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	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20200689 USCA Dkt. No. 22-0234/AR

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 the Case

On November 7, 2022, this Court granted Appellant's petition for grant of review on the issues above and ordered briefing under Rule 25. (JA001). On December 7, 2022, Appellant filed his brief with this Court. The Government responded on January 6, 2023. On January 12, 2023, this Court granted Appellant's motion for an enlargement of time to file a reply brief. This is Appellant's reply.

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.

Argument

Relying on *United States v. Hardy*, 77 M.J. 438 (C.A.A.F. 2018), the Government argues this issue is waived because Appellant pled guilty. (Gov. Br. at 7). The Government's reliance on *Hardy* is misplaced. Like the Army Court, the Government fails to address the changes to Rule for Courts-Martial [R.C.M.] 905 post-*Hardy*. *Hardy* relied on a previous version of R.C.M. 905(e), which, at that time, provided for "waiver." *Id*. at 441. The rule now provides for forfeiture. R.C.M. 905(e) (2019 ed.). Indeed, as the majority explicitly noted, "an executive order soon will amend R.C.M. 905(e), likely affecting the analysis of future cases

involving unpreserved . . . objections in which there is no other ground for finding waiver." *Id*. at 439.

The only rule that specifically says a guilty plea waives objections is R.C.M. 910(j), and it cabins waiver solely to errors relating to the factual issue of guilt. The issue here does not concern Appellant's factual guilt. Rather, "the claim is that the [Government] may not convict [Appellant] no matter how validly his factual guilt is established." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1973).

The Government next contends that Appellant affirmatively waived the issue because the military judge explained to Appellant, as part of the plea colloquy, that "certain" motions are waived if not raised prior to the plea, despite that the military judge never identified what those motions actually were. (Gov. Br. at 8).

The Government is mistaken for three reasons. First, failure to state an offense is explicitly excluded from those motions that must be made prior to the plea. R.C.M. 905(b)(2). Second, following the changes to R.C.M. 905(e), Appellant was not waiving *any* motions by failing to raise them "prior to the plea," and the only motions Appellant waived by failing to raise them at all were those motions relating to the factual issue of his guilt. R.C.M. 910(j). Lastly, this Court has required more than an acknowledgement to a vague advisement that *certain* motions are waived to find an "intentional relinquishment" of a "known right."

United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citations omitted).[1] In this case, there was no affirmative waiver.[2]

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).

Argument

The Government, for all intents and purposes, concedes that Appellant's *conduct* was not obscene or otherwise criminal, in and of itself, but argues instead that it was Appellant's "fantasies" that made his actions indecent. (Gov. Br. at 16). Curiously, the Government states that these *thoughts* are subject to criminalization because they lack any artistic value. (Gov. Br. at 17). The Government's interpretation of the reach of Article 134 is breathtaking and without *any* authority. As the Supreme Court declared in *Stanley v. Georgia*, "[o]ur whole constitutional

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[1] *See also United States v. Olano,* 507 U.S. 725, 733 (1993) ("…Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment or a known right.'" (citations omitted)).

[2] Even if this Court finds waiver, Appellant's guilty plea did not waive the deficient inquiry under *United States v. Hartman* as that issue relates to Appellant's providence. *See United States v. Moon*, 73 M.J. 382, 386-88 (C.A.A.F. 2014).

heritage rebels at the thoughts of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). *See also United States v. Meakin*, 78 M.J. 396, 402 (C.A.A.F. 2019) (*Stanley* "emphasized the freedom of thought and mind in the privacy of his own home." (citations omitted)).

There is no indication in the providence inquiry or the stipulation of fact that Appellant's "fantasies" were ever expressed to anyone. At all times his thoughts remained private.

Despite the Government's contention, *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008), does not support its claim that Appellant's private thoughts may be proscribed by the military. (Gov. Br. at 16-17). To the contrary, *Wilcox* held a direct and palpable connection between First Amendment protected conduct and the military mission or environment is required for an Article 134 offense charged under a service discrediting theory, such as here. *Wilcox*, 66 M.J. at 448-49. This Court found, "[i]f such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive. And to use this standard to impose criminal sanctions under Article 134, UCMJ, would surely be both vague and overbroad." *Id*. at 449 (citing *United States v. O'Connor*, 58 M.J. 450, 455 (C.A.A.F. 2003)). Here, like in *Wilcox*, there was no direct and palpable connection between

Appellant's conduct (or his fantasies) and the military mission or military environment.

Finally, even if his conduct was indecent, the providence inquiry failed to adhere to the heightened requirements of *United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011). While the Government provides a recitation of what Appellant admitted to (Gov. Br. at 18-22), the significant fact the Government ignores is the complete absence of any discussion or acknowledgement of the distinction between what is permissible and what is prohibited. *Id*. at 468 (citation omitted). Critically, the military judge never explained to Appellant that the videos he watched were constitutionally protected. (JA083). And while the Government concedes that this conduct was likely protected, and that it was his fantasies that were service discrediting, Appellant's answers to the military judge demonstrated his focus was on the protected material. (JA086).

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 January 23, 2023.

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