30 June 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

BRENT A. CAMPBELL,
(O-3), USAF
Appellant.

Crim. App. No. 37460
USCA Dkt. No. 11-0403/AF

BRIEF IN SUPPORT OF PETITION GRANTED

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,	)	**BRIEF IN SUPPORT OF**
Appellee,	)	**PETITION GRANTED**
v.	)	
	)	USCA Dkt. No. /AF
Captain (O-3)	)	Crim. App. No. 37460
BRENT A. CAMPBELL,	)	
USAF,	)	
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE MILITARY JUDGE ERRED, AFTER FINDING ALL THREE CHARGES AROSE OUT OF THE SAME TRANSACTION AND WERE PART OF THE SAME IMPULSE, BY MERGING THEM FOR SENTENCING RATHER THAN DISMISSING THEM.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. §866(c). This Court has jurisdiction to review this case under Article 67, UCMJ, 10 U.S.C. §867.

Statement of the Case

On 17-19 February 2009, Appellant was tried by a general court-martial composed of officer members at Travis AFB, CA. The charges and specifications on which he was arraigned, his pleas, and the findings of the court-martial are as follows:

Chg	UCMJ Art	Spec	Summary of Offense	Plea	Finding
I	107			NG	G
			Did, at Travis AFB, CA, on divers occasions between 1 Sep 07 through o/a 3 Dec 07, w/ intent to deceive, make to the David Grant Medical Center Pharmacy, an official statement, to wit: that the medication he acquired at the Pyxis MedStation was per a physician's order for administration to one particular patient, which statement was false in that the medication he acquired was not ordered by a physician to be administered to the patient, and was then known by Capt Campbell to be so false.	NG	G
II	121			NG	G
			Did, at Travis AFB, CA, on divers occasions b/o/a 1 Sep 07 & o/a 3 Dec 07, steal Vicodin & Percocet tablets, military property, of a value of $500.00 or less, the property of USAF.	NG	G
III	112a			NG	G
			Did, at Travis AFB, CA, on divers occasions b/o/a 1 Sep 07 & o/a 3 Dec 07, wrongfully possess some amount of Percocet, a Sch. II controlled substance, and some amt of Vicodin, a Sch. III controlled substance.	NG	G

Appellant was sentenced to a dismissal. J. App. 18. On 3 June 2009, the convening authority approved the sentence as adjudged. AFCCA affirmed the findings and sentence. *United States v. Campbell*, No. ACM 37460 (A.F. Ct. Crim. App. Jan 31, 2011) (unpub. op.)(J. App. 1-4). The Appellate Records Branch notified the Appellate Defense Division that a copy of the lower court's decision was deposited in the United States mail by first-class certified mail on 2 February 2011, to the last

address provided by Appellant. Appellant filed a Petition for Grant of Review and a Supplement to the Petition for Grant of Review on 28 March 2011. The Government filed a general opposition on 29 March 2011. Review was granted by this Court on 2 June 2011.

Statement of Facts

Appellant worked as a nurse manager in the emergency room (ER) of the David Grant Medical Center, Travis AFB, CA. J. App. 127. As a registered nurse, Appellant had access to a medication dispensing machine maintained by the pharmacy known as a Pyxis Medstation. J. App. 95-96, 107. With this machine, Appellant could quickly obtain medications for ER patients, including narcotics, without first presenting a doctor's order. J. App. 112-126.

The Government's theory was that Appellant obtained Vicodin and Percocet by false pretenses on approximately 28 occasions. J. App. 48-80. Appellant would go to the Pyxis machine and falsely assert that a doctor had ordered Vicodin or Percocet for a particular patient. J. App. 72-74. Through these "false pretenses," he would wrongfully take Vicodin and Percocet from the Pyxis machine. J. App. 74-75. Because these takings were not pursuant to a doctor's authorization or a valid personal prescription, he therefore also wrongfully possessed Vicodin and Percocet on divers occasions. J. App. 76.

