IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

JEREMY S. WATFORD
Major, Judge Advocate
Appellate Government Counsel
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0761
jeremy.s.watford.mil@mail.mil
U.S.C.A.A.F. Bar No. 36902

ERIC K. STAFFORD
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36897

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

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Issue Presented:

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals [hereinafter Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

In appellant's first trial, on April 18, September 27, and October 1-3, 2013, an officer panel sitting as a general court-martial convicted him, contrary to his pleas, of two specifications of rape of a child (against victims AP and SR), two

specifications of aggravated sexual abuse of a child (against victims AP and SR), and two specifications of child endangerment (against victims AP and SR), in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920 and 934 (2008). The panel sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, fifty years' confinement, and a dishonorable discharge. On appeal, the Army Court set aside the findings and sentence, authorizing a rehearing, in light of this Court's opinion in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). *United States v. Gonzales*, ARMY 20130849, 2017 CCA LEXIS 128 (Army Ct. Crim. App. Feb. 22, 2017).

On June 26, July 31, and August 7-9, 2017, appellant was retried on all the offenses for which he was originally convicted, and was also tried for additional, newly preferred specifications (against victims AP, SR, NG, JG, and XV) under Articles 120 and 125, UCMJ (2008). (JA 12, 14). At this retrial, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of aggravated sexual contact of a child (against victim AP),[1] one specification of aggravated sexual abuse of a child (against victim AP), one specification of child endangerment (against victim AP), and one specification of

[1] The military judge found appellant guilty of this offense as a lesser-included offense of the charged offense, rape of a child. (JA 9).

indecent liberties with a child (against victims AP, SR, and NG),[2] in violation of Articles 120 and 134, UCMJ (2008). (JA 78). The military judge found appellant not guilty of the retried offenses against SR and all of the other additional, newly preferred offenses. (JA 78). The military judge sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, twenty-two years' confinement, and a dishonorable discharge. (JA 11). The convening authority approved the findings and sentence and granted appellant 1,274 days of credit against his sentence of confinement. (JA 11).

On June 25, 2018, the Army Court affirmed the findings and sentence from appellant's retrial. (JA 1). Appellant filed a Petition for Grant of Review and Motion for Leave to File Supplement Separately on August 22, 2018. This Court granted review on December 28, 2018. Appellant's Brief on the granted issue was filed on February 14, 2019.

Statement of Facts

AP was born on June 5, 2006; at the time of trial, she was eleven years old. (JA 34). She previously lived with Mrs. Michelle Gonzales (her biological mother), appellant, and four other siblings and half-siblings. (JA 35-37). On one occasion during the time period described in Specifications 1 and 5 of Charge II,

[2] The offense of indecent liberty with a child, Specification 6 of Additional Charge II, was a newly preferred offense at appellant's retrial. All of appellant's other convictions were based upon offenses for which he was retried. (JA 2-11).

AP was showering when appellant entered the shower and began touching her "private parts." (Charge Sheet; JA 38-39). AP explained that by "private parts" she meant her vagina and buttocks. (JA 38). She testified that appellant "put his hands in [my privates] and then he put his penis on me," though she denied that appellant penetrated her with his penis. (JA 39-40). In addition to touching AP's genitals with his hands, AP described how appellant placed his penis on her genitals, placed it "sometimes around on [her] body," and how he "would just rub it on [her]," specifically her stomach. (JA 39-41). AP clearly testified that appellant only touched her in this manner on a single occasion; appellant's touching of her genitals with his hands and penis both occurred on the same occasion, in the shower. (JA 40). AP was three-to-four years old at the time of this incident. At appellant's first trial, AP similarly testified that appellant only touched her in a sexual manner on a single occasion. (Supp. JA 13-14).

AP also testified that, on a separate occasion, appellant brought her and her siblings into the bedroom he shared with Mrs. Gonzales to watch them have sex. (JA 41, 45). AP testified that she was sitting on the floor of their bedroom and witnessed appellant and Mrs. Gonzales unclothed and in bed. (JA 42, 46). On cross-examination, AP testified that this event occurred when she was four-to-five

years old. (JA 46). SR[3], one of AP's younger sisters, corroborated this incident at trial. (JA 55).

