

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

| | | |
|----------------------------|---|-------------------------------|
| UNITED STATES |) | |
| |) | |
| v. |) | GOVERNMENT RESPONSE TO |
| |) | DEFENSE MOTION TO DISMISS FOR |
| JAMES M. ROWE |) | MULTIPLICITY AND UNREASONABLE |
| CAPTAIN |) | MULTIPLICATION OF CHARGES |
| UNITED STATES MARINE CORPS |) | |
| |) | 14 NOVEMBER 2011 |
| |) | |

1. **Nature of Motion.** The United States of America, by and through its trial counsel, moves this honorable Court to deny the Defense motion to dismiss for multiplicity and unreasonable multiplication of charges, or in the alternative, provide instructions to the members that the governments charged contingencies of proof are lesser included offenses of the principal crimes.

4. **Burden of Proof.** The defense bears the burden of proof and persuasion by a preponderance of the evidence.

2. **Statement of Facts.**

a. On 27 April 2011 the government preferred six charges comprising 14 specifications.

b. On 4 August 2011 the government preferred two Additional Charges comprising three specifications.

c. On 5 August 2011 the government withdrew and dismissed Additional Charge I and its sole specification.

d. At this point the accused was charged with seven charges comprising sixteen specifications. However, Charges II through VI were incorrectly numbered as Charges III through VII.

e. As the charge sheet stood at that time, the charges preferred against the accused were:

- i. Charge I: Article 120
 - a. Specification 1: Aggravated Sexual Assault
 - b. Specification 2: Abusive Sexual Contact
 - c. Specification 3: Abusive Sexual Contact
 - d. Specification 4: Indecent Act
 - e. Specification 5: Wrongful Sexual Contact
- ii. Charge II: Article 125 (Incorrectly Numbered as Charge III)
 - a. Specification 1: Forcible Sodomy
 - b. Specification 2: Forcible Sodomy
- iii. Charge III: Article 127 (Incorrectly Numbered as Charge IV)
 - a. Sole Specification: Extortion
- iv. Charge IV: Article 128 (Incorrectly Numbered as Charge V)
 - a. Sole Specification: Assault consummated by
Battery
- v. Charge V: Article 133 (Incorrectly Numbered as Charge VI)

a. Sole Specification: Conduct unbecoming on 28
august 2010

vi. Charge VI: Article 134 (Incorrectly Numbered as
Charge VII)

a. Specification 1: Adultery

b. Specification 2: Disorderly Conduct

c. Specification 3: Indecent Language

d. Specification 4: Soliciting Another to Commit
an Offense

vii. Additional Charge: Article 133

a. Specification 1: Conduct unbecoming between 1
January and 28 August 2010

b. Specification 2: Conduct unbecoming on 28
August 2010

f. As nearly as the government can tell, this charge sheet is
the one which the defense references in its motion.

g. The defense's motion appears to refer to the incorrect
numbering of the charges on several occasions (as the motion refers
to "Charge VII" on multiple occasions but there is no Charge VII).

h. thus, as far as the government can ascertain the defense
argument actually is as follows:

i. Multiplicious Charges

a. Charge I, Specification 2 as multiplicious
with Charge II

- b. Charge I, specification 5 as multiplicitious with Charge I, Specification 1
- c. Charge II, specification 1 as multiplicitious with Charge II, Specification 2
- d. Charge III as multiplicitious with Charge VI, Specification 3 and Additional Charge, specification 2
- e. Charge IV as multiplicitious with Charge I
- f. Charge V as multiplicitious with Charge VI, Specification 1

ii. Unreasonable Multiplication of Charges

- a. Charge I, Specification 4 as the umbrella charge for:
 - i. Charge I, Specifications 1, 2, 3, and 5
 - ii. Charge II
 - iii. Charge IV
 - iv. Charge VI, Specifications 1 and 4
 - v. Additional Charge, Specification 2
- b. Charge II, Specification 1 as the umbrella charge for Charge II, Specification 2
- c. Additional Specification 2 as the umbrella charge for Charge III

i. On 4 November 2011, the government withdrew and dismissed the following charges and specifications (which notice was provided to the court and the defense on 10 November 2011):

- i. Charge II: Sodomy
- ii. Charge VI: Article 134
 - a. Specification 2
 - b. Specification 4
- iii. The Language ", kiss First Lieutenant Klay" in the Additional Charge, Specification 1.

j. Therefore, the remaining defense contentions are as follows (The numbering of the charges and specifications before the 4 November withdrawal is retained for the purposes of clarity):

