IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20080602
Staff Sergeant **IVAN D. GOINGS,** United States Army, Appellant	)	USCA Dkt. No. 11-0547/AR

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Staff Sergeant (E-6) **Ivan D. Goings,** United States Army, Appellant	)

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

Issue Presented

WHETHER *LAWRENCE V. TEXAS* EXTENDS A ZONE OF PRIVACY TO THE INDECENT ACT OF WHICH APPELLANT WAS CONVICTED.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2008) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On May 27, June 17, and June 23-27, 2008, Staff Sergeant Ivan D. Goings [hereinafter appellant] was tried at Heidelberg, Germany, before a military judge sitting as a general court-martial. Contrary to his pleas, appellant was found guilty of

rape and committing an indecent act, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934 (2005).[1] The military judge sentenced appellant to reduction to Private E-1, forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge. (JA 150). The convening authority approved the adjudged sentence. (JA 151).

The Army Court affirmed the findings of guilty and the sentence on May 5, 2011. (JA 1). On May 26, 2011, the Army Court mailed appellant a copy of the Army Court's decision and appellant, through his counsel, petitioned this Court for review on June 3, 2011.

On October 14, 2011, this Court granted review and ordered the case remanded to the Army Court for reconsideration of the findings in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). On February 7, 2012, the Army Court re-affirmed the findings and sentence. (JA 2). A copy of the decision was mailed to appellant and on April 5, 2012, appellant, through his counsel, petitioned this Court for review. On June 13, 2012, this Court granted appellant's petition for review.

[1] Appellant was found not guilty of rape and two specifications of indecent acts in violation of Articles 120 and 134, UCMJ.

Statement of Facts

During a search of appellant's off-post housing, a video camera and several video cassette tapes were found among appellant's belongings.[2] One of the video recordings depicted appellant engaging in consensual sexual intercourse with an unidentified female in appellant's off-post housing. (JA 21, 45-56). At one point in the video, a hand crosses the video screen indicating that a third person was present and recording the sexual intercourse between appellant and the female. *Id.* At another point in the video, an unidentified male is shown having consensual sexual intercourse with the same unidentified female. *Id.* At trial, the government argued that the hand crossing the screen belonged to the unidentified male in the video and that he recorded appellant having sexual intercourse with the female. (JA 243). Nothing in the video indicates that the unidentified female or male were members of the Armed Forces. Nothing in the video indicates that the male or female did not consent to the sexual activity or the recording.

Following the discovery of the videos, the government charged apppellant with committing an indecent act in violation of Article 134, UCMJ. (JA 4). Specification 6 of Charge II read:

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[2] The search was conducted pursuant to a German search warrant. The warrant was issued on charges unrelated to the charge at issue in this brief.

> In that Staff Sergeant Ivan D. Goings, U.S. Army, did at or near Leiman, Germany, between 5 February 2003 and 1 February 2006, wrongfully commit an indecent act with another male and a female by allowing another male to be present and video record on a video cassette tape the said SSG Ivan D. Goings engaging in sexual intercourse with the female.

Id.

At trial, the government called Carl Robert Kriigel, from the Army crime lab, to testify about the contents of the video. (JA 13). Mr. Kriigel viewed the video tapes during the course of the investigation and ensured correct copies were produced for trial. (JA 13-70). He testified that, between 25:43 and 28:02,[3] the video depicted "two people engaged in sexual activity. A third person is holding the camera." (JA 49). He knew someone was holding the camera because of the "way the camera is moving around, zooming in, shifting locations, above and below and constantly in motion." *Id.* It was later determined that the male having sexual intercourse was appellant. (JA 89). Mr. Kriigel also testified that the camera appeared to be on a night vision setting which would allow someone to be recorded without their knowledge. *Id.* Mr. Kriigel did not testify that the videos depicted nonconsensual

[3] The trial counsel proffered that this time sequence served as the underlying conduct for Specification 6 of Charge II. (JA 48).

sexual intercourse or that it appeared the female did not know she was being recorded.

The government also called two witnesses, First Sergeant (1SG) Peter Perkins and Sergeant First Class (SFC) Juan Olivarez, to testify about the effect of the videos on good order and discipline and their potential service discrediting nature. (JA 71-97). After viewing the video cassette for the first time during trial, 1SG Perkins testified, on direct examination, that he believed that certain portions of the video were prejudicial to good order and discipline. (JA 77-78). But after being cross-examined by appellant's defense counsel, 1SG Perkins testified that it would only be prejudicial to good order and discipline if another soldier within his unit learned of appellant's conduct because sexual intercourse, alone, is not enough. (JA 80). First Sergeant Perkins did not testify that appellant's actions were known by any soldiers within his unit. First Sergeant Perkins also conceded, on cross-examination, that a member of the public would have to have knowledge of appellant's actions for the conduct to be service discrediting. (JA 85). First Sergeant Perkins did not testify that a member of the public viewed the video cassettes or was aware of the video cassettes.

