16 October 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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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?

STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

The United States concurs with Appellant's statement of the case.

STATEMENT OF FACTS

In April of 2014, Appellant responded to an online ad for "Military Hotspot. W for M or Woman for Man, 18." (JA at 43.) Going by the alias "Bob

Buckhorny," Appellant wrote that he was "26, 6,0, 165lbs ddf clean guy that lives in Clearwater and is in the air force. I can wear my uniform for you when we meet if your [sic] into that! Im real and available now and all weekend! hit me up if interested." (JA at 95.) He received a reply from "Gaby," who in the first reply stated, "Air Force! 26 is kinda older … I don't turn 15 til later this yr… ur pics r cute tho…is ur name really bob buckhorny? lol… too funny…" (JA at 95.)

Within the first three emails after being told Gaby was 14 years old, Appellant told Gaby, "your[sic] pretty cute yourself," that she had "found a good guy," and that if she was "lucky" he "could be bad with [her]!" (JA at 95-96.)

Within the next three emails, Appellant asked Gaby where she lived, explained to her how close he lived, and asked Gaby to meet in person. (JA at 96.) Appellant offered to meet "in a public place" first "like starbucks" then "we could go to the beach or back" to his place. (Id.)

In total, Appellant and Gaby exchanged 42 emails over a two day period. (JA at 95-99.) At a certain point, Appellant then asked Gaby to move the conversation to the telephone. (JA at 51.) After initial pleasantries, the following conversation ensued:

ACC: So what are you up to?
WIT: Nothing, just hanging out.
ACC: Yea.
WIT: Bored.

ACC: Same here. I wanted to, you know, spice up the day do something new, you know, meet somebody new.
WIT: Yeah. What do you want to do?
ACC: Well, I don't know, we start by like going to Starbucks or something and see if we did [sic] each other and then go from there. What do you think?
…
ACC: What do you want to do?
WIT: I don't know. I've never really done this before…I'm not sure.
ACC: Well, YOLO.
…
WIT: Can you think of [a Starbucks] that I can maybe walk to?
ACC: Ah ha, no car, ha?
WIT: No. Well, I'm only 14 so.
…
ACC: Well, which Starbucks can you walk to?
…
ACC: Maybe you can think of somewhere closer. I don't know.
…
WIT: Like where the Bayside and stuff is.
ACC: Where the – yea, I think I do.
WIT: By the – like I live over there.
ACC: Okay, Cool. Cool.
WIT: I mean I don't know – there's nobody here.
ACC: Okay. Shoot, if you're cool with me just coming over then.
WIT: Yea, I mean that's – you could come over. I'm – my mom's –
…
WIT: My parents are – well, they're not here so and my older brother is at work.
ACC: Right on.
WIT: I don't know what time –
ACC: What's your address?
WIT: --like I don't know what time he's going to be home.

(JA 57-60.) Appellant told Gaby that he likes "[i]nexperienced girls." (JA at 62.)

WIT: Well, that's cool. Guys my age are so stupid.
ACC: Yea, that's true. Older guys are a lot better.
WIT: Older guys are better?
ACC: Yea, we know what we're doing.

(JA at 62-63.) Appellant told Gaby that he is "horny a lot" and that when he gets "horny" he "jack [his] dick." (JA at 62.) Appellant asked if Gaby "likes to masturbate." (JA at 64.) Appellant again asks for Gaby's address. (JA at 67.)

ACC: Hang out sounds like an idea.
WIT: Okay.
ACC: Cool. So what's your address?
WIT: I'm nervous.
ACC: It's all good. If you don't want to meet at your house we can just –
WIT: It's not that I don't want to ----
ACC: It's up to you.
…
ACC: Well if you want we could just make out.
WIT: Make out?
ACC: Yea.

(JA at 67.) Appellant then told Gaby she could "finally touch a dick." (JA at 68.) Appellant again notes that they have " [h]uge age gap" and tells Gaby that he no longer wants to come over because it's "kind of illegal." (JA at 70.) They hung up. (JA at 71.)

