IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
	)	Crim. App. Dkt. No. 20140708
First Lieutenant (1LT) **CHRISTOPHER S. SCHLOFF,** United States Army, Appellant	)	USCA Dkt. No. _____/AR

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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) **SCHLOFF, CHRISTOPHER S.,** United States Army, Appellant	) SUPPLEMENT TO PETITION) FOR GRANT OF REVIEW))))) Crim. App. Dkt. No. 20140708)) USCA Dkt. No. _____)

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

Statement of Error

THE ARMY COURT ERRED IN EXPANDING THE DEFINITION OF A "SEXUAL CONTACT" TO A TOUCH ACCOMPLISHED BY AN OBJECT CONTRARY TO THE PLAIN LANGUAGE OF ARTICLE 120(G)(2).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On October 22, 2013, the government charged First Lieutenant (1LT) Christopher S. Schloff with five specifications of abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). (Charge Sheet).

Following an Article 32 pretrial investigation the Investigating Officer [hereinafter IO] submitted his report to the Special Court-Martial Convening Authority on December 23, 2014 wherein he recommended against referral of three of the five specifications of The Charge to court-martial. (Encl. 3 to App. Ex. XVIII). Despite the recommendations, on January 16, 2014, all five specifications of The Charge were referred to a general court-martial by the Commander, Headquarters, Eight Army, Yongsan, Republic of Korea. (Charge Sheet). Trial Counsel dismissed Specification 5 of The Charge on September 9, 2013 (R. at 123) and Specification 2 of The Charge before trial and the remaining specifications were then renumbered. (R. at 142).

At the close of the government's case, defense counsel moved for a finding of not guilty to all three specifications under Rule for Courts-Martial (R.C.M.) 917, and alternatively to have the specifications dismissed for failure to state an offense. (R. at 495). The military judge denied the R.C.M. 917 motion and deferred ruling on the failure to state an offense motion. (R. at 508).

On September 13, 2014, the panel found 1LT Schloff guilty of only Specification 2 of The Charge and sentenced him to a dismissal. (R. at 570, 658). After the panel was released, the military judge dismissed Specification 2 of

The Charge and The Charge because that charge failed to state an offense. (R. at 660). His ruling is attached as Appendix A.

The government appealed the military judge's ruling and on December 16, 2014 the Army Court vacated the military judge's ruling and returned the record to the military judge. *United States v. Schloff*, ARMY No. 20140708 at *5 (Army Ct. Crim. App. 16 Dec. 2014) (Appendix B).

Reasons to Grant Review

This Court should grant 1LT Schloff's petition because the Army Court decided a question of law which has not been, but should be, settled by of this Court. United States Court of Appeals for the Armed Forces Rule of Practice and Procedure 21(b)(5)(A) [hereinafter Rule(s)]. As demonstrated by the conflicting interpretations of Article 120(g)(2) by the military judge and the Army Court in this case, significant confusion exists regarding the meaning of "touching" in Article 120(g)(2), particularly the last sentence referencing the requirement "be accomplished by any part of the body." Without further guidance from this Court, easily avoidable appellate errors related to scope of the term touching in Article 120(d) will arise. The question is therefore not whether the Court should resolve this issue, but when.

It can do so now, thus minimizing potential unfairness, providing maximum clarity to those subject to the UCMJ, and providing the lower court's guidance in resolving this issue. There is nothing more to be done in this case at the trial level, it is simply pending action by the convening authority. (R. at 662). To wait until this case comes up in the course of regular appellate review does not just needlessly delay the process for 1LT Schloff, but could also cause other service members to be convicted and imprisoned pending resolution of this issue. This Court can ensure that the issue he raises, whether the plain language of the statute actually requires bodily contact, does not continue to vex military courts.

Statement of Facts

After the government presented evidence on two of the three remaining specifications, the military judge held an Article 39(a), UCMJ, session to inform the parties: "Sexual contact seems to require that touching of the body part by another party [sic] part, not by a stethoscope." (R. at 388-389). The government indicated they were "going to look into it" and the defense mentioned the "IO brought the very same question up." (R. at 389). The following day, the military judge noted "we had an 802 this morning . . . [w]e also talked about the issues that I had raised yesterday about

the - whether or not the three specifications in this case alleged an offense or not" without going into further detail. (R. at 416).

Later the defense made a motion for a finding of not guilty to all three specifications under Rule for Courts-Martial (R.C.M.) 917. (R. at 495). At the same time, defense counsel also made an alternative motion to have the specifications dismissed for failing to state an offense. (R. at 495).

In support of these two motions, defense counsel argued that there was no evidence before the panel that 1LT Schloff touched any of the witnesses with any part of his body and the applicable version of the statute does not include contact with an instrument or object. (R. at 496). Defense counsel also argued that the military judge should apply the rule of lenity. (R. at 503).

The government responded: 1) Article 120, UCMJ, should be interpreted broadly; 2) there is no limiting language that sexual contact cannot be accomplished by an object; and 3) a case interpreting an Oklahoma state statute that found a vibrator over the clothes could be used to accomplish a touching was somehow "persuasive evidence." (R. at 497, 499)(Attached as Appendix D). The military judge did not

find the case to be helpful because it was interpreting an Oklahoma statute, not Article 120, UCMJ. (R. at 499).

The military judge compared Article 120's definition of sexual assault, which says penetration could be by a part of the body or an object, with the definition of sexual contact, which defined exactly what a touching could encompass—contact by any part of the body. (R. at 498). He concluded Congress, whether intentionally or not, by not including the word "object" in the definition of sexual contact, excluded touching with anything but a part of the body. (R. at 499). The military judge noted that neither side provided case law directly on point. (R. at 499).

After considering the issue of statutory interpretation the military judge denied the defense's motion for a finding of not guilty pursuant to R.C.M. 917 because he found "the issue in this case is whether or not the specifications state an offense." (R. at 508). He explained that for judicial economy—to prevent having to reassemble the panel in the future and because a complete acquittal would moot the issue—he was going to defer his ruling on the motion to dismiss for failure to state an offense and allow the panel to reach their findings, and if necessary, their sentence. (R. at 508).

The government requested the panel be instructed on simple assault and assault consummated by at battery as a lesser included offense of abusive sexual contact by fraudulent representation. (R. at 511). The military judge denied this request because he found abusive sexual contact by fraudulent representation requires no element of bodily harm or offensive touching. (R. at 512). The record establishes, and the parties do not contest, it was only 1LT Schloff's stethoscope that made contact with SSG CP. (R. at 257-265, 267).

The panel found 1LT Schloff guilty of only Specification 2 of The Charge. (R. at 570). The panel sentenced 1LT Schloff to a dismissal. (R. at 658.) The military judge released the panel and dismissed Specification 2 of The Charge and The Charge for failure to state an offense and set aside both the finding of guilty and the sentence. (R. at 660). He explained:

> The offense of abusive sexual contact under Article 120(d) requires a sexual contact. The definition of sexual contact, provided in Article 120(g)(2), requires the touching of another person. Article 120(g)(2) also states that 'touching may be accomplished by any part of the body.' In so providing, Congress has limited the offense of abusive sexual contact to a touching in which some part of the accused's body touches the alleged victim. . . Had Congress intended otherwise, they would have added the words 'or object' at the

> end of that sentence. This conclusion is bolstered by the fact that Congress was aware of the distinction between body parts and objects, as reflected in its definition of sexual act in the same statute.

(App. Ex. LXXI)(Appendix A).

Following a government appeal, the Army Court conducted a de novo review a whether the specification states an offense, and found that "touching of a person's breasts with a stethoscope can constitute the offense of abusive sexual contact as proscribed by Article 120(d), UCMJ. *Schloff*, ARMY No. 20140708 at *3 (Appendix B). The Army Court based its decision on: 1) the language of Article 120(g)(2)(A) and (B), without reference to Article 120(g)(1); 2) "the broader context of the entire statutory framework to include other punitive articles," specifically Article 128, UCMJ; and 3) the plain language of Article 120(g)(2), which the Army Court found to be "unambiguously permissive and not exclusive." *Schloff*, ARMY No. 20140708 at *3-5 (Appendix B).

Error and Argument

> THE ARMY COURT ERRED IN EXPANDING THE DEFINITION OF A "SEXUAL CONTACT" TO A TOUCH ACCOMPLISHED BY AN OBJECT CONTRARY TO THE PLAIN LANGUAGE OF ARTICLE 120(G)(2).

Standard of Review

The question of whether a specification states an offense is a question of law, which this Court reviews de

novo. *United States v. Crafter* 64 M.J. 209, 2006 CAAF LEXIS 1228 (C.A.A.F. 2006)(citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) and *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)).

To state an offense "a specification must allege, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)(citing R.C.M. 307(c)(3) and *Dear*, 40 M.J. at 197). This is a three-prong test requiring (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy. *Dear*, 40 M.J. at 197.

Law & Argument

The Military Judge's Decision to Dismiss Specification 2 of The Charge was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. He raised his concern that the government had failed to state an offense and allowed counsel for both sides to proffer supporting precedent. He properly applied the relevant cannons of statutory interpretation. The military judge's resolution of this question of law was fairly supported by the record, and thus survives de novo review.

1. Due Process and the Plain Language of Article 120, UCMJ

The Due Process Clause of the Fifth Amendment requires the government to prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). To convict an accused, the government must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged." *Winship*, 65 M.J. at 364. In Specification 2 of The Charge, the elements of abusive sexual contact that the government would have needed to prove to survive a motion to dismiss for failing to state an offense are: 1) "the accused committed sexual contact" upon SSG CP; and 2) "that accused did so by making a fraudulent representation that the sexual contact served a professional purpose." *Manual for Courts-Martial*, United States (2012 ed.) [hereinafter MCM] pt. IV, ¶ 45.a.(d)(iv).

The definition section defines sexual act and sexual contact as:

> (g) *Definitions.* **In this section:**
>
> (1) *Sexual act.* **The term 'sexual act' means—**
>
> **(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or**
>
> **(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.**
>
> (2) *Sexual contact.* **The term 'sexual contact' means—**
>
> **(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.**

MCM pt. IV, ¶ 45.a.(g)(1)&(2).

It is a "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp*, 134 S.Ct. 870, 876 (2014)(citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The Supreme Court also recently stressed that, "especially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted

meaning, and that disfavors the defendant." *United States v. Burrage*, 134 S. Ct. 881 (2014)(citing *Moskal v. United States*, 498 U.S. 103, 107-108, (1990)).

The first step in all statutory construction cases is to determine whether the language at issue has a plain and unambiguous meaning. *United States v. McPherson*, 73 M.J. 393 (C.A.A.F. 2014). "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.*

That first step settles the matter here. The military judge found the plain and unambiguous meaning of the definition of sexual contact was that the touching may be accomplished by any part of the body. The Army Court's interpretation prevails only if this Court adds the word "object" to the statute. But as *Burrage* establishes, this court must strictly construe statues. In this case, the plain language does not contemplate criminal liability without a bodily touching.

2. Cannons of Statutory Interpretation Considered by the Military Judge.

In addition to looking to the plain language of Article 120, the military judge considered the rule of lenity and the context of the definitions within, not just a related statute, but the same statute. Even if the sentence, "Touching may be accomplished by any part of the body" was

not unambiguous on its face, *Burrage* makes it clear that the rule of lenity prevents this court from interpreting an inconclusive text in a manner that disfavors a criminal defendant.

The military judge was not just interpreting related statutes that needed to be read together. He was interpreting a single statutory provision. His ruling indicated that he had considered the context of the definition of sexual contact and compared it with the definition that comes right before it, the definition of sexual assault. "Had Congress intended otherwise, they would have added the words 'or object' at the end of that sentence . . . Congress was aware of the distinction between body parts and objects, as reflected in its definition of sexual act in the same statute." (Appendix A). His decision was rational and supported by the record.

3. Additional Cannons of Statutory Interpretation Supporting the Military Judge's Decision.

Both the formatting of the definitions provided in the current version of Article 120, UCMJ and the differences between the 2008 and 2012 versions of Article 120, UCMJ also support the military judge's decision.

Article 120 Excerpts - 2008 MCM	Article 120 Excerpts - 2012 MCM
(h) *Abusive sexual contact.* **Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.**	(d) ***Abusive Sexual Contact.*** **Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.**
(2) *Sexual contact.* **The term "sexual contact" means 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.**	(2) *Sexual contact.* **The term 'sexual contact' means—** **(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.**

The reenactment cannon was not mentioned by the military judge, but it also supports his decision. "If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in the language is presumed to entail a change in meaning." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (Thompson/West, 2012). The changes to Article 120 were not mere consolidation or restyling, they were substantial revisions. MCM, Analysis, App. 23). The definition of sexual contact went from not

specifying how the touching could be accomplished in 2008, to specifying in 2012, that the touching may be accomplished by any part of the body.

The scope-of-subparts cannon also supports the military judge's decision. "Material within an indented subpart relates only to that subpart; material contained in unindented text relate to all the following or preceding indented subparts." SCALIA & GARNER, READING LAW at 156. As is reproduced above, the phrase "Touching may be accomplished by any part of the body" is unindented, indicating that it applies equally to the touching described in both (A) and (B).

The military judge's legal conclusion that the abusive sexual contact by touching with an object did not state an offense under the current statute was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

4. The Army Court's Incorrect Reasoning.

a. The full statutory definition of "sexual contact" within the language of Article 120(g)(2)(A) and (B), without reference to Article 120(g)(1);

The Army Court found that because the statutory language explicitly includes "causing another person to touch" a victim, direct contact is not required in the definition of touching. *Schloff*, ARMY No. 20140708 at *3 (Appendix B). The fact that the statute includes actions

directly perpetrated by the accused, and actions he causes another to take does not change the proper definition of contact. And while indirect contact, but not penetration, with sex toys and sadomasochistic devices fit under the Army Court's "umbrella of 'sexual contact'" it does not satisfy the requirements of Article 120(d), UCMJ. (Appendix B at *3).

b. The broader context of the entire statutory framework to include other punitive articles, specifically Article 128, UCMJ;

The Army Court claims to "look at the relevant term in the broader context of the entire statutory framework to include other punitive articles of the UCMJ." *Schloff*, ARMY No. 20140708 at *4 (Appendix B). But they looked past the most relevant definition, Article 120(g)(1) without any explanation as to why it would be more appropriate to reference Article 128, UCMJ. *Schloff*, ARMY No. 20140708 at *4 (Appendix B). The explanation section of an entirely different punitive article is not more probative than the language a mere two paragraphs above, within the same definition section, of the same punitive article.

To support its conclusion that it is proper to use Article 128, UCMJ instead of Article 120(g)(1) to understand Article 120(g)(2), the Army Court cites two cases. The first is a securities law case that held the code section creating

a cause of action for misrepresenting information in a public offering, 15 U.S.C. § 77l, must be read consistently with the definition of "prospectus" in 15 U.S.C. § 77j to prevent the definition from being expanded to include documentation for a private sale. *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). And the second permitted a military judge to use the drug-context definition of distribution in a child pornography case because there was not a definition of distribution in the child pornography context. *United States v. Kuemmerle*, 67 M.J. 141, 2009 CAAF LEXIS 4 (C.A.A.F. 2009).

The first case is an instance where the Supreme Court addressed different sections within 15 U.S.C. § 77 (the Securities Act of 1933) that included the word "prospectus," and held that these sections need to be read together rather than in conflict. This case support the conclusion that the sections of 10 U.S.C. § 920 (Article 120) should be read together rather that in conflict. "Touching" is not defined in Article 120 or 128, UCMJ and thus this case is different from *Kuemmerle* where distribution was defined in Article 112a, UCMJ but not Article 134, UCMJ. These cases do not support the decision to ignore Article 120(g)(1) when attempting to construe the term touching consistently throughout Article 120, UCMJ.

c. The plain language of Article 120(g)(2) is "unambiguously permissive and not exclusive."

The Army Court found that Congress's use of the phrase "touching may be accomplished" instead of "touching will/shall be accomplished" indicated there are other possibilities to accomplish a sexual contact. However, the military judge at trial squarely addressed this notion:

> I know you say they use the word, may, but if you put the word must in there, it wouldn't make much sense, touching must be accomplished by any part of the body—I don't believe that would make sense to write it that way. I think they say touching may be accomplished by any part of the body—to indicate that it doesn't just have to be a hand, it could be any part of the body that touches the person.

(R. at 489-499).

The Army Court concluded "we interpret this statute in such a manner as to focus on whether the alleged victim was touched and whether the accused caused the touching" citing two multiplicity cases. *Schloff*, ARMY No. 20140708 at *5 (Appendix B). *United States v. Goins*, 18 U.S.C.M.A. 395, 398 (C.M.A. 1969) held that maiming and robbery were not multiplicious, and *United States v. Huerta*, 2005 CCA LEXIS 630 (A.C.C.A. Feb. 23, 2005) held that maltreatment and indecent assault were not multiplicious. Neither of these cases justify ignoring the plain language of Article 120, UCMJ, to interpret the statute in any other way.

Conclusion

WHEREFORE, 1LT Schloff respectfully requests this Honorable Court grant his petition for review and dismiss The Charge and its specifications.

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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. _____/AR, was electronically filed with both the Court and Government Appellate Division on January 7, 2015.

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APPENDIX A

With respect to the earlier defense motions to (1) find the accused not guilty due to legal insufficiency of the evidence, and (2) dismiss the charge due to failure to state an offense, the court takes the following action:

Specification 2 of the Charge and the Charge are dismissed for failure to state an offense. As a result, the finding of guilty to Specification 2 and the Charge, as well as the sentence, are set aside.

The offense of abusive sexual contact under Article 120(d) requires a sexual contact. The definition of sexual contact, provided in Article 120(g)(2), requires the touching of another person. Article 120(g)(2) also states that "touching may be accomplished by any part of the body." In so providing, Congress has limited the offense of abusive sexual contact to a touching in which some part of the accused's body touches the alleged victim. With regards to Specification 2 of the Charge, the specification alleges that the accused touched SGT Pfautz's breast with a stethoscope – not with any part of his body. The evidence at trial was consistent with the specification, establishing only that the accused touched SGT Pfautz's breast with a stethoscope.

The statutory language providing that "touching may be accomplished by any part of the body" unambiguously limits a sexual contact to a touching accomplished by some part of the accused's body. Had Congress intended otherwise, they would have added the words "or object" at the end of that sentence. This conclusion is bolstered by the fact that Congress was aware of the distinction between body parts and objects, as reflected in its definition of sexual act in the same statute. That definition of sexual act, contained in Article 120(g)(1), provides that the penetration required for a sexual act may be accomplished "by any part of the body or by any object."

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. The determination of whether the evidence in this case is legally sufficient depends upon whether the touching required by a sexual contact can be accomplished by only a part of the body or whether objects may also be used. If the court is correct in its interpretation that the statute limits a touching for sexual contact to those accomplished by a part of the body, then the evidence in this case would not be legally sufficient. If a touching can be accomplished with an object, then the evidence would be legally sufficient.

However, given the court's dismissal of Specification 2 and the Charge for failure to state an offense, a ruling on the legal sufficiency of the evidence is unnecessary at this time.

