

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Mark J. ROSARIO  
Sergeant (E-5)  
United States Marine Corps,

Appellant

REPLY ON BEHALF OF  
APPELLANT

Crim. App. Dkt. No. 201500251

USCA Dkt. No. 16-0424/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES:

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## Argument

WHETHER THE LOWER COURT ERRED IN CONDUCTING ITS ARTICLE 66(c), UCMJ, REVIEW BY FINDING AS FACT ALLEGATIONS THAT SUPPORTED CHARGES OF WHICH SGT ROSARIO WAS ACQUITTED TO AFFIRM THE FINDINGS AND SENTENCE.

Not once does the Government's brief address the controlling case on the granted issue—*United States v. Smith*.<sup>1</sup> It does not even cite *Smith* in passing. Instead, the Government focuses on issues irrelevant to the granted issue, sets up straw men arguments, and tries to knock them down.

The Government's position is that Sgt Rosario is challenging his conviction on the basis of it being an inconsistent verdict. While inconsistent verdicts are allowed and appellants seeking relief will not normally succeed on that basis alone, inconsistent verdict analysis is completely outside the matter before this Court. The Government's positions demonstrate a lack of understanding of the issues present.

Sergeant Rosario is not asking this Court to expand the rules in *Walters*<sup>2</sup> or *Stewart*.<sup>3</sup> Rather, he is asking this Court to apply *Smith*<sup>4</sup> and its applicability to a service appellate court's Article 66(c), UCMJ, review to protect his double

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<sup>1</sup> 39 M.J. 448 (C.M.A. 1994).

<sup>2</sup> *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003).

<sup>3</sup> *United States v. Stewart*, 71 M.J. 38 (C.A.A.F. 2012).

<sup>4</sup> 39 M.J. 448.

jeopardy rights. *Walters* and *Stewart* are merely illustrative for prior examples as to when this Court applied *Smith* and provided full and fair consideration to an appellant's double jeopardy rights. Reversal in this case does not expand *Walters* or *Stewart* in an untenable way as the Government argues.

Finally, the Government's assertions that service appellate courts would be unable to conduct factual sufficiency review on lesser-included offenses or inconsistent verdicts is wrong. This argument ignores the powers granted to service appellate courts under Article 66(c), UCMJ, and its interplay with an accused's double jeopardy protections.

**A. Sergeant Rosario does not challenge his conviction due to an inconsistent verdict. The Government's analysis on this issue is beyond the scope of Sgt Rosario's challenge and this Court's granted issue.**

The Government points to the fact Sgt Rosario did not ask for a bill of particulars or make any post-trial motions based on ambiguous findings, inconsistent verdicts, or double jeopardy issues.<sup>5</sup> This is not relevant. The problems with this case stem from the lower court's violation Sgt Rosario's double jeopardy protections. Any double jeopardy motion by the Trial Defense Counsel would not have been ripe, as this error did not occur at the trial level.

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<sup>5</sup> Appellee's Brief at 8.

Any analysis of inconsistent verdict case law to this case is beside the point, particularly the cases of *Dunn v. United States*<sup>6</sup> and *United States v. Jackson*.<sup>7</sup> Both have nothing to do with the granted issues in this case. *Dunn* is not applicable here. It only applies when the Government offers the same evidence in support of two offenses separately charged.<sup>8</sup> More importantly to this case, though, it would only be relevant if Sgt Rosario were making an inconsistent verdict challenge, which he is not.

The Government also cites *United States v. Jackson*,<sup>9</sup> a Court of Military Appeals Case applying *Dunn*. Just as in *Dunn*, though, the same facts were offered in support of both charges in *Jackson*.<sup>10</sup> Once again, the *Jackson* decision only applies if Sergeant Rosario were challenging his conviction based on inconsistent verdicts.

The Government's reliance on *United States v. Gutierrez*<sup>11</sup> is also misguided in that it deals with a members panel's ability to reach inconsistent verdicts. While members are allowed to do that (and the Government even specifically addresses that it's the *members* who have this authority), *Gutierrez* does nothing to address

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<sup>6</sup> 284 U.S. 390 (1932).

<sup>7</sup> 7 C.M.A. 67 (C.M.A. 1956).

<sup>8</sup> *Dunn*, 284 U.S. at 393.

<sup>9</sup> *United States v. Jackson*, 7 C.M.A. 67 (C.M.A. 1956).

<sup>10</sup> *Id.*

<sup>11</sup> 73 M.J. 172 (C.A.A.F. 2014).

*Smith* and its general proposition on the limits of service appellate courts in their fact-finding role.

