IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **ANDREW J. SHAFRAN** Boatswain's Mate Third Class (E-4) U.S. Coast Guard, Appellant	**REPLY BRIEF ON BEHALF OF APPELLANT** Crim. App. Dkt. No. 1480 USCA Dkt. No. 24-0134/CG

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

Benjamin M. Cook
Lieutenant, U.S. Navy
Appellate Defense Counsel
Appellate Defense Division, Code 45
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7297
benjamin.m.cook8.mil@us.navy.mil
CAAF Bar No. 37999

Kristen R. Bradley
Lieutenant Commander, USCG
Appellate Defense Counsel
1250 10th St SE
Bldg. 200, Suite 1200
Washington, DC 20374
Phone: (202) 685-5591
kristen.r.bradley.mil@us.navy.mil
CAAF Bar No. 37650

Philip D. Cave
CAAF Bar No. 22647
Cave & Freeburg, LLP
1318 Princess St.
Alexandria, VA 22314
(703) 298-9562
mljucmj@court-martial.com

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A. The standard of review for failure to state an offense is *de novo*, and R.C.M. 905(e) specifically exempts this issue from the consequences of forfeiture.

This Court has long held that the "question of whether a specification states an offense is a question of law, which this Court reviews de novo."[1] Despite the Government's urging,[2] recent changes to R.C.M. 905(e) demonstrate this issue is not forfeited if raised for the first time on appeal. Accordingly, this issue is not reviewed under the plain error standard. The standard of review is *de novo*, regardless of when the issue is raised.

The lower court correctly held that a "plain reading of [R.C.M. 905(e)] indicates" it "exempt[s] claims for failure to state an offense" from forfeiture when pleading deadlines are not met.[3] While failure to state an offense is "now waivable [under R.C.M. 907] . . . R.C.M. 905 . . . continues to single it and jurisdiction out for special treatment."[4] Thus, under the new rules, either the issue is waived (and there is no error to review) or it is reviewed *de novo*. In this contested court-

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[1] *See, e.g., United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006); *United States v. Dear*, 40 M.J. 196, 197 (C.A.A.F. 1994)).
[2] *See* Government's Br. at 9-10.
[3] *United States v. Shafran*, No. 1480, slip op. at 6 (C.G. Ct. Crim App. 2024) (unpublished) (citing R.C.M. 905(e) (2019)).
[4] *Id.*

martial, there is no affirmative waiver (nor does the Government argue as such); therefore, under R.C.M. 905(e)'s plain reading, the granted issue is exempted from the consequence of forfeiture.

The Government cites to *United States v. Day* for the opposite proposition: that this claim is forfeited if not raised before the military judge.[5] But this Court did not analyze the new language of R.C.M. 905 in *Day* because "neither party briefed the changes to R.C.M. 905 or raised the issue of whether under it, forfeiture no longer applied."[6] *Day* was also a guilty plea with a "waive all waivable motions" provision and included a unique and unrelated waiver issue that is inapplicable to this case.[7]

Here, Appellant has always argued that the standard of review is *de novo* and the lower court agreed that R.C.M. 905 exempts failure to state a claim from forfeiture.[8] Appellant never affirmatively waived this issue. The standard of review, therefore, is *de novo*. However, because the specification was "first challenged after trial," it is "viewed with greater tolerance than one which was

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[5] Government's Br. at 9 (Nov. 20, 2024) (citing *United States v. Day*, 83 M.J. 53, 58-59 (C.A.A.F. 2022)).
[6] *Shafran*, no. 1480, slip op. at 7.
[7] *Day*, 83 M.J. at 54, 55-57 (declining to find waiver where the military judge incorrectly advised the appellant that failure to state a claim was not waivable).
[8] *See Shafran*, no. 1480, slip op. at 5-7; JA at 156 (Appellant's lower court Assignments of Error and Brief); Appellant's Br. at 9.

attacked before findings and sentence."[9] This is not a plain error review, but instead is the lens through which this Court reads the specification as part of its *de novo* review.

