IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,	Appellee	**BRIEF ON BEHALF OF APPELLEE**
v.		Docket No. ARMY 20240284
Private First Class (E-3) **CHRISTIAN T. ROWE**, United States Army,	Appellant	Tried at Kaiserslautern, Germany, on 4 June 2024, before a special court-martial convened by the Commander, 21st Theater Sustainment Command, Lieutenant Colonel Thomas P. Hynes, Military Judge, presiding.

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

Assignment of Error I[1]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ABIDE BY THE HEIGHTENED PLEA INQUIRY REQUIREMENTS UNDER *UNITED STATES V. BYUNGGU KIM*, 83 M.J. 235 (C.A.A.F. 2023) WHEN HE NEGLECTED TO CONDUCT AN INQUIRY CONCERNING APPELLANT'S FIRST AMENDMENT RIGHTS.

[1] The government has reviewed appellant's *Grostefon* matters and submits that they lack merit. Should this court find any of appellant's *Grostefon* matters meritorious, the government requests notice and an opportunity to file a supplemental brief addressing the claimed error.

PANEL NO. 2

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S PLEA FOR VIOLATING ARMY REGULATION 600-20'S ONLINE MISCONDUCT PROVISION WHEN THE COMMUNICATION WAS TO A GERMAN NATIONAL WITH NO AFFILIATION TO THE ARMED FORCES.

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Statement of the Case

On 4 June 2024, a military judge, sitting as a special court-martial, convicted appellant, in accordance with his pleas, of one specification for violation of a general regulation, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 (2018) [UCMJ], and one specification of communicating a threat, in violation of Article 115, UCMJ, 10 U.S.C. § 915 (2018). (R. at 60). On 4 June 2024, the military judge sentenced appellant to be separated from the service with a bad-conduct discharge. (R. at 85). On 21 June 2024, the convening authority took no action on the findings and sentence as adjudged. (Action). On 21 June 2024, the military judge entered judgment. (Judgment).

Statement of Facts

A. After Ms. [redacted] decided to not go on a second date with appellant, he harassed and threatened her.

After arriving in Germany for his military assignment in February of 2021, appellant met Ms. [redacted] on a dating application called Tinder. (Pros. Ex. 1 at p. 2). Over a period of about two weeks, they texted each other, video-chatted frequently, and met in person. (Pros. Ex. at p. 2). However, Ms. [redacted] then decided that she did not want to go on a second date with appellant. (Pros. Ex. 1 at p. 2).

1. Appellant harassed Ms. [redacted] and undermined her dignity and respect.

After Ms. [redacted] rejected appellant, between on or about 1 April 2021, and on or about 7 April 2021, appellant sent Ms. [redacted] multiple messages through the

electronic-media applications WhatsApp and Instagram, even though he knew that she did not want these messages. (Pros. Ex. 1 at p. 2). Ms. [redacted] had told appellant that she did not wish to communicate with him any longer, but he "still communicated to her past that, making multiple attempts at doing so[.]" (R. at 21).

Ms. [redacted] explicitly told appellant on Snapchat that "she did not wish to talk with [appellant] any further." (R. at 21). Ms. [redacted] even blocked appellant "on most social media," including Snapchat, WhatsApp, and Instagram. (R. at 21–22, 28). Despite Ms. [redacted]'s efforts, appellant still messaged Ms. [redacted]. (R. at 22). Appellant had no "legal or moral reason" to keep messaging her, and appellant knew that Ms. [redacted] did not want "any further communication" from appellant. (R. at 21–22).

After Ms. [redacted] blocked appellant on social media, appellant created new accounts with different usernames and continued to message Ms. [redacted], and even texted her sister. (R. at 27–28). Appellant engaged in all this harassment after Ms. [redacted] made "clear to [him] that she no longer wanted to talk to [him.]" (R. at 28–29).

Appellant acknowledged that his conduct undermined Ms. [redacted]'s respect because appellant went "against [Ms. [redacted]'s] wishes and messaged her." (R. at 22; Pros. Ex. 1 at p. 2). He acknowledged that his conduct undermined the respect he should have had for Ms. [redacted]—his actions "eliminated my respect for her," as he put it. (R. at 22). And he further acknowledged that his conduct undermined Ms. [redacted]'s dignity because he "stooped low enough to communicate with her," even though

he knew that she no longer wished to receive his communications. (R. at 22). Appellant admitted that these communications with Ms. [redacted] were wrongful, unjustified, and without excuse; and he recognized that he knew that he was not supposed to engage in these communications but still did. (R. at 23).

Appellant admitted that his harassment of Ms. [redacted] violated a lawful general regulation, Army Reg. 600-20, Army Command Policy, para. 4-19(a)(5) (24 July 2020) [AR 600-20], which was in effect during appellant's harassment of Ms. [redacted]. (R. at 15–16, 20, 23–24). Appellant admitted that he had a duty to obey this regulation because, as he said, "I'm a Soldier[.]" (R. at 19, 24).

Specifically, AR 600-20, para. 4-19(a), covers various types of harassment that may be punished under the UCMJ. And paragraph 4-19(a)(5) prohibits "online misconduct," which is the "use of electronic communication to inflict harm"; online misconduct includes harassment "that undermines dignity and respect."

AR 600-20, para. 4-19(a)(4), makes clear, "Harassment is prohibited in all circumstances and environments[.]" And paragraph 4-19 says that Army personnel are expected to treat "all persons as they should be treated—with dignity and respect."

Appellant admitted that his electronic communication with Ms. [redacted] "constituted wrongful online misconduct." (R. at 23). And he affirmed that AR

600-20, para. 4-19(a)(5), had a military purpose. (R. at 18). Indeed, AR 600-20, para. 4-19, says that the failure to lead by example and prevent abusive treatment of others "brings discredit on the Army and may have strategic implications."

2. Appellant threatened Ms. [redacted].

Furthermore, between on or about 1 April 2021, and on or about 7 April 2021, appellant also sent Ms. [redacted] an Instagram message stating, "I'll stop messaging you, but leak the video chats where you are topless," or words to that effect. (Pros. Ex. 1 at p. 2; R. at 29–31). These "video chats" referred to nude topless photos of Ms. [redacted] that she had originally meant to send only to appellant. (R. at 35–36; Pros. Ex. 1 at pp. 5–6). Ms. [redacted] did not want these photos to be made public, and appellant knew that. (R. at 35–36; Pros. Ex. 1 at pp. 5–6).

