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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

WALTER FISK,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Petition for Discretionary Review from the
Fourth Court of Appeals, San Antonio, Texas
No. 04-17-00174-CR

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Petitioner

IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the **Honorable Kevin M. O'Connell**, Presiding Judge of the 227th Judicial District Court, Bexar County, Texas.

The parties to this case are as follows:

1) **Walter Fisk** was the defendant in the trial court and appellant in the court of appeals.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) Walter Fisk was represented by **Jesse Hernandez**, 7143 Oaklawn Drive, San Antonio, TX 78229, and **John Paul Young**, P.O. Box 700713, San Antonio, TX 78270.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Anna Scott**, **Sade Mitchell**, and **Andrew Warthen**, Assistant District Attorneys, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

The appellate attorneys to the Fourth Court of Appeals were as follows:

1) Walter Fisk was represented by **Michael Robbins**, Assistant Public Defender, Paul Elizondo Tower, 101 W. Nueva Street, Suite 310, San Antonio, TX 78205.

2) The State of Texas was represented by **Nicholas "Nico" LaHood**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

The State of Texas is represented in this petition by **Nicholas "Nico" LaHood**, District Attorney, and **Andrew N. Warthen**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, Seventh Floor, San Antonio, Texas 78205.

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STATEMENT REGARDING ORAL ARGUMENT

The State believes that oral argument will aid the Court in its resolution of the issues and, accordingly, requests oral argument. Oral argument will aid in determining whether this Court should alter the test it has outlined to determine whether an out-of-state offense is substantially similar to an enumerated Texas offense. Moreover, even if the test is not altered, oral argument will aid this Court in determining whether the court of appeals properly applied the existing test.

STATEMENT OF THE CASE

Appellant was convicted of three counts of indecency with a child by contact. At sentencing, a former military judgment was entered into evidence showing that appellant had previously been convicted of indecent acts and liberties with a child. Finding that that military offense was substantially similar to Texas's indecency-with-a-child statute, the trial court sentenced appellant to three consecutive life sentences. On appeal, the court of appeals, concluding that the military's indecent-acts-and-liberties statute was not substantially similar to Texas's indecency-with-a-child statute, reversed and remanded for a new punishment hearing.

At the second punishment hearing, the trial court determined that the former military sodomy statute, which appellant was previously convicted of, was substantially similar to Texas's sexual-assault statute. It, thus, again sentenced appellant to three consecutive life sentences. As before, the court of appeals disagreed with the trial court, reversed appellant's life sentences, and remanded for another sentencing hearing.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals's opinion was handed down on December 6, 2017. *Fisk v. State*, No. 04-17-00174-CR, 2017 Tex. App. LEXIS 11311 (Tex. App.—San Antonio Dec. 6, 2017, pet. filed).

GROUNDS FOR REVIEW

1. The current test for determining whether an out-of-state offense is substantially similar to an enumerated Texas offense is too broad. Accordingly, this Court should disavow that test and replace it with one that only compares the elements of the respective offenses.

2. Even if not disavowed, the court of appeals misapplied the current test when it concluded that the military's former sodomy-with-a-child statute is not substantially similar to Texas's sexual-assault statute.

ARGUMENT

This Honorable Court should grant this petition because the court of appeals has misconstrued a statute, and it has decided an important question of state law that has not been, but should be, settled by this Court. Tex. R. App. P. 66.3.

I. The *Prudholm-Anderson* test for determining whether an out-of-state offense is "substantially similar" to an enumerated Texas offense goes beyond what is required by the plain language of § 12.42(c).

a. The current test for determining substantial similarity

"Penal Code Section 12.42 provides enhanced penalties for repeat felony offenders." *Prudholm v. State*, 333 S.W.3d 590, 592 (Tex. Crim. App. 2011). Section 12.42(c)(2) mandates a life sentence if the defendant was convicted of an offense listed under § 12.42(c)(2)(A)—which includes § 21.11(a)(1), the offense appellant was convicted of in this case—and has been previously convicted of an offense listed under subsections (B)(i)-(iv)—which includes § 22.011—or an out-of-state offense,[1] the elements of which are "substantially similar" to an offense listed in subsections (B)(i)-(iv). *Id*.; Tex. Penal Code Ann. § 12.42(c)(2).

This Court has outlined a two-step process for determining whether an out-of-state sexual offense contains substantially similar elements to a listed Texas offense. First, "the elements being compared must display a high degree of

[1] Under § 12.42(c)(2)(B)(v), convictions under the Uniform Code of Military Justice ("UCMJ") are convictions under the law of another state requiring life sentences. *Rushing v. State*, 353 S.W.3d 863, 863-68 (Tex. Crim. App. 2011).

likeness." *Anderson v. State*, 394 S.W.3d 531, 535 (Tex. Crim. App. 2013) (internal quotation marks and alterations omitted). "But the elements may be less than identical and need not parallel one another precisely." *Id*. (internal quotation marks omitted).

Second, "the elements must be substantially similar with respect to the individual or public interests protected *and* the impact of the elements on the seriousness of the offenses." *Id*. (internal quotation marks omitted). "This is itself a two-step analysis." *Id*. "Courts must first determine if there is a similar danger to society that the statute is trying to prevent." *Id*. "The court must then determine if the class, degree, and punishment range of the two offenses are substantially similar." *Id*. (internal quotation marks omitted).

"No single factor in the analysis is dispositive, so a court must weigh all factors before making a determination." *Id*. at 537.

b. The above-outlined test goes beyond what the statute requires

As can be seen above, the test outlined by this Court when determining whether the elements of two statutes are "substantially similar" goes well beyond comparing the elements of the relevant offenses. In addition to the elements of the offenses, it seeks to determine whether the two statutes protect against similar dangers to society, and compares the "class, degree, and punishment range" of the two offenses. This Court first added the second prong in *Prudholm* when it looked

to § 1.02 of the Penal Code, which delineates the objectives of the Penal Code. *Prudholm*, 333 S.W.3d 594-95 (quoting Tex. Penal Code Ann. § 1.02(3)). But little analysis of *why* that was done is provided.

