IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201800268
Gregory S. SIMPSON, Gunnery Sergeant (E-7) U.S. Marine Corps, Appellant	)	USCA Dkt. No. 20-0268/MC

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UNITED STATES DISTRICT COURT CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946 (2012):

REGULATIONS, RULES, OTHER SOURCES

Issue Presented

WHETHER IT IS LEGALLY IMPOSSIBLE FOR APPELLANT TO BE CONVICTED OF DISTRIBUTING INDECENT IMAGES TO HIMSELF UNDER ARTICLE 77, UCMJ, WHEN THE PLAIN LANGUAGE OF ARTICLE 120C(D)(5), UCMJ REQUIRES THE IMAGES BE DISTRIBUTED TO "ANOTHER."

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a bad conduct discharge and one year or more of confinement. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of conspiracy to create and distribute indecent visual recordings, creation of indecent visual recordings, distribution of indecent visual recordings, and assault consummated by a battery, in violation of Articles 81, 120c, and 128, UCMJ, 10 U.S.C. §§ 881, 920c, and 928 (2012). The Military Judge sentenced Appellant to thirty-two months of confinement, reduction to pay grade E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged. Under a Pretrial Agreement, the Convening Authority

suspended confinement over eighteen months and, except for the punitive discharge, ordered the sentence executed.

The Record of Trial was docketed at the lower court on September 13, 2018. Appellant and the United States submitted briefs and provided oral argument. On March 11, 2020, the lower court merged two Specifications of assault consummated by a battery, altered the date of suspension, and affirmed the findings and sentence. *United States v. Simpson*, No. 201800268, 2020 CCA LEXIS 67, at *25, *46–48 (N-M. Ct. Crim. App. Mar. 11, 2020).

On June 11, 2020, Appellant petitioned this Court for review, which was granted July 28, 2020. Appellant filed his Brief September 16, 2020.

Statement of Facts

A. The United States charged Appellant with conspiracy, indecent visual recording, distribution of indecent visual recording, and assault.

In Charge I, the United States alleged Appellant (1) "conspired with [MB] to commit an offense under the UCMJ, to wit: Article 120c(a)(2) Indecent Visual Recording" and (2) "conspired with [MB] to commit an offense under the UCMJ, to wit: Article 120c(a)(3) Distribution of an Indecent Recording." (J.A. 48.)

In Charge II, the United States alleged Appellant (1) "knowingly photographed the private area of [ENF], without her consent and under circumstances in which she had a reasonable expectation of privacy" and (2) "knowingly distributed a recording of the private area of [ENF] when he knew

or reasonably should have known that the recording was made and distributed without the consent of [ENF] and under circumstances in which she had a reasonable expectation of privacy." (J.A. 48.)

In Charge III, the United States alleged Appellant assaulted his wife. (J.A. 48.)

B. The Military Judge asked the United States to clarify its theory of liability for Charge II.

Prior to Appellant entering pleas, the Military Judge asked Trial Counsel, "Charge II alleges that the accused photographed and then distributed. Is that based on an aiding and abetting theory of liability?" (R. 174.) Trial Counsel responded, "Yes, sir, it's a principle [*sic*] liability theory." (R. 174.)

C. Appellant agreed to plead guilty in a Pretrial Agreement.

Appellant entered into a Pretrial Agreement, wherein he agreed to plead guilty to the conspiracy Specifications, the Specifications for creation and distribution of indecent visual recordings, and assault consummated by a battery. (J.A. 228–30.) The Convening Authority agreed to suspend all confinement in excess of eighteen months. (J.A. 232.)

D. Appellant entered a Stipulation of Fact, wherein he admitted to conspiring with and counseling MB to take intimate photos of her daughter, ENF, and send them to him.

In the Stipulation of Fact, Appellant admitted he entered into a conspiracy with MB, wherein she would secretly take nude photos and videos of her daughter, ENF, and email them to Appellant. (J.A. 153–55.)

Appellant admitted he "knowingly and willfully counseled" MB to take the photos of ENF. (J.A. 154.) He did so "by repeatedly encouraging and requesting via email that [MB] take indecent photographs and videos of [ENF]." (J.A. 154.) Appellant acknowledged he was "guilty of making indecent visual recordings of [ENF] even though he was not physically present with [MB] when she took the photographs and videos." (J.A. 154.) Appellant stated MB "would not otherwise have taken them if [Appellant] did not counsel [MB] to take the photographs." (J.A. 154–55.)

Appellant admitted he "knowingly and willfully counseled" MB to "send [the photos] to him via email." (J.A. 155.) He did so "by repeatedly encourag[ing] and request[ing] that [MB] send the photographs and videos to him via his yahoo email address." (J.A. 155.) Appellant acknowledged he was "guilty of distribution of indecent visual recordings of [ENF] even though he was not physically present with [MB] when . . . she sent the photographs and videos." (J.A. 155.) Appellant

stated MB "would not otherwise have sent them if [Appellant] did not counsel [MB] to send the photographs and videos." (J.A. 155.)

Appellant also admitted to three specifications of assault. (J.A. 156–57.)

E. Appellant pled guilty and testified about his misconduct.

Appellant pled guilty consistent with the Pretrial Agreement and testified about his misconduct. (J.A. 56, 62–87.)

