IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	
v.	)	ANSWER ON BEHALF OF APPELLEE
Wilson MEDINA, Gunner's Mate, First Class (E-6) U.S. Coast Guard, Appellee	)	CGCCA Dkt. No. 1325 USCAAF Dkt. 13-5002/CG

ANSWER OF BEHALF OF APPELLEE

/s/

Paul R. Casey
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
CAAF Bar No. 35353
Commandant (CG-2)
2100 Second St., S.W.
Washington, DC 20593
(202)372-2714
Paul.R.Casey@uscg.mil

INDEX OF BRIEF

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

AIR FORCE COURT OF CRIMINAL APPEALS

COAST GUARD COURT OF CRIMINAL APPEALS

STATUTES

RULE FOR COURTS-MARTIAL

OTHER AUTHORITIES

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 (sic) 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 PLEAS OF GUILTY TO THE SPECIFICATION OF SODOMY UNDER THE STANDARD SET FORTH IN *HARTMAN*?**

STATEMENT OF STATUTORY JURISDICTION

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

STATEMENT OF THE CASE

Appellee concurs with Appellant's statement of the case.

STATEMENT OF FACTS

Appellee was a first-class petty officer serving as an assistant company commander at Coast Guard Training Center Cape May, NJ. J.A. at 70. In the summer of 2007, Appellee served as assistant company commander to November Company. SN JM was one of the recruits assigned to November Company. *Id.*

SN JM was already 23 years old when he joined the Coast Guard and arrived at Training Center Cape May. R. at 145. SN JM

had worked in construction prior to deciding to enlist. R. at 146. During the eight-week boot camp, Appellee and SN JM maintained a proper company commander-recruit relationship. J.A. at 36-38. Toward the end of training, Appellee began to transition his relationship with his recruits from that of drill instructor to peer, telling members of November Company, including SN JM, that the "doors on my house are-are open." J.A. at 38. Before graduating from boot camp, SN JM gave his phone number to Appellee. J.A. at 39.

After graduation, SN JM was assigned to Coast Guard Station Cape May, located across the street from the training center. R. at 150. On 11 November 2007, after several phone conversations, Appellee invited SN JM to his off-base residence to watch a boxing match. J.A. at 41. SN JM thought the invitation was a chance for him to begin a friendship with Appellee. R. at 152. Appellee picked SN JM up at his barracks and drove back to Appellee's residence. J.A. at 42. At the house, SN JM enjoyed dinner with Appellee and Appellee's family, played video games, and watched the boxing match. J.A. at 43. Throughout the evening, both Appellee and SN JM consumed a significant amount of alcohol. J.A. at 44-45. After Appellee's family retired to their second-floor bedrooms, Appellee and SN JM were left alone in the family room. J.A. at 59. After making a bed for SN JM, Appellee removed SN JM's pants and performed oral sex on him.

J.A. at 59. SN JM was awake the entire time, and Appellee peformed oral sex on SN JM for about one minute. *Id.* At no point during the oral sex did SN JM object to Appellee's actions. J.A. at 71. After a minute of receiving oral sex from Appellee, SN JM said, "this is wrong." J.A. at 59. Appellee immediately stopped performing oral sex on SN JM, left the room, and went to his own bedroom. *Id.*

At trial, Appellee entered a plea of guilty to the charge of consensual sodomy. R. at 23. During the providence inquiry, the military judge described the offense of sodomy in accordance with the *Manual for Courts-Martial (MCM)* (2008 ed.), Pt. IV, ¶ 51b. However, the military judge also instructed Appellee on definitions of "prejudicial to good order and discipline" and "conduct of a nature to bring discredit upon the Armed Forces." J.A. at 55-57. Following these definitions, the military judge asked Appellee several questions about his conduct. J.A. at 57-61. During this questioning, the military judge and defense counsel engaged in a colloquy involving the constitutional requirements for a conviction under Article 125. J.A. at 62-64. The military judge did not explain the significance of his discussion with defense counsel, nor did the military judge ask Appellee whether he understood the relevance of the added element. J.A. at 55-61.

Summary of Argument

Article 125, UCMJ is unconstitutional as applied to Appellee's conduct. Appellee's conviction involved consensual oral sex between Appellee and a 23-year old friend, which occurred off-base in Appellee's personal residence. Furthermore, Appellee and SN JM were not in the same chain of command. Appellee's actions were not prohibited by any Coast Guard regulations. The record cannot support the conclusion that Appellee's conduct fell outside constitutionally protected liberty interests, and the charge must therefore be dismissed.

Even if this Court finds that Appellee's conduct fell outside a protected liberty interest, Appellee's plea to the charge of consensual sodomy was not provident. In *United States v. Hartman,* 69 M.J. 467 (C.A.A.F. 2011), this Court established a clear standard: when a servicemember attempts to plead guilty to charges that may implicate constitutionally protected conduct, the military judge has an affirmative duty to ask questions to the accused using lay terminology to ensure the accused's understanding of the difference between constitutionally protected behavior and criminal conduct. In this case, the military judge did not explain this critical distinction to Appellee. The record cannot establish that Appellee was pleading guilty because he believed his conduct was outside the scope of constitutionally protected sexual conduct.

Accordingly, this Court cannot view Appellee's plea as provident and must affirm the decision of the Coast Guard Court of Criminal Appeals.

