IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
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Sergeant First Class (E-7) **BYUNGGU KIM,** United States Army, Appellant	)	Crim. App. Dkt. ARMY 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 Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2019) [UCMJ]. The statutory basis for this Court's jurisdiction rests upon Article 67(a)(3), UCMJ.

Statement of the Case

On November 16, 2020, a military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of four specifications of committing a lewd act, one specification of indecent recording, one specification of assault consummated by a battery, and one specification of indecent conduct, in violation of Articles 120b, 120c, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920b, 920c, 928, 934 (2019) [UCMJ]. (JA096). The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 130 months, and a dishonorable discharge. (JA097). On January 7, 2021, in accordance with the pretrial agreement, (JA033, 38), the convening authority approved only so much of the sentence as provided for reduction to E-1, confinement for six years, and a dishonorable discharge. (JA010). The military judge entered judgment on January 11, 2021. (JA011).

On May 26, 2022, ACCA affirmed the findings of guilty and sentence, which included the indecent conduct specification. *United States v. Kim*, ARMY 20200689 (Army Ct. Crim. App. May 26, 2022) (unpub. op.). (JA002–05).

Statement of Facts

A. Appellant Sexually Assaulted AK

From 1 June 2018 to 24 April 2019, Appellant sexually abused his stepdaughter, AK, on at least seven occasions in Dededo, Guam, and West Point, New York. (JA012, 024–26, 31). AK was twelve when Appellant began to sexually abuse her, and she reported him when she was thirteen. (JA043). Appellant sexually abused AK by touching her back, shoulders, buttocks, inner thigh, and genitalia, both directly and through the clothing—all with the intent to arouse and gratify his sexual desire. (JA024–26, 046). Appellant's abuse occurred late at night, when AK was tired. (JA046). Appellant waited for AK to be semi-conscious, and he sexually abused her. (JA024–25, 30, 46).

From 20–23 January 2019, Appellant surreptitiously recorded AK while she showered. (JA061). Appellant hid his phone in the bathroom, which allowed him to record AK nude as she entered and exited the shower. (JA061). Appellant retrieved his phone, edited the video clips—capturing only the portions where AK was nude—and stored the edited video clips in a folder labeled "trash." (JA065).

On 24 April 2019, Appellant sexually abused AK for the last time. (JA0070–71, 76–77). On this date, Appellant's wife—AK's mother—was in the hospital after giving birth to Appellant's youngest child. (JA071). Appellant had AK stay up late, followed her to her room, kissed her on the lips after she told him

no, and touched her genitalia over her clothes. (JA070–72, 76). He attempted to record the kiss, but he was unable to because she protested. (JA072). AK eventually locked herself in another room and called the police. (JA077).

During the period Appellant abused AK, she was on medication that caused hallucinations. (JA024). Appellant attempted to exacerbate these hallucinations by flashing lights and pounding on her wall late at night. (JA031). Appellant sexually abused AK during periods when she suffered from hallucinations and was particularly drowsy. (JA024).

B. Appellant Conducted Searches for Sexually Explicit Videos to Remind Him of Sexually Assaulting AK

From February 24, 2019 to April 17 2019, Appellant conducted several internet searches for "rape sleep" and "drugged sleep" on a pornographic website. (JA029, 081). Appellant searched for these terms because they reminded him of the times he sexually abused AK—specifically the times Appellant waited for AK to be almost asleep before touching her genitalia. (JA029, 83–85). During the providence inquiry, Appellant described how the videos he found on the internet reminded him of sexually abusing AK—Appellant found the videos when he conducted an internet search with the terms at issue. (JA086). According to Appellant, as he was conducting the internet search, he reminisced about one specific instance when he sexually abused AK—he had a battle assembly and waited for AK to fall asleep so he could touch her genitalia. (JA084). During the

providence inquiry, Appellant also admitted that his internet searches were of a nature to bring discredit on the armed forces. (JA086). Appellant stated, "if the public were to know that I looked this kind of stuff up, then it would hurt the reputation of the service." (JA086). In addition to pleading guilty, Appellant signed a stipulation of fact wherein he acknowledged that if the public found out he "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).

