IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant,	)	20 December 2012
v.	)	BRIEF ON BEHALF OF APPELLEE
Wilson MEDINA, Gunner's Mate, First Class U.S. Coast Guard, Appellee	)	CGCCA Dkt. 1325 USCAAF Dkt. ______

BRIEF ON BEHALF OF APPELLANT

Date: 20 December 2012

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ISSUE PRESENTED

I. WHETHER THE COAST GUARD COURT OF CRIMINAL APPEALS ERRED BY APPLYING THE PROVIDENCY REQUIREMENTS OF *HARTMAN* IN A CASE WHERE THE FACTS ELICITED DURING THE PROVIDENCY INQUIRY REVEALED THAT THE SEXUAL ACTIVITY FELL OUTSIDE OF THE CONSTITUTIONAL PROTECTIONS BOUNDED BY *LAWRENCE V. TEXAS* BECAUSE IT INVOLVED A RECENT, PRIOR TRAINER-TRAINEE RELATIONSHIP.

II. ASSUMING THAT A *HARTMAN* INQUIRY IS REQUIRED, WHAT CONSTITUTES A SUFFICIENT COLLOQUY BETWEEN THE MILITARY JUDGE AND AN ACCUSED TO SUPPORT A PLEA OF GUILTY TO THE SPECIFICATION OF SODOMY UNDER THE STANDARD SET FORTH IN *HARTMAN*.

STATEMENT OF STATUTORY JURISDICTION

The statutory basis for jurisdiction of the Coast Guard Court of Criminal Appeals was 10 U.S.C. § 866(b), Article 66(b), UCMJ. The statutory basis for this Court's jurisdiction is 10 U.S.C. § 867(a)(2) and (c), Article 67(a)(2) and (c), UCMJ.

STATEMENT OF THE CASE

Pursuant to his pleas of guilty, Appellee was convicted of one specification of sodomy and one specification of assault consummated by battery in violation of Articles 125 and 128, UCMJ. The military judge sentenced Appellee to confinement for thirteen months, reduction to E-1, and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged.

Originally, Appellee sought relief based upon unreasonable and unexplained post-trial delay. On 24 September 2010, the Coast Guard Court of Criminal Appeals affirmed the findings of

guilty, but only granted relief by approving so much of the sentence as provided for confinement for eleven months, reduction to E-2, and a bad-conduct discharge. *United States v. Medina*, No. 0261 (C.G. Ct. Crim. App., September 24, 2010). On 23 May 2011, this Court vacated the Coast Guard Court's decision and remanded the case for consideration in light of *United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011). *United States v. Medina*, No. 11-0154/CG (C.A.A.F. May 23, 2011).

On 7 November 2012, the Coast Guard Court of Criminal Appeals issued a published decision that the plea to sodomy was improvident based on *Hartman's* requirement. *United States v. Medina*, No. 0261 (C.G. Ct. Crim. App., November 7, 2012). The court set aside the Article 125 conviction and affirmed the finding of guilty to the Article 128 charge. *Id.* at 5.

In its decretal paragraph, the Court returned the case to the Convening Authority to order a new hearing on the findings and sentence for the sodomy charge. *Id.* at 6. If the Convening Authority finds that doing so is impracticable, a sentence rehearing may instead be ordered for the assault charge. *Id.* The Court limited the sentence which could be approved without a rehearing to one of "no punishment." *Id.*

STATEMENT OF FACTS

SN J.M. graduated from basic training at Coast Guard Training Center Cape May, New Jersey in late October 2007. R.

at 145. At the time he joined the Coast Guard, SN J.M. was twenty three years old. R. at 145.

During basic training, SN J.M. was a Seaman Recruit assigned to November Company. R. at 48. There he met Appellee, Wilson Medina, an assistant company commander of recruits, who was then a 35-year-old First Class Petty Officer with over twelve years of service in the Coast Guard. PE 1; AE 14. As the assistant company commander, Appellee was responsible for training SN J.M. and the rest of the recruits assigned to November Company. R. at 39-48.

During the eight weeks of basic training, Appellee and SN J.M. maintained a formal company commander-recruit relationship. R. at 49. Notwithstanding the fact that the relationship was professional within the context of a military training environment, the link between company commander and recruit was an inherently coercive association. PE 1. In his role as a company commander, Appellee was responsible for indoctrinating new recruits into the customs and practices of military life. R. at 41. He administered disciplinary measures to correct deficiencies by means of instructing recruits, ordering recruits to engage in physical training, and at times through intimidation. PE 1, R. at 42-45, 148. In essence, Appellee, as a company commander, served the role of parent, teacher, supervisor, mentor, and disciplinarian. R. at 45.