Argument

I. Article 125 of the UCMJ Is Unconstitutional as Applied to Appellee's Conduct.

Standard of Review

Whether Article 125 is constitutional as applied to Appellee's conduct is a legal question, reviewed *de novo*. *United States v. Marcum*, 60 M.J. 198, 202-03 (C.A.A.F. 2004).

Discussion

In *United States v. Marcum,* this Court addressed the constitutionality of prosecutions involving sodomy under Article 125, UCMJ in the aftermath of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a Texas statute criminalizing certain intimate sexual conduct between two persons as violating the constitutional right to liberty under the Due Process Clause). In *Marcum*, this Court established a tripartite framework to ensure convictions involving consensual sodomy charged under Article 125 were constitutional as applied to an accused servicemember's conduct. Under this framework, this Court asked:

> First, was the conduct. . .of a nature to bring it within the liberty 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?

Marcum, 60 M.J. at 206-07.

Every one of these considerations favors Appellee.

A. Appellee's Conduct Was Within the Liberty Interest Identified by the Supreme Court in *Lawrence*.

Appellee's conduct clearly falls within the liberty interest identified in *Lawrence*. Under the first prong of the *Marcum* analysis, this Court asks whether Appellee's conduct was of a nature to bring it within the *Lawrence* framework. Namely, did Appellee's conduct involve private, consensual sexual activity between adults? *Marcum*, 60 M.J. at 207. Here, Appellee's conduct clearly falls within the *Lawrence* framework because the sexual acts were consensual, occurred while off-duty, and took place in the privacy of his off-base home. Accordingly, Appellee's actions satisfy the first prong of the *Marcum* inquiry.

B. Appellee's Conduct Does Not Involve Any Factor Identified As Outside of the *Lawrence* Analysis.

The conduct for which Appellee was found guilty does not involve any factor that would place it outside the *Lawrence* analysis. In its holding, the *Lawrence* court specifically excluded conduct that involved minors, public conduct, prostitution or coercion. *See Marcum*, 60 M.J. at 203.

Appellee's conduct did not involve minors, public acts, or prostitution.

Furthermore, contrary to the Government's assertions, the record demonstrates that SN JM as a person not easily coerced. SN JM was a 23-year old man who had worked in construction prior to joining the Coast Guard. R. at 146. He was not a recent high-school graduate away from home for the first time. *Id.* SN JM sought Appellee out as a friend by giving Appellee his telephone number. SN JM had multiple phone conversations with Appellee before accepting an invitation to Appellee's home to watch a boxing match. SN JM was excited at the prospect of becoming friends with Appellee. R. at 152. At the time Appellee engaged in a consensual sexual act with SN JM, the two were no longer in the same chain of command. This is a key factor that the Coast Guard Court of Criminal Appeals found to satisfy the *Lawrence* analysis. *United States v. Smith,* 66 M.J. 556, 561 (C.G.Ct.Crim.App. 2008), *aff'd,* 67 M.J. 371 (C.A.A.F. 2009), *cert. denied,* 131 S.Ct. 639 (2010)(finding that two cadets not within the same chain of command as within the *Lawrence* liberty interest).

Lastly, any allegation or even suggestion of force or lack of consent need not be considered because the Government withdrew and dismissed the charges encompassing those elements. R. at 107-08. *See United States v. Stirewalt*, 60 M.J. 297, 303

(C.A.A.F. 2004)(assuming without deciding that accused's conduct did not encompass behavior or factors outside the *Lawrence* analysis when defendant pled guilty to a charge of forcible sodomy by excepting out the language "by force and without consent.").

C. There Are No Specific Military Factors That Would Limit the Nature and Reach of the *Lawrence* Liberty Interest.

Finally, this case does not present any specific factors that would limit the nature and reach of the *Lawrence* liberty interest. The final prong of the *Marcum* framework asks whether there are any 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. Here, the conduct in question occurred during liberty hours in the private, off-base residence of Appellee. The consensual sexual relations between Appellee, an E-6, and his partner, an E-3, did not violate any Coast Guard policy.[1] Section 8.H of the Coast Guard Personnel Manual, COMDTINST M1000.6A (PERSMAN) outlined various forms of relationships, defining them as either "acceptable," "unacceptable," or "prohibited." *See* PERSMAN, 8.H.2.c, 8.H.2.f, 8.H.2.g. Prohibited relationships include: engaging in sexually

[1] The applicable Coast Guard instruction at the time of the conduct was the Coast Guard Personnel Manual, COMDTINST M1000.6A (PERSMAN). In September 2011, the Coast Guard divided the PERSMAN into several Commandant Instruction Manual. Guidance regarding inter-personal relationships is now located in Chapter 2 of the Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2.

intimate behavior aboard any Coast Guard vessel or in any Coast Guard controlled work place; or romantic relationships outside of marriage between commissioned officers and enlisted personnel; or personal and romantic relationships between instructors at training commands and students. PERSMAN 8.H.2.g. Unacceptable relationships are defined in the PERSMAN to include those in which the members have a supervisor and subordinate relationship; or members are assigned to the same small shore unit (fewer than 60 members); or members are assigned to the same cutter; or a relationship between chief petty officers and junior enlisted personnel; or a relationship manifested in the work environment in a way which disrupts the effective conduct of daily business. PERSMAN 8.H.2.f. Paragraph 8.H.2.d.3.c notes that resolution of an unacceptable relationship is normally administrative. PERSMAN section 8.H.6.

