IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 17-0553/AF
Captain (O-3) RYAN A. HARDY, USAF *Appellant*.	)	Crim. App. Misc. Dkt. No. 38937

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

ISSUE PRESENTED

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

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

The United States concurs with Appellant's statement of the case.

STATEMENT OF FACTS

Appellant married his wife in 1995. (J.A. 0116.) At the time, Appellant's wife had a one-and-a-half year old daughter, AT, from a previous relationship. (Id.) Soon though, Appellant and his wife had their own daughter. (Id.) They named her TH. (Id.) She was born on 29 August 1996. (Id.)

Appellant pled guilty to multiple sexual offenses against his daughter while TH was **between the ages of 11 and 16 years old**, including:

> causing TH to touch his genitalia on divers occasions (J.A. 8, Charge II, Specification 1);
> touching TH's breasts with his hands on divers occasions (J.A. 10, Charge II, Specification 2);
> touching TH's genitalia on divers occasions (J.A. 10, Charge II, Specification 3);
> watching pornography in TH's presence on divers occasions (J.A. 10, Charge II, Specification 4);
> rubbing his exposed penis in TH's presence on divers occasions (J.A. 10, Charge II, Specification 5);
> ejaculating on TH's bare chest (J.A. 10, Charge II, Specification 6); and
> committing sodomy against TH (J.A. 12, Charge IV),

(J.A. 28.) Appellant committed these offenses at various locations, including Florida, New Mexico, and Ramstein Air Base, Germany. (J.A. 116-119.)

Appellant pled guilty to multiple sexual offenses against his daughter while TH was **older than 16 years old**, including:

> touching TH's breasts with his hand on divers occasions (J.A. 10, Charge II, Specification 7);
> touching TH's genitalia on divers occasions (J.A. 11, Charge II, Specification 8);

touching TH's breasts with his hand on divers occasions (J.A. 11, Charge III);
watching pornography in TH's presence on divers occasions (J.A. 12, Charge V); and
wrongfully communicating to TH the indecent language "I can buy you a vibrator and show you how to use it," or words to that effect (J.A. 12, Charge VI, Specification 1).

(J.A. 28.) Appellant committed these offenses at various locations, including Ramstein Air Base and New Mexico. (J.A. 116-119.) Appellant also pled guilty to a sexual offense against AT, his stepdaughter, while AT was under the age of 16, which included fondling AT's breast. (J.A. 12, Charge VI, Specification 2.)

Additional facts necessary for the disposition of these issues are set forth in the argument sections below.

SUMMARY OF THE ARGUMENT

The Air Force Court of Criminal Appeals did not err by holding that Appellant waived, rather than forfeited, Appellant's claim of unreasonable multiplication of charges for sentencing.[1] An unconditional plea waives all nonjurisdictional and non-due process defects at the trial level, and while some exceptions exist to the general rule of waiver, unreasonable multiplication of charges for sentencing is not one of them. An exception should not be created,

[1] The CCA held that unreasonable multiplication of charges was waived, but in the throes of their analysis, the CCA discusses only unreasonable multiplication of charges generally. United States v. Hardy, 76 M.J. 732, 736 (A.F. Ct. Crim. App. 2017). Appellant raised the issue to the CCA as unreasonable multiplication of charges for sentencing. Id. at 734. Appellant again argues to this Court that the specifications should have been merged for sentencing. (App. Br. at 18.) *See* R.C.M. 906(b)(12)(ii); R.C.M. 1003(C)(1)(c)(ii).

especially under the current circumstances. But even if Appellant did not waive the issue, he forfeited it. Although plain error analysis of unreasonable multiplication of charges falls outside of issue granted by this Court, even if this Court conducted such an analysis, relief would not be warranted under the Quiroz factors.

