IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201500251
Mark J. ROSARIO, Sergeant (E-5) U.S. Marine Corps Appellant	)	USCA Dkt. No. 16-0424/MC

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

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STATUTES, RULES, AND OTHER AUTHORITIES

Uniform Code of Military Justice, 10 U.S.C. §§ 801-946:

Issue Presented

WHETHER THE LOWER COURT ERRED IN CONDUCTING ITS ARTICLE 66(c), UCMJ, REVIEW BY FINDING AS FACT ALLEGATIONS THAT SUPPORTED CHARGES OF WHICH SGT ROSARIO WAS ACQUITTED TO AFFIRM THE FINDINGS AND SENTENCE.

Statement of Statutory Jurisdiction

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

Statement of the Case

A panel of members with enlisted representation sitting as a special court-martial convicted Appellant, contrary to his pleas, of one specification of violating a lawful general order (Marine Corps Order 1000.9A (Sexual Harassment)) in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2012). The Members sentenced Appellant to 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.

On January 28, 2016, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. Rosario*, No. 201500251, 2016 CCA LEXIS 32 (N-M. Ct. Crim. App. Jan. 28, 2016) (J.A. 1-6).

Appellant filed a Petition for a Grant of Review with this Court on March 28, 2016, and a Supplement to the Petition on April 18, 2016. This Court granted review on June 10, 2016, and Appellant filed his Brief in support of his Petition on July 11, 2016.

Statement of Facts

A. Appellant was charged with sexually harassing Lance Corporal BA, his subordinate, on divers occasions between September 2013 and February 2014. Appellant was also charged with abusive sexual contact and assault under Articles 120 and 128.

Appellant was charged with sexually harassing Lance Corporal (LCpl) BA, his subordinate, over the course of approximately five months, in violation of Article 92, UCMJ. (J.A. 14.) The Charge alleged that:

> [Appellant] . . . did, on divers[] occasions, at or near New River, North Carolina, between on or about 13 September 2013 and on or about 21 February 2014, violate a lawful general order, to wit: Marine Corps Order 1000.9a, dated 30 May 2006, by wrongfully sexually harassing Lance Corporal [BA], U.S. Marine Corps.

(J.A. 14.) Marine Corps Order (MCO) 1000.9A defines sexual harassment as "unwelcome sexual advances . . . and other verbal *or physical* conduct of a sexual nature when . . . [s]uch conduct has the purpose or effect of unreasonably

interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment." (J.A. 151 (emphasis added).)

In addition to the Article 92 violation, Appellant was charged with two specifications of abusive sexual contact and one specification of assault consummated by a battery, in violation of Articles 120(d) and 128, UCMJ, 10 U.S.C. §§ 920(d) and 928 (2012). (J.A. 14, 16, 147.) The first Article 120 specification alleged that:

> [Appellant] . . . did, at or near New River, North Carolina, between on or about 15 October 2013 and on or about 31 October 2013, commit *sexual contact* upon Lance Corporal [BA], U.S. Marine Corps, by causing bodily harm, to wit: *touching her cheek with his mouth*.

(J.A. 14 (emphasis added).) The second Article 120 specification alleged that:

> [Appellant] . . . did, at or near New River, North Carolina, between on or about 19 February 2014, commit *sexual contact* upon Lance Corporal [BA], U.S. Marine Corps, by causing bodily harm, to wit: *touching her ear with his tongue*.

(J.A. 16 (emphasis added).) And the Article 128 specification alleged that:

> [Appellant] . . . did, at or near New River, North Carolina, between on or about 15 October 2013 and on or about 31 October 2013, assault Lance Corporal [BA], U.S. Marine Corps, *by unlawfully touching her hand with his hand*.

(J.A. 16 (emphasis added).)

B. The United States presented evidence of Appellant's verbal and physical sexual harassment of LCpl BA, including evidence of physical conduct that was also relevant to the sexual contact and assault charges.

