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

Before Panel No. 3

UNITED STATES, Appellee v. Gregory T. Miles Lance Corporal (E-3) U.S. Marine Corps, Appellant	**BRIEF AMICUS CURIAE AND APPENDIX OF THE NATIONAL COALITION FOR SEXUAL FREEDOM** Case No. 201300272

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

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PRELIMINARY STATEMENT: ISSUES ADDRESSED

This brief *amicus curiae* is submitted by The National Coalition for Sexual Freedom (NCSF), not to support either the Appellant or the Appellee, but rather to assist the Court in the important task of reaching a decision that

(1) applies the Uniform Code of Military Justice (UCMJ) to the facts of this case in a manner consistent with constitutional precedents and principles applicable to criminal prosecutions directed at consensual non-injurious sexual conduct, and

(2) is consistent with the mores of today's "common propriety."

The central concern of NCSF is that criminal law, including the UCMJ, should be applied consistent with the ruling of the United States Supreme Court in Lawrence v. Texas[1] that consensual, non-injurious sexual conduct may not be the subject of criminal prosecution except to the extent necessary to protect a valid societal interest, and that moral disapproval does not constitute a societal interest sufficient to warrant the criminalization of such conduct. NCSF seeks to help this Court understand how the principles of Lawrence and other constitutional principles (such as the vagueness doctrine) apply

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

to statutes that criminalize either specific sexual acts (such as sodomy) or generalized definitions of morally offensive sexual conduct.

At the outset, we wish the Court to understand that the focus of NCSF's concern is on consensual sexual conduct. We have read the initial briefs in this case of both the Appellant[2] and the Government[3] and we note that they take different views on whether the conduct for which LCpl Miles was convicted was consensual. While this is an issue that this Court may wish to resolve, we would note the following:

- LCpl Miles was not charged with acts of sodomy that were either "forcible" or "without consent",[4]

- There was a dispute in the testimony on the question of whether the sexual activity of which Appellant was convicted was or was not consensual,[5] and

- To NCSF's knowledge, the Court below made no finding that the acts in question were not consensual.[6]

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[2] Appellant's Brief and Assignment of Errors, filed 16 December 2013 (hereinafter "Appellant's Brief").
[3] Answer on Behalf of Appellee, filed 16 March 2014 (hereinafter "Appellee's Brief").
[4] Appellee's Brief at 25.
[5] Compare Appellee's brief at 5-6 with Appelles's Brief at 23.
[6] Appellee's Brief, at 18, cites, as supposed support for the proposition that the "victims did not consent to the activity at

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

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

   a. The conduct of LCpl Miles falls within the scope of consensual conduct considered by Lawrence and the provisions of the UCMJ purporting to criminalize such conduct are, on their face, unconstitutional.

   b. Even if LCpl Miles' acts are deemed to be "public," Lawrence v. Texas does not permit a prosecution for sodomy (as opposed to some offense such as "public indecency").

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issue," a special finding by the Military Judge "on the sodomy offenses that Appellant attempted to engage in sodomy with BNC and EED with the requisite 'criminal intent.' (R238-40 (emphasis added.).)" But this seems to us to be irrelevant. The issue of consent relates, not to the perpetrator's intent, but to the victim's intent. Thus a finding made as to Appellant's "criminal intent" tells us nothing about whether BNC or EED consented.

2. The conviction of LCpl Miles for "indecent acts" and "indecent conduct" was an improper and unconstitutional application of the relevant UCMJ provisions.

   a. The first sentence of Article 120(t)(12), UCMJ, must - under the doctrine of *inclusio unius est exclusio alterius* - be read as limited to the acts enumerated in the second sentence, which have no relevance to the conduct for which Appellant was convicted.

   b. Viewed alone, the first sentence of Article 120(t)(12) appears to us to be unconstitutional, both on the ground of vagueness and on the ground that, by its terms, it is predicated precisely on the basis that the Supreme Court ruled in Lawrence does not suffice as a basis for criminalizing consensual, non-injurious sexual conduct - namely, moral disapproval.

