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 BRIEF AND ASSIGNMENTS OF ERROR** Case No. 201300272 Tried at Camp Foster, Okinawa, Japan, by general court-martial convened by Commanding General, III Marine Expeditionary Force, on 7 Jan, 7 Mar, and 3-4 Apr 2013.

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

Jared A. Hernandez
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124

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"SODOMY", AS DEFINED BY ARTICLE 125, UCMJ, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES.

Statement of Statutory Jurisdiction

Lance Corporal (LCpl) Gregory T. Miles received an approved court-martial sentence that included confinement for one year and a punitive discharge. Accordingly, his case falls within this Court's Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1), jurisdiction.

Statement of the Case

LCpl Miles was charged with violating Articles 107, 120, 125, and 134, UCMJ. But a general court-martial, consisting of military judge alone, acquitted LCpl Miles of the most serious offenses charged. In fact, LCpl Miles was found not guilty, in whole or in part, of all charges except adultery.[1]

Specifically, LCpl Miles was found not guilty of making a false official statement in violation of Article 107, UCMJ. He was also found not guilty of aggravated sexual assault, abusive sexual assault, and wrongful sexual contact in violation of Article 120, UCMJ. And LCpl Miles was found not guilty of consensual sodomy in violation of Article 125, UCMJ.

LCpl Miles was convicted of *attempted consensual sodomy* and adultery in violation of Articles 80 and 134, UCMJ. Also, he was convicted of indecent acts for consensual sexual conduct between adults in violation of Article 120(k), UCMJ.[2]

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[1] R. at 234-35.
[2] 10 U.S.C. § 920(k)(2006).

This resulted in a sentence of a reduction to pay grade E-1, forfeiture of all pay and allowances, confinement for one year and a bad-conduct discharge that the convening authority subsequently approved.[3]

Statement of Facts

BNC was angry with her husband.[4] This was not the first time they had fought since arriving to Okinawa.[5] They had bickered over money, their marriage, and a recent miscarriage.[6]

But this night was supposed to be different.[7] This night was a "girl's night" that had been planned for weeks and BNC was going to have fun.[8] It didn't matter if she was only eighteen years old and underage; she was going to drink in the club.[9]

She was out with her best friend EED; and they were going to drink, and dance, and flirt the night away.[10] So after loading up on drinks in town, the girls headed to "The Palms."[11]

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[3] R. at 268; Convening Authority's Action of 8 Jul 13.
[4] R. at 57.
[5] R. at 70, 108; Appellate Exhibit VIII.
[6] *Id.*
[7] R. at 52, 77, 107, 154.
[8] *Id.*
[9] R. at 56, 158.
[10] R. at 77, 80, 100, 106, 154, 157-58. Prosecution Exhibit 14 at 14-16.
[11] R. at 53; Appellate Exhibit X at 1 ("I think I had two shots of liquor while I was in this bar, one of Bailey's, and one Tequila. I also had two mixed drinks, both of them were Peach Schnapps and Sprite. We then went to Yumi's and stayed for about fifteen or twenty minutes. During that time I had a shot called a 'snake bite.' It's a mixture of Southern Comfort and Red Bull. ... We left and then went to East Coast and stayed

The Palms is the on-base enlisted club; it was there that they met LCpl Miles.[12]

LCpl Miles arrived with a few of his friends just as BNC and EED were about to leave The Palms.[13] The three hit it off immediately so BNC and EED decided to stay at the club to dance and talk to this Marine.[14]

LCpl Miles was clearly flirting with the girls and he believed they were flirting back.[15] There was playful poking and grabbing and EED knew that her actions could be perceived as flirtatious.[16] BNC was throwing out flirtatious signs as well.[17] The atmosphere was definitely friendly.[18]

After flirting with LCpl Miles, the group went to the dance floor.[19] That's when the girls began dancing together.[20] And just when the music was pumping, BNC threw her hands up and everybody saw it: no wristband.[21]

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until 11:00. I had one mixed drink at this bar, a vodka and orange juice drink.").

[12] Prosecution Exhibit 14 at 11-15. Appellate Exhibit X at 2.
[13] Prosecution Exhibit 14 at 11-15, 64.
[14] Prosecution Exhibit 14 at 11.
[15] Prosecution Exhibit 14 at 11-15.
[16] R. at 100; Prosecution Exhibit 14 at 15, 65.
[17] Prosecution Exhibit 14 at 15.
[18] R. at 57.
[19] Appellate Exhibit IX at 1.
[20] R. at 157.
[21] Prosecution Exhibit 14 at 67.

The bouncers pulled BNC off the dance floor and, since she was caught drinking underage, kicked her out of the club.[22] One of the bouncers confiscated BNC's ID, escorted her to the front desk, and made her call her husband.[23] But BNC wasn't ready to leave yet, so she talked her way back into the club and gave LCpl Miles her phone number.[24]

After flirting all night, EED and BNC gave LCpl Miles their phone number.[25] After all, BNC had a party at her house next weekend so if LCpl Miles wanted to see EED again, he needed their digits.[26] BNC told him that she was always with EED, and if you hang out with EED, you'll always get the both of them.[27]

After the girls left, LCpl Miles began texting back and forth with EED.[28] Not wanting the night to be over, EED invited LCpl Miles to the barracks where the girls were staying.[29] After talking and hanging out for a bit, the group went to the "mat room" to wrestle.[30]

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[22] R. at 56, 158; Prosecution Exhibit 14 at 67.
[23] Appellate Exhibit X at 2.
[24] Appellate Exhibit X at 2; Prosecution Exhibit 14 at 68.
[25] Prosecution Exhibit 14 at 16, 69.
[26] R. at 82; Prosecution Exhibit 14 at 16, 69.
[27] Prosecution Exhibit 14 at 69.
[28] Prosecution Exhibits 11-13, 16-19; Prosecution Exhibit 14 at 17.
[29] R. at 84; Prosecution Exhibit 14 at 18.
[30] R. at 84-85.

The night began winding down and the girls, along with LCpl Miles and LCpl S went upstairs to go to sleep.[31] LCpl S gave LCpl Miles permission to stay in her room with the girls.[32] That's when EED and BNC began to tease LCpl Miles about "snuggling" and the fact that he had no "snuggle buddy."[33]

Before going to sleep herself, LCpl S saw LCpl Miles climb into bed with EED and BNC.[34] The last thing LCpl S heard before dozing off was LCpl Miles flirting with EED and BNC while laughing and giggling came from the bed.[35]

At that point, LCpl Miles was on the bed "sandwiched" in-between EED and BNC.[36] BNC was against the wall while LCpl Miles was spooning EED on the other side.[37] The three were cuddling together in bed.[38]

Sometime during the night, BNC began pushing closer to LCpl Miles and grabbing at him.[39] LCpl Miles turned around and they began kissing and it quickly escalated.[40] BNC and LCpl Miles began having sex.[41]

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[31] R. at 63, 86; Prosecution Exhibit 14 at 19.
[32] *Id.*
[33] Prosecution Exhibit 14 at 74.
[34] R. at 64.
[35] R. at 64, 71.
[36] Prosecution Exhibit 14 at 19.
[37] Prosecution Exhibit 14 at 21.
[38] *Id.*
[39] Prosecution Exhibit 14 at 22.
[40] *Id.*
[41] *Id.*

LCpl Miles was rubbing BNC's breasts and grabbing her buttocks while BNC was directing him and controlling the sex.[42] That's when EED began rubbing on LCpl Miles's chest and stomach.[43] EED and LCpl Miles began kissing while BNC was on the other side.[44]

BNC then got out of bed while EED and LCpl Miles continued their liaison.[45] BNC realized things had gone too far and knew that one of her husband's friends lived in the barracks.[46] She raced to the friend's barracks room and claimed that she had just been sexually assaulted.[47]

Summary of Argument

I.

Together, BNC and EED engaged in consensual sexual conduct with LCpl Miles. BNC, fearing that her husband would find out, reported the act as a sexual assault. Because of that, LCpl Miles was charged "six ways from Sunday".

The evidence did not sustain any of the sexual assault claims made by BNC and LCpl Miles was found not guilty of the most serious charges. But, the government had charged several "catch-all crimes" in order to ensure a conviction. Two of

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[42] Prosecution Exhibit 14 at 25-26.
[43] Prosecution Exhibit 14 at 27, 79, 80.
[44] *Id.*
[45] Prosecution Exhibit 14 at 33, 81.
[46] Appellate Exhibit X at 2; Prosecution Exhibit 14 at 84.
[47] Appellate Exhibit X at 2.

those offenses, indecent acts and sodomy, consisted of the same conduct.

