

SUMMARY OF KINK-RELATED MILITARY LAW¹

0. **Content warning.** Please be advised that the following case summaries contain discussions of sensitive topics, including instances of sexual and physical violence.

1. **Introduction and Preliminary note.** This document outlines some of the court cases, regulations, and policies of potential relevance to military members who participate in kink.² “Surprisingly, there is a dearth of published case law — civilian or military — regarding the defense of consent to charges arising from sadomasochistic relationships in a marital setting.”³ The following outlines some of the findings of these cases as well as relevant regulations and policies. As a basic principle, the sexual freedom allowed to servicemembers by the UCMJ may be somewhat more limited than the sexual freedom available to civilians. After a basic precis of authorities on the military justice system, the below discusses two classes of military cases: (1) those in which the word “consent” appeared along with “aggravated assault,” “strangulation,” “choking,” “suffocation,” variations of these, or the phrase “Article 128b” and (2) those mentioning “kink,” “BDSM” or “sadomasochism” as well as variations of “sadomasochism.”

2. Uniform Code of Military Justice (UCMJ) & Manual for Courts-Martial (MCM)

a. The military justice system is governed by the UCMJ which is part of Title 10 of the United States Code.⁴ Article 36 empowers the President to prescribe rules and regulations for courts-martial. Under this authority, the first Manual for Courts-Martial (MCM)⁵ was promulgated by President Truman in 1951. It has been updated regularly since then. It was most recently updated by President Biden on 26 January 2022 via Executive Order (EO) 14062 which covers, among other things, domestic violence, strangulation and suffocation.⁶ The MCM outlines the Military Rules of Evidence (which are based on, but differ from, the Model Rules of Evidence) and the Rules for Courts Martial.⁷ It also discusses every criminal Article of the UCMJ at length, restating the statutory language then providing the elements of the possible offenses covered by that Article, relevant definitions and maximum punishments.

1. Obligatory disclaimer: Every effort has been made to ensure these summaries are accurate and complete as of the time of writing (18 November 2023), but the law can and does change. This information is presented for educational purposes and does not constitute legal advice. If you need legal advice, please consult an attorney; if you are a member of the U.S. military, either active duty or reserve, a criminal defense attorney is available to you at no cost through your military service.

2. This summary does not explore case law concerning extramarital sexual conduct.

3. *U.S. v. Arab*, 55 M.J. 508, 517 (Army Ct. Crim. App. 2001). Obviously, BDSM doesn’t only occur in the context of marital relationships but the court was discussing potential heightened constitutional protection for sexual intimacy in marital relationships and quote highlights the paucity of military case law on these issues.

4. More generally, the UCMJ starts with Article 1 at 10 U.S.C. § 801 and the full statute for any Article is 10 U.S.C. § (800 plus the article number).

5. The 2023 MCM is available online at <https://jsc.defense.gov/military-law/current-publications-and-updates/>

6. The EO is available at public-inspection.federalregister.gov/2022-02027.pdf.

7. The Military Rules of Evidence are based on the Model Rules of Evidence and the Rules for Courts Martial are based on the Federal Rules of Criminal Procedure. There are substantial differences between the military rules and their civilian counterparts but those differences are not relevant for the purposes of these summaries.

SUMMARY OF KINK-RELATED MILITARY LAW

b. Article 128 is the military's general assault statute and the aggravated assault criminalizes *inter alia* inflicting "substantial bodily harm or grievous bodily harm on another person" while committing an assault and committing "an assault by strangulation or suffocation." The January 2022 changes to the MCM added explanation concerning the strangulation and suffocation provision of Article 128(b)(3) and defined "assault by strangulation" as "an assault committed intentionally, knowingly, or recklessly, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim." It defines "assault," "strangulation" and "suffocation" as follows:

(1) "[A]ssault. An assault is an unlawful attempt or offer, made with force or violence, to do bodily harm to another, whether or not the attempt or offer is consummated. It must be done without legal justification or excuse and without the lawful consent of the person affected."⁸ It is clear that "bodily harm" doesn't require any lasting harm; it simply "means an offensive touching of another, however slight."⁹

(2) "*Strangulation*. Intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim."¹⁰

