IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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	) APPELLANT/CROSS-APPELLEE'S REPLY) BRIEF TO FINAL BRIEF ON BEHALF) OF APELLEE/CROSS-APPELLANT) (GRANTED ISSUE)))) Crim. App. Dkt. No. 20110264)) USCA Dkt. No. 13-5001/AR

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TO THE HONORABLE, THE 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 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 (over the certified issues) 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] Further, this Honorable Court has jurisdiction over the instant granted issue per Article 67(a)(3).[3]

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[1] *United States v. Schell*, 71 M.J. 574 (Army Ct. Crim. App. 2012) (en banc); 10 U.S.C. § 866(b) (2008).
[2] 10 U.S.C. §867(a)(2).
[3] 10 U.S.C. §867(a)(3).

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.[4] 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.[5] 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.[6] 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.[7]

On September 12, 2012, the Army Court, 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) (Charge II), but affirmed the

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[4] Record [R.] at 59.
[5] R. at 59.
[6] R. at 83.
[7] Action.

convictions of the two specifications of Charge I, violating Article 80, UCMJ.[8] The Army Court permitted a rehearing on Charge II, or - alternatively - a rehearing for sentencing purposes only on the remaining affirmed convictions.[9]

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 the government's brief. On November 13, 2012, cross-appellant filed a cross-appeal petition, which was subsequently granted by this Honorable Court on February 6, 2013. Cross-appellant filed his brief on the "granted issue" on March 7, 2013.[10]

Statement of Facts

The government relies on the Statement of Facts in its original brief filed on November 9, 2012 (TJAG certified issues).

Summary of Argument

There is no basis in law or fact to question SGT Schell's guilty plea. Omitting a discussion of the "substantial step"

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[8] *Schell*, 71 M.J. at 582-83.
[9] *Id.*
[10] The granted issue is substantially the same as the "supplemental assignment of error" raised by cross-appellant before the Army Court of Criminal Appeals, to which the government replied in its brief dated May 24, 2012.

prong of the attempt element of 18 U.S.C. § 2422(b) during his providence inquiry was not fatal to the plea under the well-known standards of *United States v. Care*[11] and *United States Redlinski*.[12] SGT Schell's own stipulation of fact, coupled with his answers during the colloquy, manifest his understanding that his conduct had to be characterized as a "substantial step" and that his particular conduct met that requirement abundantly. Moreover, the essential concepts of attempt law, including the requirement for a "substantial step" and its meaning, were explained to SGT Schell during the military judge's discussion of the two Article 80, UCMJ, specifications immediately preceding the discussion of 18 U.S.C. § 2422(b). Finally, the predicate concepts of "attempt" were discussed with SGT Schell's counsel during a pre-trial Rule for Court-Martial [R.C.M.] 802 conference. In sum, the record leaves no substantial basis upon which to question his guilty plea to the 18 U.S.C. § 2422(b) charge.

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[11] 18 U.S.C.M.A. 535; 40 C.M.R. 247 (1969).
[12] 58 M.J. 117 (C.A.A.F. 2003).

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 predicate questions of law de novo.[13]

Law and Argument

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.

Relevant Law

1. Basis for accepting a guilty plea

The scope of the providence inquiry encompasses the facts admitted by the accused, the stipulation of fact, as well as the reasonable inferences derived from these admissions.[14] This scope is of paramount importance when reviewing the record on appeal for a defect allegedly made by the trial judge. Given this scope of the R.C.M. 910 and Article 45, UCMJ, inquiry and the deferential review afforded to the trial court's acceptance

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[13] *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)).

