IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Peter J. Hernandez Electrician's Mate Second Class (E-5) U.S. Coast Guard, Appellant	) 16 August 2017)) ASSIGNMENT OF ERRORS AND) BRIEF ON BEHALF OF APPELLANT)) Dkt. No. 1452) Case No. CGCMSP 249556) Panel Three)) Tried at Alameda, CA by a Special Court-) Martial convened by Commander, Coast) Guard Pacific Area on 30 January 2017.

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

Statement of the Case

Appellant, Electrician's Mate Second Class (EM2) Peter J. Hernandez, United States Coast Guard (USCG), was tried at Alameda, California by a special court-martial convened by Commander, Coast Guard Pacific Area. The court was composed of the military judge alone. Pursuant to a Pre-Trial Agreement, the accused plead guilty to three specifications of assault consummated by battery under Article 128, UCMJ, 10 U.S.C. § 928 (2012).

On 30 January 2017, the Military Judge sentenced EM2 Hernandez to reduction in pay-grade to E-1, eight months of confinement, and a bad-conduct discharge. (R. at 127.) The convening authority approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered it executed on 1 May 2017. (CA's Action.)

The Judge Advocate General of the Coast Guard referred the case to the Coast Guard Court of Criminal Appeals (CGCCA) for review under Article 66, Uniform Code of Military Justice (UCMJ),10 U.S.C. § 866 (2012), on 17 May 2017.

Statement of Facts

On the evening of 19 September 2015, EM2 Hernandez went out to dinner with his close friend, SK3 J.C. (P.E. 1 at 2.) Before that, SK3 J.C. decided to spend the night at EM2 Hernandez's apartment so that she could drive EM2 Hernandez to the airport the next morning. *Id.* That night the two went out drinking, playing pool, and singing karaoke. (R. at 38, 90, 97.)

At about 0200 hours the two returned to EM2 Hernandez's apartment. (R. at 97.) SK3 J.C. then felt dizzy and wanted to go to bed. (P.E. 1 at 2.) EM2 Hernandez helped SK3 J.C. into the bed in his spare bedroom so that she could sleep. (R. at 97; P.E. 1 at 2.) After turning off the lights, EM2 Hernandez got into the bed and positioned himself on top of her: his pelvis made contact with the inside of her leg, above her knee, and his hands touched her ribs, upper torso, and hips as he pulled down SK3 J.C.'s strapless dress and underpants. (P.E. 1 at 2-3.) Immediately upon this touching, SK3 J.C. told him to stop and pushed him. (P.E. 1 at 3.) EM2 Hernandez immediately stopped and left the room. (P.E. 1 at 3; R. at 99.) The instances of physical contact all occurred "really fast" at "right around the same time" as the others. (R. at 42.)

The three specifications at issue are:

> CHARGE I: Violation of the UCMJ, Article 128
> SPECIFICATION 1: In that EM2 Peter J. Hernandez, U.S. Coast Guard, on active duty, did, at or near Honolulu, HI, on or about 20 September 2015, unlawfully touch SK3 J.C. on the leg, above the knee, with his pelvis.
> SPECIFICATION 2: In that EM2 Peter J. Hernandez, U.S. Coast Guard, on active duty, did, at or near Honolulu, HI, on or about 20 September 2015, unlawfully touch SK3 J.C. on her ribs and upper torso with his hands.
> SPECIFICATION 3: In that EM2 Peter J. Hernandez, U.S. Coast Guard, on active duty, did, at or near Honolulu, HI, on or about 20 September 2015, unlawfully touch SK3 J.C. on her hips with his hands.

The issues of multiplicity and unreasonable multiplication of charges were raised at several points during trial.

Additional facts necessary for the resolution of this case are contained in the argument below.

Errors and Argument

I.

