IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. MICHAEL R. RODRIGUEZ Boatswain's Mate Second Class U.S. Coast Guard, Appellant	APPELLANT'S BRIEF Crim. App. Dkt. No. 1450 USCA Dkt. No. 18-0350/CG

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

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Issue Presented

WHETHER *UNITED STATES v. ORBEN*, WHICH ESTABLISHED WHAT THE GOVERNMENT MUST SHOW TO PROVE INTENT FOR INDECENT LIBERTIES UNDER ARTICLE 134 (THE PRECURSOR TO ARTICLE 120b), APPLIES TO THE INTENT ELEMENT OF ARTICLE 120b(c), SEXUAL ABUSE OF A CHILD.

Statement of Statutory Jurisdiction

The U.S. Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), because the convening authority approved a sentence that includes a punitive discharge. 10 U.S.C. § 866(b)(1) (2018). The CGCCA affirmed the findings and sentence and Appellant timely filed a Petition for Grant of Review under Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3) (2018). This Court granted the Petition and therefore has jurisdiction under Article 67, UCMJ. 10 U.S.C. § 867 (2018).

Statement of the Case

On September 19 to 21, 2016, a military judge sitting as a general court-martial tried Boatswain's Mate Second Class (BM2) Michael R. Rodriguez. Contrary to his pleas, the military judge convicted him of sexual abuse of a child (one specification) and adultery (one specification) in violation of Articles 120b and 134, UCMJ, 10 U.S.C. §§ 920b, 934 (2012). The military judge acquitted BM2 Rodriguez of sexual abuse of a child (one specification), obstruction of

justice (one specification), and indecent language (one specification), under Articles 120b and 134, UCMJ, 10 U.S.C. §§ 920b and 934.

The military judge sentenced BM2 Rodriguez to reduction to E-1, eighteen months' confinement, and a bad-conduct discharge. (JA at 133.) On February 27, 2017, the convening authority approved the adjudged sentence. (JA at 14-18.)

On June 27, 2018, the CGCCA affirmed the findings and sentence as approved by the convening authority. *United States v. Rodriguez*, No. 1450 (C.G. Ct. Crim. App. Jun. 27, 2018). This Court granted BM2 Rodriguez's Petition for Review on November 29, 2018.

Statement of Facts

Background

This case was the inadvertent byproduct of an investigation of BM3 Darius [last name omitted] for allegedly sexually assaulting his wife Eleonore. BM2 Rodriguez and Eleonore had an affair in April and May 2015. (JA at 45-47.) During the affair, Eleonore told him that her husband BM3 Darius had sexually assaulted her and BM2 Rodriguez reported that to the authorities. (JA at 48.) During the investigation that followed, Coast Guard Investigative Service (CGIS) agents obtained a warrant for the search and seizure of Eleonore's phone. (JA 27-28.) This investigation did not lead to criminal charges filed against BM3 Darius, but it did reveal a series of sexual text messages between BM2 Rodriguez and

Eleonore. These messages caught the attention of Coast Guard prosecutors, who in turn directed further investigation by CGIS.

The messages between BM2 Rodriguez and Eleonore were part of an intimate relationship between the two. Their relationship at the time was secret because both were in other romantic relationships. BM2 Rodriguez was engaged to Krystle, whom he ultimately married in 2015. (JA at 78.) From 2013 until the time of trial in 2016, BM2 Rodriguez and Krystle lived together with Krystle's three biological children from a prior marriage. (JA at 95-96.) In addition to two sons, Krystle had an eight-year old daughter, VG, who is the subject of the Article 120b charge alleging sexual abuse of a child. (JA at 94.)

The Text Message Exchanges.

Within the eighty-nine-page compilation of text messages law enforcement extracted from Eleonore's phone are several exchanges with BM2 Rodriguez. In those messages, BM2 Rodriguez and Eleonore professed their attachment to each other and shared their sexual fantasies. Eleonore and BM2 Rodriguez mutually fantasized about incorporating feet into their sexual activity. (JA at 133.)

Eleonore was first to introduce foot fantasy into the conversation. (JA at 133.) In her testimony she explained: "I like feet. I have a fetish, a sexual fetish to feet. And I opened that up to Mike and Mike too as well had a sexual fetish to feet." (JA at 61.)