(3) "*Suffocation*. Intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim."¹¹

c. Article 128b was added to the UCMJ in the National Defense Authorization Act for 2019 and allows for aggravated sentencing in domestic violence cases. Prior to Article 128b, domestic violence cases were under Article 128, typically but not always as an assault consummated by a battery which is analogous to a simple assault in the Model Penal Code § 211.1. Article 128b prohibits several things including assaulting "a spouse, an intimate partner, or an immediate family member of that person by strangling or suffocating." The terms "assault," "strangling" and "suffocating" have the same meanings in Article 128b as they do in Article 128.

d. The UCMJ also includes a "general Article" at Article 134. This criminalizes (1) "disorders and neglects to the prejudice of good order and discipline in the armed forces," (2) "conduct of a nature to bring discredit on the armed forces" and (3) "crimes and offenses not capital." The MCM includes 17 "enumerated" Article 134 offenses including bigamy, animal abuse, gambling with subordinates, "straggling," (wandering away from one's unit during a march or maneuver) and drunken or disorderly conduct. "Crimes and offenses not capital" allows the military to prosecute service members for violations of federal criminal laws that are not part of the UCMJ. Most notably, this provision allows court-martial charges to arise for

8. MCM, Part IV, ¶77.c(2)(a) at p. IV-118.

9. *Id.* at ¶c(1)(a).

10. *Id.* at ¶c(5)(c)(iii) at p. IV-122.

11. *Id.* at ¶c(5)(c)(iii).

SUMMARY OF KINK-RELATED MILITARY LAW

violations of state law that occur on a military installation under the Assimilative Crimes Act (18 U.S.C. § 13). There is also an enumerated offense for “extramarital sexual conduct” which, like every other Article 134 offense, requires a showing that the offense is either “to the prejudice of good order and discipline in the armed forces” or “conduct of a nature to bring discredit on the armed forces.”

3. Cases

a. *U.S. v. Holmes*, 24 C.M.R. 762 (A.F.B.R. 1957). A concern of outside perceptions goes back almost to the beginning of the modern military criminal legal system. Only a few years after the creation of the UCMJ, the Air Force Board of Review (the precursor to the Air Force Court of Criminal Appeals (AFCCA)) faced a case we may now recognize as a BDSM scene. The victim “desired and required slapping and physical abuse before engaging in sexual intercourse” and in the assault at issue in the case, ran from her house into the street where the accused chased her and brought her back to the house, literally kicking and screaming.¹² The accused testified that it had been his experience that the victim invited and took pleasure in physical abuse. Toward that end it was her custom to slap or strike him. Usually after she had provoked him to beat her, she would “go to bed with him. She once told the accused that she “wouldn’t even go with a man unless he slapped her around.”¹³ The court held that consent of the other party did not authorize a breach of the peace and upheld his conviction for assault.¹⁴

b. *U.S. v. Snyder*, 4 C.M.R. 15 (Mil. App. Ct. 1952). “[F]ornication, in the absence of aggravating circumstances,” is not a violation of the UCMJ.¹⁵ However, in this case, the court upheld a conviction for a “[d]efendant [who] approached three servicemen and offered his female companion to them for sex without asking for remuneration.”¹⁶ The court’s reasoned that while “fornication” is not prohibited the defendant “sought to entice three members of the armed forces to engage in fornication. By doing so, he clearly evinced to [them] a wanton disregard for a moral standard generally and properly accepted by society.”¹⁷

c. *U.S. v. Christopher*, No. 201600084, 2017 CCA LEXIS 601 (N-M Ct. Crim. App. 12 Sep 17). The Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that use of a safe word “cemented” an accused’s knowledge that the victim was not consenting.¹⁸ In this case, the accused and his girlfriend “practiced ‘Bondage, Dominance, [and] Sadomasochism’ (BDSM) that involved ‘scenes’ of sexual spanking, role-playing, and sadism.”¹⁹ They had a “written

12. *U.S. v. Holmes*, 24 C.M.R. 762, 763-764 (A.F.B.R. 1957).

13. *Id.* (internal citations omitted).

14. This holding doesn’t seem out-of-step with contemporary views of consent in the kink community and how they regard public scenes (i.e., scenes which necessarily involve third parties who haven’t consented to be involved). See generally, Kayla Lords, *Being Kinky in Public or Violating Public Consent?*, FETISH.COM (Dec. 2020) available at www.fetish.com/magazine/fetish-scene/private-kink-vs-public-consent/ and *Consent and Kink in Public*, LIFE OF A KINKY WIFE (3 Nov. 2020) available at lifeofakinkywife.com/consent-and-kink-in-public/.

