IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States,

Appellant/Cross-Appellee,

v.

Patrick Carter
Master Sergeant (E-7)
U.S. Air Force,

Appellee/Cross-Appellant.

APPELLEE'S ANSWER BRIEF

USCA Dkt. No. 17-0086/AF

Crim.App. No. 38708

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

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ISSUE PRESENTED

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) ERRED BY FINDING THAT THE CONVENING AUTHORITY EXCEEDED THE SCOPE OF AFCCA'S REMAND WHEN HE REFERRED APPELLANT'S CASE TO AN "OTHER" TRIAL UNDER R.C.M. 1107(e)(2) FOLLOWING AFCCA'S ORIGINAL REMAND DECISION?

Statement of Statutory Jurisdiction

The Judge Advocate General of the Air Force (TJAG) ordered this case to be sent to this Court pursuant to Article 67(a)(2), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

Master Sergeant (MSgt) Carter was tried by a general court-martial composed of officer members between 16 and 26 February 2010. The members acquitted MSgt Carter of one specification of raping a child under age 12, one specification of raping a child over 12 but under age 16, one specification of digitally penetrating a child over 12 but under age 16, one specification of sodomy of a child under age 12, and one specification of sodomy of a child over 12 but under age 16 in violation of Articles 120 and 125, UCMJ, respectively. 10 U.S.C. §§ 920, 925 (2007). He was convicted, by exceptions and substitutions, of one specification of indecent liberties with a child under 16, one specification of child endangerment, and one specification of indecent liberties with a child under 16 in violation of Articles 120 and 134, UCMJ. 10 U.S.C. §§ 920, 934 (2007).

The members sentenced Appellee to a dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to E-1. On August 19, 2010, the Convening Authority (CA) disapproved the members' finding with respect to the specification of indecent liberties with a child under 16 in violation of

Article 120(j), approved the remaining two specifications, and approved only so much of the sentence that provided for a dishonorable discharge, three years confinement, forfeiture of all pay and allowances, and reduction to E-1.

On January 4, 2013, the Air Force Court of Criminal Appeals (AFCCA) set aside and dismissed the remaining two specifications pursuant to *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012). (JA 236.) AFCCA did not authorize a rehearing. *Id.*

On April 16, 2013, TJAG certified three issues to this Court. On August 2, 2013, this Court summarily affirmed AFFCA's dismissal of the two remaining charges pursuant to *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013) and *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013). (JA 235.) This Court denied the government's Petition for Reconsideration on August 29, 2013. (JA 234.)

On January 16, 2014, TJAG, citing this Court's affirmance of AFCCA's decision, ordered all rights restored, and further ordered the CA to take action "in accordance with the decision of the Court of Appeals for the Armed Forces[.]" (JA 233.)

But that did not end this case. Despite the fact that neither AFCCA nor this Court authorized a rehearing, after consulting the Air Force Appellate Government Division (JA 213), the CA elected to proceed with an "other trial" pursuant to R.C.M. 810(e).

Appellee was arraigned at his "other trial" on June 10, 2014, and a military judge, sitting as a general court-martial, tried Appellee between 21 and 24 July 2014. Contrary to his pleas, Appellee was convicted of one charge and one specification of child endangerment and one specification of taking indecent liberties with a child in violation of Article 134, UCMJ. 10 U.S.C. § 934 (2012); (R. at 61.) Appellee was sentenced to confinement for forty months, forfeiture of all pay and allowances, and reduction to E-1. (R. at 328.) On November 6, 2014, the CA purportedly approved the adjudged sentence even though it was greater than the sentence previously approved in this case in violation of Article 63, UCMJ. 10 U.S.C. § 863 (2012). (Gen. Court-Martial Order No. 4 dtd Nov. 6, 2014.)

On July, 21, 2016, the lower court affirmed it had previously dismissed the charge and specifications in this case, and that the "other trial" now before this Court exceeded the scope of AFCCA's remand. (JA 13-15.) Judge Brown dissented, but noted the "other trial" he believed to be authorized was "subject to applicable speedy trial, double jeopardy and statute of limitations considerations." *Id.*

Thirty days later, the government moved for reconsideration and reconsideration *en banc* with AFCCA. (JA 28; 54.) On August 26, 2016, the *en banc* court denied reconsideration by an evenly divided vote, and the panel denied reconsideration on September 19, 2016. (JA 23.)

