IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**BRIEF ON BEHALF OF APPELLANT (REHEARING)**
v.	Docket No. ARMY 20140735
Staff Sergeant (E-6) **ANGEL M. SANCHEZ** United States Army Appellant	Tried at Fort Leonard Wood, Missouri on 12 August, 3 and 22–24 September 2014, before a general court-martial appointed by Commander, Headquarters, Maneuver Support Center of Excellence and Fort Leonard Wood, Colonel Jeffery R. Nance, military judge, presiding. Re-tried at Fort Leavenworth, Kansas, on 17 September 2019 and 7 January 2020, before a general court-martial appointed by Commander, Headquarters, United States Army Combined Arms Center & Fort Leavenworth, Lieutenant Colonel S. Charles Neill, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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Panel 4

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Assignment of Error

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S GUILTY PLEA TO A SPECIFICATION THAT DID NOT STATE AN OFFENSE.

Statement of the Case

On 22–24 September 2014, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of three specifications of violating a general order by engaging in conduct of a sexual nature with basic trainees, in violation of Article 92, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 892 (2012). (R. at 638–40, *Sanchez I*; Charge Sheet, *Sanchez I*). Contrary to his pleas, the military judge convicted appellant of an additional specification of violating a general order, four specifications of cruelty and maltreatment, four specifications of sexual assault, and six specifications of abusive sexual contact, in violation of Articles 92, 93 and 120, UCMJ; 10 U.S.C. §§ 892, 893, and 920 (2012). (R. at 638–40, *Sanchez I*; Charge Sheet, *Sanchez I*). The military judge found appellant not guilty of one specification of violating a lawful general regulation by wrongfully having a sexual relationship with a trainee, four specifications of cruelty and maltreatment, two specifications of sexual assault, and two specifications of abusive sexual contact, in violation of Articles 92, 93 and 120, UCMJ. (R. at 638–40, *Sanchez I*; Charge Sheet, *Sanchez I*). The military judge sentenced appellant to a dishonorable discharge, confinement for twenty years, forfeiture of all pay and allowances, and reduction to the grade of E-1. (R. at 691, *Sanchez I*). The convening authority deferred adjudged and waived automatic

forfeitures and approved the remainder of the adjudged sentence. (Action, *Sanchez I*).

On 28 March 2017, this court affirmed the findings of guilty and sentence. *United States v. Sanchez*, ARMY 20140735, 2017 CCA LEXIS 203 (A. Ct. Crim. App., 28 Mar. 2017). Appellant requested reconsideration based on the Court of Appeals for the Armed Forces' (C.A.A.F.) decision in *United States v. Hukill*, 76 M.J. 219 (C.A.A.F. 2017). This court granted reconsideration, and again affirmed the findings and sentence. *United States v. Sanchez*, ARMY 20140735, 2017 CCA LEXIS 470 (A. Ct. Crim. App., 17 Jul. 2017).

Appellant petitioned the Court of Appeals for the Armed Forces (C.A.A.F.). On 15 October 2018, C.A.A.F. both granted appellant's petition and reversed the decision of this court, remanding appellant's case to this court for a new Article 66 review. *United States v. Sanchez*, 78 M.J. 166 (C.A.A.F. 2018). Upon remand, this court set aside the findings of guilty as to Specifications 1, 2, 3, 4, 7, 8, 11, 13, 14, and 15 of Charge I and the sentence, and affirmed remaining findings of guilty, and authorizing a rehearing on the set aside findings and sentence. *United States v. Sanchez*, ARMY 20140735, 2019 CCA LEXIS 164 (A. Ct. Crim. App. 10 Apr. 2019).

On 7 January 2020, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of three specifications of abusive sexual

contact, in violation of Article 120, UCMJ. (R. at 73, *Sanchez II;* Charge Sheet, *Sanchez II*). The military judge dismissed the remaining remanded specifications of Charge I prior to findings. (R. at 72, *Sanchez II*). The military judge sentenced appellant to a dishonorable discharge, confinement for 54 months, and reduction to the grade of E-1. (R. at 133, *Sanchez II*). The convening authority approved the adjudged sentence.[1] (Action, *Sanchez II*).

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S GUILTY PLEA TO A SPECIFICATION THAT DID NOT STATE AN OFFENSE.