Appellant admitted that he had been upset when he sent the threat to Ms. [redacted], and he "ended up issuing those threats in an attempt to get[] her to communicate with" him further. (R. at 31). Appellant was angry and sent the threat "to get her to at least talk to [him] again[.]" (R. at 33). And appellant sent the threat to Ms. [redacted] because he "was wanting to get her to respond to me and I knew that it was not right[.]" (R. at 35).

Appellant was certain that Ms. [redacted] saw his threatening message. (R. at 32). He further knew that his message was an "actual threat," and he also recognized that Ms. [redacted] would view it as a threat. (Pros. Ex. 1 at p. 2; R. at 33, 35).

In sending this threat, appellant intended to injure Ms. [redacted]'s reputation; he knew that posting Ms. [redacted]'s nude pictures would indeed damage her reputation, and he understood that his threatening message expressed a "determination or intent" to injure Ms. [redacted]'s reputation presently or in the future. (Pros. Ex. 1 at p. 2; R. at 32, 36–38). Appellant did not send the threat in jest, or for any innocent or legitimate purpose. (Pros. Ex. 1 at p. 2; R. at 33–34).

Ms. [redacted], who was a German national, eventually filed a criminal complaint, and the German police interviewed her and appellant. (Pros. Ex. at 5–6; Appellant's Br. 2). Ms. [redacted] also requested prosecution. (Pros. Ex. at 5–6). The German police produced a report, and appellant admitted that the report was accurate. (R. at 33; Pros. Ex. 1 at pp. 5–6).

B. In entering a plea agreement, appellant agreed to waive all waivable motions, and he admitted that he had no legal excuse or justification for his crimes.

Upon consultation with counsel, appellant agreed to waive all waivable motions as part of his plea agreement. (App. Ex. III at pp. 1, 3). In his stipulation of fact, appellant also expressly disclaimed the existence of any defense to the charges he pleaded guilty to, and he admitted that he had no legal excuse or justification for his crimes. (Pros. Ex. 1 at p. 3).

During the guilty plea, the military judge further confirmed with appellant and his counsel that appellant wanted to waive all waivable motions, including

potential motions to suppress evidence from appellant's phone. (R. at 37, 48–51). At one point during the colloquy, the following exchange occurred between the military judge and appellant regarding the agreement to waive all waivable motions:

> [MJ]: . . . Do you understand that this term of your plea agreement means that you give up the right to make *any* motion which by law is given up when you plead guilty?
>
> ACC: I understand, Your Honor.

(R. at 49) (emphasis added). Appellant confirmed that he had "thoroughly" read his plea agreement and understood it. (R. at 39–40). Appellant further confirmed that he had "thoroughly" discussed with counsel the significance of waiving all waivable motions under the plea agreement. (R. at 50).

C. Appellant pleaded guilty to harassing and threatening Ms. [redacted].

At court-martial, appellant pleaded guilty to violating AR 600-20, para. 4-19(a)(5), by harassing Ms. [redacted]; and he pleaded guilty to wrongfully communicating to Ms. [redacted] a threat to injure her reputation. (R. at 9, 59–60; Pros. Ex. 1; App. Ex. III; Charge Sheet).

First, when discussing the harassment specification under Article 92, UCMJ, appellant admitted that he lacked "any kind of a justification at all to continue to communicate with" Ms. [redacted]. (R. at 23). Appellant also admitted that he did not have any excuse for continuing to communicate with Ms. [redacted]. (R. at 23). At the

end of the colloquy about the harassment specification, appellant's counsel agreed that no further discussion about this specification was necessary. (R. at 29).

Second, when discussing the threat specification under Article 115, UCMJ, appellant admitted that he lacked "any legal justification or excuse for sending those words to [Ms. [redacted].]" (R. at 34). During the colloquy with the military judge, appellant also admitted that no defenses applied to this threat specification. (R. at 37). And at the end of the colloquy about the threat specification, appellant's counsel again agreed that no further discussion about this specification was necessary. (R. at 38).

Finally, after discussing the facts and laws surrounding the harassment specification and the threat specification, the military judge found appellant's guilty plea to be provident and accepted it. (R. at 15–17, 29–30, 59–60).

Assignment of Error I

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ABIDE BY THE HEIGHTENED PLEA INQUIRY REQUIREMENTS UNDER *UNITED STATES V. BYUNGGU KIM*, 83 M.J. 235 (C.A.A.F. 2023) WHEN HE NEGLECTED TO CONDUCT AN INQUIRY CONCERNING APPELLANT'S FIRST AMENDMENT RIGHTS.

Standard of Review

This court reviews a military judge's "decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo."

United States v. Byunggu Kim, 83 M.J. 235, 238 (C.A.A.F. 2023). A military judge abuses his discretion if he accepts a guilty plea without an adequate factual basis to support the plea; additionally, any ruling based on an erroneous view of the law also constitutes an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 321–22 (C.A.A.F. 2008).

Courts give the military judge broad discretion in the decision to accept a guilty plea because the facts are undeveloped in such cases. *Kim*, 83 M.J. at 238. Indeed, a court "must uphold Appellant's guilty plea unless there is a substantial basis in law and fact for questioning the guilty plea." *United States v. Simpson*, 81 M.J. 33, 36 (C.A.A.F. 2021) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)) (internal quotation marks omitted).

Furthermore, appellate courts generally "do not review waived issues because a valid waiver leaves no error to correct on appeal." *See United States v. Hardy*, 76 M.J. 732, 736 (A.F. Ct. Crim. App. 2017), *aff'd* 77 M.J. 438 (C.A.A.F. 2018) (internal quotation marks omitted). In contrast, forfeiture is the "failure to make the timely assertion of a right" and is reviewed for plain error. *United States v. Rich*, 79 M.J. 472, 475 (C.A.A.F. 2020) (quoting *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020)). "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.'" *United States v. Campos*, 67

M.J. 330, 332 n.2 (C.A.A.F. 2009) (quoting *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)).

Law

A. Violation of a lawful general regulation.

In this case, the elements for violation of a lawful general regulation are the following: (1) that there was in effect a certain lawful general regulation, AR 600-20, para. 4-19(a)(5); (2) that appellant had a duty to obey it; and (3) that appellant violated the regulation. Article 92, UCMJ; *Manual for Courts-Martial*, United States (2019 ed.) [*MCM*], pt. IV, ¶ 18.b.(1).

AR 600-20, para. 4-19(a)(5), prohibits "online misconduct," which is the "use of electronic communication to inflict harm." Electronic communications include text messages, chats, and instant messaging. AR 600-20, para. 4-19(a)(5). Examples of online misconduct include "harassment . . . that undermines dignity and respect." AR 600-20, para. 4-19(a)(5).