3. Finally, this Court should be aware that the UCMJ provisions that criminalize consensual, non-injurious sexual conduct are inconsistent with the mores of today's society. To help the Court

understand this issue, we submit as an Appendix a paper entitled "Non-Monogamy and Changing Societal Mores."

ARGUMENT

I. The Conviction of LCpl Miles for Attempted Consensual Sodomy Under Article 134, UCMJ, Violated His Constitutional Liberty as Defined by the U.S. Supreme Court in Lawrence v. Texas

In our view, it is inconceivable that the conviction of LCpl Miles for attempted consensual sodomy can be deemed consistent with the decision of the United States Supreme Court, in Lawrence v. Texas,[7] that criminal prosecution of adults for consensual, non-injurious intimate sexual conduct—specifically including consensual sodomy—violates the liberty guaranteed under the Due Process Clause of the Fourteenth Amendment.

NCSF respectfully submits that Article 125, UCMJ, making consensual sodomy a military crime, was[8] on its face unconstitutional. By incontrovertible extension, therefore, criminalization of attempted consensual sodomy under the rubric of Article 134, UCMJ, was equally unconstitutional.

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[7] 539 U.S. 558, 123 S. Ct. 2472 (2003)

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

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

These points are explained in detail below.

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

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

> (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.[9]

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

As demonstrated by the prosecution of LCpl Miles, the Article 125(a) crime of sodomy is carried over—and extended to "attempted consensual sodomy"—by the reference to "and crimes and offenses not capital" in Article 134, UCMJ:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and

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[9] 10 U.S.C §925(a).

> discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense and shall be punished at the discretion of that court.[10]

In Lawrence v. Texas[11] the United States Supreme Court addressed, and resolved conclusively, the question whether prosecution of consensual, non-injurious sodomy by adults is inconsistent with the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. Justice Kennedy, writing for the Court's majority, began by emphasizing the breadth of that constitutional guarantee of liberty, both in its spatial (i.e., private place) sense, "and in its more transcendent dimensions":

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.[12]

Thus the Court emphasized that it was not addressing a right of privacy and freedom from government intrusion that arises simply because the acts in question take place in the

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[10] 10 U.S.C. §934 (emphasis added)
[11] Supra, note 1.
[12] 539 U.S. at 562.

home or in some other traditionally private venue. Rather the Fourteenth Amendment liberty has "transcendent dimensions" that arise from the intimate, personal nature of the acts themselves. In explaining why it was necessary to overturn Bowers v. Hardwick,[13] the Court observed that laws criminalizing consensual, non-injurious sexual practices that do not "abuse...an institution the law protects", intrude into "the most private human conduct, sexual behavior," and thus intrude unwarrantedly into the deepest of personal relationships:

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

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[13] 478 U.S. 186, 106 S.Ct. 2841 (1986) (upholding a state law making homosexual sodomy a crime).

> The liberty protected by the Constitution allows homosexual persons the right to make this choice.[14]

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

> It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850, 112 s Ct. 2791. 120 L.Ed2d 674 (1991).*[15]

It was this point to which the Court returned in reaching its conclusion to overturn Bowers and to rule that consensual,

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[14] 539 U.S. at 567.
[15] 539 U.S. at 571.

non-injurious, intimate sexual practices may not be made criminal:

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

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

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government...The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[17]

In sum, criminalization of consensual sodomy is inconsistent with the Due Process Clause of the Fourteenth Amendment. Because Article 125(a), UCMJ, as it existed at the time of LCpl Miles' prosecution, did precisely that, Article 125(a) was unconstitutional. And to the extent that Article 134, UCMJ, incorporated the criminalization of consensual sodomy such as to make possible a prosecution for attempted consensual sodomy, Article 134 is unconstitutional.