On November 16, 2016, TJAG filed a second certification in this case. Appellee filed a cross petition on November 18, 2016.

Statement of Facts

The Chief of Appellate Records, Ms. Hattie Simmons, testified that, on Christmas Eve 2013, the Associate Chief, Government Trial and Appellate Counsel Division, Mr. Roger Bruce, contacted her and told her the Solicitor General had declined to file a petition for a writ of certiorari of this Court's affirmance of AFCCA's 2013, decision dismissing the charge and specifications. (JA 109.)

Believing a rehearing was authorized on the single charge and specification disapproved by the CA in 2010, Ms. Simmons forwarded the record of trial to the original CA, Eighteenth Air Force, on December 27, 2013. (JA 110.) After doing so, she read AFCCA's decision and spoke with the Chief Judge of AFCCA. "We were filing the paperwork and noticed that the Air Force court decision didn't actually specify that a rehearing was authorized so I went over to the Air Force court and spoke with the chief judge there to ask for some clarification and that's when they pointed out that a rehearing was not authorized because there were no offenses left." (JA 111.) "There were no offenses left to have a rehearing on." (JA 113.) She then contacted Eighteenth Air Force and instructed the command to return the record of trial to her. (JA 113.)

On January 16, 2014, Ms. Simmons, acting for the TJAG, notified Appellee his case had been dismissed, and further directed a substitute CA, Air Force District of Washington (AFDW), to take action in accordance with AFCCA's decision. (JA 233.) For reasons not explained in the record, Eighteenth Air Force later contacted Ms. Simmons and "expressed an interest in retrying the case[.]" (JA 115.) Ms. Simmons contacted Mr. Frank Miller, an attorney in the Staff Judge Advocate's Office for AFDW, and he "did not have a problem with letting them retry the case if that was their intent." (JA 115; JA 218.) Ms. Simmons sent the record of trial back to Eighteenth Air Force on February 4, 2014. (JA 116.) Again acting for TJAG, Ms. Simmons instructed Eighteenth Air Force they had 120 days from receipt of the record of trial in which to proceed to trial. (JA 152.) Ms. Simmons relayed to Eighteenth Air Force that she had spoken with Mr. Bruce, and the CA could proceed with an "other trial" under R.C.M. 1208. (JA 213.)

Summary of Argument

Last term, TJAG queried whether the government is entitled to a rehearing or whether the Courts of Criminal Appeals (CCAs) could exercise their discretion to dismiss charges and specifications. *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016). In this case, TJAG asks if, after a CCA has exercised its discretion and dismissed charges and specifications, a convening authority may nevertheless authorize further proceedings. After a CCA dismisses a charge, a convening authority

may not initiate further proceedings unless authorized to do so by the CCA. AFCCA did not abuse its discretion when it determined that its previous remand did not authorize further proceedings in this case.

Argument

I

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THE COURT'S PREVIOUS REMAND DID NOT AUTHORIZE FURTHER PROCEEDINGS.

Standard of Review

This Court reviews questions of statutory interpretation de novo. *United States v. Atchak*, 75 M.J. at 195. But "where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2204 (2009) (citation omitted). To the extent a court's order is ambiguous, a reviewing court will not reverse a lower court's interpretation of its own orders "unless the record clearly shows an abuse of discretion." *Southworth v. Bd. of Regents*, 376 F. 3d 757, 766 (7th Cir. 2004) (citing *In re Chicago, Rock Island & Pacific R.R. Co.*, 860 F. 2d 267, 272 (7th Cir. 1988)); *see generally Travelers*, 129 S. Ct. at 2204 n. 4.

Law & Analysis

A) The statue governing remands by a CCA, Article 66, UCMJ, provides for a binary choice: authorize a rehearing or dismiss.

