IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	BRIEF ON BEHALF OF APPELLEE
Appellee	)	
	)	Crim.App. Dkt. No. 201600357
v.	)	
	)	USCA Dkt. No. 18-0304/NA
Lamar A. FORBES,	)	
Aviation Maintenance	)	
Administration	)	
Second Class (E-5)	)	
U.S. Navy	)	
Appellant	)	

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

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Issue granted

WHETHER THE NAVY COURT ERRED IN HOLDING THAT APPELLANT WAS PROVIDENT TO SEXUAL ASSAULT BY BODILY HARM DUE TO HIS FAILURE TO INFORM HIS SEXUAL PARTNERS OF HIS HIV STATUS.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of making a false official statement, four specifications of sexual assault, four specifications of assault consummated by a battery, and one specification of the assimilated Virginia law of infected sexual battery, in violation of Articles 107, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 920, 928, and 934 (2012). Pursuant to a Pretrial Agreement, the United States conditionally withdrew and dismissed without prejudice, pending appellate review, the four specifications of assault consummated by a battery and one specification of sexual assault. The Military Judge sentenced Appellant to eight years of

confinement, reduction to pay grade E-1, and a dishonorable discharge.

The Convening Authority approved the findings and sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. The Pretrial Agreement had no effect on the sentence.

Statement of Facts

A. Appellant was charged with false official statement and multiple specifications of sexual assault and battery.

The United States charged Appellant with a false official statement, four Specifications of sexual assault by bodily harm, one for each Victim, four Specifications of assault consummated by a battery, one for each Victim, and a Specification assimilating a Virginia statute. (J.A. 58-60.)

B. Before pleas, Appellant moved for release from pretrial confinement.

In a Motion for release from pretrial confinement, Appellant attached a study—not involving him personally—that advocated decriminalizing unprotected sex for Human Immunodeficiency Virus (HIV) positive individuals due to the low risk of transmission while using antiretroviral therapy (ART), and a memo from the Department of Justice. (J.A. 254-67; Appellate Ex. III.)

Appellant never argued before trial, during trial, or at any time during the two years between trial and his Motion to Attach during direct review at the lower court, that his viral load was undetectable thus minimizing or eliminating the risk of transmission. (R. 18-22, 54-55.)

C. In a Pretrial Agreement and Stipulation of Fact, Appellant agreed to plead Guilty to four Specifications of sexual assault by failing to inform Victims that he carried HIV.

In a Pretrial Agreement, Appellant agreed to plead guilty to all Specifications, including the sexual assault Specifications alleging that he "commit[ed] a sexual act upon [the Victim], to wit: penetration of her vulva with his penis, by causing bodily harm to her, to wit: engaging in such act without previously informing her that he carries the Human Immunodeficiency Virus." (J.A. 58; 276-88.)[1]

Appellant signed a Stipulation of Fact, admitting that: "my acts were unlawful, and . . . were done with unlawful force *because there was no valid consent* obtained from the females in question." (J.A. 250-53) (emphasis added).

D. Prior to trial, the Military Judge provided Appellant a draft Providence Inquiry that discussed informed consent. Appellant made no objections and had no changes to the Judge's proposed questions. Appellant agreed that by pleading guilty, he gave up his right to trial on the facts.

A day before trial, the Military Judge sent via e-mail to the parties, a draft version of the Providence Inquiry that discussed informed consent. (J.A. 274; R. 87-88.) Appellant did not object to the draft. (R. 88.)

During the Providence Inquiry, the Military Judge informed Appellant that

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[1] All Specifications alleged the same language except for the Victim's name. (J.A. 60.)

by pleading guilty he gave up his "right to a trial of the facts" and "to have this court-martial decide whether or not [he was] guilty based on evidence." (J.A. 66.) Appellant indicated he understood his rights and that he was voluntarily giving them up by pleading guilty. (J.A. 66-67.)

E. The Military Judge gave Appellant statutory definitions of bodily harm and consent, and discussed *Gutierrez* and informed consent. Appellant agreed that failing to inform his Victims about his HIV status satisfied *Gutierrez* and constituted bodily harm. Appellant made no objections.

