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 APPELLANT** Crim.App. Dkt. No. 1480 USCA Dkt. No. 24-0134/CG

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

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Issue Presented

Does the specification of Charge II, alleging a violation of Article 134 (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?

Introduction

In *United States v. Vaughan*, this Court held "[a]n Article 134 offense that is not specifically listed in the [Manual for Courts-Martial] *must* have words of criminality and provide an accused with notice as to the elements against which he or she must defend,"[1] since due process "requires fair notice as to the standard applicable to the forbidden conduct."[2] Subsequently, in *United States v. Fosler*, the Court held the terminal element of Article 134 must *also* be pled because words of criminality do not themselves imply the terminal element.[3]

Here, the divided lower court upheld an Article 134 specification that pled no words of criminality by flipping *Fosler* upside down: construing the terminal element to imply words of criminality.[4] It did so in reliance on *dicta* and a since-

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[1] *United States v. Vaughan*, 58 M.J. 29, 35 (C.A.A.F. 2003) (citing *United States v. Davis*, 26 M.J. 445, 447-48 (C.M.A. 1988) (emphasis added).
[2] *Vaughan*, 58 M.J. at 31 (citing *Parker v. Levy*, 417 U.S. 733, 755 (1974)).
[3] *United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011).
[4] *United States v. Shafran*, No. 1480, slip op. at 20 (C.G. Ct. Crim. App. Feb. 26, 2024) (unpublished) ("whether Appellant's conduct is criminal ultimately depends not on any such state law exceptions, but rather whether his conduct was prejudicial to good order and discipline or service-discrediting").

unused "two category" test from a 36-year old Court of Military Appeals (CMA) case: *United States v. Davis*.[5] But as the lower court's dissent aptly notes, *Davis* "preceded a 'sea change' in Article 134 jurisprudence,"[6] and "[v]iewed through a post-*Fosler* lens, *Davis*'s dictum appears, frankly, outdated and unhelpful to the question of how to plead a particular Article 134 offense."[7]

The issue presented thus boils down to a simple question: should this Court reaffirm the crisp, clear guidance it provided in *Vaughan* on how to charge unenumerated Article 134 offenses, or should it muddy the waters by dusting off the "two category" test that predated both *Vaughan* and *Fosler*, which neither of those cases applied,[8] and which deprives an accused of "fair notice as to the standard applicable to the forbidden conduct"[9] (in violation of due process)?

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[5] 26 M.J. at 445; *see Shafran*, No. 1480, slip op. at 10, 12, 14, 16 (citing to *Davis*'s categorical test and dicta).

[6] *Shafran*, No. 1480, slip op. at 43 (Brubaker, J., dissenting) (citing *United States v. Richard*, 82 M.J. 473, 479 (C.A.A.F. 2022)).

[7] *Id.* at 44.

[8] The word "category" is contained nowhere in the controlling *Vaughan* opinion and is only mentioned in the concurring opinion. *Vaughan*, 58 M.J. at 42 (Crawford, C.J., concurring). This Court addressed a similar issue the same year in *United States v. Saunders*, and likewise did not apply the "category" approach. 59 M.J. 1, 6-8 (C.A.A.F. 2003) (comparing the specification to the federal interstate stalking statute and similar laws in the states). *Fosler* similarly makes no mention of a "category" approach and does not cite to *Davis* in the opinion, 70 M.J. at 225-247.

[9] *Vaughan*, 58 M.J. at 31 (citing *Parker v. Levy*, 417 U.S. 733, 755 (1974)).

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a punitive discharge.[10] The Coast Guard Court of Criminal Appeals reviewed this case under Article 66(b), UCMJ. This Court has jurisdiction under Article 67(a)(3), UCMJ.

Statement of the Case

A general court-martial with enlisted representation convicted Appellant, contrary to his pleas, of abusive sexual contact and providing alcoholic beverages to a person under the age of 21, in violation of Articles 120 and 134, UCMJ.[11] The court sentenced him to reduction to E-1, forfeiture of all pay and allowances, confinement for 180 days, and a bad-conduct discharge.[12] The convening authority approved the sentence as adjudged, and the Military Judge entered the findings and sentence into judgment.[13] In a divided, *en banc* decision, the lower court affirmed the findings and sentence.[14]

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[10] Joint Appendix [JA] at 419.
[11] JA at 418. Appellant was acquitted of sexual assault under Article 120, UCMJ. *Id.*
[12] JA at 419.
[13] JA at 451-58.
[14] *Shafran*, No. 1480, slip op. at 1.

Statement of Facts

The Government's charges against Appellant included an unenumerated specification under Article 134, UCMJ, for providing alcoholic beverages to a person under the age of 21. The specification alleged:[15]

> 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 alcohol 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.

The specification originally included the language "whom he knew to be" immediately before the words "under the age of 21."[16] But when the Defense moved for an instruction based on the requisite *mens rea* of knowledge,[17] the Government struck the words "whom he knew to be" just before arraignment.[18] The Military Judge found that "the Government ha[d] removed the inartfully drafted portions of the specification" and stated he would instruct the members "that the proper *mens rea* to prove this specification is recklessness."[19]

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[15] JA at 335-38.
[16] JA at 335-38.
[17] JA at 420-22.
[18] JA at 339.
[19] JA at 430-432.

After they met at her workplace, Lowe's, and later chatted on Tinder, an online dating platform, Ms. E.F. went to Appellant's house, where she drank alcoholic beverages that either Appellant or his roommate provided.[20] At the time, she was 20 years and 11 months old.[21] Ms. E.F. testified that while her online profile contained her age, she never informed Appellant that she was not twenty-one.[22]

The Defense asked for two instructions on affirmative defenses to the Article 134 specification's language of "several" (referring to alcoholic beverages) and "in the presence of other junior enlisted members of the U.S. Coast Guard and U.S. Air Force."[23] The Government responded that this language pertained to the Government's theory of the terminal element and that "striking that language doesn't change the criminality."[24] The Military Judge denied the requested instructions, ruling the phrases were not "added element[s]" and that it was not a defense to show the Government could not prove the language it had alleged.[25]

The Military Judge then included the following in his findings instructions to the members:

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[20] JA at 349-351, 355, 364-65.
[21] JA at 374.
[22] JA at 374, 376.
[23] JA at 391.
[24] JA at 392.
[25] JA at 392.

