DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL OPERATIONS AGENCY
IN THE USAF JUDICIARY

UNITED STATES	)	
	)	
v.	)	**MOTION FOR RECONSIDERATION**
	)	
TSgt ROBERT C. BRISSETTE	)	
7th EMS (ACC)	)	**7 September 2011**
DYESS AFB, TX	)	
	)	

COMES NOW the accused, by and through counsel, pursuant to Rules for Courts-Martial (R.C.M.) 701(a), 703(f), 905(b)(4), and 906(b)(7), and moves this Honorable Court to reconsider its holding that as to Charge IV and its Specification the addition of the terminal element to the charge after arraignment, the only offense TSgt Brissette was found guilty of, was a minor change and find that it was a major change and the finding therefore should be withdrawn and dismissed and TSgt Brissette immediately released from confinement.

Issue Presented

WHETHER THE INDECENT ACT SPECIFICATION FAILED TO STATE AN OFFENSE BECAUSE IT ALLEGED A VIOLATION OF ARTICLE 134 BUT FAILED TO ALLEGE ANY OF ARTICLE 134'S THREE CLAUSES AND WHETHER THE ADDITION OF THE TERMINAL ELEMENT AFTER ARRAIGNMNET CONSTITUTED A MAJOR CHANGE OVER DEFENSE OBJECTION.

Summary of Proceedings

On 20 June 2011, TSgt Robert Brissette was tried by a general court-martial composed of officer members at Dyess Air Force Base, Texas. TSgt Brissette was alleged to have committed numerous sexual offenses against his step-daughter, Dominique Chesley, including indecent acts under Article 134 of the Uniform Code of Military Justice (UCMJ). TSgt Brissette pleaded not guilty to all charges and specifications and was convicted of one charge with exceptions;

indecent acts on divers occasions by touching Dominique Chesley on her breasts in violation of Article 134 of the UCMJ. TSgt Brissette was sentenced to a bad-conduct discharge and confinement for thirteen months. As of the date of this motion for reconsideration, the record of trial has not been authenticated and clemency has not been submitted. TSgt Brissette is currently in confinement at the Navy Brig in Miramar, CA.

Statement of Facts

In the Specification of Charge IV, TSgt Brissette was charged with committing indecent acts upon the body of Dominique Chesley, a girl under the age of 16, to include touching her breasts on divers occasions with the intent to gratify his sexual desires. TSgt Brissette pleaded not guilty to all charges and specifications. TSgt Brisette was found guilty of the Article 134 charge and its specification by exceptions.

The Article 134 specification did not include an allegation that the charged conduct was prejudicial to good order and discipline, was service discrediting, or violated a non-capital federal criminal statute. At trial, after arraignment, Trial Counsel moved to amend the charge to include an additional element, that language being "such conduct being of a nature to bring discredit upon the armed forces." The Defense opposed the amendment and argued that the addition of this language added an additional element of proof that TSgt Brissette was not on notice he would have to defend against and therefore was a major change. It was our position that although the Article 32 investigating officer identified the additional element in her report, it was not actually investigated. Trial Counsel argued that as the state of the law stood at trial, the additional language was surplusage and therefore not a major change to the charge. The Military Judge found that the terminal element was investigated at the Article 32 investigation so there really was no question that TSgt Brissette was on notice as to all of the elements which he would

be required to defend and ruled that the addition would be a minor change and therefore allowed the charge to be amended.

Argument

The indecent act charge failed to state an offense because it alleged a violation of Article 134 but failed to allege any of Article 134's three clauses and addition of the amended language was a major change.

A. Law and Analysis

In *United States v. Fosler*, __ M.J. __, No. 11-0149/MC, 2011 WL 3477186 (C.A.A.F. Aug. 8, 2011), the Court of Appeals for the Armed Forces held that where "the Government failed to allege at least one of Article 134's "three clauses either expressly or by necessary implication[,]" an Article 134 charge and specification "fail to state an offense under Article 134." *Fosler*, 2011 WL 3477186, at *1. The Article 134 specification in this case suffered from the same defect as the Article 134 specification at issue in *Fosler*.