Sergeant First Olivarez testified, on direct examination, that the videos were both prejudicial to good order and

discipline and service discrediting. (JA 89-91). He made this assertion after watching the video one time in preparation for trial. (JA 71). However, after further questioning by appellant's defense counsel, SFC Olivarez admitted that the conduct would only be prejudicial to good order and discipline if it impacted appellant's duty performance. (JA 94). He then went on to state, "and I will say that up this point good order and discipline that I know of has not been affected by Sergeant Goings." *Id.* First Sergeant Olivarez did not testify that anyone, aside from himself and 1SG Perkins, viewed or had knowledge of the video cassettes. He also did not testify that the sexual intercourse appeared to be non-consensual or that the individuals did not know they were being recorded.

The government did not call the unidentified female or male depicted in the video cassettes. Nor did the government argue that the sexual intercourse, specifically depicted in the charged video, was non-consensual or that the individuals did not know they were being recorded.[4] In their closing argument,

[4] At a session held in accordance with Article 39a, UCMJ, the trial counsel argued that one of the videos may depict a female that had previously made allegations against appellant. If that video did exist, the military judge did not admit it into evidence and it is irrelevant to the portion of the video at issue in this brief.

the government stated, "Sometimes they consented, as you see in the videos, and sometimes they didn't, unfortunately."[5]

Summary of Argument

Appellant's conduct falls within a protected liberty interest and cannot form the basis of a charged offense. Under *Lawrence v. Texas*, "immorality" is no longer a valid basis to convict a person of a crime. The *Lawrence* rationale is directly on point today—just as it was with private, consenting homosexual conduct. A constitutionally-protected zone of privacy shields the parties from criminal prosecution for wholly private consensual sexual acts, regardless of public opinion. Here, appellant's conduct was wholly private and consensual, with no military nexus, such that it falls within the zone of privacy established in *Lawrence* and his conviction must be overturned.

Argument

Standard of Review

Whether appellant's conviction of indecent acts, under Article 134, UCMJ, must be set aside in light of the Supreme Court's holding in *Lawrence v. Texas,* 539 U.S. 558 (2003), is a constitutional question, reviewed de novo. *United States v.*

[5] The government was addressing Charge I when referring to instances where the females allegedly did not consent to the sexual activity. There is no indication that the female depicted in the video did not consent to the sexual activity.

Marcum, 60 M.J. 198, 202-03 (C.A.A.F. 2004) (citing *Jacobellis v. Ohio*, 378 U.S. 180, 190 (1964)).

Law

a. Applicability of Constitutional Rights to Service Members

It has long been recognized that "[m]en and women in the armed forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *United States v. Mitchell*, 39 M.J. 131, 135 (C.M.A. 1994)(quoting *Weiss v. United States*, 510 U.S. 163, 194 (1994)(Ginsburg, J., concurring)). "Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). As a result, this Court has consistently applied the Bill of Rights to members of the armed forces, except in cases where the express terms of the Constitution make such application inapposite. *See United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960)("[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.").

At the same time, these constitutional rights may apply differently to members of the armed forces than they do to civilians. *See Parker v. Levy*, 417 U.S. 733, 758 (1974) (holding that in light of the military mission, it is clear that

service members, as a general matter, do not share the same autonomy as civilians). "The military is, by necessity, a specialized society." *Id.* Thus, when considering how the Bill of Rights applies in the military, this Court has relied on Supreme Court precedent, but has also specifically addressed contextual factors involving military life. *See United States v. McCarthy,* 38 M.J. 398 (C.M.A. 1993) (warrantless entry into military barracks room to effectuate apprehension did not violate the Fourth Amendment). In light of the military mission, service members do not share the same autonomy as civilians. *See Parker,* 417 U.S. at 758. Further, in the military setting, an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life. *Marcum,* 60 M.J. at 206.

b. *Lawrence v. Texas*

In *Lawrence v. Texas*, the Supreme Court determined the constitutional validity of a Texas anti-sodomy law. Lawrence and others claimed the statute infringed on their rights to privacy under the Equal Protection Clause and the Due Process Clause. The petitioners maintained that the government could not intrude into their homes to regulate wholly private and consensual actions. The petitioners were adults at the time of

the alleged offense and their conduct was both private and consensual. *Lawrence*, 539 U.S. at 564.

