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	REPLY 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:

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 the Case

On February 13, 2023, Appellant filed his brief with this Court. On March 13, 2023, the Government filed its brief. This is Appellant's reply.

Argument

This reply addresses two of the Government's arguments. Appellant submits the Government's other arguments are meritless, and for those Appellant rests on his initial brief.

A. Article 120c(a)(1), UCMJ does not include viewing a visual image of the private area.

While Appellant and the Government apparently agree that *view* means to simply "look at", the Government suggests this Court read three assumptions into the statutory text: 1) the viewing can be direct or indirect, 2) indirect includes visual images, and 3) such viewing must be done in real time. While this tortured path may advance the Government's argument, it ignores the simple, plain statutory language. A person can look at an object. A person can look at a visual image of an object. The operative language requiring statutory analysis is not *view*, but rather *private area*. As addressed in Appellant's initial brief, the term *private area* does not include *visual image* of a private area.

The Government mischaracterizes Appellant's argument as advancing the notion that only the direct viewing of private areas is criminalized, but not any form of indirect viewing. (Gov't Br. at 12-13). The Government's false analogy to mirrors or binoculars is unavailing. This Court need not determine whether indecent viewing can be accomplished through reflection or refraction. The issue presented only addresses whether indecent viewing includes viewing a *visual image* of the private area. Contrary to the government's unsupported assertion, neither mirrors nor binoculars involve a *visual image*. (Gov't Br. at 13) *See* Article 117a(b)(7), UCMJ (defining visual image).

B. The absurdity doctrine does not apply.

The Government's reliance on the absurdity doctrine is also misplaced. (Gov't Br. at 23-25). This Court has acknowledged that "in very limited circumstances, a court can refuse to apply the literal text of a statute when doing so would produce an absurd result." *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021). "'[D]eparture from the letter of the law' may be justified to avoid an absurd result if 'the absurdity . . . is so gross as to shock the general moral or common sense.'" *Id*. (citing *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)) (ellipsis in original).

The Government's absurdity argument relies in part on its same misapprehension concerning mirrors and binoculars, addressed *supra*. The Government also ignores that, if Congress truly intended to criminalize viewing a visual image in Article 120c(a)(1), UCMJ, then such "an 'unintentional drafting gap' is insufficient to warrant judicial correction; correction is the province of Congress in cases where an admittedly 'anomalous' result 'may seem odd, but . . . is not absurd.'" *McPherson*, 81 M.J. at 378 (citing *Exxon Mobil Corp. v. Allapattah Servs*., 545 U.S. 546, 565-66 (2005)). Congress addressed such a gap in Article 120c, UCMJ through enactment of Article 117a, UCMJ.

Moreover, the Government's argument is premised on the incorrect assumption that the conduct at issue is not otherwise captured under the UCMJ.

Article 120c(a)(2), UCMJ proscribes the "photograph[ing], videotap[ing], film[ing], or record[ing] by any means the private area of another person." The Government assumes, without explaining, that capturing a visual image with a camera sensor as alleged here would not constitute a recording under Article 120c(a)(2), UCMJ. (Gov't Br. at 17, 23). Congress does not define recording, but it broadly provides that such action may be accomplished by *any means*. Article 120c(a)(2), UCMJ. The Presidentially prescribed definition of recording is "a still or moving visual image captured or recorded by any means." *Manual for Courts-Martial, United States* (2016 ed.), pt. IV, ¶ 45c.c.(2)(a). The definition of *visual image* specifically includes "streaming media, even if not stored in a permanent format" and "digital or electronic data capable of conversion into a visual image." Article 117a(b)(7), UCMJ. To interpret recording broadly to include non-permanent format would also give practical effect to the Congressional definition of *reasonable expectation of privacy* under Article 120c(d)(3)(A), UCMJ, which addresses any concern "that an image of a private area of the person was being captured." Under the Government's suggested narrow view of recording, this privacy interest would not be implicated by a livestream, because a visual image is not being captured.

Similarly, Article 120c(a)(3), UCMJ proscribes the broadcasting of any such recording. The statutorily defined term *broadcast* means "to electronically

transmit a *visual image* with the intent that it be viewed by a person or persons." Article 120c(d)(4), UCMJ (emphasis added). The capturing of a visual image of someone's private area by a cellphone camera sensor, then transmission of the streaming video to the cellphone's screen could also constitute an indecent broadcast. *See United States v. Lajoie*, 79 M.J. 723, 727 (N-M Ct. Crim. App. 2019) (finding capturing of private area within cellphone camera then display of the image on the same device constitutes indecent broadcast).

While this Court has yet to address the statutory interpretation of the term recording, the Government's absurdity argument fails because it requests this Court take an overly broad construction of Article 120c(a)(1), UCMJ while demanding a restrictive view of Article 120c(a)(2)-(3), UCMJ.

Conclusion

WHEREFORE, Appellant respectfully requests this Court set aside and dismiss Charge III and its Specifications.

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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 March 20, 2023.

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