IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. **CHRISTOPHER L. OLIVER** Senior Airman (E-4), U.S. Air Force *Appellant.*	**REPLY BRIEF ON BEHALF OF APPELLANT** Crim. App. No. 38481 USCA Dkt. No. 16-0484/AF

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

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Argument

SrA Oliver did not waive his constitutional rights to notice and to not be convicted of a crime that is not a lesser-included offense (LIO) of the offense with which he was charged. The government concedes, in light of *United States v. Riggins*, 75 M.J. 72 (C.A.A.F. 2016), that wrongful sexual contact is not an LIO of abusive sexual contact under the theory charged here (Gov't Br. at 4). Thus, SrA Oliver's due process rights were in fact violated because "all of the elements [are not] included in the definition of the offense of which the [Appellant was] charged." *United States v. Girouard*, 70 M.J. 5, 15 (C.A.A.F. 2011) (quoting *Patterson v. New York*, 432 US 197, 210 (1977). But the government asks this Court to ignore the presumption against waiver, and infer waiver without facts demonstrating a clear and intentional relinquishment of a known right. *Cf. United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) ("[T]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege.") (*quoting United States v. Olano*, 507 U.S. 725, 732-33 (1993)).

The government is internally inconsistent. In one breath it concedes the importance of *Riggins* in that it made clear wrongful sexual contact is not an LIO of abusive sexual contact by placing another person in fear (Gov. Br. at 4). In the

next breath, however, the government argues *Riggins* did not "change the landscape of the law" and since SrA Oliver's counsel did not object to wrongful sexual contact as an LIO at trial, his constitutional right to legal notice is waived (Gov. Br. at 6).

Similar to *Girouard*, here SrA Oliver could not have waived his Constitutional rights because at the time of trial *Riggins* had not been decided. *See* 70 M.J. at 14. Not until this Court's decision in *Riggins* was there clarity on the LIO issue and a controlling ruling that a victim's legal inability to consent is not the same as proving lack of consent. What SrA Oliver's counsel had at the time of trial was the confusing landscape of conflicting decisions on whether wrongful sexual contact was an LIO of any Article 120, Uniform Code of Military Justice (UCMJ) offense.[1] Even the Air Force Court of Criminal Appeals had held

[1] *Compare United States v. Medina*, 68 M.J. 587 (N.M. Ct. Crim. App. 2009) (Beal, J., dissenting in part and concurring in part) (observing that wrongful sexual contact was an LIO of aggravated sexual assault because "the Manual for Courts-Martial itself validates the notion that 'lack of consent' is an implicit element to aggravated sexual assault" in recognizing wrongful sexual contact as a potential lesser included offense in paragraph 45(e)(8)); *United States v. Wagner*, Army 2013 CCA LEXIS 573 at *15 (Army Ct. Crim. App. July 29, 2013) (holding wrongful sexual contact is an LIO of the offense of aggravated sexual assault but not under the particular facts of that case); and *United States v. Johanson*, 71 M.J. 688, 693 (C.G. Ct. Crim. App. 2012) (concluding wrongful sexual contact is an LIO of abusive sexual contact of a person substantially incapable of declining participation because "[s]urely a lack of consent is inherent in substantial incapability of declining participation"); *with United States v. Honeycutt*, 2010 CCA LEXIS 104 at *5 (Army Ct. Crim. App. Sep. 1, 2010) (finding wrongful sexual contact was not an LIO of rape by force because "[t]he elements of rape by

wrongful sexual contact to be an LIO of aggravated sexual assault. *See United States v. Pitman*, 2011 CCA LEXIS 93 at *11 (A.F. Ct. Crim. App. May 19, 2011) ("[A]n allegation that a victim is compelled to submit to sexual acts by force clearly includes as a subset that the victim is not consenting."), *contra United States v. Barlow*, 2014 CCA LEXIS 166, at *16-24 (A.F. Ct. Crim. App. Mar. 13, 2014) (rejecting the "common sense" notion that "without permission" is included in the second element of abusive sexual contact, "by placing that other person in fear."). Counsel for SrA Oliver did not have the benefit of *Barlow* at trial.

The government also asserts SrA Oliver knowingly and intentionally waived his rights to notice and to not be convicted of an offense other than one appearing on the charge sheet because he presented evidence of consent (Gov't Br. 6). But SrA Oliver presented evidence that Cadet LMS consented as an affirmative defense to the charged allegation that Cadet LMS engaged in the sexual contact alleged because she was placed in fear for her military career. SJA 22-23. The government never presented evidence of lack of consent and maintained a constructive theory force throughout SrA Oliver's trial. JA 254. SrA Oliver's

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force do not include any, let alone all, of the elements of wrongful sexual contact"); and *United States v. Prothro*, 2013 CCA LEXIS 293 at *5-6 (Army Ct. Crim. App., Mar. 29, 2013) ("In this case, wrongful sexual contact does not qualify as a lesser-included offense because that offense requires an element [without the other person's permission] not required for the greater offense of abusive sexual contact caused solely by fear."). *See United States v. Barlow*, 2014 CCA LEXIS 166, at *22-23 (A.F. Ct. Crim. App. March 13, 2014).

affirmative defense was a rebuttal to the offense charged, not a "clear and strong case of an intentional relinquishment of a known right" that the government asserts (Gov't Br. at 6). The raising of the affirmative defense neither alleviated the failure to put SrA Oliver on legal notice to defend against wrongful sexual contact, nor the government's burden of proving lack of consent beyond a reasonable doubt. This Court should decline the government's invitation to make such an inference of constitutional waiver.

Where there is no waiver and no objection at trial, this Court has applied a plain error standard based on the law at the time of the appeal. *Girouard*, 70 M.J. at 16-18. The government concedes that wrongful sexual contact is not an LIO of abusive sexual contact because wrongful sexual contact has the additional element of consent absent in abusive sexual contact (Gov't Br. at 4). Therefore, the military judge's finding was clear and obvious error. *See Riggins*, 75 M.J. at 81, 83.

As in *Girouard*, the only question is whether SrA Oliver suffered prejudice to a substantial right. 70 M.J. at 11. As noted in *McMurrin* and *Girouard*, "the rights at issue in this context are substantial," and implicate core due process rights protected by the Fifth and Sixth Amendment. *McMurrin*, 70 M.J. at 19 (citations omitted). In claiming that "[i]t is the defense's trial strategy that matters," the government cites *United States v. Wilkins*, 71 M.J. 410, 414 (C.A.A.F. 2012)

(Gov't Br. at 9), but in that case, the appellant was ultimately not denied due process when he was charged with conduct that "could never constitute the offense of aggravated sexual assault," but the charged specification "expressly stated" the elements of the erroneous lesser included offense: abusive sexual contact. *Id.* at 414. The charging instrument here did no such thing. Further, the government does not even attempt to address whether it assumed the burden of proof beyond a reasonable doubt on the element of consent (Gov't Br. at 8-11). 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). The government does not cite to, or attempt to explain how *Neal*'s logic fails to demonstrate the prejudice to SrA Oliver. Accordingly, the government's harmlessness argument must fail.

Conclusion

Appellant respectfully requests this Court set aside Appellant's conviction for wrongful sexual contact and order a rehearing on the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that delivery of a copy of the foregoing to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, occurred on 1 December 2016.

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