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

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

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

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

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[18] 60 M.J. 198 (C.A.A.F. 2004) Our discussion will address only the second part of the Marcum test. As to the first part, sodomy clearly falls within the Lawrence liberty interest. NCSF takes no potion on the military-specific third part.

[19] 539 U.S. at 571.

In particular, we will explain that the reference to "public conduct" cannot be read to justify prosecution for the "crime" of consensual sodomy, even when done in public, but rather relates to prosecution for a different offense such as "public indecency". We will also argue that the term "public" does not simply mean "was or could have been observed".

1. The "does not involve" references in Lawrence, and particularly the reference to "public conduct", do not establish exceptions to the rule that consensual sodomy cannot be prosecuted as a crime

At the outset, it is important to recall that the Lawrence Court focused on the intimate, personal nature of consensual sexual conduct and its integral role in the most fundamental of interpersonal relationships. Thus the Court emphasized "the liberty of the person both in its spatial and in its more transcendent dimensions."[20] Given that emphasis, it is illogical to consider that the Court envisioned that this intimate, personal type of conduct should become criminal simply because, for example, it is done in public view rather than in one's own home. Rather it is more logical to interpret these "does not involve" statements as meaning that the act of sodomy (or some other consensual sexual act) may, in certain circumstances, give rise to prosecution for a different offense, one arising from

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[20] 539 U.S. at 562 (emphasis added).

the circumstances, not from the nature of the sex act. And an examination of each of the "does not involve" statements confirms such an interpretation:

- "does not involve minors" – Minors, of course, are protected by separate criminal laws. Sodomy committed by an adult with a minor would be prosecuted, not as sodomy, but as statutory rape or child abuse. It would certainly not be prosecuted as consensual sodomy, because minors are, by law, incapable of consenting.
- "does not involve persons who might be injured" – In the unlikely event that an act of sodomy would cause injury, it would not be prosecuted as consensual sodomy, but rather as assault and/or battery.
- "does not involve persons who...might be coerced or who are situated in relationships where consent might not easily be refused" – By definition, this could not be prosecuted as consensual sodomy, but rather would be prosecuted as forcible sodomy or perhaps as rape.
- "does not involve...prostitution" – Prostitution, of course, is a separate and distinct crime. The gravamen of prostitution is its commerciality, not the nature of the sex act that is sold.

- "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter" - This, of course, is an entirely different legal issue, not a criminal law question at all.

In short, what the Supreme Court is saying here is: "We are dealing in this decision only with the issue whether consensual sodomy may be criminalized as consensual sodomy. We are not dealing with other legal issues that might arise—criminal law or regulatory issues—in connection with sodomy."

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

whose gravamen is doing something in public view that might offend people. It brings to mind the old saying from Victorian days: "We don't care how you practice sex, as long as you don't do it in public where it might frighten the horses".

In sum, the second prong of the Marcum test is perfectly appropriate, as long as it is understood to mean only that the prohibition against criminal prosecution of consensual sex acts does not prevent bringing, in appropriate circumstances, other kinds of criminal prosecutions. NCSF's understanding is that no such other charges were brought against LCpl Miles.

2. "Public conduct," as referenced in Lawrence, does not mean simply that the act of sodomy was or might have been observed

Even if, contrary to the analysis presented above, this Court determines that the Lawrence "public conduct" reference creates an exception to the constitutional liberty interest that makes possible a prosecution for actual or attempted consensual sodomy, NCSF respectfully suggests that the Court avoid an overly broad definition of what constitutes "public conduct". It must be remembered that we are dealing here with a very important liberty interest—one which turns primarily on the deeply personal and intimate nature of consensual sexual conduct and at most secondarily on the locus in which that conduct occurs.

NCSF respectfully suggests that, in order to find "public conduct", the facts of the case should either show (a) that the participants in the consensual sex act did so knowing—and perhaps even intending—that their conduct would be displayed to the public in some general manner or at least (b) that the circumstances were such that the participants should have known that their conduct would be on public display.

