IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Jeffrey D. SAGER Aviation Ordnanceman Airman (E-3) United States Navy, Appellant	REPLY ON BEHALF OF APPELLANT Crim. App. Dkt. No. 201400356 USCA Dkt. No. 16-0418/NA

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

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Argument

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IN AFFIRMING THE ABUSIVE SEXUAL CONTACT CONVICTION, THE LOWER COURT RELIED ON FACTS OF WHICH THE MEMBERS ACQUITTED APPELLANT. WAS THIS ERROR?

II.

ARTICLE 120(d), UCMJ, PROHIBITS SEXUAL CONTACT ON ANOTHER PERSON WHEN THAT PERSON IS "ASLEEP, UNCONSCIOUS, OR OTHERWISE UNAWARE." DESPITE THESE SPECIFIC STATUTORY TERMS, THE LOWER COURT HELD THAT "ASLEEP" AND "UNCONSCIOUS" DO NOT ESTABLISH THEORIES OF CRIMINAL LIABILITY, BUT ONLY THE PHRASE "OTHERWISE UNAWARE" ESTABLISHES CRIMINAL LIABILITY. DID THE LOWER COURT ERR IN ITS INTERPRETATION OF ARTICLE 120(d), UCMJ?

The Government's position is that Article 120(c) creates a single theory of liability that is subject to a general verdict. The Government also asserts that the express acquittals in this case do not bar the NMCCA from considering "alternative theories of guilt" in conducting its Article 66(c), UCMJ, factual sufficiency review. The Government's positions, though, demonstrate a lack of understanding of the issues present.

Airman Sager's case has nothing to do with general verdicts. The members made specific findings regarding the appropriate theory of liability. The

Government also relies on cases, such as *Dunn*, *Jackson*, and *Gutierrez*, which are only applicable to inconsistent verdicts by a court-martial panel; that is entirely outside the granted issues and facts of this case. Finally, the Government's argument completely fails to account for the fact-finding powers of the service appellate courts and the unique way in which double jeopardy concerns can be implicated that do not exist in the civilian appellate courts.

A. The Defense's acquiescence to both the findings instructions and the format of the findings sheet are irrelevant to the granted issues.

Here, the Government deems it significant that Airman Sager did not challenge the findings worksheet or findings instructions provided by the military judge to the court-martial members.[1] These arguments completely miss the point, though. The findings instructions and worksheet are not in dispute in this case. Rather, it is the way the lower court opted to review those findings that is in violation of Airman Sager's double jeopardy protections.

Any notion that Airman Sager waived any objection in this case is misguided. Airman Sager could not have objected at the trial level or the lower court level to an erroneous application of the law undertaken by the lower court after the submission of all pleadings. This case is before this Court not because of any incorrect rulings by the military judge or failure to raise an issue at the lower court, but rather due to a flawed Article 66(c) review conducted by the lower court.

[1] Appellee's Brief at 9-10.

Airman Sager even filed a motion for *en banc* reconsideration with the lower court on January 15, 2016, seeking review of the legal sufficiency of his conviction due to the NMCCA's incorrect interpretation of "otherwise unaware." This motion was denied. There is no waiver in this case.

B. Because of the specific findings indicated on the findings worksheet, the members did not reach a general verdict in this case.

The Government argues Article 120(b)(2), UCMJ, creates a single theory of liability that is subject to a general verdict. Whether or not this is correct, however, is beside the point. Because the members made specific findings regarding Airman Sager's liability in this case by circling "reasonably should have known" and "otherwise unaware" on the findings sheet, there are no general verdict issues. Rather, the issue present is the erroneous review by the lower court in fulfilling its statutory requirement to analyze the specific findings of the court-martial as approved by the convening authority.[2]

The members' findings, as well as the canons of statutory interpretation discussed in Airman Sager's initial brief, debunk any notion of this verdict being a general verdict. In its brief, the Government argues, "determining whether the means listed in a statute constitute separate and distinct offenses is a matter of statutory interpretation, the difficulty of which [the] Supreme Court has

[2] *See* Article 66(c), UCMJ (2012).

recognized."[3] This is correct; statutory interpretation *is* necessary to parse out the offenses listed in Article 120(b)(2).

However, the plain language of the statute, as well as the use of the disjunctive "or," indicates separate theories of liability, particularly when the members only chose a single theory of liability in this case. The Government does not attempt to address the plain meaning of the statute, nor the widely-accepted surplusage canon of statutory interpretation, but instead chooses to focus on Congress's purpose in creating the statute. When the ordinary meaning of a statute is clear and unambiguous, though, it is unnecessary to parse out statutory intent. As this Court held, "Unless the statute is ambiguous, the plain language of a statute will control unless it leads to an absurd result."[4]

Here, there is no absurdity; the members chose a specific theory of liability. Even if a general verdict is allowed under the statute, the members rendered any such discussion moot by circling specific findings. The Government's lengthy dissertation on general verdicts is irrelevant here, because there is no general verdict in this case.

[3] Appellee's Brief at 17 (internal quotations omitted).
[4] *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013).

C. The Government misunderstands the differences between the fact-finding powers of a court-martial and those of the service courts of criminal appeals.

The Government incorrectly asserts "the members made no findings about whether AN TK "was asleep" or was "unconscious" and thus did not "acquit" Appellant of either of those facts."[5] This is error. It ignores clearly established Supreme Court precedent. Further, in an attempt to justify the members' actions, the Government relies on a litany of case law dealing with general verdicts or inconsistent verdicts. Both are inapplicable to the matters before this Court.

1. The Government's analysis of *Green* does not recognize the double jeopardy implications at the service courts of criminal appeals that arise due to their unique Article 66(c), UCMJ, authority.