[14] *See* R.C.M. 910(c)(1) and (e), discussion; Article 45(a), UCMJ; *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003).

of a guilty plea, the plea should be set aside only when the record depicts substantial conflict with the accused's plea.[15]

The record adequately supports the plea's acceptance when it meets the standards set forth in *United States v. Care*.[16] The first *Care* requirement, and the only one relevant to this granted issue, is that the elements of the offense have been explained to the accused.[17]

2. Inferring the accused's awareness of the elements from context of the Record is permissible.

In the specific context of an "attempt" offense, this Court in *United States v. Redlinski*[18] said the first *Care* requirement need not focus on a "technical listing of the elements of an offense, [but rather the] context of the entire record to determine whether an accused is aware of the elements, either explicitly *or inferentially*."[19] The appellant in *Redlinksi* was charged and plead guilty to, *inter alia*, attempted wrongful distribution of marijuana.[20] During the appellant's guilty plea

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[15] *United States v. Smauley*, 42 M.J. 449, 450 (C.A.A.F. 1995) (internal citations omitted).
[16] 18 U.S.C.M.A. 535; 40 C.M.R. 247 (1969) (the trial judge did not personally inform the accused of the elements of the offense or "establish the factual component of the plea").
[17] *Id.*, at 253-54.
[18] 58 M.J. 117 (C.A.A.F. 2003).
[19] *Redlinski*, 58 M.J. at 119 (internal citations omitted) (emphasis added).
[20] *Id.*, at 118.

colloquy, the military judge defined and explained the elements of distribution, but did not explain the elements of attempt.[21] Specifically, this Court found that nothing in the record "reflect[ed]" that appellant was advised that the attempt requires an overt act that amounts to more than mere preparation and tends to effect the commission of the intended offense, nor "reflect[ed] that the appellant understood all of these concepts."[22] This Court concluded that, as a result of the total record's silence, there was no "evidence" of the appellant's explicit or inferential knowledge of the elements of attempt.[23]

Redlinski stands for the well-known rule that the military judge's failure to explicitly explain each element does not definitively make a plea improvident.[24] Rather, when such an omission occurs, the appellate courts will then look to the "entire record" to see if the appellant knew the elements, freely admitted them, and entered his plea because he was guilty before concluding the omission was reversible error.[25] Both a military judge, and the appellate courts, can find the plea

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[21] *Id.*, at 119.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id. See also United States v. Fisher*, 58 M.J. 300, 304 (C.A.A.F. 2003) ("[f]ailure to explain each and every element of the charged offense to the accused in a clear and precise manner prior to accepting the plea is not reversible error if it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty") (citing *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992)).

provident and knowing based on inferences, reasonably drawn from the record, that an accused knew and understood the elements of the offense to which he plead guilty.

Argument

1. Elements of 2422(b) and the Substantial Step

Evidence of SGT Schell's understanding of the attempt element of substantial step is transparent when looking at what he admitted during his providence inquiry and within his stipulation of fact. 18 U.S.C. § 2422(b) "criminalizes attempts to knowingly persuade, induce, entice, or coerce any minor to engage in . . . any sexual activity using a means of interstate commerce."[26] An "attempt" requires that the accused had an intent to entice and "took a substantial step toward" that end.[27] In 18 U.S.C. § 2422(b) cases, this Court has followed the other federal courts (specifically, the Second,[28] Seventh,[29] and Ninth[30] Circuits) in defining "substantial step" as "more than mere preparation" – that is, "conduct strongly corroborative of the firmness of the defendant's criminal intent" and which

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[26] *United States v. Winckelmann*, 70 M.J. 403, 407 (2011) (internal quotations and citations omitted).
[27] *Id.*
[28] *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977).
[29] *United States v. Chambers*, 642 F.3d 588 (7th Cir. 2011).
[30] *United States v. Goetzke*, 494 F.3d 1231 (9th Cir. 2007).