> In charge two, the accused is charged with violations [sic] of Article 134, of providing alcohol *to a minor*. The element[s] of that offense are as follows: one, that on about 12 May 2020, at or near Newport News, Virginia, the accused provided several alcoholic beverages to [Ms. E.F.] [a] person under the age of 21 in the presence of other junior enlisted members of the US Coast Guard in [sic] the US Air Force. And two that under the circumstances, the conduct of the accused was [sic] the prejudice of good order and discipline in the armed forces in our [sic] nature to bring disgrace upon the armed forces. 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 within the offense would be that the accused honestly but mistakenly believed [Ms. E.F.] was of a *legal drinking age*.
>
> . . .
>
> Not every act of providing alcohol *to a minor* constitutes an offense under the UCMJ.[26]

The Government introduced no evidence at trial as to a "legal" drinking age where the alleged conduct occurred, and the Military Judge never defined the term "minor" for the members. In closing, the Government referred to Ms. E.F. as "underage,"[27] and specifically argued Clause Two was satisfied by asking, would "an objective observer of this instance of Coast Guard, pushing an *underage girl* to drink, lower esteem? It absolutely would."[28] The Trial Counsel later continued,

[26] JA at 395-96 (emphasis added).
[27] JA at 398.
[28] JA at 399 (emphasis added).

"[i]n a situation where an *underage person* is being fed alcohol . . . all of that discredits the service."[29]

The Defense's closing argument did not discuss the "legal drinking age" or whether Ms. E.F. was "underage."[30] The Trial Counsel's rebuttal asserted Appellant "knew she was *underage*" and "knew she shouldn't be drinking."[31]

Summary of Argument

This Court's case law is clear that unenumerated Article 134 specifications "*must* have words of criminality."[32] This requirement is consistent with the President's guidance to practitioners in the *Manual for Courts-Martial* (*MCM*).[33] And it accomplishes what such specifications must do: separate lawful from unlawful conduct,[34] capture the essence of a crime,[35] and provide a legal standard applicable to the forbidden conduct.[36]

To affirm Appellant's conviction, this Court would have to find the specification's language, "provid[ed] . . . alcoholic beverages to Ms. E.F., a person

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[29] JA at 399 (emphasis added).
[30] JA 401-414.
[31] JA at 415 (emphasis added).
[32] *Vaughan*, 58 M.J. at 35 (citing *Davis*, 26 M.J. at 447-48) (emphasis added).
[33] *Manual for Courts-Martial* (2019 ed.), [*MCM* (2019)], R.C.M. 307(c)(3), Discussion, para (G)(ii).
[34] *United States v. Rapert*, 75 M.J. 164, 165 (C.A.A.F. 2016) (internal quotations omitted).
[35] *Vaughan*, 58 M.J. at 35.
[36] *Saunders*, 59 M.J. at 9 (citing *Parker*, 417 U.S. at 755).

under the age of [twenty-one]"[37]—which contains no words of criminality and provides no legal standard for a drinking age—adequately alleges criminality and separates lawful from unlawful conduct. That would turn back the clock on over a decade of Article 134 jurisprudence by allowing the terminal element to satisfy words of criminality, when *Fosler* squarely held just the opposite: that words of criminality *cannot* satisfy the terminal element. This needless regression would conflict with this Court's clear guidance that words of criminality must be pled, and it would prejudice military defendants just as it did Appellant—primarily by removing any burden for the Government to plead and prove any standard by which to judge the conduct.

The Government charged Appellant without identifying any standard by which his conduct was forbidden—shifting the burden to him to defend against a moving (or rather, unknown) target. It then never presented (and the Military Judge never instructed on) any evidence, law, or military custom regarding the legal standard of a drinking age or how providing alcohol to a person under that age was unlawful. This left Appellant unable to properly hold the Government to its burden of proof and left him charged with a *per se* crime, when providing alcoholic beverages to a person under 21 is not a *per se* crime because it is not

[37] JA at 335-38.

virtually always criminal. The Military Judge and the Trial Counsel then made up for this deficiency by inserting undefined words suggesting criminality into the instructions and argument, after the presentation of evidence,[38] bringing the unfairness of the pleading failure—and the prejudice it caused—into sharp relief.

Argument

The Article 134 specification's failure to allege words of criminality prejudiced Appellant by allowing the members to find him guilty based on suggestions from the Government and the Military Judge that his conduct may have violated some other unspecified law.

Standard of Review

Courts review claims of failure to state an offense *de novo*.[39] Where, as here, a "flawed specification [is] first challenged after trial," it is "viewed with greater tolerance than one which was attacked before findings and sentence."[40] This Court "liberally construu[es] specifications in favor of validity when they are challenged for the first time on appeal."[41]

[38] JA at 395-96, 398-399.
[39] *Shafran*, No. 1480, slip op. at 7; *see also United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (internal citations omitted).
[40] *Turner*, 79 M.J. at 405 (quoting *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)).
[41] *Id.*

Discussion

"Due process . . . requires fair notice as to the standard applicable to the forbidden conduct."[42] Likewise, the Sixth Amendment requires an accused to "be informed of the nature and cause of the accusation against him."[43] A charge is constitutionally required to contain "the elements of the offense charged *and* fairly inform a defendant of the charge against which he must defend."[44] A charged specification will be found constitutionally sufficient only if it alleges "every element" of the offense, "so as to give the accused notice [of the charge against which he must defend] and protect him against double jeopardy."[45]

With respect to alleged violations of Article 134, UCMJ, in particular, "[a]n Article 134 offense that is not specifically listed in the *MCM* must have words of criminality *and* provide an accused with notice as to the elements against which he or she must defend."[46] The President has distilled this charging guidance in the *MCM*, explaining that "words indicating criminality such as 'wrongfully,'

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[42] *Vaughan*, 58 M.J. at 31 (citing *Parker*, 417 U.S. at 755).
[43] U.S. CONST. AMEND. VI.
[44] *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007) (emphasis added and citation omitted).
[45] *Turner*, 79 M.J. at 403 (quoting *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (internal quotation marks omitted)); *see also* R.C.M. 307(c)(3); *Fosler*, 70 M.J. at 229; *United States v. Crafter*, 64 M.J. 209, 212 (C.A.A.F. 2006).
[46] *Vaughan*, 58 M.J. at 35 (emphasis added) (citing *Davis*, 26 M.J. at 447-48); *see also Saunders*, 59 M.J. at 9 ("An Article 134 specification must contain words of criminality") (citing *Vaughan*, 58 M.J. at 35).