B. The Government charged Appellant's conduct as if it were a *per se* crime; therefore, Appellant could not raise any defense or exception.

The Government seems to acknowledge that Appellant was indeed charged with a *per se* crime.[10] Nonetheless, the Government's argument that "there are not facts in this case that would make Appellant's conduct . . . not prohibited"[11] misses the point. The facts necessary to determine whether Appellant's conduct was permissible under state law were not developed at trial because it would not have been a defense to the charged specification. The fact that those details are absent from the Record says nothing, and certainly lends no support to the Government's argument regarding prejudice.

The Government argues that Appellant "did not argue" he could have met "one of the exceptions under Virginia state law," and that if he had, it would have

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[9] *Turner*, 79 M.J. at 405 (quoting *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)); *see also* Appellant's Br. at 34-35 (discussing the "maximum liberality" standard and Judge Maggs' dissent in *Turner*, 79 M.J. 401, 409 (Maggs, J., dissenting)).

[10] Government's Br. at 15 (describing the terminal element as the only standard under which the criminality of Appellant's conduct would be measured).

[11] Government's Br. at 15.

been "an affirmative defense" that he "could have brought forward during trial."[12] But he could not have done either, and this demonstrates the precise problem. Contrary to the Government's assertions, even if Appellant had argued an exception under Virginia state law, he would still be guilty under the charged specification.

The Government did not have to prove that he committed the conduct wrongfully because it did not charge that he did it wrongfully, and the Military Judge did not instruct the members that they must find he did it wrongfully. The Government charged the conduct in a way where any justification under state law would not be a legal defense—and that is the problem. The Government is incorrect that Appellant could have raised a defense, and that if he had, anything would have, or could have, changed.

The Defense is always limited to a presenting relevant evidence, and due to the way the offense was charged, justifications under state law would not even meet the bare standard of legal relevance. It is unclear why the Government believes a defense under a law it did not charge would even be available. More importantly, in order to do as the Government suggests, the Defense would have to identify and ask the Court to take judicial notice of the very law that the

[12] Government's Br. at 24.

Government had failed to identify or offer into evidence.

Thus, this would shift the burden to the Defense to offer evidence of why the conduct could be wrongful so that it could then defend against it. This would inevitably assist the Government in meeting its burden of proving the terminal element by identifying a law that Appellant had potentially violated (arguably proving the conduct was service discrediting). Yet, if the Government had pled and then proven wrongfulness from the start, this burden-shifting problem would not exist or create a barrier to presenting a defense of this type. In sum, the absence of words of criminality prevented the Defense from presenting a state-law based affirmative defense.

While the Government declaratively states that the "specification explicitly alleged the standard under which the criminality of [Appellant's] conduct would be measured," it provides no explanation or citation for that proposition other than citing to the lower court's similar conclusory statement.[13] But the specification did no such thing.

[13] Government's Br. at 15 (citing *Shafran*, No. 1480, slip op. at 14). The lower court simply concluded the "standard" was the terminal element itself (as opposed to any actual legal standard under a majority of state statutes or customary military law), and it relied on the flawed *Tevelein*/*Farence* concept that the terminal elements are, "without more, words importing criminality." *United States v. Tevelein*, 75 M.J. 708, 711 (C.G. Ct. Crim. App. 2016) (quoting *United States v. Farence*, 57 M.J. 674, 677 (C.G. Ct. Crim. App. 2002) (internal quotation omitted).

The specification reads: "provide . . . alcohol beverages to Ms. E.F., a person under the age of 21."[14] This bare language does nothing to provide the standard applicable to the forbidden conduct, alert the accused to possible defenses, or separate lawful from unlawful conduct.[15] The specification shows the Government's true theory: Appellant's conduct could never be lawful if it was prejudicial to good order and discipline or service discrediting. But this concept violates this Court's admonition that an unenumerated Article 134 offense "must have words of criminality."[16]

This left Appellant with "the burden to affirmatively refute every possible theory."[17] But this is not "how the justice system works."[18] The Government bears the burden to prove guilt beyond a reasonable doubt. The burden is no different with an unenumerated offense under Article 134, and this Court should reinforce its clear guidance in *Vaughan* and *Saunders* that words of criminality must be pled. The Government cannot omit words of criminality to lower its burden.

