IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Julian D. SCHMIDT
Sergeant (E-5)
United States Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 201900043

USCA Dkt. No. 21-0004/MC

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

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SUBJECT INDEX

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UCMJ ARTICLES

MANUAL FOR COURTS-MARTIAL (2016)

OTHER SOURCES

Granted Issues

I.

WHETHER THE PHRASE "IN THE PRESENCE OF" USED TO DEFINE THE TERM "LEWD ACT" IN ARTICLE 120b(h)(5)(D) REQUIRES THE CHILD TO BE AWARE OF THE LEWD ACT OR MERELY THAT THE ACCUSED BE AWARE OF THE CHILD'S PRESENCE?

II.

WHETHER APPELLANT AFFIRMATIVELY WAIVED ANY OBJECTION TO THE MILITARY JUDGE'S INSTRUCTIONS AND THE FAILURE TO INSTRUCT ON THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT?

III.

WHETHER, HAVING ASSUMED DEFICIENT PERFORMANCE BY COUNSEL, THE LOWER COURT ERRED IN FINDING NO PREJUDICE?

Statement of Statutory Jurisdiction

Sergeant ("Sgt") Julian D. Schmidt's approved general court-martial sentence included a bad-conduct discharge and fifteen months of confinement. Accordingly, his case fell within the lower court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

A panel of officer and enlisted members, sitting as a general court-martial,

convicted Sgt Schmidt, contrary to his pleas,[1] of Specification 2 of the Charge and the Charge of committing a lewd act upon a child of less than sixteen years of age, in violation of Article 120b, UCMJ.[2] The members sentenced him to reduction to E-1, fifteen months of confinement, and a bad-conduct discharge.[3] On January 30, 2019, the convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.[4]

On direct review under Article 66, UCMJ, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed the findings and sentence in a published opinion on August 7, 2020.[5] Sergeant Schmidt timely filed a petition for review, invoking this Court's jurisdiction pursuant to Article 67(a)(3), UCMJ. This Court granted review of his case on April 23, 2021. He hereby submits this brief.

Statement of Facts

"Jared"[6]—the alleged victim in this case—and Sgt Schmidt had a mutual family friend named "Michelle."[7] Jared and his family used to live next-door to Michelle in Carlsbad, California.[8] Because Jared's mom was away often, Michelle

[1] JA 53.
[2] JA 238. The members acquitted Sgt Schmidt of Specification 1 of the Charge of sexual assault on a child, in violation of Article 120b, UCMJ. *Id.*
[3] JA 239.
[4] General Court-Martial Order 18-2018.
[5] *United States v. Schmidt*, 80 M.J. 856 (N-M. Ct. Crim. App. 2020).
[6] The NMCCA used "Jared" and "Michelle" as pseudonyms.
[7] JA 58, 180.
[8] JA 58.

would look after Jared and his siblings "almost every single day" as their nanny.[9] Around the same time, Michelle and Sgt Schmidt had been friends for over ten years and would hang out "almost every weekend."[10]

Michelle introduced Sgt Schmidt to Jared and his siblings because Jared's older brother, "Josh," was thinking about joining the Marine Corps.[11] Sergeant Schmidt, Jared, and Josh immediately became close; Sgt Schmidt acted as a mentor and older brother to the boys.[12] Sergeant Schmidt practiced patience even though Jared ridiculed him and called him names.[13]

Jared's family moved from Carlsbad, California to Las Vegas, Nevada in December of 2015.[14] In August of 2016, the family returned to Carlsbad, California to visit Sgt Schmidt before he deployed.[15] The family stayed at Michelle's house during their visit.[16] During that visit, Sgt Schmidt only spent two nights with Jared's family at Michelle's house because of his restrictive work schedule: Friday, August 27 and Saturday, August 28.[17]

On August 27, Sgt Schmidt slept on a "blow-up mattress" on the floor of the

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[9] JA 181.
[10] JA 180.
[11] JA 182.
[12] *Id*.
[13] JA 182-83.
[14] JA 60, 107, 110.
[15] JA 60.
[16] JA 60, 133, 185.
[17] JA 184-85.

master bedroom where Michelle slept.[18] Jared slept on another blow-up mattress in the front room with his brother,[19] and Jared's sisters slept in Michelle's bed with Michelle.[20] Jared's mother and her boyfriend slept together in a separate room.[21] On August 28, Jared again slept on the air mattress in the front room.[22] Jared went to lay down on the air mattress at 9:00 p.m. because he claimed to feel nauseous.[23] Josh did not want to sleep with Jared that night because he thought Jared "might be contagious."[24] Josh also did not want to sleep on the air mattress with Jared because he had a bad back.[25] The air mattress leaked so that if two people laid on it, it would be deflated in the morning, which hurt Josh's back.[26] Sergeant Schmidt offered his air mattress in the master bedroom to Josh and said he was going to sleep on one of the chairs in the room where Jared was sleeping.[27] Sergeant Schmidt opted to sleep on the chairs because Michelle did not want anyone sleeping on the couch.[28]

