

No. _____

In the Supreme Court of the United States

JAMAR M. DAVIS, AIRMAN,
UNITED STATES NAVY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Together, 10 U.S.C. §§ 920b(c) and 920b(h)(5)(B) impose criminal liability for “commit[ting] a lewd act upon a child” by “*intentionally* exposing one’s genitalia . . . to a child by any means, including via communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.” (emphasis added). J.R., a minor, reached out to Petitioner on Snapchat, unsolicited, and immediately launched into sexually-charged banter with him. Believing he was interacting with an adult, Petitioner responded with explicit images of himself. However, the lower court concluded his belief that he was communicating with an adult was “irrelevant” because “the underlying crime is properly deemed a strict liability offense.” App.17 (quoting *United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016) (citing *Liparota v. United States*, 471 U.S. 419, 443 n.7 (1985) (White, J., joined by Burger, C.J., dissenting))).

The question presented is:

Whether subsections (d)(1) and (d)(2) of 10 U.S.C. § 920b (2024) relieve the Government of the burden of proving the specific intent required for “intentionally exposing . . . genitalia . . . to a child.”

PARTIES TO THE PROCEEDINGS

All parties to this proceeding appear in the caption on the cover page of this petition. Those parties are Airman Jamar M. Davis, the Petitioner, and the United States, the Respondent.

RELATED PROCEEDINGS

The related proceedings below are:

- (1) *United States v. Davis* (General Court-Martial Convened by Commander, Navy Region Southeast, Naval Air Station Mayport, Florida) – Judgment entered on March 19, 2024.
- (2) *United States v. Davis*, No. 202400121 (N-M. Ct. Crim. App.) – Judgment entered on October 15, 2025.
- (3) *United States v. Davis*, No. 26-0058 (C.A.A.F.) – Order Denying Petition for Review entered on March 17, 2026.

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The decision of the United States Court of Appeals for the Armed Forces (CAAF) denying review of Petitioner's case is not yet reported. It is available at 2026 CAAF LEXIS 256 (C.A.A.F. 2026), and is reproduced in App.2. The decision of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) is unreported. It is available at 2025 CCA LEXIS 478 (N-M. Ct. Crim. App. Oct. 15, 2025) and is reproduced at App.4-22.

JURISDICTION

The NMCCA had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2024). The CAAF had jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2024). On March 17, 2026, the CAAF issued its order denying review, under 10 U.S.C. § 867(b)(1)-(2) (2024). This Court has jurisdiction under 28 U.S.C. § 1259(3) (2024).

STATUTORY PROVISIONS INVOLVED

Article 120b, UCMJ, 10 U.S.C. § 920b (2024), states, in relevant part:

(a) **RAPE OF A CHILD.**—Any person subject to this chapter who—

(1) commits a sexual act upon a child who has not attained the age of 12 years; or

(2) commits a sexual act upon a child who has attained the age of 12 years by—

(A) using force against any person;

(B) threatening or placing that child in fear;

(C) rendering the child unconscious;
or

(D) administering to that child a drug, intoxicant, or other similar substance;

is guilty of rape of a child and shall be punished as a court-martial may direct.

(b) **SEXUAL ASSAULT OF A CHILD.**—Any person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct.

(c) **SEXUAL ABUSE OF A CHILD.**—Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.

(d) **AGE OF CHILD.**—

(1) **UNDER 12 YEARS.**—In a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act. It is not a defense that the accused

reasonably believed that the child had attained the age of 12 years.

(2) UNDER 16 YEARS.—In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under . . . subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

. . .

(h) DEFINITIONS.—In this section:

. . .

(5) LEWD ACT.—The term “lewd act” means—

(A) any sexual contact with a child;

(B) intentionally exposing one’s genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;

(C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(D) 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.

INTRODUCTION

Before she found Petitioner guilty of sexual abuse of J.R., the military judge asked him to “explain to me how sending these [explicit] images intentionally--you said you didn’t think she was a child, so *to an adult*, arouse[d] or gratif[ied] your sexual desire.” App.58. But Petitioner wasn’t charged with intentionally sending explicit images to an “adult,” he was charged with *intentionally* sending them “*to a child*” pursuant to 10 U.S.C. § 920b(h)(5)(B). And he stands convicted because, applying “traditional rules of statutory construction” and guidance from its “superior court,” Appx. 14, the NMCCA found Petitioner’s belief that he was communicating with an adult was “irrelevant” since “the underlying crime is properly deemed a strict liability offense.” App.17 (quoting *United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016) (citing *Liparota v. United States*, 471 U.S. 419, 443 n.7 (1985) (White, J., joined by Burger, C.J., dissenting))).

The theory of statutory interpretation on which Petitioner’s conviction is based is misguided and incorrect. The statute at issue, 10 U.S.C. § 920b, covers various sexual crimes against children, both contact offenses and those committed over the internet. While the contact offenses are properly characterized as imposing strict liability, Congress required a mens rea of specific intent for others conducted “via any communication technology,” including the offense for which Petitioner was convicted.

The confusion seems to have arisen from the language of subsections (d)(1) and (d)(2) of 10 U.S.C. § 920b, which remove a knowledge requirement as to age. But what both the military judge and the NMCCA failed to recognize—and the CAAF chose not

to address—is that removing this *knowledge* requirement (which renders some of the offenses strict liability crimes) does not negate the *intent* requirement for the offenses that may be accomplished electronically.

By failing to reckon with the intent requirement of subsection (h)(5)(B) of 10 U.S.C. § 920b, the military judge and the NMCCA effectively removed the mens rea from a federal statute that clearly requires it. And this wasn't for a charge of unauthorized absence for showing up for duty late or failing to salute a superior officer. It was for the Title 10 military equivalent of a serious sexual offense that would ordinarily fall under Title 18—one that exposes servicemembers to up to fifteen years of confinement, loss of all rank, a dishonorable discharge, and a lifetime of sex offender registration in the civilian world with all the stigma that comes with it.

Our troops, who are deployed in harm's way all over the world to support and defend our Constitution, deserve a better caliber of appellate review than what Petitioner received in this case.

STATEMENT OF THE CASE

This case began when J.R., a minor whom Petitioner had never met, contacted him out of the blue and immediately began engaging him with sexual banter the military judge described as far beyond what was normal for her age group. App.46. Petitioner said J.R. altered her appearance by adding internet filters to the pictures she sent him, App.34, which appeared to be of an adult, and never told him her age. App.35. Believing he was interacting with a consenting adult, he eventually responded with sexually-charged messages of his own, and the two ultimately traded explicit images of each other.

J.R.'s mom walked in on one of these interactions and grabbed the phone she was using, because this had happened before.¹ She yelled at Petitioner for interacting with her daughter online and he apologized profusely, telling her he didn't realize she was a child. App.Ex.V.55; App.Ex.X.43. J.R.'s mom didn't accept the apology and began reaching out to members of Petitioner's social media network to embarrass him. App.Ex.V.41.

Concerned that he might be the victim of an online scam, Petitioner reached out to the Naval Criminal Investigative Service (NCIS) for help. App.Ex.XVII. 142-43. When the agents investigated, they discovered that J.R. was, in fact, underage. Navy prosecutors subsequently charged Petitioner with sexual abuse of a child pursuant to 10 U.S.C.

¹ J.R. lived at her great-grandmother's house and had a habit of taking her phone without her knowledge to set up online profiles. She would then reach out to random people to add friends. When J.R. got caught with the phone, the accounts would be deleted. App.Ex.XXXVII.15.

§ 920b(c), which criminalizes anyone who “commits a lewd act with a child.” The lewd act in this case was the “intentional exposure” of his genitals “to a child.” App.47-48.²

A. Petitioner’s Court-Martial

At court-martial, the Government filed a motion in limine to preclude Petitioner from raising a mistake of fact defense as to J.R.’s age at trial. App.32. The Government argued that J.R.’s failure to disclose her age was irrelevant because “[t]he mens rea is the intentional exposure, . . . you deliberately -- in this case -- send a video of his penis *to someone else*.” App.36 (emphasis added). However, the actual statutory language requires that the exposure be done “*intentionally . . . to a child*.” 10 U.S.C. § 920b(h)(5)(B) (emphasis added).

The prosecutor looked to subsection (d)(1), a separate provision of the statute, which states “[i]n a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act.” App.44. It further provides that “[i]t is not a defense that the accused reasonably believed that the child had attained the age of 12 years.” 10 U.S.C. § 920b(d)(2).

Skeptical of the Government’s position given the facts of this case, the military judge expressed her concern that “[m]aybe you actually need a mens rea to commit the crime.” App.35. She found J.R.’s communications “a bit shocking considering that she’s

² Although the charging document informed Petitioner that he was charged with a lewd act with a child by “indecent exposure,” App.Ex.XXXI.2, indecency is not an element of the offense. Rather, 10 U.S.C. § 920b(h)(B)(5) criminalizes only the “intentional exposure” of genitalia “to a child.”

not even supposed to be on that platform.”³ App.42. She also pointed out that “this is not like [Petitioner] knew the identity; this is technology with filters.”⁴ App.41-42.

The military judge was also concerned about the inability to raise a mistake of fact defense in the context of online interactions. She questioned what the harm would be of allowing the affirmative defense, stating that “if the members [jurors] don’t buy it, that’s fine, they can say ‘we don’t find that there was a mistake,’ then why should that issue not be left to the members to decide?” App.42. Despite her misgivings, however, the military judge ultimately ruled that the lewd act charged under 10 U.S.C. § 920b is a “*strict liability offense*” that for children under the age of 12 “does not allow for a mistake of fact as to age.” App.29 (emphasis added).

Deprived of the ability to assert either that he lacked the mens rea stated in the statute or an affirmative defense of mistake of fact as to age, Petitioner conditionally pleaded guilty, reserving his right to raise the issue on appeal. *See* App.65. During the plea colloquy, he admitted sending a picture and video of his erect penis to J.R. to gratify himself sexually, but remained steadfast that, at the time, he believed she was an adult. He stated he “thought that

³ According to the Snapchat Terms of Service, its services “are not directed to children under the age of 13,” and users “must confirm” that they “are 13 years or older to create an account and use the services.” Snap, Inc., <https://www.snap.com/terms> (last visited Jun. 7, 2026).

⁴ While NCIS retrieved images of J.R. from the phone that she used to communicate with Petitioner, the Government conceded it could not “prove that those were for sure what the accused received.” R.124.

she was an adult” because “the text messages [he] received [were] of an adult,” and he believed the digitally filtered images J.R. sent to him were of a “grown woman.” App.53-55.

In response to the military judge’s questions, Petitioner agreed the exposure was “indecent” (which is not an element of the offense) because society would find it “extremely inappropriate” for an adult to send pictures of his exposed genitals to a child. App.57. But he remained adamant throughout the plea colloquy that he believed J.R. was an adult at the time he sent the photo to her.

In the face of his refusal to admit to an intent he simply didn’t have, the military judge asked Petitioner to “explain to me how sending these images intentionally--you said you didn’t think she was a child, so *to an adult*, arouse[d] or gratif[ied] your sexual desire.” App.58. After Petitioner asked her to repeat the question, she told him to “[e]xplain to me how sending these images of your exposed penis intentionally to *someone else* aroused or gratified your sexual desire.” App.58. He explained that responding to the images J.R. sent to him—which he believed were of “an adult”—was sexually pleasing to him. App.60.

When the military judge asked Petitioner if he had “any legal justification or excuse” for the offense to which he was pleading guilty, he responded that he did. App.63. She then called a recess so he could confer with his counsel. App.64. When court resumed, he stated that, given the military judge’s pretrial ruling, he “recognize[d] that at this time [he] had no legal justification,” but that he “reserve[d] this particular issue for appeal.” App.65. The military judge then accepted Petitioner’s plea. R.247-48.

B. Petitioner's Appeal

On appeal to the NMCCA, Petitioner argued he lacked the requisite criminal intent required by 10 U.S.C. § 920b(h)(5)(B). App.19. The NMCCA disagreed and affirmed his conviction, finding the charged crime was a strict liability offense. It explained that “[w]hile strict liability offenses are generally disfavored, ‘Congress may purposefully omit from a statute the need to prove an accused’s *criminal intent*, and courts are then obligated to recognize this congressional intent and conform their rulings accordingly.’” App.14 (quoting *Gifford*, 75 M.J. at 143 (citing *United States v. Balint*, 258 U.S. 250, 252-53 (1922), and *Staples v. United States*, 511 U.S. 600, 606 (1994))) (emphasis added).