The Military Judge read the Article 120 statutory definitions of "bodily harm" and "consent." (J.A. 75, 78.) She told Appellant that "Bodily harm . . . include[es] any *nonconsensual* sexual act or *nonconsensual* sexual contact." (J.A. 75) (emphasis added). She told Appellant that the Government would "have the burden to prove . . . that the named victims did not consent to having sexual intercourse." (J.A. 75.) She told Appellant that "Consent" included "a freely given agreement to the conduct at issue" and that "[a]ll the surrounding circumstances" were relevant to consent. (J.A. 75.) And she told Appellant, citing *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015), and a consistent Air Force Court of Criminal Appeals case, that "a person who is unaware of the HIV status of her sexual partner cannot provide meaningful, informed consent to engage in a sex act with that person." (J.A. 78.)

Appellant agreed that he understood the elements and that he had discussed with his Trial Defense Counsel the terms "bodily harm" and "consent." (J.A. 83-84.) Appellant affirmed that his actions satisfied the elements and the statutory definitions, stating he committed the "sexual act[s] by causing bodily harm" on each Victim. (J.A. 78-79; 83-84; R. 116, 119.)

F. In his Stipulation of Fact, Appellant agreed that the U.S. Navy ordered him to tell sexual partners, before sex, that he carried HIV. Appellant admitted he had unprotected sex with four women without telling he was HIV positive.

Appellant agreed that everything in his Stipulation of Fact was "true and correct" and that the facts "cannot be contradicted." (J.A. 69-70.) He also asked that the Judge consider the Stipulation for the purposes of satisfying his Providence Inquiry. (J.A. 69-70.)

Appellant's Stipulation admitted that in February, 2012, he was told he tested positive for HIV. (J.A. 250.) His U.S. Navy medical provider counseled him about his HIV status five times between 2012 and 2014. (J.A. 240, 246-47, 250.) As part of each session, , Appellant signed a statement informing him his blood and bodily fluids, including semen, can transmit HIV and that "prior to engaging in sexual activity . . . I must verbally advise any prospective sexual partner that I am HIV positive and that there is a risk of possible infection." (J.A. 240, 246-47.)

Between April, 2013 and October, 2014, Appellant admitted that he had unprotected sexual intercourse with four women without telling them he was HIV positive. (J.A. 81-86, 250-53.)

Before engaging in sexual intercourse, the first Victim, Ms. LK, told Appellant that she was taking anti-rejection medication for a recent kidney transplant, thus had a weakened immune system. (J.A. 132-35.) The second Victim was a fellow Sailor. (J.A. 251.)

In August, 2014, law enforcement questioned Appellant on allegations that he had unprotected sex without informing his sexual partners he was HIV positive. (J.A. 252.) He lied to the investigators claiming he had unprotected sexual intercourse with fewer women, when he knew it was more. (J.A. 252; R. 123.)

After being questioned by law enforcement, Appellant had unprotected sexual intercourse with two more Victims. (J.A. 251-52; R. 112-20.) Appellant told the third Victim, Ms. AR, that he "was clean" when she asked him if he had any sexually transmitted diseases. (J.A. 252.) The fourth Victim was a single mother of two children. (J.A. 112-113.)

G. The Military Judge accepted Appellant's pleas and found him Guilty of all Charges. She conditionally dismissed one of the sexual assault Specifications.

The Military Judge accepted Appellant's pleas and found him Guilty of all Charges and Specifications. (J.A. 87-88.) She conditionally dismissed Appellant's

guilty Findings for sexual assault against Victim 2, the Sailor, and all the Article 128, UCMJ, Specifications as an unreasonable multiplication of charges. (J.A. 55-60; R. 147.)

H. At sentencing, the United States introduced Appellant's medical record. Appellant admitted none of the women would have had sex with him had he disclosed his HIV status. "[A]bout seven times" Appellant's HIV viral load tested above the detectable level.

The United States introduced Prosecution Exhibit 1, part of Appellant's medical record. (J.A. 157-249; R. 150.)

In April, 2013, when Appellant had unprotected sex with Ms. LK, he had tested above the level of detection for HIV. (J.A. 191.)

In April, 2014, when Appellant was having unprotected sex with the second Victim, he had tested above the level of detection for HIV. (J.A. 175.)

Appellant's physician testified that while Appellant had two tests with undetectable levels of HIV virus, "about seven other times he [had] a detectable viral load."[2] (R. 272.)

