IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	15 September 2017
	ANSWER TO APPELLANT'S ASSIGNMENT OF ERRORS ON BEHALF OF THE UNITED STATES
	Dkt. No. 1452 Case No. CGCMSP 249556 Panel Three
v.	
Peter J. HERNANDEZ, Electrician's Mate Second Class (E-5), U.S. Coast Guard, Appellant	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

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 15 of this honorable Court's Rules of Practice and Procedure.

STATEMENT OF THE CASE

Before a military judge alone, Appellant, Electrician's Mate Second Class (EM2) Peter J. Hernandez, was tried at a special court-martial convened by Commander, Coast Guard Pacific Area. On 30 January 2017, pursuant to a pre-trial agreement, the Appellant pleaded guilty to three specifications of assault consummated by battery under Article 128, U.C.M.J., 10 U.S.C. § 928 (2012). The Military Judge sentenced Appellant to reduction in pay-grade to E-1, eight months 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.

STATEMENT OF FACTS

On the evening of 19 September 2015, SK3 JC went to the Appellant's house in Honolulu, HI to sleep over. R. 90. The purpose for the sleep over was to watch the 49er's game with the Appellant early the next morning, prior to giving him a ride to the airport. R. 90. SK3 JC considered the Appellant to be her best friend and thought of him as a brother. R. 90. At the time, SK3 JC was aware that Appellant was in a relationship with a different individual. P.E. 1 at 1.

Before going to sleep, SK3 JC and Appellant went out for dinner followed by an evening of drinking, shooting pool and signing karaoke. R. 38, 90, 97. When they returned to the Appellant's house in the early morning hours of 20 September 2015, SK3 JC felt dizzy and wanted to sleep on the couch. P.E. 1 at 2. However, the Appellant assisted SK3 JC to a guest bedroom, turned off the lights, and closed the door at her request. P.E. 1 at 2. Without SK3 JC's knowledge, the Appellant remained in the room and removed his shirt and pants. P.E. 1 at 2. Then, without SK3 JC's consent, the Appellant positioned himself so that his pelvis was touching SK3 JC's leg above the knee. R. 38–39. SK3 JC felt threatened by this touching. P.E. 1 at 2. "Right around the same time," the Appellant touched SK3 JC's ribs and upper torso with his hands. R. 42. The Appellant placed his hands on SK3 JC's ribs and upper torso without her consent in order to pull down her strapless dress and expose her nude breasts. P.E. 1 at 3. SK3 JC felt uncomfortable and threatened by this touching. P.E. at 3. Then the Appellant "tried to make a pass" and moved his hands to touch SK3 JC on her hips. R. 46. The Appellant put his hands on SK3 JC's hips without her consent in order to pull down her underwear.

P.E. 1 at 3. At his point SK3 JC pushed the Appellant off of her and said "No, Pete, No. Stop. Stop." P.E. 1 at 3.

Pursuant to a pre-trial agreement, Appellant pleaded guilty to three specifications:

> 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.

Trial defense counsel never moved for appropriate relief alleging either multiplicity or unreasonable multiplication of charges as to the specifications of Charge I.[1] At trial, defense counsel offered no motions regarding unreasonable multiplication of charges as applied to findings. R. 31-32. After Appellant entered pleas, but before pre-sentencing evidence was presented, the Military Judge stated "I find that under R.C.M. 1003(c)(1)(C)(ii), that I do have an obligation to review whether or not I find that there is an unreasonable multiplication of charges [as applied to sentence]." R. 84. The Military Judge then stated that he had considered the five *Quiroz* factors and found no unreasonable multiplication of charges. R. 84. The Military Judge then addressed each of the *Quiroz* factors. R. 84-86. The Appellant was then given an opportunity to raise a motion in regard to this issue to which counsel replied "we do not wish to raise that motion, your honor." R. 86-87.

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

[1] The military judge stated "according to the 802 that was held this morning, civilian defense counsel stated

argument below.

I.

APPELLANT WAIVED THE ISSUE OF WHETHER THE SPECIFICATIONS UNDER CHARGE I WERE MULTIPLICIOUS.

