IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	) BRIEF ON BEHALF OF APPELLEE)
v.	) USCA Dkt. No. 11-0547/AR)
Staff Sergeant (E-6) **IVAN D. GOINGS** United States Army, Appellant	) Crim. App. Dkt. No. 20080602))))

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

Issue Presented

WHETHER *LAWRENCE v. TEXAS*[1] EXTENDS A ZONE OF PRIVACY TO THE INDECENT ACT OF WHICH APPELLANT WAS CONVICTED.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice (UCMJ).[2] This Court has jurisdiction under Article 67(a)(3), UCMJ.[3]

Statement of the Case

A military judge sitting as a general court-martial convicted appellant,[4] contrary to his pleas,[5] of one specification of rape and one specification of indecent acts, in violation of Articles 120 and 134, Uniform Code of Military Justice [hereinafter UCMJ].[6] The military judge sentenced appellant to be reduced to the grade of E-1, be confined for five years, forfeit all pay and allowances, and be discharged from the service with a dishonorable discharge.[7] The convening authority approved the reduction to E-1, confinement for five

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[1] 359 U.S. 558 (2003).
[2] 10 U.S.C. § 866.
[3] 10 U.S.C. § 867(a)(3).
[4] Joint Appendix ("JA") 149; *see also* R. at 1245 (military judge corrected his findings.
[5] JA 7.
[6] 10 U.S.C. §§ 920, 934 (2005).
[7] JA 150.

years, and dishonorable discharge.[8] Appellant's adjudged forfeitures were disapproved, and the automatic forfeitures were waived for a period of six months, beginning 12 March 2009.[9]

The Army Court affirmed the findings and sentence and denied appellant's petition for new trial on 5 May 2011.[10] This Court granted appellant's petition for review on 14 October 2011 and remanded the case to the Army Court for reconsideration in light of *United States v. Fosler*.[11] On 7 February 2012, the Army Court again affirmed the findings and sentence and denied the petition for new trial.[12] On 13 June 2012, this Court granted appellant's petition for review.

Statement of Facts

Appellant was a Soldier stationed in Germany.[13] While searching appellant's off-post home, German police seized a video camera and several related video cassettes from appellant's possession.[14] The videotapes included several scenes of adults engaged in sexual activity.[15]

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[8] JA 151.
[9] *Id.*
[10] JA 1.
[11] 70 M.J. 225 (C.A.A.F. 2011).
[12] JA 2.
[13] JA 74.
[14] *See, e.g.*, R. at 823.
[15] JA 21.

The Government charged appellant, among other crimes, with indecent acts with another, in violation of Article 134, UCMJ. The specification at issue was drafted as follows:

> SPECIFICATION 6: in that [appellant], U.S. Army, did, at or near Leimen, Germany, between on or about 15 February 2003 and 1 February 2006, wrongfully commit an indecent act with another male and female by allowing the other male to be present and video record on a video cassette tape the said [appellant] engaging in sexual intercourse with the female.[16]

The Government called Mr. Kriigel, who has worked at the Army Crime Lab since 1989.[17] Appellant stipulated that Mr. Kriigel was an expert witness regarding forensic imaging and audio-visual examination.[18] Mr. Kriigel received and reviewed several cassette tapes, one DVD, and one CD.[19]

Mr. Kriigel described the conduct relating to Specification 6 as "two people engaged in sexual activity. A third person is holding the camera."[20] Mr. Kriigel knew a third person was holding the camera because of the "way the camera is moving around, above and below, and constantly in motion."[21]

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[16] JA 5.
[17] JA 13.
[18] JA 14.
[19] JA 14-15.
[20] JA 48-49. Trial counsel proffered that the time period from approximately 25:42 onward constituted the charged conduct of Specification 6. That particular scene ends at approximately 30:06. R. at PE 6.
[21] JA 49.

