APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Julian D. SCHMIDT, Sergeant
United States Marine Corps, Appellant

No. 21-0004
Crim. App. No. 201900043

Argued October 5, 2021—Decided February 11, 2022

Military Judge: Matthew J. Kent

For Appellant: *Tami L. Mitchell*, Esq. (argued); *Lieutenant Megan E. Horst*, JAGC, USN (on brief); *David P. Sheldon*, Esq.

For Appellee: *Lieutenant John L. Flynn IV*, JAGC, USN
(argued); *Lieutenant Colonel Christopher G. Blosser*, USMC,
Major Kerry E. Friedewald, USMC, and *Brian K. Keller*, Esq. (on brief); *Lieutenant Colonel Nicholas L. Gannon*, USMC, and *Lieutenant Gregory A. Rustico*, JAGC, USN.

Judge SPARKS announced the judgment of the Court. Chief Judge OHLSON filed a separate opinion concurring in the judgment, in which Senior Judge ERDMANN joined. Judge MAGGS filed a separate opinion concurring in the judgment, in which Judge HARDY joined. _____

Judge SPARKS announced the judgment of the Court.

I. Background

In relevant part, Appellant was charged with committing a lewd act on Jared,[1] a child under sixteen years old, by engaging in indecent conduct by intentionally masturbating in his presence, in violation of Article 120b(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b(c) (2012 & Supp. IV 2013–2017). At trial, Jared testified that, on the night in question, he fell asleep on an air mattress and, later, Jared awoke feeling sick. When he awoke, Jared felt Appellant's arm on his back. Jared became frightened and pretended to be asleep while sliding away from Appellant onto the floor. Appellant proceeded to hold Jared's right hand and began licking and kissing Jared's fingers. Appellant then made sounds and movements indicative of masturbation. After a few minutes, Appellant made a grunting sound and left the room. Appellant proceeded to take a shower and then, before leaving the house, while Jared was still pretending to be asleep, came over to the foot of the air mattress and prayed aloud for Jared's protection.

During an interrogation by the Naval Criminal Investigative Service (NCIS), Appellant admitted masturbating under a blanket to help him fall asleep. Appellant nodded when the NCIS agent 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 sleeping pills, whatever, man, everybody does their own thing."

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[1] The United States Navy-Marine Corps Court of Criminal Appeals opinion referred to the victim as Jared. We adopt the same pseudonym throughout this opinion.

After the close of evidence on findings, the military judge held an Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2012), session to discuss his proposed findings instructions. The military judge asked, "Do counsel for either side have any objections to the findings instructions in their current form?" Appellant's trial defense counsel responded, "No, sir." The military judge then asked, "Any requests for instructions that do not appear in the findings instructions?" Appellant's trial defense counsel responded, "No, Your Honor."

In delivering his instructions to the members, the military judge provided the elements of the offense of sexual abuse of a child as follows:

> That on or about 29 August 2016, at or near Carlsbad, California, the accused committed a lewd act upon [Jared] by engaging in indecent conduct, to wit: Masturbating, intentionally done in the presence of [Jared];
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> That at the time, [Jared] had not attained the age of 16 years; and,
>
> That the conduct amount [sic] to a form of immorality relating to a sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, intends [sic] to excite sexual desires, or deprave morals with respect to sexual relations.

The military judge did not instruct on the defense of mistake of fact as to whether Jared was asleep.

During closing arguments, trial defense counsel argued, in part, that a key issue was whether Appellant masturbated "while he knew there was a kid there that was observing or aware, and he did it

with some criminal intent." Later, trial defense counsel argued:

> Masturbating isn't a crime. Masturbating in a room where you think everybody is asleep and no one is watching you and no one is aware, doesn't meet the elements of what they're saying. That is not a crime. Any more than two parents having sexual relations and the kid on the other side of the apartment waking up and walking in. It is not the same thing. Someone in a bunk underneath a blanket while everyone is asleep pitching, touching themselves, and someone just happens to be two bunks down and overhears it, that doesn't mean that you are a child molester.

Finally, trial defense counsel argued, "The kid was in the room. That is not enough. It must be a lewd act. . . . If you are underneath a blanket, masturbating, you cover yourself up, and you think everyone is sleeping, it's dark, it's not a lewd act upon him."

During the panel's deliberations, the members submitted a question to the military judge asking with respect to the offense of sexual abuse of a child, "[W]hat does 'upon' mean and what does 'in the presence of' mean?" " During an Article 39(a), UCMJ, session the military judge informed the parties he intended to answer the question by providing the statutory definition of "lewd act" and then advising that "absent specific legal technical definition, the members are to apply their own common sense understanding [of] the definition of words." When asked whether he had any objection to that instruction, Appellant's trial defense counsel stated, "I do not, sir. There is no definition . . . in the benchbook."

The military judge then instructed the members as follows:

> "Lewd act" is defined as any 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 to deprave morals with respect to sexual relations.
>
> . . . .
>
> So when the offense alleges that the accused committed a lewd act upon [Jared], that is, essentially—that is statutory language as articulated in the specification is what he has to had 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.

Contrary to his plea, a panel of members with enlisted representation sitting as a general court-martial convicted Appellant of sexual abuse of a child, in violation of Article 120b(c), UCMJ, 10 U.S.C. § 920b(c). The panel sentenced Appellant to a bad-conduct discharge, confinement for fifteen months, and a reduction to E-1. The convening authority approved the sentence as adjudged.

At the lower court, Appellant contended that the phrase "in the presence of" a victim required the victim's awareness. *United States v. Schmidt*, 80 M.J. 586, 595 (N-M. Ct. Crim. App. 2020). The lower court agreed, finding that the offense of sexual abuse of a

child by indecent conduct required that the child be aware of the conduct in order for the conduct to be done "in the presence of" the child. *Id*. at 598. Further, the lower court found that for "indecent conduct to be '*intentionally* done . . . in the presence of a child,' the accused must intend that the child be aware of the conduct." *Id*. (alteration in original) (footnote omitted). As such, where raised by the evidence, an honest mistake of fact as to the child's awareness of the conduct is a defense which must be disproven beyond a reasonable doubt. *Id*. The lower court concluded that the evidence supported that Appellant did not honestly believe Jared was asleep when he masturbated. *Id*. at 598–99.

Next, the lower court found that Appellant waived any objection to the military judge's instructions when trial defense counsel "expressly and unequivocally acquiesce[d] to the military judge's instructions," including both the way he handled the definitions of "upon" and "in the presence of" for the elements of the offense and the lack of an instruction on honest mistake of fact as a defense. *Id*. at 601 (internal quotation marks omitted) (citation omitted).

Finally, Appellant argued that he received ineffective assistance when his counsel failed to object to the military judge's instruction on the definition of "in the presence of." *Id*. at 603 (internal quotation marks omitted). The lower court sua sponte considered trial counsel's additional failure to request the related mistake of fact instruction. *Id*. The lower court assumed, without deciding, that Appellant's counsel was deficient by failing to pursue these instructions, but concluded there was no prejudice because the evidence strongly supported a guilty finding, as Jared clearly was aware of the conduct and the defense of

honest mistake of fact rested on thin evidence. *Id*. at 603–04.

We then granted review of three issues:

> I. Whether the phrase "in the presence of" used to define the term 'lewd act' in Article 120b(h)(5)(D) requires the child to be aware of the lewd act or merely that the accused be aware of the child's presence.
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> 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.

II. Waiver

Sexual abuse of a child under Article 120b(c), UCMJ, is defined as "commit[ting] a lewd act upon a child." The definition of "lewd act" includes:

> any 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.

Article 120b(h)(5)(D), 10 U.S.C. § 920b(h)(5)(D).

The threshold question is whether Appellant affirmatively waived the opportunity to now object to

the military judge's instruction to the members on what "in the presence of" means. Whether an appellant has waived an issue is a legal question we review de novo. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citing *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019)). "[W]aiver is the intentional relinquishment or abandonment of a known right." *Id.* (internal quotation marks omitted) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). "[W]hile we review forfeited issues for plain error, 'we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal.' " *Id.* (quoting *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)).

In *Davis*, we acknowledged our prior precedent holding that, pursuant to Rule for Courts-Martial 920(f), objections to instructions not raised at trial were forfeited, and were subject to plain error review on appeal. 79 M.J. at 332. However, we clarified that where trial defense counsel not only failed to raise an objection to findings instructions, but twice told the military judge that the defense had no objections, the appellant had "affirmatively waived any objection" to the instructions. *Id.* (citations omitted).

In the instant case, the first opportunity for Appellant to object or offer instructions or definitions arose when the parties and the military judge met to discuss the military judge's final instructions on the merits. At this point, it was reasonable to assume that the issue regarding the victim's awareness, or Appellant's mistake as to that fact, had yet to arise. However, during deliberations the members sent a question to the military judge wanting to know what "in the presence of" meant. This was the opportunity trial defense counsel had to either object to what the

military judge was going to tell the members, or to offer his own view of what the phrase meant, particularly since he had just argued during closing argument that his client might not have known that the victim was feigning sleep during Appellant's actions in the room. Because there was no definition set forth in the Benchbook, the military judge indicated to trial defense counsel that he was going to ask the members to rely on their common sense to define the phrase for themselves. Trial defense counsel assented to the military judge's proposal. Thus, the instruction given to the members did not indicate whether the phrase at issue had an awareness requirement on the part of the victim.

In light of *Davis*, this affirmative declination to object to the military judge's definition regarding "in the presence of," would appear to waive Appellant's right to challenge that definition on appeal. However, in *Davis*, we noted that we review a matter for plain error " 'when there is a new rule of law, when the law was previously unsettled, and when the [trial court] reached a decision contrary to a subsequent rule.' " 79 M.J. at 331 (first alteration in original removed) (second alteration in original) (quoting *United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017)). At the time of Appellant's trial, it was unsettled whether the phrase "in the presence of" used to define the term "lewd act" in Article 120b(h)(5)(D), UCMJ, required the child to be aware of the lewd act. The statute did not define "in the presence of" and there was no case law interpreting this phrase in Article 120b(h)(5)(D), UCMJ. Thus, there was no binding precedent demonstrating that "in the presence of" required victim awareness. Accordingly, trial defense counsel's failure to object was not waiver given the unsettled

nature of the law at the time of Appellant's court-martial.

III. Plain Error Review

When "an appellant has forfeited a right by failing to raise it at trial, we review for plain error." *Oliver***,** 76 M.J. at 274– 75 (internal quotation marks omitted) (quoting *Gladue*, 67 M.J. at 313). When claiming that a military judge committed plain error, an appellant has the burden of establishing "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *Id.* at 275 (internal quotation marks omitted) (citation omitted). "Failure to establish any one of the prongs is fatal to a plain error claim." *Id.* (alteration in original removed) (internal quotation marks omitted) (citation omitted).

