IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Index of Brief

Granted Issue:

> WHETHER THE SPECIFICATION OF CHARGE II, ALLEGING THE COMMUNICATION OF INDECENT LANGUAGE TO A CHILD [UNDER 16 YEARS] IN VIOLATION OF ARTICLE 134, UCMJ, WAS PREEMPTED BY ARTICLE 120b.

Table of Authorities

Supreme Court of the United States

Court of Appeals for the Armed Forces & Court of Military Appeals

Service Courts of Criminal Appeals

Federal Circuit Court of Appeals

Statutes, Regulations, and Other Materials

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WHETHER THE SPECIFICATION OF CHARGE II, ALLEGING THE COMMUNICATION OF INDECENT LANGUAGE TO A CHILD [UNDER 16 YEARS] IN VIOLATION OF ARTICLE 134, UCMJ, WAS PREEMPTED BY ARTICLE 120b

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), UCMJ, 10 U.S.C. § 866(b) (2012) . The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On January 14 and March 17-19, 2014, at United States Army Garrison [USAG] Yongsan, Republic of Korea, a panel with enlisted representation sitting

as a general court-martial convicted appellant, contrary to his pleas, of one specification of sexual assault of a child and one specification of communicating indecent language to a child under the age of sixteen years in violation of Articles 120b and 134, UCMJ, 10 U.S.C. §§ 920b and 934 (2012). (R. at 519). The panel sentenced appellant to be reduced to the grade of E-1 and to be discharged from the service with a bad-conduct discharge. (R. at 584). The convening authority approved the sentence as adjudged. (JA 23). Appellant did not raise the preemption issue either before or after trial.

On November 30, 2017, the Army Court affirmed the findings of guilty but set aside the sentence, unrelated to the granted issue, and ordered a sentence rehearing. (JA 16). The Army Court did not address the issue of preemption because appellant did not raise it as an assignment of error. Appellant petitioned this Court for review on January 23, 2018. Appellant filed his supplement to his Petition for Grant of Review on February 12, 2018 where he first raised the preemption issue. This Court denied the petition without prejudice on February 26, 2018 and the case was sent back to the convening authority for a rehearing.

At appellant's sentence rehearing on June 26, 2019, a military judge sitting as a general court-martial sentenced appellant to be reduced to the grade of E-1, five months of confinement, and a bad-conduct discharge. (Rehearing, R. at 73). The issue of preemption was not raised by appellant at the rehearing. In

accordance with Rule for Court-Martial [RCM] 810(d)(1), the convening authority approved only so much of the sentence as provided for the reduction to E-1 and the bad-conduct discharge. (Action on rehearing dated September 28, 2018).

On February 19, 2019, the Army Court affirmed the findings and sentence. (JA 21). Appellant did not raise the issue of preemption to the service court for their review. Appellant petitioned this Court for review on April 19, 2019. This Court granted appellant's petition on August 20, 2019.

Statement of Facts

Appellant was a twenty-three year-old married soldier with three children serving an accompanied tour in Youngsan, Korea. In the latter half of 2012, Miss HK, the twelve year-old stepdaughter of Sergeant [SGT] GH, began to babysit for appellant. (JA 32-34). Miss HK became close to appellant after confiding in him about various ongoing issues in her life. (JA 34-35).

The relationship progressed to the point that appellant and Miss HK consistently exchanged Facebook messages, planned secret rendezvous, and engaged in "make out" sessions where appellant inserted his tongue into Miss HK's mouth. (JA 36-37, 39-40). These "make out" sessions were the basis for appellant's sexual assault of a child conviction under Article 120b, UCMJ. (JA 22).

The Facebook communications also included an instance where appellant and Miss HK engaged in a name calling duel. (JA 43, 55). During this exchange, appellant called Miss HK, then thirteen years old, a "cum guzzling gutter slut" which was the basis for the indecent language conviction. (JA 27).

