IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
	)	Crim.App. No. 201500295
v.	)	
	)	USCA Dkt. No. 17-0049/MC
Tanner J. FORRESTER, Corporal (E-4) United States Marine Corps Appellant	)	

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

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Issue Presented

WHETHER PUNISHING THE SAME TRANSACTION OF OBTAINING CHILD PORNOGRAPHY WITH FOUR CONVICTIONS UNREASONABLY EXAGGERATES CPL FORRESTER'S CRIMINALITY AND TRIPLES HIS PUNITIVE EXPOSURE, CONSTITUTING AN UNREASONABLE MULTIPLICATION OF CHARGES?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a bad conduct discharge and one year or more of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of six specifications of wrongful possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). After announcing Findings, the Military Judge consolidated four Specifications into two. The Military Judge sentenced Appellant to forty months of confinement, forfeiture of all pay and allowances, reduction to pay-grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On August 30, 2016, the lower court affirmed the Findings and Sentence. *United States v. Forrester*, No. 201500295, 2016 CCA LEXIS 519 (N-M. Ct. Crim. App. Aug. 30, 2016). On October 29, 2016, Appellant filed a Petition for Review, granted by this Court on January 12, 2017.

Statement of Facts

A. Appellant copied twenty-three images of child pornography onto multiple media devices he possessed.

In 2010, Appellant stored the same twenty-three images of child pornography on both an iPhone and an iPod. (J.A. 37, 60-62, 154, 157.) He stored the images in an album called "Little girls" on the iPhone, and a second copy[1] in an album called "kid porn" on the iPod. (J.A. 37, 65.) On each device, the albums resided in a passcode-protected application called "SpyCalc," where Appellant could secretly, view, and email the images. (J.A. 37, 41-46.)

1. The Hewlett-Packard Laptop.

Also in 2010, Appellant owned a Hewlett-Packard (HP) laptop computer with a password-protected account profile bearing his name. (J.A. 37, 80.) He used this laptop to create a "backup" third copy of his iPod files. (J.A. 26, 37, 40-

[1] For ease of reference only, the United States numbers the copies Appellant made of the images. Beyond dates, the Record does not explicitly reveal the order in which the copies were made, nor does the Government rely on this order. It is indisputable that Appellant made multiple copies of the images of child pornography.

41, 82.) And he created iPod photo cache databases on the laptop, from which he could transfer the child pornography images to other media. (J.A. 82-83.)

2. The Black Seagate External Hard-drive.

On April 29, 2011, Appellant copied the twenty-three images from his laptop onto his black Seagate external hard-drive. (J.A. 33, 59-60, 76, 83.) He placed this fourth copy of the images in a folder on the file path "the other/little." (J.A. 33, 153.)

The next day, Appellant installed a new operating system on the HP laptop and transferred a fifth copy of the images from the black Seagate hard-drive back to the laptop. (J.A. 82-83.)

On November 1, 2011, Appellant placed a sixth copy of the images into a different folder on the same black Seagate hard-drive. (J.A. 34, 60.) This copy resided in a folder on the file-path "pics/the other/other/cute little girls/little." (J.A. 34, 153.) After this act, Appellant had two copies of the same images on his black Seagate hard-drive. (*Id*.)

3. The Gmail Account.

On August 7, 2011, Appellant sent several emails to his Gmail account, using the same Gmail account. (J.A. 48-50, 63-64, 82, 105.) He serially attached the twenty-three child pornography images from the SpyCalc albums to these emails. (*Id*.)

On October 2, 2011, using Windows Live on his HP laptop, Appellant downloaded the Gmail emails containing the child pornography images. (J.A. 48-49.) This act created a seventh copy of the images, which he could view directly on his laptop until 2014. (J.A. 49, 64.)

4. The Blue Seagate External Hard-drive.

On February 19, 2012, Appellant made an eighth and ninth copy of the twenty-three images on his blue Seagate external hard-drive. (J.A. 33, 59, 83.) Appellant saved these copies in two separate folders on the blue hard-drive—one on the file-path "the other/little" and another on the file-path "other/cute little girls/little." (J.A. 33-34, 76-77, 153.)

B. After Findings, the Military Judge consolidated four Specifications into two, leaving one conviction each of the four devices or media on which Appellant wrongfully possessed child pornography.

Appellant never raised multiplicity or unreasonable multiplication of charges pretrial or during trial on the merits. (J.A. 143-44.)

The Military Judge convicted Appellant of six Specifications of wrongful possession of child pornography in violation of Article 134, UCMJ. (J.A. 143.) Immediately after announcing Findings, the Military Judge consolidated

Specifications 1 and 2, relating to the black Seagate hard-drive, and Specifications 5 and 6, the HP laptop, into just two Specifications.[2] (J.A. 12, 13, 143.)