This Court has looked before to the Coast Guard Personnel Manual in deciding whether sexual relations between particular classes of Coast Guard members limit the application of the *Lawrence* liberty interest. *Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004)(finding that that consensual sodomy between an E-5 and an 0-2 fell outside *Lawrence* because Coast Guard regulations prohibited romantic relationships outside of marriage between commissioned officers and enlisted personnel). By contrast, the sexual conduct in this case between the Appellee and SN JM was

not prohibited by Coast Guard policy, and was certainly not criminal under the Coast Guard Personnel Manual. In fact, the Coast Guard Court of Criminal Appeals has unequivocally held that senior and junior enlisted members who engage in consensual sexual conduct cannot be held criminally liable under 10 U.S.C. § 934, Art. 134, UCMJ, since the PERSMAN unambiguously categorizes those relationships as "unacceptable" rather than "prohibited". *United States v. Daly*, 69 M.J. 549 (C.G.Ct.Crim.App. 2010) (vacated on other grounds, 69 M.J. 485 (C.A.A.F. 2011)). In interpreting the Coast Guard Personnel Manual's provision on sexual relationships between senior and junior enlisted members, the Coast Guard court stated, "we interpret PERSMAN [Chapter] 8.H. as giving servicemembers notice of the *noncriminality of unacceptable relationships* for purposes of Article 134." *Id.* at 553 (emphasis added). This Court recognized a bright line distinction between prohibited and unacceptable relationships for the purposes of criminal liability. Id. at 552-53.

In this case, Appellee's and SN JM's conduct was neither prohibited nor unacceptable as defined by Coast Guard regulations. The actions were consensual, between two enlisted Coast Guard members, and did not occur aboard a Coast Guard vessel or in a Coast Guard controlled workspace. Furthermore, the behavior was not between an instructor and a student because

SN JM had graduated from boot camp and was no longer attached to the training center command.

Even if this Court considers this conduct unacceptable relationship, it cannot deem Appellee's conduct outside of the *Lawrence* protection because the relevant conduct is not criminal within the Coast Guard. *See Daly*, 69 M.J. at 549. Since the Appellee's consensual sexual act in and of itself could not be the basis for a criminal conviction in the Coast Guard under Article 134 or any adverse administrative matter under the PERSMAN, there is no basis to use the same conduct to justify a criminal conviction under the third *Marcum* prong. By employing the same analysis and examination of applicable Coast Guard regulations in the present case, this Court must conclude that Article 125 is unconstitutional as applied to Appellee's conduct.

II. Even If Article 125, UCMJ Is Constitutional As Applied To Appellee's Conduct, This Court Cannot View Appellee's Plea As Provident.

Standard of Review

The standard for reviewing a military judge's decision to accept a plea of guilty is an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 321. A military judge abuses his discretion if he accepts a guilty plea without an adequate factual basis to support the plea. *Id.* In contrast, the

military judge's determinations of law arising during or after the plea inquiry are reviewed *de novo*. *Id.*

Discussion

A. The Military Judge Was Required to Follow the Providence Inquiry Requirements of *United States v. Hartman* because the Charged Offense of Consensual Sodomy May Implicate Both Criminal and Constitutionally Protected Conduct.

For a guilty plea to be provident, the accused must be convinced of, and be able to describe, all of the facts necessary to establish guilt. Rule for Courts-Martial 910(e) discussion. In order to establish an adequate factual basis for a guilty plea, the military judge must elicit facts from the accused himself that objectively support the plea. *United States v. O'Connor,* 58 M.J. 450, 453 (C.A.A.F. 2003)(citing *United States v.Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Further, "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.'" *Hartman,* 69 M.J. at 468 (quoting *O'Connor*, 58 M.J. at 453). In these circumstances, a guilty plea may be accepted only if there exists an appropriate discussion and acknowledgment on the part of the accused of the critical distinction between constitutionally protected, and criminally prohibited behavior. *Hartman,* 69 M.J. at 468. Therefore, providence inquiries

involving consensual sodomy charges under Article 125, UCMJ must elicit facts that ensure a constitutional conviction: one that satisfies the *Marcum* framework.

Even when facts elicited during the providence inquiry indicate that an accused's behavior falls outside of constitutional protection, *Hartman* providence inquiry requirements still apply. *See Hartman,* 69 M.J. at 469; *see also United States v. Anderson,* 2012 WL 1077463 at *3 (A.F.Ct.Crim.App. Mar. 2, 2012). In *Hartman*, when responding to the military judge's questions, the accused revealed that the consensual sodomy occurred aboard a U.S. Navy facility with a member of the accused's ship and that a third shipmate was present in the room at the time of the incident. 69 M.J. at 469. While these facts clearly established that the accused's conduct fell outside of *Lawrence* protections, this Court unanimously concluded that the accused's plea to the consensual sodomy charge was not provident because the military judge failed to explain to the accused the significance of the supplemental questions. *Id.*

The service courts have taken a similar approach in following this Court's guidance in *Hartman.* For instance, in *Anderson, the* Air Force Court of Criminal Appeals applied *Hartman* in a consensual sodomy case where the accused admitted during his providence inquiry to receiving oral sex from a co-

worker while he was on duty onboard Charleston Air Force Base. *Anderson,* 2012 WL 1077463 at *1. Based on these facts, the Air Force court noted that Article 125, UCMJ is "clearly constitutional as applied to appellant's conduct." *Id.* at *5. Although the providence inquiry elicited facts relevant to the *Marcum* framework, the court nevertheless set aside and dismissed the accused's consensual sodomy conviction because "the discussion between the military judge and the appellant did not establish the appellant's understanding of the significance of these facts relative to the criminal nature in light of *Lawrence* and *Marcum.*" *Id.* at *4.