Appellant's lead defense counsel during the retrial, Captain Nicole Cooper, also served as detailed defense counsel during appellant's first trial. (Supp. JA 1-3). At the Article 32 Preliminary Hearing for appellant's retrial, the government submitted AP's testimony from the first trial. (Supp. JA 7). At trial, there was no discussion of potential lesser-included offenses prior to findings, and following findings, appellant did not raise any objection to the military judge's consideration of aggravated sexual contact of a child as a lesser-included offense of rape of a child.[4]

Additional facts necessary to address the issue presented are incorporated below.

Summary of Argument

Because defense counsel failed to take any steps to raise or preserve the issue of an erroneous lesser-included offense, this issue is reviewed for plain error. Under a plain error analysis, this Court should affirm the Army Court's decision for three reasons.

[3] At the time of her testimony, SR's name was MS. (JA 21).
[4] Defense counsel could have immediately moved for the military judge to reconsider his findings pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 924(c), or asked for a post-trial Article 39(a) session at a later date to raise the issue.

First, there is no error, because aggravated sexual contact with a child is a lesser included offense (LIO) of rape of a child. Under the elements test, the government prevails because a "sexual contact" does not require an additional specific intent that is not already present in a "sexual act" based on penile penetration of the vulva—rather, a sexual intent is inherent in the very act of penile penetration of the vulva, and that act does not permit the possibility of some other, legally justifiable intent. Furthermore, the specification as drafted in this case, alleging the "sexual act" of penile penetration of the vulva, necessarily includes the "sexual contact" of penile contact with the genitalia, as it is impossible to commit the greater offense without committing the lesser offense and the specification provided ample notice of the factual predicate for which appellant was convicted.

Second, even if error, it was not a "plain or obvious" mistake to consider aggravated sexual contact of a child an LIO of rape of a child. The applicable *Manual for Courts Martial* [hereinafter *MCM*] (2008 ed.) explicitly listed aggravated sexual contact of a child as an enumerated LIO of rape of a child. Furthermore, there is a split in the federal circuits over whether this is an LIO, but a majority of the military service courts which have considered this issue have found that it is an LIO. Where the *Manual* and Army and Navy-Marine Courts of Criminal Appeal all unequivocally support the military judge's interpretation of the law, his mistake cannot be "plain or obvious."

Third, even if there was plain and obvious error, appellant cannot show material prejudice to a substantial right, specifically the constitutional right to notice. In addition to the plain language of the *MCM*, the concurrent charges against appellant and the course of litigation in this case ensured appellant was on notice of the precise misconduct against which he had to defend. Appellant was also charged with touching AP's genitals, an offense which also required the specific intent at issue, based upon the same, single incident for which appellant was simultaneously charged with rape.[5] AP previously testified that those specifications stemmed from the same incident, and her prior testimony was presented at the Preliminary Hearing to this trial. Consequently, as charged and litigated in this case, appellant was already on notice that he was accused of having the specific intent at issue during the single course of conduct during which he was accused of raping and sexually abusing AP in the shower. Accordingly, there is nothing to indicate material prejudice to appellant's substantial rights.

Standard of Review

"Whether an offense is a lesser included offense is a question of law [this court] review[s] de novo." *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012) (quoting *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011)). As this issue was not properly preserved at trial by defense counsel, this Court reviews for

[5] Specification 5 of Charge II, alleging aggravated sexual abuse of a child.

plain error. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018); *Wilkins*, 71 M.J. at 412. "Under plain error review, the appellant has the burden of demonstrating '(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.'" *Armstrong*, 77 M.J. at 469 (quoting *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)).

"An error in charging an offense is not subject to automatic dismissal, even though it affects constitutional rights." *United States v. Oliver*, 76 M.J. 271, 275 (C.A.A.F. 2017) (quoting *Wilkins*, 71 M.J. at 413); *see also United States v. McMurrin*, 70 MJ 15, 20 (C.A.A.F. 2011) ("Rather than assume structural error whenever an accused has been convicted of an offense on the mistaken assumption that it is an LIO of the charged offense, we must determine whether the constitutional error was prejudicial . . . ."). The burden remains on appellant to show "that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice." *Wilkins*, 71 M.J. at 413 (alteration in original); *see also Armstrong*, 77 M.J. at 474; *Oliver*, 76 M.J. at 275; *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011). [6]

[6] Conversely, only when this error is preserved at trial is it tested for harmlessness beyond a reasonable doubt. *See United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016).

