

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES

Appellee

v.

ZACHARY C. ROCHA

Airman (E-2)

U. S. Air Force

Appellant

**BRIEF ON BEHALF OF THE
NATIONAL INSTITUTE OF
MILITARY JUSTICE AS
AMICUS CURIAE**

Crim. App. Dkt. No. ACM 40134

USCA Dkt. No. 25-0157/AF

**TO THE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES:**

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Issues Presented

I.

DID THE AIR FORCE COURT OF CRIMINAL APPEALS FAIL TO FOLLOW THIS COURT'S REMAND INSTRUCTION BY ANALYZING THE PURPORTED *LAWRENCE V. TEXAS* LIBERTY INTEREST AS "MASTURBATION IN SOLITUDE, IN SECRET, AND IN PRIVATE," INSTEAD OF "PRIVATELY ENGAG[ING] IN SEXUAL ACTIVITY WITH A CHILDLIKE SEX DOLL"?

II.

DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR IN ITS APPLICATION OF *LAWRENCE V. TEXAS* AND *UNITED STATES V. MARCUM*, TO FIND APPELLEE'S CONVICTION FACTUALLY INSUFFICIENT?

INTEREST OF THE AMICUS

The National Institute of Military Justice (NIMJ) is a private, non-profit organization dedicated to promoting the fair administration of justice in the armed forces and increasing public understanding of the military justice system. Established in 1991, NIMJ has consistently advocated for reforms that enhance clarity, consistency, and fairness in military justice. Since this case involves key issues at the core of its mission, it holds significant interest for NIMJ. Ambiguity and inconsistency in military law can weaken both command effectiveness

and the protection of constitutional rights for those who volunteer to serve. Service members deserve legal protections that are clear, consistent, and constitutionally sound. NIMJ respectfully submits this brief to support that principle.

Consistent with C.A.A.F. R. 26(b)(4), Amicus requests leave of the Court to file the attached brief.

SUMMARY OF THE ARGUMENT

This Court should update and overrule the framework outlined in *United States v. Marcum* for the application of unenumerated substantive due process rights announced by the Supreme Court.¹ This is a significant issue presenting a vexing confrontation between civilian constitutional jurisprudence and the needs of a military community: how should the so-called “Privacy Cases” apply to the military? The current framework—created just one year after *Lawrence*—is unworthy of its important task.² Experience with its application in the service courts, moreover, shows that it has failed to provide clarity and workability.

¹ *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

While *Marcum* seems to establish only a test for applying the *Lawrence*-specific liberty interest, the Court noted that this interest falls under the broader category of “substantive due process” privacy rights, such as those recognized in cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965); 60 M.J. at 203. It is reasonable to view *Marcum* as the only existing test for all substantive due process privacy rights.

In *Marcum*, this Court announced a three-part framework to consider whether *Lawrence's*³ application in individual cases is constitutional. While the framework attempts to reconcile individual liberty with the unique demands of military service, in practice it fails to provide clear, consistent protection.

The first two prongs of the *Marcum* framework add little independent analytical value. The first prong essentially restates *Lawrence's* threshold question: whether the conduct at issue falls under a protected liberty interest. The second prong considers whether that interest is limited by any of the exceptions the Court discussed in *Lawrence*, such as conduct involving minors, non-consensual acts, or public behavior. Because these initial steps largely mirror the basic analysis that any court applying any case would already undertake—effectively the work of basic legal reasoning and distinguishing of case law—they do not meaningfully advance the final inquiry.

As a result, the third prong often bears most of the court's analysis—examining whether military-specific interests justify overriding or limiting a recognized liberty interest. Without further

³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

clarification from this court, which has not addressed this issue in over twenty years, the third *Marcum* prong will remain problematically vague.

At its weakest, it can serve as a vague standard that encourages inconsistency and doesn't truly address the liberty interests involved. Concepts like “unit cohesion” are often used as catch-all reasons to restrict liberty, even without specific, credible evidence of disruption or harm. This form of magic language is often used without solid evidence to back it up.

Similarly, courts sometimes treat the existence of a general order alone as sufficient to implicate military-specific concerns, thus permitting commanders to delineate the contours of constitutional rights. Such a justification is essentially circular and devoid of content. It also invites abuse and arbitrariness depending on a commanders’ whims.

