IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	**BRIEF ON BEHALF OF APPELLEE (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, 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, United States Army Combined Arms Center and 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

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

PANEL NO. 4

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 lawful general regulation, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 (2012) [UCMJ]. Contrary to his pleas, the military judge convicted appellant of an additional specification of violating a lawful general regulation, four specifications of maltreatment, and ten specifications of sexual assault and rape, in violation of Articles 92, 93, and 120, UCMJ. The military judge sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for twenty years, and a dishonorable discharge.

On 28 March 2017, the Army Court of Criminal Appeals (ACCA) affirmed appellant's convictions and sentence. *United States v. Sanchez*, ARMY 20140735, 2017 CCA LEXIS 203 (Army Ct. Crim. App. 28 Mar. 2017) (mem. op.); *United States v. Sanchez*, ARMY 20140735, 2017 CCA LEXIS 470 (Army Ct. Crim. App. 17 Jul. 2017) (mem. op. on reconsideration). On 15 October 2018, the Court of Appeals for the Armed Forces (CAAF) reversed the ACCA's decision and returned the record to the Judge Advocate General of the Army for remand to the ACCA for a new review under Article 66, UCMJ. *United States v. Sanchez*, 78 M.J. 166, 167 (C.A.A.F. 2018). On 10 April 2019, ACCA reviewed the record anew and granted relief to appellant by setting aside ten specifications of Article 120, UCMJ,

affirmed the remaining guilty findings, set aside the sentence, and authorized a rehearing on the ten specifications in violation of Article 120, UCMJ. *United States v. Sanchez*, 2019 CCA LEXIS 164, at *7 (Army Ct. Crim. App. 10 Apr. 2019) (summ. disp. on remand).

On 31 July 2019, the convening authority referred the ten specifications to a general court-martial for a rehearing. (Charge Sheet). In accordance with an offer to plead guilty, the government dismissed seven specifications of violations of Article 120, UCMJ.[1] (R. at 72). 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). Appellant also remained convicted of four specifications of violation of a lawful general regulation and three specifications of maltreatment, in violation of Articles 92 and 93, UCMJ. (App. Ex. VIII).

The military judge sentenced appellant to reduction to E-1, confinement for fifty-four months, and a dishonorable discharge. (R. at 133). Appellant received confinement credit of 1,671 days. (R. at 133, Action). On 8 May 2020, the convening authority approved the sentence as adjudged, noting appellant's "confinement has been served." (Action).

[1] Specifications 1, 2, 3, 4, 10, 12, and 13 of Charge I. (R. at 72).

Statement of Facts

a. Appellant sexually abused trainees when he served as a drill sergeant.

From 7 May 2013 until 16 October 2014, appellant was assigned as a drill sergeant over basic trainees at Fort Leonard Wood, Missouri. (Pros. Exs. 1–2). Between on or about 15 December 2013 and 6 January 2014, appellant took [redacted] into a storage closet under "the guise of having her straighten it out." (R. at 33). He "closed the door behind [them]" and led [redacted] a desk. (R. at 33). Appellant "sat her on top of the desk." (R. at 33).

Appellant "placed [himself] in between [redacted] legs with [his] hips touching pretty much the furthest entry point of her thighs." (R. at 33). Appellant "moved up to the point where her legs could no longer open up any more." (R. at 34). There was "natural contact between her inner thighs and [appellant's] hips." (R. at 34). Appellant also committed abusive sexual contact upon [redacted] and a fellow drill sergeant, [redacted]. (Pros. Ex. 1; R. at 38, 49, 52).

[2] Regarding appellant's offense against [redacted] the military judge granted the government's motion to amend Specification 8 of Charge I. (R. at 45–46). The promulgating order dated 8 May 2020 does not reflect this amended language. (Prom. Order). As appellant notes, a correction is appropriate. (Appellant's Br. 4).

b. Appellant's guilty plea, stipulation of fact, and providence inquiry.