Jared woke up face down on the air mattress around 2:00 a.m. because he

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[18] JA 186.
[19] JA 134.
[20] JA 187.
[21] JA 186.
[22] JA 61.
[23] JA 63, 115.
[24] JA 112, 117.
[25] JA 134.
[26] JA 134-35.
[27] JA 117, 130.
[28] JA 134.

was feeling nauseous.[29] Jared claimed Sgt Schmidt was laying on the air mattress with him, with Sgt Schmidt's arm across his shoulder blades.[30] Jared slid off the air mattress so that he was on the floor between the couches and the air mattress.[31] Sergeant Schmidt was sleeping at the time;[32] Jared "guessed" Sgt Schmidt woke up and started holding his hand.[33] Jared claimed Sgt Schmidt then started kissing Jared's hand while Jared continued pretending to be asleep.[34] Jared claimed Sgt Schmidt subsequently started masturbating.[35] Jared did not see him masturbating because his eyes were closed and his face was in the air mattress.[36] Jared claimed it "sounded" like Sgt Schmidt was masturbating.[37] Jared guessed Sgt Schmidt ejaculated because he "grunted," then got up to leave.[38] Sergeant Schmidt then awoke Michelle, as she was his ride back to Camp Pendleton, and took a shower.[39] Jared subsequently "woke up."[40] Sergeant Schmidt prayed for God to watch over

[29] JA 64-65.
[30] *Id*.
[31] JA 66, 72.
[32] JA 66.
[33] *Id*.
[34] JA 67-68.
[35] *Id.*
[36] JA 69.
[37] JA 68.
[38] JA 68-69.
[39] JA 73-74.
[40] JA 74.

Jared before he left.[41] Jared still pretended to be asleep.[42] Michelle tried to wake Jared up so he could get back on the air mattress because his face was in the floor.[43] However, Jared would not wake up.[44]

After Sgt Schmidt left the house with Michelle, Jared sent Michelle text messages, including: "Where are you? I need you to come home right now. I feel sick. I'm throwing up. Mama won't wake up. I need your help."[45] Jared then woke his mother up and told her, "Julian did something to me and I need you."[46] His mother was confused and told him to calm down.[47] She thought he had had a nightmare.[48] Jared's mother subsequently sent text messages to Sgt Schmidt accusing him of masturbating while he touched Jared.[49] Sergeant Schmidt denied doing so and initially thought someone was playing a prank on him.[50] He then thought Jared's mother's boyfriend was texting him.[51]

Jared's mother then called the police,[52] who arrived around 4:30 a.m., about

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[41] JA 74-75.
[42] JA 75.
[43] JA 197.
[44] *Id*.
[45] JA 77, 190-91, 198.
[46] JA 76, 118.
[47] JA 118.
[48] *Id.*
[49] JA 121-22, 247-56.
[50] JA 247-56.
[51] *Id.*
[52] JA 77.

fifteen to twenty minutes after she called them.[53] The air mattress was still inflated.[54] Jared told the responding police officer he saw Sgt Schmidt sleeping on the couch.[55] When asked how he knew Sgt Schmidt masturbated, Jared responded, "I just know."[56] Josh was also involved in the interview and suggested to Jared that it sounded like "skin on skin."[57] Jared also told the police Sgt Schmidt wiped his hands all over the sheets.[58] Jared acknowledged that he was not sure what he told the police was true, since his eyes were closed.[59] Jared told Special Agent (SA) C of NCIS that Sgt Schmidt wiped his hands on his shorts.[60] The police officer took pictures of the living room and took the sheets and Jared's shirt as evidence.[61] Jared and his family returned to Las Vegas that day.[62]

Jared was an emotionally troubled teenager. His parents got divorced because his father was cheating on his mother.[63] His nine-year-old sister was going to have surgery to have her kidney removed at the time of the alleged

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[53] JA 199, 202.
[54] JA 240-46.
[55] JA 142 (emphasis added).
[56] JA 90, 131.
[57] JA 90-91, 131-32.
[58] JA 91-92, 148, 259-65.
[59] JA 93.
[60] JA 93-94.
[61] JA 78, 142.
[62] JA 78.
[63] JA 81-82, 110.