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[14] Charge Sheet; *see also* Appellant's Br. at 4, 13 (noting that the Government conceded that other language in the specification was not words of criminality).
[15] *United States v. Rapert*, 75 M.J. 164, 165 (C.A.A.F. 2016); *United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011); *United States v. Vaughan*, 58 M.J. 29, 31, 35 (C.A.A.F. 2003).
[16] *Vaughan*, 58 M.J. at 35.
[17] Appellant's Br. at 33-34 (citing *United States v. Wells*, __ M.J. __, No. 23-0219/AF, slip op. at 9 (C.A.A.F. Sep. 24, 2023) (Hardy, J., dissenting)) (internal citation omitted).
[18] *Id.*

C. The similar alcohol-related cases the Government cites all charged words of criminality.

The Government cites to a number of cases involving similar allegations for the proposition that "Appellant had fair notice" that his conduct was criminal.[19] But these citations miss the point. The Government's cited cases charged words of criminality involving some legal standard by which to measure the accused's conduct.[20] These cases stand for the opposite proposition from what the Government argues—if anything, they stand for the fact that the conduct at issue here is not "virtually always" criminal and reinforce this Court's holding that an unenumerated Article 134 offense "must have words of criminality."[21]

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[19] Government's Br. at 11.

[20] *United States v. Tucker*, 78 M.J. 183, 185 (C.A.A.F. 2018) ("unlawfully"); *United States v. Simmons*, ACM 38788, 2016 WL 4191360, slip op. at *6 (A.F. Ct. Crim. App. July 17, 2016) (memorandum op.), *aff'd on other grounds*, 76 M.J. 127 (C.A.A.F. 2017) ("minors who had not attained the legal drinking age of 20"); *United States v. Weis*, No. ARMY 9800134, 2001 WL 36264252, at *1 (Army Ct. Crim. App. Jan. 26, 2001) (an assimilated crime under Clause Three); *United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000) ("in violation of Section 12.05 of the Wisconsin Statutes"). *Staton* is unhelpful because that case does not show the language of the charged specification, the appellant did not raise failure to state an offense, and the court did not analyze the issue of the specification or words of criminality. *United States v. Staton*, 34 M.J. 880 (C.G.C.M.R. 1991).

[21] *Vaughan*, 58 M.J. at 35.

D. Providing alcohol to a civilian under the age of twenty-one is not "virtually always" criminal under customary military law or a *per se* crime under the majority of state statutes, contrary to the Government's cited authorities.

Providing alcohol to a person under the age of twenty-one is not "virtually always"[22] criminal in a majority of state statutes or under customary military law. The authorities to which the Government cites reinforce, rather than contradict, this notion. The Government cites to COMDTINST M6320.5, but this instruction very specifically, and intentionally, *does not* cover either (1) the minimum drinking age for civilians; or (2) providing alcohol to civilians (like Ms. E.F.).[23]

That instruction only applies to the drinking age for *military members* and providing alcohol to *military members*. In fact, even when discussing military members, the instruction only qualifies "provid[ing] alcohol to an underage military member" as an "alcohol incident," which triggers an "incident referral" to treatment, but does not appear to be punitive or criminal.[24] This instruction therefore does not support the Government's argument that the charged conduct here (providing alcohol to a civilian in an off-base, private home) is always

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[22] *United States v. Davis*, 26 M.J. 445, 449 (C.M.A. 1988).
[23] Government's Br. at 11 (citing COMDTINST M6320.5, Ch.A.6.d.(1) (May 2018). That instruction reads: "Any military member who provides alcohol to an underage *military member* must be awarded an [Alcohol Incident]" and "the . . . minimum drinking age is 21 for *all military members*[.]" COMDTINST M6320.5 Ch.A.6.c. and d.(1).(a) (emphasis added).
[24] COMDTINST M6320.5 Ch. A.6.c. and C.1.c.

criminal under "customary military law."

