25 September 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) DAVID J.A. GUTIERREZ, USAF, *Appellant.*	)))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES USCA Dkt. No. 13-0522/AF Crim. App. Dkt. ACM 37913

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUES PRESENTED

I.

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ASSAULT LIKELY TO RESULT IN GRIEVOUS BODILY HARM.[1]

II.

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

III.

WHETHER THE FACIALLY UNREASONABLE DELAY IN POST-TRIAL PROCESSING DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO SPEEDY REVIEW, PURSUANT TO UNITED STATES V. MORENO, 63 M.J. 129 (C.A.A.F. 2006).

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[1] This issue is framed in terms of whether the evidence was legally insufficient to sustain Appellant's convictions for assault likely to commit grievous bodily harm. As discussed below, the evidence was legally sufficient to sustain Appellant's convictions for assault likely to commit grievous bodily harm. However, a more accurate description is that the evidence is legally sufficient to support a conviction for an assault likely to cause *death* because the HIV expert testified that HIV is an incurable disease that, absent medical intervention, will result in that person's death. (J.A. at 194-95.)

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2006). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2008).

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF THE FACTS

In 2007, Appellant was diagnosed with HIV. (Pros. Ex. 3.[2]) On 29 October 2009, he was given an order by his commander to refrain from engaging in unprotected sexual intercourse and directed to inform any prospective sexual partner of his HIV status prior to engaging in any sexual intercourse. (J.A. at 74-75.) Between 1 January 2009 and 9 August 2010, Appellant engaged in the "swinger lifestyle," where he and his wife met other couples in an effort to participate in group sex and/or sex with the other person's spouse. (J.A. at 84-181.) During that timeframe, Appellant met VW, CL, DS, PSB, MEH, DC, and PT. He engaged in sexual intercourse with each of them. (Id.) On several occasions between 1 January 2009 and 9 August 2010, Appellant engaged in these sexual acts and sodomy in the

[2] Prosecution Exhibits 3 and 5 remain sealed in the original record of trial and therefore are not included in the Joint Appendix. A review of these medical records will conclusively demonstrate to this Court, as it did to the military judge and the Court of Criminal Appeals, that the accused was in fact HIV positive.

presence of other individuals or in close proximity of other individuals. (Id.) At no time did he ever advise any of them that he was HIV positive. (Id.) On four occasions, Appellant engaged in this sexual activity in a manner that was in direct violation of a lawful order from his commander. (J.A. at 79-83, 118-26, 129-34, 174-80.)

Additional facts necessary to the disposition of the case are set forth in the argument below.

SUMMARY OF THE ARGUMENT

Appellant's convictions for aggravated assault with a means likely to cause death or grievous bodily harm are legally sufficient because the possibility that he would transmit HIV to his victims was not merely fanciful, speculative, or remote. Evaluating the evidence in the light most favorable to the prosecution as is required by law, the possibility of transmission was as high as 20 in 10,000 (or 1 in 500) exposures. Recognizing the concerns expressed in the concurring opinion in United States v. Dacus, 66 M.J. 235 (C.A.A.F. 2008)(Ryan, J. concurring), this case is not analogous to Dacus. The evidence, viewed in the light most favorable to the prosecution, reveals that Appellant's likelihood of transmission was 100 times more likely than SSGT Dacus'. Eventually, a case may come along where the evidence raises the concerns expressed

by the concurring opinion in Dacus. However, this case is not it, and the Court should affirm the convictions.

Moreover, Appellant's convictions for adultery are legally sufficient despite his wife consenting or acquiescing to the adulterous conduct because a spouse is not the only potential victim of adultery. To prove adultery, the evidence must show beyond a reasonable doubt that the conduct was prejudicial to good order and discipline in the armed forces or be service discrediting. In this case, evaluating the evidence in the light most favorable to the prosecution, the military judge as a reasonable fact finder correctly found that the conduct was prejudicial to good order and discipline in the armed forces or service discrediting. He did so after hearing unchallenged evidence that each instance of adulterous conduct was either committed openly and notoriously or in direct violation to a lawful order or both.

Finally, Appellant's right to speedy review of his case has not been violated. Though the length of delay between the initial docketing of the case at the CCA and the initial decision exceeds the 18-month standard, the reasons for the delay that are attributable to the government are reasonable. Furthermore, Appellant never asserted his right to speedy trial review, and he suffered absolutely no prejudice as a result of

any delay. Therefore, the Air Force Court's decision to affirm the findings and sentence should be upheld.

