IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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 the Case

On May 18, 2021, this Court granted appellant's petition for grant of review on the issue above and ordered briefing under Rule 25. (JA0001). On June 17, 2021, appellant filed his brief with this court. The government responded on June

28, 2021. On July 8, 2021, the court granted appellant's motion to extend time to file a reply brief. This is appellant's reply.

Argument

1. Appellant's testimony, consisting of facts not legally possible, does not support a finding that the person depicted in the posted videos was identifiable as Specialist VG.

During a providence inquiry, the military judge must determine "whether there is an adequate basis in law and fact to support the plea." *United States v. Castro*, __ M.J._, 2021 CAAF LEXIS 480, at *10 (C.A.A.F. 17 May 2021) (citation omitted). A providence inquiry also requires "that the factual circumstances as revealed by the accused himself objectively support that plea." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). Parties may stipulate facts that are legally possible. *Castro*, 2021 CAAF LEXIS 480, at *14, fn. 4 (C.A.A.F. 17 May 2021).

A violation of Article 117a, UCMJ requires the victim to be "identifiable from the visual images or from information displayed in connection with the visual images…" 10 U.S.C. § 917a. (JA 0204). The Benchbook does not define or explain "information displayed in connection with the intimate visual image."

In *Page*, the accused pled guilty to a violation of Article 117a, UCMJ for the wrongful broadcast of an intimate visual image of a fellow servicemember. *United States v. Page*, 80 M.J. 760 (N-M.C.C.A. 2021). The intimate visual images at issue were nude photographs of the servicemember's genitals. Because the servicemember was not identifiable from the intimate visual image itself, the court considered whether he was "identifiable from information displayed in connection with the intimate visual image" which was "the text message conversation in which it was found, which identified the [servicemember] as the sender and his wife as the recipient." *Page*, 80 M.J. at 766. The court found that this information alone, "known to the broadcaster but not accompanying the image as broadcast is not 'information displayed in connection with the intimate visual image.'" *Page* at 767. Accordingly, the facts failed to establish the third element of Article 117a, UCMJ, and the court set aside the findings of guilty for this charge and specification. *Id*.

Here, similar to the circumstances in *Page*, the subject in the video is not facially identifiable from the videos uploaded online. The videos only capture her from her back side. (JA0092). The video does not capture appellant's face. *Id*. Thus, the video depicts a man and a woman engaging in intercourse, but the identity of SPC VG cannot be confirmed, as her face is not shown. Moreover, the descriptions of SPC VG's wedding ring and the hair bun that appellant offered as

potentially identifying markers, while visible within the image itself, are not unique nor sufficiently specific to satisfy the third element of Article 117a, UCMJ. As the *Page* court discussed, information known to the broadcaster is not enough. From the providence inquiry there is no way to quantify what it means for a diamond to be "decent-sized." (JA0095). There is no discussion of shape or design or color; there is nothing about the ring that would make it objectively stand out. Likewise, because of its generic phrasing the description about the hair bun cannot survive as a basis for the third element: "slick, very tight-down" and "very well-maintained while properly worn" hair buns can look a hundred different ways side-by-side and still conform to those descriptions. Additionally, appellant's testimony about his account profile name and the general reference to "my wife" in the title (as opposed to *her* name) fall into the category of "information displayed in connection with the intimate visual image" that calls for speculation as to the identity of the otherwise non-identifiable woman in the image. (JA 0095).

Based on the lack of facial recognition, the generic descriptions of SPC VG's hair bun and ring, the providence inquiry is not factually possible to establish the third element of Article 117a, UCMJ. Put another way, it is legally impossible to view the uploaded image and facially determine that the woman depicted is SPC VG.

2. The canon against surplusage requires distinct factual bases to separately establish the elements of the Article 117a, UCMJ offense.

"Statutory construction begins with a look at the plain language of a rule." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). The canon against surplusage requires that, "if possible, every word and every provision is to be given effect and that no word should be ignored or needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Id*. (alternation in original) (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)).

To adopt the government's interpretation of the facts to the sixth and seventh elements of Article 117a, UCMJ would run afoul of the canon against surplusage, because a single factual basis would serve to satisfy two elements. Here, the government refers to SPC VG's embarrassment and emotional distress and argues that the resulting internal harm she suffered satisfies both the sixth element as well as the seventh. (App. Br. 13-15). But the government's reading of the statute is so expansive as to render it meaningless, as anything could fit within the government's definition.