In this regard, NCSF would commend to the Court's attention Section 250.2(1) of the American Law Institute's Model Penal Code, which defines "public" as "affecting or likely to affect persons in a place to which the public or a substantial group has access: among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood." Conduct of consensual sodomy in such venues might be deemed to imply that the participants did not see this entirely as something personal to them, but rather as something of which they wished to make a public display.

Thus a bedroom or barracks room would not be "public" in this sense, even if the door were left unlocked or even open.[21]

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[21] See United States v. Humphreys, No. 200300750, 2005 CCA Lexis 401, at 7, unpublished op. (19 Dec. 2005); United States v. Izquierdo, 51 M.J. 421, 423 (C.A..A.P. 1999).

Nor would sodomy in the back seat of a parked car be "public", even though a passer-by could look in the window.[22]

NCSF has researched the case law on "public conduct" in the context of Lawrence. Interestingly enough, we find very little precedent outside the military courts. The case law in the military court system, while not entirely consistent, includes decisions that support the view we express here. See, for example, the following statement in United States v. Humphreys:[23]

> The Government contends that no liberty interest is implicated because the conduct occurred in a military barracks room, where the military has a right to regulate otherwise permissible conduct. We disagree. This court recently held that consensual sexual conduct in military married housing qualifies for the protected liberty interest defined in Lawrence. See United States v. Bart, 61 M.J. 578, 582 (N.M. Ct. Crim. App. 2005)

We would also commend to this Court's attention a series of well-reasoned dissenting opinions on this issue by Judge Stucky, particularly in United States v. Goings, 72 M.J. 202 (C.A.A.F. 2013).[24] Judge Stucky questions the appropriateness of equating Lawrence's reference to "public conduct" with the line of cases interpreting "open and notorious". NCSF also views "open and notorious" as an overly restrictive standard, but it at least

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[22] See United States v. Frazer, 51 M.J. 501 (C.G. Ct. Crim. App. 1999).
[23] 2005 Wl 359 1140, p.3 (N.M.Ct.Crim. App. 1999).
[24] See also Judge Stucky's views in United States v. Elhelou and United States v. Howard, both at 72 M.J. 404 (C.A.A.F. 2013) and in United States v. Castellano, 72 M.J. 217 (C.A.A.F.2013)..

conveys the concept that the participants did the act in question with the expectation that it would be viewed by non-participating third parties.

II. The Definition of "Indecent Conduct" in Article 120(t)(12), Applied to LCpl Miles' Acts Via Article 120(k) Is, by Rules of Statutory Construction, Inapplicable to the Facts of This Case and Is Moreover Unconstitutionally Vague

NCSF has consistently raised concerns about the dangers of using broadly worded and indefinite criminal law provisions to prosecute specific types of consensual sexual activity. This is part of our concern—shared by the Supreme Court in Lawrence — that criminal law may be bent to the service of moral concerns that, no matter how strongly held, do not represent the type of societal interest that justifies making non-injurious personal acts criminal. We have seen in many contexts the temptation for prosecutors and courts, offended morally by certain acts but unable to find criminal laws that deal specifically with such acts, to try to shoe-horn the morally offensive but non-injurious conduct into a vague and broadly worded statute that covers something like "vulgar, obscene and repugnant" conduct.

Sometimes the problem is that such a statutory provision is so vague that it provides no guidance to citizens as to what specific conduct is criminalized. In some cases, it seems clear that the statute is intended to apply to conduct very different from that charged in the case at hand. We have both types of

concerns as to the UCMJ provisions at issue here—Articles 120(k) dealing with "indecent acts" and 120(t)(12) purporting to define "indecent conduct". Article 120(k)[25] provides as follows:

> (k) Indecent act.—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.

The term "indecent conduct" which is the gravamen of an offense under Article 120(k) is defined in Article 120(t)12).[26]

> (12) Indecent Conduct.—The term "indecent conduct" means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's expectation of privacy, of—
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> (A) that other person's genitals, anus, or buttocks, or (if that person is female) that person's areola or nipple; or
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> (B) that other person while that other person is engaged in a sexual act, sodomy (under Section 925 (Article 125)), or sexual contact.

