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*.	REPLY 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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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 THE CASE

On January 29, 2019 SPC Turner, appellant, petitioned this Court for a grant of review. On July 16, this Court granted that petition. (JA 1). Appellant filed his brief on August 22 and the Government responded on September 23.

1. Summary of the Argument

The Government advocates that this Court return to the past. In doing so, the Government invites this Court to return to the same "fairly embraced" Hydra that it repudiated in *United States v. Jones*, 68 M.J. 465, 469 (C.A.A.F. 2010), and to walk back its failure to state a claim jurisprudence to the days of merely calling something "close enough." But *Fosler* rejected the imprecise practice of looking beyond the plain language of a specification to determine whether an element was "necessarily implied" under Rule for Courts-Martial [R.C.M.] 307. *United States v. Fosler*, 70 M.J. 225, 228 (C.A.A.F. 2011). This Court made clear that it will not "wade back into the murky pre-*Teters* waters" by looking beyond the plain language at issue in its lesser-included offense [LIO] cases. *United States v. Coleman*, __ M.J.__, 2019 CAAF LEXIS 504, *7 (C.A.A.F. 2019). It should similarly decline the Government's invitation to do the same thing here.

2. Pleading requirements under the Uniform Code of Military Justice are uniform.

The Government opens by claiming that *Fosler* created a unique pleading standard for Article 134 offenses. (Gov't Br. 9). This argument fails for three reasons.

First, *Fosler* interpreted R.C.M. 307, a rule that plainly applies to all criminal pleadings in the military. *Fosler* simply restored meaning to the words

"necessarily implied." It did not create a new pleading standard and the Government offers no persuasive arguments to support its assertion that the President or Congress intended to carve out an exception for pleading Article 134 offenses.

Second, the Government's suggestion that *Fosler* applies only to Article 134 offenses is undermined by the fact *Fosler* is rooted in principles initially articulated in *United States v. Schmuck*, 489 U.S. 705 (1989), which did not involve an Article 134 offense and, indeed, concerned a case arising out of the Title 18 of the United States Code. *Fosler*, 70 M.J. at 228. The constitutional rights to notice and to not be convicted of an uncharged offense apply with equal force to any offense.

Third, the fact that subsequent applications of *Fosler* dealt with Article 134 offenses is easily explained—*Fosler* announced a significant change in this Court's Article 134 jurisprudence, and the trailer cases the Government points to all were tried before *Fosler* was decided. (Gov't Br. 11). Beyond the Article 134 context, most prosecutors manage to draft charges properly by using the words in the punitive article so as to not deviate into precisely the pickle the government confronts now.

If anything, the lack of non-Article 134 cases is evidence of *Fosler*'s clarity and predictability. Prosecutors must follow a bright-line rule and, when they fail,

trial judges have a clear rule to apply.[1] As such, the Government's argument is actually a testament to *Fosler*, and another reason this Court should decline to muddy the waters by applying anything other than a plain-language understanding of the words "necessarily implied."

3. The Government position would introduce confusion about this Court's precedents on lesser-included offenses.

The Government fails to acknowledge the intrinsic relationship between LIO and failure to state an offense jurisprudence (Appellant's Br. 8–14), despite the fact this Court has underscored the significance of that very relationship. *See Fosler*, 70 M.J. at 239. As this Court observed, the rights at issue in *Fosler* "include the same rights we addressed in the context of our LIO jurisprudence," and while "the object we must construe is different—elements versus charge and specification—the basic question is the same[.]" *Fosler*, 70 M.J. at 239. (Appellant's Br. 11).

Any suggestion that this Court should find that an attempt to kill "necessarily" implies murder also asks this Court to cast doubt on its well-established line of LIO cases, or risk an untenable inconsistency between two areas of the law that should logically be consistent. *See*, *e.g.*, *United States v. Coleman*, __ M.J.__, 2019 CAAF LEXIS 504 at *4 (C.A.A.F. 2019); *United States v.*

[1] Indeed, the military judge's fundamental mistake was in failing to apply *Fosler*, not in misapplying the rule.

Gonzales, __ M.J. __, 2019 CAAF LEXIS 396, *7 (C.A.A.F. 2019); *United States v. Armstrong*, 77 M.J. 465 (C.A.A.F. 2018). In light of the Government's concerns about doctrinal "uncertainty," (Gov't Br. 7), it is surprising that it would overlook the implications its position has for this Court's greater body of law.

4. The Government fails to distinguish between preserved and unpreserved objections.

The Government spends multiple pages calling this Court's attention to the aggravating facts in this case to support its assertion that unlawful is somehow necessarily implied. (Gov't 15–16). It fails, however, to recognize that, while the proceedings and proof are relevant when the objection is forfeited, they are not part of the calculus when the objection for failure to state an offense is raised before adjournment. *Compare United States v. Ballan*, 70 M.J. 71 M.J. 28 (C.A.A.F. 2012) *with Fosler*, 70 M.J. at 230–31. The defense made a timely objection per R.C.M. 307, and forfeiture simply does not apply.

