IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee v. Gregory T. Miles LCpl (E-3) U.S. Marine Corps, Appellant	**APPELLANT'S REPLY BRIEF** Case No. 201300272

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

A. The government fails to grasp the term "Not Guilty".

LCpl Miles was found NOT GUILTY of aggravated sexual assault.[1] LCpl Miles was found NOT GUILTY of abusive sexual contact.[2] LCpl Miles was found NOT GUILTY of wrongful sexual contact.[3]

Yet the government persists in trying to convince this Court otherwise.[4] The government alleges "that fondling the buttocks and vagina and removing the tampon of an intoxicated and incapacitated woman without her consent" would be criminal.[5] The government is correct; such actions are criminal.

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[1] R. at 234-35.
[2] *Id.*
[3] *Id.*
[4] *See* Appellee's Br. at 10, 13, 15-16, 17, 18, 19.
[5] *Id.* at 17.

And had LCpl Miles been convicted of aggravated sexual assault, abusive sexual contact, or wrongful sexual contact the government could fairly characterize his actions in that manner. But he was found NOT GUILTY of those offenses and no amount of lurid prose by the government on appeal can change that fact.

The government's use of the word "incapacitated" is particularly troublesome. Incapacitation is a legal term of art that carries great import. The military judge refused to find that EED and BNC were incapacitated in this case.[6] In fact, he found just the opposite.[7]

The military judge did not find that EED and BNC were incapacitated and that LCpl Miles "digitally penetrated [their] anus and vagina" as the government argues.[8] Had the military judge made this finding, he would have been forced to find LCpl Miles guilty of aggravated sexual assault. But LCpl Miles was found NOT GUILTY of that offense.[9]

Now, the military judge did find that "the Government has proven beyond a reasonable doubt that the penetration required for sexual intercourse, however slight, of the sex organ by the penis occurred in this case in both instances."[10] If the military judge had found those acts to be without consent he

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[6] *See* R. at 234-35; *see also* Appellate Ex. XII.
[7] R. at 234-35.
[8] Appellee's Br. at 17.
[9] R. at 234-235.
[10] Appellate Ex. XII, at 3.

would have had to convict LCpl Miles of aggravated sexual assault. Yet, LCpl Miles was found NOT GUILTY of that crime.[11] So the military judge did not find the sexual activity occurred without consent. Put simply, the military judge found that the sexual penetration was consensual.

Similarly, the government argues that these women had their buttocks and vagina fondled without consent.[12] But the military judge did not make that finding either.[13] Because if he had, LCpl Miles would stand convicted of abusive sexual contact or wrongful sexual contact.[14] But LCpl Miles was found NOT GUILTY of both these crimes.[15]

Though, from the government's argument, you wouldn't realize that LCpl Miles stands exonerated of those charges. Using such colorful language as "predatory"[16], "victimization"[17] and "incapacitated",[18] the government attempts to retry LCpl Miles for offenses it failed to prove at trial. LCpl Miles was found NOT GUILTY of these offenses.

The government's use of loaded terms and shocking description is woefully imprecise and contradicts the evidence and findings. This Court should not be moved by such tactics.

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[11] R. at 234-35.
[12] *Id.*
[13] *See* R. at 234-35; *see also* Appellate Ex. XII.
[14] *See* 10 U.S.C. §§ 920(h) and 920(m) (2008 ed.).
[15] R. at 234-35.
[16] Appellee's Br. at 16.
[17] *Id.*

B. The government cannot change its theory on appeal.

The change of theory doctrine "is a general rule that the theory adopted by the court and the parties in the trial of a case will be accepted and followed on appeal."[19] "[I]t is well settled that the theory upon which the case was tried in the court below must be *strictly adhered to on appeal* or review."[20] "Fundamentally", this doctrine is designed "to prevent injustice."[21]

Here, for the first time on appeal, the Government contends that LCpl Miles was convicted of non-consensual conduct.[22] This stands in stark contrast to the position that Trial Counsel took below.[23] In fact, Trial Counsel specifically argued in opening and closing that he was presenting two alternate theories of criminality to the military judge.[24]

The military judge then found LCpl Miles not guilty of the greater offenses and guilty by exceptions and substitutions of others while entering special findings.[25] The military judge's special findings, exceptions, and substitutions mattered. At

