IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant,

v.

DANIEL H. CHIN,
Staff Sergeant (E-5), USAF
Appellee.

Crim. App. No. 38452
USCA Dkt. No. 15-0741/AF

APPELLEE'S BRIEF IN ANSWER AND OPPOSITION TO THE AMENDED CERTIFIED ISSUE

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellant*, v.	) **APPELLEE'S BRIEF IN ANSWER AND OPPOSITION TO THE AMENDED CERTIFIED ISSUE**
Staff Sergeant (E-5) **DANIEL H. CHIN,** USAF, *Appellee*.	) Crim. App. Dkt. No. 38452) USCA Dkt. No. 15-0741/AF

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

Issues 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).[1]

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), and the Judge Advocate General of the United Sates Air Force certified the above issue to this Honorable Court. Thus, this Honorable Court has jurisdiction to review this case under Article 67(a)(2), UCMJ.[2]

[1] Although The Judge Advocate General of the United Sates Air Force certified the issue above, Appellee contends the better statement of the issue this Court should consider is "Whether the Air Force Court of Criminal Appeals committed legal error when it exercised its authority under 10 USC § 866 (c) and determined that, on the basis of the entire record, all of the findings of guilty and sentence in Appellee's case *should not* be approved." *See* JA 2.

[2] The Appellee also petitioned this Court for review, therefore this Honorable Court may have jurisdiction to review this case under Article 67(a)(3), UCMJ, as well.

Statement of the Case

On 14 June 2013, Appellee was tried by a General Court-Martial composed of a military judge siting alone. Pursuant to his pleas, Appellee was found guilty of 13 specifications of disobeying a lawful general order or regulation and dereliction of duty, one specification of larceny, and five specifications of violating 18 U.S.C. §793(e), in violation of Articles 92, 121, and 134, UCMJ. *See* Joint Appendix (JA) 203-206.

Appellee was sentenced to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and a reduction to E-2. JA 176. On 26 September 2013, the convening authority approved only so much of the sentence that provided for a bad-conduct discharge, *confinement for 10 months*, forfeiture of all pay and allowances, and a reduction to E-2. *See* JA 206 (emphasis added). On 7 April 2015, the AFCCA issued a decision in this case, finding some of the specifications should be dismissed or merged for sentencing as an unreasonable multiplication of charges. JA 17-32. The government moved for and AFCCA granted reconsideration. *See* JA 2. On 12 June 2015, AFCCA issued a second decision in line with its original decision, *sua sponte* holding the charging scheme "grossly exaggerated" Appellee's criminality and "plainly presented" an unreasonable multiplication of charges. JA 6. The AFCCA elected to exercise its plenary, *de novo* power of review and determined that not all of the findings of guilty should be approved and

that some specifications should be merged for sentencing. JA 6-14. Thus, the AFCCA dismissed Specification 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 purposes. JA 6-16. The AFCCA then reassessed Appellee's sentence to the same sentence approved by the convening authority. JA 14-16. The Judge Advocate General (TJAG) of the United States Air Force certified the case for this Court's review on 11 August 2015. On 20 November 2015, TJAG submitted an amended certificate, striking the words "abused its discretion and".

Statement of Facts

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

Argument

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT COMMIT LEGAL ERROR WHEN IT EXERCISED ITS AUTHORITY UNDER 10 USC § 866 (C) AND DETERMINED THAT, ON THE BASIS OF THE ENTIRE RECORD, ALL OF THE FINDINGS OF GUILTY AND SENTENCE SHOULD NOT BE APPROVED.

Standard of Review

When a Court of Criminal Appeals (CCA) acts to disapprove findings because they are not appropriate based upon a review of the entire record, this Court reviews the decision for an abuse of discretion. *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2009). When a CCA acts to disapprove findings, even where the findings are correct in law and fact, the CCA's action is

accepted on appellate review unless, in disapproving the findings, the CCA clearly acted without regard to a legal standard. *Id*. at 147. When to apply the doctrine of waiver or forfeiture is left to a CCA's discretion, and it is "well within [a CCA's] authority to determine the circumstances, if any, under which it [will] apply waiver or forfeiture." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (citing *United States v. Claxton*, 32 MJ 159, 162 (CMA 1991)).

