IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	)	BRIEF ON BEHALF OF APPELLANT
v.	)	
Sergeant (E-5) **JESUS D. CARDENAS** United States Army Appellant	)	Crim. App. Dkt. No. 20180416
	)	USCA Dkt. No. 20-0090/AR

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

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Issue Presented

WHETHER THE ARMY COURT, AFTER FINDING APPELLANT'S CONVICTIONS WERE MULTIPLICIOUS, ERRED IN PERMITTING THE GOVERNMENT TO CHOOSE WHICH OF THE APPELLANT'S CONVICTIONS TO DISMISS ON APPEAL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On May 24 and July 24, 2017, and January 3 and May 1–3, 2018, a military judge sitting as a general court-martial convicted Sergeant (SGT) Jesus D.

Cardenas, contrary to his pleas, of one specification of sexual assault, one specification of abusive sexual contact, one specification of maltreatment of a subordinate, and one specification of obstruction of justice, in violation of Articles 120, 93, and 134, UCMJ; 10 USC §§ 920, 893, and 934 (2012). (JA025). The military judge sentenced the appellant to be reduced to the grade of E-1, to be confined for five years, and to be discharged from the service with a dishonorable discharge. (JA015). On August 16, 2018, the convening authority approved the sentence as adjudged. (JA015).

On November 27, 2019, the Army Court issued its opinion. (JA004). The court dismissed as factually insufficient appellant's conviction for obstruction of justice and part of his conviction for maltreatment by "pressuring [SD] into a relationship." *United States v. Cardenas*, ARMY 20180416, 2019 CCA LEXIS 479, *10 (Army Ct. Crim. App., Nov. 27, 2019). The court went on to find appellant's convictions for sexual assault and maltreatment by sexual assault to be multiplicious and allowed the Government to elect to dismiss the greater offense of maltreatment. *Id.* at *12. Ultimately, the court affirmed only so much of the sentence that provided for a dishonorable discharge, confinement for four years, and a reduction to E-1. *Id.* at *18. This Court granted Appellant's petition for grant of review on March 25, 2020 on the issue above and ordered briefing under Rule 25. (JA001).

Summary of the Argument

This Court's most recent precedent and the Rules for Courts-Martial (R.C.M.) are clear that when charges are multiplicious, the lesser-included offense, as determined by the elements test, shall be dismissed. *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014); R.C.M. 921(c)(5); R.C.M. 1003(c)(1)(C)(i). Rather than follow that established rule in this case, the Army Court relied on a line of precedents stemming from *United States v. Cherukuri* that are inconsistent with this rule and unjustifiably tolerate service courts deferring to the Government's choice of which multiplicious charge to dismiss on appeal even if that means dismissing the greater offense. *Cardenas*, 2019 CAA LEXIS 479 at *12 (citations partially omitted) (citing *United States v. Cherukuri*, 53 M.J. 68, 74 (C.A.A.F. 2000)).[1]

The practice of authorizing the Government to elect their preferred conviction between multiplicious charges is not only at odds with recent cases like *Elespuru* and the Rules for Courts-Martial, but is also at odds with the principles of law upon which *Cherukuri* itself relied. In *Cherukuri*, this Court wrote that "dismissal of the lesser-included offense is required by the Supreme Court's recent

[1] In this case, the Army Court did not even offer the Government the opportunity to choose; rather, the Government offered its unsolicited opinion to dismiss the greater offense, and the Army Court erroneously accepted it. *Cardenas*, 2019 CAA LEXIS 479 at *12.

cases on the Double Jeopardy Clause of the United States Constitution." 53 M.J. at 71. *Cherukuri* then inexplicably authorized the Government to select its preference of specifications to dismiss without citing to any authority or tethering that remedy to a Constitutional principle. *Id.* at 74.

Cherukuri is also a judicially created remedy that gives the Government a windfall to affirm legally erroneous findings, whereas dismissing the lesser-included offense is a bright line rule that promotes the integrity of the military justice system. Consequently, this Court should resolve the inconsistency between the remedy in *Cherukuri* and the requirement that courts dismiss the lesser-included offense when charges are multiplicious by preventing the Government from electing which charge to dismiss. This Court should then apply the rule that the lesser-included offense must be dismissed in this case and dismiss Specification 1 of Charge I.

