IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	BRIEF ON BEHALF OF APPELLANT
v.	
Specialist (E-4) **ROBERT S. AVERY** United States Army Appellant	Crim. App. Dkt. No. 20140202 USCA Dkt. No. 19-0259/AR

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

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TABLE OF CONTENTS

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

Issue Presented

WHETHER CHARGE II, ALLEGING INDECENT LANGUAGE COMMUNICATED TO A CHILD UNDER 16, ARTICLE 134, UCMJ, WAS PREEMPTED BY ARTICLE 120b, UCMJ.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3)(2012).

Statement of the Case

On January 14 and March 17–19, 2014, at USAG Yongsan, Republic of Korea, an enlisted panel sitting as a general court-martial convicted Specialist (SPC) Robert S. Avery, contrary to his pleas, of one specification of sexual assault

of a child and one specification of communicating indecent language to a child under the age of sixteen in violation of Articles 120(b) and 134, UCMJ. The panel acquitted SPC Avery of three specifications of sexual abuse of a child under the age of 16 in violation of Article 120(b), UCMJ. The panel sentenced SPC Avery to be reduced to the grade of E-1 and to be discharged from the service with a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On November 30, 2017, the Army Court affirmed the findings of guilty, but set aside the sentence. Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on January 23, 2018. Appellant filed his Supplement to his Petition for Grant of Review on February 12, 2018, and this Court denied the petition without prejudice to Appellant's right to raise the matter asserted during the normal course of appellate review on February 26, 2018.

The Appellant's sentence rehearing occurred on June 26, 2018, and the Army Court affirmed the findings and sentence on February 19, 2019. Appellant was notified of the Army Court's decision and, filed a Petition for Grant of Review on April 19, 2019. This Court granted review on August 20, 2019.

Issue Presented

WHETHER CHARGE II, ALLEGING INDECENT LANGUAGE COMMUNICATED TO A CHILD UNDER 16, ARTICLE 134, UCMJ, WAS PREEMPTED BY ARTICLE 120b, UCMJ.

Summary of the Argument

The preemption doctrine precludes prosecution under Article 134, UCMJ, when two prongs are met: (1) "Congress intended to limit prosecution for . . . a particular area" of misconduct to "offenses defined in specific articles of the code"; and (2) "the offense charged is composed of a residuum of elements of a specific offense." *United States v. Curry*, 35 M.J. 259, 260-61 (C.M.A. 1992). Both prongs are met here. Congress clearly intended to limit prosecution for indecent language communicated to children to Article 120b. And by choosing instead to prosecute SPC Avery with communicating indecent language under Article 134, the government circumvented Article 120b's requirement that it prove a specific intent to abuse, humiliate, degrade, or gratify sexual desires. SPC Avery respectfully requests that this Court dismiss The Specification of Charge II.

Statement of Facts

In The Specification of Charge II, the government charged SPC Avery with communicating indecent language in violation of Article 134, UCMJ. (JA 27). As alleged by the government, SPC Avery communicated indecent language to HK when he called her a "cum guzzling gutter slut." This exchange occurred on

December 20, 2012 through Facebook messages, and the context of the conversation is as follows:

HK: Wicked witch of the west said to watch the video

RA: I'm not home.

HK: -_____-

It's a squished whale

RA: Eww

HK: Your [sic] a squished whale

RA: Are you calling me fat?

HK: No just a squised [sic] whale

RA: Meanie

HK: hobo

RA: Queer

HK: Fag

RA: Biatch

HK: Motherfucker

RA: Cum guzzling gutter slut

Oooooo burn

(JA 54-55).

During HK's cross-examination, the defense asked a series of questions regarding these Facebook messages:

Q. And you called him a fag?

A. Yes, sir.

Q. And that's a derogatory term for homosexual?

A. Yes, sir.

Q. And you also called him a mother fucker?

A. Yes, sir.

Q. And you called him – a butt wipe?

A. Yes, sir.

Q. And a dick weed?

A. Yes, sir.

Q. And that's when he called you a cum guzzling – something along those lines, right?

A. Yes, sir.

Q. Okay. *And this was all in joke, right?*

A. *Yes, sir.*

Q. *This was in jest?*

A. *Yes, sir.*

Q. *You didn't take it seriously to what he mentioned?*

A. *No, sir.*

(JA 46-47) (emphasis added).