Since this charging decision misrepresented LCpl Miles' criminality and unreasonably increased his punitive exposure. This was an unreasonable multiplication of charges. Thus, this Court should dismiss the conviction for indecent acts and reassess the sentence accordingly.

II.

Article 120(k), UCMJ, Indecent Act, is unconstitutionally vague and overbroad. Precedent pertaining to "Article 134 style" indecent acts is inapplicable. Precedent upholding Article 120(k) is wrongly decided.

III.

Article 120(k), UCMJ, Indecent Act, is unconstitutional as applied to LCpl Miles. Consensual sexual conduct between three partners is not "vulgar, obscene, and repugnant to common propriety" when applying contemporary community standards.

Congress itself has already removed indecent acts from Article 120.[48] In fact, as of June 28, 2012, "Indecent Acts" is no longer an enumerated crime at all.[49]

IV.

[48] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).

"Sodomy", as defined by Article 125, UCMJ, is unconstitutionally vague and overbroad.

V.

"Sodomy", as defined by Article 125, UCMJ, is unconstitutional as applied to LCpl Miles. LCpl Miles was convicted of *attempted consensual sodomy*. The government never alleged force in this case and the military judge did not articulate *Marcum* factors for sodomy.

Argument

I.

THE GOVERNMENT SUBJECTED LCPL MILES TO AN UNREASONABLE MULTIPLICATION OF CHARGES.

Standard of Review

An unreasonable multiplication of charges is reviewed under an abuse of discretion standard.[50]

Principles of Law

The Manual for Courts-Martial states, and courts have agreed that, "what is substantially one transaction should not be made the basis for an unreasonable multiplication of

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[49] LCpl Miles was alleged to have committed these acts on February 3, 2012. This means that just five months later, his conduct would not have been criminal under Article 120.

[50] *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004)(quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (A. Ct. Crim. App. 1999).

charges."[51] A claim based on unreasonable multiplication of charges is conceptually different than a claim of multiplicity.[52] The concept of unreasonable multiplication of charges "promotes fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress."[53] This issue may be raised for the first time on appeal.[54]

In *United States v.* Quiroz, this Court applied five factors to determine whether a multiplication of charges or specifications was unreasonable.[55]

1. Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
2. Is each charge and specification aimed at distinctly separate criminal acts?
3. Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
4. Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? and;
5. Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?[56]

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[51] *See* R.C.M. 307(c)(4), Discussion.
[52] *See United States v. Joyce*, 50 M.J. 567, 568 (N-M. Ct. Crim. App. 1999).
[53] *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001).
[54] *Id.* at 338.

When charges refer to the same factual conduct, they are not directed at "distinctly separate" criminal acts.[57] Similarly, an accused's criminality is exaggerated when punished separately for charges that are based upon the same factual conduct.[58] In *Quiroz*, the defendant's criminality was exaggerated because charges that were based on the same conduct were considered separate offenses for findings and sentencing.[59]

Discussion

A. Charged and punished separately for the same offense.

Here, LCpl Miles was charged and punished two separate ways for one act, consensual sexual conduct with EED and BNC.[60] Specifically, LCpl Miles was charged with, and punished for,

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[55] *United States v. Quiroz*, 57 M.J. 583 (N-M. Ct. Crim. App. 2002).
[56] *Id.* at 585-86.
[57] *See United States v. Akes*, No. 98-01284, 2000 CCA LEXIS 62 (N-M. Ct. Crim. App. 31 Mar. 2000)(unpublished decision)(slip op. at 8)(finding charges of maltreatment and indecent assault were not discrete criminal acts because they were based on the same factual conduct); *Quiroz*, 53 M.J. at 607-08 (finding appellant was punished for the same conduct twice when he was charged under separate statutes for selling the same explosive).
[58] *Quiroz*, 53 M.J. at 608; *see also Akes*, slip op. at 8-9; *United States v. Hinkle*, 54 M.J. 680 (N-M. Ct. Crim. App. 2000)(finding appellant's criminality was exaggerated and he was unfairly exposed to the risk of greater punishment when he was convicted of unauthorized absence (UA) and violating an order to report to the correctional custody unit by going UA).
[59] *Quiroz*, 53 M.J. at 608.
[60] Charge Sheet; R. at 234-35, 268.

indecent acts and sodomy with EED and BCN for consensual sexual conduct with each.[61] This is both wrong and legally incorrect.

Looking at the indecent act specifications alone, it becomes clear that the government has overcharged this case. The government charged that LCpl Miles committed indecent conduct by "penetrating the vagina and anus with his penis, digitally penetrating the vagina and anus, and touching the vagina and buttocks of [BNC]."[62] Further, that he again committed indecent conduct by: "penetrating the vagina and anus with his penis and rubbing the breast and vagina of [EED]."[63]

Leaving aside for the moment that the government now considers penetration of the vagina by the penis and rubbing breasts to be "indecent,"[64] the government is charging sodomy twice. Put simply, the same conduct charged above forms the basis for the specifications that follow.

Examine for a moment Charge III. This is the charge for *consensual* sodomy. In it, LCpl Miles is alleged to have committed sodomy with BNC and EED, respectively, by: "penetrating her anus with his penis."[65]

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[61] *Id.*; *Cf* R. at 234 (Military Judge finds LCpl Miles not guilty of *consensual sodomy* in violation of Article 125, UCMJ but guilty of *attempted consensual sodomy* in violation of Article 80, UCMJ).
[62] Charge Sheet (Specification 4 of Charge II).
[63] Charge Sheet (Specification 5 of Charge II).
[64] Discussed *infra* at 33.
[65] Charge Sheet (Specifications 1 & 2 of Charge III).

You read that correctly. The very same conduct alleged in the indecent act charge was alleged in the sodomy charge. The gravamen, "penetrating the anus with his penis" is identical.[66]

It is instructive to examine the five factors posited by this Court to determine whether an unreasonable multiplication of charges has occurred.[67] A full four out of five of these factors weigh in favor of LCpl Miles. Thus, this Court should find that the government created an unreasonable multiplication of charges in this case.

B. Four *Quiroz* factors favor LCpl Miles.

Quiroz factors two through five favor LCpl Miles. First, charges in this case were not aimed at distinctly criminal acts.[68] The government alleged the same act two separate ways. Compare Specifications 4 & 5 of Charge II ("Penetrating the… anus with his penis") and Specifications 1 & 2 of Charge III ("penetrating her anus with his penis"). The act of sodomy has been subsumed by the indecent act charge. The same criminal conduct was charged and punished two separate ways; this violates the second *Quiroz* factor.[69]

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[66] *Compare* Specifications 4 & 5 of Charge II ("Penetrating the… anus with his penis") and Specifications 1 & 2 of Charge III ("penetrating her anus with his penis").
[67] *Quiroz*, 57 M.J. at 585-86.
[68] *Id.* (Is each charge and specification aimed at distinctly separate criminal acts?)
[69] *Id.*

Next, the extent of LCpl Miles's criminality was misrepresented and exaggerated because, like *Quiroz*, charges based on the same conduct were considered separate offenses for findings and sentencing.[70] It's worth noting that the military judge actually found LCpl Miles guilty of *attempted sodomy*.[71] This occurred immediately after he found LCpl Miles guilty of committing an indecent act by...*attempting sodomy*.[72] The third *Quiroz* factor favors LCpl Miles because all of the alleged conduct occurred at virtually the same time with the two females.[73]

With regard to the fourth *Quiroz* factor, the number of specifications and charges unreasonably increased LCpl Miles' punitive exposure.[74] LCpl Miles's punitive exposure was doubled from a possible five years confinement to ten years,[75] simply because the government chose to include the fall back charge of *consensual sodomy*.[76]

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[70] *Quiroz*, 53 M.J. at 608; Charge Sheet; R. at 234-35, 268.
[71] R. at 234.
[72] *Id.* ("…except the words 'and anus with his penis' and substituting therefore the words 'with his penis and touching the anus with his penis.'")
[73] *Quiroz*, 57 M.J. at 585-86 ("…the number of charges and specifications misrepresent or exaggerate appellant's criminality").
[74] *Quiroz*, 57 M.J. at 585-86 ("Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?")
[75] Manual for Courts-Martial, Appendix 12 (2008 ed.).
[76] *See infra* at 38.

