

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
BURTON, RODRIGUEZ, and FLEMING  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Staff Sergeant SVEN M. COUNCIL**  
**United States Army, Appellant**

ARMY 20190321

Headquarters, United States Training Center and Fort Jackson  
Alyssa S. Adams, Military Judge  
Lieutenant Colonel Scott E. Linger, Staff Judge Advocate

For Appellant: Captain Catherine E. Godfrey, JA; Frank J. Spinner, Esquire;  
William E. Cassara, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H.  
Williams, JA; Major Craig J. Schapira, JA; Captain Amanda L. Dixon, JA (on  
brief).

21 May 2021

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MEMORANDUM OPINION  
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*This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.*

BURTON, Senior Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of willfully disobeying a superior commissioned officer, one specification of failing to obey a general order or regulation, one specification of maltreatment, one specification of sexual assault, and one specification of adultery, in violation of Articles 90, 92, 93, 120, and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 890, 892, 893, 920, & 934. The panel sentenced appellant to a dishonorable discharge, confinement for seven years, total forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

## BACKGROUND

Appellant tested positive for human immunodeficiency virus (HIV) in May 2012. In 2016, while appellant was stationed at Fort Jackson, South Carolina, he received a counseling about his HIV positive status (“preventative medicine counseling”) from Major (MAJ) GB, the chief of public health nursing and HIV program manager at Fort Jackson, as required by Army Reg. 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus, para. 4-8 (22 April 2014) [AR 600-110]. During the preventative medicine counseling, MAJ GB wore his uniform with his rank properly affixed. Major GB’s rank was also listed on the Dep’t of Army, Form 5669, Preventative Medicine Counseling Record (July 2012) [DA Form 5669], as required by AR 600-110. Appellant and MAJ GB signed the counseling form. The preventative medicine counseling directed appellant to “us[e] barriers such as condoms with every sexual act or insist [his] partners use condoms.” The preventative medicine counseling also directed appellant that “[c]ondom use [did] not remove [appellant’s] obligation to inform partners of [his] HIV infection before engaging in intimate sexual contact,” including “oral, vaginal, penile, or anal sex with any partner.”

In 2017, appellant was a drill sergeant at Fort Jackson. On 30 September 2017, appellant engaged in oral and vaginal intercourse with a trainee in his platoon. Before engaging in intercourse, appellant did not inform the trainee of his HIV positive status, and he did not use a condom. The government subsequently charged appellant, *inter alia*, with sexual assault for having intercourse without the trainee’s consent, and with willfully disobeying a superior officer for disobeying the preventative medicine counseling provided to him by MAJ GB.

Prior to trial, the government requested an instruction mirroring the Court of Appeals for the Armed Forces’ (CAAF) holding in *United States v. Forbes*, 78 M.J. 279 (C.A.A.F. 2019).<sup>1</sup> Defense counsel did not respond to that request, and instead

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<sup>1</sup> The government requested the following instruction:

To be freely given, consent must be informed. Without disclosure of HIV-positive status, there cannot be a true consent. Failure to disclose one’s HIV-positive status before engaging in a sexual act constitutes an offensive touching. On the other hand, informed consent can convert what might otherwise be an offensive touching into a nonoffensive touching. Therefore, you should find the accused guilty of sexual assault if you find beyond a

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requested the military judge compel an expert on HIV to assist them in crafting a defense and responding to the government's requested instruction. Defense counsel averred the expert was necessary to help them present the most current science on HIV in order to argue the *Forbes* instruction was inapplicable to appellant's case.

Approximately a month before trial, the military judge held a hearing on the defense motion to compel an expert. There, defense argued that because appellant's "viral load has been undetectable for six years," he could not transmit HIV. Because appellant could not transmit HIV, appellant theorized, the "absolute disclosure requirement" of *Forbes* should not apply to appellant's case. This, according to defense counsel, was precisely the reason they needed an expert—to review appellant's medical records and formulate an argument to the military judge why the *Forbes* instruction was inapplicable.

The government, in response, argued that *Forbes* is "explicit as to what the standard is. If you carry HIV, and you do not inform your partner that you are HIV positive, then you have not properly got informed consent, and therefore you've committed a sexual assault." The government then argued that until the *Forbes* "decision is overruled, it would be improper for [the trial] court to go against CAAF's precedent."

