No. 22-____

IN THE

Supreme Court of the United States

JULIAN D. SCHMIDT,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented are:

1. Does the ambiguous phrase "in the presence of a child" require the child to be aware of the conduct through a sensory connection, regardless of physical proximity, or does "in the presence of a child" require merely that the child be within physical proximity, regardless of whether the child is unaware of the conduct (i.e. sleeping or unconscious)?

2. Does "intentionally done . . . in the presence of a child" require an intent to harm the child by making the child aware of the acts, or does "intentionally done" require an intent to merely perform the act while being aware a child is present?

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case:

1. *United States v. Schmidt*, No. 201900043, 80 M.J. 586 (N-M. Ct. Crim. App. 2020).

2. *United States v. Schmidt*, No. 21-0004/MC, 82 M.J. 68 (C.A.A.F. 2022), pet. recon. denied, 2022 CAAF LEXIS 180 (C.A.A.F. Mar. 4, 2022). Judgment entered on Feb. 11, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Sergeant Schmidt, United States Marine Corps, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces (CAAF) in this case.

OPINIONS BELOW

The CAAF's published opinion appears at pages 1a through 10a of the appendix to this petition. It is reported at 82 M.J. 68. The published opinion of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) appears at 11a through 39a of the appendix. It is reported at 80 M.J. 586.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"[1] Additionally, "no…*ex post facto* law shall be passed."[2]

Articles 120b(c) and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920b(c) and 934.

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[1] U.S. CONST. amend. V.

[2] U.S. CONST. art. I, § 9, cl. 3.

STATEMENT OF THE CASE

I. INTRODUCTION

Sergeant Schmidt was convicted of sexual abuse of a child for masturbating under a blanket near a 15-year-old boy, "Jared,"[3] who he believed was sleeping, and therefore unaware of Petitioner's masturbation. Jared admitted during Petitioner's court-martial that, although awake, he pretended to remain asleep until Petitioner left the house. Sexual abuse of a child is a violation of Article 120b(c), UCMJ (10 U.S.C. § 920b(c)).[4]

In contrast, "indecent conduct," a violation of Article 134, UCMJ (10 U.S.C. § 934), includes offenses previously proscribed as "indecent conduct with another," except that the presence of another person is no longer required.[5] "Indecent conduct" may involve children.[6] However, "indecent conduct" did not become an offense until September 16, 2016, approximately three weeks *after* Petitioner's conduct.[7]

Petitioner first sought relief from the Navy-Marine Corps Court of Criminal Appeals (NMCCA).[8] The NMCCA held "in the presence of" a child required Jared to be aware of Petitioner's lewd act through a sensory connection, and that, if Jared had been asleep,

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[3] "Jared" was a pseudonym used in both opinions from the military appellate courts.

[4] Petitioner was acquitted of another charged offense of sexual assault on a child related to the same boy.

[5] *Manual for Courts-Martial* [*MCM*] (2016 ed.), pt. IV, para. 90c.(2).

[6] *Id.*

[7] *Id.*, app. 23, para. 90.

[8] *United States v. Schmidt*, 80 M.J. 586 (N-M. Ct. Crim. App. 2020) (*Schmidt I*), *rev'd*, *United States v. Tabor*, __ M.J. __, 2022 CCA Lexis 314 (N-M. Ct. Crim. App. 2022) (*en banc*).

he would not have been aware of Petitioner's masturbation.[9] However, the NMCCA ultimately upheld Petitioner's conviction because it concluded Petitioner did not honestly believe Jared was asleep.[10] The NMCCA further held that Petitioner waived objection to the military judge's instruction to the panel members when they asked what "in the presence of" meant. The instruction given did not include guidance that Jared must have been aware of the conduct, Petitioner must have intended for Jared to be aware of his conduct, and that if Petitioner honestly but mistakenly believed Jared was asleep, then that belief constituted a mistake of fact that relieved Petitioner of criminal liability.[11]

Petitioner subsequently sought, and was granted, review of his case by the Court of Appeals for the Armed Forces (CAAF).[12] The CAAF specified the issue of "whether the phrase 'in the presence of' used to define the term 'lewd act' in Article 120b(h)(5)(D), [UCMJ] requires the child to be aware of the lewd act or merely that the accused be aware of the child's presence."[13] In a fractured decision, the CAAF affirmed Petitioner's conviction.