Summary of Argument

"Indecent language communicated to a child under the age of 16 years" under Article 134, UCMJ, is not preempted by "sexual abuse of a child" under Article 120b, UCMJ. Congress has not upset the historical treatment spanning approximately sixty years of the two offenses as separate and distinct offenses. This is evidenced by Congress never expressly stating Article 120b, UCMJ, was meant to supersede "indecent language communicated to a child under the age of 16 years" under Article 134, UCMJ. Further, the legislative history for Article 120b, UCMJ, is devoid of Congress's intent to fully occupy the space covered by indecent language communicated to a child under the age of 16 years.

It is of no import that "indecent language communicated to a child" charged under Article 134, UCMJ, does not contain the specific intent element found in Article 120b, UCMJ, because it addresses indecent language which does not fall within the realm of sexual abuse or predation. The distinction between acts which amount to the sexual abuse of a child under Article 120b, UCMJ, and those which fall within the class of general indecency offenses was outlined by this Court long

ago in *United States v. Brown*, 3 U.S.C.M.A. 454; 1953 CMA LEXIS 587; 13 C.M.R. 10 (1953). As sexual abuse of a child and indecent language communicated to a child serve as separate and distinct offenses occupying different classes of offenses, finding that Article 120b, UCMJ, preempts "indecent language communicated to a child" is inappropriate.

Even if the Court finds appellant's conviction for communicating indecent language to a child under the age of 16 years in violation of Article 134, UCMJ, constituted legal error, such error was not plain or obvious.

Standard of Review

Whether an offense is preempted is a question of statutory interpretation and is reviewed de novo. *United States v. Wheeler*, 77 M.J. 289, 291 (C.A.A.F. 2018). Appellant failed to raise the preemption issue during trial or during the initial appellate proceedings before the service court. Consequently, this Court should review appellant's recently-raised preemption issue for plain error. *United States v. Gleason*, 78 M.J. 473, 475 (C.A.A.F. 2019); *see also United States v. Warner*, 73 M.J. 1, 3 (C.A.A.F. 2013). To establish plain error, appellant has the burden to demonstrate: (1) there was error; (2) the error was clear and obvious; and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Gonzales*, 78 M.J. 480, 483 (C.A.A.F. 2019). For appellant to prevail, all three prongs of the test must be satisfied. *Id.*

Law and Analysis

1. Limitations on charging Article 134, UCMJ, offenses

The preemption doctrine "prohibits application of Article 134 to conduct covered by Articles 80 through 132." *MCM*, pt. IV, ¶ 60.c.(5)(a). The clear purpose of this limitation is to prevent the government from taking Article 134, UCMJ, as far as the statutory language might permit. *Gleason*, 78 M.J. at 477. (Ryan, J., dissenting on other grounds) (citing *Parker v. Levy*, 417 U.S. 733, 753–56 (1974)). This limitation precludes the government from taking an existing UCMJ offense, removing an important element—such as the requisite intent—and charging the remaining elements as an Article 134, UCMJ, offense. *Id.* (Ryan, J., dissenting on other grounds) (citing *United States v. Guardado*, 77 M.J. 90, 95 (C.A.A.F. 2017); *United States v. Reese*, 76 M.J. 297, 302 (C.A.A.F. 2017)).

Notwithstanding this limitation, this Court has long placed a significant restriction on the application of the preemption doctrine. *See United States v. Anderson*, 68 M.J. 378, 386–87 (C.A.A.F. 2010) ("[S]imply because the offense charged under Article 134, UCMJ, embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine. In addition, it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way."). Thus, the preemption doctrine "applies only when: (1) Congress intended to limit prosecution for . . . a particular

area of misconduct to offenses defined in specific articles of the Code; and (2) the offense charged is composed of a residuum of elements of a specific offense." *United States v. Curry*, 35 M.J. 359, 360–61 (C.M.A. 1992).

2. Congress did not intend to limit the prosecution of indecent language communicated to a child under the age of 16 years only to Article 120b, UCMJ. Therefore, appellant's conviction under Article 134, UCMJ, does not constitute error.