GRANTED ISSUE 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 an appellant has waived an objection is a legal question that this Court reviews de novo. *United States v. Day*, 2022 CAAF LEXIS 892, at *6, (C.A.A.F. 2022)(quoting *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002)). When a claim of error is forfeited, the court reviews for plain error. *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). For Appellant "to prevail under plain error review, there must be an error, that was clear or obvious, and which prejudiced a substantial right of the accused." *Id.*

(citing *Sweeney*, 70 M.J. at 304). A finding of plain error requires: 1) error, 2) that the error be plain or obvious, and 3) that the error affect substantial rights. *United States v. Olano*, 507 U.S. 725, 732-34 (1993). The court may correct such plain error when it materially prejudices an Appellant's substantial right. *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998)).

An "unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010). Rule for Courts-Martial (R.C.M.) 907(b)(2)(E) states that, "A charge or specification *shall* be dismissed upon motion made by the accused *before* the final adjournment of the court-martial in that case if…the specification fails to state an offense. (emphasis added).

Law

It is a long-established principle that an unconditional plea of guilty waives all nonjurisdictional issues the defendant may have wished to raise at a contested trial. *See United States v. Lee*, 73 M.J. 166, 167 (C.A.A.F. 2014), *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010), *United States v. Joseph*, 11 M.J. 333, 335 (C.M.A. 1981).

In 2016, the President amended the Rules for Court Martial (R.C.M.), including R.C.M. 907, which states that failures to state an offense through defect of charging were nonjurisdictional and therefor subject to waiver. (R.C.M.

907(b)(2)(E).

Jurisdictional errors that impact the court's authority to hear a case cannot be waived. *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). Nonjurisdictional issues such as found in R.C.M. 907, in contrast, can be waived. The court "cannot review waived issues at all because a valid waiver leaves no error for [it] to correct on appeal." *United States v. Davis*, 79 M.J. 329, 331, (C.A.A.F 2020).

Argument

A. Appellant's unconditional guilty plea waived a failure to state an offense under the Rules of Court-Martial.

Appellant argues that failure to state an offense is not an automatic waiver and that Appellant did not affirmatively waive this issue. (Appellant's Br. 6) However, Appellant entered an unconditional guilty plea which affirmatively waived his right to raise this issue on appeal. (JA090–91). The Army Court of Criminal Appeals did not err when it found the issue was waived. (JA002–05). As this court found in *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2008), when a defendant unconditionally pleads guilty, he is waiving any nonjurisdictional objections and appeals. As stated in R.C.M. 907, failure to state an offense is a waivable issue and was indeed waived in this case. Any implication by Appellant that another reading to dispose of waivable, nonjurisdictional defects in a charging document would be "inconsistent with the fair and efficient

administration of justice." *United States v. Sanchez*, 81 M.J. 501, 506 (Army Ct. Crim. App. 2021).

Appellant also argues that because this failure to state an offense for indecent conduct was not brought to the judge during the acceptance of the plea agreement, it should be subject to forfeiture *vice* waiver based on the discussion in R.C.M. 910(j)[1]. (Appellant's Br. 7). However, this interpretation of the rule is flawed because, in his guilty plea, Appellant is "not simply stating that he did the discrete acts described in the [specification]; he is admitting guilt of a substantive crime." *See United States v. Hardy*, 77 M.J. 438, 442) (C.A.A.F. 2018).

Finally, Appellant's argument that the failure to state an offense motion was for Charge V (unrelated to indecent conduct); however the military judge also explained to Appellant, "that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering your plea." (JA090) The military judge confirmed that Appellant knew of his right to file pretrial motions, and that he was "expressly and affirmatively waiving this right to file motion*s*." (JA090)(emphasis added). Appellant agreed to the indecent conduct charge "freely and voluntarily … in order to receive what [he] believed to be a

[1] R.C.M. 910(j) *Discussion*. Other 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.

beneficial agreement in exchange."[2] (JA092).

