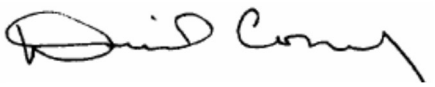
IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private First Class **CONNER B. HISER** United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. ARMY 20190325 USCA Dkt. No. 21-0219 /AR

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



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Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION BY ACCEPTING APPELLANT'S GUILTY PLEA TO A VIOLATION OF ARTICLE 117A, UCMJ, WHEN APPELLANT POSTED INTIMATE VIDEOS OF A PERSON UNDER CIRCUMSTANCES WHERE THE PERSON WAS NOT READILY IDENTIFIABLE AND THERE WAS NO REASONABLE CONNECTION TO THE MILITARY ENVIRONMENT.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866 (2018). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) (2018).

Statement of the Case

On 11 January and 10 May 2019, at Fort Drum, New York, a military judge sitting as a general court-martial convicted Private First Class (PFC) Conner B. Hiser (hereinafter appellant), pursuant to his pleas, of one specification of disrespecting a superior commissioned officer, three specifications of wrongfully broadcasting intimate visual images, one specification of aggravated assault, one

specification of assault consummated by battery, and one specification of communicating a threat, in violation of Articles 89, 117a, 128, and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 889, 917a, 928 and 934 (2012), respectively. (JA0003-0006). The military judge sentenced appellant to a reduction to the grade of E-1, confinement for thirty-nine months, and a dishonorable discharge from the service. (JA0202). In accordance with the terms of the pre-trial agreement, the convening authority approved only so much of the adjudged sentence as provides for a reduction to the grade of E-1, confinement for three years, and a dishonorable discharge. (JA0007).

The Army Court of Criminal Appeals denied relief on February 10, 2021. (JA0002). Appellant was notified of the Army Court's decision, and in accordance with Rules 19 and 20 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review and a Supplement on May 3, 2021. This Court granted Appellant's petition for grant of review on May 18, 2021, and ordered briefing under Rule 25. (JA001).

Summary of Argument

Appellant posted intimate videos of himself and his wife. The military judge abused her discretion by accepting appellant's guilty plea to a violation of Article 117a as pertaining to those videos, because in the circumstances captured within

the videos appellant nor his wife are not readily identifiable and there was no reasonable connection to the military environment.

The final statutory element of Article 117a, UCMJ, is that "the accused's conduct, under the circumstances, had a reasonably direct and palpable connection to the military mission or military environment." The Manual for Courts-Martial does not yet contain any further explanation or definitions for this element. Additionally, there is no caselaw regarding the contours of this element under Article 117a, UCMJ.

However, in *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008), the Court of Appeals for the Armed Forces (C.A.A.F.) analyzed whether the accused's racist and anti-government posts on the internet were punishable because they lacked "a reasonably direct and palpable connection between the speech and the military mission or military environment." This standard is identical to the statutory element of Article 117a, UCMJ, at issue in this case. Furthermore, since the manner in which Wilcox posted his speech online was very similar to the way appellant posted the videos online, the impact of their speech on the military mission and environment (or lack thereof) is also comparable. Thus, while the content of the speech is different, appellant's plea was improvident for the many of the same reasons the C.A.A.F. found Wilcox's conviction legally insufficient. The

Army Court therefore erred in affirming the findings and sentence of appellant's convictions as violations of Article 117a, UCMJ.

Statement of Facts

In Specifications 1, 2, and 3 of Charge III, the government charged appellant with wrongfully broadcasting intimate videos of his then-wife, Specialist (SPC) VG, in violation of Article 117a, UCMJ. (JA0008-0011). During the providence inquiry, appellant explained that over the course of three days, he uploaded snippets of a single video he had recorded of him having consensual sexual intercourse with SPC VG onto the website "Pornhub.com."[1] (JA0092-0093). Appellant stated that SPC VG consented to being recorded at the time, but not to the upload onto Pornhub.com. (JA0092).