At trial, the United States presented evidence that Appellant sexually harassed LCpl BA both verbally and physically. (J.A. 26-50.)

LCpl BA testified that Appellant made sexual comments that caused her to feel uncomfortable, beginning during her check-in process in September 2013 and continuing through February 2014. (J.A. 28-35.) On separate occasions, Appellant told her "te quiero" (Spanish for "I want you"), and "[y]ou're very pretty . . . too pretty to be a Marine." (J.A. 29, 41, 56.) After the Thanksgiving holiday, Appellant asked her how many times she had sex with her husband, and after the Christmas holiday he told her that he "really missed [her and] really missed [her] face." (J.A. 33-35.) On another occasion, Appellant told her that he was going to keep her apartment key as his "spare key for when [he] come[s] over." (J.A. 35.) And another time, he told her to have a house warming party so that they could "party and drink" together. (J.A. 35.)

LCpl BA described two instances where Appellant touched her. In October 2013, LCpl BA was repairing a large refrigeration unit when Appellant placed his hand over hers and kissed the side of her face. (J.A. 29-31, 49-50, 54-55.) In mid-January 2014, LCpl BA was helping Appellant repair an air conditioning unit in an

enclosed storage bay when he placed his hand on the back of her neck and stuck his tongue in her ear. (J.A. 36-38.)

Although the evidence of Appellant's physical conduct toward LCpl BA also supported the specifications under Article 120 and 128, the physical acts were not presented as separate events or as unrelated to Appellant's verbal comments toward LCpl BA. (J.A. 28-38.) Instead, the United States presented Appellant's verbal and physical acts in chronological order, as part of a continuous course of conduct that took place throughout the five months Appellant was LCpl BA's Platoon Sergeant. (J.A. 28-38.)

LCpl BA was consistently taken aback and offended by her Platoon Sergeant's verbal and physical conduct . (J.A. 29, 33-35.) She responded by questioning Appellant directly about it, stating her disapproval, trying to change the subject to something more professional, or physically withdrawing from him. (J.A. 29-35, 56.)

After the January 2014 tongue-in-the-ear incident, LCpl BA "freaked out," "pushed [Appellant] away," and told him "[her] husband would fucking kill [him]." (J.A. 38.) The next day, Appellant told LCpl BA that although his actions were inappropriate, he always made sure "nobody was around," that "people do this all the time in the Marine Corps," and that "[i]t's normal, it's okay." (J.A. 41, 79.)

LCpl BA did not report Appellant's various actions to her command because she believed that "[her] career was in his hands" and because she knew he had a wife and children. (J.A. 42-43.) After the command learned of Appellant's offenses from another Marine, LCpl BA came forward and made a statement reporting Appellant's verbal and physical conduct toward her. (J.A. 44, 100-01.)

C. The Military Judge instructed the Members on the distinct elements of each of the charged offenses, and instructed them that they could consider the evidence presented in support of multiple offenses.

The Military Judge instructed the Members on the distinct elements of each of the charged offenses. (J.A. 132-42, 156-68.)

First, the Military Judge instructed the Members on the three elements of sexual harassment under Article 92, UCMJ: (1) that there was a lawful general order, Marine Corps Order 1000.9A, prohibiting sexual harassment; (2) that Appellant had a duty to obey the order; and (3) that Appellant violated the order "by wrongfully sexually harassing Lance Corporal [BA]."[1] (J.A. 133, 156-57.)

The Military Judge instructed the Members that the Marine Corps Order defines sexual harassment as:

[1] The Military Judge omitted the words "on divers occasions" (J.A. 133, 157), but these were included in the Specification submitted to the Members on the Flyer (Appellate Ex. IX) and Appellant did not object to their omission at trial or raise the issue below or before this Court. Moreover, as noted *infra*, the Marine Corps Order and Military Judge's findings instructions defined sexual harassment as a course of conduct that can include "repeated" verbal or physical acts over time.

