IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Christopher E. Olsen
Machinery Technician Third Class (E-4)
U. S. Coast Guard,
Appellant

23 November 2018

BRIEF ON BEHALF OF APPELLANT

Dkt. 1462
Case No. CGCMG 0366
Before McClelland, Hamilton and Brubaker

Tried at Boston, MA by a General Court Martial convened by Commander, Coast Guard First District, on 16 March 2018.

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

Assignment of Errors

I. WHETHER CHARGE I AND CHARGE II ARE MULTIPLICITOUS WHEN COMMISSION OF THE CRIME NECESSITATES ATTEMPTING TO COMMIT THE CRIME THROUGH TRIAL AND ERROR.

II. WHETHER UNREASONABLE MULTIPLICATION OF CHARGES EXISTS WHEN ALL SPECIFICATIONS CAN BE MERGED BY CHANGING THE DATE.

III. THE GOVERNMENT INTRODUCED EVIDENCE IMPLYING THAT ACCESSING THE DARK WEB COULD RESULT IN A COMPLETE TAKEOVER OF THE DEPARTMENT OF DEFENSE AND HOMELAND SECURITY COMPUTER SYSTEMS. WAS THIS IMPROPER EVIDENCE IN AGGRAVATION UNDER R.C.M. 1001(B)(4)?

IV. WHETHER THE APPELLANT'S SENTENCE WAS UNDULY SEVERE WHEN HE RECEIVED A BAD CONDUCT DISCHARGE FOR VIEWING PORNOGRAPHIC PHOTOS ON A GOVERNMENT COMPUTER.

Table of Contents

Statement of the Case

The appellant was tried by a military judge sitting as a General Court-Martial at Boston, Massachusetts, on 16 March 2018 convened by Commander, First Coast Guard District.

Appellant pleaded as follows:

Charge	Spec.	Article	Description	Plea	Finding
I		80	Attempted Violation of General Order	G	G
I	1	80	Attempted Violation of General Order	G	G
I	2	80	Attempted Violation of General Order	NG	Withdrawn
II		92	Violation of General Order	G	G
II	1	92	Violation of General Order	G	G
III		134	Viewing of Child Pornography	NG	Withdrawn
III	1	134	Viewing of Child Pornography	NG	Withdrawn
III	2	134	Viewing of Child Pornography	NG	Withdrawn

Charge	Spec.	Article	Description	Plea	Finding
Additional Charge		92	Violation of General Order	G	G
Additional Charge	1	92	Violation of General Order	G	G
Additional Charge	2	92	Violation of General Order	G	G

The military judge sentenced the appellant to a reduction to E-1, confinement for 90 days, and a Bad-Conduct discharge.

Statement of Facts

Multiplicity and Unreasonable Multiplication of Charges

After the military judge found the appellant guilty in accordance with his pleas, the military judge, *sua sponte,* raised the issue of merger for the purposes of multiplicity and Unreasonable Multiplication of Charges. (R. at 85). The military judge told counsel

> M.J. "…I had told you that I was looking at that issue because there is some overlap in the time period in Specification 1 of Charge 1, which I have found the Accused guilty of, which dates from 6 June to on or about 29 June 2016, and Specification of Charge 2 says that from about 16 November 2015 to on or about 29 June 2016, so there is some overlap of about a month there…."

(R. at 85). Defense counsel articulated his position on multiplicity and unreasonable multiplication of charges:

> "[O]ur position is that it could properly be merged for findings, the attempt, into the 92, and it should be. First, because of multiplicity, and if we look at that, we start with this date range of the Article 80 being fully encapsulated by the 92, the completed offense, both being on divers occasions. So we start with the basic premise that an 80, if completed, merges into the completed offense, the 92, and then even if it – if it doesn't, it's considered an LIO of the greater offense. So he should not stand convicted of both for multiplicity reasons. But even if we say that they are separate offenses because there were different keystrokes involved and one is blocked, but then the next one is not, we really have UMC concerns at that point because it's not an unbroken chain of events here. I mean, as the Providency here demonstrated, he is sitting at a computer during the same time frame. Search 1 may be blocked and so that's only an attempt, but Search 2 a minute later is not blocked or it's accessed through a different website. So you don't have distinctly different transactions or occurrence/occurrences, but for whatever specifications of the filter that there are, he is only committing one offense. So the question is really is it fair that he stands convicted of two criminal offenses for what is essentially one act on divers occasions. The time frames are the same. And should he then likewise not only stand convicted of two offenses, but be punished and sentenced doubly for those."

