Measure for Measure: Recent Developments in Substantive Criminal Law

Major Jeffrey C. Hagler
Professor, Criminal Law Department
The Judge Advocate General's Legal Center and School, United States Army
Charlottesville, Virginia

Introduction

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch, and not their terror.[1]

The military justice system, like any common law jurisdiction, continually adapts to the changing customs of our society and the needs of the military mission. Simultaneously, it responds to change by affirming military members' individual rights, maintaining a proper balance between discipline and fairness. Last year's symposium addressed measures that altered our substantive law to capture conduct that—while punishable in a civilian jurisdiction—might otherwise escape liability under the Uniform Code of Military Justice (UCMJ).[2] The past year's developments continue that trend, but in a different way: they criminalize acts by Soldiers that might be constitutionally protected if done by a civilian. At the same time, military appellate courts have continued to affirm measures that protect Soldiers, by preventing unwarranted intrusion into private sexual conduct, ensuring the providency of guilty pleas, and extending the protections afforded by affirmative defenses.

Unlike the previous symposium, which covered developments of diverse origin—from legislation amending the UCMJ, to landmark pronouncements from the U.S. Supreme Court, to far-reaching decisions from the Court of Appeals for the Armed Forces (CAAF)[3]—this year's topics come exclusively from the more familiar source: military appellate court opinions. These decisions, however, build upon several of the themes from the previous symposium and will have an immediate impact in the future shape of military justice.

This article focuses primarily on the CAAF's recent holdings in cases involving sodomy,[4] child pornography,[5] and absence offenses.[6] It also covers notable decisions on these topics from the service courts of criminal appeals.[7] Since these issues are addressed in multiple cases, this article identifies trends and offers suggestions to counsel who are likely to encounter the issues in their practice. Next, the article discusses military appellate decisions in other areas of substantive criminal law,[8] including kidnapping,[9] involuntary manslaughter,[10] obscene mail material,[11] and the defenses of duress,[12] accident, and defense of another.[13] In doing so, the article points out potential issues and attempts to provide useful guidance to practitioners.

---

[1] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 1.

[2] *See* Major Jeffrey C. Hagler, *Duck Soup: Recent Developments in Substantive Criminal Law*, ARMY LAW., July 2004, at 79 (discussing statutory UCMJ changes that added Article 119a, which created liability for acts that cause death or injury to unborn children, and extended the Article 43 statute of limitations for child abuse offenses; the article also addressed cases that affirmed convictions for child neglect and stalking in overseas locations).

[3] *Id*.

[4] United States v. Marcum, 60 M.J. 198 (2004); United States v. Stirewalt, 60 M.J. 297 (2004).

[5] United States v. Mason, 60 M.J. 15 (2004); United States v. Irvin, 60 M.J. 23 (2004).

[6] United States v. Hardeman, 59 M.J. 389 (2004); United States v. Pinero, 60 M.J. 31 (2004).

[7] *See, e.g.*, United States v. Myers, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (unpublished); United States v. Avery, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (unpublished); United States v. Barber, No. 20000413 (Army Ct. Crim. App. Oct. 7, 2004) (unpublished); United States v. Bullock, No. 20030534 (Army Ct. Crim. App. Nov. 30, 2004) (unpublished); United States v. Scott, 59 M.J. 718 (Army Ct. Crim. App. 2004); United States v. Rogers, 59 M.J. 584 (Army Ct. Crim. App. 2003).

[8] Most of these topics are the subject of only one recent reported case, so their discussion is less robust than that of the previously listed topics. Nevertheless, counsel encountering these issues will gain much insight by reading and considering the military appellate courts' most recent holdings.

[9] United States v. Seay, 58 M.J. 42 (2003).

[10] United States v. Stanley, 58 M.J. 42 (2003).

[11] United States v. Negron, 58 M.J. 42 (2003).

[12] United States v. Le, 58 M.J. 42 (2003).

[13] United States v. Jenkins, 58 M.J. 42 (2003).

Last year's symposium article discussed in some detail the Supreme Court's landmark decision in *Lawrence v. Texas*.[14] In *Lawrence*, the Court reversed a conviction under a Texas law prohibiting homosexual sodomy.[15] The Court also expressly overruled *Bowers v. Hardwick*,[16] which had served as the basis for the constitutionality of Article 125, the UCMJ's prohibition of sodomy.[17] But *Lawrence* was not a military case, so it did not squarely answer whether and to what extent Article 125 would remain a viable offense.[18] The CAAF specifically answered these questions in two decisions during its 2004 term.

The CAAF Responds to Lawrence: Marcum *and* Stirewalt

Following the Supreme Court's decision in *Lawrence*, military appellate courts received numerous petitions from appellants, who claimed *Lawrence* invalidated their sodomy convictions. On 29 August 2003, the CAAF granted review of its first post-*Lawrence* sodomy case, *United States v. Marcum*.[19] The court heard oral argument on 7 October 2003 and rendered a decision on 23 August 2004.[20]

Staff Sergeant (SSgt) Eric Marcum supervised junior airmen newly assigned to his flight at Offut Air Force Base, Nebraska.[21] He often socialized with his subordinates, who sometimes spent the night at his off-post home after parties.[22] One such night, Senior Airman (SrA) Harrison, an enlisted airman under the accused's supervisory authority, awoke to find SSgt Marcum orally sodomizing him.[23] Marcum was charged, *inter alia*, with forcible sodomy under Article 125. At trial, SSgt Marcum admitted to kissing SrA Harrison's penis twice—but not to "oral sex"—and to committing other acts with SrA Harrison he described as consensual.[24] On cross examination, SSgt Marcum testified he knew that sexual relationships between noncommissioned officers (NCOs) and junior enlisted airmen were prohibited by Air Force regulations.[25] Harrison testified that the oral sodomy was not consensual but admitted that he and SSgt Marcum had salsa danced and kissed "in the European custom of men."[26] Perhaps due to this testimony, the officer panel convicted SSgt Marcum, by exceptions and substitutions, of the lesser included offense of non-forcible sodomy.[27] After the Air Force Court affirmed SSgt Marcum's

---

[14] *See* Hagler, *supra* note 2, at 82-4 (discussing Lawrence v. Texas, 539 U.S. 558 (2003)). A 6-3 majority of the Court found the Texas homosexual sodomy law unconstitutional as applied to adults engaged in consensual sodomy in a private setting. The Due Process Clause gives consenting adults the right to engage in private sexual conduct without government intervention, and in the majority's view, the Texas statute furthered no legitimate state interest to justify its intrusion into an individual's personal and private life. The language of the decision is expansive, although the Court did narrow its reach at one point. Noting the case did not involve public conduct, prostitution, minors, persons who might be injured or coerced, or those who might not easily refuse consent, the Court apparently left the door open to prosecution in those areas. *See id*.

[15] *Lawrence*, 539 U.S. at 579.

[16] *Id.* at 578 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

[17] *See* United States v. Henderson, 34 M.J. 174, 177 (C.M.A. 1992).

[18] *See* Hagler, *supra* note 2, at 83 (noting that the Supreme Court has recognized the increased regulation of individual rights in the military, a separate society requiring good order and discipline, and that the privacy and liberty interests identified in *Lawrence* may not exist to the same extent in military society).

[19] United States v. Marcum, 60 M.J. 198, 201 (2004).

[20] *Id*. at 198. During this interim period, the Coast Guard Court responded to a *Lawrence* challenge. The appellant pled guilty to non-forcible sodomy for acts occurring in the women's berthing area of a USCG cutter. The court affirmed the sodomy conviction, holding that notwithstanding *Lawrence*, it would follow the then-current precedent, *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992), until otherwise modified by the CAAF. Even so, the court found the appellant's misconduct "a far cry" from the private, consensual act in *Lawrence*. The appellant unlawfully entered the berthing area, a location which provides little privacy and where other women were present. The court concluded that the Coast Guard has a legitimate military interest that justifies its intrusion into sexual matters on board ship. *See* United States v. Abdul-Rahman, 59 M.J. 924 (C.G. Ct. Crim. App. 2004), *aff'd*, No. 04-0612/CG, 2005 CAAF LEXIS 203 (Feb. 18, 2005).

[21] *Marcum*, 60 M.J. at 200.

[22] *Id*.

[23] *Id*.

[24] *Id*. at 200-01.

[25] *Id*. at 201 (citing U.S. DEP'T OF AIR FORCE, INSTR. 36-2909, PROFESSIONAL AND UNPROFESSIONAL RELATIONSHIPS (1 May 1996)).

[26] *Id*.

