IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	26 December 2018
	ANSWER TO APPELLANT'S ASSIGNMENT OF ERRORS ON BEHALF OF THE UNITED STATES
v.	
	Dkt. No. 1462 CGCMG 0366 Before McClelland, Brubaker, Hamilton
Christopher E. OLSEN, Machinery Technician Third Class (E-4), U.S. Coast Guard, Appellant	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

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, Machinery Technician Third Class Christopher E. Olsen, was tried at a general court-martial convened by Commander, First Coast Guard District on 16 March 2018. Pursuant to a pretrial agreement, Appellant was found guilty, in accordance with his pleas of: specification one of Charge I, the attempted violation of a lawful general order under Article 80, U.C.M.J., 10 U.S.C. § 880 (2016); the sole specification of Charge II, the violation of a lawful general order under Article 92, U.C.M.J., 10 U.S.C. § 892 (2016); and two specifications of the Additional Charge,

the violation of a general order under Article 92, U.C.M.J., 10 U.S.C. § 892 (2016). R. at 254.

Appellant plead not guilty to all specifications of Charge III, viewing of child pornography under Article 134, U.C.M.J., 10 U.S.C. § 934 (2016); and not guilty to specification two of Charge I, the attempted violation of a general order under Article 80, U.C.M.J., 10 U.S.C. § 880 (2016). A.E. VI at 1-2. These charges and specifications were dismissed by the convening authority without prejudice, to ripen into prejudice upon completion of appellate review. R. at 240, 254; A.E. VI.

The Military Judge sentenced Appellant "to be reduced to the grade of E-1, to be confined for ninety days and to be discharged from the service with a bad conduct discharge." R. at 436. The convening authority approved the findings as adjudged, and with exception of the bad-conduct discharge, ordered it executed on 26 June 2018. R. at 7. This Court has jurisdiction over this case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2016).

STATEMENT OF FACTS

From on or about 21 October 2015 to on or about 16 March 2018, Appellant was assigned to Sector Field Office (SFO) Moriches, East Moriches, New York. At that time, COMDTINST 5375.1D, a lawful general order, was in effect which prohibited the "[u]se of government office equipment or services to intentionally and knowingly view, download, store, display, transmit, or copy any materials that are sexually explicit or are predominantly sexually oriented." P.E. 1 at 1.

Charge I, Specification 1: Violation of Article 80

From on or about 6 June 2016 to on or about 29 June 2016, Appellant made multiple attempts to view pornography on a Coast Guard workstation located in SFO Moriches' MK Shop Office. P.E. 1 at 2. During the work days and while on duty, Appellant attempted to view pornography on sexually explicit websites by "entering the URLs [uniform resource locator, or web address] of known pornographic websites, as well as entering search terms into a search browser and clicking on subsequent links." R. at 194. Appellant was blocked from viewing these sites by Coast Guard cybersecurity firewalls. R. at 195. Upon being blocked, Appellant sometimes attempted to circumvent Coast Guard cyber security using the "Tor2Web" browser anonymity program. *Id.*; P.E. 1 at 2. Appellant stipulated his actions were "more than merely a preparatory step" to violate a lawful general order. P.E. 1 at 3. Appellant also stipulated that these actions were attempts to "intentionally and wrongfully violate lawful general order COMDTINST 5375.1D." P.E. 1 at 2.

Charge II, Specification 1: Violation of Article 92

From on or about 16 November 2015 to on or about 29 June 2016, Appellant viewed sexually explicit or predominantly sexual images and videos using a secured Coast Guard workstation. P.E. 1 at 3. During this time, Appellant searched numerous sexually explicit websites. *Id.* Appellant stipulated that by viewing these images he "intentionally and wrongfully violated COMDTINST 5375.1D." *Id.*

Additional Charge, Specification 1 and 2: Violation of Article 92

On or about 18 August 2016, and also on or about 30 August 2016 to on or about 31 August 2016, while assigned to SFO Moriches, Appellant viewed numerous sexually

explicit or predominantly sexually oriented images and videos on a Coast Guard workstation. P.E. 1 at 3. Appellant stipulated that by viewing these images he "intentionally and wrongfully violated COMDTINST 5375.1D." *Id.*

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

I.

