**IN THE UNITED STATES COAST GUARD**
**COURT OF CRIMINAL APPEALS**

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| UNITED STATES,<br>Appellee | ) | 16 February 2018 |
| | ) | ASSIGNMENTS OF ERROR AND<br>BRIEF ON BEHALF OF APPELLANT |
| | ) | Dkt. 1391 |
| v. | ) | Case No. G 0302 |
| | ) | Panel 26 |
| Mathew A. Rogers<br>Electrician's Mate Third Class<br>U. S. Coast Guard,<br>Appellant | ) | Tried at Norfolk, VA by a general court-martial convened by Commander, Ninth Coast Guard District, on 20 September and 10 November 2016 |

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES**
**COAST GUARD COURT OF CRIMINAL APPEALS**

## Statement of the Case

Appellant, Electrician's Mate Third Class (EM3) Matthew A. Rogers, United States Coast Guard (USCG), was tried in Norfolk, Virginia by a general court-martial convened by Commander, Ninth Coast Guard District. The court-martial was composed of the military judge and members with enlisted representation. Contrary to his pleas, EM3 Rogers was convicted of three specifications of service discrediting conduct in violation of Article 134, UCMJ—two specifications for obstruction of justice and one specification relating to the manner in which he used his military identification card.[1] EM3 Rogers was found not guilty of one specification alleging a violation of Article 107, and two specifications alleging a violation of Article 120.

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[1] The specification alleging wrongful use of EM3 Rogers' military identification card purports to allege a violation of 18 U.S.C. § 499 (falsely make, forge, counterfeit, alter, or tamper with a military pass), but does not allege all the elements of that offense. It also alleges the terminal elements of clause 1 and clause 2 Article 134, UCMJ, offenses, but it does not allege all the elements of the applicable Article 134 enumerated offense of wrongful use of a military

On 4 March 2017, members sentenced EM3 Rogers to reduction in pay-grade to E-1 and a bad-conduct discharge. (R. vol. X at 135.) The convening authority approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered it executed on 18 July 2017. (CA's Action.)

On 15 August 2017, the Judge Advocate General of the Coast Guard referred the case to the Coast Guard Court of Criminal Appeals (CGCCA) for review under Article 66, Uniform Code of Military Justice (UCMJ),10 U.S.C. § 866 (2012).

**Statement of Facts**

On 16 August 2012, when EM3 Rogers returned to his hotel room at the end of his day of training, he was met by Detectives [redacted] and [redacted] of the Portsmouth Police Department. (R. vol. IX at17.) The local hospital called the detectives after a young woman, MC, had been seen for a bump on her head. (R. vol. VII at 144.) The detectives sought EM3 Rogers because MC, who did not remember much about the night before, awoke in his hotel room. (R. vol. VII at 130, vol. IX at 14-17.) The detectives asked EM3 Rogers if they could speak with him and all three sat down for a twenty-minute interview in the hotel's conference room. *Id*.

After that interview, the detectives asked EM3 Rogers for permission to see his room, which he had not been in since leaving that morning. He consented and detectives searched and photographed the room. (R. vol. IX at 19-20; P.E. 17.) Detectives then asked EM3 Rogers to come with them for a second interview at the police station so the interview could be video recorded. (R. vol. IX at 29.) He again consented and rode with the detectives in a police car to the station. (R. vol. IX at 30.) EM3 Rogers was not advised of his Miranda Rights or UCMJ Art. 31(b) rights before the interview. (R. vol. IX at 67.)

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identification card.

During this police station interview he recounted the prior evening. EM3 Rogers told detectives that he remembered being at the Bier Garten and then Long Boards drinking beer and taking shots. He told them that after that he did not remember much and that he was "browning out." EM3 Rogers did remember going out from his room for a smoke, hearing noises and finding MC in the stairwell in a pool of urine. He told the detectives that he brought her to his room and showered her off. (P.E. 20.)

He went on to tell Detective [redacted] that later he went to the bathroom in the hotel room and returned to the bedroom to find MC "on all fours on the bed playing with herself." EM3 Rogers laid down on the other bed. MC then came to his bed and "started giving [him] oral pleasure." (P.E. 20.) EM3 Rogers said that was the last thing he remembered until he woke up. He then recounted that when he awoke he remembered seeing MC in the adjacent bed before he left for training. (P.E. 20.)

Detective [redacted] circled back and asked several follow up questions. The detective then told EM3 Rogers that she had notified Coast Guard investigators about her investigation. Detective [redacted] explained that she did not know whether the Coast Guard would want any involvement, "being that it was not on Coast Guard property, whatever, I don't know what they'll—how they work. Navy, if it's not on their property and everything, a lot of times they won't want to get involved; they will support us but they won't do anything else." (P.E. 20.)

Detective [redacted] then proceeded to ask about EM3 Rogers's cell phone. Rogers stated that there was a picture or video of MC on his phone, but that he deleted it before the detectives approached him. The detective then questioned him on his intent in deleting the picture, asking if he knew at the time that "all this was problematic for you." He replied that he did not know "anything was going on," but that "I don't like having stuff like that, really, on my phones."

Detective [redacted] told him that a detective would be in touch with him about imaging the phone so that it could be searched pursuant to a warrant. He voluntarily provided the detective the phone so that she could copy the serial number for the warrant. (P.E. 20.)

Detective [redacted] concluded the interview by telling EM3 Rogers that if there was anyone he could talk to or anything that would refresh his memory he should get back to them. She emphasized the importance of his cooperation even though bringing the phone by would be a "pain in the ass" but that "twenty to life is a…" "it could be a rape charge."[2] (P.E. 20.) EM3 Rogers then became emotional and inventoried a number of things that he had left out but remembered to show that he was telling her everything he could. (P.E. 20.) In response to a question from the detective, EM3 Rogers voluntarily lifted his shirt so the detective could check for marks. (R. vol. IX at 57.) At trial, Detective [redacted] characterized EM3 Rogers as cooperative with the investigation. (R. vol. IX at 54.)

Following the interview, Detective [redacted] went to the Bier Garten to retrieve the security camera footage from the night before. (R. vol. IX at 42.) Detectives copied about twenty minutes of silent footage, covering the time period when MC displayed the most obvious signs of being intoxicated. (R. vol. IX at 43-44, 51.) At the beginning of the recording, MC was hugging and swaying beside another customer and then fell over. (P.E. 2.) At about this point, EM3 Rogers entered the Bier Garten. (P.E. 2; R. vol. IX at 41.) After EM3 Rogers and several other customers helped her up, she embraced the men and stroked their faces and hair. (P.E. 2.) Her skirt remained down around her ankles for some time after she was helped up. While her skirt was down, she began grinding her buttocks on a customer's crotch. (R. vol. IX at 119, 125.)

[2] At trial, Detective [redacted] explained that this statement was made as part of an interviewing tactic, not because it reflected what she considered to be an appropriate outcome. (R. vol. IX at 65.)

The bartender became uncomfortable with MC's behavior and her safety in the event she left the bar. (R. vol. IX at 43-44, 47.) She went through MC's purse to find her ID and then asked MC about her address. MC did not provide it. (R. vol. IX at 44-5.) At about this time, EM3 Rogers presented his military ID to the bartender and told her that he would take MC home. (R. vol. IX at 45-46.) MC was eager to leave with him. (R. vol. IX at 64.) He left his military ID card with the bartender as a show of trustworthiness. (R. vol. IX at 44-36.) EM3 Rogers then approached MC and they departed together, arms around each other. As she departed, MC turned and high-fived another woman in the bar. (P.E. 2.)

Although the detectives viewed the footage of the entire time that MC was at the bar and later when EM3 Rogers returned to the bar later that night to retrieve his ID card, they did not copy it because of the weakness of the case. (R vol. IX at 44, 52-53.) This unrecorded video would have covered the footage of MC's arrival at the Bier Garten and the timeframe when EM3 Rogers returned. (R. vol. VIII at 74, 79, vol. IX at 43-44, 51.) Similarly, detectives did not note the time in the surveillance footage that he returned.

A day or two after the initial interview Detective [redacted] arranged for the forensics kit to be collected from the clinic. The kit was not sent for testing. (R vol. IX at 45.)

About a week after the initial interview, Detective [redacted] directed Detective [redacted] her trainee, to invite EM3 Rogers to the Police Station to watch the surveillance video and ask him about it while she was on a cruise. Detective [redacted] testified that this was not a "re-interview." (R. vol. IX at 115.) Like the last interview, this one was recorded on video and no rights advisements were made. (R. vol. IX at118, 22.) Detective [redacted] was accompanied by male Navy veteran detective who was there in an attempt to make EM3 Rogers feel more open. (R. vol. IX at 118.)

At the beginning of the interview, Detective [redacted] began playing the surveillance video, which EM3 Rogers had not, up to that point, seen. As the video proceeded, the detectives narrated what was going on and periodically asked EM3 Rogers if the video had refreshed his memory. (P.E. 21.)[3] At the conclusion of the video, Detective [redacted] asked EM3 Rogers to recount everything he could remember, starting with the morning of the day he met MC. EM3 Rogers shared the same memories with Detective [redacted] as he had at the earlier interview with Detective [redacted] (P.E. 21.)

