IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Tanner J. FORRESTER Corporal (E-4) U.S. Marine Corps, Appellant	APPELLANT'S REPLY BRIEF Crim.App. No. 201500295 USCA Dkt. No. 17-0049/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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STATUTES

Introduction

The Government is not completely wrong in its Answer. The trouble for the Government is that, to the extent it is correct, it furthers Cpl Forrester's case that he has suffered an unreasonable multiplication of charges.

Several of the Government's arguments may be easily dismissed. For example, the Government argues at length that Cpl Forrester waived[1] an issue—multiplicity[2]—he has not raised before this Court. The Government also argues the *United States v. Planck*[3] court's "different transactions" analysis "[is not] the holding of the case . . . ."[4] on the very same page the Government reports "[t]he [*Planck*] court ***held*** that Planck, ''[t]hrough ***different transactions***, . . . possessed child pornography in three separate places . . . .'"[5]

The Government punctuates its apparent confusion on these matters with suspect logic. For example, in one non-sequitur the Government argues that because Cpl Forrester asks this Court to adopt the *Planck* rule, he concedes that the *Planck* rule is unclear.[6] In another non-sequitur, the Government's "no prejudice" argument requires this Court to believe that when the military judge declined to

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[1] Or forfeited, or both—it never really decides. *See* Appellee's Br. 8, 10, 11-14.
[2] Appellee's Br. 8-14.
[3] *United States v. Planck*, 493 F.3d 501 (5th Cir. 2007).
[4] Appellee's Br. 16-17.
[5] *Id.*15-16 (emphasis added).
[6] *Id.* at 14.

merge the offenses for sentencing, he nonetheless merged the offenses for sentencing, resulting in no difference in the sentence.

To assist the Court in the face of the Government's confusion and fallacious reasoning, Cpl Forrester replies as follows.

Argument

A. The Government forfeited its waiver and forfeiture arguments, which otherwise lack a factual basis and fail to comport with waiver doctrine.

The Government's first argument—that Cpl Forrester either "waived or forfeited" his multiplicity claims[7]—fails in at least three ways. First, Cpl Forrester has alleged unreasonable multiplication of charges—not multiplicity. He did so at trial and at the lower court.

Second, the Government has forfeited its argument[8] that Cpl Forrester has waived or forfeited the ability to apply the logic of *Planck*[9] to his discussion of *United States v. Quiroz*[10] factors. The Government may forfeit waiver when it fails to assert waiver.[11] Nowhere in its brief at the lower court did the

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[7] Appellee's Br. 8.
[8] *See id*. at 12-13.
[9] *United States v. Planck*, 493 F.3d 501 (5th Cir. 2007).
[10] *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).
[11] *Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) (citations omitted); *see also Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2009); *Wilson v. Kelkhoff*, 86 F.3d 1438, 1445 (7th Cir. 1996); *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994) (principle is applicable when "the government … neglected to argue on appeal that a defendant has failed to preserve a given argument in the district court"); *see also Kontrick v. Ryan*, 540 U.S. 443, 458 (2004).

Government assert Cpl Forrester had waived or forfeited application of *Planck* to his claim. Instead, the Government set forth its own interpretation of how *Planck* applies to the *Quiroz* factors.[12] Thus, to the extent the Government's waiver argument applies to the issue Cpl Forrester actually raised, the Government has forfeited that argument.

Third, the Government's forfeited waiver/forfeiture argument fails to comport with the policies underlying the waiver doctrine. The waiver doctrine aims to promote judicial efficiency and conservation of resources, to respect the initial tribunal, and to provide fairness to the parties.[13]

Here, the trial defense counsel asked for merger of the offenses after findings because each specification addressed "the exact same criminal conduct."[14] The military judge thus considered the very matter Cpl Forrester raises in this appeal. Further, the lower court addressed the application of *Planck* to unreasonable multiplication of charges.[15] And, as noted, at the lower court the Government argued the merits of how *Planck* applies to the *Quiroz*

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[12] Appellee's Br. 9-17, *United States v. Forrester*, No. 201500295, 2016 CCA LEXIS 519 (N-M. Ct. Crim. App. Aug. 30, 2016).
[13] *See, e.g.*, *Bailey v. Int'l Brotherhood of Boilermakers*, 175 F.3d 526, 529-30 (7th Cir. 1999); *Pfeifer v. Jones &Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982), *vacated and remanded*, 462 U.S. 523 (1983).
[14] J.A. 0144.
[15] 2016 CCA LEXIS 519, *3-*6; J.A. 0002-03.

factors .[16]

Thus, the granted issue has been properly litigated, leaving no impediment to judicial efficiency. Indeed, it would actually undermine judicial efficiency to resolve this case on waiver or forfeiture when the issue has been well-preserved, the Court has already granted review, and both parties have briefed the issue.

