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

REPLY 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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Introduction

The Government's novel charging scheme to turn non-criminal conduct into criminal conduct and its conflation of theories of inchoate criminal liability "tax the brain of even a trained lawyer."[1] This is not an ordinary guilty plea case. This is a novel case involving a novel charging scheme, novel pretrial agreement provisions, and an issue of first impression as to how two competing laws affect criminal liability under Article 77, UCMJ. The Granted Issue pits the Government's tortured interpretation and application of Article 77, UCMJ against foundational tenets of criminal law.

The end result is that what the Government charged in Specification 2 of Charge II, that Gunnery Sergeant (GySgt) Simpson "knowingly distributed a recording of the private area of Ms. ENF,"[2] is a legal nullity and does not match the facts of what he actually did. He presents several reasons why the Government's position is wrong. Whether this Court agrees with one or all of these reasons, Specification 2 of Charge II must be set aside and dismissed.

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[1] *United States v. Hills*, 75 M.J. 350, 358 (C.A.A.F. 2016).
[2] JA at 48, 228.

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?"

Argument

The Government unexpectedly concedes it is legally impossible to distribute indecent images to one's self, and that GySgt Simpson did not violate Article 120c, UCMJ, by sending the images of ENF to himself.[3] This concession necessarily leads to the conclusion that, as charged in Specification 2 of Charge II, GySgt Simpson's conduct was simply not "punishable under the UCMJ," and therefore, his conviction is a legal nullity.

What the Government charged GySgt Simpson with—"distributing" images to himself—is a legal nullity because, without a delivery of images to "another person," there is no "distribution." Therefore, "distributing" images to one's self is not "punishable under the UCMJ." His receipt of the images from MB is also not "punishable under the UCMJ" because Congress did not criminalize the receipt of indecent images.[4] Finally, MB's act of sending him the images was not a "criminal" act for her, and GySgt Simpson did not "actively participate" in MB's

[3] Appellee's Br. at 10.
[4] Article 120c, UCMJ.

act of sending the images, both of which are required for Article 77(1), UCMJ liability. Accordingly, there is simply no UCMJ offense to which he could have pled guilty.

As there is a substantial basis in fact and/or law to question GySgt Simpson's guilty plea, this Court must set aside his conviction of Specification 2 of Charge II and dismiss it. In light of the Government's concession, and for the reasons discussed *infra*, this raises the question of whether GySgt Simpson's guilty plea was "knowing and voluntary."[5] Accordingly, this Court should set aside the Navy-Marine Court of Criminal Appeals (NMCCA's) decision and remand the court-martial for a post-trial hearing regarding the impact of its decision on the pretrial agreement and the "voluntariness" of GySgt Simpson's guilty plea.

I. Statutory Construction and Congressional Intent

The parties agree that in construing the meaning of a statute, courts begin with the language of the statute and presume that a legislature says what it means, and means what it says.[6] By defining "distribution" as requiring delivery to the possession of "another person,"[7] Congress showed it did not intend for the

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[5] *United States v. Medina*, 66 M.J. 21, 25 (C.A.A.F. 2008).
[6] *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) and *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).
[7] Manual for Courts-Martial [MCM], pt. IV, paras. 37.c(3) (Article 112a, UCMJ), 45c.a(d)(5) (Article 120c, UCMJ), and 68b.c(3) (Article 134, UCMJ—Child Pornography). Although Congress did not define the offense of distribution of

Government to use Article 77, UCMJ to impose criminal liability on the recipient for the act of delivery by the distributor, where the *only* individuals involved in the distribution are the distributor and the recipient, as occurred in this case.

As the Government recognizes, courts must "stop clever prosecutors from circumventing Congressional intent."[8] However, just as courts cannot read limitations into statutes,[9] neither can courts expand statutes to include something Congress did not intend.[10] Expanding criminal liability under Article 120c, UCMJ to include those who receive "indecent" images via Article 77, UCMJ would frustrate Congressional intent not to criminalize such receipt. Congress does not criminalize every unusual, disagreeable, or distasteful act.[11] While the Government is allowed some leeway in creativity with respect to "novel" criminal charges under the UCMJ, that leeway has limits.[12] The Government cannot use

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child pornography, the definition of "distribution" contained therein is still relevant to the analysis of the meaning of "distribution" as a violation of Article 120c, UCMJ.