Detective [redacted] then brought EM3 Rogers's phone to the forensics experts that copy electronic devices for analysis. Detective [redacted] testified they never identified anything relevant on the phone. (R. vol. IX at 123.)

At the conclusion of the Portsmouth Police investigation, the local District Attorney declined to prosecute the case. (R. vol. IX at 77-78, 146.) The Portsmouth detectives working the case subsequently contacted the Coast Guard Investigative Service (CGIS) agent, Special Agent (SA) [redacted] with whom they had earlier been in contact, to pass on news regarding the case's disposition. Up to that point, CGIS had only conducted a monitor investigation. (R. vol. IX at 145-47.) A "monitor investigation" is nothing more than a courtesy call to the agency conducting an investigation to identify a CGIS agent as a point of contact and provide assistance that the investigating police department might want. (R. vol. IX at 145.)

After the Portsmouth Police department transferred the evidence to SA [redacted] he conducted re-interviews with witnesses who had already been interviewed; he also interviewed

[3] The copy of this exhibit provided to appellate defense counsel did not cover the entire length presented at trial. After several attempts at producing a substitute exhibit, the original was eventually located. On 1 February 2018, a copy of this was produced appellate defense counsel. This copy was unplayable. Finally in 15 February, counsel was able to view the original P.E. 21 disc.

several more tangential witnesses. (R. vol. IX at 145-59.) The collection kit from the forensic examination of MC was sent to the lab. Its analysis rendered no relevant evidence and prompted no further investigatory steps. (R. vol. IX at 159.)

On 20 September 2012, SA [redacted] conducted the third interview of EM3 Rogers. SA [redacted] testified that it is "standard procedure" to interview the "subject" of the investigation last. (R. vol. IX at 162-63.) The idea behind this approach is that "[y]ou've done all the leads. When you sit down and talk with them, you have really the whole investigation done. And that's your chance to get their full side of the story." (R. vol. IX at 163.) SA [redacted] started by providing the Article 31(b) rights warning to EM3 Rogers, noting that he suspected him of Article 120 Rape and Obstruction of Justice. The obstruction of justice warning was made on the advice of a lawyer working with the agent based on suspicion that EM3 Rogers had made "false or misleading statements to the police." (R. vol. IX at 166.) SA [redacted] did not articulate what, precisely, they believed to be false or what other evidence contradicted his statements to the police.

At the beginning of the interview, EM3 Rogers made statements that coincided with his earlier statements. (R. vol. IX at 171.) The agent then outlined the other evidence he had received and told EM3 Rogers that he believed he remembered more than he had provided in statements so far. SA [redacted] went on: "but this interview is not finished yet. I know some of what you told us is true, so the truth's in there. Are you interested in dropping this fabricated story and telling us what really happened that night?" (R. vol. IX at 181.) At that point, EM3 Rogers told SA [redacted] that he remembered meeting MC in the Bier Garten and leaving with MC to his hotel room. EM3 Rogers stated that he also remembered pleasuring her after she had masturbated herself and had given him oral sex. (R. vol. IX at 183.) He further said that he had

not told the Portsmouth detectives all of these details because he was "scared." (R. vol. IX at 187.)

Based on EM3 Rogers's more detailed statement to SA [redacted] two specifications of obstruction of justice and one specification for making a false official statement were included with the charges alleging sexual assault and violating 18 U.S.C. § 499 (falsely make, forge, counterfeit, alter, or tamper with an official pass). The subject of the specifications for false official statement and obstruction of justice was EM3 Rogers's alleged statement "that the first time the accused met [MC] was when he found her lying naked on a hotel floor having urinated herself and that he only remembered placing his penis in [MC]'s mouth before passing out." (Charge Sheet.)

At the close of the government's case, the defense moved to dismiss all charges and specifications except the violation of 18 U.S.C. § 499. With respect to the false official statement charge (Charge I), the defense's motion was based on the absence of evidence that EM3 Rogers asserted that he first met MC in the hotel stairwell; rather the evidence was that the stairwell was his first memory of her at that time. (R. vol. X at 19.) When the government was unable to provide evidence that EM3 Rogers's video-recorded statements addressed meeting, versus remembering, Trial Counsel requested that the first alleged statement be excepted. (R. vol. X at 28-29.) The defense objected to this and the Military Judge dismissed Charge I and its sole specification. (R. vol. X at 29.)

As the two obstruction of justice specifications—alleged in Charge II of the cleansed charge sheet—addressed the same substance in the accused's statements, the defense articulated the same position in the motion to dismiss those specifications. (R. vol. X at 41.) The defense further argued that the obstruction specifications were not proven because they alleged that EM3

Rogers had said he put his penis in her mouth, but the proof at trial showed that he said she gave him oral pleasure. (R. vol. X at 42-43.) Trial counsel again proposed to except the statement about the hotel stairwell and move forward with the obstruction specifications being solely based on the statement that EM3 Rogers did not remember what happened after oral sex. (R. vol. X at 42.)

Government trial counsel conceded that the evidence varied from the charge, but asserted that it was mere "semantics" that the evidence was within the "sum and substance" of the language the government charged. (R. vol. X at 44-45.) Defense counsel asserted that the Military Judge's exceptions and substitutions based on a R.C.M. 917 motion were improper and that had the charge been worded differently, their strategy and preparation would have been different. (R. vol. X at 45-47.) The Military Judge announced that the motion was "denied and granted in part with the substitution—without substitution except the language found by the Court."

Regarding Specification 2 of Charge III, Defense Counsel renewed the arguments made for Specification 1 and also pointed to the lack of evidence of intent to impede an investigation. The entirety of the government's position on this issue was that "he lied and therefore tried to turn off the investigation." Government trial counsel further argued that evidence that EM3 Rogers had a high tolerance for alcohol could be used to show that his statements about memory gaps were lies. (R. vol. X at 50-51.) The Military Judge made no findings on this point, but summarily denied the motions and excepted the language concerning the stairwell encounter. (R. vol. X at 52-53.)

After a recess the Military Judge restated his rulings on the R.C.M. 917 motions. But this time adding, apparently *sua sponte*, that for the obstruction of justice specifications he excepted

the language alleging the conduct was prejudicial to good order and discipline. (R. vol. X at 54-56.)

In closing arguments, government trial counsel argued that EM3 Rogers told SA [redacted] that he lied because he had more to drink than MC. (R. vol. XI at 87). "He had to lie to get them to back down" "[h]e knew if he could just lie, they wouldn't be able to keep pushing this issue." She argued further: "when a military member obstructs justice, and in that second interview, in uniform, that's service discrediting." (R. vol. XI at 87.)

Once in deliberations, the members requested a copy of 18 U.S.C. § 499, which was redacted and provided. The Commandant's instruction that had also been noticed was neither requested nor provided. (R. vol. XII at 168-69.)

The members returned findings of not guilty with respect to the violations of Article 120 and guilty of obstruction of justice and the offense relating to EM3 Rogers's use of his military ID card. (R. vol. XII at 189.)

Following the announcement of findings, an Article 39(a) session was held to determine the maximum sentence. The defense argued that the maximum allowed by § 499—five year's confinement—was excessive in light of the facts and requested six months based on the closer factual analogy to the offenses of drunk and disorderly conduct and obtaining services under false pretenses. (R. vol. XIII at 11.) The military judge ultimately calculated the maximum sentence based on the maximum punishment for the enumerated Article 134 false pass offense—three years. (R. vol. XIII at 12.)

Additional facts necessary for the resolution of this case are contained in the argument below.

## Errors and Argument

## I

## EM3 ROGERS WAS NOT ON NOTICE THAT THE LETTING ANOTHER PERSON HAVE HIS MILITARY IDENTIFICATION CARD WAS CRIMINAL CONDUCT.

### Standard of Review

Whether a specification is defective is a question of law, which is reviewed *de novo* on appeal. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Whether a charge or specification fails to state an offense, when raised for the first time on appeal, is subject to plain error review. *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). An appellate court will find that a charge fails to state an offense when (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

### Discussion

A service member must have fair notice that his conduct is punishable in order to be charged with violating Article 134. *United States v. Merritt,* 72 M.J. 483, 487 (C.A.A.F. 2013); *United States v. Warner,* 73 M.J. 1, 3 (C.A.A.F. 2013); *United States v. Vaughan,* 58 M.J. 29, 31 (C.A.A.F. 2003). Fair notice that conduct is punishable under the general article may be found in federal law, state law, military case law, military custom and usage, and military regulations. *United States v. Warner,* 73 M.J. 1, 3 (C.A.A.F. 2013). An "aura of criminality" surrounding a general area of behavior does not provide fair notice "solely due to its proximity to the prohibited conduct." *United States v. Merritt,* 72 M.J. 483, 488 (C.A.A.F. 2013). Rather, the notice that the specific conduct charged is criminal must be found in one of the recognized sources—statutory law, cases, or custom. *Id.*

A. Specification 3 of Charge III did not state a violation of 18 U.S.C. § 499.

Section 499 of Tittle 18 U.S.C., the statute listed in the in specification, states the following:

> Whoever falsely makes, forges, counterfeits, alters, or tampers with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with intent to defraud uses or possesses any such pass or permit, or personates or falsely represents himself to be or not to be a person to whom such pass or permit has been duly issued, or willfully allows any other person to have or use any such pass or permit, issued for his use alone, shall be fined under this title or imprisoned not more than five years, or both.