Before arraignment, Appellant moved for appropriate relief on the basis of multiplicity and unreasonable multiplication of charges.[1] App. Ex. VIII. The Military Judge determined the charges were not multiplicious but deferred on the question of unreasonable multiplication of charges until after findings. J. App. 30-31. After findings, the Military Judge merged the charges for sentencing purposes noting:

> Based on the way the evidence came out during the court-martial, what evidence was presented, and the findings the members reached, *clearly what we were talking about was one transaction*. The false official statement is kind of part of the larceny, in that, the way to commit the larceny was to make the false official statement, essentially to get the pills out of the Pyxis machine. And then the possession. The only evidence we had of possession would be the possession that would have occurred subsequent to the actual larceny. *I do believe that all three offenses essentially arose out of this same transaction and were part of the same impulse*. And so for that reason, I do believe it would be appropriate to merge the three offenses into one, for purposes of sentencing.

J. App. 34 (emphasis added).

Summary of Argument

The Military Judge correctly concluded that all three charges in this case arose from the same single transaction and impulse and were, therefore, unreasonably multiplied. He erred, however, by failing to consider dismissal of charges as a

[1] Although the motion initially involved only dismissal of Charge III, Appellant expanded the scope of the motion during argument to cover all three charges. J. App. 20-23, 28-29.

possible remedy. Instead, the Military Judge merged the charges for sentencing which may be appropriate in some cases, but the only appropriate remedy in Appellant's case was dismissal of the unreasonably multiplied charges. Only then would Appellant be completely free from the prejudice of overcharging. *See United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006) ("Dismissal of unreasonably multiplied charges is a remedy available to the trial court.")

Argument

THE MILITARY JUDGE ERRED, AFTER FINDING ALL THREE CHARGES AROSE OUT OF THE SAME TRANSACTION AND WERE PART OF THE SAME IMPULSE, BY FAILING TO DISMISS CHARGES I AND CHARGE III.

Standard of Review

Unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004).

Law and Analysis

"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). Unlike multiplicity, which focuses on double jeopardy concerns, unreasonable multiplication of charges "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v.*

Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001). Whether there is an unreasonable multiplication of charges is determined by evaluating the five *Quiroz* factors:

1) Did the accused object at trial?

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 unreasonably increase appellant's punitive exposure?

5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338-39. These factors "must be balanced, with no single factor necessarily governing the result." *Pauling,* 60 M.J. at 95. The appropriate remedy may include dismissal of charges. *Roderick*, 62 M.J. at 433.

The Military Judge Correctly Concluded the Government Unreasonably Multiplied the Charges

In this case, the Military Judge correctly determined that the Government had unreasonably multiplied the charges. J. App. 34. Applying the *Quiroz* factors demonstrates that the charges were unreasonably multiplied: (1) Appellant objected at trial by filing a motion to dismiss; (2) the charges are all aimed at the same criminal act; (3) the number of charges exaggerated Appellant's criminality; (4) the number of charges unreasonably increased Appellant's punitive liability; (5) all of which evidenced

prosecutorial overreaching in drafting the charges. The Military Judge erred, however, by failing to consider dismissal of Charge I and Charge III as a remedy for the reasons set forth below.

Appellant's Criminality was Exaggerated and his Punitive Liability was Unreasonably Increased through Creative Charging

Assuming the allegations are true, Appellant obtained controlled substances by false pretenses, i.e. by falsely representing that Appellant had authorization to obtain Vicodin and Percocet from the Pyxis machine. "The false pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth." *See* Part IV, ¶46c(e) MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). In layman's terms, larceny by false pretenses will always contain (1) a lie, (2) a taking, and (3) possession. By charging the lie separately and the possession separately, the Government charged the same lie twice and the same possession twice, thereby exaggerating Appellant's criminality and unreasonably increasing Appellant's punitive liability.