[2] Prosecution Exhibit 1 contains nine tests with detectable levels of the HIV virus and only two with undetectable levels of the HIV virus. (J.A. 175, 179, 182, 191, 198, 202, 209, 210, 216, 230, 232.) Prosecution Exhibit 1 stops with a test in April, 2014 and due to the uncontested nature of the guilty plea, Appellant's viral load after April, 2014 is unknown. (J.A. 175.)

Appellant also, at one time, went "off medication due to his own reluctance" and stated that he would not take medication "unless he [was] forced to by the [United States Navy]." (J.A. 241.)

Appellant admitted none of the women would have engaged in sexual intercourse with him, had they known of his HIV status. (R. 305.) One Victim expressly stated she would not have had sexual intercourse with Appellant had she known of his HIV status. (J.A. 113.)

I. Appellant unsuccessfully tried to expand the Record with new facts to argue that his medications suppressed the HIV virus at the time of his crimes. Appellant never presented these facts at trial.

For the first time, at the lower court and 699 days after adjournment of his case, Appellant tried to expand the Record by moving to attach: (1) a letter from the Center for Disease Control; (2) a study on the risk of transmission of HIV while on antiretroviral therapy (ART); (3) a study from the United Kingdom on ART; and, (4) a study on the effectiveness of ART in adolescents. (J.A. 378-414.) The lower court rejected the Motion. (J.A. 415.)

About six months later, Appellant included the denied Motion and all attachments in the Joint Appendix filed with this Court. (J.A. 378-414.)

Appellant never introduced these facts at trial, and they were not included in the trial motion regarding his request for release from pretrial confinement. Despite the lower court rejecting his Motion to Attach and despite not appealing

the lower court's rejection of those documents, Appellant includes these facts in his Joint Appendix, ostensibly in support of his statistical argument that he had "potentially no HIV virus with which to commit an offensive touching." (Appellant Br. at 6.)

Argument

I.

BY PLEADING GUILTY, APPELLANT WAIVED THE FACTUAL ISSUES HE NOW PRESENTS TO THIS COURT UNDER R.C.M. 910(j).

A. By pleading guilty, Appellant waived any factual issue of guilt.

A plea of guilty that results in a finding of guilty "waives any objection" as it relates "to the factual issue of guilt of the offense[s] to which the plea is made." R.C.M. 910(j); *United States v. Jones,* 69 M.J. 294, 299 (C.A.A.F. 2011) (internal citations and quotations omitted). "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case." *Id*. (emphasis in original). So too, unconditional guilty pleas generally waive all pretrial and trial defects that are neither jurisdictional nor deprivations of due process of law. *Id.* Where a claim factually contradicts the indictment or plea agreement, then that claim is "foreclosed by the admissions inherent in their guilty plea." *Class v. United States*, 138 S. Ct. 798, 804 (2018) (citing *United States v. Broce*, 488 U.S. 563, 576

(1989)).

B. Both Appellant's arguments address the factual issue of guilt. As in *United States v. Jones,* 69 M.J. 294 (C.A.A.F. 2011), they are waived by his unconditional pleas.

1. Causation is a factual question, waived by his provident pleas.

Whether a statute requires causation is a question of fact made by a jury or trier of fact. *See Henderson v. Kibbe*, 431 U.S. 145, 152-53 (1977) (causation a question of fact required for jury deliberation); *Maslenjak v. United States*, 137 S. Ct. 1918, 1928 (2017) (same). To the extent Article 120(b), UCMJ, has a causation requirement for bodily harm, it is a factual determination made by the factfinder. 10 U.S.C. § 920(b)(1)(B) (2012); *see infra* at 16-20.

Appellant's argument now that he could have more extensively "explain[ed] how any alleged touching with the HIV virus caused the sexual acts" contradicts his explicit Providence Inquiry and Stipulation admissions that he committed the sexual acts "by causing" bodily harm to each Victim. (Appellant Br. 4; J.A. 83, 86, 305; R. 116, 119.) Because this factual claim contradicts his pleas, this argument is "foreclosed" to Appellant. *Broce*, 488 U.S. at 576.

