

UNITED STATES ARMY TRIAL JUDICIARY
FOURTH JUDICIAL CIRCUIT, REPUBLIC OF KOREA

UNITED STATES OF AMERICA)	
	)	PROSECUTION RESPONSE TO
v.	)	DEFENSE MOTION TO DISMISS
)	
Schloff, Christopher S.)	
1LT, U.S. Army)	
Headquarters and Support Company)	
Headquarters and Headquarters	)	11 September 2014
Battalion)	
Eighth Army)	
APO AP 96205)	

RELIEF SOUGHT

The Government in the above case request that the Court overrule the Defense's Motion to dismiss for failure to state an offense, made orally in open court on this day, 11 September 2014.

BURDEN OF PERSUASION AND STANDARD OF PROOF

Under R.C.M. 905(c)(1) and (2), the defense, as the moving party, bears the burden of proof and burden of persuasion on any factual matter necessary to decide this motion by a preponderance of the evidence.

FACTS

The government has alleged that the Accused committed wrongful sexual contact, by fraud, when he touched three different victims with his stethoscope. On the charge sheet, the government has charged the case as three distinct violations of Article 120, as follows:

In that First Lieutenant Christopher S. Schloff, US Army, did, at or near US Army Garrison-Yongsan, Republic of Korea, on or about (date), commit sexual contact upon (victim's name), to wit: touching with a stethoscope, the breast of said (victim's name) by making a fraudulent representation that the sexual contact served a professional purpose.

WITNESSES/EVIDENCE

The evidence in the case at bar has shown that the Accused touched the breasts of the three distinct victims, using his stethoscope. At the conclusion of the government's case, the defense made a motion for a finding of Not Guilty under RCM 917, along with a Motion to Dismiss, pursuant to RCM 907(b)(1)(B).

LEGAL AUTHORITY AND ARGUMENT

The UCMJ defines abusive sexual contact as: "Any Person subject to this chapter 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*,¹ is guilty of abusive sexual contact and shall be punished as a court-martial may direct."

The term, "Sexual Contact" is further defined as:

- (2) *Sexual contact*. The term 'sexual contact' means—
- (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.
- Touching may be accomplished by any part of the body.*
(*emphasis added*)

The primary question before this court is what constitutes a "touching" for purposes of a violation of Article 120, Abusive Sexual Contact. The government contends that a person may be touched by an object, and not only with a hand or body part.

Plain Meaning. The Merriam-Webster Dictionary defines the word "touch" in several different ways. The second listed definition is, "to strike or push lightly especially with the hand or foot or an implement."² If the plain meaning of the word touch were otherwise, then an angry person could never touch me with their cane, a

¹ See the Analysis of punitive articles in Appendix 23 of the Manual for Courts-Martial, (2012 Edition) para 45, "Sexual Contact Offenses : Aggravated Sexual Contact and Abusive Sexual Contact remain significantly unchanged from the 2007 version of Article 120 except to substitute "commits" for "engages in" in accordance with the analysis above. Wrongful Sexual Contact is deleted because it is no longer necessary. Committing a sexual act upon another person by causing bodily harm constitutes Sexual Assault under Article 120(b) if the bodily harm consists of any offensive touching, including the nonconsensual sexual act itself. Abusive Sexual Contact is intended to cover acts where the sexual contact was committed in the same manner as a sexual act. Therefore, if sexual *contact* constitutes "bodily harm" (any offensive touching), then it will be considered Abusive Sexual Contact."

² See <http://www.merriam-webster.com/dictionary/touch>, last accessed on this day, 11 September 2014.

driver could never touch a pedestrian with his car, and a baseball player could never touch a base-runner with the ball or glove.

Limitations on the Plain Meaning. The UCMJ, and its underlying statute, 10 USC § 920, begin to define the word touch by stating that it may be accomplished in a certain way. However, because something may be done in one manner, does not mean that it may not be done in myriad other ways. If Congress had meant to limit the term, “touch,” it would have stated that touching “must” or “shall” be accomplished by a part of the body. That specific limitation was never imposed. Therefore, touching by any part of the body is a sub-set of the overall concept of touch. It is a way that touching may be accomplished.

Limitation based on definition of Sexual Assault. The crimes of Sexual Assault and Rape have the element of a sex act. That term is defined as:

(1) *Sexual Act.* The term ‘sexual act’ means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body 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.

The element of a sexual act is unique to the crimes of Rape and Sexual Assault. These crimes are separate and distinct from a sexual contact crime in that they involve some form of penetration. The term penetration is distinguishable from the term touch, in that penetration is specifically allowed by a body part or object (with the requisite intent), where as touch is left with its plain meaning.

This court should not make a limitation on one crime based upon the definition of another. A touch is still a touch.

Belvin v. Addison, 561 Fed.Appx.684 (10th Cir. Court of App., April 4, 2014).

This case shortly and succinctly states that the element of a “touch,” required under an Oklahoma Statute³ (21 Okl.St. Ann. § 1123 (A)(2)) to complete a sexual crime upon a child, can be accomplished by an object. In that case, the touch was accomplished by a

³ 21 Okl.St. Ann. § 1123, “ Lewd or Indecent Proposals or Acts as to Child Under 16 or Person Believed to be under 16 -- Sexual battery, (A) It is a felony for any person to knowingly and intentionally: 1. ...; or 2. Look upon, *touch*, maul, or feel the body or private parts of any child under sixteen (16) years of age in any lewd or lascivious manner by any acts against public decency and morality, as defined by law; ...” (*emphasis added*)

vibrator. Neither the 10th Circuit Court of Appeals, nor the State Courts, spent an appreciable amount of writing in reaching that conclusion. The brevity is even defended by the Federal Appeals Court. The Prosecution argues that a minimum amount of writing was given in the opinions because it was based on the common definition of "touch."

Reading Article 120 and 10 USC § 920 plainly, it is apparent that Congress did not make unwanted touching of a breast or genital region with a vibrator a non-sexual sexual crime. Likewise, fraudulent sexual touching of the breasts by a stethoscope state's an offense.

Assault Consummated by a Battery. Article 128, Assault Consummated by a Battery, is a contact offense. In Article 128's definition of "battery," the following examples are given:

(c) *Examples of battery.* It may be a battery to spit on another, push a third person against another, set a dog at another which bites the person, cut another's clothes while the person is wearing them though without touching or intending to touch the person, shoot a person, cause a person to take poison, or drive an automobile into a person. A person who, although excused in using force, uses more force than is required, commits a battery. Throwing an object into a crowd may be a battery on anyone whom the object hits.