The statute is located in the Chapter containing federal criminal statutes on counterfeiting and forgery. *See* 18 U.S.C. ch. 25. The Fourth Circuit Court of Appeals said "[t]he gravamen of the offenses is the assault on the integrity of the United States and its official documents." *United States v. Birch*, 470 F.2d 808, 812 (4th Cir. 1972). The statute prohibits the false making, forging, counterfeiting, altering, or tampering with naval, military, or official passes or permits. In addition to prohibiting these acts of falsification, the statute criminalizes the categories of subsequent use of falsified passes or permits:

(1) using or possessing a falsified pass or permit with intent to defraud;

(2) using a falsified pass or permit to impersonate someone else; and

(3) willfully allowing another person to have or use a falsified pass issued to him or her for his or her use. (18 U.S.C. § 499).

Specification 3 did not state a violation of § 499 because it did not involve a pass that had been falsely made, forged, counterfeited, altered, or tampered with. The specification addresses one who "willfully allows any other person to have or use any such pass or permit, issued for his

use alone." (Charge Sheet). The specification incorrectly substitutes the phrase "any such permit" for any naval, military, or official pass or permit. This specification fails as it does not reference the requirement for falsification or alteration. The statute does not encompass every military pass or permit, rather those that are falsified or altered. There are five separate arguments that support this.

First, criminal statutes are construed consistently with the legislative purpose behind them. *United States v. Rowe,* 32 C.M.R. 302, 311 (1962). Section 499 was aimed at protecting the integrity of military passes and permits issued under its authority. Given that three of the four offenses contained in the statute contain explicit reference to falsity and fraudulence, it would be anomalous for a forth offense to be included that was unrelated to falsification or fraudulent activity associated with passes and permits. Thus, the rule of *ejusdem generis* supports the result indicated by legislative purpose: the reference to "any such pass" refers to false passes described in the clause before it.

Second, courts will consider the penalty authorized under a criminal statute when construing its meaning. Section 499 imposes the same punishment for all four offenses contained within it. This indicates that all four offenses are equally grave. Reading the false or altered character out of the "any such passes" puts willfully letting another have a pass or permit on par with using a permit to defraud or impersonate a member of the military. If all four offenses involved falsified passes or permits, a uniform punishment makes sense.

Third, the result is required by the rule of strict construction. *United States v. Rowe,* 32 C.M.R. 302, 311 (1962). This rule of construction interprets any ambiguity on the statute in favor of those subject to it in the same way that contracts are construed against the drafter. *See e.g. Snitkin v. United States*, 265 F. 489, 494 (7th Cir. 1920). Thus, even if legislative intent and

other rules of construction favored neither of the two constructions, "any such pass or permit" should be interpreted to refer to those falsified in the first clause because it creates the narrower scope of criminal liability.

Fourth, as discussed further under Assignment of Error II, the enumerated false or unauthorized pass offense found in paragraph 77 of the Manual which was an outgrowth of § 499, only covers conduct involving passes that are false or unauthorized. Since this offense is rooted in 499, it stands to reason the § 499 also only addresses conduct with passes that are either unauthorized or false.

Finally, the result is dictated by common sense: one person could never validly use a pass or permit properly issued to another person. In this case for example, the bartender could never use EM3 Rogers's military identification card, which bore his picture and identifying information. On the other hand, preventing the use and circulation of falsified passes or permits does serve a purpose.

B. Reference to the statute does not provide notice of criminality where the conduct was not a violation of the statute.

The existence of laws criminalizing certain types of conduct does not provide notice by an "aura of criminality." *United States v. Merritt,* 72 M.J. 483, 488 (C.A.A.F. 2013). In *Merritt,* the accused was charged with viewing child pornography under Article 134. At the time, the federal and military criminal justice system did not recognize the act of viewing as criminal, unlike possession and distribution. The C.A.A.F. rejected the government's position that the extent of criminalization associated with child pornography provided sufficient notice that viewing it could be punishable. *Id*. Similarly, the existence of a statute that prohibits giving a pass or permit issued, issued to one person, to another person in certain circumstances—where it was falsified or altered—does not provide notice where those circumstances are absent.

## Request for Relief

For the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss Specification 3 of Charge III.

## II

**WHETHER SPECIFICATION 3 OF CHARGE III FAILS TO STATE AN OFFENSE WHERE IT ALLEGED AN OFFENSE NOT CAPITAL WITHOUT PLEADING CLAUSE 3 AND WHERE IT WAS PREEMPTED UNDER CLAUSE 2 OF ARTICLE 134, UCMJ.**

## Standard of Review

Whether a specification is defective is a question of law, which is reviewed *de novo* on appeal. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Whether a charge or specification fails to state an offense, when raised for the first time on appeal, is subject to plain error review. *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). An appellate court will find that a charge fails to state an offense when (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Girouard*, 70 M.J. at 11 (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

## Discussion

A. Specification 3 fails to state an offense under clause 3 of Article 134.

The three clauses of Article 134, UCMJ, represent three distinct offenses. *United States v. Fosler*, 70 M.J. 225, 230 (C.A.A.F. 2011). Non-capital violations of federal criminal laws are punishable under clause 3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt IV ¶ 60 c (4)(b) (2016). When a violation of clause 3 is alleged, "the specification must expressly allege that the conduct was 'an offense not capital,' and each element of the federal statute… must be alleged expressly or by necessary implication." *Id.* at IV ¶ 60 c (6)(b).

Section 499, 18 U.S.C., is an offense not capital. To be properly charged as a clause three violation, the terminal element must be alleged as well as each element of the offense. *Id; United States v. Humphries,* 71 M.J. 209 (C.A.A.F. 2012). In addition to the failure to allege that the pass or permit was falsely made, forged, counterfeited, altered, or tampered with, the specification attempted to charge a violation of a crime or offense not capital without pleading the third element. As such, the specification was defective.

B. Specification 3 fails to state an offense under clause 2, because it falls within an enumerated offense and lacks elements of that offense.

Offenses under clause 2 of Article 134, UCMJ, the general article, contain two elements: (1) that the accused did or failed to do certain acts; and (2) that, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces. MCM, pt. IV, para. 60.b; *United States v. Cherukuri*, 53 M.J. 68, 71 (C.A.A.F. 2000).

In *United States v. Saunders*, the C.A.A.F. explained:

> Article 134, the "General Article," criminalizes service-discrediting conduct by military service members. Certain specified offenses are included under this Article. *See* [MCM 2002 ed.], pt. IV, paras. 61-113. However, "if conduct by an accused does not fall under any of the listed offenses. . . a specification not listed in this Manual may be used to allege the offense." *Id*. at Part IV, para. 60.c.(6)(c).

59 M.J. 1, 6 (C.A.A.F. 2003) (footnote omitted). The C.A.A.F. has applied this language to prohibit a "novel" specification under clause 1 or 2 if it addresses conduct covered by an enumerated Article 134 offense, but reduces the government's burden of proof. *United States v. Reese*, 76 M.J. 297 (C.A.A.F. 2016); *see also United States v. Guardado*, 77 M.J. 90, 95-96 (C.A.A.F. 2017).

Paragraph 77 of the Manual specifies three distinct offenses under the heading of "false or unauthorized pass offenses." Offenses that involve counterfeiting or falsifying passes, or using

or possessing a pass with intent to defraud, carry a maximum punishment of a dishonorable discharge, confinement for three years and total forfeitures. All other offenses are limited to a bad-conduct discharge, six months confinement, and total forfeitures. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt IV ¶ 77 (2016).

Charging this conduct by reference to § 499 rather than the enumerated offense of "wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card" lightened the government's burden in several ways. First, the acts covered in the enumerated offense are less ambiguous: while the charged conduct probably satisfies the term "let have," it is far less clear that a factfinder would have concluded that EM3 Rogers "gave or loaned" the ID card to the bartender. *Id.* Moreover, the enumerated offense explicitly requires that the gift or loan be "wrongful." *Id.* The Government offered no evidence on the subject of the act of transfer possession of an ID card being wrongful or unlawful. Similarly, the enumerated offense requires that the pass or ID card itself be false or unauthorized. *Id.* Given these differences, the effect of charging the offense under the novel § 499 specification rather than that contained in the Manual reduced the number of elements that the government had to prove and was therefore improper under *Reese*. Because this conclusion can be reached by reference only the language of the specification, the error is plain.

