IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Specialist (E-4) MALCOLM R. TURNER, United States Army, *Appellant*.	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 19-0158/AR Crim. App. No. 20160131

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

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

ISSUE PRESENTED

WHETHER THE SPECIFICATION OF CHARGE I ALLEGING AN ATTEMPTED KILLING FAILS TO STATE AN OFFENSE BECAUSE IT DOES NOT EXPLICITLY, OR BY NECESSARY IMPLICATION, ALLEGE THE ATTEMPTED KILLING WAS UNLAWFUL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On March 4, 2016, a panel with enlisted representation, sitting as a general court-martial, convicted appellant, Specialist (SPC) Malcolm R. Turner, contrary to his pleas, of an "attempt to *kill* with premeditation," conspiracy to commit premeditated murder, maiming, and obstruction of justice, in violation of Articles 80, 81, 124 and 134, UCMJ, 10 U.S.C. §§ 880, 881, 924, and 934. (JA 35). The panel sentenced SPC Turner to confinement for life without eligibility for parole, reduction to E-1, forfeiture of all pay and allowances, and a dishonorable discharge. (JA 36). The convening authority approved the adjudged sentence and credited SPC Turner with 599 days confinement against his sentence. (JA 23).

On November 30, 2018, the Army Court dismissed Specification 1 of Charge IV (obstruction of justice, Article 134, UCMJ), conditionally dismissed The Specification of Charge II (maiming, Article 124, UCMJ), and affirmed the remaining findings and sentence. (JA 2, 18). On January 29, 2019, SPC Turner petitioned this Court for a grant of review and on July 16, 2019, this Court granted that petition. (JA 1).

Statement of Facts

On January 1, 2015, Specialist Turner shot SPC CSG in the right arm, back, and through her cheek. (JA 62). Specialist CSG survived.

At trial, the defense moved to dismiss The Specification of Charge I for failure to state an offense under R.C.M. 907(b)(1)(B) (2012). (JA 65). That specification reads:

> "In that, Specialist Malcolm R. Turner, U.S. Army, did, at or near Clarksville, Tennessee, on or about 1 January 2015, attempt to *kill* with premeditation Specialist [C.S-G.] by means of shooting her with a loaded firearm, causing grievous bodily injury."

(JA 24) (emphasis added).

The defense argued that under R.C.M. 307(c)(3) and *United States v. Fosler*, 70 M.J. 225, 228 (C.A.A.F. 2011), the specification on the charge sheet neither expressly nor by necessary implication alleged the element of unlawfulness. (JA 66). The defense noted that "the word 'murder' implie[s] the malice necessary to connote unlawful killing" but that to "kill"—according to *Ballantine's Law Dictionary*— simply means "to cause death" or "put an end to something." (JA 67). Defense counsel also emphasized that the model specification in the *Manual for Courts-Martial* uses the word "murder" and that the Government deviated from this language and instead chose to use the word "kill." (JA 67).

The Government responded that the "test for failure to state an offense" is a "three-part test requiring the essential elements of the offense, notice of the charge, and protection against double-jeopardy." (JA 68). It argued that SPC Turner "had not been misled in any way," that he knew what offense the prosecution intended

to charge, and that to "kill with premeditation" necessarily implied an unlawful killing. (JA 68).

That evening the Government, in an email, tried to amend its position. (JA 76). The Government claimed unlawfully was necessarily implied not only by "kill with premeditation," but also by other language in the specification, including "by shooting with a loaded firearm" and "by causing grievous bodily harm." (JA 76). The Government argued that it *did* use the word "murder" in a separate charge and, citing to *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986), urged the military judge to employ a liberal standard to find that Charge I stated an offense. (JA 76). The Government also reiterated its claim that at numerous stages of the trial the defense had actual notice of the Government's intent to charge SPC Turner with attempted premeditated murder. (JA 76).

In response, the defense emphasized "[t]he word 'kill' is not synonymous with 'murder' or 'unlawfulness'" and that "during our current period of armed conflict, personnel in the United States Army attempt to kill others with premeditation and loaded firearms every day. In many cases we are not successful and we inflict grievous bodily harm instead[.]" (JA 75). The defense pointed out

that R.C.M. 907(b)(1)(B) is non-waivable and may be raised "at any stage of the proceedings." (JA 75).[1]

The military judge denied the defense motion the following day. (JA 74). In doing so, the military judge did not focus on the charge sheet, but instead found that other documents throughout the proceedings referred to "attempted murder" or "attempted premeditated murder." (JA 70). He noted that one of the defense's voir dire questions read: "One of the offenses alleged in this case is attempted premeditated murder" and that his instructions for Charge III, conspiracy, acquainted the panel with the concept that "Proof that the offense of Premeditated Murder actually occurred is not required." (JA 71).

