IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	*AMICUS CURIAE* BRIEF OF U.S. ARMY DEFENSE APPELLATE DIVISION
	)	**IN SUPPORT OF APPELLANT**
	)	Crim. App. Dkt. No. 37913
v.	)	
	)	USCA Dkt. No. 13-0522/AF
Technical Sergeant (E-6) **DAVID J.A. GUTIERREZ,** United States Air Force, Appellant	)	

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INDEX

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

U.S. Supreme Court

Court of Appeals for the Armed Forces

Court of Criminal Appeals

Statutes

United States Code

Executive Orders

Secondary Sources

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

Issue Presented

WHETHER THE PLAIN LANGUAGE OF ARTICLE 128, UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 928, (2012) CAN BE INTERPRETTED TO MAKE ALL SEXUAL CONTACT BY AN HIV-POSITIVE INDIVIDIUAL PER SE AGGRAVATED ASSAULT.

Statement of the Case

Amicus accepts appellant's statement of the case.

Statement of the Facts

Amicus accepts appellant's statement of the facts.

Introduction

In Human Immunodeficiency Virus (HIV) related cases, this Court's precedent ignores the plain language of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2012) [hereinafter UCMJ]. This Court must return to reviewing HIV cases using the plain language of the statute because it cannot countenance convictions for aggravated assault where the government has used a statistically insignificant possibility to prove likelihood of death or grievous bodily harm. Instead, due process requires that the fact finder evaluate the individual service member, his or her viral load, the specific conduct, and other relevant circumstances. Additionally, in the past decade, science has advanced exponentially beyond where it was when this Court last deeply scrutinized HIV-related cases. Now that viral

load tests are readily available, the assumption that all HIV-positive individuals can transmit the virus with the same likelihood is false. Ari Ezra Waldman, *Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL'Y & L. 550, 561 (2011). The panic-induced misreading of the word "likely" has created a per se offense of aggravated assault to cover all sexual contact by a service member with HIV. There is a vast difference between maliciously attempting to infect as many unsuspecting innocents versus the informed, reasoned, and statistically safe, private decision between consenting partners. But this Court's current precedents treat these two vastly different situations identically.

In the past, this Court assumed a greater magnitude of harm from AIDS if it occurs. For example, this Court wrote "given the consequences of []AIDS, the label 'offensive touching' seems rather mild." *United States v. Joseph*, 37 M.J. 392, 395-396 (C.M.A. 1992). But, relying upon the plain language of the statute and after the scientific advances of the past thirty years, the proper legal analysis requires that the finder of fact: 1) must evaluate the evidence about an individual accused's viral load, condom use, and other circumstances surrounding the intimate contact to find the probability of transmission; 2) must find that a .001-3.0% chance of transmission is more than merely a fanciful, speculative, or

remote possibility; and 3) must determine that death or grievous bodily harm is a probable, not just a possible, consequence of the assault.

Argument

A. Outbreak of an Epidemic and the Criminal Law Response

The world became aware of the Acquired Immune Deficiency Syndrome (AIDS) when Rock Hudson died of the disease in 1985. RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC xxi (1988). "But suddenly, in the summer of 1985, when a movie star was diagnosed with the disease and the newspapers couldn't stop talking about it, the AIDS epidemic became palpable and the threat loomed everywhere." *Id. See also* REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODIFICIENCY VIRUS EPIDEMIC at 1 (1988)[hereinafter 1988 Commission Report]. An "epidemic of fear" pervaded the country, adversely impacting even those in the medical profession. VICTORIA A. HARDEN, AIDS AT 30, 77-78 (2012).

The government's expert in the field of HIV medicine in Technical Sergeant (TSgt) Guitterez's case recalled what it was like as a medical provider in the mid 1980s. Dr. Sweet had been lecturing about AIDS for a couple years before she had her first HIV-positive patient in 1983. (J.A. 184). Her patients died on a regular basis, so when patients got an AIDS diagnosis, they

could be certified for hospice because they would be dead almost certainly within six months. (J.A. 184-186).

