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

BEFORE

CHARLES Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Patrick J. HURD
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200101126 Decided 24 February 2004

Sentence adjudged 2 November 1999. Military Judge: M.J. Griffith. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Aviation Logistics Squadron 31, Marine Aircraft Group 31, MCAS, Beaufort, SC.

LCDR STEVEN B. FILLMAN, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LT C.J. GRAMICCIONI, JAGC, USNR, Appellate Government Counsel

VILLEMEZ, Judge, delivered an opinion, Parts IA, IB, IC, III, IV, V and VI of which are for the Court, and filed a dissenting opinion as to Part II. DORMAN, Chief Judge, joined in portions of Parts IA, IB and VI, and with Parts III and IV of that opinion; HARRIS, Judge, filed an opinion concurring in Parts IA, IB, IC, III, IV, V and VI of that opinion. DORMAN, Chief Judge, delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion as to portions of Parts IA, IB, and VI, and with Parts IC and V. HARRIS, Judge, filed an opinion concurring in Part II of that opinion.

VILLEMEZ, Judge:

On 2 November 1999, a military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of attempted sodomy with a child under age 16, violation of a lawful order, making a false official statement, two specifications of carnal knowledge, communicating indecent language to a child under age 16, and two specifications of committing indecent acts with a child under age 16, in violation of Articles 80, 92, 107,

120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, 907, 920, and 934. The appellant was sentenced to confinement for 4 months, forfeiture of $600.00 pay per month for 4 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. A pretrial agreement had no effect on the sentence.

After carefully considering the record of trial, the appellant's four assignments of error, and the Government's response, we conclude, except as noted below, 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. *See* Arts. 59(a) and 66(c), UCMJ.

Part I - Charge V, Specification 3

In his first assignment of error, the appellant contends that the military judge erred in failing to dismiss Charge V, Specification 3 as: (a) a lesser included offense of Charge IV, Specification 2, (b) multiplicious with Charge IV, Specification 2, and (c) an unreasonable multiplication of charges with Charge IV, Specification 2. The fact that the appellant pled guilty to all these offenses frames our consideration of this case, in that by pleading guilty the record is somewhat curtailed from that which might have existed if the Government had been required to present evidence on every element of each alleged offense.

A. Lesser Included Offense

Charge V, Specification 3 charges the appellant with committing an indecent act with a child, A.L., on 20 July 1999, by placing his finger in her vagina. Charge IV, Specification 2 alleges that the appellant engaged in carnal knowledge with A.L. on 20 July 1999. The appellant contends that because indecent acts or liberties with a person under 16 is specifically listed in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 45d(2)(a), as a lesser included offense of carnal knowledge, he may not be found guilty of both. Appellant's Brief of 13 Feb 2002 at 5. Based on the circumstances of this case and the manner in which the alleged offenses were charged, we disagree. Article 79, UCMJ states: "An accused may be found guilty of an offense necessarily included in the offense . . . ." In this case, the offenses are separate and distinct acts and are charged as such. The indecent act of appellant inserting his finger in A.L.'s vagina was committed and completed several minutes prior to the separate and distinct act of the sexual intercourse that occurred between them.[1] Record at 47-48.

[1] The appellant stated that his indecent act of inserting his fingers into A.L.'s vagina was part of the sexual foreplay that preceded his sexual intercourse with her on 20 July. The appellant indicated that the sexual foreplay began "about 2300" and the sexual intercourse began "about 2310." Record at 47 and 48, respectively.

B. Multiplicious

Specifications are multiplicious for findings if each alleges the same offense, or if one offense is *necessarily* included in the other. RULE FOR COURTS-MARTIAL 907(b)(3)(B), MANUAL FOR COURTS-MARTIAL (1998 ed.), Discussion (emphasis added). "A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways." *Id.* If each offense requires proof of an element that the other offense does not, then the offenses are not multiplicious for findings. *See United States v. Frelix-Vann*, 55 M.J. 329, 331-32 (C.A.A.F. 2001).

Not raised at trial, this issue is forfeited, unless it rises to the level of plain error. *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001). The appellant has the burden of persuasion on the existence of plain error. *Id.* He or she may do this by demonstrating that the specifications are facially duplicative (i.e., factually the same). *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000); *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). The determination of whether the specifications are facially duplicative is made from the language of the specifications and the facts apparent in the record, including the providence inquiry. *Lloyd*, 46 M.J. at 23-24.