Although the defense objected during trial, the military judge cited *Watkins,* 21 M.J. at 208, and *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012)—both cases where the objection was raised for the first time on appeal—for the notion that unpreserved objections to the failure to state an offense are disfavored, should be viewed liberally, and require a showing of material prejudice to a substantial right. (JA 71–72). The judge also cited *United States v. Russell*, 47 M.J. 412

[1] R.C.M. 907(b)(1)(B) was subsequently amended in order to make failure to state an offense forfeitable if raised "before final adjournment of the court-martial." R.C.M. 907(b)(2) (2016). According to the drafters, "R.C.M. 907(b) was amended consistent with *United States v. Humphries*[.]" Drafters' Analysis of R.C.M. 907(b), *MCM*, App'x 21-57. Specialist Turner was arraigned on November 10, 2015, but even if the amended version of the rule applied, SPC Turner's objection was timely under either version. All further references are to the 2012 rule.

(C.A.A.F. 1998) for the proposition that where defense counsel is on actual notice of the charge and specification, only legal knowledge is at issue.[2] (JA 73). The military judge did not cite this Court's decision in *Fosler*, and instead, relied on "overwhelming" evidence that defense counsel had notice, stating:

> The reading of the specification itself can be read in no other way than to be interpreted that if it is in fact alleging a crime under the Uniform Code of Military Justice, it is alleging a crime that is an attempt to kill someone with premeditation. To say at this juncture that there is doubt or that the accused has in any way been prejudiced as to whether or not that was meant to mean the crime alleged was attempted premeditated murder is beyond the reason of this Court.

(JA 73, 74).

Standard of Review

"Whether a specification is defective and the remedy for such error are questions of law, which we review *de novo*." *Ballan*, 71 M.J. at 33. In contested cases where the charge and specification are challenged at trial, this Court "read[s] the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Fosler*, 70 M.J. at 230 (citing *Watkins*, 21 M.J. at 209–10) (where trial defense counsel objected at the end of the government's case-in-chief).

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[2] In *Russell* this Court found the word "wrongfully" charged in a specification for wrongfully receiving and possessing materials depicting minors engaging in sexually explicit conduct, was sufficient, coupled with the charged reference to 18 U.S.C. § 2252, to allege appellant "knowingly" committed the acts. 47 M.J. 412.

Law

1. Notice-pleading in the military.

As this Court noted in *Fosler*, the military has long been a notice pleading jurisdiction. 70 M.J. at 229 (citing *United States v. Sell*, 3 C.M.A. 202, 206 (C.M.A. 1953)). "A charge and specification will be found sufficient if they, 'first contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Id*. (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974) (brackets omitted); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *United States v. Sutton*, 68 M.J. 455, 455 (C.A.A.F. 2010). "A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." R.C.M. 307(c)(3).

2. Common law murder and murder under the UCMJ.

"By the common law, murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied." *Sparf v. United States*, 156 U.S. 51, 59 (1895). The United States Criminal Code still defines murder in much the same way. 18 U.S.C. § 1111(a) ("Murder is the unlawful killing of a human being with malice aforethought.") Similarly, under the UCMJ, "murder" has long been accepted as carrying "a connotation of killing

of a human being with malice," *i.e.*, that the killing be done evilly and therefore unlawfully. *United States v. Schatzinger*, 9 C.M.R. 586, 592 (1953).

Under Article 118, UCMJ, the elements of premeditated murder are: (1) that a person is dead; (2) that the accused's act or omission caused the death; (3) that at the time of the killing, the accused had a premeditated design to kill; and (4) "that the killing was unlawful." *Manual for Courts-Martial*, *United States* (2012 ed.) (*MCM*), Part IV, para. 43b(1)(a)–(d). Unlawful is also an element under the other two theories of liability under Article 118(a)(2) and (3). *MCM*, Part IV, para. 43b(2)(c) and (3)(e).

