

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellee

v.

Master Sergeant (E-8)
ANDREW D. STEELE
United States Army
Appellant

**APPELLANT’S REPLY BRIEF
ON SPECIFIED ISSUES ON
SENTENCE REHEARING**

Docket No. ARMY 20170303

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**

Specified Assignments of Error

I.

WHETHER THIS COURT HAS DISCRETION TO CONSIDER AN ASSIGNMENT OF ERROR CHALLENGING THE FINDINGS WHEN: (1) APPELLANT FAILED TO RAISE IT DURING HIS FIRST APPEAL BEFORE THIS COURT; AND (2) THIS COURT ONLY REMANDED APPELLANT’S CASE FOR A SENTENCE REHEARING.

II.

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

Statement of the Case

On 12 October 2021, appellant filed his brief with no issues. It posited the second specified issue in *Grosteфон* matters. *United States v. Grosteфон*, 12 M.J. 431, 436 (C.M.A. 1982). On 22 November 2021, this court specified the issues above. On 22 December 2021, the government filed its brief. This is appellant's reply.

Statement of Facts

Appellant relies on the statement of facts from his 1 September 2021 *Grosteфон* issue.

I.

WHETHER THIS COURT HAS DISCRETION TO CONSIDER AN ASSIGNMENT OF ERROR CHALLENGING THE FINDINGS WHEN: (1) APPELLANT FAILED TO RAISE IT DURING HIS FIRST APPEAL BEFORE THIS COURT; AND (2) THIS COURT ONLY REMANDED APPELLANT'S CASE FOR A SENTENCE REHEARING.

Argument

Appellant's first appellate defense counsel failed to raise Specified Issue II on his first appeal to this court. The government lists numerous reasons why this court could decline to hear his appeal this time, but none require such an unjust result. This court has discretion to hear the Specified Issue II, and if meritorious, this court has a duty to address it under Article 66, Uniform Code of Military

Justice [UCMJ] (this court “may affirm only such findings of guilty as the Court finds correct in law, and in fact . . .”).

By remanding the case for a sentence rehearing, this court must review now whether the results are just. *United States v. Davis*, 63 M.J. 171, 177 (C.A.A.F. 2006). The power of a rehearing to adjudicate a new sentence derives from the initial court-martial and appellate action of this court. *Id.* Continuing jurisdiction provides that a “rehearing relates back to the initial trial and to the appellate court's responsibility to ensure that the results of a trial are just.” *Id.* This review includes the entire record of trial, not only selected portions of a record or allegations of error alone. *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016) (noting that even waived issues may be reviewed under the Article 66, UCMJ mandate).

Just as this court has the power to specify errors to remedy issues, this court has the power and obligation to remedy errors when it finds them in the entire record. Should this court find that the results are not just, then this court has a duty to act on Specified Issue II.

A. This court would not abuse its discretion in conducting a second review.

Service courts have broad discretion in conducting Article 66(c), UCMJ reviews. *United States v. Swift*, 76 M.J. 210, 216 (C.A.A.F. 2017) (also finding that a complete Article 66, UCMJ review is a substantial right of the accused). The Court of Appeals for the Armed Forces recognizes *entitlement* to one plenary

review. *United States v. Smith*, 41 M.J. 385, 386 (C.A.A.F. 1995). However, this court would not abuse its discretion in conducting a second review, provided the new assignments of error are closely related to the prior issues and there is an adequate record available to evaluate the newly raised errors. *United States v. Hemmingsen*, 2021 CCA LEXIS 180, *2-3, (mem. op.), *pet. denied*, 2021 CAAF LEXIS 652 (C.A.A.F. 12 July 2021) (citing *Smith*, 41 M.J. at 386 (noting that it had yet to consider whether the court could consider new errors but finding that it was not improper to not consider them) (citing *United States v. Jordan*, 38 M.J. 346, 353 (C.M.A. 1993) (Wiss, J., dissenting))); *see also United States v. Gray*, 51 M.J. 1, 63-64 (C.A.A.F. 1999) (finding though appellant filed his *Groستefon* matters late, the C.A.A.F. still considered and disposed of them).

Here, factual and legal sufficiency are closely related to the unconstitutional vagueness issue. The government agrees. (Appellee Br. at 10-11) (“This court has already specifically considered appellant’s challenge to the legal and factual sufficiency of his indecent exposure conviction under Article 120c, UCMJ—conducting an analysis strikingly similar to an as-applied vagueness challenge—and affirmed the findings as “correct in fact.”). The record is sufficient to complete the review because it details all the facts necessary to evaluate the validity of Specified Issue II. This court would not abuse its discretion in evaluating that issue.

B. Appellant’s original counsel failed to act, which is itself good cause.

Original appellate counsel’s failure to raise the issue is good cause, should this court find Specified Issue II meritorious. Appellant should not receive an unjust conviction because his original appellate counsel failed in their duties.¹

C. This court can pierce waiver under its Article 66, UCMJ powers.

In *United States v. Chin*, the C.A.A.F. notes that this court is *commanded* by statute to review the entire record and “approve only that which ‘should be approved.’” 75 M.J. at 222. This court is required to assess the entire record to determine whether to leave waiver intact, or to correct the error. *Id.* Though analyzing post-trial delay without actual prejudice, the same analysis holds true here for waiver: “Article 66(c) is a broader, three-pronged constraint on the court’s authority to affirm. Before it may affirm, the court must be satisfied that the findings and sentence are (1) ‘correct in law,’ and (2) ‘correct in fact.’ Even if these first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it “determines, on the basis of the entire record, should be approved.” *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). When there is waiver, a court may pierce the waiver if it affects which findings and sentence should be approved on the basis of the entire record. Here, when a

¹ Appellant can provide further briefing under *Strickland v. Washington*, 466 U.S. 668, 690 (1984), should the court desire to explore this issue further.

constitutionally vague statute is the basis for a conviction, it should not be approved as a finding. This is true regardless of the fact that this is a sentence rehearing. This court should review the full record to ensure the sentencing proceeded from findings of guilty that were correct in law and fact.