WHETHER THE THREE SPECIFICATIONS OF THE SOLE CHARGE AGAINST EM2 HERNANDEZ WHERE MULTIPLICIOUS WHERE THE THREE ACTIONS OCCURRED NEARLY SIMULTANEOUSLY, INVOLVED A SINGLE SUBJECT, AND EFFECTUATED A SINGLE PURPOSE.

Standard of Review

Multiplicity claims in uncontested guilty pleas are reviewed for plain error. *See United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). It is plain error to enterer findings on specifications are that are facially duplicative. *United States v. Britton*, 47 M.J. 195, 198-99 (C.A.A.F. 1997). "Whether two offenses are facially duplicative is a question of law that we will review de novo." *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004) (citation omitted).

Discussion

"[A] guilty plea does not foreclose or relinquish consideration of all legal issues, particularly double jeopardy claims, which can be decided on the basis of facts apparent on the face of the record." *United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997). Under R.C.M. 910(j), a guilty plea waives all objections related to "the factual issue of guilt of the offense(s) to which the plea was made." This distinction between objections related to the issue of guilt and

objections related to jurisdiction or due process of law is the genesis of the facially duplicative exception to the waiver rule. *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009).

Whether specifications are facially duplicative is determined by reviewing the language of the specifications and the "facts apparent on the face of the record." *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001).

Where the specifications at issue result in multiple convictions for violating the same criminal statute, two questions determine whether they are multiplicious: First, whether the acts were so united in time, circumstance, and impulse in regard to a single subject that they constitute a single offense. *United States v. Rushing*, 11 M.J. 95, 98 (C.M.A. 1981); *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989). Second, what was the unit of prosecution intended by Congress in enacting the criminal prohibition? *Id.*

With regard to the first question, EM2 Hernandez's conduct is plainly united in time, circumstance, and impulse. The three instances of touching all occurred within minutes, if not seconds of each other, beginning when EM2 Hernandez crawled on top of SK3 J.C. The first specification describes the contact between EM2 Hernandez's body and that of SK3 J.C. It occurred during the touching with the hands described in specifications two and three. During this brief period, no circumstances changed. Significantly, all three occurred before SK3 J.C. told him to stop.

The three touches described in the specifications were part of a single impulse. During the providence inquiry, EM2 Hernandez described what happened: "I tried to make a pass." (R. at 46.) In the facially duplicative multiplicity analysis, the "duration of the specific intent required for commission of the offense" is decisive. *United States v. Flynn*, 28 M.J. 218, 221

(C.M.A. 1989). Appellant's intent was singular and uninterrupted during the brief period involved and consequently must be viewed as a single episode.

Next, it is necessary to consider how Congress intended assaults be counted for purposes determining the number of discrete violations. This is a well-settled issue for Article 128 assaults: "When Congress enacted Article 128, it did not intend that, in a single altercation between two people, each blow might be separately charged as an assault." *United States v. Morris*, 18 M.J. 450, 450 (C.M.A. 1984). More generally, the Court of Military Appeals described Article 128, UCMJ, 10 U.S.C. § 928, as "a continuous course-of-conduct-type offense;" and therefore, "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.M.A.1989). The Army Court of Criminal Appeals recently noted that this aspect of Article 128 distinguishes it from the specialized assaults charged under Article 120 or 134 for which individual acts in a single continuous course of conduct can be charged discretely. *United States v. Clarke*, 74 M.J. 627, 628 (A. Ct. Crim. App. 2015), *review denied*, 74 M.J. 459 (C.A.A.F. May 4, 2015).

The three touches described in the specifications in this case are even less distinguishable as individual instances than three blows in a fight. The testimony during the providence inquiry clearly indicated that the touching was part of a fluid series of movements in a short period and thus clearly one assault and not three. Charging three specifications for this touching put EM2 Hernandez in jeopardy thrice for the same offense. This conclusion is readily apparent from the charge sheet and record of EM2 Hernandez's guilty plea and is consequently plain error.

