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	APPELLEE'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:

Stephen Miros
Lieutenant Commander
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, DC 20593-7213
(202) 372-3808
Stephen.Miros@uscg.mil
CAAF Bar No. 36894

Emily A. Rose
Lieutenant Commander
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, DC 20593-7213
(202) 372-3811
Emily.A.Rose@uscg.mil
CAAF Bar No. 37035

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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 (CG CCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2018), because the convening authority approved a sentence that includes a punitive discharge. The CG CCA 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.

Statement of the Case

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

(2012). JA at 14 – 15. The military judge acquitted Appellant of one specification of sexual abuse of a child, Article 120b, UCMJ, 10 U.S.C. § 920b (2012), one specification of obstruction of justice, Article 134, UCMJ, 10 U.S.C. § 934 (2012), and one specification of indecent language, Article 134, UCMJ, 10 U.S.C. § 934 (2012). *Id*. The military judge sentenced Appellant to reduction to E-1, eighteen months' confinement, and a bad-conduct discharge. JA at 132. Pursuant to Rule for Courts-Martial (RCM) 918(b), the Military Judge made special findings in writing on January 18, 2017. JA at 142 - 146. On February 27, 2017, the convening authority disapproved the reduction in pay grade and waived automatic forfeitures for a period of six months but otherwise approved the adjudged sentence. JA at 18.

On June 27, 2018, the CG CCA 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 Appellant's Petition for Review on November 29, 2018.

Statement of Facts

The impetus for this case was the "search of a cell phone in an unrelated case [that] exposed a volume of sexually explicit text messages between Appellant and . . . Mrs. EJ." *United States v. Rodriguez*, No. 1450 (C.G. Ct. Crim. App. June

27, 2018). During the time frame these sexually explicit text messages were exchanged, Appellant was engaged to and lived with KR and her three biological children, one of whom was KR's eight-year old daughter, VG. JA at 94 – 96.

The messages exchanged between Appellant and EJ "evinced a mutual sexual fascination with feet." *Rodriguez*, No. 1450 (C.G. Ct. Crim. App. June 27, 2018); JA at 61. Some of these messages specifically discussed VG's feet and included pictures of Appellant posing VG's feet. JA at 65-69, 137, and 143-144. These messages were used as a form of "foreplay" between Appellant and EJ. JA at 65. In one exchange focusing on their shared sexual predilection for feet, Appellant referenced placing VG's foot in his mouth. JA at 135. In another exchange, Appellant expressed his desire to watch EJ "lick VG's feet." JA 68 and 137.

VG testified that Appellant painted her toes, massaged her feet, and kissed her feet. JA at 39-41. KR testified that Appellant blew on VG's feet with his lips and would "bite and aggravate [VG's feet] . . . with his mouth." JA at 97-98. Appellant's ex-wife, SV, testified that during their marriage Appellant had touched her feet in a sexual manner. JA at 109. However, unlike with his step-daughter (VG), his ex-wife testified Appellant never painted his biological daughter's toes. *Id*. EJ testified that Appellant would hold VG's feet while he blew on them with

his mouth. JA at 71-72. During the December 2014 through April 2015 timeframe that Appellant was touching VG's feet with his hands and mouth, he expressed his sexual arousal and gratification that was linked to VG's feet. JA at 143.

The Military Judge made a special finding that the kissing of VG's feet "as testified to by VG and [KR] was somewhat vague, [but]. . . [was] corroborated by the timeframe [EJ] knew the accused and VG[.]" JA at 143-144. Regarding the issue of intent, the Military Judge specifically found:

> 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 [EJ]. 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 [EJ] for purposes of foreplay and stating that he would like to see [EJ] lick V.G.'s feet and suck on his.

Id.