Appellant's punitive liability based solely on Charge II – the essence of the Government's case (larceny by false pretenses of military property of a value under $500) – was dismissal, forfeiture of all pay and allowances, and one year of confinement. By charging the lie as a false official statement (Charge I) and the possession as wrongful possession of controlled substances

(Charge III), the Government (before trial) increased Appellant's punitive liability from just one year to eleven years of confinement. *See Quiroz*, 55 M.J. at 337 (Discussing the "calculation of maximum imposable punishment through cumulation of maximum punishment for each offense, rather than through use of sentencing guidelines or concurrent sentencing"); *see also* R.C.M. 1003(c)(1)(C)("When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense.").

The Military Judge's Erroneous Remedy still Subjected Appellant to an Unreasonable Increase in Punitive Liability

The Government was ultimately successful in unreasonably increasing Appellant's punitive liability in excess of the maximum punishment authorized solely by Charge II during presentencing when the Military Judge calculated the maximum punishment as dismissal, forfeiture of all pay and allowances, and confinement for five years. J. App. 34-35. After increasing the maximum punishment to five years of confinement through creative drafting, the Government then leveraged the increased maximum sentence during argument by stating that ten months of confinement, versus five years, was a reasonable sentence recommendation:

> The United States is not asking for five years. We agree that is unreasonable. We're asking for a mere fraction of that. We're asking you to consider 10 months confinement.

J. App. 92. By extension, asking for less confinement in light of the greater punitive exposure likely allowed the Government's recommendation for a dismissal to appear reasonable as well. In other words, if the Government made a sentence recommendation of dismissal, total forfeitures, and 10 months of confinement against a backdrop of a maximum authorized punishment of dismissal, total forfeitures, and one year of confinement, the recommendation would have not have been "a mere fraction" of the authorized punishment the Military Judge would have instructed the panel upon. Therefore, the Military Judge's remedy to merge the charges for sentencing purposes did not wholly cure the prejudice Appellant suffered in presentencing as a result of the Government's overreaching.

The Military Judge Erred by Failing to Address the Prejudice of Exaggerating Appellant's Criminality

The Military Judge's remedy did not cure the prejudice of exaggerating Appellant's criminality. The appropriate remedy is dismissal of the unreasonably multiplied charges. *See Roderick*, 62 M.J. at 433; *see also Pauling*, 60 M.J. at 97 (Erdmann, J., dissenting in part)("Three-fold multiplication of Pauling's punitive exposure exaggerated his criminality, unreasonably multiplied his punitive exposure, and constituted overreaching in the charging process."); *see also Pauling* at 97 (Baker, J., dissenting)("I would decide this case on the ground that Appellant

was subjected to an unreasonable multiplication of charges. ... The only thing creative about this case was the Government's charging scheme.").

The Military Judge appears to have failed to even consider dismissal of Charges I and III as a remedy after the panel announced its findings. During the pretrial hearing on the motion to dismiss, the Military Judge stated:

> I do think it would be inappropriate at this time to find them being an unreasonable multiplication of charges for purposes of findings. However, after findings, if there is a finding of guilty to two or more offenses, then I will reconsider. So I'm basically deferring. I'll consider it at that point, based upon what evidence did come forth here at the court-martial, *to determine whether or not they are an unreasonable multiplication of charges for sentencing purposes*. But I do not find that they're multiplicious and I do not find that an appropriate remedy -- I'm not even finding at this point that there is an unreasonable multiplication of charges. But even if there were, I don't think an appropriate remedy at this time would be to dismiss one or two of those offenses, given the different possibilities the members could reach based upon that. But again, I will reconsider that if and when we reach a sentencing portion.

J. App. 31 (emphasis added). The Military Judge, much like the military judge in *Roderick*, failed to consider the possibility of dismissal of charges after the panel announced its findings, despite the benefit of having the plain language of *Roderick*. The Military Judge, when deferring on the unreasonable multiplication of charges motion, stated that dismissal of charges at the beginning of trial was inappropriate, but in the event of findings

of guilty to more than one offense, he will consider whether there is "an unreasonable multiplication of charges for sentencing purposes." Noticeably absent from the Military Judge's statements during the motions hearing and when the Military Judge made his ruling after findings is whether or not he would even consider dismissal post-findings as a possible remedy.