B. Communicating a threat.

In this case, the elements for communicating a threat are the following: (1) that appellant communicated certain language expressing a present determination or intent to injure the reputation of Ms. [redacted], presently or in the future; (2) that the communication was made known to Ms. [redacted]; and (3) that the communication was wrongful. Article 115, UCMJ; *MCM*, pt. IV, ¶ 53.b.(1).

The "wrongfulness" of the communication relates to appellant's "subjective intent." *MCM*, pt. IV, ¶ 53.c.(2). For purposes of this crime, "the mental state requirement is satisfied if the accused transmitted the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat." *Id.*

C. Providence inquiries in cases of constitutional gray areas.

During providence inquiries, military judges must take certain precautions when an accused's conduct occupies a "constitutional gray area." *Kim*, 83 M.J. at 239. In particular, constitutional gray areas arise in cases that involve conduct that would be constitutionally protected in the civilian world but not necessarily protected in the military system. *See*, *e.g.*, *Kim*, 83 M.J. at 237, 239 (setting forth standards for a colloquy regarding a charge about searching the internet for terms like "rape sleep," in light of *Stanley v. Georgia*, 394 U.S. 557 (1969)); *United States v. Hartman*, 69 M.J. 467, 468–69 (C.A.A.F. 2011) (setting forth standards for a colloquy about a consensual-sodomy charge, in light of *Lawrence v. Texas*, 539 U.S. 558 (2003)).

Accordingly, if "a charge against a servicemember may implicate both criminal and constitutionally protected conduct," it is critical to make a "distinction between what is permitted and what is prohibited." *Kim*, 83 M.J. at 238 (quoting *Hartman*, 69 M.J. at 468). In providence inquiries with a "constitutional gray

area," the military judge should discuss with the accused "the existence of constitutional rights relevant to his situation" and make sure the accused understands "why his behavior under the circumstances did not merit such protection." *Id.* at 239.

Argument

A. Appellant's guilty plea for violating a general regulation was provident.

Under *Simpson*, 81 M.J. at 36, the military judge acted well within his broad discretion by finding appellant's guilty plea for violating a general regulation to be provident, because there is no substantial basis in law and fact for questioning the guilty plea. Appellant's uncontradicted admissions met all three elements for violation of a lawful general regulation because he admitted (1) that AR 600-20, para. 4-19(a)(5), was a lawful general regulation in effect during his harassment (R. at 15–16, 20, 23–24); (2) that he had a duty to obey this regulation (R. at 19, 24); and (3) that he violated this regulation (R. at 20, 23–24).

Furthermore, none of appellant's alleged First Amendment arguments can manufacture any substantial basis in law or fact to question the guilty plea.

1. The military judge was not required to discuss appellant's First Amendment rights, because the harassment specification did not implicate a combination of criminal conduct and constitutionally protected conduct.

Appellant's harassment specification did not present a constitutional gray area, because the specification criminalized appellant's harassing conduct, not his

speech. Accordingly, the military judge was not required to discuss appellant's First Amendment rights, because the harassment specification was not one that might implicate a combination of criminal conduct and constitutionally protected conduct.

Unlike the specification in the case of *Kim*, 83 M.J. at 237, 239, the harassment specification here did not criminalize any type of speech that would be constitutionally protected in the civilian world; rather, the specification criminalized harmful *conduct*, which caused harm to Ms. [redacted] by undermining her dignity and respect. (R. at 22).

There is no constitutional right protecting appellant's harassing conduct here. In contrast, in *Kim*, 83 M.J. at 237, 239, the court pointed to *Stanley*, 394 U.S. at 558, 565, which set the foundation for a constitutional right in the civilian world to merely search on the internet for terms like "rape sleep" and "drug sleep." And in *Hartman*, 69 M.J. at 468–69, the court pointed to *Lawrence*, 539 U.S. at 562, which showed that there was a constitutional right in the civilian world to engage in consensual sodomy. But there is no such case law showing a constitutional protection in the civilian world for the type of misconduct appellant engaged in here.

Indeed, the federal courts, in the civilian context, have found no First Amendment protection in situations similar to that of appellant. In *Thorne v.*

Bailey, 846 F.2d 241, 243 (4th Cir. 1988), a defendant was convicted under a West Virginia harassment statute. According to trial testimony in *Bailey*, the defendant, a suspended university student, repeatedly telephoned his university using "language and tone" that "became harassing." *Id.* For example, the defendant referred to those he called, as well as other officials at the university, as "pigs," "racists pigs," "bigot" and "local trash." *Id.* In upholding the conviction, the *Bailey* court found that the harassment statute "prohibits conduct and not protected speech." *Id.* The court also favorably quoted an opinion from the Supreme Court of Appeals of West Virginia:

> Prohibiting harassment is not prohibiting speech, because harassment is not a protected speech. Harassment is not communication, although it may take the form of speech. The statute prohibits only telephone calls made with the intent to harass. Phone calls made with the intent to communicate are not prohibited. Harassment, in this case, thus is not protected merely because it is accomplished using a telephone.

Bailey, 846 F.2d at 243 (quoting *State v. Thorne*, 333 S.E.2d 817, 819 (W. Va. 1985)); *see also United States v. Waggy*, 936 F.3d 1014, 1020 (9th Cir. 2019) ("In sum, Washington Revised Code section 9.61.230(1)(a) requires proof that the defendant specifically intended to harm the victim when initiating the call. As applied here, that requirement ensures that Defendant was convicted for his conduct, not for speech protected by the First Amendment."); *United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018) (finding that "criminal harassment . . . is

unprotected because it constitutes true threats or speech that is integral to proscribable criminal conduct" (citation omitted)). As the Supreme Court of the United States has made clear, "'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Just as the harassing conduct on the telephone in *Bailey*, 846 F.2d at 243, is not constitutionally protected, appellant's harassing conduct on his messaging applications would similarly merit no constitutional protection under the First Amendment. The harassment specification here covered appellant's conduct, not his speech; that is why the military judge, during the colloquy about the harassment specification, never asked appellant about the content of his harassing messages to Ms. [redacted]. Instead, the military judge rightly focused on topics like whether Ms. [redacted] made clear her desire to no longer communicate with appellant; whether appellant knew about Ms. [redacted]'s desire before he kept messaging her; and the harm that appellant's harassing conduct had inflicted on Ms. [redacted] by undermining her dignity and respect. (R. at 21–22).

Unlike the military judges in *Kim* and *Hartman*, the military judge here did not confront any type of "constitutional gray area"—appellant's harassment

specification was not one that might implicate a combination of constitutionally protected behavior and criminal conduct. Thus, the military judge was not required to engage in the type of First Amendment colloquy required in *Kim*, 83 M.J. at 239.