While discussing Charge II during the providence inquiry, the Military Judge noted that Appellant was "named as the person doing the acts. But I understand that [MB] was the one who actually took and distributed the recordings." (J.A. 81.) The Military Judge then confirmed that Appellant understood he was "charged as a principal in this case," and the Military Judge provided instructions on principal liability. (J.A. 80–81.)

When asked how he aided and abetted MB, Appellant said he "encouraged her and requested the photographs." (J.A. 81, 85.) Appellant confirmed he "encourage[d], advise[d], instigate[d], and counsel[ed] her to commit" the offenses. (J.A. 81, 85.) Appellant testified he specifically intended for MB to take and distribute the photos of ENF's private area, without her consent and when ENF had a reasonable expectation of privacy. (J.A. 82–83, 85.) According to Appellant, without his actions, MB would not have taken or distributed the photos. (J.A. 82, 85.)

F. The Military Judge consolidated the conspiracy Specifications for findings and found Appellant guilty.

The Military Judge consolidated the conspiracy Specifications for findings. (J.A. 88–89.) The Military Judge accepted Appellant's pleas and found him guilty of the Charges and Specifications to which he pled guilty. (J.A. 99–100, 234.)

G. The Military Judge merged the misconduct with MB for sentencing.

The Military Judge merged the conspiracy Specifications and the creation and distribution Specifications—all the Specifications involving MB—for sentencing. (J.A. 90.) The Military Judge also merged the three Specifications in Charge III. (J.A. 90.) As a result, the maximum punishment was seven years and six months of confinement and a dishonorable discharge. (J.A. 90.)

H. The United States presented evidence in aggravation, including Appellant's messages with MB and testimony about the impact of Appellant's actions on the military and ENF.

Over Appellant's objection, the Military Judge admitted Prosecution Exhibit 2, the email exchanges between Appellant and MB through which he committed his misconduct. (J.A. 101–06.) The messages included Appellant's requests for pictures of ENF and MB's delivery of those pictures. (*See* J.A. 160–61, 165, 169–71, 175, 182, 188, 192, 202–03, 218.) The Military Judge found that the messages provided context to the offense and showed the extent of the conspiracy, but he limited his consideration to messages directly related to the

conspiracy and indecent visual recording offenses, disregarding evidence of offenses to which Appellant pled not guilty. (J.A. 105, 142–43.)

Colonel SH, the commander in charge of an ammunitions plant where Appellant worked, testified at the presentencing hearing, and Appellant did not object to any part of his testimony. (J.A. 106–15.) He testified that news of Appellant's misconduct ran "like wildfire" through the community and had a negative effect on people's ability to focus on their work. (J.A. 111–13.)

ENF testified she has anxiety and worries about how many people have seen the intimate photos of her. (J.A. 116–21.) Appellant did not object to any part of her testimony. (J.A. 116–21.)

I. The Military Judge sentenced Appellant.

The Military Judge sentenced Appellant to thirty-two months of confinement, reduction to pay grade E-1, and a bad-conduct discharge. (J.A. 143.) The Convening Authority approved the sentence as adjudged, and in accordance with the Pretrial Agreement, suspended confinement in excess of eighteen months. (J.A. 147, 232.)

Argument

AN INDIVIDUAL CAN BE LIABLE FOR AIDING AND ABETTING A CRIME HE CANNOT COMMIT HIMSELF. BECAUSE APPELLANT COUNSELED THE PERPETRATOR, MB, TO DISTRIBUTE TO ANOTHER, HE IS A PRINCIPAL. NOTHING IN ARTICLE 77(1) OR PRECEDENT SUPPORTS APPELLANT'S CLAIM.

A. Standard of review.

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "A military judge abuses his discretion if he fails to obtain from the accused an adequate factual basis to support the plea," or if he accepts a guilty plea based on an erroneous view of the law. *Id.*; *see also United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005).

To determine if a military judge abuses his discretion accepting a plea, military appellate courts apply the "substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *United States v. Ferguson*, 68 M.J. 431, 434 (C.A.A.F. 2010) (quoting *Inabinette*, 66 M.J. at 322).

B. Article 77(1) establishes criminal liability for those who aid, abet, or counsel others to commit offenses.

Article 77 states: "Any person punishable under this chapter who (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands or procures its commission; or (2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal." 10 U.S.C. § 877 (2012). An individual who actually commits an offense or directly causes it to occur, in addition to being a principal, *see id.*, is also known as the "perpetrator," Manual for Courts-Martial, United States (MCM) pt. IV para. 1.b.(2)(a) (2016 ed.).

Article 77(1), much like its federal counterpart, eliminated the common law distinctions between principals in the first degree, principals in the second degree, and accessories before the fact by extending principal criminal liability to those who facilitate crimes. *See* MCM pt. IV para. 1.b.(1); *see also Standefer v. United States*, 447 U.S. 10, 15–20 (1980) (discussing origins of 18 U.S.C. § 2).

C. No substantial basis in law exists to question Appellant's plea. One can be criminally liable for aiding, abetting, or counseling the commission of an offense even if it is legally impossible to commit the offense himself.

Appellant does not contest the factual basis of his plea; rather, he argues a substantial basis in law exists to question his plea. (*See* Appellant's Br. at 4, Sept. 16, 2020.)

