

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,) REPLY BRIEF ON BEHALF
 Appellee) OF APPELLANT
))
 v.) Crim. App. Dkt. No. 20091092
))
) USCA Dkt. No. 12-0486/AR
Specialist (E-4))
Jeremy C. Clifton,)
United States Army,)
 Appellant)

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

Issue Presented

**WHETHER THE ARMY COURT OF CRIMINAL APPEALS
ERRED WHEN IT DETERMINED THE MILITARY JUDGE
COMMITTED ERROR BY DENYING A PANEL MEMBER'S
REQUEST TO CALL TWO ADDITIONAL WITNESSES FOR
QUESTIONING, BUT FOUND THIS ERROR TO BE
HARMLESS.**

Statement of Facts

On April 23, 2012, The Army Court of Criminal Appeals (ACCA) issued a decision in appellant's case. ACCA determined the military judge abused his discretion when he summarily denied the panel member's request to recall two additional witnesses. (JA 1). The Army Court held, "[w]hile affording counsel an opportunity to object . . . it is not clearly apparent from the record that the military judge considered the first three *Lampani* factors before disapproving MSG H's request. As such, we find the military judge abused his discretion." *Id.*

In determining the military judge did not abuse his discretion, the Army Court specifically noted that, "[p]ursuant to our superior court's decision in *Lampani* and this court's decision in *Rios*, the absence of a defense objection to the military judge's actions does not equate to waiver." (JA 3). However, ACCA ultimately found that, although the military judge erred in his determination, the error did not have "a substantial influence on the findings" and affirmed the findings and sentence. (JA 1-7).

On May 8, 2012, appellant personally petitioned this Court for a grant of review of the ACCA's findings in his case. This Court granted appellant's petition on August 6, 2012. The government did not certify any issues in appellant's case.

On September 5, 2012, appellant submitted his final brief to this Honorable Court. On October 5, 2012, over four months after the ACCA rendered its decision in appellant's case, appellee submitted its final brief to this Honorable Court. As an initial matter, appellee argued, "[u]nlike in *Lampani*, where appellant was silent, and the court declined to equate this silence with a waiver of appellant's rights; here appellant affirmatively agreed with the military judge's ruling and replied no objection." Thus, appellant waived any claim on appeal. (Appellee Brief at 6) (internal citations omitted). Appellee did not certify this issue to this Honorable Court.

The remainder of appellee's brief addressed the granted issue in this case. *Id.*

Law and Argument

"When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case." *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006). The law-of-the-case doctrine involves the exercise of appellate discretion rather than binding legal doctrine. *Id.* This Court has previously noted:

[T]he law-of-the-case doctrine does not preclude this Court from examining the legal ruling of a subordinate court in a case where the Judge Advocate General has not certified the issue. However, we are reluctant to exercise this power and, as a rule, reserve it for those cases where the lower court's decision is clearly erroneous and would work a manifest injustice if the parties were bound by it.

United States v. Doss, 57 M.J. 182, 185 (C.A.A.F.2002)

(citations and quotation marks omitted).

Here, the government did not appeal the lower court's ruling that waiver did not exist in appellant's case. Further, the government has not established in the present appeal that "the lower court's decision [as it relates to waiver] is clearly erroneous and would work a manifest injustice." *Id.* (citations and quotation marks omitted). Thus, it is appropriate, in this case, to apply the law-of-the-case doctrine.

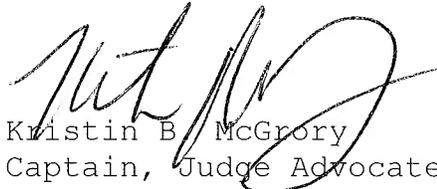
With respect to the first prong of *Doss*, the ruling of the court below, as it related to waiver, was not clearly erroneous. As noted in *Lampani*, the failure of defense counsel to object to the military judge's ruling does not equate to waiver. See *United States v. Lampani*, 14 M.J. 22, 27 (C.M.A. 1982) ("While we do not equate this silence with a waiver of appellant's right to have the court correctly instructed by the judge, we infer that-consistent with his entire strategy during the trial-the defense counsel was relying on weaknesses in the prosecution's case."). Instead, the *Lampani* court held that trial counsel's failure to object could be considered by the military judge when exercising his discretion in granting or denying a panel member's request for additional evidence. See *United States v. Carr*, 40 M.J. 102, 104 (C.M.A. 1994) (citing *Lampani*, at 26). Ultimately finding that appellant did not waive his claim to error, ACCA specifically cited to this Court's holding in *Lampani* and appropriately found that defense counsel's statement of "no objection" was just one of several factors which should have been considered by the military judge. (JA 3). Thus, ACCA's finding on waiver was not clearly erroneous.

Additionally, the government has failed to show the lower court's ruling on waiver would "work a manifest injustice if the parties were bound by it." *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). "That standard is difficult to achieve: a

finding of manifest injustice requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong." *Id.* at 12 (citing *Ellis v. United States*, 313 F.3d 636, 648-49 (1st Cir. 2002)); see also *United States v. Moran*, 393 F.3d 1, 7-8 (1st Cir. 2004) (describing the burden of establishing manifest injustice as "a steep uphill climb"). Although, in its brief, the government argues that waiver applies in appellant's case, it has not carried its burden of establishing that adhering to ACCA's finding would create a manifest injustice. In finding that waiver did not exist in appellant's case, ACCA specifically cited to this Court's holding in *Lampani* and appropriately found that defense counsel's lack of objection did not constitute waiver. Instead, ACCA considered the lack of objection as one of several factors in determining if the military judge abused his discretion in appellant's case. This application is consistent with this Court's holding in *Lampani* and applying such a rule does not create a manifest injustice.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside and dismiss the Specification of Charge II and remand appellant's case for a sentence rehearing.



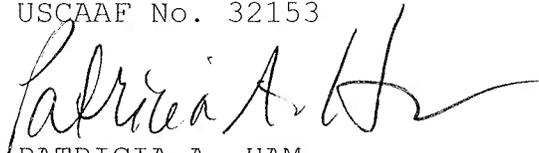
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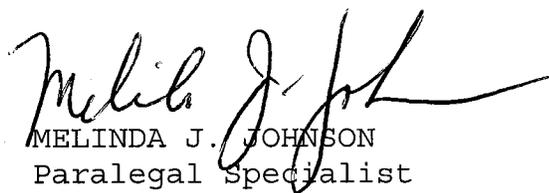
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Clifton, Crim. App. Dkt. No. 20091092, Dkt. No. 12-0486/AR, was delivered to the Court and Government Appellate Division on October 22, 2012.


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