IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **DEONTRAY D. COLEMAN** Private First Class (E-3) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20170013 USCA Dkt. No. 19-0087 / AR

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

ZACHARY A. SZILAGYI
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 634-9224
USCAAF No. 36909

JULIE L. BORCHERS
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 36843

TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 34640

ELIZABETH G. MAROTTA
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 34037

Index of Brief

Table of Authorities

Supreme Court of the United States

U.S. Court of Appeals for the Armed Forces

U.S. Court of Military Appeals

U.S. Courts of Military Review

U.S. Constitution

Uniform Code of Military Justice

Manual for Courts-Martial, United States (2016 ed.)

Rules for Courts-Martial

Other Sources

Issue Presented

WHETHER SPECIFICATION 1 OF CHARGE VII IS MULTIPLICIOUS WITH SPECIFICATION 1 OF CHARGE I, AS THEY ARE PART OF THE SAME TRANSACTION.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ] 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On August 11, 2016, October 5, 2016, and January 11-12, 2017, a military judge sitting as a general court-martial tried Private First Class (PFC) Deontray D. Coleman at Fort Hood, Texas. Pursuant to his pleas, the military judge convicted PFC Coleman of one specification of failure to go to his place of duty, two specifications of disrespect toward a superior commissioned officer, one specification of insubordinate conduct toward a noncommissioned officer, and one specification of failure to obey an order, in violation of Articles 86, 89, 91 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 889, 891, and 892 (2012) [hereinafter UCMJ]. Contrary to his pleas, the military judge found PFC Coleman

guilty of one specification of attempted murder, one specification of failure to obey an order, and two specifications of willfully discharging a firearm under circumstances to endanger human life, in violation of Articles 80, 92, 118 and 134, UCMJ, 10 U.S.C. §§ 880, 892, 918 and 934 (2012).[1] The military judge recommended dismissal of Specification 2 of Charge V, a violation of Article 92, UCMJ, 10 U.S.C. § 892 (2012). The military judge acquitted PFC Coleman of three specifications of attempted murder, one specification of aggravated assault, one specification of assault consummated by battery, and one specification of reckless endangerment in violation of Articles 80, 118, 128 and 134, UCMJ, 10 U.S.C. §§ 880, 918, 928 and 934 (2012). The military judge sentenced PFC Coleman to be reduced to the grade of E-1, to be confined for ten years and eight months, and to be dishonorably discharged from the service. The convening authority approved the sentence as adjudged. PFC Coleman was credited with 255 days of credit against the sentence to confinement.

On October 5, 2018, the Army Court conducted its review pursuant to Article 66, UCMJ. (JA 1-3). The Army Court set aside and dismissed

[1] After arraignment, but before pleas, the convening authority dismissed without prejudice one specification of robbery and one specification of assault with intent to commit robbery in violation of Articles 122 and 134, UCMJ, 10 U.S.C. §§ 922 and 934 (2012). The charges were renumbered accordingly. (JA 39, 189).

Specification 2 of Charge V, but affirmed the remaining findings of guilty and the sentence. (JA 3).

The appellant was notified of the Army Court's decision and, in accordance with Rules 19, 20, and 21 of this Court's Rules of Practice and Procedure, filed a Petition for Grant of Review and Supplement on December 4, 2018. On February 13, 2019, this Honorable Court granted appellant's Petition for Review.

Statement of Facts

Private First Class Coleman was charged with fifteen specifications alleging violations of the UCMJ while assigned as a Soldier at Fort Hood, Texas. (JA 13-17; Charge Sheet). Many of the specifications involved alleged misconduct occurring in Killeen, Texas on the night of September 7, 2015. (JA 13-17; Charge Sheet).

