UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain EDWARD T. HUDSON
United States Air Force

ACM 37249 (f rev)

14 March 2013

Sentence adjudged 4 December 2007 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Dawn R. Eflein.

Approved sentence: Dismissal and confinement for 4 years.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Scott W. Medlyn; Major Jennifer J. Raab; Major Nathan A. White; and Frank J. Spinner, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Jeremy S. Weber; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

En Banc

STONE, ORR, GREGORY, ROAN, HARNEY, CHERRY,
MARKSTEINER, HECKER, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

GREGORY, SJ., delivered the opinion of the Court, in which STONE, CJ., HARNEY, J., CHERRY, J., and SOYBEL, J., join. MARKSTEINER, J., filed a concurring opinion. ROAN, SJ., wrote a dissenting opinion, in which ORR, SJ., and HECKER, J., join.

GREGORY, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of two specifications of divers indecent acts with a child, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The court members sentenced the appellant to a dismissal, 10 years of confinement, and forfeiture of all pay and allowances. Pursuant to a post-trial agreement, the convening authority set aside and dismissed the finding on Specification 1 of the Charge and approved only so much of the sentence that called for a dismissal and 4 years of confinement.[2]

We previously affirmed the findings and sentence in an unpublished decision. *United States v. Hudson*, ACM 37249 (rem) (A.F. Ct. Crim. App. 24 May 2011) (unpub. op.), *vacated*, 70 M.J. 382 (C.A.A.F. 2011). The Court of Appeals for the Armed Forces (CAAF) granted review of whether the specification fails to state an offense because it does not allege a terminal element under Article 134, UCMJ. The Court vacated our decision and remanded the case for consideration of the granted issue in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *Hudson*, 70 M.J. at 382. Applying *Fosler* and *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986), we again affirmed after concluding that the specification necessarily implied the terminal elements and fairly informed the appellant of the charge against him. *United States v. Hudson*, ACM 37249 (rem) (A.F. Ct. Crim. App. 3 February 2012) (unpub. op.), *rev'd*, 71 M.J. 348 (C.A.A.F. 2012). In *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), our superior court provided additional guidance in this area for litigated cases such as the appellant's and remanded the case for further consideration in light of *Humphries*. *Hudson*, 71 M.J. at 348.

Humphries and the Terminal Element

Whether a specification is defective and the remedy for such error are questions of law, which we review de novo. *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). When defects in specifications are not raised

[1] The charged offenses and the arraignment occurred before 1 October 2007, prior to the enactment of the new Article 120, UCMJ, 10 U.S.C. § 920. Thus, it was proper to charge the appellant under Article 134, UCMJ, 10 U.S.C. § 934, rather than under the new Article 120, UCMJ. *See* Drafter's Analysis, *Manual for Courts-Martial, United States*, A23-15 (2008 ed.).

[2] The convening authority took the aforementioned action in return for the appellant's promise to waive the following trial and appellate issues: (1) dismissal of Specification 1 of the Charge due to a statute of limitations violation; (2) consequent motion for a mistrial, as to findings and sentencing, based upon the dismissal of Specification 1 of the Charge; (3) consequent motion for a sentencing rehearing based upon the dismissal of Specification 1 of the Charge; (4) consequent petition for a new trial based upon the dismissal of Specification 1 of the Charge; (5) any challenge to the finding of guilty on Specification 2 of the Charge, based upon the admission of underlying evidence supporting Specification 1 of the Charge under Mil. R. Evid. 414; (6) any challenge to the sentence, based upon the admission of underlying evidence supporting Specification 1 of the Charge under Rule for Courts-Martial 1001(b)(4) and Mil. R. Evid. 403; and (7) any other issue raised in his 31 March 2008 motion for appropriate relief.

at trial, we analyze for plain error. *Humphries*, 71 M.J. at 215; *Fosler*, 70 M.J. at 230-31; *Ballan*, 71 M.J. at 33. Failure to allege the terminal element of Article 134, UCMJ, in a specification is plain and obvious error. *Humphries*, 71 M.J. at 215. Whether there is a remedy for this error will depend on whether the defective specification resulted in material prejudice to the appellant's substantial right to notice pursuant to the Fifth and Sixth Amendments[3]. *Id*. To determine whether the defective specification resulted in material prejudice to a substantial right, this Court "look[s] 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." *Humphries*, 71 M.J. at 215-16 (citing *United States v. Cotton*, 535 U.S. 625, 633 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1997)).