On April 16, 2015, the following exchange occurred when Eleonore mentioned watching pornography and masturbating the night before:

BM2 Rodriguez:	I thought so. Perhaps have [an adult co-worker's] feet in your face while you watch pornhub and masturbate.
. . . .	
Eleonore:	Lol. Aww
Eleonore:	And hmmm I would she's got oriental short little feet they are adorable.
BM2 Rodriguez:	I know they do. Probably for [*sic*] the whole thing in my mouth like I do with [VG].
Eleonore:	Haha

(JA at 135.)

And a bit later on the same morning:

BM2 Rodriguez:	I was showing u [VG']s feet Posing them for u
Eleonore:	And the crazy thing was i was pretty upset. The only feet i wanted were yours
BM2 Rodriguez:	Mmmmm
Eleonore:	Those little toes tho do make me happy but not the same
BM2 Rodriguez:	I wanted to see u lick [VG']s feet And suck on mine I let u rub my feet
Eleonore:	Touching your feet was the best i felt ten times better. But i was sad i only got one theyre not even Tried to make krystle think i was new at it but i knew exactly how to please ur feet

(JA at 137.)

At trial Eleonore testified that the message about posing VG's feet was accompanied by a picture. The analysis of her phone, however, did not produce the picture. (JA at 67.) Eleonore testified that she deleted it. *Id*.

The alleged lewd acts.

The discovery of these messages resulted in interviews by CGIS, Child Protective Services, and local law enforcement to determine whether BM2 Rodriguez committed misconduct with VG. (JA at 19-20.) Although Child Protective Services found no substantiated concern and local authorities did not pursue the case, the Coast Guard referred charges of child sexual abuse to a General Court-Martial. (JA at 19-20.)

Three eyewitnesses testified about the charged lewd acts—Eleonore, Krystle, and Krystle's daughter, VG. VG testified as follows:

Trial Counsel:	Does [BM2 Rodriguez] kiss your feet?
VG:	Sometimes.
Trial Counsel:	Can you tell me about that when he kisses your feet?
VG:	Umm he likes to play around with me, he tickles it and then it kisses it like a real quick kiss. And that's it.
Trial Counsel:	Does he ever kiss your feet when he's painting your toenails?
VG:	No, sir.
Trial Counsel:	Does he ever ask you to do anything before he kisses your feet?
VG:	No, sir.
Trial Counsel:	Does he ever say anything when he's kissing your feet?

VG: No, sir.

(JA at 41.)

VG testified that her mother was sitting next to her when BM2 Rodriguez kissed her feet. (JA at 42.) Krystle's testimony on the alleged lewd acts was as follows:

Trial Counsel: Do you ever see him give raspberry's to her feet?
Krystle: Like?
Trial Counsel: Like blowing on her feet with his lips?
Krystle: Yes, aggravating, yes.
Trial Counsel: And have you ever seen BM2 Rodriguez place her feet near his mouth?
Krystle: You have to, to kiss it. I mean.
Trial Counsel: Have you ever seen BM2 Rodriguez suck on ---
Krystle: No, sir.

(JA at 97.) Krystle also testified that VG never complained about BM2 Rodriguez and that VG loves him and enjoys being around him. (JA at 102). According to her testimony, BM2 Rodriguez also did the same to her two older sons to "aggravate them" and that these interactions were like those of a typical father figure. Finally, BM2 Rodriguez did not spend time alone with VG. (JA at 100-102.)

Eleonore, who was apparently present at some point when BM2 Rodriguez kissed VG's feet, testified:

> So him and [VG] were both very playful towards each other with Krystle being around. And he would play around and kiss on her feet or be like tossing her onto the couch and give her raspberry's towards her feet.

(JA at 72.)

Neither counsel nor the military judge asked any of the witnesses when or how often this kissing occurred.

Summary of Argument

BM2 Rodriguez was charged with sexual abuse of a child for kissing his stepdaughter's feet. Where the act charged is not inherently lewd, this Court's decisions have allowed convictions when the act is accompanied by behavior that demonstrates the prohibited intent to arouse or gratify sexual desires. The CGCCA affirmed the conviction for child sexual abuse without evidence of accompanying behavior or language manifesting the prohibited specific intent by BM2 Rodriguez.

