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

REPLY BRIEF IN SUPPORT OF PETITION GRANTED

VIRGINIA M. BARE, Major, USAF
USCAAF Bar No. 34724
Appellate Defense Division
Air Force Legal Operations Agency
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

Counsel for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Issue Presented

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

Argument

Article 120b, UCMJ did not merely restate existing law, but expanded it to include a broad spectrum of sexual offenses against children. The differing definition of a child's age between the military offense and the federal enticement statute is not evidence of different fields of conduct proscribed by the separate statutes. Finally, the federal enticement statute is a subset of the conduct addressed by Article 120b.

The Government asserts, "§ 920b is a subset of already-codified law that was 'separated' out from the original Article 120 due, in part, because the previous Article 120 had been too 'cumbersome.'" Gov. Br. at 12. The Government's brief

argues that Article 120b, UCMJ is not intended to cover the spectrum of offenses against children, which include online enticement offenses. A review of the previous and current wording of the statute, and the analysis in the Manual for Courts-Martial, demonstrates that this is incorrect.

The 2007 version of Article 120 included several distinct sexual offenses against children. Article 120, UCMJ, 10 U.S.C. § 920 (2007). A "lewd act" with a child was charged as aggravated sexual abuse of a child. *Manual for Courts-Martial*, United States (MCM), App. 28, ¶ 45.a.(f). A lewd act required physical contact with genitals. MCM, App. 28, ¶ 45.a.(t)(10). Indecent liberty with a child required being in the physical presence of a child. The charged conduct could "consist of communication of indecent language as long as the communication is made in the physical presence of the child." MCM, App. 28, ¶ 45.a.(t)(11)F. Indecent conduct was broadly defined, but focused on observing or recording another person contrary to their reasonable expectation of privacy, and could be charged as an indecent act. MCM, App. 28, ¶¶ 45.a.(t)(12), 45.a.(k).

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) (2016 ed.). "The term 'child' means any person who has

not attained the age of 16 years." MCM, part IV, ¶ 45b.h(4) (2016 ed.). 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) (2016 ed.).

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, App. 23, at A23-16 (emphasis added) (2016 ed.).

The government's position that § 920b is intended to "consolidate parts of already-existing law" is contradicted by the plain language of the statute.

Although consolidation of the law was part of the revision, another aim was to expand definitions to include a broader array of offenses, as described in the Analysis of Article 120b quoted above. A plain language review of this spectrum of offenses shows that it includes online enticement. Using indecent language with a child is prohibited by Article 120b, any indecent exposure is prohibited by Article 120b, sexual contact and sexual acts are prohibited by Article 120b, and attempts to commit any of these offenses can be charged under Article 80.

The Government's position that enticement is a separate and distinct harm from committing any of these named offenses, or attempts to commit a named offense, is contrary to the language of the statute. For instance, the Government asserts, "one can entice a minor with non-lewd, non-sexual language, that in-and-of itself is not vulgar, such as, 'which Starbucks can you walk to' and 'seems like your parents are never home' and '[s]hoot, if you're cool with me just coming over then.'" Gov. Br. at 16. Normally, this might be considered a substantial step toward the commission of an offense, the planning stages of an attempted sexual act. However, the Government argues this is enticement. The Government's position is sexual misconduct with minors is properly charged under the UCMJ, unless that minor needed to be persuaded in any way to engage in the sexual conduct, sexual discussion, or sexual exhibition. The Government further argues, "persuasion is not a performance of a sexual act," as a distinction between the two

statutes. Gov. Br. at 18. However, persuasion, inducement, and coercion are substantial steps toward either sexual assault or sexual abuse offenses, and can properly be charged as attempts. This was discussed in *United States v. Winckelmann*, in which this Court explained that "online dialogue must be analyzed to distinguish 'hot air' and nebulous comments" from more "concrete conversation" that might include "making arrangements for meeting the (supposed) [minor], agreeing on a time and place for a meeting, making a hotel reservation, purchasing a gift, or traveling to a rendezvous point." 70 M.J. 403, 408 (C.A.A.F. 2011) (citations omitted). Thus, online language may be a substantial step toward committing a sexual offense, chargeable as attempt, or charged as a lewd act.