> a form of discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal *or physical conduct* of a sexual nature when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

(J.A. 134, 151, 157-58 (emphasis added).) And he instructed the Members, pursuant to MCO 1000.9A, that "any military member . . . who makes deliberate *or repeated* unwelcome verbal comments, gestures, *or physical contact* of a sexual nature in the workplace is also engaging in sexual harassment." (J.A. 134-35, 151, 157-58 (emphasis added).)

Next, the Military Judge instructed the Members on the elements of the two abusive sexual contact specifications under Article 120: (1) that Appellant committed sexual contact upon LCpl BA by touching her cheek with his mouth in October 2013 (Specification 1), and by touching her ear with his mouth on February 19, 2014 (Specification 2); (2) that he did so by causing bodily harm to her; and (3) that he did so without her consent. (J.A. 135, 158-59.) The Military Judge then provided definitions for the Article 120 specifications, including the definitions of "sexual contact," "bodily harm," and "consent." (J.A. 135-36, 159-60.) The definition of "sexual contact" required that the Members find that the Appellant acted "with an intent to arouse or gratify the sexual desire of any person." (J.A. 135-36, 159.)

Finally, the Military Judge instructed the Members on the elements of assault consummated by a battery under Article 128: (1) that Appellant did bodily harm to LCpl BA in October 2013; (2) that he did so by touching her hand with his hand; and (3) that the bodily harm was done with unlawful force or violence. (J.A. 138, 162.) The Military Judge then provided additional definitions for "assault," "battery," and "bodily harm." (*Id.*)

The Military Judge instructed the Members: "[i]f evidence has been presented which is relevant to more than one offense, *you may consider that evidence with respect to each offense to which it is relevant*." (J.A. 140, 164 (emphasis added).)

D. The Members convicted Appellant of sexual harassment, but acquitted him of the abusive sexual contact and assault charges.

The Members convicted Appellant of the sexual harassment charge, returning a general verdict of guilty with no exceptions or substitutions to the specification in the Findings Worksheet. (J.A. 17, 147.) The Members found Appellant not guilty of the Article 120 and 128 charges and specifications. (J.A. 14, 16, 147.)

Appellant never asked for a bill of particulars regarding the "divers occasions" of sexual harassment alleged in Charge I, and he made no post-trial motions or objections regarding ambiguous findings, inconsistent verdicts, or Double Jeopardy issues.

E. Appellant argued below that the lower court could not consider evidence of physical sexual harassment for the Article 92 charge because of his acquittals on the Article 120 and 128 charges.

On appeal before the lower court, Appellant argued that the evidence was factually and legally insufficient to sustain his sexual harassment conviction. (Appellant's Br. at 16-21, Nov. 2, 2015.) Appellant suggested the lower court was estopped from considering his touching LCpl BA's hand, neck, face, and inner-ear because the trial court acquitted him of the Article 120 and 128 charges. (Appellant's Br. at 7, 15, 17, Nov. 2, 2015; Appellant's Reply at 3, Dec. 8, 2015.)

The lower court rejected Appellant's suggestion, interpreting it as an "inconsistent verdict" challenge. (J.A. 4 (citing *Dunn v. United States*, 284 U.S. 390, 393 (1932) and *United States v. Jackson*, 7 C.M.A. 67, 71-72 (C.M.A. 1956)).) "Considering all the relevant facts, including the incidents where [Appellant] touched LCpl B.A," the lower court concluded that Appellant's verbal comments *and physical acts* constituted sexual harassment under MCO 1000.9A as they "were sexual in nature and . . . affected or unreasonably interfered with [LCpl B.A.'s] work environment":

> LCpl B.A.'s testimony that the appellant made unwanted sexual advances—touching her hand and kissing her cheek during the October 2013 incident, touching her neck and sticking his tongue in her ear during the January 2014 incident, and making numerous comments about his attraction to and desire for her throughout the course of several months—also clearly conveyed that she felt harassed.

