IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Specialist (E-4) **MICHAEL J. GONZALES** United States Army Appellant	**BRIEF ON BEHALF OF APPELLANT** Crim. App. Dkt. No. 20130849 USCA Dkt. No. 18-0347/AR

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

STEVEN J. DRAY
Captain, Judge Advocate
Appellate Defense counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 36887

JULIE L. BORCHERS
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 36843

CHRISTOPHER D. CARRIER
Lieutenant Colonel, Judge Advocate
Appellate Defense Counsel
USCAAF Bar No. 32172

TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 34640

ELIZABETH G. MAROTTA
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 34037

TABLE OF CONTENTS

Issue Presented

WHETHER AGGRAVATED SEXUAL CONTACT OF A CHILD WAS A LESSER INCLUDED OFFENSE OF RAPE OF A CHILD.

Statement of Statutory Jurisdiction 1

Statement of the Case 1

Summary of the Argument 3

Statement of Facts 5

Standard of Review 6

Law 7

Argument 8

1. The elements test is not satisfied here because the lesser offense includes an element that is not included in the greater offense and because the language of the specification does not satisfy all the elements of each offense. 8

a. Under the statutory definitions, the elements of aggravated sexual contact of a child are not necessarily included in the elements of rape of a child 8

b. The language of the specification failed to put the appellant on notice as to the elements the appellant was required to defend against 11

2. A majority of the Circuit Courts of Appeals have held that a sex crime with a specific intent element is not a lesser included offense of a general intent sex crime 12

3. This court should conduct a de novo review and conduct a harmless beyond a reasonable doubt prejudice analysis 14

a. The military judge did not discuss the possibility of lesser included offenses with the parties prior to announcing his findings 14

b. The error implicated the appellant's rights under the Fifth and Sixth Amendments and was not harmless beyond a reasonable doubt. 15

Conclusion 18

TABLE OF CASES

Supreme Court of the United States

Cole v. Arkansas, 333 U.S. 196, 201 (1948) 6
Dunn v. United States, 442 U.S. 100 (1979)..... 6
In re Winship, 397 U.S. 358 (1970)..... 6
Jackson v. Virginia, 443 U.S. 307 (1979)..... 6
Mitchell v. Esparza, 540 U.S. 12 (2003) 6
Schmuck v. United States, 489 U.S. 705 (1989) 13, 14

Court of Appeals for the Armed Forces

United States v. Alston, 69 M.J. 214 (C.A.A.F. 2010) 8
United States v. Armstrong, 77 M.J. 465 (C.A.A.F. 2018)..... passim
United States v. Flores, 69 M.J. 366 (C.A.A.F. 2011) 15
United States v. Girouard, 70 M.J. 5 (C.A.A.F. 2011)..... 7, 16
United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012)..... 15
United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010)..... passim
United States v. Lopez, 35 M.J. 35 (C.M.A. 1992)..... 8
United States v. McMurrin, 70 M.J. 15 (C.A.A.F. 2011)..... 17
United States v. Medina, 66 M.J. 21 (C.A.A.F. 2008) 7
United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009 ..... 6, 7
United States v. Monroe, 52 M.J. 326 (C.A.A.F. 2000)..... 7
United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016) 6, 14, 15
United States v. Tunstall, 72 M.J. 191 (C.A.A.F. 2013)..... 6
United States v. Wilkins, 71 M.J. 410 (C.A.A.F. 2012)..... 6 ,12, 16

Other Federal Courts

United States v. Castillo, 140 F. 3d 874 (10th Cir. 1998) 13
United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989)..... 14
United States v. Hawpetoss, 478 F.2d 820 (7th Cir. 2007) 13
United States v. Hawpetoss, 388 F.Supp. 2d 952 (E.D. Wis. 2005)..... 13
United States v. Hourihan, 66 F.3d 458 (2d Cir. 1995)..... 12
United States v. Sneezer, 900 F.2d 177 (9th Cir. 1990)..... 12
United States v. Torres, 937 F.2d 1469 (9th Cir. 1991) 12

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	BRIEF ON BEHALF OF APPELLANT
v.	
Specialist (E-4) **MICHAEL J. GONZALES** United States Army Appellant	Crim. App. Dkt. No. 20130849 USCA Dkt. No. 18-0347/AR

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

Issue Presented

I.

WHETHER AGGRAVATED SEXUAL CONTACT OF A CHILD WAS A LESSER INCLUDED OFFENSE OF RAPE OF A CHILD.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. §866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3)(2012).