Appellant remained convicted of four Specifications corresponding to the devices and media where he stored the copies of child pornography:

> In that [Appellant], did, at unknown locations, between on or about 29 April 2011 and on or about 1 May 2013, knowingly and wrongfully possess, on a black in color Seagate External Hard Drive, child pornography, to wit: digital images of a minor, or what appears to be a minor, engaging in sexually explicit conduct, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.
>
> In that [Appellant], did, at unknown locations, between on or about 29 April 2011 and on or about 14 January 2014, knowingly and wrongfully possess, on a Hewlett Packard Laptop Computer Hard Drive, child pornography, to wit: digital images of a minor, or what appears to be a minor, engaging in sexually explicit conduct, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.
>
> In that [Appellant], did, at unknown locations, between on or about 7 August 2011 and on or about 2 October 2011, knowingly and wrongfully possess, in a Google electronic mail account, child pornography, to wit: digital images of a minor, or what appears to be a minor, engaging in sexually explicit conduct, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.
>
> In that [Appellant], did, at unknown locations, between on or about 19 February 2012 and on or about 1 May 2013, knowingly and

[2] This consolidation was consistent with the Military Judge's pretrial severance of duplicitous Specifications that overlapped the 2012 implementation of child pornography possession under Article 134, UCMJ. (J.A. 12, 13.) Appellant litigated that issue at trial and at the lower court, but has not raised it at this Court. (J.A. 3)

> wrongfully possess, on a blue in color Seagate External Hard Drive, child pornography, to wit: digital images of a minor, or what appears to be a minor, engaging in sexually explicit conduct, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(J.A. 12-14, 143, 147-48.)

C. Prior to sentencing, Appellant requested merger "for purposes of sentencing only." The Military Judge denied the Motion.

At sentencing, Appellant moved "for the sole Charge and all Specifications thereunder to be merged into a single specification for purposes of sentencing only." (J.A. 144.) Appellant argued that "the nature of all of the images are exactly the same with regards to each specification, as is the date range. And the only difference is the device on which it was charged." (J.A. 144.)

The Military Judge denied the motion, citing the factors in *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001), as interpreted by, *inter alia*, *United States v. Campbell*, 66 M.J. 578 (N-M. Ct. Crim. App. 2008), *rev'd on other grounds*, 68 M.J. 217 (C.A.A.F. 2009). (J.A. 144.)

Appellant faced a maximum sentence that included thirty years and four months of confinement. (J.A. 145.)

The Military Judge sentenced him to, *inter alia*, forty months of confinement. (J.A. 15.)

Summary of Argument

Appellant's attempt to invoke *United States v. Planck*, 493 F.3d 501 (5th Cir. 2007), fails when he waived, or forfeited, objection to multiplicity, which was the holding in *Planck*, and his specifications were not facially duplicative. Because *Planck*'s 18 U.S.C. § 2252A holding does not bind analysis of Article 134 child pornography specifications, Appellant also fails to show it was plain error not to apply his reading of *Planck*'s multiplicity holding directly to his request that the four specifications be merged for sentencing. Moreover, on the merits of multiplicity, Appellant's child pornography possession crimes addressed separate "units of prosecution."

The Military Judge and the lower court were within their broad authority in applying *Quiroz* precedent to reject Appellant's complaint of unreasonable multiplication. This Court should apply the deference and reasonableness standards, decline to revisit the lower court's incorporation of a *Planck*-like analysis to the second *Quiroz* factor, and find no unreasonable multiplication.

Finally, even under a *Quiroz* analysis that applies *Planck* without the typical deference and abuse of discretion standards in unreasonable multiplication analysis, the charges are still not unreasonably multiplied. Appellant obtained his contraband on each medium through separate transactions. And even if Appellant could show error, he fails to demonstrate any prejudice to his sentence.

Argument

APPELLANT FAILED TO RAISE MULTIPLICITY, WAIVING OR FORFEITING REVIEW OF *PLANCK*'S MULTIPLICITY HOLDING. REGARDLESS, THE MILITARY JUDGE AND LOWER COURT DID NOT ABUSE THEIR BROAD DISCRETION OR ACT UNREASONABLY WHEN THEY DECLINED TO FURTHER MERGE FOUR SPECIFICATIONS OF CHILD PORNOGRAPHY SPREAD ACROSS FOUR DIFFERENT DEVICES.

A. To the extent Appellant raises multiplicity, he waived or forfeited appellate review of whether his specifications were multiplicious. Regardless, even *Planck* and other courts interpreting the statute in *Planck* find the "unit of prosecution" to be the individual media where images are possessed.

1. Multiplicity and unreasonable multiplication of charges are distinct doctrines.

The prohibition against unreasonable multiplication of charges addresses the danger of prosecutorial overreach in the military justice system. *Quiroz*, 55 M.J. at 337 (noting the system's "preference for trying all known offenses at a single trial" and "broadly-worded offenses unknown in civil society"). The prohibition arises not from the Constitution, but from R.C.M. 307(c)(4): "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges." *See id*. at 345 (Sullivan, J., dissenting) ("Judicial action thus transforms a hortatory principle of military justice . . . into a legally enforceable right of an accused . . . ."); *see also United States v. Campbell*, 71 M.J. 19, 26 (C.A.A.F. 2012) (Stucky, J., dissenting) (noting that the prohibition "is a judicially created

doctrine . . . without a basis in statute"). Most importantly, unreasonable multiplication of charges determinations are reviewed for abused of discretion and are governed, at core, by the overarching "reasonableness" of a court's ruling on the issue. *Quiroz,* 55 M.J. at 338; *Campbell*, 71 M.J. at 22.