Summary of Argument

Appellant's act of kissing his eight-year old step-daughter's feet were "lewd acts" in the form of "sexual contact," and he was duly charged and convicted of sexual abuse of a child, in violation of the 2012 version of Article 120b(c), UCMJ. The definition of "sexual contact" as used in that statute is based on laws implemented by Congress in 2006, and not on the non-contact indecent liberties

offense analyzed in *United States v. Orben*, 28 M.J. 172 (C.M.A. 1989). Further, the test in *Orben* was not extended to physical contact indecent liberties offenses, which are more comparable to what occurred here. Thus, reliance on *Orben* as a guide to analyze sexual abuse of a child, in violation of the 2012 version of Article 120b(c), UCMJ is misplaced.

Cases involving physical contact indecent liberties offenses are more persuasive under the facts in this case. Precedent from those cases unambiguously allows for circumstantial evidence to be used to prove specific intent, including circumstantial evidence that occurred non-contemporaneously with the act in question. Thus, the required specific intent in this case did not need to be manifested at the time of the act.

Even if looked to as instructive, *Orben* is misinterpreted by Appellant. Appellant's contention that "accompanied" means contemporaneous is an overly narrow reading of *Orben* that is without merit. Rather, "accompanied" simply requires a link between the behavior or language which demonstrates the specific intent and the act in question. Here, a reasonable fact finder would be convinced beyond a reasonable doubt that the charged act was supported by legally sufficient evidence that linked Appellant's intent to sexually arouse and gratify himself to his act of kissing VG's feet.

Argument

UNITED STATES v. ORBEN, WHICH ESTABLISHED WHAT THE GOVERNMENT MUST SHOW TO PROVE INTENT UNDER THE PRE-OCTOBER 1, 2007 VERSION OF INDECENT LIBERTIES DOES NOT APPLY TO THE INTENT ELEMENT OF THE POST JUNE 27, 2012 VERSION OF ARTICLE 120b(c), SEXUAL ABUSE OF A CHILD. AND, APPELLANT'S CONVICTION WAS SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.

Standard of Review

"This Court reviews *de novo* questions of statutory interpretation[.]" *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015). "This Court [also] reviews questions of legal sufficiency *de novo*." *United States v. Spicer*, 71 M.J. 470, 472 (C.A.A.F. 2013). "The test for legal sufficiency is whether, 'considering the evidence in the light most favorable to the prosecution, any reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *Id.* (quotation omitted).

Analysis

A. *United States v. Orben* is not binding authority for interpreting Article 120b(c), UCMJ, 10 U.S.C. § 920b (2012), sexual abuse of a child, given the extensive amendments to the UCMJ since 1989.

Appellant was charged and convicted of committing a lewd act upon his eight-year old stepdaughter, VG, by kissing her feet with an intent to arouse or

gratify his own sexual desire, in violation of the 2012 version of Article 120b(c), UCMJ. As charged, the Government was required to prove the following elements beyond a reasonable doubt: (1) that Appellant on divers occasions committed a lewd act upon VG by kissing her feet with his lips with an intent to arouse or gratify his sexual desire; and (2) that VG, at the time, had not attained the age of twelve years. JA at 12. Under Article 120b(c), Congress specifically defined the term "lewd act" to include "any sexual contact with a child." Article 120b(h)(5)(A). At the time, the definition of "sexual contact" was further defined 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." Article 120(g), UCMJ (2012) (emphasis added); *see* Article 120b(h)(1), UCMJ (2012) (explaining the term "sexual contact" under 120b has the same meaning as Article 120(g)). In this case, the Government introduced sufficient evidence to prove that Appellant kissed a body part of an eight-year-old, specifically her feet, with the specific intent to arouse or gratify his sexual desire.

Nevertheless, Appellant urges this Court to apply *Orben* as binding precedent to the case at hand. However, *Orben* concerned the non-contact crime of taking indecent liberties with a child under Article 134, which has since "been

replaced in its entirety." Manual for Courts-Martial United States (2019 Edition), Appendix 21 at 18. In *Orben*, according to the 1984 version of the Manual for Courts-Martial, the Government was required to prove that the accused "committed a certain act in the presence of a child under the age of 16 years of age, which amounted to the taking of indecent liberties and was with the intent to arouse, appeal to, or gratify the lust, passions or sexual desires of the accused, the victim or both." 28 M.J. at 174 (citing to the Manual for Courts-Martial, United States (1984 Edition) para 87b(2)(e)).