The two distinct analytical frameworks recognize that in addition to notice, the constitution protects against an independent right to not be convicted of a crime that is not charged. *Fosler*, 70 M.J. at 227–28 (citing, *inter alia*, *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011); *Jones*, 68 M.J. at 468). (Appellant's Br. 20–21). Thus, when appellant timely raised an objection for failure to state an offense, he asserted the latter right, and the military judge's erroneous denial was

prejudicial. *Id*. at 233 ("The remedy for this erroneously denied motion to dismiss is dismissal"). But if appellant had not timely objected per the Rule, he could not now claim he was prejudiced by the judge's erroneous denial *of his motion*. In that circumstance, this Court would necessarily look for prejudice in the context of plain error and determine whether the defense had actual notice or may have been misled by the flawed specification. *Ballan*, 71 M.J. at 34–35.

Both parties agree that the objection was timely raised, and both agree that "[t]he present case shares *Fosler*'s procedural posture and likewise involves a less than perfectly precise specification." (Gov't Br. 11). The point of divergence is seemingly whether the Court should consider extraneous information beyond the language of the deficient specification. *Fosler* makes clear the answer is no and, as such, appellant should prevail.

5. *United States v. Bryant* cannot be reconciled with the later decisions in *Jones* and *Fosler*.

The Government places much emphasis on *United States v. Bryant*, 30 M.J. 72, 73 (C.A.A.F. 1990), claiming it is a procedurally similar case that involved a preserved objection to an inchoate offense. (Gov't Br. 13). *Bryant*, however, long predated *Jones* and *Fosler*, and it applied the subsequently rejected "fairly implied" test. *Id*. at 73. Since then, this Court has made clear that this test is "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.

Moreover, to the extent *Bryant* applies at all, it contains a distinction that bolsters appellant's position. The language of the deficient specification in *Bryant* provided appellant with "express notice that the object of the conspiracy was the violation of a federal statute, a provision of the [UCMJ.]" *Bryant*, 30 M.J. at 74. The same cannot be said here, where the specification charged appellant with attempting to do something that is not a crime. Nor, unlike *Bryant*, did the specification incorporate the underlying offense by reference, or even state that the attempted act was a violation of a criminal statute.

6. The pleading standards for inchoate offenses cannot save this specification.

Even under the pleading standard for inchoate offenses this specification remains deficient. The Government correctly asserts that "the government need only allege the elements of an inchoate offense." *United States v. Norwood*, 71 M.J. 204, 205 (C.A.A.F. 2012). (Gov't Br. 14). It also correctly lists the elements of attempt under Article 80. (Gov't Br. 15). However, it completely overlooks the fact that the second element requires that "the act was done with the intent to commit a certain offense under the code." *Manual for Courts-Martial*, *United States* (2012 ed.) [*MCM*], Part IV, para. 4.b.

The Government's strained analysis says it all. In its effort to argue this element was sufficiently pleaded, the Government writes "the specification alleges a specific intent: That appellant attempted to kill with premeditation." (Gov't Br. 15). But this analysis overlooks the fact that the element requires an intent to commit an "offense under the code," *MCM*, Part IV, para. 4.b, and for the reasons previously discussed, to "kill" does not *necessarily* imply an offense under the Code. (Appellant's Br. 7–8).

Indeed, unlike the Government's approach, appellant's position is consistent with both *United States v. Norwood*, 71 M.J. 204 (C.A.A.F. 2012) and *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). In *Norwood*, the specification included the phrase "attempt to commit adultery." *Norwood*, 71 M.J. at 206. In *Resendiz-Ponce*, the indictment language explicitly incorporated the underlying statute. *Resendiz-Ponce*, 549 U.S. at 10. In other words, those two cases expressly referenced the underlying statute itself. The deficient specification here does not. It does not say appellant attempted to murder the victim, *e.g.*, *Norwood*, or even that he attempted to kill her in violation of Article 118, *e.g.*, *Resendiz-Ponce*. (Appellant's Br. 23–25). Instead, it merely states that appellant attempted to do something that was not an offense under the Code and, as such, fails to state an offense under Article 80 or any other Article in the UCMJ.

7. The fundamental line-drawing problem.

The essential failing of the Government's position is that it presents a fundamental line-drawing problem, very much akin to the one this Court faced when employing the "fairly embraced" test. *See Fosler*, 68 M.J. at 469 (citing *United States v. Zupancic*, 18 M.J. 387, 391–93 (C.M.A. 1984) (Cook, S.J., concurring in part and dissenting in part).

The Government fails to offer a principled basis for drawing the line where it does because none exists. Instead, the Government repeatedly calls the Court's attention to the admittedly aggravating facts of this case—facts not included in the language of the specification—in an effort to rectify its trial error. (Gov't Br. 4, 16). But this Court's precedent is clear and logically compelling. This specification does not state an offense, the defense objected to the specification at trial, and therefore it must be dismissed.

CONCLUSION

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

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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,* Army Dkt. No. 20160131, USCA Dkt. No. 19-19-0158/AR, was electronically filed brief with the Court and Government Appellate Division on September 30, 2019.

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