IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	REPLY 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:

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.

Statement of the Case

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). Appellant filed his brief with this Court on May 6, 2020. The government responded on June 1, 2020. This is appellant's reply.

Argument

1. Dismissing the lesser-included of multiplicious offenses is not a windfall for appellant, but rather the appropriate action as an operation of law.

The government claims that Appellant is requesting a windfall based on the "mistaken belief that he has a right to dictate the penalty scheme under which he is sentenced" while also claiming that nothing supports the idea that a lesser-included offense must be dismissed. (Appellee Br. 8, 16). However, the Appellant has not dictated anything regarding the charges or sentence throughout the course of trial or his appeal and does not seek to do so now. The government made its charging decisions prior to trial, whether in the alternative or not, and the Army Court, ultimately, found two offenses to be multiplicious. (JA010). The correct action now is to dismiss the lesser-included offense. *United States v. Elespuru*, 73 M.J. 326, 328, 330 (C.A.A.F. 2014) (holding that an elements test is the proper test for determining the lesser-included offense, then dismissing the lesser-included offense of wrongful sexual contact); *United States v. Cherukuri*, 53 M.J. 68, 71 (C.A.A.F. 2000) ("dismissal of the lesser included offense is required by the Supreme Court's recent cases on the Double Jeopardy Clause of the United States Constitution."). Appellant is not seeking to dictate the penalty scheme under which he is sentenced, but merely asking the Court to follow precedent.[1]

[1] The government accuses Appellant of ignoring the remedy announced in *Cherukuri*, but that remedy was not tethered to any authority or constitutional

Though the government complains that it is "absurd" to allow appellant to "escape" a sexual assault conviction, (Appellee Br. 20, 28–29), the palatability of the result and the government's policy arguments cannot stand in the way of this Court applying the correct law. *See Ramos v. Louisiana*, 140 S.Ct. 1390, 1419 (2020) ("Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law?"); *United States v. Moore*, __ M.J. __, slip op. at 8–9 (C.A.A.F. 2020) (taking no position on policy arguments since they were not relevant to deciding the case).

The absurdity would be to allow the government to elect its preferred offense at this late stage of the process. The Rules for Courts-Martial seek to implement and effectuate the Double Jeopardy Clause of the Fifth Amendment by actively guarding and preventing the accused from being convicted and punished for the same offense. R.C.M. 907(b)(3)(B) Discussion. Furthermore, as this court pointed out in *Cherukuri,* the Double Jeopardy clause of the Fifth Amendment requires dismissing the lesser included of multiplicious offenses. *Cherukuri*, 53

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principle. (Appellee Br. 10); 53 M.J. at 74. The government cannot square its position in this case with the express language in *Cherukuri* requiring dismissal of the lesser-included of multiplicious offenses in order to comply with the Constitution. 53 M.J. at 71. Appellant asks this Court to resolve this inconsistency applying a bright line rule and dismissing the lesser-included of multiplicious offenses.

M.J. at 71. Therefore, dismissing Specification 1 of Charge I is the correct action as an operation of law.

2. The government's distinction between a "less serious offense" and a "lesser-included offense" is irrelevant to this case.

The government argues that the non-binding Rule for Courts-Martial 907(b)(3)(B) Discussion undercuts Appellant's position because it says the "less serious offense shall be dismissed." (Appellee Br. 14); R.C.M. 907(b)(3)(B) Discussion. However, the word "shall" in the Discussion really shows the government has no choice of which offense to dismiss. Moreover, the use of the undefined term "less serious" in the Discussion does not trump this Court's unequivocal language in *Cherukuri* that "dismissal of the lesser 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.

The government, relying on *Ball v. United States* and *Rutledge v. United States*, also claims the federal courts informs this Court how it should handle dismissing multiplicious offenses on appeal while noting that some federal circuits consider punitive exposure. (Appellee Br. 9, 11, 18–19); *Rutledge v. United States*, 517 U.S. 292, 307 (1996); *Ball v. United States*, 470 U.S. 856, 865 (1985). But federal precedent is not as informative as the government suggests in this case.

In *Ball* and *Rutledge*, the Supreme Court of the United States did not address the government's ability to elect its preferred offense, merely that two

multiplicious offenses could not both stand. In both cases, the Supreme Court remanded the cases back to the district court for further action, but this Court's precedent has established a more economical course of action. That is, this Court has consistently applied the elements test in determining lesser-included offenses, and *Cherukuri* states that dismissing the lesser-included offense is the correct course of action in light of the Double Jeopardy clause of the Fifth Amendment. *United States v. Coleman*, 79 M.J. 100, 103 (C.A.A.F. 2019) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)); *Elespuru*, 73 M.J. at 328; *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010); *Cherukuri*, 53 M.J. at 71; *United States v. Teters*, 37 M.J. 370, 376 (C.A.A.F. 1993)("this rule of multiplicity, like the *Blockburger* rule used in Double Jeopardy cases, would be limited to consideration of the statutory elements of the involved crimes.")

Also, although *Elespuru* does reference the Manual for Courts-Martial's maximum punishment chart, this 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. Beyond that, the maximum punishment chart is irrelevant for determining the lesser-included offense.