The providence inquiry and Prosecution Exhibit 1, a stipulation of fact introduced incident to that inquiry, establish that these two offenses occurred on the same date and in the same location--that is on 20 July 1999, in the appellant's barracks room. However, the record does not demonstrate that these offenses are factually the same. The indecent act offense, as noted above, was committed and completed first, by the appellant's act of placing his finger in the victim's vagina with the required criminal knowledge and intent. The carnal knowledge offense was committed a few minutes later by the appellant's act of engaging in sexual intercourse with A.L., with knowledge that she was under the age of 16. Although both actions occurred during about the same general period of time and were both part of consensual sexual relations between the appellant and A.L., they were two distinct and separate criminal acts.

Additionally, each of the offenses required proof of at least one element that the other did not. Carnal knowledge under Article 120, UCMJ, requires proof of three elements: (1) an act of sexual intercourse; (2) with a person not the accused's spouse; and (3) who was under 16 years of age at the time. MCM, Part IV, ¶ 45b(2). The first element--an act of sexual intercourse--is not an element of indecent act with a child under Article 134, UCMJ. The offense of indecent act with a child through physical contact requires proof of five elements: (1) commission of an act upon or with the body of a person; (2) who was under 16 and not the accused's spouse; (3) the act was indecent; (4) the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or

both; and (5) the conduct was prejudicial to good order and discipline or service-discrediting. MCM, Part IV, ¶ 87b(1). These last three elements are not required by Article 120, UCMJ, as noted above, to prove the offense of carnal knowledge.

For the foregoing reasons, the appellant has failed to persuade us that Specification 3 of Charge V and Specification 2 of Charge IV are facially duplicative, and therefore his claim that these specifications are multiplicious is forfeited.

C. Unreasonable Multiplication of Charges (UMC)

Additionally, the appellant also asserts that one of the two specifications should be dismissed as an unreasonable multiplication of charges with the other. He contends the *sua sponte* ruling of the military judge that the two offenses are multiplicious for sentencing purposes is not sufficient. Record at 110; Appellant's Brief at 10. After applying the non-exclusive factors this court has established to evaluate such a claim of unreasonable multiplication of charges, we disagree. *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). The doctrine of multiplicity for sentencing purposes has been expressly recognized by R.C.M. 906(b)(12), as well as our senior court in *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001). "This doctrine may well be subsumed under the concept of an [UMC] when the military judge . . . determines that the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings." *Id.* at 339. In practical effect, the military judge has already resolved this assignment of error in the appellant's favor.

Part II - Charge V, Specification 1

In his second assignment of error, the appellant contends that the military judge erred in failing to dismiss Charge V, Specification 1 as an unreasonable multiplication of charges which were alleged under Charge I. Appellant's Brief at 12. Charge V, Specification 1 alleges that the appellant communicated indecent language to A.L., a child under 16, by asking her to "perform oral sex" on him, while Charge I documents an attempt by the appellant to commit sodomy with A.L.

Applying the analysis factors and process cited above, I disagree with the conclusion of the majority of the court on this matter and would find that these two offenses are not an unreasonable multiplication of charges. *Quiroz*, 57 M.J. at 585-86.

Once again, the court is dealing with two separate and distinct acts, which, in an abundance of caution directed toward the benefit of the appellant, the military judge concluded are multiplicious for sentencing. Record at 110. The appellant told the military judge that--separate and apart from the foreplay

leading up to the sexual intercourse he subsequently had with A.L.--he wanted to have oral sex with her and asked A.L. to do so; however, she refused. The military judge spoke at length with the appellant about the two offenses and their relationship with each other. Record at 49-55. While the military judge later determined the two offenses were multiplicious for sentencing and, thus, afforded the appellant punishment protection, he did not find them an unreasonable multiplication of charges. In the context in which the words were spoken by the appellant to A.L., they were indecent in and of themselves. *See United States v. Brinson*, 49 M.J. 360 (C.A.A.F. 1998); *United States v. French*, 31 M.J. 57 (C.M.A. 1990); *United States v. Negron*, 58 M.J. 834 (N.M.Ct.Crim.App. 2003). As the military judge and the appellant discussed the two offenses, the appellant's act of asking A.L. to perform oral sex on him was the overt act beyond mere preparation required to consummate an "attempt" offense under Article 80, UCMJ. Both the appellant and A.L. were naked and engaged in sexual foreplay prior to the appellant asking A.L. to perform oral sex on him. The only thing that prevented the offense of sodomy from actually occurring was A.L. declining the appellant's request for the act. The appellant's indecent request was an elemental factor in his attempt to commit sodomy with A.L., but--additionally, under the context in which it was made--it comprised a stand-alone offense, which might, legitimately, be charged separately, and one for which he could separately be convicted. Accordingly, I respectfully dissent with the conclusion of the majority of the court on this issue and would find this assignment of error to be without merit.