To enhance clarity, consistency, and constitutional integrity in this area of law, NIMJ advocates for adopting a straightforward “totality of the circumstances” balancing test for applying privacy rights to the UCMJ. This test would effectively weigh the government’s asserted interests against the fundamental liberty interests of individual

servicemembers. Over time, a clear body of case law would develop, providing greater consistency and predictability.

Application of the above test to these facts would result in affirming the decision of the Air Force court below.

ARGUMENT

The *Marcum* framework has been a failure. It relies on circular logic and invites outcomes that neither service members nor the public can reasonably, confidently trust; with each application, more risk befalls the constitutional safeguards of service members through vague, inconsistent limitations on individual rights. In light of this, (1) the *Marcum* framework should be rejected and (2) this Court should adopt a simple balancing test to replace it. This Court addresses issues of overruling precedent under the doctrine of stare decisis.⁴ In assessing the applicability of stare decisis, the Court considers four factors: (1) whether the prior decision is unworkable or poorly reasoned; (2) any intervening events; (3) the reasonable expectations of service members; and (4) the

⁴ *United States v. Blanks*, 77 M.J. 239, 242-42 (C.A.A.F. 2018).

risk of undermining public confidence in the law.⁵ We focus here on the first prong alone.

I. THE *MARCUM* FRAMEWORK SHOULD BE ABANDONED

A. Marcum's First & Second Steps Add No Analytic Value

Marcum's first and second prongs simply restate what *Lawrence* already requires: determining whether the conduct falls within protected liberty interests and whether any recognized exceptions apply.⁶ A legal framework is only as strong as its parts: if each element does not add unique, substantive value to the court's analysis, it becomes vulnerable to inconsistency, ambiguity, and unchecked overreach. The first and second prongs of the *Marcum* framework add little meaningful guidance, do not involve any military-specific considerations, and do not substantively advance the analysis. These steps effectively instruct the lower court to engage in basic threshold legal analysis (something it must already do); they ought not form explicit steps as part of a constitutional test.

⁵*Id.* at 239, 242 (quoting *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015))..

⁶ *Marcum*, 60 M.J. at 206-07.

Accordingly, courts applying the *Marcum* framework often overlook the first and second prongs, treating them as foregone conclusions rather than essential components of the analysis.⁷ Each element of a constitutional law framework must have its own independent value in the court’s analysis. Yet, the first two prongs of *Marcum* only echo *Lawrence*’s threshold questions and do not narrow the issues in dispute. Lower courts do not need this Court to tell them to engage in the basic legal reasoning of identifying and distinguishing caselaw.

B. Marcum’s Third Prong Is Too Vague And Has Been Interpreted Problematically

The lower courts need clear guidance from this Court concerning how to apply *Lawrence* in the variegated fact patterns that military criminal cases present. But the prong purportedly dedicated to this core inquiry—number three—does not rise to the occasion.

First, this Court has not provided new guidance on the meaning of the third prong in over 20 years. In *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004), this Court identified two relevant factors: (1) difference in rank and (2) service-level regulation. In 2013, this Court

⁷ See, e.g., *United States v. Stirewalt*, 60 M.J. 297, 301 (C.A.A.F. 2004) (the Court assumed without deciding that the conduct fell well within the *Lawrence* liberty interests).

suggested that inclusion of conduct in the UCMJ or in the Manual for Courts-Martial itself weighed in favor of finding that the military had an interest in regulating the conduct,⁸ but such an observation effectively punts the judicial duty to determine constitutionality to commanders. It simply provides no guidance for lower courts.

The vagueness of *Marcum*'s third prong has led to problems in the service courts. It has allowed CCAs to incant talismanic references to good order and discipline, or honor rather than engage in the hard work of determining whether conduct really affects the military. Moreover, it has allowed them to perpetuate the error of *Stirewalt* and *Goings*—the notion that the existence of a regulation or order prohibiting the conduct is itself what connects the conduct to military discipline, prioritizing obedience for its own sake, regardless of the conduct's relationship to military interests. Indeed, such an approach threatens to swallow *Marcum*'s objective of protecting service members' liberty interests in the face of regulations inconsistent with the Constitution.