Request for Relief

EM2 Hernandez requests this Court merge the three specifications into a single specification and affirm no more of the confinement sentence than authorized for a single specification of assault consummated by battery, six months' confinement.

II.

WHETHER CHARGING THREE SPECIFICATIONS FOR A SINGLE TRANSACTION WAS AN UNREASONABLE MULTIPLICATION OF CHARGES WHERE MILITARY JUDGE ERRED IN HIS ANALYSIS OF ALL FIVE OF THE RELEVANT FACTORS.

Standard of Review

On appeal assertions of unreasonable multiplication of charges are reviewed for abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004).

Discussion

The prohibition against unreasonably multiplying charges for sentencing purposes has its basis in the Manual for Courts-Martial, which states that "what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges." *See* R.C.M. 307(c)(4), Discussion. The Court of Appeals for the Armed Forces recognizes five factors as relevant to determining whether charges are unreasonably multiplied for sentencing: (1) "Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?," (2) "Is each charge and specification aimed at distinctly separate criminal acts?," (3) "Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?," (4) "Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?," and (5) "Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?" *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001).

This court must determine whether the military judge abused his discretion in identifying and weighing the *Quiroz* factors. An abuse of discretion has been cogently explained as follows: "when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."

United States v. Houser, 36 M.J. 392, 397-98 (C.M.A. 1993) (quoting Magruder, J, *The New York Law Journal* at 4, col. 2, Mar. 1, 1962). The military judge's analysis of unreasonable multiplication of charges in this case contained clear errors of judgement on each factor.

First, the military judge incorrectly found that the accused did not object. (R. at 84.) Although defense counsel did not "object" by using that word, the record makes it very clear that defense counsel raised the issue and the military judge conducted the *Quiroz* analysis on defense counsel's prompting. The military judge's finding of waiver in his analysis of the first *Quiroz* factor contradicted his handling of the issue. If the issue was waived, he should not have analyzed and ruled on the issue.

Rather, the military judge discussed both unreasonable multiplication of charges and the waiver of that issue extensively. His discussion of both was confusing.[1] During the providence inquiry, he began his discussion of multiplicity by saying "we will maintain the issue as we come before." (R. at 31.) He then went on to announce,

> But for now, for the purposes now of findings, I find that the accused has, after careful consideration and discussion with his counsel, has waived the issue, has been briefed on the Quiroz Factors, highlight , understands the issue that by not raising it at trial , defers his ability to raise it on appeal, and that will be given the opportunity, once he has had an opportunity to review the unsworn statement from the accused, from the alleged victim, and after having another recess to discuss that, may allow the counsel to address the issue of the potential of unreasonable multiplication of charges at the sentencing phase of trial.

(R. at. 31-2.)

[1] Adding to the confusion on this subject was the military judge's mistaken uses the terms multiplicity and unreasonable multiplication of charges interchangeably. The military judge characterized *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012), as providing that "unreasonable multiplication of charges may be considered differently on findings than sentencing." (R. at 31). Furthering the confusing conflation of terms, the military judge announced that EM2 Hernandez had waived unreasonable multiplication of charges "for purposes of findings." (R. at 31.) This incorrect use of terminology was not a slip of the tongue. At sentencing the military judge again stated that "as it applies to the findings, I found that I did not find that there was an unreasonable multiplication of charges as applied to findings." (R. at 84.)

Paradoxically, after conducting the *Quiroz* analysis at sentencing and ruling against the defense, the military judge asked if the defense wanted to make a motion on the unreasonable multiplication of charges. The fact that the defense did not make a motion after the judge had made and oral ruling on the subject cannot be treated as waiver. Given the extensive discussion of the issue throughout the proceeding, the military judge erred in weighing this factor against EM2 Hernandez.

