IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201900043
Julian D. SCHMIDT Sergeant (E-5) U. S. Marine Corps Appellant	)	USCA Dkt. No. 21-0004/MC

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Issues Presented

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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), because Appellant's sentence included a bad-conduct discharge and one or more years of confinement. This Court has jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual abuse of a child, in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2012). The Members sentenced Appellant to reduction to pay grade E-1, fifteen months of confinement, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

Appellant raised seven Assignments of Error at the lower court, including: (1) legal and factual insufficiency; (2) instructional error in the definitions of "upon" and "in the presence of"; (3) error in failing to instruct on the defense of an honest but mistaken belief that the Victim was asleep; and (4) ineffective assistance of counsel for failing to object to instructions on the definition of "upon" and "in the presence of." *United States v. Schmidt*, 80 M.J. 586, 592 (N-M. Ct. Crim. App. 2020). The Navy-Marine Corps Court of Criminal Appeals found no prejudicial error and affirmed the findings and the sentence as correct in law and fact. *Id*. at 591, 604.

This Court granted Appellant's petition for review, specifying three issues. Order, *United States v. Schmidt*, No. 21-0004/MC (C.A.A.F. Apr. 23, 2021).

Statement of Facts

A. The United States charged Appellant with committing lewd acts upon the Victim, a child under sixteen years old.

The United States charged Appellant with committing two lewd acts on the Victim, a child under sixteen years old: (1) touching, licking, and kissing his hand (Specification 1); and (2) indecent conduct, by intentionally masturbating in the presence of the Victim (Specification 2). (J.A. 45.)

B. The United States presented evidence that Appellant intentionally masturbated in the same room as the Victim and while Appellant knew the Victim was in the room with him, and that the Victim was aware of Appellant's conduct.

1. The Victim and his family visited Appellant.

The Victim and his family met Appellant through a neighbor, Michelle,[1] in Carlsbad, California, when the Victim was thirteen years old. (J.A. 58.)

The Victim and his family took a trip to Carlsbad to see Appellant before he deployed. (J.A. 60.) They stayed at Michelle's house. (J.A. 60.)

2. The Victim felt sick and went to bed early. He woke up to find Appellant on his air mattress. The Victim felt Appellant lick and kiss his hand and heard Appellant masturbate.

During the trip, the Victim went to a trampoline park with his brother and sisters, Michelle, and Appellant. (J.A. 61, 87, 129.) When they arrived back at

[1] The United States adopts the pseudonyms used by the Navy-Marine Corps Court of Criminal Appeals. *See Schmidt*, 80 M.J. at 592.

Michelle's house, the Victim felt sick. (J.A. 63, 115, 130.) He lied down on the air mattress in the front room and fell asleep. (J.A. 63, 115–16, 130, 241.)

Around 2 a.m., the Victim woke up feeling nauseous. (J.A. 64–65.) He was on the left side of the bed, laying on his stomach; he opened his eyes for a few seconds and saw Appellant next to him on his right, on the same air mattress as the Victim. (J.A. 65, 72, 103–04, 242.) Appellant was not supposed to be sleeping in that room. (J.A. 66, 85, 117.) The Victim realized Appellant's arm was on his back, so he slid off the bed to the left. (J.A. 65–66, 72, 88, 246.) The Victim's left shoulder was on the floor and his face was pressed into the side of the air mattress. (J.A. 89.) The Victim's right hand was still on the bed. (J.A. 66.) The Victim did not open his eyes again but remained awake. (J.A. 104.)

The Victim felt Appellant holding his right hand, interlacing his fingers with the Victim's, and felt Appellant kiss and lick the Victim's fingers and hand. (J.A. 66–68, 89–90.) The Victim was scared and acted like he was asleep. (J.A. 68.)

The Victim heard Appellant masturbate, which included "skin with skin" sounds and Appellant's moaning. (J.A. 68.) The Victim could tell when Appellant ejaculated because Appellant grunted and the bed moved. (J.A. 68.)

3. The Victim told his mother what happened after Appellant left the house. The Victim's mother called the police.

After Appellant ejaculated, he got up to wake Michelle, since she was driving him back to base. (J.A. 73.) The Victim heard Appellant go down the hall,

take a shower, return to the room, and pray for him. (J.A. 74–75.) The Victim continued to act like he was asleep until Appellant and Michelle left. (J.A. 74–75.)

Once Appellant left, the Victim woke his mother to tell her what happened. (J.A. 76, 118.) At the Victim's urging, his mother called the police. (J.A. 77, 118–19.) The Victim's mother texted Appellant and accused him of masturbating while touching a little boy. (J.A. 121–22, 247–49.)

4. The police collected evidence.

The police took the Victim's statement, crime scene photographs, the bed sheets, a red blanket, and the Victim's shirt. (J.A. 140, 142–43, 240–46.)