(J.A. 4-5.) The lower court, affirming the conviction, made no amendments or exceptions to the Article 92 specification. (J.A. 5.)

Summary of Argument

The Article 92, 120, and 128 charges have distinct elements, thus the Article 120 and 128 acquittals did not render the Article 92 conviction inconsistent. Moreover, Appellant's estoppel argument fails because courts-martial are permitted to render inconsistent verdicts—and Courts of Criminal Appeals are permitted to review them—with few exceptions. This Court should not expand the narrow *Stewart* exception to this case. Finally, this Court should decline to further expand the narrow *Walters* general verdict exception, as the Members made no exception to the sexual harassment charge, thus the lower court reviewed an "unadulterated, unobjected-to, general verdict," unlike in *Walters*. Appellant's proposed expansion of the *Walters* rule would make lesser-included offense convictions, and appellate court review of inconsistent verdicts, impossible.

Argument

INCONSISTENT VERDICTS ARE NOT GROUNDS FOR APPELLATE REVERSAL. APPELLANT'S RELIANCE ON *WALTERS* AND *STEWART* IS MISPLACED, AS THIS CASE DOES NOT INVOLVE AMBIGUOUS FINDINGS DUE TO EXCEPTION OF THE WORDS "ON DIVERS OCCASIONS" BY THE MEMBERS (*WALTERS*) OR SIMULTANEOUS FINDINGS OF GUILT AND NON-GUILT OF THE SAME OFFENSE (*STEWART*). APPELLANT'S RULE WOULD BAR LESSER-INCLUDED OFFENSE CONVICTIONS AND APPELLATE REVIEW OF INCONSISTENT VERDICTS.

A. The standard of review is *de novo*.

Whether a Court of Criminal Appeals can review a conviction for factual sufficiency under Article 66(c), UCMJ, when the appellant was charged with committing an illegal act "on divers occasions" is a question of law this Court reviews *de novo*. *United States v. Walters*, 58 M.J. 391, 395-96 (C.A.A.F. 2003). Whether double jeopardy applies, and whether an appellant's conviction of one offense prevents a Court of Criminal Appeals from affirming his conviction of a different offense, are also questions of law this Court reviews *de novo*. *United States v. Gutierrez*, 73 M.J. 172, 175-76 (C.A.A.F. 2014); *United States v. Campbell*, 71 M.J. 19, 26-27 (C.A.A.F. 2012) (Stucky, J., concurring in the result).

B. Inconsistent verdicts are not grounds for appellate reversal, nor does an acquittal of one charge does not render the evidence presented in support of that charge "off limits" to the Court of Criminal Appeals in its Article 66(c) review.

This Court has said "that the 'verdict on one count of an indictment cannot have the effect of determining factual issues under another count, even though the same evidence is offered in support of both counts.'" *United States v. Littlepage*, 10 C.M.A. 245, 247 (C.M.A. 1959) (quoting *Bryson v United States*, 238 F2d 657, 663 (9th Cir. 1956)). This proposition applies to the facts of this case—and rebuts Appellant's assertion of error by the lower court—in at least two ways.

1. The verdicts are not inconsistent: Articles 92, 120, and 128 have distinct elements. Appellant's acquittals do not indicate the Members found him "not guilty" of touching, kissing, and licking LCpl BA in October 2013 and January 2014.

The Article 120 and Article 128 charges contain additional elements absent from Article 92 the sexual harassment charge. The "abusive sexual contact" charge under Article 120(c) required proof not only that Appellant committed sexual contact upon LCpl BA, but that he did so "with an intent to arouse or gratify the sexual desire of any person." Article 120(g)(2)(B), UCMJ; (J.A. 135-36, 159). And the "assault consummated by a battery" charge under Article 128 required proof not only that Appellant did bodily harm to LCpl BA, but that he did so "with unlawful force or violence." Manual for Courts-Martial (MCM), United States (2012 ed.), pt. IV, para. 54.b.(2)(b); (J.A. 138, 162).