Although this crime is separate from Art 120, Abusive Sexual Contact, it is a contact (non-penetrative) offense. Its definition of contact sufficient to satisfy the element of battery is persuasive. For an Article 128 offense, battery can be accomplished by a held, propelled, or thrown object, which results in contact.

In the *Crimes and Defenses Handbook*⁴, under the definition of Battery, it is noted that,

Any offensive touching will suffice. See *United States v. Sever*, 29 MJ 1 (C.M.A. 1994) (nonconsensual kiss); *United States v. Bonano-Torres*, 29 M.J. 845 (A.M.C.R. 1989), *aff'd* 31 M.J. 175 (C.M.A.1990) (nonconsensual kiss and touching buttons on blouse); *United States v. Madigar*, 46 M.J. 802 (C.G. Ct. Crim.App 1997) (unnecessary exposure to X-ray radiation was sufficient physical touching); *United States v. Banks*, 39 M.J. 571 (N.M.C.M.R. 1993), *aff'd* 40 M.J.320 (C.M.A. 1994) (smoke inhalation).⁵

⁴ Published by The Judge Advocate General's Legal Center and School, 2011 edition.

⁵ See pp. D-2, 3.

The case of *US v. Madigar* (cited above) is directly on point. The appellant, in that short opinion, argues that his guilty plea was improvident, "because X-ray is insufficient to constitute the harmful or offensive touching necessary to support such an assault." The Coast Guard Court of Criminal Appeals did not agree with the appellant, concluding that medically unnecessary X-ray exposure constituted, "sufficient proof of a battery's harmful touching element."

In the case at bar, the Accused is charged with unnecessary touching of the breasts with a stethoscope, by fraud, with a sexual intent. The charge states an offense as worded.

CONCLUSION

Based on the above, the Government respectfully requests that the Court deny the Defense motion to dismiss.

(b) (6)

A large black rectangular redaction box covers the signature area. The text "(b) (6)" is written in red at the top left corner of the redaction.

CPT, JA
Trial Counsel

With respect to the earlier defense motions to (1) find the accused not guilty due to legal insufficiency of the evidence, and (2) dismiss the charge due to failure to state an offense, the court takes the following action:

Specification 2 of the Charge and the Charge are dismissed for failure to state an offense. As a result, the finding of guilty to Specification 2 and the Charge, as well as the sentence, are set aside.

The offense of abusive sexual contact under Article 120(d) requires a sexual contact. The definition of sexual contact, provided in Article 120(g)(2), requires the touching of another person. Article 120(g)(2) also states that "touching may be accomplished by any part of the body." In so providing, Congress has limited the offense of abusive sexual contact to a touching in which some part of the accused's body touches the alleged victim. With regards to Specification 2 of the Charge, the specification alleges that the accused touched SGT (b) (6) breast with a stethoscope – not with any part of his body. The evidence at trial was consistent with the specification, establishing only that the accused touched SGT (b) (6) breast with a stethoscope.

The statutory language providing that "touching may be accomplished by any part of the body" unambiguously limits a sexual contact to a touching accomplished by some part of the accused's body. Had Congress intended otherwise, they would have added the words "or object" at the end of that sentence. This conclusion is bolstered by the fact that Congress was aware of the distinction between body parts and objects, as reflected in its definition of sexual act in the same statute. That definition of sexual act, contained in Article 120(g)(1), provides that the penetration required for a sexual act may be accomplished "by any part of the body or by any object."

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. The determination of whether the evidence in this case is legally sufficient depends upon whether the touching required by a sexual contact can be accomplished by only a part of the body or whether objects may also be used. If the court is correct in its interpretation that the statute limits a touching for sexual contact to those accomplished by a part of the body, then the evidence in this case would not be legally sufficient. If a touching can be accomplished with an object, then the evidence would be legally sufficient.

However, given the court's dismissal of Specification 2 and the Charge for failure to state an offense, a ruling on the legal sufficiency of the evidence is unnecessary at this time.

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
US ARMY TRIAL JUDICIARY, FOURTH JUDICIAL CIRCUIT

UNITED STATES)	
)	
vs.)	
	)	DEFENSE REQUESTED
MCCLURE, Dajuan A.)	
SPC, U.S. Army	)	INSTRUCTION
Headquarters and Headquarters Company)	
4th Battalion, 1st Field Artillery Regiment)	
3rd Infantry Brigade Combat Team)	
Fort Bliss, Texas 79916	)	21 August 2014

RELIEF SOUGHT

The defense respectfully requests an instruction on the definition of “impairment by a drug, intoxicant, or other similar substance” as alleged in Specification 1 of the Charge.

LAW

R.C.M. 920(1) states that “[t]he military judge shall give the members appropriate instructions on findings.” Furthermore, the military judge must grant a moving party’s submitted request for non-standard findings instructions so long as: 1) the issue has been raised by the evidence at trial; 2) the proposed instruction is an accurate statement of the law; and 3) the issue is not adequately covered by the other instructions given to the members. R.C.M. 920(c); See United States v. Briggs, 42 M.J. 367 (C.A.A.F. 1995). “If an issue has been raised [at trial], ordinarily the military judge must instruct on the issue when requested.” Discussion section of R.C.M. 920(c).

ARGUMENT

The elements of Specification 1 of The Charge allege:

- (1) That between on or about 1 November 2012 and on or about 30 January 2013, at or near Fort Bliss, Texas, the accused committed a sexual act upon SPC (b) (6), to wit: inserting his penis into her vulva;
- (2) That the accused did so when SPC (b) (6) was incapable of consenting to the sexual act due to impairment by a drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused; and
- (3) That the accused did so without the consent of SPC (b) (6)

**DEFENSE REQUESTED INSTRUCTION
SPC MCCLURE, DAJUAN A.**

Currently, for sexual assault offenses, neither the Military Judge's Benchbook (DA PAM 27-9) nor the Manual for Courts-Martial define "impairment" by an intoxicant. While the Military Judge's Benchbook defines the term "sexual act," "vulva," and "consent," it does not define the term "impairment." Therefore, in order to properly instruct the panel on the elements of sexual assault, this Court must define the term "impairment" as alleged in Specification 1 of the Charge.

