Federal Law including U.S. Military

Analysis

Donation or sale of blood, semen, tissues, organs, or other bodily fluids is prohibited for people living with HIV (PLHIV).

Federal law explicitly addresses HIV transmission as a criminal offense in only one area: donation or sale of blood or other potentially infectious fluids or human tissues.[1] Federal law provides that for conviction, the person must receive "actual notice" of a positive HIV test result, although there is no requirement that the person be informed that HIV can be transmitted by blood, other body fluids, or human tissue.[2] There is an exception for donations or sales that are necessary for medical research or testing.[3]

Neither intent to transmit nor actual transmission of HIV is required for conviction.[4]

Because of widespread use of testing to screen for HIV in donated blood (and widespread testing of donors of semen or other human body fluids or tissue), there is very little likelihood that blood containing the virus will be donated or sold.

Although Congress enacted this law in 1994, there are no reported prosecutions. Many states have similar statutes, and prosecutions of individuals have been reported under those laws.

Enhanced federal sentences for defendants with HIV.

Unlike many states, Congress has not enacted a law imposing enhanced sentences for defendants in criminal cases involving conduct posing a risk of HIV transmission. The U.S. Sentencing Commission considered issuing a guideline for enhanced sentences in cases of intentional exposure to HIV through sexual contact, and declined to do so given the rarity of such cases in the federal courts.[5] Instead, the Commission concluded that the federal guidelines' "general departure" provision,[6] which allows for an

[1] 18 U.S.C. § 1122(a) (2016).
[2] *Id.*
[3] *Id.*
[4] 18 U.S.C. § 1122(b) (2016).
[5] U.S. SENTENCING COMM'N, REPORT TO CONGRESS: ADEQUACY OF PENALTIES FOR THE INTENTIONAL EXPOSURE OF OTHERS THROUGH SEXUAL ACTIVITY TO THE HUMAN IMMUNODEFICIENCY VIRUS 4 (1995) (concluding that HIV transmission issues are rare in federal sentences, based on a review of 235 criminal cases sentenced in fiscal year 1993 in which HIV was mentioned in only four cases, and in only one of those cases, which was not a sexual offense case, was intentional transmission of HIV an issue).
[6] 18 U.S.C. Appx. § 5K2.0 (2016).

upward departure from the guideline range for aggravating circumstances, is the appropriate way to handle cases involving HIV. As a result of U.S. Supreme Court decisions in the last 20 years,[7] the federal sentencing guidelines are now largely advisory, and federal judges can determine sentences based on concerns other than those set forth in the guidelines.

Very few federal cases have involved upward departure sentences for sex offenses committed by defendants living with HIV. For example, in *United States v. Blas*, the Court of Appeals for the Eleventh Circuit affirmed an "extreme conduct" upward sentence departure based on the defendant's numerous sexual acts with a 15-year-old girl.[8] The defendant had not disclosed his HIV status, although the record indicated that the defendant used a condom at least some of the time.[9] The court found that as a result of the sexual contact, the complainant feared that she was infected with HIV, suffered psychological trauma, and repeatedly sought HIV testing.[10] In another federal case, *United States v. Burnett*, the court's use of the defendant's HIV status to impose an upward departure was much more problematic.[11] In that case, there was no risk of HIV transmission presented by the underlying offense, public lewdness when soliciting an undercover federal officer for sex, and the court's opinion fails to determine the risk of HIV transmission involved in the sexual activity that was solicited from the undercover agent.[12]

In at least one case, a federal judge has imposed a sentence far beyond the federal sentencing guidelines, based solely on HIV status. In 2009, a federal judge in Maine determined a pregnant woman's sentence based solely on her HIV status.[13] The woman was charged with possession and use of false immigration documents, a crime for which the federal sentencing guidelines recommend 0-6 months incarceration.[14] The woman had been incarcerated for almost 4 months at the time of her sentencing, and both the defense and prosecution recommended that the judge enter a sentence of "time served."[15] However, the judge sentenced her to a total of 7.9 months because, he argued, the interests of the "unborn child" necessitated that the woman remain in prison past her due date so that he could ensure she received treatment to prevent HIV transmission to the child she was carrying.[16]

Prosecution of federal inmates living with HIV for risk of HIV transmission to correctional officers.

Although there are many convictions of PLHIV, increased penalties for posing an alleged risk of HIV transmission, and matters in state courts for altercations (often involving biting or spitting) with law enforcement personnel, very few such federal cases have been reported. The reported cases tend to

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[7] *See, e.g., United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[8] *United States v. Blas* 360 F.3d 1268, 1273 (11th Cir. 2004).

