IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*	FINAL BRIEF ON BEHALF OF APPELLEE
v.	
Sergeant (E-5) **JARED D. HERRMANN** United States Army, *Appellant*	Crim. App. Dkt. No. 20131064
	USCA Dkt. No. 16-0599/AR

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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 Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter the Army Court] reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2015). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2015).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of willful dereliction of duty and reckless endangerment, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892 and 934 (2012). The military judge sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for ten months, and a bad-conduct discharge. (JA 28). The convening authority approved the sentence as adjudged. (JA 17-18).

On April 18, 2016, the Army Court affirmed the findings and sentence as approved by the convening authority. (JA 1-15). Appellant filed a Petition for Grant of Review on June 15, 2016, and a Supplement to the Petition for Grant of Review on July 5, 2016. This Court granted review on October 20, 2016.

Statement of Facts

Appellant was a non-commissioned officer and parachute rigger assigned to the 10th Special Forces Group. (JA 445). In February 2013, appellant worked as a Pack In-Process Inspector (IP) in the Consolidated Parachute Rigging Facility. (JA 41). An IP is responsible for ensuring that parachutes are packed in accordance with the applicable technical manuals (TMs) by observing up to four packers at a time and inspecting the parachutes at each "rigger check" during the packing process. (JA 41-42). The TMs governing the proper packing process include repeated warnings that failures to inspect or repack as instructed could result in "serious injury or death to the parachutist." (JA 360, 390, 398, 404). After a parachute is packed and inspected properly, the packer signs a DA Form 3912 indicating that the parachute was packed in accordance with the applicable TM. (JA 49). The IP also signs the parachute log book attesting that he inspected the parachute at every rigger check and that the parachute was packed and airworthy in accordance with the TM. (JA 49-50). After the IP signs off, a Final Inspector (FI) compiles the packed parachute serial numbers into a report, but does not personally inspect the parachutes themselves. (JA 70). As such, "[t]he packer and the IP are the ones ultimately responsible for ensuring that [the parachutes] are packed properly." (JA 75). These parachutes are then moved to the Ready-for-Issue (RFI) cage to be used for training or a real-world event. (JA 50-51).

Between February 19 to 22, appellant was the IP responsible for supervising three packers: Specialist (SPC) Tristan Brown, SPC Johnny Arrington, and Private First Class (PFC) Elizabeth Martinez. (R. at 36, 210). Their mission during this period was to pack a certain number of T-11 Reserve (T-11R) parachutes, which are "chest rig" reserve parachutes associated with the MC-6 main "troop-back parachute." (R. at 38-39, 23). According to Mr. Gordon Whiteman, the military's T-11R project lead and a Senior Aerospace Engineer, a T-11R must be repacked after every airborne operation, or at least every 365 days "to ensure that it has a safe deployment" and "everything with respect to a parachute . . . is especially important when inspecting to make sure that it's airborne safe and airborne certified to jump, ready to jump." (JA 165, 168).

However, instead of ensuring these parachutes were repacked and inspected as required, appellant instructed his packers to "pencil pack" some of the parachutes so they could get out of work early. (JA 180-81, 254). "Pencil packing" is a colloquialism for failing to inspect or repack the parachute, but still signing off on the requisite forms as if the proper procedures had been followed. (JA 53, 183). The packers did as appellant directed, each of them "pencil packing" several T-11R parachutes, which appellant would sign off as properly packed without actually inspecting them at any of the nine "rigger checks" required by the TM for the T-11R. (JA 185, 228, 253, 322).

On February 22, 2013, Sergeant (SGT) Elizabeth Escobar was performing miscellaneous administrative duties around the facility and helping with "overseeing the pack." (JA 268-69). After cleaning the foyer, she decided to walk around and check individual pack sheets to see how the mission was progressing that day. (JA 269-70). She noticed that SPC Arrington, who was a notoriously slow packer, had completed far more parachutes than she thought possible for him, and eventually raised her concerns with the Shop Officer-in-Charge (OIC), Chief Warrant Officer (Chief) Franklin Fowler. (JA 51, 270-71). In response, Chief Fowler checked the packing slips and ultimately ceased the facility's packing operations to investigate the potential "pencil packing" situation. (JA 53, 273-74).

