UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	**)**	**Misc. Dkt. No. 2012-01**
Respondent	**)**	
	)	
v.	**)**	
	)	**ORDER**
Airman First Class (A1C)	**)**	
JOHN C. CALHOUN,	**)**	
USAF,	**)**	
Petitioner - *Pro se*	**)**	**Panel No. 2**

This is a petition for extraordinary relief in the nature of a writ of habeas corpus. Petitioner argues that recent decisions by the Court of Appeals for the Armed Forces (CAAF) invalidate his conviction for two specifications of indecent assault, in violation of Article 134, UCMJ, 10 U.S.C. § 934. In this respect, petitioner is seeking the retroactive application of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), and *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), to his case. We hold that petitioner is not entitled to habeas corpus relief because neither *Fosler* nor *Humphries* established a new rule of law that mandates retroactive application.[1]

From 25 March through 30 March 2008, petitioner was tried by a general court-martial composed of officer members and convicted, contrary to his pleas, of one specification of rape, one specification of aggravated assault by means likely to produce death or grievous bodily harm, one specification of aggravated assault with a dangerous weapon, four specifications of assault consummated by a battery, and two specifications of indecent assault, in violation of Articles 120, 128, and 134, UCMJ, 10 U.S.C. §§ 920, 928, 934. He was sentenced to a dishonorable discharge, confinement for 11 years, and reduction to the lowest enlisted grade. The petitioner was represented by appellate defense counsel and filed eight assignments of error with this Court on 22 December 2009. This Court denied the petitioner's appeal on 10 June 2010 and affirmed the conviction and sentence. The CAAF denied the petitioner's request for a grant of review on 4 October 2010. The convening authority executed the petitioner's dishonorable discharge on 16 November 2010, finalizing the proceedings in accordance with Articles 71(c) and 76, UCMJ, 10 U.S.C. §§ 871, 876.

[1] This Court received the petitioner's reply brief and considered it prior to issuing this order.

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. § 1651(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.[2] *Denedo II*, 556 U.S. at 911, 913, 917. Our superior court held in *Denedo I* that, although the petitioner's court-martial was final under both Articles 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 or 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 of the judgment rendered and affirmed." 66 M.J. at 120. On this basis, we conclude that we have jurisdiction to entertain the petition for extraordinary relief in this case.

After reaching our conclusion that petitioner's writ warrants review, we must next determine whether the decisions reached in *Fosler* and *Humphries* are to be given retroactive effect.

Fosler and Humphries

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 the appellant had 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 *Humphries*. 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. *Humphries*, 71 M.J. at 211. Employing

[2] Although entitled a writ of habeas corpus, we will evaluate the petition as a writ of coram nobis. We note the petition was filed pro se and we do not place a great amount of significance to the label placed on a petition for extraordinary relief. *Nkosi v. Lowe*, 38 M.J. 552, 553 (A.F.C.M.R. 1993) (citing *Ex parte Simons*, 247 U.S. 231, 240, (1918); *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974), *overruled on other grounds by United States v. Banks*, 7 M.J. 92 (C.M.A. 1979) ("petition for extraordinary relief"); *Collier v. United States*, 42 C.M.R. 113 (C.M.A. 1970) ("petition for appropriate relief").

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. Where notice is not found extant in the record or the element is not uncontroverted, the specification must be dismissed.

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 (internal quotation marks and citations 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 proceedings." *Id.* (internal quotation marks and citations omitted).

Application to Petitioner

With regard to the petitioner, his convictions and sentence became final under Article 71(c)(1)(A), UCMJ, on 16 November 2010. 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 specific charge." *Fosler*, 70 M.J. at 229.

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) (citing *Teague*, 489 U.S. at 311) (internal quotation marks omitted). 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) (citing *Teague*, 489 U.S. at 311) (internal quotation marks omitted). 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 (emphasis in the original) (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 that the holdings of *Fosler* and *Humphries* are retroactively applicable to his case.

Accordingly, it is by the Court on this 3rd day of December, 2012,

ORDERED:

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

Judges ROAN, CHERRY, and MARKSTEINER concur.

FOR THE COURT

OFFICIAL

STEVEN LUCAS
Clerk of the Court