(R. at 87-88). The military judge on findings found that the offenses were not multiplicitous and ruled that there was no unreasonable multiplication of charges. (R. at 92). After the defense's request to merge specifications on sentencing, the military judge found no unreasonable

multiplication of charges on sentencing. (R. at 264).

Charge I Stipulation of Fact and Providence Inquiry

The Stipulation of Fact as to Charge I stated:

> **1.** From on or about 6 June 2016 to on or about 29 June 2016, while assigned to SFO Moriches, MIO Olsen used the Coast Guard workstation in the MK Shop office. He knowingly attempted, on numerous occasions, to use this workstation to search for and view sexually explicit or predominantly sexually oriented images and videos.
>
> **2.** MIO Olsen attempted to view images and videos of pornography from either websites or the use of search terms like "hd-erotika," "bestnudegirl," "hidefporn," "elite babes," "katka cum like crazy," "nude babes, "x-art," "assinclusive," "freepornscat.net," "pimpandhost," "x art katka two into one," "smutty.com," "eroticgifs," "jizzday.com," "Anal Sex," "photo -Anal-AssHardcore,""Orgy," "Five Way Fucking," "The Perfect Threesome," "The Swingers Club," "sex video gif," "loveyourxxx," "yogapantsfuck," "porn," "tits university," and "erotic8."
>
> **3.** By searching for and attempting to view pornography, MIO Olsen intentionally and wrongfully attempted to violate COMDTINST 5375.lD.
>
> **4.** MIO Olsen would have been able to successfully view the pornography he sought but he was blocked by Coast Guard cybersecurity protocols including the "URL" filter database or web reputation value, known as firewalls and filters. Additionally, after being blocked, instead of ceasing his attempts to view sexually explicit or predominantly sexually oriented images on a Coast Guard workstation, he tried to use a Tor2web program to mask his search efforts and circumvent Coast Guard cybersecurity protocols

and view pornography on a Coast Guard workstation.

5. By searching for pornography on a Coast Guard workstation, and then using a program like Tor2web to mask his search efforts, MK3 Olsen's actions were more than merely preparatory steps. That is, he took substantial steps to view sexually explicit or predominantly sexually oriented images on a Coast Guard workstation.

(Pros. Ex. 1, pg. 2-3). The military judge instructed appellant on the following elements of Charge I:

1. "The first element is that on or about 6 June 2016 to on or about 29 June 2016 on board SFO Moriches, you did certain acts, That is, wrongfully, intentionally and knowingly attempting to view sexually explicit or predominantly sexually oriented images on a Coast Guard work station, a computer which is owned by the government." (R. at 20-21).

2. "The second element would be that the acts were done with specific intent to commit the offense of violating a lawful general order, to wit, which is paragraph 7 of Commandant Instruction 5375.1D." (R. at 21).

3. "[T]he third element is that the acts amounted to more than mere preparation." (R. at 21).

4. "[T]he fourth element is that such acts apparently tended to bring about the commission of the offense of a violation of a lawful general order. That is, that the acts apparently would have resulted in the actual commission of the offense of violating paragraph seven of Commandant Instruction 5375.1D, except for unexpected intervening

circumstances, the Coast Guard cyber protections, which prevented completion of that offense." (R. at 21).