In the era before biometrics and chip readers, when § 499 was more frequently charged, Military Courts recognized a tiered structure of violations of 18 U.S.C. § 499. *See e.g. United States v. Warthen*, 28 C.M. R. 317 (C.M.A. 1959). These offenses were codified into the false pass offenses enumerated under Article 134 in the Manual for Courts-Martial. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 213f(11) (1969). In his concurrence in *Warthen*, Judge Latimer recognized that "the pass offenses in the military spring from the Federal statute." *United*

*States v. Warthen*, 28 C.M. R. 317, 320 (C.M.A. 1959). Similarly, the current Manual's reference to *United States v. Burton* and *United States v. Warthen*, reflects that the current enumerated Article 134 false pass offense is based on 18 U.S.C. § 499 and the tiered system of violations that developed from it in military law. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Article 134 analysis, at A23-23 (2016). Thus, in addition to notice issue it presented by the novel specification, it also created a greater risk the § 499 would be misconstrued because the enumerated offense contains decades of gloss on the statute and gap filling under clauses 1 and 2.

Finally, the terminal element in a specification for violating Article 134 must be charged and proven. *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). If the court is to believe that the violation of 18 U.S.C. § 499 was drafted as a violation of clause 2, because the specification states "was of a nature to bring discredit" it is clear that by doing so the government improperly eased their burden.

C. Prejudice.

Allowing the members to make findings on Specification 3 of Charge III materially prejudiced EM3 Rogers substantial rights in several ways. First, the defective pleading of terminal elements was prejudicial because it created significant confusion. This is best evidenced by the inquires both during the Military Judge's reading of instruction and during deliberations about § 499. (R. vol. XII at 59; A.E. 290). Moreover, the charge of the offense not capital with the addition for clause 2, prejudiced EM3 Rogers by creating a possibility for confusion over whether all elements of the statute needed to be proved or whether the members were presented with a "novel" specification and the omission was intended and proper.

Second, as noted above, it precluded the members from considering whether leaving the ID card with the bartender was "wrongful" and "unauthorized." Finally, it significantly increased

his punitive exposure. Section 499 provides a maximum punishment of five years while the analogous offense enumerated under Article 134 allows only six months of confinement.

**Request for Relief**

For the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss Specification 3 of Charge III.

**III**

**WHETHER THE MILITARY JUDGE ERRED IN FAILING PROVIDE THE MEMBERS WITH INSTRUCTIONS ON ALL OF THE ELEMENTS OF THE ALLEGED VIOLATION OF 18 U.S.C. § 499.**

**Standard of Review**

The sufficiency of an instruction provided to the members without objection by Defense counsel is reviewed for plain error. *United States v. Haverty,* 76 M.J. 199, 208 (C.A.A.F. 2017). In addition to requiring plain error by the Military Judge, a showing must be made that the error in instructions had an unfair prejudicial impact on the members' deliberations. *Id*; *United States v. Payne,* 73 M.J. 19 (C.A.A.F. 2014).

**Discussion**

The Military Judge's instructions on findings must include "[a] description of the elements of each offense charged." R.C.M. 920(e)(1). The elements in the alleged specification were that EM3 Rogers (1) willfully allowed another person to have a pass or permit; (2) that the pass or permit was issued under the authority of the United States; (3) for his use alone.[4] (Charge Sheet.)

[4] The charged language itself omits an element, as discussed above. This assignment of error is argued in the alternative: if the specification did not state an offense, the correctness of the instructions would not be at issue.

The Military Judge's instructions to the members were as follows:

> **In Specification 3 of Charge III, the accused is charged with violating 18 U.S.C. 499, in violation of Article 134, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:**
>
> **CRIMES AND OFFENSES NOT CAPITAL--VIOLATIONS OF FEDERAL LAW (ARTICLE 134, CLAUSE 3)**
>
> (1) That on or about 15 August 2012, the accused possessed a military identification card issued by or under the authority of the United States which constituted a pass or permit;
> (2) That the accused willfully allowed another person, to wit: Julie Walker, to have his military identification card;
> (3) That such conduct of the accused was of a nature to bring discredit upon the armed forces.
>
> "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem.

This instruction omits two elements of the offense as charged. First, it omits the requirement for proof that EM3 Rogers's identification card was a pass or permit as defined by 18 U.S.C. § 499. Second, it omits the requirement that the pass or permit be issued for EM3 Rogers's use alone. The Military Judge's failure to instruct on these elements is plain error. It also materially prejudiced EM3 Rogers's right to findings made by the members of the court in accordance with Article 51.

An accused is prejudiced by the omission of instructions on the elements of an offense where the element is contested, where the evidence on the element is tenuous, or where the element is part of the defense presented at trial. *United States v. Payne*, 73 M.J. 19, 25 (C.A.A.F. 2014). Whether EM3 Rogers's ID card was a pass or permit under the statute and whether leaving it with the bartender for a half hour or so was outside the scope of "for his use alone" were contested at trial. (R. vol. X at 136-37.) Defense Counsel concluded his arguments by posing the following question: "when you give your ID card to somebody to go do something for you and take it back, is that a violation of the statute? I'm going to leave it in your

judgement. You can apply the law to the facts." (R. vol. 137.)

The core of the defense's argument on this specification was that the government failed to meet its burden of proof that EM3 Rogers's actions amounted to a violation specific statutory language of 18 U.S.C. § 499. Failing to provide adequate instructions which would inform the members that they were required to find proof beyond a reasonable doubt of all elements of 18 U.S.C. § 499 relieved the Government of its burden of proof, subverted the presumption of innocence, and usurped the members' truth finding role in violation of Article 51.

The first of the omitted elements, whether an ID card is a pass or permit under the statute, was a factual question that Defense Counsel doggedly argued belonged to the members. When the Military Judge took notice of the requested Commandant Instruction (COMDTINST), Defense Counsel further pressed this issue by requesting that the Military Judge provide the adjudicative fact instruction on this point. (R. vol. XI at 23-25.) Conflating the terms "pass or permit" and military ID card amounted to a directed verdict on this element, contrary to Article 51.

The second omitted element, that the pass or permit was "issued for his use alone" was essential because it requires consideration of two key issues. The first is that military ID cards remain the property of the government and are issued for the *use* of military members. The opportunity for confusion on the part of the members on this aspect of the offense was compounded by the Military Judge's characterization of the card as "his military identification card" in the instructions. The second issue posed by this element is whether handing over the ID card was an act that went outside of "his use." These distinctions are not merely semantic when applying a 1948 criminal statute to regulate the use of documents that did not exist at the time of the statute's enactment. They were at the heart of the defense's theory which accepted that the

ID card was left with the bartender for a short period of time, but argued that conduct was not a violation of 18 U.S.C. § 499.

The prejudicial impact on the members' deliberations is best reflected by the fact that one of the members actually interrupted the Military Judge to ask for further instruction.

> MEM: Your Honor, are there any elements of the, what is it, I guess, 18 U.S.C. 499, for that specification?
>
> MJ: The following elements -- you mean any further definitions?
>
> MEM: Correct. Like what are the actual rules of law on ----
>
> MJ: I have taken judicial notice of 18 U.S.C. 499, and I will instruct you in that later on.
>
> MEM: Okay.

(R. vol. XII at 59.) The confusion persisted and in deliberations, the members requested a copy of the statute from the Military Judge. (A.E. 290 and 291.)

Providing the members with a copy of the statute did not diminish the prejudice that resulted from the omission, but rather worsened it. The members were permitted to compare the language of the statute to the instructions. Doing so allowed the opportunity for members to conclude that not all of the elements of § 499 were before them. This shows that the members were struggling with understanding the offense and creates a greater likelihood that the omissions functioned as a directed verdict.

The prejudice resulting from the omissions in the instruction was magnified by the complete lack of proof on these points. As discussed fully under the factual sufficiency assignment of error, no witnesses testified about Coast Guard or DOD policies on the status of ID cards and their proper use by the military personnel to whom they are issued. Although

COMDTINST M5512.1A may have contained evidence relevant to these questions, the instruction was neither entered into evidence nor provided to members otherwise. The Military Judge's omission obscured the weakness of the government's case on two contested elements and thereby prejudicially undermined EM3 Rogers's right to findings by the members of the court on each element of the offense.

**Request for Relief**

For the foregoing reasons, appellant respectfully requests that this Honorable Court set aside and dismiss Specification 3 of Charge III.

**IV**

**WHETHER THE PROOF THAT EM3 ROGERS VIOLATED 18 U.S.C. § 499 WAS FACTUALLY AND LEGALLY INSUFFICIENT WHERE THE MILITARY JUDGE TOOK JUDICIAL NOTICE OF A 320-PAGE INSTRUCTION WITHOUT IT BEING OFFERED AND ENTERED INTO EVIDENCE, RESULTING IN NO EVIDENCE OF THE STATUS OF THE IDENTIFICATION CARD AS "PASS OR PERMIT" FOR "HIS USE ALONE."** [5]

**Standard of Review**

This Court reviews legal and factual sufficiency of the evidence *de novo*. Art. 66(c), UCMJ; *United States v. Beatty*, 64 M.J. 456, 459 (C.A.A.F. 2007); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

**Discussion**

A. Judicial notice did not provide sufficient evidence that EM3 Rogers's military identification card was a pass or permit under 18 U.S.C. § 499.