Certainly, as § 1.02 itself states, the objectives of the Penal Code should be kept in mind when construing its provisions. Tex. Penal Code Ann. § 1.02 ("To this end, the provisions of this code are intended, and shall be construed, to achieve the following objectives . . . ."). Thus, if there are two ways to read a Code provision—one that meets the objectives, and another that contravenes them—then the meaning that best conforms to the objectives should win the day. However, objectives do not give license to go beyond the language of any given statutory provision. The legislature specifically mandated life sentences for persons previously convicted of out-of-statute offenses that had substantially similar *elements*. If it wanted individual and public interests and elemental impact to be considered, it could have stated that in the statute. It did not.

And comparing such considerations is problematic. First, what one state considers important may not be given much consideration at all by another. Second, the expanded test ignores that, as the concerns of society change, statutory purposes and punishment ranges can often change drastically over time. Because sodomizing a child is exactly the type of conduct § 12.42(c) is concerned with, this case offers a good example why the current test is too expansive.

Accordingly, because the court of appeals used the test that goes beyond the plain language of § 12.42, this Court should use this case as an opportunity to re-evaluate that test and limit it to its proper scope. Thus, the State invites this Court to grant this petition for full briefing on the issue.

II. Even applying the current test, the court of appeals erred when it concluded that the military's previous sodomy-with-a-child statute is not substantially similar to Texas's sexual-assault statute.

Even applying the existing test, the court of appeals still erred. While the court of appeals determined that the punishments of the two offenses are "extremely similar," it concluded that "the elements and the interests protected by the two statutes are not." *Fisk v. State*, No. 04-17-00174-CR, 2017 Tex. App. LEXIS 11311, at *22 (Tex. App.—San Antonio Dec. 6, 2017, pet. filed). As a result, it reversed the life sentences imposed by the trial court. It should not have.

a. The elements of the relevant offenses display a high degree of likeness

1. Article 125

The full text of Article 125 in force at the time of appellant's conviction, which was codified in the United States Code, was:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

10 U.S.C.A. § 925 (West 2010) (amended 2013) (current versions at 10 U.S.C.A. §§ 920b, 925 (West 2017)); (*see also* State's Ex. P4, ¶ 51(a)).[2]

Unnatural carnal copulation occurred if:

i. A person took into that person's mouth or anus the sexual organ of another person or of an animal;

ii. Placed that person's sexual organ in the mouth or anus of another person or of an animal;

iii. Had carnal copulation in any opening of the body, except the sexual parts, with another person; or

iv. Had carnal copulation with an animal.

(RR1 22; *see also* State's Ex. P4, ¶ 51(c)). The crime was enhanced if either of two additional elements were proven: 1) the victim was under the age of 16, or 2) the act was done by force and without the victim's consent. (RR1 23; *see also* State's Ex. P4, ¶ 51(b), (e)).

[2] State's Exhibit P4 is an excerpt from the 1984 Manual for Courts-Martial—specifically ¶ 51, the portion outlining the military sodomy statute. The full version of the 1984 Manual for Courts-Martial can be found online. *See* https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1984.pdf.

2. Section 22.011 of the Texas Penal Code

Section 22.011 of the Penal Code states:

> (a) A person commits an offense if the person:
>
> (1) intentionally or knowingly:
>
> (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;
>
> (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
>
> (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
>
> (2) intentionally or knowingly:
>
> (A) causes the penetration of the anus or sexual organ of a child by any means;
>
> (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
>
> (C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
>
> (D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
>
> (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

Tex. Penal Code Ann. § 22.011(a). Section 22.011 defines "child" as "a person younger than 17 years of age." *Id*. § 22.011(c)(1).

3. What should be compared?

Relying on language in *Anderson*, the court of appeals focused on the myriad of ways that one could commit sodomy under Article 125. *Fisk*, 2017 Tex. App. LEXIS 11311, at *18-19. But, by doing so, the lower court ignored the fact that the *Anderson* Court was required to compare the entirety of the relevant out-of-state offense because "the judgment did not set out any elements of the offense." *Anderson*, 394 S.W.3d at 534. Instead, the out-of-state judgment in that case only contained what type of felony Anderson was convicted of and the sentence imposed. *Id*. Accordingly, the *Anderson* Court had little choice but to compare the entire out-of-state statute to Texas's indecency-with-a-child statute.

That is not the case here. Appellant's military judgment states that he committed sodomy with "a child under the age of 16 years." (State's Ex. P3.) Thus, there was no need to compare the bestiality, consenting-adult, or forcible-sodomy provisions of Article 125 to the Texas sexual-assault statute because the method of sodomy appellant was charged with was known to the court. That is to say, it is irrelevant that "Article 125 prohibits the unnatural carnal copulation with an animal," or that it "prohibits certain forms of consensual sex between adults,"

Fisk, 2017 Tex. App. LEXIS 11311, at *18, because the military judgment makes it clear that those were not the methods of sodomy appellant was found guilty of.

Prudholm supports comparing the method of offense alleged rather than the entire statute. There, Prudholm "had been previously convicted in California of the *felony* offense of sexual battery." *Prudholm*, 333 S.W.3d at 592 (emphasis added). The California statute itself was generally a misdemeanor, but it included aggravating conduct that elevated the offense to a felony. *Id*. at 596-97. When this Court compared the statutory elements, it included the aggravating element in its comparison. *Id*. at 597. Thus, it looked to the judgment to determine exactly what out-of-state offense was at issue and compared that portion of the statute. Therefore, the court of appeals erred when it compared every possible method of sodomy under Article 125 to § 22.011.

It is true that the *Anderson* Court stated that "the focus of the *Prudholm* inquiry is on the *elements* of the offense, not the specific conduct that was alleged." *Anderson*, 394 S.W.3d at 536. But that means that courts should not look to the manner and means of *how* an offense was committed. For instance, the elements of the offense of child sodomy should be compared, but it is irrelevant if that act was accomplished by penetrating the child's mouth, penetrating the child's anus, having one's own mouth or anus penetrated by the child, *et cetera*.

Simply, it is unlikely that the Texas legislature intended substantial similarity to be determined based on how other legislatures decided to lump criminal acts together. The military sodomy statute in place at the time was *the* statute that criminalized oral and anal sex with children, meaning it covered the same acts currently prohibited by § 22.011. It is doubtful that the legislature did not intend life sentences for defendants who have been convicted under the very military statute designed to protect children from oral and anal sex just because that military offense also happened to cover bestiality.