Standard of Review

An unconditional guilty plea ordinarily waives a multiplicity issue. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). However, a claim founded in multiplicity will not be waived by a failure to make a timely motion to dismiss if the claim rises to the level of plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). "In order to prevail under a plain error analysis, [an appellant] must demonstrate that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *U.S. v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008) (citation omitted "An appellant may show plain error and overcome waiver by showing that the specifications are 'facially duplicative, that is factually the same.'" *Heryford*, 52 M.J. at 266 (citation and quotation omitted). "Whether two offenses are facially duplicative is a question of law . . . [reviewed] de novo." *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004) (citation omitted) S*ee also United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F.) (citation omitted) (stating the United States Court of Appeals for the Armed Forces conducts "a de novo review of multiplicity claims."). "Two offenses are not facially duplicative if each 'requires proof of a fact which the other does not.'" *Pauling* 60 M.J. at 94 (quotation omitted).

Discussion

Multiplicity is a violation of the Double Jeopardy Clause that occurs when "'a court, contrary to the intent of Congress, imposes multiple convictions and punishments

under different statutes for the same act or course of conduct.'" *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010) (quoting *Roderick,* 62 M.J. at 431) (emphasis added). Multiplicity also occurs "when 'charges for multiple violations *of the same statute* are predicated on arguably the same criminal conduct.'" *United States v. Forrester*, 76 M.J. 389 (C.A.A.F. 2017) (quoting *United States v. Woerner*, 709 F.3d 527, 539 (5th Cir. 2013) (emphasis in original).

In *U.S. v. Gladue*, the United States Court of Appeals for the Armed Forces stated "that even in cases in which an appellant failed to raise multiplicity at trial, he would be entitled to relief if the specifications were facially duplicative . . . [however] '[e]xpress waiver or voluntary consent . . . will foreclose even this limited form of inquiry.'"[2] 67 M.J. 311, 314 (C.A.A.F. 2009) (citing and quoting *Lloyd*, 46 M.J. at 23). In *Gladue,* the Appellant had a pretrial agreement in which he agreed to "waive all waivable motions," additionally no motions regarding multiplicity or unreasonable multiplication of charges were discussed at trial. In *U.S. v. Chin*, the United States Court of Appeals for the Armed Forces stated "[w]aiver at the trial level continues to preclude an appellant from raising the issue before either the CCA or this Court. And a 'waive all waivable motions' provision or unconditional guilty plea continues to serve as a factor for a CCA to weigh in determining whether to nonetheless disapprove a finding or sentence." 75 M.J. 220, 223 (C.A.A.F. 2016) (*citing Gladue*, 67 M.J. at 313-14).

The Appellant's pretrial agreement did not contain a "waive all waivable motions" provision and there was no express waiver regarding multiplicity at trial level.

[2] The United States Court of Appeals for the Armed Forces has stated "we see no reason why the same caveat regarding express waiver or consent [as applied to multiplicity] should not apply to the concept of unreasonable multiplication of charges, and therefore adopt it." *Gladue*, 67 M.J. at 314. Thus, factual duplicity is the standard for both multiplicity and unreasonable multiplication of charges.

Therefore, his unconditional guilty plea waived multiplicity unless the offenses were "'facially duplicative, that is, factually the same." *Pauling*, 60 M.J. at 94 (quotation omitted).

Specifications are not facially duplicative when each requires proof of a fact not required for the others. *United States v. Campbell*, 68 M.J. 217, 219-220 (C.A.A.F. 2009). The discussion of R.C.M. 907(b)(3)(B) states "[t]o determine if two charges are multiplicious, the practitioner should first determine whether they are based on separate acts. If so, the charges are not multiplicious because separate acts may be charged and punished separately." Contrary to Appellant's argument, the question of whether acts are so united in time, circumstance, and impulse in regard to a single subject "describe the sort of factors found in *Quiroz* for determining when the charges, sentencing exposure, or both, unduly exaggerate an accused's criminality." *United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012). Thus, Appellant is basically making an unreasonable multiplication of charges argument and calling it multiplicity.

The fact that the three specifications all derive from the same statute does not make them facially duplicative, per se. *See Forrester*, 76 M.J. 389 (holding that four specifications of Article 134 UCMJ, 10 U.S.C. § 934 (2012) were not facially duplicative, and "represent[ed] four separate criminal acts under the relevant statute, rather than one criminal act charged four times."). Rather, "[w]hether specifications are facially duplicative is determined by reviewing the language of the specifications and 'facts apparent on the face of the record.'" *Heryford*, 52 M.J. at 266 (quoting *Lloyd*, 46 M.J. at 24). An examination of the specifications and record here shows that each specification constituted a distinct action, and each "'requir[ed] proof of a fact

[specifically offensive touching] which the other[s] [did] not.'" *Pauling*, 60 M.J. at 94 (quotation omitted).