Law

"[T]he 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." *Oliver*, 76 M.J. at 273 (C.A.A.F. 2017) (quoting *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010)); *see also Schmuck v. United States*, 489 U.S. 705, 719 (1989) ("It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him."). "Article 79, UCMJ, authorizes a court-martial to find the accused 'guilty of an offense necessarily included in the offense charged.'" *Armstrong*, 77 M.J. at 469. An accused has sufficient notice of any offense necessarily included in the charged offense because "the elements of the lesser offense are a subset of the elements of the greater offense alleged," thereby alerting the accused to "be prepared to defend against [the lesser offense] in addition to the offense specifically charged." *Id*. (citing *MCM* pt. IV, para. 3.b.(1) & Discussion (2012 ed.)).

This court applies the "elements test" in two ways to determine whether an offense is "necessarily included in the offense charged" under Article 79, UCMJ. *Id*. First, this court compares the statutory language of the two offenses—"an offense is a lesser included offense of the charged offense if each of its elements is necessarily also an element of the charged offense." *Id*. (citing *United States v.*

Gaskins, 72 M.J. 225, 235 (C.A.A.F. 2013); *MCM* pt. IV, para. 3.b.(1) (2012 ed.)). "The elements test does not require that the two offenses at issue employ identical statutory language." *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). Appellate courts "apply normal rules of statutory interpretation and construction to 'determine whether the elements of the [lesser included offense] would necessarily be proven by proving the elements of the greater offense.'" *Riggins*, 75 M.J. at 83 (quoting *Gaskins*, 72 M.J. at 235). This Court "engage[s] in statutory construction to determine whether a close analysis of the relevant statute(s) reveals that the elements of the putative lesser offense were implicitly subsumed by the elements of the charged offense." *Armstrong*, 77 M.J. at 474 (J. Ohlson, concurring).

Second, this Court also examines the specification of the charged offense as written—"[a]n offense can also be a lesser included offense of the charged offense if the specification of the charged offense is drafted in such a manner that it alleges facts that necessarily satisfy all the elements of each offense." *Id.* at 470 (citing *Arriaga*, 70 M.J. at 55; *Riggins*, 75 M.J. at 85 n.7). "[E]ven if the elements of an offense are not necessarily a subset of the elements of the charged offense, the charging language may ensure that the offense is 'necessarily included in the offense charged,' within the meaning of Article 79." *Id*. at 472 (internal citations omitted). "In making this lesser included offense determination, courts examine the offense 'in the context of the charge at issue.'" *Riggins*, 75 M.J. at 83 (quoting

Alston, 69 M.J. at 216). "The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against." *Jones*, 68 M.J. at 472. "If the elements test is satisfied in either way the accused will have the notice necessary to prepare a defense." *Armstrong*, 77 M.J. at 470.

A lesser offense may encompass a wider range of conduct than the greater offense and still satisfy the "elements test" as an LIO. "The fact that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.'" *Arriaga*, 70 M.J. at 55 (quoting *United States v. McCullough*, 348 F.3d 620, 626 (7th. Cir. 2004)); *see also* Wayne R. LaFave, Criminal Procedure, § 24.8(b) at 1152-54 (4th ed. 2004) ("When the lesser offense is one defined by statute as committed in several different ways, it is a lesser-included offense if the higher offense invariably includes at least one of these alternatives."). Consequently, it may be possible to commit the lesser offense without necessarily committing the greater, but "[t]o be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *Schmuck*, 489 U.S. at 719 (quoting *Giles v. United States*, 144 F.2d 860, 8861 (9th. Cir. 1944)).

