

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE GARLAND E. BURRELL, JR., JUDGE

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR. S-12-181

CESAR CABALLERO,

Defendant.

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REPORTER'S TRANSCRIPT

HEARING

FRIDAY, SEPTEMBER 28, 2012

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Reported by: KIMBERLY M. BENNETT, CSR #8953

RPR, CRR, RMR

APPEARANCES

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1 SACRAMENTO, CALIFORNIA

2 FRIDAY, SEPTEMBER 28, 2012, 9:50 a.m.

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4 THE CLERK: Calling 12-181; United States versus Cesar  
5 Caballero.

6 MS. CHANG: Chris Chang, on behalf of the United  
7 States. Good morning, Your Honor.

8 THE COURT: Good morning. Thank you.

9 MR. SMITH: Good morning, Your Honor. Certified law  
10 student, Jacob Smith, on behalf of Cesar Caballero,  
11 supervised by Rachelle Barbour of the Federal Defender's  
12 Office.

13 THE COURT: All right. Thank you. Good morning.

14 This matter is on calendar for hearing on the appeal  
15 filed concerning a trial that the magistrate judge conducted.

16 The defendant was convicted at that trial of three  
17 counts of violating 18 USC Section 1701. That section reads  
18 as follows:

19 "Whoever knowingly and willfully obstructs or retards  
20 the passage of the mail, or any carrier or conveyance  
21 carrying the mail..." then it has other language.

22 The defendant filed a trial brief concerning that  
23 statute in which the defendant cited United States versus  
24 Upshaw, and then the manner in which Upshaw articulated the  
25 elements. I don't know if I've stated it, but Upshaw is a

1 Third Circuit case.

2 Is there a Ninth Circuit case that articulates the  
3 elements?

4 MS. CHANG: The government's understanding is that  
5 there is not a Ninth Circuit case.

6 MR. SMITH: It's the defense's understanding as well,  
7 Your Honor.

8 THE COURT: There is a Sixth Circuit case that  
9 articulates the elements, and I will provide you with the  
10 cite to it, see if you're familiar with it. It's United  
11 States versus, and I'll spell the last name,  
12 S-C-H-A-N-K-O-W-S-K-I, it's at 782 F.2d 628, the pin cite is  
13 631, it's a 1986 case. It's cited in Upshaw. It articulates  
14 the elements in a different manner than Upshaw.

15 It states, "Under Section 1701 there are three  
16 elements of the offense: Obstructing or retarding, passage of  
17 the mails, willfully and knowingly."

18 The district court opinion, citing that Sixth Circuit  
19 decision in Wooden, at 832 F.Supp. 748, 751, Southern  
20 District of New York, 1993, states as follows:

21 "'Knowing and willfully' as used in Section 1701  
22 requires the government to prove beyond a reasonable doubt  
23 that the defendant knew that his acts had this effect." And  
24 it goes on, and it states that "Specific intent," as  
25 interpreted in the Sixth Circuit opinion I just gave you,

1 "merely requires that 'the defendant knew that the effect of  
2 her actions would be to obstruct the mail.'"

3 So, how is this statute interpreted?

4 What does "passage of the mail" mean in this statute?

5 Again, the statute reads, "Whoever knowingly and  
6 willfully obstructs or retards the passage of the mail."

7 What's meant by "the passage of the mail"?

8 MR. SMITH: Well, Your Honor, in our brief we cite to  
9 United States versus Fleming. And Fleming defines the  
10 passage of the mail as --

11 THE COURT: Help me out a little bit more.

12 MR. SMITH: Yes, Your Honor.

13 THE COURT: I do have all the briefs with me.

14 MR. SMITH: Yes, Your Honor.

15 THE COURT: Is that a circuit decision?

16 MR. SMITH: Sorry, Your Honor. That is a Tenth  
17 Circuit decision from 1973. And in that decision they  
18 discuss what exactly is meant by passage of the mail. And  
19 the Court says that passage of the mail is from the time of  
20 placing the mail into an official mail receptacle or  
21 depository until it reaches the addressee.