Prior to the 2012 modification of Article 120, UCMJ, an Accused committed the Article 120, UCMJ, offense of aggravated sexual assault by "engaging in a sexual act with another person when that person [was] substantially incapacitated or substantially incapable of: appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act." In paragraph 3-45-5 of DA PAM 27-9, the Military Judge's Benchbook contains a "substantial incapacitation" definition for aggravated sexual assault offenses that expressly defines the level of impairment the Government must prove beyond a reasonable doubt. Specifically, the instruction defines "substantial incapacitation" as "that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions." DA Pam 27-9, paragraph 3-45-5 (2013).

REQUESTED DEFINITION

Based upon the above listed definition of "substantial incapacitation," the Defense requests that this Court adopt the below listed definition of "impairment" and instruct the enlisted panel on this definition for Specification 1 of The Charge:

As listed in Specification 1 of Charge I, "impairment" means that level of intoxication due to consumption of alcohol which diminished the alleged victim's cognitive abilities to the point that she was incapable of consenting because she was either a) unable to appraise the nature of the sexual conduct at issue, b) unable to physically communicate unwillingness to engage in the sexual conduct at issue, or c) otherwise unable to make or communicate competent decisions.

(b) (6)

Captain, JA
Defense Counsel

**IN A GENERAL COURT MARTIAL OF THE UNITED STATES
ARMY TRIAL JUDICIARY, FOURTH JUDICIAL CIRCUIT**

UNITED STATES)	
)	
)	
v.	)	GOVERNMENT RESPONSE TO
	)	DEFENSE REQUESTED
MCCLURE, DAJAUN A.,	)	INSTRUCTION
SPC, U.S. Army)	
HHB, 4-1 Field Artillery Regiment	)	25 August 2014
3d Infantry Brigade Combat Team)	
1st Armored Division)	
Fort Bliss, Texas 79916)	
)	

RELIEF SOUGHT

The Government respectfully requests that the Court adopt an instruction of the definition of “impairment” by a drug, intoxicant, or other similar substance” as and set forth below and deny Defense’s requested instruction.

LAW

The Government agrees with the statement of law set forth by Defense.

ARGUMENT

The term “impairment” or “impaired” is expressly defined in the Military Judge’s Benchbook, and therefore, the enlisted panel should be instructed based on this definition. Accordingly, “impaired” is defined as “any intoxication sufficient to impair the rational and full exercise of the mental or physical faculties.” See U.S. DEP’T OF ARMY, PAM 27-9, MILITARY JUDGE’S BENCHBOOK, para 3-35-1(d) (Unofficial Version 14.4 – 12 June 2014) [hereinafter “Benchbook”]. This definition discusses impairment by a controlled substance, which is the allegation in this case.

The Defense properly presents to the Court a definition of “substantial incapacitation” derived from the Benchbook. This definition states “substantial incapacitation” is “that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.” Put simply, this is the wrong definition for this case. The Defense now seeks to poach a definition that applied to the crime of aggravated sexual assault and apply it to the crime of sexual assault. This is problematic for two reasons.

First, the definition no longer fits. The definition the Defense proposes would be circular if used in the current specification under post-2012 Article 120(b) offenses. The Defense's own definition uses the word "impairment" itself. If "impairment" as established in post-2012 Article 120 is the same as "substantial incapacitation" as defined in post-2007 Article 120, then the first words of the definition of "impairment" would be "that level of mental impairment . . ." Clearly, the word cannot define itself. This circular definition highlights the absurdity of the Defense's position.

Second, Congress had the opportunity to use the words "substantial incapacitation" in 2012 when it re-drafted Article 120. It did not. Those words were decidedly omitted in the 2012 modification to Article 120, UCMJ, and Congress chose instead to use the word "impairment." Presumably, this is so because Congress meant something different. If it did not, then there was no reason to change the words that had already been clearly defined, and definitively applied by the courts. Accordingly, it is unreasonable to assume that Congress changed the language contained in the law, but expected it to mean the exact same thing. It is reasonable, however, to assume that Congress, when selecting the word "impairment," meant to use that word in a similar manner to how it is used in Article 111. This inference can be reasonably drawn from the fact that Congress had already used the term, certainly knew how it had defined the term, and had tacitly accepted the application of that term by the judiciary in prior cases.

REQUESTED DEFINITION

Based on the above listed definition of "impaired," as specifically defined in the Benchbook, the Government respectfully requests that this Court adopt the below listed definition of "impairment" and instruct the enlisted panel of this definition for Specification 1 of The Charge:

"As listed in Specification 1 of Charge 1, "impairment" means any intoxication sufficient to impair the rational and full exercise of the mental or physical faculties."

I hereby certify that I served this Response on the Court and that a copy of this Response has been provided to Defense Counsel on the date listed above.

(b) (6)



CPT, JA
Trial Counsel

UNITED STATES)	
)	
v.	)	DEFENSE
	)	REQUEST FOR DEFINITION
VALENZUELA, ELI)	
SPC, US Army)	
Headquarters and Headquarters	)	27 May 2014
Company, United States Army Medical)	
Department Activity)	
Fort Leavenworth, Kansas 66027)	

The Defense in the above-captioned case requests that the Court employ the definition submitted for “incapable of consenting ... due to impairment by alcohol” in the Specification of Charge I.

Discussion

The term “impairment,” as used in the Specification of Charge I is not defined in the Manual For Courts-Martial, 2012 Edition (MCM). This word was newly inserted into the law after the changes to the UCMJ in 2012, which delineated the potential theories of liability for sexual assault and abusive sexual contact into three distinct categories: (1) sexual contacts accomplished via threats, bodily harm, fraud, or false identity; (2) sexual contacts committed when the accused knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual contact is occurring; and (3) sexual contacts committed when the other person is incapable of consenting to the sexual contact due to impairment of a drug or other intoxicant, or a mental disease or physical disability. MCM, Part IV, paragraph 45a(b) and (d).

Prior to 2012, the wrongfulness of sexual acts and sexual contacts with another person were not specified into those three categories. Rather, the theories of wrongfulness (2) and (3) as listed above were both included within the term “substantial incapacitation,” which was defined and which expressly included all types of unconsciousness, as well as a conscious but severely impaired state in which one was not capable of consenting to sexual activity.¹

To date, “impairment” by an intoxicant has not been defined in either the MCM or DA Pam 27-9. It is therefore appropriate and necessary that the Court issue a determination of what this term means for purposes of determining whether SPC Valenzuela is guilty of the Specification of Charge I.