Applying “traditional rules of statutory construction,” guidance from its “superior court,” and its prior decision in *United States v. Armao*, No. 202200109, 2023 CCA LEXIS 483 (N-M. Ct. Crim. App. Nov. 17, 2023) (unpublished), Appx.14, the NMCCA found “an express indication of congressional intent” to “dispense with mens rea as to the age of the victim” in subsection (d)(1). 17-18. The court reasoned that, since the prosecution was “not required to prove that an accused had knowledge of the facts that make his or her actions criminal [the age of the victim] in order to secure a conviction,” the “underlying crime is properly deemed a strict liability offense.” App.14 (quoting *Gifford*, 75 M.J. at 142 (citing *Liparota*, 471 U.S. 419 at 443 n.7 (White, J., joined by Burger, C.J., dissenting))). It saw “no reason to change course here” and concluded that “evidence tending to show that Appellant did not know the age of the victim at the time of the offense is therefore irrelevant.” App.17-18.

But the court's opinion failed to reckon with the word "intentionally" as used in subsection (h)(5)(B) of the statute, whether it conflicted with the court's finding that subsection (h)(5)(B) creates a strict liability offense, or whether the rule of lenity may apply.

Petitioner then filed a petition for review with the CAAF, which the court denied. App.2-3.

This petition followed.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because, in effect, the military judge and the NMCCA took it upon themselves to obviate the mens rea requirement for 10 U.S.C. § 920b(h)(5)(B)—a federal criminal statute that imposes severe punishment for a serious sexual offense. These decisions reveal basic misconceptions in the military justice system—both as to the nature of strict liability offenses and as to basic tenets of statutory construction—which have produced precisely the sort of “absurd” result this Court warned against in *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994). Despite the fact that Petitioner presented “good cause” for the CAAF to review his case, it declined to do so—leaving unaddressed the fact that the military judge and the NMCCA have improperly removed the mens rea requirement for a federal non-contact sexual offense that carries up to fifteen years of confinement.

A. Imposing a strict liability standard is inappropriate when such an interpretation would criminalize “otherwise innocent conduct.”

This Court’s baseline assumption is that “[t]he existence of mens rea [in criminal statutes] is the rule, rather than the exception to, principles of Anglo-American criminal jurisprudence.” *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)). Thus, imposing criminal liability without scienter as to the gravamen of the offense is “generally . . . disfavored.” *Staples*, 511 U.S. at 606 (citing *Liparota*, 471 U.S. at 426). This basic rule applies to “each of the statutory elements that criminalize otherwise innocent conduct.” *X-Citement Video*, 513

U.S. at 72 (citing *Morrisette v. United States*, 342 U.S. 246, 271 (1952), and *Staples*, 511 U.S. at 691); *see also Rehaif v. United States*, 588 U.S. 225, 233 (2019).

If Congress chooses to impose a strict liability standard on a non-regulatory or non-public welfare offense, it generally must state this intent explicitly in the statute. *See U.S. Gypsum Co.*, 438 U.S. at 438 (“Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.”). Or Congress may impose strict liability without making it explicit in the statute where the criminal conduct involves an activity the perpetrator should know is wrong, such as assaulting someone (which is inherently criminal) who turns out to be a federal officer. *See United States v. Feola*, 420 U.S. 671, 685 (1975) (noting this situation “is not one where legitimate conduct becomes unlawful *solely because of the identity of the individual or agency affected*”) (emphasis added).

When the analysis is one of statutory construction, this Court has routinely held that adverbs designating a mens rea, such as knowingly or intentionally, apply to any element that follows that would otherwise “criminalize a broad range of apparently innocent conduct.” *Liparota*, 471 U.S. at 426; *see also Balint*, 258 U.S. at 251-53; *Staples*, 511 U.S. at 605-07; *X-Citement Video*, 513 U.S. at 71. Even in cases where “the most natural grammatical reading” of a statute supports an interpretation that the mens rea does not apply to a particular element, this Court has found that it does in order to avoid “not merely odd, but positively absurd” results that “would sweep within the ambit of the statute” actors who had no idea they

were doing anything wrong. *X-Citement Video*, 513 U.S. at 68-69.

B. 10 U.S.C. § 920b contains three offenses that are strict liability and three that require a specific intent mens rea, but the military judge and the NMCCA failed to recognize this distinction.

10 U.S.C. § 920b covers various sexual offenses against children. Subsection 920b(a) defines rape of a child and subsection (b) defines sexual assault of a child. They both involve “commit[ting] a sexual act” upon a minor. Subsection 920b(d)(1) states that “it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act” and “[i]t is not a defense that the accused reasonably believed that the child had attained the age of 12 years.” Subsection (d)(2) similarly removes this knowledge requirement, but provides for a mistake of fact as to age defense if the victim is between 12 and 16. Taken together, these provisions properly designate rape and sexual assault of a child as strict liability offenses because there is no mens rea stated, and Congress explicitly removed a knowledge requirement as to the age of the victim.

Subsections (c) and (h)(5) of the statute criminalize four types of “lewd act[s] upon a child.” The first type of lewd act imposes criminal liability for one who has “any sexual contact with a child.” 10 U.S.C. § 920b(h)(5)(A). The term “sexual contact” is defined as “any touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching

may be accomplished by any part of the body or an object.” 10 U.S.C. §§ 920(g)(2), 920b(h)(1). This too is a strict liability offense for the same reasons discussed above.

However, the remaining three types of lewd acts all require that they be “intentionally” done “to,” “with,” or “in the presence of” a “child.” 10 U.S.C. § 920b(h)(5)(B)-(D). Among these is the offense at issue in this case, which involves “*intentionally* exposing one’s genitalia, anus, buttocks, or female areola or nipple *to a child* by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.” 10 U.S.C. § 920b(h)(5)(B) (emphasis added).

This specific intent requirement distinguishes it from rape, sexual assault, and lewd act by sexual contact, which do not contain any mens rea. Although Congress omitted the word “intentionally” from each of these offenses involving *physical contact* with a child, it specifically included that word as the mens rea required for lewd act by exposure, as well as the other two acts contained in subsections (h)(5)(C) and (h)(5)(D). This makes sense because, as opposed to online interactions where an actor is not in the actual physical presence of the other person, one who engages in physical contact with a child likely knows that his conduct is wrong. But to be guilty of 10 U.S.C. § 920b(h)(5)(B) via electronic communications, one must *specifically intend* that the object of the exposure be a child.

C. The language of § 920b(d)(1)-(2) (age of child) does not negate the mens rea requirement included in § 920b(h)(5)(B) (defining lewd act by intentional exposure).

While perhaps subsection 920b(d) “complies with Supreme Court requirements to dispense with mens rea with respect to the *age* of the victim,” *see* App.17-18, the language of subsection (h)(5)(B) does *not* dispense with the mens rea requiring that a lewd act by exposure must be done “*intentionally . . . to a child.*” Anything more than a cursory look at the text of the statute bears this out. But neither the NMCCA nor the CAAF chose to look.

Congress’ intent is far from clear as it relates to the non-contact offenses defined in 10 U.S.C. § 920b(h)(5)(B)-(D), including the exposure offense at issue here. That’s because it specifically used the word “intentionally” to define these types of lewd acts done “to,” “with,” or “in the presence of” a child, including “via any communication technology.” The provision at issue here does not merely criminalize conduct toward a person who later turns out to be a child. Rather, it criminalizes “*intentionally exposing*” specified body parts “*to a child*” by any means, including via communication technology, for the purpose of sexual gratification.⁵ The insertion of “intentionally” in 10

⁵ Congress similarly included “intentionally” as the required mens rea in 10 U.S.C. § 920b(h)(5)(C)-(D). § 920b(h)(5)(C) criminalizes “*intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person*” (emphasis added). § 920b(h)(5)(D) criminalizes “any indecent conduct, *intentionally* done with or in the presence of a child,

U.S.C. § 920b(h)(5)(B) indicates that, even if the Government didn't have to show that Petitioner *knew* how old J.R. was when he sent her the explicit images, it still had to prove that he specifically *intended* to send them *to a child* to prove the offense. Put another way, how can a person “intentionally” expose himself “to a child” without intending that “the object of [his exposure]” be a child? See *United States v. Buddi*, 168 F.4th 439, 446 (6th Cir. 2026) (“It is difficult to understand how ‘knowingly’ could modify a transitive verb like ‘persuades, induces, entices, or coerces’ without also modifying the grammatical object. . . .”).

A plain reading of the statute’s text yields no plausible way to divorce “intentionally” from “to a child” under any of this Court’s precedents. Doing so would require finding the word “intentionally” applies to the ten words that immediately follow it (“exposing one’s genitalia, anus, buttocks, or female areola or nipple”), passes over the next three words (“to a child”), then reconnects with “by any means, including via any communication technology.” Such a reading requires the sort of linguistic gymnastics that this Court has specifically rejected. See *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) (“In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence.”). Doing so also cuts against this Court’s

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.” (emphasis added).

decision in *X-Citement Video*, holding that knowledge that the actors in the videos were minors was the “crucial element separating legal innocence from wrongful conduct.” 513 U.S. at 73.

Therefore, while the language of subsections 920b(d)(1)-(2) generally remove a knowledge requirement as to the victim’s age from offenses under 10 U.S.C. § 920b, they do not negate the specific requirement of subsection 920b(h)(5)(B) that the exposure at issue be done “*intentionally . . . to a child.*” That’s because the mens rea of *knowledge* is discrete from the mens rea of *intent*. See *United States v. Bailey*, 444 U.S. 394, 403-06 (1980). While knowledge is a state of awareness, intent denotes a purpose and “conscious[] desire[]” to achieve a particular result. See *id.* at 404 (quoting *U.S. Gypsum Co.*, 438 U.S. at 196). And the “particular result” contemplated for this offense, is the “*intentional exposure*” of “*genitalia . . . to a child.*”

In the real world, this distinction is the difference between first degree murder and manslaughter. In the online world, it’s the difference between harmless expression and a federal conviction for a serious sexual offense. That’s because, as the Ninth Circuit has explained, “[t]he guilt arises from the defendant’s *knowledge of what he intends to do,*” not on his mistaken knowledge of the actual facts, which are “irrelevant.” *United States v Meek*, 366 F.3d 705, 718 (9th Cir. 2004) (upholding a conviction for attempted enticement of a child (who was in reality an undercover officer) over the internet because a jury could reasonably find that the appellant “sought sexual activity, and knowingly sought it with a minor.”). In other words, regardless of the actual facts,

it is “the guilty mind required by the statute” that is the dispositive analysis. *Id.* at 718

So too here. As the statute is written, it’s Petitioner’s intent with respect to the conduct at issue (not just J.R.’s age) that differentiates potential criminal conduct on his part from innocent online activity. Just as intending to send explicit content to a child who turns out to be an adult is criminalized as an attempt, the flip-side is also true—*intentionally* sending graphic images to someone believed to be an adult, who turns out to be a child, is non-criminal conduct.

If Congress had intended to fashion committing a lewd act by exposure to a child as a strict liability offense, as it did with other offenses in 10 U.S.C. § 920b, it could have done so by simply criminalizing “exposing one’s genitalia . . . to a child.” Including “intentionally” in subsection 920b(h)(5)(B) is unnecessary unless its purpose is to denote the mens rea that provision requires. Conflating the intent requirement of subsection 920b(h)(5)(B) with the knowledge provision of subsections 920b(d)(1)-(2)—or simply ignoring the former altogether—impermissibly renders the word “intentionally” mere surplusage. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (citing *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013)) (stating that “the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”). Any concerns regarding accidental exposure are already addressed by the subsection’s further language requiring that the exposure be done “with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.”

D. The failure of the military judge and the NMCCA to specifically address the intent language of § 920b(h)(5)(B) obviates the mens rea required by a federal statute.

The NMCCA noted that “traditional rules of statutory construction guide our review” and then promptly disregarded them. Although purporting to draw on this Court’s strict liability jurisprudence, it simply offered a blanket statement that the entirety of 10 U.S.C. § 920b is a strict liability offense based on subsection (d)(1) without addressing the text of subsection (h)(5)(B), under which Petitioner is charged.

Citing one of its prior decisions, the NMCCA explained it had “noted previously” that 10 U.S.C. § 920b “complies with Supreme Court requirements to dispense with mens rea with respect to the age of the victim because the article includes an ‘indication of congressional intent.’” App.17-18 (citing *Armao*, 2023 CCA LEXIS 483, at *15) (quoting *Staples*, 511 U.S. at 606))). But *Armao*—on which the military judge also relied—addressed the offense of *sexual assault* of a child under § 920b(b), which makes it punishable to “commit[] a sexual act upon a child,” a physical contact offense. *Armao*, 2023 CCA LEXIS 483, at *16; App.28-29. *Armao*, in turn, relied on the NMCCA’s prior decision in *United States v. Lotz*, 2023 CCA LEXIS 483 (N-M. Ct. Crim. App. Nov. 17, 2023), which also involved sexual assault of a child. *Id.* Thus, none of these cases addresses an offense containing the mens rea of “intentionally” or has anything to do with the intent requirement of § 920b(h)(5)(B) for non-contact offenses conducted over the internet.