Appellant calls Gaby back the following day. (Id.) Appellant

ACC: I'm able to finally hang out.
…
ACC: Yea. So do not have parents or something if seems like your parents are never home.
…
ACC: So where are your parents at? Still up in Minot or?
…

ACC: Well, I could fix your lonely problem if you want to hang out.
WIT: You can?
ACC: Yup.
WIT: Yea, I'd love to. Can you come here?
ACC: Yea.
WIT: Or at least like pick me up or something.
ACC: Yea. I can come over there.
WIT: Okay.

(JA 71-75.) Appellant again asks Gaby where she lives, and starts driving to meet her. (JA at 75, 77.) Unbeknownst to Appellant at the time, Gaby was actually Special Agent WG and Sergeant AM. (JA at 44, 52.) Upon arrival, Appellant was taken into custody. (JA at 88.) During search incident to arrest, officers discovered a condom on his person. (JA at 88-89.)

Appellant was charged with Charge I: a violation of Article 80, UCMJ, for an attempt to commit a lewd act by "intentionally communicating to 'Gaby' indecent language, to wit: stating the accused like to 'jack his dick,' stating 'Gaby' 'can finally touch a dick' and asking whether 'Gaby' likes to masturbate . . . with an intent to arouse or gratify" his sexual desire. (JA at 25.)

Appellant was also charged with Charge II: a violation of Article 134 for an attempt to "knowingly persuade, induce, or entice an individual . . . believed to be a child who had not attained the age of 18 years . . . in violation of 18 USC Section 2422(b), a crime or offense not capital." (Id.) To both offenses, Appellant was found guilty. (JA at 90.)

On appeal, Appellant asserted that the government was preempted from charging the Article 134 offense. United States v. Wheeler, 76 M.J. 564, 567 (A.F. Ct. Crim. App. 2017). The Air Force Court of Criminal Appeals determined that "[c]onsistent with the plain language of Article 120b, UCMJ, 18 U.S.C. § 2422(b), and the holding in Schell, we find that the Article 134 clause 3 offense" was "not composed of a residuum of elements of any other enumerated UCMJ offenses." Id. at 572. The Court found that the defining characteristic of 18 U.S.C § 2422(b) is the "enticement" element, which was not specifically addressed in the UCMJ. Id.

SUMMARY OF THE ARGUMENT

Appellant has failed to demonstrate that Congress intended Article 120b, 10 U.S.C. §920b, to cover the field of enticement crimes against children in a complete way, as Congress included no specific language demonstrating such intent, the legislative record demonstrates that Article 120b consolidated versions of previous code, which did not themselves preempt Article 134, and the plain language of Article 120b does not preempt Article 134. Additionally, Appellant has failed to demonstrate that Charge II is a "residuum" of elements of Article 120b.

ARGUMENT

CHARGE II WAS NOT PREEMPTED BECAUSE CONGRESS DID NOT INTEND ARTICLE 120b,

UCMJ, TO COVER THE FIELD OF ENTICEMENT, THE PLAIN LANGUAGE OF ARTICLE 120b DOES NOT COVER ENTICEMENT, AND ARTICLE 134 IS NOT A "RESIDUUM" OF ELEMENTS OF ARTICLE 120b.

Standard of Review

This Court reviews questions of statutory interpretation, including preemption, de novo. United States v. Schloff, 74 M.J. 312, 313 (C.A.A.F. 2015); United States v. Benitez, 65 M.J. 827, 828 (A.F. Ct. Crim. App. 2007).

Law and Analysis

The crime as charged is not preempted by Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b, because Congress did not intend Article 120b to cover the field of enticement crimes against children. Moreover, the offense charged here, Article 134, UCMJ, a violation of 18 U.S.C. §2422(b), coercion or enticement, is not a residuum of elements of Article 120b.