The Members may have acquitted Appellant of these more serious charges not because they disbelieved LCpl BA's testimony regarding Appellant's physical conduct toward her—conduct which was presented at trial as part of the same harassing course of conduct as Appellant's numerous sexual comments—but because they determined the evidence offered at trial did not support the additional elements under Articles 120(d) and 128 beyond a reasonable doubt. Indeed, the Article 120 requirement that the Government prove intent to arouse alone could explain the "inconsistent" verdicts—if an explanation were legally necessary, which it is not. *See infra* at 13-15.

Thus, contrary to Appellant's contention that the Members "acquitted" him of all physical conduct in the case (Appellant's Br. at 12), the Members' findings reflect only that they did not convict Appellant of *all* the elements under Articles 120(d) and 128, not that they acquitted him of each and every element that made up these more serious offenses.

2. Even if the Members' findings of guilt and non-guilt were inconsistent, no reversible error occurred as a result.

This Court has long "followed the rule that inconsistency in the jury verdict does not justify setting aside findings of guilty sustained by the evidence." *Littlepage*, 10 C.M.A. at 247 (citations omitted); *see United States v. Ferguson*, 21 C.M.A. 200, 202-03 (C.M.A. 1972) ("[I]n military law, as in the Federal system generally, consistency of verdicts is not demanded.") (citing *Jackson*, 7 C.M.A. at

67); *United States v. Shelton*, 62 M.J. 1, 13 n.6 (C.A.A.F. 2005) (Baker, J., dissenting) ("[V]erdict inconsistency is ordinarily not sufficient grounds for reversal.") (citing *United States v. Powell*, 469 U.S. 57, 66-69 (1984) and *Dunn*, 284 U.S. at 393).

Instead, as the lower court recognized, "[w]hen the same evidence is offered in support of two separately charged offenses, as the physical encounters were here, 'an acquittal on one [may] not be pleaded as *res judicata* of the other.'" (J.A. 4 (quoting *Dunn*, 284 U.S. at 393).) "The reason for [this] rule is that the court-martial may merely have given the accused 'a break.'" *United States v. Lyon*, 15 C.M.A. 307, 313 (C.M.A. 1965). As this Court elaborated in *Jackson*:

> Because the court preferred to free [the appellant] on one specification alleging a more serious offense does not also mean it found that one particular element of a less aggravated offense was not established. Perhaps the court-martial preferred not to return a finding of guilt on an offense which traditionally has been regarded as a most heinous military crime. It is an acknowledged fact that verdicts are sometimes founded on leniency, compromise, or mistake, and if the accused is the beneficiary of compassion or error, he is not in a position to complain.

Jackson, 21 C.M.A. at 71-72; *see also Powell*, 469 U.S. at 57 (reaffirming *Dunn* and exploring the numerous rationales for allowing inconsistent verdicts in criminal trials—even where the verdicts acquit on a predicate offense while convicting on the compound offense, a situation far more incongruous than the findings reached by the Members here).

In *Gutierrez*, this Court rejected an inconsistent verdict challenge similar to the "Double Jeopardy" issue asserted by Appellant. *Gutierrez*, 73 M.J. at 172. Gutierrez, acquitted of rape but found guilty of stalking, argued that "since the government relied upon the evidence underlying the rape allegation as evidence of a 'course of conduct' required to establish the offense of stalking, the panel's acquittal on that charge removed that incident as a possible basis for establishing [the] 'course of conduct'" element of the stalking charge. *Id.* at 172, 174. The *Gutierrez* Court disagreed, holding that "the panel could independently consider the evidence supporting [the acquitted rape specification] while deliberating on the stalking charge." *Gutierrez*, 73 M.J. at 175 (citing *Dunn*, *Jackson*, and *Powell*).

