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	REPLY 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:

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Issue Presented

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

Statement of the Case

On December 18, 2018, this Court granted appellant's petition for review. On February 14, 2019, appellant filed his final brief with this Court. The government responded on March 18, 2019. This is appellant's reply.

Argument

The government's erroneous and repeated assertion that any "sexual act" as charged in the context of this case is also necessarily a "sexual contact" as defined in the *Manual for Courts-Martial* [hereinafter *MCM*] (2008 ed.) is unsupported by any binding precedent and fails to properly apply this Court's elements test to a

lesser included offense analysis. Thus, this Court should find that aggravated sexual contact of a child was not a lesser included offense of a rape of a child involving the penetration of a vulva by a penis, and that the error prejudiced the appellant's right to fair notice.

1. Aggravated sexual contact of a child was not a lesser included offense of rape of a child.

a. The "elements test" is not satisfied when the lesser offense requires proof of a specific intent not necessarily included in the greater offense as the government charged it here.

Appellee claims that "every penile-vulva penetration necessarily includes a corresponding sexual intent." (Gov't Br. 14). In support of this proposition, the government cites *United States v. Wagner*, an unpublished Army Court opinion that audaciously asserts it is '"beyond cavil' that every penile-vulval penetration includes a corresponding sexual intent," yet acknowledges that several Federal Circuits actually do cavil at this premise. 20111064, 2013 CCA LEXIS 573, *30 (A. Ct. Crim. App. Jul. 29, 2013) (citing *United States v. Castillo*, 140 F. 3d 874, 886 (10th Cir. 1998) and *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990)).

The assertions of the Army Court in *Wagner* and of Appellee in this case are wrong because the statute does not require proof of the subjective intent of the accused. *See generally MCM* (2008 ed.), pt. IV, para. 45.a.(o)(1) (clarifying that there is no defense of mistake of fact as to age for rape of a child); and *id*., para

45.a.(t) (clearly establishing that a non-penile penetration of the vulva requires a defined subjective intent).

While there are circumstances where it may be justified to penetrate a child's vulva with something other than a penis—for instance, a doctor performing an exam—there is never a justification for penetration of a child's vulva with a penis. A perpetrator could have any reason or no reason, and the government would still meet all the elements for rape of a child if it proved penetration. This Court has previously held that an offense is not a lesser included of another if there is even one factual scenario where the greater offense would not necessarily prove the lesser. *See generally United States v. Armstrong*, 77 M.J. 465 (C.A.A.F. 2018) (discussing the peculiar facts of *United States v. Claxton*, ACM 38188 (rem), 2016 CCA LEXIS 649 (A.F. Ct. Crim. App. Oct. 31, 2016) *aff'd* 76 M.J. 356 (C.A.A.F. 2017), and concluding that "although examples like [it] may be unusual," because it was possible for an appellant to commit an abusive sexual contact by causing bodily harm without committing an assault consummated by a battery, the latter was not a lesser included offense of the former).

b. Aggravated sexual contact of a child was not necessarily included in Specification 1 of Charge II, rape of a child, as charged.

By stating that the appellant was "fully on notice that he was charged with a course of conduct that necessarily included making penile contact with her external genitalia with a sexual intent," Appellee acknowledges that this unwritten,

unrequired element, of rape of a child is necessary. (Gov't Br. 16). However, appellee misapprehends the way it changes the scope of the charge. Appellee's argument is merely a repetition of its analysis of the elements test—that a sexual intent is necessarily implied for all acts alleging penetration of the vulva by a penis, and thus superfluous language. The language of Specification 1 of Charge II did not state the elements of both rape of a child and aggravated sexual contact with a child because it made no reference whatsoever to specific intent.

2. This Court should conduct a de novo review of this issue and analyze prejudice under a harmless beyond a reasonable doubt standard.

a. The trial defense counsel did not have an opportunity to object.

In a footnote citing to Rule for Courts-Martial 924(c) and Article 39(a), Appellee asks this Court to review for plain error. (Gov't Br. 5). Prior to announcing findings, the military judge never discussed the possibility of lesser included offenses with the parties, thereby never giving trial defense counsel an opportunity to object. While the trial defense counsel could have asked the military judge to reconsider his findings pursuant to R.C.M. 924(c), the government offers no authority that required him to do so to preserve the issue. Appellee's reliance on *United States v. Frady*, 456 U.S. 152, 163 (1982) is further misplaced. The government's citation to *Frady* stands for the unremarkable proposition that an appellant is usually precluded from raising an erroneous instruction issue if they did not preserve it *before* the jury deliberated. *Frady* at 163 ("No party may assign

as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict….").

However, this was not a panel case and there were no instructions. The military judge could have discussed possible lesser included offenses prior to deliberating, and if the defense failed to object *at that time* then *Frady* might be applicable. *See United States v. Armstrong*, 77 M.J. 465, 468-69 (C.A.A.F. 2018) (analyzing under plain error where Armstrong's trial defense counsel stated he took "no position" after the military judge asked him if he believed assault consummated by a battery was a lesser included offense); *United States v. Oliver*, 76 M.J. 271, 273 (C.A.A.F. 2017) (analyzing under plain error where the military judge affirmatively asked the trial defense counsel if he objected to his consideration of the lesser included offense, and the trial defense counsel said no); and *United States v. Jones*, 68 M.J. 465, 67 (C.A.A.F. 2010) (analyzing under plain error, where the military judge gave the trial defense counsel the opportunity to object to an instruction on lesser included offenses, and the trial defense counsel agreed to consideration of the offense). Nevertheless, Appellee offers no authority requiring a trial defense counsel to divine what lesser included offenses a military judge may consider while deliberating on the findings of a case. As such, this Court should review this question of law de novo.

b. The error was not harmless beyond a reasonable doubt.

