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*	BRIEF ON BEHALF OF APPELLEE Crim. App. Dkt. No. 1480 USCA Dkt. No. 24-0134/CG

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

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Issue Presented

DOES THE SPECIFICATION OF CHARGE II, ALLEGING A VIOLATION OF ARTICLE 134, UCMJ (PROVIDING SEVERAL ALCOHOLIC BEVERAGES TO A PERSON UNDER THE AGE OF 21), FAIL TO STATE AN OFFENSE BECAUSE IT FAILS TO ALLEGE WORDS OF CRIMINALITY?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad conduct discharge. (JA 419.) The Coast Guard Court of Criminal Appeals (CGCCA) exercised jurisdiction over this case pursuant to Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3). This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A panel of members with enlisted representation convicted Appellant, contrary to his pleas, of one specification of violating Article 120, UCMJ, 10 U.S.C. § 920 (abusive sexual contact without the consent of the other person), and one specification of violating Article 134, UCMJ, 10 U.S.C. § 934 (providing alcoholic beverages to a person under the age of twenty-one). (JA 453.) Consistent with his plea, the panel acquitted him of one specification of violating Article 120 (sexual assault without the consent of the other person). (JA 453.) On 18 September 2021, the members sentenced Appellant to 180 days of confinement,

reduction to E-1, and a bad conduct discharge. (JA 451–454.) The convening authority approved the sentence as adjudged. (JA 452.)

The CGCCA affirmed the findings of guilty and the sentence. (JA 029.) The CGCCA held that the Article 134 specification alleged both the terminal element and "conduct that is generally a crime in all fifty states and the District of Columbia." (JA 023.) The specification was sufficient because it "provided [Appellant] notice of the nature of the offense alleged and what he needed to defend against either expressly or by necessary implication." (JA 023.) Specifically, the CGCCA found that the specification alleged "a crime by alleging conduct 'which is or generally has been recognized as illegal.'" (JA 010.) The CGCCA rejected a formalistic requirement to always include unlawful or wrongful in an Article 134 specification specifically when the alleged conduct is generally recognized as criminal. (JA 012.) "This legal conclusion stems from logic and common sense—if conduct is generally recognized as criminal, the addition of words of criminality add nothing to the specification as the conduct itself, as described in the specification, is criminal and thereby established 'the required notice of what an accused must defend against.'" (JA 012.) The CGCCA also noted that Appellant conceded he knew his conduct could be criminalized under Article 134. (JA 010.)

On 20 September 2024, this Court granted Appellant's petition for review.

Statement of Facts

A. Chronology of Events.

On or about 6 May 2020, Ms. E.F. met Appellant for the first time while working at a retail store in Virginia. (JA 348–49.) She rejected his request for her phone number. (JA 350.) The next time they communicated was on Tinder. (JA 350.) Ms. E.F. used Tinder to make friends because she moved regularly due to her father's Air Force career and had recently moved to Virginia. (JA 347, 350, 353.)

To match with someone on Tinder and start a conversation, both individuals must swipe right on each other's profiles. (JA 350.) Appellant swiped right on Ms. E.F.'s profile first. (JA 351.) Ms. E.F.'s Tinder profile accurately listed her age as twenty years old. (JA 351.) Ms. E.F. testified that "[d]efinitely, during the first interaction [over Tinder] . . . he knew my age." (JA 366.) When asked "[d]id you ever tell him that you were 20[,]" Ms. E.F. testified "yes" and that she had mentioned it as a reason why she would not drink. (JA 376.)

Appellant asked Ms. E.F. to come over to his house multiple times. (JA 352.) On 11 May 2020, Ms. E.F. eventually accepted an invitation to Appellant's house. (JA 351, 353.) Ms. E.F. testified that she arrived at Appellant's house around 8:30pm and was first shown around the house. (JA 356–358.) On the second floor, she saw Appellant's roommate, Seaman V.P., and a few other visiting

servicemembers in a small bedroom. (JA 003, 360–61.) Appellant's roommate and a few of the men were in the Coast Guard while one was in the Air Force. (JA 003, 361.)

Eventually, Seaman V.P. came to ask if Ms. E.F. and Appellant wanted any alcohol because he was going to go buy some, but Ms. E.F. declined the offer. (JA 362.) When Seaman V.P. returned, Ms. E.F. and Appellant went downstairs. (JA 363.) Appellant pulled out a glass bottle of alcohol from the fridge. (JA 363–65.) Ms. E.F. testified that she "believe[d] it was [Appellant]" who brought out the alcohol from the fridge. (JA 364.) Ms. E.F. testified that Appellant suggested they do shots. (JA 373.)