'unlawfully,' or 'without authority' . . . should be used to described the accused's acts" when charging unenumerated Article 134 offenses.[47]

The requirement to plead words of criminality serves multiple purposes. First, it "separates lawful conduct from unlawful conduct."[48] Second, words of criminality assist with providing "fair notice as to the standard applicable to the forbidden conduct."[49] Third, words of criminality identify available defenses to the charged conduct.[50]

While no specific words must be pled to satisfy the requirement to include words of criminality, words such as "wrongfully," "unlawfully" or "without authority" are commonly used to do so.[51] That said, other words may be used so long as they (1) "capture the essence of a crime"[52] and (2) provide the "standard applicable to forbidden conduct."[53] The specification under Charge II fails to include words that do either.

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[47] *MCM* 2019, RCM 307 discussion, para G(ii).
[48] *Rapert,* 75 M.J. at 165 (internal quotations omitted).
[49] *Saunders*, 59 M.J. at 9 (quoting *Parker*, 417 U.S. at 755).
[50] *See Fosler*, 70 M.J. at 230-31 ("[W]ords of criminality speak to mens rea and the lack of a defense or justification."); *United States v. Hughey*, 72 M.J. 809, 814 (C.G. Ct. Crim. App. 2013), *overruled by United States v. Tevelein*, 75 M.J. 708 (C.G. Ct. Crim. App. 2016).
[51] *MCM* 2019, R.C.M. 307(c)(3), Discussion para. (G)(ii).
[52] *Vaughan*, 58 M.J. at 35-36.
[53] *Saunders*, 59 M.J. at 9.

A. The language of the specification under Charge II fails to "capture the essence" of a crime and separate lawful conduct from unlawful conduct.

The words of a specification must, at least, "capture the essence" of a crime.[54] This Court has looked to "military customs and regulation," federal criminal laws, state statutes, and "terms" that have "common usage within the UCMJ" to determine the sufficiency of a specification.[55] Words of criminality like "wrongful" serve to "separate[] lawful conduct from unlawful conduct."[56]

By way of example, this Court found the specification in *Vaughan* satisfied this standard. In *Vaughan*, the charged specification read as follows:

> In that AIRMAN FIRST CLASS SONYA R. VAUGHAN, United States Air Force, did, at or near Pickliessum, Germany, on diverse [sic] occasions between on or about 16 Nov 98 and on or about 3 Feb 99, neglect her daughter, [SRK] a child under the age of one year, by leaving the said [SRK] in their house without supervision or care for unreasonable periods of time without regard for the mental or physical health, safety, or welfare of the said [SRK], such conduct being of a nature to bring discredit upon the armed forces.[57]

In upholding that specification (which at the time, was unenumerated in Article 134), this Court explained that the "military judge defined the elements herself," and that the "elements she listed capture[d] the essence of 'child neglect'

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[54] *See Vaughan*, 58 M.J. at 35-36.
[55] *Id*.; *Saunders*, 59 M.J. at 7-8.
[56] *Rapert*, 75 M.J. at 165.
[57] *United States v. Vaughan*, 56 M.J. 706, 707 (A.F. Ct. Crim. App. 2001), *aff'd*, 58 M.J. at 36.

as reflected in military custom and regulation as well as a majority of state statutes."[58]

Of note, the specification did not contain the traditional words of criminality like wrongfully, unlawfully, or without authority. However, it contained words that described the "essence" of the crime: "leaving" a child "under the age of one year" in a "house without supervision or care for unreasonable periods of time without regard for the mental or physical health, safety, or welfare [of the child.]"[59] The Court also noted the military judge "elaborated" on the offense elements to further ensure the accused had notice of the criminality of acts to which she was pleading guilty.[60] Therefore, this Court held that "the elements given by the military judge gave Appellant sufficient notice."[61]

Here, unlike in *Vaughan*, the specification fails to capture the essence a crime. The Government has already conceded that the specification's use of "several" and "in the presence of other junior enlisted members of the U.S. Coast Guard and U.S. Air Force" pertained only to the terminal element and were not

[58] *Vaughan*, 58 M.J. at 35-36.
[59] *Id.* at 33.
[60] *Id.* at 33-36.
[61] *Id.* at 36.

words of criminality.[62] Therefore, the only words in the specification that can potentially save the specification are "providing . . . alcoholic beverages to Ms. E.F., a person under the age of 21."

The Government must convince this Court that those words alone imply criminality and separate lawful conduct from unlawful conduct. But in many circumstances, this act—providing alcohol to someone under the age of twenty-one—is legal, including on some military bases and in private homes in the Commonwealth of Virginia (where the allegation here took place).[63]

The specification did not rely on any commonly used terms from the UCMJ—the words "provide" and "under the age of 21" are not common within the UCMJ, which notably does not establish a minimum drinking age for service members or criminalize providing alcohol to persons under the age of twenty-one. In fact, where Article 134 and the *MCM* do establish an age for "minors," that age is eighteen, not twenty-one.[64]

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[62] JA at 391-92 ("describing 'several' and 'presence of junior enlisted members . . . [are] both [] probably surpluses of the good order and discipline piece of it . . . striking that language doesn't change the criminality").
[63] *See* 10 U.S.C § 2683 (allowing the Secretary concerned to establish minimum drinking ages as the lowest applicable age established by law of a state or jurisdiction of Mexico or Canada that is within 50 miles of a military installation); *Shafran*, No. 1480, slip op. at 45 (Brubaker, J., dissenting) (citing the seven applicable exceptions to Va. Code § 4.1-306.A1, 4.1-200.1–7)).
[64] *MCM* 2019, Article 134 (Child pornography) Discussion, para 95.c.(1)-(2).