By charging the appellant with rape of child involving the penetration of a vulva by a penis, the government limited appellant to a single defense: deny the event occurred. Appellee asserts the appellant could have "pivoted" his defense to one of mistaken understanding as AP was testifying, (Gov't Br. 25), but this fails to acknowledge the Constitutional imperative that an accused requires adequate notice to *prepare* a defense before trial, not during it. *See Russell v. United States*, 369 U.S. 749, 763-64 (1962) (emphasizing the importance of the charging document itself including the elements against which an accused must defend). Thus, when the military judge found the appellant guilty of a lesser-included offense to which there were other available defenses—specifically, mistake, accident, or misinterpretation of what occurred in a shower—the military judge also foreclosed the appellant the opportunity to defend against that offense with a different theory.

3. Even if this Court reviews for plain error, the appellant should prevail.

"Under plain error review, the appellant has the burden of demonstrating (1) error that is (2) clear and obvious and (3) results in material prejudice to his substantial rights." *Armstrong*, 77 M.J. at 469.

a. The military judge's finding was error.

This Court reviews whether an offense is a lesser included offense de novo. *United States v. Girouard*, 70 M.J. 5, 9 (C.A.A.F. 2011). "It is a fundamental tenet of statutory construction to construe a statute in accordance with its plain meaning." *United States v. Mooney*, 77 M.J. 252 (C.A.A.F. 2018).

Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987).

As discussed *supra* and in appellant's Brief on Behalf of Appellant, a plain reading of the 2007 version of Article 120, UCMJ does not require proof of an accused's specific intent to prove the offense of rape of a child where the alleged sexual act is the penetration of a vulva by a penis. That intent changed the nature of this offense in a way that violated the appellant's right to fair notice of the offense.

b. The error was clear and obvious.

Appellee's argument focuses on three erroneous premises in support of its argument that this error was not clear or obvious. First, that it was impossible to commit a "sexual act" without first committing a "sexual contact." (Gov't Br. 20). As discussed *supra*, this argument lacks merit.

Second, Appellee ignores this Court's clear rejection of the notion that the *Manual for Courts-Martial* can dictate lesser included offenses. *See United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010) (where this Court repeatedly denounced this proposition, and among other examples, stated that "suggesting that listing a criminal offense as an LIO within the *MCM* automatically makes it one, irrespective of its elements, ignores the very definition of a crime"). Even the MCM admonishes trial practitioners to use the *Jones* elements test. *See MCM*, part IV, para. 3. and its discussion ("practitioners must consider lesser offenses on a case-by-case basis.").

Third, Appellee argues that this error was not clear because there was no consensus among the military services or federal circuit courts. Nevertheless, errant holdings are not binding precedent, especially when they contradict this Court's *Jones* elements test and the Supreme Court's reasoning in *Schmuck v. United States*, 489 U.S. 705, 716 (1989). This Court has held that an error is "plain and obvious" when the lesser included charge does not meet the elements test. *See Armstrong*, 77 M.J. at 472 (where this Court noted it had "other similar errors regarding what is a lesser included offense to be plain errors" after completing a detailed analysis of the elements test); *United States v. Tunstall*, 72 M.J. 191 (C.A.A.F. 2013) (where, after concluding an offense was not a lesser included offense by applying the elements test, this Court found that it was "therefore plain

and obvious error or the military judge" to give an instruction on the lesser included offense). Therefore, if the elements test analysis is sufficient to establish error, there was error and it was also clear and obvious.

c. The appellant's substantial rights were materially prejudiced.

Here the appellant did not have the opportunity to prepare a defense prior to trial that reasonably addressed the aggravated sexual contact offence of which he was convicted. Appellee argues that the appellant was on notice that the government's charging scheme related to misconduct against AP on one discrete incident, and that this incident included at least one other alleged sexual contact. But, the "government controls the charge sheet" and an accused "is entitled to rely on the charge sheet and the government's decision not to amend the charge sheet prior to trial." *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

The alleged misconduct could have been charged in the alternative.[1] Because appellant was charged with multiple offenses spanning nearly a year, he was required to defend against those multiple different incidents across 355 days. However, as discussed *supra* the penetrative offense limited appellant's available defenses to one—deny the event occurred. No other defense was available, and the

[1] Specification 5 of Charge II alleged appellant a committed a lewd act on AP. (JA 03). That specification alleges a touching, not through the clothing, of AP's genitalia. However, there is no indication regarding what the appellant may have touched AP with.

appellant could not offer a defense of mistake, accident, or misperception without also admitting guilt. *See United States v. Wilkins*, 71 M.J. 410, 414 (C.A.A.F.) (where this Court found no prejudice because Wilkins's "strategy demonstrated that [Wilkins] understood he was defending against all of the elements of [the so-called lesser included offense].") Thus, appellant was convicted of an offense to which he could not present a defense.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside and dismiss Specification 1 of Charge II.

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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 March 28, 2019.

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