also be a minor. In *United States v. Page*, 43 M.J. 804, 806 (A.F. Ct. Crim. App. 1995), the AFCCA determined that changing a specification alleging conduct unbecoming an officer by having a close personal relationship with an enlisted member to add that the relationship was displayed openly and the enlisted member was married was minor change. The change to Charge III, Specification 3 this case does not add matters, result in an increase in punishment,

implicate the statute of limitations, or convert a specification that does not state an offense into one that does. The change only alters the part of the body with which Appellant sexually abused EV.

2. The change to Charge III, Specification 3 did not unfairly surprise Appellant by misleading him about the charges he faced.

The second prong of the *Sullivan* test asks whether the change caused unfair surprise. "The evil to be avoided is denying the defendant notice of the charge against him." *Sullivan,* 42 M.J. 360. Even when no new matter is added, a change to a specification could still constitute a major change when it unfairly surprises an accused by misleading him about the charges faced. In *United States v. Longmire*, 39 M.J. 536, 539 (A.C.M.R. 1994), for example, the government changed the description of the order allegedly violated from a policy directive issued by one officer on one date to a unit memorandum issued by a different officer on a different date. Although the offense itself, its maximum punishment, the parties, and the dates all remained the same, and nothing was added, the court still found the change impermissible because it misled the accused. The identity of the order, was crucial to a charge of violating a general order, so that the accused defend by arguing that he did not know of the order, or that it was not punitive. The defense needs to know the exact identity of the order in order to prepare those defenses. *Id.*

In *United States v. Marshall*, 67 M.J. 418, 419 (C.A.A.F. 2009), this Court explained that a variance is material when it "substantially changes the nature of

the offense."[1] In *Marshall,* the fact-finder used exceptions and substitutions to change the name of the custodian from whom the accused escaped. This Court found that this substantially changed the offense because the accused had focused his defense on lack of evidence that he had escaped from the original custodian, and did not have the opportunity to prepare a defense to escaping from the new custodian, which the government argued was as acting as the original custodian's agent at the time of the escape. In *United States v. Mandy,* 73 M.J. 619, 625 (A.F. Ct. Crim. App. 2015), the AFCCA found material variance when the panel found the accused, who was charged with malingering by self-inflicted injury, guilty of malingering by feigning the seriousness of his injury. Even though the parties, dates, and offenses remained the same, the methodology by which the crime was committed was substantially changed to the accused's detriment—particularly because the defense strategy was to argue that the injury was accidental, not self-inflicted.

[1] The issue of whether variance in findings under R.C.M. 918(a)(1) is fatal is closely related to the issue of whether post-referral changes to specifications are permissible under R.C.M. 603. Both embrace the issue of an accused's right to receive fair notice of the charges the accused faces. *See Treat,* 73 M.J. at 335. The test for whether a variance is material is very similar to that for whether a change is minor: whether it "substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense. *Marshall,* 67 M.J. 420.

This case differs from *Longmire* and *Mandy* because nothing about changing the specification from licking with the tongue to touching with the hand changed the way Appellant presented a defense. Defense strategies to defend against sexual abuse of a child generally involve (1) denial that the abuse occurred at all, (2) showing unreliability of the child's complaint due to motive to lie, inability to accurately remember and recount events due to young age or other factors, (3) improper influence by others on the child's memory or testimony, (4) alternative explanations for the child's precocious sexual knowledge or behavior, and (5) innocent purpose for touching the child. As the military judge correctly found, Appellant knew that EV reported through words and gestures that Appellant touched his penis since at least the April 24, 2014 Article 32 hearing. Nothing about the change in methodology of the abuse changed the defense strategies available to Appellant at trial. Defense also had a full opportunity to explore all of the above strategies at trial, unlike the defense in *Longmire*, who was totally surprised and unprepared by an allegation about an entirely different order than what was originally alleged. *Longmire*, 39 M.J. at 536.

It could be argued that Appellant is similarly situated to the accused in *Marshall,* who focused his strategy on the fact that no evidence was presented that he escaped from the custody of CPT K, only to find himself convicted of escaping from the custody of one SSG F. *Marshall* 67 M.J. at 421. But such analogy is

incomplete in two ways. First, in *Marshall*, the change in custodian resulted from the government's last-minute decision to argue an agency theory, for which Appellant was unable to prepare. Here, the change from licking to touching the child's penis involved the same type of lewd act—Appellant was certainly on notice that he was accused of improperly touching EV's penis with some part of his body. Second, because Appellant's case involved a post-referral change upon motion by the government, and not post-findings variance, Appellant actually did have an opportunity to adjust trial strategy as he saw fit, unlike Marshall.

