IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	)	30 March 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 the Appellant, through undersigned appellate defense counsel, pursuant to Rule 23 of the Court of Criminal Appeals Rules of Practice and Procedure, provides the following Reply to the Government's Answer and moves this Court to order oral argument.

Errors and Argument

I.[1]

A. Section 499's plain language contradicts the government's construction of "such pass or permit;" and even under the government's construction, the rule of lenity and requirement to construe statutes to be constitutional where possible (i.e. not vague) require construction that leads to the narrower scope of criminal liability.

The government argues that construing the phrase "such pass or permit" to include all properly issued passes or permits—not just passes or permits that have been forged, counterfeited, altered, or tampered—is necessary because Congress intended the broadest scope

[1] Appellant's reply brief is organized under the Assignments of Error (AoE) as numbered in the government's Answer and Brief. Many of the issues presented by these arguments apply across AoE I though IV as addressed in

of criminal liability possible under the language of the statute. (Gov't Answer at 12-14.) This position lacks merit for at least five reasons.

First, the chapter in which Section 499 is located is titled "COUNTERFEITING AND FORGERY." This suggests the offenses that Section 499 identifies relate to counterfeiting and forgery. Indeed, the first description of passes and permits in Section 499 states: "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 . . . ." 10 U.S.C. § 499. The statute goes on using the term "such pass or permit" rather than including the long description each time. The language would be too cumbersome (particularly for one sentence) had Congresses included that long description each time it used the term "pass or permit." The word "such" simply refers back to the initial description requiring some element of fraud.

Second, the government's Answer focuses on a plain language analysis of the statute, but it also relies on purported congressional intent. Congressional intent is superfluous under plain language analysis. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002). Consequently, even if Congress intended a broad scope of liability that fact is irrelevant in a plain language analysis.

Third, the government's interpretation of the statute is ambiguous and not susceptible to plain meaning. The government argues that the additions of the phrases "duly issued" and "issued for his use alone" indicate that "such pass or permit" refers to all passes. However, these modifiers themselves introduce ambiguity insofar as they call into question the absence of the phrase "duly issued" in the fourth offense of the statute. Moreover, the phrase "issued for his use alone" is plainly congruous with passes or permits that have been issued for one person's use alone, but subsequently altered or tampered with. Because of the variety of plausible

constructions of the phrase under the government's reading, it must be treated as ambiguous.

Fourth, the government's statutory construction is erroneous because it fails to apply the rule of lenity to resolve this ambiguity and instead erroneously construes the ambiguity in favor of the broadest scope of criminal liability. (*See* Appellant's Substitute Assignment of Error and Brief at 20.) Rather, the correct construction is that which results in the narrower scope of liability. *United States v. Guerrero*, 28 M.J. 223, 227 (C.M.A. 1989).

Finally, under the government's interpretation of the statute, the statue is unconstitutionally vague and therefore void. (*See* argument, *infra*, at AoE V.)

B. The government incorrectly asserts the paragraph 77 offense should be viewed to be narrower than Section 499.

Regarding paragraph 77, the government argues that "Congress showed an intent for paragraph 77 to have a narrower scope of criminality than § 499 when it used different language than that found in § 499 by requiring each pass or permit be 'false or unauthorized.'" (Gov't Answer at 13-14.) This argument is incorrect on two fronts: (1) paragraph 77 is promulgated by the President based on customary military law and does not, therefore, reflect congressional intent; and (2) paragraph 77 is not narrower than Section 499. Comparing Section 499 to paragraph 77's predecessor, the Air Force Board of Review concluded in 1953 that "the offense so delineated in the model specifications and as commonly understood in the military is broader in scope and more inclusive than the statutory offense." *United States v. Tomes*, 9 C.M.R. 679, 681 (A.F.B.R. 1953).

III

The Military Judge's use of the possessive pronoun "his" was insufficient as an instruction that the members were required to find that the pass was issued for "his use alone."

To arrive at their position that the Military Judge's instructions addressed all of the

elements of the offense, the government asserts "[t]he military judge described the fifth element of § 499 within the second portion of his instruction which stated 'his military identification card.'" (Gov't Answer at 19.) Mere use of the possessive pronoun does not meet the R.C.M. 920(e)(1) requirement to describe the element "for his use alone."

IV

A. There is no "government purpose" test imbedded in Section 499.

Although the government argues for strict construction of the statute in a way that results in the greatest scope of criminal liability under AoEs I through III, under this AoE the government argues for the application of a novel "government purpose" test to avoid the absurd results that follow such a construction.[2] The government proposes this test to address the quandary posed by construing Section 499 in a way that comports with the routine necessity of passing over military IDs. (Gov't Answer at 24.) This position suffers from four flaws.