*Littlepage*,<sup>12</sup> which the Government cites in its brief, only deals with fact-finding powers at the trial level. None of the cases relied upon by the Government address the unique powers of a service appellate court and the unique double jeopardy implications that arise from the authority provided to them through statute.

Inconsistency in the verdict, whether or not present here, is not at issue and Sgt Rosario is not challenging this case on that basis. The issue is the lower court's use of facts that supported charges of which Sgt Rosario was acquitted to affirm another conviction. Consistent with double jeopardy principles, appellate courts cannot speculate as to *why* the members may have acquitted Sgt Rosario and base their fact-finding around that; they are simply bound by the fact the charge resulted in an acquittal and must conduct its Article 66(c), UCMJ, review without relying on the facts on which the members acquitted.

The Double Jeopardy Clause of the Fifth Amendment protects an accused from “a second prosecution for the same offense after acquittal.”<sup>13</sup> This principle means a “Court of Military Review may not make findings of fact contradicting

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<sup>12</sup> *United States v. Littlepage*, 10 C.M.A. 245 (C.M.A. 1959).

<sup>13</sup> *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

findings of not guilty reached by the factfinder.”<sup>14</sup> The lower court can “affirm only such findings of guilty . . . as it finds correct in law and fact.”<sup>15</sup> The service courts of criminal appeals “cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not-guilty.”<sup>16</sup>

*Dunn, Jackson, Littlepage, and Gutierrez* do not address a service court of criminal appeals Article 66(c) powers. These cases address the fact-finding powers from the court-martial level, not the appellate level. Nothing in the litany of cases cited by the Government contradicts *Smith* and its progeny, which do expressly address a service court’s authority under Article 66(c), UCMJ.

**B. Sergeant Rosario does not ask for an expansion of the *Walters* or *Stewart* rules, but rather asks this Court to protect his double jeopardy rights by applying *Smith* to this case.**

The Government greatly mischaracterizes Sgt Rosario’s use of *Stewart*.<sup>17</sup> Sergeant Rosario does not assert it’s a perfect analog to his case, but rather uses it illustratively for the general rule of double jeopardy and the constraints placed on appellate courts in using rejected findings from the court-martial.<sup>18</sup> The Government doubles down on its faulty argument when they assert “[T]his Court should clearly hold that the service courts’ power to review inconsistent verdicts

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<sup>14</sup> *United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994).

<sup>15</sup> 10 U.S.C. § 866(c) (2012).

<sup>16</sup> *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).

<sup>17</sup> Appellee’s Brief at 16.

<sup>18</sup> Appellant’s Brief at 10-11



mirrors the Members' ability to issue inconsistent verdicts, with the sole exception of the *Stewart* scenario.”<sup>19</sup>

First, as discussed above, Sgt Rosario does not raise inconsistent verdict concerns at this Court and there are no inconsistent verdict issues in this case. The Government asks this Court to apply a rule that has no place even being addressed in Sgt Rosario's case. Second, *Stewart* is merely an example of one way in which a service court of criminal appeals is bound by double jeopardy constraints. It is not, however, the only limitation in this regard (i.e. *Smith*).

The Government also misstates Sgt Rosario's position on *Walters*, arguing its inapplicability to the current case. The Government, however, limits its analysis of *Walters* to its narrow applicability to ambiguous verdicts. There are no general or ambiguous verdict issues in this case. Sergeant Rosario acknowledges the facts aren't the same as *Walters*; but the legal proposition relied upon in *Walters* still applies: “A Court of Criminal Appeals cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not-guilty.”<sup>20</sup>

While *Walters* dealt with a court of criminal appeals reviewing an ambiguous verdict, the double jeopardy implications go far beyond that narrow factual scenario. While the facts are not identical to *Walters*, Sgt Rosario's double

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<sup>19</sup> Appellee's Brief at 16.

<sup>20</sup> *Walters*, 58 M.J at 395 (quoting *Smith*, 39 M.J. at 451).

jeopardy protections are no less affected by the lower court's error in this case.

Sergeant Rosario does not ask this Court to expand *Walters* in any way. Rather, he asks this Court to enforce the *Smith* rule, as the Air Force Court did in *Hernandez*<sup>21</sup> and as this court did in *Walters*.