After questioning several individuals, Chief Fowler and the Shop Noncommissioned-Officer-in-Charge (NCOIC), Sergeant First Class (SFC) David Doris, began to pull down and inspect the suspected parachutes. (JA 54). Over the course of three days, Chief Fowler and SFC Doris pulled out and inspected hundreds of parachutes from the Ready-for-Issue Cage, eventually identifying fourteen T-11R parachutes that had been "pencil packed" due to frayed connector ties and other deficiencies. (JA 64-65, 68, 135-37). After identifying the fourteen "pencil packed" parachutes, the first two were subject to a "full pull down" (meaning, a "step-by-step" "reverse pack" to determine any deficiencies in the pack process) while the remaining twelve were locked away for further

investigation by other authorities. (JA 68-69, 446). According to Chief Fowler, some obvious indications that these parachutes were "pencil packed" included "spreader bar ties" that were "dirty, frayed, or look like they've been abused" and canopies that were apparently compact rather than "fluffy" as they should have been if they had been recently packed. (JA 130). Two of the deficient parachutes were missing ejector springs, and all had knots in their closing loops. (JA 135). Each of these deficient parachutes had been signed off as properly packed and inspected by appellant. (JA 446).

The government presented testimony as to how each of the specific deficiencies in the "pencil packed" parachutes could lead to death or serious injury of soldiers using that equipment. (JA 75-77, 164-173). For one, the missing ejector springs--which are critical to the proper opening and quick deployment of a T-11R--could have resulted in death or serious injury to a paratrooper who needed to deploy his reserve. (JA 76-77, 140, 169-70). When the main parachute fails to open within the allotted four-second time period,[1] or if the paratrooper loses altitude awareness, she must pull her reserve parachute as quickly as possible; "any delay in that reserve opening, whether it be the jumper not acting quick enough or

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[1] In general, soldiers using MC-6 and T-11 Reserve parachutes typically jump from an aircraft between 1000 to 1500 feet above ground level. (JA 174). Upon jumping, they conduct a four-second count to allow their main parachutes to open, as this is the maximum opening time rated for the MC-6. (JA 200, 351).

the ejector spring not being to the proper specifications," can cause "serious injury or death to the paratrooper . . . ." (JA 170).

Likewise, the spreader bar ties that were not properly replaced on these deficient parachutes also increased the risk of injury or death to the jumper. (JA 171). These cotton ties within the canopy facilitate a low opening shock and can degrade over time when subject to moisture from high humidity environments or airborne operations in the rain or snow. (JA 171). Thus, when these ties are missing or degraded, "the opening shock can be pretty violent" or "the parachute may not be able to fully open properly," leading to "a higher risk of injury or potential death." (JA 171).

As for the deficient closing loops on each of the fourteen "pencil packed" parachutes, appellant's failure to inspect or replace them also posed a significant risk since the closing loop is critical to the proper closing of the pack tray. (JA 168). An improper closing could result in the "premature" or "unintended" deployment of the reserve parachute, which could have grave consequences for a jumper during an airborne operation. (JA 168). Even if a jumper has not yet left the aircraft, but is simply standing "in the doorway of the aircraft or by the ramp, that jumper could get extracted [by a premature or unintended deployment of his reserve parachute] and potentially have a severe injury, if not leading to death...." (JA 169).

Accordingly, appellant's conduct presented an extremely serious, "life threatening," "emergency situation" according to several government witnesses. (JA 52, 57, 140). Staff Sergeant Ian-Michael McGlynn, a supervisory rigger in appellant's unit, explained, "[T]hose parachutes have to be pulled down and repacked because that reserve is the last line of defense for a jumper if there is an issue with the main parachute. To put a product out on a jumper that's not to standard is not acceptable," and could potentially lead to death. (JA 324). Chief Fowler testified that he had personally witnessed "a daughter lose her dad" due to deficiencies in a reserve parachute. (JA 142-43).