Murder was, is, and always has been defined by a requirement that the killing be unlawful. To kill—in and of itself—is not a crime. As Justice Scalia remarked, "Would we say that, in a first degree murder, the element of 'malice aforethought' could be omitted from the indictment simply because it is commonly understood, and that the law has always required it? Surely not." *Resendiz-Ponce*, 549 U.S. at 113 (Scalia, J., dissenting).

3. Abandoning the "Fair Notice" Hydra.

In *Fosler*, this Court harmonized its jurisprudence governing a failure to state an offense with developments in the law governing lesser-included offenses (LIOs). Just one year earlier, in *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010), this Court re-asserted that its doctrinal approach to lesser-included offenses

strictly followed the elements test in *Schmuck v. United States,* 489 U.S. 705 (1989). Ultimately, the evolution of this Court's doctrine from *Jones* (addressing LIOs) to *Fosler* (addressing a failure to state an offense) makes clear that elements matter and, often times, are both the beginning and end of the analysis.

This Court originally embraced *Schmuck's* elements test in *United States v. Teters*, 37 M.J. 370 (C.A.A.F. 1993). In the subsequent years, however, "this Court drifted significantly from the *Teters* application of *Schmuck* with respect to LIOs." *Jones*, 68 M.J. at 470 (citing *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004)). *Jones*, however, made clear that this drift was over and that "rather than embracing a 'Hydra' we return to the elements test." *Id*. at 468.

Moreover, *Jones* made clear that the absence of any element could not be cured by actual notice. This Court roundly rejected the Government's suggestion that "the elements test is merely a means to the end of fulfilling the notice requirement of the Due Process Clause, and the notice function of the elements test can be accommodated in this case by either case law or LIOs listed within the explanation sections of the *MCM*, pt. IV." *Id*. at 470.

According to *Jones*, "the Government's suggestion that this is merely a matter of [notice] fails in the face of Article 79, UCMJ." *Id*. at 471. "[*Jones*] implicates not only the question of whether appellant was on notice that he would need to defend against indecent acts, but also the interpretation and application of

Article 79, UCMJ." *Jones*, 68 M.J. at 471. "Interpreting Article 79, UCMJ, to require the elements test for LIOs has the constitutionally sound consequence of ensuring that one can determine *ex ante*—solely from what one is charged with—all that one may need to defend against." *Id*. at 472.

In *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011) this Court reaffirmed its conclusion that actual notice could not cure defects in the charging documents. As in *Jones*, negligent homicide was listed as an LIO of premeditated murder at the time of the *Girouard* court-martial. *Id.* at 10. Notwithstanding defense counsel's express request for an instruction on the lesser included offense of negligent homicide, and Girouard's subsequent conviction for negligent homicide, this Court set aside the conviction. *Id*. at 8.

In doing so, the Court articulated a due process interest related to, but ultimately distinct from, notice: "[W]hen 'all of the elements [are not] included in the definition of the offense of which the defendant is charged,' then the defendant's due process rights have in fact been compromised." *Id*. at 10 (citing *Patterson v. New York*, 432 U.S. 197, 210 (1997)). And "in the case at bar, the rights at stake are Appellant's constitutional rights to notice *and* to not be convicted of a crime that is not an LIO of the offense with which he was charged." *Girouard*, 70 M.J. at 10 (emphasis added) (citing U.S. CONST. AMENDS. V, VI).

Thus, this Court expressly found there was a constitutional right, distinct from actual notice, to not be convicted of a crime not charged. This Court made clear that these interests were related but distinct: "Our analysis in *Jones*, was primarily focused upon Appellant's constitutional right to notice…. But as this decision makes clear, constitutional rights of the accused to be charged with the offense of which he is convicted encompass more than notice." *Girouard*, 70 M.J. at 10 n. 6.

Turning to prejudice, this Court tested for plain error. *Id*. at 11. With respect to the third prong of the plain error test, this Court stated, "The prejudice is clear—Appellant was convicted of an offense that was not an LIO of the charged offense." *Girouard*, 70 M.J. at 11. "But for the error, Appellant would not have been convicted of negligent homicide." *Id*.

4. *Fosler* brings clarity.

Fosler recognized that much like the Court's LIO jurisprudence, its failure to state an offense jurisprudence was similarly marred by ambiguity and needed to be doctrinally consistent with *Jones*, *Girouard*, and *Schmuck*. *Fosler*, 70 M.J. at 228. Unlike the questions raised in LIO inquiries, in *Fosler*, this Court was "called upon to determine not whether the terminal element is necessarily included in the elements of the charged offense, but whether it is necessarily implied in the charge

and specification." *Fosler*, 70 M.J. at 229 (where appellant was charged with adultery under Article 134 but the specification omitted the terminal element).