The military judge denied the defense motion to compel. In her written ruling, she concluded that in light of the CAAF's holding in *Forbes*, the question of whether appellant had the ability to transmit HIV through sexual intercourse was "irrelevant to the charges at hand." She ultimately concluded:

*Forbes* stands for the concept that an individual about to engage in sexual activity with a partner has the right to be informed if that person has HIV, and has the right to decide whether he or she wishes to continue. As such, the court rejects the defense request for assistance concerning whether the accused had the ability to place the HIV virus in the body of the complaining witness, as it could only result in offering evidence that is irrelevant, confusing to the factfinder, and which would undermine the instructions on the law given by the court.

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reasonable doubt that he performed a sexual act upon an alleged victim without first informing her of his HIV-positive status and thereby lawfully obtaining her consent to the sexual act.

The morning of trial, defense counsel moved to dismiss the specification of disobeying a superior officer for disobeying the preventative medicine counseling provided to appellant by MAJ GB. Defense counsel argued there was no lawful order because MAJ GB provided appellant a counseling, and not a “command” or an “order.” The military judge denied this motion, finding the preventative medicine counseling “was a lawful command for the purposes of charging Article 90.”

At trial, the trainee testified appellant did not inform her of his HIV positive status, and had he done so, she would not have engaged in sexual intercourse with him. Additionally, the government introduced the preventative medicine counseling into evidence, and called MAJ GB to testify about the counseling process.

When instructing the members prior to findings, the military judge provided the following instruction pursuant to *Forbes*:

To be freely given, consent must be informed. A person who is unaware of the HIV-positive status of his or her sexual partner cannot provide meaningful, informed consent to engage in sexual acts with the person. On the other hand, informed consent can convert what might otherwise be an offensive touching into a non-offensive touching. Therefore, you should find the accused guilty of sexual assault if you find beyond a reasonable doubt that he performed a sexual act upon [the trainee] without first informing her of his HIV positive status and thereby lawfully obtaining her consent to the sexual act.

During closing argument, the government argued that because the trainee was not informed of appellant’s HIV positive status, she could not provide informed consent to the sexual acts. The panel ultimately convicted appellant of both sexual assault and willfully disobeying a superior officer.

## LAW AND DISCUSSION

Appellant raises ten assignments of error. We address three,<sup>2</sup> and affirm the findings and sentence.

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<sup>2</sup> We have given full and fair consideration to appellant’s other assigned errors and determine they warrant neither discussion nor relief. Specifically, we have carefully considered appellant’s assertions, that his trial defense counsel were ineffective for failing to “fully” challenge a panel member. We disagree with appellant’s assertion. We do not find appellant has established either deficient performance or prejudice.

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*1. The Military Judge's Instruction*

Appellant first urges us to conclude the military judge erred by providing the panel an instruction based on *Forbes*. Instructional errors are reviewed de novo. *United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2016).<sup>3</sup> Because the instruction relates to the elements of the offense, we turn there first.

As charged in Specification 1 of Charge II, the government was required to prove appellant (i) “committed a sexual act upon another person by causing penetration, however slight, of the vulva . . . by the penis; and (ii) That [he] did so by causing bodily harm to that other person.” *Manual for Courts-Martial, United*

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*See United States v. Akbar*, 74 M.J. 364, 371 (C.A.A.F. 2015) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). We have also considered whether to compel affidavits from defense counsel, but we do not find that the “allegation[s] and the record contain evidence which, if unrebutted, would overcome the presumption of competence.” *United States v. Melson*, 66 M.J. 346, 347 (C.A.A.F. 2008) (quoting *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995)); *see also United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997) (noting the five factors for when affidavits are not required).

We have also considered appellant’s assertion that he is entitled to Rule for Courts-Martial 305(k) credit because he was confined on the evening between the findings and presentencing phase of his court-martial. Again, we disagree with appellant. We draw this conclusion based, in part, on: (1) Appellant’s outbursts in the courtroom immediately after findings, including shouting “just shoot me, just shoot me, just shoot me” and “shoot me, [and] get it over with”; (2) Appellant’s repeated non-compliance to the direction of law enforcement’s directives, including clenching his fist and his arms into his sides and saying “I am not going, I am not going”; (3) The military judge’s findings that the responding officer “acted out of trying to protect the safety of both the accused and others who are in the building”; and (4) Army Reg. 190-47, The Army Corrections System, para. 16-3a (15 June 2006), which states “[m]ilitary . . . personnel apprehended by the military police may be detained in a military police detention cell (D cell) only when necessary to prevent escape or to *ensure safety of the detainee or others*” (emphasis added).

<sup>3</sup> The government urges us to conclude that appellant waived any instructional issue pursuant to *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020). We disagree, and note this case is distinguishable from *Davis*, as appellant here repeatedly and systematically challenged *Forbes* applicability to his case. Regardless, we need not address the question of waiver, as we determine the military judge did not err in issuing the *Forbes* instruction.