The video itself shows appellant receiving oral sodomy from a female.[22] At one point, appellant looks at the camera and appears aware of the third person in the room.[23] The female does not appear to look at the camera and does not show any awareness that someone is filming her.[24] She does not speak to the cameraman.[25] The cameraman remains quiet.[26] Music is playing in the background.[27] The main source of light in the room is a candle.[28] Eventually appellant and the female appear to engage in sexual intercourse.[29]

Mr. Kriigel testified that the camera was filming in "night vision" mode.[30] The camera "can record without the ability of people to know they are being recorded."[31] Using infrared light, that camera "records in total darkness."[32] Only the operator can see it.[33] The manufacturer of the camera described the night vision capability as 16 times more powerful than any regular

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[22] PE 60 is a video recording included only in the original record of trial.
[23] PE 60.
[24] PE 60.
[25] PE 60.
[26] PE 60.
[27] PE 60.
[28] PE 60.
[29] PE 60.
[30] JA 49.
[31] JA 49.
[32] JA 49.
[33] JA 49.

night vision of earlier models.[34] The spot light emitter could thus go "a lot further across the room."[35] Mr. Kriigel testified that the camera would not make "any great noise" while filming.[36]

Appellant argued that the Government did not prove the essential elements of Article 134. Appellant argued, "The defense's position as to all three videotapes is that there is no 134 element which has been proven beyond a reasonable doubt."[37] At trial, appellant expressly "did not dispute that it can be an offense to have sexual relations in the presence of a third party or to have a third party present while you have sexual relations."[38] Appellant did not invoke any legal claim regarding *Lawrence v. Texas* during trial or clemency.[39]

Summary of Argument

Lawrence does not extend a zone of privacy to appellant's indecent act because the offense by its very nature tends to be service discrediting. This Court should engage in a two-step analysis. First, it should examine the evidence using a legal

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[34] JA 58.
[35] JA 58.
[36] JA 61.
[37] JA 138.
[38] JA 99.
[39] In questioning SFC Olivarez, appellant's defense counsel referenced "constitutionally protected activity" in passing. JA 93. He never followed up with a formal motion with the military judge that the charged conduct was constitutionally protected.

sufficiency standard. Second, it should apply the *Marcum* factors to that legally sufficient evidence.

Assuming without conceding that *Lawrence* added a constitutional dimension to Article 134, the evidence was still legally sufficient to convict appellant of indecent acts. First, a rational fact finder could conclude that the video in question was recorded surreptitiously. Second, the indecent conduct in question was public, open, and notorious. Third, a rational fact finder could conclude that appellant's conduct, under the circumstances, would tend to discredit the armed forces.

The *Marcum* factors, applied to this evidence, all weigh in favor of the government. First, appellant's conduct was outside the liberty interest in *Lawrence* because his conduct was of a service-discrediting nature. Second, appellant's public, open and notorious sexual conduct encompasses behavior *Lawrence* listed outside its analyses. Third, the relevant factors that encompass *Marcum's* third prong are necessarily included within legally sufficient proof of the terminal element in this case.

Standard of Review

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.[40] Appellant did not raise a *Lawrence* claim at trial and has thus forfeited this claim in the absence of plain error.[41] In the context of a plain error analysis, appellant has the burden of demonstrating that 1) there was error, 2) the error was plain or obvious, and 3) the error materially prejudiced a substantial right of the accused.[42]

Law

Indecent Acts Under Article 134, UCMJ

The President has described the Article 134 offense of indecent acts with another as having the following elements: (1) that the accused committed a wrongful act with a certain person; (2) that the act was indecent; and (3) that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[43]

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[40] *United States v. Marcum*, 60 M.J. 198, 202-203 (C.A.A.F. 2004), *citing Jacobellis v. Ohio,* 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964).

[41] *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."; *accord United States v. Olano*, 507 U.S. 725, 731 (1993); *United States v. Cotton*, 535 U.S. 625, 634 (2002); *Puckett v. United States*, 556 U.S. 129, 134 (2009).

