22 November 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant,* v. Staff Sergeant (E-5) DANIEL H. CHIN, USAF *Appellee.*	)))))))))	APPELLANT'S BRIEF IN SUPPORT OF THE AMENDED ISSUE CERTIFIED Crim. App. No. 38452 USCA Dkt. No. 15-0749/AF

APPELLANT'S BRIEF IN SUPPORT OF THE AMENDED ISSUE CERTIFIED

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INDEX

TABLE OF AUTHORITIES

CASES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

STATUTES

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

ISSUE PRESENTED

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) 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).

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Honorable Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

On 14 June 2013, Appellee was tried by a general court-martial composed of a military judge sitting alone. (J.A. at 38-39.) Appellee was convicted, in accordance with his pleas and pursuant to a pretrial agreement, of three specifications of failure to obey a lawful general regulation, in violation of

Article 92, UCMJ; three specifications of failure to obey a lawful order, in violation of Article 92, UCMJ; negligent dereliction of duty, in violation of Article 92, UCMJ; six specifications of willful dereliction of duty, in violation of Article 92, UCMJ; larceny of military property of a value less than $500, in violation of Article 121, UCMJ; and five specifications of violating Title 18, United States Code, Section 793(e), in violation of Article 134, UCMJ. (J.A. at 203-06.) The military judge sentenced Appellee to be reduced to the grade of E-2, forfeiture of all pay and allowances, 12 months confinement, and a bad conduct discharge. (J.A. at 176.) The convening authority approved only 10 months of confinement and approved the remainder of the findings and sentence as adjudged. (J.A. at 206.)

On 7 April 2015, AFCCA issued an unpublished decision, in which they held, relevant to the issue presented:

> Because of the unreasonable multiplication of charges so plainly presented in this case, we elect to exercise our plenary, de novo power of review. We differentiate this case from those in which we have found waiver, in that the totality of the circumstances presented convinces us that several of the charges and specifications were clearly charged in the alternative due to potential exigencies of proof and grossly exaggerate the appellant's criminality.

United States v. Chin, ACM 38452 (A.F. Ct. Crim. App. 7 April 2015) (unpub. op.) (J.A. at 21.) Subsequent to the 7 April 2015

opinion, AFCCA granted the United States' motion for reconsideration. (J.A. at 2.) On 12 June 2015, AFCCA issued an unpublished reconsideration opinion, in which AFCCA again declined to apply waiver. United States v. Chin, ACM 38452 (recon) (A.F. Ct. Crim. App. 12 June 2015) (unpub. op.) (J.A. at 1-16.) In again declining to apply waiver, despite the pretrial agreement and waive all waivable motions provision, AFCCA clarified its earlier opinion:

> During our initial review of this case, we dismissed one specification of failure to obey a lawful general order or regulation and two specifications of dereliction of duty, and merged for sentencing the five specifications charged under Article 134, UCMJ. In dismissing the specifications, we reasoned, in part, that those three specifications were charged in the alternative for exigencies of proof. The government timely moves this court to reconsider our opinion, arguing: (1) this court erroneously found the specifications were charged in the alternative for exigencies of proof, and (2) our superior court's decision in *Gladue* prohibited this court from finding unreasonable multiplication of charges where the issue had been waived at trial. *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009). We granted reconsideration to make clear that our analysis did not turn on whether the offenses were in fact charged in the alternative, but rather on the peculiarity of the charging decisions for which we find no reasonable explanation.

(J.A. at 4-5.) Finding that Article 66(c) empowers the service courts to consider claims of multiplicity or unreasonable multiplication of charges even when those claims have been waived, AFCCA dismissed Specifications 2, 7, and 11 of Charge I

and merged Specifications 8 and 9 of Charge I, as well as Specifications 1, 2, 3, 4, and 5 of Charge II for sentencing. (J.A. at 6-14.) AFCCA reassessed Appellee's sentence to the same sentence that was approved by the convening authority. (J.A. at 16.) The Judge Advocate General, United States Air Force, certified the following issue under Article 67(a)(2), UCMJ:

> **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).**

On 20 November 2015, The Judge Advocate General, United States Air Force, filed an amended certificate for review with this Court pursuant to Rule 22 of this Court's Rules of Practice and Procedure, on the following issue:

> **WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) 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).**

STATEMENT OF FACTS

The facts necessary to the disposition of the issue are set forth in the argument below.