"unequivocally demonstrate[s] that the crime will take place unless interrupted by independent circumstances."[31]

In "non-travel" fact-patterns – such as the instant case – involving the Internet, this Court has acknowledged that no set catalogue of activity meets the "substantial step" requirement.[32] Rather, the courts use a "case-by-case approach" to distinguish online "hot air and nebulous comments from more concrete conversation."[33] Such "concrete conversation" that may equate to a "substantial step" includes "making arrangements for meeting the (supposed) [minor], agreeing on a time and place for a meeting, making a hotel reservation, [or] purchasing a gift."[34]

Even when no such "concrete conversation" takes place, courts have found a "substantial step" for the purpose of conviction of an attempted 18 U.S.C. § 2422(b) act when there is "grooming" conduct exhibited. This Court has cited favorably to numerous examples of other courts finding the substantial step was met by "grooming behavior" as diverse as mailing flirtatious and flattering letters that described sex acts[35] to repeated contacts in which the accused urged the victim to meet and used

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[31] *Winckelmann*, 70 M.J. at 407 (citing *United States v. Byrd*, 24 M.J. 286, 290 (C.M.A. 1987)).
[32] *Winckelmann*, 70 M.J. at 407.
[33] *Id.* (internal quotations and citations omitted).
[34] *Id.*
[35] *Id.*, at 408 (citing *Goetzke*, 494 F.3d at 1236).

"graphic language to describe how he wanted to perform oral sex on [the victim]."[36]

In sum, this Court has approved of at least three general categories of conduct, gleaned from its sister Courts of Appeals, that can satisfy the "substantial step" element of attempt under 18 U.S.C. § 2422(b): (1) travel; (2) "concrete conversation" (of varied examples) or (3) a "course of conduct equating to grooming behavior."[37] SGT Schell's explicit admissions to acts that were characteristically "concrete conversation" and "grooming behavior" are easily established in the record; thus, inferring his understanding of the "substantial step" is easily drawn from the full context of his guilty plea.

2. Inferring knowledge of the "substantial step" element from the record

The military judge did not *explicitly* list the two elements of an attempt as it applied to 18 U.S.C. 2422(b) during the guilty plea. That omission is not fatal.[38] Several points in this record unambiguously provide grounds for inferring

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[36] *Id.* (citing *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000)).
[37] *Id.* (concluding that the facts before it [the online chat room question "u free tonight"] were "not legally sufficient to constitute a substantial step when measured against any of the benchmarks described").
[38] *Fisher*, 58 M.J. at 304.

appellant's understanding of all elements of an attempt, including the concept of a "substantial step."

a. The Providence Inquiry and Stipulation of Fact

SGT Schell's colloquy established that he knew of the "substantial step" requirement of attempt and that his actions met this requirement. The degree of detail in his admissions inexorably imply that he understood precisely what he needed to admit in order to satisfy each element of the 18 U.S.C. § 2422(b) offense, charged under Article 134, UCMJ. As this Court recently observed in *United States v. Garner*,[39]

> where an accused pleads guilty and during the providence inquiry admits that he went beyond mere preparation and points to a particular action that satisfies himself on this point, it is neither legally nor logically well-founded to say that actions that may be ambiguous on this point fall short of the line "as a matter of law" so as to be substantially inconsistent with the guilty plea.[40]

In describing his conduct, SGT Schell said, "I did take the steps to attempt to persuade"[41] the supposed minor to engage in sexual activity. The military judge probed further:

> MJ: And what exactly, what parts of your conduct do you believe make up this persuasion or inducement or enticement, in other words, the encouragement or persuasion?

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[39] 69 M.J. 31 (C.A.A.F. 2010).
[40] *Id.*, at 33 (quoting *United States v. Schoof*, 37 M.J. 96, 103 (C.M.A. 1993)).
[41] R. at 40.

ACC: Through the instant messaging, through sending the photos that was taking steps to persuade the individual.

MJ: . . . what were you trying to induce or persuade Taylor to do?

ACC: Commit sexual acts with me or with other individuals, ma'am.[42]

Followed by:

MJ: . . . [w]hat sort of sexual activity were you trying to persuade her to do?

