

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**Richard K. CORDLE  
Lieutenant (O-3), U. S. Navy**

NMCCA 200600570

Decided 17 April 2007

Sentence adjudged 09 May 2005. Military Judge: C.L. Reismeier. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest San Diego, CA.

Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel  
LT JUSTIN DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of five specifications of attempted indecent language, failure to obey a lawful general regulation, and conduct unbecoming an officer, in violation of Articles 80, 92, and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 992, and 933. The appellant was sentenced to confinement for 48 months, forfeiture of all pay and allowances, and a dismissal. The convening authority approved the sentence as adjudged.<sup>1</sup>

On appeal, the appellant raises three assignments of error. First, that the military judge erred by failing to dismiss Specifications 1 through 4 of Charge I as an unreasonable multiplication of charges with Specification 5 of Charge I. Second, that the military judge erred by failing to dismiss the

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<sup>1</sup> Prior to taking his action and pursuant to the appellant's request, the convening authority deferred forfeitures until the date of his action for the benefit of the appellant's wife.

sole specification of the Additional Charge as an unreasonable multiplication of charges with the five specifications of Charge I. Finally, the appellant avers that his sentence was inappropriately severe.

We have examined the record of trial, the three assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

### **Unreasonable Multiplication of Charges**

The appellant's first assignment of error (AOE) contends that Specifications 1 through 4 of Charge I (attempt to communicate indecent language: to a child under the age of 16 [two specifications], to an individual and a child under the age of 16 [one specification], and to an individual [one specification]) is an unreasonable multiplication of charges with Specification 5 of Charge I (attempt to communicate indecent language to an individual and a child under the age of 16). Appellant's Brief of 19 Sep 2006 at 3-6. The appellant's second assignment of error contends that the sole specification of the Additional Charge (violation of Joint Ethics Regulations, Department of Defense [DoD] Directive 5500.7R by using Government computer to receive and send unauthorized personal e-mail) is an unreasonable multiplication of charges with the five specifications of Charge I. *Id.* at 6-7. We disagree with the appellant as to both of these assignments of error.

#### **A. The Quiroz factors**

Unreasonable multiplication of charges is a separate and distinct concept from multiplicity. *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). While multiplicity is based on the constitutional and statutory prohibitions against double jeopardy, the doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id.*

We apply five non-exclusive factors in evaluating a claim of unreasonable multiplication of charges:

- (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 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*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition); *accord Quiroz*, 55 M.J. at 339 ("this approach is well within the discretion of [this court] to determine how it will exercise its Article 66(c) powers"). "These factors must be balanced, with no single factor necessarily governing the result." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Furthermore, in deciding issues of unreasonable multiplication of charges, we also consider RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Discussion, which provides the following guidance: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Applying these factors to the appellant's case, we find that there has not been an unreasonable multiplication of charges.

## **B. Applying the Quiroz factors**

### **1. Objection at trial**

We note that with regard to both claims of unreasonable multiplication of charges that the appellant did not object at trial. Appellant's Brief at 5-6. Although this significantly weakens his argument on appeal, that single factor is not dispositive of the issue.

### **2. Distinctly separate criminal acts**

#### **a. Comparing the specifications under AOE I**

The first four specifications cited under Charge I as compared to Specification 5 of Charge I are separate and distinct criminal acts. See *United States v. Flynn*, 28 M.J. 218,

221 (C.M.A. 1989). Each violation under Charge I concerns a separate indecent e-mail sent by the appellant, at a different time and, in four instances, on different dates. Prosecution Exhibits 4-4E. When compared with the Government's exhibits, the specifications clearly demonstrate that Specification 1 is based on the 27 February 2004 e-mail (PE 4); Specification 2 on the 8 March 2004 e-mail (PE 4B); Specification 3 on the 11:57 am 19 March 2004 e-mail (PE 4D); Specification 4 on the 12:55 pm 19 March 2004 e-mail (PE 4E); and Specification 5 on the 17 March 2004 e-mail (PE 4C).<sup>2</sup> The indecent language charged in each specification is based only on its corresponding e-mail and is not found in any other specification or e-mail. More specifically for our analysis, none of the cited language in Specification 5 was included in any one of the e-mails charged in Specifications 1 through 4. Contrary to the appellant's contention, these e-mails and the specifications derived from them do not represent "a single, staccato conversation." Appellant's Brief at 5. Each of these specifications stands on its own.

