

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES)	REPLY BRIEF IN SUPPORT
)	OF PETITION GRANTED
)	
v.)	
)	Crim. App. Dkt. No. 38937
Captain (O-3))	
RYAN A. HARDY,)	
United States Air Force)	USCA Dkt. No. 17-0553/AF
<i>Appellant.</i>)	

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

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Additional Argument

THIS COURT’S PRECEDENT DEMONSTRATES THAT CAPT HARDY’S CLAIM OF UNREASONABLE MULTIPLICATION OF CHARGES WAS NOT WAIVED BY HIS GUILTY PLEA.

United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) is the appropriate framework to analyze whether an appellate issue has been waived or forfeited, to include the issue of unreasonable multiplication of charges (UMC).

As this Court held in *Gladue*:

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. The distinction between the terms is important. If an appellant has forfeited a right by failing to raise it at trial, [the Court] reviews for plain error. When, on the other hand, an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal.

Id. at 313 (internal quotation marks and citations omitted).

Here, the following exchange between the military judge and Capt Hardy demonstrates that Capt Hardy had no reason to believe he was “intentionally relinquishing” the issue of UMC during appellate review. To the contrary, the discussion on the record specifically addresses only the motions that were previously filed in this particular case.

Military Judge: The accused was previously arraigned. We had some motion practice. There were a couple of motions still on the table from when we last gathered and I don’t know what effect there is if the [pretrial agreement (PTA)] has any motions or they may have been resolved by the parties. But when we last gathered there was an

issue of witness production and 404(b) matters. I suspect that with the anticipated pleas, the 404(b) issue would probably go by the wayside. I don't know. Are any motions – they apparently are unaffected by the PTA but I don't know what still needs to be resolved.

Civilian Defense Counsel: Yes, Your Honor. The PTA does not contain a waiver provision; however, the motions are rendered moot by the agreements contained in the PTA.

Military Judge: Okay.

(J.A. 23).

The PTA in this case did not contain a “waive all waivable motions” provision. (J.A. 127-32). While the Government argues that such a term is surplusage, *see* Appellee’s brief at 19-20, under the framework established in *Gladue*, such a provision would elevate an appellant’s unconditional guilty plea to an intentional waiver of all appellate issues that are capable of being waived. Thus, the Government’s characterization of this common PTA term as superfluous is mistaken, because it provides precisely what *Gladue* requires for waiver—“an intentional relinquishment or abandonment of a known right.” 67 M.J. at 313.

The government cites *United States v. Lee*, 73 M.J. 166 (C.A.A.F. 2014) for the broad proposition that “[a]n unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings.” *Id.* at 167 (citation omitted). In *Lee*, this Court analyzed whether the appellant waived review of post-trial delay occurring both before and after his rehearing. *Id.* at 167. This Court

held: “We conclude that he waived review of all but the 141 days of delay between the sentencing portion of the rehearing and the convening authority's [post-rehearing] action.” *Id.* at 169-170. The rationale for applying waiver for the pre-rehearing delay was that “Appellant's guilty plea occurred after a motion for relief for the [pre-rehearing delay] . . . was fully briefed, argued, and denied. In fact, [the guilty plea] was immediately following the military judge's ruling, and without any attempt to preserve the . . . issue for appeal” *Id.* at 170.

The government's brief also relies on *United States v. Bradley*, 68 M.J. 279 (C.A.A.F. 2010), for the similar proposition that an express waiver of an issue is not required when the appellant enters into an unconditional guilty plea.

Appellee's brief at 14. In *Bradley*, the appellant filed a motion to dismiss his charges at trial because the trial counsel in his case had elicited immunized statements from the appellant in a related court-martial. 68 M.J. at 280. After fully litigating the motion to dismiss, the motion was denied, as was a separate defense motion to recuse the trial counsel. *Id.* After denying these motions, the appellant pleaded guilty pursuant to a PTA. *Id.* The military judge instructed the appellant that the litigated issues would be waived by virtue of the plea. *Id.* at 280-81. Defense counsel disagreed, and there was unresolved confusion about whether the guilty plea waived the litigated motions. *Id.* This Court held the

appellant had not properly entered into a conditional guilty plea, which would have preserved the litigated motions for appeal, and therefore the issues were waived. *Id.* at 281-82.

