IN THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	APPELLANT'S BRIEF ON GRANTED ISSUE FOR REVIEW
v.	)	
	)	
	)	USCA Dkt. No. 15-0334 /MC
Quantaus R. Riggins,	)	
Staff Sergeant (E-7)	)	Crim.App. No. 201400046
U. S. Marine Corps,	)	
Appellant	)	

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

JEFFREY S. STEPHENS
C.A.A.F. Bar Number: 33272
Quindlen Law Firm, P.A.
P.O. Box 2450
Beaufort, SC 29901
Tel: (843) 379-2660
jeff@quindlenlaw.com

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Statement of Statutory Jurisdiction

Appellant received a sentence that included a bad-conduct discharge and confinement in excess of one year, thus bringing this case within the Lower Court's Article 66, Uniform Code of Military Justice (UCMJ) jurisdiction. Appellant filed a timely appeal, bringing this case within this Court's Article 67, UCMJ jurisdiction.

Statement of the Case

A general court-martial, military judge alone, tried Appellant on June 10, 2013, September 11, 2013, and September 24-26, 2013. The specifications upon which he was arraigned, his pleas, and the court-martial's findings are as follows:

Chg	Art	Spec	Summary of Offense	Plea	Finding
I	92	1	Viol. of Sexual Harassment Order	G*	G
		2	Viol. of Fraternization Order	G	G
II	107	---	False Official Statement	G	G
III	120	1	Abusive Sexual Contact	NG	NG
		2	Abusive Sexual Contact	NG	NG
		3	Abusive Sexual Contact	NG	NG
		4	Abusive Sexual Contact	NG	NG
		5	Sexual Assault	NG	NG
		6	Sexual Assault	NG	NG

IV	134	1	Adultery	G	G
		2	Indecent Language	NG	G
AC	120	1	Abusive Sexual Contact	NG	NG**
		2	Abusive Sexual Contact	NG	NG**
		3	Abusive Sexual Contact	NG	NG
		4	Abusive Sexual Contact	NG	NG**
		5	Sexual Assault	NG	NG**
		6	Sexual Assault	NG	NG**

* Appellant initially entered a plea of guilty to this specification, but his plea was rejected by the military judge.
** But guilty of what the military judge determined to be a "lesser-included" offense of assault consummated by a battery, in violation of Article 128, UCMJ.

Appellant was sentenced by the military judge to confinement for 3 years, and a bad-conduct discharge. The convening authority approved the sentence on January 10, 2014, and, except for the bad-conduct discharge, ordered the sentence executed. The record of trial was docketed with the Navy-Marine Corps Court of Criminal Appeals on January 29, 2014. The Lower Court issued its opinion in this case on November 26, 2014.

STATEMENT OF FACTS

At the time of the alleged offenses, Staff Sergeant Riggins was assigned to Eighth Engineer Support Battalion (8th ESB),

Second Marine Logistics Group, Camp Lejeune, North Carolina, and was detached from his normal duties as Operations Chief in preparation for a deployment to Afghanistan later that year. (Joint Appendix at 45-52, 62-63.) He met Lance Corporal MS sometime after his assignment to the 8th ESB in November 2012. *Id.* She was working as a basic electrician with Support Utilities at the 8th ESB and Appellant had some supervisory responsibilities over her duty assignments until he detached on March 1, 2013. (Joint Appendix at 64, 68.)

On the morning of March 20, 2013, Appellant picked Lance Corporal MS up in his automobile from an on-base Dunkin Donuts and took her to his on-base residence where they participated in a number of sexual activities which formed the basis of the charged violations of Article 120, UCMJ. (Joint Appendix at 45-52, 65-67, 71-88.) Lance Corporal MS made an audio recording of this sexual encounter that was turned over to the Naval Criminal Investigative Service (NCIS) when she reported this incident as a sexual assault on 22 March 2013. (Joint Appendix at 56-61.)

