IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v.	APPELLANT'S BRIEF ON SENTENCE REHEARING Docket No. ARMY 20170303
Master Sergeant (E-8) **ANDREW D. STEELE** United States Army Appellant	Tried at Joint Base Lewis-McChord, Washington, on 2 March, 21 April, 16-19 May, 4 October 2017, 23 January, 3 April, 8 September, 25 September, 21-23 October 2020, before a general court-martial appointed by Commander, Headquarters, 7th Infantry Division, Colonel J. Harper Cook and Lieutenant Colonel Matthew Fitzgerald, Military Judges, presiding over sentence rehearing.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Statement of the Case[1]

The first undersigned appellate defense counsel attests that she has, on appellant's behalf, carefully examined the record of trial in this case. Appellant does not admit that the findings and sentence are correct in law and fact, but submits the case to this Honorable Court on its merits with no specific assignments of error.

[redacted]
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CPT, JA
Appellate Defense Counsel
Defense Appellate Division

[redacted]
RACHEL P. GORDIENKO
MAJ, JA
Branch Chief
Defense Appellate Division

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider those matters set forth in Appendix A.

APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, through appellate defense counsel, requests this court consider the following matters:

Statement of the Case

On 2 March, 21 April, 16-19 May, and 4 October 2017, a military judge, sitting as a general court-martial, convicted Master Sergeant (MSG) Andrew D. Steele, pursuant to his pleas, of one specification of violating a lawful general order and one specification of fraternization in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892 and 934 (2012). Contrary to appellant's pleas, the military judge also convicted him of one specification of indecent exposure and one specification of disorderly conduct in violation of Articles 120c and 134, UCMJ (2012). The military judge sentenced appellant to be reduced to the grade of E-3 and discharged from the service with a bad-conduct discharge. The convening authority approved the findings and sentence as adjudged.

On 5 March 2019, this court affirmed the findings but set aside the sentence because the government could not provide a verbatim transcript. This court authorized a sentence rehearing.

On 23 January, 3 April, 8 September, 25 September, 21-23 October 2020, a panel with enlisted representation sentenced appellant to be reduced to the grade of E-5. On 6 May 2021, the convening authority approved the sentence as adjudged.

Statement of Facts

On 30 April 2016, appellant and seven other individuals were spending time together in an enclosed area of the hot tub of an apartment complex pool. (R. at 387, 414). This area was a "pretty decent ways away from the apartment complex itself," and to get to it one needed to walk through a parking lot. (R. at 268). On that evening, there was "quite a bit of steam around the hot tub." (R. at 268). There was a lock entry code in place on the gate to the pool area. (R. at 290). While there was video security in place at the pool area, there is no indication that anyone was watching a live feed of the pool, as no individual reviewed the film until requested to do so as part of a law enforcement investigation. (R. at 293).

Everyone in the pool area was naked, and they were all "just talking, making jokes, and stuff." (R. at 245). The one person who indicated any negative emotions related to the group's nudity was Specialist (SPC) [redacted], who testified it was "definitely awkward," but insisted he did not believe the nudity was vulgar. (R. at 434). Specialist [redacted] was also voluntarily nude himself. (R. at 434). The government presented no evidence that any person, other than those present in the pool area who were also nude, saw appellant nude that evening. In fact, there was no evidence adduced at trial that the police were called, that the apartment complex noticed the behavior or requested it to stop, that anyone walked by the pool area, or that anyone entered the hot tub area that was not already with the same group of

nude individuals. (R. at 431). The only other people who saw appellant's nudity were personnel from the apartment complex who later reviewed the video surveillance footage from that evening "when asked" to do so by law enforcement. (R. at 293).