In this case, as in *Hartman* and *Anderson,* Appellee pled guilty to the charge of consensual sodomy, implicating both criminal and constitutionally protected conduct. As in *Hartman* and *Anderson,* Appellee's conduct would have to fall outside of a protected liberty interest in order for Article 125, UCMJ to be constitutional as applied to Appellee's conduct. However, like the failed providence inquiry in *Hartman*, and the failed providence inquiry in *Anderson*, Appellee's plea cannot be viewed as provident because the military judge failed to conduct a satisfactory dialogue with Appellee in order to establish Appellee's personal understanding of the criminality of his conduct.

However, the Government argues that *Hartman* does not apply to sexual behavior that does not fall under the second (or first) prong of the *Marcum* test. Appellant's Br. at 19. This argument misinterprets this Court's mandate. *Hartman* requires that when a charge on its face *may* implicate constitutionally protected conduct, the military judge is required to engage the accused in a discussion which explains the critical differences between constitutionally protected and criminal behavior. *Hartman,* 69 M.J. at 468. Here, the charge of consensual sodomy on its face may implicate constitutionally protected conduct. Thus, the military judge was required to enter into an inquiry with Appellee to establish whether Appellee's conduct fell outside *Lawrence* protections and whether Appellee understood the difference between protected and criminal behavior.

B. Appellee's Guilty Plea to Consensual Sodomy Was Not Provident because the Military Judge Failed to Establish Appellee's Personal Understanding of the Criminality of His Conduct.

When an accused pleads guilty to the charge of consensual sodomy, this Court explicitly requires a discussion between the military judge and the accused that contains an acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior. *Hartman,* 69 M.J. at 468. (citing *United States v. Care,* 18 C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969) and Rule for Courts-Martial 910). Questions

that only elicit facts that pertain to the *Marcum* factors do not satisfy the requirements of *Care* and R.C.M. 910. *Hartman,* 69 M.J. at 468.

Hartman requires the military judge to explain to the accused the significance of these questions. *Id.* The military judge must ask the accused whether he understands the relationship of the questions and answers with respect to the distinction between constitutionally protected behavior and criminal conduct. *Id.* at 469. A discussion between counsel and the military judge regarding legal theory and practice, where the accused is a mere bystander, is not sufficient. *Id.* Thus, a guilty plea to the charge of consensual sodomy will be viewed as provident only when the discussion between the military judge and an accused includes an explanation to the accused of the significance of the *Marcum* factors, and an acknowledgment from the accused concerning the understanding of those supplemental questions and the issue of criminality. *Id.*

1. The military judge did not explain to nor discuss with Appellee why his conduct may have been outside the bounds of constitutionally protected conduct.

Here, Appellee's providence inquiry is similar to the inadequate providence inquiry in *Hartman.* As in the failed inquiry in *Hartman,* the military judge in this case began the inquiry by providing the definition of the elements of sodomy as outlined in the *Manual for Courts-Martial, United States* (MCM)

(2008 ed.), Pt. IV, ¶ 51b. J.A. at 55. However, unlike *Hartman*, the military judge appears to have added an additional element to the offense by instructing Appellee on the element of prejudicial to good order and discipline. J.A. at 55-56. In its opinion, the Coast Guard court acknowledged that this was an effort to "take the conduct outside the liberty interest described in *Lawrence v. Texas,* as applied to the military in *United States v. Marcum*, and *United States v. Stirewalt*." *United States v. Medina,* No. 1325, (C.G.Ct.Crim.App. 2012), J.A. at 3. However, after reviewing the stipulation of fact with Appellee, the military judge finally asked Appellee to explain, "why this consensual sodomy was prejudicial to good order and discipline, or Service-discrediting?" J.A. at 64. To which Appellee answered simply, "because I was an E-6 and he was an E-3, and I was his former Company Commander, Sir." *Id.*

This colloquy does not satisfy *Hartman* for two reasons. First, the military judge failed to explain to Appellee the significance of the questions. Second, the military judge failed to ask Appellee whether he understood the relationship of these questions and answers to the distinction drawn in *Lawrence* and *Marcum*. The Coast Guard court acknowledged these failings:

> [t]he military judge did not explain to or discuss with Appellant why his particular conduct was of such a nature that it fell outside the bounds of a constitutionally protected liberty

> interest. Although the military judge indirectly touched on the fact that Appellant's sexual acts with someone who had recently been a "boot" under his charge as a company commander could potentially override the liberty interest, there was no further explanation beyond a bare inquiry into the existence of the former company commander relationship and the E-6/E-3 grade differential.

J.A. at 5.

