

## Prosecuting an HIV-Related Crime in a Military Court-Martial: A Primer

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### I. Introduction

Prosecuting an human immunodeficiency virus (HIV) assault under the Uniform Code of Military Justice (UCMJ) creates unique substantive and procedural challenges for the military prosecutor. Substantively, the challenge for prosecutors begins with the fact that there are no HIV-specific articles in the UCMJ. Procedurally, prosecutors may encounter witness issues, pretrial agreement (PTA) provisions, and sentencing arguments that are unique to HIV prosecutions. This article discusses all of these challenges in two major sections: the charging decision and procedural issues.<sup>1</sup>

In section II, this article analyzes the charging decision in HIV cases. The most common methods of charging HIV-related misconduct under the UCMJ are aggravated assault under Article 128,<sup>2</sup> violation of a “safe-sex” order under Article 90<sup>3</sup> or Article 92,<sup>4</sup> and conduct that is prejudicial to good order and discipline and/or service discrediting under Article 134.<sup>5</sup> The applicable tests and standards for HIV prosecutions, especially for aggravated assaults, were fairly well-settled<sup>6</sup> until the 2008 decision by the Court of Appeals of the Armed Forces (CAAF) in *United States v. Dacus*.<sup>7</sup> In *Dacus*, a two-judge concurrence expressed concern about the viability of the current practice of charging HIV-related assaults as aggravated assaults.<sup>8</sup> The section will look at the effect of *Dacus* on HIV charging decisions. It also looks at the effect of recent developments regarding an individual’s right to private sexual behavior<sup>9</sup> on the constitutionality of HIV “safe-sex” orders.

Section III of this article contains three sub-sections that cover all aspects of HIV prosecutions not related to the charging decision. The first procedural sub-section describes the unique hurdles in HIV investigations related to investigating a case and coordinating witness interviews. These hurdles are in the areas of medical privacy, the Department of Defense (DoD) homosexual conduct policy, and immunity. The section explains how prosecutors can comply with applicable regulations in these areas and ensure all evidence and witness testimony are available for trial. The section concludes with a recommended process for HIV cases that helps coordinate the efforts of prosecutors, investigators, medical authorities, and commanders. The second procedural sub-section examines the opportunity for a unique PTA provision in guilty plea cases that can protect

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<sup>1</sup> Earlier articles have focused on the basic framework for HIV-related prosecutions in the military, but they did not cover some of the procedural aspects of prosecutions and have also become slightly outdated due to more recent court opinions. See generally Major John P. Einwechter, *New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice* (1997), ARMY LAW., Apr. 1998, at 20, 24–27 (discussing the “means likely” element of aggravated assault in HIV cases); Elizabeth Beard McLaughlin, *A “Society Apart?” The Military’s Response to the Threat of AIDS*, ARMY LAW., Oct. 1993, at 3 (examining the military’s approach to HIV-related cases); Captain Melissa Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, ARMY LAW., Jan. 1988, at 17 (discussing substantive issues with charging HIV-related crimes).

<sup>2</sup> UCMJ art. 128(b)(1) (2008).

<sup>3</sup> *Id.* art. 90(2).

<sup>4</sup> *Id.* art. 92.

<sup>5</sup> *Id.* art. 134.

<sup>6</sup> The first reported opinion for an HIV case was an interlocutory appeal. See *United States v. Morris*, 25 M.J. 579 (A.C.M.R. 1987). After *Morris*, appellate courts narrowly tailored their opinions as they tried to make an HIV-related crime fit into an existing punitive article. The last reported Court of Appeals for the Armed Forces (CAAF) opinion on the merits of an HIV charge, prior to *United States v. Dacus*, 66 M.J. 235 (C.A.A.F. 2008), was in 1997. See *United States v. Klauck*, 47 M.J. 24 (C.A.A.F. 1997).

<sup>7</sup> 66 M.J. 235 (upholding a guilty plea for an HIV aggravated assault).

<sup>8</sup> *Id.* at 240 (Ryan, J., concurring) (“There is at least a question whether traditional notions of aggravated assault comport with current scientific evidence regarding HIV and AIDS.”).

<sup>9</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding consenting adults have a “full right to engage in [private sexual conduct] without intervention of the government”); see *infra* notes 65–66, and accompanying text (discussing impact of *Lawrence* on safe-sex orders).

other potential victims of the accused. The third procedural sub-section discusses using the accused's HIV-positive status as an aggravating factor in non-aggravated assault convictions.

Although the coordination for the procedural hurdles in an HIV case should occur very early in the process, prosecutors must first understand the legal basis for the anticipated charges. Prosecutors can gain this understanding with a careful analysis of the different HIV charging options that have developed in appellate case law.

## II. Substantive Case Law—The Charging Decision

In most HIV-related cases, the criminal “act” is exposing another individual to HIV without that individual’s knowledge and consent. Although there are civilian cases dealing with HIV transmission through spitting<sup>10</sup> and biting,<sup>11</sup> all reported military cases involve some type of sexual behavior as the means of exposure. Normally, sexual assaults are covered by Article 120,<sup>12</sup> which provides a comprehensive and detailed framework using the nature of the criminal act and the status of the victim to aid prosecutors in the charging decision.<sup>13</sup> Unfortunately, the current Article 120, like its predecessor, does not provide guidance on what to do with HIV-related misconduct. The most effective way to charge this behavior falls into one of three categories: aggravated assault, disobeying a lawful order, or conduct that is prejudicial to good order and discipline and/or service discrediting. This section will summarize each of these potential charging methods and examine key case law for each method.

### A. Article 128—Aggravated Assault

When an HIV-infected individual exposes another person to the virus without that person’s knowledge, the criminal activity most closely resembles an assault. There is clearly an uninvited, offensive touching.<sup>14</sup> Although the sexual activity may have been consensual, the exposure to HIV was not consensual.<sup>15</sup> The strong likelihood of death following infection by HIV makes HIV assault more serious than simple assault;<sup>16</sup> aggravated assault is therefore the most appropriate charge under the UCMJ.<sup>17</sup> An aggravated assault is an assault “with a dangerous weapon or other means of force likely to produce death or grievous bodily harm.”<sup>18</sup> The “means likely” in an HIV prosecution is either the accused’s semen or the virus itself. In *United States v. Johnson*, the court said, “[w]hether the means was alleged to be the virus itself, or the medium and the virus, does not seem significant to us.”<sup>19</sup> Later cases, however, moved the focus away from the virus as the “means likely” to the

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<sup>10</sup> See, e.g., *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995) (upholding conviction for attempted murder where HIV-positive appellant spit on a prison guard).

<sup>11</sup> See, e.g., *United States v. Sturgis*, 48 F.3d 784 (4th Cir. 1995) (upholding conviction for assault with a dangerous weapon where HIV-positive appellant bit corrections officers).

<sup>12</sup> UCMJ art. 120 (2008) (Rape, sexual assault, and other sexual misconduct); see also *id.* art. 125 (Sodomy).

<sup>13</sup> See generally National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256 (completely revising the scope of Article 120 by expanding the number of offenses from two to fourteen, removing “without consent” as an element, and creating new definitions for “sexual act” and “sexual contact”).

<sup>14</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 54c(1)(a) (2008) [hereinafter MCM] (defining an assault as “unlawful force or violence . . . done without legal justification or excuse and without the lawful consent of the person affected”). Even if the victim is aware of the accused’s HIV status and “invites” the offensive touching, there can still be an aggravated assault. See *United States v. Bygrave*, 46 M.J. 491 (C.A.A.F. 1997) (affirming aggravated assault where victim knowingly consented to unprotected sex with HIV-positive accused because you cannot consent to an act likely to produce death or grievous bodily harm).

<sup>15</sup> See *United States v. Joseph*, 37 M.J. 392, 395 (C.M.A. 1993) (“We can think of no reason why a factfinder cannot rationally find it to be an ‘offensive touching’ when a knowingly HIV-infected person has sexual intercourse with another, without first informing his sex partner of his illness—regardless whether protective measures are utilized.”).

