IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States, Appellee v. Robert L. Honea, Captain (O-3) U.S. Air Force Appellant	REPLY TO GOVERNMENT ANSWER USCA Dkt. No. 17-0347/AF Crim.App. No. 38905

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

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Captain Robert Honea, the Appellant, hereby replies to the government's brief concerning the granted issues, filed August 10, 2017.

I

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.

If waiver occurred in this case, it took place when the government failed to argue Captain Honea was convicted of touching Captain RVS's pelvic region at trial, again during post-trial processing where trial counsel reported Captain

Honea had been convicted of assault consummated by a battery by touching Captain RVS's vulva with penis,[1] and yet again when the government failed to assert the defense's compliance with the military judge's direction to draft a specification—for a plea of guilty that never came—had any legal significance whatsoever in its brief below. *United States v. Whitfield*, 590 F. 3d 325 (5th Cir. 2009) ("As a general rule, a party waives any argument that it fails to brief on direct appeal.") (citing FED. R. APP. P. 28(a)(9)(A)).

But waiver cannot be inferred from Captain Honea's failure to plead guilty to a draft specification submitted pursuant to R.C.M. 910. Acquiescence to a major change, "in the air, so to speak, will not do." *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) (citing *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 341 (N.Y. 1928)). Captain Honea agrees no "magic words are required to establish a waiver." (Gov't Ans. at 23) (citing *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999)). There must *be* words, however.

As noted by the majority below, there "was no discussion on the record about the impact of entering a plea to the LIO, nor was there a discussion about the impact of submitting a draft specification." (JA at 4.) In light of these uncontroverted facts, it was not merely "preferable for the military judge to ask Appellant" or his attorneys as to what they believed was taking place as the parties discussed R.C.M. 910 with the military judge. (JA at 11.)

[1] (Report of Results of Trial dtd May 8, 2015.)

When coupled with the defense's pretrial objection to a major change to the greater offense, the military judge's invocation of an irrelevant Rule for Courts-Martial provides little basis to suggest the defense was even aware the specification was purportedly being amended. If the government's repeated procedural default set forth above does not constitute waiver, then the mere silence acknowledged by the lower court cannot serve as "an intentional relinquishment or abandonment of a known right or privilege." *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014).

Indeed, the major change to the specification was accomplished so stealthily that it evaded notice of the defense, prosecution, the Convening Authority, and his Staff Judge Advocate, until the government filed its Motion to Cite Supplemental Authority on November 22, 2016, 564 days after Captain Honea's court-martial.

Had the defense been aware of the major change to the specification, the defense would have reiterated its previous objection that Captain Honea was not on notice to defend against an allegation he touched Captain RVS's pelvic region. (JA at 31.) While the government points out this objection was to the greater offense of abusive sexual contact, (Gov't Ans. at 24), it is not immediately clear why that is relevant. And while it is also true "Appellant had almost six months to raise issue…with the content of the specification," *id.*, it is equally unclear on what basis he would have done so given the military

judge's ruling narrowed the specification "to touching of the 'vulva.'" (JA at 251.)

If it indeed happened, permitting the government to replace vulva with pelvic region at the close of the defense case resulted in a major change and precisely the unfair surprise prohibited by R.C.M. 603. *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017). Beginning with his Article 32, UCMJ, hearing on July 23, 2014, Captain Honea defended himself on the theory that the charged touching never occurred, and that any incidental touching occurred during a consensual "hook up" as he and Captain RVS mutually kissed and undressed each other in a guest bedroom. (JA at 156.)

The government's concession that the change at issue "merely increased the scope of the area touched," (Gov't Ans. at 31), should be dispositive in determining whether the change was "slight" and "fairly included in the original specification." *Reese*, 76 M.J. at 300.

