No. 19-557

In the Supreme Court of the United States

CEDRIC L. MCDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces correctly rejected, on plain-error review, petitioner's contention that a mens rea higher than general intent should be inferred into the offense of sexual assault by bodily harm under Uniform Code of Military Justice Article 120(b)(1)(B) (2012), 10 U.S.C. 920(b)(1)(B) (2012), as to which petitioner was permitted to raise a reasonable-mistake-of-fact defense with respect to the victim's consent.

ADDITIONAL RELATED PROCEEDINGS

United States Army Court of Criminal Appeals:

United States v. *McDonald*, Army 20160339 (May 16, 2018)

United States Court of Appeals for the Armed Forces:

United States v. *McDonald*, No. 18-0308 (Apr. 17, 2019)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-10a) is reported at 78 M.J. 376. The opinion of the United States Army Court of Criminal Appeals (Pet. App. 11a-19a) is not published in the Military Justice Reporter but is available at 2018 WL 2273588.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on April 17, 2019. A petition for reconsideration was denied on May 29, 2019. On August 19, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 26, 2019 (a Saturday), and the petition was filed on October 28, 2019 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of one specification of conspiracy to commit sexual assault and one specification of sexual assault by bodily harm, in violation of Articles 81 and 120 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 920 (2012). Pet. App. 2a. Petitioner was sentenced to a dishonorable discharge, reduction to the lowest enlisted grade, forfeiture of all pay and allowances, and three years of confinement. *Ibid.* The convening authority approved the findings and sentence, *ibid.*, and the United States Army Court of Criminal Appeals (Army CCA) affirmed, *id.* at 11a-19a. The United States Court of Appeals for the Armed Forces (CAAF) granted discretionary review and then affirmed. *Id.* at 1a-10a.

1. In August of 2015, petitioner was a Private First Class in the Army and the barracks roommate of Private Quantavious Thomas. Pet. App. 3a. Thomas met DJ, a civilian woman, through a dating website that summer. *Ibid.* Before the night of August 31, 2015, Thomas and DJ had met in person on two occasions; petitioner was present at those times, but had never spoken to DJ. *Ibid.*

On August 31, 2015, at approximately 1 a.m., DJ visited Thomas in his barracks room at Fort Polk, Louisiana, at Thomas's request. Pet. App. 3a, 13a. Before arriving, DJ asked Thomas via text message if anyone else would be in the room, and Thomas twice confirmed that there would not be. *Id.* at 3a. When DJ entered the barracks room, it was dark and she saw no one other than Thomas. *Id.* at 3a, 13a. Petitioner "did not make his presence known to her as he was apparently hiding in the room." *Id.* at 13a.

DJ and Thomas talked and listened to music. Pet. App. 3a. Then they began having sexual intercourse. *Ibid.* While DJ was bent over a bed with her face on the mattress, Thomas stopped having sexual intercourse with DJ in order to move a chair. *Ibid.* At that point, petitioner and Thomas "took the opportunity to switch places," and petitioner began having sexual intercourse with DJ from behind her. *Id.* at 13a. DJ testified that petitioner "did not identify himself, speak to her in any manner or otherwise seek consent prior to penetrating her vulva with his penis." *Id.* at 13a-14a. Upon feeling the penetration become rougher, however, DJ reached her hand back and felt a wrist watch, which she knew Thomas was not wearing, on the arm of the person penetrating her. *Id.* at 3a, 14a. DJ then "kind of freaked out," and petitioner stopped having sex with her. *Id.* at 14a. Thomas told DJ to keep her head down on the bed, and he resumed having sexual intercourse with her. *Ibid.*

Later the same day, DJ reported to civilian law enforcement that she had been sexually assaulted. Pet. App. 14a.

2. Military authorities initiated court-martial proceedings against petitioner. He was charged with one specification of conspiracy to commit sexual assault in violation of UCMJ Article 81, 10 U.S.C. 881 (2012); one specification of sexual assault by bodily harm in violation of UCMJ Article 120, 10 U.S.C. 920 (2012); and one specification of sexual assault by artifice, pretense, or concealment in violation of UCMJ Article 120, 10 U.S.C. 920 (2012). CAAF App. 9.