ACC: To have sexual intercourse with me, ma'am.[43]

This dialogue clearly illustrates that SGT Schell knew that his conduct equated to "trying" to accomplish some ultimate end: that is, to persuade or entice "Taylor" to have sex with him. Moreover, SGT Schell acknowledged that, "if Taylor had been a real 14 year old girl and [he] had actually undertaken that activity, that sexual activity," that it would have also been a crime under Article 120, UCMJ.[44] SGT Schell made it abundantly clear that he understood the distinction between the inchoate offense of attempt and the completed offense.

SGT Schell's detailed Stipulation of Fact (Pros. Ex. 1) manifests this understanding that the attempt offense under 18 U.S.C. § 2422(b) requires more than more preparation and his understanding that his conduct was "strongly corroborative of

[42] R. at 41.
[43] R. at 41.
[44] R. at 42.

the firmness of [his] criminal intent" to persuade, entice, or induce "Taylor" into sexual activity.[45] He admitted to conduct that can and should be characterized as both "concrete conversation" and "grooming" of the person he believed to be a 14 year-old girl.

First, during his Yahoo! chat conversation on 17 March 2010, SGT Schell asked "joco_cheer_girl," almost immediately upon entering this chat room, for her age, sex, and location. From this question, he learned that this screen name belonged to "Taylor," a 14 year-old girl from Olathe, Kansas.[46]

Second, after telling "Taylor" that he was 22 years-old, SGT Schell then immediately pivoted the conversation from informal greetings to graphic sexual inquiries, including questions about whether "Taylor" would be "into girls" and whether she would engage in sexual activity with her own father.[47]

Third, this grooming conduct continued when SGT Schell then asked "Taylor" if she would be interested in sexual

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[45] *Winckelmann*, 70 M.J. at 407; *see also, e.g., United States v. Berk*, 652 F.3d 132, 140 (1st Cir. 2011) ("[t]he crime of attempt [under Section 2422(b)] requires an intention to commit the substantive offense – here, critically, to persuade, induce, entice and coerce – and a substantial step towards it commission")).

[46] Pros. Ex. 1, at 2-3, para. 7-8.

[47] Pros. Ex. 1, at 3, para. 9.

activity with his own fiancé, "Krystal."[48] He described Krystal's sexual orientation and her physical attributes, including her attractiveness and breast size.[49] Krystal was not a figment of SGT Schell's libidinous imagination created solely for the purpose of innocuous online sexual fantasy: rather, at this time, SGT Schell was then engaged to Krystal Stamper, a woman who was then living with SGT Schell and who had previously agreed to an open, non-monogamous, sexual relationship with him and other women he solicited via "Craigslist" online advertisements.[50]

Fourth, SGT Schell admitted that he gave such a description of Krystal "in order to entice" the person he believed to be "Taylor."[51]

Fifth, this grooming behavior later, the next morning, transitioned to "concrete conversation" during which SGT Schell gave "Taylor" his telephone number, and requested photographs of her.[52] SGT Schell also engaged in graphic conversation about his penis size and the extent to which this might hurt her during sex.[53]

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[48] Pros. Ex. 1, at 3, para. 10.
[49] Pros. Ex. 1, at 3, para. 10.
[50] Pros. Ex. 1, at 2, para. 4.
[51] Pros. Ex. 1, at 3, para. 10.
[52] Pros. Ex. 1, at 3, para. 12.
[53] Pros. Ex. 1, at 4, para. 15 ("I might hurt u tho being so big;" "U think u can handle 10 inchs;" "Ya if I shoved my hole cock in u would probally make u scream;" and finally, "I want to

Sixth, having ostensibly found a young girl who engaged in sexually frank conversation and who sent him photographs of herself, SGT Schell then explored the extent to which "Taylor" could convince any of her teenage friends to also engage in sexual activity with him.[54]

Seventh, SGT Schell sent several digital photographs of himself, including pictures of his penis, to "Taylor" and requested that "she" send him – in return – "erotically posed photographs of herself or perhaps those of her naked genitalia or breasts."[55]