[27] *Id*.

conviction, the Supreme Court reached its decision in *Lawrence*.[28] The appellant then challenged his conviction, claiming Article 125 was unconstitutional under *Lawrence*.[29]

The CAAF held that as applied to the appellant and in the context of his conduct, Article 125 is constitutional.[30] At the outset, the court considered whether the liberty interest identified in *Lawrence*—the right of consenting adults to engage in private sexual activity—was a fundamental right.[31] If so, the appellant argued, then a law restricting that right must be narrowly tailored to meet a compelling government interest.[32] On the other hand, if it was not a fundamental right, as the government argued, then Article 125 must only have a rational basis, which in this case was to promote morale, good order, and discipline in the armed forces.[33] Since the Supreme Court declined to identify the interest as a fundamental right in *Lawrence*, the CAAF reasoned, it would not presume it to be so. Instead, the court determined that *Lawrence* required "searching constitutional inquiry."[34]

Next, the CAAF rejected the government's contention that the *Lawrence* liberty interest did not apply to the military, stating, "Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable."[35] The court, however, determined that Article 125 challenges should receive contextual, as-applied review, rather than a review of the statute on its face.[36] The court then set out a three-part test to determine whether sodomy may be constitutionally prohibited in the context of the charged conduct:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court [in *Lawrence*]? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*?[37] Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?[38]

The court assumed, without deciding, that the appellant's conduct involved private sodomy between consenting adults, thus satisfying the first prong of the test.[39] Nevertheless, the court found the appellant's conduct met *Marcum*'s second prong.[40] Specifically, the appellant was the airman's supervising NCO and knew his behavior was prohibited by service regulations concerning improper senior-subordinate relationships.[41] Because the situation involved a person "who might be coerced" and a "relationship where consent might not easily be refused"—facts the Supreme Court specifically said were absent in *Lawrence*—the appellant's conduct was outside the liberty interest recognized in *Lawrence.*[42] Consistent with a contextual,

---

[28] *Id*.

[29] *Id*. at 202.

[30] *Id*. at 200.

[31] *Id*. at 202.

[32] *Id*.

[33] *Id*. (citing 10 U.S.C. § 654(a)(15) (2000) (stating the congressional finding that homosexual conduct "create[s] an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion" in the military)). *See infra* note 72 and accompanying text.

[34] *Id*. at 205. The opinion did not specifically define "searching constitutional inquiry." The court did state that by identifying certain situations that were outside the *Lawrence* liberty interest, the Supreme Court "held open the door" for lower courts to further define the scope and nature of the interest in light of "contexts and factors" not addressed in *Lawrence*. *See id*.

[35] *Id*. at 206. The government argued that Congress found homosexuality "incompatible with military service" in 10 U.S.C. § 654; thus, the court should defer to Congress's exercise of its Article I authority. In response, the CAAF noted that Congress enacted the statute before *Lawrence* and that the Supreme Court did not preclude *Lawrence*'s application to the military. *Id*.

[36] *Id*. (citing Sabri v. United States, 541 U.S. 600, 608 (2004) ("[F]acial challenges to criminal statutes are 'best when infrequent' and are 'especially to be discouraged'")).

[37] Did the conduct involve public acts, prostitution, minors, persons who might be injured or coerced or who might not easily refuse consent? *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[38] *Marcum*, 60 M.J. at 206-7. Unlike the first and second prongs of the *Marcum* test, which collectively ask whether the charged conduct is outside the factual boundaries of *Lawrence*, the court's basis for the third prong is not explicitly clear. Presumably, it comes from the body of Supreme Court case law holding that "constitutional rights may apply differently to members of the armed forces" and the Court's recognition of the need for discipline and order in the military. *See id*. at 205 (citing Parker v. Levy, 417 U.S. 733 (1974); United States v. Priest, 21 C.M.A. 564 (1972); United States v. McCarthy, 38 M.J. 398 (C.M.A. 1993)).

[39] *Id*. at 207.

[40] *Id*. at 208.

[41] *Id*.

[42] *Id*.

case-by-case review, the CAAF expressly declined to decide whether Article 125 would be constitutional in other situations.[43] Significantly, the court chose not to address the third prong of the test: whether military considerations could limit the reach of *Lawrence*.[44]

One month after *Marcum*, the CAAF addressed this question in its second post-*Lawrence* sodomy case, *United States v. Stirewalt*.[45] Petty Officer Second Class (PO2) Darrell Stirewalt was originally convicted for maltreatment, rape, forcible sodomy, battery, adultery, and indecent assault of female crew members assigned to his Coast Guard cutter, to include Lieutenant Junior Grade (LTJG) B.[46] On review, the Coast Guard court set aside the convictions for rape, forcible sodomy, battery and indecent assault of LTJG B, because the military judge improperly excluded certain testimony under the "rape shield" provisions of MRE 412.[47] At a second trial, PO2 Stirewalt pled guilty to non-forcible sodomy, and the government dismissed the remaining charges that had been set aside.[48] On appeal to the CAAF, the appellant claimed his sodomy conviction was unconstitutional under *Lawrence*. The CAAF affirmed the conviction, holding that as applied to the appellant and in the context of his conduct, Article 125 is constitutional.[49]

After reviewing *Marcum*'s "tripartite framework" for addressing *Lawrence* challenges in the military, the court assumed that the appellant's conduct satisfied the first two parts of the *Marcum* test.[50] The court then found the facts "squarely implicate[d] the third prong," noting that the appellant's conduct with his commissioned department head, while both were assigned to the same cutter, violated Coast Guard regulations.[51] These regulations prohibited improper relationships between members of different ranks and reflected the Coast Guard's "clear military interests of discipline and order" in regulating the appellant's conduct.[52] Thus, his acts of sodomy fell outside any liberty interest recognized in *Lawrence*.[53]

Taken together, *Marcum* and *Stirewalt* provide important guidance on the lawful scope of Article 125 in light of *Lawrence*, as well as practical tips to counsel dealing with potential sodomy offenses. First, and perhaps most significantly, the cases firmly establish that the liberty interests identified in *Lawrence* do apply to military members—although not to the same extent as to civilians—and the cases provide a straightforward, three-part test for dealing with Article 125 challenges. Second, *Marcum* and *Stirewalt* show that challenges to Article 125 are reviewed on a case-by-case, as-applied basis, rather than by facial challenge. This means counsel will be limited to the facts of a specific case—not hypothetical situations—in arguing whether a sodomy charge is constitutional. Third, the cases support Article 125 as a viable charge in situations involving force, coercion, prostitution, public conduct and minor victims. Likewise, they affirm that Article 125 may apply to "relationships where consent might not easily be refused,"[54] although the precise contours of such relationships are left notably vague. In light of this, counsel for both sides should introduce evidence and argue whether an accused's conduct fits these categories and thus, satisfies the second prong of *Marcum*. Fourth, the cases establish that military considerations may affect the nature and reach of *Lawrence*, under the facts of each case. Again, counsel should offer evidence and argue whether that the military has a legitimate interest in punishing an accused's activity, such as its impact on good order and discipline or on the public's perception of the armed forces.[55]

---

[43] *Id*.

[44] Specifically, the CAAF declined to consider the potential impact of Congressional findings in 10 U.S.C. § 654 that homosexuality was incompatible with military service. *See supra* note 35; *infra* note 72.

[45] United States v. Stirewalt, 60 M.J. 297 (2004).

[46] *Id*. at 298.

[47] *Id*. at 298-9.

[48] After the rehearing, the appellant stood convicted of sexual harassment, adultery, and indecent assault from the first trial and sodomy from the second trial. *Id*. at 299

[49] *Id*. at 304.

[50] "[W]e will assume without deciding that Stirewalt's conduct falls within the liberty interest identified by the Supreme Court and does not encompass behavior or factors outside the *Lawrence* analysis." *Id*.

[51] *Id*. (citing U.S. DEP'T OF TRANSPORTATION, COAST GUARD PERSONNEL MANUAL ¶ 8.H.2.f. (C26, 1988)).

[52] *Id*.

[53] *Id*.

[54] United States v. Marcum, 60 M.J. 198, 208 (2004).

[55] Some may argue *Marcum* and *Stirewalt* effectively "convert" Article 125 sodomy to an Article 134 offense, requiring the conduct to be prejudicial to good order or service-discrediting. This claim, however, ignores the categories of conduct that are beyond the reach of *Lawrence* (*i.e*., conduct involving force, coercion, minors, public acts, prostitution, or relationships where consent might not easily be refused). In these situations, there is no need for the sodomy to be prejudicial or service-discrediting, as the result in *Marcum* shows, because such evidence tends to implicate only the third prong of the *Marcum* test. Even so, trial counsel are well-advised to plead and prove the conduct's prejudicial or service-discrediting nature as an element of the offense.

Defense counsel may find it appropriate to challenge an Article 125 charge at several stages of a court-martial. During the pretrial investigation and pretrial negotiations, counsel should consider raising the issue to influence the convening authority's decision on disposition. The defense should also consider motions to dismiss for failure to state an offense or for a bill of particulars to make the government reveal how it believes the conduct satisfies the *Marcum* test. At trial, the defense should address the test in a motion for a finding of not guilty and in discussions with the military judge on proposed instructions. For government counsel, the implication of *Marcum* is clear: if the evidence fails the test, do not proceed any further. During a contested trial, be prepared to satisfy the *Marcum* test at any stage of the proceedings. In a guilty plea, counsel must ensure that the accused admits to sufficient facts during his providence inquiry that would satisfy the test on appeal.