2. Even if the harassment specification implicated a combination of criminal conduct and constitutionally protected conduct, appellant showed that he understood why his harassment was not protected.

Even if appellant's misconduct somehow implicated a combination of criminal conduct and constitutionally protected conduct, appellant showed, through his answers to the military judge's questions, that he understood his rights and understood that his harassing conduct was not protected in any way—whether under the First Amendment, Second Amendment, or any other provision. He also understood why his harassing conduct was wrongful and thus not protected.

For example, when discussing the harassment specification, appellant admitted that he lacked "any kind of a justification at all to continue to communicate with" Ms. [redacted], and that he lacked any excuse for continuing to communicate with her. (R. at 23). And of course, such purported justifications or excuses would include ones based on the First Amendment. (R. at 23). Appellant confessed he had no "legal or moral reason" to keep messaging her; this confession would cover any rights under the First Amendment. (R. at 21–22). After all, if appellant believed he had a First Amendment right to keep messaging Ms. [redacted], then

he could not properly admit to having no "legal or moral reason" to keep messaging her.

The military judge also ensured that appellant had a full understanding of all his rights by confirming that appellant had thoroughly read his plea agreement and understood it. (R. at 39–40). Additionally, the military judge confirmed that appellant had "thoroughly" discussed with counsel the significance of waiving all waivable motions under the plea agreement. (R. at 50). And even though the military judge did not explicitly mention the words "First Amendment," the trial defense counsel informed the military judge that counsel had discussed with appellant the viability of a potential motion to suppress evidence from his phone (R. at 37, 48–49); and such discussions about a motion to suppress could possibly have involved talking about various (and ultimately, inapplicable) First Amendment protections. *See Lo-Ji Sales v. New York*, 442 U.S. 319, 326 n.5 (1979) ("But we have recognized special constraints upon searches for and seizures of material arguably protected by the First Amendment[.]"); *see also*, *e.g.*, *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000) ("Monroe challenges the affidavit as violating the Supreme Court's standard for seizing materials presumptively protected by the First Amendment because it contained only Duff's conclusory allegation that the photographs were obscene and provided no independent means for Green to determine if the photographs were, in fact,

obscene."); *United States v. Maxwell*, 45 M.J. 406, 414 n.2 (C.A.A.F. 1996) (on appeal, an accused challenged the legality of a warrant for e-mails because the warrant allegedly failed to employ means that would have avoided First Amendment infringements).

Therefore, the military judge ensured that appellant understood his various applicable rights and ensured that appellant understood that his harassing conduct could not be justified or excused in any way, whether under the First Amendment or any other provision.

3. Appellant waived any First Amendment issues surrounding the harassment specification.

Appellant's unconditional guilty plea and waiver of all waivable motions resulted in waiver of any First Amendment-based challenge to his guilty plea. *See United States v. Day*, 83 M.J. 53, 56 (C.A.A.F. 2022) ("We have held that an unconditional guilty plea generally waives all defects which are neither jurisdictional nor a deprivation of due process of law." (citing *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009)) (internal quotation marks and brackets omitted)). Appellant's waiver of all waivable motions was part of his plea agreement, which he admitted having thoroughly read and understood. (R. at 39–40). Appellant further confirmed that he had "thoroughly" discussed with counsel the significance of waiving all waivable motions. (R. at 50). Accordingly, appellant's "waive all waivable motions" clause certainly constitutes an affirmative

waiver.[2] *United States v. Spykerman*, 81 M.J. 709, 723 (N-M. Ct. Crim. App. 2021). Indeed, even though an accused may enjoy certain rights under the First Amendment, a "'criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.'" *United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (quoting *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995)).

Even if appellant did not waive the right to challenge his guilty plea based on the First Amendment, then he certainly forfeited such a right, and this court should not find any plain error for the reasons previously stated here in subsection A ("Appellant's guilty plea for violating a general regulation was provident") of the "Argument" section under Assignment of Error I.

B. Appellant's guilty plea for communicating a threat was provident.

Under *Simpson*, 81 M.J. at 36, appellant's guilty plea for communicating a threat must be found provident because there is no substantial basis in law and fact for questioning the guilty plea. The military judge acted well within his discretion by accepting the guilty plea because appellant's uncontradicted admissions met all three elements for communicating a threat because he admitted (1) that he sent Ms.

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[2] In further contrast with appellant's case here, *Kim*, 83 M.J. 235, involved a plea agreement that "did *not* contain a 'waive all waivables' clause." (Appellant Kim's C.A.A.F. Br. 9, included in the Appendix and available at https://www.armfor.uscourts.gov/briefs/2022Term/Kim220234AppellantBrief.pdf).

[redacted] a message stating, "I'll stop messaging you, but leak the video chats where you are topless," or words to that effect, expressing a determination or intent to injure Ms. [redacted]'s reputation presently or in the future (Pros. Ex. 1 at p. 2; R. at 29–32, 36–38); (2) that he was certain that the threat was communicated to Ms. [redacted] (R. at 32); and (3) that he knew that his wrongful message was an actual threat, and that Ms. [redacted] would view it as a threat (Pros. Ex. 1 at p. 2; R. at 33, 35).

Furthermore, none of appellant's alleged First Amendment issues can manufacture any substantial basis in law or fact to question the guilty plea.

1. The military judge was not required to discuss appellant's First Amendment rights, because the threat specification did not implicate a combination of criminal conduct and constitutionally protected conduct.

Appellant's threat specification did not present a constitutional gray area, because the specification criminalized unprotected conduct. The threat specification here did not criminalize any type of speech that would be constitutionally protected in the civilian world. Accordingly, the military judge was not required to discuss appellant's First Amendment rights, because the threat specification was not one that might implicate a combination of criminal conduct and constitutionally protected conduct.

There is no constitutional right protecting appellant's communication of a threat. In contrast, in *Kim*, 83 M.J. at 237, 239, the court pointed to *Stanley*, 394 U.S. at 558, 565, which set the foundation for a constitutional right in the civilian

world to merely search on the internet for terms like "rape sleep" and "drug sleep." But there is no such case law showing a constitutional protection in the civilian world for appellant's communication of a threat.