On September 7, 2015, Specialist (SPC) QB, another soldier assigned to Fort Hood and a friend of PFC Coleman, saw an incoming call to his fiancée, AW[2], allegedly from PFC Coleman's phone number. (JA 50). Specialist QB previously suspected his fiancée and PFC Coleman were having an affair. (JA 62). Although he did not answer the initial call, SPC QB returned the call twice using his

[2] Although AW is listed on the charge sheet and was AW at the time of the charged incident, she testified as AB. (JA 48, 89). For clarity, this brief will refer to her as "AW".

fiancée's phone, with no answer. (JA 50). He then called the phone number using his own phone, again with no answer. (JA 50). However, after SPC QB called the number from his phone, he received a text directing him to go to Baldwin Loop, a housing development in Killeen, Texas. (JA 51, 79). Specialist QB drove fast and loud to Baldwin Loop exceeding the speed limit because he wanted to confront PFC Coleman.[3] (JA 64-65). His fiancée, AB, and his stepdaughter, YK, were passengers in his car. (JA 64). Upon arriving at Baldwin Loop, SPC QB's vehicle was hit by at least two bullets. (JA 52, 157-64). Specialist QB did not hear the gunshots nor did he feel the bullets impact his vehicle. (JA 66). Specialist QB also did not see anyone firing at him. (JA 66). The only indication SPC QB had that shots were fired at his vehicle were from witnesses in the area. (JA 80-81). Specialist QB stopped his vehicle, exited his vehicle, and stood in the street. (JA 52, 67, 79). While SPC QB was standing in the street next to his parked vehicle, PFC Coleman drove past in a non-aggressive manner in the space between SPC QB's vehicle and the street-parked vehicles and left the Baldwin Loop-area. (JA 52, 55, 67-68, 81-82). Specialist QB then directed his wife and stepdaughter to get in her sister's vehicle, and SPC QB drove alone to PFC Coleman's residence to confront and fight him. (JA 58, 68, 74).

[3] Specialist QB testified he drove a Mustang with a pipe exhaust system which made his car sound loud when driving fast. (JA 64-66).

Summary of Argument

In this case, the government charged a single transaction—the shooting at Baldwin Loop—two ways: (1) three specifications of attempted murder in violation of Articles 80 and 118, UCMJ,[4] and (2) one specification of willful discharge of a firearm under circumstances to endanger human life in violation of Article 134, UCMJ.[5] The doctrine of multiplicity prohibits an appellant from being twice punished for a single offense, in violation of the Double Jeopardy Clause of the Fifth Amendment. *See United States v. Teters*, 37 M.J. 370 (C.M.A. 1993). Where there is an absence of express congressional intent to impose multiple punishments for offenses arising from the same act, such as in this case, this Court applies the *Blockburger* test to determine whether the charges are multiplicious. *Teters*, 37 M.J. at 377 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932)). This test is satisfied if one of the statutory provisions "requires proof of an additional fact which the other does not". *Id*. Here, there was no additional fact required to find PFC Coleman guilty of both attempted murder and willful discharge of a firearm under circumstances to endanger human life.

[4] Specifications 1 through 3 of Charge I. (JA 13-17). The military judge acquitted PFC Coleman of Specifications 2 and 3 of Charge I. (JA 155-56).
[5] Specification 1 of Charge VII. (JA 13-17).

Standard of Review

Multiplicity claims are reviewed de novo. *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Failing to object to charges as multiplicious waives the issue absent plain error. *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997). An "[a]ppellant may show plain error and overcome [waiver] by showing that the specifications are facially duplicative, that is, factually the same." *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004)(citations and quotations omitted).

Law and Argument

Multiplicity is grounded in the Double Jeopardy Clause of the Fifth Amendment. The Double Jeopardy Clause of the Fifth Amendment and Article 44(a), UCMJ, 10 U.S.C. § 844(a),

> have been construed, *inter alia*, to prohibit a person from being *twice punished at a single trial for the same offense*, contrary to the will of Congress. . . . [I]t has been held that *two convictions* or findings of guilty *for the same offense at a single trial* are double punishment and a violation of the above legal authorities, *again*, unless authorized by Congress.

United States v. Neblock, 45 M.J. 191, 195 (C.A.A.F. 1996)(citations omitted)(emphasis in the original). *See Teters*, 37 M.J. 370.

In this case, the willful discharge of a firearm under circumstances to endanger human life results in an attempted murder. The government transformed

a single transaction—the shooting at Baldwin Loop—two ways: (1) three specifications of attempted murder in violation of Articles 80 and 118, UCMJ, and (2) one specification of willful discharge of a firearm under circumstances to endanger human life in violation of Article 134, UCMJ. *See Forrester*, 79 M.J. at 395 n.6.

a. Congress has not expressed an intent to make these charges separably punishable when arising from the same act.