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. But, whether a remedy was required depended on "whether the defective specification resulted in material prejudice to [the appellant]'s substantial right to notice." *Humphries*, 71 M.J. 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 review requires close scrutiny 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. After a close review of the record, the Court found no such notice.

Concluding that "[n]either the specification nor the record provides notice of which terminal element or theory of criminality the Government pursued," the Court identified several salient weaknesses in the record to highlight where notice was missing: (1) the Government did not even mention the adultery charge in its opening statement let alone the terminal elements of the charge; (2) the Government presented no evidence or witnesses to show how the conduct satisfied either Clause 1, Clause 2, or both clauses of the terminal element; (3) the Government made no attempt to link evidence or witnesses to either clause of the terminal element; and (4) the Government made only a passing reference to the adultery charge in closing argument but again failed to mention either terminal element. *Id*. at 216. In sum, 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*.

[3] U.S. CONST. amend. V, VI.

Further contributing to the lack of reasonable notice was the relatively minor nature of the adultery charge compared to the far more serious allegations of rape and forcible sodomy. Noting the impact of this disparity in charges on the prejudice analysis, the Court stated that "the material prejudice to the substantial right to constitutional notice in this case is blatantly obvious, in large part because it appears the charge was, as [the appellant] argued at trial, a 'throw away charge[ ].'" *Id*. at 217 n.10. In its search, the Court found "not a single mention of the missing element, or of which theory of guilt the Government was pursuing, anywhere in the trial record." *Id*. at 217.

Humphries did not discuss the contours of when an omitted element was uncontroverted, but the Court did cite three Supreme Court cases important to this analysis: *Cotton*, *Johnson*, and *Neder v. United States*, 527 U.S. 1 (1999). In *Johnson* and *Neder*, the Supreme Court reviewed cases where the element of materiality was not submitted to the jury for determination and, therefore, the defendants were convicted without a finding on the omitted element. In both cases, the Supreme Court applied the plain error test set forth in Fed. R. Crim. P. 52(b) and interpreted in *United States v. Olano*, 507 U.S. 725 (1993).[4] In *Johnson*, the Court determined that the error did not "seriously affect the fairness, integrity or public reputation of judicial proceedings," *Johnson*, 520 U.S. at 469 (quoting *Olano*, 507 U.S. at 736), because "the evidence supporting materiality [the omitted element] was overwhelming. Materiality was essentially uncontroverted at trial and has remained so on appeal." *Id.* at 470 (internal quotation marks omitted).

In *Neder*, the Supreme Court recognized that its decision in *Johnson* did not decide whether the omission of an element "affects substantial rights," but instead held in *Johnson* that "the error did not warrant correction in light of the 'overwhelming' and 'uncontroverted' evidence supporting materiality." *Neder*, 527 U.S. at 9 (quoting *Johnson*, 520 U.S. at 470). The *Neder* Court then held that "where an omitted element is supported by uncontroverted evidence," the error of omission is harmless, and therefore does not affect substantial rights. *Id.* at 18. Finally, in a case more analogous to the instant one, the Supreme Court in *Cotton* reviewed a charge which omitted an element of the offense from the charging document. Again applying the *Olano* plain-error test, the Court held that omission of the element from the charging document did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings," because the evidence proving the omitted element was "'overwhelming' and 'essentially uncontroverted.'" *Cotton*, 535 U.S. at 632–33 (quoting *Johnson*, 520 U.S. at 470). Thus, *Johnson*, *Neder*, and *Cotton* inquired into the weight of the evidence presented on the

[4] Under this plain error standard, "before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)) (internal quotation marks, citations, and alterations omitted).

omitted element in order to determine whether it was overwhelming and uncontested, i.e., whether the element was "essentially uncontroverted."

