IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) LUKE D. ENGLISH United States Army, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20160510 USCA Dkt. No. 19-0050/AR

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

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Issue Granted

WHETHER THE ARMY COURT OF CRIMINAL APPEALS CAN FIND THE UNLAWFUL FORCE, AS ALLEGED, FACTUALLY INSUFFICIENT AND STILL AFFIRM THE FINDING BASED ON A THEORY OF CRIMINALITY NOT PRESENTED AT TRIAL.

STATEMENT OF THE CASE

On February 25, 2019, this Court granted appellant's petition for review. On March 29, 2019, appellant submitted his final brief to this Court. The government responded on April 29, 2019. This is appellant's reply.

a. The factual predicate charged by the trial counsel in the element of unlawful force was not surplusage and is tied to the material element.

The appellee argues that the factual predicate alleged in the specification is surplusage. (Gov. Br. at 12-13). It is not.

1. The federal practice regarding surplusage supports appellant's position.

When "a particular offense was charged in the indictment, and those allegations were a necessary part of the description of that particular offense, and the rule is that, where words are employed in the indictment which are descriptive of the identity of that which is legally essential to the charge in the indictment, such words cannot be stricken out as surplusage." *Butler v. United States*, 20 F.2d 570, 573 (8th Cir. 1927) (citations omitted). *See generally Rabens v. United States*, 146 F. 978, 979 (4th Cir. 1906); *United States v. Eisenminger*, 16 F.2d 816 (D. Del. 1926); *United States v. Root*, 366 F.2d 377 (9th Cir. 1966).

For example, in *United States v. Scotto*, 98 A.F.T.R.D. 2d (RIA) 6381, *17-18 (S.D.N.Y. 2006), the district court declined to strike language in an indictment that discussed the defendant's financial transactions because language was "directly relevant to tax evasion claim as it illustrated *the method* by which [appellant] attempted to conceal his income and assets to avoid payment of taxes

that were allegedly due and payable by him." (citing *United States v. Hernandez*, 85 F.3d 1023, 1030 (2d Cir. 1996)) (emphasis added).

The federal counterpart to R.C.M. 603 – Fed. R. Crim. P. 7 – serves "to protect defendant[s] against prejudicial allegations that are neither relevant or material to the charges made in an indictment . . . or not essential to the charge . . . or unnecessary, or inflammatory." *United States v. Poore*, 594 F.2d 39 (4th Cir. 1979) (citations omitted). Generally, "any fact or circumstance laid in an indictment which is not a necessary ingredient of an offense" is surplusage. *Johnson v. Biddle*, 12 F.2d 366, 369 (8th Cir. 1926).

"[I]f the language in the indictment is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be (provided it is legally relevant)." *United States v. Climatetemp, Inc.*, 482 F. Supp. 376, 391(N.D. Ill. 1979) (citing *United States v. Chas. Pfizer & Co.*, 217 Supp. 199 (S.D.N.Y. 1963)), *rev'd* on other grounds, 426 F.2d 32 (2nd Cir. 1970); *see also United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971).

2. Unlawful force cannot be broadly inferred when the specification limited the modality.

Here, government offers the same spurious rationale the government made in *United States v. Lubasky*, 68 M.J. 260, 264-65 (C.A.A.F. 2010), by asking this Court to read in the surrounding circumstances in evaluating unlawful force despite

the "to wit" language to avoid variance "concerns" on appeal. (Gov. Br. at 9-10, 15, 19).

b. Because the government limited itself to a specific theory in the specification, only the trial court could make a general finding.

While the appellee argues that the Army Court affirmed a "general verdict," authority to affirm on a broader, or different, theory of criminal liability is not found in Article 59(a), UCMJ. (Gov. Br. 13-14). Article 59(a), UCMJ, specifically permits appellate courts to affirm offenses that are expressly or inherently a lesser-included offense. A general verdict may be reached by the fact finder at trial; it is not a lesser-included offense as the appellee asserts. (Gov. Br. 14). Instead, the result from the Army Court is a parallel offense which the government could have charged originally – or alternatively – to the specification referred to trial. Therefore, it is not a lesser-included offense.

c. When the Army Court found the force element factually insufficient, there was no lesser included offense.

Attempted rape, under Article 80, UCMJ, and abusive sexual contact, under Article 120(b), UCMJ, are not lesser-included offenses of Specification 6 of Charge I *in this case*. As an initial matter, the lesser-included offense analysis follows the Army Court's finding that the charged factual predicate of "grabbing her head with his hands" was factually insufficient. At the time of trial, a lesser-

included offense existed hypothetically because the bodily harm would have been "grabbing her head with his hands." When the Army Court found the charged language of unlawful force factually insufficient, however, it eliminated the lesser-included offense. Even if the statutory elements of sexual assault can be a lesser-included offense of rape by force, there is no *factual* lesser-included offense in this case. The appellee broadly argues that rape has lesser-included offenses pursuant to *United States v. Armstrong*, 77 M.J. 465 (C.A.A.F. 2018). That argument is immaterial here, because when Army Court found that the unlawful force, as charged, was factually insufficient, it eliminated the lesser-included offense of sexual assault by bodily harm, which would have been "grabbing her head with his hands."

The appellee argues that all the facts from the entire evening are relevant to describe some unspecified unlawful force. (Gov. Br. at 19). However, the statutory modalities of sexual assault include fear and bodily harm as separate offenses within the category of sexual assault. The government charged a theory of criminal liability under the statute and the defense counsel defended against that specific theory. To affirm on appeal under a theory that was not charged and not proven at trial would violate the concepts of notice and justice. The government is expected to prove its case, and when it does not, it has failed meet its burden at trial.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court dismiss Specification 6 of Charge I, consistent with the Army Court's finding that the evidence of the specification as charged was factually insufficient.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 1139 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. English,* Army Dkt. No. 20160510, USCA Dkt. No. 18-0050/AR, was electronically filed brief with the Court and Government Appellate Division on May 9, 2019.

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