IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant, v. Staff Sergeant (E-5), **DANIEL H. CHIN,** United States Air Force, Appellee	) UNITED STATES ARMY GOVERNMENT) APPELLATE DIVISION BRIEF OF AMICUS) CURIAE IN SUPPORT OF APPELLANT))) Crim. App. Dkt. No. 38452)) USCA Misc. Dkt. No. 15-0749/AF))

JIHAN WALKER
Captain, U.S. Army
Branch Chief, Government
Appellate Division
United States Army Legal
Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0783
jihan.e.walker.mil@mail.mil
U.S.C.A.A.F. Bar No. 36340

A.G. COURIE III
Major, U.S. Army
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36422

MARK H. SYDENHAM
Colonel, U.S. Army
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 34432

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Certified Issue

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ABUSED ITS DISCRETION AND COMMITTED LEGAL ERROR BY FINDING THAT UNREASONABLE MULTIPLICATION OF CHARGES WAS NOT WAIVED, IN DIRECT CONTRADICTION OF THIS COURT'S BINDING PRECEDENT IN UNITED STATES V. GLADUE, 67 M.J. 311 (C.A.A.F. 2009).

Interest of Amicus Curiae

The United States Army Government Appellate Division (GAD) represents the United States in court-martial appeals before the United States Army Court of Criminal Appeals (ACCA) and this court. Accordingly, the undersigned counsel is authorized to file an amicus brief in support of appellant pursuant to Rule 26(a) of this court's Rules of Practice and Procedure.

In the instant case, the AFCCA impermissibly expanded the scope of its authority under Article 66, Uniform Code of Military Justice, [hereinafter UCMJ], 10 U.S.C. § 866 (2012), in granting equitable relief for an issue that appellee affirmatively waived. In support of this impermissible expansion, AFCCA improperly relied upon unpublished opinions by ACCA. As a result, Army GAD has an interest in providing analysis to this court so that any precedent resulting from this case properly limits the scope of Article 66(c), UCMJ, to legal standards—not equitable standards—consistent with this court's precedent.

Statement of Statutory Jurisdiction

Since AFCCA reviewed this case pursuant to Article 66, UCMJ,[1] this court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A military judge sitting as general court-martial, convicted appellee, pursuant to his pleas, of six specifications of failure to obey a general order or regulation, seven specifications of dereliction of duty, one specification of larceny, and five specifications of unauthorized possession of documents relating to the national defense and failure to deliver these documents to the officer or employee of the United States entitled to receive them in violation of Articles 92, 121, and 134, UCMJ.[3] The military judge sentenced appellee to reduction to the grade of E-2, total forfeiture of all pay and allowances, confinement for 12 months, and to be discharged with a bad-conduct discharge.[4] The convening authority approved only 10 months confinement and approved the remainder of the adjudged findings and sentence.[5] On 12 June 2015, AFCCA dismissed Specifications 2, 7, and 11 of Charge I as unreasonable multiplication of the charges (UMC) and affirmed the remaining

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[1] JA 001.
[2] 10 U.S.C. § 867(a)(3).
[3] JA 048, 155; 10 U.S.C. §§ 892, 921, and 934.
[4] JA 176.
[5] JA 206.

findings and sentence.[6] The Judge Advocate General, United States Air Force, certified the issue before this court and appellant filed its brief on 10 September 2015.

Statement of Facts

Appellee pled guilty pursuant to a pretrial agreement and waived all waviable motions.[7] The military judge and appellee's defense counsel explained the consequences of this provision and the entire pretrial agreement to appellee.[8] Appellee's defense counsel indicated that absent the provision, the defense would have raised a "multiplicity motion both [on] findings and sentence," and AFCCA found that the defense would also have raised UMC.[9] The military judge addressed these UMC related issues with appellee.[10] Appellee indicated to the military judge that he understood "those agreements and their full effect."[11] He indicated another three times on the record that he "fully underst[ood] all of the terms of the pretrial agreement and how they affect [his] case."[12]

On appeal, appellee did not raise UMC but instead challenged the providence of his guilty plea to larceny.[13] The

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[6] JA 016
[7] JA 048, 185-90.
[8] JA 142-52. Appellee told the military judge that he had "enough time to discuss [the pretrial] agreement with [his] defense counsel." JA 145.
[9] JA 005, 150.
[10] JA 150.
[11] JA 150.
[12] JA 145, 151-52.
[13] JA 002.

