IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ALEXANDER S. WHEELER,
Staff Sergeant (E-5), USAF,
Appellant.

Crim. App. No. 38908
USCA Dkt. No. 17-0456/AF

BRIEF IN SUPPORT OF PETITION GRANTED

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UNITED STATES	)	**BRIEF ON BEHALF**
Appellee,	)	**OF APPELLANT**
v.	)	
	)	USCA Dkt. No. 17-0456/AF
Staff Sergeant (E-5)	)	Crim. App. No. 38908
ALEXANDER S. WHEELER,	)	
USAF,	)	
*Appellant***.**	)	

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

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Issue Presented

WHETHER THE LOWER COURT ERRONEOUSLY CONCLUDED CHARGE II WAS NOT PREEMPTED BY ARTICLE 120b, UCMJ, 10 U.S.C. § 920.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

On 1 May and 7-8 July 2015, Appellant was tried at a general court-martial by a military judge alone at MacDill Air Force Base, Florida. JA at 20, 27. Contrary to his pleas, Appellant was found guilty of one specification of *attempted sexual abuse of a child* in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880 (2012), and one specification of *attempted enticement of an individual under the age of 18*, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). JA at 25, 26, 90.

Appellant was sentenced to be reduced to the grade of E-1, to be confined for 30 months, to forfeit all pay and allowances, and to be discharged from the service with a dishonorable discharge. JA at 93. The General Court-Martial Convening Authority approved the sentence as adjudged. JA at 18.

On 19 April 2017, in a published opinion, the AFCCA affirmed the findings and the sentence after finding that "no error materially prejudicial to the substantial rights of Appellant occurred." JA at 15. The Appellate Records Branch notified the Appellate Defense Division a copy of the Court's decision was deposited in the United States mail by first-class certified mail to the last address provided by Appellant on 20 April 2017.

Statement of Facts

In April of 2014, the Pinellas County Sheriff's Office conducted Operation Guardian II, a joint law enforcement operation targeting child predators. Part of the operation included placing dating profiles in the persona of a female on different websites. JA at 54-55. On 11 April 2014, Appellant responded to an advertisement in the "Casual Encounters" section of the Craigslist website,[1] Tampa Bay, entitled "military HOT spot…. – w4m – 18 (Clearwater)." JA at 94. The substance of the advertisement read as follows:

> n town from the cold for a cpl wks… lookn to chill this wknd w/the right ppl. hmu w/stats n pic… this :) loooovvvvess soldier n air force… navy.. eh… marines… they get crazy… lol but real talk… no 75 yr old grandpas… no fakes… no trannies lol… no guys who act like girls… no fat couples… not a bbw n not into bbw… lol… military gets first reply :)

Id.

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[1] Craigslist is an online classifieds website. It includes a personals section, which is further broken down into more specific dating and sexual encounter advertisements. JA at 43.

Appellant responded to the advertisement at 12:51pm on 11 April 2014 through an e-mail address labeled "Bob Buckhorny." JA at 95. A series of 14 short e-mails followed, during which the agent in the persona of the person who had posted the advertisement explained that she was 14 years old, not 18, as the ad stated. JA at 45. The e-mails discussed where they could meet, and "Gaby"[2] provided her phone number for him to call or text "her." JA at 96. After "Gaby" suggested that Appellant call, he did, and a law enforcement officer named Amy White spoke to him on the phone impersonating "Gaby." JA at 56.

Throughout the conversation, "Gaby" discussed why she posted the advertisement as she did, explaining she was looking for an older male, and asked him what they could do sexually. JA at 65. Though at times Appellant's responses were vague, he engaged in a sexually charged conversation, to include asking "Gaby" if she had ever touched a penis before, and admitting he was masturbating while speaking with her. JA at 62-63. When questioned about what they could do, Appellant said they could kiss and touch each other, and that he could "show her the ropes." JA at 68. At the end of the first conversation, Appellant declined to meet up with "Gaby." JA at 70. By the following day, Appellant changed his mind and called "Gaby" to meet her. JA at 71-73. As Appellant drove to meet her, "Gaby" provided directions within the Wellington Arms Apartment complex.