Fosler applies retroactively to TSgt Brissette's case because it was, and still is, pending final action when *Fosler* was decided. Furthermore, if not reconsidered now, the issue most certainly would be ripe on direct appeal following final action. As the Supreme Court has explained, "an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). Thus, for a case such as this that is still at the trial level, a new Court of Appeals for the Armed Forces decision applies. As the Court of Appeals for the Armed Forces has emphasized, an appellate court will apply the law as it exists "at the time of appeal," not "at the time of the court-martial." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008); *accord United States v. Mullins*, 69 M.J. 113, 116-17 (2010).

"To adequately allege an offense, a specification must (1) notify the accused of the offense charged, (2) contain the elements of the offense either expressly or by fair implication, and (3) together with the record of trial, bar any subsequent prosecution in the event of acquittal or conviction." *United States v. Conway*, 40 M.J. 859, 861 (A.F.C.M.R. 1994). The Article 134 specification in this case failed to state an offense because it did not allege any element of a violation of Article 134, either expressly or by fair implication. The Government recognized the legally defective nature of the Article 134 charge and moved to amend it at trail. The Military Judge ruled that this amendment was a minor change over defense objection, as was appropriate pre-*Fosler*.

In *Fosler*, the Court of Appeals for the Armed Forces emphasized the constitutional rights at issue when a charge and specification fail to state an offense: "The Constitution protects against conviction of uncharged offenses through the Fifth and Sixth Amendments." *Fosler*, 2011 WL 3477186, at *4. "The Fifth Amendment provides that no person shall be 'deprived of life, liberty, or property, without due process of law,' U.S. Const. amend. V, and the Sixth Amendment provides that an accused shall 'be informed of the nature and cause of the accusation,' U.S. Const. amend. VI." *Id*. (quoting *Girouard*, 70 M.J. at 10). Those constitutional provisions were violated in this case. Although not binding on this court, the United States Navy-Marine Corps Court of Criminal Appeals recently set aside findings on two Article 134 specifications for failing to state and offense in accordance with *Fosler*. See *United States v. Lonsford* __ M.J. __, No. 201100022 (N.M.Ct.Crim. App. Aug 30, 2011).

Article 134, the "General Article," criminalizes three categories of conduct "not specifically mentioned in this chapter": (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces"; (2) "all conduct of a nature to bring discredit upon the

armed forces"; and (3) "crimes and offenses not capital." Art. 134, UCMJ, 10 U.S.C. § 934 (2006). While Charge IV states that it alleges a violation of the UCMJ, Article 134, it failed to allege that TSgt Brissette's conduct prejudiced good order and discipline, was of a nature to bring discredit to the armed forces, or constituted crimes or offenses not capital. The specification, therefore, failed to allege any element of an Article 134 offense prior to the Military Judge allowing its amendment.

In *Fosler*, the Court highlighted the necessity of charging a specific clause or clauses of Article 134 because an accused must be given notice as to which clause or clauses he must defend against:

> The three clauses of Article 134 constitute "three distinct and separate parts." *United States v. Frantz*, 2 C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953). Violation of one clause does not necessarily lead to a violation of the other clauses. For example, "disorders and neglects to the prejudice of good order and discipline" is not synonymous with "conduct of a nature to bring discredit upon the armed forces," although some conduct may support conviction under both clauses. This is particularly true of clause 3. *See, e.g., United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005) (detailing significant additional steps required to obtain a conviction under clause 3, as compared with clauses 1 and 2).
>
> An accused must be given notice as to which clause or clauses he must defend against. As we explained in the context of a guilty plea: "[F]or the purposes of Article 134, UCMJ, it is important for the accused to know whether [the offense in question is] a crime or offense not capital under clause 3, a 'disorder or neglect' under clause 1, conduct proscribed under clause 2, or all three." [*United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008).] This requirement was based on fair notice. *See id.*

Fosler, 2011 WL 3477186, at *5 (first two alterations in the original).