Part III - Charge I

In his third assignment of error, the appellant asserts that the military judge failed to establish a factual basis for the appellant's conviction of Charge I and its Specification. Appellant's Brief at 13. The appellant contends that his plea of guilty to attempted sodomy was improvident, because his act of asking A.L. to “perform oral sex” on him did not go beyond mere preparation.

An “attempt” under Article 80, UCMJ requires the commission of “an overt act which directly tends to accomplish the unlawful purpose.” MCM, Part IV, ¶ 4c(1). This overt act must be more than “mere preparation.” The Manual for Courts-Martial explains: "Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense." *Id*. at ¶ 4c(2). Merely soliciting another to commit an offense does not constitute an attempt. *Id*. at ¶ 4c(5). The appellant contends his asking A.L. for oral sex merely was "soliciting another to commit an offense," and, therefore, not an "attempt." *Id*.

In discussing Article 80 (Attempts), UCMJ, the Manual for Courts-Martial provides an example to illustrate the type of required overt act as that which:

> goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to applying a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

Id. at 4(c)(2). If the appellant had gone up to a strange woman in a bar and, on impulse, just asked her to perform oral sex, that would have been analogous to the mere purchase of matches with the intent to burn a haystack; but not an attempt under Article 80, UCMJ. Based on the circumstances in this case as discussed above--with both the appellant and A.L. already naked and engaged in consensual sexual foreplay and with a history of prior sexual intercourse--the facts of this case are more analogous with the actual-attempt-to-burn-the-haystack example provided by the Manual for Courts-Martial. Conducive circumstances existed, and the appellant's request to A.L. for oral sex was the application of the burning match to the haystack. Only A.L.'s refusal made it an attempt, vice the actual act of sodomy. Record at 45-55; Prosecution Exhibit 1. *See United States v. Smith*, 50 M.J. 380, 383 (C.A.A.F. 1999); *United States v. Schoof*, 37 M.J. 96, 103 (C.M.A. 1993). We find that the military judge, in fact, did establish an adequate factual basis for the acceptance of the appellant's provident plea to attempted sodomy under Article 80, UCMJ.

Part IV - Post-Trial Delay

In his final assignment of error, the appellant asserts that he has been denied speedy post-trial review of his court-martial in that over 597 days passed before the record of trial was delivered to this court for appellate review. Appellant's Brief at 13. The appellant points out that while his trial occurred on 2 November 1999, the Convening Authority’s Action was not taken until 14 March 2001, and this court did not receive the record until 22 June 2001.

It appears from the record that the appellant raises the issue of delay in the post-trial processing of his court-martial

for the first time in his appeal to this court, not having made any requests to the CA concerning the time involved in the processing of his case. We are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for post-trial delay, even in the absence of actual prejudice, as discussed by our senior court in *United States v. Tardif,* 57 M.J. 219 (C.A.A.F. 2002). However, in this case, having carefully reviewed the record in light of our authority and responsibility under both Articles 59(a) and 66(c), UCMJ, and having found no prejudice or harm to the appellant or any other basis to afford him relief for any post-trial processing delays that occurred in this case, we decline to grant relief on this ground.

Part V - Summary

As some wise individual once said, "Reasonable [judicial] minds can differ." In his reasonable in-part dissenting, in-part majority opinion, the Chief Judge, in concluding there are several instances of an unreasonable multiplication of charges in this case, characterizes the Government's charging philosophy as one dwelling "on the lascivious blow-by-blow details" of the case. My hopefully as reasonable, but differing, view is that, for the most part, and specifically in this case, as long as particular charges and specifications may be legally referred to a court-martial--meaning they are not, by law, multiplicious--then, even in doing our *de novo* review of the issue, as a starting point, *consideration* should be given to the prosecutorial discretion concerning which charges and specifications are to be tried, in order to most accurately capture and document the accused's alleged misconduct.[2] In *Ball v. United States*, the Supreme Court expressed that sentiment, when it concluded: "This Court has long acknowledged the Government's broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." 470 U.S. 856, 859 (1985). Many years earlier the Supreme Court had reasoned in *Bartkus v. Illinois*: "Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable." 359 U.S. 121, 131-32 (1959).

