IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. Dkt. No. 20080602
	)	USCA Dkt. No. 11-0547/AR
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 Facts

At trial the government argued,

> [T]his conduct is service discrediting when the participants know that a third party is viewing. Now, the argument that there is a high speed zoom lens, or that the video was under night vision, just doesn't hold weight, Your Honor, when you think about the angles and what's happening in the videos, very in-depth close up shots. People turning the camera on themselves, talking, you see hands come up on the bed while the two people are engaged in intercourse. You see people come along the side, the camera constantly moving, you even see a part where it appears as though the person taking the film at the end gets on top.[1]

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[1] While this argument immediately follows the trial counsel's argument regarding Specification 4 of Charge II, the argument pertains to all three specifications alleging an indecent act.

(JA 120-21).

At the trial level, the government argued that appellant's acts were indecent because he allowed another male to be present and video record appellant engaging in sexual intercourse with an unidentified woman. *Id.* The government did not argue that the unidentified female was unaware of the third-person or the video recording. Nor did the government charge that the video was made without the female's awareness. (JA 5).

On appeal to the Army Court of Criminal Appeals, the government argued that appellant's actions were not constitutionally protected because of their service discrediting nature. The government stated, "[i]n this case, appellant not only knew a third person was present, he and the third person alternated video-taping and engaging in hard-core pornographic sexual acts with a female." (Gov. App. Brief. to the Army Court at 11). The government did not argue that the unidentified female was unaware of the video recording.

This is evidenced by trial counsel's mention of the various time stamps on the video tapes, time stamps which relate to Specifications 4, 5, and 6. Additionally, all three specifications attempt to criminalize one incident of sexual intercourse.

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. Marcum*, 60 M.J. 198, 202-03 (C.A.A.F. 2004) (citing *Jacobellis v. Ohio,* 378 U.S. 180, 189-90 (1964) ("[T]he Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case.").

Law and Argument

"[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009) (quoting *Dunn v. United States,* 442 U.S. 100, 107 (1979))(alteration in original); *see also Chiarella v. United States*, 445 U.S. 222, 236-37 (1980) (stating that the Court would not affirm a conviction based on a theory not presented to the jury). "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Dunn*, 442 U.S. at 106.

In this case, the government has revised the basis of culpability from that presented at trial and on appeal at the Army Court. At both the trial level and at the Army Court, the government argued appellant's conduct was indecent because a third-party was clearly present, participating in, and recording the sexual intercourse between appellant and an unidentified female. (JA 5, 10-12, 121; Gov. App. Brief. to the Army Court at 11). The government did not argue that appellant's conduct was indecent due to the unidentified female being unaware of the video recording. In fact, in their closing argument at trial, the government completely disavowed this notion. They argued, "[n]ow, the argument that there is a high speed zoom lens, or that the video was under night vision, just doesn't hold weight, Your Honor, when you think about the angles and what's happening in the videos, very in-depth close up shots." (JA 120).

Contrary to the position taken at both the trial level and the Army Court, the government has now changed their theory of culpability. In their brief to this Honorable Court, the government argues that appellant's conduct was indecent because a reasonable person "could have inferred that this video was recorded surreptitiously and was thus indecent." (Brief on Behalf of Appellee at 16). To support their argument, the government posits that the unidentified female did not acknowledge the video camera during sexual intercourse. *Id.* at

17.[2] This is the first time such a theory of culpability has been raised.

The government's current position was not raised at the trial court or at the Army Court of Criminal Appeals. As such, this Honorable Court cannot affirm appellant's conviction based on the newly formulated theory of culpability. *See Miller*, 67 M.J. at 389; *see also United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) ("An appellate court may not affirm an included offense on 'a theory not presented to the' trier of fact." (quoting *Chiarella*, 445 U.S. at 236)).

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[2] Although the unidentified female may not look directly at the camera, PE 60 clearly depicts that all parties were aware of the third-party presence and the video camera. This is evidenced by the close-up and varying angles of photography, the alternating partners to the sexual activity, and the unidentified male turning the camera upon himself and saying "love and hard work" while filming appellant and the unidentified female engaging in sexual intercourse. (R. at PE 60).

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 August 30, 2012.

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