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[18] Appellee Br. *passim*.
[19] *United States v. Blevens*, 18 C.M.R. 104, 110 (C.M.A. 1955) (quoting *Marks v. State of Indiana*, 40 N.E.2d 108, 114 (1942)).
[20] *See Pearson v. United States*, 192 F.2d 681, 694 (6th Cir. 1951) (emphasis added).
[21] *Blevens*, 18 C.M.R. at 108 (citing *Wagner v. United States*, 67 F.2d 656 (9th Cir. 1933)).
[22] Appellee Br. *passim*.
[23] *See* Results of Trial; *see also* Capt Lowe decl. Mar. 24, 2014.
[24] R. at 30, 219.
[25] R. at 234-35.

that point, the government adopted the position that LCpl Miles was convicted of consensual sexual conduct only.[26]

Trial Counsel later explained that: "The judge found the accused NOT GUILTY of all specifications and language that reflected non-consensual acts. The judge found the accused GUILTY of the specifications and language which reflected consensual acts."[27] Furthermore, Trial Counsel acted on this position.

Based on the military judge's findings and DOD INST 1325.07, Trial Counsel reflected on the results of trial that the accused was NOT required to register as a sex offender.[28] Trial Counsel explained the government's rationale by citing DOD INST 1325.07, Appendix 4 to Enclosure 2 paragraph 6 which states:

> offenses under Article 120 or 134 of the UCMJ that constitute only public sex acts between consenting adults do not require sex offender registration (i.e. indecent exposure). An offense involving consensual sexual conduct between adults is not a reportable offense...[29]

Thus, as evidenced by the Trial Counsel's own words and actions, the government adopted the position that LCpl Miles was convicted of consensual sexual conduct only.

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[26] *See* Results of Trial; *see also* Capt Lowe decl. Mar. 24, 2014.
[27] *See* Trial Counsel Email, Aug. 29, 2013 (emphasis in original).
[28] *See* Results of Trial, Apr. 4, 2013, ¶ 13.
[29] *See also* Trial Counsel Email, Aug. 29, 2013.

And this position comports with the military judge's special findings.[30] The military judge found that, "[the] sexual activity in this case occurred when the *participants* knew that someone else, indeed a few others, were present."[31] "Participants", in plural, included LCpl Miles, BNC, and EED.

Then, the military judge relied heavily on LCpl Miles's recounting of the events.[32] By doing so, the military judge tacitly rejected the testimony of BNC and EED, and found that the acts were consensual but "indecent."[33] Consequently, at trial, the military judge and the government agreed that LCpl Miles had been convicted of only consensual sexual conduct.

Appellate government counsel may not now, in an attempt to gain advantage on appeal, suddenly take an opposite position.[34] Precedent and justice preclude such legal gymnastics.

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[30] Appellate Ex. XII.
[31] Appellate Ex. XII, at 1. (emphasis added)
[32] Appellate Ex. XII, at 2.
[33] Appellant maintains that Article 120(k), UCMJ, Indecent Act and Article 125, UCMJ, "Consensual Sodomy" is unconstitutional facially and as applied to LCpl Miles.
[34] *Davis v. Wakelee*, 156 U.S. 680 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position...").

C. The government's invocation of "forcible sodomy" is bizarre.

The government never alleged, and the military judge did not find, that LCpl Miles committed forcible sodomy.[35] LCpl Miles was charged with "consensual sodomy" and he was found guilty of "attempted consensual sodomy".[36] Force, with regard to sodomy, was never at issue in this case.

That is why the government's invocation of "forcible sodomy" on appeal is so bizarre.[37] In fairness, the government quickly contradicts its own argument, noting that the charges of sodomy never alleged force or lack of consent.[38] But then, inexplicably, the government goes on to claim that "the Record supports the conclusion that Appellant attempted to commit forcible sodomy...".[39]

This legal "flip-flop-flip" occurs in less than twenty pages of the government's answer. The final pirouette

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[35] Charge Sheet; R. at 234-35.
[36] *Id.*
[37] Appellee Br. at 8 ("Since any reasonable service member would understand that *committing sodomy by force* and without consent is something that is criminal...")(emphasis added).
[38] Government Answer at 25 ("[a]lthough the two specifications under Charge III did not allege that Appellant's acts against BNC and EED were 'forcible' and/or 'without consent'...").
[39] Appellee Br. at 27.

actually takes place over a mere two pages.[40] Not only is this incredibly confusing, but it is also wrong.