The first step in plain error analysis is to determine whether an error occurred at all. Here, did the military judge err by not defining "in the presence of" to mean that the victim had to be aware of the indecent conduct? It is a general rule of statutory construction that if a statute is clear and unambiguous—that is, susceptible to only one interpretation—we use its plain meaning and apply it as written. *United States v. Kohlbek*, 78 M.J. 326, 331 (C.A.A.F. 2019). We may also resort to case law to resolve any ambiguity, although fundamentally "case law must comport with [the statute], not vice versa." *United States v. Warner*, 62 M.J. 114, 120 n.30 (C.A.A.F. 2005). "We assume that Congress is aware of existing law when it passes legislation." *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019) (internal quotation marks omitted) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)).

The definition of "in the presence of" required under Article 120b(c), UCMJ, is an issue of first impression for this Court. As noted by the lower court, the use of " 'in the presence of' was adopted and developed in the context of the offense of indecent liberties with a child under Article 134, UCMJ—the predecessor to the sexual abuse of a child by indecent conduct under Article 120b(c)[, UCMJ]." *Schmidt*, 80 M.J. at 596. In *United States v. Brown*, 3 C.M.A. 454, 457, 13 C.M.R. 10, 13 (1953), we determined that the "purpose of this type of legislation [indecent liberties with a child] is to protect children under a certain age from those acts which have a tendency to corrupt their morals." In *United States v. Knowles*, 15 C.M.A 404, 405-06, 35 C.M.R. 376, 377–78 (1965), in the context of obscene language conveyed over the telephone, we found that for an allegation of indecent liberty to stand, the phrase "in the presence of" a minor "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." In *United States v. Miller*, 67 M.J. 87, 90 (C.A.A.F. 2008), we held that conduct done in the child's constructive presence via internet-based, audiovisual communication was also not "in the presence of" the child. In *Miller*, we noted that "[t]he definition and common understanding of 'presence' is: '[t]he state or fact of being in a particular place and time' and '[c]lose physical proximity coupled with awareness.' " *Id.* (second and third alterations in original) (quoting *Black's Law Dictionary* 1221 (8th ed. 2004)).

The current version of this offense is now codified as a sexual abuse of a child by indecent conduct. The definitional language under which Appellant was convicted is much the same as that used in the former

indecent liberties offense, with one key difference: in the current statute, Congress filled the gap created by *Knowles* and *Miller* by more broadly defining "in the presence of" a child as "including via any communication technology." Article 120b(h)(5)(D), UCMJ. Thus, sexual abuse of a child by indecent conduct now does not require physical presence and may be accomplished by purely constructive presence, such as through the sort of internet-based, video-communication technology at issue in *Miller*, or over a telephone line as in *Knowles*.

Therefore, as to the offense of sexual abuse of a child, I conclude that for the conduct at issue to be done "in the presence of" a child, the child must be aware of it. This interpretation comports with our long-standing view that the "purpose of this type of legislation is to protect children under a certain age from those acts which have a tendency to corrupt their morals." *Brown*, 3 C.M.A. at 457, 13 C.M.R. at 13. The focus of the revised statute thus remains on prohibiting indecent and immoral conduct that causes the sort of corrupting harm to children—shame, embarrassment, humiliation, juvenile delinquency—which can occur by the conduct merely being done in their presence (including via communication technology). In order for conduct to cause that type of harm to a child, there must be a sufficient "conjunction of [at least one] sense[] of the victim with those of the accused," that makes the child aware of the conduct. *Knowles*, 15 C.M.A. at 406, 35 C.M.R. at 378. Accordingly, I find the military judge erred by not defining "in the presence of" a child to include awareness.

Although I conclude there was error in this case, I would hold that the error was not plain or obvious. An "error cannot be plain or obvious if the law is unsettled

on the issue at the time of trial and remains so on appeal." *United States v. Nieto*, 66 M.J. 146, 151 (C.A.A.F. 2008) (Stucky, J., concurring)
(citing *United States v. Garcia-Rodriguez*, 415 F.3d 452, 455– 56 (5th Cir. 2005); *United States v. Diaz*, 285 F.3d 92, 96 (1st Cir. 2002)). As noted above, this Court has never held one way or the other 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. Since the law was and remains unsettled, I cannot say that the error was plain or obvious. Appellant is therefore unable to meet the plain error standard.[2] For this reason, I concur in affirming the decision of the United States Navy-Marine Corps Court of Criminal Appeals.

IV. Conclusion

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

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[2] Appellant's failure to show plain error is fatal to his ineffective assistance of counsel claims. 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, 361–62 (C.A.A.F. 2010) (citations omitted). Appellant cannot demonstrate that his counsel's failure to object to the military judge's instruction on "in the presence of" was deficient when there is no plain or obvious error.

Chief Judge OHLSON, with whom Senior Judge ERDMANN joins, concurring in the judgment.

I agree with Judge Sparks that this is not a waiver case. However, I part ways with him in terms of the proper interpretation of Article 120b(h)(5)(D), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b(h)(5)(D) (2018). In relevant part, this provision prohibits servicemembers from intentionally engaging in indecent conduct—such as masturbating— "*in the presence of* a child." (Emphasis added.) In my view, the plain language of the statute only requires an accused who is intentionally engaging in a lewd act to be aware of the child's *presence*; it does *not* require the child victim to be *aware* of the accused's lewd act. Therefore, I believe the military judge properly instructed the court-martial panel and I would affirm Appellant's conviction.

I. Applicable Statute

Article 120b(c), UCMJ, makes it a crime to "commit[] a lewd act upon a child." That statute defines a "lewd act" as, among other acts:

> [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.

Article 120b(h)(5)(D), UCMJ (emphasis added).

II. Analysis

Appellant does not contest the notion that masturbating can constitute "indecent conduct." Therefore, the initial question we must answer is whether the phrase
"intentionally done . . . in the presence of a child" requires the child victim to be aware of the lewd act, or only requires the accused to be aware of the child's presence. Article 120b(h)(5)(D), UCMJ. "The construction of a statute is a question of law we review de novo." *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018).

The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) concluded that in order for an accused to be convicted under Article 120b(c): first, the child victim had to be aware of the accused's conduct; and, second, the accused had to intend for the child to be aware of the accused's conduct. *United States v. Schmidt*, 80 M.J. 586, 598 (N-M. Ct. Crim. App. 2020). Appellant similarly argues that "[t]he history of case law defining 'in the presence of a child' establishes that 'victim awareness' of the indecent conduct through a sensory connection has always been required." Brief for Appellant at 9, *United States v. Schmidt*, No. 21-0004 (C.A.A.F. June 23, 2021).

Both the holding of the NMCCA and the argument by Appellant pivot on one of the definitions of "presence" that appears in *Black's Law Dictionary*.[3] This

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[3] The NMCCA's reliance on cases such as *United States v. Brown*, 3 C.M.A. 454, 13 C.M.R. 10 (1953), which involved the offense of "indecent acts," is misplaced. The statute at issue in the *Brown* case required an accused to commit a wrongful act "with" another person. *Id.* at 456, 13 C.M.R. at 12. "With"

definition is also cited in multiple previous decisions of the service Courts of Criminal Appeals (CCAs), as well as in this Court's decision in *United States v. Miller*, 67 M.J. 87, 90 (C.A.A.F. 2008).[4] In turn, both the NMCCA and Appellant in the instant case rely heavily upon these prior cases. *Schmidt*, 80 M.J. at 596–97. Thus, it is instructive to examine in depth the definition of the word "presence."

The entry for "presence" in *Black's Law Dictionary* reads as follows:

> 1. The quality, state, or condition of being in a particular time and place, particularly with reference to some act that was done then and there <his presence at the scene saved two lives>. 2. Close physical proximity coupled with awareness <the agent was in the presence of the principal>.

Black's Law Dictionary 1432 (11th ed. 2019). Appellant points to the second portion of this entry that refers to proximity "*coupled with awareness*." *Id.* (emphasis added). Specifically, he argues that: (1) as applied to the facts in the instant case, this particular definition from *Black's Law Dictionary* required the child victim to be aware that Appellant was masturbating next to him in order for Appellant to be

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another person and "in the presence of" another person are clearly distinguishable modes of liability in this statute.

[4] *See, e.g.*, *United States v. Burkhart*, 72 M.J. 590, 594–95 (A.F. Ct. Crim. App. 2013); *United States v. Gould*, No. ARMY 20120727, 2014 CCA LEXIS 694, at *2, 2014 WL 7242761, at *1 (A. Ct. Crim. App. Sept. 16, 2014) (unpublished), *rev'd in part on other grounds*, 75 M.J. 22 (C.A.A.F. 2015); *United States v. Anderson*, No. NMCCA 201200499, 2013 CCA LEXIS 517, at *15–16, 2013 WL 3242397, at *5 (N-M. Ct. Crim. App. June 27, 2013) (unpublished).

guilty of the offense of sexual abuse of a child; (2) because Appellant honestly believed that the child victim was asleep when Appellant was masturbating, "the military judge was obligated to instruct the panel members that an honest mistaken belief [that the victim] was sleeping constituted a defense that absolved [Appellant] of criminal liability," Brief for Appellant at 19, *United States v. Schmidt*, No. 21-0004 (C.A.A.F. June 23, 2021); and (3) because the military judge failed to give such an instruction, "this Court should set aside and dismiss [Appellant's] conviction." *Id*. at 28.

Appellant is mistaken on a number of fronts. Although *Black's Law Dictionary* may be the preeminent source for definitions of legal terms and phrases, when a word has an easily graspable definition outside of a legal context, authoritative lay dictionaries may also be consulted.[5] *See Brackett v. Focus Hope, Inc.*, 753

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[5] Notably, even other legal dictionaries do not define the word "presence" in such a manner as to require awareness. *See Ballentine's Law Dictionary* 981 (3d ed. 1969) (defining "presence," in relevant part, as "[t]he fact of being at a place at a particular time"); 3 *Bouvier's Law Dictionary and Concise Encyclopedia* 2673 (8th ed. 1914) (defining "presence" as "[t]he being in a particular place"). The explanation accompanying the definition in *Bouvier's Law Dictionary and Concise Encyclopedia* acknowledges the usage relied on by the NMCCA and Appellant, but notes that it is a legal term of art. *See id.* ("In many contracts and judicial proceedings it is necessary that the parties should be present in order to render them valid . . . ."). *Ballentine's Law Dictionary* cites case law to similar effect: "Anything done within the four walls of a room . . . is usually done in the presence of all who are in the room whether it is seen or not. But proximity and consciousness may create presence." *Ballentine's Law*

N.W.2d 207, 211 (Mich. 2008) ("A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning."). Here, a number of authoritative lay dictionaries do not require awareness in order for one person to be in the presence of another person.[6]

Further, while both legal and lay dictionaries can be eminently helpful and instructive in the course of interpreting statutes, a definition contained in a dictionary—standing alone—is not dispositive of the legal issue of what a provision in a statute actually means. "Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion). Rather, whether a statute is plain or ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context

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Dictionary 981 (3d ed. 1969) (citing *Nock v. Nock's Ex'rs*, 51 Va. (10 Gratt.) 106, 117 (1853)).