Military custom and regulation, similarly, do not insert patent criminality into these words—best evinced by the fact that Congress has authorized commanders to lower the drinking age at certain military bases.[65] The specification also bears little comparison to the state statute that would have applied in a civilian context, which itself contains *seven* exceptions—including one that is at least similar to the circumstances in this case.[66]

There is ample support in case law and the enumerated punitive articles that there are other ways to "capture the essence" of a crime beyond the traditional words "unlawful," "wrongful," and "without authority."[67] But words of criminality still must be captured. When they are not pled, the Government's burden to plead and prove that conduct was unlawful is removed, and it can convert any act into a *per se* crime as it did here. This is not "form over substance," as the lower court suggests.[68] Here, the act alleged did not capture the essence of a crime or in any way separate lawful conduct from unlawful conduct.

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[65] 10 U.S.C § 2683.
[66] *Shafran*, No. 1480, slip op. at 45 (Brubaker, J., dissenting) (citing Va. Code § 4.1-306.A1, 4.1-200.1–7). See Va. Code § 4.1-200.7 (excepting lawfully acquired alcoholic beverages in personal homes when served in the residence to persons twenty-one years of age or older or people under twenty-one years of age who are accompanied by a parent, guardian, or spouse).
[67] *See* Vaughan, 58 M.J. at 45-46.
[68] *Shafran*, No. 1480, slip op. at 11.

B. The language of the specification under Charge II fails to provide the "standard applicable to forbidden conduct."

To satisfy due process standards a specification must adequately describe the "standard applicable to forbidden conduct."[69] In doing so, the specification may reference "common legal standards"[70] or other laws or regulations, such as state laws.[71]

This Court applied this reasoning to an unenumerated Article 134 specification in *Saunders*. The *Saunders* court upheld the charged specification as providing fair notice "that [the Appellant] risked prosecution under Article 134 if he knowingly engaged in a course of conduct that placed another person in reasonable fear of injury or emotional distress."[72] The Court compared the specification to the federal interstate stalking statute and noted all fifty states and the District of Columbia had enacted criminal laws addressing stalking or harassing conduct to support the conclusion that the appellant was on notice of the criminality of his actions.[73]

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[69] *Saunders*, 59 M.J. at 9 (citing *Vaughan*, 58 M.J. at 31) (applying the *Parker* due process standard, 417 U.S. at 755).
[70] *See id.* at 9 (referencing the reasonableness standard).
[71] *See United States v. Nygren*, 53 M.J. 716 (C.G. Ct. Crim. App. 2000) (analyzing a specification under Article 134, UCMJ, alleging a violation of a Wisconsin statute).
[72] *Saunders*, 59 M.J. at 9.
[73] *Id.* at 7-8.

The specification at issue in *Saunders* was highly detailed, containing no fewer than twelve lines, including both a *mens rea* ("knowingly and willfully") and various words of criminality ("without her consent," "attempting to gain access to her home, breaking into her home," "wrongfully refusing to leave her house when asked," "wrongfully visiting her place of employment," "wrongfully calling," and "willfully damaging her car.").[74] In upholding the specification, the Court stressed the specification was pled using "common legal standards" such as causing "emotional distress in a *reasonable* person" and "placing a person in *reasonable* fear."[75]

But here, unlike in *Saunders*, the specification at issue fails to incorporate any common legal standards. It provides no "standard" for how Appellant's act of "providing" alcohol could be, or was, unlawful. At best, it references the age of twenty-one without explaining the significance of that age or tying it to any legal standard whatsoever. It fails to identify any standard by which the criminality of this act could or should be judged.

The language alleges a *per se* crime that anyone, anywhere, who provides an alcoholic beverage to someone under the age of twenty-one under any circumstances has committed a crime—but this is not a "common legal standard"

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[74] *Id.* at 5.
[75] *Id.* at 9 (emphasis in original).

and has no grounding in federal or state law. The act alleged falls short of even the basic notice requirements set by this Court, and is fatally defective.

By contrast, cases in which courts have upheld unenumerated Article 134 specifications related to underage alcohol consumption have all involved specifications with greater specificity than Appellant's that included either express or implied words of criminality:

- "*unlawfully* provide Private [TMG], a person under the age of 21, alcoholic beverages"[76]
- "did, at Sturgeon Bay, Wisconsin, on or about 20 February 1999, consume alcoholic beverages while under the age of 21 years, *in violation of Section 125.07 of the Wisconsin Statutes*"[77]
- Provided alcoholic beverages to "minors who had not attained the *legal drinking age of 20*"[78]

Unlike the specifications in those cases, the Government did not plead the Article 134 specification in this case as an assimilated crime under Clause Three of Article 134; it did not plead Appellant's act was "unlawful"; and it did not plead

[76] *United States v. Tucker*, 78 M.J. 183, 185 (C.A.A.F. 2018) (emphasis added).
[77] *Nygren*, 53 M.J. at 717(emphasis added).
[78] *United States v. Simmons*, ACM 38788, 2016 WL 4191360, slip op. at *6 (A.F. Ct. Crim.App. July 17, 2016) (memorandum op.), *aff'd on other grounds*, 76 M.J. 127 (C.A.A.F. 2017) (emphasis added).

that Ms. E.F. had not attained any "legal drinking age." Nor did it present any evidence, law, or custom regarding the definition of "minor" or "legal drinking age." Thus, both the language of the specification and the evidence in the record are devoid of any reference to a legal standard by which Appellant's conduct could be judged. The specification, therefore, is fatally defective (just as the evidence is legally insufficient).

C. Words of criminality are required and are missing from the specification under Charge II.

To uphold the specification, the lower court acknowledged the specification contained no traditional words of criminality and instead looked at the "nature of [the] offense."[79] The lower court majority concluded that it:

> [B]elieve[d] the facts alleged do describe a violation of unwritten, customary law as evidenced by military case law, as well as state and federal law; therefore, neither wrongfully or unlawfully is required . . . there are no facts that would per se take Appellant's conduct outside the prohibition against providing alcohol to a person under the age of [twenty-one].[80]

But after determining that words of criminality were not required, the lower court then held that this prior determination was irrelevant, by stating: "[W]hether Appellant's conduct is criminal ultimately depends *not* on any such state law exception, *but rather* whether his conduct was prejudicial to good order and

[79] *Shafran*, No. 1480, slip op. at 19.
[80] *Id.*

discipline or service-discrediting."[81] The lower court therefore grounded its holding in finding that the terminal element imported the criminality.