The Appellant provided proof of the distinct assaults in the form of his guilty plea which is "the strongest form proof known to the law." *U.S. v. Hansen*, 59 M.J. 410, 414 (C.A.A.F. 2004) (citing *U.S. v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969)). With regard to Charge I, Specification 1, the Appellant stipulated to touching SK JC's leg with his pelvis, more specifically his penis made contact with her inner thigh. P.E. 1 at 2. Regarding Charge I, Specification 2, the Appellant stipulated to touching SK3 JC's ribs and upper torso with his hands in order to pull down her top and expose her nude breasts. P.E. 1 at 3. Finally regarding Charge I, Specification 3, the Appellant stipulated to touching SK3 JC's hips with his hands, in order to remove SK3 JC's underware. P.E. 1 at 3. After each of these distinct actions, the Appellant could have ceased, yet he continued.

The Appellant made no timely motion to dismiss based on multiplicity. However he stipulated that he committed each of the specifications, and pleaded guilty. Because Appellant now fails to show that the specifications were facially duplicative his waiver cannot be overcome.

II.

APPELLANT WAIVED THE ISSUE OF WHETHER THE SPECIFICATIONS UNDER CHARGE I AMOUNTED TO AN UNREASONABLE MULTIPLICATION OF CHARGES AND THE SPECIFICATIONS DID NOT AMOUNT TO AN UNREASONABLE MULTIPLICATION.

Standard of Review

When not waived "'[u]nreasonable multiplication of charges [are] reviewed for an abuse of discretion.'" *Pauling* 60 M.J. at 95 (quotation omitted). "[T]he prohibition

against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

Discussion

A. Appellant waived his claim of unreasonable multiplication of charges

"Although multiplicity and unreasonable multiplication of charges are distinct concepts, [the Court of Appeals for the Armed Forces] has applied multiplicity waiver principles to the concept of unreasonable multiplication of charges." *United States v. Bailey*, ACM S32375, 2017 WL 2422845, at *2 (A.F. Crim. App. May 22, 2017) (unpublished) (citing *Campbell*, 71 M.J. at 24; *Gladu*e, 67 M.J. at 313-14). "'A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.'" *Gladue*, 67 M.J. at 314 (quoting *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). That includes double jeopardy, the basis of the multiplicity objection. *Id*. "[B]ecause an accused may waive claims related to the constitutional principle of multiplicity . . . it necessarily follows that he may also waive the non-constitutional, presidentially-created protection from unreasonably-multiplied charges." *Bailey*, ACM S32375, 2017 WL 2422845, at *2.

R.C.M. 910(j) provides a bright-line rule that an unconditional guilty plea "which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made." "Objections that do not relate to factual issues of guilt are not covered by this bright-line rule, but the general principle still applies: An unconditional guilty

plea generally 'waives all defects which are neither jurisdictional nor a deprivation of due process of law.'" *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) (quotation omitted). The Army Court of Criminal Appeals has repeatedly interpreted *Schweitzer* to mean that an unconditional guilty plea absent facially duplicative specifications waives any issue of unreasonable multiplication of charges. *See U.S. v. Moore*, ARMY 20150007, 2017 WL 437629, at *1 (Army Crim. App. Jan. 31, 2017), *review denied*, (App. Armed Forces June 7, 2017)*; U.S. v. Watford*, ARMY 20150549, 2017 WL 416780, at *1 (Army Crim. App. Jan. 30, 2017), *review granted, decision aff'd*, (App. Armed Forces May 22, 2017)*; U.S. v. Russell*, ARMY 20150397, 2016 WL 6875881, at *1 (Army Crim. App. Nov. 18, 2016), *review denied*, (App. Armed Forces Jan. 30, 2017). On the other hand, the United States Air Force Court of Criminal Appeals has not considered an unconditional plea dispositive on the issue of waiver of unreasonable multiplication of charges and has instead applied forfeiture in guilty-plea cases absent affirmative waiver of the issue at trial. *Id.* at 2. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Gladue*, 67 M.J. at 313 (citation and quotation omitted). The United States Air Force Court of Criminal Appeals holds that "[i]f [unreasonable multiplication of charges] is waived [at trial], the claim 'is extinguished and may not be raised on appeal' unless the challenged specifications are facially duplicative." *Hardy*, ACM 38937, 2017 WL 2888830, at *3 (quoting *Gladue*, 67 M.J. at 313).

