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

BEFORE

C.L. SCOVEL **J.F. FELTHAM** **J.D. HARTY**

UNITED STATES

v.

Steven G. CARLSON
Gunnery Sergeant (E-7), U. S. Marine Corps

NMCCA 200100209 Decided 14 February 2006

Sentence adjudged 20 May 1999. Military Judge: Maj C. R. Zelnis. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot/Eastern, Recruiting Region, Parris Island, SC.

FRANK J. SPINNER, Civilian Defense Counsel
LT ELYSIA NG, JAGC, USNR, Appellate Defense Counsel
LCDR JASON GROVER, JAGC, USN, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel

HARTY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of seven specifications of violating a lawful general regulation, violating a lawful order, two specifications of cruelty to subordinates, two specifications of making a false official statement, two specifications of forcible sodomy, six specifications of indecent assault, two specifications of false swearing, indecent exposure, three specifications of indecent language, two specifications of soliciting another to commit an offense, and breaking restriction in violation of Articles 92, 93, 107, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 907, 925, and 934. The members sentenced the appellant to confinement for 15 years, total forfeiture of pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

We have carefully considered the record of trial, the appellant's 10 assignments of error,[1] the Government's Answer and the appellant's Reply Brief to the Government's Answer.[2] We find merit in the appellant's sixth and ninth assignments of error and will take corrective action in our decretal paragraph. Otherwise, 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.

Background

The appellant was stationed at the Marine Corps Detachment, Fort McClellan, Alabama, where he instructed Marines attending military police military occupational specialty training. While in that position, the appellant transported students in his private vehicle, provided them alcohol, consumed alcohol with them, and socialized with them, in violation of Navy Regulations, an installation general order, and a Marine Detachment order. The appellant used these social interactions to determine if a student would be receptive to homosexual activity with him. This

[1] I. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN HE ALLOWED THE PROSECUTION TO PROJECT LARGE COMPUTERIZED IMAGES OF MEN ENGAGING IN HIGHLY INFLAMMATORY HOMOSEXUAL ACTS AS A DEMONSTRATIVE AID IN THE PRESENCE OF COURT MEMBERS.
II. THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR WHEN HE ADMITTED INTO EVIDENCE UNDER MIL.R.EVID. 403 AND 404(b), PORNOGRAPHIC IMAGES FROM APPELLANT'S COMPUTER IN ADDITION TO IMAGES AND TITLES FROM WEB SITES THAT WERE NOT SHOWN TO HAVE BEEN OBSERVED BY APPELLANT.
III. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE APPOINTMENT OF AN INVESTIGATOR TO ASSIST DEFENSE COUNSEL IN PREPARING A DEFENSE.
IV. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE ACCESS TO THE PERSONNEL FILES MAINTAINED ON THE CID INVESTIGATORS ASSIGNED TO APPELLANT'S CASE.
V. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED A CHALLENGE FOR CAUSE AGAINST THE COURT PRESIDENT, WHO RESIDED NEXT DOOR TO THE TRAIL COUNSEL IN THE FAMILY HOUSING AREA.
VI. THE MILITARY JUDGE ERRED IN FAILING TO DISMISS CERTAIN SPECIFICATIONS AS MULTIPLICIOUS OR AN UNREASONABLE MULTIPLICATION OF CHARGES AND SPECIFICATIONS.
VII. THE MILITARY JUDGE ERRED WHEN HE FAILED TO SUA SPONTE DISMISS CHARGE I, SPECIFICATIONS 4, 5, 6 AND 7 FOR FAILURE TO ALLEGE THE OFFENSE WITH SUFFICIENT SPECIFICITY.
VIII. THE MILITARY JUDGE ERRED WHEN HE FAILED TO DISMISS CHARGE V, SPECIFICATION 1 FOR FAILURE TO ALLEGE AN OFFENSE.
IX. THE STAFF JUDGE ADVOCATE'S RECOMMENDATION AND THE GENERAL COURT-MARTIAL PROMULGATING ORDER INCORRECTLY REFLECT THE FINDINGS OF THE COURT-MARTIAL WITH REGARD TO CHARGE V, SPECIFICATION 9.
X. THE FINDINGS OF GUILTY CANNOT BE AFFIRMED WHERE THE EVIDENCE IS NOT FACTUALLY AND LEGALLY SUFFICIENT TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

