IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

GREGORY S. SIMPSON,
Gunnery Sergeant (E-7)
United States Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Ct. Crim. App. Dkt. No. 201800268

USCA Dkt. No. 20-0268/MC

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

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Granted Issue

WHETHER IT IS LEGALLY IMPOSSIBLE FOR GYSGT SIMPSON TO BE CONVICTED OF DISTRIBUTING INDECENT IMAGES TO HIMSELF UNDER ARTICLE 77, UCMJ, WHEN THE PLAIN LANGUAGE OF ARTICLE 120c(a)(d)(5), UCMJ REQUIRES THE IMAGES BE DISTRIBUTED TO "ANOTHER?"

Statement of Statutory Jurisdiction

Gunnery Sergeant ("GySgt") Gregory S. Simpson's approved general court-martial sentence included a bad-conduct discharge and 32 months of confinement. Accordingly, his case fell within the lower court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

A military judge sitting as a general court-martial convicted GySgt Simpson, pursuant to his pleas,[1] of Specifications 2-3 of Charge I alleging conspiracy to indecently record and distribute said recordings;[2] Charge II and its specifications of indecent recording and distribution of indecent recordings; Specifications 1-2 of Charge III alleging assault consummated by a battery; and Specification 3 of Charge III of a lesser-included offense of assault consummated by a battery, in

[1] JA 50.
[2] The military judge merged Specifications 2-3 of Charge I into one. JA 84-85.

violation of Articles 81, 120c, and 128, UCMJ.[3] The military judge sentenced GySgt Simpson to confinement for 32 months, a bad conduct discharge, and reduction to E-1.[4] Pursuant to a pretrial agreement, the convening authority withdrew the remaining specifications, approved the reduction to E-1, bad-conduct discharge, and confinement for 18 months, and suspended the remaining amount of confinement for 44 months.[5] Except for the bad-conduct discharge, the convening authority ordered the sentence executed.[6]

On direct review, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) merged GySgt Simpson's convictions of Specifications 1-2 of Charge III for findings, set the beginning date of suspension as the date of sentencing instead of the date of the convening authority's action, and otherwise affirmed the findings and sentence.[7] The NMCCA then denied GySgt Simpson's reconsideration request.

Gunnery Sergeant Simpson timely filed a petition for review, invoking this Court's jurisdiction pursuant to Article 67(a)(3), UCMJ. This Court granted review of his case on July 28, 2020. He hereby submits this brief.

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[3] JA 99-100.
[4] JA 143.
[5] JA 147-48, General Court-Martial Order No. 1-2018.
[6] *Id*.
[7] JA 19-20, *United States v. Simpson*, No. 201800268, 2020 CCA LEXIS 67, at *43-48 (N-M. Ct. Crim. App. Mar. 11, 2020).

Statement of Facts[8]

In 2016, GySgt Simpson was assigned to the McAlester Army Ammunition Plant in McAlester, Oklahoma as a liaison officer. He engaged in "intimate relationships" with two civilian women, CB and MB. While GySgt Simpson lived with CB, he used a Yahoo email account to communicate with MB. MB had an 18-year-old daughter, ENF.

Unbeknownst to GySgt Simpson, CB accessed his Yahoo account after suspecting GySgt Simpson of cheating on her. CB found multiple "sexting" emails between MB and GySgt Simpson, and nude pictures of a woman she believed was MB. CB shared her discovery with her friend, JR, and gave JR the password to GySgt Simpson's Yahoo account. JR then accessed GySgt Simpson's Yahoo account and added his emails to her own account. JR looked at the images and realized they were of ENF. Thinking ENF was a minor, JR reported the matter to civilian and military law enforcement agents.

A digital forensic analysis of GySgt Simpson's phone revealed several images of ENF. Most of the images were of her nude in the bathtub. Other images were of ENF partially nude, wearing thong underwear, or clothed while doing yoga or cleaning the floor in a common area of the home.

[8] Unless otherwise indicated, the Statement of Facts is derived from the Stipulation of Fact, Prosecution Exhibit (PE) 1 (JA 150-56).

