24 October 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States,
Appellee

v.

DAVID J.A. GUTIERREZ,
Technical Sergeant (E-6),
United States Air Force,
Appellant

USCA Dkt. No. 13-0522/AF

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	**BRIEF IN SUPPORT OF PETITION GRANTED**
v.	)	USCA Dkt. No. 13-0522/AF
Technical Sergeant (E-6) **DAVID J.A. GUTIERREZ,** USAF, *Appellant.*	)	Crim. App. No. 37913

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Granted

I.

WHETHER THE EVIDENCE WAS LEGALLY SUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ASSAULT LIKELY TO RESULT IN GRIEVOUS BODILY HARM.

II.

WHETHER THE EVIDENCE WAS LEGALLY SUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ADULTERY.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals reviewed this case pursuant to Article 66(b), UCMJ, 10 U.S.C. § 866(b). This Court has jurisdiction pursuant to Article 67, UCMJ, 10 U.S.C. § 867(a).

Statement of the Case

On 18 and 19 January 2011, Technical Sergeant David J.A. Gutierrez, (hereinafter "Appellant"), was tried at a general court-martial by a military judge alone at McConnell AFB, Kansas. He was charged with violations of Article 92 (violating a lawful order), Article 120 (indecent act), Article 128 (10 assault

specifications), and Article 134 (eight adultery specifications). (J.A. 23-25). He pled not guilty, and was found guilty of all of the charges except for some exceptions and substitutions on the Article 92 specification (four victims rather than 11) and two of the 10 Article 128 charges (Specifications 7 and 8), which were withdrawn after arraignment. (J.A. 250). All of the charges stemmed from Appellant engaging in sexual relations without informing his partners that he had tested positive for the Human Immunodeficiency Virus (HIV).

Appellant was sentenced to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for eight (8) years, and to be dishonorably discharged from the service. (J.A. 267). The convening authority approved the sentence as adjudged. (J.A. 8-13).

On 21 March 2013, the Air Force Court of Criminal Appeals affirmed the findings and sentence. (J.A. 1-5.) On September 24, 2013, this Honorable Court granted Appellant's petition for review. *United States v. Gutierrez*, __ M.J. __, No. 13-0522/AF (C.A.A.F. September 24, 2013).

Statement of Facts

a. Introduction

Appellant, with the express consent and involvement of his spouse, Gina Gutierrez, engaged in a "swinger's lifestyle" while assigned to McConnell AFB. (J.A. 77-182). Through various web

sites and personal contacts, Appellant and his spouse engaged other consenting adults, none of whom were active duty personnel, to participate in sexual conduct throughout various locations in Kansas from 1 January 2009 to 9 August 2010. *Id*. This activity often occurred in the presence of others but at no time upon any military installation or in the presence of any non-consenting adult or minor. *Id*. While this conduct was ongoing, Appellant had been previously informed that he had tested positive for HIV. (J.A. 74). When ordered by his commanding officer to abstain from sexual activity unless using protection and informing the partner, Appellant did not inform his partners and, on occasion, failed to use protection. (J.A. 77-182).

b. Pretrial

On 29 October 2009, Appellant's commander informed him that a test that he took at his prior duty station, Aviano AB, had been reported as positive for HIV. (J.A. 74). Appellant's commander, Major Christopher Hague, ordered Appellant, per Air Force Instruction 48-135, to abstain from engaging in sexual relationships without using protection and informing his partner. (J.A. 75). Appellant signed an acknowledgement of the order. *Id*. Despite this order, Appellant engaged in sexual conduct with the various partners identified in the charge sheet. At no time did he inform any partner of the test results.

