# UNITED STATES NAVY-MARINE CORPS
# COURT OF CRIMINAL APPEALS
# WASHINGTON, D.C.

**Before**
**C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI**
**Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**AKEEM A. WILKINS**
**MASTER-AT-ARMS THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201000289**
**GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 19 November 2009.
**Military Judge:** CAPT Ross Leuning, JAGC, USN.
**Convening Authority:** Commander, Navy Region Europe, Africa, Southwest Asia, Sicily, Italy.
**Staff Judge Advocate's Recommendation:** LCDR T.D. Stone, JAGC, USN.
**For Appellant:** Maj Kirk Sripinyo, USMC.
**For Appellee:** Maj Paul Ervasti, USMC; Maj Elizabeth Harvey, USMC.

**29 November 2011**

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**OPINION OF THE COURT**

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PER CURIAM:

A general court-martial composed of officers and enlisted members convicted the appellant, contrary to his pleas, of abusive sexual contact and forcible sodomy, violations of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925. The appellant was sentenced to eighteen month's confinement and a dishonorable discharge from the United

States Navy. The convening authority approved the sentence as adjudged.

In his initial pleadings, the appellant raised two assignments of error: that the military judge erroneously concluded that subsection (h) of Article 120, abusive sexual contact, is a lesser included offense (LIO) of subsection (c), aggravated sexual assault, thereby violating the appellant's due process right to notice of the offense which he must defend against; and that the statutory scheme of Article 120 places a burden on the defense to disprove an element of the Government's case, specifically, that the victim of the offense was not substantially incapacitated.

On 24 March 2011, this court concluded that the assigned errors were without merit and affirmed the general court-martial's finding and sentence. On 27 July 2011, the U.S. Court of Appeals for the Armed Forces (CAAF) vacated this court's decision and remanded "for reconsideration in light of *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011), *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011), *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011), and *United States v. Alston*, 69 M.J. 214 (C.A.A.F. 2010)."

The issue for this court's renewed consideration: "whether the appellant's right to due process of law was violated when he was convicted for abusive sexual contact as a lesser included offense of aggravated sexual assault."

Upon review of the record of trial and the parties' pleadings, we again conclude that the findings and sentence are correct in law and fact, and there was no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.[1]

**Facts**

In June 2009, the appellant, Master-at-Arms Third Class (MA3) L, and several other Sailors from their command took leave to visit a nearby resort area. Their first night at the resort, MA3 L consumed a significant amount of alcohol and had to be escorted to bed. This was at approximately 0500. Soon thereafter, he woke up to a "pressure" around his groin and anus. He looked down and saw the appellant fondling him. MA3 L

[1] With respect to the appellant's second assignment of error (burden shift), we find the appellant is not entitled to relief for the reasons stated in our decision of 24 March 2011.

made it known that the appellant's actions were unwelcome and the appellant stopped. MA3 L reported the incident the next day.

**Procedural Posture**

The appellant was charged under Articles 120 and 125. One specification of the Article 120 charge alleged aggravated sexual assault (10 U.S.C. § 920(c)), that the appellant digitally penetrated MA3 L's anus while MA3 L was substantially incapable of declining participation or communicating his unwillingness to engage in the sexual act. The other specification of the Article 120 charge alleged abusive sexual contact (10 U.S.C. § 920(h)), that the appellant touched MA3 L's penis while MA3 L was substantially incapable of declining participating or communicating his unwillingness to engage in the sexual contact. The Article 125 charge consisted of a single specification alleging that the appellant committed anal sodomy by force and without MA3 L's consent.

The appellant argued at trial that the two specifications under Article 120 were unreasonable multiplications of the same act. The military judge agreed and dismissed the specification alleging abusive sexual contact (alleging the touching of MA3 L's penis), but kept in place the specification of aggravated sexual assault (alleging the penetration of MA3 L's anus). Later in the proceedings, however, the military judge noticed that the remaining aggravated sexual assault specification was facially improper. The Government had alleged that the appellant "did engage in a sexual act, to wit: placing his fingers or another object in MA3 L's anus." Until that point, no one had noticed that the legislature's definition of a "sexual act" ("the penetration, however slight, of the *genital opening* of another by a hand or finger or by any object" (emphasis added), Article 120(t)(1), precluded its application to a crime that does not involve a genital opening. The military judge entered a *sua sponte* finding of not guilty to aggravated sexual assault, but instructed the jury members that they may find the appellant guilty of the LIO of abusive sexual contact. Trial defense counsel did not object to the judge's instruction.

The members found the appellant guilty of that specification, as well as to the sole specification under Article 125. The military judge then instructed the members that for purposes of sentencing, they were to consider both "charges of conviction as a single incident and treat it as a

single charge for the purpose of sentencing." Record at 786. The members sentenced the appellant to eighteen months confinement and a dishonorable discharge.

In March 2011, this court issued an unpublished opinion in this case and held that abusive sexual contact was an LIO of aggravated sexual assault. We found that "the appellant had the requisite due-process notice of the elements he was required to defend against at his trial." *United States v. Wilkins*, No. 201000289, unpublished op. (N.M.Ct.Crim.App. 24 Mar 2011). In July 2011, CAAF vacated our decision and remanded for reconsideration in light of several recent cases – *McMurrin*, *Girouard*, *Bonner*, and *Alston* – all of which discussed when an LIO may be properly derived from a charged offense.

