No. __-_____

IN THE

Supreme Court of the United States

GREGORY S. SIMPSON,
GUNNERY SERGEANT,
UNITED STATES MARINE CORPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a constitutional due process violation for Petitioner's guilty plea to distribution of indecent images to be accepted based on a theory that he "aided and abetted" a distribution of indecent images to himself, when the only individuals involved were the distributor and Petitioner as the recipient?

2. Is it a constitutional due process violation for Petitioner to be convicted for another's non-criminal act of sending indecent images to Petitioner, and when his receipt and possession of the images were also not criminal acts?

3. What is the *mens rea* required for an aider and abettor to incur criminal liability when the penal law applicable to the aider and abettor requires a general intent, but the penal law applicable to the principal requires specific intent?

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case:

United States v. Simpson, No. 201800268, 2020 CCA LEXIS 67 (N-M. Ct. Crim. App. Mar. 11, 2020) (unpub. op.).

United States v. Simpson, No. 20-0268/MC, 81 M.J. 33 (C.A.A.F. 2021). Judgment entered on Mar. 10, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Gunnery Sergeant Simpson, United States Marine Corps, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The CAAF's published opinion appears at pages 1a through 10a of the appendix to this petition. It is reported at 81 M.J. 33. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) appears at 11a through 39a of the appendix. It is available at 2020 CCA LEXIS 67.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"[1]

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Articles 77 and 120c of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 877 and 920c, and Rule for Courts-Martial (R.C.M.) 910(e).

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[1] U.S. CONST. amend. V.

STATEMENT OF THE CASE

I. Introduction

Gunnery Sergeant Simpson pled guilty to conduct that was not a crime—(1) encouraging MB, his civilian girlfriend and an Oklahoma resident, to send him indecent images of MB's adult daughter, ENF, and (2) receiving said indecent images. The criminal theory of which he was advised at trial was that he had "aided and abetted" MB in the distribution of the images to himself by encouraging MB to send the images to him and by actually receiving the images. However, neither Oklahoma state law nor federal law criminalized MB's act of sending the images to Petitioner, and as a civilian, MB was not subject to the UCMJ. Nor did the UCMJ criminalize Petitioner's receipt or possession of the images.[2] For these actions, Petitioner pled guilty to, and was convicted of, conspiracy to record and distribute indecent images of ENF in violation of Article 81, UCMJ (10 U.S.C. § 881), recording indecent images of ENF as an aider and abettor in violation of Article 120c, UCMJ, and distributing said images as an aider and abettor in violation of Article 120c, UCMJ (10 U.S.C. § 920c).

Almost fifty years ago, this Court recognized a "conviction and punishment . . . for an act that the law does not make criminal . . . inherently results in a complete miscarriage of justice."[3] Unfortunately for Petitioner, none of the participants in his court-martial recognized this fundamental tenet of criminal law. As a result,

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[2] *United States v. Simpson*, 81 M.J. 33, 37 (C.A.A.F. 2021).
[3] *Davis v. United States*, 417 U.S. 333, 346 (1974).

Petitioner pled guilty to something that was not a crime.

Petitioner first sought relief from the Navy-Marine Corps Court of Criminal Appeals (NMCCA). Petitioner subsequently sought, and was granted, review of his distribution conviction by the Court of Appeals for the Armed Forces (CAAF). In a 3-2 decision, the CAAF affirmed Petitioner's conviction for distributing indecent images of ENF as an "aider and abettor."[4] The majority's rationale was that Petitioner incurred accomplice liability simply by "associating himself with [MB's] purpose of distributing the images of ENF to him."[5] The majority overlooked the fact that MB's "purpose" in sending the images to Petitioner was not criminal,[6] due to the lack of specific intent to harass, intimidate, or coerce ENF, as required by Oklahoma statute.[7] The majority also overlooked case law from federal circuits that hold a recipient of contraband does not incur liability as the distributor under an aiding and abetting theory, when the distribution is limited to the two people required for the distribution to be completed.[8]