Under *Teters*, courts first determine whether Congress intended, either expressly in the statutory language or in their legislative history, for a single act to transform into multiple separate offenses. *Teters*, 37 M.J. at 376; *see also Forrester*, 79 M.J. at 395 n.6.

Neither the text of the statutes nor the legislative histories of attempted murder in violation of Articles 80 and 118, UCMJ, and willfully discharging a firearm under circumstances to endanger human life in violation of Article 134, UCMJ, discuss multiple convictions. *See e.g.*, Hearings on H.R. 2498 Before a Subcom. of the House Armed Services Comm., 81st Cong., 1st Sess. 1233 (1949). Notwithstanding Congressional silence, the enumerated crimes of Article 134 are left to the president to define and not a creature of Congress.

Where Congress has not provided its intent, either expressly or in legislative histories, courts then apply the *Blockburger* test to determine whether the charges

are multiplicious. *Teters*, 37 M.J. at 377 (citing *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182); *see also United States v. Morrison*, 41 M.J. 482, 483 (C.A.A.F. 1995)(citation omitted). Therefore:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Id. (quoting *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182).

b. Where one transaction results in multiple offenses, Blockburger requires a comparison of the proof required for each element of each offense.

The *Blockburger* "elements" test determines "whether there are two offenses [arising from the same act] or only one by analyzing whether each provision requires proof of a fact which the other does not." *Teters*, 37 M.J. at 377 (quoting *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182). If one statute's elements requires a proof of fact not required by the other statue, then it is presumed that Congress intended for the same transaction to result in separate charges and therefore the charges are not multiplicious. *Teters*, 37 M.J at 377-78. However, this presumption is overcome if an appellant can show "any other indications of contrary intent on Congress' part . . . ." *Teters*, 37 M.J at 378.

Willful discharge of a firearm under circumstances to endanger human life in violation of Article 134, UCMJ, requires proof:

> (1) That the accused discharged a firearm;
>
> (2) That such discharge was willful and wrongful;
>
> (3) That this discharge was under circumstances such as to endanger human life; and
>
> (4) That, under the circumstances, the conduct of the accused was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States (2016 ed.) [hereinafter *MCM*], pt. IV, para. 81.b. "'Under circumstances such as to endanger human life' refers to a reasonable potentiality for harm to human beings in general. The test is . . . whether, considering the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general." *MCM*, pt. IV, para. 81.c.

Attempted unpremeditated murder in violation of Articles 80 and 118, UCMJ, requires proof:

> (1) That the accused did a certain overt act;
>
> (2) That such act was done with the specific intent to commit to commit a certain offense under the code;
>
> (3) That the act amounted to more than mere preparation; and
>
> (4) That the act apparently tended to bring about the commission of the offense.

MCM, pt. IV, para. 4.b.

c. The charged offenses are factually duplicative: no additional fact was required to find PFC Coleman guilty of both Specification I of Charge I and Specification I of Charge VII.

There is no indication in the record that the government charged the offenses as alternative theories. Nonetheless, Specification I of Charge I and Specification I of Charge VII entirely overlap factually. The trial counsel's closing argument was clear evidence regarding these theories of liability:

> Now, those shots were fired when the accused attempted to murder Specialist [QB], [AW], [YW]. When he shot a firearm six to seven times at Specialist [QB]'s 2007 blue Ford Mustang. He didn't fire in the air or down the street. He fired at that car, directly at the vehicle causing bullet holes in the driver side, inches from where those occupants were sitting. *You see that charge, Your Honor, Specifications 1 through 3 of Charge I, and Specification 1 of Charge VII*.

(JA 146)(emphasis added). The government's theory and proof for each offense was ultimately the same. As a result, the willful discharge of a firearm under circumstances to endanger human life shares the *actus reus* and the *mens rea* for attempted murder.

1) The *actus reus* of willfully discharging the firearm was the *actus reus* for the attempted murder.

For the *actus reus* element of each of each offense, the government had to prove PFC Coleman fired shots at SPC QB's vehicle with AW and YW as

passengers while it traveled in the Baldwin Loop-area of Killeen, Texas on September 7, 2015. (JA 171-74, 181, 185-86). Accordingly, SPC QB testified that upon arriving at Baldwin Loop, the vehicle he was driving—with AW and YW as passengers—was hit by several bullets. (JA 52). The government's theory was that PFC Coleman fired "six to seven rounds" at SPC QB's Mustang using a Smith & Wesson .40 caliber handgun as it approached him at Baldwin Loop. (JA 145, 66-168). There was no evidence that there were two separate shooting incidents at Baldwin Loop.