The prohibition against multiplicity is grounded in the "constitutional and statutory restrictions against Double Jeopardy" and involves statutory interpretation and legislative intent. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *Quiroz*, 55 M.J. at 337); *Campbell,* 71 M.J. at 23. The Double Jeopardy Clause of the Fifth Amendment "protects against multiple punishments for the same offense." *Brown v. Ohio,* 432 U.S. 161, 165 (1977).

Multiplicity questions involving different statutes are resolved using the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299 (1932). In contrast, questions of multiplicity concerning charges brought under the same statute are resolved by looking to statutory language and legislative intent and determining Congress' permissible statutory "unit of prosecution." *See Ladner v. United States*, 358 U.S. 169, 173 (1958); *Bell v. United States*, 349 U.S. 81, 81 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *United States v. Szentmiklosi,* 55 M.J. 487, 490 (C.A.A.F. 2001) (looking to the "unit of prosecution" to determine whether one or two robberies could be affirmed); *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989); *cf. United States v. Campbell,* 68

M.J. 217, 219 (C.A.A.F. 2009) (raising a "unit of prosecution" question under 18 U.S.C. § 2252A that this Court described as "sound[ing] in multiplicity," and finding guilty plea waived claim absent facially duplicative specifications).

This Court in *Campbell* commented on recurring confusion between multiplicity law and unreasonable multiplication of charges. 71 M.J. at 23 ("[T]he terms multiplicity, multiplicity for sentencing, and unreasonable multiplication of charges in military practice are sometimes used interchangeably as well as with uncertain definition."). But this Court tried to set the record straight, rejecting further conflation of multiplicity—which protects against double jeopardy and looks to the statute—and "multiplicity for sentencing," governed after *Campbell* by *Quiroz*'s unreasonable multiplication of charges analysis. *Id*. at 23-24.[3]

2. Waived and forfeited multiplicity claims receive relief only where the specifications are facially duplicative.

"A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v.*

[3] Notably, this case stems from yet another conflation of these two historically distinct tests—the Navy-Marine Corps court in *Campbell*, 66 M.J. 578, found a straight multiplicity analysis to be "instructive" for the second prong of *Quiroz*. But as argued, *infra*, once the Navy-Marine Corps court made this test its own for unreasonable multiplication of charges, *see United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010) (holding that the lower court's broad Article 66(c) powers, including its unreasonable multiplication of charges tests, are constrained to "do justice with reference to some legal standard"), review of the issue is governed by reasonableness and abuse of discretion—not by multiplicity precedent.

Cook, 406 F.3d 485, 487 (7th Cir. 2005); *United States v. Campos*, 67 M.J. 330 (C.A.A.F. 2009). "While we review forfeited issues for plain error, we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005) (citation and quotation marks omitted); *see also United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008). In determining whether a particular circumstance constitutes a waiver or a forfeiture, we consider whether the failure to raise the objection at the trial level constituted an intentional relinquishment of a known right. *See Harcrow*, 66 M.J. at 156 (citing *United States v. Olano*, 507 U.S. 725, 733-34 (1993)).

When an appellant pleads guilty unconditionally, multiplicity claims are waived unless the offenses are "facially duplicative." *Campbell*, 68 M.J. at 219; *see also United States v. Craig*, 68 M.J. 399, 400 (C.A.A.F. 2010). The *Campbell* court held that the appellant failed his burden to demonstrate specifications were "facially duplicative," and thus waived appellate review of the issue, where "[e]ach of the three specifications alleges a different date and a different medium on which the images of child pornography were possessed." *Id.* at 219-220.

This Court has also applied the same "facially duplicative" test to forfeiture of multiplicity, holding that when an appellant fails to raise multiplicity at trial, he forfeits the issue absent plain error. *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997) (holding multiplicity error was "waived," but reviewing for plain

error), *overturned in part on other grounds*, *United States v. Miller*, 67 M.J. 385, 388-89 (C.A.A.F. 2009)).

3. Multiplicity and unreasonable multiplication are two legal tests that cover similar territory. Appellant knew he could raise multiplicity and instead moved to merge the charges "for purposes of sentencing only," hence waiving direct application of *Planck*.