Legislators and courts understandably reacted to the "epidemic of fear" by seeking to use legal tools to eradicate the spread of the virus. Sun Goo Lee, *Criminal Law and HIV Testing: Empirical Analysis of How At-Risk Individuals Respond to the Law*, 14 YALE J. HEALTH POL'Y, L. & ETHICS 194, 198 (2014). These methods included abandoning time-tested notions of due process, especially in establishing "new norms" in criminalizing behavior that was believed to spread the disease. *Id*.

The military was not immune to what was happening. In 1985, the reaction in the Armed Forces to this panic made it necessary for Defense Secretary Caspar W. Weinberger to issue a policy memorandum preventing punitive action against military personnel solely on the basis of disclosing being gay or lesbian or using drugs in the course of being tested for HIV. Jonathan Fuerbringer, *Military Clarifies AIDS Test Policies*, N.Y. Times, 27 October 1985, http://www.nytimes.com/1985/10/27/us/military-clarifies-aids-test-policies.html. In April 1987, the Department of Defense ordered the services to help health authorities around the world identify civilians exposed to AIDS by military personnel. *Military to Help Civilians on AIDS Warnings*, N.Y. Times, 23 April 1987, http://www.nytimes.com/1987/04/23/us/military-to-help-civilians-on-aids-warnings.html.

Service members were questioned about their sexual partners and about individuals with whom they shared drug syringes. *Id*. In April of 1987, of the 1,717,000 military personnel who had been tested for HIV, 2,777 showed symptoms of the virus and 200 had developed AIDS. *Id*. Since the 1980s, the branches of the armed forces have developed strategies to prevent the spread of HIV, including safe-sex orders. *See, e.g.* Department of the Army Form 5669, Preventive Medicine Counseling Record, (Jul 2012). Under their respective service regulations and policies, military members carrying the virus are carefully briefed on the risks and dangers of sexual contact with others. At-risk soldiers are informed that a violation of those warnings could result in both punishment and an unfavorable discharge from the military. *Military to Help Civilians on AIDS Warnings*, N.Y. Times, 23 April 1987, http://www.nytimes.com/1987/04/23/us/military-to-help-civilians-on-aids-warnings.html.

The 1988 Commission Report recommended "extending criminal liability to those who knowingly engage in behavior that is likely to transmit HIV," but cautioned that "criminal sanctions for HIV transmission must be carefully drawn, must be directed only towards behavior which is scientifically established at a mode of transmission, and should be employed only when all other public health and civil actions fail to produce responsible behavior." 1988 COMMISSION REPORT at 130. Civilian jurisdictions

developed various ways to criminalize behavior that spreads HIV, from drafting specific statutes to applying traditional criminal concepts to HIV cases. Lee, *Criminal Law and HIV Testing* at 198. As of February 2014, there had been 913 known arrests or prosecutions of HIV-positive individuals for exposing others to HIV. Global Network of People Living with HIV, *Global Criminalisation Scan*, http://criminalisation.gnpplus.net /country/united-states-america.

The military justice system also prosecuted service members who did not comply with various policies, going so far as to prosecute those who only notionally exposed others to HIV. This Court sanctioned the adoption of conflicting theories of liability during this period of panic. A service member who complies with a safe-sex order, by informing his sexual partner of his HIV-positive status and who uses all available protective measures when engaging in sexual contact, could and still can be prosecuted notwithstanding his partner's informed consent. Service members were, and are still, prosecuted for failing to obey a safe-sex order, aggravated assault, and wanton disregard for human life. *See generally, United States v. Womack*, 29 M.J. 88 (C.M.A. 1989)(Article 90, UCMJ); *United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994)(Article 128, UCMJ); *United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990)(Article 134, UCMJ).