<sup>16</sup> See, e.g., *id.* at 395–96 (“Given the consequences of Acquired Immune Deficiency Syndrome (AIDS), the label ‘offensive touching’ seems rather mild for such unwarned, intimate contact with an HIV-infected person.”).

<sup>17</sup> MCM, *supra* note 14, pt. IV, ¶ 54b(4)(a).

<sup>18</sup> *Id.*

<sup>19</sup> 30 M.J. 53, 56 n.5 (C.M.A. 1990).

act of intercourse itself.<sup>20</sup> Whether the “means likely” is the virus or intercourse, the prosecution must satisfy a two-prong analysis used for all aggravated assault cases.<sup>21</sup> The two prongs are as follows:

(1) the risk of harm and (2) the magnitude of harm. The likelihood of death or grievous bodily harm is determined by measuring both prongs, not just the statistical risk of harm. Where the magnitude of harm is great, there may be an aggravated assault, even though the risk of harm is statistically low.<sup>22</sup>

Because the likelihood of death is so high for a person with HIV, little litigation exists for HIV cases involving the second prong of the test—the magnitude of harm.<sup>23</sup> Instead, “[t]he HIV cases focus on the first prong, the risk of harm, that is, likelihood that HIV will be transmitted and the victim will develop acquired immune deficiency syndrome (AIDS).”<sup>24</sup> The difficulty with the first prong is that HIV assaults do not always neatly fit within the existing elements of Article 128. Prosecutors must therefore understand how the courts have analyzed this first prong.

Early aggravated assault cases focused heavily on the first prong—the risk of harm. In the first Court of Military Appeals (COMA) case dealing with aggravated assault, the court issued a simple two-page opinion upholding an HIV aggravated assault conviction by citing medical testimony that there was a thirty to fifty percent chance of getting AIDS from HIV.<sup>25</sup> The court did not provide a detailed legal analysis about why aggravated assault was a proper charge in an HIV case,<sup>26</sup> thereby leaving the issue to be explored in later cases. Unfortunately, some subsequent opinions also failed to provide a comprehensive analysis on the proper use of Article 128. Instead, they simply found it to be appropriate. In *United States v. Johnson*,<sup>27</sup> the court relied on three earlier non-Article 128 HIV prosecutions to hold that “[i]t is now beyond cavil that it is permissible under the Code to charge aggravated assault, where the means alleged as likely to produce death or grievous bodily harm is HIV.”<sup>28</sup> From those three earlier cases, the *Johnson* court created a very low threshold for finding sufficient risk of harm, stating that it “must at least be more than merely a fanciful, speculative, or remote possibility.”<sup>29</sup> The *Johnson* court’s focus on the risk of harm, under its “more than merely fanciful standard,” influenced HIV cases for the following seven years. Courts spent little time on the magnitude of harm prong as they struggled to apply the *Johnson* test to issues such as the intent requirement for an HIV aggravated assault,<sup>30</sup> consent,<sup>31</sup> the use of condoms,<sup>32</sup> and vasectomies.<sup>33</sup> The

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<sup>20</sup> See *United States v. Schoolfield*, 40 M.J. 132, 135 (C.M.A. 1994) (upholding an aggravated assault conviction under the “intentional-battery theory of assault with the bodily harm being unprotected sexual intercourse”); *Joseph*, 37 M.J. at 395–96 (upholding an aggravated assault conviction under a battery theory).

<sup>21</sup> *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998) (“The standard for determining whether an instrumentality is a ‘means likely to produce death or grievous bodily harm’ is the same in all aggravated assault cases under Article 128(b)(1).”).

<sup>22</sup> *Id.* (citations omitted).

<sup>23</sup> See *id.* at 212 (“The test for the second prong, set out in the Manual for Courts-Martial, is whether death or grievous bodily harm was a natural and probable consequence.”); see also MCM, *supra* note 14, pt. IV, ¶ 54c(4)(a)(ii) (“When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means of force is ‘likely’ to produce that result.”). The second prong is almost assumed to be met in most HIV cases. See *Weatherspoon*, 49 M.J. at 211 (“The second prong of the likelihood analysis, consideration of the magnitude of the risk, was not at issue in the HIV cases. In those cases, it was uncontested that death was a natural and probable consequence if the virus was transmitted and the victim developed AIDS.”); see also *Johnson*, 30 M.J. at 55 (noting expert testimony that thirty-five percent of those with HIV will develop AIDS, with a fifty percent mortality rate for those with AIDS).

<sup>24</sup> *Weatherspoon*, 49 M.J. at 211.

<sup>25</sup> *United States v. Stewart*, 29 M.J. 92, 93 (C.M.A. 1989) (finding that the chance of getting AIDS was sufficient to meet the “natural and probable consequence” test).

<sup>26</sup> *Id.* (relying mainly on a “very thorough and detailed inquiry” during providency about the accused’s unprotected sexual intercourse).

<sup>27</sup> 30 M.J. 53 (C.M.A. 1990).

<sup>28</sup> *Id.* at 56; see *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) (upholding a safe-sex order in a narrowly written opinion that said the safe-sex order was the least restrictive means available to address a compelling governmental interest); *Stewart*, 29 M.J. at 92 (upholding an aggravated assault conviction but providing very little legal justification for doing so); *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (upholding an Article 134 conviction in a case where an HIV-positive accused had unprotected sex with a fellow servicemember; the court specifically did not address if the act would justify another offense under the Code, or if violation of the safe-sex order in the case could be enforced as violation of a direct order).

<sup>29</sup> *Johnson*, 30 M.J. at 57 (citing *Stewart* and *Womack* for this proposition, even though *Stewart* only used a “natural and probable consequence” test and *Womack* did not even discuss a risk of harm analysis because it only focused on the lawfulness of a safe-sex order).

<sup>30</sup> See *United States v. Schoolfield*, 40 M.J. 132 (C.M.A. 1994) (upholding an HIV-aggravated assault with a detailed analysis of the intent requirement in an HIV-aggravated assault; four judges held it was general intent crime, and one judge held it was a specific intent crime); see also *United States v. Joseph*, 37 M.J. 392 (C.M.R. 1993) (finding the use of a condom is not a defense, with a concurring opinion expressing concern that the majority opinion never discussed how the use of a condom relates to the intent requirement of the crime).

“more than merely fanciful” standard present in all of these early HIV cases is also the standard risk-of-harm test in all types of aggravated assault cases.<sup>34</sup>

Although it would seem that the simple risk of harm and magnitude of harm tests would make HIV prosecutions easy, prosecutors must still use caution before charging an HIV aggravated assault for two reasons. First, the existing case law on HIV aggravated assaults has left some issues unanswered. Specifically, the courts have not ruled on whether a putative victim can consent to protected sex with an HIV-positive accused. In *United States v. Bygrave*, the CAAF held that consent was not a defense to unprotected sex.<sup>35</sup> In *United States v. Klauck*, the CAAF clearly stated that using a condom “is not a defense” to an HIV aggravated assault.<sup>36</sup> Reading *Bygrave* and *Klauck* together, it seems there is still an aggravated assault when an HIV-positive person has consensual, protected intercourse. This interpretation would make all sexual contact by HIV-positive servicemembers a crime. Service-specific guidance, in contrast, informs HIV-positive members they can only have intercourse if they inform potential partners of their HIV status and they practice safe sex.<sup>37</sup> By using a non-HIV specific crime for HIV aggravated assaults, the courts may have created legal conclusions that are irreconcilable with current service guidance.<sup>38</sup> Another open issue involves sex between two HIV-positive individuals. In *Bygrave*, the court specifically mentioned this issue without ruling on it.<sup>39</sup>

The second reason prosecutors must use caution in charging HIV aggravated assaults is the *Dacus* concurrence, which creates some doubt about the applicability of Article 128 in general. In *Dacus*, medical evidence presented at trial showed that the accused’s likelihood of transmitting HIV during sexual intercourse was very low due to his uniquely low viral load.<sup>40</sup> The accused had protected intercourse with one woman, and both protected and unprotected intercourse with another woman, without informing either woman of his HIV status.<sup>41</sup> Despite the extremely unlikely, but possible, chance that the accused could transmit HIV to a sexual partner, a three-judge majority upheld an aggravated assault conviction because “although the risk of transmitting the virus was low and therefore arguably ‘remote,’ the risk was certainly more than fanciful or speculative.”<sup>42</sup> The two-judge concurrence agreed with the majority because the “Appellant did not raise matters inconsistent

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<sup>31</sup> See *United States v. Bygrave*, 46 M.J. 491 (C.A.A.F. 1997) (affirming aggravated assault where victim knowingly consented to unprotected sex with HIV-positive accused because one cannot consent to an act which is likely to produce grievous bodily harm or death); see also *United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996) (finding, in a non-HIV case, that it is legally impossible to consent to aggravated assault; this opinion was used as precedent in the *Bygrave* decision).

