UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	**)**	**Misc. Dkt. No. 2011-10**
Respondent	**)**	
	)	
v.	**)**	
	)	**ORDER**
Colonel (O-6)	**)**	
SAMUEL LOFTON, III	**)**	
USAF,	**)**	
Petitioner	**)**	**Panel No. 1**

Petitioner has submitted a Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus. He argues that recent decisions by the Court of Appeals for the Armed Forces (CAAF) require dismissal of two specifications of indecent assault for failing to state an offense by not expressly alleging the terminal element. Specifically, he argues *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010) stands for the legal proposition that all elements, including the terminal element of an Article 134, UCMJ, 10 U.S.C. § 934, offense, must be set forth in the specification. Alternatively, he seeks retroactive application of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) to his case. We hold that Petitioner is not entitled to habeas corpus relief because neither *Fosler* nor its progeny established a new rule of law that mandates retroactive application. We also find Petitioner's reliance on *Jones* to be without merit.

Petitioner was tried by a general court-martial composed of officer members between 8 May and 26 June 2008. Pursuant to his pleas, Petitioner was found guilty of one specification of divers willful dereliction of duty, one specification of divers violation of a lawful general regulation, seventeen specifications of larceny, and eleven specifications of absenting himself from his place of duty, in violation of Articles 92, 121, and 86, UCMJ, 10 U.S.C. §§ 892, 921, 886, respectively. Contrary to his pleas, Petitioner was found guilty of two specifications of conduct unbecoming an officer and two specifications of indecent assault, in violation of Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934. He was sentenced to a dismissal, confinement for 9 years, forfeiture of all pay and allowances, a fine of $14,000.00, and an additional year of confinement if the fine was not paid. Upon his appeal, this Court affirmed his conviction and sentence. *United States v. Lofton*, ACM 37317 (A.F. Ct. Crim. App. 19 April 2010) (unpub. op.), *aff'd*, 69 M.J. 386 (C.A.A.F. 2011). The CAAF's ultimate affirmance of this Court's decision rendered judgment final in accordance with Article 71 (c)(1), UCMJ, 10 U.S.C. § 871.

Jurisdiction

Pursuant to the All Writs Act, military Courts of Criminal Appeals are empowered to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 161(a) (2006). *See United States v. Denedo (Denedo II)*, 556 U.S. 904, 911 (2009), *aff'g sub nom., Denedo v. United States (Denedo I)*, 66 M.J. 114, 124 (C.A.A.F. 2008). The Supreme Court has declared that writs of coram nobis may be issued to correct factual and legal errors of the most fundamental character, to include violations of constitutional rights.[1] *Denedo II*, 556 U.S. at 911, 913, 917. Our superior court held in *Denedo I* that, although that petitioner's court-martial was final under both Article 71 and 76, UCMJ, a writ of coram nobis was '"in aid of' the court's existing jurisdiction" where the petitioner: (a) sought the writ to examine the findings and sentence of a final court-martial that a Court of Criminal Appeals previously reviewed and (b) "raised a claim . . . that goes directly to the validity and integrity of the judgment rendered and affirmed." 66 M.J. at 120. On this basis, we conclude that we have jurisdiction to consider the petition for extraordinary relief in this case.

After reaching our conclusion that Petitioner's writ warrants review, we turn to the issues of 1) whether the decision reached in *Jones* established the new rule of law requiring the terminal element to be specifically pled and, if not, 2) whether the decision reached in *Fosler* is retroactively applicable.

In *Fosler*, CAAF departed from 60 years of established precedent and held that, in a contested case, the terminal element of Article 134, UCMJ, could not be necessarily implied from the language in a specification alleging that the appellant had "wrongfully" committed adultery. *Fosler*, 70 M.J. at 231. Because Fosler challenged the lack of a stated terminal element at trial, the Court strictly construed the text of the specification and dismissed the charge. In making its ruling, the Court recognized that the decision marked a change from accepted military practice in order to align the military justice system with Supreme Court precedent dealing with lesser included offenses. *Id*. at 232.

Following *Fosler*, our superior court decided *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). In *Humphries*, CAAF dismissed a contested adultery specification that failed to expressly allege the terminal element even though trial defense counsel had not raised the matter at trial. The Court found the issue was forfeited rather than waived. *Id*. at 211. Employing a plain error analysis, CAAF held that failure to allege the terminal element was plain and obvious error, requiring the appellate court to "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

[1] Although entitled a writ of habeas corpus, we will evaluate the petition as a writ of coram nobis. We note the petition was originally filed pro se and we will not place significance on the label placed on the petition for extraordinary relief. *Nkosi v. Lowe*, 38 M.J. 552, 553 (A.F.C.M.R. 1993) (citations omitted).

(citations omitted). Where notice is not found extant in the record or the element is not uncontroverted, the specification must be dismissed. *Id*.

