IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE FINAL BRIEF
	)	
v.	)	
	)	Crim. App. Dkt. No. 20180416
Sergeant (E-5) **JESUS D. CARDENAS,** United States Army, Appellant	)	USCA Dkt. No. 20-0090/AR

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[5] Reproduced in the Appendix pursuant to Rule 24(f)(1)(B).
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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, Appellee v. Sergeant (E-5) **JESUS D. CARDENAS,** United States Army, Appellant	)))))))))	APPELLEE FINAL BRIEF Crim. App. Dkt. No. 20180416 USCA Dkt. No. 20-0090/AR

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

Issue Presented

WHETHER THE ARMY COURT, AFTER FINDING APPELLANT'S CONVICTIONS WERE MULTIPLICIOUS, ERRED IN PERMITTING THE GOVERNMENT TO CHOOSE WHICH OF THE APPELLANT'S CONVICTIONS TO DISMISS ON APPEAL.

Statement of Statutory Jurisdiction

This Court exercises jurisdiction over appellant's case pursuant to Article 67(a)(3), Uniform Code of Military Justice [UCMJ]. On 25 March 2020, this Court granted appellant's petition for review on one issue. (JA 1).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of maltreatment, abusive sexual contact, sexual assault, and obstruction of justice in violation of Articles 93, 120, and 134, UCMJ, 10 U.S.C. §§ 893, 920, and 934. (JA 2, 25). The convening authority approved the adjudged sentence of a dishonorable discharge, five years' confinement, and reduction to the grade of E-1. (JA 2, 17).

On 27 November 2019, the Army Court of Criminal Appeals [ACCA], exercising its Article 66, UCMJ, jurisdiction, set aside and dismissed appellant's obstruction of justice conviction (Charge III and its Specification), finding it factually insufficient. (JA 12). The ACCA also found a portion of appellant's maltreatment conviction (Specification 1 of Charge II) factually insufficient. (JA 9). Specifically, the ACCA was not convinced beyond a reasonable doubt that appellant maltreated Specialist (SPC) JD by "pressuring" her into a relationship. (JA 9). The ACCA found the remaining portion of appellant's conviction for maltreating SPC JD by "sexually assaulting" her to be legally and factually sufficient. (JA 9). In light of the ACCA's conclusion, appellant's sexual assault and maltreatment convictions relied upon an identical factual predicate, with maltreatment as the elementally greater offense. (JA 9–10).

All parties agreed before the ACCA that there was a multiplicity problem remediable by dismissing either appellant's maltreatment or sexual assault conviction. In supplemental briefing to the ACCA, appellant argued the elementally lesser-included offense of sexual assault should be dismissed. (JA 2–3, 34). The government urged the ACCA to retain appellant's sexual assault conviction and dismiss appellant's maltreatment conviction. (JA 2–3, 64).

Applying this Court's precedent in *United States v. Palagar*, 56 M.J. 294, 296–97 (C.A.A.F. 2002), *United States v. Frelix-Vann*, 55 M.J. 329, 333 (C.A.A.F. 2001) and *United States v. Cherukuri*, 53 M.J. 68, 74 (C.A.A.F. 2000), the ACCA granted the government's request to retain appellant's sexual assault conviction. (JA 10). Although appellant's sexual assault conviction was the elementally lesser-included offense of appellant's maltreatment conviction, it was the more serious offense as it carried a higher punitive exposure, a mandatory discharge, and a requirement for appellant to register as a sex offender. *See* Article 56(b)(2), UCMJ; Dep't of Defense Instr. 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authorities, App'x 4 to Enclosure 2, Table 6 (11 Mar. 2013). After dismissing appellant's maltreatment and obstruction of justice convictions, the ACCA reassessed and affirmed only so much of appellant's approved sentence extending to a dishonorable discharge, confinement for four years, and reduction to the grade of E-1. (JA 13).

Statement of Facts

A. Appellant's maltreatment and sexual abuse of Specialist JD.

While assigned as a noncommissioned officer and cadre member at the Fort Belvoir Warrior Transition Battalion (WTB) in the fall of 2014, appellant initiated a personal relationship with SPC JD. (JA 5). Specialist JD was assigned to the WTB as a trainee. (JA 5). Initially, appellant brought her lunch. (JA 5). The friendship quickly progressed and the two began having dinner together and attending sporting events. (JA 6). Although SPC JD initially declined appellant's invitation for her to meet with him at his off-post apartment, she eventually visited him there on multiple occasions. (JA 6). Up to this point, their relationship was platonic. (JA 6). This changed in May 2015 when appellant sexually assaulted SPC JD in his apartment. (JA 6).

On a Friday in early May, SPC JD visited appellant at his apartment. (JA 6). She did not intend on spending the night, but appellant asked her to stay overnight. (JA 6). Specialist JD declined initially but then agreed to stay overnight on the condition that she and appellant sleep in different rooms. (JA 6). Appellant agreed, the two slept in different rooms, and the night ended without incident. (JA 6). The next day, appellant asked SPC JD to spend the day with him. (JA 6). Specialist JD declined, stating she needed to go home to get clean clothes. (JA 6). Appellant responded by leaving his apartment and buying SPC JD new clothes.

(JA 6). After returning to his apartment with the clothes, appellant asked SPC JD to be his girlfriend. (JA 6). When SPC JD declined, appellant—a noncommissioned officer serving as a cadre member in the same organization as SPC JD—begged the junior-enlisted trainee to change her mind and agree to date him. (JA 6). Eventually, SPC JD, trying to be "nice," said she would be his girlfriend, although she intended to end the "relationship" as soon as possible. (JA 6). She later agreed to spend Saturday night at appellant's residence. (JA 6).

Appellant asked SPC JD to sleep in his bed with him. (JA 6). Although not romantically interested in appellant, SPC JD agreed to sleep in appellant's bed on the condition that they sleep on opposite sides of the bed and not touch one another. (JA 6). Once in bed, appellant began touching SPC JD's face with his hand. (JA 7). She did not respond to this touching. (JA 7). Appellant then moved his hand down her body, eventually placing his hand between her legs. (JA 7). This time, SPC JD told him "no." (JA 7). Appellant did not stop. (JA 7). Instead, he pulled down SPC JD's leggings and underwear despite her physical and verbal resistance. (JA 7). Appellant continued to ignore SPC JD's protestations and penetrated her vulva with his penis. (JA 7). Shortly after, SPC JD reported appellant's sexual abuse to a social worker at the WTB. (JA 7).

B. The charges, trial court findings, and appellate action.

The government charged appellant with sexual assault by bodily harm for his nonconsensual penetration of SPD JD's vulva with his penis. (JA 18). Also, in a single specification, the government charged appellant with maltreating SPC JD in two ways: (i) by "forcing her into a relationship" and (ii) by "sexually assaulting her." (JA 18). The military judge, sitting as trier of fact, convicted appellant of the sexual assault as charged. (JA 25). He also convicted appellant of maltreating SPC JD. But when entering findings, he excepted the word "forcing" and substituted in its place the word "pressuring." (JA 25). The military judge found the words "and sexually assaulting [SPC JD]" contained in the maltreatment specification constituted an unreasonable multiplication of charges with appellant's sexual assault and abusive sexual contact convictions and merged that portion of the maltreatment specification for purposes of sentencing. (JA 25). The military judge did not, however, dismiss that language ("sexually assaulting her") in the maltreatment specification. (JA 9).

As discussed above, the ACCA found part of appellant's maltreatment conviction factually insufficient because, in its view, the government did not prove beyond a reasonable doubt that appellant maltreated SPC JD by pressuring her into a relationship. (JA 7–9). It did, however, conclude that appellant' sexual assault conviction and the part of the maltreatment specification that alleged maltreatment

by sexually assaulting SPC JD were legally and factually sufficient. (JA 7–9). In response to additional briefing ordered by the ACCA, the government conceded below that appellant's conviction for maltreating SPC JD by sexually assaulting her was multiplicious with his conviction for sexually assaulting SPC JD by bodily harm. (JA 9–10, 62–64). Citing *United States v. Armstrong*, 77 M.J. 465 (C.A.A.F. 2018), the government agreed appellant's conviction for maltreating SPC JD by sexually assaulting her necessarily included all of the elements of the sexual assault conviction and was based on the same course of conduct. (JA 62–64).

Standard of Review

"The scope of an appellate court's authority is a legal question this Court reviews de novo." *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019) (citing *United States v. Bennitt*, 74 M.J. 125, 128–29 (C.A.A.F. 2015)).

Summary of Argument

The ACCA did not err when it correctly applied the well-established precedent of this Court. Appellant's claim that he is entitled to be convicted of the elementally greater offense of maltreatment alone finds no support. To the contrary, this Court's established precedent endorses the ACCA's chosen remedial action. Unable to demonstrate any error in the lower court, appellant also fails to

carry his substantial burden of persuasion under the doctrine of stare decisis to show why this Court should overturn or alter its precedent.

At its core, appellant's argument is little more than a request for a sentencing windfall, based on his mistaken belief that he has a right to dictate the penalty scheme under which he is sentenced. Appellant is wrong. While he has a right not to be convicted of multiplicious offenses, he has no right to the sentencing scheme of his choosing. This Court should affirm the judgment of the ACCA.

Law & Argument

An appellant has no right to choose the penalty he will receive. *See United States v. Batchelder*, 442 U.S. 114, 125 (1979) ("Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution neither is he entitled to choose the penalty scheme under which he will be sentenced."). Absent a contrary intent of Congress, however, an appellant is protected from "multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Coleman*, 79 M.J. 100, 102 (C.A.A.F. 2019) (citation omitted).

A. The ACCA correctly applied this Court's well-established precedent when it remedied the multiplicity problem by permitting the government to elect which conviction to retain.

When an appellant has been convicted of multiplicious offenses—in this case, a greater and lesser-included offense based on the same conduct—the

Supreme Court instructs "the District Court[s] [to] exercise [their] discretion to vacate one of the convictions." *Ball v. United States*, 470 U.S. 856, 865 (1985); *see Rutledge v. United States*, 517 U.S. 292, 307 (1996) (citing *Ball*, 470 U.S. at 864) (remanding and noting that one of the petitioner's convictions "must be vacated"). For at least twenty years, this Court has directed the service courts of criminal appeals [CCAs] to remedy multiplicity errors by allowing the government to elect which multiplicious conviction to retain and which to dismiss. *Palagar*, 56 M.J. at 296–97 (affirming the practice of allowing the government to elect which conviction to retain because "disapproving either conviction would remedy the multiplicity"); *Frelix-Vann*, 55 M.J. at 333 (affirming the practice of "leav[ing] to the Government the decision which conviction to retain"); *Cherukuri*, 53 M.J. at 74 ("A remand to the [CCA] is appropriate, where the Government can elect to retain the four convictions of the lesser-included offense under Article 134 or the single consolidated conviction of the greater offense under Article 133.").

This trio of cases post-dates *Ball* and *Rutledge*. *Cherukuri* discussed *Ball* and *Rutledge* in detail. 53 M.J. at 71–74. Clearly, this Court determined that the procedural practice espoused in this line of cases complied with Supreme Court precedent. Indeed, application of this line of cases by the CCAs vindicates the only right an appellant has in this context—the right not to be subject to "multiple convictions and punishments under different statutes for the same act or course of

conduct." *Coleman*, 79 M.J. at 102 (citation omitted); *Palagar*, 56 M.J. at 297 ("The error to be remedied is a double conviction for the same act."); *United States v. Peel*, 595 F.3d 763, 768 (7th Cir. 2010) ("The remedy is to eliminate the doubleness.").

Here, the ACCA adhered to this well-established process by identifying the multiplicious offenses, obtaining the government's election to retain the sexual assault conviction, affirming appellant's conviction for sexual assault, dismissing appellant's conviction for maltreatment, and reassessing appellant's sentence. (JA 10). As such, the ACCA did not err. Following this Court's precedent, the ACCA provided appellant with the only remedy mandated by the Constitution. He is entitled to nothing more.

Appellant contends that this Court's precedent and the Rules for Courts-Martial [R.C.M.] require, in all circumstances, that the elementally lesser offense be dismissed. (Appellant's Br. 7–11). Neither argument is persuasive. First, he argues that *Cherukuri* itself mandates the dismissal of the lesser-included offense, based on this Court's statement that "dismissal of the lesser-included offense is required by the Supreme Court's recent cases on the Double Jeopardy Clause of the United States Constitution." 53 M.J. at 71 (citing *Rutledge* and *Ball* without pinpoint citations). The problem with appellant's argument, of course, is that the concluding paragraph of *Cherukuri* remanded the case to the CCA with

instructions to let the government choose which conviction to retain. *Id.* at 74. Then, in two subsequent opinions, this Court cited *Cherukuri* approvingly and affirmed the very same practice of permitting the government's election. *See Palagar*, 56 M.J. at 296–97; *Frelix-Vann*, 55 M.J. at 333. Unlike appellant, the government assumes this Court knew what it was doing when it provided this particular procedure to remedy multiplicity issues and reaffirmed the practice in two subsequent cases.[8] This Court has never categorically mandated the dismissal of the elementally lesser offense. Neither has the Supreme Court. *Ball*, 470 U.S. at 865 (remanding the case with direction to "the District Court [to] exercise its discretion to vacate one of the convictions"); *Rutledge*, 517 U.S. at 307 (citing *Ball*, 470 U.S. at 864) (remanding and noting that one of the petitioner's convictions "must be vacated"). Appellant's arguments to the contrary are unavailing.

Other than *Cherukuri*, appellant argues this Court's more recent opinion in *United States v. Elespuru*, 73 M.J. 326 (C.A.A.F. 2014) compels his desired outcome. (Appellant's Br. 7–8). It does not. In *Elespuru*, this Court dismissed the appellant's conviction for the lesser-included offense of wrongful sexual contact

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[8] Appellant concedes the granted issue concerns a "procedural process" rather than a substantive rule of law. (Appellant's Br. 15). He also does not argue that this Court exceeded its authority under Article 67, UCMJ, or R.C.M. 1204 when it implemented and later reaffirmed this process for remedying multiplicity errors.

and affirmed his conviction for abusive sexual contact, the "crime carrying a higher sentence." 73 M.J. at 329. Unlike the posture of this case, the government in *Elespuru* incorrectly argued that the appellant should remain convicted of both offenses and the CCA incorrectly "characterized the issue as one of unreasonable multiplication of charges" instead of multiplicity. *Id.* at 328–29.

As discussed in more detail below, *Elespuru* simply reaffirmed the long-standing practice of charging offenses alternatively for exigencies of proof and reiterated that if an accused is convicted of specifications charged in the alternative, then it is incumbent on the military judge or the CCA "either to consolidate or dismiss *a* specification." *Id.* (emphasis added) (citing *United States v. Mayberry*, 72 M.J. 467, 467–68 (C.A.A.F. 2013)). A remand to the CCA to dismiss one of appellant's convictions was unnecessary in *Elespuru* because the offenses were merged for sentencing at trial. *Id.* at 330. As such, this Court's dismissal of the crime carrying a lower punitive exposure remedied the appellant's right not to be convicted of multiple offenses for the same act or course of conduct. This Court has never held, nor does the government argue, that this Court's precedent in *Cherukuri* established the exclusive method to remedy multiplicity errors. *See Palagar*, 56 M.J. at 296–97 (acknowledging that ordering a remand to the CCA so the government could elect to retain either the appellant's larceny or conduct unbecoming conviction would be appropriate under *Cherukuri* and *Frelix-*

Vann but declining to do so because it was judicially economical for this Court to dismiss one of the convictions and affirm the appellant's sentence).

