IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **BYUNGGU KIM** Sergeant First Class (E-7) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20200689 USCA Dkt. No. 22-0234/AR

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

Issues Presented

I.

WHETHER A GUILTY PLEA TO AN OFFENSE WAIVES A CHALLENGE THAT THE CONDUCT IS NOT A COGNIZABLE OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

II.

WHETHER, IN THIS CASE, INTERNET SEARCH QUERIES FOR "DRUGGED SLEEP" AND "RAPE SLEEP" ARE INDECENT CONDUCT; IN THE ALTERNATIVE, WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ABIDE BY THE HEIGHTENED PLEA INQUIRY REQUIREMENTS UNDER *UNITED STATES V. HARTMAN*, 69 M.J. 467 (C.A.A.F. 2011).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction over this matter under Article 67 (a)(3), UCMJ.

Statement of the Case

On November 16, 2020, a military judge sitting as a general court-martial convicted Appellant, Sergeant First Class (SFC) Byunggu Kim, in accordance with his pleas, of four specifications of committing a lewd act, one specification of making an illegal recording, one specification of assault consummated by a battery, and one specification of indecent conduct, in violation of Articles 120b, 120c, 128, and 134, UCMJ, respectively. (JA006-9).

The military judge sentenced Appellant to be confined for 130 months, reduced to the grade of E-1, and discharged with a dishonorable discharge. (JA097). The convening authority approved only so much of the sentence that extended to the reduction to the grade of E-1, confinement for six years, and a dishonorable discharge. (JA010-11).

On May 26, 2021, the Army Court affirmed the findings of guilty and the sentence. (JA002-5).

Statement of Facts

Appellant was charged with eleven specifications, corresponding to six separate charges, most of which centered on acts with his stepdaughter, AK, in violation of Article 120b, UCMJ. (JA012-15). Appellant was also charged with indecent conduct under Article 134, UCMJ. (JA012-15). Specifically, the specification for this offense alleged that:

> [Appellant], did, at or near West Point, New York, on divers occasions between on or about 24 February 2019 and on or about 17 April 2019, commit indecent conduct, to wit: conducting an internet search for "rape sleep", and "drugged sleep", and that said conduct was of a nature to bring discredit upon the armed forces.

(JA015).

The Stipulation of Fact summarized the facts supporting the indecent conduct charge as follows:

> After returning to West Point from Arkansas, the Accused remained sexually attracted to and aroused by his thirteen-year-old step-daughter [AK]. Between on or about 24 February 2019 and on or about 17 April 2019, the Accused conducted internet searches on divers occasions for "rape sleep" and "drugged sleep" at the internet pornography website spankbang.com. The Accused stipulates and believes that[,] if informed that the Accused was searching for these videos with the intent to watch them for his personal sexual gratification because they reminded him of instances in which he was sexually abusing [AK], the average person would find this conduct indecent and of a nature to bring discredit upon the armed forces.

(JA029).

During the plea inquiry, Appellant said he used the terms "rape sleep" and "drugged sleep" to find "pornographic videos that depicted simulated vulgar sex

scenes." (JA082). Appellant discussed only one video, which he described as a woman pretending to sleep while a man placed his penis in her mouth. (JA083). The woman then gave the man fellatio, and the couple engaged in sexual intercourse while her eyes were closed. (JA083). While Appellant admitted that the videos were "vulgar," the military judge did not ask Appellant to provide additional details or ask either party whether these videos were constitutionally protected. (JA086). However, the military judge did repeatedly ask Appellant to confirm that the videos reminded him of abusing AK. (JA083, JA085).

The military judge accepted Appellant's plea.

I.

WHETHER A GUILTY PLEA TO AN OFFENSE WAIVES A CHALLENGE THAT THE CONDUCT IS NOT A COGNIZABLE OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

Standard of Review

Whether Appellant waived a claim for failure to state an offense is reviewed de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

Law and Argument

A. A guilty plea does not waive a failure to state an offense under the Rules for Courts-Martial.

Prior to 2018, Rule for Courts-Martial (R.C.M.) 905(e) provided, "[f]ailure by a party to raise defenses or objections or to make motions or requests which

must be made before pleas are entered under subsection (b) of this rule shall constitute waiver . . . Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver." R.C.M. 905(e) (2016 ed.) (JA101). In *United States v. Hardy*, this Court determined that "waiver" meant precisely what it said–waiver, not forfeiture. 77 M.J. 438, 441-42 (C.A.A.F. 2018). This result was consonant with the general criminal law principle that an unconditional plea of guilty waives all non-jurisdictional defects. *Id*. at 442.

In 2018, the President amended R.C.M. 905(e). *See* Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018) (effective Jan. 1, 2019) (JA141-3). R.C.M. 905(e) now provides that failure to raise defenses or objections, except jurisdiction and failure to state an offense, shall constitute "*forfeiture* absent *affirmative* waiver." R.C.M. 905(e) (2019 ed.) (emphasis added) (JA107). The amendment was intended to provide clarity on the applicability of forfeiture and waiver throughout the Manual. Manual for Courts-Martial [MCM], Analysis on the Rules for Courts-Martial, App. 15-14, Rule 905 (2019 ed.) (JA111).