This failure is particularly troubling given that the NMCCA’s rationale for finding a strict liability offense

here is that “Congress may purposefully omit from a statute the need to prove an accused’s *criminal intent*, and courts are then obligated to recognize this congressional intent and conform their rulings accordingly.” App.14 (quoting *Gifford*, 75 M.J. at 142 (citing *Balint*, 258 U.S. at 252-53, and *Staples*, 511 U.S. at 606))). But Congress *did not* remove criminal intent from § 920b(h)(5)(B). The military judge and the NMCCA took it upon themselves to do so by simply ignoring the word “intentionally.”

Labeling this crime a “strict liability offense” by ignoring the explicit mens rea that Congress included in the statute yields precisely the sort of “absurd” results this Court has warned against. See *X-Citement Video*, 513 U.S. at 69. Under the NMCCA’s interpretation of the statute, for example, Petitioner would be criminally responsible under subsection (h)(5)(B) if J.R. had written to him that she was thirty years old, sent him images of a thirty-year-old model portrayed as herself, and requested that he send her pictures of his anatomy in return. Even under this scenario, Petitioner would still be guilty of “intentionally exposing [his] genitalia . . . to a child” based on how both the military judge and the NMCCA interpreted the statute.

Indeed, the prosecutor responded to just such a hypothetical during the motion in limine. He explained that while “in that scenario we would have photos of an adult woman being exchanged,” in this case “we also know” that J.R. was a minor. App.45. He failed to recognize that, under a strict liability interpretation of the statute, having the pictures of an adult woman wouldn’t matter. Nor would it matter, in an even more “absurd” scenario, if a sixteen-year-old young woman decided to play a joke on Petitioner and

tricked him into sending an explicit image to her younger sister. Under a strict-liability standard, this would still meet all the elements of the offense.

E. This Court should ensure 10 U.S.C. § 920b(h)(5)(B) is interpreted in a way so as to avoid ensnaring servicemembers for acts that are not criminal because they lack the required mens rea.

We live in a time where artificial intelligence (AI) has blurred the lines between what’s real and what’s an illusion. But the behavior of children remains unchanged. And many of them will not be able to resist the urge to enhance their appearance—to make themselves look more trendy, more attractive, or *older*. And although social media companies attempt to block minors from their platforms with user agreements that are rarely read, Petitioner’s case demonstrates how such measures are often largely ineffective. As the military judge pointed out, J.R.’s communications were “a bit shocking considering that she’s not even supposed to be on that platform.” App.42.

Aside from the fact that the plain language of subsection (h)(5)(B) explicitly requires a mens rea of specific intent, this interpretation also makes sense in the digital age. That’s because, as this Court has noted, “the opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction.” *X-Citement*, 513 U.S. at 72 n.2. To remove this explicit mens rea, as the military judge and the lower court have done, poses the very risk associated with overbroad interpretations of criminal liability that this Court has warned against: creating a “snare for the unsuspecting,” who have no basis to know their conduct is wrongful, *see Feola*, 420 U.S. at

685, which unfairly exposes them to catastrophic consequences. *Cf. Morrisette*, 342 U.S. 246 at 256 (noting that the stakes involved in violations of strict liability offenses are typically low, the “penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation.”).

At the very least, the text of § 920b(h)(5)(B) makes the reach of the intent requirement textually ambiguous. Under such circumstances, statutory ambiguity must be resolved in favor of lenity unless “resort to ‘the language and structure, legislative history, and motivating policies’ of the statute” removes all “reasonable doubt . . . about [the] statute’s intended scope.” *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citing *Bilfulco v. United States*, 447 U.S. 381, 387 (1980)); *see also Liparota*, 471 U.S. at 427 (citations omitted).

F. The federal circuits routinely weigh in on the mens rea required in federal child sex offense statutes when the text is ambiguous, but when petitioner asserted his right to a similar review for an equally ambiguous statute, the CAAF denied review.

If Petitioner had been convicted in a U.S. District Court, he would be entitled to a review of the lower court’s erroneous decision regarding the mens rea required by subsection (h)(5)(B) by a U.S. Circuit Court of Appeals. *See* 28 U.S.C. §§ 1291-1292 (2024); *see also Buddi*, 168 F.4th at 445-50; *United States v. Flores-Figueroa*, 274 Fed. Appx. 501, 501-02 (8th Cir. 2008), *rev’d*, 556 U.S. 646 (2009); *Meek*, 366 F.3d at 717-20; *United States v. X-Citement Video*, 982 F.2d 1285, 1289-92 (9th Cir. 1992), *rev’d*, 513 U.S. 64 (1994); *United States v. Alsondo*, 486 F.2d 1339, 1342-

45 (2nd Cir. 1973), *rev'd*, 420 U.S. 671 (1975). But since he was convicted in a military court, he's subject to the vagaries of the CAAF's "internal management," which is "left to [its] discretion in accordance with guidelines expressed in [its] rules." *See United States v. Rorie*, 58 M.J. 399, 405 (C.A.A.F. 2003) (quoting S. REP. No 98-53, at 34 (1983)).

In short, the CAAF has granted itself "unfettered . . . discretion . . . to deny review regardless of the merits of the case," thereby confusing the "good cause standard [under Article 67] with certiorari." *See id.* at 408 (Effron, J., dissenting). Therefore, even when a servicemember shows "good cause" to grant a petition for review, the CAAF should, but is not required to, consider the case under its statutory mandate. *See Baumgartner v. United States*, No. ACM 40413, 2025 CCA LEXIS 95 (A.F. Ct. Crim. App. Feb. 18, 2025), *pet. for grant of rev. denied*, 86 M.J. 227 (C.A.A.F. Jun. 20 2025), *cert. denied*, ___ S. Ct. ___, 223 L. Ed. 2d 516 (U.S. Jan. 12, 2026) (cert. petition arguing that "[e]quating 'good cause' to the unfettered discretionary standard enjoyed by this Court improperly narrows the statutory text in Article 67, UCMJ . . .").

Here, there is little doubt that Petitioner has a colorable claim that he was erroneously subjected to strict liability for a serious sex offense carrying fifteen years of confinement. But despite this "good cause" to review his case, the CAAF declined to do so.

The National Defense Authorization Act for Fiscal Year 2024 has provided a path to alleviate this injustice. *See* Pub. L. No. 118-31, § 533, 137 Stat. 136, 261 (2023). Under its jurisdictional amendment, this Court now has the authority to review Petitioner's case irrespective of whether the CAAF granted

review. In other words, this Court has the opportunity to set the record straight on § 920b(h)(5)(B), to protect unsuspecting servicemembers from the lower court's improper interpretation of strict liability, and to establish much-needed guidance on presumptions of criminal liability for online offenses in the digital age.

Conclusion

Our servicemembers give up a lot when they join the military, and willingly submit to the Uniform Code of Military Justice. In the event they are convicted of a crime, they have the right to expect their case will receive the same caliber of appellate review it would receive in any other federal jurisdiction in the country.

Therefore, review of this case goes far beyond mere error correction because the decisions of the military judge and the NMCCA evince a fundamental misunderstanding of the nature of strict liability offenses, and their misguided interpretation of § 920b(h)(5)(B) poses a substantial risk of unfairness to all the troops, particularly in the age of AI. *See* SUP. CT. R. 10. Given that the CAAF chose not to consider the matter, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted.

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APPENDIX

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**Appendix A — Order of United States Court of
Appeals for the Armed Forces Denying Petition
for Review (March 17, 2026)**

**United States Court of Appeals
for the Armed Forces
Washington, D.C.**

United States,	USCA Dkt. No. 26-0058/NA
Appellee	Crim.App. No. 202400121

v.

ORDER DENYING
PETITION

Jamar M.

Davis,

Appellant

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is by the Court, this 17th day of March, 2026,

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ORDERED:

That the petition is hereby denied.

For the Court,

/s/ Malcolm H. Squires, Jr.

Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (McMahon)
Appellate Government Counsel (Keller)

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**Appendix B — Opinion of the United States
Navy-Marine Corps Court of Criminal Appeals
(October 15, 2025)**

*This opinion is subject to administrative correction
before final disposition.*

**United States Navy–Marine Corps
Court of Criminal Appeals**

Before

KISOR, FLUHR, and FLINTOFT

Appellate Military Judges

UNITED STATES

Appellee

v.

Jamar M. DAVIS

Aviation Boatswain's Mate Aircraft Handler Airman
(E-3), U.S. Navy

Appellant

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No. 202400121

Decided: 15 October 2025

Appeal from the United States Navy-Marine Corps
Trial Judiciary

Military Judge:

Rachel E. Trest

Sentence adjudged 11 December 2023 by a general court-martial convened at Naval Station Mayport, Florida, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for six months, and a bad-conduct discharge.

For Appellant:

Lieutenant Commander Christopher C. McMahon,
JAGC, USN

For Appellee:

Commander John T. Cole, JAGC, USN
Major Mary Claire Finnen, USMC

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This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

PER CURIAM:

A general court-martial convicted Appellant, consistent with his pleas, of one specification of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ).¹ We have jurisdiction to review this case under Article 66(b)(3), UCMJ.²

Appellant asserts two assignments of error. The assignments of error are reordered and rephrased, as follows: (1) whether the military judge erred in barring Appellant from raising a mistake of fact defense as to the victim's age; and (2) whether the military judge abused her discretion in accepting Appellant's pleas of guilty to sexual abuse of a child involving indecent exposure when there was evidence Appellant may have lacked knowledge at the time of the offense that the victim was a child. We find no prejudicial error and affirm.

¹ 10 U.S.C. § 920b.

² 10 U.S.C. § 866(b)(3).

I. BACKGROUND

In early March 2021, while stationed in Yokosuka, Japan, Appellant received a friend request over the Snapchat application from an individual he did not know.³ The requestor was later identified as J.R.,⁴ a seven-year-old girl. Appellant accepted J.R.’s request and they began exchanging communications. Initially, the messaging consisted of “small talk,” according to Appellant.⁵ However, the tenor of the communications escalated with both Appellant and J.R. eventually transmitting sexually explicit material.⁶ More specifically, Appellant intentionally sent J.R. “photos of [his] exposed penis” and “videos of [his] exposed penis while [he] masturbated.”⁷ Appellant “sent both the pictures and videos of [his] exposed penis with the intent to gratify [his] sexual desire.”⁸

To communicate with Appellant, J.R. used the Snapchat application on a family member’s mobile telephone.⁹ J.R.’s mother discovered her explicit communications with Appellant. J.R.’s mother used Appellant’s Snapchat username and other social

³ Pros. Ex. 1 at para. 4.

⁴ All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

⁵ Pros. Ex. 1 at para. 4.

⁶ Pros. Ex. 1 at paras. 5-6.

⁷ Pros. Ex. 1 at para. 6.

⁸ Pros. Ex. 1 at para. 6.

⁹ App. Ex. V at 6.

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media platforms to identify Appellant's identity.¹⁰ J.R.'s mother and other family members eventually referred the matter to local law enforcement.

The Naval Criminal Investigative Service opened an investigation, and an agent conducted an interview of Appellant. When asked about J.R.'s age, Appellant stated that based on the materials he received from J.R., that she could have been "an underage girl."¹¹ When questioned further regarding J.R.'s age, Appellant characterized her as "pretty young" and that she was "like, 17, 15, or 18. Something like that."¹² Later in the interview, Appellant stated that 15 was a "pretty fair and accurate" estimate of J.R.'s age.¹³ Appellant expressed to the interviewing agent that he did not know J.R. was a seven-year-old girl until her mother contacted him through social media and advised him as to J.R.'s age.¹⁴

The Government charged Appellant under Article 120b for sexual abuse of a child involving indecent exposure and sexual abuse of a child involving indecent communication. The Government also charged him under Article 134 for receiving child pornography and producing child pornography.

After arraignment, the parties filed several pretrial motions. Of note for our appellate review, the

¹⁰ App. Ex. V at 6.

¹¹ App. Ex. XXXV at 69.

¹² App. Ex. XXXV at 70.

¹³ App. Ex. XXXV at 72.

¹⁴ App. Ex. XXXV at 74.

