IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 37913
	)	USCA Dkt. No. 13-0522/AF
DAVID J.A. GUTIERREZ Technical Sergeant (E-6) United States Air Force, *Appellant.*	)	

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

COMES NOW Appellant, by and through undersigned counsel, and pursuant to Rule 24 and 25 of this Honorable Court's Rules of Practice and Procedure and this Honorable Court's Docketing Notice of 31 July 2014, and files this reply to the United States' final brief.

I.

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

The government's own expert, Dr. Sweet, testified that Appellants' HIV status did not subject his sexual partners to the potential for death or grievous bodily harm.

A. *Government's expert estimates risk of infection ranged from 1 in 10,000 to 1 in 100,000.*

Dr. Sweet testified 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. The government in their brief

liberally cites the statistical probability of somewhere between 10 and 20 per 10,000. Appellee's Final Brief at 10. Dr. Sweet testified that the statistical probability is "somewhere between 10 and 20 positives per 10,000 encounters." J.A. 201. She explained that this figure was on the "high-end" and "there are other people that would say 1 out of 10,000 to 1 out of 100,000 given encounters." J.A. 201-02. Dr. Sweet clarified that individuals at higher risk might be people who had sexual exposure to five or six people in an evening, two or three times a week. J.A. 202.

Dr. Sweet reiterated that in her estimation the probability was "roughly 1 in 10,000 to 1 in 100,000 per sexual act." J.A. 206. When asked if the Appellant was capable of transmission, Dr. Sweet stated: "[t]here 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." *Id.* Dr. Nancy Banks estimated that if the probability was of male to female transmission rates where 1 per 1,000 encounters, assuming three sexual encounters per week, "it would take from six to twenty-four years for the virus to be transmitted". J.A. 313. This all assumes the Appellant is infected with HIV, as Dr. Banks opined "that prosecutors have produced no evidence that can be used to reasonably conclude with any degree of medical or scientific certainty that Technical Sergeant David Gutierrez was ever, or currently is, infected with what is called HIV." J.A. 316-17.

B. 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.

Judge Ryan expressed her concerns regarding the statistical chance of infection of a probability being 1-50,000, stating:

> 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.

United States vs. Dacus, 66 M.J. 235 at 240 (C.A.A.F. 2008) (emphasis added) (citations omitted).

The government relies on *United States v. Joseph*, 37 M.J. 392 (C.M.A 1993) in their brief for the proposition that "likely refers to "the likelihood of the virus causing death or serious bodily harm if it invades the victim's body." Appellee's Final Brief at 7. First, it should be noted that this case is twenty-years old and encompasses outdated views on HIV and its transmission. It is no longer a commonly held principle that once one is infected with HIV that, in and of itself, will cause death or bodily harm. J.A. 312. Second, 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.

In response to the *Weatherspoon* factors, Judge Ryan stated 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

If you do something three times a week, every week and it takes six to twenty-four years for the consequences of that event to occur, that statistical probability is "merely a fanciful, speculative, or remote possibility." *See Weatherspoon*, 49 M.J. at 211. This case represents, with odds of 1-10,000 to 1-100,000, that point where the statistical risk of harm is so low; the statutory standard is not satisfied.

II.

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

The government lacked any rational basis for regulating, much less criminalizing, Appellant's private marital conduct,

especially, when Appellant's wife consented to his sexual relations with other persons, and also actively participated in those encounters.

A. *Taylor* established that a wife is the victim of adultery and as a result, can consent to sexual relations outside the marital construct

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. The military was not the victim in the case nor is there any case law on point to establish this fact. *See* Appellee's Final Brief at 17. The Appellant engaged in consensual sex with civilians. J.A. 77-182. None of the civilians had any military affiliation, or any affiliation with his unit or the chain-of-command structure. *Id.*

The fact that this case may have received media attention or that the Appellant may have been HIV positive has no bearing on the elements of adultery where the spouse is consenting. The government argues that the sexual acts were without an informed consent, in violation of a lawful order, and/or in an open and notorious manner. Appellee's Final Brief at 17. Although these factors may have some bearing on other crimes that might have been alleged, they have no bearing on the question of adultery

and the ability of the spouse to consent to an open sexual lifestyle.

B. The ability of the spouse to consent to private sexual activity within a martial relationship is consistent with *Lawrence*, *Marcum*, and *Griswold*.

The idea that a spouse could not consent to private sexual activity within the marital relationship is "repulsive to the notions of privacy surrounding the marriage relationship." *Griswold v. Connecticut*, 381 U.S. 479 at 486-87 (1965). 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." *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). "The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* at 578.

This Court applied *Lawrence* to the military environment in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). The government is incorrect in its analysis that *Marcum* does not bring the private consensual activity of a married couple within the *Lawrence* liberty interest. *See* Appellee's Final Brief at 17. In *Marcum*, a three part test was established in determining if *Lawrence* was applicable: First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court in *Lawrence*; second, did the conduct encompass any behavior or factors

identified by the Supreme Court as outside the analysis in *Lawrence;* and third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest? *See Marcum*, 60 M.J. at 206-207.

The answers to these questions are yes. First, 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. This conduct falls squarely within the purview of *Lawrence*.

Second, the risk of harm to Appellant's sexual partners was remote. Further, the sexual contact was with civilians, was consensual, and fell completely outside the sphere of the military and the military chain-of-command. None of the factors discussed in *Marcum* exclude this case from the *Lawrence* analysis.

Third, the question is whether the Appellant committed adultery when engaging in private sexual relations with other people with his wife's consent, not whether this act constituted an indecent act. Criminalizing consensual sexual intercourse that occurs within a marital relationship is impinging on a protected liberty interest. The government is violating not only a servicemember's right to pursue a marriage as he/she sees fit, but also violating the right of that member's spouse – often a civilian – to do the same.

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.

III.

APPELLANT WAS DENIED HIS RIGHT TO SPEEDY POST-TRIAL REVIEW.

Appellant's right to speedy post-trial review was violated by the unreasonably lengthy delay, the lack of any constitutionally justifiable reasons for the delay, and the prejudice suffered by Appellant as a result of oppressive incarceration.

A. Appellant's counsel asserted a right to a speedy trial.

Appellant's civilian counsel requested in the R.C.M 1105 Request for Clemency that "[i]n the interest of justice and judicial economy, these matters should be heard sooner rather than later." J.A. 366. This is plainly and unequivocally an assertion of the right to a speedy trial.[1]

B. Appellant suffered Oppressive Incarceration

There is no justification in law that equates continued medical care as a justification for oppressive incarceration; nor

[1] Government counsel seems to intimate: 1) that a request for speedy trial should be waived when the Appellant does not submit clemency by the original deadline, but only meets the deadline of the additional granted time by the Staff Judge Advocate; and 2)this court should rely on the Appellant's supplement to the petition, where Appellant's counsel originally, and erroneously, conceded there was no assertion of the right to a speedy trial (a more thorough review in preparation of the grant to the petition illuminated the correct facts). Appellee's Final Brief at 25-26. Government counsel offers no case law to support either proposition.

is there any basis in fact that the Appellant would have received 8 years and a dishonorable discharge for failing to obey an order and engaging in consensual sexual activity in the presence of others. Appellee's Final Brief at 27-28. If this Court overturns the conviction, Appellant will have served longer than he otherwise would have in oppressive incarceration.

The balancing of the four Barker factors conclusively exhibits Appellant was denied his due process right to speedy review and appeal.

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 6, 2014.

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