APPELLANT'S UNCONDITIONAL GUILTY PLEA WAIVED THE ISSUE OF WHETHER THE SPECIFICATIONS UNDER CHARGE I AND II 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) (citation and quotation omitted). "An appellant may show plain error and overcome waiver by showing that the specifications are 'facially duplicative, that is factually the same.'" *Id.* (citation 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).

Discussion

Contrary to Appellant's argument, his guilty plea unconditionally waived the multiplicity issue, and the waiver cannot be overcome because the specifications under Charges I and II were not facially duplicative. The record shows that neither Appellant

nor the Military Judge raised the issue of multiplicity. R. at 259-60. Rather, a different issue, unreasonable multiplication of charges (UMC), was argued.[1]

Directly after findings were announced, Defense Counsel stated "it might be a good time to discuss merger for the UMC multiplicity issues since [the Military Judge] just got to the findings . . . just in case that they need to be adjusted." R. at 254. The Military Judge agreed stating, "I wanted to hear your thoughts on, for findings and sentencing, regarding whether this would constitute an unreasonable multiplication of charges." R. at 255. Trial Counsel and Defense Counsel subsequently argued the issue of "unreasonable multiplication of charges for purposes of findings." R. at 255-258. Defense Counsel used the term multiplicity only when arguing whether "each charge and specification was aimed at distinctly separate criminal acts" [2] specifically in order to prove one of the *Quiroz* factors. R. at 256 – 257. Defense Counsel stated "our position is that it could properly be merged for findings, the attempt, into the 92, and it should be. First because of multiplicity[.]" R. at 256. Thus, Appellant neither raised nor preserved the specific issue of multiplicity for double jeopardy purposes. And, while the Military Judge addressed both "multiplicity" and "unreasonable multiplication of charges for findings," the Government contends that the Defense Counsel orated his position with regards to unreasonable multiplication of charges, not multiplicity. R. at 258 – 259.

Assuming *arguendo* that Appellant had in fact placed objections on the record regarding multiplicity, the exchange did not affect the waiver created by his guilty plea.

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[1] The record indicates that the "potential for going through the *Quiroz* factors for merger . . . for both findings and sentencing" was first mentioned at a telephonic conference held pursuant to Rule for Courts-Martial 802, on March 13, 2018. R. at 178.

[2] *See United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (endorsing five factors for courts to consider when ruling on a claim of unreasonable multiplication of charges; one of which is whether each charge addresses a different act).

In *Pauling*, the "[a]ppellant entered an unconditional plea of guilty and persisted with that plea after the military judge denied the defense's multiplicity motion." 60 M.J. at 94. Here, the exchange in question occurred after findings; therefore, Appellant failed to make a timely motion.[3] Additionally, the Military Judge instructed Appellant that he "may request to withdraw [his] guilty plea [at any time] before the sentence is announced." R. at 230. Appellant chose not to make a motion to withdrawal. Thus, "[a]ppellant had the opportunity to challenge the theory of the specifications and attempt to show that the [attempts to violate a lawful general order and the actual violations of a lawful general order] amounted to only one offense. He 'chose not to and hence relinquished that entitlement' in the absence of the specifications being facially duplicative." *United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009) (citation omitted).

The Government notes that Appellant does not argue that an inadequate providence inquiry occurred in this case.[4] Rather, Appellant alleges ambiguity between Charge I and Charge II. Appellant argues "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[,]" and thus the charges fail under the *Blockburger* test[5]

[3] The record does not indicate that the distinct issue of multiplicity was discussed at any time prior to findings. *See supra* n. 1.
[4] The Court of Appeals for the Armed Forces "limited case law [addressing the factual basis of a plea] typically has arisen in the context of determining whether a military judge complied with [the] mandate to solicit sufficient detail about the underlying facts of an offense." *United States v. Price*, 76 M.J. 136, 138 (C.A.A.F. 2017). During providence inquiries, military judges have an affirmative duty "to conduct a detailed inquiry into the offenses charged, the accused's understanding of the elements of each offense, the accused's conduct, and the accused's willingness to plead guilty." *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F 2003) (citing to *United States v. Care*, 40 C.M.R. 247, 250 (C.M.A. 1969)).
[5] *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (stating "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.").