Appellant and Seaman V.P. then took out shot glasses. (JA 365.) Ms. E.F. initially declined the alcohol because she had to go home, and it was getting late. (JA 365.) Ms. E.F. testified that Appellant and Seaman V.P. nonetheless pressured her into taking shots with them. (JA 365.) Ms. E.F. felt "very uncomfortable" and shook her head denoting she did not want to take any. (JA 365.) They tried to "hype [her] up" into taking the shots and told her to "come on" and "do it." (JA 366.) She then "felt obligated" and took a shot with them. (JA 365.) Appellant and Seaman V.P. demonstrated to Ms. E.F. how to take a shot. (JA 368.)

Appellant and Seaman V.P. then pressured Ms. E.F. into taking two more shots even as she repeated her concern that she had to drive home. (JA 365.) Ms.

E.F. felt "nervous" and did not want to take more shots, but they made her feel obligated to continue. (JA 365.) In total, she consumed three shots taken about a minute apart from each other. (JA 365–66.) Prior to this evening, Ms. E.F. had never consumed alcohol. (JA 366.) Ms. E.F. testified that "[she] never wanted to drink alcohol." (JA 366.)

After her third shot, Seaman V.P. left for his room and Ms. E.F. testified that she began to feel the alcohol affect her and experienced "vertigo." (JA 369–70.) She did not have anything else to drink and Appellant never provided her food as he had promised. (JA 353–54, 370.) Appellant and Ms. E.F. then walked his dog together and during the walk Ms. E.F. felt fuzzy and her vertigo worsened to the point that Appellant grabbed her arm and walked her back to his house. (JA 371–72.) Ms. E.F. testified that she stayed at Appellant's house because she did not want to leave until she felt sober to drive. (JA 377, 379.)

B. Seaman V.P.'s Testimony.

Appellant was Seaman V.P.'s supervisor and roommate. (JA 003.) Seaman V.P. testified that he would provide alcohol to guests if they were of age and knew that giving alcohol to a minor would get him in trouble. (JA 381, 385.) During Seaman V.P.'s cross-examination, the defense asked whether Seaman V.P. thought it was okay to have alcohol in the house because he was twenty-one which he answered affirmatively. (JA 387.)

C. Court-martial Events.

One of the charges the Government alleged was a violation of Article 134 for providing alcoholic beverages to a person under the age of twenty-one. Specifically, Charge II stated:

> In that BM3 Andrew Shafran, U.S. Coast Guard, on active duty, did, at or near Newport News, VA, on or about 12 May 2020, provide several alcoholic beverages to Ms. E.F., a person under the age of 21, in the presence of other junior enlisted members of the U.S. Coast Guard and U.S. Air Force, and that said conduct was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

(JA 335.)

On 15 July 2021, prior to the start of trial, defense counsel filed a motion requesting that the military judge instruct the members that the requisite mens rea for the Article 134 offense was that the accused knew he was providing alcohol to a person under the age of twenty-one. (JA 420–22.) On 22 July 2021, the Government in their opposition motion argued that this Court in *United States v. Tucker*, 78 M.J. 183 (C.A.A.F. 2018) established recklessness as the appropriate mens rea and requested the military judge provide an instruction that the "accused consciously disregarded a known risk that Ms. E.F. was not 21 years old and yet provided alcohol to her anyways . . . ." (JA 423, 425.)

Prior to arraignment, the Government struck the language "whom he knew to be" from Charge II. (JA 339, 432.) On 9 August 2021, the military judge ruled

that this was a minor change to the specification and held he would instruct the panel members that the proper mens rea was recklessness. (JA 432.) On 1 September 2021, the defense requested that the court instruct the members on the requisite mens rea of recklessness. (JA 442.)

The military judge discussed the mens rea instruction for Charge II with counsel stating:

> So the first thing we talked about was the mens rea . . . analysis regarding the specification. [Counsel] and I agreed pretty quickly that, under United States v. Tucker, as we talked about in our pre-trial litigation in this case[,] [t]he appropriate mens rea was recklessness. So we agreed to add language straight from the Tucker opinion as to the recklessness standard, as well as the defense of an honest misunderstanding of the age of the person. So counsel agreed on that.

(JA 389–90.) Once the final findings instruction was completed, the military judge ensured counsel was able to review the instructions and specifically asked defense counsel "just to be absolutely clear, you have no motions. Correct?" (JA 393–94.) Defense counsel responded "[t]hat's correct." (JA 394.)

The military judge included the following in the instructions to the panel members: "If you are convinced beyond a reasonable doubt that the accused consciously disregarded a known risk that Ms. [E.F.] was under the age of 21 years old and yet provided several alcoholic beverages to her, that information would satisfy the first element of the offense." (JA 396, 445.) The military judge reiterated to the panel members, "just to be clear, if you found that the government

didn't prove that the accused was reckless in knowing [Ms. E.F.'s] age, if they didn't meet that element, it would still be a finding of not guilty." (JA 417.)