In fact, in the civilian context, the federal courts have found no First Amendment protection for the type of threatening communication that appellant engaged in. In *United States v. Petrovic*, 701 F.3d 849, 852 (8th Cir. 2012), the defendant similarly threatened his ex-wife, the victim. The victim had sent revealing private and intimate information in text messages, which the defendant had saved. *Id.* Later, when the victim informed the defendant that she was ending their relationship, the defendant told her that he had saved the victim's messages; he threatened to post them on the internet so that her family could read the text messages. *Id.* The defendant was convicted for the "communications in which [the defendant] threatened to harm [the victim's] reputation if she ended their relationship." *Id.* at 857–58. And the court found that "it is well established that extortionate threats may be proscribed consistent with the First Amendment." *Id.* at 855 n.3; *see also United States v. Hobgood*, 868 F.3d 744, 748 (8th Cir. 2017) (finding that "extortionate communications that threatened another's reputation, and communications carrying out the threat, were not protected by the First Amendment"); *United States v. Coss*, 677 F.3d 278, 289 (6th Cir. 2012) (finding that "extortionate threats, which are true threats," are "therefore not protected

speech"). Here, just as the threatening communications sent to the victims in these federal cases were not constitutionally protected, appellant's threat to Ms. [redacted] would similarly merit no constitutional protection under the First Amendment.

Ultimately, unlike the military judges in *Kim* and *Hartman*, the military judge here did not confront any type of "constitutional gray area"—appellant's threat specification was not one that might implicate a combination of constitutionally protected conduct and criminal conduct. Thus, the military judge was not required to engage in the type of First Amendment colloquy required in *Kim*, 83 M.J. at 239.

2. Even if the threat specification implicated a combination of criminal conduct and constitutionally protected conduct, appellant showed that he understood why his threat was not protected.

Even if appellant's threatening communication somehow implicated a combination of criminal conduct and constitutionally protected conduct, appellant showed, through his answers to the military judge's questions, that he understood his rights and understood that his threat was not protected in any way—whether under the First Amendment or any other provision. He also understood why his threat was wrongful and thus not protected.

For example, when discussing the threat specification under Article 115, UCMJ, appellant admitted that he lacked "any legal justification or excuse for sending those words to [Ms. [redacted].]" (R. at 34). If appellant believed he had a First

Amendment right to send his threat, he could not have properly admitted to having no "legal justification or excuse" for sending it. (R. at 34).

During the colloquy with the military judge, appellant also admitted that no defenses applied to this threat specification. (R. at 37). Moreover, appellant confessed that he did not send the threat for any innocent or legitimate purpose. (Pros. Ex. 1 at p. 2; R. at 33–34).

After the colloquies about the harassment specification and threat specification, the military judge also ensured that appellant had a full understanding of all his rights by confirming that appellant had thoroughly read his plea agreement and understood it. (R. at 39–40). The military judge also confirmed that appellant had "thoroughly" discussed with counsel the significance of waiving all waivable motions under the plea agreement. (R. at 50). And although the military judge did not explicitly mention the words "First Amendment," the trial defense counsel informed the military judge that counsel had discussed with appellant the viability of a potential motion to suppress evidence from his phone (R. at 37, 48–49); and such discussions about a motion to suppress could possibly have involved talking about various (and ultimately, inapplicable) First Amendment protections. *See Lo-Ji Sales*, 442 U.S. at 326 n.5 ("But we have recognized special constraints upon searches for and seizures of material arguably protected by the First Amendment[.]"); *see also*, *e.g.*, *Monroe*,

52 M.J. at 331 ("Monroe challenges the affidavit as violating the Supreme Court's standard for seizing materials presumptively protected by the First Amendment because it contained only Duff's conclusory allegation that the photographs were obscene and provided no independent means for Green to determine if the photographs were, in fact, obscene.").

Therefore, the military judge ensured that appellant understood his various applicable rights and ensured that appellant understood that his harassing conduct could not be justified or excused in any way, whether under the First Amendment or any other provision.

3. Appellant waived any First Amendment issues surrounding the threat specification.

For the reasons stated in subsection A(3) ("Appellant waived any First Amendment issues surrounding the harassment specification") of the "Argument" section under Assignment of Error I, appellant also waived any First Amendment issues surrounding his threat specification.

And even if appellant did not waive the right to challenge his guilty plea based on the First Amendment, then he certainly forfeited such a right, and this court should not find any plain error for the reasons previously stated here in subsection B ("Appellant's guilty plea for communicating a threat was provident") of the "Argument" section under Assignment of Error I.

Assignment of Error II

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING APPELLANT'S PLEA FOR VIOLATING ARMY REGULATION 600-20'S ONLINE MISCONDUCT PROVISION WHEN THE COMMUNICATION WAS TO A GERMAN NATIONAL WITH NO AFFILIATION TO THE ARMED FORCES.

Standard of Review

The standard of review here is the same as the one under Assignment of Error I's "Standard of Review" section.

Law

The law here is the same as the one under Assignment of Error I's subsection A ("Violation of a lawful general regulation"), which is under the "Law" section of Assignment of Error I.

In addition, "an unconditional guilty plea waives a later claim that the pleaded-to specification fails to state an offense." *United States v. Sanchez*, 81 M.J. 501, 502 (Army Ct. Crim. App. 2021); *see also* Rule for Courts-Martial 907(b)(2)(E) (2019 ed.) (listing failure-to-state-an-offense claim as waivable).

Argument

A. The military judge acted well within his discretion by accepting appellant's guilty plea, because appellant's admissions satisfied the elements of the harassment specification.

For the reasons set forth in subsection A ("Appellant's guilty plea for violating a general regulation was provident") of the "Argument" section under Assignment of Error I, the military judge here acted well within his broad discretion by accepting appellant's guilty plea and finding his guilty plea to be provident.

Appellant now claims on appeal that the government "charged the wrong crime"; in particular, he focuses on how the providence inquiry failed to meet the elements of Article 134, UCMJ, 10 U.S.C. § 934. (Appellant's Br. 12–13). But whether appellant's admitted misconduct meets the elements of Article 134, UCMJ, is irrelevant. By appellant's own admissions and his stipulation of fact, he showed that his misconduct met the applicable elements of Article 92, UCMJ. (R. at 15–16, 19–20, 23–24; Pros. Ex. 1 at p. 2).

Appellant also implies that because he harassed only a German national, his conduct is covered by neither AR 600-20, para. 4-19(a)(5), nor Article 92, UCMJ; he claims, "If the facts were different and appellant was harassing a member in his command, not a German National he was trying to date, this violation of Article

92, UCMJ may be appropriate." (Appellant's Br. 12–14). But appellant's assertion is incorrect.

Indeed, AR 600-20, para. 4-19(a)(4), makes clear that harassment is prohibited in "all circumstances and environments," not just when interacting with other soldiers. Paragraph 4-19 specifically says that Army personnel are expected to treat "all persons"—which would include German nationals—with "dignity and respect."

