IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	**BRIEF IN SUPPORT OF**
Appellee,	)	**PETITION GRANTED**
	)	
v.	)	
	)	Crim. App. Dkt. No. 38937
Captain (O-3)	)	
RYAN A. HARDY,	)	
United States Air Force	)	USCA Dkt. No. 17-0553/AF
Appellant.	)	

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

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Issue presented

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING APPELLANT WAIVED, RATHER THAN FORFEITED, HIS CLAIM OF UNREASONABLE MULTIPLICATION OF CHARGES.

Statement of Statutory Jurisdiction

The Air Force Corps Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A military judge, sitting alone as a general court-martial, convicted Capt Hardy, pursuant to his pleas, of abusive sexual contact with a child (x2), aggravated sexual abuse of a child, indecent liberties with a child (x3), abusive sexual contact (x2), sexual abuse of a child, sodomy, conduct unbecoming an officer and a gentleman, indecent language, and indecent acts with a child, in violation of Articles 120, 120b, 125, 133, and 134, UCMJ. (J.A. 14-17). The military judge sentenced the Appellant to confinement for 16 years and one day, total forfeitures, and a dismissal. (J.A. 17). A pretrial agreement limited the approved confinement to 12 years. (J.A. 130).

Before the Air Force of Criminal Appeals (AFCCA), Capt Hardy raised, *inter alia*, an assignment of error alleging the unreasonable multiplication of charges (UMC). (J.A. 2). Capt Hardy argued the military judge failed to merge several specifications during his sentencing hearing. *Id*. This argument was not raised at trial. *Id*. In a published decision, the AFCCA found that Capt Hardy waived the issue of unreasonable multiplication of charges by virtue of his failure to raise it during his court-martial, and his unconditional guilty plea. (J.A. 1, 4). The AFCCA also declined to use its discretion under Article 66(c), UCMJ, to address the merits of the issue despite the court's conclusion that it had been waived. (J.A. 5) (citing *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016)).

Statement of Facts

On July 30, 2015, after a lengthy delay due to discovery violations and other prosecutorial misconduct, Capt Hardy's general court-martial re-convened. (J.A. 18, 23-28). He pleaded guilty to multiple offenses pursuant to a pretrial agreement (PTA). (J.A. 127-30). The military judge accepted his plea (J.A. 115).

Prior to his guilty plea, Capt Hardy raised several motions for relief, including a motion regarding potential Mil. R. Evid. 404(b) evidence, a motion to produce a witness, a motion to dismiss based on evidence of prosecutorial misconduct, a motion to dismiss for failure to state an offense, a motion to dismiss

under the statute of limitations, a motion to produce Mil. R. Evid. 513 records, and a motion under Mil. R. Evid. 412. (J.A. 23-27; App. Exs. VI, IX, XI, XV, XVII, & XVIII). Capt Hardy did not raise the issue of UMC either in writing or orally during his court-martial.

Capt Hardy's PTA did not include a term which required Capt Hardy to waive all "waivable" motions. (J.A. 127-30). Prior to accepting Capt Hardy's pleas, the military judge had the following exchange with the trial defense counsel regarding the terms of the PTA and its impact on motions practice:

> **Military Judge**: The accused was previously arraigned. We had some motion practice. There were a couple of motions still on the table from when we last gathered and I don't know what effect there is if the PTA has any motions or they may have been resolved by the parties. But when we last gathered there was an issue of witness production and 404(b) matters. I suspect that with the anticipated pleas, the 404(b) issue would probably go by the wayside. I don't know. Are any motions – they apparently are unaffected by the PTA but I don't know what still needs to be resolved.
>
> **Civilian Defense Counsel**: Yes, Your Honor. The PTA does not contain a waiver provision; however, the motions are rendered moot by the agreements contained in the PTA.
>
> **Military Judge**: Okay.

(J.A. 23). When the parties reviewed the terms of the pretrial agreement, there was no further discussion of motions or potentially waived issues. (J.A. 104-113).

Capt Hardy pleaded guilty to offenses involving two minors, TH and AT. (J.A. 14-17). TH is Capt Hardy's daughter. (J.A. 116). The government charged Capt Hardy with a course of conduct where, on divers occasions, he committed essentially the same series of offenses with TH. These offenses occurred while the family was stationed in Florida, New Mexico, and Germany.