In contrast, the dissent argued it would have overturned Petitioner's conviction for the distribution because MB's conduct was not criminal, which precludes criminal liability under an aiding and abetting theory.[9] The dissent went further to state that the majority's characterization of Petitioner's conduct in "causing" MB to send him

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[4] *Simpson*, 81 M.J. at 34.
[5] *Id.* at 37.
[6] *Id.* at 38 (Stucky, C.J. and Hardy, J. dissenting).
[7] 21 O.S. §1040.13b.B.2.
[8] *United States v. Baker*, 10 F.3d 1374, 1418 (9th Cir. 1993); *United States v. Harold*, 531 F.2d 704, 705 (5th Cir. 1976) (citing *United States v. Anthony*, 474 F.2d 770 (5th Cir. 1973).
[9] *Simpson*, 81 M.J. at 38 (Stucky, C.J. and Hardy, J. dissenting).

images as "aiding and abetting" rendered 10 U.S.C. § 877(2), which covers conduct as a "causer," superfluous.[10] Therefore, it was "legally impossible" for Petitioner to commit the offense of distribution as an "aider and abettor."[11] And, because Petitioner was not charged with or put on notice that he could be convicted of distribution as a "causer" under 10 U.S.C. § 877(2), Petitioner's conviction for distribution was required to be set aside.[12]

II. Legal and Factual Background

The facts of this case are not disputed.[13] While Petitioner had a live-in girlfriend, he also engaged in a romantic relationship with another woman, MB. MB had an 18-year-old daughter, ENF. Petitioner and MB exchanged sexually explicit emails that included discussions of unusual sexual fantasies, and used images of ENF while she bathed to fuel their fantasy talk. MB surreptitiously took these images of ENF with her cell phone and emailed them to Petitioner, as he requested and encouraged MB to do. "But for" Petitioner's "encouragement," MB would not have emailed the images of ENF to Petitioner. Petitioner's live-in girlfriend suspected he was cheating on her, hacked into his email account to confirm her suspicions, and discovered the emails with MB and the images of ENF. This occurred in Oklahoma. MB was a civilian, not subject to the UCMJ.

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[10] *Id.*
[11] *Id.*
[12] *Id.* (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)).
[13] These facts are contained in the record of trial at R. 182-212 and the Stipulation of Fact, Prosecution Exhibit 1.

In criminalizing nonconsensual distribution of intimate images, Oklahoma law requires the distributor to distribute the images with the intent to harass, intimidate or coerce the person who is the subject of the images.[14] 10 U.S.C. § 920c(a)(3) does not require such an intent. Because Petitioner and MB intended to keep the recordings and distribution of ENF's images a secret from ENF, neither Petitioner nor MB intended to harass, intimidate, or coerce her with the distribution of the images.[15] Petitioner did not personally distribute the images of ENF to another person.

Simpson stands for two alarming propositions: (1) a recipient of contraband incurs criminal liability as the *distributor* of that contraband by receiving it; and (2) a person can incur criminal liability as an "accomplice" even though the principal's conduct is not a criminal act if the conduct is morally, but not legally, objectionable.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Inconsistent in Their Analyses of the *Mens Rea* Requirement for Accomplice Liability, and CAAF Split from the Circuits on Whether the Recipient of Contraband can Incur Liability as the Distributor when the Only People Involved are the Distributor and the Recipient.

In enacting 18 U.S.C. § 2 (and by extension 10 U.S.C. § 877), Congress intended to eliminate the common-law distinction between principals and accessories before the fact by making them all criminally liable as principals.[16] "This elimination of distinctions speaks in favor of applying to the accomplice whatever mental state

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[14] 21 O.S. §1040.13b.B.2.
[15] *Simpson*, 81 M.J. at 38 (Stucky, C.J. and Hardy, J. dissenting).
[16] *Standefer v. United States*, 447 U.S. 10, 18-19 (1980) (citations omitted).

applies to the principal."[17] While Congress intended to simplify the law by eliminating the distinctions,[18] federal courts have instead complicated it with their varying interpretations of the elements of aiding and abetting, as well as their variety in *mens rea* requirements for a person to incur accomplice liability.

