IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,	)	REPLY BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Sergeant (E-5)	)	Crim. App. Dkt. No. 20131064
JARED D. HERRMANN,	)	
United States Army,	)	USCA Dkt. No. 16-0599/AR
Appellant	)	

Patrick J. Scudieri
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0648
USCAAF Bar No. 36025

Cody D. Cheek
Captain, Judge Advocate
Appellate Defense Counsel
USCAAF Bar No. 36711

Christopher D. Coleman
Major, Judge Advocate
Branch Chief, Defense Appellate Division
USCAAF Bar Number 36567

Melissa R. Covolesky
Lieutenant Colonel, Judge Advocate
Acting Chief, Defense Appellate Division
USCAAF Bar Number 35347

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Patrick J. Scudieri
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0648
USCAAF Bar No. 36025

Cody D. Cheek
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division

Christopher D. Coleman
Major, Judge Advocate
Branch Chief, Defense Appellate Division
USCAAF Bar Number 36567

Melissa R. Covolesky
Lieutenant Colonel, Judge Advocate
Acting Chief, Defense Appellate Division
USCAAF Bar Number 30649

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Sergeant (E-5) **JARED D. HERRMANN**, United States Army, Appellant	)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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Issue Presented

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO FIND APPELLANT COMMITTED RECKLESS ENDANGERMENT, WHICH REQUIRES PROOF THE CONDUCT WAS LIKELY TO PRODUCE DEATH OR GRIEVOUS BODILY HARM.

Statement of the Case

On October 20, 2016, this Honorable Court granted appellant's petition for review. On November 21, 2016, appellant filed his final brief with this Court. The government responded on December 21, 2016. This is appellant's reply.

Statement of Fact

Appellant relies on his statement of facts in his original brief.

Argument

The government contends that, when appellant failed to inspect or replace closing loops, it posed "a *significant risk* since the closing loop is *critical* to the proper closing of the pack tray." (Gov't Br. at 7)(emphasis added). Appellee cites to "JA 168-169." However, neither pages 168-169 of the Joint Appendix nor any other point in the record states the closing loop is "critical" to the proper closing of the tray or a failure to replace the closing loop annually creates a "significant" risk. While a closing loop is an unknown risk in and of itself, and that risk increases at an unknown rate due to the age of the fabric, categorizing that risk as "significant" to a "critical" portion of the reserve parachute is both misleading and imprecise. What the testimony does lay out is:

> "It could be where the Jumpmaster is potentially checking the troop door to ensure there are no obstacles or preparing to jump, so potentially the ripcord handle could blow off if there is not enough tension on that closed loop and rip cord handle. *Also, to adjust to the everyday handling too, just donning and doffing potentially if it is really loose, I mean that can happen, and during JMPI too, Jumpmaster Parachute Inspection*."

(JA 168–69).

Contrary to the government's assertions regarding *Gutierrez*, the term "likely" does not mean one thing for aggravated assault under Article 128 and another thing for reckless endangerment under Article 134. Also, the government's argument, that the conditions precedent are irrelevant because of how the government chose

to charge the offense, is without merit. Finally, the government's contention that appellant is asking this Court to set an exact percentage regarding likeliness is also without merit.

A. The term "likely" does not have different meanings for aggravated assault and reckless endangerment.

Despite acknowledging the "explicit definitional link" between aggravated assault and reckless endangerment, the government argues *Gutierrez* should only apply to aggravated assault cases and the term "likely" requires two separate definitions: one for Article 128 cases (*Gutierrez*) and one for all other cases (*Joseph*). (Gov't Br. 10-20). This contorted and narrow reading of *Gutierrez* is mistaken.

First, the language relating to reckless endangerment has not changed since this Court's opinion in *Gutierrez*. Therefore, the language of the statute remains the same, and the President did not choose to clarify or alter the elements or explanatory text for reckless endangerment after *Gutierrez.* Put simply, the "explicit definitional link" between these offenses (as conceded by the government) existed at the time of *Gutierrez* and still exists today.

The government argues the President actually had two views of "likely" in mind, one for Article 128 cases and one for Article 134 cases "based on *United States* v. *Woods*." (Gov't Br. at 12-14). However, given the ability to clear up this

alleged ambiguity following *Gutierrez*, or "gap in the UCMJ," the President did not make any changes. If anything, this evidences the President's intent on "likely" was to maintain the same clear definitional link between the two offenses.