Finally, it is worth noting that both *Marcum* and *Stirewalt* involved conduct independently prohibited by relevant service regulations. In *Marcum*, the CAAF applied this evidence to the second prong of its test; in *Stirewalt*, the court considered the evidence under *Marcum*'s third prong. In any event, given the CAAF's strong reliance on this evidence in both cases, counsel should offer evidence of any regulations governing an accused's conduct, or highlight the lack of any such prohibition.

The Service Courts Tackle Marcum

The service Courts of Criminal Appeals have applied the *Marcum* test in several opinions, and predictably, given the nature of *Marcum*'s case-by-case-approach, the results have been mixed. Although the following decisions are all unpublished, counsel may gain further insight from the service courts' treatment of *Lawrence* challenges.

In *United States v. Myers*, a junior enlisted Marine was convicted for committing consensual sodomy with the wife of a Navy petty officer, in the petty officer's on-base quarters, while the petty officer was standing duty.[56] The Navy-Marine court affirmed, finding the appellant's conduct had a "detrimental impact on military interests and order" and thus satisfied the third prong of *Marcum*.[57]

Similarly, in *United States v. Avery*, a separate panel of the Navy-Marine court affirmed a married male Sailor's conviction for extra-marital, consensual sodomy with two female Japanese civilians.[58] The conduct occurred in the appellant's barracks room on a U.S. Navy base in Japan.[59] The court found that the appellant's conduct was open and notorious, was known to his subordinates, and was known to members of the local Japanese community, to include the appellant's estranged Japanese wife.[60] Finding "direct and obvious impacts on both the command structure and the armed forces reputation in the local community. . . ," the court concluded the appellant's conduct implicated *Marcum*'s third prong and was not constitutionally protected.[61]

In contrast, the Army Court applied the *Marcum* test to two cases and found that the appellants' acts of sodomy were protected under *Lawrence*. In *United States v. Barber*, the court set aside and dismissed a noncommissioned officer's sodomy convictions, finding Article 125 unconstitutional as applied to his conduct.[62] The appellant pled guilty to consensual sodomy on two separate occasions with two female Soldiers in his barracks room.[63] Both partners were of "equivalent rank" as the appellant, and there was no apparent duty connection between them and the appellant.[64] One of the Soldiers was married, however, and the appellant videotaped their sexual acts without her knowledge or consent.[65] Applying the *Marcum*

If an appellate court later disagrees with the trial judge's conclusion that the accused's conduct was beyond the reach of *Lawrence*, that court could still affirm a conviction under the third prong of *Marcum*.

[56] United States v. Myers, 2005 CCA LEXIS 44 (N-M. Ct. Crim. App. Feb. 10, 2005) (unpublished).

[57] *Id*. at 5.

[58] United States v. Avery, 2005 CCA LEXIS 59 (N-M. Ct. Crim. App. Feb. 28, 2005) (unpublished).

[59] *Id*. at 2.

[60] *Id*. at 2-3.

[61] *Id*. at 5.

[62] United States v. Barber, No. 20000413 (Army Ct. Crim. App. Oct. 7, 2004) (unpublished), *rev. denied*, 60 M.J. 418 (Dec. 7, 2004).

[63] *Id*. at 10. The appellant was also convicted, contrary to his pleas, of indecent assault and extortion. *Id*. at 1.

[64] *Id*. at 12. At the time of the charged sodomy offenses, the appellant held the rank of specialist (E4). *Id*. at n.10.

[65] *Id*. at 10.

test, the court found the appellant's conduct was "squarely within" the *Lawrence* liberty interest, it did not fall into any of the categories of conduct cited in *Lawrence*, and the providence inquiry revealed no military considerations that might affect the reach of *Lawrence*.[66] Consequently, the appellant's conviction was unconstitutional under *Marcum*.[67]

In a similar case, *United States v. Bullock*, the court set aside and dismissed a male Soldier's conviction for consensual sodomy with a female civilian in the appellant's barracks room.[68] After finding the first two prongs of *Marcum* satisfied, the court found "no military connection other than that [the sodomy] occurred in a barracks room."[69] The court found this fact and the remainder of the record were not enough to satisfy the third prong of *Marcum*, so the appellant's providency inquiry was insufficient to support his guilty plea.[70]

What lessons may counsel draw from the service courts' applications of the *Marcum* test? All four cases primarily turned on *Marcum*'s third prong: the presence or absence of military factors that affect the nature and reach of *Lawrence*. The Navy-Marine court cases both contained evidence of the conduct's impact on good order and discipline or its service-discrediting nature, and the court found this evidence sufficient to limit the reach of *Lawrence* in a military context. The Army court found no such evidence in its cases, even when the sodomy occurred in the barracks and with a married woman whose sexual acts were videotaped without her consent. It is difficult to draw trends from only four unpublished cases, which do not serve as binding precedent, particularly under the case-by-case approach mandated by *Marcum*. Nevertheless, it is clear that the result in many future cases will turn on the strength of the evidence showing the conduct's prejudice to good order and discipline or its service-discrediting nature. It is equally uncertain how the CAAF will weigh the military's interest in prohibiting extra-marital sodomy, sodomy in military barracks, or sodomy that is known to the local community and to members of an accused's unit.

What's Next for Article 125?

Looking ahead, counsel should note that aside from *Marcum*, the above cases all involved sodomy between different-sex partners. Will the courts treat homosexual sodomy any differently? Given the result in *Lawrence*, the broad language of the opinion, and its emphatic overruling of *Bowers*, there is no principled distinction between hetero- and homosexual sodomy, at least in civilian society.[71] But under *Marcum*'s third prong, there may still be room to argue that homosexual sodomy in a military context raises issues that may affect the reach of *Lawrence*. In *Marcum*, the government offered evidence of congressional findings regarding homosexuality in the military to support its unsuccessful contention that *Lawrence* did not apply to military members.[72] The CAAF, however, judiciously dodged the question of how these findings might impact the

---

[66] *Id*. at 11-2.

[67] *Id*. at 2.

[68] United States v. Bullock, No. 20030534 (Army Ct. Crim. App. Nov. 30, 2004) (unpublished), *petition for rev. filed*, No. 05-0239/AR (Jan. 14, 2005).

[69] *Id*. at 5.

[70] *Id*.

[71] In reaching its decision, the Court expressly declined to rely upon the petitioners' Equal Protection argument, stating, "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." Lawrence v. Texas, 539 U.S. 558, 575 (2003). The Georgia statute affirmed in *Bowers* prohibited sodomy whether or not the participants were of the same sex. *See id*. at 566.

[72] *See supra* notes 35, 44. In 1993, Congress made specific findings to support a policy excluding homosexuals from military service, including the following:

> (8) Military life is fundamentally different from civilian life in that—
>
> (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and
> (B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.
>
> ….
>
> (12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.
>
> (13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.
>
> ….

third prong of the *Marcum* test by deciding the case under second prong, so the question remains unanswered. Future decisions may turn on whether these findings—although not specific to any one case—represent a military interest in regulating the accused's charged homosexual conduct, and whether this interest alone is sufficient to limit the scope of *Lawrence*. Under an as-applied analysis, this will be a difficult burden for the government to meet, absent concrete evidence of some detriment to military readiness or discipline caused by the accused's conduct.[73]

Child Pornography: How Do You Solve a Problem Like *O'Connor*?

As discussed in last year's symposium, the Supreme Court's 2002 decision in *Ashcroft v. Free Speech Coalition*[74] and the CAAF's subsequent decision in *United States v. O'Connor*[75] potentially affected all pending and future child pornography cases charged as violations of the federal Child Pornography Prevention Act (CPPA).[76] In the wake of *O'Connor*, military appellate courts scrambled to address the issues created when trial judges used CPPA definitions that were deemed unconstitutional under *Free Speech Coalition*.[77] The most common of these issues was whether the images of child pornography depicted actual minors or were merely computer-generated "virtual" children.[78] For future child pornography offenses charged as CPPA violations, this issue will not arise if the judge instructs the panel using the proper definitions, and the government proves or the accused admits the images depict actual children.[79] Still, the CAAF decided two recent cases that provide additional guidance to counsel dealing with child pornography offenses charged under Article 134.[80]

Child Pornography as a Lesser Included Offense Under Article 134, Clauses 1 and 2: United States v. Mason[81]

Major (Maj.) Robert Mason pled guilty to receipt of child pornography under Article 134, Clause 3, in violation of the CPPA.[82] During the providence inquiry, the military judge defined child pornography, in part using statutory language later declared unconstitutional in *Free Speech Coalition*.[83] The military judge also discussed with the appellant an additional

---

> (15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654(a) (2000).