Facts Relevant to Assignment of Error

The government charged appellant with abusive sexual contact in the following manner:

> Specification 7: In that Drill Sergeant (E-6) Angel M. Sanchez, U.S. Army, did, at or near Fort Leonard Wood, Missouri, between on or about 17 September 2013 and on or about 31 January 2014, commit sexual contact upon Private [redacted] without her consent by causing bodily harm to her, *to wit: by placing himself between Private [redacted]'s*

[1] Appellant notes the promulgating order incorrectly reflects the language of Specification 8 of Charge I, as amended. (Prom. Order). The government moved to amend this specification by excepting the words, "by placing her in fear that she would be kicked out of the Army if she did not comply," and substituting therefor the words "without her consent by causing bodily harm to her." (R. at 45). Trial defense counsel did not object to this change, and the military judge granted the government's motion. (R. at 46). The promulgating order does not reflect this change. (Prom. Order). Appellant requests this court correct this apparent ministerial error.

> *legs while in a closet*, with the intent to gratify his own sexual desires.

(Charge Sheet, *Sanchez II* (emphasis added)). Appellant agreed to plead guilty to this specification on 20 December 2019 as part of his offer to plead guilty. (App. Ex. XVII, *Sanchez II*).

Prior to the rehearing, appellant entered into a stipulation of fact with the government regarding, among others, Specification 7. (Pros. Ex. 1, *Sanchez II*). There, appellant stipulated he pushed Private (PVT) [redacted]. onto a desk and "lifted up both of PVT [redacted]'s legs and stood in between them such that [appellant] and PVT [redacted]'s bodies were chest to chest and his groin was against hers." (Pros. Ex. 1, p. 3, *Sanchez II*). Appellant also stipulated "He placed himself between [PVT [redacted]'s] legs by grabbing her legs. When he did so, he did it with the intent to gratify his own sexual desires." (Pros. Ex. 1, p. 5, *Sanchez II*).

During the providence inquiry, the military judge asked appellant to explain how appellant did the acts alleged in Specification 7. (R. at 33, *Sanchez II*). Appellant responded by telling the military judge, "I closed the door behind us and at that point I led [PVT [redacted]] to the desk and I sat her on top of the desk and at that point I placed myself in between her legs with my hips touching pretty much the furthest entry point of her thighs, and that's it." (R. at 33, *Sanchez II*). The military judge then asked appellant whether he touched PVT [redacted] with his hands,

and appellant responded that he touched "her body, her upper body, like her shoulders or her back." (R. at 33, *Sanchez II*).

Presumably unconvinced by appellant's description of the events, the military judge asked for clarification:

> MJ: And then how did you make contact with her legs?
>
> ACC: Just-- I moved up to the point where her legs could no longer open up any more, so it was just natural contact between her inner thighs and my hips.
>
> MJ: And so were you pushing her legs open with your legs?
>
> ACC: I was just essentially walking forward, sir, yes, but essentially, yes.
>
> MJ: Just to make sure that I'm clear with the factual predicate for your plea, you approached her and then with your legs you pushed into her legs, is that right?
>
> ACC: Yes, sir. I stepped in between her legs and as I continued to inch forward her legs opened up more and more.

(R. at 34, *Sanchez II*). Appellant clarified later in the inquiry he made contact with PVT [redacted]. at the point where her shorts ended. (R. at 35, *Sanchez II*). The military judge then found appellant provident and accepted his plea. (R. at 72, *Sanchez II*).

Standard of Review

The question of whether a specification fails to state an offense is a question of law appellate courts review de novo. *United States v. Turner*, 79 M.J. 401, 404

(C.A.A.F. 2020) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)).

Law

"It is the Government's responsibility to determine what offense to bring against an accused." *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010); *see United States v. Elespuru*, 73 M.J. 326, 329 (C.A.A.F. 2014). Because of this responsibility—and its exclusive control over the charge sheet—the government is required to place an accused on notice of the charges against which he must defend himself. *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) (citing *Morton*, 69 M.J. at 16).

A. Drafting with Specificity

The government is not always required to draft specifications alleging the particular manner in which the accused committed the alleged unlawful act. *Id.* at 120 (citing *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011)) (in the context of an Article 120 offense, "the Government was not required to draft the specification alleging a particular type of force, i.e., that Appellant committed this particular offense by 'grabbing her head with his hands.'"). However, where the government *does* narrow the scope of the charged offense by alleging with particularity the manner in which the accused is alleged to have committed an unlawful act, it is "required to prove the facts as alleged." *Id*. (citing *United States*

v. Reese, 76 M.J. 297, 300–01 (C.A.A.F. 2017)). Put another way, once the government makes a charging decision, it is "bound to abide by it." *Id.* (citing *Morton*, 69 M.J. at 16). As the Court of Appeals for the Armed Forces (C.A.A.F.) recently noted, "peril . . . lies in wait for any government attorney who, when drafting charges, fails to meticulously follow the language contained in the UCMJ sample specifications." *Turner*, 79 M.J. at 402.

