IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201400046
Quantaus R. RIGGINS, Staff Sergeant (E-6) U.S. Marine Corps Appellant	)	USCA Dkt. No. 15-0334/MC

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

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Issue Presented

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?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a bad-conduct discharge and one year or more of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of two specifications of violating of a lawful general order,[1] making a false official statement, and adultery, in violation of Articles 92, 107, and 134, UCMJ, 10 U.S.C. §§ 892, 907, 934, (2006). Appellant was convicted, contrary to his pleas, of six

[1] Appellant pleaded guilty to violating Paragraph 4(a), Marine Corps Order 1000.9A for wrongfully sexually harassing Lance Corporal MS, and Article 1165, U.S. Navy Regulations proscribing fraternization. (R. 144-45; Charge Sheet, May 23, 2013.)

specifications of assault consummated by a battery,[2] and one specification of indecent language in violation of Articles 128, and 134, UCMJ, 10 U.S.C. §§ 928, and 934 (2006). The Military Judge sentenced Appellant to three years confinement, reduction to pay grade E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The record of trial was docketed with the Navy-Marine Corps Court of Criminal Appeals on January 29, 2014. After Appellant and the Government submitted briefs, the lower court ordered oral argument. On November 26, 2014, the lower court affirmed the findings and approved sentence. *United States v. Riggins*, No 201400046, 2014 CCA LEXIS 864 (N-M. Ct. Crim. App. Nov. 26, 2014). Appellant subsequently petitioned this Court for review of the lower court decision.

Statement of Facts

Appellant was assigned to 8th Engineer Support Battalion (8th ESB), Second Marine Logistics Group, Camp Lejuene, North Carolina, pending a deployment to Afghanistan. (R. 162-63.) In November 2012, while Appellant was attached to 8th ESB, he met

[2] Under the Additional Charge, Appellant pled not guilty to four specifications of abusive sexual contact and two specifications of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012), but was convicted of six specifications of the lesser-included offense of assault consummated by a battery for the charged offenses. (R. 315-17.)

Lance Corporal (LCpl) MS, who was assigned to the unit as a basic electrician. (*Id*.) As the only staff non-commissioned officer (SNCO) in the section to which LCpl MS was assigned, Appellant had direct supervisory authority over LCpl MS's duty assignments until he detached from the unit on March 1, 2013. (R. 163-64, 199.)

After Appellant detached from the unit, he pursued an unduly familiar personal relationship with LCpl MS. (R. 199.) Later in March 2013, Appellant came up behind LCpl MS outside of the building where she worked, grabbed her by the waist and "humped" her with his pelvis, and said, "Oh, I just jizzed on myself." (R. 199-200.) After that incident, Appellant approached LCpl MS two other times and requested that she have sex with him. (R. 201-202.)

On March 20, 2013, Appellant instructed LCpl MS to meet him in the parking lot of an on-base Dunkin Donuts. (R. 203.) LCpl MS followed his instructions because of his rank and position as a SNCO. (*Id*.) When Appellant arrived, he instructed LCpl MS to get into his vehicle and again pressured her for sexual favors. (R. 205-206.) Because she wanted to have proof of Appellant's inappropriate advances, LCpl MS recorded her conversation with Appellant on her phone. (R. 101-106, 203-204.) She told him numerous times that she did not want to have sex with him. (R. 206-207.) She eventually acquiesced, however, because she was

afraid that Appellant would refer her to nonjudicial punishment as he was aware that LCpl MS had posted a photograph of herself on Facebook drinking alcohol while she was on convalescent leave and under orders not to consume alcohol. (R. 206-207.) Appellant then drove LCpl MS to his on-base residence. (R. 171-73, 207-209.)

Once at his residence, Appellant persisted in asking LCpl MS for sexual favors, despite LCpl MS reiterating that she did not want to have sex with Appellant. (R. 209-210.) LCpl MS eventually acquiesced to Appellant's demands because of his rank and her fears of receiving nonjudicial punishment. (R. 217.) LCpl MS manually masturbated Appellant. (R. 216.) Appellant masturbated on her breasts, digitally penetrated her, and had sexual intercourse with LCpl MS. (R. 216-19.)

When she reported Appellant's assault to the Naval Criminal Investigative Service (NCIS) on March 22, 2013, LCpl MS turned over the audio recording of her March 20, 2013, conversations with Appellant, which included her numerous statements that she did not want to have sex with Appellant. (R. 101-106, 219-20; Pros. Ex. 7.) When Appellant was interviewed by NCIS agents on March 22, 2013, he gave a written statement in which he answered "No" to the question, "Did LCpl [MS] say anything to indicate she did not want to have sex with you before, during or after?" (R. 175-79; Pros. Ex. 8 at 3.)