3. The government mischaracterized several of appellant's arguments.

a. The government claims Appellant conceded that the issue in this case is procedural and not substantive, but Appellant did not. (Appellee Br. 11 n.8). Appellant's position is there is a required procedural outcome as informed by substantive law, which dictates the lesser-included offense must be dismissed. *Elespuru*, 73. M.J. at 328, 330; *Cherukuri*, 53 M.J. at 71; R.C.M. 907(b)(3)(B) Discussion; R.C.M. 921(c)(5); R.C.M. 1003(c)(1)(C)(i).

b. The government claims Appellant's position is that *Elespuru* overruled *Cherukuri* by implication. (Appellee Br. 27). That is not Appellant's position. Appellant's position is that *Elespuru*, along with Rules for Courts-Martial 921(c)(5) and 1003(c)(1)(C)(i) and *Cherukuri* itself demonstrate the inconsistency and unreasonableness of the judicially created remedy in *Cherukuri*. In the end, it is inescapable that *Cherukuri* stated the Double Jeopardy Clause of the Fifth Amendment requires dismissing the lesser-included offense, before fashioning a remedy allowing the government to choose to do the opposite. *Cherukuri*, 53. M.J. at 71, 74. *Elespuru* is significant because it occurred after *Cherukuri*, this Court dismissed the lesser-included of multiplicious offenses, and it did not allow the government to choose its favored offense. 73 M.J. at 330.

c. The government contends that appellant believes the government pursued an impermissible charging strategy. (Appellee Br. 16). That is not Appellant's

position. Appellant's position is that the government may charge in the alternative or charge multiplicious offenses, but when it does so, it accepts the consequence that if the accused is later convicted of those multiplicious offenses, this Court's precedent and the Rules for Courts-Martial dictate that the lesser-included offense must be dismissed. *Cherukuri*, 53 M.J. at 71; R.C.M. 921(c)(5); R.C.M. 1003(c)(1)(C)(i). In other words, multiplicious findings trigger an operation of law, not a decision point for the government.[2] If the government preferred a conviction to sexual assault over a conviction to maltreatment of a subordinate, it was in the government's purview to simply charge sexual assault rather than stack the charge sheet with an additional offense that yielded a multiplicity problem.

d. Appellee claims the Court should not consider Appellant's stare decisis argument because it strays from the granted issue. (Appellee Br. 21 n.10). However, Appellant's stare decisis argument is inextricably linked to the granted issue, which concerns whether the Army Court erred by allowing the government

[2] In this case, Specification 1 of Charge I and Specification 1 of Charge 2 are multiplicious based on an elements test. (JA009). This situation is separate from when the fact-finder returns guilty findings based on alternative theories of the same offense. In the latter case, since the elements do not match, this yields a distinct multiplicity problem, but still necessitates dismissal of an offense. *See United States v. Mayberry*, 72 M.J. 467, 467–68 (C.A.A.F. 2013); R.C.M. 907(b)(3)(B) Discussion ("A lesser included offense will always be multiplicious if charged separately, but offenses do not have to be lesser included to be multiplicious."). Given that this case does not involve alternative theories, appellant's brief does not address resolving that issue.

to elect which multiplicious offense to dismiss on appeal. (JA001). The Army Court believes the authority for the government making this election derives from *Cherukuri*. (JA010). Because the judicially created remedy in *Cherukuri* is unreasonable and unworkable, which is a test for overturning stare decisis, this Court may find that the Army Court erred in allowing the government to select which multiplicious offense to dismiss. *See United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003); *Cherukuri*, 53 M.J. at 74.

In its defense of the remedy in *Cherukuri*, the government also attacks *United States v. Williams* for being an "inexplicabl[e]," "poorly reasoned" decision "citing no authority." (Appellee Br. 24)(citing *United States v. Williams*, 74 M.J. 572, 576 (A.F. Crim. Ct. App. 2014)). However, the remedy crafted by the Air Force Court in *Williams* (dismissing the accused's desired specification rather than the government's) is no more tethered than the remedy in *Cherukuri*. *Id.* In short, by attacking the Air Force Court's remedy in *Williams* as "inexplicable" and "citing no authority," the government casts doubt on the efficacy of the remedy in *Cherukuri* as well, thus buttressing appellant's position that the remedy in *Cherukuri* is badly reasoned and not tethered to constitutional principle.

Conclusion

Due to the principles of the Double Jeopardy clause of the Fifth Amendment, when faced with multiplicious offenses, the lesser-included offense

must be dismissed in accordance with this Court's jurisprudence and the Rules for Courts-Martial. *Elespuru*, 73 M.J. at 328; *Cherukuri*, 53 M.J. at 71; R.C.M. 907(b)(3)(B) Discussion; R.C.M. 921(c)(5); R.C.M. 1003(c)(1)(C)(i).

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.

THOMAS J. TRAVERS
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0696
USCAAF Bar No. 37220

JAMES J. BERRETH
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar No. 37099

KYLE C. SPRAGUE
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 36867

TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief, Defense Appellate Division
USCAAF Bar No. 34640

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. 20-0090AR, was electronically filed with the Court and Government Appellate Division on June 11, 2020.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736