During closing argument, the defense asked the panel members, "was [Appellant] reckless?" and "[w]as there a conscious disregard for her age?" (JA 412.) The defense also argued:

> She's turning 21 in a month. How old do you think she held herself? And is it really reasonable to expect a 21 year old to consciously ask everyone who comes over to his house? Are they in fact 20 plus. He's supposed to check IDs at the door. There's no evidence the government has been able to present that proves that he consciously disregarded.

(JA 412.)

Summary of Argument

The specification of Charge II is viewed with maximum liberality and liberally construed in favor of validity since Appellant failed to object to the specification during trial. As the specification alleges all of the necessary elements of an Article 134 offense, the specification states an offense. Additionally, the facts alleged in the specification are widely recognized as prohibited in the military and civilian context. As such, the specification necessarily implies words of criminality. Based on the Record, even if there was error, Appellant was not prejudiced as the Record shows Appellant understood what he had to defend against and appropriately argued various defenses that were available to him.

Argument

THE SPECIFICATION OF CHARGE II STATES AN OFFENSE.

A. This Court reviews for plain error because Appellant did not raise failure to state an offense for the specification of Charge II at trial.

When not raised at trial, this Court reviews claims for failure to state an offense for plain error.[1] *United States v. Day*, 83 M.J. 53, 58–59 (C.A.A.F. 2022);

[1] The CGCCA held that the "revised R.C.M. 905 exempts claims of failure to state an offense from the consequences of forfeiture if not raised during trial" and accordingly reviewed whether the specification states an offense de novo. (JA 007.) This Court, however, in *United States v. Day* reviewed for plain error when the 2019 version of Rule for Courts-Martial (R.C.M.) 905 seemingly applied. *Day*, 83 M.J. at 58–59; *see United States v. Hamilton*, 82 M.J. 530, 533 (Army Ct. Crim. App. 2022), *review denied*, 82 M.J. 423 (C.A.A.F. 2022) (applying plain error to a claim for failure to state an offense when the offense occurred in 2019); *United States v. Taylor*, No. ACM 40371, 2024 WL 3597025, at *16 (A.F. Ct. Crim. App. July 31, 2024) (applying plain error to a claim that the specification was defective); *United States v. Helems*, No. 202100278, 2023 WL 1879324, at *2 (N-M. Ct. Crim. App. Feb. 10, 2023) (applying plain error to a failure to a state an offense claim).

R.C.M. 905(e) does not expressly state that failure to state an offense is not forfeitable and only explicitly states it does not have to be raised before adjournment. R.C.M. 905(e) ("Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case. Failure to raise such other motions, requests, defenses, or objections, shall constitute forfeiture, absent an affirmative waiver."). In light of R.C.M. 907(b)(2)(E) which makes failure to state an offense waivable, the language in R.C.M. 905(e) serves to make this waivable ground not automatic. *See United States v. Macko*, 82 M.J. 501, 504 (N-M. Ct. Crim. App. 2021). Based on Supreme Court case law and this Court's precedent, this Court should apply plain error to a claim for failure to state an offense when not raised at trial. *See United States v. Cotton*, 535 U.S. 625, 631 (2002) (applying

United States v. Oliver, 76 M.J. 271, 274–75 (C.A.A.F. 2017); *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013); *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012); *United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F. 2012).

Appellant did not raise at trial that Charge II was defective for failure to state an offense and therefore is only entitled to plain error review. Under plain error, "Appellant 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." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citation omitted). "'[T]he failure to establish any one of the prongs is fatal to a plain error claim.'" *United States v. Feliciano*, 76 M.J. 237, 240 (C.A.A.F. 2017) (quoting *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006)).

B. Charge II states an offense because it alleges the required elements of an Article 134 offense and words of criminality are necessarily implied.

The specification of Charge II states an offense because it expressly alleges all of the necessary elements of an Article 134 offense. Additionally, the specification necessarily implies words of criminality because the facts alleged in

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the plain error test when examining a claim that an indictment was defective); *see Ballan*, 71 M.J. at 34 (citing to *Cotton* and *United States v. Sinks*, 473 F.3d 1315, 1320–21 (10th Cir. 2007) for plain error review); see *also United States v. Sanchez*, 81 M.J. 501, 506 (Army Ct. Crim. App. 2021) ("R.C.M. 905(e)(2) mirrors the pre-2016 R.C.M. 907 by grouping 'failure to state an offense' claims with jurisdictional claims, arguably in contravention of *Cotton*.").

the specification are generally recognized as proscribed. "The military is a notice pleading jurisdiction."[2] *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (citation omitted). A charge and specification provide sufficient notice if

> it 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 for a similar

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[2] Servicemembers must have "fair notice" that their conduct is punishable under the UCMJ. *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998) (quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974)). The *Manual for Courts-Martial*, federal law, state law, military case law, military custom and usage, and military regulations are potential sources of fair notice. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003).