Congress adopted Article 134 to cover, *inter alia*, "all crimes and offenses not capital" that are "not specifically mentioned" in the Uniform Code of Military Justice. 50 U.S.C. §§ 551-736 (1950), Public Law 506, 81st Congress, 64 Stat. 108, c. 169 § 1. Referred to as "clause 3" offenses under Article 134, the offenses include those of unlimited application prohibited by Title 18 of the United States Code. Manual for Courts-Martial, United States, Ch. XXVIII, para. 213 (1951 ed.); Manual for Courts-Martial, United States, pt. IV, para. 60.c.(1)(2017 ed.)

The legal framework for considering the preemption doctrine has remained relatively unchanged since it was first judicially-considered in United States v. Norris, 8 C.M.R. 36 (C.M.A. 1953); United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979). This Court has held that the preemption doctrine applies if two questions are answered in the affirmative:

> The primary question is whether Congress intended to limit 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. McGuinness, 35 M.J. 149, 151-52 (C.M.A. 1992). Additionally, when considering Congressional intent, this Court

> require[s] Congress to indicate through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ.

United States v. Anderson, 68 M.J. 378, 387 (C.A.A.F. 2010); *see* Kick, 7 M.J. at 85. Appellant must show "that Congress intended the other punitive article to cover a class of offenses in a complete way." Kick, 7 M.J. at 85.

a. Congress did not intend Article 120b, UCMJ, 10 U.S.C. § 920b, to cover enticement offenses in a complete way.

Appellant has failed in three separate ways to demonstrate that Congress intended Article 120b, UCMJ, 10 U.S.C. § 920b ("§920b"), to cover all enticement crimes against children. First, Congress did not expressly or directly indicate their intent to cover this class of offenses. Second, Congress intended § 920b to be consolidated from the previous version of §920, Article 120, which itself did not preempt Article 134 and 18 U.S.C. §2422. Lastly, the plain language of the law demonstrates that Congress did not intend § 920b to cover all enticement crimes.

First, Congress did not directly or expressly indicate that the particular enticement or coercion conduct in this case was covered under §920b. The United States respectfully urges the Court to consider the matter based on Anderson, 68 M.J. at 386-87. The Court in Anderson looked to express legislative history when considering preemption, just as the precursor of this Court did when first considering preemption in United States v. Norris, 8 C.M.R. at 37. It must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way. Anderson, 68 M.J. at 386-87. Here, that is simply not the case.

In Norris, the Court of Military Appeals considered whether "wrongful taking" while intoxicated is a permitted offense under Article 134. 8 C.M.R. at 37. The Court identified that the proposed offense constituted an Article 121 violation without the requisite specific intent. Id. The Court reasoned that "[w]e cannot

grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses *expressly defined* by Congress and permit the remaining elements to be punished as an offense under Article 134." Id. at 39 (emphasis added). The Court reviewed legislative history and determined that Congress, in Article 121, "covered the entire field of criminal conversion for military law." Id. Thus, the central question of preemption was whether Congress "expressly defined" an offense elsewhere and whether that express definition was intended to cover the complete field of crimes at issue. Likewise in Anderson, the Court looked to direct legislative intent. The Court in Anderson, held that Article 104, UCMJ was not preempted by Article 134, UCMJ because if the distinction between the offenses as charged "was not permissible in light of Article 104, UCMJ, Congress was free to clearly state that Article 104, UCMJ, supersedes Article 134, UCMJ, in this context." Id. at 387.

Appellant has failed to demonstrate any direct or express legislative intent that the new §920b was drafted to create a new military-specific offense for the enticement of children and cover all enticement of children offenses previously charged under Article 134 and 18 U.S.C.§ 2422.

Congress did intend, however, that §920b be drawn from the previous version of §920 and already-codified military crimes against children, which themselves did not preempt clause 3 charging of enticement through Article 134.