Specification 2 of Charge II alleges:

> On divers occasions between on or about 1 December 2016 and on or about 19 February 2017, at or near McAlester, OK, active duty U.S. Marine GySgt Gregory Simpson knowingly distributed a recording of the private area of Ms. ENF, when he knew or reasonably should have known that the recording was made and distributed without the consent of Ms. ENF and under circumstances in which she had a reasonable expectation of privacy.[9]

Additional facts necessary to address the Granted Issue are contained below.

Summary of Argument

This case demonstrates the limits of "aiding and abetting" as a theory of criminal liability under Article 77, UCMJ. In this case, the application of Article 77, UCMJ to GySgt Simpson's receipt of the images of ENF results in him "distributing" those images to himself, contrary to the plain language of Article 120c(a)(d)(5), UCMJ. Just as "a receiver of drugs cannot be transmuted into a distributor by use of Article 77, [UCMJ],"[10] neither can GySgt Simpson be transmuted into a distributor of indecent images by his receipt of those images.

[9] JA 48, 228.
[10] *United States v. Hill*, 25 M.J. 411, 414 (C.M.A. 1988).

Argument

IT IS LEGALLY IMPOSSIBLE FOR GYSGT SIMPSON TO BE CONVICTED OF DISTRIBUTING INDECENT IMAGES TO HIMSELF UNDER ARTICLE 77, UCMJ, WHEN THE PLAIN LANGUAGE OF ARTICLE 120c(a)(d)(5), UCMJ REQUIRES THE IMAGES BE DISTRIBUTED TO "ANOTHER."

Standard of Review

An issue of statutory construction is a question of law reviewed *de novo*.[11]

Argument

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion; questions of law arising from the guilty plea are reviewed *de novo*."[12] To reject a guilty plea on appeal, the record must show a "substantial basis" in law or fact for questioning the guilty plea.[13]

"Any person punishable under this chapter who . . . aids, abets, counsels, commands, or procures [an offense's] commission . . . is a principal."[14] Article 77, UCMJ, identifies two ways in which a person can incur criminal liability as a "principal"—a "perpetrator" or an "other party."[15] "A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by causing

[11] *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018).
[12] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2015).
[13] *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).
[14] Article 77(1), UCMJ.
[15] Manual for Courts-Martial [MCM] (2016 ed.), pt. IV, para. 1b(2).

an offense to be committed . . . ."[16] "If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must . . . counsel . . . another . . . and share in the criminal purpose or design."[17]

A. The Plain Language of "Distribute" Precludes Application of Article 77, UCMJ where the accused is charged with distributing indecent images to himself.

The Government charged GySgt Simpson under Article 77(1), UCMJ, as an "aider and abettor" to MB because he "counseled" MB to send him the indecent images she took of ENF. But one of the basic canons of statutory construction is for courts to interpret statutes in a way that gives meaning to each and every word.[18] "A statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[19] It is a "basic and

[16] *Id*. at para. 1b(2)(a).
[17] *Id*. at para. 1b(2)(b). Additionally:

> [T]he elements of aiding and abetting an offense under Article 77, UCMJ are: (1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of the offense.

United States v. Gosselin, 62 M.J. 349, 353 (C.A.A.F. 2006) (quoting *United States v. Pritchett*, 31 M.J. 213, 217 (C.M.A. 1990)).
[18] *United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007).
[19] *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

unexceptional rule that courts must give effect to the clear meaning of statutes as written."[20]

Courts "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context."[21] "Distribution" of indecent images in violation of Article 120c, UCMJ, is defined as "to *deliver* to the actual or constructive possession of *another*."[22] "Deliver" is defined in the UCMJ as "the actual, constructive, or attempted transfer of an item."[23] "Another" is defined as "[a]dditional; distinct or different."[24] The context indicates that Congress intended only to punish the person transferring indecent images *to someone else*.[25]

Giving effect to every word in the definition of "distribution," in order for GySgt Simpson to be guilty of distributing indecent images, the statute requires that *he* "transfer" the images of ENF to a "different" person. This did not happen.