This Court in *Jones* faced a similar issue The *Jones* appellant claimed that despite his explicit admissions during the providence inquiry and in the stipulation of fact that the images he possessed were child pornography, he had been erroneously denied the ability to review the images again and thus could not "attest

to whether . . . the images . . . were child pornography as defined by the law." 69 M.J. at 299. The *Jones* court rejected the appellant's claim that he did not know if the images were factually and legally child pornography. *Id.* That argument, the *Jones* court held, "both ignores the detailed stipulation of fact and addresses the factual issue of guilt," which this court noted was waived. *Id.*

Appellant waived any claim on appeal that he failed to adequately "explain how any alleged touching with the HIV virus caused the sexual acts." (Appellant Br. at 4.) This ignores his explicit admissions as to causation, including that he secured each Victim's consent by failing disclose his HIV infection. (R. 305); *United States v. Mooney*, 77 M.J. 252, 255 (C.A.A.F. 2018).

2. Appellant's claim that no offensive touching occurred was waived by his provident pleas.

A guilty plea "is more than a confession which admits that the accused did various acts[,] it is an admission that he committed the crime charged against him." *Broce*, 488 U.S. at 570 (internal quotations and citations omitted). By pleading guilty, an accused is "admitting guilt of a substantive crime." *Id*.

Per *Jones, Class* and *Broce,* Appellant's claim that "no offensive touching" occurred is waived. His argument now contradicts the Stipulation of Fact and his statements in his Providence Inquiry. (J.A. 55-59, 83, 86; R. 116, 119, 250-52.)

II.

NO SUBSTANTIAL BASIS EXISTS TO REJECT APPELLANT'S PLEA. APPELLANT KNEW THE ELEMENTS OF SEXUAL ASSAULT AND ADMITTED AN OFFENSIVE TOUCHING DUE TO LACK OF INFORMED CONSENT. POST-TRIAL FACTS DISPUTING WHETHER HE AT ALL TIMES CARRIED ACTIVE HUMAN IMMUNODEFICIENCY VIRUS FALL SHORT OF A MERE POSSIBILITY OF INCONSISTENCY IN LIGHT OF HIS EXPLICIT PLEAS, TESTIMONY THAT THE MAJORITY OF HIS TESTS INDICATED INFECTION, AND THE CHARGING THEORY OF ASSAULT BY UNINFORMED CONSENT.

A. A substantial basis is required to overturn a guilty plea. A mere possibility of conflict is insufficient.

The decision to "accept a guilty plea is reviewed for an abuse of discretion." *United States v. Inabinette*, 66 M.J. 320, 321-22 (C.A.A.F. 2008) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). Appellant has the burden to demonstrate a substantial basis in law and fact for questioning the plea. *United States v. Finch*, 73 M.J. 144, 148 (C.A.A.F. 2014) (quoting *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004)). A ruling based on an erroneous view of the law constitutes an abuse of discretion. *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005).

Appellate courts will not set aside guilty pleas absent a substantial conflict between the pleas and the accused's statements or other evidence in the record.

United States v. Moon, 73 M.J 382, 386 (C.A.A.F. 2014) (citation omitted). More than a "mere possibility" of a conflict is required to overturn a guilty plea. *Id.*

B. The trial judge must inform an accused of the elements and elicit a factual basis. Appellate courts look to the record of trial to assess whether the trial judge advised correctly and elicited sufficient facts.

To ensure a provident plea, a military judge must inform the accused of the nature of his offense, a correct definition of the legal concepts, and elicit a factual basis for the plea. *See Finch*, 73 M.J. at 148; *Negron*, 60 M.J. at 141. Appellate courts review "the record of trial and the documents considered by the court below" to determine if the plea was knowing and voluntary. *United States v. Riley*, 72 M.J. 115, 120 (C.A.A.F. 2013) (internal quotations omitted).

C. Article 120 and the Specification include nonconsensual acts as the "bodily harm."

In Article 120, UCMJ, bodily harm is defined as "any offensive touching of another, however slight, including any nonconsensual sexual act." 10 U.S.C. § 920(g) (2012). Consent is "a freely given agreement to the conduct at issue by a competent person." *Id*. Lack of consent "may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions." *Id*.

The United States alleged that the bodily harm in the sexual assault Specifications was "engaging in [the sexual] act without previously informing [the

Victim] that he carries the Human Immunodeficiency Virus." (J.A. 58; 276-88.)

D. No substantial basis exists where the Judge advised on all elements and Appellant admitted that his failure to disclose his HIV carrier status caused the sexual act.

