IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20080009
Specialist **PHILIP L. PIERCE,** United States Army, Appellant	)	USCA Dkt. No. 11-0239/AR

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v.	) Crim. App. Dkt. No. 20080009
	) USCA Dkt. No. 11-0239/AR
Specialist (E-4) **Philip L. Pierce** United States Army, Appellant	)

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Granted Issue

WHETHER THE ARMY COURT OF CRIMINAL APPEALS INCORRECTLY FOUND THAT THE MILILTARY JUDGE'S FAILURE TO INSTRUCT ON NECESSARY ELEMENTS OF AN OFFENSE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Certified Issue

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE MILITARY JUDGE'S INSTRUCTION ON 18 U.S.C. § 2422(B), WHICH INSTRUCTION USED THE TERM "INTERNET" INSTEAD OF "ANY FACILITY OR MEANS OF INTERSTATE OR FOREIGN COMMERCE," WAS ERRONEOUS.

Specified Issue

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE MILITARY JUDGE'S INSTRUCTION ON 18 U.S.C. § 2422(B), WHICH INSTRUCTION USED THE TERM "INTERNET" INSTEAD OF "ANY FACILITY OR MEANS OF INTERSTATE OR FOREIGN COMMERCE," WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Summary of Argument

In this case, the military judge, in her instructions to the panel, failed to instruct the members they must find appellant's act of attempted enticement, charged under clause 1 and clause 2 of Article 134, UCMJ, was prejudicial to good order and discipline or service discrediting. The Army Court of Criminal Appeals erred when they determined this omission was harmless beyond a reasonable doubt because the government failed to produce overwhelming evidence on the elements and there is a reasonable possibility that the error contributed to appellant's conviction. *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Similarly, the military judge erroneously instructed the members that appellant's act of enticement involved the use of the "internet" rather than the required statutory element- "facility or means of interstate or foreign commerce." The Army Court of Criminal Appeals correctly determined this error was not harmless beyond a reasonable doubt because the government failed to produce any evidence that the internet was, in fact, a means or facility of interstate commerce.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2008) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On October 11, and December 14, 2007, and on January 4, 7, and 8, 2008, a panel composed of officers and enlisted members sitting as a general court-martial tried Specialist (E-4) Phillip L. Pierce [hereinafter appellant]. Contrary to his pleas, appellant was convicted of attempted indecent acts with a minor, attempting to communicate indecent language to a minor, and using the internet in an attempt to wrongfully solicit, entice, induce or coerce a minor to engage in sexual activity, assimilating 18 U.S.C. § 2422, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880 and 934 (2005). Appellant was sentenced to confinement for fifteen months, reduction to E-1, and a bad-conduct discharge. The convening authority approved the adjudged sentence but granted appellant twenty days of credit against the sentence to confinement.

The Army Court affirmed the finding of guilty as to the Specification of Charge II except the words "in violation of

Title 18, United States Code, Section 2422." (JA 1.) The remaining findings of guilty and the sentence were affirmed on November 8, 2010. *Id.* On January 5, 2011, appellant petitioned this Court for review.

On May 23, 2011, this Honorable Court granted appellant's petition for review and specified an additional issue. On June 14, 2011, the Government certified an additional issue to this Honorable Court.

Statement of Facts

In the Specification of Charge II, appellant was charged with attempted enticement of a minor to engage in sexual activity in violation of Article 134, UCMJ. The specification alleged violations of clause 1 (conduct prejudicial to good order and discipline), clause 2 (service discrediting conduct), and clause 3 (conduct violating a non-capital federal offense) of Article 134. The specification read as follows:

> In that Specialist (E-4) Phillip Lynn Pierce, U.S. Army, did, at or near Fort Lewis, Washington, on divers occasions, between on or about 25 October 2006 and on or about 18 December 2006, via the internet, wrongfully and knowingly attempt to persuade, induce, entice, or coerce "Anastasia," someone he thought was a female 13 years of age, who was, in fact, Rachel Lepovetsky, a Naval Criminal Investigative Service undercover special agent, to engage in sexual activity in violation of Title 18, United States

> Code, Section 2422, which conduct was prejudicial to good order and discipline or likely to bring discredit upon the armed forces.[1]

(JA 13.)