The CGCCA erred and the conviction must be set aside because the decisions requiring an external manifestation of specific intent apply equally to the present Article 120b offense as they do to past Article 134 indecent liberties offenses. Accompanying behavior or language is indispensable to avoid unconstitutional application of the child sexual abuse offense, which would otherwise be impermissibly vague and overbroad.

The evidence of intent relied on by both the military judge and CGCCA—a text message exchange between BM2 Rodriguez and Eleonore—was legally

insufficient because it did not accompany the alleged touching. Because the facts and circumstances established by VG, her mother, and Eleonore demonstrate the conduct was accompanied by language and behavior demonstrating BM2 Rodriguez acted with innocent, fatherly intent, the conviction must be set aside.

Argument

UNITED STATES v. ORBEN ESTABLISHED THAT THERE MUST BE EVIDENCE OF ACCOMPANYING BEHAVIOR OR LANGUAGE THAT DEMONSTRATES THE ACCUSED'S SPECIFIC INTENT. THE LEWD ACT CHARGED IS NOT INHERENTLY INDECENT. TWO EYEWITNESSES AND THE VICTIM TESTIFIED THAT THE CHARGED KISSING WAS FATHERLY IN NATURE. THE EVIDENCE OF THE ALLEGED SPECIFIC INTENT IS LEGALLY INSUFFICIENT.

Standard of Review

This Court reviews questions of legal sufficiency *de novo*. *United States v. Spicer*, 71 M.J. 470, 472 (C.A.A.F. 2013). Legal sufficiency review requires the appellate court to conclude that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt when the evidence is viewed in the light most favorable to the prosecution. *Id.*; *United States v. Day*, 66 M.J. 172, 173-74 (C.A.A.F. 2008); *United States v. Miller*, 67 M.J. 87, 91 (C.A.A.F. 2008).

Analysis

A. Without the specific intent element, the offense of sexual abuse of a child by touching is void for vagueness.

Indecent liberties offenses are uniquely vulnerable to constitutional challenges for vagueness because of the immense scope of conduct encompassed with little definition. *See, e.g., Sullivan v. State*, 986 S.W.2d 708, 712 (Tex. App. 1999) (addressing vagueness challenge to Texas sexual contact offense); *People v.*

Martinez, 11 Cal. 4th 434, 442 (Cal. 1995) (addressing vagueness challenge to California lewd conduct offense); *State v. Driscoll*, 53 Wis. 2d 699, 701-02 (Wis. 1972) (addressing vagueness challenge to indecent liberties offense); *State v. Stuhr*, 96 P.2d. 479 (Wash. 1939) (same).

The offense charged here is no more definite despite the labyrinth of internal, cross-referencing definitions in the Article. Under Article 120b, a service member may be charged with any "indecent conduct" done in the presence of a child and any "touching … with intent to arouse or gratify the sexual desire of any person." The offense encompasses acts "causing another person" to touch, touching "either directly or through the clothing, any part of any person," and concludes "[t]ouching may be accomplished by any part of the body." Art. 120(g)(2)(B), UCMJ, 10 U.S.C. § 920(g)(2)(B). In short, a sexual abuse of a child charge could include any physical contact between a child and adult with the requisite intent to arouse or gratify any person's sexual desire.

Consequently, Article 120b is no less susceptible to challenge as unconstitutionally vague than its predecessor and similar state offenses. In response to the breadth of the "sexual contact" definition the Judicial Proceedings Panel has suggested that the words "'any touching, or causing another person to touch, either directly or through the clothing, any body part of any person[]' should be deleted" from the definition of sexual contact under Article 120. *Judicial*

Proceedings Panel Report on Article 120 of the Uniform Code of Military Justice (JA at 157-58.)

The intent element in Article 120b is constitutionally indispensable when the sexual abuse charge alleges non-sexual body parts were touched. Without it, the sexual contact charge violates the vagueness doctrine, which requires criminal statutes give a person of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; the doctrine safeguards against criminal enactment that authorizes or encourages arbitrary or discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Without the intent element, the offense is overbroad. *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (holding loitering conviction violated due process for lack of evidence of culpable behavior.).

The requirement to prove a specific intent satisfies the basic requirement that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252 (1952). This requirement bears particular importance where the act prohibited in the offense may be lawful in some circumstances and not in others. *See United States v. X-Citement Video, Inc*., 513 U.S. 64, 73 (1994) (holding that the *mens rea* of knowledge applied to the "character and content" of child pornography because "the age of the performers is the crucial element separating legal innocence from wrongful conduct").