Appellant trial defense counsel corresponded with Clark Baker, the director of the Office of Medical and Scientific

Justice, Inc. (OMSJ). (J.A. 355). OMSJ is a non-profit organization and, among other endeavors, provides assistance to defense counsel litigating HIV-related charges throughout the United States. Mr. Baker identified potential issues to include, among other things, chain of custody flaws relating to collection and storing of blood samples, flaws in the testing process and in the underlying science relating to HIV identification and testing. (J.A. 341-52).

c. Court-Martial Proceedings

At trial, the defense moved to dismiss Charge III as failing to state an offense under a privacy theory emanating from *Lawrence v. Texas*, 539 U.S. 558 (2003). (J.A. 37). The military judge denied the motion. (J.A. 46).

The government's case-in-chief lasted the first day and most of the following morning. The government called a series of witnesses who had engaged in or witnessed sexual conduct with Appellant in 2009-10.[1]

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[1] M.E.H. testified to oral sex occurring on a single occasion with the use of a condom. Appellant's wife was present and neither admitted to any sexually transmitted diseases [hereinafter "STDs"]. (J.A. 81). This occasion occurred approximately during the New Year's Eve 2009 time frame and the condom did not break. Since that date, she has been tested for HIV and has tested negative. (J.A. 83).

V.A.W. testified to at least two occasions of unprotected vaginal sex during 2009 with Appellant. Appellant and his wife denied having any STDs and she has since tested negative for HIV. (J.A. 89, 95).

C.L. engaged Appellant in unprotected intercourse and oral sex on at least two occasions in late 2009 and early 2010. (J.A. 97, 99). Appellant denied STDs when it was discussed. (J.A. 105). Appellant's wife freely engaged in the conduct. (J.A. 108). C.L. did not know at the time that Appellant was in the military. She learned that fact later but his status in the military did not make her think less of Appellant. C.L. has since tested negative for HIV. (J.A. 109).

The government's last witness was Donna Sweet, M.D. She testified that she had been a physician since 1982 and had been involved with HIV and Acquired Immunodeficiency Syndrome (AIDS) cases since 1983. (J.A. 183-84). She was recognized as an expert without objection from defense. (J.A. 184-85). Based on her review of Appellant's medical records, she determined that his ability to infect, or "viral load," was "low." (J.A. 198). She testified that, at the levels reflected in his records from January 2009 through January 2010, his viral load would have

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D.S.C. met Appellant and his wife late 2009. Appellant and D.S.C engaged in protected oral and vaginal sex in the presence of Appellant's wife who told her that she had been in this lifestyle 20-30 years before she met Appellant. (J.A. 114-17). Appellant denied STDs which she believed in part to the fact she knew he was in the military. (J.A. 114-15). D.S.C. has since tested negative for HIV. (J.A. 116).

P.B. testified that she met Appellant and his wife in late 2009. She had unprotected oral and vaginal sex with Appellant. (J.A. 124-25). She knew that Appellant's wife was a registered nurse and assumed, because of her profession, Appellant's wife and Appellant would not engage in unprotected sex if infected. Further, Appellant never told her he was infected. (J.A. 125). She has since tested negative for HIV. (J.A. 127).

D.S. testified that she met Appellant and his wife in late 2009. On at least two occasions she engaged Appellant in protected intercourse in the presence of Appellant's spouse and a third person. (J.A. 130). Appellant never revealed his HIV status. (J.A. 134). She knew Appellant was in the military and does not think any less of the military because of the consensual nature of the conduct. (J.A. 137). She has since tested negative for HIV. (J.A. 137).

H.A.D. testified that she and her husband R.D. met Appellant and his wife in May 2009. (J.A. 139). She never had sexual contact with the Appellant. (J.A. 146). She learned of Appellant's HIV status from paperwork found in the glove box of Appellant's wife's car. (J.A. 143).

R.D. denied any sexual contact with Appellant but confirmed observing Appellant engage in sexual conduct with C.L. and V.A.W. (J.A. 149). Appellant and his wife denied his HIV status after H.A.D. located the paperwork in the car. He further stated that Appellant's wife was very involved in the activities. (J.A. 165).