[8] Appellee's Br. at 17.

[9] *Germain*, 503 U.S. at 253–54.

[10] *EV v. United States*, 75 M.J. 331, 333-34 (C.A.A.F. 2016); *see also United States v. Davis*, No. 20160069, 2018 CCA Lexis 417, at *24-27 (A. Ct. Crim. App. Aug. 16, 2018) (unpub. op.) (displaying an indecent recording to another Soldier who was physically present did not constitute "broadcasting" as defined by Congress because "broadcasting" required the recording to be "electronically transmitted.").

[11] *United States v. Amazaki*, 67 M.J. 666, 671 (A. Ct. Crim. App. 2009).

[12] *United States v. Hill*, 25 M.J. 411, 413 (C.M.A. 1988) ("However, in order to effectuate a presumed legislative intent, the courts have developed some limitations on prosecutorial discretion."); *see i.e. United States v. Guardado*, 77

Article 77, UCMJ to convert non-criminal conduct into criminal conduct.[13] Yet, that is exactly what the Government did in this case, and that is exactly what the Government asks this Court to approve.

A servicemember "may be found guilty of aiding and abetting another individual in [her] *violation of a statute* that the aider and abettor could not be charged personally with violating."[14] However, a basic tenet of criminal law is that "without a criminal act, there can be no punishment."[15] Another basic tenet of criminal law is *nullum crimen sine lege*—without a law, there can be no crime.[16] In other words, there is no "crime" without a law proscribing the act. Basic tenets of criminal law are not "loopholes" by which the "guilty" escape accountability, as the Government asserts.[17] Rather, they are the foundation upon which the UCMJ

M.J. 90, 95-96 (C.A.A.F. 2017) (convictions for sexual comments to girls more than 16 years old set aside); *United States v. Herron*, 39 M.J. 860 (N.M.C.M.R. 1994) (conviction for vulgar, but not indecent, language set aside); *Amazaki*, 67 M.J. 666 (guilty plea to negligent possession of child pornography set aside).

[13] *Hill*, 25 M.J. at 413.

[14] Appellee's Br. at 11 (emphasis added). The Government could have charged GySgt Simpson with violating Okla. Stat. tit. 21 § 1040.13b, as an Article 134, UCMJ offense. MCM, pt. IV, para. 60. However, the Government would not have been able to prove such a violation for the lack of evidence regarding the specific intent to harass, coerce, or intimidate ENF in the distribution of the images.

[15] Martin R. Gardner, *Criminal Law: Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment*," 98 J. Crim. L. & Criminology 429, 432 (Winter 2008).

[16] Definition of *nullum crimen sine lege*, https://law.cornell.edu/wex/nullum_crimen_sine_lege (last viewed on Oct. 14, 2020).

[17] Appellee's Br. at 15, 25.

is created. If the foundations of military justice are eroded to accommodate a bad charging decision, the UCMJ crumbles to the ground.

The parties agree the determinant for whether GySgt Simpson is criminally liable for MB's distribution of the images is whether the act aided and abetted is an offense.[18] The main problems with this case are that: (1) the Government pursued a theory of criminal liability (Article 77(1), UCMJ) that is not consistent with the theory it charged (Article 77(2), UCMJ); and (2) under either Article 77, UCMJ theory, a receiver of contraband cannot be held criminally liable as a "deliverer" for the act of delivery,[19] when the *only* people involved in the alleged distribution are the deliverer and the recipient.[20] In this case, as discussed *infra*, there are simply no facts that GySgt Simpson could admit to that, as a matter of law, make him criminally liable for MB's act in sending him the images of ENF.[21]