This analysis is logically inconsistent and faulty for four reasons. First, the lower court vacillates between determining whether words of criminality are required (and present here), and whether they are not required merely because the conduct satisfies the terminal element.

Second, the lower court's conclusion that the language pled here violated "customary law" and "the prohibition against providing alcohol to a person under the age of [twenty-one]" is not actually supported by "military case law" or "state and federal law."[82] Notably, the lower court never defines the source of "the prohibition" it identifies and does not refer to anywhere in the record where the Government or the Military Judge defined or explained this "prohibition."

Third, the lower court concludes that the Government pled a *per se* crime, eliminating any need to separate lawful conduct from unlawful conduct or notify the accused of potential defenses.

And fourth, as explained in greater detail below, the lower court concludes by adopting a faulty, pre-*Fosler* justification that allows the terminal element to satisfy words of criminality.

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[81] *Id.* at 20.
[82] *See supra*, notes 63-66, 76-78.

i. *Davis* requires the Government to plead words of criminality; the lower court erred in using *Davis* to hold just the opposite.

The lower court heavily relies on the pre-*Fosler* CMA case, *United States v. Davis*, to justify its conclusion that the specification contained words of criminality or otherwise described conduct that was unlawful.[83] But its reliance is misplaced because, if anything, *Davis* only stands for the proposition that words of criminality must be pled[84] and when the alleged conduct *on a military base* is "*virtually always*" illegal, the specification properly pled criminality.[85]

The offense in *Davis* regarded cross-dressing on a military installation.[86] The specifications at issue read as follows:

> In that . . . [appellant], a male, was at Building 885, Enlisted Barracks, Puget Sound Naval Shipyard, Bremerton, Washington, on or about 10 January 1986, dressed in women's clothing, to wit: nylon stockings, skirt, blouse, sweater and wig, which conduct was to the prejudice of good order and discipline and of a nature to bring discredit upon the Armed Forces.
>
> In that . . . [appellant], a male, did at building #434, Motion Picture Exchange, Puget Sound Naval Shipyard, Bremerton, Washington, on

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[83] *Shafran*, No. 1480, slip op. at 10, 12, 14, and 16.
[84] *Vaughan*, 58 M.J. at 35 (citing *Davis*, 26 M.J. at 447-48).
[85] *Davis*, 26 M.J. at 449 (the "particular facts and surrounding circumstances recited in the specifications in this case describe conduct on a military installation which virtually always would be prejudicial to good order and discipline and discrediting to the Armed Forces").
[86] *Davis*, 26 M.J. at 447.

> or about January 1986, appear dressed in articles of women's clothing, to wit: nylon stockings, blouse, bra, shoes, women's fashion jeans, nail polish, purse and a woman's coat, which conduct was to the prejudice of good order and discipline and of a nature to bring discredit upon the Armed Forces.[87]

The *Davis* court began its analysis by implementing a two-category test: a category one offense was one that "is or generally has been recognized as illegal under the common law or under most statutory criminal codes," whereas a category two offense was one "which—however eccentric or unusual—would not be viewed as criminal outside the military context."[88] In dicta, *Davis* posited that in the former category, "it can be argued that a specific allegation of 'wrongfulness' or 'unlawfulness" is surplusage," but the court then declined to resolve that issue.[89]

The *Davis* court initially identified the offense as a category two offense,[90] but ultimately did not employ the categorical approach, and upheld the specification instead because "[t]he particular facts and surrounding circumstances recited in the specifications [] describe conduct on a military installation which *virtually always* would be prejudicial to good order and discipline and discrediting

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[87] *Id.*
[88] *Id.* at 448.
[89] *Id.*
[90] *Id.*

to the Armed Forces."[91]

The lower court here relied heavily on the *Davis* categorical approach in its opinion.[92] It approvingly cited *Davis*'s dicta that for category one offenses (conduct that is "generally viewed as illegal"), pleading words of criminality is "surplusage."[93] But it then confusingly explained that (1) *Davis* found the facts fell into category two,[94] and (2) "category two specifications likely will require pleading either unlawful or wrongful."[95] In fact, the *Davis* specification did *not* include "unlawful" or "wrongful," yet this Court's predecessor *still* upheld the specification in *Davis*. The lower court's understanding of *Davis*, therefore, does not make sense.

The lower court's dissenting judges more aptly describe *Davis*'s holding: instead of relying on the categorical approach, the Court "instead looked to the particular acts alleged, which, applying the mores of its time, it found fully expressed criminality under customary military law."[96]

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[91] *Id.* at 449 (emphasis added); *see Shafran*, No. 1480 slip op. at 44 (Brubaker, J., dissenting) ("[T]he court did not apply a categorical approach, and instead looked to the particular acts alleged, which, applying the mores of its time, it found fully expressed criminality under customary military law.").
[92] *Shafran*, No. 1480, slip op. at 10, 12, 14, and 16 (applying the *Davis* categorical approach).
[93] *Id.* at 12.
[94] *Id.* at 12, n.14.
[95] *Id.* at 12.
[96] *Id.* at 44 (Brubaker, J., dissenting).

Ultimately, in a post-*Fosler* landscape, *Davis* stands for precisely what this Court held in *Vaughan*: words of criminality must be pled and the specification must "capture the essence" of a crime defined by military custom, regulation, or a majority of state statutes.[97] In 1988, the *Davis* court found the specification expressed sufficient words of criminality when analyzing conduct *on a military installation* that would "*virtually always*" be criminal.[98] It did not hold that "category one" offenses (which are *generally* recognized as criminal), writ large, did not require words of criminality.[99]

That an act is generally considered unlawful does not obviate the need for words of criminality. Under the UCMJ, distribution of a controlled substance (commonly considered unlawful) under Article 112a still requires the Government to plead wrongfulness.[100] Under Article 134 in the *MCM*, possession of child pornography (commonly considered unlawful) still requires the Government to plead wrongfulness.[101] Just because an act is commonly assumed to be unlawful, or may sometimes be unlawful, does not

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[97] *Vaughan*, 58 M.J. at 35.
[98] *Davis*, 26 M.J. at 449.
[99] *Id.* at 448 (declining to decide whether words of criminality for offenses generally viewed as illegal was surplusage).
[100] *Shafran*, No. 1480, slip op. at 42 (Brubaker, J. dissenting) (citing *MCM* 2019, pt. IV, para 50.b.(1), c(2), c(5)).
[101] *Id.* at 41 (citing *MCM*, pt. IV, para 95.b.(1)).

mean that it is *always* so obviously unlawful to obviate the need to plead the fact that, under the circumstances, it was actually criminal.