A. Circuits Diverge on Elements and *Mens Rea* for Accomplice Liability

The "status of the law on the aider and abettor's mental state is far from clear. In fact, it is best described . . . as in a state of chaos."[19] The aiding and abetting *mens rea* "chaos" is on full display in the divided CAAF's opinion, which highlights the divergence in the Circuits' interpretation of not only the elements of aiding and abetting, but also their *mens rea* requirements.[20] In this case, the penal law applicable to Petitioner as an "accomplice" is a "general intent" crime that requires only that he knew (or should have known) that the images of ENF's private areas were recorded without her consent and under circumstances in which she had a reasonable expectation of privacy.[21] However, the penal law applicable to MB as the "principal" who emailed those images to Petitioner is a "specific intent" crime because it required MB to have the intent to harass, intimidate, or coerce ENF at the time of

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[17] Baruch Weiss, *What Were They Thinking? The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1362 (2002).
[18] *Rosemond v. United States*, 572 U.S. 65, 70, 76 (2014) (citing *Standefer*, 447 U.S. at 14-19 and *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir. 1939)).
[19] Weiss, *What Were They Thinking? The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. at 1351.
[20] *Id.* at 1349 ("In other words, is the mental state of the aider and abettor the same as that of the principal (whose mental state may vary from offense to offense), or is it the same for all aiders and abettors, regardless of the mental state required of the principal?").
[21] 10 U.S.C. § 920c(a)(3).

the distribution.[22] Therefore, if "whatever mental state is applicable to the principal must also be applied to the aider and abettor," then Petitioner did not commit a "distribution" crime, and he stands wrongly convicted.

Case law interpreting 18 U.S.C. § 2(a) started as logical proposition that an aider and abettor "must associate himself with the criminal venture, participate in it as something he wishes to bring about, and seek by his action to make the criminal venture succeed."[23] Judge Learned Hand believed the words "aiding" and "abetting" implied that the necessary *mens rea* was "purposeful intent."[24]

This Court subsequently adopted the *Peoni* formula in *Nye & Nissen v. United States*.[25] This Court later expounded on this formula in *Rosemond v. United States*,[26] by citing two elements: (1) taking an affirmative act in furtherance of the substantive offense, (2) with the intent of facilitating that substantive offense's commission.[27] "An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must relate to the specific and entire crime charged."[28]

This Court also clarified that, to intend the facilitation of the substantive offense, the aider and abettor must have full knowledge in advance of the circumstances constituting the substantive offense.[29] Because the substantive

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[22] 21 O.S. §1040.13b.
[23] *Peoni*, 100 F.2d at 402.
[24] *Id.*
[25] 336 U.S. 613, 619 (1949).
[26] 572 U.S. 65.
[27] *Id.* at 71.
[28] *Id.* at 76.
[29] *Id.* at 77.

offense in *Rosemond* was a "general intent" crime (use or carriage of a firearm during a drug-trafficking offense), advance "knowledge" that someone in Mr. Rosemond's group carried a firearm to their "drug deal gone bad" was the appropriate *mens rea* for Mr. Rosemond to incur criminal liability as an aider and abettor. Petitioner's case is different because the substantive offense at issue in his case required a specific intent to harass, intimidate, or coerce ENF, based on MB being the "principal" as the distributor.[30]

The law on aiding and abetting liability has been subject to varying interpretations in the circuit courts over the years, both before and after *Rosemond*. The circuits that have considered the issue differ in their elements and *mens rea* requirements. For example, while the First Circuit adopted this Court's reasoning in *Rosemond* regarding the elements and *mens rea*,[31] the Fifth Circuit does not seem to require *any mens rea*.[32] The Tenth Circuit also has a two-element formula, but with a dual *mens rea* requirement."[33]

The Sixth Circuit noted that the conflicts among circuits in accomplice liability may be related to "the increasing complexity of federal criminal statutes and the

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[30] 21 O.S. §1040.13b.

