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	) 21 September 2017)) REPLY TO APPELLEE'S ANSWER) AND BRIEF AND MOTION FOR ORAL) ARGUMENT)) 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

Appellant, Electrician's Mate Second Class (EM2) Peter J. Hernandez, United States Coast Guard (USCG), through counsel, hereby replies to the United States' Answer of 15 September 2017 with regard to Assignment of Error I. With regard to the remaining assignment of error, Appellant Stands upon the arguments in his brief of 16 August 2017.

I.

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

The Government's Answer misapplies the law and fails to provide support for their position that Appellant waived the issue of multiplicity expressly or by operation of law when he pleaded guilty. In addition, its Answer incorrectly argues that the *Blockberger/Teters* elements test applies in this case.

1. Waiver or Forfeiture

The Government's position that Appellant waived the issue of multiplicity is both factually and legally unsupported. With respect to the first, the record of trial is devoid of an express multiplicity waiver. As noted in the Government's Answer, Appellant's pretrial agreement contained no waiver provision. Nor was the issue of multiplicity addressed during Appellant's guilty plea. The government points to no express waiver in the pretrial agreement or during the providence inquiry. Thus, factually both Appellant and Government agree that there was no express waiver of multiplicity by Appellant. The question of whether the issue was passively or effectively waived—forfeited—is a distinct question.

The Government cites *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997), for the proposition that "[a]n unconditional guilty plea ordinarily waives a multiplicity issue." Answer at 4. This is a misreading of *Lloyd*. To start, *Lloyd* addressed forfeiture, sometimes referred to as "passive waiver" rather than "express waiver." 46 M.J. at 22. Moreover, in *Lloyd*, C.A.A.F. rejected a bright-line rule that multiplicity issues are forfeited unless raised at trial and instead extended appellate review to all cases where there was a showing a facial duplicity. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). C.A.A.F. found that "the record of trial in a guilty-plea court-martial is a more than adequate basis from which to determine whether the offenses are duplicative." *Id*. As discussed fully in Appellant's previous brief, the record of trial in this case contains the facts that demonstrate the facial duplicity of the three specification of assault consummated by battery.

Similarly, the government's reliance on *Gladue* as authority for a finding waiver in this case is misplaced. C.A.A.F. was explicit in *Gladue* that "[t]his case is distinct from the cases

relied upon by Appellant [like *Lloyd*] because here Appellant's pretrial agreement expressly waived all waivable motions." *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). In the case currently before this Court, there was no waiver provision in the pre-trial agreement, nor was there a knowing voluntary waiver during EM3 Hernandez's guilty plea and providence inquiry. Consequently, this honorable Court must consider the substance of assigned error.

2. Inapplicability of the Blockberger/Teters Test

Notwithstanding the circuitous discussion of waiver contained in Government's Answer, both Appellant and Government agree that the facial duplicity of the charged specifications is determinative in whether the charges were multiplicious. However, the Government's Answer applies the incorrect analysis to whether the specifications are facially duplicative.

The Government's Answer applies the *Blockberger/Teters* analysis to this case and suggests the specifications are not multiplicious because each specification requires proof of a fact not required for the others. Both *Blockberger* and *Teters* were cases in which the respective courts considered whether it violated the double jeopardy protection to charge multiple offences for a single course of conduct. Justice Sutherland succinctly framed the question in the case thus: "whether, both sections being violated by the same act, the accused committed two offenses or only one." *Blockberger v. United States,* 284 U.S. 299, 304 (1932). Likewise, *Teters* considered whether the accused could be convicted of both larceny and forgery for the same act. *United States v. Teters,* 37 M.J. 370 (C.M.A. 1993).

A different analysis governs multiple specifications of the same offense. This distinction between the two types of multiplicity was most clearly articulated by the C.A.A.F. in *United States v. Nebloc,* where it distinguished between offenses that are continuous in character, and those that can be committed *uno ictu,* or in one blow. *United States v. Neblock*, 45 M.J. 191,

(C.A.A.F. 1996). In these cases, congressional intent with regard to the unit of the offense is determinative. *United States v. Flynn*, 28 M.J. 218, 221 (C.M.A. 1989). This doctrine long predates *Blockberger* was first enunciated in 1777 by Lord Mansfield in *Crepps v Durden*: "[i]f the Act of Parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law." *Crepps v Durden*, 98 E. R. 183 (1777); *see also Ex parte Snow* 120 U.S. 274 (1887).

With respect to assault consummated by battery under Article 128 of the Uniform Code of Military Justice, it is a settled question that blow-by-blow charging is impermissible. *See United States v. Morris*, 18 M.J. 450, 450 (C.M.A. 1984) *and United States v. Flynn*, 28 M.J. 218, 221 (C.M.A.1989). The Government chose Article 128 and is consequently limited by the unit of prosecution that accompanies it.

3. Inapplicability of Unreasonable Multiplication of Charges Analysis to Multiplicity

Multiplicity and unreasonable multiplication of charges are distinct doctrines. *United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012) The government's reliance on C.A.A.F.'s 2012 decision in *United States v. Campbell* is misplaced because the Court was analyzing a claim of unreasonable multiplication of charges. The analysis of whether there were "distinctly separate acts" in factor two of the *Quiroz* test is a different analysis from that in facial duplicity because, as discussed above, the facial duplicity analysis evaluates the course of conduct with reference with congressional intent with regard to the offense charged. Because multiplicity is a findings issue and unreasonable multiplication of charges arises at sentencing, precedents under one cannot be applied to the other. *Campbell*, 71 M.J. at 24. In claiming that the three instances of touching constituted a single assault consummated by battery Appellant is not making an unreasonable multiplication of charges argument and calling it multiplicity and Government's

Answer contends. Rather Appellant argues that it was impermissible to be punished for three violations of the statute where Congress intended only one.

Appellant requests oral argument on this assignment of error.

WHEREFORE, EM2 Hernandez requests this honorable Court merge the three specifications of the sole charge into a single specification.

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 21 September 2017.

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