B. Proof of specific intent must be connected to the charged act.

Article 120(g)(2)(B) defines "sexual contact" as:

> any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done *with* an intent to arouse or gratify the sexual desire of any person.

10 U.S.C. § 920(g)(2)(b) (emphasis added). The first indication that proof of specific intent must be connected to the act is the use of the preposition "with." Joining the act and intent by the preposition "with" requires the act and intent coexist in time and place. While evidence from other points in time may be admissible to prove such an intent, *see* MIL. R. EVID. 803(3), the intent to arouse or gratify sexual desires must exist in the accused at the moment of the touch.

It is not enough that the accused held the specific intent at some point in time and did the prohibited act at a different time. Take, for example, the offense of possession of a controlled substance with intent to distribute. It does not suffice merely to prove that at some point the accused intended to distribute narcotics. Rather it must be proven that when he possessed the narcotics he intended to distribute them. *United States v. Gomez-Tostado*, 597 F.2d 170, 173 (9th Cir. 1979) (holding that proof of intent to distribute heroin sufficient when "intent coincides at some point with possession").

This principle is not limited to narcotics charges. Proof that the accused knew of potential charges sufficient to form the necessary intent to obstruct justice

must be contemporaneous with the charged obstructive act. *United States v. Athey*, 34 M.J. 44, 49 (C.M.A. 1992) (looking to situation at the time of the discussion to determine whether specific intent had formed). Similarly, conspiracy criminalizes an innocent "overt act" when it is done with specific criminal intent. *See United States v. Finch*, 64 M.J. 118 (C.A.A.F. 2006).

The need for uniting specific intent with the charged act is at the core of the voluntary abandonment doctrine, which provides a defense where the specific intent to commit the ultimate offense is formed and then abandoned. *United States v. Byrd*, 24 M.J. 286, 293 (C.M.A. 1987). Proof of coexistent specific intent recognizes the possibility that an accused may abandon his blameworthy mind. *See Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015); *United States v. Byrd*, 24 M.J. 286, 293 (C.M.A. 1987).

C. The rule in *United States v. Orben* provided an indispensable guidepost to defining indecent liberties.

In *United States v. Orben*, this Court's predecessor was confronted with whether a service member could be convicted of indecent liberties for showing nude—but not pornographic or obscene—pictures to children. The Court found that the convictions were permissible because the acts were "accompanied by behavior and language of an accused which demonstrated his intent to arouse his

own sexual passions, those of the child, or both." *United States v. Orben*, 28 M.J. 172, 174-75 (C.M.A. 1989).

Orben was not the first time military appellate courts resolved the question of intent to arouse or gratify sexual desires by reference to the accused's accompanying actions and behaviors. In *United States v. Johnson*, for example, the accused was charged with attempting to kiss a thirteen-year-old girl. 35 M.J. 587 (A.B.M.R. 1965). On appeal, the defense challenged the sufficiency of evidence for intent to gratify sexual desires. Because "no words were spoken to her," the board looked to the conduct that accompanied his attempted kiss. *Id.* at 590. The court affirmed on these grounds:

> the accused's actions showed far more eloquently than words what his intentions were. The accused was a mature man. Late at night he gained entrance to an apartment by deceiving his 13-year-old victim to whom he was a complete stranger. He grabbed her hand and held it against the wall, he forced her body against the wall and then leaned his body close to hers. He covered her mouth with his hand when she screamed and ceased in his persistence only after she continued to scream.

Id. While the accused's accompanying behavior in *Johnson* bespeaks his culpable intent, BM2 Rodriguez's behavior at the time of the alleged kissing was objectively innocent.

States with offenses that prohibit touching any body part of a child have analogous rules to that articulated in *Orben*. An Illinois case, *People v. Ostrowski*, provides a strikingly apt example. 394 Ill. App. 3d 82, 95 (2009). Mr. Ostrowski

was charged with kissing his four-year-old granddaughter for the purpose of sexual gratification or arousal. *Id.* at 91. At trial, the testimony showed that the defendant was involved in the care and up-bringing of his granddaughter and that the family was affectionate and showed affection by kissing. The charges were based on kissing that occurred at an outdoor public concert in the summer. The defendant was laying on the ground with his granddaughter and an onlooker noticed him kiss her two times, each for four to fifteen seconds. The trial court found him guilty relying on the following three factors:

- The duration of the kiss exceeded a reasonable peck on the lips;
- Evidence the defendant's mouth was open while kissing his granddaughter indicated his action was intended for something other than a reasonable kiss from a grandfather;
- The manner in which the defendant positioned his body while kissing his granddaughter indicated that his conduct was sexual.