ARGUMENT

I.

APPELLANT'S CONVICTIONS FOR AGGRAVATED ASSAULT WITH A MEANS LIKELY TO CAUSE DEATH WERE SUFFICIENT WHERE THE POSSIBILITY OF APPELLANT TRANSMITTING HIS INCURABLE, DEADLY DISEASE WAS NOT MERELY FANCIFUL, SPECULATIVE, OR REMOTE.

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 of the evidence is whether, considering the evidence[3] in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

[3] It is well-settled that the evidence to be considered in a legal sufficiency determination is "limited to the evidence presented at trial." United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) *citing* United States v. Duffy, 11 C.M.R. 20, 23 (C.M.A. 1953); United States v. Whiteman, 11 C.M.R. 179, 180 (C.M.A. 1953); United States v. Lanford, 20 C.M.R. 87, 95 (C.M.A. 1955); United States v. Bethea, 46 C.M.R. 223, 224-25 (C.M.A. 1973); United States v. Holt, 58 M.J. 227, 232 (C.A.A.F. 2003). Despite this clear principle, Appellant attempts to justify his legal sufficiency challenge based on submissions made in a post-trial clemency request from individuals who did not testify at trial and were not subject to an in-court oath or cross examination. This Court should continue to apply the principle that a legal sufficiency review of findings is limited to evidence presented at trial and reject Appellant's attempt to attack his convictions by statements of non-witnesses to the trial and information outside the record of trial.

Law and Analysis

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 part IV, para. 54.b.(4)(a) (2008 ed.) (MCM). This Court in United States v. Weatherspoon, 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.

49 M.J. 209, 211 (C.A.A.F. 1998) (citations omitted).

In this case, the evidence regarding Appellant's commission of multiple aggravated assaults likely to cause death or grievous bodily harm was overwhelming. On multiple occasions

during the charged timeframe, Appellant engaged in protected and unprotected sexual intercourse and unprotected oral sex with the numerous victims. Ignoring his commander's direct, written and verbal order to do so, Appellant never advised his sexual partners that he was HIV positive.

Appellant's argument here is an echo of trial defense counsel's argument at trial regarding statistical probability of infection as it relates to the risk of harm. (J.A. at 234-46.) The military judge and the Air Force Court of Criminal Appeals were not persuaded by this argument, and this Court should reach the same conclusion.

This case is analogous to United States v. Joseph, 37 M.J. 392 (C.M.A. 1993). In Joseph, this Court upheld a conviction for aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm where Joseph engaged in protected sexual intercourse while he was HIV positive. Id. The Court held,

> Depending on the circumstances of a particular case, we believe a factfinder could rationally find even ostensibly protected intercourse to be a "means... likely to produce death or grievous bodily harm." INDEED, ANY TIME A PERSON WILLFULLY OR DELIBERATELY EXPOSES AN UNSUSPECTING VICTIM TO A DEADLY OR DEBILITATING DISEASE OR INFECTION, SUCH AS HIV, POLIO, HEPATITIS B, OR CERTAIN VENERIAL DISEASES, THE ACTOR MAY BE LIABLE FOR AN AGGRAVATED ASSAULT- OR WORSE.

Id. at 397 (emphasis in original).

Appellant's arguments misapply the law with regards to the meaning of "likely" as it relates to a prosecution of an aggravated assault likely to cause death or grievous bodily harm in the context of HIV sexual intercourse. This Court in Joseph rejected the defense argument that "likely" means the likelihood of the HIV virus invading the victim's body. Joseph, 37 M.J. at 397. Rather, "likely" refers to "the likelihood of the virus causing death or serious bodily harm *if* it invades the victim's body." Id. (emphasis in original); United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1998).