The military judge failed to conduct a satisfactory plea inquiry regarding the charge of consensual sodomy. Not only did the military judge fail to establish Appellee's understanding of the criminality of his conduct, he further confused the inquiry by adding an element to the crime without explaining the reasoning to Appellee. As discussed above, the facts elicited do not even establish that Appellee's conduct fell outside constitutionally protected conduct. This would require additional inquiry to establish the baseline criminality of Appellee's conduct. For these reasons, this Court cannot view Appellee's plea to consensual sodomy as provident.

> 2. A discussion between the military judge and defense counsel about legal theory and practice, where Appellee is a mere bystander, does not meet the requirements of a satisfactory plea inquiry.

Trial defense counsel's acknowledgement on the record of *his* understanding of the *Marcum* factors does not change the analysis. "The fundamental requirement of plea inquiry under

Care and R.C.M. 910 involve a dialogue in which the military judge poses questions about the nature of the offense and the *accused* provides answers that describe his *personal understanding* of the criminality of his or her conduct." *Hartman,* 69 M.J. at 469 (emphasis added). During the providence inquiry in *Hartman*, trial counsel and the military judge engaged in a discussion on the record about *Lawrence* and *Marcum*. Directly after this discussion, at trial counsel's request, the military judge posed questions to the accused in an attempt to elicit facts to establish the criminality of the accused's conduct. *Id.* This Court refused to accept this colloquy as sufficient, noting, "[a] discussion between trial counsel and the military judge about 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." *Id.*

Here, Appellee's providence inquiry is again factually similar to the flawed inquiry in *Hartman*. During the inquiry, Appellee's trial defense counsel objected to the line of questioning from the military judge. J.A. at 62. In discussing the objection, defense counsel noted, "we understand the - the factors for the *Marcum* inquiry . . . I understand the court needs to meet those factors, and get us within the realm of that, and away from the Supreme Court decision." *Id.* In

response to trial defense counsel's comment, the military judge offered, in his own words, a "ridiculous example" of constitutionally permissible behavior. *Id.* The military judge did not explain the meaning of the *Marcum* factors with Appellee, nor did he explain to Appellee the significance of the questions or hypothetical. Moreover, he provided only a "ridiculous example" based on his discussions with trial defense counsel. This dialogue does not even come close to satisfying this Court's requirement of the military judge to employ "lay terminology" to establish an accused's understanding of the criminality of his conduct. *Hartman,* 69 M.J. at 469.

In its brief, the Government argues that *Hartman* stands for the limited holding that a discussion between *trial counsel* and the military judge in which an accused is a bystander is unsatisfactory. Appellant's Br. at 26. This argument is flawed in that it contorts the basic requirements of a plea inquiry under *Care* and R.C.M. 910. Before a military judge accepts an accused's guilty plea, he must have a dialogue with *the accused* where *the accused* describes his personal understanding of the criminality of the conduct. The accused cannot stand silent while the attorneys in the courtroom discuss issues of constitutional law. *Hartman* stands for the clear proposition that the record must contain the understanding from the accused, not trial *or* defense counsel, of the accused's understanding of

the criminality of his conduct. Such an understanding is not obtained by a "hornbook review of the legal distinction between permissible and impermissible sodomy." Appellant's Br. at 20. But rather, a simple dialogue between the military judge and the accused in which the military judge employs lay terminology to establish an understanding by the accused as to the criminality of his actions. *Hartman,* 69 M.J. at 469. This simple dialogue did not occur in Appellee's case, and therefore, this Court cannot view Appellee's plea as provident.

Conclusion

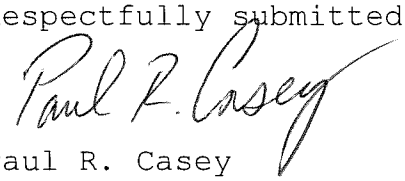
Article 125, UCMJ is unconstitutional as applied to Appellee's conduct. The sexual activity involved private, consensual oral sex in the privacy of Appellee's off-base home. Contrary to Appellant's assertions, Appellee's partner was not easily coerced. He was a 23 year-old man who had joined the Coast Guard after several years of work experience, and who desired to establish a friendship with Appellee. The fact that Appellee and SN JM previously had a trainer-trainee relationship does not establish that SN JM was a person who was "easily coerced." Furthermore, Coast Guard regulations did not prohibit Appellee and SN JM's relationship. As a result, Appellee's conviction for consensual sodomy is unconstitutional.

Even if this Court finds Article 125, UCMJ constitutional as applied to Appellee's conduct, this Court must find his plea

to Article 125 improvident. In plea inquiries involving charges that may implicate both constitutionally protected and criminal behavior, such as consensual sodomy, this Court requires the military judge to ask an accused questions, using lay terminology, to establish the accused's understanding between the critical distinction between protected and criminal behavior. The military judge failed to do so in this case.

Therefore, Appellee respectfully requests that this Court affirm the decision of the Coast Guard Court of Criminal Appeals.

Respectfully submitted,

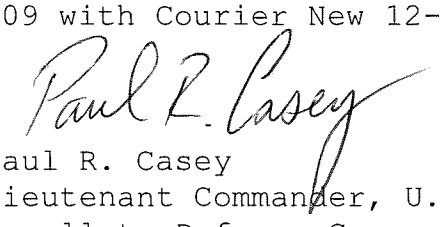


Paul R. Casey
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
CAAF Bar No. 35353
Commandant (CG-2)
2100 Second St., S.W.
Washington, D.C. 20593
(202)372-2714
Paul.R.Casey@uscg.mil

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because it contains 4,627 words.

