DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES	)	
	)	**GOVERNMENT RESPONSE TO THE**
v.	)	**DEFENSE MOTION FOR**
	)	**RECONSIDERATION**
TSGT ROBERT BRISSETTE	)	
7TH EMS (ACC)	)	**9 SEPTEMBER 2011**
DYESS AIR FORCE BASE, TX	)	

COMES NOW, the United States, by and through its detailed counsel, and, given the discussion below, respectfully requests this Court deny: (1) The Defense Motion for Reconsideration, dated 7 September 2011; (2) The Defense request to dismiss the Charge and Specification of which the Accused was found guilty; and, (3) The Defense request to order the release of the Accused from confinement.

FACTS

1. All Charges and Specifications in this case were preferred 7 December 2010. An Article 32 hearing was held on 25 January 2011 and all charges and specifications, including the one at issue in this motion, were investigated (see Attachment 1). At the time of the Article 32 hearing, the charge and specification at issue in this motion was Charge IV, Specification 3. In investigating this specification, the investigating officer (IO) specifically wrote out the elements of the alleged offense. (Id.). The fifth and final element, as investigated by the IO was, "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." (Id.).

2. The Defense did not argue at the Article 32 hearing, or in a written objection after the fact that Charge IV, Specification 3 failed to state an offense. In fact, the Defense did not argue that any or all of the seven Article 134 specifications on the charge sheet at the time failed to state an offense, or failed to give proper notice to the Accused of the offenses of which he was charged despite the fact the terminal element was not pleaded in any of them.

3. A copy of the Article 32 report was served on the Accused and his counsel on 2 February 2011 and 11 February 2011 respectively. The report was also forwarded to the General Court-Martial Convening Authority (GCMCA) with the Staff Judge Advocate's (SJA) pretrial advice (Attachment 2). In the pretrial advice, the SJA informed the GCMCA that the Defense had filed no objections to the Article 32 report and advised the GCMCA that "the charges and specifications state offenses under the UCMJ." (Id.). A copy of the pretrial advice was also provided to the Defense.

4. The charge and specification at issue in this motion (now Charge IV, and its Specification) was the only Article 134 offense referred to trial. The court was referred to a general court-martial and initial arraignment in this case was held on 21 March 2011. Trial on the merits

began on 20 June 2011. On 20 June 2011, the Defense filed a number of motions; however, it did not move this Court to dismiss Charge IV and its Specification for failure to state an offense.

5. Acting in response to oral arguments in the Fosler case, and after arraignment, but prior to the members receiving the flyer, the United States requested permission from the Court to make a pen and ink addition to Charge IV, and its Specification. Specifically, the United States sought to add the terminal element (i.e., "such conduct being of a nature to bring discredit upon the Armed Forces.") to the Specification of Charge IV. During its motion the United States argued the pen and ink change adding the terminal element was a minor change because it had been properly investigated by the IO during the Article 32 hearing.

6. Despite conceding the terminal element had been investigated at the Article 32 hearing, the Defense objected to the pen and ink addition of the terminal element and argued that a new Article 32 hearing was necessary. The Defense did not proffer to the Court how, or even if, the change prejudiced a substantial right of the Accused.

7. After hearing arguments from both the United States and the Defense, and after considering the oral arguments made in the Fosler case, the Court overruled the Defense objection. (Id.) The United States was allowed to add the terminal element to the Specification of Charge IV as the Court viewed the addition to be a minor change under Rules for Courts-Martial (RCM) 603. The Court concluded the charges as previously drafted and investigated were sufficient to put the Accused on notice of all the elements of the offense for which he was charged.

8. The Defense did not move the Court for a continuance, or any delay, in order to adequately prepare to defend against the added terminal element. At the trial on the merits, which concluded on 24 June 2011, after the presentation of the government and defense's cases, the military judge fully instructed the members on the element of all offense, including the terminal element of the offense at issue.

9. On 8 August 2011, the Court of Appeals for the Armed Forces (CAAF) issued its opinion in the Fosler case. On 7 September 2011, the Defense filed its Motion to Reconsider arguing Fosler stood for the proposition that adding the terminal element after arraignment amounted to a major change. It then requested this Court to not only reverse its previous ruling but also to dismiss of Charge IV and its Specification and order the immediate release of the Accused from confinement.

LAW AND ARGUMENT

The Pen and Ink Addition of the Terminal Element Amounts to a "Minor Change"

10. RCM 603 reads in part:

> (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.

11. In Sullivan, CAAF adopted a two prong test to determine whether or not a judge erred in allowing the Government to amend a specification after arraignment and over the objection of the Accused. (see United States v. Sullivan, 42 MJ 360 (CAAF 1995). Specifically, an amendment is "permissible if no additional or different offense is charged [first prong] and if substantial rights of the defendant are not prejudiced [second prong]." (Id. at 365).

12. Applying those two prongs to the instant case, it is clear that the pen and ink addition of the terminal element was permissible in this case. First, no additional or different offense was charged (recognizing the Defense's position, Fosler will be addressed below). The addition of the terminal element did not add to or change the initial Charge and Specification. The terminal element (as it had been for decades in military justice jurisprudence) had always been an element of the offense charged, and nothing changed by writing in the terminal element after arraignment. Second, no substantial rights of the Accused were prejudiced by the minor change to the charge sheet. The Accused had received a copy of the Article 32 report four months prior to the trial on the merits beginning. Additionally, the Defense Counsel, understanding the implied terminal element, and also having received a copy of the Article 32 report in February, had prepared to defend against the terminal element. "The evil to be avoided is denying the defendant notice of the charge against him, thereby hindering his defense preparation." (Id.). The Accused and Defense Counsel were not surprised by the annotation of the terminal element at the time of trial. Yes, the Defense objected to the change, but it had failed to move to dismiss the offense for failing to state an offense prior to arraignment or at the time of trial, and did not move the court for a delay to prepare after the judge overruled its objection. Both the Accused and the Defense understood the terminal element was an element of the charged offense, and they came into court prepared to defend against it. Having lost, the Defense argues Fosler warrants a reversal of the Court's ruling, dismissal of the Charge and Specification and the Accused's immediate release from confinement.

