IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellant	) BRIEF ON BEHALF OF APPELLANT)
v.	) Crim. App. Dkt. No. 20110264)
Sergeant (E-5) **NICHOLAS R. SCHELL** United States Army, Appellee	) USCA Dkt. No.)))

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Certified Issue I

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN, CONTRARY TO THE PLAIN LANGUAGE OF 18 U.S.C. § 2422(B), *UNITED STATES V. BROOKS*, 60 M.J. 495 (C.A.A.F. 2005), AND THE UNITED STATES COURTS OF APPEALS, THE SERVICE COURT HELD THAT "THE INTENT ELEMENT OF ATTEMPTED PERSUASION, INDUCEMENT, OR ENTICEMENT REQUIRES [THAT] THE ACCUSED . . . MUST INTEND THAT THE MINOR, ULTIMATELY, ACTUALLY ENGAGE IN ILLEGAL SEXUAL ACTIVITY AS A RESULT OF HIS PERSUASION, INDUCEMENT, OR ENTICEMENT."

Certified Issue II

WHETHER THE ACCUSED'S UNSWORN STATEMENT DURING THE SENTENCING PHASE OF TRIAL WAS INCONSISTENT WITH HIS GUILTY PLEA.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is found in Article 67(a)(2), UCMJ, which allows review in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."[2]

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[1] *United States v. Schell*, 71 M.J. 574, 2012 WL 4018280 (Army Ct. Crim. App. 12 Sept. 2012) (en banc); 10 U.S.C. § 866(b) (2008).
[2] 10 U.S.C. §867(a)(2).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of attempting to communicate indecent language to a person he believed to be less than 16 years old, and attempting to commit indecent conduct, both in violation of Article 80, UCMJ.[3] The military judge also convicted appellant, pursuant to his plea, of attempting to persuade, entice, or induce a minor to engage in illegal sexual activity in violation of 18 U.S.C. § 2422(b), which conduct was also charged as being of a nature to bring discredit upon the armed forces under Article 134, UCMJ.[4] The military judge sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for eighteen months, and a bad-conduct discharge.[5] The convening authority reduced the period of confinement to thirteen months in accordance with a pre-trial agreement, but affirmed the remainder of the sentence as adjudged.[6]

On September 12, 2012, the Army Court of Criminal Appeals [hereinafter ACCA], in an en banc published opinion, set aside appellant's conviction for attempted persuasion, enticement, or inducement of a minor in violation of 18 U.S.C. § 2422(b)

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[3] Record [R.] at 59.
[4] *Id.*
[5] *Id.*, at 83.
[6] Action.

(Charge II), but affirmed the convictions of the two specifications of Charge I, violating Article 80, UCMJ.[7] ACCA permitted a rehearing on Charge II, or - alternatively - a rehearing for sentencing purposes only on the remaining affirmed convictions.[8]

The Judge Advocate General of the Army filed a certificate for review of the Army Court's decision with this Honorable Court on November 9, 2012, contemporaneously with this brief.

Statement of Facts

In 2010, SGT Nicholas Schell was a military police guard assigned to the United States Disciplinary Barracks at Fort Leavenworth.[9] This case stems from SGT Schell's repeated sexually-explicit Internet conversations, over a two-day period, with a person he believed was a fourteen year-old girl named "Taylor."[10] These conversations involved graphic descriptions of sexual activity, what SGT Schell would do to "Taylor," exchange of telephone numbers, asking for nude and erotic photographs of "Taylor," suggestions to "Taylor" that she should invite her friends to their planned sexual rendezvous and sending "Taylor"

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[7] *Schell*, 71 M.J. at 582-83.
[8] *Id.*
[9] Prosecution Exhibit 1 (Stipulation of Fact), at 1, para. 2.
[10] *Id.*, at 2-4, para. 6-20.

a digital photograph of his erect penis.[11] SGT Schell went so far as to set up a time and place for the purposes of engaging in sexual activity with "Taylor."[12] Ultimately, SGT Schell declined to travel to the proposed rendezvous point, citing to a fear that his fiancé would get "mad" but suggesting that he might "another day."[13]

In fact, SGT Schell was not communicating with an actual minor, but with a civilian undercover law enforcement agent posing as a minor.[14] After SGT Schell cancelled the planned rendezvous, he made no further contact with the person he believed to be "Taylor."[15] Three months later, after determining that further contact initiated by SGT Schell was unlikely, the law enforcement agent forwarded his investigative file and record of Internet chatting and text messages to Criminal Investigative Command ("CID") agents on Fort Leavenworth.[16] An Army CID agent subsequently interviewed SGT Schell, who waived his right to silence and provided a sworn statement in which he admitted that he engaged in sexually-explicit communications with "Taylor."[17]

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[11] *Id.*
[12] *Id.*, at 4, para. 18.
[13] *Id.*, para. 20.
[14] *Id.*, at 4-5, para. 21.
[15] *Id.*, at 5, para. 25.
[16] *Id.*
[17] *Id.*, at 6, para. 26.

At trial, SGT Schell entered pleas of guilty to all three of the charged specifications.[18] The government then offered, without defense objection, Prosecution Exhibit 1 - a detailed seven-page Stipulation of Fact.[19] The military judge discussed the elements and definitions associated with Article 80, UCMJ, Article 134, UCMJ, and 18 U.S.C. § 2422(b).[20] Subsequently, SGT Schell explained and repeatedly admitted to possessing the specific intent and doing acts that constituted a substantial step toward the commission of these offenses.[21]

After the military judge found SGT Schell's plea provident and accepted it, entering a finding of guilty to each offense,[22] SGT Schell made an unsworn statement to the judge during the sentencing phase of his trial.[23] During this unsworn statement, SGT Schell repeatedly apologized, repeatedly referenced the "wrongfulness" of his conduct, and unequivocally accepted responsibility.[24]

In his unsworn statement, SGT Schell also disavowed any intention to consummate a sexual relationship with "Taylor."[25] Bookending SGT Schell's statement, his defense counsel twice

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[18] R. at 11.
[19] R. at 19.
[20] R. at 19-29.
[21] R. at 29-46.
[22] R. at 59.
[23] R. at 67-71.
[24] *Id.*
[25] R. at 68-69.