[31] *United States v. Encarnación-Ruiz*, 787 F.3d 581, 588-90 (1st Cir. 2015) (overturning a conditional guilty plea to aiding and abetting production of child pornography because the defendant did not know the female participant was a minor, and knowledge that the person was a minor was the only element that made the production criminal. *See also United States v. Ford*, 2016 U.S. App. LEXIS 6712, *15-16 (1st Cir. Apr. 13, 2016) (unpub. op.) (clarifying the *mens rea* element requires the aider and abettor to have full advance knowledge of the facts that made the *principal's* conduct criminal).

[32] *United States v. Surtain*, 519 Fed. Appx. 266, 277 (5th Cir. 2013) (citation omitted) ("An aider and abettor is liable for criminal acts that are the 'natural or probable consequence of the crime' that he . . . encouraged.").

[33] *United States v. Bowen*, 527 F.3d 1065, 1078 (10th Cir. 2008).

government expanding the net of criminal liability by charging accomplices in addition to principals."[34] It sought to create a "refined" theory of aiding and abetting liability, as it applied to illegal gambling businesses.[35] However, in the process of creating its "refined" theory, it imposed three *mens rea* requirements.[36] The Seventh Circuit has three elements that imply two *mens rea* requirements.[37] However, the circuit has yet to clarify whether the aider and abettor must "know" that the activity is illegal, or know the substance of the illegal activity.

The Ninth Circuit appears to be the only circuit that has considered the *mens rea* requirement for aiding and abetting a specific intent crime:

> (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent to commit the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that the principal committed the underlying offense.[38]

With this formula, there are two specific-intent *mens rea* requirements: (1) the "specific intent" to facilitate the commission of the underlying substantive offense; *and* (2) the specific intent *required of the principal* to commit the underlying substantive offense.

The CAAF and the DC circuit have the same four elements and requirements for aiding and abetting.[39] However, the first *mens rea* requirement is "specific intent"

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[34] *United States v. Hill*, 55 F.3d 1197, 1200 (6th Cir. 1995).
[35] *Id.* at 1201-02.
[36] *Id.*
[37] *United States v. Hunt*, 272 F.3d 488, 493 (7th Cir. 2001) (quotation omitted).
[38] *United States v. Hernandez-Orellana*, 539 F.3d 994, 1006-07 (9th Cir. 2008) (citation omitted).
[39] *United States v. Gosselin*, 62 M.J. 349, 353 (C.A.A.F. 2006) (quotation omitted); *United States v. Washington*, 106 F.3d 983, 1004 (D.C. Cir. 1997) (quoting *United States v. Raper*, 676 F.2d 841, 849 (D.C. Cir. 1982)) ("(1) the specific intent to facilitate the commission of a crime by another; (2) guilty

while the second *mens rea* requirement, "guilty knowledge," is a "general intent." Additionally, the DC Circuit also specifies that the aider and abettor have "a shared intent" with the principal,"[40] which raises questions as to whether the "shared" intent is specific or general.

"It is hornbook law that a defendant charged with aiding and abetting the commission of a crime by another cannot be convicted in the absence of proof that the crime was actually committed."[41] The failure to convict the principal "does not preclude conviction of the aider and abettor, *as long as the commission of the crime by [the] principal is proved*."[42] The undisputed facts showed MB did not have the specific intent required by Oklahoma statute to criminalize her distribution of the images of ENF to Petitioner. Therefore, MB incurred no criminal liability.[43] Because aiding and abetting liability hinges on the principal's criminal liability, and it was not a crime for MB to send the images to Petitioner, then there was no crime for which Petitioner could incur criminal liability as an aider and abettor. That 10 U.S.C. § 920c(a)(3) applied to Petitioner was irrelevant because this penal law did not apply to MB; she was not subject to the UCMJ.

B. CAAF Split from Circuits Regarding Recipient Liability as a Distributor.

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knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of the offense.").

[40] *Washington*, 106 F.3d at 1004.

