IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee v. First Lieutenant (1LT) **Christopher S. Schloff,** United States Army, Appellant	) SPECIAL VICTIM COUNSEL AMICUS) CURIAE BRIEF ON BEHALF OF) VICTIM)) Crim.App. Dkt. No. 20140708)) **USCA Dkt. No. 15-0294/AR**)))

VIETLONG T. NGUYEN
Captain, JA
Special Victim Counsel
U.S. Army Japan
Unit 45005
APO, AP 96343-5005
Phone: DSN 315-263-4698

Index of Brief

Issue Presented:

THE ARMY COURT OF CRIMINAL APPEALS WAS CORRECT IN APPLYING THE PLAIN LANGUAGE OF ARTICLE 120(G)(2) IN RULING THAT A "SEXUAL CONTACT" COULD BE ACCOMPLISHED BY AN OBJECT.

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Supreme Court of the United States

United States Court of Appeals for the Armed Forces

Military Courts of Criminal Appeal

Federal Appellate Court

Uniform Code of Military Justice

Treatises

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee v. First Lieutenant (1LT) **Christopher S. Schloff,** United States Army, Appellant	) SPECIAL VICTIM COUNSEL AMICUS) CURIAE BRIEF ON BEHALF OF) VICTIM)) Crim.App. Dkt. No. 20140708)) **USCA Dkt. No. 15-0294/AR**)))

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

Issue Presented

THE ARMY COURT OF CRIMINAL APPEALS WAS CORRECT IN APPLYING THE PLAIN LANGUAGE OF ARTICLE 120(G)(2) IN RULING THAT A "SEXUAL CONTACT" COULD BE ACCOMPLISHED BY AN OBJECT.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals reviewed this case pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 [hereinafter UCMJ].[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(2), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces [hereinafter C.A.A.F.] has granted a review."[2]

1. Art. 62, 10 U.S.C. § 862
2. Art. 67(a)(2), 10 U.S.C. § 867(a)(3)

Statement of the Case

The Appellant was charged with five specifications of abusive sexual contact when he used his stethoscope to touch the breasts of the victims during medical examinations, in violation of Article 120(d), UCMJ, 10 U.S.C. § 920 (2012).[3] Three of these specifications were referred to trial.[4] During the trial, the defense raised and renewed its motion to dismiss for failure to state an offense under RCM 905(b)(2).[5] For judicial economy, the military judge [hereinafter MJ] refrained from making a ruling until the end of trial.[6] On the merits, the panel found the Appellee guilty of one specification of abusive sexual assault.[7] Afterwards, they adjudged a sentence of dismissal.[8] The MJ then made a ruling on the defense's motion in which he granted the motion on grounds of legal insufficiency and vacated the panel's findings.[9] The Government then appealed this decision under Article 62 of the UCMJ.[10]

Statement of Facts

Those facts necessary to resolve the assignments of error are set forth above and below.

---

3. Charging Sheet
4. R. at 6, 154
5. R. at 496, 573.
6. R. at 505, 508, 574.
7. R. at 570.
8. R. at 658.
9. R. at 660-662.
10. R. at 662.

Assignment of Error

THE ARMY COURT OF CRIMINAL APPEALS WAS CORRECT IN APPLYING THE PLAIN LANGUAGE OF ARTICLE 120(G)(2) IN RULING THAT A "SEXUAL CONTACT" COULD BE ACCOMPLISHED BY AN OBJECT.

Standard of Review

The standard of review for a question of law and statutory construction is de novo.[11] The standard as to whether a specification states an offense is "whether the specification alleges 'every element' of [the offense] 'either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy."[12] "A specification is sufficient 'so long as [the elements] may be found by a reasonable construction of other language in the challenged specification."[13] The question here is what constitutes a "touching" for the purpose of a violation of Article 120(d), Abusive Sexual Contact.[14]

Law and Argument

THE ARMY COURT PROPERLY APPLIED THE PLAIN MEANING OF ARTICLE 120(G)(2) IN DECIDING THAT A "SEXUAL CONTACT" CAN BE ACCOMPLISHED BY THE USE OF AN OBJECT.