Summary of the Argument

This Court should clarify that its treatment of the definition of "likely" in *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015), is limited to aggravated assault under Article 128, UCMJ, and does not reach the offense of reckless endangerment under Article 134, UCMJ. However, even under *Gutierrez*, the evidence is legally sufficient to sustain appellant's conviction for reckless endangerment. As such, this Court should affirm the decision of the Army Court of Criminal Appeals.

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). To test whether the evidence is

legally sufficient, this Court must determine "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In reviewing a legal sufficiency challenge, this court is "not limited to appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996). On the contrary, this court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000).

Argument

To support appellant's conviction for reckless endangerment under Article 134, UCMJ, the government proved beyond a reasonable doubt the following four elements as prescribed by the President:

(1) That the accused did engage in certain conduct, to wit: failing 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;

(2) That the conduct was wrongful and reckless or wanton;

(3) That the conduct was likely to produce death or grievous bodily harm to another person, to wit: Soldiers exiting an aircraft during airborne operations with the T-11 Reserve parachutes that had not been repacked; and

(4) 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.

(JA 17); *Manual for Courts-Martial, United States* [hereinafter *MCM*] (2012 ed.), pt. IV ¶ 100a.b. On appeal, Appellant challenges only the legal sufficiency of the evidence as to the third element. Specifically, Appellant primarily relies on this Court's analysis in *United States v. Gutierrez* to argue that the evidence is legally insufficient to prove that his conduct was "likely to produce death or grievous bodily harm." (Appellant's Br. 13).

Appellant however misreads and misapplies *Gutierrez*, a case involving HIV-related aggravated assault, to require a far more stringent standard of "likely" than necessary for the offense of reckless endangerment. For the reasons explained below, this Court should limit its application of *Gutierrez* to aggravated assault under Article 128, UCMJ, and further clarify the definition of "likely" to ensure it appropriately captures the President's intent for the offense of reckless endangerment under Article 134, UCMJ. Even under the standard espoused in *Gutierrez* and other aggravated assault cases, the evidence here is legally sufficient to sustain appellant's conviction for reckless endangerment under Article 134, UCMJ.

A. To the extent that *Gutierrez* changed the definition of "likely" for aggravated assault under Article 128, UCMJ, this should not apply to the offense of reckless endangerment under Article 134, UCMJ.

In *United States v. Gutierrez*, this Court revisited the definition of "likely" in a case of HIV-related aggravated assault and overturned a two-decade-long precedent and oft-repeated proposition that "the risk of harm need only be 'more than merely a fanciful, speculative, or remote possibility.'" 74 M.J. at 67 (citing *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998) (other citations and quotation marks omitted). This Court did "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." *Id.* Rather, this definition of "likely," which was first expressed in *United States v. Johnson*, 30 M.J. 53 (C.A.A.F. 1990), and expounded in *United States v. Joseph*, 37 M.J. 392 (C.M.A. 1993), "appears to be sui generis to HIV cases and is not derived from the statute itself." *Id.* Thus, this Court rejected the *Joseph/Johnson* proposition in favor of the "ultimate standard": "whether--in plain English--the charged conduct was 'likely' to bring about grievous bodily harm." *Gutierrez*, 74 M.J. at 66.

This Court's treatment of the *Joseph/Johnson* standard in *Gutierrez* was largely grounded in longstanding concerns with charging undisclosed HIV exposure as aggravated assault, which this Court described as trying to "fit a round peg of conduct into a square hole of a punitive statutory provision," and an analysis

of Article 128. *Id.* Reckless endangerment, however, is a different offense prohibited under a different statute from aggravated assault under Article 128, UCMJ. It was added by the President in 1999 as a newly enumerated offense under Article 134.[2] *1999 Amendments to the Manual for Courts-Martial, United States*, Exec. Ord. No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999). Apart from the definition of "likely to produce death or grievous bodily harm," reckless endangerment involves a different language, history, context, and purpose from that of aggravated assault under Article 128. As such, determining "how likely is likely?" for reckless endangerment necessitates its own analysis independent of the Article 128-based rationale in *Gutierrez*.