¹ DA Pam 27-9 defined this incapacitation in the following way: “[T]hat level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.” DA Pam 27-9, paragraph 3-45-5 (2013).

“Impairment” is defined as, “The fact or state of being damaged, weakened, or diminished.” *Blacks Law Dictionary*, Eighth Edition, 2004. “Unconscious” is defined as, “Without awareness, not conscious.” *Id.*

Requested Definition

The Defense requests that the Court define the phrase used in the Specification of Charge I, “impairment by alcohol” to mean the following:

As used in the Specification of Charge I, “impairment by alcohol” means that level of intoxication due to consumption of alcohol which damaged, weakened, or diminished Mrs. (b) (6) cognitive abilities to the point that she was unable to appreciate or comprehend the nature of the sexual contacts at issue or was unable to make or communicate competent decisions. “Impairment by alcohol” does not mean merely that Mrs. (b) (6) decision-making faculties or inhibitions to certain behaviors were lowered to the point where she engaged in acts she otherwise may not have while sober. Additionally, “impairment by alcohol” does not mean that Mrs. (b) (6) was unconscious, either due to sleep, chemical sedation, injury, or any other voluntary or involuntary state of unconsciousness.

(b) (6)

CPT, JA
Defense Counsel

**IN THE FIRST JUDICIAL CIRCUIT
UNITED STATES ARMY
FORT EUSTIS, VIRGINIA**

UNITED STATES)	
	)	MOTION FOR APPROPRIATE RELIEF -
v.	)	BILL OF PARTICULARS
)	
MASTON, CHARLES)	
SGT, U.S. Army)	
Headquarters and Headquarters Co.,)	
Special Troops Battalion,	)	3 June 2014
7th Sustainment Brigade,)	
Fort Eustis, Virginia 23604)	

RELIEF SOUGHT

Pursuant to R.C.M. 906(b)(6), the Accused moves that the Government be compelled to furnish a bill of particulars describing "bodily harm," as that term is used in each specification of Charge I, in sufficient detail.

BURDEN OF PROOF

Pursuant to R.C.M. 905(c), the Defense, as the moving party, bears the burden of persuasion by a preponderance of the evidence.

FACTS

In Charge I, Specifications 1 and 2, the Accused is charged with two specifications of sexual assault under Art. 120, U.C.M.J. He is alleged to have committed sexual acts upon (b) (6) (b) (6) by causing her bodily harm in both specifications. In neither specification is the means of bodily harm specified in any detail (See Enclosure 1).

EVIDENCE

1. Enclosure 1, Charge Sheet;
2. Enclosure 2, Excerpt, Summary of Proceedings: Article 32(b) Investigation;
3. Enclosure 3, Excerpt, Instruction 3-45-14, Military Judges' Benchbook.

ARGUMENT

The purposes of a bill of particulars are, inter alia, to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial and to avoid or minimize the danger of surprise at the time of trial. See R.C.M. 906(b)(6), Discussion. A bill of particulars is used to inform the defense of the nature of the charge when a specification is vague or indefinite. United States v. Saintaude, 56 M.J 888, 889 n.2 (Army Ct. Crim. App. 2002). A bill of particulars is not used “to conduct discovery or to provide details of the government's evidence, but to obtain sufficient information of the accused's own conduct as it relates to the elements of the offenses so that the accused may prepare his defense. The purpose is not to find out what the government knows, but what the government claims.” United States v. Newman, 25 M.J. 604, 606 n.3 (A.C.M.R. 1987).

The Defense in the present case needs to understand exactly what “bodily harm” the Government is alleging the Accused used as a means to commit the sexual acts upon (b) (6) (b) (6) alleged in Charge I, Specifications 1 and 2. Based on the current record, the “bodily harm” for either specification could be any number of things. For instance, for Charge I, Specification 1, which alleges the penetration of (b) (6) vulva through bodily harm, the bodily harm could be the undressing of (b) (6) holding (b) (6) arms down, forcing her legs apart with his legs, or the penetration of her vulva with his penis itself (See Enclosure 2, p.5, starting line 16 of body). The same problem exists in the case of Charge II, Specification 2 as well, simply based on the nature of the alleged offense (See Enclosure 2, p. 8, 1st full paragraph). Without a description of the “bodily harm” in both specifications with some degree of specificity that comports with the model specification and elements of sexual assault as stated in the Military Judges’ Benchbook (See Enclosure 3, element 2(a) requires a statement of the bodily harm alleged following a “to wit:”), the Defense is unable to adequately prepare or to defend against these specifications.

CONCLUSION

For the above stated reasons, the Accused moves that the Government be compelled to furnish a bill of particulars describing “bodily harm,” as that term is used in each specification of Charge I, in sufficient detail.

(b) (6)

CPT, JA
Defense Counsel

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial) MASTON, Charles		2. SSN (b) (6)	3. GRADE OR RANK SGT	4. PAY GRADE E-5
5. UNIT OR ORGANIZATION 66th Transportation Company Headquarters and Headquarters Company, Special Troops Battalion, 7th Sustainment Brigade, Fort Eustis, Virginia 23604			6. CURRENT SERVICE	
7. PAY PER MONTH			a. INITIAL DATE 20110908	b. TERM 3 yrs
a. BASIC \$2,893.50	b. SEA/FOREIGN DUTY \$0.00	c. TOTAL \$2,893.50	8. NATURE OF RESTRAINT OF ACCUSED None	
			9. DATE(S) IMPOSED N/A	

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 120.

SPECIFICATION 1: In that Sergeant Charles Maston, U.S. Army, did, at or near Newport News, VA, on or about 28 June 2012, commit a sexual act upon (b) (6) to wit: penetrated her vulva with his penis, by causing bodily harm to the said (b) (6)

SPECIFICATION 2: In that Sergeant Charles Maston, U.S. Army, did, at or near Newport News, VA, on or about 28 June 2012, commit a sexual act upon (b) (6) to wit: penetrated her mouth with his penis, by causing bodily harm to the said (b) (6)

CHARGE II: Violation of the UCMJ, Article 134.