In his company commander capacity, Appellee maintained special authority over recruits in a training atmosphere where recruits were inculcated not to ask questions but to follow instructions and obey orders as demanded. R. at 48, 50. SN J.M. and Appellee maintained this regimented relationship during the entire indoctrination period. R. at 49.

After graduating from boot camp and spending some leave time with his family, SN J.M. reported to his new duty assignment at Station Cape May. R. at 150. Just days after SN J.M. graduated from boot camp, Appellee invited SN J.M. to his house to watch a boxing match on television on November 11, 2007. R. at 54. SN J.M., still nervous about his new assignment and excited about spending time with his company commander, accepted the invitation. R. at 54-56, 151.

That evening, Appellee drove to pick up SN J.M. at his barracks. R. at 55. After arriving at Appellee's house, SN J.M. ate dinner with Appellee and Appellee's family, played video games, and watched the boxing match on television. R. at 56. Both SN J.M. and Appellee drank a considerable amount of alcohol throughout the night, starting around five or six o'clock. R. at 57. Appellee drank whiskey; SN J.M. drank beer and then vodka. R. at 57-58. They both drank to the point of intoxication. R. at 57-58. Appellee imbibed "more than ever before . . . in [his] life", and SN J.M. also drank heavily throughout the

evening and into the night. R. at 57-59.

After Appellee's family retired to their bedrooms, Appellee and SN J.M. were left alone in the family room on the main level. R. at 59. Approximately forty-five minutes to an hour later, SN J.M. and Appellee began a conversation regarding a scar located on SN J.M.'s upper chest. R. at 59. After SN J.M. pulled down the neck of his shirt to reveal the mark, Appellee touched the scar and then pushed his hand down inside SN J.M.'s pants and underwear to fondle his penis and testicles. R. at 60-62. Appellee then pleaded with SN J.M. to continue by stating: "Let me do it." R. at 62. SN J.M. responded by forcibly removing Appellee's hand from his pants and stating that Appellee's actions were "messed up." R. at 64.

Afterwards, SN J.M. went outside and smoked a cigarette, where Appellee accompanied him. R. at 66. SN J.M. was upset, and expressed to Appellee that he lost faith in what Appellee taught him in boot camp. R. at 66. In return, Appellee acknowledged that his actions were wrong by apologizing to SN J.M. R. at 66.

After some time, SN J.M.'s indignation abated and he asked Appellee to spend the night, presumably because he was still intoxicated. R. at 71. After Appellee made a bed for SN J.M. on the family room futon, SN J.M. laid down. Without SN J.M. inviting Appellee to touch him, Appellee removed SN J.M.'s pants

and underwear, exposing his genitals, and performed oral sex on him. R. at 71-72. After approximately a minute, SN J.M. voiced his displeasure by stating: "This was wrong." R. at 72. At that point, Appellee stopped performing oral sex on SN J.M. R. at 72.

SUMMARY OF ARGUMENT

In *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011), this Court held that a provident plea to Article 125, UCMJ, which implicates both criminal and constitutionally protected conduct, must include a colloquy between the military judge and the accused discussing "the critical distinction between permissible and prohibited behavior." *Id.* at 468. A fundamental requirement of this dialogue is for the accused to provide "answers that describe his personal understanding of the criminality of his . . . conduct," with the dialogue "employing lay terminology to establish [that] understanding." *Id.* at 469.

Hartman necessitates this guilty plea inquiry requirement when facts objectively support a finding that the military member's conduct is within the constitutional liberty interest articulated in *Lawrence v. Texas*, 539 U.S. 558 (2003), as recognized by *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). The *Lawrence* liberty interest pertains only to private, sexual behavior between two consenting adults. *Lawrence*, 539 U.S. at 578. *Hartman* is not applicable to non-consensual sexual

behavior or sexual behavior that is commercial, in public, with minors, inherently coercive, or with a person who cannot easily refuse consent. *Id.* By deduction, *Lawrence* protection does not apply to the innately coercive military relationship between a trainer-trainee; thus, in this context, *Hartman* is not applicable as well.

In the case *sub judice*, Appellee used his military position, rank, and authority as a company commander to take advantage of an impressionable and compliant former trainee, a trainee who just days before graduated from boot camp. The relationship with the victim was inherently coercive and the sexual sodomy was with a person who was not in a position to refuse consent freely. In this case, the sexual conduct falls categorically outside the protected zone articulated in *Lawrence*. *Id.* As such, no "implication" is raised on a potential constitutionally protected liberty interest requiring a *Hartman*-like colloquy. The facts implicate only criminally oriented conduct.