[9] *Id.* at 1271.

[10] *Id.* at 1271-72.

[11] 545 F. Supp. 2d 1207 (N.D. Ala. 2008).

[12] *Id.*

[13] *See* Brief for National Advocates for Pregnant Women, Center for HIV Law and Policy, Verrill Dana, LLP on behalf of Medical, Public Health and HIV Experts and Advocates as Amici Curiae Supporting Respondents, United States v. "Mrs. T", (No. 09-19-B-W), *available at* http://www.hivlawandpolicy.org/resources/view/412.

[14] *Id.* at 1.

[15] *Id.*

[16] *Id.* at 1-2.

involve substantial prison sentences for conduct posing limited risk of HIV transmission. In one such case, *United States v. Sturgis*, the Court of Appeals for the Fourth Circuit concluded the defendant's teeth were used as a deadly weapon when he bit two corrections officers because the "substantial possibility that HIV, which causes AIDS, can be transmitted via a human bite," meant that the "attack may not only have inflicted serious injury on the officers but endangered their lives as well.[17]

Similarly, in *United States v. Studnicka* the U.S. District Court for the Eastern District of Texas sentenced a federal inmate who had pled guilty to forcibly assaulting a correctional officer while a prisoner in federal prison to a ten-year prison term.[18] That sentence represents an enhancement that was, in part, based on the defendant's HIV status.[19] The correctional officer's injury was considered to be "between the level of serious bodily injury and permanent or life-threatening bodily injury," because, "[i]n order to combat the serious possibility of infection with HIV, [he] was given a number of shots and daily cocktails of medications for a period of six months, which made him extremely ill."[20] However, according to the Centers for Disease Control and Prevention, the risk of HIV transmission through a bite is negligible.[21]

Prosecution of HIV-Related offenses in the U.S. Military

Members of the U.S. Armed Forces have been prosecuted and convicted for offenses involving sexual transmission or risk of transmission of HIV. Although applicants with HIV are barred from enlisting in the armed forces, military service members are tested for HIV, and those who test positive are retained in the service as long as they are able to meet fitness for duty standards.

All prosecutions of service members for HIV-related offenses are pursuant to the Uniform Code of Military Justice, which does not include any provision explicitly addressing HIV transmission or exposure. Instead, service members with HIV have been prosecuted under general criminal assault provisions, similar to the criminal assault prosecutions of civilians with HIV under state law. Military service members have also been prosecuted under provisions unique to the military: (1) failing to follow safe-sex orders and (2) conduct prejudicial to good order, and related provisions. These scenarios are explained in more detail below. All military cases appear to involve sexual contact, and thus there is an absence of reported biting, spitting, or similar assault cases of the sort prosecuted in civilian state courts.

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[17] *United States v. Sturgis*, 48 F.3d 784, 788-89 (4th Cir. 1995) (affirming sentence of 14 years based on the underlying offense, as well as a finding that the inmate committed perjury at trial concerning his knowledge of his HIV status).

[18] *United States v. Studnicka*, 450 F. Supp. 2d 680 (E.D. Tex. 2006).

[19] *Id.* at 681. *See also* 18 U.S.C. Appx. §§ 2A2.2(b)(3) (2016) ("If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury).

[20] *Studnicka* at 682 (internal quotations omitted). *See also* 18 U.S.C. Appx. § 1B1.1, Application Notes (1)(l), (j) ("'Serious bodily injury' means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. . .") ("'Permanent or life-threatening bodily injury' means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. . .").

[21] CTR. FOR DISEASE CONTROL & PREVENTION, *HIV Risk Behaviors*, *Estimated Per-Act Probability of Acquiring HIV from an Infected Source, by Exposure Act*, (Dec. 4, 2015) *available at* http://www.cdc.gov/hiv/policies/law/risk.html (last visited Nov. 29, 2016) (explaining HIV transmission risk for biting is "technically possible but unlikely and not well documented," while listing HIV transmission risk for receptive and insertive oral intercourse as "low," and the transmission risk for insertive penile-vaginal intercourse as "4 per 10,000 exposures.").

Military service members living with HIV may be convicted of assault consummated by battery for engaging in various sex acts.