Here, the testimony of each of the victims was clear. Each testified that they engaged in either protected or unprotected sexual intercourse with Appellant. (J.A. at 81, 87, 88, 92-93, 101-02, 104, 114, 125, 131, 141, 178.) Additionally, VW, CL and PSB engaged in unprotected oral sex with Appellant. (J.A. at 92, 97, 99, 101, 125.) Dr. Sweet testified about the risk of transmission between individuals who participate in these activities. (J.A. at 198-207.) Though her testimony made clear that the statistical risk of transmission was relatively low, Appellant was capable of transmitting HIV to his sexual partners. (J.A. at 200.) Such was the case whether the sexual intercourse involved the use of a condom or not. (J.A. at 205.) Dr. Sweet testified that whenever a man puts his penis inside of

a vagina, there is *always* a risk that HIV will be spread from one person to the other person. (Id.) Further, she testified that once a person has contracted HIV, absent medical intervention, that person was going to die from the virus. (J.A. at 195-98.) Hence, the natural and probable consequence of the virus entering a person's body is death. Klauck, 47 M.J. at 25.

Appellant cites to the concurring opinion in Dacus. 66 M.J. at 240 (Ryan, J. concurring). In Dacus, this Court affirmed SSGT Dacus' guilty plea to aggravated assault with a means likely to cause death or grievous bodily harm where SSGT Dacus, while HIV positive, engaged in protected and unprotected sexual intercourse. Id. The concurring opinion raised concerns, but rendered no recommendation to reverse or overturn the Court's prior holdings in Joseph or Klauck. Nor did this opinion assert that the Court should hold that based on the evidence presented that Appellant's plea was improvident.

Yet, the concurring opinion did raise interesting issues. First, is there a point statistically where transmission of the HIV virus (and certain death absent medical intervention) is so unlikely as to render that harm not "likely" under Weatherspoon? Second, if there is a statistical point, what should that point be? While these are interesting questions, they are not germane to the facts of this case and need not be resolved to affirm

Appellant's convictions for aggravated assault with a means likely to cause death. This is especially true because this Court must view the evidence in the light most favorable to the prosecution.

Dr. Sweet, the HIV expert who testified at Appellant's trial, provided three statistics regarding the probability of transmission of HIV through exposure during unprotected sexual intercourse.[4] (J.A. at 201-02.) Appellant repeatedly references one of the statistics she stated which was that the probability of transmission had been quoted at 1 out of 10,000 to 1 out of 100,000 encounters. (App. Br. At 6, 12, 13.) Naturally, this is the statistic that is most supportive of his argument, but it is inconsistent with and not supported by the standard of review. Dr. Sweet provided two other statistics as well that cannot be ignored and carry the day in a legal sufficiency challenge. She stated that the transmission rates have been quoted as high as somewhere between 10 and 20 per 10,000 encounters and as somewhere between 1 and 10 per 10,000 exposures. (J.A. at 201-02). When evaluating this evidence, it

[4] Dr. Sweet did testify regarding the chances of reducing HIV transmission using a condom. (J.A. at 202.) However, she also testified that these chances rested on the proper use and handling as well as other factors that could undermine the effectiveness of condoms. (J.A. at 202-04.) Considering this evidence, the fact that Appellant used a condom on some occasions does not diminish the evidence regarding his possibility of transmission because it cannot be assumed that it was used correctly, with the right lubricant, and with no ruptures or accidents. Even if such assumptions are made, there was still a 2-3 percent chance the condom would not protect from exposure. (J.A. at 202.) *See* Joseph, 37 M.J. at 398.

is important to remember the standard of review the United States Supreme Court set forth in Jackson. Appellate courts review the evidence in the light most favorable to the prosecution. Jackson, 443 U.S. at 318-19. Hence, evaluating this evidence in the light most favorable to the prosecution in this case, the statistic of 20 per 10,000 exposures, or 1 in 500 exposures, is the statistic this Court must utilize and is bound to follow.

In Dacus, the expert testified that in his opinion, the probability that SSGT Dacus would transmit HIV while engaging in sexual intercourse using a condom could be reduced to 1 in 50,000 exposures. Dacus, 66 M.J. at 240 (Ryan, J. concurring). That evidence is not analogous to the evidence we have in Appellant's case. Here, the evidence presented, evaluated in the light most favorable to the prosecution, was that Appellant's chances of transmission was 1 in 500 exposures, or 100 times more likely than the evidence presented in the Dacus case. A 1 in 500 chance of receiving a deadly, incurable disease is not a merely fanciful, speculative, or remote possibility. It is a real possibility. That real possibility of harm, when balanced with the magnitude of the harm, certain

death, provides more than enough justification to hold Appellant criminally liable here.[5]