"Judicial notice is a procedure for the adjudication of certain facts or matters without the

[5] This Assignment of Error is raised in the alternative to Assignments of Error I and II should this Court determine Specification 3 of Charge III states an offense.

requirement of formal proof. It cannot, however, be utilized as a procedure to dispense with establishing the government's case." *United States v. Williams*, 3 MJ 155, 157 (C.M.A. 1977). Where a law or regulation is the proof of an element of the offense, it is a fact of consequence that must be judicially noticed and entered into evidence. *United States v. Bradley*, 68 M.J. 556, 559 (A.C.C.A. 2009). Mere citation to a military regulation or instruction is insufficient when that instruction is a fact of consequence in a case. *United States v. Hill,* 31 M.J. 543, 544 (N.M.C.M.R. 1990).

For example, in *Hill*, Appellant was convicted of false swearing for a statement made to NCIS. On appeal, the Navy-Marine Corps Court of Military Review found the handwritten citation to the relevant Navy instruction on Appellant's NCIS statement was legally insufficient as proof that the agent was authorized to administer oaths. Significantly, the court recognized the distinction between judicial notice of the instruction's promulgation and judicial notice of the underlying fact.[6]

The Military Judge in this case took notice of COMDTINST M5512.1A, which implements a Department of Defense Instruction on "Identification Cards for Members of the Uniformed Services and other Eligible Personnel." The trial counsel requested not only that the Military Judge take judicial notice of the existence of the instruction, but also that "Paragraph 1.7 articulates that a military identification card constitutes a pass or permit, with respect to the applicability of 18 U.S.C. § 499." (A.E. 274.) The government's motion requested judicial notice under Military Rule of Evidence 202, the rule on judicial notice of law. Judicial notice

[6] In *Hill*, the court concluded that because the regulation was a fact of consequence, or adjudicative fact, it could not take notice of the contents of the regulation at the appellate level. As discussed below, the Military Judge in this case did not treat regulation as an adjudicative fact. Consequently, this court could not take notice of the contents of the regulation for the first time at the appellate level.

that the instruction existed was proper under M.R.E. 202. However, the second portion of the motion sought judicial notice of a fact—that a military ID card is a pass or permit. The Military Judge made three errors in connection with taking judicial notice of this conclusion.

First, he did not provide a copy of the noticed instruction to the members. The members were only provided with the following:

**JUDICIAL NOTICE**

Judicial Notice of Law: I have taken judicial notice of COMDTINST M5512.1A and 18 U.S.C. 499. This means that you are permitted to recognize and consider this service regulation and statute without further proof.

The Military Judge's error in providing the noticed law was actually noted by the members, who requested a copy of 18 U.S.C. § 499. (A.E. 291.) The Military Judge provided a copy 18 U.S.C. § 499 to the members, but not a copy of COMDTINST M5512.1A. When domestic law is the subject of judicial notice, it must be entered into evidence. *United States v. Bradley*, 68 M.J. 556, 559 (A.C.C.A. 2009). Given the length of the Commandant Instruction , the failure to do so is significant. Moreover, the terms of the instruction merited consideration by the members: contrary to Trial Counsel's position, the instruction does not explicitly provide authority for the position that a military identification card is a "pass or permit" for purposes of 18 U.S.C. § 499. Rather 1.7 merely summarizes the penalty provisions related to misuse of identification cards:

**1.7. Penalties for Misuse of ID Cards. Any person willfully altering, damaging, lending, counterfeiting or using ID cards in an unauthorized manner is subject to fine, imprisonment, or both according to Title 18, U.S.C., Sections 499, 506, 509, 701, or 1001.**

This statement is far from explicit authoritative agency interpretation that an identification card is a "pass or permit" and at best stands for the proposition by implication.

Furthermore, the description of the prohibited acts introduces doubt as to whether EM3 Rogers's conduct is prohibited by its use of the language "lending" and "using ID cards in an unauthorized way" rather than "allowing another to have."

Instructing the members on the existence of the instruction without providing them with its content deprived them of the opportunity to evaluate its meaning and relevance to the question of fact posed by the charge: was the ID card a "pass or permit" and did EM3 Rogers use it in a way that violated § 499?

Second, the Military Judge noticed the complete instruction and instructed the members that he had noticed the entire instruction without having reviewed it in its entirety. Trial Counsel only provided 39 pages of the instruction to the Military Judge in support of her M.R.E. 202 motion; the instruction, however, is 320 pages, including the Commandant's implementing instruction. (A.E. 274.) Among the many chapters not provided to the Military Judge was Chapter 12, which addresses the type of identification card presumably at issue here, the Common Access Card (CAC) and contains an entry titled "Individual Responsibility" that provides some insight into the legal status of the CAC card and the holder's responsibilities. Not only was this counter to the Rule of Completeness, M.R.E. 106, it skewed the Court's understanding of the effect of taking notice of the statute.[7]

Third, the Military Judge apparently took notice of the factual conclusion that a military identification card is a "pass or permit," but declined to provide a government requested

[7] That the proffered instruction was not authoritative is indicated by the fact that it is merely an implementing instruction for U.S. DEP'T OF DEF., INST 1000.13, IDENTIFICATION (ID) CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR DEPENDENTS, AND OTHER ELIGIBLE INDIVIDUALS (23 Jan 2014). This instruction provides more specificity for unauthorized uses. The facts of this case do not fall within any of the examples in the instruction.

instruction.[8] (R. vol. at 17-18.) In doing so, he eliminated the only proof offered by the Government on this element. By not introducing the instruction as evidence, the Government also failed to produce any evidence to prove that EM3 Rogers's ID card was "issued for his use alone," which is also an element of 18 U.S.C. § 499.

B. There is insufficient evidence that EM3 Rogers let another person "have" his military identification card.

The exact duration for which the bartender was holding EM3 Roger's identification card is not known with certainty because the Police Detectives did not preserve the barroom surveillance footage covering his return. (R vol. IX at 44, 52-53.) However, the bartender's testimony indicated they likely departed the bar between 2200 and 2300 hours and that EM3 Rogers returned around 0130. (R. vol. IX at 38, 44, 74.) Although EM3 Rogers clearly let the bartender hold his identification card, he neither intended to let her *have* the ID card nor did she ultimately retain it beyond the time-frame they had discussed.

Criminal statutes are construed strictly: the words of the statute are given the meaning that effectuates the intent of the statute as a whole. *United States v. Rowe*, 32 C.M.R. 302, 311 (1962). They should not, however, be construed so strictly that they defeat the legislative purpose in enacting the provision. *Id.* Section 499, enacted in 1948, is located in the Chapter containing federal criminal statutes on counterfeiting and forgery; it has been understood to contain four distinct offenses. *See United States v. Warthen*, 28 C.M.R. 317, 322 (C.M.A. 1959). It was enacted in an era when leave and liberty were managed through simple paper pass forms with little to no inherent mechanisms to impede falsification. *Id.*

The government charged the last of the four prohibited acts in §499. (willfully allow[ing]

[8] The proposed instructions in this case were not preserved as an appellate exhibit, so the exact content of the government's proposal is absent from the record.

any other person to have or use any such pass or permit, issued for his use alone). 18 U.S.C. § 499. If the word "have" means to merely possess, "use" adds nothing to the statute, as one must possess in order to use. This conclusion also fits with common sense: military members frequently hand their ID cards to other people for various lawful purposes: passing through security and verifying their identity or military status in their personal business. Moreover, sometimes security protocols require the ID card to be deposited while the person to whom it was issued is in a controlled or secure space. It is unreasonable to construe § 499 to encompass such conduct. In the absence of other limiting language in the statute, it is reasonable to construe "allows to have" to require a permanent transfer of possession. EM3 Rogers merely allowed the bartender to hold his ID card and never intended for more than a few hours during which she never used it; these facts are not legally sufficient to prove a violation of § 499.

C. There was insufficient evidence of the service discrediting nature.

Trial Counsel's theory for the service discrediting nature of the violation of 18 U.S.C. § 499 was: "[w]hen a military member trades his ID for access to a drunk woman that's service discrediting." (R. vol. XI at 87.) Although this may certainly be proper evidence in aggravation for sentencing purposes, this was not the conduct charged. Rather, the government charged EM3 Rogers with letting another person have the military identification card that was issued for his use alone. Even if doing so is *malum prohibitum* under a federal statute,[9] it is not of a nature that injures the reputation of the Armed Forces by bringing it into disrepute or lowers it in the public esteem. MANUAL FOR COURTS-MARTIAL, UNITED STATES, part IV, ¶ 60.c(3) (2016). Members of the military are constantly handing over military identification cards for various innocent uses.

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[9] A violation of 18 U.S.C. § 499 could have been charged as a crime or offense not capital under clause 3 of Article 134.

The charged misconduct is not service discrediting on its face nor by inference of the facts alleged.

**Request for Relief**

Appellant requests that this honorable Court set aside and dismiss Specification 3 of Charge III.