II. The Distinctions Between Inchoate Liability Theories Under Article 77, UCMJ

In charging GySgt Simpson, and in obtaining his guilty plea, the way it did, the Government conflated two similar, but nevertheless distinct, theories of inchoate liability: aiding and abetting, Article 77(1), UCMJ, in which he incurs

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[18] *United States v. Minor*, 11 M.J. 608, 611 (A.C.M.R. 1981) (citation omitted).
[19] *Hill*, 25 M.J. at 414; *United States v. Harold*, 531 F.2d 704, 705-06 (5th Cir. 1976); *United States v. Baker*, 10 F.3d 1374, 1418 (9th Cir. 1993); *United States v. Campa*, 679 F.2d 1006, 1010 (1st Cir. 1982).
[20] *Id.*
[21] *Medina*, 66 M.J. at 26 (citing *United States v. Care*, 40 C.M.R. 247, 250-51 (C.M.A. 1969)).

criminal liability due to the "perpetrator's" criminal act;[22] and "causing" an act punishable under the UCMJ, Article 77(2), UCMJ, in which he incurs criminal liability because *he* is considered the "perpetrator."[23] As a result of this conflation, GySgt Simpson was misled on the law regarding inchoate criminal liability, which results in him having a conviction for non-criminal conduct. In turn, not only is his conviction a legal nullity, the "knowing and voluntariness" of his guilty plea is now in question, since the two Article 77, UCMJ theories are alternate theories of liability, as opposed to "lesser-included" of each other.[24] As GySgt Simpson was never put on notice of an alternate theory of liability, his guilty plea cannot be affirmed.[25]

A thorough understanding of the nuances between both Article 77, UCMJ theories is necessary to seeing the problems with the Government's position, which the NMCCA overlooked. This Court cannot do the same. For purposes of the following examples, "A" refers to GySgt Simpson, and "B" refers to MB.

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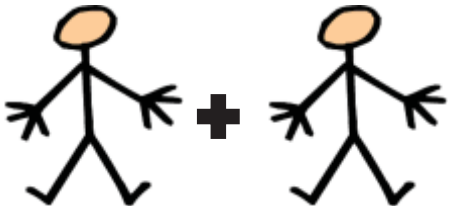
[22] A "perpetrator" is a person who personally performs the act necessary to constitute an offense. MCM, pt. IV, paras. 1.b(1)-(2)(a).
[23] *Id*. at para. 1.b(2)(a).
[24] *Medina*, 66 M.J. at 27.
[25] *Id*.

A. Causing an Act—Article 77(2), UCMJ[26]



A = B

In charging GySgt Simpson with "distributing" the images of ENF,[27] the Government alleged a clause two theory of liability. Under this theory, "A" is the perpetrator for causing "B" to commit an act which, if *directly* performed by "A," would be punishable under the UCMJ.[28] "A" *is* "B" under a clause two theory. Because the offense at issue is "punishable by the UCMJ," there is no need to analyze whether "B" incurs criminal liability under any other applicable law.[29]

An example of this theory is *Minor*. In *Minor*, while PFC Minor and his co-actor, a fellow Soldier, assaulted two German citizens, the co-actor threatened them with a pistol if the male German citizen did not perform cunnilingus on the female German citizen.[30] PFC Minor became part of that threat by "encouraging" the threat along with his active participation in the assaults he and his co-actor were committing on both German citizens.[31] By becoming part of the threat, PFC

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[26] MCM, pt. IV, paras. 1a(2) and 1b(2)(a).
[27] JA at 48, 228
[28] *Minor*, 11 M.J. at 610.
[29] *Id.*
[30] *Id*. at 609.
[31] *Id*.