SUMMARY OF ARGUMENT

AFCCA's holding finding that unreasonable multiplication of

charges was not waived constituted legal error, in direct contradiction of this Court's binding precedent in United States v. Gladue. This Court has unequivocally held that when an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal. Appellee pled guilty pursuant to a pretrial agreement (PTA) containing a waive all waivable motions provision, and expressly discussed and waived multiplicity/unreasonable multiplication of charges on the record. Therefore, Appellee intentionally waived a known right and his ability to raise that issue on appeal was extinguished. In declining to apply waiver in this case, AFCCA disregarded this Court's binding precedent and committed an obvious legal error.

ARGUMENT

THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) COMMITTED LEGAL ERROR BY ERRONEOUSLY 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).

Standard of Review

The scope and meaning of Article 66(c), UCMJ, is a matter of statutory interpretation and a question of law reviewed *de novo*. Id. (citing United States v. Lopez de Victoria, 66 M.J.

67, 73 (C.A.A.F. 2008)).[1]

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); *see also* United States v. Cron, 73 M.J. 718 (A.F. Ct. Crim. App. 2014).

Law and Analysis

Appellee's intentional and voluntary waiver precluded him from even seeking the relief AFCCA granted.[2] Prior to trial, Appellee entered into a pretrial agreement with the convening authority, agreeing, in part, to plead guilty to all Charges and Specifications. (J.A. at 185.) Appellee also agreed to "waive all waivable motions." (Id.) At trial, Appellee entered pleas of guilty to all charges and specifications, consistent with his bargained for pretrial agreement with the convening authority. (J.A. at 48.)

After conducting a thorough guilty plea inquiry, the military judge discussed the provisions of the pretrial agreement with Appellee. (J.A. at 140-52.) The military judge had the

[1] This Court generally reviews a Court of Criminal Appeal's exercise of its Article 66(c) authority for an abuse of discretion. United States v. Nerad, 69 M.J. 138, 142 (C.A.A.F. 2009) (citing United States v. Lacy, 50 M.J. 286, 287-89 (C.A.A.F. 1999)). However, service courts receive no deference in determining the scope of Article 66(c) and have no discretion in determining whether to apply this Court's binding precedent. *See* United States v. Allbery, 44 M.J.226, 227-28 (C.A.A.F. 1996).

[2] Presumably, this is why Appellee did not raise unreasonable multiplication of charges before AFCCA.

following colloquy with Appellee and trial defense counsel regarding the provision to waive all waiveable motions:

> MJ: Very well. Now, in looking at Appellate Exhibit I, it states that you would plead guilty to all charges and specifications. It also states that you agree to enter into a reasonable stipulation of fact. I find that you have conformed to those two terms. Agree to waive all waivable motions; defense counsel, were there any motions that you would have raised?
>
> ACC: Yes, Your Honor, we would have raised a multiplicity motion.
>
> MJ: Very well. I find that multiplicity motions may be [waived] as part of pretrial agreement...Do you understand those agreements and their full affect [sic]?
>
> ACC: Yes, Your Honor.

(J.A. at 150.) When the text of a pretrial agreement (PTA) unambiguously agrees to waive all waivable motions, and after the military judge conducted a "detailed, careful, and searching examination of [Appellee] to ensure that he understood the effect of the PTA provision," and Appellee "explicitly indicated his understanding" of the provision, claims of unreasonable multiplication of charges are waived, and Appellee's right to raise this issue on appeal was extinguished. *See* Gladue, 67 M.J. at 314.

With the unambiguous waiver of motions provision in the PTA, Appellee's explicit indication of his understanding of the effect of the provision, and Appellee's express discussion of

unreasonable multiplication of charges on the record, there can be no clearer case of waiver.[3] This Court could not have been more straightforward on the effect of such a waiver. "Appellant's express waiver of any waivable motions waived claims of multiplicity and unreasonable multiplication of charges, and **extinguished** his right to raise these issues on appeal." Gladue, 67 M.J. at 314 (emphasis added).