Statement of Facts

After the Army Court's decision in this case, the Specification of Charge II, of which appellant stands convicted, reads as follows:

> In that [appellant], at or near Fort Belvoir, Virginia, between on or about 1 March 2015 and on or about 5 May 2015, did maltreat Specialist [SD], a soldier in transition and a person subject to his orders, by sexually assaulting her while said appellant was cadre and a squad leader at the Warrior Transition Brigade.

Cardenas, 2019 CCA LEXIS 479 at *12.

The Army Court correctly noted that the sexual assault that comprised the underlying conduct in the maltreatment specification is the same sexual assault of which appellant stands convicted in Specification 1 of Charge I. *Id*. The Army Court found that in alleging the maltreatment, "the Government essentially incorporated the elements of sexual assault into its maltreatment specification," which in turn required the Government to "prove beyond a reasonable doubt that appellant did in fact sexually assault SPC SD." *Id*.

The Army Court also correctly found that by charging the sexual assault as the underlying conduct of the maltreatment specification, the sexual assault offense became a lesser-included offense of the maltreatment specification. *Id.* ("An offense is a *lesser-included offense* of the charged offense if each of its elements is necessarily also an element of the charged offense") (emphasis original) (quoting *United States v. Armstrong*, 77 M.J. 465 (C.A.A.F. 2018)).

However, relying upon *Cherukuri*, the Army Court granted the Government's request to set aside and dismiss appellant's conviction of the greater offense of maltreatment. *Id.* (citing *United States v. Palagar*, 56 M.J. 294, 296–297 (C.A.A.F 2002); *United States v. Frelix-Vann*, 55 M.J. 329, 333 (C.A.A.F. 2001); and *United States v. Cherukuri*, 53 M.J. 68, 74 (C.A.A.F. 2000)). The Army Court noted appellant's opposition to this course of action, but still opted to

allow the Government to make the choice of which specification to dismiss. *Cardenas*, 2019 CCA LEXIS 479 at *12, n. 9.[2]

Issue

WHETHER THE ARMY COURT, AFTER FINDING APPELLANT'S CONVICTIONS WERE MULTIPLICIOUS, ERRED IN PERMITTING THE GOVERNMENT TO CHOOSE WHICH OF THE APPELLANT'S CONVICTIONS TO DISMISS ON APPEAL.

Standard of Review

"The scope of an appellate court's authority is a legal question this Court reviews de novo." *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019).

Law and Argument

The Army Court cited three cases as support for its position that the Government can elect which multiplicious conviction to dismiss in this case. *Cardenas*, CCA LEXIS 479 at *12 (citing *Palagar*, 56 M.J. at 296–97 (finding charges of obstructing justice and conduct unbecoming an officer were multiplicious); *Frelix-Vann*, 55 M.J. at 333 (finding larceny and conduct

[2] In this same footnote, the Army Court revealed it misunderstood appellant's reason for citing *Fosler* in his objection to the dismissal of the greater offense. *Cardenas*, 2019 CCA LEXIS 479 at *12, n. 9 (citing *United States v. Fosler*, 70 M.J. 225, 228 (C.A.A.F. 2011)). *Fosler*, which is a post-*Cherukuri* decision, not only held that the terminal element in an Article 134 offense must be pled, but also affirmed that the elements test is the proper method for determining whether an offense is a lesser-included offense to the charged offense. *Fosler*, 70 M.J. at 228.

unbecoming an officer offenses multiplicious); and *Cherukuri*, 53 M.J. at 74 (finding conduct unbecoming an officer multiplicious with indecent assault under Art. 134)).[3] However, the Army Court erred for three reasons: (1) When charges are multiplicious, this Court's jurisprudence and the Rules for Courts-Martial require dismissing the lesser-included offense rather than allowing the Government to choose which offense to dismiss on appeal; (2) Requiring dismissal of the lesser-included offense is a bright line rule that promotes the integrity of the military justice system; and (3) *Cherukuri* is a judicially created remedy that gives the Government a windfall.

1. This Court's jurisprudence and the Rules for Courts-Martial require dismissing the lesser-included offense rather than allowing the Government to choose which offense to dismiss on appeal.