At trial, neither party objected to the written instructions prepared by the military judge. For the offense of communicating indecent language, the military judge instructed the panel members on the following elements:

> First, that between on or about 1 September 2012, and on or about 28 February 2013, at or near Hannam Village, Republic of Korea, the accused in writing communicated with [HK] a child under the age of 16 years certain language to wit: "cum guzzling gutter slut";
>
> Second, that language was indecent; and
>
> Third, that under the circumstances the conduct of the accused was of a nature to bring discredit upon the armed forces.

(JA 57-58).

The military judge defined "indecent language" for the panel,[1] (JA 58), and the trial counsel summarized this offense to the panel as follows during rebuttal argument:

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[1] "Indecent language [is] that which is grossly offensive to the community sense of modesty, decency, or propriety, or shocks the moral sense of the community because of its vulgar, filthy, or disgusting nature. Language is also indecent if it is grossly offensive to the community sense of modesty, decency, and propriety, or shocks the moral sense of the community because of its tendency to incite lustful thought. Language is therefore indecent if it tends to reasonably corrupt morals or incited lustful thought either expressly or by implication from the circumstances under which it is spoken. Seemingly chaste or innocuous language can constitute this offense if the context in which it was said--in which it was used sends an

> [T]here is two parts to that charge:
>
> The first is whether or not the language was indecent.
>
> The second part is was that of a nature to bring discredit upon the service. Both of those together is what makes it a crime.

(JA 60).

Following deliberations, the panel convicted SPC Avery of this offense. Effective at the time SPC Avery exchanged this message with HK was Article 120b, UCMJ, applicable to offenses committed after June 28, 2012. This statute criminalized lewd acts against children. The statutory definition of a lewd act proscribed communicating indecent language to a child by any means, including via any communication technology.

Standard of Review

"Whether an offense is preempted depends on statutory interpretation, which is a question of law we review de novo." *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018).

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indecent message as reasonably interpreted by commonly accepted community standards." (JA 58).

Argument

1. Congress intended to limit prosecution of indecent language communicated to children to Article 120b.

a. All criminally "indecent" language under the UCMJ is inherently sexual in nature.

The first written contemplation of indecent language was in the 1969 Manual for Courts-Martial, in which it was listed only in the table of maximum punishments. Para. 127c., 25-16, *Manual for Courts-Martial* (*MCM*), United States, (1969 ed.). It was written more expansively there, and included "indecent, insulting, or obscene language." Nevertheless, the word "[o]bscene" was removed from the title of the offense in the 1984 amendment because it was synonymous with indecent. *United States v. French*, 31 M.J. 57, 59 (C.A.A.F. 1990). The word "insulting" was removed from the 1984 amendment because "insulting language between soldiers is not a violation of Article 134 unless the language conveys a *libidinous* message." *United States v. Prince*, 14 M.J. 654, 656 (A. Ct. Crim. App. 1982) (emphasis added) (referenced in MCM (1984 ed.), para. 89b as reason for the excision). "'Indecent' language was first defined in the manual as "that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar filthy, or disgusting nature, or its tendency to incite lustful thought." *MCM* (1984 ed.), para. 89b.

While many jurists have wrestled with the fluidity of what exactly indecent (or obscene) means in a "constantly changing set of societal mores and values," *French*, 31 M.J. at 59, the guideposts used have seemingly always been limited to "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the *prurient* interest. *Id*., (quoting *Roth v. United States*, 354 U.S. 476 (1957)) (emphasis added). Thus, indecent language concerns sexual matters, and sexual matters only.

b. Congress amended the UCMJ to specifically include all indecent language communicated to a child, regardless of the means, within Article 120b.

Prior to the enactment of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 (2006), Congress did not criminalize indecent language communicated to a child within the enumerated Articles. Rather, such an offense was only punishable under Article 134. With the 2006 amendment, Congress expressed its intent to specifically define certain crimes against children within Article 120, UCMJ, to cover sexual offenses against children that had previously been criminalized under Article 134, UCMJ. *MCM* (2008 ed.), Analysis of Punitive Articles, A23-15. Congress specifically prohibited any "indecent liberty" with a child. Article 120(j), UCMJ (2007). An "indecent liberty" covered "communication of indecent language as long as the communication is made in the physical presence of the child." *MCM* (2008 ed.),

pt. IV, para. 45.a.(t)(11). Indecent communications to a child made via remote means remained punishable under Article 134, UCMJ (2007).