At the very least, this Court should grant this petition and use this case as an opportunity to clarify whether the entire statute should be compared or only the offense listed in the out-of-state judgment.

4. Degree of likeness

Comparing the two statutes, their elements display a high degree of likeness because Article 125 criminalizes the same conduct that is criminalized by § 22.011(a).

Article 125 protects children under the age of 16, while § 22.011 protects children under the age of 17. (State's Ex. P4, ¶ 51(b)(2)); Tex. Penal Code Ann. § 22.011(c)(1). Moreover, the statutes cover the same conduct. Article 125 prohibits placing one's sexual organ in a child's mouth or anus. (State's Ex. P4, ¶ 51(c)). Likewise, § 22.011 prohibits penetrating the mouth of a child by the actor's

sexual organ, or the anus of the child by any means—which would include penetration by the actor's sexual organ. Tex. Penal Code Ann. § 22.011(a)(2)(A), (B). In addition, Article 125 criminalizes taking into the person's mouth or anus the sexual organ of a child, while § 22.011 prohibits causing the sexual organ of a child to penetrate the actor's mouth or anus. (State's Ex. P4, ¶ 51(c)); Tex. Penal Code Ann. § 22.011(a)(2)(C).

It is irrelevant that the two statutes do not totally overlap. As the *Anderson* Court stated, "[T]here is no requirement of a total overlap, but the out-of-state offense cannot be markedly *broader* than or distinct from the Texas prohibited conduct." *Anderson*, 394 S.W.3d at 536 (emphasis added). The statutes in both *Prudholm* and *Anderson* were markedly broader than the relevant Texas statutes. Here, on the other hand, Article 125's child-sodomy provision is more circumscribed.

Moreover, Article 125 did not punish penetration of a child's genitals, but Article 120 of the UCMJ did. *See 1984 Manual for Courts-Martial*, Part IV, Art. 120, ¶ 45 (located on page 376 of the PDF file linked in footnote 2, above). Plainly, it is a dubious proposition to say that the legislature did not want to impose a life sentence on someone who penetrated either the genitals or anus of a child simply because those two offenses were placed in different statutory provisions even though Texas prohibits both acts.

Thus, comparing the elements of Article 125's child-sodomy provision and § 22.011, there is a high degree of likeness between them because their elements are substantially similar and they proscribe the same conduct. Thus, the court of appeals erred when it concluded otherwise.

5. The offenses advance the same specific interests

As discussed above, the court of appeals concluded that the "danger to society" that Article 125 was designed to prevent was unnatural, non-procreative sexual activities. *Fisk*, 2017 Tex. App. LEXIS 11311, at *20. That might be true of the consenting-adults provisions of the statute. It seems that, at the time, Congress felt it necessary to regulate sexual conduct between service members and other consenting adults. But that was before *Lawrence v. Texas*, 539 U.S. 558 (2003).

Following *Lawrence*, the consenting-adults method became un-prosecutable, but, even though the statute's language stayed the same, the offense of sodomy with a child lived on. *See, e.g., United States v. Banker*, 63 M.J. 657 (A.F. Ct. Crim. App. 2006), *aff'd*, 64 M.J. 437 (C.A.A.F. 2007). That indicates that that offense's objective was quite different from traditional anti-sodomy laws that were designed to prohibit non-procreative sex.

Frankly, it is unfathomable that the military prohibited sodomizing children because it was concerned about children not procreating. Instead, that offense—

like the prohibited conduct found in § 22.011(a)(2)—was designed to protect children from sexual abuse. The court of appeals observed that "Article 125 expressly did not criminalize a defendant's sexual assault of a child if the sexual assault is by means of genital-to-genital penetration." *Fisk*, 2017 Tex. App. LEXIS 11311, at *20. But that again ignores that such conduct was prohibited by Article 120. That Congress prohibited sexual assault of children in two different statutes does not change the fact that its primary concern in prohibiting such conduct was to protect children from sexual assault.

Section 22.011 protects against "the severe physical and psychological trauma of rape." *Prudholm v. State*, 333 S.W.3d 590, 599 (Tex. Crim. App. 2011). Certainly, because it prohibits the same type of conduct, Article 125's sodomy-with-a-child provision serves the same interests. This petition should be granted to correct the lower court's error.

6. The offenses' class, degree, and punishment ranges are substantially similar

The court of appeals concluded that the class, degree, and punishments were substantially similar. The State agrees with that conclusion.

Considering the foregoing, this Court should grant this petition to determine whether courts should compare offenses as charged in an out-of-state judgment or the out-of-state statute as a whole, and whether the court of appeals erred when it

concluded that the former military sodomy statute was substantially similar to Texas's sexual-assault statute.

PRAYER

The State prays that this Honorable Court grant this petition and reverse the court of appeals.

Respectfully submitted,

Nicholas "Nico" LaHood
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Bexar County, Texas

/s/*Andrew N. Warthen*
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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this petition is 3,107. I also certify that a true and correct copy of this petition for discretionary review was emailed to respondent Walter Fisk's attorney, Michael D. Robbins, Assistant Public Defender, at mrobbins@bexar.org, and to Stacey Soule, State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov, on this the 22nd day of December, 2017.

/s/*Andrew N. Warthen*
Andrew N. Warthen
Assistant Criminal District Attorney

Attorney for the State

Appendix

Fisk v. State

Court of Appeals of Texas, Fourth District, San Antonio

December 6, 2017, Delivered; December 6, 2017, Filed

No. 04-17-00174-CR

Reporter
2017 Tex. App. LEXIS 11311 *

Walter FISK, Appellant v. The STATE of Texas, Appellee

Notice: PUBLISH

Prior History: [*1] From the 227th Judicial District Court, Bexar County, Texas. Trial Court No. 2014CR3772. Honorable Kevin M. O'Connell, Judge Presiding.

Fisk v. State, 510 S.W.3d 165, 2016 Tex. App. LEXIS 12243 (Tex. App. San Antonio, Nov. 16, 2016)

Disposition: REVERSED AND REMANDED.