On appeal, this court is permitted to "narrow the scope of an appellant's conviction to that conduct it deems legally and factually sufficient." *United States v. Piolunek*, 74 M.J. 107, 112 (C.A.A.F. 2015); *English*, 79 M.J. at 120. But this court may not change the scope of a specific offense to a broader charge not presented at trial. *English*, 79 M.J. at 120 (citing *Piolunek*, 74 M.J. at 112; *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008)). This prohibition on expanding the scope of charged misconduct precludes courts from revising "the basis on which a defendant is convicted simply because the same result would likely obtain on retrial," thereby violating appellants' constitutional due process rights. *Dunn v. United States*, 442 U.S. 100, 107 (1979); *see United States v. Riley*, 50 M.J. 410, 415–16 (C.A.A.F. 1999).

B. Maximum Liberality

Although the standard of review is always de novo, the "lens" through which appellate courts evaluate the sufficiency of a specification "differs depending on

when counsel first raise[] the issue." *Id.* When counsel first raise an issue on appeal, the specification is "view[ed] with a greater tolerance than one which was attacked before findings and sentence." *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) (citing *United States v. Whyte*, 1 M.J. 163 (C.M.A. 1975); *United States v. Sell*, 3 U.S.C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953)). This "greater tolerance" means that courts evaluate the specification at issue with "maximum liberality" in favor of validity of the specification. *Turner*, 79 M.J. at 403 (quoting *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990)).

When applying the maximum liberality standard, military courts have long adopted the federal court's view that "a conviction will not be reversed where the indictment is challenged only after conviction unless the indictment cannot within reason be construed to charge a crime." *Watkins*, 21 M.J. at 210 (quoting *United States v. Hart*, 640 F.2d 856, 857–58 (6th Cir. 1981), *cert. denied*, 451 U.S. 992 (1981)); *see United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990).

In this context of a guilty plea, the maximum liberality test is applied to an even greater extent, as the "accused knowingly and voluntarily plead[ed] guilty to the offense." *Watkins*, 21 M.J. 208 (citing *United States v. Hoskins*, 17 M.J. 134, 135 (C.M.A.1984)).

C. The Remedy

As discussed *supra*, conviction for failure to state an offense is an error of constitution proportion. *See Dunn*, 442 U.S. at 107. Therefore, "[i]f a specification fails to state an offense, the appropriate remedy is dismissal of that specification unless the Government can demonstrate that this constitutional error was harmless beyond a reasonable doubt." *Turner*, 79 M.J. at 403 (citing *United States v. Humphries*, 71 M.J. 209, 213 n.5 (C.A.A.F. 2012)).

Argument

A. Specification 7, as charged, does not allege contact of any manner.

In the present case, the government charged an offense under a statute requiring sexual contact—and then promptly added language to the specification that does not allege contact of any type. Under any definition of sexual contact, the government is required to prove "touching, or causing another person to touch" some part of the alleged victim's body. Article 120(g)(2)(A & B), UCMJ; 10 U.S.C. § 920(g)(2)(A & B) (2012). Therefore, in order for the specification as charged to state an offense under Article 120(d), UCMJ, the operative word—here, "placing"—must "fairly encompass" a touching of some manner. *United States v. Hoskins*, 17 M.J. 134, 135–36 (C.M.A. 1984) (cited in *Watkins*, 21 M.J. at 201).

Any reasonable definition of the word "placing," however, does not fairly encompass a "touching" as Article 120(d) requires for an Abusive Sexual Contact

charge. "Placing," or more precisely in its root form, "place" means "to distribute in an orderly manner." *Place*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1981). Other definitions include "to put in the proper position or order; arrange; dispose." *Place*, THE RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1975). But what is not included in this definition is just as important: touching of any kind. Based on these definitions, the government's theory of liability for the charged sexual contact was an act that involved no contact of any variety.

It is clear sexual contact requires at least minimal contact, not just mere proximity to another person, as the term "placing" implies. What the government did here was charge a theory of liability—a placing, which under the standard definition of the word, does not involve touching at all—that was not criminal under Article 120(d) of the UCMJ. Accordingly, there is no "sexual contact" regarding these acts that form the predicate basis for the Abusive Sexual Contact alleged in Specification 7 of Charge I.