Appellant's next argument relies on R.C.M. 921(c)(5) (titled "Deliberations and voting on findings") and R.C.M. 1003(c)(1)(C)(i) (titled "Punishments") as "instructive" authority for his position that dismissal of the lesser-included offense is required in all cases. (Appellant's Br. 8). Appellant neither cites nor discusses the actual R.C.M. that addresses multiplicity, R.C.M. 907(b)(3)(B). Putting that aside for now, appellant's argument based on R.C.M. 1003 is easily discarded because the rule says nothing about which multiplicious conviction must be dismissed, only that dismissal of a multiplicious charge must occur. *See* R.C.M. 1003(c)(1)(C)(i) ("A charge is multiplicious and must be dismissed if the proof of such charge also proves every element of another charged offense."). The government does not quarrel with the general concept that, absent a contrary intent of Congress, an accused cannot stand convicted of multiplicious offenses based on the same act or course of conduct. *See, e.g.*, *United States v. Teters*, 37 M.J. 370, 373 (C.A.A.F. 1993) (citing *Ball*, 470 U.S. at 861). However, the disagreement remains concerning the government's authority to choose which conviction to dismiss, and R.C.M. 1003 does not advance appellant's argument.

While R.C.M. 1003 is unhelpful, the discussion to R.C.M. 907 provides some clarity on the question of which multiplicious conviction should be

dismissed. *See* R.C.M. 907(b)(3)(B) discussion ("The *less serious* of any multiplicious offenses shall be dismissed after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.") (emphasis added). Although the discussion to the R.C.M. is not binding law, this section directly undercuts appellant's argument that he is entitled to be convicted of maltreatment alone, which is clearly the "less serious" offense in comparison to sexual assault. So even in a legal universe free of any precedent from this Court on this issue, appellant would still lose under this R.C.M.

Appellant's next argument based on R.C.M. 921(c)(5), while ultimately misguided, raises a broader issue the government feels compelled to address in more detail. Percolating throughout his supplement to the petition for review and brief is the motif of prosecutorial gamesmanship, based on appellant's apparent belief that the government pursued an impermissible charging strategy. (Appellant's Br. 14–15). This claim reflects a misunderstanding of constitutional law and prosecutorial discretion.

The government has every right to charge an accused and seek convictions on greater and lesser-included offenses. The Double Jeopardy Clause does not limit the number of charges that the government may bring in a single proceeding. *Ohio v. Johnson*, 467 U.S. 493, 500 (1984) ("While the Double Jeopardy Clause

may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single prosecution."); *see Ball*, 470 U.S. at 860 nn. 7–8; *United States v. Kaiser*, 893 F.2d 1300, 1303 (11th Cir. 1990) (citing *Johnson*, 467 U.S. at 500) ("[T]he government may charge a defendant with both a greater and a lesser included offense and may prosecute those offenses at a single trial[.]").

Whether for exigencies of proof, concern about a criminal statute surviving constitutional scrutiny on appeal, or some other non-discriminatory reason, the government is at liberty to charge its case as it sees fit. *See Elespuru*, 73 M.J. at 329–30 (noting that alternatively charging multiple offenses based on a single course of conduct "for exigencies of proof" is "an unexceptional and often prudent decision"); R.C.M. 907(b)(3)(B) (noting that charging multiplicious offenses based on a single act is permissible "to enable the prosecution to meet the exigencies of proof through trial, review, *and appellate action*") (emphasis added). Indeed, every CCA permits the government to seek convictions for possible or even likely multiplicious offenses at trial and allows military judges to dismiss one of the convictions on the condition that the other conviction survives appellate review. *See United States v. Hines*, 75 M.J. 734, 738 n.4 (Army Ct. Crim. App. 2016) (discussing Judge Effron's concurring opinion in *United States v. Britton*, 47 M.J.

195, 203 (C.A.A.F. 1997) and collecting CCA cases approving the practice of conditional dismissals); R.C.M. 907(b)(3)(B) discussion. To the extent appellant argues otherwise, or suggests governmental overreach in this case through an incompetent or impermissible charging strategy, he is wrong.

Returning to R.C.M. 921(c)(5), assuming it applies at all to this case, it must be read in conjunction with R.C.M 907(b)(3)(B) and the authorities discussed above. It does not vitiate the constitutional and often prudent prosecutorial practice of seeking multiple convictions under different statutes for precisely the same course of conduct, and then dismissing the less serious conviction only after the more serious conviction withstands appellate review.

B. This Court's precedent and the greater weight of precedent of other federal courts does not require a lower court to vacate the elementally lesser-included offense.

Appellant claims he is entitled to a bright-line rule mandating the dismissal of his elementally lesser-included conviction for sexual assault instead of the elementally greater conviction for maltreatment. (Appellant's Br. 11). No body of law supports his claim. Indeed, this Court's precedent is clear that the government may elect to retain the conviction of its choosing. *Cherukuri*, 53 M.J. at 74. In most cases, the government will likely elect to retain the conviction carrying the highest punitive exposure, irrespective of whether the retained conviction is the elementally greater or lesser offense. *See, e.g.*, *United States v. Lampe*, ARMY

20120742, 2014 CCA LEXIS 646, *5–6 (Army Ct. Crim. App. 28 Aug. 2014) (mem. op.) (applying *Cherukuri* and reassessing the appellant's sentence after the government elected to retain the elementally lesser-included convictions for abusive sexual contact and wrongful sexual contact instead of the elementally greater conviction for conduct unbecoming). This sentencing outcome furthers legitimate societal and penological interests in maintaining convictions and sentences for the most serious offenses. *See United States v. Valigura*, 54 M.J. 187, 195 (C.A.A.F. 2000) (Crawford, C.J., dissenting) ("In short, criminal law aims to punish and deter socially undesirable behavior.").

Cherukuri itself is a prime example of when the government may want to elect to retain an elementally lesser-included conviction because of its legitimate interest in maximizing an appellant's punitive exposure. Forced to choose, the government wanted Lieutenant Colonel Cherukuri to be convicted, punished, and forever known to society as a sexual offender rather than simply a disgraced officer. *United States v. Cherukuri*, ARMY 9601824, 2000 CCA LEXIS 357, *8 (Army Ct. Crim. App. 5 Oct. 2000) (mem. op. on remand) (noting that based on the government's election to retain the indecent assault convictions instead of the consolidated conviction for conduct unbecoming, the appellant would "forever bear the brand of sexual predator, which he is, but not the shame of a disgraceful officer, which he also is"). (JA 80). This is perfectly legitimate. Indeed, the logic

of *Cherukuri* rings even truer today. Under the sentencing scheme applicable to appellant, the sexual assault conviction carried a mandatory minimum punishment whereas the maltreatment conviction did not. *See* Article 56(b)(2), UCMJ. Like Lieutenant Colonel Cherukuri, appellant should be convicted, punished, and forever known to society as a sexual offender, which he is, rather than simply a disgraced noncommissioned officer, which he also is. *Cherukuri* and this case highlight the inappropriateness of appellant's novel, bright-line proposal. Effectively, appellant's rule would pressure the government to abandon possible charges because of a risk that it might prevail on all charges at trial but then lose the most serious punishment on appeal based on an unprincipled technicality. This is not a result our system should countenance.

Outside of this Court's precedent, the practice of retaining convictions for offenses carrying higher punitive exposures is fully consistent with the practice of the federal courts because choosing which conviction to vacate "is fundamentally a sentencing decision." *United States v. Maier*, 646 F.3d 1148, 1154 (9th Cir. 2011); *see Peel*, 595 F.3d at 768 (noting the decision as to which conviction to vacate "is a matter committed to the trial judge's discretion because functionally it is a decision concerning the length of the defendant's sentence").[9] As such, whether a

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[9] When confronted with appellants convicted of multiplicious offenses, most circuits, consistent with *Ball*, require district court judges to exercise their discretion in determining which conviction to vacate. *See United States v. Coiro*,

statute is "greater" or "lesser" in the context of sentencing depends not on the number of elements a statute contains, but instead on the authorized punitive exposure it carries. *See Peel*, 595 F.3d at 767–68 (stating that even though the defendant's conviction for obstruction of justice was elementally a lesser-included offense of his conviction for bankruptcy fraud, it was nevertheless the "graver offense" because obstruction of justice carried a "higher statutory maximum sentence" than bankruptcy fraud); *United States v. Chambers*, 944 F.2d 1253, 1269 (6th Cir. 1991) (noting that an "anomaly" in the sentencing guidelines produced a higher punitive exposure if the conviction for the lesser-included offense was maintained instead of the greater offense). A review of the federal cases reveals that while "a long line of authorities direct[s] vacation of the conviction that carries the more lenient penalty when a defendant is convicted of both a greater and lesser-included offense," *United States v. Brown*, 701 F.3d 120, 128 (4th Cir. 2012), "there is no Iron Law that it is the conviction with the lowest penalty that *must* be vacated." *Fischer*, 205 F.3d at 971.

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922 F.2d 1008, 1015 (2d Cir. 1991); *United States v. Miller*, 527 F.3d 54, 74 (3d Cir. 2008); *United States v. Fischer*, 205 F.3d 967, 970 n.2 (7th Cir. 2000); *United States v. Harvey*, 829 F.3d 586, 591 (8th Cir. 2016); *Maier*, 646 F.3d at 1154; *United States v. Bobb*, 577 F.3d 1366, 1372 (11th Cir. 2009); *United States v. Palmer*, 902 F. Supp. 2d 1, 11 (D.D.C. 2012). In a handful of cases, the circuit court mandated the vacation of the lesser-included offense rather than leaving the decision to the discretion of the district court. *See, e.g.*, *United States v. Sellers*, 657 F. App'x 145, 148 (4th Cir. 2016); *United States v. Brito*, 136 F.3d 397, 408 (5th Cir. 1998).

The fact that "usually it's the conviction carrying the lesser penalty that is vacated" makes good sense. *Peel*, 595 F.3d at 768. It would be "paradoxical to give the defendant a shorter sentence than he would have received had the government not also charged him with the less serious offense." *Id.* (citing *Lanier v. United States*, 220 F.3d 883, 842 (7th Cir. 2000)). This default rule also eliminates potential gamesmanship in plea deals. *See Maier*, 646 F.3d at 1154 ("Such a rule safeguards against cases where a defendant charged with both possession and receipt/distribution of child pornography pleads guilty to both offenses with the hope that he will be sentenced under the lesser crime.").

After receiving assurance that one multiplicious conviction will be eliminated, an appellant's position as to what conviction he ought to be sentenced under should continue to be of no moment. An appellant is not entitled to a sentencing windfall just because he was convicted of multiplicious offenses. Having prevailed at trial, however, the government's position on which conviction ought to remain should continue to be outcome-determinative. Here, it would be absurd to allow appellant to escape from his sexual assault conviction simply because the government permissibly convicted him of the less severe—but elementally greater—offense of maltreatment.

C. Appellant cannot carry his substantial burden under the doctrine of stare decisis to show why this Court should overrule or alter its precedent.

Unable to demonstrate any error on the ACCA's part based on its correct application of this Court's established precedent, appellant's last effort is to ask this Court to jettison its precedent. Standing in his way, however, is the stout doctrine of stare decisis.[10] "Stare decisis is defined as [t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (quoting *United States v. Quick*, 74 M.J. 332, 343 (C.A.A.F. 2015) (Stucky, J., joined by Ohlson, J., dissenting)). Under the concept of "horizontal stare decisis," an appellate court "must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." *Id.* (quoting *Quick*, 74 M.J. at 343) (Stucky, J., joined by Ohlson, J., dissenting).

"[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters

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[10] Appellant's stare decisis argument, to the extent he makes one, is outside the scope of the granted issue, which this Court granted "with the exact wording requested by [a]ppellant." *United States v. Bodoh*, 78 M.J. 231, 233 n.1 (C.A.A.F. 2019) (citing *United States v. Guardado*, 77 M.J. 90, 95 n.1 (C.A.A.F. 2017)). The issue of whether a CCA erred by failing to adhere to this Court's precedent is separate and distinct from the issue of whether appellant has met his burden of establishing why this Court should overrule or alter its own precedent. Therefore, this Court should decline to address appellant's stare decisis argument. *See id.* The government responds in the event this Court decides to consider it.

reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* (internal quotation marks omitted) (quoting *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018)). This Court will not overturn "precedent . . . [that] has been treated as authoritative for a long time . . . unless the most cogent reasons and inescapable logic require it." *Id.* (internal quotation marks and citation omitted). The party requesting that a court overturn precedent bears "a substantial burden of persuasion." *Id.* (internal quotation marks and citation omitted).

Applying stare decisis is, however, "not an inexorable command." *Id.* (quoting *Blanks*, 77 M.J. at 242) (internal quotation marks omitted). This Court is not bound by precedent where "there has been a significant change in circumstances after the adoption of a legal rule, or an error in legal analysis," and this Court is "willing to depart from precedent when it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *Id.* (internal quotation marks and citation omitted).

This Court considers the following factors in evaluating the application of stare decisis: (i) "whether the prior decision is unworkable or poorly reasoned;" (ii) "any intervening events;" (iii) "the reasonable expectations of servicemembers;" and (iv) "the risk of undermining public confidence in the law." *Id.* (quoting *Blanks*, 77 M.J. at 242) (internal quotation marks omitted). "Even if

these factors weigh in favor of overturning long-settled precedent," this Court still requires "special justification, not just an argument that the precedent was wrongly decided." *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). The government addresses each factor in turn.

1. This Court's precedent is eminently workable and well-reasoned.

In the morass of appellate criminal law, fewer procedural rules are simpler than one that requires the choice between option A or option B. This Court's precedent established precisely this straightforward, practical process. Appellant argues this system is unworkable and that the CCAs are inconsistent in applying this Court's precedent. (Appellant's Br. 12–14). He is wrong.

In fact, the CCAs have implemented this precedent without issue for the past twenty years. *See, e.g.*, *United States v. Loniak*, ARMY 20150835, 2017 CCA LEXIS 563, *14 (Army Ct. Crim. App. 18 Aug. 2017) (mem. op.); *United States v. Mathis*, ARMY 20140473, 2016 CCA LEXIS 229, *5 (Army Ct. Crim. App. 13 Apr. 2016) (mem. op.); *Lampe*, 2014 CCA LEXIS 646 at *5–6; *United States v. Jackson*, ARMY 20120026, 2013 CCA LEXIS 1011, *6 (Army Ct. Crim. App. 26 Nov. 2013) (summ. disp.); *United States v. Servantez*, ARMY 20120217, 2013 CCA LEXIS 948, *3–4 (Army Ct. Crim. App. 7 Nov. 2013) (summ. disp.); *United States v. Lee*, 2007 CCA LEXIS 233, *19 (N–M. Ct. Crim. App. 26 Jun. 2007) (unpublished). The government is unaware of any frustration or confusion from

the CCAs concerning this Court's precedent. Similarly, the government is unaware of any case of this Court reversing a CCA for erroneously applying this line of cases. History demonstrates this Court's precedent is eminently workable.

In support of his argument that the CCAs are inconsistent in their application of this Court's precedent, appellant cites the Air Force case of *United States v. Williams*, 74 M.J. 572 (A.F. Ct. Crim. App. 2014). (Appellant's Br. 13). Rather than demonstrating unworkability or inconsistency, *Williams* actually represents a failure of a CCA to adhere to the precedent of its superior court. In *Williams*, the Air Force Court stated that when an appellant "has been convicted of multiplicious specifications, this court *may permit* the Government to elect which finding of guilty will be affirmed." 74 M.J. at 576 (citing *Palagar*, 56 M.J. at 296–97) (emphasis added). Then, inexplicably, and citing no authority, the court stated, "However, the Government need not be given this option." *Id.* Ungrounded from any authority at this point, the Air Force Court then dismissed the conviction *requested by appellant* instead of the government because the court—creating its own novel standard—saw "nothing unreasonable with the appellant's request." *Id.*

Rather than demonstrating unworkability or inconsistency amongst the CCAs in applying this Court's precedent, *Williams* is simply a rogue, poorly reasoned decision. Despite the clear mandate of this Court to "leave to the Government the decision which conviction to retain," *Frelix-Vann*, 55 M.J. at 333,

the Air Force Court wrongly decided not to adhere to this Court's precedent and instead to make it up as it went. *See United States v. Davis*, 76 M.J. 224, 228 n.2 (C.A.A.F. 2017) (citation omitted) ("[T]he service courts of criminal appeals must adhere to this Court's precedent . . ."). If the Air Force Court disagreed with this Court's precedent, or believed the underlying logic of it had changed in the meantime, "its recourse was to express that viewpoint and to urge [this Court's] reconsideration of [its] precedent." *Id.* The Air Force Court got it doubly wrong in *Williams*. But a contumacious opinion from one CCA hardly demonstrates wild inconsistency, nor does it cut against the eminently workable precedent of this Court. The fundamental flaw with appellant's argument is his mistaking workability with adherence to vertical stare decisis. And even assuming *Williams* supports appellant's argument on unworkability or inconsistency, it cuts against his merits argument for a bright-line rule mandating the dismissal of the lesser-included offense. Even in *Williams*, the Air Force Court provided a choice, albeit to the wrong party.