This Court has required that, in order for preemption to apply, not only must an offense charged under Article 134 lack an element of an enumerated offense, "it must [also] be shown that Congress intended the other punitive article to cover a class of offenses in a complete way." *Anderson*, 68 M.J. at 387 (quoting *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979)). In *Anderson*, this Court further explained, "[t]hus, we have required Congress to indicate through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under Article 134, UCMJ." *Id.* (citations omitted). This Court has remained consistent with this proposition even when the missing element is one of intent. *See e.g. Kick*, 7 M.J. at 85 (finding no preemption for an Article 134, UCMJ, offense that required a lesser degree of intent); *See United States v. Maze*, 21 U.S.C.M.A. 260, 263 (C.M.A. 1972) (finding no preemption when an Article 134, UCMJ, offense lacked an intent to defraud); *See also United States v. Taylor*, 17 U.S.C.M.A. 595

(C.M.A. 1968) (finding no preemption when an Article 134, UCMJ, offense lacked an intent to shirk military duty).

In the present case, Congress did not intend to limit the prosecution for indecent language communicated to a child solely to Article 120b, UCMJ. This is evidenced through: 1) the notable absence of a Congressional statement indicating that Article 120b, UCMJ, supersedes "indecent language" under Article 134, UCMJ; 2) the legislative history for Article 120b, UCMJ, shows Congress intended to occupy the field of sexual predation of children but not the class of minor indecency offenses; 3) indecent language communicated to a child in violation of Article 134, UCMJ, covers offenses that involve indecent language communicated to a child that do not amount to sexual abuse or predation of children; and 4) upholding the indecent language communicated to a child in violation of Article 134, UCMJ, offense is consistent with longstanding precedent of this Court.

a) Congress never expressed an intent to punish all crimes involving the communication of indecent language to children under the age of 16 years as a violation of Article 120b, UCMJ.

This Court has rightfully declined to extend the preemption doctrine to prevent charging conduct under Article 134, UCMJ, unless it is clear that Congress intended to fully occupy a field of misconduct. The most straightforward way for Congress to accomplish this task is to expressly indicate this intent. This Court has historically required such express language before finding preemption. *See*

Anderson, 68 M.J. at 387 ("If this distinction was not permissible in light of Article 104, UCMJ, Congress was free to clearly state that Article 104, UCMJ, supersedes Article 134, UCMJ, in this context. Appellant's preemption argument is therefore rejected."); *See also Kick*, 7 M.J. at 85 (reasoning that preemption did not apply because "Congress could have affirmatively acted in the formulation of the 1968 amendments to the Code to eliminate negligent homicide as a criminal offense if it so desired"); *See also Taylor*, 17 U.S.C.M.A. at 597 ("Nothing in the language, or the arrangement of Article 115 indicates that Congress intended to eliminate the existing offense and substitute as exclusively punishable acts those defined in Article 115.").

Congress has not declared that Article 120b(c), UCMJ, is intended to supersede "indecent language" under Article 134, UCMJ, as it applies to children. Even through three separate revisions of the MCM, there is no indication that Congress objected to the continued presence of indecent language communicated to children under Article 134, UCMJ. *See MCM* (2012 ed.), pt. IV, ¶ 89; *MCM* (2016 ed.), pt. IV ¶ 89; *MCM* (2019 ed.), pt. IV, ¶ 105.

Furthermore, the President was responsible for promulgating the preemption doctrine and signing Article 120b, UCMJ, into law. His continued inclusion of indecent language communicated to a child with a separate and distinct maximum punishment demonstrates his recognition that Article 134, UCMJ, criminalizes

conduct which falls outside of that covered by Article 120b, UCMJ. This is evidenced by the fact that all other offenses consumed by the revision of Article 120, UCMJ, in 2007 were properly deleted from Article 134, UCMJ. *See MCM* (2008 ed.), Analysis of Punitive Articles, A23-14-15. Appellant's position is unreasonable and should be recognized by this Court as unpersuasive.