incident.[64] Jared had outbursts at school.[65] He also had an outburst at the trampoline park the evening of the alleged incident, yelling at his brother for making fun of him for not being able to do a backflip.[66] He called Sgt Schmidt a "faggot,"[67] and told him he hoped the Taliban cut his head off.[68] Jared would also tell Sgt Schmidt, "shut up bitch."[69] Jared's mother instructed him to apologize to Sgt Schmidt.[70] Jared acknowledged his history of lying to his parents and siblings to get out of trouble and to get his brother into trouble.[71] Jared was not a truthful person, and acted out frequently to get his mother's attention.[72]

Sergeant Schmidt admitted to masturbating in the living room while Jared was sleeping.[73] Sergeant Schmidt admitted to laying in one of the chairs, covering himself with the red blanket, and masturbating to help himself fall asleep.[74] He ejaculated into the red blanket, which he subsequently tossed onto the white couch.[75] Sergeant Schmidt denied touching Jared and denied being on the air

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[64] JA 111.
[65] JA 82.
[66] *Id*.
[67] JA 80, 231.
[68] JA 81.
[69] JA 184, 182.
[70] JA 82-83, 183-84.
[71] JA 98-101.
[72] JA 183.
[73] JA 258.
[74] *Id*.
[75] *Id.*

mattress.[76] His semen was not found on the air mattress's bedsheets, only on the red blanket.[77] Because his semen was not found on the bedsheets, they were not tested for his DNA.[78]

Additional facts necessary to address the Granted Issues are contained below.

Summary of Argument

The history of case law defining "in the presence of a child" establishes that "victim awareness" of the indecent conduct through a sensory connection has always been required. It is also well-settled law that a sleeping child cannot be aware of the conduct due to the lack of sensory connection. The purpose of the Congressional amendment to change "indecent liberties with a child" to "lewd act upon a child" was to eliminate the physical presence requirement. But this statutory amendment did not change the requirement for "victim awareness" of the conduct in order to obtain a conviction. Rather, Congress eliminated the physical presence requirement to account for conduct that occurs online. Congress still requires the child victim to be aware of the act through a sensory connection. Therefore, a holding that "victim awareness" is not required to sustain a conviction

[76] JA 258.
[77] JA 170-71.
[78] *Id*.

for a lewd act upon a child would undermine Congressional intent by taking the statute back to the pre-amendment requirement for a "physical presence."

Sergeant Schmidt did not "affirmatively" waive an instruction for an accurate definition of "in the presence of," nor did he affirmatively waive a required instruction on mistake of fact regarding Jared's "awareness." This Court's 2020 ruling in *United States v. Davis*[79] conflicts with its 2017 ruling in *United States v. Davis*,[80] as well as other prior case law. The 2020 *Davis* decision changed the standard from "affirmative waiver," which bars appellate review, to "affirmative acquiescence," which is reviewed for plain error.[81] This Court should return to the "affirmative waiver" standard.

If this Court nevertheless holds that Sgt Schmidt's acquiescence to the military judge's failure to define "in the presence of" and failure to give a required mistake of fact instruction amount to "affirmative waiver," then Sgt Schmidt was necessarily prejudiced by that waiver; defense counsel's closing argument lacked reinforcement of accurate instructions on the law. If the military judge had accurately defined "in the presence of" and given an instruction that an honest mistaken belief the child was not aware of Sgt Schmidt's conduct due to being

[79] 79 M.J. 329 (C.A.A.F. 2020).
[80] 76 M.J. 224 (C.A.A.F. 2017).
[81] 79 M.J. at 331 ("By 'expressly and unequivocally acquiescing' to the military judge's instructions, Appellant waived all objections to the instructions . . . .").

asleep, there is, at the very least, a reasonable probability Sgt Schmidt would have been acquitted. The "waiver" of required, accurate instructions deprived Sgt Schmidt of a trial whose result is reliable.

Argument

I.

THE PHRASE "IN THE PRESENCE OF" USED TO DEFINE THE TERM "LEWD ACT" IN ARTICLE 120b(h)(5)(D) REQUIRES THE CHILD TO BE AWARE OF THE LEWD ACT.

Standard of Review

An issue of statutory construction is a question of law reviewed *de novo*.[82]

Additional Facts

During closing argument, civilian defense counsel argued that Sgt Schmidt had not committed a crime:[83]

> Masturbating isn't a crime. *Masturbating in a room where you think everybody is asleep and no one is watching you and no one is aware, doesn't meet the elements of what they're saying. That is not a crime*.
>
> ….
>
> The kid was in the room. *That is not enough*. It must be a lewd act [upon] J.M.T. If you are underneath a blanket, masturbating, you cover yourself up, and you think everyone is sleeping, it's dark, *it's not a lewd act upon him*.[84]

[82] *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018).
[83] JA 221-22, 226-27.
[84] JA 226 (emphasis added).