This Court's recent jurisprudence has firmly established that military courts must dismiss the lesser-included of multiplicious offenses. *Elespuru*, 73 M.J. at 328 (dismissing the lesser-included offense of wrongful sexual contact and affirming the greater offense of abusive sexual contact); *Cherukuri*, 53 M.J. at 71 ("dismissal of the lesser-included offense is required by the Supreme Court's

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[3] Notably, all these decisions predate this Court's decisions in *Elespuru*, *Fosler*, and *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010) (requiring an elements test to determine what is or is not a lesser-included offense). *See also Cherukuri*, 53 M.J. at 74 (Crawford, C.J. dissenting) (citations omitted) (finding the majority's conclusion "absurd" and reiterating, "Applying a 'statutory' elements approach or a pleading-elements approach, these offenses are not multiplicious.").

recent cases on the Double Jeopardy Clause of the United States Constitution"); *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999) (dismissing the lesser-included offense of possession with intent to distribute). Furthermore, in *Elespuru*, *Fosler*, and *Jones*, this Court also made clear that an elements test is the "constitutionally sound" way of determining what is a lesser-included offense. *Elespuru*, 73 M.J. at 328; *Fosler*, 70 M.J. at 228; *Jones*, 68 M.J. at 472.[4] The uncontroverted nature of the elements test is why the Government had no choice but to concede that the charges in question were multiplicious to the Army Court. *Cardenas*, 2019 CCA LEXIS 479 at *11.

The Rules for Courts-Martial are also instructive on how courts are to handle multiplicious offenses. R.C.M. 921(c)(5) prohibits the finder of fact from even considering a finding of guilt to a lesser-included offense until a finding of not guilty as been reached on the greater offense. If the finder of fact convicts the accused of the greater offense, the rules further mandate the dismissal of the lesser-included offense. R.C.M. 1003(c)(1)(C)(i) ("A charge is multiplicious and *must be dismissed* if the proof of such charge also proves every element of another charged

[4] Although *Elespuru* refers to the Manual for Courts-Martial's maximum punishment chart, the Court did so to explain why there was no prejudice in affirming the sentence since the accused remained convicted of the greater offense and the military judge had merged the two specifications in question for sentencing. 73 M.J. at 329–30. The maximum punishment chart is not part of the test for determining lesser-included offenses.

offense") (emphasis added). While these rules govern the activity of the trial court, they demonstrate that the mandate requiring the lesser offense be dismissed triggers an operation of law, not a decision point for the Government.

In this case, the Army Court ignored both this Court's most recent jurisprudence and the Rule for Courts-Martial by relying on a remedy advanced by *Cherukuri* and its progeny in accepting the Government's election to dismiss the greater offense. *Cardenas*, 2019 CAA LEXIS 479 at *12. In *Cherukuri*, this Court, after finding appellant's convictions multiplicious, remanded the case to the Service Court, "where the Government can elect to retain the four convictions of the lesser-included offense under Article 134 or the single consolidated conviction of the greater offense under Article 133." 53. M.J. at 74. In fashioning the remedy, the majority in *Cherukuri* cited no authority for granting the Government this discretion and did not tether it to a Constitutional principle, while also acknowledging that dismissal of lesser-included offenses is required by the Supreme Court of the United States and the Constitution. *Id*. at 71, 74.

In the subsequent two years, this Court followed *Cherukuri* for this principle of granting the Government discretion on which multiplicious charge to dismiss in *Frelix-Vann* and *Palagar*. *Palagar*, 56 M.J. at 296–97; *Frelix-Vann*, 55 M.J. at 333. Yet, in *Palagar*, the Army Court identified only one of two sets of multiplicious charges, and this Court opted to set aside the lesser-included offense

of the additional set of multiplicious charges, rather than allowing the Government to choose, citing *United States v. Harwood*. *Palagar*, 56 M.J. at 297 (citing *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997) and *United States v. Rodriguez*, 18 M.J. 363 (C.M.A. 1989)).

In *Harwood*, the Court of Military Appeals, after considering "the legal relationship of the two offenses said to be multiplicious," dismissed the lesser-included offense and affirmed the sentence. *Harwood*, 46 M.J. at 28–29; *see also Rodriguez*, 18 M.J. 363, 364 (C.M.A. 1984) (dismissing the lesser-included offense of two multiplicious charges); *United States v. Holt*, 16 M.J. 393, 394 (C.M.A. 1983) (stating "the failure of the trial or intermediate appellate courts to dismiss the included offenses" was plain error).