Similarly, the Government cites to a one-paragraph summary from the Federal Trade Commission (FTC) for the proposition that "providing alcohol to someone under the age of twenty-one in all fifty states is prohibited."[25] But a closer read of that FTC website reveals that many of these state statutes have exceptions, including "private locations" and "private residences," similar to the facts of this case. The FTC's website links to another federal government website from the National Institute on Alcohol Abuse and Alcoholism (NIAAA) of the National Institutes of Health (NIH).

The NIH website lists the applicable statutes in all fifty states and the District of Columbia, outlining in a chart the exceptions by category and location, and the affirmative defenses.[26] Even where the chart does not list one of the common exceptions, many of these statutes have their own state-level

[25] Government's Br. at 16, n. 3 (citing Federal Trade Commission Consumer Advice, Alcohol Laws by State (Sept 2013), https://consumer.ftc.gov/articles/0388-alcohol-laws-state, last visited Nov 11, 2024).

[26] Alcohol Policy Information System, NIAA, NIH, Underage Drinking, Furnishing Alcohol to Minors (Jan. 2023), https://alcoholpolicy.niaaa.nih.gov/apis-policy-topics/furnishing-alcohol-to-minors/40, last visited Nov. 26, 2024.

idiosyncrasies and other exceptions.[27] Should this Court conduct a review of applicable state statutes as it did in *Vaughan* and *Saunders*,[28] Appellant believes this resource would be particularly helpful.

In conducting such a review, this Court would see that the majority of these state statutes contain various particularities, exceptions, qualifications, conditions, and defenses, unique to each state. In the aggregate, these statutes *do not* stand for the proposition that this alleged conduct is a *per se* crime for which there is never a defense.

The Government also cites to 23 U.S.C. § 158 for the proposition that "the legal drinking age in all fifty states has been twenty-one" since the 1980s.[29] But this statute, which is actually a federal funding statute tied to transportation funds (and not a criminal statute), specifically addresses "the purchase or *public possession*" of alcohol—which, again, is not at issue here (conduct in a private

[27] *See, e.g.*, D.C. Code § 25–785 (exception for lawful employment responsibilities); New Hampshire Revised Statutes § 179:5 (listing three defenses, such as "other facts that reasonably indicated at the time of sale that the purchaser was at least the required age"); New York Alcohol Beverage Control Act § 65-C (exceptions for students required to taste alcoholic beverages pursuant to a curriculum or when provided by a parent or guardian).
[28] *Vaughan*, 58 M.J. at 25 (analyzing thirty-three state child neglect statutes); *United States v. Saunders*, 59 M.J. 1, 5, 7 (C.A.A.F. 2003) (analyzing the Georgia and federal interstate stalking statutes).
[29] Government's Br. at 16, n.3.

home).[30]

As the lower court's dissenting judges aptly noted, courts and the President have required the Government to plead "wrongfully" for child pornography and controlled substances offenses.[31] This Court has stated that an unenumerated Article 134 offense "must have words of criminality."[32] The relatively minor, non-military conduct of providing alcohol to an almost-twenty-one year old civilian in an off-base home cannot possibly be more obviously and more "always"[33] criminal when compared to those much more serious offenses. Notably, those offenses contain far fewer and more narrow exceptions than this conduct—essentially, the only defenses are for law enforcement or medical purposes, accidental viewing of child pornography, or innocent ingestion of controlled substances. But words of criminality must still be pled there, and so too here.[34]

E. That the members brought their outside knowledge of the law into deliberations reflects prejudice, rather than a lack of prejudice.