AFCCA found that appellee affirmatively waived his potential UMC claim but nevertheless dismissed Specifications 2, 7, and 11 of Charge I.[14]

Summary of Argument

The AFCCA erred in sua sponte addressing UMC because appellee affirmatively waived the issue, thereby extinguishing it on appeal. By disregarding this court's binding legal precedent on the effect of an affirmative waiver, AFCCA also erred by granting appellee relief based on equitable grounds. This court should not permit AFCCA's improper expansion of its authority under Article 66(c), UCMJ, in granting relief on equitable grounds because the unpredictability of such decisions will deter future plea bargain negotiations.

Standard of Review

This case involves the scope and meaning of Article 66(c), UCMJ, which is "a matter of statutory interpretation, a question of law reviewed de novo."[15]

Argument

[14] JA 005-06, 016.
[15] *United States v. Nerad*, 69 M.J. 138, 141-42 (C.A.A.F. 2010).

A. AFCCA erred in sua sponte addressing UMC because appellee affirmatively waived the issue, thereby extinguishing it on appeal.

Prior to addressing a substantive issue on appeal, a court must make a threshold determination as to whether the accused forfeited or waived the issue.[16] "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law."[17] "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' . . . ."[18] Instead, if an accused forfeits an issue, courts address the substantive issue under a plain error analysis.[19] By contrast, under this court's precedent in *United States v. Gladue*, when an accused "intentionally waives a known right at trial, it is extinguished and may not be raised on appeal."[20] Indeed, under Article 61, UCMJ, an accused may waive

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[16] *United States v. Campos*, 67 M.J. 330, 331 (C.A.A.F. 2009)("In reviewing this case we have determined that there is a threshold issue as to whether [the accused] expressly waived [the issue] or merely forfeited the issue."); *see also United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008)("The facts surrounding the admission of the laboratory reports raise a threshold issue as to whether [the accused] waived the [issue] . . . or merely forfeited the issue . . . .").

[17] *Campos*, 67 M.J. at 332 (citing *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)); *see also, United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'")(quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

[18] *Harcrow*, 66 M.J. at 156 (quoting *Olano*, 507 U.S. at 732-33).

[19] *Gladue*, 67 M.J. at 313.

[20] *Id.* (citing *Olano*, 507 U.S. at 733-34). Additionally, an unconditional guilty plea "generally waives all defects which are neither jurisdictional nor a deprivation of due process of law." *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009); *see also, United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010)("An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings.").

appellate review of his entire case, thereby depriving a Court of Criminal Appeals (CCA) from exercising any reviewing powers under Article 66(c), UCMJ.[21] If an accused can prevent Article 66(c), UCMJ, review of his entire case, an accused may also prevent Article 66(c), UCMJ, review on limited issues such as UMC.

Military courts consistently fail to "distinguish between the terms 'waiver' and 'forfeiture.'"[22] For example, the court in *United States v. Claxton* (decided 18 years prior to *Gladue*) fell into this forfeiture/waiver trap. In *Claxton*, the defense did not object to a commander's improper testimony concerning the accused's rehabilitative potential.[23] Although the court referred to the defense's oversight as "waiver"[24] the lack of objection constituted "forfeiture."[25]

Likewise, *United States v. Quiroz* (decided 8 years prior to *Gladue*) involved forfeiture as opposed to waiver. In *Quiroz*, the accused failed to raise the issue of UMC at trial.[26] Indeed, the portion of this court's opinion addressing the defense's

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[21] UCMJ art. 61(a), (c).
[22] *Gladue*, 67 M.J. at 313.
[23] *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991).
[24] *Id.* ("Such lack of objection can amount to waiver.").
[25] In *Harcrow*, this court explained that its prior decisions "more often addresses 'waiver' in the context of plain error review" and clarified that this "more lenient version of waiver is labeled 'forfeiture'" under the terminology used by the Supreme Court in *Olano*. *Harcrow*, 66 M.J. at 157, n.1.
[26] *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

oversight was entitled "FORFEITURE."[27] The Navy-Marine Corps Court of Criminal Appeals concluded that it would apply waiver if "an accused affirmatively, knowingly, and voluntarily relinquishes the issue at trial."[28] Specifically, the lower court stated,

> Given our broad and unique authority bestowed by Congress in Article 66(c), UCMJ, to affirm only such findings and sentence as we find correct in law and fact and determine, on the basis of the entire record, should be approved, we believe that we are never **required** to apply forfeiture. . . . However, if an accused affirmatively, knowingly, and voluntarily relinquishes the issue at trial, we may apply waiver.