AFCCA erroneously declined to apply waiver to this case despite the clear and binding guidance from this Court. In support of its holding that waiver did not apply, AFCCA stated: "[A]s our colleagues in the Army Court of Criminal Appeals have noted, Article 66(c) empowers the service courts to consider claims of multiplicity or unreasonable multiplication of charges even when those claims have been waived." Chin, ACM 38452 (recon) (J.A. at 6). The case upon which AFCCA relied is United States v. Rivera, an unpublished case decided by the Army Court of Criminal Appeals. United States v. Rivera, ARMY 20130397 (Army Ct. Crim. App. 15 December 2014) (upub. op.) (J.A. at 191-92). In Rivera, the Army Court noted: "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

[3] Waiver was conclusively established in this record. However, AFCCA's opinion effectively creates an untenable and legally unsupportable requirement that a military judge perform the academic exercise of analyzing waived issues as if they had not been waived.

be approved.'...This 'awesome, plenary, *de novo* power' vests us with the authority to determine whether to apply waiver to claims of unreasonable multiplication of charges." Rivera, ARMY 20130397 (J.A. at 192.) However, as the Army Court applied waiver in Rivera, this discussion amounts to nothing more than dicta. With respect to AFCCA, dicta in a page-long unpublished opinion from the Army Court of Criminal Appeals offers little support for AFCCA's decision to ignore the clear and binding precedent of Gladue.[4]

In applying the Army Court's analysis in Rivera to this case, AFCCA stated "[t]he Army court's position is consistent with our superior court's direction in *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991), in which the court held that a service court need not apply waiver or plain error review in the interest of justice." Chin, ACM 38452 (recon) (J.A. at 6.) However, in citing to Claxton, AFCCA failed to analyze the development of the law since the time Claxton was decided. Most notably, Claxton was decided eighteen years prior to this Court's decision in Gladue. *See* United States v. Claxton, 32 M.J. 159 (C.M.A. 1991). At the time of the Claxton decision,

[4] AFCCA also mistakenly cites to United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990) for the proposition that a military court of criminal appeals has "awesome, plenary, *de novo* power of review...to, indeed, 'substitute its judgment' for that of the military judge" and need not apply deferential standards of review when it deems such deference inappropriate. Chin, ACM 38452 (recon) (J.A. at 6.) What AFCCA failed to recognize is that while a service court may substitute its judgment for that of the military judge, it may not do so in a manner adverse to the binding precedent from the Court of Appeals for the Armed Forces.

there was no distinction between the concepts of "waiver" and "forfeiture" and the terms were used interchangeably. That is why the Court of Military Appeals, in Claxton, held that "where plain error is present, the [service court] may not rely on waiver." Claxton, 32 M.J. at 162. In Gladue, this Court recognized the failure of military courts to distinguish between waiver and forfeiture. This Court held that waiver is the "intentional relinquishment or abandonment of a known right," and if an appellant forfeits a right by failing to raise it at trial it is reviewed for plain error, but if an appellant intentionally waives a known right at trial it is extinguished and may not be raised on appeal. Gladue, 67 M.J. at 313. Therefore, Claxton is inapplicable and fully distinguished from this case.[5]

Claxton was also decided prior to this Court's clear guidance on the extent of a service court's authority under Article 66. While a court of criminal appeal's Article 66 power is broad, it is not boundless. In Nerad, this Court noted when discussing AFCCA's authority under Article 66(c): "We hold that while CCAs have broad authority under Article 66(c), UCMJ...that authority is not unfettered. It must be exercised in the context of legal -- not equitable -- standards, subject to

[5] To the extent Claxton can be read to permit a service court to disregard this Court's precedent, the United States respectfully asks this Honorable Court to overturn Claxton.

appellate review." United States v. Nerad, 69 M.J. 138, 140 (C.A.A.F. 2009) (internal quotations and citations omitted). Particularly applicable here, while a service court may substitute its judgment for that of the military judge, it may not do so for the judgment of this Court. In United States v. Allbery, 41 M.J. 501 (A.F. Ct. Crim. App. 1994), the appellant contended he was not criminally liable for worthless checks he had written so that he could gamble, citing the holding from United States v. Wallace, 36 C.M.R. 148 (C.M.A. 1966). The appellant in Allbery did not find a sympathetic audience in AFCCA, which wrote:

> While we are not generally free to ignore precedent established by the Court of Military Appeals (*see United States v. Jones, 23 M.J. 301, 302 (CMA 1987)*), we believe it no longer makes sense to follow *Wallace*. Therefore, unless ordered by one of our superior courts to do so, we will not.