While the amendment excepts out failure to state an offense, it does not provide for *what* occurs if it is not raised, other than to state it is "waivable."

R.C.M. 907(b)(2)(E) (JA115). However, forfeiture rather than automatic waiver should apply for three reasons.

First, since at least 1984, the President has excepted failure to state an offense from automatic waiver, even when failure to state an offense became "waivable." R.C.M. 905(e) (2016 ed.) (JA101); *see also United States v. Sorrells*, 2019 CCA LEXIS 112 at *6 (N.M. Ct. Crim. App. Mar. 13, 2019) (JA132-40). If the President intended to repudiate this rule, one would expect a statement to that effect in the rule's text, Discussion, or a comment in the Drafter's Analysis. *See Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987) (if a statutory interpretation would change the legal landscape, legislators are expected to comment on that change); *see also Freeman v. United States*, 131 S. Ct. 2685, 2696 (2011) (Sotomayor, J., concurring); Anita S. Krishnakumar, *The Sherlock Holmes Canon,* 84 Geo. Wash. L. Rev. 1 (2016). This is especially so where the President has amended the rules to now make forfeiture the appropriate standard to address *all* other defenses, motions, and objections that are otherwise waivable but were not raised.

Second, this was a guilty plea. Rule for Courts-Martial 910, which specifically pertains to guilty pleas, discusses "waiver" in two sections. Under R.C.M. 910(c)(4), a guilty plea specifically waives: (1) the right to plead not guilty; (2) the right to trial; (3) the right to confrontation; and (4) the right against

self-incrimination. R.C.M. 910(c)(4) (2019 ed.) (JA118). And under R.C.M. 910(j), an accused also waives "any objection, whether or not previously raised, *insofar as the objection relates to the factual issue of guilt of the offense(s)* to which the plea was made." R.C.M. 910(j) (2019 ed.)(emphasis added) (JA121-22). Importantly, the rule's discussion then notes, "[o]ther errors with respect to the plea inquiry or acceptance of a plea under this rule are subject to *forfeiture* if not brought to the attention of the military judge, and will be reviewed for harmless error under Article 45." Discussion, R.C.M. 910(j) (emphasis added) (JA122). Thus, by implication, R.C.M. 910 indicates that failure to state an offense is "subject to forfeiture."

Third, to the extent any ambiguity remains, remedial laws should be liberally construed in favor of granting access to the remedy. *Pitman Farms v. Kuehl Poultry*, LLC, 48 F. 4th 866, 883 (8th Cir. 2022) (citing *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 916 (Minn. 2012)). This includes rules of appellate procedure, which are remedial in nature. *See e.g., In re Milton Arrowhead Mountain*, 726 A.2d 54, 56 (Vt. 1999) (rules "regulating appeal rights are remedial in nature and must be liberally construed in favor of persons exercising those rights . . ."); *Silverbrand v. County of Los Angeles*, 205 P.3d 1047, 1050 (Cal. 2009) ("[courts] long have recognized a well-established policy, based upon the remedial character of the right of appeal, of according that right in doubtful cases when such

can be accomplished without doing violence to applicable rules") (internal citations and quotation marks omitted); *Van Meter* v. *Segal-Schadel Co.*, 214 N.E.2d 664, 665 (Ohio 1966) ("[S]tatutes providing for appeals and for proceedings with respect to appeals and for limitations on the right of appeal are remedial in nature and should be given a liberal interpretation in favor of a right of appeal"). Consequently, any ambiguity should be resolved in favor of Appellant.

In sum, a failure to state an offense is "waivable" only in the sense of an *affirmative* waiver, which is consistent with every other "waivable" defense, objection, or motion under R.C.M. 905(e).

To be sure, however, post-2018 decisions of the Army Court have found otherwise, relying on *Hardy*'s reasoning that when an accused pleads guilty to a specification, he is "'not simply stating that he did the discrete acts described in the [specification]; he is *admitting guilt of a substantive crime*.'" *United States v. Sanchez*, 81 M.J. 501, 504 (Army. Ct. Crim. App. 2021) (quoting *Hardy*, 77 M.J. at 442)(internal quotation marks omitted)(emphasis added) (JA005). Thus, to the Army Court, it "makes sense" that a guilty plea waives a failure to state an offense. *Id*. That may have been true in *Sanchez*, where the failure to state the offense was the omission of an element on the charge sheet, *Id.* at 503, but that holds no water here where the allegation is that there was *no substantive crime*, a critical

distinction recognized in federal cases.[1] To draw from the Supreme Court's recent decision in *Class v. United States*: "if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged." 138 S. Ct. 798, 804 (2018).[2]

B. The record does not support an affirmative waiver of a failure to state an offense.

Here, Appellant's plea agreement did *not* contain a "waive all waivables" clause. *Cf. United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). Although the agreement did indicate that Appellant waived a failure to state an offense issue (JA035), the record reveals that this waiver specifically pertained to a *different*

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[1] *See e.g.*, *United States v. Peter*, 310 F. 3d 709 (11th Cir. 2002) (failure to state an offense where act is outside the reach of the statute is nonwaivable); *United States v. Rita-Ortiz*, 348 F. 3d 33, 36 (1st Cir. 2003) ("a guilty plea does not preclude an [appellant] from arguing on appeal that the statute of conviction does not actually proscribe the conduct charged in the indictment"); s*ee also Class v. United States,* 138 S. Ct. 798, 801 (2018) ("[i]n more recent years, the Court has reaffirmed the . . . basic teaching that 'a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.'") (citations omitted).

