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|  Beck Capt Eldon W | <p>Human Immunodeficiency Virus (HIV) Cases</p> <p>Having recently had an HIV-related court-martial withdrawn and dismissed pursuant to an Article 32 IO's recommendations, Maj Workman and I wanted to post lessons learned and take-away points for those who may have HIV cases in the future.</p> <p>Our success in challenging the HIV issues in our case is largely due to Clark Baker (a former Marine, retired LAPD investigator, and licensed CA PI), Baron Coleman (a young civilian lawyer with expertise challenging HIV prosecutions), and other members of Clark's team at the Office of Medical and Scientific Justice (OMSJ). Without them, we would not have been able to effectively challenge the HIV testing, chain of custody, and alleged diagnosis of our client. For more information, visit www.omsj.org or the HIV Innocence Group at http://www.omsj.org/innocence-group. You should contact Clark immediately if you are detailed to an HIV-related case.</p> <p>Because the caselaw surrounding HIV was mostly developed at the height of the HIV/AIDS scare 20 years ago, the government's evidence is usually filled with gaps because it relies upon a variety of assumptions. But the military's current procedures for supposedly diagnosing people as HIV positive is scientifically, medically, and legally inadequate. Here are some of the major problems you may expect to find:</p> <ul style="list-style-type: none">• Handling Blood Samples. There will probably not be a chain of custody for the blood sample that produced the first "positive" or "reactive" result. HIV test manufacturers have all sorts of precautions that must be observed regarding the timing, handling, and temperature of blood samples. The government's HIV "expert," most likely a Navy medical officer who works in a naval hospital infectious diseases division, knows nothing about these requirements and will have no knowledge of whether these procedures were followed or not. Moreover, with the contract lab currently used by DOD (Center for Disease Detection) YOU can be |

certified to handle and ship blood samples to the lab by taking a brief online course that merely requires you to click the “forward” button a few times and then type in your name at the end.

- Testing. Viral Loads and CD4 counts are used to manage care of HIV patients; they are NOT used to diagnose someone with HIV. However, the government tends to charge cases based upon the information most readily available in the client’s medical record, which is the VL and CD4 information. The tests used to identify the presence of HIV antibodies (as a basis for making an HIV “diagnosis”) are the ELISA and Western Blot tests. These are somewhat like the Immunoassay and GC/MS tests used in drug labs. With HIV tests, the ELISA test must be positive twice, followed by a confirmatory Western Blot test. However, this testing is subjective and involves interpretations of various shades of grade. Moreover, there is NO test that can identify the presence of HIV in a person. These tests only identify the presence of HIV antibodies. Additionally, there have been several different recalls of HIV tests in recent years, but military doctors won’t know whether your client’s test was ever subject to recall.
- Diagnosis / Clinical Correlation. Once a person’s HIV test shows a positive result for antibodies, the military treats that individual as “HIV positive” (or “HIV antibody positive”). From the perspective of the military, a servicemember is considered HIV positive when the Western Blot test returns a positive lab result. At that point, a letter reporting the positive test results is sent to the CO, who is supposed to personally notify the servicemember and send him to an HIV Evaluation and Treatment Unit (HETU) which is located at the biggest local Navy medicine facilities (e.g. NMCSDB/“Balboa” on the West Coast). There, he receives classes, group therapy, and medical counseling about HIV and how to survive and live life as an HIV positive person. The doctors conduct some limited tests and labs to rule out a few things that could create false HIV positives, but the majority of issues that could create false positive results are never addressed. More than 100 different illnesses, vaccinations, and other conditions are known to cause false positive HIV results.
- “Safe Sex Order.” When an “HIV antibody positive” servicemember first reports to the HETU for counseling/treatment, he fills out and reviews a “counseling statement” that advises him not to have sex without first disclosing his HIV status to his potential sexual partner and advising that the partner should use protection. The various orders governing HIV, such as NAVMC 2904 and SECNAVINST 5300.30D w/ Ch 1, indicate that a Marine will be counseled by his CO after receiving this medical counseling. In our case, however, the CO never counseled or issued an order to our client regarding sex; therefore the government’s sole basis for an Article 92 charge was his violation of the HETU counseling statement. However, the MO in our case was adamant that his counseling statement was not an order at all; it was medical counseling.

In conclusion, an HIV case is NOT a slam dunk for the government. Get the right HIV experts on your team and you will probably be able to kill the case before trial. If the government is reckless enough to go to trial, you will probably be able to get a strong win for your client.