UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Akeem A. Wilkins Master-At-Arms Third Class (E-4) U. S. Navy, Appellant.	**APPELLANT'S BRIEF ON THE MERITS** **Crim. App. No. 201000289** **USCA Dkt. No. 11-0486/NA**

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

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Issue Presented

WHETHER APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN HE WAS CONVICTED FOR ABUSIVE SEXUAL CONTACT AS A LESSER-INCLUDED OFFENSE OF AGGRAVATED SEXUAL ASSAULT.

Statement of Statutory Jurisdiction

The lower court reviewed Appellant's case pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1). The statutory basis for the exercise of jurisdiction by this Court is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On November 18, 2009, contrary to his pleas, a general court-martial composed of members with enlisted representation convicted Appellant of one specification of abusive sexual contact in violation of Article 120, UCMJ, and one specification of sodomy by force and without consent in violation of Article 125, UCMJ. (JA 187.) The court-martial sentenced Appellant to be confined for eighteen months and to be discharged with a dishonorable discharge. (JA 202.) The Convening Authority approved the adjudged sentence and, except for the discharge, ordered it executed. The lower court issued its first opinion in the case affirming the findings and sentence on March 24, 2011. *United States v. Wilkins*, No. 201000289, slip op. (N-M. Ct. Crim. App. March 24, 2011) (unpublished). Appellant then filed a timely petition for grant of review.

On July 27, 2011, this Court granted Appellant's petition for grant of review, set aside the lower court's opinion and remanded the case to the CCA for "for reconsideration in light

of *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011), *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011), *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011), and *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010)."

The lower court issued a second opinion affirming the findings and sentence on November 29, 2011. Appellant subsequently filed a timely petition for grant of review, and this Court granted review in the case on April 18, 2012.

Statement of Facts

Master-at-Arms Third Class (MA3) BDL and Appellant (both males) met when MA3 BDL first checked in to Naval Support Activity (NSA) Souda Bay, Greece. (JA 46.) MA3 BDL knew that Appellant was sexually interested in him, (JA 49) but since MA3 BDL was neither bi-sexual nor homosexual, they did not have a romantic relationship. They were, however, good friends. (JA 48.)

MA3 BDL, Appellant, and several others from their unit decided to take a trip to Malia, Greece during the weekend of June 26, 2009. (JA 49.) Malia is "like a British resort area." (JA 48.) The group arrived in Malia and went out drinking for the evening. (JA 54.) MA3 BDL had approximately nineteen alcoholic drinks throughout the course of the night. (JA 59.) Eventually they returned to the hotel and, about fifteen minutes

later, MA3 BDL began throwing up over the side of the balcony. (JA 61.)

After MA3 BDL was done vomiting, one of the other members of their group took MA3 BDL back into the hotel room and laid him down to sleep. (JA 61.) MA3 BDL awoke to a "sensation going on down in [his] groin area" and pressure around his "anus area." (JA 62.) He looked down to see Appellant "just coming up from [his] groin area." (JA 62.)

Specification 1 of Charge I alleged that Appellant committed aggravated sexual assault by "engag[ing] in a sexual act" by "placing his fingers or another object in the anus of Master-at-Arms Third Class [BDL] . . . ." (JA 25.) Specification 2 of Charge I alleged that Appellant committed an abusive sexual contact when he "placed the penis of Master-at-Arms Third Class [BDL] in his hand . . . ." (JA 25.) During trial, the military judge granted a defense motion to dismiss the charge for touching MA3 BDL's penis——Specification 2 of Charge I. (JA 214.)

Then, just before closing arguments, the military judge *sua sponte* entered a finding of not guilty to the aggravated sexual assault (Specification 1 of Charge I), but allowed the members to consider whether Appellant was guilty of abusive sexual contact as a lesser-included offense of the charged aggravated sexual assault. He explained that:

> in [his] review of [the case], [he] determined that the Specification under Charge I does not fit the facts. . . . Charge I alleges sexual acts, and the facts in this case do not fit the definition of sexual act, but rather it fits the definition of . . . wrongful[1] [sic] sexual contact.

(JA 165.) After deliberations, the members returned a verdict of guilty to the crime that the military judge had found to be a lesser-included offense. (JA 187.)

During presentencing proceedings, the military judge ruled that the two charges Appellant had been convicted of——Art. 120 and Art. 125——were "multiplicious for purposes of sentencing. (JA 188-89.) Accordingly, he instructed the members that they were to "consider the charges of conviction as a single incident and treat it as a single charge for the purpose of sentencing." (JA 197.)