- i. Multiplicious Charges
 - a. Charge I, specification 5 as multiplicious with Charge I, Specification 1
 - b. Charge III as multiplicious with Charge VI, Specification 3 and Additional Charge, specification 2
 - c. Charge IV as multiplicious with Charge I
 - d. Charge V as multiplicious with Charge VI, Specification 1
- ii. Unreasonable Multiplication of Charges
 - a. Charge I, Specification 4 as the umbrella charge for:
 - i. Charge I, Specifications 1, 2, 3, and 5
 - ii. Charge IV
 - iii. Charge VI, Specification 1
 - iv. Additional Charge, Specification 2

b. Additional Specification 2 as the umbrella charge for Charge III

3. **Discussion.**

a. **Multiplicity.** A Constitutional violation under the Double Jeopardy Clause of the Constitution now occurs only if a court, *contrary to the intent of Congress*, imposes multiple convictions and punishments under different statutes for the same act or course of conduct. US v. Teeters 37 MJ 370, 373 (CMA 1993). The defendant asserts that the issue of multiplicity is raised because the defendant is charged with the following offenses which the defense contends are multiplicitious:

i. Aggravated Sexual Assault and wrongful sexual contact

ii. Extortion, Communicating Indecent Language, and Conduct

Unbecoming related to the language used on 28 August 2010.

iii. Assault Consummated by Battery and the Article 120 Offenses

iv. Conduct unbecoming and adultery for engaging in sexual contact/intercourse with then 1stLt Klay

According to R.C.M. 907 (b) (3) (B), "a specification may be dismissed if the specification is multiplicitious with another specification", but..."Ordinarily, a specification should not be dismissed before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification." Discussion, R.C.M. 907 (b). In United States v. Teeters, 37 MJ 370 (CMA 1993), the U.S. Court of Military Appeals set forth the three ways in which an accused may show that the

charges he faces are multiplicitous. First, the defendant may show that "Congress expressly provided in the articles or their legislative histories that multiple convictions are not authorized in this case." Id. 376 (1993). Defense counsel in this case has made no such assertion.

Second, an accused may apply the "Blockburger rule," from United States v. Blockburger, 284 U.S. 299 (1932), to show that conviction of multiple charges is precluded because each charge requires proof of facts and elements identical to the other. "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to each provision requires proof of a fact which the other does not." Id. at 304. In United States v. Jones, 68 M.J. 465 (CAAF 2010), CAAF held that the elements of each offense, not the specifications, are the touchstone for analyzing charges; in Jones, the Court held that offense X is a lesser included offense of offense Y only if all the elements of offense X are also elements of offense Y. Id., 470, citing United States v. Teeters, 37 MJ 370 (CMA 1993). Here, each charge requires proof of different elements, or different facts. Under Jones and Blockburger, the charges can be considered neither the same nor lesser included offenses of each other.

Each of the charges which the defense alleges requires proof of an element that the others do not. As illustrated here:

- i. Aggravated Sexual Assault and wrongful sexual contact

- a. Aggravated sexual assault requires penetration of the vagina by the penis, hand, finger, or any other object.
 - b. Wrongful sexual contact however, requires no penetration; but rather the touching of the breast, groin, genitalia, inner thigh or buttocks.
 - c. Additionally, the aggravated sexual assault specification requires some threat, whereas there is no such threat required for wrongful sexual contact.
- ii. Extortion, Communicating Indecent Language (Article 134), and Conduct Unbecoming related to the language used on 28 August 2010.
- a. Extortion requires the specific intent by the accused to acquire something of value.
 - b. Communicating Indecent Language requires that the accused's conduct be prejudicial to good order and discipline or of a nature to bring discredit on the armed forces.
 - c. The article 133 charge simply requires that the conduct be unbecoming an officer and a gentleman.
 - d. Members could find any of the three listed elements without finding the other two.
- iii. Assault Consummated by Battery and the Article 120 Offenses

- a. The article 120 offenses require that any touching be sexual in nature (either sexual act or sexual contact).
- b. The Assault consummated by battery requires that the touching be done with unlawful force or violence.
- c. The members could find either of the above facts without finding the other.

iv. Conduct unbecoming and adultery for engaging in sexual contact/intercourse with then 1stLt Klay.

- a. The Article 134 adultery requires that the accused's conduct be prejudicial to good order and discipline or of a nature to bring discredit on the armed forces.
- b. The article 133 charge simply requires that the conduct be unbecoming an officer and a gentlemen.
- c. The members could find either of the above facts without finding the other.

The final manner in which an accused may show that the charges he faces are multiplicitous is to establish an "indication of a contrary intent on Congress' part to overcome the *Blockburger* presumption that the offenses are separate for the purposes of findings." United States v. Teeters, 37 MJ 370, 378. In this case, Defense Counsel has made no such assertion.

b. Multiplication of Charges

The government has charged the accused with violations of Article 120, Article 127, Article 128, Article 133, and Article 134. The five specifications for the Article 120 charge require different elements. Likewise, each of the charged articles contains elements not found in the other charged articles.