Minor ("A") *directly* "caused" the male German citizen ("B) to commit an act of sodomy, which was punishable under Article 125, UCMJ.[32] Under these circumstances, the Army Court did not need to consider whether Germany had an analogous law prohibiting sodomy.[33]

Specification 2 of Charge II alleges that "*GySgt Gregory Simpson* knowingly distributed a recording of the private area of Ms. ENF,"[34] strongly suggesting a clause two theory. This language shows it was the *Government*, not GySgt Simpson, who "transmuted" him into MB by alleging *he* personally distributed the images of ENF. As the Government concedes, the charge as written is legally insufficient because it results in an act of GySgt Simpson delivering images to himself, which is not punishable by the UCMJ.[35] Receiving indecent images is not punishable under the UCMJ, nor is possession of indecent images.[36] If the act is not punishable by the UCMJ, then there is no criminal liability for GySgt Simpson via Article 77(2), UCMJ.[37]

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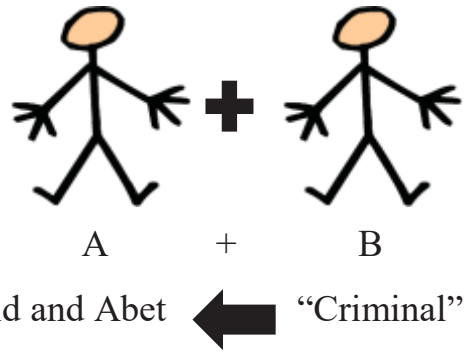
[32] *Id*. at 610.
[33] *Id*.
[34] JA at 48, 228 (emphasis added).
[35] Article 120c, UCMJ.
[36] If Congress wants to criminalize the "wrongful" receipt or possession of indecent images in response to this case, it is free to do so.
[37] MCM, pt. IV, para. 1a(2).

Moreover, while GySgt Simpson admitted that MB would not have sent him the images of ENF without his "encouragement,"[38] he was never advised of an Article 77(2), UCMJ theory during his guilty plea. Furthermore, although the Government raised this theory before the NMCCA,[39] the Government now disavows it.[40] The reason for the Government's disavowal is apparent—a guilty plea cannot be affirmed on appeal on a theory that was not presented at trial, and no notice to the accused was provided as to the alternate theory of liability.[41]

B. Aiding and Abetting—Article 77(1), UCMJ



In order to incur criminal liability as an aider and abettor, "A" must

[38] JA at 85. Prosecution Exhibit 2 contradicts this assertion. The first time MB sent pictures to GySgt Simpson, she did so without a request. JA at 160. When MB apologizes for not getting pictures, GySgt Simpson states, "It's OK." JA at 161. On January 28, 2017, GySgt Simpson asks MB if she got any pictures; MB replies, "No," and GySgt Simpson again says, "K [sic]." JA at 165. Based on Prosecution Exhibit 2, it appears MB did not need any encouragement to take pictures of her daughter and send them to GySgt Simpson.
[39] *United States v. Simpson*, No. 201600268, 2020 CCA Lexis 67, at *16 n.13 (N-M. Crim. Ct. App. Mar. 11, 2020) (unpub. op.).
[40] Appellee's Br. at 13, 15.
[41] *Medina*, 66 M.J. at 26-27.

"encourage, advise, instigate, etc." "B" to commit a "criminal" act,[42] which makes "B" the perpetrator.[43] "A" must also actively or affirmatively participate.[44] "A" and "B" must "share in the criminal purpose or design" for criminal liability to attach to "A."[45] Under this theory, criminal liability flows in only one direction—from "B" to "A," but only if "B" commits a criminal act.[46] Because "B" is the perpetrator, "A's" liability hinges on whether "B" commits a "criminal" act.[47] Accordingly, under the tenet of *nullum crimen sine lege*, if the act committed by "B" is not criminal for "B," then it cannot be criminal for "A;" there is no "criminal purpose or design" for "A" to share with "B." From another perspective, if "A" encourages "B" to commit an act that is not criminal for "B," then there is