1. The Military Judge advised Appellant of every element and definition supporting the Pretrial Agreement and Appellant's pleas to sexual assault by failure to ensure informed consent.

In *United States v. Murphy*, this Court found no substantial basis of law to question the appellant's pleas because the military judge properly explained every element of Article 121, UCMJ. 74 M.J. 302, 308 (C.A.A.F. 2015). Despite the fact that the military judge erred in failing to read a supplemental definition of "explosive" as set out in two statutes explicitly incorporated into R.C.M. 103(11), the *Murphy* court concluded that there was no abuse of discretion in accepting the pleas because "it [was] clear from the entire record that the accused knew the elements [of Article 121], admitted them freely, and pleaded guilty because he was guilty." *Id.* (quoting *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992)).

As in *Murphy*, Appellant was properly informed of every element of the statute and the statutory definitions for bodily harm and consent. (J.A. 75-76.) After consultation with his Defense Counsel as to these two terms, he agreed his conduct satisfied these elements, and pled guilty to sexual assault. (J.A. 83-84.) Appellant admitted none of the women would have had sex with him had they known he was HIV positive. (R. 305.) Appellant agreed he informed no Victim

he was HIV positive. (J.A. 83, 250-53.) He agreed that failure was "wrongful" and "unlawful." (J.A. 83, 250-53.) The Providence Inquiry, Stipulation of Fact and Appellant's own statements establish that his failure to inform the Victims "caused" the "offensive touching." Appellant repeatedly agreed that his actions, failure to inform, caused the "bodily harm." (J.A. 79; 83-84; R. 116, 119, 305.)

The Military Judge did not abuse her discretion accepting his pleas.

2. The Military Judge ensured Appellant knowingly and voluntarily agreed to the charges and pleas by discussing this Court's *Gutierrez* holding and service court precedent pertaining to assault through lack of informed consent.

Appellant had a clear and correct understanding of the legal definitions underlying his sexual assault offenses, and was advised that *Gutierrez* supported his decision to plead guilty. (J.A. 79.) Rather than contest *Gutierrez* as a theory of culpability, Appellant admitted he "carr[ied] HIV" and "was HIV positive," and pled guilty to sexual assault by means of securing consent through non-disclosure of his sexually transmitted virus. (J.A. 65, 78-79; 83-84, 250-51; R. 116, 119).

But unlike in *Murphy* where the judge did not supplement the statutory definitions of "explosive", the Judge here cited and explained *Gutierrez* to Appellant. (J.A. 78.) This Court held that "bodily harm" included "an offensive touching to which . . . sexual partners did not provide meaningful informed consent." *Gutierrez*, 74 M.J. at 68 (internal citation omitted); *see United States v. Allbery*, 44 M.J. 226, 228 (C.A.A.F. 1996) (lower courts are not free to ignore

precedent). Rather than avoiding relevant information, the Judge here properly informed Appellant of precedent.

E. Appellant's speculative argument, suggesting that Article 120 requires "touching with the HIV virus" to cause a separate sexual act, fails.

"'[C]ourts must give effect to the clear meaning of statutes as written' and questions of statutory interpretation should 'begin and end . . . with statutory text.'" *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (quoting *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017)). "The role of this Court is to apply the statute as written—even if we think some other approach might accord with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014). "The plain language of a statute will control, unless use of the plain language would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007).

1. Nothing in the statute requires the "bodily harm" to be the HIV virus itself, rather than the lack of informed consent to the risk of transmission.

Article 120 permits charging sexual assaults where a person "commits a sexual act . . . by—(b) causing bodily harm." (*See* II.C, *supra*.) Bodily harm includes nonconsensual sexual acts. Art. 120(g)(3). And "consent" requires "freely given agreement" and is assessed by "all the surrounding circumstances." Art. 120(g)(8). This Court has held that "the statutory phrase 'freely given agreement' reflects the voluntariness aspect of consent.'" *United States v. Pease,*

75 MJ 180, 185 (C.A.A.F. 2016).

Although Appellant now argues that the "offensive touching" at trial was more appropriately "touching with the HIV virus" rather than the nonconsensual touching he pled to at trial, he points to nothing in the statute that requires this. (Appellant Br. at 4.) Not only does the Record reflect that Appellant believed the bodily harm was a "nonconsensual sex act," (J.A. 75), but Appellant also pled guilty to "engaging in [the sexual] act without previously informing [the Victim] that he carries the Human Immunodeficiency Virus." (J.A. 58; 276-88.) Appellant admitted the Victims were "not able to provide . . . meaningful consent" because he "[did not] inform [the Victims] of [his] HIV status prior." (J.A. 83, 86; R. 116, 119.) As argued above, Appellant waived his factual dispute on appeal that it was "touching with the HIV virus" that was the bodily harm, rather than the failure to inform that he agreed was factually true in his Stipulation of Fact and his statements in his Providence Inquiry. *See supra* at 10-11.