[73] In *Marcum*, the CAAF downplayed the relevance of 10 U.S.C. § 654, noting that it was enacted before *Lawrence* and while *Bowers* was the controlling precedent. *See supra* note 35 and accompanying text.

[74] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (finding that portions of the definition of child pornography in the Child Pornography Prevention Act (CPPA) violated the First Amendment, specifically those portions addressing images that "appear[] to be" minors or that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" that they depict minors). *Id.* at 245, 258 (citing 18 U.S.C. § 2256(8)(B), (D)).

[75] United States v. O'Connor, 58 M.J. 450 (2003). The appellant pled guilty to possession of child pornography, in violation of the CPPA, charged under Article 134, Clause 3. The CAAF found the appellant's plea improvident and set aside the conviction, because the military judge used definitions from the CPPA that were later found to be unconstitutional. After *Ashcroft v. Free Speech Coalition*, the distinction between "virtual" and "actual" images of child pornography has constitutional significance. *See id*.

[76] 18 U.S.C. § 2252A. *See* Hagler, *supra* note 2, at 92. In 2003, Congress amended or deleted the portions of the statute found unconstitutional in *Free Speech Coalition*. In sum, the prohibition of images that appeared to be minors was changed to cover digital images that are "indistinguishable from" minors, and the reference to images promoted or advertised as child pornography was deleted. *See* 18 U.S.C. § 2256(8).

[77] *See* Hagler, *supra* note 2, at 93.

[78] *See*, *e.g.*, United States v. Lee, 59 M.J. 261 (2004); United States v. Harrison, 59 M.J. 262 (2004); United States v. Mathews, 59 M.J. 263 (2004).

[79] *See id*. (noting that after *O'Connor*, the "actual" character of the visual depictions was a factual predicate to any plea of guilty under the CPPA and by extension, an element of an offense charged as a violation of the CPPA).

[80] Article 134, UCMJ, has three clauses, each of which represents a separate theory of liability. Clause 1 covers conduct prejudicial to good order and discipline. Clause 2 covers conduct of a nature to bring discredit upon the armed forces. Clause 3 incorporates non-capital federal crimes, to include state law violations adopted under the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 60.c. (2002) [hereinafter MCM].

[81] United States v. Mason, 60 M.J. 15 (2004).

[82] *See* MCM, *supra* note 80, pt. IV, para. 60.c.(4). The elements of an Article 134, Clause 3 offense are drawn from the charged federal statute or assimilated state statue. Clause 3 offenses do not require proof of the conduct's prejudice to good order and discipline or of its service-discrediting nature. *See id*. pt. IV, ¶ 60.c.(6)(b).

[83] *Mason*, 60 M.J. at 18.

element: whether his conduct was prejudicial to good order and discipline or service-discrediting.[84] Major Mason admitted his conduct satisfied the additional element, and the military judge found him guilty.[85] On appeal to the CAAF, Maj. Mason claimed his plea was improvident under *O'Connor*.[86] The CAAF agreed, but found the plea provident to a lesser included offense under Article 134, Clauses 1 and 2.[87] Notably, the court affirmed that the distinction between "virtual" and "actual" images was of constitutional significance for a CPPA violation, but not for Clause 1 and 2 offenses.[88] In contrast, the nature of the images was not dispositive as to whether receiving such images was prejudicial to good order and discipline or service-discrediting, because it did not "alter the character of Mason's conduct."[89] Quoting from the Supreme Court's opinion in *Parker v. Levy*, the court noted:

> While the members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. 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.[90]

Even if the case involved only "virtual" images, the court held, the appellant could still be convicted of the "uniquely military" Clause 1 and 2 offenses.[91] The CAAF made this distinction between the CPPA and Article 134 even more explicit in a decision it rendered the same day as *Mason*.

Child Pornography as a Charged Offense Under Article 134, Clause 1 or 2: United States v. Irvin[92]

Master Sergeant (MSgt) Kent Irvin pled guilty to possession of child pornography, charged as a violation of Article 134, Clauses 1 and 2 (conduct prejudicial to good order and discipline and reflecting discredit upon the armed forces).[93] At the time of the charged offense, MSgt Irvin was attached to Geilenkirchen Air Base, Germany.[94] The images in question were seized from his off-base residence.[95] Perhaps due to concerns about the extraterritorial application of the CPPA, the government did not charge MSgt Irvin under Article 134, Clause 3. Instead, he was charged with possession of "visual depictions of minors engaging in sexually explicit conduct," in violation of Clauses 1 and 2.[96] During the providence inquiry and in the stipulation of fact, MSgt Irvin admitted that the images depicted minors engaging in sexually explicit conduct, and that his conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces, and the military judge accepted his guilty plea.[97] On appeal, MSgt Irvin challenged his conviction, citing *Free Speech Coalition* and *O'Connor*.[98]

The CAAF affirmed the conviction, finding that the military judge had used none of the improper language from the CPPA; rather, he described the offense using language derived from the specification and from definitions in the federal law left untouched by *Free Speech Coalition*.[99] Consequently, there was no basis under *O'Connor* to question the plea, as the

---

[84] *Id.* at 17. According to the court, this discussion provided "what was missing in *O'Connor*": a basis in the record to affirm a lesser included offense. *Id.* at 19.

[85] *Id*. at 18.

[86] *Id*. at 16.

[87] *Id*. For information on Art. 134, clauses 1 and 2, see *supra* note 80.

[88] *Id*. at 19-20.

[89] *Id*. at 20.

[90] *Id*. (citing Parker v. Levy, 417 U.S. 733, 758 (1974)).

[91] *Id*.

[92] United States v. Irvin, 60 M.J. 23 (2004).

[93] *Id*. at 23.

[94] *Id*. at 24.

[95] *Id*.

[96] *Id*. at 25.

[97] *Id*.

[98] *Id*.

[99] *Id*. at 25-6.

appellant's conduct was measured by the "different yardsticks" provided by Clauses 1 and 2.[100] Moreover, there was no basis in the record to question the validity of the plea as conduct prejudicial to good order and discipline or service-discrediting conduct, because the appellant explained how his conduct satisfied both of these elements.[101]

Taken together with *O'Connor*, the *Mason* and *Irvin* decisions provide clear direction to military practitioners. First, in future cases, counsel should rely only on the constitutional portions of the CPPA and should treat the "actual" nature of the images as an element of the offense when charged as a violation of the CPPA under Article 134, Clause 3.

Second, it makes sense for the government to add language to the specification indicating that the accused's conduct was prejudicial to good order, service-discrediting, or both. Adding these elements provides notice to the accused, preserves lesser included offenses under Clauses 1 and 2, and further reminds counsel to introduce evidence of these elements or to address them in a guilty plea providence inquiry.

Third, the cases show that in a military context, it is legitimate to charge child pornography offenses directly under Clauses 1 and 2, without regard to the CPPA. At first glance, this may look like the simplest approach, but counsel should consider the potential long-term impact of this charging technique on the accused. Because the CPPA is a well-recognized federal crime, its violation would label the accused as a child sex offender under many state registration schemes.[102] A conviction under Clause 1 or 2, on the other hand, may not trigger some states' registration requirements. Even if it does, state officials who are unfamiliar with the UCMJ may not recognize the charge as a qualifying conviction. Counsel should keep in mind these collateral consequences when making recommendations on charging and disposition.

Absence Offenses

If the Dates Don't Fit, You Must Acquit:[103] Hardeman *and* Pinero

Recently, there has been an increase in the number of reported appellate decisions on absence offenses.[104] Perhaps this trend simply follows an increase in the overall number of unauthorized absences,[105] or it reflects commanders' perception that absence without leave (AWOL)[106] and desertion are more serious offenses in times of armed conflict, or it results from changes in how the Army handles absent Soldiers who have been dropped from the rolls.[107] Whatever the cause, counsel should be prepared to deal with some of the recurring issues that arise in the prosecution of absence offenses. The CAAF decided two noteworthy absence cases during the past year, and although neither case changed the substantive law, they clearly illustrate some of these recurring issues and the perils of not properly addressing them at trial.

In the first of these cases, SrA Stanley Hardeman failed to report for training at Tinker Air Force Base.[108] Three days later, his supervisor, SSgt Andrew, called SrA Hardeman at home and told him to report the following morning.[109] The next

---

[100] *See id.* at 25.

[101] *Id*. at 26.

[102] Each state and the District of Columbia maintains a sex offender registry governed by its own set of regulations and qualifying offenses. *See* Federal Bureau of Investigation (FBI), *Investigative Programs, Crimes Against Children*, *at* http://www.fbi.gov/hq/cid/cac/states.htm (State Sex Offender Registry Web Sites) (last visited Apr. 13, 2005). In addition, the FBI's Crimes Against Children Unit has implemented the National Sex Offenders Registry (NSOR). *See id. at* http://www.fbi.gov/hq/cid/cac/registry.htm (National Sex Offender Registry) (last visited Apr. 13, 2005).

