Military Court Vacates Affirmation of HIV Charges Against Kenneth Pinkela

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The U.S. Court of Appeals for the Armed Forces (CAAF) has vacated the decision of the Army Court of Criminal Appeals (ACCA) to affirm HIV-related charges of aggravated assault and reckless endangerment against Lieutenant Colonel Kenneth Pinkela of the U.S. Army, according to a CAAF announcement reported by the Sero Project.

The record of the trial is now returned to the ACCA, which must decide whether the evidence against Pinkela was sufficient beyond a reasonable doubt to show that he committed aggravated assault and reckless endangerment by having unprotected sex while HIV positive. Pinkela has two lesser charges, which could be thrown out. In looking at the case, the ACCA is instructed to take into consideration the recent military court ruling in United States v. Gutierrez.

In the Gutierrez case, the military court reversed an HIV-related aggravated assault convection against Kansas airman David Gutierrez who had attended swingers parties and didn't disclose his HIV-positive status. The court ruled that prosecutors didn't prove his actions were likely to transmit the virus; he was on antiretrovirals, had an undetectable viral load and in fact did not transmit HIV. The charges were reduced to assault and battery.

In 2013, Pinkela addressed the Presidential Advisory Council on HIV/AIDS (PACHA) regarding his case. His speech was then posted as a POZ opinion piece. It reads in part:

> I am here today just three weeks after being released from an Army prison at Fort Leavenworth, Kansas, after serving 272 days. I was not charged with infecting anyone, but with aggravated assault solely because of an accusation that I exposed someone to HIV. I want to thank you—on behalf of my family, friends, neighbors,

and co-workers, both civilian and military, all of whom have been affected by my prosecution—for having demonstrated such leadership with the passage of the criminalization resolution at your February meeting.

What did or did not happen, between me and the person who accused me, did not matter to the Army. Two things mattered: 1) I was accused, and 2) I have HIV. The prosecution's case was focused almost solely on proving that I had HIV; the military court would not allow my counsel to introduce critical evidence, as well as physical and medical evidence.

The prosecutor said, and I am quoting directly here, "where there is smoke, there is fire...you are HIV positive so it must have been you."

Now I am a convicted felon and registered sex offender. My 26-year career of service and sacrifice to my Nation—including a stint as the Army's legislative liaison to the U.S. House of Representatives—is gone.

No job. No retirement benefits. No access to medical care for either combat injuries I have suffered or other health needs, like treating HIV. Not even a flag for my coffin when I die. My ability to care for my family and our future is in jeopardy. My case is pending in the military appeals process, and we pray that that process will right this wrong. But the damage that has already been inflicted on my life, family, friends and reputation can never be corrected.

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