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. Dkt. No. 20110264
Sergeant (E-5) **NICHOLAS R. SCHELL,** United States Army, Appellant	)	USCA Dkt. No. 13-5001/AR

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

Certified Issues

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."

II.

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2008). *United States v. Schell*, 71 M.J. 574, 2012 WL 4018280 (Army Ct. Crim. App. 12 Sept. 2012)(en banc). This Honorable Court has

jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2008).

Statement of the Case

A military judge sitting as a general court-martial convicted Sergeant Nicholas R. Schell (appellee), pursuant to his pleas, of attempted indecent language and attempted indecent act in violation of Article 80, UCMJ, 10 U.S.C. § 880 (2006 & Supp. III 2009), and attempted persuasion, inducement, or enticement of a minor to engage in sexual activity that would be criminal under Article 120, UCMJ, by means of the internet, in violation of 18 U.S.C. § 2422(b) (2006) as a violation of Article 134, UCMJ. (R. at 59). The military judge sentenced appellee to a bad-conduct discharge, confinement for eighteen months, forfeiture of all pay and allowances, and reduction to the grade of E-1. (R. at 83). In accordance with the terms of a pretrial agreement, the convening authority approved confinement for thirteen months, but otherwise approved the adjudged sentence. (Action).

On September 12, 2012, the Army Court, in an en banc published opinion, set aside appellee's conviction for attempted persuasion, enticement, or inducement of a minor in violation of 18 U.S.C. § 2422(b) (Charge II), but affirmed the convictions of the two specifications of Charge I, violating Article 80, UCMJ. *Schell*, 71 M.J. at 582-83. The Army Court permitted a rehearing

on Charge II, or alternatively, a rehearing for sentencing purposes only on the remaining affirmed convictions. *Id.*

On November 9, 2012, the Judge Advocate General of the Army (TJAG) filed a certificate for review of the Army Court's decision with this Honorable Court. (TJAG Certification Memorandum).

Statement of Facts

Sergeant Nicholas R. Schell was a military police guard assigned to the United States Disciplinary Barracks at Fort Leavenworth. (Pros. Ex. 1). The appellee engaged in an online conversation with an individual he believed was a fourteen year-old girl named "Taylor." However, "Taylor" was an adult law enforcement agent posing as a young girl. *Id.*

The appellee began having sexually explicit conversations with "Taylor" and went so far as to recommend a time and place for the two to meet. However, the appellee declined to travel to the proposed rendezvous site and terminated future communications with "Taylor." *Id.* Three months later, after determining that further contact with the appellee would not occur, the law enforcement agent forwarded his investigation file to the Criminal Investigation Command (CID) at Fort Leavenworth, Kansas. The appellee was subsequently contacted by a U.S. Army CID agent and provided a sworn statement admitting to communicating with "Taylor." *Id.*

During appellee's providence inquiry, the military judge defined "attempt" with respect to Specification 1 of Charge I (indecent language). (R. at 20-21). However, at no point did the military judge define "attempt" for the Specification of Charge II (assimilated 18 U.S.C. § 2422(b)). Regarding the charge of attempted enticement of a minor, Sergeant Schell admitted that the elements and definitions described by the military judge correctly described what he did. (R. at 29). Sergeant Schell also described why he believed he was guilty. (R. at 29-46). Sergeant Schell admitted that when he sent the online messages to "Taylor," his intent was to meet a fourteen year-old girl. (R. at 33). He also admitted that he sent her the photos because he wanted to get "Taylor's" opinion before he actually committed the "act." (R. at 37-38). Sergeant Schell further admitted that, using instant messages, he took steps to attempt to persuade Taylor to want to have sex with him or with other individuals. (R. at 40-41).