Specifications 2 through 6 of Charge II alleged that while stationed in the United States, Capt Hardy viewed pornography and masturbated in TH's presence, invited TH to come close to him and disrobe, and touched TH's breasts and genitalia—all during the same encounters. (J.A. 46-73). The Specification under Charge V also alleges Capt Hardy viewed pornography in TH's presence on divers occasions while stationed at Ramstein Air Base, Germany. (J.A. 89-93).

During the providency inquiry, Capt Hardy described the connection between Specifications 2 through 6 of Charge II. When describing his conduct under Specification 2, he stated while stationed in Florida, he touched TH's breast with his hands while watching pornography. (J.A. 48). He "told her to get undressed and she did so. When she was undressed, [he] touched her breasts [with his] hands." *Id*. While in New Mexico, he touched her breasts "while engaged in wrestling or horseplay" on more than one occasion. *Id*.

When admitting to Specification 3 of Charge II, Capt Hardy stated, "I previously discussed touching [TH's] breast with my hands. I touched her genitalia during the same incidents, under the same circumstances." (J.A. 51).

Regarding Specification 4 of Charge II, Capt Hardy stated he watched pornography in the presence of TH on multiple occasions while stationed in Florida and New Mexico. (J.A. 56). Similarly, with respect to Charge V and its Specification, Capt Hardy stated he "watched pornographic videos in the presence of [TH]" while stationed in Germany. (J.A. 89).

During Capt Hardy's guilty plea to Specification 5 of Charge II, he stated, "As I previously mentioned, I watched pornography while [TH] was in the house. . . . I knew she was there. I also knew she could see me and I masturbated while viewing pornography . . . ." (J.A. 61). This occurred in Florida. *Id*.

For Specification 6 of Charge II, Capt Hardy acknowledged based on his review of the evidence that "after viewing pornography and participating in some of the previous acts described[,] [he] . . . ejaculated on [TH's] chest." (J.A. 72).

Specifications 7 and 8 of Charge II allege Capt Hardy touched TH's breast and genitalia when Capt Hardy was stationed in Germany. (J.A. 74-80). When describing his conduct for Specification 7, Capt Hardy admitted he "engaged in wrestling and horseplay with [TH]" on multiple occasions where he intentionally

touched her breast. (J.A. 75). For Specification 8, Capt Hardy stated during these same encounters he "would touch her genital area." (J.A. 78).

As a result of his guilty plea, Capt Hardy faced a maximum term of confinement of 150 years and six months. (J.A. 101). For Specification 2 of Charge II, he faced 15 years of confinement. (J.A. 100). For Specification 3 of Charge II, the maximum was 20 years. (J.A. 101). Specifications 4 through 6 of Charge II each carried a maximum of 15 years. *Id*. For both Specifications 7 and 8 of Charge II, the maximum term of confinement was 7 years. *Id*.

Argument

I.

THE COURT OF CRIMINAL APPEALS ERRED BY HOLDING APPELLANT WAIVED, RATHER THAN FORFEITED, HIS CLAIM OF UNREASONABLE MULTIPLICATION OF CHARGES.

Standard of Review

Whether an appellant has waived an issue is reviewed de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

Analysis

The Appellant did not waive his claim of UMC. This Court's precedent demonstrates that entering into a guilty plea without a specific and explicit waiver

of UMC merely forfeits—not waives—this issue. As such, this Court should review the issue of UMC for plain error.

At the outset, taking this Court's precedent into consideration, the question of whether an unconditional guilty plea waives appellate review of an issue can be divided into three categories.

The first category ("Category I") encompasses those issues that are unquestionably waived by an unconditional guilty plea. Rule for Court-Martial (RCM) 910(j) states a guilty plea alone, "waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilty of the offense(s) to which the plea was made." As such, any and all factual issues are waived by an unconditional guilty plea and may not be reviewed on appeal. The principle is consistent with trial defense counsel's acknowledgement on the record that Capt Hardy's guilty plea waived the MRE 404(b) and witness production motions, because those issues relate to the factual issue of guilt. (J.A. 23).

The AFCCA acknowledged in this case that RCM 910(j) does not apply because UMC addresses prosecutorial overreach, not factual issues of guilt. (J.A. 3). Therefore, by the AFCCA's own analysis, Capt Hardy's claim of UMC on appeal is not foreclosed by RCM 910(j).

