IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	)	10 October 2018
	)	APPELLANT'S REPLY BRIEF
	)	Dkt. 1461
v.	)	Case No. G 0365
	)	Before McClelland, Brubaker, Mooradian
Juan A. GUZMAN Machinery Technician Third Class U. S. Coast Guard, Appellant	)	Tried in Seattle, Washington by a general court-martial convened by Commander, Thirteenth Coast Guard District, on 15 November 2016, 13 January, 6 March, and 14-19. 21-25 August 2017.

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

Machinery Technician Third Class (MK3) Juan Guzman submits the following in reply to the government's Answer and Brief through undersigned appellate defense counsel.

II.

[redacted]

[redacted]

III.

[redacted]

[redacted]

[redacted]

IV.

A. The government conceded that the charges were brought in the alternative at trial.

The government argues the rationale of *United States v. Gaddis*, that Congress sought to punish different wrongdoers, does not apply to offenses under Article 120. 424 U.S. 544 (1976). (Government Answer at 32.) Appellant's brief did not rely on *Gaddis* for this point, but for the assertion that where charges are brought in the alternative to accommodate the exigencies of proof, the members must be instructed that they may make a finding of guilty for one of the alternatives.

Gaddis, which involved robbery offenses, is not and need not be relied on for the question of whether two specifications were charged in the alternative. That question is uncontested in this case. The government conceded that point at trial:

> MJ: ….But you've charged these in the alternative, right?
> ATC: Yes…

(R. at 1184.)

Thus, while the multiplicity analysis for robbery offenses may vary from that for Article 120 military sexual offenses, this analysis is unnecessary here. The military judge, trial counsel, and defense counsel all agreed that the specifications were going to the members in the alternative. That being the case, the opinion in *Gaddis* dictates that the members be instructed that they may only enter guilty findings on one alternative.

B. Because the instructions were premised on the charges going to the members as alternate theories of liability to account for exigencies of proof, it was plain error not to instruct the members on this point.

The government's argument that the failure to give the instruction is not plain error because it is "common place" deprives the plain error standard of review of effect as a mechanism for appellate supervision. (Government Answer at 30.) Because plain error review only applies where no objection is made it is particularly anomalous to treat an error as not subject to review because the issue was not raised in another case on appeal. Aside from that, the cases cited by the government as examples fall short: The two offenses in *Elespuru* were not alternate theories of a single offense, but were two different offenses, nor was one a lesser-included offense of the other. Rather they were two different offenses under the same article. *United States v. Elespuru*, 73 M.J. 328-29 (C.A.A.F. 2014). *Mayberry*, a summary decision, merely identified error by the trial judge and NMCCA in affirming guilty findings on both specifications charged as alternative theories of liability and consolidated the specifications. *United States v. Mayberry*, 72 M.J. 467 (C.A.A.F. 2013).

The government asserts "when supported by the evidence, there is no error in a panel returning findings of guilt for different sexual assault offenses not standing in a greater/lesser offense relationship based on the same sexual act." (Government Answer at 30.) This assertion, which bears no citation to authority, is simply incorrect. The three cases cited by the

government immediately preceding this claim all treat such a finding as error. In *Mayberry*, the C.A.A.F. consolidated the specifications to address this very error. *United States v. Mayberry*, 72 M.J. 467 (C.A.A.F. 2013). In *Elespuru*, the court set aside the finding on a specification also sent to the members for the exigencies of proof. *Elespuru*, 73 M.J. 326, 330. In *Thomas*, NMCCA explicitly noted that the government *did not concede* that the specifications were charged in the alternative. *United States v. Thomas*, 74 M.J. 563, 568 (N-M. Ct. Crim. App. 2014).

What all three of the cases the government cited share is that guilty findings on more than one offense are impermissible when the offenses are charged in the alternative. With a rule so clear as this and the prosecution's concession that the offenses were alternative theories presented as exigencies of proof, it was plain error to provide instructions that led to impermissible findings of guilt.