[6] *See Merriam-Webster's Unabridged Online Dictionary*, https://unabridged.merriam-webster.com/unabridged/presence (last visited Jan. 27, 2022) (defining "presence," in relevant part, as "the state of being in one place and not elsewhere[,] the condition of being within sight or call, at hand, or in a place being thought of[, or] the state of being in front of or in the same place as someone or something"); *The American Heritage Dictionary of the English Language* 1393 (5th ed. 2018) (defining "presence," as "[t]he state or fact of being present" and "present," in relevant part, as "[b]eing at hand or in attendance"); *Merriam-Webster's Collegiate Dictionary* 982 (11th ed. 2020) (defining "presence," in relevant part, as "the part of space within one's immediate vicinity").

of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

As noted above, the definition of "presence" contained in *Black's Law Dictionary* has two separate entries. The primary definition of the word is: "The quality, state, or condition of being in a particular time and place, particularly with reference to some act that was done then and there . . . ." *Black's Law Dictionary* 1432 (11th ed. 2019). The secondary definition is: "Close physical proximity coupled with awareness . . . ." *Id.* Appellant fails to explain why *both* entries should apply to the disposition of this case. "[W]e interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, *the context in which the language is used*, and the broader statutory context." *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (emphasis added).[7] In making a choice between two competing definitions, if only one of the definitions gives effect to the clear statutory purpose,

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[7] For example, the verb form of the word "sanction" can mean to give official approval of an action *or* to impose a penalty for an unapproved action. *See Merriam-Webster's Unabridged Online Dictionary*, https://unabridged.merriam-webster.com/unabridged/ sanction (last visited Jan. 27, 2022) (defining "sanction" as both "to establish, maintain, encourage, or permit usually by some authoritative approval or consent" and "to attach a sanction or penalty to [a] violation"). These two definitions are highly dissimilar, and without examining the use of the word "sanction" in context, it would be difficult indeed for a court to reconcile both of them in a statutory provision. As can be seen then, in the course of analyzing a statutory provision, a court must sometimes choose between competing definitions of the same word.

then that definition must be the one intended by Congress.[8]

In relying on the second definition of "presence" that appears in *Black's Law Dictionary*, Appellant, the lower court here, and CCAs in prior cases have failed to take note of the material contained in the adjoining angle brackets. The prefatory material in *Black's Law Dictionary* explains that information contained within angle brackets provides "[*c*]*ontextual* illustration of a headword."[9] *Black's Law Dictionary* xxix (11th ed. 2019) (emphasis added). Here, the material contained in the angle brackets accompanying the second definition of "presence" informs us that the awareness requirement arises in the context of the following example: "[T]he agent was in the presence of the principal." *Id.* at 1432. This illustration makes clear that the type of presence connoted by the second definition is that which is required for certain events

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[8] To be sure, an accused gets the benefit of ambiguity in a criminal statute. However, "[w]here Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent." *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (internal quotation marks omitted) (citation omitted).

[9] Another entry in *Black's Law Dictionary* underscores this point; the "presence-of-the-testator rule" is defined as "[t]he principle that a testator must be aware . . . that the witnesses are signing the will." *Black's Law Dictionary* 1432 (11th ed. 2019).

of particular legal significance, such as the binding of a principal or the attestation of a will. *See N. Owsley & Sons v. Woolhopter*, 14 Ga. 124, 128 (1853) ("[I]f one, in the presence of the principal, sell[s] a parcel of goods of the latter, as his agent, without objection, the tacit consent of the principal will be presumed; and it will bind him."); *In re Estate of Meyer*, 2016 WY 6, ¶ 28, 367 P.3d 629, 638 (Wyo. 2016) ("[T]he will must be signed by the testator in the presence of both witnesses, and the signatures of both witnesses must be made in the presence of the testator and in the presence of each other . . . ."). Of course, a scenario where an adult male is masturbating—knowing that a child is within arm's reach—is in no way similar to a principal-agent relationship. Therefore, it is the first definition of "presence" in *Black's Law Dictionary*—and all of the similar definitions in lay dictionaries—that should guide us in the instant case. And in that definition, there is no implication that "awareness" is required for one person to be "in the presence of" another.

Appellant is correct that this Court's opinion in *Miller* refers not only to the first definition of "presence" in *Black's Law Dictionary* but also to the second definition. 67 M.J. at 90. However, in that case the Court was interpreting whether "constructive presence" constituted "physical presence"; it was not deciding any issue involving whether "presence" requires awareness. *Id.* Thus, the most that can be said about the *Miller* case is that the Court *cited* the second definition from *Black's Law Dictionary*, not that it *relied* upon that second definition or that the second definition played a central role in the disposition of the case. In fact, the *Miller* Court held that "physical presence" merely "requires that an

accused be in the same physical space as the victim." *Id.* Therefore, *Miller* actually serves to undermine Appellant's position.

In their analyses of similar federal statutes, other courts have recognized that Congress did not intend to offer safe haven to sexual predators simply because their victims have been caught unawares. In *United States v. Finley*, 726 F.3d 483, 495 (3d Cir. 2013), the United States Court of Appeals for the Third Circuit interpreted a federal statute that, among other things, criminalizes "us[ing] . . . any minor to engage in . . . sexually explicit conduct." 18 U.S.C. § 2251(a) (2018). That court recognized that "a perpetrator can 'use' a minor to engage in sexually explicit conduct without the minor's conscious or active participation." *Finley,* 726 F.3d at 495. The court therefore believed that "[i]t would be absurd to suppose that Congress intended the statute to protect children actively involved in sexually explicit conduct, but not protect children who are passively involved in sexually explicit conduct while sleeping, when they are considerably more vulnerable." *Id.* Similarly, in *United States v. O'Neal*, the United States Court of Appeals for the Sixth Circuit stated: "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." 835 F. App'x 70, 72 (6th Cir. 2020).

Finally, interpreting the word "presence" to have its ordinary meaning for purposes of Article 120b(h)(5)(D), UCMJ, would not present a particular danger of prosecutorial overreach. Conduct is "indecent" for purposes of this article only when it "amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and

repugnant to common propriety." Article 120b(h)(5)(D), UCMJ; *see also United States v. Rollins*, 61 M.J. 338, 344 (C.A.A.F. 2005) ("The determination of whether an act is indecent requires examination of all the circumstances . . . .").

For all these reasons, it is clear to me that Congress did not intend the meaning of the phrase "in the presence of" in Article 120b(h)(5)(D) to include any element of "awareness." For purposes of this article, the phrase simply means that one person is in the immediate vicinity of another person. Because "the language at issue has a plain and unambiguous meaning" and "the statutory scheme is coherent and consistent," our role of judicial interpretation is at an end. *Robinson,* 519 U.S. at 340 (internal quotation marks omitted) (citation omitted).

III. Conclusion

The military judge adequately and accurately summarized the law when he instructed the members to apply the common definitions of the statute's words and phrases—to include "in the presence of"—and when he declined to provide a mistake of fact instruction. Because the military judge did not err, we do not need to address the third granted issue pertaining to whether there was ineffective assistance by trial defense counsel. In regard to the second granted issue, as I noted at the outset, I agree with Judge Sparks that there was no waiver here.[10]

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[10] Appellant expressly argued at trial that his actions did not amount to a crime. In closing, Appellant's counsel argued to the members that "[m]asturbating 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

Accordingly, as to Issue I, I would hold that the phrase "in the presence of" does not require that the child be aware of the lewd act, only that the accused be aware of the child's presence. Additionally, I would answer Issue II in the negative, and hold that Issue III is moot.

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saying. That is not a crime." (Emphasis added.) Appellant renewed this argument before the lower court. *Schmidt*, 80 M.J. at 595 ("Appellant asserts the evidence is insufficient as to the first element[:] that he committed a lewd act *upon* Jared by masturbating, *intentionally* done *in the presence of* Jared."). Appellant now argues this point before this Court, asking us to consider: "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." *United States v. Schmidt*, 81 M.J. 240 (C.A.A.F. 2021) (order granting review). Therefore, regardless of whether Appellant acquiesced to the military judge's instruction, I do not believe he has waived or forfeited his core argument that "presence" connotes "awareness" for purposes of Article 120b(h)(5)(D).

Judge MAGGS, with whom Judge HARDY joins, concurring in the judgment.

A general court-martial found Appellant guilty of one specification of sexual abuse of a child in violation of Article 120b(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b(c). The specification alleged, in relevant part, that Appellant had committed a "lewd act" upon a child "by engaging in indecent conduct, to wit: masturbating, intentionally done *in the presence of*" that child. (Emphasis added.) Appellant contends before this Court that the military judge incorrectly instructed the members about this specification and that his civilian defense counsel was ineffective for failing to object.

We have granted review of three assigned issues:

> I. Whether the phrase "in the presence of" used to define the term "lewd act" in Article 120b(h)(5)(D) requires the child to be aware of the lewd act or merely that the accused be aware of the child's presence.
>
> II. Whether Appellant affirmatively waived any objection to the military judge's instructions and the failure to instruct on the affirmative defense of mistake of fact.
>
> III. Whether, having assumed deficient performance by counsel, the lower court erred in finding no prejudice.

United States v. Schmidt, 81 M.J. 240 (C.A.A.F. 2021) (order granting review).

My views on the first two of these assigned issues differ from those expressed by the authors of the other opinions in this case. Unlike Judge Sparks and Chief Judge Ohlson, I answer Assigned Issue II in the affirmative, concluding that Appellant waived any

objection to the military judge's instructions. Because I find waiver, I do not answer Assigned Issue I. But in accordance with the other Judges, I answer Assigned Issue III in the negative. I therefore concur in the judgment of the Court and would affirm the judgment of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA), which affirmed the findings and sentence in this case. *United States v. Schmidt*, 80 M.J. 586, 603–04 (N-M. Ct. Crim. App. 2020).

I. Waiver

Under Article 120b(c), UCMJ, an accused may commit the offense of sexual abuse of a child by performing "a *lewd act* upon a child." (Emphasis added.) As defined in Article 120b(h)(5)(D), UCMJ, the term "lewd act" means: any indecent conduct, intentionally done with or *in the presence of a child* . . . 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.