Further facts relevant to the case are detailed below.

Summary of Argument

Appellant's conviction for abusive sexual contact of the anus as a lesser-included offense of aggravated sexual assault should be set aside because touching the anus is not a course of action that is necessarily included in the perpetration of a "sexual act" as defined by Congress.

[1] The military judge simply misspoke; Trial Counsel corrected the error. (JA 166.)

Thus, the military judge erred when, faced with a defective specification for aggravated sexual assault, he entered a not-guilty finding to the charge but then let the members go forward on the conduct as a lesser-included offense. Under this Court's recent case law, abusive sexual contact of the anus is not a lesser-included offense of aggravated sexual assault——it is a completely separate crime. Therefore while it was proper for the military judge to enter a not-guilty finding to the charge, it was improper for him to then allow the government to go forward on abusive sexual contact of the anus as a lesser-included offense of the charged "sexual act."

Argument

APPELLANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN HE WAS CONVICTED FOR ABUSIVE SEXUAL CONTACT AS A LESSER-INCLUDED OFFENSE OF AGGRAVATED SEXUAL ASSAULT.

Standard of Review

The question of whether Appellant's right to due process of law was violated when he was convicted for Abusive Sexual Contact as a lesser-included offense of Aggravated Sexual Assault is a question of constitutional law reviewed *de novo*. *United States v. Disney*, 67 M.J. 46, 48 (C.A.A.F. 2008). In the absence of waiver or objection, the instructions provided by a military judge are examined for plain error based on the law at

the time of review. *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citations omitted).

Discussion

The ultimate resolution of this case rests on the recognition of three important points:

(1) the due process violation here originated in the defective specification that the government drafted and preferred, but was perfected by the military judge's subsequent handling of the specification;

(2) the sexual contact described within the defective specification was not conduct that is necessarily included in any "sexual act" as defined by statute; and

(3) the boiler-plate instruction given by the military judge where he instructed the members to "consider the charges of conviction as a single incident and treat it as a single charge for the purpose of sentencing" was not sufficient to undo the prejudice here.

When taken together, these points lead to the logical conclusion that Appellant's right to due process of law was violated when he was convicted of committing a "sexual contact" of the anus as a lesser-included offense of a "sexual act" and that both his conviction, and the sentence should be set aside.

1. The original specification was defective.

The original specification at issue was defective because it alleged the commission of a criminal sexual act, but then described conduct that did not amount to a sexual act. Specifically, the specification said that Appellant:

> engage[d] in a sexual act, to wit: placing his fingers or another object in the anus of Master-at-Arms Third Class [BDL], U.S. Navy, when Master-at-Arms Third Class [BDL],

> U.S. Navy was substantially incapable of declining participation in the sexual act or communicating unwillingness to engage in the sexual act because he was asleep.

(JA 25.) But the term "sexual act" has a specific statutory definition. To meet that definition, there must be either "contact between the penis and the vulva" or the "penetration, however slight, of the genital opening." Article 120(t)(1), UCMJ, 10 U.S.C. § 920(t)(1) (2006). Neither of these was alleged in the specification. Thus, even assuming the conduct described in the specification happened, it still did not amount to the commission of the charged crime of aggravated sexual assault (i.e., the commission of a criminal "sexual act"). The allegation detailed digital penetration of the anus of MA3 BDL (JA 25), and though this may be criminal in its own right, it is not criminal as an aggravated sexual assault.

The situation here is akin to one where a defendant has been incorrectly charged with "Larceny by unlawfully striking a victim." In such a case, even if one takes it as true that the defendant unlawfully struck his victim, the defendant is still not guilty of larceny. And although a defective charge like this could, arguably, be construed as a scrivener's error——where the government simply wrote "larceny" when they actually meant "assault"——that resolution is not available here.

A. The error was not a scrivener's error.

To begin with, all of the trial participants treated the charge as though it was an aggravated sexual assault charge. This is unsurprising since the specification is labeled as such in the heading, and its plain language alleges that Appellant "did . . . engage in a sexual act" and then uses the "sexual act" terminology two more times. (JA 25.) In addition, the very next specification alleges that Appellant committed an abusive sexual contact, so it is not as though the government did not know how to make the proper allegation.