At trial, the defense counsel moved to dismiss the Specification of Charge II under Rule for Courts-Martial (R.C.M.) 917. (R. at 448). The trial counsel rebutted by arguing that an indecent exposure is analyzed under an objective standard, and that someone *"could* have seen [the nudity], and had they seen it" *would* have been "repulsed" by it. (R. at 458)(emphasis added). In closing argument, the trial counsel argued, "you can see [MSG Steele] expose his genitalia and buttocks," and that it was indecent because this was an apartment complex with 100 to 150 residents, who all had access to the hot tub. (R. at 512). Trial counsel referenced an aerial photo that showed the hot tub, a public road, and a clubhouse that was open to all the residents, and then wondered "what would have those residents have thought if they came by and saw MSG Steele walking around butt naked." (R. at 513).

I.

WHETHER INDECENT EXPOSURE, ARTICLE 120c, UCMJ, IS UNCONSTITUTIONALLY VAGUE.

Standard of Review

This court has the power to review whether the findings and sentence are correct in law and fact. Article 66, UCMJ. This court reviews whether a statute is unconstitutional as applied de novo. *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013). To determine if a statute is unconstitutional as applied, this court conducts a fact-specific inquiry. *Id*. This court tests for prejudice based on the nature of the right violated, whether the error is preserved or not. *United States v. Tovarchavez*, 78 M.J 458, 465 (C.A.A.F. 2019). If a constitutional error is found, whether it is harmless beyond a reasonable doubt is reviewed de novo. *United States v. Busch*, 75 M.J. 87, 91 (C.A.A.F. 2016).

Law and Argument

1. Article 120c, UCMJ, includes vague definitions and fails to put a reasonable person on notice of what conduct is criminalized.

In statutory construction cases, the first step—and usually the last—is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020). The inquiry ceases if the statutory language is unambiguous. *Id*.

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)). However, in our constitutional order, "a vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). When Congress exercises its power to write new federal criminal laws, it must write statutes that give ordinary people fair warning about what the law demands of them. *Id.* Vague laws hand off the legislature's responsibility to unelected prosecutors and judges, and leave people with no sure way to know what consequences will attach to their conduct. *Id.* "When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again." *Id.*

Article 120c, UCMJ, states, "Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure . . . ." Article 120c(c), UCMJ (2012). The statute further defines "indecent manner" as "conduct that amounts to a 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." Article 120c(d)(6), UCMJ.[1]

To withstand a vagueness challenge, a statute must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed. *United States v. Moore*, 58 M.J. 466, 469 (C.A.A.F. 2003) (citing *Parker v. Levy*, 417 U.S. 733, 757 (1974)); *see also United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (holding due process requires fair notice that an act is forbidden and subject to criminal sanction). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391(1926)).

Both the rule of lenity to favor the accused in reading statutes and the vagueness doctrine are founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of

[1] This offense expands the previous version of indecent exposure (then proscribed by Article 120(n), UCMJ (2007)) "to include situations in which the exposure is indecent – even if committed in a place where it would not reasonably be expected to be viewed by people other than members of the actor's family or household." *MCM*, A23-17. While trying to criminalize more conduct, Congress unknowingly expanded the field to include consensual, private conduct and failed to delineate criminal from non-criminal behavior.

punishment is vested in the legislative, not in the judicial department." *Davis*, 139 S. Ct. at 2333.

Article 120c is vague in many regards.

First, Article 120c lacks a definition for its most critical term: "exposure." This court previously found the term "exposed" ambiguous. *United States v. Williams*, 75 M.J. 663 (A.C.C.A. 2016) (holding Congress did not intend to criminalize an "exposure" through communication technology under Article 120c). Moreover, this court imposes a temporal and presence requirement that violations occur when a victim may be present to view the actual body parts listed in the statutes. *United States v. Bragan*, ARMY 20160124, 2017 CCA LEXIS 146 (A.C.C.A. 15 Mar. 2017) (mem. op.) (cleaned up).

Further, the definition of "indecent manner," leaves the determination of criminality up to "common propriety"—also an undefined term. The statute provides no reliable way to determine which acts qualify as crimes other than a "prosecutor" charged it. *See Davis*, 139 S. Ct. at 2323.