ARGUMENT

AFCCA DID NOT ERR BY APPLYING WAIVER IN THIS CASE BECAUSE APPELLANT'S UNCONDITIONAL GUILTY PLEA WAIVED ALL NONJURISDICTIONAL AND NON-DUE PROCESS DEFECTS AT TRIAL, AND AN EXCEPTION TO THIS WAIVER DOCTRINE DOES NOT AND SHOULD NOT APPLY FOR UNREASONABLE MULTIPLICATION OF CHARGES.

Standard of Review

When an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal. United States v. Gladue, 67 M.J. 311, 313-14 (C.A.A.F. 2009)(citing United States v. Olano, 507 U.S. 725, 733-734 (1993); United States v. Harcrow, 66 M.J. 154, 156 (C.A.A.F. 2008)). Waiver, however, is different from forfeiture. Olano, 507 U.S. at 733. If an appellant has forfeited a right by failing to raise it at trial, this Court reviews for plain error. Harcrow, 66 M.J. at 156 (citations omitted). Under plain error review, an appellant must demonstrate that "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." Id. at 158 (citations omitted).

Law and Analysis

This Court is asked to once again descend into the "inner circle of the Inferno where the damned endlessly debate multiplicity for sentencing." United States v. Barnard, 32 M.J. 530, 537 (A.F.C.M.R. 1990). This Court need not delve too deeply, however, as this Court narrowly granted review as to whether the Air Force Court of Criminal Appeals erred in determining waiver applied in this current case. App. Br. at 16.

Appellant waived the issue when he pled guilty unconditionally to each separate specification and in doing so, he intrinsically and intentionally agreed that he should be sentenced for each of his crimes. Generally, an unconditional plea waives all nonjurisdictional and non-due process defects at the trial level. United States v. Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009). No exception to this general waiver rule exists for a post-trial allegation of unreasonable multiplication of charges ("UMC"), and a new exception should not be recognized.

Multiplicity and unreasonable multiplication of charges are "distinct concepts." United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001)(citation omitted). Multiplicity is derived from the concept of the Double Jeopardy Clause, while unreasonable multiplication of charges promotes "fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress.

Id. (citing United States v. Quiroz, 53 M.J. 600, 604-05 (N.M. Ct. Crim. App. 2000)). UMC is not constitutional in nature, but rather "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." United States v. Campbell, 71 M.J. 19, 23 (C.A.A.F. 2012)(citing Quiroz, 55 M.J. at 337); *see also* R.C.M. 906(12) Discussion.

a. Appellant's unconditional plea of guilty waived the issue of unreasonable multiplication of charges because the issue is neither jurisdictional in nature nor implicates due process.

Rules for Courts-Martial (R.C.M.) 910(j) provides a "bright line rule" that an unconditional plea "which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made." R.C.M. 910(j); United Schweitzer, 68 M.J. at 136. Notably, "[o]bjections that do not relate to factual issues of guilt are not covered by this bright-line rule, but the general principle still applies: An unconditional guilty plea generally waives all defects which are neither jurisdictional nor a deprivation of due process of law." Schweitzer, 68 M.J. at 136 (citations omitted).

This Court recently reaffirmed that "[a]n unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." United States v. Lee, 73 M.J. 166, 167, 170 (C.A.A.F. 2014) (citing United States v. Joseph, 11 M.J. 333, 335 (C.M.A. 1981)); *see also* United States v. Bradley, 68 M.J. 279, 281

(C.A.A.F. 2010); United States v. Rehorn, 9 U.S.C.M.A. 487, 488-89 (C.M.A. 1958) ("It is a fundamental principle of Federal criminal law that a plea of guilty waives all defects which are neither jurisdictional nor a deprivation of due process of law.")

In Lee, the Court recognized that this waiver doctrine "is not without limits," but caveated that "those limits are narrow and relate to situations, in which, on its face, the prosecution may not constitutionally be maintained." Lee, 73 M.J. at 170 (citing Bradley, 68 M.J. at 282). Furthermore,

> such limits do not arise where an appellant merely complains of antecedent constitutional violations or a deprivation of constitutional rights that occurred prior to the entry of the guilty plea, rather they apply where on the face of the record the court had no power to enter the conviction or impose the sentence.