In 2012, Congress again amended the Code by enacting Article 120b, UCMJ. National Defense Authorization Act for Fiscal Year 2012, 112 Pub. L. No. 81 § 541 (2011). This time, Congress intentionally broadened the definitions of prohibited sexual acts, sexual contact, and lewd acts "*to cover all sexual offenses against children*. *See MCM* (2012 ed.) Analysis of Punitive Articles, A23-16 (emphasis added). There, Congress expanded the definition of "lewd act" to include "intentionally communicating indecent language to a child by any means, including via any communication technology." Article 120b(h)(5)(C), UCMJ. In other words, Congress effectively criminalized all forms of indecent communication with children, regardless of modality, by dispensing with the limitation that an indecent communication occur in the physical presence of a child. This shows Congress's intent that Article 120b "cover a class of offenses in a complete way." *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010).[2]

[2] Further, both the Army and Air Force Courts of Criminal Appeals have conducted analyses of Article 120b and concluded that Congress intended it to be a comprehensive statute to address sexual misconduct with children. *See United States v. Rodriguez*, 2015 CCA LEXIS 551, ARMY 20130577 (A. Ct. Crim. App., Dec 1. 2015); *United States v. Costianes*, 2016 CCA LEXIS 391, ACM 28868 (A.F. Ct. Crim. App. Jun. 30, 2016); *United States v. Long*, 2014 CCA LEXIS 386, Misc. Dkt. No. 2014-02 (A.F. Ct. Crim. App. Jul. 2, 2014).

2. The prosecution charged an offense composed of a residuum of elements of a specific offense.

a. Article 120b requires the government to prove a specific intent that is absent from a charge of indecent language under Article 134.

The Specification of Charge II alleged that SPC Avery communicated indecent language to a child under the age of sixteen in violation of Article 134, UCMJ. (JA 27). That offense consists of the following elements:

> (1) That the accused orally or in writing communicated to another person certain language;
>
> (2) That the person to whom the language was communicated was a child under the age of 16;
>
> (3) That such language was indecent; and,
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, pt. IV, para. 89.b. Under the third element, the military judge defined "indecent" as:

> [T]hat which is grossly offensive to modesty, decency, or propriety or shocks the moral sense, because of its vulgar, filthy or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

MCM, pt IV, para. 89.c. Thus, as the government charged this statement, SPC Avery's intent was irrelevant to a determination of his guilt.

The elements of Article 120b(c), UCMJ, are:

> (1) That the accused intentionally communicated indecent language to a child[3] by any means; and
>
> (2) That the accused did so with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.

MCM, pt. IV, para. 45b.a.(c), (h). Although Article 120b(c) does not define "indecent language," at least one military court has applied the definition of "indecent language" contained in Article 134, UCMJ. *United States v. Yang*, 2019 CCA LEXIS 127, No. 201800127 (N-M. Ct. Crim. App. Mar. 25, 2019).

b. The government's charging decision lessened its evidentiary burden.

Just recently, this Court held that Article 120b did not preempt the government from charging appellant with attempting to persuade, induce, or entice a minor to engage in sexual activity in violation of a federal statute under clause 3 of Article 134. *See Wheeler*, 77 M.J. 289. This Court's logic was based on the defense's inability to show that the government "lessened its evidentiary burden at trial by circumventing the mens rea element or removing a specific vital element from an enumerated UCMJ offense." *Wheeler*, 77 M.J. at 293 (stating "herein lies the basis for our decision"). In *Wheeler*, this Court determined the preemption doctrine did not apply because Article 120b had little more in common with 18

[3] A "child" is any person who has not attained the age of 16 years. Art. 120b(h)(4).

