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

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| United States<br><br>Appellee<br><br>v.<br><br>Robert L. Honea III<br>Captain (O-3)<br>U.S. Air Force<br><br>Appellant | APPELLANT'S BRIEF IN SUPPORT OF GRANTED ISSUES (UNDER SEAL)<br><br>USCA Dkt. No. 17-0347/AF<br><br>Crim.App. No. 38905 |

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

Brian L. Mizer
Senior Appellate Defense Counsel
C.A.A.F. Bar No. 33030

Patricia Encarnación Miranda, Capt, USAF
Appellate Defense Counsel
C.A.A.F. Bar No. 35639
Air Force Legal Operations Agency
United States Air Force
1500 West Perimeter Rd, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

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## ISSUES PRESENTED

I.

IMMEDIATELY BEFORE THE DEFENSE RESTED ITS CASE, THE MILITARY JUDGE INVITED THE PARTIES' ATTENTION TO R.C.M. 910, AND DIRECTED THE DEFENSE TO PROVIDE THE MILITARY JUDGE WITH A DRAFT SPECIFICATION OF ASSAULT CONSUMMATED BY A BATTERY. DID THE LOWER COURT ERR WHEN IT HELD THAT THE DEFENSE'S COMPLIANCE WITH THE MILITARY JUDGE'S DIRECTIVE CONSTITUTED A DE FACTO DEFENSE REQUEST TO MODIFY THE SPECIFICATION PURSUANT TO R.C.M. 603 WHERE THERE IS NO EVIDENCE THAT EITHER THE DEFENSE OR THE CONVENING AUTHORITY WERE AWARE THE CHARGE WAS BEING AMENDED PURSUANT TO R.C.M. 603?

II.

THE MILITARY JUDGE DISMISSED SPECIFICATION 2 OF CHARGE II, ABUSIVE SEXUAL CONTACT BY CAUSING BODILY HARM, FOR FAILURE TO STATE AN OFFENSE, BUT SHE ALLOWED THE GOVERNMENT TO PROCEED TO TRIAL ON THE PURPORTED LESSER INCLUDED OFFENSE OF ASSAULT CONSUMMATED BY A BATTERY. DID THE MILITARY JUDGE ERR?

## Statement of Statutory Jurisdiction

The lower court had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012). The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

## Statement of the Case

Appellant was tried by a military judge sitting as a general court-martial between May 4 and 8, 2015. Appellant was convicted, contrary to his plea of not guilty, of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2007). (JA 56; 184.) Appellant was acquitted of rape, attempted aggravated sexual assault by causing bodily harm, attempted aggravated sexual assault upon a person substantially incapacitated, and forcible sodomy, in violation of Articles 80, 120 and 125, UCMJ, respectively. 10 U.S.C. §§ 880, 920, 925 (2007).

On May 8, 2015, the military judge sentenced Appellant to a dismissal and thirty days of confinement. (JA 18; R. at 927.) On September 21, 2015, the Convening Authority (CA) approved the sentence as adjudged and, with the exception of the dismissal, ordered it executed. (JA 18.) The CA waived automatic forfeitures until Captain Honea's release from confinement. (*Id.*)

The lower court affirmed the findings and sentence on February 15, 2017. *United States v. Honea*, 2017 CCA LEXIS 174 (A. F. Ct. Crim. App. 2017). On February 21, 2017, Appellant moved for reconsideration *en banc*. (Mot. for Recon.

(Feb. 21, 2017)). The lower court denied Appellant's motion on March 3, 2017. (Order (Mar. 3, 2017)). Appellant petitioned this Court for review on April 12, 2017, and this Court granted review on May 26, 2017.

## Statement of Facts

All the issues in this case stem from the inability of Captain RVS—a commissioned officer who was by her own account not intoxicated when she was allegedly assaulted by Captain Honea—to describe precisely where on her anatomy she was touched by Captain Honea. Captain Honea was initially charged with abusive sexual contact by bodily harm by touching Captain RVS's vulva with his penis, but the dearth of evidence to support that allegation has at all times been apparent to everyone.