The Government argues that *Green v. United States*[6] only prohibits a retrial on the "asleep" or "unconscious" theories and that it doesn't apply to appellate review of findings based on alternative theories.[7] Not only is this incorrect, but the Government completely ignores the other key takeaway from *Green*: that silence as to a charge operates as an acquittal to that charge.[8]

The Government's narrow reading of *Green* to only prohibit retrials is incorrect when viewed in conjunction with the service appellate courts' unique

[5] Appellee's Brief at 21.
[6] 355 U.S. 184 (1957).
[7] Appellee's Brief at 23.
[8] 355 U.S. 184, 191 (1957).

Article 66(c), UCMJ, fact-finding authority. The Double Jeopardy Clause of the Fifth Amendment protects an accused from "a second prosecution for the same offense after acquittal."[9] This principle means a "Court of Military Review may not make findings of fact contradicting findings of not guilty reached by the factfinder."[10] The lower court can "affirm only such findings of guilty . . . as it finds correct in law and fact."[11] 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."[12]

That the Supreme Court only mentioned a re-trial in *Green* is not important here: the appellate courts in *Green* did not have the sweeping fact-finding authority of service appellate courts. Despite the Government's arguments to the contrary, there is a litany of case law preventing making findings of fact contradicting findings of not-guilty at the court-martial. The Government's assertion that appellate courts can review findings on alternative theories of guilt is not supported by any case law or statutory authority. [13] Allowing the lower court to reconsider acquitted charges in Airman Sager's case violates the Double Jeopardy Clause.

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[9] *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).
[10] *United States v. Smith*, 39 M.J. 448, 451-52 (C.M.A. 1994).
[11] 10 U.S.C. § 866(c) (2012).
[12] *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003).
[13] Appellee's Brief at 23. In fact, this Court has held the exact opposite. *United States v. Riley*, 50 M.J. 410, 415-16 (C.A.A.F. 1999) (holding that a reviewing

The Government compounds this misreading of *Green's* central holding when they misstate the applicability of *Smith* to a service appellate court's review. They argue, "*Smith* exclusively concerned statutory limits on service courts of appeal when reviewing explicit 'not guilty' findings. *Smith* was silent as to cases like Appellant's, where the Members selected what was, at most, one of multiple theories of liability."[14] There is no reading of *Smith* that limits it to "explicit" not guilty findings. Further, by operation of law per *Green*, the members returned not guilty findings to the un-circled theories of liability in Airman Sager's case. Accordingly, the NMCCA was bound by the findings as approved by the convening authority.

The Government's argument that "their express acquittal on Charge I means only that the Members were not convinced beyond a reasonable doubt that while Appellant performed oral sex, he either knew or reasonably should have known that AN TK was incapable of consenting due to impairment by intoxicant"[15] fails in that the Government assumes the lower court is able to determine which part of the specification the members rejected. The Government, just like the Court, cannot be sure of which theory the members rejected. All the lower court knew

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court may not affirm a conviction on alternative theories not presented to the members).

[14] Appellee's Brief at 26.

[15] Appellee's Brief at 22.

was that the members acquitted Airman Sager of this charge; they were bound by this finding.

2. In relying on *Gutierrez*, *Dunn*, and *Jackson*, the Government does not comprehend the differences between inconsistent verdicts from a court-martial and the appropriate scope of appellate review allowed under Article 66(c), UCMJ.

Much like the Government conflates general verdicts with Airman Sager's case, they incorrectly apply inconsistent verdict case law to their argument, particularly the cases of *Dunn v. United States*[16] and *United States v. Jackson*.[17] 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.[18] More importantly to this case, though, it would only be relevant if Airman Sager were making an inconsistent verdict challenge, which he is not.

The Government also cites *United States v. Jackson*,[19] 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*.[20] Once again, the *Jackson* decision only applies if Airman Sager were challenging his conviction based on inconsistent verdicts.

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[16] 284 U.S. 390 (1932).
[17] 7 C.M.A. 67 (C.M.A. 1956).
[18] *Dunn*, 284 U.S. at 393.
[19] *United States v. Jackson*, 7 C.M.A. 67 (C.M.A. 1956).
[20] *Id.*

The Government's reliance on *United States v. Gutierrez*[21] is also misguided in that it deals with a members-panel's abilities to reach inconsistent verdicts. While members are allowed to do that, *Gutierrez* does nothing to address *Smith* and its general proposition on the limits of service appellate courts in their fact-finding role.

Neither *Dunn*, *Jackson*, nor *Gutierrez* addresses 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 *Dunn*, *Jackson*, or *Gutierrez* contradicts *Smith* or *Walters*, which do expressly address a service court's authority under Article 66(c).

Conclusion

The Government's answer is a series of cases and arguments dealing with general verdicts and inconsistent verdicts: neither of which apply here. It lacks any meaningful analysis of the canons of statutory interpretation and a service appellate court's authority to conduct fact-finding under Article 66(c) and how that authority relates to the double jeopardy protections afforded an accused such as Airman Sager. The lower court relied on facts of which Airman Sager was acquitted in affirming his conviction for sexual assault. Moreover, they interpreted the statute in a manner entirely inconsistent with well-established statutory interpretation

[21] 73 M.J. 172 (C.A.A.F. 2014).

principles, based on an erroneous Air Force decision[22] in order to affirm. To give the lower court the powers the Government advocates for would deprive any appellant of meaningful and fair review under Article 66(c), UCMJ.

Wherefore, Airman Sager asks this Honorable Court to reverse the opinion of the lower court, set aside the conviction, and dismiss the charge.

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 11, 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 2,221 words.

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[22] *United States v. Chero*, No. ACM 38470, 2015 CCA LEXIS 168 (A.F. Ct. Crim. App. Apr. 28, 2015).