On 20 December 2019, appellant submitted an offer to the convening authority where, *inter alia*, he agreed to plead guilty to Specification 7 of Charge I.[3] (App. Ex. XVII). The convening authority accepted this offer on 3 January 2020. (App. Ex. XVII). On 7 January 2020, appellant appeared at his court martial, represented by both civilian and military defense counsel, and entered pleas consistent with his offer. (R. at 15, 21).

Before reviewing the charges against appellant, the military judge explained the consequences of a guilty plea to appellant and the "important rights" he was giving up with respect to the offenses to which he pleaded guilty. (R. at 22). The military judge told appellant he was going "to explain the elements of the offenses to which" he pleaded guilty, and he told appellant to ask himself "two things: first, is the element true; and second, do you wish to admit that it is true." (R. at 27). Appellant agreed. (R. at 27).

Regarding Specification 7 of Charge I, the military judge told appellant, "you are charged with the offense of abusive sexual contact, in violation of Article

[3] Appellant also offered to plead guilty to Specification 8 and 14 of Charge I, which were the abusive sexual contact offenses against [redacted] and [redacted] (App. Ex. XVII). Specification 7 of Charge I is the specification alluded to in the assignment of error.

120, UCMJ." (R. at 27). "By pleading guilty to this offense you are admitting the following elements are true and correctly describe what you did." (R. at 28).

> (1) That between on or about 17 September 2013 and on or about 31 January 2014, at or near Fort Leonard Wood, Missouri, you committed sexual contact upon [redacted] by touching directly or through the clothing, the legs of [redacted]
> (2) That you did so by causing bodily harm to [redacted] to wit, placing yourself between her legs while in a closet;
> (3) That you did so with the intent to gratify your own sexual desires; and
> (4) That you did so without the consent of [redacted].

(R. at 28). He later explained that "[t]ouching may be accomplished by any part of the body." (R. at 29).

When engaging in the colloquy with appellant regarding this offense, the military judge said, "[p]lease tell me what you did." (R. at 33). In his own words, appellant explained:

> So on the stated day and location I, along with [redacted], went into the former office with the guise of having her straighten it out. I closed the door behind us and at this point I led her 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, sir.

(R. at 33). The questions and answers regarding Specification 7 of Charge I continued:

> MJ: Did you touch her with your hands?

ACC: I had my—my hands touching her body, her upper body, like her shoulders on her back.
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.
. . .
MJ: When you pushed your legs up against her were you touching her skin?
ACC: At that point, no, sir. It was—she had her shorts on and I had my—my trousers were still on—they were on, I'm sorry.
MJ: So you were touching then through the clothing on your trousers to her bare skin, is that right?
ACC: She had on shorts, sir, so not her bare skin, but there was a point where I touched where the shorts end, so essentially, yes, it started that way.
. . .
MJ: What was your intent when you touched her legs?
ACC: To gratify my own sexual desire, sir.

(R. at 33–36).

The stipulation of fact described this incident as: "The Accused lifted up both of [redacted]s legs and stood in between them such that the Accused and [redacted] bodies were chest to chest and his groin was against hers." (Pros. Ex. 1, p. 3). Appellant agreed that everything in the stipulation was "true." (R. at 26).

The military judge confirmed that appellant "read this document thoroughly before [he] signed it," and that it constituted the "uncontradicted facts in this case." (R. at 24–25).

c. Appellant's pre and post-trial matters.

Appellant did not request a bill of particulars, even though the military judge enumerated it as one of the pretrial motions required for appellant to file should he need clarification. (App. Ex. XI, p. 3). Following his guilty plea and sentence rehearing, appellant raised no legal error in his clemency submission to the convening authority. (Post-Trial Matters; staff judge advocate's recommendation (SJAR)).

Assignment of Error

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

Standard of Review

Whether a specification states an offense is reviewed de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). Where appellant fails to challenge the specification at trial, his challenge is reviewed for plain error. *United States v. Tunstall*, 72 M.J. 191, 196 (C.A.A.F. 2013); *see also United States v. Gleason*, 78 M.J. 473, 475 (C.A.A.F. 2019) ("Because Appellant did not challenge the specification at trial, we review his challenge to the 'novel' specification for plain

error."). In the context of a guilty plea, this court reviews a military judge's acceptance of that plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

Law

The Constitution protects against conviction of uncharged offenses through the Fifth and Sixth Amendments. *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011). The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V, and the Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation." U.S. Const. amend. VI. "The rules governing court-martial procedure encompass the notice requirement: 'A specification is sufficient if it alleges every element of the charged offense expressly or by implication.'" *Fosler*, 70 M.J. at 229 (quoting Rule for Courts-Martial 307(c)(3)).

a. Sufficiency of a specification in a notice pleading jurisdiction.