Appellant here is more similarly situated to the accused in *Page*, whose trial strategy continued to be that he and the enlisted person with whom he committed conduct unbecoming an officer were "just friends" both before and after the amendment. *Page*, 43 M.J. at 807. Appellant did not change his trial strategy of denying that he ever touched EV, denying that he was ever alone with EV, attacking the reliability of EV's complaint, and positing alternative sources for EV's precocious sexual knowledge and conduct, either before or after the change.

C. The military judge did not abuse her discretion in permitting the minor change because no substantial right of the accused was prejudiced.

Even when a change is minor, the military judge still must, under R.C.M. 603(c), decide whether the substantial rights of the accused are prejudiced prior to permitting it. In his brief, Appellant argues that he was prejudiced because he was denied notice. App. Br. at 14. He also argues that his substantial rights were

prejudiced because he made tactical choices about pleas and forum he would not have made had he know that the change would be permitted. *Id.* This Court has found that substantial rights include an accused's right to notice under the Fifth and Sixth Amendments. *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) see also *United States v. Humphries*, 71 M.J. 209, 211 (C.A.A.F. 2012). Appellant argues that had he known what the charges ultimately would be, he would have pleaded differently or chosen a different forum. App. Br. at 16. These are not separate material rights, but should be viewed as indicators of whether Appellant was on notice of what he had to defend against.

The record supports the military judge's findings that Appellant was not surprised by EV's allegation that Appellant had touched his penis because the defense had access to that allegation as far back as April 2014. Eight months before trial, defense was aware that there was evidence that EV had made gestures and reports consistent with Appellant's having touched his penis because these matters were presented at the Article 32 investigation. JA 147, 160. Appellant made his first forum selection after knowing of EV's statements and conduct indicating Appellant had touched EV's penis. J.A. 43. While testifying on appellant's motions to suppress the parents' statements as impermissible hearsay, as litigated on July 22, 2014, EV's mother stated that EV had started "holding his penis and trying to pull it" while saying "this is like what Uncle Shane does to

me." J.A. 172. During EV's November 11, 2014 deposition, it became clear that EV would testify Appellant had touched EV's penis with Appellant's hand. J.A. 205. It was with this knowledge that Appellant changed his forum selection. *Id*.

At trial, Appellant presented a full defense, exploring nearly every possible theory for reasonable doubt. Defense cross-examined EV on a number of different theories, including that he had practiced his testimony with his parents (J.A. 59, 61-3), and that he had made prior inconsistent statements (J.A. 60-1). Defense also explored with Appellant's wife alternative ways EV could have learned to grab and chop at his penis. J.A. 80. Appellant testified and provided a general denial of being alone with, or touching EV. J.A. 82. After the change was permitted, Appellant availed himself of a continuance, recalled EV, and presented the defense case, including calling the accused and the accused's wife.

Minor changes to specifications are specifically permitted by R.C.M. 603. The United States is not requesting this Court to create a rule that, as the Appellant suggests, "allows the government to modify charged offenses every time the government's evidence wholly fails to support the charged offenses." App. Br. at 17. Military courts have properly applied the test found in the rule itself to sort out which changes are minor, and which are major, permitting the former only when those do not prejudice the substantial rights of the accused. In this particular case, the change did not add a substantial matter not fairly included in the offense as

originally charged, nor did it prejudice a substantial right of the accused. As such, this Court should affirm the CGCCA's decision.

VIII. Argument: Granted Issue 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. Standard of Review.

Whether a specification is defective is a question of law, which this Court reviews *de novo*. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Because Appellant did not object to the Specification at trial, this Court now reviews for plain error. *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013). Appellant bears the burden of establishing the following three prongs: (1) there was error; (2) the error was clear or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). "As all three prongs must be satisfied ..., the failure to establish any one of the prongs is fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

Because Appellant challenges this specification for the first time before this Court, this Court should construe the specification liberally in favor of validity. *United States v. Brecheen*, 27 M.J. 67, 68 (C.M.A. 1988). When determining the

sufficiency of a specification challenged for the first time on appeal, this Court applies the fair implication rule, finding sufficient a specification where "necessary facts appear in any form, or by fair construction can be found, within the terms of the specification." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).This Court should not find plain error unless the specification "cannot within reason be construed to charge a crime." *United States v. Watkins*, 21 M.J. 208,210 (C.M.A. 1986).