During his unsworn statement, Sergeant Schell stated, "I never intended to do anything with that girl I thought I was talking to online." (R. at 69). He also stated, "that's why I never left post and I did make an excuse not to meet up with her." (R. at 69). Further, the defense counsel reiterated during her sentencing argument that appellee never intended on

meeting the minor. (R. at 73-75). At the conclusion of the sentencing agreements, the following colloquy occurred:

> MJ: . . . there's obviously testimony and argument that Sergeant Schell did not ever leave Fort Leavenworth, but that in my discussions with counsel that they indicated and defense agreed that the offense . . . was complete when the enticement happened, the fact that he never acted on it, that what he'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 drove or followed through of anything like that. Would you agree with that, defense?
>
> DC: That is correct, Your Honor, and specifically there is case law that does not require a substantial step moving forward to actually commit the offense for which he was enticing for, just that he intended to entice them to commit that offense.
>
> MJ: Okay, and, government, would you also agree?
>
> ATC: Yes, Your Honor.
>
> MJ: Okay, and, Sergeant Schell, do you agree? I would assume that you've discussed this with your counsel that despite the fact that or even in light of the fact that you didn't actually leave Leavenworth, would you agree that you committed the offense when you were attempting to persuade or entice her?
>
> ACC : Yes, ma'am.

(R. at 80-81).

Summary of Argument

The Army Court's decision should be affirmed because an unresolved inconsistency existed between appellee's guilty plea to the Article 134, UCMJ offense and his unsworn statement during sentencing.

The Army Court, through a methodical and rational reading of the law, correctly stated that an attempt conviction under 18 U.S.C. § 2422(b) requires: (1) that the appellee intend to persuade, induce, or entice a minor *to engage in sexual activity*; and (2) that he take a substantial step toward such persuasion, inducement, or enticement. The Army Court properly held that the first prong requires appellee intend to actually persuade, induce, or entice a minor *to actually engage in illegal sexual activity*. In short, the appellee must intend that the minor, ultimately, *actually engage* in illegal sexual activity as a *result of* his persuasion, inducement, or enticement. This follows the plain language of the statue.

Should the plain language be insufficient to move this Honorable Court in favor of the appellant or appellee, this Court need only look to the legislative history and the targeted acts the statute sought to criminalize. Congress clearly intended to address those who lure children out to *actually engage* in illegal sexual activity; not those who simply

encourage or incite children to assent to the possibility of illegal sex.

Appellee's unsworn statement that he never actually intended "to do anything" with "Taylor" created an inconsistency with appellee's providence inquiry and, absent appellee affirming a specific intent to persuade "Taylor" to *actually engage* in illegal sexual activity, his conviction cannot stand. Therefore, the military judge abused her discretion when she accepted the plea and the Army Court's decision should be affirmed.

Standard of Review

This Court examines a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). Therefore, this Honorable Court should review Certified Issue I de novo and Certified Issue II for an abuse of discretion.

Certified Issues Presented and Arguments

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."

This Court can look to the plain meaning of 18 U.S.C. § 2422(b) and, if necessary, the legislative history and discussion of the act, to safely determine that the Army Court's reading satisfies Congress' intent. *See United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).

A. Plain Language of the Statute

The Army Court correctly determined that an attempt under 18 U.S.C. § 2422(b) requires a specific intent on the part of appellee to have the minor *actually engage* in the illicit sexual activity. *Schell*, 71 M.J. at 578. This conclusion follows the plain meaning of the statute. 18 U.S.C. § 2422(b), Coercion and Enticement, 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.

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

The plain language makes clear that Congress meant that in order to violate the statute, an individual must knowingly, or attempt to, persuade, induce, entice, or coerce a minor to *do*

something, i.e. to engage in illegal sexual activity. As the Army Court explicitly summarized, the perpetrator, "must *intend* that the minor, ultimately, *actually engage* in illegal sexual activity as a *result* of his persuasion, inducement or enticement." *Schell*, 71 M.J. at 578 (emphasis added). Moreover, the Army Court makes clear that, "one 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 to do anything." *Id.* at 578-79 (emphasis added). This rationale is simple logic and supports the language of the statute.

The terms "persuasion, inducement, enticement, and coercion" are often used as synonyms to define one another. Black's Law Dictionary defines "inducement" as "the act or process of enticing or persuading another person *to take a certain course of action*." Black's Law Dictionary (9th ed.)(unabridged) (2009) (emphasis added). This definition fits squarely with the Army Court's analysis that a violator of the statute must *intend to do something*. Otherwise, there is no specific intent to satisfy the persuasion, inducement, enticement, or coercion. The government argues that "Congress said what it meant and meant what it said." (Appellant's Brief at 16). If true, then Congress' word choice of "persuasion, inducement, enticement, and coercion" should be more than enough

for this Honorable Court to conclude the true purpose of the statute: to protect minors from being lured into actual sexual crimes.[1]