The government could have charged appellant with abusive sexual contact without alleging with specificity how the contact occurred. *See English*, 79 M.J. at 120 (citing *Fosler*, 70 M.J. at 229). If the government wished to charge only that appellant committed sexual contact upon Private [redacted] without further clarifying information, it could have done so. *Fosler*, 70 M.J. at 229 (citing *United States v.*

Sell, 3 C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953)). In such an instance, if defense counsel is unsure of the particularized theory of liability, they are free to ask for a bill of particulars. *United States v. Nicola*, 78 M.J. 223, 226, n.2 (C.A.A.F. 2019).

That is not what the government did in this case. Here, the government clearly announced its theory of liability in the charge itself by alleging appellant committed sexual contact by "placing himself between Private [redacted]'s legs while in a closet." (Charge Sheet). Because the government elected to add this language to the specification, "it was bound to abide by it." *English*, 70 M.J. at 120 (citing *Morton*, 69 M.J. at 16). That the government is bound to abide by this decision is precisely what creates the problem in this case because the specification as written fails to allege an offense under Article 120(d), UCMJ.

As in all cases, the government controlled charging in appellant's case. In appellant's case, the government controlled the language referred to trial not once, but twice. *See United States v. Moore*, 79 M.J. 483, 486 (C.A.A.F. 2020) (discussing the government's ability to edit charges on rehearing under Article 34, UCMJ, 10 U.S.C. § 834). As such, the government could have caught the charging deficiency on two separate occasions and could have corrected the error. Even in the context of appellant's guilty plea, the government could have requested, under Rule for Court-Martial 603, to modify the language of the specification to comport

with appellant's providence inquiry, as it did with Specification 8. (R. at 45–46). It did neither. Accordingly, the government has only itself to blame for the deficient language in the specification at issue.

Regardless, the specification as charged does not state an offense because "placing" does not fairly encompass a touching, as the statute requires. As such, the specification on its face fails to state an offense. Therefore, the analysis turns to whether appellant's conviction can stand even under the maximum liberality standard.

B. Even under the maximum liberality standard, Specification 7 cannot "within reason be construed to charge a crime."

Even in the context of a guilty plea, a conviction cannot stand if "the indictment cannot within reason be construed to charge a crime." *Watkins*, 21 M.J. at 209. This case presents a stark contrast to *Watkins*—the seminal case applying the maximum liberality test—and therefore warrants a different result.

In *Watkins*, the government charged that appellant with absenting himself from his unit, but left out the words "without authority." *Id.* The Court of Military Appeals (C.M.A.) noted that Article 86 specification must contain the language "without authority," or it is fatally defective. *Id.* However, the C.M.A. went on to apply the maximum liberality test, and found because that appellant acknowledged his absence was unauthorized, and admitted he understood the offenses contained

the element "without proper authority," the maximum liberality test allowed the conviction to stand *Id.* at 210.

Appellant's case is not similar. In *Watkins*, the government *omitted* an element of the crime. *Id.* at 209. Yet here, the government did not omit an element; instead, it *added* language that created a specification that does not allege a crime. In *Watkins*, that appellant could effectively perfect the government's charge by simply *adding* in language to his providence inquiry and his stipulation of fact proving the element the government failed to charge. *Id.* at 210. Here, appellant cannot do the inverse and *delete* the offending language merely by pleading guilty to different acts which did constitute a crime. Neither the government nor appellant during his guilty plea could overrule the C.A.A.F.'s holding in *English* that the government is bound by the language it uses to allege a crime. *English*, 70 M.J. at 120 (once a government charging decision is made, the government is "bound to abide by it."). As such, there is no manner in which appellant could plead guilty to this charge and solve the government's charging deficiencies as occurred in *Watkins*. Here, the only possible remedy was modification of the specification—which did not occur.

This comparison of *Watkins* and the present case reveals clear guidance from the C.M.A. and the C.A.A.F. In cases where the government omits a required portion of a specification, an accused may plead guilty and perfect the

government's charging error by making it clear at the trial level that he understood the offense to which he was pleading guilty. But this rule does not extend to the present situation, where language was added to the charge in a manner that made the charge legally insufficient. In such a case, an accused is not at liberty to override the government's charging decision and plead guilty to something the government did not charge him with, absent the government's permission.

Accordingly, because the government chose to add language to the specification, thereby rendering it a specifcation that "cannot within reason be construed to charge a crime," this court cannot affirm Specification 7 of Charge I, even under the maximum liberality standard. As such, this court must dismiss Specification 7 of Charge I.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on September 25, 2020.

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