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 CROSS-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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U N I T E D S T A T E S, Appellant and Cross-Appellee v. Sergeant (E-5), NICHOLAS R. SCHELL, United States Army, Appellee and Cross-Appellant	FINAL BRIEF ON BEHALF OF CROSS-APPELLANT Crim.App. Dkt. No. 20110264 USCA Dkt. No. 13-5001/AR

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

Granted Issue:

WHETHER THE MILITARY JUDGE'S FAILURE TO DISCUSS WITH CROSS-APPELLANT THAT THE OFFENSE OF ATTEMPTED ENTICEMENT OF A MINOR REQUIRES A SUBSTANTIAL STEP TOWARD THE COMMISSION OF THE UNDERLYING SUBSTANTIVE OFFENSE PROVIDES A SUBSTANTIAL BASIS IN LAW TO QUESTION CROSS-APPELLANT'S 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 (2012). *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)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Sergeant Nicholas R. Schell (cross-appellant), 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 cross-appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for eighteen months, a bad-conduct discharge. (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 cross-appellant's conviction for attempted persuasion, enticement, or inducement of a minor in violation of 18 U.S.C. § 2422(b) (Charge II), because the military judge failed to effectively resolve an inconsistency related to the intent element. Although the Army Court noted the military judge did not address the elements inherent in an attempt, including the substantial step toward commission of the offense, it rested its decision on the intent required to support convictions under 18 U.S.C. § 2422(b).

The Army Court affirmed the convictions of the two specifications of Charge I, violating Article 80, UCMJ, and 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). Cross-Appellant was subsequently notified of the TJAG's order. On November 13, 2012, cross-appellant filed a cross-appeal petition. On February 6, 2013, this Court granted cross-appellant's petition for review.

Statement of Facts

The military judge accepted Sergeant Schell's guilty plea without advising him of all the elements of attempted enticement of a minor under 18 U.S.C. § 2422(b). (R. at 59). Specifically, the military judge failed to explain that the offense of attempted enticement of a minor under the United States Code requires a "substantial step" toward the commission of the intended offense. As a result, the military judge also failed to define what constitutes a "substantial step." (i.e. one that goes beyond mere preparation). (R. at 27-29, 40-46). Despite the omission, the military judge obtained Sergeant Schell's agreement that her explanation of the elements correctly described what he did. (R. at 29). Similarly, in the stipulation of fact, Sergeant Schell admitted all the elements of attempted enticement of a minor, except the element that he took a "substantial step" toward the commission of the underlying substantive offense. (Pros Ex. 1, p.7).

The military judge did, however, advise Sergeant Schell of the "substantial step" element for the Article 80, UCMJ, offenses of attempted indecent language and attempted indecent conduct under Specifications 1 and 2 of Charge I. (R. at 20, 25). Notably, the government charged attempted enticement of a minor under clauses 2 and 3 of Article 134, UCMJ, incorporating the attempt offense under the United States Code. (Charge Sheet).

Relying solely on the charge sheet, the military judge stated that "the elements of that offense are basically all articulated within the charge itself." (R. at 43).

Summary of Argument

The military judge failed her basic responsibility to ensure that appellant understood the elements to the offense pled. By omitting any discussion that an "attempt" requires a substantial step toward the commission of the offense, and further omitting what constitutes a "substantial step," the military judge failed to ensure that cross-appellant's guilty plea was knowing and voluntary.

Regardless of whether the military judge erred in not resolving an inconsistency related to the intent required under 18 U.S.C. § 2422(b), the military judge abused her discretion when she failed, at the most basic level, to explain to Sergeant Schell that the offense of attempted enticement of a minor

requires that he took a substantial step toward the commission of the offense. The military judge's failure creates a substantial basis in law and fact to question cross-appellant's plea and this Court should set aside the finding to The Specification of Charge II and dismiss The Specification of Charge II.