In light of the strict elements tests enforced by the Court of Appeals for the Armed Forces in United States v. Jones, the government must plead multiple contingencies of proof to ensure that members are instructed on the primary offenses of which they can convict the accused and, alternatively, the lesser offenses that stem from the same misconduct. 68 M.J. 465 (CAAF 2010). In the Jones case, the accused was convicted of *indecent act* as a lesser included offense of *rape* and the Court held that *indecent act* was not a lesser included offense to *rape* because the elements of *indecent act* are not found in the elements of *rape*. *Id.* at 467. In this case, the elements the government must prove for each offense are different from one offense to another and do not pass the test for lesser included offenses in Jones.

Although the government is charging the forced sexual acts and the accused's conduct on the morning of August 28, 2010, several different ways, the government is bound by the strict elements test enumerated in Jones and must plead contingencies of proof when the elements of one offense are not contained within another. In this case, which, like Jones involves sexual misconduct, the government

has charged the accused various acts of misconduct in distinct ways. As discussed in the government's response to the defense's multiplicity motion, none of the charged offenses share elements and thus are required to be pleaded separately in light of Jones.

The government offers the twelve remaining specifications to the members as alternative forms of proof. If the members do not find the accused guilty of Charge aggravated sexual assault they can find him guilty of abusive sexual contact, wrongful sexual contact, assault consummated by a battery, or indecent act. If the members do not find the accused guilty of any non-consensual sexual offense, they can find him guilty of adultery or the conduct unbecoming charge. If the members do not find the accused guilty of extortion they can still find him guilty of communicating indecent language.

Finally, because the government acted in accordance with the requirements of Jones, the five prong analysis from United States v. Quiroz, 52 M.J. 510 (N.M. Ct. Crim. App. 2000); affirmed on reconsideration by United States v. Quiroz, 53 M.J. 600 (N.M. Ct. Crim. App. 2000); remanded in United States v. Quiroz, 55 M.J. 334; and modified on remand by United States v. Quiroz, 57 M.J. 583 (N.M. Ct. Crim. App. 2002):

- i. The first factor to be considered is whether the accused objected at trial to an unreasonable multiplication of charges. Obviously, the defense has made the objection at

the trial level, but this is not a factor to be weighed in making a determination by the trial judge.

ii. The second factor is whether each charge and specification is aimed at distinctly separate criminal acts. While the charges and specifications at issue in this case arose out of one encounter, the government has complied with the Jones test in charging all offenses which require proof of different elements. Therefore, the charges are aimed at distinct and separate offenses.

iii. The third factor is whether the number of charges misrepresents or exaggerates the accused's criminal conduct. Because the government has charged distinct offenses, several of which are based on contingencies of proof (charging in the alternative) there is no exaggeration or misrepresentation of the accused's conduct. Rather, the charges and specifications accurately represent those portions of the U.C.M.J. which the accused's conduct allegedly violated.

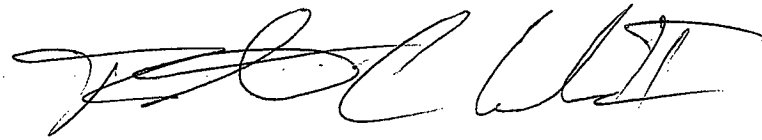
iv. The fourth factor is whether the number of charges and specifications unfairly increases the accused's punitive exposure. Here, because the government is charging in the alternative, the offenses would merge for sentencing purposes. Thus, for any offenses which do charge the same act, the accused could only be punished for the most serious of which he may be convicted.

v. Finally, the fifth factor is whether there is any evidence of prosecutorial abuse or overreaching. The defense has presented no evidence of such, and has made no such assertion.

Therefore, the five Quiroz factors weigh in favor of the government.

5. **Relief Requested.** The government respectfully requests that the Court deny the defense motion to dismiss for multiplicity and unreasonable multiplication of charges

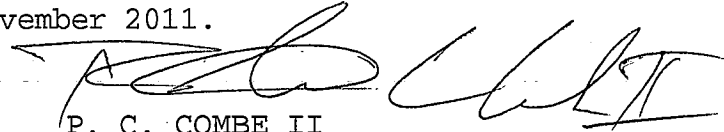
6. **Argument.** The government requests oral argument.



P. C. COMBE II
Captain, USMC
Chief Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on Defense Counsel and the Court on 16 November 2011.



P. C. COMBE II
Captain, USMC
Chief Trial Counsel