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Government filed a motion *in limine* to bar Appellant from mounting a mistake of fact defense as to J.R.'s age for the two specifications charged under Article 120b.¹⁵ In its motion, the Government urged a “plain reading” of Article 120b which provides that “[i]t is not a defense that the accused reasonably believed that the child had attained the age of 12 years,”¹⁶ and that the Government was not required “to prove that the accused knew the age of the child, and a reasonable belief that the child was above the age of 12 cannot be used as a defense.”¹⁷ Appellant nevertheless opposed the government’s motion *in limine*. In so doing, Appellant insisted that he be permitted to assert a mistake of fact defense as to the victim’s age because it is an important factor in determining whether his actions were “indecent.”¹⁸ In that regard, Appellant asserted that there was nothing to make him aware that that the victim was seven years old.¹⁹

After conducting a hearing on the Government’s motion *in limine*, the military judge granted the motion.²⁰ In a written ruling on the motion, the military judge made several findings of fact, including that J.R. was seven years old at the time she received an image of an “unclothed penis” from Appellant over

¹⁵ App. Ex. IV.

¹⁶ App. Ex. IV at 2-3 (citing 10 U.S.C. § 920b(d)(1)).

¹⁷ App. Ex. IV at 2-3.

¹⁸ App. Ex. XVIII at 2.

¹⁹ App. Ex. XVIII at 3.

²⁰ App. Ex. XL.

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the Snapchat application.²¹ She then referred to the plain language of Article 120b that “[i]t is not a defense that the accused reasonably believed that the child had attained the age of 12 years, when the age of the child is under 12 years.”²² The military judge noted that Congress has made its intent “crystal clear” by allowing a mistake of fact defense for a case involving a victim who is under 12 years of age.²³ Citing Appellant’s concession that J.R. was seven years old at the time of the offense, as well as evidence regarding J.R.’s age submitted by the Government in support of its motion, the military judge concluded that Appellant could not assert a mistake of fact defense as to the offenses charged under Article 120b.²⁴

Following resolution of the parties’ pretrial motions by the military judge, the parties entered into a plea agreement. Through that agreement, Appellant agreed to enter a plea of guilty to Specification 1 under Charge I, which alleged that he committed sexual abuse of a child involving indecent exposure, in violation of Article 120b.²⁵ Also, Appellant agreed “to waive all motions not already raised, except those that are non-waivable pursuant to R.C.M. 705(c)(1)(B), specifically preserving the right to appeal the Military

²¹ App. Ex. XXXII at 3.

²² App. Ex. XXXII at 5 (citing 10 U.S.C. § 920b(d)(1)).

²³ App. Ex. XXXII at 6.

²⁴ App. Ex. XXXII at 7.

²⁵ App. Ex. XXXIII at 2.

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Judge's ruling with respect to the Government's motion *in limine* dated 28 July 2023."²⁶

Appellant signed a stipulation of fact admitting guilt to the Article 120b offense.²⁷ He acknowledged the following in the stipulation of fact:

In addition to receiving the explicit images and videos from J.R., I reciprocated by intentionally sending her photos of my exposed penis. I also sent her videos of my exposed penis while I masturbated. I sent both the pictures and videos of my exposed penis with the intent to gratify my sexual desire.²⁸

As to J.R.'s age, Appellant stated in the stipulation of fact that "I am now aware that in March 2021, J.R. was seven years old and was thus a child under the age of 16 years."²⁹

During the providence inquiry, the military judge explained the elements of the offense as follows:

That on or about March 2021, at or near Yokosuka, Japan, you committed a lewd act upon [J.R.] by intentionally exposing your genitalia to J.R. via communication technology;

Two, that at the time, J.R. had not attained the age of 16 years; and

²⁶ App. Ex. XXXIII at 5.

²⁷ Pros. Ex. 1.

²⁸ Pros. Ex. 1 at para. 6.

²⁹ Pros. Ex. 1 at para. 8.

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Three, that you did so with an intent to abuse,
humiliate or degrade any person, or to arouse
or gratify the sexual desire of any person.³⁰

The military judge also defined several key terms relating to Appellant's offense, including "lewd act" and "child."³¹ Appellant then admitted that the elements of the offense as explained by the military judge accurately described what he did.³²

When asked to state why he believed he was guilty of the charged offense, Appellant responded, "I sent pictures and videos to a minor to sexually gratify myself."³³ Regarding J.R.'s age, Appellant claimed that at the time of the offense he believed she was an adult over the age of 18, based on the "body parts and the text messages that [he] received was of an adult."³⁴ According to Appellant, J.R. did not tell him how old she was.³⁵ After reviewing materials relating to the investigation, including a forensic interview of J.R., Appellant accepted that she was indeed a child who was seven years old at the pertinent time.³⁶ Appellant

³⁰ R. at 203.

³¹ R. at 203-04.

³² R. at 204.

³³ R. at 204-05.

³⁴ R. at 210.

³⁵ R. at 217-18.

³⁶ R. at 212.

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also acknowledged the “lewd” nature of his actions relating to J.R.³⁷

While preserving a challenge to the military judge’s ruling barring a mistake of fact as to age defense, Appellant affirmed that he did not have any legal justification or excuse for committing the offense.³⁸ He also noted that he could have avoided committing the offense “[b]y asking her age or blocking communication in general.”³⁹

After considering and then accepting the plea agreement between the parties, the military judge found that Appellant entered his plea of guilty “voluntarily and with full knowledge of its meaning and effect” and that his guilty plea was provident.⁴⁰ As such, she accepted Appellant’s guilty plea and entered a finding of guilty on the sexual abuse of a child charge.⁴¹

II. DISCUSSION

A. The Military Judge did not Commit Error by Prohibiting Appellant from Raising a Mistake of Fact Defense.

Describing the imposition of strict liability in sexual abuse cases involving a victim under the age of 12 as “unworkable in the digital age,” Appellant

³⁷ R. at 214, 217.

³⁸ R. at 223.

³⁹ R. at 223-24; App. Ex. XXXIII.

⁴⁰ R. at 247-48.

⁴¹ R. at 249.

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argues that he should have been able to raise a mistake of fact as to J.R.'s age to defend himself against the Article 120b charge.⁴² He further contends that allowing him to mount such a defense “would not seriously disrupt the effective operation” of Article 120b nor would it “materially hamper the vital effort to protect minors from sexual abuse.”⁴³

In determining a question of law, such as whether a mens rea requirement applies to a punitive article of the UCMJ, this court employs a de novo standard of review.⁴⁴ Moreover, traditional rules of statutory construction guide our review.⁴⁵ Our superior court has held that if the prosecution “is not required to prove that an accused had knowledge of the facts that make his or her actions criminal in order to secure a conviction, then the underlying crime is properly deemed a strict liability offense.”⁴⁶ While strict liability offenses are generally disfavored, “Congress may purposefully omit from a statute the need to prove an accused’s criminal intent, and courts are then obligated to recognize this congressional intent and conform their rulings accordingly.”⁴⁷

⁴² Appellant’s Brief at 37-38.

⁴³ Appellant’s Brief at 44 (citations omitted).

⁴⁴ *United States v. Serianne*, 69 M.J. 8, 10 (C.A.A.F. 2010)).

⁴⁵ *United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016) (citing *United States v. Estrada*, 69 M.J. 45, 47 (C.A.A.F. 2010)).

⁴⁶ *Gifford*, 75 M.J. at 142 (citing *Liparota v. United States*, 471 U.S. 419, 443 n. 7 (1985) (White, J., dissenting)).

⁴⁷ *Id.* At 143 (citing *United States v. Balint*, 258 U.S. 250, 252-53 (1922); *Staples v. United States*, 511 U.S. 600, 606 (1994)).

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Turning to the construction of Article 120b, that article was enacted into law in December 2011⁴⁸ and provides that “[a]ny person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.”⁴⁹ Article 120b defines “child” to mean a “person who has not attained the age of 16 years.”⁵⁰ Furthermore, the term “lewd act” is defined under Article 120b to include “intentionally exposing one’s genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.”⁵¹

Of significance here, Congress included specific language in Article 120b regarding the age of victim children. For cases involving a child under the age of 12, the statutory language plainly states:

In a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act. It is not a defense that the accused reasonably believed that the child had attained the age of 12 years.⁵²

⁴⁸ Nat’l Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, tit. V, § 541(b), 125 Stat. 1407 (2011).

⁴⁹ 10 U.S.C. § 920b(c).

⁵⁰ 10 U.S.C. § 920b(h)(4).

⁵¹ 10 U.S.C. § 920b(h)(5)(B).

⁵² 10 U.S.C. § 920b(d)(1).

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In the face of the clear expression of congressional intent embodied in Article 120b, Appellant nonetheless argues that he should have been able to raise a mistake of fact defense as to J.R.'s age.⁵³ Appellant relies principally on an opinion of the United States Court of Appeals for the Ninth Circuit, which addressed a prosecution under Title 18, United States Code, Section 2251(a).⁵⁴ That statute criminalizes, among other things, employing or using any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.⁵⁵ Concluding that imposing criminal sanctions under Section 2251(a) on a strict liability basis could impinge on speech protected by the First Amendment to the United States Constitution, the Ninth Circuit considered if the defendant in that case should be permitted to mount a mistake of fact defense as to the victim's age.⁵⁶ The Ninth Circuit noted that Section 2251 was "silent on whether reasonable mistake of age may serve as an affirmative defense" and that "there is no evidence that Congress considered and rejected the possibility of providing for such a defense."⁵⁷ Hence, the Ninth Circuit concluded that "[e]ngrafting such a defense would therefore not

⁵³ Appellant's Brief at 38.

⁵⁴ *United States v. United States Dist. Court for Cent. Dist.*, 858 F.2d 534 (9th Cir. 1988).

⁵⁵ 18 U.S.C. § 2251(a).

⁵⁶ *United States Dist. Court for Cent. Dist.*, 858 F.2d at 542.

⁵⁷ *Id.*

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require us to ignore the legislative will in order to avoid” conflict with the First Amendment.⁵⁸

In contrast to the defendant in *United States Dist. Court for Cent. Dist.*, Appellant has not advanced an argument that his communications with J.R. were somehow protected by the First Amendment. Moreover, unlike Section 2251, Article 120b contains an express indication of congressional intent in the text of the statute to dispense with mens rea as to the age of the victim.⁵⁹ The language in question provides that “[i]n a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act.”⁶⁰ With that above statutory language, “the underlying crime is properly deemed a strict liability offense”⁶¹ and evidence tending to show that Appellant did not know the age of the victim at the time of the offense is therefore irrelevant.

Furthermore, as we noted previously in a case involving a victim between 12 years of age and 16 years of age, Article 120b complies with Supreme Court requirements to dispense with mens rea with respect to the age of the victim because the article

⁵⁸ *Id.* (internal quotations omitted).

⁵⁹ 10 U.S.C. § 920b(d)(1).

⁶⁰ *Id.*

⁶¹ *Gifford*, 75 M.J. at 142 (citing *Liparota v. United States*, 471 U.S. 419, 443 n. 7 (1985) (White, J., dissenting)).

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includes an “indication of congressional intent.”⁶² We see no reason to change course here, especially in a case involving a victim who is under 12 years of age for which Congress’s expression of its intent is even more strongly articulated because it bars “a defense that the accused reasonable believed that the child had attained the age of 12 years.”⁶³ With such clear statutory language, reading a mistake of fact defense into Article 120b for offenses involving victims under 12 years of age is a decision for policymakers, not this Court.⁶⁴ As such, we find no error in the military judge’s decision to prohibit Appellant from raising a mistake of fact as to the victim’s age in defense of the charge under Article 120b.

B. The Military Judge did not Abuse her Discretion by Accepting Appellant’s Guilty Plea.

We review a military judge’s decision to accept a guilty plea for an abuse of discretion.⁶⁵ It is an abuse of discretion for a military judge to accept a guilty plea if the acceptance is based on an erroneous view of the law.⁶⁶ A reviewing appellate court may only reject a guilty plea if there is a substantial basis in law or fact

⁶² *United States v. Armao*, No. 202200109, 2023 CCA LEXIS 483, * 15 (N-M. Ct. Crim. App. Nov. 17, 2023) (unpublished) (citing *Staples*, 511 U.S. at 606).

⁶³ 10 U.S.C. § 920b(d)(1).

⁶⁴ *United States v. Wilson*, 66 M.J. 39, 43 (C.A.A.F. 2008).

⁶⁵ *United States v. Hiser*, 82 M.J. 60, 64 (C.A.A.F. 2022).