Regardless, the particular actions the military judge took in this case preclude treating the defective charge and the subsequent due process violation as a scrivener's error. The military judge did not fail to notice the error, nor did he ask the government to amend the charge sheet. Instead, he recognized that Appellant's alleged conduct did not amount to a sexual act and entered a not-guilty finding to the charge. He explained that the specification in question "allege[d] sexual acts" but that the facts of the case fit the definition of "sexual contacts." (JA 165.) He then let the members go forward on a charge of abusive sexual contact of the anus as a lesser-included offense of the charged criminal "sexual act." (JA 166.) But in light of this Court's intervening decisions regarding lesser-included offenses, that was error.

2. Under this Court's recent case law, it was plain error to allow the members to consider abusive sexual contact of the anus as a lesser-included offense of the incorrectly charged aggravated sexual assault.

Abusive sexual contact of the anus was not a lesser-included offense of the specification, therefore the members could not properly consider it or convict on it. At the time of Appellant's trial this Court had not yet decided *United States v. Jones*, 68 M.J. 465 (C.A.A.F 2010), and the MCM listed abusive sexual contact as a lesser-included offense of aggravated sexual assault. But after Appellant's trial, this Court, in *United States v. Jones*, 68 M.J. 465 (C.A.A.F 2010), returned to the elements test delineated in *United States v. Teters*, 37 M.J. 370, 375-76 (C.A.A.F. 1993). Under that test, a crime is a lesser-included offense of another crime (the greater crime) only if all elements of the proposed lesser crime are also defined as elements of the greater crime.

Here, the disconnect in the elements lies in the statutory definition of a "sexual act" and the alleged conduct of digital anal penetration. At the time of Appellant's trial, a sexual act was defined under Article 120, UCMJ as:

> contact between the penis and the vulva . . . or the penetration, however slight, of the genital opening of another by a hand, or finger, or any other object with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Article 120(t)(1), UCMJ.

Two relevant points spring from this definition. First, a "sexual act", as defined by the statute, has nothing to do with the anus. Second, because of this, the digital penetration of the anus is not something that is "necessarily" included in the commission of a sexual act. These points are important because Article 79 of the UCMJ permits conviction of a crime as a lesser-included offense of another crime only where the alleged lesser offense is "necessarily included in the offense charged . . . ." Article 79, UCMJ.

That is not the case here. The act of penetrating a person's genital opening includes touching the genitals, but the act of penetrating the *anus*——the act alleged here——does not. So although abusive sexual contact of the genitals is necessarily included in any aggravated sexual assault, abusive sexual contact of the anus is not. Abusive sexual contact of the anus is a separate crime with different elements.

This fact differentiates this case from cases like *United States v. Arriaga*, 70 M.J. 51 (C.A.A.F. 2011). In *Arriaga*, this Court examined whether housebreaking was a lesser-included offense of burglary. In coming to the conclusion that it was, this Court noted that "it is impossible to prove a burglary without also proving a housebreaking" and that "[t]he offense as charged included all of the elements of housebreaking and all of those elements are also elements of burglary." *Arriaga*, 70 M.J.

at 55. Here, the specification alleged all the elements of abusive sexual contact of the anus, but unlike *Arriaga* those elements are not elements of aggravated sexual assault. Thus, the abusive sexual contact of the anus in question here is not a lesser-included offense of aggravated sexual assault.

Moreover, although one might argue from *Arriaga* that abusive sexual contact is a lesser-included offense here because it is impossible to prove a "sexual act" without proving "sexual contact" of the genitals, that is an incorrect application of *Arriaga*. In *Arriaga* this Court held that the housebreaking of a dwelling was a lesser-included offense of the burglary of the same dwelling, in part because one could not prove burglary of a dwelling without also proving the housebreaking of the same dwelling. *Arriaga*, 70 M.J. at 55. This case is different. The anus is a separate location and body part from the genitals. And the application of the logical framework established in *Arriaga* to the situation here leads to the conclusion that because contact with the anus is not necessarily established by proving penetration of the genital opening, abusive sexual contact of the anus is not a lesser-included offense of a sexual act as defined by congress.

If one imagines that a potential burglary victim has a cabin in the woods used as a summer dwelling and a house in the city used as a winter dwelling, the point becomes plain.

Housebreaking of the winter dwelling would be a lesser-included offense of the burglary of the winter dwelling, but housebreaking of the summer dwelling would not. This is because one does not necessarily prove housebreaking of the summer dwelling when proving burglary of the winter dwelling—— housebreaking of the summer dwelling is a completely separate crime that occurs at a completely different location.