5. Appellant admitted to masturbating into the red blanket.

Law enforcement interviewed Appellant. (J.A. 151.) While out with his unit, Appellant received text messages accusing him of masturbating while touching a little boy. (J.A. 247–56, 258[2] at 32:40.) Appellant called Michelle and she told him about the Victim's allegation and that the police took the red blanket, the Victim's shirt, and the sheets from the air mattress. (J.A. 258 at 37:00, 57:28.)

Appellant denied touching and licking the Victim's hand. (J.A. 258 at 37:34, 1:08:40.) Appellant went to sleep on the two striped chairs next to the air mattress where the Victim slept, woke up, and left. (J.A. 258 at 51:45, 56:20, 57:00.) He eventually admitted to masturbating and ejaculating into the red

[2] J.A. 258 is Prosecution Exhibit 6, the video recording of Appellant's interview.

blanket while on the striped chairs to help him fall asleep. (J.A. 258 at 58:00–59:05.) Appellant admitted agents would find his semen on the red blanket and may find his DNA on the sheets. (J.A. 258 at 59:50.)

Appellant suspected the Victim must have seen him, but denied being on the mattress. (J.A. 258 at 1:02:10.) Appellant never stated he thought the Victim was asleep when he masturbated. (*See* J.A. 258 at 1:02:10.) Appellant nodded when an NCIS agent said in his interview, "I mean, you were laying there, you're like, this kid's sleeping. I'm just going to masturbate to try to go to sleep, you know, take my sleeping pills, whatever man, everybody does their own thing." (J.A. 258 at 1:03:24.)

6. Forensic analysis revealed Appellant's semen on the red blanket.

The forensics lab found seminal fluid on the red blanket, which matched Appellant's DNA profile. (J.A. 162, 164, 257.)

C. The only Defense witness testified she slept in the room next to the Victim's room, but heard nothing.

On the night of the incident, Michelle slept in the office next to the room where the Victim slept. (J.A. 189.) Michelle heard nothing going on in the room where the Victim slept. (J.A. 190.)

Appellant woke her when it was time to leave. (J.A. 190.) Before leaving, Michelle saw the Victim lying on the floor next to the air mattress. (J.A. 197.) She tried to wake him but the Victim did not move. (J.A. 197.)

On the drive back, Michelle received a text message from the Victim, asking her to come home quickly because he felt sick and his mother would not wake up. (J.A. 190–91, 198.) She received a call from the Victim and his mother, and they told her about Appellant's actions. (J.A. 198.)

D. The Military Judge instructed the Members.

The Military Judge discussed Findings Instructions with the parties. (J.A. 203.) Asked if he had objections to the Findings Instructions, Civilian Defense Counsel stated, "No, sir." (J.A. 203.) Asked if he had requests for additional instructions, he stated, "No, Your Honor." (J.A. 203.)

The Military Judge instructed the Members. (J.A. 204–11.) He did not instruct on a defense of mistake of fact. (*See* J.A. 204–11.)

E. Appellant gave a closing argument.

In closing, Appellant argued that it was not criminal to masturbate in a room where he thought no one was awake or listening. (J.A. 222.)

F. The Members asked the Military Judge to define "upon" and "in the presence of."

During deliberations, the Members asked the Military Judge to define "upon" and "in the presence of." (J.A. 235.) The parties discussed the question,

and Civilian Defense Counsel looked in the Benchbook for definitions but found none. (J.A. 235–36.)

The Military Judge stated he would re-read the definition of "lewd act" and instruct the Members to apply their commonsense understanding of the words. (J.A. 235–36.) The Military Judge asked the parties if they objected to those instructions, and they did not. (J.A. 236.)

The Military Judge instructed the Members on the definition of "lewd act" again and told them:

> So when the offense alleges that the accused committed a lewd act upon [the Victim], that is, essentially–that is statutory language as articulated in the specification is what he has to had [sic] done upon him. So beyond that, you, the members, are 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.

(J.A. 237.)

G. The Members convicted and sentenced Appellant.

The Members found Appellant guilty of Specification 2 of the Charge, for committing a lewd act upon the Victim by intentionally masturbating in the presence of the Victim. (J.A. 45, 238.) The Members sentenced Appellant to reduction to pay grade E-1, confinement for fifteen months, and a bad-conduct discharge. (J.A. 239.)

H. The lower court affirmed, holding that for the indecent conduct to be "in the presence of" the child victim, the child must be aware of the sexual abuse and the accused must intend the child be aware of it.

The lower court held that for sexual abuse of a child by indecent conduct "to be done 'in the presence of' a child, the child must be aware of it," and "the accused must intend the child be aware of the conduct." *Schmidt*, 80 M.J. at 598. The court affirmed Appellant's conviction because of insufficient evidence that he held an honest belief the Victim was asleep. *Id.* at 599. The lower court further found: (1) Appellant waived his claims of instructional error; and (2) Civilian Defense Counsel was not ineffective. *Id.* at 601, 604.

Argument

I.