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[42] MCM, pt. IV, para. 1.b(2)(b)(i).
[43] *Id*. at para. 1.b(2)(a).
[44] *United States v. Bennitt*, 72 M.J. 266, 267-68 (C.A.A.F. 2013) (crushing a narcotic pill and dividing it with a card for the victim to inhale); *Hill*, 25 M.J. at 415 ("fronting" some of the money for the drug sale); *Harold*, 531 F.2d at 705-06; *Baker*, 10 F.3d at 1418; *Campa*, 679 F.2d at 1010.
[45] MCM, pt. IV, para. 1b(2)(b)(ii).
[46] *Id*. at para. 1.b(1); *United States v. Jefferson*, 22 M.J. 315, 323 (C.M.A. 1986). This Court suggested in *Jefferson* that criminal liability for a conspiracy could be included in Article 77, UCMJ. *Id*. at 323-24. However, this is incorrect because in a conspiracy, criminal liability flows in *both* directions, from "A" to "B" and from "B" to "A," as a result of a criminal agreement. MCM, pt. IV, para. 5.c(5). Therefore, this Court should overrule *Jefferson* on this point and hold that criminal liability for a conspiracy cannot be included in Article 77(1), UCMJ.
[47] *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)); *Minor*, 11 M.J. at 611.

no "criminal" act to punish "A" for,[48] which comports with the other foundational tenet that "without a criminal act, there can be no punishment."

Lack of "Criminal Act" for MB

In order to determine whether "B" committed a "criminal act," courts must consider the laws applicable to "B." Here, MB's act of delivering the images of ENF was not criminal because it was not proscribed by an applicable analogous law. While Okla. Stat. tit. 21 § 1040.13b proscribes the non-consensual distribution of "private sexual" images, it differs from Article 120c, UCMJ in that it requires the sender of the images to have the specific intent to harass, intimidate, or coerce the person in the images. In contrast, Article 120c, UCMJ does not require specific intent.[49] It is that lack of specific intent that makes MB's delivery of the images of ENF non-criminal. Because her act was not criminal, as a matter of law, GySgt Simpson could not "counsel" or "encourage" MB to commit a "crime."[50]

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[48] Gardner, *Criminal Law: Rethinking Robinson v. California*, 98 J. Crim. L. & Criminology at 432; 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 convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place.").

[49] JA at 39.

[50] Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense,"* 57 S.C. L. REV. at 91.

The Government argues Okla. Stat. tit. 21 § 1040.13b is irrelevant because distribution of indecent images is still punishable under Article 120c, UCMJ for GySgt Simpson.[51] This may be true under an Article 77(2), UCMJ theory that alleged GySgt Simpson caused the distribution of indecent images *to another person*. However, he was never charged with distributing images to another person. Instead, he was charged for the act of delivering the images of ENF to himself. For the reasons discussed *supra*, the act of delivering contraband to one's self is not "punishable under the UCMJ."[52] Under the tenet of *nullum crimen sine lege*, if the act is not a crime for MB, the act cannot be a crime for GySgt Simpson. Thus, the Government's position is incorrect.

This holds true even for the Government's examples with respect to aiding and abetting distribution of marijuana.[53] Hypothetically, a servicemember (or anyone else subject to the UCMJ) could drive a civilian to a recreational marijuana shop, knowing the civilian intends to purchase marijuana for personal use. But, if this occurs in a jurisdiction where the sale and possession of marijuana is legal, the civilian's receipt of marijuana is not "wrongful." Congress only proscribes the

[51] Appellee's Br. at 20-21.
[52] MCM, pt. IV, para. 1b(2)(a).
[53] Appellee's Br. at 25. The cases upon which the Government relies all include third parties, which exceeds the minimum number of parties for a "distribution" to occur.

wrongful distribution and possession of marijuana.[54] If Congress wants to criminalize aiding *any* marijuana-related transaction, even providing aid to those who can do so legally, Congress can amend Article 112a, UCMJ. Otherwise, if the servicemember receives the marijuana from the civilian, then the servicemember incurs criminal liability for wrongful possession, in violation of Article 112a, UCMJ, as opposed to aiding and abetting a distribution of marijuana as a recipient via Article 77(1), UCMJ.[55]