[2] We have also considered the appellant's motion for oral argument. The appellant's motion is hereby denied.

determination was made by plying students with alcohol and then discussing topics such as masturbation, penis size, oral sex, and "playing truth or dare." During truth or dare, the appellant would ask students if they had ever thought of having sodomy with a man or kissing a man, or he would dare them to expose themselves in public or to get naked in private. These interactions came to light when a student reported that the appellant had sodomized him.

Admission of Evidence

For his first two assignments of error, the appellant avers that the military judge abused his discretion by allowing the Government to project computer images of male homosexual conduct from a website address that was found on the appellant's computer. The appellant argues that the images displayed had no relationship to any images stored on the appellant's computer and, therefore, were substantially more prejudicial than probative. Appellant's Brief of 29 Oct 2003 at 8. In addition, the appellant asserts the military judge abused his discretion by admitting into evidence images and website addresses found on the appellant's computer hard drive because there was no showing the appellant was the person who accessed the material. *Id*. at 11.

A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)(citing *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000)). "We will not overturn a military judge's evidentiary decision unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)(quoting United *States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)).

The Government requested to have its computer expert demonstrate how the internet creates a history file of website addresses accessed from, and images downloaded to, the accessing computer. The stated purpose of this in-court demonstration was to show that website addresses and images found on the appellant's home computer were the result of the appellant's intentional acts rather than the result of the internet throwing the appellant to an unsolicited website and then automatically throwing the appellant from image to image. The website used for the in-court demonstration was a website found on the appellant's computer history index, although the three images to be displayed in court were not. The images displayed dealt with male-on-male anal intercourse. The appellant objected on relevance and MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), grounds. Specifically, the appellant's position was that the images to be shown were not found on his computer and the images selected for demonstration purposes were substantially more prejudicial than probative. Record at 1154.

Citing MIL. R. EVID. 404(b) and 403, the appellant also objected to the introduction of a list of websites accessed from his home computer, images found on that computer, and color copies of the opening web page for the website addresses, claiming there was no nexus between the offered evidence and the charges. Record at 371-72.

The military judge conducted a lengthy discussion of Prosecution Exhibits 11, 12, and 13 for identification, and pertinent case law. He determined that the acts of accessing the websites and possessing the images were specific acts of conduct under MIL. R. EVID. 404(b) and relevant to the issue of intent as required for the charged indecent assaults. After conducting a MIL. R. EVID. 403 balancing test, the military judge ruled that the exhibits must be redacted before they would pass the required balancing test, and the exhibits were returned to the Government for compliance. Record at 371-99. The Government's first attempt at redacting the exhibits failed, and the military judge directed further specific redactions and limitations based on cumulativeness. *Id*. at 823-54. Upon further redaction, Prosecution Exhibit 11[3] was admitted prior to the Government's computer expert conducting the in-court internet demonstration. *Id*. at 1238. Prosecution Exhibit 13 for identification was redacted and admitted as Prosecution Exhibit 35.[4] *Id*. at 1361. Was this evidence relevant, and if relevant, was it substantially more prejudicial than probative?

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MIL. R. EVID. 401. The appellant was charged with, among other things, multiple indecent assaults of a homosexual nature. Indecent assault requires that the act be done with the "intent to gratify the lust or sexual desires of the accused." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 63b(2). Whether the appellant intentionally accessed a male homosexual website and intentionally accessed multiple images of male homosexual conduct on that website is circumstantial evidence of the appellant's intent at the time of the charged indecent assaults.

While the evidence sought to be admitted is relevant as to the appellant's specific intent required for indecent assault, it may still be excluded if its probative value is substantially outweighed by its prejudicial impact. MIL. R. EVID. 403.

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[3] Prosecution Exhibit 11 consisted, in part, of website names and thumbnail photos of men in sexually provocative poses recovered from the appellant's home computer.