In the second category ("Category II"), there are issues that are never waived by an unconditional guilty plea. These include all defects related to jurisdiction or due process. *See United States v. Schweitzter*, 68 M.J. 133, 136 (C.A.A.F. 2009) (quoting *United States v. Rehorn*, 26 C.M.R. 267, 268-69 (C.M.A. 1958)). Again, UMC does not fall into this category. UMC is a rule-based principle unique in military practice that is found in the Rules for Court-Martial, not the Constitution. *See United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). As such, Category II is inapplicable to the discussion at hand.

The third category ("Category III") applies to those defects that are waived only by intentional relinquishment or abandonment by the Appellant. This category is very fact-specific and encompasses either the explicit terms of the PTA with a "waive-all-waivable motions" provision, an express waiver of a particular issue, or an explicit discussion on the record between an appellant and the military judge regarding the issues that are being waived by entering into the plea. It is this third category in which UMC must be analyzed to determine if it is forfeited or waived in a particular case. To be clear, it is certainly possible to waive the issue of UMC, but it must be done explicitly. If it is not, then it is merely forfeited, and may be reviewed for plain error on appeal.

The concept of Category III issues is not novel. This Court has found that an unconditional guilty plea by itself in certain circumstances does not waive a nonfactual issue on appeal. *See, e.g., United States v. Pratchard,* 61 M.J. 279, 280 (C.A.A.F. 2005) (guilty plea does not waive a speedy trial objection under Article 10, UCMJ) (citing *United States v. Mizgala*, 61 M.J. 122 (C.A.A.F.2005)); *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004) (unconditional guilty plea does not waive a multiplicity issue when the offenses are "facially duplicative").

In order to analyze whether an issue in Category III has been waived or merely forfeited by a guilty plea, it is necessary to review this Court's precedent to understand how this distinction is drawn.

As this Court recently acknowledged in *United States v. Feliciano*, 76 M.J. 237, 240 n.2 (C.A.A.F. 2017), military courts have often struggled with differentiating the concepts of waiver and forfeiture in a consistent manner. This Court attempted to settle the confusion by giving these terms a clear definition in *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). In *Gladue*, this Court provided clarity about the distinction between waiver and forfeiture:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. The distinction between the terms is important. If an appellant has forfeited a right by failing to raise it at trial, [the Court] reviews for plain error.

> When, on the other hand, an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal.

67 M.J. at 313 (internal quotation marks and citations omitted).

Recent decisions by this Court addressing the issue of waiver versus forfeiture in the context of litigated courts-martial support the conclusion that resolving this question requires a fact-specific inquiry into the record and the particular issue under consideration. As this Court reiterated in *Ahern*, "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." 76 M.J. at 197 (citation omitted). Also, in *United States v. Oliver*, 76 M.J. 271, 273-74 (C.A.A.F. 2017), this Court held that the trial defense counsel's affirmative statement that he had no objection to the military judge's consideration of wrongful sexual contact as lesser-included offense of abusive sexual contact was not waiver, but merely a forfeiture of the right to challenge that conclusion on appeal, given changes in the law after his trial. As a result, it was proper to conduct a plain error review. *Id*. at 274-75.

Here, in its published decision in this case, the AFCCA breathed new life into the uncertainty by finding that Capt Hardy waived, rather than forfeited, his claim of UMC, despite the lack of any discussion on the record about waiving this

particular issue and the absence of a waive-all-waivable-motions provision in his PTA. (J.A. 127-30). The only discussion on the plea's impact on motions and waiver occurred during trial defense counsel and the military judge's colloquy about pending MRE 404(b) and witness production motions. (J.A. 23). Counsel acknowledged these particular motions were waived. This discussion did not extend to all motions, whether raised previously or not. *Id*. The parties' review of the PTA did not address the waiver of any other motions for relief. (J.A. 103-112).