In *United States v. Gutierrez*, the United States Court of Appeals for the Armed Forces expressly overruled decades of precedent by reversing the aggravated assault conviction of a service member living with HIV that was based on his having unprotected oral sex and protected and unprotected vaginal sex.[22] According to Article 128 of the Uniform Code of Military Justice (UCMJ), aggravated assault consists of an assault undertaken "with a dangerous weapon or other means likely to produce death or grievous bodily harm," or an assault in which the actor intentionally inflicts grievous bodily harm.[23] The service member had been sentenced, upon conviction of that charge, to eight years' confinement, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.[24]

However, the Court in *Gutierrez* held the evidence presented was legally insufficient to find the essential elements of aggravated assault, reasoning that, with a maximum risk of 1 in 500, "HIV transmission is not the likely consequence of unprotected vaginal sex."[25] In making such a determination, the Court adopted the standard for "likely to produce death or grievous bodily harm" used in other aggravated assault prosecutions by assessing if grievous bodily harm was the likely consequence of the service member's sexual activity.[26] In doing so, it expressly overruled its prior standard, from *United States v. Joseph*, in which the Court laid out a unique analysis for aggravated assault prosecutions based on HIV exposure, stating, "the question is not the statistical probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victim's body."[27]

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[22] *United States v. Gutierrez*, 74 M.J. 61, 64, 68 (C.A.A.F. 2015).

[23] 10 U.S.C. § 928(b) (2016). Military courts had held there is no requirement that the defendant act with the specific intent to infect a sexual partner, but, rather, only a general intent to engage in unprotected sex – "with its substantial possibility of introduction of the virus" – is required for conviction. *See United States v. Schoolfield*, 40 M.J. 132, 135 (C.M.A. 1994) (holding that a service member living with HIV who had unprotected sex with five women without disclosing his HIV status, but without evidence that he intended to infect anyone with HIV, was guilty of aggravated assault), *cert. denied*, *Schoolfield v. United States*, 513 U.S. 1178 (1995). Article 128 had also included attempted as well as completed assaults, thus subjecting a service member living with HIV to conviction for an attempt to have unprotected, consensual anal intercourse, which was abandoned before achieving penetration. *United States v. Johnson*, 30 M.J. 53, 57 (C.M.A. 1990) (affirming conviction and sentence of confinement for six years, total forfeitures, reduction in rank, and dishonorable discharge) (*cert. denied*, *Johnson v. United States*, 498 U.S. 919 (1990)). Moreover, even in cases in which a service member had disclosed their HIV status to the sexual partner(s), and the partner(s) gave informed consent to the sexual contact, the service member could be convicted of aggravated assault. *See United States v. Bygrave*, 46 M.J. 491, 495-97 (C.A.A.F. 1997) (affirming conviction on ground that informed consent to sexual intercourse with service member living with HIV was not a defense). However, the Court in *Gutierrez* rejected such this approach. *Gutierrez* at 67-68 ("An attempt requires 'specific intent to commit [the] offense.' Thus, an attempted aggravated assault charge may lie when an accused knew he was infected with HIV and, using a syringe of his blood or intentionally using his body as a weapon, specifically intended to inflict grievous bodily harm as demonstrated by the evidence at trial.") (internal citations omitted).

[24] *Gutierrez*, 74 M.J. at 62.

[25] *Id.* at 66-67. The Court also accepted testimony characterizing the HIV transmission risk as "almost zero" via unprotected oral sex and "only remotely possible" via protected vaginal sex. *Id.*

[26] *Id*. at 66.

[27] *United States v. Joseph*, 37 M.J. 392, 397 (C.M.A. 1993). Cases before *Gutierrez* laid the groundwork for the express overruling of *Joseph.* In *United States v. Dacus*, a service member had pled not guilty to two counts of attempted murder and guilty to the lesser included offense of aggravated assault after having sex without disclosing his HIV status to his partners. *United States v. Dacus*, 66 M.J. 235, 236 (C.A.A.F. 2008). Although the Court of Appeals for the Armed Forces affirmed the aggravated assault conviction, a concurring opinion questioned the adequacy of the legal standard at issue, noting that it "does not state that because the magnitude of the harm from AIDS is great, the risk of harm does not matter." *Id.* at 240. In

The Court in *Gutierrez* nevertheless affirmed the lesser included offense of assault consummated by battery,[28] reasoning that the service member's "conduct included an offensive touching to which his sexual partners did not provide meaningful informed consent."[29] The Court's holding rested on a 1998 decision from the Supreme Court of Canada which reasoned, "[w]ithout disclosure of HIV status there cannot be a true consent."[30]