In our view, this approach to evaluating the evidence for the purpose of deciding whether an error requires reversal was adopted by our superior court in *Humphries*. Although, the plain error standard applied by the Supreme Court differs from that applied by military appellate courts, compare Fed. R. Crim. P. 52(b) with Article 59(a), UCMJ, 10 U.S.C. § 859(a), and *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998), CAAF noted in *Humphries* that the inquiry into prejudicial error in the military system is "considered in light of the principles the Supreme Court has articulated in its consideration of a different rule." *Humphries*, 71 M.J. at 214. CAAF then rejected application of the prejudice standard from *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), favorably cited both *Cotton* and *Johnson*, and held that a showing of prejudice depends upon "whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Humphries*, 71 M.J. at 215-17 & n.7. The effect of this holding was to create a prejudice test that not only looks to notice, but also adopts the inquiry formulated in *Cotton* and *Johnson*, and applies it in the military context. *See* Article 59(a), UCMJ (requiring a showing of material prejudice to a substantial right).

The specification in the present case alleged that the appellant committed indecent acts on CG, a female under 16 years of age, by touching her private parts with his hands, grabbing her and forcing her to touch his penis, touching her leg with his penis, and licking her private parts with his tongue with the intent to satisfy his sexual desires. Although charged under Article 134, UCMJ, the specification did not expressly allege the terminal element. Under *Humphries*, this is plain and obvious error. Thus, we will apply the *Humphries* test as described above.

The Record and the Determination of Prejudice

Unlike *Humphries*, the specification in the present case was anything but a "throw away." CG's family and the appellant lived in the San Antonio area. The appellant is CG's uncle, and she referred to him as "Uncle Todd." In April 2006, when CG was nine years old, the appellant called CG's mother, RM, after a church picnic and asked if he could take CG to a movie. The appellant's wife was out of town. RM agreed and dropped her off at the appellant's home. But rather than take CG to a movie, the appellant told CG that he needed to wash her clothes because they were soiled from the church picnic. He gave her one of his wife's T-shirts to wear, put her clothes in the washing machine, and took her to the bedroom where they "laid on the bed and started to watch TV."

The appellant began touching her "private part" with his hand by moving his fingers in a circular motion. While he was touching her, the appellant said, "Don't tell

anyone, because I could go to jail." When he finished touching her, they went to the computer to look at movie schedules. While CG sat on the appellant's lap in front of the computer, the appellant removed his penis from his underwear and placed it on CG's leg. As she moved away the appellant pushed his penis against her leg. CG described it as feeling wet. They got dressed, and the appellant took her shopping at Target where he bought her a DVD and a toy. He then dropped her off at her home.

On another occasion when CG visited the appellant while his wife was away, they again lay on the bed and the appellant began touching her "like how he did the other times." This time, after he touched her for awhile, CG testified that he "got down between my legs and he had started to—to lick my private part." She described the appellant as "going like up and down" with his tongue and that it "felt weird." On a third occasion when they were alone on the bed watching TV, the appellant placed her hand over his penis and began moving it in a circular motion. CG testified that it made her sad to talk about what the appellant had done to her.

Child Protective Services (CPS) contacted RM concerning information that CG had been abused by the appellant. She had no idea what they were talking about. She handed the telephone to her husband while she spoke with CG, who told her what the appellant had done to her. Both RM and her husband were very upset by what had happened. The appellant called later that day to ask what RM had told CPS and told her not to give them any information because they were "on a witch hunt." RM did not again allow CG to visit the appellant.

The military judge instructed the members on all the elements of the offense to include the terminal element, and the trial counsel argued that the appellant's conduct was both prejudicial to good order and discipline and service discrediting. The trial defense counsel did not object to the instruction on the terminal element; did not dispute the trial counsel's argument on the terminal element; and did not dispute that the acts, if proven, would be prejudicial to good order and discipline and service discrediting. Thus, unlike the counsel in *Humphries*, the trial defense counsel here did not controvert the terminal element but instead disputed whether the specific acts occurred and left the terminal element "essentially uncontroverted."

The testimony of CG and her mother provide overwhelming evidence of the service discrediting nature of the appellant's acts. Clause 2 of Article 134, UCMJ, does not require testimony regarding either public opinion or even public knowledge of the misconduct for it to be service discrediting; rather, the evidence must be sufficient to show that the misconduct is "of a nature" to bring discredit upon the armed forces. *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011). In *Humphries*, the Court distinguished the issue of failure to provide notice from the issue of factual and legal sufficiency. *Humphries*, 71 M.J. at 216 n. 8 (citing *Phillips*). We recognize and apply that distinction here by evaluating the evidence to determine whether it is

"'overwhelming' and 'essentially uncontroverted.'" *Cotton*, 535 U.S. at 632–33 (quoting *Johnson*, 520 U.S. at 470). The record shows that it was: in the face of overwhelming evidence on the terminal element, the defense quite logically chose not to dispute that the acts described by CG would prove the terminal element but instead argued that the acts did not occur. With the terminal element "essentially uncontroverted," the Government's failure to provide the appellant notice of the terminal element did not result in material prejudice to the appellant's substantial right to notice.