After the Military Judge entered findings, Civilian Defense Counsel moved to merge the six specification of the lesser included assaults consummated by a battery under the Additional Charge and the two specifications of violating a lawful general order under Charge I, respectively, as an unreasonable multiplication of charges for sentencing. (R. 315-18, 320-26.) The Military Judge denied the motion, explaining:

> I've had a chance to deliberate on the motion from the defense and make the following findings and conclusions. With regard to merger of the 128 offenses, I find that each specification is aimed at a distinct act separated by time, discussion between the accused and the complaining witness, location of some of the specifications, and protests by the complaining witness.
>
> I do not see this as an exaggeration of criminality of the accused or of prosecutorial overreaching. Although the acts occur over a fairly short time span, there is time and was time for reflection between each act. I further note that since this is an, not a member's trials, the Court stands in a much better position to recognize the sentencing implications of multiple charges occurring over a short timeframe. Accordingly, I will not merge the Article 128 specifications.
>
> With regard to merging Specifications 1 and 2 of Charge I, I find that each specification is aimed at a distinct statutory goal. Sexual harassment protects against workplace conduct while fraternization guards against improper senior-subordinate relationships among other reasons. I again note that the Court can and will take into consideration the overlapping conduct in both specifications. The test is not that any multiplication of charges is wrong, but that an unreasonable multiplication of charges is prohibited. I do not find the multiple charges in this case to be unreasonable. Accordingly, the defense motion is denied.

(R. 325-26.) Concurrent with the unreasonable multiplication of charges motion, Civilian Defense Counsel requested special findings on the specifications under Charge I and the Additional Charge. (R. 318-19; Appellate Ex. XLI.) Noting that the request for special findings was untimely under Rule for Court-Martial (R.C.M.) 918(b), the Military Judge attached special findings to the Record on Specification 1 of Charge I,[3] and Specifications 1-2, 4-6 of the Additional Charge which were consistent with his ruling on the Defense's trial motion asserting unreasonable multiplication of charges. (Appellate Ex. XLI.)

Summary of Argument

Assault consummated by a battery was a lesser included offense of both abusive sexual contact and sexual assault, and Appellant's convictions for that lesser included offense were proper.

[3] The Military Judge's Special Findings of November 19, 2013 contain apparent scrivener's errors which refer to "Specification 1, Charge III" vice Charge I, and which refer to the general order as "MCO 100.9A" vice MCO 1000.9A.

Argument

THE OFFENSIVE CONTACT REQUIRED FOR AN ASSAULT CONSUMMANTED BY A BATTERY IS NECESSARILY INCLUDED IN THE ARTICLE 120 OFFENSES CHARGED UNDER THE ADDITIONAL CHARGE. THE MILITARY JUDGE DID NOT ERR IN FINDING THAT ASSAULT CONSUMMATED BY A BATTERY IS A LESSER INCLUDED OFFENSE OF BOTH ABUSIVE SEXUAL CONTACT AND SEXUAL ASSAULT UNDER THESE FACTS.

A. Standard of Review.

Whether an offense is a lesser included offense is a question of law that is reviewed *de novo*. *United States v. Miller*, 67 M.J. 385, 387 (C.A.A.F. 2009) (citations omitted).

"An accused may be found guilty of an offense necessarily included in the offense charged. . ." Article 79, UCMJ. Article 79 requires application of the elements test to determine whether one offense is a lesser included offense of a charged offense:

> Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.

United States v. Jones, 68 M.J. 465, 470 (C.A.A.F. 2010) (quoting *Schmuck v. United States*, 489 U.S. 705 (1989); *see also United States v. Arriaga*, 70 M.J. 51 (C.A.A.F. 2011) (applying the *Jones* elements test,); *United States v. Teters*, 37 M.J. 370, 376 (C.A.A.F. 1993). The elements test "does not require that

the two offenses at issue employ identical statutory language." *Jones*, 68 M.J. at 470. Instead, after applying the "normal principles of statutory construction," the court asks whether the elements of the alleged lesser included offense are a subset of the elements for the charged offense. *United States v. Alston,* 69 M.J. 214, 216 (C.A.A.F. 2010); *see also Arriaga*, 70 M.J. at 53-54 (applying elements test and finding housebreaking to be a lesser included offense of burglary on facts presented).