Case Summary

Overview

HOLDINGS: [1]-The court erred in finding that defendant's prior sodomy court-martial convictions under Article 125 of the Uniform Code of Military Justice (UCMJ) were substantially similar to sexual assault pursuant to *Tex. Penal Code Ann. § 22.011*, because while the punishments were extremely similar, the elements and the interests protected by the two statutes were not; Article 125 was designed to protect against a certain type of sexual activity regardless of whether that activity was between consenting adults, between adults and children or between persons and animals, and *Tex. Penal Code Ann. § 22.011* set out protections against nonconsensual contact or penetration of an adult or any sexual acts against children.

Outcome

Judgment reversed and case remanded.

Counsel: For APPELLANT: Michael D. Robbins, Assistant Public Defender, San Antonio, TX.

For APPELLEE: Andrew Warthen, Assistant Criminal District Attorney, San Antonio, TX.

Judges: Opinion by: Patricia O. Alvarez, Justice. Sitting: Sandee Bryan Marion, Chief Justice, Karen Angelini, Justice, Patricia O. Alvarez, Justice.

Opinion by: Patricia O. Alvarez

Opinion

REVERSED AND REMANDED

A Bexar County jury convicted Appellant Walter Fisk on three counts of indecency with a child. *See* Act of May 18, 2009, 81st Leg., R.S., ch. 260, § 1, 2009 Tex. Gen. Laws 710, 711 (amended 2017) (current version at *Tex. Penal Code § 21.11*). The trial court found Fisk's prior conviction true, thereby elevating the punishment range from second-degree felony to habitual offender. *See* *Tex. Penal Code Ann. § 12.42(c)(2)* (West Supp. 2016).[1]

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[1] Fisk's charged offenses were in February 2013 and February 2014. *Section 12.42 of the Penal Code* was amended between the dates of Fisk's offenses, but the effects of the amendments are not at issue here. *See* Act of May 2, 2013, 83d Leg., ch. 161, § 16.003, 2013 Tex. Gen. Laws 622, 679 (effective Sept. 1, 2013); Act of May 21, 2013,

Fisk was assessed three life sentences in the Institutional Division of the Texas Department of Criminal Justice.

On appeal, Fisk contends (1) the evidence is legally insufficient to prove he is the same person convicted of sodomy pursuant to a former version of *Article 125 of the Uniform Code of Military Justice (UCMJ)*, *see* **[*2]** *10 U.S.C. § 925 (2000)* (current version), and (2) the UCMJ sodomy offense contains elements that are not "substantially similar" to the elements of sexual assault under *section 22.011 of the Texas Penal Code*, *see Tex. Penal Code Ann. § 22.011*. Because we conclude the elements of *UCMJ Article 125* sodomy and *Texas Penal Code section 22.011* sexual assault are not substantially similar, we reverse the trial court's imposition of three life sentences and remand this matter for a new sentencing hearing.

PROCEDURAL BACKGROUND

This is Fisk's second appeal from the trial court's imposition of life sentences imposed pursuant to *section 12.42(c)(2) of the Texas Penal Code*. *See id. § 12.42(c)(2)*. *Section 12.42(c)(2)* mandates a life sentence if the defendant (1) is convicted of certain sex offenses enumerated in *Subsection (A)*; and (2) has a prior conviction for a sex offense in violation of one of the Texas Penal Code provisions enumerated in *subsection (B)*. *Id. Subsection (B)* further provides the prior conviction "under the laws of another state" may satisfy the second requirement of *section 12.42(c)(2)* if the offense "contain[s] elements that are substantially similar to the elements" of one of the Texas Penal Code provisions enumerated in *subsection (B)*. *See id. § 12.42(c)(2)(B)(v)*.

A. Fisk's First Trial and Sentencing Hearing

A Bexar County jury returned a guilty verdict against Fisk for multiple counts of indecency with a child by contact. *See id.* **[*3]** *§ 21.11*. Pursuant to Fisk's pretrial election, the case proceeded to punishment before the trial court. *Section 22.011* is one of the statutory provisions enumerated under *subsection (A) of Penal Code 12.42*. *See id. § 12.42(c)(2)(A)*. Several months before trial, the State filed a notice of intent to use prior court-martial convictions for punishment enhancement purposes.

At the punishment hearing, the trial court admitted into evidence Fisk's 1990 court-martial convictions, charged under earlier versions of two Articles of the UCMJ. The first was *Article 125* of the former UCMJ. *See 10 U.S.C. § 925(a)* (1982).[2] The relevant provisions of *Article 125* generally prohibited sodomy, which included bestiality and certain consensual sex acts between adults, but also contained enhancements for forcible sodomy and sodomy with a child under the age of sixteen years. The second Article, under which Fisk had several prior convictions, was *Article 134* of the former UCMJ. *See id. § 934* (1982). The relevant provisions of *Article 134* prohibited "[i]ndecent acts or liberties with a child" under the age of sixteen years.[3]

The trial court found the elements of *Article 134*'s prohibition of indecent acts and liberties with a child were substantially similar to the elements of one of the Texas offenses enumerated in *Subsection (B) of Texas Penal Code section 12.42(c)(2)*,

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83d Leg., ch. 663, §§ 7-9, 2013 Tex. Gen. Laws 1751, 1753 (effective Sept. 1, 2013); Act of May 20, 2013, 83d Leg., ch. 1323, § 11, 2013 Tex. Gen. Laws 3506, 3512 (effective Dec. 1, 2013) (current version at *Tex. Penal Code 12.42*). For ease of readability, we will cite to the Texas Penal Code rather than to the then-current session law.

[2] *10 U.S.C. § 925(a) (2000)* provides as follows:

Forcible sodomy.—Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by unlawful force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct.