[41] *United States v. Ruffin*, 613 F.2d 408, 412 (2nd Cir. 1979); *Giragosian v. United States*, 349 F.2d 166, 167-68 (1st Cir. 1965); *United States v. Cades*, 495 F.2d 1166, 1167 (3rd Cir. 1974).

[42] *Ruffin*, 613 F.2d at 412 (emphasis added).

[43] *Id.*; *Giragosian*, 349 F.2d at 167-68; *Cades*, 495 F.2d at 1167; *Simpson*, 81 M.J. at 38 (Stucky, C.J. and Hardy, J. dissenting).

The CAAF's holding that a recipient incurs liability as a distributor simply by associating with the purpose of the distributor breaks away from circuit courts that hold otherwise. While accomplice liability generally has broad application, "not every substantive crime is susceptible to an aiding and abetting charge."[44] "An exception to the general rule that aiding and abetting goes hand-in-glove with the commission of a substantive crime is when the crime requires participation by another for its commission."[45] This is similar to "Wharton's Rule," which holds that two parties cannot be criminally liable for a conspiracy to commit a substantive crime when the crime itself requires two parties for its completion.[46] This includes distribution crimes, "because the underlying crime of distribution entails the actual, constructive, or attempted transfer from one party to another."[47] Indeed, the distribution of indecent images proscribed by 10 U.S.C. § 920c(a)(3) requires "delivering *to* the actual or constructive possession of *another*."[48] There is a logical reason to except distribution from general rule of accomplice liability, because in order for a distribution of any contraband to be completed, the recipient's purpose in receiving the contraband must necessarily align with the distributor's purpose in delivering it.

Until *Simpson*, the recipient of contraband could not incur criminal liability as the *distributor* of that contraband as an aider and abettor, *when the transaction was only*

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[44] *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983).
[45] *Id.* at 19-20; *United States v. Hill*, 25 M.J. 411, 414 (C.M.A. 1988).
[46] *Iannelli v. United States*, 420 U.S. 770, 773 (1975); *United States v. Wheat*, 988 F.3d 299, 307 (6th Cir. 2021).
[47] *Wheat*, 988 F.3d at 308; *Baker*, 10 F.3d at 1418; *Harold*, 531 F.2d at 705 (citing *Anthony*, 474 F.2d 770).
[48] 10 U.S.C. § 920c(d)(5) (emphasis added).

between the distributor and the recipient.[49] To hold the recipient liable as the distributor under an aiding and abetting theory essentially transforms the recipient into the distributor,[50] which runs afoul of Congressional intent to punish the distributor of the contraband more severely than the recipient,[51] assuming Congress chose to punish the recipient at all.[52] In Petitioner's case, Congress chose not to punish the receipt or possession of indecent images.[53] The Government cannot punish a servicemember when Congress demonstrates an intent to let some category of people go unpunished.[54]

Furthermore, imposing criminal liability on the recipient ("aider and abettor") of

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[49] *Baker*, 10 F.3d at 1418; *Harold*, 531 F.2d 705; *see United States v. Swiderski*, 548 F.2d 445, 449-50 (2nd Cir. 1977) (holding that two people who obtain drugs only for joint personal use are guilty of drug possession, not drug possession with intent to distribute, as they are not part of the distribution link); *see also Hill*, 25 M.J. 411 (affirming guilty plea to drug distribution as an aider and abettor because there were more than two people involved in the distribution).

[50] *United States v. Petty*, 132 F.3d 373, 377 (7th Cir. 1997) ("In a sense, the essential elements of aiding and abetting serve as a substitute for the defendant's actual physical participation in the crime."); Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principals*, 57 S.C. L. REV. 85, 89-90, 93 (Autumn 2005) (noting the terminology refers to the "principal" as the person who physically commits the offense, and that the concept of an "aider and abettor" is not interchangeable or synonymous with the concept of a "principal").

[51] *Swiderski*, 548 F.2d at 449-50.

