IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF OF BEHALF OF APPELLEE
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:

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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 Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2006). Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006), provides the Court with jurisdiction over this case.

Statement of the Case

Appellant entered mixed pleas. Consistent 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, 10 U.S.C § 934 (2006). A panel of members with enlisted representation convicted Appellant, contrary to his pleas, of one specification of sodomy, one specification of attempted adultery, two specifications of assault consummated by a battery, and two specifications of indecent acts in violation of Articles 80, 125, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 925,

928, 934 (2006). The Members acquitted Appellant of forcible sodomy but convicted him on the lesser included offense of consensual sodomy. The Members also acquitted Appellant of aggravated sexual assault and aggravated sexual contact but convicted him of the lesser included offenses of assault consummated by a battery.

The Members sentenced Appellant to eighteen months confinement, reduction to the pay grade E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

On June 26, 2012, the lower court set aside the two convictions for assault consummated by a battery, reassessed the sentence, and affirmed the sentence.

Statement of Facts

Appellant entered mixed pleas to multiple sex crimes. (R. 31.) During the providence inquiry for his guilty plea to adultery, Appellant admitted to having consensual sexual intercourse with LCpl B, his neighbor and work collegue. (R. 40.) Appellant also admitted that his conduct was service discrediting because the public may think less of the Marine Corps if they thought "all they do is cheat on their wives." (R. 43.) Additionally, Appellant admitted that his conduct was prejudicial to good order and discipline because he and LCpl B

worked in the same office, and Appellant's wife was a fellow Marine. (R. 44.)

Prior to conducting *voir dire*, Trial Defense Counsel requested that the Military Judge inform the Members that Appellant pled guilty to a single specification of adultery with LCpl B. (R. 111.) One of the offenses to which he pled not guilty included a charge of forcible sodomy on LCpl B. The oral sodomy occurred immediately before and after the sexual intercourse to which Appellant pled guilty. (R. 31, 44.)

At the time of the sodomy, Appellant was married to an active duty Marine Corporal. (R. 42.) Appellant and his wife lived next door to LCpl B in an apartment in Ginowan City, Okinawa. (R. 311.) Although a single woman, LCpl B received permission to live out in town because she was seven and a half months pregnant. (R. 311.) That night, Appellant and LCpl B ran errands together, prepared dinner at her apartment, and settled on her couch to watch a movie. (R. 320-22.) Appellant's wife did not join in any of the activities. (R. 321-22.)

Appellant then performed oral sodomy on LCpl B. (R. 323.) LCpl B testified that she conveyed her lack of consent to the sexual act when she unsuccessfully attempted to push Appellant off of her and the sodomy turned to intercourse. (R. 324.) After ejaculating during intercourse, Appellant again performed

oral sodomy on LCpl B. (R. 325.) LCpl B testified she again sought to push Appellant off of her and told him to stop. (R. 325.)

At the close of the case on the merits, the Military Judge stated that he would instruct the Members on the lesser included offense of consensual sodomy:

> I indicated last night that I thought there was a military connection and that somehow it would therefore be beyond the *Lawrence* Liberty interest. I looked at that again last night for quite some time, and I am going to allow the lesser included offense of consensual sodomy to go forward and I'll put rationale of the record later talking about that three-part *Marcum* test, et cetera.

(R. 849.)

The Trial Defense Counsel objected to the judicial instruction of consensual sodomy as a lesser included offense of forcible sodomy. (R. 857-58.) In the objection, the Defense stated that the conduct between LCpl B and Appellant remained a protected liberty interest under *Lawrence v. Texas* and *United States v. Marcum*. (R. 858.)

The Military Judge overruled the objection and instructed the Members as follows: "My duty is to instruct on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused." (R. 853, 860.) The Military Judge continued,

> Sodomy is unnatural carnal copulation. Unnatural carnal copulation occurs when the person penetrates

> the female sex organ with his mouth, lips or tongue. Penetration of the female sex organ, however slight, is required to establish this offense.
>
> ...
>
> 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 you are convinced beyond a reasonable doubt that an act of sodomy occurred between the accused and Lance Corporal B, you may find the accused guilty of the lesser included offense of consensual sodomy.