THE PHRASE "IN THE PRESENCE OF" USED TO DEFINE THE TERM "LEWD ACT" REQUIRES THAT THE ACCUSED INTENTIONALLY COMMIT A LEWD ACT IN THE PROXIMITY OF THE VICTIM. NOTHING IN THE STATUTE REQUIRES VICTIM AWARENESS.

A. Standard of review.

Appellate courts review questions of statutory construction de novo. *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019).

B. Statutory interpretation begins with the plain language of the statute. If the statutory language is ambiguous, then courts look to legislative intent.

The first step of statutory construction is to determine what the statutory language means using the "ordinary or natural meaning" of the words. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (citations omitted).

"[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The inquiry into the meaning of statutory language must cease if the "language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (internal citation omitted).

Courts only reach the second step of statutory construction if the plain meaning includes an ambiguity or reaches an absurd result. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 449–50 (2002). In such circumstances, courts look beyond the statutory language to the draftsman's intent; the plain and unambiguous meaning of a statute prevails in the absence of clearly expressed legislative intent to the contrary. *Mansell v. Mansell*, 490 U.S. 581, 592 (1989).

C. The plain language of Article 120b(c) requires that an accused intentionally commit indecent conduct with or in the presence of a child. Nothing in the statute requires victim awareness.

The definition of "presence" required under Article 120b(c) is an issue of first impression. Although the Court previously found indecent liberties with a child required a "conjunction of the several senses of the victim with those of the accused," *United States v. Knowles*, 35 C.M.A. 376, 378 (C.M.A. 1965), this is no longer relevant because Congress subsequently revised the statute and added new language, *see* 10 U.S.C. § 920b(c) (2012). Thus, there is no current or binding precedent dictating that "in the presence of" in Article 120b(h)(5)(D) requires the victim's awareness.

1. Accepted definitions of "presence" in the Merriam Webster Dictionary do not require victim awareness.

In 2012, Congress consolidated Article 120(j) and other child sex offenses into a single offense of sexual abuse of a child. 10 U.S.C. § 920b(c) (2012); *see also United States v. Busch*, 75 M.J. 87, 89 (C.A.A.F. 2016) (noting consolidation). Under this new consolidated offense, Article 120b(c), "[a]ny person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct." 10 U.S.C. § 920b(c).

A "lewd act" now includes:

> [A]ny indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar,

> obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

10 U.S.C. § 920b(h)(5)(D).

In the absence of specific statutory definitions, courts look to the ordinary meaning of words. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015); *see Wall v. Kholi*, 562 U.S. 545, 545–46 (2011) (using dictionary definitions to determine ordinary meaning). Definitions of "presence" include "the fact or condition of being present" and "the part of space within one's immediate vicinity; proximity," Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/presence (last accessed June 29, 2021), and "the fact that someone or something is in a place," Cambridge Dictionary, https://dictionary .cambridge.org/us/dictionary/english/presence (last accessed July 21, 2021). This Court can rely on these ordinary and natural meanings of "presence." *See Schloff*, 74 M.J. at 313; *Leocal*, 543 U.S. at 9.

Applying these plain language definitions to the statute, the meaning of "presence" shows Article 120b(h)(5)(D) proscribes an accused from intentionally committing indecent conduct within the immediate vicinity or proximity of a child. Thus, the statute requires only that the accused be aware of the child's presence, but not the child's reciprocal awareness of the accused's conduct.

2. The Court should decline to add a victim awareness requirement to Article 120b(h)(5)(D) based on inapposite, alternate definitions of "presence." Nothing in the context of Article 120b points to a definition requiring victim awareness.

Application of dictionary definitions is not always straightforward, and when words have several meanings, courts look to context to choose among them. *See Nixon v. Mo. Mun. League*, 541 U.S. 125, 132–133 (2004) (interpreting the phrase "any private entity" in context).

In *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994), the Court declined to find ambiguity in the term "modify" based on an alternative definition found in a single dictionary that "not only *supplement*[*ed*] the meaning contained in all other dictionaries, but *contradict*[*ed*] one of the meanings contained in virtually all other dictionaries." *Id.* at 225–27.

In *Shoemaker v. Funkhouser*, 856 S.E.2d 174 (Va. 2021), the court noted that "presence," in certain areas of law, means more than being within arm's reach of another," and described the different meanings of "presence" in the context of robberies, warrantless arrests, and will attestations. *Id.* at 180 n.5; *see also London v. Md. Cas. Co.*, 299 N.W. 193, 194 (Minn. 1941) ("[W]hat constitutes the presence of an officer at the commission of a crime for purpose of authorizing arrest without warrant . . . is likely to be wholly dissimilar from the presence required to attesting witnesses to a will.").