because Charge I is really recounting a continuing course of conduct of that acts charged under Charge II. Appellant's Brief at 16. Appellant had the opportunity to raise this issue and argue what these "strong inferences" might be at trial but did not do so, thus waiving this argument.[6]

"Two offenses are not facially duplicative if each requires proof of a fact which the other does not." *Pauling,* 60 M.J. 91, 94 (C.A.A.F. 2004) (citation omitted). Per the Stipulation of Fact, Charge I states that from on or about 6 June 2016 to on or about 29 June 2016, Appellant attempted to view pornography on a Coast Guard workstation from either websites or through the use of search terms such as: "katka cum like crazy;" "jizzday.com;" "photo-Anal-Ass-Hardcore;" "Orgy;" "Five Way Fucking;" "The Perfect Threesome;" "sex videos gif;" "yogapantsfuck;" "porn;" and "tits university." P.E. 1 at 2. These attempts were thwarted by the Coast Guard firewall. R. at 195. On some occasions, Appellant attempted to bypass this firewall using technology that "makes it harder to track your actions" but was also unsuccessful. *Id.* Per the Stipulation of Fact, Charge II recites that from on or about 16 November 2015 to on or about 29 June 2016, Appellant used his Coast Guard workstation to search for and view pornographic images from either websites or through the use search terms, including but not limited to: "teen porn;" "lesbian-sex;" "Next-Door-Nikki-takes-of-underpants;" Next-Door-Nikki-and-Misty-kiss-and-touch;" "youjizz.com;" "big-bouncing-tits;" "playboy.tv;" "pornhub.com;" and "lushstories.com." P.E. 1 at 3.

[6] *See Campbell*, 68 M.J. at 219 (quoting *United States v. Broce*, 488 U.S. 563, 570 (1989) (stating "'[j]ust as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does as accused who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes.").

The Court of Appeals for the Armed Forces in *Heryford*, unequivocally required that charges be "factually the same" in order to be considered "facially duplicative." 52 M.J. at 266. "Whether specifications are facially duplicative is determined by reviewing the language of the specifications and facts apparent on the face of the record." *Id.* (internal quotations and citation omitted). Here, the facts established by Appellant's stipulation of fact make clear that the violations outlined in Charge I and Charge II were based on separate search terms or websites across a different, but partially overlapping, timeframe and recounts the different distinct actions needed to make those specific searches. P.E. 1 at 2-3. No search terms or websites that Appellant described in the Stipulation as to Charge I, are repeated in the search terms or websites listed in the Stipulation for Charge II. *Id.* Thus, nothing on the record indicates that the charges are facially duplicative.

Charge I and II are also based upon different statutes. Appellant claims that "Charge I and Charge II violate multiplicity because both occurred during a continuous-course-of-conduct." Appellant's Brief at 16. However, the analysis for a continuous course-of-action offense, such as an Article 128, U.C.M.J. offense, would be inapplicable here, as this is not a "single-statute case." *See United States v. Hernandez*, No. 1452 (C.G. Ct. Crim. App. 31 Oct. 2018) (citations omitted). [7] "Courts assess single-act/multiple-statutes cases 'using the *Blockburger/Teters* analysis.' Thus, unless statutory intent is clear, 'where the same act or transaction constitutes a violation of two distinct

[7] The Government acknowledges that in certain circumstances an attempt may be considered a lesser included offense of a completed offense. The Government offers no position on whether a case with an offense completed after first committing a lesser included attempt offense would be analyzed under the "single-statute case" framework. Here, the record does not establish that the Charge I acts were necessarily inherent in the course of accomplishing Charge II. Thus, a "single-statute case" framework (i.e. course-of-action analysis) would be inappropriate.

statutory provisions, the test . . . is whether each provision requires proof of a fact which the other does not." *Id*. For the same reason the charges are not facially duplicative, they survive this analysis.[8] When violating Charge I (Article 80) Appellant entered no search terms or websites that were repeated when Appellant violated Charge II (Article 92). P.E. 1 at 2-3. Therefore, Appellant's multiplicity claim is without merit and the charges should be affirmed.