Noting the ambiguity in Captain RVS's testimony at Captain Honea's Article 32, UCMJ, hearing, the Investigating Officer concluded her testimony "would create reasonable doubt as to the exact anatomical location that was touched." (JA 205.) He maintained her testimony "more accurately" reflected Captain Honea allegedly touched her "groin" or "inner thigh[.]" (*Id.*) He recommended Charge II and its specifications not be referred to a general court-martial. (JA 209.) In advice provided pursuant to Article 34, UCMJ, the Staff Judge Advocate (SJA) likewise recommended against referral of Charge II and its specifications as drafted. (JA 213.) Instead, he recommended replacing the word "vulva" with the words "pelvic region" in both specifications. (*Id.*)

The CA concurred with his SJA's recommendation that the specifications be so modified. (JA 214.) Two days before referring the charges to a general court-martial, his staff lined through the word "vulva" in both Specifications 1 and 2 of Charge II, and replaced it with "pelvic region." For reasons that remain unclear, but are most likely scrivener's error, the CA's staff only lined through the first reference to vulva in Specification 2 of Charge II, but left it undisturbed in the second element, bodily harm.[1] (JA 16.)

Before trial, the defense moved to dismiss Charge II and its specifications on the basis that "pelvic region" did not constitute sexual contact as defined in Article 120(t)(2), UCMJ, and that the charge thus failed to state an offense. (JA 30-31.) The defense also argued that the pen-and-ink change to the charge and specification constituted a major change, and that Captain Honea was not on notice to defend against an allegation he had touched Captain RVS's pelvic region. (JA 31.)

The military judge granted the defense motion to dismiss Specification 1 of Charge II for failure to state an offense, and dismissed the greater offense of abusive

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[1] Had the SJA's staff actually complied with the CA's direction, the specification at issue in this case would have been dismissed for failure to state an offense, for the same reasons the military judge dismissed Specification 1 of Charge II. (JA 251.) Regardless, the CA concurred with his SJA's advice that the word "vulva" be replaced in Specification of Charge II, and it would appear Captain Honea's court-martial never had jurisdiction over the charge now before this Court. *United States v. Wilkins*,

sexual contact by bodily harm in Specification 2. (JA 251.) She reasoned, "Specification 2 is alleged as occurring by causing bodily harm and the Court sees Assault Consummated by a Battery (Article 128, UCMJ,) as a lesser included offense." (*Id.*) "Hence in Specification 2, although the term 'pelvic region' still exists, it is narrowed down to touching of the 'vulva.' The Defense is placed on sufficient notice of the lesser included offense." (*Id.*)

The military judge set forth in her ruling what she believed to be the two elements of assault consummated by a battery, and concluded it was a lesser included offense (LIO) of abusive sexual contact by bodily harm. (*Id.*) In light of her ruling, the military judge concluded the question whether the change to the Charge "constituted a major change or whether the Pre-Trial Advice was erroneous are moot." (*Id.*)

The government proceeded to trial on the following alleged violation of Article 128, UCMJ:

> In that Captain Robert L. Honea III, United States Air Force, 1st Air Force, Tyndall Air Force Base, Florida, did, at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, engage in sexual contact, to wit: touching [1LT RVS's] pelvic region with his penis, by causing bodily harm upon her, to wit: touching [1LT RVS's] vulva with his penis.

(JA 16.)

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29 M.J. 421, 424 (C.M.A. 1990).

A new military judge was thereafter detailed to the case, but Captain RVS's testimony did not improve in the time between the Article 32, UCMJ, hearing and trial. At best, she recalled Captain Honea touched her "pelvis or pubic bone area." (JA 107.)