If appellant establishes an erroneous conviction of a LIO and that the error was plain and obvious, appellant still bears the burden of proving that the error

"resulted in material prejudice to [his] substantial, constitutional right to notice." *Oliver*, 76 M.J. at 275 (quoting *Wilkins*, 71 M.J. at 413)). "In cases involving . . . lesser included offenses, prejudice can be caused by not having 'notice as to the offense that must be defended against.'" *Armstrong*, 77 M.J. 473 (quoting *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009)). "The manner in which a case was contested may reveal whether an accused was prejudiced by an erroneous consideration of an offense that is not actually a lesser included offense." *Id*. (citing *Oliver*, 76 M.J. at 275). An appellant may fail to meet this burden when he "cannot establish prejudice to his ability to defend against the charge he was convicted of or his right to notice." *Wilkins*, 71 M.J. at 413.

Argument

1. There was no error because aggravated sexual contact of a child is a lesser-included offense of rape of a child.

A. The "elements test" is satisfied because the elements of aggravated sexual contact of a child are necessarily included in the elements of rape of a child.

Aggravated sexual contact with a child who had not yet attained the age of twelve years old included two elements: (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*, pt. IV, para. 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, pt. IV, 45.a.(t)(1) (2008 ed.).

Appellant's original charge of rape of a child 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." *MCM*, pt. IV, para. 45.b.(2)(a) (2008 ed.). "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, para. 45.a.(t)(1)(A)-(B) (2008 ed.). In this case, the specific intent component of "sexual contact" is necessarily included within a "sexual act."

A "sexual act" is defined in two ways—penetration of the genital opening by a hand, finger, or other object with the same sexual intent language used in the definition of "sexual contact," or by penile penetration of the vulva. The presence of the specific intent language within both definitions demonstrates that a sexual intent is necessary for both a "sexual act" and for "sexual contact"—"sexual

contact" does not add an additional element not already present in a "sexual act." However, for penile-vulva penetration, there is no need to specify an explicit intent element because every penile-vulva penetration necessarily includes a corresponding sexual intent. *See United States v. Wagner*, ARMY 20111064, 2013 CCA LEXIS 573, *29-31 (Army Ct. Crim. App. 29 Jul 2013); *United States v. Demarrias*, 876 F.2d 674, 676-77 (8th. Cir. 1989).

Because the definition of "sexual act" encompasses a highly specific act which by its very nature is sexual—penile penetration of the vulva—there is no need for an additional showing of intent when that is the conduct at issue.[7] Conversely, other types of conduct, namely penetration of the vulva by a finger or object, may be made for legitimate purposes other than sexual gratification (such as medical treatment). *See Demarrias*, 876 F.2d at 676.

Taken as a whole, "sexual act" and "sexual contact" under Article 120 encompass three varieties of sexual conduct, all of which carry a specific sexual intent: (1) penetrative acts which by their very nature carry a sexual intent (penile penetration of the vulva); (2) penetrative acts which may constitute a "sexual act" if done with a sexual intent (digital penetration of the genital opening); and (3) non-penetrative acts which may constitute "sexual contact" if done with a sexual

[7] This is a point on which appellant appears to agree, noting that "there is never a justification for penetrating the vulva of a child with a penis." (Appellant's Br. at 10).

intent. The requirement for an additional showing of specific sexual intent as to the conduct covered by instances (2) and (3) simply ensures that it is in fact "sexual" conduct being captured by the statute (as opposed to other legitimate conduct, such as medical treatment).

In all three instances, a specific sexual intent is present—penile penetration of the vulva (assuming the requisite general intent for that *actus reus*—i.e., absent accident, etc.) cannot be accomplished without an intentional touching with sexual intent. *See Demarrias*, 876 F.2d at 676-77; *see also Wilkins*, 71 M.J. at 413 ("Abusive sexual contact is an LIO of aggravated sexual assault in some instances. For example, if an accused is charged with aggravated sexual assault by penetrating the genital opening of another, then any penetration of the genital opening would also require a touching of the genital opening."). In *Armstrong*, this Court found that while there may be some overlap between the offenses of abusive sexual contact and assault consummated by a battery, it was possible to commit abusive sexual contact by causing bodily harm without also committing assault consummated by a battery. 77 M.J. at 471-72. By contrast, in the present case it is impossible to commit, or prove, a "sexual act" based on penile penetration of the vulva, without first having also committed, or proven, "sexual contact" based on non-penetrative contact between the penis and the victim's genitalia.