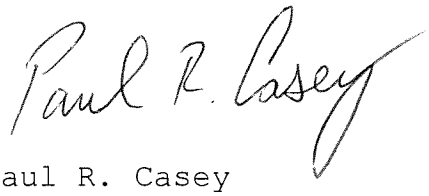
2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a monospaced typeface using Microsoft Word Version 2009 with Courier New 12-point typeface.



Paul R. Casey
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
CAAF Bar No. 35353
Commandant (CG-2)
2100 Second St. S.W.
Washington, D.C. 20593
(202)372-2714
Paul.R.Casey@uscg.mil

CERTIFICATE OF FILING AND SERVICE

I certify that foregoing was delivered on 22 January 2013 via electronic means to the United States Court of Appeals for the Armed Forces at efiling@armfor.uscourts.gov and that a copy of the foregoing was transmitted by electronic means with the consent of counsel for the government, LCDR Vasilios Tasikas, on 22 January 2013.



Paul R. Casey
Lieutenant Commander, U.S. Coast Guard
Appellate Defense Counsel
CAAF Bar No. 35353
Commandant (CG-2),
2100 Second St., S.W.,
Washington, D.C. 20593
(202)372-2714
Paul.R.Casey@uscg.mil

APPENDIX A

Coast Guard Personnel Manual, COMDTINST M1000.6, Chapter 8.H

8.H. Interpersonal Relationships within the Coast Guard

8.H.1. General

8.H.1.a. Coast Guard Values

The Coast Guard attracts and retains highly qualified people with commonly shared values of honor, respect and devotion to duty. These values anchor our cultural and Service norms and serve as a common foundation for our interpersonal relationships within the Coast Guard.

8.H.1.b. Mission Success

We interact, communicate and work together as teams to accomplish our missions. Indeed, mission success depends on cultivating positive, professional relationships among our personnel. An environment of mutual respect and trust inspires teamwork, assures equal treatment, and grants Service members the opportunity to excel.

8.H.1.c. Leadership and Military Discipline

Professional interpersonal relationships always acknowledge military rank and reinforce respect for authority. Good leaders understand the privilege of holding rank requires exercising impartiality and objectivity. Interpersonal relationships which raise even a perception of unfairness undermine good leadership and military discipline.

8.H.1.d. Custom and Tradition

The Coast Guard has relied on custom and tradition to establish boundaries of appropriate behavior in interpersonal relationships. Proper social interaction is encouraged to enhance unit morale and esprit de corps. Proper behavior between seniors and juniors, particularly between officers and enlisted personnel, enhances teamwork and strengthens respect for authority.

8.H.1.e. Officers and Senior Enlisted

By long standing custom and tradition, commissioned officers, including warrant officers, have leadership responsibilities extending across the Service. Likewise, chief petty officers (E-7 to E-9) have a distinct leadership role, particularly within their assigned command. Both provide leadership not just within the direct chain of command, but for a broader spectrum of the Service. Due to these broad leadership responsibilities, relationships involving officers or chief petty officers merit close attention.

8.H.2. Policy

8.H.2.a. Professional Work Environment

Coast Guard policy is to sustain a professional work environment which fosters mutual respect among all personnel, and in which decisions affecting personnel, in appearance and actuality, are based on sound leadership principles. Commanding Officers, officers-in-charge, and supervisors are expected to provide an environment which enhances positive interaction among all personnel through education, human relations training, and adherence to core values.

8.H.2.b. Positive Social Interaction

Coast Guard policy on interpersonal relationships has been crafted to be as gender-neutral as possible. However, this approach may obscure one important issue: the fundamental principle that interpersonal activities which are appropriate among men or among women are likewise appropriate among men and women. Positive social interaction among men has proved beneficial to the individuals and the organization in the past, and women should be afforded equal opportunity to participate in these activities. Women must not be insulated or isolated from proper professional and social activities if the Coast Guard is to benefit from the full measure of their contributions.

8.H.2.c. Acceptable Personal Relationships

As people work together, different types of relationships arise. Professional relationships sometimes develop into personal relationships. Service custom recognizes that personal relationships, regardless of gender, are acceptable provided they do not, either in actuality or in appearance:

1. Jeopardize the members' impartiality,
2. Undermine the respect for authority inherent in a member's rank or position,
3. Result in members improperly using the relationship for personal gain or favor, or
4. Violate a punitive article of the UCMJ.

8.H.2.d. Assessing the Propriety

The great variety of interpersonal relationships precludes listing every specific situation that members and commands may encounter. While some situations are clearly discernible and appropriate action is easily identified, others are more complex and do not lend themselves to simple solutions. Evaluating interpersonal relationships requires sound judgment by all personnel. Factors to consider in assessing the propriety of a relationship include:

1. The organizational relationship between the individuals: whether one member can influence another's personnel or disciplinary actions, assignments, benefits or privileges;

2. The relative rank and status of the individuals: peers, officer and enlisted, CPO and junior enlisted, supervisor and subordinate, military and civilian, instructor and student; and

3. The character of the relationship; e.g., personal, romantic, marital.

   a. Personal relationship: Non-intimate, non-romantic association between two or more people (of the same gender or not), such as occasional attendance at recreational or entertainment events (movies, ball games, concerts, etc.) or meals. (Does not involve conduct which violates the UCMJ.)

   b. Romantic relationship: Cross-gender sexual or amorous relationship. (Does not involve conduct which violates the UCMJ.)

   c. Unacceptable relationship: Inappropriate and not allowed under Service policy. Resolution normally administrative. Relationship must be terminated or otherwise resolved once recognized.

   d. Prohibited relationship: Violates the UCMJ. Resolution may be either administrative, punitive, or both as circumstances warrant.