Standard of Review

A military judge's acceptance of an accused's guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The test for whether a guilty plea must be set aside is whether the record of trial shows a substantial basis in law or fact for questioning the plea. *Id.* Traditionally, the military courts presented the "substantial basis" test in the conjunctive (i.e., law and fact). *Id.*; *see, e.g., United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). However, it is better to apply the test in the disjunctive (i.e., law or fact), because "it is possible to have a factually supportable plea yet still have a substantial basis in law for questioning it." *Inabinette*, 66 M.J. at 322.

Law and Argument

For this Court to find that a guilty plea is knowing and voluntary, the record must show that the military judge explained to the accused the elements of each offense to which he pled guilty. *United States v. Redlinski*, 58 M.J. 117, 119

(C.A.A.F. 2003)(citing *United States v. Care*, 18 C.M.A. 535, 541, 40 C.M.R. 247 (1969)). If the military judge fails to do so, this Court must set aside the guilty plea, unless "it is clear from the entire record that the accused knew all the elements, admitted them freely, and pleaded guilty because he was guilty." *Redlinski*, 58 M.J. at 119 (citing *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992)). A guilty plea to attempted enticement under 18 U.S.C. § 2422(b) is provident when the military judge correctly advises appellant on the intent and substantial step requirement and definitions and the appellant admits he had the required specific intent and took actions beyond mere preparation. *United States v. Garner*, 69 M.J. 31, 32 (C.A.A.F. 2010).

A. The military judge failed to expressly define all necessary elements to The Specification of Charge II.

The military judge had a basic responsibility to ensure that cross-appellant fully understood the elements of the offense to which he pled guilty. In determining the elements, the military judge relied upon the charge sheet but ignored federal law.

In pertinent part, 18 U.S.C. § 2422(b) reads:

> Whoever, using any facility or means of interstate commerce or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual act for which any

> person may be criminally prosecuted, or attempts to do so, shall be fined. . . .

Under federal law, the elements of enticing a minor under 18 U.S.C. § 2422(b) are that the accused:

> (1) used a facility of interstate commerce, such as the internet or the telephone system;
>
> (2) knowingly used the facility of internet commerce with the intent to persuade or entice a person to engage in illegal sexual activity; and
>
> (3) believed that the person he sought to persuade or entice was under the age of eighteen.

United States v. Young, 613 F.3d 735, 741 (8th Cir. 2010).

When the offense is charged as an attempt under the same statute, as was done here, the elements are that the accused: (1) acted with the culpability required to commit the underlying substantive offense, and (2) took a substantial step toward its commission. *Id.* at 742; *United States v. Barlow*, 568 F.3d 215, 219 (5th Cir. 2010); *accord United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011)("To be guilty of attempt under § 2422(b), the Government must prove, *inter alia*, that the defendant . . . took a substantial step toward enticement.") (citation omitted).

A "substantial step" is "more than mere preparation, but less than the last act necessary before the commission of the crime." *Winckelmann*, 70 M.J. at 407 (quoting *United States v.*

Chambers, 642 F.3d 588, 592 (7th Cir. 2011). The "substantial step must 'unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *Id.* (quoting *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). *See also* 2 Kevin F. O'Malley et al., *Federal Jury Practice Instructions* § 21:04 (6th ed. 2013) ("Mere intention to commit a crime can never amount to an attempt. It is absolutely essential that the defendant, with the intent of committing a particular crime, perform some overt act in furtherance of the criminal scheme.").

For the offense of attempted enticement of a minor under The Specification of Charge II, the military judge advised Sergeant Schell of following elements:

> (1) "That on or between 17 March 2010 and 18 March 2010, at or near Fort Leavenworth, Kansas, that you knowingly attempted to persuade, induce, or entice an individual known to you by the screen name of Joco_cheer_girl and with the given name of Taylor Ackles, to engage in sexual activity, which if undertaken would constitute a offense under Article 120 of the Uniform Code of Military Justice;" and "would be a violation of 18 USC Section 2422[b];"
>
> (2) "[T]hat you did so by means of or a facility of interstate commerce, in this case the internet;"
>
> (3) "[T]hat under the circumstances your conduct was of a nature to bring discredit upon the armed forces[;]" and

> (4) "[T]hat you believe that the person you were communicating with was less than 18 years of age."