B. In this case, the aggravated sexual contact of a child for which appellant was convicted was necessarily included in the specification of rape of a child as drafted.

The specification as written alleges sufficient facts—penile penetration of the vulva—to put appellant on notice of the offense for which he was ultimately convicted, non-penetrative contact between his penis and AP's external genitalia. Appellant was charged with "engag[ing] in a sexual act, to wit: penetrating, with his penis, the vulva of AP." (JA 2). The specification informed appellant that he was accused of penetrating AP's vulva with his penis, a "sexual act" that inherently includes a sexual intent. Because it would be impossible for appellant to penetrate AP's vulva with his penis without first making physical contact with her external genitals with his penis, 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.

This stands in contrast to a case where appellant is charged with a "sexual act" and then convicted of a completely different type of "sexual contact," such as in *United States v. Marbury*, ARMY 20140023, 2016 CCA LEXIS 696 (Army Ct. Crim. App. 2016). In *Marbury*, the appellant was charged with sexual assault based upon penile penetration of the vulva, but was convicted of abusive sexual contact as an LIO, based upon the "sexual contact" of touching the victim's breast with "some part or parts of his body." *Id*. at *3. The Army Court correctly found

that abusive sexual contact was not an LIO of sexual assault "under the facts and circumstances of this case." *Id*. at *4. As written, "the specification did not encompass a scenario in which appellant touched another soldier's breast with an unknown part or parts of his body." *Id*. Consequently, the appellant was convicted based upon a factual ground on which he was not prepared to defend. *Id*.

In the present case, the specification as written clearly encompassed a scenario in which appellant first committed a "sexual contact" by touching AP's external genitalia with his penis. In fact, the specification factually requires it, as it would have been impossible for appellant to penetrate AP's vulva with his penis, without first touching her genitalia with his penis, possessing the same sexual intent which would accompany the act of penetration. The specific conduct, and the requisite intent, for which appellant was convicted were necessarily included within the specification as charged. Consequently, appellant's conviction for aggravated sexual contact of a child is an LIO of his original charge of rape of a child, based on the language of the charge and the facts in this case.

2. Even if aggravated sexual contact of a child is not a lesser-included offense of rape of a child, the error was not "clear or obvious."

An error is "plain" when it is "obvious" or "clear under current law." *United States v. Olano*, 507 U.S. 725, 734 (1993). This Court examines the circumstances of an error, considering whether the error was so obvious "in the context of the entire trial" that "the military judge should be 'faulted for taking no action' even

without an objection." *United States v. Gomez*, 76 M.J. 76, 81 (C.A.A.F. 2017) (citing *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009) (quoting *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008))); *see also United States v. Frady*, 456 U.S. 152, 163 (1982) (noting that error is clear if "the trial judge and prosecutor [would be] derelict in countenancing it, even absent the defendant's timely assistance in detecting it").

A. The error is not "clear or obvious" where the military judge's decision is consistent with the *Manual for Courts-Martial* and both Federal circuits and military service courts are split on the issue.

First, any error in this case was not "obvious" or "clear under current law." *Olano*, 507 U.S. at 734. As a starting point, the applicable *MCM* for this charge explicitly lists aggravated sexual contact as an enumerated LIO of rape, and similarly explicitly lists aggravated sexual contact of a child as an enumerated LIO of rape of a child. *MCM*, pt. IV, para. 45.d.(1).(a) and 45.d.(2).(a) (2008). Furthermore, there is a split on this issue within both the Federal circuits and the military service courts of appeals. The Eighth Circuit has held that an offense based on "sexual contact" is necessarily included within an offense alleging a "sexual act," reasoning that certain sexual acts "need[] no explicit intent element," because the sexual intent is inherent in the act. *Demarrias*, 876 F.2d at 676. As appellant notes, the Second, Ninth, and Tenth Circuits disagree, and have all explicitly held that "sexual contact" offenses requiring a specific intent element fail

the "elements test" and thus cannot be an LIO of "sexual act" offenses. *See United States v. Hourihan*, 66 F.3d 458 (2nd Cir. 1995); *United States v. Sneezer*, 900 F.2d 177 (9th Cir. 1990); *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998).