Finally, Appellant points to nothing in *Gutierrez* or his Providence Inquiry or charges that demonstrate any substantial basis to dispute his admissions at trial as to what the "bodily harm" was. *Gutierrez* held the offensive touching was "his sexual partners did not provide meaningful consent." 74 M.J. at 68. *Gutierrez* never mentioned "touching with the HIV virus." (Appellant Br. at 4.)

Nothing in Article 120 requires the bodily harm be "touching with the HIV

virus." Appellant's argument should be rejected.

2. Nothing in Article 120 prevents charging the same act as both bodily harm and the sexual act.

Words and phrases in the Code are interpreted by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context. *See United States v. Schloff*, 74 M.J. 312, 314 (C.A.A.F. 2015); *see also Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). "The plain language of a statute will control, unless use of the plain language would lead to an absurd result." *Lewis*, 65 M.J. at 88.

Nothing in Article 120 precludes the bodily harm and sexual act from being the same act. Nor has application of similar statutory language required otherwise. *See Gutierrez*, 74 M.J. at 68 (sexual act itself is the bodily harm); *United States v. Guin*, 75 M.J. 588, 592-93 (N-M. Ct. Crim. App. 2018), *rev. denied*, 75 M.J. 367 (C.A.A.F. 2016) (same). Indeed, the plain language of Article 120(b)(1) supports that "by" should be interpreted contextually similar to how "with" or "by" is generically used: as the "means" by which an Article 120(b)(1) crime is committed. *E.g.,* Art. 120c(a) ("photographs, videotapes, films, or records *by any means"*); Art. 125 ("unnatural carnal copulation . . . *by* unlawful force or without the consent of the other person"); Art. 128 ("assault *with* a dangerous weapon or other means or force").

Where the same act is alleged as both sexual act and bodily harm—there

need not be a self-causation requirement, and any such requirement by appellate courts would lead to absurd results. Such an interpretation would require the nonconsensual nature of the sexual act to have "caused" the sexual act, rather than be the "means" by which the sexual act was accomplished.

Appellant's sexual assault Specifications alleged the sexual act itself, along with failing to inform he carried HIV, as the bodily harm. (J.A. 58.) Appellant's causation argument fails.

3. Even accepting that (i) the sexual act and bodily harm must be separate, (ii) the bodily harm is the "touching with the HIV virus," and (iii) the HIV "touching" must cause a subsequent sexual act, Appellant merits no relief. Once Appellant began the sexual act, subjecting the Victims to HIV infection, *Pease* supports the remaining sexual act was involuntary, nonconsensual, and chargeable.

This Court in *Pease,* as noted above, held that "freely given agreement" incorporates voluntariness. 75 MJ at 185.

Even accepting Appellant's strained theory on appeal that Article 120 could only be satisfied by bodily harm through literally "touching [the Victims] with the HIV virus," the sexual act that transpired *after* the initial "touching with HIV" was indisputably involuntary, nonconsensual, and a direct result of the initial "touching." Any other reading of Article 120 would preclude prosecuting sexual assaults resulting from nondisclosure of infected status, and would lead to an absurd result. (Appellant Br. at 4-5); *Lewis*, 65 M.J. at 88.

F. Appellant's claim that he had "no HIV virus present" should be rejected.

1. Appellant's insertion-by-fiat of rejected facts into the Joint Appendix to support his factual argument that he had "no viral load" should be rejected.