*States* (2016 ed.) pt. IV, para. 45.b.(3)(b) [*MCM*]. “Bodily harm” is defined as “any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.” *MCM*, pt. IV, para. 45.a.(g)(3). “Consent” is defined as “a freely given agreement to the conduct at issue by a competent person.” *MCM*, pt. IV, para. 45.a.(g)(8)(A).

If consent is to be freely given, it “must be informed.” *Forbes*, 78 M.J. at 281 (citations omitted). When applied to an individual who is HIV positive, informed consent requires that individual to inform his prospective sexual partners of his or her HIV positive status before engaging in sexual acts. *United States v. Gutierrez*, 74 M.J. 61, 68 (C.A.A.F. 2015) (explaining in the context of offensive touching that “[w]ithout disclosure of HIV status there cannot be a true consent.” (quoting *R. v. Cuerrier*, [1998] 2 S.C.R. 371, 372 (Can.))); see, e.g., *United States v. Bygrave*, 46 M.J. 491, 493 (C.A.A.F. 1997) (noting that “lack of consent is an element of the offense” of rape and discussing informed consent as an individual’s decision to have sex with her partner after he informed her he was HIV positive).

In the present case, the military judge’s instruction mirrored our superior court’s holding in *Forbes*. There, the CAAF evaluated the interplay between a lack of consent and the appellant’s HIV positive status. See generally *id.* The CAAF focused its attention on whether an individual could give informed consent if they did not know of their prospective partner’s HIV positive status. *Id.* at 281. It concluded that “we have long held . . . failure to disclose one’s HIV-positive status before engaging in sexual activity constitutes an offensive touching, including offensive touching constituting bodily harm . . .” *Id.* (citing *United States v. Joseph*, 37 M.J. 392, 395 (C.M.A. 1993), overruled in part by *Gutierrez*, 74 M.J. 61; *United States v. Upham*, 66 M.J. 83, 87 (C.A.A.F. 2008)). Finally, the CAAF concluded “consistent with Article 120(b)(1)(B), UCMJ, [a]ppellant committed a sexual assault each time he had sexual intercourse with one of the victims without first informing her of his HIV status and thereby lawfully obtaining her consent to the intercourse.”

Here, appellant urges us to conclude the military judge erred by issuing an instruction based on the language of *Forbes* because appellant’s viral load was too low to actually transmit HIV.<sup>4</sup> Essentially, appellant asks us to make a determination that because his viral load was so low, he was not required to comply with the disclosure requirement *Forbes* endorses. Appellant asserts we should come to such a conclusion because the CAAF in both *Forbes* and *Gutierrez* cited a

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<sup>4</sup> Appellant does not contest that the instruction given was a correct recitation of the law as announced by the CAAF in *Forbes*. Accordingly, if we determine that *Forbes* applies to appellant’s case, the military judge did not err in providing the instruction.

Canadian case, *R. v. Cuerrier*, but there is another Canadian case, *R. v. Mabior*, that supports appellant's conclusion. See *Gutierrez*, 74 M.J. at 68 (citing *Cuerrier*, 2 S.C.R. at 372); *Forbes*, 78 M.J. at 281 (citing *Cuerrier*, 2 S.C.R. at 372); *R. v. Mabior*, [2012] 2 S.C.R. 584 (Can.).

We are unwilling to abandon the binding precedent of our superior court to apply law from a foreign court at appellant's suggestion. See *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (quoting *United States v. Quick*, 74 M.J. 332, 343 (C.A.A.F. 2015)) (stare decisis requires that "courts must strictly follow the decisions handed down by higher courts").<sup>5</sup> Instead, we agree with our sister service court that although "the improvement of treatment regimens over the years has steadily lowered the risk of transmission for those who are HIV-positive, it is the prerogative of our superior court, not this one, to determine whether this presents a significant change in circumstances warranting a departure from its prior precedents." *United States v. Lewis*, 2020 CCA LEXIS 269, at \*10 (N-M. Ct. Crim. App. 17 August 2020) pet. denied, 2021 CAAF LEXIS 387 (C.A.A.F. 4 Mar. 2021) (citing *Andrews*, 77 M.J. at 399; *United States v. Davis*, 76 M.J. 224, 228 n.2 (C.A.A.F. 2017) ("It is this Court's prerogative to overrule its own decisions.")).

Because we determine the CAAF's holding in *Forbes* properly applies to appellant's case, the military judge did not err in providing an instruction to that end. We next turn to whether the preventative medicine order appellant received was a lawful order.

