IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES Appellee	**APPELLANT'S REPLY BRIEF**
v.	Docket No. ARMY 20200623
Private (E-2) **CAMERON M. MAYS,** United States Army, Appellant	Tried at Fort Drum, New York, on 19 June, and 8, 13, and 19-22 October 2020, before a general court-martial appointed by Commander, Headquarters, Fort Drum, Lieutenant Colonel Teresa L. Raymond and Lieutenant Colonel William C. Ramsey, military judges, presiding.

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

Assignment of Error

WHETHER APPELLANT'S CONVICTION OF ATTEMPTED INDECENT VIEWING IS LEGALLY AND FACTUALLY SUFFICIENT WHEN THE GOVERNMENT ONLY PRESENTED EVIDENCE THAT APPELLANT ATTEMPTED TO VIEW A VISUAL RECORDING OF NAKED PEOPLE.

Law and Argument

A. The government conflates "indirectly" viewing a person's private area with viewing a digital image of a person's private area.

At the outset, the government seeks to insert ambiguity into Article 120c(a)(1) by claiming "the statutory language does not dictate one way or the other whether the prohibited viewing must be done 'directly' or 'indirectly,' such

as through a mirror or a technological aid." (Appellee Br. 14-15). Despite the fact that it would be a stretch to construe the meaning of the word "views" to include observing something through indirect[1] means, that is simply a red herring. In this case, it does not matter. Assuming *arguendo* that appellant committed the alleged acts, he did not view the "private area" of any person, either through direct or indirect means. Appellant viewed something entirely different – a *digital image* of the alleged victim's private areas.

The statutory definition of "private area" is clear and unambiguous; it means "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." Article 120c(d)(2), UCMJ. To the extent Article 120c(a)(1) proscribes viewing a person's private area through indirect means, that *could* be accomplished by using a mirror as the government suggests. (Appellee Br. 14-15). However, when the viewing is accomplished by a digital device, such as a camera, the viewer is no longer observing a person's private area *as it is defined* in Article 120c(d)(2). Instead, the viewer is observing pixels on a screen that have been *created by the digital camera*. While those pixels might resemble a person's private area, they

[1] This court need not look far to find an example of Congress explicitly proscribing conduct through direct or indirect means. *See* Article 120(g)(2), UCMJ ("The term 'sexual contact' means touching. . .*either directly or through the clothing*. . ."). Because Congress chose not proscribe indirect viewing, this court should not add words "to what the text states or reasonably implies." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012).

are not *actually* a person's private area. When the viewer uses a mirror to "indirectly" observe a person's private area, they are *actually* viewing the person's private area and *not* a collection of pixels created by a digital device.

The statute's definition of "private area" makes absolutely no mention of digital images or visual recordings and "in general, 'a matter not covered is to be treated as not covered' – a principle "so obvious that it seems absurd to recite it." *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012)).

In short, this court need not decide whether the plain language of Article 120c(a)(1) includes viewing a person's private area by "indirect" means because viewing a digital image or visual recording of a person's private area is not proscribed at all. Because the definition of "private area" is plain and unambiguous, this court's "job is at an end[,]" and it should not accept the government's invitation to alter the statute's reach "by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724-25 (2020).

B. The broader statutory context of Article 120c(a), UCMJ, indicates Congress did not intend to criminalize "viewing" through communication technology.

Relying on mere dicta[2] from *United States v. Shea* – an unpublished Air Force opinion – the government asks this court to "find that Congress intended to proscribe the knowing and wrongful viewing, by direct or indirect means, of the private area of another person, without that other person's consent during the existence of circumstances in which that other person has a reasonable expectation of privacy." (Appellee Br. 14) (quoting *Shea*, ACM S32220, 2015 CCA LEXIS 235, at *9 (A.F. Ct. Crim. App. 4 Jun. 2015)). Notwithstanding its minimal persuasive authority, the opinion in *Shea* suffers from several flaws.

First, just like the government in this case, *Shea* conflates "indirectly" viewing a person's private area with viewing a digital image of a person's private area; as stated in Part A, *supra*, those two actions are not the same.

Second, *Shea* ignores multiple canons of statutory construction. For example, *Shea* acknowledges that Congress explicitly criminalized the making and

[2] Notably, in *Shea*, the court ultimately found the specification to be legally insufficient because the appellant did not view the indecent recording at the time it was made. 2015 CCA LEXIS 235 at *1-2. Accordingly, *Shea's* conclusion that Article 120c(a)(1) proscribes "indirect" viewing is nothing more than dicta. *See Cohens v. Virginia*, 19 U.S. 264, 399 (1821) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

recording of "visual recordings" but did not explicitly criminalize the viewing of "visual recordings." 2015 CCA LEXIS 235, at *7. Remarkably, *Shea* concludes the absence of the term "visual recording" from Article 120c(a)(1) "may indicate Congress intended to exclude viewing a recording from the reach of that section, [but] it does not reasonably exclude the possibility Congress intended it to be covered by an earlier section of the same statute." *Id.* Such an interpretation completely ignores the canon of *expressio unius est exclusio alterius*. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) ("[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations and internal quotation marks omitted).

As this court correctly observed in *United States v. Williams*, "Article 120c, UCMJ, is not silent on the issue of photographing private areas or electronically transmitting images. Congress used clear and unambiguous language to expressly proscribe the making and distributing of indecent visual recordings." 75 M.J. 663, 669. Consequently, just as this court found that "Congress did not intend to criminalize an 'exposure' through communication technology[,]" it should also find that Congress did not intend to criminalize viewing through communication technology. *Id*. at 668-69.

C. This court should not apply the absurdity doctrine.

The government complains that if this court does not adopt its interpretation of Article 120c(a)(1), it will lead to absurd results because it will prevent the government from prosecuting "patently" criminal conduct. (Appellee Br. 19). But the government's argument isn't based on actual absurdity; rather, the government simply laments that it won't be able to prosecute conduct that *it believes* should be criminal. Similar to *United States v. McPherson*, "[t]o accept the Government's argument, [this court] would have to 'find justification for wrenching from the words of a statute a meaning which literally they [do] not bear in order to escape consequences thought to be absurd or to entail great hardship.'" 81 M.J. 372, 374 (C.A.A.F. 2021) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). Indeed, this court would have to find justification for interpreting the term "private area" to include a digital image or visual recording of one's private area when those words are nowhere to be found in the definition.

Even if the omission of the words "digital image" or "visual recording" from Article 120c(a)(1) was a mistake, "courts are not empowered to 'repair such a congressional oversight or mistake' because. . .'enlargement of [a statute] by [a] court, so that what was omitted, presumably by inadvertence, may be included within its scope. . .transcends the judicial function.'" *McPherson*, 81 M.J. at 378 (quoting *Logan v. United States*, 552 U.S. 23, 35 n.6 (2007)). Moreover, to the

extent Article 120c(a)(1) is ambiguous, this court should apply the rule of lenity because the government is better positioned to seek clarity from Congress. *See United States v. Santos*, 553 U.S. 507, 514 (2008) (explaining that one purpose of the rule of lenity is to "place[] the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

Conclusion

Based on the foregoing, appellant respectfully requests this court set aside the findings of guilty to Charge III and its Specifications and reassess the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 29 March 2022.

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