15. *U.S. v. Snyder*, 4 C.M.R. 15, 20 (Mil. App. Ct. 1952).

16. *Id.* at 15.

17. *Id.* at 19.

18. *U.S. v. Christopher*, No. 201600084, 2017 CCA LEXIS 601, *15 (N-M Ct. Crim. App. 12 Sep 17).

19. *Id.* at *3.

SUMMARY OF KINK-RELATED MILITARY LAW

contract [which] guided their BDSM practice, and one of [the victim's] rules from early in the relationship was '[n]o penetration of [her] butt.' She later had "anal sex with the [accused] and also tried 'anal training' with sex implements."²⁰ The core of the criminal charges in *Christopher* was a "third anal penetration occurred outside of a BDSM scene context, without [victim's] consent" after she returned from a party, the accused "was upset at her and repeatedly digitally penetrated her anus, despite [the victim's] pleas to stop."²¹ At trial, the accused argued that either she consented to this conduct — as she had consented to prior anal play — or that he had a reasonable mistake of fact as to her consent. NMCCA was explicit that "prior anal penetration does not equate to consent on this particular occasion"²² and found that the assaultive event "was not part of a BDSM scene" and instead "occurred because the appellant was angry."²³ The defendant argued both at trial and on appeal that "his digital penetration of [the victim's] anus was 'consensual and for which [he] had a mistaken belief' that she consented."²⁴ However, the court held that he had no **reasonable** belief that she had consented at the time of his digital penetration even if he thought "consent would be granted after the fact."²⁵

d. *U.S. v. Arab*, 55 M.J. 508 (Army Ct. Crim. App. 2001). Examined a "decidedly peculiar marital relationship" which involved "administration of light cuts and burns during sexual activities."²⁶ The court declined to outline the specific limits "to the degree of sadomasochism legally permissible in a marital relationship" but instead noted that wherever "the line is drawn on 'lawful consent' or 'unlawful force or violence.' ... [T]hat the [accused's] conduct was well beyond it."²⁷ This case involved the accused tying the victim's hand behind her back with flex cuffs such that her hands went numb, had her lie on the floor and "had her perform fellatio on him, during which he forced deep penetration. She tried to talk with him and asked him to stop. He responded by poking her in the eyes with his fingers."²⁸ He dragged her "into the bedroom by her hair" and during intercourse "slapped her and made small cuts on her abdomen with a knife" then "burned her repeatedly with a cigarette, including burns on her nipples," and multiple other places on her upper chest and torso."²⁹ He then carved his name into her left buttock with a knife in block letters after which he went to bed and – after applying bandages to herself – she did as well. The victim "testified that during the[se] events, she cried, told the appellant 'no,' and asked him to stop."³⁰ Just like in *Holmes*, the court in *Arab* discussed the good order and discipline issue of having the victim's injuries "open and visible to a casual observer" and the concern that "[s]uch visible injuries would be likely to evoke comment or query, and could lead friends and neighbors to form a negative opinion of her soldier-husband."³¹

20. *Id.* at *3–4.

21. *Id.* at *4.

22. *Id.* at *15.

23. *Id.* at *14.

24. *Id.*

25. *Id.* at *26.

26. *U.S. v. Arab*, 55 M.J. 508, 517 (Army Ct. Crim. App. 2001).

27. *Id.* at 519.

28. *Id.* at 514.

29. *Id.*

30. *Id.*

31. *Id.* at 517.

SUMMARY OF KINK-RELATED MILITARY LAW

e. *U.S. v. Goings*, 72 M.J. 202 (C.A.A.F. 2013). Upheld a conviction involving a sexual assault of an unidentified victim which was video recorded by a third party. He was charged with rape as well as “indecent acts with another” in violation of Article 134 for “wrongfully commit[ing] an indecent act with another male and a female by allowing the other male to be present and video record ... [him] engaging in sexual intercourse with” someone.³² At trial, the defendant argued that the acts were consensual but, despite this defense, he was convicted. On appeal, the defendant argued it was unconstitutional to punish him for having sex in the presence of a third party. Because he did not raise that issue at trial, the court deemed him to have waived it.³³