Id. (internal citations and quotations omitted.)

This Court held in Lee that limits on the waiver doctrine apply, but do so "where on the face of the record the court had no power to enter the conviction or impose the sentence." Id. at 170 (citing United States v. Broce, 488 U.S. 563, 569 (1989)(emphasis added). Other types of limits to the general rule of waiver include cases where specifications are facially duplicative or fail to state an offense, or include cases where the "unique nature of the protections" of speedy trial set forth in Article 10, UCMJ, are at issue. Id., United States v. Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009); United States v. Mizgala, 61 M.J. 122, 126-127

(C.A.A.F. 2005)(carving out an Article 10, UCMJ, speedy trial exception). None of the recognized limits to the general rule of waiver applies to UMC for sentencing.

Additionally, the Court should consider that the charges in Appellant's case are not facially duplicative. In United States v. Lloyd, 46 M.J. 19, 24 (C.A.A.F. 1997), this Court held that "appellate consideration of multiplicity claims is effectively waived by unconditional guilty pleas, except where the record shows that the challenged offenses are 'facially duplicative.'" Lloyd, 46 M.J. at 20. The Court further held that since the existing record in the case "did not show the challenged offenses to be factually the same . . . appellant's multiplicity claims were waived by his guilty plea." Id. While Lloyd dealt specifically with multiplicity and did not address the issue of unreasonable multiplication of charges, similar principles from the Court's holding apply. Significantly, Lloyd did not dictate a plain error review in *all* cases where an appellant raises multiplicity claims after an unconditional guilty plea. Subsequent cases have interpreted Lloyd to stand for the proposition that appellate review of a multiplicity claim is "not appropriate under the plain error doctrine where the specifications were not facially duplicative." United States v. Harwood, 46 M.J. 26, 28 (C.A.A.F. 1997). If a plain error review of multiplicity is not appropriate when the

specifications are not facially duplicative, then it is difficult to argue that a plain error review is appropriate for an alleged unreasonable multiplication of charges.

In the current case, Specifications 2-6 and Specifications 7-8 of Charge II all charge separate physical acts, in multiple locations, and are therefore not factually the same. None of the specifications to which Appellant pled guilty were reliant on the existence of another: Appellant could have stopped engaging in lewd acts and sexual contact at any time. Instead, Appellant chose to do them again (and again) in multiple locations, both prior to and after his daughter turned 16 years of age. Like the analysis in Lloyd, where the Court determined the appellant's unconditional guilty plea to facially dissimilar charges waived the issue of multiplicity on appeal, here Appellant's unconditional plea must also have waived his right to raise the issue of unreasonable multiplication of charges on appeal where the charges were not facially duplicative.

Notably, no case from this Court has ever *explicitly* analyzed whether an unconditional guilty plea waives unreasonable multiplication of charges. *See* United States v. Lloyd, 46 M.J. 19, 24 (C.A.A.F 1997), *but see* United States v. Pauling, 60 M.J. 91 (C.A.A.F. 2004)(discussed *infra*). Of note, the Courts of Criminal Appeal (CCA) have provided variable holdings on the issue. *See* United States v. Wheeler, 76 M.J. 564, 572 (A.F. Ct. Crim. App. 2017)(multiplicity issue forfeited, UMC reviewed under Quiroz despite the appellant raising the issue for

the first time on appeal); United States v. Dimas, ARMY 20160784, 2017 CCA Lexis 591, unpub. op. at *4 (Army Ct. Crim. App. 30 August 2017)(applied waiver of UMC issue); United States v. Torinese, NMCCA 201500129, 2015 CCA Lexis 498, unpub. op. at *6-10 (N-M. Ct. Crim. App. 5 November 2015)(appellant waived UMC after pretrial agreement and pleading guilty).

