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 REPLY 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:

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, BM2 Michael Rodriguez, the Appellant, hereby replies to the government's brief of March 4, 2019.

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.

A. The government urges the Court not to apply *Orben*. In its place, it offers *United States v. Cottrill,* which addressed contact with genitalia. The legal sufficiency analysis for evidence of specific intent that applies to contact with private parts of the body does not apply to the facts of this case.

In *United States v. Cottrill*, this Court allowed intent to arouse or gratify to be proven circumstantially by the accused's statements. *United States v. Cottrill*, 45 M.J. 485, 487 (C.A.A.F. 1997). The government's answer argues that *Cottrill* provides authority for affirming the convictions in this case. (Gov't Answer at 15-16.) This is incorrect for two reasons. First, the differences in the quantity and character of the evidence in these cases readily distinguish them. In *Cottrill*, the accused confessed to law enforcement that after penetrating the child's vulva with his finger he was sexually aroused "to the point of masturbation." *Id.* at 487. In fact, *Cottrill* challenged whether evidence from the examining physician on an "unnatural opening" in the child's hymen was sufficient to satisfy the corroboration rule in M.R.E. 304. *Id.* at 489.

In contrast to Cottrill's confession, the evidence the government used to establish BM2 Rodriguez's specific intent—messages he sent to his paramour—Eleonore, were merely expressions of sexual fantasy rather than a description of actual events. Cottrill's statements were corroborated by an expert medical opinion that sexual abuse had occurred based on a physical examination of the victim's genitals. But here not even Eleonore's testimony corroborated that the kissing manifested any intent to arouse.

Second, in cases involving contact with sexual body parts it has long been recognized that the nature of the body parts involved is, by inference, evidence of specific intent. *See United States v. Neill*, 4 C.M.R. 221, 225 (C.M.A. 1952) (finding intent to arouse or gratify sexual desires was inferred from accused's physical contact with penis of young boys during boy scout camping trip). Thus, the mere act of digital penetration of the vulva in *Cottrill* and the "extensive fondling of a girl's breasts" in *Sakaye* could be treated as circumstantial evidence of intent to arouse.

Kissing, or making "raspberry" noises on a child's feet does not carry with it the same inferences. Thus, the claim that circumstantial evidence demonstrated the specific intent to arouse or gratify BM2 Rodriguez's sexual desires is not supported. For the messages to be treated as circumstantial evidence relevant to the kissing, they would need to align with the theory of specific intent, i.e. express a desire to kiss VG's feet to arouse himself, and be correlated in time with the kissing. The absence of these facts in the record forecloses their use as circumstantial evidence of intent.

B. The government argues, alternatively, that *Orben* is satisfied. The analysis offered to support this claim omits the most probative facts in the record.

The government brief relies on two authorities to argue *Orben*'s requirement, that behavior or language evincing intent must accompany the alleged act, is satisfied by the evidence here. *United States v. Orben*, 28 M.J. 172 (C.M.A.

1989); (Gov't Answer at 19). Neither are sufficient. The first is a sequence of dictionary definitions for "accompany" and "association." Even these definitions, if used, result in a factually insufficient conviction. The government quotes "association" to mean "linked in memory" or "the process of forming mental connections or bounds between sensations, ideas, or memories." (Gov't Answer at 19.) The answer lacks application of the facts to this definition, and does not explain how the messages were linked in memory or connected with the described kissing.

Second, the government quotes the Illinois appellate court's reference to the accused's actions "before and after the conduct" for circumstantial evidence of specific intent. *People v. Ostrowski*, 394 Ill. App. 3d 82, 95 (2009); (Gov't Answer at 19). But again the failure of the evidence to connect the timing of the messages with the conduct makes this reference inapposite. At trial, the government presented no evidence of when in the five-month timeframe the alleged kissing occurred. The messages may have been within a day of the kissing or as remote as four and a half months; they may have been before or they may have been after.