Conclusion

Having considered the record in light of *Humphries* as directed by our superior court, we again find no error that substantially prejudiced the rights of the appellant. The approved findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence are

AFFIRMED.

MARKSTEINER, Judge, concurring:

I read the case law to allow us, on the facts of this case, to find error but nevertheless leave the appellant's conviction undisturbed. I therefore respectfully concur with the majority's holding.

The cases most commonly cited as the basis for the *Humphries* either "extant" or "uncontroverted" test, are indeed *Cotton* and *Johnson*. In both of those decisions, the Court left convictions undisturbed based on the fourth factor of the test from *Olano*. In both cases, notwithstanding errors a non-lawyer might refer to as legal technicalities, the Court upheld convictions because doing so would be neither fundamentally unfair nor injurious to the reputation of the judicial system. Under *Cotton* and *Johnson*, the fourth *Olano* prong allows non-military federal courts that find prejudicial error to nevertheless leave convictions undisturbed unless failing to reverse them would be—or would appear in the eyes of the public to be—fundamentally unfair.

Our dissenting colleagues consider CAAF to have entirely foreclosed a court of criminal appeals' (CCA) authority to conduct any sort of *Olano*-like evaluation in cases involving an omitted element of Article 134, UCMJ, based on factors other than the specific mention of a terminal element between opening and the close of evidence. Their proposition is well supported. *See Powell*; *Humphries*, 71 M.J. at 219-24 (Stucky, J., dissenting)*; United States v. McMurrin*, 70 M.J. 15, 18 n.2 (C.A.A.F. 2011).

I read our options more broadly. Our superior court has held that an omitted element error may not rise to the level of substantially prejudicing a material right if either: evidence of notice of the omitted element is somewhere extant in the trial record, or if the missing element is essentially uncontroverted. *Humphries*, 71 M.J. at 216 (citing *Cotton*, 535 U.S. at 633). I understand the "essentially uncontroverted" option to mean: Though we may find an omitted element error that is not cured or abated by mention of the terminal element somewhere in the record, we may nevertheless leave a conviction undisturbed if we exercise our discretion to do so in light of the principles the Supreme Court has articulated in *Cotton* and *Johnson*, and when doing so would preserve the careful balance between judicial efficiency and the redress of injustice as the Supreme Court considered those interests in *Cotton* and *Johnson*. *Humphries*, 71 M.J. at 214. Therefore, in the case before us,

I respectfully concur.

ROAN, Senior Judge, with whom ORR, Senior Judge, and HECKER, Judge, join, dissenting:

As the majority mentions, in *Humphries*, CAAF set aside a finding of guilty to a contested adultery charge because the specification did not allege the terminal element of Article 134, UCMJ. Although defense counsel did not object to the lack of the missing element at trial, the court determined that the issue was forfeited rather than waived. The court applied a plain error test, saying, "In the context of a plain error analysis of defective indictments, '[the] [a]ppellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *Id*. at 214 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). After finding the failure to allege the terminal element was plain and obvious error, the Court turned to the question of whether that error materially prejudiced the appellant's substantial constitutional right to notice under the Fifth and Sixth Amendments. *Humphries*, 71 M.J. at 215. This analysis "demand[s] close review of the trial record" to determine whether notice of the missing terminal element "is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Humphries*, 71 M.J. at 216. After finding "on this record, there is no such notice, and the missing element was controverted," CAAF concluded that neither the specification nor the record provided notice of which terminal element or theory of criminality the Government pursued in the case, and therefore there was material prejudice to the accused's substantial right to notice. *Id*. The *Humphries* Court did not define the term "essentially uncontroverted," explain precisely what made the element "controverted" in that case, or clarify how to evaluate this issue in the context of a plain error analysis.