Military jurisprudence has long held that it is a "notice pleading jurisdiction." *Id.* (quoting *United States v. Sell*, 3 C.M.A. 202, 2016, 11 C.M.R. 202, 206 (1953)). "A specification states an offense if it alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Crafter*, 64 M.J. at 211 (citing *United*

States v. Dear, 40 M.J. 196, 197 (C.M.A. 1994)); *see also Fosler*, 70 M.J. at 229 (noting that a "charge and specification will be found sufficient if they, first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense.") (citations omitted).

b. Specifications susceptible to multiple meanings.

"A specification that is susceptible to multiple meanings is different from a specification that is facially deficient." *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). Where a specification is susceptible to multiple meanings, "it is appropriate to consider" matters such as "proof at trial or to a rule referenced in the specification." *Id*. In other words, a specification is sufficient if the elements "may be found by reasonable construction of other language in the challenged specification." *United States v. Russell*, 47 M.J. 412, 413 (C.A.A.F. 1998).

c. The elements and definitions of Article 120, UCMJ.

"Any person . . . who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct." Article 120, UCMJ; *Manual for Courts-Martial,*

United States (2012 ed.) [*MCM*], pt. IV, ¶ 45.a.(d). The term "sexual contact" is defined in two ways:

> (A) touching, or 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
> (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

Article 120(g)(2), UCMJ; *MCM*, pt. IV, ¶ 45.a.(g)(2)(A)–(B). "Bodily harm" is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." Article 120(g)(3), UCMJ; *MCM*, pt. IV, ¶ 45.a.(g)(3). "Touching may be accomplished by any part of the body." Article 120(g)(2)(B); *MCM*, pt. IV, ¶ 45.a.(g)(2)(B).

The elements of abusive sexual contact by causing bodily harm are:

> (i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;
> (ii) That the accused did so by causing bodily harm to that other person; and
> (iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

Article 120(g)(2)(B), UCMJ; *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*, 2019], App'x 22-7.[4]

[4] At the time of the 2012 *MCM* publication, the President had not yet included sample specifications that are ordinarily included in accordance with Article 36.

Argument

After appellant received the charge sheet and retained civilian and military counsel, he elected not to request a bill of particulars. (R. at 16, 21). Instead, he offered to plead guilty to the specification in exchange for a benefit of a sentence limitation. (App. Ex. XVII). He subsequently detailed how his behavior met each element of each charged offense in both oral and in written form. (R. at 32–37; Pros. Ex. 1). Appellant now—for the first time on appeal—takes issue with Specification 7 of Charge I. (Appellant's Br. 11). Appellant argues that the language of "placing himself between [ ]'s legs," (Charge Sheet), insufficiently alleges "a touching of some manner" and entitles him to relief.[5] (Appellant's Br. 10). This argument fails for three reasons.

First, Specification 7 of Charge I stated each element of Article 120, UCMJ, and fairly informed appellant of the charges against which he needed to defend.

MCM, pt. IV, ¶ 45.a.(g) note. These advisory elements are listed in Appendix 22, and are applicable to sexual offenses committed between 12 June 2012 and 31 December 2018.

[5] Appellant incorrectly asserts that the term "placing" is connected to the "sexual contact" element. (Appellant's Br. 11). It is not. This language actually describes the "bodily harm" appellant used to effectuate the abusive sexual contact. (Charge Sheet). The military judge explained this element to appellant before his providence inquiry: "That you did so by causing bodily harm to [ ], to wit, placing yourself between her legs while in a closet." (R. at 28). Still, as the definition of "bodily harm" also requires "offensive *touching* of another," appellant's argument could apply to this element and the government responds accordingly. Article 120(g)(3); *MCM*, pt. IV, ¶ 45.a.(g)(3).