Appellant had fair notice based on federal law, state law, and case law that his conduct was criminal. (JA 010, 116, 129); Va. Code Ann. § 4.1-306A1 (2011) (prohibiting providing alcohol to a person under the age of twenty-one); *see Tucker*, 78 M.J. at 184 (providing alcohol to an underage individual in violation of Article 134); *United States v. Simmons*, No. ACM 38788, 2016 WL 4191360, at *1 (A.F. Ct. Crim. App. July 7, 2016) (providing alcohol to a minor), *aff'd*, (C.A.A.F. Feb. 13, 2017); *United States v. Weis*, No. ARMY 9800134, 2001 WL 36264252, at *1 (Army Ct. Crim. App. Jan. 26, 2001) (same); *United States v. Nygren*, 53 M.J. 716, 718 (C.G. Ct. Crim. App. 2000) (violating "Wisconsin law by openly drinking beer in the civilian community" while under the age of twenty-one); *United States v. Staton*, 34 M.J. 880, 880 (C.G.C.M.R. 1991) (furnishing alcohol to a person under the age of twenty-one). The CGCCA noted that "Appellant concede[d] he knew his conduct could be criminalized under Article 134, *i.e.*, he was on notice that the conduct alleged in the specification was generally recognized as criminal." (JA 010–011.)

The bright line rule that the minimum drinking age is twenty-one is also reflected in related Coast Guard regulations of which Appellant is assumed to be aware. *See* Coast Guard Substance Abuse Prevention and Treatment Manual, COMDTINST M6320.5, Ch.A.6.d.(1) (May 2018) (setting the minimum drinking age as twenty-one for active duty members not on approved leave); *see Vaughan*, 58 M.J. at 33 (stating "[w]hile DOD and service regulations are not the same as UCMJ offenses, this Court may take notice of such regulations as evidence of notice through custom of an Article 134 offense").

> offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

United States v. Tevelein, 75 M.J. 708, 710 (C.G. Ct. Crim. App. 2016) (citing *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)).

"Criminal conduct involves an act, usually by the accused, mens rea and appropriate notice." *United States v. McDivitt,* 41 M.J. 442, 443 (C.A.A.F. 1995). Under the Sixth Amendment, an accused must "be informed of the nature and cause of the accusation against him." *United States v. Lopez*, No. ACM 40161, 2023 WL 2401185, at *9 (A.F. Ct. Crim. App. Mar. 7, 2023) (quoting *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020)). "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3); *see Fosler*, 70 M.J. at 232. This gives the accused notice of the charges he must defend and "protect[s] him against double jeopardy." *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (citing *Hamling v. United States*, 418 U.S. 87 (1974)); *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). Courts "look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Humphries,* 71 M.J. at 215–16 (citations omitted); *see United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citation omitted) ("If, however, a specification has not been challenged prior to findings and sentence, the sufficiency of the specification may be sustained 'if the necessary facts appear in

any form or by fair construction can be found within the terms of the specification.'"); *Hamilton*, 82 M.J. at 534 ("[W]e are not only confined to the text of the specification, we next look to the record to see if the specification's wording . . . necessarily implied [the elements] and therefore gave appellant sufficient notice of the offense he must defend himself against.").

Article 134 is "[i]ntended to serve as a means for a military commander to meet and enforce the exigencies of military discipline" and "is an expansive, flexible, and amorphous prosecutorial tool within the military justice system with no analog in Title 18." *United States v. Rice*, 80 M.J. 36, 41 (C.A.A.F. 2020). "It is well settled that conduct that is not specifically listed in the *MCM* may be prosecuted under Article 134." *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003) (citing *Vaughan*, 58 M.J. at 31). "To punish conduct that is to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces, the government must establish (1) a predicate act or failure to act, and (2) the terminal element." *United States v. Gaskins*, 72 M.J. 225, 233 (C.A.A.F. 2013) (citing *United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008)).

"Neither the statutory text nor the MCM contains a requirement that the word unlawful or wrongful be included in the specification." (JA 013); Article 134, UCMJ; *Manual for Courts-Martial*, United States (2019 ed.) (*MCM*), pt. IV, para. 91. The *MCM* instead mentions "words indicating criminality" stating they are

only required when the alleged act is not itself an offense. R.C.M. 307(c)(3) Discussion (G)(ii). Also, due process, notice pleading, the statutory and *MCM* text, and military case law "all support the position that an Article 134 offense that alleges as its first element conduct that is generally a crime . . . does not always require the specification to also plead that the conduct is wrongful or unlawful." (JA 016.)