In *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009), this Court found waiver where "failure to raise the objection at the trial level constituted an intentional relinquishment of a known right." The *Campos* appellant entered into a stipulation of fact as to a witness' expected testimony and made no objection at trial when the document was admitted, but then on appeal objected to the admissibility of the testimony under R.C.M. 1001(b)(5) because the witness had no personal knowledge of the appellant. *Id.* And the appellant raised no ineffective assistance of counsel objection. *Id.* at 333. The *Campos* court noted that while entering into a stipulation is not tantamount to consenting to the admission of the testimony, the defense counsel's statement that he had no objections when the stipulation was admitted amounted to a waiver of the R.C.M. 1001(b)(5) objection. *Id.* at 332-33.

So too here, at trial Appellant requested that the Specifications at issue be "merged into a single specification for purposes of sentencing only." (J.A. 144; Appellant's Br. at 7-19.) He lodged no objection, however, that the "unit of

prosecution" multiplicity holding in *Planck* restricted the United States' ability to charge four separate specifications. And despite his apparent argument now that *Planck* must apply directly to these charges, Appellant chose not to raise Planck-based arguments or multiplicity at trial. (J.A. 144; Appellant's Br. at 7-19.) Appellant thus has waived appellate review of the sole issue that *Planck* bears on—multiplicity, and specifically the statutory "allowable unit of prosecution" for 18 U.S.C. § 2252A(a) possession charges. *See Campos*, 67 M.J. at 332-33.

All that remains is for this court to review the reasonableness of the lower court's application of its own precedent—not direct application of *Planck* to these four specifications.

4. Reviewed under either waiver or forfeiture, the four Article 134 specifications are not facially the same, as they allege possessions on different dates and on different media.

Facial comparison of Appellant's four possession specifications demonstrates they are not facially the same. Each specification alleges different dates corresponding to Appellant's multiple "possessions" of child pornography, and the different media or devices on which Appellant possessed the child pornography images. (J.A. 143, 147-48.) Each specification requires "proof a fact which the other does not." *Anderson*, 68 M.J. at 385 (quoting *Blockburger*, 284 U.S. at 304); *see also Campbell*, 68 M.J. at 219-20 (holding convictions were not multiplicious, in part because each specification alleged "a different medium on

which the images of child pornography were possessed"). To the extent he raises it now for the first time on appeal, Appellant's waived, or forfeited, multiplicity claim affords him no relief.

5. If analyzed for forfeiture, any error is not plain: the Fifth Circuit's "different transactions" dicta arising in an 18 U.S.C. § 2252A case does not clearly indicate the allowable unit of prosecution for Article 134, UCMJ, child pornography convictions.

Moreover, this Court has never held that the Fifth Circuit's analysis of the allowable unit of prosecution under 18 U.S.C. § 2252A, controls the current version of Article 134, UCMJ, convictions for possession of child pornography not incorporating the Federal child pornography statute. Even if Appellant is correct that passing reference to "transactions" in *Planck* is part of that case's holding—and he is not, *see infra*—no clear law requires deviation from established multiplicity and Article 134 law to compel the application of a Fifth Circuit multiplicity holding Appellant demands now on appeal. Indeed, Appellant appears to concede the law is unclear through his invitation for this Court to "adopt" *Planck*. (Appellant's Br. at 12-14.)

In the absence of clear law, plain error review cannot provide Appellant relief on Appellant's reading of non-holding language in *Planck*. *See Olano*, 507 U.S. at 734 ("[A] court of appeals cannot correct an error [under the plain-error doctrine] unless the error is clear under current law.").

6. Even reviewing multiplicity on its merits and applying Federal multiplicity law directly to Appellant's specifications, Appellant's attempt to invoke *Planck* fails.

a. Federal circuits including the Fifth Circuit in *Planck* have rejected multiplicity challenges of 18 U.S.C. § 2252A(a) possession charges, and hold that the "unit of prosecution" for that statute is the medium on which the contraband is contained.

Where, as here, a single act or transaction is alleged to have resulted in multiple violations of the same statutory provision, the Supreme Court has stated that the proper multiplicity inquiry involves the determination of "what Congress has made the allowable unit of prosecution." *Universal C.I.T.*, 344 U.S. at 221; *see also Bell*, 349 U.S. at 81.

In *Planck*, the Fifth Circuit Court of Appeals considered the "allowable unit of prosecution" for three convictions of possessing child pornography under 18 U.S.C. § 2252A(a)(5)(B) (2000). *Planck*, 493 F.3d at 502. The charges alleged possession on three different devices: a desktop computer; a laptop computer; and, computer diskettes. *Id*. The *Planck* court looked to federal statutes governing firearm receipt and possession: in those cases the permissible unit of prosecution, respectively, was receipt at different times, or possession and storage in different places. *Id.* (citations omitted). By analogy, the Fifth Circuit concluded that the Government "need only prove the defendant possessed the contraband at a single place and time to establish" an individual act of possession. *Id.* at 505. The court

held that Planck, "[t]hrough different transactions, . . . possessed child pornography in three separate places—a laptop and desktop computer and diskettes—and, therefore, committed three separate crimes. The counts are not multiplicitous." *Id.* at 505.

