IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	REPLY ON BEHALF OF APPELLANT
v.	)	Crim. App. Dkt. No. 201600357
	)	USCA Dkt. No. 18-0304/NA
Lamar FORBES AMA Second Class, (E-5) U.S. Navy, Appellant	)	

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

I.

THE GOVERNMENT MISCHARACTERIZES MATTERS CONTAINED IN THE RECORD OF TRIAL AND INCONSISTENT WITH APPELLANT'S PLEAS AS NEW MATTERS BARRED BY R.C.M. 910(j).

A. Appellant does not require facts external to the record of trial in order to prevail on the granted issue, but relies upon matters inconsistent with his pleas and contained within the record of trial to render his pleas improvident.

The government improperly conflates an appellant's inability to raise new matters with the providency requirement for guilty pleas. "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." R.C.M. 901(e). Where an accused raises a matter inconsistent with his plea, the military judge has

a duty to inquire further. *United States v. Thompson*, 21 C.M.A. 526, 45 C.M.R. 300, 301 (C.M.A. 1972). A military judge may not a plea where an accused describes facts inconsistent with guilt or a theory of guilt which does not constitute a violation of the law. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Appellant raises the matters contained in his providency inquiry as being factually and legally inconsistent with a violation of Article 120, UCMJ, not the underlying factual issues of guilt. Appellant therefore has not waived the issues that he raises because his pleas were inconsistent with the record of trial.

B. Appellant's first argument, that causation is an element of Article 120, is a legal argument. Appellant's second argument, that his pleas to the Article 120 specifications were improvident because matters inconsistent with an offensive touching are contained in the record of trial, deals with providency, not the ultimate issue of guilt of innocence.

The Government incorrectly asserts that "[w]hether a statute requires causation is a question of fact made by a jury or trier of fact." Gov. Br. at 10. Question of statutory construction are questions of law which this honorable court reviews de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). They are not questions of fact for the factfinder. The government's incredible assertion that "the extent [to which] Article 120(b), UCMJ, has a causation requirement for bodily harm, it is a factual determination made by the factfinder" is simply wrong. Gov. Br. at 10.

Appellant's pleas were not provident because the record of trial contains matters inconsistent with the occurrence of an offensive touching. Legal formalisms contained in a stipulation of fact do not render a plea provident when the record of trial contains matters inconsistent with the plea. Instead, this honorable court must set aside a plea when there is a substantial basis in law and fact for questioning the guilty plea. *United States v. Prather*, 32 M.J. M.J. 433, 436 (C.A.A.F. 1991). Neither the stipulation of fact's use of the words "bodily harm" nor Appellant's use of them during his colloquy with the military judge render his pleas provident because neither address how Appellant's HIV-positive status caused the sex acts at issue, or whether Appellant believed that his bodily fluids contained any amount of the HIV virus during the relevant period. Therefore, his pleas were not rendered provident by the stipulation of fact.

II.

THE GOVERNMENT INCORRECTLY ASSERTS THAT NO SUBSTANTIAL BASIS EXISTS TO REJECT APPELLANT'S PLEAS.

A. Article 120 does not negate consent to a sex act due to fraud in the inducement.

The government points to no language in Article 120 which indicates that Congress intended to criminalize fraud in the inducement to a sex act. A person commits fraud in the *factum* when he i.) falsely represents to a partner that his physical acts are other than sexual or ii) falsely represents himself as another

person. *United States v. Booker*, 25 M.J. 114, 116 (C.A.A.F. 1987). All other misrepresentations as to a sexual transaction are fraud in the inducement. *Id.* Fraud in the inducement does not negate consent to a sex act. *United States v. Outhier*, 45 M.J. 326, 330 (C.A.A.F. 1996). A sex act completed pursuant to consent obtained by fraud in the inducement remains consensual. *United States v. Carr*, 63 M.J. 615, 619 (C.A.A.F. 2006).