Similarly, there is no clear consensus among the military service courts of appeal. The Army Court has explicitly held that a "sexual contact" offense is an LIO of a "sexual act" offense based on penile penetration of the vulva, because "it is beyond cavil that every penile-vaginal penetration includes a corresponding sexual intent." *Wagner*, 2013 CCA LEXIS 573 at *30. Similarly, the Navy-Marine Court found that where an appellant was convicted of rape of a child and aggravated sexual abuse of a child, for "both penetrating [the victim's] vulva and touching her genitalia with his penis," the charges were multiplicious because the latter offense was an LIO of the former. *United States v. Decker*, 2012 CCA LEXIS 454, *22 (N.M. Ct. Crim. App. Nov. 30, 2012). In fact, the Navy-Marine Court went so far as to deem it "plain and obvious error" for the military judge not to dismiss the sexual abuse offense as multiplicious, even where the appellant did not object at trial. *Id.* Conversely, the Air Force Court analyzed this issue and found that abusive sexual contact is not an LIO of aggravated sexual assault where the assault is based on penile penetration, because the specific intent element is "not found in the elements of the greater offense." *United States v. Lyson*, 2013 CCA LEXIS 816, *37-38 (A.F. Ct. Crim. App. Sept. 16, 2013).

Consequently, as of this appeal, the Federal circuits are split on this issue, with a majority of the circuits that have addressed this issue favoring appellant, and the military service courts are similarly split, with a majority of military courts that have addressed the issue favoring the government's position. Where the military judge's decision in this case was based upon the explicit guidance of the *MCM*, followed the LIO analysis favored by a majority of the military courts that have addressed this issue, and was also supported by at least one Federal circuit, finding aggravated sexual contact of a child to be an LIO of rape of a child was not clearly error under current law.

B. The error is not "clear or obvious" in the context of this trial, where it was impossible to commit the "sexual act" charged without first committing the "sexual contact" for which appellant was convicted.

Within the context of this specific trial, (1) appellant was charged with rape by penetrating AP's vulva with his penis, an act which necessarily required appellant to make physical contact between his penis and the exterior genitalia of AP; (2) the *MCM* clearly stated aggravated sexual contact as an LIO of the charged offense, a fact presumably known both to the military judge and counsel; and (3) AP's testimony at trial supported a finding that appellant physically contacted her genitalia with his penis, with a sexual intent, but that no penetration occurred.

In light of the specific conduct charged in this case, and the specific facts presented by the evidence, the military judge was not "derelict" in applying the

plain guidance of the *MCM*, particularly where appellant raised no challenge or objection to this finding at trial. *Frady*, 456 U.S. at 163.

3. Appellant cannot demonstrate material prejudice to a substantial right because he was on notice both of the applicable lesser-included offense and that his specific intent was relevant to the incident at issue.

Even if this Court finds that the military judge committed plain and obvious error, appellant cannot demonstrate material prejudice to a substantial right. Appellant claims he had no notice that aggravated sexual contact (and its corresponding specific intent) was at issue regarding the allegation that he penetrated AP's vulva with his penis and that his defense would have significantly changed had he been aware of this. To the contrary, appellant had notice of this LIO and the relevance of specific intent from the *MCM*, from the charge sheet, and from the course of litigation in this case. If the military judge's finding of an LIO was erroneous, it had no effect on appellant's strategy or defense in this case.

A. Appellant had notice based upon the *Manual for Courts-Martial*.

As discussed above, the applicable version of the *MCM* explicitly lists aggravated sexual contact of a child as an LIO of rape of a child. *MCM*, pt. IV, para. 45.d.(2).(a) (2008 ed.). Aggravated sexual contact of a child's listing as an enumerated LIO of rape of a child does not depend upon the factual circumstances of the case—rather, it is specifically enumerated as an LIO. *Compare MCM*, pt. IV, para. 45.d.(2).(A) and 45.e.(2) (2008 ed.). The *MCM*'s specific enumeration of

a lesser included offense does not, standing alone, "automatically make[]" something a lesser included offense. *See Jones*, 68 M.J. at 471. However, where the question is one of notice, even if aggravated sexual contact of a child ultimately fails the "elements test" as an LIO of rape of a child, the specific enumeration of this offense as an LIO in the *MCM* unequivocally put appellant on notice that when charged with rape of a child he should reasonably be prepared to defend against aggravated sexual contact based upon the same conduct.

