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

REPLY BRIEF ON BEHALF OF APPELLANT

Ct. 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:

TAMI L. MITCHELL
Civilian Defense Counsel
Law Office of Tami L. Mitchell
5390 Goodview Drive
Colorado Springs, CO 80911
Tel: (719) 426-8967
tamimitchelljustice@gmail.com
C.A.A.F. Bar No. 32231

MEGAN E. HORST
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (202) 685-7087
megan.e.horst@navy.mil
C.A.A.F. Bar No. 37381

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Introduction to Appellant's Reply

There are three main problems with the Government's argument about Granted Issue I. First, the Government fails to address the distinction between Article 120b, UCMJ "lewd act upon a child," which requires "presence," and Article 134, UCMJ "indecent conduct," which does not require "presence." Second, the Government's argument that "presence" only requires the accused to be aware of the child's presence flies in the face of Congressional intent for "presence" to require the child's awareness of the indecent conduct in order for it to cause the harm Congress addressed when it revised the statute. Third, the Government's argument that Article 120b, UCMJ requires only an accused's awareness of the child's presence contradicts case law holding otherwise, and lowers the *mens rea* requirement from "intentionally" to "knowingly." This Court cannot condone the Government's proposal.

Until this Court's 2020 *Davis* decision,[1] in order for appellate courts to apply "affirmative waiver" to required instructions, a discussion of the issue being "waived" must be made on the record. If there is no discussion on the record, then a plain error standard applies based on the law at the time of the direct appeal. While there was limited discussion of the legally correct definition of "in the presence of," there was *zero* discussion of the affirmative defense of honest

[1] 79 M.J. 329 (C.A.A.F. 2020).

mistake of fact that Jared was asleep. Therefore, at the very least, this Court should hold the lower Court erred in applying waiver to the military judge's failure to instruct the panel members on the mistake of fact defense.

Finally, the military judge's failure to provide a legally correct definition of "in the presence of" and an instruction on the mistake of fact defense led to a trial whose result is unreliable. Sergeant Schmidt has an *ex post facto* conviction for mere "indecent conduct," in violation of the Constitution. As Sgt Schmidt's defense counsel correctly argued during closing, masturbating near a sleeping child (or a child believed to be asleep) was not a crime. It did not become a crime until September 16, 2016.[2] Having a criminal conviction for a non-criminal act is *per se* prejudicial.

For all of these reasons, this Court should set aside Sgt Schmidt's conviction and sentence and dismiss with prejudice. Alternatively, this Court could set aside the finding and sentence and authorize a rehearing, but in the interests of judicial economy, should not do so.

[2] JA 38.

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?

Argument

I.

"Old" Rules v. "New" Rules

The old "indecent liberties with a child" offense is the new "lewd act upon a child" offense, in violation of Article 120b, UCMJ.[3] Under the old "indecent liberties with a child" offense, "in the presence of" required "victim awareness" of

[3] Manual for Courts-Martial [*MCM*], United States, app. 23, ¶ 45 (2012 ed.) ("This change expands the pre-2021 definition of 'indecent liberty' which proscribed conduct only if committed in the physical presence of a child."); JA 37.

the conduct in order to sustain a conviction for indecent liberties with a child.[4] This is because the indecent liberties offense required the child to be exposed to the sexual conduct.[5] There can be no exposure to sexual conduct without "victim awareness" of the conduct *through a sensory connection*.[6] At most, it is "indecent conduct."[7]

In contrast, the old "indecent acts with another" offense is the new "indecent conduct" offense, in violation of Article 134, UCMJ.[8] For the new "indecent conduct" offense, "presence of another person," victim or not, is not required to

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[4] *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.), *pet. rev. denied*, 73 M.J. 56 (C.A.A.F. 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 at *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.").

[5] *See United States v. Stout*, 2014 CCA Lexis 469 at *12 (A. Ct. Crim. App. Jul. 25, 2014) (unpub. op.) (citing *MCM*, pt. IV, ¶ 45.a(j), (t)(11) (2008 ed.)); JA 32, 34.