(Emphasis added.) Although this definition requires the Government to prove that the accused committed indecent conduct "in the presence of" a child, the UCMJ provides no definition of "in the presence of." Appellant contends that the phrase "in the presence of" implicitly requires the Government to prove that the child was aware that Appellant was masturbating and that the military judge erred by not so instructing the members. The Government responds, in part, by arguing that Appellant waived any objection to the findings instructions.

To support its waiver argument, the Government argues that this case is indistinguishable from *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020). In *Davis*, the appellant was charged with violating Article 120c(a)(2), UCMJ, 10 U.S.C. § 920c(a)(2) (2012). *Davis*, 79 M.J. at 330. This article makes it an offense to record "knowingly . . . the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy." Article 120c(a)(2), UCMJ. At trial, the military judge presented proposed findings instructions to counsel before giving the instructions to the members. *Davis*, 79 M.J. at 331. The military judge twice asked whether counsel desired any changes. *Id.* Trial defense counsel responded by saying " 'No changes, sir' " and " 'No, Your Honor.' " *Id.*

On appeal, the appellant in *Davis* argued Article 120c(a)(2), UCMJ, requires the prosecution to prove beyond a reasonable doubt that he subjectively *knew* the alleged victim was not consenting and that the military judge had erred by not so instructing the panel. *Davis*, 79 M.J. at 331. This Court did not decide the merits of the appellant's argument because it concluded that the appellant had waived the issue. *Id.* at 332–33. The Court ruled: "By 'expressly and unequivocally acquiescing' to the military judge's instructions, Appellant waived all objections to the instructions, including in regards to the elements of the offense." *Id.* at 332 (quoting *United States v. Smith*, 2 C.M.A. 440, 442, 9 C.M.R. 70, 72 (1953)).

In the present case, Appellant was charged with sexual abuse of a child in violation of Article 120b(c), UCMJ. As in *Davis*, the military judge presented proposed findings instructions to counsel before

reading the instructions to the members. The military judge asked counsel whether they had any objections to the proposed findings instructions. Civilian defense counsel responded, "No, sir." The military judge also asked counsel whether they wished to request additional instructions. Civilian defense counsel responded, "No, Your Honor." The military judge then gave the findings instructions to the members. During deliberations, the members asked the military judge to define the words "upon" and "in the presence of." The military judge proposed to counsel that he would reread the definition of "lewd act" and instruct the members to apply their commonsense understanding of the words. The military judge then asked counsel if they had any objections. Civilian defense counsel said: "I do not, sir." On appeal, however, Appellant now contends that the military judge should have instructed the members that the term "in the presence of" required the Government to prove that the child was aware of the fact that Appellant was masturbating.

As these descriptions show, the present case is indistinguishable from *Davis*. In both cases, when provided the opportunity to object to proposed findings instructions and to suggest additional instructions, defense counsel expressly told the military judge that the defense had no objection and the defense did not request additional instructions. On appeal, both appellants then faulted the military judge for not defining an element of an offense in a particular way. Because the Court found waiver in *Davis*, I would reach the same conclusion in this case. "By 'expressly and unequivocally acquiescing' to the military judge's instructions, Appellant waived all objections to the instructions, including in regards to the elements of

the offense." *Davis*, 79 M.J. at 332 (quoting *Smith*, 2 C.M.A. at 442, 9 C.M.R. at 72).

Two counterarguments to this conclusion deserve attention. The first is that this Court in *Davis* incorrectly construed the trial defense counsel's statement of "no objection" as a waiver rather than a forfeiture and that the Court should not repeat the error in this case. Appellant contends: "In this context, 'no objection' means a failure to object, because an attorney cannot stand mute when called upon to answer the military judge's question." So construed, Appellant contends, a mere failure to object would only be a forfeiture, which would allow for plain error review.

I disagree for three reasons. First, as the Court explained in *Davis*, "Appellant did not just fail to object and thereby merely forfeited his claim. He affirmatively declined to object to the military judge's instructions and offered no additional instructions." *Davis*, 79 M.J. at 332. In contrast, if the military judge had not asked whether counsel wanted additional instructions, and counsel simply had remained silent, then that would have been a forfeiture. *See, e.g., United States v. Easterly*, 79 M.J. 325, 327 (C.A.A.F. 2020) (construing defense counsel's failure to ask for a sentencing instruction on the impact of a punitive discharge as a forfeiture rather than a waiver where "[n]either party requested an instruction" and the "military judge did not ask the parties if they wanted such an instruction").

Second, although Appellant is correct in asserting that trial defense counsel generally cannot "stand mute" when a military judge asks a question, nothing in the Rules for Courts-Martial (R.C.M.) prevents the

military judge from requiring the parties to take a position on a legal issue arising in the court-martial. On the contrary, the R.C.M. contemplate that the military judge will require answers from counsel. For example, R.C.M. 920(f) provides: "The military judge may require the party objecting [to instructions] to specify of what respect the instructions given were improper."

Third, allowing trial defense counsel to tell the military judge one thing (i.e., "I have no objection to the instructions") and then allowing appellate defense counsel to assert something else on appeal (i.e., "the instructions were incorrect") would go against the general prohibition against taking inconsistent litigation positions. *See* 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4477 (2d ed. 1992 & Supp. 2021) ("Absent any good explanation, a party should not be allowed to gain an advantage by litigating on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."). Here, Appellant has not offered a convincing justification for allowing his inconsistent positions.

The other counterargument is that Appellant could not intentionally relinquish the right that he now claims— namely, the right to have the members instructed that the Government must prove that the child was aware of the lewd act—because precedent has not yet established whether this right exists. Although Appellant does not specifically make this argument in his briefs, Judge Sparks explains and accepts the argument. *United States v. Schmidt*, __ M.J. __– __ (6)–(7) (C.A.A.F. 2022) (Sparks, J., opinion announcing the judgment of the Court).

A lack of applicable precedent, however, does not negate the waiver in this case because a similar lack of applicable precedent did not negate the waiver in *Davis*. The issue in *Davis*—namely, whether Article 120c(a)(2), UCMJ, requires the prosecution to prove beyond a reasonable doubt that the accused subjectively knew the alleged victim was not consenting—was also unresolved at the time of the trial and the appeal. *Davis*, 79 M.J. at 331. This Court, however, did not see the lack of precedent as a ground for treating the objection as a forfeiture subject to plain error review rather than as a waiver. Instead, the Court specifically explained: "We generally only review the matter for plain error when a new rule of law exists, as '[a]n appellant gets the benefit of changes to the law between the time of trial and the time of his appeal.' " *Id.* at 332 (alteration in original) (quoting *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019)). The Court in *Davis* ruled that the appellant could not take advantage of that principle because he "was tried after the applicable precedents were decided." *Id.* (footnote omitted).

The same analysis applies in this case. All the authorities that Appellant cites in support of his argument predate his trial. Indeed, Appellant's principal argument is that military courts "historically" have defined the term "in the presence of" to require a victim's awareness. Appellant is thus not asking for the benefit of a new rule announced during the pendency of his appeal, and is therefore not entitled to plain error review.

For these reasons, I would answer Assigned Issue II in the affirmative, concluding that Appellant waived his argument that victim awareness was required. Because of this waiver, I express no opinion on the

merits of Appellant's argument about the meaning of the phrase "in the presence of" in Article 120b(h)(5), UCMJ. *See United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (" '[W]e cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal.' " (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005))). I therefore do not answer Assigned Issue I.

II. Ineffective Assistance of Counsel

Assigned Issue III raises the question whether civilian defense counsel provided ineffective assistance in violation of the Sixth Amendment. Under the familiar test in *Strickland v. Washington*, 466 U.S. 668 (1984), to prevail on an ineffective assistance of counsel claim, an appellant must prove both that trial defense counsel's performance was deficient and that the deficiency caused prejudice. *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland*, 466 U.S. at 698). Our role in reviewing such a claim is constrained. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

In this case, the NMCCA held that even assuming that counsel's performance was deficient, Appellant could not establish prejudice. *Schmidt*, 80 M.J. at 603–04. I agree with the NMCCA's analysis and conclusion. I therefore would answer Assigned Issue III in the negative.

I would add only that it is by no means certain that civilian defense counsel's performance was deficient. The text of Article 120b(h)(5)(D), UCMJ, does not

clearly require such awareness. To be sure, in some cases, when one person does something "in the presence of" another person, the latter person is aware of the former person's action. *See, e.g., United States v. Miller*, 67 M.J. 87, 90 (C.A.A.F. 2008) (defining "presence" as "close physical proximity coupled with awareness" (internal quotation marks omitted) (quoting *Black's Law Dictionary* 1221 (8th ed. 2004))). But this is not always so. For example, Article 99, UCMJ, provides that "[a]ny member of the armed forces who before or *in the presence of the enemy*" does certain improper acts commits the offense of misbehavior before the enemy. 10 U.S.C. § 899(1)– (9). These improper acts include running away, casting away arms or ammunition, quitting a place of duty to plunder or pillage, and so forth. *Id.* In cases charging the accused with violating Article 99, UCMJ, this Court has not required the government to prove that the enemy was aware that the accused committed these acts. *See, e.g.*, *United States v. Sperland*, 1 C.MA. 661, 663, 5 C.M.R. 89, 91 (1952) (construing "in the presence of the enemy" to mean "situated . . . within effective range of the enemy weapons"). Because no court had held that Article 120b(h)(5)(D), UCMJ, requires victim awareness at the time of Appellant's courtmartial—a question that remains unresolved today—there is a very substantial argument that counsel was not deficient for failing to raise the issue.

III. Conclusion

For these reasons, I concur in the judgment to affirm the NMCCA.

United States v. Schmidt

United States Navy-Marine Corps Court of Criminal Appeals

August 7, 2020, Decided

No. 201900043

Reporter

80 M.J. 586 *; 2020 CCA LEXIS 259 **; 2020 WL 4558063

UNITED STATES, Appellee v. Julian D. SCHMIDT, Sergeant (E-5), U.S. Marine Corps, Appellant

Prior History: [1]** Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Matthew J. Kent. Sentence adjudged 30 October 2018 by a general court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of officer and enlisted members. Sentence approved by the convening authority: reduction to E-1, confinement for 15 months, and a bad-conduct discharge.

Counsel: For Appellant: David P. Sheldon, Esq., Tami L. Mitchell, Esq., Lieutenant Gregory Hargis, JAGC, USN.

For Appellee: Major Kerry E. Friedewald, USMC, Lieutenant Kimberly Rios, JAGC, USN.

Judges: Before CRISFIELD, GASTON, and STEWART, Appellate Military Judges. Senior Judge GASTON delivered the opinion of the Court, in which Chief Judge Emeritus CRISFIELD and Judge STEWART joined. Chief Judge Emeritus CRISFIELD and Judge STEWART concur.