When "evaluating whether the specification contains words of criminality, [courts do not look] for 'magic' words. The mere failure to include the word 'wrongfully' does not necessarily render a specification invalid." *United States v. Hoffmann*, No. 201400067, 2020 WL 3045674, at *9 (N-M. Ct. Crim. App. June 8, 2020), *review denied*, 80 M.J. 463 (C.A.A.F. 2020); *see Tevelein*, 75 M.J. at 711 n.21 (stating it "remains elusive in military justice jurisprudence . . . precisely which circumstances require additional words of criminality."). This Court has stated that "words of criminality speak to mens rea and the lack of a defense or justification, not to the elements of an offense." *Fosler*, 70 M.J. at 230–31. Military case law supports that a specification can be found sufficient even if it does not contain express words of criminality. (*See* JA 017–18 (citing a string of military cases where the courts upheld specifications lacking the word wrongful or other words of criminality).) Additionally, all of the CGCCA judges, even the dissenting judges, agree that Article 134 offenses do not "always require particular

words of criminality, such as 'wrongfully' or 'unlawfully,' and that instead what suffices as words of criminality depends on the nature of each offense." (JA 038.)

The specification here explicitly states Appellant's predicate act which was providing several alcoholic beverages to Ms. E.F., a person under the age of twenty-one, and the terminal elements of Article 134 (clauses 1 and 2). The facts alleged in the specification "describe a violation of unwritten, customary law as evidenced by military case law, as well as state and federal law." (JA 019.) The specification explicitly alleged the standard under which the criminality of his conduct would be measured. (JA 014.) Appellant would be guilty if the members found his conduct was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit to the armed forces. (JA 014.) The specification contained the elements of the offense charged and fairly informed Appellant of what he needed to defend against.

Additionally, there are no facts in this case that would make Appellant's conduct of providing alcohol to someone under the age of twenty-one not prohibited. Based on the facts of this case, his conduct did not fall under any of the Virginia state statute exceptions. (*See* JA 020, 130–31); Va. Code Ann. § 4.1-200. Additionally, whether his "conduct is criminal ultimately depends not on any such state law exception, but rather whether his conduct was prejudicial to good order and discipline or service-discrediting." (JA 020.) Accordingly, the Government

provided Appellant the information necessary to vindicate his constitutionally required notice of what he had to defend against.

The Record shows that the specification's language of providing several alcoholic beverages to Ms. E.F., a person under the age of twenty-one, necessarily implied unlawfulness. During the defense's cross-examination of Seaman V.P., defense counsel specifically asked whether Seaman V.P. thought it was okay to have alcohol in the house because he was twenty-one and "[a]re you aware of any law that makes it impermissible to have alcohol in your house if you are of age?" (JA 386–87.) In the military judge's instructions to the members the military judge stated, "[A] defense to this element . . . would be that the accused honestly but mistakenly believed [Ms. E.F.] was of a *legal drinking age*." (JA 396 (emphasis added).) Also, during Ms. E.F.'s cross-examination, defense counsel specifically asked, "You did not tell him you were not legally old enough to drink?" (JA 374.)

The emphasis on Ms. E.F.'s age during the trial as well as the language "legal drinking age" and "legally old enough to drink"[3] show that the language in the

[3] Since the 1980s, the legal drinking age in all fifty states has been twenty-one. *See* 23 U.S.C. § 158 (requiring States to set their minimum drinking age to twenty-one to avoid losing federal funding)); Toomey, Rosenfeld, Wagenaar, *The Minimum Legal Drinking Age History, Effectiveness, and Ongoing Debate*, 20:4 Alcohol Health Res World 213 (1996). Accordingly, providing alcohol to someone under the age of twenty-one in all fifty states is prohibited. *See* 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. This is common knowledge that the members would have known. *See*

specification necessarily implied that Appellant's actions were illegal or unlawful especially when viewed with maximum liberality. *See United States v. Gaskin*, 31 C.M.R. 5, 7 (C.M.A. 1961) (stating "it was unnecessary to include words imparting criminality in a specification, the averments of which implicitly contain a charge that the acts there set out were in themselves criminal"); *United States v. Brecheen*, 27 M.J. 67, 68 (C.M.A. 1988) (upholding specifications under Article 112a, UCMJ, that omitted the word "wrongfulness" because despite this omission the offense could reasonably be construed as a crime).