(1) In a dissent, one of the members of the court noted that “aside from limited exceptions, it is not the province of [military courts] to determine what types of private sexual activities are appropriate”³⁴ and continued that “[t]here is no law indicating that recording sexual acts is a punishable offense under Article 134.”³⁵

f. *U.S. v. Millican*, No. 202100343, 2023 CCA LEXIS 6 (N-M Ct. Crim. App. 11 Jan 23). Featured a charging decision to allege strangulation as explicitly non-consensual; while only an individual decision by one convening authority, it reflects that at least some military justice practitioners do not believe strangulation is *per se* aggravated assault. Prosecutors alleged that the accused “intentionally and **without consent** grabbed the neck of his spouse ... and that he did bodily harm to [her] by engaging in forceful grabbing of her neck — **without her consent or legal justification or excuse.**”³⁶

g. *U.S. v. Doyle*, No. 201900190, 2020 CCA LEXIS 294 (N-M Ct. Crim. App. 31 Aug 20). During the providency inquiry into a guilty plea for aggravated assault by strangulation, the military judge confirmed with the accused that despite a previous conversation about the victim “maybe want[ing] [him] to be more aggressive,” she did not “consent to [him] strangling her on this occasion?”³⁷ On review, NMCCA set aside his conviction for aggravated assault due to a lack of information in the record that his strangulation involved “force sufficient to make death or grievous bodily harm likely.”³⁸ The court was explicit that “simply squeezing a neck—without evidence of the amount of force used—does not *ipso facto* establish an aggravated assault.”³⁹

h. *U.S. v. Knowles*, No. 201500181, 2016 CCA LEXIS 236 (N-M Ct. Crim. App. 19 Apr 16). Upheld an aggravated assault conviction for an accused who “did not merely place a hand on her throat: he pinned her down, used both hands and thumbs to cut off all oxygen, and choked her long enough for her to fade in and out of consciousness.”⁴⁰

32. *U.S. v. Goings*, 72 M.J. 202, 215 (C.A.A.F. 2013)

33. *Id.* at 205.

34. *Id.* at 215 (Stucky, J., dissenting).

35. *Id.* at 214 (Stucky, J., dissenting)

36. No. 202100343, 2023 CCA LEXIS 6, at *2 3 (N-M Ct. Crim. App. 11 Jan 23) (emphasis added).

37. *U.S. v. Doyle*, No. 201900190, 2020 CCA LEXIS 294, at *9 (N-M Ct. Crim. App. 31 Aug 20).

38. *Id.* at *17

39. *Id.*

40. *U.S. v. Knowles*, No. 201500181, 2016 CCA LEXIS 236, at *5 (N-M Ct. Crim. App. 19 Apr 16).

SUMMARY OF KINK-RELATED MILITARY LAW

i. *U.S. v. Codymiles*, 2023 CCA LEXIS 154 (N-M Ct. Crim. App. 5 Apr 23). Choking **after** a sexually assaultive event was held not to be an appropriate basis for a charge of aggravated sexual contact.⁴¹ A Sailor went into the barracks room of another Sailor who was drunk and “began touching [the victim] on her breasts and buttocks. She repeatedly told him to stop and moved his hands from her body, but each time she moved his hands away” he continued.⁴² “[I]mmediately after groping her,” the accused “choked her by putting his arm around her neck” which resulted in “seeing stars, blurry vision, and difficulty breathing.”⁴³ However, as the prosecution erroneously and improperly conflated the choking and the groping, the court set aside his conviction for aggravated sexual contact.⁴⁴ The appeal did not overturn his separate conviction for assault consummated by a battery for this choking.⁴⁵

j. *U.S. v. Haner*, 49 M.J. 72 (C.A.A.F. 1998). Upheld a conviction for assault consummated by a battery and indecent conduct despite a victim recantation.⁴⁶ The victim’s “written account” of her assault outlined 3 hours of “torture,” where the accused “made her lie stomach-down on the floor” then taped her at the wrist and ankles and began “beating her with a leather belt.”⁴⁷ He then scratched her torso with the point of his knife and then, while her hands were still taped, he “placed his fingers in her vagina, then took them out and placed the handle of the knife in her vagina.”⁴⁸ She “pleaded for him to stop hurting her and started praying out loud to be saved. [The accused] told her he was going to keep her there all day and then kill her.”⁴⁹