Distinguishing Fosler

13. The Defense relies solely on Fosler (United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011)) in support of its assertion that the pen and ink addition of the terminal element in this case amounted to a major change. Fosler, however, is distinguishable from the instant case.

14. First, the addition of the terminal element may not have even been necessary in the instant case because the terminal element is implied in the charge itself. The Fosler majority conceded, "that *Resendiz–Ponce* does not foreclose the possibility that an element could be implied." (*referring to* United States v. Resendiz-Ponce, 549 U.S. (2007)). In Resendiz-Ponce, the Supreme Court held that the overt act was implicitly alleged by alleging an attempt. (Id. at 107-

108). It was enough for the indictment to point to the relevant criminal statute and alleged that Appellant "intentionally attempted to [commit said crime]. . . ." (Id. at 105). The Supreme Court explained that alleging attempt connotes action rather than mere intent and that the concept of an attempt encompasses both the overt act and intent elements as used in the law for centuries. (Id. at 107). Similarly, Indecent Act is an Article 134 offense that fully encompasses at least one specific terminal element; in this case, namely that the conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

15. The element omitted from Resendiz-Ponce, the overt act, is far more important for the preparation of a defense than the terminal element omitted from Appellant's charge sheet, which is an impact element required for every Article 134 offense. Nonetheless, Resendiz-Ponce held that the overt act could be implicitly read into the charged offense overturning the Ninth Circuit opinion that held the specification was defective. In its "implied analysis" of the terminal element, the Fosler majority focused on the specific type of Article 134 offense at issue in the case, adultery. The majority concluded that "adultery, standing alone, does not constitute an offense under Article 134, the mere allegation that an accused has engaged in adulterous conduct cannot imply the terminal element."

16. Under the facts of this case, the nature of the Accused's indecent acts committed against his minor step-daughter appears very distinguishable from Fosler's adultery. Moreover, the Fosler majority also concluded that "[i]n a contested case in which Appellant challenged the charge and specification at trial" a charge which contains some combination of the words "wrongfully" and "Article 134" also fall short of implying a terminal element. Said succinctly, "an accused must be notified which of the three clauses he must defend against, to survive an R.C.M. 907 motion to dismiss, the terminal element must be set forth in the charge and specification." Had trial defense not made a R.C.M. 907 motion in Fosler, then it is unlikely the majority of this Court would have questioned the adequacy of the government's notice by implication of the terminal element of the Article 134. The move by trial defense counsel convinced the majority to "[c]onstrue the text of the charge and specification narrowly." As such, the majority concluded that an adultery charge, which excluded the terminal element, could not be salvaged by implication over trial defense's objection. Thus, the charge and specification were dismissed. These predicates of Fosler are lacking in this case.

17. Based what happened at trial, the Accused cannot reasonably rely upon Fosler to support his freshly-minted claim that he did not have notice about the terminal element. The Accused did not contest the specifications at the Article 32 hearing or at trial, did not file a motion to dismiss for failure to allege an offense, did not request a continuance when the Court allowed the United States to add the terminal element as a minor change, and most importantly was on notice as early as the Article 32 investigation that the offenses included a terminal element. Fosler simply must be distinguished here.

18. Since Fosler is inapplicable to this case, this Court should consider the long-standing precedent that listed Article 134 specifications need not list the terminal element (thus, the addition of which would be a minor change), which is further supported by the doctrine of stare decisis. "The doctrine of stare decisis is 'the preferred course because it promotes the even handed, predictable, and consistent development of legal principles, fosters reliance on judicial

decisions, and contributes to the actual and perceived integrity of the judicial process.'" United States v. Rorie, 58 M.J. 399, 406 (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)). "Reliance on precedent as a critical guidepost in deciding cases – the doctrine of stare decisis – is essential to the fair administration of justice." (Id. at 408). This critical principle should not be overlooked when considering the reach of Fosler and its inapplicability in this case.

19. Military practice has developed in light of the guidepost set by this Court's clear precedents. The notion that such an Article 134 offense properly states an offense has been explicitly upheld since 1952. Since Fosler does not apply, this Court should deny the Accused's invitation to overturn nearly 60 years of precedent and now extend such abandonment beyond the very narrow parameters of Fosler.

CONCLUSION

20. The Court's previous ruling that the pen and ink addition of the terminal element to the Specification of Charge IV was correct. Despite the Defense's reliance on Fosler, the addition of the terminal element did not create an additional or different offense, nor were any of the Accused's substantial rights prejudiced. Therefore, the United States respectfully requests this Court deny the Defense Motion to Reconsider and its requested remedies.

Respectfully submitted,

ERVIN N. HARRIS, Capt, USAF
Trial Counsel

Attachments:
1 - Article 32 Report (18 pages).
2 - Pretrial Advice (3 pages).

CERTIFICATE OF SERVICE

I certify that I emailed a copy of the Government's Response to the Defense Motion for Reconsideration to the Military Judge and the Defense on 9 September 2011.

ERVIN N. HARRIS, Capt, USAF
Trial Counsel