According to the 2000 *MCM* Analysis, the offense of reckless endangerment

> is based on *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989); *see also* Md. Ann. Code art. 27, sec 120. The definitions of 'reckless' and 'wanton' have been taken from the Article 111 (drunken or reckless driving). The definition of 'likely to produce grievous bodily harm' has been taken from Article 128 (assault).

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[2] When a President enumerates an offense under Article 134, he "is not defining offenses but merely indicating various circumstances in which the elements of Article 134, UCMJ, could be met. The President's list of offenses under Article 134, UCMJ, is *persuasive* authority to the courts . . . and offers guidance to judge advocates under his command regarding potential violations of the article." *United States v. Jones*, 68 M.J. 465, 471-72 (C.A.A.F. 2010) (citations omitted).

MCM (2000 ed.), App. 23, Analysis of Punitive Articles ¶ 100a. This explanation reveals several important points to consider, one of which is that the offense was based primarily on the Maryland reckless endangerment statute, but adapted to utilize specific existing definitions in the UCMJ. Regarding the element of "likely to produce death or grievous bodily harm," the *MCM* includes an explicit definitional link to the same term in Article 128, UCMJ. *MCM*, pt. IV ¶ 100a. For this reason, the Army Court understandably felt "compelled to apply the same definition of 'likely' [from *Gutierrez*] to reckless endangerment as to aggravated assault." *United States v. Herrmann*, 75 M.J. 672, 676 (Army Ct. Crim. App. 2016); *see also id.* at 681 (Wolfe, J., concurring) ("as to the definition of 'likely'--we are required to follow our superior court's determination that the 'plain English definition' shall apply."). However, several reasons should compel this Court to pause before doing the same.

First, when the President enumerated reckless endangerment as an offense and linked its definition of "likely to produce" to the same term in Article 128, UCMJ, the *Joseph/Johnson* standard was still good law. In fact, it was the controlling standard for HIV-related aggravated assault cases, which had emerged largely due to the lack of more appropriate provisions in the UCMJ by which such conduct could be prosecuted. *See Gutierrez*, 74 M.J. at 67 ("Unlike several other jurisdictions that have created statutory crimes of HIV nondisclosure, Congress has

not criminalized HIV nondisclosure in the UCMJ. Thus, prosecutors have relied on generally applicable punitive articles to litigate these cases."). This gap in the UCMJ was apparently one that reckless endangerment was intended to fill, in light of the fact that the offense was "based on *United States v. Woods*," a 1989 case involving the exposure of a deadly sexually-transmitted disease (STD). In other words, the offense of reckless endangerment was enumerated (at least in part) to capture conduct similar to that in *Woods*, wherein appellant was charged with a general Article 134 offense for engaging in unprotected sexual intercourse while knowing that his seminal fluid contained a deadly virus capable of sexual transmission.[3] 28 M.J. 318, 319 (C.M.A. 1989). It is thus reasonable to infer that, when the President enumerated the offense of reckless endangerment, his express reference to the Article 128 definition of "likely" was largely due to an intent to employ the *Joseph/Johnson* proposition that had developed in HIV-related aggravated assault cases. Accordingly, this Court's recent abandonment of that standard in *Gutierrez* may run contrary to what was originally intended for reckless endangerment under Article 134.

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[3] Additional elements alleged by the government in the Article 134 charge in this case included: "having been counseled regarding others, an act that he knew was inherently dangerous to others, and that death or great bodily harm was a probable consequence of the act, and that was an act showing wanton disregard of human life."