⁶⁶ *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

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to question the plea.⁶⁷ We review questions of law arising from guilty pleas de novo.⁶⁸

Appellant argues that the military judge should have rejected his guilty plea because at the time of the offense, Appellant did not believe J.R. was a child and that he “therefore lacked the requisite criminal intent for a finding of guilty on this charge.”⁶⁹ We disagree and conclude that it need not have been proven that Appellant knew the age of the victim at the time he committed offense. Moreover, as discussed *supra*, Appellant was properly prohibited from raising a mistake of fact defense as to J.R.’s age because she was under 12 years old. Finally, Appellant’s guilty plea to an offense under Article 120b was provident, as discussed below.

As the military judge explained, the elements for sexual abuse of a child, in violation of Article 120b included: (1) that on or about March 2021, at or near Yokosuka, Japan, Appellant committed a lewd act upon J.R. by intentionally exposing his genitalia to J.R. via communication technology; (2) that Appellant committed the lewd act with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; and (3) that at the time of the lewd act, J.R. was a child, meaning that she had not attained the age of 16 years.⁷⁰ Absent

⁶⁷ *Inabinette*, 66 M.J. at 322 (C.A.A.F. 2008) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

⁶⁸ *Id.*

⁶⁹ Appellant’s brief at 21.

⁷⁰ R. at 203-04.

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from those elements is a requirement that it be proven that Appellant “knew the age” of J.R. while committing the offense.⁷¹

Regarding evidence to support the above elements, Appellant entered into a stipulation of fact on 1 December 2023, which the military judge admitted into the record.⁷² In the stipulation of fact, Appellant admitted that he intentionally sent J.R. “photos of [his] exposed penis.”⁷³ He also admitted in the stipulation of fact that he “sent her videos of [his] exposed penis while [he] masturbated.”⁷⁴ Appellant confirmed that he “sent both the pictures and videos of [his] exposed penis with the intent to gratify [his] sexual desire.”⁷⁵ As to J.R.’s age, Appellant stated in the stipulation of fact that he was “now aware that in March 2021, J.R. was seven years old and was thus a child under the age of 16 years.”⁷⁶

During the providence inquiry, the military judge explained the elements and defined key terms related to the offense.⁷⁷ Appellant admitted that the elements of the offense as explained by the military judge

⁷¹ 10 U.S.C. § 920b(d)(1).

⁷² Pros. Ex. 1; R. at 201 (admitting the stipulation of fact into evidence).

⁷³ Pros. Ex. 1 at para. 6.

⁷⁴ Pros. Ex. 1 at para. 6.

⁷⁵ Pros. Ex. 1 at para. 6.

⁷⁶ Pros. Ex. 1 at para. 8.

⁷⁷ R. at 202-04.

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accurately described what he did.⁷⁸ When asked to describe his offense in his own words, Appellant stated, “I sent pictures and videos to a minor to sexually gratify myself.”⁷⁹ Appellant also acknowledged that he subsequently learned that J.R. was a seven-year-old child at the time he committed the offense.⁸⁰

The factual circumstances as revealed by Appellant through his stipulation of fact and statements under oath during the providence inquiry “objectively support” the guilty plea.⁸¹ Moreover, the contents of the stipulation of fact and the providence inquiry provide a sufficient factual basis to establish the elements of sexual abuse of a child, in violation of Article 120b. Furthermore, because Appellant himself conceded that J.R. had not attained the age of 12 years,⁸² the defense of mistake of fact as to her age was not available.⁸³ Therefore, we find that the military judge did not abuse her discretion in accepting Appellant’s guilty plea.

⁷⁸ R. at 204.

⁷⁹ R. at 205.

⁸⁰ R. at 212-13, 218.

⁸¹ *See United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (CMA 1980)).

⁸² Pros. Ex. 1 at para. 8; R. at 212-13, 218.

⁸³ 10 U.S.C. § 920b(d)(1).

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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.⁸⁴

The findings and sentence are **AFFIRMED**.



FOR THE COURT:

Mark K. Jamison

MARK K. JAMISON
Clerk of Court

⁸⁴ Articles 59 & 66, UCMJ, 10 U.S.C. §§ 859, 866.

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**Appendix C — Ruling on Government Motion
In Limine Regarding Mistake of Fact Defense
for Article 120B, UCMJ (December 4, 2023)**

UNITED STATES NAVY
NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES	) RULING ON
	) GOVERNMENT
v.	) MOTION IN LIMINE
	) REGARDING
JAMAR M. DAVIS	) MISTAKE OF FACT
ABHAN/E-3 USN	) DEFENSE FOR
	) ARTICLE 120B UCMJ
	)
	) 4 DECEMBER 2023

1. Nature of the Motion

On 28 July 2023, the Government moved this Court pursuant to Rule for Courts-Martial (R.C.M.) 905 and Article 120b, Uniform Code of Military

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Justice (UCMJ) to issue an opinion that mistake of fact is not a defense to specifications 1 and 2 of Charge I under Article 120b when the alleged victim was under 12 years of age. (AE IV). The Defense submitted a response in opposition on 11 August 2023. (AE XVIII). The Defense argues that mistake of fact as to age should be applicable in this case since there is no evidence that the accused knew the alleged victim was under 12 years of age at the time of the offense.

The Court held an Article 39(a) hearing on 18 August 2023, where the Government and Defense presented additional evidence and oral argument on this case. The Court considered all applicable evidence and law and **GRANTED** the Government's motion in an email dated 26 November 2023. Below is the complete ruling.

2. Issue

a. Is the mistake of fact defense available to the Defense when the Accused is charged with two specifications of 120b, UCMJ, sexual abuse of a child involving indecent exposure and indecent communication, and the Government has presented evidence that the alleged victim was 7 years old at the time of the offense?

3. Findings of Fact

In reaching its findings and conclusions, the Court considered all legal and competent evidence presented by the parties and the reasonable inferences to be drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact:

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a. ABRAN Davis is charged with two specifications of violating Article 120b, UCMJ, sexual abuse of a child, and two specifications of violating Article 134, UCMJ, child pornography. All specifications are alleged to involve J.R., a seven-year-old girl, as the complaining witness. The violations of Article 120b are for sexual abuse of a child involving indecent exposure and indecent communication. The violations of Article 134 are for receiving and producing child pornography. Charges were referred to a general court-martial on 27 April 2023.

b. In March 2021, J.R. was seven-years-old. In early March, J.R. used her great-grandmother's phone and randomly found the Accused, ABRAN Davis, on Snapchat. J.R. added ABRAN Davis using the "random friend request" feature on Snapchat, and ABRAN Davis accepted the request.

c. Upon becoming Snapchat "friends," J.R. initially attempted to call ABRAN Davis through the application, but he declined the call. She messaged him telling him that she wanted to be friends and to talk to him, but he told her that he could not because he was at work.

d. J.R. and ABRAN Davis began exchanging messages. They messaged on multiple occasions in March 2021. J.R. never told ABRAN Davis her age.

e. Both J.R. and ABRAN Davis stated during their interviews that ABRAN Davis requested nude images of J.R.'s genitals and that J.R. sent the images.

f. ABRAN Davis also requested that J.R. send

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him videos. ABRAN Davis estimated that he received three videos of J.R. digitally penetrating her vagina.

g. J.R. was interviewed by a child forensic interviewer in April 2021, and J.R. said she was seven-years-old. J.R. and ABRAN Davis both stated during their interviews that ABRAN Davis sent J.R. an image of his unclothed penis. J.R.'s mother, Ms. Myleena Senciros-Perez, also stated that she witnessed J.R. looking at an image of an adult male's unclothed penis on Snapchat, and that J.R. was seven-years-old at the time this took place.

Remaining facts necessary to resolve the motion are included within the analysis and discussion and incorporated herein.

4. Principles of Law

“In determining the mens rea applicable to an offense, we must first discern whether one is stated in the text, or failing that, whether Congress impliedly intended a particular mens rea.” United States v. McDonald, 78 M.J. 376, 378(C.A.A.F. 2019). Generally, the analysis as to whether a mistake of fact defense is available turns on the question whether a mistake with respect to the fact in question negates a required mental state essential to the crime charged. United States v. Wilson. 66 M.J. 39, 40-41 (C.A.A.F. 2008) (citing Wayne R. LeFave, *Substantive Criminal Law* § 5.6 (2d ed. 2003)). The answer to that question, in turn, is a matter of statutory construction, and, when necessary, an “inference of the intent of Congress.” Wilson at 40. (quoting Staples v. United States. 511 U.S. 600, 605 (1994) (remaining citation

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omitted).

“As in all statutory construction cases, we begin with the language of the statute.” McDonald at 379. Even where the statute does not require mens rea with respect to a particular fact, whether expressly or impliedly, the legislature or the executive may, as a matter of policy, explicitly add a mistake of fact defense. *See* Article 120, UCMJ; R.C.M. 916(j)(2) (providing a mistake of fact as to age defense when the sexual conduct involves a person at least twelve, but less than sixteen, years old). Id. Even though the government need not prove any mens rea with respect to a particular fact essential to the crime charged, a mistake of fact defense may be created by the appropriate policymaker. Id. at 41.

Sexual abuse of a child in violation of Article 120b, UCMJ provides that “Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.” 10 U.S.C.S. § 920b (LexisNexis, Lexis Advance through Public Law 118-22, approved November 17, 2023). The statute goes on to say regarding the age of the child:

(1) UNDER 12 YEARS.- In a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act. It is not a defense that the accused reasonably believed that the child had attained the age of 12 years. Id.

The statute continues to state:

(2) UNDER 16 YEARS.- In a prosecution under

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this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years. Id.

“The Supreme Court has noted exceptions to the common law assumption otherwise arguing in favor of mens rea.” Wilson, at 42. “Most often, the Supreme Court has determined that when the offense is deemed to be one directed at protecting the “public welfare” no mens rea is required. Id. (see United States v. Freed, 401 U.S. 601, 607 (1971)). The Supreme Court has specifically noted that the age of children in sexual offenses involving children is a “public welfare offense” that does not require a mens rea. Id. at 43. CAAF therefore takes the position that creating a defense in sexual offenses involving children is a matter for policymakers and not the courts. Id.

Most recently on 17 November 2023, in an unpublished but persuasive Navy Marine Corps Court of Criminal Appeals (NMCCA) case United States v. Armao, No. 202200109, 2023 CCA LEXIS 483 (N-M Ct. Crim. App. Nov. 17, 2023), the NMCCA found that Article 120b, UCMJ contains an express “indication of congressional intent” in the plain text of the statute regarding the child's age, in compliance with Supreme Court requirements. United States v. Armao, NMCCA No. 202200109 (citing United States v. Staples, 511

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U.S. 600,606 (1994). NMCCA stated in Armao that, “The CAAF, as well as the Supreme Court, has recognized that—although generally disfavored—strict liability offenses are proper where Congress expresses its intent that an offense be treated as such.” Id. NMCCA found that 120b, UCMJ does in fact contain a clear expression of congressional intent that the offense be a strict liability offense (absent a reasonable mistake of fact as to the child's age) when the child is between 12-years-old and 16-years-old. Id. Using this same logic, when a child is under the age of 12-years-old, Article 120b is still a strict liability offense, however here Congress goes further and specifically does NOT allow for a mistake of fact as to age.

5. Analysis and Conclusions of Law

The plain reading of the statute indicates that Congress was clear, “It is not a defense that the accused reasonably believed that the child had attained the age of 12 years,” when the age of the child is under 12 years. 10 U.S.C.S. § 920b(d)(1).

Congress's intent is made even clearer when contrasting 10 U.S.C.S. § 920b(d)(1) and 10 U.S.C.S. § 920b(d)(2). In 10 U.S.C.S. § 920b(d)(2) Congress states, “but it is a defense in a prosecution under subsection... (c) (sexual abuse of a child), which the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.” Congress is crystal clear in its intent that there may be a mistake of fact defense available to the Accused when a child is under 16 years (/the child had in fact attained at least the age of 12 years, and that there is no defense

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available to an accused that reasonably believed that the child had attained the age of 12 years when the child is actually under 12-years-old.

The Defense wants this Court to consider the unpublished Air Force Court of Criminal Appeals (AFCCA) case of United States v. McInnis, 2020 CCA LEXIS 194, where the AFCCA assumed without deciding that mistake of fact as to identity defense is different than a mistake of fact as to age defense, and analyzed that case as to whether the accused had mistaken the identity of a 7-year-old girl for a 38-year-old woman. United States v. McInnis, 2020 CCA LEXIS 194, *16. In that case the accused presented facts that when he mistakenly went into the wrong room on a Carnival Cruise ship and touched the buttocks of a 7-year-old girl he thought he was in a different room and that he was touching the buttocks of a 38-year-old woman he wanted to meet. AFFCA analyzed this case under a question of mistaken identity and not a mistake of fact as to age, which is explicitly prohibited by the Article 120b statute. AFFCA found that even given these facts the accused's mistake of fact was not reasonable as to the mistaken identity.