Writing for the majority, Justice Kennedy proclaimed, "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions." *Id.* at 562. As such, "the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty" under the Due Process Clause. *Id.*

Justice Kennedy cited to cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), to reaffirm the "substantive force of the liberty protected by the Due Process Clause." *Lawrence*, 539 U.S. at 570. *Casey*, in particular,

> confirmed that our laws and tradition afford constitutional protection to personal decisions . . . . [and "a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion from the State."

Lawrence, 539 U.S. at 573-74 (quoting *Casey*, 505 U.S. at 851).

The Court used the reasoning of these cases to reaffirm the privacy and/or liberty interests guaranteed by the Due Process Clause. *Lawrence,* 539 U.S. at 578. Finding that the Due Process Clause did, in fact, protect certain un-enumerated privacy rights,[6] the Supreme Court ultimately struck down the Texas anti-sodomy law as violating the Due Process Clauses of the Fifth and Fourteenth Amendments. "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[7] *Id.* *Lawrence* reaffirmed the existence of privacy interests and sanctioned a zone of privacy for consenting adult sexual activities. The *Lawrence* Court explained that physical intimacy, even when not used to procreate, constitutes a liberty

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[6] The Court set forth, "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities they might have been more specific." *Lawrence*, 539 U.S. at 578.

[7] While citing cases establishing liberty interests as fundamental rights, the Supreme Court seemed to apply a rational basis test to determine the validity of the statute. The Court held, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* This is contrary to the cases cited by the Supreme Court where strict scrutiny was applied.

interest protected from government interference by constitutional due process. *Id.* at 561. *Lawrence* established that certain acts, perhaps traditionally punishable, were protected and free from the imposition of punishment. That zone of privacy "cannot be determined by any formula or code; instead it is something that changes over time in response to changes in values and morales." *Id.; see also Poe v. Ullman*, 367 U.S. 497 (1961). However, the Court went on to acknowledge that certain conduct involving minors, persons who might be injured, or individuals who could not consent, would take the conduct outside of the Due Process protections. *Lawrence,* 539 U.S. at 578.

c. *Lawrence* Applied to the Military

Lawrence was subsequently applied to the military in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). In *Marcum,* this Court considered the case of an Air Force E-6 convicted of non-forcible sodomy with a subordinate. On appeal, Marcum argued his conviction should be overturned because *Lawrence* recognized a constitutional liberty interest in sexual intimacy between consenting adults in private and thus, his conduct could not be criminalized. *Marcum*, 60 M.J. at 201. In response, the government argued *Lawrence* did not apply to the military due to the distinct and separate character of military life from civilian life as recognized by the Supreme Court in *Parker v.*

Levy, 417 U.S. 733 (1974).

Rejecting the government's primary argument, this Court confirmed uniformed citizens cannot be stripped of basic rights simply because they had "'doffed their civilian clothes.'" *Marcum*, 60 M.J. at 205 (quoting *Goldman v. Weinberger*, 75 U.S. 503, 507 (1986)). The protections of the Bill of Rights—except when expressly or by necessarily implication are made inapplicable—are available to military members. *Id.* at 205. However, this Court went on to hold, "[w]hile servicemembers 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 of orders, and civilian supremecy.'" *Id.* at 207 (quoting *United States v. Brown*, 45 M.J. 389, 397 (C.A.A.F. 1996)).

In determining if Marcum's conduct was protected conduct, this Court set forth three questions for considering *Lawrence* in a military setting: [1] was the conduct of the nature to bring it within the liberty interest identified by the Supreme Court-did appellant's conduct involve private, consensual sexual activity between adults; [2] did the conduct encompass any behavior *Lawrence* listed as outside its analysis; and [3] are there additional factors relevant solely in the military environment. *Id.* at 206.

Using this "as applied" framework, this Court assumed, without deciding, Marcum's conduct fell within the liberty interest identified by the Supreme Court in *Lawrence* because the conduct occurred off-base and in private. *Id.* at 207. However, under the second step of the analysis, this Court determined Marcum's conduct was outside *Lawrence*'s protected liberty interest because, as Marcum had acknowledged, Marcum committed the sodomy charged with a subordinate member of his chain of command. *Id.* at 208. That conduct was prohibited by Air Force policy, and fell within the realm of conduct that the Supreme Court expressly exempted from *Lawrence*'s protection as "a relationship where consent might not easily be refused." *Id.* This Court therefore affirmed Marcum's conviction. *Id.* at 211.