[3] The "Indecent acts or liberties with a child" provision of *Article 134* was deleted in 2007. Exec. Order No. 13,447, 72 Fed. Reg. 56,179, 56,237 (Oct. 2, 2007).

specifically indecency with a child under *Texas Penal Code section 21.11*. *See id.* *§§ 12.42(c)(2)(A)(i)*, *21.11(a)(1)*. Concluding the State's evidence relating to Fisk's prior *Article 134* court-martial conviction satisfied *subsections (A)* and **[*4]** *(B)*, the trial court imposed three statutorily mandated life sentences. *See id.* *§ 12.42(c)(2)*. Importantly, the State did not ask for a finding, and the trial court did not consider, whether the elements of sodomy under *Article 125* were substantially similar to one of the offenses enumerated in *section 12.42(c)(2)(B)*. *See id.* *§ 12.42(c)(2)(B)*.

On appeal, Fisk argued the elements of indecent acts and liberties with a child under *Article 134* were not substantially similar to the elements of indecency with a child under *Texas Penal Code section 21.11*. *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 87 (1982) (hereinafter MCM) ("Indecent acts or liberties with a child") *with* *Tex. Penal Code Ann. § 22.11(a)* ("Indecency With a Child"). In determining whether the offenses were substantially similar, we applied the tests set forth in *Anderson v. State, 394 S.W.3d 531 (Tex. Crim. App. 2013)*, and *Prudholm v. State, 333 S.W.3d 590 (Tex. Crim. App. 2011)*.

In our analysis, we concluded the statutes were designed to protect against similar dangers—the safety and well-being of children. *See* *Fisk v. State (Fisk I), 510 S.W.3d 165, 180-81 (Tex. App.—San Antonio 2016, no pet.)*; *see also* *Anderson, 394 S.W.3d at 536, 539-40*. Additionally, although the punishment ranges reflect some similarities, they are not substantially similar. *See* *Fisk I, 510 S.W.3d at 181*; *see also* *Anderson, 394 S.W.3d at 537*. Most importantly, however, this court concluded the offenses did not "display a high degree of likeness." *See* *Fisk I, 510 S.W.3d at 180*. The *Article 134* offenses, specifically those delineated in paragraph 87, encompassed "much broader" conduct **[*5]** and "potentially criminaliz[ed] a significant amount of conduct that is lawful in Texas." *Id.* "Although both laws [sought] to criminalize sexual acts against children, the penalties for each offense [were] not substantially similar. After considering each of the factors, we conclude[d] the trial court erred in finding that Fisk's prior court-martial[] convictions were substantially similar to the Texas indecency-with-a-child offense." *Id. at 181*. Fisk's convictions were affirmed, the sentences were reversed, and the matter was remanded to the trial court for a new sentencing hearing. *Id.*

B. Second Punishment Hearing

At the resentencing hearing, the State argued Fisk's sodomy conviction under *Article 125*, irrespective of *Article 134*, required mandatory life sentences under *section 12.42(c)(2)*. *See* *Tex. Penal Code Ann. § 12.42(c)(2)*. The trial court agreed with the State and made findings of fact and conclusions of law. The trial court concluded the elements of sodomy under the former version of *UCMJ Article 125* were substantially similar to sexual assault under *section 22.011 of the Texas Penal Code*. *See* *Tex. Penal Code Ann. § 22.011*. Under *Texas Penal Code section 12.42(c)(2)*, the trial court again imposed a life sentence for each of Fisk's convictions for indecency with a child.

In his second appeal, Fisk argues (1) the evidence is insufficient to prove that he is the same individual convicted under the name **[*6]** "Walter Loyal Fisk" in the 1990 court-martial proceedings, and (2) the trial court erred in finding the elements of his sodomy conviction under the former version of *Article 125* are substantially similar to sexual assault pursuant to *Texas Penal Code section 22.011*.

We turn first to Fisk's argument that the State failed to prove he was the same individual previously court-martialed under the name "Walter Loyal Fisk."

PRIOR CONVICTION

A. Standard of Review

When reviewing the sufficiency of the evidence after a bench trial, we apply the same *Jackson v. Virginia* standard that is applied in an appeal from a jury trial. *See Robinson v. State, 466 S.W.3d 166, 173 (Tex. Crim. App. 2015)* (citing *Jackson v. Virginia, 443 U.S. 307, 309, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*). "We view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Adames v. State, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011)*; *accord Gear v. State, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011)*. "This standard recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence . . . ." *Adames, 353 S.W.3d at 860*; *accord Gear, 340 S.W.3d at 746*. The reviewing court must also give deference to the factfinder's ability "'to draw reasonable inferences from basic facts to ultimate facts.'" *Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)* (quoting *Jackson, 443 U.S. at 319*). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative **[*7]** force of all the incriminating circumstances is sufficient to support the conviction." *Id.* (citing *Johnson v. State, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993)*). "[D]irect evidence and circumstantial evidence are equally probative." *Tate v. State, 500 S.W.3d 410, 413 (Tex. Crim. App. 2016)*; *accord Hooper, 214 S.W.3d at 13*.

B. Arguments of the Parties

Fisk argues there is legally insufficient evidence showing he was the individual convicted in the 1990 sodomy court-martial conviction that the State presented and the trial court admitted. The State maintains the evidence is sufficient.

C. Proof Necessary for Prior Conviction

To prove a defendant has a prior conviction, "the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction." *Flowers v. State, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007)*; *accord Prihoda v. State, 352 S.W.3d 796, 807 (Tex. App.—San Antonio 2011, pet. ref'd)*. "No specific document or mode of proof is required to prove these two elements." *Flowers, 220 S.W.3d at 921*. "Any type of evidence, documentary or testimonial, might suffice," as long as the document "contains sufficient information to establish both the existence of a prior conviction and the defendant's identity as the person convicted." *Id.*; *see also Garner v. State, 864 S.W.2d 92, 97 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd)* ("The State may prove a prior conviction by any of several methods, one of which is by the introduction of certified or otherwise properly authenticated copies of the judgment and sentence and records **[*8]** of the Institutional Division of the Texas Department of Criminal Justice or a county jail that includes fingerprints of the accused, supported by expert testimony identifying the fingerprints of the accused with known prints of the defendant." (footnote omitted)); *Ortiz v. State, No. 02-07-00397-CR, 2008 Tex. App. LEXIS 7900, 2008 WL 4602243, at *2 (Tex. App.—Fort Worth Oct. 16, 2008, pet. ref'd)* (mem. op., not designated for publication) (holding that State sufficiently linked defendant to prior conviction when his fingerprints matched those on jail card, which contained same CID number as that on indictment although judgment did not contain CID number).

