

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	ASSIGNMENT OF ERRORS AND
<i>Appellee</i>)	BRIEF ON BEHALF OF APPELLANT
)	
v.)	Before Panel No.
)	Case No. ACM 37913
Technical Sergeant (E-6))	
DAVID J.A. GUTIERREZ,)	Tried at McConnell AFB, Kansas 18-19
USAF)	January 2011, before a general court-
<i>Appellant.</i>)	martial convened by HQ 18 AF/CC (AMC)

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS:

Issues Presented

I.

WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL DEFENSE COUNSEL REFUSED FREE EXPERT ASSISTANCE THAT WOULD HAVE PROVIDED A VALID DEFENSE TO CHARGE III.

II.

WHETHER THE EVIDENCE WAS FACTUALLY AND LEGALLY SUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ASSAULT LIKELY TO CAUSE GRIEVOUS BODILY HARM.

III.

WHETHER THE EVIDENCE WAS FACTUALLY AND LEGALLY SUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ADULTERY.

IV.

WHETHER CHARGE IV FAILS TO STATE AN OFFENSE UNDER ARTICLE 134 DUE TO ITS FAILURE TO ALLEGE ANY OF THE TERMINAL ELEMENTS.

V.

WHETHER APPELLANT'S CONVICTION FOR INDECENT ACTS UNDER CHARGE II MUST BE SET ASIDE AS HIS CONDUCT FALLS WITHIN THE CONSTITUTIONALLY PROTECTED LIBERTY INTEREST UNDER *LAWRENCE v. TEXAS*, 539 U.S. 558 (2003).

Statement of the Case

On 18-19 January 2011, Appellant was tried at a general court-martial by a military judge sitting alone at McConnell AFB, Kansas. He was charged with violations of Article 92 (violating a lawful order), Article 120 (indecent act), Article 128 (10 specifications), and Article 134 (eight adultery specifications). He pled not guilty, and was found guilty of all of the charges except for some exceptions and substitutions on the Article 92 specification (four victims rather than 11) and two of the 10 Article 128 charges (Specifications 7 and 8), which were withdrawn after arraignment. All of the charges stemmed from Appellant engaging in sexual relations without informing his partners that he had tested positive for the Human Immunodeficiency Virus (HIV).

Appellant was sentenced to a reduction to E-1, eight years' confinement, total forfeitures, and a dishonorable discharge. R. at 267. On 27 April 2011, the convening authority approved the findings and sentence as adjudged.

Statement of Facts

a. Introduction

Appellant, with the express consent and involvement of his spouse, Gina Gutierrez, engaged in a "swinger's lifestyle" while assigned to McConnell AFB. Using the Web and personal contacts, Appellant and his spouse engaged other consenting adults, none of whom were active duty personnel, to participate in sexual activity at various locations in Kansas from 1 January 2009 through 9 August 2010. Such acts occurred in the presence of others although at no time on any military installation or in the presence of any non-consenting adult or minor. Appellant had been previously informed that he

had tested positive for the Human Immunodeficiency Virus (HIV). His commander ordered him not to engage in sexual activity without using protection and informing his sexual partners. Yet Appellant did not inform his partners and, on occasion, failed to use protection.

b. Pretrial

On 29 October 2009, Appellant's commander advised him that a test that he had taken at his prior duty station, Aviano AB, Italy, was positive for HIV. R. at 51. His commander ordered him, per AFI 48-135, to cease sexual relationships unless he informed his partner of the test results and used a condom. Appellant signed an acknowledgement of the order. R. at 53.

Despite this order, Appellant engaged in sexual conduct, including sexual intercourse, with the various partners identified in the charge sheet. At no time did he inform any partner of the test results.

During July 2010, Appellant's spouse contacted the McConnell AFB Staff Judge Advocate regarding her husband's activities. The SJA referred the matter to AFOSI. R. Vol. II, Article 32 Report, Ex. 28. The investigation conducted by AFOSI entailed use of civilian search warrants to seize evidence from Appellant's off-base home and numerous interviews conducted of individuals who had purportedly engaged in sexual conduct with Appellant. On or about 9 August 2010, Appellant was apprehended and placed in pretrial confinement until his trial on 18-19 January 2011. In due course, word of the investigation became public knowledge and the investigation, charges, and court-martial engendered significant national media interest. R. Vol. I, 1105 submission, Enclosure 2.