II.

CHARGE I AND CHARGE II WERE NOT AN UNREASONABLE MULTIPLICATION OF CHARGES.

Standard of Review

The Court of Appeals for the Armed Forces has "held that when an appellant has forfeited an issue, we may review the issue for plain error, but when an appellant has waived an issue, we cannot review it at all." *United States v. Hardy*, 77 M.J. 438, 440. An unconditional guilty plea waives the issue of unreasonable multiplication of charges. *Id.* at 442. "As a practical matter, a UMC objection must be raised before the accused enters a guilty plea because the objection may affect the maximum sentence that the court-martial may impose." *Id*. Here, Appellant raised the issue of unreasonable multiplication of charges at a Rule for Courts-Martial 802 conference (802), three days before the military judge accepted his guilty plea. R. at 178. However, at trial when the Military Judge asked Trial Counsel "what do you calculate to be the maximum punishment authorized in this case based solely on the Accused' guilty plea," Trial

[8] The Military Judge acknowledged that the charges required proof of distinct facts stating "[t]hose are two distinct acts, two distinct crimes, based on whether he was successful in either getting lucky with a URL or he had knowledge of what would work and what would not work. He was successful during the greater time frame in actually viewing pornography." R. at 259.

Counsel responded "eight years confinement." R. at 220. This calculation equates to the maximum punishment for four violations of Article 92, U.C.M.J., 10 U.S.C. § 892 (2016).[9] Defense Counsel agreed with this calculation.[10] *Id.* However, after findings but before sentencing, the Military Judge allowed arguments concerning whether there was unreasonable multiplication of charges "just in case that they need to be adjusted." R. at 254. The Government contends that the discussion at the 802 prior to trial that was continued after findings has no impact on the unreasonable multiplication of charges waiver created by the guilty plea.

However, considering that, "*Quiroz* is about how a CCA may exercise its special power under Article 66(c), UCMJ, to revise a case notwithstanding the failure to preserve the objection at trial" the following analysis is provided. *Hardy*, 77 M.J. at 442. When not waived "[u]nreasonable multiplication of charges [are] reviewed for an abuse of discretion." *Pauling,* 60 M.J. at 95. "'[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 an error in judgment in the conclusion it reached upon weighing the relevant factors.'" *United States v. Houser*, 36 M.J. 392, 397-98 (C.M.A. 1993) (quotation omitted).

Discussion

After Appellant entered his pleas, but before presentencing evidence was presented, the Military Judge addressed the issue of unreasonable multiplication of

[9] *See* Appendix 12 of the Manual for Courts-Martial United States (2016 Edition).
[10] *See Hardy*, 77 M.J. at 442 (stating "[u]nder R.C.M. 910(c)(1), before a military judge accepts a guilty plea, the military judge must inform the accused of the 'maximum possible penalty provided by law' and 'determine that the accused understands.' The military judge cannot perform this duty accurately if a UMC objection later will result in a merger of specifications.").

charges. *See* R. at 256. Once Trial Counsel and Defense Counsel presented arguments, the Military Judge ruled that Charge I and Charge II "do not result in an unreasonable multiplication [of] charge[s] for findings." R. at 261. Appellant is not entitled to relief because the Military Judge's finding was not an error. [11]

"[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 consequence of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *Quiroz*, 55 M.J. at 338. The following non-exclusive 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 specifications?;

(2) Is each charge and specification aimed at distinctly separate criminal acts?;

(3) Does the number of the 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).