Id. at 502.

This Court's response to AFCCA's lack of adherence to *stare decisis* was unambiguous. Although only a plurality of the Court found the public policy against gambling had not changed since Wallace, a unanimous Court decisively struck down AFCCA's ruling:

> It is trite to say that the now Court of Criminal Appeals is not generally free to ignore our precedent. Although the court below recognized this maxim, it declined to adhere to it because,

> in its view, "it no longer makes sense to follow *Wallace*.
>
> . . .
>
> The fundamental error in the court's analysis was in according the policy of *stare decisis* an aspect of flexibility that it does not have. "A precedent-making decision may be overruled by the court that made it or by a court of higher rank." That discretion, however, does not reside in a court of lower rank. In the absence of a superseding statute or intervening decision of this Court or the Supreme Court of the United States, *Wallace* was absolutely binding on the Court of Criminal Appeals.
>
> If that court believed the underlying logic of that decision had changed in the meantime, its recourse was to express that viewpoint and to urge our reconsideration of our precedent. Beyond that, however, the court was bound either to follow *Wallace* or to distinguish it. It did neither and, so, erred.

United States v. Allbery, 44 M.J. 226, 227-28 (C.A.A.F. 1996) (citations omitted).

In the case at bar, AFCCA has substituted its own judgment for that of this Court. Gladue clearly commands that when an appellant expressly waives multiplicity and unreasonable multiplication of charges, appellate review of those issues is extinguished. In the absence of a superseding statute or decision of the Supreme Court of the United States, Gladue is absolutely binding on the service courts. As a result, AFCCA was bound to follow Gladue or distinguish it. Like Allbery,

AFCCA did neither and, so, erred.[6]

In support of its holding that is contrary to this Court's clear and binding precedent, AFCCA held that their analysis rested on "the peculiarity of the charging decisions for which we find no reasonable explanation." Chin, ACM 38452 (recon) (J.A. at 5.) However, the record plainly demonstrates there was nothing peculiar about the way this case was charged and that the government properly charged multiple offenses because Appellee's conduct satisfied the elements of multiple criminal acts. First and foremost, Appellee recognized that each specification was charged as a distinct and separate specification. He bargained for a pretrial agreement, agreeing to plead guilty to all charges and specifications. (J.A. at 185.) At trial, Appellee complied with the pretrial agreement and pleaded guilty to each specification, recognizing that each was charged as a separate offense. (R. at 59-139.) As was clear to all parties at trial, including Appellee, each of the offenses charged were aimed at distinct misconduct, and each of the offenses contained different elements and requirements of proof. Even on appeal to AFCCA, Appellee did not raise any claim of multiplicity or unreasonable multiplication of charges.

[6] Of note, in its unpublished opinion AFCCA attempted to distinguish this case from other cases in which this Court has applied Gladue, but made no effort to explain the direct conflict with Gladue itself. Simply stating "notwithstanding Gladue" does not serve to distinguish it.

Assuming AFCCA actually had authority to not apply waiver as required in Gladue, the Court's analysis was still mistaken. The error in AFCCA's opinion is most evident in the discussion of Specifications 1 and 2 of Charge I. In finding Specifications 1 and 2 of Charge I to be an unreasonable multiplication of charges unable to be waived AFCCA held:

> In reviewing Specifications 1 and 2, we note that the *only* difference between the two as reflected on the charging document is the location of the offense, and the difference is slight: the first charges the misconduct as occurring "at or near Grand Forks Air Force Base (AFB), North Dakota," while the second charges the misconduct as taking place "at or near Grand Forks, North Dakota." In every other respect, the specifications read exactly the same. The appellant admitted that he failed to properly store classified materials both at his work station located on Grand Forks AFB as well as at his off-base residence in the city of Grand Forks, as alleged in Specifications 1 and 2, respectively. We find that the improper storage of classified material by the appellant both on base and at his nearby residence occurred "at or near" Grand Forks AFB, such that they are more appropriately viewed as one offense and should have been charged as such. Charging these offenses as two separate specifications misrepresents and exaggerates the appellant's criminality. Accordingly, we set aside and dismiss Specification 2 of Charge I.