In addition to being workable, this Court's precedent is well-reasoned. A correct application of this Court's precedent ensures a judgment free of constitutional infirmity because an appellant will not stand convicted of multiplicious offenses. Furthermore, in the unique context of military justice, which does not have Article III district court judges charged with sentencing

responsibilities, it was wise for this Court to leave the implementation of this precedent to the CCAs. After all, the CCAs possess "vast powers" concerning sentence appropriateness. *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018). Indeed, the power of a CCA "'has no direct parallel in the federal civilian sector,' and no other federal appellate court, including [this Court], in the American criminal justice system possesses the same power." *Id.* (quoting *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)). In many circumstances, when a CCA dismisses a multiplicious conviction after receiving the government's election, it will be appropriate and judicially economical for that same court, in the same opinion, to reassess the appellant's sentence. *United States v. Winkelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). Finally, this precedent is fair to both appellants and the government. Fair to an appellant in that he will not stand convicted of multiplicious offenses; fair to the government in that, as the prevailing party at trial, it gets to choose which conviction to retain.

2. No intervening events compel a different result.

There is no recent Supreme Court decision, no decision from this Court, and no change to military rule, regulation, or structure necessitating the overruling of this Court's precedent. *Cf. United States v. Fosler*, 70 M.J. 225, 232 (C.A.A.F. 2011) (declining to adhere to prior precedent because the "jurisprudence of the Supreme Court and our own Court has changed"). In appellant's view, this Court's

decision in *Elespuru* somehow abrogated this Court's precedent in *Cherukuri*, *Frelix-Vann*, and *Palagar*. (Appellant's Br. 13–15). Why appellant believes this is mysterious, especially because this Court said nothing in *Elespuru* about overturning or altering this trio of cases while repeatedly stating in other cases that "overruling by implication is disfavored." *United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019) (quoting *United States v. Pack*, 65 M.J. 381, 383 (C.A.A.F. 2007)). If *Elespuru* was as seismic as appellant avers, the government can only assume this Court would have said so.

Likewise, there have been no intervening events in other federal courts militating towards a departure from this Court's established precedent. As noted above, the practice approved by this Court is remarkably similar to the way this practice plays out in federal courts, accounting for the obvious differences between the systems. Specifically, it is the norm that appellants will stand convicted of the offense carrying the highest punitive exposure irrespective of whether that offense was elementally greater or lesser than the vacated conviction. *See Brown*, 701 F.3d at 128; *Peel*, 595 F.3d at 768. This makes good sense, and nothing has changed since *Cherukuri* was decided in 2000 that compels a different result.

3. Whatever the reasonable expectation of servicemembers is concerning this Court's precedent, it cuts against an unwarranted departure.

The government acknowledges it is "difficult to quantify the expectation of servicemembers in regard to the authority" of the CCAs to remedy multiplicity errors by permitting the government to elect which conviction to retain. *Quick*, 74 M.J. at 337. However, it is beyond dispute that in the past twenty years, this practice "has become an established component of the military justice system." *Id.* Following *Cherukuri*, this Court reaffirmed the practice on at least two occasions. *See Palagar*, 56 M.J. at 296–97; *Frelix-Vann*, 55 M.J. at 333. Neither *Palagar* nor *Frelix-Vann* modified or overturned *Cherukuri*. As previously discussed, the CCAs that properly adhere to this Court's precedent have applied it without issue. In the military context, where uniformity and predictability are part and parcel of the profession of arms, there is no compelling reason to upset the reliance interest built upon this Court's precedent.

Relevant to appellant's sexual misconduct in this case, the interests of Congress and the Department of Defense in eradicating sexual offenses within the armed forces and subsequent enhancement of victim rights are well known. *See* Colonel Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Development*, 2019 ARMY LAW. 64 (2019); *see also* Article 6b, UCMJ. Sexual assault "is one of the most destructive factors in

building a mission-focused military." Brief of Petitioner United States, 5, United States v. Briggs, (No. 19-108) (quoting *Memorandum from James N. Mattis*, *Secretary of Defense*, *to All Members of the Department of Defense: Sexual Assault Prevention and Awareness* (18 Apr. 2018)) (internal quotation marks omitted).[11] The "personal devastation" a sexual assault victim experiences "comes with systematic effects that are unique to the military context." *Id.* While the decision concerning which conviction to retain ultimately rests with the government, a servicemember–victim of sexual assault, whose testimony at trial secured a conviction against her perpetrator, must have some reasonable expectation that the perpetrator's sexual assault conviction will not be dismissed on appeal simply because he would prefer to be sentenced under a more lenient penalty landscape. An appellant, on the other hand, has only the reasonable expectation that he will not stand convicted of multiplicious offenses—a result this Court's precedent already ensures.

4. Fewer things would more severely undermine public confidence in the law than for an appellant—already made constitutionally whole—to receive a sentencing windfall of his choosing.

Confidence in the military justice system would be eroded if an appellant, having been duly convicted of abusing his official position and status and of

[11] *Available at* https://www.supremecourt.gov/DocketPDF/19/19-108/127645/20200106162031945_19-108tsUnitedStates.pdf (last accessed 14 May 2020).

sexually assaulting a junior servicemember subject to his orders, was allowed to dictate his sentencing scheme on appeal. It would be paradoxical indeed for an appellant to receive such a sentencing windfall simply because the government—consistent with Supreme Court precedent—shouldered a heavier burden at trial and convicted him of the additional UCMJ offense of maltreatment rather than just sexual assault. The outrage from a ruling endorsing such an absurd result would be well-justified. *See Peel*, 595 F.3d at 763 ("[I]magine convicting a person of attempted murder and of murder and punishing him only for the attempt."). Make no mistake, appellant endeavors to evade justice by having his sexual assault conviction dismissed. Such a result would both undermine public confidence in the law and harm good order and discipline. *See* Brief of Petitioner United States, 7, United States v. Briggs, (No. 19-108) ("And the destruction of 'morale, good order and discipline' is only exacerbated by a failure to bring assailants to justice.") (quoting United States Dep't of Defense, *Sex Crimes and the UCMJ: A Report for the Joint Service Comm. On Military Justice* 2). This stare decisis consideration alone is strong enough to militate against a departure from this Court's precedent.

5. No special justifications exist.

In this case, appellant argues no special justifications, and the government conceives of none. Considering the factors together, appellant fails to carry his burden to establish why this Court should not adhere to its precedent.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the judgment of the Army Court of Criminal Appeals.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 8,216 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

BRIAN JONES
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June, 2020

Appendix to Appellee's Brief

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As of: May 14, 2020 4:24 PM Z

United States v. Cherukuri

United States Army Court of Criminal Appeals

October 5, 2000, Decided

ARMY 9601824

Reporter
2000 CCA LEXIS 357 *; 2000 WL 35801877

UNITED STATES, Appellee v. Lieutenant Colonel SARVESWARA R. CHERUKURI, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Cherukuri, 54 M.J. 374, 2000 CAAF LEXIS 1343 (C.A.A.F., 2000)*

Prior History: **[*1]** 1st Infantry Division. F. Kennedy, Military Judge.

Core Terms

sentence, patients, military, specification, breasts, reassessment, senior, conduct unbecoming, indecent assault, assaults, elect, indecent, military officer, superior court, misconduct, adjudged

Counsel: For Appellant: Colonel Adele H. Odegard, JA; Lieutenant Colonel David A. Mayfield, JA; Major Jonathan F. Potter, JA; Captain Steven P. Haight, JA (on brief).

For Appellee: Lieutenant Colonel Edith M. Rob, JA; Major Anthony P. Nicastro, JA; Captain Arthur L. Rabin, JA (on brief).

Judges: Before MERCK, CASIDA, and TRANT, Appellate Military Judges. Senior Judge MERCK and Judge CASIDA concur.

Opinion by: TRANT

Opinion

MEMORANDUM OPINION ON REMAND

TRANT, Judge:

A general court-martial composed of officer members convicted appellant, contrary to his pleas, of one specification of conduct unbecoming an officer and gentleman and four specifications of indecent assault, in violation of Articles 133 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 933* and *934* [hereinafter UCMJ]. His approved sentence was to a dismissal, confinement for two years, and forfeiture of all pay and allowances.

At trial, appellant claimed that the four specifications of indecent assault were lesser included offenses of the conduct unbecoming an officer offense or, alternatively, an unreasonable multiplication of charges. The military judge rejected these claims. In a memorandum opinion, dated **[*2]** 28 December 1998, this court also rejected these claims and affirmed the findings and sentence. (Unpub.). On 26 May 2000, a majority of the United States Court of Appeals for the Armed Forces agreed with appellant's claims, reversed the decision of this

court, and remanded the case to us for further action. 53 M.J. 68 (2000). In its opinion, our superior court authorized the government to elect to retain the four specifications of indecent assault or the one specification of conduct unbecoming an officer and gentleman, and, after such an election, for this court to determine whether a rehearing on sentence is necessary.

On 6 July 2000, this court ordered that the government make its election and directed that pleadings be filed on the issue of whether a rehearing on sentence is required. On 12 July 2000, the government elected to retain the four specifications of indecent assault. In his pleadings, appellant challenges the authority of the government to elect which specification or specifications to retain, in spite of the clear mandate of our superior court, and asserts that sentence reassessment by this court is an impossible task. Conversely, the government accedes to the mandate **[*3]** of our superior court and requests that this court affirm the election of charges and affirm, presumably after reassessing, the sentence.

The facts of this case, as set forth in our original opinion, remain unchanged and bear repeating. As we found then, and now, the evidence showed that:

> Appellant, a reservist employed in his civilian capacity at a Veteran's Administration Hospital in Michigan, was called to active duty and assigned to a medical clinic in Vilseck, Germany where he performed general medical and family practice duties. During this assignment appellant's contact with female patients gave rise to the allegations of indecent assault upon four women. . . .
>
> [B]etween 21 and 29 May 1996, appellant examined four women, all dependents of enlisted military members. The medical complaints of these women involved a sore throat, a urinary tract infection, headaches, and stomach distress. Appellant never used a chaperone and always closed and locked the door to the examining room after the women entered. In two cases, he was reported to have "pressed" his body against the patient's in ways that made them feel uncomfortable.
>
> In each case, appellant requested that the women perform acts, **[*4]** which while purporting to further his medical examination, also facilitated access to the women for the purpose of touching or fondling their breasts. Specifically, two patients were asked to lift up their outer garments so that their brassier clad breasts became exposed. Another patient was asked to unfasten her brassier after appellant had lifted her shirt and stared at her breasts "for what appeared to be a pretty long time."
>
> Appellant also induced two of the women to lay down on the examining table, ostensibly for examinations relating to their specific complaints. In the case of Mrs. JLP, he then pinned her hand between his groin area and the table as he examined her. When she attempted to terminate this contact, appellant placed her hand back on his erect penis.
>
> In the case of Mrs. DKR, she complied with appellant's request that she lift her windbreaker above her bosom while remaining prone on the table. Thereafter, "he leaned over and grabbed the front of [her] sports bra . . . and pulled it up," and subsequently commented on her "nice tan."
>
> Ultimately, each patient "examination" led to appellant's placing of his stethoscope on the patient's breast(s) and then touching or manipulating **[*5]** the breast with the same hand. In the case of Mrs. DKR, he did this twice. While his use of a stethoscope was consistent with checking for heart and lung functions, the necessity of these "checks" was not obvious and was never explained to the patients.
>
> This lack of apparent "necessity" was highlighted by appellant's response to the specific patient complaints. For the complaint of a urinary tract infection, a brief examination of the abdominal and pubic areas was conducted by pressing upon them. After this, appellant proceeded to an examination of the chest and breasts. Similarly, for the case involving stomach distress, appellant appeared to ignore the patient's medical history, "felt around on [her] stomach area" while asking if it caused pain, and then proceeded to examine her chest and breasts, ostensibly so he could listen to her heart. The necessity or need to contact or examine the chest and breasts of the woman complaining of persistent headaches was similarly unclear and unexplained.
>
> Expert medical testimony indicated that the treatment notes did not document appellant's examination of the various patients' breasts. The testimony also indicated that it was usually not necessary **[*6]** to require a female patient to expose her bosom to view in order to perform a heart or lung function check. In this regard, the expert noted that placing a stethoscope upon breast tissue, as opposed to placing it centrally,

> either above or below the breasts, was ineffective as a means of accurately checking heart/lung function.
>
> Given the nature of the patients' medical problems and the entire treatment record, no medical reason to physically touch or observe the patients' breasts was noted. While much of appellant's conduct with these patients was within professional bounds, the expert observed that certain aspects were neither medically required or appropriate.
>
> All of the victims testified to being shocked, very upset, and feeling violated by appellant's conduct. Other witnesses corroborated this testimony. Three of the victims described appellant's misconduct in terms of violating a trust. One of them specifically used that terminology in elaborating on her reaction to appellant's "bedside manner."

Slip. op. at 2-4 (footnote omitted).

First, we summarily reject appellant's contention that the government cannot do precisely what our superior court authorized them to do, that is elect **[*7]** to retain the four indecent assault specifications in lieu of the one conduct unbecoming an officer specification. *See* 53 M.J. at 74. This is yet another instance where the quagmire of multiplicity has trapped another unwary victim. Had the government been more creative in the verbiage that it included in the conduct unbecoming an officer specification, it may have avoided this fate. Had appellant indecently assaulted at random four civilian strangers, who were unaware of his status as an Army officer and doctor, while on leave in civilian clothes away from the military installation at a stateside location, he would be guilty of four indecent assaults. If, as in the instant case, appellant abused his position of trust and responsibility, as both a senior Army officer and doctor, to indecently assault four dependents of enlisted military members while he was in uniform on duty in a military hospital in a foreign country, has he only engaged in the same magnitude of criminal misconduct? We think not; but, these underlying facts were apparently not sufficiently alleged in the specification to satiate the multiplicity hobgoblin. As Chief Judge Crawford noted, this leads to "an absurd **[*8]** conclusion." 53 M.J. at 74 (2000)(dissenting).

The government relied upon what is obvious to us, as it was to the senior military officers who served on appellant's court-martial panel, that it is the sum total of appellant's misconduct, not simply the four indecent assaults, that we find offensive as military officers and criminal as military judges. Had the government listed in excruciating detail every aspect and permeation of the abhorrent conduct that appellant engaged in while abusing his position of trust and responsibility as a senior military officer, they may have appeased the multiplicity monster. But alas, the government did not do this, so appellant will forever bear the brand of sexual predator, which he is, but not the shame of a disgraceful officer, which he also is.

Second, we reject appellant's contention that "sentence reassessment by this Court is nearly impossible." We three members of this panel, all experienced military appellate judges, former military trial judges, and senior military officers, are confident that we can fairly accomplish this feat. As our superior court noted:

> We are, of course, well aware that the experienced and professional military lawyers **[*9]** who find themselves appointed as trial judges and judges on the courts of [criminal appeals] have a solid feel for the range of punishments typically meted out in courts-martial. Indeed, by the time they receive such assignments, they can scarcely help it; and we have every confidence that this accumulated knowledge is an explicit or implicit factor in virtually every case in which a military judge imposes sentence or a court of [criminal appeals] assesses for sentence appropriateness.

United States v. Ballard, 20 M.J. 282, 286 (C.M.A. 1985).