[4] Prosecution Exhibit 35 consisted of color web pages corresponding to website addresses found on the appellant's home computer. These "pages" contained photographs of male homosexuality, situations and products.

The military judge carefully weighed the probative value of the in-court demonstration, the website history, and the photographs found on the appellant's computer. He correctly determined that the limited in-court demonstration was probative and not substantially outweighed by possible prejudice. He also correctly found that the images and websites dealing with male homosexuality were probative and took corrective action to severely limit the scope and content of the prosecution exhibits prior to admission to insure their probative value was not substantially outweighed by their prejudicial impact.

To further limit any prejudicial impact from the in-court demonstration, admission of photos, and admission of websites, the military judge twice instructed the members before the computer expert testified that any evidence found on the appellant's computer of a male homosexual nature could only be used to prove or disprove the specific intent element of the charged indecent assaults and for no other purpose. Record at 407, 1246. The members were again given the limiting instruction prior to the admission of Prosecution Exhibit 35 containing the opening page of websites visited from the appellant's home computer (*id*. at 1365), and again prior to findings. *Id*. at 1647. In light of the charges and the evidence presented, the judge's decision to allow the in-court demonstration and to admit Prosecution Exhibits 11 and 35 was neither erroneous nor unreasonable, nor influenced by an erroneous view of the law.

Even if we were to determine that the brief display of three computer images or the introduction of website addresses and stored images was improper, which we do not, we cannot say, based on the record before us, that the appellant is entitled to relief. Considering the nature of the images displayed in comparison with the charges and the evidence presented, and given the limiting instructions as to their proper purpose provided by the military judge, we are persuaded that the evidence objected to did not "materially prejudice[] the substantial rights of the accused." Art. 59(a), UCMJ. This issue is without merit.

Defense-Requested Investigator

For his third assignment of error, the appellant avers that the military judge abused his discretion by denying the appellant's request for an investigator to assist the defense team in interviewing witnesses. Appellant's Brief at 13. We disagree.

We review a military judge's decision to deny a defense request for expert assistance for an abuse of discretion. *United States v. Washington*, 46 M.J. 477, 480 (C.A.A.F. 1997). When an accused requests investigative assistance, he must demonstrate the necessity for those services. *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986). This demonstration must show that there exists a reasonable probability that the requested investigative assistance would be of benefit to the defense and

that the denial of the requested investigative assistance would result in a fundamentally unfair trial. *United States v. Kelly*, 39 M.J. 235, 237 (C.M.A. 1994). In determining whether government-funded investigative assistance is necessary, we apply a three-part test: (1) why the assistance is needed; (2) what the assistance would accomplish for the accused; and (3) why the defense counsel is unable to gather and present the evidence that the investigator would be able to develop. *See United States v. Short*, 50 M.J. 370, 372-73 (C.A.A.F. 1999); *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R. 1990)(*en banc*).

Here, the appellant requested a military investigator be provided to assist his four attorneys in interviewing witnesses. Record at 80; Appellate Exhibit XXI. Government investigators had interviewed approximately 350 potential witnesses. Most of those were screening interviews that resulted in no information of value. Many of the witnesses who had information were identified prior to the Article 32, UCMJ, investigation. During the almost five months between counsel being detailed to the appellant's case and litigating the request for investigative assistance, the defense team had not been systematically contacting the identified witnesses. The appellant was not able to articulate what the investigator could accomplish that the defense team could not. Record at 80-86. After reviewing the appellant's request and the military judge's findings on this issue, we find no abuse of discretion.

Access to Witness Personnel Files

For his fourth assignment of error, the appellant avers that the military judge erred by denying access to official personnel files of the Army Criminal Investigation Division (CID) agents involved in the case. Appellant's Brief at 15. We disagree.

At trial, the civilian defense counsel requested that the defense be allowed to inspect and copy personnel files of those CID agents involved in the appellant's investigation. When asked for a proffer, civilian defense counsel stated that there may be evidence of an agent having been previously punished or counseled for overreaching during an investigation, although he was not aware of any such action and had not discussed it with any CID witness. The military judge denied the request because there was no showing of any possibility that relevant information was located in the personnel files. Record at 58-59.

