IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	)	13 April 2018
	)	REPLY BRIEF
	)	ON BEHALF OF APPELLANT
	)	Dkt. 1391
v.	)	Case No. G 0302
	)	Before McClelland, Havranek, Brubaker
Matthew A. Rogers Electrician's Mate Third Class U. S. Coast Guard, Appellant	)	Tried at Norfolk, VA by a general court-martial convened by Commander, Ninth Coast Guard District, on 20 September and 10 November 2016.

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

COMES NOW EM3 Rogers, through undersigned appellate defense counsel, pursuant to Rule 15 of the Court of Criminal Appeals Rules of Practice and Procedure, to provide the following Reply to the government's Answer to Substitute Assignment of Error.

Errors and Argument

I

WHETHER SPECIFICATION 3 OF CHARGE III FAILS TO STATE AN OFFENSE UNDER ARTICLE 134, CLAUSE 3 WHERE IT FAILS TO ALLEGE TWO ELEMENTS REQUIRED TO ESTABLISH A VIOLATION OF 18 U.S.C. SECTION 499.

The fundamental error the government committed in Specification 3 of Charge III was treating EM3 Rogers's act of briefly giving his military ID card to a third party as criminal. Then, instead of charging him with an enumerated offense under Article 134, UCMJ, the government chose to frame the conduct as a different crime, namely a violation of 18 U.S.C.

Section 499. This critical error, and follow-on errors, leaves one guessing as to what Article 134 clause, 2 or 3, the government pursued and the members considered at trial.[1]

A. Because Specification 3 of Charge III alleges a violation of federal criminal law, the charge is under Clause 3 of Article 134.

On appeal, the government characterizes this specification as a Clause 2 violation, based on the use of the Clause 2 terminal element. This conflicts with the military judge's written instructions, wherein he classifies the specification as a Clause 3 violation and his oral instructions wherein he states EM3 Rogers, in Specification 3 of Charge III "is charged with violating 18 U.S.C. § 499, in violation of Article 134, UCMJ." (R. Vol. XII at 59.) This Clause 2 theory also flies in the face of the specification itself, which looks strikingly similar to a specification attempting to allege a Clause 3 violation, albeit one with the incorrect terminal element. The government attributes the written instruction error to "a scrivener's error" while ignoring the oral instruction inconsistency and the specification itself. If, however, the Court agrees with appellant that this specification was in fact a Clause 3 violation, it fails for the reasons stated in Appellant's Substitute Assignment of Error and Brief.

B. The presence of the allegation that the EM3 Rogers' conduct "was of a nature to bring discredit upon the armed forces" in a specification is not the proper test for whether Charge III, Specification 3 states an offense.

The government's Answer to Substitute Assignment of Error I argues that because the specification was shown to "constitute a 'certain act' that under the circumstances, 'was of a nature to bring discredit upon the armed forces'" it was proper under Clause 2 of Article 134, UCMJ. (Gov't Answer to Sub. Assignment of Error at 2.) This position is a gross over-simplification that fails to address the interrelation between Clauses 2 and 3, the limits the

[1] Appellant invites the Court to avoid this legal question and dismiss the specification for the simple fact that the

Constitution imposes on Clause 2, judicial precedent, and the rules the President imposed through the Manual for Courts-Martial. The government's argument is rooted in the absence of an express prohibition.[2] The positive authority contained in Clause 3 and Paragraph 60(c)(4) of the MCM should not be consigned to oblivion by overbroad application of Clause 2. Instead, this Court should give force MCM's explanation that "Clause 3 offenses involve noncapital crimes or offenses which violate Federal Law" and analyze the charged violation of federal law a under Clause 3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c (1) (2016).

C. The government's statutory interpretation argument based on the predecessor statute fails: Sections 1 and 2 of Title X of the Act of 15 June 1917 (both addressing use of government seals) do not indicate that Section 3 (Section 499's predecessor addressing naval, military, or official passes or permits) encompasses unforged or unaltered passes or permits.