---

11. *United States v. Crafter*, 64 M.J. 206 (C.A.A.F. 2006) *and United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (quoting R.C.M. 307(c)(3)) (citing *Hamling v. United States*, 48 U.S. 87 (1974)).
12. *Dear*, 40 M.J. at 197 (quoting R.C.M. 307(c)(3)).
13. *United States v. Russell*, 47 M.J. 412, 413 (C.A.A.F. 1998) (quoting *United States v. Brecheen*, 27 M.J. 67, 68 (C.M.A. 1988)).
14. 10 U.S.C. § 920 (UCMJ)

A. THE PLAIN MEANING OF THE WORDS IN THE STATUTE INCLUDES TOUCHES MADE BY ANY PART OF THE BODY AND OBJECTS.

Upon appeal by the government, the Army Court reviewed the MJ's dismissal of the Charge for failure to state an offense. The Army Court vacated the MJ's decision after looking to the plain meaning of the statute.

The U.S. Supreme Court and C.A.A.F. state that "[s]tatutory construction begins with a look at the plain language of a rule."[15] "Unless the text of a statute is ambiguous, 'the plain language of a statute will control unless it leads to an absurd result.'"[16] The Supreme Court went further in *Ron Pair Enterprises* when it held that "when the statute's language is plain, then 'the sole function of the courts is to enforce it according to its terms.'"[17] When the language of the statute is plain and expresses the Congress' intent, there is no need to employ other tools of statutory interpretation.[18]

In the present case, abusive sexual contact, is defined in the UCMJ at Article 120, which states that it occurs when "[a]ny Person . . . who commits or causes sexual contact upon or by another person . . . ." Moreover, in defining "sexual contact," the statute provides that a "sexual contact" is:

---

15. *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007); *see also United States v. Ron Pair Enterprises*, Inc., 489 U.S. 235, 241-42 (1989).
16. *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012) (citing *Lewis*, 65 M.J. at 88).
17. *Ron Pair Enterprises, Inc.*, 789 U.S. at 241 (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).
18. *See Ron Pair Enterprises, Inc.*, 489 U.S. at 241.

> (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or
>
> (B) ***any*** touching, or causing another person to touch, either directly or through the clothing, *any* body part of ***any*** person, if done with an intent to arouse or gratify the sexual desire of ***any*** person.
> *Touching may* be accomplished by ***any*** part of the body.[19]

Focusing primarily on subparagraph (B), the language is noticeably broad. "Sexual contacts" under this provision includes *any* touching to *any* body part of any person if intended to sexually arouse or gratify *any* person. In this portion alone, the word "any" is used and applied four times. This is expansive language used to broaden the possibilities under which a sexual contact may occur. The legislature included the last clause - Touching may be accomplished by any part of the body -- to reiterate and clarify the expansive applicability of this subparagraph, not to limit or exclude certain touchings.

Of equal importance to the words used are the words that are not used. Here, there is nothing to indicate any form of restrictions or limitations. For example, had the statute read "any *bodily* touching . . ." or "[t]ouching *must [or shall]* be .

19. Article 120(g)(2), UCMJ, 2012 (emphasis added).

. . ," then the statute's applicability would be limited to only touches accomplished by parts of the body.

Therefore, the plain meaning of the statute is that a touch may be accomplished by any part of the body or any object.

B. *THE MEMBERS OF THE PANEL APPLIED THE PLAIN MEANING OF THE STATUTE, USED THE COMMON USAGE OF THE WORD "TOUCH," AND FOUND THE APPELLANT GUILTY OF ABUSIVE SEXUAL CONTACT.*

Although it does not apply in the present case, if the court, out of an abundance of caution, thought there may be some ambiguity with the statute, then the court should look to the common usage of the word to ascertain the meaning of the statute.[20] "In construing the language of a statute or rule, it is generally understood that the words should be given their common and approved usage."[21] "Words generally known and in universal use do not need judicial definition."[22] In applying this principle to the word "touch," the panel members found the Appellant guilty of one specification of abusive sexual contact.[23] Prior to reaching this verdict, the panel did not request nor were they given instructions on what constitutes a "touch." The MJ never instructed them on the legal meaning of