Critically, the definition of "indecent manner" also fails to include any discussion of the place or context in which the exposure is made. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (the Supreme Court invalidated a statute finding a liberty right under the Due Process Clause for consenting adults to engage in private sexual conduct without intervention of the government regardless of

whether the conduct might inflame some individuals' conceptions of right and acceptable). This court has unfortunately fallen prey to doing Congress's work in delineating what conduct is criminal. *United States v. Hayes*, ARMY 20180165, 2019 CCA LEXIS 326, *7-8, (A.C.C.A. Aug. 12, 2019) (mem. op.). ("Whether exposure is public or private is a factor relevant to a determination of indecency. Although no longer a requirement for indecent exposure, a public setting can still render the manner of exposure indecent.").

"Indecent" does not include whether the exposure must be non-consensual—a topic on which our sister courts have injected their own interpretations. *See United States v. Johnston*, 75 M.J. 563, 567 (N.M.C.C.A. 2016) ("On the other hand, invitation and consent can be equally dispositive in finding intentional exposure is not indecent.") (citing *United States v. Hockemeyer*, No. 200800077, 2008 CCA LEXIS 310, *8 (N.M.C.C.A. 2008)) (unpub.) (exposure to an investigative agent posing as a 12-year-old who explicitly consented was factually insufficient to support conviction of indecent exposure); s*ee also United States v. Lee*, 2020 CCA LEXIS 61, *24 (A.F.C.C.A. 2020) (unpub.). The statute itself does not specifically criminalize consensual exposure, which leaves unelected trial counsel and military judges to step in and provide the rules that Congress was constitutionally bound to provide.

This statute currently criminalizes a massive swath of otherwise private behavior. The Supreme Court held that the State cannot "control [others'] destin[ies] by making their private sexual conduct a crime," nor can it criminalize private, non-commercial behavior between consenting adults. *Lawrence*, 539 U.S. at 578. Facially, the statute here criminalizes any exposure perceived as sexually impure, regardless of where that exposure occurred or who witnessed it. By criminalizing this extent of private consensual behavior read through the light of the rule of lenity, Congress abdicated its responsibility to set the standards of the criminal law, and left it to the prosecutors and police to decide who and what are worthy of state intervention. The appropriate step is to render the statute a nullity, and invite Congress to "try again."

2. As applied to the facts of this case, this statute is unconstitutionally vague.

In this case, appellant and seven others chose to get naked at night in a hot tub that was: (1) physically removed from an apartment complex by a parking lot, (2) partially obscured by steam, and (3) had a locked fence around it that allowed access only to those who lived in the apartment complex. The government offered no evidence that any individual saw any of these individuals, apart from the apartment management personnel reviewing the video of the evening "when asked of us to do so." (R. at 293). The police were never called and there is no evidence they were present. There is no evidence that anyone made any kind of complaint.

While this was an ostensibly quasi-public area, appellant's nudity did not reasonably establish "a 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" when the only people who saw his nudity were themselves also voluntarily nude. Moreover, there is no "exposure" when there is no temporal and physical presence of victims. *See Williams*, 75 M.J. at 666.

As a matter of trial strategy, the defense was not on notice of what made appellant's conduct criminal and thus could not determine if witness interviews and investigation should focus on proving that none of the other seven individuals saw appellant nude, or that no other member of the public saw appellant nude, or that it was not reasonably likely that someone *could* have seen appellant nude, or whether just being nude in a fenced-in hot tub at least a parking lot removed from private apartments where there was no evidence that anyone was home, is the type nudity that could qualify as sexual impurity. This ambiguity necessitates judicial interpretation to reasonably confine the scope of the conduct this statute criminalizes.

This statute fails for vagueness, as a reasonable person would assume that nudity is not offensive if everyone present is nude.