D. Proof Adduced before the Trial Court

During the resentencing hearing, the trial court admitted into evidence, without objection, a copy of a "General Court-Martial Order," dated June 25, 1990, which contains a conviction for sodomy with a child under the age of sixteen. The General Court-Martial Order shows "Walter Loyal Fisk" was the defendant in that proceeding. Attached to the General Court-Martial Order is a business records affidavit containing the social security number and birthdate of "Walter Loyal Fisk." The trial court

also admitted Fisk's arrest record for the offenses in this case which includes Fisk's **[*9]** social security number and birthdate. Although the arrest record does not contain a middle name, the first name, last name, birthdate, and social security number of Fisk's arrest records in this case are identical to the first name, last name, birthdate, and social security number on both the General Court-Martial Order and the business records affidavit.[4]

Additionally, the Bexar County Sheriff's Office fingerprint examiner testified the fingerprints on the sodomy arrest record matched those of the individual in the courtroom identified as "Walter Fisk." The use of fingerprint analysis is an approved method of proving prior convictions. *See* *Beck v. State, 719 S.W.2d 205, 209-10 (Tex. Crim. App. 1986)*; *see also* *Paschall v. State, 285 S.W.3d 166, 174-75 (Tex. App.—Fort Worth 2009, pet. ref'd)*; *Rios v. State, 230 S.W.3d 252, 256 (Tex. App.—Waco 2007, pet. ref'd)* (affirming identification evidence sufficient based on expert's testimony comparing pen packet's fingerprints with known fingerprints of defendant and concluding the two sets were the same); *Zimmer v. State, 989 S.W.2d 48, 51 (Tex. App.—San Antonio 1998, pet. ref'd)*.

Viewing the evidence in the light most favorable to the verdict, we conclude a rational trier of fact could have found the essential elements to decide that the Walter Loyal Fisk identified in the 1990 sodomy Court Martial was the same Walter Fisk convicted of the current indecency with a child convictions. *See* *Adames, 353 S.W.3d at 860*; *Prihoda, 352 S.W.3d at 807*. Accordingly, the evidence was **[*10]** legally sufficient to show Fisk was the same person previously convicted under *Article 125* for sodomy.

We therefore turn to Fisk's argument regarding substantial similarity.

[4] We note that the arrest record does not contain Fisk's middle name, but the trial court proceedings in this case are styled "Walter Loyal Fisk."

SUBSTANTIAL SIMILARITY

A. Standard of Review

Whether an offense under the laws of another state contains substantially similar elements as one of the Texas Penal Code offenses enumerated in *subsection (B) of section 12.42(c)(2)* is a question of law. *See* *Anderson, 394 S.W.3d at 534*; *Hardy v. State, 187 S.W.3d 232, 236 (Tex. App.—Texarkana 2006, pet. ref'd)*. We therefore review a trial court's "substantially similar" conclusion de novo. *Fisk I, 510 S.W.3d at 178* (citing *Brooks v. State, 357 S.W.3d 777, 786 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd)*); *see also* *Anderson, 394 S.W.3d at 534*.

B. Arguments of the Parties

In his second issue, Fisk argues the trial court erred in concluding the elements of the offenses are "substantially similar" and subsequently imposing life sentences under *Texas Penal Code section 12.42(c)(2)*. *See* *Tex. Penal Code Ann. §§ 12.42(c)(2)*; *22.011*; *10 U.S.C. § 925 (Article 125)*. The State argues the trial court correctly determined that the elements were substantially similar as required by *subsection (B) of Texas Penal Code section 12.42(c)(2)*. *See* *Tex. Penal Code Ann. § 12.42(c)(2)*.

C. Two Strikes Policy

The Texas Penal Code provides for enhanced punishments for individuals convicted of first-, second-, or third-degree felony offenses and who have prior non-state-jail felony convictions. *See* *Tex. Penal Code Ann. § 12.42*. When a defendant is convicted of indecency with a child under *Texas Penal Code section 21.11*, and has a prior conviction for one of the sex offenses listed in **[*11]** *subsection (B) of Texas Penal Code section 12.42(c)(2)*, the trial court must impose a

life sentence. *Id.* § 12.42(c)(2). Also known as the "two-strikes policy" for repeat sex offenders in Texas, section 12.42(c)(2) "'embod[ies] the legislature's intent to treat repeat sex offenders more harshly than other repeat offenders.'" Anderson, 394 S.W.3d at 535 (quoting Prudholm, 333 S.W.3d at 592). "The legislature also mandated the automatic 'two strikes' enhancement to life imprisonment if the 'defendant has previously been convicted of an offense . . . under the laws of another state containing elements that are substantially similar to the elements of an [enumerated Texas] offense.'" *Id.* (alterations in original) (quoting Tex. Penal Code Ann. § 12.42(c)(2)); *see* Tex. Penal Code Ann. § 12.42(c)(2)(B)(v).

This court must therefore determine whether the State met its burden regarding each requirement under section 12.42(c)(2).

1. Section 12.42(c)(2)(A)*—Current Conviction*

It is undisputed that, in the present case, Fisk was convicted of three counts of indecency with a child in satisfaction of subsection (A). *See id.* § 12.42(c)(2)(A).

2. Section 12.42(c)(2)(B)*—Substantially Similar*

Subsection (B) is satisfied if Fisk's prior conviction for sodomy under former UCMJ Article 125 is substantially similar to one of the Texas offenses enumerated in Subsection (B). Subsection (B) requires the out-of-state offense to be under "the laws of another state containing elements that are **[*12]** substantially similar to the elements" of one of the enumerated Texas offenses. *Id.* § 12.42(c)(2)(B)(v).

In Rushing v. State, 353 S.W.3d 863, 867-68 (Tex. Crim. App. 2011), the Court of Criminal Appeals held the United States is "another state," and the laws of the United States, including the UCMJ, are the "laws of another state." Thus, a prior court-martial conviction under the UCMJ counts as a "strike" under section 12.42(c)(2) *if the elements of the former UCMJ offense are substantially similar to the elements of a Texas Penal Code provision enumerated in subsection (B). See id. (emphasis added).*

The trial court concluded the elements of sodomy under Article 125 were substantially similar to the elements of sexual assault under Texas Penal Code section 22.011, and imposed automatic life sentences on Fisk. Sexual assault under Texas Penal Code section 22.011 is one of the provisions enumerated in subsection (B). Tex. Penal Code Ann. § 12.42(c)(2)(B)(ii).