asked the military judge to consider – for sentencing purposes – the fact that SGT Schell never left his home installation to travel to the rendezvous point.[26] After the defense counsel finished his sentencing argument, the military judge asked both parties whether there was an inconsistency between SGT Schell's plea colloquy and his unsworn statement with respect to the "intent" element of the Article 134 Charge.[27] All parties, including the military judge, agreed that the offense was "complete when the enticement happened" and the absence of travel and sexual follow-through was immaterial.[28] Afterward, the military closed the trial to deliberate, and returned with the above-mentioned sentence.[29]

Summary of Argument

The Army Court's conclusion that SGT Schell created an unresolved inconsistency between his guilty plea to the Article 134 offense and his sentencing unsworn statement is incorrect and should be reversed because it rests entirely on a flawed premise. The Army Court below erred when it determined, as a preliminary matter of law, that an attempt conviction under 18 U.S.C. § 2422(b) requires evidence of a specific intent that the

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[26] R. at 66, 75-80.
[27] R. at 80.
[28] R. at 81.
[29] R. at 83.

minor *actually engage* in the illegal sexual activity. This interpretation is contrary to the plain language of the statute, wherein the predicate offense is simply the persuasion, inducement, enticement, or coercion of a minor to engage in illegal sexual activity. Moreover, the Army Court's interpretation is inconsistent with this Honorable Court's discussion of the elements of attempt under 18 U.S.C. § 2422(b), as well as the uniform interpretations from *every* circuit Court of Appeals for the last twelve years. Consequently, when applying the correct and statutorily-clear "intent," this Court can see that SGT Schell's detailed plea colloquy, including his stipulation of fact, is fully consistent with his unsworn statement. Therefore, the military judge below did not abuse her discretion when accepting the plea and the Army Court erred when it set aside that conviction.

Standard of Review

This Court examines a military judge's decision to accept a guilty plea for an abuse of discretion; however, this Court examines the predicate pure question of law de novo.[30] Certified Issue I therefore requires a de novo analysis, whereas Certified Issue II should be reviewed for an abuse of discretion.

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[30] *United States v. Watson*, 71 M.J. 54, 56 (C.A.A.F. 2012) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

Law and Argument

Certified Issue I:

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED WHEN, CONTRARY TO THE PLAIN LANGUAGE OF 18 U.S.C. § 2422(B), *UNITED STATES V. BROOKS*, 60 M.J. 495 (C.A.A.F. 2005), AND THE UNITED STATES COURTS OF APPEALS, THE SERVICE COURT HELD THAT "THE INTENT ELEMENT OF ATTEMPTED PERSUASION, INDUCEMENT, OR ENTICEMENT REQUIRES [THAT] THE ACCUSED . . . MUST INTEND THAT THE MINOR, ULTIMATELY, ACTUALLY ENGAGE IN ILLEGAL SEXUAL ACTIVITY AS A RESULT OF HIS PERSUASION, INDUCEMENT, OR ENTICEMENT.

I. The Army Court erred in its interpretation of the intent required for an attempt conviction under 18 U.S.C. § 2422(b)

This Honorable Court should consider the following *non sequitur* from the Army Court below:

> *In short, the accused must intend that the minor, ultimately, actually engage in illegal sexual activity as a result of his persuasion . . . [because] [o]ne who specifically intends to persuade another to do something expects and intends that something to be done.*[31]

The Army Court's statement starkly contrasts against what one federal Court of Appeals has said:

> *[I]n enacting section 2422(b), Congress said what it meant and meant what it said. Consequently, we reject the appellant's thesis that section 2422(b) should be interpreted to include, as an additional element of the offense, an intent that the underlying sexual activity actually take place.*[32]

The Army Court erred when it determined that an attempt under 18 U.S.C. § 2422(b) required a distorted form of specific "intent" on the part of the accused: not merely an intent to

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[31] *Schell*, 71 M.J. at 578-79.

[32] *United States v. Dwinells*, 508 F.3d 63, 65 (1st Cir. 2007).

commit the predicate statutory offense of persuasion, inducement, or enticement, but a more expansive *intent to have the minor actually engage* in the illicit sexual activity that was the apparent objective of the persuasion, inducement, or enticement. Such re-interpretation departs from the plain language of the statute, this Court's recent cases addressing § 2422(b) attempts, and the understanding of the federal Court of Appeals.

The Army Court's unjustified departure seems to rest on legal reasoning that fails on three bases. First, the court looked past the vast volume of sister circuit courts addressing required intent for an attempt conviction under § 2422(b); second, the court unnecessarily looked to irrelevant and unconvincing legislative history to glean meaning for what is facially unambiguous and supported by uniform consensus among the courts; and third, the court dictated a conclusory *non sequitur* unsupported by any reference: "[o]ne who specifically intends to persuade another to do something, expects and intends that something to be done, otherwise he does not actually intend to persuade anyone do anything."[33]

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[33] *Schell*, 71 M.J. at 578-79. The Army Court's conclusion does not follow necessarily, as a matter of logic, from its premise. This faulty "commonsense" observation was similarly raised and dismissed in *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000). A simple hypothetical also disproves the Army Court's conclusion: Accused (A) may intend to lure Victim (V)

This flawed reasoning, and re-interpreting of the "intent" required under an attempted § 2422(b) charge, allowed the Army Court to reach the unsound conclusion that the accused's unsworn statement during the sentencing phase of his court-martial was "inconsistent" with his earlier plea colloquy and his detailed stipulation of fact.[34] Because the Army Court erred, its ultimate interpretation of the sworn plea juxtaposed against the unsworn sentencing statement is incorrect. Thus, the court's holding with regard to Charge II must be reversed.

A. The Army Court's opinion disregards the plain language of the statute.

Section 2422(b) reads:

> 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.[35]

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outside of her home, for what (V) thinks to be a lurid rendezvous, when - in fact - (A) actually intends to burglarize (V)'s home while she is away. If (V) is a minor, and (A) used means of nationwide cellular telephone service or internet service to communicate with (V), then (A) could be guilty of § 2422(b) provided the facts evidenced a specific intent to persuade or entice and a substantial step toward that end. In other words, the targeted goal of *burglary* (and its constituent criminal intent) is immaterial to the prosecution under § 2422(b).

[34] *Schell*, 71 M.J. at 579.