First, there is no authority for this test. Second, rather than reducing the vagueness of the statute, it increases it. Third, the test, which lacks any basis in the statute, would result in criminalizing behavior that is widely accepted as lawful. The government's own arguments countenance the use of military ID cards for "a commercial transaction to prove their age or name; to receive a military discount from a commercial retailer; or to obtain medical care" without explaining how a service member should know where the line is drawn. (Gov't Answer at 25.) Fourth, the elements of any such test on which the government relied to obtain a conviction would have to be pled in the specification and determined by the trier of fact, which did not happen here. *United States v. Castellano*, 72 M.J. 217, 220-23 (C.A.A.F. 2013) (finding the relevant *Marcum* factors, which were judicially created to save the old sodomy statute from

[2] This theory was not articulated by trial counsel at trial. (R. vol. XI at 84-85).

being unconstitutional and had to be proved to obtain a sodomy conviction, must be pled in the specification and determined by the trier of fact); *accord United States v. Bass*, 74 M.J. 806, 814 (N-M. Ct. Crim. App. 2015).

The government also argues that EM3 Rogers's conduct was criminal because of the duration of time that the bartender held the card and the fact she held it out of his sight. (Gov't Answer at 25.) Neither of these factors are elements of Section 499. Both of these factors increase the vagueness associated with the statute rather than narrow it. A construction of a criminal statute that provides "no standard for determining what a suspect has to do in order to satisfy the requirement" in the statute renders it void for vagueness. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

The void-for-vagueness doctrine vindicates two constitutional priorities—setting definite, comprehensible standards for those bound to comply with the law and discouraging arbitrary enforcement. *Id.* In *Kolender*, the Supreme Court considered the California Supreme Court's construction of a statute requiring loiterers to provide police with a "credible and reliable" identification. The state court construed that statute to require "reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id.* The Supreme Court held that this construction provided no meaningful standard to govern the statute's enforcement and thus violated the constitutional void-for-vagueness doctrine.

Similarly, the various proposed criteria—a government purpose, short duration, and presence of the issuee—fail to provide a sufficiently clear standard to let ordinary people understand what is prohibited. The government's own arguments recognize that all three are not required. Furthermore, none of the three presents a clear line. Rather each of these factors

requires a subjective determination of what furthers a government purpose, how much time is too long for a non-issuee to hold an ID card and what degree of supervision an issuee must exercise over someone who temporarily possesses his or her ID card. As a result, they do not provide a constitutionally acceptable resolution to the absurd result that follows the government's "plain language" construction of Section 499.

B. If the status of a military identification card as a pass or permit is a question of law, the Military Judge erred in finding that it was a pass or permit.

The government asserts that "the question of whether a military identification card constituted a pass or permit under Section 499 was a question of law answered by domestic law." (Gov't Answer at 29.) The Government's Answer renews the theory put forward at trial that COMDTINST M5512.1A is a regulation that conclusively answers this question. In fact, COMDTINST M5512.1A is a Coast Guard implementation of a Department of Defense Instruction on "Identification Cards for Members of the Uniformed Services and other Eligible Personnel." The instruction states that it is to be used "to prepare, issue, use, account for, and dispose of ID cards the Uniformed Services issue." The instruction never explicitly asserts that a military ID card is a pass or permit. Although it does reference Section 499 under a heading that collects related statutory penalties this is insufficient to provide authority that as a matter of "domestic law" a military ID card is a "pass or permit" under Section 499.

Domestic law, on the contrary leads to the opposite conclusion. In *United States v. Oakley*, the Court of Military Appeals held that the charge of wrongful possession of another's identification card "is unrelated to and not included in crimes involving passes." 29 C.M.R. 345. As a consequence, the 1969 edition of the MCM added "identification card" to pass or permit to the listed Article 134 offense. *See* Col. Walter L. Lewis, *Sentence and Punishment under the Manual for Courts-Martial*, 1969, 10 A.F. L. Rev. 32 (1968). Although the President's revision

of what is now paragraph 77 in part IV brought identification cards on par with passes and permits under the enumerated Article 134 offense, the proclamation had no impact on the scope of Section 499's liability.

Thus, in *United States v. James*, the CAAF recognized that a leave authorization form was not a pass for purposes of charging conduct under 18 U.S.C. § 499 and Article 134 but was within the scope of the forgery article. 42 M.J. 270 (C.A.A.F. 1995). This case is insightful for its reference to the definition of pass contained in Air Force regulation to distinguish a "pass" from a leave authorization form. The regulation articulates that "[a] pass, as differentiated from leave, is an authorized absence from duty station, granted for a relatively short period, to provide respite from the working environment or for other specific reasons. Such authorized absences are not chargeable as leave."

In light of these cases, if the question is one of domestic law, the answer is that a pass is a document authorizing uncharged leave, and not an identification card.[3]

C. The Military Judge's grant of trial counsel's motion to take judicial notice of COMDTINST M5512.1A does not establish proof beyond a reasonable doubt that EM3 Roger's military identification card was a pass or permit, and the government offered no proof that it was.

The government, at trial and now on appeal, acknowledged that one of the elements of the charged offense was and is that Appellant's military ID card is a pass or permit as used in 18 U.S.C. § 499. Because the government failed to present any such evidence to the factfinder, this Court must dismiss this specification. At trial and on appeal, the government attempted to prove this element through judicial notice. The judicial notice provided to the members concerning

[3] Undersigned counsel was only able to identify one reported opinion addressing a specification for a "permit," *United States v. Tomes*, 9 C.M.R. 679, 681 (A.F.B.R. 1953). In that case, the Air Force Board of Review concluded that the "vehicle clearance certificate" was an official military document, whose use could be punished under Article 134, but not a permit for purposes of Section 499. *Id.*

this issue was:

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.