1. It is legally impossible to "distribute" an indecent visual recording to oneself.

"The term 'distribute' means delivering to the actual or constructive possession of another, including transmission by electronic means." Art. 120c(d)(5), UCMJ, 10 U.S.C. § 920c(d)(5) (2012). The United States agrees Appellant would not have violated Article 120c if he had sent the photos of ENF to himself. *See id.*

2. Longstanding Supreme Court and federal precedent establishes an individual may aid and abet an offense it was legally impossible to commit himself. Appellant's claim that an aiding and abetting charge is analyzed as though the principal were the perpetrator is contrary to this precedent.

In *Coffin v. United States*, 156 U.S. 432 (1895), the petitioners were charged with aiding and abetting the president of the Indianapolis National Bank in willfully misapplying funds and making false entries in bank books. *Id.* at 433–34. Because the petitioners were not employees of the National Bank, it was impossible for them to have committed the underlying offenses, so the petitioners argued the indictment failed to state an offense. *Id.* at 446–47. The Court rejected this argument, finding the aiding-and-abetting clause was intended to "punish every person who aids and abets," not just employees of the National Bank. *Id.* at 447.

In applying a federal statute identical to Article 77(1) in relevant respects, courts have repeatedly held that an accused can be prosecuted for aiding and

abetting crimes he could not have committed. *See, e.g.*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 281 (2d Cir. 2007) ("[I]t is 'well settled that one may be found guilty of aiding and abetting another individual in his violation of a statute that the aider and abettor could not be charged personally with violating.'" (quoting *In re Nofziger*, 956 F.2d 287, 290 (D.C. Cir. 1992))); *United States v. Yakou*, 428 F.3d 241, 252 (D.C. Cir. 2005) (same); *United States v. Smith*, 891 F.2d 703, 710–11 (9th Cir. 1989) (same); *United States v. Standefer*, 610 F.2d 1076, 1085 (3d Cir. 1979) *aff'd*, 447 U.S. 10 (1980) (same); *see also* 21 Am. Jur. 2d *Criminal Law* § 159 (2020) ("Thus, an aiding and abetting statute may be applied where, by statutory definition, the defendant would be incapable of committing the substantive offense individually.")

Two illustrative examples come from *Nofziger* and *Standefer*. In both cases, the defendants were charged with aiding and abetting violations of government-ethics statutes that they could not have violated personally because they were not government employees, and in both cases this impossibility was not a bar to principal liability. *Nofziger*, 956 F.2d at 288, 290; *Standefer*, 610 F.2d at 1085.

Like the defendants in *Coffin*, *Nofziger*, and *Standefer*, Appellant seeks to escape liability for aiding and abetting an offense he could not legally commit. Appellant's argument rests on the faulty premise that "the 'aider and abettor' theory of liability transmutes [Appellant] into MB's position as the distributor" and

thus "[Appellant] *was* MB, thus making him *both* the distributor *and* the recipient." (Appellant's Br. at 8.)

But this claim, unsupported by precedent, merely repeats the legal impossibility arguments rejected by *Coffin*, *Nofziger*, and *Standefer*. (*See id*.) This Court should likewise hold that the legal impossibility of Appellant committing the underlying offense is no bar to his conviction for aiding and abetting that offense.

3. Nothing in Article 77(1) indicates a congressional intent to deviate from this established case law or establish that principal liability under Article 77(1) should be analyzed by "transmuting" the aider and abettor into the role of the perpetrator.

"As in all statutory construction cases, we begin with the language of the statute." *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)). Courts "must presume that a legislature says in a statute what it means and means in a statute what it says there" and not read "limitations into the plain language of [a] statute." *Id*. (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

Just as the statute in *Coffin* covered "every person who aids and abets" and the statute in *Nofziger* and *Standefer* covered "whoever" aids and abets another, Article 77(1) states "[a]ny person punishable under this chapter" can be a principal for aiding and abetting. 10 U.S.C. § 877 (2012). Nothing in the plain language of

the statute limits principal liability based on impossibility or analyzes principal liability by transmuting the aider and abettor into the role of the perpetrator.

Despite this plain language, Appellant argues, without authority, that this Court should analyze his actions by "transmut[ing] [Appellant] into MB's position as the distributor." (*See* Appellant's Br. at 8.)

Although that approach may be viable under Article 77(2) which criminalizes "caus[ing] an act to be done which if directly performed by him would be punishable under this chapter," *but see United States v. Lester*, 363 F.2d 68, 72–74 (6th Cir. 1966) (criticizing similar argument regarding 18 U.S.C. § 2(b)), Appellant was not charged under Article 77(2): he was charged under Article 77(1) as an aider, abettor, and counselor. (*See* R. 174; J.A. 79–81.) During the providence inquiry, the Military Judge provided the definitions of aiding and abetting from Article 77(1) and Appellant admitted to "encourag[ing], advis[ing], instigat[ing], and counsel[ing]" MB to take and send the photos—as opposed to causing an act to be done which if performed by him would be distribution. (J.A. 79–81, 85); *see also Simpson*, 2020 CCA LEXIS 67, at *16 & n.14.