The issue before the court in *Orben* centered on the required intent for the now superseded offense of indecent liberties with a child under the General Article, not a sexual contact offense under the modern-day Article 120b framework. As detailed below, the analysis in *Orben* is not binding on this case because: (1) Article 120b(c) (2012) and its definitions are primarily based on separate federal laws implemented by Congress in the National Defense Authorization Act of 2006, not the non-contact indecent liberties offense at issue in *Orben*; and (2) *Orben* addressed a non-contact indecent liberties offense, not the sexual contact offense at issue in this case.

1. The sexual contact offense in this case was not the direct successor of the non-contact indecent liberty offense in *Orben*.

The United States disagrees with Appellant's contention that sexual abuse of a child[1] committed via a lewd act, "is the successor of the indecent liberties with a child offense listed in the Manual for Courts-Martial under Article 134." Appellant's Brief at 16. Significant amendments have been made to the UCMJ since *Orben*, which replaced offenses under Article 120 and 134 with various offenses modeled after federal crimes under Title 18 of the United States Code. Contrary to Appellant's assertions, a review of these statutory developments demonstrates that the sexual contact offense under Article 120b(c) in this case is not the successor of the non-contact indecent liberties offense in *Orben*.

As an initial matter, Appellant's reliance on *Sex Crimes and the UCMJ: A Report to the Joint Service Committee on Military Justice* to support his contention is misplaced. First, the referenced Report is a 2005 product produced by a subcommittee to the Joint Service Committee, before both the 2007 and 2012 amendments to the UCMJ were made. Supplemental JA at 1-9. Second, the section referenced discusses "indecent liberty with a child" but did not include a discussion of indecent acts with a child "because [it was recommended] that [such]

[1] Article 120b(c), UCMJ, 10 U.S.C. § 920b(c) (2012).

conduct [be] prohibited by subsection 920(g), 'aggravated sexual contact with a child.'" JA at 165. Thus, the referenced Report has limited, if any, utility in analyzing the sexual contact offense at issue here.

To understand why *Orben* is inapplicable to sexual abuse of a child[2] committed via sexual contact requires an analysis of the 2007 and 2012 amendments to the UCMJ. Given the expansive and numerous reforms to sex-related crimes under the UCMJ, tracing the history of these changes is anything but simple. In 2006, Congress instituted changes to address sexual assault in the armed forces with the stated purpose "to [align] the statutory language of sexual assault law under the UCMJ with the federal law under sections 2241 through 2247 of title 18, United States Code." Supplemental JA at 10-11. As a result, "[the 2007 amendment to] Article 120 [consolidated] several sexual misconduct offenses and is generally based on the Sexual Abuse Act of 1986, 18 U.S.C. Sections 2241 – 2245." Manual for Courts-Martial United States (2019 Edition), Appendix 21 at 18. In completing this alignment, Congress replaced indecent acts or liberties with a child, "*in its entirety*," with three new offenses under Article 120, UCMJ: aggravated sexual contact with a child,[3] abusive sexual contact with a child,[4] and

[2] Article 120b(c), UCMJ, 10 U.S.C. § 920b(c) (2012).
[3] Article 120(g), UCMJ, 10 U.S.C. § 920(g) (2008).
[4] Article 120(i), UCMJ, 10 U.S.C. § 920(i) (2008).

indecent liberty with a child.[5] *Id*. (emphasis added). The offense of aggravated sexual abuse of a child, explained in further detail below, was also added in 2006. These offenses, and their accompanying definitions, are primarily based on parallel crimes under Title 18, not historic versions of the offenses under the UCMJ, or more specifically this Court's interpretation of those offenses.[6]