<sup>32</sup> See *United States v. Klauck*, 47 M.J. 24 (C.A.A.F. 1997) (finding that the accused’s use of a condom is not a defense to an HIV aggravated assault); *Joseph*, 37 M.J. at 396 (finding that “use of a condom does not translate into ‘safe sex,’ but potentially ‘safer sex’”).

<sup>33</sup> See *United States v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991) (finding no aggravated assault where the accused previously had a vasectomy, a defense expert testified the accused was incapable of transmitting the virus because of the vasectomy, and the government did not rebut the defense expert or prove that transmission was possible after a vasectomy).

<sup>34</sup> *United States v. Weatherspoon*, 49 M.J. 209, 211–12 (C.A.A.F. 1998) (upholding accused’s aggravated assault conviction for choking his wife and kicking her in the face and holding that the proper test for the risk of harm prong in any aggravated assault case was whether the risk of harm was “more than merely a fanciful, speculative, or remote possibility” (citations omitted)).

<sup>35</sup> *Bygrave*, 46 M.J. at 494 n.5 (“Because appellant was only prosecuted for having unprotected sex, we need not, and do not, address whether one may validly consent to protected sex with an HIV-positive partner.”).

<sup>36</sup> *Klauck*, 47 M.J. at 25 (“The fact that a male uses a condom during sexual intercourse is not a defense to assault with a means or force likely to produce death or grievous bodily harm.”).

<sup>37</sup> See *infra* notes 51–54 and accompanying text.

<sup>38</sup> See *Bygrave*, 46 M.J. at 494 n.8 (“Thus, the prosecution of an HIV-positive servicemember for having safe sex after providing appropriate notice of his status to his or her partner might conceivably raise constitutional due process concerns.”).

<sup>39</sup> *Id.* at 494 n.6 (noting, but not deciding, that evaluating consent in HIV cases may be different if both parties were HIV-positive). The court mentioned the “‘antigenic stimulation’ theory,” where “additional exposure to HIV increases [the] speed with which HIV-positive individuals begin to show symptoms of full-blown AIDS . . . .” *Id.* (citing *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 641–43 (7th Cir. 1995)).

<sup>40</sup> 66 M.J. 235, 237 n.1 (C.A.A.F. 2008) (noting that the accused’s “viral load was so low that it was not detectable with existing technology”). According to expert testimony in the case, the accused’s likelihood of “transmission of HIV through unprotected sex was approximately 1 in 10,000,” and only “1 in 50,000” during protected sex. *Id.* at 240 (Ryan, J., concurring).

<sup>41</sup> *Id.* at 236–37.

<sup>42</sup> *Id.* at 239 (supporting their holding by reaffirming the two-step risk of harm/magnitude of harm test discussed in *Weatherspoon*).

with Appellant's guilty plea under our current case law."<sup>43</sup> The concurrence, however, expressed doubt that in a litigated court-martial the "means likely" test could be satisfied when the likelihood of harm was "statistically remote."<sup>44</sup>

Although the facts in *Dacus* are unique,<sup>45</sup> prosecutors should be wary of the concurring opinion for two reasons. First, *Dacus* is an example of the importance of medical evidence in HIV trials. Experts are essential to explain why the risk of harm prong<sup>46</sup> and the magnitude of harm prong<sup>47</sup> are satisfied in a specific case. Second, prosecutors should take note of the strongest language in the *Dacus* concurrence: "There is at least a question whether traditional notions of aggravated assault comport with current scientific evidence regarding HIV and AIDS."<sup>48</sup> This language, in conjunction with the remaining open issues involving HIV assaults, should caution all prosecutors to carefully consider the facts of their case, as well as alternate charging options.

For prosecutors charging a case under Article 128, it is vital that they use a detailed stipulation of fact that incorporates key language from any applicable cases.<sup>49</sup> At a minimum, it should address how the facts of the case meet the *Weatherspoon* two-prong harm test. Appendix A contains a sample stipulation of fact provision for an aggravated assault case. If the facts do not support an Article 128 charge, prosecutors should consider a disobedience-based charge.

## B. Disobeying or Failing to Follow a Lawful Order

Servicemembers diagnosed with HIV will significantly interact with medical authorities and commanders. From the medical community, HIV servicemembers will receive thorough medical treatment, and substantial education on the ramifications of living with HIV. From their commanders, HIV servicemembers receive specific orders about how to handle their medical status. In many HIV cases, prosecutors will therefore have the additional option of charging the accused with violating or disobeying a "safe-sex" order.<sup>50</sup> Charging a violation of a safe-sex order requires an understanding of two sets of information: (1) DoD and service-specific guidance on HIV infected individuals, and (2) case law upholding the constitutionality of safe-sex orders.

Although DoD policy prevents the accession of HIV-positive individuals,<sup>51</sup> individuals who contract HIV after joining the military can stay on active duty if they are physically able to perform their duties.<sup>52</sup> Individuals remaining on active duty will receive medical treatment and "training on the prevention of further transmission of HIV infection to others and the legal

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<sup>43</sup> *Id.* at 240 (Ryan, J., concurring).

<sup>44</sup> *Id.*

<sup>45</sup> The medical testimony at trial indicated that "less than one percent of the population . . . have an immune system [like the accused's] that can almost completely suppress the virus on their own." *Id.* at 239.

<sup>46</sup> The *Dacus* concurrence indicates the near strict liability test of early cases, where sexual contact alone satisfied the risk of harm prong, will be more carefully scrutinized. *See id.* at 240 n.1 ("It is no doubt true that earlier cases from this Court, and other courts throughout the country, found that the mere fact that one engaged in sexual activity while HIV positive constituted a means likely to cause death or grievous bodily harm."); *see also* *United States v. Perez*, 33 M.J. 1050, 1053 (A.C.M.R. 1991) (finding "the government . . . failed to prove an essential element of the offense" by not rebutting defense expert testimony about the accused's vasectomy).

<sup>47</sup> The strong likelihood of HIV turning into AIDS easily satisfies the magnitude of harm prong. *See United States v. Johnson*, 30 M.J. 53, 55 (C.M.A. 1990) (noting medical testimony that there is a "35 percent probability that an individual who tests positive for HIV will develop AIDS"). If methods of treating HIV improve and these percentages drop significantly, it may become harder to meet the second prong.

<sup>48</sup> *Dacus*, 66 M.J. at 240 n.1 (Ryan, J., concurring).

<sup>49</sup> *See id.* at 236-37 (thoroughly reviewing key provisions of the stipulation of fact to uphold a guilty plea where medical evidence showed a very low risk of transmission). In a contested case, prosecutors should draft proposed findings of fact on the same issues.

<sup>50</sup> A "safe-sex" order protects against the spread of HIV by limiting an HIV-infected servicemember's allowable sexual activity.

<sup>51</sup> U.S. DEP'T OF DEFENSE, INSTR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS para. 4.1 (Oct. 17, 2006) [hereinafter DoDI 6485.01].