In this case the Defense is not arguing that the ABRAN Davis was mistaken as to the identity of J.R., but that he was mistaken as to the age of J.R., which Congress has explicitly legislated is not a defense when the child is under the age of 12-years-old. In this case both parties concede that J.R. was 7-years-old at the time of the charged Article 120b offenses. There is also evidence that the Government has submitted that J.R. was 7-years-old in the form of statements from

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J.R., her mother, and her aunt. Also the photographs and child forensic interview of J.R. corroborates J.R. and her family's statements that she was 7-years-old at the time of the alleged offenses. Therefore because both sides have conceded, and there has been evidence presented, that the alleged child victim in specifications 1 and 2 of Charge I is under the age of 12-years-old, there is no mistake of fact defense as to age of J.R. available to ABHAN Davis.

6. Ruling

The Government's motion in limine regarding the prohibition of the mistake of fact defense for Article 120b, UCMJ in this case is **GRANTED**.

SO ORDERED this 4th day of December, 2023.

Digital Signature
RACHEL TREST
CDR, JAGC, USN

**Appendix D — Transcript of Oral Argument on
Government’s Motion In Limine to Preclude
Petitioner from Raising a Mistake of Fact
Defense at Trial (August 18, 2023)**

TC: So for the motion in limine, this is just to bar defense from requesting a mistake-of-fact defense as to the 120b, Charge I and both of its specifications. We base our argument based off three different reasonings:

The first is just the reading of the statute under Article 120 and R.C.M. 916, a mistake-of-fact defense is not available when the child victim is under the age of 12 years old. In March of 2021, when [REDACTED] and the accused were exchanging messages, explicit photos and the videos, she was 7 years old. The plain language makes--of the statute makes that fact clear that mistake of fact is not an optional defense; in fact, under 120b, subsection (d), this is the verbatim language: “In a prosecution under Article 120b, the government need not be proven that the accused knew the age of the other person engaging in sexual acts or the lewd acts. It is not a defense that the accused reasonably believed that the child attained the age of 12 years old.”

Beyond just the plain reading, Your Honor, we can also look to Congress' intent of 120b was created with the 2012 edition of the MCM. In the 2012 edition, Congress did add that a lewd act could be committed via any communication or technological communications, and it also contains the barring of a mistake-of-fact defense for a child that has not yet attained 12 years old. We are now on the third iteration since the 2012, 2016, 2019; both have maintained that mistake-of-fact defense is not

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applicable when the child has not yet reached the age of 12. If Congress wanted to create that caveat and allow the mistake-of-fact defense, they easily could have changed it over the last three; they have chosen not to.

And then finally, Your Honor, just briefly to touch on some of the cases that defense cited in their response to the motion, primarily looking at the U.S. v. Johnson, which is 57 MJ 563. The first thing I want to point out is that the victim in that case was 14 years old so, therefore, the statute was applicable. The government does acknowledge that if [J.R.] had attained the age of 12, then we'd be dealing with a different perspective here, but she had not.

And then just looking at what really Johnson discusses, Johnson's more discussing indecency because it was an indecent-exposure case, and that really delved into UMC, and then that's where defense pulled the language discussing indecency and how age could be a factor of the indecency. We don't believe that that's actually applicable in this analysis. Johnson's applicable to the UMC motion, but it doesn't really provide a lot of guidance to the court, and that's the same thing, Johnson bases its indecency language off Strode, which is 43 MJ 29, and in that case, the victim in Strode was 13. So once again, mistake of fact statutorily would be allowed.

MJ: You don't think that the accused had to know that the—he's talking to a 7-year-old?

TC: For the 120b, no, Your Honor.

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MJ: Just what about just--well, I'm going to hear from defense, and then we'll come back. Defense.

CDC: Yes, Your Honor. Obviously, we disagree. I--I think the nature--starting in reverse, the nature of the indecency itself lends itself to an analysis of whether or not the individual in question was a minor. There is a case that I did not cite as well called United States versus McInnis, it is an Air Force CCA case, and if you look at--I'm sorry, the cite to that is--I apologize--2020 CCA LEXIS 194, I don't have the MJ cite offhand, I can try and track that down, but again that's 2020 CCA LEXIS, 194. And the reason I'm referencing that case is, here we have an analysis--and we even discuss it in paragraph 13 of our argument--that they've never met--there was a question as to the--you know, knowing the identity of the individual. McInnis talks about mistake of fact and mistake of identity as being potentially different in the sense of knowing who you're involved with.

There's clear testimony from the accused as to a motion in limine that there was potential filters used, so I analogize this to "I don't know who I'm talking to if they're wearing a mask," and I think this is vastly different, and McInnis deals with a situation like that where he walks in and is touching somebody who he thinks is his girlfriend, but it was a minor; in this case, I believe it was under the age of 13.

So when you're dealing with a situation where identity of the individual over the internet with a real question as to whether or not the accused saw any of the images and could reasonably

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form an opinion as to the age, this is a rather unique scenario. This is not a touching offense, this is not--obviously there's no contact, and the question as to what images he may have seen and whether they were filtered in some form or fashion, I think, you know, while he's not saying he thought he was Jane instead of Sally, he clearly didn't think it was Sally, so it--you know, the identity of the individual in a sense of--we identify individuals by age, by sex, by race, by a number of different factors. So in this case, I think it's a--it would be a lack of due process for him to be able to argue the idea that he knew or did not realize that this child was the age that they're purporting her to be at the time.

MJ: Maybe you actually need a mens rea to commit the crime.

CDC: Yes, ma'am.

MJ: And so, government, what's your response to that? I mean here we're not talking about seeing who she was--I mean is there any evidence that she had actually said what her age was?

TC: No, Your Honor, she never told him her age.

MJ: Okay. So we're--the defense's point is that there's filters being used, that--I'm not saying there's not evidence to rebut that, but I'm just saying that there is some evidence also that a filter is being used so she's not just not fully clear on what her identity is, and that she's in fact using Snapchat, which is--she's not even supposed to be on, but clearly she had access to it through her grandmother or great-grandmother's phone, so why

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do you not think those facts should come in and that they should be able to argue that?

TC: Yes, Your Honor, I guess to--first to address--I'll take your last question and then address the first. Why they shouldn't come in is because it's statutorily not allowed. The mens rea is the intentional exposure, it's the intentional, you deliberately--in this case--send a video of his penis to someone else, that is--

MJ: So I mean you did--it is charged to under the age of 16 years, right?

TC: Yes, Your Honor, yes, because that is what--that is based off the electronic benchbook, the standard--

MJ: Yeah, but I mean you--that's your notice, right? You gave notice of it was to someone under the age of 16 years.

TC: Yes, Your Honor.

MJ: So--continue. So there is some age-variation here, but--I mean I know your argument is that if they're under 7 that you shouldn't have to, but still, continue.

TC: Okay, so that--just where you--that's just taken off the point where you asked there has to be a mens rea element. We agree--

MJ: Yes.

TC: --it's the intentional--

MJ: So he has to know it's under 16, so that does--that is something you have to prove.

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TC: Yes, Your Honor, but as for the mistake of fact, she had not yet--because--or--they cannot raise the mistake of fact that she had not attained--or that...

MJ: So...

TC: Yes, we will need to prove that she had not attained 18--or 16, but they will not be able to raise the mistake-of-fact defense.

MJ: So why not--if they had--if you have to show that--so if they say--okay, so you're saying that they can't raise mistake of fact that she was--what age, if she was 16?

TC: That he had a reasonable mistake of fact that she was 16, yes, Your Honor.

MJ: Why not? If--if you allege that she had not--has to be not just a lewd act upon J.R., a child who had not attained the age of 16 years, so you're saying if he doesn't know that she'd have to--she was not the age of 16 years? So if--would it be, though, criminal if she was not a child had not attained the age of 16 years? If she was 16--sorry, let me just ask it more clearly. If she was 16, is this a crime?

TC: No, Your Honor.

MJ: Okay. So part of the crime is that she has to be under 16. Your argument is that she didn't have to know--he didn't have to know she was under 16.

TC: Yes, Your Honor.

MJ: So, really, if he--if--in reality she was 13, then he could argue that "I didn't know," but you're

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saying because she's under 12, that you don't have to—

TC: Yes, Your Honor.

MJ: --because it's so obvious. But really, is it [laughing] is my question.

TC: So no--no, it--

MJ: I understand that if, like, you're texting a child, you know, there's not a lot of confusion--we are saying at least of a prepubescent child, right? A prepubescent should be obvious. I mean that's generally--is that what your understanding? What's the purpose of the statute?

TC: Yes, Your Honor, yes—

MJ: Okay.

TC: --agreed, and agree that in a touching situation, it would be more obvious; however, Congress has included "via any technology" so they did perceive these circumstances where adult military members would be conversing and possibly sending explicit images to minors; and then whether--you know, whether this was clear or not, in his initial reporting of the incident, the accused admitted that he got a picture of her face, now we have evidence that it was possibly half her face and and a still face, but then he also said that he got pictures of a buttocks and a vagina. Your Honor, as we mentioned in our motion to suppress, during the court-martial, we do intend to admit photos that were found on J.R.'s great-grandmother's phone that match those descriptions. Face photos, which you have actually received, that was our addendum

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with the enclosures, but then there's also photos of her buttocks and her vagina with no sexual development. So whether it would be clear or not, the government's stance is yes--

MJ: Are you putting on any experts about the tanner staging.

TC: We--the government does not intend to for the tanner staging, no, Your Honor.

MJ: You're just going to argue that she's definitely prepubescent?

TC: Yes, Your Honor.

MJ: And it's not filtered in any way, these pictures?

TC: No, they are not, Your Honor.

MJ: Okay, but if--

TC: And again, their circumstantial, Your Honor, because we cannot prove that those were for sure what the accused received; however, matching his description to NCIS that he got a picture of her photo, and then buttocks and vagina, those are what were discovered on the phone.

MJ: Okay. And what is your response to that, Mr. Crisp, of the genitalia pictures, if it's clear that it's prepubescent, so under the age of--I mean under the age of 12?

CDC: Going back to the same issue that Lieutenant Luncheon mentioned in a number of these issues as well, that a factfinder question doesn't go to the admissibility of the defense, so then it just goes to whether or not the defense is

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reasonable. If it's clear to a panel member's mind that this child is 7, 8, 9, 10, whatever, then it's an unreasonable belief that was held by the accused. It doesn't preclude us from arguing that we think this doesn't look like a 7-year-old's vagina or a 7-year-old's buttock based on the angle, based on the coloring. You know, not getting into it, I don't know if Your Honor has seen the photos yet, but a very colorable argument can be made as to certain of the images based on how close they are, the angle in which they're taken that you're not getting a full context, in this case a full context of a 7-year-old, so, you know, I disagree with the government that Congress has foreseen this based on one communication. We know that statutes can't be written to foresee every potential situation and the evolution of technology so I would disagree that that is dispositive to this particular issue based on the idea that there--there is not a clear understanding of the child's age based on the surrounding facts.

I also failed to bring up the fact that there were 10,000 chats, 10,000 points which the enclosure that I referenced also leads one to believe that a 7-year-old--you know, my client's chat number was 3,000, and he is a 25-year-old male, so to expect a 7-year-old child to have that many just goes--again, the factor is in our favor in terms of the unreasonableness of the presumption that the government wants to apply in a strict-liability context.

And I would also--before we move on to that, the one thing that concerns me as well is I think the

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government is--they have a bleed-over on the 404(b) motion, but they waived the issue of age being a consideration, and reasons why they're positing the reason to bring in certain of this evidence, so I think there's an implied argument there that the government recognizes that this is a reasonable argument to make, even in the motion that they filed under 404(b), so I'll table that, but I just--I do want to bring that to the court's attention. Certainly the government wouldn't have brought that up if they didn't think this was a rational concern or trying to use this as a basis for admissibility in other pieces of evidence.

MJ: I understand your argument. Government, what--what about your thoughts about Snapchat, the platform on which all this occurred? The fact that--I mean is it reasonable to believe a 7-year-old would be on there when Snapchat says "if we know you're 7, we're going to delete your account"--not 7, if under 13, that's what it says, right? It says 13 and up you can create an account; obviously, I think you probably have to have your parents' permission or whatever, but they do address 13 as sort of their cutoff. So is it reasonable to think that a 7-year-old--I mean, and just plainly, 7 is young to—

TC: Yes, Your Honor.