Second, appellant is protected from future prosecutions for the same misconduct. *United States v. Dear*, 40 M.J. 196, 197 (C.A.A.F. 1994). Finally, because appellant pleaded guilty to this offense, he fails to overcome the maximum liberality standard stacked against him. *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990).

a. Specification 7 of Charge I properly alleged each element of Article 120, UCMJ, and fairly informed appellant of the charge against which he needed to defend.

For the first time on appeal, appellant complains of the following specification:

> 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 [redacted] without her consent by causing bodily harm to her, to wit: by placing himself between [redacted]s legs while in a closet, with the intent to gratify his own sexual desires.

(Charge Sheet). This specification states every element of Article 120, UCMJ, including sexual contact, bodily harm, and the requisite *mens rea*. The language "placing himself between [redacted]s legs" describes the bodily harm appellant used to accomplish the sexual contact. This explanatory phrase following the language "to wit," while it is subject to one possible—although not very plausible—interpretation of no contact, it also equally, or more logically and likely, alleges contact. As such, the specification fairly informed appellant of the

charge against him and the military judge did not abuse his discretion in accepting appellant's guilty plea to this offense.

1. The government properly alleged all three elements of abusive sexual contact, in violation of Article 120, UCMJ, in Specification 7 of Charge I.

Specification 7 of Charge I contains all three elements of abusive sexual contact. The government alleged the first element of sexual contact, "[t]hat the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person," Article 120(g)(2)(B), UCMJ; *MCM* 2019, App'x 22-7, when it alleged that appellant "commit[ed] sexual contact upon [redacted] without her consent." (Charge Sheet). The government properly alleged the second element of bodily harm, "that the accused did so by causing bodily harm to that other person," Article 120(g)(2)(B), UCMJ; *MCM*, 2019, App'x 22-7, when it alleged that appellant "caus[ed] bodily harm to her, to wit: by placing himself between [redacted]s legs while in a closet." (Charge Sheet.) The government properly alleged the third element, the requisite *mens rea* "[t]hat the accused did so with intent to arouse or gratify the sexual desire of any person," Article 120(g)(2)(B), UCMJ; *MCM*, 2019, App'x 22-7, when it alleged that appellant performed the actions "with the intent to gratify his own sexual desires." (Charge Sheet).

2. "[P]lacing himself between [redacted]s legs while in a closet" described offensive touching with sufficient detail that it included the element of bodily harm expressly or by necessary implication.

Specification 7 of Charge I is sufficient because the language, "by causing bodily harm to her, to wit: by placing himself between [redacted]s legs," expressly states the element of bodily harm. (Charge Sheet). When appellant placed himself between [redacted] legs, he touched her legs; he directly stated such. (R. at 33). Alternatively, even if this court finds some ambiguity, the specification is still sufficient because the specification alleges the bodily harm element by necessary implication. *See* R.C.M. 307(c)(3) ("A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.").

"Place" is a homonym. It has different meanings with the same spelling and pronunciation. Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/homonym (last visited 8 October 2020). In his brief, appellant acknowledges that the word "place" has multiple meanings, as he discusses the "*standard* definition of the word" and "[a]ny *reasonable* definition of the word." (Appellant's Br. 10–11) (emphasis added). Appellant is correct that in some contexts, "place" means "to distribute in an orderly manner" and "to put in the proper position," (Appellant's Br. 11), but the term also has other commonly-used definitions—one of which expressly alleges bodily harm.

Merriam-Webster defines "place," when used as a transitive verb, as "to put in or as if in a particular place or position." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/place (last visited 6 October 2020). The synonym listed for this verb is "set." *Id.* Therefore, when the government alleged that appellant "plac[ed] himself between [redacted]s legs," that meant appellant "*put* himself in a particular place or position between [redacted]s legs," or "*set* himself between [redacted]]'s legs." (Charge Sheet). As such, the government expressly alleged the element of bodily harm in Specification 7 of Charge I.

