UNITED STATES OF AMERICA v. MOHAMMED JAWAD	**Defense Motion** to Dismiss Charge II and its Specifications for Multiplicity and Unreasonable Multiplication of Charges 23 May 2008

Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 7 May 2008 scheduling order.

1. **Relief Sought:** Mr. Jawad moves to dismiss specification Charge II (Intentionally Causing Serious Bodily Injury) for multiplicity and unreasonable multiplication of charges. Alternatively, the defense requests a ruling that the accused may only be convicted of either a Specification of Charge I or the corresponding Specification of Charge II, but not both, and/or a ruling that Charge II and its specifications are multiplicious for sentencing.

3. **Overview:**

(1) Multiplicity and unreasonable multiplication of charges are two distinct concepts. *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). Multiplicity occurs if 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. Paxton,* 64 M.J. 484, 490 (C.A.A.F. 2007) (citing *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993)). Multiplicity is present in this case because the prosecution has charged Mr. Jawad with two separate charges, each containing three specifications, all based on exactly the same alleged actions.

(2) Even if offenses are not multiplicious as a matter of law, the prohibition against unreasonable multiplication of charges allows military judges to address prosecutorial overreaching by imposing a standard of reasonableness. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006) (finding an unreasonable multiplication of charges). In this case, the prosecution has unreasonably multiplied the charges against Mr. Jawad requiring dismissal of

Charge II and all its specifications.

4. **Burdens of Proof and Persuasion:** The burden of persuasion on this motion rests with the moving party. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

5. **Facts:** This motion presents a question of law. For the purposes of this motion, the pertinent facts are those alleged in the charges and specifications.

6. **Law and Argument:**

A. CHARGE II, INTENTIONALLY CAUSING SERIOUS BODILY INJURY, IS MULTIPLICIOUS WITH CHARGE I AND THEREFORE SHOULD BE DISMISSED

(1) The Discussion to Rule for Military Commissions (R.M.C.) 907(b)(3) states that a specification may be multiplicious with another if it alleges "an offense necessarily included" in another alleged offense or describes "substantially the same misconduct in two different ways." The prohibition against multiplicity is necessary to ensure compliance with the statutory and constitutional restrictions against double jeopardy. *Quiroz*, 55 M.J. at 337. The statutory prohibition against double jeopardy contained in section 949h of the Military Commissions Act (MCA) is identical to the statutory prohibition against double jeopardy found in Article 44 of the UCMJ. 10 U.S.C. § 844; § 949h (2006). Unless expressly authorized by Congress, two convictions for the same offense at the same trial constitute double punishment. *United States v. Neblock*, 45 M.J. 191, 195 (C.A.A.F. 1996) (internal citations omitted).

(2) The charge sheet in this case describes "substantially the same misconduct in two different ways." R.M.C. 907(b)(3) discussion. As a result, Mr. Jawad faces multiple convictions for the same act of alleged misconduct. Both Charge I and Charge II allege that Mr. Jawad threw a hand grenade into the passenger compartment of a vehicle. The 3 specifications under each charge contain identical descriptions of his conduct and name identical alleged victims. And this identical act of alleged misconduct is the sole factual basis for all charges and specifications alleged against Mr. Jawad. By charging a single act of alleged misconduct as both attempted murder in violation of the law of war and intentionally causing serious bodily injury, the

prosecution seeks to expose Mr. Jawad to the risk of multiple convictions for a single alleged act.

(3) To determine whether convictions under separate statutes constitute one or multiple offenses, courts look to the language of the statutes, how those statutes fare under the *Blockburger* test, and express congressional intent, if any, on the issue of multiple punishment. *See United States v. Gore*, 154 F.3d 34, 44 (2d Cir. 1998) (citing *United States v. Muhammad*, 824 F.2d 214, 218 (2d Cir. 1987)).

(4) According to the *Blockburger* test, if "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) (emphasis added). When applying the *Blockburger* test, the Supreme Court has "often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other." *Rutledge*, 517 U.S. at 297. Thus, a lesser included offense is not a separate offense subject to additional punishment because it does not contain a unique element absent from the elements necessary to prove the greater offense. "If proof of a greater offense proves all the elements of another offense and more, then the other offense is a subset of the elements. Conversely, if proof of the 'subset' is necessary to prove the greater offense, then the 'elements test' is met" and the conduct satisfying the subset of elements should not be deemed a separate offense in addition to the greater offense. *United States v. Foster*, 40 M.J. 140, 143-44 (C.M.A. 1994). Elements in the lesser offense that are "legally less serious" than elements of the greater offense are included elements. *United States v. Weymouth*, 43 M.J. 329, 340 (C.A.A.F. 1995) (citing *Foster*)).

(5) A comparison of the elements of the two offenses alleged against Mr. Jawad reveals that intentionally causing serious bodily injury is a lesser included offense of attempted murder in violation of the law of war. The elements for attempted murder in violation of the law of war are:

(1) The accused did a certain overt act;

(2) The act was done with the specific intent to commit a certain offense under the M.C.A;

(3) The act amounted to more than mere preparation; and

(4) The act apparently tended to effect the commission of the intended offense.