Black's Law Dictionary's primary definition of "presence" is similar to Webster's—"[t]he state or fact of being in a particular place and time." Black's Law Dictionary 1221 (8th ed. 2004). Similar to the outlier dictionary definition in *MCI Telecomms. Corp.*, Black's Law Dictionary contains an alternative definition of "presence"— "[c]lose proximity coupled with awareness"—a definition not found in other dictionaries. *See id.*

Black's Law Dictionary did not always contain an "awareness" requirement. Instead, it derived its primary definition of "presence" from *London* as: an "[a]ct, fact, or state of being in a certain place and not elsewhere, or within sight or call, at hand, or in some place that is being thought of." Black's Law Dictionary 1346 (4th ed. 1968). Black's Law Dictionary's definition of "presence" in 1968 only referenced awareness in the context of "constructive presence" ("actively cooperating with another who was actually present"), "presence of an officer" (seeing, hearing, or observing circumstances showing commission of an offense), "presence of the court" (contempt committed "in the ocular view of the court"), and "presence of the testator" ("[W]itnesses are within range of any of testator's senses."). *Id.*

Thus, Black's Law Dictionary's alternative definition of "presence" as "coupled with awareness" is more applicable to statutory schemes requiring legal presence, such as witnessing a signature or will attestation. *See Shoemaker*, 856

S.E.2d at 180 n.5. In contrast, the statutory scheme here shows that "presence" takes on the ordinary meaning of the word. Article 120b(h)(5)(D) requires the accused's awareness of the victim's presence—"intentionally done with or in the presence of a child"—and this Court should decline to adopt a reciprocal victim awareness requirement based on an inapposite alternative definition of "presence."

3. *State v. Bryan* shows that "presence" may implicate victim awareness, but only in cases where, for example, the statutory scheme requires an offender's specific intent to gratify the victim's sexual desires. But Article 120b(h)(5)(D) includes no such victim awareness requirement.

In *State v. Bryan*, 130 P.3d 85 (Kan. 2006), the Supreme Court of Kansas analyzed whether the appellant could be convicted for exposing his penis to a sleeping victim. *Id.* at 87. The Kansas statute criminalized public exposure "in the presence of a person . . . with intent to arouse or gratify the sexual desires of the offender or another." *Id.* The court found this final phrase limited the broad term "presence." *Id.* at 88.

> When "presence" is linked to the specific intent element of the offense, the victim only has to be aware of the offender's sex organ when the specific intent of the offender is to arouse or gratify the sexual desires of the victim. *If the offender is arousing or gratifying his or her own sexual desires, then only the offender must be aware* of the victim and his or her own act of exposing a sex organ. Similarly, if the offender intends to arouse or gratify the sexual desires of another person, that person must be aware of the offender's exposed sex organ. Even though the term "presence" implies an awareness, the question is whose awareness is incorporated in [the statute].

Id. at 88–89 (emphasis added).

The *Bryan* court held that the combination of "'presence' with a specific intent element indicates the legislature's intent to criminalize lewd and lascivious behavior whether or not the victim has actually seen or perceived the offending act or acts." *Id.* at 92.

Unlike *Bryan*, Congress here makes no statutory link between the accused's actions and the gratification of sexual desires of another person, such that victim awareness *could* be implicated. Instead, Article 120b(h)(5)(D) solely requires proof of the *accused's* awareness *of the victim*: it requires the accused's act be "intentionally done with or in the presence of a child." But like *Bryan*, nothing in Article 120b(h)(5)(D)'s description of "indecent conduct" requires victim awareness of the lewd conduct.[3]

To the contrary, conduct is indecent where it "amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave

[3] State courts fall on different sides of the issue depending on the particular statute, the conduct being criminalized, and legislative history. *See State v. Resun*, 442 P.3d 447 (Haw. Ct. App. 2019) (no awareness); *Klausen v. State*, 669 S.E.2d 460, 462 (Ga. Ct. App. 2008) (same); *Baumgartner v. State*, 891 N.E.2d 1131, 1138 (Ind. Ct. App. 2008) (same); *State v. Stevenson*, 656 N.W.2d 235, 239 (Minn. 2003) (same); *Glotzbach v. State*, 783 N.E.2d 1221, 1227 (Ind. Ct. App. 2003) (same); *Holley v. Com.*, 562 S.E.2d 351, 354 (Va. Ct. App. 2002) (same); *Siquina v. Com.*, 508 S.E.2d 350, 352 (Va. Ct. App. 1998) (same); *State v. Interiano*, 868 So. 2d 9, 16 (La. 2004) (awareness); *State v. Werner*, 609 So. 2d 585, 586 (Fla. 1992) (same).

morals with respect to sexual relations." 10 U.S.C. § 920b(h)(5)(D). Congress's objective test for indecency requires neither that the offender's nor the victim's sexual desires be excited for the conduct to be indecent.

Victim awareness appears and is implicated nowhere in the statutory language; it is immaterial to commission of the offense. *Cf. Bryan*, 130 P.3d at 88–89.

4. Victim awareness may be relevant to legal sufficiency analyses of whether conduct is immoral, sexually impure, grossly vulgar, repugnant, or excites sexual desire or depraves morals. But nothing in the statute requires awareness for "presence."

The definition of "lewd act" in Article 120b(h)(5)(D) specifies what conduct is indecent—conduct "that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." 10 U.S.C. § 920b(h)(5)(D).