Appellant himself affirmed that AR 600-20, para. 4-19(a)(5), had a military purpose. (R. at 18). And appellant admitted that he had a duty to obey this regulation because he was a soldier. (R. at 19, 24).

The regulation's military nexus here is inherently apparent, but AR 600-20, para. 4-19, also explicitly says that the failure to lead by example and prevent abusive treatment of others "brings discredit on the Army and may have strategic implications." As an example of possible strategic implications, when appellant committed his misconduct on German soil against a German national, she reported it to the German police and requested prosecution, thus causing an American soldier to be investigated, interviewed, and potentially prosecuted by foreign law-enforcement authorities. (Pros. Ex. at 5–6). Misconduct by soldiers stationed in a foreign nation certainly has potential strategic implications and a military nexus, especially when the misconduct is against the people of that foreign nation.

Army Regulation 600-20, para. 4-19, covered appellant's admitted misconduct, which met the applicable elements under Article 92, UCMJ. Ms. [redacted] had told appellant that she did not want him to communicate with her anymore, but he "still communicated to her past that, making multiple attempts at doing so[.]" (R. at 21). She even blocked appellant "on most social media," but appellant persisted in messaging her. (R. at 21–22, 28). Despite Ms. [redacted]'s efforts and rebuffs, appellant still messaged Ms. [redacted]. (R. at 22). Appellant had no "legal or moral reason" to keep messaging her, and appellant also knew that Ms. [redacted] did not want "any further communication" from appellant. (R. at 21–22). Finally, appellant acknowledged that his conduct undermined Ms. [redacted]'s dignity and respect. (R. at 22; Pros. Ex. 1 at p. 2). Therefore, the military judge properly accepted appellant's guilty plea because appellant's misconduct met the elements of Article 92, UCMJ, and his conduct violated AR 600-20, para. 4-19(a)(5).

B. Appellant waived any argument about whether AR 600-20 and Article 92, UCMJ, cover his misconduct.

In any event, appellant waived any type of argument about whether AR 600-20 and Article 92, UCMJ, cover his harassment offense. Appellant's unconditional guilty plea and waiver of all waivable motions resulted in waiver of his arguments about AR 600-20's military nexus, AR 600-20's applicability to his harassment of a German national, and any other challenges about what particular law should cover his misconduct. *See Day*, 83 M.J. at 56 ("We have held that an

unconditional guilty plea generally waives all defects which are neither jurisdictional nor a deprivation of due process of law." (citing *Schweitzer*, 68 M.J. at 136) (internal quotation marks and brackets omitted)). Appellant's "waive all waivable motions" clause constitutes an affirmative waiver of all such issues. *Spykerman*, 81 M.J. at 723.

And to the extent that appellant now claims that the harassment specification failed to state an offense, that claim has been waived too. Because "an unconditional guilty plea waives a later claim that the pleaded-to specification fails to state an offense." *Sanchez*, 81 M.J. at 502.

Finally, even if appellant did not waive the right to challenge these issues, then he certainly forfeited his right to challenge them, and this court should not find any plain error for the reasons previously stated here in subsection A ("Appellant's guilty plea for violating a general regulation was provident") of the "Argument" section under Assignment of Error I.

Conclusion

WHEREFORE, the government respectfully requests that this honorable court affirm the findings and sentence.

[redacted]

JOSEPH H. LAM
MAJ, JA
Appellate Attorney, Government
Appellate Division

[redacted]

LISA LIMB
MAJ, JA
Branch Chief, Government
Appellate Division

[redacted]

RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **BYUNGGU KIM** Sergeant First Class (E-7) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20200689 USCA Dkt. No. 22-0234/AR

CAROL K. RIM
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
[redacted]
USCAAF Bar No. 37399

BRYAN A. OSTERHAGE
Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
[redacted]
USCAAF Bar No. 36871

DALE C. McFEATTERS
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 37645

MICHAEL C. FRIESS
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 33185

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **BYUNGGU KIM** Sergeant First Class (E-7) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20200689 USCA Dkt. No. 22-0234/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER A GUILTY PLEA TO AN OFFENSE WAIVES A CHALLENGE THAT THE CONDUCT IS NOT A COGNIZABLE OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

II.

WHETHER, IN THIS CASE, INTERNET SEARCH QUERIES FOR "DRUGGED SLEEP" AND "RAPE SLEEP" ARE INDECENT CONDUCT; IN THE ALTERNATIVE, WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ABIDE BY THE HEIGHTENED PLEA INQUIRY REQUIREMENTS UNDER *UNITED STATES V. HARTMAN*, 69 M.J. 467 (C.A.A.F. 2011).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction over this matter under Article 67 (a)(3), UCMJ.

Statement of the Case

On November 16, 2020, a military judge sitting as a general court-martial convicted Appellant, Sergeant First Class (SFC) Byunggu Kim, in accordance with his pleas, of four specifications of committing a lewd act, one specification of making an illegal recording, one specification of assault consummated by a battery, and one specification of indecent conduct, in violation of Articles 120b, 120c, 128, and 134, UCMJ, respectively. (JA006-9).

The military judge sentenced Appellant to be confined for 130 months, reduced to the grade of E-1, and discharged with a dishonorable discharge. (JA097). The convening authority approved only so much of the sentence that extended to the reduction to the grade of E-1, confinement for six years, and a dishonorable discharge. (JA010-11).

On May 26, 2021, the Army Court affirmed the findings of guilty and the sentence. (JA002-5).

Statement of Facts

Appellant was charged with eleven specifications, corresponding to six separate charges, most of which centered on acts with his stepdaughter, [redacted] in violation of Article 120b, UCMJ. (JA012-15). Appellant was also charged with indecent conduct under Article 134, UCMJ. (JA012-15). Specifically, the specification for this offense alleged that:

> [Appellant], did, at or near West Point, New York, on divers occasions between on or about 24 February 2019 and on or about 17 April 2019, commit indecent conduct, to wit: conducting an internet search for "rape sleep", and "drugged sleep", and that said conduct was of a nature to bring discredit upon the armed forces.

(JA015).

The Stipulation of Fact summarized the facts supporting the indecent conduct charge as follows:

> After returning to West Point from Arkansas, the Accused remained sexually attracted to and aroused by his [redacted] step-daughter [redacted] Between on or about 24 February 2019 and on or about 17 April 2019, the Accused conducted internet searches on divers occasions for "rape sleep" and "drugged sleep" at the internet pornography website spankbang.com. The Accused stipulates and believes that[,] if informed that the Accused was searching for these videos with the intent to watch them for his personal sexual gratification because they reminded him of instances in which he was sexually abusing [redacted] the average person would find this conduct indecent and of a nature to bring discredit upon the armed forces.

