IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	**APPELLANT'S BRIEF**
v.	
	Crim.App. Dkt. No. 201100248
Antonio M. CASTELLANO Lance Corporal (E-3) United States Marine Corps, Appellant	USCA Dkt. No. 12-0684/MC

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

/S/
MICHAEL D. BERRY
Captain, USMC
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Suite 100
Washington Navy Yard, DC 20374
(202) 685-7713
Bar Number 34828

Table of Contents

Table of Authorities.....iv

Granted Issue

IN *MILLER v. CALIFORNIA*, THE SUPREME COURT HELD THAT THE TRIER OF FACT MUST DETERMINE WHETHER JUDICIALLY-CREATED FACTORS THAT DISTINGUISH BETWEEN CONSTITUTIONALLY-PROTECTED AND CRIMINAL CONDUCT ARE SATISFIED. THE FACTORS IDENTIFIED IN *UNITED STATES v. MARCUM* ARE AN EXAMPLE OF SUCH FACTORS. BUT THE LOWER COURT HELD THAT THE MILITARY JUDGE MUST DETERMINE WHETHER THE *MARCUM* FACTORS ARE SATISFIED. WHO DETERMINES WHETHER THEY HAVE BEEN SATISFIED?

Statement of Statutory Jurisdiction.....1

Statement of the Case.....1

Statement of Facts.....2

Summary of Argument.....4

Argument

I. THE *MARCUM* FACTORS DETERMINE WHETHER CONDUCT IS CONSTITUTIONALLY-PROTECTED OR CRIMINAL, AND THEY INCREASE PUNITIVE EXPOSURE. THEREFORE, THE TRIER OF FACT MUST DETERMINE WHETHER THEY HAVE BEEN SATISFIED.....5

a. The *Marcum* factors are judicially-created factors that distinguish between criminal and constitutionally-protected conduct.....6

b. Although not statutory elements, judicially-created factors must be alleged, instructed upon, and proved beyond a reasonable doubt.....7

c. As with judicially-created factors, sentence-aggravating factors operate as the "functional equivalent of elements" that must be alleged, instructed-upon, and proved beyond a reasonable doubt.....9

d. Functional equivalents in military non-capital cases..11

e. Other circumstances when non-statutory factors must be determined by the trier of fact.....14

Conclusion.....17

Certificate of Compliance.....18

Certificate of Filing and Service.....18

Table of Authorities

SUPREME COURT OF THE UNITED STATES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....10,11
Jones v. United States, 526 U.S. 227 (1999).....10,11
Lawrence v. Texas, 539 U.S. 558 (2003).....3,6
Miller v. California, 413 U.S. 15 (1973).....6,7
Ring v. Arizona, 536 U.S. 584 (2002).....11
Roth v. United States, 354 U.S. 476 (1957).....7

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States v. Beninate, 15 C.M.R. 98 (C.M.A. 1954).....12,13
United States v. Berry, 20 C.M.R. 325 (C.M.A. 1956).....8
United States v. Flucas, 49 C.M.R. 449 (C.M.A. 1975).....13
United States v. Grossman, 9 C.M.R. 36 (C.M.A. 1953).....12
United States v. Hartman, 69 M.J. 467 (C.A.A.F. 2011).....16
United States v. Lovell, 22 C.M.R. 235 (C.M.A. 1956).....13
United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).....3,6,7
United States v. McDonald, 57 M.J. 18 (C.A.A.F. 2002).....5
United States v. Nickaboine, 11 C.M.R. 152 (C.M.A. 1953).....12
United States v. Westmoreland, 31 M.J. 160 (C.M.A. 1990).....5

SERVICE COURTS OF CRIMINAL APPEALS

United States v. Castellano, No. 2011000248, unpublished op. (N.M. Ct. Crim. App. Jun 26, 2012).....2,15