"Sexual contact" as used in the aggravated sexual contact with a child[7] and abusive sexual contact with a child[8] offenses adopted language from 18 U.S.C. § 2246(3). The definition requires proof of "an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person." Manual for Courts-Martial United States (2019 Edition), Appendix 21 at 3. The indecent liberty with a child[9] offense also adopted the 18 U.S.C. § 2246(3) definition, but retained the "appeal to . . . the sexual desire of any person" language from indecent acts or indecent liberties with a child under the General Article. *Id.* at 2. While the definition used in aggravated sexual contact with a child and abusive sexual contact with a child in 2007 on its face was similar to the "prohibited intent"

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[5] Article 120(j), UCMJ, 10 U.S.C. § 920(j) (2008).
[6] The United States acknowledges that the definition of "indecent" in the 2007 amendments was taken from the Article 134 definition under the 2005 edition of the Manual for Courts-Martial. Manual for Courts-Martial (2012 ed.) Appendix 28 at 17. However, the offense charged in this case was committing a lewd act via sexual contact, not committing an indecent liberty.
[7] *See supra* n. 3.
[8] *See supra* n. 4.
[9] *See supra* n. 5.

required for indecent acts or indecent liberties with a child under the General Article, it was based on a completely different statute. Thus, any interpretation of "sexual contact" for the amended offenses would not require application of the interpretation in *Orben*.

Separately, Congress, in the 2006, also added the new offense of aggravated sexual abuse of a child.[10] That offense criminalized engaging in a "lewd act with a child." That definition of "lewd act" included two variations of unlawful touching of genitalia "with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person" that were modeled from the definition of "sexual contact" under 18 U.S.C. § 2246(3), not previous offenses under the UCMJ. *See* Manual for Courts-Martial United States (2019 Edition), Appendix 21 at 4.

In 2012, additional amendments to the UCMJ took effect. The offense of aggravated sexual abuse of a child[11] was renamed to sexual abuse of a child[12] and codified as Article 120b(c). This new offense under Article 120(b)(c), which proscribed committing a "lewd act" upon a child, was intended to consolidate the 2007 versions of aggravated sexual abuse of a child, aggravated sexual contact

[10] Article 120(f), UCMJ, 10 U.S.C. § 920(f) (2008).
[11] *Id*.
[12] Article 120b(c), UCMJ, 10 U.S.C. § 920b(c) (2012).

with a child, abusive sexual contact with a child, and indecent liberty with a child, "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." Manual for Courts-Martial United States (2016 Edition), Appendix 23 at 16. The definition of sexual contact was further "broadened to include any touching of the body with the intent to arouse or gratify[.]" Manual for Courts-Martial United States (2016 Edition), Appendix 23 at 15. The term "sexual contact" as used in the sexual abuse of a child offense, Article 120b(c), traces its history within the UCMJ no further then to the addition of aggravated sexual abuse of a child, which adopted definitions from 18 U.S.C. § 2246(3) in 2007.

The fact that the intent required under the definition of "sexual contact" under Article 120b(c) may appear similar to the intent required to violate either indecent acts or indecent liberties with a child under the General Article does nothing to establish the link proposed by Appellant that he contends mandates the use of *Orben* to interpret Article 120b(c). Appellant was charged with committing a lewd act via sexual contact, not under the other possible forms of committing a lewd act. Consequently, any possible argued connection to the prior offense of indecent liberties with a child analyzed in *Orben*, at most, would relate to other

parts of the definition of lewd act (e.g., committing indecent conduct in the presence of a child), not the sexual contact version charged in this case.

2. *Orben*, which addressed the required intent for a non-contact indecent liberty offense, is not applicable to the sexual contact offense charged in this case.

In *Orben*, the accused contested the sufficiency of a specification that alleged he committed the offense of indecent liberties by showing a male under the age of 16 "several magazines containing numerous pictures depicting the full body of adults and children, with intent to arouse and appeal to the lust, passion and sexual desires of" both the accused and the child. 28 M.J. at 172. The specification at issue was a non-contact version of the offense of indecent liberties with a child under Article 134, UCMJ.