Statement of the Case

On April 18, September 27, and October 1-3, 2013, an officer panel sitting as a general court-martial convicted Specialist (SPC) Michael J. Gonzales, contrary

to his pleas, of two specifications of rape of a child, two specifications of aggravated sexual abuse of a child, and two specifications of child endangerment, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934 (2007). The panel sentenced SPC Gonzales to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 50 years, and to be discharged from the service with a dishonorable discharge. On February 22, 2017, the Army Court set aside the findings and sentence and authorized a rehearing.[1] *United States v. Gonzales*, ARMY 20130849, 2017 CCA LEXIS 128, (Army Ct. Crim. App. 22 Feb. 2017).

On June 26, July 31, and August 7-9, 2017, a military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of one specification of aggravated sexual contact of a child, which he identified as a lesser included offense of rape of a child, one specification of aggravated sexual abuse of a child, one specification of indecent liberty with a child, and one specification of child endangerment in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934, (2007). (JA 78). The military judge sentenced SPC Gonzales to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for

[1] The Army Court set aside the findings of guilty and sentence in light of *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2015). *United States v. Gonzales*, ARMY 20130849, 2017 CCA LEXIS 128 (A. Ct. Crim. App. 22 Feb. 2017). The Army Court noted that "not only did the military judge give muddled and confusing instructions, but the government's closing argument also stressed the importance of the propensity evidence." *Id*. at *5.

twenty-two years, and to be discharged from the service with a dishonorable discharge. The convening authority approved the findings and the sentence and gave the appellant 1274 days of credit against the sentence to confinement.

On June 25, 2018, the Army Court affirmed the findings and sentence. The undersigned counsel filed a Petition for Grant of Review and Motion for Leave to File Supplement Separately on August 22, 2018. This Court granted review on on December 18, 2018.

Summary of the Argument

The government charged the appellant with raping his child, AP, by penetrating her vulva with his penis sometime between April 2010 and April 2011. At that time, rape of a child included two possible theories of liability: (1) penetration of the vulva with the penis; and (2) the penetration of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. *Manual for Courts-Martial* (2008 ed.), pt. IV, ¶45 a.(t)(1)(A)-(B). AP testified that the appellant never penetrated her vulva with his penis. The military judge convicted the appellant of aggravated sexual contact with a child after improperly determining it was a lesser included offense of the alleged rape of a child. The military judge never discussed lesser included offenses with the parties, and the parties never argued for any lesser included offenses.

When the government chose to charge rape of a child by penile penetration of AP's vulva, it charged a general intent crime. Aggravated sexual contact with a child always required a specific intent to "abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." *MCM*, pt. IV, ¶45 a.(t)(2). As charged, the appellant's only available defense was to deny that the conduct occurred. Had the government charged the appellant with aggravated sexual contact with a child, he could have offered a defense that the complaining witness—three or four years old at the time of the offense—had instead misperceived his conduct. Such a defense is relevant where, as here, the complaining witness testified that the single incident occurred in the shower.

The dissonance between the charged offense and the military judge's findings implicated the appellant's constitutional right to notice. As such, this Court must review the prejudice to appellant under a harmless beyond a reasonable doubt standard. The appellant's possible defenses were limited by the military judge's improper finding of a lesser included offense within the specification as charged by the government. As such, the prejudice appellant suffered was not harmless beyond a reasonable doubt.

Issue Presented

I.

WHETHER AGGRAVATED SEXUAL CONTACT OF A CHILD WAS A LESSER INCLUDED OFFENSE OF RAPE OF A CHILD.

Statement of Facts

AP was born on June 5, 2006. (JA 34). At trial the government acknowledged that appellant was deployed from the end of January 2011 until April 2011. Thus, AP was *at most* four years old during the timeframe alleged in Specification 1 of Charge II. AP testified that on one occasion, sometime during the year-long period alleged in Specification 1 of Charge II, the appellant touched her about the vagina and body with his penis in the shower. (JA 33-42). She testified that the appellant's penis did not penetrate her vagina. (JA 40). The military judge found the appellant guilty of aggravated sexual contact of a child, which he identified as a lesser included offense of the charged offenses of rape of a child. (JA 78). Prior to findings, the military judge never discussed the possibility of lesser included offenses with either of the parties.

AP was eleven years old when she testified, recounting events the government alleged to have occurred seven years prior, when she was three or four. The trial defense counsel argued AP did not remember details of the alleged incident, the implication being that the events did not happen. (JA 68). The trial defense counsel's argument comprised roughly thirteen pages of trial record, and

she only discussed the instant charge briefly and focused exclusively on AP's untrustworthiness. (JA 68).

Standard of Review

"Whether an offense is a lesser included offense is a question of law that is reviewed de novo." *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013) (citing *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011)).