This Court began by acknowledging the historical practice of implying, and not expressly alleging, the terminal element of Article 134, but found such practice "no longer permissible" under recent cases following *Schmuck*, which require "a greater degree of specificity in the charging." *Id*. at 227–28 (citing, *inter alia*, *Girouard*, 70 M.J. at 9; *Jones*, 68 M.J. at 468).[3] The Court found the practice of omitting the terminal element was called into question by the holdings in these cases which implicated an accused's twin constitutional rights to notice and to not be convicted of a crime that is not charged. *Id.* (citing *Girouard*, 70 M.J. at 10 (stating the twin constitutional rights are violated because not all of the elements of the LIO the accused is ultimately convicted of are "included in the definition of the offense *of which the defendant is charged*.") (emphasis in the original)).

In determining whether the terminal element was necessarily implied, *Fosler* looked exclusively to "interpret the text of the charge and the specification" within the precise language of the specification itself. *Id*. at 231; *see also United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (where the specification is "facially

[3] The full line of cases cited by the court included *United States v. McMurrin*, 70 M.J. 15, 17 (C.A.A.F. 2011); *Girouard*, 70 M.J. at 9; *Jones*, 68 M.J. at 468; *United States v. Miller*, 67 M.J. 385, 388–89 (C.A.A.F. 2009); and *United States v. Medina*, 66 M.J. 21, 24–25 (C.A.A.F. 2008).

deficient" instead of merely susceptible to multiple meanings, it "cannot be saved by reference to proof at trial or to a rule referenced in the specification"). Looking solely at the text of the specification, this Court rejected the Government's arguments "that the terminal element is implied because the specification alleged adultery, the word 'wrongfully' was used, and the charge stated 'Article 134.'" *Fosler*, 70 M.J. at 231. Therefore, even though the specification explicitly incorporated both the underlying Article and the colloquial name of the charge at issue, "We are compelled to hold that the charge and specification do not allege the terminal element expressly or by necessary implication." *Id*. at 232.

Notably missing from the *Fosler* opinion was any discussion of whether defense counsel had actual notice based on the specific facts of the case. And nowhere in *Fosler* did the majority consider whether the defense was misled. Instead, after looking only to the text of the charge and specification, this Court concluded that nothing inherent in an adulterous act was necessarily service discrediting, prejudicial to good order and discipline, or a crime not capital. *Id*. at 230.

Turning to its prejudice analysis, *Fosler* concluded, "Because allegation of the terminal element is constitutionally required and the Government failed to satisfy that requirement here, the military judge's decision to deny Appellant's

motion to dismiss was in error. *The remedy for this erroneously denied motion to dismiss is dismissal*." *Fosler*, 70 M.J. at 233 (emphasis added).

In *United States v. Humphries*, 71 M.J. 209, 213 n. 5 (C.A.A.F. 2012), this Court clarified that to the extent this could be read to suggest the failure to state an offense is jurisdictional, it is not. Instead it stated, "Implicit in this determination [that the remedy was dismissal] was our application of the harmless error test and finding that the government had failed to demonstrate that the constitutional error in [*Fosler*] was harmless beyond a reasonable doubt."[4]

5. Pleading standards for inchoate offenses.

Both the Supreme Court and this Court have recognized that a specification alleging an inchoate offense need not plead the elements of the underlying offense with the same specificity that would otherwise be required for a specification alleging the completed offense. *Resendiz-Ponce*, 549 U.S. at 102; *United States v. Norwood*, 71 M.J. 204 (C.A.A.F. 2012).

In *Norwood*, this Court looked to relevant Supreme Court cases and concluded that "in order to state the elements of an inchoate offense under Articles

[4] On the other hand, in *United States v. Reese*, a case dealing with an objected to major change, this Court concluded: "[I]f a change is major and the defense objects, the charge has no legal basis and the court-martial may not consider it unless and until it is 'preferred anew,' and subsequently referred." 76 M.J. 297, 301 (C.A.A.F. 2017). "To the extent our precedent has required a separate showing of prejudice under these circumstances, it is overruled[.]" *Id*. at 302.