"[T]he plain language of Article 66(d), UCMJ, provides that when a CCA sets aside findings, it '*may*...order a rehearing,' and if it does not, 'it *shall* order that the charges be dismissed.'" *Atchak*, 75 M.J. at 194. "The only command under Article 66(d), UCMJ, is that a CCA must dismiss charges when it does not authorize a rehearing on a finding it has disapproved." *Id.*

The parties are in apparent agreement that AFCCA did not authorize a rehearing and dismissed the charge and specifications in its initial review of this case. (Gov't Br. at 15.) And, in 2016, the lower court was unanimous in concluding "that our election of the dismissal option precludes the convening authority from ordering a rehearing." (JA at 12.)

B) AFCCA did not abuse its discretion when it determined that its previous dismissal and remand did not authorize further proceedings and that the case before the Court exceeded the scope of AFCCA's remand.

(1) Upon remand, a convening authority may not exceed the scope of authority delegated to him by a CCA.

As early as 1838, the Supreme Court announced a rule that has never been abandoned:

> Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor

> intermeddle with it, further than to settle so much as has been remanded.

Ex parte Sibbald v. United States, 37 U.S. 488, 492 (1838).

This rule has long been recognized by this Court. *United States v. Stevens*, 10 C.M.A. 417, 418 (C.M.A. 1959) ("After remand of a case, a lower court, or in the military any lower echelon, is without power to modify, amend, alter, set aside, or in any manner disturb or depart from the judgment of the reviewing court.").

"Of course, the same principle applies when the Court of Military Review remands a case to a convening authority for further action." *United States v. Montesinos*, 28 M.J. 38, 44 (C.M.A. 1989). "As we interpret the Code, the convening authority to whom the case was remanded by the Court of Military Review had no independent statutory authority at that time to act on the findings and sentence. *See*, Art. 60. Instead, he was acting by delegation from the Court of Military Review – to which he was subordinate (regardless of his rank) in the military justice system. If his action exceeds the scope of his delegated authority, it may be set aside on further direct review or, if necessary, by extraordinary writ." *Id.*

"Here, the case was remanded to the appropriate convening authority to take action consistent with the January 2013 opinion – that is, to issue a final court-martial order reflecting that the charges and specifications were dismissed." (JA 13 (citing *United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001); *United States v. Diaz*, 40 M.J. 335, 343-45 (C.M.A. 1994))).

(2) AFCCA did not abuse its discretion when it determined the convening authority exceeded the scope of the authority delegated to him by AFCCA when he authorized further proceedings in this case.

The government urges this Court to conduct a *de novo* review of AFCCA's remand. (Gov't Br. at 7, 14-15.) But the question certified asks whether AFCCA erred by finding that the convening authority exceeded the scope of AFCCA's remand, which is guided by the "broad deference" given to a lower court in "its interpretation of its own orders." *Southworth*, 376 F. 3d at 766. "That court is in the best position to interpret its own orders." *In re Chicago, Rock Island & Pacific R.R. Co.*, 860 F. 2d at 272; *WRS, Inc. v. Plaza Entm't, Inc.*, 402 F. 3d 424, 428 (3rd Cir. 2005) (recognizing "great deference" given to lower court's interpretation of its own orders). Accordingly, this Court need not "consider the body of the remanding court's opinion," (Gov't Br. at 15), where AFCCA has already done so, and determined further proceedings were unauthorized. (JA 4-14.)

Nevertheless, a review of AFCCA's 2013, decision provides no basis to conclude AFCCA abused its discretion in determining its remand did not authorize further proceedings. In the body of the decision, AFCCA "found that Appellant, in a contested case, was charged with and convicted of two specifications that failed to allege an element of the charged offense, resulting in material prejudice to his substantial, constitutional right to notice under the Fifth and Sixth Amendments." (JA 11 (citing *Humphries*, 71 M.J. at 215; *Carter*, 2013 CCA LEXIS 1. [JA 238-

39])). And aside from MSgt's right to timely appellate processing, AFCCA declined to review his other assignments of error given the court's dismissal of the charge and specifications. (JA 239 n. 6 ("Given our decision, it is unnecessary to discuss the remaining assignments of error.")). These included case-dispositive assignments of error including factual and legal sufficiency. (JA 237.)