Placing the aider or abettor in the shoes of the perpetrator "[w]hether under clause one or two of Article 77, UCMJ," (Appellant's Br. at 8), would effectively collapse the two separate clauses of Article 77: if every principal liability case is analyzed by asking whether the accused caused an act to be done which if directly

performed by him would be a violation of the Code, regardless of how it was charged, then every Clause 1 charge becomes a Clause 2 charge, making Clause 1 surplusage. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *see also United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017) (same).[1]

4. Because principal liability under Article 77(1) is not analyzed by "transmuting" the principal into the role of the perpetrator, Appellant's conviction is not contrary to the plain language of Article 120c. To hold otherwise would yield absurd results.

As *Coffin*, *Nofziger*, and *Standefer* illustrate, legal impossibility as expressed through Appellant's proposed "transmutation rule" is irrelevant. Appellant was charged with aiding and abetting the distribution of intimate visual images, not the actual distribution. *Cf. Coffin*, 156 U.S. at 447; *Nofziger*, 956 F.2d at 288, 290; *Standefer*, 610 F.2d at 1085; *supra* Section C.3. Appellant aided and abetted MB's distribution. Appellant did not, himself, distribute the images.

[1] Appellant ironically accuses the lower court of making this same blending error. (Appellant's Br. at 11); *see Simpson*, 2020 CCA LEXIS 67, at *16 n.13 (noting Article 77(1) liability "has the same impact [as Article 77(2)] namely, creating liability when a Service member 'counsels' another to commit 'an offense punishable by this chapter.'"). Rather than "blend[] both clauses of Article 77, UCMJ[,] into one," (Appellant's Br. at 11), the lower court merely noted that both clauses of Article 77 have the same effect of creating principal liability; it then proceeded to accurately apply Article 77(1) to Appellant's case. *See Simpson*, 2020 CCA LEXIS 67, at *15–18.

Thus because MB did not distribute to herself, the plain text of Article 120c is satisfied. Because neither Article 77(1) nor Article 120c contain any such "transmutation rule," Appellant's conviction does not contradict the plain language of either statute.[2]

Nor does charging Appellant with aiding and abetting the distribution of images to another frustrate Congress's intent to punish distributors, (*contra* Appellant's Br. at 6–7); rather, it is consistent with the text of Article 77(1) and the intent of Congress to punish any servicemember who "aids, abets, counsels, commands, or procures" the commission of offenses by others. Art. 77(1), UCMJ, 10 U.S.C. § 877(1) (2012); *cf.* MCM pt. IV para. 5.c.(1) ("A person may be guilty of conspiracy although incapable of committing the intended offense.").

Furthermore, Appellant's proposed rule would create a loophole through which a servicemember who aids, abets, counsels, commands, or procures another to commit a crime may escape justice if, by design or by luck, the servicemember could not have committed the crime himself. For instance, a servicemember over the age of twenty-one would not be liable for aiding and abetting underage

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[2] Contrary to Appellant's contention, the United States did not change its theory of liability at the lower court. (Appellant's Br. at 10–11.) As the lower court recognized, the United States offered Article 77(2) as an alternate theory of liability, not as a change in charging theory. *See Simpson*, 2020 CCA LEXIS 67, at *16 n.13. Regardless, it is unclear how this alternate theory, rejected by the lower court, *see id.*, is relevant here.

drinking. *See* Art. 92, UCMJ, 10 U.S.C. § 892 (2012). Similarly, an off-duty servicemember would not be liable for counseling someone else to be drunk on duty. *See* Art. 112, UCMJ, 10 U.S.C. § 912 (2012).

Such outcomes contradict the unambiguous text of Article 77, which reflects a congressional intent to expand criminal liability beyond those who actually perpetrate crimes to those who aid, abet, counsel, command, or procure the commission of crimes, regardless of impossibility. *See* Art. 77, UCMJ, 10 U.S.C. § 877 (2012); MCM pt. IV para. 1.b.(1).

5. *Hill* has never been applied beyond controlled substances, and should not be expanded. Regardless, *Hill*'s reasoning supports Appellant's conviction because he played an active role in MB's distribution.

In *United States v. Hill*, 25 M.J. 411 (C.M.A. 1988), the appellant pled guilty to aiding and abetting the distribution of controlled substances when he traveled to a civilian's residence and loaned his friends money to buy drugs. *Id.* at 412. The Court noted that, because Congress and the President intended to penalize possession and distribution of controlled substances differently under Article 112a, an ordinary buyer of drugs should not be charged as aiding and abetting the seller's distribution. *Id.* at 413–14. Nevertheless, the Court affirmed the appellant's conviction because someone who is initially brought into a drug purchase by the buyer can "sufficiently associate himself with the purpose of the seller so that he becomes an aider and abettor of the seller." *Id.* at 414.

a. *Hill* has never been expanded beyond controlled substances, and its reasoning does not apply here.

Hill was based on the unique statutory and regulatory scheme around controlled substances. *Id.* at 413–14. The Court found Congress evinced a clear intent to treat distribution and mere possession differently by creating distinct distribution and possession offenses, and the President followed suit by establishing separate maximum punishments. *Id.* Allowing prosecutors to charge simple possessors as aiders and abettors of distributors would "obliterate the distinction between possessors and distributors" Congress and the President intended to create. *Id.* at 413 (citing *United States v. Swiderski*, 548 F.2d 445, 449–50 (2d Cir. 1977)).