B. There is no error in the Specification because it alleges the offense of Obstructing Justice.

1. Because specifications challenged for the first time on appeal are construed liberally in favor of validity, this Court may properly find that the Specification alleged the offense of Obstructing Justice.

This Court should apply the fair construction rule to find that the Specification, first challenged before this Court, states the offense of Obstructing Justice under Article 134. The military is a notice pleading jurisdiction. *United States v. Sell*, 3 C.M.A. 202, 206 (C.M.A. 1953). A charge and specification will be found sufficient if it, "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). R.C.M. 307(c)(3), provides that each element of a charged

offense must be alleged either "expressly or by necessary implication." However, "no specific format is required." *Id. see also Watkins,* 21 M.J. at 209.

In applying liberal construction in favor of validity, this Court has permitted specifications that entirely omit essential elements as long as the specifications can be reasonably construed to charge a crime. In *Brecheen*, 27 M.J at 68 this Court upheld specifications under Article 112a that omitted the essential element of "wrongfulness," finding that despite this omission, the offense could be reasonably construed as a crime. In *Watkins,* 21 M.J. at 209, this Court upheld a specification under Article 86 that alleged absence without authority, even when the specification omitted the words "without authority." This Court in *Watkins* explained that under the post-conviction liberal construction rule, courts were reluctant to grant relief, absent a clear showing of substantial prejudice, unless an indictment was "so obviously defective that by no reasonably construction can it be said to charge an offense." *Id.* This Court has also permitted, in the case of post-conviction challenge of specifications, looking to other portions of the charge sheet for context about the offenses charged. *Watkins,* 21 M.J. 208. *See also United States v. Jones*, 68 M.J. 465, 471–72 (C.A.A.F. 2010). (analyzing lesser included offenses) ([A]lthough the terms Congress chose for [Article 134] are broad, what is general is made specific through the language of a given specification. The charge

sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against.")

Under the rule of liberal construction, this Court should first examine whether the Specification actually alleges the offense enumerated in the Manual for Courts Martial (MCM) pt. IV, ¶96, Obstructing Justice. A comparison of the offense alleged side-by-side with the elements set out in MCM pt. IV, ¶ 96, shows how each element of that offense is set out in the Specification, either expressly or by necessary implication.

Element in Para. 96	How element found in the Specification
That the accused wrongfully **did a certain act**	That the accused made a statement to EV: that if EV told anyone *what appellant had done to him* the Appellant and Appellant's wife would go to jail
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	Reference to "what appellant had done to [EV]" and "jail" necessarily imply that Appellant believed that if others learned that he had sexually abused EV, criminal proceedings would begin
That the act was done with intent to influence, impede, or otherwise obstruct the due administration of justice	The "if…then" nature of the statement, told directly to a four-year-old child necessarily implies intent to influence child-victim's behavior
That the act was of a nature to bring discredit upon the armed forces	That the act was of a nature to bring discredit upon the armed forces

Thus, each element of the violation of Article 134 described in Paragraph 96 of the MCM (Obstructing Justice) is set out either explicitly or by necessary implication, to include the wrongfulness of the conduct (as alleged by the implication that Appellant had in fact done *something* to the child which could

result in criminal proceedings,) the expectation of criminal sanction (implied by reference to "go[ing] to jail,") and the intent to obstruct justice (use of if-then statement designed to appeal to the child's desire to protect his abuser and the abuser's family, thus compelling him not to reveal the abuse where he otherwise might have). In this case, the other charges on the charge sheet provide context to the Specification that supplies any missing aspects of the intent or wrongfulness elements: "what [Appellant] had done to EV" was to sexually abuse him.

2. Even if the Specification is defective, relief is not warranted because any error is not clear or obvious, and Appellant has not demonstrated prejudice.

The existence of error alone does not dictate that relief in the form of a dismissal is available. While a specification that fails to properly allege an element of a charged offense is defective, and while such a defect affects constitutional rights, it does not constitute structural error subject to automatic dismissal. *Humphries*, 71 M.J. at 212. Where the Specification can reasonably be found to allege each element of the offense of Obstructing Justice either expressly or by necessary implication, this Court should not find plain error. Even if it finds plain error, Appellant is not entitled to relief for failure to demonstrate prejudice. Appellant has not explained how the proof, the defense theory or presentation, the testimony, the results, or the sentence would have been different had the

government set forth the offense of Obstructing Justice exactly as enumerated in MCM pt. IV, ¶96..