Opinion by: GASTON

Opinion

[*591] GASTON, Senior Judge:

A panel of officer and enlisted members convicted Appellant, contrary to his pleas, of a single specification of sexual abuse of a child, in violation of *Article 120b(c), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920b(c) (2016)*, for committing a lewd act upon a 15-year-old boy by indecent conduct, to wit: intentionally masturbating in the presence of the victim.[1]

[*592] Appellant **[**2]** asserts the following assignments of error [AOE],[2] which we reorder as follows: (1) the military judge erred in denying a Defense challenge for cause against a panel member; (2) the evidence is legally and factually insufficient to sustain Appellant's conviction; (3) the military judge erred in his instructions on the definitions of "upon" and "in the presence of" in the specification; (4) the military judge erred in failing to instruct that Appellant's honest but mistaken belief that the victim was asleep is a defense; (5) Appellant's trial defense counsel were ineffective for failing to object to the military judge's instructions on the definition of "upon" and "in the presence of"; (6) Appellant's trial defense counsel were ineffective for failing to object to the Government forensics expert's testimony as a

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[1] Appellant was acquitted of a second specification charging him with sexually abusing the same victim by touching, licking, and kissing the victim's hand with an intent to arouse and gratify his own sexual desires.

[2] Appellant's fifth, sixth, and seventh AOEs are raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

violation of Appellant's right to confront the person who conducted the actual forensic testing; and (7) officials at Camp Pendleton unreasonably interfered with Appellant's ability to communicate and meet with his civilian appellate defense counsel.[3]

We find no prejudicial error and affirm.

I. Background

Appellant met the victim, "Jared,"[4] and his family through a mutual family **[**3]** friend, "Michelle," who lived next door to Jared's family in Carlsbad, California, and often served as a nanny for Jared and his siblings. During his regular visits to Michelle's house, Appellant became a friend and mentor to Jared and his older brother.

Jared's family moved away from Carlsbad a few months after meeting Appellant, but returned for a visit nine months later, when Jared was 15 years old. The family stayed at Michelle's house, where Appellant also stayed for two nights during their visit. On the first night Appellant 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 was feeling nauseated, 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

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[3] We have reviewed and considered this final AOE and find it to be without merit. *See United States v. Matias, 25 M.J. 356, 363 (C.M.A. 1987)*.

[4] The names used in this opinion are pseudonyms.

room next to the air mattress where Jared was sleeping.

Jared testified that he woke up around 0200 that night, lying on his stomach on the left side of the air mattress, and Appellant was on the mattress beside him with an arm on Jared's bare back near his shoulder **[**4]** blades. This frightened Jared and he slid away from Appellant off the left side of the air mattress onto the floor, where he pretended to be asleep. However, Jared's right hand was still on the mattress, and Appellant started holding it and licking and kissing Jared's fingers and then started making sounds and movements indicative of masturbation. After a few minutes Appellant made a grunting sound and then got up, and Jared heard him go wake up Michelle to drive him back to his base. Jared then heard Appellant 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 Appellant left, Jared, crying and upset, woke up his mother in another part of the house and told her what Appellant had done. Jared's mother called the police and sent angry text messages to Appellant confronting him about his conduct and calling him a pedophile.

During his subsequent interrogation by the Naval Criminal Investigative Service [NCIS], Appellant said that on the night in question he slept across the two upholstered swivel chairs, one facing the other, in the front room of Michelle's **[**5]** house. He denied touching or being on the air mattress with Jared, and initially denied masturbating. When the NCIS agent brought up the possibility of DNA evidence, Appellant

admitted masturbating **[*593]** in the early morning hours under a red blanket while lying across the chairs, to help him sleep. He said it was a mistake. He said he eventually ejaculated into the red blanket and then threw it on the couch when he got up. He said that when he received the text messages from Jared's mother, he was confused and suspected Jared must have seen him masturbating. Appellant did not tell the NCIS agent he believed Jared was asleep. However, he nodded when the NCIS agent 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 sleeping pills, whatever, man, everybody does their own thing."[5]

The police collected the red blanket from the couch, and forensic analysis detected semen on it that was a match for Appellant's DNA.

At trial, Jared was cross-examined about his history of lying and acting out to get attention or get out of trouble, his history of calling Appellant derogatory names, and his prior inconsistent **[**6]** statements about how Appellant was positioned during the incident. Michelle testified that in her opinion Jared was untruthful. She also testified that when she left with Appellant that morning, Jared was lying on the floor to the left of the air mattress, apparently asleep, and the upholstered swivel chairs were facing the room parallel to each other.

Additional facts necessary to resolve the AOEs are discussed below.

II. Discussion

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[5] Prosecution Exhibit 6.

A. Challenge for Cause

Appellant asserts the military judge erred in denying a Defense challenge for cause against Sergeant Major [SgtMaj] "Ortiz" on grounds of implied bias. We review a military judge's ruling on a challenge for cause for an abuse of discretion. *United States v. Woods, 74 M.J. 238, 243 (C.A.A.F. 2015)*. While rulings based on actual bias are afforded a high degree of deference, "issues of implied bias are reviewed under a standard less deferential than abuse of discretion, but more deferential than de novo." *Id.* (quoting *United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002))*.

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *Downing, 56 M.J. at 421* (quoting *United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001))*. "A member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having **[**7]** the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). To that end, members may be excused on grounds of either actual or implied bias. *Downing, 56 M.J. at 422*. Defense challenges for cause on either basis must be liberally granted. *United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005)*.

The test for implied bias is an objective one that considers "the public's perception of fairness in having a particular member as part of the court-martial panel." *Woods, 74 M.J. at 243* (quoting *United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015))*. "[A]t its core, implied bias addresses the perception or appearance of fairness of the military justice system." *Downing, 56*

M.J. at 422 (citation omitted). The totality of the circumstances are considered in making this assessment. *Woods, 74 M.J. at 243* (citation omitted). While the military judge's observations of a member's demeanor are normally used to assess actual bias, our superior court has found they are "also relevant to an objective observer's consideration" in addressing questions of implied bias. *Downing, 56 M.J. at 423*.

Here, SgtMaj Ortiz stated during voir dire that when he was a child—nearly 40 years prior to Appellant's court-martial—he found out that his nine-year-old cousin, with whom he was very close at the time, had been sexually molested. Although he was not involved in any criminal proceedings, the experience **[**8]** had upset him and he had been disappointed (though not particularly surprised) that the offender (his uncle) was not prosecuted. However, his uncle had left the area soon afterward, and in the intervening **[*594]** decades SgtMaj Ortiz had lost touch with his cousin, embarked on a 29-year career in the Marine Corps, and acquired a more informed, detached perspective on the criminal justice process. Consequently, he stated his firm belief that he was unbiased and could be a fair and impartial member on Appellant's court-martial.

Appellant's trial defense counsel argued the incident involving SgtMaj Ortiz's cousin created an issue of implied bias. The military judge disagreed. He found SgtMaj Ortiz's "continence, bearing and manner" in answering the questions about his impartiality were such that "when he stated that he could be unbiased, he did so with great conviction."[6] The military judge also pointed to the nearly 40-year span of time since

[6] R. at 84.

the cousin's abuse occurred and the intervening circumstances of SgtMaj Ortiz's long career and development in the Marine Corps. Based on his assessment, the military judge found no actual bias, and further stated that "through the eyes of the public, focusing **[**9]** on the appearance of fairness, I believe anyone who witnessed [SgtMaj Ortiz]'s colloquially [sic] and his demeanor throughout the instructions in voir dire, would believe he would not be prejudiced."[7] As a result, while acknowledging the liberal grant mandate, the military judge found no implied bias and denied the Defense challenge.

We find no error in the ruling articulated by the military judge. As our superior court has noted, "the fact that a member was close to someone who had been a victim of a similar crime is not grounds for per se disqualification." *United States v. Terry, 64 M.J. 295, 303 (C.A.A.F. 2007)* (citation omitted). Furthermore, "regardless of a member's prior exposure to a crime, it is often possible for a member to rehabilitate himself before the military judge by honestly claiming that he would not be biased." *Id.* The member did so here, reasonably related his lack of bias to his mature, detached view of the criminal justice system wrought by a long career in the Marine Corps, and he did so with such conviction that the military judge remarked on it. Under the totality of the circumstances—particularly the passage of nearly four decades since the incident occurred during childhood to a cousin he later lost touch with—we **[**10]** believe that most persons in SgtMaj Ortiz's position would not have difficulty sitting on Appellant's trial. Thus, we

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[7] *Id.* at 85.

conclude an objective observer would not have doubts about the fairness of Appellant's court-martial panel.

B. Legal and Factual Sufficiency

Appellant asserts the evidence is legally and factually insufficient to support his conviction. We review such questions de novo. *Art. 66(c), UCMJ*; *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)*.

To determine legal sufficiency, we ask whether, "considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987)* (citing *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979))*. In conducting this analysis, we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Gutierrez, 74 M.J. 61, 65 (C.A.A.F. 2015)*.

In evaluating factual sufficiency, we determine whether, after weighing the evidence in the record of trial and making allowances for not having observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner, 25 M.J. at 325 (C.M.A. 1987)*. In conducting this unique appellate function, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent **[**11]** determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington, 57 M.J. at 399*. Proof beyond a "[r]easonable doubt, however, does not mean the evidence must be free

from conflict." *United States v. Rankin, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006)*.

[*595] Appellant was convicted of sexual abuse of a child for "commit[ting] a lewd act upon [Jared] by . . . engaging in indecent conduct, to wit: masturbating, intentionally done in the presence of [Jared]." To prove this offense, the Government was required to prove: (1) that Appellant committed a lewd act upon Jared by engaging in indecent conduct, to wit: masturbating, intentionally done in the presence of Jared; (2) that at the time Jared had not attained the age of 16 years; and (3) that the conduct amounted to a form of immorality relating to a sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desires, or deprave morals with respect to sexual relations. *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*], Part IV, ¶ 45b.b.(4)(e).

Appellant asserts the evidence is insufficient as to the first element, that he committed a lewd act *upon* Jared by masturbating, *intentionally* done *in* ***[**12]*** *the presence of* Jared. He argues that committing a lewd act "upon" a victim requires complete or approximate contact with the victim; that for indecent conduct to be done "in the presence of" a victim requires the victim not only to be in close proximity, but also to be aware of the conduct; and that "intentionally" requires that the accused intend that the victim be aware of the conduct. He argues that because the charged language creates a specific-intent crime, an honest mistake of fact as to the victim's awareness of his conduct is a defense which must be disproven beyond a reasonable doubt. He argues that although he masturbated in the same room as Jared, Jared was by his own testimony pretending to be asleep at the time, which led

Appellant to honestly believe that Jared was asleep and thus unaware that Appellant was masturbating. Appellant asserts that this defense of honest mistake of fact was not disproven beyond a reasonable doubt; therefore, the evidence does not support his conviction.