B.W. testified to observing Appellant have intercourse with C.L. in Spring 2009. (J.A. 171). She never had any contact with Appellant. (J.A. 172). At no time did she hear Appellant indicate that he was HIV positive. *Id*.

P.T. testified that she and her husband met Appellant and his wife in late 2009. (J.A. 175). She had protected sex with Appellant on one occasion in which she believed ejaculation did not occur. (J.A. 178). Appellant never advised her that he had tested

provided a zero chance of Appellant infecting anyone through oral sex, regardless if a condom was used. (J.A. 200). She concluded that, on those occasions that Appellant had protected sex, the chance of infecting a partner was "very low" and that the chance of transmission was only "remotely possible". (J.A. 202, 207).

On cross-examination, Dr. Sweet testified that Appellant's viral count provided a 1-10,000 to 1-100,000 chance in infecting a partner through unprotected intercourse. (J.A. 206).

At no time was Dr. Sweet asked whether Appellant was HIV positive. Nor was she ever asked to confirm the chain of custody for the original test or to identify the manufacturer of the test. Further, she never volunteered that she was actually the Appellant's *treating* physician.

The government did not offer a stipulation wherein the Appellant agreed that he was HIV positive. The defense did not offer any evidence of its own. The military judge, after a lunch recess, announced his findings as identified above. (J.A. 250-51).

d. Post-Trial Investigation

After trial, Appellant's medical records were reviewed by Dr. Rodney Richards, a preeminent chemist and expert in the field of HIV testing. (J.A. 321-40). Dr. Richards' review of the

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positive for HIV. (J.A. 179). She has since never tested positive for HIV. (J.A. 180).

records led him to the conclusion that Appellant was not HIV positive. (J.A. 336). Further, Dr. Richards noted a distinctive lack of documentation relating to chain of custody and sufficient safeguards to insure accurate results as to the original test results from the sample taken at Aviano AB. (J.A. 325-26). Moreover, he noted that this single test result was being used as the basis for subsequent confirmations of his HIV status; the records fail to show a subsequent test to confirm the existence of HIV. (J.A. 334-35).

Mr. Baker also enlisted the services of Dr. Nancy Banks, a Harvard-educated medical expert in the field of sexually transmitted diseases. (J.A. 298). She has researched and written extensively on the topic of HIV and testing and diagnosis. (J.A. 299). In addition to reviewing the medical records of Appellant, she reviewed the testimony of Dr. Sweet. (J.A. 302). Dr. Banks confirmed the fact that the FDA had recalled test kits. (J.A. 305). Moreover, even if a test kit with FDA approval was used, and if a positive test result was obtained, Dr. Banks indicated that such tests were susceptible to false reactions due to a great variety of reasons, particularly vaccinations. (J.A. 300). Appellant's military medical records reflect in excess of 40 vaccinations, 17 of which were administered roughly at the same time he was subjected to the initial test and the follow-up viral load test. (J.A. 354).

In response to a myriad of factors and considerations, Dr. Banks formulated an opinion that in light of the evidence presented, Appellant could not be considered HIV positive to a reasonable medical or scientific certainty. (J.A. 316).

Summary of the Argument

This case presents the opportunity for this Court to address the concerns posed by Judge Ryan in *United States v. Dacus*, 66 M.J. 235, 240-41 (C.A.A.F. 2008). Unlike *Dacus*, Appellant did not admit to the element of the charge that his HIV status subjected his sexual partners to the potential for death or grievous bodily harm. Rather, assuming that Appellant even has HIV, which is an assumption unsupported by any reliable evidence, the government's own expert testified that the statistical probability of Appellant infecting anyone was so low that there was never any real potential for harm. The evidence upon which the trial court concluded Appellant was HIV positive was woefully unreliable.

The state of the evidence used to convict Appellant is akin to the government failing to provide, and the defense refusing to compel, evidence the handgun used in an assault is in fact the same gun and that it was operable at the time the trigger was pulled.