In *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004), this Court again examined a *Lawrence* challenge to a conviction using the *Marcum* three-part analysis. There, this Court assumed, without deciding, that "Stirewalt's conduct f[ell] within the liberty interest identified by the Supreme Court and does not encompass behavior or factors outside the *Lawrence* analysis." *Id.* at 304. The Court then affirmed Stirewalt's conviction, finding that his conduct implicated the third *Marcum* prong and fell outside of *Lawrence's* protection because it "occurred between a commissioned department head and her subordinate enlisted crew member." *Id.* This Court placed

special emphasis on the fact that Stirewalt's conduct was specifically prohibited by a Coast Guard regulation pertaining to conduct on small vessels. *Id.*

Analysis

Applying the *Marcum* framework, appellant's conduct falls within the zone of privacy established in *Lawrence* and his conviction violates the Due Process Clause. First, appellant's conduct involved wholly private and consensual activity. *Marcum*, 60 M.J. at 207. The sexual intercourse occurred in appellant's home and behind closed doors. There was no evidence produced by the government which would indicate that members of the public viewed appellant's conduct or even became aware of the conduct until preparing for trial. (JA 72). Nor was any evidence produced to indicate non-consent from any of the parties involved. The trial counsel even acknowledged this fact in his closing statement. (JA 123). Thus, appellant's conduct was of a nature to bring it directly within the liberty interest established in *Lawrence*. *See Lawrence*, 539 U.S. at 564 (refusing to limit the framed issue to homosexual sodomy, the *Lawrence* Court found the question to be "[w]hether petitioners' criminal convictions for *adult consensual sexual intimacy* in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment")(emphasis added).

Second, appellant's conduct did not encompass any behavior *Lawrence* listed as outside its analysis. The Court specifically listed cases involving "minors. . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. . . . public conduct or prostitution" as being outside the *Lawrence* zone of privacy. *Id.* at 578. The evidence produced at trial shows that appellant engaged in sexual intercourse with consenting adults. Appellant's conduct did not involve minors, prostitution, coercion, or a lack of consent. Also, the fact a third party was present recording the sexual activity does not, in this case, constitute "public conduct." In this case, the third person was a participant to the sexual intercourse and all parties involved consented to his presence and participation. He was not a casual observer or a member of the public who would be surprised or upset by the scene. *See People v. Legal,* 24 Ill. App. 3d. 554 (1974) (holding that an act is public where it is reasonably foreseeable that the conduct would be viewed by a casual observer).

Appellant's case is clearly distinguishable from military cases establishing third-party presence as sufficient to prove "open and notorious" conduct. In *United States v. Izquierdo,* decided prior to *Lawrence*, this Honorable Court noted, "'How many persons then need be present to make the act a public one?

In our opinion, the act is "open and notorious," flagrant, and discrediting to the military service when the participants know that a third person is present.'" 51 M.J. 421, 423 (C.A.A.F. 1999) (quoting *United States v. Berry*, 20 C.M.R. 325, 330 (C.M.A. 1956)).[8] Izquierrdo engaged in sexual intercourse in his barracks room while two other soldiers were present. The soldiers present, in the barracks room, were not participating in the acts and did not consent to appellant engaging in sexual acts in their presence. In contrast, appellant's conduct occurred with civilians, in the privacy of his own off-post residence, and all present parties were participating in the sexual conduct.

Lastly, appellant's conduct does not involve additional factors relevant only in a military setting. Appellant was not engaged in a superior/subordinate relationship and his conduct did not implicate military regulations (like those that existed in *Marcum* and *Stirewalt*). In fact, the male and female participants were not members of the military, and there is no evidence to indicate their awareness of appellant's military status. There is also no evidence that appellant's conduct was prejudicial to good order and discipline or service

[8] In light of *Lawrence,* appellant maintains that *United States v. Berry* should be overturned to the extent it allows the regulation of wholly private, consensual, sexual conduct that does not have a military connection other than the accused being a member of the military.

discrediting. While both SFC Olivarez and 1SG Perkins initially testified that appellant's conduct was service discrediting and prejudicial to good order and discipline, both witnesses changed their testimony on cross-examination. (JA 78-82, 84-85, 91-96). Both SFC Olivarez and 1SG Perkins ultimately admitted that appellant's conduct had absolutely no effect on their units, and sexual intercourse, alone, was not enough to be service discrediting. *Id.* This is especially true where there is no evidence to indicate anyone viewed the video cassettes or were even aware of appellant's conduct prior to his court-martial. Rather, the evidence in this case clearly shows that the only people to have viewed the videos did so in anticipation of trial.

Accordingly, appellant's conduct falls within a protected liberty interest and cannot form the basis of a charged offense. Under *Lawrence*, "immorality" is no longer a valid basis to convict. The *Lawrence* rationale is directly on point today–just as it was with private, consenting homosexual conduct. A constitutionally-protected zone of privacy shields the parties, regardless of public opinion.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside Specification 6 of Charge II and remand the case to the Army Court of Criminal Appeals to reassess the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Goings, Crim. App. Dkt. No. 20080602, Dkt. No. 11-0547/AR, was delivered to the Court and Government Appellate Division on July 20, 2012.

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