1. Legal definition of "in the presence of"

"Construction of a statute is a question of law we review de novo." *United States v. Kelly, 77 M.J. 404, 406 (C.A.A.F. 2018)* (citation omitted). "[W]e interpret words and phrases used in the UCMJ by examining **[**13]** the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *United States v. Pease, 75 M.J. 180, 184 (C.A.A.F. 2016)*. If a statute is clear and unambiguous—that is, susceptible to only one interpretation—we use its plain meaning and apply it as written. *United States v. Kohlbek, 78 M.J. 326, 331 (C.A.A.F. 2019)*; *United States v. Clark, 62 M.J. 195, 198 (C.A.A.F. 2005)* (citations omitted). Otherwise, "there are a number of factors that provide a framework for engaging in statutory interpretation . . . includ[ing] the contemporaneous history of the statute; the contemporaneous interpretation of the statute; and subsequent legislative action or inaction regarding the statute." *United States v. Tardif, 57 M.J. 219, 226 (C.A.A.F. 2002)* (Crawford, C.J., dissenting). We may also resort to case law to resolve any ambiguity, although fundamentally "case law must comport with [the statute], not vice versa." *United States v. Warner, 62 M.J. 114, 120 n.30 (CA.A.F. 2005)*. "We assume that Congress is aware of existing law when it passes legislation." *United States v. McDonald, 78 M.J. 376, 380 (C.A.A.F. 2019)*

(quoting *Miles v. Apex Marine Corps, 498 U.S. 19, 32, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990)*).

Sexual abuse of a child under *Article 120b(c), UCMJ*, is defined as "com-mit[ting] a lewd act *upon* a child." *10 U.S.C. § 920b(c)* (emphasis added). The definition of "lewd act" includes "any 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 **[**14]** 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)* (emphasis added). The statute does not define "upon" or "in the presence of." However, based on the above statutory language, we determine that for lewd acts consisting of indecent conduct, the phrase "*upon* a child" is essentially subsumed within the statute's further definition of indecent conduct done "*with* or *in the presence of a child*."

[*596] Here, we need focus only on the latter half of that phrase, "*in the presence of* a child," as that is what the specification at issue alleges. Considering the ordinary meaning of "in the presence of," we find it is susceptible to more than one interpretation. The dictionary definition of "in the presence of" is "in a condition of being in view or at hand." *Presence, Merriam-Webster's Collegiate Dictionary* (10th ed. 1993) (defining "presence" as "the fact or condition of being present," and "present" as "being in view or at hand"). Black's Law Dictionary defines "presence" as "[t]he state or fact of being in a particular place and time" and "[c]lose proximity coupled with awareness." *Black's Law Dictionary* (9th **[**15]** ed. 2009). Combined, these definitions suggest that for A's

conduct to be "in the presence of" B, the two are related in either (or both) of two different respects: first, a connection between their relative locations (A's conduct being "at hand" or "in close proximity" to B); and second, a sensory connection between them (A's conduct being "in view" of B, who is "aware" of it).

The use of "in the presence of" was adopted and developed in the context of the offense of indecent liberties with a child under *Article 134, UCMJ*—the predecessor to the current sexual abuse of a child by indecent conduct offense under *Article 120b(c)*. In an early case, *United States v. Brown, 3 C.M.A. 454, 13 C.M.R. 10 (C.M.A. 1953)*, our superior court found the offense of indecent liberties "*with* a child" did not require physical contact. The court determined that the "purpose of this type of legislation is to protect children under a certain age from those acts which have a tendency to corrupt their morals," and the statutory language was "broad enough to cover specifically those offensive situations in which an assault or battery is missing but the immoral and indecent liberties are so offensive that the minor is harmed." *Id. at 13-14*. The court reasoned that "the injury to the **[**16]** child and the consequential damage to society from the performance of the depraved act *in [the child's] presence* are just as great as when there is an actual physical contact between the performer and the child." *Id. at 13* (emphasis added). Thus, *Brown* established that certain conduct done "in the presence of" a child could amount to an indecent liberty due to the connection between the conduct and the harm it causes to the child.

After *Brown*, the court declined to extend "in the presence of" to situations where the conduct occurred outside of the child's physical presence, due to the lack

of a sufficient sensory connection between the child and the accused's conduct. In *United States v. Knowles, 15 C.M.A. 404, 35 C.M.R. 376 (C.M.A. 1965)*, in the context of obscene language conveyed over the telephone, the court found that for an indecent liberty to be done "in the presence of" a minor "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." *Id.* at 377-78. Subsequently, in *United States v. Miller, 67 M.J. 87 (C.A.A.F. 2008)*, the court held that conduct done in the child's constructive presence via Internet-based, audio-visual communication was also not "in the presence of" the child. *Id. at 90*. In addition to citing post-*Knowles* language in the **[**17]** *MCM* requiring that an indecent liberty "must be taken *in the physical presence of the child*," the court in *Miller* also pointed to the language we cited above from Black's Law Dictionary, defining "presence" as "[c]lose proximity *coupled with awareness*." *Miller, 67 M.J. at 89-90* (emphasis added).

Adopting *Miller*'s use of "[c]lose proximity coupled with awareness," our sister courts found that in order to sustain a conviction for indecent liberties with a child, the child had to be aware of the conduct. In *United States v. Burkhart, 72 M.J. 590 (A.F. Ct. Crim. App. 2013)*, the conduct at issue was the appellant masturbating while his three-year-old daughter was nearby asleep or otherwise unaware of his conduct. Reversing the conviction, the Air Force Court of Criminal Appeals stated that "the child must be aware of the accused's conduct," and pointed to the statutory intent of the offense which, similar to what the court in *Brown* found, was to protect children from "indecent and immoral acts which cause [them] shame,

embarrassment, and humiliation . . . or lead them further down the road to delinquency . . . [or] have a tendency to corrupt their morals"—all harms which derive from the child's awareness of the offensive conduct. **[**18]** *Burkhart, 72 [*597] M.J. at 594* (citations and internal quotation marks omitted). Similarly, the Army Court of Criminal Appeals summarily rejected a conviction where the government "did not prove that the child . . . was aware of the indecent act alleged sufficient to establish the offense of indecent liberty with a child . . . ." *United States v. Gould, No. 20120727, 2014 CCA LEXIS 694, at *2 (A. Ct. Crim. App. Sep. 16, 2014)* (unpub. op.), *rev'd in part on other grounds*, *75 M.J. 22 (2015)*.

This Court reached a similar conclusion where the appellant pled guilty to indecent liberty with a child for having sexual intercourse with his wife while their five-year-old niece was unconscious on the bed beside them. *United States v. Anderson, No. 201200499, 2013 CCA LEXIS 517 (N-M. Ct. Crim. App. June 27, 2013)* (unpub. op.). Drawing from the discussion and reasoning in *Miller* and *Burkhart*, we concluded that "to sustain a charge of indecent liberty under *Article 120(j), UCMJ*, the child must at least have some awareness that the accused is in her physical presence." *Anderson, 2013 CCA LEXIS 517, at *16*. We held that because the providence inquiry indicated the child "was unconscious, and therefore not aware that the appellant and his wife engaged in sexual intercourse in the bed next to her," there was substantial basis to question Appellant's plea, and we set aside his conviction. *Id. See also United States v. Brown, 39 M.J. 688, 690 (N.M.C.M.R. 1993)* (setting aside the appellant's plea **[**19]** for masturbating unobserved near his sleeping niece, stating we had

"found no case and none has been brought to our attention that upholds a conviction for committing indecent acts with another in violation of *Article 134, UCMJ*, where the other person is sleeping and does not observe the act or acts").

We find that the discussion and reasoning in the above cases compel the same conclusion regarding the victim's awareness for conduct done "*in the presence* of a child" under the current version of this offense, now codified as sexual abuse of a child by indecent conduct. The definitional language under which Appellant was convicted is much the same as that used in the former indecent liberties offense, with one key difference: in the current statute Congress filled the gap created by *Knowles* and *Miller* by more broadly defining "in the presence of a child" as "including via any communication technology." *UCMJ art. 120b(h)(5)(D)*. Thus, sexual abuse of a child by indecent conduct now does not require physical presence at all and may be accomplished by purely constructive presence, such as through the sort of Internet-based, video-communication technology at issue in *Miller*, or over a telephone **[**20]** line as in *Knowles*.

In broadening the meaning of "in the presence of" from physical presence to a more generalized sort of presence that can be accomplished "via *any* communication technology," the new statutory language places even greater emphasis on construing "in the presence of" as less about the proximity of the relative locations of A's conduct and B and more about the sensory connection between the two. The word "communication" itself means "a process by which information is *exchanged between* individuals through a common system of symbols, signs, or behavior." *Communication, Merriam-Webster's Collegiate*

Dictionary (10th ed. 1993) (emphasis added). "Communication technology," then, is a mechanism by which the information of A's conduct is *exchanged* (through A's observable behavior) *between* A and B. In this context, A's conduct is not done "in the presence of" B unless B is aware of it, because absent a sufficient sensory connection leading to such awareness, nothing about A's conduct is actually being exchanged between A and B.[8]

[*598] We find the offense of sexual abuse of a child by indecent conduct—like **[**21]** its predecessor, indecent liberties with a child—requires that in order for the accused's conduct to be done "in the presence of" a child, the child must be aware of it. This interpretation comports with our superior court's longstanding view that the "purpose of this type of legislation is to protect children under a certain age from those acts which have a tendency to corrupt their morals." *Brown, 13 C.M.R. at 13*. The focus of the revised statute thus remains on prohibiting indecent and immoral conduct that causes the sort of

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[8] For this reason, we reject the Government's argument that our unpublished decision in *United States v. Lopez, No. 201700252, 2019 CCA LEXIS 37 (N-M. Ct. Crim. App. Jan 31, 2019)* has bearing on this case. The offense at issue in *Lopez*—committing a lewd act by intentionally exposing one's genitalia to a child—is separately defined under the current statute and does not use the operative phrase at issue here: "in the presence of." Rather, the word at issue in *Lopez* was "expose," which we found meant "to lay open . . . leave unprotected . . . to make accessible." *Id. at *5* (quoting *Webster's New World Dictionary of American English* (3d. College ed. 1994), at 479). This, we found, "place[d] the focus on the appellant's actions, not [the victim's] awareness," as did the alleged intent of the exposure, which was to arouse or gratify the *appellant's* sexual desires. *Id. at *5-6*. Here, the focus, through use of a different operative phrase, *is* on the *victim's* awareness.

corrupting harm to children—shame, embarrassment, humiliation, juvenile delinquency—which can occur by the conduct merely being done in their presence (including via communication technology). In order for conduct to cause that type of harm to a child, there must be a sufficient "conjunction of . . . [at least one] sense[ ] of the victim with those of the accused," *Knowles*, 35 C.M.R. at 378, that makes the child aware of the conduct.