While it is true the Court referenced a "possible rehearing" in *dicta* denying relief for timely appellate processing, neither the government nor any member of AFCCA asserts that a rehearing was authorized in this case. Instead, the government argues AFCCA's "erroneous" reference to a rehearing was either express or implied authorization to conduct an "other trial" in this case. (Gov't Br. at 15.) The lower court did not abuse its discretion in rejecting this argument, which is untenable under even a *de novo* review of AFCCA's opinion.

(3) The binary choice set forth in Article 66, UCMJ, affords the CCAs no authority to issue general remands. A CCA may either authorize further proceedings or it shall dismiss the charges.

Confronted with AFCCA's remand dismissing the charge and specifications in this case, the government argues the remand was "presumptively a general mandate." (Gov't Br. at 13.) Assuming for the sake of argument the dismissal of charges in this case was not, "in effect, unmistakable," *United States v. Campbell*, 168 F. 3d 263 (6th Cir. 1999), there is no statutory authority for the concept of general remands in the UCMJ.

The government relies heavily on *United States v. McMurrin*, 72 M.J. 697 (N-M. Ct. Crim. App. 2013), the only military case suggesting CCAs possess the authority to issue general and limited remands. (Gov't Br. at 7.) But even the Navy Court of Criminal Appeals (NMCCA) recognized general remands were "not articulated in military jurisprudence[.]" *McMurrin*, 72 M.J. 702. And for good reason.

Article III, federal courts possess such authority because 28 U.S.C. § 2106 "provides appellate courts with the authority to grant general or limited remands." *United States v. Moore*, 131 F. 3d 595, 597-98 (6th Cir. 1997). That statute provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (2012). But even under this statute, "the absence of an express limitation does not a limitless remand make." *United States v. Davilla-Felix*, 763 F. 3d 105, 109 (1st Cir. 2014).

By contrast, Article 66, UCMJ, provides:

> If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the

> findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

10 U.S.C. § 866(d) (2012).

The CCAs "are purely creatures of statute and their power and authority—like that of the court-martial itself—must be found within the confines of the creating legislation." *United States v. Simmons*, 6 C.M.R. 105, 107 (C.M.A. 1952); *see also United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015). Article 66, UCMJ, does not authorize the CCAs to issue general remands, and "a convening authority cannot disregard a mandate of this or any other court to disadvantage an accused beyond the extent permitted by the court." *Montesinos*, 28 M.J. at 47 (Cox, J. dissenting). "[T]he convening authority, upon receiving the record of trial on remand from [AFCCA], was only authorized to issue a final order effectuating [AFCCA's] previous dismissal of the specifications." (JA 14 (citing *Riley*, 55 M.J. at 188; *Diaz*, 40 M.J. at 343-45)); *Beal Bank, S.S.B. v. Caddo Parish-Villas S., Ltd.*, 174 F. 3d 624, 628 (5th Cir. 1999) ("Judicial functions entail significant further proceedings; ministerial functions do not.").

C) There is no statutory authority to convene "other trials." If such a military tribunal continues to exist, it is a judicial creation reserved for jurisdictional error initially identified by the convening authority before initial action where jeopardy has neither attached nor terminated. None of these circumstances are present in this case.

(1) There is no statutory authority for "other trials." The authority for such proceedings is rooted solely in this Court's divided interpretation of the 1951 Manual for Courts-Martial in *United States v. Padilla*, 5 C.M.R. 31 (C.M.A. 1952), which should be expressly abandoned.

AFCCA acknowledged the absence of statutory authority for "other trials," but asserted this "concept...began in the 1951 Manual for Courts-Martial." (JA 8.) Citing *Padilla*, the government goes further arguing the 1951 Manual for Courts-Martial "treated new trials, other trials, and rehearings as separate and distinct types of proceedings." (Gov't Br. at 11.) In fact, the divided Court in *Padilla* declined to decide that question. *Padilla*, 5 C.M.R. at 39 ("We do not find it necessary to a solution of the present problem that we determine whether the Manual for Courts-Martial, supra, provides for a rehearing in these premises or for an entirely new and independent proceeding.").