80 and 81, UCMJ, a specification is not required to *expressly allege* each element of the predicate offense." *Norwood*, 71 M.J. at 205 (citing *Resendiz-Ponce*, 549 U.S. at 102; *Wong Tai v. United States*, 273 U.S. 77 (1927)) (emphasis added). As was the case in *Ballan*, in *Norwood* the appellant "pleaded guilty to both of these specifications [and d]uring the plea colloquy for these offenses, the military judge listed and explained the elements of the Article 80 and 81, UCMJ, offenses[.]" *Id*. at 206. Both specifications specifically incorporated the underlying offenses, obstruction of justice and adultery, into the language of the charged specifications. *Id*. Nevertheless, for the first time on appeal, the appellant alleged that "the inchoate attempt and conspiracy specifications, to which he pleaded guilty, are insufficient because they do not allege all elements of the 'target' or predicate offenses." *Id*.

Looking first at conspiracy, this Court recognized that "it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, or to state such object with the detail which would be required in an indictment for committing the substantive offense." *Id*. (citing *Wong Tai*, 273 U.S. at 81).

Turning to attempt, this Court concluded that this "logic applies equally to attempt, especially given the Supreme Court's decision in *Resendiz-Ponce* that an indictment alleging attempted illegal reentry under [the criminal code] need not

specifically allege a particular overt act or any other 'component par[t]' of the offense." *Norwood*, 71 M.J. at 207 (citing *Resendiz-Ponce*, 549 U.S. at 107).

In *Resendiz-Ponce*, the appellant, having twice been previously deported, walked up to a port of entry, displayed a photo identification of his cousin to the border agent, and stated that he was a legal resident traveling to California. *Id.* at 104–05. The Supreme Court determined that an indictment alleging attempted illegal reentry under 8 U.S.C. § 1326(a) did not need to expressly allege a particular overt act or any other "component part" of the offense. *Resendiz-Ponce*, 549 U.S. at 107. "It was enough for the indictment in this case to *point to the relevant criminal statute* and allege that '[o]n or about June 1, 2003,' respondent 'attempted to enter the United States of America at or near San Luis in the District of Arizona." *Id*. at 108.

In addition to emphasizing that the indictment expressly "point[ed] to the relevant criminal statute," *id*., the Supreme Court also concluded that the indictment implicitly alleged the necessary overt act when it stated he "attempted" to enter the United States. *Id*. n 4. Specifically, the use of the word "attempt," coupled with the specific time and place of respondent's attempted illegal reentry, necessarily implied the overt act and thereby satisfied the constitutional requirements for an indictment. *Id*. at 108–09. In other words, the attempt to cross

into the United States was the overt act and therefore the charge was sufficient under the federal rules of criminal procedure.

Summary of the Argument

In *Fosler*, this Court made clear that elements matter and when a failure to state an offense is raised at trial, the Court will look solely and squarely to the language of the specification, as charged, to determine whether every element is truly "necessarily implied." *Fosler*, 70 M.J. at 230. *Fosler* represented the final repudiation of the historic tendency to loosely infer elements not explicitly charged in favor of a plain-language reading of "necessarily implied."

Looking solely to the language of the specification here, and applying the plain meaning of the words "necessarily implied," the element "unlawful" is neither expressly charged nor necessarily implied. Any suggestion that this Court should digress from a decade of case law and liberalize the definition of "necessarily implied" in order to find this specification sufficient is a retrogression in this Court's otherwise steady march toward clarity and doctrinal consistency. And because *Fosler* so plainly controls in this case: "The remedy for this erroneously denied motion to dismiss is dismissal." 70 M.J. at 233.

Argument

1. *Fosler*, not *Ballan*, provides the controlling framework in this case because the objection was raised at trial.

By 2012, this Court had articulated the appropriate framework for analyzing objections for failure to state an offense at every stage of proceedings *and* in the context of both contested cases and guilty pleas. Despite the fact that defense counsel cited *Fosler*, (JA 66), the judge ruled on the objection without once referencing the one case that analyzed an objection raised before appeal in a contested case.[5] Yet *Ballan*, relied upon by the military judge, references *Fosler* no fewer than fifteen times. And in one of the many cites, the Court in *Ballan*—a guilty plea where the appellant raised his objection for the first time on appeal—expressly juxtaposed its analysis with *Fosler*—a contested case where the appellant objected at trial—making clear that *Fosler* is the most procedurally relevant decision to appellant's case. *Ballan*, 71 M.J. at 34 ("In *Fosler*—a contested case where the appellant objected—we dismissed the charge").