(JA029).

During the plea inquiry, Appellant said he used the terms "rape sleep" and "drugged sleep" to find "pornographic videos that depicted simulated vulgar sex

scenes." (JA082). Appellant discussed only one video, which he described as a woman pretending to sleep while a man placed his penis in her mouth. (JA083). The woman then gave the man fellatio, and the couple engaged in sexual intercourse while her eyes were closed. (JA083). While Appellant admitted that the videos were "vulgar," the military judge did not ask Appellant to provide additional details or ask either party whether these videos were constitutionally protected. (JA086). However, the military judge did repeatedly ask Appellant to confirm that the videos reminded him of abusing [redacted] (JA083, JA085).

The military judge accepted Appellant's plea.

I.

WHETHER A GUILTY PLEA TO AN OFFENSE WAIVES A CHALLENGE THAT THE CONDUCT IS NOT A COGNIZABLE OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

Standard of Review

Whether Appellant waived a claim for failure to state an offense is reviewed de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

Law and Argument

A. A guilty plea does not waive a failure to state an offense under the Rules for Courts-Martial.

Prior to 2018, Rule for Courts-Martial (R.C.M.) 905(e) provided, "[f]ailure by a party to raise defenses or objections or to make motions or requests which

must be made before pleas are entered under subsection (b) of this rule shall constitute waiver . . . Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver." R.C.M. 905(e) (2016 ed.) (JA101). In *United States v. Hardy*, this Court determined that "waiver" meant precisely what it said–waiver, not forfeiture. 77 M.J. 438, 441-42 (C.A.A.F. 2018). This result was consonant with the general criminal law principle that an unconditional plea of guilty waives all non-jurisdictional defects. *Id*. at 442.

In 2018, the President amended R.C.M. 905(e). *See* Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018) (effective Jan. 1, 2019) (JA141-3). R.C.M. 905(e) now provides that failure to raise defenses or objections, except jurisdiction and failure to state an offense, shall constitute "*forfeiture* absent *affirmative* waiver." R.C.M. 905(e) (2019 ed.) (emphasis added) (JA107). The amendment was intended to provide clarity on the applicability of forfeiture and waiver throughout the Manual. Manual for Courts-Martial [MCM], Analysis on the Rules for Courts-Martial, App. 15-14, Rule 905 (2019 ed.) (JA111).

While the amendment excepts out failure to state an offense, it does not provide for *what* occurs if it is not raised, other than to state it is "waivable."

R.C.M. 907(b)(2)(E) (JA115). However, forfeiture rather than automatic waiver should apply for three reasons.

First, since at least 1984, the President has excepted failure to state an offense from automatic waiver, even when failure to state an offense became "waivable." R.C.M. 905(e) (2016 ed.) (JA101); *see also United States v. Sorrells*, 2019 CCA LEXIS 112 at *6 (N.M. Ct. Crim. App. Mar. 13, 2019) (JA132-40). If the President intended to repudiate this rule, one would expect a statement to that effect in the rule's text, Discussion, or a comment in the Drafter's Analysis. *See Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987) (if a statutory interpretation would change the legal landscape, legislators are expected to comment on that change); *see also Freeman v. United States*, 131 S. Ct. 2685, 2696 (2011) (Sotomayor, J., concurring); Anita S. Krishnakumar, *The Sherlock Holmes Canon,* 84 Geo. Wash. L. Rev. 1 (2016). This is especially so where the President has amended the rules to now make forfeiture the appropriate standard to address *all* other defenses, motions, and objections that are otherwise waivable but were not raised.

Second, this was a guilty plea. Rule for Courts-Martial 910, which specifically pertains to guilty pleas, discusses "waiver" in two sections. Under R.C.M. 910(c)(4), a guilty plea specifically waives: (1) the right to plead not guilty; (2) the right to trial; (3) the right to confrontation; and (4) the right against

self-incrimination. R.C.M. 910(c)(4) (2019 ed.) (JA118). And under R.C.M. 910(j), an accused also waives "any objection, whether or not previously raised, *insofar as the objection relates to the factual issue of guilt of the offense(s)* to which the plea was made." R.C.M. 910(j) (2019 ed.)(emphasis added) (JA121-22). Importantly, the rule's discussion then notes, "[o]ther errors with respect to the plea inquiry or acceptance of a plea under this rule are subject to *forfeiture* if not brought to the attention of the military judge, and will be reviewed for harmless error under Article 45." Discussion, R.C.M. 910(j) (emphasis added) (JA122). Thus, by implication, R.C.M. 910 indicates that failure to state an offense is "subject to forfeiture."

Third, to the extent any ambiguity remains, remedial laws should be liberally construed in favor of granting access to the remedy. *Pitman Farms v. Kuehl Poultry*, LLC, 48 F. 4th 866, 883 (8th Cir. 2022) (citing *Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d 906, 916 (Minn. 2012)). This includes rules of appellate procedure, which are remedial in nature. *See e.g., In re Milton Arrowhead Mountain*, 726 A.2d 54, 56 (Vt. 1999) (rules "regulating appeal rights are remedial in nature and must be liberally construed in favor of persons exercising those rights . . ."); *Silverbrand v. County of Los Angeles*, 205 P.3d 1047, 1050 (Cal. 2009) ("[courts] long have recognized a well-established policy, based upon the remedial character of the right of appeal, of according that right in doubtful cases when such

can be accomplished without doing violence to applicable rules") (internal citations and quotation marks omitted); *Van Meter* v. *Segal-Schadel Co.*, 214 N.E.2d 664, 665 (Ohio 1966) ("[S]tatutes providing for appeals and for proceedings with respect to appeals and for limitations on the right of appeal are remedial in nature and should be given a liberal interpretation in favor of a right of appeal"). Consequently, any ambiguity should be resolved in favor of Appellant.

In sum, a failure to state an offense is "waivable" only in the sense of an *affirmative* waiver, which is consistent with every other "waivable" defense, objection, or motion under R.C.M. 905(e).