On appeal, Captain Honea challenged the sufficiency of the evidence to prove Captain Honea touched RVS's vulva as charged. Four days before oral argument was held on November 22, 2016, the government filed a Motion to Cite Supplemental Authority, and raised a new argument "for the purposes of clarity at oral argument." (JA 228.) In its motion, the government asserted the charge at issue in this case was not the one referred to trial, defended by Captain Honea, and approved by the CA. Instead, the government argued, for the first time, the evidence was factually sufficient to prove Captain Honea touched Captain RVS's "pelvic region," and that *this* was the offense and theory of guilt under which Captain Honea had been convicted.[2] (*Id.*)

The government's basis for its "supplemental authority" was the military judge's summary of an R.C.M. 802 conference held immediately before the defense rested its case. The military judge reconvened the court-martial, noting he had—apparently on his own volition—"informed or advised the parties to refer to" R.C.M. 910, "with respect to Captain Honea's plea to a lesser included offense of assault consummated by a

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[2] Appellant opposed the government's motion and argued the government had forfeited the issue it sought to raise in a motion to cite supplemental authority. (JA

battery, and that's a lesser included offense of Specification 2 of Charge II." (JA 130.) The military judge noted the defense had provided the court "a specification" in response to this request. (*Id.*)

The non-binding discussion accompanying R.C.M. 910 provides:

> When the plea is *to a lesser included offense without the use of exceptions and substitutions*, the defense counsel should provide a written revised specification to be included in the record as an appellate exhibit.

Manual for Courts-Martial (MCM), United States (2012 ed.) at II-101 (emphasis added).

The military judge's rationale for relying on R.C.M. 910 to request this information from the parties is unclear, as Captain Honea maintained his plea of not guilty to all charges and specifications throughout the proceedings. (JA 56.) Even so, the defense complied with the military judge's direction, providing the following draft specification:

> In that Captain Robert L. Honea III, United States Air Force, 1st Air Force, Tyndall Air Force Base, Florida, did, at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, unlawfully touch [1LT RVS] on the pelvic region with his penis.

(JA 226.)

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230.)

The military judge then asked the prosecution, "Do you agree that that's what the lesser included offense specification would look like, or is, I should say?" (JA 130.) The prosecution replied, "Yes, Your Honor." (*Id.*)

There is nothing more in the record of trial to indicate whether the specification referred by the CA—originally alleging abusive sexual contact before purportedly being reduced to the "LIO" of assault consummated by a battery—or the specification supplied to the military judge at his direction resulted in Captain Honea's conviction. When he entered findings, the military judge acquitted Captain Honea of all of the charges and specifications except for the "lesser included offense of Specification 2 of Charge II, assault consummated by a battery, in violation of Article 128, UCMJ." (JA 184.) The military judge also noted that Captain Honea was found "not guilty" of Charge II, which alleged a violation of Article 120, UCMJ, previously dismissed for failure to state an offense, "but guilty of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice." (*Id.*)

Rather than approving findings based on the draft specification requested by the military judge, the CA's promulgating order used the language in the specification actually referred to Captain Honea's court-martial:

> Did, at or near Dove [sic] Air Force Base, Delaware, on or about 1 February 2011 and on about 30 April 2011, engage in sexual contact, to wit: touching [1LT RVS's] pelvic region with his penis, by causing bodily harm upon her, to wit touching [1LT RVS's] vulva with his penis. Plea: NG to the

> LIO of assault consummated by battery. Finding: G of the remaining LIO of assault consummated by battery in violation of Art 128, UCMJ (greater Art 120 offense dismissed by Military Judge after defense motion for failure to state an offense).

(JA 17.)