The Coast Guard Court of Criminal Appeals "was not convinced that *Hartman* [did] not apply" because it deemed that the case involved a charge of "consensual sodomy," and held that Appellee's plea of guilty was improvident because the military judge failed to manifestly discuss the application of *Lawrence* and *Marcum*. *United States v. Medina*, No. 0261, at 5.

Putting aside the issue on whether *Hartman* is required during a providency plea involving a inherently coercive relationship where a person cannot refuse consent freely, the additional military-specific details adduced during the plea justify removing Appellee's sexual behavior from the liberty interest as articulated by this Court in *Marcum*. In this context, *Hartman* is required because what might be permissible in the civilian community is prohibited in the Armed Forces because of "factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." *Marcum*, 60 M.J. at 207.

Hartman requires a constitutional inquiry when a matter of "critical significance" is implicated. However, this Court has not clarified the exact contours of what constitutes an appropriate colloquy with regard to an Article 125 charge. Regarding the military factors in this case, the record shows that the colloquy between the military judge and Appellee did contain a dialogue implicating the constitutional aspects in layperson terms. During the plea inquiry, the military judge not only explained the elements of Article 125, but he also added additional elements that required Appellee's sexual conduct to be prejudicial to good order and discipline or service-discrediting. The question remains for this Court is whether this judged imposed additional evidentiary requirement,

along with the judge's accompanying explanations of those elements, satisfied the required factors to the military-specific exception under *Marcum.*

Appellee explained in his own words why he believed his conduct was criminal, and he made statements that he personally understood the distinguishing factors criminalizing his conduct within the military context. Moreover, his comprehension was supported by assertions made by his defense counsel, the stipulation of fact, and by the record of trial.

In this case, the military judge conducted an inquiry with Appellee eliciting objective facts which arguably distinguish between constitutionally protected and criminal behavior as it applies to Article 125 in a method that Appellee could comprehend and acknowledge. We ask this Court for greater amplification on whether the military judge's method of drawing attention to the *Marcum* factors constitutes a legally sufficient inquiry under *Hartman*.

STANDARD OF REVIEW

The legal standard for determining whether a guilty plea is provident is whether the record presents a substantial basis in law or fact for questioning it. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea. *Id.*

ARGUMENT

1. The sexual conduct committed by Appellee fell outside of the constitutional protection bounded by *Lawrence v. Texas* because of the status of Appellee as a company commander placed his recent former boot camp trainee in a situation where consent was not easily refused, thus the *Hartman* providency requirement was not necessary.

Law

In *Lawrence v. Texas*, 539 U.S. 558, 572 (2003), the Supreme Court held that two adults who engage in sexual behavior "with full and mutual consent from each other" are "entitled to respect for their private lives." *Id.* at 578. The Court did not expressly identify the liberty interest in *Lawrence* as a fundamental right. *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004). As such, the liberty interest articulated in *Lawrence* was not without limits. Beyond the requirement that the sexual activity be "with full and mutual consent," the Supreme Court added that the liberty interest does not extend to conduct involving minors, public conduct, prostitution, coercion, or "persons who are situated in relationships where consent might not easily be refused." *Lawrence*, 539 U.S. at 578. The Supreme Court did not state that these examples represent an exhaustive list of exceptions; logically these examples set forth an illustrative list of exceptions. It is clear that the constitutional right in *Lawrence* is limited to the facts and circumstances of a particular case. *Marcum*, 60

M.J. at 203-04.

Following the Supreme Court's decision, the Court of Appeals for the Armed Forces (CAAF) acknowledged the application of *Lawrence* in the Armed Forces as it pertains to the prosecution of consensual sodomy under Article 125 but with noted military exceptions. *United States v. Marcum*, 60 M.J. 198, 206-07(C.A.A.F. 2004).

The necessary elements of Article 125 are:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

On its face, Article 125 criminalizes sodomy, with or without consent, in private or public settings, among heterosexual or homosexual couples. See *United States v. Scoby*, 5 M.J. 160, 163 (C.M.A. 1978).