Law and Analysis

A. <u>AFCCA properly exercised Article 66 appropriateness review</u>

"The legislative history of Article 66 reflects congressional intent to vest broad power in the Courts of Criminal Appeals." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002). A CCA has "awesome, plenary *de novo* power of review [that] grants unto the Court ... authority to, indeed, 'substitute its judgment' for that of the military judge .... [and] for that of the court members." *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F.2007)(quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A.1990))(alterations in original). CCAs can assess the record and determine whether the findings and sentence "should be approved," thus Article 66(c) empowers CCA's to perform an appropriateness review of courts-martial findings and sentence. *See Nerad* 69 M.J. at 145.

In the event a CCA finds error, the CCA may disapprove a court-martial finding, even if the error does not rise to the

level of requiring disapproval of the finding as a matter of law; *e.g.*, in the context of trial errors in which doctrines applicable to issues of law, such as waiver, would preclude CCA action in the absence of the "should be approved" language of Article 66(c). *Nerad* 69 M.J. at 146-48. While this discretion to set aside a finding is not "unfettered," where a CCA articulates the appropriate legal standards and explains a reasonable rationale in acting, this Court will not disturb the CCA's decision. *See Nerad* 69 M.J. at 140.

Quiroz, a seminal case dealing with unreasonable multiplication of charges (UMC), demonstrates a CCA is well within its legal authority to exercise its Article 66 discretion and set aside findings and sentence even if an appellant forfeits or waives the issue at trial. *See United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F.2001). When the appellant in *Quiroz* pled guilty, the appellant raised multiplicity but did not raise UMC at trial. *Quiroz*, 55 M.J. at 338. On appeal, the CCA did not deny relief despite the government's contentions waiver and forfeiture precluded relief for the *Quiroz* appellant. *Id*. The *Quiroz* Court approved the CCA's exercise of Article 66 discretion, noting the CCA was "well within its authority to determine the circumstances, if any, under which it would apply waiver or forfeiture." *Quiroz*, 55 M.J. at 338 (citing *United States v. Claxton*, 32 MJ 159, 162 (CMA 1991)).

Appellee's case, in all material respects, is no different than *Quiroz*. Like in *Quiroz*, the Appellee did not raise unreasonable multiplication of charges at trial, but would have raised *multiplicity*, absent Appellee's pretrial agreement. JA 113. Yet in the course of the CCA's Article 66 review, the AFCCA affirmatively chose not to apply the waiver doctrine,[3] and dismissed charges that constituted an unreasonable multiplication of charges, relying on its Article 66 powers. JA 5-6.

In reviewing the AFCCA discretionary action the question is, are there facts that could support the AFCCA's UMC determination and did the AFCCA consider the appropriate legal standards. The question is *not* whether this Court "would as an original matter have [acted as the court below did]; it is whether the [court below] abused its discretion in so doing." *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 642 (1976).

The AFCCA considered Appellee's guilty plea inquiry (JA 49-102), the stipulation of fact (JA 178-84), and Appellee's pre-trial agreement (185-190). JA 1-17. These portions of the record fairly support the AFCCA's factual determination that the charging "grossly exaggerated" Appellee's criminality and "plainly presented" an unreasonable multiplication of charges. JA 6. Likewise, the AFCCA considered and applied the appropriate

[3] The AFCCA acknowledged that a waive all waivable motions might preclude an Appellant from raising UMC, acknowledged the precedential import of *Gladue*, and acknowledged the language of *Nerad* and *Quiroz* holding that the consideration of waiver and forfeiture is left to the sound discretion of a CCA. JA 5-6.

legal standards involved in both a multiplicity and UMC context, including a waiver analysis, looking to *Quiroz*, *Gladue*, *Claxton*, and *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012), among others. JA 4-14. Because the AFCCA considered and applied the appropriate law and AFCCA's factual determinations are supported by the record, there is no basis for this Court to disrupt AFCCA's exercise of its Article 66 discretionary power, and the AFCCA did not commit legal error.