D. The "Substantial Similarity" Test

"Courts engage in a two-prong analysis when determining if an out-of-state sexual offense contains 'substantially similar' elements to a listed Texas sexual offense." Fisk I, 510 S.W.3d at 176 (citing Anderson, 394 S.W.3d at 534). "No single factor in the analysis is dispositive," and "a court must weigh all factors" before determining whether "the out-of-state [sexual] offense truly is 'substantially similar' to those serious Texas sex offenses that call for **[*13]** an automatic life-imprisonment enhancement." Anderson, 394 S.W.3d at 537.

1. First Prong: High Degree of Likeness

Under the first prong, the elements "must display a high degree of likeness," but "'may be less than identical' and need not parallel one another precisely." Id. at 535 (quoting Prudholm, 333 S.W.3d at 594). "It is not essential that a person who is guilty of an out-of-state sexual offense would necessarily be guilty of a Texas sexual offense as there is no requirement of a total overlap, but the out-of-state offense cannot be markedly broader than or distinct from the Texas prohibited conduct." Id. at 535-36. The focus of the inquiry "is

on the elements of the offense, not the specific conduct that was alleged." *Id. at 536*; *see also Prudholm, 333 S.W.3d at 592 n.9*.

2. Second Prong: Protection of Individual or Public Interests

Under the second prong of the analysis, the "elements must be substantially similar with respect to the individual or public interests protected and the impact of the elements on the seriousness of the offenses." *Prudholm, 333 S.W.3d at 595*. "This is itself a two-step analysis. Courts must first determine if there is a 'similar danger to society' that the statute is trying to prevent. The court must then determine if the class, degree, and punishment range of the two offenses are substantially **[*14]** similar." *Anderson, 394 S.W.3d at 536* (footnotes omitted) (quoting *Prudholm, 333 S.W.3d at 595 n.21*).

We therefore turn to whether the elements set forth in *Texas Penal Code section 22.011* are substantially similar to the elements of *Article 125* under which Fisk was convicted.

D. Elements of the Statutes in Question

1. Section 22.011 of the Texas Penal Code

The relevant provisions of *section 22.011 of the Texas Penal Code*, "Sexual Assault," under which Fisk was convicted provide as follows:

> (a) A person commits an offense if the person:
> (1) intentionally or knowingly:
> (A) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;
> (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
> (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
> (2) intentionally or knowingly:
> (A) causes the penetration of the anus or sexual organ of a child by any means;
> (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
> (C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
>
> (D) causes the anus of a child to contact the mouth, anus, or **[*15]** sexual organ of another person, including the actor; or
> (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

Act of May 18, 2009, 81st Leg., R.S., ch. 260, §§ 3-4, 2009 Tex. Gen. Laws 710, 711 (amended 2017) (current version at *Tex. Penal Code Ann. § 22.011(a)*).[5] *Subsection (b)*, not listed, identifies eleven alternative circumstances under which a sexual assault under *Subsection (a)(1)* "is without the consent of the other person." *Id. § 22.011(b)*. *Subsection (c)*, not listed, contains definitions of words used in the section, including the word "Child," which "means a person younger than 17 years of age." *Id. § 22.011(c)*. *Subsections (d)* and *(e)*, not listed, contain defenses to prosecution under *Subsection (a)(2)*. *Id. § 22.011(d)*, *(e)*. *Subsection (f)* provides as follows:

> (f) An offense under this section is a felony of the second degree, except that an offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being

[5] The version of *Penal Code section 22.011* in effect on the dates of Fisk's Texas offenses is available on the Internet. *See* Texas Constitution and Statutes, Statues by Date, *http://www.statutes.legis.state.tx.us/StatutesByDate.aspx*.

married under *Section 25.01*.

Id. § 22.011(f).

2. Former UCMJ Article 125[6]

The 1984 *Manual for Courts-Martial* included *Article 125*—Sodomy, and its relevant portions read as follows:

> **[*16]** a. *Text*.
> "(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct."
>
> b. *Elements*.
> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
> [Note: Add either or both of the following elements, if applicable]
> (2) That the act was done with a child under the age of 16.
> (3) That the act was done by force and without the consent of the other person.
>
> c. *Explanation*. It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

MCM, *supra* pt. IV, ¶ 51. For a conviction under *Article 125*—Sodomy, with a child under the age of sixteen years old, the maximum punishment is "[d]ishonorable discharge, forfeiture of **[*17]** all pay and allowances, and confinement for 20 years."[7]

E. Comparison of *Section 22.011* and *UCMJ Article 125*

1. Degree of Likeness of the Offense Elements

In its findings of fact and conclusions of law, the trial court concluded the State met its burden of proof regarding the "substantial similarity" test's first prong—*Article 125* encompassed the same conduct criminalized by *Texas Penal Code section 22.011(a)(2)*.

The trial court relied on the *Anderson* Court's conclusion that, although not precise, statutes that prohibit the rape of a child under the age sixteen years significantly overlap with statutes that prohibit the rape of children under the age of seventeen years of age. *See Anderson, 394 S.W.3d at 536 n.17* ("For example, if one state's statute sets the age for child rape at 16 while another sets it at 17, the statutory overlap is significant, though not precise."); *Prudholm, 333 S.W.3d at 593-94* ("The one-year age difference provides a good example of elements that are substantially similar, but not identical."). We agree. As the trial court correctly noted, we conclude the one-year age difference for qualification of a victim under the statute is not fatal to the State's argument that the statutes are substantially similar.

The trial court also concluded that because "there

[6] The trial court took judicial notice of the 1984 *Manual for Courts-Martial*, Part IV. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 13, 1984); *see also* Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (Jul. 13, 1984) (making stylistic changes to ¶ 51).