The *Marcum* court embraced the Supreme Court's pronouncement that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Marcum*, 60 M.J. at 205 (quoting *Lawrence v. Texas*, 539 U.S. 558, 572 (2003)). The Court also noted that constitutional rights generally apply to military service members "unless by their express terms, or the express language of the Constitution, they are inapplicable." *Id.* at 206. However, CAAF also acknowledged that constitutional rights

"apply differently" to those serving in the "specialized society" of the military. *Id.* (citing *Parker v. Levy*, 417 U.S. 733, 743 (1974)). When analyzing the applicability of a constitutional right in the military context, CAAF recognized that courts must address the "contextual factors involving military life and the mission of the armed forces." *Id.* (citing *United v. Priest*, 21 C.M.A. 564, 570 (1972)).

Accounting for the "nuance of military life" in ascertaining the scope and nature of the constitutional right identified in *Lawrence*, CAAF embraced a contextual, as-applied analysis, rather than a facial review of a conviction of non-forcible sodomy in violation of Article 125. *Id.* at 206. In order to determine whether a sodomy conviction under Article 125 is constitutional as applied, CAAF adopted a framework for addressing *Lawrence* challenges within the military context. *Id.* Under the three-part test, the Court asked:

> 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*; Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-07. If any of the questions in the three-part test are answered contrary to Appellee's interest, *Lawrence* does not afford constitutional sanctuary.

In *United States v. Hartman*, CAAF explained that when considering charges under Article 125, the "distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'" 69 M.J. 467, 468 (C.A.A.F. 2011). In the context of guilty pleas, a provident plea to Article 125 must include an "appropriate discussion and acknowledgment on the part of the accused of the distinction between what is permitted and what is prohibited behavior." *Id.* As pointed out in the holding, CAAF imposed this "critical distinction" colloquy during a plea "[w]hen a charge against a servicemember *may implicate* both criminal and constitutionally protected conduct." *Id.* (emphasis added).

Discussion

Appellee's conviction of sodomy under Article 125 was not the kind derived from complete and mutual consent entitling Apppellee to respect for his private sexual in the context of which the Supreme Court decided in *Lawrence*. While convicted of sexual sodomy, Appellee's conduct falls outside the liberty interest identified in *Lawrence*. Appellee was a company commander; the victim was a recent former recruit. The victim just completed eight weeks of intensive military indoctrination where he was instructed not to question senior officials, and he knew Appellee only as a person with special authority over him. Military courts have long recognized the "special relationship

between non-commissioned officers and trainees." *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003)(The Court upheld rape conviction based on the notion that the relationship between a drill instructor and trainee was sufficiently coercive in nature to find constructive force and lack of consensual sex). Because of this inherently coercive military relationship, Appellee's sodomy fails the second prong in the *Marcum* tripartite framework. Thus, *Hartman* is not implicated.

The second prong of the *Marcum* test asks whether Appellee's conduct encompasses any of the general behavior exceptions identified by the Supreme Court that fall outside *Lawrence's* protections. *Marcum*, 60 M.J. at 206-07. As noted above, in *Lawrence*, the Court excepted from its holding sexual conduct involving minors, coercion, public conduct, and prostitution. *Lawrence*, 539 U.S. at 578. It also excepted "persons situated in relationships where consent might not easily be refused." *Id.* In *Marcum*, CAAF added that when analyzing whether the appellee's conduct involved persons who might be injured or coerced or who were situated in relationships where consent might not easily be refused, the "nuance of military life is significant." *Marcum*, 60 M.J. at 207.

Moreover, a conviction of non-forcible sodomy does not, by itself, equate to consensual sodomy, or at least sodomy free from coercion. And not all convictions of sodomy vest with it

constitutional protection. *See United States v. Stirewalt*, 60 M.J. 297, 305 (C.A.A.F. 2004) (Crawford, C.J., concurring in part and in the result).

Appellee's sexual actions are not of the same character or quality described in *Lawrence*. The Supreme Court, in *Lawrence*, recognized a liberty interest when two adults engage in sexual relations based on unequivocal consent. The sodomy performed on SN J.M. was not born of intimacy and personal choice, but a sexual act brought on by manipulation through real or perceived authority as well as by vitiating virtue through inducing intoxication.

Approximately an hour before Appellee sodomized SN J.M., Appellee unlawfully molested SN J.M. by fondling his genitals without consent. He did so suddenly and unexpectedly - surprising SN J.M. with his abrupt sexual interest. And he did so when SN J.M. was intoxicated. Surprised, confused, and upset, SN J.M. conveyed to Appellee that everything that he learned from Appellee at boot camp was "thrown out the window" - his idealism tarnished; his trust broken; his respect shattered.