MJ: --to be on Snapchat. I mean that's young, period. So is it reasonable that an average person--I mean that seems to be an issue that why is that not fair for defense to at least--I mean why should the government get that windfall of 7 when we are in technology--I think defense brings up some valid points. We're in a--this is not like he knew who the

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identity; this is technology with filters. In this day and age you can do a lot--again, we don't have the exact images. We have some circumstantial evidence, but that could be argued either way, and so just because it turned out that she is 7, that seems a bit shocking, considering that she's not even supposed to be on that platform, but she got on the platform, so--he didn't help her get on the platform. So again, why shouldn't he at least have--if the members don't buy it, that's fine, they can say "we don't find that there was a mistake," then why should that issue not be left to the members to decide?

TC: Yes, Your Honor, so first to address the Snapchat portion. The government agrees that 7 years old is very young to be on, you know, phones and social media; however, I don't think the terms of the agreement to, you know, the license agreement really should carry the day how many people just click, click, click to then access the app. I have Snapchat. I did not know that I have at one point agreed that I was over 13 years old. I don't--I just don't think that's common knowledge that--that 13 is the cutoff.

MJ: Even to navigate apps and to find Snapchat and to have 10,000 snaps, I mean that is a lot for a 7-year-old to even know what to do--how to do all those things. I'm not saying it's crazy; I mean the generation these days, they're very technologically advanced. I'm just saying that--I mean that is still--well, there are some shocking facts that why not allow the members to be able to--let the accused be able to put on a defense like it's his 6th Amendment

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right, and to at least be able to evaluate those facts so that if they decide that he wasn't faking--I mean he still has to--I mean because if he--if this girl was--if J.R. was 12--under 12, correct? That's the--

TC: Had not attained the age of 12--

MJ: Yeah--

TC: --it's really a negative though.

MJ: --so 12 or 13 or 14, this--then they could argue mistake: is that your understanding?

TC: Yes.

MJ: So it just seems like an arbitrary age when technology--and my job is--I mean obviously I care what Congress thinks, right, but I also what the Constitution says, and that he has a fair trial, and that he's able to put on a defense under the 6th amendment, and that when we have technology that has oftentimes outpaced the statutes, and we're charging him with a crime and--and he has to know at least she has attained the age of 16 years, even if the government proves--I mean, obviously, it's still a lot of--it's still going to be hard for the defense to rebut that she's 7, but shouldn't they have at least a chance to present evidence and then be able to argue mistake--if evidence evolves at trial--to be able to argue that defense when--when we have technology, when we have a platform that a 7-year-old wouldn't be on and when he doesn't know the identity of this child?

TC: Yes, Your Honor, I--well, just to kind of go back to what I brought up initially, 120b was enumerated in 2012. Statute--I know from personal knowledge that Snapchat was being used around

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that time period. We are now 11 years later, and Congress still includes that the lewd act can be committed--this us under subsection--this is definitions, subsection 5(b) and (c), it still allows for the--communications via technology, and then it still maintains that under 12, it need not be proven that the accused knew that the child had not attained the age of 16. So we--we're just bringing--we--we, you know, we're told constantly in the docketing of motions in limine to lay out the battleground for—

MJ: No, the court appreciates this--

TC: So we just wanted to bring it up. We believe that under the plain reading that the mistake-of-fact defense is not allowed, that there's really no reason to believe that a caveat has been created, even--despite the technology being around, but understood the court's concerns regarding some of the surrounding circumstances. The government's stance is just that's not an actual defense.

MJ: Okay. I understand both--Mr. Crisp, did you want to say anything else on the matter?

CDC: I don't think--yes., I'm sorry. Taking the government's argument to its logical extreme, if you had a situation where a 7-, 8-, 9-, 10-year-old was portraying herself and--and using images that were not her but of an adult female, and disguising her voice, and my client was soliciting her in some fashion and exposing himself to her in some fashion, in that scenario, the government's argument would say that he would not be eligible for this defense, and that is not reasonable, and that is not what I believe Congress had intended in a situation like this

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where it is truly a mixed question of identity and age.
That's it.

MJ: Okay, thank you. Do you want to reply to that?

TC: Just momentarily.

MJ: Sure.

TC: Understood about the extreme, but in that scenario we would have photos of an adult woman being exchanged; here we have voice messages that we--we do have thousands of voice messages from J.R., and then we also know that there were images sent from a 7-year-old.

MJ: Was that text--I remember going through and I can go back and look, but something about "I have to go to school" or something, but "I miss" or "I love you?"

TC: Yes, Your Honor.

MJ: I mean that's--

TC: And we have voice messages.

MJ: Those are voice messages?

TC: Those--no, what you read was a screenshot of it because--I am not good at technology, but I just wanted to show you the screenshot, but we do--those play, and they were able to--

MJ: They weren't just written; they were actual--

TC: There are both.

MJ: Okay. And I want to listen--I mean do we have the audio?

TC: Yeah, we'll--we can supplement, Your Honor.

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MJ: Okay. Because when I'm reading it--I mean, look, I have kids around this age, and I'm, like, this is pretty well sentence structure for a 7-year-old, too. I mean, so there are things definitely that--now again I haven't heard it so I don't know, but there are just things that give me pause as somebody who is familiar with that age group of--I'm not saying that ABHAN Davis is familiar with that age group, but that a reasonable person may not think--I mean 7 doesn't even come to mind when you're on Snapchat when they're conversing that way and they're sending those things, so I--I do have an issue. I'm going to look at the case law and look at the--the specification, so--but if you want to supplement, that's helpful.

**Appendix E — Transcript of Petitioner's Guilty
Plea to Committing a Lewd Act with a Minor
(December 11, 2023)**

MJ: Okay. Now please look at Specification 1 of Charge I. There you've pled guilty to sexual abuse of a child involving indecent exposure, a violation of Article 120b of the Uniform Code of Military Justice. Now the elements of that offense are:

That on or about March 2021, at or near Yokosuka, Japan, you committed a lewd act upon [J. R.]--and hereinafter, we're going to refer to her as J.R.-- by intentionally exposing your genitalia to J.R. via communication technology;

Two, that at the time, J.R. had not attained the age of 16 years; and

Three, that you did so with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

Now I'm going to give you some definitions.

A "lewd act" means intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person.

"Indecent" is that 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.

A "child" means any person who has not attained the age of 16 years. The prosecution is not

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required to prove that you knew the age of J.R. at the time of the alleged lewd act occurred.

Now do you understand the elements and definitions as I have read them to you?

ACC [Accused]: Yes, Your Honor.

MJ: Do you have any questions about any of them?

ACC: No, Your Honor.

MJ: Do you understand that your plea of guilty admits that these elements accurately describe what you did?

ACC: Yes, Your Honor.

MJ: Do you believe and admit that the elements and definitions taken together correctly describe what you did?

ACC: Yes, Your Honor.

MJ: Now tell me in your own words--and you may use Prosecution Exhibit 1 to guide you and you also may confer with your counsel if you--if it's necessary, but tell me why you believe you are guilty of this offense.

ACC: I'm guilty because I actually sent a picture to a minor who I believe later that was 7 years old. I sent picture to--pictures and video to gratify myself.

MJ: I'm sorry, could you repeat that last part?

ACC: I sent pictures and videos to a minor to sexually gratify myself.

MJ: To sexually gratify yourself.

ACC: Yes, Your Honor.

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MJ: Okay. So I'm just to go into a little bit more detail on that with you. So sometime on or about March 2021, did you engage in a lewd act with J.R.?

ACC: Yes, Your Honor.

MJ: Okay. And where did this occur?

ACC: In my barracks room, Your Honor.

MJ: In your barracks room? Was that onboard where? Was it in Yokosuka or onboard the RONALD REAGAN?

ACC: It was in Yokosuka base.

MJ: Barracks room onboard the--is it Naval Station Yokosuka or what's the name of the naval base there?

ACC: I believe so, Your Honor.

MJ: Okay. And that's Yokosuka, Japan?

ACC: Yokosuka, Japan, yes, Your Honor.

MJ: Who is J.R.?

ACC: J.R. is a woman that is from Texas.

MJ: It's a woman?

ACC: Is a little girl from Texas.

MJ: Okay. And how do you know who J.R. was?

ACC: Over Snapchat, Your Honor.

MJ: And what is Snapchat?

ACC: Snapchat is a communication app.

MJ: An app? It's like an application?

ACC: Yes, Your Honor.

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MJ: Okay. Communication application, and is it-- what device did you use to engage in Snapchat communication?

ACC: On my iPhone 11, Your Honor.

MJ: Okay. So how did you find J.R. on the Snapchat communication?

ACC: I found her--well, she found me when she added me in a friend request, and I accepted, Your Honor.

MJ: So you didn't know her before that?

ACC: No, Your Honor.

MJ: And did--and did she introduce herself with that name or what--do you remember what the name was?

ACC: No, Your Honor, she didn't introduce herself like that.

MJ: Do you remember what name she used? And you can use Prosecution Exhibit 1 if that assists you.

ACC: [Referring to Prosecution Exhibit 1.] Her username was Nessa5151, Your Honor.

MJ: Okay. And later you found out that she was J.R.?

ACC: Yes, Your Honor.

MJ: Okay. And how did you find that out?

ACC: [Conferring with counsel.] Discovery from receiving materials from the government, Your Honor.

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MJ: Okay. Did you have any idea who--what her name was when you were talking to NCIS or did they not use her name?

ACC: No, Your Honor, I don't believe I remember-

MJ: Did you talk to her mom at all?

ACC: --ever seeing her name. No, Your Honor.

MJ: Okay. So it was through discovery that you received through your counsel that you found out her name was J.R.?

ACC: Yes, Your Honor.

MJ: Okay. So it says, also, in Prosecution Exhibit 1, at the time, you were--you were stationed on the REAGAN, but then you had a barracks room at the time in Yokosuka?

ACC: Yes, Your Honor.

MJ: Okay. Did you communicate with her on the REAGAN and in your barracks room or just in the barracks room?

ACC: Just in the barracks room, Your Honor.

MJ: Okay. Were you ever married to J.R.?

ACC: No, Your Honor.

MJ: So I'm going to ask you to describe what the lewd act was. Do you need reread you the definition of lewd act?

ACC: No, Your Honor.

MJ: Okay, so what in your mind was the lewd act that you're guilty of?

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ACC: Sending pictures and videos of my exposed penis with an intent to gratify and pleasure myself.

MJ: With an intent to--you said gratify yourself?

ACC: Yes, Your Honor.

MJ: And are you talking about sexually gratify yourself?

ACC: Yes, Your Honor.

MJ: The pictures you sent, was it an erect exposed penis?

ACC: Yes, Your Honor.

MJ: Okay. And it was--and your intent, then, was to sexually gratify yourself at that time when you sent those pictures?

ACC: Yes, Your Honor.

MJ: Okay. So how did you do this? Did you intentionally decide to take your--your phone out, and what did you take a picture with? Was it your phone?

ACC: [Conferring with counsel.] Yes, Your Honor, I used the Snapchat application to record myself sexually pleasuring myself.

MJ: You used the Snapchat application to--I'm sorry, I'm--it's hard for me to hear, that's why I'm repeating it to you. So you used the Snapchat application to record yourself--and what was the last part you said?

ACC: Yes, Your Honor, I used the Snapchat video to record myself and send it, Your Honor.

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MJ: Okay. And when you say record yourself, what were you doing in the recording?

ACC: Masturbating, Your Honor.

MJ: Okay. And that was with your exposed penis?

ACC: Yes, Your Honor.

MJ: And so--do do you record yourself and then send it, or is it live-streamed, how is it done?

ACC: I recorded myself and then then sent it.

MJ: Okay. So when you went to send it, then, you knew exactly what you were sending to--at the time it Mar_Mar69?

ACC: Yes, Your Honor.

MJ: No, I'm sorry, that was you. You're sending it from that, but you were sending it to Nessa5151?

ACC: Yes, Your Honor.

MJ: Okay. And your intention was to send it to J.R.

ACC: Yes, Your Honor, which I believed was an adult at the time.

MJ: I'm sorry, who you believed what?

ACC: Was an adult at the time.

MJ: Okay, an adult or--do you--I think you had earlier said a minor, not 7, but you had said--is that not correct?

ACC: Yes, Your Honor, but I--before, when I sent that, I thought she was an adult.

MJ: When you say adult, how old?

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ACC: Eighteen years old, Your Honor.

MJ: Okay. And why do you think she was 18 years old?

ACC: The body parts and the text messages that I received was of an adult.

MJ: The body parts? So tell me what body parts are you talking about?