FEDERAL STATUTES

10 U.S.C. § 856 12
18 U.S.C. § 2119 10

RULES FOR COURTS-MARTIAL

Rule for Courts-Martial 920.....15

SECONDARY SOURCES

Department of the Army Pamphlet 27-9 16,17,18

Issue Presented

IN *MILLER v. CALIFORNIA*, THE SUPREME COURT HELD THAT THE TRIER OF FACT MUST DETERMINE WHETHER JUDICIALLY-CREATED FACTORS THAT DISTINGUISH BETWEEN CONSTITUTIONALLY-PROTECTED AND CRIMINAL CONDUCT ARE SATISFIED. THE FACTORS IDENTIFIED IN *UNITED STATES v. MARCUM* ARE AN EXAMPLE OF SUCH FACTORS. BUT THE LOWER COURT HELD THAT THE MILITARY JUDGE MUST DETERMINE WHETHER THE *MARCUM* FACTORS ARE SATISFIED. WHO DETERMINES WHETHER THEY HAVE BEEN SATISFIED?

Statement of Statutory Jurisdiction

The lower court reviewed Appellant's case pursuant to Article 66(b)(1), UCMJ. The statutory basis for this Court's exercise of jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

Appellant entered mixed pleas. In accordance with his pleas, a military judge sitting as a general court-martial found Appellant guilty of one specification of adultery, in violation of Article 134, UCMJ. Contrary to his pleas, members with enlisted representation found Appellant guilty of one specification of consensual sodomy, one specification of attempted adultery, two specifications of assault consummated by battery, and two specifications of indecent acts, in violation of Articles 80, 125, 128, and 134, UCMJ. The members sentenced Appellant to eighteen months of confinement, total forfeitures of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On June 26, 2012, the lower court set aside the two convictions for assault consummated by battery and after

reassessing the sentence, affirmed the adjudged sentence.[1]

Statement of Facts

The Government charged Appellant with various offenses involving two women: Lance Corporal (LCpl) B and Private First Class (PFC) H.

LCpl B's allegation of forcible rape and forcible sodomy

In September 2009, Appellant, who was married, visited the off-base apartment of LCpl B, an unmarried pregnant woman.[2] Appellant and LCpl B were neighbors and "acquaintances."[3]

The couple sat on the couch and watched the film "Cannibal."[4] Appellant soon fell asleep with his head in LCpl B's lap.[5] According to LCpl B, Appellant later awoke, left the room, and returned moments later.[6] When he returned, he sat down next to LCpl B and began kissing and caressing her belly.[7] His touching progressed and Appellant soon put his head between LCpl B's legs and began performing oral sex on her.[8] After performing oral sex on LCpl B, the two had sexual intercourse until Appellant ejaculated.[9] After intercourse, Appellant again performed oral sex on LCpl B, after which the two once again had

---

[1] *United States v. Castellano*, No. 2011000248, unpublished op. (N-M. Ct. Crim. App. Jun. 26, 2012).
[2] Joint Appendix (JA) at 33-34.
[3] JA at 31.
[4] JA at 33-34.
[5] JA at 34.
[6] JA at 35.
[7] JA at 36, 52.
[8] JA at 36.
[9] JA at 37.

sexual intercourse.[10] Before Appellant left LCpl B's apartment, she reminded him not to forget his hat.[11]

LCpl B reported this encounter as a forcible rape and forcible sodomy. The Government charged Appellant, *inter alia*, with forcible sodomy upon LCpl B. At trial, before the military judge instructed the members, he stated that he planned to instruct them on the lesser-included offense of consensual sodomy. The trial defense counsel repeatedly objected to this instruction, citing *Lawrence v. Texas*[12] and *United States v. Marcum*[13] for the proposition that, if the sodomy was consensual, then Appellant's conduct was constitutionally protected.[14] The military judge overruled the defense counsel's objections, stating that he "thought there was a military connection and that somehow it would therefore be beyond the *Lawrence* liberty interest."[15] However, at that time he did not explain what the military connection was and he instructed the members on the lesser-included offense of consensual sodomy.