**V**

**WHETHER THE OBSTRUCTION OF JUSTICE CONVICTION IS FACTUALLY INSUFFICIENT WHERE THERE IS NO EVIDENCE THE CHARGED STATEMENT WAS MADE AND NO EVIDENCE OF INTENT TO IMPEDE THE INVESTIGATION.**

**Standard of Review**

The factual basis of a finding of guilt is reviewed *de novo* by this Court. Article 66(c), UCMJ, 10 U.S.C. §866(c) (2012), *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002) (internal citations omitted). Factual sufficiency review by this Court is "a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency beyond the admonition of Article 66(c), UCMJ, to take into account the fact that the trial court saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). A guilty finding is only factually sufficient if the members of this court are convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

**Discussion**

The offense of obstruction under Article 134 is found in Paragraph 96(b), Part IV, MANUAL FOR COURTS–MARTIAL, UNITED STATES (2016). The manual lists four elements:

> (1) That the accused wrongfully did a certain act;
> (2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;
> (3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and

> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The first, third, and fourth elements lack a basis in the record for this court to conclude that the elements were proven beyond a reasonable doubt.

A. There is insufficient evidence of the act charged.

The wrongful act alleged was that EM3 Rogers "falsely stat[ed] in sum and substance . . . that he only remembered placing his penis in [MC's] mouth before passing out . . . " The alleged statement, contained in two different specifications, is based on the statements EM3 Rogers made in the two video-recorded interviews with the Portsmouth detectives. In the first video, EM3 Rogers actually stated that he remembered that MC "started giving [him] oral pleasure and that's about where I blacked out again." (P.E. 20 at 6:40.) Thus, the recorded statement is substantively different from that charged in two ways. First, in the charged statement EM3 Rogers is initiating the act by inserting his penis in her mouth, but in his recorded interview, EM3 Rogers described passively receiving oral sex. Second, the specifications used the language "passing out" where EM3 Rogers stated in the video-recorded interview that he "blacked out." In a case in which both sides called expert witnesses to testify on the effects of alcohol on memory formation and decision making, the terms "passing out" and "blacking out" cannot be viewed as the same in substance.

In addition to the lack of proof that the alleged statement was made, the proof of its falsity is also feeble. No evidence in the record ever EM3 Rogers's statement that MC gave him "oral pleasure" was false. Rather the apparent focus of this overbroad charge was that EM3 Rogers's statement that he "blacked out" after the oral sex began was false. "Blacking out" is a phenomena where a conscious, person stops recording memories. (R. vol. IX at 114-20.)

Consequently, this statement is an assertion that he did not remember what occurred next. When an alleged statement by the subject of a criminal investigation that he does not remember is charged as false, the issue is the existence or non-existence of memory of the act rather than whether the act itself occurred. To prove such a statement to be false, the Government must introduce evidence proving that appellant did, in fact, have such a clear memory of the act or details of the event in issue that he was obligated to provide that information when asked about it during an official interrogation. *United States v. Black*, 47 M.J. 146, 148 (C.A.A.F. 1997). It failed to do so.

The insufficiency of the evidence of the statement and its falsity is most compellingly indicated by the Military Judge's dismissal of the Article 107 charge pursuant to Defense's R.C.M. 917 motion on these very grounds.[10] It is logically impossible to conclude that proof of false statement could fail the "some evidence" standard of R.C.M. 917 as an Article 107 charge and yet clear the reasonable doubt standard that this court applies under Article 66.

B. <u>There is insufficient evidence of intent to impede the due administration of justice.</u>

In closing, trial counsel argued, without support of the record, that Rogers told SA [redacted] he lied because he had more to drink than she. (R. vol. XI at 87.) Government trial counsel continued by arguing that "[h]e had to lie to get them to back down" "[h]e knew if he could just lie, they wouldn't be able to keep pushing this issue." The record actually shows that SA [redacted] testified that EM3 Rogers did not discuss "fingering" MC earlier because he was "scared." (R. vol. IX at 187.) Similarly, in his written statement, EM3 Rogers stated that he did not disclose the "fingering" because he was "scared, embarrassed, and it is very hard for me to

10 The Article 107 charge was also impermissible *United States v. Spicer*, as discussed further below; however, this basis for dismissal was not discussed in either the R.C.M. 917 motion or the Military Judge's Ruling. It is also noteworthy that proof that the statement was made with

talk about sexual things with women." (P.E. 23.)

Even setting aside direct proof of intent through testimony of the CGIS agent, intent to impede the due administration of justice cannot be inferred logically from circumstantial evidence in this case. EM3 Rogers was exceedingly cooperative: he consented to the search of his room and phone and voluntarily went to the police station for interviews at the detective's request. His statements to the detectives gave them extensive information that they could not obtain from MC, who remembered almost nothing of the evening and provided the only evidence of a sexual act—oral sex—to form the basis of a charge. The detectives themselves did not see the case as strong and consequently opted not to collect the barroom security camera footage for the complete timeframe involved and did not send the forensic kit collected from MC for testing. (R vol. IX at 52-53, 445.)

Furthermore, since the due administration of justice in the U.S. legal system does not rest on the criminal suspect providing potentially inculpating information to the police, a statement to the police that one does not remember a particular timeframe is not on its face suggestive of intent to impede the due administration of justice. Although there are many reported cases in which false statements are recognized as having been done with the intent to impede the due administration of justice, those cases infer the intent from the affect that the false statement had on the investigators by steering the investigation in the wrong direction. *See, e.g.*, *United States v. Arriaga*, 49 M.J. 9 (1998) (finding false statement that led investigators on a "wild goose chase" looking for evidence in the wrong places does impede the due administration of justice).

Finally, the CGIS agent's own testimony indicated that a statement by the accused would not impede their investigation of a crime because it is "standard procedure" to interview the

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intent to deceive also lacked.

"subject" of the investigation last. (R. vol. IX at 162-63.) Similarly, the Portsmouth detectives had already interviewed MC and [redacted] prior to their recorded interview with EM3 Rogers. (R. vol. VII at 43.) Given this testimony, it is unreasonable to conclude that anything the accused said could have impeded the investigation or that he intended that it do so.

C. There is insufficient evidence that the act was service discrediting conduct in its nature.

"Whether conduct is of a 'nature' to bring discredit upon the armed forces is a question that depends on the facts and circumstances of the conduct, which includes facts regarding the setting as well as the extent to which Appellant's conduct is known to others." *United States v. Philips*, 70 M.J. 161, 166 (C.A.A.F. 2011). Although the service discrediting nature of the alleged conduct may be proved through inference, trial counsel should articulate the government's proof. *United States v. Norman*, 74 M.J. 144, 153, n.5 (C.A.A.F. 2015). Here, trial counsel argued that "when a military member obstructs justice, and in that second interview, in uniform, that's service discrediting." This tautology provided no theory for the members. Furthermore, accepting this argument at face value, one of the two specifications lacks a service discrediting nature because EM3 Rogers appeared in civilian clothes in the first interview.

Conduct is service discrediting if it injures the reputation of the Armed Forces by bringing it into disrepute or lowers it in the public esteem. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016), part IV, 60.c(3). Assuming the falsity of EM3 Rogers's statement that he blacked out, it is difficult to characterize such an act lowering the public esteem of the service. When both detectives testified, they described EM3 Rogers as cooperative. As discussed further under Assignment of Error VI, his statement explicitly falls outside of Virginia's obstruction of justice statute. Leaving out details in a voluntary interview about an embarrassing sexual encounter is simply insufficient to support an inference—beyond a reasonable doubt—that EM3

Rogers's conduct in the interview was service discrediting in its nature.

**Request for Relief**

Wherefore Appellant prays this honorable Court set aside Specifications 1 and 2 of Charge III.

**VI**

**WHETHER THE EVIDENCE OF OBSTRUCTION OF JUSTICE UNDER ARTICLE 134 WAS LEGALLY SUFFICIENT WHERE THE CONDUCT WAS A STATEMENT BY THE ACCUSED TO CIVILIAN DETECTIVES IN A CIVILIAN LAW ENFORCEMENT INVESTIGATION THAT HIS MEMORY BLACKED OUT AT A CERTAIN POINT IN THE EVENING.**

**Standard of Review**

Questions of legal sufficiency are reviewed *de novo*. *United States v. Spicer*, 71 M.J. 470, 472 (C.A.A.F. 2013). Legal sufficiency review requires the appellate court to conclude that any reasonable factfinder could have found all the essential elements beyond a reasonable doubt when the evidence is viewed in the light most favorable to the prosecution. *United States v. Spicer*, 71 M.J. 470, 472 (C.A.A.F. 2013); *United States v. Day*, 66 M.J. 172, 173–74 (C.A.A.F. 2008).