1. Appellant did not object at trial that there was an unreasonable multiplication of charges.

[11] Appellant cites to *United States v. Caulfield*, 72 M.J. 690 (C.G. Ct. Crim. App. 2013) and *United States v. Sidebottom*, 54 M.J. 928 (C.G. Ct. Crim. App. 2001) as relevant examples of unreasonable multiplication of charges. Appellant's Brief at 18. However, in *Caulfield*, the charges in question both involved simply the "possession of Oxycodone" unlike the specifically enumerated, different pornographic websites and search terms outlined in the stipulation regarding Charge I and Charge II. And, unlike here, *Sidebottom* involved the charging of the *same activity* under different articles.

The "*potential* for going through the *Quiroz* factors for merger . . . for both findings and sentencing" was first mentioned at a telephonic 802, on March 13, 2018. R. at 178. (emphasis added). However, at trial when asked if he was "objecting to this as an unreasonable multiplication of charge" Defense Counsel stated "I don't think based upon the Agreement, the PTA, that we can [object] . . . because we've agreed to enter pleas." R. at 256. When presenting his findings, the Military Judge stated, "I was the one who brought [unreasonable multiplication of charges] up, Defense Counsel is not objecting at trial, so that cuts in favor of the government." R. at 260.

2. Each charge was aimed at a distinctly criminal act.

Appellant's argument that the charges all cover one continuous criminal act of viewing pornography on a government computer is not supported by the record. The facts to which Appellant stipulated confirm that the violations outlined in Charge I and Charge II were based on separate search terms or websites across a different, albeit partially overlapping timeframe. P.E. 1 at 2-3. Appellant admitted to the different distinct actions needed to make those specific searches. *Id*.

3. The number of charges did not misrepresent or exaggerate Appellant's criminality.

Appellant's actions involved accessing numerous websites in violation of COMDTINST 5375.1D. R. at 198, 305-6. The Military Judge noted "the government could have stepped out every time there was an attempt in a different specification." R. at 260-261. Rather than charging Appellant for each separate transgression, the Government significantly reduced Appellant's criminality by charging on divers occasions.[12]

[12] *See United States v. Campbell*, 71 M.J. 19, 25 (C.A.A.F. 2012) (stating "[t]he Government's decision to charge on divers occasions . . . exposed Appellant to [less] confinement [than had each violation been

Appellant argues that "Charge II and the Additional Charge and its specifications may be combined into a single specification by changing the dates." Appellant's Brief at 19.[13] While a charge could have alleged diverse occasions from 16 November 2015 to 31 August 2016, the fact there were separate charges and specifications does nothing to misrepresent or exaggerate the criminality of Appellant's many attempted violations and actual violations of COMDTINST 5375.1D. If Appellant's argument were accepted in this case, it would create a disincentive for the Government to charge "on divers occasions" and incentivize charging each specific act of misconduct separately.

The final two *Quiroz* factors also weigh in favor the Government. Appellant entered "freely, knowingly, intelligently, and voluntarily" into a pretrial agreement. R. at 438. And, since the pretrial agreement included a sentencing cap for the term of confinement, his punitive exposure was reduced from 8 years to 14 months. Considering that Appellant entered into the agreement based on the charges as drafted, it was reasonable for the Military Judge to find the charges and specifications represented distinct, separate acts of misconduct and therefore was not a prosecutorial overreach.

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charged separately]. Thus, rather than exaggerating Appellant's criminality or exposure, arguably, it was reduced.").

[13] The discussion of unreasonable multiplication of charges on the record does not involve the additional charge, rather Defense Counsel only argued in regards to Charge I and II. Thus, per *Hardy*, any claim of unreasonable multiplication of charges concerning the additional charge has been waived. *See* 77 M.J. at 445.

III.

ANY ERROR IN THE ADMISSION OF EVIDENCE REGARDING THE EFFECTS THAT ACCESSING THE DARK WEB COULD HAVE HAD ON GOVERNMENT COMPUTER SYSTEMS DID NOT MATERIALLY PREJUDICE APPELLANT.

Standard of Review

A military judge's decision to admit evidence in aggravation at sentencing is reviewed for an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009).