Petitioner pleaded not guilty, and a general court-martial composed of both officer and enlisted members was convened. Pet. App. 2a. At trial, petitioner claimed

that DJ had consented to sexual intercourse with him, or that at least he thought she had. *Id.* at 3a-4a.

The military judge instructed the panel members that in order to find petitioner guilty of sexual assault, they must find three elements beyond a reasonable doubt: (1) that petitioner committed a sexual act upon DJ by penetrating her with his penis, (2) that he did so by causing "bodily harm," namely the penetration itself, and (3) that he did so without DJ's consent. Pet. App. 4a. The judge explained that consent "means a freely given agreement to the conduct at issue by a competent person" and that "[l]ack of verbal or physical resistance . . . does not constitute consent." *Ibid.* (brackets in original).

The military judge also instructed the panel members on the prosecution's burden to rebut a mistake-of-fact defense as to DJ's consent. The judge explained that "[m]istake of fact as to consent is a defense" to sexual assault, under which a defendant is entitled to acquittal if (1) "the accused held, as a result of ignorance or a mistake, an incorrect belief that the other person consented to the sexual conduct" and (2) the mistaken belief was "reasonable under all the circumstances." CAAF App. 554-555. The instructions then placed the burden of proof on the prosecution to establish beyond a reasonable doubt that "the accused was not under a mistaken belief that the other person consented" or that "at the time of the charged offense the accused's mistake was unreasonable." *Ibid.* Petitioner did not object to the military judge's instructions, which "mirrored the language of the Military Judges' Benchbook, the Rules for Courts-Martial (R.C.M.), and Article 120, UCMJ." Pet. App. 4a.

The court-martial found petitioner guilty of conspiracy to commit sexual assault and sexual assault by bodily harm, and found him not guilty of sexual assault by artifice, pretense, or concealment. CAAF App. 9.

3. Petitioner appealed to the Army CCA, claiming for the first time that the military judge erred by failing to instruct the court-martial that the offense of sexual assault by bodily harm requires a mens rea of at least recklessness. Pet. App. 16a. The Army CCA reviewed petitioner's claim for plain error because petitioner did not object to the instructions at trial, and affirmed. *Id.* at 16a-19a.

The Army CCA found "nothing in the record to suggest that the military judge applied an impermissibly low *mens rea* standard" in petitioner's case. Pet. App. 17a. The court also found that even if the judge had erred, the error caused "no material prejudice to appellant's substantial rights," because the evidence indicated that petitioner's "misconduct of having sexual intercourse with DJ without her consent was at the very least reckless, but more likely purposeful." *Id.* at 17a-18a. The court observed that DJ was unaware petitioner was in the room until he penetrated her. *Ibid.* The court noted petitioner's and Thomas's claim that DJ consented, but was "not convinced of the veracity of these claims in light of their self-serving nature and multiple inconsistencies." *Id.* at 18a.

4. On discretionary review, the CAAF affirmed. Like the Army CCA, the CAAF applied plain-error review because petitioner had not objected to the military judge's instructions at trial. Pet. App. 5a. The CAAF found no instructional error, because "Congress clearly intended a general intent mens rea for Article 120(b)(1)(B), * * * sexual assault by bodily harm." *Ibid.*

The CAAF began by analyzing the text of Article 120. Pet. App. 5a-6a. The CAAF explained that under Article 120, "it is an offense to commit a sexual act without consent, although an honest and reasonable (non-negligent) mistake of fact as to consent serves as an affirmative defense" under the R.C.M. *Id.* at 6a. And the CAAF determined that the statutory elements showed that sexual assault by bodily harm is "a general intent offense." *Ibid.* The CAAF stated that mens rea may be "presumed in the absence of clear congressional intent to the contrary," citing *Elonis* v. *United States*, 135 S. Ct. 2001 (2015), but observed that "a general intent mens rea is not the absence of a mens rea, and such offenses remain viable in appropriate circumstances post-*Elonis*." Pet. App. 7a.