The new §920b was enacted with the passage of the National Defense Authorization Act of 2012 (NDAA). When moving the Act to the full Senate, the Committee on Armed Services recommendation was to:

> amend section 920 of title 10, United States Code (Article 120 of the Uniform Code of Military Justice (UCMJ)) to **separate** Article 120, UCMJ, into three **separate** articles of the UCMJ: Article 120, UCMJ, would apply to the offenses of rape and sexual assault of any person; Article 120b, UCMJ, would apply to sexual offenses against children; and Article 120c, UCMJ, would apply to other non-consensual sexual misconduct offenses.

112 S. Rpt 26, Title V, Subtitle E—Military Justice and Legal Matters Generally, *Reform of offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice* (emphasis added). These changes were recommended by the Joint Services Committee (JSC) on Military Justice. Id. The JSC specifically recommended to Congress that Article 120 was "cumbersome and confusing," that the burden shifting to defense on the issue of "consent" had been reviewed by this Court, and other issues with lesser-included offenses created confusion.[1] U.S. Dep't of Def., *Report of the Defense Task Force on Sexual Assault in the Military Services*, 80-81 (2009).

[1] The JSC noted that the amended Article 120, UCMJ, sets forth "new sex-related offenses constituting degrees" of sexual assault offenses, and specifically noted that Article 134, UCMJ, offense of communicating indecent language in the presence of a child was now part of the new Article 120. U.S. Dep't of Def., *Report of the Defense Task Force on Sexual Assault in the Military Services*, H-2, fn 207 (2009). The JSC specifically stated that communicating indecent

Thus, Congress indicated that §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."[2] Id. This aligns with the discussion thereafter provided by the Joint Services Committee on Military Justice on the topic of the "Sexual Abuse of a Child" offense and what constitutes a "lewd act." Manual for Courts-Martial, United States, App. 23 at A23-16 (2012 ed). Specifically:

> 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),[3] Article 120(g),[4] Article 120(i),[5] and Article 120(j),[6] by expanding the definition of "lewd act"

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language offenses under Article 134 were included in the consolidation, but the JSC did not state the same for enticement offenses previously charged under Article 134.

[2] In 2001, the "Cox Commission" had recommended the repeal of UCMJ rape provisions out of Article 134, and recommended the creation of a comprehensive criminal sexual conduct article that was similar to the model penal code or Title 18 of the United States Code. Id. That new comprehensive sexual misconduct article, Article 120, was effective for offenses committed after 1 Oct 2007. Id. In practice, this one-stop article had become "cumbersome and confusing." Id.

[3] *Aggravated Sexual Abuse of a Child.* Any person subject to this chapter who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct. 10 USC § 920(f)(2008).

[4] *Aggravated Sexual Contact With a Child.* Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct. 10 USC § 920(g)(2008).

[5] *Abusive Sexual Contact With a Child.* Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct. 10 USC § 920(i)(2008).

[6] *Indecent Liberty With a Child*. Any person subject to this chapter who engages in indecent liberty in the physical presence of a child (1) with the intent to arouse, appeal to, or gratify the sexual desire of any person; or (2) with the intent to abuse, humiliate, or degrade any person; is

> to include any sexual contact with a child, indecent exposure to a child, communicating indecent language to a child, committing indecent conduct with or in the presence of a child.

Id. Prior to this consolidation, the above-referenced subsections did not preempt charging Article 134 and 18 U.S.C. § 2422. *See* United States v. Schell, 71 M.J. 574, 582 (A.C.C.A 2012), *rev'd in part*, 72 M.J. 339 (C.A.A.F. 2013); *see also* United States v. Reese, 76 M.J. 297 (C.A.A.F. 2017); United States v. Winckelmann, 70 M.J. 403 (C.A.A.F. 2011); United States v. Pierce, 70 M.J. 391 (C.A.A.F. 2011).