(R. 866-67, 869-70.)

While the Members deliberated, the Military Judge put specific findings on the Record regarding his analysis of the *Marcum* factors:

> The first prong is, is the accused's conduct within the liberty interest identified by the Supreme Court in *Lawrence*; Second, does the conduct encompass any behavior or factors outside—identified as outside the analysis of *Lawrence*.
>
> ...
>
> And the third factor is, are there additional factors relevant solely in the military environment that effect the reach of *Lawrence* liberty interest.

(R. 1007-08.)

Finally, the Military Judge explained the analysis under the third prong:

> And the bottom line in this case was that I thought the additional factors that were relevant strictly in a military environment which would put this beyond the *Lawrence* liberty interest would be the fact of the accused being married to a fellow service member living next door principally and therefore that these

> actions between neighbors when all three of these individuals belonged to the military had the potential to be prejudicial to good order and discipline or service discrediting certainly but [sic] this outside the *Lawrence* liberty interest.

(R. 1008-09.)

The Members convicted Appellant of sodomy with LCpl B. (R. 1014.)

Argument

WHETHER CONSENSUAL SODOMY IS CONSTITUTIONALLY PROTECTED UNDER *UNITED STATES V. MARCUM* IS A QUESTION OF CONSTITUTIONAL LAW FOR THE MILITARY JUDGE TO DETERMINE, NOT A QUESTION OF FACT FOR THE MEMBERS.

A. The standard of review is *de novo*.

Claims of constitutional error are questions of law that are reviewed *de novo*. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004).

B. The Code and R.C.M. require a military judge to decide questions of law.

A military judge, not members, decides questions of law even though there may be "questions of fact that must be addressed by the military judge for the limited purposes of resolving the issue of law." *United States v. Deisher*, 61 M.J. 313, .317 (C.A.A.F. 2005).

> The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military

> judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court.

Art. 51(b); *see also* R.C.M. 801(a)(4).

This is true even where the question of law turns on the facts, as demonstrated in various contexts. *See, e.g., United States v. Ali*, No. 12-008/AR, 2012 CAAF LEXIS 815 (Jul. 18, 2012) (whether act of Congress is constitutional is question of law); *United States v. Rauscher*, No. 12-0172/NA, 2012 CAAF LEXIS 690 (Jun. 18, 2012) (whether specification states an offense is question of law); *United States v. Humphries*, No. 10-5004/AF, 2012 CAAF LEXIS 691 (Jun. 15, 2012) (whether specification is defective, and remedy for error, is question of law); *United States v. Ignacio*, 71 M.J. 125 (C.A.A.F. 2012) (whether members properly instructed by military judge is question of law); *United States v. Wilkins*, No. 11-0486/NA, 2012 CAAF Lexis 1245 (Nov. 16, 2012) (whether offense is lesser included offense is question of law); and notably, *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001) (whether order is lawful is question of law).

While it is true that many of the foregoing cases may be distinguished from the case at bar as being procedural in nature, they at least inform the accuracy of the notion that it is the Judge, not the members, who should be deciding matters of

law. And in that regard the most compelling of those cited cases is *United States v. New*.

In *New*, the Appellant was convicted of violating a lawful order when he refused to modify his Army uniform with the emblems of the United Nations. *New*, 55 M.J. at 97-98. At trial, the military judge determined the order was lawful before the members deliberated to determine whether the appellant was guilty of violating the lawful order. *Id.* On appeal, the Appellant asked this Court to find that "lawfulness" was actually a discrete element of an orders violation that should have gone to the members for final adjudication, not the military judge. *Id.* at 102.