The appellant's argument likens the specific intent definitions of persuasion, inducement, enticement, or coercion to that of simple corruption. However, as is clear, 18 U.S.C. § 2422(b) seeks to protect minors from being lured by online sexual predators to commit unlawful sexual acts, not to criminalize all sexually charged communications. If Congress wanted to protect minors from online corruption or grooming, Congress would simply have chosen those words. Furthermore, the appellant encourages this Court to only read a portion of the statute and to minimize the importance of the "*to engage in. . .*" section of the statute. The appellant's proposition is a blatant misinterpretation of the words Congress chose to define conduct that 18 U.S.C. § 2242(b) prohibits. Congress intended for the entire statute to be in effect and with equal importance.

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[1] 18 U.S.C. § 2422(b) traces its origin to the White Slave Traffic (Mann) Act, ch. 395, § 4, 36 Stat. 825 (1910), which was enacted to criminalize the interstate transportation of women for prostitution. As one court noted, "[t]he two subsections of § 2422 share a common lineage in the Mann Act of 1910, and they are nearly identical in wording, except that § 2422(b) specifically addresses minors. *U.S. v. Nielsen*, 694 F.3d 1032, 1036 n.4 (9th Cir. 2012).

B. The Purpose and Legislative History of 18 U.S.C. § 2422(b)

If the plain language is insufficient to form a consensus for this Honorable Court, this Court need only look to the Army Court's analysis of the legislative support. The Army Court supplements its opinion defining the intent requirement of 18 U.S.C. § 2422(b) with a thorough analysis of not only the plain text of the statute but also legislative history. Simply put, "Congress enacted the statute to address predatory behavior by adults intent upon exploiting the internet to *actually* persuade, induce, entice, or coerce children to *actually engage* in sexual activity." *Schell*, 71 M.J. at 579 (citing H.R. Rep. No. 105-557 at 680-81) (1998)) (emphasis added).

This Court need only examine Congress' targeted purpose in enacting 18 U.S.C. § 2422(b), labeled as "the most comprehensive package of new crimes and increased penalties ever developed in response to crimes against children, particularly assaults facilitated by computers." H.R. Rep. No. 105-557, at 681.

> H.R. 3494 cracks down on pedophiles who use and distribute child pornography to *lure children into sexual encounters*.
>
> . . .
>
> Background and need for Legislation
>
> The bill attacks pedophiles who stalk children on the Internet. It prohibits contacting a minor over the Internet *for the purposes of engaging in illegal sexual activity* and punishes those who knowingly send obscenity to children.

H.R. Rep. No. 105-557, at 679, 681 (emphasis added).

The fundamental purpose, emphasized throughout the statute's legislative history, is to protect children from pedophiles and online predators who desire minors to *engage* in illegal sexual activity. As the Army Court expressively concluded, 18 U.S.C. § 2422(b) is a "luring statute; not a corrupting statute." *Schell*, 71 M.J. at 579. An offender of 18 U.S.C. § 2422(b) must intend for a minor to *engage* in illegal sexual activity. The plain text of the statute, along with its supporting history, only supports this conclusion. Anything short is insufficient and nowhere in the in-depth discussion of the statute does Congress seek to criminalize sexual e-communication with a minor.

In addition, the Army Court not only analyzes the plain language of the statute and the legislative history but the proposed, and ultimately rejected, amendments that would have supported the government's intent definition argument. *Schell*, 71 M.J. at 580. Congress contemplated creating an additional crime within 18 U.S.C. § 2422 to outlaw internet contact, or attempts to contact, of a minor for purposes of engaging in criminal sexual activity. H.R. Rep. No. 105-557, at 687. This effectively would have substituted the current terms of 18

U.S.C. § 2422(b)'s "persuasion, inducement, enticement, or coercion" for "contact".

This proposed "contact amendment" would have criminalized any individual who contacts, or attempts to contacts, a minor to engage in unlawful sexual activity. However, the *attempt* portion of the proposed amendment would have created significant legal issues as discussed by the Army Court and Congress. In short, ". . . this amendment would move the law too close to creating a thought crime." *Schell*, 71 M.J. at 580.

If Congress enacted the contact amendment, the government could then prosecute individuals for much less than persuasion, inducement, enticement, or coercion of a minor. However, Congress firmly rejected this amendment. In short, Congress clearly contemplated, discussed, and abandoned the government's interpretation of the intent requirement.