Similarly, neither the trial judge nor lower court could complain of a want of respect when Cpl Forrester raised unreasonable multiplication of charges at both the trial and lower court. Nor can the Government claim it has been unfairly surprised when it has already litigated the issue at trial and the lower court.

Under the circumstances, the waiver/forfeiture doctrine is an inapt tool to resolve this case.[17]

B. The Government's attempts to water down abuse of discretion review should not dissuade this Court from properly applying *Planck* to this case.

Perhaps sensing the weakness of its waiver or forfeiture argument, the Government next tries to water down this Court's review by placing *Planck* off limits.

In its forfeited "waiver or forfeiture" argument, the Government argues for

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[16] Appellee's Br. 9-17, *United States v. Forrester*, No. 201500295, 2016 CCA LEXIS 519 (N-M. Ct. Crim. App. Aug. 30, 2016).

[17] From defense counsel's perspective, merging the offenses for findings purposes would have had the same effect as dismissing them. Consequently, we conclude that defense counsel's request for merger preserved his claim on appeal regarding dismissal of any unreasonably multiplied offenses. *United States v. Campbell* (*Campbell III*), 71 M.J. 19, 22 (C.A.A.F. 2012).

a watered-down abuse of discretion review. In a footnote, the Government seems to contend that when applying abuse of discretion analysis to the lower court's decision, this Court need only examine whether the lower court applied "'some legal standard,'" in its decision,[18] implying that the lower Court need not apply the ***correct*** legal standard.[19] In other words, the Government suggests that this Court need not assess whether the lower Court correctly applied its *Planck* analysis to this case. This argument both misunderstands how abuse of discretion review applies to questions of law, and rests on an unsustain-able distortion of *United States v. Nerad*.[20]

Even when reviewing for abuse of discretion, this Court reviews de novo questions of law underlying a ruling: "[A]ny ruling based on an erroneous view of the law also constitutes an abuse of discretion."[21] At least four of the *Quiroz* factors involve questions of law. For example, as Cpl Forrester noted in his original Brief,[22] in its decision in this case, the lower court cited its earlier decision in *United States v. Campbell* (*Campbell I*)[23] with respect to whether each

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[18] Appellee's Br. 10 n.3.
[19] *Id.* (citing 69 M.J. 138 (2010)).
[20] 69 M.J. 138.
[21] *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Griggs,* 61 M.J. 402, 406 (C.A.A.F. 2005); *United States v. Wardle,* 58 M.J. 156, 157 (C.A.A.F. 2003); *United States v. Sullivan,* 42 M.J. 360, 363 (C.A.A.F. 1995)).
[22] Appellant's Br. 11.
[23] *United States v. Campbell* (*Campbell I*), 66 M.J. 578 (N-M. Ct. Crim. App.

charge and specification aims at distinctly separate criminal acts (second *Quiroz* factor): "We rejected this assertion in *United States v. Campbell*. There, we relied on the holding in *United States v. Planck*. . . ."[24] Thus, the lower court relied on an issue of law in its decision.

Similarly, the lower court then applied its faulty understanding of *Planck*—a rule of law—to *Quiroz* factors two and together.[25] Again citing its earlier decision in *Campbell I*,[26] which relied on *Planck*: "Therefore, we adopt the Fifth Circuit's rationale . . . ."[27]

Turning to *Quiroz* four, the *Campbell* court again incorrectly applied a legal rule by misconstruing what it means to "obtain" images through "different transactions." It said, "[H]aving concluded that the three specifications . . . were directed at separate and distinct criminal acts . . . the increase in his punitive exposure was not unreasonable."[28] The lower court's citation to *Campbell*'s faulty *Planck* analysis thus injects an erroneous view of the law into its ultimate

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2008), *rev'd on other grounds*; *United States v. Campbell* (*Campbell II*),68 M.J. 217 (C.A.A.F. 2009) .