In conclusion, the specification alleges each element of an Article 134 offense and words of criminality are necessarily implied by the conduct alleged in the specification. Admittedly, the Government could have written a more foolproof specification, however, specifications are not expected to be absolutely perfect. *See United States v. Williams*, 40 M.J. 379, 382 (C.M.A. 1994) (citation omitted) ("In determining whether an indictment is sufficiently specific, the traditional test 'is not whether it could have been made more definite and certain[.]'"); *United States v.*

United States v. Dugan, 58 M.J. 253, 257 (C.A.A.F. 2003) ("[T]he general and common knowledge a court member brings to deliberations is an intrinsic part of the deliberative process."); *United States v. Bailey*, 77 M.J. 11, 15 (C.A.A.F. 2017) (finding that the phrase "incapable of consenting" did not require additional definition and therefore an instruction was not required); *United States v. Payne*, 73 M.J. 19, 26 n.10 (C.A.A.F. 2014) (citation omitted) ("'Words generally known and in universal use do not need judicial definition.'").

Rocha, 84 M.J. 346, 351 (C.A.A.F. 2024) ("[A]bsolute precision is not the standard."); *Sell*, 11 C.M.R. at 206 ("For a certainty, appellate tribunals should not permit a pleading to be challenged for the first time on appeal merely because it is loosely drawn."). Accordingly, as specifications not challenged at trial are liberally construed in favor of validity and with maximum liberality, the language in the specification here was sufficient to inform Appellant of what he had to defend against.

As such, there is no error as to Charge II because it alleges all of the required elements for an Article 134 offense and words of criminality were necessarily implied.

C. Even if error exists, it is not plain and obvious.

"At a minimum, an error is 'plain' when it is 'obvious' or 'clear under current law.'" *Warner*, 73 M.J. at 4 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). The plain error doctrine should be used sparingly and solely in circumstances where the miscarriage of justice would result. *United States v. Fisher*, 21 M.J. 327, 328–29 (C.M.A. 1986). The error must be so plain that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163 (1982). Although the terms "clear" or "obvious" do not have a special definition, "the Supreme Court has distinguished clear and obvious errors from

errors that are subject to reasonable dispute." *United States v. Gonzalez*, 78 M.J. 480, 486 (C.A.A.F. 2019) (internal quotation and citations omitted). Simply put, "[n]o plain error occurs when the state of the law is murky." *United States v. Sweeny*, 226 F.3d 43, 46 (1st Cir. 2000).

It remains an open question when specific words of criminality are necessary in an Article 134 specification. (JA 023 ("This returns us to the position that when an unenumerated Article 134 offense requires words of criminality remains an open question perhaps unavailing of any simple answer . . . .")); *see Hoffmann*, 2020 WL 3045674, at *10 (finding that because the CGCCA vacillated on the legal question of what constitutes words of criminality, any error was not clear or obvious); *Tevelein*, 75 M.J. at 711 n.21 ("What remains elusive in military justice jurisprudence is precisely which circumstances require additional words of criminality."); *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988) ("With respect to conduct that, wherever it occurs, is generally viewed as illegal, it can be argued that a specific allegation of 'wrongfulness' or 'unlawfulness' is surplusage."). This demonstrates that it is not clear or obvious that specific words of criminality are always necessary in an Article 134 specification. Appellant has not met his burden to show plain or obvious error.

D. Even if there was error, it did not materially prejudice Appellant's substantial rights.

"An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." *United States v. Wilkins*, 71 M.J. 410, 413 (C.A.A.F. 2012) (citing *Humphries,* 71 M.J. at 212). Instead, it is determined whether the error materially prejudiced the substantial rights of the accused. *Id.*; *see* Article 59(a), UCMJ, 10 U.S.C. § 859(a). The prejudice analysis "demand[s] close review of the trial record." *Humphries*, 71 M.J. at 215–16 (citing *Girouard*, 70 M.J. at 11).

When a claim for failure to state an offense "is 'first raised after trial,' the claim will fail 'absent a clear showing of substantial prejudice to the accused—such as a showing that the indictment is so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" *Turner*, 79 M.J. at 406 (citations omitted); *see Humphries*, 71 M.J. at 217 (citing *Puckett v. United States,* 556 U.S. 129, 142 (2009)) ("[T]he mere showing of error cannot be 'recast[]' as the effect on substantial rights."). Without a showing of prejudice, a conviction will not be reversed when the specification is only challenged after conviction. *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986) (citation omitted); *Brecheen*, 27 M.J. at 68; *cf. Davila v. Davis*, 582 U.S. 521, 531 (2017) (citations omitted) (stating the criminal trial "is the main

event at which a defendant's rights are to be determined . . . and not simply a tryout on the road to appellate review").