[42] *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

[43] *Manual for Courts-Martial, United States* (2005 ed.)(*MCM*), pt. IV, ¶ 90.b.

This Court has consistently held that fornication, when committed "openly and notoriously," is an "aggravating circumstance [] sufficient to state an offense under Article 134."[44] As the C.M.A. noted in *United States v. Berry*:

> The public nature of an act is not always determined by the place of occurrence. A private residence in which other persons are gathered may be regarded as a public place for the purpose of evaluating the character of conduct by one of the persons. This is particularly true when the act is of such a nature as to bring discredit upon the armed forces. An act, therefore, may be "open and notorious" not merely because of the *locus*, but because of the actual presence of other persons.... 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.[45]

Additionally, under military case law, photographing or filming sexual acts is an offense punishable under Article 134 of the UCMJ.[46]

Constitutional Rights as Applied to the Military

The protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are

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[44] *United States v. Izquierdo*, 51 M.J. 421, 422 (C.A.A.F. 1999), citing *United States v. Berry*, 6 U.S.C.M.A. 609, 614, 20 C.M.R. 325, 330 (1956).
[45] 6 U.S.C.M.A. at 614, 20 C.M.R. at 330 (citations omitted).
[46] *United States v. Cohen*, 63 M.J. 45, 53 (C.A.A.F. 2006), *citing United States v. Lujan*, 59 M.J. 23 (C.A.A.F. 2003); *United States v. Daye*, 37 M.J. 714, 717-18 (A.F.C.M.R. 1993); *Izquierdo*, 51 M.J. at 422-23; *United States v. Whitcomb*, 34 M.J. 984, 987-88 (A.C.M.R. 1992). *See also* Article 120(k), UCMJ, 10 U.S.C. §§ 920(k)&(t)(12) (2006).

available to members of the armed forces.[47] At the same time, these constitutional rights may apply differently to members of our armed forces than they do to civilians.[48] This determination as to whether possibly constitutionally-protected conduct might be service discrediting must be done on a case-by-case basis.[49]

This Court has noted that under appropriate circumstances, conduct that is constitutionally protected in civilian society could still be viewed as prejudicial to good order and discipline or likely to bring discredit upon the armed forces.[50] The military is, by necessity, a specialized society.[51] Military law is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.[52] And to maintain the discipline essential to perform its mission effectively, the military has developed what may not be unfitly

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[47] *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004), *citing United States v. Jacoby*, 11 C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).
[48] *Id.*
[49] *United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004) (in the context of "virtual child pornography"); *accord Marcum*, 60 M.J. at 206 (applying *Lawrence v. Texas* to Article 125 on an as applied basis).
[50] *United States v. Barberi*, 71 M.J. 127, 131 (C.A.A.F. 2012), *citing Parker v. Levy*, 417 U.S. 733, 759 (1974).
[51] *Parker*, 417 U.S. at 743.
[52] *Id.* at 744, *citing Burns v. Wilson*, 346 U.S. 137, 140 (1953).

called the customary military law or general usage of the military service.[53]

The Liberty Interest in Lawrence v. Texas

In *Lawrence v. Texas,* the Supreme Court held that a Texas statute criminalizing certain intimate conduct between people of the same sex violated the Due Process Clause and was unconstitutional. In doing so, the Supreme Court overruled its earlier decision of *Bowers v. Hardwick.*[54] The Supreme Court in *Bowers* addressed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[55] The Court in *Lawrence* concluded that the *Bowers* Court had failed to appreciate the extent of the liberty at stake.[56]

The Supreme Court described that liberty in its first paragraph:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. ***Liberty presumes an autonomy of self that includes freedom of thought, belief,***

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[53] *Id., citing Martin v. Mott,* 12 Wheat 19, 35, 6 L.Ed. 537 (1827).
[54] *Id.* at 578, overruling 478 U.S. 186 (1986).
[55] *Bowers*, 478 U.S. at 190.
[56] *Lawrence*, 539 U.S. at 567.