As in *Gutierrez*, even though Appellant was acquitted of the abusive sexual contact and assault specifications, the Members could independently consider the evidence supporting those incidents while deliberating on the sexual harassment charge. *See id.*; (J.A. 140, 164 ("If evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant.").) Appellant's asserted "Double Jeopardy" issue thus fails, as it is no more than a *Gutierrez* inconsistent verdict challenge erroneously called by another name.

3. *Stewart* does not prevent Article 66 review: it is the lone exception to the inconsistent verdict rule, and addressed unique circumstances where the Members both convicted and acquitted of two identical offenses.

In *United States v. Stewart*, 71 M.J. 38 (C.A.A.F. 2012), a military judge provided the members with identical instructions on two separate specifications, instructing the Members they could "return only a finding of guilty for one but not both charged specifications." *Id.* at 40-41. The members acquitted Stewart of the first specification but convicted him of the second specification. *Id.* This Court, "recogniz[ing] that generally consistency in a verdict is not necessary," found that under the "unique circumstances" of the case, the *identical* instructions "made it impossible" for the Court of Criminal Appeals to conduct a factual sufficiency review. *Id.* at 43[4] (citing *Jackson*, 7 C.M.A. at 21 and *United States v. Wilson*, 13 M.J. 247 (C.M.A. 1982)). Because the members had already acquitted Stewart of the exact same offense for which they subsequently convicted him—including identical elements—this Court set aside the findings and sentence and dismissed the charge with prejudice. *Id.*

[4] The two instructions given by the military judge in *Stewart* had a troubling legislative and precedential history. Previously in *United States v. Prather*, 69 M.J. 338, 345 (C.A.A.F. 2011), this Court found any distinction between those two instructions to be "meaningless." This case, unlike *Stewart,* does not involve the perplexing version of Article 120 that mired *Prather*, *Stewart*, and many other cases before this and other military courts in "Ouroboros-like" statutory interpretation.

Contrary to Appellant's assertion, the "unique circumstances" at play in *Stewart* are not applicable here. (Appellant's Br. at 10.) Unlike Stewart, Appellant was not charged with two specifications alleging identical offenses. *See supra* at 2-3. Nor did the Military Judge in this case issue contradictory instructions to the Members that caused them to find Appellant simultaneously guilty and not guilty of the same offense, based on identical elements. *See supra* at 6-8. The holding in *Stewart* is inapplicable.

Moreover, this Court should clearly hold that the service courts' power to review inconsistent verdicts *mirrors* the Members' ability to issue inconsistent verdicts, with the sole exception of the *Stewart* scenario. Appellant's assignment of error indicates he thinks otherwise; this Court should reject that interpretation.

C. This Court should decline Appellant's invitation to further extend the narrow *Walters* exception to the general verdict rule. Appellant's case involves a finding of guilt affirmed by the lower court with no exception to the Findings. Appellant's acquittal of other charges is an "inconstant verdict" issue—not a *Walters* issue.

1. The lower court did not err when it considered multiple acts of verbal and physical harassment to affirm the Members' general verdict of guilt as to sexual harassment "on divers occasions."

Under the common law general verdict rule, "when the factfinder returns a guilty verdict on an indictment charging several acts, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *United States v. Rodriguez*, 66 M.J. 201, 204 (C.A.A.F. 2008) (citing *Griffin v. United States*, 502

U.S. 46, 49 (1991)). In the context of an "'on *divers occasions*' specification[,] . . . so long as the factfinder entered a general verdict of guilty to the . . . specification without exception, any one of the individual acts may be affirmed by the CCA as part of its *Article 66*, UCMJ, review." *Id.* at 203 (emphasis in original); *see id.* at 205 ("An unadulterated, unobjected-to, general verdict implicitly contains a verdict of guilt as to each underlying act . . . ."); *see also United States v. Piolunek*, 74 M.J. 107, 111-12 (C.A.A.F. 2015) (holding, in a "case involv[ing] a straightforward application of the 'general verdict rule,' [that] . . . convictions by general verdict for possession and receipt of visual depictions of a minor engaging in sexually explicit conduct on divers occasions by a properly instructed panel need not be set aside after the CCA decides several images considered by the members do not depict the genitals or pubic region") (quoting *United States v. Barberi*, 71 M.J. 127, 131 (C.A.A.F. 2012)).