An appellate court reviews a military judge's decision on a request for discovery for abuse of discretion. *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999). A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law. RULE FOR COURTS-MARTIAL 703(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) states that "[e]ach party is entitled to the production of evidence which is relevant and necessary." R.C.M. 701(g)(2) provides for the regulation of

discovery by the military judge, which includes that the "military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate."

In *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004), the trial defense counsel learned during an interview of the lead investigator that the investigator had previously been disciplined but not why. Trial defense counsel subsequently filed a motion to compel discovery of the disciplinary action against the investigator, and the military judge conducted an *in camera* inspection of the investigator's personnel file. Although the file contained evidence that the investigator had falsely denied an accusation of misconduct, the military judge ruled the investigator's personnel file did not contain evidence of impeachment value. On appeal, our superior court determined that the military judge erred as a matter of law when he denied the defense motion to compel discovery, because "[t]he defense had a right to this information because it was relevant to [the investigator's] credibility and was therefore material to the preparation of the defense for purposes of the Government's obligation to disclose under R.C.M. 701(a)(2)(A)." *Roberts*, 59 M.J. at 326.

Unlike in *Roberts*, the appellant's civilian defense counsel had not interviewed the CID agents concerning whether they had ever been counseled or received punishment. He had no information from any source that indicated any CID agent had been counseled or received punishment for any matter. Under these circumstances, we do not believe the military judge abused his discretion in denying the discovery request. Nor do we believe he was obligated to *sua sponte* perform an *in camera* inspection of every CID agent's personnel file, or that the Government had any obligation to sift through those private records for possible discoverable information. We find that the military judge did not abuse his discretion by denying the appellant access to CID agents' personnel files based on the proffer provided by the civilian defense counsel.

Member Challenge

For his fifth assignment of error, the appellant asserts that the military judge erred by denying the appellant's challenge for cause against a prospective member who lived next door to the assistant trial counsel in base housing. Appellant's Brief at 17. The Government argues waiver. Government's Answer at 22.

At trial, the appellant challenged for cause Major (Maj) G. Through *voir dire*, it was discovered that:

1. Maj G, as executive officer, was the battalion legal officer and had attended a one-week legal officer course,

however, he was not predisposed to believe one side over the other.

2. Maj G's sister was a Secret Service agent who did some protective service detail work but mostly credit card fraud investigation, however, that would not cause him to give more weight to a government witness.

3. Maj G lived next door to the assistant trial counsel, and down the street from the trial counsel, in base housing, however, he could not recall them ever talking about their jobs or discussing this case.

4. Maj G had eaten dinner at the assistant trial counsel's house once and had attended neighborhood parties, however, if he felt the appellant was not guilty, he would not feel he was voting against a friend.

5. Maj G did not consider himself a close personal friend of either prosecutor, and did not believe an acquittal in this case would cause any discomfort in the neighborhood or between himself and the prosecutors.

6. Within the six months prior to the appellant's trial, Maj G sat as a member on a court-martial prosecuted by the same prosecutors in this case. The service member was found not guilty.

Record at 280-84.

The appellant challenged for cause three officers including Maj G. *Id*. at 299. The military judge granted the challenges against the other two officers and denied the challenge against Maj G. *Id*. at 300-10. The appellant argued that allowing Maj G to remain on the panel created an appearance of unfairness based on the close relationship with the prosecutors. *Id*. at 304-08. After the military judge denied the challenge against Maj G, the appellant used his peremptory challenge against Maj R. *Id*. at 309. Maj G became the only officer member which also made him the panel president. *Id*. at 310.

A. Waiver

We disagree with the Government as to waiver. A challenge for cause must be properly preserved for appellate review. R.C.M. 912(f)(4) provides in pertinent part that:

> When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, *a peremptory challenge by the challenging party against any member shall preserve the issue for later review*,

> provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

(Emphasis added). In this case, the appellant used his peremptory challenge against a prospective member other than Maj G. Because he used his peremptory challenge against someone other than Maj G, he had no further obligation in order to preserve the issue for appeal. We do not find waiver.