"If a post-trial allegation of fact covers a matter within the record . . . and no reason is proffered for rejecting the earlier contrary assertion . . . the allegation can be summarily rejected as inherently incredible, and no hearing need be ordered." *United States v. Ginn*, 47 M.J. 236, 245 (C.A.A.F. 1997). "When an appellate claim . . . contradicts a matter that is within the record of a guilty plea, an appellate court may decide the issue on the basis of the appellate file and record." *Ginn*, 47 M.J. at 248. Additionally, when the record as a whole "compellingly demonstrate[s]" the improbability of a claim, this Court may discount those factual assertions. *Id.*

The lower court rejected Appellant's motion to attach the studies he relies on to argue that it was "impossible" that he "plac[ed] some amount of the HIV virus inside [the Victims]" because he viral load was undetectable. (Appellant Br. at 6.) A post-trial evidentiary hearing is not required because this case meets the fourth and fifth *Ginn* factors.

Here, not only does the claim that Appellant had no HIV virus in his body contradict the Stipulation of Fact and his statements during the Providence Inquiry, but also the Record as a whole also demonstrates the improbability of such a claim.

See supra at 10-11, *infra* at 21-23. Appellant's continued attempt to dispute the established Record with extra-record facts should be rejected.

2. As Charge III was conditionally dismissed, his argument that he could not commit assault consummated by a battery is moot.

An issue is moot when any action by an appellate court "would not materially alter the situation presented" with respect to the parties. *United States v. Datavs*, 71 M.J. 420, 426 (C.A.A.F. 2012) (citation omitted).

Appellant claims there was "no HIV virus present in his bodily fluids. He therefore could not commit *assault consummated by battery*." (Appellant Br. at 5-6) (emphasis added). Appellant cites Article 128, UCMJ, for the proposition that "[a]n offensive touching must occur in order for an appellant to be guilty of assault consummated by a battery." (Appellant Br. at 6.)

But Charge III, assault consummated by battery, was conditionally dismissed. (J.A. 58-59, 279; R. 147.) Appellant's argument is moot.

3. Appellant's claim he did not carry HIV, raised for the first time on appeal, fails to raise more than a mere possibility of an inconsistency for three reasons.

If an accused raises matters inconsistent with a guilty plea, the military judge must either resolve the apparent inconsistency or reject the plea. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006) (internal quotations omitted). "A 'mere possibility' of such a conflict is not a sufficient basis to overturn the trial results." *Id*. (*quoting United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

First, Appellant errs in claiming he had "no viral load and therefore no HIV virus present in his bodily fluids." (Appellant Br. at 5-6.) Appellant points to a single test in which his levels of the HIV virus were undetectable. (J.A. 179; Appellant Br. at 6.) But Appellant's physician testified that "about seven other times he [had] a detectable viral load." (R. 272.)

Appellant also points to a test during an inapplicable timeframe—December, 2013. Appellant pled guilty to sexually assaulting the first Victim in April, 2013. (J.A. 251.) That same month, he had detectable levels of HIV in his viral load. (J.A. 191.) Appellant also pled guilty to sexually assaulting the second Victim in April, 2014, during which time his viral load was "above the lower limit of detection." (J.A. 251, 175.) The chance that his Victims may, from time to time, have been less likely to contract HIV themselves raises only a mere possibility of inconsistency—and in any case does not conflict with theory of uninformed consent that he pled guilty to.

Second, the studies Appellant cites to argue that anti-retroviral treatment (ART) "completely suppresses the HIV virus," are inapplicable to Appellant and do not support his claim. (Appellant Br. at 6.) Both citations reference a possible 96% reduction in transmission with use of ART in certain case studies. (J.A. 258, 264.) Neither source supports that ART "completely suppresses the HIV virus" in everyone, much less Appellant. (Appellant Br. at 6.)

Finally, Appellant misreads *Gutierrez*. *Gutierrez* does not support that bodily harm comes from "placing some amount of the HIV virus inside that other person." (Appellant Br. at 6.) Instead, *Gutierrez* holds that a failure to inform a sexual partner of an HIV status can constitute bodily harm or an offensive touching. 74 M.J. at 68. *Gutierrez* does not refer to actual transferring the HIV virus to another person.

Appellant fails to show even a mere possibility of an inconsistency. The Military Judge did not abuse her discretion in accepting his guilty plea.

Conclusion

This Court should affirm Appellant's dishonorable discharge and hold his pleas were provident.

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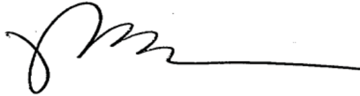

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I certify that a copy of the foregoing was delivered electronically to the Court and opposing counsel on October 25, 2018.

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