Moving beyond statistics though, there is more evidence in the record to justify affirming his convictions for aggravated assault with a means likely to cause death or grievous bodily harm. All but one of Appellant's victims in this case testified that they would not have had sex with Appellant had they known that he was HIV positive.[6] (J.A. at 81, 91, 115, 126, 179-80.) This illustrates an important point. Evidence of lay persons living in today's society with their own perceptions of what risks they are willing to take on and risks they are not willing to take on should give meaning to the standard "merely fanciful, speculative or remote possibility." Moreover, this case involved a cadre of persons who are arguably more open to take on substantially more risk than the average person with regards to sexual behavior. Yet, each one that was asked specifically stated that had they known that Appellant was HIV positive, they would not have engaged in sexual intercourse with him. This

[5] The *Amicus Curiae* brief filed by the U.S. Army Defense Appellate Division advances essentially the same erroneous arguments made by Appellant and, like Appellant, improperly attempts to support a legal sufficiency challenge by referencing facts ***not contained in the record***. (Amicus Br. at 5-15.) As much as Appellant or *Amicus Curiae* would prefer to, as the Air Force Court of Criminal Appeals recognized, "try the case again with a different expert," this Court's long-standing prior precedent prohibits challenging a case on appeal in this manner. (J.A. at 3.); Beatty, 64 M.J. at 458. The facts of this case, ***as presented at trial***, provide more than enough justification to find Appellant's convictions legally sufficient.

[6] DS did not testify specifically about this as she was not asked. (J.A. at 128-138.)

evidence is compelling and when viewed in the light most favorable to the prosecution, provides additional justification for the conclusion that the possibility of transmission was not merely fanciful or speculative. The victims appreciated and understood the unacceptable risk and magnitude of harm, and the United States is confident this Court will as well.

For all of the above reasons, applying this Court's well settled law as set forth in Joseph, Klauck, and Weatherspoon, considering the risk of harm and the magnitude of harm, the military judge, as a reasonable fact finder, correctly found Appellant guilty of aggravated assault with a means likely to cause death or grievous bodily harm.[7] (J.A. at 250-51.) Evaluating the evidence in the light most favorable to the prosecution, Appellant's convictions are legally sufficient and should be affirmed.

[7] If the Court disagrees and finds that the convictions for aggravated assault are not legally sufficient, this Court can easily affirm convictions for attempts to do so as Appellant's conduct undoubtedly amounted to overt acts and substantial steps to commit aggravated assaults; or at the very least, assaults consummated by a battery in that an informed consent was not obtained from any of Appellant's victims. *See* United States v. Miller, 67 M.J. 87, 91 (C.A.A.F. 2008); *See also* United States v. Perez, 33 M.J. 1050, 1053 (C.A.A.F. 1992).

II.

APPELLANT'S CONVICTIONS FOR ADULTERY ARE SUFFICIENT WHERE APPELLANT'S CONDUCT WAS WITHOUT AN INFORMED CONSENT, OPEN, NOTORIOUS AND IN VIOLATION OF A LAWFUL ORDER.

Standard of Review

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

Law and Analysis

The offense of adultery consists of three elements: (1) that the accused wrongfully had sexual intercourse with a certain person; (2) that, at the time, the accused or the other person was married to someone else; and (3) that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM part IV, para. 62(b).

Here, Appellant was convicted of engaging in adulterous relationships with seven different women. Testimony regarding the acts of sexual intercourse and sodomy as well as evidence relating to Appellant's marriage at the time of the offenses was unchallenged at trial or here on appeal. The remaining element

then is whether these adulterous acts were prejudicial to good order and discipline or were service discrediting. When considering whether an adulterous act is prejudicial to good order and discipline or is service discrediting, and thus criminal, several non-exhaustive factors should be considered including the following particularly relevant to this case: the co-actor's marital status and relationship to the armed forces; whether the adulterous conduct was accompanied by other violations of the UCMJ; whether the conduct persisted despite counseling or orders to desist; and the flagrancy of the conduct, such as whether notoriety ensued. MCM part IV, para. 62(c)(2)(b, f).