A. Articles 120(k) and 120(t)(12), UCMJ, Are Intended To Protect the Privacy of Persons Committing Sexual Acts, Not To Criminalize the Sexual Acts Themselves

Our first concern is that it does not seem proper to interpret these provisions as applicable to the acts—adultery, sodomy and sexual "threesome"—that underlie the criminal charges brought against LCpl Miles. While the opening sentence speaks

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[25] 10 U.S.C.A.§920(k).
[26] 10 U.S.C.A.§920(t)(12).

in general terms of things like "immorality", "sexual impurity", etc., the enumeration in the second sentence of specific acts addressed by this provision are not at all relevant to the acts allegedly committed by LCpl Miles. Indeed, the second sentence is not at all directed at criminalizing the commission of sexual acts, but rather at criminalizing the unauthorized observance or recording of such activity by persons other than those engaged in the sexual acts.

It is true that the second sentence begins with the phrase "Indecent conduct includes…." However, under the recognized statutory interpretation principle of "inclusio unius est exlusio alterius", words of general import, when followed by a list of specific examples, are deemed to be limited in scope to those enumerated examples, or at least to the types or categories of things specifically listed.

Application of the "inclusio unius" rule to the interpretation of these UCMJ provisions, we submit, is particularly appropriate in the case at hand. It must be remembered that the core issue here is whether the consensual non-injurious sexual conduct of LCpl Miles is entitled to Due Process privacy protection from criminal prosecution under Lawrence. It would be anomalous in the extreme to argue that LCpl Miles' conduct is criminal under a statutory provision that

speaks in such detail of protecting the privacy of sexual conduct from unauthorized observation or recording.

B. To the Extent that Articles 120(k) and 120(t)(12) UCMJ, Might Arguably Criminalize Some Forms of Sexual Conduct, They Are Unconstitutionally Vague and Directly Inconsistent With Lawrence

Stripped of the specifics in the second sentence of Article 120(t)(12) the UCMJ provisions defining "indecent acts" and "indecent conduct" boil down to the following:

> ...that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations".[27]

This language, while an intense expression of a moral position, fails utterly to define the prohibited conduct in a way that enables a citizen to understand what specific acts are criminal. The case at hand exhibits the problematic nature of such generalized language in a criminal statute. When LCpl Miles had consensual sex in a barracks room in a "threesome," including consensual attempted sodomy, by what standard was he supposed to know that these acts were "immoral" or acts of "sexual impurity" or that they were "vulgar, obscene and repugnant to common propriety"?[28] With the conduct taking place

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[27] Article 120(t)(12), UCMJ (10 U.S.C.A. §920(t)(12)).
[28] The question whether sexual threesomes, adultery, etc. are in fact inconsistent with today's "common propriety" is addressed in Section III, below.

in a barracks room and with the sexual conduct itself apparently not observed by third parties even though the door was left open, was LCpl Miles to understand that his conduct might "excite sexual desire or deprave morals"? NCSF respectfully submits that the UCMJ provisions contain no basis for a citizen to make such judgments and are therefore unconstitutionally vague.

The government states,[29] in its effort to argue that Articles 120(k) and 120(t)(12) are no unconstitutionally vague,

> [A]s long as a reasonable member of the military would understand that fondling the buttocks and vagina and removing the tampon of an intoxicated and incapacitated woman without her consent in an effort to foist oneself sexually upon her (R.119-20, 122-23), admitting to digitally penetrating her anus and vagina, and then admitting to attempting to achieve an erection by rubbing one's penis on her (Pros. Ex. 20) would be criminal conduct, then Article 120(k), UCMJ, is not void for vagueness.