Conclusion

Appellant respectfully requests this court dismiss the Specification of Charge II.

II.

WHETHER THE FINDING FOR THE SPECIFICATION OF CHARGE II WAS LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

The standard of review for legal sufficiency is whether, considering all the evidence in the light most favorable to the government, any rational fact-finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see also *United States v. Tollinchi*, 54 M.J. 80, 82 (C.A.A.F. 2000).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the court is] convinced of [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In doing so, the Court must take a "fresh" and "impartial look at the evidence" and apply "neither a presumption of innocence nor a presumption of guilt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). In conducting this review, this Court may independently judge the credibility of the witnesses at trial, resolve

questions of fact, and substitute its judgment for that of the military judge or the court-martial members. Art. 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). This does not mean that a conviction must be "free from conflict." *United States v. Rankin*, 63 M.J. 552, 557 (N-M. Ct. Crim. App. 2006), a*ff'd*, 64 M.J. 348 (C.A.A.F. 2007). However, the evidence must leave no fair and reasonable hypothesis other than appellant's guilt. *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003).

Law and Argument

1. Indecent exposure offenses in the military have historically focused on an actual, unwilling viewer—not the location of the exposure.

Prior to the 2006 Amendments to the UCMJ, indecent exposure was an offense under Article 134, UCMJ, and included the following elements:

> (1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;
>
> (2) That the exposure was willful and wrongful; and
>
> (3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Manual for Courts-Martial, United States, [hereinafter *MCM*]. (2005 ed.), pt. IV, ¶ 88.

Between 1 October 2007 and 27 June 2012, indecent exposure existed as the fourteenth enumerated offense under Article 120 (2007), with the following elements:

> (1) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;
>
> (2) That the accused's exposure was in an indecent manner;
>
> (3) That the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by people other than the accused's family or household; and
>
> (4) That the exposure was intentional.

MCM, 2007, ¶ 45a(n).

In 2012, Congress once again revised the offense of indecent exposure and included the following elements:

> (1) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;
>
> (2) That the accused's exposure was in an indecent manner;
>
> (3) That the exposure was intentional.

MCM, 2012, ¶ 45c. The court-martial convicted appellant of this statute.

In *United States v. Graham*, 56 M.J. 266 (C.A.A.F. 2002), this Court examined the Article 134, UCMJ, version of this offense in detail, and concluded that "'public view' means 'in the view of the public,' and in that context, 'public'

is a noun referring to any member of the public who views the indecent exposure." *Graham*, 56 M.J. at 269. While the statute this Court was reviewing was different from the one appellant is alleged to have violated, the reasoning articulated in *Graham* is still applicable—the importance of the charge is not in the place in which the exposure occurs, but in the eyes of the beholder. Following this logic, this Court ruled that [redacted] had indeed exposed himself indecently when he called a fifteen-year-old babysitter into his room and purposefully dropped the towel he was wearing to the floor, regardless of the fact that [redacted] did so in a non-public place. This Court emphasized the importance of the viewing victim, not the location. *Id*.

Similarly, in *United States v. Ferguson*, 68 M.J. 431 (C.A.A.F. 2010), [redacted] sought to convince this Court his plea was improvident because his exposure was not in "public view." *Id*. at 434. This Court framed the idea of public place in terms of an accused's willfulness—in that, if he exposed himself in a non-public place, the government may not be able to prove the requisite intent of the accused. While this Court ruled against [redacted], it did so because he chose to plead guilty and, thus, did not dispute the willfulness of his act. Nevertheless, willfulness is not at issue in the instant case—rather, the insufficiency of the indecent nature of the act. If the only people who saw the appellant's buttocks and genitals were individuals who also chose to intentionally expose themselves and

were themselves naked by choice, (R. at 414), then the government has not proved that the *appellant's nudity* was "grossly vulgar, obscene, and repugnant to common propriety…." *MCM* (2012 ed.). pt. IV, ¶45c.(6). The place in which the exposure occurs—be it private, semi-private, or public—is relevant only when someone who is not already consenting to the exposure sees the exposure.

