IN THE UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

United States, Appellee v. Gregory T. Miles Lance Corporal (E-3) U.S. Marine Corps, Appellant	MOTION ON BEHALF OF THE NATIONAL COALITION FOR FOR SEXUAL FREEDOM FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 201300272 USCA Dkt. No. 15-0109/MC

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

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PRELIMINARY STATEMENT: ISSUES ADDRESSED

This brief *amicus curiae* is submitted by The National Coalition for Sexual Freedom (NCSF), not to support either the Appellant or the Appellee, but rather to assist the Court in the important task of reaching a decision that applies the Uniform Code of Military Justice (UCMJ) to the facts of this case in a manner consistent with constitutional precedents and principles applicable to criminal prosecutions directed at consensual non-injurious sexual conduct.

The central concern of NCSF is that criminal law, including the UCMJ, should be applied consistent with the ruling of the United States Supreme Court in Lawrence v. Texas[1] that consensual, non-injurious sexual conduct may not be the subject of criminal prosecution except to the extent necessary to protect a valid societal interest, and that moral disapproval does not constitute a societal interest sufficient to warrant the criminalization of such conduct. NCSF seeks to help this Court understand how the principles of Lawrence and other constitutional principles (such as the vagueness doctrine) apply to statutes that criminalize either specific sexual acts (such as sodomy and attempted sodomy) or generalized definitions of morally offensive sexual conduct. At the outset, we wish the Court to understand that the focus of NCSF's concern is on consensual sexual conduct. We have read the

[1] 539 U.S. 558, 123 S.Ct. 2472 (2003).

briefs below in this case of both the Appellant[2] and the Government[3] and we note that they take different views on whether the conduct for which LCpl. Miles was convicted was consensual. While this is an issue that this Court may wish to resolve, we would note the following:

- LCpl. Miles was not convicted of sexual acts that were either "forcible" or "without consent",[4] and
- To NCSF's knowledge, the trial Court made no finding that the acts in question were not consensual.

On the basis of the foregoing, NCSF submits that this Court must apply to this case the law governing consensual sexual acts. This brief is submitted on that assumption, and will make the following points:

1. The conviction of LCpl. Miles for attempted consensual sodomy violated his constitutional liberty as defined by the Supreme Court in Lawrence v. Texas.

    a. The conduct of LCpl. Miles falls within the scope of consensual conduct considered by Lawrence and the provisions of the UCMJ purporting to criminalize such conduct are, as applied to L.Cpl. Miles' consensual conduct, unconstitutional.
    b. Even if LCpl. Miles' acts are deemed to be "public," or "open and notorious" Lawrence v. Texas does not permit a prosecution for sodomy[5] (as opposed to some offense such as "public indecency").
    c. In analyzing these issues concerning sodomy and Lawrence, we do not contest the validity of this Court's decision in United States v. Marcum.[6] Rather, it is our position that the application of the second prong of Marcum is this case was

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[2] Appellant's Brief and Assignment of Errors, filed 16 December 2013 (hereinafter "Appellant's Brief").
[3] Answer on Behalf of Appellee, filed 16 March 2014 (hereinafter "Appellee's Brief").
[4] Appellee's Brief at 25.
[5] The principles and arguments presented here concerning the permissibility of prosecution for sodomy apply equally to prosecution for attempted sodomy.
[6] 60 M.J. 198 (C.A.A.F. 2004).

improper, because it was based on a misinterpretation of the Lawrence phrase "does not involve public conduct."

2. The conviction of LCpl. Miles for "indecent acts" and "indecent conduct" was an improper and unconstitutional application of UCMJ Articles 120(k) and 120(t)(12) for two fundamental reasons[7]:

   a. The definition of "indecent conduct" in the first sentence of Article 120 (t)(12) is on its face unconstitutional because, contrary to the specific directive of Lawrence, a statute criminalizing sexual conduct must be based on the need to protect a societal interest, and moral disapproval – the explicit basis of the first sentence of Article 120(t)(12) – is not a sufficient societal interest to warrant criminalization.

   b. Even if this Court – wrongly, in our view – were to find constitutional a criminal statute based on morality alone, the application of that statute must be based on current societal views. Here the NMCCA explicitly refused to consider whether current societal views of the morality of LCpl. Miles' acts – attempted sodomy and a sexual threesome – justify prosecution under Articles 120(k) and 120 (t)(12).