At trial, Special Agent (SA) Rachel Lepovetsky served as the primary fact witness for the government. As a computer crimes investigator for the Naval Criminal Investigative Services, SA Lepovetsky testified that she met appellant online while posing as a thirteen year old girl. (JA 44.) She testified that she "chatted" with appellant, in a private chat room, on at least fifteen occasions between on or about October 25 2006 and December 2006 and that the conversations were sexual in nature. *Id.* She further testified that on December 2006, appellant, believing her to be thirteen years old, requested that they meet in person. (JA 45.) SA Lepovetsky recommended they meet at the local Dairy Queen because there would not be "a lot of other people." (JA 46.) Upon appellant's arrival at the Dairy Queen, he was immediately apprehended by SA Lepovetsky and two Army Criminal Investigation Division

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[1] The government did not allege an offense within the special territorial jurisdiction of the United States, since to meet the requirements of the statute, the offense must occur on property within, not *near*, such a boundary. *See, e.g., United States v. Williams*, 17 M.J. 207 (C.M.A. 1984).

Officers. *Id.* SA Lepovetsky testified that appellant was wearing his ACU's at the time of his arrest. (JA 45.)

Although SA Lepovetsky did testify about her use of a private chat room in appellant's case, she did not testify that the internet was a "means or facility of interstate commerce." Nor did she testify that appellant's conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. The government did not question SA Lepovetsky on these issues.

In addition to SA Lepovetsky's testimony, the government presented the testimony of Specialist (SPC) June Park, a Soldier from appellant's unit. SPC Park testified that during a conversation between himself and appellant, appellant admitted that he was involved in a "sting operation." (JA 22.) Appellant further relayed that he got caught talking to a minor in a sexual manner, but was not planning on doing anything sexually with her. *Id.* SPC Park did not testify about the effects of appellant's conduct on the unit. Nor did he testify about the potential service discrediting nature of appellant's conduct. The government did elicit testimony from SPC Park on these issues.

The remaining evidence presented by the government consisted of the chat logs between appellant and SA

Lepovtsky; appellant's sworn statement; photos of the appellant; and the testimony of two additional Special Agents from the Criminal Investigation Division who were involved in appellant's arrest and the taking of his subsequent sworn statement.[2] This evidence also did not address the clause 1 and clause 2 elements of the offense. Nor did this evidence address the use of the internet as "facility or means of interstate or foreign commerce."

In the closing statement to the panel, the government argued:

> [F]or you to find the [appellant] guilty of this the government must prove the [appellant] used the internet to attempt to persuade, induce, entice, or coerce 'Anastasia' to engage in sexual activity, that the accused believed 'Anastasia' to be less than 18 years of age, that if sexual activity had occurred that the [appellant]could have been charged with a criminal offense, and last, that the accused acted knowlingly and willfully.

(JA 66.)

At the close of the evidence the military judge provided the following instruction on the enticement offense:

> In the specification of Charge II, the accused is charged with the offense of use of the internet to solicit illicit

[2] Although not included in the joint appendix, this evidence can be found in the record of trial at: PE 9; PE 12; PE 1-5; R. at 177-94; and R. at 281-84.

> sex which is a violation of federal law that has been assimilated under Article 134, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt:
>
> One, that between on or about 25 October 2006 and on or about 18 December 2006, on divers occasions, that the accused knowingly used the internet to attempt to persuade, induce, entice or coerce "Anastasia," an individual under the age of 18 to engage in sexual activity, as charged;
>
> Two, that the accused believed that such individual, "Anastasia," was less than 18 years of age;
>
> Three, that if the sexual activity had occurred, the accused would have been charged with a criminal offense under Article 125 or Article 134 of the Uniform Code of Military Justice; and
>
> Four, that the accused acted knowingly and willfully.

(JA 74.)

The military judge did not instruct the members they must find appellant's act of attempted enticement was prejudicial to good order and discipline or service discrediting. Additionally, the military judge did not instruct the members that appellant's act of enticement involved use of a "facility or means of interstate or foreign commerce" as set forth in 18 U.S.C. § 2422 but

rather, instructed that the panel must find appellant used the "internet" to entice a minor. *Id.*

On appeal, the Army Court of Criminal Appeals concluded that "the panel was never told, in any manner, that they must find the internet is a means or facility of interstate commerce in order for appellant to be guilty of the offense alleged, under clause 3, and the government offered no evidence and made no argument on that element. Consequently, the court members were prevented from meaningfully considering the interstate commerce element at all. (JA 8.) The Army Court found this error was not harmless beyond a reasonable doubt and excepted the relevant clause 3 language from the specification. Additionally, the Army Court found that the military judge erred when she omitted the clause 1 and clause 2 elements from her instructions to the panel but found the omission was harmless beyond a reasonable doubt.[3] (JA 9.)

