30 January 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	APPELLANT'S REPLY TO UNITED STATES' FINAL BRIEF
v.	)	USCA Dkt. No. 12-0090/AF
Airman First Class (E-3) **JOSEPH A. HAYES,** USAF, *Appellant.*	)	Crim. App. No. 37588

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW Appellant, by and through undersigned counsel, and pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure and files this reply to the United States' final brief.

A. The Government failed to allege all the elements of Article 92, UCMJ.

The Government incorrectly states that Charge I alleges every element of Article 92, UCMJ. Grant Final Brief at 6. Charge I's specification did not include a key element under the Nevada state law that formed the basis of Appellant's duty to refrain from consuming alcohol while under the age of 21. J.A. 8.

J.A. 8. As this Honorable Court made clear in *United States v. Mayo*, a specification is "fatally flawed" if it "does not contain an allegation of fact essential to proof of the offense charged . . . ." 12 M.J. 286, 288 (C.M.A. 1982), overruled on other grounds by *United States v. Fosler*, 70 M.J. 225 (C.A.A.F.

2010). Thus, the *Mayo* Court held that a specification was legally insufficient where it referenced a federal statute outlawing bomb threats but did not incorporate one of the statute's elements -- specifically, that the threat was made, *inter alia*, by telephone or mail. *Id.*

Like the legally insufficient specification at issue in *Mayo*, Charge I references a civilian statute without incorporating every element of that statute. *See* J.A. 8. Most damning, the element missing here was the only element that made Appellant's alleged conduct criminal under Nevada state law -- namely, that he consumed alcohol at a premise that sells alcoholic beverages. *Id.* Applying its own precedent, this Court should conclude that "an allegation of fact essential to a violation" of N.R.S. 202.020 is missing from the specification and set aside Appellant's conviction on Charge I. *See Mayo*, 12 M.J. at 288.

B. The Government improperly asks this Court to engage in analysis prohibited by its own precedent and by the U.S. Supreme Court.

This Court should reject the Government's suggestion that Charge I can be saved by looking at the evidence presented both at Appellant's Article 32 hearing and his court-martial. J.A. 8-9. Not only has the Supreme Court noted the "settled rule that a bill of particulars cannot save an invalid indictment," *Russell v. United States*, 369 U.S. 749, 770 (1962), but this Honorable Court has ruled that "[a] specification fatally flawed

because it does not contain an allegation of fact essential to proof of the offense charged is not restored to legal life by the government's production at trial of evidence of the fact." *Mayo*, 12 M.J. at 288.

Further, even if this Court were not limited to analyzing the plain language of Charge I's specification itself, the "context" afforded by Appellant's Article 32 hearing and court-martial demonstrates the critical importance of constitutionally sufficient charging. Unlike in *Mayo*, where the Government consistently averred that the accused had communicated the bomb threat via telephone, the prosecution here continually shifted its theory of the case. Specifically, the Government alternately theorized that Appellant had violated state law by consuming alcohol in an apartment, at a pool, on a public street, on a casino's gaming floor, in a hotel room, and in a "public" place. J.A. 33-34, 100, 103, 111-23. Contrary to the Government's contentions that the record of trial shows "any vagary" was "clarified beyond reasonable doubt," Grant Answer at 8, the prosecution's theory continued to shift even <u>during</u> Appellant's trial -- as evidenced by trial counsel's argument during the Motion to Dismiss hearing that Appellant had violated state law by consuming alcohol in a hotel room. J.A. 62. The Government's shifting theories so confused the military judge that he erroneously concluded that N.R.S. 202.020 prohibited

minors from consuming alcohol in public places. J.A. 63-64. Had the Government simply alleged that Appellant had consumed alcohol in any of the places prohibited by N.R.S. 202.020 -- an element of which the Government was clearly aware as early as the Article 32 hearing -- the Government would have avoided any of the unconstitutional vagaries it now attempts to dispel.

C. Charge I's reference to "at or near Las Vegas, Nevada" does not necessarily imply the missing element.

The Government also argues that, by alleging Appellant's conduct occurred "at or near Las Vegas, Nevada," Charge I necessarily implies that Appellant violated Nevada state law by consuming alcohol at a premise that sells alcoholic beverages. *See* Grant Final Brief at 5 (arguing that referencing the time and place of Appellant's conduct "unmistakably places Appellant on notice that the duties at issue are those limited to this occasion"). Essentially, the Government suggests that because Appellant was on notice that his conduct occurred in Nevada, N.R.S. 202.020 applied to him -- which in turn put Appellant on notice that he consumed alcohol in a place prohibited by N.R.S. 202.020.