At the conclusion of the case on the merits, the military judge made the following statement:

> I sent a note to counsel approximately 15 minutes ago to ask them to be prepared to discuss with me a potential lesser included offenses [sic]. This is something that, obviously with members, we would've taken up in a 39(a) session prior to instructions on findings and it's an area that I wanted to have counsel

> have an opportunity to make a comment on with regard to lesser included offenses rather than just press on.
>
> I think it's important that I have counsel's thoughts with regard to lesser included offenses before I complete my deliberations. Specifically, lesser included offense with regard to the Article 120 charges. I don't believe there's lesser included offenses on the other charges, but certainly under the Article 120 charge, specifically assault consummated by a battery is a potential lesser included offense.
>
> We are at a bit of a disadvantage given the fact that Article 120, the Article 120 law under which we are currently operating doesn't have a listing of lesser included offenses, so I took a look at the previous Article 120 and obviously assault consummated by a battery has, has I'll say traditionally been a lesser included offense of sexual assault or abusive sexual contact.

(Joint Appendix at 89-90.) The defense objected to the consideration of the lesser included offense, stating that the Government was "bound by its charging decision." (Joint Appendix at 91.) Nevertheless, the military judge found Appellant guilty of five specifications of his suggested lesser-included offense of assault consummated by a battery. (Joint Appendix at 93-95.)

GRANTED ISSUE FOR REVIEW

WHETHER THE LOWER COURT ERRED AND DECIDED A QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT WHEN IT HELD THAT ASSAULT CONSUMMATED BY A BATTERY WAS A LESSER INCLUDED OFFENSE TO ABUSIVE SEXUAL CONTACT AND SEXUAL ASSAULT.

Standard of Review

Whether an offense is a lesser-included offense of another is a question of law reviewed *de novo*. *United States v. Cherukuri*, 53 M.J. 68, 71 (C.A.A.F. 2000).

Argument

In Appellant's brief and in oral argument at the Lower Court, Appellant argued that "assault consummated by a battery is not an LIO of those offenses because assault consummated by a battery contains a lack of consent element that the charged Article 120 offenses do not, thus failing the elements test." *United States v. Riggins*, No. 20140046, slip op. at 6 (N-M. Ct. Crim. App. November 26, 2014) (unpublished op.). While noting "the debate among our sister courts with regard to LIOs in Article 120 offenses," the Lower Court found that the elements test was satisfied with respect to Appellant's charges as, "the LIO is a 'subset' of the greater offense, and therefore 'one cannot prove the greater offense without proving the lesser." *Id.* at 7 (quoting *United States v. Bonner*, 70 M.J. 1, 3

(C.A.A.F. 2011) and *United States v. Neblock*, 45 M.J. 191, 201 (C.A.A.F. 1996)(internal citations omitted).

In *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993), the Court of Military Appeals adopted the strict elements test used by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299 (1932). The Court of Military Appeals further expanded the *Teters* strict element test in *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994), holding that lesser-included offenses are also determined by the "elements test" enumerated in *Teters*.

This Court expanded on the *Teters* elements test more recently in *United States v. Jones*, 68 M.J. 465, 2010 CAAF LEXIS 393 (C.A.A.F. 2010), discussing that to find an accused guilty of a "lesser-included offense" (LIO), a court must still satisfy basic principles of fair notice and saying:

> The due process principle of fair notice mandates that "an accused has a right to know what offense and under what legal theory" he will be convicted; an LIO meets this notice requirement if "it is a subset of the greater offense alleged." If indeed an LIO is a subset of the greater charged offense, the constituent parts of the greater and lesser offenses should be transparent, discernible ex ante, and extant in every instance. While people are presumed to know the law, e.g., Atkins v. Parker, 472 U.S. 115, 130 (1985), they can hardly be presumed to know that which is a moving target and dependent on the facts of a particular case. And it is for Congress to define criminal offenses and their constituent parts. One offense either is or is not an LIO, necessarily included in another offense. While it has been said that "[t]he question of what constitutes a lesser-included offense [in the military

> justice system] . . . is a Hydra," rather than embracing a "Hydra" we return to the elements test, which is eminently straightforward and has the added appeal of being fully consonant with the Constitution, precedent of the Supreme Court, and another line of our own cases.
>
> ....
>
> The Constitution requires that an accused be on notice as to the offense that must be defended against, and that only lesser included offenses that meet these notice requirements may be affirmed by an appellate court. The importance of defining LIOs in this context cannot be understated, as an accused may be convicted of uncharged LIOs precisely because they are deemed to have notice. . .