---

20. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999).
21. *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003) (citing *United Scenic Artists v. NLRB*, 246 U.S. App. D.C. 48, 762 F.2d 1027, 1032 n.15 (D.C. Cir. 1985) *and* 2A Norman J. & Singer, *Sutherland Statutory Construction* § 46.06, at 74 (4th ed. 1984)) (internal quotation marks omitted).
22. *United States v. Nelson*, 53 M.J. 319, 321 (C.A.A.F. 2000) (citing *United States v. Shepard*, 1 U.S.C.M.A. 487, 4 C.M.R. 79, 84 (1952)).
23. R. at 570.

the word "touch." And, as such, only the common usage of the word is used. As defined by Merriam-Webster, "touch" means "to strike or push lightly especially with the hand or foot or an implement."[24] Therefore, it is a reasonable conclusion that the panel members applied the common usage of the word and found it to covers both touches made by any parts of the body as well as touches made by objects.

Here, the members on the panel were all non-legal officers. Though they may have some knowledge of the legal system or the law, they are not trained attorneys nor do they have extensive legal training and knowledge.[25] They were not told what constitutes a "touch." Also, during deliberation, the members did not request clarification on what is a "touch."[26] To our lay panel, the plain meaning of the word "touch" is clear and it includes touches made by an object.

In this case, the panel members, the trier of fact, found the Appellant guilty of abusive sexual contact.[27] Thus, the Army Court was right in ruling that an abusive sexual contact could be committed here because the common usage of the word "touch" includes contacts made by objects.

---

24. *Touch - Definition and More from the Free Merriam-Webster Dictionary*, M-W.COM, http://www.merriam-webster.com/dictionary/touch (last visited Jan. 20, 2015, 2:23 PM).
25. R. at 157, 159.
26. *Contra* R. at 557-8, 567-9.
27. R. at 570.

C. THE LEGISLATURE ACTED INTENTIONALLY AND PURPOSELY WHEN IT USED DIFFERENT LANGUAGE IN SUBPARAGRAPHS (A) & (B) IN DEFINING DIFFERENT TYPES OF SEXUAL CONTACTS.

"In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."[28] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[29] Any differentiation by the Congress is intentional and these differences should be given due weight. Here, we are looking at the difference in wording between subparagraphs (A) and (B).

In looking at subparagraph (A), Congress used direct language. They included an list which limits the applicability of this subparagraph. Not all touches would be classified as a "sexual contact," but rather, only touches to the genitalia, anus, groin, breast, inner thigh, or buttocks (done with the requisite intent) would meet the definition of subparagraph (A).

In turning to subparagraph (B), the language is contrastingly different. With the broader language, Congress

---

28. *United States v. McPherson*, 73 M.J. 393, 398-9 (C.A.A.F. 2014) (citing *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991)) (internal quotation marks and citation omitted).

29. *Dean v. United States*, 556 U.S. 568, 573 (2009) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see, e.g., Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 2001-2 (2011) ("Focusing primarily on the text of [a] . . . clause . . . overlooks the broader statutory context and renders the statutory scheme [in]coherent and [in]consistent.") (internal citation omitted).

intended this subparagraph to encapsulate a wider array of touches. Unlike its preceding subparagraph, no lists are used that would limit the types of touches, the places touched, or the person aroused or gratified. In reading the subparagraphs together, Congress intended subparagraph (B) to be broader and expansive than subparagraph (A). Specifically, Congress intended that subparagraph (B) was to be a catchall to cover all touches accomplished by any part of the body or an object.

Therefore, the language in subparagraph (B) is intentionally and purposely broader in order to cover all "touches" committed by parts of the body or an object. Therefore, the Army Court was correct in ruling that an object could be used in the commission of an abusive sexual contact.

D. THE EVOLUTION OF ABUSIVE SEXUAL CONTACT SHOWS THAT THE CONGRESS INTENDED TO BROADEN, NOT RESTRICT, ITS SCOPE AND APPLICABILITY.