[103] This reference to the late Johnnie Cochran's famous statement in the O.J. Simpson trial—one of the many "Trials of the Century" occurring in the 20th Century—is not entirely correct, but it certainly sounds better than the more accurate, yet non-rhyming alternative: "If the accused doesn't admit to a definitive date, the military judge must reject his plea as improvident."

[104] In addition to the cases addressed in this section, *see*, *e.g*., United States v. Le, 59 M.J. 859 (Army Ct. Crim. App. 2004); United States v. Whiteside, 59 M.J. 903 (C.G. Ct. Crim. App 2004); United States v. Hudson, 59 M.J. 357 (2004).

[105] *See* U.S. Army Judiciary, Office of the Clerk of Court, *AWOL/Desertion Statistics from FY 2001 thru FY 2005 Q1* (14 Jan. 2004) (copy on file with author). The Army tried the following numbers of absence cases during each listed fiscal year (FY): FY 2001—52 desertion and 177 AWOL; FY 2002—153 desertion and 361 AWOL; FY 2003—171 desertion and 356 AWOL; FY 2004—176 desertion and 336 AWOL; FY 2005 (first quarter)—29 desertion and 89 AWOL. *See id*.

[106] For simplicity, this article uses the term AWOL in describing absence offenses under Article 86, UCMJ, despite the fact that other armed services and several case opinions may refer to such offenses as unauthorized absences (UA).

[107] In October, 2001, the Army changed its policy for handling deserters. Instead of receiving administrative discharges, the majority of these Soldiers were returned to their parent units for disposition. *See* U.S. DEP'T ARMY, REG. 630–10, ABSENCE WITHOUT LEAVE, DESERTION, AND ADMINISTRATION OF PERSONNEL INVOLVED IN CIVILIAN COURT PROCEEDINGS ch. 4 (22 Dec. 2003). Examining the statistics cited above, it is not difficult to see a correlation between the policy change and the number of absence offenses prosecuted. *See supra* note 105.

[108] United States v. Hardeman, 59 M.J. 389, 390 (2004).

week, SSgt Andrew released him from the training, and SrA Hardeman remained absent until he was apprehended forty-three days later.[110] At trial, he pled guilty to AWOL for the entire period.[111] The stipulation of fact stated that SSgt Andrew would testify he told SrA Hardeman to report for duty on a specific date.[112] During the providence inquiry, however, SrA Hardeman said he did not recall SSgt Andrew giving him a report date, and he was expecting a phone call advising him when to report.[113] The military judge accepted his plea and found him guilty as charged.[114] The CAAF reversed, finding the appellant's plea improvident.[115] The court held that a definitive date is necessary both to prove an AWOL offense and to determine its maximum punishment.[116] Here, the providence inquiry did not clearly establish the date on which the appellant would admit he absented himself without authority.[117] It confirmed only that after several weeks passed, the appellant knew better and should have contacted his unit.[118] Because the record did not contain the appellant's concession that his absence began on the charged date, there was a substantial basis to question his plea.[119]

In a second CAAF case with similar facts, Petty Officer Second Class (PO2) Jaime Pinero pled guilty to a single-specification, fifty-three-day AWOL terminated by apprehension.[120] During the providence inquiry, PO2 Pinero admitted he went AWOL on 23 October and was apprehended at his home on 15 December.[121] About mid-November, Pinero testified, a petty officer came to his off-base house and ordered him to participate in a command-directed urinalysis screening.[122] After dressing in his uniform and going to the urinalysis with the petty officer, PO2 Pinero returned to his residence.[123] His submission to military control lasted about five hours, although Pinero testified he never intended to terminate his absence.[124] For some unexplained reason, the trial counsel could not establish in the record the date of the urinalysis.[125] Nevertheless, the military judge accepted the accused's plea to a single AWOL for the entire period.[126] In affirming the conviction, the Navy-Marine court found that the five-hour period was a *de minimis* interruption; the appellant's participation in the urinalysis did not terminate his AWOL because he lacked the required intent.[127]

The CAAF set aside the conviction, finding that the appellant's return to military control for the urinalysis did terminate his AWOL, so he could not have been absent for the charged fifty-three-day period.[128] While noting that "the quantum of proof is less than that required at a contested trial," the court held that the military judge must clarify the basis for his determination that the accused's acts constituted a single AWOL.[129] Based on the appellant's statements, the military judge needed to resolve any conflicting facts to determine the duration of the two periods of absence; the failure to establish the date of the urinalysis left these dates unresolved.[130] Consequently, the record supported only a single, nine-day AWOL.[131]

---

[109] *Id*.

[110] *Id*.

[111] *Id.* at 389-90

[112] *Id*. at 390.

[113] *Id*.

[114] *Id.* at 391

[115] *Id*.

[116] *Id*. at 391-2.

[117] *Id*. at 392.

[118] *Id*.

[119] *Id*.

[120] United States v. Pinero, 60 M.J. 31, 32 (2004).

[121] *Id*.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*. at 33 (citing United States v. Pinero, 58 M.J. 501, 503 (N-M. Ct. Crim. App. 2003) (en banc)).

[128] *Id*. at 35. The court remanded the case for a new Article 66 review, consistent with its decision in United States v. Jenkins, 60 M.J. 27 (2004). *Id*. at 32.

[129] *Id*. at 34, 35. (citing United States v. Care, 40 C.M.R. 247 (C.M.A. 1969))

[130] *Id*. at 34.

Taken together, *Hardeman* and *Pinero* show the absolute need to establish the start and end dates of any AWOL period. As the CAAF noted, the dates are necessary to prove AWOL and to determine the maximum authorized punishment,[132] considerations which naturally impact the "voluntary and knowing" nature of an accused's plea.[133] The fact that both cases were guilty pleas makes a further point: evidence that might be sufficient to allow a panel to convict an accused in a contested case may not be sufficient to allow an accused to plead guilty. While this may seem at odds with the familiar claim that a guilty plea is "the strongest form of proof known to the law,"[134] it highlights the fundamentally unique nature of a guilty plea in the military justice system. To sustain a guilty plea conviction, the record must not only contain sufficient evidence of the accused's guilt, it must show that the accused affirmatively admits that this evidence is true. So the lesson from these cases is clear: the accused cannot plead guilty unless he is prepared to admit, with some degree of precision, the dates his AWOL began and ended, and the dates of any intervening terminations of his absence.[135] Furthermore, a stipulation of fact stating that a witness "would testify" he told the accused to report does nothing if the accused will not admit he at least heard the witness. The bottom line is that if an accused will not admit he had no authority for his absence, then he is not provident to plead guilty, even if a panel might conclude he had no authority at a contested trial.

Casual Presence or Voluntary Termination? Rogers *and* Scott

The Army court also rendered two recent decisions concerning some the most regularly recurring issues in absence offenses. As is often the case with longer absences, an AWOL Soldier may return to a military installation—or even to his unit—and then depart shortly afterwards. In such cases, the question becomes whether there are there multiple absences interspersed with "voluntary terminations," as in *Pinero*, or there is a single, longer absence, during which the accused was only "casually present" on post.

In the first of these cases, Private (PV2) Latonya Rogers pled guilty, *inter alia*, to multiple AWOL specifications.[136] She testified during the providence inquiry that she was "sometimes" on post during the charged periods and that she even went to her unit and encountered NCOs who knew she was AWOL.[137] Nevertheless, PV2 Rogers maintained, she "wanted out of the Army" and did not turn herself in to her unit.[138] The military judge accepted her plea and found her guilty as charged.[139] The Army Court affirmed the conviction, noting that military courts have long accepted the notion that "casual presence at a military installation does not, without more, terminate an unauthorized absence."[140] Here, the appellant's casual presence on post for personal reasons did not terminate her AWOL.[141] Laying out a four-part test for voluntary termination, the court found the appellant's admissions and her failure to express an intent to return to military duty showed there was no termination.[142] In support of its conclusion, the court noted that PV2 Rogers never overtly submitted to military control and that nobody attempted to exert military control over her.[143]

In the second Army court case, Specialist (SPC) Shayla Scott left Fort Hood, Texas without authority on 16 August.[144] She returned on 11 September, signed into her unit, and went to her off-post apartment.[145] After learning she had been

---

[131] *Id*. at 35.

[132] United States v. Hardeman, 59 M.J. 389, 391-92 (2004).

[133] *Compare* MCM, *supra* note 80, pt. IV, para. 10.e.(2)(b) (AWOL for more than three but not more than thirty days has a maximum punishment of six months confinement and no discharge), *with* para. 10.e.(2)(d) (AWOL for more than thirty days and terminated by apprehension has a maximum punishment of eighteen months confinement and a dishonorable discharge).

