

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20230382

Specialist (E-4)
XZAVIOR D. JONES,
United States Army,
Appellant

Tried at Fort Campbell, Kentucky, on
11 May and 12 July 2023, before a
general court-martial convened by the
Commander, Headquarters, Fort
Campbell, Colonel John R. Maloney,
Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

**WHETHER APPELLANT’S CONVICTIONS
CONSTITUTE AN UNREASONABLE
MULTIPLICATION OF CHARGES.**

Statement of the Case

On 12 July 2023, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification each of aggravated assault and assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 [UCMJ] (2019).¹ (Statement of Trial Results

¹ Upon acceptance of the appellant’s plea, the government dismissed without prejudice, to ripen into prejudice upon completion of appellate review, two specifications (3 and 4 of The Charge) of assault consummated by a battery upon PV2 HD. (STR; R. at 56). These specifications alleged that, on the same date and at the same location charged in Specifications 1 and 2, appellant “unlawfully

[STR]; R. at 57). The military judge sentenced appellant to a concurrent period of confinement totaling five months,² reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. (STR; R. at 116). On 8 August 2023, the convening authority took no action, and on 14 August 2023, the military judge entered judgment. (Action; Judgment).

Statement of Facts

On 2 July 2022, appellant and his friend, Private (PV2) HD, argued about PV2 HD meeting up with another male friend to get food. (Pros. Ex. 1). After arguing, PV2 HD collected her personal items from appellant's room and departed. (Pros. Ex. 1). The two continued communicating over the phone though, and appellant eventually invited PV2 HD back to his room. (R. at 27; Pros. Ex. 1).

Private HD accepted the invitation and returned to appellant's room that evening. (Pros. Ex. 1). The two discussed appellant's personal hardships until the matter of PV2 HD getting a meal with another male again came up. (Pros. Ex. 1). This led to a heated exchange, and appellant grabbed PV2 HD by the wrists. (R. at 30–36; Pros. Ex. 1). Appellant released PV2 HD's wrists on her request, but then

[struck PV2 HD] on the face with his finger" (Specification 3) and "unlawfully [struck PV2 HD] on the leg with his hand" (Specification 4). (STR).

² The military judge sentenced appellant to five months of confinement for the strangulation, and 14 days for the assault consummated by a battery, to be served concurrently. (R. at 116).

grabbed her neck and applied pressure, impeding the circulation of her blood. (R. at 37–42; Pros. Ex. 1).

Based on these acts, appellant entered an unconditional guilty plea to one specification each of aggravated assault by strangulation and assault consummated by a battery. (R. at 17). Appellant’s plea agreement did not include a “waive all waivable motions” term (App. Ex. II); however, upon the entry of pleas, when the military judge asked appellant whether he had “any motions to dismiss or grant other appropriate relief,” trial defense counsel answered in the negative. (R. at 17).

Assignment of Error

**WHETHER APPELLANT’S CONVICTIONS
CONSTITUTE AN UNREASONABLE
MULTIPLICATION OF CHARGES.**

Standard of Review

Whether an appellant has waived an issue is a legal question this Court reviews de novo. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citing *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019)). When an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009).

If a claim is merely forfeited, this court reviews for plain error. *United States v. Coleman*, 79 M.J. 100, 102 (C.A.A.F. 2019). For an appellant to prevail under plain error review, there must be (1) an error, (2) that was clear or obvious,

and (3) which prejudiced a substantial right of the accused. *Id.* (quoting *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019)). “Where the error is constitutional . . . the government must show that the error was harmless beyond a reasonable doubt to obviate a finding of prejudice.” *Tovarchavez*, 78 M.J. at 463 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Law

A. Waiver

Waiver is the intentional relinquishment or abandonment of a known right. *Davis*, 79 M.J. 331 (quoting *Gladue*, 67 M.J. at 313 (cleaned up)). A valid waiver leaves no error for this court to correct on appeal. *Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020)(quoting *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)). “A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.” *Gladue*, 67 M.J. at 314 (citing *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995)). “Although the President has prohibited the waiver of certain fundamental rights in a [pre-trial agreement], neither multiplicity nor the unreasonable multiplication of charges is among them.” *Gladue*, 67 M.J. at 314.

