

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 5 and 7 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 5 and 7 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 for findings makes merger an inappropriate remedy. However, the United States does not object to merging these specifications for sentencing.

### 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),

APPELLATE EXHIBIT 632  
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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;
- (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.

The CAAF in *Campbell* recognized that "the concept of UMC may apply differently to findings than to sentencing." *Campbell*, 71 M.J. at 23. When merging charges for sentencing purposes, the Court instructed military judges, in their discretion, to employ the above *Quiroz* factors and any other relevant factors as to whether merger for sentencing is appropriate. *Id.* at 24 n.9; RCM 1003(c)(1)(C) discussion; *United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010) (stating that "the application of the *Quiroz* factors involves a reasonableness determination, much like sentence appropriateness"); *Quiroz*, 55 M.J. at 399 (stating that the concept of UMC for sentencing applies "when the military judge...determines that the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings").

Under Specifications 5 and 7 of Charge II, the accused was convicted of having unauthorized possession of more than 40 classified Significant Activities (hereinafter "SIGACTs") from the Combined Information Data Network Exchange (hereinafter "CIDNE") Iraq and Afghanistan databases, and transmitting those classified records to WikiLeaks. See Charge Sheet. The parties agree that the accused transmitted the SIGACTs from both databases at the same time. See Defense Motion, at ¶ 3. **Although the transmissions occurred at the same time, the crimes are separate because the crimes began on different days and the stolen property resided on different databases.** See discussion, *infra*. Additionally, the evidence adduced at trial proved that these specifications are aimed at separate and distinct criminal acts. Nevertheless, since the accused transmitted these SIGACTs at the same time, these specifications should merge for sentencing. See *Quiroz*, 55 M.J. at 399 (stating that the concept of UMC for sentencing applies "when the military judge...determines that the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings").

I: The evidence adduced at trial relating to the accused's unauthorized possession of the SIGACTs from the CIDNE Iraq and CIDNE Afghanistan databases demonstrate that these specifications aim at separate and distinct criminal acts.

The evidence proved that the accused gained possession of the SIGACTs from their respective databases in very different ways. As an intelligence analyst in Iraq, the accused was connected to a server for the CIDNE Iraq database, making those SIGACTs contained therein readily accessible to him. *See* Prosecution Exhibit (hereinafter "PE") 116. On the other hand, 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. *See id.* 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. For Specification 6 of Charge II, the evidence proved that the accused, on 7 January 2010, between 11:51:30Z and 11:52:27Z (Zulu time), 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, thus this date marks the beginning of the unauthorized possession for Specification 4 of Charge II. Three days later, on 8 January 2010, the accused completed the theft of the SIGACTs from the CIDNE Afghanistan database thus this date marks the beginning of the unauthorized possession for Specification 6 of Charge II. 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.

The accused gained possession of the SIGACTs from the CIDNE databases in very different ways. Further, the accused had unauthorized possession of the SIGACTs from the CIDNE Iraq database three days prior to his unauthorized possession of the SIGACTs from the CIDNE Afghanistan database. Although the accused eventually combined the records and

transmitted these records to WikiLeaks at the same time, the criminal acts leading up to this transmission highlight that these specifications are aimed at separate and distinct acts.

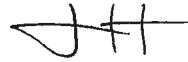
Two specifications carrying a maximum punishment of 20 years for the transmission of more than 40 classified SIGACTs from the CIDNE Iraq and CIDNE Afghanistan databases neither misrepresent or exaggerate the accused's criminality, nor unfairly increase the accused's punitive exposure. Under Specifications 5 and 7 of Charge II, the accused has been convicted of transmitting more than 40 classified SIGACTs to WikiLeaks. Put another way, the accused is facing a maximum punishment of one year confinement for every two classified documents he compromised. This does not misrepresent or exaggerate the accused's criminality, or unfairly increase the accused's punitive exposure – particularly since the criminal statute under which the accused was convicted, 18 U.S.C. § 793(e), criminalizes the unauthorized disclosure of one classified document for a maximum sentence of ten years. Further, the evidence adduced at trial proved that the CIDNE Afghanistan records transmitted by the accused have been in the possession of the enemies of our nation. The combined maximum punishment for these specifications, 20 years, accurately reflects the gravity and scope of the convicted offenses of transmitting more than 40 classified SIGACTs to an unauthorized person.

II: Since the accused transmitted the SIGACTs from the CIDNE Iraq and CIDNE Afghanistan database at the same time, the United States does not object to the merging of these specifications for sentencing.

Although the CAAF in *Campbell* noted that “[a]s a matter of logic and law, if an offense is multiplicitous for sentencing it must necessarily be multiplicitous for findings as well[,]” the Court further recognized how “the concept of unreasonable multiplication of charges may apply differently to findings than to sentencing.” *Id.* at 23. The Court explained that courts may implicate the *Quiroz* factors differently to the charging scheme than to sentencing exposure. *See id.* at 23. The evidence adduced at trial supports that these specification merge for sentencing, not for findings. The evidence proved that the accused downloaded the SIGACTs from the CIDNE Iraq database four days prior to downloading those from the CIDNE Afghanistan database. The evidence also proved that the accused was in unauthorized possession of the SIGACTs from the CIDNE Iraq database three days prior to having unauthorized possession of those from the CIDNE Afghanistan database. Nevertheless, since the accused transmitted the SIGACTs from both databases at the same time, the remedy should focus more on the accused's punitive exposure, which would be more proper for sentencing. *See Quiroz*, 55 M.J. at 399 (the concept of UMC for sentencing applies “when the military judge...determines that the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings”).

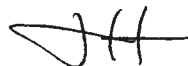
#### CONCLUSION

The United States respectfully requests that the Court deny the Defense Motion because the application of the *Quiroz* factors for findings makes merger an inappropriate remedy. However, since the accused transmitted these records at the same time, the United States does not object to the merging of these specifications for sentencing.



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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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