In rejecting Appellant's factual and legal sufficiency challenge, the lower court struggled to "determine the specific offense Appellant was convicted of[.]" (JA 9.) However, the lower court ultimately concluded "Appellant was found guilty of touching 1st LT RVS's 'pelvic region[.]'" (JA 8.) The lower court acknowledged the military judge's ruling on the motion to dismiss for failure to state an offense resulted in the following specification of assault consummated by a battery:

> Appellant did, at or near Dover Air Force Base, Delaware, between on or about 1 February 2011 and on or about 30 April 2011, unlawfully touch 1st Lt RVS's *vulva with his penis.*

(JA 9.) However, relying upon the argument raised in the government's motion to cite supplemental authority, the lower court concluded that, at the close of the defense case, "the Government agreed with the Defense as to the specification they were litigating." (JA 10.)

The lower court acknowledged this draft specification was only provided due to "the direction of the military judge," yet ultimately held "the Defense's submission of the modified specification constituted a request for a minor change and, with the concurrence of the Government, it was permissible for the military judge to accept this

change." (JA 10.) The lower court then directed a corrected General Court-Martial Order be prepared to "accurately reflect that Appellant was found guilty of assault consummated by a battery for touching 1st Lt RVS's pelvic region with his penis." (JA 12 n. 7.)

## Argument

### I

**IMMEDIATELY BEFORE THE DEFENSE RESTED ITS CASE, THE MILITARY JUDGE INVITED THE PARTIES' ATTENTION TO R.C.M. 910, AND DIRECTED THE DEFENSE TO PROVIDE THE MILITARY JUDGE WITH A DRAFT SPECIFICATION OF ASSAULT CONSUMMATED BY A BATTERY. THE LOWER COURT ERRED WHEN IT HELD THAT THE DEFENSE'S COMPLIANCE WITH THE MILITARY JUDGE'S DIRECTIVE CONSTITUTED A DE FACTO DEFENSE REQUEST TO MODIFY THE SPECIFICATION PURSUANT TO R.C.M. 603 WHERE THERE IS NO EVIDENCE THAT EITHER THE DEFENSE OR THE CONVENING AUTHORITY WERE AWARE THE CHARGE WAS BEING AMENDED PURSUANT TO R.C.M. 603.**

### Standard of Review

Whether a change made after arraignment is a minor change is a question of law reviewed *de novo*. *United States v. Reese*, __ M.J. __, No. 17-0028, slip op. at 10 (C.A.A.F. Jun. 14, 2017) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

## Additional Facts

Before trial, the defense moved to dismiss Specification 2 of Charge II because the pen-and-ink change to the specification constituted a major change prohibited by R.C.M. 603. (JA 185.) Citing *United States v. Murray*, 43 M.J. 507, 511 (A. F. Ct. Crim. App. 1995), the defense argued the change was, "substantial matter not included in the preferred charge and its specification, which clearly alleges Capt Honea touched a very specific body part of [Captain RVS]." (JA 187.) "Changing the body part of the alleged assault from 'vulva' which has a very specific evidentiary definition from the generic 'pelvic region' changes the nature of the charges." (JA 188.)

During argument on the motion, the defense objected to the CA's amendment of the specification pursuant to R.C.M. 603 arguing, "changing the anatomical location of where this offense is to alleged—to have occurred on [Captain RVS's] body is a major change." (JA 31.) "[O]bviously we are raising that objection here." (*Id.*) "Captain Honea needs to be on notice of what he is supposed to be defending against and the change to anatomical area is a major change." (*Id.*) "So, again, behind this rule it is a matter of due process that Captain Honea is on notice of what he is to defend against and changing anatomical body part touched to pelvic region changes not the name of the offense, but the nature of the offense." (JA 32.)

During the prosecution's argument that the change was minor, the military judge asked about the Investigating Officer's conclusion that such a change would

constitute a major change and might necessitate reopening the Article 32, UCMJ, investigation. (JA 38; 205.) The prosecution replied that the Investigating Officer was simply wrong. (JA 38.) The prosecution then asked the military judge, in the alternative, to amend the specification to allege Captain Honea touched Captain RVS on the "groin." (JA 39; 41-42.) The prosecution conceded the preferred specification provided Captain Honea notice he was to defend against the allegation that he committed sexual contact with Captain RVS's vulva. (JA 41.)

