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	REPLY 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:

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 the Case

On February 13, 2019, this Honorable Court granted appellant's Petition for Review. On March 15, 2019, appellant filed his brief with this Court. The government responded on April 15, 2019. This is appellant's reply.

Argument

a. Appellee conflates notice and multiplicity.

"The principle of fair notice mandates that 'an accused has a right to know to what offense and under what legal theory' he will be convicted and that a lesser included offense meets this notice requirement 'if it is a subset of the greater

offense alleged.'" *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009)(quoting *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008). Multiplicity, on the other hand, involves the principle of double jeopardy including the prohibition against "separate convictions for the same offense at the same trial" in addition to the prohibition against multiple trials for the same offense. *United States v. Britton*, 47 M.J. 195, 199 (C.A.A.F. 1997)(Effron, J., concurring).

This Court need not overrule *Miller* nor return to the principle that "clauses 1 and 2 of Article 134, UCMJ, are per se included in every enumerated offense." (Gov't Br. 9)(quoting *Miller*, 67 M.J. at 389). Nonetheless, appellee argues that appellant is asking this Court to do just that. (Gov't Br. 9-10)(citing *United States v. Jones*, 67 M.J 465, 473 (C.A.A.F. 2010); *United State v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011); *United States v. Fosler*, 70 M.J. 225, 233 (C.A.A.F. 2011)).

Rather, this case is distinguishable from *Miller*. Here, the appellant was not acquitted of the greater offense of attempted murder and then found guilty of a lesser-included offense under Article 134, UCMJ. Rather, the appellant was found guilty of the greater offense of attempted murder by "[shooting] a firearm six to seven times at Specialist [QB]'s 2007 blue Ford Mustang" as well as an Article 134, UCMJ offense for the same act. (JA 146). Willful discharge of a firearm under circumstances to endanger human life in violation of Article 134, UCMJ, is not always a factual lessor-included offense of attempted murder. Yet, it was in

this case. Here, the government used the same facts to satisfy both attempted murder and the service discrediting element of the willful discharge of a firearm under circumstances to endanger human life. A facial comparison of the elements in each offense demonstrates that each offense does *not* "require proof of a fact which the other does not." *See United States v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010); *see also United States v. Phillips*, 70 M.J. 161, 163 (C.A.A.F. 2011)("[P]roof 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 a result, appellant has "separate convictions for the same offense at the same trial." *Britton*, 47 M.J. at 199 (Effron, J., concurring).

b. The terminal element is necessarily implied in this case.

Despite identifying the elements required for a conviction for attempted murder and willful discharge of a firearm under circumstances to endanger human life, appellee's analysis is wanting. As appellant argued in his March 15, 2019 Brief on Behalf of Appellant, the specifications were facially duplicative. Further, in appellant's case, the government's theory and proof for each offense was ultimately the same.

In *United States v. Britton*, this Court held that an assault specification was facially duplicative with a rape specification "because it merely describe[d] the

force used to commit the rape." *Britton*, 47 M.J. at 199. As this Court noted, "[t]he prosecution theory was that the element of force in the rape charge was proven by the acts alleged in the assault charge, and that both charges arose out of the same incident, the same conduct that occurred on that night." *Id*. at 197 (internal quotations omitted). As a result, this Court found the assault specification facially duplicated the rape specification. *Id*. at 199.

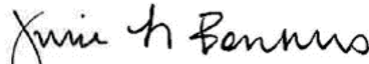
While *Britton* was partially overruled by *Miller*, this Court's holding in *Britton* focused on the duplicative nature of the force element common to rape and assault, rather than the terminal element. Here, just as in *Britton*, the prosecution theory was the same for both the attempted murder and the willful discharge of a firearm under circumstances to endanger human life. The government's closing argument demonstrated this point: "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). Thus, specification 1 of Charge VII and Specification 1 of Charge I "literally repeat each other as a matter of fact." *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997).

Appellant does not assert that the terminal element of the Article 134 offense need not be accounted for in some element of the greater offense. Instead, as appellant noted in his Brief on Behalf of Appellant, in this case, the terminal

element was contained substantively, that is, necessarily implied, in the greater offense. Here also, the *actus reus* and the *mens rea* of the two offenses were the same. The criminal act in each offense was discharging the firearm, and the specific intent to kill required for attempted murder fits within the "reasonable potentiality for harm to human beings in general" required for willful discharge of a firearm under circumstances to endanger human life. *Cf. Manual for Courts-Martial* (2016 ed.), pt. IV, para. 43.b and para. 81.c.

Conclusion

Wherefore, appellant respectfully requests this Court set aside and dismiss the finding of guilty to Specification 1 of Charge VII.



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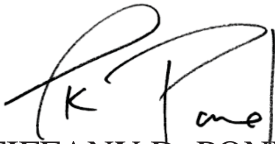

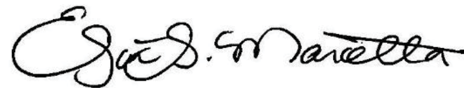

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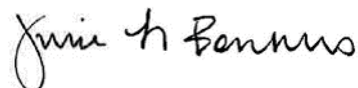
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Coleman, Crim. App. Dkt. No. 20170013, USCA Dkt. No. 19-0087/AR, was electronically filed with the Court and submitted to the Government Appellate Division on April 25, 2019.



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