Put differently, the *Joseph/Johnson* definition may remain an appropriate standard for the offense of reckless endangerment because the advent of both this "sui generis" definition by the judiciary, and the enumerated Article 134 offense by the executive, were ultimately aimed at the same underlying problem. This is supported by Judge DeCicco's dissenting opinion in *United States v. Outhier*, 42 M.J. 626 (N.M. Ct. Crim. App. 1995), which was cited with approval in *Gutierrez* for his criticism of the "unprecedented extension in military law of assault by applying such a low standard for the meaning of 'means or force likely' in a non-HIV aggravated assault scenario." In *Outhier*, the appellant was charged and pled guilty to aggravated assault for conducting "drownproofing" training under the pretense that he was qualified to do so, even though no harm actually resulted, and the Navy-Marine Court initially affirmed. Judge DeCicco dissented based on his concerns with utilizing the *Joseph/Johnson* definition for aggravated assault and noted that reckless endangerment (which was not yet recognized in the UCMJ) would better capture appellant's conduct in that case:

> [I]f the appellant committed any crime beyond an assault consummated by a battery in this incident, it could only be known in civilian jurisdictions as reckless endangerment. The genesis of this statutory crime was from a gap in the law.
>
> . . . Reckless endangerment itself has not been recognized as a violation of the UCMJ.

> . . . To find an aggravated assault in this case is certainly novel, and in my view, a significant expansion of the military law of assault that is not legally supportable. I have not found any other case involving an aggravated assault with such facts. Except for the HIV cases, I have also been unable to find any precedent for affirming an aggravated assault in a case of an assault of the consummated-battery variety where the victim was not injured.
>
> In this case, [the victim] suffered no bodily injury, as that term has been defined above. From the record before us, the drownproofing exercise was completed without a hitch. If reckless endangerment were an offense under the UCMJ, we could analyze this case under its framework. But without it, we are left to try to "shoehorn" this case into the existing military law of aggravated assault. However, it simply does not fit.

Id. at 636-37 (DeCicco, J., dissenting) (citations omitted). On appeal, this Court--while rejecting appellant's challenge to the application of the *Joseph/Johnson* standard--agreed to some extent with Judge DeCicco's dissent and set aside the guilty plea on grounds of improvidency. *See United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996).

A review of the Maryland reckless endangerment statute on which the Article 134 offense was based further supports the conclusion that defining the risk of harm as "more than merely a fanciful, speculative, or remote possibility"--while perhaps too low of a standard for aggravated assault--may be suitable for reckless endangerment. Under Article 27, Section 120, of the Maryland Annotated Code, "[a]ny person who recklessly engages in conduct that creates a substantial risk of

death or serious physical injury to another person is guilty of the misdemeanor of reckless endangerment . . . ."[4] Md. Ann. Code art. 27 § 120 (1995). This offense has been described by the Court of Special Appeals of Maryland as

> quintessentially an inchoate crime. It is designed to punish potentially harmful conduct even under those fortuitous circumstances where no harm results. . . . Inchoate crimes are designed to inhibit criminal conduct before it goes too far or to punish criminal conduct even when, luckily, it misfires. Reckless endangerment is, indeed, doubly inchoate. At the actus reus level, it is one element short of consummated harm. At the mens rea level, it is one element short of the specific intent necessary for either an attempt or for one of the aggravated assaults.

Williams v. State, 100 Md. App. 468, 480 (1994).

While the Maryland offense does not employ the term "likely" in terms of describing the risk of death or serious physical harm, it does require the creation of a risk that is both "quantitatively substantial" and "qualitatively unjustified." *Id.* A quantitatively substantial risk "does not require that the risk be almost certain to occur or *that there is even a heavy probability* that the undesired result may come about. It is enough to know that one has created an *unnecessary* risk that his conduct might cause the harmful result." *Id.* at 505 (emphasis added). For instance,

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[4] This provision was repealed in 1996 and the offense now exists in Section 3-204 of Maryland Annotated Code, Criminal Law.

> [o]ne may act recklessly if he drives fast through a thickly settled district though his chances of hitting anyone are far less than 90%, or even 50%. Indeed, if there is no social utility in doing what he is doing, one might be reckless though the chances of harm are something less than 1%.

Minor v. State, 85 Md. App. 305, 316 (1991) (quoting Wayne LaFave and Austin W. Scott, *Substantive Criminal Law* § 3.7(f) (1989) (quotation marks omitted)). Under this standard, it appears even the conduct in *Gutierrez*, which involved only a "1-in-500" chance of HIV transmission yet nonetheless created an unnecessary risk of harm, could have survived a legal sufficiency challenge if it had been charged as reckless endangerment under the Maryland statute instead of aggravated assault under Article 128, UCMJ.