Accepting our superior court's finding of a multiplicity error, we now have two options: if we conclude that we cannot "reliably determine what sentence would have been imposed at the trial level if the error had not occurred," we may order a rehearing on the sentence; or, if we conclude that, in the absence of error, the sentence "would have been at least of a certain magnitude," we may reassess the sentence accordingly. United States v. Boone, 49 M.J. 187, 194 (1998) (quoting United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986)). When we exercise the latter option, reassessing a sentence without a remand, we must not only "assure that the sentence **[*10]** is appropriate in relation to the affirmed findings of guilty, but also . . . must assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." Sales, 22 M.J. at 308 (quoting United States v. Suzuki, 20 M.J. 248, 249 (C.M.A. 1985)). If we can determine that "the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error." Boone, 49 M.J. at 195

(quoting *Sales, 22 M.J. at 307*). "The standard for reassessment is not what would be imposed at a rehearing but what would have been imposed at the original trial absent the error." *United States v. Taylor, 47 M.J. 322, 325 (1997)*; *see also* *United States v. Eversole, 53 M.J. 132, 133 (2000)*.

Multiplicity errors are not, unfortunately, uncommon, *see, e.g.*, *Sales, 22 M.J. 305*, and reassessment of the sentence following such errors is often a viable option, *see, e.g.*, *United States v. Broussard, 35 M.J. 665, 669, 671 (A.C.M.R. 1992)*; *Boone, 49 M.J. at 195 n.7* (citations omitted). As the court noted in *United States v. Peoples, 29 M.J. 426 (C.M.A. 1990)*:

> We have great confidence in the **[*11]** ability of the Court of Military Review to reassess sentences in order to purge the effects of prejudicial error at trial. Furthermore, we are well aware that it is more expeditious and less expensive for the Court of Military Review to reassess the sentence than to order a rehearing on sentence at the trial level.

Id. at 429. Although appellant is doubtful that we can "ascertain with any degree of certainty what sentence would have been adjudged absent the error," we have no such doubt, and we readily accept the reassessment option in lieu of a rehearing.

Every revolting detail of appellant's misconduct would have come to the attention of the court members, whether appellant was charged with the conduct unbecoming an officer offense or not. His status as a senior officer and doctor, and the manner in which he abused those statuses to facilitate his sexual predation upon his patients were an integral part of the indecent assault offenses. Thus, even absent the error, there was not a single salient fact admitted at trial that the members could not, or would not, have considered in sentencing appellant only for the four indecent assaults. Even without a charge of conduct unbecoming an **[*12]** officer before them, the panel members, four colonels and one promotable lieutenant colonel, would have been mindful of the aggravating nature of appellant's status as a senior officer and doctor when sentencing him for indecently assaulting the seventeen-year-old daughter of a staff sergeant, in addition to the wives of two sergeants and a staff sergeant. Regardless of the error, appellant was facing a dismissal and forfeiture of all pay and allowances. Absent the error, appellant was also facing twenty years confinement, instead of the twenty-five years that the panel had been instructed upon. Appellant's adjudged sentence of dismissal, confinement for two years, and forfeiture of all pay and allowances was far below even the adjusted maximum sentence, and that which the prosecution requested: dismissal, five years confinement, and total forfeitures.

If ever there was a case where we can state with unbridled certainty that, absent the error, "the sentence adjudged would have been of at least a certain severity," this is it. We, as we are certain the members did, focus on the underlying misconduct of appellant, not the nomenclature attached thereto. For an officer to abuse enlisted **[*13]** soldiers is reprehensible, but for an officer to sexually abuse the wives and daughter of enlisted soldiers is even more appalling. It didn't seem to matter what ailment these female patients were being treated for: a sore throat, a headache, stomach distress, or a urinary tract infection, appellant felt free to give them an unnecessary and lurid breast examination.

Being stationed overseas, these victims had limited medical care options and, as do most military dependents overseas, utilized the military medical system. Their trust in that system was severely shaken because of their experiences at the hands of appellant. The seventeen-year-old victim stated that she felt "violated" and that appellant "made me feel dirty; because doctors don't usually do that." One victim, a sergeant's wife, testified that she was already reluctant to go to the doctor and that she "didn't know very many females, personally, that do enjoy going to the doctor; but we go because of our health, and because that person is a professional." Now, after the unprofessional "treatment" that she received from appellant, she has a recurring nightmare that she is "trapped in a room with [appellant], and [she] can't **[*14]** get out." Another victim, a staff sergeant's wife and herself the child of a retired soldier, testified that she "no longer trusts doctors . . . will not see a doctor she has not seen before . . . and will never be alone with a doctor again" and that, since this assault, she has delayed treatment for a serious medical condition for two months. Appellant violated their bodies and tormented their minds. Even after all of this, appellant in his unsworn statement focused on his own humiliation, and we view his sense of remorse to be minimal and unconvincing.

Based upon our collective experiences as appellate judges, trial judges, and senior military officers, we are certain that appellant would have received a sentence at least as severe as the sentence he received, even absent the error at trial, and that the adjudged sentence was appropriate in relation to the affirmed findings of

guilty.

The findings of guilty of Charge II and its Specification are set aside and dismissed. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the error noted, the entire record of trial, and applying the principles of *Sales, 22 M.J. 305*, the court affirms the sentence.

Senior **[*15]** Judge MERCK and Judge CASIDA concur.

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United States v. Jackson

United States Army Court of Criminal Appeals

November 26, 2013, Decided

ARMY 20120026

Reporter
2013 CCA LEXIS 1011 *; 2013 WL 6255380

UNITED STATES, Appellee v. Lieutenant Colonel KEITH A. JACKSON, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by *United States v. Jackson, 2014 CAAF LEXIS 111 (C.A.A.F., Jan. 28, 2014)*

Motion granted by *United States v. Jackson, 2014 CAAF LEXIS 149 (C.A.A.F., Feb. 12, 2014)*

Affirmed by *United States v. Jackson, 2014 CAAF LEXIS 653 (C.A.A.F., June 5, 2014)*

Review granted by *United States v. Jackson, 2014 CAAF LEXIS 678 (C.A.A.F., June 5, 2014)*

Prior History: [*1] Headquarters, United States Army Maneuver Support Center of Excellence. Fort Leonard Wood, Missouri. Jeffrey R. Nance, Military Judge, Lieutenant Colonel Jim Tripp, Acting Staff Judge Advocate (pre-trial), Colonel James R. Agar II, Staff Judge Advocate (post-trial).

Core Terms

specifications, conduct unbecoming, indecent, sentence, military, charges, multiplication, multiplicious, convictions

Counsel: For Appellant: Colonel Patricia A. Ham, JA; Major Jacob D. Bashore, JA; Captain Ian M. Guy, JA (on brief).

For Appellee: Lieutenant Colonel James L. Varley, JA; Major Catherine L. Brantley, JA; Captain T. Campbell Warner, JA (on brief).

Judges: Before KERN, ALDYKIEWICZ, and MARTIN, Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of sixteen specifications of attempted indecent language and two specifications of conduct unbecoming an officer, in violation of Articles 80 and 133, Uniform Code of Military Justice [hereinafter UCMJ], *10 U.S.C. §§ 880*, *933 (2006)*. The military judge sentenced appellant to a dismissal. The convening authority approved the adjudged sentence.

Appellant's case is before this court for review pursuant to *Article 66, UCMJ*. Appellant raises two assignments of error, one of which merits discussion and relief.[1]

[1] We have also considered the matters personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431*

[*2] Appellant argues that his convictions for attempted indecent language are multiplicious and constitute an unreasonable multiplication of charges with the second specification of the conduct unbecoming charge. The government concedes, and we agree, that the second specification of the conduct unbecoming an officer conviction is multiplicious and must be set aside. Therefore, we need not reach the assignment of error regarding unreasonable multiplication of charges.

BACKGROUND

Over the course of several months, appellant used his web camera to transfer obscene material over the internet to a person he believed to be a girl under sixteen years of age. He also communicated indecent language to the same person. The person on the receiving end of appellant's transmissions was actually a detective assigned to the cyber crimes task force. At trial, appellant did not dispute that he sent the videos and communicated indecent language to someone, but argued that due to his heavy drinking and subsequent black outs, **[*3]** he was merely role playing with a person he believed to be an adult.

At trial, the defense made a motion to dismiss the attempted indecent language specifications of Charge I, under Article 80, UCMJ as being multiplicious and an unreasonable multiplication of charges. The defense asserted the Article 80, UCMJ specifications were based on the same conduct that formed the basis of the conduct unbecoming an officer specifications under Article 133, UCMJ, contained in Charge II. The military judge found appellant guilty of Specifications 3-18 of Charge I, and both specifications of Charge II. After findings, the military judge denied the multiplicity portion of the motion, but found that under the facts of this case, Specification 2 of the Article 133, UCMJ offense was an unreasonable multiplication of charges with the remaining Article 80, UCMJ convictions for purposes of sentencing.

LAW AND DISCUSSION

Article 133, UCMJ "includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and gentleman." United States v. Palagar, 56 M.J. 294, 296 (C.A.A.F. 2002) (quoting *Manual for Courts-Martial, United States* (2000 ed.) [hereinafter *MCM*], Part IV, ¶ 59.c.(2) **[*4]**).[2]"Whenever a specific offense is also charged as conduct unbecoming an officer, 'the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.'" Palagar, 56 M.J. at 296. When a specific offense is also charged as a violation of Article 133, UCMJ, our superior court has treated the specific offense as a lesser included offense. *Id.*; *see* United States v. Frelix-Vann, 55 M.J. 329, 331 (C.A.A.F. 2001) (holding that since the crime of larceny was alleged as the sole basis for the conduct unbecoming an officer specification, the Article 121, UCMJ was a lesser included offense of the Article 133, UCMJ offense).

"The Fifth Amendment protection against double jeopardy provides that an accused cannot be convicted of both an offense and a lesser-included offense. *See* Article 44(a), UCMJ, *[ ]*; Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); United States v. Teters, 37 M.J. 370 (C.M.A. 1993). Charges reflecting both an offense and a **[*5]** lesser-included offense are impermissibly multiplicious." United States v. Hudson, 59 M.J. 357, 358 (C.A.A.F. 2004), *overruled on other grounds by* United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010).

We find that appellant's attempted indecent language convictions are based on the same criminal conduct as the second specification of the conduct unbecoming conviction. Although the Article 80, UCMJ specifications actually address more instances of the indecent language than the Article 133, UCMJ specification, both "describe substantially the same misconduct in two different ways." R.C.M. 907(b)(3) discussion. Put another way, as charged in this case, it is impossible to commit the Article 133, UCMJ offense without first having committed the Article 80, UCMJ offenses. *See* Schmuck v. United States, 489 U.S. 705, 719, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989) (citing Giles v. United States, 144 F.2d 860, 10 Alaska 455 (9th Cir. 1944). It follows that while the Article 133, UCMJ offense requires proof of a fact that the Article 80, UCMJ offense does not, the opposite is not true. *See* Blockburger, 284 U.S. at 304 ("the test to be applied to determine whether there are two offenses or only one, is whether *each* provision requires proof of an

(C.M.A. 1982) and determined they do not merit discussion or relief.

[2] This language from the *MCM* has remained unchanged for all times relevant to this appeal.

[*6] additional fact which the other does not . . . .") (emphasis added). Accordingly, appellant's conviction for conduct unbecoming an officer for communicating indecent language to a person appellant believed to be a child under the age of sixteen years is multiplicious with the attempt to communicate indecent language and one of the offenses must be set aside.

We would normally dismiss the conviction for the lesser-included offense. *See* *United States v. St. John, 72 M.J. 685, 689 (Army. Ct. Crim. App. 2013)*. However, in both *Frelix—Vann* and *United States v. Cherukuri, 53 M.J. 68, 74 (C.A.A.F. 2000)*, our superior court ordered a remand to the service court where the government could elect which conviction to retain. In permitting an election, the Court ". . . recognized that disapproving either conviction would remedy the multiplicity." *Palagar, 56 M.J. at 296*. In this case, the government elects to dismiss Specification 2 of Charge II, and retain appellant's convictions for Specifications 3 through 18 of Charge I.

CONCLUSION

The finding of guilty of Specification 2 of Charge II is set aside and that specification is dismissed. On consideration of the entire record, the assigned errors, **[*7]** and the matters personally raised by appellant pursuant to *Grostefon*, the remaining findings are AFFIRMED. Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *United States v. Sales, 22 M.J. 305 (C.M.A. 1986)*, and *United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006)*, to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*, the approved sentence is AFFIRMED.[3] All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are hereby ordered restored.

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[3] In our review of the sentence, we specifically considered appellant's eligibility for retirement. Additionally, we note that the military judge found that Specification 2 of Charge II constituted an unreasonable multiplication of charges with the remaining *Article 80, UCMJ* offenses for purposes of sentencing.

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United States v. Lampe

United States Army Court of Criminal Appeals

August 28, 2014, Decided

ARMY 20120741

Reporter
2014 CCA LEXIS 646 *

UNITED STATES, Appellee v. Second Lieutenant ROGAN E. LAMPE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by United States v. Lampe, 2014 CAAF LEXIS 1039 (C.A.A.F., Oct. 27, 2014)

Prior History: **[*1]** U.S. Army Combined Arms Support Command, Sustainment Center of Excellence and Fort Lee. Fansu Ku, Military Judge (arraignment), Michael Hargis, Military Judge (trial), Colonel Andrew J. Glass, Staff Judge Advocate.

Core Terms

Specification, sexual contact, sentence, post-trial, charges, conduct unbecoming, multiplication, military

Counsel: For Appellant: Lieutenant Colonel Peter Kageleiry, Jr., JA; Major Vincent T. Shuler, JA; Captain Aaron R. Inkenbrandt, JA (on brief); Lieutenant Colonel Jonathan F. Potter, JA; Captain Aaron R. Inkenbrandt, JA (on reply brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major John K. Choike, JA; Captain Jaclyn E. Shea, JA (on brief).

Judges: Before LIND, KRAUSS, and PENLAND, Appellate Military Judges. Senior Judge LIND and Judge KRAUSS concur.

Opinion by: PENLAND

Opinion

SUMMARY DISPOSITION

PENLAND, Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of abusive sexual contact, one specification of wrongful sexual contact, and two specifications of conduct unbecoming an officer and a gentleman in violation of Articles 120 and 133, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 920 and 933 (2006 and Supp. IV 2011).[*] The panel sentenced appellant to a dismissal, confinement for sixty days, and forfeiture of all pay and allowances. **[*2]** The convening authority approved the adjudged sentence.

[*] Appellant was also charged with two specifications of assault consummated by a battery (Charge II and its specifications) in violation of Article 128, UCMJ, 10 U.S.C. § 928. Pursuant to defense counsel's multiplicity motion, the military judge held both assault specifications were lesser-included offenses of the abusive sexual contact and wrongful sexual contact specifications and dismissed the assault specifications.

This case is before the court for review under Article 66, UCMJ. Appellant raises two assignments of error. Both merit brief discussion and relief. We have also considered those matters personally raised by appellant pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), and find they are without merit.

Appellant was convicted of, *inter alia*, the following charges and specifications:

> Charge I: Article 120, UCMJ
> Specification 1: In that [appellant], did, at or near Petersburg, Virginia, on or about 24 November 2011, engage in sexual contact, to wit: touching the penis of [NC], while the said [NC] was substantially incapable of declining participation in the sexual contact.
>
> Specification 2: In that [appellant], did, at or near Petersburg, Virginia, on or about 24 November 2011, **[*3]** wrongfully engage in sexual contact, to wit: touching the buttocks of [NC] by pressing his body against the said [NC], with [NC], and without the permission of [NC].
>
> Charge III: Article 133, UCMJ
> Specification 1: In that [appellant], did, at or near Petersburg, Virginia, on or about 24 November 2011, touch the penis and buttocks of [NC], such conduct being unbecoming of an officer and a gentleman.

Unreasonable Multiplication of Charges

Appellant's first assignment of error asks us to hold that "the military judge abused his discretion by denying [appellant's] motion to dismiss Specification 2 of Charge I and Specification 1 of Charge III as an unreasonable multiplication of charges with Specification 1 of Charge I" because "all three offenses arose from a single transaction." However, appellant did not, by motion or otherwise, request that the military judge dismiss Specification 2 of Charge I (wrongful sexual contact) as an unreasonable multiplication of charges with Specification 1 of Charge I (abusive sexual contact).