NCSF respectfully differs with the assessment that a "reasonable" person would understand that the physical acts thus described constitute conduct regarded as "criminal" in modern American society. Putting aside the conclusory language "without her consent," as to which NCSF understands that there was no finding that these acts were not consensual, and the reference to "removing the tampon," which does not appear to be

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[29] Appellee's Brief at 17.

supported by the evidence,[30] the acts that any "reasonable" person should (in Appellee's view) have known were criminal are:

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

NCSF respectfully submits that each and every one of these acts are done regularly throughout the United States by persons engaging in consensual love-making. The idea that a "reasonable" person would understand any or all of these acts constitute criminal conduct is simply preposterous. See Appendix A, which analyzes the evolving view of sexual conduct in the United States.

Accordingly, as with all of the issues in this case, the constitutionality of this conviction of LCpl Miles stands or falls on whether the sexual acts that occurred between him and these two women were found to be non-consensual. To NCSF's

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[30] Appellee's Brief, at 4, states "BNC was menstruating that day and had been wearing a tampon; however, when she awoke, the tampon was no longer in her vagina and she did not know how it was removed. (R.122-23.)" NCSF assumes that there was no evidence, much less a finding by the Court below, that Appellant Miles removed the tampon, because Appellee's brief would have mentioned prominently any such evidence or finding if they existed.

knowledge, there was no such finding by the Court below. The most that Appellee can point to are statements by the two women that they did not give consent,[31] statements that are contradicted by LCpl Miles' testimony that the acts were consensual.[32] This conflict in the evidence was not resolved by any finding of the Court below. Indeed, it seems clear that the prosecution did not find convincing evidence on non-consensuality, because - as Appellee notes - the prosecution "did not allege that Appellant's acts against BNC and EED were 'forcible' and/or 'without consent'…."[33] For Appellee to pervasively and repeatedly refer in its brief to forcible and nonconsensual conduct is, at best, inaccurate and unsupported.

Stripped of Appellee's insupportable verbiage concerning lack of consent, application of Article 120(k) to this case must be rejected on the ground of unconstitutional vagueness. None of the acts that took place between Appellant Miles and these two women are mentioned in Article 120(t)(12). These acts bear no resemblance to the specific acts enumerated in the second sentence of Article 120(t)(12). They cannot, for the reasons stated above, be deemed acts which a "reasonable" person would

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[31] Appellee's Brief at 23.
[32] Appellee's Brief at 5-6.
[33] Appellee's Brief at 25.

understand to be criminal conduct, whether under the language of Article 120(t)(12) or otherwise.

These provisions are also blatantly in violation of the Supreme Court's decision in Lawrence. There, it will be recalled, the Court explicitly held that it is not a permissible function of criminal law "to mandate our own moral code"[34] and that common propriety or prevailing moral views are not a sufficient legitimate interest of the state to warrant making sexual conduct criminal.[35] Contrary to this explicit Supreme Court mandate, Articles 120(k) and 120(t)(12) justify the criminalizing of "indecent acts" and "indecent conduct" explicitly and exclusively on the basis of "immorality" and "repugnance to common propriety". Accordingly, these provisions are, on their face, unconstitutional violations of the Due Process Clause of the Fourteenth Amendment.

III. The UCMJ Provisions Concerning Consensual, Non-injurious Sexual Conduct Are Inconsistent With Current Sexual Mores in American Society

An important aspect of the Supreme Court's analysis in Lawrence v. Texas was its directive that, in analyzing the constitutionality of criminal laws dealing with consensual sexual conduct, it is essential to take into account the evolution of social and moral views on sexual issues in this

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[34] 539 U.S. at 571.
[35] 539 U.S. at 577-578.

country. Thus, in explaining its decision to overturn Bowers v. Hardwick, the Court emphasized the necessity of examining how changing American sexual mores have invalidated historical condemnation of sodomy and homosexual conduct on which Bowers had relied:

> In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.[36]

NCSF respectfully suggests that many of the UCMJ provisions making consensual sexual conduct criminal, including the provisions involved in this case with regard to consensual sodomy, adultery and "indecent acts," are inconsistent with the evolution of America's sexual mores to which the Supreme Court referred in Lawrence. To aid the Court in assessing the consistency of these UCMJ provisions with today's American mores, Susan Wright, a member of the Board of NCSF, has prepared a paper entitled "Non-monogamy and Changing Societal Mores," which is attached as the Appendix to this brief.