Writing for herself, Judge Hecker cites language from *Padilla* asserting there is "a legal and practical difference between a 'rehearing' ordered for procedural error, and 'another trial' ordered for jurisdictional defect in the original proceedings," but she fails to note this language comes from Chief Judge Quinn's dissent. (JA 13 n. 40 (citing *Padilla,* 5 C.M.R. at 42 (Quinn, C.J., dissenting))).

Judge Latimer wrote a third opinion in *Padilla* concurring in the result:

> Conceding for the purposes of argument, that the writers of the Manual attempted to distinguish between a rehearing based on procedural error and 'another trial' based on lack of jurisdiction, I would not perpetuate the

> distinction. To do so tends to confuse what can be orderly procedure for the sole purpose of asserting refined concepts of jurisdiction.

Padilla, 5 C.M.R. at 40 (Latimer, J. concurring in result). Judge Latimer relied upon language in Article 63, UCMJ, "rehearings," which is now located in Article 60(f)(3): "If [the CA] disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges."

Padilla's three separate opinions discussing the meaning of "another trial" in paragraph 92 of the 1951 Manual for Courts-Martial, and specifically Chief Judge Quinn's dissent, provide the entire legal foundation for the existence of "other trials," which are now referenced in R.C.M. 810(e). MANUAL FOR COURTS-MARTIAL (MCM), App. 21 at A21-48 UNITED STATES (2016 ed.) ("This definition is taken from paragraph 81d(2) of MCM 1969 (Rev.). *See also* paragraph 92b of MCM, 1969 (Rev.)).

Importantly, it has now been nearly twenty years since this Court made even an oblique reference to an "other trial." *See United States v. Reid*, 46 M.J. 236, 240 (C.A.A.F. 1997). In *Reid*, this Court's decretal paragraph affirmed the CCAs decision purporting to authorize both an "other trial" and a rehearing on sentence. The government argues this single sentence "recognize[d] the distinction between a rehearing and 'other trial' in its holding[.]" (Gov't Br. at 10.)

This Court's failure to authorize an "other trial" in the intervening twenty years, and specifically in cases following *Humphries*, suggests the concept of "other trials" naturally expired sometime late in the last century for want of legal authority. However, the government's reliance on what is ultimately a dissenting opinion in *Padilla* requires the "shoveling of fresh dirt upon" a concept the government seeks to rescue from the grave. *Ohio v. Clark*, 135 S. Ct. 2173, 2184 (2015) (Scalia, J. concurring); *United States v. Baier*, 60 M.J. 382, 383 (C.A.A.F. 2005) ("That mistake is a weed in the garden of our jurisprudence. We will now pull it up by the roots.").

(2) Even if "other trials" continue to be authorized as a matter of law, they are limited to situations involving jurisdictional error, and *Humphries* makes clear that failure to state an offense is non-jurisdictional, procedural error tested for prejudice.

Chief Judge Quinn's dissenting opinion in *Padilla*, which as outlined above provides the dubious legal underpinnings for other trials "other trials," argues "there is a legal and practical difference between a 'rehearing' ordered for procedural error, and 'another trial' ordered for jurisdictional defect in the original proceedings." 5 C.M.R. at 42; *United States v. Ellison*, 40 C.M.R. 726, 729-30 (A.B.R. 1969) ("[A]nother trial" is an entirely new proceeding, based upon the nullity of the former one; thus not even the express authorization by the Board was required for another trial in order to avoid the former jeopardy bar."). Accordingly, the MCM continues to define an "other trial" as "another trial" in which the prior proceedings were

declared to be invalid "because of lack of jurisdiction or failure of a charge to state an offense." MCM, R.C.M. 810(e), UNITED STATES (2016 ed.)

