

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
Appellee)	ACM 37545
)	
v.)	
)	ORDER
Staff Sergeant (E-5))	
DAVID A. AGUILAR,)	
USAF,)	
Appellant)	Panel No. 1

This Court specifies the following issues for briefing in the above-captioned case:

Whether assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928, of which the appellant was convicted, is a lesser included offense of the charged Rape by Use of Physical Violence in violation of Article 120, UCMJ, 10 U.S.C. § 920, if the proof does not show the assault is the alleged act of physical violence that compelled sexual intercourse.¹

Accordingly, it is by the Court on this 6th day of July, 2010;

ORDERED:

The appellant’s brief on the specified issue will be filed in accordance with Rule 15(a), Court of Criminal Appeals Rules of Practice and Procedure (01 Sep 2000).

¹ Although specification 2 of the Charge alleges rape by physical violence such that the victim could not escape, the government theory appears to be aggravated sexual assault based on victim incapacitation. (Record 51, 453) This view of the proof is consistent with both the recommendations of the investigating officer and the trial testimony of the victim that the assault (a slap) was simply an act that awoke an unconscious victim rather than an act of force which compelled sexual intercourse. (Record 64-65, 72; Investigating Officer’s Report, Item 21, paragraph c(2)(b)) Although neither side in this judge alone trial requested consideration of any lesser included offenses on this specification of the charge, the military judge *sua sponte* found the appellant guilty of simple assault consummated by a battery under Article 128. (Record 448, 477-78) We particularly invite the parties’ views on the constitutional due process notice requirements necessary for conviction of a lesser included offense. See *United States v. Jones*, 68 M.J. 465 (2010)

The appellant's brief is due not later than **06 August 2010**, unless an enlargement of time is granted.

The appellee shall file an answer in accordance with Rule 15(b).

FOR THE COURT

OFFICIAL



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over the seal.

STEVEN LUCAS, YA-02, DAF
Clerk of the Court