IV. Conclusion

The National Coalition for Sexual Freedom appreciates the opportunity to present to the Court the views set forth in this *amicus* brief. We believe that the issues raised by this case

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[36] 539 U.S. at 571-572.

are of substantial importance for military personnel (indeed, for all Americans) and for the fair application of justice in the military. We therefore urge the Court to take into account the arguments and views presented herein as it gives consideration to LCpl Miles' appeal of his conviction.

Respectfully submitted,

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APPENDIX

Non-Monogamy and Changing Societal Mores

By Susan Wright, Member of the Board,
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For decades - centuries, even—there have been continuing shifts in the United States as to what is culturally, morally, and legally acceptable in intimate relationships. For example, in the 1920s women gained a tremendous amount of sexual independence with the ready availability of birth control. This shift continued into the civil rights movement and sexual revolution of the 1960s, when our culture became more accepting of open sexuality, and the Court in Griswold v. Connecticut[37] first identified a legal right to sexual privacy. By the 1990s, the media openly presented oral sex and extra-marital dalliance during the impeachment proceedings against President Bill Clinton's - who not only survived impeachment, but remains happily married to this day. Finally, in 2003, the court articulated a constitutionally protected "liberty interest" in sexual freedom.[38]

Today in 2014, it is considered morally acceptable to engage in sexual behavior with two or more consenting adults. Sexual encounters between consenting adults are considered to be

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[37] 381 U.S. 479, 85 S.Ct. 1678 (1965).
[38] Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472 (2003).

a personal choice, not something that should be controlled or punished by government or employers.

Currently the most popular terms for non-monogamy and open relationships are "swinging" and "polyamory." Swinging involves couples engaging in social and sexual activities with other couples. Polyamory is defined as individuals who engage in simultaneous emotional and intimate relationships with two or more other individuals with the consent of all involved. The common-place popularity of these terms is a clear indication of the cultural shift towards the acceptability of non-monogamy as a personal choice, in which consenting adults have a "liberty interest."

The Science on Non-Monogamy

Many studies have examined the psychological and emotional health of non-monogomous couples and individuals, and have found no significant differences between them and the general population. For example, Duckworth and Levitt gave the Minnesota Multiphasic Personality Inventory (MMPI) to 30 swingers in 1985, and found no sign of serious psychological disturbances whatsoever.[39] Similarly, Bergstrand and Sinski's survey in 2000 of 1,100 swingers found that they didn't differ from non-

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[39] Jane Duckworth and Eugene E. Levitt (1985). "Personality analysis of a swingers' club," *Journal of Family and Economic Issues*, Volume 8, Issue 1, pp 35-45.

swingers in terms of mental health, and in fact found that the swingers were *less* likely than the general population to come from abusive backgrounds.[40]

In terms of prevalence, by the mid-1990s, researchers found that approximately 20-25% of men and 10-15% of women reported in engaging in consensual extramarital sex at least once during their marriage.[41] [42] This is consistent with the earlier finding of Blumstein and Schwartz's 1983 sample of 3,574 married gay, lesbian and heterosexual couples, in which 15-28% had an understanding that allowed non-monogamy under some circumstances.[43] This shift in cultural mores applies to "threesomes" as well. In a 2009 survey of professional literature, Jonason[44] found that an average of 8% of subjects had engaged in a threesome, and to bring culture surveys into the mix, in a 2005 online survey of 317,000 people - "the largest

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[40] Curtis R. Bergstrand and Jennifer B. Sinski (2009). *Swinging in America: Love, Sex, and Marriage in the 21st Century*, Santa Barbara: ABC-CLIO.