After explaining the elements of Charge I to the appellant, the military judge and appellant had the following exchange:

> **MJ:** Okay. Now, why did you not actually complete the violation? So. You didn't - what we're talking about is you tried, you made substantial steps, you put in these websites, these URLs and these search terms, but in fact you were somehow thwarted in accessing pornography. So explain to me why you were thwarted, how come you didn't complete the crime of violating the general order.
>
> **Appellant:** Your Honor, upon entering the URLs or clicking the search results, I was met with a banner listing that the Coast Guard Military Firewall has identified said websites as pornographic and were therefore blocked and I was denied access.
>
> **MJ:** And how many times did that happen? And I don't need an exact number obviously, but - was it just one time? Did you stop after you got that first banner or would you get a banner and maybe try a different URL or different search term?
>
> **Appellant:** Yes, Your Honor, I would try multiple times.
>
> **MJ:** Okay. More than ten?
>
> **Appellant:** I think so, Your Honor.
>
> **MJ:** Okay. And once you got those banners, did you try other actions to try to get around that firewall?
>
> **Appellant:** I did, Your Honor. I tried to access using a Tor2web URL, which is a kind of an anonymizing technology. It makes it harder to track your actions, but those were also

met with banners saying that the access was denied, either because of pornography or because it recognized the anonymizing technology.

(R. at 26-27).

Charge II Stipulation of Fact and Providence Inquiry

The Stipulation of fact for Charge II stated:

> **1.** COMDTINST 5375.lD was in effect from on or about 16 November 2015 to on or about 29 June 2016.
>
> **2.** MK3 Olsen knowingly viewed pornography on a Coast Guard workstation numerous times from on or about 16 November 2015 to on or about 29 June 2016. While assigned to SFO Morichcs, MK3 Olsen used the Coast Guard workstation in the MK Shop office. From on or about 16 November 2015 to on or about 29 June 20 16 he used this workstation to search for and view approximately 200 sexually explicit or predominantly sexually oriented images and videos.
>
> **3.** The images and videos of pornography came from either websites or the use of search terms like "teen porn," "lesbian-sex," "babepedia.com," “Next-Door-Nikki-takes-of-underpants," "NextDoorNikki-Nikki-and-Misty-kiss-and-touch," "yourdirtymind.com," “Little-Strip-Teast-w-Ycllow-Bikini," "youjizz.com," "big-bouncing-tits," "playboy.tv," "pornhub.com," "Amateur-babes," and "lushstories.com."
>
> **4.** By searching for and viewing pornography, MIO Olsen intentionally and wrongfully disobeyed COMDTINST 5375.lD.

(Pros. Ex. 1, pg. 3). The elements the military judge instructed for Charge II were:

1. "[T]here was in existence a certain lawful general order in the following terms, which is paragraph 7 of the Commandant Instruction 5375.1D dated 3 October 2013, which states in part that, "Use of government office equipment or services to intentionally and knowingly view, download, store, display, transmit, or copy any materials that are sexually explicit or predominantly sexually oriented is prohibited." (R. at 30-31).

2. "[T]he second element is that you had a duty to obey such order." (R. at 31).

3. "[T]he third element is that from on or about 16 November 2015 to on or about 29 June 2016, you violated this lawful general order by wrongfully, intentionally, and knowingly viewing sexually explicit or predominantly sexually oriented images on a Coast Guard workstation, which is a computer owned by the government. Now, again, divers occasions - and it's stated in the offense that you did so on divers occasions." (R. at 31).

During the providence inquiry, the military judge and appellant had the following exchange:

MJ: And tell me about how you violated this general order during that time frame.

...

Appellant: Uh, Your Honor, I violated that general order by willfully searching for and viewing pornography and sexually explicit images on a Coast Guard computer.

MJ: Okay. And that's a pretty long time period, right, that we're talking about, you know, six/seven months. What was the difference from - the previous was an attempt where you got blocked. Now, we're talking about where you were successful on accessing sexually explicit or similar images. How did you get around the firewalls this time?

...

Appellant: Your Honor, while many of the time periods were the same, some of the websites would be blocked and some of them were not blocked, for whatever reason they weren't flagged.