Petitioner rests his argument on his position that the *Jones* decision dictated the holding in *Fosler*, and subsequently *Humphries*. He contends that the *Jones* holding established the rule that each element of an offense charged under Article 134, UCMJ, including the terminal element, must be alleged on the charge sheet to provide constitutionally required notice. He asserts this holding represents the "new rule" rather than the holding in *Fosler*. He further argues that since the *Jones* decision was prior to final judgment in his case, this Court should reconsider our prior ruling in *United States v. Calhoun*, Misc. Dkt. No. 2012-01 (A.F. Ct. Crim. App. 3 December 2012) (order denying petition asserting retroactive application of *Fosler* and *Humphries*). We disagree with his interpretation and analysis of *Jones.*

First, we note the issue presented in *Jones* regarded the notice requirement for lesser included offenses. In fact, the *Fosler* Court expressly distinguished the legal questions posed in the two cases by explaining: "In the instant case, we are called upon to determine, not whether the terminal element is necessarily included in the elements of the charged offense [as in *Jones*], but whether it is necessarily implied in the charge and specification." *Fosler*, 70 M.J. at 229. Furthermore, our superior court had, prior to *Fosler*, consistently held that the terminal element of an Article 134, UCMJ, offense was necessarily implied in the language of a specification. The holding in *Jones* did not disturb this precedent. To the contrary, it was not until *Fosler* that they felt "compelled" to "hold that the charge and specification do not allege the terminal element expressly or by necessary implication [and that t]o the extent that prior decisions such as *Mayo* and *Marker* hold to the contrary, they are overruled." *Fosler*, 70 M.J. at 231 (citing *United States v. Mayo*, 12 M.J. 286 (C.M.A. 1982); *United States v. Marker*, 3 C.M.R. 127 (C.M.A. 1952)). As such, we reject Petitioner's argument that the new rule was established by *Jones.*

Law on Retroactive Application

Subject to limited exceptions, when a new rule of criminal law is announced, that rule does not apply to cases that have become final. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion); *Loving v. United States*, 64 M.J. 132 (C.A.A.F. 2006). Accordingly, to assess retroactivity we must determine: (1) whether the petitioner's conviction is final; (2) whether the rule is actually "new" by asking "whether the Constitution, as interpreted by the precedent then existing, compels the rule"; and (3) if it is new, whether an exception to the principle of nonretroactivity applies. *Beard v. Banks*, 542 U.S. 406, 411 (2004) (citations omitted).

A military justice matter is final for purposes of retroactive application when "there is a final judgment as to the legality of the proceedings" under Article 71(c), UCMJ. *Loving*, 64 M.J. at 136 (quoting Article 71(c)(1), UCMJ).

As a general rule, only new substantive rules of criminal law will apply retroactively. A rule is substantive, rather than procedural, if it alters the range of conduct or the class of persons that the law punishes or if it modifies the elements of an offense. *See Bousley v. United States*, 523 U.S. 614, 620-21 (1998). "This includes decisions that narrow the scope of a criminal statute by interpreting its terms as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (citations omitted). The rationale for applying such rules retroactively is because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id*. at 352 (citations and internal quotation marks omitted).

Conversely, new rules of criminal procedure generally do not apply retroactively. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id*. Put another way, rules that regulate only the *manner of determining* the defendant's culpability are procedural. *Id.* The Supreme Court has limited retroactive effect "to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (citations and internal quotation marks omitted).

Application to Petitioner

With regard to the petitioner, his convictions and sentence became final under Article 71(c)(1)(C), UCMJ, on 19 February 2011. Consequently, the decisions in *Fosler* and *Humphries* will not be retroactive in the petitioner's case unless their application would constitute a new rule of substantive law or amount to a "watershed" rule of criminal procedure.

The new rule announced in *Fosler* and *Humphries* does not amount to a substantive change to the law. The Court's decisions do not "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352. Rather, these holdings, in essence, required the Government to allege the terminal element of an Article 134, UCMJ, offense with greater specificity than had been permitted in the past. Indeed, the *Fosler* Court described this requirement in terms of procedural due process: "[no] principle of procedural due process is more clearly established than . . . notice of the specific charge." *Fosler*, 70 M.J. at 229 (alteration and omission in original) (citations omitted).

Nor do *Fosler* or *Humphries* establish a new watershed rule of criminal procedure. Such rules are rare and apply "only to a small core of rules requiring [the] observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham v. Collins*, 506 U.S. 461, 478 (1993) (omission in original) (internal quotation marks omitted) (citing *Teague*, 489 U.S. at 311). Such rules must "improve [the] accuracy" of criminal proceedings and "alter [the court's] understanding of the *bedrock procedural elements* essential to the fairness of [those] proceeding[s]." *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990) (internal quotation marks omitted) (citing *Teague*, 489 U.S. at 311). Further, the new procedural rule must be so "fundamental" that "without [it] the likelihood of an accurate conviction is *seriously* diminished." *Schriro*, 542 U.S. at 352 (quotation marks omitted) (citations omitted). *Fosler* and *Humphries* impose a stricter notice requirement for offenses charged under Article 134, UCMJ, but do not amount to a watershed rule of criminal procedure that requires retroactive application. Given that the military judge properly instructed the members on the terminal elements of Article 134, UCMJ, during the petitioner's court-martial, we do not find that the "likelihood of an accurate conviction was seriously diminished." *Id.*

Conclusion

An extraordinary writ is a drastic remedy that should be used only in extraordinary circumstances. *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983). The petitioner has the burden to show a clear and indisputable right to the extraordinary relief requested. *Denedo I*, 66 M.J. at 126 (citing *Cheney v. United States District Court*, 542 U.S. 367, 381 (2004); *United States v. Morgan*, 346 U.S. 502, 512–13 (1954). We find the petitioner has not carried his burden to show *Jones* is applicable here or that the holdings of *Fosler* and *Humphries* should be retroactively applicable to his case.

Accordingly, it is by the Court on this 15th day of July, 2013,

ORDERED:

That Petitioner's request is hereby **DENIED**.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court