[52] *See United States v. Farrar*, 281 U.S. 624, 634 (1930):

> Since long before the adoption of the Eighteenth Amendment it has been held with practical unanimity that . . . the purchaser of intoxicating liquor, the sale of which was prohibited, was guilty of no offense. [] [I]t is fair to assume that Congress, when it came to pass the Prohibition Act, knew this history and, acting in the light of it, deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability.

[53] *Simpson*, 81 M.J. at 37.

[54] *United States v. Hoskins*, 902 F.3d 69, 80 (2nd Cir. 2018); *see also United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

contraband as the distributor ("principal") renders a conviction a legal nullity because the recipient is not sending it to "another" person—he is sending the contraband to himself.[55] The Government conceded to CAAF that it was legally impossible for Petitioner to distribute images to himself.[56] Because distribution of indecent images necessarily required MB to send them and for Petitioner to receive them,[57] and because the only two people involved in the distribution were Petitioner and MB, Petitioner could not incur criminal liability as the "distributor" under an aiding and abetting theory.

II. This Case Presents an Opportunity for this Court to Harmonize the Circuits' Analyses of the Elements and *Mens Rea* Requirements for Accomplice Liability.

Given the different approaches to analyzing accomplice liability identified in Part I.A., *supra*, this Court needs to harmonize them by providing a uniform standard for elements and *mens rea* requirements that can be applied to a wide variety of crimes, and which would only depend on whether the principal's offense is a "general intent" crime (this Court's *Rosemond* approach) or a "specific intent" crime (the Ninth Circuit's *Hernandez-Orellana* approach). Both of these approaches fulfill Congressional intent in treating the accomplice the same as the principal. Petitioner's case offers an ideal opportunity to provide a uniform approach because (1) the nature of the alleged crime is one courts frequently deal with (distribution of

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[55] *Petty*, 132 F.3d at 377; Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principals*, 57 S.C. L. REV. at 93; *see Swiderski*, 548 F.2d at 449-50.
[56] Appendix at 43a.
[57] 10 U.S.C. § 920c(d)(5).

contraband), and (2) it involves a combination of laws of different sovereigns (federal and state) with different *mens rea* requirements, thereby demonstrating the benefits of harmonized standards that start with the basic principle that aiding and abetting liability hinges on principal liability.

III. This Case Presents Issues of National Importance.

The expansive nature of accomplice liability permits the Government to obtain a conviction for the commission of a substantive offense without having to prove the accused actually committed all of the elements of the offense.[58] Therefore, like conspiracy, accomplice liability presents a high risk for misuse,[59] and it is up to the courts to impose limits to guard against such misuse.[60] Otherwise, prosecutors would be free to flout the distinctions Congress makes between recipients of contraband and distributors of contraband,[61] and, in Petitioner's case, devise novel charging schemes to criminalize non-criminal conduct.

Simpson opens the door not only for military prosecutors to misuse 10 U.S.C. § 877 to prosecute servicemembers for "aiding and abetting" non-criminal conduct by civilians, but also for the Department of Justice to misuse 18 U.S.C. § 2 to prosecute civilians for "aiding and abetting" conduct by servicemembers not criminalized by Articles 82-132, UCMJ. For example, the Department of Justice would have been able to prosecute MB for "aiding and abetting" Petitioner's "distribution" of the

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[58] Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principals*, 57 S.C. L. REV. at 94.
[59] *Id.*
[60] *Hill*, 25 M.J. at 413.
[61] *Id.*

images of ENF by delivering them to himself, even though MB's delivery was not a criminal act, and Petitioner's receipt and subsequent possession were not criminal acts under 10 U.S.C. § 920c(a)(3). The Department of Justice could do this simply because 10 U.S.C. § 920c(a)(3) does not require the intent that 21 O.S. § 1040.13b requires.

Protecting the integrity of the criminal justice system and the constitutional rights of the accused are also of national importance. Those who plead guilty are required to waive constitutional rights, and must do so voluntarily and intelligently.[62] "[A] plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'"[63] Therefore, in protecting constitutional due process rights of an accused who pleads guilty, courts must be vigilant against involuntary and unintelligent pleas. Courts that allow unintelligent guilty pleas undermine the public's confidence in, and therefore the integrity of, the criminal-justice system.