THE SPECIFICATION: In that Sergeant Charles Maston, U.S. Army, a married man, did, at or near Newport News, VA, on or about 28 June 2012, wrongfully have sexual intercourse with (b) (6) a woman not his wife, and that said conduct was of a nature to bring discredit upon the armed forces.

(END OF CHARGES)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial) (b) (6)	b. GRADE (b) (6) -3	c. ORGANIZATION OF ACCUSER HHC, STB, 7TH SUST BDE
d. SIGNATURE OF ACCUSER (b) (6)	e. DATE (YYYYMMDD) 07 January 2014	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 7 day of January, 2014, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

<p>(b) (6)</p> <p>_____ Typed Name of Officer</p> <p>O-3 Grade</p> <p>(b) (6)</p> <p>_____ Signature</p>	<p align="center">HQ, 7th Sus Bde Organization of Officer</p> <p align="center">Trial Counsel Official Capacity to Administer Oath (See R.C.M. 307(b)_ must be commissioned officer)</p>
--	--

Enclosure 1

12.

On 07 JAN, 2014, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(b)). (See R.C.M. 308 if notification cannot be made.)

(b) (6)
Typed Name of Immediate Commander

HHC, STB, 7TH SUST BDE
Organization of Immediate Commander

(b) (6)
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1504 hours, 7 JANUARY, 2014 at STB, 7TH SUST BDE
Designation of Command or

FORT EUSTIS, VIRGINIA 23604

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE 1

(b) (6)
Typed Name of Officer
O-5

Commanding
Official Capacity of Officer Signing

(b) (6)
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE (YYYYMMDD)

HQ, USACASCOM

FORT LEE, VA 23801

20140312

Referred for trial to the general court-martial convened by Court-Martial Convening Order no. 5,

dated 26 November, 2013, subject to the following instructions: 2

By COMMAND of MAJOR GENERAL LARRY D. WYCHE
Command or Order

(b) (6)
Typed Name of Officer
O-3

CHIEF, MILITARY JUSTICE
Official Capacity of Officer Signing

(b) (6)
Signature

15.

On 12 March, 2014, I (caused to be) served a copy hereof on (each of) the above named accused.

(b) (6)
Typed Name of Trial Counsel

O-3
Grade or Rank of Trial Counsel

(b) (6)
Signature

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken.
2 - See R.C.M. 601(e) concerning instructions. If none, so state.

DIRECT EXAMINATION of (b) (6)
CPT (b) (6) Government Counsel

I am in (b) (6), I have been here since August of 2013, I have 2 children (b) (6) met the accused in our apartment complex around May of 2012, we met in passing. His apartment was to the left of my building. I am in a relationship with SFC (b) (6) who knew SGT (b) (6) was a neighborhood kid. We have social drinks within the neighborhood/ apartment complex. The night of the incident SGT Maston was trying to get me to drink and I initially said no because I wasn't feeling well. SFC (b) (6) was at his residence in Maryland. Later in the evening I finally decided to drink. My kids were sleeping at this time. Later in the evening we went to a party down the street after I had 2 drinks of captain Morgan and coke. At the party I had 1 beer and had my medication in me since I wasn't feeling well, which this caused me to get ill so I asked (b) (6) to walk me home but SGT Maston walked up behind me as I was going home. When I got home I went to the bathroom to throw up and then went to the kitchen to get a glass of water and that's when I saw him standing in my kitchen. When I got to my apartment I had closed the door with him outside of the apartment. I told him I was tired and was going to bed I would talk to him tomorrow and that's when he threw me over his shoulder and carried me to my bedroom. He threw me on the bed and started to undress me and then himself. I told him no several times and tried to pull my pants back up but he eventually got them and my underwear off. I was on my period at the time. He got undressed and he got on top of me. He was wearing basketball shorts. He held my arms down and tried kissing me and biting on my neck and I told him this is wrong and he just laughed. It was clear this shouldn't happen and I tried to push with my legs but was unsuccessful. He forced my legs apart and penetrated me and continued. He did ejaculate, but I am not sure where but he did get some of it on my thigh. Something like this has happened to me before. I did have thoughts of my kids sleeping in the other room. After he was finished I rushed to get my clothes on and told him I am telling someone. I rushed to the party, I was looking for (b) (6) I went home after not finding him. The next day I went to work and my boss whom I am friends with asked me what was wrong and I told her I had to leave. I went to the Langley Hospital to ensure there was nothing wrong with me. I went to Sentara for the kit to be done. It made me feel scared and dirty. I had been going to counseling and then made a report to Newport News Police Department and I felt as if that went terrible. The detective told me I was a liar and people like me cry rape so that they don't look bad because I had a boyfriend. CID started its own investigation. Now I am paranoid, have trust issues, I am still hurt by this.

1021:

Defense Counsel Cross Examines Ms. (b) (6)

CROSS EXAMINATION of (b) (6)
CPT (b) (6) Defense Counsel

I lived in (b) (6). I was on the 2nd floor, they were nice apartments, normally no bug issues. I lived there about 2 years. My apartment was a 2 bedroom, my room was on the left and the kids were on the right of the hallway. I was employed at (b) (6) as a head photo specialist. I am currently dating SFC (b) (6) whom is deployed to Afghanistan and we live together. SFC (b) (6) has never been abusive towards me or my children. We have been together a little over 3 years. (b) (6) met SGT Maston shortly after I did in May. Our little group hung out about every weekend. We didn't always drink, but we mostly had beer, Captain Morgan is my drink of choice and I usually mix it with coke. (b) (6) is not the father, their father is (b) (6) and he lives in (b) (6).

- Defense Counsel requested (b) (6) Contact Information from Ms. (b) (6) and she gave it to him.

We were playing Guitar Hero, it's a game on the XBOX and I am not sure what other system it is available on.

- CPT (b) (6) made an objection to the relevance of the explanation of the video game. Defense explained the relevance of their questioning. The Investigating Officer noted the objection and allowed the witness to continue explaining how the game works.