The military judge's findings in this case implicate the appellant's constitutional right to notice. U.S. Const. amends. V, VI. "The constitution requires that an accused be on notice as to the offense that must be defended against, and that only lesser included offenses that meet these notice requirements may be affirmed by an appellate court." *United States v. Wilkins*, 71 M.J. 410, 413-414 (C.A.A.F. 2012) (quoting *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009) citing *Jackson v. Virginia*, 443 U.S. 307, 314 (1979)); *In re Winship*, 397 U.S. 358, 364 (1970); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Dunn v. United States*, 442 U.S. 100, 107 (1979). "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F. 2016) (citing *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003)).

Law

"The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted" and a lesser included offense meets this criteria if it is necessarily included in the greater offense. *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010) (quoting *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008) (internal quotations omitted)). Fair notice allows an accused to prepare a defense. *See United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (citing *Miller*, 67 M.J. at 388). The charge sheet provides the accused notice of what he or she will need to defend against at trial. *See id.* Article 79, UCMJ, authorizes a court-martial to find the accused "guilty of an offense necessarily included in the offense charged," based on the idea that "the elements of the lesser offense are a subset of the elements of the greater offense alleged," thereby alleviating any concern an accused will not have the ability to defend against them. *See Armstrong*, 77 M.J. at 469 (citing *MCM* pt. IV, para. 3.b.(1) & Discussion (2012 ed.)).

This court uses the "elements test" to determine if an offense is "necessarily included in the offense charged" under Article 79, UCMJ. *Jones*, 68 M.J. at 472. The elements test is applied in two ways—if either way is satisfied, the accused will have the notice necessary to prepare a defense. *Armstrong*, 77 M.J. at 470. The first involves a comparison of the statutory language of the two offenses, and a

lesser included offense is one where each of its elements is necessarily also an element of the charged offense. *See id*.; *see also United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (noting that an offense is not a lesser included offense when it requires an element that is not an element of the greater offense). The second examines the specification of the charged offense to determine if it is charged in such a manner that it alleges facts necessary to satisfy all the elements of each offense. *Id*. "Interpreting Article 79, UCMJ, to require the elements test for [lesser included offenses] has the constitutionally sound consequence of ensuring that one can determine *ex* ante—solely from what one is charged with—all that one may need to defend against." *Jones*, 68 M.J. at 472.

Argument

1. The elements test is not satisfied here because the lesser offense includes an element that is not included in the greater offense and because the language of the specification does not satisfy all the elements of each offense.

a. Under the statutory definitions, the elements of aggravated sexual contact of a child are not necessarily included in the elements of rape of a child.

Rape of a child at the time the offense was allegedly committed included two elements: "(i) that the accused engaged in a sexual act with a child; and (ii) that at the time of the sexual act the child had not attained the age of twelve years." *Manual for Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶45 b.(2)(a). "Sexual act" was defined as:

> (A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
>
> (B) the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

MCM, pt. IV, ¶45 a.(t)(1)(A)-(B).

The elements of aggravated sexual contact with a child who had not yet attained the age of twelve years old were: (i) the accused engaged in sexual contact with a child; and (ii) at the time of the contact, the child had not attained the age of 12 years. *MCM*, App. 28 ¶45.b.(7)(a) (2008 ed.). "Sexual contact" was defined as:

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

MCM, *United States*, App. 28 ¶45 a.(t)(1) (2008 ed.) (emphasis added).

Aggravated sexual contact contained an additional specific intent element that is not part of the elements of a rape of a child as the government charged it here. Rape of a child included the penetration of a child's vulva with a penis, or the penetration of a genital opening with an object other than a penis with the requisite specific intent. Therefore, when the charged offense alleged a penis as the

penetrative object, specific intent was not an element. Further, defenses such as accident or mistake were not defenses to rape of a child as it was charged here. In short, the accused need only have the general intent to accomplish the act, not the specific intent to abuse, humiliate or degrade any person or to arouse or gratify the sexual desire of any person, because there is a never a justification for penetrating the vulva of a child with a penis.

Conversely, a non-penetrative touching of the genitals of a child does include socially accepted explanations. A parent may examine a child's genitals in order to decide whether to seek medical assistance or to apply treatment to a rash. Further, a doctor may examine a child's genitals for medical purposes. Relevant here is that parents routinely clean their children in a bath or shower. AP was three or four years old at the time of the alleged misconduct. She testified that a single incident of touching occurred in the shower. She alleged no other touching. Her description involved the appellant touching her privates with both his hands and his penis, but she specified that his penis did not go inside her privates "even if just a little bit." (JA 40). She added that he also touched her belly with his penis, and that he never tried to put it in her mouth. (JA 41).