In *United States v. Pinkela*, upon remand from the Court of Appeals for the Armed Forces, the Army Court of Criminal Appeals attempted to distinguish *Pinkela* from *Gutierrez* because (1) the service member in *Pinkela* had a "pretty significant" viral load, (2) he did not use a condom, (3) the relevant conduct was anal sex, and (4) the service member's sex partner's anus was bleeding prior to the sexual activity.[31] The court thus reinstated the service member's conviction of, among other crimes, aggravated assault and reckless endangerment.[32] The Court of Appeals for the Armed Forces, again applying the *Gutierrez* standard, reversed these convictions once more.[33] As with *Gutierrez*, however, the Court in *Pinkela* affirmed the lesser included offense of assault consummated by battery.[34]

Lower military courts have held similarly following the *Gutierrez* standard. In *United States v. Atchak*, the Air Force Court of Criminal Appeals set aside a service member's guilty plea to aggravated assault, based on unprotected oral and anal sex, because the risk of HIV transmission did not meet the *Gutierrez* standard for assault by means likely to produce death or grievous bodily harm.[35] The court also set aside the conviction for the lesser included offense of assault consummated by battery, "because the issue of consent as a defense to that offense was not adequately explored . . . during the plea inquiry."[36] In *United States v. Sosa*, the United States Army Court of Criminal Appeals held that a service member could not be convicted of aggravated assault for having sex without disclosing his HIV status because the HIV transmission risk did not meet the *Gutierrez* standard.[37] Moreover, the court held that evidence of the service member's sexual partner subsequently acquiring HIV was inadmissible because, since the government did not prove the service member caused the HIV

United States v. Upham, the United States Coast Guard Court of Criminal appeals reversed the aggravated assault conviction of a service member living with HIV who had unprotected vaginal sex because the military judge had provided instruction, based on the *Joseph* standard, that "removed from the court's purview the issue of whether [the service member] employed a means likely to produce death or grievous bodily harm." *United States v. Upham*, 64 M.J. 547, 550 (C. G. Ct. Crim. App. 2006), ***aff'd*** 66 M.J. 83 (C.A.A.F. 2008). The court noted medical testimony that, "risk of contracting HIV was very low," given the service member's low viral load, but nevertheless affirmed the conviction of the lesser included offense of assault consummated by battery. *Id* at 548.

[28] 10 U.S.C. § 928(a) (2016) ("Any person subject to this chapter who attempts or offers with unlawful force to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.").

[29] *Gutierrez,* 74 M.J at 68.

[30] *Id. R. Cuerrier*, [1998] 2 S.C.R. 371, 372 (Can.).

[31] *United States v. Pinkela*, 2015 CCA LEXIS 254 (A. Ct. Crim. App. June 11, 2015).

[32] *Id.* 10 U.S.C. § 934 (2016).

[33] *United States v. Pinkela*, 75 M.J. 108 (C.A.A.F. 2015).

[34] *Pinkela*, 75 M.J. at 108 (2015).

[35] *United States v. Atchak*, 2015 CCA LEXIS 328 (A.F. Ct. Crim. App. Aug. 10, 2015), ***aff'd*** 75 M.J. 193 (C.A.A.F. 2016).

[36] *Id. But see United States v. Young*, 2016 CCA LEXIS 201 (A.F. Ct. Crim. App. March 24, 2016) (affirming conviction of assault consummated by battery based on defendant's guilty plea because he "admitted that the contact constituted an offensive touching because of his failure to disclose his HIV status," and "the mere possibility of a conflict between the plea and an appellant's statements or other evidence is not sufficient to set aside a guilty plea.").

[37] *United States v. Sosa*, 2016 CCA LEXIS 635 (A. Ct. Crim. App. Oct. 28, 2016).

infection through his sexual conduct, its probative value was, "*at most*, marginal," coupled with "substantial risk to [the service member's] right to a fair trial."[38]

Military service members with HIV have been convicted of disobeying a "safe-sex order" in cases in which HIV status is not disclosed or in which condoms are not used.