⁸ *United States v. Goings*, 72 M.J. 202, 206 (C.A.A.F. 2013).

Consider first the mystique of “unit cohesion”—a concept long abused by defenders of military prerogative.⁹ This has been invoked under *Marcum*’s third prong as a catch-all rationale to limit individual liberties and criminalize conduct without requiring explicit, objective evidence that the conduct at issue genuinely harms good order and discipline. *United States v. Truss*, 70 M.J. 545, 549 (A. Ct. Crim. App. 2011) (“The military has a unique need for unit cohesion and discipline that does not necessarily exist outside of the military environment.... Appellant's act of sodomizing PFC LY in PFC LY's barracks room, *without PFC LY's consent*, not only violates the trust between soldiers, but also compromises unit cohesion and discipline.”) (emphasis added).

Similarly, *Marcum*-three’s vagueness has allowed for conceptions of “honor”—as interpreted by CCA judges—to determine the limits of constitutional liberty. *United States v. Harvey*, 67 M.J. 758, 762 (A.F. Ct. Crim. App. 2009) (“[T]he appellant's act of performing fellatio on a

⁹ “[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit’s survival in time of war.... [I]n every case I am familiar with, and there are many, whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered.” Testimony of Norman Schwartzkopf, Hearing, Senate Armed Services Committee, July 1993, available at <https://www.cmrlink.org/data/Sites/85/CMRDocuments/SR103-112_072793.pdf>

Turkish national at a time when the appellant, an officer, was serving as a representative of the United States military abroad, and at a time when the appellant had been confronted about and knew rumors abounded on and off base about his alleged homosexual relationship with another Turkish national (Mr. MH), evinced, as the trier of fact found, a degree of indecorum that disgraced and dishonored the appellant and seriously compromised his standing as an officer.”).¹⁰

Just as cohesion and honor are essentially empty and arbitrary concepts without further authoritative definition, similarly empty and circular is *Marcum*-three’s consideration of the existence of orders or regulations as bearing on military connection. Such a move allows for commanders or service secretaries to, by fiat, determine the content of constitutional rights. This Court invited such an approach in *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004) (service-level regulation

¹⁰ A commendable counterexample is *United States v. Stratton*, No. NMCCA 201000637, 2012 CCA LEXIS 16, at *14-15 (N-M Ct. Crim. App. Jan. 26, 2012) (“Finally, the military judge’s ruling that the general disruption to the unit implicated the third *Marcum* prong is untenable. In effect, the military judge ruled that the criminal process inherent in this case, including the involvement of the military police, emergency management technicians, and command legal personnel, was a source of disruption substantial enough to satisfy the requirements of the third *Marcum* prong. We find the military judge erred in his application of this factor, essentially using the mere fact that the allegation was reported and required investigation, as is always the case when a crime is reported, to be held against the appellant as independent substantiation of impact on the command.”).

relevant for *Marcum*-three), and the lower courts have followed suit. *See United States v. Crawford*, No. ACM 38408, 2015 CCA LEXIS 139, at *9 (A.F. Ct. Crim. App. Apr. 9, 2015) (“Based solely on this third *Marcum* factor, we conclude the appellant's consensual sexual relationship with A1C SG is outside the bounds of constitutionally protected activity because it was explicitly prohibited by the AETC instruction.”); *United States v. Smith*, 66 M.J. 556, 561 (C.G. Ct. Crim. App., 2008) (violation of cadet regulations); *United States v. Barrera*, No. NMCCA 200400371, 2006 CCA LEXIS 215, at *7-8 (N-M Ct. Crim. App. Aug. 28, 2006) (“Second, the record demonstrates that all sexual activity was specifically prohibited in the barracks, and that fact underscores the harm to good order and discipline posed by the conduct at issue.”); *United States v. Bart*, 61 M.J. 578, 582 (N-M. Ct. Crim. App. 2005) (violation of Secretary of Navy Instruction proscribing relations between enlisted members that are unduly familiar, with court noting that “a potential Article 92, UCMJ, violation informs this court's analysis as to the third prong of the framework.”); *United States v. Christian*, 61 M.J. 560 (N-M. Ct. Crim. App., 2005) (violation of regulation regarding recruiters and Delayed Entry Program participants).