But this Court declined to extend the holding of *United States v. Gaudin*, 515 U.S. 506 (1995), where the Supreme Court ruled that "materiality" was an element of 18 U.S.C. § 1001 and must be submitted to the jury. *New*, 55 M.J. at 104. Distinguishing between the constitutional principles raised in *Gaudin*, and the judicial responsibilities unique to the military justice system under the Code, this Court held that the lawfulness of an order is a question of law for the military judge, not an element of the offense. *Id.* at 104. Moreover,

> Adjudicating the issue of lawfulness as a question of law for the military judge ensures that the validity of the regulation or order will be resolved in a manner that provides for consistency of interpretation through appellate review. By contrast, if the issue

> of lawfulness were treated as an element that must be proved in each case beyond a reasonable doubt, the validity of regulations and orders of critical import to the national security would be subject to unreviewable and potentially inconsistent treatment by different court-martial panels.

New, 55 M.J. at 105.

Clearly at least one of the concerns of the *New* court was consistency - making lawfulness an issue for the members to decide would have led to inconsistent results, most disconcertingly in cases relevant to the national security of the United States. Similarly, this Court should look to *New* and reserve the *Marcum* analysis for the military judge. In doing so, this Court helps to advance consistent treatment of the *Marcum* factors across the judiciary. While this is not a case of national security import, the next case may be. One need only look to the national headlines to find situations where men with access to even the most highly classified information find themselves at the heart of similar scandalous conduct. As such reserving constitutional analyses in the hands of the military judge helps to avoid the potentially inconsistent, if not altogether constitutionally flawed, analyses that may occur if the *Marcum* factors are left for members to decide.

An additional distinction between fact and law is highlighted in *United States v. Bailey*, 6 M.J. 965 (N.C.M.R. 1979). In *Bailey*, the Government charged the appellant with a

variety of offenses to include desertion, unauthorized absence, and an orders violation. *Id.* at 966. At trial, the appellant challenged whether the court had personal jurisdiction to court-martial him. *Id.* Because the appellant was charged with crimes related to his duty status, his status in the armed forces created both a legal question and a factual question. *Id.* at 967. The court found that the military judge must determine the legal question of personal jurisdiction by a preponderance of the evidence, whereas the factual question of "military status, when it bears on the ultimate issue of guilt or innocence, may be raised again during trial on the merits, and at that time the Government must prove beyond a reasonable doubt that the accused is a member of the military." *Id.* at 969.

Here, *Bailey's* judicial determination *of* whether personal jurisdiction exists is similar to a military judge's determination of whether conduct is constitutionally protected under *Marcum*. In both instances the military judge must find a basis in law to forward the charges to the members. Once the military judge makes a determination of law (be it a matter of personal jurisdiction or whether personal conduct is constitutionally protected), only then may the members consider whether the government has proved the factual basis of the charge beyond a reasonable doubt.

Additionally, based upon the reasoning in *Bailey*, this Court should adopt a similar "purpose test" and find that it is not the facts analyzed, but the purpose of the legal analysis that determines whether the military judge or the members make a decision relevant to the case. When one applies this "purpose test" to the facts here, it is clear that the only purpose of the *Marcum* factors is to conduct a constitutional analysis for the ultimate benefit of the accused. Accordingly, a constitutional question of this magnitude should remain the responsibility of an experienced military judge rather than members.

C. Members determined that the Government proved Article 125's element beyond a reasonable doubt.

"The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). Moreover, the Court looks to the plain meaning of the statute:

> As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

United States v. Nerad, 69 M.J. 138, 151 (C.A.A.F. 2010).

Sodomy has one element:

> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

51b. (1, 4), Part IV, Manual for Courts-Martial, United States (2012 ed.)

This element alone statutorily permits punishment as a court-martial may direct. The President further prescribed aggravating factors:

> (1) that the act was done with a child under the age of twelve;
> (2) that the act was done with a child who had attained the age of twelve but was under the age of sixteen; and
> (3) that the act was done by force and without the consent of the other person.

¶51b. (1, 4), Part IV, Manual for Courts-Martial, United States (2012 ed.).

1. <u>This Court should not expand Article 125, UCMJ, beyond the elements provided by Congress and the President</u>.