Since *Vaughan* and *Saunders* (both decided in 2003), this Court has cited to *Davis* once regarding a notice issue and it bears little resemblance to this case.[102] In that case, *United States v. Conliffe*, the accused pled guilty to housebreaking (then under Article 130, UCMJ) but this Court held that the "criminal intent" element of housebreaking could not be supported by pleading that the criminal intent was conduct unbecoming an officer.[103] It then affirmed the lesser-included offense of unlawful entry (then under Article 134), and cited to *Davis* to demonstrate that the accused's unlawful entry satisfied the terminal element under Article 134.[104] The Court equated the appellant's plea to "discredit in the context of . . . conduct unbecoming" to "an admission to discrediting conduct for the

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[102] This Court has cited to *Davis* five times since *Saunders* (which was issued after *Vaughan*) for other points of law: *United States v. Richard*, 82 M.J. 473, 478-79, n.6 (C.A.A.F. 2022) (regarding the proof required for the terminal element); *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011) (regarding the proof required for the terminal element); *United States v. Conliffe*, 67 M.J. 127, 134 (C.A.A.F. 2009) (noting that under *Davis*, Article 134 punishes conduct "which is or generally has been recognized as illegal under the common law or under most statutory criminal codes," and that "[S]uch activity, by its unlawful nature, tends to prejudice good order or to discredit the service") (internal quotations omitted); *United States v. Toohey*, 63 M.J. 353, 358 (C.A.A.F. 2006) (regarding the appropriate test for prejudice); *United States v. Kreutzer*, 61 M.J. 293, 298, 300 (C.A.A.F. 2005) (regarding the appropriate test for prejudice).

[103] *Conliffe*, 67 M.J. at 132-33.

[104] *Id.* at 133-36 (internal citations omitted).

purposes of unlawful entry."[105] *Conliffe*, which involved a very different scenario than here, has not been cited by any military court since this Court issued *Fosler*.

In sum, this Court did not apply the categorical test in *Vaughan* or *Saunders*,[106] and since those decisions it has never used *Davis* to support the categorical test or the proposition that words of criminality do not need to be pled. The test is confusing and questionable post-*Fosler*, and it should give way to the clearer standards in *Vaughan*, *Saunders*, *Rapert*, and the *MCM*.

While cross-dressing on a military installation in the 1980s may have been "virtually always" criminal, providing alcohol to a civilian who is twenty years and eleven months old in an off-base home is not "virtually always" criminal.[107] Importantly, *Davis* involved on base conduct where the relevance and applicability of historical military customs logically have more weight. Extending *Davis* from an act that is "virtually always" criminal *on a military base* to off-base conduct in a private home is a stretch—particularly where applicable federal and state laws carve out exceptions for that conduct and do not make it a *per se* crime. In light of this Court's established starting point that words of criminality "must" be pled—this extension of *Davis* is without support, prejudicial to Appellant and other

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[105] *Id.* at 134.
[106] *See supra*, note 8.
[107] *See* 10 U.S.C § 2683; *Shafran*, No. 1480, slip op. at 45 (Brubaker, J., dissenting) (citing Va. Code § 4.1-306.A1, 4.1-200.1–7).

military defendants, and generally ill-advised in light of this Court's more recent Article 134 jurisprudence.[108]

In *Parker v. Levy*, the Supreme Court noted the "factors differentiating military society from civilian society" twice in upholding the constitutionality of Articles 133 and 134.[109] The *Parker* Court pointed out that while some areas "have been left vague," the appellant's conduct squarely fell within "military precedents" supplied by "less formalized custom and usage" when he urged enlisted men not to go to Vietnam if ordered to do so.[110]

There, like in *Davis*, the relevance of military custom and regulation in providing criminality is more apt when addressing purely military conduct. But when addressing conduct lacking that military nexus and governing off-base, non-military conduct that the Government simply wants to charge under Article 134, the same logic should not apply. There, the Government is in the territory that *Parker* described as still "vague."[111] In that case, like here, "the criminal provision is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that

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[108] *Vaughan*, 58 M.J. at 35.
[109] *Parker*, 417 U.S. at 756.
[110] *Id.* at 754-58.
[111] *Id.* at 754 ("It would be idle to pretend that there are not areas within the general confines of the articles' language which have been left vague despite these narrowing constructions.")

no standard of conduct is specified at all."[112]

The Government should have borne the burden to plead, and then prove, the standard applicable to this allegedly forbidden conduct—but it instead pled a *per se* crime with no standard at all. The lower court's reliance on the categorical test and its imprecise reading of *Davis* were erroneous and this Court should clarify what portions of *Davis*, if any, survive the cases that followed.

ii. Words of criminality and the terminal element are distinct and serve different purposes—one does not imply the other.

In *Fosler*, this Court distinguished between words of criminality and the terminal element, explaining that the former "speak to mens rea and lack of a defense or justification," and "do not imply the terminal element."[113] The lower court initially adopted this reasoning in *United States v. Hughey* for the same question presented in this case, stating, "Surely the converse is also true: a terminal element does not imply the word 'wrongfully.'"[114] But the lower court then overturned itself in *United States v. Tevelein*, citing to its own pre-*Fosler* case from 2002 (*United States v. Farence*), by explaining that the words of the terminal element "are, without more, 'words importing

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[112] *Parker*, 417 U.S. at 755 (internal quotations and citation omitted).
[113] *Fosler*, 70 M.J. at 231.
[114] *United States v. Hughey*, 72 M.J. 809, 814 (C.G. Ct. Crim. App. 2013), *overruled by Tevelein*, 75 M.J. at 711.

criminality' sufficient to support a specification alleging acts that would not otherwise constitute a crime."[115]

The lower court attempted to distinguish *Tevelein* as being decided by "the facts and circumstances of the case" and pushed back on the notion that it "establish[ed] a bright line rule that words of criminality are never required."[116] But it then upheld the "criminal[ity]" of the specification here because it found the "conduct was prejudicial to good order and discipline or service-discrediting."[117] Therefore, it applied the bright line rule it stated did not exist, and "imported" criminality from the terminal element to satisfy the specification.