Chin, ACM 38452 (recon) (J.A. at 11.) However, such a holding fails to recognize the separate crimes Appellee committed and the unique concerns and risks associated with each. Under Specifications 1 and 2 of Charge I, Appellee was convicted in accordance with his pleas of violating a lawful general

regulation by failing to store classified materials under conditions adequate to deter and detect access by unauthorized persons. (J.A. at 33.) AFCCA was correct in stating "the only difference between the two as reflected on the charging document is the location of the offense." However, AFCCA was incorrect in stating that the difference is "slight." While the city of Grand Forks is geographically close to Grand Forks AFB, the differences between Appellee's misconduct in failing to properly safeguard classified information on a military installation and failing to separately do so at an off-base location is anything but slight. In April 2012, Appellee left a folder in an unsecure area of his workspace at Grand Forks AFB, ND, containing multiple classified documents that Appellant had transported from previous duty assignments. (J.A. at 179.) The unsecured documents were discovered by Appellee's supervisor, and substantially formed the basis of Specification 1 of Charge I. (J.A. at 62-63; 179.) After the discovery of the folder at Appellee's workspace on the more protected confines of a military installation, the FBI executed a search of Appellee's off-base private residence and found additional hard copy classified documents and numerous electronic classified documents on an external hard drive. (J.A. at 180.) It was this separate and significant misconduct that substantially formed the basis of Specification 2 of Charge I.

From the record, with respect to Specifications 1 and 2 of Charge I, it is clear that Appellee committed distinct criminal acts in two distinct locations. AFCCA's opinion effectively stands for the proposition that once Appellee mishandled classified materials at his workplace, he was free to do so off-base without fear of being held accountable for his separate crimes, so long as he was geographically close to Grand Forks AFB. AFCCA's focus on the geographical proximity of Grand Forks to Grand Forks AFB, rather than the elements of each of the crimes committed and the risks attendant to each of them, is mistaken. Here, Appellee mishandled classified materials on base, endangering the security of those materials and risking unauthorized disclosure. However, that crime was committed on a secure military installation, where the danger is markedly less than the unauthorized disclosure of classified material to the general public. Once Appellee improperly took classified materials off base and stored them at his off-base unsecured and private residence, he committed a separate and much more egregious crime. As such, it was entirely appropriate for the government to charge those acts as separate and distinct crimes.

When the record is viewed in its entirety, there is no question that Appellee received the benefit of his bargained for pretrial agreement and expressly waived any claims of multiplicity or unreasonable multiplication of charges. There

can be no clearer case of waiver than presented here. AFCCA's decision fails to heed this Court's binding precedent by declining to apply waiver and is an error likely to reoccur. Indeed, citing to Chin AFCCA recently again held that Article 66(c) empowers the service courts to consider claims of multiplicity or unreasonable multiplication of charges even when those claims have been waived pursuant to a pretrial agreement (PTA). United States v. Jeffers, ACM 38664 (A.F. Ct. Crim. App. 28 October 2015) (unpub. op.). *See also* United States v. Gay, 74 M.J. 736 (A.F. Ct. Crim. App. 2015)(expanding Article 66(c) to permit the service court to grant sentence appropriateness relief for post-trial confinement conditions even in the absence of a violation of the Eighth Amendment or Article 55, UCMJ); United States v. Baumwell, ACM S32271 (A.F. Ct. Crim. App. 16 June 2015) (unpub. op.) (J.A. at 193) and United States v. Lombardi, ACM 38637 (A.F. Ct. Crim. App. 1 September 2015) (unpub. op.) (J.A. at 197)(holding that Article 66(c), UCMJ, grants the service courts the authority to disregard Gladue and decline to apply waiver).

In addition to the direct conflict with this Court's precedent, AFCCA's opinion, while unpublished, sets a problematic precedent for future cases. One of the main incentives for pretrial agreement negotiations is the ability to streamline the appellate process, which is good for appellants and the

government. In holding that waiver doesn't always mean waiver, AFCCA will encourage appellate litigation of issues that were ostensibly waived at trial. Such a result is inconsistent with this Court's precedent, the efficient administration of justice, and will work to the detriment of appellants by deterring the government from entering into pretrial agreements.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court reverse the decision of the Air Force Court of Criminal Appeals in an opinion that reminds CCAs of their obligation to follow this Court's precedent and apply waiver under the circumstances of this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, and to the Appellate Defense Division on 22 November 2015.