The record is replete with evidence illustrating these factors. All of the women were civilians. Three of them were married themselves. (J.A. at 78, 129, 176.) Each time Appellant engaged in the wrongful sexual intercourse, he was simultaneously committing another UCMJ offense: aggravated assault with a means likely to cause death or grievous bodily harm; indecent acts; and/or violation of a lawful order. Moreover, Appellant made no secret of the fact that he was a military member. (J.A. at 94, 155, 117, 125, 127.) As a result of his conduct, a significant amount of notoriety ensued illustrated by the media attending the trial and sitting in the members' box during this judge alone trial. (J.A. at 30.)

Furthermore, almost every victim in this case testified that they would not have had sex with Appellant had they known that he was HIV positive. (J.A. at 82, 91, 115, 126, 179-80.) Finally, two of the victims expressly stated that they trusted that Appellant was "clean" because he was a military member. (J.A. at 115, 125.) This evidence overwhelmingly established the third element of adultery. Viewing this evidence in the light most favorable to the government, the military judge, as a reasonable fact finder, could easily convict Appellant of the adultery offenses.

Appellant erroneously asserts that because his wife was complicit and, in several occasions, encouraged his adulterous conduct that his convictions are somehow rendered legally insufficient. To support this flawed assertion, Appellant relies on United States v. Taylor, 62 M.J. 636 (C.A.A.F. 2007). Taylor was a case about spousal communications in an adultery case, not the sufficiency of evidence to support an adultery conviction. As the military judge noted at trial, Taylor is inapplicable to this case. (J.A. at 215.) The crux of Appellant's argument is a request for this Court to, without precedential support, invent a complete defense to the crime of adultery based on spousal consent. Agreeing to this request is neither appropriate nor legally supported. Appellant claims that because his wife consented, or at least acquiesced, to

these adulterous acts, that she is not a victim and therefore there was no crime. This assertion ignores the elements of these crimes. While it is true that in Taylor this Court recognized that a spouse can be a victim of an adultery crime, an evaluation of what must be proved to sustain an adultery conviction clearly demonstrates that the *spouse is not the only victim*. The military is unquestionably a victim of the adulterous acts. An element of the crime is that the conduct must be prejudicial to good order and discipline or service discrediting. Thus, in spite of a spouse's consent, there are numerous scenarios where the crime of adultery can be committed. This case demonstrates several of those scenarios (i.e., the sexual acts were without an informed consent, in violation of a lawful order, and/or in an open and notorious manner). As discussed above, evidence of the prejudice to good order and discipline and service discrediting nature of Appellant's conduct was clearly established. The military judge, as a reasonable fact finder, properly found Appellant guilty of adultery.

Additionally, Appellant argues that these adultery specifications were unconstitutional as applied to him citing to Lawrence v. Texas, 539 U.S. 558 (2003). In Lawrence, the United States Supreme Court held that, with some exceptions, there is a constitutionally protected liberty interest in sodomy between

consenting adults. The Court provided examples of some exceptions including cases involving: minors; persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused; and public conduct or prostitution. 539 U.S. at 577.

This Court applied this holding to the military environment in United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004). This Court articulated a three part test to determine whether a conviction for consensual sodomy could be sustained or whether a conviction violated an accused's Lawrence liberty interest: (1) was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified in Lawrence; (2) did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence; and (3) are there any additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest? Marcum, 60 M.J. at 206-07. This Court's case law shows Appellant's adulterous conduct fell well outside of the Lawrence liberty interest and therefore, these specifications are constitutional as applied to him.

The Air Force Court of Criminal Appeals properly found that Appellant's sexual acts also amounted to aggravated assaults and therefore were not constitutionally protected. (J.A. at 6.) To

reach that conclusion, the Court recognized that, despite Appellant's assertion to the contrary, Appellant's acts were not consensual. Though the victims of Appellant's offenses thought they were consenting to the sexual acts, a person cannot consent to an act that is likely to produce death or grievous bodily harm. United States v. Bygrave, 46 M.J. 491, 493 (C.A.A.F. 1997). Even if they could, an informed consent was never given here because Appellant never advised these victims that he was HIV positive. Therefore, Appellant's acts were not consensual and not protected under Lawrence. Moreover, each of Appellant's victim's that were asked (all but one) testified that if they knew Appellant was HIV positive, they would not have engaged in sexual contact with Appellant. (J.A. at 82, 91, 105, 115, 126, 179-80.)