The Government argues Congress did not intend to preempt enticement offenses, in part due to the difference in age requirements. Military law requires that an offense against a child, as articulated in Article 120b, requires that the child be under 16 years old. MCM, part IV, ¶ 45b.a.(d)(2) (2016 ed.). In contrast, federal law requires only that the person be under 18. 18 U.S.C. § 2422(b). This Court granted review of whether Charge II, as charged in this case, is preempted by Article 134, UCMJ. In the facts of this case, the agent posed as a 14-year-old girl. J.A. at 44. As such, the issue before this Court is whether the offense of online enticement to sexual activity of a child under the age of 16 is preempted by Article 120b, UCMJ, not a child under the age of 18.

The Government's position that Congressional intent can be divined by the differing age requirements is an argument rejected by the United States Supreme Court. In *Williams v. United States*, the Supreme Court held that the Assimilative Crimes Act could not be used to expand the definition of statutory rape to include intercourse with minors aged 16 and 17 (which would have violated state law) when federal law defined the offending age as under 16. 327 U.S. 711 (1946). The Supreme Court's reasoning is summarized in their holding as follows:

> If Congress had been satisfied to continue to apply local law to this and related offenses it would have been simple for it to have left the offense to the Assimilative Crimes Act. A contrary intent of Congress has been made obvious. Congress repeatedly has increased its list of specific prohibitions of related offenses and has enlarged the areas within which those prohibitions are applicable. It has covered the field with uniform federal legislation affecting areas within the jurisdiction of Congress.

Williams, 327 U.S. at 724.

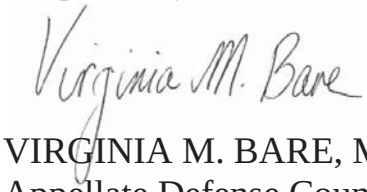
Similar to the comparison of state and federal law in *Williams*, Congress has amended the UCMJ several times to reflect their intent in defining military crimes. The federal enticement law, 18 U.S.C. § 2422(b), has been in its current form since 1998, though the minimum and maximum sentences were adjusted in 2003 and 2006. Congress passed Article 120b, UCMJ in 2012, well after the federal enticement law. Congress has "covered the field" of the spectrum of sexual offenses against minors in Article 120b.

The Government's argument that "families are still responsible for their children (and online behavior at home) until the child becomes an adult" as justification for the differences in the laws is unsupported by case law and legislative history. Gov. Br. at 13-14. It also implies that families have a special obligation to their children's online behavior that they do not have for their actual sexual behavior. Congress expressly regulated online communication with children in Article 120b, and defined "child" with a full knowledge of the federal enticement statement. The distinction relied upon by the government between the online sexual behavior and actual sexual behavior of minors does not flow from the statutory construct at issue.

The Government argues that 18 U.S.C. § 2422(b) is not a residuum of elements of Article 120b, and thus is not preempted by Article 120b. Communication to persuade, induce or coerce a minor to engage in sexual activity is a subset of the conduct proscribed by Article 120b. Article 120b includes all lewd acts against children, to include any indecent language or conduct done in the presence of the child or through any communication technology. Because Congress created Article 120b to proscribe these acts, the doctrine of preemption prohibits the government from picking a different statute for its prosecution.

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,



VIRGINIA M. BARE, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34724
United States Air Force
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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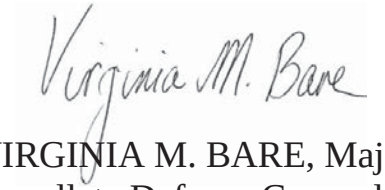

VIRGINIA M. BARE, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34724
United States Air Force
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 October 26, 2017.

VIRGINIA M. BARE, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34724
United States Air Force
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

Counsel for Appellant