B. Unreasonable multiplication of charges (UMC)

“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” Rule for Courts-

Martial [R.C.M.] 307(c)(4). “In *Quiroz*, the Court of Appeals for the Armed Forces endorsed several factors iterated by the lower court in that case as a guide for military judges and appellate courts to consider in determining whether there has been an unreasonable multiplication of charges.” *Campbell*, 71 M.J. at 23 (citing *United States v. Quiroz*, 55 M.J. 334, 338–39 (C.A.A.F. 2001)). The *Quiroz* factors include:

- (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
- (2) Is each charge and specification aimed at distinctly separate criminal acts?;
- (3) Does the number of charges and specifications misrepresent or exaggerate the appellant’s criminality?;
- (4) Does the number of charges and specifications unfairly increase the appellant’s punitive exposure?; and
- (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Quiroz, 55 M.J. at 338 (citation omitted); *see also Campbell*, 71 M.J. at 24 & n.10.

“One or more factors may be sufficiently compelling, without more, to warrant relief.” *Campbell*, 71 M.J. at 23.

Argument

Appellant’s claim of UMC was waived; even if it was not, the two specifications at issue were not a UMC and thus there was no error, plain or

otherwise, and appellant knowingly and voluntarily pled guilty to the two specifications. Finally, even if this court disagrees, appellant suffered no prejudice.

A. Appellant’s claim is waived.

Appellant affirmatively waived his right to pursue unreasonable multiplication of charges at his guilty plea. In *United States v. Malone*, a majority of this panel recently considered whether an appellant had waived his multiplicity claim to three specifications of domestic violence (UCMJ art. 128b), all arising from the same altercation, at a guilty plea. ARMY 20230151, 2024 CCA LEXIS 217 (Army Ct. Crim. App. 23 May 2024) ([mem. op.](#)). In exchange for Malone’s pleas of guilty, the convening authority agreed to a number of terms benefitting Malone, to include withdrawal and dismissal of various other specifications and a 32-month cap on his sentence to confinement, compared to the 23 years he potentially faced at a contested trial. *Id* at *3. While the plea agreement did not include a “waive all waivable motions,” term, Malone’s trial defense counsel informed the military judge that he had no motions to dismiss or for other appropriate relief prior to the entry of pleas. *Id*.

As in *Malone*, appellant’s counsel here “did not merely fail to object;” rather, counsel “affirmatively told the military judge that he had no motions to

dismiss.” (R. at 17); *Malone*, 2024 CCA LEXIS at *8. That was a “deliberate decision,” and therefore an affirmative waiver. *Id.*³

Further, appellant, through his counsel, agreed with the trial counsel’s calculation and military judge’s recitation of the maximum term of confinement. (R. at 44). “As a practical matter, a UMC objection must be raised before the accused enters a guilty plea because the objection may affect that the maximum sentence that the court martial may impose.” *Malone*, 2024 CCA LEXIS 217 at *9 (quoting *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018)). This court in *Malone* found the defense counsel’s agreement with trial counsel’s recitation of the maximum punishment an implicit concession that there was no multiplicity error; this court ought to arrive at the same conclusion regarding appellant’s UMC claim.

Though appellant now argues, after receiving the benefit of the bargain, that his “plea agreement did not require [him] to waive all waivable motions” (Appellant’s Br. 5), this court in *Malone* held such a clause to be unnecessary for the reasons iterated above. 2024 CCA LEXIS 217 at *8 (citing *Hardy*, 77 M.J. at 442).⁴

³ Although *Malone* involved a claim of multiplicity rather than UMC, the logic and legal principles derived from that case are equally applicable to appellant’s UMC claim. See *Malone*, 2024 CCA LEXIS 217 at *4; *Gladue*, 67 M.J. at 314.

⁴ Notably, this court in *Malone* recognized its authority to pierce waiver and provide sentence relief “on the basis of the entire record.” *Malone*, 2024 CCA LEXIS 217 at *6, n. 4 (citing UCMJ art. 66(d)(1)). The court then declined to do so because the military judge had imposed concurrent sentences for the

By knowingly and voluntarily entering an unconditional guilty plea, under the circumstances outlined, appellant waived the UMC claim he now raises. *See Hardy*, 77 M.J. at 442 (“because an unreasonable multiplication of charges is not a jurisdictional defect, a guilty plea waives the objection.”) (citing *United States v. Lee*, 73 M.J. 166, 167 (C.A.A.F. 2014) and *United States v. Broce*, 488 U.S. 563, 570 (1989) (additional citations omitted)).

B. There is not an unreasonable multiplication of charges under *Quiroz*.

Even if this court finds no waiver by appellant, the two specifications at issue are not UMC under the five *Quiroz* factors.