In *United States v. Rollins*, 61 M.J. 338 (C.A.A.F. 2005), this Court analyzed the same definition of indecent conduct, relating to the 2002 Article 134, UCMJ, offense of indecent acts with a minor. *Id.* at 344. The *Rollins* court noted that "the determination of whether an act is indecent requires examination of all the circumstances, including the age of the victim, the nature of the request, the relationship of the parties, and the location of the intended act." *Id.* The court concluded the appellant's acts—buying a pornographic magazine for the child and

asking him to masturbate with him while in the parked car at a grocery store—were legally sufficient for a factfinder to find them indecent. *Id.*

Here, like the offense in *Rollins* involving the same definition of indecency, whether conduct under Article 120b(h)(5)(D) is indecent turns on "an examination of all the circumstances." *Id.* This Court should decline to impose any awareness requirement on the 2012 statute. Nothing in the statutory language requires this constrained definition of "in the presence of," which would act to per se exclude indecent conduct where the victim is unaware. Rather, following *Rollins*, the factfinder should decide on a case-by-case basis whether the conduct rises to "that form of immorality relating to sexual impurity" despite the victim's lack of awareness, or whether the lack of awareness makes the specific case legally insufficient. 10 U.S.C. § 920b(h)(5)(D).

In fact, Appellant argued this point to the Members. (*See* J.A. 222 ("Masturbating in a room where you think everybody is asleep . . . doesn't meet the elements").) Appellant's argument emphasized the appropriate legal analysis of indecency—as an examination of the totality of the circumstances, including Appellant's perception of the Victim's awareness. *See Rollins*, 61 M.J. at 344. This Court should reject Appellant's argument now that, based on an erroneous interpretation of "in the presence of," he should have received a mistake of fact instruction. (*See* Appellant's Br. at 18–19.) The Members properly considered

Appellant's perception of the Victim's awareness in their determination of whether his conduct was indecent, (*see* J.A. 237 (instructing Members on definition of "lewd act")), and rejected it.

D. The lower court incorrectly relied on *Burkhart*. *Burkhart*'s judicially imposed victim awareness requirement is based on a misreading of *Miller* and should be rejected.

In *United States v. Burkhart*, 72 M.J. 590 (A.F. Ct. Crim. App. 2013), the Air Force Court of Criminal Appeals analyzed the legal sufficiency of the appellant's indecent liberties conviction for masturbating while his three-year-old daughter was asleep on the other end of the couch. *Id.* at 592. The court analyzed the pre-2012 statute, using Black's Law Dictionary's definitions of "presence" referenced in *Miller* and the statutory intent discussed in *United States v. Brown*, 13 C.M.A. 10 (C.M.A. 1953). *Burkhart*, 72 M.J. at 593–95. The court found that in order to sustain a conviction for indecent liberties with a child, the child must be aware of the conduct. *Id.* at 595; *see also United States v. Gould*, No. ARMY 20120727, 2014 CCA LEXIS 694, at *2 (A. Ct. Crim. App. Sept. 16, 2014) (adopting *Burkhart*); *United States v. Anderson*, No. 201200499, 2013 CCA LEXIS 517, at *13–16 (N-M. Ct. Crim. App. June 27, 2013) (same); *Schmidt*, 80 M.J. at 596–98 (adopting *Burkhart* to Article 120b(c)).

But *Burkhart* based its holding on a misreading of *Miller*. In *United States v. Miller*, 67 M.J. 87 (C.A.A.F. 2008), this Court, analyzing the 2002 Article 134

offense of indecent liberties with a child, held constructive presence insufficient to show "physical presence," and set aside the appellant's conviction for indecent conduct committed over a webcam. *Id.* at 91. This Court quoted dictionary definitions of "presence," including: "[c]lose physical proximity coupled with awareness," *id.* at 90 (quoting Black's Law Dictionary 1221 (8th ed. 2004)), but did not elaborate on whose "awareness" was relevant, since there was no question in *Miller* that both parties were aware of the conduct. *See id.* at 90.

The *Burkhart* court erroneously assumed the *Miller* awareness requirement applied to the victim's awareness instead of the accused's awareness. *See Burkhart*, 72 M.J. at 594 (finding *Miller* indicated "the child must be aware of the accused's conduct"); *Miller*, 67 M.J. at 90. But *Miller* did not specify whose awareness was required, let alone hold that the victim's awareness was required at all. *See Miller*, 67 M.J. at 90. (*Contra* Appellant's Br. at 15 (asserting *Miller* "held" the child victim's close proximity coupled with awareness was required for indecent liberties with a child).)