<sup>52</sup> *Id.* para. 6.2. Human immunodeficiency virus members can be retained on active duty but may be restricted in the duties they can perform or where they can be assigned. *See, e.g.,* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5300.30D, MANAGEMENT OF HUMAN IMMUNODEFICIENCY VIRUS (HIV) INFECTION IN THE NAVY AND THE MARINE CORPS para. 3c(3) (3 Jan. 2006) [hereinafter SECNAVINST 5300.30D] (limiting assignment of HIV-positive members to the continental United States or Hawaii); U.S. DEP'T OF ARMY, REG. 600-110, IDENTIFICATION, SURVEILLANCE, AND ADMINISTRATION OF PERSONNEL INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV) para. 4-2 (15 July 2005) [hereinafter AR 600-110] (stating that HIV-positive Soldiers "will not be deployed or assigned overseas"); U.S. DEP'T OF AIR FORCE, INSTR. 48-135, HUMAN IMMUNODEFICIENCY VIRUS PROGRAM para. A10 (12 May 2004) [hereinafter AFI 48-135] (limiting duty assignments for HIV-positive members).

consequences of exposing others to HIV infection.”<sup>53</sup> The reference to legal consequences is amplified in service regulations that direct commanders to give HIV-positive members in their command direct orders to inform all sexual partners of the member’s HIV status and to engage only in safe sex.<sup>54</sup>

If an accused violates a safe-sex order from a commander, prosecutors can charge the accused with violating Article 90<sup>55</sup> or Article 92.<sup>56</sup> Courts have affirmed the constitutionality of these orders with relative ease, but most opinions only analyzed narrow portions of the safe-sex orders.<sup>57</sup> Many of the courts’ decisions built on the logic used in earlier safe-sex order cases, and in some instances on HIV cases not involving safe-sex orders. Therefore, the best way to understand how to charge a safe-sex order violation is to examine how these cases arrived at the conclusion that the orders are lawful.

The first case to address safe-sex orders was the Army Court of Military Review (ACMR) in *United States v. Negron*.<sup>58</sup> In *Negron*, the appellant wore a condom as ordered, but did not inform his partner of his HIV status.<sup>59</sup> The appellant challenged his conviction under Article 90 by asserting that the safe-sex order violated his right to privacy under the Constitution.<sup>60</sup> The court soundly rejected appellant’s argument after analyzing Supreme Court privacy cases that identified “penumbral” privacy rights.<sup>61</sup> The court relied on *Bowers v. Hardwick*<sup>62</sup> to find the appellant had no “constitutionally protected privacy ‘right to freely, and without limitation, engage in consensual, private, intimate heterosexual relations.’”<sup>63</sup> Prosecutors must be aware that the entire line of military appellate decisions on safe-sex orders following *Negron* was decided before *Lawrence v. Texas*,<sup>64</sup> which overruled *Bowers*.<sup>65</sup> A full analysis of the *Lawrence* opinion is beyond the scope of this article, but it is important to note that *Lawrence* found the Texas statute did not have a “legitimate state interest . . . [justifying] . . . intrusion into the personal and private life of the individual.”<sup>66</sup> After *Lawrence*, prosecutors must be ready to identify a legitimate governmental interest for issuing a safe-sex order.

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<sup>53</sup> DoDI 6485.01, *supra* note 51, para. 6.3.

<sup>54</sup> The Navy states that HIV members “shall be advised that they will be directed to follow these preventive medicine procedures by their command.” SECNAVINST 5300.30D, *supra* note 52, para. 12b(1)(a). The Navy provides commanders with a preventive medicine order that is a “legal order that the member must obey and is not to be confused with the physician counseling statement the member may have signed during initial evaluation or follow-up treatment.” See U.S. DEP’T OF NAVY, BUREAU OF MED. AND SURG., GUIDE FOR COMMANDING OFFICERS AND OFFICERS IN CHARGE OF HIV-INFECTED MEMBERS para. 4.0 (Oct. 2008), available at [http://www.bethesda.med.navy.mil/patient/health\\_care/clinical\\_support/hiv/forms/Guide\\_for\\_Commanding\\_Officers.doc](http://www.bethesda.med.navy.mil/patient/health_care/clinical_support/hiv/forms/Guide_for_Commanding_Officers.doc). Army commanders must use a specific form and language to counsel all HIV Soldiers and give them direct orders to engage in safe sex. See AR 600-110, *supra* note 52, para. 2-14. The Air Force also requires commanders to give a preventive medicine order and provides a specific form. See AFI 48-135, *supra* note 52, para. A8.1.

<sup>55</sup> See, e.g., *United States v. Pritchard*, 45 M.J. 126 (C.A.A.F. 1996) (upholding an order that prohibited sodomy without a condom and that required HIV-positive member to wear a condom when having intercourse with his spouse); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) (finding written safe-sex order constitutionally valid); *United States v. Sargent*, 29 M.J. 812 (A.C.M.R. 1989) (upholding written safe-sex order from commander); *United States v. Negron*, 28 M.J. 775 (A.C.M.R. 1989), *aff’d*, 29 M.J. 324 (C.M.A. 1989) (finding safe-sex order did not violate a privacy right).

<sup>56</sup> See, e.g., *United States v. Klauck*, 47 M.J. 24 (C.A.A.F. 1997) (reviewing only an aggravated assault issue, but the trial court also convicted the accused of Article 92); *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990) (extending the scope of the *Womack* holding by finding that a written safe-sex order restricting sex with civilians was not overbroad).

<sup>57</sup> See, e.g., *Womack*, 29 M.J. at 91 (declining to review appellant’s claim that a safe-sex order prohibiting sex with civilians was overbroad because the charges in the case did not specifically involve civilians).

<sup>58</sup> *Negron*, 28 M.J. 775 *aff’d*, 29 M.J. 324.

<sup>59</sup> *Id.* at 776.

<sup>60</sup> Appellant did not claim that the commander’s order lacked a lawful military purpose. *Id.* at 777.

<sup>61</sup> *Id.* (noting that the Constitution “does not expressly articulate a right to privacy,” but acknowledging a long line of Supreme Court cases dealing with the “penumbral privacy right protecting some aspects of sexual intimacy” (citations omitted)).

<sup>62</sup> 478 U.S. 186 (1986) (holding there is no constitutionally protected right to consensual homosexual sodomy). The *Bowers* Court found that its earlier privacy cases did not establish “that any kind of private sexual contact between consenting adults [was] constitutionally insulated from state proscription.” *Id.* at 191.

<sup>63</sup> *Negron*, 28 M.J. at 777, *aff’d*, 29 M.J. 324.

<sup>64</sup> 539 U.S. 558 (2003).

<sup>65</sup> *Id.* at 578 (finding consenting adults have a “full right to engage in [private sexual conduct] without intervention of the government”). “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.” *Id.*

<sup>66</sup> *Id.*

A review of other HIV safe-sex order cases demonstrates that there is a legitimate governmental interest in limiting the sexual conduct of HIV-positive servicemembers. At the same time the *Negron* court was looking at the privacy aspect of safe-sex orders, the COMA was looking at the governmental interest and valid military purpose aspects of safe-sex orders.<sup>67</sup> In *United States v. Womack*, the accused conditionally pled guilty to an Article 90 violation after unsuccessfully challenging a written safe-sex order as overbroad, overly intrusive, and exceeding military necessity.<sup>68</sup> On appeal, the COMA found the order lawful after looking at five areas. First, the court found a legitimate governmental interest in preventing the spread of infectious disease and called safe-sex orders a “less restrictive means” to meet that interest.<sup>69</sup> Second, the court said the order in the case was “specific, definite, and certain,” and therefore not void for vagueness.<sup>70</sup> Third, the court found a valid military purpose, stating, “[t]he military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty.”<sup>71</sup> Fourth, the court held the order was not overbroad.<sup>72</sup> The court refused to analyze how the order applied to any hypothetical situations beyond the facts of the case involving the appellant’s sexual contact with another servicemember.<sup>73</sup> The fifth and final area the court examined was privacy. Similar to *Negron*, the court found no valid privacy interest involving sodomy.<sup>74</sup>