[41] Laumann, E., Gagnon, J.H., Michael, R.T., and Michaels, S (1994). *The Social Organization of Sexuality: Sexual Practices in the United States.* Chicago: University of Chicago Press. Also reported in the companion volume, Michael et al, *Sex in America: A Definitive Survey,* 1994.

[42] Wiederman, M. W. (1997). "Extramarital sex: Prevalence and correlates in a National Survey." *Journal of Sex Research* 34(2), pp. 167-174.

[43] Blumstein and Schwartz (1983). *Advocate*, Issue 382, December, p. 28.

[44] Jonason, P.K., & Marks, M.J. (2009). "Common vs. uncommon sexual acts: Evidence for the sexual double standard." *Sex Roles, 60,* 357-365.

sexual health research project…in the world" Durex found that 24% of the respondents in the U.S. reported engaging in a threesome.[45]

Non-Monogamy in the Media

The U.S. media embraces overtly sexualized images in everyday marketing and popular culture, including innuendos and depictions of sex among three or more people. TV shows like "Sister Wives" (TLC, 2010), "Polyamory: Married & Dating" (Showtime, 2012) and *"Secret Sex Lives: Swingers" (Discovery Fit & Health, 2013)* are giving people a glimpse into the real-life inner workings of multi-partnered couples. *"Big Love"* (HBO, 2006-2011) broke ground as a fictionalized portrayal of modern polygamous relationships. These TV shows have had a direct impact on the American public on what is considered socially acceptable in terms of non-monogamy.

According to Gette Levy of Open Love NY, a local support group with more than 1,000 members, the organization has seen a steady increase in membership since forming in 2009. "Dating has changed over the past 50 years," says Levy. "Many adults of all

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[45] Durex Global Sex Survey. http://www.durex.com/en-jp/sexualwellbeingsurvey/documents/gss2005result.pdf

ages are finding that monogamy does not suit them and is no longer a fiscal and social requirement."[46]

The sharp rise in societal support for non-monogamy has been documented in the media coverage since 2010 by the National Coalition for Sexual Freedom in its Media Updates, which include links to articles about BDSM, swinging and polyamory so that its constituents can comment on the tone and facts in each article.[47] For the purpose of comparing the annual data in NCSF's Media Updates about swinging, polyamory and other forms of non-monogamous relationships, the articles will be designated as "positive" or "negative." The articles designated as "positive" are thoughtful and exploratory in tone and generally supportive of non-monogamous lifestyles. The articles designated as "negative" are primarily about swingers clubs that were challenged by their local communities and/or closed down by the local authorities, or individuals who were "outed" as being swingers. From the list below, it is clear there is a sharply decreasing trend in negative articles which reflects a rapid spread in acceptance of non-monogamy as a lifestyle choice:

In 2010, a total of 50 articles were broadcast: 18 were positive and 42 were negative.

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[46] Tricia Romano. "3 no longer a crowd as open relationships see a boom," New York Post October 2, 2013.
[47] National Coalition for Sexual Freedom: https://ncsfreedom.org/press/blog.html

In 2011, a total of 33 articles were broadcast: 10 were positive and 23 were negative.

In 2012, a total of 21 articles were broadcast: 13 were positive and 8 were negative.

In 2013, a total of 42 articles were broadcast: 34 were positive and 8 were negative.

In the first two months of 2014, a total of 16 articles were broadcast: 13 were positive and 3 were negative.

It can only be concluded that, as the "sexual revolution" has evolved and as homosexuals have gained widespread legal and social support for gay marriage, this has created a ripple effect for other forms of non-traditional relationships.

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing Motion on Behalf of the National Coalition for Sexual Freedom for Leave To File a Brief as *Amicus Curiae*, together with the foregoing Brief *Amicus Curiae* on Behalf of the National Coalition for Sexual Freedom (with attached Appendix) was delivered to the Navy-Marine Corps Court of Criminal Appeals, and that copies were served on the Appellate Government Division and Appellate Defense Counsel on 25 March, 2014.

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