Trial counsel responded in rebuttal:

> [Sgt Schmidt] admits to being in the room. He knows that J.M.T. is 15 years old. He talks about J.M.T. was right next to him in the room. He gives this weird explanation about wanting to go to sleep, but he doesn't go to sleep. He gets up, gets his gear together, and leaves. He admits to masturbating; he admits to ejaculating.
> ….
>
> I mean, members, looks [sic] at the element of Specification 2, which is indecent conduct by *intentionally masturbating in the presence of a person less than 16 years old*. The evidence is proven beyond a reasonable doubt that each one of those elements in Specification 2 has been met. That can be proven based on the accused's interrogation alone.[85]
>
> And — again, members, *there's no question that Sergeant Schmidt was masturbating in that room right next to J.M.T.*[86]

Argument

Courts "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context."[87] Military courts look at "the evil the provision is directed towards, and the remedy in view,"[88] so that the interpretation of the statute brings about a logical result. Additionally, courts "assume that Congress is aware

[85] JA 231 (emphasis added).
[86] JA 232 (emphasis added).
[87] *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).
[88] *United States v. Brown*, 13 C.M.R. 10, 12 (C.M.A. 1953).

of existing law when it passes legislation."[89]

A. The lower court correctly held that in order for an accused's "lewd act" to be done "in the presence of a child," the child must be aware of it.

The lower court reviewed how "in the presence of" was defined in dictionaries and through case law.[90] That review established that historically, military courts have required "victim awareness" of the conduct by defining "presence" as "being in view" and/or "close physical proximity *coupled with* awareness."[91] The "evil" that Congress addressed in proscribing lewd acts upon a child under Article 120b, UCMJ was, and still is, to protect children from acts that have a tendency to corrupt their morals," or that might cause the child to be embarrassed, humiliated, or ashamed."[92] These "harms derive from the child's awareness of the offensive conduct."[93] Considering this history, the NMCCA

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[89] *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019) (quoting *Miles v. Apex Marine Corps*, 498 U.S. 19, 32 (1990)).
[90] *Schmidt*, 80 M.J. at 596-98.
[91] *See United States v. Miller*, 67 M.J. 87, 90 (C.A.A.F. 2008) (quoting BLACK'S LAW DICTIONARY 1221 (8th ed. 2004)) (defining "presence" as "close physical proximity coupled with awareness"); *United States v. Burkhart*, 72 M.J. 590, 594-95 (A.F. Ct. Crim. App. 2013) (finding that "presence" requires the child to be aware of the accused's presence and actions); *United States v. Anderson*, 2013 CCA Lexis 517, *16 (N-M. Ct. Crim. App. June 27, 2013) ("in order to sustain a charge of indecent liberty . . . the child must have at least some awareness the accused is in her physical presence."); *see also* Manual for Courts-Martial [MCM] (2016 ed.), pt. IV, para. 90c(2) and App. 23, para. 90 (presence not required).
[92] *Schmidt*, 80 M.J. at 596 (quoting *Brown*, 13 C.M.R. at 13); *see also Brown*, 13 C.M.R. at 17.
[93] *Schmidt*, 80 M.J. at 596 (citing *United States v. Burkhart*, 72 M.J. 590, 594 (A.F. Ct. Crim. App. 2013)).

correctly held that in order for a conviction for lewd conduct upon a child to be sustained, "victim awareness" of the indecent conduct through a sensory connection was required for the conduct to be "in the presence of" the child.[94]

B. The legal definition of "in the presence of" has changed since *United States v. Brown*, but the requirement for victim awareness has remained throughout case law precedent.

In *United States v. Brown*,[95] this Court's predecessor, the Court of Military Appeals (CMA), first addressed the definition of "in the presence of a child" in examining a conviction for indecent liberties via intentional exposure of genitals to two young girls, ages ten and seven.[96] This Court held that the conviction was legally sufficient.[97] Because the appellant intentionally drove by the two girls twice so that they could see his exposed genitals, and they in fact saw his exposed genitals, he was "in view" of them.[98] This satisfied the "victim awareness" requirement for his indecent exposure to be "in the presence of a child."[99]

The next significant decision was *United States v. Knowles*,[100] which reversed a guilty plea to indecent liberties with a child by communicating obscene language over the telephone. The CMA reversed the conviction, holding that "in

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[94] *Schmidt*, 80 M.J. at 598.
[95] 13 C.M.R. 10 (C.M.A. 1953).
[96] *Id*. at 11.
[97] *Id*. at 17.
[98] *Id*. at 11.
[99] *Id*.
[100] 35 C.M.R. 376 (C.M.A. 1965).

the presence of a child" required the child victim to be in the physical presence of the accused.[101] However, the requirement for "physical presence" was based on the requirement for the child to have a sensory connection to the offense beyond hearing the obscene language—"[t]he offense before us requires greater conjunction of the *several senses of the victim* with those of the accused than that of hearing a voice over a telephone wire."[102]