In this case, not only did Appellant waive any claim of unreasonable multiplication of charges by his unconditionally guilty plea, but he also did so by stating

at trial that he had no motions related to the issue. The transcript reads:

> MJ: And your counsel had stated that, in discussing with his co-counsel, Lieutenant Stutin, that there may be an issue having to do with what used to be called multiplicious for sentencing, and what is now, based on current Court of Appeals for Armed Forces case law, is just referred to as unreasonable multiplication of charges. In discussing unreasonable multiplication of charges, one of the five factors that is considered is whether or not you object at trial. So, you should have had, we, between the 802, when we were coming on the record, there was a fifteen minute break, I, I believe that you may have discussed this with your counsel. Was this issue raised with your counsel?
>
> ACC: Yes, yes we discussed it, Your Honor.
>
> MJ: Okay. So, as I said before, in order to consider some motions, they have to be entered before pleas are entered, so I'm, I'm giving you, and it's been agreed to by the defense, by trial counsel, and so if you wish to withdraw your plea at this point, and enter a motion, we, we can do that. But at this point, do you have any motions you wish the Court to consider? Counsel, you can, you can answer on behalf of your client.
>
> DC: Okay. All right. Your Honor, we do not have any motions.

R. 30-31. After the Military Judge discussed *Campbell* stating "unreasonable multiplication of charges as applied to sentence" encompasses what had previously been described as "multiplicity in sentencing." R. 31. The transcript continues:

> MJ: So, counsel, let's address this issue again, if the findings are accepted, and if we reach the sentencing phase of the trial. 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 *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 the 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. Government counsel, any objection to that course of action?
>
> TC: No, Your Honor.
>
> MJ: Defense counsel, any objection?

CDC: No objection, Your Honor.

R. 31-32. Then following the finding of guilty and after considering the *Quiroz* factors the Military Judge addressed the issue of unreasonable multiplication of charges again:

> MJ: I also said when we discussed the motions as they applied to findings that the government, the defense would have another opportunity to make a motion at his point in regards to unreasonable multiplication of charges as it applies to sentencing. Petty Officer Hernandez, do you wish at this point to raise a motion in regards to unreasonable multiplication of charges as it applies to sentencing? And counsel, you may answer on his behalf.
>
> CDC: We do not wish to raise that motion, Your Honor.

R. 86-87.

The transcript shows that the Military Judge provided the Appellant two opportunities to raise a motion alleging unreasonable multiplication of charges, and in each instance the Appellant intentionally chose not to do so.[3] This is similar to *Bailey*, where the United States Air Force Court of Criminal Appeals held that an "unconditional guilty plea, coupled with trial defense counsel's explicit withdrawal of a request for a bill of particulars, waived appellate consideration of [unreasonable multiplication of charges]." ACM S32375, 2017 WL 2422845, at *2 *Compare with United States v. Dexter*, No. 1436 (C.G.Ct.Crim.App. 2017) (unpublished) (holding that unreasonable multiplication of charges was not waived when after findings the defense took an affirmative position, invoking unreasonable multiplication of charge).

Under existing United States Court of Appeals for the Armed Forces precedent, as well as more specific precedent of the Army and Air Force Courts of Criminal Appeals regarding the impact of a guilty plea on waiver of an allegation of unreasonable

[3] In his clemency submission, Appellant alleged that the military judge committed legal error in failing to merge his specifications for sentencing. Appellant's Clemency Request of 4 April 2017.

multiplication of charges, in the circumstances in this case, appellant's claim is waived because the issue of unreasonable multiplication of charges was affirmatively waived at the trial level and further the specifications are not facially duplicative. *See supra* Part I.

B. The Military Judge did not abuse his discretion in determining the Quiroz factors

Even if this Court were to find no waiver, Appellant would still not be entitled to relief because the military judge did not err in finding no unreasonable multiplication of charges as applied to sentence. After a colloquy between counsel and the Military Judge in an R.C.M. 802 session, later summarized on the record, the Military Judge determined he would analyze the specifications under Charge I under the factors from *United States v. Quiroz, supra.* Appellant asserts the Military Judge's evaluation of the *Quiroz* factors was erroneous. R. 84. "'[W]hen judicial action is taken in a discretionary manner, 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 weighing of the relevant factors.'" *United States v. Houser*, 36 M.J. 392, 397-98 (C.M.A. 1993) (quotation omitted). Regardless if applied to findings or to sentence, the following non-exhaustive factors are considered to determine if an unreasonable multiplication of charges has occurred:

> (1) Did the [appellant] 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?;
>
> (5) Is there any evidence of prosecutorial overreach or abuse in drafting of

the charges?