Those facts necessary for the disposition of the assigned error are set forth below.

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[3] On appeal to this Court, neither party has questioned the rulings of the Army Court with respect to the conclusion that the military judge erred by omitting the clause 1 and clause 2 elements from her instructions to the panel. Because neither party has addressed this issue, appellant contends that it is now the law of the case. *See United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2011).

Standard of Review

The issue of whether a panel was properly instructed is a question of law reviewed de novo. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). While Rule for Courts-Martial [hereinafter R.C.M.] 920(f) states errors in instructions are waived and reviewed only for plain error, plain error does not apply when the error involves a missing instruction on a required element under R.C.M. 920(e)(1). *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000); *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988); *United States v. Hearn*, 66 M.J. 770, 775 (Army Ct. Crim. App. 2008). "[T]he waiver rule in R.C.M. 920(f) . . . does not apply to '[r]equired instructions' such as those on reasonable doubt, elements of the offenses, and affirmative defenses[.]" *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (quoting *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988)).

Issues Presented and Argument

I.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS INCORRECTLY FOUND THAT THE MILILTARY JUDGE'S FAILURE TO INSTRUCT ON NECESSARY ELEMENTS OF AN OFFENSE WAS HARMLESS BEYOND A REASONABLE DOUBT.

Law

When a case is heard before members, a military judge must instruct on all elements. Article 51(c), UCMJ, R.C.M.

920(e)(1). This is a sua sponte duty. *United States v. McDonald*, 57 M.J. 18, 19 (C.A.A.F. 2002) (citing R.C.M. 920(e)). "A military judge is obligated to 'assure that the accused receives a fair trial.'" *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006) (quoting *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975)). "This obligation includes the duty to 'provide appropriate legal guidelines to assist the jury in its deliberations . . . .'" *Id.* (quoting *United States v. McGee*, 1 M.J. 193, 195 (C.M.A. 1975)). "The military judge [has an] independent duty to determine and deliver appropriate instructions . . . ." *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990). The judge's instructions are a "vital stage" of any court-martial. *Id.* at 420 (quoting *United States v. Groce*, 3 M.J. 369, 370 (C.M.A. 1977)).

When a military judge's instruction incorrectly describes elements of an offense or omits elements of an offense, the error is analyzed for prejudice under a standard of harmlessness beyond a reasonable doubt. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008) (citing *Neder v. United States*, 527 U.S. 1, 17 (1999)). Error is harmless beyond a reasonable doubt when there is no "reasonable possibility that the evidence [or error] complained of might have contributed to the conviction." *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting

Chapman v. California, 386 U.S. 18, 24, (1967) (brackets in original)).

Offenses charged under Article 134, UCMJ, 10 U.S.C. § 934, clauses 1 or 2, include the element that, ". . . the accused's conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces." *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009)(quoting Article 95, UCMJ). The terminal elements, if charged, are an "essential element of the offense" as to which members must be instructed. *See United States v. Williams*, 8 U.S.C.M.A. 325, 327, 24 C.M.R. 135, 137 (1957).

While the government need not prove both of these prongs, they must prove one or the other.

> For any offense charged under Article 134, UCMJ, clauses 1 or 2, the government must prove: (1) that the accused did a certain act, and (2) that the act was, under the circumstances, to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces.

United States v. Wilcox, 66 M.J. 442, 448 (C.A.A.F. 2008)(citation omitted). "[T]o satisfy the due process requirements of the Fifth Amendment, the Government must prove beyond a reasonable doubt every element of the charged offense." *Wilcox*, 66 M.J. at 448 (citing *In re Winship*, 397 U.S. 358, 364, (1970)), *see also United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008). Additionally, "an appellate court may not

affirm on a theory not presented to the trier of fact and adjudicated beyond a reasonable doubt." *Id.* at 27.

Argument

In this case, the military judge erred when she omitted the essential, clause 1 and clause 2, terminal elements from her instructions to the panel on the Specification of Charge II. Contrary to the Army Court's finding, this instructional error was not harmless beyond a reasonable doubt because there is a "reasonable possibility" that the error contributed to appellant's conviction. *See Upham*, 66 M.J. at 87. In considering whether the instructional error was harmless, two factors are considered by the reviewing court: "whether the matter was contested, and whether the element at issue was established by overwhelming evidence." *Id, cited in United States v. Forney*, 67 M.J. 271, 280 (C.A.A.F. 2009) (Effron, C.J., concurring in the result).