Id. at 90.

On appeal, the Second District Appellate Court reversed the aggravated-criminal-sexual-abuse conviction. The court concluded that the conviction was deficient because "no other acts accompanied the kissing to suggest that defendant was acting to gratify sexual urges or to arouse himself." *Id.* at 93. This analysis, which parallels that in *Orben*, further underscores the need for evidence of

unambiguous language or behavior demonstrating the specific intent for the conviction to satisfy constitutional due process and vagueness minima.

D. Article 120b is the direct successor to the indecent liberties offense under Article 134 and *Orben* therefore applies to this case.

The offense charged in this case is the successor of the indecent liberties with a child offense listed in the Manual for Court-Martial under Article 134. *See Sex Crimes and the UCMJ: A Report to the Joint Service Committee on Military Justice* at 260 (2005) [hereinafter *Sex Crimes and the UCMJ*]. The old indecent liberties offense was based on a District of Columbia offense and was construed in parallel with that statute. *United States v. Brown*, 13 C.M.R. 10, 12 (C.M.A. 1953). It encompassed all forms of lewd contact, both with and without contact.

When indecent liberties first became an enumerated UCMJ offense in 2007, the indecent physical contact offense was set out in a separate paragraph from indecent liberties. *Sex Crimes and the UCMJ* at 297; MCM, UNITED STATES, app. 28 (2016). Two contact offenses with children became distinct offenses—aggravated sexual contact and lewd acts. *Sex Crimes and the UCMJ* at 297. But both of these offenses were limited in scope to touching of stated sexual body parts.

The 2007 offense made several substantive changes to the offense of indecent liberties: (1) it eliminated the need to plead and prove Article 134's

terminal element; (2) it added the alternate intent to "abuse, humiliate, or degrade;" (3) it eliminated the "physical contact" aspect of the offense and created the new offense of "aggravated sexual contact of a child" in its place; (4) it eliminated non-marriage as an element; and (5) it eliminated a child's consent to touch as an affirmative defense. *Sex Crimes and the UCMJ* at 260.

The conduct described in the specification here would not have fit within the 2007 offense of aggravated sexual contact, which only covers contact with sexual body parts. By separating contact offenses involving sexual body parts from other forms of indecent liberties, Congress intended that physical contact with children not involving sexual body parts no longer be punished as indecent liberties. Thus the conduct in this case would have fallen outside the scope of indecent liberties after 2007.

This changed in 2012 when the definition of sexual contact was amended by adding a second alternative to the definition of sexual contact—paragraph (B)'s "any body part" language. Art. 120, UCMJ, 10 U.S.C. § 920 (2012). By encompassing all physical contact with children, the offense broadened again.

This evolution of the offense supports the conclusion that indecent liberty precedent applies to the Article 120b charge here. The previous description in the manual and the present version of the offense penalize "an act upon the body" or "touching" based on the intent with which it is done. MCM, app. 27. The absence

of the former MCM requirement that the act be "indecent," which arguably would have precluded charging the offense at all, makes the *Orben* standard all the more relevant under the latest statute.

In this respect, the present sexual abuse of a child offense covers far more than the former indecent liberties by physical contact did. Because the current offense, like the offense addressed in *Orben*, punishes otherwise lawful behavior based on the actor's specific intent, the rule can and should be applied to the successor offense of "sexual abuse of a child" charged against BM2 Rodriguez.