C. The exigencies of proof doctrine is an accommodation to the government applicable at the trial level. The doctrine does not, and should not, apply on appeal.

The government argues that "[r]eviving the conditionally dismissed specification would not violate double jeopardy, as the members found appellant guilty of both offenses." (Government Answer at 32.) Findings in the alternative. The government's argument seeks a judicially-created doctrine of "findings in the alternative." But the following four firmly established constitutional principles lead logically to the conclusion that the Constitution forbids this practice.

- Premise 1: When an appellate court sets aside a guilty finding on one offense, the government may not obtain a conviction on another offense in a greater or lesser relationship. *Green v. United States*, 355 U.S. 184 (1957).
- Premise 2: The double jeopardy clause prohibits a guilty finding on two offenses in a greater or lesser relationship. *Id.*

- Premise 3: The double jeopardy clause prohibits a guilty finding on more than one alternative charges brought for exigencies of proof. *United States v. Gaddis*, 424 U.S. 544, 550 (1976); *United States v. Elespuru*,73 M.J. 326 (C.A.A.F. 2014);
- Premise 4: There is no meaningful distinction between obtaining a second guilty finding at a second trial, or "reviving" a second guilty finding that has been "dismissed." *See Green*, 355 U.S. 184, 197 (discussing double jeopardy implications of appellate guilt findings under U.S. Philippine territorial law.)
- Conclusion: When an appellate court sets aside a guilty finding on one offense, it may not revive another that was charged in the alternative with the offense set aside.

What this argument demonstrates is how allowing "findings in the alternative" and the practice of conditional dismissal functions to create an exigencies of appeal doctrine: If the un-dismissed specification fails on appeal, the government is afforded a fallback guilty finding to revive as a conviction. The justification of the exigencies of proof doctrine—that prosecutors can never quite be sure of the testimony that will come out at trial—does not apply on appeal. If the un-dismissed specification fails on appeal, the conviction must fail on appeal. Extending the "exigencies" post-trial is both fundamentally unfair and counter to the principal in *Green* that the choice to appeal a conviction should not be accompanied by a threat of a subsequent conviction for the same conduct.

D. The military judge's failure to instruct the members that they could only convict on one of the two alternative specifications materially prejudiced his right to an acquittal on one of two specifications.

Although this feature of the military justice system is soon to change, at court-martial, in contrast with civilian criminal law, there is no entry of an order or judgement by the military judge following a finding of guilt. Rather, the announcement of findings in court are immediately effective. *United States v. Hitchcock*, 6 M.J. 188, 190 (C.M.A. 1979). And an acquittal, once announced, cannot be reconsidered. *Id.*

The government asserts that "the potential revival of the conditional dismissal also does not prejudice a substantial right of the appellant." (Government Answer at 31.) This assertion of

no-prejudice focuses on the wrong error by the judge. The question is *not* whether his rights were prejudiced by the conditional dismissal. The question is whether his rights were prejudiced by the failure to properly instruct the members in the alternative nature of the charges. The instructional error deprived MK3 Guzman of a certain acquittal on one of two sexual offenses. The unassailable, sacrosanct character of an acquittal is at the core of the Sixth Amendment double jeopardy protection. It is a substantial right that was materially prejudiced by the failure to give the instruction that would have necessitated an acquittal on one of two specifications. The legal authority on this issue demonstrates that "conditional dismissal" in no cure.

Conclusion

MK3 Guzman asks this Court to grant his requests for relief as set out in his Assignments of Error and Brief.

Respectfully submitted,

ROBINSON.BENJAMIN.MORRIS.1242772039

Digitally signed by ROBINSON.BENJAMIN.MORRIS.1242772039

COMPLETED

Date: 10 October 2018

Benjamin M. Robinson
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-7389
benjamin.m.robinson@navy.mil

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via email on 10 October 2018

Date: 10 October 2018

Benjamin M. Robinson
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-7389
benjamin.m.robinson@navy.mil