Our review of the record reflects significant litigation during the trial regarding whether "Charge I and its specifications" were either multiplicious or an unreasonable multiplication of charges **[*4]** with "Charge III and its specifications" and "Charge II and its specifications." Given this extensive litigation, we hold appellant waived any claim that Specifications 1 and 2 of Charge I are unreasonably multiplied with each other, and therefore, we decline to address the issue on appeal. *See* United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001) ("Particularly in view of the extraordinary power of a Court of Criminal Appeals to substitute its judgment for that of the court-martial, the court below was well within its authority to determine the circumstances, if any, under which it would apply waiver or forfeiture to the type of error at issue in the present case.") (internal citations and quotation marks omitted).

Although appellant also asks us to hold that Specification 1 of Charge III (conduct unbecoming an officer) constitutes an unreasonable multiplication of charges with Specification 1 of Charge I (abusive sexual contact), we find that relief is more appropriately granted by applying a multiplicity analysis.

Multiplicity

Regarding multiplicity, the government concedes that the sexual conduct alleged in Specification 1 of Charge III (conduct unbecoming an officer) is the same sexual conduct alleged in Specifications 1 and 2 of Charge **[*5]** I (abusive sexual contact and wrongful sexual contact). When a specific offense alleges criminal conduct that is also charged as conduct unbecoming an officer under Article 133, UCMJ, the specific offense is multiplicious with the Article 133 offense. United States v. Palagar, 56 M.J. 294 (C.A.A.F. 2002); United States v. Frelix-Vann, 55 M.J. 329 (C.A.A.F. 2001); United States v. Cherukuri, 53 M.J. 68 (C.A.A.F. 2000). In the past, our superior court has allowed the government to elect which conviction to retain. Palagar, 56 M.J. at 296-97; Frelix-Vann, 55 M.J. at 333, Cherukuri, 53 M.J. at 74. The government has requested this court to set aside and dismiss appellant's conviction of conduct unbecoming an officer (Specification 1 of Charge III). We will do so in the decretal paragraph.

Unreasonable Post-Trial Delay

Considering the time elapsed between imposition of sentence and the record's arrival at this court *and* a significant post-trial error within that time period, we find unreasonable post-trial delay warranting relief.

The government was accountable for 168 days of post-trial processing time between sentence and initial action for a 340-page record of trial. *See* United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006) (recognizing

"a presumption of unreasonable delay . . . . where the action of the convening authority is not taken within 120 days of the completion of trial). An additional 41 days elapsed between initial action and this court's receiving the record of trial; **[*6]** this period of time is significant on its own, yet the government offers no explanation. *See id.* (applying "a similar presumption of unreasonable delay for [cases] . . . where the record of trial is not docketed by the service Court of Criminal Appeals within thirty days of the convening authority's action"). Appellant cited post-trial delay in his Rule for Courts-Martial [hereinafter R.C.M.] 1105 matters, raising an allegation of legal error. However, the Staff Judge Advocate (SJA) did not respond to appellant's allegation of legal error as required by R.C.M. 1106(d)(4). *See United States v. Arias, 72 M.J. 501, 504-505 (Army Ct. Crim. App. 2013)*.

The government argues that appellant has not established prejudice as a result of the length of the post-trial process, and we agree. *See Moreno, 63 M.J. at 138-41*. However, prejudice is not required for a service court of criminal appeals to grant relief for post-trial processing delay. *See United States v. Toohey, 63 M.J. 353, 362-63 (C.A.A.F. 2006)*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*. *Article 66(c), UCMJ*, requires this court to assess the appropriateness of appellant's sentence in light of presumptively unreasonable and unexplained delay in the posttrial processing of his case. *Toohey, 63 M.J. 362-63*; *Tardif, 57 M.J. at 224*. Considering the entire record, the lack of explanation from the government for a significant period of post-trial delay, and the SJA's lack of response to appellant's assertion **[*7]** of legal error, we find a 30-day reduction in the sentence to confinement is appropriate.

CONCLUSION

The finding of guilty of Specification 1 of Charge III is set aside and that specification is dismissed. The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the dismissed specification and in accordance with the principles of *United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013)* and *United States v. Sales, 22 M.J. 305, 308 (C.M.A. 1986)*, we are confident the panel would have adjudged the same sentence. There are no dramatic changes in the penalty landscape or exposure because the military judge instructed the panel that Specification 1 of Charge III should be "considered as one for sentencing purposes with the offenses listed in Specifications 1 and 2 of Charge I." *See Winckelmann, 73 M.J. at 15-16*. The nature of the remaining offenses captures the gravamen of the criminal conduct, and the admissible aggravation evidence remains unchanged. *See id. at 16*.

Reviewing the appropriateness of appellant's sentence in accordance with *Art. 66(c), UCMJ*, and in light of the unreasonable and unexplained post-trial delay and the SJA's lack of response to appellant's assertion of legal error, the court affirms only so much of the sentence as provides for a dismissal, confinement for 30 days, and forfeiture **[*8]** of all pay and allowances. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings and sentence set aside by this decision are ordered restored. *See UCMJ art. 75(a)*.

Senior Judge LIND and Judge KRAUSS concur.

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United States v. Lee

United States Navy-Marine Corps Court of Criminal Appeals

June 26, 2007, Decided

NMCCA 200600543

Reporter
2007 CCA LEXIS 233 *; 2007 WL 1890683

UNITED STATES v. Jonathan E. LEE, Captain (O-3), U.S. Marine Corps

Notice: AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Review granted by *United States v. Lee, 2007 CAAF LEXIS 1593 (C.A.A.F., Nov. 20, 2007)*

Prior History: [*1] Sentence adjudged 4 May 2005. Military Judge: S.F. Day. Staff Judge Advocate's Recommendation: LtCol M.A. Lawrence, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.

Core Terms

offenses, specifications, military, hot tub, indecent assault, new trial, assaulted, sentence, touching, burglary, bed, conduct unbecoming, hotel, conflicting interest, indecently, foot, hotel room, sexual, night, leg, newly discovered evidence, Pertaining, convinced, witnesses, weighing, grabbed, sitting, cases, beyond a reasonable doubt, fraternization

Counsel: EUGENE R. FIDELL, Civilian Appellate Defense Counsel.

BRENT C. HARVEY, Civilian Appellate Defense Counsel.

LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel.

LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel.

Judges: BEFORE W.L. RITTER, E.S. WHITE, B.G. FILBERT. Senior Judge RITTER and Judge WHITE concur.

Opinion by: W.L. RITTER

Opinion

FILBERT, Judge:

A military judge sitting as a general court-martial, convicted the appellant, contrary to his pleas, of three specifications of burglary, conduct unbecoming an officer, fraternization, and five specifications of indecent assault. The appellant was also convicted, pursuant to his pleas, of two specifications of fraternization. His offenses violated Articles 129, 133 and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 929*, *933*, and *934*. The convening authority approved the adjudged

sentence of confinement for three years, dismissal, and forfeiture of all pay and allowances.

The appellant **[*2]** raises five assignments or error, claiming: (1) the evidence was legally and factually insufficient to support his convictions on two of the three specifications of burglary, four of the five specifications of indecent assault, and that part of the conduct unbecoming an officer specification alleging burglary and indecent assault; (2) the military trial defense counsel's failure to disclose a conflict of interest resulted in an uninformed and invalid election of counsel; (3) the conduct unbecoming an officer charge is multiplicious with the offenses of burglary and indecent assault and should be dismissed; (4) the sentence is disproportionately severe; and (5) the lack of a fixed term of office for Navy and Marine Corps judges violates his due process and equal protection rights. The appellant also submitted a Petition for a New Trial on the basis of newly discovered evidence, which we deny for the reasons set forth below.

We have carefully examined the record of trial, the appellant's brief, reply brief and petition for a new trial, and the Government's answer. We find merit in the appellant's contention that the evidence was not factually sufficient to sustain his conviction for one **[*3]** of the specifications of indecent assault. We also conclude that dismissal of the conduct unbecoming an officer charge (Charge II) is warranted because it is multiplicious with the offenses of burglary and indecent assault. After taking corrective action in our decretal paragraph with respect to these two offenses and reassessing the sentence, we conclude that the remaining findings and the reassessed sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. *Arts. 59(a)* and *66(c)*, UCMJ. [1]

Legal and Factual Sufficiency

The appellant contends that the evidence is legally and factually insufficient to support his conviction on two of the three specifications of burglary, four of the five specifications of indecent assault, and that part of the conduct unbecoming an officer specification alleging burglary and indecent assault. We agree with the appellant's contention that the evidence is factually insufficient to sustain his conviction for indecently assaulting Sergeant (Sgt) J. We find that the evidence is legally and factually **[*4]** sufficient to convict the appellant of the remaining offenses.

Facts

Fifty to sixty Marines, including twenty to thirty officers, attended a Professional Military Education (PME) course given in Londonderry, Ireland over the weekend of 9-12 January 2004. The purpose of the trip was to commemorate and learn about the contributions of Marines who served in Northern Ireland during World War II. All of the Marines stayed in the Beech Hill Country House Hotel in Londonderry during the weekend.

On Friday evening 9 January 2004, the appellant went with a group of enlisted Marines to several bars in Londonderry. The appellant was the only officer in the group of Marines. When the appellant arrived back at the hotel at approximately 0200, he continued to drink at the hotel bar with other Marines. Eventually, five Marines, including the appellant, Corporal (Cpl) K, Sgt J, Lance Corporal (LCpl) Natalie Christofferson and Sgt Robert Dugan, went to sit in a hot tub in the hotel.

The hot tub was small, causing everyone to sit close to each other. Cpl K testified that while sitting in the hot tub he felt something touch his testicles and that he saw appellant's leg stretched across the hot tub and his **[*5]** foot touching Cpl K's testicles. He gave the appellant a stern look and shook his head to let the appellant know he was not comfortable with the situation. Cpl K testified that the appellant was looking at him while he was touching his testicles as if waiting for a reaction. After Cpl K looked at him and shook his head, the appellant retracted his leg.

After this incident and while still in the hot tub, the appellant grabbed Cpl K's legs and pulled Cpl K towards him on three different occasions. Each time, Cpl K pushed the appellant away. LCpl Christofferson and Sgt J both corroborated that the appellant grabbed the legs of Cpl K. Sgt J testified that Cpl K appeared uncomfortable with the actions of the appellant.

Sgt J testified that while sitting in the hot tub directly across from the appellant, he felt a hand touch his foot for a brief second, which caused him to quickly pull his foot away. He testified that he believed that it was the appellant who touched his foot because he was the only person sitting close to him. Sgt J could not tell if the touching was an accident or not. After a few moments, Sgt J placed his foot back where it had been. The

[1] The appellant's motion of 20 November 2006 for oral argument in this case is hereby denied.

appellant then touched Sgt J's foot **[*6]** with his hand. Sgt J pulled his foot back and then left the tub because he felt uncomfortable.

Cpl K testified that after everyone had exited the hot tub he confronted the appellant and told him "don't ever do it again or else I am going to kick your ass or kill you." Record at 239. Cpl K testified that he later returned to his room where he found the appellant lying on the ground in between the two beds looking up at him as though he was lying in wait. Cpl K testified he then grabbed the appellant by the arm and escorted him out of the room.

On the same night in the early morning hours, the appellant was in the hotel room shared by Sgt B, Staff Sergeant (SSgt) J.R. Forbes, Sgt David Anderson, and Sgt Christopher Rager. An Irish national, Bridgette Kelly, was also in the hotel room for part of the night. The evidence established that Sgt B was intoxicated at the time of the events in question. While in Sgt B's room, the appellant introduced conversations about pornographic materials and sexual situations. After spending some time in the hotel room, the appellant left. After Sgt B went to sleep, he was awakened by the appellant "playing with my penis, like, stroking my penis." Record **[*7]** at 167. Sgt B jumped out of his own bed to get away and into Sgt Anderson's bed. Sgt Anderson pushed him out of his bed and Sgt B fell between the beds. Sgt B then got up and told the appellant to stop. The appellant continued to touch his leg, hand and shoulder, and told Sgt B to "shoosh." Record at 168. Sgt B grabbed the appellant by the throat and pushed him back, and the appellant left the room. The hotel room was dark during the assault on Sgt B and the ensuing altercation between Sgt B and the appellant.

Sgt Rager stated that he heard some kind of scuffle between Sgt B and the appellant during the night. Sgt Forbes and Sgt Anderson corroborated that at some point Sgt B jumped into Sgt Anderson's bed. Sgt Anderson testified that, after Sgt B left the bed, Sgt Anderson heard Sgt B say something to the effect of "no" or "stop it." Record at 223. Sgt Anderson testified that he had no recollection of the appellant ever being in the hotel room. SSgt Forbes testified that because there was only one key to the room, a towel was used to prop the door open and that it stayed that way all night.

Cpl M and Cpl S were roommates at the hotel. On Sunday evening, 12 January 2004, Cpl M went to **[*8]** a club in Londonderry and returned to the hotel around midnight. He attempted to go to the hot tub but was met by the appellant, who told him the hot tub was not working. Cpl M went to the room of two enlisted Marines, where he talked with the Marines and three Irish women. He returned to his own room with one of women. Cpl M was on the bed with the woman with the lights out when he was startled to discover the appellant rubbing his chest and the lining of his boxers. Cpl M yelled and chased the appellant out of the room. The appellant does not challenge the factual sufficiency of the specifications emanating from this incident.

Cpl S testified that on Sunday night he returned to the hotel after a night of drinking in Londonderry. He went to the hotel bar, where he chatted with the appellant. After about an hour, Cpl S and the appellant went to the hot tub area. Cpl S went to his room first to put on some shorts. When he returned, he found the appellant at the hot tub area. At that point, Cpl S started to feel "kind of fuzzy and hazy" and he blacked out from drinking. Record at 274. When he came to, Cpl S was lying inside the sauna wearing only a towel, and the appellant was massaging **[*9]** his stomach. The appellant, who also wore only a towel, asked Cpl S to roll over. At that point, Cpl S left the sauna and went to the bathroom. After collecting his thoughts in the bathroom, he went back out to the main area of the gym to find his clothes. The appellant followed Cpl S back to his room.

After his encounter with the appellant, Cpl M told Sgt Michael Hjelmstad what the appellant had done to him. Sgt Hjelmstad advised Cpl M that he had just seen the appellant walking down the hall with Cpl S. Cpl M gave Sgt Hjelmstad the only key to the room he shared with Cpl S and told him to lock Cpl S in the room. Sgt Hjelmstad found Cpl S leaning against the door to his room and he appeared very intoxicated. Sgt Hjelmstad used the key he obtained from Cpl M to open the door. The appellant appeared next to him and said "I got it, I will help him in" and tried to enter the room. Record at 334. Sgt Hjelmstad argued with the appellant and said he would take care of it and the appellant left.

Law

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact finder could have found all the necessary elements of the offense **[*10]** beyond a reasonable doubt. *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*(citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979))*. The test for factual sufficiency is whether, after weighing all

the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. Turner, 25 M.J. at 325. Reasonable doubt does not, however, mean the evidence must be free of conflict. United States v. Reed, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1997), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A fact-finder may believe one part of a witness' testimony and disbelieve another. United States v. Lepresti, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

The elements of burglary, in violation of Article 129, UCMJ, are:

(1) That the accused unlawfully broke and entered the dwelling house of another;

(2) That both the breaking and entering were done in the nighttime; and

(3) That the breaking and entering were done with the intent to commit an offense punishable under Articles 118 through 128, except Article 123a.

MANUAL FOR COURTS MARTIAL, UNITED STATES (2005 ed.), Part IV, P 55.

The elements of indecent assault, **[*11]** in violation of Article 134, UCMJ, are:

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

(3) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, P 63.