[24] *Forrester*, 2016 CCA LEXIS 519, *4-*5 (internal citations omitted).

[25] *Id*. at *6.

[26] *Id*.

[27] 66 M.J. at 583. It is the lower court's continuing claim to rely on *Planck* that requires this Court to assess whether and how to apply *Planck*. The Government's suggestion, (Appellee's Br. 14), that Cpl Forrester lacks a basis to ask this Court to ***properly*** apply *Planck* therefore lacks merit.

[28] *Id*.

conclusion that the Government has not unreasonably multiplied charges.[29] By definition, the court's reliance on an erroneous view of the law is an abuse of discretion.

The Government's attempt to place assessment of *Planck* off limits amounts to watering down this Court's review for abuse of discretion. Its argument for such abdication of the judicial office rests on an untenable interpretation of *United States v. Nerad*.[30] The Government characterizes *Nerad* as "holding" that the lower courts are "constrained to 'do justice with reference to some legal standard.'"[31] Thus, the Government contends, "once [the lower court] made this test [i.e., its version of the *Planck* rule] its own for unreasonable multiplication of charges, review of the issue is governed by reasonableness and abuse of discretion—not by multiplicity precedent."[32]

Tellingly, the Government's reliance on the "holding" of *Nerad* lacks a pinpoint citation. That case addressed whether the lower court's mandate in Article 66(c), Uniform Code of Military Justice (UCMJ), to approve only that part of a sentence that it finds "should be approved," gave the lower court

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[29] As Cpl Forrester argued in his Brief, the lower court's erroneous application of *Planck* in *Campbell* also builds prosecutorial overreach into naval law, thus affecting *Quiroz* five. Appellant's Br. 18.
[30] 69 M.J. 138 (2010).
[31] Appellee's Br. 10 n.3 (citing 69 M.J. 138 (2010)).
[32] *Id.* (citation omitted).

unfettered authority to disapprove a finding.[33] Specifically, *Nerad* considered whether the lower courts could disapprove a finding "as clemency," "for any reason, or no reason at all."[34] The *Nerad* court ***actually*** held: "We hold that while CCAs have broad authority under Article 66(c), UCMJ, to disapprove a finding, that authority is not unfettered. It must be exercised in the context of legal—not equitable—standards, subject to appellate review."[35]

As this holding makes clear, the Government's use of *Nerad* to justify watering down review for abuse of discretion is inapt. The actual holding distinguishes equitable from legal standards, not the correct legal standard from "a [possibly incorrect] legal standard" as the Government would have it.

Although a fair reading of *Nerad* does not sustain the Government's interpretation, the end of the *Nerad* holding does indicate how this Court should treat the lower court's decision. The lower court's use of legal standards is "subject to appellate review." Thus, to the extent *Nerad* applies, it supports this Court's examination of how the *Planck* rationale applies to this case.

C. The Court should reject the Government's misrepresentation of *Planck* and find that the Government unreasonably multiplied charges against Cpl Forrester.

1. The Government distorts *Planck* and *Hinkeldey* in its attempt to convince this Court the lower court did not err.

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[33] 69 M.J. at 140.
[34] *Id*. at 144.
[35] *Id.* at 140 (citing *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001)).

The Government correctly notes that the test for multiplicity requires analysis of a law's intended "unit of prosecution."[36] But the Government claims without citation that *Planck* "held that the location of the contraband was dispositive"[37] for the unit of prosecution. In effect, the Government argues, *Planck* held that the unit of prosecution does not entail a "different transaction." But as the Government notes on the previous page of its brief,[38] and as Cpl Forrester demonstrated in his initial brief,[39] in *Planck*, the Court of Appeals for the Fifth Circuit (Fifth Circuit) held that when an accused has images stored in separate media, the Government may separately charge each medium, "as long as the ***prohibited images*** were ***obtained*** through the result of ***different***

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[36] Appellee's Br. 15 (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *Bell v. United States*, 349 U.S. 81 (1955)). *Universal C.I.T.* applies to this case in another way. In that case, the Supreme Court noted that "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." 344 U.S. at 221-22. The Government also points to *United States v. Schales*, 546 F.3d 965(9th Cir. 2008) as supporting its argument that only the medium constitutes a unit of prosecution. Appellee's Br. 17, n.4. But *Schales* was not addressing multiplicity for multiple counts of possession and involved an appellant who confessed to repeated instances of downloading contraband. 546 F.3d at 969. It was simply not addressing identical images from one *Planck* transaction. Further, the Schales court's dicta cited *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997), which also involved multiple transactions. 119. F.3d at 745.