E. The *Orben* analysis effectuates the offense's purpose by punishing conduct that exposes children to sexual behavior.

The elements and nature of the indecent liberties offense have long been defined, construed, and explained with reference to the purpose of the offense. For decades the offense has been understood as a means of protecting children from moral and emotional harm in the present and in their future development. *See United States v. Brown*, 13 C.M.R. 10, 13, 17 (C.M.A. 1953); *United States v. Scott*, 21 M.J. 345, 348 (C.M.A. 1986); *United States v. Orben*, 28 M.J. 172, 175 (C.M.A. 1989). The *Orben* opinion explained the goal of punishing indecent liberties: "Children are entitled to develop without premature exposure to materials which arouse their sexual passions." *Id.*

For decades, this Court rejected constructions that enlarged the offense beyond the scope justified by its purpose. In *United States v. Knowles* this Court held that indecent telephone communications with a minor lacked physical presence and therefore fell outside indecent liberties. *United States v. Knowles*, 35 C.M.R. 376, 377 (C.M.A. 1965). The opinion in *Knowles* insightfully characterized the physical presence requirement as a means of punishing indecent conduct with sufficient "conjunction of the several senses of the victim with those of the accused." *Id.* at 378. *Orben* furthered the same end by evaluating legal sufficiency of evidence with reference to objectively discernible indicia of intent to arouse or gratify contemporaneously with neutral or ambiguous behavior. *United States v. Orben*, 28 M.J. 172, 174–75 (C.M.A. 1989).

More recently, this Court rejected the theory of constructive presence and set aside a conviction for attempted indecent liberties where the accused had masturbated on a webcam. *United States v. Miller*, 67 M.J. 87, 89 (C.A.A.F. 2008). In arriving at this construction, this Court referred to Black's Law Dictionary, which defines presence as "close physical proximity coupled with awareness." *Id.* at 90. The coupling of presence and awareness shows that punishing otherwise lawful behavior because of the illicit intent that accompanies it only protects children when that intent to arouse or gratify is somehow manifest

to the child. *Id.* It is then that the child becomes a victim because of moral and emotional harm that follows from the child's exposure to adult sexuality.

VG was physically present when BM2 Rodriguez blew on her feet, but this act was unaccompanied by any manifestation of the required intent. Rather the act was accompanied with behaviors that manifested a healthy and positive intent. Even if the text messages are understood to show BM2 Rodriguez harbored arousal over VG's feet, there was no indication of that sexual arousal or any other sexual arousal in VG's presence. Consequently, punishing the conduct is counter to the purposes of the offense.

F. The military judge and Coast Guard Court of Criminal Appeals erred by not requiring that the charged act be accompanied by language or behavior manifesting the alleged specific intent.

The government's specific intent theory, itself perhaps at odds with the evidence, was that "[t]he context of the text messages and the testimony of [Eleonore] show both that he was aroused by feet and that he was aroused by small feet including [VG's]." (JA at 117.) Although the defense counsel in closing argument, pointed out that neither Krystle, Eleonore, nor VG perceived BM2 Rodriguez's foot kissing as inappropriate, let alone a sex crime, the military judge essentially adopted, wholesale, the prosecution's theory. (JA at 120.) The military judge found:

> i. The evidence of intent to arouse and gratify the sexual desire of the accused is demonstrated most significantly through the accused's text messages to Eleonore []. Both preceding and following other sexually explicit text conversations, the accused's expressing an ability to put another woman's small foot into his mouth like he does with V.G.'s was compelling evidence of sexual intent when kissing V.G.'s feet. The evidence was further strengthened by additional admissions by the accused that he would pose V.G.'s feet for Eleonore [] for purposes of foreplay and stating that he would like to see Eleonore [] lick V.G.'s feet and suck on his.
>
> j. The Court is satisfied, beyond a reasonable doubt, that the kissing of V.G.'s feet was done with the intent of to arouse and gratify the sexual desire of the accused based on the text messages alone when placed in context of the sexual text conversations. However, such evidence was further strengthened by Eleonore[]'s testimony that the accused would send pictures of V.G.'s feet when engaging in sexual conversation with her.

(JA at 143-44.)

Although the CGCCA noted in passing that "VG's testimony itself did little to illuminate Appellant's intent," it left this issue unresolved and adopted the military judge's special findings on the issue. *United States v. Rodriguez*, No. 1450 at 6 (C.G. Ct. Crim. App. Jun. 27, 2018).

The special findings, however, parted ways with *Orben* by evaluating legal sufficiency of the evidence without reference to language or behavior accompanying the alleged act that demonstrated the impermissible specific intent. Instead the special finding treats the issue of intent in isolation from the kissing acts. The military judge notes that mention of VG's feet occurred in a series of text messages on a sexual subject and therefore concludes that BM2 Rodriguez

possessed intent to arouse or gratify himself. This analysis falls short on two fronts.

