

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROS L. DAVIS
BOATSWAIN'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201000302
GENERAL COURT-MARTIAL**

Sentence Adjudged: 26 January 2010.

Military Judge: LtCol Michael D. Mori, USMC.

Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.

Staff Judge Advocate's Recommendation: CAPT R.B. Blazewick, JAGC, USN.

For Appellant: Maj Jeffrey R. Liebenguth, USMC.

For Appellee: LT Kevin D. Shea, JAGC, USN.

16 December 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RUE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his pleas, of one general order violation (fraternization), three specifications of orders violations, two specifications of wrongful sexual contact, and two specifications of adultery, in violation of Articles 92, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 934. The appellant was sentenced to confinement for 30 months, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, all confinement in excess of 18 months was suspended for the period of confinement served plus six months.

The appellant asserts one assignment of error: that Additional Charge III and the two specifications thereunder do not state an offense, as the specifications do not allege that the appellant's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. Appellant's Brief of 11 Aug 2010 at 4, 14.

In light of our decision in *United States v. Fosler*, ___ M.J. ___, No. 201000134, 2010 CCA LEXIS 357 (N.M.Ct.Crim.App. 28 Oct 2010), the matter of the necessity of pleading the "terminal element" in Article 134 for clause 1 and 2 offenses, has been resolved. In the present case, each of the two specifications under Additional Charge III allege that while he was a married man living in Oahu, Hawaii, the appellant "wrongfully" had sexual intercourse with a woman not his wife in violation of Article 134, UCMJ.¹ "Wrongful" was employed as a word of criminality in the two specifications, and when alleged in concert with the specified conduct, necessarily implies the terminal element. *Fosler*, 2010 CCA LEXIS 357, at *26. Under the circumstances of this case, the Government was not required to expressly allege the terminal element for these Article 134, UCMJ, offenses.

We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. The findings and sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

¹ In Specification 1 of Additional Charge III, the appellant was charged with committing adultery with Gas Turbine Mechanic Third Class K.Y.W, U.S. Navy. In Specification 2, the appellant was charged with committing adultery with Seaman R.M.S., U.S. Navy.