IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**Reply Brief on Behalf of Appellant**
v.	Docket No. ARMY 20200689
Sergeant First Class (E-7) **BYUNGGU KIM** United States Army Appellant	Tried at West Point, New York, on 27 Jun and 16 Nov 2020, before a general court-martial appointed by Commander, United States Military Academy, West Point, New York, Lieutenant Colonels Mark Vergona and Troy A. Smith, Military Judges, presiding.

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

1. Appellant did not waive the constitutional challenge to the Specification of Charge VI by pleading guilty because when judged on its face, the charge is one which the government may not constitutionally prosecute.

As Chief Judge Ohlson wrote, "waiver is serious business" and courts "should invoke the waiver doctrine with great caution." *United States v. Hardy,* 77 M.J. 438, 445 (C.A.A.F. 2018). Appellant entered into an unconditional guilty plea. Normally, an unconditional guilty plea would waive any non-jurisdictional defects. *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010). Further, an unconditional guilty plea generally waives all defects which are neither jurisdictional nor a deprivation of due process of law. *United States v.* Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009). Nonetheless, a guilty plea does not waive the basic foundational requirement that a person be charged with an actual crime.

The idea that a person cannot plead guilty to something that is not a crime is not only grounded in basic logic and reason, but in nearly 150 years of American jurisprudence. "In 1869 Justice Ames wrote for the Supreme Judicial Court of Massachusetts, "[I]f the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged." *Class v. United* States, 138 S. Ct. 798, 804 (Citing *Commonwealth v. Hinds*, 101 Mass. 209, 210). The Supreme Court reaffirmed this notion in *Blackledge v. Perry*, 417 U.S. 21 (1974), as well as *Menna v. New York*, 423 U.S. 61 (1975). They explicitly held, "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Menna v. New York*, 423 U.S. 61, 62 (1975).

The phrase "judged on its face" does not mean the same thing as a facial constitutional challenge. In *United States v. Broce*, 488 U.S. 563, 569 (1989), the Supreme Court reiterated, "a guilty plea does not bar a claim on appeal where on the face of the record the court had no power to enter the conviction or impose the sentence." That is the situation here. Much like in *Class*, appellant's claim "challenge[s] the Government's power to criminalize [appellant's] (admitted) conduct." *Class*, 138 S. Ct. at 805.

Article 134, UCMJ, is not facially deficient in all circumstances, which is what prevents appellant from raising a true facial challenge to the

unconstitutionality of the statute. However, because of the unique and broad nature of Article 134, and the myriad different ways in which whole swathes of activity can be charged, there are circumstances, like the present one, where the statute as charged is facially unconstitutional.

In the present case, the charge, as written, could never constitute a crime because the conduct described is not indecent. The conduct described in the specification, "conducting an internet search for 'rape sleep', and 'drugged sleep,'" while upsetting, is not in any way indecent. (R. at 74). Furthermore, it is conduct that is protected under the First Amendment. Appellee argues such conduct was indecent because of what the videos that resulted from the internet search "reminded" appellant of. (Appellee Br. at 16). In other words, otherwise lawful conduct became criminally indecent because it resulted in certain images, and then those images caused certain thoughts in the mind of appellant. Not only can we as a society not charge someone for their thoughts, but in this case, the unsavory thoughts were two steps removed from the charged conduct of the internet search.

Such basic and obvious tenets of law cannot be waived. In the event that there was waiver, in the present case, it was not intentional. Appellant did not intentionally waive a challenge against a charge that the government could not constitutionally prosecute. Waiver constitutes "the intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313

(C.A.A.F. 2009). Not everything can be waived, however. Under the government's implication that everything is waivable, those charged with crimes could elect to dispense with the entire court-martial process.

In *United States v. Hartman*, the C.A.A.F. stated that 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." Therefore, even when an accused elects to waive most of his rights and plead guilty, there still must include an appropriate discussion and acknowledgement 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).

Hartman involved a consensual sodomy charge under Article 125 after the Supreme Court's landmark ruling in *Lawrence v. Texas*. *Id.* There, appellant unconditionally plead guilty but there was not a discussion with appellant, in layman's terms, regarding the elements of the charge that criminalized his otherwise now constitutionally protected behavior. *Id*. The C.A.A.F. found that absent that dialogue, the court could not review appellant's plea as provident because it was not clear that the waiver was intentional. *Id*. In the present case, there was no mention at all that the charged conduct, conducting an internet search, was constitutionally protected conduct. There is no discussion on the record

regarding appellant's First Amendment rights and the implications of those rights as it relates to Charge VI. The record is devoid of any indication that appellant was aware that he was pleading guilty to something that was not a crime. Accordingly, there was no intentional relinquishment of a *known* right, and therefore there was no waiver.[1]

Appellant could not, and did not, knowingly waive such a basic right and foundational aspect of American jurisprudence – that his conduct actually constituted a crime. Since this issue was not waived and is of constitutional magnitude, it should be reviewed de novo, and reversed

2. Appellant's conduct is protected under the First and Fifth Amendments of the Constitution.

"As a matter of constitutional tradition, in the absence of evidence to the contrary, a federal court must presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno v. ACLU,* 521 U.S. 844, 885 (1997). Appellant was charged with searching the

[1] See also *United States v. Hardy*, 77 M.J. 438, 442 (C.A.A.F. 2018). *See e.g.*, *United States v. Pratchard*, 61 M.J. 279, 280 (C.A.A.F. 2005) (holding that a guilty plea does not waive a speedy trial objection); *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004) (holding that a guilty plea does not waive a multiplicity issue when the offenses are "facially duplicative").

internet for legal, adult pornography. This is protected speech. *See United States v. Valle*, 807 F.3d 508, 518 (2nd Cir. 2015) ("To be sure, Internet searches can provide some relevant proof of intent. However, an Internet search, in and of itself, is not criminal.")