GRANTED ISSUE 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

"[Appellate courts] review a military judge's acceptance of a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." *United States v. Simpson*, 77 M.J. 279, 282 (C.A.A.F. 2018) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

Whether a statute is unconstitutional as applied to an individual case is reviewed de novo. *United States v. Ali*, 71 M.J. 256, 265 (C.A.A.F. 2012), *cert. denied*, 569 U.S. 972 (2013) (citing *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005)).

Law

When a court evaluates whether a statute is unconstitutional as-applied, it conducts a fact-specific inquiry. *Ali* at 265–66 (citing *Dahnke-Walker Milling Co.*

[2] Regardless of the language in the pretrial agreement, the unconditional guilty plea waived this nonjurisdictional issue on appeal.

v. Bondurant, 257 U.S. 282, 289 (1921)) ("A statute may be invalid as-applied to one state of facts and yet valid as applied to another."). Even after *Class v. United States*, 138 S. Ct. 798 (2018) however, federal courts apply plain-error review to unpreserved (and thereby forfeited) challenges to a statute's constitutionality. *See United States v. Bacon*, 884 F.3d 605, 610–11 (6th Cir. 2018) (applying plain-error review to a constitutional challenge raised for the first time on appeal); *cf. United States v. St. Hubert*, 909 F.3d 335, 339, 341, 344–46 (11th Cir. 2018) (applying de novo review to a preserved constitutional challenge after an unconditional guilty plea). Upon plain error review, to prove that Article 134, UCMJ—a facially constitutional criminal statute—is unconstitutional, Appellant must point to particular facts in the record that plainly demonstrate why his interests should overcome Congress' and the President's determinations that his conduct be proscribed. *United States v. Vazquez*, 72 M.J. 13, 16–21 (C.A.A.F. 2013).

As-applied challenges, unlike facial challenges, are subject to waiver by virtue of unconditional guilty pleas. *See United States v. Phillips,* 645 F.3d 859, 862 (7th Cir. 2011); *United States v. De Vaughn*, 694 F.3d 1141, 1149–50 & n.5 (10th Cir. 2012); *United States v. Morgan*, 230 F.3d 1067, 1071 (8th Cir. 2000). This is so because "[u]nlike a facial challenge, an as-applied challenge does not dispute the court's power to hear cases under the statute; rather, it questions the

court's limited ability to enter a conviction in the case before it." *Phillips*, 645 F.3d at 863.

The First Amendment to the United States Constitution notes, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The sweep of this protection is less comprehensive in the military context, given the different character of the military community and mission. *Parker v. Levy*, 417 U.S. 733, 758 (1974). These differences result in military laws that "regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated." *United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008) (citing *Parker*, 417 U.S. at 749).

Although more limited, there is no dispute that servicemembers enjoy some measure of free speech granted by the First Amendment. *See Parker*, 417 U.S. at 758 (noting that "members of the military are not excluded from the protection granted by the First Amendment . . ."). Some speech—dangerous speech, obscenity, or fighting words—is not protected by the First Amendment, regardless of the military or civilian status of the speaker. *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996) (citing *Cohen v. California,* 403 U.S. 15 (1971); *Roth v. United States,* 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942)). Specifically, it is "well settled law" that obscenity falls outside of First Amendment protections. *United States v. Meakin,* 78 M.J. 396, 401 (C.A.A.F.