The military judge's analysis of the second factor incorrectly concluded that because each specification addressed a different body part it therefore "address[ed] different acts of criminal misconduct." He reached this conclusion despite his recognition that the "misconduct which makes up all three specifications happened on the same evening, and within what's most likely minutes of each other." The military judge's conclusion was an abuse of discretion because he focused on conduct that was not contained in the specification—removing her clothing and accidentally touching her with his penis. The *Quiroz* factor references "distinctly separate criminal acts;" the accused was not charged with the accidental contact made by his penis, nor was he charged with an offense that punishes one for removing another's clothing. Thus, although these were distinctly separate acts, the military judge abused his discretion by analyzing them as criminal acts when they had not been charged.

A correct analysis of the second factor would have concluded that the three specifications were not distinctly separate acts because they involved the same two people in a fluid series of touches that occurred over the narrow timeframe of minutes, at best. As such, the court should have found that the three specifications represented "substantially one transaction" under R.C.M. 307, weighing in favor of finding unreasonable multiplication of charges.

The military judge conducted no analysis whatsoever on the third factor and concluded perfunctorily that "I find for the Number 3 factor in the Quiroz factors, that the number of, that the one charge and three specification[s], does not misrepresent or exaggerate the accused's criminality."

Thus it appears that the only consideration was the fact that the three specifications were charged under one article. This rationale is wrong because it incorrectly focuses on the number of articles charged rather than the number of violations in the specification, which reflects the number of offenses of which the appellant was convicted. *See* R.C.M. 307(c).

Instead, the third factor analysis should consider whether the number of *offenses* of which the appellant has been convicted accurately reflects his criminality. Whether this question is approached as a technical legal question or as a matter of common sense, the conclusion is the same. As discussed extensively above, it is well-establish that the offense of assault consummated by battery under Article 128 covers a complete course of conduct. *United States v. Morris*, 18 M.J. 450, 450 (C.M.A. 1984). Thus convictions for three assaults indicates that the accused is culpable for assaults at either three distinct times or against three distinct victims. This fits with a layperson's understanding that convictions for three assaults is what it sounds like. Beyond the impact of the unreasonable multiplication on EM2 Hernandez's sentencing exposure, the life-long stigma associated with this undue exaggerated criminality weighs heavily for finding this factor in EM2 Hernandez's favor.

Perhaps the most egregious error in the military judge's *Quiroz* analysis was on factor four: whether the specifications unreasonably increase the appellant's punitive exposure. After correctly noting that the multiplication of charges had the practical effect of doubling the confinement exposure from six months to the jurisdiction maximum of one year, the military judge stated that this is justified by the "benefits" EM2 Herandez obtained in entering a pre-trial agreement:

> I also point out that the accused entered freely and intelligently into this pretrial agreement, and that is shown in Appellate Exhibit 10, a copy of the charges and specifications that have been referred to a general court martial, and which, at this point have been withdrawn, and that will later be dismissed without prejudice, pending the appellate review, that the accused is gaining a benefit of having these charges addressed at a special court martial, also particularly considering the accused was facing in a general court martial, charges which would result in more confinement and potentially having to register as a sex offender.

This rationale erroneously took into account the punitive exposure for charges under a different article, referred to a different forum, that the government had withdrawn. Similarly, the military judge erred in considering the fact that these withdrawn charges could have exposed the accused to sex offender registration. *See United States v. Datavs*, 70 M.J. 595, 604 (A.F. Ct. Crim. App. 2011). Essentially the military judge took the position that mere accusations of a more serious offense, no longer before a court, justifies doubling the accused's punitive exposure. The *Quiroz* factors don't support conducting such an analysis. The fact that the accused negotiated a pretrial agreement doesn't mean that the government can subject him to an unreasonable multiplication of charges. The military judge's analysis has no basis in law and his conclusion is an abuse of discretion.