The government argues that analyzing the thorough legislative history to determine Congress' true intent is an "undependable guide" and chastises the Army Court's use of the report. (Appellant's Brief at 14). This argument is undoubtedly made due to the clarity of Congress' intent to make 18 U.S.C. § 2422(b) require *more* than mere engagement of sexually explicit conversations with a minor. *Schell*, 71 M.J. at 580.

18 U.S.C. § 2422(b)'s legislative history is abundantly clear. This Honorable Court should not dismiss Congress' clear intent to criminalize the necessary specific intent to satisfy the prohibited conduct.

Military Courts' Analysis of 18 U.S.C. § 2422(b)

The appellant would have this Court believe that military courts have squarely addressed the specific intent definition 18 U.S.C. § 2422(b) requires. This is simply not the case. Although similarly situated 18 U.S.C. § 2422(b) convictions have been appealed and decided on various grounds as to "the substantial step" required for an attempt (prong two), this Court has yet to define the intent to persuade, entice, induce, or coerce (prong one). *See United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011); *United States v. Garner*, 69 M.J. 31, 33 (C.A.A.F. 2010).

In *Winckelmann*, this Honorable Court recently decided that to be guilty of an attempt under 18 U.S.C. 2422(b) the government must prove: (1) the accused intended to persuade, induce, or entice a minor to engage in sexual activity that would be criminal under the law, by means of the internet; and (2) that the accused took a substantial step toward such persuasion, inducement, or enticement. *Winckelmann*, 70 M.J. at 407. The focal issue of *Winckelmann*, however, was the

sufficiency of the evidence to satisfy the substantial step requirement of the attempt. *Id.* at 404.

Similarly, in *Garner*, this Honorable Court addressed the substantial step requirement of an attempt in the context of a guilty plea. The appellant, relying on *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008), claimed his guilty plea was improvident because the "substantial step" under 18 U.S.C. § 2422(b) "requires a specific arrangement for an actual rendezvous with the purported minor." The government, citing *United States v. Goetzke*, 494 F.3d 1231 (9th Cir. 2007), argued that travel arrangements were not necessary to establish a substantial step. This Honorable Court upheld the conviction and refused to rely on either *Gladish* or *Goetzke* or the lower court's interpretation of these cases stating that "[i]n contrast to those contested cases, the case before us involves a guilty plea, with a detailed plea inquiry in which Appellant admitted that he intended to persuade, entice, or induce [the allege victim] into sexual activity." *Garner*, 69 M.J. at 33.

In *United States v. Brooks*, 60 M.J. 495, 496 (C.A.A.F. 2005), this Court granted a petition to determine if one can violate 18 U.S.C. § 2422(b) by attempting to induce a fictitious minor. However, this Court was not pressed to and did not define the specific intent required to persuade, entice, induce, or coerce.

In short, *Brooks* is inapplicable to the instant case because the required specific intent was not at issue and remained undefined. *Brooks'* one line reliance on *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000) is unpersuasive and, significantly, does not address the certified issue. *Brooks*, 60 M.J. at 498. The question is not whether appellee attempted an actual sexual act but whether appellee intended to persuade a minor to actually engage in a sexual act. *Id.* In light of the certified issue, *Brooks* provides little assistance to this Court.

Similarly, the specific intent required has rarely been the focal issue of any particular case in the military courts of criminal appeals. Although the Army and Coast Guard Courts of Criminal Appeals affirmed convictions with intent definitions requiring more than the government's proposed interpretation, their presence does not answer the certified issue. *United States v. Winckelmann*, 2010 WL 4892816, 5 (A. Ct. Crim. App. 2010), *aff'd in part, vacated in part, rev'd in part*, 70 M.J. 403 (C.A.A.F. 2011); *U.S. v. Kowalski*, 69 M.J. 705 (C.G. Ct. Crim. App. 2010), *pet denied*, 70 M.J. 35 (C.A.A.F. 2011).