Other circuits have agreed. The Eighth Circuit in *United States v. Hinkeldey*, 626 F.3d 1010 (8th Cir. 2010), held that the allowable statutory "unit of prosecution" for multiplicity purposes in 18 U.S.C. § 2252A(a)(5)(B) is each physical storage device. The *Hinkeldey* court, reviewing for plain error because no motion raising multiplicity was made before trial, upheld six counts of possession for one computer, one zip drive, and four computer disks. *Id.* at 1012-13. The court cited *Planck* and held that the double jeopardy challenge "must fail because it is not 'clear' or 'obvious' under current law that Congress intended that conduct like Hinkeldey's make up a single unit of possession." *Id.* And the Eighth Circuit rejected the appellant's argument citing to *Planck*'s "different transactions" language—also not raised at trial—noting for plain error review that the Eighth Circuit had not addressed the "different transactions" language, and that the trial court's refusal to merge the charges due to a multiplicity violation was not plain error. *Id.* at 1014.

Appellant, like the appellant in *Hinkeldey*, cites to those two words in *Planck* that are neither the holding of that case, nor dispositive to the holding:

"different transactions." (Appellant Br. 9.) The *Planck* court analyzed the unit of prosecution under the possession statute, and as noted *supra*, held that the location of the contraband was dispositive. The court noted a different result for the analogous receipt of child pornography statute, which as with receipt of firearms, required that the Government bear the burden of "establishing multiple counts by charging and proving separate receipts." *Id.* at 404-405 (citations omitted). And like the appellant in *Hinkeldey,* Appellant never raised the "different transactions" words at trial. No plain error occurred.

The only issue in *Planck* was whether storage on different devices had a bearing on multiplicity. The *Planck* court never considered whether receipt of a single tranche of images, later copied multiple times and divided onto different devices, would raise a multiplicity error.[4] Nor did the Fifth Circuit augment its

[4] Appellant's best "unit of prosecution" argument may lie in an earlier federal child pornography statute, 18 U.S.C. § 2252. *See* COMMENT: SHOW MANY IS "ANY"?: INTERPRETING § 2252A'S UNIT OF PROSECUTION FOR CHILD PORNOGRAPHY POSSESSION, 62 Am. U.L. Rev. 1675, 1678 (2013). But even under the older statute—not relied on by Appellant—courts have indicated they would not agree with Appellant in a case like his where copies of images were moved onto different media devices. In *United States v. Schales,* 546 F.3d 965, 979 (9th Cir. 2008), the Ninth Circuit found a receipt and possession charge multiplicious under 18 U.S.C. § 2252(a)(4)(B) because the same four images were charged as possessed on the same medium on which they were received and the "unit of prosecution" for that statute is *not* the individual medium where each image is possessed. However, even under that statute, the *Schales* court noted that "there would have been no double jeopardy violation if the government had distinctly charged Schales with both receipt of material involving the sexual

reasoning in *United States v. Woerner*, 709 F.3d 527 (5th Cir. 2013), despite Appellant's argument to the contrary. (Appellant's Br. at 10-11.) There, the court reiterated that the unit of prosecution was the medium containing child pornography—and affirmed, over a multiplicity complaint, convictions for possessing child pornography on two separate media when evidence sufficiently established (1) the presence of two devices and (2) an inference that the images on them were obtained in different transactions. *Woerner*, 709 F.3d at 540.

Nothing in *Planck*—or *Woerner*—requires or implies that the use of the words "different transactions" means anything more than the unremarkable suggestion that when an appellant at a single point of time receives multiple contraband items, he might not be subject to multiple punishments absent further action by the appellant to possess those items in different locations. *Planck*, 493 F.3d at 504; *Woerner*, 709 F.3d at 540.

Indeed, if those were the facts here, Appellant might have an argument. He does not. He misreads the precedent. Neither *Planck* nor *Woerner* protects an

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exploitation of minors for the images that he downloaded from the internet and with possession of material involving . . . the images that he transferred to and stored on compact discs." *Id*. at 980. The Ninth Circuit applied the same rule later in *United States v. Overton*, 567 F.3d 1148 (9th Cir. 2009), rejecting a multiplicity objection. "[T]he transfer and storage of previously-downloaded Internet images—to a memory card or diskette, for example—describes conduct separate from the act of downloading pornography and may thus provide sufficient independent basis for a possession conviction." 567 F.3d at 1151.

appellant who receives or possesses contraband at a single time and place, but then takes further action to replicate and disseminate those items onto various media in his possession—particularly when the contraband is child pornography, where the harm Congress explicitly seeks to prevent under the most recent iteration of the child pornography statute, 18 U.S.C. § 2252A(a)(5)(B), is the copying and duplication of those pernicious images.

b. It is settled in military and civilian jurisdictions that possession is typically a lesser-included offense of receipt when the contraband is received and possessed in the same location—but when the contraband is moved, separate possession charges may stand and not violate multiplicity. The *Planck* and *Hinkeldey* holdings are consistent with this settled precedent.