22 THE COURT: Does the government agree?

23 MS. CHANG: Your Honor, the government's position  
24 would be that interpreting passage of mail would mean that  
25 mail that's put in the regular course of the postal stream.

1           Anything that's done to obstruct or retard that mail,  
2           which would include postal employees who have to then change  
3           the course of their conduct based -- pertained to the facts  
4           of this case, based on submitting a change of address form,  
5           would then put in the process of retarding or obstructing  
6           mail that's in that course -- in the postal service course of  
7           mail.

8           THE COURT: Are you telling me that you agree or  
9           disagree with what the appellant just said?

10          MS. CHANG: The government's position is that we  
11          disagree that that is the only way to interpret passage of  
12          mail, as the defense has interpreted it.

13          THE COURT: Does the Sixth Circuit correctly  
14          articulate the elements of the offense?

15          MR. SMITH: The appellant believes the Sixth Circuit  
16          does correctly articulate the elements, Your Honor.

17          THE COURT: Government?

18          MS. CHANG: The government is in agreement that the  
19          Sixth Circuit case spells out the elements of the offense.

20          THE COURT: The Sixth Circuit's elements are:  
21          obstructing or retarding, passage of the mails, willfully or  
22          knowingly. The statute states "the passage of the mail."

23          What does "the passage of the mail" mean?

24          MR. SMITH: Well, once again, Your Honor, the  
25          appellant relies on the definition given in United States

1 versus Fleming, the Tenth Circuit opinion, that the passage  
2 of the mail would be defined as the time from when mail is  
3 put into an official depository, such as a post box or  
4 mailbox, until that piece of mail, whatever it be, a letter,  
5 parcel, what have you, until it reaches the person to whom it  
6 is addressed.

7 THE COURT: So, are you stating, then, that when the  
8 statute says, "Whoever knowingly and willfully obstructs or  
9 retards the passage of the mail," I'm to read something into  
10 that? This seems to state that there is a passage of the  
11 mail.

12 MR. SMITH: Yes, Your Honor.

13 THE COURT: That there is a conduit, I'm using that  
14 word, utilized for mail.

15 It appears that the appellant is arguing that before  
16 the words "the passage of the mail," Congress intended to  
17 say, "obstructs or retards mail that is in the passage of the  
18 mail."

19 MR. SMITH: Yes, Your Honor.

20 THE COURT: Is that what you're saying?

21 MR. SMITH: It is, Your Honor.

22 THE COURT: Well, if that's what Congress intended to  
23 say, it seems to me Congress should have said that. Congress  
24 did not say that.

25 Does the government read the statute the same way as

1 the appellant?

2 MS. CHANG: No, Your Honor. The government's position  
3 is that that definition is very narrow. In a sense, that  
4 anything that's placed, such as a change of address form,  
5 within that -- in the postal service, in that passage, is  
6 passage of mail. And, also, that passage of mail --

7 THE COURT: I'm not sure what you mean by that. I  
8 just heard you say -- and maybe I misunderstood what you  
9 said. I thought I just heard you say that the change of  
10 address form is a passage of the mail, or something like  
11 that.

12 Could you read back what she just said.

13 (Record read aloud.)

14 THE COURT: I'm not clear about what the government is  
15 arguing, because the government appears to be arguing that a  
16 change of address form is a passage of mail. Just reading  
17 the statute, it says, "Whoever knowingly and willfully  
18 obstructs or retards the passage of the mail."

19 MS. CHANG: Your Honor, may I clarify what I just  
20 said?

21 THE COURT: Okay.

22 MS. CHANG: The government's position is that the  
23 mail -- the passage of mail does not simply refer to mail  
24 that's dropped in a box and then later ends up at its  
25 intended addressee, but that within that there is a process



1 and procedure that the mail goes through that the postal  
2 service uses within those channels.

3 Bringing it back to the facts of this case, in placing  
4 a change of -- in submitting a change of address form, that  
5 then changes the procedure that the post office uses, and in  
6 this case that would be to divert mail that was going to a  
7 particular address, and diverting it to another address,  
8 which in this case was the defendant's address.