In *Winckelmann*, the Army Court acknowledged, accepted as law of the case, and did not correct the military judge's instruction that "it is necessary for the government to prove that the accused intended to engage in some form of unlawful

sexual activity. . ." *Winckelmann*, 2010 WL 4892816 at 5. In *Kowalski*, the Coast Guard Court specifically identified the military judge's intent definition as an "[intent] to engage in some form of unlawful sexual activity with the individual. . ." *Kowalski*, 69 M.J. at 708. This is in line with the Army Court's conclusion requiring the accused to intend that the minor actually engage in illegal sexual activity as a result of the persuasion. *Schell*, 71 M.J. at 578.

In 2009, The Navy-Marine Court of Criminal Appeals (the Navy-Marine Court) in *United States v. Garner*, 67 M.J. 734 (N.M. Ct. Crim. App. 2009), *aff'd* 69 M.J. 31, attempted to address the intent definition issue but merely relied upon a misreading of this Court's interpretation of *Brooks*. Specifically, the Navy-Marine court in *Garner* admittedly "inextricably intertwined" the: (1) intent and the (2) substantial step element. *Garner*, 67 M.J. at 738. As previously stated, this Honorable Court refused to rely on the lower court's interpretation of federal "substantial step" case law. *Garner*, 69 M.J. at 33. The military appellate courts have yet to clearly define the intent required and has left an inconsistency when tasked with dealing with the full spectrum of 18 U.S.C. §2422(b).

Evolution of 18 U.S.C. § 2422(b) in the Federal Circuits

The government boldly states that there is "unquestionable uniformity among the federal circuits with respect to the intent

required for an attempted violation of § 2422(b)." (Appellant's Brief at 20). However, a quick examination of federal court cases proves otherwise.[2]

In reviewing circuit court decisions, it is apparent that the law encompassing the intent definition of 18 U.S.C. § 2422(b) continues to evolve. Cases from the early 2000's, only a few years after the statute was passed, initially adopted an infinitely broad view of the intent definition with little to no analysis. In *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), the court held that "a conviction under the statute only requires a finding that the defendant had an intent to persuade or to attempt to persuade." *Id.* at 638. *See also United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004) (citing *Bailey*, 228 F.3d at 637-39) and *United States v. Brand*, 467 F.3d 179 (2d Cir. 2006) (citing *Bailey*, 228 F.3d at 638-39). This holding failed to analyze the term "persuade" or identify the specific outcome the defendant sought to accomplish through his persuasion. As the Army Court noted, "[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 to do anything." *Schell, 71 M.J. at 578-79.*

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[2] The flawed reasoning, discussed *supra*, of the Navy-Marine Court in *Garner*, 67 M.J. 734, and the Sixth Circuit Court of Appeals in *Bailey*, 228 F.3d 637, support appellant's position that only the specific intent to "persuade, induce, entice, or coerce" the minor is required without providing a meaningful analysis.

Later cases referenced *Bailey* but adopted a narrower "minor's assent" standard. In *United States v. Dwinells*, 508 F.3d 63 (1st Cir. 2007), the court held that, "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." (emphasis in original). The courts that have adopted the minor's assent standard rely on *Dwinells'* intent definition requiring that the defendant only seek to achieve a "mental state" of the victim regardless of the accused's intentions to consummate the sexual activity. *See United States v. Engle*, 676 F.3d 405 (4th Cir. 2012); *United States v. Berg*, 640 F.3d 239 (7th Cir. 2011); *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010); *United States v. Hofus*, 598 F.3d 1171 (9th Cir. 2010); *United States v. Goetzke*, 494 F.3d 1231 (9th Cir. 2007); *United States v. Dhingra*, 371 F.3d 557 (9th Cir. 2004). The Army Court identified, analyzed, and subsequently rejected this standard as contrary to the plain language of the statute, congressional intent, and possibly afoul of enumerated violations within the Manual for Courts-Martial. *Schell*, 71 M.J. at 579.

Recently, circuit courts have held that an accused must intend that the minor, ultimately, actually engage in illegal sexual activity as a result of the accused's persuasion,

inducement or enticement. The Fifth Circuit in *United States v. Ludy*, 676 F.3d 444, 450-51 (5th Cir. 2012) held that, based upon the underlying facts, it was "necessary for the Government to prove that the Defendant attempted to persuade, induce, or entice a minor to engage in some form of unlawful sexual activity with the Defendant. . . ."[3] *See also United States v. Lebowitz*, 676 F.3d 1000 (11th Cir. 2012).