Because its reasoning was based on a unique statutory scheme, *Hill* has been confined to the context of controlled substances. Appellant fails to cite any cases where *Hill* has been extended beyond controlled substances, and the United States is aware of none. The reasoning that underpinned *Hill*—stopping clever prosecutors from circumventing congressional intent—does not apply here because Appellant's conviction is consistent with Congress's intent to punish aiders and abettors. *See supra* Section C.4. Nor does Appellant's conviction conflict with Congress's decision to penalize distributors, but not possessors, in Article 120c because Appellant actively participated in the distribution. *See infra* Section C.5.b. (*Contra* Appellant's Br. at 8–9.)

In the absence of an analogous statutory scheme, the Court should decline to extend *Hill* beyond the scope of controlled substances.

b. Even applying *Hill* outside the context of controlled substances, it does not bar Appellant's conviction because he "sufficiently associate[d] himself with the purpose of [MB]."

In *United States v. Tracy*, 33 M.J. 142 (C.M.A. 1991), the appellant was charged with aiding and abetting the distribution of LSD after he helped a police informant find a civilian drug dealer, invited the drug dealer into the car, and told them to "do it now," meaning complete the drug transaction. *Id.* at 142–43. The Court affirmed the appellant's conviction because he "assisted the distribution" by advising on how to buy LSD, actively searching for a dealer, and acting as a lookout while the transaction was completed. *Id.* at 143; *see also United States v. Jones*, 37 M.J. 459, 460–61 (C.M.A. 1993) (aiding and abetting attempted distribution); *United States v. Pritchett*, 31 M.J. 213, 216–19 (C.M.A. 1990) (aiding and abetting distribution by spouse).

Here, as in *Tracy* and *Hill*, Appellant was more than a simple possessor: he was intimately involved in MB's distribution. As Appellant admitted, he "encourage[d], advise[d], instigate[d], and counsel[ed]" MB to take and send the photos of ENF, and MB would not have sent the photos if not for his actions. (J.A. 68–87, 153–55.) Unlike the arms-length, isolated drug transaction contemplated by this Court in *Hill*, Appellant "sufficiently associate[d] himself

with the purpose of [MB] so that he bec[a]me[] an aider and abettor of [MB]." *Hill*, 25 M.J. at 414; *cf. Tracy*, 33 M.J. at 143.

In charging Appellant, the United States did not "obliterate the distinction between possessors and distributors" because Appellant, through his aiding, abetting, and counseling of MB, became more than a possessor: he became a principal to MB's distribution. *Hill*, 25 M.J. at 413.

Appellant cites *Hill* for the proposition that a receiver can never be liable as aiding and abetting a distributor, (*see* Appellant's Br. at 8), but this conclusion is overly simplistic. While the *Hill* court held that "a buyer of drugs for his own personal use is not an aider and abettor of the distributor," it also held that one who "sufficiently associate[s] himself with the purpose of the seller" can become an aider and abettor, and the Court affirmed the conviction on that basis. 25 M.J. at 414–15. *Hill* was intended to stop prosecutors from turning every possessor into a distributor, but it did not create a bright-line rule. *Id.* at 413.

The Court should not, as Appellant does, interpret *Hill* beyond its intended meaning. Consequently, *Hill* does not bar Appellant's conviction.

D. There is no substantial basis in law to question Appellant's plea. Even if MB's conduct did not violate civilian law, her criminal liability is irrelevant to Appellant's liability.[4]

This Court has established that a servicemember can be liable as a principal even if the perpetrator is a civilian and not subject to the Code. *See, e.g.*, *Jones*, 37 M.J. at 460 (aiding and abetting attempted civilian drug distribution); *Hill*, 25 M.J. at 412–15 (aiding and abetting civilian drug distribution). Nevertheless, Appellant incorrectly posits that when a servicemember aids or abets a civilian, he is guilty only if the civilian's conduct is independently criminal. (*Contra* Appellant's Br. at 9–10.)

1. Case law and provisions in the Manual support that the amenability of the perpetrator to prosecution is irrelevant.

While an individual cannot be prosecuted for aiding and abetting acts that are not offenses under the Code, *see Jones*, 37 M.J. at 460, nothing requires that the perpetrator be criminally liable in order for the principal to be liable, *see United States v. Bennitt*, 72 M.J. 266, 274–75 (C.A.A.F. 2013) (Baker, J., dissenting) ("Thus, the requirement is that an 'offense punishable by this chapter' be

[4] Despite responding to this claim, the United States maintains this argument falls outside the scope of the granted issue. (*Compare* Supplement to Pet. for Grant of Review at 8–12, July 6, 2020, *with* Order Granting Review, July 28, 2020, *and* Appellant's Br. at 9–10.) This argument is merely a permutation of an issue this Court did not grant. (*See* Supplement to Pet. for Grant of Review at 12–15, July 6, 2020.) This Court should decline to consider it. *See, e.g.*, *United States v. Bodoh*, 78 M.J. 231, 233 n.1 (C.A.A.F. 2019).

committed, not that the perpetrator be amenable to prosecution."); *see also Standefer*, 447 U.S. at 11 ("[A]ll participants in conduct violating a federal criminal statute are 'principals,' and as such they are punishable for their criminal conduct, the fate of other participants being irrelevant."); *United States v. Lopez*, 662 F. Supp. 1083, 1086 (N.D. Cal. 1987) ("[A] sane getaway driver could be convicted of aiding and abetting an insane person's bank robbery."). (*Contra* Appellant's Br. at 9–10.)