Given the notable absence of an express comment by Congress that it intended to supersede indecent language communicated to a child, this Court should not extend the preemption doctrine to the present case.

b) The legislative history of Article 120b, UCMJ, shows that Congress intended to occupy the class of sexual predation offenses, but not the more general class of indecency offenses.

For the preemption doctrine to apply, Congress must have intended to "fully cover a class of offenses in a complete way." *Anderson*, 68 M.J. at 387. The history of sexual abuse of a child under Article 120b, UCMJ, shows that this article was meant to address the class of offenses targeted against the sexual predation of children. *See infra* pp. 10-12. Alternatively, the history of indecent language communicated to a child under Article 134, UCMJ, shows that this article falls within a lesser class of offenses and is targeted at protecting the public from obscene content no matter the intent of the individual engaging in this conduct. *See infra* p. 13. By enacting Article 120b, UCMJ, Congress meant to address this higher class of offenses while leaving the lesser class of offenses undisturbed.

The requisite intent moves the sexual abuse of children in violation of Article 120b, UCMJ, into a higher class of offenses that target the sexual predation of children and distinguishes this crime from the separate and distinct general disorders otherwise containing similar elements. Sexual abuse of a child under Article 120b, UCMJ, traces its roots to the offense of "indecent liberty with a child" enacted in 1951 under Article 134, UCMJ. *United States v. Busch*, 75 M.J. 87, 93 (C.A.A.F. 2016). This offense was created in order to protect minors from "the variety of crimes being committed by sexual psychopaths." *Brown*, 3 U.S.C.M.A. at 457. Immediately following its implementation, military courts found that general indecency offenses may amount to "indecent liberties with a child" but only if they are made with the requisite intent. *See id.* (finding that the commission of both assault and indecent exposure to a child with the requisite intent constitutes "indecent liberties"); *See also United States v. Riffe*, 25 C.M.R. 650 (A.B.R. 1957) (finding that the commission of indecent language to a child with the requisite intent constitutes "indecent liberties"). In so finding, this Court determined that the inclusion of the specific intent of the offender made such acts a separate and distinguishable offense from the more "petty" or "minor" offenses which otherwise contained the same elements. *Brown*, 3 U.S.C.M.A. at 461. This Court reasoned that "it should be readily apparent that when the act is committed with the specific intent, the potentiality for harm to the child is increased." *Id*.

Thus, it is the specific intent requirement that made the misconduct an "indecent liberty" aimed at targeting the sexual predation of children and a wholly separate and distinct offense from the more "minor" offenses otherwise sharing similar elements. *See id.*

The 2012 MCM's "Sexual Abuse of a Child" offense in violation of Article 120b(c), UCMJ, proscribes the same conduct as was previously covered by the 2005 MCM's "indecent acts or liberties with a child" offense under Article 134, UCMJ. *Cf. MCM* (2012 ed.), pt. IV, ¶ 45b(c), ¶ 45b(h)(5), and *MCM* (2005 ed.), pt. IV, ¶ 87c(2)[1]. The only difference between the conduct covered under Article 120b(c), UCMJ, from the previous "indecent acts or liberties with a child" under Article 134, UCMJ, is that Congress removed the physical presence requirement accounting for the significant advances in technology. *See MCM* (2012 ed.), App'x 23-16 (indicating that 120b(c) applies to offenses committed using "modern forms of communication"). Even with this change, however, Article 120b(c),

[1] In the 2008 *MCM*, "indecent acts or liberties with a child" was removed from Article 134, UCMJ, and separated into 4 separate offenses. *See MCM*, 2008 ed., App'x 23-15 (indicating that "indecent acts or liberties with a child" has been divided into Articles 120(g), 120(i), and 120(j), UCMJ); *See also* Article 120(f), UCMJ (2007) (while not notated, this offense is another form of sexual contact involving a minor which was covered by "indecent acts or liberties with a child"). In the 2012 *MCM* these offenses were re-combined to constitute the "sexual abuse of a child" offense under Article 120b(c). *MCM* (2012 ed.), App'x 23-16 (explaining that the new offense of "Sexual Abuse of a Child" consolidates Articles 120(f), 120(g), 120(i), and 120(j)).