It was SGT Maston's idea to play Guitar Hero, I am not sure how long we played, it was after around midnight time, not sure how many songs we played. I had 2 captain and cokes. During one of the smoke breaks we spotted the party. SGT Maston and (b) (6) said lets go to the party. I mixed one of my drinks and SGT Maston mixed the 2nd drink. I am not sure if (b) (6) had a drink or not. When I was on the phone with Keith earlier he told me not to have anyone in the house when I was alone, especially not SGT Maston. I did not recognize anyone at the party, I only knew SGT Maston and (b) (6). We were there less than an hour and I wanted to go home because I was sick. I found out that SGT Maston told (b) (6) "I got this" and he followed me home. The apartment door was closed when SGT Maston was in my apartment. I told him I was going to bed and I will see him later. I told him to put me down. He threw me on the bed and undressed me. I resisted by trying to pull my pants back up. I have a king sized bed, I was laying across the bed when he threw me on it. I kept repeating no multiple times loudly but not screaming. My pants were on the floor and I could not reach them. SGT Maston didn't say anything he just laughed. It was an evil laugh I am not sure how to explain it.

- CPT (b) (6) made an objection to the Defense Counsel attempting to get the witness to try and imitate the laugh. The IO stated he will allow the Defense to try and elicit an explanation of the laugh.

I cant explain how his laugh was evil it sounded like it was an unhappy laugh. I repeated no as he spread my legs and he penetrated me. He held my wrists above my head, he alternated his hands to hold my arms down. After he ejaculated I got dressed and ran out of the house. Went to the party to find (b) (6) The people at the party told me he went home. I did not cry out for help as I did not want to wake up my children. I don't recall saying anything about SGT Maston's wife. I went home after not finding (b) (6) at the party, I walked fast when I got back the door was closed and SGT Maston was not there. When I got inside I locked the door and went to bed, I cried myself to sleep. I didn't shower, call, or text anyone about the incident. I got up to get my kids on the bus before I went to work. Not sure of the exact time. I was at work about an hour before anything was said. My coworker (b) (6) was the first one I told and agreed I needed to go to the hospital. I called Keith and told him before I went to the hospital. He was at work in Maryland when I talked to him. I then went to the hospital. I was sent to Sentara for the rape kit. I wasn't sure how to handle the situation. It felt like the detective was attacking me because she said she didn't believe me. I believe I talked to her one more time. I told her I wanted to proceed. Not sure when the voicemail was left for the Detective. I am 5'1" and not sure how tall the ceilings were in my apartment but I could not touch them. I sent SGT Maston a text while at the Langley Hospital and never got a response. I told him it was wrong and I was upset. The day of the incident we texted and SGT Maston used my phone that night to talk to (b) (6) and asked him when he would be coming back down. I have not contacted SGT Maston since the incident. Not sure if I said this isn't right to SGT Maston.

1123:

The Investigating Officer has questions for Ms. (b) (6) Reporter moves the Phone and TDS' Recording Device closer to the Investigating Officer.

INVESTIGATING OFFICER EXAMINATION

Of (b) (6)

When I talked to (b) (6) the night of the incident I told him what was going on that night and he told me that he didn't trust SGT Maston. I found out later that the two had words. (b) (6) had not spoken to me about previous conversations between him and SGT Maston. He said don't have him alone at the house. I passed SGT Maston the phone and he had asked (b) (6) when he would be back in town. When (b) (6) and I went to Maston's house before we noticed he had a woman at his house who was not his wife. He said to give him a minute to make sure his woman was decent. (b) (6) may have indicated I should call it a night early. I believe I honored (b) (6) concerns by staying up late drinking with SGT Maston and (b) (6) in my apartment and by going to a party with them around 1AM. I didn't know what to think when I saw SGT Maston in my kitchen. It was unclear what his intentions were, I didn't tell him directly to get out but told him I am going to bed and I would see him later.

1132:

Objection by CPT (b) (6) that the IO is cross examining the witness. CPT (b) (6) stated that the IO was cross examining the witness and that those present in the court room

now knew where the IO stood on case. The Phone was placed on hold as the IO asked CPT (b) (6) to keep it professional and explained to CPT (b) (6) he was free to make objections and ask questions but that the IO had an Appointing Authority and legal advisor to instruct him on his role as IO and that the IO did not need CPT (b) (6) to instruct him on his role as the IO.

1134:

The Investigating Officer takes the phone off of hold and resumes questions

I didn't bring up the Oral Sex because I couldn't remember much of it. I was wearing a pad that night during my period. He grabbed the back of my head and forced me to give him oral. I did not bite SGT Maston when he forced me to perform oral sex on him. I did not push, hit, kick or scratch SGT Maston when he had sex with me.

1138:

The Defense Counsel has follow up questions to the IO's questions.

RE-CROSS EXAMINATION of (b) (6)
CPT (b) (6) Defense Counsel

There were no sexual innuendos given throughout the night. After the fact (b) (6) told me there had been some comments from SGT Maston. (b) (6) just reiterated he did not trust SGT Maston. Oral sex came before he ejaculated but unclear when. He was standing at the time and I was kneeling and grabbed my head and forced my head down. I have under shoulder length hair. He pushed me down but I cant remember much. The Oral sex happened before the penetration but unclear if it was before or after I was thrown on the bed. I believe he pulled me off the bed but I am unclear as to how. He did not ejaculate during oral, I am not clear as to how long but less than 5 minutes. Not sure where his hands were after he pulled out of my mouth. I am not clear how he picked me up and forced me back on the bed. He didn't pull my hair or grab me by my wrists. I am not sure how he threw me on the bed. My legs were straight and I was laying across the bed.

1151:

The witness was permanently excused telephonically.

1153:

Article 32b Recessed for 10 minutes.

1203:

Article 32b Reconvened with all parties present.

1204:

In (the) specification (____) of (the) (additional) Charge (____), the accused is charged with the offense of _____, in violation of Article _____, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

3-45-14. SEXUAL ASSAULT (ARTICLE 120)

NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.

a. MAXIMUM PUNISHMENT: DD, TF, 30 years, E-1.

b. MODEL SPECIFICATION:

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____, commit (a) sexual act(s) upon _____, to wit: _____, [by causing bodily harm to him/her, to wit: _____] [by threatening or placing him/her in fear that (state wrongful action that was the subject of threat or fear)] [by making a fraudulent representation that the sexual act(s) served a professional purpose] [by inducing a belief by artifice, pretense, or concealment that the accused was another person] [when the accused knew or reasonably should have known that _____ was (asleep) (unconscious) (otherwise unaware that the sexual act was occurring)] [when _____ was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused] .

c. ELEMENTS:

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), to wit: (state the act(s) alleged); (and)

[(2)] That the accused did so by

(a) causing bodily harm to (state the name of the alleged victim), to wit: (state the bodily harm alleged).