But the lower court's *Farence* holding has always been based on an incorrect premise. It justified its holding that the terminal element "import[s]" words of criminality by citing to *United States v. Brice*,[118] where this Court's predecessor held a specification as deficient because it lacked words of criminality (the specification regarded an attempt to sell

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[115] *Tevelein*, 75 M.J. at 711 (quoting *United States v. Farence*, 57 M.J. 674, 677 (C.G. Ct. Crim. App. 2002)).
[116] *Shafran*, No. 1480, slip op. at 18-19.
[117] *Id.* at 20.
[118] *Farence*, 57 M.J. at 677 (citing *United States v. Brice*, 38 C.M.R. 134 (1967)).

marijuana).[119] But in that pre-*Fosler* 1967 CMA case, the specification did not plead the terminal element, either.[120] Therefore, the lower court's line of cases relying on *Brice* (which did not plead the terminal element), to justify the premise that the terminal element "imports" words of criminality, was always inherently flawed. Post-*Fosler*, this application is confusing, inconsistent, and needless—especially in light of the clear guidance from this Court and the President to plead words of criminality for unenumerated Article 134 offenses.

Appellant asked the lower court to revisit *Tevelein* because it conflicted with *Fosler* and *Vaughan*. The lower court declined to do so.[121]

D. The deficient specification prejudiced Appellant by shifting the burden to Appellant to define the "standard" applicable to the allegedly "forbidden conduct."

The Government must demonstrate that the error was harmless beyond a reasonable doubt.[122] When the sufficiency of a specification is challenged for the first time on appeal, harmlessness is determined by "look[ing] at the record to

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[119] *Brice*, 38 C.M.R. at 138 ("Where an act is not in itself an offense, being made so only by statute, regulations, or custom, words importing criminality are a requirement and, if lacking, the specification is deficient").
[120] *Id.* at 137 ("In that . . . did . . . attempt to sell to Wayne C. Wood marihuana (hashish) at Landstuhl, Germany, on or about 19 August 1966").
[121] *Shafran*, No. 1480, slip op. at 18-19 (declining to overrule *Tevelein*).
[122] *See Turner*, 79 M.J. at 403.

determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'"[123] It cannot prove either here.

i. While faulty specifications can sometimes be cured in a guilty plea inquiry, the same analysis does not work for contested cases.

This Court has routinely held that some notice issues can be cured during a guilty plea inquiry. But that logic does not apply in the same way to contested cases where an accused is defending against a charged specification. In *Vaughan*, this Court relied heavily on the Military Judge's providence inquiry: it transposed a 612-word portion of this exchange into its opinion.[124] During the inquiry, the military judge asked the accused questions such as:[125]

- "[Y]ou agree then that a child of that age, about a month-and-a-half, needs to generally have supervision or someone around them to watch over them?"
- "That means your decision to leave her—and this wasn't any emergency that made you leave the child, that you had to take care of something else?"

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[123] *See United States v. Humphries*, 71 M.J. 209, 215-16 (C.A.A.F. 2012) (quoting *United States v. Cotton*, 535 U.S. 625, 633 (2002)).
[124] *Vaughan*, 58 M.J. at 33-36.
[125] *Id.* at 34.

- "It was just for whatever you wanted to do personally, correct?"
- "[Y]ou agree that potentially, depending upon what might happen—sometimes little babies can have milk or something, and they can vomit little amounts, or they could potentially, if they're on their back or side, or anything like that, choke."

Here, in just these four examples from the colloquy (there are more), the military judge was confirming the accused understood the criminality: the duty of care (a child needs supervision), the lack of defense (there was no duress or emergency, the appellant left because she wanted to), and why this is a crime (because a child can die).

In *United States v. Watkins*, this Court's predecessor explained that the accused was "not misled, as he pleaded guilty to both specifications, had the elements of absence without leave correctly explained to him during the providence inquiry, and admitted that he understood the offenses to contain the element 'without proper authority.'"[126] Similarly, in *United States v. Brecheen*, the CMA distinguished *United States v. Brice* by explaining that the accused "pleaded guilty, had a pretrial agreement, and satisfactorily completed the providence

[126] *Watkins*, 21 M.J. at 210.

inquiry (*including admitting his distributions were wrongful*)."[127]

Even in *Tevelein*, the lower court largely based its holding on the accused's guilty plea stipulation of fact. The lower court noted that the appellant "entered into a stipulation of fact, and admitted that he used Spice to get high, for its mind-altering effects, that he expected the effects to be similar to marijuana . . . and that he used Spice in part because he knew it would not be detected by an urinalysis test."[128] The lower court noted these stipulated facts "well established [the use] was unlawful."[129]

The analysis is different in a contested case. Where an accused has pled not guilty and must fashion a defense, "[d]ue process requires a criminal defendant to be presented with a 'meaningful opportunity' to defend himself."[130] In *United States v. Wells*, two Judges of this Court explained the unfairness where the Government has "no obligation to present any evidence or argument with respect

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[127] *United States v. Brecheen*, 27 M.J. 67, 68 (C.M.A. 1988) (emphasis added) (noting that "[s]ince the time of Brice, drug offenses have been expressly prohibited by a codal provision, Article 112a," that the specification contained "a mental state [that] comports with the knowledge required for wrongful distribution," and that the "large amount" of controlled substances pled "suggest strongly that a legitimate law enforcement activity was not involved").
[128] *Shafran*, No. 1480, slip op. at 18-19 (quoting *Tevelein*, 75 M.J. at 712-13).
[129] *Id.* at 19.
[130] *United States v. Wells*, __ M.J. __, No. 23-0219/AF, slip op. at 9 (C.A.A.F. Sep. 24, 2023) (Hardy, J., dissenting) (citing *Jackson v. Virginia*, 443 U.S. 307, 314 (1979)).

to [the terminal element]," but the "accused has the burden to affirmatively refute *every possible theory* [for that element]."[131]

The same concept of unfairness applies to pleading words of criminality, which provide the standard applicable to the forbidden conduct, alert the accused to possible defenses, and separate lawful conduct from unlawful conduct.[132] If they 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. That is what happened here.