UCMJ, still serves the same intent of the previous version of criminalizing the sexual predation of children. *See Wheeler*, 77 M.J. at 292 ("[T]he precise language of Article 120b(c), UCMJ, and 18 U.S.C. § 2422(b), have little in common other than that they are both aimed at criminalizing the sexual predation of children.").

Alternatively, "indecent language," and other minor crimes of indecency not requiring the specific intent found in Article 120b(c), UCMJ, have historically protected the general social interest in order and morality. *Roth v. U.S.*, 354 U.S. 476 (1957) ("Such utterances are . . . clearly outweighed by the social interest in order and morality.") (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)). Included within this general interest is the protection of children from being exposed to such material. *See Miller v. California*, 413 U.S. 15, 18-19 (1973) ("States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."); *See also Ginsberg v. New York*, 390 U.S. 629, 641-642 (1968). Thus, general indecency crimes are meant to protect the public, especially children, from the obscene content itself no matter the intent of the individual disseminating it. *See United States v. Graham*, 56 M.J. 266, 269 (C.A.A.F. 2002) ("The purpose of criminalizing public indecency is to protect the public from shocking and embarrassing displays of sexual activities.").

It is only when the minor offenses are performed with the specific intent currently outlined in Article 120b(c), UCMJ, that moves them into a separate higher class of offenses protecting children from sexual predation. *See Brown* 3 U.S.C.M.A. at 461 (explaining that the specific intent surrounding "indecent liberty" is what distinguishes it from more minor offenses and places it in a higher class). "Sexual abuse of a child" occurs by a soldier with the requisite intent through: 1) touching; 2) exposure; 3) communication; or 4) conduct. *MCM* (2012 ed.), pt. IV, ¶ 45b(h)(5). These same acts constitute separate and distinct minor offenses when committed instead with only a general intent. Article 128, UCMJ (2012), 10 U.S.C. § 928; Article 120c(c), UCMJ (2012), 10 U.S.C. § 920c(c); *MCM* (2012 ed.), pt. IV, ¶ 89; *see also MCM* (2016 ed.), pt. IV, ¶ 90. Indeed since the inception of the varying offenses, this class distinction has been recognized and reflected in the applicable maximum punishments. *See MCM* (1969 ed.), Ch. 25, 25-14, 25-16 (the maximum punishments are: indecent liberties – 7 years; assault on a child – 2 years; indecent exposure – 6 months; indecent language to a child – 2 years; and indecent conduct - 5 years); *see also MCM* (2012 ed.), App'x 12-4, 12-5, 12-7 (the maximum punishments are: sexual abuse of a child – 15 years; assault on a child – 2 years; indecent exposure – 1 year; and indecent language to a child – 2 years).

For 50 years, the offenses of "indecent liberties" and the more general minor offenses, including "indecent language," have been maintained as separate and distinct offenses aimed at different evils. *See MCM* (1969 ed.), App'x 6c ¶ 156-158. When two offenses have historically existed aside and apart from one another, the Court "surely cannot find any indication of Congressional intent to change the situation and pre-empt the field when, by the newly enacted statutes, the pattern was perpetuated and ratified." *United States v. Toutges*, 13 U.S.C.M.A. 425, 427 (1963).

Sexual abuse of a child in violation of Article 120b(c), UCMJ, and indecent language communicated to a child in violation of Article 134, UCMJ, are aimed at addressing different criminal conduct that has historically been treated as separate and distinct offenses. Given this clear difference in conduct, its enactment of Article 120b(c), UCMJ, further expresses Congress's intent to, in that particular statute, only occupy the field of offenses that protect children from sexual predation. As such, Congress left indecent language communicated to a child under Article 134, UCMJ, undisturbed and a finding of preemption is inappropriate.

c) The present case illustrates the void left by "Sexual Abuse of a Child" under Article 120b(c), UCMJ, which is properly addressed by "Indecent language communicated to a child" under Article 134, UCMJ.