Further, *Burkhart*'s awareness requirement, even assuming *arguendo* it was applicable to the pre-2012 statute, is inapplicable to Article 120b(h)(5)(D), which has a different intent requirement. *Compare* Article 120(j) ("engages in indecent liberties in the physical presence of a child [] with the intent to arouse, appeal to, or gratify the sexual desire of any person"), *with* Article 120b(h)(5)(D) ("intentionally

done with or in the presence of a child"). Thus the pre-2012 statute was more akin to the *Bryan* statute, in that the victim's awareness could be relevant, depending on whose sexual desire the offender intended to "arouse, appeal to, or gratify." *Cf. Bryan*, 130 P.3d at 88–89; *see supra* Section I.C.3.

Additionally, *Burkhart*'s overly narrow interpretation of the congressional intent expressed in *Brown* is mistaken. In *Brown*, the Court of Military Appeals, in dicta, reasoned that the purpose of criminalizing indecent liberties was to protect children from "those acts which have a *tendency* to corrupt their morals," 13 C.M.A. at 13 (emphasis added), and "to throw a cloak of protection around minors and discourage sexual deviates from performing with, or before them," *id.* at 17. *Burkhart*'s victim awareness requirement narrows this congressional intent to only those victims *actually* exposed to indecent conduct. 72 M.J. at 595. This fails to recognize that—regardless of the victim's potential unawareness—intentionally masturbating in the presence of a sleeping child has "a tendency to corrupt [the victim's] morals" because of the risk the child could wake up or discover the misconduct later. *See Brown*, 13 C.M.A. at 13; *see also United States v. O'Neal*, 835 Fed. Appx. 70, 72 (6th Cir. 2020) ("Even if the minor is unaware of the masturbation (perhaps because the child is asleep), such conduct creates serious risks anyway because the child could wake up or find out about it after the fact.").

Finally, Congress could not have intended to incorporate *Burkhart*'s victim awareness requirement when drafting Article 120b(c). Congress is presumed to legislate with knowledge of existing law, including "judicial interpretation of a statute," and is presumed to "adopt that interpretation when it re-enacts a statute without change." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978). But Congress is not presumed to adopt a judicial interpretation unless "the supposed judicial consensus [is] so broad and unquestioned that Congress knew of and endorsed it." *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005).

Contrary to Appellant's assertion, *Miller* did not hold that the victim's awareness was a prerequisite for their "presence," instead holding that "physical presence" requires the accused be in the same physical space as the victim. *Miller*, 67 M.J. at 90; (*see* Appellant's Br. at 15). Only *Burkhart* and its successors support a victim awareness requirement—all of which were decided after enactment of Article 120b(c). *See Gould*, 2014 CCA LEXIS 694, at *2; *Anderson*, 2013 CCA LEXIS 517, at *13–16; *Burkhart*, 72 M.J. at 594. Thus, Congress could not have adopted or ratified *Burkhart*'s victim awareness requirement in the new statute, *Jama*, 543 U.S. at 349, and nothing in the legislative history demonstrates an intent to do so.

In sum, Appellant argues for a counterintuitive definition of "presence," urges this Court to disregard new statutory language, and relies on questionable interpretations of an outdated statute. This Court should reject Appellant's argument, give effect to the statute's plain meaning, and hold that "in the presence of" requires only that the accused be aware of the child's presence.

II.

APPELLANT WAIVED ANY ALLEGED ERROR BY AFFIRMATIVELY STATING HE DID NOT OBJECT TO THE MILITARY JUDGE'S INSTRUCTIONS.

A. Standard of review.

Whether an appellant waived an issue is a question of law appellate courts review de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

B. Waiver requires affirmative action. An accused may affirmatively waive required instructions by stating he has no objection.

"Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). When an appellant "intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citation omitted); *see also United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) ("[A] valid waiver leaves no error for us to correct on appeal.").

"Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error."[4] R.C.M. 920(f). "[W]aiver in the context of required instructions is accomplished by an affirmative action, not a mere failure to object." *United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017) (citing *United States v. Barnes*, 39 M.J. 230, 233 (C.A.A.F. 1994)).

As a general proposition, an affirmative statement of "no objection" constitutes an affirmative waiver of the right or admission at issue. *See United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019) (statement akin to "no objection" constituted waiver of confinement credit); *United States v. Swift*, 76 M.J. 210, 217 (C.A.A.F. 2017) ("no objection" affirmatively waived objection to admission of confession); *Ahern*, 76 M.J. at 198 ("no objection" constituted waiver of objection to admission of pretrial statements); *Campos*, 67 M.J. at 332–33 ("no objection" affirmatively waived objection to admission of stipulation of expected testimony where appellant on notice of its contents).

Following this proposition, an accused may affirmatively waive required instructions by stating he has no objection. *See United States v. Rich*, 79 M.J. 472, 476–77 (C.A.A.F. 2020) (finding waiver of mistake of fact instruction where

[4] "R.C.M. 920(f) uses the word 'waiver,' but it is clearly referring to 'forfeiture.'" *United States v. Davis*, 76 M.J. 224, 227 (C.A.A.F. 2017).

appellant did not request the instruction and repeatedly confirmed he had no other objections to instructions after preserving objection to separate instruction); *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999) (finding "[t]hat's not exactly what I wanted, but it's close" was affirmative waiver of proposed instruction); *United States v. Mundy*, 2 C.M.A. 500, 503–04 (C.M.A. 1953) (finding "the defense would leave it up to the law officer" constituted affirmative waiver of required instructions); *United States v. Wall*, 349 F.3d 18, 24 (1st Cir. 2003)[5] (appellant waived right to object where counsel twice confirmed he had "no objection and no additional requests [regarding the instructions].").