The government charged the attempted murder of SPC QB, AW and YK as separate specifications: Specification 1, 2 and 3 of Charge I, respectively. (JA 13)(Charge Sheet). The alleged willful discharge, however, was charged as one specification listing SPC QB, AW and YW in Specification I of Charge VII. (JA 15)(Charge Sheet). The military judge found PFC Coleman guilty of the willful discharge offense. (JA 156). This specification required proof that SPC QB, AW and YW where in the vehicle as the military judge did not except out language identifying SPC QB. The military judge also found PFC Coleman guilty of the attempted murder of SPC QB, Specification I of Charge I, but acquitted him of the attempted murders of AW and YW. (JA 155). As a result, the evidence established that PFC Coleman committed the overt act of discharging a firearm at

SPC QB, AW and YW and more specifically, "shooting a firearm at a vehicle containing [SPC QB]". (JA 13).

The element requiring that the discharge was willful and wrongful, as well as the element requiring that the shooting a firearm at the Mustang amounted to more than mere preparation, are essentially the same. If the fact finder concluded that PFC Coleman's act of discharging a firearm satisfied the substantial step towards unlawful killing of SPC QB element for the attempted murder offense, then the fact finder had to conclude that it also satisfied willful and wrongful element for the willful discharge offense because the charge specified a vehicle containing SPC QB, AW and YW in the specification. "Unlawful" is defined as "without legal justification or excuse." *MCM,* pt. IV, para. 43.c.(1). Although "willful" and "wrongful" are not defined in the enumerated Article 134 offense, it is defined in other Article 134, UCMJ, offenses. For example in a kidnapping charge, "willfully" requires the specific intent to hold a victim against their will. *MCM,* pt. IV, para. 92.c.(4). "Wrongful" is defined the same as "unlawful" for an attempted murder offense, i.e., "without justification or excuse." *MCM,* pt. IV, paras. 43.c.(1). and 92.c.(5); *see also MCM*, pt. IV, para. 100a.c(2). Therefore, these elements are facially duplicative.

2) The offenses have the same *mens rea*.

The facts also showed PFC Coleman had the same *mens rea* for the willful discharge of the firearm under circumstances such as to endanger human life offense as the attempted murder offense. By finding PFC Coleman guilty of Specification 1 of Charge I, the military judge concluded that PFC Coleman had the specific intent to kill SPC QB (or inflict great bodily harm). This *mens rea* required for attempted murder is the exception, however. Generally, for an attempt, the government needs only to establish that such act was done with the specific intent to commit a certain offense under the code. *United States v. Foster*, 14 M.J. 246 (C.M.A. 1982). However, the specific intent to kill is essential element of attempted murder. *United States v Allen*, 21 MJ 72 (C.M.A. 1985). This is true even though "[a] person may be convicted of unpremeditated murder even if the person had no intent to kill prior to taking an act, so long as the act itself was intentional and likely to result in death *or great bodily harm*." *United States v. Dobson*, 63 M.J. 1, 21(C.A.A.F. 2006)(emphasis added).

Nevertheless, for the case at bar the specific intent to kill required for the attempted murder fits within the "reasonable potentiality for harm to human beings in general" requirement for the willful discharge of a firearm under circumstances to endanger human life. *MCM*, pt. IV, para. 81.c. *See e.g., United States v. King*, 10 U.S.C.M.A. 465, 469, 28 C.M.R. 31, 35 (1957)("[P]resence of a specific intent

in an offense does not, in and of itself, preclude that offense from being lesser included within a general intent crime.").

Since the military judge found that PFC Coleman had the specific intent to kill SPC QB, he therefore had to conclude that, considering the circumstances surrounding the wrongful discharge of the weapon including the specific intent to kill SPC QB, the act was unsafe to human life in general. *MCM*, pt. IV, para. 81.c. Whether PFC Coleman had the specific intent to kill AW and YW is not necessary. All that that had to be establish is whether the act of firing a .40 caliber handgun in the act was unsafe to human life in general. *MCM*, pt. IV, para. 81.c. The act of PFC Coleman firing shots at SPC QB in his car with AW and YW as passengers, as well as the specific intent to kill SPC QB was clearly unsafe to human life in general.

