UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	DEFENSE MOTION FOR APPROPRIATE RELIEF
JOSHUA HAWK STAFF SERGEANT U.S. MARINE CORPS	)	(Motion to dismiss based on multiplicity and misuse of the assimilative crimes act)
	)	17 November 2009

Pursuant to RCM 907(b)(3)(B), the Accused now moves this Court to order the Government to dismiss certain charges and specifications on his charge sheet preferred 27 July 2009. The basis for this motion is that much of the charges and specifications are multiplicious either or both for the merits and on sentencing. Additionally, some of the charges and specifications under Charge V (Article 134) misuse the federal assimilative crimes act in that they charge the Accused with offenses that he is also charged with under the UCMJ already.

Facts

Per the referenced charge sheet, the Accused is charged with five charges consisting of 18 specifications.

1. Charge I, an Article 80 charge, charges the Accused with attempting to commit a 120 offense against a Ms. Ligon on 11 September 2008. The conduct described in Charge I is substantially the same as the conduct described in Charge IV, an Article 120 charge, that charges the Accused with committing a 120 offense against a Ms. Ligon on 11 September 2008.

2. Charge II, Specifications 1 and 2 (Article 92), charge the Accused with both an orders violation (under SECNAV M-5510.30B) for failing to report or disclose (on 11 Sept 08) that he had been arrested in connection with an incident that occurred on or about 27 February 2000, as well as a dereliction of duty offense for willfully not disclosing the same information regarding that 27 February 2000 arrest. Note, these charges discuss conduct of the Accused that is also charged under Charge II, Specification 5 (for an Article 92 offense on 7 Oct 08); Charge III, Specification 2 (an 11 Sept 08 Article 107 offense); Charge

III, Specification 4 (a 7 Oct 08 Article 107 offense); Charge V, Specification 2 (a 11 Sept 08 Article 134 offense); Charge V, Specification 6 (a 7 Oct 08 Article 134 offense).

3. Charge II, Specification 3 (an 11 Sept 08Article 92 offense), charges the Accused with willfully not disclosing that he had a stepfather named James Clayton as it was his duty to do so. This conduct is also charged against the Accused under Charge III, Specification 2 (an 11 Sept 08 Article 107 offense); and Charge V, Specification 4 (an 11 Sept 08 Article 134 offense).

4. Charge II, Specification 4 (an 11 Sept 08 Article 92 offense), charges the Accused with willfully not disclosing that he had visited foreign countries as it was his duty to do so. This conduct is also charged against the Accused in Charge III, Specification 3 (an 11 Sept 08 Article 107 offense) and Charge V, Specification 5 (an 11 Sept 08 Article 134 offense).

5. Charge II, Specification 5 (a 7 Oct 08 Article 92 offense), charges the Accused with willfully not disclosing facts related to the Accused's alleged arrests in 27 February 2000, 16 August 2003 and 20 May 2008 as it was his duty to do so. However, this conduct is charged in Charge II, Specifications 1 and 2 (an 11 Sept 08 Article 92 offense); Charge III, Specification 2 (an 11 Sept 08 Article 107 offense); Charge III, Specification 4 (a 7 Oct 08 Article 107 offense); Charge V, Specification 2 (an 11 Sept 08 Article 134 offense), and Charge V, Specification 6 (a 7 Oct 08 Article 134 offense).

6. Charge III, Specification 1 (a 15 Oct 08 Article 107 offense) and Charge III, Specification 5 (a 10 Oct 08 Article 107 offense) are also multiplicious with each other and concern the same transaction of the Accused. The dates for these charges are 10 October 08 and 15 October 08, respectively. However, the defense counsel suspects that 10 October 08 was a scriveners error as the interview with the Accused with NCIS SA Rendon actually occurred on 15 October 08.

7. Regarding all of the Charge V (Article 134) offenses, save the drunk and disorderly specifications at 1 and 3; it appears that the Government has charged the Accused under the Federal Assimilative Crimes Act for a violation of 18 US Code Section 1001. See MCM 2008 ed., p. IV-112. The conduct the Accused is charged with at Charge V for those specifications covers the same conduct the Accused is charged with at Charge II and Charge III (Articles 92 and 107, respectively).

LAW AND ANALYSIS

Pursuant to RCM 907(b)(3)(B), multiplicious specifications should be dismissed.

From the comments for RCM 907(b)(3)(B), "A specification is muliplicious with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways. For example, assault and disorderly conduct may be multiplicious if the disorderly conduct consists solely of the assault."

CAAF has stated "We agree with the observation of the Court of Criminal Appeals that, although the concept of unreasonable multiplication has been placed in the non-binding Discussion, 'we do not believe that the action of the President in placing this long-standing principle in a discussion section of the Manual for Courts-Martial had the effect of repealing it, thereby enabling imaginative prosecutors to multiply charges without limit.'" United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001).

"(B)ased upon the evidence of record, we are satisfied that the assault alleged in Charge II and its specification was the force used to accomplish the attempted robbery in Charge I. Under that circumstance, the assault is a lesser-included offense of the attempted robbery. Para. 47(d), Part IV, Manual, supra. It is, therefore, multiplicious for findings as a matter of long-standing law." United States v. McMillian, 33 M.J. 257, 259 (C.M.A. 1991).