Simply put, the language of Article 125, UCMJ, has a plain and unambiguous meaning with respect to sodomy. And since this Court's decision in 2004, Congress has not added elements to Article 125 incorporating the *Marcum* factors. As recently as 2012, Congress updated the UCMJ to reflect the changing needs of the service—most notably Article 120, UCMJ, Rape. However, the element of sodomy has remained unchanged, and this Court has previously declined to judicially alter Article 125, UCMJ, to include elements and defenses not specifically included in the

statutory text by either Congress or the President. *United States v. Wilson*, 66 M.J. 39, 47 (C.A.A.F. 2008).

In *Wilson*, the appellant argued that Article 125 should include the mistake of fact defense for sodomy involving a minor under the age of sixteen. *Id.* at 40. This Court disagreed and found that Article 125 was intentionally silent as to certain defenses, and as such, it was not the place of the Court to intervene. *Id.* at 47. The Court should take a similar approach here and find that Article 125 is intentionally silent as to the *Marcum* factors because neither Congress nor the President intend for them to be construed as criminal elements of the crime.

2. Appellant was properly charged and convicted by the jury of the single element of sodomy.

Here, in accord with the existing structure, the Government charged Appellant with the statutory violation of sodomy and the presidentially prescribed aggravating factor of "force":

> In that Lance Corporal Antonio M. Castellano, U.S. Marine Corps, on active duty, did, at Okinawa, Japan, on or about 16 September 2009, commit sodomy with Lance Corporal [JB], U.S. Marine Corps, by force and without consent of the said Lance Corporal [JB], U.S. Marine Corps.

(Charge Sheet, Mar. 5, 2010.)

After presentation of the evidence, the Military Judge instructed the Members that they could convict Appellant of sodomy if they did not find "force" as an aggravating factor. (R. 869-70.) Accordingly, the Members did not find force, but

they convicted Appellant of sodomy. (R. 1014.) The single sodomy element was for the Members to find beyond a reasonable doubt, which they did. (R. 1014.) Whether the offense was constitutionally viable was not an element of the offense; rather, it was a question of law for the Military Judge.

D. The Military Judge appropriately analyzed the *Marcum* factors and determined, as a question of law, that Appellant's conduct fell outside *Lawrence*'s protection.

1. This Court established the *Marcum* factors to analyze the constitutionality of individual conduct.

In 2004, the Supreme Court determined that private, consensual sodomy between two adults was protected under the constitutional right to privacy. *United States v. Lawrence*, 539 U.S. 558, 574 (2003). The protection found in *Lawrence* is not absolute, however, and the Supreme Court did not expressly identify the liberty interest as a fundamental right. *Lawrence*, 539 U.S. at 577. Thus a constitutional challenge to Article 125 "based on the Supreme Court's decision in *Lawrence* must be addressed on an as applied, case-by-case basis." *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004). Examples of unprotected conduct include the involvement of a minor, public conduct, or an imbalance of authority between the participants. *Lawrence*, 539 U.S. at 578.

This Court applied *Lawrence* to Article 125, UCMJ, and the military in *Marcum*. *United States v. Marcum*, 60 M.J. 198

(C.A.A.F. 2004). "While service members clearly retain a liberty interest to engage in certain intimate sexual conduct, 'this right must be tempered in a military setting based on the mission of the military, the need for obedience to orders, and civilian supremacy.'" *Id.* at 208.

Marcum laid out a three-step test to analyze whether Article 125 is constitutional under *Lawrence*, on a case-by-case basis, as applied to an appellant's conduct: (1) was Appellant's conduct of a nature to bring it within the Lawrence liberty interest as it pertains to private, consensual sodomy between adults; (2) did Appellant's conduct fall outside of the *Lawrence* liberty interest pursuant to those factors discussed by the Supreme Court (involve a minor, public conduct or unbalanced relationships); and, (3) do additional military specific facts render the act unprotected? *Marcum*, 60 M.J. at 208.