[7] During the resentencing hearing, Jacquelyn Christilles testified for the State as an expert in military law and opined that the elements of former *Article 125*—Sodomy are similar to *section 22.011* sexual assault under the Texas Penal Code.

need not be total overlap between the two statutes," **[*18]** the fact that the two statutes criminalize "other potential scenarios" is "not relevant." We disagree. *See* Anderson, 394 S.W.3d at 536 n.17 ("[I]f one statute punishes any 'intimate' touching of a child, while a second statute punishes only the touching of the anus or genitals, the statutes are not substantially similar."). Subsection (B) requires something more than a mere similarity between two statutes—the elements being compared "must display a high degree of likeness" and the two statutes must not encompass "a markedly different range of conduct." Prudholm, 333 S.W.3d at 594, 599. In Anderson, 394 S.W.3d at 538, the Court of Criminal Appeals explained a court properly considers conduct that falls within both statutes, but errs by not considering whether the other state's statute covers a wide variety of conduct excluded by the Texas statute.

A plain reading of Article 125 provides distinctively different concerns addressed by the statute. The most obvious of which is that Article 125 prohibits the unnatural carnal copulation with an animal; section 22.011 does not address such conduct. Even assuming this court restricts Article 125 to the facts as plead in the charging instrument—a child under the age of sixteen years, the differences are still significant. Article 125 prohibits certain forms of consensual sex between adults; section 22.011 **[*19]** does not. Article 125 requires penetration, however slight, but specifically excludes genital-to-genital penetration from its purview. Section 22.011 expressly includes sexual contact, as well as genital-to-genital penetration. *See* Prudholm, 333 S.W.3d at 599 (finding it relevant that the other state's law "specifically excludes" other serious sexual conduct that the Texas statute includes).

Accordingly, although the difference in the victim's age alone is not dispositive, we conclude the statutes criminalize distinctively different conduct and that the State failed to establish that the elements of Article 125 of the former UCMJ and the elements of section 22.011 of the Texas Penal Code share a high degree of likeness.

2. Protection of Individual and Public Interests and Penalty Range

In determining whether the statutes protect individual and public interests, the court considers two distinct requirements. First, whether the "individual or public interests protected" by each statute are substantially similar. Anderson, 394 S.W.3d at 539. Second, whether the "impact of the elements on the seriousness of the offense" is substantially similar. Id. at 540; Prudholm, 333 S.W.3d at 595.

a. Individual or Public Interests

In its findings of fact and conclusions of law, the trial court concluded Texas Penal Code section 22.011 and Article 125 protected the same public interests:

> "[T]he obvious danger to society that the child-under-16 provision of the sodomy statute and § 2[2].011(a)(2) are trying to prevent is the sexual assault of young children." *See* Anderson, 394 S.W.3d at 536 (requiring courts to determine whether there **[*20]** is a "similar danger to society" the statutes are trying to prevent).

Both statutes clearly discourage some sexual conduct with children, but the question is whether the individual and public interests are substantially similar. Although Article 125 provides for an enhancement if the victim is under the age of sixteen years, the article's prohibition is the unnatural carnal copulation with a person or animal. *See* MCM, *supra* pt. IV, ¶ 51(b), (d)(1), (e)(2). Article 125 expressly did not criminalize a defendant's sexual assault of a child if the sexual assault is by means of genital-to-genital penetration. *See id.* ¶ 51(a); 10 U.S.C. § 925. Moreover, Article 125's prohibition against sexual assault of a minor child was limited to sodomy; it did not criminalize the sexual assault of a minor

child if sodomy was not involved. *See* MCM, *supra* pt. IV, ¶ 51(a); *10 U.S.C. § 925*.

The "danger to society" *Article 125* tried to prevent, like other anti-sodomy laws, was the nonprocreative sexual activity the government deemed unnatural—regardless of whether the non-procreative sexual activity was between consenting adults. *See Lawrence v. Texas, 539 U.S. 558, 568, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)* ("[E]arly American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally . . . ."). The Texas sexual assault **[*21]** statute, on the other hand, is designed to protect against "the severe physical and psychological trauma of rape." *See Prudholm, 333 S.W.3d at 599*. Viewed as a whole, although there is some overlap, we conclude the statutes seek to prevent different "danger[s] to society" and the interests protected are not substantially similar. *See Anderson, 394 S.W.3d at 536*.

b. Impact of the Elements on the Seriousness of the Offense

This court must also determine whether the class, degree, and punishment range of the two offenses are substantially similar. *Id.* Generally, sexual assault under *section 22.011* is a felony of the second degree, punishable by confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of not more than twenty years or less than two years, and a fine not to exceed $10,000.00. *See Tex. Penal Code Ann. § 22.011(f)*. The maximum punishment under the former *Article 125* for sodomy with a child under the age of sixteen years was a dishonorable discharge, forfeiture or all pay and allowances, and confinement for twenty years. *See* MCM, *supra* pt. IV, ¶ 51(e)(2). We cannot conclude the punishment ranges are significantly different in class, degree, and punishment.

No single factor in our analysis stands alone; we are called upon to weigh each and every factor in **[*22]** making a determination regarding whether the offenses are substantially similar. *See Anderson, 394 S.W.3d at 537*. After considering each of the factors, we conclude the elements of the two statutes, the former *Article 125 of the UCMJ* and *section 22.011 of the Texas Penal Code*, are not substantially similar. While the punishments are extremely similar, the elements and the interests protected by the two statutes are not. *Article 125* was designed to protect against a certain type of sexual activity—penetration of the mouth or anus by the sexual organ of another—regardless of whether that activity was between consenting adults, between adults and children, or between persons and animals. *See* MCM, *supra* pt. IV, ¶ 51(a), (c). *Section 22.011* sets out protections against nonconsensual contact or penetration of the mouth, anus, or sexual organ of an adult or any sexual acts against children. *See Tex. Penal Code Ann. § 22.011*.

We, therefore, conclude the trial court erred in finding that Fisk's prior sodomy court-martial convictions under *Article 125* were substantially similar to sexual assault pursuant to *Texas Penal Code section 22.011*. Accordingly, we reverse the trial court's judgments as to punishment and remand this matter to the trial court for a new sentencing hearing.

Patricia O. Alvarez, Justice

PUBLISH

CONCLUSION