**Discussion**

A. Legally insufficient wrongfulness of the act.

In order for a service member to be charged for a service discrediting offense he must have fair notice that his conduct is punishable. *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013); *United States v. Merritt*, 72 M.J. 483, 487 (C.A.A.F. 2013). *United States v. Vaughan*, 58 M.J. 29, 31. This is a question of law that "does not turn on whether [the appellate court] approve[s] or disapprove[s] of the conduct in question." *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013); *United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013). Fair notice that conduct

is service discrediting may be found in federal law, state law, military case law, military custom and usage, and military regulations. *Id.*

A wrongful act is one done without legal justification or with some sinister purpose. *United States v. Barner*, 56 M.J. 131, 136 (C.A.A.F. 2001). The wrongfulness of the act must be pleaded and proved for the charge to be legally sufficient. MANUAL FOR COURTS MARTIAL, UNITED STATES, Article 134 analysis at A23-25 (2016). The government did not develop a theory of the wrongfulness of EM3 Rogers's answer to the detective's questions beyond that it was allegedly false based on what he was to have said to someone else later. There is no evidence of a sinister purpose in answering the question.

The MCM does not define "wrongful act" but the discussion of obstruction of justice does provide examples. The language that is closest to describing the conduct alleged in the specifications at issue here describes "delaying or preventing communication of information relating to a violation of any criminal statute" "by means of […] misrepresentation." MANUAL FOR COURTS MARTIAL, UNITED STATES, pt IV, ¶ 96c (2016). Thus the manual does not provide notice that a misrepresentation alone is a "wrongful act."

Nor does civil federal law: a false statement to an investigating agent does not constitute obstruction of justice under the federal statute. *United States v. Aguilar*, 515 U.S. 593 (1995). Furthermore, the statement does not amount to obstruction of justice under Virginia law. Virginia's obstruction of justice statute explicitly limits its scope to "materially false statement[s]" made to law enforcement officers investigating a "crime by another." Code of Va. 18.2-460. Thus, detectives [redacted] and [redacted] who were Virginia law enforcement officers, investigating a crime alleged to have occurred in Virginia would not have understood the appellant's statement to be unlawful, even if it was false.

The scope of conduct prohibited by the military obstruction of justice is particularly difficult to circumscribe where the suspect in an investigation is the subject of the charge. The Court of Appeals for the Armed Forces (C.A.A.F.) has recognized that evaluating whether conduct amounts to a wrongful act for Article 134 obstruction of justice may present "conceptual ambiguity between the notion of whether an act was taken as an effort by the accused to avoid detection or whether it was taken in an effort to corrupt the due administration of the processes of justice." *United States v. Lennette*, 41 M.J. 488, 490 (C.A.A.F. 1995). The C.A.A.F. has rejected bright-line rules for delineating the latter, relying on a case-by-case analysis of the facts and circumstances. *Id.*

While military members are generally on notice that they must be truthful in their statements to investigators, military law has long recognized that criminal liability for false statements made in an interview with criminal investigators comes about after a suspect has received his rights advisement under Article 31(b). *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). In *United States v. Arriage*, one of the only reported obstruction of military justice cases with charges based on lying to investigators, the untruthful statement occurred after Article 31(b) rights advisement occurred. 49 M.J. 9, 10-11 (C.A.A.F. 1998).[11] Thus, Senior Judge Sullivan opined: "In my view, there is an independent duty not to lie to investigators once one has waived his or her self-incrimination rights. The Constitution and Article 31 provide rights and protect the serviceperson until those rights are waived." *United States v. Czeschin*, 56 M.J. 346, 350 (C.A.A.F. 2002) (Sullivan, Sr. J., concurring). EM3 Rogers received neither civilian nor military

[11] In fact, for the first three or four decades following the enactment of the UCMJ a statement made to military law enforcement was not generally considered "official" under Article 107. *See, e.g.*, *United States v. Osborne,* 26 C.M.R. 235 (C.M.A. 1958); *United States v. Washington*, 25 C.M.R. 393 (C.M.A. 1958); *United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957). Although C.A.A.F. no longer follows these cases, they have never been explicitly abrogated. *See United*

rights advisement that would give rise to a duty to be truthful or remain silent and under both state and federal civilian law his statement would not fall within criminal proscriptions. Consequently, even if the court could find that the facts and circumstances, in a light most favorable to the government, show that EM3 Rogers lied to detectives about the extent of his memories, he was not on notice that doing so was a crime.

B. Legally insufficient connection to military justice

The overriding purpose of the obstruction of justice offense in military law is the protection of "the administration of justice in the military system." *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989). Thus, the offense is often referred to as "obstruction or interference with the administration of military justice" *United States v. Jones*, 20 M.J. 38, 40 (C.M.A. 1985).

The distinction between the obstruction of military justice and obstruction of civil justice is not merely stylistic: the military offense of obstruction of justice is far broader than that under federal and state civil statutes. *Compare* MANUAL FOR COURTS–MARTIAL, UNITED STATES (2016) pt. IV ¶ 96b, *and* 18 U.S.C. §§ 1503, 1510. Thus, in one of the earliest challenges to a charge of obstructing justice that did not meet the elements of the federal offense, the Court of Military Appeals in 1952 held that the "essence of the offense" was the obstruction or interference with the administration of justice in the military and that "Clause (1) covers that type of disorder." *United States v. Long*, 6 C.M.R. 60, 65 (1952). The Court has continued to rely on this rationale to support the breadth of the Article 134 obstruction of justice offense. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989); *United States v. Jones*, 20 M.J. 38, 40 (C.M.A. 1985).

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*States v. Jackson*, 26 M.J. 377 (C.M.A. 1988).

The explanation contained in the Manual for Courts-Martial indicates that the offense deals with obstruction of military justice:

> This offense may be based on conduct that occurred before preferral of charges. Actual obstruction of justice is not an element of this offense. For purposes of this paragraph "criminal proceedings" includes nonjudicial punishment proceedings under Part V of this Manual. Examples of obstruction of justice include wrongfully influencing, intimidating, impeding, or injuring a witness, a person acting on charges under this chapter, an investigating officer under R.C.M. 406, or a party; and by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to a violation of any criminal statute of the United States to a person authorized by a department, agency, or armed force of the United States to conduct or engage in investigations or prosecutions of such offenses; or endeavoring to do so. See also paragraph 22 and Article 37.

MANUAL FOR COURTS–MARTIAL, UNITED STATES (2016) pt. IV ¶

This focus on the procedural phases and personnel roles of the court-martial is also found in the model specification contained in the Manual for Courts-Martial. The focus of the offense on military justice is further evinced by the reference to Paragraph 22, Article 98, provisions that criminalize non-compliance with procedural rules of the UCMJ and Article 37, which prohibits unlawful influence of courts-martial. To the extent that the explanation covers all federal crimes and agencies of the federal government outside the Armed Forces, it clearly does not encompass state law enforcement investigations of state law crimes.

Of the four service courts, only the Army Court of Criminal Appeals has explicitly affirmed a prosecution for obstruction of justice by a service member for actions in a state law enforcement investigation.[12] *United States v. Smith*, 32 M.J. 567 (A.C.M.R. 1991) *set aside and*

[12] The N.M.C.C.A. cited the case in *United States v. Ashby*, an unreported case involving an obstruction of justice in an investigation by a foreign criminal investigation. 2007 WL 1893626.

*remanded on other grounds*, 34 M.J. 319 (C.M.A.1992). The Army Court's opinion in *Smith* rested on the jurisdictional expansion recognized in *Solorio v. United States*, 483 U.S. 435 (1987), *rehearing denied*, 483 U.S. 1056 (1987) and the premise that "[w]henever a person subject to the Code acts to obstruct justice in a state criminal proceeding he should know that a military criminal investigation or proceeding could result." *Smith*, at 569. The reach of the decision was noted at the time and neither sister courts nor the C.A.A.F. have followed suit. *See* Major Milhizer, *Obstructing Justice by Attempting to Influence a State Court Proceeding*, ARMY LAWYER, June 1991, at 31.

Since *Smith*, the CAAF decided *United States v. Spicer*, which held that the prohibition against false statements in Article 107 was limited to statements affecting military functions and did not extend to statements made to civilian law enforcement unless they bore a clear and direct relationship to the service member's official duties. 71 M.J. 470 (C.A.A.F. 2013). Like Article 107, Article 134 obstruction of justice is a military offense: it is a military offense that exists under Article 134 to protect the integrity of the court-martial process. *United States v. Jones*, 20 M.J. 38, 40 (C.M.A. 1985). If this long-recognized requirement for a military justice nexus is disregarded, the long-standing, uniquely-broad obstruction of military justice offense loses a guide-post that keeps it clear of unconstitutional vagueness. *See Parker v. Levy*, 417 U.S. 733, 752-53, 761 (1974).

The necessity for a military justice nexus for the obstruction of justice specifications to be legally sufficient is most apparent in *Arriaga*. *United States v. Arriaga*, 49 M.J. 9 (C.A.A.F. 1998). Corporal Arriaga was interviewed by Marine Corps Criminal Investigation Division (CID) personnel, who suspected him of stealing military property. In response to questions about the whereabouts of the stolen property, Arriaga told the investigators that he had jettisoned it at

made-up locations along a highway. On appeal, he challenged his guilty plea based on the Supreme Court's holding in *United States v. Aguilar* that lying to investigative agents does not amount to obstruction of justice. *United States v. Arriaga*, 49 M.J. 9, 10 (C.A.A.F. 1998). The C.A.A.F. declined to recognize the holding in *Aguilar* based on the differences between 18 U.S.C. § 1503 and the military offense. *Id.* at 12. If a nexus to a military investigation is not required the C.A.A.F.'s holding in *Arriaga* loses its underlying rationale.

