IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee	)	BRIEF OF AMICUS CURIAE IN
	)	SUPPORT OF APPELLANT
v.	)	
	)	
Sergeant (E-5)	)	
JARED D. HERRMANN	)	USCA Dkt. No. 16-0599/AR
United States Army,	)	Crim. App. Dkt. No. 20131064
Appellant	)	

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

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

Issue Presented

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

Statement of Statutory Jurisdiction

Amicus curiae adopts Appellant's Statement of Statutory Jurisdiction.

Statement of the Case

Amicus curiae adopts Appellant's Statement of the Case.

Statement of the Facts

Amicus curiae adopts Appellant's Statement of the Facts.

Statement of the Movant's Interest

The purpose of this amicus brief, being filed pursuant to the Court's invitation, is to bring relevant matters to the attention of the Court. In particular, this brief focuses on how the lower court misapplied the controlling judicial standard in determining whether the conduct at issue was likely to produce death or grievous bodily harm. The proper standard requires a court to weigh the risk of harm in addition to conducting a full analysis of magnitude of harm.

Summary of Argument

This Honorable Court should reverse the decision of the lower court for the reasons listed below. Amicus curiae accepts and adopts Appellant's argument, as set forth in his brief, that the evidence was legally insufficient to uphold his conviction of reckless endangerment. The purpose of this brief is to focus not on the sufficiency argument as addressed by Appellant, but rather, to provide the Court with a further examination of the manner in which the lower court applied the controlling standard. First, the lower court did utilize the correct judicial standard. Second, despite this, the lower court, while adopting the correct judicial standard, applied it in a manner inconsistent with this Court's precedent. In fact, the manner in which the lower court applied the standard is more akin to the judicial standard emanating from case law that has been expressly overruled by this Court.

Argument

THE LOWER COURT MISAPPLIED THE CORRECT JUDICIAL STANDARD AND FAILED TO ANALYZE THE RISK OF HARM IN A MANNER CONSISTENT WITH THIS COURT'S PRECEDENT.

Standard of Review

This Court reviews questions of legal and factual 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, after viewing the evidence in the light most favorable to the prosecution, *any* trier of fact could have found the essential elements of the crime beyond a reasonable doubt (emphasis in original)." *United States v. Cage*, 42 M.J. 139, 143 (C.A.A.F. 1995) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In determining questions of legal sufficiency, the Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citing *United States v Rogers*, 54 M.J 244, 246 (C.A.A.F 2000)).

Law and Analysis

The lower court misapplied the test for determining whether conduct is likely to cause death or grievous bodily harm as set forth by this Court in *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015). The present case serves as a useful vehicle for the Court to clarify the extent to which the test in *Gutierrez* should be applied in determining whether conduct is likely to produce death or

grievous bodily harm in supporting a conviction of reckless endangerment under Article 134, Uniform Code of Military Justice [hereinafter "UCMJ"], 10 U.S.C. § 935 (2012). While Appellant's brief focuses on legal sufficiency of the evidence, a closer examination of the lower court's application of *Gutierrez* is necessary. Although the lower court correctly adopted the *Gutierrez* standard, its analysis under this standard was improper. Thus, for the reasons discussed below, this Court should reverse the decision of the lower court, and overturn Appellant's conviction of reckless endangerment.

A. The standard as set forth in *Gutierrez* is the correct standard in the context of reckless endangerment as adopted by the lower court.

In order to support a conviction for reckless endangerment under Article 134, UCMJ, each of the following elements must be demonstrated as set forth by the President:

(1) That the accused did engage in conduct;
(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; 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.

Manual for Courts—Martial, United States [hereinafter "MCM"] (2012 ed.), pt. IV ¶ 100a.b.

In analyzing the third element, the lower court adopted the test established by this Court in *Gutierrez*. That "ultimate standard" is "whether—in plain English—the charged conduct was 'likely' to bring about death or grievous bodily harm." *Gutierrez*, 74 M.J. at 66. In *Gutierrez*, the appellant was convicted of aggravated assault under Article 128, UCMJ, 10 U.S.C. § 928 (2012) for failing to disclose that he was infected with Human Immunodeficiency Virus (HIV) before engaging in sexual intercourse with multiple partners. *Id*. at 62. In determining the correct standard to be applied in HIV-related aggravated assault cases, the Court stated that "'likely' must mean the same thing in an Article 128, UCMJ, prosecution for aggravated assault involving HIV transmission as it does in any other prosecution under the statute." *Id*. at 66. Thus, the Court rejected the notion that a separate standard sui generis to HIV-related aggravated assault cases should apply and instead adopted a uniform standard. *Id*. at 66-67.