More fundamentally, criminal defendants charged under a statute are entitled to equal application of that statute, because the principle of "equality before the law . . . gives to the humblest, the poorest, the most despised [person] the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Gutierrez*, 74 M.J. at 66 (internal quotations omitted); *citing Jones v. Helms*, 452 U.S. 412, 424 n.23 (1981). The President said that "likely" means the same for Article 134 as is does for Article 128 so it must be interpreted so. Otherwise, appellant is not equal to others under the law. The government even cites to language consistent with the premise that "likely" means the same thing for Article 128 offenses as it does for Article 134 offenses. "The definition of 'likely to produce grievous bodily harm' [for reckless endangerment] has been taken from Article 128 (assault)." (Gov't Br. at 12-13) (*citing* MCM (2000 ed.), App. 23, Analysis of Punitive Articles ¶ 100a.). The two definitions must be the same.

The Government's argument is also inconsistent with the President's reaction to this Court's opinion in *United States v. Adams*, 74 M.J. 137 (C.A.A.F. 2015). In *Adams*, this Court found the corroboration requirements for a confession were

high. *See id*. The provision of the Uniform Code of Military Justice relied on by this court stated:

> An admission or a confession of the accused may be considered as evidence against the accused . . . only if independent evidence . . . has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. . . . If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence.

Id. at 139; *citing* Military Rule of Evidence (M.R.E.) 304(c).

In response, the President changed the language of M.R.E. 304 (c) to:

> An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession. . . . If the independent evidence raises an inference of the truth of the admission or confession, then it may be considered as evidence against the accused. Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety.

Military Rule of Evidence (M.R.E.) 304(c). Had the President wanted to have two different definitions of 'likely' as the Government proposes, he could have changed the definitions in the manual as he did with M.R.E. 304(c) after *Adams*. However, he did not act in reaction to *Gutierrez*.

Ultimately, the plain reading of *Gutierrez* is that the term likely means the plain English meaning of likely. 74 M.J. at 66. The only question left to decide is "how likely is likely?" *Id*. at 65. The burden of "how likely" is squarely on the government's shoulders, and they did not meet it.

B. The government's reliance on *Weatherspoon* remains misplaced.

The government argues "[a] likelihood of death or grievous bodily harm may exist [w]here the magnitude of the harm is great . . . even though the risk of harm is statistically low." (Gov't Br. at 20)(*citing United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998))(internal quotations omitted). Yet, this Court clearly stated:

> In the area of assault through exposure to HIV, our Court repeatedly has held that the risk of harm need only be more than merely a fanciful, speculative, or remote possibility. We do not believe that this statement is consistent with the statutory language of Article 128, UCMJ, as generally applied in the context of Article 128, UCMJ.

Gutierrez, 74 M.J. at 65 (internal citations and quotations omitted).

Therefore, the government cites to the express language in *Weatherspoon* that this Court called into question and, in turn, overruled in *Gutierrez*. This Court specifically agreed with the premise that "it is not the weapon that must likely cause great harm, but rather the manner in which it is used must be likely to cause the resulting harm." *Id*.; *citing* Ari E. Waldman, Exceptions: The Criminal Law's Illogical Approach to HIV-Related Aggravated Assaults, 18 Va. J. Soc. Pol'y & L.

550, 591 (2011). Plain and simple, the old proposition that, if the magnitude is high, "the risk of harm need only be more than merely a fanciful, speculative, or remote possibility" is no longer good law.

C. Conditions precedent are relevant to determining if something is "likely."

The government claims that all eight of the conditions precedent listed in appellant's brief "were not necessary given the government's theory of the case and evidence presented in support" because "the government's charging theory already presumed that Soldiers would be exiting an aircraft with these deficient reserve parachutes." (Gov't Br. at 23). This logic would forever permit the government to circumvent the presumption of innocence by alleging presumptions of guilt.

The government alleged appellant's conduct was reckless because he "fail[ed] to conduct Pack In-Process Inspections as the designated Pack In-Process Inspector of T-11 Reserve parachutes provide to Parachute Riggers under his supervision for packing. . ." and this conduct was likely to cause death or grievous bodily harm to jumpers. (JA 25). As shown in the charge itself, the "conduct" must be likely to cause death or grievous bodily harm.