The opinion's author, Judge Sparks, agreed with the NMCCA, holding "in the presence of a child" required the child to be aware of the lewd act through a sensory connection.[14] Judge Sparks also agreed with the NMCCA that in order to "intentionally"

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[9] 80 M.J. at 598.
[10] *Id.* at 599.
[11] *Id.* at 600-02.
[12] *United States v. Schmidt*, 82 M.J. 68 (C.A.A.F. 2022) (*Schmidt II*).
[13] *Id.* at 71-72.
[14] *Id.* at 74.

masturbate "in the presence of" Jared, Petitioner must have intended for Jared to be aware of his masturbation.[15] Judge Sparks held that because the definition of "in the presence of" a child was unsettled, Petitioner could not have waived an objection to the instruction. However, he held that the military judge's failure to instruct the panel members on these two points was not plain error, because it involved a first-impression interpretation of a new law.[16]

Chief Judge Ohlson and Senior Judge Erdmann concurred in the judgment.[17] However, they held that "in the presence of" a child only required Petitioner to be aware of Jared's physical presence while he masturbated; it did not require that Jared be aware of the conduct.[18] They concluded that "presence" was plain and unambiguous, and that the term does not include "awareness;" it simply requires the victim be in the "immediate vicinity" of the accused.[19]

Judges Maggs and Hardy held that Petitioner waived objection to the military judge's instruction to the panel members when they asked during deliberations for guidance on the meaning of the phrase "in the presence of."[20] Therefore, they did not address the issue regarding the meaning of "in the presence of."[21]

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 77 (Ohlson, C.J. and Erdmann, S.J. concurring).
[19] *Id.* at 78 (Ohlson, C.J. and Erdmann, S.J. concurring).
[20] *Id.* at 78-81 (Maggs, J. and Hardy, J. concurring).
[21] *Id.* at 79 (Maggs, J. and Hardy, J. concurring).

II. FACTUAL AND LEGAL BACKGROUND

Although two factual issues are disputed, this Court does not need to resolve them in order to review the Presented Questions. The Presented Questions related to questions of law of constitutional dimension, because they implicate the Fifth Amendment Due Process prohibition against vagueness and ambiguity.

A. Factual Background[22]

Petitioner knew Jared and his family through a mutual family friend, "Michelle," who lived next door to Jared's family in Carlsbad, California. Petitioner became a friend and mentor to Jared and his older brother. Jared's family moved away from Carlsbad, but returned for a visit when Jared was 15 years old. The family stayed at Michelle's house, where Petitioner also stayed for two nights during their visit.

On the first night, Petitioner slept on an air mattress on the floor of Michelle's bedroom, while Jared and his older brother slept on an air mattress on the floor in her front room. On the second night Jared felt nauseous, and his brother did not want to sleep next to him, so Appellant offered the air mattress in Michelle's room to Jared's brother and arranged to sleep across two upholstered swivel chairs in the front room, next to the air mattress where Jared was sleeping.

Jared testified that he woke up that night, lying on his stomach on the left side of the air mattress, and Petitioner was on the mattress beside him with an

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[22] Unless otherwise indicated, the factual background is derived from the NMCCA's opinion in *Schmidt I*, 80 M.J. at 592-93, 600-01, 603.

arm on Jared's back near his shoulder blades. Jared felt frightened and slid away from Petitioner off the air mattress and onto the floor, where he pretended to be asleep. Jared further testified that his right hand was still on the mattress; Petitioner started holding it and licking and kissing Jared's fingers.[23] Jared claimed that Petitioner started making sounds and movements indicative of masturbation. After a few minutes, Petitioner made a grunting sound and got up. Jared heard Petitioner wake up Michelle to drive him back to his base. Jared heard Petitioner take a shower and then, before leaving the house—while Jared was still pretending to be asleep—come over to the foot of the air mattress and pray aloud for Jared's protection. After Petitioner left, Jared, crying and upset, woke up his mother in another part of the house and told her what Petitioner did. Jared's mother called the police and sent angry text messages to Petitioner.

During his interrogation by Naval Criminal Investigative Service (NCIS) agents, Petitioner stated he was laying on the two swivel chairs, positioned so that they were facing each other, in the front room. Petitioner denied touching Jared or being on the air mattress with him. When the agents brought up DNA evidence, Petitioner admitted he masturbated on the chairs, under the blanket, to the point of ejaculating. When he got up, Petitioner threw the blanket across the room, over Jared, onto the couch on the other side of the front room. Petitioner nodded when one of the NCIS agents said to him, "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

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[23] This conduct formed the basis for the other Specification of sexual abuse of a child, of which Petitioner was acquitted.

sleeping pills, whatever, man, everybody does their own thing."

During closing argument, Petitioner's trial defense counsel argued "masturbating in a room where you think everybody is asleep and no one is watching you and no one is aware, doesn't meet the elements of what they're saying. That is not a crime." While acknowledging Jared was in the same room as Petitioner, trial defense counsel argued physical proximity was not enough. In rebuttal, trial counsel argued that Jared's physical proximity to Petitioner was enough to convict Petitioner.