B. Panic over the Epidemic Led to an Unlawful Expansion of Criminal Liability

In a 1990 case before this Court, an HIV-positive airman was convicted of aggravated assault for attempting to have anal sex with a seventeen-year-old male. *United States v. Johnson*, 30 M.J. 53 (C.M.A. 1990). The government's expert testified that: 1) unprotected sexual intercourse posed a dangerous risk of transmitting the HIV virus; 2) the probability of an HIV-positive individual developing AIDS was 35%; and 3) the mortality rate for those with AIDS was 50%. *Id.* at 55. This Court in *Johnson* found that the "circumstances surrounding the sexual contact" could make it likely HIV would be transmitted. *Id*. at 57 n.7. This Court further held that "whether the conduct of the accused involves a means used in a manner likely to produce death or grievous bodily harm is a question to be determined by the fact finder." *Id*. at 57 (internal quotations omitted).

However, *Johnson* interpreted the word "likely" inconsistently with its ordinary and accepted meaning. Likely is defined as "having a high probability of occurring or being true: very probable." Merriam-Webster.com. 2014. http://www.merriam-webster.com. Yet *Johnson* established an HIV-specific definition of "likely"—one that need only be "more than merely a fanciful, speculative, or remote possibility." *Johnson*,

30 M.J. at 57. This Court's expansion of the ordinary meaning of the word "likely" reflected the alarming statistics from the 1980s and 1990s, but it was a departure from established cannons of statutory interpretation.

At the time, HIV was seen as "one of the most feared and fearsome health threats that has faced humanity." *Joseph*, 37 M.J. at 402 (concurring opinion). Some judges required defendants infected with AIDS to enter pleas and receive sentences over the phone, and one judge reportedly moved the sentencing proceedings to the courthouse parking lot to reduce the risk of the defendant infecting the court personnel with AIDS. *Johnson*, 30 M.J. at 58 n.9. But these fears were no more founded in science than was *Johnson's* interpretation of Article 128, UCMJ, founded on plain language.

Within two years of *Johnson*, this Court was presented with another case illustrating the then presumed uncontrollable nature of HIV. In *Joseph*, a female petty officer contracted HIV without knowing that the accused was HIV-positive, even though she insisted that he wear a condom. *Joseph*, 37 M.J. 392. While again recognizing the importance of the fact finder evaluating the circumstances surrounding the sexual contact to gauge the risk of HIV transmission, *Joseph* futher decreased the government's burden in aggravated assault cases. According to this Court, "[T]he question is not the statistical probability

of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victim's body." *Id.* at 397. This method of analysis is no more legally sound than arguing that the question in a case where a minor assault results a scratch, is not the statistical probability of a major infection invading the victim's body, but rather the likelihood of death or serious bodily harm *if* it invades the victim's body.

The outdated approach to HIV cases has morphed what should be a factual inquiry regarding the circumstance of each case into a per se assumption that if an individual with HIV has sexual contact with another, he or she has committed the crime of aggravated assault. This is true even if the partner knowingly consented. Indeed, the military is in the small minority of jurisdictions that still hold HIV-infected individuals criminally liable for intercourse even when they have informed their partners and used precautions such as properly taking medication and using condoms. Lee, *Criminal Law and HIV Testing* at 208.[*]

[*] *Also,* Article 128, UMCJ, potentially criminalizes private, consensual sexual activity between adults that should logically require the three part analysis of *United States v. Marcum*, 60 M.J. 198, 206-207 (C.A.A.F. 2004). *See also, Lawrence v. Texas*, 539 U.S. 558 (2003). This amicus brief does not address, but this Court cannot ignore, the potential constitutional implications of criminalizing the behavior of two consenting, fully informed adults engaging in sexual intercourse.

C. The Proper Analysis: Due Process and the Plain Language of Article 128, UCMJ

The Due Process Clause of the Fifth Amendment requires the government to prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). To convict an accused, the government must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged." *Winship*, 65 M.J. at 364. The relevant element of aggravated assault is "the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm." *Manual for Courts-Martial*, United States (2012 ed.) [hereinafter MCM] pt. IV, ¶ 54.b.(4)(a)(iv). The explanation to Article 128, UCMJ, provides "when the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that that means or force is 'likely' to produce that result." Id. at ¶c.(4)(a)(ii).

