IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	REPLY TO GOVERNMENT'S ANSWER TO PETITION FOR
v.	)	RECONSIDERATION
	)	
David A. GUTIERREZ	)	Crim. App. Dkt. No. 37913
Technical Sergeant (E-6)	)	
U.S. Air Force,	)	USCA Dkt. No. 13-0522/AF
Appellant	)	

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

Pursuant to Rule 31(c) of this Court's Rules of Practice and Procedure, Appellant respectfully submits this Reply in order to highlight three reasons why the Government's Answer compels this Court to grant Appellant's petition.

1. The Government clings to a *sui generis* standard.

This Court's opinion held that "in cases involving HIV exposure, 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." __ M.J. at __ (15). Yet the Government's Answer asserts that:

> Appellant's victims had absolutely no idea Appellant was infected with a deadly, incurable, sexually transmitted disease. Exposure to a disease that would be a death sentence, no matter how low the risk, cannot be termed "collateral."

Gov't Ans. at 6.

The Government's argument does not turn on the likelihood that any of Appellant's sexual partners might have contracted HIV (for the Government plainly disclaims any consideration of the risk of transmission). Instead, the Government clings to the very notion that this Court rejected in this case: that prosecutions under Article 128 involving HIV exposure should be treated differently simply because they involve HIV exposure.

By rhetorically equating any HIV exposure to a sentence to death, the Government obfuscates the crucial detail that "on a long enough time line, everyone's survival rate drops to zero." Chuck Palahniuk, Fight Club 176 (W. W. Norton & Co., 1996). Yet it is Appellant's position that if the circumstances of a particular exposure to HIV are not likely to produce death or grievous bodily harm, then mere exposure is insufficient to constitute any violation of Article 128.

Appellant's position was recognized by the Army Court of Military Review when that court found a conviction of assault consummated by a battery legally insufficient because the Government failed to prove a sufficient likelihood of transmission of HIV. United States v. Perez, 33 M.J. 1050, 1053 (A.C.M.R. 1991). This Court should adopt the same reasoning, disabuse the Government of its *sui generis* standard in cases involving HIV exposure, and grant Appellant's petition.

2. The Government opens Pandora's Box.

By untethering HIV exposure from the risk of actual transmission, the Government's Answer opens a Pandora's Box of consequences. The proposition that Appellant's sexual partners did not consent because exposure to HIV cannot be termed collateral "no matter how low the risk," Gov't Ans. at 6, allows the Government to prosecute an accused in the position of Appellant for sexual assault on the basis that a nonconsensual sexual act constitutes bodily harm. See Article 120(b)(1)(B). See also Article 120(g)(3) ("The term 'bodily harm' means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact."). Similarly, by disregarding the risk of transmission, the Government's Answer foretells Article 128 prosecutions of HIV-positive service members for unwarned contact with others where the risk of transmission is zero, such as a handshake. In these ways, the Government will misuse the language of this Court's decision to criminally stigmatize persons infected with HIV even when their conduct does not risk transmission of the virus.

Because Appellant's actions were not likely to transmit HIV, his partners were legally capable of consenting to those actions, as they did. This Court should grant Appellant's petition and make this conclusion clear.

3. The Government presumes an element.

The offense of assault consummated by a battery in violation of Article 128 has two elements:

> (a) That the accused did bodily harm to a certain person; and
>
> (b) That the bodily harm was done with unlawful force or violence.

Manual for Courts-Martial, United States, pt. IV, para. 54.b.(2). Even if mere exposure to HIV – untethered from any likelihood of transmission – is bodily harm sufficient to sustain a conviction of assault consummated by a battery, the Government's Answer presumes from such harm the element of unlawful force or violence.

Appellant did not disguise his identity or trick his sexual partners into believing that they were joining him in activities other than protected oral sex,[1] unprotected oral sex, protected vaginal sex, and unprotected vaginal sex. Nor did Appellant overpower his partners or render them incapable of declining participating in the sexual acts. Appellant merely engaged in sexual activities with people who undisputedly wanted to engage

[1] After the Government's expert testified at trial that there was zero risk of HIV transmission during protected oral sex, Appellant was acquitted of any violation of Article 128 related to this activity. However, by untethering exposure from the risk of transmission, the Government's reasoning would compel a conviction of the lesser included offense of assault consummated by a battery.

in those activities with him at the time, and who communicated their desires to him in unambiguous terms.

The Government highlights that "Appellant failed to inform his victims that he was infected with HIV." Gov't Ans. at 6. Yet the mere failure to speak about something not likely under the circumstances to produce death or grievous bodily harm does not amount to the use of unlawful force or violence.[2] This is true whether the undisclosed fact involves lineage, political affiliation, marital status, general knavery, or HIV.

This Court should grant Appellant's petition to settle this important point by vacating that portion of its decision affirming convictions of assault consummated by a battery as lesser included offenses of the charged offenses of aggravated assault, and remand the case to the Court of Criminal Appeals for further proceedings. In the alternative, Appellant moves that this Court invite further briefing on the issue of whether the evidence presented at trial is legally sufficient to affirm convictions of assault consummated by a battery.

[2] It was, in this case, in violation of a lawful order, for which Appellant was convicted of a violation of Article 92. Appellant has not challenged that conviction on appeal.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director Air Force Government Trial and Appellate Counsel Division, on March 12, 2015.

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