During deliberations, a panel member asked for a definition of "in the presence of." The military judge proposed to the parties that he re-read the definition of "lewd act" and tell the members that, in the absence of a specific, technical legal definition, they were to use their own common sense understanding of the definition. Petitioner did not object to this, nor did he propose an alternative definition of "in the presence of."

B. Legal Background

In *United States v. Brown*,[24] the CAAF's predecessor, the Court of Military Appeals (CMA), first addressed the definition of "in the presence of a child" in examining a conviction for taking indecent liberties with a child, via intentional exposure of genitals to two young girls, ages ten and seven.[25] The CMA held that the conviction was legally sufficient.[26] In addressing whether "indecent exposure" constituted "indecent liberties with a child," the CMA

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[24] 13 C.M.R. 10 (C.M.A. 1953).
[25] *Id.* at 11.
[26] *Id.* at 17.

answered in the affirmative, holding that the purpose of the statute was to protect children under a certain age from acts having a tendency to corrupt their morals.[27] Because Brown intentionally drove by the two girls twice so that they could see his exposed genitals, and they in fact saw his exposed genitals, he was "in view" of them.[28] This satisfied the "victim awareness through a sensory connection" requirement for his indecent exposure to be "in the presence of a child."[29]

The next significant decision was *United States v. Knowles*,[30] which reversed a guilty plea to indecent liberties with a child by communicating obscene language over the telephone. The CMA reversed the conviction, holding that "in the presence of a child" required the child victim to be in the physical presence of the accused.[31] However, the requirement for "physical presence" was based on the child having a sensory connection to the offense beyond hearing the obscene language—"[t]he offense before us requires greater conjunction of the *several senses of the victim with those of the accused* than that of hearing a voice over a telephone wire."[32]

The UCMJ underwent revision in 1969, and again in 1984. During both of these revisions, "indecent liberties with a child" remained an offense under Article 134, UCMJ. While physical contact with a child was not required, the indecent liberty must have

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[27] *Id.* at 13.
[28] *Id.* at 11.
[29] *Id.*
[30] 35 C.M.R. 376 (C.M.A. 1965).
[31] *Id.* at 377.
[32] *Id.* at 377-78 (emphasis added).

occurred in child's "physical presence." This continued through 2005.

The requirement for the physical presence of a child continued in *United States v. Miller*,[33] when the CAAF held that a child's "virtual" presence via online, internet-based communication was not sufficient to uphold a conviction for attempted indecent liberties with a child, as the offense was defined in 2005.[34] The offense required the child to be in the "physical presence" of the accused. It was at this point that the CAAF analyzed the meaning of "presence" and held the child victim's "close proximity" to the accused in physical location must be "coupled with awareness" of the indecent conduct in order to sustain a conviction for indecent liberties with a child.[35] Therefore, in *Miller*, while the purported child was aware of the indecent conduct through sensory connections of sight and sound enabled by the internet, the purported child was not in "close proximity" to Miller in physical location. Accordingly, the child was not "physically present,"[36] and the conviction was overturned.[37]

In response to *Miller*,[38] Congress amended the offense of "indecent liberties with a child" to "lewd act upon a child" to eliminate the "close proximity in physical location" requirement, and to include acts that occur via communication technology. This change renders a child's physical presence

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[33] 67 M.J. 87 (C.A.A.F. 2008).
[34] *Id.* at 90. The "child" was actually an undercover agent. The MCM required the child's physical presence during the indecent conduct in order to sustain a conviction.
[35] *Id.* at 89-90.
[36] *Id.* at 91.
[37] *Id.*
[38] *Id.* at 90.

unnecessary. Congress also amended the law from a general intent crime to a specific-intent crime by including a *mens rea* that the conduct be "intentionally done . . . in the presence of a child."

In reviewing convictions for indecent liberties with a child, the services' Courts of Criminal Appeals (CCAs) consistently applied "close proximity coupled with awareness." In *United States v. Burkhart*,[39] the Air Force Court of Criminal Appeals (AFCCA) reversed the conviction because, while the appellant's three-year-old daughter was in "close proximity" while he masturbated on the couch (only two to three feet away),[40] she was sleeping.[41] Because she slept, she had no sensory connection to the appellant's masturbation, and therefore was not "aware" of it.[42] Even after she awoke, she did not see him masturbating, because the evidence showed he stopped when she woke up, pushed her out of the room, and then only resumed masturbating after she left the room.[43] Therefore, the evidence was legally insufficient to sustain the conviction for indecent liberty with a child.[44]

The NMCCA agreed with this reasoning in *United States v. Anderson*,[45] setting aside appellant's guilty plea to indecent liberty with a child for having sex with his wife while their five-year-old niece laid in bed next to them because she was unconscious, and