Here, the lower court correctly considered evidence of both verbal and physical acts of sexual harassment in order to affirm the Members' general verdict of guilt as to the "on divers occasions" sexual harassment charge. (J.A. 4-5.) The lower court may affirm "any one of the individual acts" for which the United States presented legally and factually sufficient evidence. *Rodriguez*, 66 M.J. at 203; Article 66(c), UCMJ. The lower court's opinion reflects a judgment that at least two of the instances of verbal and physical sexual harassment in the evidence

presented at trial supported the legal and factual sufficiency of the Article 92 charge. *See Rodriguez*, 66 M.J. at 203 ("When members find an accused guilty of an 'on divers occasions' specification, they need only determine that the accused committed two acts that satisfied the elements of the crime as charged—without specifying the acts, or how many acts, upon which the conviction was based.").

2. The *Walters* rule applies only where the words "on divers occasions" are excepted from the specification by the Members and the resulting findings are ambiguous.

Without addressing *Rodriguez* or the general verdict rule, Appellant avers that the lower court erred when it "relied on the evidence [of physical sexual harassment] that went to the offenses of which the court-martial acquitted [him]." (Appellant's Br. at 8.) Quoting *Walters*, 58 M.J. at 395, Appellant argues that a Court of Criminal Appeals "'cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not-guilty.'" (Appellant's Br. at 8.)

But this ignores several things. First, it misses that "[t]he rule from *Walters* . . . applies 'only in those narrow circumstance[s] involving the conversion of a '*divers occasions*' specification to a 'one occasion' specification through exceptions and substitutions' *by the members*." *Rodriguez*, 66 M.J. at 205 (emphasis added) (quoting *United States v. Brown*, 65 M.J. 356, 358 (C.A.A.F. 2007) (quoting *Walters*, 58 M.J. at 396) (internal quotation marks omitted)).

Under those unique circumstances, the *Walters* court noted, if the military judge fails to secure clarification regarding which of the underlying acts formed the basis of the members' conviction and which formed the basis for the members' acquittals, the potential for ambiguous findings becomes a distinct possibility. *Walters*, 58 M.J. at 396.

Second, Appellant's argument ignores that *none* of the *Walters* cases involve *distinct charges* as does this case. The Article 92 charge here resulted in a conviction under an "unadulterated, unobjected-to, general verdict"—that is, the Members did not except out the "on divers occasions" language from the sexual harassment specification and "Appellant never asked for a bill of particulars regarding the" multiple acts alleged therein. *Rodriguez*, 66 M.J. at 202, 205; (J.A. 17.) The *Walters* rule is thus inapplicable: the Members did not "acquit" Appellant of any misconduct under the specification, and their general verdict of guilt was properly affirmed, "unadulterated," by the lower court. *Brown*, 65 M.J. at 358; *Rodriguez*, 66 M.J. at 205.

Nonetheless, Appellant now looks to different charges and asks that *Walters*' limited applicability be expanded to create a new "exception" to the inconsistent verdict rule under which an acquittal of one offense renders all evidence offered in support of that offense similarly "acquitted," or "off-limits," even in relation to other charged offenses and findings of guilt thereof. Moreover, Appellant asks that

this Court ignore the general applicability of the inconsistent verdict rule, the obvious inapplicability of *Stewart*, and the distinct but inapplicable circumstances in the *Walters* cases—and find reversible error here. (Appellant's Br. at 12.) But three inapplicable rules do not a reversible error make.

D. Appellant's argument would make it impossible to convict an accused of a lesser included offense, and would prevent review of inconsistent verdicts by military appellate courts.