Ultimately, this Court's jurisprudence before and after *Cherukuri*, as well as the Rules for Courts-Martial, demonstrate how inconsistent *Cherukuri* is with the rule that military courts must dismiss the lesser-included of multiplicious offenses. *Elespuru*, 73 M.J. at 328; *Savage*, 50 M.J. at 245; *Harwood*, 46 M.J. at 28–29.[5]

[5] Following this line of precedents also aligns with multiple federal circuits including the 2nd, 5th, 7th, 10th, and 11th Circuits. *See Lanier v. United States*, 220 F.3d 833, 841 (7th Cir. 2000) ("The proper remedy for convictions on both greater and lesser-included offenses is to vacate the conviction and the sentence of the lesser-included offense.") (citing *United States v. Boyd*, 131 F.3d 951, 954–55 (11th Cir. 1997)); *United States v. McSwain*, 197 F.3d 472, 483 (10th Cir. 1999) (agreeing with appellant that the lesser-included offense must be vacated); *United States v. Brito*, 136 F.3d 397, 408 (5th Cir. 1998) ("[T]he law is clear that the lesser, rather than the greater, offense should be vacated."); *United States v.*

Cherukuri and its progeny, to which the Army Court cites, are merely a specious string born out of a judicially created remedy neither grounded in law nor tethered to any Constitutional principle. *See* 53. M.J. at 74.

This Court should reverse the Army Court's decision to acquiesce to the Government's request to dismiss the greater offense, apply the rule that the lesser-included offense must be dismissed, and dismiss the lesser-included offense, which, undisputedly, is Specification 1 of Charge I.

2. Requiring dismissal of the lesser-included offense is a bright line rule that promotes the integrity of the military justice system.

When faced with multiplicious charges on appeal, dismissing the lesser-included offense supports the Supreme Court of the United States' preference for promoting "evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *see also United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003). Allowing the Government to elect its preferred conviction after the finder of fact returned a verdict does not support the integrity of the military judicial process because it shows deference to the Government's election over both the findings and the Constitution. *Cherukuri* itself said that "dismissal of the lesser-

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Rosario, 111 F.3d 293, 301 (2nd Cir. 1997) (vacating the conviction for the lesser-included offense).

included offense is required by the Supreme Court's recent cases on the Double Jeopardy Clause of the United States Constitution." 53 M.J. at 71.

Furthermore, as it currently stands, the service courts have struggled to fairly and uniformly resolve cases similar to this one. The Army Court has acknowledged that but for this court's holding in *Frelix-Vann* and *Cherukuri*, "we would normally dismiss the conviction for the lesser-included offense." *United States v. Jackson*, ARMY 20120026, 2013 CCA LEXIS 1011, *6 (Army Ct. Crim. App. Nov. 26, 2013) (summ. disp.), *aff'd* 2014 CAAF LEXIS 678 (C.A.A.F. June 5, 2014).[6] The Navy-Marine Corps Court has observed this situation as well, noting "we are mindful of the line of cases suggesting the Government should be permitted to decide" when dealing with lesser-included offenses on appeal. *United States v. Carson*, NMCCA 200600994, 2008 CCA LEXIS 393, *11 (N.M. Ct. Crim. App. Nov. 6, 2008) (citation omitted.)

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[6] The Army court has followed this practice in numerous other cases as well. *See United States v. Mathis*, ARMY 20140473, 2016 CCA LEXIS 229 (Army Ct. Crim. App. Apr. 13, 2016) (mem. op.) (Government elected to set aside conviction of solicitation which was multiplicious with conduct unbecoming an officer); *United States v. Lampie*, ARMY 20120741, 2014 CCA LEXIS 646 (Army Ct. Crim. App. Aug. 28, 2014) (summ. disp.) (Government elected to dismiss conduct unbecoming an officer conviction which was multiplicious with abusive sexual contact and wrongful sexual contact convictions); *United States v. Servantez*, ARMY 20120217, 2013 CCA LEXIS 948 (Army Ct. Crim. App. Nov. 7, 2013) (summ. disp.) (Government elected to set aside appellant's conviction for conduct unbecoming an officer as multiplicious with his conviction for maltreatment).