> ***expression, and certain intimate conduct.*** The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[57]

The Supreme Court concluded that the Texas statute furthered no legitimate state interest which could justify its intrusion into the personal and private life of the individual.[58]

Lawrence v. Texas as Applied to the Military

This Court has previously applied *Lawrence* in the context of Article 125, UCMJ, which prohibits sodomy.[59] Article 125 forbids sodomy whether it is consensual or forcible, heterosexual or homosexual, public or private.[60] Article 125 lacks an essential element that the charged conduct must be prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces - in contrast with Article 134.

This Court concluded that "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 of orders, and civilian supremacy."[61] As the Supreme Court noted in *Parker v. Levy*:

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[57] *Id.* at 562.
[58] *Id.* at 578.
[59] *See, e.g., Marcum*, 60 M.J. 198.
[60] *Marcum*, 60 M.J. at 202.
[61] *Marcum*, 60 M.J. at 208 (internal quotations omitted).

> Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one. That relationship also reflects the different purposes of the two communities. As we observed in In re Grimley, 137 U.S., at 153, 11 S.Ct., at 55, the military 'is the executive arm' whose 'law is that of obedience.' ***While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community.*** The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.[62]

The Court applied *Lawrence* to Article 125 on an as applied basis.[63]

The Court applied the following three factors when determining whether Article 125 was constitutional as applied to that appellant. First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court in *Lawrence*? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?[64] Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?[65] The Court applied those factors

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[62] 417 U.S. at 751 (emphasis added).
[63] *Marcum*, 60 M.J. at 206.
[64] *Id.* at 578.
[65] *Marcum*, 60 M.J. at 206-07.

and determined that appellant's conduct was outside the protected liberty interest in *Lawrence* and was also contrary to Article 125.[66] This Court has subsequently stated that this tripartite framework applies generally to *Lawrence* challenges in the military environment.[67]

In the context of Article 134, this Court has considered the interplay between the terminal element and conduct that might be constitutionally protected in civilian society in the context of virtual child pornography and the First Amendment. In particular, *Ashcroft v. Free Speech Coalition*[68] created a "constitutional dimension" to an Article 134 charge that did not exist previously.[69] As a result, the elements of service discredit or prejudicial conduct must be considered in the context of a military member's possession of what might be considered virtual child pornography, or pornography the Supreme Court otherwise determined was constitutionally protected in a civilian context.[70] In light of *Free Speech Coalition,* this Court looks to the record to determine whether the evidence demonstrates that appellant's conduct is service-discrediting

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[66] *Id.* at 208.
[67] *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).
[68] 535 U.S. 234 (2002).
[69] *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006).
[70] *Id., citing United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004); *United States v. O'Connor*, 58 M.J. 450, 454 (C.A.A.F. 2003).

and/or prejudicial to good order and discipline, even if such conduct would have been protected in a civilian context.[71]

The Limits of Legal Sufficiency

This Court's review of the sufficiency of the evidence is limited to legal sufficiency.[72] The test for legal sufficiency is whether, in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[73] The trier of fact must determine beyond a reasonable doubt that the conduct alleged actually occurred and must also evaluate the nature of the conduct and determine beyond a reasonable doubt that appellant's conduct would tend to bring the service into disrepute if it were known.[74]

Argument

Lawrence does not extend a zone of privacy to appellant's indecent act because the offense by its very nature is of a service discrediting nature. This Court should engage in a two-step analysis. First, it should examine the evidence using a

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[71] *Id.*
[72] Article 67(c), UCMJ ("The Court of Appeals for the Armed Forces shall take action only with respect to matters of law."); *see also United States v. Holt*, 52 M.J. 173, 186 (C.A.A.F. 1999).
[73] *Jackson v. United States*, 443 U.S. 307, 319 (1979).
[74] *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

legal sufficiency standard. Second, it should apply the *Marcum* factors to that legally sufficient evidence.