Ballan is simply inapposite. Although the military judge cited *Ballan* for the proposition that courts apply maximum liberality to challenges raised "after conviction," the opinion expressly stated this analysis applies to objections raised

[5] Similarly, the Army Court referenced *Fosler* only one time even though it acknowledged the objection was timely raised. *United States v. Turner*, ARMY 20160131, 2018 CCA LEXIS 593, slip op. *13–14 (A. Ct. Crim. App. Nov. 30, 2018).

"for the first time on *appeal*." *Ballan*, 71 M.J. at 33. Moreover, *Ballan* explicitly held that the failure to allege the terminal element was error. *Id*. at 34. As such, if the objection had been timely raised in *Ballan*, the military judge should have granted it. Finally, it was only in conducting its plain error analysis that *Ballan* was willing to look to the plea colloquy as evidence that there was no material prejudice to a substantial right. *Id.* at 34–36.

The other cases cited by the military judge are similarly unpursuasive. *See Watkins*, 21 M.J. at 209–10 (decided nearly a quarter century before this Court reaffirmed its adherence to *Schmuck*, applying the defunct "reasonable construction test," and involving a challenge to a guilty plea where the appellant alleged failure to state an offense for the first time on appeal); *Russell*, 47 M.J. at 413 (where the government, in contrast to the present case, actually charged the word "wrongfully" which necessarily implied knowledge required for the possession of child pornography); *Crafter*, 64 M.J. at 211 (appellant raised the failure to state an offense for the first time on appeal).

To the extent that *Crafter* is instructive, the Court noted that where a specification is "facially deficient" by failing to contain all the elements of an offense—opposed to merely susceptible to different meanings—it "cannot be saved by reference to proof at trial or to a rule referenced in the specification." *Id*. at 211 (citation omitted). Accordingly, even the cases cited by the military judge

make clear that he erred when he looked beyond the plain language of the charge and specification in his assessment of the defense's motion to dismiss.

It is only when brought for the first time on appeal, under a plain error analysis, that this Court is willing to look beyond the text of the specification as written on the charge sheet. In doing so, the Court has found that where actual notice exists, an otherwise plain error may be harmless. But *Fosler* makes clear that when a facially defective specification is challenged before the adjournment of proceedings, it cannot be saved merely by looking to the attendant circumstances of the trial or the facts of the case.

2. Appellant has the right not to be convicted of a crime not charged.

As already established, the military judge erred from the outset by applying the plain error standard. By ignoring *Fosler* and *Girouard*, the military judge's emphasis on whether the defense was misled or there was an actual notice issue ignored the independent right of SPC Turner not to be convicted of a specification for which he was not charged. *See Girouard*, 50 M.J. at 10; *Fosler*, 70 M.J. at 228.

Although these twin rights are related, they are ultimately distinct. *See Girouard*, 50 M.J. at 10 ("In the case at bar, the rights at stake are Appellant's constitutional rights to notice *and* to not be convicted of a crime that is not an LIO of the offense with which he was charged.") (emphasis added) (citing U.S. CONST. AMENDS. V, VI). An accused's constitutional right "to be charged with the offense

of which he is convicted encompass more than notice." *Girouard*, 50 M.J. at 10 n. 6. In *Fosler*, the Court recognized this that this independent right extended to objections for failure to state an offense "because not 'all of the elements' of the offense of conviction are 'included in the definition of the offense *of which the defendant is charged*.'" *Fosler*, 70 M.J. at 228 (citing *Girouard*, 70 M.J. at 10).

The military judge's analysis simply failed to consider this independent constitutional right not to be convicted of an uncharged offense and instead, collapsed these rights into a singular issue of actual notice. (JA 73). His analysis plainly assumed that the violation of the right not to be convicted of an uncharged offense could be cured by actual notice. Yet this Court has made plain that this is simply not the case. *See Jones*, 68 M.J. at 470–71 (rejecting the argument that the notice requirement was satisfied by case law or the list of LIOs in the MCM); *Fosler*, 70 M.J. at 228.

As such, in contested cases, where the charge and specification are challenged at trial, this Court hews closely to the plaint text in the specification. *Fosler*, 70 M.J. at 230 (citing *Watkins*, 21 M.J. at 209–10). And irrespective of actual notice, the specification must "allege[] every element of the offense expressly or by necessary implication." R.C.M. 307(c)(3).