[6] *United States v. Schmidt*, 80 M.J. 586, 597 (N-M. Ct. Crim. App. 2020); *Burkhart*, 72 M.J. at 595-96 (masturbating next to a sleeping child, and no indication the child saw masturbation when she awoke, not sufficient to affirm conviction for "indecent liberties," but sufficient to affirm conviction for "indecent conduct"); *Anderson*, 2013 CCA Lexis 517 at *13-19 (having sex with spouse next to an unconscious niece not sufficient to affirm conviction for indecent liberties with a child, but sufficient to affirm an LIO of indecent conduct).

[7] *Id*.

[8] *MCM*, app. 23, ¶ 90 (2016 ed.) ("This offense . . . includes offenses previously proscribed by 'Indecent Acts with Another' . . . ."); JA 38.

sustain a conviction.[9] The explanation goes on to state that, "For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c)."[10] However, this statute did not take effect until September 16, 2016, about three weeks *after* Sgt Schmidt's alleged conduct.[11]

If Sgt Schmidt had been court-martialed under the "old" rules, he would have been charged with, and convicted of, "indecent liberties with a child." But under the "old" rules, the NMCCA would not have affirmed a conviction for indecent liberties, because accepting Jared's testimony at face value, he admitted that he pretended to be asleep the entire time.[12] Even afterwards, he continued to pretend he was asleep to the point that even Michelle believed Jared was sleeping when she left with Sgt Schmidt to take him to work.[13] If the circumstances had been what Sgt Schmidt honestly believed them to be,[14] Jared was asleep and therefore did not have a sensory connection to Sgt Schmidt's masturbation.[15]

To summarize, under the "old" rules, if "indecent conduct" had been a lesser-included offense at the time of Sgt Schmidt's conduct, and assuming

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[9] *Id*., pt. IV, ¶ 90.c.(2) (2016 ed.), JA 36.
[10] *Id*.
[11] *MCM*, app. 23, ¶ 90 (2016 ed.), JA 38.
[12] JA 69, 74-75, 89, 92-96, 103-04.
[13] JA 197.
[14] R.C.M. 916(j)(1).
[15] *Burkhart*, 72 M.J. 590, 595-96; *Anderson*, 2013 CCA Lexis 517 at *13-19.

"indecent conduct" would have been charged in the alternative as service-discrediting conduct, the NMCCA could have affirmed a conviction for indecent conduct in violation of Article 134, UCMJ.[16] However, because "indecent conduct" was not an offense at the time, no conviction can be affirmed for anything.[17]

Ambiguity of Definition of "Presence"

The parties agree that when statutory language is ambiguous, then courts look to legislative intent to resolve the ambiguity.[18] The NMCCA held that "in the presence of" was "susceptible to more than one interpretation,"[19] meaning it was ambiguous. The Government does not challenge this holding. If this Court agrees that "presence" is susceptible for more than one interpretation, then in interpreting the meaning of "presence,"[20] this Court must resolve the ambiguity in Sgt Schmidt's favor.[21]

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[16] *Burkhart*, 72 M.J. 590, 595-96; *Anderson*, 2013 CCA Lexis 517 at *13-19.
[17] *Calder v. Bull*, 3 U.S. 386, 390 (1798).
[18] Gov. Br. at 10.
[19] *United States v. Schmidt*, 80 M.J. 586, 596 (N-M. Ct. Crim. App. 2020).
[20] As the Government suggests, statutory interpretation requires analyzing legislative history and assessing whether the statutory scheme is coherent and consistent. Gov. Br. at 10 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).
[21] *Liparota v. United States*, 471 U.S. 419, 427 (1985); *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Ladner v. United States*, 358 U.S. 169, 177-78 (1958).

The legislative history shows that, in revising the elements of "lewd act upon a child" to eliminate the physical proximity requirement, Congress intended to address the online, internet-based communication in *United States v. Miller*.[22] Congress proscribed indecent conduct of which the child was aware, regardless of the child's physical proximity to the accused,[23] because the child's awareness of the indecent conduct is what causes the harm to the child.[24] In revising this statute, the "evil" Congress sought to address was the harm to the child through exposure to indecent conduct.[25] In order to be "exposed" to the indecent conduct, the child must have a sensory connection to it.[26]

The Government's argument that "presence" only proscribes indecent conduct in close physical proximity of the child flies in the face of Congressional intent. Congress intended to eliminate the physical proximity requirement in "indecent liberties with a child" so as to permit a conviction for indecent conduct of which the child is aware through sensory connection, but is not within close physical proximity to the offender.