*Negron* and *Womack* laid the foundation for safe-sex order cases in military criminal practice, but two other cases expanded their basic holdings. In *United States v. Dumford*, COMA answered the open question in *Womack* about applying safe-sex orders to sexual contact with civilians with very clear language: “We have absolutely no doubt that preventing a servicemember who has HIV from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective. It is clear to us that such conduct could be found to be service-discrediting.”<sup>75</sup>

In *United States v. Pritchard*,<sup>76</sup> the CAAF addressed the scope of sexual conduct covered by safe-sex orders. In *Pritchard*, the safe-sex order only discussed intercourse, but the accused also received medical counseling that explained the virus could be transmitted by oral-genital contact.<sup>77</sup> During providency, the military judge conducted a “thorough, searching inquiry” where the accused acknowledged that he understood the safe-sex order also required him to “advise sodomy partners of his infection and to wear a condom during sodomy.”<sup>78</sup> The CAAF affirmed the accused’s Article 92 conviction because “failure to wear a condom or advise a sexual partner about a communicable disease prior to sexual intercourse is ‘closely related’ to failure to do the same prior to another form of sexual connection.”<sup>79</sup>

The *Dumford* and *Pritchard* cases make it clear that safe-sex orders will be broadly accepted by courts,<sup>80</sup> but prosecutors must be aware of potential pitfalls. *Pritchard* did not address the fact that the accused was convicted in part for “unprotected

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<sup>67</sup> *United States v. Womack*, 29 M.J. 88, 89 (C.M.A. 1989) (reviewing a safe-sex order that required a servicemember to notify all partners of his infected status, and which prohibited him from engaging in acts of sodomy or homosexuality); see also *United States v. Sargent*, 29 M.J. 812, 814–17 (A.C.M.R. 1989) (providing detailed analysis about why a written safe-sex order had a valid military purpose and did not violate any constitutional privacy rights).

<sup>68</sup> *Womack*, 29 M.J. at 89.

<sup>69</sup> *Id.* at 90 (referring to earlier cases involving sexually transmitted diseases and smallpox). The court did not engage in any significant discussion about the particular dangers of HIV.

<sup>70</sup> *Id.* (finding the accused “had actual knowledge of its nature and terms, and he was on fair notice as to the particular conduct which was prohibited”).

<sup>71</sup> *Id.* The court specifically referred to its holding in *United States v. Woods* where it held that transmitting HIV through intercourse was an “inherently dangerous act” that was prejudicial to good order and discipline. 28 M.J. 318, 320 (C.M.A. 1989).

<sup>72</sup> *Womack*, 29 M.J. at 91 (rejecting appellant’s argument that the order was overbroad because it had “implicit limitations on sexual contact with civilians having no connection with the military,” as well as a “requirement to notify all medical personnel”).

<sup>73</sup> *Id.* (citing *Parker v. Levy*, 417 U.S. 733 (1974)).

<sup>74</sup> *Id.*

<sup>75</sup> 30 M.J. 137, 138 n.2 (C.M.A. 1990).

<sup>76</sup> 45 M.J. 126 (C.A.A.F. 1996).

<sup>77</sup> *Id.* at 128–29.

<sup>78</sup> *Id.* at 128.

<sup>79</sup> *Id.* at 130 (noting that the issue was a “technical variance problem aris[ing] for the first time on appeal”).

<sup>80</sup> The rationale used by the courts in the safe-sex order cases has been adopted in other types of cases. See generally *United States v. McDaniels*, 50 M.J. 407, 408–09 (C.A.A.F. 1999) (citing *Womack* to uphold an order prohibiting a servicemember with narcolepsy from driving an automobile); *United States v. Padgett*, 48 M.J. 273, 277–78 (C.A.A.F. 1998) (citing *Dumford* and *Womack* to uphold an order for a servicemember to cease all interaction with a fourteen-year-old girl).

sexual intercourse with his *wife* in violation of his commander's safe-sex order."<sup>81</sup> The CAAF said the issue had "obvious constitutional implications, but they need not be addressed in this case [because the accused] conceded this issue at trial."<sup>82</sup> Regulating an HIV-positive servicemember's sexual contact with his or her spouse is therefore still an open question. Another open question is the impact of *Lawrence* on safe-sex orders. Prosecutors must be prepared to use the rationale of earlier safe-sex order cases to explain why there is a legitimate governmental interest, and how the safe-sex order in the case is the least restrictive means of meeting that interest. Prosecutors should use a stipulation of fact, or proposed findings of fact, that clearly identifies why the safe-sex order is lawful.<sup>83</sup> If the facts do not support an orders violation charge, prosecutors can consider an Article 134 charge.

### C. Article 134—The General Article

The last charging option for prosecutors in an HIV case is Article 134. In the first two reported HIV cases, *United States v. Woods*<sup>84</sup> and *United States v. Morris*,<sup>85</sup> the prosecutors charged the offenses under Article 134. In *Woods*, there was no safe-sex order, but the court upheld a conviction under Article 134 for conduct that was prejudicial to good order and discipline when the accused had unprotected sex without informing his partner of his HIV status.<sup>86</sup> The court offered little analysis in support of its finding, simply stating, "a factfinder could properly find that the conduct 'was palpably and directly prejudicial to good order and discipline of the service'."<sup>87</sup> The *Woods* court did not seem overly concerned about notice to a servicemember that unprotected intercourse while HIV-positive could be a crime because "a member of the armed forces has Article 134 'carefully explained' to him or her on initial 'entrance on active duty' and 'again after he [or she] has completed six months of' service."<sup>88</sup>

In *Morris*, the appellant had unprotected sexual intercourse with another servicemember who knew of the appellant's HIV status.<sup>89</sup> The appellant argued that because there was no safe-sex order in his case, the conviction "violat[ed] his right to due process in that he did not know nor could he have reasonably known that his conduct was unlawful."<sup>90</sup> Even though there was no safe-sex order, the court upheld the conviction because the specification alleging that the appellant's conduct showed a "wanton disregard for human life" provided fair notice to the appellant.<sup>91</sup>

*Woods* and *Morris* are the only reported HIV opinions that contain Article 134 charges. As the number of HIV cases increased, the charging theories moved toward aggravated assault and violating safe-sex orders. The appellate analysis of the issues in these newer charging theories was more in depth than the relatively conclusory opinions of fair notice in *Woods* and *Morris*. Prosecutors should use Articles 90, 92, and 128 in future cases, and not rely on Article 134 if at all possible, thereby avoiding any concern about fair notice and alleging words of criminality. If prosecutors have proof issues for a lawful order or aggravated assault charge and must look elsewhere, they can consider using Article 134, Reckless Endangerment,<sup>92</sup> which

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<sup>81</sup> *Pritchard*, 45 M.J. at 131 (emphasis added).

<sup>82</sup> *Id.* (citations omitted).

<sup>83</sup> Appendix A contains sample language for a stipulation of fact involving a safe-sex order.

<sup>84</sup> 28 M.J. 318 (C.M.A. 1989).

<sup>85</sup> 30 M.J. 1221 (A.C.M.R. 1990). Although this opinion was issued after the aggravated assault case in *United States v. Johnson*, the facts of the case preceded *Johnson*. The *Morris* case experienced a significant delay due to an interlocutory appeal on the admissibility of medical records. See *United States v. Morris*, 25 M.J. 579 (A.C.M.R. 1987) (ruling on the admissibility of HIV medical records).

<sup>86</sup> *Woods*, 28 M.J. 318. The court did not decide if the accused could have been convicted of another offense or if violation of a safe-sex order would be a valid charge. *Id.* at 320 n.2.

<sup>87</sup> *Id.* at 319–20.

<sup>88</sup> *Id.* at 320.

<sup>89</sup> *Morris*, 30 M.J. at 1228.

<sup>90</sup> *Id.* at 1224–25. The appellant urged that he "engaged in non-deviant sexual intercourse with a female who, like himself, was unmarried at the time, and that such conduct is not a crime." *Id.* at 1225.