Following this line of reasoning, the lower court adopted the *Gutierrez* test in determining whether conduct is "likely to produce death or grievous bodily harm" in order to support a conviction for reckless endangerment under Article 134, UCMJ. *See United States v. Herrmann*, 75 M.J. 672, 675-76 (A. Ct. Crim. App. 2016). Thus, in ensuring consistent interpretation, the lower court stated that "'likely to produce death or grievous bodily harm' does not mean one thing for purposes of an aggravated assault charged under Article 128, UCMJ, and another

for purposes of a reckless endangerment charged under Article 134, UCMJ." *Id*. at 676. And, in fact, this definitional consistency is expressly established in the MCM.[1] Moreover, despite its contention that the President's enumeration of offenses under Article 134, UCMJ in the MCM serves as only persuasive authority to courts, (Appellee Br. 12 fn. 2), the Government acknowledged that the definition of "likely to produce" in the context of reckless endangerment was indeed linked to the definition of "likely to produce" in supporting an allegation of aggravated assault. (Appellee Br. 13). Furthermore, the lower court also acknowledged the definitional consistency of "likely to produce" between Article 128, UCMJ, and Article 134, UCMJ, stating that "we adhere to that definitional link between the two offenses." *Herrmann*, 75 M.J. at 676.

Therefore, as a result of the definitional consistency of "likely to produce," and this Court's reasoning that consistent interpretation should be followed, the standard for proving "likely to produce death or grievous bodily harm" in aggravated assault cases as established in *Gutierrez* is the controlling standard in cases of reckless endangerment as well.

[1] MCM pt. IV ¶ 100a.c. (5) defines "likely to produce" in the context of reckless endangerment under Article, 134 UCMJ, as the following: "When the natural or probable consequences of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is 'likely' to produce that result. *See* paragraph 54c(5)(a)(ii)." MCM pt. IV ¶ 54c(5)(a)(ii) defines "likely to produce" in supporting a conviction for aggravated assault under Article 128, UCMJ.

B. The lower court misapplied the standard as set forth in *Gutierrez*.

In analyzing "likely" in the context of HIV-related aggravated assaults, courts have traditionally used a two-prong test to determine (1) the risk of harm, and (2) the magnitude of the harm. *See United States v. Dacus*, 66 M.J. 235, 238 (C.A.A.F. 2008) (quoting *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998)). However, prior to the decision in *Gutierrez*, the first prong was established so long as the evidence proved that the risk of harm was "more than merely a fanciful, speculative or remote possibility." *Weatherspoon*, 49 M.J. at 211; *United States v. Joseph*, 37 M.J. 392, 396-97 (C.M.A. 1993). The decision in *Gutierrez* expressly overruled this standard in determining the risk of harm prong in demonstrating what constitutes "likely" in HIV-related aggravated assault cases. *Herrmann*, 75 M.J. at 676. Thus, in determining the risk of harm prong, the *Gutierrez* standard should be controlling, requiring a reviewing court to look to the "plain English" meaning of "likely." *See id*.

However, despite adopting this rule and rejecting the test for risk of harm as stated in *Joseph* and *Weatherspoon*, the lower court incorrectly applied the standard from *Gutierrez* to the facts in this case. This Court in *Joseph* stated that:

> If we were considering a rifle bullet instead of HIV, 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.' Likewise, in this case, the question is not the statistical

> probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victim's body. The probability of infection need only be 'more than merely a fanciful, speculative or remote possibility (emphasis in original).'"