MJ: Okay. So the filter didn't identify either, you know, the website you put in or the search terms, and for a lack of a better way of saying it, it got through the filters and you were able to access – [the images]

Appellant: Yes, Your Honor.

(R. at 35-36).

Improper Aggravation Evidence

The government elicited testimony on sentencing from ITC [redacted] former Cyber Security Analyst. (R. at 108). ITC [redacted] testified to the following about threats associated with accessing the dark web on government computers:

- "[The dark web] It is - it opens up a web gate - it opens up a gateway to the rest of the Internet. It circumvents all the security appliances, the whole stack. Members basically making a hole in the security of - in our security appliances." (R. at 111).
- "There are numerous [dark web] threats. It's - a lot of the time, we are usually concerned with viruses and malware. We are concerned about bad people, hackers, trying to get access inside into the Coast Guard network." (R. at 112).
- "[Accessing the dark web] could potentially allow whoever was on the outside full blown access into the Coast Guard network, to include even into the DHS and the Department of

Defense networks." (R. at 112).

- As a result of dark web malware, an individual "can take full blown control of our system, give it out to somewhere else. They can exfiltrate data." (R. at 113).

Defense counsel objected to this testimony arguing that it was improper aggravation evidence. (R. at 113). The military judge overruled Defense counsel's objection. (R. at 114). When asked if any of the potential harms from the dark web occurred in appellant's case, ITC [redacted] stated:

> **Government:** Okay. Were you able to determine whether any damage was done as a result of his attempts to access the dark web?
>
> **ITC [redacted]:** No, Sir. That's not part of my job.

(R. at 115).

Errors and Argument

I. WHETHER CHARGE I AND CHARGE II ARE MULTIPLICITOUS WHEN COMMISSION OF THE CRIME NECESSITATES ATTEMPTING TO COMMIT THE CRIME THROUGH TRIAL AND ERROR.

Standard of Review

This court reviews multiplicity claims de novo. *United States v. Forrester*, 76 M.J. 479, 484 (C.A.A.F. 2017)(citing *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010)). "Whether an offense is a lesser included offense is a question of law we review de novo." *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012) (citing *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F.2011)). "Double jeopardy claims, including those founded in multiplicity, are error waived by failure to make a timely motion to dismiss, unless they rise to the level of plain error." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). Whether offenses are facially duplicative is a matter of law that we review de novo. *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004).

Law

"The concept of multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment, which prohibits multiple punishments "for the same offen[s]e." *Forrester*, 76 M.J. at 484 (citing U.S. Const. amend. V; Article 44(a), UCMJ, 10 U.S.C. § 844(a) (2012) ("No person may, without his consent, be tried a second time for the same offense.")). The Double Jeopardy Clause prohibits "multiplicitous prosecutions .... [i.e.,] when the government charges a defendant twice for what is essentially a single crime." *Forrester*, 76 M.J. at 484-85 (citing *United States v. Chiaradio*, 684 F.3d 265, 272 (1st Cir. 2012)).

Military courts analyze convictions under different articles for congressional intent using the "separate elements test" developed in *Blockburger v. United States*. 284 U.S. 299, 304 (1932). "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Anderson*, 68 M.J. at 385 (citing *Blockburger*, 284 U.S. at 304).

This court applies the elements test to determine whether one offense is a lesser included offense of another. *Arriaga*, 70 M.J. at 54 (citation omitted). "If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements." *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010). The two offenses need not have "identical statutory language." *Arriaga*, 70 M.J. at 54 (citation omitted). "Instead, the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'" *Id.* If two offenses are related such that one is a lesser included offense of the other, then conviction of

both violates the prohibition against double jeopardy. See *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014) (citations omitted). "The fact that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.'" *Arriaga*, 70 M.J. at 55.

