AIR FORCE LEGAL SERVICES AGENCY
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES	)	
	)	
v.	)	**RULING ON**
	)	**DEFENSE MOTION TO**
	)	**RECONSIDER**
	)	
	)	
TSGT ROBERT C. BRISSETTE	)	
7th EMS (ACC)	)	**12 May 2011**
Dyess Air Force Base, Texas	)	

FACTS

1. On 20 June 2011, the accused was tried by a general court-martial composed of officer members at Dyess Air Force Base, Texas. The Charges included numerous sexual offenses against his step-daughter, Dominique Chesley, including indecent acts under Article 134 of the Uniform Code of Military Justice (UCMJ). The accused plead "Not Guilty" to all Charges and specifications, but was convicted only of the single specification of the Article 134 charge, and that by exceptions; limiting the type of conduct to indecent acts on divers occasions by touching Dominique Chesley on her breasts. The accused was sentenced to a bad-conduct discharge and confinement for thirteen months.

2. In the Specification of Charge IV, the accused 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. The Article 134 specification, as preferred, did not include an allegation of Article 134's so-called "terminal element;" that the charged conduct was prejudicial to good order and discipline, was service discrediting, or violated a non-capital federal criminal statute. At trial, Trial Counsel moved to amend the charge to include the additional language, "such conduct being of a nature to bring discredit upon the armed forces." The Defense objected to the amendment, contending that it constituted a major change. Based on the "well-settled" state of the law at the time, that the express allegation of the terminal element was not required to state an offense, I allowed the amendment. Subsequent to the announcement of the sentence, the Court of Appeals for the Armed Forces decided *U.S. v. Fosler*, 70 M.J. 205 (2011), overruling decades worth of settled precedent and requiring, in effect, that the terminal element be alleged in every Article 134 prosecution.

LAW

3. "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." RCM 603(a). "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." RCM 603(c). "[A]n amendment is a major change when it converts a specification which did not allege an offense into one that does." *U.S. v. Garrett,* 17 M.J. 907 (A.F.C.M.R.1984), *U.S. v. Page,* 43 M.J. 804, 806 (A.F.C.C.A. 1995).

4. "To establish a violation of Article 134, Uniform Code of Military Justice … the government must prove beyond a reasonable doubt both that the accused engaged in certain conduct and that the conduct satisfied at least one of three listed criteria. The latter element is commonly referred to as the 'terminal element' of Article 134 and the government must prove that at least one of the article's three clauses has been met: that the accused's conduct was (1) 'to the prejudice of good order and discipline,' (2) 'of a nature to bring discredit upon the armed forces,' or (3) a 'crime[or] offense[ ] not capital.'" *Fosler supra.* Where the government fails to expressly allege at least one of these three elements expressly or by necessary implication, the specification has failed to state an offense. *Id.*

ANALYSIS

5. Clearly, prior to amendment of the specification in issue, it failed to expressly alleged the terminal element. While the government is correct that the *Fosler* court left open the possibility that there may be offenses wherein the nature of the offense or the allegation is such that the terminal element is included by necessary implication, a review of the related lesser included offense litigation does not indicate that a case such as this one would meet that requirement. For instance, in *United States v. Jones,* 68 M.J. 465, 468 (C.A.A.F.2010), the terminal element was not read into the offense of Rape. In fact, in discussing their LIO jurisprudence, the court in *Fosler* noted, "none of the enumerated articles we examined contained elements the ordinary understanding of which could be interpreted to mean or necessarily include the concepts of prejudice to 'good order and discipline' or 'conduct of a nature to bring discredit upon the armed forces….'"

6. Against this backdrop, I see no reason to imply the "service discrediting" terminal element to an Indecent Acts specification when our high court has explicitly declined to do so in the case of Rape and has indicated that it would be improper to do so in the case of similarly heinous offenses. Though I cannot conceive of a circumstance where Indecent Acts With a Child would not be service discrediting, the clear import of the *Fosler* decision is that the accused is entitled to know under which clause the government is proceeding. Furthermore, the inescapable implication of that reasoning to the present case is that such notice must be in the form of a sworn specification, properly investigated and referred to trial. In the present case, the required verbiage was not properly sworn to or referred, warranting relief.

RULING

7. Based on the foregoing, the finding of "Guilty" and the sentence are hereby set aside and the specification of Charge IV and Charge IV are DISMISSED WITHOUT PREJUDICE.

So Ordered on this 13th day of September 2011.

J. WESLEY MOORE, Colonel, USAF
Military Judge