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[22] 67 M.J. 87 (C.A.A.F. 2008).
[23] *MCM*, app. 23, ¶ 45 (2012 ed.), JA 37; *see also United States v. Rodriguez*, 2015 CCA Lexis 551 at *21-24 (A. Ct. Crim. App. Dec. 1, 2015) (unpub. op.).
[24] *United States v. Brown*, 13 C.M.R. 10, 13-14 (C.M.A. 1953).
[25] *Id*. at 12; *United States v. Rinkes*, 53 M.J. 741, 743 (N-M. Ct. Crim. App. 2000).
[26] *Schmidt*, 80 M.J. at 597, 602.

In contrast, the Article 134, UCMJ, prohibition on "indecent conduct" was intended to address the "evil" to societal morals by someone engaging in indecent conduct without the "presence" of another person (*i.e.* awareness through a sensory connection),[27] regardless of whether that other person is an adult or a child.[28] By comparing "lewd act upon a child" in violation of Article 120b, UCMJ with "indecent conduct" in violation of Article 134, UCMJ, and considering case law on "indecent liberties" versus "indecent conduct," this Court can see the statutory scheme is coherent and consistent in proscribing a variety of indecent conduct. The differentiating factor between the two offenses is whether the child is aware of the indecent conduct through a sensory connection.

For the Government to argue that the child does not need to be aware of the conduct in order to sustain a conviction for lewd act upon a child is simply incorrect,[29] and contrary to Congressional intent. The Government's interpretation returns Article 120b(c), UCMJ back to the results in *Miller*.[30] In that case, this Court set aside the conviction for attempted indecent liberties with a child because, even though the "child" (who was in reality an undercover agent) was exposed to

[27] *Rinkes*, 53 M.J. at 743.
[28] *MCM*, pt. IV, ¶ 90.c.(2) (2016 ed.), JA 36.
[29] Gov. Br. at 17-19.
[30] *Miller*, 67 M.J. at 90-91.

indecent conduct through the use of webcams, the "child" was not in close physical proximity to the offender.[31]

The 2004 Black's Law Dictionary's definition of "presence" the NMCCA used is the very same definition this Court used in *Miller*,[32] which existed when Congress revised the statute. The Government acknowledges this,[33] yet, attempts to use other dictionaries' definitions of "presence" to argue why the NMCCA, and therefore essentially this Court, erred in relying on the 2004 Black's Law Dictionary's definition of "presence."[34] In relying on other dictionaries' definition of "presence," the Government fails to explain why relying on an "ordinary" dictionary's definition is better than relying on a *legal* dictionary's definition. While it is acceptable practice to use an ordinary dictionary to define an ordinary word, the better practice is to use a *legal* dictionary's definition to define a *legal* term of art.[35] As used in Article 120b, UCMJ, "in the presence of" is a legal term of art.

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[31] *Miller*, 67 M.J. at 90-91.
[32] *Compare Schmidt,* 80 M.J. at 596 *with Miller,* 67 M.J. at 90.
[33] Gov. Br. at 19.
[34] *Id*.
[35] Even using the Black's Law Dictionary's historical definition of "presence," which required the other person to be within "sight or call," does not support the Government's argument, because the historical definition of "presence" required a *sensory connection* through sight or sound, which a sleeping child lacks. Gov. Br. at 14.

Mens Rea Requirement

In revising the offense of lewd conduct upon a child, Congress made another significant change to require that the accused *intentionally* engage in indecent conduct in the "presence" of the child.[36] In doing so, Congress turned the old "indecent liberties with a child" offense, which was a general intent crime,[37] into the "lewd act upon a child" offense, which is now a specific intent crime.[38] It appears Congress added this heightened *mens rea* requirement to balance against the lack of physical proximity to ensure that only those who *intended to harm the child* with indecent conduct were convicted of an offense under Article 120b, UCMJ. On the other hand, a "knowing" *mens rea* only requires the accused "to be aware that the result is practically certain to follow from his conduct."[39] A lower *mens rea* is recklessness, which requires the accused "to consciously disregard a substantial risk that the conduct will cause harm to another."[40] Finally,

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[36] Article 120b(h)(5)(D), JA 30; *Schmidt*, 80 M.J. at 597.