Appellant was assigned as his defense counsel Maj James R. Dorman, Senior Defense Counsel at Tinker AFB, OK, who in turn detailed Capt Aaron M. Maness, Area Defense Counsel at Whiteman AFB, MO. On or about 14 September 2010, Capt Maness began an e-mail and telephonic communication with Clark Baker, director of the Office of Medical and Scientific Justice, Inc., located in Studio City, CA. R. Vol. I, 1105 submission, Enclosure 12. This non-profit organization, among

other endeavors, provides assistance to defendants and defense counsel facing HIV-related charges. This assistance includes providing learned counsel and medical experts free of charge. Mr. Baker conveyed to Capt Maness that such services would be made available upon Appellant's request. Moreover, Mr. Baker identified experts and counsel who would be made available to Appellant. Mr. Baker's potential issues included chain of custody flaws relating to collection and storing of blood samples and flaws in the testing process and in the underlying science relating to HIV identification and testing. R. Vol. I, 1105 submission, Enclosure 9.

On 20 September 2010, charges were preferred against Appellant.

On 5 October 2010, an Article 32 hearing was conducted and on 13 October 2010, the Investigation Officer's Report was completed, generally recommending forwarding the charges. Charges were referred against Appellant on 19 October 2010. None of the specifications under Charge IV contained the terminal element of Article 134.

On 23 November 2010, trial defense counsel for Appellant submitted a motion requesting the military judge order the release of Appellant prior to trial. On or about 15 December 2010, the military judge denied the motion.

On 10 January 2011, Capt Maness informed Mr. Baker that his organization's services would not be required. R. Vol. I, 1105 submission, Enclosure 12.

On 18 January 2011, the court-martial of Appellant commenced. The defense submitted and argued a motion to dismiss for the failure to state an offense. The essence of the motion was a request to dismiss Charge III and its specifications under a privacy theory emanating from *Lawrence v. Texas*, 539 U.S. 558 (2003). Despite invitation by the military judge's suggestion that this motion might apply to the other charges, trial defense counsel declined to expand the scope of the motion. R. at 16. The military judge denied the motion. R. at 23.

c. Synopsis of Court Martial

Testimony offered by the Government in its case in chief lasted throughout the first day of the court-martial and the majority of the morning of 19 January 2011. The Government called Maj Christopher Hague, Appellant's squadron commander. He testified regarding the order on 29 October 2009 and that Appellant acknowledged the order in his presence. R. at 53.

The Government next called a series of witnesses who had engaged in sexual conduct with Appellant in 2009-10. Mary Elaine Hammons testified to engaging in oral sex on one occasion with the use of a condom. R. at 58. This was during the New Year's Eve 2009 timeframe and the condom did not break. R. at 60. Appellant's wife was present and they both denied having any sexually transmitted diseases (STDs). R. at 58. Ms. Hammons has since tested negative for HIV. R. at 60.

Valerie Warden testified to at least two occasions of unprotected vaginal sex in 2009 with Appellant. Appellant and his wife denied any STDs and Ms. Warden has since tested negative for HIV. R. 66, 72.

Carla Luce had unprotected oral and vaginal sex with Appellant in late 2009 and early 2010. R. at 74, 76-77. Appellant denied having STDs when he was asked. R. at 82. Appellant's wife freely engaged in the conduct. R. at 85. Ms. Luce did not know at the time that Appellant was in the military. She learned of that fact later, but his military status did not make her think less of him. R. at 86. Ms. Luce has since tested negative for HIV. R. at 86.

Dorcus Clark met Appellant and his wife in late 2009. Appellant and Ms. Clark engaged in protected oral and vaginal sex in Appellant's wife's presence. Mrs. Gutierrez told Ms. Clark that she had been living the swinger lifestyle for 20-30 years before meeting Appellant. R. 91, 94. Appellant denied having STDs, which Ms. Clark believed, in part, because he was in the military. R. 91-92. Ms. Clark has since tested negative for HIV. R. at 93.