In the present case, the majority opinion reasons that the *Humphries* citation to two Supreme Court cases, *Cotton* and *Johnson*, indicates our superior court has

"adopted" the *Cotton* and *Johnson* "approach to evaluating the evidence for purpose of deciding whether an error requires reversal," such that we are to "inquire[] into the weight of the evidence presented on the omitted element in order to determine if it was overwhelming and uncontested, i.e. whether the element was 'essentially uncontroverted.'" Based on our superior court's precedents regarding the application of the plain error test in military cases, including in *Humphries* itself, and its decision not to incorporate the "overwhelming evidence" aspect from the Supreme Court cases it cites, we cannot agree with the majority's conclusion that the effect of the *Humphries* holding "was to create a prejudice test that not only looks to notice, but also adopts the inquiry formulated in *Cotton* and *Johnson*, and applies it in the military context." We therefore respectfully dissent.

As the majority notes, in both *Cotton* and *Johnson*, the Supreme Court applied plain error analysis using the principles established in *Olano*. In *Olano*, the Court articulated a four-part test to be applied before an appellate court can correct an error not raised at trial: there must be (1) error, (2) that is plain, and (3) that affects substantial rights; if all three conditions are met, an appellate court may then order correction of the error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 732-34. However, the Court did not require an appellate court to correct plain error. Rather the Court held that an appellate court may, in the exercise of its sound discretion, notice such error in "criminal cases where the life, or as in this case the liberty, of the defendant is at stake." *Id*. at 735 (citing *Sykes v. United States*, 204 F. 909, 913 (8th Cir. 1913). The Court further explained that an appellate court should use its discretion to find plain error only "in those circumstances in which a miscarriage of justice would otherwise result." *Id*. at 734.

In *Cotton*, using this plain error rubric and focusing on *Olano's* fourth prong, where an indictment failed to allege a specific quantity of drugs justifying an enhanced sentence, the Court nevertheless declined to find the sentence infirm "because even assuming [the defendant's] substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" as "[t]he evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted.'" *Cotton*, 535 U.S. at 633. The Court noted :

> Congress intended that defendants, like respondents, involved in large-scale drug operations receive more severe punishment than those committing drug offenses involving lesser quantities. Indeed, *the fairness and integrity* of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments. The real threat then to the "*fairness, integrity, and public reputation of judicial proceedings*" would be if respondents, despite the *overwhelming and uncontroverted evidence* that they were involved in a vast drug conspiracy, were to receive

> a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial.

Id. at 634 (emphasis added).

Restated, the Supreme Court found the magnitude of the Government's error in failing to allege the quantity of drugs required to justify a longer prison term, when measured against the overwhelming and uncontroverted quantum of evidence establishing the defendant in fact possessed drugs in excess of the threshold amount, did not warrant invalidating the sentence because doing so would amount to a windfall for the defendant that would call into question the fairness, integrity, and public reputation of judicial proceedings. The decision expressly used the "uncontroverted and overwhelming" evidence to justify its conclusion under the fourth prong of the *Olano* test.

Similarly, in *Johnson*, where the trial court failed to submit an element of the charged offense to the jury during findings, the Court nevertheless affirmed Johnson's conviction, reasoning:

> [E]ven assuming that the failure to submit materiality [of her perjured testimony] to the jury affected substantial rights, it does not meet the final requirement of *Olano*. When the first three parts of *Olano* are satisfied, an appellate court '*must then determine whether the forfeited error seriously affects the fairness, integrity or public reputation of judicial proceedings before it may exercise its discretion to correct the error*.'"

Johnson, 520 U.S at 469-70 (emphasis added) (internal quotations and citations omitted). Noting that evidence supporting the materiality of Johnson's perjured statement was "overwhelming" and that materiality was "essentially uncontroverted" at trial, the Court upheld the conviction, stating:

> On this record there is no basis for concluding that the error *seriously affected the fairness, integrity or public reputation of judicial proceedings*. Indeed, it would be the reversal of a conviction such as this which would have that effect. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it. *No miscarriage of justice will result here if we do not notice the error, and we decline to do so*.

Johnson, 520 U.S at 470 (emphasis added).

In sum, the decisions in *Cotton* and *Johnson* turn on an analysis involving an indivisible blend of the "weight of the evidence" and the "fairness and integrity" of the

overall proceeding, finding that the results of those cases should not be overturned. The Court did not reach that decision simply because evidence supporting the missing element was "overwhelming" or because the element itself was "uncontroverted." Instead, the Court used those conclusions to find that reversing the trial outcome would call into question the fairness, integrity, and public reputation of judicial proceedings.