Nor does the government provide compelling examples to support its definition. First, as the government admits, the "Marines United" scandal involved hundreds of Marines found to have shared hundreds of naked photographs of numerous female servicemembers without their consent. (App. Br. 15-16). This case is vastly different from that context, where there was a massive number of impacted servicemembers, either as victims or perpetrators. Article 117a, UCMJ from its very inception was not intended for a case like this, involving two--and only two-- servicemember spouses.

Second, appellant's motive may have been a desire to embarrass his wife, but nothing establishes that the video was ever viewed by anyone else other than appellant and SPC VG. In the absence of evidence that any other servicemember was involved, impacted, or connected to the conduct, accepting the mere military status of the victim as sufficient to establish the connection between the conduct and the military mission or environment required in the terminal element fails to address the types of circumstances Congress intended to address in response to "Marines United".

3. Constitutional implications in the Article 117a, UCMJ offenses here require analysis under *United States v. Wilcox*.

"A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is

prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008) (internal citations omitted).

The underlying intimate visual images depicting SPC VG were consensually recorded. (JA0091). Even if these images were determined to be obscene, "[o]ur national reluctance to inhibit free expression dictates that the connection between the statements or publications involved and their effect on military discipline be closely examined." *United States v. Brown*, 45 M.J. 389, 396 (C.A.A.F. 1996) (citations omitted).

Unlike Article 120c, UCMJ or other revenge porn statutes, Article 117a, UCMJ criminalizes the non-consensual broadcast of intimate visual images only when such conduct has a "reasonably direct and palpable connection to a military mission or military environment." In *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008), this Court discussed the "reasonably direct and palpable connection between the speech and the military mission or military environment." This Court found no reasonably direct and palpable connection between the offensive speech and the military mission or environment because of the lack of evidence that any of the speech was directed at military members or ever reached his unit. *Wilcox* at 450. Here, like in *Wilcox*, there is no connection between the conduct and the military mission or environment because appellant did not direct

the videos to any servicemembers. Should this Court adopt an interpretation that uploading a generically non-descript video to a public Internet site with massive traffic volume meets the terminal element as a "reasonably direct and palpable connection," the standards will become too broad and dilute the distinctions intended between Article 117a, UCMJ and other revenge porn statutes, which risks seriously overbroad enforcement under Article 117a, UCMJ.

4. Under the doctrine of stare decisis, this Court should apply the standards delineated in *United States v. Wilcox* to define the terminal element of Article 117a, UCMJ.

The doctrine of stare decisis is "most compelling where courts undertake statutory construction." *United States v. Quick*, 74 M.J. 332, 335 (C.A.A.F. 2015) (quoting *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003)). "Under this fundamental principle, adherence to precedent 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Id*. (quoting *Payne v. Tennessee*, 501 U.S. 808 (1991)). Under the doctrine of stare decisis, this Court examines whether an applicable precedent is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law. *Quick* at 336.

Nothing suggests that *Wilcox* is unworkable or poorly reasoned. There are no intervening events to consider in this context. Because this Court examined statutory provisions precisely worded as the ones in Article 117a, UCMJ, the reasonable expectation of servicemembers weighs in favor of adopting the *Wilcox* analysis in appellant's case. Finally, acknowledging the viability of the *Wilcox* analysis in the context of identical statutory provisions promotes public confidence in the law through predictable and consistent development of legal principles and fosters reliance on judicial decisions.

Conclusion

WHEREFORE, appellant respectfully requests that this Honorable Court grant the relief requested and set aside the findings and sentence.

DANIEL S. CONWAY
Civilian Appellate Defense Counsel
Gary Myers, Daniel Conway and Assoc.
78 Clark Mill Road
Weare, NH 03281
Tel: 800-355-1095
Fax: 800-908-8310
conway@mclaw.us
www.mcmilitarylaw.com
USCAAF Bar Number 34771

CAROL K. RIM
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0648
USCAAF Bar Number 37399

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This reply brief complies with the type-volume limitation of Rule 24(c) because it contains 1,942 words. It also complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

CAROL K. RIM
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-693-0648
USCAAF Bar Number 37399

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 July 27, 2021.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736