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[20] *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017); *see United States v. Bergdahl*, __ M.J. __, 2020 CAAF Lexis 489, at *10 (C.A.A.F. 2020) ("[C]ourts adhere to the plain meaning of any text—statutory, regulatory, or otherwise.").
[21] *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).
[22] MCM, pt. IV, para. 45ca(d)(5) (emphasis added).
[23] *Id*. at para. 37c(3).
[24] BLACK'S LAW DICTIONARY 91 (6th ed.)
[25] *Bergdahl*, 2020 CAAF Lexis 489, at *9-10 (recognizing "textualism" as "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means.") (citations omitted).

Instead, MB transferred the images of ENF *to* GySgt Simpson by emailing them to *his* email account.[26]

This Court held in *Hill* that "a receiver . . . cannot be transmuted into a distributor by use of Article 77 of the Code."[27] Although *Hill* was a drug case, "distribute" is defined the same under Articles 112a and 120c, UCMJ—"to deliver to the possession of another."[28] As the definitions of "distribute" are the same for both offenses, this Court should extend *Hill*'s holding to this case:

> [A] legislative intent is indicated that one who receives [indecent images] for personal use should not be considered as aiding and abetting distribution of the [images] which he has received. Otherwise, prosecutors would be free to obliterate the distinction between possessors and distributors by charging any possessor with aiding and abetting the distribution of the [images] which he has received.[29]

The Government's decision to charge GySgt Simpson with distributing indecent photos of ENF, under a principle liability theory of aiding and abetting MB, results in him delivering the images to *himself*. Whether under clause one or two of Article 77, UCMJ, the "aider and abettor" theory of liability transmutes GySgt Simpson into MB's position as the distributor. This transmutation is necessary to convict GySgt Simpson of "distributing" images of ENF, as he did not take the photos, nor was he present when they were taken. Put simply, GySgt

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[26] JA 153.
[27] *Hill*, 25 M.J. at 414.
[28] *Compare* MCM, pt. IV, para. 37c(3) *with* MCM, pt. IV, para. 45ca(d)(5).
[29] *Hill*, 25 M.J. at 413.

Simpson *was* MB, thus making him *both* the distributor *and* the recipient. Considering the charging scheme, the images of ENF were never transferred to *another*. To this end, it is contrary to the plain language of the statute—and therefore legally impossible—for GySgt Simpson to be charged with and convicted of distributing indecent images to himself, as opposed to "another" person.

Moreover, it is clear from the statute's text that Congress did not intend to criminalize the receipt or possession of indecent images. Gunnery Sergeant Simpson's actions were nothing more than receiving and possessing images of ENF from MB. Article 120c, UCMJ only criminalizes the distribution of indecent images—not the receipt or possession of those images. The Government's contortion of Article 77, UCMJ to criminalize non-criminal conduct should not, and cannot, be condoned by this Court, because condoning it would obliterate the distinction between non-criminal possessors and criminal distributors by charging the possessor with aiding and abetting the distribution.[30]

Finally, in order for GySgt Simpson to be guilty of distribution as an "aider and abettor," MB's actions in sending the images to his email account necessarily also needed to be criminal.[31] Her distribution of the images to GySgt Simpson

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[30] *Id*.

[31] *Gosselin*, 62 M.J. at 353 ("(3) that an offense was being committed by someone…."); Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 91 (Autumn 2005) ("no one can be

was not criminalized by federal or Oklahoma law.[32] Because MB did not commit a criminal offense in sending the pictures of ENF to GySgt Simpson, the third element of aiding and abetting under Article 77, UCMJ is absent.[33] Accordingly, there is a substantial basis in law for questioning the providence of his guilty plea.[34]

B. The Government amended its theory of principal liability at the lower court.

Notably, during the litigation of GySgt Simpson's case before the NMCCA, the Government changed its theory of principal liability from an "aider and abettor" under Article 77(1), UCMJ to that of a "perpetrator" under Article 77(2), UCMJ by arguing GySgt Simpson "caused" MB to send the images to him.[35] The

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convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place.").

[32] 18 U.S.C. § 1801, entitled "Video Voyeurism," only prohibits the "capturing" of an image; it does not prohibit the subsequent distribution of the captured image. Aside from Article 120c, UCMJ, there is no federal statute prohibiting the distribution of indecent images. While nonconsensual distribution of private sexual images to another is prohibited under Okla. Stat. tit. 21 § 1040.13b, it is only prohibited when the images are distributed with the intent to harass, intimidate, or coerce the victim. There is no evidence that MB intended to harass, intimidate, or coerce ENF when she distributed images to GySgt Simpson. To the contrary, MB's intent was for ENF to be unaware she was recording the images and sending them to GySgt Simpson.

