IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private (E-2) **CAMERON M. MAYS** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20200623 USCA Dkt. No. 23-0001/AR

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

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Table of Contents

Table of Authorities

STATUTES

UNIFORM CODE OF MILITARY JUSTICE

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

SERVICE COURTS OF CRIMINAL APPEALS

LEGISLATIVE DOCUMENTS

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Issue Presented

WHETHER THE OFFENSE OF INDECENT VIEWING UNDER ARTICLE 120c, UCMJ, INCLUDES VIEWING A VISUAL IMAGE OF THE PRIVATE AREA OF ANOTHER PERSON.

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], 10 U.S.C. § 866. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

Statement of the Case

On October 19, 2020, a military judge sitting as a general court-martial convicted Private (E-2) Cameron M. Mays, Appellant, consistent with his pleas, of one specification each of false official statement, wrongful use of a controlled

substance, wrongful possession of a controlled substance, wrongful introduction of a controlled substance, larceny, and assault upon a person in the execution of law enforcement duties, in violation of Articles 107, 112a, 121, 128, UCMJ. (JA014-018, 023-024). The military judge convicted Appellant, contrary to his pleas, of two specifications of attempted indecent viewing, one specification of insubordinate conduct toward a non-commissioned officer, one specification of sexual assault, one specification of assault upon a commissioned officer, and one specification of assault upon a non-commissioned officer, in violation of Articles 80, 91, 120, 128, UCMJ. (JA014-018, 023, 084). The military judge sentenced Appellant to be reduced to the grade of E-1, confined for forty-eight months, and discharged from the service with a dishonorable discharge. (JA087). On November 20, 2020, the convening authority approved the sentence. (JA008). On November 23, 2020, the military judge entered the Judgment. (JA007). On September 7, 2022, the Army Court affirmed the findings and sentence. (JA002-006).

Summary of Argument

The legal sufficiency of Appellant's convictions for attempted indecent viewing turns on whether viewing a visual image of the private area of another person constitutes the offense of indecent viewing under Article 120c, UCMJ. It does not. The plain language interpretation supports that indecent viewing does

not include viewing a visual image. This conclusion is further supported by the broader statutory context of Article 120c, UCMJ and the overall statutory scheme of the UCMJ. To the extent any ambiguity remains, Appellant still prevails under the rule of lenity. Therefore, this Court should set aside and dismiss Charge III and its Specifications.

Statement of Facts

For Specification 1 of Charge III, a witness at trial testified to observing Appellant hold his phone over a shower stall with the picture screen visible and displaying from his camera application while another person was in the shower stall. (JA028, 034, 039). For Specification 2 of Charge III, the alleged victim testified at trial to observing Appellant hold his phone over a shower stall with the camera visible while the alleged victim was in the shower stall. (JA059-061). In order to affirm Charge III and its specifications for attempted indecent viewing, the Army Court determined:

> [T]he evidence indicates appellant attempted a contemporaneous viewing of his victims through the camera of his cellphone. . . On two separate occasions appellant positioned his cellphone in a manner that the camera was oriented towards an individual showering naked in a closed private bathroom stall. Appellant's acts facilitated the viewing of the naked individual in the shower stall through the camera lens of the cellphone, regardless of whether he was also capturing a photograph or recording, or merely using the camera and screen as a technologically advanced mirror.

(JA005).

Standard of Review

This Court reviews questions of legal sufficiency and statutory construction de novo. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (citations omitted).

Law and Argument

A. The Relevant Statute: Article 120c(a)(1), UCMJ.

In all statutory construction cases, appellate courts begin—and usually end—with the language of the statute. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020) ("This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end."); *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020) ("This case begins, and pretty much ends, with the text of Section 1915(g)."); *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). This is so because "courts must give effect to the clear meaning of statutes as written and questions of statutory interpretation should begin and end with statutory text, giving each word its ordinary, contemporary, and common meaning." *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (internal quotation marks omitted) (citing *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017)). Courts may not alter a statute's reach "by inserting words Congress chose to omit." *Lomax*, 140 S. Ct. at 1725 (citing *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906 (2019)).

The statutory language for indecent viewing under Article 120c(a)(1), UCMJ is:

> knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy.

Congress defines *private area* in the same statute as "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." Article 120c(d)(2), UCMJ. The term *views* is not defined. Courts accord the ordinary meaning to words that are not statutorily defined. *United States v. Harris*, 78 M.J. 434, 437 (C.A.A.F. 2019). To *view* is simply the act of seeing or looking at something. *See Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/view (defining *view* as "to look at attentively").

Examining the text of Article 120c(a)(1), the plain language requires an accused look at the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple. Congress inserted *private area* as the object of that viewing, but specifically did not include *visual image of the private area*, or incorporate visual image into the definition of private area. Therefore, a plain language interpretation supports that indecent viewing does not include viewing a visual image of a private area.

B. Broader Statutory Context: Article 120c, UCMJ.

This Court further interprets statutory words and phrases by examining the "the context in which the language is used, and the broader statutory context." *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016). A fundamental rule of statutory construction is to afford all parts of a statute the same construction. *United States v. Jacobsen*, 77 M.J. 81, 85 (C.A.A.F. 2017). "When a statute is a part of a larger Act . . . the starting point for ascertaining legislative intent is to look to other sections of the Act in pari materia with the statute under review." *United States v. McPherson*, 73 M.J. 393, 395-96 (C.A.A.F. 2014) (citing *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010)).

