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FOR IMMEDIATE RELEASE

2/23/15

In a decision released today, the Court of Appeals for the Armed Forces, [“CAAF], effectively ended the prosecution of cases in the military that allege the likelihood of grievous injury merely upon the diagnosis that a service member has been diagnosed with Human Immunodeficiency Virus [HIV] and who engages in intercourse without their partner’s knowledge of the HIV determination.

In the Air Force case of United States v. Gutierrez \_\_\_ M.J. \_\_\_, No. 13-0522/AF, CAAF overturned 25 year old precedence<sup>1</sup> that had previously allowed military personnel to be convicted of the offense of aggravated assault solely on the basis of a determination that a service member had tested “positive” for the HIV virus. In its opinion, CAAF determined that “the question in this case is not whether HIV, if contracted, is likely to inflict grievous bodily harm,” but rather that the question “is whether exposure to the risk of HIV transmission is ‘likely’ to produce death or grievous bodily harm.”

The Court’s decision should result in the significant impact upon the sentence received by David Gutierrez from his court-martial sentence handed down during his trial. Currently residing in Fort Leavenworth under a sentence of eight years of confinement, David now faces a maximum

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<sup>1</sup> United States v. Joseph 37 M.J. 392 (C.M.A. 1993)

sentence of a bad conduct discharge and six months confinement on each count of assault consummated by a battery rather than a dishonorable discharge and five years confinement for each count of aggravated assault.

The Court has ordered the Air Force to reconsider David Gutierrez' sentence in light of their decision and/or to have the original trial court conduct a rehearing as to the sentence. Furthermore, the Court determined that the length of time that it took the Air Force judicial system to allow CAAF to make its ruling constituted a "facially unreasonable appellate delay" and he should receive sentence relief accordingly.

Should such a rehearing occur before a trial court, David Gutierrez' defense will assert in mitigation that his original diagnosis of HIV was not supported by his medical history nor by the testing protocol employed by the Air Force. In the original application for clemency submitted on behalf of David Gutierrez shortly after his trial, experts opined that David Gutierrez was, in all likelihood, HIV free and the diagnosis was in error.

The expertise and investigation into the underlying circumstances and the facts in this case was provided through the efforts of Clark Baker and the personnel and experts of the Office of Medical Science and Justice, [OMSJ], a non-profit dedicated to the principle that HIV does not appear to represent the serious threat that the Center for Disease Control and the pharmaceutical industry want Americans to believe. Without OMSJ's efforts and diligence, the results in this case could not have been possible.

UNITED STATES, Appellee

v.

David J. A. GUTIERREZ, Technical Sergeant  
U.S. Air Force, Appellant

No. 13-0522

Crim. App. No. 37913

United States Court of Appeals for the Armed Forces

Argued December 9, 2014

Decided February 23, 2015

BAKER, C.J., delivered the opinion of the Court, in which  
ERDMANN, STUCKY, RYAN, and OHLSON, JJ., joined.

Counsel

For Appellant: Kevin Barry McDermott, Esq. (argued); Captain Michael A. Schrama (on brief).

For Appellee: Major Brian C. Mason, (argued); Lieutenant Colonel Katherine E. Oler and Gerald R. Bruce, Esq. (on brief).

Amicus Curiae for Appellant: Lieutenant Colonel Jonathan F. Potter, Captain Aaron R. Inkenbrandt, and Captain Amanda R. McNeil (on brief) - Army Defense Appellate Division.

Military Judge: William C. Muldoon Jr.

THIS OPINION IS SUBJECT TO REVISION BEFORE FINAL PUBLICATION.