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[39] 72 M.J. 590 (A.F. Ct. Crim. App. 2013).
[40] *Id.* at 592.
[41] *Id.*
[42] *Id.* at 595.
[43] *Id.*
[44] *Id.*
[45] No. 201200499, 2013 CCA LEXIS 517 (N-M. Ct. Crim. App. Jun. 27, 2013) (unpub. op.).

therefore, not "aware" of them having sex.[46] The NMCCA affirmed a finding of guilt of the lesser-included offense of "indecent conduct," which was then a violation of Article 120(k), UCMJ, because indecent conduct did not require the child's awareness of appellant and his wife having sex.[47] The Army Court of Criminal Appeals (ACCA) reached a similar conclusion in *United States v. Gould*,[48] setting aside the conviction for indecent liberty with a child for factual insufficiency for the Government's failure to prove the child was aware of the indecent conduct.[49]

As detailed *supra*, the CAAF's decision in Petitioner's case was fractured; it failed to provide a settled *mens rea* requirement or definition of the phrase "in the presence of" a child. One judge held that "intentionally done . . . in the presence of a child" required both the child's awareness, through a sensory connection, of the conduct and that the accused intends for the child to be aware of the conduct. Two judges held that "intentionally done . . . in the presence of a child" merely required the accused to intend to engage in the conduct, aware of the child's "presence" as being in the accused's "immediate vicinity." Two judges did not decide the issue at all.

With no guidance either way on the definition of "intentionally done . . . in the presence of a child," an *en banc* NMCCA decided *United States v. Tabor*,[50] which involved a guilty plea to a lewd act upon a child

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[46] *Id.* at *15-16.
[47] *Id.* at *19.
[48] No. 20120727, 2014 CCA LEXIS 694 (A. Ct. Crim. App. Sep. 16, 2014) (unpub. op.), *rev'd in part on other grounds*, 75 M.J. 22 (C.A.A.F. 2015).
[49] *Id.* at *2.
[50] 2022 CCA LEXIS 314.

who may have been asleep. Staff Sergeant Tabor was "sexting" with a former high school classmate, whose ten-year-old daughter was in bed with her. The mother sent a photo of her daughter and texted that she intended to masturbate when her daughter fell sleep.[51] Staff Sergeant Tabor was aroused and encouraged the mother to masturbate even though her daughter was not asleep.[52] On appeal, he challenged the providence of his guilty plea, alleging there was a substantial basis in law and fact to question it.

The majority in *Tabor* adopted Chief Judge Ohlson's and Senior Judge Erdmann's concurrence in *Schmidt II*, holding that victim awareness of the conduct through a sensory connection was not a requirement for "presence," and that the child being in the "immediate vicinity" was sufficient.[53] In adopting the Ohlson-Erdmann concurrence, the majority held that *Schmidt I* was incorrectly decided and overturned it.[54] However, the majority went further in interpreting "awareness" to require that the child "appreciate" the nature of the conduct, holding that a child who is not able to appreciate the conduct nevertheless deserves to be protected by Article 120b(c), UCMJ.[55] The majority acknowledged there were concerns that its interpretation of "lewd act upon a child" broadened its reach such that its interpretation could sweep in conduct that Congress did not intend to criminalize, for example, a married couple living in a studio apartment with a young child

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[51] *Id.* at *3-4.
[52] *Id.* at *4.
[53] *Id.* at *33-37.
[54] *Id.* at *3.
[55] *Id.* at *38.

who, with no other place to go, have sex in the room after the child falls asleep in a crib.[56]

Senior Judge Stephens concurred, writing a lengthy opinion comparing different philosophies of statutory interpretation.[57] While acknowledging "textualism" was the philosophy utilized by a majority of appellate judges, he suggested that textualism, which relies heavily on dictionaries to define legal terms of art, "contributes to the confusion over the meaning and effect of Article 120b(c), UCMJ."[58] He argued that a "classical approach" to statutory interpretation was the better philosophy. "In the classical view, there is no need to wrangle over the nature of the word 'presence,'" and "awareness" is not an element the Government must prove.[59]

Senior Judge Gaston and Judge Stewart dissented in part; they decided *Schmidt I*. They pointed out that the majority's interpretation of Article 120b(c), UCMJ converts the statute from a victim-oriented offense into a societal offense.[60] In doing so, "the majority conflates these requirements using an interpretation of "in the presence of" that ignores key statutory changes made by Congress."[61] While the majority analyzes only the word "presence," the dissent analyzed the *entire phrase* "in the presence of," which they held "connotes not mere location or proximity, but awareness of the conduct by the person."[62]

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[56] *Id*. at *41-43.
[57] *Id*. at *63-88 (Stephens, S.J. concurring).
[58] *Id*. at *63-64 (Stephens, S.J. concurring).
[59] *Id*. at *81-82 (Stephens, S.J. concurring).
[60] *Id*. at *89 (Gaston, S.J. and Stewart, J. dissenting in part).
[61] *Id*.
[62] *Id*. at *91 (Gaston, S.J. and Stewart, J. dissenting in part).