Patricia Bender testified that she met Appellant and his wife in late 2009. She had unprotected oral and vaginal sex with Appellant. R. at 101, 102. Ms. Bender knew that Appellant's wife was a registered nurse and assumed, because of her profession, that she and Appellant would not engage in unprotected sex if they had any STDs. R. at 102. Further, Appellant never told her that he was infected. R. at 102. Ms. Bender has since tested negative for HIV. R. at 104.

Deana Seigal testified that she met Appellant and his wife in late 2009. She had unprotected sex with Appellant on at least two occasions in the presence of Appellant's spouse and a third person. R. at 107. Appellant never revealed his HIV status. She knew Appellant was in the military, and testified that she does not think any less of the military because of Appellant's lifestyle. Ms. Seigal has since tested negative for HIV. R. at 114.

Heather Dick and her husband Robert met Appellant and his wife in May 2009. She never had any sexual contact with Appellant. She learned of Appellant's HIV status when she happened upon the test results in the glove box of Mrs. Gutierrez's car. R. at 120. Robert Dick denied sexual contact with Appellant but confirmed observing Appellant engaged in sexual conduct with Ms. Luce and Ms. Warden. R. at 126. Appellant and his wife denied his HIV status when confronted. Mr. Dick testified that Mrs. Gutierrez supported Appellant's swinger lifestyle. R. at 142.

Pamela Testerman testified that she and her husband met Appellant and his wife in late 2009. Ms. Testerman had protected sex with Appellant on one occasion, and she did not believe that he ejaculated. R. at 155. Appellant never told her that he had tested positive for HIV. She has since tested negative for HIV. R. at 157.

The Government's sole witness during the second day of its case-in-chief was Donna Sweet, M.D. She testified that she has been a physician since 1982 and has been involved with HIV and AIDS cases since 1983. She currently has 1,100-1,200 patients under her care. She was recognized as an

expert in “the field of HIV medicine” without objection from the defense. R. at 161, 162.

Dr. Sweet next provided a general discussion of HIV, testing and treatment. She testified that a weakened immune system compels a lifelong commitment to a “cocktail” of drugs that costs between \$1,700-1,800 per month not including monitoring costs. R. at 173. She addressed her review of Appellant’s medical records and determined that his viral load was “relatively low” and that his infectiousness was “on the low end.” R. at 175-76. During the charged timeframe, his viral load would have provided “almost zero” chance of infection through oral sex, even without a condom. R. at 177. When Appellant had unprotected vaginal sex, the risk of infection was only 2-3 percent. R. at 179.

On cross-examination, Dr. Sweet testified that Appellant’s viral count provided a 1/10,000 to 1/100,000 chance in infecting a partner through unprotected intercourse. R. at 183.

At no time was Dr. Sweet asked whether Appellant was HIV positive. She was never asked to confirm the chain of custody or to identify the manufacturer of the test indicating that Appellant was HIV positive. Further, she never volunteered that she was Appellant’s treating physician.

There was no stipulation that Appellant was HIV positive.

Trial defense counsel defense offered no case-in-chief.

There is no record that trial defense counsel requested an HIV expert. Neither did the defense request Appellant’s medical records, e.g., to examine the chain of custody for the positive test results.

d. Post-trial

While confined at Fort Leavenworth, Appellant met Mr. Baker and discussed the assistance Mr. Baker had offered Appellant through his military defense counsel. The extent of his offer had not been conveyed to Appellant. In fact, his defense counsel told him that Mr. Baker and his organization were frauds and that both would quit if Appellant accepted Mr. Baker’s assistance. R. Vol. I, 1105 submission, Enclosure 12.

Appellant accepted Mr. Baker's services after trial, and authorized the release of his medical records, to include those released to the Government from Dr. Sweet's office. Mr. Baker had Appellant's medical records reviewed by Dr. Rodney Richards, a chemist and expert in HIV testing. His review of the records led him to the conclusion that Appellant was not HIV positive. Dr. Richards noted a distinctive lack of documentation relating to chain of custody and safeguards to ensure accurate results as to the original test results from the sample taken at Aviano. Moreover, he noted that this sample was being used as the basis for subsequent confirmations of his HIV positive status. It would appear that Appellant's status had been assumed from 2007 and never reconfirmed beyond testing to check his viral load levels which, in Dr. Richards's opinion, is not an accepted method of confirming the existence of HIV. Dr. Richards also highlights the fact that HIV testing does not test for HIV but for HIV antibodies or DNA fragments. There is nothing on the market that tests for a complete HIV DNA strand. Dr. Richards also noted that the records do not reflect the manufacturer of the test kits. The FDA has recalled certain tests kits that have been widely used in the public sector. In sum, Dr. Richards found that there was no evidence to confirm Appellant's HIV positive status. R. Vol. I, 1105 submission, Enclosure 8.