Analysis

1. Offenses Pertaining to Cpl K and Sgt J

We find the evidence both clear and persuasive that the appellant committed indecent assaults when he purposely touched Cpl K's testicles with his leg and grabbed Cpl K by the legs in the hotel hot tub. The corroborating testimony of others in the hot tub and the action of Cpl K after the assaults took place fully support the conclusion that the appellant purposely committed these acts with respect to Cpl K and did so with the intent to gratify his sexual desires.

Further, we find Cpl K's testimony that he later found the appellant laying in wait in Cpl K's room to be highly credible. The appellant's earlier touching and grabbing of Cpl K in the hot tub is strong evidence that his intent in secretly **[*12]** entering the room of Cpl K was to again indecently assault him. United States v. Simpson, 56 M.J. 462, 464 (C.A.A.F. 2002).

After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, we ourselves are not convinced beyond a reasonable doubt that the appellant's brief touching of Sgt J's foot on two occasions constituted indecent assaults. These two incidents occurred in a crowded hot tub and each lasted for no more than a split second. The record does not provide sufficient facts to establish that the appellant intentionally touched Sgt J or that the appellant had the requisite intent to gratify his sexual desire. We therefore find the evidence legally and factually insufficient to support the finding of guilty to this specification.

As to the offenses of burglary, indecent assault, and conduct unbecoming an officer pertaining to Cpl K, we have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of these offenses. Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the **[*13]** trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt for these offenses.

2. Offenses Pertaining to Sgt B

The appellant's assertion that the evidence was factually insufficient to prove that he unlawfully entered the room of Sgt B and indecently assaulted him is unconvincing. The evidence was clear that the appellant was drinking in the hotel room of Sgt B and that he left the room while others, including Sgt B, remained in the room. Sgt B testified that he awoke to find the appellant stroking his penis and that he then jumped into the bed of Sgt Anderson.

While it is clear that Sgt B was intoxicated and could not recall certain events of the evening, the other Marines staying in the room corroborated important parts of his testimony. Sgt Rager overheard the scuffle between the appellant and Sgt B and heard Sgt B say to the appellant, "If you ever do that again, I will kick your ass."

Record at 196. Sgt Forbes and Sgt Anderson each testified that at some point Sgt B jumped into Sgt Anderson's bed. Additionally, Sgt Anderson testified that he heard Sgt B say "no" or "stop it" in the middle of the night. Record at 223. Moreover, the record does not suggest **[*14]** any motive to fabricate on the part of Sgt B.

As to the offenses of burglary, indecent assault, and conduct unbecoming an officer pertaining to Sgt B, we have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of these offenses. Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt for these offenses.

3. Offenses Pertaining to Cpl S

We find the evidence convincing that the appellant indecently assaulted Cpl S by massaging his stomach while he was wearing nothing but a towel. Based on the testimony of Cpl S alone, it was reasonable for the military judge to conclude that the appellant performed these acts for the purpose of gratifying his sexual desires. This conclusion is also supported by the fact that the appellant later attempted to gain access to the drunken Marine's room before being stopped by Sgt Hjelmstad. Moreover, the appellant's earlier conduct in laying in wait in the room of Cpl K and in indecently assaulting Sgt B and Cpl M demonstrates **[*15]** his intent to take sexual advantage of unsuspecting enlisted Marines such as Cpl S. *Simpson, 56 M.J. at 464*.

As to the offenses of indecent assault and conduct unbecoming an officer pertaining to Cpl S, we have considered the evidence presented at trial and find that a reasonable factfinder could have found the appellant guilty of these offenses. Furthermore, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt of the appellant's guilt for these offenses.

Conflict of Interest of Trial Defense Counsel

The appellant contends that his military trial defense counsel failed to disclose a conflict of interest in acting as a prosecutor in another case at the time of the appellant's trial. He urges us to set aside the findings and sentence on the basis that this situation resulted in an invalid election of counsel by the appellant. We disagree and decline to grant the requested relief.

Facts

The appellant contends that his military trial defense counsel, Capt Reh, failed to disclose that while the appellant's trial was in progress, he was also serving as assistant **[*16]** trial counsel in a prosecution for which the lead prosecutor was the trial counsel in the appellant's case, Maj Keane. The appellant claims that the two counsel worked together as prosecutors in an *Article 32*, UCMJ, proceeding the week before the appellant's trial. The appellant alleges that he did not learn of this situation until after his court-marital proceedings were completed. The appellant concedes that Capt Reh informed him in February 2005 that Capt Reh would be prosecuting minor offenses involving drugs and unauthorized absences as he transitioned off of active duty. The appellant also concedes that, based on this disclosure, he agreed that Capt Reh should continue to represent him. The appellant was also represented by civilian counsel throughout the proceedings.

Law

A military accused is guaranteed the right to effective assistance of counsel under the *Sixth Amendment* and *Article 27*, UCMJ. *United States v. Fluellen, 40 M.J. 96, 98 (C.M.A. 1994)*. This right includes the right to counsel free from conflicts of interest. *United States v. Carter, 40 M.J. 102, 105 (C.M.A. 1994)*. To demonstrate a *Sixth Amendment* violation, the appellant must establish (1) an actual conflict of **[*17]** interest, and (2) that this conflict adversely affected his lawyer's performance. *United States v. McClain, 50 M.J. 483, 488 (C.A.A.F. 1999)*.

Analysis

We find this assignment of error to be without merit. We find no actual conflict of interest in this case. The appellant acknowledges that Capt Reh advised that he would be prosecuting cases at the same time he was representing the appellant. Following this disclosure, the appellant decided that he wanted Capt Reh to continue to represent him, along with civilian counsel. The mere fact that Capt Reh ultimately worked as a trial counsel on a different case with the trial counsel on appellant's case does not by itself create an actual conflict of interest. Moreover, the appellant fails to identify any

connection between the fact that Capt Reh and Maj Keane worked together as prosecutors on a completely unrelated case and the representation he received at his court-martial. To the contrary, all evidence in the record indicates that the appellant received excellent representation from his civilian and military trial defense counsel throughout the court-martial process. Additionally, the appellant's civilian counsel was the lead counsel throughout **[*18]** the appellant's trial.

The appellant urges us to apply an "inherent prejudice" standard to his case. Certain cases involving concurrent representation of multiple clients have been treated as inherently prejudicial. *See* Cuyler v. Sullivan, 446 U.S. 335, 348-49, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). Also, in United States v. Cain, 59 M.J. 285, 295 (C.A.A.F. 2004), our superior court found that the situation in that case was inherently prejudicial because it involved "an attorney's abuse of a military office, a violation of the duty of loyalty, fraternization, and repeated commission of the same criminal offense for which the attorney's client was on trial," all of which was left unexplained as a result of defense counsel's suicide. *Cain* advised, however, that "most cases will require specifically tailored analyses in which the appellant must demonstrate both the deficiency and prejudice under the standards set by *Strickland*." 59 M.J. at 294. We find that the application of an inherent prejudice standard to this case is clearly not warranted under existing case law. United Statesv. Nicholson, 15 M.J. 436, 438 (C.M.A. 1983); United States v. Hubbard, 20 C.M.A. 482, 43 C.M.R. 322, 325 (C.M.A. 1971); *see* Cain, 59 M.J. at 294.

Conclusion

Because **[*19]** the appellant has failed to establish the existence of any actual conflict of interest and failed to show that the alleged conflict adversely affected his military trial defense counsel's performance, we find no merit in this assignment of error.

Multiplicity

The appellant contends, and the Government agrees, that the conduct unbecoming an officer charge (Charge II) is multiplicious with the burglary, fraternization and indecent assault offenses and should be dismissed. We agree and will take action in our decretal paragraph. *See* United States v. Palagar, 56 M.J. 294, 297 (C.A.A.F. 2002); United States v. Cherukuri, 53 M.J. 68, 73-74 (C.A.A.F. 2000).

Other Assignments of Error

We have also considered the appellant's contentions that: (1) the adjudged sentence of three years confinement, forfeiture of all pay and allowances and dismissal is disproportionately severe; and (2) his equal protection and due process rights have been violated because there are no fixed terms of office of military or appellate judges in the Navy and Marine Corps. We find no merit in either of these contentions.

The appellant would have us view his actions as a simple lapse in judgment fueled by alcohol and a party-like **[*20]** atmosphere. The evidence showed, however, that he sexually assaulted five different enlisted Marines over the course of a weekend. Also, the two fraternization specifications to which the appellant pled guilty related to conduct that occurred in the fall of 2003. He also claims that his sentence is disproportionate to similar cases decided by this court. However, the appellant fails to demonstrate that the two cases he cites are closely related to his case. His brief contains only a brief recitation of the charges in these cases, with no discussion of the facts affecting the sentences. We have carefully considered the entire record, including the evidence of the appellant's service, and find that that the sentence is appropriate for this offender and his offenses. United States v. Baier, 60 M.J. 382 (C.A.A.F. 2005); United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant contends that because there are no fixed terms of office of military or appellate judges in the Navy and Marine Corps, but there are fixed terms for military and appellate judges in the Army and Coast Guard, that his equal protection and due process rights have been violated and his conviction must **[*21]** be set aside. We disagree. This assignment of error has been previously raised and rejected by this Court and by our brethren on the Air Force Court of Criminal Appeals. *See* United States v, Gaines, 61 M.J. 689, 692 (N.M.Ct.Crim.App. 2005), *aff'd*, 64 M.J. 176 (C.A.A.F. 2006); United States v. Belkowitz, No. ACM 36358, 2006 CCA LEXIS 345, unpublished op. (A.F.Ct.Crim.App. 20 Dec. 2006); *see also* Weiss v. United States, 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994); *United States v. Graf 35 M.J. 450 (C.M.A. 1992)*. We therefore find no merit in it based on the authorities cited above.

Petition for New Trial

The appellant seeks a new trial, claiming that an affidavit from Bridgette Kelly, [2] executed after his trial was completed, constitutes newly discovered evidence. The affidavit from Ms. Kelly, which is referenced in but not attached to the petition, allegedly states that she does not remember the appellant returning to Sgt B's room and does not remember any incident or altercation while she was in Sgt B's room.

A new trial shall not be granted on the basis of newly discovered evidence unless the petition demonstrates that:

> (1) The evidence **[*22]** was discovered after the trial;
> (2) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (3) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a more favorable result for the accused.

RULE FOR COURTS-MARTIAL 1210(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Petitions for a new trial are "'generally disfavored.'" *United States v. Brooks, 49 M.J. 64, 68 (C.A.A.F. 1998)*(quoting *United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993))*. "They should be granted only if a manifest injustice would result absent a new trial ... based on proffered new evidence." *Id.* A reviewing court will judge the credibility and materiality of the new evidence, and in so doing will weigh the "testimony at trial against the post-trial evidence to determine which is credible." *United States v. Sztuka, 43 M.J. 261, 268 (C.A.A.F. 1995)*(citing *United States v. Bacon, 12 M.J. 489, 492 (C.M.A. 1982))*; *United States v. Brozaukis*, 46 C.M.R. 743, 751 (N.M.C.M.R. 1972).

In this case, the evidence at issue falls far short of satisfying the standards **[*23]** for a new trial based on newly discovered evidence. First, the affidavit of Ms. Kelly is not attached to the appellant's petition for a new trial. Thus, we have no factual basis to assess whether Ms. Kelly's statements actually constitute newly discovered evidence. Second, assuming that Ms. Kelly's affidavit actually exists and contains the statements described in the appellant's petition, such evidence clearly could have been discovered by the appellant at the time of trial in the exercise of due diligence. Ms. Kelly's existence as a witness was well known to the appellant and his counsel prior to trial. The fact that an Irish counsel hired after trial was able to obtain a statement from this known witness demonstrates that such evidence could have been discovered with due diligence prior to the appellant's trial. Finally, given circumstances in the dark hotel room at the time the appellant indecently assaulted Sgt B, it does not surprise us that Ms. Kelly was not aware of the incident between the appellant and Sgt B. Moreover, the testimony of Sgt B and the witnesses in the room who corroborate his version of events, leads us to find it improbable that this new evidence would produce **[*24]** a more favorable result for the appellant at a new trial.

We therefore deny the appellant's petition for a new trial.

Conclusion

We set aside the findings of guilty, and dismiss Charge II and the sole specification thereunder, and Specification 8 of Charge III. We affirm the remaining findings, as approved by the convening authority. We have reassessed the sentence in accordance with *United States v. Cook, 48 M.J. 434, 438 (C.A.A.F. 1998)*, *United States v. Peoples, 29 M.J. 426, 428 (C.M.A. 1990)*, and *United States v. Sales, 22 M.J. 305, 307-308 (C.M.A. 1986)*. In view of the remaining offenses, and taking into account the military judge's action in merging Charge II for sentencing, we are satisfied that the military judge would have adjudged no lesser punishment for the remaining charges and specifications. Accordingly, we affirm the sentence approved by the convening authority.

Senior Judge RITTER and Judge WHITE concur.

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[2] The petition for a new trial refers to Bridgette Kelly as "Brid Kelly."

Caution
As of: May 14, 2020 4:42 PM Z

United States v. Loniak

United States Army Court of Criminal Appeals

August 18, 2017, Decided

ARMY 20150835

Reporter

2017 CCA LEXIS 563 *

UNITED STATES, Appellee v. Captain JOHN W. LONIAK, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by, Without prejudice, Motion denied by, As moot United States v. Loniak, 2017 CAAF LEXIS 1207 (C.A.A.F., Oct. 11, 2017)

Review denied by United States v. Loniak, 2018 CAAF LEXIS 4 (C.A.A.F., Jan. 5, 2018)

Prior History: **[*1]** Headquarters, I Corps. Jeffrey D. Lippert, Military Judge (arraignment). Sean F. Mangan, Military Judge (trial). Colonel Randall J. Bagwell, Staff Judge Advocate.

Core Terms

specification, military, larceny, guilty plea, gift card, sentence, defense counsel, ineffective, appreciate, mental disease, severe, confinement, disorder, conduct unbecoming, court-martial, diagnosis, tangible, pleas

Counsel: For Appellant: Lieutenant Colonel Melissa R. Covolesky, JA; Captain Katherine L. DePaul, JA; Captain Michael A. Gold, JA (on brief); Lieutenant Colonel Christopher D. Carrier, JA; Captain Katherine L. DePaul, JA; Captain Michael A. Gold, JA (Motion to Stay the Proceedings and Motion for R.C.M. 706 Inquiry).

For Appellee: Colonel Tania M. Martin, JA; Lieutenant Colonel Eric K. Stafford, JA; Major Michael E. Korte, JA; Captain Christopher A. Clausen, JA (on brief).

Judges: Before MULLIGAN, LEVIN,[1] and WOLFE, Appellate Military Judges. Senior Judge MULLIGAN and Judge WOLFE concur.

Opinion by: LEVIN

Opinion

MEMORANDUM OPINION

LEVIN, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of attempted wrongful appropriation, three specifications of wrongful appropriation, six specifications of larceny, and one specification of conduct unbecoming an officer and a gentleman, in violation of Articles 80, 121, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 921, 933 (2012) [hereinafter UCMJ]. The military judge sentenced **[*2]** appellant to be dismissed from the service and to be

[1] Judge Levin took final action while on active duty.

confined for ten months. Although the plea agreement limited the term of confinement to six months, the convening authority granted clemency, approving the findings and only so much of the sentence as provided for a dismissal from the service and four months confinement.

Appellant's case is before this court for review under Article 66, UCMJ. Appellate defense counsel raises four errors, all of which merit discussion and one of which the government concedes merits relief. We provide relief in our decretal paragraph. The matters personally raised by appellant pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), are without merit.

BACKGROUND

Over a period of five months, appellant entered numerous Army and Air Force Exchange Service (AAFES) facilities, removed the posted price tags from high-priced items, and substituted tags reflecting lower prices. With respect to the larceny specifications, appellant wrongfully obtained several items of merchandise in a total amount exceeding $10,000.00. Among the items included in his scheme were seven Apple Mac mini computers, an Apple Airport Time Capsule, and a shredder. In the box containing the shredder, appellant hid ten secure digital **[*3]** memory cards. On one occasion, appellant attempted to purchase a camera and two more mini computers, but abandoned his scheme on that particular day when he was questioned by a suspicious cashier.