1. Appellant did not object.

The first *Quiroz* factor weighs in favor of the government because appellant did not raise any objection regarding UMC. Appellant, with the assistance of trial defense counsel, made an informed decision to negotiate and enter into a guilty plea with the government; he does not now claim any coercion or lack of agency. Further, when appellant’s defense counsel was given the opportunity to raise objections and motions to dismiss before entry of pleas, he entered pleas on appellant’s behalf and then responded, upon a request for confirmation from the

specifications at issue. *Id.* at *7, n. 4 (cont’d). This court should likewise decline to grant sentence relief to appellant here for the same reason.

military judge that he had no motions to raise, “No motions, Your Honor.” (R. at 17).

2. Each specification was aimed at a distinct criminal act.

The second *Quiroz* factor favors the government because each specification targets a specific act, independent of the other. The mere fact that there is overlap in some of the underlying facts which support each of appellant’s conviction does not render them unreasonably multiplied. In Specification 1 of The Charge, appellant admitted to strangling PV2 HD. In Specification 2 of The Charge, appellant admitted to violently and offensively grabbing PV2 HD by her wrists. Although these acts stemmed from the same dispute, they occurred independently from each other, one after the other. Compare this, for example, to charging appellant for each individual punch in a succession of blows. *See Malone*, 2024 CCA LEXIS 217 at *7–8 (“as we have previously recognized, the unit of prosecution for assault consummated by battery consisting of ‘an uninterrupted attack comprising touchings united in time, circumstance, and impulse . . . is the number of overall beatings the victim endured rather than the number of individual blows suffered.’” (citing *United States v. Clarke*, 74 M.J. 627, 628 (Army Ct. Crim. App. 2015) ((additional citation omitted))).

3. The specifications did not exaggerate appellant's criminality.

Similarly, the third *Quiroz* factor weighs in the government's favor because the specifications do not "misrepresent or exaggerate the appellant's criminality." *Quiroz*, 55 M.J. at 338 (citation omitted). Appellant stands convicted of two distinct specifications of assault, because he committed two separate crimes. This charging theory was clearly intended to punish two separate offenses: (a) grabbing PV2 HD by the wrists in an offensive manner; and then, once releasing her wrists, (b) strangling her and restricting blood circulation. As stated by the trial judge in a sister service case, "[t]here is a marked difference between punching someone in the face versus [strangling] somebody. Even though they occurred during the course of one fight, these are separate criminal acts that can be charged separately." (*United States v. Kolwyck*, 2016 CCA 713, at *1 (N.M. Ct. Crim. App. 2016)).

4. The specifications did not unfairly increase appellant's punitive exposure.

The fourth *Quiroz* factor favors the government. As discussed *supra*, appellant's convictions for the two acts are separate, distinct, and broken briefly in time. Additionally, the military judge ordered the sentences of Specifications 1 and 2 of The Charge to run concurrently, pursuant to the plea agreement. As such, if this court were to merge the specifications or dismiss Specification 2 and

reassess appellant's sentence, there would be no impact to appellant's aggregate sentence and his punitive exposure would have ultimately remained the same.

5. There was no evidence of prosecutorial overreaching.

The fifth and final *Quiroz* factor also weighs in favor of the government, as there is no evidence of prosecutorial overreaching. Appellant knowingly and voluntarily offered and entered into a plea agreement that included a guilty plea to Specifications 1–2 of The Charge, conditioned upon the government limiting his punitive exposure for those specifications and, further, dismissing Specifications 3–4. (R. at 17, 56; App. Ex. IV). Appellant cannot now accuse the prosecution, for the first time, of overreaching when appellant specifically agreed to plead guilty to both of those charges.

C. Appellant cannot show prejudice.

As previously demonstrated, the concurrent nature of the sentences for the two specifications at issue renders any claimed error entirely harmless. If this court were to merge Specifications 1 and 2 of The Charge or dismiss Specification 2 and its term of confinement, there would be no impact to appellant's aggregate sentence. As such, appellant has suffered no prejudice.⁵

⁵ See also *Malone*, 2024 CCA LEXIS 217, at *5 (“It does not serve the ends of justice to allow appellant to deliberately decline to make a multiplicity challenge, even when directly asked by the military judge if he had any such motions, at a time when the convening authority could still withdraw from the [plea] agreement; and instead wait to raise such a challenge for the first time on appeal after he has

Conclusion

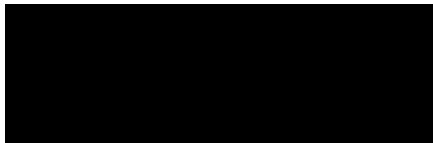
WHEREFORE, the government respectfully requests this honorable court deny appellant's request for relief and affirm the findings and sentence.