We believe that CAAF has precluded the military CCAs from using the "fourth prong" of the *Olano* test when evaluating plain error, and that this restriction prevents us from using *Cotton* and *Johnson* in the manner espoused by the majority. In *Humphries*, the Court unequivocally stated, "The standard that we apply here is the constitutional [error] standard as it has been articulated by this [C]ourt in plain error cases since [*Powell*]." *Humphries*, 71 M.J. at 214. The Court's explicit reference to and application of the *Powell* standard for plain error is important to understanding the Court's decision in *Humphries* and our basis for dissenting here.

Prior to *Powell*, plain error review in the military system was limited to errors that were obvious and substantial, and application of the doctrine was necessary to rectify those situations "that seriously affect the fairness, integrity or public reputation of the judicial proceedings." *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (citing *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The *Fisher* Court announced that plain error was only to be found "sparingly and in those circumstances in which a miscarriage of justice would otherwise result." *Fisher*, 31 M.J. at 328-29 (citing *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)). This standard was similar to that later adopted by the Supreme Court as the "fourth" prong or element in the *Olano* test. However, through the *Powell* decision in 1998, our superior court modified the plain error standard while also addressing the application of *Olano* in the military justice context.

In *Powell*, the Navy Marine-Corps Court of Criminal Appeals followed the *Fisher/Olano* rationale when addressing whether the military judge committed plain error in allowing evidence of uncharged misconduct to be admitted during sentencing. That court found plain error occurred, but denied the appellant relief, reasoning:

> Even if plain error is found, corrective action does not necessarily follow. Further analysis is required to determine whether an appellate court should exercise discretion in granting relief. Such discretion should be exercised rarely, and only if the plain error seriously affected the fairness, integrity, or public reputation of the proceeding, or to avoid a miscarriage of justice.

United States v. Powell, 45 M.J. 637, 641 (N.M. Ct. Crim. App. 1997) (citing *Olano*, 507 U.S. at 736). On review, CAAF affirmed the lower court's decision but, in doing so, modified the plain error analysis it had set forth in *Fisher* and moved away from the standard set forth in *Olano*.

The *Powell* court noted, "In *Olano*, Justice O'Connor makes it clear that the definition of plain error under the federal rule has three elements, not four." *Id*. at 465. The Court further concluded that the "fourth element," calling for an evaluation of the effect of the error on the fairness, integrity, or public reputation of the proceeding, "does not change the definition of plain error, but instead, defines when a court may exercise its discretionary power to correct a plain error." *Id*.

The *Powell* Court determined that the third element of *Olano's* plain error definition, requiring that an error must "affect substantial rights," is unsuitable for use in the military system due to the requirements of Article 59(a), UCMJ. Although Article 59(a), UCMJ, "parallels the third *Olano* element," it requires that "the error materially prejudice the substantial rights of the accused," and thus an error that only "affects the substantial rights" of an accused "falls short" of the requirement for reversal set forth in Article 59(a), UCMJ. *Id.* at 465. The Court then stated the fourth element of the Supreme Court's plain error test "applies only to courts exercising discretionary review." *Id.* Although this reference implies that the fourth element of the *Olano* test was still viable in the military context, cases subsequent to *Powell* have not included this element when evaluating plain error.[5]

Based on the *Humphries* Court's specific citation to the three elements of the *Powell* test as well as the logic applied by the Supreme Court in analyzing *Cotton* and *Johnson* relative to the *Olano* test, we do not believe the *Humphries* Court's fleeting reference to *Cotton* and *Johnson* and its use of the phrase "essentially uncontroverted" leads to the conclusion that the Court implicitly reconsidered and expanded the plain error test. If the Court had intended for the complete *Olano* test to now apply when analyzing plain error, there would have been no need to specifically refer to the three-part *Powell* test and then cite to multiple military cases, all of which employ the same standard and do not include the application of the fairness and integrity prong.[6] Consequently, we are left with the conclusion that the underpinning rationale of the *Olano*, *Cotton*, and *Johnson* decisions—error suffered by the appellant is to be balanced against the adverse impact to the fairness and integrity of the judicial proceedings before

[5] Following the decision in *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998), our superior court has consistently applied its three-prong test when conducting a plain error analysis. *See e.g. United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009); *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008); *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007); *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005); *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999). Granted, the Court of Appeals for the Armed Forces (CAAF) itself has recently voiced uncertainty on whether the fourth prong of the *Olano* plain error test applies in military law. *See United States v. McMurrin*, 70 M.J. 15, n.2 (C.A.A.F. 2011) ("There is some disagreement about the application of the fourth prong of . . . *Olano*.") (citations omitted)).