After making the various purchases, appellant returned several of the items for a full refund, which was provided to him in the form of store credit on AAFES gift cards. Appellant would thereafter purchase Visa gift cards with the AAFES gift cards that he could use in facilities not associated with AAFES. In an effort to avoid detection, appellant engaged in his long-term crime spree at different AAFES facilities on installations throughout California, Nevada, and Washington.

A. Whether a Subsequent Mental Health Diagnosis Renders the Pleas Improvident.

Prior to appellant's trial, he underwent a mental health evaluation pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 706. The so-called "sanity board" determined that appellant suffered from post-traumatic stress disorder, disordered social connectedness, and maladaptive gambling behaviors. Significantly, the board concluded that appellant did not suffer from a severe mental defect at the time of his crimes and he was able to appreciate fully the **[*4]** nature, quality, and wrongfulness of his conduct.

After the convening authority took action on his case, and after his release from confinement, appellant obtained treatment from two mental health professionals, one of whom diagnosed appellant with post-traumatic stress disorder and schizoaffective disorder, bipolar type. Neither of the two practitioners concluded that appellant was unable to appreciate fully the nature, quality, and wrongfulness of his conduct.[2]

Rather than raise the issue of a new trial in light of newly-discovered evidence, which is precluded under the procedural rules, appellant contends his pleas were improvident as a result of his subsequent mental health diagnosis. *See* R.C.M. 1210(a) ("A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea."). To that end, appellant submitted various materials for our review that were not presented to the military judge. There is nothing that permits this court to consider these materials in the context of an appeal of a guilty plea. Nevertheless, even considering these materials, for the reasons stated below, **[*5]** we disagree with appellant's contention.

A military judge's acceptance of a guilty plea is reviewed for an abuse of discretion. United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea will be rejected only where the record of trial shows a substantial basis in law or fact for questioning the plea. United States v. Hardeman, 59 M.J. 389, 391 (C.A.A.F. 2004); United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002); United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991). We review de novo the military judge's legal conclusion that appellant's pleas were provident. Inabinette, 66 M.J. at 322. A plea of guilty waives a number of important constitutional rights. United States v. Care, 18 C.M.A 535, 541-42, 40 C.M.R. 247 (1969). As a result, the waiver of these rights must be an informed one. United States v. Hansen, 59 M.J.

[2] Lack of mental responsibility can be a valid defense in only one situation, when: "at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts." R.C.M. 916(k)(1).

410, 412-13 (C.A.A.F. 2004).

During the providence inquiry, the military judge and appellant engaged in the following colloquy:

> MJ: I note that Appellate Exhibit I references a result of a 706 inquiry that was conducted in this case. In addition[,] I would just like to discuss with you and your counsel, briefly, the concept of mental responsibility just so it's clear on the record, okay, Captain?
> ACC: Yes, sir:
>
> MJ: Based on the information contained in the 706 request and the fact that there was a 706 request raises the discussion of whether or not the defense of lack of mental responsibility exists in this case. By that I mean whether there is a defense that you would be potentially able to raise against these crimes based **[*6]** on whether you were not mentally responsible due to a severe mental disease or defect.

The military judge then proceeded to explain the term "severe mental disease or defect" and asked appellant if he understood the term. Appellant indicated that he did, after which time the colloquy continued as follows:

> MJ: If at the time of the offense you are not suffering from a mental disease or defect, then there is no defense of mental responsibility. Do you understand that?
> ACC: Roger, sir.
> MJ: If at the time of the offense you were suffering from a mental disease or defect, then I must inquire whether as a result of that severe mental disease or defect you were unable to appreciate the nature and quality of the wrongfulness of your conduct. Do you understand that?
> ACC: Yes, sir.
> MJ: Have you discussed this with your attorney?
> ACC: Yes[,] I have, sir.
> MJ: Defense [c]ounsel, do you believe that there is a defense of mental responsibility at the time of the offense in this case?
>
> DC: Sir, I do not. I have been detailed to this case since 12 May of 2015. I have met with [appellant] numerous times over the course of my representation of him. Consulted with two different civilian attorneys and a number of other investigative **[*7]** sources in this case, sir, and I am confident based on the investigation that, while there may be mental health mitigation factors, those factors do not rise to the level of a defense.
>
> MJ: [Appellant], do you . . . understand what I've basically asked your counsel here. From his perspective,
> having discussed the topic with you, and to sort of document that, do you agree with your counsel? ACC: I do, sir.

At the conclusion of appellant's providence inquiry, and after appellant again indicated that he still wished to plead guilty, the military judge stated:

> I find that your plea of guilty is made voluntarily, and with full knowledge of its meaning and affect. I further find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial and to be confronted by the witnesses against you. Further, there is no defense applicable to the offenses based on your statements and the evidence presented. Accordingly, your plea of guilty is provident and I do accept it . . . .

In support of his position that his pleas were improvident, appellant relies on United States v. Harris, 61 M.J. 391, 398 (C.A.A.F. 2005) (setting aside an accused's guilty pleas due to the military judge's **[*8]** findings that the accused suffered from a severe mental disease or defect). There are at least two significant facts that easily distinguish this case from Harris. First, in *Harris*, the military judge failed to inquire whether the accused understood that he had the defense of lack of mental responsibility available to him. Second, in *Harris*, there was some evidence that the accused could not appreciate the nature and quality and wrongfulness of his conduct. That is simply not the case here.

In this case, the military judge raised the issue of a potential defense of mental responsibility and discussed that issue in some detail with appellant. Appellant, along with his counsel, acknowledged that they were aware of the potential defense and that it did not apply. Moreover, neither of the two mental health professionals retained by appellant indicated that he was unable to appreciate the wrongfulness of his conduct. Given that appellant went to some length to avoid detection during his crime spree, this is not surprising. At most, appellant now has some evidence post-trial that his diagnosis is different than his diagnosis before trial. This subsequent diagnosis, however, does not "undermine **[*9]** the adequacy of the plea." Inabinette, 66 M.J. at 323. *See also* United States v. Shaw, 64 M.J. 460, 462-64 (C.A.A.F. 2007). Unless the condition is severe enough to cause the appellant to not "appreciate the nature and quality or the wrongfulness of the acts[,]" it "does not

otherwise constitute a defense." UCMJ art. 50a(a). There is no evidence before us that appellant did not appreciate the nature and quality or the wrongfulness of his acts. Thus, we conclude that the military judge did not abuse his discretion and there is not a substantial basis in law or fact to question appellant's pleas of guilty.

B. Whether Theft of "Store Credit" Amounts to Larceny.

In his second assigned error, appellant argues that the specifications alleging larceny failed to state an offense because "store credit" is intangible and cannot be stolen. We review whether a specification states an offense de novo. United States v. Schloff, 74 M.J. 312, 313 (C.A.A.F. 2015). Failure to state an offense is a non-waivable ground for dismissal of a charge. R.C.M. 907(b)(1)(B).[3]

To determine if a specification states an offense, we employ a three-prong test in which the specification must: 1) allege the essential elements of the offense, either expressly or by necessary implication; 2) provide notice to the accused of the offense so he can defend against it; and **[*10]** 3) give sufficient facts to protect against double jeopardy. United States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994); United States v. Sell, 3 U.S.C.M.A. 202, 206, 11 C.M.R. 202, 206 (C.M.A. 1953). There is no question that the specifications for larceny alleged all of the essential elements of larceny. Each specification alleged a specific date range and location. Each specification alleged that appellant stole property with the intent permanently to deprive the owner of its use, that is, store credit, and that the credit was a thing of value.

During his providence inquiry below, appellant acknowledged that store credit was a thing of value as he could use it to purchase other items. On appeal, however, appellant contends that AAFES "store credit" cannot be stolen because it is "intangible" and therefore not capable of being possessed, citing to United States v. Mervine, 26 M.J. 482, 483 (C.M.A. 1988). In that case, our superior court held that extinguishing a debt through fraud did not constitute larceny because a debt is not the proper subject of a larceny charge. In reaching its decision, the court noted "[P]ossession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of" and a debt is "simply not the equivalent of money for purposes of Article 121[, UCMJ]." Id. at 483-84 (quotation marks and citation omitted). Appellant's fraudulent acquisition **[*11]** of store credit is not analogous to the fraud perpetrated in Mervine.

As stated by our sister court in *United States v. Perrine*:

> The offense of larceny requires the appellant to have wrongfully taken or obtained "money, personal property, or [an] article of value of any kind," from its owner with the requisite intent. Additionally, "[w]rongfully engaging in credit, debit, or electronic transaction to obtain goods . . . is usually a larceny of those goods from the merchant offering them."

ACM S31972, 2013 CCA LEXIS 234, at *10 (A.F. Ct. Crim. App. 18 Mar. 2013) (internal citations omitted).

In this case, appellant did "take possession" of "tangible property" that had "value." He walked away from the AAFES customer service counter carrying a gift card that had been credited with the value of the item he had just fraudulently returned to AAFES. In addition to its literal value as a piece of plastic, that card had a further tangible and actual value—the dollar amount contained on it. Appellant took that tangible value (which was equivalent to money) and converted it to the goods he received from AAFES by using those gift cards to buy additional items valued at over $500.00.

This court has also addressed whether a gift card has **[*12]** value and could be the subject of a larceny charge in the context of a guilty plea. In *United States v. Manriquez*, we rejected appellant's claim that a gift card had no tangible value other than the plastic itself. ARMY 20140893, 2016 CCA LEXIS 347, at *9 (Army Ct. Crim. App. 20 May 2016) (noting that "[a]n activated gift card, like a movie ticket, sports ticket, or lottery ticket, is an object with value").

In this case, appellant pled guilty and acknowledged during his providence inquiry that the gift cards had value in that he "could use [them] to buy other things[.]" Value is a question of fact, not law. *Manual for Courts-Martial, United States* (2012 ed.), pt. IV, ¶ 46.c.(1)(g)(i). As this was a guilty plea, appellant's admissions that the card had value is conclusive. Thus, appellant's conduct

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[3] We note that R.C.M. 907 changed after trial and no longer includes subsection (b)(1)(B). *Compare* R.C.M. 907(b)(1) (2012), *with* R.C.M. 907(b)(1) (2016). We assume, without deciding, that the 2012 version of the rule applies to this appeal. *See* United States v. Thomas, ARMY 20150205, 2016 CCA LEXIS 551, at *4-11 (Army Ct. Crim. App. 9 Sept. 2016) (mem. op.) (discussing changes to R.C.M. 907).

amounted to larceny, and the charge sheet properly stated an offense.

C. Whether Larceny and Conduct Unbecoming an Officer and Gentleman are Multiplicious.

Appellant alleges, and the government concedes, that one specification alleging larceny and one specification alleging conduct unbecoming an officer and gentleman are multiplicious. *See* United States v. Frelix-Vann, 55 M.J. 329 (C.A.A.F. 2001). We agree.

Claims of multiplicity are reviewed de novo. United States v. Anderson, 68 M.J. 378, 385 (C.A.A.F. 2010) (citing United States v. Roderick, 62 M.J. 425, 431 (C.A.A.F. 2006)). In *United States* **[*13]** *v. Campbell*, our superior court discussed the distinction between multiplicity, unreasonable multiplication of charges for findings, and unreasonable multiplication of charges for sentencing. 71 M.J. 19, 22 (C.A.A.F. 2012). The court clarified that "there is only one form of multiplicity, that which is aimed at the protection against double jeopardy as determined using the *Blockburger/Teters* analysis." Id. at 23 (referring to Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and United States v. Teters, 37 M.J. 370 (C.M.A. 1993)). *Blockburger* provides that when "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 a fact which the other does not." Blockburger, 284 U.S. at 304.

In this case, Specification 1 of Charge II charged appellant with the theft of an Apple Mac Mini on divers occasions, between 20 August 2014 and 8 September 2014. The Specification of Charge III charged appellant with conduct unbecoming an officer and a gentleman in that he obtained an Apple Mac Mini on divers occasions, between 20 August 2014 and 8 September 2014, through false pretenses. As the government acknowledges, the only difference in the specifications is the unbecoming nature of the conduct alleged in the **[*14]** Specification of Charge III. Thus, one of the specifications must be dismissed. *See* Frelix-Vann, 55 M.J. at 331 (explaining, under *Teters* analysis, "since only one offense (conduct unbecoming by committing larceny) has a different element than the other (larceny), these offenses were not separate").

Appellant acknowledges that it is the government's prerogative to decide which specification should be dismissed. United States v. Palagar, 56 M.J. 294, 296 (C.A.A.F. 2002). The government seeks to dismiss the Specification of Charge III and Charge III, which we do below.

D. Whether Failure to Call Certain Witnesses in the Presentencing Phase of the Court-Martial Amounts to Ineffective Assistance of Counsel.

Although appellant praised his defense team in his unsworn statement, asserting they had done a "champion's job," appellant now complains that his defense counsel were ineffective during the presentencing phase of the court-martial by failing to present testimonial evidence in extenuation and mitigation regarding the following: 1) appellant's mental health and medical conditions; and 2) his previous good duty performance. We disagree.

To prevail on a claim of ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, **[*15]** and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361-62 (C.A.A.F. 2010) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)) (additional citation omitted). "We review ineffective assistance of counsel claims de novo." Id. at 362.

When assessing *Strickland's* first prong, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" 466 U.S. at 689. To demonstrate prejudice, "'the [appellant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Green, 68 M.J. at 362 (quoting Strickland, 466 U.S. at 698). "If we conclude that any error would not have been prejudicial under the second prong of *Strickland*, we need not ascertain the validity of the allegations or grade the quality of counsel's performance under the first prong." United States v. Saintaude, 61 M.J. 175, 179-80 (C.A.A.F. 2005) (citing Strickland, 466 U.S. at 697).

During the presentencing phase of appellant's court-martial, defense counsel presented a three-page list of thirty-six prescribed medications that had been dispensed to appellant over the years. Appellant contends, however, that he received ineffective

assistance of counsel because his defense counsel failed to introduce the medical **[*16]** and mental health history that necessitated those prescriptions. Appellant further claims that his counsel were ineffective by failing to call witnesses who could testify about his accomplishments during his stints in the Navy, Marine Corps, and his enlisted time in the Army.

The record of this guilty plea compellingly demonstrates defense counsel were not ineffective at sentencing. In addition to presenting a memorandum of expected retirement benefits that showed a potential financial loss of $1.6 million to appellant and his family, counsel moved into evidence a comprehensive 27-page Good Soldier Book. This latter exhibit included Officer Evaluation Reports, Noncommissioned Officer Evaluation Reports, along with several training documents. Appellant's wife and a former neighbor also testified, both of whom described the appellant as a supportive parent. Rather than highlight appellant's medical issues and military service through witness testimony, counsel emphasized the financial harm to appellant should he be dismissed from the Army and the impact that harm would have on his family. Still, as discussed *supra*, they did not ignore the mental health issues. Earlier, the military judge **[*17]** had been presented with the findings of the R.C.M. 706 sanity board, which reflected that appellant suffered from post-traumatic stress disorder, disordered social connectedness, and maladaptive gambling behaviors. In his closing argument, defense counsel reminded the judge of the results of that board, urging him to also "consider the medical history, the numerous drugs that [appellant] has been prescribed throughout his time in the Army for a variety of things, . . . from things then related to health issues that have come up out of the Army, sir."

The record of trial convincingly demonstrates that defense counsel had sound and reasonable tactical reasons for the course of action they chose. *See* United States v. Perez, 64 M.J. 239, 243-44 (C.A.A.F. 2006). For instance, had defense counsel highlighted the mental health issues to any greater extent through witness testimony, government counsel would have likely emphasized the premeditation and care that went into appellant's crimes, such as: 1) their planning and subsequent execution which involved purchasing lower priced items, switching price tags, returning the items for a full refund, and obtaining gift cards; 2) the fact that this course of conduct continued for several months; 3) appellant's concealment **[*18]** of a number of digital memory cards in a box containing a shredder; 4) appellant's decision to leave the store prior to purchasing a camera and two computers when he was questioned by a suspicious employee; and 5) appellant's additional efforts to avoid detection by traveling to different installations in three different states. These deliberate actions, which would have likely been elicited through cross-examination of witnesses, might very well have shifted the focus from appellant's family and financial hardship to his calculating conduct.