What this suggests is that the President, in looking to Maryland's "doubly inchoate" offense, intended reckless endangerment under Article 134 to capture conduct that may not necessarily arise to aggravated assault, but nonetheless creates a substantial and unjustified risk of death or bodily harm. In fact, the Manual for Courts-Martial describes reckless endangerment under Article 134 as "intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or grievous bodily harm to others." *MCM*, pt. IV ¶ 100a.c.(1).

In light of the above, this Court's reasoning in *Joseph* seems to hold true for the offense of reckless endangerment:

> [W]e do not construe the word, 'likely,' in the phrase 'likely to produce death or grievous bodily harm,' as involving nice calculations of statistical probability. If we were considering a rifle bullet...the question would be whether the bullet is likely to inflict death or serious bodily harm if it hits the victim, not the statistical probability of the bullet hitting the victim. The statistical probability of hitting the victim need only be "more than merely a fanciful, speculative, or remote possibility."

37 M.J. 392, 396 (C.A.A.F. 1993) (citing *Johnson*, 30 M.J. at 57). So while this Court's rejection of the *Joseph/Johnson* proposition in *Gutierrez* may make sense for aggravated assault, it appears far less so for reckless endangerment. Moreover, as the Army Court opinion highlights, this Court's removal of the "lower bound" definition of "likely" without replacing it with anything except for the "plain English" definition of the term, can present many difficulties in practice, particularly in reckless endangerment cases. *Herrmann*, 75 M.J. at 678 ("While we certainly concur with [the *Gutierrez*] approach, we have found its implementation somewhat difficult."); *id.* at 679-80 (Wolfe, J., concurring) ("by deleting the lower bound definition of 'likely,' we invite the very result that the C.A.A.F. appears to have been trying to avoid. . . . Put simply, if the examples of probabilities (e.g. fanciful, etc.) at the lower bound of the definition of 'likely' were insufficient to protect an accused against a wrongful conviction, they should be replaced, not deleted.").

Accordingly, this Court should clarify that its analysis and rejection of the *Joseph/Johnson* standard is limited to the realm of aggravated assault under Article 128, UCMJ, and that the definition of the "likely" element for reckless endangerment should track that of the Maryland offense--meaning, the creation of a substantial and unjustifiable risk. In the alternative, if this Court continues to employ the same definition for both offenses, it should expound upon the definition to encompass the purpose and context of reckless endangerment.

B. Even under *Gutierrez*, the evidence is legally sufficient to show that appellant's conduct was "likely to produce death or grievous bodily harm."

Even if this Court opts not to revisit *Gutierrez* and limit or clarify its application to reckless endangerment, the evidence in this case is nonetheless sufficient to prove the element of "likely to produce death or grievous bodily harm." The "likelihood of death or grievous bodily harm" can be determined by measuring two prongs: (1) the risk of harm, and (2) the magnitude of harm. *Weatherspoon*, 49 M.J. at 211. 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." *Id.* (citations omitted). This, of course, is not to say that where the magnitude of harm is great, "the risk of harm does not matter." See *Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (quoting *United States v. Dacus*, 66 M.J. 235, 240 (C.A.A.F. 2008) (Ryan, J. with whom Baker, J., joined, concurring)). "When the natural and probable consequence of particular conduct

would be death or grievous bodily harm, it may be inferred that the conduct is 'likely to produce' that result. The drawing of this inference is not required. It is not necessary that death or grievous bodily harm actually result." *MCM*, pt. IV, ¶ 100a.c(5); *Gutierrez*, 74 M.J. at 66.

