9 August 2011

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	
	)	USCA Dkt. No. 11-0403/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:

COMES NOW Appellant, by and through his undersigned counsel, and pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rule of Practice and Procedure replies to the Government's brief.

Appellant never waived the motion to dismiss

The Government incorrectly argues throughout its brief that Appellant "intentionally and voluntarily waived" and "expressly abandoned" his motion to dismiss on the basis of an unreasonable multiplication of charges. *See, e.g.*, Gov't Brief at 4, 5. Furthermore, the Government mistakenly relies on *Gladue* and *Lloyd* in support of their position.

Waiver is the intentional relinquishment or abandonment of a known right. *See United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008); *see also United States v. Olano*, 507 U.S. 725, 733 (1993), *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The Supreme Court in *Olano* elaborated on the circumstances

surrounding waiver: "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depends on the right at stake." *Olano*, 507 U.S. at 733. This Court need not even undertake an *Olano* inquiry as to whether waiver exists because the record is devoid of anything that would demonstrate Appellant expressly waived his right to appellate review of his motion to dismiss on appeal.

Prior to the military judge's ruling, trial defense counsel never withdrew the motion to dismiss, nor did trial defense counsel state anything that could be construed as withdrawing the motion to dismiss. During presentencing, trial defense counsel continued to advocate that all charges arose out of the same transaction and that the false official statement and wrongful possession charges were essentially various aspects of the larceny by false pretenses charge. J. App. 33-34. Trial defense counsel continued to advocate that the allegations consisted of a single impulse or intent and continued to advocate for a determination that this single transaction at a single point in time warranted "such a determination"; i.e., a finding that there was an unreasonable multiplication of charges and that dismissal was the appropriate remedy per *Quiroz* and *Roderick*. *Id.* Trial defense counsel's presentencing argument

was consistent with her initial pretrial motions argument; thus, nothing in the record could be construed as trial defense counsel or Appellant waiving or withdrawing the motion to dismiss Charges I and III on the basis of an unreasonable multiplication of charges.

The Government distorts the record when referencing the military judge's comment about Appellant "amending" his position regarding the motion to dismiss. Gov't Brief at 6, (citing J. App. 32). The Government incorrectly implies that trial defense counsel was abandoning the motion to dismiss when, in actuality, the military judge's reference was to trial defense counsel expanding the scope of the motion to dismiss beyond the contents of the written motion to dismiss. Trial defense counsel stated,

> "The Government seems to be more appropriately arguing that Captain Campbell's alleged actions, which [consisted of] using the Pyxis machine to steal prescription medications, are larcenies by false pretense. If that's the case, the government (sic) would ask that Charge II (sic) and its specification be dismissed for the additional reason that it's multiplicious with the larceny charge."[1] Counsel then stated this should be added to the motion to dismiss. J. App. 20-21.

Lastly, the Government mistakenly relies on *Gladue* and *Lloyd* in support of its position. *See United States v. Gladue*,

[1] The term "Government" was either a speaking error or error in transcription. The false official statement charge was originally charge II before dismissal of the original charge I (see J. App. 5); therefore Appellant asserts that trial defense counsel was stating that the false official statement charge should be dismissed in addition to dismissal of the possession charge, which was requested in the written motion.

67 M.J. 311 (C.A.A.F. 2009) citing *United States v. Lloyd*, 46 M.J. 19 (C.A.A.F. 1997). First and foremost, both *Gladue* and *Lloyd* are different from this case because they involve appellants who entered unconditional guilty pleas to all charges and specifications. In this case, Appellant raised unreasonable multiplication of charges at trial and contested all charges. Nothing in *Lloyd* or *Gladue* support the Government's contention that Appellant somehow expressly and voluntarily waived appellate review of the military judge's ruling on the motion, or as stated above, that Appellant somehow abandoned this issue for appellate review by the manner in which trial defense counsel re-argued Appellant's position after findings. No colloquy took place between the military judge and Appellant as in *Gladue*, and no conversation regarding waiver or withdrawal of the motion to dismiss occurred between the military judge and trial defense counsel. Appellant raised the issue at trial, Appellant argued the issue at trial, the military judge made a ruling, and the issue was preserved for appeal. The Government's waiver argument is not supported by the facts of this case or the law relevant to this case.