Thus, the Government has an inherent, almost-proprietary interest in documenting a servicemember's misconduct. It should normally be allowed to do so, except in those rare cases when true prosecutorial overreaching clearly evidences an unreasonable piling on of excessive charges, to the point where

[2] This should not be interpreted as a statement discounting, in any way, the validity of the non-exclusive factors provided by this court in *Quiroz* as guidance in the resolution of UMC issues. *Quiroz*, 57 M.J. at 585-86.

one "know[s] it when [he or she] see[s] it," which in essence is where the current UMC process and procedure is at anyway.[3] In such cases, the military judge is well-equipped to "cure" the improper proliferation of charges, either in limiting the charges or specifications themselves, or in protecting the accused regarding potential punishment, as sentencing is really where the accused needs to be and should be afforded judicial protection. As our senior court concluded more than four decades ago: "In other words, unreasonable multiplication of charges usually raises a question affecting the sentence, not the findings." *United States v. Middleton*, 12 C.M.A. 54, 58, 30 C.M.R. 54, 58 (1960)(internal cite omitted).

It seems reasonable that the interests of the Government are served when the accused's misconduct is properly documented, while the accused's primary interest is protected when the maximum punishment is limited. If all the procedural safeguards and checks and balances fail prior to the case reaching this level, this court always can ensure the "right thing" is done through the exercise of its "clear[] *carte blanche* to do justice," courtesy of Article 66(c), UCMJ. *United States v. Claxton,* 32 M.J. 159, 162 (C.M.A. 1991).[4]

Part VI - Conclusion

Accordingly, the court dismisses the finding of guilty of Specification 1 under Charge V and affirms the remaining findings and the sentence as approved by the convening authority. The sentence has been reassessed in accordance with *United States v. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 427-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Having done so, the court finds the adjudged sentence appropriate for the remaining offenses and this offender, and, therefore, affirms the sentence as approved by the convening authority.

While not assigned as error, we note that the court-martial order fails to comply with the provisions of R.C.M. 1114(c)(1), in that it omits any listing or summary of Charge V and the three specifications thereunder. Additionally, the summary of specifications under Charge IV is in error, with one specification being left out and two that should be under Charge V listed under Charge IV. Accordingly, we direct that the supplemental court-martial order provide an accurate listing of

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[3] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(Stewart, J., concurring).

[4] "In those rare instances in which [prosecutorial] discretion is abused to such a shocking extent that due process of law has been infringed, no test would stand in the way of remedial action." *United States v. Baker*, 14 M.J. 361, 376 (C.M.A. 1983)(Cook, J., dissenting).

charges and a summary of specifications, *United States v. Glover*, 57 M.J. 696 (N.M.Ct.Crim.App. 2002), and note that Specification 1 of Charge V has been dismissed.

DORMAN, Chief Judge (for the court as to Part II/concurring in part/dissenting in part):

I write separately for several reasons. First, I write for the court with respect to the appellant's second assignment of error, Part II, alleging that Specification 1 of Charge V is an unreasonable multiplication of the Specification under Charge I. We find that Specification 1 of Charge V should be dismissed as an unreasonable multiplication of charges with the Specification under Charge I. Second, I write to voice my dissent to Part V and portions of Parts IA and IB[1] of the court's opinion. Third, I write to voice my dissent to the court's resolution of the appellant's first assignment of error, Part IC, alleging that Specification 3 of Charge V, represents an unreasonable multiplication of charges with Specification 2 of Charge IV.

Part IC - Charge V, Specification 3

In determining whether there is an unreasonable multiplication of charges, we consider five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *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). In deciding issues we should also consider RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL (1998 ed.), Discussion. That discussion provides the following guidance, "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." That guidance was clearly violated in this case.

In my view, application of the *Quiroz* factors in this case leads to the conclusion that Specification 3 of Charge V should be dismissed as an unreasonable multiplication of charges with Specification 2 of Charge IV. The appellant stands convicted of an indecent act by placing his fingers in his under-aged girlfriend's vagina shortly before he had sex with her. He also

[1] In Part IA, the court finds that the indecent act was committed "several minutes prior to" the sexual intercourse. In Part IB, the court states that the indecent act was followed by the sexual intercourse "a few minutes later." I find no support for those conclusions in either the providence inquiry or in Prosecution Exhibit 1. The majority cites pages 47 and 48 of the record as support. See footnote 1, *supra*. While the appellant does state that foreplay began about ten minutes before the sexual intercourse, he does not say when the indecent act occurred. This record does not tell us how many minutes, if any, passed between the two acts.

stands convicted of having sex with her. Further elaboration of why these two offenses under the facts of this case are essentially one transaction is totally unnecessary. In light of the fact that the military judge considered these offenses the same for sentencing purposes, however, there would be no need to reassess the sentence.