In this case, the act contemplated under the second element is murder in violation of the law of war which has six elements:

(1) One or more persons are dead;

(2) The death of the persons resulted from the act or omission of the accused;

(3) The killing was unlawful;

(4) The accused intended to kill the person or persons;

(5) The killing was in violation of the law of war;

(6) The killing took place in the context of and was associated with an armed conflict.

There are only five elements to intentionally causing serious bodily injury:

(1) The accused caused serious injury to the body or health of one or more persons;

(2) The accused intended to inflict such serious injury upon the person or persons;

(3) The injury was done with unlawful force or violence;

(4) The serious bodily injury inflicted by the accused was in violation of the law of war; and

(5) The conduct took place in the context of and was associated with armed conflict.

A comparison of the elements in this case supports the conclusion that intentionally causing serious bodily injury is a lesser included offense of attempted murder. "Under military law, it would be unthinkable to conclude that serious (grievous) bodily harm is not an injury legally less serious than death." *Weymouth* 43 M.J. at 336 (finding that assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm was necessarily and completely included within attempted intentional murder). Accordingly, the specifications under Charge II are multiplicious with the specifications under Charge I and should be dismissed.

B. CHARGE II, INTENTIONALLY CAUSING SERIOUS BODILY INJURY CONSTITUTES AN UNREASONABLE MULTIPLICATION OF CHARGES

(1) While multiplicity involves analysis of the statutes, their elements, and the intent of Congress, the prohibition against unreasonable multiplication of charges addresses those features "of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Quiroz*, 55 M.J. at 337. An accused cannot be charged with multiple offenses that stem from the alleged commission of only one criminal act. *See* R.M.C. 307(c)(4) (providing that within the charge sheet, "each specification shall state only one offense. What is substantially one transaction should not be the basis for an unreasonable multiplication of charges against one person."). Military judges must "exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused." *United States v. Foster*, 40 M.J. 140, 144 (C.M.A. 1994).

(2) A finding that there has been an unreasonable multiplication of charges can result in dismissal of charges and specifications. *See United States v. Esposito*, 57 M.J. 608, 610-611 (C.G.Ct.Crim.App. 2002) (dismissing a specification of wrongfully soliciting a false statement from a fellow crewmember, because the charge was based on the same act that led to a separate specification alleging obstruction of justice). If specifications are not dismissed, a finding that there has been an unreasonable multiplication of charges can result in consolidation of the specifications. *See United States v. Gilchrist*, 61 M.J. 785, 789 (Army Ct.Crim.App. 2005) (merging two specifications that described larceny of cash and Xanax pills into one specification because one act of stealing two items constituted a single larceny).

(3) To determine whether there has been an unreasonable multiplication of charges, courts use a five-factor test adopted in *Quiroz*: (1) whether the accused objected at trial that there was an unreasonable multiplication of charges and/or specifications (2) whether each charge and specification is aimed at distinctly separate criminal acts (3) whether the number of charges and specifications misrepresent or exaggerate the appellant's criminality (4) whether the number of charges and specifications unreasonably increase the appellant's punitive exposure and (5) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N-M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003).

(4) In adhering to this test, courts have dismissed specifications that base more than one allegation on a single act. *See, e.g.*, *United States v. Christian*, 61 M.J. 560, 566 (N-M.Ct.Crim.App. 2005) (dismissing three specifications that were unreasonably multiplied because allegations of indecent language and assault consummated by a battery were brought in addition to an allegation of violation of lawful general order/sexual harassment). For example, in *United States v. Christian*, the court held that the language and assault were themselves the actions that specifically defined the sexual harassment, and thus they could not be charged separately. *Id.* at 567.

(5) In the instant case, Charge II must be dismissed because it does nothing more than repeat accusations of the same activity alleged in Charge I. Charge II is entirely identical in content to Charge I, and differs only in the phrasing of the allegation. Both specifications allege that Mr. Jawad threw a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces. The specifications are, therefore, not aimed at distinctly separate criminal acts as the conduct alleged within Charge II is engulfed by the conduct alleged in Charge I.

(6) Twice charging Mr. Jawad for the same acts exaggerates his criminality. *See, e.g.*, *United States v. Quiroz*, 57 M.J. 583, 586 (N.M.Ct.Crim.App. 2002) (finding criminal activity magnified where appellant was charged twice for the sale of the same C-4). It exposes him to being convicted and sentenced twice for the same conduct.

(8) Charge II serves no purpose other than to repeat allegations of the same criminal behavior alleged in Charge I. Since Charge II is a lesser-included offense of Charge I, the government need not charge both specifications for purposes of contingencies of proof. Rather, the military judge must instruct the members on lesser-included offenses. R.M.C. 920(e)(5)(C). Charging both offenses under these circumstances amounts to prosecutorial overreaching and application of the *Quiroz* factors demonstrates that there has been an unreasonable multiplication of charges.