The military judge's instructions on consensual sodomy omitted any reference to the *Marcum* factors and did not task the members with determining whether Appellant's conduct was constitutionally-protected under *Lawrence.* Instead, the military judge told the members simply that if Appellant committed sodomy

[10] JA at 38.
[11] JA at 57.
[12] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[13] *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).
[14] JA at 65-66, 67, 68-69, 93.
[15] JA at 66.

with LCpl B, he should be convicted:

> Consensual sodomy is a lesser-included offense of the offense of sodomy by force and without consent. If you have a reasonable doubt about either the element of force or lack of consent but are convinced beyond a reasonable doubt that an act of sodomy occurred . . . you may find the accused guilty of the lesser-included offense of consensual sodomy.[16]

Thus, the members were unaware that they must acquit Appellant if his conduct did not satisfy any of the factors identified in *Marcum.*

Later, in an Article 39(a) session held while the members were deliberating, the military judge explained in more depth why he believed Appellant's conduct fell outside of the privacy interest articulated in *Lawrence*.[17] The members found Appellant not guilty of forcible sodomy, but guilty of consensual sodomy as a lesser-included offense.

Summary of Argument

When judicially-determined factors, such as the *Marcum* factors, are ultimately dispositive on the issue of guilt or innocence, the Fifth and Sixth Amendments require that the trier-of-fact determine whether they are met. The *Marcum* factors *a*re the functional equivalent of elements. They determine whether service member can be convicted and punished for what might otherwise be constitutionally-protected conduct. Therefore, the military judge should have instructed the members that it was their duty to determine whether Appellant's consensual sodomy

[16] JA at 71-72.
[17] JA at 77-78.

with LCpl B satisfied the *Marcum* factors. His failure to do so was a denial of Appellant's right due process.

Argument

THE *MARCUM* FACTORS DETERMINE WHETHER CONDUCT IS CONSTITUTIONALLY-PROTECTED OR CRIMINAL. THEREFORE, THE TRIER OF FACT MUST BE INSTRUCTED ON THEM TO DETERMINE WHETHER THEY HAVE BEEN SATISFIED.

Standard of Review:

Whether a jury was properly instructed is a question of law reviewed *de novo*.[18] The military judge has an independent duty to determine and deliver appropriate instructions.[19]

Discussion:

It is axiomatic that Congress defines criminal conduct. But the distinction between constitutionally-protected and criminal conduct is sometimes thin. In the absence of legislation to resolve such distinctions, courts interpret criminal statues to avoid running afoul of the Constitution. And doing so, courts may identify factors to be used in determining whether certain conduct is punishable. Generally speaking, such judicially-created factors are for the trier-of-fact to determine.[20]

To permit otherwise is to allow, as an interlocutory matter, the determination as to whether or not an alleged act was criminal, and only then ask a trier-of-fact to find beyond a reasonable doubt whether the act occurred. In cases like this one, where the charge is forcible sodomy, consent is a defense.

---

[18] *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).
[19] *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990).

But if the *Marcum* factors are an interlocutory matter, the accused is placed in the impossible predicament of defending himself against the military judge. All that is left for the members to decide is whether the act occurred or not. A finding by the trier-of-fact that the act occurred results in strict liability under this method. This approach is logically unsound, a violation of due process, and contrary to military precedent and current practice.

Because the *Marcum* factors determine whether conduct is constitutionally-protected, they function like elements of the offense. As such, they must be alleged, instructed upon, and proved beyond a reasonable doubt.

a. The *Marcum* factors are judicially-created factors that distinguish between criminal and constitutionally-protected conduct.