2. The *Marcum* factors and the viability of sodomy is a question of law for the military judge in each case.

Military appellate courts treat *Lawrence*'s and *Marcum*'s constitutional question as a question of law: "whether Appellant's conviction must be set aside in light of the Supreme Court's holding in *Lawrence* is a constitutional question reviewed *de novo*." *Marcum*, 60 M.J. at 202; *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

As the *Marcum* factors create a question of law, a military judge does not err when he fails to instruct a jury on the *Marcum* factors. *United States v. Harvey*, 67 M.J. 758, 763 (A-F. Ct. Crim. App. 2009), *rev. denied*, 2010 CAAF LEXIS 45 (C.A.A.F. 2010); *see also United States v. Stratton*, No. 201000637, 2012 CCA LEXIS 16, *10 (N-M. Ct. Crim. App. Jan. 26, 2012.) In *Harvey*, a general-court martial composed of members convicted the appellant of conduct unbecoming an officer based upon allegations of consensual sodomy with a Turkish national while deployed. 67 M.J. at 760. On appeal, the appellant argued that the military judge erred when he did not instruct the members on the *Marcum* factors. *Id.* at 759. The court rejected the appellant's argument and found that "the *Marcum* questions or factors are a three-part test for military courts to determine if a particular UCMJ article proscribing the sexual conduct of the military member is constitutional as applied to that member." *Id.* at 763.

Additionally, the court adopted this Court's legal reasoning in *New* and, applying it to the *Marcum* factors, stated, "'Whether an act comports with law, that is, whether it is legal or illegal [in relation to a constitutional or statutory right of an accused] is a question of law, not an issue of fact for determination by the triers of fact.'"

Harvey, 67 M.J. at 737 (quoting *New*, 55 M.J. at 101 (quoting *United States v. Carson*, 15 C.M.A 407 (C.M.A. 1965))).

Here, this Court should find *Harvey*, and by extension, *New*, analogous to the present facts. Specifically, because the *Marcum* factors required the Military Judge to analyze the facts for the constitutional purpose of determining whether the conduct fell within a protected liberty interest, the military judge had no legal obligation to instruct members on the *Marcum* factors—a question of law.

3. Because Appellant was married at the time of the crime, the Military Judge properly determined that the sodomy in this case fell outside of any liberty interest as a matter of law.

"While service members clearly retain a liberty interest to engage in certain intimate sexual conduct, 'this right must be tempered in a military setting based on the mission of the military, the need for obedience to orders, and civilian supremacy.'" *Marcum*, 60 M.J. at 208 (quoting *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996). Here, the *Marcum* factors required the Military Judge to analyze the facts not for the guilt or innocence of the sodomy charge but for the purpose of determining whether the conduct fell within a protected liberty interest. Accordingly, the Military Judge applied the *Marcum* factors to determine whether sodomy under the military

specific facts fell within *Lawrence's* protected liberty interest. (R. 849.)

Citing the active duty status of Appellant and LCpl B, as well as the active duty status of Appellant's wife (and next door neighbor), the Military Judge concluded that the sodomy did not fall within the protected liberty interest articulated in *Lawrence*. (R. 1007-08.) The Military Judge then detailed his findings on the Record. (R. 1007-08.) Under these facts, and pursuant to the terms of Article 51(b), UCMJ, the Military Judge properly ruled that Appellant's conduct was not protected under *Lawrence*.

Accordingly, the Military Judge did not err when he alone determined that the sodomy fell outside of *Lawrence's* protected liberty interest. (R. 849.)

E. Appellant's reliance on *Ring v. Arizona*, *Apprendi v. New Jersey* and *Miller v. California* are misplaced.

1. *Apprendi* and *Ring* do not apply under the UCMJ.

Neither *Apprendi* nor *Ring* apply to cases arising under the UCMJ. Both Supreme Court cases are premised on the Sixth Amendment's right to a jury trial and, to a lesser extent, on the Fifth Amendment's indictment clause. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002). This is reiterated in the cases that followed. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *United States v. Booker*, 543

U.S. 220 (2005). Neither protection strictly applies to courts-martial. *See United States v. Easton,* 71 M.J. 168, 175 (C.A.A.F. 2012) (citing *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002)).