SN J.M. emphatically made it known to Appellee that he was not interested in a sexual tryst and conveyed his complete disappointment in his superior's vulgar affront. And even after apologizing for his illegal actions, Appellee continued to pursue his sexual urges towards the inexperience and intoxicated

seaman.

Although both Appellee and SN J.M. were adults, Appellee's relationship with SN J.M. was one which consent might not have been easily refused. While it is true that Appellee and SN J.M. were no longer in the technical chain of command, this factor alone cannot divorce itself from the realities of military life. Appellee was senior to SN J.M. in rank, age, and experience. Appellee was a senior First-Class Petty Officer with over 12 years in the Coast Guard. SN J.M. was 23-years-old, away from home for the first time, and had not even been in the Coast Guard a month since graduating from boot camp. SN J.M. looked to Appellee as a mentor – someone he respected, someone to look up to, and someone to follow.

For eight intense weeks during boot camp, SN J.M. knew Appellee as a company commander. He only knew Appellee as a military servicemember who posed special authority over him. That authority that was not to be questioned. The evidence suggests that no other relationship, casual or otherwise, existed during basic training other than that of a purely professional company commander-to-recruit dynamic. SN J.M. did not instantly become a peer to Appellee only a few days after graduating from a strenuous and coercive military training environment. There are lingering vestiges of authority based on previous supervisor-subordinate or instructor-trainee

relationships that simply do not wash away once that formal relationship is severed. The stipulation of fact signed by Appellee echoes the words that place his conduct squarely outside of *Lawrence* protection, where the document states because of "the inherently coercive relationship between a recently graduated seaman and a boot camp company commander it was unlikely that [SN J.M.] would easily refuse the continued sexual advances made by [Appellee], his former company commander." PE 1.

Moreover, as already stated, Appellee acknowledged that SN J.M. was extremely intoxicated from an evening of steady drinking of alcohol. The victim was under the influence of alcohol at the time of the sodomy offense.

The facts of this case do not rise to the liberty interest outlined in *Lawrence*. Quite simply, Appellee's conduct did not "involve two adults engaged in full and mutual consent from each other." Under the unique circumstances that accounts for the nuance of military life, the record establishes that sodomy took place within a relationship in which consent might not easily be refused. Because of these facts, the requirements set forth in *Hartman* do not apply.

The Coast Guard Court of Criminal Appeals found that Appellee's plea of guilty to the act of sodomy was improvident because the military judge failed to manifestly discuss the

application of *Lawrence* and *Marcum*. It based its decision on the supposition that the charged specification of sodomy without the sentence enhancement element of sodomy by force dictates whether a *Hartman*-like inquiry is required or not. Despite the Coast Guard Court describing the sexual conduct as "consensual sodomy," a *Hartman* inquiry is triggered only after a factual claim objectively supports a finding that the military member's conduct may be inside the constitutional liberty interest as it pertains to sexual behavior between two fully consenting adults within the confines expressed by *Lawrence*.

In *United States v. Hartman*, CAAF explained that when considering charges under Article 125, the "distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'" 69 M.J. 467, 468 (C.A.A.F. 2011). In the context of guilty pleas, a provident plea to Article 125 must include an "appropriate discussion and acknowledgment on the part of the accused of the distinction between what is permitted and what is prohibited behavior." *Id.*

Hartman, however, does not require that the military judge notify every accused charged with a sexual crime that sexual activity is constitutionally protected. *Hartman* makes clear that a dialogue is necessitated between the military judge and the accused when the distinction between permitted and criminal conduct constitute a "critical significance." *Id.* And this

"critical significance" only exists "when a charge against a servicemember *may implicate* both criminal and constitutional protected conduct." *Id.* (emphasis added). Put another way, "A *Hartman* analysis should not be triggered unless there is a possibility the accused's conduct could be constitutionally protected." *United States v. Anderson*, 2012 WL 1077463, at *9 (A.F. Ct. Crim. App. March 2, 2012) (Judge Orr dissenting in part).

Hartman is not applicable to sexual behavior that does not fall under the second (or first) prong of the *Marcum* test. How the government chose to charge the offense is immaterial to the constitutional protection afforded to Appellee; rather it is the facts themselves that are determinative. *Hartman* is not applicable to cases involving sodomy with a prostitute or with a minor, or sodomy taken place in public; and *Hartman* is not applicable, as in this case, to sodomy in an inherently coercive relationship or with a person situated in a relationship where consent might not easily be refused.