Joseph, 37 M.J. at 396-97 (citing *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A. 1990)). The focus in *Joseph* was not on the probability of transmission of HIV; rather, the analysis focused on the probability of death or grievous bodily harm if there was transmission of the virus. *Id*. In *Gutierrez*—to the contrary—this Court relied on expert testimony and statistical data in determining whether the risk of harm was, in "plain English," likely to cause death or grievous bodily harm vis-à-vis the probability of transmission of HIV.[2]

Concededly, even in situations where the risk of harm is found to be low, a finding of "likely" is still possible if the magnitude of harm is great. *See Dacus*, 66 M.J. at 239-40. However, and with this in mind, this Court in *Gutierrez* pointed out that the case law "'does not state that because the magnitude of the harm from AIDS is great, the risk of harm does not matter.'" *Gutierrez*, 74 M.J. at 65

[2] The expert testimony presented in *Gutierrez* established (1) that the risk of HIV transmission from unprotected oral sex was "almost zero"; (2) the use of a condom prevented exchange of bodily fluids at a rate of ninety-seven to ninety-eight percent, and that the transmission of HIV occurs only through the exchange of bodily fluids; and (3) that roughly 1 in 500 people exposed to HIV as a result of unprotected sexual intercourse would contract the virus, and a 1 in 500 chance, in "plain English," was simply not likely. *Gutierrez*, 74 M.J. at 66-67.

(quoting *Dacus*, 66 M.J. at 240 (Ryan, J. with whom Baker, J., joined, concurring)).

The factors presented in *Gutierrez* ultimately militated against a finding that exposure to the possible transmission of HIV was "likely to produce death or grievous bodily harm," despite the fact that magnitude of harm from HIV was great. *Id*. at 67. However, the lower court never conducted this type of analysis in its application of *Gutierrez* to this case. This Court in *Gutierrez* stated that one problem with the rationale in *Joseph* was that the analysis "focused exclusively on the likelihood that death or grievous bodily harm would occur in the event of transmission, without consideration of whether the risk of transmission was itself likely." *Id*. at 65. In its application of *Gutierrez* to this case, the lower court focused almost exclusively on the "likelihood that death or grievous bodily harm would occur [in the event of a paratrooper using a deficient T-11 Reserve parachute that may have ultimately failed], without consideration of whether the risk [of having to resort to the use of such a deficient parachute, which may ultimately fail,] was itself likely." *See id*.

The lower court briefly discussed the Government's witness testimony presented in front of the military judge; the conclusion of these witnesses was clear that, in the event of a paratrooper having to rely upon of one of the deficient reserve parachutes "pencil packed" by Appellant, and were that parachute to fail,

the result would likely be death or grievous bodily injury. *Herrmann*, 75 M.J. 674-75. There is no dispute that if this situation were to arise, it would likely end in death or grievous bodily injury. However, this witness testimony looks only to the second prong of the test in showing magnitude. What this evidence does not show is whether it is likely, in "plain English," that a paratrooper would be equipped with one of the deficient parachutes, experience a failure of the main parachute, and be forced to rely upon the deficient reserve parachute.[3]

These factors are analogous to the probability of risk of the transmission of HIV as a result of unprotected sexual intercourse on which the *Gutierrez* analysis focused. *See Gutierrez*, 74 M.J. 66-67. No such consideration was given at the lower court level. The practical effect of this is that, despite articulating the *Gutierrez* standard, in actuality, the lower court adhered to the standard in *Joseph* and *Weatherspoon* by not accepting that the actual risk of parachute use and failure—much like risk of transmission of HIV—must be fully evaluated.

Thus, because the lower court did not apply the "plain English" standard as to whether it was likely that a paratrooper would end up in the situation that would have required the use of one of the deficient reserve parachutes, the lower court

[3] In Appellant's brief, it was asserted that this evidence presupposed a series of eight conditions precedent, the end result of which would be a paratrooper using a deficiently packed reserve parachute and it failing. (Appellant Br. 9).

improperly held that Appellant's conduct was "likely to produce death or grievous bodily harm."

Conclusion

Correctly applying the standard from *Gutierrez* to the facts of this case then, as discussed in detail in Appellant's brief, the risk that one of these defective parachutes would have been used and resulted in death, in "plain English," is not likely. Therefore, the standard of conduct "likely to produce death or grievous bodily harm" has not been met here, and this Court should reverse the lower court's decision.

Respectfully submitted,

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** Mr. Calpin has prepared this brief under the supervision of Lauren E. Bartlett pursuant to Rule 13A of the Rules of Practice and Procedure of the Court of Appeals for the Armed Forces.*

Certificate of Filing and Service

I certify that a copy of the foregoing was electronically mailed to the Court and transmitted by electronic means with the consent of the counsel being served on March 20, 2017 to:

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Certificate of Compliance with Rule 24(d)

This brief complies with the type-volume limitation of Rule 24(c) in that it contains 2,698 words.

This brief complies with the typeface and type style requirements of Rule 37.

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Dated: March 20, 2017