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reaped all of the benefits and the convening authority can no longer withdraw.”) Though appellant's claim here involved UMC rather than multiplicity, the same logic applies.

CERTIFICATE OF FILING AND SERVICE,

I certify that a copy of the foregoing was sent via electronic submission to the
Defense Appellate Division at [REDACTED]
[REDACTED] on this 17th day of March 2024.

[REDACTED]

K

Paralegal Specialist
Government Appellate Division

United States v. Kolwyck

United States Navy-Marine Corps Court of Criminal Appeals

December 15, 2016, Decided

No. 201600210

Reporter

2016 CCA LEXIS 713 *

UNITED STATES OF AMERICA, Appellee v.
BRANDON M. KOLWYCK Corporal (E-4), U.S.
Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Major Mark Sameit, USMC.

Counsel: For Appellant: Commander R.D. Evans, JR., JAGC, USN.

For Appellee: Lieutenant Commander Jeremy R. Brooks, JAGC, USN; Captain Sean M. Monks, USMC.

Judges: Before CAMPBELL, RUGH, and HUTCHISON, Appellate Military Judges. Senior Judge CAMPBELL and Judge HUTCHISON concur.

Opinion by: RUGH

Opinion

RUGH, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of assault with intent to inflict grievous bodily harm and one specification of assault with a means or force

likely to produce death or grievous bodily harm in violation of [Article 128, Uniform Code of Military Justice \(UCMJ\)](#), 10 U.S.C. § 928. The military judge sentenced the appellant to 14 months' confinement and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant now raises as error that he was subjected to an unreasonable multiplication of charges as applied to sentencing. We agree and analyze for sentence reassessment below. Otherwise, we conclude the findings and sentence are correct in law and fact, and we find no other error materially prejudicial to [*2] the appellant's substantial rights. [Arts. 59\(a\)](#) and [66\(c\), UCMJ](#).

I. BACKGROUND

On 14 November 2015, the appellant resolved a domestic dispute with his wife by punching her repeatedly in the face with his fists. He then "grabbed her around the throat and moved her 180 degrees to the hallway wall. . . . [and] then struck her three or four more times" ¹ He did this in their on-base residence while his one-year-old daughter watched and his two-year-old son slept downstairs.

Although the entire assault lasted only a few minutes, the appellant's wife suffered a fracture to her left eye socket and spent several days in the hospital. At trial, the appellant admitted that he punched his wife

¹ Record at 17.

almost as hard as he could, that he knew his punches might break bones in her face, and that he intended to inflict grievous bodily harm on his wife by punching her. He also acknowledged that he squeezed his wife's throat with sufficient force that grievous bodily harm could have occurred.

Prior to findings, defense counsel objected that the two specifications of assault arising from the one violent altercation amounted to an unreasonable multiplication of charges. The military judge disagreed, and, after [*3] identifying the factors for assessing an unreasonable multiplication of charges provided in [United States v. Quiroz, 55 M.J. 334, 338-39 \(C.A.A.F. 2001\)](#), determined:

[T]hat these are distinctly separate acts that were charged in this case. There is a marked difference between punching someone in the face versus [strangling] somebody. Even though they occurred during the course of one fight, these are separate criminal acts that can be charged separately, and they both have their own unique risks to them.²

On the matter of whether the two specifications unreasonably increased the appellant's punitive exposure, he explained:

These are two separate crimes which have their own individual risks and Congress found the need to separate and charge both of these separately because of the separate risks. The President has assigned separate punishments to these two types of crimes that need to be prevented, and the [appellant] actually did assault two separate body parts of the victim in this case.³

The military judge then denied the defense motion.

II. DISCUSSION

A. Unreasonable multiplication of charges

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." RULE FOR COURTS-MARTIAL (R.C.M.) 307(c)(4), MANUAL FOR COURTS-MARTIAL, [*4] UNITED STATES (2012 ed.). Unreasonable multiplication of charges is a concept distinct from multiplicity. [Quiroz, 55 M.J. at 337](#). It "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id.* A military judge's unreasonable multiplication of charges ruling is reviewed for an abuse of discretion. [United States v. Campbell, 71 M.J. 19, 22 \(C.A.A.F. 2012\)](#).