This interpretation is consistent with our previous holdings, and those of our sister courts, that if a child is asleep or otherwise oblivious to the conduct, then the conduct is not done "in the presence of" the child. Arguing against this conclusion, the Government would have **[**22]** us remove the child's awareness of the conduct from the "in-the-presence-of" determination and use it instead as an additional factor for assessing whether the conduct is "indecent." We do not disagree that the absence of awareness by the child may also lead to the conclusion that the conduct at issue is not indecent, which requires an examination of all the surrounding circumstances. *See United States v. Rollins, 61 M.J. 338, 344 (C.A.A.F. 2005)*. However, given the statutory language in both its current and its historical context, we conclude that in order for conduct charged as having been done "in the presence of" a child to amount to a "lewd act," which is ultimately what the statute requires, the child's awareness of the conduct is a prerequisite.

Accordingly, we hold that with respect to the offense of sexual abuse of a child by indecent conduct, in order for the conduct to be done "in the presence of" a child, there must be a sufficient sensory connection for the child to be aware of it. We further hold that for indecent conduct to be "*intentionally* done . . . in the

presence of a child,"[9] the accused must intend that the child be aware of the conduct. As such, where raised by the evidence, an honest mistake of fact as to the child's **[**23]** awareness of the conduct is a defense which must be disproven beyond a reasonable doubt. Rule for Courts-Martial [R.C.M.] 916(b)(1), 916(j)(1).

2. Application to the evidence

Here, we find the evidence adduced at trial supports the elements of the offense. Jared had a sufficient sensory connection to Appellant's conduct that he was aware of it as it was occurring. He woke up to find Appellant beside him on the mattress, felt Appellant's hand on his back, and slid off the mattress to distance himself from Appellant. He then felt Appellant kissing and licking his fingers. He then heard sounds indicative of masturbation, which Appellant later admitted to NCIS he had intentionally done and was forensically corroborated by the semen found on the red blanket matching Appellant's DNA. Fifteen years old at the time, Jared was scared by Appellant's actions to the point of pretending to be asleep. Based on these surrounding facts and circumstances, we find Appellant's conduct amounted to a form of immorality relating to a sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desires, or deprave morals with respect to sexual relations. It was therefore a lewd act. **[**24]**

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[9] Because the clause, "intentionally done . . . in the presence of a child," is set off by commas from the remainder of the definitional language in the statute, we construe "intentionally" to apply to both other elements within that clause—i.e., not only to doing the conduct, but also to doing it in the presence of a child.

[*599] Appellant argues the evidence does not support beyond a reasonable doubt that his conduct was intentionally done in Jared's presence—i.e., Jared's awareness—because he was honestly mistaken that Jared was asleep. We disagree. While Jared testified he pretended to be asleep, and appeared asleep to Michelle when she later walked past him to take Appellant back to base, the only direct evidence that Appellant honestly believed Jared 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, whatever, man, everybody does their own thing."[10] This is very thin evidence upon which to find that Appellant honestly believed Jared was asleep.

The weight of the other evidence, by contrast, strongly supports that Appellant masturbated under circumstances in which he knew that Jared, despite pretending to be asleep, was aware of what was going on. Appellant was the one who suggested that Jared's brother go sleep on the air mattress in Michelle's room while Appellant slept in the room with Jared. Appellant then moved down onto the mattress **[**25]** with Jared and put his hand on Jared's back, which caused Jared to move away from Appellant onto the floor, where Michelle later found him. This circumstance alone makes it singularly unconvincing that Appellant actually believed Jared was asleep during this time. After that happened, rather than back off, Appellant proceeded to take

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[10] Prosecution Exhibit 6.

Jared's hand, kiss and lick Jared's fingers,[11] and then masturbate. This ongoing physical contact distinguishes this case from the other cases discussed above, involving conduct by an accused not in physical contact with a sleeping or otherwise unaware victim.

Considering the evidence in the light most favorable to the prosecution, we conclude a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. The evidence is thus legally sufficient to support the convictions. Regarding factual sufficiency, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt.

C. Instructional Error

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[11] Although Appellant was acquitted of another specification charging these other acts as separate lewd acts, we are not bound by that acquittal from viewing this as contextual evidence to support the offense of which he was convicted. While the members may not have found these acts proven beyond a reasonable doubt (or else found the evidence for the elements of that specification lacking in some other respect), those acts are not elements which must be proven beyond a reasonable doubt for the indecent-conduct specification we are considering here. *See* *United States v. Hicks*, *24 M.J. 3, 9 (C.M.A. 1987)* (distinguishing between a not-guilty verdict's indication that the prosecution did not prove every element of the charged offense beyond a reasonable doubt and the use of other-acts evidence—which does not have to result in criminal liability or even constitute a crime in order to be admissible under Military Rule of Evidence 404(b)—to prove some other offense). Nor do we find any of the inconsistencies of Jared's prior statements compelling enough to disbelieve his testimony that Appellant performed these other acts, particularly when Jared's account is so strongly corroborated in its central claims.

After the close of the case on the merits, the military judge discussed the findings instructions with the parties **[**26]** off the record. He then asked on the record, "Do counsel for either side have any objections to the findings instructions in their current form?" Appellant's trial defense counsel responded, "No, sir."[12] The military judge then asked, "Any requests for instructions that do not appear in the findings instructions?" Appellant's trial defense counsel responded, "No, Your Honor."[13]

In delivering his instructions to the members, the military judge provided the elements of the offense of sexual abuse of a child in Specification 2 of the Charge as follows:

That on or about 29 August 2016, at or near Carlsbad, California, the accused committed a lewd act upon [Jared] by engaging in indecent conduct, to wit: Masturbating, **[*600]** intentionally done in the presence of [Jared];

That at the time, [Jared] had not attained the age of 16 years; and,

That the conduct amount [sic] to a form of immorality relating to a sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, intends [sic] to excite sexual desires, or deprave morals with respect to sexual relations.[14]

The military judge did not instruct on the defense of mistake of fact as to age, nor did he instruct on any defense of mistake **[**27]** of fact as to whether the victim was asleep. At the close of his findings

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[12] R. at 253.
[13] *Id.*
[14] *Id.* at 255.

instructions, the military judge asked, "Do counsel object to any instructions given or request any additional instructions?" Appellant's trial defense counsel responded, "No, Your Honor."[15]

During deliberations, the senior member submitted a question to the military judge asking with respect to Specification 2, "What does 'upon' mean and what does 'in the presence of' mean?"[16] During an *Article 39(a), UCMJ*, session outside the presence of the members, the military judge informed the parties he intended to answer the question by providing the statutory definition of "lewd act" and then advising that "absent specific legal technical definition, the members are to apply their own common sense understanding the definition of words." When asked whether he had any objection to that instruction, Appellant's trial defense counsel stated, "I do not, sir. There is no definition for the record in the Benchbook."[17]

The military judge then instructed the members as follows:

"Lewd act" is defined as any indecent conduct intentionally done with or in the presence of a child including, via any communication technology, that amounts **[**28]** 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 to deprave morals with respect to sexual relations. . . .

So when the offense alleges that the accused committed a lewd act upon [Jared], that is,

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[15] *Id.* at 294.
[16] *Id.* at 296.
[17] *Id.* at 297.

essentially—that is statutory language as articulated in the specification is what he has to had 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.[18]

The military judge then asked the senior member, "Does that answer your question?" and the senior member responded, "Yes, Your Honor."[19]

Appellant asserts the military judge erred in his instructions about the definition of "upon" and "in the presence of" regarding the first element of the specification, and further erred by failing to instruct that Appellant's honest but mistaken belief that the victim was asleep is a defense to the offense. The Government argues that Appellant waived any asserted instructional error when his trial defense counsel repeatedly **[**29]** stated he had no objections or additions to the military judge's instructions.

"Whether an appellant has waived an issue is a legal question that this Court reviews de novo. 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. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020)* (citation and internal quotation marks omitted). In *Davis*, the military judge had a preliminary discussion with the parties regarding the findings instructions he intended to give. He asked whether there were any objections or requests for additional instructions, to which the trial defense

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[18] *Id.* at 297-98.

[19] *Id.* at 298.

counsel responded, "No changes, sir." *Id. at 330*. Subsequently, after granting a finding of **[*601]** not guilty to one of the specifications and marking the instructions as an appellate exhibit, the military judge again asked if there were any objections to the findings instructions, to which the trial defense counsel responded, "No, Your Honor." *Id.* The military judge then provided the instructions to the members.

When the appellant claimed error on appeal regarding the military judge's instruction on an element of one of the offenses, the court in *Davis* found **[**30]** that:

Appellant did not just fail to object and thereby merely forfeited [sic] his claim. He affirmatively declined to object to the military judge's instructions and offered no additional instructions. By expressly and unequivocally acquiescing to the military judge's instructions, Appellant waived all objections to the instructions, including in regards to the elements of the offense.

Id. at 331 (citations and internal quotation marks omitted). Having found the appellant affirmatively waived any objection to the findings instructions, the court determined it had "nothing left . . . to correct on appeal" and declined to address his assertion of legal error regarding the instructions. *Id. at 331-32*.

We find Appellant's assertions of instructional error are waived under *Davis*. The factual scenario presented here is virtually identical to *Davis*, with the exception that in this case Appellant's trial defense counsel affirmatively declined to object to the military judge's instructions and offered no additional instructions not twice, but three times (including the additional instructions given in response to the senior member's question during deliberations). Through

these repeated affirmative declinations, Appellant **[**31]** "expressly and unequivocally acquiesce[d] to the military judge's instructions," including both the way he handled the definitions of "upon" and "in the presence of" for the elements of the offense and the lack of any instruction on honest mistake of fact as a defense. "As Appellant affirmatively waived any objection the military judge's findings instructions, there is nothing left for us to correct on appeal." *Id. at 331* (citations omitted).

We specifically find an instruction on the defense of mistake of fact was also waived under *Davis* because any such instruction hinged on the instruction for "in the presence of," regarding which any assertion of error was waived. We acknowledge that just as a military judge has a duty to correctly instruct on the elements of the offenses, the military judge also has a sua sponte duty to instruct on any defenses reasonably raised by the evidence. R.C.M. 920(e); *United States v. Barnes, 39 M.J. 230, 233 (C.A.A.F. 1994)*. However, instructions on defenses may also be affirmatively waived. *Id.* We find no logical basis upon which to find that in expressly and unequivocally acquiescing to the military judge's instructions as a whole, thereby waiving any issue as to the elements of the offense, Appellant did not also waive any issue **[**32]** as to the lack of a mistake-of-fact instruction which was contingent on the instructions on the elements. Given the interrelationship between the interpretation of conduct intentionally done "in the presence of" a child with respect to the elements of the offense (as requiring the victim's awareness) and the defense of honest mistake of fact (as to the victim's awareness), we find it impossible under *Davis* to hold that the

assertion of error was waived for one instruction and not the other.