   Exhibit 8.H.1 contains a matrix depicting common interpersonal relationships.

8.H.2.e. Violation of Service Policy

Relationships cross gender lines, can develop into romantic relationships, and even lead to marriage. A relationship, including marriage, does not violate Service policy unless the relationship or the members' conduct fails to meet the standards set by this section, standards of conduct set by the Uniform Code of Military Justice (UCMJ), or other regulations.

8.H.2.f. Unacceptable Romantic Relationships

Romantic relationships between members are unacceptable when:

1. Members have a supervisor and subordinate relationship (including periodic supervision of duty section or watchstanding personnel), or

2. Members are assigned to the same small shore unit (less than 60 members), or

3. Members are assigned to the same cutter, or

4. The relationship is between chief petty officers (E-7/8/9) and junior enlisted personnel (E-4 and below), or

5. The relationship is manifested in the work environment in a way which disrupts the effective conduct of daily business.

The nature of operations and personnel interactions on cutters and small shore units makes romantic relationships between members assigned to such units the equivalent of relationships in the chain of command and, therefore, unacceptable. This policy applies regardless of rank, grade, or position. This policy applies to Reservists in an active status, whether or not on duty.

8.H.2.g. Prohibited Relationships

Coast Guard policy prohibits the following relationships or conduct, regardless of rank, grade, or position of the persons involved:

1. Engaging in sexually intimate behavior aboard any Coast Guard vessel, or in any Coast Guard-controlled work place,

2. Romantic relationships outside of marriage between commissioned officers and enlisted personnel. For the purposes of this paragraph, Coast Guard Academy cadets and officer candidates (both OCS and ROCI) are considered officers.

3. Personal and romantic relationships between instructors at training commands and students.

This provision is a punitive general regulation, applicable to all personnel subject to the Uniform Code of Military Justice without further implementation. A violation of this provision is punishable in accordance with the UCMJ.

8.H.2.h. Family Relationships

Service members married to Service members, or otherwise closely related; e.g., parent and child, siblings, etc., shall maintain requisite respect and decorum attending the official military relationship between them while either is on duty or in uniform in public. Members married to members or otherwise closely related shall not be assigned in the same chain of command.

8.H.3. Examples of Acceptable and Unacceptable Relationships and Conduct

8.H.3.a. Acceptable Relationships

Examples of acceptable personal relationships:

1. Two crewmembers going to an occasional movie, dinner, concert, or other social event.

2. Members jogging or participating in wellness or recreational activities together.

8.H.3.b. Unacceptable Relationships

Examples of unacceptable relationships:

1. Supervisors and subordinates in private business together.

2. Supervisors and subordinates in a romantic relationship.

8.H.3.c. Unacceptable Conduct

Examples of unacceptable conduct:

1. Supervisors and subordinates gambling together.

2. Giving or receiving gifts, except gifts of nominal value on special occasions.

3. Changing duty rosters or work schedules to the benefit of one or more members in a relationship when other members of the command are not afforded the same consideration.

8.H.4. Fraternization

8.H.4.a. Definition

Fraternization describes the criminal prohibition of certain conduct between officer and enlisted personnel set out in the UCMJ. Interpersonal relationships between officer and enlisted personnel and fraternization are not synonymous. Fraternization does not apply exclusively to male-female relationships, but a much broader range of inappropriate conduct. (While not an exhaustive listing, ☛ paragraph 8.H.3.) The elements of the offense of fraternization specified in the Manual for Courts-Martial are:

1. The accused is a commissioned or warrant officer, and

2. The accused officer fraternized on terms of military equality with one or more enlisted members in a certain manner, and

3. The accused knew the person to be an enlisted member, and

4. The association violated the custom of the Service that officers shall not fraternize with enlisted members on terms of military equality, and

5. That, under the circumstances, the conduct of the member was prejudicial to good order and discipline in the Armed Forces, or was of a nature to bring discredit upon the Armed Forces.

8.H.4.b. Personal Relationships Between Officer and Enlisted

The custom of the Service accepts personal relationships between officer and enlisted personnel, regardless of gender, if they do not violate the provisions of 8.H.2.c. Relationships in conflict with those provisions violate the custom of the Service.

8.H.4.c. Romantic Relationships Between Officer and Enlisted

The custom of the Service prohibits romantic relationships outside of marriage between officer and enlisted personnel. This includes such relationships with members of other military services. Officer and enlisted romantic relationships undermine the respect for authority which is essential for the Coast Guard to accomplish its military mission.

8.H.4.d. Marriage Between Officer and Enlisted

The custom of the Service accepts officer and enlisted marriages which occur before the officer receives a commission. Lawful marriage between an officer and enlisted service member does not create a presumption of misconduct or fraternization. However, misconduct, including fraternization, is neither excused nor mitigated by subsequent marriage.