The Government posits that "providing alcohol to someone under the age of twenty-one in all fifty states is prohibited . . . is common knowledge that the

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[30] 23 U.S.C. § 158 (emphasis added).
[31] *Shafran*, No. 1480, slip op. at 42 (Brubaker, J. dissenting) (citing *Manual for Courts-Martial* (2019) [*MCM* 2019], pt. IV, para 50.b.(1), c.(2), c.(5)).
[32] *Vaughan*, 58 M.J. at 35.
[33] *Davis*, 26 M.J. at 449.
[34] *Vaughan*, 58 M.J. at 35.

members would have known."[35] This Government argument is exactly the problem, and is by no means a curative solution. "Members are not and should not be charged with independent knowledge of the law."[36] Rather, the military judge has a *sua sponte* duty to instruct on the law and "give the members appropriate instructions on the findings," along with "[s]uch other explanations, descriptions, or directions as may be necessary."[37]

If a member believed they had any knowledge of a state law regarding the legal drinking age, they should have been instructed to disregard that perceived knowledge and follow the judge's instructions as to the applicable law. To permit the members to convict based on their perceived knowledge of state laws sets an incredibly dangerous precedent and is at odds with even the most fundamental legal principles surrounding jury trials.

Here, the Government never pled words of criminality containing a standard applicable to forbidden conduct, separating wrongful conduct from lawful conduct, or alerting to possible defenses.[38] Then, at the end of the trial after the conclusion of evidence, the Military Judge, on his own, inserted ambiguous hints about that criminality into the instructions—adding the phrases "minor" and "legal drinking

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[35] Government's Br. at 16, n.3.
[36] *United States v. Woods*, 74 M.J. 238, 244 (C.A.A.F. 2015).
[37] R.C.M. 920(e)(7) (2019).
[38] *Rapert*, 75 M.J. at 165; *Fosler*, 70 M.J. 230-31; *Vaughan*, 58 M.J. at 31, 35.

age" when they were never on the charge sheet or part of the Government's case.[39] At the instructions stage, in this contested members court-martial, those erroneous instructions dealt a final, fatal blow to Appellant's due process.

The instruction encouraged the members to import criminality into a charge where the Government had charged none. It allowed the members to convict Appellant on something *for which he was not charged* and for which the *Government never proved*[40]—namely, that the conduct violated some unnamed law. And the members likely did so, as the Government concedes, by inserting their "common knowledge" of their belief of the law. This is highly problematic for the military justice system writ large, and it was especially prejudicial for Appellant.

F. Unlike in *United States v. Turner,* the Record is not replete with examples where the Defense demonstrated its knowledge of the alleged criminality of the charge. The Military Judge's instruction reflects prejudice, rather than a lack of prejudice.

The Defense was never on notice of the charged criminality other than that the Government charged the conduct as if it were a *per se* crime. While the

[39] Appellant's Br. at 6; JA at 395-96.

[40] This failure of proof is jarring given that the Government did not even make the simple effort to request judicial notice of an applicable state law. If the Government had actually charged the theory upon which the judge instructed, this failure of proof would have left Appellant's conviction legally insufficient.

Government points to three items in the Record where the concept of a "legal drinking age" comes up, one is inapplicable and the other two are not sufficient under *Turner*.[41] The first item is the Military Judge's *ex post facto* instruction that served as a fourth-quarter judicial attempt to remedy a Government charging failure. Rather than demonstrating a lack of prejudice, this instruction—parts of which the Defense objected to—was prejudicial to Appellant rather than curing any charging or notice error.[42]

The Government's other references are to two benign questions Trial Defense Counsel asked Seaman V.P. and Ms. E.F. They asked Seaman V.P. if he was aware of any law that makes it impermissible to have alcohol in his house if he was "of age."[43] Here, the question did not even relate to the concept of serving alcohol to a person under the age of twenty-one; rather, it related to having alcohol in one's home if the individuals themselves are twenty-one—which both Seaman V.P. and Appellant were. It is not on point to the issue at play in this case.

The question to Ms. E.F. likewise does not demonstrate the Defense was defending against the charge as if it had the required notice. The Defense asked Ms. E.F. to confirm that she did not tell the Appellant she was not legally old

[41] Government's Br. at 16.
[42] JA at 389-394.
[43] Government's Br. at 16.

enough to drink. This question goes to the issue of *mens rea*, a defect that the Defense had earlier raised. This question to Ms. E.F. was targeted at defending against the *mens rea* of recklessness and Appellant's potential disregard for Ms. E.F.'s age (even though the Defense had objected to the pre-arraignment changes to the charge sheet to that affect).[44]

Ms. E.F.'s answer to this question may potentially affect the issue of *mens rea*, but it would not affect other potential defenses or exceptions or provide any standard applicable to the forbidden conduct. In other words, even though the Government also failed to plead recklessness and the Military Judge attempted to cure that error just before arraignment, the Government still pled the conduct as if it were a *per se* crime that Appellant provided alcohol to someone under the age of twenty-one, albeit recklessly.