Still, in the UCMJ context, R.C.M. 307(c)(3) requires the Government to allege each element and the "facts that increase the maximum authorized punishment ...." Accordingly, the Government alleged and argued "force" as a fact that increases the maximum authorized punishment in this case.

The distinction between the requirements of *Apprendi* and those associated with the R.C.M.—are relevant because Appellant's brief relies heavily on *Apprendi*, and *Ring* in an effort to turn the *Marcum* constitutional question into a "functional element." (Appellant's Br. at 9-15.) Since these cases do not apply to courts-martial, Appellant's argument founders.

2. The *Marcum* factors do not create functional elements.

Even under the aegis of *Apprendi* and *Ring*, if they were to apply as a matter of policy, Appellant's argument fails, because *Apprendi* and *Ring* only require the trier of fact to find every element beyond a reasonable doubt. They do not turn questions of law into questions of fact.

In *Apprendi*, the Supreme Court analyzed a New Jersey statute that allowed for the trial judge to find certain sentence enhancements by a preponderance of the evidence after the jury convicted the defendant based on certain elements beyond a reasonable doubt. *Id.* at 468-69. This sentence enhancement was critical because the original jury verdict only allowed for a statutory-maximum punishment of ten years of imprisonment. *Id.* at 474. But the enhancement—based on the judge's finding by a preponderance—increased the statutory-maximum to twenty years of imprisonment. *Id.*

Accordingly, the Supreme Court held that even though the state legislature did not label the sentencing enhancement as an element, it was an element in effect. *Id.* at 494 n.19 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."). And since the judge found this statutory element by only a preponderance of the evidence, rather than the jury by evidence beyond a reasonable doubt, it ran afoul of Due Process protections. *Id.* at 497.

Similarly in *Ring*, the Supreme Court reviewed an Arizona law that required the judge to make certain factual findings during the sentencing phase before death was an authorized

punishment. *Ring*, 536 U.S. at 592. Under this statutory framework, the jury's guilty verdict only authorized a maximum punishment of life in prison. *Id.* at 597. Only after the judge found certain statutory aggravating factors was the death penalty permissible. *Id.*

The Supreme Court found that, as in *Apprendi*, these additional statutory factors were the functional equivalent of statutory elements because they allowed for a greater maximum punishment than what was permissible based on the jury's finding alone. *Id.* at 608. It was therefore a constitutional violation because the jury did not find this element beyond a reasonable doubt as required under the law. *Id.*

Both *Apprendi* and *Ring* stand for the fundamental premise that a jury must find every statutory element beyond a reasonable doubt before convicting an accused of a crime. The Government does not disagree as a general principle; yet neither case transforms *Marcum's* constitutional question into a functional element for the members. Nor does either case support Appellant's argument that a question of law goes to the trier-of-fact since it may turn on facts.

3. Appellant's arguments based upon criminal decency elements considered in *Miller v. California* and *United States v. Berry* do not apply here.

Appellant also argues that this Court should look to *Miller v. California*, 413 U.S. 15 (1972), and find its treatment of

obscenity statutes to be analogous to the present case. (Appellant's Br. at 7.) In *Miller*, the defendant was tried on charges of knowingly distributing obscene material after he mailed unsolicited brochures that depicted pictures and drawings of sexual activity. *Id.* at 16-18. At the conclusion of the presentation of evidence, the judge instructed the jury to consider whether the materials were obscene based upon the "contemporary standards of the State of California." *Id.* at 19-20. The jury found the defendant guilty of distributing obscene materials as charged. *Id.* at 16. On appeal, the Supreme Court upheld the defendant's conviction and found that the state's requirement that the jury evaluate the obscenity element based upon the "contemporary standards" instruction was constitutionally adequate. *Id.* at 33.