This Court continued the physical presence requirement in *United States v. Miller*,[103] when it ruled that a child's "constructive" presence via online, internet-based communication was not sufficient to uphold a conviction for attempted indecent liberties with a child.[104] It was at this point that this Court held the child victim's "close proximity" in physical presence must be "coupled with awareness" of the indecent conduct in order to sustain a conviction for indecent liberties with a child.[105] Therefore, in *Miller*, while the purported victim was aware of the indecent conduct through sensory connections of sight and sound enabled by the internet, the child was not in "close proximity" to the accused. Accordingly, the

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[101] *Knowles*, 35 C.M.R. at 377.
[102] *Id*. at 377-78 (emphasis added).
[103] 67 M.J. 87 (C.A.A.F. 2008).
[104] *Id*. at 90. The "child" was actually an undercover agent. The MCM required the child's physical presence during the indecent conduct in order to sustain a conviction.
[105] *Id*. at 89-90.

child was not "physically present."[106]

The lower courts consistently applied "close proximity coupled with awareness" in reviewing convictions for indecent liberties with a child. In *United States v. Burkhart*,[107] the Air Force Court of Criminal Appeals (AFCCA) reversed the conviction because, while the appellant's three-year-old daughter was certainly in "close proximity" while he masturbated on the couch (only two to three feet away),[108] she was sleeping.[109] Because she slept, she had no sensory connection to the appellant's masturbation, and therefore was not "aware" of it.[110] Even after she awoke, she did not see him masturbating, because the evidence showed he stopped when she woke up, pushed her out of the room, and then only resumed masturbating after she left the room.[111] Therefore, the evidence was legally insufficient to sustain the conviction for indecent liberty with a child.[112]

The NMCCA agreed with this reasoning in *United States v. Anderson*,[113] setting aside the appellant's guilty plea to indecent liberty with a child for having sex with his wife while their five-year-old niece laid in bed with them because she

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[106] *Miller*, 67 M.J. at 91.
[107] 72 M.J. 590.
[108] *Id*. at 592.
[109] *Id*.
[110] *Id*. at 595.
[111] *Id.*
[112] *Id*.
[113] 2013 CCA LEXIS 517.

was unconscious, and therefore, not "aware" of them having sex.[114] Finally, the Army Court of Criminal Appeals (ACCA) reached a similar conclusion in *United States v. Gould*,[115] setting aside the conviction for indecent liberty with a child for factual insufficiency for the Government's failure to prove the child was aware of the indecent conduct.[116]

C. When Congress changed the statutory offense from "indecent liberties with a child" to "lewd act upon a child," the requirement for victim awareness remained.

Congress subsequently changed the offense from "indecent liberties with a child" to "lewd act upon a child." Congress continued the requirement for the lewd act to occur "in the presence of" the child; however, Congress eliminated the requirement for the act to occur in the physical presence of the child to account for conduct that occurs online, such as the conduct that occurred in *Miller*.[117]

With this amendment, Congress essentially eliminated the requirement for "close proximity" and instead emphasized the requirement for the child victim to be aware of the act through sensory connection. The logic behind this change is simple. A child who "Skypes" with someone who masturbates during their Skype session on the other side of the earth has a sensory connection to the masturbation

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[114] *Anderson*, 2013 CCA LEXIS 517 at *15-*16.
[115] 2014 CCA LEXIS 694 (A. Ct. Crim. App. Sep. 16, 2014) (unpub. op.), *rev'd in part on other grounds*, 75 M.J. 22 (C.A.A.F. 2015).
[116] *Id*. at *2.
[117] *Schmidt*, 80 M.J. at 597.

via sight, and is therefore subject to a "corrupting harm" without physical proximity.[118] In contrast, a sleeping child would not have *any* sensory connection to the lewd act charged, regardless of physical proximity, and therefore, is not at risk of experiencing a "corrupting harm."[119]

It is not enough to establish an accused's awareness of the child's proximity in order to sustain a conviction for a lewd act upon a child, as a child with a close physical proximity may nevertheless be unaware of the accused's conduct due to the lack of a sensory connection, as established in *Burkhart*, *Anderson*, and *Gould*. Instead, because "in the presence of a child" requires victim awareness, an accused must intend to not only engage in "indecent" conduct, he must also intend for the victim to be aware of the conduct,[120] such that the victim will experience the type of "corrupting harm" that Congress sought to proscribe by amending the law.

D. Jared, the alleged victim in this case, testified that he pretended to be asleep. Sergeant Schmidt honestly believed Jared was asleep. As such, Sgt Schmidt did not intend for Jared to be aware of his conduct.