Similarly, the government's explanation of how this evidence satisfies the description of specific intent that "coincides" with the prohibited act in *United States v. Gomez-Tostado* skips a critical analytical step. 597 F.2d 170, 173 (9th

Cir. 1979); (Gov't Answer at 20). While the Ninth Circuit found coinciding intent may be circumstantially proven by circumstantial evidence from another point in time, this analysis leads to a different conclusion in BM2 Rodriguez's case. In *Gomez-Tostado*, the Ninth Circuit allowed intent to distribute that was "formed" earlier to apply to the possession after the drugs were within the United States. *United States v. Gomez-Tostado*, 597 F.2d 170 (9th Cir. 1979). The decision rested on the following facts:

> A confidential source indicated that Gomez-Tostado had, in the past, transported a quantity of heroin by [a particular] route. The informant also stated that Gomez-Tostado had recently left Tijuana… [and] was headed into the interior of Mexico via El Paso, Texas to bring another shipment of heroin to Tijuana. Agents confirmed that Gomez-Tostado's car had indeed crossed the border at San Ysidro on February 20, 1978. On February 22, 1978, DEA agents discovered the suspect car heading west at Yuma, Arizona, and began following it. [Along this route the car was seized,] then searched and, secreted inside the body of the car adjacent to the taillight assemblies, the agents found packages containing approximately five kilograms of 40 percent pure heroin.

Id. at 172.

The critical distinguishing fact in *Gomez-Tostado*, is the constant possession of drugs. Gomez-Tostado possessed the same drugs prior to and after entry into the United States. There was no break in possession. Once the drugs entered the United States, the offense was complete. Without a break in possession, it was appropriate to infer that there was no break in intent underlying possession. In

other words, once specific intent to distribute drugs is formed, it may be inferred that it continued as long as the actor possesses the drugs.

The facts of this case are different. Unlike the constant possession of the same drug, for ostensibly the same purpose, the text messages were not constant, nor are they temporally or factually related to the charged misconduct. For *Gomez-Tostado* to support the government's assertion, the facts would have to be thus: Gomez-Tostado is proven to have formed specific intent to sell 20 kilograms of cocaine on a particular date. The government has proof that he possessed different quantities of marijuana over a timeframe ranging months or weeks before or after they can prove intent to distribute cocaine.

The government brief, while conceding the evidence of specific intent must be connected to the charged act, fails to articulate how it is connected. (Gov't Answer at 16.) Their argument rests on a weak propensity theory that violates BM2 Rodriguez's right to due process. Additionally, the government's propensity theory is incompatible with the eyewitness's and victim's descriptions of what happened. Consequently, their propensity theory merits no weight on the question of intent at the time of the kissing.

C. Common sense and sound fact-finding require a temporal connection between the evidence of the intent and the act.

The government's answer, in a bold-lettered heading, claims "[t]he requisite intent under Article 120b(c) . . . can be proven via circumstantial evidence, without

temporal limitations." This defies the exhortations to "the common experience of mankind" referenced in the judge's instructions cited by the government. (Gov't Answer at 15, 17.) The government's misunderstanding is evinced by the hypothetical situation it offered:

> Under Appellant's interpretation of *Orben*, an accused who told multiple people the day before kissing a child's feet that he was sexually aroused by kissing that child's feet, and who the day after he kissed the child's feet told multiple people he was sexually aroused when he kissed the child's feet the day before, could not be convicted if he otherwise said nothing while in the presence of the child and did no other act in the child's presence that clearly indicated sexual intent.

(Gov't Answer at 18.)

The actor in this hypothetical made an admission that "he *was* sexually aroused *when* he kissed the child's feet," disclosing his state of mind *at the time of the act*. Thus in the government's hypothetical there is evidence of contemporaneous intent to arouse or gratify sexual desires *at the time of the act*.