[37] A "general intent" crime only requires that the accused intentionally engage in the prohibited conduct and not by mistake or accident. In other words, proof of a general intent offense requires only that the accused intended to commit the *actus reus* of the crime; whether the accused desired the consequences that result is irrelevant. *United States v. Voorhees*, 79 M.J. 5, 16 (C.A.A.F. 2019); *United States v. Haverty*, 76 M.J. 199, 204 (C.A.A.F. 2017); *United States v. Axelson*, 65 M.J. 501, 512 (A. Ct. Crim. App. 2007) (citations omitted).

[38] In contrast, a "specific intent" crime requires the accused to "act with the specific purpose of violating the law." *Axelson*, 65 M.J. at 512 (citations omitted).

[39] *United States v. Bailey*, 444 U.S. 394, 404 (1980).

[40] *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016); *Haverty*, 76 M.J. at 204-05.

the lowest *mens rea* standard is negligence ("should have known" standard).

In order for the Government to sustain a conviction for "lewd act upon a child," it had to prove that Sgt Schmidt "intentionally" masturbated in Jared's "presence," such that Sgt Schmidt consciously desired to harm Jared by ensuring Jared was aware of Sgt Schmidt's masturbation through a sensory connection.[41] A belief that Jared was sleeping renders Sgt Schmidt's conduct unintentional—a sleeping child does not have the required sensory connection to the indecent conduct,[42] and therefore, is not "present."[43]

The Government's argument that Article 120b(c), UCMJ includes circumstances where the accused takes a risk that a sleeping child might wake up,[44] lowers the required *mens rea* from "intentionally" to "reckless." Such an interpretation inappropriately broadens the scope of conduct covered by Article 120b(c), UCMJ to include "indecent conduct" as well as "lewd acts upon a child." Courts cannot enlarge a statute to include conduct that Congress omitted, even if the Court believes there was an oversight or mistake.[45]

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[41] *United States v. United States Gypsum Co*., 438 U.S. 422, 445-46 (1978); *Schmidt*, 80 M.J. at 597.
[42] *Schmidt*, 80 M.J. at 597-98 (considering the statutory language in both its current and its historical context).
[43] *Id*. at 597-98, 602.
[44] Gov. Br. at 21.
[45] *United States v. McPherson*, __ M.J. __, 2021 CAAF 710 at *25 (C.A.A.F. 2021) (citations omitted).

II.[46]

"'A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law.'"[47] "A forfeiture is the 'passive abandonment of a right by neglecting to preserve an objection,' whereas waiver is the affirmative, intentional relinquishment or abandonment of a known right.'"[48] "Acquiescing" is a "passive," not "affirmative," action.[49]

In characterizing a "waiver" as "affirmatively acquiescing" through the failure to object,[50] this Court created an internal contradiction in words and law, because a waiver of a mandatory instruction must be through an *affirmative*, not passive, action,[51] based on a discussion of the issue on the record.[52] Otherwise, there is either: (1) an objection that preserves the issue, which is tested for

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[46] Most of the cases on which the Government relies do not deal with instructions. Gov. Br. at 24.
[47] *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020) (citations omitted).
[48] *United States v. Sandoval*, 2020 CCA Lexis 114 at *15-16 (N-M. Ct. Crim. App. Apr. 13, 2020) (unpub. op.) (quoting *United States v. Davis*, 76 M.J. 224, 227 n.1 (C.A.A.F. 2017) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)).
[49] BLACK'S LAW DICTIONARY 24 (6th ed. 1992) ("passive compliance, "[f]ailure to make any objections," "distinguished from avowed consent, on the one hand, and from open discontent or opposition, on the other"); Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/acquiesce (last accessed Aug. 29, 2021) ("to accept, comply, or submit tacitly or passively").
[50] *Davis*, 79 M.J. at 331.
[51] *Davis*, 76 M.J. at 229; R.C.M. 920(f). In this context, "no objection" means a failure to object, because an attorney cannot stand mute when called upon to answer the military judge's question.
[52] *United States v. Gutierrez*, 64 M.J. 374 (C.A.A.F. 2007).