EM3 Rogers never obstructed military justice in this case: when the state prosecutors declined the case and the CGIS took it up, he provided every detail that his memory held of the sexual encounter under investigation. He did so having already been warned that he was suspected of obstructing justice by the investigator. (R. vol. IX at 166.) Having been warned that he was suspected of obstructing justice he nonetheless provided the details that the Government used as the basis of the charge. Ultimately, even with the additional details of the sexual encounter and an instruction from the Military Judge that the members could infer EM3 Rogers's consciousness of guilt from the "false exculpatory statement" alleged, the members acquitted him of all of the specifications of sexual assault. (A.E. 287 at 11.) Punishing EM3 Rogers for a statement that failed analysis under R.C.M. 917 as an Article 107 false official is beyond Article 134 when it had no impact on the Coast Guard's ability to exhaustively investigate and prosecute the alleged misconduct.

**Request for Relief**

Appellant requests this honorable Court set aside Specifications 1 and 2 of Charge III.

## VII

## WHETHER THE MILITARY JUDGE ERRED IN RULING THAT THE TWO SPECIFICATIONS FOR OBSTRUCTION JUSTICE WERE NOT MULTIPLICIOUS

**WHERE THEY ADDRESSED THE SAME STATEMENT TO DETECTIVES WORKING TOGETHER ON THE SAME INVESTIGATION.**

**Standard of Review**

Multiplicity is reviewed de novo. *United States v. Forrester*, 76 M.J. 479, 484 (C.A.A.F. 2017); *United States v. Palagar*, 56 M.J. 294 (C.A.A.F. 2002).

**Discussion**

Where the specifications at issue resulted in multiple convictions for violating the same criminal statute, two questions determine whether they are multiplicious: First, whether the acts were so united in time, circumstance, and impulse in regard to a single subject that they constitute a single offense. *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981); *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989). Second, what was the unit of prosecution intended by Congress in enacting the criminal prohibition? *Id*.

The C.A.A.F. has considered multiplicity in findings of obstruction of justice in several cases. Its analysis of the issue considers whether the specifications address acts directed toward different individuals, the distinctness of the instances in time, and whether the alleged acts were qualitatively different from acts directed to the others involved in the investigation. *United States v. Barner*, 56 M.J. 131, 137-38 (C.A.A.F. 2001). Not one of these considerations is dispositive and the C.A.A.F. has explicitly held that the number of witnesses contained in the specifications does not determine the unit of prosecution for Article 134, obstruction of military justice. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989). Due to the vagueness of the elements of Article 134 obstruction of military justice and the inability to consider legislative intent, the rule of lenity is applied to this analysis. *Id.*

In *Gerrero*, the accused was charged with two specifications for stopping his car on the

way back from a fight and telling the other soldiers and spouses with him to lie to the Military Police about what had just happened. *Id.* at 225. The Court concluded that the two resulting specifications were facially duplicative and therefore multiplicious. *Id.* at 227. *Barner* addressed two specifications that spanned three distinct interactions with two different soldiers, one of whom the accused had touched on the hair and breast. In the first instance the accused apologized, implored her "not to tell," and suggested that the investigation was race-motivated. Two to three days later the accused approached one of the two soldiers and went further by saying "I'll do anything, if you don't tell." In a third instance the appellant called both soldiers together to his office and attempted to dissuade them from moving forward by alleging that the prosecution was motivated by race. *United States v. Barner*, 56 M.J. 131, 133 (C.A.A.F. 2001).

In *Guerrero*, the C.M.A. merged the specifications after concluding that the same statement made to two witnesses is a single obstruction. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989). In contrast, the C.A.A.F. affirmed the two specifications in *Barner* based on the rationale that "they were distinctively different statements designed to thwart the administration of justice in distinctively different ways." *United States v. Barner*, 56 M.J. 131, 138 (C.A.A.F. 2001).

Defense Counsel in this case made a motion to merge the specifications of obstruction before trial. (A.E. 5). The Military Judge applied the *Quiroz* factors and concluded that the fact that the two statements were substantively the same did not lead to the conclusion that they were "one continuous, connected course of conduct." (A.E. 59). His ruling does not cite either *Guerrero* or *Barner* in concluding "[t]hat EM3 Rogers made essentially the same statement on each of these occasions is of no moment." (A.E. 59 at 2). This was in error.

EM3 Rogers's conduct described in the two specifications is verbatim the same,

distinguished only by the names of the two detectives and the "on or about" dates. The facts in the record establish that the time between the two statements and the different hearers do not lead to the conclusion that the statements amounted to two obstructions of justice. The detectives were working as a pair: in fact, Detective [redacted] was mentoring Detective [redacted] who was not experienced in special victims investigations. Detective [redacted] was only absent from the second interview because she was on a personal vacation. The second interview was conducted at Detective [redacted] direction in order to allow EM3 Rogers to view the barroom surveillance video to see if it would prompt any memories and to facilitate the imaging of EM3 Rogers phone. Although Detective [redacted] testified that this was not a "re-interview," it ultimately covered the same substance as the earlier interview. (R. vol. IX at 115.) Upon Detective [redacted] return, she resumed responsibility for the investigation.

The two statements, described in the specifications in identical language, amount to a single obstruction of justice. The two detectives were functionally one entity, conducting a single investigation into the report of a single incident. The repetition of the same statements in this context cannot be seen as distinct instances of obstruction of justice because the speaking of words is not the focus of the offense, as it is under Articles 107 or 117 or the indecent language offense under Article 134. Rather, the statement is the fact alleged to satisfy the "wrongful act" element. Thus, the number of times that something is said by itself is of little import in the context. As noted in *Guerrero*, the purpose of the military obstruction of justice offense is not the protection of witnesses, but rather the integrity of the administration of justice. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989). These two instances are even less compelling as two obstructions: Guerrero's actions attempted to eliminate two sources of evidence in his case; however, EM3 Rogers's statements involved only a single avenue of proof—his own statement.

Given the singularity of EM3 Rogers's actions and the lenity required because of the vague scope of the offense as defined in the Manual, the two specifications must be merged for findings.

**Request for Relief**

Appellant requests that the Court merge Specifications 1 and 2 of Charge III and affirm only so much of the sentence as extends to reduction in grade to E-1.

**VIII**

**WHETHER THE MILITARY JUDGE ERRED IN RULING THAT THE TWO SPECIFICATIONS FOR OBSTRUCTION OF JUSTICE WERE NOT AN UNREASONABLE MULTIPLICATION OF CHARGES WHERE THEY WERE BASED ON THE SAME ALLEGEDLY FALSE STATEMENTS MADE TWO DETECTIVES WORKING TOGETHER ON THE SAME INVESTIGATION.**

**Standard of Review**

On appeal assertions of unreasonable multiplication of charges are reviewed for abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004).

**Discussion**

The prohibition against unreasonably multiplying charges for sentencing purposes has its basis in the Manual for Courts-Martial, which states that "what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges." *See* R.C.M. 307(c)(4), Discussion. The Court of Appeals for the Armed Forces recognizes five factors as relevant to determining whether charges are unreasonably multiplied for sentencing:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure? and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

*United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001) (internal quotations omitted).

When the Quiroz factors are applied to the facts adduced at trial, it is apparent the Military Judge's pretrial ruling was erroneous. First, Defense Counsel raised the issue by motion. Second, as discussed above, although there were distinct interviews, they are not distinctly separate as criminal acts. Third, the charges clearly exaggerate EM3 Rogers's criminality: he obstructed justice in a single way in a single investigation of a single alleged offense, of which he was ultimately acquitted. Fourth, the two specifications doubled his punitive exposure. Fifth, charging a specification for violation of Article 107 in addition to the specifications of obstruction of justice for a single substantive assertion that EM3 Rogers did not remember something indicates prosecutorial overreaching. *See United States v. Esposito*, 57 M.J. 608, 611 (C.G.C.C.A. 2002) (Holding that specifications for false official statement under Article 107, and obstructing justice in violation of Article 134, for a single utterance is an unreasonable multiplication of charges). Because analysis of all five of the factors indicates unreasonable multiplication of charges, the Military Judge's ruling was an abuse of discretion.

**Prayer for Relief**

Appellant requests that the Court merge Specifications 1 and 2 of Charge III and affirm only so much of the sentence as extends to reduction in grade to E-1.

**ORAL ARGUMENT**

Appellant moves this Court to order oral argument in this case pursuant to Rule 16 of this Court's Rules of Practice and Procedure on all Assignments of Error. Under Rule 16, oral arguments may be heard in the discretion of the Court. The assignments of error raised above involve analysis of extensive factual material contained in the voluminous record of trial in this case. Holding oral argument in this case would allow better development of the issues.