UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MATTHEW F. ANDERSON
United States Air Force

ACM 37606

02 March 2012

Sentence adjudged 18 December 2009 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 15 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Shane A. McCammon (argued); Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Major Michael S. Kerr.

Appellate Counsel for the United States: Lieutenant Colonel Linell A. Letendre (argued); Colonel Don M. Christensen; Major Deanna Daly; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire

Before

ORR, ROAN, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge

On 18 December 2009, consistent with his pleas, a general court-martial composed of a military judge convicted the appellant of one specification of making false official statements; two specifications of wrongful use of cocaine and marijuana, respectively; one specification of consensual sodomy; and one specification of wrongful interference with an adverse administrative proceeding, in violation of Articles 107, 112a,

125, and 134, UCMJ, 10 U.S.C. §§ 907, 912a, 925, 934. The adjudged sentence consisted of a dishonorable discharge, confinement for 23 months, forfeiture of all pay and allowances and reduction to E-1. Pursuant to a pretrial agreement, the convening authority lowered the confinement period to 15 months and approved the findings and the remainder of the sentence as adjudged.[1] We heard arguments in this case as part of our Project Outreach Program at Duke University School of Law in Durham, North Carolina, on 3 November 2011.

On appeal, the appellant contends his conviction for consensual sodomy violates his vital interest in liberty and privacy, protected by the Due Process Clause of the Fifth Amendment,[2] and that the adjudged dishonorable discharge is inappropriately severe. We will also address two additional issues concerning whether the Article 134, UCMJ, specification is sufficient to state an offense in light of *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), and whether delay in post-trial review prejudiced the appellant in light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

The facts relevant to each issue are discussed below.

Conviction for Consensual Sodomy

During the summer of 2006, TRS, the civilian Drug Testing Program Administrative Manager (DTPAM) at Charleston Air Force Base, South Carolina, approached the appellant and offered to perform oral sodomy on him.[3] He agreed to her proposal and they engaged in this behavior on five or six occasions through December 2008. The appellant was on duty and in uniform when these activities took place. After one of the parties would contact the other via e-mail, TRS would perform oral sodomy on the appellant in the Drug Demand Reduction Program (DDRP) office. The activity would take place during the duty day but after the conclusion of established drug-testing hours.

The DDRP office included the Drug Testing Program Manager's office (TRS's supervisor) and the secure storage room, where urine samples were stored prior to being sent for testing. After the appellant would arrive at the DDRP office, TRS would shut the outer door and lead him to the program manager's office or the storage room where she

[1] The court-martial order (CMO), dated 10 February 2010, fails to list the appellant's pleas and the findings to Charge IV and its Specification. The Court orders the CMO corrected to include the missing pleas and findings.

[2] U.S. CONST. amend. V.

[3] The stipulation of fact generally refers to her as "Mrs." TRS, but in one location refers to her as "Ms." TRS. The charge sheet describes her as "Ms." TRS. Other than this salutation, no evidence was presented regarding TRS' marital status and the Government did not argue her status was relevant to the judge's decision on sentence. Given the lack of certainty and the fact that the Government elected to present no dispositive evidence on this point, this Court declines to find that TRS was in fact married at the time of these offenses.

would perform sodomy on the appellant. The DDRP office was located within a base building that also contained the offices of Medical Readiness, Mental Health, and Human Resource and Development. During the time the appellant and TRS were engaging in oral sodomy, the rest of the building was occupied by civilian employees, military members, patients and dependents who were either working in or receiving assistance from those other offices.

On 7 July 2008, the appellant was ordered to provide a urine sample as part of a random urinalysis test. The appellant knew his sample would test positive for cocaine, because he had been using cocaine on a regular basis since 2006. He returned to TRS' office later that day, after drug testing hours, and she again performed oral sodomy on him. The appellant then told TRS he needed her "help" because his urine sample was going to test positive as he had recently done "a line" of cocaine. Knowing he would likely face administrative discharge processing and intending to impede and obstruct that process, the appellant told TRS he would allow her to perform oral sex on him once a week if she helped him escape detection by destroying his urine sample. TRS agreed to help the appellant and destroyed the sample. Later, TRS altered the drug testing logs and chain of custody documentation to falsely indicate he had not provided a sample.

Approximately three weeks later, the appellant returned to TRS' office and asked her to perform oral sodomy on him. She complied in the storage room. This was the last time they engaged in this conduct, but this demonstrates that the accused had in fact partially complied with the bargain he struck with TRS in exchange for her destruction of his sample.