> The conclusion that such sensory awareness is required for conduct to be done "in the presence of" a child is reinforced by the statute's inclusion of the modifying phrase, "including via any communication technology." In the context of this modifying phrase, "in the presence of" is not about physical presence at all, since conduct done in the presence of another person "via communication technology" is *not* done in the person's physical presence, or "immediate vicinity," as the majority now calls it. Rather, the doing of the conduct in one location is simply conveyed (*i.e.*, communicated) to the person in another location through the transfer of sensory data (*e.g.*, sight and sound).[63]

Senior Judge Gaston and Judge Stewart also point out that the majority conflates "awareness of the conduct" with "appreciation of the conduct."[64] "Awareness" of the conduct does not require the child to "appreciate" the nature of the conduct; instead, "awareness" is gained through a sensory connection. A child may not be able to cognitively understand what the indecent conduct is, or why people engage in sexual conduct, but can nevertheless be "aware" of indecent conduct occurring through a sensory connection of sight, sound, touch, smell, or taste.

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[63] *Id.* at *94 (Gaston, S.J. and Stewart, J. dissenting in part).
[64] *Id.* at *102 (Gaston, S.J. and Stewart, J. dissenting in part).

REASONS FOR GRANTING THE PETITION

I. THE DEFINITION OF "IN THE PRESENCE OF" A CHILD, AND THE ISSUE OF WHOSE AWARENESS IS REQUIRED FOR CRIMINAL LIABILITY TO ATTACH, ARE MATTERS OF FIRST IMPRESSION AT THE FEDERAL LEVEL

While multiple circuits have generally addressed the offense of sexual misconduct "in the presence of" a child, they have done so in the context of sentencing guidelines or removal proceedings for illegal aliens. No federal court cases squarely address the definition of "in the presence of" in the context of defining the phrase as it relates to criminal liability for a lewd act upon a child. However, at least three states' supreme courts *have* squarely addressed the issue, and those courts' opinions support Petitioner's arguments.

A. *Florida v. Werner*[65]

Werner was initially convicted of committing a lewd and lascivious act "in the presence of" a child by masturbating in the bathroom in the physical presence of his thirteen-month-old daughter. His conviction was reversed on appeal because there was no evidence his daughter saw or otherwise sensed he was masturbating. The prosecutor argued that he did not have to prove the daughter actually saw Werner masturbating; it was sufficient that she was in the bathroom with him.[66]

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[65] 609 So. 2d 585 (Fla. 1992). This case was also cited by the dissent in *Tabor*, 2022 CCA LEXIS 314 at *93-94 (Gaston, S.J. and Stewart, J. dissenting in part).

[66] *Id.* at 585-86.

The Florida Supreme Court affirmed the reversal of Werner's conviction. The Court held that the "complete" definition of "presence," and the context in which the word was used, required more than just being in the "part of the space within one's immediate vicinity."[67] The Court held that "presence encompasses sensory awareness as well as physical proximity."[68] "Presence" as used in the criminal statute had a legal significance, and therefore it was appropriate to consider the definitions and examples used in Black's Law Dictionary, which included sensory perceptions of the acts involved.[69]

> Applying the legal as well as the common-sense meaning of the word "presence" to [the statute], leads us to the conclusion that, while the child need not be able to articulate or even comprehend what the offender is doing, the child must see or sense that a lewd or lascivious act is taking place for a violation [of the statute] to occur.[70]

Finally, responding to arguments that requiring proof of "victim awareness" as an element of "presence" was contrary to legislative intent, the Court pointed to the preamble to the act amending the statute stating, "the intent of the Legislature was and remains to prohibit lewd and lascivious acts *upon* children."[71] Thus, for a lewd and lascivious act to be performed "upon" a child, the child must experience it; the only way for a child to experience

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[67] *Id.* at 586.
[68] *Id.*
[69] *Id.* at 586-87.
[70] *Id.* at 587.
[71] *Id.*

the act is through awareness via a sensory connection. Masturbating in the "immediate vicinity" of a child who is unaware of the masturbation is not an act "upon" the child.

B. *Louisiana v. Interiano*[72]

This case involved Interiano's ten-month-old daughter. Interiano admitted to occasionally watching pornography and masturbating on the living room couch while his daughter played or slept on the floor nearby.[73] Interiano successfully moved the trial court to quash the indictment by arguing the statute proscribing lewd and lascivious acts in the presence of a child was unconstitutionally vague. The trial court agreed, noting the statute was subject to more than one interpretation;[74] the Government appealed the ruling to the Louisiana Supreme Court.