(b) threatening or placing (state the name of the alleged victim) in fear that (state the threatened wrongful action).

(c) making a fraudulent representation that the sexual act served a professional purpose.

(d) inducing a belief by artifice, pretense, or concealment that the accused was another person.

[(2)] That the accused did so when

IN A GENERAL COURT-MARTIAL
IN THE FIRST JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY,
FORT LEE, VIRGINIA

UNITED STATES)	
)	
v.	)	GOVERNMENT RESPONSE TO
	)	DEFENSE MOTION FOR APPROPRIATE
MASTON, Charles	)	RELIEF – BILL OF PARTICULARS
SGT, U.S. ARMY)	
Headquarters and Headquarters Co.,)	
Special Troops Battalion,)	
7th Sustainment Brigade,	)	04 June 2014
Fort Eustis, Virginia 23604)	

RELIEF SOUGHT

COMES NOW THE UNITED STATES, by and through its appointed representative, and pursuant to R.C.M. 906(b)(6), files this response to the Defense's request for a bill of particulars.

BILL OF PARTICULARS

a) The Defense requested additional specificity with regard to the "bodily harm" charged in Specification 1 of Charge I.

PARTICULARS: With respect to Specification 1 of Charge I, the bodily harm is alleged to be the penetration of Ms. (b) (6) vulva by the Accused's penis.

b) The Defense requested additional specificity with regard to the "bodily harm" charged in Specification 2 of Charge I.

PARTICULARS: With respect to Specification 2 of Charge I, the bodily harm is alleged to be the penetration of Ms. (b) (6) mouth by the Accused's penis.

c) The Government reserves the right to supplement these Particulars as necessary.

(b) (6)

CPT, JA
Special Victims Prosecutor

I certify that the above "Government Response to Defense Motion for Appropriate Relief - Bill of Particulars" was served on the Defense via e-mail on 04 June 2014.

(b) (6)

A large black rectangular redaction box covers the majority of the text in this section. The text "(b) (6)" is visible in red at the top left corner of the redacted area.

CPT, JA
Special Victims Prosecutor

**United States Army Trial Judiciary
Third Judicial Circuit, Fort Leonard Wood, Missouri**

UNITED STATES)	
)	
v.	)	Defense Motion to Dismiss for Failure to State an Offense
)	
SSG Angel M. Robles, II)	
463rd MP CO, 92nd MP BN)	
4th Maneuver Enhancement Brigade	)	24 June 2014
Fort Leonard Wood, MO 65473)	

RELIEF SOUGHT

Pursuant to Rule for Courts Martial (R.C.M.) 907(b)(1)(B) & 907(b)(3)(A), the Defense respectfully requests that this Court dismiss Specification 1 and Specification 2 of Charge I as they fail to state an offense or are otherwise defective.

BURDEN OF PROOF

Pursuant to R.C.M. 905(c)(1) and (2), the Defense, as the moving party, bears the burden of proof by a preponderance of the evidence.

WITNESSES/EVIDENCE

The Defense does not call any witnesses but does offer the DD Form 458 for consideration in this motion. Defense also attaches the applicable instruction and model specification for aggravated sexual contact (Attachment 1).

LEGAL AUTHORITY AND ARGUMENT

The Court of Military Appeals first articulated the test to be applied in ascertaining the sufficiency of a specification in *U.S. v. Sell*, 11 C.M.R. 202 (C.M.A. 1953). In *Sell*, the court found that a legally sufficient specification must: (1) Allege all the elements of the offense; (2) Provide notice to the accused of the offense against which he must defend; and (3) Give sufficient facts to protect against re-prosecution.

The Court of Military Appeals affirmed the "*Sell test*" in *U.S. v. Dear*, 40 M.J. 196 (C.M.A. 1994) ("This is a three-prong test requiring (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy." *Id.* at 197. The "*Sell test*" is further codified in RCM 307, discussion (G)(iii) ("The specification should be

UNITED STATES V. ANGEL M. ROBLES, II – MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE

sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy.”).

In this case, the Government has charged SSG Robles with aggravated sexual contact in violation of Article 120, UCMJ. The Military Judges’ Benchbook provides a model specification for aggravated sexual contact. The manner by which the Government has pled Specification 1 and Specification 2 of Charge I differs in language and does not follow the model specification. Both of the specifications as pled fail to follow the Military Judges’ Benchbook model specification for aggravated sexual contact for offenses occurring on and after 28 June 2012.

Essentially, the Government fails to allege by what act(s) the harm is caused for both elements of aggravated sexual contact. The specifications as written are defective because they imply that the act(s) caused the *bodily harm*. Therefore, the elements of the offenses are not properly alleged as required under *Sell*. The way the specifications are written implies that the sexual contact was caused by bodily harm when the act(s) provided should describe the sexual contact. The Defense did not receive proper notice and both specifications under Charge I are defective. As such, the Government has failed the *Sell* test and the Defense moves this Court to dismiss Specifications 1 and 2 of Charge I.

CONCLUSION

Wherefore, SSG Robles requests this Court to dismiss Specifications 1 and 2 of Charge I, Violation of Article 120, UCMJ, as the Charge fails to state an offense or is otherwise defective.

(b) (6)

A large black rectangular redaction box covers the signature of the Civilian Defense Counsel.

Civilian Defense Counsel

IN THE THIRD JUDICIAL CIRCUIT, U.S. ARMY
FORT LEONARD WOOD, MISSOURI

UNITED STATES

v.

**Robles, Angel M. II
SSG, U.S. Army,
463d MP Co, 92d MP Bn
4th Maneuver Enhancement Brigade
Fort Leonard Wood, MO**

**Government Response to Defense
Motion to Dismiss:
Failure to State an Offense**

25 June 2014

RELIEF SOUGHT

The Government in the above case requests that the Court deny the defense's motion to dismiss Specifications 1 and 2 of Charge I for failure to state an offense.

BURDEN OF PERSUASION AND BURDEN OF PROOF

Defense, as the moving party, bears the burden of proof by a preponderance of the evidence. Rule for Courts-Martial 905(c)(1)&(2).