In its determination of Capt Hardy's request to review the issue of UMC, AFFCA cited *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009), for the broad proposition that unconditional guilty pleas waive all issues that are not jurisdictional or a deprivation of due process. (J.A. 3). Yet, this justification ignores this Court's precedent where other issues not explicitly waived were reviewed for plain error. Additionally, when citing *Schweitzer*, AFCCA failed to acknowledge that, unlike Capt Hardy, the appellant in *Schweitzer* expressly waived appellate review on all issues except for those involving jurisdictional, due process, and other constitutional issues. *See* 68 M.J. at 137 (citing *Gladue*, 67 M.J. at 313). The AFFCA's analysis provides no explanation as to the purpose of a waive-all-waivable-motions provision in a PTA if waiver is simply read-in

regardless of the circumstances. If the AFCCA's interpretation were correct, this common PTA terms would become surplusage with no practical effect.

Perhaps most significantly, the AFCCA's analysis conflicts with this Court's important precedent on the issue of UMC. This Court has, on a number of occasions, addressed the merits of claims of UMC under the plain error standard when the appellant pleaded guilty at trial. *See, e.g.*, *United States v. Pauling*, 60 M.J. at 92-96 (C.A.A.F. 2004); *United States v. Quiroz*, 55 M.J. at 338 (C.A.A.F. 2001). These bedrock cases in the area of UMC all fall into Category III, wherein UMC was not waived by the terms of the PTAs or by virtue of some other explicit act. As such, they were properly reviewed for plain error on appeal.

In *Pauling*, the Appellant entered into an unconditional guilty plea for making a false official statement, two specifications of larceny, and two specifications of forgery. 60 M.J. at 93. At trial, the appellant raised the issue of multiplicity with respect to the practice of double-charging forgeries on a fraudulent check when the both the drawer and indorser's signatures are forged on a single check. *Id*. Before this Court, the appellant in *Pauling* raised for the first time the issue of UMC with respect to this practice. *See id*. at 92 n.2. This Court granted review on both the issue of multiplicity and UMC. *Id*. Because the specifications were not facially duplicative, this Court found the unconditional

guilty plea had waived the multiplicity motion. *Id*. at 93-95. But this Court did not conduct a similar waiver analysis with respect to UMC, despite the appellant's failure to raise the issue below. Instead, this Court engaged in a thorough application of the *Quiroz* factors to determine if UMC existed. *Id.* at 95-96.

This Court's opinion in *Pauling* confirms that, while the concept of multiplicity derives from Constitutional protections, UMC is subject to a distinct, fairness-based analysis. Even where specifications are not facially duplicative or multiplicious, they may still violate the rule against UMC.

Similarly, in *Quiroz*, perhaps this Court's most important UMC case, this Court addressed the merits of the lower court's analysis of a UMC issue in the context of a guilty plea where the appellant had not raised the issue at trial. As this Court explained, "The [lower court] concluded that Article 66(c) provided it with authority to consider all claims of UMC, even if raised for the first time on appeal, and to consider waiver only 'if an accused affirmatively, knowingly, and voluntarily relinquishes the issue at trial . . . .'" *Quiroz*, 55 M.J. at 338. This Court proceeded to affirm the five-factor framework used by the lower court to analyze UMC issues, remanding only for clarification on one of the factors. *Id*. at 339.

This Court's precedent in *Pauling* and *Quiroz* demonstrates that claims of UMC are not waived simply by operation of an unconditional guilty plea. The

AFCCA's published opinion reaching the opposite conclusion suggests *Pauling* and *Quiroz* were incorrectly decided with respect to waiver. In doing so, the AFCCA overlooked the different way in which a waiver analysis is applied to factual issues that impact the question of guilt, jurisdictional or due process issues that cannot be waived, and cases like this one where the subject of waiver turns on the terms of the PTA or some other explicit source found in the record.

The AFCCA's broad announcement on the issue of waiver is inconsistent with *Gladue*, which provides the appropriate framework for determining waiver in the case. Here, there was no express waiver of this issue, nor was there a provision in the pretrial agreement that waived all waivable motions. Under the test described in *Gladue*, Capt Hardy's claim of UMC was forfeited, not waived. For this reason, Capt Hardy is entitled to plain error review of this issue.

II.

UNDER A PLAIN ERROR ANALYSIS, CAPT HARDY IS ENTITLED TO SENTENCING RELIEF FOR THE UNREASONABLE MULTPLICATION OF CHARGES.

Standard of Review

When "an appellant has forfeited a right by failing to raise it at trial, [this Court] reviews for plain error." *Gladue*, 67 M.J. at 313. Appellant thus "has the burden of establishing (1) error that is (2) clear or obvious and (3) results in

material prejudice to his substantial rights." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006).