C. Appellant did not merely fail to object. He affirmatively waived any instructional errors.

In *United States v. Gutierrez*, 64 M.J. 374 (C.A.A.F. 2007), the appellant unsuccessfully argued his statement, "I simply do not want to request [an instruction] on the battery," was "simple acquiescence to the military judge's assertions on the matter, not an affirmative waiver." *Id.* at 376. Although the appellant claimed his "entire defense theory was mistake of fact," this Court found he affirmatively waived the required mistake of fact instruction when he responded to the military judge's inquiry. *Id.* at 377.

[5] Rule for Courts-Martial 920(f) is based on Fed. R. Crim. P. 30. R.C.M. 920(f) Analysis at A21-69.

As in *Gutierrez*, Appellant argues he simply acquiesced to the Military Judge's failure to define terms and give a required mistake of fact instruction, and that Appellant's mistaken belief "was the heart of the defense's case." *See id.* at 376–77; (Appellant's Br. at 10, 26.) But even more so than in *Gutierrez*, Appellant affirmatively waived this issue by stating (1) he did not object to the Military Judge's proposed instructions, and (2) he did not want any additional instructions. (J.A. 203); *see Gutierrez*, 64 M.J. at 377–78; *see also Swift*, 76 M.J. at 217 ("[A]s a general proposition of law, 'no objection' constitutes an affirmative waiver of the right . . . at issue.").

Appellant's characterization of his waiver as an "implicit[] objection" is unconvincing. (*See* Appellant's Br. at 23.) When asked whether he objected to an instruction that the Members could apply their own common sense understanding to words without a legal technical definition, Appellant stated, "I do not, sir. There is no definition for the record in the [B]enchbook." (J.A. 236.) Although Appellant's statement may shed light on his reasoning not to object, it did not condition his objection on the nonexistence of a Benchbook definition. And even if this created a condition precedent for an affirmative waiver, that condition was satisfied because the Benchbook contains no definition for "upon."

Thus, this is a case of contemplative speech and action—not a case of mere silence or of counsel simply failing to object "without more." *See Davis*, 76 M.J.

at 225–26. By stating that he had no objection to the instructions, Appellant waived any error, leaving nothing for this Court to correct on appeal. *See Ahern*, 76 M.J. at 197–98 (holding that "no objection" amounts to affirmative waiver).

D. This Court's 2017 *Davis* and 2020 *Davis* decisions do not conflict. The affirmative waiver standard is good law, and affirmative acquiescence is one way to affirmatively waive a claim of error.

In *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020), the appellant waived his claim of error regarding the military judge's instruction on an element when he stated, "No changes, sir," when asked if he had objections or requests for additional instructions, and "No, your honor," when asked again if he had any objections to the instructions. *Id.* at 330. This Court reasoned that by "'expressly and unequivocally acquiescing' to the military judge's instructions," the appellant waived his claim of instructional error. *Id.* at 331 (citations omitted).

Similarly, in *United States v. Davis*, 76 M.J. 224 (C.A.A.F. 2017), this Court reviewed the appellant's case for plain error where he "did not request, or object to the absence of, a mistake-of-fact instruction." *Id.* at 230. This Court differentiated between forfeiture and waiver, noting that "waiver in the context of required instructions is accomplished by an affirmative action, not a mere failure to object." *Id.* at 229.

Contrary to Appellant's assertions, the 2020 *Davis* and 2017 *Davis* rulings do not conflict. (*See* Appellant's Br. at 10.) This Court never departed from the

affirmative waiver standard discussed in the 2017 *Davis* ruling. *See Davis*, 79 M.J. at 331. At most, the 2020 *Davis* opinion highlighted one way affirmative waiver might be reached—through affirmative acquiescence. *See Davis*, 79 M.J. at 331. Moreover, 2020 *Davis* is consistent with a long line of waiver findings by this Court. *See, e.g.*, *Rich*, 79 M.J. at 476–77; *Haynes*, 79 M.J. at 19; *Swift*, 76 M.J. at 217; *Ahern*, 76 M.J. at 198; *Campos*, 67 M.J. at 332–33; *Smith*, 50 M.J. at 456; *Mundy*, 2 C.M.A. at 503–04.

By affirmatively stating on the Record he had no objections to findings instructions and no requests for additional instructions, Appellant waived his claimed error through affirmative acquiescence. (J.A. 203.) This Court should decline Appellant's invitation to needlessly overrule its 2020 *Davis* decision. (*See* Appellant's Br. at 24–25.)

III.