In *Fosler*, in the course of analyzing whether the specification at issue "necessarily implied" the missing element, the Court of Appeals for the Armed Forces concluded that neither the appearance of the word "wrongfully" in a specification nor the labeling of a specification as arising under "Article 134" provides "a basis, individually or together, to find that the charge and

specification necessarily implied the terminal element." *Id*. at *6. The Court explained that "the word 'wrongfully' cannot of itself imply the terminal element." *Id*. "'Wrongfully' is a word of criminality" and "words of criminality speak to mens rea and the lack of a defense of justification, not to the elements of an offense." *Id*. Thus, "[n]either the word 'wrongfully' nor similar words of criminality can be read to mean or be defined as, for example, a 'disorder [or] neglect[] to the prejudice of good order and discipline.'" *Id*. (second and third alterations in the original). "[S]uch words do not imply the terminal element in the charge and specification." *Id*.

> Nor is an allegation of a violation of "Article 134" sufficient to state an offense:
>
> The words "Article 134" do not, by definition, mean prejudicial to "good order and discipline," "of a nature to bring discredit upon the armed forces," or a "crime[or] offense[ ] not capital," and we are unable to construe the words "Article 134" in the charge we now review to embrace the terminal element.

Id. (alterations in original).

Thus, "[t]hese components of the charge and specification do not imply the terminal element alone or when combined." *Id*. at *7. However, this is the exact pitfall the Article 32 investigating officer fell into in her report, and the Military Judge then relied on, to find that TSgt Brissette was on notice of the additional terminal element that was added at trial.

"[A] specification which fails to allege every essential element of the offense charged is fatally defective and will not support a conviction of that charge." *United States v. Petree*, 8 C.M.A. 9, 23 C.M.R. 236 (1957). In this case, the Article 134 specification failed to allege every essential element of an Article 134 offense when referred. That specification was, therefore, fatally defective. *Fosler* clearly holds that in regards to Article 134 specifications, an accused must be put on notice of all elements he will be required to defend against, to include the Article 134 clause(s). The requirement is unambiguous, "an accused must be notified which of the three clauses under Article 134, UCMJ, he must defend against, … the terminal element must be

set forth in the charge and specification." *Fosler* at 21. TSgt Brissette was not on notice that he would have to defend against the additional element that was added at trial. This language was not surplusage, but an essential element of the charge. As such, it was not a minor change.

Rule for Courts-Martial (hereinafter R.C.M) 603 provides:

> (a) Minor changes defined. Minor changes in charges and specifications are any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged.
> . . . .
>
> (c) Minor changes after arraignment. After arraignment the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.
>
> (d) Major changes. Changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

The additional language added after arraignment was a substantial matter not fairly included in the previously referred charge and specification. It added an additional essential element, an element that resolves an Article 134 charge as fatally defective if absent. As *Fosler* has held that the components of an Article 134 charge and specification do no infer the terminal element, an Article 134 charge referred without this essential element could not have fairly included it in order to support addition of such language as a minor change.

Furthermore, in the Article 32 report of investigation, the investigating officer identified six elements of the offense in question, the sixth element being "that, under the circumstances, the conduct of the Accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." The investigating officer did not further discuss whether or not there was evidence to support this element, but simply recommended changes to the charge itself. This generic identification by the investigating

officer did not place TSgt Brissette on notice as to what specific additional element, what 134 clause(s), he was being charged with and would be required to defend against at trial. The additional language added an essential element to the charge that TSgt Brissette was not on proper notice to defend against. The charge was legally defective and should have been dismissed for failing to state an offense.

B. Remedy

The proper remedy is to set aside the finding of guilty to Charge IV and its specification and dismiss that charge and its specification. *See, e.g., United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010). Since this is the only charge TSgt Brissette was convicted of and sentenced on, TSgt Brissette's release from confinement should be ordered by this court, effective immediately.

Respectfully Submitted,

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