In the event that the Court chooses to delve into the proper elements of 18 U.S.C. Section 499, the appellant continues to assert the government misreads the statute and therefore fails to identify the elements that accompany this offense. Section 499 is based on an Act of 15 June 1917, Title X, Section 3. H.R. 291, 75th Cong. Ch. 30, Title X, §3, 40 Stat. 217, 228 (1917). The government's answer to EM3 Rogers's substitute brief relies on Section 2 of Title X. Section 2 addresses forging, etc., or affixing, etc., forged government seals. Section 3 addresses forging, etc., naval, military, or official passes or permits. Comparing Section 2's language to Section 3's language the government argues that Congress did not intend to limit the scope of "any such pass or permit" to only those that had been forged or altered in Section 3 of the 1917

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government failed to offer any evidence to support one of the elements of the offense: that a military ID card is a pass or permit, regardless of the status as a Clause 2 or Clause 3 offense.

[2] While no proscriptive statement appears in this paragraph prohibiting this action, this practice would make clause 3 redundant and irrelevant while in conflict with the plain language in para 60c.(1), which states: "Clause 3 offenses involve noncapital crimes or offenses which violate Federal Law including laws made applicable through the Federal Assimilative Crimes Act." Manual for Courts-Martial, United States, pt. IV, ¶ 60c (1) (2016). para 60c.(4)(c)(i) states, [t]here are two types of congressional enactments of local application:" specific federal statutes (defining particular crimes), and a general federal statute, the Federal Assimilative Crimes Act (which adopts certain state criminal laws). MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 60c(4) (2016).There is no mention of the ability to charge the former type of violation as a Clause 2 offense.

Act and later in Section 499. (Gov't Answer to Sub. Assignment of Error at 5-6.) This is incorrect for several reasons.

First, that Section 2 has any bearing on Section 3 is dubious. All three of the sections that comprised Title X of the 1917 Act were included in Title 18 during the codification. Although they comprised a single title at the time of their enactment, the Congress that codified the federal criminal statutes treated them as unrelated: Sections 1, 2, and 3 became Title 18 Sections 1020, 506, and 499 respectively. Other than the common theme of prohibiting the creation and use of fraudulent government documents, they are stand-alone criminal offense provisions and treated as such by the codifying Congress. H. Rep. No. 152, Table 1, at A185. (1945)

Similarly, the subject matter of the Title X offenses are different enough in nature that comparison of the statutes is of little analytic value. Section 2 deals with the government seals while Section 3 deals with military or official passes or permits. In this regard Section 498, originally enacted in March 1917, and codified immediately before Section 499 is more similar. Section 498 only addresses forged, altered or falsified military discharge certificates:

> Whoever forges, counterfeits, or falsely alters any certificate of discharge from the military or naval service of the United States, or uses, unlawfully possesses or exhibits *any such certificate,* knowing the same to be forged, counterfeited, or falsely altered, shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 498 (emphasis added). It also uses the language "any such certificate" to refer to certificates that are forged, counterfeited, or altered. The element requiring knowledge that the certificate is forged, etc., makes this evident. *Id.*

Finally, the Statutes at Large in which Section 499 was first published further indicate that from the outset the statute has been aimed at forgery. The heading of Title X at the time of the enactment was "Counterfeiting Government Seal":

TITLE X.

COUNTERFEITING GOVERNMENT SEAL. Official seals.

Furthermore, the summary published in the margin of the Statutes at Large describes Section 3 as "Punishment for forging, etc. naval, military, or official passes or permits":

Punishment for forging, etc., naval, military, or official passes or permits.

SEC. 3. Whoever shall falsely make, forge, counterfeit, alter, or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall willfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

40 Stat. 217, 227-8 (1917).

In light of the similar purpose of the WWI-era statutes and the codifying Congress's desire to group the Sections 498 and 499 together, any legislative intent to be gleaned from neighboring provisions should be seen as favoring the construction that limits the scope to forged or altered passes or permits.

Conclusion

WHEREFORE, EM3 Rogers requests this honorable Court grant his requests for relief as identified in Appellant's Substitute Assignments of Error and Brief.

Respectfully submitted,

ROBINSON.BENJAMIN.MORRIS.1242772039

Digitally signed by ROBINSON.BENJAMIN.MORRIS.1242772039
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Date: 2018.04.13 15:35:32 -04'00'

DATE: 13 April 2018

Benjamin M. Robinson
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-8587
benjamin.m.robinson@navy.mil

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 13 April 2018.

ROBINSON.BENJAMIN.MORRIS.1242772039

Digitally signed by ROBINSON.BENJAMIN.MORRIS.1242772039
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Date: 2018.04.13 15:37:29 -04'00'

Benjamin M. Robinson
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-8587
benjamin.m.robinson@navy.mil