Even if error exists, a lack of prejudice precludes relief. In *United States v. Goings*, this Court found there was plain and obvious error because the Government had not alleged the terminal element of Article 134. *United States v. Goings*, 72 M.J. 202, 207 (C.A.A.F. 2013). The Court, however, found there was no prejudice because the record showed that the accused "(1) was put on notice that the Government intended to prove that his conduct was both prejudicial to good order and discipline and service discrediting and (2) defended himself against those theories of guilt." *Id*. at 208; *cf. Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("[A] person cannot incur the loss of liberty for an offense without . . . a meaningful opportunity to defend.").

The Record here shows that Appellant was on notice that the Government intended to prove Appellant provided alcohol to someone under the age of twenty-one. Before the trial even started, the defense and the Government filed motions pertaining to the appropriate mens rea for this offense. The *Tucker* case was central to these motions because the case set forth the minimum mens rea for an offense alleging providing alcohol to someone under the age of twenty-one. (*See* JA 423, 425, 439.) It was clear from these motions particularly with reference to *Tucker*,

which pertained to a similar specification, the misconduct Appellant needed to defend against.

Additionally, during the trial, the Government asked Ms. E.F. questions about her age at the time of the offense, what type of alcohol she was provided, who provided her the alcohol, and whether Appellant knew her age at the time. (JA 351, 364, 366, 376.) During the Government's examination of Seaman V.P., trial counsel asked if he knew that giving alcohol to a minor would get him in trouble. (JA 385.) During Seaman V.P.'s cross-examination, defense counsel also asked questions about alcohol; specifically, whether Seaman V.P. thought it was okay to have alcohol in the house because he was twenty-one. (JA 387.) The members even asked Seaman V.P. if he believed Appellant was made aware of Ms. E.F.'s age before she consumed alcohol that evening. (JA 388.) Based on the record, the Appellant was clearly on notice that the Government intended to prove that Appellant provided Ms. E.F. with alcohol even though she was not legally old enough to drink alcohol.

Further, in the military judge's instructions to the members the military judge stated:

> If you're convinced beyond a reasonable doubt that the accused consciously disregarded a known risk that [Ms. E.F.] was under the age of 21 years old, and yet provided several alcoholic beverages to her, that information would satisfy the first element of the offense. However, a defense to this element . . . would be that the accused honestly but mistakenly believed [Ms. E.F.] was of a *legal drinking age*.

(JA 396 (emphasis added)). The military judge's instruction shows that the Government's case included proving that Appellant was not honestly mistaken to Ms. E.F. being under the legal drinking age. *Cf. United States v. Hasan*, 84 M.J. 181, 221 (C.A.A.F. 2024) ("Absent evidence to the contrary, we presume the members understood and followed the military judge's instructions"). Defense had the opportunity to object to this instruction, but did not do so. (JA 393–94.)

Appellant's defense was clearly prepared to counter the Government's points, thereby acknowledging what theories Appellant needed to defend against and precluding any prejudice. First, defense counsel filed a motion requesting that the court instruct the members that the requisite mens rea was whether Appellant knew Ms. E.F. was under the age of twenty-one. (JA 420.) Second, the defense argued at opening that there was no evidence to show Appellant thought Ms. E.F. was under twenty-one, no evidence of alcohol bottles, and no evidence from blood or breath alcohol tests. (JA 345.) Third, during the cross-examination of Ms. E.F., defense counsel specifically asked, "You did not tell him you were not legally old enough to drink?" (JA 374.) Fourth, during defense counsel's closing, he argued there was no evidence besides Ms. E.F.'s testimony that Appellant provided her alcohol and questioned whether it is reasonable to expect a twenty-one-year-old to consciously ask people who come over to his house if they are twenty-one or check their ID at the door. (JA 411–12.) He also posed the following question to the

members: "Was there a conscious disregard for her age?" (JA 412.) Finally, defense counsel requested the military judge provide the members with an instruction that if the members found Ms. E.F. was not provided several alcoholic beverages, or if there was no evidence of an Air Force member being present, then that would be a complete defense to the charge. (JA 391–92.) This illustrates how the defense understood the Government's theories of criminality and prepared a specific defense tailored to those theories.