B. Major G

A court member must be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial "free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(n). Military judges are enjoined to be liberal in granting challenges for cause. *See United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003). This rule includes challenges for actual bias as well as implied bias. *United States v. Schlamer*, 52 M.J. 80, 92 (C.A.A.F. 1999)(citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)).

Actual bias and implied bias are separate tests, but not separate grounds for a challenge. *Miles*, 58 M.J. at 194. There is implied bias "'when most people in the same position would be prejudiced.'" *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996)(quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985). The focus for implied bias is on the perception or appearance of fairness of the military justice system. *See United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). When there is no actual bias, "'implied bias should be invoked rarely.'" *United States v. McDonald*, 57 M.J. 747, 752 (N.M.Ct.Crim.App. 2002)(quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)).

We review rulings on challenges for cause for abuse of discretion. *United States v. Lavender*, 46 M.J. 485, 488 (C.A.A.F. 1997). On questions of actual bias, we give the military judge great deference because we recognize that he has observed the demeanor of the participants in the *voir dire* and challenge process. *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000)(citing *United States v. Warden*, 51 M.J. 78, 81 (C.A.A.F. 1999)). This is because a challenge for cause for actual bias is essentially one of credibility. *Miles*, 58 M.J. at 194-95. This court, however, gives less deference to the military judge when reviewing a finding on implied bias because it is objectively viewed through the eyes of the public. *Napolitano*, 53 M.J. at 166. We, therefore, apply an objective standard when reviewing the judge's decision regarding implied bias. *Miles*, 58 M.J. at 195.

The appellant objected to Maj G because he lived next door to, and on one occasion had dinner with, the assistant trial counsel. The concern was that allowing Maj G to remain on the panel would create an objective appearance of unfairness. The military judge found that the minimal social contact between the member and the assistant trial counsel was not out of the ordinary for a small base environment and did not rise to the level of implied bias.

There is no per se rule that a service member cannot sit as an impartial member just because of the proximity of his or her residence to that of the prosecutor. Some social interaction between service members of similar grade living in base housing is common and certainly not disqualifying. The question is the extent of the social contact and personal relationship between the prosecutor and member. Here, the relationship was limited to the proximity of their residences and one social interaction. Based on the totality of these circumstances, we hold that Maj G's service as a member of the appellant's court-martial did not raise a significant question of legality, fairness, or impartiality, to the public observer pursuant to the doctrine of implied bias. The military judge did not abuse his discretion and we find no plain error.

Multiplicity

For his sixth assignment of error, the appellant avers that the offenses of indecent assault and forcible sodomy, based on the same acts, are multiplicious with each other. Appellant's Brief at 19. The Government concedes that it would be multiplicious to charge the act of sodomy as both forcible sodomy and an indecent assault, but argues that the force used to commit the forcible sodomy may be separately charged. Government's Brief at 23.

We conduct a *de novo* review of multiplicity claims. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002)(citing *United States v. Cherukuri*, 53 M.J. 68, 71 (C.A.A.F. 2000)). Specifications are multiplicious for findings if each alleges the same offense, if one offense is necessarily included in the other, or if they describe substantially the same misconduct in two different ways. R.C.M. 907(b)(3)(B), Discussion.

An accused may not be convicted and punished under more than one statute for the same act, if it would be contrary to the intent of Congress. *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993); *see* R.C.M. 307(c)(4), Discussion ("In no case should both an offense and a lesser included offense thereof be separately charged."). Where the intent of Congress is unclear, we use the elements test to determine whether one offense is necessarily included in another. Under this test, one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged

offense. *United States v. Britton*, 47 M.J. 195, 197 (C.A.A.F. 1997); *United States v. Foster*, 40 M.J. 140, 142-43 (C.M.A. 1994); *Teters*, 37 M.J. at 376. Where the intent of Congress is clear, the elements test is unnecessary. *Britton*, 47 M.J. at 197 (citing *United States v. Albrecht*, 43 M.J. 65, 67 (C.A.A.F. 1995)).