In *Lawrence v. Texas*, the U.S. Supreme Court struck down as unconstitutional a Texas anti-sodomy law, holding: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[21] In *Marcum*, this Court applied *Lawrence* to the military by adopting a three-part inquiry to determine whether a service member's conduct is constitutionally protected under *Lawrence.*[22] Using this approach, courts must ask the following questions of alleged conduct:

---

[20] *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973).
[21] *Lawrence*, 539 U.S. at 578.
[22] *Marcum*, 60 M.J. at 206-07.

(1) Is it of a nature that brings it outside the liberty interest identified in *Lawrence*?

(2) Does it encompass behavior identified by the Supreme Court as outside the analysis in *Lawrence*?

(3) Are there additional factors relevant solely in the military that affect the nature and reach of the *Lawrence* liberty interest?[23]

Under *Marcum*, if any of these factors are met, then a service member's conduct is not constitutionally-protected. As such, the *Marcum* factors delineate the difference between what is and is not a crime.

b. Although not statutory elements, judicially-created factors must be alleged, instructed upon, and proved beyond a reasonable doubt.

Obscenity statutes provide a useful analogy to the issue here because Congress has not established elements that distinguish between protected and obscene (criminal) conduct. As such, state legislatures are left to make those distinctions.

In *Miller v. California*, the Supreme Court determined whether a state obscenity statute violated the First Amendment. In its determination, the Court articulated several factors, independent of the statutory elements, to be used when determining whether material is obscene or protected under the First Amendment.[24] Importantly, the Court held that it is the jury, not the judge, who is tasked with determining whether judicially-created factors have been met.[25]

---

[23] *Marcum*, 60 M.J. at 206-07.
[24] *Miller*, 413 U.S. at 24; *see also Roth v. United States*, 354 U.S. 476 (1957).
[25] *Miller*, 413 U.S. at 24.

In the military context, a similar situation arose in pre-2012 prosecutions for indecent acts under what was then Article 120(k), UCMJ. But Congress did not define any elements that distinguish between an indecent act and a constitutionally-protected act. The sole statutory element of indecent acts was "indecent conduct." Based on that lone statutory element, the crime of indecent acts could conceivably punish constitutionally-protected conduct. To avoid constitutional issues, military courts identified circumstances — judicially-created factors — under which certain indecent acts were criminal. One such factor was that, to be convicted for an indecent act, the conduct at issue must be "open and notorious."[26]

Likewise, in Article 125, UCMJ, Congress did not define elements that distinguish between constitutionally-protected, consensual sodomy and criminal, consensual sodomy. The lone statutory element is "unlawful carnal copulation." Hence the *Marcum* decision.

Ironically, Appellant was charged with both indecent acts and sodomy in this case. With respect to indecent acts, the military judge instructed the members that, to convict, they must find that his conduct was open and notorious:

> [Indecent acts] is not intended to regulate the wholly private, consensual, sexual activities of individuals. In the absence of aggravating circumstances, private, consensual, sexual activity is not possible (sic) punishable as an indecent act. Among possible aggravating circumstances is that the sexual activity

[26] *United States v. Berry*, 20 C.M.R. 325, 330 (C.M.A. 1956).

was open and notorious.[27]

Inexplicably, despite defense objection and the military judge's own recognition that the members had to determine whether the judicially-created factors governing whether the conduct was criminal were satisfied for indecent acts, the military judge failed to similarly task them with respect to consensual sodomy.

Here, as in *Miller* and *Berry*, the *Marcum* factors, which also distinguish between criminal and constitutionally-protected conduct, must be instructed upon and proved beyond a reasonable doubt. But even if this Court distinguishes this case from *Miller* and *Berry*, there are other considerations that require the *Marcum* factors to be determined by the trier-of-fact. The prevailing Supreme Court practice is that whenever judicially-created factors are the "functional equivalent of elements,"[28] they must be alleged, instructed upon, and proved beyond a reasonable doubt.

c. As with judicially-created factors, sentence-aggravating factors operate as the "functional equivalent of elements" that must be alleged, instructed-upon, and proved beyond a reasonable doubt.