If this Court does not affirm Appellant's convictions for aggravated assault, Appellant's convictions for adultery remain legally sufficient. Sexual acts between consenting adults are not criminal, "absent some other fact." United States v. Wilson, 66 M.J. 39, 41 (C.A.A.F. 2008). In this case, the "some other fact" removing these acts from a protected liberty interest was proven beyond a reasonable doubt. Specifications 1, 4, 6, and 7 of Charge IV relate to the adulterous conduct Appellant had with PSB, MEH, DS, and PT. (J.A. at 10-11.) Appellant's sexual intercourse with each of these women occurred

after Appellant's commander's order to inform his sexual partners of his HIV status as well as to use condoms. (J.A. at 79-83, 118-26, 129-34, 174-80.) He did not inform any of these women that he was HIV positive. (Id.) Moreover, he did not use a condom with PSB. (J.A. at 83.) Thus, in committing these acts, Appellant was also committing the crime of failing to obey a lawful order. The "some other fact" proven with regards to these specifications was that they were each a violation of lawful order.[8] Therefore, these sexual acts were wholly outside any protected liberty interest. Specifications 1, 4, 6, and 7 of Charge IV are not unconstitutional as applied to him and remain legally sufficient.

Specifications 2, 5, and 8 of Charge IV relate to the adulterous conduct Appellant committed with DC, CL and VW. Here, the "some other fact" proven at trial was that this conduct also amounted to indecent acts. Each sexual act with DC, CL, and VW was committed either in direct view of others or in close proximity to others. *See* United States v. Izquierdo, 51 M.J. 421 (C.A.A.F. 1999). There is no protected liberty interest implicated in the criminalizing of public sexual acts. Lawrence, 539 U.S. at 578. As this Court held in Castellano, where sexual conduct is open and notorious and therefore an indecent act, those sexual acts are "outside the private

[8] Appellant does not challenge the lawfulness of this order.

sphere." 72 M.J. 217, 222 (C.A.A.F. 23 May 2013) *citing* United States v. Berry, 20 C.M.R. 325, 330 (C.M.A. 1956). Appellant's sexual intercourse with DC, CL, and VW was open and notorious. (J.A. at 86-87, 90, 97, 112-18.)[9] Therefore, Appellant's convictions for Specifications 2, 5, and 8 of Charge IV did not implicate a protected liberty interest and are not unconstitutional as applied to him. Thus, his convictions on these Specifications remain legally sufficient.

Considering all the evidence in the light most favorable to the government, the military judge, as a reasonable fact finder, properly convicted Appellant of the seven specifications of adultery at issue here. Appellant was married. He engaged in sexual intercourse with each woman as alleged. In doing so, he also committed an aggravated assault. With all the women, but one[10], he did so in an open and notorious manner. Four of the offenses were committed in direct violation of Appellant's commander's order. This conduct was prejudicial to good order and discipline in the armed forces and service discrediting. Appellant's convictions for adultery are legally sufficient and

[9] The sexual acts referenced in Specifications 4, 6, and 7 were also committed in an open and notorious manner providing additional justification for the conclusion that these acts were not protected by any liberty interest. (J.A. at 79-83, 129-34, 174-80.)

[10] The unprotected sexual intercourse Appellant had with PSB (Specification 1) did not occur in an open and notorious manner, but was in violation of the commander's order. (J.A. 118-26.)

do not implicate any protected liberty interest. Accordingly, those convictions should be affirmed.

III.

APPELLANT HAS NOT BEEN DEPRIVED OF HIS RIGHT TO SPEEDY POST TRIAL REVIEW.

Standard of Review

This Court reviews violations of the right to a speedy post trial review de novo. United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law and Analysis

The Court has recognized that convicted servicemembers have a due process right to timely review and appeal of their court-martial convictions. Id. The Court utilizes a four-factor test to review claims of unreasonable post-trial delay, evaluating (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Id. "Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find the post-trial delay constitutes a due process violation." Id. at 136.

(1) Length of the Delay

"Unless the delay is facially unreasonable, the full due process analysis will not be triggered." Id. The Air Force

Court of Criminal Appeals found that the time between the docketing of the case and the initial decision (681 days) was facially unreasonable, triggering the full analysis for that time period.[11]

(2) Reasons for the Delay

Under this factor, the Court evaluates responsibility for the delay as well as any legitimate reasons for the delay. Id. at 136. The Court has declined to attribute responsibility for delays to an appellant who was represented only by military appellate defense counsel. Id. However, because Appellant was not only represented by military defense counsel, but was also represented by privately procured civilian defense counsel of his own choosing, responsibility for the 240 days of defense delay it took for Appellant's Assignment of Errors to be filed as well as the 14 days of delay it took for Appellant to file his reply brief is attributable to Appellant. *See* United States v. Merritt, 72 M.J. 483, 489 (C.A.A.F. 2013).