"Indecent language communicated to a child" covers a class of offenses which are not encompassed within Article 120b(c), UCMJ. These include instances where the actions of the accused are not targeted at the sexual predation of children but are nonetheless indecent. While it would be proper to charge both of the separate and distinct offenses in the alternative where appropriate, some cases will dictate that only the offense of "indecent communication to a child" under Article 134, UCMJ, is appropriate. Accordingly, indecent language communicated to a child in violation of Article 134, UCMJ, covers different criminal conduct and should not be found to be preempted.

An example of when "indecent language communicated to a child" should be charged under Article 134, UCMJ, is found in the present case[2]. Appellant called Miss HK, a thirteen year old child, a "cum guzzling gutter slut" during a name calling duel. (JA 27, 43-44, 55). The panel correctly found that such act constituted language which is indecent and of a nature to bring discredit upon the armed forces. (JA 23). Even though the panel was not required to find that appellant communicated this language with the specific intent required under

[2] Because appellant failed to make a timely objection prior to trial, it is unclear whether the government may have had additional evidence which could support a charge under Article 120b(c), UCMJ, had they been forced to do so.

Article 120b(c), UCMJ, Congress did not intend to legalize calling a minor child a "cum guzzling gutter slut" merely because the perpetrator lacked specific sexual intent. This case shows exactly the type of offense that falls outside of Article 120b(c), UCMJ, but is fully within the confines of "indecent language communicated to a child" under Article 134, UCMJ.

In addition to the obscene name calling found in the present case, under appellant's position, Congress would have inexplicably intended to allow soldiers to joke or boast (instances not meeting the intent requirement of Article 120b(c), UCMJ) about such things as bestiality, necrophilia, or other shocking and obscene descriptions of sexual activity no matter the potential damage to the public perception of the service or the harm the military community as a whole. This would create a situation where a soldier in uniform could approach an unwitting civilian father with two young children, joke about engaging in obscene sexual behavior, and the military could punish the soldier for communicating such indecent language to the father under Article 134, UCMJ, but not to the minor children.

The universe of indecent communication to children extends beyond that of sexual predation and thus outside the reach of Article 120b(c), UCMJ. Accordingly, it should be clear that while Congress has occupied the field of sexual predation of children, it did not intend to fully occupy the field of indecency

offenses involving children generally. As such, the preemption doctrine should not bar such offenses from being prosecuted under Article 134, UCMJ.

d) Upholding the "indecent language" communicated to a child under Article 134, UCMJ, offense is consistent with this Court's longstanding precedent.

This Court has historically declined to find preemption of long-standing military offenses. *See United States v. Gomez*, 46 M.J. 241, 245 (C.A.A.F. 1997) (finding no preemption of assault with intent to commit rape based upon 45 years of precedent finding it to be an offense under Article 134, UCMJ); *See also Kick*, 7 M.J. at 85 (finding no preemption of negligent homicide based upon decades of application under Article 134, UCMJ); See also *Taylor*, 17 USCMA at 597 (finding no preemption of deliberate self-injury based upon a history of its application under the general article); *See also Toutges*, 13 U.S.C.M.A. at 427 (finding no preemption of assault on a commissioned officer not in the execution of his office based upon historical existence of such offense under the general article).

Likewise, this Court has previously refused to apply the preemption doctrine even when a newly written statute contained a level of intent which was not required in the historical offense under Article 134, UCMJ. *See Kick*, 7 M.J. at 85 (finding preemption did not apply to negligent homicide under Article 134, UCMJ, even though it requires a lesser intent requirement than murder or manslaughter

under Article 118, UCMJ); *See also Taylor*, 17 U.S.C.M.A. at 597 (finding preemption did not apply to deliberate self-injury under Article 134, UCMJ, even though it lacks the element of intent to shirk military duty as required in Article 115, UCMJ).