[2] Throughout the record, "Gaby" is spelled both "Gaby" and "Gabby." Because "Gaby" is the spelling used in the charge sheet, it is also used in this brief.

JA at 80-81. Appellant was apprehended upon his arrival by the Clearwater Police Department. JA at 86-89.

The substantive allegation of Charge II reads as follows:

> …attempt to knowingly persuade, induce or entice… a person STAFF SERGEANT ALEXANDER S. WHEELER believed to be a child who had not attained the age of 18 years, to engage in sexual activity which, if undertaken, would constitute a criminal offense under 10 USC Section 920b, by means or facility of interstate commerce, to wit: the Internet and cellular telephone, in violation of 18 USC Section 2422(b), a crime or offense not capital.

JA at 25.

Argument

Standard of Review

The Court of Appeals for the Armed Forces reviews questions of law de novo. *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016).

Law

Article 134, UCMJ, 10 U.S.C. § 934, itself makes punishable acts specifically not covered in any other area of the code and is divided into three parts: offenses involving disorders and neglects to the prejudice of good order and discipline in the armed forces, conduct of a nature to bring discredit upon the armed forces, and offenses which violate Federal Law including law made applicable through the Federal Assimilative Crimes Act. *MCM*, Part IV, ¶ 60(c)(1). "If any conduct of this nature is specifically made punishable by another article of

the code, it must be charged as a violation of that article." *Id*. However, the President has placed limitations on Article 134, UCMJ, 10 U.S.C. § 934, as the preemption doctrine prohibits the application of Article 134 UCMJ, 10 U.S.C. § 934, to conduct covered by Articles 80 through 132, UCMJ, 10 U.S.C. §§ 880-932. *MCM*, part IV ¶ 60(c)(5)(a).

In *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979), the Court of Military Appeals (CMA) explained the preemption doctrine:

> [P]reemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element. However, simply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way.

To determine the applicability of the preemption doctrine, the CMA set out a two-part test:

> The primary question is whether Congress intended to limit the prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134, which, because of their sweep, are commonly described as the general articles.

United States v. Wright, 5 M.J. 106, 110-111 (C.M.A 1978). The preemption doctrine precludes assimilation if both questions are answered affirmatively. *Id*.

Article 120b, UCMJ, 10 U.S.C. § 920b, *Sexual Abuse of a Child*, reads "Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct." *MCM*, Part IV, ¶ 45b.a(b). "The term 'child' means any person who has not attained the age of 16 years." *MCM*, Part IV, ¶ 45b.h(4). The term "lewd act" includes:

> (C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or
>
> (D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excited sexual desire or deprave morals with respect to sexual relations.

MCM, Part IV, ¶ 45b.h(5)(C)-(D).

Article 120b, UCMJ, 10 U.S.C. § 920b, was enacted in 2012. This new Article 120b was intended to cover the spectrum of sexual offenses against children. Specifically, the analysis of the punitive article explains that "[t]he definitions of prohibited sexual acts, sexual contact, and lewd acts have been broadened to cover all sexual offenses against children currently covered under the 2007 version of Article 120(g), Article 120(i), and Article 120(j)." *MCM*, 2012, App. 23, Analysis of Punitive Articles, A23-16. The analysis of this new broadened Article 120b describes it as follows:

> The new "Sexual Abuse of a Child" offense under Article 120b(c), which proscribes committing a "lewd act" upon a child, was intended to consolidate the 2007 version of Article 120(f), Article 120(g), Article 120(i), and Article 120(j), by expanding the definition of "lewd act" to include any sexual contact with a child, indecent exposure to a child, communicating indecent language to a child, and committing indecent conduct with or in the presence of a child. Exposure, communication, and indecent conduct now include offenses committed via any communication technology to encompass offenses committed via the internet (such as exposing oneself to a child by using a webcam), cell phones, and other modern forms of communication. This change expands the pre-2012 definition of "indecent liberty" which proscribed conduct only if committed in the physical presence of a child.