Upon testing positive, military service members living with HIV are counseled regarding the risk of HIV transmission and are routinely issued orders to (1) disclose their HIV status to sexual partners, (2) avoid sexual activities posing a significant risk of HIV transmission, and (3) use condoms or other protection to reduce the risk of transmission.[39] Violations of safe-sex orders are prosecuted under Articles 90 or 92 of the UCMJ.[40] Obtaining the consent of a sexual partner, after disclosure of HIV status, to sexual intercourse without a condom or other protection would be irrelevant to whether a safe-sex order was violated. Military service members with HIV have been convicted for failing to follow safe-sex orders for engaging in (1) unprotected sex without disclosing their HIV status, [41] (2) protected sex without disclosing HIV status,[42] and (3) sexual relations with their spouses.[43] A charge for failure to obey a lawful order can be combined with the general criminal charges discussed above.[44]

Some safe-sex orders, though overly broad in prohibiting service members from engaging in behaviors that pose no risk of HIV transmission, have nevertheless been upheld as lawful orders. In *United States v. Womack*, the service member was issued an order requiring him to take affirmative steps "during any sexual activity to protect your sexual partner from coming in contact with your blood, semen, urine, feces, or saliva."[45] The service member was accused of having oral-genital contact with another man, and his subsequent conviction for willful disobedience of the order was affirmed because his saliva came in contact with his partner during sexual activity.[46]

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[38] *Id.* at *14-15.

[39] *See, e.g., Atchak*, 2015 CCA LEXIS 328 (A.F. Ct. Crim. App. Aug. 10, 2015), *aff'd* 75 M.J. 193 (C.A.A.F. 2016).

[40] 10 U.S.C. §§ 890(2), 890 (2016).

[41] *United States v. Stevens*, No. NMCCA 201300116, 2013 CCA LEXIS 913 (N-M. Ct. Crim. App. Oct. 31, 2013) (affirming conviction based on service member's guilty plea to violating a lawful order), *review denied*, 73 M.J. 258 (C.A.A.F. 2014); *United States v. Dumford*, 30 M.J. 137 (C.M.A.) (affirming conviction for disobeying an order not to engage in sexual activity without informing sexual partners of HIV status), *cert. denied*, 498 U.S. 854 (1990); *United States v. Barrows*, 48 M.J. 783, 787-88 (A. Ct. Crim. App. 1998) (affirming conviction for disobeying a lawful order by having unprotected sex without disclosing HIV status); *United States v. Sargeant*, 29 M.J. 812, 814–17 (A.C.M.R. 1989) (affirming conviction on charges of willful disobedience of a lawful order for having unprotected sex without disclosing HIV status).

[42] *United States v. Negron*, 28 M.J. 775, 776–79 (A.C.M.R.) (upholding conviction for violation of safe-sex order by service member who used condom during heterosexual intercourse but did not disclose his HIV status), *aff'd*, 29 M.J. 324 (C.M.A. 1989).

[43] *United States v. Pritchard*, 45 M.J. 126 (C.A.A.F. 1996), *cert. denied,* 520 U.S. 1253 (1997). Prosecutions involving spousal sexual contact, or others involving regulation of service members' consensual sexual contact, particularly with civilians, could violate constitutional privacy rights, *see Lawrence v. Texas*, 539 U.S. 558 (2003), although no military case has directly addressed this issue.

[44] *See, e.g., Gutierrez, supra* note 22 (service member was convicted of, in addition to assault consummated by a battery, failure to obey a lawful order, among other charges).

[45] *United States v. Womack*, 29 M.J. 88, 89 (C.M.A. 1989). The order also required disclosure of HIV status to all health care professionals.

[46] *Id.* at 90-91.

The court affirmed the safe sex orders over challenges that they (1) failed to relate to any valid military purpose and (2) interfered with the service member's constitutionally protected privacy.[47] If either challenge were successful, the orders likely could not stand.[48] However, the court dispensed of the first challenge by stating, without addressing HIV transmission risk,[49] "[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."[50] Addressing the service member's privacy, the court first noted, "that forcible sodomy is not constitutionally protected conduct,"[51] and then asserted, "because of the unique mission and need for internal discipline. . . the armed forces may constitutionally prohibit or regulate conduct which might be permissible elsewhere."[52]

Although *Womack* is still good law, the court's reasoning might no longer stand up to these challenges, in light of recent legal developments. *Womack* is part of the line of cases that used the *Joseph* standard to frame aggravated assault prosecutions by stating, "the question is not the statistical probability of HIV invading the victim's body, but rather the likelihood of the virus causing death or serious bodily harm *if* it invades the victim's body."[53] Indeed, *Womack* builds this very reasoning into its valid military purpose argument.[54] With the *Joseph* standard explicitly overruled, a renewed challenge to the valid military purpose of broad safe-sex orders might force the court to consider the nexus between prohibited conduct and the HIV transmission risk posed by that conduct. The constitutional right to privacy challenge also presents a new legal context. Although the court in *Womack* framed the matter as one where no constitutional right exists as a threshold issue, the legal support for such a view has since been expressly overruled.[55] However, the distinction in First Amendment analyses between civilian and military provisions may nevertheless still stand.