[35] 18 U.S.C. § 2422(b) (2006) (emphasis added).

This law prohibits the knowing persuasion, inducement, enticement, or coercion of a minor to engage in illegal sexual activity. It also criminalizes the attempt to do so. "To constitute an attempt, there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose."[36] Unless the text is ambiguous, "the plain language of a statute will control unless it leads to an absurd result."[37] This Honorable Court has previously discussed, in the context of attempted § 2422(b) violations, that the plain language of the statute requires only an intent to persuade, induce, or entice.[38]

Despite this Court's admonishment to steer away from reliance upon other, less determinative, canons of statutory construction or legislative interpretation when the meaning is facially plain,[39] the Army Court below did just that. The majority opinion builds its case for reinterpreting the "intent"

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[36] Manual for Courts-Martial (United States) (2008) [hereinafter *MCM*], Part IV, para. 4.a.(a), 4.c.(1). "Attempt" is not defined in the relevant chapter of Title 18.
[37] *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).
[38] *United States v. Brooks*, 60 M.J. 495, 498-99 (C.A.A.F. 2005) (citing *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004) and *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000)); *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (citing federal circuit courts of appeals from the Second, Fifth, and Eighth Circuits).
[39] *United States v. Ware*, 1 M.J. 282, 285 (C.M.A. 1976).

prong required of § 2422(b), in part, on legislative history.[40] The majority cites, primarily, to the failure to pass the so-called "contact" amendment, which would have been enacted as a new § 2422(*c*), punishing anyone who uses the Internet to knowingly *contact* an individual under the age of 18 for the purpose of engaging in any sexual activity.[41] This failure to pass, according the majority, was evidence that Congress was concerned about potentially enacting "thought crimes" and - from that supposition - inferring that "Congress understood § 2422(*b*) as requiring more than merely engaging in sexually explicit conversation that engendered, encouraged, or incited the thought of assent to possible sex."[42]

The plain language of the statute makes such suppositions and inferences redundant and ultimately unnecessary: the mere "*thought* of assent" is *not* proscribed (as feared by the Army Court). Rather, as least three United States appellate circuits recognize, the statute actually discusses *manifested assent*, in that assent is naturally evidenced by the persuasion,

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[40] *Schell*, 71 M.J. at 579-81. More accurately, the Army Court relies on legislative history of a proposed amendment to the statute that never actually passed into law. Strangely, the majority of the Army Court also believed that the language of the statute plainly supported its understanding of "intent," so it is unclear why they felt compelled to explore the reports from the subcommittee hearings in the House of Representatives to bolster that supposedly "plain" meaning.

[41] *Schell*, 71 M.J. at 580.

[42] *Schell*, 71 M.J. at 580-81.

inducement, enticement, or coercion.[43] The Army Court's repeated suggestion that § 2422(b) was "not intended to address those who simply encourage or incite children to assent to the possibility of illegal sex,"[44] is both facially incongruent with the plain text of the law and a red herring that diverts analysis from the

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[43] *United States v. Goetzke*, 494 F.3d 1231, 1236 (9th Cir. 2007) (distinguishing between the crime of attempt to engage in sexual activity from the crime of *attempt to persuade to engage*, the court said that the attempt to persuade, induce, entice, or coerce equals an "attempt to achieve the mental act of assent"). *See also United States v. Lee*, 603 F.3d 904, 913-14 (11th Cir. 2010) (discussing the "intent" prong of attempt under § 2422(b), the court noted that "with regard to intent, the government must prove that the defendant intended to cause assent on the part of the minor, not that he acted with the specific intent to engage in sexual activity" (internal citations omitted); *and see Dwinells*, 508 F.3d at 71 ("section 2422(b) criminalizes an intentional attempt to achieve a mental state - a minor's assent"). As one court has recently observed in dicta, the terms "persuade, induce, and entice" are not statutorily defined in or around § 2422, but found them to be "words of common usage" and so accorded them their "ordinary meaning," which that court felt was "effectively synonymous": that is, "one person leading or moving another by persuasion or influence, as to some action [or] state of mind." *United States v. Engle*, 676 F.3d 405, 412, n. 3 (4th Cir. 2012) (quoting *United States v. Broxmeyer*, 616 F.3d 120, 125 (2d Cir. 2010)). *Compare* definition of "persuade" in BLACK'S LAW DICTIONARY (4th ed. rev.) (unabridged) (1968), at 1301 (" . . . the act of influencing the mind"), with definitions of "entice" (at 626) ("wrongfully solicit, persuade, procure, allure, attract . . . or seduce") and "induce" (at 915) ("to bring about, to affect, cause, to influence to an act or course of conduct, lead by persuasion"). *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976), at 1688 (definition of "persuade"), 757 (definition of "entice"), and 1154 (definition of "induce"). In perusing these resources, this Court should note the overlapping definitions, clearly indicating their synonymous nature in common usage. The end result, in the mind of the target of such persuasion, inducement, or enticement, would be - naturally - that person's *assent*.

[44] *Schell*, 71 M.J. at 579.

basic precepts of attempt jurisprudence into the indefinite realm of congressional history.[45]

Moreover, it is a well-settled maxim of legal reasoning that legislative history is often an "undependable guide" to discerning legislative intent, and that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation" of a statute.[46] The Army Court's reliance on

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[45] Rather than dissecting the legislative history (H.R. 105-557) of what did not become § 2422(c) via H.R. 3494, as the Army Court did, a more pertinent discussion of what Congress intended regarding the statute at issue - § 2422(*b*) - might be found in history of Public Law 104-104, enacted as the Telecommunications Act of 1996, in which § 2422(b) *first* appeared. Looking at the "conference agreement" between the House and Senate committees drafting the bill, it seems that § 2422(b) was intended to prohibit the use of Internet for the "purpose of luring, enticing, or coercing a minor into . . . a sexual crime" and to "protect children and families from online harm." *See* H.R. 104-458 (1996). This description cannot be read to favor an interpretation of § 2422(b) that requires a manifested intent to have the minor, or accused, *actually engage* in the illegal sex. Rather, this portion of legislative history could be read as supporting a theory that § 2422(b) stands for Congress' attempt to criminalize the online grooming and exploitation of minors, for the purpose of setting the groundwork or conditions in which a minor might be corrupted into engaging in illicit activity. Such is the danger of relying on amorphous and sometimes contradictory legislative history - a danger that the Army Court could have avoided by relying on plain text of the statute and the persuasive interpretations of the federal courts (see discussion *infra*).