If violating any standing order is enough to activate *Marcum-III*, then commanding officers effectively have the authority to determine servicemembers' constitutional rights. For example, commanding officers might issue an order stating that even off-base, consensual intimacy with an unmarried civilian is prohibited (the exact facts of *Lawrence!*). Therefore, even if the conduct on its own would meet *Marcum*'s first two prongs, the third prong would be satisfied simply because of disobedience, and the conduct would not be protected by the Constitution.

A framework so vague that it allows individual commanders to define the scope of fundamental liberty interests cannot provide servicemembers with a clear or fair understanding of what the law demands. It also fails to reliably foster public trust that military justice will uphold and safeguard constitutional guarantees. Therefore, *Marcum*'s ambiguity, inconsistency, and circular reasoning demonstrate why the principles of stare decisis should compel this court to reject it.

II. THIS COURT SHOULD ADOPT A BALANCING TEST THAT MEANINGFULLY WEIGHS GOVERNMENT INTERESTS AGAINST THE FUNDAMENTAL LIBERTY INTERESTS OF INDIVIDUAL SERVICE MEMBERS

Having described the problems with *Marcum*, NIMJ submits that there is a better alternative: this Court should reject talismanic

incantations of good order and discipline, or honor, and adopt a straightforward balancing test that meaningfully weighs the government's compelling interests in maintaining good order and discipline against the fundamental liberty interests of individual service members. A balancing test grounded in the totality of the circumstances would provide a reasonable, objective, context-specific framework for evaluating each issue, ensuring that restrictions on individual rights are justified and proportionate rather than relying on vague or circular reasoning. This approach would foster clarity and consistency in the administration of military justice. Over time, as courts continue to apply this new balancing test, a more coherent and principled body of precedent would develop naturally. Most importantly, this test would provide service members, commanders, and courts with meaningful guidance to reinforce integrity and help ensure that military justice remains steadfast in its commitment to constitutional principles without sacrificing the unique needs of the armed forces.

In adopting such a test, the Court should clarify that the existence of a standing order or service regulation *on its own* is insufficient to

constitute a government interest, and that the content of the rules themselves must be independently scrutinized for constitutionality.

III. APPLICATION OF THE BALANCING TEST TO THIS CASE WOULD RESULT IN AFFIRMANCE

In this case, the balancing test laid out above yields the conclusion that Rocha's conduct was constitutionally protected.

What government interest in maintaining good order and discipline is involved in secret masturbation and playing with a sex doll in a private dormitory room? Almost none. At most, there is a concern that allowing the use of such a toy might increase the risk that the servicemember's pre-existing pedophilic tendency would worsen. However, many other criminal laws address this risk—most notably, the law of attempt. *See* Article 80, UCMJ, 10 U.S.C. § 880.

Against this minimal government interest, the Court can consider the circumstances relating to individual privacy interests. Rocha's conduct was solitary and secret; it was individual, isolated sexual gratification. The conduct affected only Rocha himself.

The punishment of masturbation was properly left behind in the Victorian era. *See* R. POSNER, *SEX AND REASON* 16-17. That a toy was used in this case should not change the constitutional analysis.

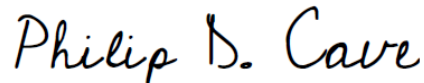
CONCLUSION

For the reasons set forth, this Court should abandon the *Marcum* framework and replace it with a balancing test that safeguards the constitutional rights of service members while accounting for legitimate government interests. NIMJ respectfully submits that adopting this test, which can be refined through jurisprudence over time, will advance clarity, consistency, and fairness in military justice.

Respectfully submitted,



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STATEMENT OF COMPLIANCE WITH RULE 26

A separate motion for leave of Court to file this brief has been submitted contemporaneously.

CERTIFICATE OF COMPLIANCE WITH RULE 24(B)

This brief contains 2969 words and complies with the typeface and type style requirements of Rule 37. Additionally, this brief complies with Rule 24 and 26(f) because it is under 6,500 words.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered by email to this Court and the Chief, Government Trial & Appellate Operations and Chief, Air Force Appellate Division and Chief, Defense Appellate Division on 1 August 2025.

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