Id. This court upheld this approach but conflated waiver and forfeiture in the process.[29]

Nevertheless, this court resolved the confusion regarding waiver and forfeiture in *Gladue*. In *Gladue*, the accused pled guilty and entered into a pretrial agreement that contained a provision to "waive all waivable" motions.[30] Although the military judge did not directly address UMC, the military judge conducted a detailed, careful, and searching examination of the "waive all waivable" provision to ensure the accused understood

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[27] *Id.*
[28] *United States v. Quiroz*, 53 M.J. 600, 606 (N.M. Ct. Crim. App. 2000).
[29] *Quiroz*, 55 M.J. at 338. This court stated, "the court below was well within its authority to determine the circumstances, if any, under which it would apply waiver or forfeiture to the type of error at issue in the present case." *Id.*
[30] *Gladue*, 67 M.J. at 312-13.

its effect.[31] The accused explicitly indicated his understanding that he gave up the right to make any motions.[32] This court held that the accused "waived, rather than forfeited" the UMC issue, thereby extinguishing it on appeal.[33]

Here, similar to the facts in *Gladue*, appellee pled guilty and waived any right to make any motions such as a claim for UMC by agreeing to a "waive all waivable" provision in his pretrial agreement.[34] Indeed, this case contains more facts to support an affirmative and knowing waiver than *Gladue* because the military judge addressed UMC related issues with appellee.[35] Moreover, the military judge conducted a detailed, careful, and searching examination of this provision and the entire pretrial agreement with appellee.[36] After discussing the "waive all waivable" provision, the military judge asked appellee, "Do you understand those agreements and their full effect?"[37] Appellee stated, "Yes, Your Honor."[38] In fact, appellee indicated three times on the record that he "fully underst[ood] all of the terms of the

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[31] *Id.* at 312, 314.
[32] *Id.* at 314.
[33] *Id.*
[34] JA 185.
[35] JA 150. The military judge inquired into what motions the defense would have raised absent the provision and the defense stated "multiplicity motion both [on] findings and sentencing." JA 150. Although the defense used "multiplicity" terminology, AFCCA found that the defense would have raised UMC in addition to multiplicity. JA 005. The military judge specifically found that the multiplicity motions may be waived as part of the pretrial agreement. JA 005, 150.
[36] JA 145-52.
[37] JA 150.
[38] JA 150.

pretrial agreement and how they affect [his] case" and the military judge specifically found that appellee "fully" understood his pretrial agreement.[39] Finally, AFCCA found that appellee affirmatively waived his potential UMC claim.[40] Given appellee's intentional waiver of a known right, the UMC issue was extinguished and AFCCA erred by sua sponte raising it on appeal.[41]

B. By disregarding this court's binding legal precedent, AFCCA erred and granted appellee relief based on equitable grounds.

The CCA's authority under Article 66(c), UCMJ, "must be exercised in the context of legal - - not equitable - - standards, subject to appellate review."[42] Accordingly, a CCA "may not disapprove a finding based on solely equitable grounds."[43] This court established the applicable legal standard for an affirmative waiver in *Gladue*. As discussed *supra*, an affirmative waiver extinguishes an issue on appeal. In reaching this conclusion, this court made no distinction between an appellate court's authority under Article 66, UCMJ, or Article 67, UCMJ.[44] When an accused affirmatively waives an issue and extinguishes it on appeal, by definition, there is no legal

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[39] JA 145,151-52.
[40] JA 005-06.
[41] Of significance, appellee did not raise UMC on appeal but instead challenged the providence of his guilty plea to larceny. JA 002.
[42] *Nerad*, 69 M.J. at 140.
[43] *Id.* at 143, n. 4.
[44] *Gladue*, 67 M.J. at 313-14.