1. Prejudicial to good order and discipline (clause 1).

Far from producing "overwhelming" evidence on this element, the government failed to produce any evidence that appellant's conduct was prejudicial to good order and discipline. The government did not question a single witness about the impact of appellant's conduct on good order and discipline and they did not present a clause 1 theory of culpability in their opening or closing statement. In fact, the only witness capable of

testifying about the impact of appellant's conduct was SPC June Park. Yet, SPC Park's testimony consisted only of admitting appellant's potentially incriminating statement as an admission of a party-opponent. (JA 22.) He was not questioned on the impact of appellant's conduct and did not offer any information outside of appellant's statement.

While this issue was not expressly contested at the trial level, this does not negate the harmful impact of the military judge's omission of the essential clause 1 element. Error is only harmless beyond a reasonable doubt when there is no "reasonable possibility that the evidence [or error] complained of might have contributed to the conviction." *Moran*, 65 M.J. at 187. Here, there is no doubt the military judge's omission contributed to appellant's conviction. The government did not present this theory to the panel and did not present any evidence to prove the relevant element. It was simply ignored by the government and then subsequently ignored by the military judge in her instructions to the panel. This combination made it impossible for the panel to know they must make a factual determination on the clause 2 element. Thus, the military judge's failure to give the panel the necessary instruction foreclosed any possibility that the panel would return a proper finding against appellant on the merits and thus, the error was not harmless beyond a reasonable doubt.

2. Of a nature to bring discredit upon the armed forces (Clause 2).

In his closing argument to the panel, appellant's civilian defense counsel directly contested the service discrediting nature of appellant's conduct. He stated, "We also have the issue of discredting the Army. That's a tough one I will admit, but I need to point out that the only reason the Army was brought up was because the agent asked about it." Additionally, appellant's defense counsel, in his cross-examination of SA Lepovetsky, established that her conversations with appellant took place within a private chat room; outside the purview of the public; and contained limited information about appellant's military status. (JA 61.)

Although the government need not present evidence that anyone witnessed the conduct, "whether conduct is of a 'nature' to bring discredit upon the armed forces is a question that depends on the facts and circumstances of the conduct, which includes facts regarding the setting as well as the extent to which Appellant's conduct is known to others." *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011). Recognizing this prinicple, appellant's counsel, through his closing argument and his questioning of SA Lepovetsky, highlighted the private nature of the "chats"

and the minimal discussions about appellant's military status - factors which counter the government's contention that appellant's conduct brought discredit upon the armed forces. Thus, appellant clearly contested the service discrediting nature of appellant's conduct at trial. *See Neder*, 527 M.J. at 16. ("Where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.")

Further, "overwhelming" evidence of the clause 2 element does not exist in this case. In determining whether an offense is service discrediting, the fact-finder must look at all of the facts and circumstances presented at trial. A conclusive presumption cannot be made from any particular course of action or conduct itself. *See Phillips*, 70 M.J. 161. In this case, the government failed to question a single witness on the clause 2 element of the offense. Additionally, the evidence that was produced revealed that appellant, while believing he was conversing with a thirteen year old girl, was in a private chat room with an adult Naval investigative agent. (JA 44.) The chat room was private and members of the public were not aware of their content. (JA 39 and JA 107.)

Additionally, the fact appellant was wearing his Army uniform at the time of his apprehension, does not, alone, produce the "overwhelming evidence" necessary to find the instructional error harmless. SA Lepovetsky testified that she chose to meet appellant at the Dairy Queen because there would be very few people around, making it extremely unlikely that members of the public observed the apphrension. (JA 46.) These facts simply do not produce the necessary "overwhelming evidence" to determine the error was harmless in appellant's case.