First, there is no temporal connection between the messages and the incidents of kissing. This is likely because the military judge found that "the timeframe of the kissing as V.G. and V.G.'s mother testified was somewhat vague." (JA at 143-44.) The CGCCA pointed out that it would have "simplified matters" if trial counsel "ask[ed] witnesses directly whether Appellant had kissed VG's feet on more than one occasion." *United States v. Rodriguez*, No. 1450 at 5 (C.G. Ct. Crim. App. Jun. 27, 2018). In fact, the timing of the kissing was so unclear that the military judge requested rebuttal closing arguments on proof that conduct occurred within the alleged divers occasion timeframe. (JA at128-130.) Without knowing when any of the divers occasions occurred within the five-month period, the messages cannot be linked to the kissing. And lacking a temporal link—a close link—between the messages and the kissing, the messages cannot be characterized as accompanying words.

The second analytical flaw in the findings is the substitution of arousal produced by the text messages with arousal produced by kissing his step-daughter's feet. The specification at issue alleged that the kissing was done with intent to arouse and gratify BM2 Rodriguez. Intent to arouse or gratify himself through the exchange of sexual text messages is beside the point. Likewise, intent

to arouse or gratify Eleonore, either through the text messages or by kissing VG's feet, was not alleged in the specification, argued by the prosecution, or found through substitution by the military judge.

The military judge's vague findings are insufficient because they did not establish that BM2 Rodriguez's innocent act was accompanied by behavior or language manifesting the specific intent that was the crux of the variety of the charged lewd acts.

G. The evidence of intent is not legally sufficient and must be set aside.

Legally sufficient proof of the alleged intent fails on three fronts. First, the text messages were not contemporaneous with the touching and therefore fail to provide the evidence of *accompanying* words or actions. Second, and related, the text messages are not factual or truthful and are weak evidence. Third, the facts and circumstances established by VG, her mother, and Eleonore demonstrate the conduct was not accompanied by any sexual intent.

1. The evidence referenced in the military judge's findings does not establish accompanying behavior or language.

The military judge relied entirely on the text message exchange dated April 16, 2015 for evidence of BM2 Rodriguez's intent to arouse or gratify his sexual desire. This evidence does not satisfy the *Orben* analysis for accompanying language or behavior because the messages, which occurred within a single day, were not contemporaneous with any incident of foot contact in the divers occasions

timeframe alleged—December 2014 through April 2015. In fact, the messages were exchanged on a day just two weeks short of the end of the five-month divers occasions timeframe in the military judge's findings. Neither the findings nor evidence indicate how many incidents the military judge found he committed, or the date of their occurrence. Absent these temporal links, no reasonable factfinder could find the requisite intent by looking at BM2 Rodriguez's text messages with Eleonore.

Beyond the lack of connection in time, the messages express fantasy rather than fact. The voluminous body of text messages entered into evidence cannot be relied on for the truth of the matter asserted. MIL. R. EVID. 802. Neither counsel nor the parties addressed a hearsay exception associated with admitting the messages. (JA at 52.)

More importantly, even taken at face value, the messages do not demonstrate the intent charged. Eleonore testified that she believed the messages were discussing fantasy. (JA at 80-81, 85.) Perhaps the best example of the non-factual nature of the messages is BM2 Rodriguez's message about putting VG's entire foot in his mouth. Eleonore noted the absurdity of this idea and pointed out that putting an entire eight-year-old's foot in one's mouth would be uncomfortable—more likely impossible—and un-erotic. (JA at 135.) Finally, the military judge's acquittal on the specification alleging BM2 Rodriguez sucked VG's feet

demonstrates that the military judge did not find the message to be sufficient to prove that any of the behavior discussed had in fact occurred.

Reading the messages more carefully, one notes that BM2 Rodriguez was not interested in having sexualized-contact with VG's feet at all. Rather he suggested the idea to Eleonore based on her professed interest in small feet: Eleonore's declared sexual desire for a co-worker's small feet indicate that Eleonore, and not BM2 Rodriguez was aroused and gratified by small feet. BM2 Rodriguez created text messages in an attempt to gratify the peculiar tastes of his paramour. Consistent with this, the government's expert witness concluded that any interest demonstrated in the text messages was "directly associated to watching others, in this case…[Eleonore] lick [V.G.]'s feet, suck his own feet, or rub his feet." (JA at 113) (emphasis added).

