

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

**Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, M.G. MCALEVY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**NAPOLEON C. HERNANDEZ
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000427
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 14 April 2010.

Military Judge: Maj Robert Palmer, USMC.

Convening Authority: Commanding Officer, 4th Marine Corps
District, MCRD/ERR, Parris Island, SC.

Staff Judge Advocate's Recommendation: Col J.J. Lagasca,
USMC.

For Appellant: LT Michael Hanzel, JAGC, USN.

For Appellee: Capt Samuel Moore, USMC.

27 January 2011

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 special court-martial convicted the appellant, in accordance with his pleas, of one specification of attempting to impede an investigation, three specifications of general orders violations, one specification of making a false official statement, and one specification of obstruction of justice, in violation of Articles 80, 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, 907, and 934. The appellant was sentenced to confinement for 12 months, reduction to pay grade E-1, and a bad-conduct discharge.

The convening authority (CA) approved the sentence as adjudged, but suspended the bad-conduct discharge pursuant to a pretrial agreement.

The appellant asserts two assignments of error: (1) that the case should be remanded for new post-trial processing because the CA's action erroneously states that the appellant was convicted of 3 specifications of adultery when in fact those offenses were dismissed at a post-trial Article 39, UCMJ, hearing, and because the record of trial does not contain proof of service of the staff judge advocate's recommendation (SJAR) upon defense counsel; and (2) that Specification 2 of Additional Charge III (obstruction of justice) does not state an offense under Article 134, UCMJ, as it does 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 8 Oct 2010 at 5-6, 6-12.

As to the appellant's first assignment of error, we agree that the combined CA's Action and Order is erroneous in that it fails to reflect that the military judge dismissed the three adultery specifications at the post-trial Article 39(a) session. However, we conclude that this was harmless error because, in taking action, the CA stated that he considered, *inter alia*, the Results of Trial and the SJAR, to which was attached the "Addendum to the Results of Trial" dated 17 Jun 2010, and which correctly listed the post-trial Article 39(a) dismissal of the adultery specifications. Thus, the CA was not misled as to the findings. Moreover, contrary to the appellant's assertion, the original Record of Trial filed with this court contains a signed Receipt of Service of the SJAR by defense counsel dated 12 July 2010. In addition, as evidenced by trial defense counsel's affidavit which was submitted to the Court in the Government's Motion to Attach dated 12 November 2010, trial defense counsel affirmatively acknowledged that he did, in fact, receive service of the SJAR on 12 July 2010. The appellant has not asserted, and we have not found any prejudice to the appellant from the errors. Nonetheless, because service members are entitled to records that correctly reflect the results of court-martial proceedings, see *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998), we shall order the necessary corrective action in our decretal paragraph.

As to the appellant's second assignment of error, in light of our decision in *United States v. Fosler*, 69 M.J. 669 (N.M.Ct.Crim.App. 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, the specification under Additional Charge III alleges that the appellant "wrongfully" influenced the testimony of a witness and asked her to fabricate a story for investigators, in violation of Article 134, UCMJ. "Wrongful" was employed as a word of criminality in the specification, and when alleged in concert

with the specified conduct, necessarily implies the terminal element. Under the circumstances of this case, the Government was not required to expressly allege the terminal element for this 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 approved sentence are affirmed. The supplemental court-martial order shall correctly reflect that Charge IV and its specifications and Specification 1 under Additional Charge III were dismissed.

For the Court

R.H. TROIDL
Clerk of Court