1. The elements test this Court applies is based on well-settled Supreme Court precedent defining lesser-included offenses.

Recently in *Tunstall*, this Court applied the elements test articulated in *Sansone v. United States*, 380 U.S. 343 (1965), to analyze whether indecent acts was a lesser-included offense of aggravated sexual assault. *United States v. Tunstall,* 72 M.J. 191, 195 (C.A.A.F. 2013). The *Sansone* Court addressed when a jury instruction on a lesser-included offense was required under the Federal Rules of Criminal Procedure. 380 U.S. at 349. Although focused on the issue of when a criminal defendant was entitled to an instruction on a lesser included offense, *Sansone* provides clear definition for what is or is not a lesser included offense.

The question in *Sansone* was whether two misdemeanor tax fraud counts that only proscribed the willful failure to perform a number of specified acts at the time required were lesser

included offenses of a felony tax evasion statute that required, in part, "an affirmative act constituting an evasion or attempted evasion of the tax."[4] *Sansone*, 380 U.S. at 349-50. The *Sansone* Court found that there were no disputed issues of fact that would have justified instructions to the jury that it could have found that the appellant committed all the elements of the misdemeanor offenses for which he sought an instruction and the greater, felony offense. *Id*. at 350-54.

Applying the then-applicable Federal Rule, the Supreme Court held, "in a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense." *Id*. (quoting *Berra v. United States*, 351 U.S. 151 (1956)). "But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses." *Id*. at 349-50. "In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. Thus, a lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is

[4] The felony statute at issue was 26 U.S.C. § 7201 and *Sansone* requested instructions for offenses under 22 U.S.C. §§ 7203 and 7207. *Sansone*, 380 U.S. at 347-349.

not required for conviction of the lesser-included offense." *Id*.

2. Consistent with the well-settled test in *Sansone,* this Court *in Bonner*, *Arriaga*, and *Tunstall,* has applied the elements test to define when offenses under the UCMJ constitute a lesser included offense.

Under facts similar to those in this case, this Court applied the elements test in *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011), and concluded that assault consummated by a battery was a lesser included offense of wrongful sexual contact under the former Article 120(m), UCMJ, 10 U.S.C. § 920(m) (2006). The appellant was charged with wrongful sexual contact for tapping his penis on his victim's forehead; the conviction was affirmed on the theory that since each offense involved a quantum of wrongful contact that under those circumstances assault consummated by a battery was a lesser-included offense of wrongful sexual contact. *Bonner*, 70 M.J. at 3.

This Court also applied the elements test in *Arriaga*, concluding that housebreaking was a lesser included offense of burglary. 70 M.J. at 53. The appellant in *Arriaga* argued that the specific intent element required for housebreaking was not as limited as that required for burglary, therefore the intent element for housebreaking was not included in the offense of burglary under the elements test articulated in *Jones*. *Arriaga*, 70 M.J. at 54. The appellant in *Arriaga* also asserted even were

housebreaking a lesser included offense of burglary that the facts in his case did not fairly raise the issue. *Id*.

This Court, consistent with *Jones*, applied the elements test and found that the intent element of housebreaking, which only required entry into a building or structure with the intent to commit a criminal offense, was a lesser-included offense of burglary, which required unlawful entry with the intent to commit certain enumerated offenses under the Code. *Id*. at 55. This Court held that proof of the intent to commit any criminal offense was on those facts an alternative means of proving unlawful entry with the intent to commit an offense under Article 120, UCMJ, as was charged in that case, and the fact there may be an "alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser included offense." *Id*. (citations omitted).

B. Applying normal principles of statutory construction, assault consummated by a battery is necessarily a lesser-included offense of sexual assault and abusive sexual contact.

1. Both greater offenses require a touching accompanied by a specific sexually-oriented intent, which necessarily prove the lesser offense's element of a mere offensive touching.

Specifications 1-4 under the Additional Charge alleged, under Article 120, UCMJ, that Appellant committed abusive sexual contact upon LCpl MS by engaging in various sexual acts with her on March 20, 2013. (Charge Sheet.) Specification 1 alleged

that Appellant "touch[ed] her vagina with his hand"; Specification 2 alleged that Appellant "touch[ed] her breast with his lips"; Specification 3 alleged that Appellant caused her to touch "his penis with her hand"; and, Specification 4 alleged that Appellant "touch[ed] her breast with his penis." (*Id*.) Each of these specifications alleged that Appellant facilitated the sexual contact "by placing [LCpl MS] in fear that, through the use or abuse of military position, rank, or authority, he would affect her military career." (*Id*.)