That the Defense cross-examined Ms. E.F. on this issue may help the Government's argument on its failure to plead a *mens rea*. The Defense was obviously on notice as to the *mens rea* related to this offense, because the Defense raised it and the Military Judge ruled on it. But regarding the words of criminality—which is a concept separate from, but tangentially related to, *mens*

[44] *See* JA at 339, 420-441.

rea[45]—this single question to Ms. E.F. does not move the needle.[46]

Regardless, when compared to the laundry list of "examples" this Court highlighted in *Turner*, a single cross-examination question on an ancillary issue cannot save a plainly defective specification.[47]

G. The Government's continued reliance on the inherently flawed *Tevelein* decision must be addressed.

The Government's and lower court's foundational theory that the words of the terminal element "are, without more, words importing criminality sufficient to support a specification alleging acts that would not otherwise constitute a crime" originates from an erroneous citation to the Court of Military Appeal's decision in

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[45] *See Fosler*, 70 M.J. at 230-31. Additionally, the lack of alleged criminality still impacts the Government's burden to prove that Appellant acted recklessly. To act recklessly, he had to consciously disregard a known risk. But what is the *risk*? The risk is that he violated some state law by giving Ms. E.F. a drink in his private home—but the Government never pled or proved that such a law existed or that he wrongfully and recklessly violated it.

[46] *Rapert*, 75 M.J. at 165 (separating lawful conduct from unlawful conduct); *Fosler*, 70 M.J. 230-31 (alerting to possible defenses); *Vaughan*, 58 M.J. at 31, 35 (providing a standard applicable to the forbidden conduct).

[47] *Turner*, 79 M.J. at 407-08. In *Turner*, this Court outlined seven critical places in the record where the Government's theory was discussed, including several that originated from the defense at pre-trial stages, reflecting the defense knew and was defending against the precise standard applicable to the forbidden conduct, unlawful attempted murder. *Id.*

United States v. Brice.[48] This Court should bring the Coast Guard in line with C.A.A.F. precedent (e.g., *Fosler*) and reject this flawed line of cases by setting aside this specification.

The specification at issue in *Brice* was an attempt to sell marijuana charged under Article 80.[49] The Court in *Brice* explained that the underlying conduct for the attempt specification was selling marijuana under Article 134, and that "[w]here an act is not in itself an offense, being made so only by statute, regulations, or custom, words importing criminality are a requirement and, if lacking, the specification is deficient."[50]

But the attempt specification in *Brice* did not plead the terminal element and the entire opinion contains no reference to, or mention of, either terminal element (prejudice to good order and discipline or discredit of the service).[51] It is unclear

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[48] *Tevelein*, 75 M.J. at 711 (quoting *United States v. Farence*, 57 M.J. 674, 677 (C.G. Ct. Crim. App. 2002) (internal quotation omitted). For this apparent proposition, *Farence* cited to *Brice*. *Farence*, 57 M.J. at 677 (citing *United States v. Brice*, 38 C.M.R. 134 (1967)).

[49] Appellant's Br. at 30 incorrectly referred to this specification as an Article 134 specification rather than an Article 80 specification. Appellant wants to clarify this for the Court. However, Appellant's point, which remains the same, is that the specification (an Article 80 attempt offense for underlying conduct under Article 134) did not plead the terminal element, and therefore, the holding in *Brice* cannot, and did not, stand for the proposition that the terminal element alone, imports words of criminality.

[50] *Brice*, 38 C.M.R. at 138.

[51] *Id.*

how the lower court in *Farence* read *Brice* for the proposition that the terminal element, alone, imports criminality into the specification. That concept is not remotely analyzed, let alone held, by the *Brice* court, and appears to have been created out of whole cloth in *Farence*.