Jones, 2010 CAAF LEXIS 393 at 6-7.

The Lower Court erred when applying *Teters* and *Jones* to the case at bar by finding that the elements of assault consummated by a battery were a "subset" to the elements of sexual assault and abusive sexual contact and finding that Appellant had due process notice of the same. Unlike the offense of wrongful sexual contact which this Court analyzed in its *Bonner* decision, sexual assault and abusive sexual contact by placing in fear, as charged here, do not contain an element relating to consent or permission for any sexual contact. Sexual assault as charged here requires only that the accused:

> (1) That the accused commited a sexual act upon another person; and
> (2) That the accused did so by threatening or placing that other person in fear.

Manual for Courts-Martial, United States (2012 Ed.), Part IV, ¶45.a.(b)(1)(A). Similarly, abusive sexual contact as charged here requires only:

> (1) That the accused engaged in sexual contact with another person; and
> (2) That the accused did so by threatening or placing that other person in fear.

MCM, Part IV, ¶45.a.(b)(1)(A) and 45.a.(d).[1]

Article 128, Manual for Courts-Martial, lists the following elements for the offense of assault consummated by a battery:

> (1) That the accused did bodily harm to a certain person; and
> (2) That the bodily harm was done with unlawful force or violence.

MCM, Part IV, ¶54.b.(2). "Bodily harm" is defined as any offensive touching, no matter how slight. *Id.* at ¶54.c.(1)(a). The assault must also be done "without the lawful consent of the person affected." *Id.*

Although no other appellate court has yet issued an opinion on whether assault consummated by a battery is a lesser included offense to the charged violations of Article 120, the Air Force Court of Criminal Appeals recently held that wrongful sexual contact was not a lesser-included offense of abusive sexual

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[1] Note that while a definition of consent is given at paragraph 45.a.(g)(8) and is relied upon by the Lower Court in its opinion (*Riggins* at 8), this definition is not referenced in the text of the offenses and there is currently no explanation or elements subparagraphs that address consent or lack of consent.

contact based on the same rational of a missing element of lack of consent[2] as argued here, stating:

> We must assume Congress intended and understood the effect of omitting "lack of consent" as an element of the offense. *See United States v. Wilson*, 66 M.J. 39, 45-46 (C.A.A.F. 2008). According to the plain language of Congress, wrongful sexual contact *requires* proof of an element, i.e. without permission, that abusive sexual contact does not. This additional proof requirement mandates a conclusion that wrongful sexual contact cannot be considered an LIO of abusive sexual contact under the test articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Without permission or consent cannot be *necessarily* included in the elements of abusive sexual contact when Congress has unambiguously stated that consent is "not an issue" in abusive sexual contact cases, regardless of the common sense appeal of an argument to the contrary. While the scope of the meaning of "not an issue" can be open to some interpretation, even the narrowest reading of the language requires a conclusion that "without consent" or "permission" is not an element of abusive sexual contact.
>
> In a prosecution for abusive sexual contact, the Government does not have to prove the absence of consent in order to secure a conviction. *See United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). Under the structure of the version of Article 120, UCMJ, in effect at the time of the alleged offenses in this case, the absence of consent or permission was not a fact necessary to prove the offense of abusive sexual contact. Evidence that the alleged victim consented would be relevant to the factfinder's determination of whether the Government proved the element of "by fear" beyond a reasonable doubt, but it was not necessary under the law. Article 120(r), UCMJ, does not preclude introduction of evidence of consent as a "subsidiary fact" pertinent to the prosecution's burden to prove an element of abusive sexual contact beyond a reasonable doubt, but it also does not require the Government to introduce any evidence of lack of consent or permission to prove the elements of the

[2] Under the former provisions of Article 120, U.C.M.J.