9 THE COURT: Does the government address the standard  
10 I'm asking about in its brief?

11 I'm asking about the elements of 1701, and I'm seeking  
12 to find out if the government addresses those elements in its  
13 brief.

14 Well, I'm asking the question, but you could  
15 reasonably assume that I read the briefs before taking the  
16 bench. I did, but it's been a while ago. When I read the  
17 statute, then I did independent research, because I wasn't  
18 sure about how the Third Circuit stated the elements.

19 Have you addressed the elements of 1701 in your brief?

20 MS. CHANG: Your Honor, in the government's brief, the  
21 elements of 1701 were addressed.

22 First, the evidence at trial showed the defendant's  
23 intent --

24 THE COURT: I'm asking -- I'm not asking about -- you  
25 may have an opportunity to argue that. I was seeking to ask

1 a more narrow question as to whether you have addressed the  
2 elements of 1701 in your brief. And, if so, where?

3 MS. CHANG: The elements are on -- addressed on page 5  
4 of the United States's brief.

5 THE COURT: You cite the Third Circuit case. It's the  
6 same case the magistrate judge referenced in his ruling.  
7 It's the same case that the defendant, I believe, included in  
8 his trial brief, and that the defendant also cites in his  
9 appellate brief.

10 I guess the question here, and maybe it's already been  
11 answered by each side, is what is the passage of mail, and  
12 how does that standard apply to the facts in this case.

13 MR. SMITH: Well, Your Honor, if I may, it is the  
14 position of the appellant, once again, that the passage of  
15 mail, as I said previously, is defined temporally from when  
16 mail is placed into an official receptacle until it is  
17 actually received by the intended addressee.

18 So, to use your conduit example, it would be the  
19 conduit begins when the mail enters the mailbox and the  
20 conduit ends when it gets to the addressee.

21 THE COURT: From the appellant's position, is that --  
22 there has to be something in the passage before there can be  
23 a conviction.

24 MR. SMITH: Precisely, Your Honor. Without any mail,  
25 how could there be an obstruction of the passage of the mail?

1           THE COURT: Well, I guess that's a rhetorical question  
2 that you asked. You're not really asking me that question, I  
3 presume. But the statute doesn't seem to support what you  
4 just said, because it says, "Whoever knowingly and willfully  
5 obstructs or retards the passage of the mail."

6           I don't think either side has looked at this in your  
7 briefs from the perspective that I am. The appellant clearly  
8 hasn't, and I'm not sure about the government's position as  
9 far as the brief is concerned, but it makes a difference.

10           Anyway, you may have an opportunity to argue the issue  
11 further. If there are other issues, maybe we should move to  
12 another issue, unless you want to spend more time on this one  
13 now.

14           MR. SMITH: Well, Your Honor, today we're prepared to  
15 argue solely the issue of the sufficiency of the evidence,  
16 and our contention that there was insufficient evidence to  
17 convict Mr. Caballero. As to the other issues, we'll submit  
18 on our brief.

19           THE COURT: Okay.

20           MR. SMITH: As you've stated, there are three elements  
21 of the violation of 18 USC 1701, and --

22           THE COURT: I'm not sure we see them the same way.

23           MR. SMITH: Exactly, Your Honor. But to use your  
24 construction under United States versus Schankowski, the  
25 elements would be: obstructing or retarding, passage of the

1 mails, willfully and knowingly, as you previously stated.

2 We argue that as to the willfully and knowingly, in  
3 the light most favorable to the government, Mr. Caballero's  
4 actions were knowing and intentional. However, in the light  
5 most favorable to the government, we argue that there was  
6 insufficient evidence to establish obstruction or retarding  
7 the passage of the mail. In the light most favorable to the  
8 government, there was insufficient evidence to show an  
9 obstruction or retardation of the mail.

10 THE COURT: Let me ask you a question.

11 MR. SMITH: Yes, Your Honor.

12 THE COURT: The trial record indicates that your  
13 client filed three change of address forms. I think there  
14 were two post office boxes, same post office box numbers.

