

UNITED STATES OF AMERICA)

v.)

Manning, Bradley E.)
PFC, U.S. Army,)
HHC, U.S. Army Garrison,)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**Prosecution Response to
Defense Motion to Merge
Specifications 4 and 6 of
Charge II for Findings**

2 August 2013

RELIEF SOUGHT

The United States respectfully requests that the Court deny the Defense Motion to Merge Specifications 4 and 6 of Charge II for Findings (hereinafter the "Defense Motion") under Rule for Courts-Martial (hereinafter "RCM") 924(c) because the application of the *Quiroz* factors makes merger an inappropriate remedy.

BURDEN OF PERSUASION

The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by preponderance of the evidence. *See* RCM 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. *See* RCM 905(c)(2). Here, the defense bears this burden.

FACTS

The accused was convicted of causing intelligence to be "wrongfully and wantonly" published in violation of Article 134, Uniform Code of Military Justice (hereinafter "UCMJ"), six specifications of misconduct in violation of 18 U.S.C. § 793(e), five specifications of misconduct in violation of 18 U.S.C. § 641, one specification of misconduct in violation of 18 U.S.C. § 1030(a)(1), five specifications of misconduct in violation of Article 92, UCMJ, and two specifications of conduct prejudicial to good order and discipline in violation of Article 134, UCMJ. *See* Appellate Exhibit (hereinafter "AE") 624.

WITNESSES/EVIDENCE

The United States does not request any witnesses or evidence be produced for this motion. The United States requests that the Court consider the evidence adduced at trial and the referenced Appellate Exhibits.

LEGAL AUTHORITY AND ARGUMENT

The Court of Appeals for the Armed Forces (hereinafter "CAAF") in *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012) endorsed the following non-exclusive factors, commonly known as *Quiroz* factors in light of *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001), as a guide for military judges to consider when the defense objects that the United States has unreasonably multiplied the charges:

- (1) Whether each charge and specification is aimed at distinctly separate criminal acts;

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- (2) Whether the number of charges and specifications misrepresent or exaggerate the accused's criminality;
- (3) Whether the number of charges and specifications unfairly increase the accused's punitive exposure; and
- (4) Whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

See Campbell, 71 M.J. at 24. None of the *Quiroz* factors are pre-requisites, meaning one or more factors may be sufficient to establish an unreasonable multiplication of charges (hereinafter "UMC") based on prosecutorial over-reaching. *See Quiroz*, 55 M.J. at 339. A singular act may implicate multiple and significant criminal law interests, none necessarily dependent upon the other. *See AE 78*.

I: Specifications 4 and 6 of Charge II are aimed at distinctly separate criminal acts.

For Specification 4 of Charge II, the evidence proved that the accused, an intelligence analyst deployed to Iraq, had ready access to the Significant Activities (hereinafter "SIGACTs") from the Combined Information Data Network Exchange (hereinafter "CIDNE") Iraq database. With such access, the accused completed exporting more than 380,000 SIGACTs from the CIDNE Iraq database between 04:39:13C and 04:54:04C (Iraq time) on 3 January 2010. *See Prosecution Exhibit (PE) 116*.

For Specification 6 of Charge II, the evidence proved that the accused did not have ready access to the SIGACTs from the CIDNE Afghanistan database because Servicemembers deployed to Iraq, including members of the accused's unit, were not connected to a server for the CIDNE Afghanistan database. Rather, the main servers to the CIDNE Afghanistan database were located throughout Afghanistan, and the back-up server was located at the United States Central Command Headquarters in Tampa, Florida. *See id.* Therefore, to possess the SIGACTs from the CIDNE Afghanistan database, the accused took it upon himself to connect to the back-up server in Tampa, Florida. The accused connected to the back-up server in Tampa from 1-7 January 2010. *See PE 152*. On 7 January 2010, between 11:51:30Z and 11:52:27Z (Zulu time), the accused completed exporting more than 90,000 SIGACTs from the CIDNE-A database. *See id.*

SA Shaver testified that he found a password-protected folder named "yada.tar.bz2.nc" on the accused's personal computer. *See Testimony of SA Shaver*. This folder was created using "MCrypt", which SA Shaver testified is an open source utility to encrypt files that was found on the accused's personal computer. *See id.* Four files were located within the "yada.tar.bz2.nc" folder, one of which was entitled "irq_events.csv" and another was entitled "afg_events.csv." The file "irq_events.csv" contained more than 380,000 SIGACTs from the CIDNE Iraq database. *See id.* The file "irq_events.csv" was last written on 5 January 2010, which means 5 January 2010 was the last time the file "irq_events.csv" was written to or updated on his personal computer. *See id.* The file "afg_events.csv" contained more than 90,000 SIGACTs from the CIDNE Afghanistan database. The file "afg_events.csv" was last written on 8 January 2010, meaning the last time that file was written to or updated on his personal computer was 8 January 2010. *See id.*

Simply put, the accused completed the theft of the SIGACTs from the CIDNE Iraq database on 5 January 2010. *Three days later*, on 8 January 2010, the accused completed the

theft of the SIGACTs from the CIDNE Afghanistan database. Further, his theft of the SIGACTs from the CIDNE Afghanistan database required the accused to take overt acts to connect to the CIDNE Afghanistan database, a database that does not share information with the CIDNE Iraq database. The accused stole the records employing different methods, from different databases, and on different days. The theft of the SIGACTs from the CIDNE Iraq database consists of distinctly separate criminal acts than the theft of the SIGACTs from the CIDNE Afghanistan database.

II: Two specifications carrying a maximum punishment of 20 years for the theft of nearly 500,000 SIGACTs from the CIDNE Iraq and CIDNE Afghanistan databases neither misrepresent or exaggerate the accused's criminality, nor unfairly increase the accused's punitive exposure.

Under Specifications 4 and 6 of Charge II, the accused has been convicted of stealing nearly 500,000 SIGACTs. The sheer volume of data supports not merging these offenses. *See* AE 78 at 5 (concluding that the sheer volume of records weighs this *Quiroz* factor in favor of not merging the offenses). To steal these records, the accused exported SIGACTs from the CIDNE databases on 144 separate occasions. *See* PE 116 (stating that a user can export data from the CIDNE database *only* one month at a time). Further, the evidence adduced at trial proved that the SIGACTs from the CIDNE Afghanistan database transmitted by the accused have been in the possession of the enemies of our nation. *See* PE 153. The combined maximum punishment for these specifications, 20 years, accurately reflects the gravity and scope of the convicted offenses the accused's theft of nearly 500,000 SIGACTs.

CONCLUSION

The United States respectfully requests that the Court deny the Defense Motion because application of the *Quiroz* factors makes merger an inappropriate remedy.



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Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 2 August 2013.



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