IV. The Lower Court's Decision Conflicts with this Court's Precedents on Accomplice Liability, Statutory Construction, and Standards for Accepting Guilty Pleas.

The CAAF's majority decision is incorrect for three reasons:

A. It is Contrary to this Court's Precedent on Accomplice Liability.

Almost sixty years ago, this Court held "there can be no conviction for aiding and

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[62] *Bousley v. United States*, 523 U.S. 614, 618 (1998); *Medina*, 66 M.J. at 26 (citations omitted).
[63] *Id.* (citations omitted).

abetting someone to do an innocent act."[64] Such is the case here—while MB's conduct in emailing indecent images of her own daughter to Petitioner may be morally repugnant, MB's conduct was nevertheless "innocent" due to the lack of specific intent required by Oklahoma statute.[65] Because MB's delivery of the images of ENF to Petitioner was not criminal, then Petitioner cannot incur criminal liability as an "aider and abettor."[66] Yet, the CAAF upheld Petitioner's conviction anyway.

B. It Contradicts this Court's Precedent on Statutory Construction.

"'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[67] As noted by the dissent, upholding Petitioner's conviction for distribution as an aider and abettor renders "Article 77(2) [liability through causation] superfluous, and that we cannot do."[68]

The aider and abettor must act through a guilty principal, while the causer may act through an innocent intermediary.[69] It was apparent that MB was seen as an "innocent intermediary," because, "but for" Petitioner's encouragement, she would

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[64] *Shuttlesworth v. Birmingham*, 373 U.S. 262, 265 (1963) (citations omitted).
[65] 21 O.S. §1040.13b.
[66] *Id.*; *Simpson*, 81 M.J. at 38 (Stucky, C.J. and Hardy, J. dissenting) ("MB was not subject to the UCMJ and neither the Government nor the majority have alleged that she committed any crime. Therefore, [Petitioner] could not have aided or abetted in the commission of the offense."); *see also* Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principals*, 57 S.C. L. REV. at 92 ("Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed in the first place.").
[67] *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (additional quotations omitted)).
[68] *Simpson*, 81 M.J. at 38 (Stucky, C.J. and Hardy, J. dissenting).
[69] Weiss, *What Were They Thinking? The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. at 1364; *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983).

not have sent the images of ENF to him. But, this is a "causation" theory of liability, not an "aiding and abetting" theory.[70] By combining "aiding and abetting" liability with "causation" liability, the majority eliminated the distinction between the two theories under 10 U.S.C. § 877, rendering clause two "superfluous."

C. It Contradicts this Court's Precedent on the Standards for Guilty Pleas.

The military adopted the *Bousley* standard for intelligent guilty pleas by requiring the military judge to determine the accuracy of the plea by ensuring three things: (1) there is a factual basis for the guilty plea;[71] (2) the accused has an accurate understanding of the law; (3) the accused has an accurate understanding of how the law applies to the facts of the accused's case.[72] When alternate theories of liability are possible, "fair notice" also requires the military judge to advise the accused of all of those alternate theories.[73] The failure to meet any one of these requirements results in an "unintelligent" guilty plea that is constitutionally invalid.[74]

That is what happened in Petitioner's case—an unintelligent guilty plea to distributing images as an "aider and abetter," because as stated by the dissent, the applicable theory of liability was "causing" MB to send Petitioner the images, not "aiding and abetting."[75] Petitioner could not be guilty of distribution as an aider and abettor because MB's distribution of the images to Petitioner was not a criminal act

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[70] 10 U.S.C. § 877(2).
[71] R.C.M. 910(e).
[72] *Medina*, 66 M.J. at 26.
[73] *Id.* at 27.
[74] *Id.*; *Bousley*, 523 U.S. at 618.
[75] *Simpson*, 81 M.J. at 38 (Stucky, C.J. and Hardy, J. dissenting).

for her; therefore, it could not be criminal for him.[76]

CONCLUSION

For all of the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[76] *Id.*