It is a "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp*, 134 S.Ct. 870, 876 (2014)(citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The Supreme Court also recently stressed that, "especially in the interpretation of a criminal statute subject to the rule of lenity, we cannot give the text a meaning that is different from its ordinary, accepted meaning,

and that disfavors the defendant." *United States v. Burrage*, 134 S.Ct. 881 (2014)(citing *Moskal v. United States*, 498 U.S. 103, 107–108, (1990)).

The first step in all statutory construction cases is to determine whether the language at issue has a plain and unambiguous meaning. *United States v. McPherson*, 73 M.J. 393 (C.A.A.F. 2014). "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id.*

C. Two-pronged Analysis

This Court has contended that it applies the same standard to HIV cases as all other aggravated assault cases. *United States v. Outhier*, 45 M.J. 326, 328 (C.A.A.F. 1996). According to this Court, what makes Article 128 narrower than civilian aggravated assault statutes is the requirement that the dangerous instrumentality be used in a manner "likely to produce death or grievous bodily harm." *United States v. Weatherspoon,* 49 M.J. 209 (C.A.A.F. 1998). This Court divided the concept of likelihood into two prongs: 1) the risk of harm; *and* 2) the magnitude of the harm. *Id*. Both prongs are essential, but in practice, the magnitude of the harm becomes the issue and the likelihood of the harm is practically ignored. As Judge Ryan stated, "*Weatherspoon* does not state that because the magnitude of harm from AIDS is great, the risk of the harm does not

matter." *United States v. Dacus*, 66 M.J. 235, 240 (C.A.A.F. 2008)(concurring opinion). The societal reaction to the AIDS epidemic distorted this Court's analysis of the first prong. Rather than requiring the risk of harm to have a high probability of occurring, *Johnson* diluted the standard to "more than merely a fanciful, speculative, or remote possibility." *Johnson*, 30 M.J. at 57. Even this low standard has not been properly applied. True to the plain language of the statute, the second prong of the analysis—the magnitude of the harm prong—requires that death or grievous bodily harm is a probable, not just a possible, consequence of the assault. Yet the fact that HIV is a treatable condition now has not altered the outcome in these cases.

Reviewing the existing case law, this Court in non-HIV cases has focused on the magnitude of harm prong, but in HIV cases has focused on the risk of harm prong, the magnitude of harm being presumed. "The second prong of the likelihood analysis, consideration of the magnitude of the risk, was not at issue in the HIV cases. In those cases, it was uncontested that death was the natural and probable consequence if the virus was transmitted and the victim developed AIDS." *Weatherspoon*, 49 M.J. at 211. This case—the first amicus is aware of before this Court in which both prongs are at issue—is one of first impression and provides this Court the opportunity to reevaluate

its HIV precedents, while considering the medical advances of the past thirty years. Some of the relevant data related to those medical advancements follows.

1. Risk of Harm

Multiple factors impact the risk of transmission caused by exposure to HIV during sexual intercourse: viral load of the HIV-positive individual, proper use of a condom, and type of intercourse. The risk of HIV acquisition per coital act of receptive vaginal intercourse is 0.04-0.032%, while, the risk of transmission is highest in receptive anal intercourse at 0.04-3.0%. Julia Fox et al., *Quantifying Sexual Exposure to HIV Within an HIV-Serodiscordant Relationship: Development of an Algorithm*, 25(8) AIDS 1066 (2011). Given the statistical differences in the rate of transmission, the manner of intercourse impacts the risk of harm and must be considered on a case by case basis.