However, an analysis of this Court's existing case law, as detailed above, leads to the conclusion that Appellant waived the issue. To summarize the applicable law, an unconditional guilty plea waives all defects that are neither jurisdictional nor a deprivation of due process. Limits to this waiver doctrine relate to situations in which the prosecution, on its face, may not constitutionally be maintained, in other words, where the court had no power to enter the conviction or impose the sentence. Some such limits previously recognized include case where specifications are facially duplicative or fail to state an offense, or where there is a speedy trial violation under Article 10, UCMJ.

Allegations of unreasonable multiplication of charges for sentencing do not fall within the exceptions to the waiver doctrine previously recognized by the Court, and no exception need be recognized now. Unreasonable multiplication of charges is not jurisdictional, does not implicate due process, and does not have its foundation in the Constitution; it relates only to prosecutorial overreaching, which is not a recognized exception to the waiver doctrine. Moreover, this is not a case

where the trial court had no power to enter a conviction or impose the sentence. The military judge's ruling on UMC would have been discretionary. R.C.M. 1003(c)(1)(C)(ii); United States v. Campbell, 71 M.J. 19, 24, fn 9 (C.A.A.F. 2012).

Appellant urges the Court to consider Pauling and Quiroz for the proposition that UMC is not waived by his pretrial agreement, therefore UMC should be considered merely forfeited and reviewed under plain error. (App. Br. at 12.) In United States v. Pauling, 60 M.J. 91, 92-96 (C.A.A.F. 2004), this Court reviewed a case for unreasonable multiplication of charges, finding none, even though the appellant had entered an unconditional guilty plea. However, this Court provided no analysis or reasoning as to why the issue of UMC was or was not waived by the appellant's unconditional guilty plea. 60 M.J. at 93-95.[2] As demonstrated above, a deeper review of this Court's relevant case law analyzing the waiver doctrine indicates that waiver should apply in such situations. In short, Pauling seems to be at odds with this Court's more recent cases concerning the waiver doctrine, and this Court now has the opportunity to clarify the issue.

[2] The trial in Pauling occurred well prior to 2001, which is when the Court began the process of uncluttering multiplicious for sentencing and unreasonable multiplication of charges for sentencing. *Compare* United States v. Pauling, ARMY 9700685, 1999 CCA Lexis 398 (Army Ct. Crim. App. 15 July 1999) (unpub. op.) and Quiroz (2001). Military judges had not previously used the term "unreasonable multiplication of charges for sentencing," instead considering "multiplicity for sentencing" and a rubric involving a "single impulse or intent" or "a unity of time" with a chain of events, to determine multiplicity for sentencing. *See* Campbell, 71 M.J. at 23.

Distinguishable from the current case, the Court in United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2001), addressed an instance where the appellant had entered an unconditional guilty plea to all offenses and then raised this issue of unreasonable multiplication of charges for the first time on appeal. The Navy-Marine Corps Court dismissed certain specifications and "concluded that Article 66(c) provided it with authority to consider all claims of unreasonable multiplication of charges, 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 . . . ." Id. at 338. This Court determined that the CCA had distinct and unique authority under Article 66(c) to "determine the circumstances, if any, under which it would apply waiver or forfeiture" in an Article 66(c) framework. Id. at 338. In the current case, the Air Force Court of Criminal Appeals specifically held that Appellant's case did not warrant an exercise of their authority under Article 66(c). Thus, Quiroz is inapposite to the current case.

Finally, there would be no good reason for this Court to recognize an exception to the waiver doctrine for unreasonable multiplication of charges. The waiver doctrine exists, in part, because it:

> places responsibility upon defense counsel to object . . . This rule is designed . . . to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished.