Further emphasizing a split among the courts, opinions within the same circuit continue to evolve. A perfect example of the progression of the intent definition is the Eleventh Circuit's cases of *Lebowitz*, 676 F.3d 1000, *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010) and *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004). In 2004, the court in *Murrell* determined that "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. The court then gave the following example: "that is, if a person *persuaded* a minor to engage in sexual conduct (e.g. with himself or a third party), without then actually committing any

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[3] Note that this holding is based upon the specific facts of the case as 18 U.S.C. § 2422(b) does not necessarily require that an accused intend for the minor to engage in criminal sexual activity the accused. It is also an offense under this statute to persuade a minor to engage in criminal sexual activity with a third party.

sex act himself, he would nevertheless violate § 2422(b)." *Id.* However, this analysis is unhelpful with respect to the required specific intent because the court's own emphasis on the word "persuaded" already assumes that the defendant satisfied the specific intent to actually have illicit sexual contact. The court in *Murrell* merely made the observation that the focus of the statute was not on the completed unlawful sexual act; rather, the statute sought to criminalize the persuasion, inducement, enticement, or coercion of a minor. In that case, it was unnecessary for the court to determine the required specific intent of the persuasion as the facts clearly indicated Murrell intended to both induce the minor to engage in sexual activity and to ultimately engage in unlawful acts with the minor.

In 2010, the Eleventh Circuit decision in *Lee* moved away from the simplistic *Murrell* definition and firmly adopted the *Dwinells'* minor's assent standard. *Lee*, 603 F.3d at 914. The court held that "[w]ith 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.'" *Id.* (internal citation omitted).

The court made its final evolution in 2012 when the Eleventh Circuit decided *Lebowitz*. In *Lebowitz*, the court addressed the sufficiency of the evidence when the defendant

stated he abandoned his desire for sexual activity upon finding the minor's true age. *Lebowitz*, 676 F.3d at 1000. In accord with the Army Court's decision in *Schell*, the intent for the minor to actually engage in sexual misconduct was an identified factor and analyzed by the appellate court. The court affirmatively stated that, based upon the underlying facts, 18 U.S.C. § 2422(b) "required the Government prove beyond a reasonable doubt that [the accused] intended to engage in criminal sexual activity with [the minor]." *Id.* at 1013. Consequently, Lebowitz's specific intent to persuade the minor necessarily included the intent for the minor to actually engage in the criminal sexual activity.

The Ninth Circuit has also issued opinions that continue to chronicle the evolution of the intent requirement of 18 U.S.C. § 2422(b). In 2004, the Ninth Circuit in *United States v. Dhingra*, 371 F.3d 557, 562 (9th Cir. 2004) appeared to adopt an overbroad reading of the intent definition. However, *Dhingra* then explicitly stated that:

> the focus of the statute is on the actor and the intent of his actions, and thus liability depends on the audience for whom the communication is intended and the conduct the communication seeks to provoke. For example, the statute would not criminalize speech that is received by minors but is not spoken with the intent to persuade, induce, entice, or coerce a minor into illegal sexual activity.

Id. This rationale, that the defendant must intend to persuade a minor to *do something*, supports the Army Court's evolved decision.

In 2007, the Ninth Circuit in *Goetzke*, 494 F.3d at 1236, affirmatively moved the court towards the minor's assent standard, stating that attempting to persuade, induce, entice or coerce a minor is an attempt to achieve the mental act of assent. Despite *Goetzke*, the Ninth Circuit continues to slowly develop the intent definition. This is evident in *United States v. Hofus*, 598 F.3d 1171, 1177 (9th Cir. 2010).

In *Hofus*, the Ninth Circuit affirmed the decision to limit an expert's opinion on whether or not Hofus "was likely to engage in the ultimate sexual activity with the minor." *Id.* at 1178. Although the majority relied on *Goetzke* to satisfy the intent requirement and exclude the expert testimony, the dissent identified the crucial point that "if the defendant did not intend to have intercourse with the minor, he was unlikely to be attempting to persuade her to have intercourse." *Id.* at 1180 (Noonan, J. dissenting). This reasoning is identical to the Army Court's analysis. Judge Noonan further explains that distinguishing between: (1) the intent to attempt to persuade; and (2) the intent to have sexual intercourse is a difficult distinction to grasp but it is essential to the case.