Mr. Baker also enlisted Dr. Nancy Banks, a Harvard-educated medical expert in the field of STDs. She has researched and written extensively on the topic of HIV diagnostic testing. In addition to reviewing Appellant's medical records, Dr. Banks reviewed Dr. Sweet's testimony, and provided her opinion into the nature of cross-examination to which Dr. Sweet should have been subjected had she been cross-examined by reasonably effective counsel. Moreover, she notes that even if a test kit properly approved by the FDA was used, such tests are susceptible to false reactions for a variety of reasons, particularly vaccinations. This fact is particularly germane because Appellant's records reflect in excess of 40 vaccinations, 17 of which were administered roughly at the same time he was subjected

to the initial test and follow-up viral load test. R. Vol. I, 1105 submission, Enclosure 11.

In light of these factors, Dr. Banks concluded that Appellant could not be considered HIV positive to a reasonable medical or scientific certainty. R. Vol. I, 1105 submission, Enclosure 7.

In an effort to assist Appellant in the preparation of post-trial clemency, Appellant sought to obtain information from his trial defense counsel as to the efforts made to develop a trial strategy. Trial defense counsel chose not to cooperate. R. Vol. I, 1105 submission, Enclosure 4, 5.

Argument

I.

APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN TRIAL DEFENSE COUNSEL REFUSED FREE EXPERT ASSISTANCE THAT WOULD HAVE PROVIDED A VALID DEFENSE TO CHARGE III.

Standard of Review

Allegations of ineffective assistance of counsel are mixed claims of law and fact, and are to be reviewed de novo. *United States v. Hicks*, 52 M.J. 70, 72 (C.A.A.F. 1999); *United States v. Smith*, 44 M.J. 459, 460 (C.A.A.F. 1996).

Analysis

The United States Supreme Court has repeatedly emphasized the “fundamental” role of counsel in ensuring a defendant a fair trial. *See, e.g., United States v. Cronin*, 466 U.S. 648 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). The Court has stated that all other rights of a defendant at trial are secured by counsel. *Cronin*, 466 U.S. at 653. This central pillar of our adversarial system would be meaningless if counsel performs incompetently. Hence, if counsel fails to provide adequate representation, there is no assurance the adversarial process has produced a just result. *Strickland v. Washington*, 446 U.S. 668 (1984). It is for this reason the Supreme Court has

held the right to counsel necessarily encompasses “the right to the effective assistance of counsel.”

McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

A claim of ineffective assistance of counsel must be resolved by examining the facts in light of the principles enunciated by the Supreme Court in the two-pronged standard of *Strickland*. See also *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). In *Strickland*, the Court stated counsel is constitutionally ineffective if counsel’s conduct so undermined the proper functioning of the adversarial process that one cannot rely upon the trial as having produced a just result. *Id.* at 668. *Strickland* is satisfied if a defendant establishes both that his representation “fell below an objective standard of reasonableness,” *id.* at 688, and that he was “prejudiced” by his attorney’s substandard performance. *Id.* at 692.

a. Sub-Standard Performance

In order to make the first determination, the proper inquiry is whether counsel’s conduct fell below an objective standard of reasonableness. *Id.* at 694. In other words, a petitioner challenging the assistance of counsel must show the particular acts of counsel were outside the “wide range of professionally competent assistance.” *Id.*

The Court of Appeals for the Armed Forces has followed the dictates of *Cronic* by establishing a presumption that counsel was competent at trial. *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). Appellant must overcome this presumption by meeting a three prong test:

1. Are Appellant’s allegations true; if so, “is there a reasonable explanation for counsel’s actions”?
2. If the allegations are true, did defense counsel’s level of advocacy “fall measurably below the performance . . . [ordinarily expected] of fallible counsel”?
3. If defense counsel was ineffective, is there “a reasonable probability that, absent the errors,” there would have been a different result?