7. **Oral Argument**: The Defense does not request oral argument.

8. **Witnesses and Evidence:** The Defense does not anticipate the need to call witnesses or present evidence in connection with this motion at this time.

9. **Certificate of Conference:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution concurs that Charges I and II are multiplicious for sentencing, but disagrees with the request to dismiss Charge II. The government's position is that Charge I and II are "in the alternative" and that the commission members should be instructed accordingly by the military judge.

10. **Additional Information:** In making this motion, or any other motion, Mr. Jawad does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms and forums.

Respectfully Submitted,

By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel
[redacted]sel

UNITED STATES OF AMERICA v. MOHAMMED JAWAD	**GOVERNMENT'S RESPONSE** **To the Defense's Motion to Dismiss Charge II and its Specifications** 03 June 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's most recent scheduling order.

2. Relief Requested: The Government has no objection to Defense's motion to dismiss Charge II ("Mot. to Dismiss II") if the court determines that Charge II is an lesser included offense (LIO) of Charge I. Absent this finding, the Government requests that the Mot. To Dismiss II be denied in total.

3. Overview: If the court finds that Intentionally Causing Serious Bodily Injury is an LIO of Attempted Murder in Violation of the Law of War, then the Government has no objection to consolidating the charges and the judge instructing the members as to the LIO if the evidence justifies the instruction. If the court does not find that the one charge is an LIO of the other, then the Government requests that the motion to dismiss be denied.

4. Burden and Persuasion: The burden of persuasion rests with the moving party. *See* Rule for Military Commissions ("RMC") 905(c)(2)(A).

5. Facts: This motion presents a question of law and the facts necessary to decide the motion are contained in the charges and specifications.

6. Discussion:

A. INTENTIONALLY CAUSING SERIOUS BODILY INJURY AS AN LIO OF ATTEMPTED MURDER

(1) The discussion for Rules for Military Commissions ("RMC") 918 states that the factfinder "may find the accused not guilty of the offense charged but guilty of a named lesser offense, which is included in the offense charged…" RMC 918. The discussion also states that the accused "may be found guilty of two or more offenses arising from the same act or transaction, whether or not the offenses are separately punishable."

(2) In general courts utilize an elements test for determining whether

particular charges are multiplicious with other offenses or LIO's. *United States v. Teters*, 37 M.J. 370 (CMA 1993), *cert. denied*, 114 S. Ct. 919 (1994), *Schmuck v. United States*, 489 U.S. 705 (1989), and *Blockburger v. United States*, 284 U.S. 299 (1932). In the military jurisdiction, an LIO is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. *Weymouth* 43 M.J. 329, 332 (C.A.A.F. 1995). According to the court, the notice requirement is met when:

> (a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, larceny as a lesser included offense of robbery);
>
> (b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is *legally less serious* (for example, housebreaking as lesser included offense of burglary); or
>
> (c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).
>
> The notice requirement may also be met, *depending on the allegations in the specification*, even though an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery.

Weymouth 43 M.J. at 332.

(3) *United States v. Weymouth*, represents the case most on point in this matter. In *Weymouth* the court addressed the question whether the lower court had erred in holding that assault with a dangerous weapon was an LIO of attempted murder. The facts of that case involved a U.S. Air Force Airman who was accused of stabbing another Airman in the stomach with a knife. The Government charged the Airman with both assault with a dangerous weapon and attempted murder. The trial judge consolidated the charges and specifically stated, with concurrence by the Defense, that if the evidence raised assault, then assault would be treated as an LIO. The court in *Weymouth* held that the trial judge did not err.

(4) However, the court also stated that while the trial judge did not commit error by allowing the murder charge to go forward as the sole charge, the appellate court's ruling was based, "primarily, on the fact that the parties understood and the accused agreed that the various assault charges were lesser-included offenses." The court was clear that had the military judge allowed the Government to proceed on the assault and attempted murder charges as two separate offenses, "the military judge would not have abused his discretion" because "[u]tilizing our analytical model, one can see that

it is not *necessary* to prove the element of "grievous bodily harm" to prove the attempted murder." *Weymouth* 43 M.J. at 337.

(5) In its motion to dismiss, the Defense states, "A comparison of the elements in this case supports the conclusion that intentionally causing serious bodily injury is a lesser included offense of attempted murder." Mot. to Dismiss II at 5. If the Defense continues to consider the charge of intentionally causing serious bodily injury to be an LIO of attempted murder and agrees that, if the evidence raises the offense of intentionally causing serious bodily injury, the judge may instruct the members as to the LIO, then the Government has no objection to consolidating the two charges and proceeding forward on the sole charge of attempted murder. Based on the reasoning of the *Weymouth* court, absent an agreement on the part of the Defense, this court should allow the Government to proceed on both charges separately.

7. Oral Argument: The Government requests oral argument.

8. Witnesses and Evidence: The Government does not intend to call witnesses or present evidence.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

Respectfully Submitted,

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Prosecutor