In *Britton*, our superior court held that Congress did not intend that rape and the force element of rape be charged as separate offenses. *Id*. at 198-99. Even if congressional intent was ambiguous on the issue, the court found rape and assault with intent to commit rape were multiplicious under an elements test, because "[i]t has long been recognized that a person who commits rape 'necessarily commits an assault.'" *Id* at 198 (quoting *United States v. Headspeth*, 10 C.M.R. 133, 134 (C.M.A. 1953)); *see United States v. Schoolfield*, 40 M.J. 132, 137 n.7 (C.M.A. 1994) (indecent assault is lesser included offense of rape). We will apply our superior court's analysis here to the offenses of forcible sodomy and indecent assault.

A. Forcible sodomy and indecent assault

On 29 June 1998 at Fort McClellan, Alabama, the appellant invited Private First Class (PFC) M into the woods where he pulled PFC M's pants and his own pants down and began fondling PFC M's penis. The appellant then put PFC M's hand on the appellant's penis and pulled PFC M toward him and kissed him. The appellant asked PFC M to perform oral sodomy on him and when PFC M refused, the appellant performed oral sodomy on PFC M. PFC M testified that the appellant's acts shocked him, he froze, and was scared. *Id*. at 427-31. From these facts, the appellant was charged with indecent assault on PFC M on board Fort McClellan on or about 29 June 1998 alleging the following acts: "forcing [PFC M] to fondle [the appellant's] penis and the [appellant] fondling [PFC M's} penis and performing oral sodomy on [PFC M}" (Charge V, Specification 1), and forcible sodomy on PFC M on board Fort McClellan on or about 29 June 1998 (Charge IV, Specification 2).

We hold that the principles used by our superior court in *Britton* are equally applicable in a case involving forcible sodomy and the force used to commit that sodomy. Under the circumstances in this case, it is clear that the acts alleged as indecent assault under Charge V, Specification 1, include the identical act of sodomy and the identical acts of force necessary to prove the force element of forcible sodomy under Charge IV, Specification 2. Congress did not intend for the act of forcible sodomy and the force used to achieve the crime to be charged as separate acts. Even if there is ambiguity as to the congressional intent on this issue, the two offenses are multiplicious under an elements test, because indecent assault is a lesser included offense of forcible sodomy. MCM, Part IV, ¶ 51d(2)(c). The specifications are, therefore, multiplicious and we will take corrective action in our decretal paragraph.

Unreasonable Multiplication of Charges

The appellant, as part of his sixth assignment of error, asserts an unreasonable multiplication of charges based on the following charges:

1. Cruelty toward PFC M (Charge II, Specification 1), indecent assault on PFC M (Charge V, Specification 1),[5] and forcible sodomy of PFC M (Charge IV, Specification 2). Appellant's Brief at 22.

2. Cruelty toward Lance Corporal (LCpl) V (Charge II, Specification 2), and forcible sodomy of LCpl V (Charge IV, Specification 1). *Id*. at 23.

3. False official statement (Charge III, Specification 1) and false swearing (Charge Charge V, Specification 7). *Id*. at 25.

4. False official statement (Charge III, Specification 2) and false swearing (Charge V, Specification 8). *Id*.

After a general discussion of the law, we will combine similar offenses, above, for discussion.

Unreasonable multiplication of charges is a separate and distinct concept from multiplicity. *See 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.*

To resolve claims of an unreasonable multiplication of charges, we look at whether the specifications are aimed at distinctly separate criminal acts, whether they misrepresent or exaggerate the appellant's criminality, whether they unfairly increase an appellant's exposure to punishment, and whether they suggest prosecutorial abuse of discretion in the drafting of the specifications. By weighing all of these factors together, we are able to determine whether the charges were unreasonably multiplied. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). During this analytical process, we are mindful that "[w]hat 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.

[5] Because we have dismissed Specification 1 of Charge V as multiplicious with Specification 2 of Charge IV, this portion of the assigned error is moot.

1. Cruelty and forcible sodomy

A. Specification 1 of Charge II charges the appellant with cruelty toward PFC M at or near Fort McClellan on or about 29 June 1998 based on the following acts: "by placing [PFC M's] hand on [the appellant's] penis and requesting the said [PFC M] to perform oral sodomy and by grabbing [PFC M's] penis and performing oral sodomy upon [PFC M]."[6] Specification 2 of Charge IV charges the forcible sodomy of PFC M on board Fort McClellan on or about 29 June 1998. Charge Sheet.