In fact, the government charged a series of "catch-alls" in an attempt to capture a shred of criminality in this consensual act. The same act was charged six separate ways in decreasing levels of culpability.[77]

It is understandable that the government sought to preserve contingencies of proof. But once overlapping findings had been entered, trial counsel should have requested the military judge consolidate the offenses for sentencing. He did nothing of the sort.[78] This is evidence of prosecutorial overreach, the fifth *Quiroz* factor.[79]

Conclusion

Here, there is an unreasonable multiplication of charges for findings and sentencing. Dismissal of the unreasonable charge is an appropriate remedy.[80] LCpl Miles was prejudiced by the additional guilty findings because an "'unauthorized conviction . . . constitutes unauthorized punishment in an [sic]

[77] Charge Sheet (Charges II, III, and IV; all specifications thereunder).
[78] R. at 234-35, 268.
[79] *See Akes*, slip op. at 8.
[80] *Campbell*, 71 M.J. at 22-23; cf. *United States v. Ducharme*, 59 M.J. 816, 819-20 (N-M. Ct. Crim. App. 2004) (court dismissed the conviction deciding it was an unreasonable multiplication of charges and merged specifications).

of itself.'"[81] Therefore, this Court should set aside the indecent acts charge and reassess the sentence accordingly.

If instead this Court finds that there is an unreasonable multiplication of charges for sentencing alone, then this Court should reassess the sentence by setting aside the punitive discharge.

II.

ARTICLE 120(k), UCMJ, INDECENT ACT, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD. PRECEDENT PERTAINING TO "ARTICLE 134 STYLE" INDECENT ACTS IS INAPPLICABLE. PRECEDENT UPHOLDING ARTICLE 120(k) IS WRONGLY DECIDED.

Standard of Review

This Court reviews the constitutionality of statutes *de novo*.[82]

Principles of Law

Due process requires fair notice that an act is forbidden and subject to criminal sanctions.[83] It also requires fair notice as to the standard applicable to the forbidden conduct.[84] Potential sources of "fair notice" that one's conduct is

[81] United States v. Falcon, 65 M.J. 582, 586 (N-M. Ct. Crim. App. 2006) (quoting *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999)).
[82] *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005).
[83] *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)(citing *United States v. Bivens*, 49 M.J. 328, 330 (C.A.A.F. 1998).
[84] *Parker v. Levy*, 417 U.S. 733, 755 (1974).

definitively proscribed include federal law, state law, military case law, military custom and usage, and military regulations.[85]

As the Supreme Court has stated, "[v]oid for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."[86] The void-for-vagueness doctrine also requires that penal statutes be defined in a manner that does not encourage "arbitrary and discriminatory enforcement" by law enforcement authorities.[87] In determining the sufficiency of the notice, "a statute must of necessity be examined in the light of the conduct with which the defendant is charged."[88]

A criminal statute is overbroad if, in addition to prohibiting conduct which is properly subject to government control, it also proscribes activities which are constitutionally protected or otherwise innocent.[89] A statute should be invalidated when its overbreadth is substantial.[90] Also, when there is a realistic danger that the statute could

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[85] *Vaughan*, 58 M.J. at 31.
[86] *Parker*, 417 U.S. at 757.
[87] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).
[88] *Parker*, 417 U.S. at 757; *See also United States v. Mazurie*, 419 U.S. 544, 550 (1975).
[89] *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).
[90] *New York v. Ferber*, 458 U.S. 747, 769 (1982).

significantly compromise recognized First Amendment protections of parties *not before the court* it should be struck down.[91]

Discussion

This Court must answer two basic questions in determining whether Article 120(k), indecent conduct is void for vagueness. First, did it provide fair notice or warning to the appellant as far as what is prohibited or required by the statute? Second, did it provide an ascertainable standard of guilt so that it did not encourage arbitrary and discriminatory enforcement?[92] The answer to both questions must be in the affirmative for the statute to be upheld against a void for vagueness challenge.[93]

Here, both questions should be answered in the negative. The statute does not provide fair notice and also encourages arbitrary and discriminatory enforcement. A Marine should not have to guess how each new commanding general defines "immorality" before engaging in consensual sex between adults.

A. Article 134, UCMJ, Indecent Acts case law is inapplicable.

Prior to October 1, 2007, "indecent acts with another" was an example of conduct that could satisfy the elements of Article 134.[94] That offense consisted of three elements:

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[91] *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).
[92] *Kolender*, 461 U.S. at 357.
[93] *United States v. Powell*, 423 U.S. 87, 92-93 (1975).
[94] *See United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010)("Enumerated" Article 134, UCMJ, paragraphs do not define

1) That the accused committed a certain wrong;
2) That the act was indecent; and
3) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[95]

The term "indecent" contained in the second element was explained as follows:

> Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust *and* deprave morals with respect to sexual relations.[96]

This explanation, coupled with the terminal element of this offense, sufficiently defined conduct that could be considered "indecent." Under Article 134, a Marine was on notice that his sexual conduct, even if protected outside the military, would be criminal if it was prejudicial to good order and discipline or service discrediting.[97] In upholding the general article – a precursor to Article 134 – the Supreme Court stated:

> Notwithstanding the apparent indeterminateness of [the general article], it is not liable to abuse; for what those crimes are, and how they are to be punished, is *well known by practical men* in the navy and army.[98]

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offenses but merely indicate examples of circumstances where elements of Article 134, UCMJ, could be met).

[95] 10 U.S.C. § 934 ¶90.b. Manual for Courts-martial (2005 Ed.)

[96] Manual for Courts-martial (2008 Ed.) Appendix A27-4(emphasis added).

[97] *Dynes v. Hoover*, 61 U.S. 65 (1857).

[98] *Dynes*, 61 U.S. at 82 (emphasis added).

The Supreme Court looked to *Dynes* and the "longstanding customs and usage" of Article 134 to uphold restrictions on servicemember's conduct.[99] Similarly, ever since two non-commissioned officers met a couple of *frauleins*, our senior Court has held that "open and notorious" sexual conduct is discrediting to the military service.[100]

The idea that open and notorious sexual conduct is a violation of Article 134 has been reapplied several times throughout military jurisprudence.[101] Each time, emphasis was placed on the fact that the act was either service discrediting or prejudicial to good order and discipline.[102] Violation of "the longstanding customs and usage" of Article 134 made the act criminal.

Appellant does not contest that this precedent was wrongly applied to Article 134 offenses. Rather, that these cases are inapplicable to Article 120(k) offenses that do not allege a terminal element. Unlike Article 134, Article 120(k) has no longstanding custom or usage.

Without the terminal element, the term "indecent" is open to myriad definition.

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[99] *Parker*, 417 U.S. at 747-48.
[100] *United States v. Berry*, 6 U.S.C.M.A. 609, 614, 20 C.M.R. 325, 330 (1956).
[101] *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).
[102] *Id.*

B. Practical men in the armed services do not know what the crime is or how it will be punished.[103]

From October 1, 2007 through June 27, 2012 indecent acts was punishable under Article 120.[104] The text of the statute during this period read:

> Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

Congress demonstrated its clear intent to remove the terminal element from consideration in determining whether an indecent act was criminal. Instead, Congress altered its previous definition of "indecent conduct" to read:

> ...that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire *or* deprave morals with respect to sexual relations.[105]

Congress may have intended that the interim definition, a rough approximation of the previous, subsume the case law defining indecent conduct under the old Article 134.[106] But in

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[103] *See Dynes*, 61 U.S. at 82.
[104] "Indecent Acts" has been repealed and is no longer an enumerated crime. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).
[105] Article 120(t)(12)(2008 ed.)(emphasis added).
[106] *See Analysis of Punitive Articles*, MANUAL FOR COURTS-MARTIAL (2008 ed.), UNITED STATES at A23-15; *See also United States v. Walton*, 2010 CCA LEXIS 250, (unpublished) *3-*4(A.F.C.C.A. 2010).

seemingly making it 1) easier to commit an indecent act[107] and 2) untethering the offense from the terminal element, Congress failed to provide a reasonable standard to determine when conduct is indecent.[108]

Congress defined "indecent conduct" as a "form of immorality relating to sexual impurity." The problem here is that what one person defines as immoral as it relates to sexual impurity can differ drastically from what another might think. Morality with respect to consensual sex amongst adults is entirely subjective.