Multiplicity is also considered in the context of an ongoing transaction or occurrence. "If [the offense] is a continuous-course-of-conduct offense as a matter of law, a separate conviction for each alternative method of commission or component of this offense during the course of conduct might not be authorized." *United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996) (citations omitted). The Court of Appeals for the Armed Forces has held that an assault is "a continuous course-of-conduct-type offense and that each blow in a single altercation should not be the basis of a separate finding of guilty." *United States v. Flynn*, 28 M.J. 218, 221 (C.A.A.F. 1989) (citing *United States v. Morris*, 18 M.J. 450 (C.M.A. 1984); *United States v. Rushing*, 11 M.J. 95 (C.M.A. 1981)). This court recently held in *United States v. Hernandez* that three consecutive touches charged as Art. 128 violations were multiplicitous. *United States v. Hernandez*, COASTGUARD 24956, slip. op. at n. 6 (C.G. Ct. Crim. App. 31 Oct. 2018). The court reasoned that the touching "happened really fast," "around the same time," and were part of an uninterrupted sequence. *Id.*

Generally, a waiver of all motions possible in a guilty plea prohibits appellate review on multiplicity grounds. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). Absence of waiver, but without objection, is treated as a forfeiture that is entitled to plain error review. *Id.* Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). Under

this standard, challenges based on multiplicity must be "facially duplicative." *United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009). "Offenses are 'facially duplicative' if, on the face of the guilty plea record, it is apparent that the multiple convictions offend the Double Jeopardy Clause because admission to one offense cannot 'conceivably be construed' as amounting to more than a redundant admission to another." *United States v. Broce*, 488 U.S. 563, 574 (1989); *Menna v. New York*, 423 U.S. 61, 62 (1975) ("Where the State is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.").

Analysis

Charge I and Charge II are multiplicitous for failing both the elements test, and the continuous course of conduct test. Appellant did not waive nor forfeit the multiplicity issue. Although the appellant did not make a multiplicity motion, the military judge raising the issue *sua sponte* brought the issue to the court's attention, defense counsel orated its position on multiplicity, and preserved it for de novo review. Defense counsel's objections were placed on the record before the military judge. See *United States v. Reynoso*, 66 M.J. 208 ,210 (C.A.A.F. 2008)(stating "In short, M.R.E. 103 should be applied in a practical rather than a formulaic manner.").

Charge I and Charge II fail the *Blockburger* test and are facially duplicative. The date of commission for Charge I, 6 June 2016-29 June 2016, occurred within the same time period as Charge II, 16 November 2015 – 29 June 2016. (R. at 20-21, 31). The jurisdictional information for both charges, including location and workstation, is identical. (*Id.*). Elements one through three of Charge I, including the underlying *mens rea* and *actus rea* of using a government

computer in attempting to view pornography, are present in Charge II. Element 4 of Charge I, the unexpected intervening circumstance of the firewall denying appellant access, is included in Charge II when considered in context with the stipulation of fact and appellant's providence inquiry. The appellant stated that he accessed pornography through trial and error. He would consecutively search terms and use techniques to access pornography on his government computer. The military judge did not clarify the ambiguity between Charge I and Charge II, but the record develops a strong inference that the appellant would type a term, get stopped by a firewall, then type another term or use another method until he had access to pornography. See *Arriaga*, 70 M.J. at 51 (stating "housebreaking is a lesser included offense of burglary. Comparing the statutory elements, it is impossible to prove a burglary without also proving a housebreaking. Furthermore, the offense as charged in this case clearly alleges the elements of both offenses."). The completion of Charge II required providing Charge I. Appellant would not have been able to view pornography without first attempting to do so. The military judge erred by failing to properly conduct a *Blockburger* test for Charge I and Charge II.