Finally, SGT Schell's "concrete conversation" turned to logistics: he sought and received her home address in Olathe, Kansas, and assured her that he could find her home using the Google search engine.[56]

In light of these particular and highly specific admissions, SGT Schell stated that he "attempted to entice" this

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see how much I'm Gona make u scream and cum . . . Just don't want to get caught making you scream"). Additionally, SGT Schell's sexually-suggestive questions illustrated in Pros. Ex. 1, at Enclosure 6 (and reflected in Specification 1 of Charge I) also depict concrete conversation in which he displayed characteristic grooming behavior. *See Winckelmann*, 70 M.J. at 408, n. 6 (citing *United States v. Brand*, 467 F.3d 179, 203 (2d Cor. 2006) and Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. LEGAL MED. 471, 479 (1998)).

[54] Pros. Ex. 1, at 3, para. 12.

[55] Pros. Ex. 1, at 4, para. 14, and Enclosure 4.

[56] Pros. Ex. 1, at 4, para. 18.

person he believed to be a 14 year-old girl.[57] Each portion of his conduct - ranging from his description of Krystal, sending photographs of his penis, his graphic sexual discussion, and his request for explicitly erotic photographs, to his request for her address - can be characterized as either "grooming" or "concrete conversation" based on this Court's recent decision in *United States v. Winckelmann*.[58] Either way his conduct is labeled, SGT Schell is unambiguous that his conduct abundantly satisfies the "substantial step" toward the commission of the crime: the enticement, persuasion, inducement, or coercion of a minor to engage in sexual activity.[59] For that reason, this Court should be highly reticent to find a substantial basis to question the plea.[60] However, this Court may add even more persuasive evidence to support the inference that SGT Schell understood the concept of "attempt" and its predicate elements.

b. The military judge's explanation of "Attempt" concepts in relation to Charge I

SGT Schell understood well the concepts and requirements related to any attempt crime, including under 18 U.S.C. § 2422(b). The military judge correctly and accurately described

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[57] Pros. Ex. 1, at 4, para. 17.
[58] 70 M.J. at 407-08 (discussing the legal sufficiency of the evidence of a "substantial step" in the context of 18 U.S.C. § 2422(b), citing to numerous persuasive fact-patterns from the federal circuit Courts of Appeals).
[59] *Garner*, 69 M.J. at 33.
[60] *Id.*

attempt under Article 80, UCMJ, immediately preceding the transition to 18 U.S.C. § 2422(b). All three specifications on the charge sheet alleged some type of attempt offense.[61] Before parsing out the differences between Article 80, UCMJ, and 18 U.S.C. § 2422(b), the military judge reminded SGT Schell of this theory of culpability linking all the offenses.

> MJ: [a]nd now some of these explanations, because they are attempted offenses, I'm going to explain to you the elements for those attempts and then we're going to discuss the underlying offenses themselves as well.[62]

To begin the providence inquiry, the military judge described the offense of attempted indecent language (Specification 1 of Charge I), and told SGT Schell that the acts must "amount[] to more than mere preparation, that is they were a substantial step and direct movement toward the commission of the intended offense, and that such acts apparently tended to bring about the commission of the offense . . ."[63] The military judge went on to further advise SGT Schell that a "substantial step is one that is strongly corroborative of your criminal intent and is indicative of your resolve to commit the offense . . ."[64]

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[61] *See* Charge Sheet.
[62] R. at 20.
[63] R. at 20.
[64] R. at 23.