[46] *United States v. Tykarsky*, 446 F.3d 458, 468 (3d Cir. 2006) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002)) (disfavoring two district court cases, relied upon by Tykarsky on appeal, whose reasoning erroneously rested on the same discarded § 2422(c) proposal to glean the intent for existing § 2422(b)).

such hollow support is unpersuasive and is disputed by the plain language of the statute.

Furthermore, if this Court wishes to explore beyond the four corners of the text itself, there are far more reliable markers of congressional intent than this legislative history. Reasoning *in pari materia*, 18 U.S.C. § 2423(a) provides a notable contrast with respect to the required intent or *mens rea* of the accused. That section criminalizes the knowing transportation of a minor in interstate commerce "with [the] intent that the individual engage in" illegal sexual activity. To convict a person of this statute, then, the government must prove that the underlying objective of the accused is not just the intent to transport but *also the intent that the minor actually engage in illegal sexual conduct*. That additional "intent" is factually and legally distinct from an intent to persuade, induce, or entice (or "groom" or "solicit") a minor using the Internet prior to, and irrespective of, any future sexual encounter.[47]

Similarly, 18 U.S.C. § 2251 criminalizes, *inter alia*, persuasion, inducement, enticement, or coercion of a minor to

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[47] *Engle*, 676 F.3d at 419 (quoting *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011) (§ 2422(b) "was designed to protect children from the act of solicitation itself." Contrast this against § 2423(b) which criminalizes interstate travel for the purpose of engaging in illicit sexual conduct with another person, also requiring an intent to commit the underlying sexual act).

engage in any sexually explicit conduct for purpose of producing any visual depiction. Unlike § 2422(b), Congress explicitly requires that a person accused of violating § 2251 have "the intent that such minor engage in [the] sexually explicit conduct."[48] Even assuming some ambiguity existed within § 2422(b) on this point, reasoning *in pari materia* strongly supports the conclusion that "Congress said what it meant and meant what it said"[49] by drafting § 2422(b) the way it did. These two provisions illustrate how Congress can, and did, expressly require the kind of ultimate specific intent to commit the sex act itself with a minor that the Army Court erroneously reads into § 2422(b).

B. The Army Court's interpretation contradicts or ignores this Court's understanding of section 2422(b) attempts.

Besides the plain language of the statute, giving a facially reasonable ground to correct the Army Court's interpretation, this Honorable Court has already addressed the question in a convincing manner. In *United States v. Brooks*,[50] this Court followed the other federal Courts of Appeals by holding that the indirect inducement of a minor, through contacting a third party intermediary (the mother of an eight

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[48] 18 U.S.C. § 2251.
[49] *Dwinells*, 508 F.3d at 65.
[50] 60 M.J. 495 (C.A.A.F. 2005).

year-old girl), was sufficient to convict Brooks of attempt under § 2422(b). As a necessary part of analyzing evidentiary sufficiency for the attempt conviction, this Court examined evidence of his specific intent. Analogizing favorably to *United States v. Murrell*,[51] the Court observed that intent means intending to *influence* the victim to engage in unlawful sexual activity.[52] Citing favorably to *United States v. Bailey*,[53] the Court reiterated that § 2422(b) does not require that the defendant actually attempt a sexual act, but only that the accused has "an intent to persuade."[54]

Subsequently, in *United States v. Garner*,[55] this Court affirmed a guilty plea conviction after answering, in the affirmative, the question of whether there was sufficient evidence of the "substantial step" prong of the attempted § 2422(b) violation. Though the nature of "intent" was not specifically questioned on appeal, the *Garner* court favorably considered the accused's plea colloquy *in toto*, and specifically approved of his answers identifying his intent to induce, entice, and persuade the presumed minor to engage in sexual activity.[56]

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[51] 368 F.3d 1283 (11th Cir. 2004).
[52] *Brooks*, 60 M.J. at 498.
[53] 228 F.3d 637 (6th Cir. 2000).
[54] *Brooks*, 60 M.J. at 497.
[55] 69 M.J. 31 (C.A.A.F. 2010).
[56] 69 M.J. at 32-33.

Finally, in *United States v. Winckelmann*,[57] this Court primarily addressed whether a particular line of text in an online conversation constituted the "substantial step" required of an attempt conviction under § 2422(b) under the circumstances.[58] As a preliminary matter, this Court laid out the necessary elements of the offense, citing to Courts of Appeals from the Second, Fifth, and Eighth Circuits: "[t]o be guilty of an attempt under § 2422(b), the government must prove, *inter alia*, that the defendant (1) *had the intent to entice*, and (2) took a substantial step toward enticement."[59] If that basic premise were not clear enough, this Court went on to note that the military judge had *erroneously* instructed the members that the "substantial step" must be toward actually engaging in sexual activity "rather than a substantial step toward enticement alone."[60] Ergo, as the substantial step must be toward the predicate criminalized act, the intent must be toward the predicate criminalized act.[61]

This Court has had no difficulty interpreting the plain language of § 2422(b) and finding that the requisite intent

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[57] 70 M.J. 403 (C.A.A.F. 2011).
[58] 70 M.J. at 407.
[59] *Id.* (emphasis added).
[60] 70 M.J., at 407, n. 4.
[61] *See, e.g., United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010); *Tykarsky*, 446 F.3d at 469; *United States v. Young*, 613 F.3d 735, 742 (8th Cir. 2010); *United States v. Shinn*, 681 F.3d 924, 931 (8th Cir. 2012).

extends no further than the intent to persuade, induce, or entice.