The Government relies on Chief Judge Baker's dissenting opinion in *Bennitt*[56] to support its argument that a servicemember can still incur criminal liability as an aider and abettor even when the perpetrator is "not subject to prosecution."[57] However, a close reading of the facts in *Bennitt* shows that the victim, 16-year-old LK, perpetrated a "criminal" act in violation of Rev. Code Wash. § 69.50.412(1), by using a rolled-up dollar bill to inhale the Opana pill crushed by Bennitt.[58] Opana is a Schedule II controlled substance.[59] The Washington statute is analogous to the prohibition in Article 112a, UCMJ against the wrongful use of a controlled substance. Because LK's act of using a rolled-up

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[54] MCM, pt. IV, para. 37c(5).
[55] *Hill*, 25 M.J. at 415.
[56] 72 M.J. at 273 (Baker, C.J. dissenting).
[57] Gov. Br. at 20-21.
[58] 72 M.J. at 267-68.
[59] Rev. Code Wash. § 69.50.206(b)(1)(xvii).

dollar bill to inhale the Opana was criminalized by an applicable state law, Bennitt could have been convicted of violating Article 112a, UCMJ under an aiding and abetting theory. Chief Judge Baker's reference to LK not being subject to prosecution for wrongful use of a controlled substance suggests a jurisdictional impediment to her prosecution because LK was not subject to the UCMJ, not because she did not commit a criminal act. A jurisdictional impediment to prosecution is much different than a legal impediment to prosecution due to lack of a criminal act. Gunnery Sergeant Simpson's argument focuses on the latter, not the former.

The Government makes much ado about the "difficult burden" on the Government if it has to "wade through the morass of local criminal laws—including from foreign jurisdictions—to determine whether a civilian perpetrator's conduct was independently criminal."[60] When *Blevins* was decided in 1964, it probably was difficult to research various local criminal laws. But technological advances have changed that. However, in *this* century, it is relatively easy to research local criminal laws, even in foreign jurisdictions, whether via the internet through Google®, Lexis®, or Westlaw®, or consulting with a judge advocate or another attorney engaging in federal litigation, rule of law missions, or handling

[60] Appellee's Br. at 24-25, citing *Bennitt*, 72 M.J. at 274 (Baker, J., dissenting) (quoting *United States v. Blevins*, 34 C.M.R. 967, 979 (A.F.B.R. 1964)).

claims in foreign countries. Furthermore, the Government would have to research civilian criminal laws in order to charge servicemembers with violation of those laws as an Article 134, UCMJ, clause 3 offense. Therefore, *Blevins*' outdated concern about the difficulty of conducting legal research is no longer valid in light of modern research capabilities.

The Government's reliance on *Coffin v. United States* is misplaced, as the federal statute at issue in *Coffin* made it a crime for "every person" who, "with like intent," to assist bank officials in the willful misapplication of funds.[61] Therefore, non-bank officials incurred criminal liability through the bank officials who willfully misapplied funds, so long as the non-bank officials had the same intent as the bank officials.[62] Here, the lack of specific intent under Okla. Stat. tit. 21 § 1040.13b renders MB's act non-criminal, and therefore there is no criminal liability for GySgt Simpson via Article 77(1), UCMJ. As there is no act "punishable by the UCMJ," GySgt Simpson cannot be convicted of Article 120c(a)(3), UCMJ via Article 77(1), UCMJ.

No "Active Participation"

Even if this Court does not agree GySgt Simpson cannot be convicted, as a matter of law, but for MB's acts being criminal, receipt of indecent images does

[61] 156 U.S. 432, 447 (1895).
[62] *Id*.

not constitute "active participation" sufficient to constitute "aiding and abetting."[63] "A person cannot aid and abet a crime which has already been completed."[64] The receipt of the contraband is merely a passive result of the delivery,[65] whereas "active participation" in the *delivery* is necessary to effect the delivery.