After again advising SGT Schell that a "substantial step" was required as part of proving the attempt in Specification 2 of Charge I, SGT Schell said he remembered the explanation from a moment earlier regarding preparation, and declined the military judge's offer to repeat her explanation and definitions of the substantial step.[65]

Thereafter, the military judge shifted into her explanation of the elements of 18 U.S.C. § 2422(b), listed as Charge II. Though she clearly told SGT Schell that one element of this offense was the "attempt," the military judge did not further define it as she had moments earlier with respect to Charge I.[66] Nevertheless, the military judge reminded both sides that she "welcome[s] counsel, if I overlook something or misstate that it is not an issue at all for you to correct me,"[67] and asked both parties if they had any issues with the elements or definitions she just provided.[68] Both trial counsel and defense counsel replied that they had no questions, objections, or concerns with her fulfilling her obligations to define the elements under *Care*.[69]

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[65] R. at 25.
[66] R. at 27-28.
[67] R. at 27.
[68] R. at 28.
[69] R. at 28.

Probing even further, the military judge pivoted to SGT Schell himself, and asked him directly whether he understood the elements and definitions as she read them to him. His response:

> ACC: Yes, Ma'am.[70]

Moreover, this cautionary colloquy continued:

> MJ: Do you have any questions about any of them?
>
> ACC: No, Ma'am.
>
> MJ: Do you understand that your plea of guilty admits that these elements accurately describe what you did?
>
> ACC: Yes, Ma'am.
>
> MJ: Do you believe and admit that the elements and definitions taken together correctly describe what you did?
>
> ACC: Yes, Ma'am.[71]

Having just heard the requirement for, and definition of, a "substantial step," and knowing that Charge II was an "attempt" charge in the same way as the specifications of Charge I, it is unlikely and incredulous to assert, as he does now on appeal, that he lacked sufficient understanding of the concept.

c. The R.C.M. 802 Conference prior to the plea.

Finally, the record evidences an R.C.M. 802 conference, prior to SGT Schell's plea, during which the military judge discussed the elements of the "federal charge" that became the

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[70] R. at 29.
[71] R. at 29.

revised Specification of Charge II.[72] Though it is not precisely clear what was discussed in chambers, both parties agreed that this discussion about 18 U.S.C. § 2422(b), charged as an attempt theory, occurred and neither party had any grievance, objection, or concern with the military judge's summary of that discussion.[73]

Immediately prior to SGT Schell's plea it is clear that he had no misunderstanding of the nature of the Article 134, UCMJ, offense alleged in this Specification. The military judge recounted the R.C.M. 802 conference discussion over the "amendments" to the charge sheet, including the dismissal of three of the specifications and the "merger" of the terminal elements language to what became the lone remaining specification of an offense under Article 134, UCMJ.[74] Through counsel, SGT Schell affirmatively acknowledged that he had no questions, objections, or concerns with the resulting revised Charge Sheet.[75]

d. The full context of his plea evidences transparent understanding of the "substantial step" requirement

The military judge's omission of the "substantial step" description was not fatal as it would have been unnecessary and cumulative according to both SGT Schell and his own defense

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[72] R. at 7.
[73] R. at 7.
[74] R. at 6.
[75] R. at 6.

counsel. It would have been unnecessary in light of the informative pre-trial R.C.M 802 conference. It would have been unnecessary in light of the detailed stipulation of fact coupled with his detailed recitation during the military judge's face-to-face colloquy with SGT Schell. It would have been cumulative in light of sufficient description of "attempt" concepts and the definition of "substantial step" the military judge had *just* provided SGT Schell with respect to the Article 80, UCMJ, specifications. It would have been cumulative as evidenced by both SGT Schell and his defense counsel declining the military judge's invitation for more clarity or more explanation.

These three pivotal examples - easily drawn from the full context of the record - indicate that SGT Schell knew and understood the concept of "substantial step" as applied to Charge II.[76] In other words, "[i]t is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty."[77] Therefore, the only reasonable conclusion is that there is no "substantial basis in law or fact to question" the plea.

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[76] *See Redlinksi*, 57 M.J. at 119.
[77] *Fisher*, 58 M.J. at 304, citing *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992)).

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Conclusion

The "entire context of the record" easily establishes abundant evidence that SGT Schell understood the definition and meaning of "substantial step" as it applied to his prosecution under 18 U.S.C. § 2422(b).

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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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 21, 2013.

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