(1) After charges had been brought, the victim sent a letter to military authorities which said everything described above was consensual. She wrote, “I consented to all the sexual acts ... including taping my hands and ankles, hitting me with the belt, anal intercourse, and vaginal penetration with his hands and the knife.”⁵⁰ At trial, she testified for the defense where she “reiterated her contention that the beatings and sexual activity had been consensual. Testifying on his own behalf, appellant also claimed that his wife had consented to his acts.”⁵¹

(2) The accused was convicted, contrary to his pleas, of one specification each of assault consummated by a battery and indecent conduct with his wife.⁵² The decision is not clear whether these are for the same incident (the one described above) but I believe it is. He was

41. *U.S. v. Codymiles*, 2023 CCA LEXIS 154 (N-M Ct. Crim. App. 5 Apr 23).

42. *Id.* at *6.

43. *Id.* at *10.

44. *Id.* at *15–16.

45. *Id.* at *40. At trial, Codymiles stood charged with aggravated assault for this incident but was only convicted of assault consummated by a battery. *U.S. v. Codymiles*, No. 202100276, at 7 (Commander, Navy Region Southwest, Bremerton, Wash., 11 Jun 21) *available at* jag.navylive.dodlive.mil/Portals/359/Documents/records/us_v_codymiles_jacquez_usn.pdf.

46. Victim recantation occurs frequently in domestic violence cases. Some estimates put the rate of recantation above 80%. Tom Liminger, *Evidentiary Issues in Federal Prosecution of Violence Against Women*, 36 Indiana L. Rev. 686, 707 n. 68 (2003) *available at* mckinneylaw.iu.edu/ilr/pdf/vol36p687.pdf.

47. *U.S. v. Haner*, 49 M.J. 72, 74 (C.A.A.F. 1998).

48. *Id.* at 74–75.

49. *Id.* at 75.

50. *Id.* at 75 n. 3.

51. *Id.* at 75.

52. *Id.* at 73.

SUMMARY OF KINK-RELATED MILITARY LAW

acquitted of 11 other specifications and “was [only] convicted of those offenses which he did not deny or could not remember.”⁵³ AFCCA found the convictions to be factually sufficient on the grounds that the members found the victim’s initial statements (to both law enforcement and medical personnel) to be more credible than her recantation.

4. **HIV-related Cases.** While not directly related to kink, military courts have also addressed questions of whether someone can give legally sufficient consent in the context of HIV. For decades, courts held that if a servicemember had HIV, then their partners were not able to consent to sex.

a. *U.S. v. Joseph*, 37 M.J. 392 (C.M.A. 1993). Held that “sexual intercourse by an HIV-infected person, even if ostensibly protected by a condom, was an assault with a means likely to cause death or grievous bodily injury.”⁵⁴

b. *U.S. v. Bygrave* 46 M.J. 491 (C.A.A.F. 1997). Held that someone cannot give “legally cognizable consent” to “unprotected sex with an HIV-positive partner.”⁵⁵ This is no longer the standard with regards to HIV but *Bygrave* and its progeny have been relied on as recently as 2021 to support the proposition that a person cannot consent to aggravated assault.⁵⁶

c. *U.S. v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015). Explicitly overruled *Joseph*. The defendant argued that right to sexual privacy outlined in *Lawrence v. Texas*⁵⁷ protected the right to participate in a “swingers’ lifestyle.”⁵⁸ The court disagreed because in doing so, the accused, who was HIV-positive, “violated his commanding officer’s order to obtain informed consent and use protection prior to engaging in sexual activity” and therefore his “conduct falls outside of the constitutional liberty interest recognized in *Lawrence*.”⁵⁹ The court did not address the more general question of whether *Lawrence* protects the “swingers’ lifestyle” absent HIV-related misconduct.

(1) He was charged with and convicted of aggravated assault for “unprotected oral sex, protected vaginal sex, and unprotected vaginal sex.”⁶⁰ AFCCA upheld the convictions, but, on review, CAAF focused on the likelihood of HIV transmission and the fact that “at most,

53. *U.S. v. Haner*, 1996 CCA LEXIS 280, *15 (A.F. Ct. Crim. App. 9 Sep 96).

54. *U.S. v. Joseph*, 37 M.J. 392, 397 (C.M.A. 1993).