How then, should a Marine know what defines "common propriety"? Does that mean that most people engage in the behavior? That most people are accepting of the behavior in others? Or that most people are proud to publically declare their support for the behavior?

Consider a convening authority or military judge with strongly held religious beliefs prohibiting premarital sex.

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[107] Compare the 2005 definition ("…tends to excite lust *and* deprave morals with respect to sexual relations.") with the 2008 ("…tends to excite sexual desire *or* deprave morals with respect to sexual relations")(emphasis added).

[108] *But see United States v. Rheel*, 2011 CCA LEXIS 370 (N-M. Ct. Crim. App. 20 Dec. 2011)(unpublished); *United States v. Hancock*, 2012 CCA LEXIS 110 (N-M. Ct. Crim. App. 29 Mar. 2012) (unpublished); *United States v. King*, 71 M.J. 50 (C.A.A.F. 2012).

Could every Friday night "hook-up"[109] be considered "grossly vulgar, obscene, and repugnant to common propriety"? Must a Marine be concerned at every change of command that what was permissible last week is now indecent in the eyes of the commanding general?

What about a long married couple looking to spice up their love life? Could an exploration of the *Kama Sutra* subject this couple to perdition from a military prosecutor who believed that any coitus other than missionary was "repugnant to common propriety"?[110]

This is the precise problem that Justice O'Connor identified in *Kolender* – arbitrary and discriminate law enforcement with no discernable standard.[111] Indeed, convening

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[109] *See Sexual hookup culture: A review*. Garcia, Justin R.; Reiber, Chris; Massey, Sean G.; Merriwether, Ann M. Review of General Psychology, Vol 16(2), Jun 2012, 161-76 ("Hookups," or uncommitted sexual encounters, are becoming progressively more engrained in popular culture, reflecting both evolved sexual predilections and changing social and sexual scripts. Hook-up activities may include a wide range of sexual behaviors, such as kissing, oral sex, and intercourse. However, these encounters often transpire without any promise of, or desire for, a more traditional romantic relationship. A review of the literature suggests that these encounters are becoming increasingly normative among adolescents and young adults in North America, representing a marked shift in openness and acceptance of uncommitted sex).

[110] *See generally The Complete Kama Sutra: The First Unabridged Modern Translation of the Classic Indian Text*. Daniélou, Alain (1993). Published by Inner Traditions; *"Missionary Positions: Christian, Modernist, and Postmodernist".* Priest, Robert J. Current Anthropology 42 at 29–68 (2001).

[111] *Kolender*, 461 U.S. 352, 357.

authorities, prosecutors, and the judiciary may use Article 120(k) to pursue their personal predilections. Without prospectively knowing what is prohibited, service members are deprived of due process in the form of "chilled" conduct or arbitrary persecution.

C. *United States v. Rheel*, an unpublished decision by this Court, was wrongly decided.

Rheel was an uncontested guilty plea where the appellant sent pictures of his naked penis via text-message to the nine-year-old daughter of his former fiancée.[112] In that case, this Court reasoned that "[a]ny reasonable person would know sending such an offending photograph to a nine-year-old child via electronic message would be a crime."[113] Further, that "*common sense* supports the conclusion that the appellant was on notice that his conduct violated the UCMJ."[114]

This Court then held, absent analysis, that: "[t]he statutory definition provides adequate notice to an ordinary person about what conduct is forbidden."[115] Granted, common sense puts reasonable people on notice that showing your penis to a nine-year-old is a crime. However not all sexual activity is so clearly criminal, and the Court failed to provide a

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[112] *Rheel*, 2011 CCA LEXIS 370 *6 (unpublished).
[113] *Id.*
[114] *Id.* (emphasis added).
[115] *Id.*

rationale for the why an ordinary person would intuitively understand a shifting and subjective definition of "immorality" in gray areas. Instead, the Court relied on a logical fallacy by offering a conclusion within its premise.

The Court's rationale breaks down as: "ordinary people" know what indecent conduct is, therefore, *res ipsa* the statute provides adequate notice. But simply calling people "ordinary" doesn't make them prescient as to what their convening authority will determine to be immoral regarding sexual conduct.

The Court concludes its consideration of the vagueness argument stating that: "because the law's meaning is readily understood, we are convinced that it will not be applied by commanders, law enforcement, or the courts in an arbitrary or discriminatory manner."[116] Despite this assurance, LCpl Miles finds himself subject to charges that, on their face, appear to describe normal sexual conduct between heterosexual adults.[117]

LCpl Miles is accused of wrongfully committing indecent conduct, "to wit: penetrating the vagina and anus with his penis, digitally penetrating the vagina and anus, and touching the vagina and buttocks of [BNC]."[118] He is also accused of: "penetrating the vagina and anus with his penis and rubbing the breast and vagina of [EED]." With the exception of the alleged

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[116] *Id.* *8.
[117] *See generally* http://www.nationalsexstudy.indiana.edu/.

consensual sodomy (a crime only in the world of American military justice and countries like Libya, Sierra Leone, and Somalia[119]) none of these acts would be considered criminal by "ordinary persons."[120]

The government appears to now consider vaginal sex and rubbing the female breasts and buttocks to be indecent. So much for, "will not be applied by…commanders in an arbitrary manner."[121]

Even if the government had tailored the specification to allege "open and notorious" conduct or "in the presence of a third person", which it did not, this was still not a crime. LCpl Miles discretely engaged in consensual sexual conduct with two adult women.[122] Nothing about that act would have immediately put him on notice that his conduct was "vulgar, obscene, and repugnant to common propriety."[123]

D. This Court's decision in *Barbier* opened the floodgates.

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[118] Charge Sheet of 14 Sep 12. Charge II Specification 4.
[119] See, e.g., http://76crimes.com/76-countries-where-homosexuality-is-illegal/ (last accessed on 15 December 2013).
[120] See, e.g., http://www.iub.edu/~kinsey/resources/images/SexualBehaviorPIc.jpg (last accessed on 15 December 2013).
[121] *Rheel*, 2011 CCA LEXIS 370 *8 (unpublished).
[122] Prosecution Exhibit 14.
[123] *See* Article 120(t)(12), UCMJ.

This Court has determined that the definition and examples contained in Article 120(t)(12) are illustrative and not exhaustive.[124] Specifically, the Court held:

> We reject the appellant's assertion that indecent conduct is limited to situations involving the violation of a person's reasonable expectation of privacy and without the person's consent. While the statute sets forth examples of indecent conduct under Article 120(t)(12), the list is not exhaustive. Nor is the list exclusive.[125]

Effectively then, this Court has opened the floodgates to what could be considered "indecent." This Court offered no limiting principle whatsoever.

The implication of this precedent is staggering. Now, anything that a commander finds "indecent" may be charged as a crime regardless of whether the act is consensual. Where then does the line get drawn?

Consider viewing pornography that depicts willing actors engaging in a consensual threesome. What prevents a commander from deeming such material "grossly vulgar, obscene, and repugnant to common propriety"? Nothing under this Court's current precedent would stop such a prosecution.

What if a particularly fusty commanding general found out that one of his Marines enjoyed light bondage with his sexual

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[124] *United States v. Barbier*, 2012 CCA LEXIS 128, *10-*11 (N-M. Ct. Crim. App. 2012)(unpublished decision).
[125] *Id.*

partners?[126] Despite being able to buy books depicting such acts on Amazon and at Barnes and Noble Bookstore,[127] could this subordinate find himself the accused at a general courts-martial? Of course, provided only that the practice of bondage is considered "indecent."

From these examples, this Court should begin to realize the scope of precluded conduct that such a permissive interpretation allows. Otherwise protected sexual behaviors could be swept up by the overbroad reach of Article 120(k) and this Court's precedent. In the case before this Court now, LCpl Miles was charged with, *inter alia*, rubbing the breasts and buttocks of a female partner.

Are the breasts and buttocks of willing female partners now considered by the government to be indecent? What strange territory Sailors and Marines find themselves in when two breasts are beautiful, but four require averting their eyes as though they've viewed the gorgon.

E. Article 134's terminal element acted as an anchor in previous cases. Without that anchor, "indecent conduct" drifts into protected areas.

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[126] "Bondage: the sexual practice that involves the tying up or restraining of one partner." New Oxford American Dictionary 2nd ed., Oxford University Press (2005).