[33] *Gosselin*, 62 M.J. at 353 ("(3) that an offense was being committed by someone….").

[34] *United States v. Blouin*, 74 M.J. 247, 251 (C.A.A.F. 2015).

[35] *Simpson*, 2020 CCA Lexis 67, at *16 n.13. In making this argument, the Government ignored the tenet that a guilty plea cannot be affirmed on appeal on a theory that is not presented at trial, and no notice to the accused is provided as to

Government changed its theory of principle liability in response to GySgt Simpson's argument that it was legally impossible for him to distribute indecent images to himself under Article 77(1), UCMJ.[36] The NMCCA declined to apply this alternate theory of liability under Article 77(2), UCMJ, holding that Article 77(1), UCMJ "has the same impact, namely, creating liability when a Service Member 'counsels' another to commit 'an offense punishable by this chapter.'"[37] The NMCCA ignored the reality that, while both clauses of Article 77, UCMJ create criminal liability, they create criminal liability in distinctly different ways—clause one creates "other party" liability, while clause two creates "perpetrator" liability. Essentially, the NMCCA blended both clauses of Article 77, UCMJ into one. The NMCCA's failure to distinguish between these two different methods of principle liability was error as a matter of law.[38]

The NMCCA also relied heavily on GySgt Simpson's admissions that he "counseled" MB to email the images of ENF to him.[39] However, if it is legally impossible for GySgt Simpson to be guilty of the offense, then his admissions do not matter, as legal conclusions of an accused are not sufficient to support a guilty

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the alternate theory of liability. *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F. 2008).
[36] *Simpson*, 2020 CCA Lexis 67, at *15-16.
[37] *Id*. at *16 n.13.
[38] *Blouin*, 74 M.J. at 251.
[39] *Simpson*, 2020 CCA Lexis 67, at *16-17.

plea.[40] "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts."[41] "The military judge's endorsement of an erroneous view of the law results in a failure to satisfactorily establish a knowing plea of guilty on the part of the accused."[42] Here, the military judge and the NMCCA endorsed an erroneous view of the law that a person can be held criminally liable for distributing indecent images to one's self.

C. The appropriate remedy in this case is for this Court to set aside GySgt Simpson's conviction and order a sentence rehearing.

Under the circumstances, this Court should set aside and dismiss GySgt Simpson's conviction for Specification 2 of Charge II. However, after considering the factors in *United States v. Winckelmann*,[43] this Court should remand for a rehearing on sentence.

This Court identified several "illustrative, but not dispositive," factors for service appellate courts to consider in deciding to reassess a sentence or to order a sentence rehearing:[44]

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[40] *Gosselin*, 62 M.J. at 353 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (setting aside a guilty plea to aiding and abetting the wrongful introduction of psilocybin mushrooms onto a military installation)).
[41] *Blouin*, 74 M.J. at 251 (quoting *Medina*, 66 M.J. at 26); *United States v. Care*, 40 C.M.R. 247, 250-51 (C.M.A. 1969).
[42] *United States v. Rice*, 71 M.J. 719, 720 (A. Ct. Crim. App. 2012).
[43] 73 M.J. 11, 15-16 (C.A.A.F. 2013).
[44] *Id*. at 15.

> (1) Dramatic changes in the penalty landscape and exposure.
>
> (2) Whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. This factor could become more relevant where charges address service custom, service discrediting conduct or conduct unbecoming.
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.
>
> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.[45]

While the first two factors favor a sentence reassessment, the third factor favors a sentence rehearing. This Court should also consider as additional factors that the military judge erred in accepting GySgt Simpson's guilty plea to Specification 2 of Charge II, erred in admitting the entirety of Pros. Ex. 2, and erred in admitting Colonel (COL) SH's and ENF's testimony as evidence in aggravation under R.C.M. 1001(b)(4).