Each of the videos depicted appellant's penis penetrating SPC VG's vagina. (JA0092). However, according to the stipulation of fact, SPC VG's face is never visible on the videos. (JA0020). When the military judge asked how someone watching the video on Pornhub would recognize her as SPC VG, appellant answered that the Pornhub profile he used to upload the videos included his last name and his profile picture was of his face. Since the videos were entitled

[1] According to Wikipedia, Pornhub.com is a public website and the tenth most trafficked website in the world.

"fucking my wife," "fucking my wife's pussy" and "quickie with the wife," anyone who knew him and watched the videos would realize the female was his wife, SPC VG. (JA0095). He also stated that she was recognizable because her wedding ring and "very slick, very tight-down" hair-bun were visible in the videos. (JA0095).

Appellant explained that he uploaded the videos because he was angry when he heard rumors SPC VG was having an affair with another Soldier. (JA0097). When asked whether he believed the videos would "hurt" SPC VG, appellant answered,

> If the people saw the videos, you know they would—especially people that she worked with, not just in her legal office, you know, as well as the unit that she was representing as a paralegal, would make fun of her for it, you know, tease her about it, you know ask her about it, you know, make her---find a way to make her feel uncomfortable. And then, it's extremely upsetting to know the fact that something that was intimate is, you know—was visible to anybody and everybody.

(JA0097-0098).

The military judge then asked about the last element: whether his conduct "under the circumstances, had a reasonable direct and palpable connection to a military mission or environment." (JA0098). She described this element as being "a little bit vague" and provided no further definition of this phrase. (JA0098).

Appellant described the reasonably direct and palpable connection to the military environment as follows:

> As, you know—being—basically knowing that we're both military, you know, if other people we know, either Fort Drum or Fort Riley—anywhere, you know, that is a military installation, could have seen it and asked why are other people in the military doing this? You know, any type of rank, they would have been like this is degrading to the U.S. military that Soldiers are uploading this kind of behavior and their intimate lives on social media or the internet.

(JA0098). However, his only explanation for how a person who did not know him and came across the video on Pornhub would identify them as being in the military was her hair bun and his military-style haircut. (JA0099). He admitted that "a lot of Soldiers are familiar with the website, PornHub" and that if other Soldiers saw the video, "it would cause [SPC VG] emotional distress." (JA0105-0106, JA0114).

However, the record contains no evidence appellant actually told anyone—Soldier or civilian—that he had uploaded the videos, even though he admitted he "potentially" and "maybe" wanted other Soldiers to see the video. (JA0099, JA0106). Instead, the videos first came to light when SPC VG herself looked at appellant's phone and discovered he had uploaded the videos in April 2018. (JA0019). When she confronted him, he took the videos down, but when she

looked again in May 2018, she discovered he had re-uploaded the videos. (JA0019).

In short, appellant's explanation for how his behavior had a "reasonably direct and palpable connection to the military mission or environment" was that if one of SPC VG's coworkers happened to see the video on Pornhub and identify her, she might get teased or harassed at work, or, if a person who saw the video believed the participants were Soldiers, they might think less of the military.

Standard of Review and Law

This Court reviews a military judge's acceptance of an accused's guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea must be set aside if the record of trial shows a substantial basis in law or fact for questioning the plea. *Id*. The providence inquiry must demonstrate the accused believes he is guilty and that his understanding of the facts supports the objective conclusion he is guilty. *United States v. Care*, 40 C.M.R 247 (C.M.A. 1969).

"A guilty plea is provident if the facts elicited make out each element of the charged offense." *United States v. Harrow*, 65 M.J. 190, 205 (C.A.A.F. 2007). Where the plea inquiry fails to establish the factual circumstances to

support an element of an offense, there is a substantial basis in law and fact to question the plea. *United States v. Jordan*, 57 M.J. 236, 240 (C.A.A.F. 2002).