Quiroz 55 M.J. at 338 (citation omitted). Ultimately "the application of the *Quiroz* factors involves a reasonableness determination[.]" *Anderson*, 68 M.J. at 386.

After Appellant entered his pleas, but before presentencing evidence was presented, the Military Judge stated "I find that under R.C.M. 1003(c)(1)(C)(ii), that I do have an obligation to review whether or not I find that there is an unreasonable multiplication of charges [as applied to sentence]." R. 84. The Military Judge considered the *Quiroz* factors prior to addressing them on the record. R. 84. In regards to Factors (1), (3), and (5) the Military Judge simply announced his findings. R. 84-86. Discussing Factor (2), the Military Judge discussed each Specification as stipulated to by the Appellant, and found they "were prudently drafted, and [that] they [did] address different acts of criminal misconduct." R. 85. In considering Factor (4), the Military Judge discussed Appellant Exhibit X, pointing out "that the accused entered freely and intelligently into this pretrial agreement, and . . . that the accused is gaining a benefit of having these charges considered at a special court-martial, also particularly considering the accused was facing a general court-martial[.]" R. 86. The original charges noted on Appellant Exhibit X, were dismissed without prejudice at the conclusion of sentencing. R. 78.

1. The appellant did not object at trial that there was an unreasonable multiplication of specifications

Prior to accepting the Stipulation of Fact, the Military Judge provided the Appellant an opportunity to object based on unreasonable multiplication of charges as applied to findings, while also informing him of the potential "to address the issue of unreasonable multiplication of charges at the sentencing phase of trial." R. 31-32. At that

time the Appellant did "not have any motions." R. 31. After finding the appellant guilty, the Military Judge reviewing for an unreasonable multiplication of charges under R.C.M. 1003(c)(1)(C)(ii); specifically found that the "accused [was] not objecting." R. 84. Of note, the Appellant offered no objection to this finding. Then after presenting his findings on all the *Quiroz* factors, the judge again provided the appellant an opportunity to make a motion regarding an unreasonable multiplication of charges as applied to sentence. R. 86-87. In response, the Appellant stated "[w]e do not wish to raise that motion." R. 87. Due to the lack of objection at trial, this factor should be weighed against the Appellant.

2. Each specification was aimed at a distinctly separate criminal act

Determining if the specifications addressed distinctly separate criminal acts requires "'the allowable unit of prosecution . . . *actus reus* of the defendant'" to be identified. *Forrester*, 76 M.J. 389 (quoting *United States v. Plank*, 493 F.3d 501 (5th Cir. 2007). *Actus reus* is defined as the "wrongful deed that comprises the physical components of a crime[.]" ACTUS REUS, Black's Law Dictionary (10th ed. 2014).

The facts to which Appellant stipulated in this case illustrate a series of distinct assaults by Appellant P.E. 1 at 2-3. In the specific circumstances of the acts committed by Appellant, the Military Judge did not abuse his discretion in finding that "although, as described in the stipulation of fact, and as described by the accused in response to his providence inquiry, the misconduct which makes up all three specifications happened on the same evening, and within what's most likely minutes of each other, that the way the specifications are written for . . . this charge, addresses separate incidents of misconduct." R. 85.

3. The number of specifications did not misrepresent or exaggerate the appellant's criminality.

While the Military Judge did not extensively analyze on the record, it is a reasonable conclusion that when considering this factor he again looked at the specifications as described in the stipulation of fact, and as described by the accused in response to his providence inquiry. R. 85. Because the abuse of discretion standard is a strict one, calling for more than a mere difference of opinion, the challenged action must be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." *United States v. Miller*, 46 MJ 63, 65 (1997); *United States v. Travers*, 25 MJ 61, 62 (1987). It was not clearly erroneous for the Military Judge to find the three specifications constituted three distinct forms of offensive touching. *See U.S. v. Clarke*, 74 M.J. 627, 628 (Army Crim. App. 2015), *review denied*, (citing *United States v. Morris*, 18 M.J. 450, 451 (C.M.A. 1984) (stating that "there may be valid reasons for separately charging individual blows" in a single altercation.). Therefore, it was reasonable for the Military Judge to find that the level of criminality and punitive exposure expressed across three specifications of assault consummated by battery was appropriate.