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APPENDIX

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DEMARRIUS R. JEFFERS
United States Air Force

ACM 38664

28 October 2015

Sentence adjudged 10 June 2014 by GCM convened at Aviano Air Base, Italy. Military Judge: Christopher F. Leavey (arraignment) and Dawn R. Efflein (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Johnathan D. Legg and Captain Michael A. Schrama.

Appellate Counsel for the United States: Major Roberto Ramirez and Gerald R. Bruce, Esquire.

Before

ALLRED, MITCHELL, and MAYBERRY
Appellate Military Judges

OPINION OF THE COURT

ALLRED, Chief Judge:

Appellant was tried at a general court-martial before a military judge alone. In accordance with his pleas, he was found guilty of drunken operation of a vehicle resulting in personal injury, involuntary manslaughter, reckless endangerment, and negligent homicide, in violation of Articles 111, 119, and 134, UCMJ, 10 U.S.C. § 911, 919, 934. The adjudged sentence consisted of a bad-conduct discharge, 2 years and 6 months confinement, and reduction to E-1. In accordance with a pretrial agreement, the

convening authority reduced confinement to 24 months and approved the remainder of the sentence as adjudged.

Before us, Appellant argues that his conviction of negligent homicide must be dismissed in light of his conviction of involuntary manslaughter for the same misconduct. We agree.

Background

Late in the evening of 1 June 2013, Appellant drove himself and a friend, Airman First Class (A1C) DF, to a club about an hour from the overseas base to which they were assigned. After drinking and socializing until about 0200 the following morning, they drove to a second club closer to base where they engaged in more drinking. Shortly before 0500, Appellant and A1C DF left the second club. By this time both individuals were quite drunk. Nevertheless, the two drove away with Appellant behind the wheel of his car and A1C DF in the passenger seat.

Shortly thereafter, Appellant was driving on a two-lane highway at about twice the posted speed limit of 50 kilometers per hour. As he approached an intersection, Appellant steered into the lane of oncoming traffic. In doing so, Appellant nearly hit a car driven by Mrs. KL—the spouse of an Air Force member—who managed to avoid a head-on collision only by swerving into the lane of traffic Appellant's car should have occupied.

After narrowly missing the vehicle of Mrs. KL, Appellant's car ran off the road, knocked over a light pole, and continued its trajectory. The car then tore through a wire fence and crashed into several cars in a parking lot. Passersby dragged the dazed Appellant from his vehicle but, before they realized his passenger was also in the car, it burst into flames.

A1C DF was subsequently pronounced dead at the scene. Appellant was taken to the hospital, where he was treated for third-degree burns to his legs and lacerations to his legs, face, and head. Appellant's blood was drawn about 90 minutes after the accident. Testing by the local hospital indicated 0.189 grams of alcohol per 100 milliliters of blood, while subsequent testing by the Armed Forces Medical Examiner System (AFMES) indicated a blood alcohol level of 0.180.

Multiple Offenses

Appellant's convictions of both involuntary manslaughter and negligent homicide are based upon the death of A1C DF. Appellant argues that both convictions for the same death cannot stand, and his conviction for negligent homicide must therefore be dismissed.

A. Waiver

In the present case, Appellant entered into a pretrial agreement containing a "waive all waivable motions" provision. When the military judge asked what motions would have been raised absent that provision, trial defense counsel stated he would have raised a claim of unreasonable multiplication of charges with regard to the offenses of involuntary manslaughter and negligent homicide. The military judge then discussed this possible motion with Appellant, who affirmed that he wished to give up this motion in order to obtain the benefit of his pretrial agreement.

In *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009), our superior court held that a "waive all waivable motions" provision waived, rather than forfeited, a claim of multiplicity on appeal and therefore the multiplicity claim was extinguished and could not be raised on appeal. The court held multiplicity was waived because the pretrial agreement required the appellant to waive all waivable motions, the military judge conducted a thorough inquiry to ensure the appellant understood the effect of this provision, and the appellant explicitly indicated his understanding that he was waiving the right to raise any waivable motion. *Id.* The court also stated the same position would result for claims of unreasonable multiplication of charges raised on appeal. *Id.*