Charge I and Charge II are multiplicitous because both occurred during a continuous-course-of-conduct. First, although Charge I is for Art. 80, UCMJ, and Charge II was under Art. 92, UCMJ, the inchoate attempted crime of Charge I incorporates and references the elements of Charge II. Charge I states that appellant typed in search words into a government computer to view pornography, but was prevented by a firewall. Charge II states that appellant entered keywords into a government computer that resulted in pornography that the appellant viewed. The appellant stated during his providence inquiry regarding this difference between Charge I and Charge II, "many of the time periods were the same, some of the websites would be blocked and some of them were not blocked, for whatever reason they weren't flagged." (R. at 35-

36)(emphasis added). The words "the same" referred to encountering a firewall, then subsequently entering different words to view pornography. This rapid succession of unsuccessful search attempts, followed by a successful search attempt is a quintessential example of the government improperly charging each blow in a single altercation separately. The military judge erred by not finding that that Charge I and Charge II were multiplicitous.

Assuming arguendo that appellant forfeited an objection to multiplicity, plain error exists. There was error in that Charge I and Charge II were multiplicitous under both the *Blockburger* and continuous-course-of-conduct tests. The stipulation of fact and providence inquiry highlighted this error to the military judge to the extent that he *sua sponte* considered multiplicity. The error materially prejudiced appellant because it increased his criminality by another conviction and contributed to him being sentenced to a bad conduct discharge.

Appellant asks that the charges and specifications be set aside. Alternatively, appellant requests that Charge I and his bad conduct discharge be set aside.

II. WHETHER UNREASONABLE MULTIPLICATION OF CHARGES EXISTS WHEN ALL SPECIFICATIONS CAN BE MERGED BY CHANGING THE DATE.

Standard of Review

Unreasonable multiplication of charges is reviewed for abuse of discretion. *Pauling*, 60 M.J. at 95. The Court of Appeals for the Armed Forces reviews forfeited issues for plain error, but cannot review waived issues. *United States v. Hardy*, 77 M.J. 438, 440 (C.A.A.F. 2018). This court may use its Article 66(c), UCMJ, discretionary authority to review waived issues. *Id.* at 443.

Law

Military courts consider five factors to determine whether there has been an unreasonable multiplication of charges as applied to findings or sentence. *Campbell*, 71 M.J. at 23-24 (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Those factors include (1) whether each charge and specification is aimed at distinctly separate criminal acts, (2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality, (3) whether the number of charges and specifications unreasonably increase the accused's punitive exposure, or (4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *Id.* (citing *Quiroz*, 55 M.J. at 338). Military courts consider the same five *Quiroz* factors to determine whether there has been an unreasonable multiplication of charges as applied to sentence. *Campbell*, 71 M.J. at 23-24.

This court has previously held that an attempt and conspiracy specification constituted unreasonable multiplication of charges for sentencing. *United States v. Caulfield*, 72 M.J. 690, 695 (C.G.C.C.A. 2013). A specification charging failure to obey an order prohibiting unauthorized use of government property and a specification charging wrongful appropriation of a government vehicle constituted an unreasonable multiplication of charges for sentencing. *United States v. Sidebottom*, 54 M.J. 926, 931 (C.G.C.C.A. 2001).

Analysis

Appellant's charging scheme constituted unreasonable multiplication of charges. The government overreached and significantly increased the criminality of appellant's conduct by expanding what should have been a charge and its specification for violation of a lawful general order, looking at pornography, from 16 November 2015 – 29 June 2016. Instead, the government

bisected the time periods, and separated preparation from commission, for the sole purpose of amplifying a single crime into four crimes.

Beginning with the first *Quiroz* factor, the charges and specifications all cover one continuous criminal act of viewing pornography on a government computer. As stated in the first assignment of error, Charge I and Charge II covered the same acts during the same period of time. Charge II is a lesser included offense of Charge I. Further, all four specifications allege divers occasions with either overlapping or consecutive time periods.

The four specifications exaggerate the appellant's criminality under the second *Quiroz* factor. This court in exercising its Article 66, UCMJ, authority must first ask if justice is served by punishing the viewing of adult pornography on a government computer with four felony convictions? Secondly, Charge II and the Additional Charge and its specifications may be combined into a single specification by changing the dates. Charge I may also be combined as it is a lesser included offense of Charge II.