Moreover, the cases from sister services cited by the Army Court do not support its holding either. The Army Court referred to *United States v. Kowalski*,[62] and *United States v. Amador*,[63] as cases where the lower service courts apparently approved of the trial judges' definitions of § 2422(b) "intent" consistent with the majority opinion: that the accused must actually intend that the sexual activity occur.[64] In fact, in *Kowalski*, the Coast Guard court merely made note of that judge's definition without comment and did not actually analyze any law related to the "intent" prong, nor did that court discuss any fact adduced during the plea colloquy supporting the requisite intent. Instead, the court's analysis focused entirely on the providence of the plea with respect to evidence of a "substantial step."[65]

Stranger still, is the Army Court's reliance on *Amador*. That case actually cites to *Brooks* for, among other things, a proposition that the "conviction requires an 'intent to persuade'"[66] rather than intent to engage in the underlying sex

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[62] 69 M.J. 705 (Coast Guard Ct. Crim. App. 2010).
[63] 61 M.J. 619 (Air Force Ct. Crim. App. 2005).
[64] *Schell*, 71 M.J. at 578, n. 1.
[65] 69 M.J., at 708-710.
[66] *Amador*, 61 M.J. at 622.

act – a position in direct conflict with the Army Court's conclusion.

C. Federal Circuits uniformly reject the Army Court's reinterpretation of "intent" under section 2422(b).

There is an unquestionable uniformity among the federal circuits with respect to the intent required for an attempted violation of § 2422(b). Every circuit agrees with a basic and plain reading of the law: the "specific intent" required to prove that an accused *attempted* to violate § 2422(b) is the intent to commit the predicate statutory offense – that is, the *intent to persuade, induce, entice, or coerce a minor to engage* in illegal sexual activity. Overwhelmingly, the federal circuit courts have conclusively disavowed the notion that, to be guilty of attempted violation of § 2422(b), the accused must also intend to commit the sexual act itself. This canvass of § 2422(b) "attempt" cases, largely ignored by the Army Court, includes *United States v. Dwinells*, 508 F.3d 63 (1st Cir. 2007),[67] *United States v. Berk*, 652 F.3d 132 (1st Cir. 2011),[68]

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[67] Reviewing the plain language of the statute, and the other federal circuits, the court observed that the intent necessary for convicting the accused of attempted enticement under § 2422(b) is the "specific intent to persuade, induce, entice, or coerce a minor into committing some illegal sexual activity." *Dwinells*, 508 F.3d at 68-69. Moreover, "Section 2422(b) criminalizes an intentional attempt to achieve a mental state – a minor's assent – *regardless* of the accused's intentions vis-à-vis the actual consummation of sexual activities with the minor." *Dwinells*, 508 F.3d at 71 (emphasis added).

United States v. Brand, 467 F.3d 179 (2d Cir. 2006),[69] *United States v. Nestor*, 574 F.3d 159 (3d Cir. 2009),[70] *United States v. Engle*, 676 F.3d 405 (4th Cir. 2012),[71] *United States v. Barlow*, 568 F.3d 215 (5th Cir. 2009),[72] *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000),[73] *United States v. Hughes*, 632 F.3d 956 (6th

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[68] "The crime of 'attempt' requires an intention to commit the substantive offense—here, critically, to 'persuade, induce, entice, and coerce.'" *Berk*, 652 F.3d at 140.

[69] Citing to cases from the 6th and 10th circuit courts of appeals, the court noted that a "conviction under § 2422(b) requires a finding only of an attempt to entice or an intent to entice, *and not an intent to perform the sexual act following the persuasion.*" *Brand*, 467 F.3d at 202 (emphasis added).

[70] After identifying various facts that could prove the defendant took one or more "substantial steps" toward completion of the offense, the court noted that they were all "calculated to put him into direct contact with a child so that he could carry out his clear *intent to persuade, induce, entice, or coerce* the child to engage in sexual activity." *Nestor*, 574 F.3d at 162 (emphasis added).

[71] Noting that § 2422(b) "does not require that the sexual contact occur, but that the defendant sought to persuade the minor to engage in that conduct" (*Engle*, 676 F.3d at 412) and observing that there is a material and relevant difference between the intent to persuade under §2422(b) and the intent to perform the act after persuasion. *Engle*, 676 F.3d at 419.

[72] Applying the elements of attempt law to § 2422(b), the court held that the government "had to prove beyond a reasonable doubt that Barlow intended to persuade, induce, entice, or coerce a person whom he believed to be a minor into illegal sexual contact . . ." *Barlow*, 568 F.3d at 219 (internal quotations and citations omitted).

[73] Referencing the "plain language" of the statute, the court observed that "while it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves," and therefore a "conviction under the statute only requires a finding that the defendant had an intent to persuade or to attempt to persuade."

Cir. 2011),[74] *United States v. Berg*, 640 F.3d 239 (7th Cir. 2011),[75] *United States v. Patten*, 397 F.3d 1100 (8th Cir. 2005),[76] *United States v. Pierson*, 544 F.3d 933 (8th Cir. 2008),[77] *United States v. Young*, 613 F.3d 735 (8th Cir. 2010),[78] *United States v. Shinn*, 681 F.3d 924 (8th Cir. 2012),[79] *United States v. Goetzke*,

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Bailey, 228 F.3d at 639. This observation was cited favorably when the Federal District Court for the District of Columbia also concluded that the "intent criminalized by § 2422(b) is the intent to persuade, induce, entice, or coerce a minor, not the intent to have sex with a minor." *United States v. Nitschke*, 843 F.Supp.2d 4, 10-122 (D.D.C. 2011).

[74] Noting that § 2422(b), as distinguished from 18 U.S.C. § 2423(b), does *not* require a specific intent to actually engage in sexual activity. *Hughes*, 632 F.3d at 960-61.

[75] Remarking that the intent required for conviction of attempted violation of § 2422(b) is the specific intent to commit the underlying crime - that is to say, the intent to persuade, induce, or entice a minor (*Berg*, 640 F.3d at 247, 251), and "not that he intended to engage in sexual activity." *Berg*, 640 F.3d at 251-52 (citing to cases from the First, Second, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals).

[76] Noting that the requisite intent is the "intent to persuade a minor to engage in illegal sexual activity" and that the jury would not need to answer the "additional question of [whether] Patten in fact intended sexual activity to occur." *Patten*, 397 F.3d. at 1103.

[77] Reviewing the elements of §2422(b), the court held that the "government need not prove that the defendant intended to participate in a physical sexual act. It is sufficient for the government to prove that the defendant intended to persuade or entice a minor to engage in illegal sexual activity." *Pierson*, 544 F.3d at 939-40.

