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September 27, 2007

VIA FACSIMILE

Mr. William A. DeCicco
Clerk of the Court
Court of Appeals for the Armed Forces
450 "E" Street N.W.
Washington, DC 20442-0001

Re: *1LT Ehren K. Watada v. LTC John M. Head, et al.*
Writ-Appeal Petition for Extraordinary Relief

Dear Mr. DeCicco:

Attached please find the following documents, which will be transmitted to the United States Court of Appeals for the Armed Forces today via Federal Express, for delivery tomorrow:

1. "Appellant's Reply to Appellees' Response in Opposition to Appellant's Application for an Immediate Stay of Court-Martial Proceedings;" and
2. Certificate of Service.

Being aware that a ruling on the Application for Immediate Stay could be issued by this Court at any time, I am transmitting this pleading via facsimile today simply so that the Court would be aware that this pleading is being filed, in case the Court would wish to consider it prior to issuing its ruling.

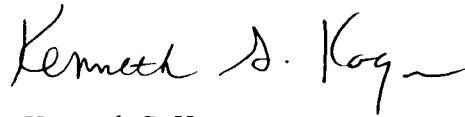
Additionally, of course, I will be transmitting to the Court, via Federal Express, the original and seven copies, for delivery tomorrow.

Thank you for your courtesy.

Mr. William A. DeCicco, Clerk of the Court
September 27, 2006
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Very truly yours,

CARNEY BADLEY SPELLMAN, P.S.

A handwritten signature in black ink that reads "Kenneth S. Kagan" with a stylized flourish at the end.

Kenneth S. Kagan
Civilian Defense Counsel

Attachments

cc: CPT Adam S. Kazin, JA (via electronic mail)
Government Appellate Division

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

First Lieutenant Ehren K. Watada,	)	APPELLANT'S REPLY TO
	)	APPELLEES' RESPONSE IN
Appellant,	)	OPPOSITION TO APPELLANT'S
	)	APPLICATION FOR AN IMMEDIATE
v.	)	STAY OF COURT-MARTIAL
	)	PROCEEDINGS
)	
The United States of America,)	
Lieutenant Col. John M. Head,	)	USCA Dkt.No. 07-8023/AR
Lieutenant Gen. Charles Jacoby,)	
	)	ARMY Misc.Dkt.Nos.
Appellees.	)	20070834 and 20070535

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

I. INTRODUCTION

The Government's response to Appellant's application for an immediate stay of trial pending this Court's appellate review of his double jeopardy claim is remarkable in several respects.

First, the Government's position is in direct conflict with the following rule, which has been adopted in virtually every Circuit to consider this issue: So long as the accused's Double Jeopardy claim is not frivolous, the filing of an appeal from the denial of a Double Jeopardy dismissal motion *automatically* divests the trial court of jurisdiction to proceed with the trial until the appeal is resolved.

Second, the Government obfuscates the question of whether the Double Jeopardy Clause of the Fifth Amendment entitles Petitioner to a stay of the scheduled trial pending appeal, by

making the irrelevant point that there is no Due Process Clause right to take an appeal at all.

While this is true, it simply ignores the fact that since there is a non-constitutional right to take an appeal, the Double Jeopardy Clause places restraints on the manner in which that appeal may be processed.

Third, by acknowledging that the Supreme Court's decision in *Abney*¹ is binding on the military court system, the Government silently *concedes* that the military trial judge erred when he said that *Abney* had no application to the military court system.

Fourth, the Government suggests that Appellant should be given appellate review of his Double Jeopardy claim at a later time, at which point it would be too late to do anything to preserve his right not to be placed in Double Jeopardy, thereby rendering his Fifth Amendment Double Jeopardy right utterly meaningless.

II.

**THE CIRCUIT COURTS OF APPEAL HAVE UNIFORMLY HELD
THAT A TRIAL COURT IS AUTOMATICALLY DIVESTED OF
JURISDICTION TO PROCEED WITH THE TRIAL OF A CASE
ONCE THE ACCUSED FILES AN APPEAL RAISING A
NON-FRIVOLOUS DOUBLE JEOPARDY CLAIM.**

The Government's position is squarely at odds with the rule adopted by virtually every Circuit Court of Appeals to consider this issue. It is uniformly recognized that if a defendant is

¹431 U.S. 651 (1977).

appealing the denial of any claim that he has "a right not to be tried," then the trial court is automatically divested of jurisdiction to conduct any further proceedings in the case.