APPENDIX B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, TELLITOCCI and HAIGHT
Appellate Military Judges

UNITED STATES, Appellant
v.
First Lieutenant CHRISTOPHER S. SCHLOFF
United States Army, Appellee

ARMY MISC 20140708

Headquarters, Eighth Army
Wendy P. Daknis, Military Judge (arraignment & pretrial motions)
Mark A. Bridges, Military Judge (pretrial motions & trial)

For Appellee: Lieutenant Colonel Jonathan F. Potter, JA; Captain Amanda R. McNeil, JA; Mr. Philip D. Cave, Esq. (on brief).

For Appellant: Colonel John P. Carrell, JA; Major Daniel D. Derner, JA; Captain Janae M. Lepir, JA; Captain Carrie L. Ward, JA (on brief).

Amicus Curiae:

For the Special Victim Counsel: Captain Vietlong T. Nguyen, JA (on brief).

16 December 2014

MEMORANDUM OPINION AND ACTION ON APPEAL
BY THE UNITED STATES FILED PURSUANT TO
ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

HAIGHT, Judge:

BACKGROUND

Appellee, a physician's assistant, was charged with, inter alia, abusive sexual contact for "touching with a stethoscope the breasts of [] Sergeant [CP] by making a fraudulent representation that the sexual contact served a professional purpose," a violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 120 [hereinafter UCMJ]. Contrary to his plea, an officer panel found appellee guilty of

this specification and sentenced him to a dismissal.[1] Immediately thereafter, the military judge dismissed that specification and charge for failure to state an offense and set aside the findings of guilty and the sentence. The government, pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 908 and Article 62, UCMJ, appeals the decision of the military judge.

When dismissing the charge, the military judge reasoned:

> The offense of abusive sexual contact under Article 120(d) requires a sexual contact. The definition of sexual contact, provided in Article 120(g)(2), requires the touching of another person. Article 120(g)(2) also states that "touching may be accomplished by any part of the body." In so providing, [C]ongress has limited the offense of abusive sexual contact to a touching in which some part of the accused's body touches the alleged victim. With regards to Specification 2 of the Charge, the specification alleges that the accused touched SGT CP's breast with a stethoscope – not with any part of his body. The evidence at trial was consistent with the specification, establishing only that the accused touched SGT CP's breast with a stethoscope.
>
> The statutory language providing that "touching may be accomplished by any part of the body" unambiguously limits a sexual contact to a touching accomplished by some part of the accused's body.

The military judge detailed further analysis and concluded:

> The determination of whether the evidence in this case is legally sufficient depends upon whether the touching required by a sexual contact can be accomplished by only a part of the body or whether objects may also be used. If the court is correct in its interpretation that the statute limits a touching for sexual contact to those accomplished by a part of the body, then the evidence in this case would not be legally sufficient. If a touching can be accomplished with an object, then the evidence would be legally sufficient.

[1] The panel acquitted appellee of two other specifications of abusive sexual contact.

DISCUSSION

Whether a specification states an offense is a question of law we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). We find the touching of a person's breasts with a stethoscope can constitute the offense of abusive sexual contact as proscribed by Article 120(d), UCMJ. Therefore, we grant the government appeal and will take appropriate action in our decretal paragraph.

The issue here, as properly identified by the military judge, is the scope of the term "touching" as found within the definition of "sexual contact" in Article 120(g)(2), UCMJ. We do not share the military judge's narrow interpretation. The language of Article 120, other provisions of the UCMJ, and the plain meaning of the word all support a broader view than that of the military judge.

First, we look at the relevant term through the discrete lens of Article 120(g), UCMJ. The full statutory definition of "sexual contact" is:

> (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.

The military judge initially observed "sexual contact seems to require that touching of the body part by another party['s] part, not by a stethoscope." Ultimately, the military judge decided that this conduct is limited to instances where the "accused's body touches the alleged victim." Such a conclusion—that direct body to body contact is necessary—is contradicted by the statute itself.