United States v. Collins, 41 M.J. 428, 430 (C.A.A.F. 1995)(citing United States v. Causey, 37 M.J. 308, 311 (C.M.A. 1993). The failure to apply waiver absent a showing of good cause "prevents finality, taxes scarce resources, and encourages withholding of objections." United States v. Johnson, 42 M.J. 443, 448 (C.A.A.F. 1995)(J. Crawford, concurring)(citing McCleskey v. Zant, 499 U.S. 467, 489-96 (1991)). It would waste precious judicial resources to allow appellants to argue unreasonable multiplication of charges on appeal after choosing to plead guilty and expressly acknowledging during their pleas that they could be sentenced to a certain term of years based on their pleas alone. (*See* Section b. *infra*.) For all of the above reasons, this Court should hold that Appellant's unconditional guilty plea waived the issue of unreasonable multiplication of charges on appeal.

b. This Court can apply the waiver doctrine even if a particular issue was not discussed on the record prior to an unconditional guilty plea; even if there was such a requirement, Appellant here demonstrated his understanding that by pleading guilty he could be sentenced to the maximum punishment of 150 years and six months confinement.

Waiver is "the intentional relinquishment or abandonment of a known right." Gladue, 67 M.J. at 313 (citing United States v. Olano, 507 U.S. 725, 733 (1993)). This raises the question of whether an appellant, in entering an unconditional guilty plea and moving unabated through sentencing, intentionally relinquished or abandoned a known right against unreasonable multiplication of charges for sentencing.

Contrary to Appellant's contention, an accused need not expressly waive a specific issue or discuss waiver on the record in order for the CCA or this Court to apply waiver following an unconditional guilty plea. Appellant has cited no authority that creates such a requirement, and this Court's prior cases indicate the opposite. For instance, in Bradley, the appellant objected to a trial counsel remaining on the case because that counsel had served as a witness at a previous Article 39(a) hearing. Bradley, 68 M.J. at 280. Defense counsel, prior to the appellant's guilty plea, noted that the appellant believed the issue "has *not* been waived." Id. at 281 (emphasis added). This Court nonetheless found waiver. Bradley, 68 M.J. at 282-283. Thus, expressly waiving an issue on the record is not a prerequisite to finding waiver.

Even assuming that discussion of an issue on the record is required for an appellate court to find waiver, in this case, Appellant explicitly agreed to be sentenced to his crimes individually with no merger of the offenses for sentencing: during the providence inquiry, Appellant agreed that the maximum punishment authorized included 150 years and six months confinement. (J.A. 101.)

Immediately before Appellant pled guilty, trial counsel discussed on the record the maximum punishment that Appellant could have received, and he did so by specification.

MJ: Counsel, breakdown the 152 years for me, please?

> ATC: Yes, Your Honor. Charge II, Specification 1; the abusive sexual contact, 15 years. Charge II, Specification 2 abusive sexual contact, also 15 years. Charge II, Specification 3 abusive – aggravated sexual abuse of a minor, 20 years. Specification 4, indecent liberty with a child . . . .

(J.A. 101-102.) After walking through each specification, trial counsel took a recess in-place to ensure the total maximum punishment was accurate. (J.A. 102.) Upon returning, trial counsel noted a correction and the military judge then turned to defense.

> TC: Sir, correction to Charge VI, Specification 1. It is indecent language not indecent language with a child. So the difference there goes from two years to six months. Therefore, the final tally from our standpoint is 150 years and six months.
>
> MJ: Defense, do you agree?
>
> CDC: Yes, Your Honor.
>
> …
>
> MJ: Alright, Captain Hardy, the maximum punishment authorized in this case based solely on your guilty plea is 150 years and six months confinement, total forfeitures of all pay and allowances, dismissal from service, a fine could also be adjudged; whether the parties seek it or not, it is part of the authorized landscape. On your plea of guilty alone, this court could sentence you to the maximum which I just stated. Do you understand that?
>
> ACC: Yes, sir.
>
> MJ: Do you have any questions as to the sentence that could be imposed as a result of your guilty plea?
>
> ACC: Not at this time.

(J.A. 102-103.)