Having successfully escaped detection of his wrongful drug use, the appellant continued to use cocaine on a regular basis. Furthermore, in late April 2009, the appellant used marijuana while at a concert. The following day, he was once again selected to provide a sample under the random urinalysis program. The appellant knew that TRS was no longer the DTPAM.[4] He attempted to invalidate the test by first making his initials illegible on the paperwork, and then by making them too large. Ultimately, the appellant provided a suitable urine sample.

Several days later, but before the test results were reported, the appellant went to the Air Force Office of Special Investigations (AFOSI) and filed a false complaint against TRS, so AFOSI would investigate her and treat him as the victim of a sex crime. He claimed that, two years earlier, TRS had threatened to ensure his urine sample would test positive unless he submitted to her demand that she perform oral sodomy on him. The appellant claimed the acts of sodomy had occurred against his will several times per month. As a result, AFOSI initiated a criminal investigation of TRS.

[4] On 1 December 2008, TRS was transferred to a position working with TRICARE. By the time of trial, she no longer worked at Charleston Air Force Base, South Carolina. No evidence was provided regarding the circumstances of these events.

Soon thereafter, AFOSI was notified that the appellant's April 2009 sample had tested positive for cocaine and marijuana. After being read his rights, the appellant falsely claimed in written and oral statements that he had begun using cocaine to numb the pain caused by the sexual abuse inflicted by TRS and that he now had a major cocaine habit. He provided the agents with details about his cocaine use and his suppliers. A urine sample the appellant provided in May 2009 again reported positive for cocaine. After interviewing other individuals and reviewing written records, AFOSI determined that the appellant's claims of sexual abuse were false.

The appellant was charged with, among other offenses, "commit[ting] sodomy with Ms. [TRS]" on divers occasions. During the guilty plea inquiry, the military judge advised the appellant of the sole element for the offense of "consensual sodomy," namely that on divers occasions between the charged dates, he had "engaged in unnatural carnal copulation with [TRS] by placing [his] penis in her mouth." The military judge advised the appellant that lack of force and consent are not defenses to this charge. After the military judge defined "divers" and "unnatural carnal copulation," the military judge and the appellant discussed the details of his sexual activities with TRS. In addition to describing the actual sexual contact, the appellant admitted knowing TRS was the DTPAM, they would arrange to meet in the DDRP office after drug testing hours, he was always in uniform and on duty, and the activity occurred within a shared office space in an Air Force building. In the written Stipulation of Fact, the appellant admitted to other facts regarding this conduct, namely that the DDRP office was located within a building that contained other Air Force offices where civilian employees, military members, patients and dependents were conducting official business during the same time he was engaging in this sexual activity in the DDRP office. The appellant and military judge did not discuss the significance of those facts relative to his criminal culpability for engaging in sexual conduct under these circumstances.

The appellant agreed that the sodomy was a "consensual act," and, in response to the military judge's question about whether he believed he had "any legal justification or excuse for what [he] did," the appellant stated "no." When asked why he engaged in the conduct, the appellant replied, "Because I chose to and it was for my own sexual gratification/pleasure." The defense and prosecution both agreed that no further inquiry was needed.

In his pretrial agreement, the appellant agreed to "waive and not to raise any pretrial motion to dismiss any specification . . . and to waive all motions which may be waived under the Rules for Courts-Martial except . . . any motion based on constitutionally protected due process violations." In discussing the facts and the pretrial agreement, the parties never referenced or discussed the potential constitutional implications of the charged act of consensual sodomy between two consenting adults.

On appeal, the appellant claims his guilty plea to sodomy was improvident because the military judge failed to establish during the inquiry how his actions fell outside of the protected liberty interests identified by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), as applied to the military environment by our superior court in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). The Government, in contrast, argues that the appellant waived any such claim by pleading guilty and negotiating the waiver provision of the pretrial agreement. In any event, his guilty plea was provident as there was nothing about its factual basis or the law that would raise a substantial question about the plea. The parties also provided competing analyses of how *Lawrence* and *Marcum* applied to the facts of the case.

In *Marcum*, in the context of a plea of not guilty, our superior court provided an analytical framework for distinguishing between conduct constitutionally protected under the Supreme Court's *Lawrence* decision and conduct by military members that may be prosecuted criminally under Article 125, UCMJ. *Marcum*, 60 M.J. at 206-07. This analysis is conducted on an as-applied, case-by-case basis, using a tripartite framework to answer the question of whether Article 125, UCMJ, is constitutional as applied to the appellant's 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? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. (internal citation omitted).