## 2. The Lawfulness of the Order

Appellant asserts the preventative medicine counseling he received from MAJ GB was not a lawful order. We disagree with appellant, and address two of his arguments with regard to the order below.<sup>6</sup>

Appellate courts review whether an order was lawful on a de novo basis. *United States v. New*, 55 M.J. 95, 100, 106 (C.A.A.F. 2001) (citing *United States v. Padgett*, 48 M.J. 273, 277 (C.A.A.F. 1998)). "An order is presumed to be lawful, and the accused bears the burden of rebutting the presumption." *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005) (citing *United States v. Hughey*, 46 M.J. 152, 154 (C.A.A.F. 1997)); see *United States v. Whitaker*, 5 C.M.R. 539, 554 (A.F.B.R. 1952) ("[O]rders are presumed to be legal and the officers giving them to

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<sup>5</sup> We also note that *R. v. Mabior*, [2012] 2 S.C.R. 584 (Can.) predates both the *Forbes* and *Gutierrez* opinions, but is conspicuously absent from both.

<sup>6</sup> We have fully considered whether the order conflicted with appellant's constitutional rights, but determine that issue warrants neither discussion nor relief.

have had authority.”) “The essential attributes of a lawful order include: (1) issuance by competent authority -- a person authorized by applicable law to give such an order; (2) communication of words that express a specific mandate to do or not do a specific act; and (3) relationship of the mandate to a military duty.” *Id.* (citing *New*, 55 M.J. at 100–01).

An accused “may challenge the lawfulness of the order on a variety of grounds, e.g., that the order directed the commission of a crime; that the issuing officer lacked authority; that the order did not relate to a military duty; that it interfered with private rights or personal affairs without a valid military purpose; that it was solely designed to achieve a private purpose; [or] that it conflicted with a person’s statutory or constitutional rights.” *United States v. Washington*, 57 M.J. 394, 398 (C.A.A.F. 2002) (citations omitted).

#### *A. Lack of Authority*

Appellant first asserts MAJ GB lacked the authority to issue him an order requiring him to notify prospective sexual partners of his HIV status and to wear a condom during sexual intercourse. Appellant draws this conclusion based upon Army Regulation 600-110, paras. 4-4, 4-8, and 4-9, which mandates a preventative medicine counseling, such as the one MAJ GB issued, and a follow-on counseling from the commander. In light of these dual counseling statement requirements, appellant asserts MAJ GB did not have the authority to give him a specific order in the form of the preventative medicine counseling because, according to appellant, MAJ GB’s “role was to educate and counsel [appellant], not to issue an order.”

Commissioned officers, regardless of their roles, may issue lawful orders. “Authorization [to issue a lawful order] may be based on law, regulation, or custom of the service.” *MCM*, pt. IV, ¶14.c.(2)(a)(iii). Our sister court addressed this precise issue in *United States v. Stevens*, 2013 CCA LEXIS 913 (N.M. Ct. Crim. App. 2013). There, the appellant tested positive for HIV during a routine screening and subsequently received a preventative medicine counseling from Commander (CDR) JT, a physician assigned to that appellant’s HIV treatment unit. *Id.* at \*2. This preventative medicine counseling statement directed the appellant to “verbally advise any prospective sexual partner that I am HIV positive and that there is a risk of possible infection,” and to “not engage in sexual activities without the use of a condom.” *Id.* at \*3. On appeal, the *Stevens* appellant argued “CDR JT had no authority to issue the safe-sex order, as he was the treating physician and not in the appellant’s chain of command.” *Id.* at \*5. Much like appellant in the present case, the *Stevens* appellant relied upon a Navy regulation that referred to “service member’s ‘command’ issuing the safe sex order.” *Id.* at \*6. Ultimately, our sister court concluded “CDR JT, as a commissioned officer and physician attached to the same command as the appellant,” was authorized to give such an order. *Id.* at \*7.



Much like the Navy Court, we conclude that MAJ GB, a commissioned officer assigned to the same installation as appellant and assigned to appellant's HIV treatment unit, was authorized to give such an order. Our conclusion is strengthened by the language of the very regulation appellant cites to support his assertion that MAJ GB's role was only to educate and counsel appellant. In AR 600-110, para. 9-2, states that HIV laboratory tests may be used to "establish the HIV infection status of a Soldier who *disobeys the preventive medicine counseling*, the commander's counseling, or both, in an administrative or *disciplinary action based on such disobedience*." (emphasis added). While appellant wants us to infer that the regulation somehow stripped MAJ GB of the ability to issue a lawful order to appellant regarding preventative medical measures relating to his HIV status, the regulation contemplates the exact opposite. Accordingly, appellant has failed to meet his burden to rebut the presumption that MAJ GB was authorized to give him the order in question.