In considering these issues, this Court should be aware of their continuing importance, as evidenced by the fact that the military courts are repeatedly encountering prosecutions of sexual acts that raise both the application of Lawrence (including the "does not involve public conduct" statement in Lawrence on which the NMCCA relied) and the application of the impermissibly morality-based criminalization of "indecent acts" under Articles 120(t)(12).

[7] We do not address here two additional grounds on which the application of Articles 120(k) and 120(t) to LCpl. Miles was improper: First, under the doctrine *inclusio unius est exclusio alterius,* the general definition of "indecent conduct" in the first sentence of Article 120(t)(12) must be interpreted as limited to the specific acts set forth in the second sentence, which have no relevance whatsoever to acts committed by LCpl. Miles. Second, the first sentence of Article 120(t)(12), if read alone, is unconstitutionally vague. These are important points, but are not central to NCSF's policy concerns.

ARGUMENT

I. THE CONVICTION OF LCPL. MILES FOR ATTEMPTED CONSENSUAL SODOMY VIOLATED HIS CONSTITUTIONAL LIBERTY AS DEFINED BY THE U.S. SUPREME COURT IN LAWRENCE V. TEXAS

In our view, it is inconceivable that the conviction of LCpl. Miles for attempted consensual sodomy can be deemed consistent with the decision of the United States Supreme Court, in Lawrence v. Texas,[8] that criminal prosecution of adults for consensual, non-injurious intimate sexual conduct—specifically including consensual sodomy—violates the liberty guaranteed under the Due Process Clause of the Fourteenth Amendment.

NCSF respectfully submits that Article 125, UCMJ, making consensual sodomy a military crime, was[9] on its face unconstitutional. By incontrovertible extension, therefore, criminalization of attempted consensual sodomy was equally unconstitutional.

NCSF further respectfully submits that the facts of this case presented no constitutional basis on which to prosecute LCpl. Miles for any offense grounded in acts of sodomy.

A. The Provisions of the UCMJ Purporting To Authorize Criminal Prosecution for Consensual Sodomy Are on Their Face Unconstitutional Under Lawrence v. Texas

At the time of prosecution of LCpl. Miles, Article 125(a), UCMJ provided as follows:

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[8] 539 U.S. 558, 123 S. Ct. 2472 (2003)

[9] Article 125 was, after LCpl. Miles' conviction, amended to delete consensual sodomy and to limit the offenses to forcible sodomy and bestiality. National Defense Authorization Act for Fiscal Year 2014, PL 113-66, December 26. 2013.

> (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.[10]

Thus, as defined by Article 125(a), the crime of sodomy did not require force or coercion. Fully consensual sodomy is as criminal as forcible sodomy.

In Lawrence v. Texas[11] the United States Supreme Court addressed, and resolved conclusively, the question whether prosecution of consensual, non-injurious sodomy by adults is inconsistent with the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. Justice Kennedy, writing for the Court's majority, began by emphasizing the breadth of that constitutional guarantee of liberty, both in its spatial (i.e., private place) sense, "and in its more transcendent dimensions". Thus the Court emphasized that it was not addressing a right of privacy and freedom from government intrusion that arises simply because the acts in question take place in the home or in some other traditionally private venue. Rather the Fourteenth Amendment liberty has "transcendent dimensions"[12] that arise from the intimate, personal nature of the acts themselves. In explaining why it was necessary to overturn Bowers v. Hardwick,[13] the Court observed that laws criminalizing consensual, non-injurious sexual

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[10] 10U.S.C. § 925(a)
[11] Supra, note 1.
[12] Id. at 562.
[13] 478 U.S. 186, 106 S.Ct. 2841 (1986) (upholding a state law making homosexual sodomy a crime).

practices that do not "abuse…an institution the law protects", intrude into "the most private human conduct, sexual behavior," and thus intrude unwarrantedly into the deepest of personal relationships.