Appellee mischaracterizes the purpose of looking at context in determining whether speech is obscene or protected. (Appellee Br. at 8 and 12). Appellee cites cases in which the court is looking at context in terms of who speech was directed toward and how that speech might affect the other person in determining whether speech was indecent or protected. (Appellee Br. at 8 and12). In *United States v. Green*, the C.A.A.F. was determining if a sound, "mmmmmm-mmmmmm-mmmmm," made by a male marine to a female marine as he was looking down her blouse was indecent language. *United States v. Green,* 68 M.J. 266, 270 (C.A.A.F. 2010). There, the court used the context, the fact that the male servicemember and the female marine were not social friends and that the male servicemember had demonstrated his sexually predatory nature in a number of other encounters with the female marine, to determine that the language was indecent. *Id.* In *Wilcox*, the Court looked at how a servicemember's views on white supremacy effected the nature of communications directed toward an undercover military investigator. *Wilcox,* 66 M.J. 442 (C.A.A.F. 2008). Ultimately, that court found that those communications were protected speech, regardless of context. *Id*.

Appellant's internal thoughts cannot be used to criminalize otherwise lawful behavior. The principles of the holding in *Stanley* still apply because, while there is not definitive evidence that appellant viewed adult pornography outside of his home, the government's argument regarding obscenity relies solely on appellant's memories which are stored in a place even more private than his home, his mind. (Appellee's Br. at 11); *Stanley v. Georgia*, 394 U.S. 557 (1969). The narrowing of *Stanley* was the result of obscene material being taken outside of someone's home and "reaching outward to share obscenity and encourage strangers across the world…." *United States v. Meakin*, 78 M.J. 396, 401 (C.A.A.F. 2019). In the present case, the only thing that could possibly make the private internet search for legal, adult pornography obscene is the memory that it evoked privately in appellant's mind. That seems to fall squarely within the purpose of *Stanley's* ruling that our "whole constitutional heritage rebels at the thoughts of giving government the power to control men's minds." *Stanley*, 394 U.S. at 565. As the C.A.A.F. stated in *Wilcox*, "courts must be sensitive to the protection of the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *Wilcox*, 66 M.J. at 447.

This situation is similar to private consensual sexual activity. The Supreme Court and the C.A.A.F. has repeatedly held that private consensual activity is not punishable as an indecent act absent aggravating circumstances. *Lawrence v.*

Texas, 539 U.S. 558 (2003); United *States v. Snyder*, 1 C.M.A. 423 (1952) and *United States v. Berry*, 6. C.M.A. 609 (1956). "This is consistent with the view expressed . . . that Congress has not intended by Article 134 and its statutory predecessors to regulate the wholly private moral conduct of an individual." *Snyder*, 1 C.M.A. at 12. "One such aggravating circumstance is that the sexual activity is 'open and notorious." *United States v. Izquierdo*, 51 M.J. 421, 422 (C.A.A.F. 1999). That is not the case here. The universe of effects stemming from appellant's lawful internet search was wholly contained within his mind. Therefore, there were no aggravating circumstances of the kind envisioned by *Snyder, Berry,* or *Izquierdo.*

3. There is a substantial basis in fact and law to question appellant's guilty plea.

The providence inquiry must demonstrate the accused believes he is guilty and that his understanding of the facts supports the objective conclusion he is guilty. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Appellant could not have been guilty of the specification of Charge VI because it is not a crime. Furthermore, the providence inquiry is insufficient for three reasons. First, it did not establish that the actions of appellant would have brought discredit on the military. Appellant's actions are not *per se* discrediting and therefore the military judge could not rely on the conclusory statement made by appellant. *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011). Second, appellant's conduct, as

charged, was not indecent. Third, the military judge failed to instruct appellant of the constitutional implications of the specification as required by *Hartman*. *Hartman*, 69 M.J. 467, 468.

Conclusion

The military judge erred in accepting appellant's guilty plea for the Specification of Charge VI because the providence inquiry was legally insufficient and violated appellant's First and Fifth Amendment rights. Appellant asks this court to set aside and dismiss the military judge's findings of guilt as to that specification and reassess the adjudged sentence.

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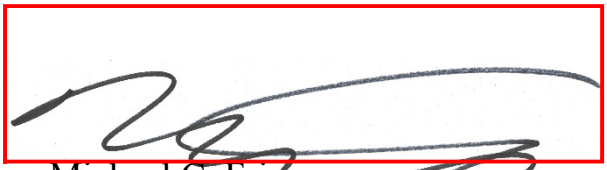

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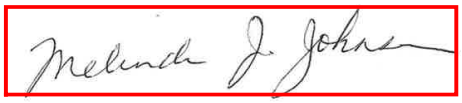
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army Court and Government Appellate Division on December 10, 2021.



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