Further, the conclusion from *Farence* and *Tevelin* that the terminal element "import[s]" words of criminality should have met its end after this Court decided *Fosler*. Initially, the lower court properly interpreted *Fosler* for this question in *United States v. Hughey* by stating, "Surely the converse is also true: a terminal element does not imply the word 'wrongfully.'"[52] But it then overturned itself in *Tevelein*.[53] And now, the Government approvingly cites *Tevelein* and still makes the same, flawed legal argument.[54]

Brice did not, and does not, stand for the proposition that the lower court purported it stood for in *Farence*. This flawed rationale encouraged the facially defective specification in this case, causing unnecessary litigation, confusion, and prejudice to infect this and other courts-martial. This Court's mandate and the

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[52] *United States v. Hughey*, 72 M.J. 809, 814 (C.G. Ct. Crim. App. 2013), *overruled by Tevelein*, 75 M.J. at 711.
[53] *Tevelein*, 75 M.J. at 711 (quoting *United States v. Farence*, 57 M.J. 674, 677 (C.G. Ct. Crim. App. 2002)).
[54] *See* Government's Br. at 15 (arguing that the "standard under which the criminality of [Appellant's] conduct would be measured" was the terminal element itself); *see also* Government's Br. at 12, 14, 19 (citing *Tevelein*, 75 M.J. at 710-11).

President's guidance on the issue has been abundantly clear—and Appellant asks the Court to settle the issue by reaffirming that an unenumerated Article 134 specification "must have words of criminality,"[55] and that the terminal element and words of criminality are "distinct."[56]

H. The Government's saving argument on prejudice cannot be that it does not bear the burden to prove what this Court has required it to plead.

The pleading failure prejudiced Appellant because it shifted the burden to him to raise any possible evidence, law, custom, or argument against theories of criminal liabilities that were not charged.[57] The Government posits that Appellant "provides no legal support for this notion that if unlawfully or wrongfully had been alleged in the specification that the Government would then have been required to present some type of evidence, law, custom, or argument on the legal significance of the age of twenty-one."[58] This argument is, again, indicative of the problem and not a curative solution.

In *Rapert* (an enumerated Article 134 offense, communicating a threat), this Court explained that the Government carried the burden to prove that the

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[55] *Vaughan*, 58 M.J. at 35.
[56] *Fosler*, 70 M.J. at 230-31.
[57] *See* Appellant's Br. at 30-38.
[58] Government's Br. at 26.

communication was wrongful.[59] Under Article 112a, if raised, the Government bears the burden to prove wrongfulness.[60] In *United States v. Gaskins*, this Court explained the appellant "was never given notice of the theory of criminality the Government pursued, and no evidence was introduced on any theory," therefore it "[could not] say that the errors in the Article 134, UCMJ specification were cured."[61] In *United States v. Torres*, this Court explained "[a]t trial the burden always was required to rest with *the Government* to prove beyond a reasonable doubt that Appellant had committed each element of the offense," including that appellant's "actions were voluntary, and hence, 'unlawful.'"[62]

The Government bore the burden to prove what this Court required it to plead: criminality.[63] Here the Government clearly did not plead any words of criminality. The Government neither presented any evidence on the issue of criminality nor did it present to the fact-finder or the Military Judge any legal

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[59] *Rapert*, 75 M.J. at 166.
[60] *MCM* 2019, pt. IV, para 50.c.(5).
[61] *United States v. Gaskins*, 72 M.J. 225, 235 (C.A.A.F. 2013) (internal citations omitted).
[62] *United States v. Torres*, 74 M.J. 154, 157 (C.A.A.F. 2015) (quoting Article 128(a), UCMJ) (emphasis in original); *see also United States v. Gonzalez*, No. ARMY 20150080, 2017 CCA LEXIS 62, at *7 (A. Ct. Crim. App. Jan. 31, 2017) (unpublished) ("To prevail at trial, the government bears [the] burden of proving its theory of criminality beyond a reasonable doubt. The proof must be such as to exclude every fair and rational hypothesis except that of guilt").
[63] *See Vaughan*, 58 M.J. at 35.

source for the standard applicable to the apparently forbidden conduct. The Military Judge, *sua sponte*, inserted undefined references regarding criminality into the findings instructions after the presentation of evidence.