To be sure, however, post-2018 decisions of the Army Court have found otherwise, relying on *Hardy*'s reasoning that when an accused pleads guilty to a specification, he is "'not simply stating that he did the discrete acts described in the [specification]; he is *admitting guilt of a substantive crime*.'" *United States v. Sanchez*, 81 M.J. 501, 504 (Army. Ct. Crim. App. 2021) (quoting *Hardy*, 77 M.J. at 442)(internal quotation marks omitted)(emphasis added) (JA005). Thus, to the Army Court, it "makes sense" that a guilty plea waives a failure to state an offense. *Id*. That may have been true in *Sanchez*, where the failure to state the offense was the omission of an element on the charge sheet, *Id.* at 503, but that holds no water here where the allegation is that there was *no substantive crime*, a critical

distinction recognized in federal cases.[1] To draw from the Supreme Court's recent decision in *Class v. United States*: "if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged." 138 S. Ct. 798, 804 (2018).[2]

B. The record does not support an affirmative waiver of a failure to state an offense.

Here, Appellant's plea agreement did *not* contain a "waive all waivables" clause. *Cf. United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). Although the agreement did indicate that Appellant waived a failure to state an offense issue (JA035), the record reveals that this waiver specifically pertained to a *different*

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[1] *See e.g.*, *United States v. Peter*, 310 F. 3d 709 (11th Cir. 2002) (failure to state an offense where act is outside the reach of the statute is nonwaivable); *United States v. Rita-Ortiz*, 348 F. 3d 33, 36 (1st Cir. 2003) ("a guilty plea does not preclude an [appellant] from arguing on appeal that the statute of conviction does not actually proscribe the conduct charged in the indictment"); s*ee also Class v. United States,* 138 S. Ct. 798, 801 (2018) ("[i]n more recent years, the Court has reaffirmed the . . . basic teaching that '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.'") (citations omitted).

[2] Arguably, this falls into the exception of nonwaivable claims under the Supreme Court's *Menna-Blackledge* doctrine discussed in *Class*, *supra*, which covers claims going to the power of the state to prosecute. *Class*, 138 S. Ct. at 801. Indeed, this claim is not one which could have been cured through a new indictment, nor is it "irrelevant to the validity of the conviction." *Id*. at 804-05; *see also United States v. Barboa*, 777 F.2d 1420, 1422-23, n. 3 (10th Cir. 1985) (a guilty plea does not waive something which is not a crime, for it goes to the very power of the state to bring charges).

offense. (JA094). Thus, Appellant did not explicitly waive the issue for indecent conduct. *Hardy*, 77 M.J. at 445, 447 (Ohlson, J., dissenting) (noting that "waiver is serious business" and that "inferential leaps should not create an 'implicit' and yet, somehow, 'intentional' relinquishment of a known right").

II.

WHETHER, IN THIS CASE, INTERNET SEARCH QUERIES FOR "DRUGGED SLEEP" AND "RAPE SLEEP" ARE INDECENT CONDUCT; IN THE ALTERNATIVE, WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO ABIDE BY THE HEIGHTENED PLEA INQUIRY REQUIREMENTS UNDER *UNITED STATES V. HARTMAN*, 69 M.J. 467 (C.A.A.F. 2011).

Standard of Review

This Court reviews failure to state offense claims de novo. *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010) (citing *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)). A forfeited issue is reviewed for plain error: whether (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused. *United States v. Armstrong*, 77 M.J. 465, 469 (C.A.A.F. 2018). With respect to accepting a plea to an offense, this Court reviews a military judge's decision for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 323 (C.A.A.F. 2008).

Law and Argument

A. The internet searches for "drugged sleep" and "rape sleep" are not indecent conduct.

This Court held in *United States v. Moon*, "the danger of sweeping and improper applications of the general article would be wholly unacceptable" where an offense is premised on an accused's "subjective reaction to viewing otherwise protected images[.]" 73 M.J. 382, 389 (C.A.A.F. 2014). However, that is precisely what occurred here.

Notwithstanding Appellant's description of one video of consensual pornography as "vulgar," this material is constitutionally protected. *See e.g.*, *American Booksellers Assoc. v. Hudnut*, 771 F. 2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) (overturning city ordinance that banned depictions of women enjoying rape); Keisha April, *Cartoons Aren't Real People, Too: Does the Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?,* 19 Cardozo J.L. & Gender 241, 261, n. 153 (2012) (noting that rape-fantasy films are protected speech) (JA146).

The Stipulation of Fact, which does not even discuss the videos, makes readily apparent that the indecency turned on his intent to receive sexual gratification with these videos solely because it "reminded him of the instances in which he was sexually abusing his [step-daughter]." In this sense, it did not matter what he was looking at. *Moon*, 73 M.J. at 389 (receiving gratification from

something does not remove its protection; otherwise, "a sexual deviant's quirks could turn a Sears catalog into pornography.") (quoting *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999)). In short, Appellant was convicted for abusing his stepdaughter and, contrary to *Moon*, separately convicted for his *thoughts* of abusing his stepdaughter. *See Stanley v. Georgia*, 394 U.S. 557, 567 (1969) ("our whole constitutional heritage rebels at the thought of giving the government the power to control men's minds").

B. Even if the conduct could be indecent, the military judge abused his discretion in accepting the plea because he failed to abide by the heighted requirements in *United States v. Hartman*.

Assuming *arguendo* that this offense *could* be criminal, the colloquy is deficient and does not support the plea. "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.'" *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011). Under *Hartman*, a detailed inquiry is required when there is the potential to criminalize otherwise protected conduct. *Id.* More specifically, the colloquy "must contain an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." *Id*. Here that did not happen.

To the extent it could have been an offense, it would have necessarily revolved around *what* he was looking, not *why*. As discussed above, this is protected material, but the colloquy never "established why the otherwise protected material could still be, and was . . . service discrediting in the military context." *Moon*, 73 M.J. at 389. Moreover, "[w]ithout a proper explanation and understanding of the constitutional implications of the charge, Appellant's admissions . . . regarding why he personally believed his conduct was service discrediting . . . do not satisfy *Hartman*." *Id*. Consequently, the military judge abused his discretion when he accepted Appellant's plea.

Conclusion

Based on the foregoing, Appellant requests that this Court grant appropriate relief.

[redacted]

CAROL K. RIM
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

[redacted]

USCAAF Bar No. 37399

[redacted]

Major, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar No. 36871

[redacted]

Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 37645

[redacted]

MICHAEL C. FRIESS
Colonel, Judge Advoca
Chief
Defense Appellate Division
USCAAF Bar No. 33185

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Kim, Crim. App. Dkt. No. 20200689, USCA Dkt. No. 22-0234/AR was electronically filed with the Court and the Government Appellate Division on December 7, 2022.

[redacted]

CAROL K. RIM
CPT, JA
Appellate Defense Counsel
Defense Appellate Division
[redacted]

CERTIFICATE OF SERVICE, U.S. v. ROWE (20240284)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] on the 10th day of April, 2025.

[redacted]

Senior Paralegal Specialist
Government Appellate Division
[redacted]