IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	REPLY 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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Statement of the Case

On August 20, 2019, this Court granted Specialist (SPC) Avery's Petition for Grant of Review. On September 19, 2019, SPC Avery filed his brief with the Court. The government responded on November 12, 2019. This is SPC Avery's reply.

Argument

When language is "indecent" because of its sexual nature, and it is communicated to a child under the age of sixteen, Congress has occupied the field and has explicitly required the government to prove the specific intent of the accused. The government charged SPC Avery with communicating indecent language to a child under Article 134, an offense comprising a residuum of the elements of the offense Congress intended. The government argues that Congress did not intend to occupy the field of indecent communications to children, and attempts to support its position by contending that communications to children are distinguishable based on the speaker's intent. Their analysis amounts to an improper usurpation of the preemption doctrine.

1. Congress intended to occupy the field of indecent language directed toward children within Article 120b, Uniform Code of Military Justice.

The government correctly cites *United States v. Anderson* (Gov't Br. 7)., for the proposition that this Court has required "express legislative history that

particular actions or facts are limited to the express language of an enumerated article." 68 M.J. 378 (C.A.A.F. 2010) That express legislative history indicates that Congress meant for Article 120b to encompass all indecent communications to children.

The changes in Article 120, UCMJ, "were recommended by the Joint Services Committee on Military Justice and the Secretary of Defense to address deficiencies in existing law . . . identified by military courts and . . . addressed in the report of the Defense Task Force on Sexual Assault in the Military of December 2009." S. REP. NO. 112-26, at 115 (2011). The Report of the Defense Task Force on Sexual Assault in the Military Services, upon which the Congress relied, asserted that:

> Article 120, UCMJ, as amended, sets forth new sex-related offenses constituting degrees of sexual assault offenses. This amendment also included the former Article 134, UCMJ offense of communicating indecent language in the presence of a child. The Article 134, UCMJ offense of indecent language communicated to another (other than in the presence of a child) remains in Article 134.

U.S. Dep't of Def., Report of the Defense Task Force on Sexual Assault in the Military Services, 2009, Appendix H, n. 207. Congress evidently relied on this assertion when it passed a law that included an offense that explicitly criminalized communicating indecent language to children. *See* Article 120b(h)(5)(c) (defining a lewd act as any intentional communication of indecent language to a child by any

means). And, as a result of this information, had Congress been concerned about the threat of anarchy posed in the government's hypothetical of a jokester corrupting morals, they could have legislated accordingly. [1] They did not.

Contrary to the government's assertion, (Gov't Br. 19-20), this Court's holding in *United States v. Guardado* is actually directly in accord with this logic. 77 M.J. 90 (C.A.A.F. 2017). In that case, the government charged Master Sergeant (MSG) Guardado with novel offenses that sought to criminalize certain things he said to young adult females. *Id*. at 95. Nevertheless, there is no indication the government sought to punish MSG Guardado for saying things to children under the age of sixteen. *Id.* (where the novel specification the government used alleged only that the "victim" was under the age of eighteen). Specialist Avery does not dispute that an offense of communicating indecent language to someone sixteen or older is an offense under Article 134 because nothing about Article 120 indicates Congress intended to occupy the field of sexually charged statements to adults. Congress, when passing the 2012 amendment to the UCMJ had this information before it and knew about the principles of preemption. Had it been concerned about a statutory "void" of indecent communications to children without a

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[1] Nothing prevents administrative action against such person. Nor is there a prohibition on ordering him to cease such communications to minors and then punishing any future violations under Articles 90-92, UCMJ.

requiring a specific intent, it could have legislated communicating indecent language to a child with a general intent. It did not. But, anything obscene directed toward someone under sixteen was now preempted by Article 120b because it "proscribes committing a 'lewd act' upon a child" and defines "lewd act" to "include . . . communicating indecent language to a child." *MCM*, (2012 ed.) App'x 23, p. A23-16.

This Court has acknowledged that Article 120b(c) is "aimed at criminalizing the sexual predation of children." *United States v. Wheeler*, 77 M.J. 289, 292 (C.A.A.F. 2018). In doing so, Congress articulated the specific intent that the government must prove in order to convict someone for a sexual predation. In other words, if a sexual comment is made to a child, the government must prove that it was made to abuse, humiliate, or degrade, or to arouse or gratify the sexual desire of any person as well. What makes the particular statement charged in the instant case "indecent" is the sexual connotation of the words. Where the person to whom a statement is directed is a child, and where the statement is "indecent" only because of the sexual connotation of the language, Congress has clearly and wholly identified the minimum proof required.

2. The government's inventive "classification" of offenses destroys the preemption doctrine.

The government concludes on its own that indecent language under Article 134 "falls within a lesser class of offenses and is targeting at protecting the public from obscene content no matter the intent of the individual engaging in this conduct." (Gov't Br. 10). But accepting this logic leaves no room for preemption to apply—ostensibly, every offense under Article 134 has some purpose in protecting the services. Framing an Article 134 offense as criminalizing "lesser" forms of misconduct is an improper analysis of preemption—the analysis is whether Congress intended to punish an offense in a certain complete way. If they did, Article 134 cannot be used to reduce the culpability or proof required for a conviction. Taken to its logical conclusion, the government's argument would "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." *United States v. Norris*, 2 C.M.A. 236 (C.M.A. 1953). Under the government's classification scheme, any element could be removed from an enumerated offense and criminalized as a "lesser" offense, ostensibly to protect the integrity of the service rather than the person.