The Military Judge found unreasonable multiplication of charges

The Government incorrectly asserts that there was no ruling of unreasonable multiplication of charges. Gov't Brief at 16. The military judge stated, "I do believe that all three offenses

essentially arose out of this same transaction and were part of the same impulse." J. App. 34. Thus, the military judge found that the charges were unreasonably multiplied. Once again, though, the military judge erred by failing to consider dismissal as an appropriate remedy although findings had been announced. When the military judge initially deferred his ruling, he stated:

> "I do think it would be inappropriate at this time to find them being an unreasonable multiplication of charges for purposes of finding. 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*" (emphasis added). J. App. 31.

Based upon this last sentence, the military judge erroneously foreclosed the possibility of dismissal as a remedy for unreasonable multiplication of charges once findings had been announced. If the charges are unreasonably multiplied, the question then becomes what the appropriate remedy is – dismissal of charges or merger in sentencing. When the military judge stated, "I do believe that all three offenses essentially arose out of this same transaction and were part of the same impulse," the military judge correctly made a finding that the charges were unreasonably multiplied. However, the military judge erred when he failed to consider dismissal of Charges I and III as the

appropriate remedy and only applied the remedy of merging the charges as one for sentencing purposes. Under *Roderick*, the military judge can dismiss the charges and should have done so even after the findings were announced.

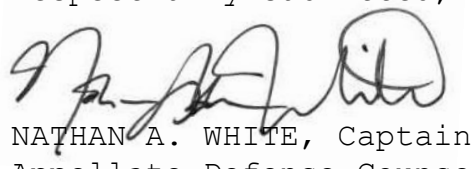
Lastly, the Government incorrectly argues that the five *Quiroz* factors weigh against providing Appellant relief for the unreasonably multiplied charges. All five *Quiroz* factors favor Appellant. For the first *Quiroz* factor, Appellant raised the issue at trial and did not waive or abandon the issue at any point, despite the Government's argument to the contrary. For the second *Quiroz* factor, the military judge correctly found that all three offenses arose out of one transaction and were part of the same impulse. The Government's reliance on *United States v. Bulger*, 41 M.J. 194 (C.M.A. 1994), is misplaced. Bulger never raised an unreasonable multiplication of charges issue at trial or on appeal. Moreover, Bulger lied about his marital status when he filled out a form and committed larceny when he received dependent allowances *at a later point* and *did not* either (1) provide support for his spouse or (2) return the allowances to the United States. Since the larceny offense was not completed until Bulger's later omissions, the false official statement and larceny offenses did not arise from the same transaction and were not part of the same impulse.

For the third and fourth *Quiroz* factors, the charges

exaggerated Appellant's criminality and unreasonably increased Appellant's punitive exposure. The Government attempts to argue that Appellant is looking for a windfall in dismissing the two charges that carried a greater maximum punishment. In actuality, the larceny by false pretenses charge *reasonably* encapsulates Appellant's criminal misconduct, whereas the prosecution was unreasonably exaggerating Appellant's criminality by adding two more charges arising from the same transaction/impulse that unreasonably increased Appellant's punitive exposure. For the fifth *Quiroz* factor, the prosecutors overreached through creative drafting of the charges by taking the lie and the post-taking possession of the larceny by false pretenses and using them to charge Appellant with three crimes.

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

Respectfully submitted,



NATHAN A. WHITE, Captain, USAF
Appellate Defense Counsel
USCAAF Bar No. 33649
Appellate Defense Division
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1100
JB Andrews, MD 20762
(240) 612-4770