"The phrase 'directly relating to or resulting from the offenses' imposes a higher standard than mere relevance."[46] In order for testimony of aggravating

[45] *Id*. at 15-16.
[46] *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990).

evidence to qualify as "directly relating to or resulting from" an offense, it must be "logically connected" to the crime and "must show the specific harm caused by the accused,"[47] not harm caused by someone else through an "independent, intervening event."[48] However, "not every circumstance or consequence of misconduct may be admitted into evidence during the pre-sentencing portion of court-martial. An accused is not 'responsible for a never-ending chain of causes and effects.'"[49] "Appellant's offense must play a material role in bringing about the effect at issue; the military judge should not admit evidence of an alleged consequence if an independent, intervening event played the only important part in bringing about the effect."[50]

Most of the Government's sentencing argument for 36 months of confinement hinged on the contents of Pros. Ex. 2 and the impact the discovery of the images had on ENF and GySgt Simpson's command.[51] Pros. Ex. 2 contained 62 pages of messages between GySgt Simpson and MB, to which the defense objected as being irrelevant and improper aggravation evidence because ENF was

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[47] *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).
[48] *United States v. Fisher*, 67 M.J. 617, 621 (A. Ct. Crim. App. 2009) (quoting *United States v. Stapp*, 60 M.J. 795, 800 (A. Ct. Crim. App. 2004), *aff'd*, 64 M.J. 179 (C.A.A.F. 2006)).
[49] *Rust*, 41 M.J. at 478; *Stapp*, 60 M.J. at 800.
[50] *Fisher*, 67 M.J. at 621 (quoting *Stapp*, 60 M.J. at 800).
[51] JA 130-32.

not aware of the messages.[52] Some of the messages also related to Specification 3 of Charge I, to which GySgt Simpson pled not guilty, and which was withdrawn and dismissed. The military judge acknowledged that much of Pros. Ex. 2 was either not relevant or of "minimal" relevance, and claimed he would not consider the consensual sexual conversations between MB and GySgt Simpson as "aggravation."[53] Nevertheless, the military judge admitted the entire exhibit into evidence and stated on the record that he considered the discussions about sexual fantasies GySgt Simpson and MB had that included ENF in adjudging GySgt Simpson's sentence,[54] in contravention of R.C.M. 1001(b)(4).

Additionally, ENF testified she was embarrassed that the photos of her "got shown to more people than they should have."[55] Colonel SH speculated about the impact on GySgt Simpson's command because it was located in a small town.[56] However, the images of ENF only became known to ENF and GySgt Simpson's chain of command as a result of CB and JR "hacking into" GySgt Simpson's email account and diverting his emails to JR's email account.[57] As the defense correctly noted during sentencing argument,[58] this was not a result of GySgt Simpson's

[52] JA 101-05.
[53] JA 105.
[54] JA 142.
[55] JA 118.
[56] JA 112.
[57] JA 151.
[58] JA 133-37.

actions, since his intent was to keep the images between MB and himself. As mere possession of the images was not a crime, and the discovery of the images was a result of an "independent, intervening event" that played the only part in bringing about the effect on ENF and GySgt Simpson's command, Colonel SH's and ENF's impact testimony did not meet the "directly related to or resulting from the offenses of which the accused was found guilty" requirement under R.C.M. 1001(b)(4). Thus, the third factor under *Winckelmann* favors a rehearing.

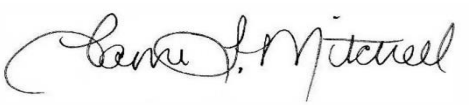
Finally, this Court should also consider as a factor whether additional mitigating evidence is available to GySgt Simpson that could affect the sentence and necessitate a rehearing. For example, GySgt Simpson and his mother, MS, testified that his sister was diagnosed with terminal pancreatic cancer.[59] Whether GySgt Simpson's sister succumbed to her illness would be an appropriate mitigating circumstance which the NMCCA could not consider in reassessing GySgt Simpson's sentence if it is not in evidence at trial.

Conclusion

For all the aforementioned reasons, this Court should set aside and dismiss GySgt Simpson's conviction for Specification 2 of Charge II and remand for a rehearing on sentence.

[59] JA 123, 129.

Respectfully submitted,



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I certify that a copy of the foregoing was electronically mailed to the Court and that a copy was electronically delivered to the Deputy Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on September 16, 2020.

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