Appellant alleges that he was prejudiced by lack of specificity in the specification with respect to *mens rea.* However, even if the Specification was deficient in this respect, the Appellant was not prejudiced by it. The record does not indicate Appellant was misled or otherwise confused by lack of specific words indicating *mens rea*. He did not request a bill of particulars or move to dismiss the charge. Appellant's defense as to this specification was not based on *mens rea*. He did not argue that he spoke the alleged words, but did so with less than a specific intent. He did not argue that he made the statement to EV for a legitimate or innocent purpose. He argued instead that neither the sexual abuse nor the statement to the child happened at all because he had never even been alone with the child. J.A. 81-2, *See also* R. 19 Nov at 46. Further, as the CGCCA correctly noted, the Specification had virtually no impact on the sentence. J.A. at 7.

C. Alternatively, the Specification properly states a non-enumerated offense under Article 134.

1. The Specification properly states an offense under Article 134.

Article 134, UCMJ has only two statutory elements (1) that the accused did or failed to do a certain act, and (2) that, under the circumstances, the conduct was prejudicial to good order and discipline, of a nature to bring discredit upon the

armed forces, or both. Article 134, UCMJ, MCM pt. IV, ¶60.b(1). *See also United States v. Cherukuri*, 53 M.J. 68, 72 (C.A.A.F. 2000), *Tevelein*, 75 M.J. at 710. An Article 134 offense not specifically listed in the MCM must state these elements, but must also have words of criminality and provide the accused with notice as to the elements against which he or she must defend. *United States v. Vaughan*, 58 M.J. 29, 35 (C.A.A.F. 2003). Notice of the elements includes notice of the requisite mental state or standard applicable to the conduct charged. *United States v. Saunders*, 59 M.J. 1, 9 (C.A.A.F. 2003). The terminal element of the offense can serve as "words of criminality." *Tevelein,*75 M.J. at 711. Where

> the specification at issue contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him . . . shows with accuracy to what extent he may plead a former acquittal or conviction, the specification is legally sufficient.

Id at 711-12, quoting *United States v. Sell*, 3 C.M.A. 202, n8 (C.M.A. 1953).

The Specification alleges an act, and a terminal element (service discrediting). It also explains the nature of the proscribed act—telling a four-year-old boy, EV, that Appellant had just sexually abused that if EV told anyone what Appellant had done, Appellant and his wife would go to jail. Even if words setting out a *mens rea* are not expressly set out, they are implicitly alleged with sufficient clarity to put Appellant on notice of the standard applicable to his conduct. The specification and its context make clear that Appellant made this communication

to EV after sexually abusing him. The "if-then" dichotomy of the statement itself, combined with the context explaining the crime that had been committed against EV, provides sufficient notice that the offense carried a standard of specific intent, and was done wrongfully.

2. Preemption does not apply internally to Article 134.

Appellant further argues that "novel specifications" may *only* be alleged when the President has not listed a similar offense in paragraphs 61-113 of MCM Pt. IV. App. Br at 23 (emphasis added), *See also* J.A. 8. In the CGCCA's dissenting opinion in this case, Judge Bruce read MCM Pt. IV, ¶ 60.c.(6)(c) "if conduct by an accused does not fall under any of the enumerated Article 134 offenses (paragraphs 61 through 113 of this Part), a specification not listed in the manual may be used to allege the offense," as a prohibition on using a specification *not* listed in the manual to allege an offense where the conduct at issue is covered by paragraphs 61-113. This conclusion seems to embrace the concept of preemption. *See* MCM pt. IV¶ 60.c.(5)(a). The question, then, is whether the doctrine of preemption applies internally to offenses under Article 134. At least two military courts have reasoned that it does not. *United States v. Guardado*, 75 M.J. 889, 903 (A. Ct. Crim. App. 2016). *United States v. Hackler*, 75 M.J. 648, 656 (N-M. Ct. Crim. App. 2016).