*B. Valid Military Purpose*

Appellant next asserts this order interfered with his private affairs without a valid military purpose. In support of this assertion, appellant argues that because he had a low viral load with a limited or negligible risk of transmission, there was no valid military purpose akin to a "safe sex" order for the order.

Appellant has failed to meet his burden of demonstrating this order did not have a valid military purpose. Assuming, arguendo, appellant had an undetectable viral load at one point does not necessarily mean he could maintain that undetectable viral load at all times. This conclusion is not conjecture; instead, it is supported by the medical articles appellant submitted to the trial court in support of his request for an expert. These articles were subsequently attached to the record as appellate exhibits. These articles state, *inter alia*, that "[t]o maintain an undetectable viral load, it is very important for a person living with HIV to stay on treatment and have regular viral load tests." Accordingly, while a person with a low viral load may not be able to transmit HIV to a sexual partner, there is no *guarantee* that person will maintain a low viral load (and the corresponding inability to transmit HIV to sexual partners) in perpetuity, particularly if their medical treatment for HIV changes in some manner.

With this in mind, we conclude this order is much the same as a "safe sex" order, and has the valid military purpose of protecting both other service members and civilians from the potential of HIV infection. *See United States v. Womack*, 29 M.J. 88, 90-91 (C.M.A. 1989) (holding "a 'safe-sex order' can have a valid military purpose"); *see also United States v. Dumford*, 30 M.J. 137, 138 (C.M.A. 1990) ("[T]he military has a legitimate interest in limiting [appellant's] contact with others, including civilians" when a service member is "capable" of spreading HIV); *see generally Padgett*, 48 M.J. 273.

Even if we were to conclude there was not valid military purpose of protecting other service members and civilians from the potential of HIV infection, we would still find this order had a valid, albeit different, military purpose. In this case, the valid military purpose of at least a portion of the order—specifically, the requirement to notify prospective sexual partners of appellant’s HIV status—is to ensure appellant does not commit some form of assault, including sexual assault. As we state above, and the CAAF clearly stated in *Forbes*, a service member’s “failure to disclose one’s HIV-positive status before engaging in sexual activity constitutes an offensive touching, including offensive touching constituting bodily harm for assault offenses.” 78 M.J. at 279. Accordingly, this order merely directed appellant to acquire informed consent before intercourse, thereby complying with existing law.

### 3. Expert Assistance

Appellant finally asserts the military judge abused her discretion by denying the defense request for an HIV expert. Both at trial and on appeal, appellant asserts this expert was “absolutely necessary to the defense in order to present the most current science on HIV in order to argue that the *Forbes* instruction was inapplicable in this case.” Because we have concluded the military judge did not err in providing the *Forbes* instruction in appellant’s case, we disagree with appellant.

We review a military judge’s ruling on whether to grant an appellant’s request for expert assistance for an abuse of discretion. *United States v. Hennis*, 79 M.J. 370, 383 (C.A.A.F. 2020). To be entitled to expert assistance, an accused must show a reasonable probability that: “(1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.” *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). “In order to satisfy the first prong of this test, [t]he defense must show (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop.” *Id.* (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994)).

In appellant’s case, we need not look past the first prong of the test. Because *Forbes* requires disclosure of HIV positive status as a condition of informed consent without regard to viral load, as we discuss above, the military judge properly ruled that evidence of appellant’s viral load was simply irrelevant to the issue before the court. This is so because even if the military judge had compelled the expert requested by the defense, she was still not at liberty to depart from the legal standard established by *Forbes* at defense counsel’s suggestion—even if appellant’s position was supported by a medical expert. Accordingly, based on the record

before us, the military judge did not err in denying defense counsel's request for an HIV expert.<sup>7</sup>

**CONCLUSION**

The findings of guilty and the sentence are AFFIRMED.

Judge RODRIGUEZ and Judge FLEMING concur.

FOR THE COURT:



JOHN P. TAITT  
Acting Clerk of Court

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<sup>7</sup> We note that appellant also suggests the requested expert may have been relevant for sentencing to provide mitigating evidence. However, defense counsel was able to introduce evidence at trial through cross-examination of MAJ GB that appellant had an undetectable viral load, and that based on this undetectable viral load, appellant was at "zero risk of transmission of HIV." Accordingly, appellant has not met his burden to show—and defense provides no indication either at trial or on appeal—what non-cumulative mitigating evidence he would have been able to present on sentencing through the requested expert testimony.