Sergeant Schmidt admitted to masturbating in the living room while Jared was sleeping.[121] Jared testified that he pretended to be asleep while Sgt Schmidt masturbated and waited until Sgt Schmidt left the house to go to work to "wake

[118] *Schmidt*, 80 M.J. at 598.
[119] *Id*; *Burkhart*, 72 M.J. at 595; *Anderson*, 2013 CCA LEXIS 517 at *16.
[120] *Schmidt*, 80 M.J. at 598.
[121] JA 258.

up."[122] This was corroborated by Michelle, who testified she thought Jared was still sleeping when she came into the living room.[123] Under these circumstances, the military judge was obligated to instruct the panel members that an honest mistaken belief Jared was sleeping constituted a defense that absolved Sgt Schmidt of criminal liability.[124]

II.

APPELLANT DID NOT AFFIRMATIVELY WAIVE ANY OBJECTION TO THE MILITARY JUDGE'S INSTRUCTIONS OR THE FAILURE TO INSTRUCT ON THE AFFIRMATIVE DEFENSE OF MISTAKE OF FACT.

Standard of Review

Whether an appellant waived an objection to an instruction or lack of instruction is a question of law reviewed *de novo*.[125]

Additional Facts

During deliberations, the panel members asked, "With regard to Specification II [sic], what does . . . 'in the presence of' mean?"[126] No definition of this term existed in the Benchbook, as acknowledged by Sgt Schmidt's civilian defense counsel and the military judge.[127] The trial counsel advocated for telling

[122] JA 68, 74.
[123] JA 197.
[124] *See* Granted Issue II, *infra*.
[125] *Davis*, 79 M.J. at 331.
[126] JA 235.
[127] JA 236.

the members to use their "common sense" and instructing the panel members on the definition of "lewd acts."[128] Although the civilian defense counsel did not object, he also made it clear that the lack of objection was due to being unable to find any definition of in the Benchbook.[129]

The military judge ultimately told the panel members they were "in the absence of a more specific legal definition. Members are to apply their common sense and understanding of the term of words and that applies to the terms 'in the presence of' as well."[130] Fifteen minutes after the members resumed deliberations,[131] they acquitted Sgt Schmidt of Specification 1 but convicted him of Specification 2.[132]

Argument

"Required instructions are those that *shall* be given."[133] Required instructions include the elements of the offense, correct legal definitions of terms,

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[128] JA 235-36.
[129] JA 236.
[130] *Id*. This Court should issue an opinion that discourages military judges from leaving it up to panel members to use their "common sense" or "ordinary understanding" to define legal terms of art. Allowing non-lawyers "free range" to define legal terms of art creates more appellate issues than it resolves. *See Pease*, 75 M.J. at 184.
[131] JA 236.
[132] JA 238, 266.
[133] *Davis*, 76 M.J. at 228 (emphasis added).

and applicable special defenses.[134] A military judge has an affirmative duty to instruct on special defenses reasonably raised by the evidence.[135] The failure to provide required instructions leaves the panel members insufficiently informed as to the law of the case.[136] In turn, this risks a wrongful conviction, as an uninformed panel will not know of technical legal views that will excuse criminal liability.[137]

"Waiver" of a required instruction requires an "affirmative action demonstrating a purposeful decision to relinquish a known right,"[138] not a mere failure to object.[139] For example, a military judge opining that a mistake of fact defense regarding consent may apply, and defense counsel stating, "I simply do not want to request one," is an affirmative waiver.[140] Another example of an affirmative waiver is trial defense counsel stating, "I did not intend to raise that as an issue . . . ."[141] Circumstances in which appellate courts have found waiver

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[134] *United States v. Ginn*, 4 C.M.R. 45, 48 (C.M.A. 1952); Article 51(c), UCMJ; R.C.M. 920(e).
[135] R.C.M. 920(e)(3).
[136] *Ginn*, 4 C.M.R. at 48.
[137] *Id*.
[138] *Davis*, 79 M.J. at 332-33 (Maggs, J. concurring); *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008); *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009); *United States v. Gutierrez*, 64 M.J. 374, 377 (C.A.A.F. 2007) (citing *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999)).
[139] *Johnson v. United States*, 520 U.S. 461, 468 (1997); *Davis*, 79 M.J. at 332-33 (Maggs, J. concurring); *Davis*, 76 M.J. at 229; *but see Davis*, 79 M.J. at 331.
[140] *Gutierrez*, 64 M.J. at 377-78.
[141] *United States v. Spears*, 39 M.J. 823 (A.F.C.M.R. 1994).

include language used by trial defense counsel that indicate satisfaction or affirmative agreement with the military judge on an issue, or whether there was a tactical advantage to the accused.[142]