15 MR. SMITH: Yes, Your Honor.

16 THE COURT: I have a note on it, so I can be clearer.

17 Two of the forms list the business name as Shingle  
18 Springs Band of Miwok Indians, and one lists the business  
19 name as Shingle Springs Rancheria. And so that's not really  
20 disputed. I mean, that's in the trial record, that your  
21 client did that.

22 MR. SMITH: It is in the trial record, yes, that he  
23 did that, Your Honor.

24 THE COURT: Okay. So, go ahead with your argument,  
25 then.

1           MR. SMITH: The trial record also shows, based on the  
2 testimony of a tribal representative, that mail was  
3 obstructed from the tribe for only one day. Now, there was  
4 no testimony as to what day that was, and there is no  
5 testimony as to the cause of why mail was not received for  
6 that one day. There is no linkage shown between the  
7 submission of the three change of address forms and the lack  
8 of mail on that one day.

9           Now, on redirect, Your Honor, the government asked the  
10 tribal representative if she would be surprised if no mail  
11 had been delivered for three or five days. She replied no,  
12 meaning she would not be surprised. But there is no evidence  
13 anywhere in the record that mail had been delayed for three  
14 to five days. The evidence in the record only supports that  
15 mail had not been delivered to the tribe for one day.

16           Additionally --

17           THE COURT: What are you conveying in that argument  
18 when you say that the evidence only shows that mail had been  
19 delayed for one day? What point are you making under the  
20 elements of 1701?

21           MR. SMITH: Yes, Your Honor. The point that we're  
22 making under the elements of 1701 is that if there is only  
23 one day in which mail is obstructed, there cannot be three  
24 convictions for obstructing the mail. It simply doesn't add  
25 up.

1 THE COURT: Can there be one?

2 MR. SMITH: We would contend that if the Court found  
3 and established that there was an obstruction of mail on that  
4 one day, yes, there could be one conviction, Your Honor.

5 THE COURT: Okay. How are you using the word  
6 "obstruction" in your argument just now? What is it that  
7 constitutes "obstruction" in your argument?

8 MR. SMITH: Obstruction is constituted in the argument  
9 as simply mail being diverted from reaching its intended  
10 addressee.

11 THE COURT: Okay.

12 MR. SMITH: Now, there is further trial testimony,  
13 when viewed in the light most favorable to the government, a  
14 postal inspector testified that Mr. Caballero told the postal  
15 inspector, during an interview, that Mr. Caballero said he  
16 received a couple pieces of mail; only a couple.

17 Now, the government produced no mail that was  
18 obstructed, and there was no evidence presented as to how  
19 many pieces of mail there were, what a couple actually meant,  
20 or to whom these pieces of mail were addressed.

21 Now, it's the government's burden of proof to link a  
22 change of address form to obstructed mail. The government  
23 hasn't produced any evidence linking a change of address form  
24 to any mail being obstructed.

25 THE COURT: But the statute doesn't say obstructed

1 mail. It doesn't say anything about mail being in passage.  
2 It says, "obstructs or retards the passage of the mail."

3 MR. SMITH: If I understand what Your Honor is saying,  
4 I believe you're interpreting the statute to mean it is an  
5 action of the passage of the mail rather than parcel?

6 THE COURT: I couldn't hear you. I'm sorry. Please  
7 repeat it.

8 MR. SMITH: Yes, sir. Would Your Honor's construction  
9 of the statute mean, then, that a violation has occurred if  
10 the action of mail going through the stream is obstructed, or  
11 if a parcel of mail is being obstructed?

12 We argue that it would be a specific piece of mail has  
13 to be obstructed, Your Honor.

14 THE COURT: Do you have any further argument? You  
15 were pausing to ask me a couple of questions, but then you  
16 kept on arguing, maybe thinking to yourself, well, I'm not  
17 really asking questions, they are rhetorical.

18 But I think that it's important that you do understand  
19 that I need to interpret this statute, and I believe I begin  
20 my interpretation by looking at the words of the statute  
21 itself, and see whether or not the words of the statute are  
22 clear.