Here, Appellant argues that the jury's determination of whether printed material is criminally obscene is analogous to requiring military members to determine whether the *Marcum* factors protect an appellant's liberty interest in consensual sodomy. (Appellant's Br. at 7-9.) This is not an accurate argument.

Contrary to the obscenity element highlighted in *Miller*, determining whether a sufficient military nexus exists to allow a sodomy charge to be forwarded to the jury does not go towards any element; it goes towards whether the evidence that has been

admitted, as to the offense, passes constitutional muster, such that it can be legally presented to the trier of fact. *Harvey*, 67 M.J. at 763. Once the members have been instructed upon the elements of sodomy, only then can they consider whether the Government has proved Appellant's guilt beyond a reasonable doubt. In this case, the members are only left to deliberate whether the single element of sodomy has been met.

In addition to the *Miller* obscenity argument, Appellant also relies upon *United States v. Berry*, 6 C.M.A. 609 (C.M.A. 1956). In this argument, Appellant states that pre-2012 allegations of indecent acts were governed by the judicially-created factor that an act must be "open and notorious." (Appellant's Br. at 8.) As a result, the factor of whether an act was open and notorious was forwarded to the jury for consideration as an element weighing on the ultimate issue of guilt or innocence. *Id.* at 8-9.

Whether an act is "open and notorious" describes how the crime of indecent acts was committed, and is but one factor used by members to determine whether certain acts were possibly "indecent"—one of the criminal elements. *United States v. Sims*, 57 M.J. 419, 421 (C.A.A.F. 2002). Specifically, when a sex act occurs in the public domain, or in an area likely to be viewed by another, it may be considered indecent by the members. *Id.* Accordingly, whether the circumstances amount to "open and

notorious" is naturally a factual question for the members, as opposed to the *Marcum* factors, which, according to *Harvey*, are questions of law for the military judge. Simply because a jury must determine the existence of a judicially-created factor of whether conduct is "open and notorious" does not render *Berry* analogous to the current case with respect to who determines the applicability of the *Marcum* factors.

Ultimately, the *Marcum* factors are not criminal elements, but rather the judicial determination of whether there is a sufficient military nexus as to the offense that passes constitutional muster, such that it can be legally presented to the trier of fact.

F. Assuming arguendo that is was error for the Military Judge not to instruct the Members on the *Marcum* factors, it was harmless error, because any trier-of-fact would have found the *Marcum* military nexus met where a male Marine married to a female Marine engaged in sodomy with his neighbor, a female Marine from his immediate work section.

Once it is determined that a specific instruction is required but not given, this error can be overcome as harmless if, "It is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. DiPaola*, 67 M.J. 98, 102 (C.A.A.F. 2008), quoting *Neder v. United States*, 527 U.S. 1, 18 (1999).

Appellant does not challenge the Military Judge's findings

that the *Marcum* factors were met. Rather, he only takes issue with the fact that the Military Judge, not the Members, ruled on whether the military nexus removed Appellant's conduct from the protected liberty zone of *Lawrence*. (Appellant's Br. at 17.)

Here, the evidence of *Marcum's* military nexus is strong. Notable facts include the active duty status of not only Appellant and LCpl B, but that of Appellant's wife as well. Moreover, not only were Appellant and his wife next-door neighbors with LCpl B in a small apartment building, but Appellant and LCpl B served together in the same work center. Taken together, these facts provide ample evidence that the sodomy was both service discrediting and prejudicial to good order and discipline. Most importantly, pursuant to *Neder*, any trier-of-fact, would have found beyond a reasonable doubt that the sodomy between Appellant and LCpl B fell outside of the *Lawrence* liberty zone and would have convicted accordingly. As such, any potential error was harmless beyond a reasonable doubt.

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.

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Certificate of Filing and Service

I certify that the original and required numbers of copies of the foregoing were electronically filed with the Court on December 28, 2012, and that a copy of the foregoing was hand delivered to Captain Michael Berry, USMC, Appellate Defense Counsel.

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