Congress did not intend §920b to replace enticement statutes, as further evidenced by the definition of "child." Title 10 U.S.C. §920b only applies if a victim is under 16 years of age, while §2422 applies to victims who are under 18 years of age. *Compare* 10 U.S.C. §920b.(h)(4) and 18 U.S.C. §2422(b). As this Court previously noted, Congress intended §2422 to address those who "lure children," but also to more broadly "protect children and families from online harm." United States v. Schell, 72 M.J. 339, 344 (C.A.A.F. 2013). Congress did not alter the §920 definition of "child" when culling §920b out of the previous statute. *Compare* 10 U.S.C. §920b.(h)(4) and 10 U.S.C. §920(o)(2)(2007). Yet even after the NDAA, families are still responsible for their children (and online

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guilty of indecent liberty with a child and shall be punished as a court-martial may direct. 10 USC § 920(j)(2008).

behavior at home) until the child becomes an adult. Thus, these differing ages, 16 and 18, suggest Congress did not intend §920b to cover the field of enticement.

Because Congress intended §920b to "consolidate" parts of already-existing law, and Congress did not specifically state that §920b replaced charging §2422 through Article 134, Congress did not intend §920b to occupy the field of enticement.

Appellant asserts that the lower Court's holding in United States v. Costianes, an unpublished opinion, is instructive here. (App. Br. at 11.) There, the lower Court determined that the preemption doctrine "foreclosed the assimilation of state laws broadly aimed at punishing sexual misconduct with minors." United States v. Costianes, 2016 CCA Lexis 391, *17, (A.F. Ct. Crim. App. 30 June 2016). The facts and holding in Costianes are distinguishable from the current case. In Costianes, unlike here, the convening authority used the Assimilative Crimes Act (ACA) to incorporate a broad state law from South Carolina. Id. at *15. The Court relied on the state-level incorporation in determining that the state law was preempted by federal statute. Id. The Air Force Court reasoned that the Supreme Court, in Lewis v. United States, 523 U.S. 155, 118 (1998), expressly rejected a strict elements test "[w]hen analyzing whether a state law is preempted" and that "it seems fairly obvious that the [federal Assimilative Crimes Act] will not apply where both state and federal statutes seek to punish approximately the same

wrongful behavior." 2016 CCA Lexis 391, *16-17 (citing United States v. Rodriguez, 2016 CCA Lexis 145,*6 (Army Ct. Crim. App. 7 March 2016)). Thus, federal, not state law, applied. While the lower Court pointed to Article 120b as a federal statute that preempted the South Carolina law under clause 1 and clause 2 Article 134 offenses, the lower Court specifically pointed to 18 U.S.C. § 2422(b) to demonstrate why a charge under "clause 3" of Article 134 also preempts the use of the South Carolina law.[7] Id. at *17. The current case was not charged under the Assimilative Crimes Act.

Finally, the plain language of §920b demonstrates that Congress did not intend to cover enticement crimes in a complete way. Unless the text of a statute is ambiguous, "the plain language of a statute will control unless it leads to an absurd result." United States v. Schell, 72 M.J. 339, 343 (C.A.A.F. 2013) (citing United States v. King, 71 M.J. 50, 52 (C.A.A.F. 2012)). One commits "sexual abuse of a child," if one "commits a lewd act **upon** a child." 10 U.S.C. § 920b (emphasis added). Conversely, the *actus reus* of the enticement statute is to cause a minor to take action themselves. Congress intended the enticement statute "to address those who lure children out to actually engage in illegal sexual activity . . ." United States v. Schell, 72 M.J. 339, 344, (C.A.A.F. 2013)(citing United States v. Schell,

[7] The Air Force Court of Criminal Appeals opined that the government "could have (and should have) charged Appellant under the UCMJ with an attempted violation of Article 120b, UCMJ" instead of charging under clause 1 or 2, Article 134, for crimes that effect good order and discipline, or service discrediting. Id. at *13-14. This dicta was not relevant to their clause 3 analysis, where they provided no similar opinion.