The government's hypothetical is not remotely close to the facts of the case. First, while the text messages clearly indicate a sexual interest in feet by two consenting adults, they do not show that BM2 Rodriguez intended to arouse his sexual desire by kissing VG's feet. They show that his expressed interest was in seeing Eleonore—not himself—make contact with VG's feet. Second, unlike the government's hypothetical, BM2 Rodriguez never communicated that VG sexually aroused him when he kissed her feet. Lastly, it is not only the absence of

manifestations of arousal at the time of the kissing that precludes finding the specific intent. BM2 Rodriguez also points to the testimony of the two adult eyewitnesses and VG that the kissing occurred in the living room with multiple people present, and importantly, they were playing, laughing, joking, and having fun. There was nothing sexual about the encounter.

Similarly, the cases the government cited, which they argue permit use of circumstantial evidence to prove intent, are not analogous. While BM2 Rodriguez agrees that intent may be proven by circumstantial evidence, simply labeling the evidence "circumstantial" does not obviate the need to consider the relevance and weight. The circumstantial evidence instruction the government quoted makes this point: "The weight, if any, to be given an inference of the accused's intent must of course depend upon the circumstances attending the proved facts which give rise to the inference, as well as all the other evidence in the case." *United States v. Sakaye*, 29 C.M.R. 496 (C.M.A. 1960).

The circumstances "attending" the kissing were different from the circumstances "attending" the text messages. Using the private exchange of messages with an adult to infer intent during an objectively innocent interaction that occurred at an unknown time somewhere from four-and-a-half months before to two weeks after the exchange makes any inference of such low probative value that it is unfairly prejudicial. Even if the messages are plausibly relevant to the

question of intent, without some temporal connection, the messages alone do not have the evidentiary weight necessary to satisfy any reasonable fact finder beyond a reasonable doubt.

In *United States v. Orben*, this Court provided a straightforward standard for identifying legally-sufficient specific intent where the alleged acts do not provide a basis for inferring that intent. The Government's answer invites this Court to untether *Orben* from the omnipresent metric of time. But as Aristotle observed with the sleeping heroes of Sardinia, failing to recognize the passage of time does not make it so. ARISTOTLE: 4 PHYSICS Pt. 11. A standard of proof that disclaims temporal limitations has no place in rational evaluation of the sufficiency of evidence. This Court should decline the government's expansive reading of *United States v. Orben*, and apply *Orben's* requirements for proving intent to Article 120b(c).

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.

ROBINSON.BENJAMIN.MORRIS.1242772039

Digitally signed by ROBINSON.BENJAMIN.MORRIS.1242772039
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=ROBINSON.BENJAMIN.MORRIS.1242772039
Date: 2019.03.14 13:07:20 -04'00'

Benjamin M. Robinson
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-8587
benjamin.m.robinson@navy.mil
CAAF Bar No. 36932

Certificate of Filing and Service

I certify that the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Appellate Government Counsel on 14 March 2019.

ROBINSON.BENJAMIN.MORRIS.1242772039

Digitally signed by ROBINSON.BENJAMIN.MORRIS.1242772039
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=ROBINSON.BENJAMIN.MORRIS.1242772039
Date: 2019.03.14 13:10:19 -04'00'

Benjamin M. Robinson
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-8587
benjamin.m.robinson@navy.mil
CAAF Bar No. 36932

Certificate of Compliance

This brief complies with the type-volume limitations of Rule 24(c) because it contains 2,075 words, and it complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one inch margins on all four sides.

ROBINSON.BENJAMIN.MORRIS.1242772039

Digitally signed by ROBINSON.BENJAMIN.MORRIS.1242772039
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USCG, cn=ROBINSON.BENJAMIN.MORRIS.1242772039
Date: 2019.03.14 13:15:09 -04'00'

Benjamin M. Robinson
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
1254 Charles Morris St., SE
Bldg. 58, Ste. 100
Washington, DC 20374
(202) 685-8587
benjamin.m.robinson@navy.mil
CAAF Bar No. 36932