The military judge's failure to give the panel the necessary instruction was not harmless beyond a reasonable doubt because appellant contested the clause 2 element of the offense and the element was not supported by overwhelming evidence. As such, one cannot be confident that the military judge's omission of the clause 2 language did not impact the findings in appellant's trial. This is especially true when the written instruction also failed to acknowledge the clause 1 and clause 2 language. The Army Court's reasoning that the military judge's reminder to the panel that the elements of Charge II's underlying offense remained the same as when charged in Charge I falls short of showing the error was harmless beyond on a

reasonable doubt.[4] Similarly, the military judge's finding that the specifications were multiplicious for sentencing does not negate the error in this case. The error was not harmless beyond a reasonable doubt because there is a reasonable possibility that the error complained of might have contributed to the conviction. *Moran*, 65 M.J. at 187 ; *Chapman v. California*, 386 U.S. 18, 24 (1967).

WHEREFORE, appellant respectfully requests this Honorable Court dismiss the Specification of Charge II.

II.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE MILITARY JUDGE'S INSTRUCTION ON 18 U.S.C. § 2422(B), WHICH INSTRUCTION USED THE TERM "INTERNET" INSTEAD OF "ANY FACILITY OR MEANS OF INTERSTATE OR FOREIGN COMMERCE," WAS ERRONEOUS.

III.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED AS A MATTER OF LAW WHEN IT HELD THAT THE MILITARY JUDGE'S INSTRUCTION ON 18 U.S.C. § 2422(B), WHICH INSTRUCTION USED THE TERM "INTERNET" INSTEAD OF "ANY FACILITY OR MEANS OF INTERSTATE OR FOREIGN COMMERCE," WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

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[4] Charge I and its specifications alleged violations of Article 80, UCMJ. The military judge's instructions on Charge I predominately focused on the "attempt" nature of the offense and not the clause 1 and clause 2 elements of the underlying offense.

Law[5]

The military judge is required to instruct on every element of the offense. R.C.M. 920(e)(1). In an offense charged under clause 3, Article 134, UCMJ, every element of a federal statute is fully applicable when charged against a service member at a court-martial, even special jurisdictional elements, such as a connection to interstate commerce. *United States v. Disney*, 62 M.J. 46 (C.A.A.F. 2005) (holding military member had standing to assert constitutional challenge to the interstate commerce element of a federal explosives statute, because such an element applied to military members charged under that statute, notwithstanding Congress's plenary power to regulate the Armed Forces).

"To establish enticement under § 2422(b), the government must prove four elements: that an individual (i) used a facility of interstate commerce; (ii) to knowingly persuade, induce or entice, or to attempt to persuade, induce or entice; (iii) any individual who is younger than eighteen-years old; (iv) to engage in sexual activity of a criminal nature." *United States v. Brand*, 467 F.3d 179, 201-02 (2d Cir. 2006); *see also United States v. Thomas*, 410 F.3d 1235, 1245 (10th Cir. 2005); *United*

[5] See issue I, *supra*, for additional law on instructional requirements.

States v. Brooks, 60 M.J. 495, 497 n.2 (C.A.A.F. 2005); 18 U.S.C. § 2422(b).[6]

The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). This is a right that cannot be made to depend upon a court's perception of the defendant's guilt or the weight of the record evidence. A court "may not direct a verdict for the State, no matter how overwhelming the evidence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) ("[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the

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[6] 18 U.S.C.§ 2422(b) states:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

evidence may point in that direction.") (citing *Carpenters*, 330 U.S. at 408; *Sparf v. United States*, 156 U.S. 51, 105 (1895)).

Argument

1. The military judge's instruction on the jurisdictional element of 18 U.S.C. 2422(B) were erroneous.

The elements of 18 U.S.C. § 2422(b) include a finding of interstate or foreign commerce or special jurisdiction of the United States. *See United States v. Brand*, 467 F.3d 179, 201-02 (2d Cir. 2006) (noting that the "affecting interstate commerce" provision in the statute is an explicit and essential element rather than a purely jurisdictional requirement). The statute specifically provides that anyone "using the mail or any facility or means of interstate or foreign commerce, or within the special maritime or territorial jurisdiction of the United States" who knowingly entices a minor to engage in sexually explicit conduct will be guilty of the offense. *See* 18 U.S.C. § 2422(B). Thus, while Congress, in the statute, has made a legislative determination that "mail" provides the requisite nexus to interstate commerce, they have not provided a legislative determination that the internet meets that elemental requirement for the purpose of the federal enticement statute at issue.