"harmlessness," with the Government bearing the burden of proof; or (2) no objection, which is tested for "plain error," with the individual accused bearing the burden to prove the error is plain, obvious, and prejudicial.[53] "Plain error" is a result of "forfeiture,"[54] and based on the law at the time of the appeal.[55]

In harmonizing the references to "waiver" and "forfeiture" in R.C.M. 920(f), this Court should look at the distinction in "mandatory instructions" under R.C.M. 920(e). Some required instructions are required regardless of a party's request or objection,[56] while other required instructions require a "proper request" by a party, or raised by the military judge *sua sponte*.[57] Examples of an instruction that is mandatory when required by a "proper request" include inferences, effect of character evidence, effect of judicial notice, and an accused's failure to testify.[58] In this case, the military judge was required to give an accurate definition of the legal term of art "in the presence of," and an instruction on the affirmative mistake of fact defense, without a request from the defense. This is why this issue should be tested for "forfeiture," not "waiver."

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[53] *Davis*, 76 M.J. at 229.
[54] *Id*. at 228-29.
[55] *Haverty*, 76 M.J. at 208 (citing *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (citation omitted)).
[56] R.C.M. 920(e)(1)-(6), JA 43-44.
[57] R.C.M. 920(e)(7), JA 44.
[58] R.C.M. 920(e), Discussion, JA 44.

Furthermore, the NMCCA acknowledged that this Court granted CCAs the discretion to review meritorious issues to "pierce" the waiver and apply a "plain error" standard for "forfeiture."[59] Because waiver is reviewed *de novo*,[60] whether the NMCCA should have "pierced" the "waiver" to review for plain error must also be reviewed *de novo*. Given the importance of establishing a precedent for defining "presence," the NMCCA should have pierced the "waiver" and examined for plain error.[61]

Legally Correct Definition of "In the Presence of"

The military judge is required to provide legally correct definitions of legal terms of art, based on the law at the time of the appeal.[62] As the NMCCA correctly established, "intentionally . . . in the presence of" requires two things: (1) the child's awareness, through sensory perception, of the indecent conduct, and (2) that the accused intends for the child to be aware of the indecent conduct.[63]

Based on the law at the time of appeal, the military judge failed to correctly instruct the panel members on the definition of "in the presence of." However, assuming *arguendo* that the limited discussion of the panel members' request for a

[59] *Schmidt*, 80 M.J. at 602 (quoting *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016)).
[60] *Davis*, 79 M.J. at 331.
[61] *See United States v. Nolen*, 2020 CCA Lexis 274 at *17-18 (A.F. Ct. Crim. App. Aug. 21, 2020) (unpub. op.).
[62] *Haverty*, 76 M.J. at 208 (citing *Harcrow*, 66 M.J. at 159 (citation omitted)).
[63] *Schmidt*, 80 M.J. at 598, 602.

proper definition is enough to constitute "waiver," for the reasons stated *infra*, "waiver" amounts of ineffective assistance of counsel that prejudiced Sgt Schmidt.

Honest Mistake of Fact Defense

A military judge is required to instruct the court-martial panel on the availability and legal requirements of an affirmative defense if "the record contains *some* evidence to which the military jury may attach credit if it so desires."[64] "An affirmative defense may be raised by evidence presented by the defense, the prosecution, or the court-martial."[65] "Any doubt whether an instruction 'should be given should be resolved in favor of the accused.'"[66] An act done as a result of a mistake is not done "intentionally."[67]

"We acknowledge that just as a military judge has a duty to correctly instruct on the elements of the offenses, the military judge also has a *sua sponte* duty to instruct on any defenses reasonably raised by the evidence."[68] In cases where defense counsel makes no request for an instruction on an affirmative defense, and also does not object to the instructions given, the military judge is still nevertheless