On appeal, the government was less certain whether changing the location of the offensive touching constituted a major or minor change. "During oral argument, the United States initially stated it might be a major change because changing from a specific bodily location (vulva) to a more general bodily location (pelvic area)." (JA 237.) But a week after argument, the government filed a memorandum of argument declaring its position had changed "as argument progressed," and "regardless Appellant never objected to the 'change' so this Court does not 'need to decide whether the change was major or minor because Appellant did not object to the military judge's actions, and the change does not alter the fact that Appellant was not prejudiced.'" (JA 238) (citing *United States v. Wilkins*, 71 M.J. 410, 414 n. 2 (C.A.A.F. 2012)).

**Law & Analysis**

> Allowing an appellate court to affirm guilt based on an offense with which the accused has not been charged, which is not a lesser included offense of the charged offense, or to which he has not entered a plea of

> guilty is inconsistent with the principle iterated in *Medina* and other recent decisions of this Court concerning the issue of fair notice.

*United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (citing *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008). And yet, this is precisely what has happened in this case.

The CCA turned the concept of fair notice on its head when it concluded the defense's compliance with the military judge's direction to provide a draft specification, for a plea never entered, and pursuant to an irrelevant Rule for Courts-Martial, somehow constituted a "request" for "a minor change that was permitted by the military judge." (JA 10.) The record does not contain even a reference to R.C.M. 603, much less a motion from either the prosecution or the defense—"with the accused's consent"—to amend the charge sheet to a "different offense than the one originally charged." *United States v. Jones*, 68 M.J. 465, 473 (C.A.A.F. 2010).

Nevertheless, the CCA concluded Captain Honea was "found guilty of the modified specification as presented by the Defense." (JA 10.) To the extent this Court is even authorized to conduct "appellate review of this type of ambiguous verdict," *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003), it should conclude the unauthorized amendment of the charge sheet constituted a major change made over a fully preserved defense objection. (JA 30-31.)

Any later silence by the defense as the charge sheet was purportedly being amended is solely attributable to the fact that the defense was unaware it was

occurring. Indeed, it evaded notice of both the CA and the government on appeal until just days before the government was to defend at oral argument the factual sufficiency of the evidence that Captain Honea assaulted Captain RVS as charged.

The defense had repeatedly, successfully defended against the allegation that Captain Honea touched Captain RVS's vulva and opposed the government's efforts to amend the charge. (JA 30-31.) It would have been gross malpractice for the defense to broaden Captain Honea's criminal exposure at the close of the defense case, and there is no evidence the defense—much less Captain Honea—acceded to amending the charge at any point in his court-martial.

Accordingly, this case turns on whether the change was major, and it was. A change "is minor so long as 'no additional or different offense is charged…and if substantial rights of the defendant are not prejudiced.'" *Reese*, slip op. at 5 (citing *United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995)). "The second prong is satisfied if the amendment does not cause unfair surprise. The evil to be avoided is denying the defendant notice of the charge against him, thereby hindering his defense preparation." *Id.* The major change before the Court presents precisely the situation this Court suggested was prejudicial in *Wilkins*. 71 M.J. 414 n. 3 ("For example, the failure to expressly allege a specific body part in a specification may render such a mistake prejudicial.").

The defense's objection at trial was that the major change altered, "not the name of the offense, but the nature of the offense." (JA 32.) The allegation that Captain Honea touched Captain RVS's pelvic region[3] is not "fairly included" in the original specification alleging he touched her vulva. *Reese*, slip op. at 6. And as in *Reese*, the government was fully aware it could not prove the charged offense, and here even made a slipshod effort to amend it before trial. It failed, and the government conceded the preferred specification only put Captain Honea on notice he was alleged to have touched Captain RVS's vulva. (JA 41.)