D. *Res judicata* does not preclude the court from acting here.

Courts may change their minds. Courts make mistakes. If they did not, then there would be no need for rules for *en banc* reconsideration of issues. Art. 66(a), UCMJ. There would also be no doctrine of *coram nobis*, referring to a directive to the court that entered the original judgment to correct an error. Steven J.

Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 Va. J. Soc. Pol'y & L. 1, 9 (2003).

This court may pierce *res judicata* under its Article 66, UCMJ powers. Even the government's own reading of *Cooper* allows for this result. *United States v. Cooper*, 80 M.J. 664, 671 (N.M. Ct. Crim. App. 2020); (Appellee's Br. at 10-11) ("recognizing that the doctrine of *res judicata* bound it to 'complete acquiescence' to the CAAF's holding that there was waiver and its previous holdings on appeal, but did not prevent it from *disregarding waiver under its Article 66, UCMJ, power*") (emphasis added).

Should this court find that Specified Issue II has merit, it should invoke its Article 66, UCMJ powers to disregard waiver or *res judicata*.

II.

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

Argument

Violating an apartment complex's policy is not a crime under the UCMJ, contrary to the government's argument. (Appellee's Br. at 23) ("While it is axiomatic that ignorance *of the law* is no excuse, appellant actually lived in this apartment complex, and so, at the very least, had constructive notice that his conduct was forbidden [under apartment complex policy]") (emphasis added).

"A vague law is no law at all," even when read in conjunction with policies enacted by unelected apartment owners. *See 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 allow unelected prosecutors, judges, and property owners to supplement their understandings for Congressional responsibility. *See id.*

Appellant did not commit a crime.² The only people who saw appellant naked, in person, were voluntarily naked themselves. The government cites to the

² *United States v. Bragan*, 2017 CCA LEXIS 146, *5-6 (A.C.C.A. 15 Mar. 2017) (mem. op.) (citing *United States v. Uriostegui*, 75 M.J. 857, 864-65 (N.M. Ct. Crim. App. 2016) ("We agree with the holding in *Williams* that this conduct is not indecent exposure under Article 120c(c), UCMJ, *because indecent exposure has 'a*

possibility of a bystander happening by but tacitly admits no live viewing occurred. (Appellee's Br. at 5, 21) (the apartment complex's pool . . . is *accessible* to apartment residents and their guests).

The government also concedes that the statute does not require a victim. (Appellee's Br. at 22). ("Moreover, the statute's plain language does not require that an accused's exposure be actually viewed by an offended party . . .). The Supreme Court forbade this criminalization of victimless private conduct in *Lawrence v. Texas* when it reasoned, "the [government] cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

Additionally, *United States v. Shaffer* also requires that the exposure be so public and open that it is "certain to be observed" by the general population. 46 M.J. 94, 97 (C.A.A.F. 1997). Not one single person saw appellant who was not also naked, indicating that it was *not* certain to be observed because no one observed him. Following the government's interpretation, a married couple could

temporal and physical presence aspect . . . [and] violations occur when a victim [may be] present to view the *actual* body parts listed in the statutes, not images or likenesses of the listed parts.") (emphasis added).

not have sex in their first floor apartment with the window and shades open, lest someone see their private behavior. This cannot be the law.

Nor can the law be that appellant did something that prosecutors find distasteful, so it falls in the ambit of this crime. The Specification of Charge II alleged:

In that MSG Andrew D. Steele, U.S. Army, did, at or near Dupont, Washington, on divers occasions, between on or about 1 February 2016 and 30 April 2016, intentionally expose his genitalia and buttocks, in an indecent manner.

(Charge Sheet).³ The specification did not clarify what made appellant's exposure indecent, and the elements of the offense of indecent exposure did not clarify this either. Appellant was not on fair notice of what he was accused of.

This court must not fashion a new, clearer law, but should treat the law as a nullity and invite Congress to try again. *See id.* Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971).

³ The military judge excepted the language and figures "divers occasions, between on or about 1 February 2016 and," and found appellant not guilty of the excepted language. (R. at 559).

Conclusion

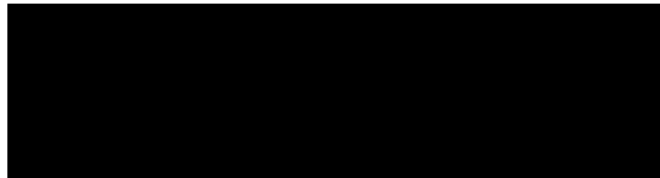
Appellant respectfully requests this court dismiss the Specification of Charge II.



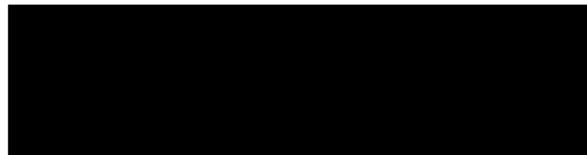
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
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