That's it. The COMDTINST was not provided to the members. No portions were published to the members. No witnesses were called to discuss the instruction. The government fails to address how COMDTINST M5512.1A, which was never entered into evidence during trial and has never been entered into the record in its entirety, proves an element of the charged offense.

Likewise, the government's argument that defense counsel's opportunity to oppose its motion for judicial notice was an acceptable due process substitute to the adjudicative fact instruction to the members fails. Given the immense difference between the low relevance showing necessary for taking judicial notice and the beyond-a-reasonable-doubt standard applicable to proving an element of the offence the assertion is untenable. *United States v. Paul*, the case the government cited for this position, merely stands for the rule that Appellate Courts cannot take judicial notice of adjudicative facts to fill evidentiary gaps on appeal. 73 M.J. 274, 279 (C.A.A.F. 2014).

To the extent the government has not conceded this issue, it appears to be based on their erroneous belief that the military judge's initial judicial notice decision—that a military ID card is a pass or permit—made it to the members. It did not. He reconsidered this ruling based on trial defense's objection and trial counsel's concession and never instructed the members that a military ID card is a pass or permit.

The government points to nothing other than judicial notice in defending this element for good reason—none exists. No reasonable factfinder, including this Court, can find beyond a reasonable doubt that Appellant's military ID card was a pass or permit based on a judicial notice that merely acknowledged the existence of an instruction and 18 U.S.C. § 499. This Court should dismiss Specification 3.

V

Intent to deceive is not coterminous with intent to impede the due administration of justice.

The government argues that evidence of intent to impede the due administration of justice is provided by "his knowledge of the falsity of his statements and his purpose of deceiving Detectives TC and MH about his interaction with MC on the night of August 14, 2012." (Gov't Answer at 32.) Further, the government argues it is demonstrated by the statement that the CGIS agent recounted: "MC was a lot drunker than [he] was, and that [he] knew it would look bad that [he] did this with a girl who was that intoxicated." (Gov't Answer at 32-33.) These theories incorrectly conflate intent to deceive the detectives and conceal conduct EM3 Rogers believed might make him "look bad" with intent to impede the due administration of justice.

VI

There is no precedent for charging obstruction of justice for a false statement that does not misdirect investigators or impede the collection of further evidence.

The government argues that EM3 Rogers's case is analogous to *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). (Gov't Answer at 36-37.) In *Ashby*, a pilot was charged under Article 133 for obstructing justice by concealing flight video tapes depicting an incident in which twenty civilians were killed. Like all reported decisions in which lying is the wrongful act in the obstruction of justice, this lie was a means of preventing investigators from collecting

evidence or accessing witnesses relevant to crime under investigation. While the lie may have provided evidence of intent, it was concealing the video of the flight that obstructed justice.

Likewise, in *United States v. Jenkins*, also relied upon by the government, the accused provided "alternative falsehoods" that included telling the police that "he had consensual sex with his spouse, there was no disturbance, he had never broken any of her bones, never harmed her, never physically touched her, and she had broken her hand by hitting another woman during a fight." 48 M.J. 594 (A.C.C.A. 1998). The Court also noted that his statements "sought to detour the police investigation by giving alternative motives for S.J. to have fabricated the allegations." *Id.*

EM3 Rogers's case is easily distinguishable from these cases and every other reported case where a statement formed the basis of an obstruction of justice specification because EM3 Rogers's statement did not conceal further evidence being pursued by investigators and therefore could not obstruct justice.

Oral Argument

On 21 March 2018, the Supreme Court issued an opinion relating to the obstruction offense contained in the Internal Revenue Code. *Marinello v. United States*, 2018 WL 1402426, __ U.S.__ (Mar. 21, 2018). Significantly, the Court's analysis referred to *United States v. Aguilar*, 515 U.S. 593 (1995), cited in Appellant's previously submitted briefs. The Court's analysis in *Marinello* demonstrated that the *Aguilar*'s holding was not limited to the federal obstruction of justice statute in Title 18. The Court applied a restrictive construction of the tax code obstruction offense so as not "to risk the lack of fair warning and related kinds of unfairness that led this Court in *Aguilar*." Likewise, the Court noted that giving the offense the broadest effect sustainable by its language "risks allowing 'policemen, prosecutors, and juries to

pursue their personal predilections.'" *Id.*

This recent development in the law on obstruction of justice would be most fully addressed through oral argument. Consequently, Appellant renews his motion for oral argument under Rule 16 of this Court's Rules of Practice and Procedure on Assignments of Error I through IV and VIII as numbered in its Substitute Assignments of Error and Brief.

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 Date: 2018.03.30 14:07:23 -04'00'

DATE: 30 March 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 30 March 2018.

ROBINSON.BENJAMIN.MORRIS.1242772039
Digitally signed by ROBINSON.BENJAMIN.MORRIS.1242772039
Date: 2018.03.30 14:09:24 -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