3) The *actus reus* of the attempted murder proved the terminal element of the Article 134 offense.

Here, since this is charged as an attempt and not the completed offense, the terminal elements of the clause 1 and clause 2 of the Article 134, UCMJ, is the same as proof from the overt act tending to bring about the commission of unpremeditated murder. *But see United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010)(holding that the terminal element contained in clauses 1 and 2 of Article 134, UCMJ, causes it to fail the elements test). The fourth element of Specification 1 of Charge VII (willful discharge of a firearm under circumstances

to endanger human life) established proof that PFC Coleman's conduct was of a nature to bring discredit upon the armed forces.[6] *MCM*, pt. IV, para. 60.b.(1)(b). The fourth element of Specification 1 of Charge I (attempted murder) established that the act of shooting a firearm at a vehicle containing SPC QB was a direct movement toward the murder of SPC QB and likely would have resulted in the unlawful killing of SPC QB. According to the government's draft instructions, the intervening circumstance that prevented the attempted murder were the shots failing to hit SPC QB. (JA 171). Nonetheless, the government established that the shots hit SPC QB's Mustang on the driver's side. (JA 157-164). Presumably, this fact helped acquit PFC Coleman of the attempted murder of AW and YW, passengers in the Mustang. But this fact also contributed to PFC Coleman's conviction for willful discharge of a firearm under circumstances to endanger human life, i.e., firing a Smith and Wesson .40 caliber handgun at a Mustang containing SPC QB, AW and YW. (JA 15)(Charge Sheet). As the government did not present any evidence of prejudice of good order and discipline, the military judge correctly excepted this language from the specification at findings. (JA 155-56). However, he concluded that the firing of the handgun at the Mustang was service discrediting. S*ee United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F.

[6] The military judge only found PFC Coleman guilty of service discrediting conduct and excepted the language "to the prejudice of good order and discipline in the armed forces and" from Specification I of Charge VII. (JA 156).

2015)(citing *United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011)("proof of the conduct itself may be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under all the circumstances, it was of a nature to bring discredit upon the armed forces")). As result, because the military judge only found service discrediting conduct and not conduct to the prejudice of good order and discipline in the armed forces, the elements are factually the same.

Conclusion

Here, the willful discharge of the firearm is also the method for the attempted murder. Private First Class Coleman's single act resulted in multiple charges and multiple convictions. Specification 1 of Charge I and Specification 1 of Charge VII are multiplicious as there was no additional fact required to find PFC Coleman guilty of the willful discharge of a firearm under circumstances to endanger human life that offense was not also required for attempted murder offense. As a result, they are facially duplicative and therefore multiplicious.[7]

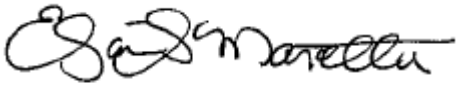
[7] However, acknowledging this Honorable Court's grant to the petition limiting this brief to the issue of multiplicity, the appellant wishes to preserve the alternative issue unreasonable multiplication of charges under *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001); Rule for Courts-Martial (R.C.M.) 307(c)(4). In addition to being multiplicious, Specification I of Charge I and Specification I of Charge VII also constitute an unreasonable multiplication of charges for both findings and sentencing. *See United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012); R.C.M. 906(b)(12).

Wherefore, appellant respectfully requests this court set aside and dismiss the finding of guilty to Specification 1 of Charge VII. Therefore, this Honorable Court should set aside Specification 1 of Charge VII as multiplicious.

ZACHARY A. SZILAGYI
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 634-9224
USCAAF No. 36909

JULIE L. BORCHERS
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 36843

TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 34640



ELIZABETH G. MAROTTA
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 34037

Certificate of Filing and Service

I certify that the forgoing was transmitted by electronic means to the Court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on government appellant counsel (usarmy.pentagon.hqda-otjag.mbx.usalsa-gad@mail.mil) on March 15, 2019.

ZACHARY A. SZILAGYI
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 634-9224
USCAAF No. 36909