[6] Indeed, Judge Stucky's dissent in *United States v. Humphries*, 71 M.J. 209, 219-24 (C.A.A.F. 2012), in which he argues that the Court should reconsider its holding in *Powell* and apply the entire *Olano* test at both the court of criminal appeals (CCA) and CAAF levels, belies the conclusion that the majority intended to incorporate *Olano*'s fourth prong by way of citing to *United States v. Cotton*, 535 U.S. 625 (2002), and *Johnson*. Presumably the majority considered but ultimately disagreed with Judge Stucky's views on this point.

relief can be granted—is not applied in military justice jurisprudence when reviewing issues for plain error. Because the Supreme Court in *Cotton* and *Johnson* linked the importance of the "uncontroverted" nature of the evidence and/or missing element to that fourth *Olano* prong, we are constrained from using those cases in the manner proposed by the majority.[7]

We also disagree with our colleagues in their ultimate conclusion that, under the totality of the circumstances, the trial defense counsel's failure to challenge the trial counsel's closing argument concerning the service discrediting nature of the appellant's conduct thereby made the element "uncontroverted" such that the charging error caused no material prejudice to the appellant's substantial right to notice. At its core, the *Humphries* decision was focused on whether an accused was "on notice of whether he needed to defend against this charge on the basis that his conduct was not service discrediting, not prejudicial to good order and discipline, both, or neither." *Humphries*, 71 M.J. at 217. There, the Court held that the defense counsel's assertion during closing argument that the Government had failed to present evidence that his conduct was prejudicial to good order and discipline or service discrediting did not constitute proof he was on notice of which theory of criminality he needed to defend against. *Id.* at 217. Here, without more indicia that the accused or his defense counsel was aware of the Government's theory of criminality, we do not believe the defense counsel's silence on this point in closing argument is sufficient to meet *Humphries*' requirements.[8]

In sum, whatever "uncontroverted" means in the majority opinion in *Humphries*, we are not convinced that our superior court has not made an exception to the plain error test established and followed in *Powell* for cases involving defective charging instruments. A somewhat passing reference to *Cotton* and *Johnson* without more explanation does not, in our opinion, authorize military appellate courts to adopt a broader application of the established plain error doctrine. Given that, we do not believe the Supreme Court decisions can be utilized in the military justice system in the manner advocated for by the majority.

---

[7] We also attach significance to CAAF's decision not to reference the "overwhelming evidence" aspect of the *Cotton* and *Johnson* holdings, finding this precludes us from considering the weight of the evidence in deciding if plain error occurred.

[8] We recognize that our superior court's cursory use of the phrase "essentially uncontroverted" in *Humphries* could be interpreted in the manner espoused by the majority, given the lack of context or explanation provided for how that phrase is defined or should be used. However, we believe implementation of that phrase in this manner, without additional facts, leads to irrational results. For example, if a defense counsel references the terminal elements in the context of challenging a trial counsel's closing argument on that element, he will be found to have "controverted" the element and the specification will be set aside, even though his argument provides some indicia that he was on notice of the element. On the other hand, if a defense counsel like the one before us does not challenge the trial counsel's closing argument on the terminal element, the element is considered "uncontroverted" and the specification will not be set aside even though the appellant and his defense counsel were not placed on notice of the existence of the Government's theory of criminality because it was not included in the charged specification.

If we were convinced our superior court permitted us to evaluate plain error using the complete test set forth in *Olano*, *Cotton*, and *Johnson*, we would have no difficulty upholding the conviction in the case before us. We agree with the majority that there is an "overwhelming" amount of evidence available in the record to prove the service discrediting nature of the appellant's conduct with his young niece. We would therefore decline to grant relief as the Government's failure to provide the appellant with notice of the terminal element in this case did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Unfortunately, we cannot find the legal authority for military courts to apply the fairness and integrity prong authorized by the Supreme Court and therefore dissent.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist