

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,) BRIEF ON BEHALF OF APPELLEE
Appellee)
)
) Crim.App. Dkt. No. 20140708
v.)
) **USCA Dkt. No. 15-0294/AR**
)
First Lieutenant (1LT))
CHRISTOPHER S. SCHLOFF,)
United States Army,)
Appellant)

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WHETHER THE ARMY COURT OF CRIMINAL APPEALS
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).

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Appellant)	

**TO THE HONORABLE JUDGES OF THE UNITED STATES
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Issue Presented

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Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) 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 (C.A.A.F.) has granted a review."²

¹ UCMJ, Art. 62, 10 U.S.C. §862.

² UCMJ, Art. 67(a)(2), 10 U.S.C. §867(a)(3).

Statement of the Case

On October 22, 2013 charges were preferred against the appellant alleging five specifications of abusive sexual contact in violation of Article 120(d), UCMJ, 10 U.S.C. § 920 (2012).³ Three specifications were ultimately referred to trial, and a panel of officers convened as a general court-martial. The panel found the accused guilty of Specification 2 of the charge, and the Charge.⁴

After the announcement of findings, appellant motioned for a finding of not guilty, alleging that Specification 2 of the charge failed to state an offense.⁵ The military judge deferred ruling, and the pre-sentencing phase of the proceedings was conducted. Appellant was sentenced to be dismissed from service.⁶

The panel was dismissed, and an Article 39a session was held. On the record, the military judge read a portion of the definition of "sexual contact" in Article 120(g)(2), to wit: "touching may be accomplished by any part of the body."⁷ The military judge found that this language specifically limited an

³ (CHARGE SHEET, (All references to the record and ancillary documents have been submitted to appellant for inclusion in the JA. These are included at App. I to this brief, and will be changed to reflect "JA designations" upon appellant's completion of the joint appendix.

⁴ R. at 570)

⁵ R. at 573-574.

⁶ R. at 658.

⁷ R. at 660-663 (Article 39a session).

offensive touching, for purposes of abusive sexual contact, to a touch between body parts.⁸ "If the court is correct in its interpretation, that the statute limits touching for sexual contact to those accomplished by a part of the body, then the evidence in this case would not be legally sufficient."⁹

The government appealed this finding. On December 16, 2014, the Army Court issued its unpublished opinion, finding that touching with an object, if done under the requisite circumstances, can constitute a sexual contact. The Army Court granted the government's appeal, vacating the ruling of the military judge.¹⁰

Statement of Facts

Appellant is a battalion physician's assistant (PA). The victim, SSG CP, had a doctor's appointment on June 4, 2013 for an injured right foot.¹¹ After a nurse completed vitals and took triage information, appellant met with SSG CP as her assigned medical provider. While seated at his computer, appellant asked SSG CP general questions about her foot injury.¹² He told SSG CP, "we should check your heart and lungs anyways because you're new to Korea."¹³

⁸ R. at 660.

⁹ R. at 661 (AE LXXI).

¹⁰ *United States v. Schloff*, ARMY No. 20140708 (Army Ct. Crim. App. 16 Dec 2014).

¹¹ R. at 251.

¹² R. at 251-254.

¹³ R. at 254.

SSG CP removed her ACU blouse at appellant's request. Appellant said, "it may be hard to hear your heart because you're skinny... that's common with women."¹⁴ SSG CP testified that she found appellant's behavior peculiar, and very inappropriate for a medical professional to comment on her appearance. She also felt that appellant was looking at her inappropriately. Based upon his demeanor, SSG CP testified that she felt appellant was indirectly commenting on her breasts.¹⁵

Appellant had SSG CP un-tuck her t-shirt and raise it midway up her torso. SSG CP felt that "it was clear that he was looking at me and that really --- in [her] opinion had nothing to do with the examination."¹⁶

Appellant continued to perform what he called a "lung examination," slipping his stethoscope into her shirt, then sliding the stethoscope further down her breast in order to listen to SSG CP's heart. Appellant placed the object "on the inner lower portion" of SSG CP's breast.¹⁷ Appellant pressed the stethoscope "between [her] chest and [her] nipple."¹⁸ SSG CP testified that this conduct was completely unlike prior medical exams, where doctors would place the stethoscope on the upper

¹⁴ R. at 254-255.

¹⁵ R. at 254-255.

¹⁶ R. at 257.

¹⁷ R. at 257.

¹⁸ R. at 258.

sternum. In this case, appellant kept the object placed on the lower, fleshy portion of her breast.¹⁹

The appellant told SSG CP that he was having difficulty listening to her heartbeat, likely due to interference from her t-shirt or bra.²⁰ Appellant then had SSG CP raise her Army t-shirt even higher, exposing her breasts. He moved the stethoscope to another area on her breast, and asked her to lift her bra. When she complied, appellant fit the stethoscope under the underwire. Appellant told SSG CP to lie down, close her eyes, and relax.²¹

SSG CP testified that she was very anxious, and found it odd that appellant repeatedly stated that he could not hear her heartbeat.²² SSG CP's anxiety was causing her heart to pound, "like I could hear my heartbeat ringing in my ears."²³ She was watching the clock, and testified that the chest exam took approximately ten minutes.²⁴ At the conclusion of the chest exam, appellant asked how long SSG CP wanted a profile for, and ordered an orthotics boot. Appellant never examined SSG CP's foot.²⁵

¹⁹ R. at 258.

²⁰ R. at 259.

²¹ R. at 259-260.

²² R. at 260.

²³ R. at 260.

²⁴ R. at 264-264.

²⁵ R. at 266.

Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS
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 standard to determine 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."²⁶ "A specification is sufficient 'so long as [the elements] may be found by reasonable construction of other language in the challenged specification.'"²⁷ The question before this court is extraordinarily limited: what constitutes a "touching" for purposes of a violation of Article 120(d), Abusive Sexual Contact.²⁸ This is a question of law and statutory construction, and should be reviewed *de novo*.²⁹

Law and Analysis

I. The Army Court properly evaluated the term "touching", and came to a legal conclusion fully supported by context, plain language, congressional intent, and common sense.

The Army Court, upon appeal by the government, reviewed the military judge's dismissal of the Charge, after conviction for

²⁶ *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)).

²⁷ *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)).

²⁸ 10 U.S.C. § 920 (UCMJ).

²⁹ *United States v. Dear*, 40 M.J. at 197.

abusive sexual contact. In its decision to vacate the military judge's order, the Army Court addressed the scope of "touch" in the context of sexual contact, and abusive sexual contact.

The Amy Court's analysis started with the plain language of the charge itself. In Article 120(g), 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; 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.³⁰

It is the final sentence in Article 120(g) that raised the question of defining "touching." In reaching the legal conclusion that an offensive touch could be accomplished by an object, the Army Court found no ambiguity in the statute. The Army Court relied upon three recognized tools for statutory interpretation in its decision.

First, the offense does not require direct contact. The statute contemplates various levels of separation between the offer and the location of the battery on the victim. Second,

³⁰ *United States v. Schloff*, ARMY No. 20140708 at p. 3 (Army Ct. Crimp. App. 16 DEC 2014) (citing 10 U.S.C. § 920(g), UCMJ).

the term "touch" should be interpreted to maintain consistency throughout the Uniform Code of Military Justice. Article 128, assault, relies upon the definition of "touch" to explain the criminality of the act. The difference between a battery under Article 128 and abusive sexual contact under Article 120 is the sexual nature of the unlawful touch, affected on one of the enumerated body parts of the alleged victim. Finally, the plain meaning of the statute is clear and unambiguous. The Army Court found that the provision, "'touching may be accomplished by any part of the body' is unambiguously permissive and not exclusive."³¹

II. The military judge's limited interpretation of the statute was overly narrow, and failed to consider the totality of Article 120, UCMJ, and the equally applicable definitions of "touch" in Article 128, UCMJ.

In his post-trial ruling, the military judge found that the language of Article 120(g), "'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."³² The military judge narrowly interpreted the term "touching" to a portion of the explanatory definition in Article 120(g)(2). This fails to consider the remainder of Article 120, or other

³¹ *United States v. Schloff*, ARMY No. 20140708 at p. 5 (Army Ct. Crimp. App. 16 DEC 2014) (citing 10 U.S.C. § 920(g), UCMJ).

³² MJ Ruling, AE LXXI.

references to the term "touching" in either the Uniform Code of Military Justice or the Manual for Courts-Martial.³³

The military judge's reading is too narrow. A statutory definition must be considered within its full context. This ruling ignores Congress' use of the words, "any sexual contact," and erroneously creates a rule of exclusivity in a statute that was expressly drafted to avoid such limitations. Abusive sexual contact is defined and designed to encompass those sexual offenses that should not be tried as a rape or sexual assault, but are nonetheless criminal. The final sentence, "may be accomplished by any part of the body" is additional language, which starts with "any touch... directly or through the clothing... if done with an intent to arouse."³⁴

The military judge mistakenly expected Congress to articulate every conceivable method of the offense in the general definition of a crime. Doing so ignores Congress' use of the word "may." Plain language and statutory interpretation makes clear that Congress intended this additional language to expressly include touchings that may be accomplished by a part of the assailant's body, but does not fully rise to the level of rape or the greater sexual assault. "May" is a permissive term, one chosen by the legislature to express its intent to separate offenses of a sexual nature from any other possible theory of

³³ 10 U.S.C. § 920(g)(2), UCMJ.

³⁴ 10 U.S.C. § 920(g)(1)(B), UCMJ.

criminal liability under the code. Congress did not use "will" or "shall" when stating that abusive sexual contact may be accomplished by any part of the body. It can be presumed that the lack of prohibition or other limiting language was deliberate. With the revisions to Article 120, Congress expanded the strict definitions of penetrative sexual assaults, allowing for criminal liability under Article 120 for other criminal sexual conduct. This deliberate expansion of criminal culpability cannot reasonably be interpreted to include such draconian limits that would result from affirmation of the military judge's interpretation of the word "touching."

A. Congress intended the 2012 revisions of Article 120 to clearly distinguish sexual assaults from all other offensive touching.

Article 120 was reorganized, effective October 1, 2007. This revision separated crimes of penetration by force (rape), bodily harm (sexual assault), and the crime of aggravated and abusive sexual contact. Both aggravated sexual contact and abusive sexual contact are broadly scoped. Each serves as a catch-all for the more serious penetrative offenses. Abusive sexual contact includes any "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."³⁵ However, the October 1, 2007 Article 120 limited penetrative assaults to that

³⁵ 10 U.S.C. § 920(c), UCMJ.

accomplished by intercourse, meaning a touching between penis and the vulva.

The 2007 statute did not have a definition of "touching" included in the explanatory language or further reference in the statute. However, there was a definition of "sexual act" which was expressly limited to contact "between penis and the vulva" for crimes of rape, and "penetration... of the genitals by hand, finger or object" for crimes of aggravated sexual assault, as well as the other sub-categories of criminal sexual acts.³⁶ The language "or an object" was still present in the definition of sexual act.

This ambiguity was addressed in June 2012, with the language at issue in this case, "may be accomplished by any part of the body."³⁷ In the plain language of the charged offense, abusive sexual contact expressly includes any offensive sexual touching that does not include penetration, but would otherwise be an sexual act as defined in Article 120(b) (sexual assault).³⁸

Article 128 is the source definition for bodily harm as "any offensive touching of another, however slight."³⁹

In contrast, sexual assault is distinguishable from the crime of assault and assault consummated by a battery only by the location of the harm on the victim's body. Article 128,

³⁶ 10 U.S.C. §920(t)(1) and (2), UCMJ (2007).

³⁷ As added to the explanatory definition in 10 U.S.C. 920(g)(2)(B).

³⁸ 10 U.S.C. § 920(g)(1), UCMJ.

³⁹ 10 U.S.C. § 928(c)(1)(a), UCMJ.

assault, defines "bodily harm" as "any offensive touching of another, however, slight, including any nonconsensual sexual act or nonconsensual sexual contact."⁴⁰ Article 120 offenses are limited to contact on the genitals, anus, buttocks, inner thigh, and breast, or any touching of "any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person."⁴¹

B. There is a clear relationship and interplay between assault, sexual assault, and abusive sexual contact. This Court should recognize the substantive distinction, rather than a restrictive interpretation that is limited to one explanatory paragraph without context or reference to the full statutory scheme.⁴²

Abusive sexual contact is a lesser form of sexual assault, and includes nonconsensual sexual contact with other parts of the victim's body, not just the genitals.⁴³ As the Army Court

⁴⁰ 10 U.S.C. § 920(g)(3).

⁴¹ 10 U.S.C. § 920(g)(2)(A) and (B), UCMJ. While not controlling on this Court, the analysis to the 2012 Article 120 outlines the distinctions between abusive sexual contact and any other unlawful sexual contact *Manual for Courts-Martial* (hereinafter MCM), United States (2012) Ed.), Analysis, App. 23. "Committing a sexual act upon another person by causing bodily harm constitutes Sexual Assault under Article 120(b) if the bodily harm consists of any offensive touching." "Abusive Sexual Contact is intended to cover act where the sexual contact was committed in the same manner as a sexual act. Therefore, if sexual contact constitutes "bodily harm" (any offensive touching), then it will be considered Abusive Sexual Contact." (Id. at p. A23-15, para. 45).

⁴² As the Army Court pointed out, the Analysis to the MCM mentions many terms used in Article 120 "such as 'unlawful' and 'force' have been changed to align with the interpretation of those same concepts found in Article 128." (*United States v. Schloff*, ARMY Misc. 20140708 at 4 (citing MCM, App. 23, Analysis of Punitive articles, ¶ 4.5a at A23-15).

⁴³ 10 U.S.C. § 920(b), UCMJ. Article 120, sexual assault is distinguishable from Article 128, assault, only by the inclusion of specific body parts, i.e., the sexual body parts of either the victim or the assailant. There is no deviation from the language, "any offensive touching... however slight." (10 U.S.C. §928(c)(1)(a), UCMJ). It is the particularly humiliating and offensive nature of the sexual touch that elevates these intrusions beyond

cited, the United States Supreme Court has "adopted 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."⁴⁴

III. The military judge's limitation on the means of "touching" is inconsistent with statutory intent, as evidenced by the absurdity that will result.⁴⁵ As it stands, this decision negates the mens rea requirement of sexual assault, and focuses criminality on the weapon of choice.

Assuming this Court finds that the plain language is unclear, by not expressly including the language "or by an object," this Court should infer that was in fact the legislative intent. To find that Congress purposely excluded touching by an object would create an absurd result in the law. The facts in this case allow for a fairly desensitized and cerebral discussion of legal definitions, but the resulting decision will have a far-reaching impact. The military judge is questioning how a stethoscope can be used by a medical professional with the intent to arouse or gratify a sexual desire. The mens rea element is not an issue before this Court.

simple assault, or even assault involving grievous bodily harm, to a crime within Article 120.

⁴⁴ *United States v. Schloff*, ARMY Misc. 20140708, at 4 (Army Ct. Crim. App., 16 December 2014) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568-569 (1998)).

⁴⁵ See FN 43; the Analysis to Article 120 specifically states the intent to conform with the broad language of "bodily harm."

But to aid in this Court's analysis, change the nature of the object. For example, no reasonable person would question the sexual nature of pressing a vibrator or other adult sexual aid to a person's genitals, anus, groin, inner thigh, buttocks or breast. Similarly, no reasonable person would question the sexual nature of misusing a gynecological speculum during a well woman exam of the genitals. This context makes it easier to see how an object can be used by appellant for a deviant sexual thrill. Any object can be used with the intent to arouse or gratify the sexual desire of any person. With the 2012 Article 120, Congress eliminated the strict rule of exclusivity that restricted sexual touching to contact with genitalia, or accomplished by a hand or finger. This change moves the focus from how an offensive touch was committed, and now rests squarely on the intent of the person committing the act.⁴⁶

Appellant used his stethoscope to conduct a ten minute breast exam when the victim complained of a foot injury. Stage by stage, he advanced from listening to her heartbeat over the t-shirt, to under the t-shirt, then moving the t-shirt to expose SSG CP's breasts, then sliding the stethoscope beneath the underwire of SSG CP's bra. Appellant had SSG CP "relax and close her eyes". He looked at her lasciviously, and made several inappropriate and non-medical comments about her breasts

⁴⁶ See *MCM*, App. 23, Analysis of Punitive Articles, ¶ 45.a at A23-15.

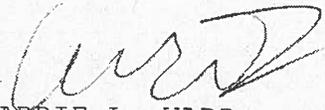
and physique, all while moving his stethoscope over the various fleshy parts of her breasts. The exam focused exclusively on SSG CP's breasts, yet resulted in a profile for her foot. SSG CP was never asked to describe her foot pain, nature or cause of her injury, or to take off her boot.

This is exactly the kind of case Congress envisioned when it codified a sexual assault achieved by "making a fraudulent representation that the sexual act serves a professional purpose."⁴⁷ Appellant is an officer. As found by the panel of officers, appellant abused his position within his battalion to commit a sexual assault on one of its female Soldiers. To negate those findings by an oversimplification of the term "touching" would be an absurdity and result in a miscarriage of justice.

⁴⁷ 10 U.S.C. § 920(b)(1)(C), UCMJ.

Conclusion

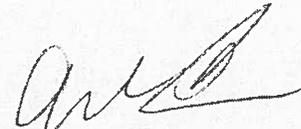
WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

for 

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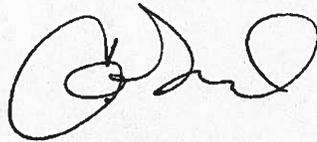
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January 15, 2015

Appendix I

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
COOK, TELLITOCCHI 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

JALS-GA

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

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 . . .”).

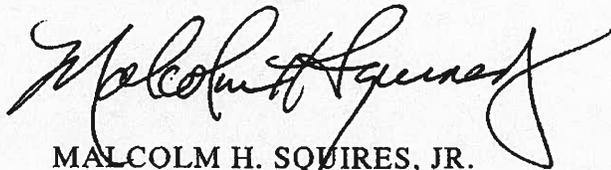
CONCLUSION

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 TELLITOCCHI concur.

FOR THE COURT:



MALCOLM H. SQUIRES, JR.
Clerk of Court

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) SCHLOFF, Christopher S.		2. SSN [REDACTED]	3. GRADE OR RANK 1LT	4. PAY GRADE O2	
5. UNIT OR ORGANIZATION Headquarters Support Company, Headquarters and Headquarters Battalion, Eighth Army, APO AP 96205			6. CURRENT SERVICE		
			a. INITIAL DATE 09 March 11	b. TERM 8 yrs	
7. PAY PER MONTH			9. DATE(S) IMPOSED N/A		
a. BASIC	b. SEA/FOREIGN DUTY	8. NATURE OF RESTRAINT OF ACCUSED			
4,771.90 \$2,193.90	\$50.00	None			
c. TOTAL					
4,821.90 \$2,193.90					

II. CHARGES AND SPECIFICATIONS

10. CHARGE: ^{MAB} VIOLATION OF THE UCMJ, ARTICLE 120.

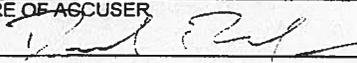
SPECIFICATION 1: In that First Lieutenant Christopher S. Schloff, U.S. Army, did, at or near U.S. Army Garrison – Yongsan, Republic of Korea, on or about 29 May 2013, commit sexual contact upon Captain C [REDACTED] S [REDACTED] to wit: touching with a stethoscope, the breasts of said Captain C [REDACTED] S [REDACTED] by making a fraudulent representation that the sexual contact served a professional purpose.

~~SPECIFICATION 2: In that First Lieutenant Christopher S. Schloff, U.S. Army, did, at or near U.S. Army Garrison – Yongsan, Republic of Korea, on or about 4 June 2013, commit sexual contact upon Staff Sergeant I [REDACTED] A [REDACTED], to wit: touching with a stethoscope, the breasts of said Staff Sergeant A [REDACTED] by making a fraudulent representation that the sexual contact served a professional purpose.~~ ^{MAB}

^{2, MAB} SPECIFICATION 3: In that First Lieutenant Christopher S. Schloff, U.S. Army, did, at or near U.S. Army Garrison – Yongsan, Republic of Korea, on or about 4 June 2013, commit sexual contact upon Sergeant C [REDACTED] E. P [REDACTED] to wit: touching with a stethoscope the breasts of said Sergeant P [REDACTED] by making a fraudulent representation that the sexual contact served a professional purpose.

(SEE CONTINUATION SHEET)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI) RIESENBERGER, Daniel W.	b. GRADE O3	c. ORGANIZATION OF ACCUSER HSC, HHB, EIGHTH ARMY
d. SIGNATURE OF ACCUSER 		e. DATE 22 Oct 13

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 22 day of October, 2013, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief

BRANDON S. JONES

Typed Name of Officer

HSC, HHB, Eighth Army

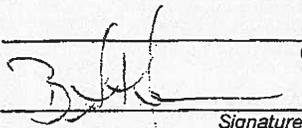
Organization of Officer

O3

Grade

Trial Counsel

*Official Capacity to Administer Oath
(See R.C.M. 307(b) – must be a commissioned officer)*


Signature

On 22 October, 2013, the accused was informed of the charges against him/her and of the name(s) of The accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

Daniel W. Riesenberger
Typed Name of Immediate Commander

HSC, HHB, EIGHTH ARMY
Organization of Immediate Commander

O3
Grade

[Signature]
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1430 hours, 22 OCT 13 2013 at HHB, EIGHTH ARMY
Designation of Command or

Eighth Army, APO AP 96205
Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

~~FOR THE~~

HEATHER J. CARLISLE
Typed Name of Officer

Commanding
Official Capacity of Officer Signing

O5
Grade

[Signature]
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY
HQ's, Eighth Army

b. PLACE
USAG-Y, KS

c. DATE
20140116

Referred for trial to the general Court-martial convened by Court-Martial Convening Order

Number 20, dated

7 September 2013, subject to the following instructions:² None

By Command of Lieutenant General Champoux
Command or Order

DONALD W. KRAMER
Typed Name of Officer

Senior Paralegal
Official Capacity of Officer Signing

E7
Grade

[Signature]
Signature

15.

On 21 January, 2014, I ~~(caused to be)~~ served a copy hereof on ~~(each of)~~ the above named accused.

Brandon S. Jones
Typed Name of Summary Court-Martial Officer

CPT / O3
Grade or Rank of Summary Court-Martial Officer

[Signature]
Signature

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken.
2 - See R.C.M. 601(e) concerning instructions. If none, so state.

CONTINUATION SHEET, DD Form 458 - 1LT SCHLOFF, CHRISTOPHER, [REDACTED]
[REDACTED], Headquarters Support Company, Headquarters & Headquarters Battalion, Eighth
Army, APO AP 96205

3 MB
SPECIFICATION ~~4~~: First Lieutenant Christopher S. Schloff, U.S. Army, did, at or near U.S. Army Garrison - Yongsan, Republic of Korea, on or about ~~4 June~~ *29 May* 2013, commit sexual contact upon Specialist A [REDACTED] A [REDACTED], to wit: touching with a stethoscope the breasts of said Specialist A [REDACTED] and did so by making a fraudulent representation that the sexual contact served a professional purpose. *MB*

~~SPECIFICATION 5: First Lieutenant Christopher S. Schloff, U.S. Army, did, at or near U.S. Army Garrison - Yongsan, Republic of Korea, on or about 3 July 2012, commit sexual contact upon Private First Class M [REDACTED] J.P. H [REDACTED], to wit: touching with hands the breasts of said PFC H [REDACTED] and did so by making a fraudulent representation that the sexual contact served a professional purpose.~~ *MB*

(END OF CHARGES)

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 P█████'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 P█████'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.

1 STAFF SERGEANT CAROLINE P [REDACTED], U.S. Army, was called as a witness
2 for the prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel:

5 Q. Staff Sergeant P [REDACTED], if you could do me a favor, please
6 state your name, rank, and current unit of assignment.

7 A. My name is Caroline Elizabeth P [REDACTED]. I am a staff
8 sergeant in the United States Army, and I am stationed at the United
9 States Army Japan base.

10 Q. Okay. Staff Sergeant P [REDACTED], how long have you been in the
11 military?

12 A. Combined, reserve and active-duty service, I have 11 1/2
13 years.

14 Q. What is your current MOS?

15 A. I am a 42R, an Army musician, sir.

16 Q. Okay. Staff Sergeant P [REDACTED], were you ever stationed in
17 Korea?

18 A. Yes, sir.

19 Q. Where in Korea were you stationed?

20 A. I was stationed here, on Yongsan.

21 Q. And do you recall what unit you were with?

22 A. Yes, sir. I was with the Eighth Army band.

1 Q. Okay. Staff Sergeant P [REDACTED], while you were here did you
2 ever have occasion to visit the Yongsan TMC?

3 A. Yes, sir.

4 Q. Do you recall a visit on or about, 4 June 2013?

5 A. Yes.

6 Q. Okay. When you were going to the TMC what was your chief
7 complaint?

8 A. I had injured my foot, sir, my right one.

9 Q. What happened when you arrived to the TMC?

10 A. I checked in with the receptionist. I was seated until the
11 nurse was ready to take my vitals. Then the nurse came and walked me
12 to their office and took my vitals.

13 Q. Okay. Did you talk to the nurse about anything in
14 particular?

15 A. Yes, I explained the symptoms that I had for my foot, and
16 then he took my blood pressure vitals and my temperature.

17 Q. Do you recall what those symptoms were that you described
18 to the nurse?

19 A. Yes. My--I had been experiencing a lot of pain in my right
20 foot, and it was also red, and tender, and swollen.

21 Q. And after the nurse took your vitals, did you recall
22 anything odd about your vitals?

1 A. No, I actually remember that-- I remembered what my blood
2 pressure was. Because I was in pain, I was worried that my blood
3 pressure was going to be elevated, but I remember that it was still
4 like 115/75, which is normal for me, so I was happy that my injury
5 wasn't affecting that, sir.

6 Q. Okay. Now after the nurse took your vitals did he do
7 anything with your vitals?

8 A. He put them into the computer.

9 Q. You observed him typing them into the computer?

10 A. Yes.

11 Q. Okay. While you were interacting with the nurse how did
12 you feel?

13 A. I was in pain, so I was uncomfortable, but the--I remember
14 the nurse was very very formal with me. I felt very respected by
15 him. I knew every statement that he said to me, and he referred to
16 me as Sergeant. It was like a very formal evaluation.

17 Q. All right. What happened after that?

18 A. After that he said that the doctor was still seeing another
19 patient so he had me go sit in the waiting room to wait until the
20 room was open.

21 Q. What happened next?

1 A. He came back once to tell me that the doctor was still
2 seing a patient, and then some time later he came back and got me and
3 brought me into the-- Lieutenant Schloff's examining room.

4 Q. Was Lieutenant Schloff in the room when you walked in?

5 A. No.

6 Q. How long were you in there by yourself, do you recall?

7 A. Just a second, not too long, sir.

8 Q. So then what happened?

9 A. I was sitting in the chair by the computer and Lieutenant
10 Schloff asked me about my foot. He reviewed what I had told the
11 nurse about the pain I was having, and then he asked me what my pain
12 level was. I engaged in a discussion with him telling him that this
13 was a recurring injury, that I had it before, and I remembered having
14 it five years prior, and that I believed that it was a stress
15 fracture on my foot.

16 Q. Okay. Now, prior to this had you had any interaction with
17 Lieutenant Schloff?

18 A. No, sir.

19 Q. And how did you feel at this point during your discussion
20 with Lieutenant Schloff?

21 A. Fine. I was still in pain but nothing was abnormal.

22 Q. What did Lieutenant Schloff do next?

1 A. He told me that the nurse had--you know, he had gone
2 through what the nurse told him about my foot, but then he told me
3 that the nurse had not given him my vitals and he asked if they were
4 taken, and I said yes they were. He didn't make any attempt to go
5 get them, he just said,

6 "Okay well we should check your heart and lungs anyways because
7 you're new to Korea."

8 Q. Did you know what he meant by that, when he said that?

9 A. No, sir.

10 Q. Did he explain why?

11 A. No. No, but I--it didn't strike me as peculiar, because I
12 was new to Korea. I had never been to Asia before. I didn't know if
13 there was something here that might affect your heart, or you know
14 that might affect your health differently than in the U.S., so I
15 thought that might be a good--a kind gesture.

16 Q. You took him at his word?

17 A. Yes, sir.

18 Q. What did Lieutenant Schloff do next?

19 A. He asked me to take off my ACU top, so he could examine my
20 heart and lungs.

21 Q. Once you removed your top did he say anything to you?

22 A. Yes, when I removed my top he had said that it may be hard
23 to hear my heart because I was skinny and he said that that's common

1 with women and Katusas. Which I thought at this point was kind of
2 peculiar. I was wearing a wicking tan T-shirt and the smallest size
3 that they sell was fairly large on me, so I thought it was a really--
4 it seemed inappropriate to me but I thought it was a peculiar comment
5 because I had this huge draping shirt on me.

6 Q. Now once he made this comment--I'm sorry--when he made this
7 comment did you feel as though it was a compliment?

8 A. I wasn't sure at that point. It seemed inappropriate from
9 a medical professional. It didn't seem as though it was related to
10 my medical status.

11 Q. So at the point where that comment was made how were you
12 feeling now sitting in that room?

13 A. That's when I started to feel uncomfortable, because I had
14 felt as though he made that comment because he had looked--he was
15 looking at me maybe inappropriately. Like he might've noticed then
16 like--I mean the way--the way a baggy T-shirt is going to drape off
17 someone who--like a woman with breast--like. I felt like he was
18 looking at me inappropriately at that point.

19 Q. Okay. So what did Lieutenant Schloff do next?

20 A. He asked me to untuck my T-shirt and I did.

21 Q. And at this point during your discussion with Lieutenant
22 Schloff where were you in this room?

23 A. I was going to sit on the examining table.

1 Q. So, before he asked you to untuck your shirt did you go sit
2 on the table or do you recall?

3 A. I think when I went to go get my heart and lungs examined I
4 went over to the table and removed my ACU top, then untucked my
5 shirt.

6 Q. So at this point are you sitting on the bed in the room?

7 A. Yes, sir.

8 Q. Okay. And where is Lieutenant Schloff in relation to you?

9 A. He was a few feet from his computer. I remember the first
10 time he called me skinny he was standing in front of me, so he had
11 already gotten off of his computer.

12 Q. So now you're sitting on the examination table. Your shirt
13 is untucked, is that correct?

14 A. Yes, sir.

15 Q. What did Lieutenant Schloff do after that?

16 A. He reached--or he asked me to pull my shirt up, so I--I
17 remember I pulled it up--about midway and I remember thinking in my
18 head that I--I didn't think that anybody was going to see me that day
19 so I wasn't wearing like--I was wearing one of like my least favorite
20 undergarment and I remember feeling a little bit embarrassed that
21 somebody else was going to see this. And that's--at that point he
22 had me lift up my shirt he commented again that I was skinny and it
23 might be hard to hear my heart.

1 Q. Okay. How did you feel when he said it again?

2 A. Even more--I started to get even more uncomfortable. Then
3 it was like clear that he was looking at me and that really--in my
4 opinion had nothing to do with the examination.

5 Q. And what did Lieutenant Schloff do next?

6 A. He--I had my shirt lifted, he reached under my, under my
7 shirt to examine my lungs first--I didn't even know what he was
8 examining. He had asked me to breathe in and out deeply, and then he
9 told me that I could stop breathing that way that he was going to--
10 that he was examining my heart then.

11 Q. So as this was happening was he walking you through the
12 process of what he was doing?

13 A. As much as most doctors do during a heart or lung exam. At
14 first he asked me to breathe in and out deeply like you do when their
15 examining your lungs, but then instead of--in my experience, they
16 examine your lungs in completion and then go to your heart. He just
17 kind of slid the stethoscope down more to examine my heart at that
18 moment.

19 Q. So when you say down more, where was he placing the
20 stethoscope?

21 A. The stethoscope was on the inner lower portion of my
22 breast.

1 Q. So at this point where are your hands? How are you holding
2 your shirt?

3 A. I was holding my shirt up with my left hand. And he was on
4 my left side.

5 Q. I'm sorry--would you mind demonstrating where the bell of
6 the stethoscope is on you at this point?

7 A. Sure. The stethoscope was like--like on my lower--my inner
8 lower portion of my breast so--between my chest and my nipple on the
9 inner portion.

10 **[The witness placed her right hand over her uniform to indicate where**
11 **her hands were during the examination.]**

12 Q. Is it on the fleshy portion of your breast?

13 A. Yes, sir. On the very--the fleshy portion, not--on
14 previous exams like--the stethoscope is--on previous heart exams that
15 I've had, the stethoscope has been on my breast but it's never been
16 on that lower portion, it's always been higher on my sternum. So
17 it's in the lower inner half of my breast.

18 Q. And to get to this portion of your breast had you moved you
19 bra at all?

20 A. No. No, sir.

21 Q. So what did Lieutenant Schloff do next?

22 A. He told me that he was having difficulty hearing my
23 heartbeat--that he could hear a beat but he couldn't hear consecutive

1 beats, and he said that it could be from interference from my T-shirt
2 or from my bra. So he asked if I could lift my T-shirt higher
3 because at that point I was only lifting my T-shirt up to midway, so
4 that I wasn't really exposing myself very much, and then I lifted my
5 T-shirt up over my breast.

6 Q. So what was Lieutenant Schloff doing at this point?

7 A. Well, he still had the stethoscope on my breast and he said
8 that he could not hear my heartbeat and that it might be easier if I
9 lied down.

10 Q. And how did you feel about that?

11 A. I was starting to get really uncomfortable. When I was
12 exposing myself here, it had been a couple of minutes that had
13 passed. I was starting to get concerned just because I've never had
14 a problem with my heart, and in my head I was starting to wonder if
15 maybe there was something wrong.

16 Q. So at this point he asked you to lie down on the table?

17 A. Yes, sir.

18 Q. Are you still holding your shirt up at this point?

19 A. Yes.

20 Q. And what is Lieutenant Schloff doing?

21 A. Well, I lie down and he continues his examination on--I
22 apologize there's--may I--may I?

23 Q. Sure.

1 A. Sorry, before--I'm trying to walk through it step-by-step.

2 While we are still--while I'm still seated upright he
3 continues his examine and also goes from underneath my breast to
4 examine another portion of my heart. Which at that point--that's
5 happened many times before but that's when I lifted up my bra
6 underneath just for him to get the stethoscope under my underwire.

7 Q. Did you do this because he asked you to?

8 A. Yes, that's, yes. That didn't make me uncomfortable.

9 Q. So what happened next?

10 A. That's when he said he was still having trouble hearing my
11 heart, and that's when he asked me to lie down.

12 Q. At the point where he asked you to lie down, approximately
13 how long had this what he called an examination been going on?

14 A. At least a couple of minutes, three, four, or five minutes,
15 at that point.

16 Q. So what happens now that you are lying down?

17 A. He goes back to the inner lower right portion of my breast
18 and supposedly he is still having trouble hearing my heartbeat and it
19 might help if I relaxed. And if I turn my head away from him and
20 closed my eyes, that that would help me relax. So I--at this point,
21 this isn't making any sense to me. My heart is like pounding as hard
22 as it can be. I don't understand how, like I could hear my heartbeat
23 ringing in my years, so. I was trying to get this over with so I

1 turn my head to the right and he--I did not close my eyes because
2 that was like my last sense that I was going to lose and I--he
3 insisted then like it really would help if you would close your eyes.

4 Q. Did he ask--why did he ask you to do this?

5 A. Because it would help me relax and then he would be able to
6 hear my heart.

7 Q. Did he notice that you were uncomfortable?

8 A. I don't know, sir.

9 Q. Okay. So what did you do after he said that?

10 A. I closed my eyes.

11 Q. Why did you do that?

12 A. I feel like--at first--like, I don't like to argue with
13 medical practitioners because I'm not an expert and maybe there is
14 some tactic that he knows that I don't. And then second--when I
15 communicate with an officer or someone of higher rank that I respect
16 if I don't agree with something usually I will politely try to refuse
17 and then I'm just going to listen, so by turning my head and not
18 closing my eyes I think it was pretty clear that I did not want to do
19 that, but at that point like I'm just going to close my eyes and get
20 this over with, and get out of--get out of that appointment as
21 quickly as possible.

1 Q. Let's go back for a second. You had said earlier that
2 Lieutenant Schloff had said that your bra was or your shirt could
3 make noise?

4 A. Yes.

5 Q. With regard to your bra, did he say anything to help you or
6 to try and help hear your heart better?

7 A. Did he say anything, sir?

8 Q. Concerning your clothing did he ask you to do anything with
9 it to help him hear your heart better?

10 A. --At that point, when I was turning and facing away--he
11 asked if I could lift my bra up, I guess like to--so the stethoscope
12 wouldn't interfere as much, I guess. At that point, I was turning
13 away, I couldn't see, my eyes were closed, and I just knew that a lot
14 of me was exposed because I could feel like cold air on my breast. I
15 could feel like just the open air but my eyes were closed and my head
16 was turned. I don't know what was going on.

17 Q. Okay. Where was the stethoscope while this was happening?

18 A. On my breast the whole time, sir.

19 Q. And again would you mind demonstrating for the members how-
20 -where that is?

21 A. Would you like me to point that's where?

22 Q. Yes, please, if you could.

23 A. Okay, okay, thank you. I just wanted to clarify.

1 It was right here the whole time [pointing towards the
2 lower left portion of her left breast below the nipple].

3 MJ: You have to describe that for the record if you're going to
4 have her point to something, okay?

5 TC: Yes, sir. Roger, sir.

6 Q. And so what you were touching just now, Staff Sergeant
7 P [REDACTED], that was the lower portion of your left breast just below you
8 nipple?

9 A. Yes, sir.

10 Q. So you said as your lifting your bra you felt cold air
11 coming in, is that correct?

12 A. Yes, sir.

13 Q. Could Lieutenant Schloff based on your estimation of how
14 far out your bra was, could he see your breast?

15 A. Yes, most definitely.

16 Q. Okay. Could you tell where he was looking?

17 A. No. My face was turned and even before I turned my face I
18 just--I think when I get uncomfortable or upset I kind of like stare--
19 -I was just staring straight ahead at that point, before I turned and
20 closed my eyes.

21 Q. You said previously that you discussed your pain levels
22 with Lieutenant Schloff, is that correct?

23 A. Yes, sir.

1 Q. Do you recall approximately how much you told him your foot
2 was hurting?

3 A. I don't remember.

4 Q. You said it was----

5 A. I know it was substantial because I did think that my blood
6 pressure was going to be affected by it. I was in a substantial
7 amount of pain but I don't recall what number on the Army pain scale
8 I gave him.

9 Q. So when you went to the TMC that day you were in a
10 substantial amount of pain, that's fair to say?

11 A. Yes, sir.

12 Q. What did Lieutenant Schloff do next after you had--after
13 you exposed yourself?

14 A. He said that he could hear my heart and everything sounded
15 normal, and he motioned for me to get up when the exam was over. As
16 I was pulling myself up on the table, he put his hand on my back to
17 help me get up which further made me uncomfortable.

18 Q. Do you recall approximately how long what Lieutenant
19 Schloff called an exam took?

20 A. About 10 minutes. At this point I was watching the clock.

21 Q. And up to this point you had had heart and lungs exam
22 before in your life?

23 A. Yes, sir.

1 Q. Had any of them ever made you feel uncomfortable?

2 A. No, sir.

3 Q. For any of those heart and lung exams have you ever had to
4 expose yourself?

5 A. No, sir. In every other heart and lung exam I've had, in
6 the upper portion of the exam the provider has gone in from the top
7 of my shirt. And in the lower portion underneath my breast, they
8 have gone in from the bottom, but they have never-- I've never had an
9 exam where it was over my breast.

10 Q. Do you have a history of heart issues or anything like
11 that?

12 A. No, sir.

13 Q. In your previous heart and lung exams did anyone ever tell
14 you that it was difficult to hear your heart?

15 A. No, sir.

16 Q. At the point where Lieutenant Schloff helped you up, how
17 were you feeling?

18 A. I'm not really sure. I was just really, really
19 uncomfortable, and upset.

20 Q. Why?

21 A. I can't really say why, at that point I just wanted to get
22 out of there.

1 Q. Did Lieutenant Schloff ever say anything to you about a
2 chaperone?

3 A. No, sir.

4 Q. What happened next in Lieutenant Schloff's office?

5 A. He went back to his computer and I moved back to the chair
6 in front of his computer, and he started asking me about how long I
7 wanted a profile for my foot.

8 Q. Do you recall what you told him?

9 A. I think I said that my previous injury that I had, had
10 healed about like three weeks or so, so I was given a three-week
11 profile.

12 Q. What did he say or do at that point?

13 A. He issued me orthotics, so I went down the hall to get
14 fitted for the orthotics. He said that that may help with the pain.

15 Q. At any point during this exam did Lieutenant Schloff ask
16 you to take your boots off?

17 A. No, sir.

18 Q. At any point during this examination did you happen to take
19 your socks off?

20 A. No, sir.

21 Q. The profile that you received from Lieutenant Schloff was
22 it correct?

1 A. No, sir. It was written for my left foot, and I had went
2 in for an injury on my right foot.

3 TC: Sir, may I have one moment please?

4 MJ: You may.

5 ATC: I'm sorry, Your Honor, may I just have one moment with my
6 co-counsel? I'm sorry about that. Oh, I'm sorry, my bad.

7 **[The trial counsel conferred with his co-counsel.]**

8 Q. Staff Sergeant P [REDACTED], let's back up a little bit. During
9 the lung exam that Lieutenant Schloff did, did he do the examination
10 on your back or your front, how did that go?

11 A. It was only done on my front. It was the beginning of the
12 exam he reached up over my breast to do the lung exam, and then moved
13 right down to my heart. He didn't go to my back at all.

14 Q. So, to listen to your lungs he--can you show where that was
15 please?

16 A. It was a normal lung--like he had me lifting my shirt at
17 that point and reached up over my breasts onto my----

18 Q. Okay, to the top portion of your chest, just above your
19 breasts?

20 A. Yes, sir.

21 Q. And he only used a stethoscope to do this?

22 A. Yes, sir.

1 Q. When Lieutenant Schloff asked you to turn your head and
2 close your eyes which direction did he ask you to look?

3 A. To the right.

4 Q. Where was he?

5 A. He was to my left.

6 Q. He asked you to look away from him?

7 A. He--yes. Yes, sir.

8 Q. And when you moved--I'm sorry. When your bra was moved so
9 that he could continue again what he considered to be an examination
10 who moved your bra?

11 A. He had asked me to help move it so that there was no
12 interference.

13 Q. Okay. So he told you to move your bra?

14 A. Yes. He kept saying that there was interference from the
15 shirt or the bra so overtime he kept asking me to lift my shirt
16 higher or to expose more of myself.

17 Q. And just to clarify, he did not ask you to take your boots
18 off, is that correct?

19 A. No, he did not, sir.

20 Q. While you were in the room did he try to examine your foot
21 through your boots?

22 A. No, sir.

23 Q. Neither your left nor your right foot, is that correct?

1 A. Neither one of my feet were examined.

2 TC: No further questions, Your Honor.

3 MJ: Go-ahead, Defense.

4 DC: Okay, thank you.

5 **CROSS-EXAMINATION**

6 **Questions by the defense counsel:**

7 Q. Sergeant, good afternoon.

8 A. Afternoon, sir.

9 Q. You went there because you were experiencing pain as well
10 as the recurring foot injury, is that correct?

11 A. Yes, sir.

12 Q. And you told Lieutenant Schloff that you felt like a 5 on
13 the 10 scale of pain?

14 A. I do not remember that, sir, what pain level.

15 Q. Okay. You did get a profile for three weeks?

16 A. Yes, sir.

17 Q. And in addition to the inserts and ice you got a
18 prescription for Meloxicam to be taken daily for inflammation.

19 A. I--I think that is incorrect, sir. All that I remember is
20 the inserts, sir.

21 Q. No, but you--you got a little bit more than just--you got
22 some expertly information.

23 A. Sure, sure I did.

1 Q. And you filled the prescription?

2 A. I don't think I did, sir.

3 Q. Okay.

4 A. I was so uncomfortable, I left as soon as I could.

5 Q. So, at no point did you fill this prescription for the
6 inflammation?

7 A. To be honest, sir, I do not remember.

8 Q. Okay. When you presented to Lieutenant Schloff you told
9 him that you--when he was asking you about the foot you told him that
10 you had mild redness on the foot area?

11 A. I don't understand what that means, sir.

12 Q. While the--the----

13 A. Oh, redness? I thought you said redness.

14 Q. Yes.

15 A. Yes, sir, I had mild redness.

16 Q. Okay. You told him that.
17 You told him that there was tenderness if you pushed here
18 and I'm pointing to the arch of my foot, so, is that right?

19 A. I don't believe so, sir. It felt--at that time it really
20 felt like the bone injury, like a stress----.

21 Q. Yes, but did you tell him that if you pushed on a part of
22 your foot whether it was the arch or not that you felt tenderness and
23 pain?

1 A. Yes. If I--if I press on the spot, yes that it hurt, sir.

2 Q. Okay. Very good, thank you.

3 And that if there was a motion you also experienced pain.

4 And I am thinking that by motion either walking or if you are

5 twisting your foot or those kind of things.

6 A. All these were discussed when he was discussing what the

7 nurse went over with me.

8 Q. I understand----

9 A. Yes.

10 Q. Sorry, I understand but these are things that you told him?

11 A. These were things that were reviewed that I had said to the

12 nurse.

13 Q. Okay. And you agreed with them?

14 A. Yes, sir. That is correct.

15 Q. So you were confirming with him what he already had

16 information wise as to some of the nature of the symptoms that you

17 were experiencing?

18 A. yes, sir.

19 Q. You were in fact--you--were new to Korea you had only been

20 here couple of months at the time?

21 A. Two weeks, sir.

22 Q. Two weeks, okay.

1 And that is the first time that you had seen Lieutenant
2 Schloff as a patient?

3 A. Yes, sir.

4 Q. During the course of the examination, he did tell you at
5 times what he--the problem that he was having and explained what he
6 needed--and that's why he was asking you to do some additional--
7 movement and going down on your back, those kind of things?

8 A. Can you----

9 Q. Sure. I think one of the things that you said was that he
10 told you he wasn't hearing consecutive heartbeats and he needed to---
11 -

12 A. Yes.

13 Q. Okay, so he was giving an explanation of what was happening
14 of concerning him?

15 A. Yes, sir.

16 Q. So he was giving you some explanation?

17 A. Yes, sir, about hearing one heartbeat

18 Q. Okay. And that he--at various times told you that he could
19 not hear and that is what ultimately led him to have you lay down on
20 your back?

21 A. --I don't know if it was that he could not hear, but he
22 could not hear consecutive heartbeats; that was the reason for lying

1 down on my back not the interference because of right or down my
2 shirt and bra were still going to be there.

3 Q. You mentioned that--did you ask for a chaperone?

4 A. No, sir.

5 Q. If the judge will allow it, could you stand up please?

6 MJ: You may.

7 [The witness did as directed.]

8 Q. Okay. If you could point again once again to the place
9 where you were showing Captain Jones where the stethoscope was.

10 A. It was right here.

11 [The witness placed her right hand just below the top button of her
12 ACU coat 2 inches to the right.]

13 Q. Okay. The witness is--just told that there if you would
14 for a second, please.

15 The witness has got her right hand across. She is between
16 the top and the next button, middle, and about 2 inches to the--as I
17 am facing her, about 2 to 3 inches to the right of the buttons.

18 And that's where you mean it to be?

19 A. Yes, sir.

20 Q. Okay. Thank you, if you could have a seat.

21 [The witness did as directed.]

22 Q. What size jacket do you wear, please?

23 A. I don't know, sir.

1 Q. Okay. Were there other places that he touched, in other
2 parts of your chest, your sternum, as part of this exam?

3 A. There was a long examination which was higher

4 Q. Uh-huh.

5 A. And then there was the heart--the upper part examination
6 which was on my lower-inner portion of my breast. And then there was
7 the other part of the hard examination which was just on my sternum
8 under my under wires as I normally experienced during hard exams.

9 Q. Okay.

10 A. This did not strike me as odd, it was the portion that was
11 on my breast that made me feel uncomfortable.

12 Q. Okay. You mentioned that you had not had heart problems
13 before?

14 A. No, sir.

15 Q. Okay. Can heart problems occur suddenly?

16 A. I don't know, sir.

17 Q. Could heart problems develop within a period of time and
18 the individual not know it?

19 A. I don't know much about heart problems, sir.

20 Q. Okay. --Would it be good to identify a problem early as
21 opposed to let it happen?

22 A. Of course.

1 Q. Would you prefer to know today that you have a heart
2 problem as opposed later when it happens?

3 A. Very much, sir.

4 Q. Okay. Do you agree that preventative medicine is good?

5 A. Yes, sir.

6 Q. In other words, the more that we can do to identify a
7 medical problem while the person is young and maintain that, that is
8 good for the individual, is that right?

9 A. Yes, sir.

10 Q. And that would in a sense be good for the Army because we
11 keep people healthy?

12 A. Yes, sir.

13 DC: Okay. Thank you very much. Thanks, Judge.

14 TC: One second, Your Honor, please.

15 Q. Staff Sergeant P██████, I just want to clarify, you went
16 over the things that you told the nurse with Lieutenant Schloff, is
17 that correct?

18 A. Yes, sir.

19 Q. But he never touched your foot?

20 A. No, sir.

21 Q. And he never observed any redness?

22 A. No, sir.

23 TC: Thank you. No further questions, Your Honor.

1 MJ: And does any member have any questions for the witness?

2 All right, apparently there is one question. So again, Colonel
3 Smith, if you could write that out on one those forms, and just sign
4 your name at the bottom, and put your name on the bottom. And
5 Bailiff, as soon as she is done with that, please bring it to the
6 court reporter.

7 [All parties did as directed.]

8 EXAMINATION BY THE COURT-MARTIAL

9 Questions by the military judge:

10 Q. All right, this question is on Appellate Exhibit XLV, it's
11 from Lieutenant Colonel Smith.

12 Sergeant P [REDACTED], the question is if you felt uncomfortable
13 about Lieutenant Schloff's examination why didn't you request is
14 chaperone?

15 A. I didn't--I felt more and more uncomfortable as the visit
16 went on, and to be honest and never occurred to me. I've never taken
17 a chaperone to any appointment. I've never felt uncomfortable having
18 a male doctor even if it's for female issues. It never occurred to
19 me to the point--and once I started feeling uncomfortable--I couldn't
20 really put my finger on exactly what was making me feel uncomfortable
21 at the time. I just had this growing knot in my stomach. It wasn't
22 until I left the appointment and processed what had just happened
23 that I realized that--how wrong the examination, and how it made me

1 feel. To be honest it didn't even occur to me. At that point in the
2 appointment I was ready--midway through this long hard examination,
3 if anything I wish I just had asked to stop. But at the beginning of
4 the appointment it didn't occur to me that I would need a chaperone.
5 I trusted Lieutenant Schloff. I always trusted other Soldiers or
6 medical professionals. Now I ask for a chaperone. Now my husband
7 goes with me to my appointments.

8 Q. All right. Thank you.

9 A. Thank you, sir.

10 Q. Colonel Smith, does that answer your question?

11 Member [LTC Smith]: Yes, sir. Thank you.

12 MJ: Any other questions from the members? All right, we do
13 have one more.

14 Bailiff, if you could get that question as well.

15 **[The bailiff did as directed.]**

16 WIT: May I add to that question, sir, Your Honor?

17 MJ: You may.

18 WIT: Okay. Now that I am thinking about it, the other--other--
19 like I said, I've never--I had never asked for a chaperone to but
20 this issue was a foot issue. So I--like I had said in my--in the
21 questioning, I did not think that anybody was going to look under my
22 shirt that day or anything. I thought if anything just my foot would
23 be examined that day.

1 Thank you, Your Honor.

2 MJ: All right. And this next question is Appellate Exhibit
3 XLVI, it comes from Major Matsuzaki.

4 Q. The question is, was Lieutenant Schloff your primary care
5 manager or just a person available at sick call or at the TMC that
6 day?

7 A. Sir, he was my primary care manager. It was my first time
8 meeting him, sir.

9 MJ: All right, any other questions from any of the members?

10 All right, we do have another one. Bailiff, can you also
11 get this one.

12 **[The bailiff did as directed.]**

13 MJ: All right, this question is on Appellate Exhibit XLVII, and
14 it is a question from Lieutenant Colonel Vasquez.

15 Q. The question is, did you witness the nurse discuss with
16 Lieutenant Schloff your vitals?

17 A. No, sir.

18 MJ: Does that answer your question?

19 MEMBER [LTC Vasquez}: Yes, sir.

20 MJ: Okay.

21 TC: Your Honor, I'm sorry. Based on that question may I ask a
22 follow-up?

23 MJ: In just a moment.

1 Members, any other questions?

2 [The members indicated a negative response.]

3 MJ: All right, apparently not. Government, yet questions?

4 TC: Yes, Your Honor. Just that one.

5 **REDIRECT EXAMINATION**

6 **Questions by the trial counsel:**

7 Q. Staff Sergeant P [REDACTED], when the nurse was taking your
8 vitals you watch him put them into the computer, is that correct?

9 A. Yes, sir.

10 TC: Thank you. No further questions, Your Honor.

11 DC: I do. Can I get something marked, Judge?

12 MJ: Yes.

13 **Questions by the defense counsel:**

14 Q. So, this being your first visit to the clinic at all here
15 on Yongsan is that correct?

16 A. Other than in-processing. Yes, sir.

17 Q. Understood. So this would be one of the first
18 opportunities to get a baseline of your current health at the time,
19 is that right?

20 A. Yes, sir.

21 DC: Okay. Could I show the witness?

22 MJ: You may.

23 DC: Take a look at this if you would please.

1 [The defense counsel provided Defense Exhibit D for ID to the
2 witness.]

3 MJ: Can you just announce what that was marked as.

4 DC: I could. It's Delta, Your Honor. I've just shown the
5 witness Defense Exhibit D for identification, I apologize.

6 Q. Sergeant P [REDACTED], do you recognize that as a picture of the
7 room you went to?

8 A. I can't say if it's the exact room, but it looks--all I
9 remember is the computer desk area and the chair and it is in the
10 same place. Yes, sir.

11 Q. Right. And the table that we have all been talking about
12 is that in the left hand side corner. That is a standard examining
13 table. It's got the white rollout sheet of paper, is that right?

14 A. Yes, sir.

15 Q. So let me retrieve that.

16 [The defense counsel retrieved Defense Exhibit D for ID from the
17 witness.]

18 DC: And I am going to ask about this be admitted as Defense
19 Exhibit D, Your Honor.

20 MJ: Any objection?

21 TC: No, Your Honor.

1 MJ: Well, I'll give it back to you if you need it. Defense
2 Exhibit D for identification is admitted as evidence as Defense
3 Exhibit D.

4 Q. And if I understood you correctly you mentioned that when
5 you were on your back he asked you to turn your head to the left?

6 A. To the right, sir.

7 Q. To the right. Okay. So he was behind you on the other side
8 of the?

9 A. Yes, sir. He was between me and the wall.

10 Q. Between you and the wall, okay. Good, thank you.

11 I have no other questions, Your Honor.

12 MJ: Anything Else, Government?

13 TC: Yes, Your Honor.

14 **Questions by the trial counsel:**

15 Q. Staff Sergeant P [REDACTED], I am going to hand you this picture
16 again.

17 **[The trial counsel handed Defense Exhibit D for ID to the witness.]**

18 Q. So, Staff Sergeant P [REDACTED], I've just handed you what said
19 marked as Defense Exhibit 2 [sic] I'm sorry Delta. You said that you
20 were laying on the table on your back, this is that table, this is
21 substantially the configuration that this room was in when you were
22 there?

1 A. As far as I remember, yes. Like I said, all I remember is
2 the positioning of the table--or the examining table to the computer.

3 Q. Okay. You said that Lieutenant Schloff was standing
4 between the table and the wall, is that correct?

5 A. Yes, sir. I don't know if it helps but the table was not--
6 from my memory the table was not flat it was----

7 Q. Raised up.

8 A. Yes, sir.

9 Q. So, almost like a chair?

10 A. Yes, sir.

11 Q. At what point did you start feeling uncomfortable during
12 this examination, where were you in the room?

13 A. I was--I had just stepped out of the computer chair, and I
14 had started to take off my ACU----

15 DC: Sir, I apologize, but I this far exceeds the scope of the
16 examination at this point.

17 TC: It's related to the image that they have just proffered
18 into evidence, Your Honor. A little latitude, please.

19 MJ: Well, how is it related to that, either it is----

20 TC: Mr. Cave just----

21 MJ: ----a response to other questions or it isn't.

1 TC: Mr. Cave just described which direction Staff Sergeant
2 P [REDACTED] was looking in, in the image. I just would like to discuss
3 that with her a little further, sir.

4 MJ: That's the purpose, and the objection is overruled.

5 DC: Yes, I am fine with that.

6 TC: Thank you, sir.

7 Q. Now, you said that you felt uncomfortable once you were on
8 this table, is that correct?

9 A. Yes, just as I was getting on the chair. Like, I was
10 picking up my ACU top and getting ready to sit up on the chair.
11 That's the first point he----

12 Q. When Lieutenant Schloff asked you to turn your head and
13 close your eyes he had you look away from the wall, correct?

14 A. Yes, sir.

15 Q. Okay. And that's away from the chaperone sign in this
16 image, is that correct?

17 A. Yes, sir.

18 Q. Okay. So at the point where he asked you to do that and
19 you're feeling uncomfortable, you couldn't see it, is that correct?

20 A. Yes, sir.

21 Q. Okay, thank you.

22 No further questions, Your Honor.

23 MJ: Can you retrieve the document please.

1 IC: Roger, sir.

2 [The trial counsel retrieved Defense Exhibit D for ID from the
3 witness.]

4 MJ: What does the witness have in her hand?

5 TC: Delta, Your Honor. Defense Exhibit D.

6 MJ: I don't think she does.

7 TC: I'm sorry----

8 MJ: It's your copy of Defense Exhibit D.

9 TC: This is prosecutions copy of Defense Exhibit D.

10 MJ: Hey Folks, when we show any document to the witness it has
11 to be a document that's marked and or admitted into the court, not
12 your own copy.

13 TC: Roger, sir.

14 MJ: Okay.

15 TC: May I show the defense that I did not mark this at all?

16 DC: Sir, I'm fine.

17 MJ: That's fine, I'm just telling you from this point forward
18 please don't show a witness a document that isn't marked.

19 TC: Yes, sir.

20 DC: Can I have another moment, Your Honor?

21 MJ: If it is relevant, sure.

22 **Questions by the defense counsel:**

23 DC: Sir, may I show this to the witness?

1 MJ: You may.

2 [The defense counsel provided Defense Exhibit E to the witness.]

3 Q. As you have just been discussing--the type of sitting
4 arrangement, you used the word chair. Does that look more like the
5 examining chair that you were in?

6 A. I--I don't know, sir. I just know that I was seated
7 somewhat--as far as I remember I was sitting somewhat upright.

8 Q. Okay.

9 A. But I--like I said I can picture myself very clearly in the
10 room going from step-to-step, but the objects around me I have no
11 recollection of, sir.

12 Q. Okay. Let me ask you this. Since the time this happened,
13 since you've been visiting the clinic are you aware that there are
14 actually two examining rooms, two different examining rooms?

15 A. What--I didn't know, sir, or I don't know.

16 Q. Okay. So when you've been to subsequent--you've had
17 subsequent visits right?

18 A. Yes, sir.

19 Q. Okay. And you've had or have not noticed that there are
20 actually two examining rooms?

21 A. I thought there was more than two. There's hall--from what
22 I remember there's a whole hallway of rooms. I don't know which is an
23 examining room or an office.

1 Q. So when you use the word chair, again I--could that be what
2 you were sitting----

3 TC: Objection, Your Honor, relevance?

4 MJ: Overruled.

5 Q. ----Could that be what you were actually sitting on or
6 sitting in?

7 A. I--as I said I don't remember the specific table but I
8 don't think so because it's not what I pictured on my head lying back
9 on the table and turning my head. I don't remember there being a
10 kind of a cupping----

11 Q. dah-dah-dah[sic]

12 A. I apologize.

13 DC: She was stopped to show it, Judge.

14 A. ----Okay, a cupping, I didn't know. I just don't remember
15 there being some sort of cupping head like that

16 Q. Okay, very good. Let me take that back.

17 **[The defense counsel retrieved Defense Exhibit E from the witness.]**

18 MJ: That was Defense Exhibit E for identification that the
19 witness was looking at.

20 DC: And I am going to return it to the court reporter, if I
21 may. And I don't have any other questions

22 **[The defense counsel provided Defense Exhibit E for ID to the court**
23 **reporter.]**

1 MJ: Any other questions from any of the members?

2 [The members indicated a negative response.]

3 MJ: All right, apparently not.

4 Temporary excusal?

5 TC: Yes, Your Honor.

6 [The witness was duly warned, temporarily excused, and withdrew from
7 the courtroom.]

8 MJ: And so Members, let's take about a 10-minute recess at this
9 point. And by the way I'll tell you too if for whatever reason you
10 need more than 10-minutes, please just let the bailiff know, he'll
11 let me know, and we'll wait until you're ready.

12 [The court-martial recessed at 1532, 10 September 2014.]

13 [The court-martial was called to order at 1545, 10 September 2014.]

14 MJ: The court is called to order.

15 TC: All parties present when the court last recessed are now
16 again present.

17 MAJOR CRAIG ROBSON, U.S. Army, was called as a witness for the
18 prosecution, was sworn, and testified as follows:

19 DIRECT EXAMINATION

20 Questions by the assistant trial counsel:

21 Q. You are Major Craig Robson?

22 A. Correct.

1 MJ: And bailiff, if you could again retrieve that for me and
2 bring it to the court reporter, please.

3 [The bailiff did as directed.]

4 MJ: All right. Members, as we discussed there will be
5 sentencing proceedings, based on the findings of the court. Because
6 it's getting a little late here, what I am going to ask you to do is
7 return at 830 tomorrow morning. At that time, you will hear the
8 sentencing evidence in the case, and you will come back and we were
9 to the instructions, and you will deliberate on the sentence in this
10 case. Any questions about that?

11 [the members indicated a negative response.]

12 MJ: All right. Please just continue during the overnight
13 recess not to discuss the case amongst yourselves, or with anyone
14 else since we still have sentencing proceedings coming up here.

15 Counsel, anything else we need to take up before release
16 the members?

17 TC: No, Your Honor.

18 CDC: No, thank you.

19 MJ: All right. Members, I will see you at 830 tomorrow morning
20 then.

21 MJ: Court is in recess.

22 [The court-martial recessed at 1522, 12 September 2014.]

1 [The Article 39 a session was called to order at 1522, 12 September
2 2014.]

3 MJ: This article 39 a session is called to order.

4 TC: All parties present when the court last recessed are again
5 present. The members are absent.

6 MJ: Thank you. All right. I just want to say on the record:

7 First, we had an 802 session, prior to the members coming
8 back with their findings. I was notified by Mr. Cave that Lieutenant
9 Schloff would be excusing him for the sentencing portion of this
10 case. Is that correct?

11 CDC: That is correct, Your Honor.

12 MJ: And Lieutenant Schloff is that what you want to do? Do you
13 want to excuse Mr. Cave from any further participation in this court-
14 martial and just have Captain Nain represent you for the remainder of
15 this trial?

16 ACC: Yes, Your Honor.

17 MJ: Okay. And that would be for the sentencing proceedings
18 that we are going to have that should be concluded by tomorrow?