Captain Honea defended himself against all three allegations involving Captain RVS by arguing they went to a guest bedroom together during a "consensual hook up after drinking." (JA 156.) But the defense denied Captain Honea made a substantial step toward sexually assaulting her, and that her version of events was "anatomically impossible." (JA 163.) Specifically, the defense argued Captain Honea's penis could not have touched Captain RVS's "vagina in the way she described with her legs closed." (JA 163.)

For its part, the prosecution conceded it had not proven the assault as charged arguing Captain Honea "couldn't figure out a way to get her legs separated to

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[3] Trial counsel defined pelvic regions as "[o]ne side of the hip to the other side of the hip, and all the areas that encompass it." (JA 42.)

get to her vulva, but, it certainly wasn't for a lack of trying." (JA 135.) And in both its closing and rebuttal arguments, the prosecution concluded by asking that Captain Honea be convicted of every offense *except* assault consummated by a battery. (JA 147; 182-83.) "[T]hat is why the accused is guilty of attempted aggravated sexual assault, and that is why the accused is guilty of rape, and that is why the accused is guilty of forcible sodomy." (JA 147.) "[Y]ou'll find that you're convinced, beyond a reasonable doubt, that the accused attempted to have aggravated sexual assault against [Captain RVS] and that he did rape his wife, Ms. [G], on three separate occasions, and that he did forcibly sodomize his wife, Ms. [G], on another." (JA 182-83.)

After the military judge's ruling on the defense's Motion to Dismiss for Failure to State an Offense, the "defense was entitled to rely on the charge sheet[.]" *Reese*, slip op. at 7. Captain Honea relied on the charge sheet in presenting his defense, and he is entitled to have the major change to the Charge and Specification made after that presentation dismissed. *Id.*

WHEREFORE, this Honorable Court should dismiss the Charge and Specification in this case.

## II

## THE MILITARY JUDGE DISMISSED SPECIFICATION 2 OF CHARGE II, ABUSIVE SEXUAL CONTACT BY CAUSING BODILY HARM, FOR FAILURE TO STATE AN OFFENSE, BUT SHE ALLOWED THE GOVERNMENT TO

**PROCEED TO TRIAL ON THE PURPORTED LESSER INCLUDED OFFENSE OF ASSAULT CONSUMMATED BY A BATTERY. THE MILITARY JUDGE ERRED.**

**Standard of Review**

This Court conducts a *de novo* review to determine whether one offense is a lesser included offense of another. *United States v. Riggins*, 75 M.J. 78, 82 (C.A.A.F. 2016). When an appellant has forfeited a right by failing to raise it at trial, this Court reviews for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009).

**Law & Analysis**

Because Captain Honea was tried under the 2007, version of Article 120, UCMJ, this Court must once again revisit "this poorly written, confusing and arguably absurdly structured and articulated act of Congress." *United States v. Medina*, 68 M.J. 587, 595 (N-M. Ct. Crim. App. 2009) (Maksym, J. concurring). In the wake of the amendments to the statute, the CCAs grappled "with whether, and to what extent, lack of consent was an element for Article 120, UCMJ, violations." *United States v. Oliver*, __ M.J. __, No. 16-0484, slip op. at 4 (C.A.A.F. May 24, 2017). This case can now be added to the list of cases cited in *Oliver* where, notwithstanding this Court's decision in *United States v. Neal*, 68 M.J. 289, 303 (C.A.A.F. 2010), "service courts still seemed to suggest that lack of consent was nonetheless an element inherent in certain offenses under Article 120, UCMJ." *Oliver*, slip op. at 5.

In the wake of this Court's decision in *Riggins*, the "question of consent, as applied to abusive sexual contact, was definitively resolved[.]" *Oliver*, slip op. at 5. Both *Riggins* and *Oliver* leave no doubt the CCA erred when it concluded consent was an element of abusive sexual contact. (JA 6.) Captain Honea is similarly situated to the appellant in *Oliver* and, "in the wake of *Riggins*, there was error and it was plain or obvious at the time of appellate review." *Oliver*, slip op. at 6.