While appellant takes issue with "the operative word—here, 'placing,'" (Appellant's Br. 10), his argument also logically extends to the phrase "between [redacted]]'s legs." The term "between" also has multiple meanings. The word "between" is both a preposition and an adverb, and the definition is dependent upon its location within a sentence. Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/between (last visited 13 October 2020). Specification 7 of Charge I employed "between" as a preposition that connected the transitive verb "placing" to the pronoun "himself." (Charge Sheet). Therefore, under this sentence structure, the term "between" indicated appellant's placement—coming into contact with [redacted] legs.

While the language as drafted could be clearer, common nomenclature and the surrounding context within the specification ultimately states the element of bodily harm. It is true that the phrase "placing between" does not always mean direct contact; yet, the phrase also equally denotes that very meaning. As an illustration, when a person "places" a book "between" two other books on a bookshelf, the common understanding is that all three books are side-by-side, physically touching. Similarly, if a drafter places page 2 between pages 1 and 3 in a sheaf of papers, then page 2 is understood to be touching both of its surrounding pages.

Applying this illustration to Specification 7 of Charge I, when appellant was "between [redacted]'s legs," the reasonable interpretation is that he was physically touching her legs. Moreover, the element of bodily harm does not require forcible touching, but rather "any offensive touching of another, however slight." Article 120(g)(3), UCMJ; *MCM*, pt. IV, ¶ 45.a.(g)(3). Therefore, while Specification 7 of Charge I is subject to different interpretations, the specification still alleges each element of abusive sexual contact by bodily harm.

To that end, the CAAF's decision in *United States v. Crafter* is dispositive. 64 M.J. 209 (C.A.A.F. 2006). In *Crafter*, the appellant faced a bribery specification that alleged he wrongfully accepted currency "for arranging for Federal Prison Camp Inmate [G] to meet in private with his friend." *Id.* at 210.

For the first time on appeal, the appellant in *Crafter* argued that the language failed to state an offense because this verbiage insufficiently alleged the "intent to influence or induce an official act, an element of the offense at issue." *Id*. at 211. The way this specification was drafted was "susceptible to at least two different meanings," only one of which correctly alleged the element of intent. *Id.* However, in finding that the specification stated an offense, the CAAF looked to the "factual context of [the] case" and discovered that "the record demonstrate[d] that Appellant was on notice of the charge." *Id*. at 211–12. The CAAF recognized that the "word 'for' has many meanings," and simply because a specification "is susceptible to multiple meanings," this is "different from a specification that is facially deficient." *Id.* at 210–11. In these scenarios, it becomes "appropriate to consider" matters such as "proof at trial or to a rule referenced in the specification." *Id.* at 211.

In appellant's case, the proof at trial makes it abundantly clear that appellant interpreted the phrase "[p]lacing himself between [redacted]s legs" as the element of bodily harm during his guilty plea. In the stipulation of fact, appellant described the contact: "The Accused lifted up both of [redacted]]'s legs and stood in between them such that the Accused and [redacted]s bodies were chest to chest *and his groin was against hers*." (Pros. Ex. 1, p. 3) (emphasis added). Appellant signed this document on 19 December 2019. (Pros. Ex. 1, p. 6). Appellant also

swore to the military judge that these were the "uncontradicted facts in this case." (R. at 24–25).

Appellant's detailed providence inquiry further demonstrates that he interpreted the words "[p]lacing himself between [redacted]'s legs" to allege bodily harm. (R. at 32–34; Charge Sheet). In response to the military judge's open-ended instruction to "tell me what you did," appellant described the event as a direct contact: "I placed myself in between her legs with my hips *touching pretty much the furthest entry point of her thighs*." (R. at 33) (emphasis added). He even clarified the state of dress when the contact first occurred: "She had on shorts, sir, so not her bare skin, but there was a point where I touched where the shorts end, so essentially, yes, it started that way." (R. at 36). As in *Crafter*, "the record [in this case] demonstrates that [a]ppellant was on notice of the charge." *Id*. at 211–12.