Appellant's explicit agreement as to the maximum imposable punishment demonstrates that he understood the consequences of his guilty plea and that by continuing to plead guilty there would be no further reduction in the maximum imposable punishment. In other words, he intentionally relinquished his right for the trial court to sentence him based on a lesser maximum punishment. An appellant's statement that he had no objection usually constitutes waiver of an issue. United States v. Ahern, 76 M.J. 194, 197-99 (C.A.A.F. 2017)(waiver where an appellant stated he had no objection to the admission of a recorded call, but later argued that the "no objection" did not constitute waiver of a challenge of the *use* of the call.) Agreeing with the maximum punishment, in combination with his unconditional plea of guilty, constituted an intentional act of waiver. At any time after intentionally waiving this right, Appellant could have withdrawn this intentional relinquishment prior to the conclusion of sentencing by withdrawing from his plea. Article 45, UCMJ, 10 U.S.C. § 845. In Lee, the Court considered that the appellant "at no point . . . challenged the 'voluntary and intelligent character' of his pleas" when determining that the appellant waived his review of appellate delay through his plea. Lee, 73 M.J. at 171 (citing Broce, 488 U.S. at 574). Likewise, here, Appellant had knowledge of the maximum punishment, had knowledge of the punishment per specification, and voluntarily and intelligently pled guilty in light of that knowledge.

Appellant was aware the military judge was to sentence him in accordance with the specifications put forth by prosecution on the charge sheet, and that he was to be sentenced in accordance with Article 56, UCMJ, 10 U.S.C. § 856. Such sentencing procedure was an automatic consequence of his plea. (J.A. 36)

This Court can apply the waiver doctrine even if a particular issue was not discussed on the record prior to an unconditional guilty plea; even if there was such a requirement, Appellant here demonstrated his understanding that by pleading guilty he could be sentenced to the maximum punishment of 150 years and six months. Appellant knowingly and intentionally relinquished any right to be sentenced based on a lower maximum punishment. Appellant waived this issue.

c. The Rules for Courts-Martial on Pretrial Agreements do not require this Court to find Appellant forfeited, rather than waived this issue.

Appellant argues that an unconditional guilty plea does not create a waiver of UMC for sentencing because Appellant's proffered pretrial agreement (PTA) did not include a "waive all waivable motions" term and to assume his guilty plea waived the issue is to turn "this common PTA terms [sic] . . . [into] surplusage with no practical effect." (App. Br. at 12.)

A pretrial agreement is permitted under the Rules for Courts-Martial. R.C.M. 705(a). Some terms and conditions, however, are prohibited. R.C.M. 705(c). The Court and the law give force and affect to proper provisions of a pretrial agreement that are not otherwise prohibited. A provision in a PTA cannot

create a waiver where none exists. *See* United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016) (The pretrial agreement provision at issue cannot waive that which the convening authority has no authority to waive, even if given full effect.) A "waive all waivable motions" term in a pretrial agreement is not specifically mentioned in the Manual for Courts-Martial. The fact that trial practitioners frequently choose to add this term to pretrial agreements has no bearing on whether issues would be waived by an unconditional guilty plea without the inclusion of the term.

A guilty plea waives certain rights in all cases irrespective of a provision in a PTA, such as the right against self-incrimination, the right to a trial of facts, and the right to confront and cross-examine. (*See* J.A. 0034.) The superfluous presence of a "waive all waivable motions" provision matters not in those circumstances. Likewise, the absence of a superfluous provision does not turn an automatically waived right into a forfeited one. An unconditional guilty plea waives certain rights irrespective of a PTA, including the intentional relinquishment of the right to argue an unreasonable multiplication of charges for sentencing.

An appellant with full knowledge of the specifications and maximum punishment, who elects to plead guilty to each individual specifications, makes a conscious decision to accept the potential sentence that comes with it.

d. Discussion of whether the charges in this case were unreasonably multiplied for sentencing is outside the granted issue. However, even if this Court addressed this underlying issue, under a plain error review the military judge did not err when he did not *sua sponte* merge the specifications for sentencing.