The majority of the Court resolved the issue with a "narrowing construction of the statute as long as that interpretation remains consistent with the overall purpose behind the legislation."[75] As in *Werner*, the Louisiana Supreme Court held that the legal usage of the word "presence" required more than mere "immediate vicinity."[76] "It is the viewing or awareness of an act that gives legal significance to the term ["presence"]."[77] It is this construction "that best fulfills the legislative intent to protect children from psychological harm that witnessing sexual displays can cause."[78] Having narrowly construed the statute

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[72] 868 So. 2d 9 (La. 2004).
[73] *Id.* at 12.
[74] *Id.*
[75] *Id.* at 13.
[76] *Id.* at 16.
[77] *Id.*
[78] *Id.*

so that it was no longer unconstitutionally vague, the Court reversed the trial court's decision and remanded for further proceedings.

Justice Knolls concurred in the judgment, but wrote separately because she disagreed with the majority's opinion that "presence" required a victim to have a sensory connection to the conduct.[79] Chief Justice Calogero dissented because he believed the Court should have upheld the trial court's ruling that the statute was unconstitutionally vague.[80] He felt that, by interpreting the statute to uphold its constitutionality,

> the majority essentially chooses to engage in curative legislation rather than function more appropriately as a judicial body ruling on the constitutionality of the statute. In my view, the court should simply uphold the lower court's finding that the statute is unconstitutionally vague and allow the legislature to rewrite the statute as it sees fit.[81]

C. *Kansas v. Bryan*[82]

Bryan was discovered by his wife laying naked on their thirteen-year-old daughter's bed, while she was asleep, with his hand on his erect penis.[83] The daughter had "night terrors," and was not aware of what her father was doing.[84] She recalled feeling like

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[79] *Id.* at 19 (Knolls, J. concurring).
[80] *Id.* at 18 (Calogero, C.J. dissenting).
[81] *Id.*
[82] 130 P.3d 85 (Kan. 2006).
[83] *Id.* at 87.
[84] *Id.*

she was being shaken, but could not attribute the sensation to Bryan.[85] She was not aware of his erect penis.[86]

The Kansas Supreme Court affirmed Bryan's conviction for indecent exposure, noting that the act of exposing one's penis "does not require someone to actually perceive what is exposed."[87] In the context of Kansas's indecent exposure offense, the Court held that "presence" simply described a location where exposure is prohibited—in the presence of the victim.[88] In analyzing the meaning of "presence," the Court acknowledged that several dictionaries either expressly or implicitly included "awareness" as an element.[89]

However, this did not resolve the issue of whose "awareness" of Bryan's exposed erect penis was required. The Court went on to hold that "presence" was linked to the specific "intent to arouse or gratify the sexual desires of the offender or another."[90] If Bryan intended to arouse his own desires, then only he needed to be "aware" his penis was exposed in the victim's presence.[91] However, if Bryan's intent was to arouse his daughter's desires, then she needed to be aware of Bryan's exposed penis.[92] Here, the evidence showed that Bryan intended to arouse his own sexual desires, which only required him to be aware his penis was exposed. He had an erection, which he was also

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[85] *Id.*
[86] *Id.*
[87] *Id.* at 88.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 88-89, 92.
[92] *Id.*

aware of through the sensory connection of touching his penis. He was aware he was on his daughter's bed while she slept in it—he admitted as much.[93]

D. Application of *Werner*, *Interiano*, and *Bryan* to Petitioner's Case

These three cases all support Petitioner's position that "presence" requires "child awareness" through a sensory connection. *Werner* and *Interiano* both require that, in performing a lewd act by masturbating "in the presence of a child," the child be aware of the conduct. While *Bryan* held that the child victim was not required to be aware, *Bryan* was an indecent exposure case, not a case involving masturbation. Petitioner did not expose his penis; he masturbated under a blanket.

II. THE DEFINITION OF "IN THE PRESENCE OF" A CHILD REMAINS UNSETTLED LAW, PRESENTING AN ISSUE OF CENTRAL IMPORTANCE THROUGHOUT THE MILITARY

This Court has granted review of courts-martial cases which present issues of central importance for military courts.[94] Petitioner's case is such a case.

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[93] *Id.* at 92.

[94] *See United States v. Briggs*, *et. al.*, 141 S. Ct. 467 (2020) (the applicable statute of limitations for rape offenses); *Ortiz v. United States*, 138 S. Ct. 2165 (2018) (the qualifications of a military judge to sit on both the Air Force Court of Criminal Appeals and the Court of Military Commission Review); *United States v. Denedo*, 556 U.S. 904 (2009) (jurisdiction of military appellate courts to consider writs of *coram nobis*); *Clinton v. Goldsmith*, 526 U.S. 529 (1999) (jurisdiction of a military appellate court to issue an injunction to enjoin the President of the United States and other Air Force officials from dropping an Air Force officer from the rolls); *Weiss v. United States*, 510 U.S. 163 (1994) (method of appointing military judges); *Middendorf v.*

When judges on the highest military appellate court do not settle important questions of law due to disagreements on the definition of a legal term of art and the correct *mens rea*, then this Court must step in and settle the matter.