Here, unlike the appellants in *Lee* and *Bradley*, Capt Hardy's UMC claim was not raised, litigated, or even mentioned on the record during his trial. (J.A. 104-113). The military judge in *Bradley* notified the parties that the litigated issues would be waived by a guilty plea. 68 M.J. at 280-81. Similarly, the appellant in *Lee* raised, litigated, and ultimately lost a motion related to the post-trial delay that was ultimately determined to be waived by the guilty plea. 73 M.J. at 170. But the exchange between the military judge and trial defense counsel in the presence of Capt Hardy stated that only previously filed, unresolved motions would be waived, and the issue of UMC was not mentioned. (J.A. 23). When entering their guilty pleas, the appellants in *Lee* and *Bradley* were aware that their bargain included potentially waiving their previously litigated issues on appeal. In this case, with a record silent on the issue of UMC, there are no facts to similarly conclude Capt Hardy relinquished or abandoned his claim of UMC on appeal.

The government also cites this Court's recent decision in *United States v. Ahern*, 76 M.J. 194, 197-99 (C.A.A.F. 2017), for the proposition that the failure to object "usually constitutes waiver of an issue." Appellee's brief at 16. Not only is

this proposal inconsistent with *Gladue*, it is also a misreading of *Ahern*. In *Ahern*, this Court applied the plain language of Mil. R. Evid. 304(f)(1), which states that objections pursuant to Mil. R. Evid. 302, 304, and 305 are waived unless raised prior to the pleas. *Id.* at 198. This Court relied on the particular rule of evidence at issue, and did not retract or modify its holding in *Gladue*. *Id.* at 197-98. Like its decision in *Ahern*, this Court does not need to look beyond the Manual for Courts-Martial to resolve the granted issue. Rule for Court-Martial 910(j) states that issues related to “the factual issue of guilty” are waived by a guilty plea, whether raised previously or not. Because UMC is not the kind of issue falling within RCM 910(j)’s ambit, Capt Hardy’s claim of UMC on appeal is not waived and should be reviewed for plain error.

By recognizing exceptions to “the waiver rule,” the government’s brief essentially recognizes what Appellant categorized in his initial brief as “Category III” issues, which require an individualized analysis of the issue and the record in order to determine if the issue may be reviewed for plain error on appeal. This approach is consistent with the Court’s description of waiver and forfeiture in *Gladue*, and it will encourage trial practitioners to ensure that PTAs or discussions on the record are thorough, understandable to all parties, and effective in ensuring that appellants knowingly and voluntarily relinquish review of certain legal issues.

The government's brief also makes a policy argument against a plain-error review of UMC, citing defense counsel's responsibility to object at trial, and to refrain from "remaining silent, making no objection, then raising the issue on appeal for the first time" *United States v. Collins*, 41 M.J. 428, 430 (C.A.A.F. 1995). This concern is misdirected. In the case of an unconditional guilty plea with a PTA, all parties have the opportunity and obligation to ensure that any terms relating to post-trial review are thoroughly hashed out either on the record or in the agreement itself. This approach would also resolve the granted issue in a manner consistent with *Gladue*. There is no need for this Court to broadly announce that all issues of UMC are waived by an unconditional guilty plea, especially when the mechanism for ensuring waiver is as simple and straightforward as adding a standard waiver provision to a PTA.

Gladue provides the appropriate framework for determining waiver in this case. Here, there was no discussion of UMC on the record, no provision in the PTA that waived UMC, and there was no catch-all PTA term purporting to "waive all waivable motions." Under the test described in *Gladue*, because the record is silent on this issue, Capt Hardy's claim of UMC was forfeited, not waived.

CONCLUSION: The Appellant respectfully requests that this Court find he forfeited, and did not waive, the issue of UMC when pleading guilty under the circumstances of this case.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Appellate Government on 27 December 2017.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Patrick A. Clary". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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