<sup>91</sup> *Id.* (noting that several people had counseled the accused on the danger of unprotected sexual intercourse, and that the accused had Article 134 "carefully explained" to him when he entered the service and "again after he . . . completed six months of service" (citing *Woods*, 28 M.J. at 320)).

<sup>92</sup> MCM, *supra* note 14, pt. IV, ¶ 100a (criminalizing "wrongful and reckless or wanton" conduct that "was likely to produce death or grievous bodily harm to another person"). The prejudicial to good order and discipline, and/or service discrediting element of this offense is easily satisfied by the rationale

codified the rationale used in *Woods*.<sup>93</sup> Before a prosecutor makes a final decision on a charging theory, however, they should consider the potential procedural hurdles that may arise in HIV cases.

### III. Procedural Issues

In addition to the unique substantive issues found in HIV cases, prosecutors should be aware of three unique procedural issues related to witnesses, PTAs, and sentencing. These three issues may not apply in every HIV prosecution, but prosecutors must understand the concepts behind them, or they will be surprised when the issues do occur. If these issues are not identified and planned for at the time the charging decision is made, the prosecutor may have a difficult time proving his case or achieving a just and proper sentence.

#### A. Witness Issues

In HIV prosecutions, investigations and witness coordination may require careful analysis of medical privacy regulations, the DoD homosexual conduct policy, and the need for immunity. These three issues can be tightly intertwined, creating hurdles for unwary prosecutors. Investigators will ask prosecutors what information they can get about the accused's HIV status and what they can reveal to potential witnesses about that status. Investigators will also ask how to approach suspected consensual partners of the accused to determine if they were exposed to HIV. Prosecutors must be able to answer these questions in a way that complies with regulations, preserves evidence, and assists the investigators in efficiently completing the investigation.

##### 1. Medical Privacy

The most important procedural witness issue in an HIV case is medical privacy. The DoD policy is to “[p]rotect the privacy of individuals with serologic evidence of HIV infection, according to DoD 5400.11-R and DoD 6025.18-R.”<sup>94</sup> Military prosecutors must be primarily aware of two HIV-specific privacy issues.

The first issue is the use of medical records that indicate a servicemember's HIV status. The general DoD rule is that HIV medical information cannot be used for adverse personnel actions against a servicemember.<sup>95</sup> The rule contains an exception for “otherwise authorized rebuttal or impeachment purposes,”<sup>96</sup> but it does not address how a prosecutor could use medical information to charge an accused prior to trial. The ACMR addressed the issue of using HIV medical information to charge an accused in *United States v. Morris*.<sup>97</sup> *Morris* was a Government interlocutory appeal after the trial judge suppressed the accused's HIV test results as privileged information based on guidance published in a Department of the Army policy letter.<sup>98</sup> The policy prohibited the use of HIV test results “against the service member in actions under the Uniform Code of Military Justice.”<sup>99</sup> The policy also contained an impeachment/rebuttal exception, as well as an exception for “[d]isciplinary or other action based on independently derived evidence.”<sup>100</sup> The *Morris* court overruled the trial judge,

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upholding the safe-sex order cases. See, e.g., *United States v. Dumford*, 30 M.J. 137, 138 n.2 (C.M.A. 1990) (“It is clear to us that such conduct could be found to be service-discrediting.”).

<sup>93</sup> MCM, *supra* note 14, pt. IV ¶ 100a analysis, at A23-24.

<sup>94</sup> DoDI 6485.01, *supra* note 51, para. 6.6. See generally U.S. DEP'T OF DEFENSE, REG. 5400.11-R, DEPARTMENT OF DEFENSE PRIVACY PROGRAM (May 14, 2007); U.S. DEP'T OF DEFENSE, REG. 6025.18-R, DoD HEALTH INFORMATION PRIVACY REGULATION (Jan. 24, 2003).

<sup>95</sup> See DoDI 6485.01, *supra* note 51, para. 6.5 (“Do not use information obtained during or primarily as a result of an epidemiologic assessment interview to support any adverse personnel action against the member . . .”).

<sup>96</sup> *Id.*

<sup>97</sup> 25 M.J. 579 (A.C.M.R. 1987).

<sup>98</sup> *Id.*; see also *United States v. Morris*, 30 M.J. 1221, 1223–24 (A.C.M.R. 1990) (reaffirming its interlocutory ruling granting admissibility in a later opinion on the merits of the case); UCMJ art. 62(a)(1)(B) (2008) (creating a Government right to appeal “an order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding”).

<sup>99</sup> *Morris*, 25 M.J. at 579.

<sup>100</sup> *Id.*

holding “the privilege is a form of limited immunity granted for possible past criminal misconduct and does not prohibit use of the test results where they directly relate to future misconduct.”<sup>101</sup> The logic of the *Morris* opinion is found in current service regulations on HIV.<sup>102</sup>

The second HIV privacy issue is how medical authorities inform individuals of potential HIV exposure. Service regulations provide detailed guidance on this process. A common theme in service regulations is that “HIV antibody test results must be treated with the highest degree of confidentiality and released to no one without a demonstrated need to know.”<sup>103</sup> This “need to know” provision would seem to limit the ability of an investigator to reveal the accused’s HIV status to a potential victim. The credibility of the investigator’s information about sexual contact between the accused and the potential victim would determine if there is a “need to know.” Additionally, if the victim is an active duty servicemember who has HIV, a physician, not an investigator, should initially inform the victim of his HIV status.<sup>104</sup>

## 2. Homosexuality and Immunity

Homosexuality and immunity<sup>105</sup> are the second and third procedural issues that may be important in HIV cases. In an HIV-related criminal investigation that involves homosexual acts, witness and victim interviews can be difficult. In a normal criminal investigation, investigators have little difficulty talking to witnesses about consensual sexual activity that may be relevant to the case. Investigators’ biggest concern may be a witness not talking out of embarrassment, but they can usually work around that with tact and professionalism. In a case involving homosexuality, however, investigators face three obstacles. First, DoD policy limits when investigators can question a servicemember about homosexual activity.<sup>106</sup> Second, potential HIV victims may be afraid to talk out of fear of criminal prosecution themselves.<sup>107</sup> Third, a servicemember involved in homosexual activity may be unwilling to cooperate out of fear of administrative separation.<sup>108</sup> Investigators of potential HIV aggravated assaults need a way to get over these three obstacles while still complying with regulations. A possible answer is immunity.

If a potential victim was a consensual homosexual partner of the accused, getting a grant of immunity is strongly recommended before interviewing the victim. Although a convening authority is unlikely to prosecute a servicemember for a consensual homosexual relationship without any aggravating factors,<sup>109</sup> a servicemember may still fear prosecution. A grant

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<sup>101</sup> *Id.* at 580 (“Here the basis of the disciplinary action is not the mere presence of HIV antibodies but rather conduct alleged to have occurred after the test and with the knowledge of HIV infection.”).

<sup>102</sup> See SECNAVINST 5300.30D, *supra* note 52, para. 15b(4) (allowing the use of HIV test results for adverse action if the servicemember violates the guidance in a preventive medicine counseling, or a preventive medicine order, or if the HIV status is an element of proof in a criminal offense); AR 600-110, *supra* note 52, para. 7-2.b (using language similar to SECNAVINST 5300.30D); AFI 48-135, *supra* note 52, paras. A11.1.2.5, A11.1.3 (using similar language).

<sup>103</sup> SECNAVINST 5300.30D, *supra* note 52, para. 14a.; *accord* AR 600-110, *supra* note 52, para. 1-13f (placing a duty on commanders to “limit[] disclosure of a soldier’s HIV antibody status to only those personnel who have a need to know about the medical condition in the performance of their duties”). The Air Force does not have any similar “need to know” guidance.

<sup>104</sup> See SECNAVINST 5300.30D, *supra* note 52, para. 12b(1)(a) (“shall be counseled by a physician”); AR 600-100, *supra* note 52, para. 2-12 (“All soldiers will be individually and privately notified of all positive HIV test results in a face-to-face interview with a physician.”); AFI 48-135, *supra* note 52, para. A12.1.2 (“shall be counseled by a physician”).