71 M.J. 574, 579 (A.C.C.A. 2012); H.R. Rep. No. 104-458 (1996); H.R. Rep. No. 104-652, § 508, at 1130 (1996) (Conf. Rep.)). There is "nothing in the legislative history suggesting that an accused had to intend to actually engage in a sexual crime." Id. (citations omitted).

A violator of §920b, however, must commit sexual conduct, which must of-itself be immoral and lewd, grossly vulgar, obscene, or repugnant. 10 U.S.C. § 920b.(h)(5)(D). Appellant asserts that an attempt to coerce a child - irrespective of the time involved, the manner it occurs, or the vulgarity of the actual words used - into the prospect of future sex is a self-authenticated sexual act. But, 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." (JA 58-75.) The plain language of the statute prohibits lewd conduct, not prospective or potentially lewd conduct. The plain language prohibits sexual conduct that one does "upon" a child, not luring a child into performing sexual conduct themselves. Thus, the plain language does not also include enticement or coercion offenses.

b. The charge of Article 134, UCMJ and 18 U.S.C. §2422 was not preempted because §2422 is not composed of a "residuum" of elements of Article 120b.

The theory of liability under § 2422 is one of persuasion or enticement, not of sexual acts or sexual conduct. Persuading a child to engage in a sexual act is not

itself a sexual act. Congress "has made 'a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.'" United States v. Brooks, 60 M.J. 495, 498 (C.A.A.F. 2005)(citing United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000), *cert. denied,* 532 U.S. 1009 (2001)). Compare 18 U.S.C. §§2422 and 2427, which establish liability for enticing a minor into sexual activity for the purposes of child pornography, with 18 U.S.C. §§ 2251, 2252, and 2251A, which create the separate offense of sexual exploitation and production. *See* United States v. Hill, 2016 CCA Lexis 291, unpub. at 6-7 (A.F. Ct. Crim. App. 9 May 2016).

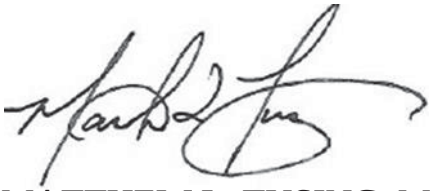
The mere fact that two charges in a case have parallel facts does not require preemption when "as charged they are nonetheless directed at distinct conduct." Anderson, 68 M.J. at 387. The government must prove that an accused: (1) had the intent to commit the substantive offense; and (2) took a substantial step toward persuading, inducing, enticing or coercing a minor to engage in illegal sexual activity. United States v. Schell, 72 M.J. 339, 344 (C.A.A.F. 2013) (citing Brooks, 60 M.J. at 498-99; Winckelmann, 70 M.J. at 407). The intent required to support an attempt conviction under §2422(b) is "the intent to commit the predicate offense – that is, the intent to persuade, induce, entice, or coerce a minor for the purposes of engaging in illegal sexual activity." Schell, 72 M.J. at 345. One need not actually intend that a sexual act ultimately occur. Id. Conversely, the theory of

liability for "Sexual Abuse of a Child" under §920b requires some sort of sexual conduct relating "to sexual impurity." 10 U.S.C. §920b.(h)(5). Because persuasion is not a performance of a sexual act, §2422 is aimed at distinct conduct and is not a residuum of elements of Article 120b.

This Court should affirm the findings and sentence for four reasons. First, Congress did not specifically state that §920b replaced enticement crimes. Second, Congress specifically noted that §920b is a consolidation of previously-enacted crimes against children, which did not themselves preempt Article 134. Third, the plain language requires that the sexual conduct be committed upon a child, not the potential of future sexual conduct upon a child. Finally, 18 U.C.S. § 2422 does not contain a "residuum" of elements of §920b. This Court should affirm the findings and sentence.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court affirm the findings and sentence.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 October 2017 via electronic filing.

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Date: 16 October 2017