

**IN THE UNITED STATES COAST GUARD  
COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Appellee

v.

Evan K. Goodell  
Seaman Recruit Machinery Technician (E-1)  
U. S. Coast Guard,  
Appellant

14 August 2019

APPELLANT’S SUPPLEMENTAL  
ASSIGNMENT OF ERROR AND BRIEF

Dkt. 1466  
Case No. CGCMG 0370  
Before McClelland, Judge, Brubaker

Tried at Norfolk, Virginia by a general  
court-martial convened by Commander CG  
Personnel Service Center, on 5 June and 7  
September 2018.

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES  
COAST GUARD COURT OF CRIMINAL APPEALS**

**Statement of Facts**

On 3 July 2019, this Court set aside the findings in *United States v. Goodell*, Dkt. 1458 (*Goodell I*).

During sentencing in this case, the government introduced the promulgating order from *Goodell I* as evidence in the government’s sentencing case. (Prosecution Ex. 5; R. at 105-6.) The government also introduced the stipulation of fact *Goodell I* as evidence in aggravation in this case. (Prosecution Ex. 6). And the stipulation of fact in this case, in turn, recited the offenses that MKSR Goodell was convicted of in *Goodell I*. (Prosecution Ex. 1.) These exhibits were all relied on in the government’s sentencing arguments and the military judge considered the convictions as part of the sentencing “context” of this case. (R. at 106, 133.)

**Supplemental Issue Presented**

**VI.**

**WHETHER THIS COURT MAY AFFIRM A SENTENCE WHERE A PRIOR CONVICTION WAS ADMITTED AS EVIDENCE IN SENTENCING BUT WAS LATER SET ASIDE.**

## Argument

### VI.

**THE VALIDITY OF A SENTENCE IS CALLED INTO QUESTION WHEN IT RELIES ON A PRIOR CONVICTION THAT IS LATER SET ASIDE ON APPEAL. THE PROSECUTION INTRODUCED MKSR GOODELL'S NOW-OVERTURNED CONVICTION AS SENTENCING EVIDENCE IN THIS CASE. THIS COURT SHOULD ORDER RESENTENCING.**

#### Standard of review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Lewis*, 78 M.J. 447, 452 (C.A.A.F. 2018). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous or his conclusions of law are incorrect. *Id.*

#### Analysis

A conviction that is set aside on appeal is no longer admissible as a prior conviction in support of the government's sentencing case. *United States v. Tucker*, 404 U.S. 443, 447-48 (1973); *United States v. Tanner*, 63 M.J. 445, 447 (C.A.A.F. 2006). The promulgating order from *Goodell I*, introduced by the government, is no longer admissible because the findings and sentence it documents have been set aside by this Court.

In these circumstances—where a prior conviction is considered at sentencing, but then later set aside—this court cannot affirm the sentence if the sentence adjudged might have been different in the absence of the prior conviction. *United States v. Tucker*, 404 U.S. 443, 447-48 (1973); *United States v. Tanner*, 63 M.J. 445, 447 (C.A.A.F. 2006). The record demonstrates that the government's sentencing would have been quite different in the absence of the prior

conviction. Without a conviction, the information presented during sentencing would be unreliable. The prosecution relied heavily on the notion that MKSR Goodell demonstrated a pattern of escalating animosity toward his wife. (R. at 106.) The prejudicial impact was compounded by the fact that the charges in *Goodell II* were for inchoate offenses. The need to punish MKSR Goodell for these unsuccessful attempts is far lesser in the absence of a prior criminal record.

The “might have” standard for prejudice is easily satisfied here. MKSR Goodell’s prior conviction is now inadmissible and surely had an impact on the sentence in this case. As a consequence, this Court cannot affirm his sentence as correct in fact and law under Article 66.

### Conclusion

WHEREFORE, MKSR Goodell prays this Court set aside the sentence in this case.

~~Respectfully submitted,~~

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DATE: 14 August 2019

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on  
14 August 2019.



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