<sup>105</sup> See MCM, *supra* note 14, R.C.M. 704.

<sup>106</sup> “Under DoD policy, a commander may initiate an investigation into homosexual conduct only upon receipt of credible information of such conduct. Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct.” Memorandum from the Under Secretary of Defense to Secretaries of the Military Departments et al., subject: Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality (24 Mar. 1997), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=2171>; see also U.S. DEP’T OF DEFENSE, INSTR. 5505.8, DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS AND OTHER DO D LAW ENFORCEMENT ORGANIZATIONS INVESTIGATIONS OF SEXUAL MISCONDUCT para. 4 (Jan. 24, 2005) (“It is DoD policy that the DCIOs or other DoD law enforcement organizations shall not conduct an investigation solely to determine a Service member’s sexual orientation (heterosexual, homosexual, or bisexual).”).

<sup>107</sup> See *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004) (finding that the military can still criminally punish consensual sodomy under unique military specific circumstances, even after the holding in *Lawrence v. Texas*, 539 U.S. 558 (2003)). Witnesses may be further intimidated if investigators read them their Article 31 rights for suspected sodomy.

<sup>108</sup> See 10 U.S.C. 654(b) (2006) (mandating separation from the armed forces for homosexual conduct).

<sup>109</sup> See *Marcum*, 60 M.J. 198 (allowing sodomy prosecutions, but only when there is an aggravating factor related to military service that removes the conduct from the privacy interest created in *Lawrence*, 539 U.S. 558); U.S. MARINE CORPS, ORDER P1900.16F Ch 2, MARINE CORPS SEPARATION AND

of immunity may eliminate the fear of prosecution from a potential victim. However, the grant of immunity will most likely not apply to an administrative separation.<sup>110</sup>

### 3. *Putting It All Together—The Need to Coordinate*

The key to dealing with the procedural issues involving medical privacy, homosexuality, and immunity is coordination. Prosecutors and investigators should discuss the interplay between these three areas as soon as an HIV-related investigation begins.

The most effective way to question a potential victim and comply with applicable regulations and policy is a five-step process. First, investigators should make a proper request for the accused's medical records to confirm his HIV status. They should also check the records to see if the accused had previously informed medical authorities about any sexual contact with the potential victim. Second, if the accused did not tell medical authorities that the potential victim was a sexual partner exposed to HIV, investigators should contact the appropriate medical authority to have the individual informed of his potential exposure. Third, while medical authorities conduct HIV testing of the potential victim, investigators should contact the immunity authority in the potential victim's chain of command to get a grant of immunity related to the individual's homosexual behavior. If this step involves multiple commands and/or services, significant coordination and time may be required between prosecutors, staff judge advocates, and convening authorities in the commands of the accused and the witness. Fourth, prior to interviewing the potential victim, investigators should locate the individual's local victim assistance office to coordinate immediate services for the individual after he learns more details about his exposure to HIV.<sup>111</sup> Fifth, after investigators have the HIV test results, medical authorities have discussed the results with the individual, and the grant of immunity is approved, the investigators should interview the individual. This sequence of events is much more complicated than the process used to interview witnesses in a traditional criminal investigation, but it is the best method for many HIV cases. It will only work when prosecutors coordinate early and often with investigators.

### B. Pretrial Agreements

A second unique procedural area in HIV prosecutions only occurs in guilty pleas. In an HIV guilty plea, the convening authority should consider using a provision that addresses any other potential victims of the accused. Beginning with the earliest military court opinions involving HIV, courts noted the military's duty to protect not only the health and welfare of its own fighting force, but also the health and welfare of society in general.<sup>112</sup> This governmental interest justifies a PTA provision that requires the accused to notify the applicable military health department of the accused's sexual partners.<sup>113</sup> The list of names included with the PTA provision should be submitted to the applicable service's lead health agency, and not the convening authority.<sup>114</sup>

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RETIREMENT MANUAL para. 6207.3f(1) (6 June 2007) ("Informal fact finding inquires and administrative separation procedures are the preferred method of addressing homosexual conduct.")

<sup>110</sup> See MCM, *supra* note 14, R.C.M. 704(b) analysis, at A21-38 ("Note that this rule relates only to criminal proceedings. A grant of immunity does not extend to administrative proceedings unless expressly covered by the grant."). The conditional language in the second sentence does not seem applicable to administrative separations for homosexual conduct, where a member "shall be separated" upon a finding of qualifying homosexual conduct. 10 U.S.C. 654(b).

<sup>111</sup> If the witness has HIV, investigators should let medical authorities initially inform the accused of his status before investigators begin questioning. See *supra* note 104 and accompanying text.

<sup>112</sup> See *supra* Section II.B (discussing safe sex orders).

<sup>113</sup> Although the accused is supposed to have done this with medical authorities, in certain cases, investigators may have good reason to believe that the accused did not tell medical authorities about all of the accused's sexual contacts.

<sup>114</sup> The convening authority generally does not need to know the health status of members outside of his command, or the private sexual activities of any military member. The goal of the provision is to warn and protect other victims; medical authorities can accomplish that goal. If the list is given to the convening authority, a perception may arise in some cases that the convening authority is using the list to find other homosexual servicemembers in order to separate them.

There are three reasons to include this PTA provision. First, it allows medical authorities to inform and test potential victims. This course of action would allow other infected persons to seek treatment and prevent the unknowing transmission of HIV to others. Second, the accused might be able to use it in exchange for some leniency in sentencing, thereby encouraging a guilty plea and quick resolution of the case. Third, the provision encourages full disclosure by the accused, because under the terms of the PTA, the accused would not face prosecution for any new victims identified on the list.<sup>115</sup> If the Government discovers new victims after trial that are not on the submitted list, Rule for Courts-Martial (RCM) 1109 allows for a vacation hearing.<sup>116</sup>

### C. Sentencing

The third and final procedural area unique to HIV prosecutions is a sentencing issue that occurs when the facts of the case preclude a successful Article 128 prosecution.<sup>117</sup> When the Government is able to convict the accused for a crime other than aggravated assault, the prosecutor should consider using the accused's HIV status in aggravation. In *United States v. Jones*, the military judge acquitted the accused of aggravated assault at a general court-martial, but convicted him of adultery based on the same sexual encounter.<sup>118</sup> The court allowed the prosecutor to use the accused's HIV status in aggravation and the military judge awarded the "maximum punishment for adultery, including a dishonorable discharge," when the trial counsel had only "suggested that a bad-conduct discharge was 'warranted,'" in addition to requesting "a term of confinement, reduction to E-1, and forfeitures."<sup>119</sup> When the military judge announced his sentence, he told the accused, "I find your conduct to be outrageous—your disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances [of your HIV status]."<sup>120</sup>

Although the three procedural issues involving witnesses, PTAs, and sentencing will not apply equally in every HIV prosecution, they are important considerations for prosecutors. Because they can affect the evidence available for trial, as well as the sentence following a guilty finding, prosecutors should review each case for these procedural issues prior to making a charging decision. Early identification of these issues will not only help in the charging decision, but will also help in explaining the value of the case to the convening authority.

### IV. Conclusion

Prosecuting HIV crimes in the military presents unique substantive and procedural issues that require advance planning, study, and coordination. The *Dacus* concurrence should remind prosecutors that HIV aggravated assaults are not always easy to charge or prove. First, prosecutors must deal with substantive charging issues left open by earlier court opinions, such as protected consensual sex with the spouse of an HIV accused. Second, prosecutors must consult with medical experts to determine if the facts of the case will satisfy the *Weatherspoon* risk of harm and magnitude of harm prongs. These requirements alone can make HIV aggravated assaults more complex and time-consuming than normal assault cases, and they only relate to the charging decision, and not to any procedural issues.

Prosecutors must also be aware of the unique procedural issues related to witnesses, PTAs, and sentencing. The largest concern involves witnesses and the interplay between medical privacy, homosexual conduct policy, and immunity that can be present in HIV cases. A legally sound charge is of no use if the accused does not plead guilty and the prosecutor is unable to get a victim or witness to testify in the case.