But preemption exists to prevent precisely that. The example the President uses in the manual states that "Article 134 cannot be used to create a new kind of

larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121." *MCM*, (2016 ed.), ¶60c.(5). A new kind of larceny offense, "one without the required intent," would be a lower "class" of offense—certainly someone who takes the property of another without any intent is less culpable than one who does—but that reduced culpability is important for more than just a reduced sentence. The President's guidance on preemption, as well as this Court's analysis of the concept, make it clear that the "offense" with the reduced culpability is no offense at all. *See Norris*, 2 C.M.A. 236. Indeed, several of the examples the government offers to validate its position—the "separate and distinct minor offenses when committed instead with only a general intent," (Gov't Br. 14), are offenses *enumerated within Articles 80 to 132 of the UCMJ*.

Specialist Avery does not dispute here that Congress has the prerogative to legislate "minor" offenses within Articles 80-132 of the UCMJ. Indeed, it often does. *See* Article 121, UCMJ (providing for varying "classes" of offenses based on the culpability of the actor); Article 128 (providing for various "classes" of offenses based on the culpability of the actor and the harm intended); Article 129 (providing a separate offense for those who breaks and enters the dwelling of another with the intent to commit another offense). These are just some of the many examples where Congress has properly used its legislative powers to

proscribe undesirable conduct in appropriate ways that accommodate varying levels of culpability. What the government proposes here neglects the entire point of preemption: that the *services* cannot do what Congress chose not to do and use Article 134 to reduce the required quantum of proof to punish certain conduct.

The government's argument that Article 120b is meant to punish sexual "predation" is also clearly refuted by the removal of indecent exposure from Article 134 after the 2007 amendment to Article 120. Prior to 2007, Article 134 punished indecent exposures and included the following elements:

> (1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;
>
> (2) That the exposure was willful and wrongful; and
>
> (3) That, under the circumstances, the accused's conduct was to the prejudice of the good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM (2005 ed.), pt. IV, ¶88. In 2007, Congress chose to include this offense within the amended Article 120. Its new definition was:

> Any person subject to this chapter who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the accused's family or household, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.

Article 120(n), UCMJ (2007). The import of this is that it refutes the government's contention that Article 120b is focused only on the sexual "predation" of children. Criminalizing an indecent exposure is no different than criminalizing an indecent communication in terms of the evil it seeks to address: both are less about "sexual predation" than they are about "protect[ing] the general social interest in order and morality." (Gov't Br. 13). Congress may have good reasons to protect morality, but when they do—as they did with the amendment to Article 120b—preemption prevents the services from further reducing the culpability required of the actor for conviction.

Congress intended to criminalize all indecent communications to children under Article 120b. That statute includes proof of a specific intent. Charging sexually charged language made to a child under Article 134 allowed the government to "eliminat[e] elements from [a] congressionally established offense[] under the UCMJ, in order to ease their evidentiary burden at trial." *Wheeler*, 77 M.J. at 293. This was error.

3. The error here is clear and obvious.

Because SPC Avery did not object that this offense was preempted at trial, this Court reviews this challenge for plain error. *United States v. Gleason*, 78 M.J. 473, 475 (C.A.A.F. 2019) (reviewing a "novel" Article 134 specification for plain error). The government does not dispute the appellant would be prejudiced if this

offense is preempted, and so if this Court agrees with SPC Avery that it is preempted, the dispute turns on whether the error is clear and obvious. *See United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018) (to establish plain error, the appellant must show (1) error that is (2) clear and obvious and (3) results in material prejudice to his substantial rights).

The government's argument that this is not a clear and obvious error is limited to asserting it is "subject to reasonable dispute." (Gov't Br. 22-23). In *United States v. Segura*, the Fifth Circuit noted that part of this analysis includes whether other Fifth Circuit authority indicates such an error would be clear and obvious. 747 F. 3d 323, 330 (5th Cir. 2014). The Air Force Court of Criminal Appeals has concluded in two separate opinions that Congress intended Article 120b to be a "comprehensive statute" meant to "address sexual misconduct with children." *United States v. Costianes*, 2016 CCA LEXIS 391 at *13-14 (A.F. Ct. Crim. App. Jun. 30, 2016); *United States v. Long*, 2014 CCA LEXIS 386 at *12 (A.F. Ct. Crim. App. Jul. 2, 2014). The Army Court of Criminal Appeals has agreed with this analysis. *United States v. Rodriguez*, 2016 CCA LEXIS 145 at *7 (A. Ct. Crim. App. Mar. 7, 2016).The logic is both clear and consistent with the offense discussed here. The nature of this statement are only colorably "indecent" because of their sexual connotation. Congress made it clear that the intent of a

speaker is not only relevant but critical for a conviction when the nature of the statement is sexual.

Conclusion

Specialist Avery requests this Court grant appropriate relief.

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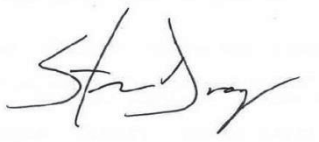
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Court of Appeals for the Armed Forces and the Government Appellate Division on 22 November 2019.



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