Prior to October 1, 2007, the offense of indecent acts or liberties with a child was presidentially prescribed under the General Article of the UCMJ and found at Paragraph 87, Part IV of the Manual for Courts-Martial. JA at 154-155. As detailed in that Manual for Courts-Martial, the elements for indecent acts or liberties with a child were enumerated under two headings: "physical contact" and "no physical contact." Manual for Courts-Martial United States (2019 Edition) Appendix 20 at 3. Though both of these variations of the offense required proof of an "intent to arouse, appeal to, or gratify the lust, passion, or sexual desires of the

accused," the Court of Military Appeals in *Orben* only addressed what was required to prove the elements of the "no physical contact" variation of the offense. *Orben*, 28 M.J. at 174-75. Whether the test outlined in *Orben*[13] would have been equally applied or required to satisfy the elements of a physical contact variation of the offense was not decided, nor was it later extended by this Court to a physical contact case under Article 134.

Here, the specification at issue is a physical contact offense under a distinctly different statute with differing elements, not a non-contact offense under the General Article. Additionally, the test in *Orben* has not been extended in the past to even apply to physical contact offenses under the General Article. Accordingly, *Orben* is not binding precedent, and is not an "indispensable guidepost" in the manner suggested by Appellant.

B. The requisite intent under Article 120b(c), "to arouse or gratify the sexual desire of any person," can be proven via circumstantial evidence, without temporal limitations.

The United States agrees with Appellant that proof of specific intent is a necessary element of Article 120b(c), UCMJ, 10 U.S.C. § 920b(c) (2012). *See* Appellant's Brief at 9. Further, the United States agrees that "specific intent must

[13] *See Orben*, 28 M.J. at 174-175 (stating the test for "prohibited intent" required a showing that the act 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.").

be connected to the charged act." *See id*. at 12. However, neither *Orben*, nor any other case law cited by Appellant, stands for the proposition that the required specific intent cannot be proven through circumstantial evidence of non-contemporaneous manifestations of the intent to arouse or gratify sexual desires via the actions in question. Further, Appellant's interpretation of the term "accompanied" under *Orben*, even if it were to apply to this case, is overly narrow.

1. Precedent from prior cases involving the physical contact variation of indecent acts with a child under the General Article are not only more persuasive than *Orben*, they also do not require a showing of contemporaneous behavior or language to prove intent.

The issue of how the requisite intent for Article 120b(c), UCMJ, 10 U.S.C. § 920b(c) (2012) can be proven has not been directly addressed by this Court. However, some prior cases have addressed the requisite intent for contact offenses charged as Indecent Acts with a Child under the General Article. While the offense of Indecent Acts with a Child is also not a direct precursor to Article 120b(c), the offense, and the related cases, are more closely aligned to the charge at issue in this case. These cases are, thus, more persuasive and instructive than *Orben*.

Almost eight years after *Orben*, this Honorable Court stated "direct evidence of sexual intent is not required for conviction of indecent acts with a child." *United States v. Cottrill*, 45 M.J. 485, 488 (C.A.A.F. 1997). In *Cottrill*, the

accused contended that neither his pretrial statements nor other evidence adequately showed that he powdered the genital area of his three and a half year-old daughter and inserted his finger into her vagina with the intent to gratify his sexual desires. *Id.* Acknowledging that the accused never expressly stated that he had such a sexual intent, this Court still held that the evidence, including the accused's admitted sexual arousal when engaging in these acts and his masturbation after these touchings, circumstantially showed he touched his daughter with an intent to gratify his sexual desires. *Id.*

Moreover, *Cottrill* cited to *United States v. Sakaye*, 29 C.M.R. 496 (C.M.A. 1960), where the accused was charged, among other offenses, with taking indecent liberties with a fifteen-year-old by extensively fondling her breasts. The accused challenged the law officer's instructions to the members for this offense. *Id.* The Court of Military Appeals upheld the law officer's instruction that:

> Intent may be proved by circumstantial evidence, that is, by facts and circumstances from which, alone or in connection with other facts, you may, according to the common experience of mankind, reasonably infer the existence of an intent. 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.