B. Specification 2 of Charge II charges the appellant with cruelty toward LCpl V at or near Fort McClellan on or about January 1997 based on the following acts: "by placing [LCpl V's] hand upon [the appellant's] penis and forcing the said [LCpl V] to perform oral sodomy and grabbing [LCpl V] thereby forcing him on the couch and performing anal sodomy upon [LCpl V]." Specification 1 of Charge IV charges forcible sodomy of LCpl V on board Fort McClellan on or about January 1997. Charge Sheet.

What was substantially one transaction was unreasonably multiplied into two charges as to each victim. The evidence presented at trial shows the acts charged as cruelty toward PFC M in Specification 1 of Charge II are the identical acts charged as forcible sodomy, including the force element, in Specification 2 of Charge IV. Record at 426-32. Likewise, the evidence presented at trial shows the acts charged as cruelty toward LCpl V in Specification 2 of Charge II are the identical acts charged as forcible sodomy, including the force element, in Specification 1 of Charge IV. Record at 1306-26.

Our *Quiroz* analysis shows that the appellant raised a multiplicity objection as to the offenses of cruelty and forcible sodomy of PFC M at trial.[7] Although the appellant did not raise an objection to the offenses of cruelty and forcible sodomy of LCpl V at trial, this factor is not dispositive of our analysis as to those offenses. As to the second and third *Quiroz* factors, we are convinced that the cruelty and corresponding forcible sodomy offenses are aimed at identical criminal conduct and that, separately charged, they unreasonably exaggerate the appellant's misconduct. As to the fourth *Quiroz* factor, we note that the appellant's punitive exposure was not increased, because life without eligibility for parole was the maximum authorized punishment for the forcible sodomy of PFC M. The charge sheet itself convinces us that there was prosecutorial overreaching in the charging. We are satisfied that, on balance, our *Quiroz* analysis favors a finding of unreasonable multiplication of

[6] These are the same acts that we have already found comprised the force element of the forcible sodomy charged under Specification 2 of Charge IV in our multiplicity analysis.

[7] Record at 139; Appellate Exhibit XXX.

charges as to the offenses of cruelty toward and forcible sodomy of PFC M and cruelty toward and forcible sodomy of LCpl V.

Under the facts of this case, we hold that dismissal of Specification 1 of Charge II, alleging cruelty toward PFC M, is required. Likewise, we hold that dismissal of Specification 2 of Charge II, alleging cruelty toward LCpl V, is required.

2. False official statement and false swearing

A. Specification 1 of Charge III charges the appellant with a false official statement made to Special Agent Craig at or near Fort McClellan on or about 30 June 1998 based on the following statement: "**I did not take [PFC M's] penis and put it in my mouth, nor did he even touch my penis**." Specification 7 of Charge V charges the appellant with false swearing on board Fort McClellan on or about 30 June 1998 based on the following statement: "**I did not take [PFC M's], U.S. Marine Corps, penis and put it in my mouth, nor did he even touch my penis.**" Charge Sheet (emphasis added).

B. Specification 2 of Charge III charges the appellant with a false official statement made to Special Agent Farabaugh at or near Fort McClellan on or about 25 June 1997 based on the following statement: "**At no time did I ever kiss [PFC H], U.S. Marine Corps, on the lips.**" Specification 8 of Charge V charges the appellant with false swearing on board Fort McClellan on or about 25 June 1997 based on the following statement: "**At no time did I ever kiss [PFC H], U.S. Marine Corps, on the lips.**" Charge Sheet (emphasis added).

We again find that what was substantially one transaction was unreasonably multiplied into two charges for each statement. The charges themselves and evidence presented at trial[8] show the statements used to establish the offense of false official statement are the identical statements used for the corresponding charge of false swearing.