23 Do you see ambiguity in the words of the statute?

24 MR. SMITH: We do, Your Honor.

25 THE COURT: Where is the ambiguity?

1 MR. SMITH: The ambiguity would be in the element that  
2 is the passage of the mails. We believe that the mails would  
3 mean that a specific --

4 THE COURT: Wait a minute. Did you say the passage of  
5 the mails, plural?

6 MR. SMITH: Passage of the mail. I did say passage of  
7 the mails, Your Honor.

8 THE COURT: Okay.

9 MR. SMITH: We believe that statement is ambiguous as  
10 written. Our contention is that the government must  
11 establish that a particular piece of mail must be obstructed.  
12 And every case that we've cited has involved actual pieces of  
13 mail being obstructed.

14 THE COURT: Okay. Anything further?

15 MR. SMITH: Yes, Your Honor. We contend that the  
16 government must establish that the change of address form in  
17 Count 1 did obstruct the passage of the mail, and the  
18 government must point to a specific piece of mail.

19 Similarly, in Count 2, the change of address form  
20 must -- the government must show that that change of address  
21 form did obstruct a specific piece of mail.

22 We also argue as to Count 3, the change of address  
23 form that is listed in Count 3, the government must show that  
24 it obstructed passage of the mail, and it must point to a  
25 specific piece of mail.



1           If the government can't establish that, can't show  
2           that a specific change of address form obstructed a specific  
3           piece of mail, then there can be no convictions here because  
4           the government has not satisfied their burden, and there is  
5           insufficient evidence to sustain the convictions.

6           THE COURT: Are you done?

7           MR. SMITH: Yes, I am, Your Honor.

8           THE COURT: Okay. Then I'll turn to the government.

9           MS. CHANG: Your Honor, the government's position is  
10          that the defendant's submission of the three change of  
11          address forms for the purpose of diverting mail, with the  
12          requisite intent to obstruct or retard the passage of the  
13          mail, was the -- showed that he violated the obstruction of  
14          mail statute.

15          The government's position is that it's not that  
16          physical mail had to be obstructed, but that by placing the  
17          change of address form, and submitting it to the post office,  
18          that, itself, obstructed or retarded the passage of mail  
19          because it then allowed the post office to change its  
20          procedure, and change the passage that the mail would have  
21          taken, and it diverted the mail from the address that was  
22          listed on each change of address form to a separate address.

23          All of that was done with the requisite intent on the  
24          defendant's part that he intended to obstruct or retard the  
25          passage of mail, and that's what the evidence at trial showed

1 through his statements made to the investigators when he was  
2 shown the change of address forms. He admitted to filling  
3 them out, dating, and signing them. And the purpose of that  
4 was to divert mail.

5 THE COURT: If I'm not mistaken, the appellant just  
6 argued that every case that the appellant is aware of  
7 involved focus on an actual piece of mail that was diverted,  
8 and that there is no case that concerns what the government  
9 is arguing right now.

10 MS. CHANG: To address the appellant's argument, then,  
11 that the burden at trial was met as to two counts, in the  
12 light most favorable to the government, the evidence showed  
13 that the tribe had the two mailing addresses that were listed  
14 on two of the change of address forms. Coupled with the  
15 testimony, again, from the investigators, where the defendant  
16 admitted to submitting the change of address forms, also his  
17 statements that he did receive pieces of mail, and also the  
18 testimony from the tribal council member who stated that the  
19 tribe didn't receive mail for a period of one to up to five  
20 days for the relevant time period, all of that taken in the  
21 light most favorable to the government would still show that  
22 the defendant, on two occasions, obstructed mail.

23 THE COURT: Let me point to something in the record.

24 The magistrate judge states on page 112 of the record,  
25 at lines 13 and following, I'm not sure how far I'm going to

1 read, "The elements, and these are -- they're set out in the  
2 Third Circuit's Upshaw case that's cited in Mr. Wiseman's  
3 brief. The obstruction element requires delay due to some  
4 sort of illegitimate action. I -- I'm satisfied that,  
5 Mr. Wiseman --" that's what I'm reading, but I don't think  
6 that's what he intended to say. Just a moment. "I think  
7 that the fact that defendant admits that that mail that the  
8 intender -- that the sender intended to go to the Red Hawk  
9 Casino and was, in fact, addressed to the casino actually was  
10 diverted to defendant's address meets one important prong of  
11 the three prongs that have to be established."