United States v. Hill is not the only case in which a federal appellate court disapproved the use of an aiding and abetting theory to transmute a receiver into a distributor.[66] In *Harold*, the Fifth Circuit reversed the appellant's conviction for aiding and abetting the distribution of heroin as a mere recipient of the heroin, even though he knew the substance was heroin and traveled with others to the airport to pick it up "looking for a fix."[67] "To aid and abet one must actively participate in the illegal venture."[68] "The illegal venture here was distribution . . . . To distribute means to deliver; it does not mean to receive."[69] The Ninth Circuit, citing *Harold*, reached the same conclusion in *Baker*—a distribution entails "delivery," not

[63] *Harold*, 531 F.2d at 705-06 ("[T]o participate actively in the distribution . . . one must do more than receive it as a user.").
[64] *Roberts v. United States*, 416 F.2d 1216, 1221 (5th Cir. 1969).
[65] *Harold*, 531 F.2d at 705-06
[66] 25 M.J. at 414.
[67] 531 F.2d at 705-06.
[68] *Id*. at 705 (citing *United States v. Anthony*, 474 F.2d 770 (5th Cir. 1973)).
[69] *Id*. (citing 21 U.S.C. § 802(11)).

"receipt."[70] The First Circuit also held in *Campa* that "affirmative participation" is required for criminal liability as an aider and abettor.[71]

These cases suggest that "active participation" requires more than "encouragement" through just words—it also requires an act. On this point, the Government is incorrect in arguing that encouragement through words is, in and of itself, "active" participation.[72] In this case, while GySgt Simpson admitted he encouraged, instigated, and counseled MB through words to send him images of ENF,[73] he did not admit to engaging in any *acts* that legally constitute "active participation."[74] While the military judge mentioned "willful" participation,[75] he did not advise GySgt Simpson of what that term meant. Instead, the military judge and GySgt Simpson relied on his previous discussion of conspiracy to inquire into GySgt Simpson's "guilt" to Specification 2 of Charge II, thereby conflating Article 77(1), UCMJ liability with Article 81, UCMJ liability.[76] Accordingly, there remains a substantial basis in law and fact to question the providence of his plea.[77]

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[70] 10 F.3d at 1418.
[71] 679 F.2d at 1010.
[72] Appellee's Br. at 19.
[73] JA at 75, 79.
[74] While the Court may be tempted to rely on Pros. Ex. 2 as evidence of "acts" constituting "active participation," this Court cannot do so because Pros. Ex. 2 was limited to consideration for the purpose of determining GySgt Simpson's sentence, and the defense objected to its admission into evidence.
[75] JA at 74.
[76] JA at 74-75.
[77] *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Additional Considerations

The distribution conviction in *Hill* was upheld because the number of parties involved in the drug transaction (four) exceeded the number required for the distribution to occur (two).[78] Because additional parties were involved, this Court was able to hold that Hill aligned himself with the civilian distributor, who incurred criminal liability in his own right, as opposed to the receiver, a military undercover agent who incurred no criminal liability because he had a legal justification as an undercover agent for possessing the drug.[79] Hill also admitted to "actively participating" in the distribution by "fronting" some of the money needed to complete the drug sale,[80] thereby providing a legally sufficient basis for affirming a conviction for distribution.

In contrast to *Hill*, only two parties were involved in this case—GySgt Simpson and MB. Words of "encouragement," alone, do not constitute "active participation."[81] Gunnery Sergeant Simpson did not admit to engaging in any acts

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[78] 25 M.J. at 412. The cases upon which the Government relies to argue for application of the result of *Hill* to this case all involve appellants who facilitated drug distribution between *other* people. Appellee's Br. at 18-19. In this case, the only two people involved in the distribution were MB as the distributor and GySgt Simpson as the recipient.

[79] *Id*.

[80] *Id*. at 415.

[81] *Bennitt*, 72 M.J. at 267-68 (crushing a narcotic pill and dividing it with a card for the victim to inhale); *Hill*, 25 M.J. at 415 ("fronting" some of the money for the drug sale); *Harold*, 531 F.2d at 705-06; *Baker*, 10 F.3d at 1418; *Campa*, 679 F.2d at 1010.

that legally constitute "active participation" in the delivery of the images,[82] and receiving the images is, in and of itself, legally insufficient to constitute "active participation." Accordingly, under *Hill*, *Harold*, *Baker*, and *Campa*, because a receiver cannot be transmuted into a distributor as an aider and abettor, GySgt Simpson incurred no criminal liability for "distributing" the images of ENF.