8.H.5. Responsibility

8.H.5.a. Primary Responsibility

All personnel are responsible for avoiding unacceptable or prohibited relationships. Primary responsibility rests with the senior member. Seniors throughout the chain of command shall attend to their associations and ensure they support the chain of command, good order and discipline.

8.H.5.b. Early Resolution

Personnel finding themselves involved in or contemplating unacceptable relationships should report the situation and seek early resolution from their supervisor, commanding officer, officer in charge, command enlisted advisor, or Coast Guard chaplain. Any potential conflict with Coast Guard policy should be addressed promptly. Commands are expected to assist members in understanding Coast Guard policy requirements and resolving conflicts. Bringing an unacceptable relationship to early Command attention will increase the opportunity for early, positive resolution.

8.H.5.c. Commanding Officer Responsibility

Coast Guard Regulations Manual, COMDTINST M5000.3 (series) specifically charge commanding officers and officers-in-charge with responsibility for their command's safety, efficiency, discipline, and well-being. They should take prompt, appropriate action to resolve conduct which does not comply with the provisions of this section.

8.H.5.d. Academy and Training Center Staff

Interpersonal relationships involving Academy and Training Center staff and students are particularly susceptible to abuse by the senior member. The Superintendent of the Academy and commanding officers of training commands may issue local directives further restricting or prohibiting such relationships as they deem appropriate. The Superintendent of the Academy may issue supplemental regulations addressing cadet relationships, including when cadets are in training situations aboard other Coast Guard units.

8.H.5.e. Violation by Commanding Officer

If a member's superior or immediate commanding officer is the subject of a report of misconduct under this article, procedures outlined in Section 9-2-2, COMDTINST M5000.3 (series), (Oppression or Other Misconduct by a Superior) shall be followed.

8.H.6. Resolving Unacceptable Relationships

8.H.6.a. General

Avoiding unacceptable personal relationships is in the best interest of all concerned. Training, counseling, and administrative actions help prevent unacceptable personal relationships or minimize detrimental effects when unacceptable relationships develop. Prompt resolution at the lowest level possible is desirable.

8.H.6.b. Training

Avoiding unacceptable and prohibited interpersonal relationships requires that personnel clearly understand Coast Guard policy and its application. The unit training program is an ideal forum to accomplish this. Training on "FRATERNIZATION AND INTERPERSONAL RELATIONSHIPS" shall be conducted at all officer and enlisted accession points and at resident training courses; e.g., leadership school, "A" and "C" Schools, etc. Training at other units is strongly encouraged.

8.H.6.c. Counseling

Early counseling often can resolve potential concerns about the characteristics of a relationship and appropriate actions to ensure the relationship develops in a manner consistent with Service custom. Counseling may be informal or more formal, including written documentation by Administrative Remarks, Form CG-3307 or an Administrative Letter of Censure (☛ Article 8.E.4.). Counseling may include a direct order to terminate a relationship.

8.H.6.d. Personnel Reassignment

Members may request or a command may recommend reassignment of a member involved in a questionable relationship. However, reassignment is not a preferred option. The Coast Guard is not obligated to reassign personnel due to members' desires or based solely on a relationship. When reassignment is not an option, members may be directed to end a relationship.

8.H.6.e. Evaluations

When members do not respond favorably to counseling, comments and marks in officer and enlisted evaluations may be appropriate.

8.H.6.f. Other Administrative Actions

As warranted, commands may recommend separation, removal or withdrawal of advancement recommendations, appointment to another status, or promotions. ☛ Chapter 12 for additional administrative actions which may be considered.

8.H.6.g. Disciplinary Action

Non-judicial punishment or courts-martial may address fraternization or other unlawful or prohibited relationships or conduct.

8.H.7. Action

Commanding officers and officers in charge are responsible for ensuring that all members of their commands are familiar with these provisions.

Interpersonal Relationships

Organizational Relationship	Character of Relationship				
	Personal	Romantic			Married/Family
Separate Units	1-4	1-2	3	4	1-4
	A	A	U	P	A
Same Large Shore Unit or Co-Located Units	1-4	1-2	3	4	1-4
	A	A	U	P	A
Same Chain of Command, Same Afloat Unit, Small Shore Unit	1-4	1-2	3	4	1-4
	A	U	U	P	U (for assignment purposes)

Legend:

Member Status:

1. Peers: (Very similar in rank or position, e.g., officers; CPOs; POs; non-rated personnel; etc.)
2. Military and Civilian CG employee
3. CPO and Junior Enlisted (E-4 and below)
4. Officer (including cadets and officer candidates) and Enlisted

Character of Relationship:

Personal: Non-intimate, non-romantic associations between two or more people (of the same gender or not), e.g. occasional attendance at recreational or entertainment events (movies, ball games, concerts, etc.) or meals. (Does not include conduct which constitutes fraternization.)

Romantic: Cross-gender sexual or amorous relationship. (Does not include conduct which violates the UCMJ.)

Married/Family: Service members married to service member, or otherwise closely related; e.g., parent and child, or siblings, etc.

Service Policy:

A = Acceptable: Permissible provided conduct meets Service standards. (☛ Article 8.H.2.c.)

U = Unacceptable: Inappropriate; not allowed under Service policy. Relationship must be terminated or otherwise resolved once recognized. Resolution is normally administrative.

P = Prohibited: The relationship violates the UCMJ.