

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	25 January 2013
Appellant,)	
)	
v.)	REPLY ON BEHALF
)	OF APPELLANT
)	
Wilson MEDINA,)	CGCCA Dkt. 1325
Gunner's Mate, First Class)	
U.S. Coast Guard,)	USCAAF Dkt. 13-5002/CG
Appellee)	

REPLY ON BEHALF OF APPELLANT

Date: 25 January 2013

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The United States hereby replies to the Appellee's Answer dated 22 January 2013. The United States stands by the argument presented in its Brief dated 20 December 2012 and provides additional amplification regarding the constitutionality of Appellee's conviction under Article 125 of the UCMJ.

ARGUMENT

Appellee's conviction under Article 125 is constitutional because his conduct fails the second and third prong of the tripartite framework outlined under *United States v. Marcum*, 60 M.J. 198, 206-07 (C.A.A.F. 2004), and thus does not fall within a constitutionally protected liberty interest.

1. *Marcum's* Second-Prong: Appellee's conduct falls outside the liberty interest identified in *Lawrence* because Appellee engaged in sodomy with someone in which consent might not easily be refused.

In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the Supreme Court identified a liberty interest when adults engage in sexual behavior "with full and mutual consent from each other." In *Lawrence*, the Supreme Court excepted from its holding sexual conduct involving minors, coercion, public conduct and prostitution. *Id.* It also excepted "persons situated in relationships where consent might not easily be refused." *Id.* These exceptions to the *Lawrence* liberty interest were adopted in the second-prong of the *Marcum* test, which asks whether an accused'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 206-207. In *Marcum*, CAAF added, when analyzing whether 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." *Id.* at 207.

In this case, Appellee's conviction under Article 125 was not the kind derived from complete and mutual consent entitling Appellee to respect for his private sexual life in the context of which the Supreme Court decided in *Lawrence*. Appellee was an E-6 with over twelve years in the military; SN J.M. was an E-3 with less than twelve weeks in the Coast Guard. However, it is not just the rank imbalance that makes Appellee's act a crime. The facts present far more than mere rank disparity.

The victim's acquiescence to oral sodomy was prompted by Appellee's military status - a position of real military authority and perceived military dominance. Appellee was SN J.M.'s company commander during boot camp. During basic training, Appellee had actual and apparent power over SN J.M. in all matters of training and discipline. Despite Appellee's contention, Appellee was not a "friend" to SN J.M. just days after the intense military indoctrination training had ended. As his former and recent recruit, SN J.M. maintained complete reverence and respect for his former company commander and

senior ranking petty officer. The residue of enduring authority remained genuine to SN J.M., as it would to any recent graduate of boot camp.

Moreover, Appellee plied SN J.M. with copious amounts of alcohol, leaving SN J.M. in an intoxicated state exhilarated by hours of steady imbibing, diminishing his cerebral inhibitions. During this state of drunkenness, Appellee made unwelcome and unexpected sexual advances by groping SN J.M.'s genitals. As soon as he began molesting SN J.M., he was immediately repulsed. Appellee even apologized for his affronting sexual advances. However, SN J.M.'s unequivocal and uncontroverted rebuffing made no difference to Appellee. Appellee continued his persistent sexual avidity; he refused to accept the verbal and physical indications that SN J.M. was not an eager sexual participant, and by all accounts in the record an uninterested sexual participant. And late into the night, when SN J.M. was most vulnerable - drunk, upset, and tired - Appellee sodomized SN J.M.

The record establishes that sodomy took place within a relationship in which consent might not easily be refused. Under these circumstances, Appellee is in no position to claim protection of the constitutional right espoused in *Lawrence* that is intended to protect the interest of adults engaged in sexual behavior with full and mutual consent.

2. *Marcum's* Third-Prong: Appellee's sexual conduct was in the context of factors relevant in the military environment that affected military interest, thus removing his sexual behavior from the liberty interest protected by *Lawrence*.