In *Guardado*, the Army Court of Criminal Appeals explained its reasoning: the test for preemption is whether Congress intended to limit prosecution for wrongful conduct within a particular field to offenses defined in specific articles of the Uniform Code of Military Justice, and whether the offense charged was composed of a residuum of elements of a specific offense but asserted to be a violation of the General Article. *Guardado,* 75 M.J. at 901, *citing United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992). "Accordingly, as the President cannot create a new offense, the enumeration of an offense under Article 134 cannot preempt another Article 134 offense under *McGuiness*."*Id.*

3. Appellant had fair notice that his acts were subject to criminal sanction.

If this Court finds that the Specification substantially alleges Obstructing Justice as set out in MCM pt. IV, ¶96, Due Process notice is not an issue, since notice that the offense is criminal is provided in the Manual for Courts-Martial. *United States v. Warner*, 73 M.J. 1, 2. (C.A.A.F. 2013). On the other hand, if this Court finds that the Specification alleges an offense under Article 134 that is not listed in the Manual for Courts-Martial, it must then analyze whether Appellant had fair notice that the conduct was punishable. *Id*.

This Court most recently analyzed Due Process notice of criminality in *Warner.* In that case, this Court explained that sources of fair notice may include federal law, state law, military case law, military custom and usage, and military

regulations. *Warner*, 73 M.J. at 3 In *Warner*, this Court held that the appellant lacked fair notice that possession of child erotica was criminal where Federal law did not prohibit it, and the Government could not identify any state statute, case law, or custom of the services that criminalized possessing such materials. *Id.* at 4.

This Court did not hold in *Warner* that the list of potential sources of notice of criminality was exclusive. *Id.* In a dissenting opinion, Chief Judge Baker stressed that there was one important source of notice that the majority had not listed, but should have used: common sense. *Warner*, 73 M.J. at 7 (Baker, C.J., dissenting). Chief Judge Baker cited various cases in which this Court, and other military courts have used common sense as a source of notice. In *United States v. Ashby*, 68 M.J. 108, 119 (C.A.A.F. 2009), this Court considered whether appellant was on notice of the illegality of his taking a videotape with evidence of a fatal aircraft accident from his aircraft, hiding it in his quarters, then giving it to a friend to "get rid of it." This Court held that "common sense support[ed] the conclusion that [appellant] was on notice that his conduct violated the UCMJ." *Id.* In *United States v. Sullivan*, 42 M.J. 360, 366 (C.A.A.F. 1995), this Court similarly applied common sense a s a source of notice, and held that "any reasonable officer," would have known that it is service discrediting to ask strangers of the opposite sex about their sexual activities, using a false name and publishing company as cover.

In this case, the Specification as charged and as defined by its surrounding context gave Appellant ample notice of the criminality of his conduct: (1) he sexually abused EV, which he believed could result in his going to jail; (2) afterwards, he told EV that if EV told anyone what Appellant had done, Appellant and Appellant's wife, both of who were beloved by EV would "go to jail," and (3) the statement was couched in an if-then dichotomy, so as to affect EV's behavior by expressing that there would be a highly undesirable consequence, which could be prevented by the child's silence. As charged, there would be little room for Appellant to be confused or mistaken about whether such conduct was criminal. Like in *Ashby* and *Sullivan*, the conduct in this case is so egregious that any reasonable servicemember would know that it is service discrediting.

"We are inclined to say that such conduct would virtually always be discrediting to the armed forces," the CGCCA wrote in this case, citing *United States v. Davis* 26 M.J. 445, 449 (C.M.A. 1988). J.A. 7. No reasonable servicemember would be confused about whether it was criminal to tell a child that if the child reports *what the member has done* to the child, the servicemember and his wife would go to jail.

While the Specification is best viewed as one that substantially alleges Obstruction of Justice, even if this Court views it instead as a novel specification under Article 134, the Specification survives because it alleges each element of the

offense, includes words of criminality (through the terminal element and implication of wrongfulness), and in any case puts Appellant on notice as to both the criminality of the offense and the specific elements he must defend against. Construing the Specification liberally, this Court should find no error, much less clear or obvious error in the Specification.

IX. Conclusion

The Appellant is entitled to no relief because (1) the change to Charge III, Specification 3 was minor, and did not prejudice his substantial rights, and was therefore correctly permitted by the military judge, and (2) The Specification of the Additional Charge states the offense of Obstructing Justice, or, alternately, alleges another offense under Article 134, is not preempted, and provides adequate notice to Appellant of the criminality of the charged acts. As such, this Court should affirm the findings and sentence in this case.

/S/

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 24(c) because it contains 7,917 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in proportional typeface with Times New Roman 14-point typeface.

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Certificate of Service

I certify that a copy of the foregoing was electronically submitted to the Court on 17 February 2017, and that Appellant's counsel, Mr. William E. Cassara and LT Jason W. Roberts were copied on the email at bill@courtmartial.com and jason.w.roberts@navy.mil.

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