The time period between Appellant's filing of his Assignments of Error to the United States filing of the Answer was merely 74 days. This time period is primarily attributable

[11] Each time period prior to the docketing of the case and subsequent to the CCA's initial decision reflects that the local installation, the convening authority, the CCA, and this Court completed their responsibilities within the Moreno standard and therefore a full analysis is not triggered for those individual time periods. United States v. Mackie, 72 M.J. 135, 136 (C.A.A.F. 2013)(holding that the Moreno standard is not violated when each period of time used for the resolution of legal issues between the CCA and this Court is within the 18 month standard).

to the need to facilitate obtaining court orders for the production of trial defense counsel affidavits.[12] This minimal time period is entirely reasonable.

The third segment of time at issue is the period after the briefs had been filed to the initial decision by the CCA. This time period was 353 days. This Court has applied a "more flexible review of this period, recognizing that it involves the exercise of the Courts of Criminal Appeals' judicial decision-making authority." Moreno, 63 M.J. at 137. During this time period, the CCA needed to consider: the five volume record of trial; the Assignments of Error that included five complex issues[13]; the United States' Answer; Appellant's reply brief; and Appellant's Motion to Attach Documents that included over 100 pages of additional affidavits and ancillary documents. A period of 353 days bearing in mind the extensive briefing and filings provided to the CCA for consideration is reasonable. Consequently, any delay in this case that is attributable to the government is reasonable. Therefore, this factor weighs in

[12] Obtaining of these affidavits resulted in substantial additional litigation culminating in defense-filed extraordinary writs that were ultimately denied by this Court. (J.A. at 428-504.) Additionally, sufficient time was required for Appellate Government Counsel to obtain and submit documents refuting Appellant's patently false IAC claim alleging that his trial defense counsel proceeded to trial without an HIV expert.

[13] One of the issues raised was based on this Court's ruling in United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011). This Court's ruling in United States v. Humphries, 71 M.J. 209 (C.A.A.F. 21012) was published after the briefs had been filed with the CCA in this case. Considering the changes in the law at that time, it is very reasonable for the CCA to be more deliberate regarding its application of this new case law with regards to Appellant's raised issue.

favor of the government.

(3) Assertion of the Right to Speedy Review

This factor calls upon the Court to examine an aspect of Appellant's role in the delay. Id. at 138. In his latest filing before this Court, Appellant, for the first time, attempts to imply that he did assert his right to a speedy review. (App. Br. At 20.) Yet, as Appellant unequivocally and correctly conceded in his supplement to the petition for review, "[n]o right to speedy trial was requested." (Supplement to Petition for Grant of Review, p. 22.) Moreover, Appellant appropriately conceded that "this factor weighs in favor of the government...." (Id.)

Appellant never asserted his right to speedy review.[14] Appellant never requested expedited review by the CCA or this Court. Appellant asserts that he requested expediency in his clemency request. The record shows, however, that this clemency request was filed well after the original deadline and after the Staff Judge Advocate generously granted the maximum extension of time allowed under the Rules for Courts-Martial for filing of clemency matters. (Letter to Civilian Defense Counsel from Col Dales, dated 24 March 2011, Vol. 1; Addendum to the Staff Judge

[14] Notably, Appellant did not raise any Moreno issue to the CCA or before this Court in his originally filed petition or supplement to the petition for grant of review despite the fact that the CCA addressed this issue *sua sponte* in the initial decision.

Advocate's Recommendation, dated 27 April 2011, Vol. 1.)[15] Despite Appellant's incredible and freshly-minted assertion to the contrary, he did not assert his right to speedy trial review and this factor does indeed weigh in favor of the government.