[134] *See* U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK ch. 2, § II, ¶ 2-2-1 (Guilty Plea Introduction) (15 Sept. 2002) [hereinafter BENCHBOOK].

[135] An accused's admission to an "on or about" date should suffice, so long as there is no dispute whether this non-specific date would trigger the enhanced punishments for longer AWOLs.

[136] United States v. Rogers, 59 M.J. 584 (Army Ct. Crim. App. 2003).

[137] *Id*. at 585.

[138] *Id*.

[139] *Id*.

[140] *Id*. at 586 (citing United States v. Jackson, 2 C.M.R. 96, 98 (C.M.A. 1952)).

[141] *Id*. (citing United States v. Coglin, 10 M.J. 670, 673 (A.C.M.R. 1981)).

[142] *Id*. at 586-8.

[143] *Id*. at 588 (citing United States v. Vaughan, 36 M.J. 645, 648 (A.C.M.R. 1992)).

[144] United States v. Scott, 59 M.J. 718, 720 (Army Ct. Crim. App. 2004).

dropped from the unit's personnel rolls, SPC Scott did not return to work the next day, but she eventually returned to military control on 5 November.[146] At trial, SPC Scott pled guilty, *inter alia*, to a single-specification AWOL for the entire eighty-one-day period.[147] During the providence inquiry, SPC Scott agreed with the military judge's conclusion that she never terminated her AWOL, because her "return was so brief that [she] never really did return to military control."[148] The military judge accepted her plea and found her guilty as charged, but the Army court found the plea improvident and set aside the conviction.[149] The court characterized the appellant's "perfunctory" agreement with the judge's statements as insufficient to show her admission that there was no voluntary termination.[150] Instead, the judge should have explained the *Manual for Courts-Martial*'s (*Manual*) three-part test for voluntary termination of AWOL, thus ensuring the appellant understood why she did not do enough to satisfy the test.[151] Rather than returning the case to the convening authority, however, the court divided the eighty-one-day period of absence into two shorter AWOLs under the same specification and affirmed the findings and sentence.[152]

Rogers and *Scott* offer three practical lessons for counsel. First, these cases set out the criteria that distinguish voluntary termination from casual presence and highlight the need to explain these requirements to an accused who pleads guilty to AWOL under such circumstances. Of particular note to practitioners, the *Rogers* opinion contains a pattern instruction for AWOL voluntary termination issues.[153]

Second, *Rogers* points out an often-overlooked *Manual* provision that allows findings of multiple AWOLs within one specification, so long as they are within the charged period, and the accused is not misled by the findings.[154] Government counsel should take advantage of this provision when charging longer AWOL periods, especially those involving "termination vs. casual presence" issues that may not be resolved until trial. By charging AWOL for the entire period, then allowing the factual issues to be resolved at trial or by pretrial agreement, counsel may employ more simplified pleadings and avoid potential variance issues.

Third, combined with *Hardeman* and *Pinero*, these cases show why counsel should be extra alert in assessing the effectiveness of a providence inquiry in an AWOL guilty plea. Whether or not the cases dispute the claim that a guilty plea is the "strongest form of proof know to the law," the accused's own statements most often raise these matters, and attentive counsel may keep many of them from becoming legitimate appellate issues.

Notable Decisions Involving Other Offenses

Kidnapping: United States v. Seay[155]

Sergeant (SGT) Bobby Seay II and SGT Darrell Shelton brought a drunken Private First Class (PFC) Jason Chafin back to SGT Seay's apartment after Chafin got in a fight in the barracks at Fort Carson, Colorado.[156] Shortly afterward, the three men left in SGT Seay's truck and drove to a remote area.[157] While PFC Chafin was in the front passenger seat, SGT Seay

---

[145] *Id*.

[146] *Id*. at 721.

[147] *Id* at 720.

[148] *Id*. at 721.

[149] *Id*. at 722.

[150] *Id*.

[151] *Id*. (citing MCM, *supra* note 80, pt. IV, para. 10.c.(10)(a) (requiring presentation to any military authority, notification of the Soldier's AWOL status, and submission or demonstration of a willingness to submit to military control)).

[152] *Id* at 723; *See* MCM, *supra* note 80, pt. IV, para. 10.c.(11).

[153] *See* United States v. Rogers, 59 M.J. 584, 588-9 (Army Ct. Crim. App. 2003).

[154] MCM, *supra* note 80, pt. IV, para. 10.c.(11).

[155] 60 M.J. 73 (2004).

[156] *Id*. at 74.

[157] *Id*.

tried to strangle him from behind with a cord.[158] Chafin fled the truck, but SGT Shelton pinned him to the ground, and both men took turns stabbing him to death.[159] The appellant was convicted, *inter alia*, of kidnapping and murder.[160]

On appeal, SGT Seay claimed the kidnapping conviction was legally insufficient. The CAAF disagreed and affirmed the conviction.[161] After listing the elements of kidnapping, the court discussed six factors to consider in assessing whether asportation, or "carrying away" a victim, satisfies an element of kidnapping or is merely an incidental or momentary detention.[162] Here, the court noted, the men drove Chafin several miles to a secluded location, where the appellant confined Chafin and held him against his will by strangling him.[163] Shelton then held Chafin to the ground while the appellant stabbed him.[164] The court found these acts occurred prior the murder, and they exceeded the acts inherent in the commission of murder.[165] Further, because the men could have killed Chafin at the appellant's apartment or in his truck, their acts created additional risk for Chafin,[166] who was less likely to find help in the secluded location.[167]

At first glance, *Seay* appears to be a boon for the government, although it does offer lessons for counsel from both sides. First, it reiterates factors the courts should consider when evaluating kidnapping as a separate offense. Notably, the *Benchbook*'s elements and definitions do not address all these factors, so counsel may employ them to craft proposed instructions or during argument on a motion to dismiss.[168] By the same token, the government should consider the factors in its charging decision. For example, when an accused moves a victim, either by physical force or trickery and thereby places the victim in greater danger, then the accused may have committed kidnapping.[169] Of course, some may question the need to charge kidnapping in a case like *Seay*, where a brutal murder was clearly the gravamen of the offense. There may be cases, however, where the maximum punishment for the "other" offense is not as serious (*e.g.*, manslaughter, assault, indecent assault or liberties, and maiming), and the addition of kidnapping is necessary to reflect the accused's culpability. On the other hand, the defense may properly highlight *Seay*'s requirement for both holding and moving the victim, or the lack of additional risk to the victim, in arguing against a kidnapping charge. In other words, because *Seay* contains an objective list of factors, counsel for either side may use them to their advantage under the facts of a specific case.

Involuntary Manslaughter: United States v. Stanley[170]

In a case with very timely[171] but tragic facts, SrA Edward Stanley's wife arrived home from a short trip to a local video store to find her husband holding their apparently lifeless six-week-old son, Timothy.[172] They rushed the infant to the emergency room, and Timothy was soon transferred to pediatric intensive care at a children's hospital.[173] There, doctors

---

[158] *Id*.

[159] *Id*. at 74-5.

[160] *Id*. at 74.

[161] *Id*. at 80-1.

[162] *Id*. The court addressed the following factors: (1) the occurrence of both an unlawful carrying away and a holding for a period of time; (2) the duration of the acts (*i.e*., asportation and detention); (3) whether the acts occurred during the commission of another crime; (4) whether the acts were inherent in the commission of that type of crime, given the location where the accused first encountered the victim; (5) whether the acts exceeded those inherent in the separate offense and showed the accused's intent to move or detain the victim more than was necessary to commit the offense in the first location; and (6) the creation of additional risk to the victim by moving him from the first location. *Id*. (citing United States v. Santistevan, 22 M.J. 538, 543 (N.M.C.M.R. 1986) and United States v. Newbold, 45 M.J. 109 (1996)).

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] The opinion states, "*The appellant* experienced an increased risk as a result of these acts. . . ," an apparent typographical error. *See id*. (emphasis added).

[167] *Id*.

[168] *See* BENCHBOOK, *supra* note 134, ¶ 3-92-1.

[169] *See id*.

[170] 60 M.J. 622 (A.F. Ct. Crim. App. 2004)

[171] This case is particularly timely, given the recent national attention paid to the Terri Schiavo case, a dispute over the decision to withhold feeding and hydration support from Mrs. Shiavo, who was in a persistent vegetative state for fifteen years. *See Terri Schiavo Case: Legal Issues Involving Healthcare Directives, Death, and Dyin**g***, *at* http://news.findlaw.com/legalnews/lit/schiavo/ (last visited May 25, 2005).

[172] *Stanley*, 60 M.J. at 623.