THE LOWER COURT CORRECTLY FOUND APPELLANT WAS NOT PREJUDICED BY HIS COUNSEL'S PRESUMED DEFICIENT PERFORMANCE. THE RESULTS OF HIS TRIAL WOULD NOT HAVE BEEN DIFFERENT BUT FOR THE MILITARY JUDGE'S INSTRUCTIONS.

A. Standard of review.

Appellate courts review ineffective assistance of counsel claims de novo. *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012).

B. To show prejudice from deficient performance, an appellant has the burden to demonstrate that, but for his counsel's deficient performance, the result of the proceeding would have been different.

To establish ineffective assistance of counsel, an "appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Under *Strickland*'s second prong, an appellant must demonstrate "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citations omitted). In other words, an appellant must show that, "absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*

C. Appellant fails to show prejudice; the result of his trial would not have been different but for the Military Judge's instructions.

Even if the Military Judge gave Appellant's desired instructions, he cannot show the results of his trial would have been different, for two reasons. First, assuming, *arguendo*, that the law requires victim awareness, the United States proved its case beyond a reasonable doubt because the Victim testified in detail that he was aware of Appellant's conduct. (J.A. 65–73.)

Second, Appellant cannot show the Members would have attached any credence to his alleged mistake of fact that he honestly believed the Victim was

asleep. Mistake of fact requires the mistake "existed in the mind of the accused." R.C.M. 916(j)(1). "The test for determining whether an affirmative defense of mistake of fact has been raised is whether the record contains some evidence of an honest . . . mistake to which the members could have attached credit if they had so desired." *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (citations omitted).

The "only direct evidence that Appellant honestly believed [the Victim] was asleep was his nodding when the NCIS agent said during his interview, 'I mean, you were laying there, you're like, this kid's sleeping, I'm just going to masturbate to try to go to sleep, you know, take my sleeping pills . . . ." *Schmidt*, 80 M.J. at 599; (J.A. 258 at 1:03:24).

Even assuming this head nod constituted "some evidence" raising an honest mistake of fact, *Hibbard*, 58 M.J. at 75, Appellant cannot show the Members would have credited such an argument. Appellant's head nod did not show any mistake of fact because (1) it was a conversational formality, not an acknowledgement; (2) at most, it signified Appellant's agreement with the phrase "I'm just going to masturbate to try to go to sleep," not "this kid's sleeping"; and (3) Appellant nodded along to countless statements by NCIS throughout the interview, including, "He's just saying that you touched his hand, that you touched the center of his back and then you masturbated and ejaculated and got up and took

a shower." (J.A. 258 at 1:03:40.) Moreover, the Members would have rejected Appellant's reliance on the Victim's and Michelle's testimony because it failed to address whether Appellant believed the Victim was asleep. (*Contra* Appellant's Br. at 27.)

Appellant's point to the contrary misses the mark. (*See* Appellant's Br. at 27–28.) Appellant was not prejudiced under *Strickland* simply because there may have been "some evidence" supporting a mistake of fact instruction; Appellant must also show that, had the Members received the instruction, they would have been persuaded by it. *Compare Hibbard*, 58 M.J. at 75 (reviewing de novo whether evidence gave rise to mistake of fact instruction), *with Datavs*, 71 M.J. at 424 (requiring showing under *Strickland* second prong that result of proceeding would have been different). Even if Appellant received the instruction, giving "legal support for [his counsel's] closing argument," (Appellant's Br. at 27–28), the results of the proceeding would not have been different.

The Members heard evidence that: (1) Appellant suggested the Victim's brother sleep on the air mattress in a separate room while Appellant slept with the Victim, (J.A. 117); (2) Appellant moved onto the air mattress and put his hand on the Victim's back, causing the Victim to move away onto the floor, (J.A. 65–66); (3) the Victim saw Appellant next to him on the bed, (J.A. 104); (4) Michelle later found the Victim on the floor, (J.A. 196–97); (5) Appellant suspected the Victim

saw him, (J.A. 258 at 1:02:10); and (6) Appellant never stated in his interview that he thought the Victim was asleep while he masturbated, (*see* J.A. 258). Given the weight of the United States' evidence and the scant evidence that Appellant held an honest mistake of fact, Appellant cannot show that, had the Members been given his desired instructions, they "would have had a reasonable doubt respecting guilt." *Datavs*, 71 M.J. at 424.

Therefore, Appellant cannot demonstrate prejudice from his Civilian Defense Counsel's failure to request a mistake of fact instruction or object to the Military Judge's definitions. His claim of ineffective assistance of counsel fails.

Conclusion

The United States respectfully requests that this Court (1) hold that the phrase "in the presence of" used to define the term "lewd act" in Article 120b(h)(5)(D) requires only that the accused be aware of the child's presence and (2) affirm the lower court's opinion as to the findings and sentence.

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I certify that I delivered a copy of the foregoing electronically to the Court and opposing Counsel, Tami L. MITCHELL and Lieutenant Megan E. HORST, JAGC, U.S. Navy, on August 13, 2021.

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