4. The number of specifications did not unreasonably increase the appellant's punitive exposure

The Military Judge considered that a general court-martial could result in "more confinement and [the Appellant] potentially having to register as a sex offender." R. 86. Additionally, the Military Judge considered the fact that "the accused entered freely and intelligently into [the] pretrial agreement." R. 86. Therefore the punitive exposure as determined by the jurisdictional forum, and as agreed to by the Appellant, had already been limited from 18 months to 12 months when considering the Charge and its specifications before the special court-martial alone, and not the other charges and

specifications that had previously been referred to general court-martial. Because, as discussed above, the specifications address separate incidents of misconduct, it was entirely reasonable to expose the Appellant to 12 months of confinement at a special court-martial. This is especially true considering Appellant would have faced a maximum of 18 months of confinement at a general court-martial, which he avoided by agreeing to plead guilty to this charge at a special court-martial.

5. There is no evidence of prosecutorial overreach or abuse in drafting of the specifications

The Military Judge provides no analysis regarding this factor. R. 86. However, it is reasonable to weigh this factor in favor of the Government, considering the Appellant entered a pretrial agreement based on the specifications as drafted. The Military Judge did not abuse his discretion when considering the *Quiroz* factors. It is reasonable to sentence Appellant for three specifications that represent three distinctly separate acts of misconduct.

III.

WHETHER EM2 HERNANDEZ'S SENTENCE WAS APPROPRIATE IN LIGHT OF HIS GUILTY PLEA FOR THREE DISTINCT CRIMINAL ACTS.

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). And, Courts of Criminal Appeals "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." Article 66(c), U.C.M.J.; 10 U.S.C. §866(c). In making this determination, courts consider the entire record, the character of the offender, and the

nature of the offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Discussion

"When the accused is found guilty of two or more offenses, the maximum punishment may be imposed for each separate offense." R.C.M. 1003(c)(1)(C). In, sentencing, the court presumes that the military judge knew and correctly applied the law absent clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007); *United States v. Mason,* 45 M.J. 483, 484 (C.A.A.F. 1997). A court-martial may lawfully impose a sentence it considered fair and just within the limits prescribed by the Code. *See Untied States v. Turner*, 14 C.M.A. 435, 437 (C.M.A. 1964); R.C.M. 1002 (providing that "a court-martial may adjudge *any punishment authorized* in this Manual, including the maximum punishment, or may adjudge a sentence of no punishment.") (emphasis added).

The Military Judge sentenced Appellant to confinement for eight months, reduction to E-1, and a bad conduct discharge. R. 127. Without jurisdictional limitations, per Appendix 12 of the Manual for Courts-Martial each specification of assault consummated by battery allows a maximum confinement of six months. Based on jurisdictional limitations, the maximum authorized sentence in this case includes confinement for up to a year, a bad conduct discharge, and a reduction to E-1. R. 52, 55. Thus Appellant received a lawful sentence that only included two-thirds of the maximum available confinement. The military judge's sentence was well within the realm of authorized punishment at Appellant's special court-martial.[4]

[4] If the Appellant is successful in his claim of unreasonable multiplication of charges, the Government concedes that the sentence would need to be reassessed.

This was not especially severe given the nature of the offenses. Appellant admitted he made skin-to-skin contact between his penis and SK3 JC's leg without her consent. P.E. 1 at 2. He also admitted that he pulled down her dress to expose her bare breasts, also without her consent. P.E. 1 at 3. Finally, he admitted he removed her underwear without her consent. P.E. 1 at 3. The victim read an unsworn statement stating she felt "hurt" and "betrayed," after being attacked by a person she considered her "family." R. 90-1, A.E. XI. She stated that she has lived in fear since the incident and currently seeks professional psychological help as a result. AE XI.

Appellant submitted service records showing above-average performance, but no distinguishing acts of heroism or valor. D.E. A-C. He submitted a single character statement from a former girlfriend, stating Appellant was sorry for his actions and has taken positive steps in his life. D.E. D. Two former supervisors submitted statements attesting to Appellant's good work performance, but one of the supervisors admitted that he "may never know the full story of what happened." D.E. D.

The assaults committed by the Appellant were in the form of offensive touching. The time frame in which these different forms of unwanted touching occurred is irrelevant, as is the lack of physical injury. The unsworn statement of the victim clearly showed that these assaults have had and will continue to have a serious psychological impact on her. R. 90 – 93. Any evidence of Appellant's above-average performance in the Coast Guard does not mitigate the severe harm he caused his shipmate.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this honorable Court affirm the findings and sentence.

Respectfully submitted,

DATE: 15 September 2017

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 15 September 2017.

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DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=OHLEY.TERESA.ZAMBRANO.1266212603
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