For example, in *United States v. Claiborne*, 727 F.2d 842, 850 (9th cir. 1984) the Ninth Circuit held:

Ordinarily, if a defendant's interlocutory claim is considered immediately appealable under *Abney*, **the district court loses its power to proceed** from the time the defendant files its notice of appeal **until the appeal is resolved**.

(Emphasis added.) *Accord United States v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1252 (9th Cir. 1980).

This rule applies to any type of claim where the litigant is asserting a "right not to be tried," whether that right stems from the Double Jeopardy Clause, or from some other source of an immunity from suit (such as judicial immunity, or qualified immunity). As the Ninth Circuit noted in *Claiborne*, this right to stop all trial court proceedings is **especially** clear in cases where the asserted right not to be tried is based on the Double Jeopardy clause.

The Court noted that the "divestiture rule" - that the trial court automatically loses all jurisdiction - "takes on added significance when applied to interlocutory *Abney*-type criminal appeals," because of the risk of putting the defendant through a trial which might later be determined to be barred by

Double Jeopardy:

[A] defendant raising an *Abney* type claim - asserting a valid constitutional 'right not to be tried' - would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal."

Claiborne, supra, 727 F.2d at 850.

At the same time, if the filing of a frivolous interlocutory appeal caused an automatic divestiture of trial court power to proceed with the trial, then criminal defendants would have a powerful incentive to file frivolous appeals raising Double Jeopardy claims. The solution, adopted by all the federal circuit courts to consider the issue, is to limit the automatic divestiture rule to non-frivolous appeals.

As the Third Circuit held in *United States v. Leppo*, 634 F.2d 101, 105 (3rd Cir. 1981):

[W]e hold that an appeal from the denial of a double jeopardy motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous and supported its conclusions by written findings. Rather, both the district court and court of appeals shall have jurisdiction to proceed. Thus the defendant is entitled ultimately to appellate review. ***Of course, in the absence of a finding that the motion is frivolous, the trial court must suspend its proceedings once a notice of appeal is filed.***

(Emphasis added.)

The Fifth Circuit adopted the same rule:

If the claim is found to be frivolous, the filing of a notice of appeal by the **defendant** shall not divest the district court of jurisdiction over the case. **If nonfrivolous, of course, the trial cannot proceed until a determination is made of the merits of an appeal.**

United States v. Dunbar, 611 F.2d 985, 988 (5th Cir.), cert. denied, 447 U.S. 926 (1980) (emphasis added).²

This is precisely the position advanced by Appellant's counsel in the trial court: "I had indicated my belief that, based on *Abney*, that stay is automatic, without having to request it. . ." ROT II at 186 (July 6, 2007); See JA, No. 18. Appellant respectfully submits that since every other Circuit follows this rule, this Court should as well. The Government has offered no reason at all as to why this Court should **not** follow this rule.

In the present case, the military trial judge never made **any** finding that Appellant's claim was frivolous, and yet he refused to recognize that he was divested of jurisdiction to proceed when Appellant filed his Notice of Appeal [see ROT II,

² Accord *Williams v. Brooks*, 996 F.2d 728 (9th Cir. 1993) ("A number of circuits have addressed the precise issue on this appeal and have uniformly held that the filing of a non-frivolous notice of interlocutory appeal following a district court's denial of a defendant's immunity defense divests the district court of jurisdiction to proceed against him"); *United States v. Hines*, 689 F.2d 934, 937 (10th Cir. 1982) (adopting the *Leppo* rule); *United States v. Lanci*, 669 F.2d 391, 394 (6th Cir. 1982) (same); *United States v. Cannon*, 727 F.2d 1228, 1231 (7th Cir. 1983) ("where a defendant's motion to dismiss on double jeopardy grounds is frivolous or fails to raise a colorable claim of double jeopardy, the mere filing of a notice of appeal is insufficient to divest the district court of jurisdiction"); *United States v. Grabinski*, 674 F.2d 677, 679 (8th Cir. 1982) (same).

AE XXV], and also refused to stay the trial date himself. Thus, the military judge violated the automatic stay rule, which is generally recognized throughout the federal judiciary.

Moreover, the fact that the Government's responsive pleading effectively concedes the non-frivolous nature of the issue, as well as the fact that the Army Court of Criminal Appeals issued a partial stay on May 18, 2007, demonstrates that this is an issue that is not frivolous and that must be taken seriously.

The Third Circuit directly addressed the issue of what an accused should do when a trial court refuses to stay a scheduled trial pending appellate review of a non-frivolous double jeopardy motion:

In those instances in which [the trial court] refuses to do so, or when its findings are not supported by the record, the concerns of Abney are sufficiently safeguarded **by the availability of a stay** pursuant to Fed.R.App.P. 8, or a writ of mandamus or prohibition under 28 U.S.C. § 1651.