Where a single *receipt* of contraband images under 18 U.S.C. § 2252A(a)(2) results in a single *possession* under 18 U.S.C. § 2252A(a)(5)(B), such possession has been held to be (1) the lesser-included offense of the receipt, *cf. United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008); and (2) potentially multiplicious with the receipt and distribution of those same images, when the images remained untouched since the receipt and were maintained on a single medium and single folder, *cf. United States v. Williams*, 74 M.J. 572, 576 (A.F. Ct. Crim. App. 2014); *United States v. Escobar*, ACM 38721, 2016 CCA LEXIS 199 (A.F. Ct. Crim. App. Mar. 24, 2016).

In contrast, service courts and federal circuit courts have held that this rule does not apply where the items received are moved to a new location. The Air Force Court of Criminal Appeals has held that where an appellant fails to raise multiplicity at his guilty plea, receipt and possession of the same images of child pornography are not facially duplicative when the appellant receives files on one medium and stores them on another. *Escobar*, 2016 CCA LEXIS 199, at *15-17. This further supports that even if a single initial receipt of multiple child pornography images preceded the crimes in this case, Appellant's multiple affirmative acts causing the replication and diffuse storage of these images across numerous separate media devices extinguishes any multiplicity concerns.

B. In refusing to merge four specifications of possession of child pornography, the Military Judge and lower court did not abuse their discretion under the unreasonable multiplication analysis. This Court should decline Appellant's demands to impose Federal multiplicity law directly upon the lower court's unreasonable multiplication precedent or to abandon the "reasonableness" and "abuse of discretion" standards applicable to that precedent.

1. The standard of review is abuse of discretion.

Unreasonable multiplication of charges is reviewed for an abuse of discretion. *Campbell*, 71 M.J. at 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)). "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. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (citations and quotation marks omitted).

2. Military judges and courts of criminal appeals have broad authority to apply "reasonableness" as the test to determine if convictions result from abuse of prosecutorial discretion.

Pursuant to case law and the President's Article 36, UCMJ, rule-making powers, "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4); *see Quiroz*, 55 M.J. at 336-39. This 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." *Quiroz*, 55 M.J. at 338.

This Court endorsed the lower court's five-factor test to determine if multiple findings of guilt constitute an unreasonable multiplication of charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?; (2) Is each charge and specification aimed at distinctly separate criminal acts?; (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?; (4) Does the number of charges and specifications unfairly increase the appellant's punitive exposure?; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Anderson, 68 M.J. 378, 386 (C.A.A.F. 2010) (quoting *Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (internal citation and quotation marks omitted)).

"[A]pplication of the *Quiroz* factors involves a reasonableness determination, much like sentence appropriateness, and is a matter well within the discretion of the CCA in the exercise of its Article 66(c), UCMJ . . . power." *Id.* (citing *Quiroz*, 55 M.J. at 339; *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985)).

3. The Military Judge's and lower court's *Quiroz* analyses were not abuses of discretion where the Military Judge cited correct law and the lower court applied the correct standard to determine that four possession specifications were reasonable under unreasonable multiplication of charges precedent.

In *Anderson*, this Court declined to reconsider the Army Court of Criminal Appeals' denial of an unreasonable multiplication of charges complaint. *Anderson*, 68 M.J. at 386. Anderson was convicted of, *inter alia*, two specifications of attempting to communicate with the enemy, in violation of Articles 80 and 104, UCMJ, 10 U.S.C. §§ 880 and 904 (2000). *Id*. at 380. He argued both at the Army Court of Criminal Appeals and this Court that these specifications were unreasonable multiplications of each other. *Id*. at 385-86. This Court reviewed the convictions under the five-factor *Quiroz* analysis and affirmed: "We do not find that the CCA abused its discretion in declining to find an abuse of prosecutorial discretion here." *Id*. at 386.

The lower court in *Anderson* did not render an explicit *Quiroz* analysis. *Id*. But this Court held: "While we do not have the benefit of the CCA's reasoning

because its disposition was summary, we presume that it undertook the correct analyses . . . and nothing about the lower court's implicit determination that the charges were not unreasonably multiplicious invites this Court to reconsider its judgment." *Id*. (citing *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000) ("A military judge is assumed to know the law and apply it correctly.")); *see also United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016) (recognizing that in the exercise of their unique Article 66(c) review powers "[a]ppellate military judges are presumed to know the law and apply it correctly") (citations omitted).

Here, the Military Judge applied *Quiroz* precedent to deny Appellant's claim of unreasonable multiplication of charges for sentencing (J.A. 144), and the lower court applied the five *Quiroz* factors to affirm. *Forrester*, 2016 CCA LEXIS 519, at *3-4. But the lower court went beyond the Army court in *Anderson* and articulated its *Quiroz* analysis of Appellant's claim. *Id*., at *4-6.