Unfortunately, it is clear the *Hofus* majority and a vast number of cases appellant cited fail to identify this distinction.

It is clear that an evolution is taking place within the circuit courts and that appellant's claim of "uniformity" is unmistakably false. The appellant fails to provide case law that is on point to address the certified issue. In its attempt to make the rounds from the First to the Eleventh Circuit Courts, the appellant would have this Court adopt scarcely relevant case law analyses.

This Court need only look to the statute's plain language and, if unsatisfactory, to Congress' intent and legislative history. There is little doubt that "Congress said what it meant and meant what it said". *Dwinells*, 508 F.3d at 65. However, it is also clear that the federal appellate courts are moving toward the conclusion that the statute requires the accused to intend that the minor engage in the underlying criminal sexual activity. *See, e.g., Lebowitz*, 676 F.3d at 1013. Therefore, this Court should affirm the Army Court's decision.

II.

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

This Honorable Court will review a military judge's decision to accept a guilty plea for an abuse of discretion.

Inabinette, 66 M.J. at 332. If, after plea, the accused sets up a matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, a plea of not guilty shall be entered. Article 45, UCMJ, 10 U.S.C. § 845(a) (2008). A special duty rests on the military judge to "resolve the apparent inconsistency or reject the plea." *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006). A military judge abuses her discretion when she neglects or chooses not to resolve the inconsistency or reject the inconsistent or irregular pleading. *United States v. Hayes*, 70 M.J. 454, 458 (C.A.A.F. 2012).

If this Honorable Court affirms the decision of the Army Court in Certified Issue I, the appellee's testimony between his providence inquiry and sentencing statement raised an inconsistent matter the military judge left unresolved. Therefore, this Honorable Court should set aside the guilty plea verdict.

The crux of the inconsistent matter occurred when appellee stated, during his unsworn statement in sentencing, that he "never intended to do anything" with the undercover police officer posing as "Taylor". (R. at 69). Trial defense counsel also emphasized in her sentencing argument that appellee never intended to meet with the minor. (R. at 74-75). When appellee

stated he did not intend to engage in illegal sexual acts with "Taylor," he created an inconsistancy with respect to whether appellee actually intended to persuade, induce, or entice a minor to engage in sexual activity.

Although appellee was able to successfully navigate through the military judge's providence inquiry with numerous affirmative responses, his statement during sentencing raised concerns by the military judge; however, the military judge's concerns focused solely on the requirements for the "substantial step" prong. (R. at 80-81). The military judge asked defense counsel if he would agree that "it's not necessary that [appellee] actually drove [off post] or followed through [with the sexual act]." (R. at 80). The defense counsel purportedly concurred but seemingly conflated the "specific intent" prong with the "substantial step" prong when he stated "there is case law that does not require a substantial step moving forward to actually commit the offense for which he was enticing for, just that he intended to entice them to commit the offense." *Id.* The trial counsel agreed with this analysis.

Although it is clear that all parties agreed that travel was not required to satisfy "substantial step" prong, the military judge did not reopen the providence inquiry to discuss whether the evidence satisfied the specific intent prong of the

attempt to persuade, entice, coerce, or induce to actually engage in sexual activity.

The military judge was required to address the inconsistency. In *United States v. Berk*, 652 F.3d 132 (1st Cir. 2011), Berk testified he had no interest in actually having sex with the minor. In reviewing the sufficiency of the evidence, the court in *Berk* specifically identified that his statement amounted to a defense that the fact finder was free to reject. *Id.* at 140 n. 8. Berk's intent to follow through with the sexual act was clearly relevant as a defense. Similiarly here, appellee's statement raised an apparent inconsistency with respect to the specific intent required to prove an attempt. This critical element of the attempt charge was left unresolved and the inconsistent statements made during appellee's unsworn statement required reversal of the § 2422(b) conviction. *Schell*, 71 M.J. at 582; citing *Hayes*, 70 M.J. at 458.

Conclusion

WHEREFORE, appellant respectfully requests that this Court affirm the Army Court decision.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 5,897 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface (12-point, Courier New font) using Microsoft Word, Version 2007 with no more than ten and a half inch characters per inch.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Schell, Crim. App. Dkt. No. 20110264, Dkt. No. 13-5001/AR, was delivered to the Court and Government Appellate Division on December 26, 2012.

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