

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.K. CARBERRY, R.E. BEAL, R.Q. WARD  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MICHAEL P.S. PEILA  
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201100500  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 10 June 2011.

**Military Judge:** LtCol Gregory L. Simmons, USMC.

**Convening Authority:** Commanding Officer, 5th Marine Regiment, 1st Marine Division (Rein), MarForPac, Camp Pendleton, CA.

**Staff Judge Advocate's Recommendation:** Col D.K. Margolin, USMC.

**For Appellant:** CDR Edward V. Hartman, JAGC, USN.

**For Appellee:** Capt Samuel C. Moore, USMC.

**24 January 2012**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of a three-day unauthorized absence and missing movement by design in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887. The appellant was sentenced to confinement for 10 months, reduction to pay grade E-1, forfeiture of \$978.00 pay for 10 months, and a bad-conduct

discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 90 days pursuant to a pretrial agreement.

In his sole assigned error, the appellant argues the unauthorized absence offense was facially duplicative with the missing movement offense and that the military judge committed plain error by failing to dismiss the unauthorized absence as a lesser included offense and multiplicitious for findings. In response, the Government argues: 1) the appellant waived the issue for appeal, and 2) that the unauthorized absence and the missing movement are not facially duplicative.

### **Background**

At trial, after the military judge announced the findings, he stated that he considered whether the two charges were multiplicitious and concluded they were not after reviewing, *inter alia*, *United States v. Baba*, 21 M.J. 76 (C.M.A. 1985). The military judge then asked if counsel concurred with his analysis. The defense counsel responded, "Yes, sir. We reviewed also *United States versus Baba* prior to this and we agree with you, sir." Record at 36.

### **Discussion**

The threshold matter in this case is whether or not the appellant waived appellate review of the multiplicity issue. Waiver is the intentional relinquishment or abandonment of a known right. When an appellant intentionally waives a waivable right at trial, it is extinguished and may not be raised on appeal. Compare *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (applying waiver to multiplicity issue where appellant unconditionally waived all waivable motions in pretrial agreement), and *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008), with *United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009) (declining to apply waiver doctrine to multiplicity issue not raised during guilty plea). Whether a particular right is subject to waiver; whether the appellant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the appellant's choice must be particularly informed or voluntary, all depend on the right at stake. *Harcrow*, 66 M.J. at 156.

Multiplicity is a concept that derives from the Double Jeopardy Clause of the U.S. Constitution which prevents defendants from being punished twice for the same act. *United*

*States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). There is a presumption against the waiver of constitutional rights, and the record must be clear that there was "an intentional relinquishment or abandonment of a known right or privilege." *Harcrow*, 66 M.J. at 156 (citations and internal quotation marks omitted). Nonetheless, counsel may waive constitutional issues on behalf of their clients under non-exceptional circumstances. *Id.* at 157.

In *Harcrow*, the Court of Appeals for the Armed Forces held that the trial defense counsel's failure to object to hearsay evidence did not constitute an intentional waiver because, subsequent to the appellant's trial and during his direct appeal, the Supreme Court's opinion in *United States v. Crawford*, 541 U.S. 36, (2004), created a new rule of criminal procedure which applied retroactively to cases on direct appeal. *Harcrow*, 66 M.J. at 157.

The appellant's case is significantly distinguishable from *Harcrow*, because the law as to what constitutes multiplicitious charges on findings is well-settled. See *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010); *Paxton*, 64 M.J. at 490; *United States v. Craig*, 67 M.J. 742, 746 (N.M.Ct.Crim.App. 2009), *aff'd*, 68 M.J. 399 (C.A.A.F. 2010). Furthermore, the appellant declined to raise a multiplicity issue on his own and when the military judge raised the issue, he disavowed any entitlement to relief on that basis. Additionally, the appellant does not allege, nor do we find, any other exceptional circumstances attendant to this guilty plea. Accordingly, we see this as an appropriate case to apply the waiver doctrine.<sup>1</sup>

### Conclusion

The findings and the sentence are affirmed.

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<sup>1</sup> Unlike other courts, the military Courts of Criminal Appeals are not bound by the waiver doctrine due to the awesome, plenary powers of review granted to them by Article 66(c), UCMJ. *United States v. Nerad*, 69 M.J. 138, 144 (C.A.A.F. 2010) (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)).

For the Court

R.H. TROIDL  
Clerk of Court