Shortly after the parties submitted their briefs in this case, our superior court issued its opinion in *United States v. Hartman*, 69 M.J. 467, 468-69 (C.A.A.F. 2011), finding the appellant's guilty plea to consensual sodomy improvident. In *Hartman*, the military judge described the offense of sodomy to the accused solely in terms of the definition of the offense set forth in the *Manual for Courts-Martial*. *See Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 51 (2008 ed.). The accused described the nature of the sexual conduct between himself and the other party to the sexual act, but there was no discussion of whether his actions were constitutionally protected. The Court stated "[w]hen a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'" *Hartman*, 69 M.J. at 468. Therefore, a guilty plea inquiry must include an "appropriate discussion and acknowledgement on the part of the accused of the critical distinction between permissible and prohibited behavior." *Id*. A fundamental requirement of this dialogue is

for the accused to "provide[] answers that describe his personal understanding of the criminality of his . . . conduct," with the dialogue "employing lay terminology to establish [that] understanding." *Id.* at 469.

Here, as in *Hartman*, the discussion between the military judge and the appellant focused exclusively on the details of the sexual contact between the appellant and TRS, with no mention of the distinction between constitutionally protected behavior and criminal conduct in this context. Although the colloquy in this case elicited facts pertinent to consideration of the *Marcum* framework, including that the appellant engaged in this conduct while on duty with a civilian employee in a shared office suite located within a building housing other military offices, the discussion between the military judge and the appellant did not establish the appellant's understanding of the significance of these facts relative to the criminal nature of his conduct in light of *Lawrence* and *Marcum*. In fact, unlike in *Hartman*, neither the military judge nor counsel for either party engaged in any discussion about *Lawrence* and *Marcum* in front of the appellant. With no discussion on this point, there was no acknowledgement by the appellant that he understood, or even knew, that certain acts of consensual sodomy may be constitutionally protected. Instead, the appellant's statements indicated that he believed he was per se guilty of this offense because he engaged in unnatural carnal copulation with TRS.

Although we agree with the dissent that Article 125, UCMJ, is clearly constitutional as applied to the appellant's conduct, we cannot view the appellant's plea as provident in light of the language of our superior court's decision in *Hartman* regarding what must be discussed during the guilty plea colloquy. Therefore, the finding of guilty of Charge III and its Specification is set aside and dismissed.

Legal Sufficiency of the Article 134, UCMJ, Specification

We note that the appellant pled guilty to one specification of wrongful interference with an adverse administrative proceeding, in violation of Article 134, UCMJ, as follows:

> In that SENIOR AIRMAN MATTHEW F. ANDERSON . . . did . . . wrongfully endeavor to impede an adverse administrative proceeding by requesting that Ms. [TRS] tamper with [his] urine sample in order to prevent the said urine sample from being tested by the Air Force Drug Testing Program.

Article 134, UCMJ, criminalizes three categories of offenses not specifically covered in other articles of the UCMJ: Clause 1 offenses require proof that the conduct alleged be prejudicial to good order and discipline; Clause 2 offenses require proof that the conduct be service discrediting; Clause 3 offenses involve noncapital Federal crimes made applicable by the Federal Assimilative Crimes Act, 18 U.S.C. § 13. *MCM*, Part IV, ¶ 60.c. As the specification at issue does not reference the Assimilative Crimes Act, it

necessarily involves Clause 1 or 2. The language of the specification complies with the *Manual*'s sample specification, but it does not expressly allege that such conduct was either prejudicial to good order and discipline or service discrediting, commonly known as the "terminal element." *See Fosler*, 70 M.J. at 226; *see also MCM*, Part IV, ¶ 51.f. Because the specifications do not expressly allege the terminal element, we will review de novo whether either is sufficient to allege an offense in light of *Fosler*.

In *Fosler*, our superior court invalidated a conviction of adultery under Article 134, UCMJ, because the military judge improperly denied a defense motion to dismiss the specification on the basis that it failed to expressly allege the terminal element of either Clause 1 or 2. *Fosler*, 70 M.J. at 233. While recognizing "the possibility that an element could be implied," the Court stated that "in contested cases, when the charge and specification are first challenged at trial, we read the wording more narrowly and will only adopt interpretations that hew closely to the plain text." *Id*. at 230. The Court implies that the result would have been different had the appellant not challenged the specification: "Because Appellant made an R.C.M. 907 motion at trial, we review the language of the charge and specification more narrowly than we might at later stages." *Id*. at 232 (referencing the appellant's pretrial motion to dismiss, pursuant to Rule for Courts-Martial 907).

While narrowly construing the specification in the posture of the case, the Court reiterated that the military is a notice-pleading jurisdiction: "A charge and specification will be found sufficient if they, 'first, contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and, second, enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *Id*. at 229 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)). Failure to object to the legal sufficiency of a specification does not constitute waiver, but "[s]pecifications which are challenged immediately at trial will be viewed in a more critical light than those which are challenged for the first time on appeal." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990); *see also United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990).