Id.

These cases counter Appellant's contention that the use of the term "accompanied by behavior and language" in *Orben* should be narrowly interpreted to mean that only a manifestation of intent at the time of the act will be sufficient to prove such an intent existed. 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. Consequently, Appellant's interpretation would lead to an overly narrow result inconsistent with this Court's precedent and a plain reading of the statute.

Contrary to Appellant's contention, the evidence used to prove that Appellant had the requisite intent does not need to have occurred at the very same time as the unlawful touching occurred, nor does the intent need to have been manifested in the physical presence of the child. Moreover, intent can be proven by circumstantial evidence.

2. Even if *Orben* is considered to be persuasive, it does not stand for the proposition advocated by Appellant.

Appellant, in narrowly construing *Orben*, asserts that the case requires the term "accompanied" to mean the evidence of intent must occur in the presence of the child. But, the term "accompany is not as limiting as Appellant suggests. Webster's defines "accompany" as "to cause or be in association with." Merriam Webster's Collegiate Dictionary 7 (10th ed., Merriam Webster 1995). And, "association" is defined as "something linked in memory or imagination with a thing or person; the process of forming mental connections or bounds between sensations, ideas, or memories." *Id*. at 70. The common use of the term "accompany" shows that non-contemporaneous circumstantial evidence of an intent to arouse or gratify sexual desires can be linked to the act in question. In other words, the accompanying "behavior and language" can exist non-contemporaneously with the act and the phrase is not limited in the way suggested by Appellant. This interpretation corresponds with, *People v. Ostrowski*¸ cited by Appellant, a case in which an Appellate Court of Illinois considered "the conduct of the defendant and the victim before and after the contact" as circumstantial evidence appropriate to determine the sexual nature of the contact in question. 394 Ill. App. 3d 82, 95 (2009) (citation omitted).

Therefore, even if *Orben* was directly applied to this case as binding precedent, the evidence admitted at trial adequately showed Appellant had the required intent. The use of the word accompanied does not mean that the evidence used to prove intent must have occurred at the exact same time as the physical contact. Instead, the evidence of intent must only be linked to the unlawful touching.

Here, Appellant and EJ sent numerous text messages that evinced their mutual fascination with feet. During these sexual charged exchanges, Appellant and EJ specifically discussed VG's feet. JA at 135. In particular, Appellant referenced sticking VG's feet in his mouth, posing her feet for EJ, and his desire for EJ to lick VG's feet in this sexual context. JA at 135, 137. Though the messages were not sent at the very same time Appellant kissed VG's feet, Appellant's behavior and language was sufficiently linked to the act of kissing VG's feet even under *Orben*.

Finally, Appellant's citation to *United States v. Gomez-Tostado* does nothing to counter the United States' argument. According to *Gomez-Tostado,* what is required is that "the intent [to arouse or gratify] coincides [with the act]," not that the circumstantial evidence used to prove intent must coincide with the act. *See* 597 F.2d 170, 173 (9th Cir. 1979).

C. Ample circumstantial evidence of Appellant's intent to arouse or gratify his sexual desire existed; therefore, the charged act was proven by legally sufficient evidence.

In this case, the Government was required to show that on divers occasions Appellant committed a lewd act upon VG, to wit: kissing her feet with his lips. The United States was not required to prove that Appellant's conduct was indecent, as Appellant seems to suggest. Rather, the United States was required to show Appellant kissed VG's feet with the intent to arouse or gratify his sexual desires.