The Record *does not* support the conclusion that Appellant attempted to commit forcible sodomy.[41] To the contrary, force was never alleged nor found.[42] In fact, the only evidence that the government adduced on this matter was that the acts of attempted sodomy were consensual.[43]

The government's assertions that this Record supports forcible sodomy are troubling.[44] This may be a stale retread of past arguments, but it is inapplicable and entirely out of place in this case. This Court should disregard any such argument.

D. *Rheel* and *Capps* are wrongly decided, not precedent, not binding or easily distinguished.

The government relies on a non-binding Air Force case and an unpublished decision of this Court to support its position that Article 120(k), UCMJ, is constitutional.[45] Appellant has already averred that, "*United States v. Rheel*, an unpublished decision by this Court, was wrongly

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[40] Government Answer at 25-27.
[41] *Contra* Appellee Br. at 27.
[42] Charge Sheet; R. at 234-35.
[43] Pros. Ex. 14 at 29, 31, 33.
[44] Appellee Br. at 8, 27.
[45] Appellee Br. at 17-18.

decided."[46] The same rationale extends to *United States v. Capps*.[47]

In short, a legal conclusion that "[t]he statutory definition provides adequate notice to an ordinary person about what conduct is forbidden"[48] is faulty without analysis. Merely calling someone "ordinary" doesn't cure the ambiguity about what is considered "indecent"; especially when contemporary sexual mores are applied.

Beyond that, these cases are either not binding or actually not precedent at all. *Rheel* begins with a bold notice that blares: THIS OPINION DOES NOT SERVE AS PRECEDENT.[49] Notably; both these cases suffer the fatal flaw of assuming that all accused, all convening authorities, all military judges, and all members agree on what conduct is "indecent" in the bedroom.

Also, the government noticeably failed to mention that the victims in *Rheel* and *Capps* were children. A nine-year-old girl in *Rheel,* and a thirteen-year-old girl in *Capps*. Neither of these victims had the legal capacity to consent.

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[46] Appellant's Br. at 25.
[47] *United States v. Capps,* No. 38160, 2013 CCA LEXIS 842 (A.F. Ct. Crim. App. Oct. 9, 2013).
[48] *United States v. Rheel*, No. 201100108, 2011 CCA LEXIS 370, at *6 (unpublished); *Cf. United States v. Capps*, No. 38160, 2013 CCA LEXIS 842, at *10 (A.F. Ct. Crim. App. Oct. 9, 2013).
[49] *Rheel*, 2011 CCA LEXIS 370.

Contrary to the facts presented in those cases, the conduct at issue here is discrete consensual sexual conduct between willing adult partners. EED, BNC, and LCpl Miles participated in a consensual *ménage a trois*. No one was privy to the sexual conduct but the participants themselves.

Such conduct is not indecent or immoral.

E. Consider the implications of the government's argument.

Appellant already argued that *Barbier*[50] opened the floodgates to what could be considered "indecent."[51] But consider for a moment the logical extension of the government's argument and the definition of "sexual contact".[52]

Sexual Contact is defined as "any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person."[53] If this Court accepts the government's interpretation of "indecent conduct" as sexual contact in an open and notorious fashion, then any military member

[50] *United States v. Barbier*, No. 201100326, 2012 CCA LEXIS 128 (N-M. Ct. Crim. App. 2012).
[51] Appellant's Br. at 27-29.
[52] 10 U.S.C. § 920(t)(2) (2008 ed.).

receiving an exotic dance would be subject to the Code's perdition. Such a result would be absurd.

So too is allowing the government to dictate sexual morality between consenting adults.

Conclusion

This Court should put an end to sexual puritanism masquerading as crime and find UCMJ Articles 120(k) and 125 unconstitutional. In so doing, this Court should set aside LCpl Miles's convictions for "Indecent Acts" and attempted consensual sodomy with prejudice.

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[53] *Id.*

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was filed with the Navy-Marine Corps Court of Criminal Appeals, and that a copy was served on Appellate Government Division and uploaded electronically into CMTIS on March 26, 2014.

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