FACTS

On 19 March 2014, three charges were preferred against the accused, Staff Sergeant Robles. On 6 May 2014, the charges were referred to court-martial by the convening authority, Major General Leslie C. Smith after receiving the advice from the staff judge advocate as required by R.C.M. 406. On 9 June 2014, the accused was arraigned on these charges and was informed as to the general nature of the charges as two specifications in violation of Article 120, Uniform Code of Military Justice, Abusive Sexual Contact; two specifications in violation of Article 120c, U.C.M.J., indecent exposure; and two specifications in violation of Article 93, Cruelty and Maltreatment of Subordinates. He was not charged with aggravated sexual contact.

WITNESSES/EVIDENCE

- Signed DD 458

United States v. Angel M. Robles II – Government Response to Defense Motion to Dismiss for Failure to State an Offense.

LEGAL AUTHORITY AND ARGUMENT

Uniform Code of Military Justice, 10 U.S.C. § 837 (2012).

R.C.M. 307.

United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2010).

Manual for Courts-Martial, 2012 Ed.

“The format of charge and specification are used to allege violation of the code.” R.C.M. 307(c)(1). “A charge states the article of the code . . . which the accused is alleged to have violated.” R.C.M. 307(c)(2). “A specification is a plain, *concise*, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. . . . *No particular format is required.*” R.C.M. 307(c)(3) (emphasis added). The elements of abusive sexual contact are enumerated in the U.C.M.J. “Any person subject to [the UCMJ] 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” M.C.M, pt. IV, ¶ 45a(d). Under sexual assault, the pertinent elements are (1) a person subject to [the UCMJ], (2) commits a sexual act upon another person by, (3) causing bodily harm to that other person.” *Id.* at ¶ 45a(b)(1)(B).¹ Sexual contact is defined as “touching, . . . , either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, with an intent to abuse, humiliate, or degrade any person; or any touching, . . . , 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.” *Id.* at ¶ 45a(g)(2). Bodily harm is defined as “any offensive touching of another, however slight, *including any nonconsensual sexual act or nonconsensual sexual contact.*” *Id.* at ¶ 45a(g)(3) (emphasis added). “The military is a notice pleading jurisdiction. A charge and specification will be found sufficient if they, first, contain the elements of the offense charged and fairly inform an accused 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.” *Fosler*, 70 M.J. at 229 (internal citations omitted). The specifications in Charge I in this case contain each element of the offense of abusive sexual contact by necessary implication, if not expressly, and would bar any future prosecutions on these offenses.

I. Defense’s First Motion to Dismiss (2 pages long).

Defense argues that Government failed to follow the benchbook and failed to allege what acts the harm is caused for both elements. First, model specifications in the

¹ This analysis purposefully omitted discussion on the elements regarding location, date, subject matter jurisdiction, and personal jurisdiction as not relevant to this motion. Those parts of the elements are not in dispute as being properly alleged.

United States v. Angel M. Robles II – Government Response to Defense Motion to Dismiss for Failure to State an Offense.

M.C.M. and sample specifications in the benchbook are simply suggestions as no particular format is required. It would be inadvisable not to follow the model specifications, but it is not necessary. That a specification is not verbatim to what is in the benchbook is not *per se* a failure to state an offense as defense counsel suggests. Second, defense's motion states "[t]he specifications[,] as written[,] are defective because they imply that the act(s) caused the *bodily harm*. As the R.C.M. states and *Fosler* supports, "a specification is sufficient if it alleges every element of the charged offense expressly or by **necessary implication**." R.C.M. 307(c)(3) (emphasis added). The way the specifications are written are that the acts that constitute the sexual contact are the same acts as the bodily harm; and, that the sexual contact was bodily harm because it was without the alleged victim's consent. Defense has said as much in its own motion to dismiss so the notice pleading has been effectuated. In order to be concise, the acts were not written twice in the specification. Regardless, using basic sentence and grammar structure it is clear that the sexual contact was the bodily harm because the acts specifically stated were without consent.

II. Defense's Second Motion to Dismiss (4 pages long).

The military is a notice pleading and must fairly inform the accused expressly or by necessary implication, while keeping to the parameters of the specifications and "plain, concise, definite statement of the essential facts." R.C.M. 307(c)(3). The "intent to abuse, humiliate or degrade" and the "intent to arouse or gratify the sexual desire of" are not elements in the statutory text of the offense. What must be alleged is "sexual contact." That was done, fair notice was given. That is what differentiates abusive sexual contact from assault consummated by battery, *sexual* contact. With respect to whether an element is necessarily implied, the court looks at historical precedent and *stare decisis*, including the M.C.M. and *Parker v. Levy*, 417 U.S. 733 (1974). See *Fosler* at 229. However, there is no test or analysis for what constitutes necessary implication. The language of the specification and the nature of the offenses the accused is charged with should play an important role in determining whether elements are necessarily implied.

In this case, it is necessarily implied, based on the language and the offenses, that the intent to arouse or gratify the sexual desire of any person is the mental state. Sexual contact is broken into two types based on the type of touching and the body parts touched. The touching alleged in the specifications fall under the "any touching of any body part" definition that states it is for the intent to arouse or gratify sexual desire, the subparagraph (B) of the definition. M.C.M. ¶ 45a(g)(2)(B). The second specification is "rubbing her leg" which firmly falls under subparagraph (B). The first specification states "touching her groin, waist, and thigh." This necessarily implies a continual act that covers three body parts, only one of which falls under the subparagraph (A) of the definition (groin) where "abuse, humiliate, degrade" is listed. That is why looking at the nature of the offenses is important. This is a "sexual desire" case, not an "abuse,

United States v. Angel M. Robles II – Government Response to Defense Motion to Dismiss for Failure to State an Offense.

humiliate, or degrade” case. SSG Robles is charged with offenses of a sexual nature towards the alleged victim. He wanted to have sex with her, not humiliate her. Therefore, the necessary implication is that the touching was with the intent to arouse or gratify his sexual desire.

Lastly, definitions are put into statutes for a reason, conciseness and efficiency. The element is sexual contact. The statute defines sexual contact. The definition fully explains what sexual contact is and why it is different from assault consummated by battery, providing the fair notice.

CONCLUSION

The government requests this Court deny the defense’s motion to dismiss for failure to state an offense. Each element is pled, pled implicitly it not expressly, and the defense is fairly informed to defend against the charge and specifications.

(b) (6)



CPT, JA
Trial Counsel