Turning to statutory history, this would clarify any nuances or changes between the current statute and the one it superseded.[30] Specifically in this case, "[s]tatutory history confirms the natural reading" in which objects can be used in the commission of an abusive sexual assault.[31] As it was originally written, objects could be used in the commission of an abusive sexual contact. In the changes since then, the

30. *See United States v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1397 (2014).
31. *See United States v. Wells*, 519 U.S. 482, 492 (1997).

Congressional intent was not to eliminate the use of objects; rather, its intent was to expand upon it.

Pre-2007 Prosecution of Abusive Sexual Contact.

Had this crime occurred before 2007, the Government would have prosecuted this offense as an Article 134 (assault-indecent).[32] To have been found guilty of this crime, the Government would have had to show:

> (1) that the accused assaulted a certain person not the spouse of the accused in a certain manner;
> (2) that the acts were done with the intent to gratify the lust or sexual desires of the accused; and
> (3) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[33]

In addition, the accused could have also been charged with the lesser included offense of Article 128 (assault consummated by a battery [hereinafter ACB]).[34] As this is a lesser included offense, then the abusive sexual contact would be an Article 128 offense plus an intent to gratify the lust or sexual desires of the accused. Therefore, an Article 128 offense accomplished by an object with an intent to gratify the lust or sexual desires could be prosecuted as an Article 134 (assault-indecent) offense.

---

32. *See* Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 [hereinafter UCMJ, 2002].
33. *Id.*
34. *See id.*

2007-2012 Prosecution of Abusive Sexual Contact.

Based on legislation, a new Article 120 offense consolidated several sexual misconduct offenses. Specifically, Article 134 (assault-indecent) (mentioned above) is replaced entirely by three new offenses: aggravated sexual contact, abusive sexual contact, and wrongful sexual contact.[35] So, to try this crime during this period, the prosecution would have to show that a sexual contact occurred, which is:

> . . . the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.[36]

Unlike the pre-2007 Article 134 (assault-indecent), this statute does not mention any lesser included offenses. Rather than having these lesser included offenses listed, the Court determines whether it is a lesser included offenses "by lining up elements realistically and determining whether each element of the supposed 'lesser' offense is rationally derivative of one

35. *See* Uniform Code of Military Justice art. 120a(g), (h), & (m), 10 U.S.C. § 920 (2006) [hereinafter UCMJ, 2008].
36. Article 120(t)(2), UCMJ, 2008.

or more elements of the other offense - and vice versa."[37] "The test does not require that the 'offenses at issue employ identical statutory language."[38]

In 2011, C.A.A.F. "conclude[d] that [ACB][39] is a lesser included offense of wrongful sexual contact.[40]"[41] To reach this conclusion, the Court compared the elements of both offenses.[42]

Ultimately, when the Court compared the elements of both offenses, they found that ACB is a lesser-included offense of wrongful sexual contact.[43] Unfortunately, the Court could not apply this analysis to abusive sexual contact, but the results would be the same. As ACB is a lesser-included offense, then object can be used in the commission of a sexual contact.

---

37. *United States v. Foster*, 40 M.J. 140, 146 (C.M.A. 1994); see also *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010).
38. *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012) (quoting *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010)).
39. "[T]he elements for an assault consummated by a battery are: '(1) [t]hat the accused did bodily harm to a certain person; and (2) [t]hat the bodily harm was done with unlawful force or violence.'" *United States v. Bonner*, 70 M.J. 1, 3. (citing *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (internal quotations omitted)). "[D]oing bodily harm means committing 'any offensive touch of another, however slight.'" *Id.* (quoting *MCM* pt. IV, para. 54.c.(1)(a) (1995 ed.) (note that the definition has not changed in the 2012 ed.)). "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." *Id.*
40. For wrongful sexual contact, the elements has been defined as follows: "(a) [t]hat the accused had sexual contact with another person; (b) [t]hat the accused did so without that other person's permission; and (c) [t]hat the accused had no legal justification or lawful authorization for that sexual contact." Article 120b(13), UCMJ, 2008. The UCMJ defined sexual contact as "intentionally causing another person to touch . . . the genitalia . . . of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person." Article 120(t)(2), UCMJ, 2008.
41. *Bonner*, 70 M.J. at 4.
42. *See id.* at 3.
43. *See id.*

Post-2012 Prosecution of Abusive Sexual Contact.