Compare the risk of transmission of HIV to other sexually transmitted infections: 40-43% for the Human Papilloma Virus; 25-50% for Gonorrhoea; .015-.089% for the Herpes Simplex Virus Type 2. The Center for HIV Law and Policy, *HIV Infectious Disease Comparative Risk Table,* http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/HIV%20Infectious%20Disease%20Comparative%20Risk%20Table%20-%20U.pdf.

2. Magnitude of Harm

HIV infection "is no longer considered a significant public health risk given advances in public health practices and interventions for prevention and control." Medical Examination of Aliens-Removal of Human Immunodeficiency Virus (HIV) Infection from Definition of Communicable Disease of Public Health Significance, 74 C.F.R. 56547-01, 56550 (Nov. 2, 2009). In 2009, HIV was removed from the Centers for Disease Control and Prevention and U.S. Department of Health and Human Services list of diseases in the definition of communicable diseases of public health significance. *Id*. at 56547. The stated reason for this change was "in consideration of scientific evidence, including epidemiologic principles and current medical knowledge regarding the mode of HIV transmission." *Id*. at 56549. Further, "while HIV infection is a serious health condition, scientific evidence shows that it does not represent a communicable disease that is a significant risk for introduction, transmission, and spread to the United States population through casual contact." *Id*.

In Technical Sergeant Guitterez's case, the government's HIV expert, Dr. Sweet, contrasted AIDS at the beginning of the 30 year epidemic with the present day: "It's very treatable", "it's changed dramatically." (J.A. 186). She explained that the measure of how infectious an HIV-positive individual is,

referred to as viral load, is monitored every three months (J.A. 189-190). The drug cocktail treatment options available for an HIV-positive individual are “amazing” and people who react well to the drugs can have their viral loads lowered to undectable levels in the first couple months of therapy. (J.A. 191-192). Individuals in their twenties who are diagnosed with HIV who take care of their health and take their medications can expect to live to the age of seventy. (J.A. 195).

Dr. Sweet testified that someone who has been infected with HIV tends to get sick somewhere between ten and fifteen years after infection, and without medical intervention they will die. (J.A. 194). However, there are many diseases and injuries which, left untreated, carry a high risk of death. It is inappropriate, as a matter of law, to assume that someone who contracts HIV will not be treated. Few diseases, including HIV, are therefore per se likely to cause death or grievous bodily harm. “[L]ife expectancy has substantially improved to the extent that HIV is increasingly considered as a chronic illness, in which a near-normal lifespan is achievable with successful care.” Fumiyo Nakagawa, *Life Expectancy Living with HIV: Recent Estimates and Future Implications*, Current Opinion in Infectious Diseases, Feb. 2013, 17, 17.

3. Technical Sergeant Guitterez's Case

Considering the relevant statistics, known medical advances, and specific evidence in Guitterez's case, this Court should not affirm his conviction. Even assuming transmission of HIV, death or grievous bodily harm from AIDS is no longer a probable result. That could be the end of the inquiry, but the risk of harm prong was misapplied in this case. The evidence indicated that although Guitterez was capable of transmitting the virus, his viral load was relatively low. (J.A. 198-200). The range of risk for transmission via unprotected vaginal intercourse was estimated from one out of 100,000 (.001%) on the low end to twenty out of 10,000 (.2%) on the high end. (J.A. 201-202). When asked whether Guitterez was capable of transmitting HIV, the government's own expert said: "He was capable. It was possible. There is possible and there is probable—it's one of those things that's difficult. I don't think it's probable. It was possible." When asked about the possibly of transmission in a case in which a condom was used, Dr. Sweet's answer was it was "remotely possible." (J.A. 207).

Conclusion

Applying the plain language of a statute immunizes it to the epidemic of the moment. When Congress created the offense of aggravated assault, it required proof beyond a reasonable doubt of a means likely to results in death or grievous bodily harm. This Court's current precedent significantly departs from this otherwise clear directive. Now that the panic has passed, and HIV is a treatable condition, this Court should see the statute for what it is and not what many once wanted it to be.

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