error to correct on appeal.[45] Since there is no legal right to vindicate, a dismissal of a specification is a grant of equitable relief, which is the sole province of the convening authority.[46]

In this case, AFCCA properly exercised its Article 66(c), UCMJ, powers to evaluate the circumstances of appellee's waiver to ensure it was knowing and voluntary. However, upon finding an affirmative waiver, AFCCA erred by substantively addressing this foreclosed issue.[47] The court stated that "[w]e recognize this is a significant departure from our consistent practice of declining to review, on appeal, issues that were waived at trial" and explained that "the totality of the circumstances presented here convinces us that the charging scheme grossly exaggerates the appellant's criminality."[48] By citing to the third factor from the five-factor framework established in *Quiroz*,[49] the court engaged in bootstrapping. The court applied a *Quiroz* factor to rationalize applying all of the *Quiroz* factors to an extinguished issue.

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[45] *See Campos*, 67 M.J. 331 ("We conclude the right to challenge the admissibility of the stipulation of expected testimony was waived at trial which leaves us with *no error to correct* on appeal.")(emphasis added).
[46] *Nerad*, 69 M.J. at 148 (citing UCMJ art. 60(c)).
[47] JA 006-14.
[48] JA 006.
[49] *Quiroz*, 55 M.J. at 338-39. This court adopted a five-factor framework for determining whether multiple findings of guilt constitute UMC and the third factor considers "whether the number of specifications 'misrepresent[s] or exaggerate[s] the [accused's] criminality.'" *Id.*

Moreover, in doing so, AFCCA disregarded this court's binding precedent and sua sponte granted appellee relief when there was no legal error to correct. Under *stare decisis*, AFCCA was bound to follow this court's precedent in *Gladue* or distinguish it.[50]

Additionally, AFCCA improperly relied upon unpublished cases decided by the ACCA involving "waive all waivable" provisions, relying upon dicta from ACCA's unpublished opinion in *United States v. Rivera*.[51] In *Rivera*, ACCA noted that "Notwithstanding *Gladue*, under Article 66(c), UCMJ, this court may affirm only such findings of guilty and sentence as we 'find correct in law and fact and determine, on the basis of the entire record, should be approved.'"[52] To the extent that this dicta appears to assert a CCA's authority to address UMC under Article 66(c), UCMJ, despite an affirmative waiver, ACCA's reliance upon *Quiroz* was misplaced because that case involved forfeiture as discussed *supra*.[53]

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[50] *United States v. Allbery*, 44 M.J. 226, 227-28 (C.A.A.F. 1996)(citations omitted).
[51] JA 006. AFCCA also improperly relied upon *Claxton*, (JA 006), a case involving forfeiture as discussed *supra* and *United States v. Cole*, (JA 006), a case that does not involve forfeiture or waiver. In *Cole*, the defense counsel properly objected to the improper testimony at issue, thereby preserving the substantive issue for appeal. *United States v. Cole*, 31 M.J. 270, 270 (C.M.A. 1990).
[52] *United States v. Rivera*, ARMY 20130397, 2014 CCA LEXIS 893, at *3 (Army Ct. Crim. App. 2014)(quoting *Quiroz*, 55 M.J. at 338).
[53] *Quiroz*, 55 M.J. at 338.

Moreover, despite this dicta, ACCA has consistently exercised restraint in practice. For example, in *Rivera*, the court held that the appellant waived the UMC issue and granted him no relief.[54] Likewise, upon finding a knowing and voluntary waiver in *United States v. You*, ACCA again granted no relief.[55] In *United States v. Martinez*, ACCA only granted the accused relief after properly distinguishing *Gladue*.[56] Although the pretrial agreement in *Martinez* contained the "waive all waivable" provision, the court found the waiver was not knowing and voluntary, stating that the discussion between the military judge and the accused was "sufficiently ambiguous as to the extent of the waiver to negate what might otherwise be a knowing, intelligent, and voluntary waiver . . . ."[57]

C. This court should not permit the CCA's to grant relief on equitable grounds because the unpredictability of such decisions will deter future plea bargain negotiations.