[127] http://www.barnesandnoble.com/s/bondage?dref=1 (Last accessed on 14 December 2013); http://www.amazon.com/Bondage-Books/lm/R2SIW9HG6HWPUE (Last accessed on 14 December 2013).

A statute is unconstitutionally overbroad if it proscribes both protected and criminal conduct.[128] In *Parker*, the Supreme Court upheld the validity of Articles 133 and 134 on the basis that civilian conduct that would otherwise be protected can be punished in the military.[129] The underlying rationale for this is that Articles 133 and 134 are narrowly tailored to satisfy specific concerns and needs of the military – obedience to orders, good order and discipline, and mission readiness.[130]

Congress did not tailor Article 120(k) in the same way it did Article 134. Instead Congress affirmatively removed good order and discipline and service discredit as elements with respect to indecent acts. This unmoored the pre-existing legal standard, and for that interim period servicemembers could be convicted and punished for *anything* that the government deemed "indecent."

Previous case law rested on Article 134's terminal element. The Air Force Court of Military Review considered "the elusive concepts of indecency" in the case of *United States v. Woodard*.[131] Though this case was later set-aside on other grounds, the *dicta* contained therein is instructive.

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[128] *Grayned*, 408 U.S. at 114.
[129] *Parker*, 417 U.S. at 759-60.
[130] *Parker*, 417 U.S. at 760-61.
[131] *United States v. Woodard*, 23 M.J. 514, 516 (A.F.C.M.R. 1986), *set aside on other grounds*, 23 M.J. 400 (C.M.A. 1987).

When considering an Article 134 type indecent act, the *Woodard* court began by noting that the definition of indecency was "highly subjective in nature."[132] Recognizing the problem this caused, the court rejected the idea that it would merely assume that everyone understood the definition of indecent.

> We would have to assume that reasonable men are in general agreement that such conclusions were universally understood to mean one thing clearly and not another within a given context and, thus capable of ready application to the facts at hand. We do not believe this is so based on existing case law…[133]

Instead, the court employed a "totality of the evidence" approach that was anchored to the terminal element of Article 134.[134] Stating *what was then* a maxim, the court opined that "it is clear enough that the Uniform Code of Military Justice does not generally purport to regulate the moral standards and sexual behavior of military members."[135] Since Congress dragged indecent acts out of Article 134, this is no longer the case.

Indecent acts under Article 120(k) criminalized, without restriction, any conduct deemed indecent. But the general prohibitions of Article 134 survived precisely because its reach was restricted to conduct that was service discrediting or

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[132] *Woodard*, 23 M.J. at 515.
[133] *Id.*
[134] *Id.* at 516-17 ("We have no problem concluding that the appellant's acts were prejudicial to good order and discipline…").

prejudicial to good order and discipline. Without similar tailoring, article 120(k), UCMJ is unconstitutionally overbroad.

This results in an impermissible chilling effect on servicemembers who might avoid constitutionally-protected conduct out of fear or ignorance of the law. The overbreadth here is not only "real, but substantial as well."[136] Without the anchor of the terminal element and with the "highly subjective" nature of indecency, servicemembers could not know when their conduct became impermissible.

Conclusion

Without a terminal element alleging prejudice to good order and discipline or service discredit, the definition of "indecent" is left to the subjective morality of men. An individual service member does not know what an "Article 120 type Indecent Act" looks like because its definition is vague and subject to whim. Absent "longstanding customs and usage" to guide him/her, a conscientious Marine would abstain from constitutionally protected conduct in an over abundance of caution.

Because the reach of Article 120(k) impermissibly extends to speech and expressive conduct that is protected under the First Amendment this Court should declare it unconstitutional.

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[135] *Id.* at 515.
[136] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Such action would be of little legal import because Congress itself has already removed indecent acts from Article 120.[137] In fact, as of June 28, 2012, "Indecent Acts" is no longer an enumerated crime at all.[138]

Thus, this Court should declare Article 120(k) unconstitutional because it lacks a definite meaning to provide notice to service members about the type of conduct that is forbidden and it impermissibly extends to speech and expressive conduct that is protected under the First Amendment of the Constitution.

III.

ARTICLE 120(k), UCMJ, INDECENT ACT, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES. DISCRETE CONSENSUAL SEXUAL CONDUCT BETWEEN ADULTS IS NOT "VULGAR, OBSCENE, OR REPUGNANT TO COMMON PROPRIETY."

A. "Obscenity" is to be determined by applying "contemporary community standards."[139]

History is replete with examples of consensual threesomes being mentioned approvingly.[140] The act is as old as the Greeks. Literally.[141]

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[137] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).
[138] LCpl Miles was alleged to have committed these acts on February 3, 2012. This means that just five months later, his conduct would not have been criminal under Article 120.
[139] *Miller v. California*, 413 U.S. 15, 37 (1973).

But let us dispense with the history lesson and examine a more salient timeframe. The lifetime of LCpl Miles; who was 22 years of age when this conduct occurred.[142] Interestingly, this places him in the vast majority of enlisted Marines, 62% of whom are under the age of 25.[143]

The last twenty years, the entire lifetime of the majority of Marines, is littered with positive cultural references to threesomes.[144] The effect has been to normalize, and even

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[140] *See generally The Complete Kama Sutra: The First Unabridged Modern Translation of the Classic Indian Text*. Daniélou, Alain (1993).

[141] *Looking at Lovemaking: Constructions of Sexuality in Roman Art 100 B.C.–A.D. 250*, p. 233-34, Clarke, John R. University of California Press, (1998, 2001).

[142] Prosecution Exhibit 21.

[143] "The Marine Corps 'A Young and Vigorous Force'", Demographics Update at 2 (June 2013)(The Marine Corps is the youngest, most junior, and least married of the four military Services). https://www.manpower.usmc.mil/portal/page/portal/MRA_HOME2/Related%20Links/Demographics%20Booklet%20June%202013.pdf

[144] *See The Threesome Handbook*: *A Practical Guide to Sleeping with Three*, Vantoch, Victoria, Avalon Publishing Group (August 30, 2007)("A step-by-step guide to realizing the American dream, The Threesome Handbook: A Practical Guide to Sleeping with Three is the first book to give tri-curious men and women the inside scoop on threesomes. Having finally slipped into the mainstream on MTV, Boston Legal, Entourage, magazines, movies, and just about every respectable blog, sexuality historian and threesome dabbler Victoria Vantoch offers practical and humorous advice on our most popular fantasy") ; *See also* "Threesome" (a 1994 film starring Lara Flynn Boyle, Stephen Baldwin and Josh Charles. Rated R); Gossip Girl (a 2009 television episode starring Hilary Duff); "Wild Things" (a 1998 film starring Matt Dillon, Neve Campbell, and Denise Richards. Rated R); "Zoolander" (a 2001 film starring Ben Stiller); and "Vicky Christina Barcelona" (a 2008 Woody Allen film starring Scarlett Johansson, Javier Bardem, and Penelope Cruz).

encourage, this behavior between individuals.[145] There is nothing vulgar, obscene, and repugnant to common propriety about a consensual threesome to this generation's LCpl.

So when Congress speaks about "common propriety" that term must necessarily be applied to the population it seeks to regulate; the majority of service members. It is the 62% of Marines under the age of 25 who define "contemporary community standards."[146]

Sexual morality from the age of Kennedy and Khrushchev should not be applied to today's Marines.[147] Acts alleged to be "obscene" must be determined by applying "contemporary community standards".[148]

B. Marie Claire, a "mainstream housewife magazine", does not write articles encouraging their readers to participate in acts "repugnant to common propriety."

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[145] See, e.g., http://abcnews.go.com/Primetime/PollVault/story?id=156921&page=1&singlePage=true (a 2004 ABCNews poll finding that 28% of single men and 14% of the general population has engaged in a threesome); http://www.cosmopolitan.com/advice/tips/great-female-survey/threesome-statistic (a 2010 survey finding that a threesome is the number one fantasy for 33% of all men); and http://www.askmen.com/media_kit/survey/sexuality_dec2004.html (a 2004 survey where 61% of men responded that they would like to engage in a threesome, and only 23% responded they would never engage in a threesome).

[146] *Supra* n.72; *Miller v. California*, 413 U.S. 15, 37 (1973).

[147] *See United States v. Berry*, 6 U.S.C.M.A. 609, 614, 20 C.M.R. 325, 330 (1956).

[148] *Miller*, 413 U.S. at 37.