Notably, appellant repeated this exact same terminology of which he now complains later in his providence inquiry. When describing how he assaulted his fellow female drill sergeant, [redacted] appellant explained: "I *placed* both my hands on her buttocks, sir, in a cupping motion, sir." (R. at 52) (emphasis added). Appellant used "place" to describe how his behavior met the elements of an entirely separate specification of abusive sexual contact. Therefore, at a minimum, Specification 7 of Charge I necessarily implied every element of the offense because appellant was evidently "aware of the nature of the underlying target or

predicate offense." *United States v. Turner*, 79 M.J. 401, 404 (C.A.A.F. 2020) (quoting *United States v. Norwood*, 71 M.J. 204, 207 (C.A.A.F. 2012) (quotations omitted)). In other words, when appellant used the same language to describe another offense under Article 120, UCMJ, it demonstrated his own awareness of the bodily harm element.

Finally, the phrase follows "bodily harm," a statutorily defined term. Article 120(g)(3), UCMJ; *MCM*, pt. IV, ¶ 45.a.(g)(3). The order of the language is important because not only was appellant already on notice of the legal definition of bodily harm, as defined in Article 120(g)(3), UCMJ, but the phrase "by placing himself between [redacted]s legs" follows the introductory phrase "to wit." (Charge Sheet). The phrase, "to wit," focuses and narrows the term "bodily harm." (Charge Sheet).

Therefore, given the order and framework of this element as written, the bodily harm "may be found by reasonable construction of other language in the challenged specification." *Russell*, 47 M.J. at 413. That appellant failed to ask for a bill of particulars before trial or raise any legal error following his rehearing further supports the conclusion that he was on notice of the charge against him and the specification is not fatally defective. Accordingly, the military judge did not abuse his discretion in accepting appellant's guilty plea to this offense.

3. The military judge did not abuse his discretion in accepting appellant's plea because he elicited a robust, factual basis to support appellant's plea during the providence inquiry.

The military judge did not abuse his discretion in accepting appellant's plea to Specification 7 of Charge I because he clarified the factual basis that supported the charged offense. *Inabinette*, 66 M.J. at 322 ("A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which we afford *significant deference*.") (emphasis added). Here, the military judge developed the facts with appellant on the record when he asked, "And then how did you make contact with her legs?" (R. at 34). Even though appellant explained that "it was just natural contact between her inner thighs and my hips," the military judge circled back to "make sure that [he was] clear with the factual predicate for [appellant's] plea." (R. at 34). The military judge then confirmed, "you approached her and then with your legs you pushed into her legs, is that right?" (R. at 34). Appellant replied, "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).

With this dialogue, the factual predicate for appellant's plea was robust and confirmed that appellant indeed made contact with [redacted]. This provided the military judge an appropriate basis to accept appellant's guilty plea. In light of the "strong arguments in favor of giving broad discretion to military judges in

accepting pleas," this case especially presents no abuse of discretion. *Inabinette*, 66 M.J. at 322.

b. Future prosecutions of this offense are barred.

Not only must a specification allege every element of the charged offense expressly or by necessary implication, it must also protect the accused from double jeopardy. *Fosler*, 70 M.J. at 229. In conducting this assessment, appellate courts consider whether the language of the specification, "taken together with the evidence, the instructions, and the findings," affords appellant protection against double jeopardy. *United States v. Williams*, 21 M.J. 330, 332 (C.M.A. 1986). Here, Specification 7 of Charge I bars future prosecutions for this offense.

The language in the specification, stipulation of fact, and providence inquiry describe the act with sufficient detail to protect appellant against double jeopardy. *See Dear*, 40 M.J. at 197 (noting "the defendant may turn to the entire record of trial in raising double-jeopardy protection."). The record here also contains a corrected Report of Result of Trial, dated 7 January 2019, that matches the abusive sexual contact to the corresponding DIBRS code.[6] This paperwork further protects appellant from double jeopardy, given this code appears directly next to

[6] The Dep't of Def. Instr. 7730.47, Defense Incident-Based Reporting System (DIBRS) (23 Jan. 2014), generally outlines DoD's criminal incident reporting to the Federal Bureau of Investigation's National Incident-Based Reporting System (NIBRS).