United States v. Gooch, 69 M.J. 353, 374 (C.A.A.F. 2010) (quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

Rather than fighting to win, trial defense counsel presented the trial court with was, essentially, a drawn-out guilty plea. The stark lack of any defense, points to a defense team that was either extremely unprepared or cynically going through the motions for a client they considered morally reprehensible and unworthy of a vigorous defense. In the crucible of adverse media interest compounded by a perceived loathsome client, counsel failed to exercise due diligence in their pretrial investigation and preparation, and therefore did not discover that conventional wisdom was wrong. That is, that a positive HIV test result *must* be accurate and reliable. That is not so. If counsel had conducted a rudimentary investigation, they would have figured this out. *See United States v. Datavs*, __ M.J. __, ACM 37537, slip op. at 21 (A.F. Ct. Crim. App. 9 Nov 2011) (finding ineffective assistance where counsel failed to consult an expert during their pretrial investigation; Judge Roan found prejudice where the majority did not and explained in his dissent that the “traditional deference owed to the tactical and strategic judgments of counsel is not justified where there was not an adequate investigation supporting those judgments.” (Roan, J., dissenting) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (“Counsel’s failure to uncover and present mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not fulfill[ed] his] obligation to conduct a thorough investigation of the defendant’s background.”)).

b. Prejudice

In order to satisfy the prejudice requirement, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. *Strickland* defined “reasonable probability” as a “probability sufficient to undermine confidence in the outcome” of the proceeding. *Id.* at 692.

Without the benefit of an expert’s review of the evidence, trial defense counsel were flying blind. They presented little more than the fact that none of the victims have subsequently tested positive for HIV and that Appellant’s “viral load” was so low that his possibility of infecting partners was remote. R. at

175. But without the requisite expert assistance, they were unprepared and unable to challenge the factual basis of the government's case-in-chief through cross-examination, or to present their own case showing the problems with the testing the government was relying on. With expert assistance, trial defense counsel would have learned that this was a target-rich environment and that there were numerous opportunities to challenge the prosecution's case. Yet they were unaware of that because they did not consult an HIV expert as they should have.

The accusations in this case were serious indeed, yet trial defense counsel devoted far less attention and preparation than would defense counsel litigating a urinalysis case. A positive HIV test does not excuse counsel abdicating their adversarial role. Yet trial defense counsel's failure to conduct a basic investigation was nothing less than such an abdication, and redounded to Appellant's prejudice. Trial defense counsel's performance fell below accepted standards, was without excuse, and adversely affected the court-martial's outcome to Appellant's prejudice.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings on Charge III and remand the case for new post-trial processing and action, so that Appellant might be and afforded the opportunity for a new trial with effective trial defense counsel.

II.

THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ASSAULT LIKELY TO CAUSE GRIEVOUS BODILY HARM.

Standard of Review

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Turner*, 25

MJ 324, 326 (C.M.A. 1987). This Court reviews the legal and factual sufficiency of the evidence *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)

This same standard of review applies to Issue III.

Analysis

Contrary to the weight of the evidence presented at trial, the military judge found Appellant guilty of certain offenses under Article 128 (Charge III). These findings must be set aside.

As noted above, the Government's expert, Dr. Sweet, stated that there was "zero" chance of infection through protected oral sex. R. at 177. Yet the military judge found Appellant guilty of violating Article 128 as to Ms. Hammons even though she testified that she had protected oral sex. R. at 58. The same is true for Ms. Testerman, who testified not only to protected oral sex but to Appellant's inability to ejaculate. R. at 155. Thus, while Charge III, Specifications 5 and 9 allege that infection and disease were a likely consequence of oral sodomy and vaginal intercourse with Ms. Hammons and Ms. Testerman, that conclusion was unsupported by the weight of the evidence and no "more than merely a fanciful, speculative, or remote possibility." *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998)

As to Ms. Seigal and Ms. Clark (Specifications 3 and 6 of Charge III, respectively), each testified they only had protected sex with Appellant. R. at 91, 111. In such circumstances, Dr. Sweet testified that there would be only a 2-3 percent chance of infection. R. at 179. Moreover, Appellant's "viral load" was low, also decreasing chances of infection. *Id.* Yet the military judge found Appellant guilty of these specifications.