(4) Prejudice

Evaluation of prejudice is viewed in light of the interests of those convicted of crimes to an appeal of their convictions unencumbered by excessive delay. Moreno, 63 M.J. at 138-139. Three subfactors encompassing these interests are reviewed: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his defenses in case of reversal and retrial, might be impaired. Id.

a. Prevention of Oppressive Incarceration

This subfactor is directly related to the success or failure of the substantive appeal. Id. Here, Appellant's substantive appeal should be rejected, undercutting any assertion of oppressive incarceration. Even if the Court disagrees and grants relief, Appellant has suffered zero oppressive incarceration. It is important to consider that

[15] These documents were not selected for the Joint Appendix because the United States did not anticipate Appellant's reversal of his previously represented position.

Appellant's convictions to Charges I and II are not before this Court and will be unaffected by the Court's ruling in this case. (J.A. at 8.) As discussed above, each of Appellant's criminal actions was either in violation of his commander's order, constituted open and notorious indecent acts, or both. Therefore, the entirety of Appellant's conduct would have been properly before the military judge sitting alone as sentencing authority even if he was acquitted of all of the charges and specifications subject to this appeal. There is no doubt that Appellant would have received a confinement sentence that would have resulted in his continued incarceration to date.

Moreover, Appellant's continued status as a military member and presence in confinement provide him the opportunity to continue to receive appropriate medical treatment.[16] Treatment for HIV is prohibitively expensive, costing anywhere from $1,700 to $1,800 just for the medications. (J.A. 196.) Because Appellant is in confinement and a military member, he does not bear this cost. In fact, Appellant discussed this concern in his unsworn statement at trial.[17] Appellant's argument that his

[16] Appellant's dishonorable discharge has not yet been executed while pending appellate review. (J.A. at 12.) Thus, he is still entitled to medical care as a military member.

[17] Appellant stated,

> Your Honor, the possibility of a future without assistance does scare me. It scares me to the core. The cost of the medication are very expensive and I do not know if I will be able to afford it when this is all done and through. I also know that if I go off the medication and then go on the medication, the possibility of living a long life would be greatly reduced. Or if I lose the

incarceration has been oppressive is without merit where: (1) regardless of the Court's ruling on this appeal, Appellant will remain convicted of offenses encompassing all of the conduct at issue in this appeal; and (2) where Appellant has had the opportunity for treatment that he may not have had in any other circumstance.

b. Minimization of Anxiety and Concern

Appellant has the burden to show particularized anxiety or concern that is distinguishable from normal anxiety experienced by prisoners awaiting an appellate decision. Moreno, 63 M.J. at 140. Appellant simply fails to meet this burden. Appellant argues that sex offender registration provides support for his position. However, unchallenged on appeal is his conviction for indecent acts which may require sex offender registration in whichever state he may reside upon release from confinement. Thus, this argument lacks merit. Merritt, 72 M.J. at 491. Appellant has suffered no particularized anxiety.

c. Impairment of Ability to Present a Defense at a Rehearing

Appellant argues that if he is successful on his substantive issues, any delay at the CCA presents "potential

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> ability to get medication or pay for medication, I will not likely live longer than 10 years at the most once I am off the medication. Add that with the real possibility that I will likely be denied life insurance and disability compensation because of my pre-existing condition adds to this.... I am willing to spend the time in jail but I beg not to lose the benefits I so dearly need.

(R. at 247-48.)

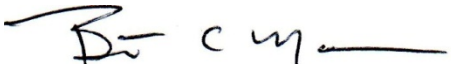
harm" for a rehearing. (App. Br. At 22.) Because these issues are legal sufficiency of the evidence challenges, if the Court rules in favor of Appellant, there would be no rehearing on those charges and specifications. Thus, Appellant cannot demonstrate prejudice by arguing inability to prepare for retrial or other related rehearing related concerns. Id. at 492.

(5) Summary – Appellate Delay

Though the length of delay between the initial docketing of the case at the CCA and the initial decision exceeds the 18 month standard, the reasons for the delay that are attributable to the government are reasonable. Furthermore, considering that Appellant never asserted his right to speedy trial review and that he suffered absolutely no prejudice as a result of any delay, Appellant is not entitled to relief on this issue.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court uphold AFCCA's ruling affirming the findings and sentence.



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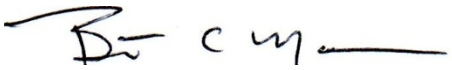
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel and to the Appellate Defense Division, on 26 September 2014.



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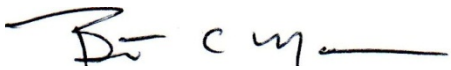

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