B. *Glaude* did not overturn *Quiroz*, as is noted in *Nerad*

The government's reliance upon *Gladue* is unfounded because the exercise of a CCA's Article 66 appropriateness review was not considered in *Glaude*. This Court granted review in *Gladue*, not to evaluate a CCA's *sua sponte* discretionary powers and duties under Article 66, but rather to determine the very narrow issue of whether a "pretrial agreement (PTA) to 'waive any waiveable [sic] motions' barred Appellant from asserting claims of multiplicity or multiplication of charges on appeal." *Gladue*, 67 M.J. at 312. Appellant's brief reads *Gladue* too broadly, asserting it stands for the proposition that a PTA *must* extinguish a CCA's Article 66 review power; rather, *Gladue* actually holds that a PTA *may* bar an *appellant's* right to raise an assignment of error on the issue of multiplicity or unreasonable multiplication of charges. But, *Gladue* does not hinge on the ability of a CCA to rectify an obvious injustice or overzealous application of the charging decision, or consider

when a CCA may exercise its discretion and *not* apply the waiver doctrine. In fact, after conducting an Article 66 review the CCA in *Gladue* affirmed the findings and sentence of that case; presumably because the CCA determined the findings and sentence were correct in fact and law, and on the basis of the entire record *should* be approved. *See Gladue*, 67 M.J. at 312. The *Gladue* court certainly did not cite to, and likely did not consider, Congress' grant of discretionary power to a CCA under Article 66 (c) to *decline* affirming any part of findings or a sentence. Therefore, *Glaude* is inapposite to the case at bar and unhelpful to its resolution.

Most importantly, just one year after the 2009 decision in *Gladue,* holding that waiver *could* extinguish an appellant's UMC claim, this Court in 2010 reaffirmed the *Quiroz* principle that declining to apply the judicial doctrine of waiver was well within the discretion of a CCA. *Nerad* 69 M.J. at 146-47.[4] Thus,

[4] *United States v. Nerad*, 69 M.J. 138, 146-47 (C.A.A.F. 2010):
"… we have held that the CCAs can assess the record and determine whether the findings and sentence "should be approved" in the event of error even if the error did not rise to the level of requiring disapproval of the finding or sentence as a matter of law, those decisions arose in the context of trial and post-trial errors in which doctrines applicable to issues of law—such as waiver—would have precluded CCA action in the absence of the "should be approved" language of Article 66(c), UCMJ. *See Quiroz*, 55 M.J. at 338 (stating that the lower court, having identified an unreasonable multiplication of charges—an abuse of prosecutorial discretion—possessed the authority under Article 66(c), UCMJ, "to determine the circumstances, if any, under which it would apply waiver or forfeiture"); . . . *Claxton*, 32 M.J. at 164 (approving a decision by the intermediate court to order a sentence rehearing in light of an evidentiary error during sentencing under circumstances in which waiver would have ordinarily precluded relief). We have expressly declined to agree that a CCA may disapprove a finding based on pure equity. *Quiroz*, 55 M.J. at 339.910 To be clear, when a CCA acts to disapprove findings that are correct in law and fact, we accept the CCA's action unless in

Gladue in no way limited the power of the AFCCA to decline applying the judicial doctrine of waiver while favoring AFCCA's Congressionally-granted appropriateness power.

In this case, AFCCA delineated the legal standard for applying UMC and declined to apply waiver, in line with *Claxton*, *Quiroz,* and *Nerad*. This Court should follow the longstanding precedent in *Claxton, Quiroz,* and *Nerad,* and summarily affirm AFCCA's decision regarding UMC.

WHEREFORE, this Honorable Court should affirm the AFCCA's exercise of discretionary power under 10 USC §866.

Respectfully Submitted,

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disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion."

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to this Honorable Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 30 November 2015.

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