After *Ferguson*, Congress amended the statute in 2012 and in doing so removed the language requiring public view of the exposure. The discussion of the change notes the following:

> This offense encompasses the offense proscribed by the 2007 version of Article 120(n), and *expands* it to include situations in which the exposure is indecent – even if committed in a place where it would not be reasonably be (sic) expected to be viewed by people other than members of the actor's family or household.

Manual for Courts-Martial, United States, Analysis of Punitive Articles, App. 23 at A23-16 (2012 ed.) (*MCM*).

This discussion makes clear that the change to the statute was meant to encompass this Court's rulings in *Graham* and *Ferguson* by criminalizing acts committed in non-public locations. Notably absent from the discussion is any expectation that indecent exposure has become a victimless crime, such that the crime is complete at the time of the exposure. While Congress may have removed the requirement that the exposure happen in a public place, it did not remove the requirement for the exposure to be viewed by a non-consenting person. Indeed,

such a contrary result would directly contradict this Court's ruling in *Graham*, which made clear that the focus of the elements is on the viewer and specifically not on the location of the act itself. Any reading of this offense that excludes the requirement that the conduct be viewed by an aggrieved party expands the scope of potentially criminal behavior to outlandish extremes.

2. The Army Court's opinion in *United States v. Williams* emphasized that exposure to a third party is required.

Indeed, the Army Court has discussed the importance of a live "victim." In *United States v. Williams*, that court noted that the definition of "exposure" within this statute was unclear before ruling that Congress did not intend to criminalize an "exposure" through communication technology. 75 M.J. at 666. The logical conclusion of the Army Court's analysis is that an exposure requires a "victim," as in, someone who is subjectively aggrieved by the exposure. A contrary reading of *Williams* renders its analysis about electronic communication superfluous—the crime would have been complete as soon as [redacted] exposed himself to take the picture, regardless of whether anyone observed it. Thus, under the Army Court's prior analysis under *Williams*, an exposure must occur in the presence of others.

Appellant certainly exposed himself in the presence of others, because at least one witness testified about seeing him nude, but that witness was also nude. Consent, therefore, should also be considered with regard to whether an exposure is indecent. Without this, all consensual sexual encounters would be open for

prosecution as indecent exposures. *See United States v. Johnston*, 75 M.J. 563, 567 (N-M Ct. Crim. App. 2016) (the presence or absence of consent can determine whether an intentional exposure is indecent). Appellant's exposure occurred in the presence of others, but those seven others all consented to the nudity. Thus, it was not indecent.

3. If a non-consenting third party is not required to actually view the nudity, a wide swath of otherwise innocent private conduct would be subject to prosecution.

If this court accepts the trial counsel's assertion that the government was not required "to prove that somebody saw it and somebody was offended by it," (R. at 558), then a whole range of reasonable behavior is within an overzealous prosecutor's reach. As this Court articulated in *Graham*, a soldier can indecently expose himself in any place, because the "focus [is] on the victims and not the location of public indecency crimes…." *Graham*, 56 M.J. at 269. *Graham* thus requires military courts to focus on the "victim" rather than the place. To put this another way, the statute only reasonably criminalizes those exposures that involve actual humans present for the live exposure who personally find the exposure to be indecent.

Further, the exposure must also be objectively indecent. Sometimes the risk of exposure may be higher than others—exposing one's genitalia in a pool area open to other people is riskier than exposing one's genitalia within one's home.

Nevertheless, both exposures require not only an actual, non-consenting third party to view the exposure, but also that an objectively reasonable person would find the exposure indecent.

Conclusion

Appellant's conviction for indecent exposure is factually and legally insufficient.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on October 12, 2021.

[redacted]
MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
[redacted]