2019) (citing *United States v. Williams,* 553 U.S. 285, 288 (2008)). The Court of Appeals for the Armed Forces [CAAF] has long held that obscene is synonymous with indecent. *Id.*

Despite obscenity's unprotected status, the Supreme Court in *Stanley v. Georgia* found that the government is limited in its power to regulate the possession of obscene materials in a person's home. 394 U.S. 557, 568 (1969). While the Court's holding in *Stanley* is clear, the constitutional principle underlying its decision is less so. *See Osborne v. Ohio,* 495 U.S. 103, 108 (1990) (noting *Stanley* is a narrow holding limited to the specific facts of that case). *Stanley* should not be read too broadly because courts have consistently rejected constitutional protection for obscene material outside of the home. *Id.; United States v. Orito,* 413 U.S. 139, 142 (1973); *United States v. Meakin*, 78 M.J. 396, 402 (C.A.A.F. 2019).

In determining whether something is obscene, the Supreme Court established a three-part test in *Miller v. California*, 413 U.S. 15, 22 (1972). The *Miller* test requires the factfinder to determine: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state [or federal] law; and (c) whether the work, taken as a whole, lacks serious

literary, artistic, political, or scientific value. *Id*. at 24 (internal quotes omitted). In determining whether something is obscene under Article 134, UCMJ, the courts have stressed the importance of the circumstances of the speech or conduct. *Wilcox,* 66 M.J. at 447 (citing *United States v. Daniels*, 19 U.S.C.M.A. 529, 534–35, 42 C.M.R. 131, 136–37 (1970)).

In *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247, 253 (C.M.A. 1969), and Rule for Courts- Martial (R.C.M.) 910, the requisite inquiry into the providence of a guilty plea is described not as a bright line test, but as a "colloquy between the military judge and an accused[, which] must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011).

"The fundamental requirement of plea inquiry under *Care* and R.C.M. 910 involves a dialogue in which the military judge poses questions about the nature of the offense and the accused provides answers that describe his personal understanding of the criminality of his or her conduct." *Id.* at 469. Further, without "…a dialogue employing lay terminology to establish an understanding by the accused as to the relationship between the supplemental questions and the issue of criminality, [this court] cannot view [a] plea as provident." *id.*

Assuming the court elects to consider Appellant's as-applied challenge, it

should do so through the lens of plain error. *See Bacon*, 884 F.3d at 610–11 (applying plain-error review to a constitutional challenge raised for the first time on appeal); *United States v. Bunch*, ARMY 20160197, 2017 CCA LEXIS 471, at *11–12 (Army Ct. Crim. App. 13 Jul. 2017) (mem. op.) (noting that because the Appellant failed to raise a constitutional overbreadth challenge at trial, he was entitled to, "at most," plain-error review). Under a plain error analysis, the accused has the burden of demonstrating that: (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. Davis*, 76 M.J. 224, 230 (C.A.A.F. 2017) (citing *United States v. Payne*, 73 M.J. 19, 23 (C.A.A.F. 2014)).

Argument

Appellant's conduct was indecent and met the elements of Article 134 of the Uniform Code of Military Justice. During the colloquy with Appellant, the judge elicited the necessary factual basis required for the guilty plea and Appellant admitted to every necessary element. (JA080–87).

Appellant argues that his conduct was constitutionally protected. (Appellant's Br. 11). Appellant's as-applied challenge fails for two reasons. First, Appellant waived the issue when he pleaded guilty unconditionally and failed to present to the military judge the arguments he now advances on appeal. And even

assuming such a claim was not waived, Appellant fails to establish there was any error, let alone plain or obvious error.

A. The internet searches for "drugged sleep" and "rape sleep" are indecent conduct. Appellant waived any as-applied challenge by virtue of his unconditional guilty plea and failed to raise this objection at trial.

The elements of the offense of indecent conduct under Article 134 of the Uniform Code of Military Justice are that (1) That the accused engaged in certain conduct; (2) That the conduct was indecent; and (3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶104.b.

"Indecent" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. *Id. at* ¶104.c.(1). (JA080) Appellant also acknowledged and agreed to this definition of indecent. (JA080)

During his providence hearing, Appellant repeatedly affirmed to the military judge that his search for these terms was directly related to reliving the times he abused his stepdaughter (JA085–086). Appellant also described how the public

would lower its esteem of the military and hurt the reputation of the military. (JA086). Appellant clearly satisfied the elements of indecent conduct during his providence inquiry.