We therefore find that appellant has failed to meet his burden of demonstrating that his counsel's conduct was deficient. Even if we were to assume a flawed strategy, appellant has not met his burden to show any prejudice in this case where, among other things, he was facing a dismissal and *nineteen years* of confinement and was sentenced only to a dismissal and *ten months* of incarceration. Furthermore, with the benefit of his counsel's efforts in securing a pretrial agreement and post-trial clemency, only the dismissal and four months of confinement were approved. Appellant has "not surmounted" the "very high hurdle" required to successfully claim **[*19]** ineffective assistance of counsel. United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997).

CONCLUSION

The findings of guilty of the Specification of Charge III and Charge III are set aside and dismissed. The remaining findings of guilty are AFFIRMED.

We are able to reassess the sentence on the basis of the error noted and do so after conducting a thorough analysis of the totality of circumstances presented by appellant's case and in accordance with the principles articulated by our superior court in United States v. Winckelmann, 73 M.J. 11, 15-16 (C.A.A.F. 2013), and United States v. Sales, 22 M.J. 305, 307-08 (C.M.A. 1986). We are confident that based on the entire record and appellant's course of conduct, the military judge would have imposed a sentence of at least that which was adjudged, and accordingly we AFFIRM the sentence.

We find this reassessed sentence is not only purged of any error but is also appropriate. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by our decision, are ordered restored.

Senior Judge MULLIGAN and Judge WOLFE concur.

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United States v. Mathis

United States Army Court of Criminal Appeals

April 13, 2016, Decided

ARMY 20140473

Reporter
2016 CCA LEXIS 229 *

UNITED STATES, Appellee v. Captain WALTER J. MATHIS, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion granted by United States v. Mathis, 2016 CAAF LEXIS 481 (C.A.A.F., June 13, 2016)

Review denied by United States v. Mathis, 2016 CAAF LEXIS 520 (C.A.A.F., June 27, 2016)

Prior History: **[*1]** Headquarters, Fort Stewart. John T. Rothwell, Military Judge (arraignment), Charles A. Kuhfahl, Jr., Military Judge (trial), Colonel Francisco A. Vila, Staff Judge Advocate (pretrial), Lieutenant Colonel Peter R. Hayden, Staff Judge Advocate (post-trial).

Core Terms

Specification, morphine, charges, wrongfully, sentence, conduct unbecoming, military, controlled substance, multiplication, distribute, weighs, finding of guilt, solicitation, Oxycodone, larceny, multiplicious, confinement, offenses, stealing, factors

Counsel: For Appellant: Lieutenant Colonel Charles D. Lozano, JA; Captain Heather L. Tregle, JA; Captain Joshua G. Grubaugh, JA (on brief).

For Appellee: Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Nathan S. Mammen, JA (on brief).

Judges: Before TOZZI, CAMPANELLA, and CELTNIEKS, Appellate Military Judges. Judge CAMPANELLA and Judge CELTNIEKS concur.

Opinion by: TOZZI

Opinion

MEMORANDUM OPINION

TOZZI, Senior Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of conspiracy to wrongfully possess a controlled substance, three specifications of wrongfully possessing a controlled substance, two specifications of larceny, two specifications of conduct unbecoming an officer, and two specifications of solicitation to distribute a controlled substance, in violation of Articles 81, 112a, 121, 133, and 134 Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, 921, 933, and 934 (2012) [hereinafter UCMJ]. The military **[*2]** judge sentenced appellant to a dismissal. The convening authority approved the sentence as adjudged.

We now review appellant's case under Article 66, UCMJ. Appellant raises two assignments of error, both

meriting discussion and relief. We find the matters personally raised by appellant pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), do not warrant relief. In one assignment of error, appellant alleges that the finding of guilty for conduct unbecoming an officer (Specification 1 of Charge IV) is multiplicious with the finding of guilty for solicitation to distribute oxycodone (Specification 1 of Charge V). Additionally, appellant alleges the findings of guilty for wrongful possession of morphine (Specification 13 of Charge II), larceny of morphine (Specification 1 of Charge III), and conduct unbecoming an officer (Specification 2 of Charge IV) are multiplicious. In a second assignment of error, appellant argues in the alternative, that the charges and specifications should be dismissed on the basis of unreasonable multiplication of charges. We find Specification 1 of Charge IV and Specification 1 of Charge V are multiplicious. We also find Specification 13 of Charge II and Specification 1 of Charge III constitute an unreasonable **[*3]** multiplication of charges. We provide relief in our decretal paragraph.

BACKGROUND

Appellant, a physician's assistant, was found guilty, *inter alia*, of the following violations of the UCMJ:

> CHARGE II: Article 112a, UCMJ
> SPECIFICATION 13: In that [appellant], U.S. Army, did, at or near Kandahar Airfield, Afghanistan, between on or about 6 December 2012 and on or about 24 June 2013, wrongfully possess some amount of Morphine, a Schedule II controlled substance.
>
> CHARGE III: Article 121, UCMJ
> SPECIFICATION 1: In that [appellant], U.S. Army, did, at or near Kandahar Airfield, Afghanistan, between on or about 6 December 2012 and on or about 24 June 2013, steal some amount of Morphine, military property, of a value of less than $500.00, the property of the U.S. Army.
>
> CHARGE IV: Article 133, UCMJ
> SPECIFICATION 1: In that [appellant], U.S. Army, did, at or near Kandahar Airfield, Afghanistan, on divers occasions between on or about 15 May 2013 and on or about 17 June 2013, wrongfully ask subordinates to wrongfully distribute Oxycodone, a Schedule II controlled substance, such conduct being unbecoming of an officer and a gentleman.
>
> SPECIFICATION 2: In that [appellant], U.S. Army, did, at or near Kandahar Airfield, Afghanistan, between on or about 6 December 2012 and on or **[*4]** about 24 June 2013, wrongfully steal Morphine intended for convoy missions and replace it with an unknown substance, such conduct being unbecoming an officer and a gentleman.
>
> CHARGE V: Article 134, UCMJ
> SPECIFICATION 1: In that [appellant], U.S. Army, did, at or near Kandahar Airfield, Afghanistan, on divers occasions, between on or about 15 May 2013 and on or about 17 June 2013, wrongfully solicit Specialist B.S., Specialist E.R., Specialist S.C., Specialist N.H., Specialist B.A., and Specialist H.F., to wrongfully distribute some amount of Oxycodone, a Schedule II controlled substance, by requesting that Specialist S., Specialist R., Specialist C., Specialist H., Specialist A., and Specialist F. give him some of their prescribed Oxycodone, and that said conduct was to the prejudice of good order and discipline in the armed forces.

Multiplicity

Regarding multiplicity, the conduct alleged in Specification 1 of Charge IV (conduct unbecoming an officer) is the same conduct alleged in Specification 1 of Charge V (solicitation to distribute oxycodone). When a specific offense alleges criminal conduct that is also charged as conduct unbecoming an officer under Article 133, UCMJ, the specific **[*5]** offense is multiplicious with the Article 133 offense. United States v. Palagar, 56 M.J 294 (C.A.A.F. 2002); United States v. Frelix-Vann, 55 M.J. 329 (C.A.A.F. 2001); United States v. Cherukuri, 53 M.J. 68 (C.A.A.F. 2000). In the past, our superior court has allowed the government to elect which conviction to retain. Palagar, 56 M.J. at 296-97; Frelix-Vann, 55 M.J. at 333, Cherukuri, 53 M.J. at 74. The government has requested this court to set aside and dismiss appellant's conviction of solicitation to wrongfully distribute oxycodone (Specification 1 of Charge V). We will do so in our decretal paragraph.

Unreasonable Multiplication of Charges

Appellant pleaded guilty to one specification of stealing morphine from carpujects located in his unit's medical safe, one specification of possessing the same morphine stolen from the carpujects, and one

specification of engaging in conduct unbecoming an officer by wrongfully stealing that same morphine intended for convoy missions and replacing it with an unknown substance.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial 307(c)(4). We consider five factors to determine whether charges have been unreasonably multiplied:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
>
> (2) Is each charge and specification aimed at distinctly separate criminal **[*6]** acts?;
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> (4) Does the number of charges and specifications [unreasonably] increase [the] appellant's punitive exposure?;
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 M.J. 334, 338-39 (C.A.A.F. 2001) (internal citation and quotation marks omitted) (internal alteration reflects the holding in *Quiroz* that "unreasonably" was the appropriate legal standard).

Here, the Quiroz factors on balance weigh in favor of appellant. First, defense counsel did object prior to trial to the unreasonable multiplication of charges, but then asked the military judge to delay ruling on the motion, and then never brought the motion up again. This factor weighs neither in favor of appellant nor the government. Regarding the second *Quiroz* factor, it appears the possession of morphine and larceny of morphine stemmed from the same act. This factor weighs in favor of appellant. Regarding the third factor, findings of guilty against appellant for these two specifications does exaggerate appellant's criminality. This factor weighs in favor of appellant. Regarding the fourth factor, appellant's **[*7]** punitive exposure is unreasonably increased for this conduct. The maximum punishment for both of the specifications combined is a dismissal, six years confinement, and total forfeitures. Possession of morphine carries a maximum of five years confinement; larceny of morphine, military property, under $500.00 in value, carries a maximum of one year confinement. The multiplication of these charges could result in an unreasonable increase in appellant's criminal exposure. This factor weighs in favor of appellant. Finally, there is no evidence of prosecution overreaching or abuse in the drafting of the charges, so the fifth factor weighs in favor of the government. On balance, we find the *Quiroz* factors weigh in favor of appellant.

Accordingly, Specification 13 of Charge II (possession of morphine) is dismissed.

We do not find the conduct unbecoming charge to be multiplicious or unreasonably multiplied with the larceny charge because appellant's conduct in stealing morphine from carpujects and replacing it with an unknown substance was a separate, subsequent act. The conduct unbecoming charge was aimed primarily at appellant's conduct that potentially put members of his unit at risk during **[*8]** subsequent operations where morphine may have been medically required.

Sentence Reassessment

This court has "broad discretion" when reassessing sentences. United States v. Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013). Our superior court has repeatedly held that if we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error." United States v. Sales, 22 M.J. 305, 308 (C.A.A.F. 1986). This analysis is based on a totality of the circumstances with the following as illustrative factors:

> (1) Dramatic changes in the penalty landscape and exposure.
> (2) Whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming.
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible **[*9]** and relevant to the remaining offenses.

> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

United States v. Winckelmann, 73 M.J. at 15-16 (internal citations omitted).

Applying these factors to this case, we are confident that reassessment is appropriate. First we look to the penalty landscape. The maximum punishment in this case drops from a dismissal, total forfeiture of pay and allowances, and thirty-eight years confinement, to a dismissal, total forfeiture of pay and allowances, and twenty-eight years confinement. Second, appellant was sentenced by a military judge. We are confident we can discern what punishment a military judge would adjudge in this case. Third, appellant remains convicted of one specification of conspiracy to wrongfully possess a controlled substance, two specifications of wrongfully possessing a controlled substance, two specifications of larceny, two specifications of conduct unbecoming an officer, and one specification of solicitation to distribute a controlled substance. Thus, neither the penalty landscape nor the admissible aggravation evidence **[*10]** has significantly changed. Lastly, we have familiarity and experience with the remaining offenses to reliably determine what sentence would have been imposed at trial.

CONCLUSION

After consideration of the entire record of trial, the findings of guilty of Specification 13 of Charge II and Specification 1 of Charge V are set aside and dismissed. The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Winckelmann, 73 M.J. at 15-16*, we AFFIRM the sentence. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his findings set aside by this decision, are ordered restored.

Judge CAMPANELLA and Judge CELTNIEKS concur.

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United States v. Servantez

United States Army Court of Criminal Appeals

November 7, 2013, Decided

ARMY 20120217

Reporter
2013 CCA LEXIS 948 *; 2013 WL 5968572

UNITED STATES, Appellee v. Chief Warrant Officer Two RICHARD SERVANTEZ, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Headquarters, Defense Language Institute Foreign Language Center. David L. Conn, Military Judge, Lieutenant Colonel William A. Schmittel, Staff Judge Advocate.

Core Terms

specification, violation of article, conduct unbecoming, sentence, finding of guilt, maltreatment, military, specific offense, multiplicious, assigned error, superior court, lesser-included, convicted, gentleman, omission

Counsel: For Appellant: Colonel Edye U. Moran, JA; Major Richard E. Gorini, JA; Captain James S. Trieschmann, Jr., JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Catherine L. Brantley, JA; Captain Michael J. Frank, JA (on brief).

Judges: Before YOB, LIND, and KRAUSS, Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of maltreatment, one specification of conduct unbecoming an officer, and one specification of fraternization in violation of Articles 93, 133, and 134, Uniform Code of Military Justice, *10 U.S.C. §§ 893*, *933*, and *934 (2006)* [hereinafter UCMJ]. The military judge sentenced appellant to a dismissal and a reprimand. The convening authority approved the adjudged sentence.

This case is before the court for review under *Article 66, UCMJ*. Appellant raises three assignments of error, only one of which merits discussion and relief. We have also considered those matters **[*2]** personally raised by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, and find they warrant neither discussion nor relief.

LAW & DISCUSSION

In his third assignment of error, appellant alleges that his convictions for maltreatment in violation of *Article 93, UCMJ* (the specification of Charge III) and for conduct unbecoming an officer in violation of *Article 133, UCMJ* (the specification of Charge IV) are multiplicious. The government concedes that the two specifications as charged are multiplicious. We agree and accept the government's concession.

Offenses are multiplicious if one is a lesser-included

offense of the other. United States v. Palagar, 56 M.J. 294, 296 (C.A.A.F. 2002). Article 133, UCMJ, specifically "includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman." *Manual for Courts—Martial, United States* (2008 ed.), pt. IV, ¶ 59.c(2). In such cases, the elements of proof for the Article 133, UCMJ, offense "are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer **[*3]** and gentleman." *MCM*, pt. IV, ¶ 59.c(2). Consequently, our superior court has repeatedly held that when a specific offense is also charged as a violation of Article 133, UCMJ, the specific offense is the lesser-included offense. Palagar, 56 M.J. at 296; United States v. Cherukuri, 53 M.J. 68, 73-74 (C.A.A.F. 2000); United States v. Frelix-Vann, 55 M.J. 329, 331 (C.A.A.F. 2001).

In view of the specifications before us, it is clear that the crime of maltreatment was alleged as the sole basis for the unbecoming an officer specification. Thus, the specification of Charge III (maltreatment in violation of Article 93, UCMJ) is a lesser included offense of the specification of Charge IV (conduct unbecoming an officer in violation of Article 133, UCMJ), and one charge must be set aside and dismissed. *See* United States. v. Deland, 22 M.J. 70, 75 (C.M.A. 1986) ("Congress never intended for findings of guilty of the same act or omission to be affirmed under both Article 133 and a specific punitive article, so one or the other must be set aside.").

In the past, our superior court has allowed the government to elect which conviction to retain. Palagar, 56 M.J. at 296-297; Cherukuri, 53 M.J. at 74; **[*4]** United States v. Frelix-Vann, 55 M.J. at 333. The government has requested this court to vacate appellant's conviction as to the greater offense of conduct unbecoming an officer (the specification of Charge IV). We will do so in the decretal paragraph.

CONCLUSION

The finding of guilty of Charge IV and its specification are set aside and dismissed. The military judge found the Specification of Charge III and the Specification of Charge IV to be an unreasonable multiplication of charges for sentencing. As such, reassessing the sentence on the basis of the error noted, the entire record of trial, and applying the principles of United States v. Sales, 22 M.J. 305 (C.M.A. 1986) and United States v. Moffeit, 63 M.J. 40 (C.A.A.F. 2006), no sentence relief is warranted. The remaining findings of guilty and the sentence are AFFIRMED. All rights, privileges, and property of which appellant has been deprived by virtue of the finding of guilty set aside by the decision are ordered restored.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on June 1st, 2020.

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