Argument

1. Appellant did not direct other Soldiers or people he knew to the videos.

In *Wilcox*, the C.A.A.F. began by analyzing whether Wilcox "at least attempted to direct his speech to servicemembers." *Id*. at 450. Citing a string of cases, the C.A.A.F. noted that speech directed at other Soldiers is more likely to have a "palpable and obvious" effect on the military mission or environment. *Id*. Wilcox, however, posted on internet forums that were not military-specific, but were open to the public, such as love.aol.com. Considering the audience that was likely to view Wilcox's post, the C.A.A.F. concluded there was no evidence his posts on the Internet "were viewed or would be viewed by other servicemembers or would be perceived by the public or servicemembers as an expression of Army or military policy." *Id*.

PornHub, like love.aol.com, is a public site that is not aimed specifically towards the military. Plenty of Soldiers may be aware of PornHub, as appellant stated. However, there is no evidence they were aware of, or would think to look for, appellant's profile on PornHub. Thus, the chances a Soldier would come

across appellant's PornHub profile was no more likely than a Soldier coming across Wilcox's love.aol.com account.

The only evidence that anyone else even saw the videos was that SPC VG discovered them when she was snooping through appellant's phone, which he had used to upload the videos. If she had not found them on appellant's phone, it is highly unlikely she would have ever found the videos. Appellant may have hoped another Soldier would see the videos, but that is quite different from actually taking the step of directing others to the videos. As in *Wilcox*, there is no evidence appellant directed or even attempted to direct other people to the videos.

2. It is highly unlikely that a member of the public viewing the videos would conclude there was a military nexus.

In *Wilcox*, the C.A.A.F. considered whether anyone seeing the posts would associate Wilcox's message with the military. Even though Wilcox identified himself as a "US Army Paratrooper," the C.A.A.F. concluded it was "pure speculation" that his post "would be perceived by the public or a servicemember as an expression of Army or military policy." *Id*. at 450.

It is even less likely that someone who stumbled upon appellant's videos would associate him or SPC VG with the military. Unlike Wilcox, appellant never explicitly stated he had any affiliation with the military. He never used his rank or position in his post, and there is no evidence that a military uniform was visible anywhere on the profile. The only possible identifier was his and SPC VG's

military-style hairdos. It is a stretch—to put it mildly—that a member of the public seeing their haircuts would even conclude they were Soldiers, let alone that what they were doing in the video somehow had a "direct and palpable" connection to the military.

3. There is no evidence of an impact on the military environment or mission.

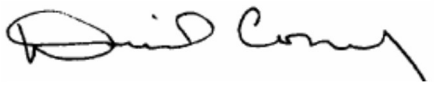
Appellant admitted that if people who worked with SPC VG found the videos, they might "make fun and pick at her kind of thing and cause her emotional distress." (JA0097-0098, JA0113-0114). That may be true, but appellant never admitted that anyone who knew him or SPC VG saw the videos, or were ever likely to discover the videos on a site as massive as Pornhub. Without a reasonable probability that someone in SPC VG's office would see the videos, there is no reasonable probability she would get teased or harassed about the videos.

Nor is there any evidence from the providence inquiry or the stipulation of fact about whether SPC VG felt any impact on her work environment or ability to perform any mission. Appellant admitted it might be "extremely upsetting" for her to know the videos were "visible to anybody," but there was never any inquiry about how this translates into having an effect on the military environment or mission. (JA0097-0098). Undoubtedly, what he appellant did caused SPC VG emotional distress. But that is a different element of Article 117a, UCMJ. And since it is a separate element, it must mean something different than having a

"reasonably direct and palpable impact on the military mission or military environment."

Conclusion

Because the military judge erred in accepting appellant's guilty plea in spite of the lack of basis to meet the final statutory element of Article 117a, UCMJ, this Court should set aside the findings and sentence. WHEREFORE, appellant respectfully requests that this Honorable Court grant the relief requested.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Hiser, Crim. App. Dkt. No. 20190325, USCA Dkt. No. 21-0219/AR, was electronically filed with the Court and Government Appellate Division on June 17, 2021.

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