

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**GEORGE W. HERNDON, JR.  
CHIEF MASTER-AT-ARMS (E-7), U.S. NAVY**

**NMCCA 201000066  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 27 October 2009.

**Military Judge:** CAPT Keith Allred, JAGC, USN.

**Convening Authority:** Commander, Navy Region Northwest,  
Silverdale, WA.

**Staff Judge Advocate's Recommendation:** LT T.M. Brown, JAGC,  
USN.

**For Appellant:** Capt Peter Griesch, USMCR.

**For Appellee:** Maj Jonathan Nelson, USMC.

**15 June 2010**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

**PER CURIAM:**

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of violating orders, false official statement, sodomy, and aggravated assault, violations, respectively, of Articles 91, 92, 107, 125, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, 907, 925, and 928. The military judge announced a punishment of confinement for 15 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct

discharge. Pursuant to a pretrial agreement, the convening authority disapproved the punitive discharge and reduction below pay grade E-5, but otherwise approved the adjudged sentence.

Before us now the appellant asserts two errors: that the military judge erred by accepting his guilty pleas to aggravated assault because he set up matter inconsistent with those pleas during sentencing, and that the sodomy convictions cannot stand because they concern private consensual relations. The appellant asserts both errors personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We have carefully reviewed the record of trial and the parties' submissions and we conclude that no error materially prejudicial to the appellant's substantial rights occurred; we therefore affirm the findings and the approved sentence.

The appellant was determined to be HIV positive in the late 1980's. He was under orders to inform all sexual partners of his condition and to engage only in "safe sex" practices. At some point, the appellant erected a barricade in his home whereby he could perform fellatio, anonymously, on men who responded to a notice on an internet site. The appellant did not inform any of these men of his HIV positive status, nor did he require them to wear condoms. The appellant also committed sodomy on other occasions with a specific junior Sailor who was living temporarily in his home; the appellant neither informed that Sailor of his HIV positive status nor used a condom.

During the sentencing portion of the trial, the appellant introduced testimony from an infectious disease specialist to the effect that the appellant's "viral load," that is, the concentration of active HIV in his blood, was "undetectable". The specialist informed the court that the studies he had reviewed "say that ['undetectable' means] probably about the same as wearing a condom as far as the chances of 98% probably protecting the patient of giving them HIV . . . . So that even being undetectable may be the same as wearing condoms, if you combine both being undetectable and wearing condoms you're even that more protected." Record at 107-08.

**The appellant did not undermine his guilty pleas with his sentencing evidence**

A military judge may not accept a guilty plea if the member sets up matter inconsistent with the proffered plea. Art. 45, UCMJ. If inconsistent matter is so set up, the military judge must resolve the inconsistent matter before entering a guilty finding. *Id.* See also RULE FOR COURTS-MARTIAL 910(h)(2), MANUAL FOR

COURTS-MARTIAL, UNITED STATES (2008 ed.); see generally *United States v. Garcia*, 44 M.J. 496, 497-98 (C.A.A.F. 1996).

The appellant argues that his "undetectable viral load" calls into question whether his sexual conduct with his various partners was actually a means likely to inflict death or grievous bodily harm, one of the elements of aggravated assault. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 54a(b)(1). In the context of this case, and in view of controlling law within the armed forces, see *United States v. Dacus*, 66 M.J. 235 (C.A.A.F. 2008), we conclude that the military judge properly accepted the appellant's guilty plea.

*Dacus*, like the case before us, involved an aggravated assault conviction where the harmful act comprised sexual intercourse between an HIV-positive male and two different females. The Soldier used a condom with only one of the females, and he did not inform either partner of his status. During sentencing proceedings, Staff Sergeant (SSG) Dacus presented medical testimony to the effect that his viral load was "so low that it was not detectable with existing technology." *Id.* at 237 n.1. This evidence, SSG Dacus argued on appeal, called into question the providence of his plea.

In holding that the military judge did not err in accepting the guilty plea, the court applied the familiar test involving both the risk of harm and the magnitude of harm. *Id.* at 238 (citing *United States v. Weatherspoon*, 49 M.J. 209, 211 (C.A.A.F. 1998)). The "risk of harm" need be only more than merely fanciful; the "magnitude of harm" in HIV cases is understood to be great, because if HIV develops into Acquired Immunity Deficiency Syndrome, the condition is either fatal or chronic. *Id.* at 239. The court looked to the appellant's own admissions in *Dacus* to find that the "risk of harm" was more than merely fanciful and found that the sentencing evidence did not conflict with the admissions. *Id.* at 240.

In the case before us, the appellant admitted to unprotected sexual activity, and he also acknowledged reviewing cases with his counsel and concluding that, while his risk of transmitting the virus was low because of his drug therapy, its transmission could still have serious effects on other persons. *Id.* at 48-49, 110.

In *Dacus*, the appellant's plea was found provident even though he had occasionally used a condom. Applying *Dacus* to the case at bar, we find that the risk of harm was more than "merely fanciful," as even at a low viral load the virus could have been

transmitted to another person because of the lack of prophylaxis. Persons infected with the virus "can get sick, actually some people actually get quite sick." Record at 88. The magnitude of the harm is therefore great. We conclude that the infectious disease specialist's testimony did not set up matter inconsistent with the appellant's guilty plea.

### **The sodomy was not protected sexual conduct**

While consensual sodomy, whether homosexual or heterosexual, between adults is now largely protected under the law, see *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), nonetheless there are certain compelling cases where prosecutions may still lie. There are also aspects unique to military life which further limit application of *Lawrence* in a military environment. See *United States v. Marcum*, 60 M.J. 198, 206-07 (C.A.A.F. 2004).

Notably in the case before us, the appellant fails to meet a critical qualification contained in the Court's recitation of the facts in *Lawrence*: "full and mutual consent". 539 U.S. at 578. The appellant admitted to the military judge that he did not inform either his anonymous partners or his known partner of his HIV status. Record at 39, 47-48, 52. On this basis alone we conclude that the appellant's activities were not within the ambit of protected activity, as there was no full consent. Cf. *United States v. Bygrave*, 46 M.J. 491, 493 (C.A.A.F. 1997) (consent to unprotected sex with an HIV-positive person is not "legally cognizable" in an aggravated assault case). We note, as well, that the appellant's known sexual partner was a junior Sailor, and the appellant acknowledged that his own status as a chief petty officer, regardless of a chain-of-command relationship, made their activity improper, and therefore outside the constitutionally protected realm, under service customs and regulations. See *Marcum*, 60 M.J. at 207; Record at 35; Prosecution Exhibit 1 at ¶ 4.

### **Conclusion**

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court