While there is never a justification for penetrating the vulva of a child with a penis, there are plausible justifications for touching a child's vulva. A three or four year old child may need assistance in the shower, and it is not illegal or even

unreasonable for the appellant to have assisted her in the shower. This is especially true if she did not want to take a shower or was resistant to appellant's attempts to bathe her. Under such circumstances appellant would not have had the requisite specific intent and any alleged contact could have been either justified, or misperceived, or accidental. A non-penetrative contact is not *per se* unlawful.

The elements test examines whether the elements of one offense are necessarily included in the elements of another. *Armstrong*, 77 M.J. at 472. The appellant was not on notice of the specific intent required for aggravated sexual contact, the government did not prove the specific intent, and appellant was not on notice to defend against the lesser offense, specifically the intent.

b. The language of the specification failed to put the appellant on notice as to the elements the appellant was required to defend against.

If the elements of the offense are not necessarily a subset of the charged offense, the charging language may still ensure that the accused is on notice of what to defend against. *See Armstrong*, 77 M.J. at 472. Specification 1 of Charge II, alleged:

> In that Specialist (E-4) Michael J. Gonzales, U.S. Army, did, at or near Fort Hood, Texas, between on or about 22 April 2010, and on or about 12 April 2011, engage in a sexual act, to wit: penetrating, with his penis, the vulva of A.P., a child who had not attained the age of 12 years.

(JA 06). This language did not sufficiently allege both offenses. The allegation that appellant penetrated AP's vulva, in light of the definition of sexual act, meant the

government was only required to prove that act, and nothing more. There is no justification for penetrating the vulva of a child with a penis, and appellant's available defenses were thus limited to denying the sexual act occurred. Nothing in the specification established that the appellant's specific intent was relevant to the offense, and so there was no reason to present a defense based on specific intent. *See Wilkins*, 71 M.J. at 414 and n.3 (recognizing the potential prejudice to an accused in some circumstances when the term sexual act is replaced by sexual contact). The specification clearly did not state the elements of both rape of a child and aggravated sexual contact of a child.

2. A majority of the Circuit Courts of Appeals have held that a sex crime with a specific intent element is not a lesser included offense of a general intent sex crime.

At least four Circuit Courts of Appeals have indicated that a sex offense requiring a specific intent is not a lesser included offense of an offense that lacks such a specific intent. *See United States v. Hourihan*, 66 F.3d 458, 465 (2d Cir. 1995) ("sexual contact requires something that an attempted sexual act does not," and "the words 'intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person' are crucially significant"); *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990) (finding no error where a trial court refused to instruct the jury on a lesser included sex-crime offense that included a specific intent, where the charged offense did not); *United States v. Torres*, 937 F.2d 1469,

1477-78 (9th Cir. 1991) (where one sex offense included a specific intent, the court found it was not a lesser included offense of one that did not); *United States v. Castillo*, 140 F. 3d 874, 886 (10th Cir. 1998) (holding that a section of a sex-crime statute containing a specific intent element is not a lesser-included offense of a section of a statute that did not); *United States v. Hawpetoss*, 388 F.Supp. 2d 952, 959 (E.D. Wis. 2005), *aff'd*, *United States v. Hawpetoss*, 478 F.2d 820 (7th Cir. 2007) (finding the so-called lesser included offense included a specific-intent element that the greater offense did not and was therefore not a lesser included offense).

Only one Circuit Court of Appeals has disagreed, and the court in that case noted that the statutory definitions for the greater and lesser offenses both included language about intent. *See United States v. Demarrias*, 876 F.2d 674, 676 (8th Cir. 1989). Further, the 8th Circuit arguably ignored the Supreme Court holding in *Schmuck* that to be necessarily included in the offense charged, a lesser offense must be embraced within the legal definition of the greater. *Schmuck v. United States*, 489 U.S. 705, 719 (1989). Indeed, the misguided holding in *Demarrias* perfectly exemplifies the prejudice in the instant case—

> Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available *and to plan their trial strategies accordingly*.

Schmuck, 489 U.S. at 720-21 (emphasis added).

As charged, Specification 1 of Charge II allowed the defense only one trial strategy—deny the sexual act occurred. Because rape of a child as charged was a general-intent crime, the only defense available was to show that the penetration did not occur. Had the government charged the appellant with aggravated sexual contact of a child, he could have presented the more-than-reasonable defense that AP's testimony was the result of her misinterpretation of a time the appellant helped her in the shower.

3. This court should conduct a de novo review and conduct a harmless beyond a reasonable doubt prejudice analysis.

a. The military judge did not discuss the possibility of lesser included offenses with the parties prior to announcing his findings.