> offense beyond a reasonable doubt. *See Neal*, 68 M.J. at 302. In short, under the plain language articulated by Congress, the Government can prove each element of abusive sexual contact beyond a reasonable doubt without introducing any evidence related to lack of permission or consent.

United States v. Barlow, ACM 37981 at 9 (A.F. Ct. Crim. App. March 13, 2014), *review denied*, ___ M.J. ___, 2014 CAAF LEXIS 1055 (C.A.A.F. Oct. 31, 2014).

Analogous to the effect of the element of lack of consent that prevents wrongful sexual contact from being a lesser included offense to abusive sexual contact, proving the greater offenses of sexual assault and abusive sexual assault here does not necessarily prove the lesser offense of assault consummated by a battery. For example, in *United States v. Johnson*, 54 M.J. 67 (C.A.A.F. 2000), the Court determined that the appellant could not be convicted of assault consummated by a battery where the victim did not manifest a lack of consent to offensive backrubs from Staff Sergeant Johnson and where there was no indication that she was unable to protest his actions or to shrug them off as she had done previously. *United States v. Johnson*, 54 M.J. at 69. *Johnson* involved a similar case of a supervising noncommissioned officer repeatedly touching a subordinate in an unwanted manner and making sexual comments to her in the office space. If Staff Sergeant Johnson were tried today, there is little doubt that the Government would be able

to establish the offense of abusive sexual contact beyond a reasonable doubt, as "[e]vidence that the alleged victim consented would be relevant to the factfinder's determination of whether the Government proved the element of 'by fear' beyond a reasonable doubt, but it [would not be] necessary under the law." *United States v. Barlow*, ACM 37981 at 9. [3]

The Lower Court based its holding on a common sense approach, that, "[o]ne cannot prove sexual assault by threatening or placing that other person in fear without necessarily proving assault consummated by a battery, because one cannot prove a legal inability to consent without necessarily proving a lack of consent," (*United States v. Riggins*, slip op. at 8.) This type of common sense approach is not only facially flawed as argued above, but also specifically criticized by the Air Force Court of Criminal Appeals in *Barlow* as stretching the rules of statutory construction and failing to apply the rule of lenity, resolving ambiguity in favor of the appellant. *United States v. Barlow*, ACM 37981 at 8, see also *United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007)(noting rule of strict statutory construction and resolving

[3] Conversely, the military judge in this case made special findings after the conclusion of the trial to justify his variance in finding Appellant guilty of the assault consummated by a battery, finding that the victim was not placed in fear, as was charged and argued by the trial counsel, but that she *had* manifested a lack of consent to touching by the Appellant, which had not been raised. (App. Ex. XLI.)

ambiguity in favor of accused). While the Congress or the President may act at some point to resolve the ambiguity surrounding the current version of Article 120, UCMJ offenses of sexual assault and abusive sexual contact, they have not done so. In the absence of a clear, unambiguous subset of elements under the *Teters* elements test, it was error for the Lower Court to find that assault and battery was a lesser included offense to sexual assault and abusive sexual contact. This error was to the substantial prejudice of the Appellant by increasing his punitive exposure and potentially exposing him to sex offender registration based on his state of residency.

WHEREFORE, Appellant respectfully requests this Honorable Court reverse the decision of the lower court and remand the case for further review.

JEFFREY S. STEPHENS
C.A.A.F. Bar Number: 33272
Quindlen Law Firm, P.A.
P.O. Box 2450
Beaufort, SC 29901
Tel: (843) 379-2660
jeff@quindlenlaw.com

Certificate of Service

I certify that an electronic copy of Appellant's Brief on the Granted Issue was delivered to the court by electronic filing, to detailed Appellate Defense Counsel and to Appellate Government Counsel on May 7, 2015.

JEFFREY S. STEPHENS
Bar Number 33272
Quindlen Law Firm, P.A.
P.O. Box 2450
Beaufort, SC 29901
(843) 379-2660
jeff@quindlenlaw.com