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
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> This as a general rule should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct, with another person, the conduct can be but one element in a personal bond that is more enduring.[14]

Such fundamental liberties, the Court reasoned, may not be infringed (as by criminalization) without the necessity to protect an important societal interest. In examining the laws against sodomy and other homosexual conduct, the Court noted that such laws have been grounded in moral conviction. The Court explicitly held that such moral disapproval is not a societal interest that justifies criminalization of consensual, intimate sexual conduct:

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[14] 539 U.S. at 567.

> The issue is whether the majority may use the power of the State to enforce these [moral] views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 850, 112 S. Ct. 2791. 120 L.Ed2d 674 (1991).[15]

It was this point to which the Court returned in reaching its conclusion to overturn Bowers and to rule that consensual, non-injurious, intimate sexual practices may not be made criminal:

> [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.[16]

Accordingly, the Court concluded that Texas' criminal sodomy statute was unconstitutional:

> [The petitioners'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government…The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[17]

In sum, criminalization of consensual sodomy is inconsistent with the Due Process Clause of the Fourteenth Amendment. Because Article 125(a), UCMJ, as it existed at the time of LCpl. Miles' prosecution, did precisely that, Article 125(a) was unconstitutional.

B. There Is, On The Facts of This Case, No Basis for Finding Any Exception to the Rule of Lawrence v. Texas That Would Permit Prosecution of LCpl. Miles for Consensual Sodomy or Attempted Consensual Sodomy

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[15] 539 U.S. at 571.
[16] 539 U.S. at 577-578 (quoting and adopting the language of Justice Stevens' dissent in Bowers, 478 U.S. at 216).
[17] 539 U.S. at 578 (citation omitted).

We have gone into some detail in the foregoing discussion of Lawrence v. Texas, not only to make it clear that laws making consensual sodomy a crime are unconstitutional, but also to provide the framework for demonstrating that, under the three-part analytical framework established in United States v. Marcum[18] for applying Lawrence in the context of military justice; there is no basis for determining that some "exception" to Lawrence permits prosecution for consensual sodomy (actual or attempted). In this regard, our analysis here focuses on what NCSF regards as a misinterpretation of Lawrence—namely, that the following language of the Supreme Court in Lawrence creates the possibility of a prosecution for consensual sodomy when one of these circumstances is present:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[19]

In particular, we will explain that the reference to "public conduct" – or the term "open and notorious," used by the Court below[20] – cannot be read to justify prosecution for the "crime" of

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[18] 60 M.J. 198 (C.A.A.F. 2004). Our discussion will address only the second part of the Marcum test. As to the first part, sodomy clearly falls within the Lawrence liberty interest. NCSF takes no position on the military-specific third part, except to note that LCpl. Miles was not convicted of any action violative of the "terminal elements.".

[19] 539 U.S. at 571.

[20] See Slip Op. at 9, 10, 13, 16, 19. The Court below uses the "open and notorious" phrase to insert into its analysis concepts of discredit to the service or conduct unbecoming. But these "terminal elements" are no longer in Article 125, and besides, LCpl. Miles was not charged with or convicted of such offenses of a peculiarly military nature. Moreover, there is good reason to question whether "open and notorious" is an appropriate synonym for "public" as the latter term is used in Lawrence. See the dissents of Judge Stucky in

consensual sodomy, even when done in public, but rather relates to prosecution for a different offense such as "public indecency." At the outset, it is important to recall that the Lawrence Court focused on the intimate, personal nature of consensual sexual conduct and its integral role in the most fundamental of interpersonal relationships. Thus the Court emphasized "the liberty of the person both in its spatial *and in its more transcendent dimensions*." Given that emphasis, it is illogical to consider that the Court envisioned that this intimate, personal type of conduct should become criminal simply because, for example, it is done in public view rather than in one's own home. Rather it is more logical to interpret these "does not involve" statements as meaning that the act of sodomy (or some other consensual sexual act) may, in certain circumstances, give rise to prosecution *for a different offense*, one arising from the circumstances, not from the nature of the sex act. And an examination of each of the "does not involve" statements confirms such an interpretation:

- "does not involve minors" – Minors, of course, are protected by separate criminal laws, such as statutory rape or child abuse.
- "does not involve persons who might be injured" – This would not be prosecuted as consensual sodomy, but rather as assault and/or battery.
- "does not involve persons who…might be coerced or who are situated in relationships where consent might not easily be refused" – By definition, this could not be prosecuted as

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United States v. Goings, 72 M.J. 202 (C.A.A.F. 2013); in United States v. Elhelou and United States v. Howard, both at 72 M.J. 404 (C.A.A.F. 2013); and in United States v. Castellano, 72 M.J. 217 (C.A.A.F. 2013).

consensual sodomy, but rather as forcible sodomy or perhaps as rape.

- "does not involve…prostitution" – Prostitution, of course, is a separate and distinct crime. The gravamen of prostitution is its commerciality, not the nature of the sex act that is sold.
- "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter" – This, of course, is an entirely different legal issue, not a criminal law question at all.

In short, the Supreme Court was simply making clear that it was dealing in this decision only with the issue whether consensual sodomy may be criminalized as consensual sodomy. It was not dealing with other legal issues that might arise–criminal law or regulatory issues–in connection with sodomy.

And that brings us to the language, "does not involve public conduct". Like each of the other "does not involve "statements, there is nothing to suggest that the Supreme Court is saying that the conduct in public of an act of consensual sodomy makes that act a criminal act of consensual sodomy. Rather, it may give rise to prosecution for a crime whose gravamen is not the act of consensual sodomy, but rather the public nature of that act. By analogy, suppose a man and a woman have genital to genital sex in a public square. They may well be committing a crime, but the sexual act is not the crime, because heterosexual genital to genital sex is not a crime–just as consensual sodomy is not a crime. Rather, they could be prosecuted for public indecency, public lewdness, public nudity or some other crime whose gravamen is doing something in public

view that might offend people. LCpl. Miles was not charged with any such offense.

In sum, the second prong of the Marcum test is perfectly appropriate, as long as it is understood to mean only that the prohibition against criminal prosecution of consensual sex acts does not prevent bringing, in appropriate circumstances, other kinds of criminal prosecutions.

II. The Conviction of LCpl. Miles for "Indecent Acts" Under Article 120 (k) and "Indecent Conduct" Under Article 120(t)(12) Is Directly Inconsistent with Lawrence v. Texas

A. Articles 120(k) and 120(t)(12) Are Facially Unconstitutional as Impermissible Provisions To Criminalize Sexual Conduct Based Solely on Moral Disapproval

In Lawrence, the Supreme Court repeatedly emphasized that personal conduct, especially in the sexual realm, can be criminal only where such criminalization is necessary to protect a legitimate societal interest, and moral disapproval is not such a legitimate societal interest:

> The condemnation [of sodomy] has been shaped by religious beliefs, corruptions of right and acceptable behavior, and respect for the traditional family…. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce their views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of*

> *Southeastern Pa v. Casey*, 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).[21]

Then, quoting with approval Justice Stevens' dissent in Bowers v. Hardwick:

> [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.…[22]

Finally, the Court held specifically that the moral disapproval that was the basis of the Texas law against sodomy was not a State interest sufficient to make that law constitutional:

> The Texas statute furthers no state interest which can justify its intrusion into the personal and private life of the individual.[23]

No clearer example of a criminal law predicated exclusively on moral disapproval can be imagined than the "indecent conduct" defined in Article 120(t)(12), which reads:

> The term "indecent conduct" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

Every operative term – "form of immorality", "sexual impurity", "grossly vulgar", "obscene", "repugnant to common propriety", "excite sexual desire" and "deprave morals" – is purely and simply an expression of moral disapproval. This statute

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[21] 539 U.S. at 571.
[22] 539 U.S. at 577.
[23] 539 U.S. at 578.

protects no societal interest other than moral disapproval. It is, on its face, unconstitutional.

