10 March 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	GOVERNMENT'S ANSWER TO PETITION FOR RECONSIDERATION
v.	)	
	)	Crim. App. No. 37913
Technical Sergeant (E-6) DAVID J.A. GUTIERREZ, USAF *Appellant.*	)	USCA Dkt. No. 13-0522/AF

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

COMES NOW the United States, and pursuant to Rule 31(b) of this Honorable Court's Rules of Practice and Procedure, submits this answer to Appellant's Petition for Reconsideration.

SUMMARY OF THE ARGUMENT

The United States opposes Appellant's petition for reconsideration. This Court fully considered the issues raised by Appellant when previously deciding Appellant's case. Appellant was granted significant relief when this Court reversed Appellant's conviction for aggravated assault. Furthermore, this Court properly applied the law by considering and affirming the lesser included offense of assault consummated by a battery. As such, Appellant has failed to establish good cause to grant his petition for reconsideration.

ARGUMENT

Law and Analysis

1. This Court properly considered and affirmed the lesser included offense of assault consummated by a battery.

Article 79, UCMJ, provides that an accused "may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charges or an offense necessarily included therein." Article 59(b), UCMJ, provides that "any reviewing authority with the power to approve or affirm findings of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense." This Court has repeatedly made clear that "appellate courts have *authority to set aside a finding of guilty and affirm only a* finding of a lesser-included offense." United States v. Riley, 50 M.J. 410, 415 (C.A.A.F. 1999).

Appellant argues that he stands convicted of "offenses based on a legal theory not presented at trial." (App. Pet. at 1.) However, Appellant neglects clear precedent that this Court may substitute a lesser included offense for disapproved findings "even if the lesser-included offense was neither considered nor instructed upon at the trial of the case." United States v. Upham, 66 M.J. 83, 88 (C.A.A.F. 2008) (quoting United States v. McKinley, 27 M.J. 78, 79 (C.M.A. 1988)). Therefore, after it found Appellant's conviction for aggravated assault legally insufficient, this Court clearly had the authority to consider and substitute a lesser included offense

for the disapproved findings and properly did so in this case.

Appellant's argument centers on the idea that "the issue of consent was not litigated at trial." (App. Pet. at 2.) As Appellant's argument would apply to any case where an accused is charged with aggravated assault, Appellant's argument must be that assault consummated by a battery is not a lesser included offense of aggravated assault. A review of the elements of the two offenses quickly demonstrates that Appellant's argument is misplaced.

Appellant was convicted of offenses including aggravated assault in violation of Article 128, UCMJ, the elements of which are:

> (1) That...Appellant did bodily harm to [victims];
>
> (2) That Appellant did so by engaging in protected/unprotected oral sodomy and/or vaginal intercourse with [victims] without informing [victims] that Appellant was infected with the Human Immunodeficiency Virus (HIV);
>
> (3) That the bodily harm to [victims] was done with unlawful force or violence; and
>
> (4) That the means were used in a manner likely to cause death or grievous bodily harm.

D.A. PAM. 27-9, 2010 Edition, § 3-54-8.[1] The elements of assault consummated by a battery, as applied to Appellant's case, are:

[1] Appellant was convicted of six specifications of aggravated assault, all of which alleging Appellant engaged in oral sodomy and/or vaginal intercourse with victims without informing them that he was infected with HIV.

(1) That...Appellant did bodily harm to [victims];

(2) That Appellant did so by engaging in protected/unprotected oral sodomy and/or vaginal intercourse with [victims] without informing [victims] that Appellant was infected with the Human Immunodeficiency Virus (HIV); and

(3) That the bodily harm to [victims] was done with unlawful force or violence.

D.A. PAM. 27-9, 2010 Edition, § 3-54-8.

"The due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted; an LIO meets this notice requirement if 'it is a subset of the greater offense alleged.'" United States v. Jones, 68 M.J. 465, 468 (C.A.A.F. 2010) (quoting United States v. Medina, 66 M.J. 21, 26-27 (C.A.A.F. 2008). Further, "[t]he Constitution requires that an accused be on notice as to the offense that must be defended against, and that only lesser included offenses that meet these notice requirements may be affirmed by an appellate court." Id. (internal quotations removed). There can be no question Appellant was on notice at trial that assault consummated by a battery was a lesser included offense of aggravated assault, and an offense of which he could have been convicted. The United States is hard pressed to think of a situation where an offense is more clearly a "subset of the greater offense alleged" than

here, where the elements of assault consummated by a battery are identical with the first three elements of the greater offense, aggravated assault. As such, after finding Appellant's conviction for aggravated assault legally insufficient, this Court was correct in its unanimous decision to consider and affirm the lesser included offense of assault consummated by a battery.

2. This Court properly analyzed consent in affirming the lesser included offense of assault consummated by a battery.

"Fraud in the inducement does not necessarily invalidate consent, especially in a simple assault and battery situation, whereas fraud in the *factum* goes to the heart of the nature of consent, and will invalidate any consent so given." United States v. Outhier, 45 M.J. 326, 330 (C.A.A.F. 1996). Appellant argues that this Court overlooked "the distinction between fraud in the factum and fraud in the inducement." (App. Pet. at 6.) However, Appellant's argument ignores the facts of this case and evinces a fundamental misunderstanding of the full breadth of the case law regarding consent by fraud.

In his petition, Appellant states "[i]t is undisputed that Appellant engaged in sexual activity with willing adults who understood the nature of the acts (unprotected oral sex, protected vaginal sex, and unprotected vaginal sex) and knew the identity of Appellant." (App. Pet. at 5.) However, this only

tells part of the story. It is also undisputed that Appellant failed to inform his victims that he was infected with HIV.

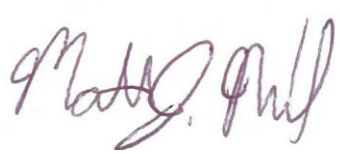
"The general rule is that if deception causes a misunderstanding as to the fact itself (fraud in the *factum*) there is no legally-recognized consent because what happened is not that for which consent was given; whereas consent induced by fraud is as effective as any other consent, so far as direct and immediate legal consequences are concerned, if the deception relates not to the thing done but merely to some **collateral matter** (fraud in the inducement)." Outhier, 45 M.J. at 330 (quoting R. Perkins R. Boyce, Criminal Law 155 (3d ed. 1982)) (emphasis added). 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." Therefore, as this Court unanimously and correctly held, "[Appellant's] sexual partners did not provide meaningful consent." United States v. Gutierrez, __ M.J. __, slip op. at 17 (C.A.A.F. 2015).[2]

CONCLUSION

WHEREFORE, the United States respectfully requests this

[2] Appellant provides this Court with a survey of Canadian law. However, this Court need look no further than its own precedent as well as the service courts to see that it is well settled that "the ability to place the HIV-virus in the body of an unaware victim" is an offensive touching and can form the basis of an assault conviction under Article 128. United States v. Perez, 33 M.J. 1050, 1053 (A.C.M.R. 1991).

Honorable Court deny Appellant’s petition for reconsideration.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 10 March 2015.

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