Finally, this Court's adoption of the "'maximum liberality' standard announced in *Watkins* . . . follows from cases such as [*Brecheen*] . . . which followed *Watkins* and distinguished *Brice*."[133] As mentioned above, *Watkins* and *Brecheen*—unlike here—were guilty pleas where the military judges conducted providence inquiries that helped to cure notice issues.[134] Appellant recognizes this Court's holding in *Turner* that this standard of review also applies to contested cases—but notes that the cases that implemented the "maximum liberality"

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[131] *Id.* at 8 (emphasis in original) (referring to service discrediting conduct).
[132] *Rapert*, 75 M.J. at 165; *Fosler*, 70 M.J. 230-31; *Vaughan*, 58 M.J. at 31, 35.
[133] *United States v. Turner*, 79 M.J. 401, 409 (Maggs, J., dissenting) (internal citations omitted).
[134] *Brecheen*, 27 M.J. at 68; *Watkins*, 21 M.J. at 210.

standard had fundamentally different circumstances (guilty pleas with providence inquiries).

In that vein, Appellant respectfully asserts that the "maximum liberality" standard should be less rigid here, compared to: (1) guilty pleas with providence inquiries; or (2) contested cases where the Defense clearly understood the criminality and standard of applicable conduct (as this Court pointed out in *Turner*).[135]

ii. The failure to plead words of criminality allowed the Government to convict Appellant of a *per se* crime without proving his conduct was unlawful or that he violated any legal standard.

This Court's decision in *Turner* is helpful in understanding why the error is not harmless beyond a reasonable doubt in this case. In *Turner*, the appellant contested the charges and this Court analyzed the impact of the Government's failure to plead words of criminality. But the prejudice analysis results differently here. In finding no prejudice, this Court pointed to seven items from the record, including several originating *from the defense at pre-trial stages*, which reflected the defense knew and was defending against the precise standard applicable to the forbidden conduct (unlawful attempted murder).[136]

[135] *Turner*, 79 M.J. at 407-08.
[136] *Id.*

Here, the situation was entirely different. As the lower court approvingly stated, Appellant was charged with a *per se* crime[137]—for which there was apparently no defense or exception, and which was apparently always unlawful. The Government's pleading structure therefore defined the offense as *per se* without any support from law, custom, or common legal terms, and removed any burden to prove that Appellant's conduct violated an applicable legal standard in any way.

The Defense attempted to attack the *mens rea* portion in argument,[138] asked for (and was denied) instructions on the specification's language,[139] and asked for a mistake instruction.[140] But unlike in *Turner*, where even pretrial, the accused clearly knew the government charged him with unlawful attempted murder, here, the Defense had no way of knowing the applicable legal standard or how to defend it—because apparently there was none. The Government never had to plead or prove why, or under what authority, the age of twenty-one had any legal significance. And the prejudice to Appellant is clear from the Government's failure of proof alone.

The Government never presented evidence, legal standards, or theories to

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[137] *Shafran*, No. 1480, slip op. at 19.
[138] JA at 411-12.
[139] JA at 389-90.
[140] JA at 442.

the court-martial addressing the standard by which providing alcohol to a person under the age of twenty-one is criminal. The Government's defective charge obviated the need for the evidence in the first place. The Government lowered its burden of proof by failing to include words of criminality, such that the Defense could not prevail on a motion under R.C.M. 917 or argue that the Government failed to prove unlawful conduct despite this failure of proof.

Further, the Defense was never provided the source of legal standard of the terms "minor" and "legal drinking age"—on which the Military Judge instructed[141] but which the Government never pled.[142] And when the Military Judge injected these legal terms into the court-martial while instructing the members, it was after the presentation of evidence. When fashioning the trial defense, the Defense had no way of knowing that these legal terms were on the table and therefore defend against "every possible theory" of applicable standards.[143]

When the Defense asked for two instructions on defenses for the language of "several" and "in the presence [of enlisted service members]," the Government argued that these were not words of criminality, were not elements, and the Military Judge declined to give the requested instruction.[144] The only instruction

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[141] JA at 395-96.
[142] JA at 335-38.
[143] *Wells*, No. 23-0219/AF, slip op. at 8 (Hardy, J., dissenting).
[144] JA at 391-92.

the Military Judge did give was to *sua sponte* import words of criminality like "minor" and "legal drinking age"—without defining either—and where the Government did not plead them.[145]

As two Judges of this Court recently explained, this is not "how the justice system works."[146] As the dissenting judges in the lower court concluded, "nothing in the trial record reasonably placed Appellant on notice of the wrongfulness element, thereby curing the error."[147] The dissenting judges were correct that "wrongfulness was not addressed one way or the other in the record," and was not "essentially uncontroverted."[148] The Record was silent on the issue of a legal standard—in stark contrast to *Turner*.[149] Therefore, the "Government cannot prove harmlessness beyond a reasonable doubt."[150]

Conclusion

Following in the footsteps of *Fosler*'s unmistakable direction that the terminal element must be pled in clause 1 or 2 Article 134, UCMJ specifications, this Court should similarly and clearly reaffirm that for unenumerated Article 134

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[145] JA at 335-38, 395-96.
[146] *Wells*, No. 23-0219/AF, slip op. at 8 (Hardy, J., dissenting).
[147] *Shafran*, No. 1480, slip op. at 47 (Brubaker, J., dissenting).
[148] *Id.*
[149] 79 M.J. at 407-08.
[150] *Id.*

offenses, the Government must plead words of criminality.[151] Just as words of criminality do not imply the terminal element,[152] pleading the terminal element does not import words of criminality into the specification. Thus, the specification under Charge II fails to state an offense.

Relief Requested

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

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[151] *Vaughan*, 58 M.J. at 35.
[152] *Fosler*, 70 M.J. at 230-31.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and opposing counsel on October 21, 2024.

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