However, this Court made clear in *Humphries*, citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), "that a specification that fails to properly allege an element of a charged offense, is defective, and while such a defect affects constitutional rights, it does not constitute structural error subject to automatic dismissal." *Humphries*, 71 M.J. at 212 (citations omitted). This Court abrogated the "apparently straightforward language of Rule for Courts-Martial (R.C.M.) 907 (b)(1)(B)—which provides that [a] charge or specification shall be dismissed at any stage of the proceedings if...[t]he specification fails to state an offense[.]" *Id.*

Nevertheless, two years after *Humphries* was decided, the government brought MSgt Carter before an "other trial" due to the "jurisdictional error" set forth in R.C.M. 810(e). Inexplicably, the government continues to assert the error in this case is jurisdictional. (Gov't Br. at 4, 7.) If there was ever authority to order "other trials" pursuant to R.C.M. 803(e) in cases involving a failure to state an offense, it was overruled when this Court invalidated the jurisdictional nature of the failure to state an offense in R.C.M. 907(b)(1)(B), which has since been abrogated by the President in the recent amendments to R.C.M. 907. MCM, R.C.M. 907(b), UNITED STATES (2016 ed.) The President's failure to also amend R.C.M. 810(e) in the face of

controlling precedent merely confirms "other trials" are the hence abandoned judicial relic and afterthought Appellant asserts them to be.

Citing Judge Brown's dissent, the government argues MSgt Carter's second court-martial was "an independent *de novo* proceeding, not a continuation of his initial trial," and even suggests the government's assignment of different case numbers is legally significant. (Gov't Br. at 6, 9-10.) But unless the failure to state an offense is jurisdictional error and MSgt Carter's initial court-martial was void, the statutory and constitutional prohibitions on double jeopardy would prevent MSgt Carter from being tried at "an independent *de novo* proceeding, not a continuation of his initial trial." (Gov't Br. at 6.) And Judge Brown acknowledged as much in his dissent. (JA 17 (Brown, J. dissenting) ("[T]he convening authority was fully empowered to prefer and refer charges related to that misconduct, subject to applicable speedy trial, double jeopardy and statute of limitations considerations.")).

This Court should accept the government's assertion that, "in ACM 37715 [AFCCA] chose dismissal rather than rehearing, and having done so, no rehearing was authorized," (Gov't Br. at 10; JA 34), and, therefore, review of ACM 37715 was "fully completed." 10 U.S.C. § 844 (2012). Even *McMurrin*, upon which the government heavily relies, concluded jeopardy had not terminated in that case because NMCCA expressly authorized a rehearing as to sentence. 72 M.J. at 704.

Accordingly, even if an "other trial" is authorized as a matter of law, where it is ordered for non-jurisdictional error, such a court-martial is subject to the prohibition on double jeopardy found in Article 44, UCMJ. Because jeopardy both attached and terminated in this case, Appellant's case must be dismissed. *McMurrin*, 72 M.J. at 704 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

Conclusion

"The so-called 'mandate rule' is simply a sub-species of the venerable 'law of the case' doctrine, a staple of our common law as old as the Republic." *Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Coops., Inc.,* 896 F. Supp. 912, 914 (E.D. Ark. 2005). "And it safeguards stability in the administration of justice, for the orderly functioning of the judiciary would no doubt crumble if trial judges were free to disregard appellate rulings." *United States v. Kennedy*, 682 F. 3d 244, 253 (3rd Cir. 2012).

Pursuant to this Court's precedent in *Humphries*, *United States v. Goings*, 72 M.J. 202, 208 (C.A.A.F. 2013), and *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013), AFCCA rightly dismissed the charge and specifications in this case after finding Appellant was prejudiced by the government's failure to charge or present evidence on the terminal element.

"[A]ny issue conclusively decided by this court on the first appeal is not remanded." *United States v. Husband*, 312 F. 3d 247, 251 (7th Cir. 2002) (citation

omitted); *Parker v. Scrap Metal Processors, Inc.*, 468 F. 3d 733, 741 (11th Cir. 2006). As it did in 2013, the government persists in complaining of a "windfall benefit" and error not amounting to "cognizable prejudice." (Gov't Br. at 16.) These arguments were advanced and rejected by AFCCA and this Court in 2013. The lower court did not authorize further proceedings in 2013, and it did not abuse its discretion in 2016, when it determined it dismissed this case in 2013.

WHEREFORE, this Honorable Court should dismiss the charge and specifications in this case.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on January 17, 2017, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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