B. Articles 120(k) and 120(t)(12), as Applied in This Case, Unconstitutionally Fail To Take Into Account Current Societal Views of the Sexual Conduct Engaged in by LCpl. Miles.

An important aspect of the Supreme Court's analysis in Lawrence was its directive that, in analyzing the constitutionality of criminal laws dealing with consensual sexual conduct, it is essential to rely on present, not past, societal views.[24]

No such protection was given here to L.Cpl. Miles and his two partners in connection with their sexual acts that night. Consider the acts that were found to be "indecent"[25]:

- fondling the buttocks,
- fondling the vagina,
- digitally penetrating the anus,
- digitally penetrating the vagina, and
- attempting to achieve erection by rubbing the penis on the partner's body.

NCSF respectfully submits that each and every one of these acts is done regularly throughout the United States by persons engaging in consensual love-making. The idea that a reasonable person would understand any or all of these acts to be "indecent," much less criminal, is preposterous.

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[24] See 539 U.S. at 571-72: "[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters of sex."

[25] Appellee's Brief below, at 17.

These acts can be viewed as "indecent" only by applying "traditional," rather than current, social standards. And that is exactly what the Court below did.[26] That is precisely what the Supreme Court in Lawrence said is not permissible.

Nor can the determination of "open and notorious" commission of these acts make them criminal. As discussed above, the use of "public" in Lawrence was not intended to make criminal the public performance of a non-criminal act. And these acts are made criminal only on the basis of moral disapproval, which cannot be sustained under Lawrence.

A different result might be considered if the issue were whether these acts were presented under a statutory provision (like Article 134) containing the "terminal element" and thus turning on whether the defendant's acts were "conduct unbecoming" or that they were detrimental to good order in the military. But LCpl. Miles was not convicted under any such statute containing the "terminal elements."[27] The issue here was purely and simply whether *the acts themselves* were criminal. They were not.

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[26] "[T]he term 'indecent' in Article 120(t)(12) is 'the same conduct that has been held to be indecent by military appellate courts' *in the past*." Slip. Op. at 9 (emphasis added).
[27] Thus the Court below's citations of Parker v. Levy, 417 U.S. 733 (1974) and United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972) are inapposite.

III. The Court Should Accept This Appeal, Because It Presents Issues That Have Been, and Will Continue Frequently To Be, Presented in Military Criminal Prosecutions

This is not a case presenting unique or isolated issues. The questions of how *Lawrence* is to be applied in presentations of consensual sexual acts, and of the applicability of the Article 120(k) and 120(t)(12) "indecent conduct" provisions, have been frequently presented in military prosecution.[28] Indeed, 2013 witnessed a veritable torrent of such cases. These issues need to be resolved now and this appeal presents the opportunity to do so.

Respectfully submitted,

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[28] See, e.g., United States v. Castellano, 72 M.J. 217 (C.A.A.F. 2013); United States v. Elhelou, 72 M.J. 404 (C.A.A.F. 2013); United States v. Turnstall, 72 M.J. 191 (C.A.A.F. 2013); United States v. Izquierdo, 51 M.J. 421 (C.A.A.F. 1999); United States v. Goings, 72 M.J. 202 (C.A.A.F. 2013); United States v. Howard, 72 M.J. 406 (C.A.A.F. 2013).

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 25, 2014, and to Lt. Jennifer L. Myers, JAGC, USN, Appellate Defense Counsel.

Certificate of Compliance

This motion complies with the page limitations of Rule 24 because it contains less than 4,500 words, which is half the number of words (9000) permitted for the petitioner's supplement under Rule 21(b). Using Microsoft Word version 2003 with 12-point-Courier New font, this supplement contains 4,015 words.

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