Although the *Marcum* factors are not sentence-aggravating factors, they function as elements of the offense. In analyzing whether the members must determine whether the facts are present for a conviction under *Marcum*, it is useful to look at other cases dealing with non-statutory factors that "operate as the functional equivalent of elements", such as sentencing-aggravating factors.

---

[27] JA at 73-74.

For example. in *Jones v. United States*,[29] the Government charged Jones with violating the following federal carjacking statute:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall:
> (1) be fined under this title or imprisoned not more than 15 years, or both; or
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both; or
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.[30]

The government did not allege any of the sentence-aggravating factors listed in the statute. Although a jury convicted Jones without considering any of the aggravating factors, the government recommended that he be sentenced to confinement for twenty-five years because the victim had suffered serious bodily injury. At issue was whether the statutory factors were elements or sentencing considerations. The Supreme Court held that the statute defined three separate offenses with distinct elements rather than a single crime with three potential maximum penalties.[31] And although the Court recognized the possibility of the alternate view, it reached its holding to avoid "grave and

---

[28] *See Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000).
[29] *Jones v. United States*, 526 U.S. 227 (1999).
[30] 18 U.S.C. § 2119.
[31] *Jones*, 526 U.S. at 239-40.

doubtful constitutional questions" such as the denial of Fifth and Sixth Amendment due process.[32] As such, *Jones* shifted the prevailing paradigm regarding what constitutes the elements of criminal offenses. After *Jones*, any facts that alter a potential sentence function as elements of offenses rather than mere sentencing considerations.[33]

The following year, the Supreme Court broadened the *Jones* principle in *Apprendi v. New Jersey*. The Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[34] Importantly, the Court also introduced the concept of the "functional equivalent of an element" and established that its test was whether the fact served to increase the maximum sentence.[35]

The Supreme Court revisited the issue again three years after *Jones*, in *Ring v. Arizona*.[36] In *Ring*, the Court extended *Jones* and *Apprendi* by holding that a jury, not a judge, must find beyond a reasonable doubt any aggravating factors that are necessary in order for a defendant to be eligible for the death penalty. It held that aggravating factors "operate as 'the functional equivalent of an element of a greater offense.'"[37]

Jones, *Apprendi*, and *Ring* make clear that whenever a fact

---

[32] *Jones*, 526 U.S. at 239.
[33] *Id.* at 232.
[34] *Apprendi*, 530 U.S. at 490.
[35] *Id.* at 494 n.19.
[36] *Ring v. Arizona*, 536 U.S. 584 (2002).
[37] *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19).

functions as an element, it is the jury, not the judge, who must determine whether such facts have been proved beyond a reasonable doubt.

d. Functional equivalents in military non-capital cases.

Within the military justice context, Congress delegated to the President the authority to establish maximum punishments for UCMJ violations.[38] Concomitant with this is the President's authority to establish aggravating factors that may increase maximum punishments. Those aggravating factors are listed as elements — or their functional equivalents — of relevant offenses in Part IV of the Manual for Courts-Martial. This is reflected in Rule for Courts-Martial (RCM) 307(c)(3) which states that, with the exception of capital cases, "facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment."

RCM 307(c)(3) also reflects the longstanding military case law requiring aggravating factors that increase the maximum punishment to be alleged, instructed upon, and proved beyond a reasonable doubt.[39] Those early UCMJ cases were bolstered two

---

[38] *See* 10 U.S.C. § 856.