Appellant's conduct was obscene—he conducted multiple internet searches for videos simulating the sexual abuse he committed against AK. (JA084–86) In isolation, conducting internet searches for "rape sleep" and "drugged sleep" may not be obscene, even under the limited First Amendment protections afforded to servicemembers, but the "context" of Appellant's searches matter. *Wilcox,* 66 M.J. at 447. Appellant, on multiple occasions, sexually abused his stepdaughter while she was falling asleep—often due to fatigue that Appellant caused or exacerbated. (JA024–25, 030, 046, 084, 086). Appellant was also aware that AK was on medication that caused hallucinations, or put another way, that she was in a "drugged" state. (JA024).

The court's assessment of the *Miller* factors must take Appellant's conduct into consideration. *Wilcox,* 66 M.J. at 447. Appellant's internet searches specifically sought videos that reminded him of his sexual abuse of his thirteen-year-old stepdaughter. (JA083, 085). These type of "repugnant sexual fantasies involving children," appealed and intended to appeal to the prurient interest. *Meakin*, 78 M.J. at 401. Appellant's conduct meets the definition of indecent—exactly what is punishable under the statute he plead guilty to. (JA080–81).

Indecent means "that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], pt. IV, ¶104.c.(1). Appellant admitted that his conduct met this definition. (JA080, 086). Specifically, Appellant admitted this after he told the military judge that he searched for these videos to remind himself of the times he sexually abused AK as she was falling asleep. (JA085–86). Finally, Appellant's conduct lacked any serious literary, artistic, political, or scientific value. Appellant cites a law review article to make the argument that there are artistic works that depict "rape sex" and "drugged sleep." (Appellant's Br. 11). What this argument fails to take into account is that his search terms were conducted within the context of fulfilling the fantasy of sexually abusing a thirteen-year-old girl—something that lacks any potential artistic value, and Appellant admitted was service discrediting. *See United States v. Green*, 68 M.J. 266, 270 (C.A.A.F. 2010) ("We must examine the entire record of trial to determine the precise circumstances under which the charged language was communicated.") (internal quotation marks and citations omitted). (JA086) Consequently, Appellant cannot show plain error exists because his conduct met the definition of "indecent," *MCM*, pt. IV, ¶104.c.(1), and there was no abuse of discretion by the judge in accepting his plea.

Further, Appellant waived his as-applied challenge to Charge VI and its specification by unconditionally pleading guilty. (JA033–36)). Importantly, Appellant raises his as-applied challenge for the first time on appeal. (JA090–91). Because Appellant did not raise this argument at trial, it is waived. *Phillips*, 645 F.3d at 862 ("Consistent with every court that has addressed this issue, we now hold that a defendant who pleads guilty without raising an as-applied . . . challenge in the trial court is barred from raising that issue on appeal."). Appellant was free to make this argument before he pled guilty, and he could have entered into a conditional guilty plea to preserve this issue. *See* Rule for Courts-Martial 901(a)(2) ("With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty."). He did neither, and his failure to do so leaves only one conclusion for this court—Appellant waived his as-applied challenge.

B. The Military Judge Did Not Abuse His Discretion when he accepted Appellant's guilty plea because he met the heightened standard in *United States v. Hartman*.