In this case, the evidence was sufficient to prove that death or grievous bodily harm was a natural and probable consequence of appellant's willful failure to inspect and ensure the parachutes were properly packed. First, the government presented overwhelming evidence that (1) appellant deliberately allowed the "pencil-packing" of a number of parachutes and (2) these actions certainly resulted in deficient parachutes, fourteen of which were identified in this case. This was accomplished through the testimony of multiple witnesses, to include SFC Doris, Chief Fowler, PFC Martinez, and SPC Brown, as well as several prosecution exhibits. Second, the government proved, through the testimony of SFC Doris and Chief Fowler, that these deficient parachutes were placed in the Ready-for-Issue cage, where they would have been issued to paratroopers for deployment in airborne training or real world missions, but for the extraordinary diligence of SGT Escobar that day. Third, the government also proved, primarily through the testimony of Mr. Whiteman, how the specific deficiencies that were found could have resulted in death or grievous bodily harm. For one, the deficient closing loops created a risk of unintended or premature deployment, which could have

grave consequences for a jumper and his fellow soldiers during an airborne operation, even prior to jumping. The missing ejector springs would have prevented the parachutes from deploying properly, and the deficient spreader bar ties could have resulted in a violent opening shock upon deployment, heightening the risk of injury or death. Lastly, it is important to consider the inherent danger to the activity involved here--unlike the sexual conduct in *Gutierrez*, jumping out of an airplane already involves a significant threshold risk of death or grievous bodily harm. Even when a parachute is packed and inspected properly, paratroopers still die or incur serious bodily injury. Appellant's willful failure to fulfill his responsibilities--which were critical to minimizing what was already a substantial risk of serious injury or death--undoubtedly and unjustifiably increased that risk. Based on the evidence presented as to the "natural and probable" course of events and all the surrounding circumstances, it was reasonable for the panel to infer that appellant's conduct was likely to produce death or grievous bodily harm to "Soldiers exiting an aircraft during airborne operations with the T-11 Reserve parachutes." Charge Sheet; *see United States v. Outhier*, 45 M.J. 326, 329 (C.A.A.F. 1996) ("whether the threat of death or grievous bodily harm is real, or whether it is merely speculative, depends on the circumstances.").

Appellant claims that the government failed in its burden because it "put on either no or insufficient evidence regarding the likelihood of" eight "conditions

precedent": 1) the reserve parachute making it through in-house checks, 2) getting onto a prospective jumper, 3) its deficiencies not being caught by JMPI, 4) the prospective jumper making it onto an aircraft, 5) the prospective jumper exiting the aircraft, 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. (Appellant's Br. 9). As a preliminary matter, most of these "conditions precedent" were not necessary given the government's theory of the case and evidence presented in support. First, the specification of reckless endangerment alleges "death or grievous bodily harm to Soldiers exiting an aircraft during airborne operations with the T-11 Reserve parachutes that had not been repacked"; thus, the government's charging theory already presumed that Soldiers would be exiting an aircraft with these deficient reserve parachutes, thus making proof of "conditions precedent" 1-5 unnecessary. 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.

More importantly however, appellant appears to demand a level of proof that is simply not the standard required. While the government did not present "nice calculations of statistical probability" to show the likelihood of each of the events, this is clearly not obligatory for the government to meet its burden. The definition

of "likely"--even in the "plain English" sense--does not necessitate the presentation of statistics, nor is this often possible in many cases of reckless endangerment. How, for instance, does the government present the statistical probability of death in the classic reckless endangerment example of firing a weapon into a crowd? Second, the appellant complains that the government presented only evidence of "potential harm" considering its witnesses "interjected numerous qualifying terms" such as "could" and "potentially." (Appellant's Br. 7). However, the likelihood of harm is a conclusion for the trial factfinder to make based on the evidence; witnesses need not (and often should not) assert legal conclusions on the record for the government to meet its proof. Rather, whether death or grievous bodily harm is likely to result from certain conduct can be inferred, without specific numbers or definite language, from evidence of the natural and probable course of events, and this is precisely what the government presented in this case. Because the evidence is legally sufficient to sustain appellant's conviction, the finding of guilty should be affirmed.

Conclusion

WHEREFORE, the Government prays this Honorable Court affirm the Army Court's decision and the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on December 21, 2016.

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