Similar to the historical general article offenses upheld by this Court, "indecent language communicated to children" has a long history of being charged under Article 134, UCMJ. This listed offense first appeared within a model specification under Article 134, UCMJ, fifty years ago in 1969, where it has since remained. *MCM* (1969 ed.) App'x 6c, ¶ 158. Further, this offense's application under Article 134, UCMJ, dates back even earlier as it has been affirmed as a conviction twelve years earlier in 1957. *Riffe*, 25 C.M.R. at 651. Since that time, this Court has routinely upheld the offense of indecent language communicated to children as a listed offense under Article 134, UCMJ. *See e.g. United States v. Green*, 68 M.J. 266 (C.A.A.F. 2010); *United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004); *United States v. French*, 31 M.J. 57 (C.M.A. 1990); *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986); *Riffe*, 25 C.M.R. at 651.

Most recently, when given the chance to find that the offense of "indecent language" was preempted by "indecent liberty with a child," this Court affirmatively found that the preemption doctrine did not apply in a unanimous holding. *Guardado*, 77 M.J. at 95. In *Guardado*, appellant was convicted of

several "novel" offenses and communicating indecent language to a child under Article 134, UCMJ, for making inappropriate comments to children within their presence. *See id.* at 92. Rather than finding that the then-existing offense of "indecent liberty with a child" under Article 120(j) preempted the government from charging such offenses under Article 134, UCMJ, this Court instead affirmed the "indecent language" specification and held that the "novel" specifications should have been charged under that same offense. *Id.* at 95. Appellant's argument here is inconsistent with this Court's holding in *Guardado*. Following appellant's argument requires this Court to find that both the "novel" offenses and the indecent language offense charged under Article 134, UCMJ, were preempted by the then-existing Article 120(j), given that the comments were made in the physical presence of the child. Article 120(j), UCMJ (2007).

Given the longstanding history of this Court's recognition and approval of indecent language communicated to children as a valid offense under Article 134, UCMJ, along with its recent decision that preemption does not apply, this Court should remain consistent with its precedent and likewise find that preemption does not apply in this context. *See generally Payne v. Tennessee*, 501 U.S. 808, 827-29 (1991) ("adhering to precedent 'is usually the wise policy'").

3. Indecent language is not a residuum of the elements of Article 120b(c) as it contained the terminal element of being of a nature to bring discredit upon the armed forces.

The second requirement for the preemption doctrine to apply is that "the offense charged is comprised of a residuum of elements of a specific offense." *Curry*, 35 M.J. at 360-361. The offense charged under Article 134, UCMJ, included the element of being of a nature to bring discredit upon the armed forces which is not included as an element within the offense of "sexual abuse of a child" under Article 120b(c), UCMJ. *Compare MCM* (2012 ed.), pt. IV, ¶ 89.b., and *MCM* (2012 ed.), pt. IV, ¶ 45b.a.(c), (h). Given the inclusion of the terminal element, "indecent language" under Article 134, UCMJ, is not a residuum of the elements and therefore the preemption doctrine does not apply. *United States v. Jones*, 68 M.J. 465, 474 n.2 (C.A.A.F. 2010) (Baker dissenting) ("The majority has also eliminated the issue of multiplicity and claims of preemption for clauses 1 and 2 of Article 134, UCMJ.").

4. Assuming *arguendo* that there was error in this case, such error was not plain and obvious at trial or during the current appellate proceedings.

Although failure of a specification to state an offense can be raised at any time, this Court has chosen to follow the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first

time on appeal. *United States v. Watkins*, 21 M.J. 208, 209 (C.A.A.F. 1986)[3]. As appellant did not object to the specification at trial, he must show not only that there was error but also that such error was plain and obvious. *Gleason*, 78 M.J. at 483. The rationale behind the heightened standard is that defects to a specification "are normally correctable before trial if seasonably brought to the attention of the . . . government" and it is "manifestly unfair for a defendant to sit silently by, take his chances with the jury, and then be allowed to ambush the prosecution through a post-trial attack." *Walker*, 665 F.3d at 228. While the terms *clear* or *obvious* do not have any special definition, the Supreme Court has distinguished clear and obvious errors from errors that are "subject to reasonable dispute." *Gonzales*, 78 M.J. at 483. (emphasis added).