Additionally, as to the guilty findings on the balance of the Article 128 specifications (1, 2, and 4, involving Warden, Luce, and Bender, respectively), Dr. Sweet testified that Appellant's viral load made the odds of infection between 1/10,000 to 1/100,000. Such statistical odds were discussed in *United States*

v. Dacas, 66 M.J. 235, 240 (C.A.A.F. 2008). In particular, Judge Ryan’s concurring opinion highlighted her concerns over a statistical factor of 1/50,000 in that case:

I write separately on a point that Appellant chose to admit, rather than litigate at trial, and which is thus unnecessary for the majority opinion to address. In my view, as a matter of first impression, *it would not appear that the statutory element – “means or force likely to produce death or grievous bodily harm”– should be satisfied where the record shows that the likelihood of death or grievous bodily harm from a particular means is statistically remote.*

Id. 240 (emphasis added). Judge Ryan continued:

And *Weatherspoon* does not state that because the magnitude of the harm from AIDS is great, the risk of harm does not matter. On the contrary, it necessarily implies that there is a point where the statistical risk of harm is so low that the statutory standard of “likely to produce death or grievous bodily harm” is not satisfied. *See* Article 128(b)(1), UCMJ.

Id.

The statistical odds are even lower in this case, which further undermines the factual and legal sufficiency for the court-martial’s findings on Charge III and its specifications.

WHEREFORE, for the reasons above stated, appellant respectfully requests this court set aside the findings and dismiss Charge III and all the specifications thereunder and that the case be remanded for new post-trial processing and action to reassess the sentence.

III.

THE EVIDENCE WAS FACTUALLY AND LEGALLY INSUFFICIENT TO FIND BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED ADULTERY.

Analysis

The trial judge could not find Appellant guilty of adultery when his wife fully consented to and participated in the conduct of which Appellant was convicted. Thus, there was no “victim” in all eight specifications of Charge IV.

In *United States v. Taylor*, 62 M.J. 636 (C.A.A.F. 2007), the accused was charged with, among other offenses, adultery. He attempted to bar his wife from testifying against him under Military Rules

of Evidence (Mil R. Evid.) 504. The trial court denied his request and his spouse testified against him. CAAF determined that, under Mil R. Evid. 504, the spouse was the victim of the crime of adultery and, as a result, could testify against her philandering spouse. By implication, *Taylor* held that the spouse is the victim for adultery charges for purposes of Mil R. Evid. 504. There is no reasonable distinction between the victim for purposes of Mil R. Evid. 504 and for Article 134. If the victim of adultery for privilege purposes is the spouse, the victim of the offense must also be the spouse.

There is no issue as to the consent of Appellant's spouse. Hence, there can be no issue that Appellant's spouse was not a victim.

WHEREFORE, for the reasons above stated, appellant respectfully requests this court set aside the findings and dismiss Charge IV and all the specifications thereunder and that the case be remanded for new post-trial processing and action to reassess the sentence.

IV.

CHARGE IV FAILS TO STATE AN OFFENSE UNDER ARTICLE 134 DUE TO ITS FAILURE TO ALLEGE ANY OF THE TERMINAL ELEMENTS.

Standard of Review

"The question of whether a specification states an offense is a question of law," subject to de novo review. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

Analysis

The Court of Appeals for the Armed Forces issued its decision in *United States v. Fosler*, 70 M.J. 255 (C.A.A.F. 2011) on 8 August 2011. This decision held that the Government's failure to allege one of Article 134's three clauses by express pleading or by "necessary implication" causes the charge to fail to state an offense under Article 134. *Id.* at 226.

Fosler applies to this case because Appellant's case was on direct appeal when the *Fosler* case was decided. *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008). As with *Fosler*, Appellant did not

plead guilty to the specifications under Charge IV. Unlike the circumstances in *Fosler*, trial defense counsel for Appellant did not challenge the Charge and specifications at trial. However, under Rule for Courts-Martial 905 (e), Manual for Courts-Martial , United States [2008 ed.], Appellant cannot waive this issue and can raise this issue for the first time on appeal. To do so, Appellant must demonstrate that the charge and specifications were “so obviously defective that no reasonable construction can be said to charge the offense for which conviction was bad.” *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A.1990) (quoting *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986)).