The following *Quiroz* analysis applies to each of the above statements. Again, although the appellant did not raise an objection to either set of charges at trial, this factor is not dispositive of our analysis. As to the second and third *Quiroz* factors, we are convinced that each false official statement and its corresponding false swearing offense are ostensibly aimed at the identical criminal conduct and that, separately charged, they unreasonably exaggerate the appellant's misconduct. As to the fourth *Quiroz* factor, we do not find that the appellant's punitive exposure was increased by the Government's charging decision, because life without possibility of parole was authorized for another offense. The charge sheet itself

[8] As to Charge III, Specification 1, and Charge V, Specification 7, *see* Record at 609-14; Prosecution Exhibit 1. As to Charge III, Specification 2, and Charge V, Specification 8, *see* record at 957-61; Prosecution Exhibit 8.

convinces us that there was prosecutorial overreaching. We are satisfied that, on balance, our *Quiroz* analysis favors a finding of unreasonable multiplication of charges as to each false official statement and its corresponding charge of false swearing. Under the facts of this case, we hold that dismissal of Specifications 7 and 8 of Charge V, alleging false swearing is required.

Remaining Issues

We have reviewed the remaining assignments of error and, except for the appellant's ninth assignment of error concerning a defect in the promulgating order, we do not find merit.[9] For his ninth assignment of error, the appellant asserts the staff judge advocate's recommendation and the general court-martial promulgating order incorrectly state the appellant was convicted of Specification 9 under Charge V, alleging indecent exposure. Appellant's Brief at 32. The Government concedes this error. Government's Answer at 30. We will order corrective action in our decretal paragraph.

Sentence Reassessment

We now reassess the appellant's sentence due to the dismissal of Specifications 1 and 2 under Charge III, and Specifications 1, 7 and 8 under Charge V. We must first try to determine what the sentence would have been absent the two convictions for cruelty, one conviction for indecent assault, and two convictions for false swearing. If we cannot make that determination, we must order a rehearing on the sentence. If we can determine that the sentence would have been at least of a certain magnitude, we can reassess and affirm a sentence that is appropriate and of a severity no higher than that which would have been adjudged absent the finding of guilty for the dismissed specifications. *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). The sentence actually adjudged at the court-martial and the highest sentence that the sentencing authority would have adjudged absent error set ceilings on punishment that can be reassessed. *Jones*, 39 M.J. at 317; *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

[9] As to his seventh assignment of error, asserting the military judge should have dismissed *sua sponte* Charge I, Specifications 4 through 7, for lack of specificity, we find the military judge did not abuse his discretion, because the specifications do not lack specificity. As to his eighth assignment of error, alleging that Charge V, Specification 1, is fatally defective, this issue is moot as a result of our action taken on the appellant's sixth assignment of error. As to his tenth assignment of error, asserting the evidence is factually and legally insufficient to support the findings of guilty, we find the remaining findings of guilty are correct in both law and fact. Art. 66(c), UCMJ.

In reassessing the sentence within the above parameters, we must ensure sentence appropriateness. Art. 66(c), UCMJ; *see Peoples*, 29 M.J. at 427. No sentence higher than that which would have been adjudged absent error will be allowed to stand. *Peoples*, 29 M.J. at 428; *United States v. Poole*, 26 M.J. at 272, 274-75 (C.M.A. 1988). However, it is not necessary that a reduction in sentence be granted in reassessing after a finding of guilty has been set aside. *Jones,* 39 M.J. at 317; *Sales*, 22 M.J. at 308.

Applying these rules, we are convinced that the same sentence would have been adjudged absent the findings of guilty for the five dismissed specifications. The facts essential to establish the dismissed specifications would still be relevant to the remaining charges and, therefore, that information would still be before the members. Convictions for the most serious charges - two specifications of forcible sodomy - still remain, along with numerous orders violations, indecent assaults, indecent exposure, false official statements, and breaking restriction. We, therefore, reassess and affirm the sentence as adjudged and approved below.

Conclusion

Accordingly, the findings of guilty as to Charge II and its two supporting specifications, and Specifications 1, 7, and 8 under Charge V are set aside and those specifications and Charge II are dismissed. The remaining findings of guilty, and the sentence as approved by the convening authority, are affirmed. We direct that the supplemental court-martial order reflect the findings of this court, and that the appellant was found not guilty of Specification 9 of Charge V.

Senior Judge SCOVEL and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court