There is no question that Appellant kissed VG's feet, but Appellant claims these acts "manifested a healthy and positive intent." Appellant's Brief at 20. Appellant's position would have this Honorable Court disregard strong inferences revealed by circumstantial evidence instead of viewing the evidence in the light most favorable to the prosecution as required. Consistent with the Military Judge's Special Findings and the CG CCA's decision, sufficient evidence was introduced to convince a reasonable fact finder that the kissing of VG's feet was an act that "arouse[d] or gratif[ied] the sexual desires of [Appellant.]" Article 120(g)(2)(B), UCMJ (2012).

Circumstantial evidence "is evidence that tends to prove some other fact from which, either alone or together with some other facts and circumstances, [one] may reasonably infer the existence or nonexistence of a fact in issue."

Supplemental JA at 22. The fact finder "should give all the evidence [including circumstantial evidence] the weight and value [he or she] believe it deserves." *Id*. Per the Military Judge's Benchbook, the instruction for circumstantial evidence (intent)[14] is listed as potentially "appropriate, as bearing on the issue of intent, if the intent to . . . arouse or gratify the sexual desire or any person is in issue" for charges of Article 120b(c), sexual abuse of a child. Supplemental JA at 17.

Although no cases directly address the use of circumstantial evidence of non-contemporaneous acts to prove "sexual contact" under Article 120(g)(2)(B), UCMJ (2012), this Honorable Court has addressed whether circumstantial evidence of non-contemporaneous acts can be used to prove an intent to arouse or gratify sexual desires in other contexts. In *United States v. Hoggard*, a case involving an indecent assault charge under the General Article, this Honorable Court previously addressed the question of "what evidence [can prove] that appellant's attempt to kiss [a victim] was done with the intent to gratify his lust or sexual desires?" 43 M.J. 1, 4 (C.A.A.F. 1995). While the circumstantial evidence

[14] The United States notes that the circumstantial evidence (intent) instruction was "ordinarily applicable" for charges of the physical contact variation of indecent acts or liberties with a child under the General Article. Supplement to the JA at 18-19. However, the same instruction was not referenced in the Military Judge's Benchbook regarding charges of the non-physical contact variation of indecent acts or liberties with a child under the General Article. Supplement to the JA at 20-21.

of later acts was found to be lacking in that case, this Honorable Court acknowledged: "[c]ertainly we understand that some kisses, and even some attempted kisses, may, in the circumstances of the conduct, be sufficient to suggest such a state of mind [and relate back and illuminate Appellant's state of mind at the time of the charged offense]." *Id.*

Similarly, this Honorable Court's analysis in *United States v. Cottrill* demonstrates that behavior and language that did not occur contemporaneously with the unlawful touching can be used to circumstantially prove specific intent. In *Cottrill*, the accused masturbated after he molested his daughter, but never in front of her; and "[s]he never knew that [the accused] got excitement out of [the molesting acts]." 45 M.J. at 487. Yet, this Court noted that this evidence and appellant's admission circumstantially showed that the accused touched his daughter with intent to gratify his sexual desires. *Id*. at 488.

Further, the use of circumstantial evidence may be especially necessary under "circumstances [when] a particular act may be entirely innocent; under other conditions" such as a kiss or putting your mouth on your step-daughter's feet. *See United States v. Tindoll*, 36 C.M.R. 350, 351 (C.M.A. 1966) (quotation omitted). Though *Tindoll* involved the kissing of a female under the age of 16, charged under the General Article as taking indecent liberties with a female under the age

of sixteen, the Court's treatment of circumstantial evidence bearing on intent is instructive in this case. The Court of Military Appeals upheld the law officer's instruction that:

> [I]ntent ordinarily cannot be proved by direct evidence because there is no way of fathoming and scrutinizing the operation of the human mind. . . . However, intent may be inferred from circumstances, from things done, and from things said. Therefore, you are advised that intent may be proved by circumstantial evidence. That is, by facts and circumstances from which you may, according to the common experience of mankind, reasonably infer the existence of an intent and from which the only reasonable and justifiable inference is that the accused had such an intent.