In *United States v. Minor*, 11 M.J. 608 (A.C.M.R. 1981), the appellant pled guilty to aiding and abetting sodomy after forcing a German citizen to perform acts of sodomy on another civilian. *Id.* at 609. The court affirmed without considering whether Germany had an analogous sodomy statute because "[t]he amenability of the actual perpetrator to prosecution is not a requirement for criminal liability as an aider or abettor. The determinant is whether the act aided and abetted is an offense, not whether the perpetrator is subject to prosecution." *Id.* at 610–11.

As in *Minor*, Appellant aided and abetted a civilian who was not subject to prosecution under the Code and may not have been subject to prosecution by civilian authorities.[5] MB's amenability to prosecution does not alter Appellant's

[5] Appellant provides only speculation that MB's actions do not fall within the ambit of a civilian criminal statute. (*See* Appellant's Br. at 10 n.32.) Regardless, this foray into discerning her amenability to prosecution underscores the absurdity of Appellant's argument. *See infra* Section D.3.

principal liability because he aided, abetted, and counseled MB to commit "an offense punishable by this chapter," which is all the statute requires. Art. 77(1), UCMJ, 10 U.S.C. § 877(1) (2012); *see Minor*, 11 M.J. at 610–11; *see also infra* Section D.2.

Likewise, the Manual supports the conclusion that the perpetrator need not be amenable to prosecution for the principal to be convicted through Article 77. For instance, the Manual states "[o]ne may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted" because they are "independently liable." MCM pt. IV para. 1.b.(6). Consequently, it would be inconsistent and untenable to require proof that the perpetrator was criminally liable when a principal can be prosecuted without said perpetrator even being identified. *See also* MCM pt. IV para. 1.b.(2)(a) (providing example of principal liability despite the person committing actus reus being "guilty of no crime").

Other presidential explanations of substantive crimes in the Manual are consistent with this reasoning. *See, e.g.*, Art. 78, UCMJ, 10 U.S.C. § 878 (2012); MCM pt. IV para. 2.c.(4) (noting that in context of accessory after the fact "[t]he principal who committed the offense in question need not be subject to the code, but the offense committed must be punishable by the code"). Thus, the liability of a perpetrator is irrelevant to the prosecution of a principal—a wholly independent proceeding. *Cf. Standefer*, 447 U.S. at 11.

Appellant's citation to *United States v. Gosselin*, 62 M.J. 349 (C.A.A.F. 2006), is inapposite. (*Contra* Appellant's Br. at 9–10). Appellant's interpretation of the element "that an offense was being committed by someone" to include that the perpetrator must be amenable to prosecution for the offense is unsupported by *Gosselin* itself, *see* 62 M.J. at 351–53, as well as other case law, *see, e.g.*, *Standefer*, 447 U.S. at 11. MB's actions constituted "an offense punishable by this chapter," Art. 77(1), UCMJ, 10 U.S.C. § 877(1) (2012), regardless of whether she could be prosecuted. *See Bennitt*, 72 M.J. at 274–75 (Baker, J., dissenting); *cf.* Art. 120c, UCMJ, 10 U.S.C. § 920c (2012).

2. Appellant would have this Court rewrite Article 77 to include a condition not present in the statute.

Article 77(1) requires that the person doing the aiding, abetting, counseling, commanding, or procuring must be a "person punishable under this chapter," but it does not require that the person being aided, abetted, counseled, or procured be "punishable under this chapter." 10 U.S.C. § 877 (2012); *cf. Jones*, 37 M.J. at 460 ("It is entirely clear from this unambiguous language that, to be guilty as an aider and abettor, the actual perpetrator had to have committed some crime punishable under the Uniform Code of Military Justice.").

As the lower court noted, "Appellant's reading of the statute would re-write Article 77 to read 'any person subject to this chapter who aids and abets another person subject to this chapter [or punishable under civilian law]' and limit

application of Article 77 far beyond what Congress intended." *Simpson*, 2020 CCA LEXIS 67, at *18. Adopting Appellant's rule would frustrate the "unambiguous language" of Article 77(1). *Jones*, 37 M.J. at 460; *cf. McPherson*, 73 M.J. at 395 (refusing to read limitation into plain statutory text).

3. Appellant's position would place a strain on military justice by requiring courts-martial to interpret criminal statutes from other jurisdictions and lead to absurd results.

Court-martial jurisdiction is designed to be unaffected by location. *See* R.C.M. 201(a)(2) ("The UCMJ applies in all places."); R.C.M. 201(a)(3) ("The jurisdiction of a court-martial with respect to offenses under the UCMJ is not affected by the place where the court-martial sits."); *see also* R.C.M. 201(a)(2) discussion ("[J]urisdiction of courts-martial does not depend on where the offense was committed.").