The Record does not indicate Appellant was misled or otherwise confused by the language of the specification. Appellant did not request a bill of particulars or move to dismiss the charge. Additionally, Appellant's strategy at trial entailed showing that Ms. E.F. held herself out to be twenty-one and he thus had no way of knowing that she was not twenty-one years old. (JA 412.) He did not argue that he had permission from Ms. E.F.'s parents to provide her alcohol which is one of the exceptions under Virginia state law. The exceptions were an affirmative defense the Appellant could have brought forward during his trial. The Government, however, was not required to negate exceptions in the specification. *See United States v. Sisson*, 399 U.S. 267, 288 (1970) (citation omitted) ("It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses"); *McKelvey v. United States*, 260 U.S. 353, 356–57 (1922) ("By repeated decisions it has come to be a settled rule . . . that an indictment . . . founded on a

general provision defining the elements of an offense . . . need not negative the matter of an exception made by a proviso or other distinct clause . . . and that it is incumbent on one who relies on such an exception to set it up and establish it"). Based on the evidence, Appellant was aware that he could not argue that his misconduct fell under one of the exceptions in the Virginia state statute. It is unclear how the defense theory or strategy, the testimony, the results, or the sentence would have been different had the Government used unlawfully or wrongfully in the specification.

Additionally, based on the facts of the case, the defense used the available defenses against the charge. Defense counsel attempted to show that it was unclear whether Appellant or Seaman V.P. provided Ms. E.F. with the alcohol. (JA 016.) Defense counsel argued that Appellant did not know she was under the age of twenty-one or did not recklessly disregard her age especially in light of the fact she was a month away from turning twenty-one, that no other enlisted members other than Seaman V.P. were present, that the alcohol was lawfully in the home due to Appellant and Seaman V.P.'s age, and that the allegations occurred in Appellant's private home. (JA 016.) The defense's performance at trial "refutes the contention that the specification as drafted failed to alert Appellant to the possibility of justification or defense. Neither would the presence of unlawful or wrongful have alerted them to a specific justification or defense because they are generic terms

not linked to any specific justification or defense." (JA 016); *see Lopez*, 2023 WL 2401185, at *11 (finding no basis to conclude that the appellant would have handled his defense differently or that the results would have been different if the Government had specified culpable negligence on the charge sheet as the appellant did not allege that he would have done anything differently, did not point to different defenses he would have raised, and did not suggest it affected how the defense approached his case); *Turner*, 79 M.J. at 408 (finding no prejudice because there was no basis in light of the record to conclude that even if the word unlawfully were included in the specification that the appellant would have handled his defense differently or the results would have been different).

Appellant argues he was prejudiced because if words of criminality are not pled "then the Government does not need to present evidence, law, custom, or argument regarding the standard applicable to the conduct. This shifts the burden to the defense to then defend against every possible theory." (Appellant's Br. at 34.) Appellant, however, 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. (*See* Appellant's Br. at 34–38.) Based on the language in the specification, the standard applicable to the conduct was explicitly alleged. If the members found that Appellant's act of

providing several alcoholic beverages to someone under the age of twenty-one was service discrediting or prejudicial to good order and discipline, then he was guilty of violating the Article 134 specification. (*See* JA 014.)

The Record clearly shows Appellant understood his conduct was not legal. During Ms. E.F.'s cross-examination, defense counsel asked, "You did not tell [Appellant] you were not *legally* old enough to drink?" (JA 374 (emphasis added).) Further, during Seaman V.P.'s direct examination, trial counsel asked, "[A]s a Coast Guard member, you know that giving alcohol to a minor would essentially get you in trouble?" (JA 385.) During Seaman V.P.'s cross-examination, defense counsel then asked whether he thought it was okay to have alcohol in the house since he was twenty-one. (JA 387.) Specifically, defense counsel asked, "Are you aware of any law that makes it impermissible to have alcohol in your house if you are of age?" (JA 386.) Defense counsel followed up and asked if Seaman V.P. thought it was okay to have alcohol in the house "[b]ecause you're 21?" (JA 387.) All of this demonstrates a general understanding that providing alcohol to persons under the age of twenty-one is prohibited.

Accordingly, even if there was error, Appellant was not prejudiced.[4]

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[4] Double jeopardy applies "where 'the same act or transaction' is involved." *Rice*, 80 M.J. at 40 (citations omitted); *see Grafton v. United States*, 206 U.S. 333, 352 (1907) (holding that "the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the

Conclusion

Wherefore, the United States requests this Court affirm the decision of the lower court.

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same or in another court, civil or military, of the same government."). Charge II clearly detailed Appellant's misconduct by alleging the exact date, the location, the individual to which the alcohol was provided, and the act of providing several alcoholic beverages to someone under twenty-one. The Record contains ample evidence to precisely demonstrate the misconduct the Government proved which protects Appellant from additional prosecution for the same misconduct. *See Sell*, 11 C.M.R. at 206 (requiring the "record [to show] with accuracy to what extent he may plead a former acquittal or conviction."). Inclusion of the word unlawfully or wrongfully in the specification would not have provided Appellant additional double jeopardy protection.

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered electronically to the Court and was transmitted by electronic means to Appellate Defense Counsel on 20 November 2024.

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