While the issue of whether there was an unreasonable multiplication of charges for sentencing falls outside the granted issue. Therefore, this Court should not consider the merits of that portion of Appellant's argument.[3] Assuming *arguendo* that Appellant did not waive the issue at trial, he forfeited the issue and the Court reviews for plain error. Harcrow, 66 M.J. at 156 (citations omitted). Under plain error review, an appellant must demonstrate that "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." Id. at 158 (citations omitted.)

First, no plain or obvious error occurred. The rules do not require a military judge to consider UMC for sentencing *sua sponte*. *See* R.C.M. 906(b)(12)(ii); R.C.M. 1003(C)(1)(c)(ii). But, even if the judge was required, the Quiroz factors have not been met here and thus no merging is warranted. The Court considers (1) whether appellant objected at trial; (2) whether each charge and specification was aimed at distinctly separate criminal acts; (3) whether the number of charges and specifications misrepresent or exaggerate appellant's criminality; (4) whether the

[3] Although AFCCA applied waiver, the Court also stated that if they had applied forfeiture, they would have found no plain error in the military judge's failure to *sua sponte* merge the specifications for sentencing. United States v. Hardy, 76 M.J. 732, 737 fn 7 (A.F. Ct. Crim. App. 2017). Therefore, even if this Court finds AFCCA erred by applying waiver, this Court can still affirm AFCCA's decision.

number of charges and specifications increase or unreasonably increase appellant's punitive exposure; and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. Quiroz, 55 M.J. at 338-39. Each of these factors weighs against Appellant

First, Appellant never objected at trial. (J.A. 23.) Appellant pled guilty to various offenses in exchange for the convening authority limiting sentence approval to 12 years of any adjudged confinement. (J.A. 127-0131.) Appellant's counsel noted at trial that the "motions are rendered moot" by the agreement. (J.A. 23.) Not only did Appellant fail to object at trial, Appellant did not raise the issue of unreasonable multiplication of charges for consideration in clemency. (ROT at Vol. 1, *Clemency Submission*.) This first Quiroz factor weighs wholly against Appellant.

Second, the charges and specifications are aimed at distinctly separate criminal acts. The crimes as charged are neither facially nor factually duplicative. The charged incidents all occurred at different places and times, including his living room in Florida, his bedroom in Florida, in New Mexico, and in Germany.

Consider the following facts for each specification at issue:

- Specification 2 of Charge II: Appellant intentionally touched TH's breasts on divers occasions. (J.A. 116 at ¶¶ 3, 4.) In addition to touching her breasts in the living room in Florida, Appellant touched her breasts on a different occasions in his bedroom in Florida and on multiple occasions while he was

stationed at Kirtland Air Force Base, New Mexico. (J.A. 48, 116-117 at ¶¶ 3-5.)

- Specification 3 of Charge II: Appellant intentionally touched TH's genitalia on divers occasions. In addition to touching her genitalia in the living room in Florida, (J.A. 117 at ¶7), Appellant touched her genitalia on different occasions in his bedroom in Florida, and on multiple occasions while he was stationed at Kirtland Air Force Base, New Mexico. (J.A. 18 at ¶¶ 8, 9. 10.)

- Specification 4 of Charge II: Appellant watched pornographic movies in TH's presence on divers occasions. (J.A. 117-118 at ¶¶ 8, 9. 10.)

- Specification 5 of Charge II: Appellant rubbed his penis with his hand in TH's presence on divers occasions. (J.A. 117-118, ¶¶ 8, 9. 10.)

- Specifications 6 of Charge II: On one occasion, Appellant ejaculated on TH's bare chest. (J.A. 117 at ¶7.)