While *Oliver* suggests this Court should proceed to test this obvious error for prejudice, *Reese* suggests the Court should not. *Reese*, slip op. at 7. In *Reese*, this Court overruled precedent testing violations of R.C.M. 603(d) for prejudice where the Rule did not discuss prejudice. *Reese*, slip op. at 8. Similarly, Articles 59(b) and 79 authorize this Court to "approve or affirm a finding of guilty" of "a lesser included offense." 10 U.S.C. §§ 859; 879 (2012); *Jones*, 68 M.J. at 468 ("The statutory authority for affirming an LIO rather than the facially charged offense derives from Article 79, UCMJ."). Respectfully, this Court lacked the statutory authority to affirm the findings in *Oliver* after it concluded the charge at issue was not an LIO of the charged offense. *Id.*

This Court's precedent to the contrary is rooted in this Court's decision in *United States v. McMurrin*, 70 M.J. 15, 19 (C.A.A.F 2011), where the appellant alleged the error

was structural error. *Id.* Captain Honea does not allege that it is.[4] But with respect to statutory construction, the Court "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Reese*, slip op. at 7-8 (citing *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation." *Perry v. MSPB*, 198 L. Ed. 2d 527, 545 (2017) (Gorsuch, J. dissenting).

Respectfully, this Court should take this opportunity to bring its jurisprudence in line with statutory authority, but it need not do so here given Captain Honea can establish "material prejudice to his substantial rights." *Reese*, slip op. at 6. "[U]nder the facts of this case, the prejudice is clear—Appellant was convicted of an offense that was not an LIO of the charged offense." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). As in *Girouard*, Captain Honea did not defend himself against the greater offense by arguing he was guilty of the LIO. *Id.* And as in *United States v. Humphries*, 71 M.J. 209, 217 n. 10 (C.A.A.F. 2012), "the material prejudice to the substantial right to constitutional notice in this case is blatantly obvious" where the prosecution did not even ask that Captain Honea be convicted of the "throw away charge" in this case. (JA

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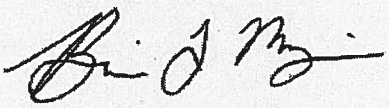
[4] However, this Court has suggested more than notice is at issue in this case, and that due process is offended where an accused is convicted of an offense with which he was not charged. *Girouard*, 70 M.J. at 10 ("Therefore, in the case at bar, the rights at stake are Appellant's constitutional rights to notice and to not be convicted of a crime

147; 182-83.) In fact, the prosecution openly conceded it had failed to prove the charged offense. (JA 135.) (Captain Honea "couldn't figure out a way to get her legs separated to get to her vulva, but, it certainly wasn't for a lack of trying.").

This Court should not disagree with the government's assessment of the evidence below, and the resulting prejudice to Captain Honea is "blatantly obvious[.]" *Humphries*, 71 M.J. at 217 n. 10.

WHEREFORE, this Honorable Court should dismiss the Charge and Specification in this case.

Respectfully submitted,



Brian L. Mizer
Senior Appellate Defense Counsel
C.A.A.F. Bar No. 33030

Patricia Encarnación Miranda, Capt, USAF
Appellate Defense Counsel
C.A.A.F. Bar No. 35639
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

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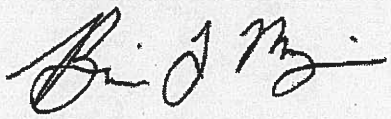
that is not an LIO of the offense with which he was charged.").

## CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing were hand-delivered to the Court on July 11, 2017, and that a copy was also hand-delivered to the Air Force Appellate Government Division on the same date.

Respectfully submitted.



Brian L. Mizer
Senior Appellate Defense Counsel
C.A.A.F. Bar No. 33030