As this case was tried by a military judge alone, a conversation about instructions was unnecessary and the parties did not discuss any potential lesser included offenses to the charged offenses. The defense rested its case, the military judge heard argument, he recessed the court to deliberate, and announced the finding at issue here. The military judge never asked the parties about potential lesser included offenses. Conversely, in *Riggins*, the military judge reconvened the court-martial and stated his position on potential lesser included offenses on the record to solicit the relative positions of the parties. *See Riggins* 75 M.J. at 81. There, the trial defense counsel had the opportunity to state their objection to the

military judge's interpretation of the potential lesser included offense. Here, the defense counsel had no opportunity to object or consent because at the time the military judge announced his findings the merits portion of the court-martial was over. While the rules allow for a discretionary reconsideration of findings by a military judge, there is no concomitant requirement that an accused move for such a reconsideration in order to preserve an error. *Compare* R.C.M. 924(c) ("the military judge may reconsider any finding of guilty at any time before announcement of sentence….") *and* R.C.M. 920(f) ("Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error.").

b. The error implicated the appellant's rights under the Fifth and Sixth Amendments and was not harmless beyond a reasonable doubt.

"An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." *Wilkins*, 71 M.J. at 413 (citing *United States v. Humphries*, 71 M.J. 209, 212 (C.A.A.F. 2012). Rather, this Court tests for prejudice under Article 59(a), UCMJ, and will find material prejudice unless the government can show the error was harmless beyond a reasonable doubt. *See Riggins*, 75 M.J. at 85 (citing *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011) ("For preserved constitutional errors, such as in the instant case, the Government bears the burden of establishing that the error [was] harmless beyond a reasonable doubt.").

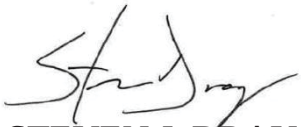
The appellant was materially prejudiced by the military judge's finding—he "was convicted of an offense that was not a [lesser included offense] of the charged offense." *Girouard*, 70 M.J. at 11 (C.A.A.F. 2011) (finding "the prejudice is clear" in such situations). The appellant did not agree to amend the charge or specification. *See id*. "Nor did the appellant defend against the charged offense" of rape of a child "on a theory that he was guilty of" aggravated sexual contact. *Id*. Further, this Court has specifically noted that "the substitution of the term 'sexual act' for 'sexual contact' in the specification could be prejudicial in some circumstances." *Wilkins*, 71 M.J. 410 at 414. The appellant's defense was based on establishing that the sexual act did not occur and urged the court to interpret AP's inconsistent statements as evidence of their lack of trustworthiness. This was a vastly different trial strategy than presenting a defense related to AP's misinterpretation of a single event that occurred in the shower when she was a toddler.

The military judge's decision to consider an improper lesser included offense came after the appellant chose not to testify. The appellant did not have any notice that he was required to defend against a specific intent not identified in his charged offense. This was prejudicial to his defense. *See Girouard*, 70 M.J. at 11 (finding prejudice where the appellant did not agree to the lesser included offense, and the appellant did not defend against the lesser included offense);

United States v. McMurrin, 70 M.J. 15, 20 (C.A.A.F. 2011) (finding prejudice where the appellant was not charged with the offense of which he was convicted, where the specification was not amended in accordance with R.C.M. 603, and he did not defend himself on the theory that while he was not guilty of the greater offense he was guilty of the so-called lesser included offense); *Jones*, 68 M.J. 473 n.11 (finding prejudice where the case was not tried on the lesser included offense theory and the issue was not addressed until after the parties presented evidence). The government has the burden of showing the error here was harmless beyond a reasonable doubt. They cannot.

Conclusion

Appellant respectfully request that this court set aside the finding of guilty to Specification 1 of Charge II, and to dismiss Specification 1 of Charge II.



STEVEN J. DRAY
Captain, Judge Advocate
Appellate Defense counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0725
USCAAF Bar No. 36887

JULIE L. BORCHERS
Major, Judge Advocate
Branch Chief
Defense Appellate Division
USCAAF Bar No. 36843

CHRISTOPHER D. CARRIER
Lieutenant Colonel, Judge Advocate
Appellate Defense Counsel
USCAAF Bar No. 32172

TIFFANY D. POND
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 34640

ELIZABETH G. MAROTTA
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 34037

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Gonzales*, USCA Dkt. No. 18-0347/AR, was delivered to the Court and Government Appellate Division on February 14, 2019.

STEVEN J. DRAY
Captain, Judge Advocate
Defense Appellate Attorney
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0725