In September of 2011, the magazine *Marie Claire,* published an article entitled: "How I planned a Ménage-a-Trois."[149] In that article, the writer describes planning a threesome for her husband's fortieth birthday. Now *Marie Claire* isn't some sort of hardcore pornographic magazine.

Marie Claire is published worldwide, has a circulation of nearly a million[150], and generally writes about health, beauty, and fashion. It's geared toward the housewife set and is about as mainstream a magazine as you can get. Yet here it is, openly discussing a subject declared *verboten* by the Court of Military Appeals in 1956.

Times have changed. A mainstream housewife's magazine would not encourage their readership to engage in conduct that is "vulgar, obscene, and repugnant to common propriety." And so it is with many contemporary cultural references to threesomes.

On May 21, 2011, Saturday Night Live, a venerable comedy institution, broadcast a skit entitled "3-way."[151] In it Justin Timberlake, Andy Samberg, and "Lady Gaga" portrayed a threesome

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[149] *See* http://www.marieclaire.com/sex-love/relationship-issues/threesome-sex-menage-a-trois-planning (Last accessed 16 December 2013).

[150] *See* http://abcas3.auditedmedia.com/ecirc/magtitlesearch.asp (statistics compiled June 30, 2013).

[151] Wagner, Curt (May 23, 2011). "Justin Timberlake, Andy Samberg, Lady Gaga caught in '3-way'". Chicago Tribune. (Retrieved December 16, 2013).

relationship as humorous. This skit received an Emmy nomination for outstanding original music and lyrics.[152]

An act that was once talked about in hushed tones is now mainstream and prevalent. Put simply, a consensual threesome is not indecent nor should it be criminal.

C. "Indecent Acts" is no longer an enumerated offense.

Even Congress agrees that threesomes, in and of themselves, should be criminal. Congress already removed indecent acts from Article 120.[153] In fact, as of June 28, 2012, "Indecent Acts" is no longer an enumerated crime at all.[154]

What this means, is that if LCpl Miles, EED, and BNC would have hooked up just five months later it wouldn't have been criminal under 120(k). The government would have had to prove the case under a novel Article 134 offense. Not only would this have eliminated potential sex offender registration,[155] but would have also reduced the total confinement from five years to six months.

120(k) was meant to punish the peeping Tom's, the voyeurs, and the "hidden camera guys." It should not be applied to a consensual sexual act between three partners.

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[152] *See* www.emmys.com.
[153] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011).
[154] LCpl Miles was alleged to have committed these acts on February 3, 2012. This means that just five months later, his conduct would not have been criminal under Article 120.

The Oath of Enlistment does not include a vow of chastity. For all their heraldry, the United States Marine Corps is not The Knights Templar. Marines do not take a vow of chastity upon agreeing to defend their country. If the government wants to invade a Marine's bedroom they should be forced to prove a military nexus through the terminal element. Anything less amounts to a violation of the Constitution's right to privacy as applied to LCpl Miles.

Conclusion

Discrete consensual sexual activity between adults is not "vulgar, obscene, or repugnant to common propriety." Attitudes about sex have changed; so should the case law.

This Court should find that Article 120(k), Indecent Act, was unconstitutionally applied to LCpl Miles. This Court should set aside LCpl Miles's convictions for Indecent Act and reassess the sentence by disapproving the punitive discharge.

IV.

ARTICLE 125, UCMJ, SODOMY, IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Standard of Review

The constitutionality of a statute is reviewed *de novo*.[156]

Principles of Law and Discussion

A. The legislative history of Article 125.

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[155] *See* DODINST 1325.7.

The UCMJ includes two types of crimes: 1) common-law offenses, sometimes called "civil type" offenses, and 2) uniquely military offenses.[157] The prohibitions against "common law crimes" were enacted to subject service members to the basic norms of civil society; in the military and combat offenses, "[t]he Code likewise imposes other sanctions for conduct that in civilian life is not subject to criminal penalties."[158]

Article 125 falls in the common-law offense category and traces its history to the wholesale adoption of the British Article of War by the Continental Congress in 1775.[159] The British Articles of War had in turn incorporated, by use and custom, British common law prohibitions against murder, suicide, manslaughter, burglary, arson, robbery, larceny, rape, sodomy, and mayhem.[160] Congress first enumerated a number of common-law offenses, including sodomy, as military crimes in 1920 when it amended the Articles of War.[161]

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[156] *Disney*, 67 M.J. at 48.
[157] *See United States v. Harris*, 8 M.J. 52 at 55-56 (C.A.A.F. 1999)(quoting the legislative history of the UCMJ as distinguishing between "so-called military offenses" and "civil types of crimes"); 1 Frances A. Giligan & Fredric I. Lederer, *Court-Martial Procedure* 16 (2d ed. 1999).
[158] *Parker*, 417 U.S. 749.
[159] *See* James E. Valle, *Rocks and Shoals: Order and Discipline in the Old Navy 1800-1861*, at 40-41(1980).
[160] *See* William Winthrop, *Military Law and Precedent* 67-72 (2d ed. 1920).
[161] *See* Article 93, Army Manual for Courts-Martial (1928).

When Congress enacted the UCMJ in 1950, it continued to criminalize the British common-law felonies listed in the Articles of War, but explicitly defined them based on the civilian laws of Maryland.[162] As a result, the 1920 one-word prohibition against "sodomy" was changed to a criminal prohibition against "engaging in unnatural carnal copulation with another person of the same or opposite sex."[163] There is *no* separate legislative history expressing a congressional purpose in prohibiting consensual sodomy through Article 125, other than the general purpose to prohibit the kinds of criminal conduct generally proscribed in civil society.[164] As the C.M.A.. has stated, [t]he background material on the adoption of the UCMJ indicates Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military community."[165]

B. Appellant has standing to challenge the law.

A party has standing to challenge the Constitutionality of a statute only insofar as it has an adverse impact on his own rights.[166] As a general rule, if there is no Constitutional

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[162] *See United States v. Henderson*, 34 M.J. 174, 176 (C.M.A. 1992)("The range of conduct proscribed by Article 125(a) is consistent with the then-existing laws of Maryland, after which the common-law punitive articles were generally patterened.").
[163] 10 U.S.C. § 925(a).
[164] *See Harris*, 8 M.J. at 55.
[165] *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1977).
[166] *Ulster Cnty v. Allen*, 442 U.S. 140, 154-55 (1979).

defect in the application of the statute to a litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.[167]

Appellant has standing to challenge Article 125, UCMJ, because the application of the statute to his conduct, consensual sodomy, is unconstitutionally vague. As the Fourth Circuit Court of Appeals found in *MacDonald v. Moose*, anti-sodomy provisions written like Article 125, are "unconstitutional when applied to any person" and thus any challenger convicted of the unconstitutional law has articulated a concrete interest.[168]

The Fourth Circuit explained that a finding of a lack of standing in these types of cases is necessarily predicated on an adverse ruling on the as-applied challenge and therefore, there should not be a barrier to an appellant's standing to challenge the statute.[169] What makes the anti-sodomy statute different

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[167] *Id.*

[168] *MacDonald v. Moose*, 2013 U.S. App. LEXIS 4921, *20-*24 (4th Cir. March 12, 2013). The statute in issue was Va. Code Ann.§ 18.2-361(A): Crimes against nature. -- If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

[169] *MacDonald*, 2013 U.S. App. LEXIS at *22.

from other statutes is that there is no identifiable act that is lawful to criminalize without qualification.[170]

Judicial elements,[171] Presidentially promulgated rules, and additional unalleged facts must be added to the bare words legislated against by Congress in order to turn Article 125 into something a legislature may have a rational basis to criminalize.[172] Article 125, UCMJ, by itself is unlawful in its application to any person convicted of it. Appellant's case therefore satisfies the threshold inquiry articulated in *Ulster County* for a Constitutional controversy because he has been denied Due Process by being convicted of a statute that is unconstitutional in its plain application.

C. The vagueness argument should be revisited.

In 2004, in *United States v. Marcum*, the Court of Appeals for the Armed Forces (CAAF) declined to evaluate a facial challenge to Article 125, UCMJ, because at the time the unique military environment—including the existence of 10 U.S.C. § 654—provided a rational basis for the existence of the law, despite the serious Constitutional concerns raised by the appellant.[173] In addition to the uniquely military concerns justification, the

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[170] *MacDonald*, 2013 U.S. App. LEXIS at *30-*31.
[171] See *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).
[172] This analysis takes into account that the application of the element of force was inapplicable against Appellant as discussed in Assignment of Error III.
[173] *Marcum*, 60 M.J. at 206.