A. The Evidence Is Legally Sufficient to Support Appellant's Conviction

As a threshold matter, the evidence is legally sufficient to support appellant's Article 134 conviction. Assuming without conceding that *Lawrence* added a "constitutional dimension" to this Article 134 offense, the record still contains legally sufficient evidence of every element.[75] Weighing the evidence in a light most favorable to the Government, a reasonable fact finder could have found the essential elements of the crime beyond a reasonable doubt.[76]

Appellant Acted Wrongfully

A reasonable fact finder could determine that appellant committed a wrongful act with a certain person. Sergeant First Class Olivarez identified appellant in the video.[77] Appellant concedes that the video cassette tape at issue was found in appellant's apartment.[78] Wrongfully is a word of criminality and speaks to mens rea and the lack of a defense or justification.[79]

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[75] *See Brisbane*, 63 M.J. at 116 (C.A.A.F. 2006) (noting that *Ashcroft v. Free Speech Coalition* created a constitutional dimension to Article 134 offenses).
[76] *Jackson*, 443 U.S. at 319.
[77] JA 89.
[78] AB at 3.
[79] *United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011).

Given those facts, a reasonable fact finder could conclude beyond a reasonable doubt that appellant acted wrongfully.

Appellant's Conduct was Indecent

A reasonable fact finder could conclude that appellant's was indecent for several reasons. First, a reasonable fact finder could have inferred that this video was recorded surreptitiously and was thus indecent.[80] The Government's expert witness testified that the video recorder "records in total darkness. It can record without the ability of people to know they are being recorded."[81] That camera had a night vision capability "16 times more powerful than any regular night vision of their earlier models."[82] That camera did not make "any great noise" when operating.[83] The totality of the circumstances, including the use of a night vision emitter and the sexual act occurring in darkness, could cause a reasonable fact finder to conclude that the video was made surreptitiously, or at least appears to be surreptitiously made.

Such a surreptitious filming would be indecent. The video itself raises a reasonable inference that the female did not

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[80] *Jackson*, 443 U.S. at 319 ("[The *Jackson* standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and *to draw reasonable inferences from basic facts to ultimate facts.*") (emphasis added).
[81] JA 49.
[82] JA 58.
[83] JA 61.

know she was being filmed. At one point, appellant looked at the cameraman. The female does not appear be aware or otherwise acknowledge that the third person is filming her.

Second, appellant's sexual behavior was public, open and notorious because another person was filming it. Mr. Kriigel testified that a third person was holding the camera.[84] The Court of Military Appeals noted that an act is "open and notorious," flagrant, and discrediting to the military service when the participants know that a third person is present.[85] Appellant memorialized his open and notorious act by recording it, thus amplifying the inference of indecency. The act of filming creates a rational inference that the act is not private and fleeting, but meant to be made permanent and potentially available for others to view.

Appellant's Conduct Satisfied the Terminal Element

Appellant's conduct was of a nature to bring discredit upon the armed forces. A rational trier of fact could conclude that sexual conduct that is surreptitiously recorded would tend to be service discrediting if known. Even a video recording that only appears to be surreptitiously recorded would tend to be service discrediting if known. Viewed in a light most favorable to the prosecution, a video that appears to be surreptitiously made by

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[84] JA 49.
[85] *Berry,* 6 U.S.C.M.A. at 614, 20 C.M.R. at 330.

necessity appears to be made through trickery or duplicity. If known, those qualities, real or perceived, would tend to discredit the armed forces in the context of this case.