B. Appellant had notice based upon the charge sheet and the prior litigation in this case.

In addition to the specification charging appellant with the rape of AP, appellant was also charged with aggravated sexual abuse of AP for committing "a lewd act, to wit: touching, not through the clothing, the genitalia of AP." (JA 3). AP previously testified, at the first trial, that there was a single incident of sexual molestation, during which appellant committed both of these offenses. (Supp. JA 13-14). AP's prior testimony was known both to appellant and his lead defense counsel, who previously represented appellant at the first trial. (Supp. JA 1-2). AP's prior testimony was also presented to the defense when it was submitted by the government at the Article 32 Preliminary Hearing for the retrial. (Supp. JA 7). In sum, prior to the beginning of this trial, appellant was on notice that the allegations of rape of AP (by penile penetration of the vulva) and aggravated sexual abuse of AP (by touching her genitalia) were based upon the same incident.

A "lewd act," as charged in this specification, is defined as:

> [t]he intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

MCM, pt. IV, para. 45.t.(10).(A) (2008 ed.). By comparison, "sexual contact" is defined as:

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

MCM, pt. IV, para. 45.t.(2) (2008 ed.). The specific intent necessary to establish a "sexual contact" is identical to the specific intent element necessary to prove a "lewd act." Appellant was charged with a parallel specification, addressing a different physical contact but during the exact same overall event (sexually molesting AP in the shower) for which his specific sexual intent was explicitly an element. (JA 3).

This Court has consistently recognized that the manner in which a case is contested "may reveal whether an accused [is] prejudiced" by an erroneous LIO. *Armstrong*, 77 M.J. at 473 (quoting *Oliver*, 76 M.J. at 275). In *Oliver*, the appellant was convicted of wrongful sexual contact as an LIO of abusive sexual contact. 76 M.J. at 272. This Court held that wrongful sexual contact was not an LIO of abusive sexual contact because lack of consent, an element of wrongful

sexual contact, was not an element of the greater offense of abusive sexual contact. *Id*. at 275. Nevertheless, this Court found that the appellant could not establish material prejudice to a substantial right because the issue of consent was raised and fully litigated at trial. *Id*. This Court held that:

> [u]ltimately, the manner in which the case was contested diminishes any argument that Appellant was not on notice as to what he had to defend against. Whether abusive sexual contact or wrongful sexual contact, Appellant knew which part of the body he was alleged to have wrongfully touched, and his theory throughout the court-martial was that [the victim] consented to the sexual activity. Accordingly, under the facts of this case, there is nothing to indicate material prejudice to Appellant's substantial rights.

Id. Likewise, in the present case, appellant knew he was accused of touching AP's vulva, he knew that he was separately accused of touching that part of her body with both his penis and his hands, and he knew that he was accused of touching her her "with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person." *MCM*, pt. IV, para. 45.t.(10).(A) (2008 ed.).

Prior to trial, appellant was on notice (1) that he was charged with rape of a child, AP; (2) that aggravated sexual contact of a child was explicitly enumerated as an LIO of rape of a child in the *MCM*; (3) that he was also charged with aggravated sexual abuse of AP, based on touching her genitalia; (4) that the charges of rape and aggravated sexual abuse were based on the same specific

incident; (5) that a specific sexual intent was an element of aggravated sexual abuse; and thus (6) that his specific sexual intent was relevant to the single alleged incident of sexual misconduct in the shower with AP. The charge sheet taken as a whole, combined with the course of litigation and AP's prior testimony on this matter, clearly put appellant on notice that his specific sexual intent was a relevant, necessary part of the government's case regarding the single alleged incident of sexual misconduct.