2. Assuming that a *Hartman* inquiry is required, what constitutes a sufficient colloquy between the military judge and an accused to support a plea of guilty to the specification of sodomy under the standard set forth in *Hartman.*

Law

"When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction

between what is permitted and what is prohibited constitutes a matter of critical significance." *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011). *Hartman* requires a military judge to establish an understanding by the appellee as to the relationship between the military-specific details that would satisfy *Marcum's* third prong and the issue of criminality. *Id.*

A *Hartman* inquiry is required when the facts of the case trigger an analysis under the third *Marcum* prong on whether there are "additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." *Marcum*, 60 M.J. at 207. In assessing the third question, it is appropriate to consider the "military interests of discipline and order" in evaluating one's conduct. *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

Appellee is not entitled to receive a hornbook review of the legal distinction between permissible and impermissible sodomy while serving in the military. *Hartman* only requires a "dialogue employing lay terminology." *Hartman*, 69 M.J. at 469.

<u>Discussion</u>

In this case, the military judge conducted a legally and an inquiry with Appellee eliciting objective facts which distinguish between constitutionally protected and criminal behavior as it applies to Article 125 in a manner and method that Appellee could comprehend and acknowledge.

During the plea inquiry, the military judge not only explained the elements of Article 125, but he also explained that in order for Appellee's sexual conduct to be criminal it must be prejudicial to good order and discipline or service-discrediting. R. at 68. The judge required and explained those additional elements in a manner to satisfy the military-specific exception under *Marcum* and to fulfill the requirement under *Hartman* that the appellee understands the necessary critical distinction – that is that the Appellee understands in layman terms that his sexual conduct was not *per se* criminal, but criminal because of the military factors of discipline and service discrediting. R. at 69-70. Appellee responded that he understood the elements and definitions, and he explained the nature of the sexual conduct between himself and SN J.M. in the context of his comprehension that his conduct was impermissible in the military. R. at 70-73.

After discussing the act of sodomy, the military judge inquired about Appellee's authority over the victim.

> MILITARY JUDGE: Early on, we talked about your role as an Assistant Company Commander, and the authority you had over [SN J.M.] when he was a - a recruit. Remember that?
>
> APPELLEE: Yes, sir.
>
> MILITARY JUDGE: So you didn't have authority over him like that . . .
>
> APPELLEE: No, sir.

MILITARY JUDGE: . . .at the time?

APPELLEE: No, sir.

MILITARY JUDGE: But it had been just a few weeks earlier that you had that kind of authority over him?

APPELLEE: Yes, sir.

MILITARY JUDGE: And as we covered, that – while he was in boot camp, at least, that . . . you know, he was – it was drilled into him, you know, not to question. .

APPELLEE: Yes sir.

MILITARY JUDGE:.. . .your orders? And we talked about that before - you know, how high he was going to jump; and if they didn't in fact do so, that they could get in trouble for that...

APPELLEE: Yes, sir.

MILITARY JUDGE:.... while they were in boot camp?

APPELLEE: Yes, sir.

MILITARY JUDGE: And that was a pretty frequent theme of their training, starting from Day One?

APPELLEE: Yes, sir.

MILITARY JUDGE:. And I believe, you know, what you said here is that that's an - while - while he's in boot camp and you're his Company Commander, that's an inherently coercive relationship between a - a boot and the - and the Company Commander; right?

APPELLEE: Yes, sir.

R. at 72-74.

Following this inquiry the military judge questioned Appellee whether he believed that the victim was unlikely to easily refuse his sexual advances because the event was close in

time after boot camp. R. 75. At that point the defense counsel objected to ensure that the judge did not enter a line of questioning that would elicit a response by Appellee admitting to a nonconsensual act. However, the defense did not object to the judge's clarification that he was only eliciting questions to ensure the constitutional aspects of the inquiry were discussed.

> MILITARY JUDGE: So given how close in time it was between when he was your . . . you know, boot, if you will - a member of your Company - and you were his Company Commander, and this event . . . do you agree that it was unlikely that he could easily refuse your - your advance?
>
> DEFENSE COUNSEL: Don't answer that. Sir, I'm going to object as to the scope of that question. I - I understand . . .
>
> MILITARY JUDGE: Well, then you're objecting to the Stipulation of Fact - Paragraph E.
>
> DEFENSE COUNSEL: Sir, my - my concern is . . . And I understand the Stipulation of Fact, and I'm - I'm not objecting to it. I. . . My concern is the act itself, that's already been admitted to as the Charge that we're pleading guilty to. We understand the - the factors for the *Marcum* inquiry . . .
>
> MILITARY JUDGE: Mmm-hmm.
>
> DEFENSE COUNSEL: . . . and I'm - I'm concerned that the Court is focusing . . . I understand the Court needs to - to meet those factors, and get us within the realm of that, and away from the Supreme Court decision.
>
> MILITARY JUDGE: Mmm-hmm.
>
> DEFENSE COUNSEL: My concern is - is the - is the degree to which we go into that, making this a