The Government offers that it was the Defense's burden to fix this issue prior to, or during the trial, by identifying the source of law, custom, or regulation itself, and presenting it to the members and the Military Judge. In doing so, the Defense would likely have invited relevance objections where the Government would inevitably argue that those regulations, customs, or laws were not the ones it charged; or even worse, the Defense would have necessarily assisted the Government in proving the terminal element by identifying a potential source of law the Appellant may have violated. This is not, and cannot be, "how the justice system works."[64]

Conclusion

Following in the footsteps of *Fosler*'s unmistakable direction that the terminal element must be pled in clause 1 or 2 Article 134, UCMJ specifications, this Court should similarly and clearly reaffirm that for unenumerated Article 134 offenses, the Government must plead words of criminality.[65] Just as words of

[64] *Wells*, __ M.J. __, No. 23-0219/AF, slip op. at 9 (C.A.A.F. Sep. 24, 2023) (Hardy, J., dissenting)) (internal citation omitted).
[65] *Vaughan*, 58 M.J. at 35.

criminality do not imply the terminal element,[66] pleading the terminal element does not import words of criminality into the specification. Thus, the specification under Charge II fails to state an offense.

Relief Requested

Appellant respectfully requests that this Court set aside the findings of guilty as to Charge II and its sole specification, dismiss that charge with prejudice, and set aside the sentence.

Benjamin M. Cook
Lieutenant, U.S. Navy
Appellate Defense Counsel
Appellate Defense Division, Code 45
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7297
benjamin.m.cook8.mil@us.navy.mil
CAAF Bar No. 37999

Kristen R. Bradley
Lieutenant Commander, USCG
Appellate Defense Counsel
1250 10th St SE
Bldg 200, Suite 1200
Washington, DC 20374
Phone: (202) 685-5591
kristen.r.bradley.mil@us.navy.mil
CAAF Bar No. 37650

Philip D. Cave
CAAF Bar No. 22647
Cave & Freeburg, LLP
1318 Princess St.
Alexandria, VA 22314
(703) 298-9562
mljucmj@court-martial.com

[66] *Fosler*, 70 M.J. at 230-31.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and opposing counsel on December 2, 2024.

Benjamin M. Cook
Lieutenant, U.S. Navy
Appellate Defense Counsel
Appellate Defense Division, Code 45
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7297
benjamin.m.cook8.mil@us.navy.mil
CAAF Bar No. 37999

Kristen R. Bradley
Lieutenant Commander, USCG
Appellate Defense Counsel
1250 10th St SE
Bldg 200, Suite 1200
Washington, DC 20374
Phone: (202) 685-5591
kristen.r.bradley.mil@us.navy.mil
CAAF Bar No. 37650

Philip D. Cave
CAAF Bar No. 22647
Cave & Freeburg, LLP
1318 Princess St.
Alexandria, VA 22314
(703) 298-9562
mljucmj@court-martial.com

Certificate of Compliance with Rule 24(b)

This brief complies with the type-volume limitations of Rule 24(b) because it contains 6,262 words and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

Benjamin M. Cook
Lieutenant, U.S. Navy
Appellate Defense Counsel
Appellate Defense Division, Code 45
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7297
benjamin.m.cook8.mil@us.navy.mil
CAAF Bar No. 37999

Kristen R. Bradley
Lieutenant Commander, USCG
Appellate Defense Counsel
1250 10th St SE
Bldg 200, Suite 1200
Washington, DC 20374
Phone: (202) 685-5591
kristen.r.bradley.mil@us.navy.mil
CAAF Bar No. 37650

Philip D. Cave
CAAF Bar No. 22647
Cave & Freeburg, LLP
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Alexandria, VA 22314
(703) 298-9562
mljucmj@court-martial.com