Appellant's position would frustrate that principle because courts-martial would be required to wade through the morass of local criminal laws—including from foreign jurisdictions—to determine whether a civilian perpetrator's conduct was independently criminal. In his dissenting opinion in *Bennitt*, Judge Baker recognized this problem, saying such a rule would "place a most difficult burden on military law." *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)).

Furthermore, Appellant's proposed rule would create a loophole through which a servicemember could evade principal liability by employing a third party who could not be prosecuted. For instance, a servicemember could avoid liability under Article 117a by counseling a civilian from one of the many jurisdictions without a comparable statute criminalizing the distribution of intimate images. *Cf.* 10 U.S.C. § 917a (2018). Similarly, a servicemember could aid and abet prostitution or the distribution of marijuana without fear of military prosecution in jurisdictions that do not prohibit such acts. *Cf.* Arts. 112a, 134, UCMJ, 10 U.S.C. §§ 912a, 934 (2012); MCM pt. IV para. 106.

This Court should decline Appellant's invitation to "place a most difficult burden on military law" that frustrates its design and creates an unnecessary loophole in the Code. *Bennitt*, 72 M.J. at 274 (Baker, J., dissenting) (quoting *Blevins*, 34 C.M.R. at 979). Appellant is liable as a principal regardless of whether MB is amendable to prosecution.

E. Should the Court set aside Appellant's conviction, this Court can reassess and affirm the adjudged sentence because all four *Winckelmann* factors favor reassessment, and the Military Judge merged the relevant Specifications for sentencing, leaving the sentencing evidence unchanged.

This Court has established four nonexclusive factors to consider when determining whether a sentence rehearing is necessary:

> (1) Whether there is a dramatic change in the penalty landscape and exposure.

> (2) Whether an appellant chose sentencing by members or a military judge alone.
>
> (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.

United States v. Winckelmann, 73 M.J. 11, 15–16 (C.A.A.F. 2013).

1. A rehearing is not necessary because all four *Winckelmann* factors favor reassessment.

In *Winckelmann*, this Court affirmed the lower court's reassessment of the appellant's sentence despite setting aside specifications of possession of child pornography and attempted enticement of a child because the appellant's maximum punishment was unchanged and the gravamen of his offenses remained the same, as he remained guilty of using the internet to entice a child. *Id.* at 13, 16.

Appellant concedes the first and second factors favor reassessment. (*See* Appellant's Br. at 13.) The penalty landscape would be unchanged—Appellant remains guilty of conspiracy to create and distribute intimate visual images, so his maximum punishment remains the same, (J.A. 90); *see also* MCM pt. IV para. 5.e. (noting maximum punishment for conspiracy is same as underlying offense)—and Appellant was sentenced by the Military Judge, (J.A. 95, 143, 225).

The third factor favors reassessment because, as in *Winckelmann*, the removal of the distribution Specification does not alter the "gravamen of criminal conduct included within the original offenses." 73 M.J. at 16. The entirety of Appellant's misconduct with MB remains relevant and admissible because he remains guilty of conspiring to create and distribute the photos of ENF, and the actions proving the conspiracy were the same actions that constituted his aiding and abetting. (*See* J.A. 153–55); *cf. Winckelmann*, 73 M.J. at 16.

This conclusion is made all the more obvious because the Military Judge merged all the misconduct with MB for sentencing, (J.A. 90), meaning he sentenced Appellant on the basis of his misconduct with MB as a whole, not three separate offenses, *cf. United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2011) (discussing effect of merger). Thus, setting aside the distribution Specification leaves the sentencing landscape unchanged, and a rehearing is not necessary.

Appellant does not address the fourth factor, (*see* Appellant's Br. at 13–16), but it favors reassessment because this Court is familiar with violations of Article 120c. *See, e.g.*, *United States v. Nicola*, 78 M.J. 223, 225–30 (C.A.A.F. 2019).

Finally, the Court should decline to consider potential post-trial mitigating evidence as a factor for ordering a rehearing. (*Contra* Appellant's Br. at 16.) While *Winckelmann*'s factors are nonexclusive, 73 M.J. at 15–16, a plea for equitable relief, better suited for a clemency petition, cannot inform this Court's

legal analysis of whether a rehearing is required by law. This Court is a court of law, not equity. *See* Art. 67, UCMJ, 10 U.S.C. § 867 (2012). Moreover, Appellant's sister's terminal illness was already considered in sentencing. (*See* J.A. 123, 129); *cf. United States v. Akbar*, 74 M.J. 364, 391 (C.A.A.F. 2015) (finding no prejudice because new mitigating evidence did not "differ in a substantial way—in strength and subject matter—from the evidence actually presented").

2. The Court can reassess and affirm the adjudged sentence because the Military Judge merged all the Specifications involving Appellant's misconduct with MB.

"When there has been error at the court-martial, the [appellate court] must try to determine what the sentence would have been absent the error." *United States v. Jones*, 39 M.J. 315, 316 (C.M.A. 1994) (citing *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). This includes affirming the approved sentence when the error did not affect sentencing. *See Sales*, 22 M.J. at 308.

In *Jones*, this Court affirmed the lower court's decision not to alter the appellant's sentence despite setting aside the most serious of his three convictions for unauthorized absence. 39 M.J. at 316–17. The Court noted the sentence was well within the statutory maximum. *Id*. at 317.