In contrast, failure to object to an instruction or the lack of instruction constitutes forfeiture.[143] Forfeiture is reviewed for plain error based on the law at the time of appeal.[144] "[A]n accused's right to an instruction on affirmative defenses [is not] waived by the absence of a request."[145] Forfeiture does not "extinguish" an error from appellate review.[146] The Supreme Court suggests the following test for determining if an error was "forfeited:" "If a legal rule was violated during the . . . court proceedings, and if the [accused] did not waive the

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[142] *United States v. Pasha*, 24 M.J. 87, 91 (C.M.A. 1987).
[143] *Johnson*, 520 U.S. at 465-66; *Davis*, 76 M.J. at 226; *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017); *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) (citing *United States v. Tunstall*, 72 M.J. 191, 193 (C.A.A.F. 2013)); *Gladue*, 67 M.J. at 313; *Gutierrez*, 64 M.J. at 377-78; *United States v. Brewer*, 61 M.J. 425, 430 (C.A.A.F. 2005); *United States v. Guthrie*, 53 M.J. 103, 106 (C.A.A.F. 2000) (citing *United States v. Maxwell*, 45 M.J. 406, 426 (C.A.A.F. 1996)); *United States v. Eckhoff*, 27 M.J. 142, 143-44 (C.M.A. 1988); R.C.M. 920(f); *but see Davis*, 79 M.J. at 331.
[144] *Johnson*, 520 U.S. at 467; *Haverty*, 76 M.J. at 208; *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (citing *Harcrow*, 66 M.J. at 159).
[145] *United States v. Taylor*, 26 M.J. 127, 129 (C.M.A. 1988), *overruled on other grounds*, *Davis*, 76 M.J. at 225-26.
[146] *United States v. Olano*, 507 U.S. 725, 733 (1993); *Gladue*, 67 M.J. at 313:

> The distinction between the terms [forfeiture and waiver] is important. If an appellant has forfeited a right by failing to raise it at trial, we review for plain error. When, on the other hand, an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal (internal citations and quotations omitted).

rule, then there has been an 'error' . . . despite the absence of a timely objection."[147]

This Court previously interpreted "waiver" to require an actual or express "renunciation of the right at issue."[148] Here, there was no actual or express "renunciation" of Sgt Schmidt's right for the panel members to be correctly instructed on legal terms of art. The record actually shows that Sgt Schmidt's defense counsel implicitly objected to the trial counsel's proposal to instruct the panel members to use their own "common sense" in defining "upon" and "in the presence of" by searching the Benchbook to find a clear definition in Article 120(b), UCMJ.[149] Defense counsel told the military judge he could not find a definition of "upon" in the Benchbook, "I haven't found anything yet, sir[;]"[150] the military judge assured him there was not one.[151] Because defense counsel could not find a definition of "upon" to provide legal support for his closing argument, at best, defense counsel acquiesced to the military judge's instructions: "I do not [object], sir. There is no definition for the record in the Benchbook."[152] A

[147] *Olano*, 507 U.S. at 733-34.
[148] *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997) (cited in *United States v. Earle*, 46 M.J. 823, 825-26 (A.F. Ct. Crim. App. 1997)).
[149] JA 236.
[150] *Id*.
[151] *Id*.
[152] *Id*.

statement of "no objection" results in forfeiture, not waiver.[153]

There is also no clear indication in the record that trial defense counsel affirmatively waived the defense of mistake of fact even though he did not specifically request it. In fact, there is zero discussion of this instruction in the record. Therefore, Sgt Schmidt did not "waive" his right for the panel members to be instructed on a defense reinforcing defense counsel's closing argument that masturbating near a sleeping child was not a crime.[154] According to past long-standing precedents, the failure to request an instruction on an affirmative defense amounts to forfeiture, not waiver.[155]

This Court's 2020 *Davis* decision equating "acquiescence" with "waiver,"[156] conflicts with its 2017 *Davis* decision, as well as other long-standing precedents from this Court and the Supreme Court, which consistently hold the failure to object to an incorrect instruction and/or the lack of a mandatory instruction amounts to forfeiture that is reviewed for plain error.[157] To that extent, this Court

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[153] *Guthrie*, 53 M.J. at 106 ("[W]ith three clear opportunities to request a spillover instruction, we find the [Individual Military Counsel] forfeited the issue.").
[154] R.C.M. 916(j)(1).
[155] *Johnson*, 520 U.S. at 468; *Davis*, 79 M.J. at 332-33 (Maggs, J. concurring); *Davis*, 76 M.J. at 229; *Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017); *Payne*, 73 M.J. at 22; *Tunstall*, 72 M.J. at 193; *Gutierrez*, 64 M.J. at 377-78; *Brewer*, 61 M.J. at 430; *Guthrie*, 53 M.J. at 106; *Maxwell*, 45 M.J. at 426; *Eckhoff*, 27 M.J. at 143-44; *but see Davis*, 79 M.J. at 331.
[156] 79 M.J. at 331.
[157] *Johnson*, 520 U.S. at 468; *Olano*, 507 U.S. at 733-34; *Davis*, 76 M.J. at 226; *Haverty*, 76 M.J. at 208; *Payne*, 73 M.J. at 22; *Tunstall*, 72 M.J. at 193; *Gutierrez*,

should overrule its 2020 *Davis* decision.

