**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Technical Sergeant RONNIE WILSON**
**United States Air Force**

**ACM 37486 (f rev)**

**05 February 2013**

Sentence adjudged 14 February 2009 by GCM convened at Royal Air Force Alconbury, United Kingdom. Military Judge: William E. Orr, Jr.

Approved sentence: Dishonorable discharge, confinement for 4 years and 9 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Nicholas W. McCue; Major David P. Bennett; Major Shannon A. Bennett; Captain Christopher D. James; Captain Luke D. Wilson; and Frank J. Spinner, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Lieutenant Colonel Jeremy S. Weber; Major Deanna Daly; Major Naomi N. Porterfield; Major Kimani R. Eason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

UPON FURTHER REVIEW



PER CURIAM:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of wrongful sexual contact with a child under the age of 16 years and two specifications of committing indecent acts on a child under the age of 16 years, in violation of Articles 120 and 134, UCMJ, 10 U.S.C.

§§ 920, 934. The court-martial sentenced the appellant to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the dishonorable discharge, confinement for four years and nine months, and reduction to E-1.

We previously affirmed the findings and sentence. *United States v. Wilson*, ACM 37486 (A.F. Ct. Crim. App. 15 December 2011) (unpub. op.), r*ev'd in part*, 71 M.J. 355 (C.A.A.F. 2012) (mem.). In that decision, we considered several issues, including the terminal element issue, in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Our superior court later provided additional guidance in this area for litigated cases such as the appellant's. *See United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). Following *Humphries*, the Court reversed that portion of our decision affirming the findings of guilty of the two indecent acts specifications alleged as a violation of Article 134, UCMJ; affirmed the remaining finding of guilty of wrongful sexual contact with a child in violation of Article 120, UCMJ; reversed as to the sentence; and remanded the case for further consideration in light of *Humphries*. *Wilson*, 71 M.J. at 355.

In *Humphries*, the Court dismissed a contested adultery specification that failed to expressly allege an Article 134, UCMJ, terminal element but which was not challenged at trial. Applying a plain error analysis, the Court found that the failure to allege the terminal element was plain and obvious error, which was forfeited rather than waived. The remedy, if any, depended on "whether the defective specification resulted in material prejudice to [the appellant]'s substantial right to notice." *Id*. at 215. Distinguishing notice issues in guilty plea cases and cases in which the defective specification is challenged at trial, the Court explained that the prejudice analysis of a defective specification under plain error requires close review of the record: "Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right . . . we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Id*. at 215-16 (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997)) (internal citations omitted). After a close review of the record, the Court found nothing "that reasonably placed [the appellant] on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, he had violated." *Id*. at 216.

In accordance with *Humphries*, we are compelled to disapprove the findings of guilty of the two indecent acts specifications under Charge III. Neither alleges the terminal element required under Article 134, UCMJ; there is nothing in the record to satisfactorily establish notice of the need to defend against the terminal elements; and there is no indication the evidence was uncontroverted as to the terminal elements. *See id.* at 215–16.[*] The first and only mention of the terminal element prior to sentencing was

[*] The Government argues Judge Stucky's dissenting view in *United States v. Humphries*, 71 M.J. 209, 222 (C.A.A.F. 2012) (Stucky, J., dissenting), that the hearing pursuant to Article 32, UCMJ, 10 U.S.C. § 832, provided

during the military judge's instructions, and, under *Humphries*, this appears far too late to provide sufficient notice of what theory of criminal liability an accused must defend against. *See id.* at 216. Further, because trial counsel did not mention the terminal element in the findings argument, we have no indication of whether the element was disputed by trial defense counsel.

On consideration of the entire record and pursuant to *Humphries*, the findings of guilty of Specifications 1 and 5 of Charge III and of Charge III are set aside, and the specifications and charge are dismissed. This leaves a conviction for only one act of molestation instead of three and reduces the maximum confinement from 21 to 7 years. Under these circumstances, we cannot reliably determine what sentence would have been adjudged absent the error. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). Therefore, the sentence is set aside and a rehearing on sentence for the remaining charge and specification may be ordered.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

fair and accurate notice of the terminal element. The majority appears to reject that view by stating that the Court looks to the "trial record" for notice of the missing element and begins its search at opening statement. *Id.* at 216-17. The Government also spends considerable time arguing that the evidence shows sufficient public knowledge to make the appellant's conduct service discrediting, but this misses the issue: as the Court stated in *Humphries*, the issue is not sufficiency of the evidence but notice. *Id.* at 216 n.8.