The effect of the prosecution overreaching resulted in a maximum punishment of eight years confinement. (R. at 51). Charging the conduct as one charge and specification would have results in a maximum punishment of two years confinement. The military judge sentenced appellant to 90 days confinement and a bad conduct discharge. (R. at 267). A downward adjustment from an eight year maximum to ninety days likely prejudiced appellant and resulted in a bad conduct discharge to offset the lenient confinement compared to the maximum sentence. A maximum sentence of only two years may have resulted in a sentence of confinement alone without a punitive discharge.

Appellant's charges and specifications were drafted in a manner to improperly increase his criminality and therefore are evidence of abuse in the drafting of the charges. Arbitrarily choosing time periods for divers occasions, and dissecting the process of trial and error attempts to bypass a firewall, is prosecutorial overreach.

Appellant asks this court to set aside the charges and specifications. In the alternative, because the appellant has already completed his confinement, sentence relief in the form of setting aside his bad conduct discharge is appropriate.

III. THE GOVERNMENT INTRODUCED EVIDENCE IMPLYING THAT ACCESSING THE DARK WEB COULD RESULT IN A COMPLETE TAKEOVER OF THE DEPARTMENT OF DEFENSE AND HOMELAND SECURITY COMPUTER SYSTEMS. WAS THIS IMPROPER EVIDENCE IN AGGRAVATION UNDER R.C.M. 1001(B)(4)?

Standard of Review

This Court reviews "a military judge's decision to admit evidence for an abuse of discretion." (citation omitted). *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018).

Law

R.C.M 1001(b)(4) provides "[t]he trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." The foundational requirement is a specific harm caused by the accused. *United States v. Rust,* 41 M.J. 472, 478 (C.A.A.F. 1995) (citing *Payne v. Tennessee,* 501 U.S. 808, 825 (1991)). The accused, moreover, is not responsible for a never-ending chain of causes and effects. *Id.* (internal citations omitted). There must be some reasonably direct connection between the offense and a negative impact that constitutes an aggravating circumstance. See *United States v. Gordon,* 31 M.J. 30, 36 (C.M.A.1990) (see also *United States v. James*, 64 M.J. 514, 516 (C.G. Ct. Crim. App. 2006) (holding that testimony of what "would

be the impact if the local law enforcement community learned that Appellant was using illegal drugs" was impermissible aggravating evidence)). "When there is error in the admission of sentencing evidence, the test for prejudice 'is whether the error substantially influenced the adjudged sentence.'" *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009) (citation omitted). When determining whether an error had a substantial influence on a sentence, this Court considers the following four factors: '(1) the strength of the Government's case; (2) the strength of the defense's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.' *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999))."

Analysis

ITC [redacted]'s testimony that appellant accessing the dark web could have resulted in the Department of Homeland Security and Department of Defense computer systems being taken over by a hacker was plainly excessive aggravating evidence. As stated in *James*, "there must be some reasonably direct connection between the offense and a negative impact that constitutes an aggravating circumstance." *James,* 77 M.J. at 384. Here, the testimony by ITC [redacted] is a clear admission on the part of a witness that there was no direct connection between the Appellant's conduct and the speculative harm that could result from similar conduct. In fact, not only is there a lack of direct connection, but there was no evidence that any harm resulted at all. The military judge abused his discretion by receiving ITC [redacted]'s testimony as aggravation evidence under R.C.M. 1001(B)(4).

ITC [redacted]'s testimony was material, and of significant quality and weight that prejudiced appellant during sentencing. The effect of his testimony was to take the act of violating a lawful order by viewing pornography at work and increasing it to threatening American national

security.

Appellant requests a new sentencing hearing. In the alternative, appellant's bad conduct discharge should be set aside.

IV. WHETHER THE APPELLANT'S SENTENCE WAS UNDULY SEVERE WHEN HE RECEIVED A BAD CONDUCT DISCHARGE FOR VIEWING PORNOGRAPHIC PHOTOS ON A GOVERNMENT COMPUTER.