Assuming *arguendo* that this Court determines there was error in appellant being charged with and convicted of communicating indecent language to a child under 16 years of age, in violation of Article 134, UCMJ, such error was not clear or obvious at trial or during the current appellate proceedings. In addition to the aforementioned reasons which show that the application of the preemption doctrine in this context is subject to reasonable dispute, the military judge followed the

[3] Since this decision, Congress has amended Federal Rule of Criminal Procedure 12(e) resulting in the Federal Circuit Courts taking an even more stringent view that failure to challenge a defect in indictment prior to trial constitutes waiver. *United States v. Walker*, 665 F.3d 212, 228 (1st Cir. 2011).

MCM by not *sua sponte* dismissing the specification for failure to state an offense. *See Gonzales*, 78 M.J. at 486-487 ("[A]n error in the *MCM* is a factor in determining whether an issue is subject to reasonable doubt.").

Given all of these factors, even if the conviction of the specification at issue constituted error, such error was not clear or obvious. Accordingly, appellant is not entitled to relief.

5. If this Court determines the Specification of Charge II must be set-aside and dismissed, the case should be remanded to the lower court to conduct a reassessment of appellant's sentence.

Even if this Court finds that the Specification of Charge II should be dismissed, it should remand the case back to the service court to reassess appellant's sentence. Courts of criminal appeals consider four factors in determining whether to reassess a sentence after it has set aside findings: (1) dramatic changes in the penalty landscape; (2) whether sentencing was by military judge or panel; (3) whether the remaining offenses capture the gravamen of the criminal conduct and whether the same aggravating circumstances remain admissible to the remaining offenses; and (4) whether the remaining offenses are of the type the judges of the court have experience and familiarity with to reliably determine what sentence would have been imposed at trial. *See United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013).

Here, three of the four *Winckelmann* factors weigh in favor of the service court reassessing and affirming appellant's sentence. First, there is minimal change to the penalty landscape. Even if this Court sets aside Charge II which carries a maximum punishment of two years, appellant is still convicted of "sexual assault of a child" under Article 120b, UCMJ, carrying a maximum punishment of twenty years of confinement and a dishonorable discharge. (R. at 520-521). Second, the remaining findings capture the gravamen of appellant's criminal conduct, specifically his sexual assault of a child who had attained twelve years but had not attained the age of sixteen years. Had Charge II been dismissed at trial, it would not have rendered inadmissible the aggravating circumstances surrounding the offense of which appellant is convicted. Finally, the service court has the experience and familiarity with the remaining offense and is able to determine reliably what sentence would have been imposed at trial. The remaining offense is not especially unique or novel such that it is not suitable for reassessment.

Notwithstanding appellant's serious misconduct, he received a favorable sentence compared to his overall punitive exposure. Facing a penalty landscape of twenty-two years of confinement and a dishonorable discharge, appellant was sentenced to no confinement, a bad-conduct discharge, and reduction to the grade of E-1. Accordingly, it would be appropriate for the Army court to reassess appellant's sentence.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence.

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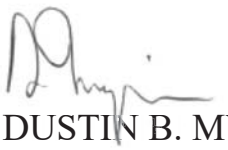

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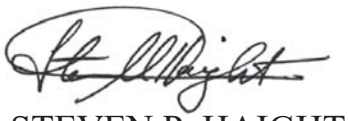

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CERTIFICATE OF FILING AND SERVICE

I certify that the original was filed electronically with the Court at *efiling@armfor.uscourts.gov* and contemporaneously served electronically on appellate defense counsel, on November 12, 2019.

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