ACC: The breasts and buttocks was what I believed was an adult, and I found out later from NCIS that it was a minor.

MJ: How old did you find out the minor was?

ACC: Seven years old, Your Honor.

MJ: Okay. So you thought the 7--and I mean was the image--and I don't know this, I don't know if you know this. Was the image of her body as a 7-year-old or another image she used?

ACC: [Conferring with counsel.] Can you repeat that question, ma'am?

MJ: So just to be clear, though, the images that were sent, do you believe those images are of a 7-year-old?

ACC: No, Your Honor.

MJ: Do you believe those images are of a minor?

ACC: No, Your Honor.

MJ: Do you believe those images are of a child?

ACC: No, Your Honor.

MJ: So are those images confusing with a woman?

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ACC: Yes, Your Honor.

MJ: A grown woman.

ACC: Yes, Your Honor.

MJ: Do you acknowledge that--to the investigation that the images that were sent to you were of actually J.R.?

ACC: Yes, Your Honor.

MJ: So you do acknowledge that they are of J.R., who is a minor.

ACC: [Conferring with counsel.] Yes, Your Honor.

MJ: And how do you know that?

ACC: Because of the NCIS investigation, Your Honor.

MJ: Okay. So it has been verified that the images you received are of a 7-year-old.

ACC: Yes, Your Honor.

MJ: At the time that they were sent to you.

ACC: Yes, Your Honor.

MJ: In your belief, you believed it was an adult.

ACC: Yes, Your Honor.

MJ: Okay. And you do believe after looking at the investigation and reading--well, tell me, what have you viewed from discovery that made you believe today as you're pleading guilty that J.R. is in fact 7 at the time that you sent the image of yourself to her.

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ACC: [Conferring with counsel.] Yes, Your Honor, her videos that she sent me and the transcript and documents, I believe that.

MJ: Transcripts and documents of what?

ACC: Her child interview, Your Honor.

MJ: So she did a child-forensic interview?

ACC: Yes, Your Honor.

MJ: And you recognized her in the interview?

ACC: Yes, Your Honor.

MJ: And so after viewing that interview, that also made you believe that she was in fact the same person who was J.R., or who was Nessa5151?

ACC: Yes, Your Honor.

MJ: Okay. And you agree from reviewing that interview that she was in fact a child--

ACC: Yes, Your Honor.

MJ: --as per the definition?

ACC: Yes, Your Honor.

MJ: And in fact 7 years old at the time.

ACC: Yes, Your Honor.

MJ: Okay. So you sent it with Snapchat. Would you agree Snapchat is a communication technology?

ACC: Yes, Your Honor.

MJ: Okay, and in what way? Can you just educate me on that?

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ACC: Snapchat is for communications with your friends and family throughout sending pictures, videos and text messages through the app.

MJ: Okay. And that is what you used to send the picture of your naked penis.

ACC: Yes, Your Honor.

MJ: Okay. Now do you agree that this exposure was indecent?

ACC: Yes, Your Honor.

MJ: Why?

ACC: Because it was sent to a minor, Your Honor.

MJ: Do you believe that exposing your genitals was grossly vulgar, obscene and repugnant to common propriety?

ACC: Yes, Your Honor.

MJ: And why is that?

ACC: [Conferring with counsel.] It was of a sexual nature, Your Honor.

MJ: And just knowing that she's a minor, specifically under the age of 12, so she's a young minor, what does society believe about sending adult-and how old were you at the time, by the way?

ACC: Twenty-five, Your Honor.

MJ: Twenty-five? So what does society say about adults sending pictures of their exposed genitalia to minors?

ACC: It's extremely inappropriate, Your Honor.

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MJ: Okay. Would you say that's also grossly vulgar?

ACC: Yes, Your Honor.

MJ: Okay. Was your intent at the time to arouse and gratify your sexual desire?

ACC: Yes, Your Honor.

MJ: Okay. And so explain to me how sending these images intentionally--you said you didn't think she was a child, so to an adult, arouse or gratify your sexual desire.

ACC: [Conferring with counsel.]

MJ: Okay. And you know what? My court reporter is saying that she's also having a hard time picking up your responses, so you really need to speak into your mic, please.

ACC: Yes, Your Honor.

MJ: Okay.

ACC: Could you repeat the question, Your Honor?

MJ: Sure. Explain to me how sending these images of your exposed penis intentionally to someone else aroused or gratified your sexual desire.

ACC: [Conferring with counsel.] Yes, Your Honor, when I saw the--the body, which I believed was an adult, I enjoyed the body and the shape of it, so it pleased--it pleased me.

MJ: I'm sorry, I could not hear what you just said.

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ACC: When I-- [Conferring with counsel.] When I--
-I enjoyed the feeling of masturbation during our
conversation--

MJ: Okay.

ACC: --and pleasuring myself.

MJ: And what? What was the last part?

ACC: And it was enjoyable, Your Honor.

MJ: And--and arousing, is that what you mean by
enjoyable?

ACC: Yes, Your Honor.

MJ: Okay. So were you engaged in some sexual
banter, is that what I'm hearing? And if I'm incorrect,
please correct me.

ACC: No, Your Honor.

MJ: Okay. So what's the conversation that
sexually aroused you and then you wanted to send--
were you, like, sending her an affirmation that you
were being sexually aroused by what you were talking
about?

ACC: No, Your Honor, it was mainly just images
back and forth, Your Honor.

MJ: So you found it sexually exciting to--you sent
an image of yourself--

ACC: Yes, Your Honor.

MJ: --or of the exposed penis, is that correct?

ACC: Yes, Your Honor.

MJ: And then she was sending a picture of what?

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ACC: Whatever she wanted to send, Your Honor, whether it be her chest or her videos of her twerking, Your Honor.

MJ: Okay. And was she also naked?

ACC: Yes, Your Honor.

MJ: Okay, so she was sending to you videos of her naked chest and herself--what's twerking?

ACC: Her shaking her bottom, Your Honor.

MJ: Okay. And it was an exposed bottom?

ACC: Yes, Your Honor.

MJ: And so you were sending her that, and she was sending you those images.

ACC: Yes, Your Honor.

MJ: And that exchange--how did that--that was sexually arousing to you?

ACC: Yes, Your Honor.

MJ: Okay. So do you agree and admit that that action meets the definition--and I'm really honing in on what you did, of sending the exposed penis picture to her over Snapchat. Does that meet the definition of lewd act as I previously described?

ACC: Yes, Your Honor.

MJ: And so you said at the time J.R. never told you how old she was?

ACC: No, Your Honor.

MJ: What age did you--did you think she was at the time of this exchange?

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ACC: Eighteen years old or above, Your Honor.

MJ: But do you agree that in fact J.R. was a child who had not reached the age of 16 years at the time?

ACC: Yes, Your Honor.

MJ: And do you agree that she was 7 years old at the time?

ACC: Yes, Your Honor.

MJ: And how do you know this?

ACC: Because of the information I received from NCIS.

MJ: So you said from NCIS and then also you had reviewed the--her interview?

ACC: Yes, Your Honor.

MJ: Okay. That was done not with NCIS but with a different agency?

ACC: Yes, Your Honor.

MJ: And at the time, then, she had sent you pictures of her own chest and her own buttocks that was naked, correct?

ACC: Yes, Your Honor.

MJ: And you do agree that the pictures she sent was of her body at the time.

ACC: Yes, Your Honor.

MJ: At being 7 years old.

ACC: Yes, Your Honor.

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MJ: Okay. And so you said that your intent when you committed this lewd act was just to gratify the sexual desire of yourself?

ACC: Yes, Your Honor.

MJ: Didn't have anything to do with the sexual desire of J.R.

ACC: No, Your Honor.

MJ: I'm sorry?

ACC: [Conferring with counsel.] Yes, Your Honor, I wanted to please her as well when I believed she was an adult.

MJ: Okay. So it's both the sexual desire of yourself and J.R.?

ACC: Yes, Your Honor.

MJ: But you would agree you did not intend to abuse, humiliate or harass or degrade anybody.

ACC: Yes, Your Honor.

MJ: Okay. Now do you understand that your plea of guilty admits that these elements accurately describe what you did?

ACC: Yes, Your Honor.

MJ: Do you believe and admit that the elements and definitions taken together correctly describe what you did?

ACC: Yes, Your Honor.

MJ: Do you believe and admit that you are guilty of the offense of sexual abuse of a child by indecent exposure?

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ACC: Yes, Your Honor.

MJ: Did anyone force or coerce you into committing these acts?

ACC: No, Your Honor.

MJ: Do you any legal justification or excuse to expose J.R. to you genitalia via communication technology on or about March 2021?

ACC: Yes, Your Honor.

MJ: What's your legal justification or excuse?

ACC: [Conferring with counsel.] No, Your Honor.

MJ: Okay. And why is it no?

ACC: There is no legal justification--

MJ: Okay.

ACC: --for somebody to do that, Your Honor.

MJ: Now one of the motions, and I think this is something you've preserved in your plea agreement, was that the government had filed a motion in limine that there's no mistake-of-fact defense to J.R.'s age available to the defense per the statute, 120b, which you are pleading guilty to. Do you understand that?

ACC: Yes, Your Honor.

MJ: Did you have that conversation with your counsel about just what that meant?

ACC: I did, Your Honor.

MJ: Okay. And so a legal--a mistake of somebody's age could be a legal defense, but Congress has explicitly said when the victim is under the age of 12,

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that that is not available to you. Do you agree that that is not available to you in these circumstances?

ACC: [Conferring with counsel.]

MJ: Understanding that your counsel and you are still appealing, and you're preserving your motion, but understanding, have you discussed with your counsel that you do not believe you're legally justified in sending that picture?

ACC: [Continuing to confer.]

MJ: And I'll let you discuss that with your counsel, your position on that.

ACC: [Conferring.]

MJ: Do you need a minute--

CDC [Civilian Defense Counsel]: Yes, Your Honor.

MJ: --need a recess? All right.

CDC: It could be a recess in place, Your Honor—

MJ: Okay. I mean I can give you more than in place. We've been on the record for about an hour so we need a head break. Do you need 10 minutes?

CDC: Not more than 5 minutes, Your Honor.

MJ: Not more than 5 minutes? Okay. Well, the court's in recess for 5 minutes. [The court-martial recessed at 1105, 11 December 2023.] [The court-martial was called to order at 1111, 11 December 2023.]

MJ: This court will come to order. All parties that were present when the court last recessed are again present. Do we still have the VLC connection okay?

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TC: Yes, Your Honor.

MJ: Okay. And they're remote. Okay, so my question was: do you have any legal justification or excuse to expose J.R. to your genitalia via communication technology on or about March 2021?

ACC: Yes, Your Honor.

MJ: So you said you--okay, so I understand you filed a motion. You understood my ruling, right, that there was no mistake of fact as to the age of J.R. because of the 120b statute and that she was under 12 at the time, that she was 7 years old, correct?

ACC: Yes, Your Honor.

MJ: And I do need you to speak up to make sure that the court reporter can capture your responses.

ACC: Yes, Your Honor.

MJ: So in light of my ruling, right, do you believe you have any legal justification?

ACC: While I reserve this particular issue for appeal, I recognize that at this time I had no legal justification, Your Honor.

MJ: Okay, because--in light of the court's ruling?

ACC: Yes.

MJ: Okay. Could you have avoided committing this act if you had wanted to?

ACC: Yes, Your Honor.

MJ: How?

ACC: By asking her age or blocking communication in general, Your Honor.

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MJ: Were these freely-made decisions on your part to commit this act of exposing your genitalia to J.R. over communication technology?

ACC: Can you repeat that question, Your Honor?

MJ: Were these freely-made decisions on your part?

ACC: Yes, Your Honor.

MJ: Okay. Do counsel believe any further inquiry is required?

TC: Nothing from the government, Your Honor.

CDC: No, Your Honor.

MJ: Trial Counsel, what do you calculate to be the maximum punishment authorized by law in this case based solely on the accused's guilty plea? I know sometimes I ask you other—based solely on his guilty plea of the one specification of Charge I?

TC: Yes, Your Honor: dishonorable discharge, are total forfeitures, 15 years' confinement, and reduction to the lowest pay grade. There is no mandatory minimum.

MJ: Of E-1.

TC: Yes, Your Honor.

MJ: Okay. And Defense Counsel, do you agree?

CDC: Yes, Your Honor, we agree.

MJ: Okay. ABHAN Davis, the maximum punishment authorized by law in this case based solely on your guilty plea is: a dishonorable discharge;

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15 years of confinement; total forfeitures; and reduction in rank to E-1. Do you understand that?

ACC: Yes, Your Honor.