> nonconsensual act - and the focus of that. I'm treading a tightrope here, sir, and . . . trying to get us through providency adequately while not throwing my client to the - to the wolves, as it were.
>
> MILITARY JUDGE: I understand. But I'm considering this solely for the purpose of ensuring that this was prejudicial to good order and discipline and was not within a protected consensual conduct.

R. at 75-76.

The military judge also clarified for Appellee and his defense counsel the distinction between constitutional and criminalized sodomy within the military. The military judge did in fact explain to the defense the "constitutional concerns" of the case. R. at 76.

> MILITARY JUDGE: For the purposes of sentencing, it is a purely consensual act, but . . ., and to illustrate it . . . I - I'm trying to distinguish between, say, for example, by ridiculous example . . . individuals . . . perhaps [Appellee] and [SN J.M.] had - had gone out to California and - and gotten married. I mean, that's clearly different from his situation. I'm trying to distinguish that, to make sure that we're clear of any - any constitutional concerns.
>
> DEFENSE COUNSEL: Roger that. Thank you, sir.
>
> MILITARY JUDGE: Okay.
>
> (Off-the-record conservation with defense counsel).

Id.

This illustrative hypothetical laid out for the Appellee and his defense counsel articulated the constitutional distinction between consensual acts permitted under the Constitution and the sexual acts that are prohibited in the

military because they are prejudicial to good order and discipline or service discrediting.

This case at hand is readily distinguishable from *Hartman*. In *Hartman*, the factors discussed during the colloquy involved only perfunctory responses to questions from the judge asking where the sex took place and with whom. *Hartman*, 69 M.J. at 469. In *Hartman*, the Appellee stated the sexual activity was with a Navy shipmate assigned to the same ship and took place in transient quarters on a U.S. Navy facility with a third shipmate asleep in the room. *Id.* Those facts do not draw attention by themselves to a layperson on why those factors matter as it pertains to the criminality of the offense under Article 125. In other words, those factors discussed in the *Hartman* case are not readily apparent as to allow a layperson to come to the conclusion on why those facts make certain sexual conduct illegal whereas without those facts the same conduct is permissible.

This makes sense: "Constitutional rights may apply differently to members of the armed forces than they do to civilians." *Marcum*, 60 M.J. at 205 (citing *Parker v. Levy*, 417 U.S. 733, 742 (1974)). Thus, there are some offenses that would be legal in the civilian world that are illegal in a military context. And this is especially true when analyzing the third prong of the *Marcum* framework analysis. *Id.* at 207.

That is not the situation in this case. In this case, the military judge elicited objective facts from Appellee in an effort to distinguish between constitutionally protected and criminal behavior as it applies to Article 125 in a manner and method that Appellee could comprehend and acknowledge. In this case, Appellee understood that there are certain aspects of his conduct beyond admitting to the element in the Article 125 offense that made his sexual behavior illegal.

The *Hartman* case stands for the limited holding that "A discussion between *trial counsel* and the military judge about the legal theory and practice, at which the accused is a mere bystander, provides no substitute for the requisite interchange between the military judge and the accused." *Hartman*, 69 M.J. at 469 (emphasis added). However, this case is not *Hartman* in that respect. Defense counsel affirmatively acknowledged that "We understand the - the factors for *Marcum* inquiry." R. at 75. By answering in the first-person plural, defense counsel was explicitly stating that Appellee was fully informed about the difference between constitutionally protected behavior and criminal conduct.

In this case, Appellee was not a mere bystander. There was ample discussion between the military judge and Appellee along with Appellee's defense counsel regarding the criminality of Appellee's action beyond the mere recitation of the definitional

elements of Article 125, which included consideration of the *Marcum* framework.

During the entire providency plea, the military judge and Appellee discussed how the differences in rank, experience, and the coercive company commander-recruit relationship, combined with intimate sexual contact, created the kind of situation that undermines authority, unit morale, and military effectiveness. In short, the factual context of Appellee's sexual conduct implicated military specific interests that warrant upholding the conviction as constitutional as applied.