12 So, this focus -- the magistrate judge's focus says,  
13 "The obstruction element requires delay due to some sort of  
14 illegitimate action." And then he is discussing the sender  
15 of the mail, and that the mail was diverted.

16 You could construe what the magistrate judge is  
17 focused on as being consistent with what the appellant is  
18 arguing, focused on the mail being diverted.

19 Is that your -- let me rephrase it. What I'm trying  
20 to say is that the magistrate judge appears to be ruling  
21 concerning mail being diverted in a manner that's consistent  
22 with the argument made by the appellant here.

23 What is the government's position on that?

24 MS. CHANG: The government's position is that the  
25 magistrate court's ruling was correct, in that the element of

1 the -- the obstruction element did require some sort of  
2 improper illegitimate action on the defendant's part, and  
3 that coupled with -- which was the submission of the change  
4 of address form, which, in turn, diverted mail that was  
5 supposed to go to the Band of Miwok Indians or the Red Hawk  
6 Casino, the tribe that runs Red Hawk Casino, and that it was  
7 instead diverted to the defendant's address.

8 But also, later, Judge -- the magistrate court finds  
9 that submitting the change of address forms on those dates,  
10 with the purpose of diverting the mail that was not sent to  
11 the defendant, was the basis of the ruling and finding  
12 defendant guilty of the --

13 THE COURT: I'm sorry, go ahead.

14 MS. CHANG: -- guilty of the obstruction of mail  
15 statute.

16 THE COURT: And where is that in the ruling?

17 MS. CHANG: It's on page 114. 114 of the excerpts.

18 THE COURT: Lines?

19 MS. CHANG: I apologize. Starting at 16. 16 on down.

20 THE COURT: I think you're correct. I think that is  
21 what he says.

22 Are you done?

23 MS. CHANG: Yes, Your Honor. I submit on the papers.

24 MR. SMITH: Very briefly, Your Honor?

25 THE COURT: Okay.

1           MR. SMITH: Once again, it's appellant's contention  
2 that the government must show a specific piece of mail was  
3 obstructed, and the government must establish that some  
4 change of address form obstructed or retarded that piece of  
5 mail from reaching its intended addressee. And we argue that  
6 the government has failed to do so, and, because of that,  
7 none of the convictions can stand.

8           However, if this Court does find that Mr. Caballero  
9 did obstruct the mail, our contention is that it can only  
10 sustain one of his convictions.

11           Thank you.

12           THE COURT: Is the matter submitted?

13           MR. SMITH: Submitted, Your Honor.

14           THE COURT: On all issues?

15           MR. SMITH: On all issues.

16           MS. CHANG: Submitted on all issues, Your Honor.

17           THE COURT: All right. I don't read the statute the  
18 way it's argued by the appellant.

19           18 USC Section 1701 prescribes, "Whoever knowingly and  
20 willfully obstructs or retards the passage of the mail  
21 shall --" there is language that I'm omitting that is not  
22 pertinent -- "shall be fined under this title," then it talks  
23 about penalties.

24           I agree with the Sixth Circuit's statement of the  
25 elements at 782 F.2d 631.

1           The Sixth Circuit also states, at 632, "1701 requires  
2 a showing that the defendant knew that the effect of his  
3 actions would be to obstruct the mail."

4           It also states, at 633, "'Knowing and willfully' as  
5 used in Section 1701 requires the government to prove beyond  
6 a reasonable doubt that the defendant knew that his acts had  
7 this effect."

8           I agree with what the magistrate judge stated, that  
9 the defendant did willfully and knowingly obstruct the  
10 passage of mail to its intended recipients when he filed the  
11 change of address forms.

12           The appellant argues his convictions on Counts 1 and 2  
13 should be reversed because he was not prepared to defend  
14 himself against those counts, and that those counts  
15 constitute a variance from the charges in the government's  
16 information.