Hence, we conclude, as the court did in *Davis*, that Appellant affirmatively waived, as opposed to merely forfeited, the issues he now asserts. *See Davis, 79 M.J. at 332*. While Appellant argues that *Miller, Burkhart, Anderson*, and other cases discussed above support his contention that the instructions were erroneous, we find that like the appellant in *Davis*, "Appellant was tried after the applicable precedents were decided, yet affirmatively declined to object to the military judge's instructions." *Davis, 79 M.J. at 331-32*; *cf. United States v. Haverty, 76 M.J. 199 (C.A.A.F. 2017)* (applying forfeiture, as opposed to waiver, where the relevant controlling precedents were decided *after* the appellant's trial but before his appeal). As our discussion above demonstrates, our superior court, our sister **[**33]** courts, and this Court have all previously held that the offense at issue here is focused on prohibiting conduct that **[*602]** when done in a child's presence causes harm to the child, which requires a sufficient "conjunction of the several senses of the victim with those of the accused." *Knowles*, 35 C.M.R. at 377-78. Thus, we do not construe our holding today as departing from the central theme of these precedents, which all stand for the proposition that some level of awareness of the accused's conduct is required on the part of the child for the conduct to be done "in the presence of" the child.[20]

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[20] Indeed, since Appellant's conduct was done not just within the sensory perception of Jared but also within his *physical presence*, the facts of this case are even more firmly rooted in the case law's interpretation of "in the presence of" than the current statute now requires.

We recognize that under our superior court's interpretation of *Article 66, UCMJ*, we are empowered "to determine whether to leave an accused's waiver intact, or to correct the error." *United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016)*. Here, we determine the appropriate course is to leave the waiver intact. As our superior court has explained, instructions "should fairly and adequately cover the issues presented, and should include such other explanations, descriptions, or directions as may be necessary and which are *properly requested by a party* or which the military judge determines, sua sponte, should be given." *United States v. Bailey, 77 M.J. 11, 13-14 (C.A.A.F. 2017)* (citing R.C.M. 920(a), Discussion; R.C.M. 920(e)(7)) (emphasis added). **[**34]** Where a discrete issue is sufficiently arcane that it lacks specific, amplifying guidance in the model instructions of the Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 [Benchbook], it is incumbent upon the parties to research and request tailored instructions as necessary to adequately address the issue, based on their theory of the case and the facts they have reason to believe will be proven at trial.

As discussed in greater detail below, Appellant's trial defense counsel made closing arguments that strongly suggest at least a passing familiarity with the pre-existing case law regarding how "in the presence of" should be interpreted. His greater knowledge of the facts of the case placed him in a far better position than the military judge to request and argue for instructions that adequately covered that issue and the related mistake-of-fact defense he intended to (and did) argue in closing. Given his ability to confront these issues head-on at the trial level, his affirmative declination to do so despite repeated inquiries by the

military judge is precisely why the principle of waiver exists. *See* *United States v. Wall, 349 F.3d 18, 24 (1st Cir. 2003)* ("[C]ounsel twice confirmed upon inquiry from the judge that he had **[**35]** 'no objection and no additional requests [regarding the instructions].' Having directly bypassed an offered opportunity to challenge and perhaps modify the instructions, appellant waived any right to object to them on appeal."), *quoted in* *Davis, 79 M.J. at 332*. Thus, while military judges remain responsible for identifying and addressing instructional issues as they arise,[21] the principle of waiver necessitates that counsel "must be especially careful to raise any objections that they might have to proposed instructions when the military judge asks them." *Davis, 79 M.J. at 332* (Maggs, J., concurring).

D. Ineffective Assistance of Counsel

Appellant asserts his trial defense counsel were ineffective for failing to object to the military judge's

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[21] Our holding today does not relieve military judges of their own obligation to ensure the instructions "*include such other explanations, descriptions, or directions as may be necessary and* which are properly requested by a party or *which the military judge determines, sua sponte, should be given*." *Bailey, 77 M.J. at 13-14* (emphasis added). To that end, the model Benchbook instructions should be considered the starting point, as opposed to the destination, for this endeavor. As we have said before, "we cannot overemphasize the duty of trial judges to (1) thoroughly examine the evidence from both parties' perspectives, in order to ensure the instructions *fairly* and *adequately* cover the issues presented . . . and then (2) critically evaluate the instructions from the members' perspective, in order to ensure they provide an accurate, complete, and *intelligible* statement of the law. *United States v. Johnson, 2020 CCA LEXIS 118, at *36 n.30 (N-M. Ct. Crim. App. 2020)* (citations and internal quotation marks omitted) (emphasis in original).

instructions discussed above and for failing to object to testimony **[*603]** from the Government forensics expert on grounds of Appellant's confrontation right. We review claims of ineffective assistance of counsel de novo. *United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009)* (citations omitted).

Our review uses the two-part test outlined in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. "In order to prevail on a claim of **[**36]** 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, 361-62 (C.A.A.F. 2010)* (citing *Strickland, 466 U.S. at 687*). When a claim for ineffective assistance of counsel is premised on trial defense counsel's failure to move the court to take some action, "an appellant must show that there is a reasonable probability that such a motion would have been meritorious." *United States v. McConnell, 55 M.J. 479, 482 (C.A.A.F. 2001)* (citation and internal quotation marks omitted). "Failure to raise a meritless argument does not constitute ineffective assistance." *United States v. Napoleon, 46 M.J. 279, 284 (C.A.A.F. 1997)* (quoting *Boag v. Raines, 769 F.2d. 1341, 1344 (9th Cir. 1985))*. With respect to whether the deficiency resulted in prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, 466 U.S. at 694*.

1. Instructional error

Appellant asserts his trial defense counsel were ineffective for failing to object to the military judge's instructions on the definition of "upon" and "in the presence of." We include in our analysis the counsel's additional failure to request the related mistake-of-fact **[**37]** instruction. As discussed above, we have concluded that in affirmatively declining to object or request additional instructions, Appellant's trial defense counsel expressly and unequivocally acquiesced to the military judge's instructions, which waived these issues. Under such circumstances, the Supreme Court has found that "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)* (citing *Strickland, 466 U.S. at 689-90*).

Here, Appellant's trial defense counsel were confronted with an issue for which there were pertinent holdings discussed in the case law, but no amplifying definitions in the Benchbook. Despite the lack of definitional guidance in the Benchbook, however, Appellant's civilian counsel appears to have thought through the issue and made exactly the kind of closing argument that the case law contemplates:

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 **[**38]** elements of what they're saying. That is not a crime. Any more than two parents having sexual relations and the kid on the other side of the apartment waking up and walking in.

It is not the same thing. Someone in a bunk underneath a blanket while everyone is asleep pitching, touching themselves, and someone just happens to be two bunks down and overhears it, that doesn't mean that you are a child molester.[22]

He later argued, "The kid was in the room. That is not enough. It must be a lewd act. . . . If you are underneath a blanket, masturbating, you cover yourself up, and you think everyone is sleeping, it's dark, it's not a lewd act upon him."[23]

Assuming, without deciding, that Appellant's counsel were deficient in failing to pursue tailored instructions in support of these arguments, we find no prejudice applying **[*604]** *Strickland* with the "scrupulous care" these circumstances demand. Based on the evidence adduced at trial, we cannot say that different instructions would have swayed the members' findings, particularly where we ourselves have found the charge proven beyond a reasonable doubt despite largely accepting and adhering to Appellant's view of the law. The mere fact that the members rejected **[**39]** Appellant's trial defense counsel's view of the evidence does not itself show a reasonable probability that, but for any deficiency in the counsel's performance, the result of the proceeding would have been different. To the contrary, had the defense counsel pursued a more detailed instruction for "in the presence of" as including Jared's awareness of Appellant's conduct, the evidence would still have strongly supported a guilty finding, since Jared clearly *was* aware of the conduct. Moreover, as we discussed in our factual sufficiency analysis, the defense of

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[22] R. at 279.

[23] *Id.* at 283.

honest mistake of fact rested on such thin evidence that it is far from clear the members would have found Appellant actually believed Jared was asleep had they been instructed on that defense. Given the weight of the evidence in this case, as explored more fully above, we do not find a probability sufficient to undermine confidence in the outcome.

2. Confrontation Clause

At trial, Dr. "Kellogg" of the U.S. Army Criminal Investigative Laboratory [USACIL] testified as a Government expert in DNA forensic examination about the forensic testing and analysis work completed by USACIL in Appellant's case. He was not the laboratory technician who conducted **[**40]** the actual tests, who was unavailable for Appellant's trial because she was testifying in another court-martial. Dr. Kellogg independently reviewed and evaluated the actual laboratory technician's work, made his own independent judgments based on the data, and testified about his interpretation of the lab work for the members. Among other things, he testified about the forensic testing done on the red blanket, which detected semen that further analysis "matched" to Appellant's DNA profile. Appellant's trial defense counsel did not object to this testimony at trial.

Appellant asserts his trial defense counsel were ineffective for failing to object to Dr. Kellogg's testimony about the forensic testing and DNA comparisons instead of the lab technician who actually conducted the tests. Appellant argues this violated his right to confrontation under *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*. We disagree.

As our superior court has held, a substitute expert may testify regarding his independent conclusions based on the results (the underlying data) of laboratory testing performed by another technician, who is unavailable at trial, without offending the *Confrontation Clause* as interpreted under *Crawford. United States v. Katso, 74 M.J. 273, 279, 284 (C.A.A.F. 2015)*. That is precisely what Dr. Kellogg did here. Hence, Appellant **[**41]** has not shown that had his trial defense counsel raised the issue at trial, there is a reasonable probability such an objection would have been meritorious. To the contrary, we are confident it would not have been.

Even assuming *arguendo* his counsel's performance was deficient in this regard, Appellant has failed to show how such deficiency resulted in prejudice. Dr. Kellogg's testimony supported that Appellant's semen was found on the red blanket, which Appellant told the NCIS agent would be expected because he had ejaculated onto it. We fail to see how expert testimony that corroborated Appellant's statements and supported the Defense theory of the case caused prejudice to Appellant.

III. Conclusion

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred. *UCMJ arts. 59*, *66*. The findings and sentence are **AFFIRMED**.

Chief Judge Emeritus CRISFIELD and Judge STEWART concur.