The Government seems to conflate the general principle underlying the *Walters* holding with the narrow facts in *Walters*. There is a *Walters* rule, as the Government refers to it, that deals with factual sufficiency review of verdicts where the court-martial does not specify the single occasion in an “on divers occasions” specification. That particular issue is not present in this case. But the *Walters* rule stems from general principles of double jeopardy violations, which are implicated in this case. Sergeant Rosario does not seek to expand *Walters* to new territories. Rather, he seeks to enforce the protections of the Double Jeopardy Clause afforded to him under the Fifth Amendment that this Court recognized in *Smith*.

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<sup>21</sup> *United States v. Hernandez*, 2015 CCA LEXIS 499 (A.F. Ct. Crim. App. Nov. 4, 2015).

**C. Despite the Government’s claims to the contrary, courts-martial would still be able to convict accused of lesser-included offenses and service courts of criminal appeals would still be able to conduct factual sufficiency reviews of lesser-included offenses even if this Court finds for Sgt Rosario.**

The Government states Sgt Rosario argues “an acquittal of an offense necessarily includes an acquittal of all the underlying acts of the offense.”<sup>22</sup>

Sergeant Rosario makes no such argument. In response to this straw man argument, the Government argues that should Sgt Rosario prevail at this Court, courts-martial would never be able to convict an accused of a lesser-included offense.<sup>23</sup> Sergeant Rosario is not aware of any legally sound principle that would lead to such a result. Double jeopardy principles certainly would not, as an accused in the Government’s scenario would only be put in jeopardy once.

The Government also seems to argue that service courts of criminal appeals would not be able to review courts-martial convictions of lesser-included offenses should Sgt Rosario prevail.<sup>24</sup> This is wrong. Without more, appellate review of lesser-included offenses does not present double jeopardy implications. This is because appellate courts are not required to rely on facts of which an appellant was acquitted to find a lesser-included-offense conviction factually sufficient.

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<sup>22</sup> Appellee’s Brief at 22.

<sup>23</sup> *Id.* at 21-23; *id.* at 22 (“There would never be a situation in which a court-martial could find an accused not guilty of a greater offense, but guilty of a lesser included offense . . . This is because the underlying acts of an offense always constitute at least one of the elements of the offense.”).

<sup>24</sup> Appellee’s Brief at 21-24.

In support of their argument, the Government posits a hypothetical scenario: that acquittal of a premeditated murder charge (Art. 118, UCMJ), and a guilty finding of the lesser-included offense of voluntary manslaughter (Art. 119, UCMJ), is impossible under Sgt Rosario's argument. This is wrong. The only difference in elements between the two charges is the premeditation requirement of Article 118. The lesser-included-offense finding is not a rejection of all of the facts, just the premeditation element. Double jeopardy concerns are only implicated in the Government's hypothetical if the appellate court found the element of premeditation was met, and perhaps applied it to uphold a separate conviction.

The Government applies this same flawed analysis when it criticizes the Air Force Court of Criminal Appeals (AFCCA) as "simply wrong"<sup>25</sup> because they applied *Smith* to the facts before them in *Hernandez*. Yet the Government never addresses *Smith*. The AFCCA simply applied *Smith*'s holding: "At issue in this case is whether Article 66 permits a Court of Military Review to find as facts certain allegations in a specification which a factfinder has found an accused not guilty of. We think not."<sup>26</sup>

Like Sgt Rosario's case, the AFCCA did not apply a *Walters* ambiguous verdict rule. They simply safeguarded an accused's double jeopardy rights that are implicated at the appellate level due to the unique fact-finding powers imbued to

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<sup>25</sup> Appellee's Brief at 23.

<sup>26</sup> *Smith*, 39 M.J. 451.

service appellate courts under Article 66(c), UCMJ. This is not an “over-expansion” of the *Walters* rule, as the Government argues, but merely a straightforward application of *Smith*.

### **Conclusion**

The Government’s arguments on inconsistent verdicts are beyond the scope of the issue presented before this Court and completely inapplicable. This case rather simply comes down to whether the lower Court properly applied *Smith* in conducting its factual sufficiency review. The lower court did not. Instead, it instead relied on facts of which Sgt Rosario was acquitted in affirming his conviction for an orders violation. This violated his double jeopardy rights and is reversible error.

Wherefore, Sgt Rosario asks this Honorable Court to reverse the opinion of the lower court.

### **Certificate of Filing and Service**

I certify that the foregoing was delivered to this Court, the Appellate Government Division, and to the Administrative Support Division, Navy-Marine Corps Appellate Review Activity on August 22, 2016.

### **Certificate of Compliance**

This brief complies with the page limitations of Rule 21(b) because it contains fewer than 7,000 words. Using Microsoft Word version 2010 with 14-point Times-New-Roman font, this brief contains 2,324 words.



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