III. The Appropriate Remedy

In GySgt Simpson's initial brief, he proposed a remand for a sentence rehearing. Contrary to the Government's suggestion,[83] GySgt Simpson is not "bootstrapping" a challenge to the admissibility of Prosecution Exhibit 2 to this Court's review of his case. Instead, he raised this issue for the purpose of proposing another factor to add to the *Winckelmann* factors, for appellate courts to consider in determining whether to reassess the sentence or remand for a sentence rehearing. Contrary to the Government's assertion,[84] GySgt Simpson could not have "reasonably foreseen" that his live-in girlfriend would hack into his email account, and that her friend would also hack into his email account and divert his emails, thus resulting in public knowledge of the photos of ENF. Finally, while his sister's illness from cancer was in evidence as mitigation, and therefore, "in the

[82] JA at 72, 75, 81
[83] Appellee's Br. at 29.
[84] *Id*. at 32.

record,"[85] her death during GySgt Simpson's appeals is not. Because her death and its resulting impact on GySgt Simpson and his parents are not "in the record" as it currently exists, the NMCCA is precluded from considering this powerful mitigation evidence in conducting a sentence reassessment.[86] Therefore, the only way for GySgt Simpson to present this mitigating evidence is at a sentence rehearing.[87]

However, the Government's unexpected concession that GySgt Simpson did not violate Article 120c, UCMJ for delivering images to himself, as it was charged in Specification 2 of Charge II, raises questions about whether GySgt Simpson's guilty plea was knowing and voluntary.[88] "An accused has a right to know what offense *and* legal theory he or she is pleading guilty. This fair notice resides at the heart of the plea inquiry."[89] Had GySgt Simpson understood that, as charged in Specification 2 of Charge II, he could not be convicted of a crime, he would not have pled guilty.

Furthermore, the validity of the pretrial agreement is also in doubt as a result of the Government's concession. The pretrial agreement contains a "unique"

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[85] *United States v. Jessie*, 79 M.J. 437, 444-45 (C.A.A.F. 2020).
[86] *See id*.
[87] *Id*.
[88] *United States v. Smead*, 68 M.J. 44, 65 (C.A.A.F. 2009) (quoting *United States v. Perron*, 58 M.J. 78, 81 (C.A.A.F. 2003)).
[89] *Medina*, 66 M.J. at 26 (emphasis added).

provision that the agreement may become null and void if GySgt Simpson "fail[s] to plead guilty as required by this agreement at a rehearing, should one occur."[90] That a rehearing was even contemplated should be extremely concerning to this Court, as it demonstrates awareness by the Government that *something* related to the charges was of dubious legality and risked being overturned by an appellate court. Gunnery Sergeant Simpson cannot comply with this requirement. Therefore, according to the terms of the agreement, if this Court sets aside GySgt Simpson's conviction for Specification 2 of Charge II and dismisses it, the pretrial agreement becomes null and void.

However, given the question about whether GySgt Simpson's guilty plea was "knowing and voluntary," he is also entitled to withdraw from it, which makes a rehearing the appropriate remedy.[91] As a result, GySgt Simpson respectfully requests that this Court reverse the NMCCA's decision, set aside the findings and sentence, dismiss Specification 2 of Charge II, and authorize a rehearing.

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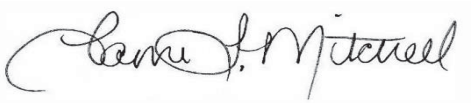
[90] JA at 189-190.

[91] *See United States v. Blouin*, 74 M.J. 247, 252 (C.A.A.F. 2015) (reversing the ACCA's decision, setting aside the findings and sentence, and authorizing a rehearing to address an improvident guilty plea to possession of child pornography because the military judge conflated three different definitions of child pornography).

Conclusion

For all the aforementioned reasons, this Court should reverse the NMCCA's decision, set aside the findings and sentence, dismiss Specification 2 of Charge II, and authorize a rehearing.

Respectfully submitted,



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