Military service members with HIV have been convicted of "conduct prejudicial to good order" for engaging in sexual activities posing a risk of HIV transmission.

Military service members with HIV have been convicted under the "general article," Article 134 of the UCMJ.[56] This catch-all provision criminalizes all conduct "to the prejudice of good order and discipline

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[47] *Womack* at 90-91.

[48] *Id.* at 90 ("In considering the validity of this military order, we note . . . it may not be overly broad in scope or impose an unjust limitation on personal rights.") (internal citations omitted).

[49] At trial, two military doctors testified that, "it was possible but not very likely that one could transmit the virus through his saliva incident to an act of fellatio." *United States v. Womack*, 27 M.J. 630, 634 (A.F.C.M.R. 1988).

[50] *Womack, supra* note 45 at 90.

[51] *Id.* at 91 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

[52] *Id*. (citing *Parker v. Levy*, 417 U.S. 773 (1974) and *United States v. Hoard*, 12 M.J. 563 (A.C.M.R. 1981)).

[53] *Joseph, supra* note 27.

[54] *Womack, supra* note 45 at 90-91 ("We have recently held that a servicemember who engages in sexual intercourse without protection, knowing that his seminal fluid contains a deadly virus capable of sexual transmission, can be convicted of committing an 'inherently dangerous act' likely to cause death or great bodily ham and that such conduct can be prejudicial to the good order and discipline of the armed forces . . .").

[55] *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003)("*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."). Notwithstanding the forcible nature of the sex acts involved in *Womack* (the service member allegedly performed fellatio on another person while he was asleep), *Bowers* stood for the broad proposition that sodomy is not constitutionally protected. Thus, as to the constitutional right threshold, *Womack* could at least be narrowed to apply only to "safe-sex orders" where there is no consent.

[56] 10 U.S.C. § 934 (2016).

in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."[57] Despite the absence of any reference in this provision to behaviors posing a risk of HIV transmission, or any reference to what behaviors involve a sufficient risk to constitute a violation, the Court of Military Appeals upheld its application to service members living with HIV on the basis that the safe-sex counseling they have received provides sufficient notice regarding conduct prohibited by Article 134.[58] Disclosure of HIV status and consent of the service member's sexual partner is not a defense to an Article 134 prosecution.[59]

Important note: *While we have made an effort to ensure that this information is current, the law is always changing and we cannot guarantee the accuracy of the information provided. This information may or may not be applicable to your specific situation and, as such, it should not be used as a substitute for legal advice.*

[57] *Id.*

[58] *United States v. Woods*, 28 M.J. 318, 319-20 (C.M.A. 1989). *See also United States v. Pinkela*, 2016 CCA LEXIS 8 (A. Ct. Crim. App. Jan. 7, 2016).

[59] *United States v. Morris*, 30 M.J. 1221 (A.C.M.R. 1990) (affirming Article 134 conviction and sentence of bad-conduct discharge, forfeiture of $400 pay per month for three months, and restriction to the limits of his base for service member who disclosed HIV status and used condoms approximately 25 percent of the time with female sex partner).

Title

Note: *Provisions imposing punitive restrictions or listing criminal sentences are denoted with ** and are generally listed first. Thereafter, provisions within a particular title are listed numerically.*

18 U.S.C. § 1122 (2016) **

Protection against the human immunodeficiency virus

(a) In general.--Whoever, after testing positive for the Human Immunodeficiency Virus (HIV) and receiving actual notice of that fact, knowingly donates or sells, or knowingly attempts to donate or sell, blood, semen, tissues, organs, or other bodily fluids for use by another, except as determined necessary for medical research or testing or in accordance with all applicable guidelines and regulations made by the Secretary of Health and Human Services under section 377E of the Public Health Service Act, shall be fined or imprisoned in accordance with subsection (c).

(b) Transmission not required.--Transmission of the Human Immunodeficiency Virus does not have to occur for a person to be convicted of a violation of this section.

(c) Penalty.--Any person convicted of violating the provisions of subsection (a) shall be subject to a fine under this title of not less than $ 10,000, imprisoned for not less than 1 year nor more than 10 years, or both.