In addition, although some federal jurisdictions[7] have recognized that the internet satisfies the jurisdictional element of the offense and is "a means or facility of interstate commerce," the legislature has yet to make that express determination in the statute. Thus, by the plain language of 18 U.S.C. § 2422(b), the government, in order to satisfy the jurisdictional element of the offense, must prove that the internet is a means or facility of interstate commerce. *See* George Costello, *Statutory Interpretation: General Principles and Recent Trends,* CRS Report for Congress, March 30, 2006 at 4. ("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.")

In this case, the military judge, rather than abide by the specific provisions of the statute, made her own finding that the "internet" satisfied the jurisdictional component of the statute. Thus, she improperly removed the element from consideration by the panel members and made her own factual determination on an element. Despite the express language of

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[7] *See United States v. MacEwan*, 445 F.3d 237, 245 (3rd Cir. 2006); *United States v. Trotter*, 478 F.3d 918, 920 (8th Cir. 2007); *United States v. Lewis*, 554 F.3d 208, 215 (1st Cir. 2009).

the statute, the military judge made a conclusive presumption on an essential element of the offense and invaded the exclusive province of the panel as the fact-finder. A conclusive presumption is unconstitutional and clear error because such presumptions conflict with the presumption of innocence and invade the province of the trier of fact. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); *see County Court of Ulster County v. Allen*, 442 U.S. 140, 156-60 (1979). Therefore, the Army Court was correct when they found the military judge erred in her instruction to the panel.

2. The military judge's instruction on 18 U.S.C. § 2422(B), which instruction used the term internet instead of "a means or facility of interstate commerce," was not harmless beyond a reasonable doubt.[8]

Once the military judge erred by presuming an element, harmless error analysis is applied. *See Upham*, 66 M.J. at 86 (citing *Neder*, 527 U.S. at 17) ([H]armless error analysis can be applied not only to omitted instructions, but also to instructions that are defective because they incorrectly describe elements or presume elements.") An error is harmless beyond a reasonable doubt when there is no "reasonable

[8] In addition, appellant argues that if this Honorable Court determines the error was indeed harmless beyond a reasonable doubt, the holding of this Court in *United States v. Riley*, 55 M.J. 185 (C.A.A.F. 2001) (citing *United States v. Crider*, 46 C.M.R. 108 (1973)), should prevent the remand of appellant's case and the potential reinstatement of the clause 3 language into the specification.

possibility that the evidence [or error] complained of might have contributed to the conviction." *Moran*, 65 M.J. at 187.

In order to meet the first *Neder* factor, it is implicit that appellant had the opportunity to challenge the element at trial. Appellant was not provided this opportunity at his court-martial. In a pre-trial motion to the court, appellant argued that the Specification of Charge II was deficient because it failed to allege the requisite jurisdictional language - "a means or facility of interstate commerce" - and, as such, it failed to mirror the federal statute. (JA 142.) In response, the military judge determined that the specification was sufficient and necessarily implied the elements of the offense. (JA 154.) This ruling, while not inhibiting appellant's ability to challenge his use of the internet, foreclosed his ability to contest whether or not the internet was, in fact, a "means or facility of interstate commerce" at trial. Thus, the first *Neder* factor should be determined in appellant's favor.

Further, the jurisdictional element was not supported by overwhelming evidence such that one could be confident that the military judge's erroneous instruction had no effect on the outcome of appellant's court martial. At trial, the government failed to produce any evidence which would indicate that the internet was a means or facility of interstate commerce. Through the testimony of SA Lepovetsky, the government

established that appellant chatted online, in a private chat room, with an individual he believed to be thirteen years old. (JA 26-52.) However, throughout her extensive testimony, the government failed to elicit any evidence to support a factual conclusion that the internet is absolutely a "means or facility of interstate commerce". In fact, the government failed to produce any testimony regarding what the "internet" was or how it might constitute a means of interstate commerce. In addition, the government made no argument even inferring circumstantial evidence which might support that element. As such the Army Court correctly found that there is "no basis to conclude the element was either uncontested or supported by overwhelming evidence." It is not clear, beyond a reasonable doubt that a rational court would have found that the internet was, in fact, a means or facility of interstate commerce. This is especially true when evidence concerning this element was not presented to the panel. As such, the military judge's error was not harmless beyond a reasonable doubt.

WHEREFORE, appellant respectfully requests this Honorable Court dismiss the Specification of Charge II.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court dismiss the Specification of Charge II.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Pierce*, Crim.App.Dkt.No. 20080009, USCA Dkt. No. 11-0239/AR, was electronically filed with both the Court and Government Appellate Division on July 14, 2011.

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