The statute does not require direct contact. To the contrary, it contemplates various levels of separation between the respective bodies of the perpetrator and the victim. For example, a scenario involving a perpetrator who grabs another's hand and forces that person to sexually grope a clothed victim could satisfy all elements of the definition of sexual contact although there are multiple interceding barriers between the perpetrator's body and the victim's body. One can easily imagine countless more examples involving indirect contact by objects such as gloves, condoms, sex toys, and sadomasochistic devices that could surely fit under the umbrella of "sexual contact" if all other mens rea factors were also satisfied. Accordingly, touching a victim with a stethoscope while possessing the requisite abusive or sexual intent can constitute sexual contact under Article 120(g), UCMJ.

Second, we look at the relevant term in the broader context of the entire statutory framework to include other punitive articles of the UCMJ. As the *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], pt. IV, ¶ 45 labels the offenses proscribed under Article 120 as "Rape and sexual assault generally," comparison to another UCMJ article which the *MCM* also labels as "Assault" seems natural.[2] Article 128, UCMJ, criminalizes assault and battery. In the *MCM's* explanation of Article 128 offenses, the term "touching" is used when defining "bodily harm" as "any offensive touching of another, however slight." *MCM*, pt. IV, ¶ 54.c.(1)(a). Further explanation reveals that the offensive touching may be inflicted directly or indirectly. Various examples are set forth:

> Thus, battery can be committed by inflicting bodily injury on a person through striking the horse on which the person is mounted causing the horse to throw the person, as well as by striking the person directly.
>
> . . . It may be a battery to spit on another, push a third person against another, set a dog at another which bites the person, cut another's clothes while the person is wearing them though without touching or intending to touch the person, shoot a person, cause a person to take poison, or drive an automobile into a person.

MCM, pt. IV, ¶ 54.c.(2)(b), (c).

We find it appropriate and proper to interpret "touching" for purposes of Article 120, UCMJ, consistently with "touching" for purposes of Article 128. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 568-569 (1998) ("[W]e adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act."; "[T]he Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout."); *see also United States v. Kuemmerle*, 67 M.J. 141 (2009) (considering and referring to the *MCM's* explanation of the term "distribute" for purposes of drug offenses to interpret the same term for purposes of child pornography offenses). The urge for consistent interpretation between Articles 120 and 128 is bolstered by the fact the *MCM's* analysis of Article 120 mentions that several terms found in that article such as "unlawful" and "force" have been changed to align with the interpretation of those same concepts found in Article 128. *MCM*, App. 23, Analysis

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[2] We understand "[c]atchlines or section headings such as this are not part of a statute. . . . and are available for interpretive purposes only if they can shed light on some ambiguity in the text." *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (2008) (citing *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29 (1947)). We find no ambiguity whatsoever in the text in question in this case.

of Punitive Articles, ¶ 45.a at A23–15. Accordingly, just as touching can be accomplished indirectly for purposes of battery, a touching can be accomplished indirectly for purposes of sexual battery.

Third, we rely upon the plain meaning of the relevant text. The sentence—Touching may be accomplished by any part of the body—is unambiguously permissive and not exclusive. UCMJ art. 120(g)(2). We read that provision not as limiting proscribed behavior but as clarifying that these particular crimes can be committed even when contact is made by or with certain body parts that are not typically considered to be of a sexual nature. We interpret this statute in such a manner as to focus on whether the alleged victim was touched and whether the accused caused that touching. *See generally United States v. Goins*, 18 U.S.C.M.A. 395, 398, 40 C.M.R. 107, 110 (1969) ("The juristic norm is the protection of the bodily integrity of citizens . . . ."); *United States v. Huerta*, ARMY 20010097, 2005 CCA LEXIS 630 (Army Ct. Crim. App. 2005) (mem. op.) ("The focus of the offense of indecent assault, however, is on the violation of the personal bodily integrity of the victim . . . .").

CONCLUSION

Here, appellee touched Sergeant CP with a stethoscope. That touching, if done under the requisite circumstances, can constitute a sexual contact.

The appeal of the United States pursuant to Article 62, UCMJ, is granted. The ruling of the military judge to set aside the findings of guilty and dismiss the sole remaining specification and charge is vacated and the record will be returned to the military judge for action not inconsistent with this opinion

Senior Judge COOK and Judge TELLITOCCI concur.

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court