"A motion to dismiss is appropriate if two offenses are multiplicious and there is no necessity to charge both offenses to enable the Government to meet the exigencies of proof." United States v. Kelson, 3 M.J. 139, 140 (C.M.A. 1977), footnotes. See also United States v. Forney, 12 MJ 987 (AFCMR 1982), discussing the discretion of Courts to decline to dismiss where a genuine issue of proof exists.

There is authority that dismissal before findings may be appropriate where exigencies of proof are lacking in an inordinate number of specifications. See United States v. Hughes, 1 MJ 346 (CMA 1976). From Hughes:

"To far too great a degree, however, multiplicious charging appears to be used solely as a vehicle to encourage stiffer sentences. We unequivocally condemn this approach to the administration of criminal justice as does paragraph 26b of the Manual for Courts-Martial, United States States, 1969 (Rev.). It is, or should foreign to our judicial process to attempt to mold a jury's or judge's findings and sentence by resort to multiple

charging of offenses which arise out of the same transaction. See ABA Standards, Joinder and Severance § 2.2 (1968). Even though there may be instances, such as the present case, in which unnecessary multiple charging returns a premium for the prosecutor, many such "victories" undoubtedly will be short-lived because of the very real risk of appellate attack which ultimately may deprive the Government and hence society of an "appropriate sentence." **Most judges as well as juries of the caliber found in the military justice system are perceptive enough to see through shotgun charge sheets and to adjudge what, to them, is an appropriate sentence nevertheless. Yet, an appellate court faced with a substantial disparity between the maximum penalty utilized during a jury's deliberations and the legally appropriate maximum punishment is duty bound to take further ameliorative steps to "cure" the error even though such action may merely retrace the jury's unrecorded deliberations.** Due consideration of this Court's approach to multiplicity questions should alleviate the need to formulate specific rules for the myriad of multiplicity combinations. Stated more succinctly, **sound legal judgment coupled with a measure of common sense often will eliminate the needless and costly judicial process of factually resolving matters of such questionable legal worth.**" United States v. Hughes, 1 M.J. 346, 348 (C.M.A. 1976), footnotes, emphasis added.

"Ordinarily, a specification should not be dismissed for multiplicity before trial **unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification.**" United States v. Cherukuri, 53 M.J. 68, 73 (C.A.A.F. 2000), emphasis added.

Accordingly, Charge I and Charge IV obviously refer to the same course of alleged sexual assault conduct by the Accused on the same date. Therefore, one of those charges should be dismissed because it is on its face multiplicious.

The same argument holds true for the numerous charges by the Government as to the Accused's alleged "failing to report", "willfully failed to disclose" or "failure to disclose" conduct that forms the basis the of the charges the Accused faces under Charge II (Article 92), Charge III (Article 107) and Charge V (Article 134). These charges are on their face multiplicious and per Cherukuri the same offenses are alleged in these different charges. The Accused should not suffer through trial with the possibility of being found guilty of multiple crimes that are essentially a single course of conduct. The sheer number of charges may confuse the members into wrongly believing that the Accused has committed many crimes where in fact he may have only committed a few.

Regarding the Charge V specifications (excluding the drunk and disorderly specifications at 1 and 2), the Government is charging

the Accused through the Federal Assimilative Crimes Act for basically not disclosing certain information while filing out a background check question form (11 Sept 08) and during a subsequent interview (7 Oct 08). However, the MCM specifically states "If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article." See Paragraph 60(c), MCM 2008 edition.

"The Act's basic purpose makes it similarly clear that assimilation may not rewrite distinctions among the forms of criminal behavior that Congress intended to create. Hence, ordinarily, there will be no gap for the Act to fill where a set of federal enactments taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amount to different ways of committing the same basic crime." United States v. Robbins, 52 M.J. 159, 162 (C.A.A.F. 1999).

In this case the offenses alleged are those same ones previously discussed regarding the Accused's alleged failure to disclose incidents that occurred in the Accused's past (e.g. 27 Feb 00, 16 Aug 03, 20 May 08, visits to Mexico, the Accused's relationship with James Clayton, etc.)

Accordingly, specifications 2, 4, 5 and 6 should be dismissed because the Government has already charged the Accused for those same crimes at Charge II (Article 92) and Charge III (Article 107). The Article 134 Assimilative Crimes Act is not appropriate in this case. It is preempted by UCMJ offenses that the Accused is already charged with.

EVIDENCE AND BURDEN OF PROOF

a. The defense will submit these documents in support of its motion:

Exhibit A: Charge Sheet

a. The defense asks the Government to produce these witnesses at the motion hearing:

Not applicable.

c. Burden of proof:

As to the motion to dismiss, the burden of proof in proving all facts in support of this motion falls upon the moving party, the defense. The burden standard is a preponderance of the evidence to prove the validity of all facts. See R.C.M. 905.

RELIEF REQUESTED

Oral argument is requested. The defense requests that this Court order as such:

That Charge I, Charge III and Charge IV (Specifications 2, 4, 5 and 6 only) be dismissed with prejudice because they are unreasonably multiplicious on their face with Charge II and its specifications.

Date: 17 Nov 09

/s/

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C. P. HUR
Captain, USMC
Detailed Defense Counsel

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Court Ruling

The motion is granted. The Court rules that:

That Charge I, Charge III and Charge IV (Specifications 2, 4, 5 and 6 only) be dismissed with prejudice because they are unreasonably multiplicious on their face with Charge II and its specifications.

Date:

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MILITARY JUDGE