U.S.C. § 2422(b)—a "highly particular 'Coercion and enticement' statute"—than criminalizing the sexual predation of children. *Id*. at 292. In other words, the assimilated federal statute criminalized a particular type of misconduct that Article 120b did not appropriately address. But that logic does not transfer to the instant case, where Article 120b(c) criminalizes the exact conduct the government chose to prosecute here. There is no requirement that this Court "contort . . . Article 120b(c), UCMJ to accommodate" communicating indecent language to a child. *Id*. Rather, Article 120b(c) explicitly criminalizes indecent communications to children, but also requires proof of a specific intent that an indecent language offense under Article 134, UCMJ, does not.[4]

In other words, by making such a charging decision the government circumvented a key element—that of the *mens rea* of an accused—and significantly lessened its evidentiary burden at trial. This "raises important due process concerns" because the "government relieved itself of the responsibility of proving" the arguably more important element of Article 120b(c): that the

[4] This Court, briefly, established a requirement that a speaker charged with a violation of using indecent language under Article 134 intend a consequence from an utterance. That "particular result" test established in *French*, 31 M.J. 57 was superseded by the 1995 amendment to Article 134. This amendment substituted the term "tends reasonably" for "calculated to" in order to "avoid the misrepresentation that indecent language is a specific intent offense." *See MCM*, App. 23, at A23-24; *see also United States v. Negron*, 58 M.J. 834, 843 (C.A.A.F. 2003). This amendment emphasizes the reduction on the government's burden of proof in the instant case.

appellant meant to abuse, humiliate, degrade, or arouse or gratify sexual desire when he made this comment. *See United States v. Guardado*, 77 M.J. 90, 96 (C.A.A.F. 2017). Rather than proving the appellant's specific intent, the prosecution was able to argue to the panel that it needed only to make an objective determination about the nature of the appellant's language. In this case, the tactical backdrop for doing so is patent: the objective context of this conversation (JA 55) (SPC Avery made the comment during an exchange of playful name-calling), along with HK's perception of this conversation (JA 47) (it was made "in jest") indicate the government could not have proven a criminal intent.

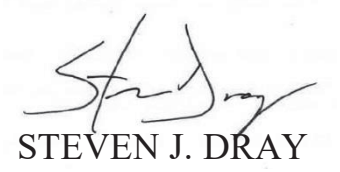
This choice of an easier-to-prove residual clause offense, when the exact conduct is covered under an enumerated congressional article, is what the preemption doctrine expressly forbids. *Id*. at 292-93 ("The preemption doctrine . . . is designed to prevent the government from eliminating elements from congressionally established offenses under the UCMJ, in order to ease their evidentiary burden at trial."); *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979); *United States v. Norris*, 2 C.M.A. 236, 239 (U.S.C.M.A. 1953) ("We cannot grant to the services unlimited authority to eliminate vital elements from . . . offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134."); *see also MCM*, pt. IV, para. 60.c.(5)(a) (where the President's explanation of preemption warns against using Article 134 to

eliminate an intent element from an enumerated article); *Guardado*, 77 M.J. at 95 ("the president has unequivocally stated that the preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132").

In this case, charging the uttered language as an Article 134 offense impermissibly lessened the burden of proof that Congress established. This the government cannot do. By enacting 10 U.S.C. § 920b, Congress made clear that the only proper way to charge indecent language toward a child is under their comprehensive scheme related to sexual crimes against children: Article 120b, UCMJ. Because the government failed to comply with both congressional and presidential intent, and because in that failure the government as able to reduce its evidentiary burden to prove an offense against SPC Avery at trial, SPC Avery's conviction under Article 134, UCMJ, must be dismissed.

Conclusion

The appellant respectfully requests this court dismiss the finding for Charge II and its Specification.



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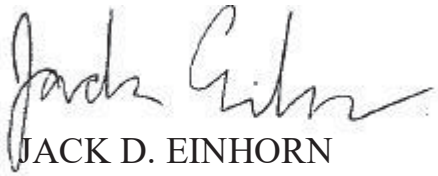

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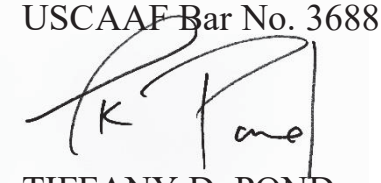

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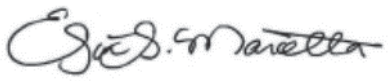

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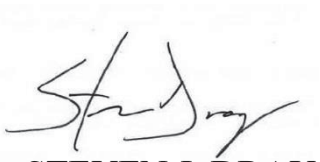

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