Ordinarily, an affirmative waiver of a claim of multiplicity and unreasonable multiplication of charges would end our inquiry. As we recently held, however, Article 66(c), 10 U.S.C. § 866(c), empowers the service courts to consider claims of multiplicity or unreasonable multiplication of charges even when those claims have been waived. *United States v. Chin*, ACM 38452 (recon) (A.F. Ct. Crim. App. 12 June 2015) (unpub. op.). In *Chin*, we declared, "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.'" *Id.* (alterations in original) (quoting *United States v. Rivera*, Army 20130397, unpub. op. at 3 (Army Ct. Crim. App. 15 December 2014) (quoting *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)). Our position in *Chin* is consistent with *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991), in which our superior court held that a service court need not apply waiver or plain error review in the interest of justice. *See also United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) (holding that a military court of criminal appeals has "awesome, plenary, *de novo* power of review . . . to, indeed, 'substitute its judgment' for that of the military judge" and need not apply deferential standards of review when it deems such deference inappropriate).

Because of the unreasonable multiplication of charges so plainly presented in this case, we elect to exercise our plenary, de novo power of review to consider whether convictions for both involuntary manslaughter and negligent homicide should be approved.

B. Multiplicity and Unreasonable Multiplication of Charges

We review claims of multiplicity and unreasonable multiplication of charges de novo. *United States v. Paxton*, 64 M.J. 484, 490–91 (C.A.A.F. 2007). In the context of multiplicity and unreasonable multiplication of charges, three concepts may arise: multiplicity for purposes of double jeopardy, unreasonable multiplication of charges as applied to findings, and unreasonable multiplication of charges as applied to sentence.

Multiplicity in violation of the Double Jeopardy Clause of the Constitution[1] occurs when "a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Anderson*, 68 M.J. 378, 385 (quoting *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)) (emphasis omitted). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993); *United States v. Morita*, 73 M.J. 548, 564 (A.F. Ct. Crim. App. 2014), *rev'd on other grounds*, 74 M.J. 116 (C.A.A.F. 2015). The Supreme Court laid out a separate elements test for analyzing multiplicity issues: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). "Accordingly, multiple convictions and punishments are permitted . . . if the two charges each have at least one separate statutory element from each other." *Morita*, 73 M.J. at 564. Where one offense is necessarily included in the other under the separate elements test, legislative intent to permit separate punishments may be expressed in the statute or its legislative history, or "it can also be presumed or inferred based on the elements of the violated statutes and their relationship to each other." *Teters*, 37 M.J. at 376–77.

Even if charged offenses are not multiplicious, courts may apply the doctrine of unreasonable multiplication of charges to dismiss certain charges and specifications. Rule for Courts-Martial 307(c)(4) summarizes this principle as follows: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." The principle provides that the government may not needlessly "pile on" charges against an accused. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994). Our superior court has endorsed the following non-exhaustive list of factors in determining whether unreasonable multiplication of charges has occurred:

> (1) Did the [appellant] object at trial that there was an unreasonable multiplication of charges and/or specifications?

[1] U.S. CONST. amend. V.

> (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 the appellant's punitive exposure?
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 M.J. 334, 338–39 (C.A.A.F. 2001) (citation and internal quotation marks omitted). "[U]nlike multiplicity—where an offense found multiplicious for findings is necessarily multiplicious for sentencing—the concept of unreasonable multiplication of charges may apply differently to findings than to sentencing." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). In a case where the *Quiroz* factors indicate the unreasonable multiplication of charges principles affect sentencing more than findings, "the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings." *Quiroz*, 55 M.J. at 339.

In the present case, Appellant's convictions for involuntary manslaughter and negligent homicide are not multiplicious. In applying the separate elements test to these two offenses, our superior court has concluded, "[N]egligent homicide under Article 134, UCMJ, is not [a lesser included offense] of involuntary manslaughter under Article 119, UCMJ." *United States v. McMurrin*, 70 M.J. 15, 18 (C.A.A.F. 2011). And we ourselves have declared, "We do not find [involuntary manslaughter and negligent homicide] multiplicious in findings, because each provision requires proof of a fact which the other does not." *United States v. Lovely*, 73 M.J. 658, 678 n.7 (A.F. Ct. Crim. App. 2014) (citing *Blockburger*, 284 U.S. at 304).