Appellant did not misrepresent who he was or lie in any way about the sexual nature of the physical acts in which he engaged with the purported victims. He therefore did not commit fraud in the inducement to the relevant sex acts. A military judge must make inquiry into defenses which the providency inquiry reasonably raises. *United States v. Palus*, 13 M.J. 179, 180 (CMA 1982). A military judge may not accept a plea if an accused does not explain why a reasonably raised defense is not applicable. *United States v. Smith*, 44 M.J. 387, 392 (C.A.A.F. 1996). Appellant's statement that the purported victims did not provide "meaningful consent" because of their ignorance of his HIV-positive status did not render Appellant provident to any violation of Article 120. JA at 83, 86. The military judge did not discuss with appellant the defense of fraud in the inducement to the sex act. The military judge did not make any inquiry into how appellant's omissions concerning a collateral matter, Appellant's HIV status, affected any purported victim's perception his identity or understanding that the

relevant physical acts were sexual. Since the providency inquiry reasonably raised this defense, the military judge erred when he accepted appellant's plea without discussing it. Therefore, this honorable court should set aside the findings and the sentence here.

B. Appellant was improvident even under the government's construction of Article 120.

The government construes the causation requirement of Article 120 to speak of the means by which the offense was committed. Gov. Br. at 19. Assuming, *arguendo*, that this is correct, Appellant's HIV infection was not the means by which he engaged in sexual relations with any purported victim. Therefore, even under the government's theory of statutory construction, appellant's plea was not provident.

C. Appellant was not provident to the Article 120 specifications because the military judge did not resolve a conflict in the record as to whether his bodily fluids contained the HIV virus.

During the relevant time period, Appellant's bodily fluids were either completely free of the HIV virus or had the virus present in minimal quantities. JA at 175, 191, 198. The record therefore indicates that Appellant's successful treatment with highly effective anti-retroviral medication [hereinafter HEART] suppressed the HIV virus to such an extent that he cycled between undetectable and minimally detectable status.

The government misconstrues scientific knowledge contained in the record for the proposition that nobody who receives HEART achieves total viral suppression. Gov. Br. at 22. Appellant's test results indicate that he was among the overwhelming majority of HIV-positive patients who do, during the course of treatment, totally suppress their viral loads. JA at 198.

The government's mischaracterizes Appellant's argument as a claim that he was cured of the HIV virus during the relevant period. Gov. Br. at 20. Appellant makes no such claim. Rather, Appellant claims that, from the record, it is questionable whether he had any HIV virus in his bodily fluids with which to commit a non-consensual offensive touching. As the military judge did not inquire into this matter which the record reasonably raises, his pleas were improvident.

The government asserts that the conditional dismissal of Charge III moots his argument as to his providence to bodily harm. Gov. Br. at 21. Bodily harm is also an element of the specifications of Charge II to which appellant pled guilty. The issue is therefore not mooted by the condition dismissal of Charge III because it is also an element of the remaining specifications of Charge II which were not conditionally dismissed.

The government incorrectly asserts that *Gutierrez* "does not refer to actual transferring the HIV virus to another person." (Gov. Br. at 23). The plain language of *Gutierrez* contradicts this claim. *Gutierrez* requires bodily harm,

which "'means any offensive touching of another, however slight.'" *Gutierrez*, 74 M.J. at 68 citing MCM pt. IV, para. 54.c.(1)(a). Nondisclosure may render a physical contact offensive, because the person touched does not know of the contact and therefore does not consent to it, but nondisclosure without contact is not bodily harm.

Gutierrez deals with the government's use of Article 128, UCMJ in "cases involving HIV exposure." *Id.* at 67. In such cases, "the government will be held to its burden of proving every element of the charged offense in the same manner that is required in other cases invoking the same statute." *Id.* Article 128, UCMJ requires that some portion of an actual physical contact be non-consensual. The only portion of the alleged physical contact that was non-consensual here was the alleged victims' potential contact with the HIV virus. Appellant's pleas were not provident because the record of trial contains matters inconsistent with any alleged victim having any contact with the HIV virus or any exposure to the HIV virus. JA 175, 191, 198.

Gutierrez describes an assault consummated by a battery. It cannot describe an offer-type assault because the potential for assault is unknown to the intimate partner of an HIV-positive person. Article 128, UCMJ assault consummated by a battery does not criminalize a failure to inform a person of the risk of an offensive touching unknown to her. Article 128, UCMJ criminalizes actual offensive

touching. If no touching actually occurred, there is no offense under Article 128, UCMJ. The government therefore improperly argues that *Gutierrez* allows conviction for violation of Article 128, UCMJ without any physical contact. (Gov. Br. at 22).

WHEREFOR, Appellant prays this honorable Court set aside and dismiss the findings as to Charge II because of the inconsistency in Appellant's plea, and order a rehearing as to sentence.

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