[39] *See, e.g.*, *United States v. Grossman*, 9 C.M.R. 36 (C.M.A. 1953) ("A sentence is limited by the facts alleged in the specification and the personal injuries should not have been considered to increase the severity of the sentence."); *United States v. Nickaboine*, 11 C.M.R. 152 (C.M.A. 1953) ("Yet to justify the imposition of the greater punishment provided in such a case, it is necessary under service authorities that this fact be (1) alleged in the specification, (2) covered by instructions, and (3) established as part of the Government's case beyond a reasonable doubt."); *United States v. Beninate*, 15 C.M.R. 98 (C.M.A. 1954) ("Punishment for a desertion terminated by

decades later in *United States v. Flucas*.[40] In *Flucas*, the accused was charged with assaulting a non-commissioned officer (NCO). The government neither alleged nor proved that Flucas knew whether the victim held NCO status, which the President listed as an aggravating factor. The members were not instructed that knowledge of the victim's NCO status was required. Holding that the aggravating factor functioned as an element, the CMA explained:

> . . . [T]he "element" of knowledge in each assault is expressly provided as part of an aggravating factor increasing the maximum permissible punishment "when the victim has a particular status or is performing a special function." In addition to his power under Article 36 to prescribe rules of procedure and modes of proof, the President also has authority to prescribe maximum limits of punishment for offenses under the Code when the Code itself does not prescribe a particular sentence. He may provide for increased punishment upon allegation, proof and instructions regarding an aggravating factor.[41]

Flucas was a precursor to *Jones*, *Apprendi*, and *Ring*. The CMA may not have coined the term "functional equivalent of an element" in *Flucas*, but it certainly understood the concept.

Thus, in both civilian and military practice, aggravating factors function as elements and they must be alleged, instructed upon, and proved beyond a reasonable doubt. And although none of

---

apprehension requires appropriate allegation in the specification and proof beyond a reasonable doubt in the record of trial."); *United States v. Lovell*, 22 C.M.R. 235 (C.M.A. 1956) ("If the punishment for an offense depends upon aggravating matter, such matter must be both alleged and established beyond a reasonable doubt by the evidence.").

[40] *United States v. Flucas*, 49 C.M.R. 449 (C.M.A. 1975).

[41] *Id.* at 450.

these military cases rely upon a statute or the Constitution for this proposition, they are consistent with the *Jones* line of cases. Therefore, they serve as valuable precedent and their reasoning is valid.

Although the *Marcum* factors are not sentence-aggravating factors, they function as elements of the offense. Similar to the carjacking statute in *Jones*, Article 125, UCMJ could be viewed as follows:

> Any person found guilty of sodomy . . .:
>
> (1) By force and without consent. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole; or
>
> (2) With a child, who, at the time of the offense, has attained the age of 12 but is under the age of 16 years. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years; or
>
> (3) With a child under the age of 12 years at the time of the offense. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole; or
>
> (4) Other cases **[in which the *Marcum* factors have been met]**. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

Because they are necessary to constitute criminal conduct, the *Marcum* factors should be treated as the functional equivalent of the elements of the crime of sodomy that must be alleged and proved beyond a reasonable doubt by the government.

e. Other circumstances when non-statutory factors must be determined by the trier of fact.

The lower court held that the *Marcum* factors:

> . . . are questions of law properly analyzed by the military judge, not questions of fact to be determined by the trier of fact. Inherent in this determination

> is the principle that "[w]hether an act comports with law, that is, whether it is legal or illegal, is a question of law, not an issue of fact for the determination by the triers of fact."[42]

This reflects an erroneous view of the law. Whether the *Marcum* factors are present is not a question of law. Rather, it is a factual question in that the fact finder must determine whether a certain fact exists. If the requisite facts exist, as a matter of law, the conduct is not constitutionally protected.

There is nothing novel about this approach, as there are other circumstances where the determination of an act's legality depends on facts and is therefore made by the members.

In the context of affirmative defenses, the military judge's responsibility is to make the threshold determination of whether an affirmative defense is raised by the evidence. But once that determination is made, the military judge must instruct the trier of fact to determine whether the additional factors giving rise to the potential affirmative defense exist.[43] Thus, it is the trier of fact, not the military judge, who must determine whether those additional factors are satisfied. And it is those factors that ultimately determine guilt or innocence. This makes sense because it would do serious violence to the Fifth and Sixth Amendments — not to mention undermining the role of the members — if the military judge first determined that an affirmative defense was raised but then ruled, as a matter of law, that it

[42] *Castellano*, slip. op. at *7 (internal citations and quotations omitted).
[43] RCM 920(e)(3).

did not exist.