Thus, we turn to whether convictions for both involuntary manslaughter and negligent homicide amount to an unreasonable multiplication of charges—and conclude that they do.

In *United States v. Wickware*, ACM 38074 (A.F. Ct. Crim. App. 10 October 2013) (unpub. op.), we confronted a multiplicity and unreasonable multiplication of charges claim based on A1C Wickware's convictions for unpremeditated murder, involuntary manslaughter, and negligent homicide in the death of his infant son. We affirmed and rejected claims of multiplicity and unreasonable multiplication of charges, reasoning that because the military judge merged the offenses for purposes of sentencing, A1C Wickware did not suffer any prejudice. *Id*. unpub. op. at 28. In a summary disposition on appeal, however, our superior court set aside the findings of guilty and dismissed the involuntary manslaughter and negligent homicide offenses. *United States v. Wickware*, 73 M.J. 350 (C.A.A.F. 2014) (mem.).

Similarly, in *United States v. Sauk*, 74 M.J. 594 (A.F. Ct. Crim. App. 2015), we affirmed the finding of guilty for involuntary manslaughter, but set aside and dismissed Technical Sergeant Sauk's convictions for negligent homicide, aggravated assault, and assault in causing the death of his infant son.[2]

Conducting a *Quiroz* analysis in the case at bar, we conclude that involuntary manslaughter and negligent homicide constitute an unreasonable multiplication of charges. We note in particular that the two charges are not aimed at distinctly separate criminal acts but address a single act of Appellant in causing the death of A1C DF. Under the totality of the circumstances, this charging scheme grossly exaggerates Appellant's criminality. Pursuant to our broad Article 66(c), UCMJ, authority, we find that Appellant's conviction for negligent homicide should not be approved.

Sentence Reassessment

Having found Appellant's convictions for involuntary manslaughter and negligent homicide constitute an unreasonable multiplication of charges warranting dismissal of the latter charge, we must consider whether we can reassess the sentence or whether this case should be returned for a sentence rehearing. We are confident we can accurately reassess Appellant's sentence.

This court has "broad discretion" when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). Our superior court has repeatedly held that if we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error . . . ." *United States v. Sales*, 22 M.J. 305, 308 (C.A.A.F. 1986). This analysis is based on a totality of the circumstances with the following as illustrative factors: dramatic changes in the penalty landscape and exposure, the forum, whether the remaining offenses capture the gravamen of the criminal conduct, whether significant or aggravating circumstances remain admissible and relevant, and whether the remaining offenses are the type that we as appellate judges have experience and familiarity with to reliably determine what sentence would have been imposed at trial. *Winckelmann*, 73 M.J. at 15–16.

In the present case, dismissing the conviction for negligent homicide reduces the maximum length of confinement from 15 years and 6 months to 12 years and 6 months.[3]

[2] In reaching the decisions in *Sauk* and *Wickware*, both we and our superior court, respectively, found that the offenses at issue had been charged in the alternative. *United States v. Sauk*, 74 M.J. 594, 601 (A.F. Ct. Crim. App. 2015); *United States v. Wickware*, 73 M.J. 350 (C.A.A.F. 2014) (mem.). The Government appears to have engaged in alternate charging in the present case as well. For, in examining the record in its entirety, we conceive no other legitimate purpose for charging Appellant with two homicides in the same death.

[3] The military judge considered the offenses "as one offense for sentencing purposes" and calculated the maximum punishment to be "12 years and six months of confinement."

There is no dramatic change to the maximum penalty landscape and, in light of the 24-month confinement limit in the pretrial agreement, there is no difference in the actual penalty exposure. The remaining offenses—drunken operation of a vehicle resulting in personal injury, involuntary manslaughter, and reckless endangerment—capture the gravamen of the criminal conduct. The forum was military judge alone and thus we are "more likely to be certain of what a military judge would have done." *Id.* at 16. This court has experience and familiarity with determining fair and appropriate sentences for this type of offense. We are confident that, absent the conviction for negligent homicide, the military judge would have imposed the same sentence. Having so found, we reassess Appellant's sentence to the same sentence that was approved by the convening authority: a bad-conduct discharge, confinement for 24 months, and reduction to E-1.

Conclusion

The findings of guilty as to the Additional Charge and its Specification are set aside and dismissed. The remaining findings, and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and sentence, as reassessed, are **AFFIRMED**.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court