Leppo, supra, 634 F.2d at 105 (emphasis added).

Appellant followed this procedure. Because the military trial judge refused to stop the court-martial proceedings below, and never even **suggested** that the Double Jeopardy motion was frivolous (nor, for that matter, has the Government), Appellant has sought a stay from this Court.

III.

WHETHER OR NOT THE RIGHT TO APPEAL IS OF STATUTORY OR CONSTITUTIONAL MAGNITUDE IS IRRELEVANT. THE HOLDING OF ABNEY IS THAT SINCE THERE IS A RIGHT TO AN APPEAL, EVEN THOUGH THAT RIGHT IS NOT OF CONSTITUTIONAL DIMENSION, THERE IS A CONSTITUTIONAL RIGHT TO A STAY PENDING APPEAL OF ANY SCHEDULED TRIAL WHICH, IF HELD, WOULD VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

In its effort to distract this Court from the blunt fact that *Abney* holds that a stay pending appeal is mandatory, the Government presents a red herring issue. The Government seeks to sidetrack this Court by noting that the right to an appeal is not of constitutional magnitude. This is true, but wholly irrelevant.

As the Government correctly points out, in *Abney* itself the Supreme Court expressly recognized that the right to appeal was not of constitutional magnitude. *Abney, supra*, 431 U.S. at 656. The Court simultaneously held, however, that because the prohibition against Double Jeopardy is a constitutional right, and because it could be irrevocably lost if the accused had to go through a trial before he could exercise his statutory right to appellate review of the Double Jeopardy question, an appellate court "must" grant a stay of the trial in order to ensure that its appellate review takes place "before that subsequent exposure [a second trial] occurs." *Abney, supra*, 431 U.S. at 662 (1977).

It is **not** unusual for the Supreme Court to recognize that

even though the right to take an appeal is not of constitutional magnitude, that nevertheless if a statutory right of appeal exists then there is a constitutional right to have that appeal processed in a specific way. Thus, for example, in *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) the Supreme Court stated:

It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e.g., *McKane v. Durston*, 153 U.S. 684, 687-688, 14 S.Ct. 913, 914-915, 38 L.Ed. 867. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings, the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Thus, even though the Supreme Court specifically held that a convicted state prisoner had no federal constitutional right to an appeal, since his State afforded him a non-constitutional right to an appeal, that State was required by the Equal Protection Clause to provide indigents with a free transcript of the trial proceedings.

The *Abney* decision is predicated upon the same logic. Even though Mr. Abney had no federal constitutional right to an appeal, he did have a constitutional right to a stay of his impending trial since he had a non-constitutional right to an

appeal and a constitutional right to be free from Double Jeopardy. This case is no different.

In both this case and *Abney*, there is a *statutory* right to an appeal. *Abney's* right was grounded in 28 U.S.C. § 1291. 1LT Watada's right is grounded in 10 U.S.C. § 866. In both court systems, because denial of a Double Jeopardy motion to dismiss is a collateral order, it is a final decision and thus the accused has a *right* to appeal from that denial. In both systems, therefore, the accused has a right to have appellate review of that denial take place **before** his second trial takes place.

Therefore, in both systems, even though his right to appeal is not of constitutional dimension, the accused has a constitutional right -- based upon the 5th Amendment Double Jeopardy Clause -- to a stay of the impending trial pending resolution of his appeal of the denial of his motion to dismiss.

IV.

THE GOVERNMENT CONCEDES THAT THE TRIAL JUDGE ERRED WHEN HE CONCLUDED THAT THE MILITARY WAS NOT BOUND BY ABNEY

Immediately after the military trial judge denied Appellant's Double Jeopardy motion to dismiss, Appellant's counsel asked the trial judge if briefing on the application of *Abney* would be helpful in determining whether to stay the trial pending appellate review of his decision. The trial judge replied in no uncertain terms that he did not need or want such

briefing because in his view Abney did not apply to the military courts:

CC [Mr. LOBSENZ]: I had one question, Your Honor, about -- seeking guidance. I had mentioned the Abney case, and you have mentioned a few times that if ACCA decides to either issue a ruling or grant a stay before whatever trial date we set, so be it. And I had indicated my belief that, based on Abney, that stay is automatic, without having to request it from ACCA, once the appeal is filed, which we have done. What I was wondering was, would it be advisable to submit briefing on that issue to you before going to ACCA?