[2] Arguably, this falls into the exception of nonwaivable claims under the Supreme Court's *Menna-Blackledge* doctrine discussed in *Class*, *supra*, which covers claims going to the power of the state to prosecute. *Class*, 138 S. Ct. at 801. Indeed, this claim is not one which could have been cured through a new indictment, nor is it "irrelevant to the validity of the conviction." *Id*. at 804-05; *see also United States v. Barboa*, 777 F.2d 1420, 1422-23, n. 3 (10th Cir. 1985) (a guilty plea does not waive something which is not a crime, for it goes to the very power of the state to bring charges).

offense. (JA094). Thus, Appellant did not explicitly waive the issue for indecent conduct. *Hardy*, 77 M.J. at 445, 447 (Ohlson, J., dissenting) (noting that "waiver is serious business" and that "inferential leaps should not create an 'implicit' and yet, somehow, 'intentional' relinquishment of a known right").

II.

WHETHER, IN THIS CASE, INTERNET SEARCH QUERIES FOR "DRUGGED SLEEP" AND "RAPE SLEEP" ARE INDECENT CONDUCT; IN THE ALTERNATIVE, WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ABIDE BY THE HEIGHTENED PLEA INQUIRY REQUIREMENTS UNDER *UNITED STATES V. HARTMAN*, 69 M.J. 467 (C.A.A.F. 2011).

Standard of Review

This Court reviews failure to state offense claims de novo. *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)). A forfeited issue is reviewed for plain error: whether (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018). With respect to accepting a plea to an offense, this Court reviews a military judge's decision for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 323 (C.A.A.F. 2008).

Law and Argument

A. The internet searches for "drugged sleep" and "rape sleep" are not indecent conduct.

This Court held in *United States v. Moon*, "the danger of sweeping and improper applications of the general article would be wholly unacceptable" where an offense is premised on an accused's "subjective reaction to viewing otherwise protected images[.]" 73 M.J. 382, 389 (C.A.A.F. 2014). However, that is precisely what occurred here.

Notwithstanding Appellant's description of one video of consensual pornography as "vulgar," this material is constitutionally protected. *See e.g.*, *American Booksellers Assoc. v. Hudnut*, 771 F. 2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) (overturning city ordinance that banned depictions of women enjoying rape); Keisha April, *Cartoons Aren't Real People, Too: Does the Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?,* 19 Cardozo J.L. & Gender 241, 261, n. 153 (2012) (noting that rape-fantasy films are protected speech) (JA146).

The Stipulation of Fact, which does not even discuss the videos, makes readily apparent that the indecency turned on his intent to receive sexual gratification with these videos solely because it "reminded him of the instances in which he was sexually abusing his [step-daughter]." In this sense, it did not matter what he was looking at. *Moon*, 73 M.J. at 389 (receiving gratification from

something does not remove its protection; otherwise, "a sexual deviant's quirks could turn a Sears catalog into pornography.") (quoting *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999)). In short, Appellant was convicted for abusing his stepdaughter and, contrary to *Moon*, separately convicted for his *thoughts* of abusing his stepdaughter. *See Stanley v. Georgia*, 394 U.S. 557, 567 (1969) ("our whole constitutional heritage rebels at the thought of giving the government the power to control men's minds").

B. Even if the conduct could be indecent, the military judge abused his discretion in accepting the plea because he failed to abide by the heighted requirements in *United States v. Hartman*.

Assuming *arguendo* that this offense *could* be criminal, the colloquy is deficient and does not support the plea. "When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'" *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011). Under *Hartman*, a detailed inquiry is required when there is the potential to criminalize otherwise protected conduct. *Id.* More specifically, the colloquy "must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." *Id*. Here that did not happen.

To the extent it could have been an offense, it would have necessarily revolved around *what* he was looking, not *why*. As discussed above, this is protected material, but the colloquy never "established why the otherwise protected material could still be, and was . . . service discrediting in the military context." *Moon*, 73 M.J. at 389. Moreover, "[w]ithout a proper explanation and understanding of the constitutional implications of the charge, Appellant's admissions . . . regarding why he personally believed his conduct was service discrediting . . . do not satisfy *Hartman*." *Id*. Consequently, the military judge abused his discretion when he accepted Appellant's plea.

Conclusion

Based on the foregoing, Appellant requests that this Court grant appropriate relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Kim, Crim. App. Dkt. No. 20200689, USCA Dkt. No. 22-0234/AR was electronically filed with the Court and the Government Appellate Division on December 7, 2022.

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