Discussion

A. Evidence in aggravation.

Appellant avers that "ITC [redacted]'s [*sic*] 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." Appellant's Brief at 21. Rule for Courts-Martial 1001(b)(4) authorizes trial counsel to "present evidence as to any aggravating circumstances directly relating to or resulting from the offense of which the accused has been found guilty." Evidence in aggravation includes "evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. R.C.M. 1001(b)(4). "The foundational requirement is a specific harm caused by the accused." *United States v. James*, 64 M.J. 514, 516 (C.G. Ct. Crim. App. 2006) (citing *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)).

In light of this Court's binding precedent, the Government concedes that the introduction of ITC [redacted].'s testimony concerning the *possible* effects Appellant's

accessing the dark web could have had on Department of Defense and Department of Homeland Security systems was not proper evidence in aggravation.[14] *See James*, 64 M.J. at 516 ("There must be some reasonably direct connection between the offense and a negative impact that constitutes an aggravating circumstance."); R. at 282. Because Appellant's attempts to access the dark web were not successful and no actual damage to the government computer systems was admitted into evidence, ITC [redacted]'s testimony concerning the possible effects of successful access to the dark web appears too attenuated to meet the reasonably connected standard under *James*. *See id.* As such, the Government acknowledges it was an abuse of discretion to admit this specific testimony.

B. The alleged error did not substantially influence the adjudged sentence.

While the admission of ITC [redacted]'s testimony was improper, Appellant has failed to show prejudice. Per Article 59(a), UCMJ, "a sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a). When evidence is erroneously admitted during the sentencing phase of a court-martial, 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). In *United States v. Barker*, 77 M.J. 377 (C.A.A.F. 2018), the Court of Appeals for the Armed Forces recently considered the following four factors in "determining whether an error had a substantial influence on a sentence: (1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality

[14] The Government's concession is limited to the portion ITC [redacted] testimony, which trial defense counsel objected to, concerning the effects accessing the dark web could have on Department of Defense and Department of Homeland Security computer systems. *See* R. at 282-283. The Government asserts that ITC [redacted] additional testimony about the dark web and malware was properly admitted evidence, and does not appear to be the basis for Appellant's assignment of error.

of the evidence in question; and (4) the quality of the evidence in question." 77 M.J. at 384 (citing *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017) (internal quotation marks omitted).

Here, the Government's sentencing case was very strong. As in *Barker*, the Stipulation of Fact laid out Appellant's guilt to all four specifications in detail. *See* 77 M.J. at 384; P.E. 1. Appellant's misconduct was not simply a one-time event; rather, his misconduct spanned over a period of at least ten months. The Government's sentencing case also illustrated the extensive nature of Appellant's attempted and successful viewing of sexually explicit material in violation of a lawful general order, his attempts to access the dark web to thwart firewalls, and his efforts to avoid detection by clearing tracking data from the Coast Guard workstation. *See* R. at 283-285, 300, 315-30, and 331-32. In contrast, the defense sentencing case, which included testimony concerning Appellant's separate personal issues, a few positive marks on an employee review, photographs of Appellant with his family, character letters, and Appellant's unsworn statement were comparably weak. *See* R. at 359-366, 401-418; D.E. A-C.

As to the third and fourth factors, the evidence in question lacked materiality to any particular fact at issue and was limited in scope. On direct examination, ITC [redacted] acknowledged that he was not able to determine that damage was done as a result of Appellant's attempts to access the dark web. R. at 284. In initially assessing the admissibility of the testimony, the Military Judge specifically commented that trial defense counsel was "free to explore on cross examination whether or not there was any actual damage to the Coast Guard network." R. at 283. Subsequently, the trial defense counsel's effective cross-examination of ITC [redacted] emphasized that the witness was

unable to determine if any damage was done to Coast Guard systems based on Appellant's conduct. *See* R. at 302. Like *James*, this cross-examination further reduced the impact of the testimony. 64 M.J. at 516. And, similar to *Sanders*, there is no indication the Military Judge gave significant weight to ITC [redacted]'s testimony about the dark web. *See* 67 M.J. at 346; R. at 283, 431.