3. Analyzed under the proper *Fosler* framework, not every element is expressly stated or necessarily implied.

The statutory elements of Article 118 include the element that the killing is "unlawful." The history of murder at common law, the statutory framework, and the Rules for Court-Martial unambiguously reflect that, under the law, killing is not an inherently unlawful act. It would be error to hold otherwise.

Applying *Fosler's* analytical approach here, nothing about the language of the specification, including the words "kill with premeditation," "by shooting with a loaded firearm," or "by causing grievous bodily harm," *necessarily* implies unlawfulness. (JA 76). Premeditation, coupled with the word "murder," not "killing," in the *MCM*, refers to the "consciously conceived" intent to take a life, not to the act itself nor to the unlawfulness of the act. *MCM*, Part IV, para. 43c(2).

With respect to the second two phrases the military judge relied upon at trial to imply unlawfulness, defense counsel's example—that U.S. Army Soldiers regularly use loaded firearms to attempt to kill with premeditation and, when unsuccessful, may inflict grievous bodily harm instead—disposes of any further suggestion unlawfulness is necessarily implied. (JA 67, 75). The reality is that incidents of lawful killing exist every day in civilian life and even more so in the daily lives of servicemembers. Both the common law and the UCMJ acknowledge that killing is not, in and of itself, a crime. Accordingly, none of the language contained in The Specification of Charge I necessarily implies unlawfulness.

As a useful counter-example of a specification that properly implies every element of an attempted violation of Article 118, this Court need look no further than the *MCM*. The *MCM's* model specification for Article 118 uses the word "murder." *MCM*, Part IV, para. 43.f. Thus, while the model specification does not expressly include the term "unlawfully kill," it is necessarily implied by the use of the word "murder." Here, the Government failed to expressly or impliedly allege an unlawful killing—the statutory element of the offense—or murder, the definition of which necessarily implies a killing that was unlawful.

4. *Norwood* and *Resendiz-Ponce* do nothing to call into question the rule that every element of an offense must, at minimum, be necessarily implied.

Nor does *Norwood* provide a basis to find this specification sufficient. *Norwood* involved challenges to specifications alleging attempted adultery and conspiracy raised for the first time on appeal and in the context of a guilty plea. *Norwood*, 71 M.J. at 205. On this basis alone, its application to this case is dubious. Furthermore, at least two more reasons undermine *Norwood*'s application here.

First, *Norwood*'s holding is limited to its conclusion that "in order to state the elements of an inchoate offense under Articles 80 and 81, UCMJ, a specification is not required to *expressly allege* each element of the predicate offense." *Id*. at 205 (emphasis added). It did nothing to upset the well-settled rule

that if it is not expressly alleged, it must be necessarily implied pursuant to R.C.M. 307(c)(3).

Indeed, it was precisely because the *Norwood* specification expressly included the phrase "attempt to commit *adultery*" that the Court found that it necessarily implied every element. *Norwood*, 71 M.J. at 206. To be analogous, the specification here would have had to charge SPC Turner with "attempt to commit murder." But it did not. *Norwood's* logic does not extend to a situation where the prosecution charges an attempt to commit an act that is not an offense under the UCMJ. Indeed, this Court took pains to make clear that Article 80 makes it an offense to attempt to commit offenses "under this chapter." 71 M.J. at 207 (citation omitted). Here, the charge and specification merely allege that SPC Turner attempted to kill the victim and, as discussed above, killing is not a crime under the UCMJ or any other statutory regime. Accordingly, even under the relaxed pleading standard for inchoate offenses, this specification remains deficient.

Resendiz-Ponce, 549 U.S. at 102, compels the same conclusion. If anything, *Resendiz-Ponce* made two things clear. First, even inchoate offenses must necessarily imply every element of an offense. *Resendiz-Ponce*, 549 U.S. at 107. Second, inchoate offenses need not expressly allege every element of the target offense because they may be necessarily implied where the attempt charge itself

expressly incorporates the underlying criminal statute. *Resendiz-Ponce*, 549 U.S. at 108.