However, what the government argues is contrary to the presumption of innocence. The government is arguing the specification permissibly presupposes that "1) the reserve parachute make[s] it through in-house checks; 2) the reserve

parachute get[s] onto a prospective jumper; 3) JMPI [does not catch] the deficiency; 4) the prospective jumper make[s] it onto an aircraft; [and] 5) the prospective jumper exit[s] the aircraft . . . .” and, therefore, appellant’s conduct was likely to cause death or grievous bodily harm. (Gov’t Br. at 23; *See* Gov’t Br. at 9).

Additionally, because appellant’s actions “could result” in death or grievous bodily harm, the government similarly claims it was “unnecessary” to demonstrate the likelihood of the three remaining conditions precedent: “6) the main parachute failing to the point a reserve parachute is needed, 7) the jumper activating the reserve parachute, and 8) the reserve parachute failing.” (Gov’t Br. at 23; *See* App. Br. at 9).[1] Now, the government appears to be shedding their burden to prove the likelihood of *anything* in the case, including the “reserve parachute failing because it was not re-packed” by appellant. (Gov’t Br. at 23; *See* Appellant Br. at 9). Now, instead of the government having to prove appellant’s actions were likely to cause grievous bodily harm, they can charge an offense in a way that presupposes certain factors leading to guilt. This is tantamount to charging someone with murder presuming someone is already dead.

[1] “Second, the evidence that the parachutes with deficient closing loops could result in a prospective jumper's death or grievous bodily harm (by prematurely deploying before they ever needed to be pulled) made ‘conditions precedent’ 6-8 unnecessary.” (Gov’t Br. at 23).

D. Appellant does not request this court mandate a "nice calculation[] of statistical probability."

Contrary to the government's position, appellant does not "demand a level of proof that is simply not the required standard." (Gov't Br. 23). Instead, appellant's argument is the government did not meet their burden under *Gutierrez*. While "nice calculations of statistical probability" would be useful, that is most likely impossible in our legal system. Appellant argues, however, that the terms "potential," "plausible," "could," "can" and other similar qualifying terms do not rise to the level of "likely."

As "likely" should be given a plain English definition, so should "potential," "plausible," "could," "can," and other qualifying terms.

> Potential: existing in possibility: capable of development into actuality.
>
> Plausible: superficially fair, reasonable, or valuable but often specious.
>
> Could (Can): used to indicate possibility.
>
> Possible: being within the limits of ability, capacity, or realization; being what may be conceived, be done, or occur according to nature, custom, or manners.
>
> Likely: having a high probability of occurring or being true: very probable.

Merriam-Webster.com. 2016. https://www.merriam-webster.com (December 21, 2016). None of the language throughout the record explains that appellant's acts are "likely," but only "possible." It "may be conceived" that someone can win the

lottery, hit a hole in one, or be struck by lightning. However, just because it is possible these events might happen does not prove they have "a high probability of occurring or being true." If the government presents no evidence that something is "likely" but only "possible," then the government has failed in their burden and a finding of guilt would be legally insufficient.

Conclusion

Appellant requests this court dismiss Specification 2 of Charge III and return this case to the Judge Advocate General of the Army for a re-hearing consistent with Article 67, UCMJ.

Patrick J. Scudieri
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0648
USCAAF Bar No. 36025

Cody Cheek
Captain, Judge Advocate
Assistant Appellate Defense Counsel
Defense Appellate Division
USCAAF Bar No. 36711

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Defense Appellate Division
USCAAF Bar No. 36567

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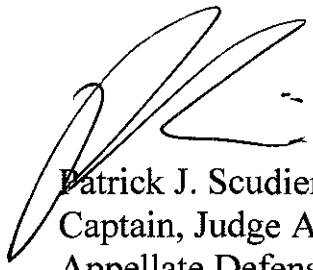
Lieutenant Colonel, Judge Advocate
Acting Chief,
Defense Appellate Division
USCAAF Bar No. 35347

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Sergeant Jared Herrmann, Crim. App. Dkt. No. 20131064, Dkt. No. 16-0599/AR, was delivered to the Court and Government Appellate Division on **December 29, 2016**.



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Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
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Fort Belvoir, Virginia 22060
(703) 693-0648
USCAAF No. 36025