Finally, this case presents the opportunity for this Court to settle the question of whether privacy interests preclude a conviction for adultery when the non-spousal sexual intercourse occurs within a martial relationship. In this case, it is

unquestioned that Appellant and his spouse were completely invested partners in each other's non-spousal sexual activities. Appellant's wife not only consented to his sexual relations with other persons, but actively participated in those encounters. If she did consent, and the partners were not military members, there can be no prejudice to good order and discipline nor can it be service discrediting. Under such circumstances, the government lacks any rational basis for regulating, much less criminalizing, what is clearly private marital conduct.

Argument

I.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ASSAULT LIKELY TO COMMIT GRIEVOUS BODILY HARM.

Standard of Review

This Court reviews legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).

Law and Analysis

The evidence submitted at trial fails to satisfy the requirement that Appellant's conduct posed a legitimate risk of

harm that could cause death or grievous bodily injury.

First, the evidence presented for the proposition that Appellant even had HIV was unreliable, where the test results and testing procedures have been called into question. (J.A. 298-356).

However, assuming that the evidence was sufficient to prove the Appellant has contracted HIV, the government's own expert, Dr. Sweet, opined that the Appellant would have been unlikely to infect others. Her estimates of infection ranged from 1 in 10,000 to 1 in 100,000.[2]

Such odds were discussed in *Dacus.* In particular, Judge Ryan in her concurring opinion expressed her significant concerns regarding the statistical chance of infection of 1-50,000 testified to in that case. Her concerns were expressed as follows:

> I write separately on a point that Appellant chose to admit, rather than litigate at trial, and which is thus unnecessary for the majority opinion to address. In my view, as a matter of first impression, it would not appear that the statutory element--"means or force likely to produce death or grievous bodily harm"–-should be satisfied where the record shows that the likelihood of death or grievous bodily harm from a particular means is statistically remote.

Dacus, 66 M.J. at 240(emphasis added) (citations omitted).

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[2] The Air Force Court's decision in this case at page 3 clearly misstates the evidence. The government's expert, at (J.A. 206), line 14 of the Record identifies the chances of passing the virus at 1 in 10,000 to 1 in 100,000.

The offense of aggravated assault by a means likely to cause death or grievous bodily harm consists of four elements: (1) that the accused attempted to do, offered to do, or did bodily harm to a certain person; (2) that the accused did so with a certain means; (3) that the attempt, offer, or bodily harm was done with unlawful force or violence, and (4) that the means was used in a manner likely to produce death or grievous bodily harm. Manual for Courts-Martial United States (MCM), part IV, para. 54.b.(4)(a) (2008 ed.).

In *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998), this Court provided guidance on evaluating the fourth element in aggravated assault cases:

> The standard for determining whether an instrumentality is a "means likely to produce death or grievous bodily harm" is the same in all aggravated assault cases under Article 128(b)(1). The concept of likelihood, however, has two prongs: (1) the risk of harm and (2) the magnitude of the harm. The likelihood of death or grievous bodily harm is determined by measuring both prongs, not just the statistical risk of harm. Where the magnitude of the harm is great, there may be an aggravated assault, even though the risk of harm is statistically low.

However, Judge Ryan went on to state in *Dacus*:

> And *Weatherspoon* does not state that because the magnitude of the harm from AIDS is great, the risk of harm does not matter. On the contrary, it necessarily implies that there is a point where the statistical risk of harm is so low that the statutory standard of "likely to produce death or grievous bodily harm" is not satisfied. *See* Article 128(b)(1), UCMJ.