The decision in *Fosler* is grounded on the well-established constitutional tenet under the Due Process Clause of the Fifth Amendment to the United States Constitution that no accused may be convicted of an offense without sufficient notice. The Court of Appeals for the Armed Forces reaffirmed this tenet when it recently decided *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011).

Appellant was not charged with violating Article 134 clause (1), (2), or (3) under any of the specifications under Charge IV. Under the dictates of *Fosler* and *Girouard*, Appellant has a due process right not to be convicted of a violation of any of those clauses.

Appellant’s case is remarkably similar to a recent decision by one of our sister service’s Court of Criminal Appeals opinions applying *Fosler* to contested Article 134 charges, which decided in Appellant’s favor. See *United States v. Lonsford*, No. NMCCA 201100022 (N-M. Ct. Crim. App. 30 Aug. 2011) (per curiam) [Appendix]. Like Appellant, Lonsford was convicted, contrary to his pleas, of adultery under specifications that did not allege any one of the terminal elements under Article 134. Further, Lonsford’s trial defense counsel did not contest the specifications at trial. Perhaps most importantly, Lonsford’s conduct occurred with the spouse of a fellow servicemember from his same unit, in base housing and without his fellow servicemember’s knowledge or consent. Despite all of the foregoing, the Navy-Marine Corps Court of Criminal Appeals, in a *per curiam* decision held that that

Fosler has set a bright line bar and sent the case back to the trial court for reconsideration of the sentence as to the balance of the case in light of their dismissal of the Article 134 adultery specifications.¹

If there would ever be an act of adultery that fairly implies conduct prejudicial to good order and discipline or service discrediting, it would be the *Lonsford* facts. In this case, Appellant, with the consent of his spouse, engaged in conduct off base with consenting adults with no service connection.

WHEREFORE, Charge IV and its specifications must be dismissed and the case returned to the trial court for resentencing. *See United States v. Buber*, 62 M.J. 476 (C.A.A.F 2006).

V.

APPELLANT'S CONVICTION FOR INDECENT ACTS UNDER CHARGE II MUST BE SET ASIDE AS HIS CONDUCT FALLS WITHIN THE CONSTITUTIONALLY PROTECTED LIBERTY INTEREST UNDER *LAWRENCE v. TEXAS*, 539 U.S. 558 (2003).

Standard of Review

Whether Appellant's conviction under Article 120, UCMJ, violated the due process clause of the Fifth Amendment is a constitutional question of law and is reviewed *de novo*. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F 2010).

Analysis

The United States Supreme Court in *Lawrence* struck down convictions for consensual sodomy outlawed by Texas statute. *Marcum* applied the *Lawrence* analysis to Article 125 but found that the facts in *Marcum* did not lend themselves to a finding that the conduct was a protected liberty interest. *Marcum* engaged in consensual sodomy but the consenting party was a subordinate of *Marcum*, calling into question the violation of the bar on subordinate-superior relationships. *Marcum*, at 208. *Marcum* established the following three-part test to determine whether a protected liberty interest exists:

¹ Per NMCCA Rule of Practice and Procedure 18.2, this case may not be used as binding precedent.

First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? 539 U.S. at 578. Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

Id. at 206-07.

This same three-prong analysis can be applied to Article 120 specifications. It can hardly be argued that consensual sodomy should be viewed any differently than consensual group sex. The only factor that would be different between these two articles is the notion that consenting adults seek to engage in sex with more than one partner.

Under the facts of this case, Appellant never engaged in group conduct with a subordinate or anyone in the Armed Forces. He never engaged in this conduct on board a military installation or in base housing. All partners were adults and, but for the hysteria surrounding Appellant's purported HIV positive status, no adult took a negative view of the Armed Forces as a result of his status.

WHEREFORE, for the reasons above stated, Appellant respectfully requests this court dismiss Charge II and the specification thereunder and that the case be remanded for new post-trial processing and action to reassess the sentence.



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Appendix