The public, open and notorious nature of appellant's indecent conduct is also service-discrediting. Such conduct has long formed the basis of Article 134 convictions.[86] A reasonable fact finder could determine that appellant's participation in a homemade pornographic film that appears to be surreptitiously filmed would tend to discredit the armed forces if known. Evidence that the public was actually aware of the conduct is not necessarily required to establish proof under Article 134(2).[87] Here, given all circumstances, proof of the conduct itself is legally sufficient proof of the terminal element.[88]

B. The *Marcum* Factors All Weigh Against Appellant

Under the facts of this case, all three *Marcum* factors weigh in favor the Government, given the legally sufficient proof of the terminal element. Regarding the first *Marcum* factor, appellant was found guilty of conduct that tends to bring the service into disrepute beyond a reasonable doubt. This conduct is far different from the Texas statute in *Lawrence*, which merely prohibited sodomy between persons of the

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[86] *See Izquierdo*, 51 M.J. 421 (C.A.A.F. 1999); *Berry*, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956).
[87] *Phillips*, 70 M.J. at 163.
[88] *Id.*

same sex.[89] This conduct is different than conduct criminalized under Article 125, which forbids sodomy "whether it is consensual or forcible, heterosexual or homosexual, public or private."[90]

Here, a reasonable fact finder could have determined that the video was surreptitiously made. A rational fact finder could conclude that the female was not aware that she was being filmed. That conduct is distinct from the conduct done with "full and mutual consent" in *Lawrence*.[91] *Lawrence* recognized an "autonomy of self" that includes freedom of intimate conduct.[92] However, "within the military community there is simply not the same autonomy as there is in the larger civilian community."[93] Conduct that would tend to bring the armed forces into disrepute is necessarily outside the *Lawrence* zone of privacy as applied to the military in this case.

The second *Marcum* factor also cuts against appellant. The Supreme Court noted that *Lawrence* does not extend to "public" conduct.[94] In *Berry* and *Izquierdo*, this Court noted that fornication in the presence of another is public.[95]

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[89] 539 U.S. at 563.
[90] *Marcum*, 60 M.J. at 202.
[91] 539 U.S. at 578.
[92] *Id.* at 562.
[93] *Parker*, 417 U.S. at 751.
[94] 539 U.S. at 578.
[95] *Izquierdo*, 51 M.J. at 422-23.

Additionally, given the surreptitious nature of the film, it is not plain or obvious that appellant and his companions were acting with full and mutual consent. The evidence reasonably supports this inference and thus must be made in the Government's favor.

In the context of Article 134, the proof of the terminal element beyond a reasonable doubt would necessarily establish the third *Marcum* factor. The terminal element must be proved beyond a reasonable doubt, which exceeds the "factors relevant" standard of the third *Marcum* factor. Put another way, there is a legitimate Government interest in protecting the reputation of the military. Prosecuting appellant for his indecent act, an act which tends to discredit the armed forces beyond a reasonable doubt, is reasonably related to this interest. A searching constitutional inquiry yields that result.

C. *Lawrence Does Not Create a Quasi-Affirmative Defense in this Case.*

In *Parker*, the Supreme Court noted that lurking within the fringes of Article 134 might be some constitutionally protected conduct.[96] In that context, constitutionally-protected conduct might serve as a quasi-affirmative defense to an Article 134 offense, where the conduct meets every element but a conviction

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[96] *Parker*, 417 U.S. at 760-61.

would be improper.[97] This case's procedural posture precludes such a conclusion. First, such an inquiry would be fact-intensive and best suited to litigation at the trial level. Appellant's forfeiture of the issue has precluded any such record. Second, the Supreme Court's language of "lurk at the fringes of the articles"[98] is antithetical to the plain or obvious standard of review given appellant's forfeiture. Third, since appellant did not raise a *Lawrence* claim at trial, the prosecution at trial was never afforded the opportunity to rebut that claim with additional evidence.[99]

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[97] An affirmative defense is "[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Black's Law Dictionary* 430 (1999 ed.); *See also* R.C.M. 916(a).

[98] *Id.*

[99] Appellant's defense was not that his conduct was *within* Article 134 but protected by *Lawrence*. Instead, he argued that his conduct could never meet the statutory elements of Article 134. *See* JA 138-39.

Conclusion

Wherefore, the Government respectfully requests this Honorable Court affirm the decision of the Army Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing Brief on Behalf of Appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on August 20, 2012 and contemporaneously served electronically on military appellate defense counsel, Captain Kristin McGrory.

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