Finally, in turning to the current version of the statute at it relates to abusive sexual contact, we have the relevant portion which was provided earlier. Cosmetically, the statute was restructured. Instead of one block paragraph which describes the circumstances in which one may commit an abusive sexual contact, it was divided into two subparagraphs.

Substantively, the statute expanded the scope and breadth within which a sexual contact may occur. In subparagraph (B), it uses broadening language to describe how an abusive sexual contact can be committed. And also, the legislature included a clarifying clause stating that "[t]ouching may be accomplished by any part of the body." These changes demonstrate that the intent was to broaden the scope of abusive sexual contacts.

Additionally, if we applied the elements test to post-2012 abusive sexual contacts, Article 128 (ACB) would still be a lesser-included offense (requires bodily harm and unlawful force/violence). The Court accepted that a sexual contact results in bodily harm.[44] And, if no consent was given by the victim, then any contact would be unlawful force.

Though the current version of the statute differs slightly from its predecessors, those differences all show a common theme and pattern. That is, the legislature is trying to frame the

44. *See Bonner*, 71 M.J. at 3.

statute in such a way that captures all types of abusive sexual contacts. With each version, limitations are removed and expansive language is included. Each time, the legislature builds upon the previous version, but also makes it broader. There were no changes that would limit the scope of abusive sexual contacts. As an object could be used in the commission of a sexual contact from pre-2007 to 2012, it remains so today. Never once did the legislature intend to limit abusive sexual contact to only bodily touches; it was always intended to include abusive sexual contacts accomplished by an object.

Therefore, the Army Court was correct in rejecting the MJ's restrictive reading of the statute and vacating his decision.

E. THE RULE OF LENITY DOES NOT APPLY AS THERE IS NO AMBIGUOUS LANGUAGE IN THE STATUTE.

The rule of lenity "applies only if, '*after* considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended."[45] Even if the text creates some ambiguity, the context, structure, history, and purpose precludes the application of the rule of lenity.[46]

---

45. *Abramski v. United States*, 134 S. Ct. 2259, 2272 (2014) (citing *Maracich v. Spears*, 570 U.S. ___, ___, 133 S. Ct. 2191, 186 L. Ed. 2d 275, 298 (2013) (quoting *Barber v. Thomas*, 560 U.S. 474, 488 (2010)) (emphasis added).
46. *See Abramski*, 134 S. Ct. at 2272; *Muscarello v. United States* 524 U.S. 125, 138 (1998); *and Smith v. United States*, 508 U.S. 223, 239 (1993).

In the present case, the rule of lenity does not apply. The Appellant has not adequately shown why the rule of lenity should apply in this matter. The Appellant argues that the failure to enumerate the use of an object within the statute constitutes an ambiguity.[47] Assuming arguendo that this does create an ambiguity, the Appellant has failed to address the context, structure, history, and purpose of the statute.

Here, there is no ambiguity as to what constitutes a "touch." In considering the plain meaning of the statute, the context, structure, history, and purpose, the statute includes "touches" made by an object. Therefore, as the statute is not ambiguous and the rule of lenity does not apply.

CONCLUSION

WHEREFORE, based on the aforementioned, the Special Victim Counsel respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

VIETLONG T. NGUYEN
CPT, JA
Special Victim Counsel

47. R. at 503-504.

Certificate of Filing and Service

I certify that a copy of the foregoing in the case of United States v. Schloff, Army Dkt. No. 20140708, USCA Dkt. No. 15-0294/AR, was electronically filed with both the Court, Government Appellate Division, Defense Appellate Division, and Mr. Philip D. Cave on January 24, 2015.

VIETLONG T. NGUYEN
Captain, JA
Special Victim Counsel
U.S. Army Japan
Unit 45005
APO, AP 96343-5005
Phone: DSN 315-263-4698