If Appellant is correct—contrary to this Court's longstanding precedent—in his claim that an acquittal on one charge can "have the effect of determining factual issues under another [charge]," *Littlepage*, 10 C.M.A. at 247, then this would cause a sea change in military justice practice far beyond the *Walker-Rodriguez-Stewart-Gutierrez* line of cases. Put simply: if this Court were to adopt Appellant's conception of the law, then convicting an accused of a lesser included offense would become impossible. So too, the lower courts' Article 66 powers would be conscribed, and they would be prevented from conducting *any* appellate review when the same facts applied to multiple offenses at trial.

A lesser included offense is defined in Article 79, UCMJ, as "an offense necessarily included in the offense charged." 10 U.S.C. § 879 (2012); *see United States v. Medina*, 66 M.J. 21, 24 (C.A.A.F. 2008). This Court applies the "elements test" to determine whether one offense is a lesser included offense of another. *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).

> 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.

Id. at 470. Under Article 79 and this Court's longstanding practice, "[a]n accused may be found guilty of [a lesser included offense of] the offense charged or of an attempt to commit either the offense charged or [a lesser included offense] therein." Article 79, UCMJ; *Jones*, 68 M.J. at 469.

But if Appellant's argument is correct that an acquittal of an offense necessarily includes an acquittal of all the underlying acts of the offense,[5] then there would never be a situation in which a court-martial could find an accused *not guilty* of a greater offense, but *guilty* of a lesser included offense. This is because the "underlying acts" of an offense *always* constitute at least one of the elements of the offense. Thus an acquittal of a murder charge would necessarily include an acquittal of the lesser included offenses of involuntary manslaughter and assault under Articles 119 and 128 because they involved the same underlying acts. And an acquittal of a rape charge would necessarily include an acquittal of all lesser

[5] *See* Appellant's Br. at 12 ("The lower court's reliance on facts that contradict the findings of not guilty by the members (i.e., that [Appellant] licked the complaining witness's ear, kissed her cheek, or assaulted her by touching her hand) . . . violated the Constitution's Double Jeopardy Clause.").

included sexual misconduct and assault offenses under Articles 120 and 128 because *they* involved the same acts.

Such a result cannot be the meaning of *Walters* and *Stewart*, the primary cases cited by Appellant in support of his argument. There is no need for this Court to expand the holdings in *Walters* and *Stewart* to reach the wholly different facts presented in this case.

Appellant cites one Air Force Court of Criminal Appeals decision in support of his argument, *United States v. Hernandez*, No. 38596, 2015 CCA LEXIS 499 (A.F. Ct. Crim. App. Nov. 4, 2015). (Appellant's Br. at 11.) The *Hernandez* court noted in *dicta* that the Court of Criminal Appeals "may not make findings of fact contrary to not guilty findings" by the members and therefore must limit its review "to exclude the actions of which [the appellant] was acquitted" in separate charges. *Id.* at *5. Similarly, in *United States v. Green*, No. 38586, 2015 CCA LEXIS 440, *4 n.2 (A.F. Ct. Crim. App. Oct. 20, 2015), the Air Force court noted, in a case where the appellant was acquitted of aggravated assault under Article 128 but found guilty of the lesser included offense of simple assault, that its "ability to find facts regarding bodily harm would be constrained by the member's [sic] finding of not guilty to the greater offenses."

The Air Force court is simply wrong that the *Walters* rule prevents it from considering evidence presented at trial in support of two *separately* charged

offenses, one of which the court-martial convicted the appellant and one of which the court-martial acquitted him. This case provides this Court an appropriate opportunity to correct this erroneous expansion of the *Walters* rule by re-emphasizing the rule concerning inconsistent verdicts. *See supra* at 12-15.

Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence as approved and affirmed below.

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I certify that the foregoing was delivered to the Court and a copy was served on opposing counsel on August 10, 2016.

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