19 ACC: Correct. I'll have Captain Nain for the sentencing
20 portion, Your Honor.

21 MJ: And are you doing this voluntarily and of your own free
22 will?

23 ACC: I am, Your Honor.

1 MJ: You understand that you could have Mr. Cave stay here and
2 continue to represent you, is that right?

3 ACC: I do. I do, Your Honor.

4 MJ: But nonetheless you agree to release him from further
5 participation in this trial?

6 ACC: Yes, Your Honor.

7 MJ: All right. Mr. Cave you will be excused for tomorrow's
8 proceedings.

9 I know there is still the issue that you mentioned earlier
10 that you want to re-raise or raise another issue?

11 CDC: I have two motions at this time, Your Honor.

12 MJ: Okay.

13 CDC: I think that this would be the better order to do them ,but
14 I have a motion under United States versus Griffith I have previously
15 provided you. And I am aware that you read that. And I would ask
16 you that you consider whether or not the evidence is legally
17 sufficient, and if you find it legally sufficient--insufficient
18 excuse me, that you enter a finding of not guilty.

19 The other motion would be yes to--if you do not determine
20 that a motion for a finding of not guilty at this stage based on
21 Griffith is not--you're not going to grant that, then I would ask you
22 to reconsider now my motion as to whether or not there is day failure
23 to state an offense. Because, should you grant either of those

1 motions then obviously that affects what's going to happen, what
2 might or might not happen and when.

3 MJ: And so, just like get this right you're making a motion
4 under the Griffith case that I enter a finding of not guilty, based
5 upon legal insufficiency?

6 CDC: That is correct, Your Honor. And again, you know this, but
7 legally not factually insufficient. And as an appellate counsel you
8 know the difference I am talking about.

9 MJ: Right. And then also though, the motion to dismiss for
10 failure to state an offense.

11 CDC: That is correct, Your Honor.

12 MJ: Okay. All right. I am going to continue deferring my
13 ruling on those issues until we have a sentence on this case. So,
14 haven't decided on them yet but will decide on them tomorrow. Once
15 we have a sentence from the court.

16 All right. And I think I have everybody's argument. I
17 know that you are not going to be here tomorrow. I understand the
18 issues, I think. I think I've got your argument, but if you do want
19 to say anything else about it you are welcome to.

20 CDC: No. You have heard the same evidence that we have and you
21 have heard my closing argument, so there's nothing to be set on that.
22 As to the other issue I think we have exhausted--and I appreciate To
23 need you to do that and I think we have exhausted the discussion on

1 that to the point where at some point you got to make a decision. I
2 don't mean to be too glib, but.

3 MJ: I will make a decision at some point.

4 Government, did you have anything else? I know that you
5 submitted, we didn't talk about this on the record before. You
6 submitted a written brief to me if you want to attach that as an
7 appellate exhibit to the record you're welcome to do that. I have
8 read your brief. I haven't attached as an appellate exhibit, but if
9 you want to do it you are welcome to do that.

10 TC: Your Honor, we would ask that you attach it as an appellate
11 exhibit.

12 MJ: Okay. Again, I am not going to physically do it. If you
13 have a copy that you want to give Sergeant White Here, then he will
14 attach it for you as an appellate exhibit, okay? We can do that
15 after we got the record.

16 TC: Yes, Your Honor.

17 MJ: All right. Let's deal with the--I think we never did admit
18 the, or deal with the defense documents that you want it admitted,
19 Captain Nain?

20 DC: Yes, Your Honor. I think the trial counsel has had an
21 opportunity to review and I'm not sure if they have any objections.

22 MJ: Okay. This is Defense Exhibit F for identification, and it
23 is a number of documents related to Lieutenant Schloff and his, I

1 does appear to be in proper order. So bailiff, if you could please
2 return this to Colonel Wilmeth. Accused and defense counsel, please
3 rise. And Colonel Wilmeth, you may announce sentence.

4 COL W: First Lieutenant Christopher S. Schloff, this court
5 martial sentences you to be dismissed from the service.

6 MJ: All right, please be seated. And bailiff, please --
7 retrieve that -- document one more time and bring it to the court
8 reporter. All right members, I want to thank you very much for your
9 -- service and for your attention throughout this court martial. --
10 And one last thing I want to remind you of before I excuse you, and
11 that is -- a part of the oath that you took when we began this court
12 martial. -- a part of that oath -- prevents you from discussing your
13 deliberations with anyone to include any member's opinion or vote
14 that was cast, unless ordered to do so by this court. You may of
15 course discuss your personal observations of a court martial and --
16 how it functions and the process, but you can't discuss anything that
17 occurred in the deliberations room. Again, I want to thank you again
18 for your service in this court martial and I'll also tell you that if
19 you did take any notes -- during this trial I'll just advise you to
20 take those with you and you can destroy them -- at your own
21 convenience. Anything else you want, you can leave it back there,
22 but I just don't want other people finding your notes and seeing

1 them, so take those with you please. Thank you very much and you are
2 excused.

3 [The members left]

4 MJ: All right, carry on. Counsel we're going to -- in about
5 ten minutes -- come back for a 39a session, so that I can address the
6 defense motions, okay?

7 ADC: Yes, Your Honor.

8 MJ: Court's in recess.

9 [The court-martial recessed at 11:44, 13 September 2014]

10

[END OF PAGE]

1 [The Article 39(a) session was called to order at 1:54PM, 13
2 September 2014.]

3 MJ: Court is called to order.

4 TC: All parties present when the court last recessed are again
5 present, the members are absent sir.

6 MJ: All right folks, with -- respect to the earlier defense
7 motion to one, find the accused not guilty to -- due to legal
8 insufficiency of the evidence, and two, dismiss the charge due to
9 failure to stay in an offense, the court takes the following action.
10 Specification two of the charge and the charge are dismissed for
11 failure to stay in defense. As a result of finding of guilty,
12 specification two and the charge as well as the sentence are set
13 aside. The offense of abusive sexual contact under article 120d
14 requires a sexual contact. The definition of sexual contact provided
15 in article 120g2 requires that touching of another person. Article
16 120g2 also states that quote, touching may be accomplished by any
17 part of the body, close quote. And soon providing congress has
18 limited the offense of abusive sexual contact to a touching in which
19 some of part of the accused's body touches the alleged victim, with
20 regards to specification two of the charge, the specification alleges
21 that the accused touched Sergeant Pfautz's breast with a stethoscope,
22 not with any part of his body. The evidence of trial was consistent
23 with the specification, establishing only that the accused Sergeant

1 P [REDACTED]'s breast with a stethoscope. The statutory language providing
2 that quote, touching may be accomplished by any part of the body,
3 close quote, unambiguously limits a sexual contact to a touching
4 accomplished by some part of the accused's body. Had congress
5 intended otherwise, they would have added the words quote or object
6 close quote at the end of that sentence. This conclusion is
7 bolstered by the fact that congress was aware of the distinction
8 between body part and objects as reflected in it's definition of it's
9 sexual act in the same statute. That definition of sexual act
10 contained in article 120g1, provides that penetration required for a
11 sexual act may be accomplished quote, by any part of the body or by
12 any object, close quote. The test for legal sufficiency is whether
13 considering the evidence in the light most favorable to the
14 prosecution, a reasonable fact finder could've found all the
15 essential elements beyond a reasonable doubt. The determination of
16 whether the evidence in this case is legally sufficient depends upon
17 whether the touching required by a sexual contact can be accomplished
18 by only a part of the body, or whether objects may also be used. If
19 the court is correct in it's interpretation, that the statutes limits
20 of touching for sexual contact to those accomplished by a part of the
21 body, then the evidence in this case would not be legally sufficient.
22 If a touching can be accomplished with an object, then the evidence
23 would be legally sufficient. However, given the court's dismissal of

1 specification two and the charge for failure to state an offense, a
2 ruling on the legal sufficiency of the evidence is unnecessary at
3 this time. So I'm going to attach -- what I just read as an
4 appellate exhibit, to the record. And so that is going to be
5 appellate exhibit 71. And Government, you indicated earlier that you
6 intended to -- take an article 62 appeal to -- to my decision if I
7 made such a decision, are you going to do that?

8 TC: Yes, Your Honor.

9 MJ: Okay, just remind you that you're required within 72 hours
10 to file a written a notice with the court, otherwise you're going to
11 forfeit your right to make an article 62 appeal, okay?

12 TC: Yes, Your Honor.

13 MJ: So -- provide that to me, the court reporter, and the
14 defense and we'll mark it as an appellate exhibit next in order, once
15 you provide it to the court reporter. If you already have it, you
16 can go ahead and -- do you have it already?

17 TC: One moment, Your Honor. Your Honor, we will provide it to
18 the court within the three days.

19 MJ: Okay, and once you do as I said, we'll attach it as the
20 next appellate exhibit in order. And -- excuse me, the appellate
21 court have to say -- Anything else that we need to address before the
22 court recesses?

1 TC: No, Your Honor.

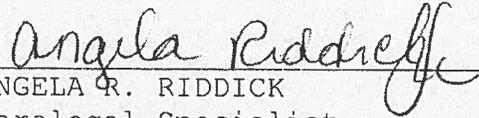
2 ADC: No, Your Honor.

3 MJ: All right, this -- court martial is in recess.

4 [The Article 39(a) session was recessed at 1:58PM, 13 September
5 2014.]

CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov and Ms. Wumie Konteh, on 15 January 2015 and delivered to defense appellate counsel by hand on January 15, 2015.



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