And if there was any doubt as to Appellee's understanding the criminality of his actions, the stipulation of fact underlying his guilty plea resolves that reservation, which reads, in pertinent part, "Due to the environment that is created by the training cadre at TRACEN Cape May, including [Appellee], all Coast Guard recruits, including [SN J.M.], are instilled with understanding that they shall not question those who are senior to them and to do so may result in disciplinary action." PE 1. The document concludes that because Appellee "was senior to SN J.M. and the inherently coercive relationship between a recently graduated seaman and a boot camp company commander it was unlikely that SN J.M. would easily refuse the continued sexual advances made by [Appellee], his former company commander." *Id.*

The very factors required to reach the *Hartman* threshold are even highlighted by Judge Havranek in his dissenting opinion regarding the sentencing reassessment. He writes, in part:

> Even after a formal training relationship has ended, a Company Commander remains a role model and paragon of military values in the eyes of his former trainees. Review of the record leaves no doubt that the victim continued to hold [Appellee] in particular esteem even after his training ended. There is also no doubt that [Appellee's] assault deeply disillusioned the victim and caused him to lose faith in the Coast Guard ethos. [Appellee] testified that the victim explained after the assault that everything that [Appellee] taught "at boot camp was out of the window." (R. at 66.) This testimony illustrates the point that a Company Commander/trainer's unlawful conduct undermines the entire military training system regardless of whether it occurs during a formal trainer-trainee relationship or not.

United States v. Medina, No. 0261, at 10.

These comments emphatically acknowledges from the record those very military-type factors fully discussed between the military judge and Appellee that would lead a reasonable trial judge to achieve an adequate factual basis to support the plea to the Article 125 offense and meet the *Hartman* requirement. These factors were unmistakably discussed by the Appellee during his providency, which also discussed and incorporated the stipulation of facts. Appellee understood that his sexual behavior alone was not a violation of military law.

CONCLUSION

At trial, the providency inquiry was legally and factually sufficient to support Appellee's plea of guilty to the offense

of sodomy. Appellee was essentially exploiting the company commander-trainee relationship, which, while technically ended, had only ended days before. While still assigned as a company commander, he engaged in oral sodomy with one of his recent graduates from basic training, and only an hour after molesting him without his consent. He used his former status as a company commander and senior rank to take advantage of a compliant and impressionable young and intoxicated seaman. In this context, Appellee's sexual behavior was outside the liberty interest recognized by the Supreme Court in *Lawrence*.

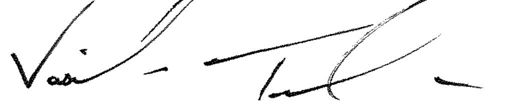
If the facts involving an Article 125 charge may include both illegal and constitutionally protected sexual conduct, the record must reflect consideration of the *Marcum* framework during a guilty plea. *Hartman*, at 469. This requirement, however, is only triggered when "distinction between what is permitted and what is prohibited constitutes a matter of critical significance." *Id.* at 468. In this case, there was no "critical significance." Because of his military status, Appellee's actions were unambiguously, unquestionably, and undeniably criminal.

Despite being charged with non-forcible sodomy, the colloquy between the military judge and Appellee described the offense of sodomy beyond the mere terms of Article 125's elements. And while the facts do not require a *Hartman*-like

colloquy, the facts as laid out in the providency plea and record reflects consideration of the *Marcum* framework. Appellee acknowledged that his sexual behavior was unlawful by admitting that the victim was not in a position to consent freely and that his actions were prejudicial to good order and discipline and service discrediting.

Therefore, the Government respectfully requests that this Court reverse the decision of the Coast Guard Court of Criminal Appeals setting aside the Article 125 specification by finding that the military judge was correct to accept Appellee's plea of guilty to the charge of sodomy.

Respectfully submitted,



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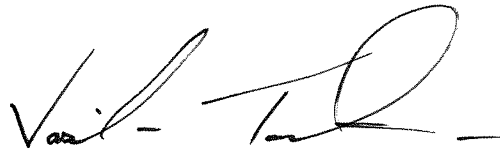

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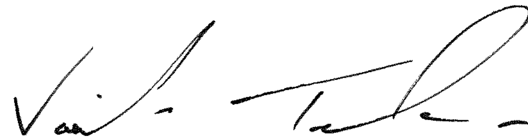
CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered on 20 December 2012 via electronic means to the United States Court of Appeals for the Armed Forces at efiling@armfor.uscourts.gov and a copy was delivered electronically to Appellee Defense Counsel, LCDR Paul R. Casey, with his consent, at paul.r.casey@uscg.mil on this 20 December 2012.



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