[37] Appellee's Br. 17.

[38] *Id.* at 15-16.

[39] Appellant's Br. 7-12.

transactions."[40] In other words, the location of the contraband was not in itself "dispositive." Rather, the resolution of *Planck* required ***both*** separate media ***and*** different transactions.

The Government's interpretation of *United States v. Hinkeldey*[41] rests on its faulty characterization of *Planck's* holding and similarly misses the mark. The *Hinkeldey* court, rather than "rejecting" the appellant's argument based on the *Planck* different transaction rule, assumed the application of the rule, and found Hinkeldey obtained the images underlying his multiple charges in different transactions. The Court noted that Hinkeldey "searched for and viewed child pornography on different occasions[,]" "acknowledged storing child pornography [prior to] the installation of the LimeWire program on his computer" (the source of one batch of images), "transferred [contraband] to one of the seized computer disks as early as February 2006" (predating the Limewire transaction), and "possessed more than 1,500 illicit photographs and videos."[42] Quoting the concurrence in *Planck*, the Court said: "Given [this evidence], 'it would exceed credulity to conclude that Hinkeldey acquired, or could have acquired, all the images and movies at the very same time.'"[43]

The Government's argument that the location of contraband is dispositive in

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[40] *Planck*, 493 F.3d at 504 (emphasis added); *see also Woerner*, 709 F.3d at 540.
[41] *Hinkeldey*, 626 F.3d 1010 (8th Cir. 2010).
[42] *Id*. at 1014.
[43] *Id*. (quoting *Planck*, 493 F.3d at 506) (brackets omitted).

justifying multiple specifications is not an accurate statement of the law. The *Planck* different transaction rule establishes that the unit of prosecution is each medium with contraband when obtained in different transactions.

2. The Government tries to distinguish proper application of *Planck* when applied to military law, which distinction actually reinforces Cpl Forrester's position.

The Government points out that the *Planck* holding applies to 18 U.S.C. § 2252A and does not bind analysis of Article 134, UCMJ, child pornography specifications.[44] Corporal Forrester does not argue otherwise. Rather, he notes that the lower court in purportedly adopting *Planck* has misapplied it here,[45] and that *Planck* properly understood is correct.[46] Thus, this Court must adopt it, not because it is a binding precedent, but because it is correct.

Still, the Government's distinction between the civilian criminal code and the UCMJ is important to the outcome of this case. This distinction is why the four specifications are unreasonable, even if this Court were to find that different transactions were not required to justify separately charging possession of identical images on separate media.[47]

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[44] Appellee's Br. 7.
[45] Appellant's Br. 10-13.
[46] *Id*. at 12-13.
[47] The Government claims Cpl Forrester concedes the second through fourth *Quiroz* factors hinge on the *Planck* rule. Appellee's Br. 27. While Cpl Forrester agrees ***proper*** application of *Planck* ***affects*** the analysis of those factors, he notes that unreasonable multiplication of charges is a distinct concept from multiplicity.

Article 134, UCMJ, includes a terminal element alleging prejudice to good order and discipline or a service discrediting nature.[48] Corporal Forrester does not here contest that the possession of child pornography on any one of the media alleged in this case would independently meet the charged terminal elements.[49] But it would be difficult to see how possession of the identical twenty-three images on four media would be ***more*** prejudicial to good order and discipline or service discrediting than possession of those images on one medium.

The policies the *Planck* court laid out for criminalizing possession of child pornography highlight that lack of additional prejudice to good order and discipline or service discredit. Copying one's already-possessed set of images does not perpetuate the abuse initiated by the producer of the materials or invade the victim's privacy more than maintaining the first set of images.[50] Nor does it provide an additional incentive to produce and distribute child pornography.[51]

Thus, even if this Court thought copying already-possessed images to other media could justify separate offenses for multiplicity purposes, in this case, permitting four specifications charged under Article 134, UCMJ, would

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United States v. Campbell, 71 M.J. 19, 24 (C.A.A.F. 2012). *Quiroz* two does not determine the outcome of three and four.