After findings were announced, the Military Judge erred by not considering the possibility of dismissal of Charges I and III and the lower court compounded the error by erroneously concluding that the Military Judge did not abuse his discretion by not finding an unreasonable multiplication of charges for findings – when the Military Judge made no such finding whatsoever.[2] (J. App. at 4). The concept of unreasonable multiplication of charges does not exist "for findings" and "for sentencing" as the lower court implies. Rather, if a military judge determines there was an unreasonable multiplication of charges, *Quiroz* tacitly states that the military judge must then determine an appropriate remedy – dismissal of certain charges or merger for calculating the maximum sentence. *See Quiroz*, 55 M.J. at 339 (The doctrine of multiplicious for sentencing "may well be subsumed under the concept of an unreasonable multiplication of charges when the

[2] The lower court also erroneously asserts that the defense counsel agreed with the Military Judge's remedy. J. App. at 2. The defense counsel (and trial counsel) agreed with the Military Judge's calculation of the maximum punishment based upon the Military Judge's ruling, not with the ruling itself. Jt. App. 35.

military judge or the Court of Criminal Appeals determines that the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings."). What *Quiroz* stated tacitly, *Roderick* stated explicitly: "Dismissal of unreasonably multiplied charges is a remedy available to the trial court." *Roderick*, 62 M.J. at 433. When the Military Judge found there was an unreasonable multiplication of charges, but failed to consider dismissal of Charges I and III as a remedy, the Military Judge committed prejudicial error.

Appellant was and remains Prejudiced by Two Unreasonably Multiplied Federal Convictions

Convictions for additional charges where the charges are unreasonably multiplied are prejudicial. *Roderick*, 62 M.J. at 433; *Ball v. United States*, 470 U.S. 856, 864-65 (1985) ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." (emphasis in original)); *Rutledge v. United States*, 517 U.S. 292, 302 (1996) ("The collateral consequences of a second conviction [even in the case of concurrent sentences] make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.").

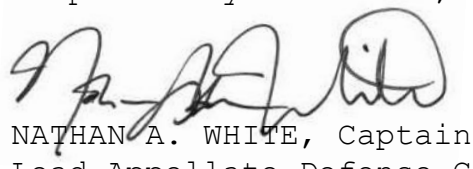
Appellant has three separate federal convictions which jurisdictions will need to evaluate as either felonies or misdemeanors in deciding which rights and privileges Appellant will lose. Additionally, Appellant has three separate federal convictions which his licensing board will have to consider in deciding whether he can ever practice again as a registered nurse.

In short, the Military Judge found there was prosecutorial abuse of discretion when he correctly determined there was an unreasonable multiplication of charges, but erred when he failed to consider dismissal of Charges I and III as a possible remedy. Absent further relief from the findings, Appellant will continue to suffer prejudice in the form of a criminal record that unjustly exaggerates his criminality and, consequently, improperly exposes him to more collateral consequences.

Appellant did not commit three separate crimes for which he justly deserves three federal convictions. This is a case of "unreasonable multiplication of charges by creative drafting." *United States v. Morrison*, 41 M.J. 482, 484 n.3 (C.A.A.F. 1995). Prosecutorial discretion must be held in check. The essence of the Government's case was larceny by false pretenses and to charge both the lie twice and the possession twice, as a matter of law, was an unreasonable multiplication of charges warranting dismissal of Charges I and III.

WHEREFORE, Appellant respectfully requests this Honorable Court dismiss Charges I and III.

Respectfully submitted,



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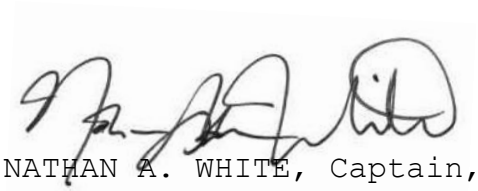

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