As in *Jones*, Appellant remains convicted of two of the three Specifications stemming from his misconduct with MB, and his sentence was well within the

statutory maximum. (J.A. 90, 99–100, 143); *see Jones*, 39 M.J. at 316. Furthermore, the maximum punishment is unchanged, the underlying conduct and sentencing evidence remain the same, and the Military Judge merged the Specifications for sentencing. (J.A. 90); *see also supra* Section E.1.

Because the sentencing landscape is unchanged, this Court can be confident the sentence would have been the same with or without the distribution Specification. *See Jones*, 39 M.J. at 316.

3. Appellant inappropriately bootstraps a challenge to the admissibility of sentencing evidence to the *Winckelmann* analysis. The lower court dismissed this claim, and Appellant did not appeal the ruling. This Court should reject Appellant's attempt to circumvent the law of the case.

When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case. *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006) (citation omitted). "The doctrine promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *United States v. Ruppel*, 49 M.J. 247, 253 (C.A.A.F. 1998) (citation omitted). Appellate courts do not disturb the law of the case unless "the lower court's decision is clearly erroneous and would work a manifest injustice if the parties were bound by it." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (quotations and citation omitted).

The lower court dismissed Appellant's claim of error by the Military Judge in admitting sentencing evidence. *See Simpson*, 2020 CCA LEXIS 67, at *2. Appellant did not challenge this ruling in his Petition to this Court. (*See* Supplement to Pet. for Grant of Review at 1.) Consequently, the lower court's ruling became the law of the case. *See Parker*, 62 M.J. at 464.

In *Doss*, this Court declined to review the appellant's sentence reassessment because it was not in the certification, it was "not encompassed by the granted issue," and the parties failed to demonstrate how the lower court's ruling was "clearly erroneous and would work a manifest injustice." 57 M.J. at 185.

Here, as in *Doss*, Appellant did not challenge the lower court's ruling on the admissibility of the sentencing evidence, and he fails to demonstrate how it was "clearly erroneous and would work a manifest injustice." *Id.* The Court should reject Appellant's attempt to circumvent the law of the case by bootstrapping settled claims through a misapplication of the third *Winckelmann* factor. (*Contra* Appellant's Br. at 13.)

4. Regardless, the Military Judge did not err.

When preserved by objection, appellate courts review a military judge's decision to admit sentencing evidence for an abuse of discretion. *See United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2009). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not

supported by the evidence in the record; (2) incorrect legal principles were used; or (3) his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

"Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error." *Eslinger*, 70 M.J. at 197–98 (citation omitted). To prove plain error, an appellant must show: "(1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (citation omitted).

Trial counsel may present evidence of aggravating circumstances "directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4).

a. Appellant fails to show the Military Judge abused his discretion by admitting Prosecution Exhibit 2 and reviewing the portions that described Appellant's crimes.

"[D]irectly relating to or resulting from" includes evidence that "put[s] appellant's offenses into context." *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001) (quotations and citations omitted).

Here, the Military Judge limited his consideration of Prosecution Exhibit 2 to "conversations pertaining to pictures of [ENF], as well as other fantasies pertaining to [ENF]." (J.A. 142.) He found these conversations "relevant to give

context," but clarified he was "not sentencing the accused for offense to which he has pled not guilty." (J.A. 142–43); *cf. Nourse*, 55 M.J. at 231.

Consequently, because the Military Judge's ruling was neither based on "incorrect legal principles" nor "clearly unreasonable," *Ellis*, 68 M.J. at 344, he did not abuse his discretion by admitting excerpts of Prosecution Exhibit 2 for context, *cf. Nourse*, 55 M.J. at 231. (*Contra* Appellant's Br. at 14–15.)

b. Appellant fails to show plain error by the Military Judge in admitting the testimony of Colonel SH and ENF.

Aggravation evidence includes "evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense," as well as "evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused." R.C.M. 1001(b)(4).

Colonel SH testified about how the release of the photos of ENF affected his unit and the community. (J.A. 111–13.) Although Appellant did not release the photos himself, their release was a foreseeable consequence of his misconduct. *Cf. United States v. Scott*, 42 M.J. 457, 460 (C.A.A.F. 1995) (finding injuries and death aggravating evidence of conviction for carrying concealed weapon). Therefore, Appellant's misconduct was the direct and immediate cause of the unit impact described by Colonel SH. *Cf. id.*; R.C.M. 1001(b)(4).

ENF testified Appellant's crimes caused her "high anxiety, mild depression, low self-esteem, trust issues, inner conflicts, social anxiety, and constant[] worry[]." (J.A. 117–19.) These social and psychological impacts directly resulted from Appellant's misconduct, regardless of whether he released the images himself, and thus were admissible. *See Scott*, 42 M.J. at 460; R.C.M. 1001(b)(4).

Therefore, the Military Judge did not commit error, let alone "plain and obvious" error, *see Jones*, 78 M.J. at 44, when he admitted Colonel SH's testimony about unit impact and ENF's testimony about victim impact, *see Scott*, 42 M.J. at 460. Regardless, Appellant fails to allege material prejudice to a substantial right. (*See* Appellant's Br. at 12–16); *Jones*, 78 M.J. at 44.

Conclusion

The United States respectfully requests that this Court affirm the lower court's decision.

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on October 16, 2020.

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