This argument fails, however, for the same reason that it failed in *Mayo*: in contested cases where the charge and specification are challenged at trial, this Court will "read the wording more narrowly and will only adopt interpretations that

hew closely to the plain text." *Fosler*, 70 M.J. at 230 (citation omitted); *see also Mayo*, 12 M.J. at 288. The plain text of "at or near Las Vegas, Nevada" means simply that Appellant must be prepared to defend himself against alleged misconduct that occurred there. It does not mean that a missing element of a Nevada state law is magically incorporated into an otherwise deficient specification, just as specifically citing to the federal bomb-threat statute did not incorporate all of the elements of that statute in *Mayo*.[1] *See* 12 M.J. at 288. In narrowly construing Charge I, this Court should find that the missing element is not necessarily implied and, as a result, set aside Appellant's conviction.

D. Even if *Fosler* is distinguishable, this Court's binding precedent required the Government to specify the duty that Appellant allegedly violated.

The Government argues that because Charge I alleges all of the elements of Article 92, UCMJ, the only deficiency here was the Government's non-fatal failure to list Appellant's duties "in complete detail." Grant Final Brief at 6. In support of this argument, the Government points to *United States v. Durham*, 21 M.J. 232 (C.M.A. 1986) and suggests that the evidence presented at

[1] Unlike in *Mayo*, Charge I did not cite to the statute incorporated by the specification. J.A. 8. Considering that not even a specific citation to the statute itself placed an accused on notice of all the elements of that statute, *Mayo*, 12 M.J. at 288, it is difficult to fathom how referencing "at or near Las Vegas, Nevada" would provide constitutionally sufficient notice to Appellant.

Appellant's trial saved the deficient charge.[2] Grant Final Brief at 12.

The Government's reliance on *Durham* is misplaced, however, as the accused in *Durham* pleaded guilty and did not object to the deficient specifications. *Id.* Importantly, the *Durham* Court explained that "had [the accused] moved for a bill of particulars or otherwise objected, the Government would have been required to list the stolen items." *Id.* (citing *United States v. Williams*, 31 C.M.R. 269 (1962); *United States v. Hoskins*, 17 M.J. 134 (C.M.A. 1984)). Here, Appellant objected by pleading not guilty and by moving to dismiss Charge I's specification for failure to state an offense. J.A. 18, 21-25, 41. Applying *Durham*, the Government was required to detail the duty Appellant violated -- namely, that his consumption of alcohol was at "premises where spirituous, malt or fermented liquors or wines are sold." J.A. 65.

Because Appellant clearly objected to the deficient specification here, his case is distinguishable from *Durham* -- and instead is on point with *United States v. Curtiss*, 42 C.M.R. 4 (C.M.A. 1970). In *Curtiss*, the Government charged the accused with multiple specifications of wrongful appropriation of "personal property," but did not detail which items he had taken. 42 C.M.R. at 4. This Court set aside the accused's convictions

[2] At issue in *Durham* was the Government's failure to specify which items the accused had stolen. 21 M.J. at 232-33.

and dismissed the faulty specifications, explaining that "[a]n allegation of this kind 'totally deprives the accused, appellate reviewing agencies, and those who may in the future examine the charge, of any information concerning the nature of the *res* which' the accused misappropriated, and is legally insufficient." *Id.* (quoting *United States v. Autrey*, 30 C.M.R. 252 (C.M.A. 1961)). Just as the fatally deficient specifications in *Curtiss* failed to specify which items the accused had stolen, the specification here fails to detail the duty Appellant allegedly violated. J.A. 8. Thus, even assuming this Court finds that the Government alleged all the elements of Article 92, Charge I's specification must be set aside due to the Government's failure to inform Appellant of the nature of the duty he allegedly violated. *See Curtiss*, 42 C.M.R. at 4.

E. Appellant was harmed by the Government's violation of his constitutional right to notice.

The Government states that "[n]ot a single mention" of Appellant's Article 92 violation "was made during either the government's or defense counsel's sentencing argument." Grant Final Brief at 14. This is incorrect. Trial counsel specifically argued that Appellant deserved a punitive discharge in part because he "was drinking underage." J.A. 93. Further, the Government fails to address the collateral consequences of a criminal conviction and incorrectly states that Appellant fails

to cite "any authority" that he has been harmed. Grant Final Brief at 15. In his Grant Brief, Appellant cited to both *Rutledge v. United States*, 517 U.S. 292 (1996), and *United States v. Marshall*, 67 M.J. 418 (C.A.A.F. 2009) for the recognized principle that an accused is harmed when the Government deprives him of his due-process rights.

WHEREFORE, Appellant respectfully requests that this Court set aside Charge I and its specification.

Respectfully submitted,

SHANE A. McCAMMON, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33983
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770