The third *Marcum* prong inquires 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 Appellee's conduct. *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

Appellee discusses the fact that there was no violation of Coast Guard policy criminalizing Appellee's sexual conduct. Appellee's Br. at 12-15. Appellee cites *United States v. Stirewalt* to support his claim that there must be a specific military instruction prohibiting sexual relations between particular classes of Coast Guard servicemembers in deciding whether to limit the application of *Lawrence*.

Appellee also cites to the vacated Coast Guard case of *United States v. Daly* to suggest that Chapter 8.H. of the Coast Guard Personnel Manual, COMDTINST M1000.6A, provides notice of "noncriminality of unacceptable relationships," which in *Daly* involved a consensual sexual relationship between a senior and junior enlisted member at the same unit. 69 M.J. 549, 553 (C.G. Ct. Crim. App. 2010) (vacated on other grounds, 69 M.J. 485

(C.A.A.F. 2011)). However, CAAF held that the Coast Guard Court lacked the jurisdictional basis to consider the case. *United States v. Daly*, 69 M.J. 485 (C.A.A.F. 2011). Thus, the principle to which Appellee refers in his brief does not reflect the current status of Coast Guard jurisprudence and has no persuasive authority.¹

The United States concedes that at the time of the offense, there was no Coast Guard regulation directly applicable in criminalizing Appellee's conduct. However, the existence of a punitive Coast Guard instruction is not the *sine qua non* when balancing Appellee's liberty interest in pursuing a sexual relationship against the military's interest in discipline and order.

Appellee's conduct was more than a personal consensual relationship in the privacy of his house. Appellee is a married servicemember. He was also a company commander with a revered

¹ Even if the Court were to rely on *Daly* as a peek behind the curtain as to what the Coast Guard Court might have opined should it have had a case properly before it, *Daly* does not stand for the notice of noncriminality of all consensual sex between senior and junior enlisted members regardless of circumstances. In *Daly*, the Coast Guard Court of Criminal Appeals narrowly held that Chapter 8.H gives "servicemembers notice of noncriminality of unacceptable relationship for the purpose of Article 134." *United States v. Daly*, 69 M.J. 549, 553 (C.G. Ct. Crim. App. 2010). (emphasis added). The very court added, "This is not to say that such a relationship cannot become the basis of a charge under the UCMJ." *Id.*

mission to train and indoctrinate the newest members of the Coast Guard. He held a public trust; and he betrayed it.

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 a recent boot camp graduate. He abused his role as a company commander and senior rank to take advantage of a compliant and unsuspecting seaman.

The facts are made clear when reading the stipulation of fact. The stipulation of fact reads, "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 adds that 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." *Id.*

When determining the consequences of a sexual relationship, it is not enough to examine existing instructions prohibiting such sexual conduct between military members. Rather, it is imperative to inquire about the entire military context and consider factors such as: Appellee's and victim's military rank,

current and former military positions, and marital status; the existence of any coerciveness, manipulation, or inducement; and any detrimental impact on good order and discipline. Here, the differences in rank, experience, and recent 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.

CONCLUSION

In *United States v. Marcum*, this Court identified a tripartite framework for addressing *Lawrence* challenges within the context of the Armed Forces. Using the tripartite framework, Appellee's conviction under Article 125 was constitutional as applied. Because of Appellee's status as a company commander, along with the excessive drinking involved and the rebuffing of earlier sexual advances, Appellee's sodomy with SN J.M. was not with "full and mutual consent." More directly, his sexual conduct was with someone who could not easily refuse consent. Moreover, additional factors relevant solely in the military context justify removing Appellee's

sexual behavior from the liberty interest protected by *Lawrence*.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Vasilios Tasikas', written over a horizontal line.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 1573 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word Version 2009 with Courier New 12-point typeface.

A handwritten signature in blue ink, appearing to read "Vasilios Tasikas".

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered on 25 January 2013 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 25 January 2013.



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