CAAF also gave the alternative reasoning, that because "Article 125 addresses both forcible and non-forcible sodomy, a facial challenge reaches too far."[174]

Appellant acknowledges that the Supreme Court has long recognized that "the military is, by necessity, a specialized society" and that "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be Constitutionally impermissible outside it."[175] However, Article 125, UCMJ, lacks a military purpose.

Times have changed since the CAAF decided *Marcum* in 2004. The uniquely military concerns no longer exist. 10 U.S.C. § 654, known as "Don't Ask, Don't Tell," was repealed on December 22, 2010.[176] The concerns regarding the detrimental impact of sodomy, a form of sexual expression in both the hetero and homosexual communities, on good order and discipline have been dismissed through legislation.

Further, since *Marcum* was decided in 2004, major changes to the military criminal law have taken place including the major redrafting of Article 120. Now, more specific sexual assault laws reach all other conceivable acts of nonconsensual sodomy

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[174] *Id.*
[175] *Parker v. Levy*, 417 U.S. 733, 743, 758 (1974).
[176] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516 (2010).

which might impact good order and discipline.[177] Additionally, *Marcum* factors can easily be recast as offenses under the general Article 134, UCMJ, for any act that would also be detrimental to good order and discipline or service discrediting; eliminating the need or rational basis for an independent sodomy statute.

Finally, to the CAAF's second point that Article 125, UCMJ, sometimes catches what might be readily identifiable illegal conduct in its net, the fact that a properly crafted statute prohibiting sodomy may survive Constitutional challenges does not mean that Article 125, UCMJ, is saved. *Bowers v. Hardwick* analyzed a facial challenge to the validity of anti-sodomy laws and found them facially Constitutional.[178] *Lawrence v. Texas* overruled *Bowers v. Hardwick's* holding and found that anti-sodomy laws that further no legitimate state interest are facially unconstitutional.[179] This Court should follow and find that Article 125, UCMJ, does not serve a military purpose and is unconstitutionally vague and overbroad.

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[177] 10 U.S.C. § 120 (2006); 2011 Amendments to the Manual for Courts-Martial, 76 Fed. Reg. 78451, 78461 (Dec. 16, 2011). The two revisions of Article 120 have criminalized sodomy in various forms, including forcible sodomy, sodomy committed when a person is incapable of consenting, and sodomy committed with minors

[178] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[179] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

Given Congress's specific criminalization of certain acts of sodomy within the code, the broad overreaching language of Article 125, UCMJ, does not support any military purpose that is not already covered in other laws, other than perhaps bestiality. The facial Constitutional challenge should be revisited. This Court will find the statute facially vague under the two theories of unconstitutional vagueness: (1) it fails to provide notice of what conduct is forbidden; and (2) it does not provide standards for law enforcement officials.[180]

D. Article 125, UCMJ, is facially vague because it does not provide fair notice to the common person of what is prohibited.

An act of Congress is unconstitutionally vague if a person cannot reasonably discern whether the contemplated conduct is criminal.[181] Due Process guaranteed by the Fifth Amendment requires fair notice that an act is forbidden and subject to criminal sanctions.[182] People of "common intelligence" must not be forced to guess at the meaning of the criminal law.[183]

In the military context what the common person can understand was addressed when the general "catch-all" article in

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[180] *Parker*, 417 U.S. at 774-75 (quoting *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974)).
[181] *United States v. Harriss,* 347 U.S. 612, 617 (1954).
[182] *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)(citing *United States v. Bivens*, 49 M.J. 328, 330 (C.A.A.F. 1998)); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).
[183] *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926).

the Code was challenged back in 1857.[184] In upholding the general article — a precursor to Article 134, UCMJ — the Supreme Court in *Dynes* stated:

> Notwithstanding the apparent indeterminateness of [the general article], it is not liable to abuse; for what those crimes are, and how they are to be punished, is *well known by practical men* in the navy and army.[185]

In *Parker*, the Supreme Court looked to *Dynes* and the "longstanding customs and usage" of Article 134, UCMJ, for guidance.[186] In contrast to Article 134, UCMJ, Congress did not sufficiently narrow the scope of Article 125, UCMJ, nor are there any customs of the service that makes it clear to the common Sailor or Marine when their acts of sexual expression may be criminalized.

Article 125, UCMJ, is facially vague and practically unworkable. Here, the statute's broad general sweep requires people of common intelligence to guess as to the application of the law to their conduct. Article 125, UCMJ states:

> (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.

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184 *Dynes v. Hoover*, 61 U.S. 65 (1857).
185 *Dynes*, 61 U.S. at 82 (emphasis added).
186 *Parker*, 417 U.S. at 747-48.

> (b) Any person guilty of sodomy shall be punished as a court-martial may direct.[187]

"Article 125 forbids sodomy whether it is consensual or forcible, heterosexual or homosexual, public or private."[188] The statute does not explain or even hint at how this sometimes-protected conduct becomes illegal.

Even conduct that the majority of people understand is illegal, such as manslaughter, is defined with significantly more precision.[189] Sodomy is a not as recognizably illegal as killing a human being.

Further, the circumstances under which sodomy is more recognizably illegal to a common person, such as by force or with a minor, are not within the text of the statute and are redundantly proscribed elsewhere in the code. This leads to further confusion as to what exactly Article 125, UCMJ criminalizes. Additionally, unlike murder, large amounts of legal and constitutionally-protected conduct are subsumed by the plain words of Article 125.

Article 125, UCMJ, is similar to the statute in *Ricks v. District of Columbia*, that the D.C. District Court condemned as

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[187] 10 § U.S.C. 925.

[188] *Marcum*, 60 M.J. at 202.

[189] "Any person subject to this chapter who with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter." Manual for Courts-Martial, United States (2008 ed.), Part IV, ¶ 44.

unconstitutionally vague.[190] *Ricks* involved a prohibition on "wander[ing] about the streets at late or unusual hours . . . without any visible or lawful business."[191] The D.C. Court explained that this language "failed to point up the prohibited act . . . and thus did not differentiate conduct calculated to harm and that which is essentially innocent."[192] Article 125, UCMJ, is similarly vague as the statute itself fails to reveal what really makes an act criminal, and similarly to the D.C. District Court in *Ricks*, this Court should find the statute unconstitutionally vague.

The lack of any specificity as to the type of sodomy that is proscribed, the existence in the code of other statutes criminalizing similar conduct, and the nature of the act being one that is not naturally understood to be illegal in most circumstances, a person of common intelligence cannot be said to understand what is proscribed or not proscribed by Article 125, UCMJ.

E. Article 125 is facially vague because it does not provide minimal enforcement guidelines thereby allowing discriminatory enforcement.

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190 *Ricks v. District of Columbia*, 414 F.2d 1097, 1104 (D.C. Cir. 1968).
191 *Ricks*, 414 F.2d at 1104 (internal citations omitted).
192 *Id.*

Statutes can also be unconstitutionally vague when they do not provide standards for prosecutors and law enforcement officials.[193]

Where a criminal statute fails to provide minimal guidelines, it "permit[s] a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[194] A vague statute furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[195]

"The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.'"[196]

In *Marcum*, the CAAF recognized that Article 125, UCMJ, sets a wide net.[197] The statute leaves prosecutors and convening authorities without guidelines to choose whose conduct can be charged — by implication allowing prosecution by personal preference over legal equality.

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193 *Parker*, 417 U.S. at 774-75.
194 *Smith v. Goguen*, 415 U.S. at 572-73 (1974).
195 *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)(noting how prosecutors can charge at their pleasure).
196 *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).
197 *Marcum*, 60 M.J. at 202.

F. Judicial intervention in an attempt to "save" Article 125, UCMJ, has gone beyond what is Constitutionally permissible.

The CAAF has previously attempted to avoid a Constitutional issue with Article 125, UCMJ, by creating tests that except out certain conduct from Article 125, UCMJ's application. The sheer amount of litigation surrounding the *Marcum* factors has proved that the application of the law is fraught with peril. Appellant's case will involve further legal manipulation of the statute. Article 125, UCMJ, can no longer be stretched to avoid the inevitable Constitutional conflict, it must break.