The fifth factor, prosecutorial overreach, looks for cases where the government has obtained undue advantage through creative drafting. *United States v. Pauling*, 60 M.J. 91, 96 (C.A.A.F. 2004) (quoting *United States v. Morrison*, 41 M.J. 482, 484 n.3 (C.A.A.F.1995)). That is precisely what the government achieved through these three specifications. Seeking both to strike a plea deal with the accused by withdrawing Article 120 charges and to expose him to the jurisdictional maximum of the special court-martial, they dissected the touching incident into three specifications. Since the three touches could have easily been set out in a single specification that included the three body parts touched, the only function of the charging scheme was to expose the appellant to greater punishment. Multiplying Article 128 charges to achieve punishments similar to those in Article 120 offenses is prosecutorial overreach. The military judge abused his discretion in ignoring this strategic overreaching in his analysis of the fifth *Quiroz* factor and ultimately sentenced the accused to confinement that exceeded the six-month maximum for a single specification of assault consummated by battery.

The military judge's errors in each of the five *Quiroz* factors surpasses the abuse of discretion standard and cannot be left undisturbed by this honorable Court.

Request for Relief

EM2 Hernandez requests this Court merge the three specifications into a single specification and affirm no more of the confinement sentence than authorized for a single specification of assault consummated by battery, six months' confinement.

III.

EM2 HERNANDEZ'S SENTENCE IS INAPPROPRIATELY SEVERE IN LIGHT OF THE NATURE OF THE CHARGED OFFENSE.

Standard of Review

Courts of Criminal Appeals review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2004).

Argument

This Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. § 866(c). The appropriateness of the sentence must be judged by an "individualized consideration" of the appellant, "on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (citation omitted). The punishment should fit both the offender and the crime. *United States v. Mack*, 9 M.J. 300, 317 (C.M.A. 1980) (citing *Williams v. New York*, 337 U.S. 241 (1949)). If a sentence is unjustifiably severe, this Court may not approve it. *See United States v. Lanford*, 20 C.M.R. 87, 92-95 (1955). The sentence should not be more severe than that "warranted by the offense, the circumstances surrounding the

offense, [the accused's] acceptance or lack of acceptance of responsibility for his offense, and his prior record." *United States v. Aurich*, 31 M.J. 95, 97 n. (C.M.A. 1990).

If a sentence is unjustifiably severe, this Court may not approve it. *See United States v. Lanford*, 6 U.S.C.M.A. 371, 20 C.M.R. 87, 92-95 (1955). A military Court of Criminal Appeals (CCA) may disapprove a punitive discharge without engaging in clemency. *United States v. Healy*, 26 M.J. 394, 396 n. 5 (C.M.A. 1988). Courts of Criminal Appeals have broad discretion to grant relief under Article 66(c). A Court of Criminal Appeals abuses its discretion when its practices have the effect of "requiring a case to achieve 'most extraordinary of circumstances' level before [it] would exercise its Article 66(c), UCMJ, authority . . . ." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

EM2 Hernandez's sentence of eight month's confinement, reduction to the lowest pay grade and a punitive discharge is unreasonably severe for a charge of assault consummated by battery that lasted mere moments and resulted in no physical injury. The government's sentencing case consisted of an unsworn statement by the victim and photographic and text message evidence EM2 Hernandez and the victim were friends before the incident. On the other hand, the defense offered unrebutted evidence that EM2 Hernandez was a superior Coast Guardsman and both his former girlfriend's statement and his own indicated full acceptance of responsibility and genuine contrition for his actions.

Such a severe punishment for a charge that carries one of the lightest maximum sentences in Appendix 12 of the Manual for Courts-Martial is anomalous. Given the military judge's comments concerning the withdrawn Article 120 charges and the sex offender registration that could result from them, the military judge unreasonably arrived at the sentence by considering

matters not relevant for sentencing under R.C.M. 1001. Consequently, this court should exercise its authority under Article 66 to affirm a more appropriate sentence.

Request for Relief

EM2 Hernandez requests this Court affirm only so much of the confinement sentence as extends to six months' confinement.

Conclusion

WHEREFORE, EM2 Hernandez requests this honorable Court grant his requests for relief as identified in the above Assignments of Error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 16 August 2017.

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