III.

HAVING ASSUMED DEFICIENT PERFORMANCE BY COUNSEL, THE LOWER COURT ERRED IN FINDING NO PREJUDICE.

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*.[158]

Argument

The Sixth Amendment right to assistance of counsel provides the accused with the right to counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances.[159] To establish ineffective assistance of counsel, an appellant must demonstrate that his counsel's performance was deficient, and that this deficiency resulted in prejudice,[160] that is, the errors deprived the appellant of a trial whose result is reliable.[161] The courts determine prejudice by looking at whether "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting

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64 M.J. at 377-78; *Brewer*, 61 M.J. at 430; *Guthrie*, 53 M.J. at 106; *Maxwell*, 45 M.J. at 426; *Eckhoff*, 27 M.J. at 143-44.

[158] *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016).

[159] *Strickland v. Washington*, 466 U.S. 668, 680 (1984).

[160] *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687).

[161] *Strickland*, 466 U.S. at 687; *see also United States v. Davis*, 75 M.J. 537, 547 (A. Ct. Crim. App. 2015) (*en banc*) (J. Penland, S.J. Tozzi, and J. Campanella concurring in part and in the result), *aff'd*, 76 M.J. 224.

guilt."[162] Here, Sgt Schmidt's wrongful conviction resulted from a panel that was insufficiently instructed on the law, which results in a trial with an unreliable result.[163]

If this Court agrees that defense counsel "waived" required instructions, Sgt Schmidt was necessarily prejudiced by his civilian defense counsel's "waiver" of his ability to provide legal support for his argument. The record demonstrates Sgt Schmidt was deprived of a trial whose result is reliable due to the lack of legally correct, required instructions on the definition for "in the presence of," and on the defense of having a mistaken belief that Jared was sleeping. The mistaken belief that Jared was sleeping was the heart of the defense's case on this Specification. As a result, the defense's closing argument that Sgt Schmidt had not committed a crime by masturbating near a sleeping child had no reinforcement from the military judge that the closing argument was legally correct. Given the panel members' request for clarification of the law, it appears this closing argument resonated with them. Had the military judge instructed them correctly on the law, there is more than a "reasonable probability" the members would have had reasonable doubt as to Sgt Schmidt's guilt.

The NMCCA's conclusion that Sgt Schmidt was not prejudiced by his

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[162] *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).
[163] *Ginn*, 4 C.M.R. at 48.

defense counsels' deficient performance was premised on its erroneous conclusion that the evidence was "too thin" to require an instruction on a mistake of fact defense.[164] However, in deciding whether sufficient evidence was admitted to warrant an instruction on an affirmative defense, the standard is "*some* evidence without regard to its source or credibility . . . upon which members might rely if they choose."[165] Given Jared's own testimony that he pretended to be asleep,[166] Michelle's testimony that Jared appeared to be asleep when she left with Sgt Schmidt,[167] and Sgt Schmidt's agreement with the agents that he thought Jared was asleep,[168] there was in fact "some" evidence sufficient to require an instruction on an honest mistake of fact.[169] Such an instruction would have provided legal

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[164] *Schmidt*, 80 M.J. at 604.

[165] *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003); *see also United States v. Heims*, 12 C.M.R. 174, 177 (C.M.A. 1953) (holding that there is a *sua sponte* duty to instruct on affirmative defenses when "reasonably raised" by the evidence); R.C.M. 920(e), Discussion (emphasis added).

[166] JA 68.

[167] JA 197.

[168] JA 258.

[169] The NMCCA correctly held that because committing a lewd act upon a child was a specific-intent crime, Sgt Schmidt only needed to have an honest mistaken belief Jared was asleep, as opposed to an honest and mistaken belief. *Schmidt*, 80 M.J. at 598; R.C.M. 916(j)(1):

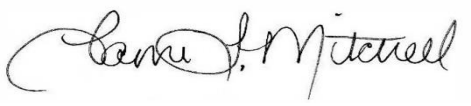
> [I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused.

support for civilian defense counsel's closing argument, thus tipping the scale in favor of Sgt Schmidt.

Conclusion

For all the aforementioned reasons, this Court should set aside and dismiss Sgt Schmidt's conviction.

Respectfully submitted,



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