Our nation's Servicemembers deserve to know precisely what conduct constitutes a violation of Articles 120b(c) or 134, UCMJ, so that they can conform their conduct to comply with the law.[95] "[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[96] A criminal statute cannot be susceptible to multiple interpretations, such that judges and juries are allowed to pursue their personal preferences as to what conduct is or is not proscribed.[97] Yet that is what occurred in Petitioner's case at CAAF, and it continues with the NMCCA in *Tabor*. Military appellate judges use different dictionaries with different definitions of "presence" to divine Congressional intent, even though there is no evidence anyone in Congress consulted a dictionary,[98]

Henry, 425 U.S. 25 (1976) (whether Servicemembers have a constitutional right to counsel for summary courts-martial proceedings); *Parker v. Levy*, 417 U.S. 733 (1974) (constitutionality of Article 133, UCMJ, proscribing conduct unbecoming of an officer and a gentleman).

[95] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

[96] *Id.*

[97] *Smith v. Goguen*, 415 U.S. 566, (1974).

[98] Joseph Kimble, *Dictionary Diving in the Courts: A Shaky Grab for Ordinary Meaning*, 22 JOURNAL OF APPELLATE PRACTICE AND PROCESS 209, 233-34 (Summer 2002) (noting a survey of drafters

as opposed to simply relying on *Miller*. The definition of "in the presence of" used by Petitioner's court-martial panel is unknown, because the military judge only instructed them to rely on their "common sense" understanding of the phrase.[99]

Petitioner's case is the right case to settle these questions. Petitioner's case was one of first impression for the CAAF.[100] Granting review of Petitioner's case will enable all military appellate courts to provide consistent answers as to whether "in the presence of a child" includes a requirement for the child's awareness of the conduct through a sensory connection, and whether "intentionally done" requires an accused to desire harm to the child by making the child aware of his conduct.

III. THE LOWER COURT'S DECISION IS INCORRECT

The CAAF's decision was incorrect for at least three reasons:

A. The Lower Court Failed to Apply the Rule of Lenity

In *Yates v. United States*,[101] this Court held that whether a statutory term is unambiguous does not turn solely on dictionary definitions of its component words. "Rather, [t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and

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showed more than 50% of drafters responded that they never or rarely used a dictionary when drafting legislation).

[99] *Schmidt II*, 82 M.J. at 71.

[100] *Id.* at 73.

[101] 574 U.S. 528, 537 (2015).

the broader context of the statute as a whole."[102] "Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things."[103] And, where a term is ambiguous, that is, susceptible to more than one interpretation, that ambiguity must be resolved in the accused's favor.[104] "When [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[105] That multiple definitions of "presence" can be found in multiple dictionaries demonstrates, at the very least, the term is ambiguous.[106] Therein lies the constitutional problem of this case warranting this Court's review.

B. The Lower Court Failed to Follow Rules of Statutory Construction

A statute should be construed so that effect is given to all of its provisions, and so that no part will be inoperative or superfluous, void or insignificant.[107] Statutory interpretation requires analyzing

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[102] *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

[103] *Id.*

[104] *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).

[105] *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks and citation omitted).

[106] *See Bryan*, 130 P.3d at 88 (nine different definitions of "presence" in two different dictionaries, with reference to a third dictionary to interpret the term "perception");

[107] *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (additional quotations omitted).

legislative history and assessing whether the statutory scheme is coherent and consistent.[108] Courts look at "the evil the provision is directed towards, and the remedy in view,"[109] so that the interpretation of the statute brings about a logical result. Courts also "assume that Congress is aware of existing law when it passes legislation."[110]

When the CAAF decided *Miller*, the requirement was "physical presence"—that is, "close proximity" and (coupled with) "awareness."[111] Congress was obviously aware of *Miller* because it revised "indecent liberties with a child" into "lewd act upon a child" in reaction to this decision. In doing so, Congress eliminated the element of "close proximity," thus shifting the requirement to simply "presence," which means "awareness." The "evil to be addressed" is conduct which harms children virtually through "communications technology," as well as conduct that harms children when it occurs in person. But regardless of the child's physical proximity to the conduct, the child cannot experience the harm intended to be addressed by Article 120b(c), UCMJ, if the child has no awareness of the conduct through a sensory connection—sight, sound, touch, smell, or taste.

