

**United States Court of Appeals
for the Armed Forces
Washington, D.C.**

United States,

Appellee

USCA Dkt. No. 15-0747/AR

Crim.App. No. 20120649

v.

ORDER

Kenneth A.R.

Pinkela,

Appellant

On consideration of Appellant's petition for grant of review of the decision of the United States Army Court of Criminal Appeals, and in light of United States v. Gutierrez, 74 M.J. 61 (C.A.A.F. 2015), we conclude that the evidence was legally insufficient to find beyond a reasonable doubt that Appellant committed the offenses of aggravated assault and reckless endangerment. We further conclude that the evidence was sufficient to affirm assault consummated by a battery as a lesser included offense of aggravated assault. Accordingly, it is, by the Court, this 4th day of November, 2015,

ORDERED:

That said petition is hereby granted on the following issue:

WHETHER THE EVIDENCE WAS LEGALLY SUFFICIENT TO
FIND BEYOND A REASONABLE DOUBT THAT APPELLANT
COMMITTED AGGRAVATED ASSAULT AND RECKLESS

ENDANGERMENT IN VIOLATION OF ARTICLES 128 AND 134, UCMJ, BY ENGAGING IN UNPROTECTED SEX WHILE HIV-POSITIVE IN LIGHT OF UNITED STATES v. GUTIERREZ, 74 M.J. 61 (C.A.A.F. 2015).

The decision of the United States Army Court of Criminal Appeals as to Charges I and IV and their specifications and the sentence is reversed. The findings of guilty as to Charge IV and its specification are set aside and dismissed. The findings of guilty as to Charge I and its specification are affirmed only as to the lesser included offense of assault consummated by a battery. The remaining findings are affirmed. The record is returned to the Judge Advocate General of the Army for remand to the Court of Criminal Appeals to either reassess the sentence based on the affirmed findings or order a sentence rehearing.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Cave)
Appellate Government Counsel (Goble)