"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) (quoting *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003). This court established a requirement for colloquy in *Hartman* that, "the colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." *id. at 468.*

The colloquy between the military judge and Appellant contained an appropriate discussion and acknowledgement on the part of the accused that met every element of indecent conduct and met the heightened requirements under *Hartman*. Appellant admitted that he conducted an internet search for the terms "rape sleep" and "drugged sleep"; that his conduct was indecent; and that under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. (JA080). The military judge clearly considered all the circumstances of appellant's conduct when finding that it was of a nature to bring discredit upon the armed forces. The military judge established that appellant searched for "rape sleep" and "drugged sleep" because he was searching for videos that reminded him of the times he sexually abused AK. (JA 080). The military judge elicited that the appellant was specifically reminded of a particular instance where he waited for AK to become groggy and fall asleep before touching her genitals; appellant

specifically remembered that this occurred before battle assembly. (JA 084). Appellant admitted that AK was under the influence of medication—or drugged—during the time period that he sexually abused her. (JA 019). Appellant attempted to exacerbate the hallucinogenic effect of the medication by flashing lights and pounding on AK's walls late at night. (JA 019).

Appellant also demonstrated through his answers to the judge's questions that he understood the service-discrediting nature of his misconduct, in that "if the public were to know I looked this stuff up, then it would hurt the reputation of the service." (JA086).

Appellant's as-applied challenge involves a fact-specific inquiry examining the particulars of Appellant's misconduct. See *Ali*, 71 M.J. at 265–66 (finding that a statute may be invalid as to one set of facts, yet valid as to another). Appellant established the requisite criminality, and thereby forwent any constitutional protection, by engaging in a colloquy with the military judge that contained the "appropriate discussion and acknowledgement on the part of the accused of the critical distinction between permissible and prohibited behavior." *Hartman*, 69 M.J. at 468.

During the inquiry into Appellant's providence to the indecent conduct, the military judge first read the charge and definitions to Appellant and Appellant confirmed he understood what the terminology meant. (JA080). The military

judge asked and confirmed multiple times that Appellant knew both what the charge and definitions meant and that they described the misconduct. (JA080) Appellant repeatedly confirmed that he both understood and admitted his misconduct fit the criminal definition of service discrediting indecent conduct. (JA080).

The military judge required Appellant to describe, in his own words, the facts and circumstances surrounding the indecent conduct. (JA080). Appellant looked for "pornographic videos depicting simulated vulgar sex scenes involving sleep or sex with an individual that was pretending to be asleep." (JA081) He wanted to find videos that "[i]nvolv[ed] sleep, or sex with individuals that was (sic) pretending to be asleep." (JA082) Appellant mentioned several times that the repugnant nature of the searched for terms would elicit disgust from the public and hurt the reputation of the Army should it be known. (JA081).

The military judge asked Appellant to also explain why he searched for those specific terms. (JA082). Responding that the vulgar nature of the videos excited him, the military judge followed-up a question whether this reminded Appellant of the times he sexually assaulted AK. (JA083). Appellant replied yes, that it reminded him of the times he sexually assaulted AK because the scenarios were similar to the pornographic videos. (JA084). When asked to elaborate how the scenarios were similar to when he abused AK, Appellant responded that it was

similar because AK was almost asleep when he massaged her—the judge reiterated, "[the time] you put your hands under her clothing, and were touching her genitalia?" to which Appellant affirmed. (JA084).

The record reflects that the judge took the time to explain the formal charges and legal definitions to the point of complete understanding with Appellant and engaged in a detailed and frank dialogue with Appellant about the specifics of his indecent conduct. (JA080–84). The military judge questioned Appellant whether his purpose for searching these terms was permissible — "someone didn't just tell you that these terms exist, and you were trying to satisfy your curiosity as to whether or not they actually would show you anything" — or impermissible, "these search terms, and the videos that you found from them, reminded you of the time you were with your stepdaughter, where she was falling asleep, and you became aroused and were touching her genitalia[.]" (JA085) Appellant confirmed that his purpose in searching was for the latter, impermissible reason. (JA085–86) This provided Appellant with the heightened dialogue required under *Hartman*. Accordingly, the military judge did not abuse his discretion by finding the guilty plea provident, and Appellant's claim of error should be denied.

Conclusion

The United States respectfully requests that this Honorable Court AFFIRM the judgment of the Army Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **4, 980** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on January 6, 2023.

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