Unless an HIV-specific crime is created for the UCMJ, prosecutors must continue to cautiously charge HIV crimes under existing articles. Despite the potential complexities of HIV prosecutions, prosecutors can succeed with well-thought-out

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<sup>115</sup> The PTA provision would contain specific language about how the names on the list will be used. *See infra* app. B (sample PTA provision).

<sup>116</sup> MCM, *supra* note 14, R.C.M. 1109. If the Government learns of a new victim after trial, prosecutors simply have to ask medical authorities if that victim's name was on the list submitted by the accused. If the name was not on the list, a Rule for Courts-Martial (RCM) 1109 hearing will be held to determine if the accused breached the PTA and if any portion of the suspended sentence should be vacated.

<sup>117</sup> UCMJ art. 128 (2008).

<sup>118</sup> 44 M.J. 103 (C.A.A.F. 1996).

<sup>119</sup> *Id.* at 104.

<sup>120</sup> *Id.*

charges and early and continuous coordination with medical authorities, investigators, and command representatives. Once at trial, prosecutors should use detailed stipulations of fact, or proposed findings of fact for contested cases, that clearly explain why the facts justify a guilty finding. An HIV assault is clearly one of the most serious types of assaults, and the potentially deadly consequences of the assault demand prosecutors continue to find a way to successfully charge the offenses at courts-martial.

## Appendix A

### Article 128

A stipulation of fact for an HIV aggravated assault should include specific details about the sexual activity relevant to the case. The stipulation should address how the risk of transmission under the first prong of *Weatherspoon* was affected by the accused's viral load, the type of sexual activity (vaginal intercourse, anal intercourse, sodomy, etc.), the use of a condom, and the means of transmission (semen, blood, saliva). It should also discuss the magnitude of harm under the second prong of *Weatherspoon*, and the issue of consent (if applicable). In addition to identifying each relevant factor in the case, the stipulation of fact should use key language from applicable case law.<sup>121</sup>

An example of the core language needed in a stipulation of fact is below. Prosecutors are encouraged to consult an expert and get specific information about how the facts of the case relate to the risk of transmission and the magnitude of harm. Prosecutors can use the expert's information in the stipulation. In particularly detailed cases, prosecutors may want to attach the expert's evidence directly to the stipulation. The sample provision below is for an HIV aggravated assault that involved vaginal intercourse, a condom, and a victim who did not know the accused was HIV-positive prior to intercourse:

I understand that an aggravated assault is an assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm. The test for whether a means of force is likely to produce death or grievous bodily harm is a two-pronged analysis. The first prong is the risk of harm and the second prong is the magnitude of harm.<sup>122</sup> The likelihood of death or grievous bodily harm is determined by measuring both prongs, not just the statistical risk of harm. Where the magnitude of harm is great, there may be an aggravated assault, even though the risk of harm is statistically low.<sup>123</sup>

I agree that the first prong is met in this case because the risk of harm was more than merely a fanciful, speculative, or remote possibility.<sup>124</sup> The risk of harm in this case was the transmission of HIV to [victim] via my semen through the act of vaginal intercourse (the "means likely"). [insert specific medical information here related to the facts of the case and the likelihood of transmission]. I agree that the use of a condom during sexual intercourse is not a defense to assault with a means or force likely to produce death or grievous bodily harm.<sup>125</sup> In this case, my use of a condom during intercourse with [victim] did not make the risk of HIV transmission less than merely a fanciful, speculative, or remote possibility.<sup>126</sup> [insert specific medical information here regarding failure rate of condoms].

I agree that the second prong is met in this case because the natural and probable consequence of my intercourse with [victim] is that I would transmit HIV to her, which would develop into AIDS and eventually cause her death. I specifically agree that the likelihood of HIV developing into AIDS is [insert specific medical information].

### Article 92

Any stipulation of fact must identify the accused's knowledge of the lawfulness of the safe-sex order and his understanding of the scope of it. The lawfulness of the order must include a description of the governmental interest in controlling the spread of HIV. For a case with a military victim, it should also cite the need to preserve a healthy fighting force as well as good order and discipline. The stipulation should use specific language from the preventive medicine order.

Sample stipulation of fact language for a safe-sex order violation:

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<sup>121</sup> The footnotes in the sample stipulation of fact have been included to identify the origin of certain language. It is the prosecutor's discretion whether to include citations to cases in an actual stipulation of fact.

<sup>122</sup> *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998).

<sup>123</sup> *Id.*

<sup>124</sup> *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A. 1990).

<sup>125</sup> *United States v. Klauck*, 47 M.J. 24, 25 (C.A.A.F. 1997).

<sup>126</sup> *Johnson*, 30 M.J. at 57.

On [date], military medical officials informed me that during a routine physical, my blood tested positive for the Human Immunodeficiency Virus (HIV). Shortly thereafter, I began a thorough and continuous course of treatment and education about my condition at [insert applicable military medical facility]. During that treatment period, I received detailed counseling and information on how to care for my HIV and how to prevent spreading it to others. As part of my treatment, I was required to sign annual counseling statements with my provider that explained how I may infect others, and what I was required to do if I desired to have sexual contact with others. Those counseling statements are included in Attachment 1. In addition to these counseling sessions, on [date] I received a preventive medicine order, or “safe-sex order,” from my commanding officer directing me not to engage in sexual intercourse, and [other listed sexual activity], without first informing my partner of my HIV-positive status. The safe-sex order also required that I use a condom for all sexual activity, including intercourse. The safe-sex order is included in Attachment 2. Based on my counseling, treatment, discussions with the medical officials, and the safe-sex order, I was well informed of what types of activity could put others at risk to exposure. Specifically, I knew that if I engaged in protected vaginal intercourse, I was putting my partner at risk. I knew that condoms decrease but do not eliminate the risk of HIV transmission because they may have defects or may not be used properly. Knowing all of this, I chose to engage in protected sexual intercourse with [victim] without informing her of my HIV-positive status.

I believe the safe-sex order in Attachment 2 was a lawful military order for two reasons. First, the military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty.<sup>127</sup> Military members with HIV are significantly hindered in their ability to be worldwide deployable, are at risk for increased health problems, and can adversely affect the performance of the military’s overall mission. Second, transmitting HIV through intercourse is an inherently dangerous act that is prejudicial to good order and discipline.<sup>128</sup> I believe these two reasons are the types of legitimate state interests that justify intrusion into the personal and private life of an individual, including private sexual conduct.<sup>129</sup>

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<sup>127</sup> United States v. Womack, 29 M.J. 88, 91 (C.M.A. 1989).

<sup>128</sup> United States v. Woods, 28 M.J. 318, 320 (C.M.A. 1989).

<sup>129</sup> Lawrence v. Texas, 539 U.S. 558, 578 (2003).

## Appendix B

In an HIV-related guilty plea, prosecutors should consider using a PTA provision that requires the accused to notify medical authorities of any other individuals the accused may have exposed to HIV. A sample provision is below:

I agree to provide a list of names of all sexual partners I had sexual relations with after I learned of my HIV status. The list of names shall contain any and all identifying information I have for each person, to include, but not limited to: name, address, telephone numbers, Internet screen name or user names, and e-mail addresses. The list of names is due to the (applicable medical authority) five days prior to my trial date. I understand that the information I provide will be used by an appropriate government health agency to notify each individual that may have been exposed to HIV. The notification shall be done in accordance with established medical procedures that do not identify me as the potential source of the virus. The convening authority will not see the list of submitted names and the list of names will not be admissible against me in a later court-martial proceeding in accordance with MRE 410. However, if the convening authority independently learns after trial about a person I exposed to HIV, the convening authority shall be allowed to ask the (applicable medical authority) if that new name was on the submitted list. If the (applicable medical authority) confirms the name was not on the list, the convening authority may, after complying with the procedures set forth in R.C.M. 1109, vacate any periods of suspension agreed to in this PTA or as otherwise approved by the convening authority, and that previously suspended portion of my sentence could be imposed upon me.