MCM, 2012, App. 23, Analysis of Punitive Articles, A23-16.

In *United States v. Rodriguez*, an unpublished decision, the Army Court of Criminal Appeals reviewed the changes to Article 120 from 2007 through 2012, and the addition of the new Article 120b. In doing so, the court held as follows:

> We conclude after reviewing this history that Congress intended Article 120b(c) to cover all indecency crimes involving child victims. In short, the 2007 version of Article 120 was intended to cover all offenses prohibited under the old Article 134 offense of Indecent Acts or Liberties with a Child, and when Article 120b was enacted in 2012, it in turn was intended to cover all offenses prohibited under the 2007 version of Article 120(j). Moreover, after reviewing this history we agree with our sister court in Long "that Congress intended for Article 120b, UCMJ, to be a comprehensive statute to address sexual misconduct with children."

United States v. Rodriguez, 2015 CCA LEXIS 551, 23-24 (A.C.C.A. 1 Dec 15); JA at 123-124.

Analysis

At trial, defense counsel moved to dismiss Charge II, arguing it was preempted by Article 120b, UCMJ, 10 U.S.C. § 920b. App. Ex. VII. The trial judge denied the motion, finding Article 120b, UCMJ, 10 U.S.C. § 920b, is not intended to regulate interstate commerce crimes. JA at 91-92.[3] The trial judge erred when he stated that "Congress in 120(b) was not attempting to regulate interstate commerce crimes." JA at 92. The opposite is true. Congress was attempting to address new forms of technology – specifically the use of the Internet and cell phones that form the basis of Charge II – in Article 120b, UCMJ, 10 U.S.C. § 920b. The "effort to induce, entice or persuade a child to engage in a sexual act through the use of interstate commerce," the trial judge referenced is

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[3] The trial judge's findings on the record were as follows:

> Section 2422(b) criminalizes using a particular meaning or medium to persuade, induce, or entice a child in order to get them to engage in a particular act -- a sexual act. The type of language used is not the issue rather it is the effort to induce, entice, or persuade a child to engage in a sexual act through the use of interstate commerce. Congress in 120(b) was not attempting to regulate interstate commerce crimes. What it was criminalizing was engaging in lewd acts with children. Lewd acts including language that is indecent when it is communicated to a child. What 120(b) lacks is both interstate commerce and the intent to have a child engage in a sexual act during the transmission of the language through means of interstate commerce. Given this, preemption does not apply to the Specification of Charge II.

JA at 92.

addressed by Article 120b UCMJ, 10 U.S.C. § 920b, and is part of the complete spectrum of offenses meant to be addressed by the updated Article 120, UCMJ, 10 U.S.C. § 920. This includes direct reference to the use of the Internet and cell phones. The use of sexually charged language with a minor, through the Internet or a cell phone, is properly charged as either sexual abuse of a minor under Article 120b, UCMJ, 10 U.S.C. § 920b, or attempt under Article 80, UCMJ, 10 U.S.C. § 880. The attempt to engage in sexual activity with a minor is properly charged as an attempt to violate Article 120b, UCMJ, 10 U.S.C. § 920b. Appellant's conduct should not have been charged under Article 134, UCMJ, 10 U.S.C. § 934, as it is preempted by Article 120b, UCMJ, 10 U.S.C. § 920b, and Article 80, UCMJ, 10 U.S.C. § 880.

The AFCCA quoted the trial judge's decision at length, quoted above in footnote 1. JA at 9. The AFCCA distinguished between Article 120b, UCMJ, 10 U.S.C. § 920b, and 18 U.S.C. § 2422(b), summarizing its holding as follows:

> We find that the defining characteristic of a violation of 18 U.S.C. § 2422(b), as it was charged in this case, is the "enticement" element. With respect to 18 U.S.C. § 2422(b), Congress intended to criminalize adult use of a means of interstate commerce to intentionally "persuade, induce, or entice" a minor into engaging in sexual activity. In its current form, this is a harm that the UCMJ does not specifically address.