Charges may constitute unreasonable multiplication either as applied *to findings* or as applied *to sentencing*. [Id. at 23](#). We consider five non-exclusive factors to determine whether there is an unreasonable multiplication of charges:

- (1) Whether the appellant objected at trial;
- (2) Whether each charge and specification is aimed at distinctly separate criminal acts;
- (3) Whether the number of charges and specifications misrepresents or exaggerates the appellant's criminality;
- (4) Whether the number of charges and specifications unreasonably increases the appellant's punitive exposure; and,
- (5) Whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

See [Quiroz, 55 M.J. at 338-39](#).

No one factor is a prerequisite. Instead, these

² *Id.* at 29.

³ *Id.* at 30.

factors are weighed together, and "one or more. . . . may be sufficiently compelling[.]" [Campbell, 71 M.J. at 23](#). While some factors [*5] may be most pertinent when assessing an unreasonable multiplication of charges *as to findings*, others may only gain in prominence when the assessment turns to an unreasonable multiplication of charges *as to sentence*.⁴

Here, the appellant objected at trial. Additionally, the parties do not allege prosecutorial overreaching or abuse in the drafting of the charges.⁵ The military judge also fully developed on the record his reasons

⁴ The *flavor* of unreasonable multiplication raised, and thereby the nature of the harm implicated, directly affects the remedy a military judge should craft. In cases in which there is an unreasonable multiplication of charges *as to findings*, the military judge should ordinarily resolve the harm through consolidation of the specifications—accomplished by "combining the operative language from each specification into a single specification that adequately reflects each conviction." [United States v. Thomas, 74 M.J. 563, 568-69 \(N-M. Ct. Crim. App. 2014\)](#) (footnote omitted). When consolidation is inappropriate, the military judge should consider conditionally dismissing one or more of the findings, to become effective upon final appellate review. [Id. at 569](#). Consolidation or conditional dismissal should then be accurately reflected in any subsequent CA's action.

In cases in which there is an unreasonable multiplication of charges *as to sentencing*, the military judge should ordinarily resolve the harm through merging the specifications for sentencing. In this situation, each affected specification remains, but the maximum punishment available is reduced to that of the greatest offense merged. In other words, the accused should be punished as if the affected specifications or charges were but a single offense. The military judge should advise members of the new, applicable maximum punishment and that the accused should be sentenced as if the merged specifications were one. In the case of military judge-alone sentencing, the military judge should announce on the record that the affected specifications are being merged for sentencing and that the accused will be sentenced on the affected specification as merged. The military judge should then inform the accused of the new, applicable maximum punishment.

⁵ At trial, just as now, the defense acknowledged that, "[T]here is[n't] anything that the prosecutor has done that is out of line in any way." Record at 27.

for denying the appellant's motion with regards to unreasonable multiplication of charges *as to findings*—that the appellant striking his wife in the face with the intent to cause grievous bodily harm and strangling her with a means likely to cause grievous bodily harm constituted "two separate crimes which have their own individual risks[.]"⁶

As a result, we do not find, and the appellant does not allege, that the military judge abused his discretion in balancing the *Quiroz* factors in assessing for an unreasonable multiplication of charges *as applied to findings*.

However, we disagree with the military judge's determination regarding the unreasonable multiplication of charges *as applied to sentencing*, particularly when weighing whether [*6] the charging scheme unreasonably exaggerated the appellant's criminality and increased his punitive exposure.

While the military judge's "separate risks" analysis was preeminent in determining whether each specification was aimed at distinctly separate criminal acts and whether the sheer number of specifications misrepresented the appellant's criminality, its applicability in the context of the appellant's punitive exposure is less persuasive. Instead, generally "one act implicating . . . separate criminal purposes" should be treated as one offense for purposes of sentencing.⁷

⁶ *Id.* at 30.

⁷ [Campbell, 71 M.J. at 25](#) (finding that the military judge did not abuse his discretion in merging three offenses into one for purposes of sentencing). See also [United States v. Jinetecabarcas, 2015 CCA LEXIS 122, *17 \(A. Ct. Crim. App. 27 Mar 2015\)](#), (finding that "[b]ecause [the] appellant's singular conduct . . . violated two orders that were essentially the same order issued by two different officials, the military judge appropriately merged these two specifications for sentencing purposes.") (citation and internal quotation marks omitted) (alteration in original), *rev. denied*, **75 M.J. 11 (C.A.A.F. 2015)**;