> The offense of "abusive sexual contact" under the version of Article 120, UCMJ, in effect at the time of Appellant's offenses proscribed: Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

10 U.S.C. § 920(d) (2012).[5] The definition of "sexual contact" included:

[5] The statutory language and definitions cited are from the 2011 amendments to Article 120 that were in effect at the time of Appellant's trial. The National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011), amended Article 120, UCMJ. Part IV of the 2012 version of the Manual for Courts-Martial included the text of the amended 10 U.S.C. § 920, but the President did not provide elements, lesser included offenses, maximum punishments, and sample specifications for the amended offenses. MCM (2012), Part IV, ¶ 45; Exec. Order No. 13,593, 3 C.F.R. 13593 (2011). However, the President did include guidance in the 2012 Manual to "refer to the appropriate statutory language, and, to the extent practicable, use Appendix 28 as a guide" in charging offenses under the amended Article 120. MCM (2012), Part IV, ¶ 45.

> (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or
>
> (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.
>
> Touching may be accomplished by any part of the body.

10 U.S.C. § 920(g)(2) (2012). A "sexual act" was defined as:

> (A) contact between the penis and the vulva or anus or mouth, and. . .contact involving the penis occurs upon penetration, however slight; or
>
> (B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

10 U.S.C. § 920(g)(1) (2012).

Specifications 5 and 6 under the Additional Charge alleged, under Article 120, UCMJ, that Appellant, "by placing [LCpl MS] in fear that, through the use or abuse of military position, rank, or authority, he would affect her military career" sexually assaulted LCpl MS by, respectively, "[penetrating] her vulva with his finger" and "[penetrating] her vulva with his penis." (Charge Sheet.) A sexual assault under Article 120, UCMJ, is committed, in relevant part, when a person subject to the Code "commits a sexual act upon another person by—

threatening or placing that other person in fear. . ." 10 U.S.C. § 920(b)(1) (2012).

The elements of assault consummated by a battery, under Article 128, UCMJ, are: "(a) that the accused did bodily harm to a certain person; and (b) that the bodily harm was done with unlawful force or violence." MCM (2012), Part IV, ¶ 54.b.(2); *see United States v. Johnson,* 54 M.J. 67, 69 (C.A.A.F. 2000) (quoting identical Manual language from 1995 edition). Doing bodily harm means committing "any offensive touching of another, however slight." *Johnson,* 54 M.J. at 69 (quoting Manual for Courts-Martial, United States (1995 ed.) (MCM), Part. IV, ¶ 54(c)(1)(a)); *see also United States v. Sever,* 39 M.J. 1, 4 (C.M.A. 1994) (noting that although kissing "implies a minimum use of force, [it] is sufficient for [assault consummated by a battery]").

Unlawful force or violence means that the accused wrongfully caused the contact, in that no legally cognizable reason existed that would excuse or justify the contact. *See Johnson,* 54 M.J. at 69 (recognizing that legal excuses or justifications, such as consent, may negate the offensiveness of the touching).

2. The Military Judge was within his legal authority under Article 79, UCMJ, to find that Appellant's physical contact with LCpl MS was unlawful and his findings of the lesser included offense of assault consummated by a battery were correct.

Here, the evidence established that on March 20, 2013, Appellant used his rank and position as a staff NCO to coerce LCpl MS into engaging in sexual acts with him. (R. 205-206, 209-10, 217.) LCpl MS only acceded to his demands because she was afraid that Appellant would refer her to nonjudicial punishment for a violation of a medical order not to consume alcohol while on convalescent leave. (R. 206-207, 217.) Despite LCpl MS reiterating that she did not want to have sex with Appellant after he had ordered her to meet him and then drove her to his home, he persisted and coerced LCpl MS into manually masturbating him, into allowing him to masturbate on her breasts, digitally penetrating her, and ultimately having sexual intercourse with him. (R. 209-210, 216-19.)

Here, as in *Bonner*, comparing the elements of the offenses, assault consummated by a battery is a lesser included offense of both abusive sexual contact and sexual assault. Each offense requires wrongful contact. The specific offensive touchings with which Appellant was charged under the Additional Charge, alleged that he touched LCpl MS's vagina and breast, touched her breast with his penis, penetrated her vulva with both his finger and penis, and caused LCpl MS to make contact with his genitalia

without her permission and with the intent of abusing her and of gratifying his sexual desires. *See* 10 U.S.C. § 920(b), (d) (2012). Such contact would, at a minimum, be offensive given the ordinary understanding of what it means for contact to be offensive. *See Johnson,* 54 M.J. at 69; cf. *Alston,* 69 M.J. at 216.