Where an appellant did not challenge a defective specification at trial, entered pleas of guilty to it, and acknowledged understanding all the elements after the military judge correctly explained those elements, the specification is sufficient to charge the crime unless it "is 'so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had.'" *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965) (citations omitted), *quoted in United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986). Such is the case here: the appellant made no motion to dismiss the Article 134, UCMJ, charge and entered pleas of guilty to the specification under the charge. The military judge thoroughly covered the elements of the offense to include the terminal elements of conduct prejudicial to good order and discipline and

service discrediting conduct. The appellant acknowledged understanding *all* the elements and explained to the military judge why he believed his conduct violated those elements.

Applying a liberal construction to the specification alleged under Article 134, UCMJ, we find that it reasonably implies the terminal element. A specification that alleges wrongfully endeavoring to impede a military administrative proceeding by asking that a urine sample be destroyed so it cannot be tested by the Air Force Drug Testing Program reasonably implies that such conduct would be service discrediting and/or prejudicial to good order and discipline. *See Watkins*. Furthermore, the military judge advised the appellant that his conduct must meet either of these elements to constitute an offense and the appellant acknowledged that his conduct met both those elements. He described his conduct as a breach of discipline that caused a direct injury to the drug testing program and said that the general public would think less of military members if they heard about his actions.

The terminal element was necessarily implied, so the appellant was thus on notice of what he needed to defend against and is protected against double jeopardy. Therefore, we find that the charge and specification under Article 134, UCMJ, is not defective for failing to state an offense.

However, in the event that our superior court determines that the specification was defective, thereby constituting error, we find no prejudice. Our superior court recently instructed "it is both notice as to the offense and an affirmative agreement to be convicted of the charge, which distinguishes a defective specification in the guilty plea context from a defective specification or conviction of an uncharged offense in a contested case . . . absent objection . . . the error is tested for prejudice." *United States v. Ballan*, No. 11-0413/NA, slip op. at 17 n.8 (C.A.A.F. 1 March 2012). After reviewing the providence inquiry, we have no doubt that the appellant understood what he was charged with, why it was prohibited, and that he was in fact guilty; therefore, we find no prejudice.

Sentence Appropriateness/Reassessment

Having set aside the appellant's guilty plea to one of the charges, we must now consider whether we can reassess the sentence or whether we must return the case for a rehearing on sentence. "To validly reassess a sentence to purge the effect of error," including the set aside of a finding of guilty, we must be able to make a number of determinations. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Our Court "must be able to discern the extent of the error's effect on the sentence [and the] reassessment must be based on a conclusion that the sentence that would have been imposed at trial absent the error 'would have been at least of a certain magnitude.'" *Id.* (quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002)). This conclusion about the sentence that would have been imposed must be made "with confidence." *United States v. Taylor*, 51 M.J. 390, 391 (C.A.A.F. 1999). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required

by Article 66(c), UCMJ, 10 U.S.C. § 866(c). In short, a reassessed sentence must be purged of prejudicial error and also must be "appropriate" for the offense involved. *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1988).

Although the set aside of the consensual sodomy conviction changed the penalty landscape by reducing the maximum punishment from 22 to 17 years, the dismissed specification was not the most significant by some order of magnitude. The appellant regularly used cocaine for over two years. He manipulated the drug testing program by asking TRS to destroy his urine sample. He then lied to investigators on two occasions in an effort to avoid detection of this drug use. Furthermore, the sexual activity between the appellant and TRS was inextricably intertwined with the other charges, and would have been known to the military judge even if the Government had not charged appellant with consensual sodomy. Their relationship consisted solely of the sexual acts, and the appellant utilized their relationship to motivate her to destroy his urine sample. He also discussed their sexual activity with investigators, as he was lying to them about being coerced into engaging in that activity.

Therefore, we reassess the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*. Under the circumstances of this case and considering the relative severity of the unaffected charges, we are confident that the military judge would have imposed at least a dishonorable discharge, confinement for 23 months, forfeiture of all pay and allowances, and reduction to E-1. We also find the convening authority's approved sentence to be appropriate, as required by Article 66(c), UCMJ, and reject the appellant's argument that he should not receive a dishonorable discharge for his pattern of misconduct.

Post-Trial Processing Delay

Although not raised by the appellant, we review de novo whether an appellant has been denied the due process right to a speedy appeal. *Moreno*, 63 M.J. at 135. This case was docketed with our Court on 22 February 2010. The overall delay between the docketing of the case with this Court and completion of our review is in excess of 540 days and therefore facially unreasonable.

Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J at 135. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case: the appellant has been released from confinement, the record shows no particularized anxiety or

concern beyond that normally experienced by those awaiting appellate resolution of their cases, and we discern no specific impairment to either the appellant's basis of his appeal or his prospects at a rehearing should the case ultimately be reversed. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

Charge III and its Specification are set aside and dismissed. The remaining findings and the approved sentence, in light of our reassessment, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the approved sentence are

AFFIRMED.

ROAN, Judge, concurring.

ORR, Chief Judge, concurring in part and dissenting in part.

I respectfully part company from the majority's conclusion regarding the providency of the guilty plea to consensual sodomy. I otherwise concur in the majority opinion as to findings and, upon reassessment, the sentence.

While fully recognizing our superior court's decision in *Hartman*, I believe that the appellant's plea is provident because this case is factually distinguishable. In short, I do not believe there is a constitutionally protected interest in committing consensual sodomy while in uniform, in a shared Air Force office, during duty hours. Additionally, on several occasions, the appellant engaged in consensual sodomy in order to escape detection of his drug use. Therefore, under these facts and circumstances, the military judge did not abuse her discretion by accepting the appellant's statement--with his counsel present--that he had no legal justification or excuse for his actions, without the *Hartman* colloquy.

Historically, the appellate courts' analysis of guilty pleas to consensual sodomy following *Marcum* was conducted though an evaluation of whether the conduct, as described in the record, was within or outside the liberty interest identified in *Lawrence*, without a focus on whether there was a specific discussion between the accused and the military judge regarding the potential constitutional implications of the sexual conduct. These cases did not reference this discussion as being necessary before an appellate court could find constitutional an Article 125, UCMJ, conviction entered pursuant to a guilty plea. *See United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004) (finding Article 125, UCMJ, constitutional as applied to sexual contact between an enlisted member and

his commissioned officer supervisor where that contact "fell outside any protected liberty interest recognized in *Lawrence* and was appropriately regulated as a matter of military discipline under Article 125."); *United States v. Christian*, 63 M.J. 714, 716 (A.F. Ct. Crim. App. 2006) (finding a judge's decision to accept a guilty plea was not an abuse of discretion where the sexual activity "was not protected conduct under *Lawrence*."), *aff'd*, 66 M.J. 291 (C.A.A.F. 2008) (mem.).

A *Hartman* analysis should not be triggered unless there is a possibility the accused's conduct could be constitutionally protected. In *Hartman*, the sexual activity occurred in a Government building designated as a residence for permanent or transitory military personnel and thus had the potential to implicate the liberty interests bounded by *Lawrence* and *Marcum.* Here, although the language of the charge on its face may appear to implicate both criminal and constitutionally protected sexual activity, the scope of criminal conduct involved in this sexual activity takes it outside of constitutional protections.

Regarding the first two prongs of the *Marcum* framework, even if we assume without deciding that the appellant's conduct falls within the liberty interest identified by the Supreme Court and does not encompass behavior or factors outside the *Lawrence* analysis, his conduct squarely implicates the third prong of the framework. That factor asks "whether there are additional factors relevant solely in the military environment, not addressed by the Supreme Court, that affect the reach and nature of the *Lawrence* liberty interest" in this context. *Stirewalt*, 60 M.J. at 304. The military environment factors that take his consensual adult sodomy outside of *Lawrence's* reach include: (1) his misuse of a military office building to engage in sexual contact during the duty day with a civilian employee; (2) his commission of these acts inside what is supposed to be a secure office designated for safeguarding sensitive urine samples; (3) his conduct occurring while other military members, employees, and family members were nearby in the building; and (4) his successful use of this sexual activity as part of a scheme to impede the military's ability to take administrative or disciplinary action against him for repeated illegal drug use. Because these facts clearly and directly affect good order and discipline and the military environment, implicating the third *Marcum* factor, the appellant's conduct was outside the protected liberty interest recognized in *Lawrence*. As a result, there was no reason for the military judge, the trial counsel, or the defense counsel to raise or discuss the theoretical possibility of such a constitutional "defense" during the court-martial. Under these circumstances, I do not believe *Hartman's* guilty plea colloquy requirements are triggered. Therefore, I would affirm Charge III and its specification.

I concur with the majority's analysis of the remaining issues, including that, with the sodomy specification set aside and dismissed, an adjudged sentence on the remaining

charges would include at least a dishonorable discharge, confinement for 23 months, forfeiture of all pay and allowances, and reduction to E-1.

OFFICIAL

STEVEN LUCAS
Clerk of the Court