A child who is asleep has no sensory connection. But the lack of sensory connection does not leave these vulnerable children without *any* protection from the law, as was argued by Chief Judge Ohlson and Senior Judge Erdmann in *Schmidt II*,[112] and the majority of

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[108] *Robinson*, 519 U.S. at 340.
[109] *Brown*, 13 C.M.R. at 12.
[110] *Miles v. Apex Marine Corps*, 498 U.S. 19, 32 (1990).
[111] 67 M.J. at 90-91.
[112] 82 M.J. at 77 (Ohlson, C.J. and Erdmann, S.J. concurring).

the NMCCA in *Tabor*.[113] Subsequent to Petitioner's conduct, a law was enacted to punish "indecent conduct" that does not require *anyone's* "presence," adult or child—Article 134, UCMJ. The explanation for "indecent conduct" warns, "for child offenses, *some* indecent conduct *may* be included in the definition of lewd act and preempted by Article 120b(c), [UCMJ]."[114] This explanation indicates that *some* indecent conduct *may not* be included in the definition of lewd act, and therefore *not* preempted, because a vital element is missing. The only elemental difference between these two statutes is "in the presence of a child"—Article 120b(c) requires it, while Article 134 does not.

Thus, the two different articles that address "indecent conduct" provide a consistent, cohesive statutory scheme—Article 120b(c), UCMJ covers indecent conduct which the child is aware of through a sensory connection, and therefore causes harm to the child, while Article 134, UCMJ covers indecent conduct which the child is not aware of due to the lack of any sensory connection, which causes a societal harm. Chief Judge Ohlson's and Senior Judge Erdmann's interpretation of Article 120b(c), UCMJ renders this statutory scheme inconsistent. Their interpretation, which requires the child be in the "immediate vicinity,"[115] would return the military to the *Miller* requirement of a child physically being in

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[113] 2022 CCA LEXIS 314 at *37-39.

[114] Manual for Courts-Martial (2016 ed.), app. 23, para. 90 (emphasis added).

[115] *Schmidt II*, 82 M.J. at 78 (Ohlson, C.J. and Erdmann, S.J. concurring).

"close proximity" to the accused.[116] This means that perpetrators of technology-based lewd acts involving children could not be prosecuted under Article 120b(c), UCMJ, contrary to Congressional intent.

Furthermore, in light of Congress broadening "presence" to include awareness of conduct acquired virtually, it was logical, and necessary, for Congress to heighten the *mens rea* requirement from a general intent, *i.e.* masturbating, to a specific intent, *i.e.* for Petitioner to desire to harm Jared by making Jared aware he was masturbating. By heightening the *mens rea* requirement to balance against a lack of physical proximity, Congress ensured that only those who *desired to harm the child* with indecent conduct were convicted of an offense under Article 120b(c), UCMJ. Holding that an accused incurs criminal liability merely by intending to masturbate near a child without a concomitant requirement to make the child aware of the masturbation, returns "lewd act upon a child" to a general intent crime,[117] also contrary to Congressional intent.[118]

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[116] *Tabor*, 2022 CCA LEXIS 314 at *101 (Gaston, S.J. and Stewart, J. dissenting in part).

[117] *Id*. at 74 (Ohlson, C.J. and Erdmann, S.J. concurring).

[118] *See Tabor*, 2022 CCA LEXIS 314 at *105 (Gaston, S.J. and Stewart, J. dissenting in part):

> [T]he majority compounds the error by blurring the distinction between conduct being "indecent" and such conduct being "intentionally done . . . in the presence of a child." Contrary to the statutory language, which requires both, the majority's conflated interpretation suggests that any sexual conduct done in the immediate vicinity of a child . . . would, in and of itself, be "indecent." This would mean that parents who discreetly have intercourse in the same room as their sleeping

C. Petitioner has an *ex post facto* conviction for indecent conduct

If "indecent conduct" in violation of Article 134, UCMJ had been in effect at the time of Petitioner's conduct, and if he had been charged with indecent conduct in the alternative, in all likelihood, the NMCCA and/or CAAF would have set aside Petitioner's conviction under Article 120b(c), UCMJ, and affirmed a conviction for a violation of Article 134, UCMJ, as occurred in *Anderson*. But understanding that mere "indecent conduct" was not a crime until approximately three weeks later, it appears the CAAF's decision was for the purpose of preserving Petitioner's conviction. To paraphrase then-Chief Justice Calogero of the Louisiana Supreme Court, "Saving the . . . conviction of the person here charged with masturbating in the same room in which [a fifteen-year-old boy] was . . . [pretending to] sleep, conceivably serves an acceptable purpose. But at the cost of disrespect for applicable legal and constitutional principles, it is hardly defensible."[119]

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infant could be subject to criminal prosecution for sexual abuse of a child.

[119] *Interiano*, 868 So. 2d at 28 (Calogero, C.J. dissenting).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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