17           "A variance...occurs when the evidence offered at  
18 trial proves facts materially different from those alleged in  
19 the indictment." Adamson, 291 F.3d at 615.

20           Appellant argues that the proof presented at trial  
21 required him to defend against charges not presented in the  
22 information, and therefore the information misled him and  
23 obstructed his defense. Appellant argues that, consequently,  
24 he had an inadequate opportunity to present a defense, and  
25 that his exposure to unanticipated evidence prejudiced him in

1 such a way as to constitute a fatal variance between what was  
2 charged in the information and what was proven at trial.  
3 Specifically, he argues he was prepared to defend against  
4 allegations of obstructing mail only from the Shingle Springs  
5 post office box based on the information, but that evidence  
6 at trial showed obstruction of mail from two other addresses.

7 "A variance between information and proof does not  
8 require reversal unless it affects the substantial rights of  
9 the parties." Kaiser, 660 F.2d 730, Ninth Circuit.

10 Allegations of a material variance are reviewed de  
11 novo. Sullivan, 522 F.3d at 980, Ninth Circuit.

12 "A material variance exists if a materially different  
13 set of facts from those alleged in the information is  
14 presented at trial, and if that variance affects the  
15 defendant's substantial rights."

16 "One of the primary purposes of an information is to  
17 inform a defendant of 'what he is accused of doing in  
18 violation of the criminal law, so that he can prepare his  
19 defense.'" Adamson, 291 at 616.

20 The information alleges -- and I won't quote the full  
21 information, but the appellant is correct in stating that as  
22 far as post office box -- I mean, I guess I need to quote it  
23 in part. It alleges that on or about the dates of August 23,  
24 2010 and August 28, 2010, Caballero "did willfully and  
25 knowingly obstruct or retard the passage of the mail, to wit:

1 defendant, without authority, submitted three Official  
2 Federal Mail Forwarding Change of Address Orders to the  
3 United States Postal Service for purposes of diverting mail  
4 addressed to the Shingle Springs Band of Miwok Indians,  
5 located at P.O. Box 1340, Shingle Springs, California, to the  
6 defendant's home address," and it's set forth in the  
7 information, "As follows:"

8           Then it specifies three counts. Count 1, then it has  
9 a date, August 23, 2010, and then the form is PS 3575.  
10 Count 2, 8/23/10, then the form PS 3510. Count 3, 8/28/10,  
11 then the form PS 3575.

12           And it states, "All in violation of Title 18, United  
13 States Code, Section 1701." And that's in the record at  
14 157-158.

15           Although the information only identifies the Shingle  
16 Springs Post Office Box address, the information references  
17 three United States Postal Service forwarding change of  
18 address forms by date and number, and those three forms were  
19 given to defendant as part of discovery. Those forms are in  
20 the record at 160, 161, 163.

21           The trial record reveals that the appellant filled out  
22 the information required to effect a change of mailing  
23 address on each form, and two of those forms listed the  
24 business name as Shingle Springs Band of Miwok Indians -- it  
25 actually is Indian, singular, I think, rather than plural,



1 and one lists the business name as Shingle Springs Rancheria.  
2 Each form has a different address for the old address portion  
3 of the form.

4 Further, the trial record shows that appellant  
5 submitted each mail forwarding change of address order to the  
6 United States Postal Service for the purpose of diverting  
7 mail intended to be delivered to the listed entities from  
8 those entities to his home address.

9 The trial record does not support appellant's argument  
10 that he did not have adequate notice and opportunity to  
11 prepare his defense based on the facts alleged in the  
12 information and the change of address forms given to him in  
13 discovery, which are in the information. It's made clear  
14 what change of address forms were referenced in the  
15 information when he received the discovery. Therefore, on  
16 this record, it has not been shown that the appellant's  
17 substantial rights have been undermined.

18 Appellant also argues two of the convictions should be  
19 reversed because the information is multiplicitous because it  
20 charges the same crime in separate counts, and it is evident  
21 that he can only be guilty of one count of obstruction.