In the context of a guilty plea, this Court held that a plea colloquy that did not reflect consideration of the *Marcum* factors in distinguishing between criminal and constitutionally-protected conduct was improvident.[44] Accordingly, in the guilty-plea context, the military judge, while acting as the trier of fact, uses the *Marcum* factors to make this determination.

The Military Judge's Benchbook also contains numerous examples of circumstances when the members determine whether an act comports with law:

> Article 85-Desertion with intent to avoid hazardous duty or to shirk important service:
>
> > Whether a (duty is hazardous) (service is important) is a question of fact for [the members] to determine and depends on the circumstances of the case.[45]
>
> Article 107-False official statement:
>
> > Whether a statement or document is official is normally a matter of law to be determined as an interlocutory question. However, even though testimony concerning officiality may be uncontroverted, or even stipulated, when such testimony permits conflicting inferences to be drawn, the question should generally be regarded as an issue of fact for the members to resolve.[46]
>
> Article 130-Housebreaking:
>
> > Whether the accused unlawfully entered the building or structure is a fact for the members to determine based on all the facts and circumstances of the case.[47]

---

[44] *United States v. Hartman*, 69 M.J. 467, 469 (C.A.A.F. 2011).
[45] Department of the Army Pamphlet (DA PAM) 27-9 ¶ 3-9-2d.
[46] *Id.* ¶ 3-31-1 n.1.
[47] *Id.* ¶ 3-56-1 n.1.

Article 134-Offenses against Correctional Custody:

> Whether the person who allegedly imposed correctional custody in this case was in such a position of authority is a question of fact which [the fact finder] must decide.[48]

Article 134-Wrongful refusal to testify:

> If an accused refused to testify based on a claim of self-incrimination which would ordinarily be valid, but an issue of fact exists as to whether trial of the accused for the offense as to which the privilege was asserted was barred because of a grant of immunity, former trial, the running of the statute of limitations, or some other reason, the military judge should submit such issue to the members, with carefully tailored instructions.[49]

These examples underscore the lower court's erroneous conclusion that the military judge determines whether the *Marcum* factors are satisfied as an interlocutory question. This is a determination that is only appropriate for the members to make because it is they who must ultimately determine whether the accused may be punished for his conduct.

Conclusion

Appellant does not question the reasoning or continued validity of *Marcum*. Nevertheless, the factors identified therein function as elements. They determine whether he can be convicted in the military for what might otherwise be constitutionally-protected conduct. When such factors are ultimately dispositive on the issue of guilt or innocence, the Fifth and Sixth Amendments require that the trier-of-fact determine whether they are met. To hold otherwise would deprive an accused of his right to due

[48] *DA PAM 27-9* ¶ 3-70-1 n.3; ¶ 3-70-2 n.3.

process of law and a jury trial. As such, Appellant respectfully requests this Court reverse the lower court's decision.

/S/
MICHAEL D. BERRY
Captain, USMC
Appellate Defense Division
1254 Charles Morris Street, SE
Washington Navy Yard, D.C. 20374
(202) 685-7713
Bar No. 34828

Certificate of Compliance

This brief complies with the page limitations of Rule 21(b) because it contains 4106 words on 18 pages. This brief also complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word with 12-point Courier New font.

Certificate of Filing and Service

I certify that the foregoing was delivered to the Court, and that a copy was delivered to Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 16, 2012.

/S/
MICHAEL D. BERRY
Captain, USMC
Appellate Defense Division
1254 Charles Morris Street, SE
Washington Navy Yard, D.C. 20374
(202) 685-7713
Bar No. 34828

[49] DA PAM 27-9 ¶ 3-108-1 n.2.