[78] Citing to *Patten*, 397 F.3d 1100, the court reviewed evidence that was sufficient to establish the defendant's "intent to entice [the victim] to meet him and engage in sexual activities." *Young*, 613 F.3d at 742-43.

[79] Noting that "attempt requires an intent to commit the predicate offense," and citing to *Patten*, for the proposition that the defendant's intent can be inferred when he has online conversations of a sexual nature with a minor. *Shinn*, 681 F.3d at 931.

494 F.3d 1231 (9th Cir. 2007),[80] *United States v. Hofus*, 598 F.3d 1171 (9th Cir. 2010),[81] *United States v. Thomas*, 410 F.3d 1235 (10th Cir. 2005),[82] *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004),[83] *United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010),[84] and *United States v. Lee*, 603 F.3d 904 (11th Cir. 2010).[85]

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[80] Finding that the evidence was sufficient to prove that the defendant "intended to persuade, induce, entice, or coerce [the victim] to engage in unlawful sexual activity." *Goetzke*, 494 F.3d at 1235.

[81] Where one issue raised by the defendant on appeal was the judge's exclusion of certain expert testimony, the court explained that part of the "ultimate issue" the jury was to decide was whether the defendant had *the intent to persuade, induce, or entice*. The proffered expert testimony, that defendant was acting out of fantasy and lacked intent to actually have sex with victim, "does not make it more likely or not that he attempted to *entice or persuade* her to agree to an illegal sex act. *Hofus*, 598 F.3d at 1179-80.

[82] Agreeing with its sister federal circuits, the court observed that "Section 2422(b) requires only that the defendant intend to entice a minor, not that the defendant intend to commit the underlying sexual act." *Thomas*, 410 F.3d at 1244.

[83] Looking to the plain language of § 2422(b), and contrasting it against the text of § 2423(b), the court observed that the government only had to prove that Murrell "acted with a specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex" and not the "specific intent to commit illegal sexual acts" because the "underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself." *Murrell*, 368 F.3d at 1286.

[84] Identifying that attempt, generally, requires an intent to commit the underlying criminal offense, and that – specifically in the context of § 2422(b) – the "very nature of the underlying offense [is] persuading, inducing, or enticing engagement in unlawful sexual activity." *Rothenberg*, 610 F.3d at 627.

[85] Noting that "with regard to intent, the government must prove that the defendant intended to cause assent on the part of the minor, not that he 'acted with the specific intent to engage in

This blanket uniformity spans a full array of potential fact-patterns that include the defendant's direct contact over the Internet with both actual minors[86] and undercover agents posing as underage children,[87] as well as contact with undercover agents posing as intermediaries (such as a parents of minors).[88] This uniformity also spans a wide range of procedural postures: guilty pleas,[89] judge-alone contests,[90] and jury convictions.[91] Finally, this uniformity spans a wide range of legal issues raised on appeal, from the directly on-point issue of the nature of "intent,"[92] to constitutionality of the statute itself,[93] to evidentiary sufficiency of the convictions,[94] to allegedly

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sexual activity'" (*Lee*, 603 F.3d at 913, citing to, among others, *Dwinells*, *Thomas*, and *Bailey*); stated another way, that the government had to prove that he intended to persuade the girls to agree to engage in illicit sex, because "our precedent and the precedents of many of our sister circuits hold that section 2422(b) prohibits attempts to cause minors to agree to engage in illegal sexual conduct, not attempts to engage in illegal sexual conduct with minors." *Lee*, 603 F.3d at 914-16.

[86] *See, e.g.*, *Engle*, 676 F.3d 405 (4th Cir. 2012), *Bailey*, 228 F.3d 637 (6th Cir. 2000), and *Goetzke*, 494 F.3d. 1231 (9th Cir. 2007).

[87] *See, e.g.*, *Dwinells*, 508 F.3d 63 (1st Cir. 2007), *Thomas*, 410 F.3d 1235 (10th Cir. 2005), and *Pierson*, 544 F.3d 933 (8th Cir. 2008).

[88] *See, e.g.*, *Nestor*, 574 F.3d 159 (3d Cir. 2009), and *Murrell*, 368 F.3d 1283 (11th Cir. 2004).

[89] *See, e.g.*, *Rothenberg*, 610 F.3d 621 (11th Cir. 2010), and *Hughes*, 632 F.3d 956 (6th Cir. 2011).

[90] *See, e.g.*, *Berk*, 652 F.3d 132 (1st Cir. 2011).

[91] *See, e.g.*, *Hofus*, 598 F.3d 1171 (9th Cir. 2010), and *Lee*, 603 F.3d 904 (11th Cir. 2010).

[92] *See, e.g.*, *Dwinells*, and *Bailey*.

[93] *See, e.g.*, *Thomas*.

[94] *See, e.g.*, *Barlow*, 568 F.3d 215 (5th Cir. 2009).

deficient jury instructions.[95] All cases, regardless of legal posture, appellate issue raised, or case-specific fact pattern, resort to the unencumbered plain language of the statute[96] and the fundamental scope and purpose of attempt law[97] to note the obvious: "Congress said what it meant and meant what it said"[98] when it created a law that permits the prosecution of a person who intends to persuade, entice, or induce a minor and takes a substantial step toward that end, without any requirement to prove that person also intended to actually engage in sex or to have that minor actually engage in sex.

Two of these cases are worth highlighting as directly on-point and directly contradicting the Army Court's re-interpretation of well-known attempt jurisprudence. In *United States v. Bailey*,[99] the defendant, using the Internet, sent sexually graphic messages and a photo of himself to various actual minors, and urged them to make arrangements to meet him. Though no actual meeting took place, he was arrested, tried by a

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[95] *See, e.g., Hofus.*

[96] *See, e.g., Nestor*, 574 F.3d. at 161; *Murrell*, 368 F.3d at 1286; *Pierson*, 544 F.3d at 939; and *Bailey*, 228 F.3d at 638.

[97] "[A] criminal attempt occurs when a person, with the intent to commit an offense, performs any act that constitutes a substantial step toward commission of that offense . . . [that is] the specific intention of committing the target crime." Joshua Dressler, UNDERSTANDING CRIMINAL LAW (3d ed. 2001), 374, 384. *Accord, Engle*, 676 F.3d at 419; *Rothenberg*, 610 F.3d at 627; *Berk*, 652 F.3d at 140; and *Shinn*, 681 F.3d 924, 931 (8th Cir. 2012).