MJ: I would ask ACCA to issue a stay, **because I don't believe that that case applies to this court. Because that case deals with a different criminal justice system.** It deals with indictments and so forth. **That's not our military system.** I would, in your pleadings up to ACCA, say that - I'm not going to issue - **I'm not going to abide by an Abney stay.** Just not going to happen.

ROT II, at 186 (July 6, 2007); See JA No. 18 (emphasis added).

Because the military trial judge stated so plainly that he did not think the U.S. Supreme Court's Double Jeopardy case law applied to the military court system, Appellant argued, in his application for a stay submitted to this Court, that U.S. Supreme Court precedent **did** apply to the military courts. *Application for Immediate Stay of Trial Proceedings*, at 12-16.

In response to Appellant's application for a stay, the Government has stated that it agrees with Appellant on this

point: "the Government agrees that Supreme Court precedent concerning the double jeopardy clause of the Fifth Amendment to the U.S. Constitution does apply to courts-martial." *Appellees' Response In Opposition*, at 4. Appellant notes that while the Government agrees with this proposition, the military trial judge expressly did not.

The Government has thus effectively conceded that the military trial judge erred when he ruled that the principles announced in *Abney* were not binding upon him. This conceded error then tainted the military trial judge's refusal to even consider granting a stay of trial pending appeal.

V.

THE GOVERNMENT SIMPLY IGNORES THE ABNEY HOLDING THAT APPELLATE REVIEW HAS TO COME BEFORE THE SECOND TRIAL IN ORDER TO AVOID RENDERING THE PROHIBITION AGAINST DOUBLE JEOPARDY MEANINGLESS.

In his *Application For an Immediate Stay of Trial Proceedings*, Appellant pointed out that *Abney* holds that "the rights conferred on the accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy were postponed until after conviction and sentence." *Abney, supra*, 431 U.S. at 660. The Supreme Court specifically noted that the Fifth Amendment protection against being tried twice "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken." *Id.* at 662.

Therefore, the Abney Court held that "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.*

The Government simply ignores these words and chooses to act as if the Abney decision simply does not exist. The Government simply contends that Appellant's trial should proceed apace, and that any violation of the Double Jeopardy Clause that may be perpetrated by holding that trial can be sorted out later, in an appeal that follows his trial. Thus, the Government cavalierly suggests that the appellate courts should not decide whether Appellant's Double Jeopardy rights were violated until a time when it would be impossible to do anything about such a violation.

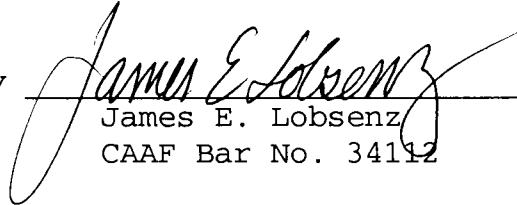
VI. CONCLUSION

For the reasons stated above, Appellant asks this Court to recognize that his Double Jeopardy claim is **not** frivolous, and, whether or not this Court concludes that it will adopt the automatic stay rule, the Court should conclude that in the instant case, a stay is warranted and necessary to prohibit the trial court from going forward with the scheduled trial until all appellate proceedings related to Appellant's Double Jeopardy claim are finally resolved.

DATED this 27th day of September, 2007.

CARNEY BADLEY SPELLMAN, P.S.

By

A handwritten signature in cursive script, reading "James E. Lobsenz", is written over a horizontal line.

James E. Lobsenz
CAAF Bar No. 34112

Kenneth S. Kagan
CAAF Bar No. 34113
Of Attorneys for Petitioner

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

First Lieutenant Ehren K. Watada,	)	CERTIFICATE OF SERVICE
Appellant,)	
)	
	)	SUBMITTED IN CONJUNCTION
	)	WITH WRIT-APPEAL PETITION
The United States of America,)	
Lieutenant Col. John M. Head,	)	USCA Dkt.No. 07-8023/AR
Lieutenant Gen. Charles Jacoby,)	
	)	ARMY MISC NO. 20070834
Appellees.)	

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

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2007, I served the following documents via electronic mail:

1. "Appellant's Reply to Appellees' Response in Opposition to Appellant's application for an Immediate Stay of Court-Martial Proceedings;"
2. Letter to Mr. William DeCicco dated September 27, 2007; and
3. This Certificate of Service

Upon the following:

CPT Adam S. Kazin, JA
Government Appellate Division
901 N. Stuart Street
Arlington, VA 22203
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CARNEY BADLEY SPELLMAN, P.S.

By Kenneth S. Kagan
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