The lower court focused its analysis on the second *Quiroz* factor. Citing its prior decisions in *United States v. Campbell*, 66 M.J. 578 (N-M. Ct. Crim. App. 2008), *rev'd on other grounds*, 68 M.J. 217 (C.A.A.F. 2009), and *United States v. Schmidt*, No. 201200339, 2013 CCA LEXIS 226, at *8 (N-M. Ct. Crim. App. Mar. 19, 2013), the court found that Appellant "took separate steps on separate dates to copy the initial 23 images to the other media devices—and thus completed the necessary *actus reus* each time he re-copied the images." *Forrester*, 2016 CCA

LEXIS 519, at *5. As each copy involved separate dates and separate media devices, the lower court found, the Specifications targeted separate acts of child pornography possession, satisfying the second *Quiroz* factor. *Id*. at *5.

After acknowledging that the separate offenses increased Appellant's punitive exposure, the lower court found that the four specifications "do not misrepresent or exaggerate his criminality." *Id*. at *6. And consistent with Appellant's concessions, the lower court found the first and fifth factors weighed in favor of the United States: Appellant failed to object to unreasonable multiplication of charges during Findings, and no evidence existed of prosecutorial overreach. *Id*. at *4-6. Weighing all the *Quiroz* factors, the lower court found no unreasonable multiplication of charges. *Id*. at *6.

The lower court's application of the *Quiroz* factors correctly focused on the "reasonableness" of the charging scheme based on the unique facts of the case, and proceeded under a "legal standard," rooted in case law, rather than a non-existent "equitable power." *Quiroz*, 55 M.J. at 338-39. As in *Anderson*, the lower court did not "abuse[ ] its discretion in declining to find an abuse of prosecutorial discretion here." *Id*. at 386. This Court should affirm.

4. This Court should not revisit the lower court's broad exercise of its Article 66 powers or its decision to incorporate a *Planck*-like analysis into its precedent for the second *Quiroz* factor. *Planck*, and Article III precedent, is not under review—rather, the lower court has authority to interpret its own unreasonable multiplication of charges precedent.

The lower court first incorporated *Planck*'s multiplicity holding into its analysis of the second *Quiroz* factor in unreasonable multiplication of charges claims in *Campbell*, 66 M.J. 578, where two specifications alleged violations of 18 U.S.C. § 2252A(a)(5)(A). The Navy-Marine Corps court held that "the Fifth Circuit's reasoning [is] instructive in addressing the appellant's multiplicity claim," noting that *Planck* concerned "different images in three different media," whereas the *Campbell* appellant "possessed identical images in three different media." *Id.* at 583.

The lower court noted that, under 18 U.S.C. § 2252A:

> The similarity of the proscribed images is not the controlling factor in the determining what constitutes possession of child pornography. Rather, the possession of separate media containing contraband images provides an independent basis for each charge, irrespective of the similarity or differences of the contraband images. . . . Although the images possessed were identical, each possession on different media was a separate crime, and, therefore, a proper basis for a separate specification alleging possession, regardless of the similarity of the images in each instance.

Id.

Applying this reasoning to the second *Quiroz* factor, the lower court held that Campbell's "possession of images of child pornography on his office

computer as a result of his initial downloading of the images, and his possession of child pornography on computer disks as a result of his subsequent copying of those same images to separate media, *were separate and distinct criminal actions*." *Id*. (emphasis added). The lower court in *Campbell* appears to determine that because the several specifications are distinct "units of prosecution" and thus not "multiplicious"—they were also satisfied that the second *Quiroz* factor's test of "separate and distinct criminal actions" was also met.

This was neither unreasonable, nor an abuse of discretion. And the lower court here merely reaffirmed its own precedent from *Campbell* to hold that the evidence demonstrated distinctly separate criminal acts of child pornography possession under Article 134: "the government was able to prove that [Appellant] took separate steps on separate dates to copy the initial 23 images to the other media devices—and thus completed the necessary *actus reus* each time he re-copied the images." *Forrester*, 2016 CCA LEXIS 519, at *5.

Appellant's request to review the lower Court's interpretation of the second *Quiroz* factor (Appellant's Br. at 11-12), by direct application of *Planck's* multiplicity holding, ignores this Court's "strong disinclination" to involve itself in the service courts' exercise of Article 66 powers. *See Clark*, 75 M.J. at 300. Appellant does not dispute the lower court's broad authority, or cite any authority that the lower court's exercise of its Article 66 powers—as opposed to its

multiplicity analysis—is bound by multiplicity law from Article III courts. Nor does Appellant cite any authority for the proposition that the lower court's *Quiroz* analysis—or the Military Judge's ruling (J.A. 144)—was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *See White*, 69 M.J. at 239.

As in *Anderson*, nothing in the lower court's exercise of its broad Article 66 powers "invites this Court to reconsider its judgment." *Anderson*, 68 M.J. at 386.

C. Even giving no deference to the lower court's and Military Judge's analysis, and even binding the lower courts by applying *Planck* directly to their unreasonable multiplication of charges analysis—no unreasonable multiplication occurred.