[173] *Id*.

diagnosed the child's condition as "shaken baby syndrome," involving traumatic injuries to the bones, eyes, and brain.[174] The baby also showed fractures to his extremities and his ribs.[175] Because Timothy lacked a gag response and suck reflex, doctors placed him on artificial life support, consisting of intravenous fluids for nutrition and hydration, and although he could breathe on his own, he was kept on a respirator.[176] After further examination, doctors determined Timothy was "neurologically devastated" and in a "persistent vegetative state" from which he would never recover.[177] His mother sought to remove the artificial life support, and when SrA Stanley opposed this move, she obtained an order from the state court giving her sole authority to make medical decisions for Timothy, to include a "do not resuscitate" directive.[178] On this authority, the mother ordered her baby's artificial life support removed, and Timothy died eight days afterward.[179] In a trial by judge alone, SrA Stanley was found guilty of involuntary manslaughter by culpable negligence.[180] On appeal, the defense challenged the factual and legal and sufficiency of the conviction, arguing SrA Stanley's acts were not the proximate cause of his son's death; rather, the removal of artificial life support was a superseding and intervening cause of death.[181]

The Air Force Court of Criminal Appeals (AFCCA) disagreed and affirmed the appellant's conviction.[182] The court first noted that that a "proximate" cause need not be the sole, nor even the most immediate cause, so long at it played a "material role" in the victim's death.[183] Further, another's negligence may intervene between the accused's conduct and a fatal result and completely eliminate the accused's acts as the proximate cause, but only when "the second act of negligence looms so large in comparison with the first, that the first is not to be regarded as a substantial factor in the final result."[184] Medical treatment may serve as an intervening cause, but under most circumstances an accused is still criminally liable, even though better treatment might have prolonged or saved the victim's life.[185] Citing legal commentators, however, the court held that only "grossly erroneous" treatment of a comparatively slight injury would loom so large as to relieve an accused of responsibility.[186] The court concluded that the appellant inflicted serious and dangerous injuries on Timothy, and any medical treatment, to include the lawful removal of life support, was a foreseeable result of his conduct.[187] Thus, it did not rise to the level of an intervening cause sufficient to relieve the appellant of criminal liability.[188] The appellant's wrongful acts "set in motion an unbroken, foreseeable chain of events" and were the proximate cause of his infant son's death.[189]

Stanley gives practitioners specific guidance on the issue of intervening cause, particularly when it involves allegedly negligent medical treatment. Although issues of causation seldom arise in intentional homicides,[190] they may often come into play in involuntary manslaughter and negligent homicide offenses.[191] In these cases, *Stanley* sets the bar high, as it requires gross medical negligence in treating relatively minor injuries caused by the accused to relieve him of liability.

---

[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] *Id*. at 624.

[178] *Id*. at 624-25.

[179] *Id*. at 625.

[180] *Id*. at 622.

[181] *Id*. at 624.

[182] *Id*. at 623.

[183] *Id*. at 626 (citing United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984)).

[184] *Id*. (quoting *Cooke*, 18 M.J. at 154).

[185] *Id*. at 626 (citing United States v. Taylor, 44 M.J. 254 (1996)).

[186] *Id*. (citing R. PERKINS & R. BOYCE, CRIMINAL LAW 801-03 (3d ed. 1982)).

[187] *Id*. at 628.

[188] *Id*.

[189] *Id*.

[190] *But see* United States v. Gomez, 15 M.J. 954 (A.C.M.R. 1983) (rejecting appellant's claim that removal of life support from an intentional assault victim was an intervening cause of the victim's death).

[191] *See*, *e.g.*, United States v. Riley, 58 M.J. 305 (2003); United States v. Oxendine, 55 M.J. 323 (2001); United States v. Henderson, 23 M.J. 77 (C.M.A. 1986).

Obscene or Indecent? United States v. Negron[192]

When his loan application was rejected, Corporal (Cpl) Wesley Negron wrote a letter to the offending credit union, containing the following statements:

> Oh, yeah, by the way y'all can kiss my ass too!! Worthless bastards! I hope y'all rot in hell you scumbags. Maybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y'all are good at that, right?[193]

Corporal Negron pled guilty, *inter alia*, to depositing obscene matter in the mail, charged under Article 134, UCMJ.[194] During the providence inquiry, the military judge defined "obscene" using terms that focused on the indecent, sexual nature of the acts described in Cpl Negron's letter.[195] Negron agreed that his writing satisfied this definition, yet he maintained he wrote the letter because he was angry and frustrated, and he selected his words to offend the reader.[196] The military judge accepted Cpl Negron's plea and found him guilty as charged.[197] A panel of the Navy-Marine court set aside the findings, but on reconsideration, the court affirmed the conviction *en banc*.[198] The majority found the language in the letter was legally obscene by community standards, it was "calculated to corrupt morals or excite libidinous thoughts," and it did not fall within an exception applicable to immediate, angry confrontations.[199]

The CAAF reversed and set aside the conviction, holding that under the "narrow definition" provided by current case law, the language used by the appellant was not obscene.[200] The judge's definition improperly focused on the indecent nature of the acts described in the letter rather than the appellant's intended result from using that language.[201] In the court's view, the providence inquiry showed that Cpl Negron was expressing his outrage, not his intent to "corrupt morals or excite lustful thoughts" in the minds of the letter's readers.[202] Further, because the judge's leading questions elicited only conclusory statements from the appellant—instead of factual information necessary to establish an offense—the CAAF declined to affirm any lesser included offense.[203]

Negron is significant for military practitioners because it resolves a potential conflict between the language of the *Manual* and prevailing First Amendment case law. The term "obscene" has constitutional implications with a long line of Supreme Court precedent.[204] When the Drafters composed the *Manual* provisions regarding obscene mail matter, they apparently had these cases in mind.[205] Thus, it may be problematic to argue that "obscene" means one thing under First Amendment law and something different under the UCMJ. Further, the case points out the internal inconsistency of the *Manual*'s definitions of "indecent" acts and language and the confusion that may follow using these definitions in a

---

[192] 60 M.J. 136 (2004).

[193] *Id*. at 137.

[194] *Id*. at 136-37. *See* MCM, *supra* note 80, pt. IV, para. 94.

[195] *See id*. at 137-38. The court speculated that the judge erroneously attempted to "blend" this definition from paragraphs of the *Manual* addressing indecent acts and obscene mail matter. *Id*. at 141-2. (citing MCM, *supra* note 80, pt. IV, paras. 90.c. and 94.c.).

[196] *Id*. at 137-9.

[197] *Id*. at 139.

[198] *Id*. at 137.

[199] *Id*. at 140 (citing United States v. French, 31 M.J. 57 (C.M.A. 1990); United States v. Brinson, 49 M.J. 360 (1998)).

[200] *Id*. at 142-43 (citing United States v. Brinson, 49 M.J. 360 (1998)).

[201] *Id*. at 142.

[202] *Id*. at 143.

[203] *Id*.

[204] *See*, *e.g*., Ashcroft v. ACLU, 159 L. Ed. 2d 690 (2004):

> Material is legally obscene if: "(a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Id. at 709 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

[205] *See* MCM, *supra* note 80, app. 23, Analysis of Punitive Articles (citing Hamling v. United States, 418 U.S. 87 (1974) and *Miller*, 413 U.S. 15 (1973)).

providence inquiry.[206] Finally, *Negron* underscores the fact that speech offenses will receive additional scrutiny on review, so counsel should use extra care when considering whether to charge them.[207] In the court's words, "When the Government makes speech a crime, the judges on appeal must use an exacting ruler."[208]

Defenses

This year's symposium includes fewer cases on defenses than last year, simply because there were fewer noteworthy decisions on defenses from military appellate courts. Even so, counsel may draw important lessons from these opinions. The first case ties in with this article's previous discussion of absence offenses and highlights an issue that, like termination and casual presence, often arises in AWOL cases. The second case involves the standard for raising affirmative defenses.

Duress and Desertion: United States v. Le[209]

Sergeant Phong Le left his unit at Fort Lewis, Washington, and was apprehended fourteen months later while attempting to cross the border at Tijuana, Mexico.[210] He pled guilty to desertion.[211] During his providence inquiry, SGT Le stated his primary reason for leaving was fear that his girlfriend's ex-boyfriend, a purported gang member, would kill or harm him.[212] In response to the military judge's questions, SGT Le repeatedly said he did not fear "immediate" death or serious bodily injury, but he did not know when the ex-boyfriend would come after him.[213]

The Army court found the appellant's guilty plea was improvident, because he raised the defense of duress, and the military judge failed to resolve the apparent inconsistency.[214] The court likened Sergeant Le's conclusory responses that he did not fear immediate harm to a "spectacle, where both counsel take hold of appellant's arms while the judge grabs the ankles and together they drag appellant across the providence finish line. . . ."[215] Noting that duress has long been recognized as a defense to absence offenses, the court held it applies only so long as the accused surrenders at the earliest possible opportunity.[216] Thus, the appellant's claim of duress could apply only while his reasonably grounded fear still existed.[217] Once away from the source of the fear, the threat lost its coercive force.[218] Instead of wholly setting aside the conviction, then, the court modified the findings to eliminate the first four days of the appellant's absence and affirmed the modified findings and sentence.[219]

The *Le* case is noteworthy because it points out another issue that frequently arises in guilty pleas involving desertion and absence offenses. During many providence inquiries, accused Soldiers will often tell their story in a favorable manner, offering sympathetic reasons for their absence. Because these reasons may raise a legal defense and invalidate the accused's plea, counsel and military judges should note the need for further questions to resolve any inconsistencies. The bottom line is that an accused cannot plead guilty to an AWOL or desertion if he maintains that he left for fear of some type of physical harm. If he cannot disclaim this belief on the record, then he must plead not guilty and attempt to persuade a factfinder.