**Analysis**

Although this Court was directed to reconsider this case in light of *McMurrin*, *Girouard*, *Bonner*, and *Alston*, we note that the specification alleging aggravated sexual assault failed to state that offense. In this instance the Government charged the appellant with aggravated sexual assault by penetrating the victim's anus with his finger or object. As discussed *infra*, penetration of the anus does not constitute a "sexual act" within the meaning of Article 120. Thus, the charge failed to state the offense of aggravated sexual assault. The language of the specification did, however, clearly state the offense of abusive sexual contact.

After reviewing the specification, we are satisfied that it alleged every element of abusive sexual contact so as to give the appellant "'notice and protect him against double jeopardy.'" *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (quoting RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984 ed.). *See United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (noting that if a specification has not been challenged prior to findings and sentence, the sufficiency of the specification may be sustained on appeal if the necessary facts appear in any form, or by fair construction can be found, within the terms of the specification).

We now reconsider in light of *McMurrin*, *Girouard*, *Bonner*, and *Alston.* "Whether an offense is a lesser included offense is a question of law we review *de novo*." *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011) (citation and internal quotation marks omitted). If there is no objection to the instruction, we review according to a "plain error" standard; the appellant must

demonstrate that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. *Girouard*, 70 M.J. at 11.

The issue CAAF directs us to resolve is Constitutional in nature. The Fifth Amendment states that no accused shall be "deprived of life, liberty, or property, without due process of law," U.S. CONST. amend. V, and the Sixth Amendment states that an accused shall "be informed of the nature and cause of the accusation," U.S. CONST. amend. VI. An accused is entitled to fair notice of each element of the Government's charges against him. *See Girouard,* 70 M.J. at 10. However, according to Article 79 of the UCMJ, "[a]n accused may be found guilty of an offense necessarily included in the offense charged." In *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010), the elements test was put forth as the analytical model for determining whether one offense is an LIO of another. Under the elements test, "the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction [regarding a lesser included offense] is to be given." *Alston*, 69 M.J. at 216 (quoting *Schmuck v. United*, 489 U.S. 705, 716 (1989)).

We begin our analysis by examining the elements of the two offenses – the charged offense and the proposed LIO – using the principles of statutory construction. *See Bonner*, 70 M.J. at 2. Then we compare the two to determine if the LIO's elements are a subset of the charged offense's elements. *Id*.

Article 120 states in relevant part:

> (c) Aggravated Sexual Assault. Any person subject to this chapter [10 USCS §§ 801 et seq.] who. . . (2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of: (A) appraising the nature of the sexual act; (B) declining participation in the sexual act; or (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.
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> (h) Abusive Sexual Contact. Any person subject to this chapter [10 USCS §§ 801 et seq.] who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated

> 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.
>
> (t) Definitions. In this section: (1) Sexual act. The term "sexual act" means . . . (B) the penetration, however slight, of the genital opening of another by a hand or finger 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. (2) Sexual contact. The term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally 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 to arouse or gratify the sexual desire of any person.

Turning to the principles of statutory construction, we note that "court[s] should always turn first to one, cardinal canon before all others. . . . [T]hat courts must presume that a legislature says in a statute what it means and means in a statute what it says. . . . ." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992). When we lay the elements of aggravated sexual assault alongside the elements of abusive sexual contact, we see only one elemental difference between the two crimes: aggravated sexual assault concerns itself with sexual acts whereas abusive sexual contact concerns itself with sexual contact. When we compare the definition of a sexual act with the definition of sexual contact, we see two differences: a sexual act necessarily involves genitalia, whereas sexual contact does not; and a sexual act requires penetration, whereas sexual contact requires mere touching. We assign these words their common, ordinary, and accepted meaning, and we afford the language of the statue its plain meaning. *See Carter v. United States*, 530 U.S. 255, 263 (2000).

Applying the principles from *McMurrin*, *Girouard*, *Bonner*, and *Alston*, to the facts of this case, it is clear that the Government's initial allegation of aggravated sexual assault was improper, as the appellant did not penetrate MA3 L's genital opening. An anus is not a genital opening. The appellant was charged with – and found to have committed – digital penetration of MA3 L's anus. By penetrating MA3 L's anus, he must at least

have touched MA3 L's anus. The appellant therefore met the statutory definition of "sexual contact," noted *supra*. We do not need to look any further into the legislature's intent with respect to these two crimes. We conclude that the military judge properly instructed the members that abusive sexual contact is an LIO of aggravated sexual assault.

We are also satisfied that the appellant had the requisite due process notice of the elements he was required to defend against at his trial. The specification alleged a specific act, i.e., insertion of something, fingers or an object, into the incapacitated victim's anus. Furthermore, a review of the entire record of trial makes it clear that the defense team knew all along that it was defending against digital or object penetration of the victim's anus, not against penetration of a genital opening. *E.g.*, charge sheet; Record at 286 (opening statement of defense counsel), 323, 371 (examination and cross-examination of victim); Prosecution Exhibit 4 (results of physical examination of victim); Record at 427 (cross-examination of on-call physician). The appellant was made aware not only of the elements of aggravated sexual assault, but also of the elements of the LIO of abusive sexual contact. Accordingly, we find that the Government did not abridge the appellant's Fifth Amendment right to due process, or his Sixth Amendment right to be informed.

Because we find no error in the LIO instruction, we do not need to conduct any further inquiry under the "plain error" standard.

**Conclusion**

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court