Standard of Review

Sentence appropriateness, an exercise of a service court's Article 66, UCMJ, authority, is reviewed *de novo*. *United States v. Hutchison*, 58 M.J. 744, 475 (C.G.C.C.A. 2003).

Law

This Court "may affirm only such . . . sentence or such part or amount of the sentence as it finds . . . should be approved." Article 66(c), UCMJ. The Court of Appeals for the Armed Forces has interpreted this provision as saying that:

> A Court of Criminal Appeals must determine whether it finds the sentence to be appropriate. It may not affirm a sentence that the court finds inappropriate, but not "so disproportionate as to cry out" for reduction. As the Army Court has recognized, Article 66(c)'s sentence appropriateness provision is "a sweeping Congressional mandate to ensure 'a fair and just punishment for every accused.'" Article 66(c) "requires that the members of [the Courts of Criminal Appeals] independently determine, in every case within [their] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [they] affirm."

United States v. Baier, 60 M.J. 382, 384-5 (C.A.A.F. 2005) (citation omitted).

In determining sentence appropriateness and in exercising discretion this Court may consider the entire record, including appellant's post-trial submissions to the convening authority

under R.C.M 1105 and 1106. See *Hutchinson*, 57 M.J. at 234; *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

"In reviewing a case for sentence appropriateness, the Courts of Criminal Appeals are not required to compare appellant's case to other specific cases unless the appellant demonstrates that his or her case is closely related to the case or cases offered for comparison. The mere similarity of offenses is not sufficient." *United States v. Washington*, 57 M.J. 394, 401 (C.A.A.F. 2002) (see also *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982)).

Analysis

Appellant's sentence was unduly severe. The underlying criminal conduct was viewing pornography on a government computer. The government has a legitimate interest in ensuring that its equipment is used in a proper manner, however, in this case there was no victim nor was there any damage caused by the defendant. The improper multiplicity and unreasonable multiplication of charges contributed significantly to appellant's sentence. The improper aggravation evidence introduced by the government added gasoline to the flame that elevated viewing adult entertainment pictures to compromising the whole Department of Defense and Department of Homeland Security computer systems. The unvarnished reality is that service members every day are administratively separated for worse conduct and provided at minimum an other than honorable discharge. Likewise, panels often choose not to issue bad conduct discharges for cases of more severe criminality[1].

[1] See *United States v. Armstrong*, 51 M.J. 612, 613 (C.G. Ct. Crim. App. 1999) (In a case where the accused was convicted of "two specifications of violating a lawful general order by engaging in an inappropriate relationship with a subordinate in violation of Article 92, of the Uniform Code of Military Justice (UCMJ); two specifications of larceny in violation of Article 121,

Appellant requests a new sentencing hearing. In the alternative, he requests that his bad conduct discharge is set aside.

Conclusion

At every opportunity the government improperly exaggerated the appellant's criminal conduct. This included asserting a truly hyperbolic claim that appellant almost shut down the military computer systems. The prejudice upon appellant is clear. One criminal conviction was expanded to four, and he was severely punished for engaging in an activity that in any other setting would have been lawful and constitutionally protected.

UCMJ; and 26 specifications of making and uttering forged checks in violation of Article 123, UCMJ. He was also convicted of the following offenses to which he had pled not guilty: one specification of failure to obey a lawful general order and eight specifications of dereliction of duty in violation of Article 92, UCMJ; one specification of making a false official statement in violation of Article 107, UCMJ; one specification of larceny in violation of Article 121, UCMJ; one specification of making a false claim in violation of Article 132, UCMJ; and one specification of communicating indecent language in violation of Article 134, UCMJ." was sentenced to "confinement for one year, reduction to paygrade E–6, and a fine of $1200, with the recommendation that the fine be reduced to $500, if Appellant made restitution to four named individuals").

WHEREFORE, the appellant respectfully requests that this court completely set aside the findings and sentence in this case and order a rehearing or other such action as the convening authority deems appropriate. Alternatively, appellant asks this court to reassess Appellant's sentence as being unduly severe.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via email on 23 November 2018.

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