- Specifications 7 and 8 of Charge II cover separate touching and penetration crimes that occurred after TH turned 16 years of age. (J.A. 116-119)

Appellant now alleges that he was "potentially only" doing all of these "two times during the same two transactions." (App. Br. at 17.) In doing so, Appellant directly contradicts himself. Appellant agreed under oath that incidents occurred "more than once or twice." (J.A. 48, 59.) After trial, Appellant unilaterally revised his offenses as either "pornography/masturbation" incidents or "wrestling or horseplay" incidents. Hardy, 76 M.J. at 735.

Appellant confuses his two *modus operandi* of the crimes that occurred over multiple times, dates, and locations, for the separate crimes themselves. But Appellant did not always perform all the same crimes each time he felt the need to violate his daughter. Each individual act constitutes a separate offense with its own individual harm. Appellant touched TH's breasts on divers occasions at multiple locations, that he touched her genitalia on divers occasions at multiple locations, that he watched pornography in her presence at times separate from masturbating in her presence, and that on one occasion, separate from others, he ejaculated on her chest. The specifications are aimed at distinct acts, none of which are contingent on themselves for completion.

The third Quiroz factor also weighs against Appellant. The specifications do not exaggerate his criminality. With respect to only the specifications at issue, Appellant touched his biological daughter's breasts and genitalia over the course of a five-year period. He did so using multiple means, in multiple locations within his home, in multiple states, and in multiple countries. His actions with her were progressive, starting with pornography and advancing to causing her to touch his penis and giving him oral sex. He ejaculated on her chest. The manner in which the crimes are charged do not exaggerate the criminality.

The fourth Quiroz factor weighs against Appellant. The specifications do not unreasonably increase his punitive exposure. Appellant's abusive behavior was

continuous over the course of years, and at many locations, states, and countries. The facts of this case, including the fact Appellant was sexually abusing his biological daughter, are particularly egregious. The charging mechanism for each type of abuse was not unreasonable.

There is no evidence of prosecutorial overreaching in the drafting of the charges, the fifth and final Quiroz factor. The issue raised by defense regarding the presence of witnesses at the Article 32 hearing is separate and occurred after the charges were preferred. (*See* J.A. 26.)

The military judge was under no duty to *sua sponte* consider UMC for purposes of sentencing, and if he was, none of the Quiroz factors was met. But even if the opposite were true, Appellant has failed to demonstrate that the error materially prejudiced a substantial right. Defense counsel argued at trial for five years of confinement. (ROT at 341.) Trial counsel argued for 16 years of confinement. (ROT at 337.) The military judge sentenced Appellant to 16 years and one day of confinement. (J.A. 17.) Appellant's pretrial agreement limited his exposure to 12 years.

Appellant suggests the specifications should have been merged to include a potential 20 year maximum punishment, ignoring all the other specifications to which Appellant pled guilty and not litigated herein. (App. Br. at 18.) But, even if the military judge would have merged all available punishment for all

specifications to 20 years of confinement, the sentence Appellant received as part of his plea was 8 years less than Appellant's hypothetical maximum punishment. Put another way, Appellant was sentenced to only 60% of Appellant's desired worst case scenario of 20 years. The odds are non-existent that the military judge, after merger, would have sentenced Appellant to less than 12 years for which Appellant bargained, especially considering the military judge actually sentenced Appellant to more than requested by trial counsel.

The Air Force Court of Criminal Appeals did not err by holding that Appellant waived, rather than forfeited, his claim of unreasonable multiplication of charges for sentencing. An unconditional plea waives all nonjurisdictional and non-due process defects at the trial level and while some exceptions exist to the general rule of waiver, unreasonable multiplication of charges for sentencing is not one of them. An exception should not be recognized, especially under the current circumstances. Again, the United States recognizes that a review of UMC under a plain error analysis is outside of the granted issue. But even if this Court were to review the underlying issue, relief is still not warranted under Quiroz factors. For these and the above-stated reasons, the findings and sentence should be approved.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court

affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 December 2017 via electronic filing.

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/s/_____

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