Part II - Charge IV, Specification 1

Applying those same *Quiroz* factors with respect to Specification 1 of Charge IV and the Specification under Charge I, we find that there was an unreasonable multiplication of the charges against the appellant, and dismiss Specification 1 of Charge IV. Looking at each factor, the first *Quiroz* factor was not satisfied because the defense counsel did not litigate the issue of unreasonable multiplication of charges at trial. The military judge, however, stated prior to announcing the sentence that he found these offenses "multiplicious" for sentencing purposes. Record at 110.

The second *Quiroz* factor does, however, indicate an unreasonable multiplication of charges. Under the facts of this case the appellant's conviction of both attempted sodomy and the use of indecent language, Specification under Charge I and Specification 1 of Charge V, is unreasonable, given the fact that the indecent language the appellant used was the overt act of the attempt.

With respect to the third *Quiroz* factor, by alleging the same criminal acts in separate specifications, the appellant’s criminality is exaggerated. Anyone reading the appellant's results of trial or his court-martial order would not know the facts as they have been explained in this opinion, or as they were developed at trial. To the casual observer, the paper trail laid down by the Government portrays the appellant in a more jaded light than his conduct merits. Since the appellant was tried by special court-martial, however, the presence of the specification that unreasonably exaggerated his criminality did not expose him to potentially greater punishment – particularly so where the military judge ruled that he would consider these offenses as multiplicious for punishment. Accordingly, the fourth *Quiroz* factor is absent.

As to the fifth *Quiroz* factor, this is one of those rare cases where there is evidence of prosecutorial overreaching in the drafting of the charges. The most egregious example was preferral and referral of eight different specifications concerning the appellant having a female in his barracks room. The Government invites us to focus primarily on this last factor in conducting our analysis. Government Brief of 17 Apr 2002 at 4. We accept that invitation and find that it overwhelmingly favors the appellant. Had the appellant been charged with assault as a result of having been in a fistfight, each blow that was landed would not have been charged in a separate

specification. In cases such as the one we have before us, we should not allege each uninterrupted aspect of the appellant's inappropriate sexual liaison as a separate crime. Trial courts, appellate courts, counsel at trial and appellate counsel all have far more important things to do than dwell on the lascivious blow-by-blow details of such cases.

Part V - Summary

With respect to Part V of the Judge Villemez's lead opinion, I find that it discounts the distinction between multiplicity and the unreasonable multiplication of charges. This case is not about multiplicity. Nor is it about giving "consideration" to prosecutorial discretion when charging decisions are challenged based upon an allegation that they violate the guidance in R.C.M. 307(c)(4). Our *Quiroz* decision makes clear that we will not do that. If any consideration is given, it should be to the guidance contained in the collective wisdom found in the Manual for Courts-Martial, not to decisions of individual prosecutors. Affording prosecutors deference, as the majority does in this case, is a significant departure from *Quiroz*. Until this court or a superior court overturns the factors of that decision, those are the factors that I will attempt to conscientiously apply.

Part VI - Conclusion

Accordingly, I dissent from the decision of this court denying the appellant's requested relief to dismiss Specification 3 of Charge V. I also voice my strongest dissent with respect to the significant deference my colleagues have afforded the trial counsel's charging decision with respect to Specification 3 of Charge V. I would order that specification dismissed for the reasons outlined above. As noted in Part VI of the lead opinion, Specification 1 under Charge V is dismissed. Except as noted above, I concur in affirming the remaining Charges and Specifications, as well as the sentence.

HARRIS, Judge (concurring):

I concur with Parts IA, IB, IC, III, IV, V, and VI, of Judge Villemez' opinion. I also concur with Chief Judge Dorman with respect to Part II that, based upon the specific facts of this case, Specification 1 of Charge V is an unreasonable multiplication of charging by the Government with Charge I. In fact, one could even argue that Specification 1 of Charge V is an undesignated lesser included offense of Charge I. As the appellant did not raise the assertion of multiplicity at trial with regards to these two offenses, he forfeited the issue absent plain error. The offenses, nonetheless, are still an unreasonable multiplication of charges.

For the Court

R.H. TROIDL
Clerk of Court