[48] 10 U.S.C. § 134 (2012).

[49] The Government alleged both terminal elements in the conjunctive. J.A. 0009, 0011.

[50] *Planck*, 493 F.3d at 505.

[51] *Id.*

unreasonably exaggerate Cpl Forrester's criminality (since the terminal element is still an element) and increase Cpl Forrester's punitive exposure.

D. The military judge declined to merge the offenses for sentencing, and punished Cpl Forrester for four separate violations.

The Government repeatedly asks this Court to defer to the military judge and lower court, but then argues the judge did not do what he said he would do. The Government claims that even assuming an unreasonable multiplication of charges, there is no prejudice.[52] This requires the Court to believe the military judge, after declining to merge the specifications for sentencing, then merged the specifications for sentencing. In fact, the unreasonable multiplication of charges here prejudices Cpl Forrester by both leaving him with multiple convictions for possession of one set of contraband, and also allowing the military judge to sentence him as if he had committed multiple offenses.

In *United States v. Campbell (Campbell III)*, this Court clarified the concept of unreasonable multiplication of charges as applied to findings and sentencing.[53] Unreasonable multiplication of charges may apply differently to findings than to sentencing. For example, the charging scheme may not implicate the *Quiroz* factors in the same way that the sentencing exposure does. Where there is an

[52] Appellee's Br. 29-30.
[53] *Campbell III*, 71 M.J. at 23-24.

unreasonable multiplication of charges for findings, the appropriate remedy is to dismiss the unreasonable charges.[54]

In this case, the four guilty findings unreasonably exaggerated Cpl Forrester's criminality because one actus reus resulted in four convictions for the same offense. Further, the multiple convictions more than tripled his punitive exposure. The military judge sentenced Cpl Forrester to forty months of a maximum 364 months of confinement.

The Government's examples of sentencing prejudice analysis[55] highlight the prejudice against Cpl Forrester. The Government cites *United States v. Roderick*,[56] which reduced the maximum sentence from 107 years to ninety-four years of confinement.[57] The seven-year adjudged sentence was 6.5 percent of the original maximum, and 7.4 percent of the new maximum sentence, less than one percent difference. Similarly, in *United States v. Mack*,[58] the adjudged sentence (two years) was only 5.0 percent of the original maximum sentence (forty years) and 5.6 percent of the new maximum.

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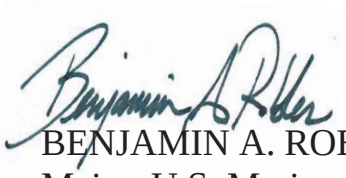
[54] *Howard*, 2013 CCA LEXIS 43 (citing *Campbell III*, 71 M.J. at 22-23; *United States v. Thomas*, 74 M.J. 563 (N-M. Ct. Crim. App. Nov. 26, 2014) (holding it is inappropriate for an accused to be convicted of two sex assault offenses for one act)).
[55] Appellee's Br. 30.
[56] 62 M.J. 425, 533-34 (C.A.A.F. 2006).
[57] *Id.* at 433.
[58] 58 M.J. 413, 418 (C.A.A.F. 2003).

In contrast, the military judge sentenced Cpl Forrester to 11.0 percent of the maximum confinement. If left in place, that same confinement would be 33.3 percent of the maximum ten-year sentence. This significant difference belies the Government's silly presumption that the judge would have sentenced Cpl Forrester identically had he ruled correctly.

In this case, the *Quiroz* factors thus apply equally to findings and sentencing. This Court should therefore dismiss all offenses but one and remand for resentencing.

Conclusion

Because the contraband at issue here was obtained through one download it properly comprised one offense of possession. This Court should adopt the *Planck* rule, clarify its application to unreasonable multiplication of charges, dismiss three specifications, and remand to the lower court for resentencing.



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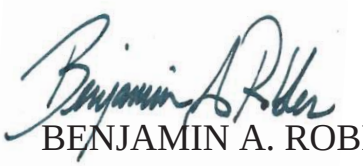
CERTIFICATE OF FILING AND SERVICE

I certify that on March 27, 2017, I electronically filed the foregoing with the Court, with copies electronically delivered to the Appellate Government Division and Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Rule 21(b) because it contains fewer than 4,000 words. Using Microsoft Word version 2010 with 14-point Times New Roman font, this supplement contains 3,610 words.



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