#### **b. Comparing the Specifications under AOE II**

The specifications of Charge I are also separate and distinct criminal acts from the sole specification of the Additional Charge; the former concerned the attempt to communicate indecent language whereas the latter concerned only the unauthorized use of a Government computer. *Flynn*, 28 M.J. at 221. Moreover, the specifications under Charge I, as compared to the sole specification under the Additional Charge, involve different victims and address distinctly separate crimes.

Under the specifications of Charge I, the appellant's conduct violated Article 80, UCMJ.<sup>3</sup> His conduct under the sole specification of the Additional Charge violated DoD Directive 5500.7R, specifically enacted to protect the integrity of the Government computer system. Although under the facts of this case there is evidence that up to four of the offenses under Charge I were completed by using a Government computer, the victims in the first charge were the individuals communicated

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<sup>2</sup> It is unclear why the Government drafted Specification 5 as "on or about March 2004" when, just like the other e-mails, the exact date was readily available in the e-mail heading. Regardless, it is clear that Specification 5 is based on PE 4C.

<sup>3</sup> Which were attempts to violate Article 134, UCMJ.

with<sup>4</sup> and the victim in the Additional Charge was the Government. The appellant's misconduct for each was a distinctly separate criminal act. The appellant could have sent - and in fact based on the evidence on one occasion did send - at least some of his indecent e-mails using a computer other than a Government computer. Each of these offenses stands on its own.

**3. Misrepresentation or exaggeration of criminality; unreasonable increase of punitive exposure; and prosecutorial overreaching or abuse**

The five separate specifications under Charge I and the sole specification under the Additional Charge do not misrepresent or exaggerate the appellant's criminality and they do not unreasonably increase the appellant's punitive exposure. Each was a discrete act, separately punishable. *United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996). Finally, as the appellant recognizes, there is no evidence of prosecutorial overreaching or abuse in the drafting of the specifications or charges at issue. Appellant's Brief at 6-7. Consequently, we do not find that the cited specifications or charges constitute an unreasonable multiplication of charges.

**Sentence Appropriateness**

The appellant's third assignment of error contends that the four years of confinement and the dismissal he received as part of his sentence were inappropriately severe in light of the offenses, his good military character, and the lack of "real" victims to the indecent language he attempted to communicate. We disagree.

The appellant, a married, 29-year-old, United States Naval Academy graduate, and Lieutenant (O-3) with close to 13 years in the Navy (as an enlisted Sailor, midshipman, and officer), was convicted of sending five separate e-mails containing indecent and sexually explicit language to persons he believed to be a 10-year-old girl and/or her father regarding the same 10-year-old girl. He was also convicted of using a Government computer to send some of those e-mails, and posting and maintaining an indecent Internet profile containing a photograph showing his

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<sup>4</sup> It is immaterial that the 10-year-old girl and her father were fictional characters portrayed by a police officer from the Internet Crimes Against Children (ICAC) Task Force.

genitals<sup>5</sup> and soliciting an extra-martial affair. The fact that the appellant attempted to communicate sexually explicit language to a police officer whom *he believed* to be a 10-year-old girl instead of an actual 10-year-old girl is not persuasive.<sup>6</sup> Appellant's Brief at 8. Similarly unpersuasive is the appellant's unsupported argument that there was "little likelihood that anyone would be 'harmed' by viewing [the appellant's] profile" because only "someone looking for adult content" would be able to access it. *Id.*

The maximum punishment authorized for the offenses in which the appellant was found guilty was confinement for 11 years,<sup>7</sup> forfeiture of all pay and allowances, and a dismissal. We find the approved sentence is appropriate for this offender and these offenses. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). This assignment of error is without merit.

### Conclusion

Accordingly, the approved findings and sentence are affirmed.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>5</sup> PE 7 is a black and white print out of a Yahoo.com member profile with one photograph showing the appellant's genitals. PE 7 was attached to the record unsealed and because of its pornographic nature we order PE 7 sealed.

<sup>6</sup> PE 6 is a color print out of a Yahoo.com member profile of a fictitious girl but contains 19 photographs identified as those of a real 10-year-old girl and one sexually explicit photograph of a girl identified as a child between the ages of 8-11 years old from a known child porn collection. PE 6 was attached to the record unsealed and because of the pornographic nature of these photographs we order PE 6 sealed.

<sup>7</sup> In determining the maximum punishment authorized under Charge II (conduct unbecoming), Article 133, UCMJ, the military judge, with counsel's consent, determined the most analogous offense was indecent exposure under Article 134, UCMJ, which carries a possible punishment of confinement up to 6 months. Record at 285.