The term *private area* must be read to have the same meaning across all other portions of Article 120c, UCMJ. *Robers v. United States*, 572 U.S. 639, 643 (2014) ("Generally, identical words used in different parts of the same statute are . . . presumed to have the same meaning.") (citations omitted) (alterations in original). Subpart (2) of Article 120c(a), UCMJ criminalizes capturing or recording by any means *a visual image of the private area* of another person. Subpart (3) of Article 120c(a), UCMJ criminalizes the distribution or broadcast of such a visual image, with broadcast statutorily defined as electronically transmitting "a visual image." Article 120c(d)(4), UCMJ. Not only do these offenses cognize the creation and dissemination of a visual image of a private area,

they would render superfluous an interpretation of private area that implicitly included a visual image of a private area.[1]

Moreover, employing the interpretive canon that statutory provisions are to be construed together, reading Article 120c, UCMJ with Article 120b, UCMJ supports that Congress did not intend visual image to be included into the term private area. Specifically, indecent exposure under Article 120c(c), which makes it an offense for anyone who "intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple," excludes visual images from its ambit. *See e.g.*, *United States v. Williams*, 75 M.J. 663, 668 (A. Ct. Crim. App. 2016). Indeed, the analogue child offense of sexual abuse under Article 120b, UCMJ which was enacted contemporaneously with Article 120c, UCMJ, similarly criminalizes "intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child" but differs from Article 120c(c), UCMJ in that it includes "*by any means, including via any communication technology*. . ." Article 120b(h)(5), UCMJ (emphasis added); National Defense Authorization Act for

[1] Congress similarly distinguishes between an *image of a private area* from simply a *private area* in the federal video voyeurism statute. 18 U.S.C. § 1801. The federal video voyeurism statute is an analogue to Article 120c, UCMJ, including an identical definition of *broadcast* and substantially similar definitions of *private area* and *reasonable expectation of privacy*. *Compare* 18 U.S.C. § 1801 *with* Article 120c, UCMJ.

Fiscal Year 2012, Pub. L. No. 112-81, § 541(b)-(c), 125 Stat. 1298, 1407-1410 (2011).

Under the negative-implication canon, Congress's deliberate inclusion of additional language for abuse of a child reveals a deliberate exclusion in Article 120c, UCMJ. *See United States v. Mooney*, 77 M.J. 252, 257 (C.A.A.F. 2018); *Williams*, 75 M.J. at 668. If Congress deliberately excluded visual images for exposing the genitalia, anus, buttocks, or female areola or nipple from the ambit of Article 120c, UCMJ, it follows that it similarly excluded visual images for the offense of viewing the genitalia, anus, buttocks, or female areola or nipple in the same statute.

C. Overall Statutory Scheme: Article 117a, UCMJ.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *McDonald*, 78 M.J. at 380 (citing *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018)). Other sections of the UCMJ are a natural referent, because "[t]he UCMJ is, after all, a 'uniform code'. . ." *United States v. Briggs*, 141 S. Ct. 467, 470 (2020).

Congress enacted Article 117a, UCMJ, effective December 12, 2017, addressing broadcast or distribution of intimate visual images, with additional statutory definitions that clarify how to interpret the language for indecent viewing.

National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 533, 131 Stat. 1283 (2017). This enactment was to address gaps in Article 120c. *See Briefing on Information Surrounding the Marines United Website: Hearing before the S. Armed Services Comm.*, 115th Cong. 60 (2017).

In Article 117a, Congress provided a definition for *visual image*:

> The term 'visual image' means the following:
>
> (A) Any developed or undeveloped photograph, picture, film, or video.
>
> (B) Any digital or computer image, picture, film, or video made by any means, including those transmitted by any means, including streaming media, even if not stored in a permanent format.
>
> (C) Any digital or electronic data capable of conversion into a visual image.

Article 117a(b)(7), UCMJ. Both Article 120c, UCMJ and Article 117a, UCMJ include identical definitions for private area and broadcast. Article 120c(d)(2),(4), UCMJ; Article 117a(b)(1),(4), UCMJ. However, Congress specifically defined *intimate visual image* as a distinct term, meaning "a visual image that depicts a private area of a person." Article 117a(b)(3), UCMJ.

Congress's inclusion of a separate definition of *intimate visual image* in Article 117a, UCMJ demonstrates that Congress identifies a cognizable difference between the private area and a visual image of the private area. "Congress is presumed to know the law" and elected to not make a corresponding expansion of

Article 120c, UCMJ to include viewing a private area or intimate visual image. *Kelly*, 77 M.J. at 407. In order for the provisions of Article 120c, UCMJ and Article 117a, UCMJ, to work in harmony, this Court must conclude indecent viewing does not include the viewing of a visual image.

D. Lenity.

Even if this Court finds Article 120c(a)(1), UCMJ ultimately includes viewing a visual image of the private area, Appellant still prevails. "[C]riminal statutes are to be strictly construed, and any ambiguity resolved in favor of the accused." *United States v. Thomas*, 65 M.J. 132, 135 n.2 (C.A.A.F. 2007). "Under the rule of lenity, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *United States v. McPherson*, 81 M.J. 372, 382 n.3 (C.A.A.F. 2021) (citing *Rewis v. United States*, 401 U.S. 808, 818 (1971)). If Congress's exclusion of *visual image* from indecent viewing is not clear from the plain language of the statute, then Appellant is entitled to the requested relief under the rule of lenity.

Conclusion

For the reasons set forth above, Appellant respectfully requests this Court set aside and dismiss Charge III and its Specifications.

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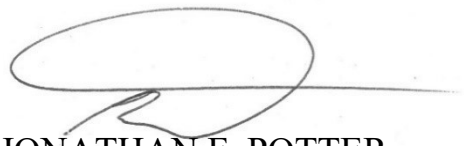

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Mays, Crim. App. Dkt. No. 20200623, USCA Dkt. No. 23-0001/AR was electronically filed with the Court and Government Appellate Division on February 13, 2023.

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