JA at 11 (citations omitted).

This distinction is erroneous. The use of a means of interstate commerce is directly addressed in Article 120b, UCMJ, 10 U.S.C. § 920b, to include the definition of "lewd act" expressly stating that communication of indecent language and indecent conduct can be "via any communication technology." *MCM*, Part IV, ¶¶ 45b.h(5)(C)-(D). The 2012 version of Article 120b codified interstate commerce in the offense, to include communication technology. However, the use of a means of interstate commerce is not a required element of 18 U.S.C. § 2422(b). The text of the law applies to "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…" 18 U.S.C. § 2422(b). The jurisdictional element is simply a jurisdictional element; the crime does not require use of interstate commerce. One can violate 18 U.S.C. § 2422(b) without using interstate commerce, as long as the person is within the special maritime and territorial jurisdiction of the United States. When the AFCCA relied on this Court's decision in *United States v. Schell*, it misapplied this Court's analysis and thus misinterpreted the elements of the offense. 72 M.J. 339 (C.A.A.F. 2013). The *Schell* court was ruling on the intent element of 18 U.S.C. § 2422(b), and did not imply that the use of interstate commerce was a required element of the offense. The offense was written to *include* the use of interstate commerce, not require it.

"Lewd acts" include "communicating indecent language to a child… to arouse or gratify the sexual desire of any person." *MCM*, Part IV, ¶ 45b.h(5)(C). "Lewd acts" also include "any indecent conduct… which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." *MCM*, Part IV, ¶ 45b.h(5)(D). Sexual enticement by language is a harm that is addressed by Article 120b UCMJ, 10 U.S.C. § 920b; it is necessarily included in the definition of lewd act. *Any* indecent conduct relating to children is also included in lewd acts, and is a broad category of harm that is encompassed by Article 120b. The AFCCA came to the exact same conclusion just last year, when it stated in an unpublished opinion that:

> Military case law supports the conclusion that when a servicemember communicates with a child under 16 years of age with the intent to engage in sexual acts or lewd acts, but unwittingly is conversing with an adult law enforcement agent, then the offender may be found guilty of attempted sexual assault or attempted sexual abuse of a child under Article 120b, UCMJ.

United States v. Costianes, No. ACM 38868, 2016 CCA LEXIS 391 (A.F. Ct. Crim. App. 30 Jun. 2016), 7; JA 132.

The trial judge's analysis in this case was incorrect because he narrowed lewd acts to only include "language that is indecent when it is communicated to a child." The trial judge's analysis ignored the "catch-all" of indecent conduct, which is a form of lewd act prohibited by 120b. *MCM*, Part IV, ¶ 45b.h(5)(D). The Military Justice Review Group called the indecent conduct provision a "catch

all" in its 2015 report, indicating that this would capture any indecent conduct not encompassed in the other categories of lewd acts. Military Justice Review Group, "Report of the Military Justice Review Group," December 22, 2015, 885.

Previous decisions that prosecution under 18 U.S.C. § 2422(b), by clause 3 of Article 134 is not preempted by Article 80, 120b, such as in *United States v. Schell*, 71 M.J. 574 (A.C.C.A. 2012) (rev'd on other grounds) are distinguished in that they rely on the 2006 version of Article 120, which predates the 2012 revision of the law. With the revision of Article 120, sexual offenses against children, including those through the Internet and cell phones, are appropriately prosecuted under Article 120b. Charge II was preempted by Article 120b, UCMJ, 10 U.S.C. § 920b, and the finding of guilt should be set aside by this Court.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the finding of guilt, and remand to the lower court for a new Article 66, UCMJ, 10 U.S.C. § 866, review.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on September 15, 2017.

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