To analyze unreasonable multiplication of charges, this Court applies the same five *Quiroz* factors the lower court used. *See Anderson* 68 M.J. at 386; *Pauling*, 60 M.J. at 95-96.

As to the first factor, Appellant's failure to object at trial weighs strongly against Appellant. *See United States v. Martinezmaldonado*, 62 M.J. 697, 699 (N-M. Ct. Crim. App. 2006), *rev. denied*, 63 M.J. 466 (C.A.A.F. 2006) (noting that failure to object to unreasonable multiplication of charges "significantly weakens" such a claim on appeal) (citing *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001)).

Nor is there evidence of prosecutorial overreach to support the fifth factor.

And as Appellant concedes (Appellant's Br. at 14-15), analysis of the third and fourth *Quiroz* factors—whether the four convictions "misrepresent or

exaggerate" Appellant's criminality or "unfairly increase" Appellant's punitive exposure—hinges on whether the convictions are aimed at distinctly separate criminal acts.

1. Appellant's claim that *Planck* results in "unreasonable multiplication" unless each medium contains "new images" of child pornography is meritless.

First, despite Appellant's claim otherwise, the phrase "new images" appears nowhere in either the statute at issue in *Planck*, 18 U.S.C. § 2252A, or, more importantly, in the child pornography provision under Article 134, UCMJ. (Appellant's Br. at 9.) Nor does *Planck* require "new images" to be present in different media devices. Had Congress or the President sought to make the "newness" of the images the *sine qua non* of child pornography possession, they surely would have done so in the statutory and regulatory prohibitions themselves.

Second, neither the language nor the concept of "new images" appears anywhere in the *Planck* court's majority or concurring opinions. *Planck*, 493 F.3d at 502-07. Appellant extrapolates this idea only through his reading of Judge Wiener's *concurrence*. (Appellant's Br. at 9 (citing *Planck*, 493.F.3d at 506 (Wiener, J., concurring)).) But even that reading misses the mark: Judge Wiener agreed with the *Planck* majority that "[a] defendant who possesses multiple items of contraband at the same time and place, may nevertheless be convicted of multiple possession offenses if he either (1) came into possession of different items

of contraband at different times or (2) . . . *stored some of the items in different places*." *Id.* at 506 (emphasis added).

Third, the *Planck* court considered and rejected Appellant's policy rationale for his interpretation of possession (Appellant's Br. at 12-14), in light of a competing rationale: "A contrary result would allow amassing a warehouse of child pornographic material—books, movies, computer images—with only a single count of possession as a potential punishment." *Planck*, 493 F.3d at 504.

Unbound by any "new images" requirement, the lower court properly found that Appellant "took separate steps on separate dates" to make copies of his twenty-three child pornography images and place them on his laptop, black hard-drive, blue hard-drive, and Gmail account, in multiple locations on those media devices. *Forrester*, 2016 CCA LEXIS 519, at *5. He thereby "obtained" the images *on each of those media devices* through "different transactions," which is all that *Planck* demands. 493 F.3d at 504. The second and third *Quiroz* factors weigh in favor of the United States, as Appellant's convictions target distinctly separate acts of child pornography possession and do not exaggerate his criminality.

2. Even if the Military Judge and lower court erred, this Court may affirm because Appellant identifies no prejudice.

"A finding or 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." Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012). As to

sentencing, this Court analyzes prejudice arising from dismissed charges by examining the maximum sentence available in the context of the sentence adjudged. *See United States v. Roderick*, 62 M.J. 425, 433-34 (C.A.A.F. 2006); *United States v. Mack*, 58 M.J. 413, 418 (C.A.A.F. 2003).

In *Roderick*, this Court dismissed several charges, including two indecent liberties specifications that the military judge erroneously failed to dismiss despite apparently finding that they were unreasonable multiplications of other offenses. *Roderick*, 62 M.J. at 433. The dismissals resulted in a reduction of the maximum sentence "from 107 years to 94 years" of confinement, but this court held that "the difference is insubstantial in light of the total maximum sentence that the military judge could have adjudged and in view of the adjudged sentence of seven years." *Id*. at 434; *see also Mack*, 58 M.J. at 418 (holding that consolidation of two conspiracy convictions into one would have no prejudice when maximum sentence was reduced from forty years to thirty-five years and six months, and adjudged sentence was two years).

Here, assuming the most beneficial sentencing landscape to Appellant, he still would have faced a maximum confinement period of ten years. Manual for Courts-Martial, United States (2012 ed.); Part IV, ¶ 68b.e.(1). He received only forty months of confinement. (J.A. 15.) As Appellant fails to make any claim that

he was prejudiced by the announced maximum sentence of thirty years and four months, this Court should affirm Appellant's sentence.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the decision of the lower court.

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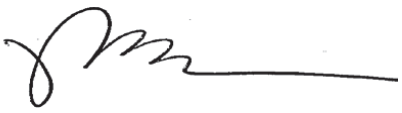

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