(R. at 27-28).

In outlining the above elements and in the subsequent providence inquiry, the military judge failed to advise Sergeant Schell that under federal law, e.g., *Young* and *Barlow*, one of the elements of attempted enticement of a minor is that he took a substantial step toward the commission of the underlying substantive offense. The stipulation of fact does not cure the military judge's error because it likewise excludes the element of a "substantial step."[1]

Sergeant Schell's agreement that the military judge correctly described his crime also fails to save his plea. *See United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)(mere legal conclusions are not enough). Even if Sergeant Schell provided an adequate factual basis for his plea, his plea was not provident because he did not understand how the law related

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[1] Similarly, trial defense counsel's reference to "substantial step" when discussing cross-appellant's plea with the military judge did not provide a factual basis to ensure cross-appellant understood the elements of the offense. R. at 80-81. The military judge merely asked the cross-appellant to agree with a legal conclusion:

> MJ: . . . would you agree that you committed the offense when you were *attempting* to persuade or entice her? (emphasis added)
>
> A: Yes, Ma'am.

to those facts. *See United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *Care*, 18 C.M.A. at 538-39, 40 C.M.R. at 250-51). When Sergeant Schell pled guilty, he had no idea that one of the elements of his crime was that he took a "substantial step" toward the commission of the target offense.

B. There is no basis to assume that Sergeant Schell knew and understood that a substantial step was a required element for The Specification of Charge II.

The government may attempt to convince this Court that cross-appellant *indirectly* knew a "substantial step" was necessary despite the military judge's failure to expressly discuss this element to The Specification of Charge II. These arguments are unpersuasive. This Court should not find Sergeant Schell's plea provident because the military judge outlined the element of "substantial step" for the other two attempt offenses. First, unlike the offense at issue, the other attempt offenses were violations of Article 80, UCMJ. It is not reasonable to infer that Sergeant Schell understood that the military offense of attempt shared the element of a "substantial step" with an entirely different attempt offense under the United States Code.

Second, the military judge did not even engage in the disfavored practice of cross-referencing the elements of the other attempt offenses when she discussed the offense of attempted enticement of a minor. *See United States v. Barton*,

60 M.J. 62, 63-65 (C.A.A.F. 2004)(affirming guilty plea but discouraging military judge's methodology of cross-referencing the elements pertaining to three specifications of larceny). The record is void of any reference to the substantial step with respect to The Specification of Charge II.

Third, unlike simple military offenses, e.g., absence without leave, the offense of attempt is complex. In describing the military offense of attempt, the CAAF observed, "[u]nlike some simple military offenses, attempt is a more complex, inchoate offense that includes two specific elements designed to distinguish it from mere preparation." *Redlinski*, 58 M.J. at 119. The CAAF further noted "[t]he distinction between preparation and attempt has proven difficult for courts and scholars alike." *Id.* Unlike *Garner*, the military judge here did not provide appellant with the proper definitions. One can only imagine how difficult it is for service members like Sergeant Schell to comprehend the offense of attempted enticement of a minor under the federal code. Simply put, Sergeant Schell did not adequately understand why his conduct was a crime.

The military judge's failure to explain the "substantial step" element of attempted enticement of a minor rendered his plea improvident under the Specification of Charge II. The

military judge's error created a substantial basis in law and fact to question Sergeant Schell's plea.

Conclusion

WHEREFORE, cross-appellant respectfully requests that this Court set aside the findings to the specification of Charge II.

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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 2,330 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 foregoing in the case of *United States v. Schell*, Crim.App.Dkt.No. 20110264, USCA Dkt. No. 13-5001/AR, was electronically filed with both the Court and Government Appellate Division on March 7, 2013.

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