55. *U.S. v. Bygrave* 46 M.J. 491, 493 (C.A.A.F. 1997). HIV-related aggravated assaults are bad policy and the Court of Appeals for the Armed Forces has seemed to reverse track on this issue with *Gutierrez* and its progeny. For issues regarding HIV-related aggravated assault prosecutions, see Ari Ezra Waldman, *Presumptive Criminals: U.S. Criminal Law and HIV-Related Aggravated Assaults*, in HANDBOOK OF LGBT COMMUNITIES, CRIME, AND JUSTICE 363 (Dana Peterson and Vanessa R. Panfil eds., 2013) and Ari Ezra Waldman, *Exceptions: The Criminal Law’s Illogical Approach to HIV-Related Aggravated Assaults*, 18 VA. J. SOC. POL’Y & L. 550 (2010–2011) available at digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1692&context=fac_articles_chapters

56. *U.S. v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021).

57. 539 U.S. 558 (2003)

58. *U.S. v. Gutierrez*, 74 M.J. 61, 63 (C.A.A.F. 2015)

59. *Gutierrez*, 74 M.J. 61, 68 n. 7.

60. *Id.* at 64. The court dismissed charges for protected oral sex since the expert testimony at trial showed there was “a ‘zero’ percent chance of HIV infection.” *Gutierrez v. U.S.*, 2013 CCA LEXIS 1014 at *10 n. 2 (A.F. Ct. Crim. App. 21 Mar 13).

SUMMARY OF KINK-RELATED MILITARY LAW

Appellant had a 1-in-500 chance to transmit HIV to some of his partners” and that he did not “actually transmit HIV” to his partners.⁶¹ The court maintained that “infliction of [HIV] meets any reasonable definition of ‘likely’ to inflict grievous bodily harm” since, if left untreated, “the natural history is death within the first 12 to 15 years” and that “HIV can cut an individual’s life short even with treatment, and that treatment requires taking antiretroviral drugs ‘religiously’ and maintaining a healthy lifestyle.”⁶² However, based on his remote chance of transmission, CAAF held that an aggravated assault is not satisfied on these facts since it requires use of “a dangerous weapon or other means or force likely to produce death or grievous bodily harm.”⁶³ The plain English meaning of “likely” means that “a 1-in-500 chance of producing death or grievous bodily harm is not legally sufficient to meet the element of ‘likely to produce death or grievous bodily harm.’” CAAF therefore reduced the conviction of aggravated assault to assault consummated by a battery due to his failure to disclose his HIV-positive status.⁶⁴

(2) *Gutierrez* found that *Joseph* used an inappropriate definition of “likely” (“more than merely a fanciful, speculative, or remote possibility”) which “appears to be *sui generis* to HIV cases and is not derived from the statute itself.”⁶⁵ While *Gutierrez* only discussed “means likely” in the context of HIV infection, grounding the legal analysis in whether HIV truly meets the statutory threshold for aggravated assault is relevant in military courts’ review of erotic choking and other kink-related cases since, as in *Doyle*, aggravated assault includes “force sufficient to make death or grievous bodily harm likely.”⁶⁶

d. *U.S. v. Lewis*, 2020 CCA LEXIS 269 (N-M. Ct. Crim. App. 17 Aug 2020). Following *Gutierrez*, assault charges for failure to disclose one’s HIV status continued under either Article 128 for assault consummated by a battery or Article 120 sexual assault. NMCCA has declined to disallow either theory. After being diagnosed with HIV, a Marine “responded well to treatment, and ... [his] viral load tested at an undetectable level (albeit not zero).”⁶⁷ He failed to disclose his HIV status before performing oral sex on another Marine (who testified that had he known about the HIV, his refusal of sex would have been “absolute”).⁶⁸ The court held that regardless of how low the accused’s viral load was and “[h]owever low the risk of HIV transmission may have been,” “without disclosure of HIV status, there cannot be true consent.”⁶⁹ It’s unclear how, if at all, *Lewis* could be applied to kink. One possibility is that a servicemember’s failure to disclose or discuss the risks of erotic choking renders their partner’s putative consent moot but there is not case law on the issue at this point.

61. 74 M.J. at 63.

62. *Id.* at 64.

63. Article 128(b)(1).

64. *Gutierrez*, 74 M.J. at 63.

65. 74 M.J. at 66.

66. 2020 CCA LEXIS 294 at *17

67. *U.S. v. Lewis*, 2020 CCA LEXIS 269, *3 (N-M. Ct. Crim. App. 17 Aug 20).

68. *Id.* at *11.

69. *Id.*