Finally, the military judge dismissed the specification that alleged these text messages were service discrediting because of the indecent nature. (JA at 14.) This finding, unexplained by the military judge, is difficult to square with the finding that the messages evinced an intent on BM2 Rodriguez's part to arouse and gratify himself.

2. The facts in the record do not establish accompanying behavior or language manifesting BM2 Rodriguez's intent.

In *Ostrowski* the Illinois court referenced a number of factors the Iowa Supreme Court applied in indecent liberties cases to discern touching with the intent to arouse or gratify sexual desires. With the same ultimate issue at stake, the factors are useful here. They include:

- Who is being aroused;
- The relationship between the adult and child;
- Whether other people were present;
- The length of the contact;
- The purposefulness of the contact;
- Whether there was a legitimate, non-sexual purpose to the contact;
- When and where the contact took place;
- And the conduct of the accused and alleged victim before and after the contact.

People v. Ostrowski, 394 Ill. App. 3d 82, 92, 914 N.E.2d 558, 567 (2009) (citing *State v. Pearson*, 514 N.W.2d 452, 454 (Iowa 1994)).

This non-exhaustive list is a useful guide in applying *Orben*'s requirement for accompanying behavior in this case. As in *Ostrowski*, the contact was made around others. It had an innocent, non-sexual purpose, appropriate to the relationship between BM2 Rodriguez and his fiancée's daughter. The contact was

brief, described by VG as "real quick." And no evidence of conduct before or after the contact indicated sexual intent. Consequently, the evidence of intent was legally insufficient—no reasonable factfinder could have concluded that EM3 Rodriguez acted with the specific intent required.

Finally, and perhaps most persuasively, neither VG nor the two other adults who were present when BM2 Rodriguez kissed VG reported the touching as a crime. Nor did they perceive a criminal or evil intent behind the touching when they saw it. Because of the unique nature of indecent liberties crimes, courts have long looked to the timeliness of a child's complaint as a valuable indicator of a substantiated complaint of child sexual abuse. *See United States v. Paulding*, 25 C.M.R. 489, 492 (C.M.A. 1957) (quoting ¶142c, MCM, 1951, at 256 that "timely complaints of the alleged offenses are persuasive evidence of the probability of the testimony of the children").

Rather than the victim, it was the trial counsel's office who "reported" this offense to CGIS based on their review of the text messages for another case involving Eleonore. In fact, trial defense counsel argued this point in closing:

> [M]y co-counsel mentioned all these people that didn't make a complaint of sexual assault. And he mentioned mom, obviously Krystle and then [VG.]. But you know who else didn't make a complaint and say it was wrong? Eleonore []… So if she truly thought that this man… was … living out her fantasy you would think given her background and given the situation as it stands she would be one that would step up and say hey, this guy is doing

> inappropriate [things] with his step-daughter. But that's not what happened.

(JA at 120.) The open setting in which the kissing occurred and the absence of any concern, let alone a report to authorities, underscore the weakness of the theory of intent contrived by prosecutors.

Conclusion

Article 120b's child sexual abuse offense exists to protect children from damaging premature exposure to sexual behavior, not to regulate the sexual fantasies of adults. The government sought to dodge this limit by hitching the message exchange to unrelated, vaguely-described incidents of un-erotic, playful contact with VG. But decades of precedent stand in the way. This Court and its predecessor have marked the outer limits of this offense. Though the offense resides in a new statute, these due process minima apply equally to Article 120b.

The need for evidence that establishes the "conjunction of the several senses of the victim with those of the accused" is clearly and eloquently answered by analyzing the charged act with reference to whether it was "accompanied by behavior and language of an accused which demonstrated his intent to arouse his own sexual passions, those of the child, or both." *United States v. Knowles*, 35 C.M.R. 376, 378 (1965); *United States v. Orben*, 28 M.J. 172, 174-75 (C.M.A. 1989). Without evidence of behavior and language demonstrating BM2

Rodriguez's intent in engaging in an otherwise permissible conduct, the record contains legally insufficient evidence.

Wherefore, BM2 Rodriguez requests that this Court set aside the finding of guilty to Additional Charge I, Specification 2 and the sentence, and remand the case authorizing a rehearing on the sentence for the remaining adultery charge.

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