Id. at 352. Like *Tindoll*, Appellant's intent to arouse or gratify his sexual desires could, and in fact was, proven through circumstantial evidence.

Here, circumstantial evidence shows that Appellant had the intent to arouse or gratify his sexual desires when he kissed VG's feet. Also, Appellant, sent "picture messages [with VG's feet] and also text messages [to EJ] talking about [VG's feet]" as a form of "foreplay." JA at 65. Specifically, Appellant discussed placing VG's foot in his mouth and a desire to watch EJ "lick" VG's feet while exchanging these sexual charged test messages with EJ. JA at 68, 135, and 137. The act of licking a foot or putting a foot in one's mouth, is closely related to the charged misconduct of "kissing VG's feet with his lips," that one could reasonably infer the existence of intent when viewed in context. JA at 12. Therefore, the

conduct presented at trial sufficiently demonstrated Appellant's state of mind at the time of the charged offense.

As in *Cottrill*, the fact that Appellant's intent may not have been outwardly manifested at the time of the act, or even apparent to the victim, does not change the sufficiency of the circumstantial evidence. It is possible for reasonable people to find that kissing your step-daughter's feet is an act that is not manifestly associated with prurient interests. However, looking at the merits of this case in the light most favorable to the prosecution, a reasonable fact finder would find that the required specific intent existed beyond a reasonable doubt. As the Military Judge stated, the text messages between Appellant and EJ, further bolstered by "additional admissions by the accused that he would pose VG's feet for [EJ] for purposes of foreplay and stating that he would like to see [EJ] lick VG's feet and suck on his" circumstantially showed that Appellant had the specific intent to arouse or gratify his sexual desires when he kissed VG's feet. JA at 144. Thus, Military Judge properly considered this circumstantial evidence in light of the attendant circumstances and appropriately found the requisite intent.

Conclusion

The offense of sexual abuse of a child deters adults from playing out their sexual fantasies with children. The long established practice of using

circumstantial evidence to prove specific intent is often required, as individuals do not often announce the thoughts in their mind while they are committing an offense. Appellant incorrectly argues that only circumstantial evidence that shows contemporaneous arousal or gratification is sufficient to prove the required intent under Article 120b(c). Rather, evidence of intent must only be linked to the unlawful touching; and the link can be made via non-contemporaneous circumstantial evidence of the specific intent. The Government introduced sufficient evidence to convince a reasonable fact finder of the link between Appellant's kissing of VG's feet and his intent to "arouse or gratify [his] sexual desires." Article 120(g)(2)(B), UCMJ (2012).

Wherefore, the United States requests that this Honorable Court uphold the finding of guilty to Additional Charge I, Specification 2 and the sentence.

MIROS.STEPHEN.RICHARD.1261805169 Digitally signed by MIROS.STEPHEN.RICHARD.1261805169 Date: 2019.03.04 12:49:45 -05'00'

//s//

Stephen Miros
Lieutenant Commander
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, DC 20593-7213
(202) 372-3808
Stephen.Miros@uscg.mil
CAAF Bar No. 36894

Emily A. Rose
Lieutenant Commander
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, DC 20593-7213
(202) 372-3811
Emily.A.Rose@uscg.mil
CAAF Bar No. 37035

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I certify that the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Appellate Defense on March 4, 2019.

MIROS.STEPHEN.RICHARD.1261805169
Digitally signed by MIROS.STEPHEN.RICHARD.1261805169
Date: 2019.03.04 12:50:14 -05'00'

Stephen Miros
Lieutenant Commander,
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, DC 20593-7213
(202) 372-3808
Stephen.Miros@uscg.mil
CAAF Bar No. 36894

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This brief complies with the type-volume limitations of Rule 24(c) because it contains 6223 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.

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Stephen Miros
Lieutenant Commander
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
2703 Martin Luther King Jr. Ave. SE
Washington, DC 20593-7213
(202) 372-3808
Stephen.Miros@uscg.mil
CAAF Bar No. 36894