[98] *Dwinells*, 508 F.3d at 65.

[99] 228 F.3d 637 (6th Cir. 2000).

jury, and was convicted of attempt under § 2422(b). On appeal, he asked the court to define the "intent" prong to mean the intent to actually engage in the ultimate underlying sex act (just as the Army Court now has), and consequently argued that there was no evidence that he had such intent. The Sixth Circuit disagreed on both fronts. That court acknowledged it may be "rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, [but nevertheless] they are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual act themselves."[100] Therefore, the court concluded, a "conviction under the statute only requires a finding that the defendant had an intent to persuade or to attempt to persuade," not an intent to actually engage in sex with the minor or (more generally) to have the minor actually engage in the sexual activity.[101]

As with *Bailey*, the First Circuit also looked to the plain language of the statute and squarely addressed the question what "intent" is really necessary for conviction of the attempt version of § 2422(b). In *United States v. Dwinells*,[102] the defendant engaged in ten months of "extensive Internet contact"

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[100] 228 F.3d at 639.
[101] *Id.*
[102] 508 F.3d 63 (1st Cir. 2007).

with three individuals he believed to be teenage girls. In reality, these were undercover law enforcement agents, who responded to the defendant's sexually-graphic conversation, requests, promises, and aborted plans to meet in person. Finding that the statute was "unambiguous," the court reiterated that the law requires the "specific intent to persuade, induce, entice, or coerce a minor into committing some illegal sexual activity" and nothing more: "section 2422(b) criminalizes an intentional attempt to achieve a *mental* state - a minor's assent - regardless of the accused's intentions vis-à-vis the actual consummation of sexual activities with the minor."[103] The court observed that this commonsense reading of the statute was consistent with "every court of appeals that ha[s] reached this issue,"[104] citing to *Bailey* as well as cases from the Eighth,[105] Ninth,[106] Tenth,[107] and Eleventh[108] Circuits.

It is clear that the Army Court below drastically under-represented the state of the law when it suggested that only "some" of the United States Courts of Appeals subscribe to this understanding of the intent prong of attempt under § 2422(b).[109]

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[103] 508 F.3d at 69, 71 (emphasis in original).
[104] 508 F.3d at 71.
[105] *Patten*, 397 F.3d 1100 (8th Cir. 2005).
[106] *Goetzke*, 494 F.3d 1231 (9th Cir. 2007).
[107] *Thomas*, 410 F.3d 1235 (10th Cir. 2005).
[108] *Murrell*, 368 F.3d 1283 (11th Cir. 2004).
[109] *Schell*, 71 M.J. at 579 (citing only *Engle*, 676 F.3d 405 (4th Cir. 2012)).

A simple canvass of the cases reveals, instead, unwavering consistency across *all* of the circuits.[110] According the courts of appeals, the government need only prove intent to persuade, induce, or entice a minor to engage in illegal sexual activity; it is immaterial whether the accused intended to have the minor actually engage in sexual activity and immaterial whether the accused intended to engage in sexual activity.

In sum, under the plain language of the statute, correctly interpreted by this Court and uniformly supported by all federal Courts of Appeals, the intent required to convict a person under § 2422(b) under an attempt theory is straightforward: *the intent to commit the predicate offense of persuasion, inducement, or enticement* of a minor to engage in illegal sexual conduct.

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[110] It does not appear that the United States Court of Appeals for the District of Columbia has had an opportunity to follow or reject the consensus formed among the other federal circuits; however, the lower United States District Court for the District of Columbia *has* recently weighed in, and specifically cited to *Bailey* (6th Cir. 2000), *Lee* (11th Cir. 2010), *Goetzke* (9th Cir. 2007), *Brand* (2d Cir. 2006), *Murrell* (11th Cir. 2004), and *Hughes* (6th Cir. 2011), following the precedent of these circuits and holding that "the intent criminalized by § 2422(b) is the intent to persuade, induce, entice, or coerce a minor, not the intent to have sex with a minor." *Nitschke*, 843 F.Supp.2d at 11.

Certified Issue II:

WHETHER THE ACCUSED'S UNSWORN STATEMENT DURING THE SENTENCING PHASE OF TRIAL WAS INCONSISTENT WITH HIS GUILTY PLEA.

I. Schell's unsworn statement was fully consistent with his plea, and the Military Judge correctly accepted it and found him guilty.

Assuming that the Army Court erred in its reinterpretation of the intent required under § 2422(b), then the Army Court erred in reversing Schell's conviction on Charge II because there was no inconsistency between his plea and unsworn statement.

A. Law

This Honorable Court will review a military judge's decision to accept a guilty plea for an abuse of discretion.[111] Article 45, UCMJ, imposes certain requirements on a military judge to ensure an accused's plea is consistent, knowing, voluntary, and there is no basis in law or fact to reject the plea.[112] "If an accused sets up a matter inconsistent with the plea at any time during the proceeding, the military judge must

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[111] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *accord, United States v. Hayes*, 70 M.J. 454, 457 (C.A.A.F. 2012).

[112] 10 U.S.C. § 845(a) (Article 45(a), U.C.M.J.); *see also* Rule for Court-Martial [R.C.M.] 910(h)(2).

either resolve the apparent inconsistency or reject the plea."[113] If the military judge neglects or chooses not to resolve the inconsistency or reject the inconsistent or irregular pleading, that judge "has abused his or her discretion."[114]

B. Facts

Because there is no inconsistency between Schell's plea and his unsworn statement, the military judge below did not abuse her discretion, and the guilty plea verdict should be affirmed.