Likewise, one does not necessarily prove contact with the anus when one proves penetration of the genital opening. And therefore abusive sexual contact of the anus is not a lesser-included offense of a sexual act as defined by congress.

In essence then, the military judge here committed error by allowing the members to consider a completely separate crime that was not a lesser-included offense of the charge. Abusive sexual contact of the victim's penis was a lesser-included offense of the charged sexual act here. Abusive sexual contact of the victim's anus was not. Thus, the military judge's actions here exposed Appellant to criminal liability for a separate, uncharged offense.

3. The prejudice.

This is reversible prejudicial error because: (1) it infringed upon Appellant's substantial right not to be convicted of a crime he was not charged with; and (2) it allowed Appellant to be punished for a crime he was not charged with.

The temptation here will be to rule that there was no error because the specification detailed the course of conduct that Appellant was ultimately convicted of. This Court should resist that temptation. Any such ruling would be based on the notion that Appellant could be convicted of abusive sexual contact as a lesser-included offense because abusive sexual contact was described in the specification. But that is simply another way of saying that abusive sexual contact was "fairly embraced" by the language of the specification. And this type of analysis would be an abrupt about-face. Just two years ago, this Court abandoned the "fairly embraced" test in *United States v. Jones*. *Jones*, 68 M.J. at 469. There is no cause to resurrect it here.

As this Court has explained, an "accused has a right to know what offense and under what legal theory" he will be convicted. *Jones*, 68 M.J. at 469. Consequently, an effective charge must provide both notice of the crime (i.e., the offense) and the actions the defendant did that actually make up the crime (i.e., the legal theory of conviction). Put simply, the government must tell the defendant "you are guilty of crime X because you did Y." Here, the offense was the commission of a criminal sexual act. The action described was digital anal penetration. But this action was not described in the specification as a charge in its own right; rather the

description was simply the articulation of the government's legal theory for conviction.

Thus, the military judge's actions here went beyond simply allowing the members to consider conduct that was necessarily included in the charged crime of a criminal "sexual act." Instead, he added an uncharged abusive sexual contact specification.

Up to that point, Appellant did not have to defend himself from the aggravated sexual assault charge because the government's legal theory for how he committed the aggravated sexual assault was insufficient. Even if Appellant had digitally penetrated MA3 BDL's anus, that act could never amount to the commission of a criminal sexual act. But this changed when the military judge incorrectly allowed the government to go forward on abusive sexual contact as a lesser-included offense. Suddenly, and without a proper amendment or Appellant's consent, Appellant was facing a new, separate charge——one that he was eventually found guilty of.

The prejudice resulting from this last-second additional charge was not limited solely to the additional conviction itself. Of course, Appellant faced the additional charge without the safeguards provided by Article 32 of the UCMJ but, more importantly, he was punished for both acts.

Although all the trial participants (the military judge, the trial counsel and the defense counsel) attempted to formulate an instruction that would properly protect Appellant's rights, (*see* JA 192-94) they were ultimately unable to. In the end, the colloquy between the military judge, trial, and defense counsel resulted in the judge adding one sentence to the instructions that told the members they were to "consider the charges of conviction as a single incident and treat it as a single charge for the purpose of sentencing." (JA 197.)

The problem with this instruction is that it is confusing and largely meaningless. It does not protect Appellant from being punished for the conduct that he was improperly convicted of. To the contrary, it instructs the members that they should punish Appellant for that improper conviction——just not as a separate incident. But there is no logical distinction between punishing a defendant for committing forcible oral sodomy and committing abusive sexual contact of the anus, and punishing a defendant for committing one course of misconduct that involved forcible oral sodomy and abusive sexual contact of the anus. In both cases the defendant is punished for each of his acts.

Conclusion

This Court should set aside Appellant's conviction for abusive sexual contact of the anus and the sentence. The military judge erred when he instructed the members on abusive

sexual contact of the anus as a lesser-included offense of the charge of aggravated sexual assault. This error allowed Appellant to be convicted and punished for a crime that was not properly before the court-martial. Accordingly, Appellant prays this Court will set aside his conviction and the sentence, and order a rehearing on sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that this brief was delivered electronically to the Court, and that copies were delivered electronically to the Appellate Government Division and to the Administrative Support Section of the Navy and Marine Corps Appellate Review Activity on May 18, 2012. I also certify that I caused paper copies of the Joint Appendix in this case to be filed on the same day.

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