C. Further notice of this lesser-included offense would not have impacted appellant's strategy or defense.

Appellant claims that his only available strategy at trial was to deny that the alleged conduct occurred and that, conversely, had he been on notice of an LIO based on "sexual contact" he would have raised the defense that he was simply assisting AP clean herself in the shower. While appellant is correct that an innocent intent would not have been a defense to the specific charge of rape of a child, he is incorrect in arguing that such a defense was not reasonably implicated by the charge sheet and the overall course of litigation.

Appellant's charge for aggravated sexual abuse, based upon the lewd act of touching AP's genitalia, gave appellant notice that a non-sexual intent (such as bathing a young child) was an applicable defense in his trial. Particularly in this case, once AP disclaimed any penile penetration during her testimony, appellant could have pivoted to this defense, attempting to explain the entire shower incident

as a misunderstanding. Instead, appellant pursued the defense that none of the alleged contact ever occurred. (JA 63-74). Appellant's strategic decision at trial is reasonable—while the claim that appellant merely "helped [AP] in the shower" might constitute a reasonable explanation for touching her with his hands, it is far less persuasive an explanation for why appellant placed his penis on her genitals and "rub[bed]" his penis on her "belly," as she testified. (Appellant's Br. at 14; JA 39-41). Appellant was on notice that his specific sexual intent was relevant to this incident, and instead elected as a matter of trial strategy to focus on undermining AP's credibility and claiming the allegations were completely fabricated. (JA 63-74).

In *Wilkins*, the appellant was convicted of abusive sexual contact as an LIO of aggravated sexual assault, based on digitally penetrating the victim's anus. 71 M.J. at 412. This Court found the specification defective in alleging a "sexual act," and thus held that the charged conduct could not be an LIO where it was a "legal impossibility" for the conduct to ever constitute the greater offense. *Id*. at 413. Nevertheless, the appellant could not establish material prejudice to a substantial right because he "was on notice of what he needed to defend against throughout his court-martial," and his strategy focused on the victim's incapacitation and his own claimed mistake of fact as to consent. *Id*. at 414 (citing *Jones*, 68 M.J. at 468). "This strategy would not have changed had the

specification properly alleged 'contact' instead of 'act,'" and so "[t]he manner in which the case was argued undercut[] any argument that [the] Appellant was not on notice of what he had to defend against or that his defense preparations were hampered." *Id*.; *see also Armstrong*, 77 M.J at 473-74 (finding no prejudice where appellant "had notice of how he needed to defend himself at the start of the case").

In the present case, appellant was on notice that he was charged with penetrating AP's vulva with his penis, and touching her genitalia with specific sexual intent, all as part of the same course of conduct. He was on notice that his specific sexual intent was a necessary element for the government to prove regarding this single incident of sexual misconduct, and thus that any defenses regarding that specific intent were relevant. Instead, appellant pursued a defense of attacking AP's credibility based on inconsistent statements, and arguing that all of the allegations were a result of the influence and suggestive questioning from adults. (JA 44, 63-74). As in *Wilkins* and *Armstrong*, appellant was on notice of the relevant defenses in his case, and his strategy would not have changed even if the specification for rape explicitly referenced his specific intent.

Conclusion

For the reasons outlined above, appellee respectfully requests this Honorable Court affirm the Army Court's decision and the findings and sentence in this case.

JEREMY WATFORD
Major, Judge Advocate
Appellate Attorney
Government Appellate Division
U.S.C.A.A.F. Bar No. 36902

ERIC K. STAFFORD
Lieutenant Colonel, Judge Advocate
Deputy Chief
Government Appellate Division
U.S.C.A.A.F. Bar No. 36897

STEVEN P. HAIGHT
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31651

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Jeremy Watford

JEREMY WATFORD
Major, Judge Advocate
Appellate Attorney
Government Appellate Division
U.S.C.A.A.F. Bar No. 36902

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I certify that a copy of the foregoing brief in the case of *United States v. Specialist Michael J. Gonzales*, Crim. App. Dkt. No. 20130849, USCA Dkt. No. 18-0347/AR, was transmitted by electronic means to the Court (***efiling@armfor.uscourts.gov***) and contemporaneously served on the Defense Appellate Division, on March 18, 2019.

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
daniel.l.mann.civ@mail.mil