Applying the elements test in *Jones*, as it has been consistently applied by this Court, one could transplant the essential facts from Specifications 1-4 alleging abusive sexual contact, or Specifications 5-6 alleging sexual assault, without alteration, into legally sufficient specifications for assault consummated by a battery under Article 128, UCMJ, as each specification would allege the essential elements of an assault consummated by a battery——that Appellant did engage in some contact with LCpl MS, and that such contact was without legal justification or lawful authorization and without the permission of [LCpl MS]. *See* MCM Part. IV, ¶ 54(f)(2).

The greater offenses of abusive sexual contact and sexual assault require additional proof that the contact was either "sexual contact" or a "sexual act" as defined by the President in Part IV of the Manual. For these reasons, assault consummated by a battery is a lesser included offense of both abusive sexual contact and sexual assault. The Military Judge did not abuse his discretion in entering findings for assault

consummated by a battery as a lesser included offense of the charged offenses, and this Court should affirm Appellant's convictions of the six specifications under the Additional Charge.

C. Appellant's reliance upon the Air Force Court of Criminal Appeals in *United States v. Barlow* is misplaced. That case involved a different version of Article 120, UCMJ, with different statutory language that is distinguishable from the case at bar.

Appellant draws an inapt analogy between this case and the Air Force Court of Criminal Appeals' decision in *United States v. Barlow*, No. 37981, 2014 CCA LEXIS 166 (A.F. Ct. Crim. App. Mar. 13, 2014), that ignores the crucial distinctions between the statutory language at issue in *Barlow* and the offenses in this case. The appellant in *Barlow* was charged with two specifications of abusive sexual contact under a former version of Article 120, UCMJ, for fondling the breasts and touching the vulva of a junior Airman by placing her in fear of reprisal by using his rank and military position. *Barlow*, 2014 CCA LEXIS 166, at *12.

He was found not guilty of these abusive sexual contact specifications but, with respect to both, was found guilty of wrongful sexual contact, also under Article 120, UCMJ, as lesser-included offenses. *Id*. The appellant in *Barlow* asserted the military judge erred in concluding wrongful sexual contact was a lesser-included offense of abusive sexual contact. *Id*.

The elements of abusive sexual contact by placing in fear under the statute at issue in *Barlow* were: (1) That the accused engaged in sexual contact with another person; and, (2) That the accused did so by placing that other person in fear of reprisal. *Barlow*, 2014 CCA LEXIS 166, at *14; MCM, Appx 28, ¶ 45.b.(8).

The elements of wrongful sexual contact were: (1) That the accused had sexual contact with another person; (2) That the accused did so without that other person's permission; and (3) That the accused had no legal justification or lawful authorization for that sexual contact. *Barlow*, 2014 CCA LEXIS 166, at *14; MCM, Appx 28, ¶ 45.b.(13)

At issue in *Barlow* was whether, applying the elements test, "without permission" was included within the second element of abusive sexual contact:

> 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.

Barlow, 2014 CCA LEXIS 166, at *14, *19-20.

The different statutory language at issue in this case renders *Barlow* inapposite. Applying the elements test of *Jones*, the question the Military Judge correctly addressed in his findings, and the Navy-Marine Corps Court of Criminal Appeals properly affirmed, is whether the bodily harm——that is, any offensive touching however slight—required for an assault consummated by a battery is necessarily included in the "sexual contact" of "sexual act" required for the charged greater offenses of abusive sexual contact and sexual assault. *Riggins*, 2014 CCA LEXIS 864, at *13-14. Unlike *Barlow* where the statutory language of the lesser-included offense included a consent element that was explicitly excluded from the greater offense, this case presents a straightforward analysis of whether the "sexual contact" or "sexual act" proscribed as abusive sexual contact and sexual assault by Article 120, UCMJ, are subsets of bodily harm.

Applying *Jones*, one cannot prove either sexual assault by threatening or placing that other person in fear or abusive sexual contact without necessarily proving the requisite bodily harm for an assault consummated by a battery. *Riggins*, 2014 CCA LEXIS 864, at *14. Accordingly, this Court should affirm the

holding of the Navy-Marine Corps Court of Criminal Appeals that assault consummated by a battery is a lesser-included offense of both sexual assault and abusive sexual contact in this case.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on June 8, 2015.

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