Unlike *Resendiz-Ponce*, nothing in the language of the specification expressly or implicitly references Article 118 or every element of the Article. *Resendiz-Ponce* found that a specification may do one or the other, but it may not fail to do both. Here, the specification did not reference the statute, did not mention murder, and did not imply the killing was unlawful. To nevertheless uphold this conviction "asks this Court to wade backwards into the murky…waters" of determining what is "fairly embraced" within the plain language of a specification. *United States v. Coleman*, __ M.J. __, 2019 CAAF LEXIS 504, *7 (C.A.A.F. 2019). Accordingly, the specification must either allege the statutory element, "unlawfully kill," or it must imply it, "murder." As the defense objected, and the specification did neither, it must be dismissed.

5. "The remedy for this erroneously denied motion to dismiss is dismissal."

In *Fosler*, this Court succinctly stated, "The remedy for this erroneously denied motion to dismiss is dismissal." 70 M.J. at 233. In a footnote in *Humphries*, however, this Court clarified that, "Implicit in this determination was our application of the harmless error test and finding that the Government had failed to demonstrate that the constitutional error in that case was harmless beyond a reasonable doubt." 71 M.J. at 213 n. 5.

The harmless beyond a reasonable doubt standard "is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Put another way, the Court asks whether it can be sure that, even in the absence of the error, the result would have been the same.

Applying this test here, but for the military judge's erroneous denial of the motion to dismiss, The Specification of Charge I would have been dismissed before adjournment. Accordingly, not only is there a reasonable doubt that the result would have been the same, there is literally no doubt the same result would not have occurred absent the error. This fact is perhaps best illustrated by the comparison between this case and a motion to suppress. In the latter instance, an appellate court can properly consider whether, even in the absence of the objectionable evidence, the fact-finder would have concluded that an appellant was nevertheless guilty of the charged offense. The same cannot be said of a motion to dismiss. If the motion should have been granted, the conviction could never survive.

Nor does the fact an error will always be prejudicial necessarily render that error "jurisdictional." A genuinely jurisdictional error warrants dismissal even if raised for the first time on appeal. Such was the case in *United States v. Cotton*,

535 U.S. 625, 628 (2002), which involved an objection, raised for the first time on appeal, that the drug quantity was neither alleged in the indictment nor submitted to the petit jury. Specialist Turner does not argue that an unpreserved motion to dismiss—if raised for the first time on appeal—warrants automatic dismissal. Instead, he merely submits that dismissal is the only remedy when it should have been granted at trial. *Fosler*, 70 M.J. at 233.

In other words, this Court need not conclude the error is jurisdictional because an appellant must still object at the time of trial. It would be more accurate to simply say such an error, "[I]s not amenable to harmless error review." *United States v. Du Bo*, 186 F.3d 1177, 1180 (9th Cir. 1999). Appellant must still object in a timely fashion. And here, under R.C.M. 907(b)(1)(B), SPC Turner's objection was timely because he raised this error while the military judge still had the opportunity to fix it.

Nothing in R.C.M. 907(b)(1)(B) states the judge "shall" dismiss the specification only if it appears that SPC Turner and his counsel were misled. Doing so would simply transfer the ambiguity and unpredictability that *Fosler* sought to eliminate from courts' analysis from whether something was error to whether that error was prejudicial. As such, to do so "asks this Court to wade backwards into the murky…waters" of determining what is "fairly embraced," *Coleman*, __ M.J. __, 2019 CAAF LEXIS 504, at *7, and to revive an approach

this Court has already deemed "no longer seriously supportable in light of [the Court's] more recent focus…on the significance of notice and elements[.]" *Jones*, 68 M.J. at 470.[6]

[6] Alternatively, this Court may conclude that the *Humphries* footnote is no longer supportable in light of this Court's decision in *Reese*, 76 M.J. at 301–2. If the referral of a specification that states a different offense—even if it states an actual offense—strips the court of jurisdiction, it logically follows that the failure of a referred specification to state *any* offense would similarly deprive the court-martial of jurisdiction over the intended offense. This is entirely consistent with the well-founded rule that jurisdiction must be "narrowly circumscribed" by the governing statutes. *United States v. Denedo*, 556 U.S. 904, 919 (2009) (Roberts, C.J., dissenting) (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)). Either way, however, SPC Turner prevails even if this Court tests for harmlessness.

CONCLUSION

WHEREFORE, Specialist Turner respectfully requests this Honorable Court set aside The Specification of Charge I and the sentence in this case.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 6,632 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Turner*, Crim. App. Dkt. 20160131, USCA Dkt. No. 19-0158/AR was electronically filed with the Court and Government Appellate Division on August 22, 2019.

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