The record is clear: Schell admitted - via a detailed stipulation of fact entered into evidence[115] and during his colloquy with the military judge[116] - his intention to entice, persuade, or induce a person he believed to be a minor. In his stipulation, Schell described some of the language he used to "entice" the supposed girl into performing sexual activity with him and with his fiancé.[117] He acknowledged that he attempted to "entice" her into having sex with him despite knowing (or believing) "she" was only 14.[118] In disavowing any entrapment defense, he acknowledged having a predisposition to attempt to

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[113] *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).
[114] *Hayes*, 70 M.J. at 458.
[115] Prosecution Exhibit 1.
[116] R. at 40-46.
[117] Pros. Exhibit 1, at para. 9, 10, and 15.
[118] *Id.*, at para. 16-17.

entice such minors based on his "history of inviting others to engage in sexually deviant behavior with him."[119] Finally, he admitted that his knowing attempt to entice, persuade, or induce was prejudicial to good order and discipline and service-discrediting under the circumstances.[120]

This manifested *intent to persuade, induce, or entice* was also clearly established when the military judge asked Schell to explain his actions and why he believed he was guilty of Charge II.[121] Referring to the specific words he used in his online chatting, Schell said "I did take the steps to attempt to persuade, come up with ideas using language that would - that would persuade them [sic] . . ., and then make her want to have sex with me."[122] He acknowledged that his text and the photo he sent of himself were designed to "persuade the individual" to "commit sexual acts with me or with other individuals."[123] Defense Counsel indicated satisfaction with the depth and breadth of this plea colloquy.[124]

The record is similarly clear that his unsworn statement during the sentencing portion of trial was designed only to dampen his exposure to punishment by minimizing his crimes,

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[119] *Id.*, at para. 22.
[120] *Id.*, at para. 29d.
[121] R. at 40.
[122] R. at 40.
[123] R. at 41.
[124] R. at 46.

calling it merely "discussion": "I do know that I never intended to act on our discussions, but really there is no excuse for my actions." Schell stated further: "I know what I did was wrong."[125] He went on to acknowledge the "wrongfulness" of his online solicitation five times, and to apologize twice,[126] all in the "hopes that you will see that I am not the person who said those awful things and sent those pictures [because] I am better than that."[127] Moreover, his own defense counsel re-emphasized that Schell acknowledged his criminality.[128] The only time his defense counsel, during sentencing argument, mentioned "intent" or lack of intent to actually engage in sex with the purported minor, was to expressly rebut the government's sentencing argument a few moments earlier.[129] The trial counsel asked the judge to consider a "specific deterrence" rationale for

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[125] R. at 68-69.
[126] R. at 67-71.
[127] R. at 67. It seems clear that Schell's language here ("I am not the person who said those awful things") is rhetorical and not meant to deny ultimate guilt, even though a cold reading of his statement from the record ostensibly appears to do just that. Similarly, his statement denying intentions to "do anything with that girl" are not denials of guilt, but rather rhetorical and unsworn efforts to minimize his culpability for sentencing purposes. *See, e.g., United States v. Howard*, 1998 WL 996273 (Air Force Ct. Crim. App. 1998) (unpublished), at 3-4 (finding that the accused's unsworn statements constituted "minimization" of his guilt, the court noted that "neither a military judge nor this court examines a plea of guilty for inconsistency solely based upon statements that are surgically removed from their context").
[128] R. at 75.
[129] R. at 75-76.

sentencing Schell – to literally keep him off the streets so that he specifically would not continue to pose a threat to the community.[130] Thus, a reasonable defense counsel would respond with any argument meant to undermine that theory of punishment – here, to re-emphasize that Schell never intended to actually have sex with this girl, and was therefore not the kind of predatory threat imagined by the government counsel.

Such minimization, by Schell's own words and during his counsel's argument, *never* undermined or contradicted Schell's earlier plea colloquy and his stipulation of fact in which he repeatedly acknowledged his criminalized intent to persuade, entice, or induce "Taylor" using the Internet. As the dissenters in the Army Court below correctly noted, "a stated *lack of intent to engage in sexual activity* is not inconsistent with the *intent to entice to engage in sexual activity.*"[131] If Sergeant Schell had said, in his unsworn statement, "I did not *intend to entice, persuade, or induce* her," *this* would present a clear contradiction. Or, again as the dissenters pointed out, if his plea necessarily involved admitting to *an intent to have sex* (if he had been charged under 18 U.S.C. § 2251, for example), followed by an unsworn statement in which he denied

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[130] R. at 71-75.
[131] *Schell*, 71 M.J. at 583 (Haight, J., dissenting) (emphasis added).

possessing *such an intent to have sex*,[132] the military judge would have had to either resolve the inconsistency by reopening the providence inquiry or enter a plea of not guilty if no resolution could be found.[133]

After the defense counsel finished his argument, it at least appeared to the military judge that such an inconsistency might exist. Rightfully, she reengaged both parties to resolve what could have been interpreted as a superficial conflict between the unsworn statement and admittance of guilt.[134] The government, defense counsel, and ultimately Schell himself, explicitly agreed with the military judge's summary and conclusion: that the offense pled to under Charge II was

> complete when the enticement happened, the fact that he never acted on it, that what's charged with is attempting to persuade, induce, or entice this individual to engage in sexual activity and that it's not necessary that he actually drive [from the installation where he resided to a rendezvous point] or followed through or anything like that.[135]

Schell concurred that his crime was complete regardless of intent to engage in sex.[136] Therefore, his unsworn statement reminding the court of his lack of intent to engage in sex was nothing more than an effort at minimization to support a less-

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[132] *Schell*, 71 M.J. at 583, n. 3 (Haight, J., dissenting).
[133] 10 U.S.C. § 845(a) (Article 45(a), U.C.M.J.); Rule for Court-Martial [R.C.M.] 910(h)(2).
[134] R. at 80-81.
[135] R. at 81.
[136] R. at 81.

severe sentence, and *not* inconsistent with his earlier plea. Because the plea and the unsworn are fundamentally consistent, there was no reason to reject the guilty plea in this case.[137] Consequently, the Army Court erred in reversing this conviction.

Conclusion

The Army Court erred by interpreting § 2422(b) to require the accused to have an intent to "actually" engage in illegal sex (or, said another way, have a minor "actually" engage in illegal sex), rather than the intent to persuade, entice, or induce a minor to engage in illegal sex. That reinterpretation is an unexplainable departure from the plain language of the statute, deviates from the known purpose of the statute, and is inconsistent with the uniform understanding of the federal circuits.

As a result, the Army Court's decision that SGT Schell's guilty plea was inconsistent with his subsequent unsworn statement at sentencing was incorrect.

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[137] Art. 45, UCMJ; R.C.M. 910(h)(2).

Wherefore, the Government respectfully requests this Honorable Court to reverse the Army Court's decision and affirm the findings and sentence in this case.

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