---

[206] *See id.* pt. IV, paras. 89.c. and 90.c. *See generally* Major Steven Cullen, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get a Legal Review First?*, 179 MIL. L. REV. 128 (2004).

[207] The maximum punishment for depositing obscene material in the mail includes a dishonorable discharge and five years confinement, compared to a bad conduct discharge and six months confinement for indecent language and four months confinement for simple disorderly conduct. *See* MCM, *supra* note 80, pt. IV, paras. 73.e.(1), 89.e., and 94.e. Considering the increased punishment for obscene mail matter and its First Amendment implications, the charge will likely receive close scrutiny in the future.

[208] *Negron*, 60 M.J. at 140 (citing *Brinson*, 49 M.J. at 361).

[209] 59 M.J. 859 (Army Ct. Crim. App. 2004).

[210] *Id*. at 860.

[211] *Id*.

[212] *Id*. at 860-61.

[213] *Id*.

[214] *Id*. at 864.

[215] *See id*. (quoting United States v. Pecard, No. 9701940, (Army Ct. Crim. App. Dec. 7, 2000) (unpublished)).

[216] *Id*. at 863-64.

[217] *Id*..

[218] *Id*. at 865.

[219] *Id*.

Accident & Defense of Another: United States v. Jenkins[220]

Specialist (SPC) Alton L. Jenkins and several fellow Soldiers drove to another unit's barracks area to resolve a dispute.[221] Specialist Jenkins took with him a loaded handgun, which he passed to a friend to hold.[222] A fight erupted between a Soldier in SPC Jenkins' group and a Soldier from the opposing faction.[223] Specialist Jenkins retrieved his pistol and fired three shots; the third shot struck PFC Davis and caused the loss of his kidney.[224] At trial, SPC Jenkins testified he fired the pistol twice in the air to prevent further injury to his friend, whom he believed was unconscious and unable to defend himself.[225] The third shot, SPC Jenkins testified, occurred accidentally as he was lowering the weapon to put it away.[226] Defense counsel requested instructions on defense of another, which the military judge gave, and on accident and withdrawal as reviving the right to self-defense, which the judge denied.[227] In denying the accident instruction, the judge found that SPC Jenkins' conduct in firing a pistol in a garrison environment was "wanton and reckless" and thus did not satisfy the requirement that the accused act without simple negligence.[228] The officer and enlisted panel found SPC Jenkins guilty of conspiracy and aggravated assault by intentional infliction of grievous bodily harm.[229]

On appeal, the Army court set aside the aggravated assault conviction, holding the military judge erred in refusing to give the requested instructions.[230] Noting that an accused's testimony alone may be sufficient to raise an affirmative defense, the court set out a novel approach to determine whether to instruct: "Trial judges should view the standard used to decide whether to give an instruction on an affirmative defense as a 'mirror image' of that used to decide whether to grant a motion for a finding of not guilty."[231] In other words, judges should view the evidence "in the light most favorable to the [defense], without an evaluation of the credibility of the witnesses."[232] The court then found evidence in the record that the appellant showed due care in firing his pistol to prevent further injury to his friend and that his failure to engage the safety was "not so clearly negligent" as to bar the accident instruction.[233] Second, when the appellant's friend became unconscious during the fight, he effectively withdrew from the mutual affray, giving the appellant the right to defend him.[234] Finally, the court dismissed the government's argument that the finding of guilt for intentional assault showed the panel's implicit rejection of the accident defense.[235] Instead, the court found the military judge's comment that he had "ruled out" the accident defense discouraged the panel from considering the possibility that the shooting was an accident or unintentional.[236]

Military practitioners may draw important lessons from *Jenkins*. First, the Army court's new formulation of the standard for instructing on an affirmative defense—the RCM 917 "mirror image" standard—dictates that the judge should not evaluate the credibility of witnesses. Even though the military judge's decision in *Jenkins* was not based on the credibility of witnesses, but on his conclusion that SPC Jenkins was objectively negligent, the court admonished the judge for displaying the "entirely human tendency to . . . invade the province of the fact finders."[237] Further, the opinion makes no mention of a judge's duty to instruct on defenses "reasonably raised by the evidence," a phrase the courts have commonly used describe

---

[220] 59 M.J. 893 (Army Ct. Crim. App. 2004).

[221] *Id*. at 895.

[222] *Id*. at 896.

[223] *Id*.

[224] *Id*.

[225] *Id*.

[226] *Id*.

[227] *Id*. at 895-96.

[228] *Id*. at 896.

[229] *Id*. at 895.

[230] *Id*.

[231] *Id*. at 898.

[232] MCM, *supra* note 80, R.C.M. 917(d).

[233] *Id*. at 899.

[234] *Id*. at 900.

[235] *Id*. at 902.

[236] *Id*.

[237] *Id*. at 898 (quoting United States v. Thornton, 41 C.M.R. 140, 144 (C.M.A. 1969)).

this standard.[238] Apparently, the court avoided this language in a conscious attempt to further discourage judges from weighing the evidence in deciding whether to instruct on defenses. Taken together, these elements of the *Jenkins* decision send a strong signal to prudent trial counsel and military judges: they should consider the risks of contesting or denying affirmative defense instructions, especially when the defense specifically requests them. If an appellate court later finds the judge's findings of fact and rationale to be insufficient, then the conviction is jeopardized. Essentially, *Jenkins* says that if the accused testifies the result of his conduct was an unintentional "accident," then the military judge should instruct and let the panel determine whether the elements of the defense are met.

Conclusion

Examining the past year's developments as a whole, we can identify several trends. First, the CAAF's decisions on sodomy and child pornography offenses have reshaped the military justice system in areas where the Supreme Court has found criminal prohibitions to be unconstitutional in a civilian setting. The child pornography decisions find strong precedent in *Parker v. Levy*, but the sodomy decisions find less direct support.[239] It may be that to satisfy *Marcum* and *Lawrence*, Article 125 will effectively become an Article 134 offense, requiring that the accused's conduct be prejudicial to good order or service-discrediting, aside from the categories of conduct specifically addressed in *Lawrence*.

At the same time, the CAAF's absence cases and *Negron* show the court's ongoing commitment to Article 45, UCMJ, by ensuring an accused knowingly and voluntarily pleads guilty.[240] These decisions may cut both ways, however. An accused cannot expect to plead guilty by making half-hearted or self-serving admissions during providency or by merely acquiescing to a military judge's leading questions. He must admit to facts that fully establish his commission of the offense and disclaim the applicability of any defenses, or he will risk losing the benefits of his guilty plea.

While last year's developments tended to bring military justice more in line with civilian norms, this year's decisions show CAAF is willing to apply the Supreme Court's "military as a separate society" jurisprudence to other offenses, recognizing that they may have a distinct impact in the military.[241] Even so, several of these developments leave significant questions unanswered. What is the future of Article 125's prohibition of sodomy? How will homosexual sodomy be treated under the third prong of the *Marcum* test? If asked, how will the Supreme Court rule on the CAAF's decisions in *Marcum*, *Mason*, and *Irvin*? Naturally, the answers to these questions will contribute to the future shape of military justice and maintain the proper measures of discipline and fairness in our system.

---

[238] *See*, *e.g.*, United States v. Hibbard, 58 M.J. 71, 75 (2003); United States v. Washington, 57 M.J. 394, 401 (2002); United States v. McDonald, 57 M.J. 18, 20 (2002); United States v. Davis, 53 M.J. 202, 205 (2000); United States v. Smith, 50 M.J. 451, 455 (1999).

[239] Parker v. Levy, 417 U.S. 733 (1974) (upholding UCMJ Articles 133 and 134 against First and Fifth Amendment challenges). Like *Levy*, the *Mason* and *Irvin* cases involved challenges based on the First Amendment. In weighing a challenge to Article 125 based on the liberty interest identified in *Lawrence*, the Supreme Court may not give the same deference to the military.

[240] *See* UCMJ art. 45 (2002).

[241] *See* Captain Heather J. Fagan, *The Military as a Separate Society—Second-class Citizen Soldiers?* (2005) (currently unpublished manuscript, on file with author) (tracing the history of the "military deference doctrine").