The Supreme Court has repeatedly held that "the government 'may encourage a guilty plea by offering substantial benefits in return for the plea.'"[58] "[I]f the prosecutor is interested in 'buying' the reliability assurance that accompanies a waiver

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[54] *Rivera*, 2014 CCA Lexis 893, at *3.
[55] *United States v. You*, ARMY 20140039, 2015 CCA LEXIS 271, at *4 (Army Ct. Crim. App. 2015). ACCA also reasoned that the terms of the accused's pretrial agreement inured to his benefit. *Id.*
[56] *United States v. Martinez*, ARMY 20120042, 2013 CCA LEXIS 997, at *3 (Army Ct. Crim. App. 2013)("[W]e find this case sufficiently distinguishable from *Gladue* to permit resolution of the matter in appellant's favor despite the waiver term at hand.").
[57] *Id.*
[58] *United States v. Mezzanatto*, 513 U.S. 196, 209 (1995).

agreement, then precluding waiver can only stifle the market for plea bargains."[59] The court reasoned that an accused "can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying."[60]

If this court permits CCA's to selectively upset the parties' reasonable expectation that the right to assert UMC is extinguished by an affirmative waiver, convening authorities will be deprived of the certainty they seek in waiver clauses. Indeed, "A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."[61] The affirmative waiver at issue in this case implicated a protection of a lesser magnitude.[62] If CCAs are permitted to set aside knowing, voluntary, affirmative waivers, convening authorities may forgo pretrial agreements altogether and proceed to trial. At a minimum, the value of an accused's offer to waive a substantive issue will decrease and convening authorities may rationally pursue a more severe possible sentence.

For example, AFCCA's action in this case conferred a windfall on appellee that will deter convening authorities in future plea negotiations. Despite appellee's affirmative waiver

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[59] *Id.* at 208.
[60] *Id.*
[61] *Gladue*, 67 M.J. at 314.
[62] *Id.* ("The caution against unreasonable multiplication of charges is not a constitutional imperative, but rather a presidential policy.").

on UMC and continued abandonment of that known right on appeal,[63] AFCCA conferred a windfall on appellee by dismissing three specifications.[64] The terms of appellee's pretrial agreement, including his waiver of UMC, inured to appellee's benefit. In exchange for pleading guilty, appellee received two benefits by limiting: the length of confinement and the type of punitive discharge he could receive.[65] Specifically, the convening authority agreed to approve no confinement in excess of 24 months and no punitive discharge more severe than a bad-conduct discharge.[66] By pleading guilty and waiving a potential UMC motion, appellee reduced his punitive exposure by 64 years and 3 months.[67] Without the reliability assurance of appellee's waiver, the convening authority would have pursued a higher sentence (at a minimum) and the benefits appellee reaped from his pretrial agreement would certainly have changed to his detriment.

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[63] Appellee did not raise this issue on appeal; rather, AFCCA sua sponte reignited it on appeal. JA 002.
[64] JA 016.
[65] JA 189.
[66] JA 189.
[67] JA 033-37. The maximum length of confinement in this case was 66 years and three months, which was limited to 24 months pursuant to the pretrial agreement. JA 102, 189.

Conclusion

The AFCCA erred in sua sponte addressing UMC because appellee's voluntary, knowing, and affirmative waiver extinguished the issue on appeal. By disregarding this court's binding legal precedent on the effect this affirmative waiver, AFCCA granted appellee equitable relief and impermissibly expanded the scope of Article 66(c), UMCJ. Given the unpredictability of granting relief based on equity instead of legal standards, this improper expansion will severely undermine the plea bargain negotiation process.

WHEREFORE, the United States Army Government Appellate Division respectfully requests this Honorable Court reverse the decision of the United States Air Force Court of Criminal Appeals.

JIHAN WALKER
Captain, JA
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36340

A.G. COURIE III
Major, JA
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36422

MARK H. SYDENHAM
Colonel, JA
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 34432

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was electronically filed with the Court to (efiling@armfor.uscourts.gov) on 21 September 2015 and contemporaneously served electronically on the United States Air Force Government Appellate Division and the United States Air Force Defense Appellate Division.

ANGELA RIDDICK
Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060-5546
(703) 693-0823