Moreover, the maximum sentence available in this case was confinement for eight years, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge. *See Manual for Courts-Martial* pt. IV, para. 16.e.(1) (2016 ed.). The Military Judge sentenced Appellant to confinement for ninety days, reduction in pay grade to E-1, and a bad conduct discharge. R. at 436. This sentence was below both the maximum authorized term of confinement and punitive discharge, and the sentencing caps in Appellant's pre-trial agreement. *See* A.E. VII.

For all these reasons, any error did not materially prejudice the substantial rights of Appellant. Accordingly, this Court should affirm the findings and sentence.

IV.

APPELLANT'S SENTENCE WAS APPROPRIATE BASED ON THE NATURE OF HIS GUILTY PLEA TO FOUR DISTINCT CRIMINAL ACTS.

Standard of Review

On appeal, the issue of sentence appropriateness is reviewed *de novo*. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2004). A service Court 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), UCMJ, 10 U.S.C. § 866(c).

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). A court-martial may lawfully impose a sentence it considered fair and just within the limits prescribed by the Code. *See United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964); R.C.M. 1002 ("[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). In making determinations about sentence appropriateness, Courts of Criminal Appeals consider the entire record, the character of the offender, and the nature and seriousness of the offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Absent a showing by an appellant that his case is closely related to a case offered for comparison, a Court of Criminal Appeals is not required to compare appellant's case to other specific cases. *United States v. Washington*, 57 M.J. 394, 401 (C.A.A.F. 2002).

Contrary to Appellant's claims, his sentence was not unduly severe. The following chart illustrates the differences between the adjudged sentence, the terms of Appellant's pre-trial agreement, and the maximum prescribed punishment for a single charge of a violation of Article 92, UCMJ:

Terms	Adjudged Sentence	Terms of PTA	Single charge of Article 92, UCMJ
Confinement	90 days	14 months	2 years
Reduction	E-1	Approved as Adjudged	E-1
Fines	None	Disapproved	Any Adjudged
Forfeiture	None	Deferred	Total Forfeiture
Discharge	BCD	Approved as Adjudged	DD, BCD

See Manual for Courts-Martial pt. IV, para. 16.e.(1); A.E. VI; R. at 436. Additionally, the total maximum combined authorized punishment for the four specifications of conviction included eight years confinement, reduction in pay grade to E-1, and a dishonorable discharge. *See id*. Appellant received a lawful punishment that was well below the maximum authorized sentence, and the terms of the pretrial agreement.

Furthermore, the sentence was warranted due to the nature and extent of Appellant's misconduct. Using a Coast Guard workstation at his unit, Appellant viewed and attempted to view sexually explicit or predominately sexually oriented images on numerous occasions, in violation of a lawful general order. P.E. 1. When Coast Guard security protocols prevented him in certain occasions from successfully viewing sexually explicit images and videos, Appellant attempted to circumvent these protocols by using the dark web. *See* P.E. 1 at 2. Additionally, Appellant's misconduct was pervasive and spanned over a period of at least ten months. *See* P.E. 1.

Finally, Appellant's cites to *United States v. Armstrong*, 51 M.J. 612, 613 (C.G. Ct. Crim. App. 1999) for the broad proposition that "panels often choose not to issue bad conduct discharges for cases of more severe criminality." Appellant's Brief at 23. Yet, Appellant has wholly failed to demonstrate that his case is closely related to *Armstrong*, which involved a variety of misconduct including general orders violations for engaging in an inappropriate relationship with a subordinate. *See* 51 M.J. at 613. Because Appellant has failed to make any showing that *Armstrong* is even related to this case, the fact that members did not include a punitive discharge in the sentence in *Armstrong* should not be used as comparison to this case. *See id*. Therefore, this Court should affirm the findings and sentence.

PRAYER FOR RELIEF

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

Respectfully submitted,

DATE: 26 December 2018

[redacted]

//S//

[redacted]

Lieutenant Commander, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
(202) 372-3808
[redacted]

Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
(202) 372-3814
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 26 December 2018.

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[redacted]

Lieutenant Commander, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, D.C. 20593-7213
(202) 372-3808
[redacted]

Lieutenant, U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
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Washington, D.C. 20593-7213
(202) 372-3814
[redacted]