Analysis

RCM 307(c)(4) provides: "What is substantially one transaction should not be made the basis for an UMC against one person." The concept of UMC applies to both sentencing and findings. *See United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). The remedy for UMC in sentencing is to limit exposure to "the maximum authorized punishment of the offense carrying the greatest maximum punishment." RCM 906(b)(12)(ii).

To determine whether there is UMC, this Court applies the factors annunciated in *Quiroz*, 55 M.J. at 337 (C.A.A.F. 2001): (1) whether the accused objected at trial; (2) whether each charge and specification is aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresents or exaggerates the appellant's criminality; (4) whether the number of charges and specifications unreasonably increases the appellant's punitive exposure; and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

In *Campbell*, this Court explained the *Quiroz* factors are not "all-inclusive." 71 M.J. at 23. "Nor is any one or more factors a prerequisite. Likewise, one or more factors may be sufficiently compelling, without more, to warrant relief on unreasonable multiplication of charges based on prosecutorial overreaching." *Id*.

Capt Hardy is entitled to relief for UMC. Specifications 2 through 6 of Charge II should have been merged for sentencing purposes at his court-martial. Additionally, Specifications 7 and 8 of Charge II should have been similarly merged. These specifications represent two sets of transactions, not six as the charge sheet suggests. By virtue of the charging scheme, Capt Hardy was exposed to a significantly greater period of confinement than he would have been if the specifications were appropriately merged. As a result, this Court should remand this case for a sentencing rehearing.

Specifications 2 through 6 of Charge II address allegations that occurred between on or about October 1, 2007 and on or about June 27, 2012. (J.A. 14-15). Specifically, Specification 2 deals with Capt Hardy intentionally touching the breasts of TH on divers occasions. (J.A. 14). Specification 3 deals with Capt Hardy intentionally touching the genitalia of TH on divers occasions; Specification 4 deals with Capt Hardy watching pornography in the presence of TH on divers occasions; Specification 5 deals with Capt Hardy rubbing his penis

in the presence of TH on divers occasions; and Specification 6 deals with a one-time allegation that Capt Hardy ejaculated on the chest of TH during the same charged timeframe. (J.A. 14-15).

As provided above, Capt Hardy's viewing of pornography in TH's presence, and his touching the breasts and genitalia of TH all occurred during the same transactions. (J.A. 46-73). Furthermore, the acts described in Specifications 5 and 6 also occurred during these same transactions, albeit not necessarily each time. (J.A. 61, 72). The charging scheme here both practically increases Capt Hardy's punitive exposure as well as exaggerates his criminal misconduct with the manner in which these acts are described as each separately occurring on divers occasions over a 4-year period. In reality, the acts described in Specifications 2-6 each occurred potentially only two times during the same two transactions, but the manner in which they are described on the charge sheet elicits a far graver image.

Specifications 7 and 8 of Charge II address allegations that on divers occasions between on or about August 29, 2012 and on or about November 7, 2013 that Capt Hardy touched the breasts of TH, and that between on or about August 29, 2012 and on or about November 7, 2015, Capt Hardy intentionally touched the genitalia of TH. (J.A. 15). Again, these acts occurred during the same transactions but were separately charged and punished.

The *Quiroz* factor most apparent under these facts is the extent to which Capt Hardy's punitive exposure was unreasonably increased due to the charging scheme. As a result of the decision to charge Specifications 2 through 6 of Charge II separately, Capt Hardy's punitive exposure increased significantly. The offense carrying the greatest authorized punishment among Specifications 2 through 6 of Charge II is Specification 3, aggravated sexual abuse of a minor, which authorizes 20 years of confinement. (J.A. 100-101). By contrast, when punished separately for Specifications 2 through 6 of Charge II, Capt Hardy's total exposure is 105 years, or 85 greater than the alternative. *Id*. Such a drastic margin represents an unreasonable increase in Capt Hardy's punitive exposure for these offenses.

CONCLUSION: The Appellant respectfully requests that this Court find he forfeited, and did not waive, his right to raise UMC by entering into a guilty plea during which he did not explicitly waive this issue. Furthermore, the Appellant requests that this Court find that under a plain error review, several of the specifications should have been merged for purposes of sentencing. As such, he is entitled to relief on his sentence.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Appellate Government on November 13, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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