Finally, the government's argument that Captain Honea was convicted of touching Captain RVS's pelvic region, and that this did not amount to a fatal variance, should begin and end with the government's acknowledgement "the military judge did not enter findings by exceptions and substitutions[.]" (Gov't Ans. at 34.) Indeed, the record contains no "clear statement on the record as to which alleged incident formed the basis of the conviction." *United States v. Trew*, 68 M.J. 364, 369 (C.A.A.F. 2010) (citing *United States v. Wilson*, 67 M.J. 423, 428

(C.A.A.F. 2009)). In seeking to prevail during the lower court's review of the sufficiency of the evidence, the government appears to have convinced the court to "affirm a finding of guilty based on an incident of which the appellant had been acquitted by the factfinder at trial." *Id.*

"It is the responsibility of military judges to ensure that these ambiguities are clarified before the findings are announced and if they fail to do so the appellate courts cannot rectify that error." *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005). This is precisely what happened in Captain Honea's case. (JA at 009) ("We must first determine the specific offense Appellant was convicted of before we can determine whether that offense was legally and factually sufficient.").

Captain Honea respectfully submits this Court cannot rectify the ambiguous findings below. But even if it were in a position to do so, the change to the specification at the close of the defense case constitutes a major change and must be dismissed in light of *Reese*. *See generally, Qwest Communs. Corps. v. Maryland-National Capital Park & Planning Comm'*, 553 F. Supp. 2d 572, 576 (D. Md. 2008) ("To put it another way, a court should not be required to use a divining rod to ascertain the necessary facts to state a cause of action.").

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.

Although the government acknowledges this Court's recent decision in *United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017), it appears unwilling to accept the plain language of that decision in arguing Captain Honea waived the granted issue. (Gov't Ans. at 38-40.) "[G]iven the seemingly unsettled nature of the law at the time of Appellant's court-martial and its clear resolution in his favor by *Riggins* at the time of appeal, we conclude that forfeiture rather than waiver applies in this case." *Oliver*, 76 M.J. at 274. In *Oliver*, the Court declined to find waiver even where "trial defense counsel affirmatively asserted he had no objection to the military judge's consideration of wrongful sexual contact as a lesser included offense of abusive sexual contact." *Id.* at 273.

In light of *Oliver*, neither the defense acknowledging the outcome of the ruling of the previous military judge, (Gov't Ans. at 39), nor the defense entering a plea of not guilty on Captain Honea's behalf, (Gov't Ans. at 40), "go beyond even" the affirmative statement in *Oliver*. (*Id.*)

Next, the government argues assault consummated by a battery has the same elements as abusive sexual contact by bodily harm. (Gov't Ans. at 41.) At certain points in its pleading, the government appears to rightly recognize the element of consent is implicated by Article 128's reference to "unlawful force or violence," which is not an element of abusive sexual contact by bodily harm. (Gov't Ans. at 43) ("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.") (citing *United States v. Bonner*, 70 M.J. 1, 3 (C.A.A.F. 2011)). But at other points, the government argues the element of bodily harm itself implicates consent. (Gov't Ans. at 44.)

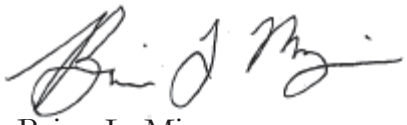
This reading ignores the plain language of the statute, which states consent is "not an issue" with respect to abusive sexual contact but may be raised as an affirmative defense. *United States v. Barlow*, 2014 CCA LEXIS 166, *18 (A. F. Ct. Crim. App. 2014) ("The 2007 amendment to Article 120, UCMJ, omitted 'lack of consent' as an element of virtually all sexual misconduct offenses, except the offense of wrongful sexual contact.").

And the language of Articles 59(b) and 79, UCMJ, is equally plain: "An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charge or an offense necessarily included therein." 10 U.S.C. § 879 (2012). After this Court concludes assault consummated by a battery is not "necessarily included" in the

crime of abusive sexual contact, as set forth in the statutory language of Article 79, UCMJ, or "a lesser included offense," as set forth in the language of Article 59(b), respectfully, this Court's power to affirm Captain Honea's conviction ends. *United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute[.]") (citation omitted).

Finally, even if this Court tests for prejudice, Captain Honea's case cannot be neatly compared to the appellant in *Oliver*, (Gov't Ans. at 47-48), who "knew which part of the body he was alleged to have wrongfully touched, and his theory throughout the court-martial was that A1C LMS consented to the sexual activity." *Oliver*, 76 M.J. at 275. Captain Honea's primary defense was that the alleged touching never occurred as it was "anatomically impossible," (JA at 163), and—nearly two years after trial—the part of the body he was alleged to have wrongfully touched continues to be a moving target.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on August 21, 2017, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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