NAVY AND MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	DEFENSE MOTION TO DISMISS (Multiplicity and Unreasonable Multiplication of Charges)
JAMES M. ROWE CAPTAIN UNITED STATES MARINE CORPS	)	10 November 2011

1. Nature of Motion. The defense moves the military judge to dismiss the following charges as multiplicious:

- Charge I Specification 2 as multiplicious with Charge II
- Charge I Specification 5 as multiplicious with Charge I Specification 1
- Charge II Specification 1 as multiplicious with Charge II Specification 2
- Charge IV as multiplicious with Charge VII Specification 3 and Additional Charge Specification 2
- Charge V as multiplicious with Charge I
- Charge VI as multiplicious with Charge VII Specification 1

In the alternative, the defense requests that the military judge find the following charges as an unreasonable multiplication of charges and join them for sentencing, if necessary:

- Charge I Specification 4 as the umbrella offense for:
    - Charge I Specifications 1, 2, 3, and 5
    - Charge III
    - Charge V
    - Charge VI

    - Charge VII Specifications 1 and 4
    - Additional Charge Specification 2
- Charge III Specification 1 as the umbrella for Charge III Specification 2
- Additional Charge Spec 2 as the umbrella offense for Charge IV

The defense has the burden of proof by a preponderance of the evidence. RULES FOR COURT-MARTIAL (hereinafter R.C.M.) 905(c) and R.C.M. 907(b)(3)(B).

2. Summary of Facts. The accused is charged with seven charges and 16 specifications with only one specification alleged to occur on a date other than 28 August 2010. Every other charge and specification – 15 in total – revolves around an alleged brief encounter between Captain James Rowe and then-First Lieutenant Ariana Klay on the morning of 28 August 2010. There were no breaks in time or course of conduct.

3. Discussion. "Multiplicity and unreasonable multiplication of charges are two distinct concepts." Roderick, 62 M.J. at 432 (citing United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001)).

a. MULTIPLICITY

Two convictions, one for a crime incidental to the other, cannot stand. Ball v. United States, 470 U.S. 856, 864-65 (1985). The only remedy in such a case is vacation of one of the underlying charges. *Id. at 864.*

A specification may be multiplicious with another if they describe "substantially the same misconduct in two different ways" or is "necessarily included" within the other offense. R.C.M. 907(b)(3)(B). Furthermore, absent exigencies of proof problems, "what is substantially one

transaction should not be made the basis for an unreasonable multiplication of charges against one person. R.C.M. 307(c)(4), discussion. "Multiplicity, a constitutional violation under the Double Jeopardy Clause, occurs 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.'" United States v. Paxton, 64 M.J. 484, 490 (C.A.A.F. 2007) (citing United States v. Teters, 37 M.J. 370, 373 (C.M.A. 1993)). The primary question that must be addressed when determining if charges are multiplicious is whether the charges address "the 'same act or course of conduct' or whether they [address] distinct and discrete acts, allowing separate convictions." Paxton, 64 M.J. at 490 (citing Teters, 37 M.J. at 373; United States v. Neblock, 45 M.J. 191, 197 (C.A.A.F. 1996)). In the instant case, the listed charges and specifications revolve around the same course of conduct.

However, if the military judge finds the charges and specifications are not multiplicious, then United States v. Quiroz states that the charges and specifications may still constitute an unreasonable multiplication of charges. United States v. Quiroz, 53 M.J. 600 (N.M. Ct. Crim. App. 2000) (*Quiroz II*).

b. UNREASONABLE MULTIPLICATION OF CHARGES

When determining if charges have been unreasonably multiplied, military appellate courts have consistently held that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." United States v. Pauling, 60 M.J. 91, 95 (C.A.A.F. 2004) (quoting R.C.M. 307(c)(4) discussion). "Even if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges allows courts-martial and reviewing

authorities to address prosecutorial overreaching by imposing a standard of reasonableness." Paxton, 64 M.J. at 490 (citing Roderick, 62 M.J. at 433). Furthermore, the discussion of R.C.M. 1003(c)(1)(C) states:

> The basis of the concept of multiplicity in sentencing is that an accused may not be punished twice for what is, in effect, one offense. Offenses arising out of the same act or transaction may be multiplicious for sentencing depending on the evidence. *No single test or formula has been developed which will resolve the question of multiplicity*. . . . *Even if* each offense requires proof of an element not required to prove the other, they may not be separately punishable if the offenses were committed as the result of a *single impulse or intent*. . . . Also, if there was a *unity of time and the existence of a connected chain of events*, the offenses may not be separately punishable, depending on all the circumstances, even if each required proof of a different element.

R.C.M. 1003(c)(1)(C)(discussion)(emphasis added).

The unreasonable multiplication of charges concept was analyzed in detail in United States v. Quiroz, 52 M.J. 510 (N.M. Ct. Crim. App. 1999) (*Quiroz I*); *affirmed on reconsideration* by United States v. Quiroz, 53 M.J. 600 (N.M. Ct. Crim. App. 2000) (*Quiroz II*); *remanded* in United States v. Quiroz, 55 M.J. 334 (*Quiroz III*); *and modified on remand* in United States v. Quiroz, 57 M.J. 583 (N.M. Ct. Crim. app. 2002)(*Quiroz IV*). Throughout the extensive appellate history of the Quiroz case, the courts have vigorously reaffirmed a 5-part test in determining whether the government unreasonably multiplied charges. The court will consider:

(1) Whether the accused objected at trial to an unreasonable multiplication of charges or specifications;
(2) Whether each charge and specification is aimed at distinctly separate criminal acts;
(3) Whether the number of charges and specifications misrepresent or exaggerate the accused's criminality;
(4) Whether the number of charges and specifications unfairly increase the accused's punitive exposure; and,
(5) Whether any evidence of prosecutorial overreaching or abuse is demonstrated in the drafting of the charges.

The court went on to state that "if we find the 'piling on' of charges so extreme or unreasonable as to necessitate invocation of our Article 66(c), UCMJ authority, we will determine the appropriate remedy on a case by case basis." Id. at 605. To underscore the importance of prosecutorial restraint in charging, unreasonable multiplication of charges can be of sufficient gravity in a contested case to warrant dismissal of all charges. Quiroz II at 605 (quoting United States v. Sturdivant, 13 M.J. 323, 329-330 (C.M.A. 1982)).

"While multiplicity is a constitutional doctrine, the prohibition against unreasonable multiplication of charges is designed to address prosecutorial overreaching." Roderick, 62 M.J. at 432 (citing Quiroz III, 55 M.J. at 337). In Quiroz III, the Court of Appeals for the Armed Forces explained its rationale by stating:

> "Even if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard -- reasonableness -- to address the consequences of an abuse of prosecutorial discretion... ."

Quiroz III, 55 M.J. at 338. Dismissal of unreasonably multiplied charges is an appropriate remedy available to the trial court. See Roderick, 62 M.J. at 432; see also United States v. Balcarczyk, 52 M.J. 809, 813 (N.M.C.C.A. 2000).

In the instant case, if requested charges and specifications are not dismissed on the grounds of multiplicity, they should be dismissed on the grounds that it constitutes prosecutorial overreaching and an unreasonable multiplication of the charges. In addressing the factors relied upon to determine if charges are unreasonably multiplied, the test laid out by the Court of Appeals of the Armed Forces is satisfied.

Review of the Quiroz framework makes clear the unreasonable multiplication of the listed charges and specifications. Each of these acts is alleged to have occurred on the same morning during the same transaction, during a 30-45 minute timeframe.

The conduct is factually indistinguishable and hence, a Quiroz analysis is appropriate. The government's conduct satisfies the Quiroz elements in the following manner:

(1) The defense objection to this unreasonable multiplication is timely--before conclusion of trial.

(2) Each charge and specification is not aimed at distinctly separate criminal acts. The same course of conduct is being charged in 15 different ways.