It is not proper or prudent for the Court to undertake the role of the legislature by judicial fiat in order to attempt to fix what is facially unconstitutional.[198] Article 125, UCMJ, suffers from the same infirmity as the vague statute described by the Supreme Court in *Raines*:

> The statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of cases it was originally designed to cover.[199]

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[198] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884-85 (1997) (explaining, in upholding facial Constitutional challenge, that "[t]his Court 'will not rewrite . . . law to conform it to Constitutional requirements'" (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

[199] *United States v. Raines*, 362 U.S. 17, 23 (1960).

As the Supreme Court explained in *Ayotte*, there are great dangers of too much judicial meddling:

> [M]indful that our Constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to Constitutional requirements even as we strive to salvage it . . . . [M]aking distinctions in a murky Constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain then we ought to undertake.[200]

The Fourth Circuit in *MacDonald* similarly declined to judicially legislate factors into Virginia's Anti-Sodomy statute in order to make the statute Constitutional. In *MacDonald*, a forty-seven year-old adult solicited a seventeen year-old to engage in oral sex.[201] Instead of legislating through caselaw in order to make an act that could legitimately be within the state's criminal interest fit within the broad prohibition, the Fourth Circuit interpreted the Supreme Court's decision in *Lawrence* to invalidate all anti-sodomy laws that are not narrowly tailored on their face.[202]

In light of *Marcum*, Article 125 requires too much judicial "meddling" in order to settle the application of the law. The statute is too broad and the acts of intervention required to

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[200] *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-30 (2006) (citations, alterations, and internal quotation marks omitted).
[201] *MacDonald,* 2013 U.S. App. LEXIS 4921 at *5-*6.

lasso it into the Constitutional realm have become too complex and fraught with litigation as prosecutors and trial judges try to apply it to the varied facts of individual cases. This Court should therefore find Article 125, UCMJ, facially unconstitutionally vague.

G. Article 125, UCMJ is overbroad.

The First Amendment overbreadth doctrine is separate from a due process vagueness challenge. It is one of the few exceptions to the general principle that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.[203] Even where the conduct of an appellant making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity, the appellant may make an attack where the law's effects substantially criminalize protected expression.[204]

Overbreath challenges to statutes proscribing conduct and speech requires an appellant to show that the overbreadth of the statute is real and substantial as judged in relation a to the

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[202] *Id.* at *23-*24.
[203] *New York v. Ferber*, 458 U.S. 747, 767-69 (1982).
[204] *Ferber*, 458 U.S. at 768-69 (citing *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980)).

government's legitimate interests in the regulation.[205] Further, in the military context, the First Amendment may be curtailed where the speech undermines the good order and discipline.[206]

An act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed.[207] In *Shelton v. Tucker*, the Supreme Court struck down as overbroad a law that required all public school teachers in Arkansas to submit an affidavit "listing all organizations to which he at the time belongs and to which he has belonged during the past five years."[208]

A federal statute challenged as overbroad should be construed to avoid constitutional problems, if the statute is subject to a limiting construction.[209] For example, in *Crowell v. Benson*, the Supreme Court found that the statute's words that allowed a Federal Court to set aside a compensation order when it was "not in accordance with the law," could be construed to fix the Constitutional challenge to the law by allowing judicial oversight.[210] If a statute does not contain language that allows a narrowing construction like in *Crowell*, then courts should

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205 *Ferber*, 458 U.S. at 770.
206 *Parker*, 417 U.S. at 759 (citing *United States v. Gray*, 20 U.S.C.M.A. 63 (1970)).
207 *Shelton v. Tucker*, 364 U.S. 479, 487, 490 (1960).
208 *Id.* at 481.
209 *Crowell v. Benson*, 285 U.S. 22, 62 (1932).
210 *Crowell*, 285 U.S. at 62.

attempt to sever only the unconstitutional portion.[211] Only when neither of these is possible will a court impose the "strong medicine" of striking down legislation for overbreadth.[212]

Regardless of considerations of whether Appellant's conduct is considered to criminal or not, Article 125 is overbroad and should be stricken. As the Supreme Court held in *Lawrence v. Texas,* laws such as Article 125, implicate First Amendment rights.[213] Article 125's implication on the conduct of everyday citizens is substantial. Determining substantiality, the Supreme Court has suggested comparing the number of cases to which the statute's literal application would violate a person's constitutional rights to the number of cases in which there would be constitutionally valid applications.[214]

While this requires some speculation, it is not unreasonable to say that a majority of sexually active members of the military violate Article 125.[215] As one study of military sexual practices noted, "[i]t seems reasonable to assume, based on general population estimates, that a majority of both married

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[211] *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971).
[212] *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).
[213] *Lawrence*, 539 U.S. at 577.
[214] *United States v. Osborne*, 495 U.S. 103, 111-114 (1990)(finding that the limiting language in the statute proscribing possession of nude minors keeps constitutionally protected conduct such as having pictures of your own children taking a bath from being subsumed within the law).

and unmarried personnel engage in oral sexual activity, at least occasionally."[216] If all of the acts were brought to trial and subjected to the literal statutory interpretation, a substantial majority of the convictions would violate a person's privacy rights.

As required by *Parker v. Levy*, the military's interest in good order and discipline must also be factored into the analysis. However, as stated above, times have changed. Congress has repealed "Don't Ask, Don't Tell," and acts of sodomy that are forceful, done against those substantially incapacitated or minors, are now specifically legislated against. Further, acts of sodomy that are either service discrediting or prejudicial to good order and discipline may be prosecuted by Article 134. This statute does not serve a military purpose in so much as there are other statutes in the UCMJ that cover any conceivable military interest.
This statute is also not subject to limiting construction. Limiting construction means you can take the words of the statute and construe those to fix the constitutional problem.

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[215] *See* RAND, *Sexual Orientation an U.S. Military Personnel Policy: Options and Assessment* at 58(1993).
[216] *Id.*

Words and tests must be added to the statute in order to fix its constitutional problems.[217]

Conclusion

This Court should find Article 125, UCMJ unconstitutionally vague and overbroad, set aside Appellant's conviction for attempted consensual sodomy, disapprove the sentence and send the case back for a new sentencing hearing.

V.

ARTICLE 125, UCMJ, SODOMY, IS UNCONSTITUTIONAL AS APPLIED TO LCPL MILES. CONSENSUAL SODOMY IS NOT CRIMINAL.

A. Article 125, UCMJ, is unconstitutionally vague as applied.

Article 125, UCMJ, is unconstitutionally vague as applied to Appellant for two reasons. First, Appellant's conviction of attempted consensual sodomy was a conviction for a crime using an inconsistent non-statutory definition.

Article 125, UCMJ, itself fails to articulate how the act of consensual sodomy may become criminal. The government alleged that Appellant committed unnatural carnal copulation. Unnatural carnal copulation, in this case attempted consensual anal sex, without any qualifying facts is not a crime.

[217] Appellant concedes that the statute may be excised by taking out "another person of the same or opposite sex or" and leave the statute to prohibit bestiality.

This Court's recent decision in *United States v. Brown*, invited a challenge from an appellant charged with and convicted of consensual sodomy rather than forcible sodomy.[218] This is just such a case. The government never alleged that LCpl Miles used unlawful force when attempting to commit sodomy. Just that the act, in and of itself, was criminal.

The government should be forced to explain what criminal purpose it has for proscribing consensual acts of sodomy amongst military members. Of what concern is it to the government that a Marine may engage with his partners in sexual conduct protected by the Constitution?

B. Even Congress recognizes criminalizing consensual sodomy is crazy.

Congress has proposed the elimination of "consensual sodomy" as a crime in the 2014 National Defense Authorization Act.[219] Section 1707, of that compromise bill repeals the offense of consensual sodomy. Even Congress recognizes that criminalizing consensual sodomy is unconstitutional.

Conclusion

LCpl Miles was found guilty for attempting an act that is not criminal. This Court should set aside his conviction for

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[218] *United States v. Brown*, No. 201300020 2013 CCA LEXIS 911 (N.M. Ct. Crim. App. Oct. 31, 2013).

[219] *See* http://armedservices.house.gov/index.cfm/files/serve?File_id=215

attempted consensual sodomy and reassess the sentence by disapproving the bad-conduct discharge.

JARED A. HERNANDEZ
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was delivered to the Navy-Marine Corps Court of Criminal Appeals, and that a copy was served on Appellate Government Division on 16 December 2013.

JARED A. HERNANDEZ
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7389

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