Specification 7 of Charge I, duplicating the abusive sexual contact specification. Department of Defense Form 2707-1. Thus, double jeopardy principles would easily bar another prosecution for this conduct. Therefore, the specification was sufficient and the military judge did not abuse his discretion in accepting appellant's guilty plea to this offense.

c. Because appellant waited until after his guilty plea to raise his claim that the specification was deficient, this court views the specification with maximum liberality—a standard appellant cannot overcome.

Appellant simply cannot overcome the maximum liberality standard that is "more favorable to the government." *Turner*, 79 M.J. at 406. The lens through which courts evaluate the sufficiency of a specification differs depending on when counsel first raised the issue. *Id.* at 403. When a charge and specification is first challenged after trial, it "is viewed with greater tolerance than one which was attacked before findings and sentence." *Id.*; *see also United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) ("Specifications that are first challenged after trial are viewed with greater tolerance than those challenged at trial.").

In appellant's case, because he complains of Specification 7 of Charge I for the first time on appeal following a guilty plea, this court should view the specification with "maximum liberality." *Bryant*, 30 M.J. at 73. Upon "such a challenge, an appellant must show substantial prejudice, demonstrating that the charge was 'so obviously defective that by no reasonable construction can it be

said to charge the offense for which conviction was had.'" *Bryant*, 30 M.J. at 73 quoting *Watkins*, 21 M.J. at 210. The rationale for this heightened requirement is that defects to a specification "are normally correctable before trial if seasonably brought to the attention of the . . . government," and it is "manifestly unfair for a defendant to sit silently by, take his chances with the jury, and then be allowed to ambush the prosecution through a post-trial attack." *United States v. Walker*, 665 F.3d 212, 228 (1st Cir. 2011).

Appellant fails to demonstrate how the phrase "placing himself between" the victim's legs, (Charge Sheet), is so "obviously defective" that no reasonable construction leads to an abusive sexual contact, in violation of Article 120, UCMJ. *Bryant*, 30 M.J. at 73. The lens this court applies favors validity at this procedural juncture. *Turner*, 79 M.J. at 403. The common nomenclature of "place," especially coupled with the term "between," and directly following the legal term, "bodily harm," makes this specification far from obviously defective. Indeed, not a single person in appellant's court martial—government, defense, or the military judge—took issue with the specification at trial, and this court should decline to do so on appeal. Furthermore, basic anatomy and common usage of terms must control. They contradict any argument that appellant believed his charge resulted from merely hovering between [redacted] thighs.

Finally, it was clear during his guilty plea proceedings that appellant wanted to keep his bargain intact, even agreeing to a major change to a specification in the middle of his providence inquiry. (R. at 45). This court should decline to disrupt this meeting-of-the-minds that appellant obviously wished to keep intact, as it could obstruct future pretrial negotiations. *See United States v. Conley*, 78 M.J. 747, 652 (Army Ct. Crim. App. 2019) (noting that "[i]f we were to disrupt the balance struck by the parties in this case, there is some risk we would undermine confidence that in future pretrial agreements the terms will be viewed as binding"). Here, appellant voluntarily submitted a guilty plea, inducing the government to dismiss seven of the ten specifications of Article 120, UCMJ. (R. at 58, 72–73; App. Ex. XVII). Appellant made a conscious choice to plead guilty to this offense, and in response, the military judge developed a strong factual basis to support appellant's plea.

To set aside a finding "that is correct in law, and which appellant specifically agreed to plead guilty to, may be seen as this court effectively disrupting the balance struck by the parties before trial." *Conley*, 78 M.J. at 652. Now that both parties have already performed pursuant to their contractual obligations, there is no need to disturb those uncontested guilty findings. Accordingly, this court should affirm the findings and sentence as approved by the

convening authority because the military judge did not abuse his discretion in accepting appellant's guilty plea to Specification 7 of Charge I.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence as approved by the convening authority.

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CERTIFICATE OF SERVICE, U.S. v. SANCHEZ, ARMY 20140735

I hereby certify that a copy of the foregoing was sent via electronic submission to Mr. [redacted], civilian appellate defense counsel, at [redacted], and the Defense Appellate Division, at [redacted] on the 23rd day of October, 2020.

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PANEL NO. 4