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[64] *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (quoting *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995)).
[65] *Id*. at 73 (quoting *Brown*, 43 M.J. at 189).
[66] *Id*.
[67] R.C.M. 916(j)(1); *United States v. Lee*, 2020 CCA Lexis 61, *23 (A.F. Ct. Crim. App. Feb. 26, 2020) (unpub. op.).
[68] *Schmidt*, 80 M.J. at 601 (citing R.C.M. 920(e) and *United States v. Barnes*, 39 M.J. 230, 233 (C.A.A.F. 1994)).

required to instruct the panel members on that affirmative defense.[69] And, where there is *zero* discussion on the record of a mistake of fact defense, then the "plain error" standard of review applies, not "waiver."[70]

Here, there was *zero* discussion on the record of a mistake of fact instruction regarding Jared's lack of awareness. If the panel members determined Sgt Schmidt honestly believed Jared was sleeping when he masturbated, so that Jared would not have been "aware," then Sgt Schmidt did not intentionally masturbate in Jared's "presence," and therefore must be found not guilty.[71] Given the NMCCA's correct conclusion that an honest mistake of fact was a defense,[72] the lack of any discussion on the record about this defense amounts to "plain error," not "waiver."

III.

"No…*ex post facto* law shall be passed."[73] An "*ex post facto*" law exists when the law makes criminal, conduct that was innocent when committed."[74] The result of Sgt Schmidt's court-martial is inherently prejudicial because, even though he was charged with "lewd act upon a child," what he stands convicted of is in

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[69] *United States v. Ginn*, 4 C.M.R. 45, 48-49 (C.M.A. 1952)
[70] *See Rich*, 79 M.J. at 476 (waiver applies when, in reviewing the record of trial, there was discussion of the mistake of fact defense, the military judge did not rule against instructing the panel on the defense and invited the parties to propose language for a mistake of fact instruction, but the defense did not respond).
[71] *Hibbard*, 58 M.J. at 75 (quoting *Brown*, 43 M.J. at 189) (emphasis added).
[72] *Schmidt*, 80 M.J. at 598.
[73] U.S. CONST. art. I, § 9, cl. 3.
[74] *Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990); *Calder*, 3 U.S. at 390.

actuality "indecent conduct." "Indecent conduct" did not become an offense until September 16, 2016, about three weeks after Sgt Schmidt's conduct.

The prejudice lies primarily in the fact that the Government's rebuttal—that Sgt Schmidt's physical proximity to Jared was sufficient for a conviction[75]— was legally incorrect. There was no instruction from the military judge that the Government's argument was legally incorrect even after the panel members requested clarification of the definition of "in the presence of."[76] Trial counsel's emphasis in closing argument on an incorrect point of law that was not contradicted by the military judge amounts to prejudice constituting "plain error,"[77] and ineffective assistance of counsel.

Conclusion

For the aforementioned reasons, this Court should set aside the finding and sentence and dismiss with prejudice.

Respectfully submitted,

TAMI L. MITCHELL
Civilian Defense Counsel
Law Office of Tami L. Mitchell
5390 Goodview Drive
Colorado Springs, CO 80911

MEGAN E. HORST
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity

[75] JA 229-34.
[76] JA 235.
[77] *United States v. Prasad*, 80 M.J. 23, 30-33 (C.A.A.F. 2020).

Tel: (719) 426-8967
tamimitchelljustice@gmail.com
C.A.A.F. Bar No. 32231

1254 Charles Morris St., SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
Tel: (202) 685-7054
megan.e.horst@navy.mil
C.A.A.F. Bar No. 37381

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MEGAN E. HORST
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris St, SE
Bldg. 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7054
megan.e.horst@navy.mil
C.A.A.F. Bar No. 37381

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I certify that a copy of the foregoing was electronically mailed to the Court and that a copy was electronically delivered to the Deputy Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on August 30, 2021.

MEGAN E. HORST
LT, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris St, SE
Bldg. 58, Suite 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-7054
megan.e.horst@navy.mil
C.A.A.F. Bar No. 37381