On the contrary, the Air Force Court has interpreted *Cherukuri* as permitting the Court to decide which specification to dismiss. *United States v. Williams*, 74 M.J. 572, 576 (A.F. Crim. Ct. App. 2014) (stating the government need not be given the option and there was "nothing unreasonable with the appellant's request" to dismiss his desired specification). The Air Force CCA has even requested the Government make an election as to which conviction to retain and still ultimately rejected the Government's request. *United States v. Morita*, 73 M.J. 548, 566 (A.F. Crim. Ct. App. 2014) *aff'd in part, rev'd on other grounds*, 74 M.J. 116 (C.A.A.F. 2015) ("We find that the more prudent course is to set aside and dismiss the Additional charge and its Specification"). In *Morita*, the Government's original charging decision was, ultimately, a significant reason the Air Force Court disregarded the Government's preference. *Id*. at 565–66.

To the extent that *Cherukuri* is stare decisis, it is inconsistent with *Elespuru*, which is more recent than any of the decisions cited by the Army Court in its analysis in this case, and "Stare decisis is a principle of decision making, not a rule, and need not be applied when the precedent at issue is 'unworkable or . . . badly reasoned.'" *Rorie*, 58 M.J. at 406 (quoting *United States v. Tualla*, 52 M.J. 288, 231 (C.A.A.F. 2000)). The inconsistency with which the service courts have applied *Cherukuri* is evidence that the decision is "unworkable." Furthermore, the *Cherukuri* opinion's internal inconsistency of highlighting the

Constitutional soundness of dismissing the lesser-included offense, then citing no authority for its created remedy, demonstrates that it is "badly reasoned." *Cherukuri*, 53 M.J. at 71, 74; *see Rorie*, 58 M.J. at 406.

Therefore, when charges are multiplicious, dismissing the lesser-included offense is appropriate, and it promotes evenhandedness, predictability, and the integrity of the military justice system. *Elespuru*, 73 M.J. at 328; *see Payne*, 501 U.S. at 827.

3. *Cherukuri* is a judicially created remedy that gives the Government a windfall.

Allowing the Government to elect which multiplicious charge to dismiss on appeal is a windfall for the Government because it gives the Government the opportunity to correct, in its eyes, the consequences of its original charging decision. Not only is this inconsistent with the Rules for Courts-Martial, as discussed above, but this is a similar type of post-findings remedy that this Court disfavored just this term. *See United States v. Turner*, __ M.J. ___, slip op. at 9 n.7 (C.A.A.F. 2020). In *Turner*, this Court inserted a "temporal distinction" to "remove[] any incentive for trial defense counsel to wait until the verdict is announced before playing the 'failure to state an offense' card." *Id.* (citing *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986)).

The same trepidation toward allowing the defense counsel to make a post-findings tactical decision related to the charges should apply to the Government.

Just as the defense should not be incentivized to wait to "play the failure to state an offense card," the Government should not be able to play the *Cherukuri* card on appeal to affirm its favored offense when an appellate court recognizes it cannot have both. *See id.* The Government had its opportunity to make charging decisions in this case all the way up to, and to a lesser extent after, referral. It would be a windfall to allow the Government to elect which charge it favors after the fact-finder has returned its verdict. Rather, appellate courts must simply apply the standard recently stated in *Elespuru* and dismiss the lesser-included offense. 73 M.J. at 328.

Conclusion

The proper procedural process for choosing which multiplicious offense to dismiss is laid out in this Court's own jurisprudence and the Rules for Courts-Martial. *Elespuru*, 73 M.J. at 328; R.C.M. 921(c)(5) & 1003(c)(1)(C)(i). The remedy created in *Cherukuri* is inconsistent with this Court's precedent and the Constitution, the service courts have struggled to apply it with any logic or consistency, and it grants the Government a windfall. Therefore, based on this Court's most recent precedent and in the interest of justice, appellant requests this Court reject the practice of allowing the Government to choose which multiplicious offense to dismiss, and simply dismiss the lesser-included offense, as determined by the elements. *Elespuru*, 73 M.J. at 328.

WHEREFORE, appellant respectfully requests that this Honorable Court apply that rule to this case and dismiss appellant's conviction under Specification 1 of Charge I.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Cardenas, Crim. App. Dkt. No. 20180416, USCA Dkt. No. 20-0090/AR, was electronically filed with the Court and Government Appellate Division on May 6, 2020.

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