**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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**UNITED STATES,**
Appellee,

v.

**GAVIN B. ATCHAK,**
Airman Basic (E-1), USAF
Appellant.

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Crim. App. No. 38526
USCA Dkt. No. 16-0054/AF

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# Answer to the Certified Issue

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3 December 2015

**IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES**

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| **UNITED STATES** | ) | **SUPPLEMENT TO PETITION** |
| *Appellee,* | ) | **FOR GRANT OF REVIEW** |
| v. | ) | |
| | ) | USCA Dkt. No. 16-0054/AF |
| Airman Basic (E-1) | ) | |
| **GAVIN B. ATCHAK,** | ) | Crim. App. No. 38526 |
| USAF, | ) | |
| *Appellant.* | ) | |

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

## Issue Presented

**WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED IN SETTING ASIDE AND DISMISSING THE SPECIFICATIONS OF AGGRAVATED ASSAULT WITHOUT AUTHORIZING THE CONVENING AUTHORITY TO ORDER A REHEARING FOR THE LESSER INCLUDED OFFENSES OF ASSAULT CONSUMMATED BY A BATTERY.**

## Statement of Statutory Jurisdiction

The United States Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

## Statement of the Case

On 1 April, 21-23 May, and 29 October 2014, Appellant was tried by a general court-martial comprised of a military judge sitting alone at Seymour Johnson Air Force Base, North Carolina. In accordance with his plea, Appellant was found guilty of three specifications of dereliction of duty and failing to obey a lawful order in violation of Article 92, UCMJ, and three

specifications of aggravated assault in violation of Article 128, UCMJ, for engaging in certain sexual activity while infected by the human immunodeficiency virus (HIV). Three specifications alleging dereliction of duty in violation of Article 92, UCMJ, two specifications alleging cocaine and marijuana use in violation of Article 112a, UCMJ, and one specification alleging abusive sexual contact in violation of Article 120, UCMJ, were withdrawn and dismissed. Appellant was sentenced to a bad-conduct discharge, 36 months of confinement, and forfeiture of all pay and allowances, and the convening authority approved the sentence as adjudged on 8 January 2014. (J.A. 39-43).

On 10 August 2015, the AFCCA issued its decision, setting aside specifications 1, 2, and 4 of Charge IV and Charge IV. The AFCCA affirmed only so much of the sentence as provided for a bad-conduct discharge and confinement for 8 months. The remaining findings and the sentence, as reassessed and modified, were affirmed. (J.A. 1-18). On 28 August 2015, the government moved the AFCCA for reconsideration and reconsideration *en banc*. (J.A. 19-32). On 11 September 2015, the AFCCA denied the motion. *Id.* On 7 October 2015, The Judge Advocate General of the United States Air Force, Lieutenant General Christopher Burne, certified this case for review with respect to the dismissed specifications under Article 67(a) (2), UCMJ.

## Statement of Facts

The facts necessary to the disposition of the issue are set forth in the argument below.

## Argument

### I.

**THE AIR FORCE COURT OF CRIMINAL APPEALS WAS CORRECT IN SETTING ASIDE AND DISMISSING THE SPECIFICATIONS OF AGGRAVATED ASSAULT WITHOUT AUTHORIZING THE CONVENING AUTHORITY TO ORDER A REHEARING FOR THE LESSER INCLUDED OFFENSES OF ASSAULT CONSUMMATED BY A BATTERY.**

*Standard of Review*

The government has conceded that the standard of review should be abuse of discretion. Appellant does not object to this Court using this standard of review. However, in light of their duty of candor to this Court, undersigned counsel note that courts normally apply a *de novo* standard of review when considering whether the Double Jeopardy Clause (U.S. Const. amend. V.) precludes a rehearing on findings. *See generally Burks v. United States*, 437 U.S. 1 (1978); *United States v. Hitchcock*, 6 M.J. 188, 189 (C.M.A. 1979); *United States v. Burroughs*, 12 M.J. 380, 382 n. 2 (C.M.A. 1982); *United States v. Ortiz*, 12 M.J. 136 (C.M.A. 1981); *United States v. McKinney*, 9 M.J. 86 (C.M.A. 1980); *United States v. Porter*, 26 C.M.R. 436 (C.M.A. 1958); *United States v. Steele*, 21 C.M.R. 29 (C.M.A. 1956); *United States v. Phillips*, 13 C.M.R. 113 (C.M.A. 1953); *United States v. Eggers*, 11 C.M.R. 191 (C.M.A. 1953); *United*

*States v. Chapman*, 7 C.M.R. 14 (C.M.A. 1953). That being said, Appellant asks this Court to accept the government's concession of an abuse of discretion standard. This is a government appeal, and is therefore inherently "unusual, exceptional, not favored." *Carrol v. United States*, 354 U.S. 394, 400 (1957). Given that holding in *Carrol*, this Court should not afford this government appeal a better standard of review than the government itself has requested.

