IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**REPLY BRIEF ON BEHALF OF APPELLANT**
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

Assignment of Error

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

PANEL 4

Argument

A. Even the government cannot find a definition of "placing" that fairly includes contact.

The government's entire argument pivots around the idea that the phrase "placing himself between Private [redacted]'s legs while in a closet," as alleged in Specification 7, "fairly encompass[es]" a sexual contact of some manner. *See United States v. Hoskins*, 17 M.J. 134, 135–36 (C.M.A. 1984). The government presumably focuses its argument here because it recognizes Rule for Courts-Martial [R.C.M.] 307(c)(3) states, "A specification is sufficient if it alleges every element of the charged offense *expressly* or by *necessary* implication." (emphasis added).

But even the government—presumably after some searching—cannot provide the court with a definition of the term "place" or "placing" that expressly includes or necessarily implies contact. Even the version of Merriam Webster's dictionary the government cites comports with the defense position. (Appellee's Br. 16). Regardless of the synonym the government attempts to use, none of them ("set," "put," or otherwise) fairly include contact or touching of any variety. (Appellee's Br. 16). Therefore, in attempting to provide an alternate definition to

the term "place," the government has proven appellant's case for him: the term "place" does not expressly, or by necessary implication, allege a touching.[1]

After failing to present any definition of the term "placing" that includes touching, the government says that the prepositional phrase "between Private [redacted]'s legs" clears up any ambiguity. (Appellee's Br. 16). Again, the government returns to the dictionary but does not present any definition to this court of how the term "between" necessitates touching, even in the context of the charge.

The real failure of the government's argument is that it completely ignores the requirements of both the R.C.M. and case law. As stated *supra*, the R.C.M. requires the charge to "*expressly* or by *necessary* implication" allege every element of the offense. R.C.M. 307(c)(3). While the government provides examples of how the term placing *might* allege a touching, the government never argues the term *necessarily implies* touching. As such the government, while properly acknowledging the R.C.M's standard, fails to meet it. (Appellee's Br. 9).

[1] In footnote 5 of appellee's brief, the government makes the surprising argument—without citation—that the term "placing" does not refer to the sexual contact at issue in this charge, but instead refers to the definition of bodily harm. (Appellee's Br. 12n.5). It has been settled law for the better part of a decade that the same physical act alleged in an abusive sexual contact specification may be *both* the sexual contact and the bodily harm. *See*, *e.g. United States v. Hardy*, 76 M.J. 732, 739 (A.F. Ct. Crim. App. 22 Jun. 2017) (citing 10 U.S.C. § 920(g)(3); *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 599 (10 Sep. 2014)). Such is the case here.

Next, the government cherry-picks language from *United States v. Crafter*, 64 M.J. 209 (C.A.A.F. 2006), to support its failing position, arguing that the "proof at trial" should influence this court's deficiency analysis. (Appellee's Br. 17–18). The government cites the second half of the operative sentence in *Crafter* to support this analysis: "it becomes 'appropriate to consider' matters such as 'proof at trial or to a rule referenced in the specification.'" (Appellee's Br. 18) (citing *Crafter*, 64 M.J. at 211. However, the first half of the same sentence is what is most important here: "[A] facially deficient specification cannot be saved by reference to proof at trial or to a rule referenced in the specification . . ." *Crafter*, 64 M.J. at 211. This language, coupled with the *Crafter* court's admonition that "a specification that is susceptible to multiple meanings is different from a specification that is facially deficient," controls in this case. *Crafter*, 64 M.J. at 211. Here, because the word "placing" has *no* definition that includes a touching, it is not susceptible to multiple meanings, and is therefore facially deficient. As such, it is impermissible for this court to turn to appellant's providence inquiry or any portion of the trial to save the government's deficient specification.

B. Because the language of the charge is clear, appellant is entitled to relief under even the maximum liberality standard.

It is for precisely these reasons that appellant prevails in this case, even under the stringent maximum liberality standard. The government's entire argument hinges on its incorrect application of *Crafter* and the occurrences during

the "middle of [appellant's] providence inquiry." (Appellee's Br. 25). As argued both in Appellant's Brief and *supra*, this court need look no further than any dictionary it chooses to determine whether the specification is facially deficient. Because the specification is facially deficient—that is to say "the indictment cannot within reason be construed to charge a crime"—appellant is entitled to relief.

Conclusion

Based on the foregoing, the appellant again respectfully requests this court dismiss Specification 7 of Charge I.

[redacted]

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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 October 30, 2020.

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