(3) This unreasonable multiplication will exaggerate and misrepresent the accused's criminality. "The vice of multiplicity is that it may lead to multiple sentences for the same offense, and that 'the prolix pleading may have some psychological effect upon a jury by suggesting to it that the defendant has committed not one but several crimes." Teters, 37 M.J. at 373 (quoting Wright, I Federal Practice and Procedure: Criminal 2d section 142 at 469, 1982). In this instance, there is potential to over-exaggerate the accused's criminality because the multiple charges indicate multiple events. The alleged act of sexual contact is being charged as 15 separate events because the conduct supposedly occurred in the presence of another person. Hence, a fact-finder may confuse the fact that the one event of sexual contact can be exaggerated into several different crimes, thus increasing the potential to convict to punish.

(4) The unreasonable multiplication unfairly increases the accused's exposure to punishment. Every charge and specification, absent one, charge various acts that allegedly took place during the same 30-45 minute event. The charges and their specifications add up to over

58 years of potential incarceration, without counting the three specifications that carry a potentially life-long sentence.

Charge/Specification	Confinement
Charge I, Spec 1	30
Spec 2	7
Spec 3	7
Spec 4	5
Spec 5	1
Charge III, Spec 1	Life
Spec 2	Life
Charge IV, Sole Spec	3
Charge V, Sole Spec	6 months
Charge VI, Sole Spec	1
Charge VII, Spec 1	1
Spec 2	6 months
Spec 3	6 months
Spec 4	Life
Additional Charge, Spec 1	1
Spec 2	1

Simply put, the accused's potential for greater punishment is made possible by the numerous charges revolving around the same alleged conduct.

(5) The defense does not assert prosecutorial abuse; however, overreaching and over-imaginative drafting is self-evident. The Quiroz court's admonition to avoid "piling on" charges is clearly ignored.

4. Summary. C.A.A.F., in the Quiroz cases, makes clear that the five-step framework for addressing unreasonable multiplication is not an all-inclusive test. Quiroz II at 608. The detriment to an accused from unreasonable multiplication does not need over-explanation.

Upon findings, it is reasonable to assume that members may believe that they can ease any indecisive feelings on a verdict by finding guilt for some charges and acquittal for others. With this in mind, a prosecutor might try to provide members with an array of charges to better

the chance that something is believed by the members – the 'throwing a bowl of spaghetti against a wall' approach. In addition, the members may be presented with a choice of charges ranging from severe to less severe in hopes that at least, the members find guilt for the less severe charges. The members may feel they are "giving an accused a break" in consideration of such a long list of charges. Understandably, prosecutorial discretion and exigencies of proof are tools of the government; however, the guidance of the Quiroz cases makes it clear that this unreasonable multiplication goes beyond such tools.

5. Relief Requested. Dismiss Charge I Specification 5 as multiplicious with Charge I Specification 1; Charge I Specification 2 as multiplicious with Charge II; Charge II Specification 1 as multiplicious with Charge II Specification 2; Charge IV as multiplicious with Charge VII Specification 3 and Additional Charge Specification 2; Charge V as multiplicious with Charge I; Charge VI as multiplicious with Charge VII Specification 1. In the alternative, the defense requests that the military judge join the following charges and specifications: Charge I Specification 4 as the umbrella offense for Charge I Specification 1, 2, 3, and 5, Charge III, Charge V, Charge VI, Charge VII Specifications 1 and 4, and Additional Charge Specification 2; join Charge III Specification 1 as the umbrella for Charge III Specification 2; and join Additional Charge Spec 2 as the umbrella offense for Charge IV.

6. Argument. Oral argument is requested.

/s/
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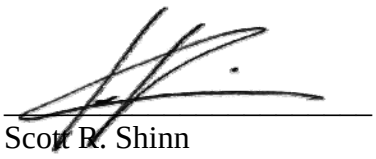
Certificate of Service

I hereby attest that a copy of the foregoing motion was electronically served on the Court and opposing counsel on 10 November 2011.



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