## *Law and Analysis*

### *I. Double Jeopardy prohibits retrial where insufficient evidence is presented to sustain a guilty verdict.*

In cases where a conviction is reversed due to a finding of insufficient evidence at trial, retrial is prohibited. *Burks v. United States*, 437 U.S. 1, 11, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978) (reversing due to the appellate court's finding of insufficient evidence to sustain a guilty verdict as the equivalent of an acquittal prohibiting retrial).

> [The Double Jeopardy Clause] is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[the] constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.

*Id*. at 11 (*quoting Green v. United States*, 355 U.S. 184, 187 (1957)); *See also Serfass v. United States*, 420 U.S. 377, 387-388 (1975); *United States v. Jorn*, 400 U.S. 470, 479 (1971). Appellant

upheld his portion of the pre-trial agreement – he pled guilty to *aggravated* assault. As will be explained below, he expressly did not enter a plea of guilty to simple assault, though that offense would normally be a lesser-included offense. The military judge accepted his plea and found him guilty of the aggravated assaults. Subsequently, the AFCCA overturned the aggravated assault convictions in accordance with this Court's decision in *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015). The government failed at trial to prove up the lesser included offense of assault consummated by a battery.

During the care inquiry, the military judge stated that even though appellant's sexual partner may have factually consented, the partner could not legally consent and that the military judge ensured that Appellant's understanding of the law was that a person cannot legally consent to an act constituting aggravated assault. R. at 691, 698, 702. The government failed to object, failed to have the military judge elicit additional information, and failed to submit additional evidence to the trier of fact to prove that consent was not an affirmative defense to the charged offense or any lesser included offenses. R. at 694, 699, 703. Here, the government "cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble." *Burks* at 16. The stipulation of fact, and certainly the military judge's colloquy with Appellant regarding a consent

defense, put the government on clear notice that simple assault was not contemplated by Appellant's guilty plea.

With the defense of consent which applies to simple assault having not been extinguished, it was incumbent on the government, if it wished to preserve the conviction on that lesser offense, to bring forth evidence to disprove the possibility of lawful consent. When the AFCCA refused to order a rehearing it was effectively, and correctly, adhering to the principle that "the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Id.* at 11.

The government cites in their brief to *United States v. Jordan*, 57 M.J. 236 (C.A.A.F 2002), *United States v. Martinelli*, 62 M.J. 52 (C.A.A.F. 2005), *United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996), and *United States v. Perez*, ACM 38559 (A.F. Ct. Crim. App. 12 August 2015) (unpub. op.), *United States v. Williams*, 53 M.J. 293 (C.A.A.F. 2000), *United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004), *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013). It is true that "[t]he principle [that the Double Jeopardy Clause] does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *Id.* at 14; (*quoting United States v. Tateo*, 377 U.S. 463, 465 (1964)

(emphasis supplied). Each of these cases cited by the government are examples of the premise put forth by the Supreme Court; however, none of these cases are applicable to Appellant.

First, each of these cases involves the appellate courts overturning the actual charged offense and allowing a re-hearing on the actual charged offense. Here, it is no longer legally permissible to charge Appellant with the actual charged offense of aggravated assault. The Appellant only pled guilty to aggravated assault, not the lesser-included offense which would have included the possibility of a consent defense, which he expressly did not disclaim, and the government failed to adequately prove up the lesser included offense where the record indicates a valid affirmative defense was raised.

Second, each of the cases submitted by the government involved a procedural error in the proceedings: *Jordan* – military judge incorrectly conducted the care inquiry; *Martinelli* – government attempted to criminalize conduct extraterritorially where it was not applicable; *Outhier* – facts contained in the record contradicted the appellant’s plea; *Perez* - failure to corroborate appellant’s confession; *Williams* - pleas were improvident due to a misunderstanding by all parties, including the trial judge, of a material portion of the plea agreement; *Negron* - appellant could not have providently pleaded guilty to placing obscene material in the mail when the judge used a

substantively different definition of obscene; and *Riley* - plea improvident since neither the service member's counsel nor the military judge advised the service member that registration as a sex offender was a consequence of a conviction.

These are the type of errors that allow for retrial without violating Double Jeopardy, under the Court's analysis in *Burks*. Here, there is no legal error. Simply put, on the facts of this case, an aggravated assault conviction could not legally be affirmed based on *Gutierrez,* and the government forfeited their right to a rehearing by their inaction at trial.

*II. This Court should reject the government's assertion that a test is needed to determine whether a new findings hearing is warranted.*

The government asks this Court to adopt a test similar to the test articulated in *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013). In *Winckelmann*, this Court provided guidance on when a CCA should reassess the sentence or, instead order a sentencing-only rehearing where the sentence has been set aside. A similar test is not needed on the facts of this case because the Constitution and the Supreme Court have already provided clear and unambiguous guidance – "where a conviction is reversed due to a finding of insufficient evidence at trial, retrial is prohibited." *Burks,* 437 U.S. 1.

**WHEREFORE**, Appellant respectfully requests this Court grant review.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 3 December 2015.

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