Additionally, while both [Articles 128\(b\)\(1\) and 128\(b\)\(2\), UCMJ](#),⁸ carry distinct maximum punishments—three years' and five years' confinement, respectively—asserting this as grounds for denying relief from an unreasonable multiplication of charges would devour the rule, as every offense under the code comes with its own unique limits proscribed by the President.⁹

Though the abuse of discretion standard is "a strict one, calling for more than a mere difference of opinion," [United States v. Lloyd, 69 M.J. 95, 99 \(C.A.A.F. 2010\)](#) (citations and internal quotation marks omitted), under the circumstances [*7] of this case, in which the two assaults arose from the same altercation and occurred at the same time without interruption, it was inappropriate to set the maximum punishment based on the aggregate of the two offenses. Doing so unfairly exaggerated the appellant's punitive exposure and resulted in an unreasonable multiplication of charges *as to sentencing*.

B. Sentence reassessment

Having determined that the two specifications should have been merged for sentencing, we must reassess the sentence. Courts of Criminal Appeals (CCAs) can often "modify

[United States v. Parker, 2015 CCA LEXIS 9, *14-16 \(N-M. Ct. Crim. App. 22 Jan 2015\)](#) (upholding the military judge's decision at trial to merge sodomy and adultery offenses occurring with the same person at the same time while not merging similar offense with a separate person occurring over two separate time periods), *rev. denied*, **75 M.J. 16 (C.A.A.F. 2015)**. Cf. [United States v. Ryan, 2014 CCA LEXIS 217, *2, *8-9, unpublished op. \(A. F. Ct. Crim. App. 28 Mar 2014\)](#) (finding the military judge did not abuse his discretion in declining to merge specifications for drug possession and use, in part because the maximum punishment was limited by referral to special court-martial).

⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), Part IV, PP 54e(8)c and 54e(9)c.

⁹ See [Art. 56, UCMJ](#).

sentences 'more expeditiously, more intelligently, and more fairly' than a new court-martial[.]" [United States v. Winckelmann, 73 M.J. 11, 15 \(C.A.A.F. 2013\)](#) (quoting [Jackson v. Taylor, 353 U.S. 569, 580, 77 S. Ct. 1027, 1 L. Ed. 2d 1045 \(1957\)](#)). In such cases, CCAs "act with broad discretion when reassessing sentences." *Id.*

Reassessing a sentence is only appropriate if we are able to reliably determine that, absent the error, the sentence would have been at least of a certain magnitude. [United States v. Harris, 53 M.J. 86, 88 \(C.A.A.F. 2000\)](#). A reassessed sentence must not only "be purged of prejudicial error [but] also must be 'appropriate' for the offense involved." [United States v. Sales, 22 M.J. 305, 308 \(C.M.A. 1986\)](#).

We base these determinations on the totality of the circumstances of each case, guided by the following "illustrative, but not dispositive, points of analysis":

- (1) [*8] Whether there has been a dramatic change in the penalty landscape or exposure.
- (2) Whether sentencing was by members or a military judge alone.
- (3) Whether the nature of the remaining offenses captures the gravamen of criminal conduct included within the original offenses and whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.
- (4) Whether the remaining offenses are of the type with which appellate judges should have the experience and familiarity to reliably determine what sentence would have been imposed at trial.

[Winckelmann, 73 M.J. at 15-16.](#)

Under all the circumstances presented, we find

that we can reassess the sentence and that it is appropriate for us to do so. First, the merger of specifications reduces the maximum authorized confinement from eight years to five years, but the appellant was adjudged only 14 months' confinement. While the three years' difference is significant, this does not represent a dramatic change in the sentencing landscape given the adjudged sentence. Second, the appellant elected to be sentenced by a military judge, and we are more likely to be certain of what sentence the military judge, as opposed [*9] to members, would have imposed. Third, we have extensive experience and familiarity with the offenses as modified, as none presents a novel issue in aggravation. Finally, the modified offenses capture the gravamen of the criminal conduct at issue, and all of the evidence remains admissible. Indeed, the military judge sentenced the appellant based on evidence of the one altercation.

Taking these facts as a whole, we can confidently and reliably determine that, absent the error, the military judge would have sentenced the appellant to at least confinement for 14 months and a bad-conduct discharge. We also conclude that the adjudged sentence is an appropriate punishment for the modified offenses and this offender—thus satisfying the *Sales* requirement that the reassessed sentence is not only purged of error, but is also appropriate. [Sales, 22 M.J. at 308](#).

III. CONCLUSION

The findings and sentence, as approved by the CA, are affirmed.

Senior Judge CAMPBELL and Judge HUTCHISON concur.