22 The government counters, and the government is  
23 correct, that the appellant's argument fails to take into  
24 account that although the information alleged the appellant  
25 submitted three change of address forms, the evidence at

1 trial showed that each change of address form sought to  
2 divert mail from completely different addresses.

3 "Charges are multiplicitous if they charge a single  
4 offense in multiple counts." Ninth Circuit, 468 Fed.App.  
5 710, 712, 2012.

6 This is to protect a defendant from being penalized  
7 multiple times for a single course of conduct in violation of  
8 the Double Jeopardy Clause of the Fifth Amendment. Nash, 115  
9 F.3d 1431, Ninth Circuit, 1997.

10 Counts are not multiplicitous when each count requires  
11 proof of a different fact that the other does not. Garlick,  
12 240 F.3d at 794, Ninth Circuit.

13 The information alleges defendant committed three  
14 counts of obstructing or retarding the passage of the mail by  
15 defendant's submission of three Official Federal Mail  
16 Forwarding Change of Address Forms to the United States  
17 Postal Service, each having the effect of obstructing or  
18 retarding the passage of the mail. Since any mail in or  
19 entering the passage of the mail would be delivered to  
20 defendant's home address, since each change of address form  
21 contains a separate and distinct address from which the  
22 passage of the mail was changed to defendant's address,  
23 defendant's multiplicity claim is rejected.

24 Considering the trial evidence in the light most  
25 favorable to the prosecution, any rational trier of fact

1 could have found the essential elements of each count beyond  
2 a reasonable doubt since the evidence shows the appellant  
3 obstructed mail, or retarded mail, on three separate  
4 occasions by knowingly and willfully obstructing or retarding  
5 the passage of the mail when diverting mail from three  
6 different addresses to the appellant's address, knowing that  
7 the effect of his actions would obstruct or retard the  
8 passage of the mail by diverting the mail from the intended  
9 recipient to the appellant's home address.

10 The appellant raises two issues concerning sentencing.

11 He argues he was not given a sufficient opportunity to  
12 address the magistrate judge during the sentencing hearing.  
13 This argument is belied by the record. He was given an  
14 opportunity to address the magistrate judge, and he took  
15 advantage of the opportunity. He continued to talk after he  
16 took advantage of that opportunity. After his lawyer was  
17 talking to the magistrate judge, and the prosecutor was  
18 talking to the magistrate judge, the appellant interjected  
19 himself in the communications by speaking to the judge. And  
20 the record reflects that the judge allowed the appellant to  
21 do that.

22 At one point during the proceeding, the judge said  
23 something to the effect that maybe the appellant -- I mean,  
24 he should talk to his lawyer, the lawyer should talk to the  
25 appellant concerning a matter, and that is the point in the

1 proceeding that the appellant uses as the basis for saying  
2 that he was not given a Constitutional right to allocute.  
3 That's not supported by the record. The law doesn't say that  
4 a defendant has an unlimited right to allocute. There is  
5 nothing in this record that supports the argument that he did  
6 not receive what was due to him under the Constitution.

7 Appellant also argues that the length of his sentence  
8 is excessive under 18 USC Section 3553; however, he has not  
9 shown that the magistrate judge abused his discretion in  
10 imposing the sentence.

11 For the stated reasons, the magistrate judge's  
12 decision is affirmed. This matter is adjourned.

13 MS. CHANG: Thank you, Your Honor.

14 MR. SMITH: Thank you, Your Honor.

15 (Court adjourned, 10:53 a.m.)

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REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA )  
COUNTY OF SACRAMENTO )

I, KIMBERLY M. BENNETT, certify that I was the Official Court Reporter, and that I reported verbatim in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the foregoing pages constitute a complete, true, and correct record of said proceedings:

COURT: U.S. District Court  
Eastern District of California

JUDGE: Honorable GARLAND E. BURRELL, JR.,  
Judge

CASE: UNITED STATES OF AMERICA vs. CESAR  
CABALLERO

DATE: SEPTEMBER 28, 2012

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California.

/s/ Kimberly M. Bennett  
KIMBERLY M. BENNETT  
CSR No. 8953, RPR, CRR, RMR