66 M.J. at 240

Common sense dictates that an event is not "likely" to happen for purposes of Article 128 and *Weatherspoon* if there is only a 1-10,000 and 1-100,000 chance of that event occurring. This case represents that "point where the statistical risk of harm is so low," the statutory standard is not satisfied. *Id*. Statistical odds of 1-10,000 to 1-100,000, as expert testimony in this case showed, is precisely the measure that would allow a reasonable trier of fact to question whether sufficient likelihood has been shown. Case law is unsettled regarding the floor and ceiling of statistical sufficiency of the probability of transmission of HIV through unprotected sex. However, the statutory elements of this crime are not satisfied where the statistical probability of the consequence of an act is so low as to approach being no "more that merely a fanciful, speculative, or remote possibility." *Weatherspoon*, 49 M.J. at 211.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside Appellant's conviction under Charge I and its Specifications.

II.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ADULTERY.

Standard of Review

The same standard of review as outlined in Issue I, *supra*, applies to this Issue.

Law and Analysis

This issue turns on whether military authorities have a rational basis to prohibit and criminalize non-spousal sexual intercourse occurring within a marital relationship. Today, following the United States Supreme Court's landmark decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), that answer has to be negative.

The Supreme Court has acknowledged "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id*. at 572. "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id*. at 578. As the decision in *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004), made clear, the *Lawrence* Court did not define the liberty interest in such a manner as to preclude its application to the military. If private sexual activity carries with it substantial privacy interests, then private sexual activity within a martial relationship must come with even greater privacy concerns.

Excising the specter of HIV from the circumstances, we are left with the fact that a married servicemember and his spouse mutually and consensually engaged with other consenting adults in sexual acts that occurred away from the base, not in public, after working hours, and did not involve other members of the military. Some of the participants did not even think less of the military after learning of Appellant's status. (J.A. 109). None of the qualifiers outlined in *Lawrence* and *Marcum* are present in this case. The only remaining basis for objecting to this conduct must be rooted in a moral objection, a construct that the *Lawrence* Court forbade.

This Court has addressed this issue in the recent past, although without the application of *Lawrence*. In *United States v. Taylor*, 64 M.J. 636 (C.A.A.F. 2007), this Court found that a wife, who did not consent to her husband's act of adultery, was the victim of the crime of adultery and, as such, could testify against her husband contrary to his efforts to invoke the marital privilege under Military Rule of Evidence (M.R.E.) 504. From this decision, it must be inferred that if the spouse can be viewed as the victim of the offense of adultery, he or she can certainly agree to consent to such conduct. Therefore, by criminalizing consensual sexual intercourse that occurs within a marital relationship, the government is violating not only a servicemember’s right to pursue their marriage as they and their spouse sees fit, but also violating the right of that member’s

spouse – often a civilian – to do the same. Such an intrusion by military authorities into the marital bedroom of servicemembers and their spouses should be met with a great deal of judicial scrutiny.

Any inquiry into the intimate details of Appellant's marriage offends the principles outlined by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), which held that marriage is "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees" and condemned laws that "invade the area of a protected freedom." *Id.* at 485; *see also Lawrence*, 539 U.S. at 565-66 (explaining that *Griswold* "described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.").

Just as a "police search [of] the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," is "repulsive to the notions of privacy surrounding the marriage relationship," *Griswold*, 381 U.S. at 486-87, so too is a legal construct that does not allow a husband and wife to freely exercise their marital sexual proclivities. This construct serves to undermine the privacy afforded to this intimate bond under *Griswold* and imposes "maximum destructive impact upon that [marriage] relationship." *Id*. at 485.

Accordingly, under the existing dictates of *Griswold*, *Lawrence*, *Marcum* and *Taylor*, there can be no reasonable basis for the government to interfere in the personal and consensual sexual decisions of the Appellant.

Can we really decide that two consenting males can lawfully engage in homosexual acts yet two consenting heterosexual adults cannot lawfully engage other consenting adults in heterosexual acts merely because of the bounds of marriage? Appellant and his wife were free as adults to engage in private conduct in the exercise of their liberty. The United States Government should have no say in the matter, and it is an affront to the very foundations of this free society for the government to assert otherwise.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside Appellant's conviction under Charge III and its Specifications.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on October 24, 2013.

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