The CAAF also considered the "legal context," explaining that rape under Article 120 was historically a general intent crime, as was common-law rape. Pet. App. 7a-8a (citation omitted). The court found nothing in the statutory text to suggest a "congressional intent to introduce a higher mens rea than the historical general intent." *Id.* at 8a. The CAAF determined that Article 120's structure in fact supported a general-intent requirement, as imposing a heightened mens rea could be inconsistent with statutory provisions establishing that consent is determined "from the alleged victim's perspective." *Id.* at 9a. And the CAAF additionally reasoned that, because Congress expressly provided for a specific intent requirement in neighboring provisions defining other sexual-assault crimes, the absence of a similar mens rea in the definition of bodily-harm sexual assault showed that only a general intent "to do the wrongful act" was required. *Ibid.*

Finally, the CAAF rejected petitioner's contention that "general intent is insufficient to separate wrongful from innocent conduct" in this context. Pet. App. 10a. The court explained that "only *consensual* sexual intercourse is innocent," and that the burden is on the actor to obtain consent rather than on the victim to manifest a lack of consent. *Ibid.* The court accordingly explained that petitioner's "actions could only be considered innocent if he had formed a reasonable belief that he had obtained consent," and that the "military judge's instructions properly reflected that." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-16) that the CAAF misunderstood the mens rea required as to a victim's consent in order to sustain a conviction under UCMJ Article 120(b)(1)(B) (2012).[1] That contention lacks merit, and further review is in any event unwarranted because petitioner would not be entitled to relief even if it were correct. The petition for a writ of certiorari should be denied.

1. At the time of petitioner's offense, UCMJ Article 120(b)(1)(B) made it a crime for a person subject to the UCMJ to commit "a sexual act upon another person by * * * causing bodily harm to that other person." 10 U.S.C. 920(b)(1)(B) (2012).[2] A "sexual act" included "contact between the penis and the vulva or anus or

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[1] A related issue, concerning the mens rea for conduct unbecoming an officer, is presented in *Voorhees* v. *United States*, 19-795 (filed Dec. 20, 2019).

[2] In the Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2935, Congress deleted the offense of sexual assault by bodily harm in Article 120(b)(1)(B) and replaced it with the offense of committing a sexual act on another person "without the consent of the other person" in Article 120(b)(2)(A).

mouth," and "bodily harm" was defined as "any offensive touching of another, however slight, including any nonconsensual sexual act." 10 U.S.C. 920(g)(1)(A) and (3) (2012). Article 120(g)(8)(A), in turn, defined "consent" as "a freely given agreement to the conduct at issue by a competent person." 10 U.S.C. 920(g)(8)(A) (2012).

Article 120(f), meanwhile, permitted an accused to raise any applicable defenses available under the R.C.M., which are contained in the *Manual for Courts-Martial, United States – 2012 (MCM)* promulgated by the President. 10 U.S.C. 920(f) (2012). R.C.M. 916(j) governs the defenses of ignorance or mistake of fact, and requires that when a mistake of fact concerns an element "requiring only general intent or knowledge," the mistake "must have existed in the mind of the accused and must have been reasonable under all the circumstances" in order for the defense to succeed. *MCM*, R.C.M. 916(j), at II-113. Once the defense is raised, the Government bears the burden to prove beyond a reasonable doubt that there was no reasonable mistake of fact. R.C.M. 916(b)(1).

2. The CAAF correctly interpreted those provisions to find that the "statutory elements [in this case] are thus ultimately straightforward: it is an offense to commit a sexual act without consent, although an honest and reasonable (nonnegligent) mistake of fact as to consent serves as an affirmative defense." Pet. App. 6a. That reasoning is required by the plain text of Article 120 and the R.C.M., and petitioner does not offer an alternative reading of those provisions. Instead, petitioner contends (Pet. 6-14) that under *Elonis* v. *United States*, 135 S. Ct. 2001 (2015), the CAAF was required to "read into the statute" a more demanding mens rea requirement as to the victim's consent. That is incorrect.

In *Elonis*, this Court held that 18 U.S.C. 875(c), which prohibits the transmission in interstate commerce of a threat to kidnap or injure, is not violated simply because a reasonable person would have understood a particular communication as a serious expression of an intention to do harm. 135 S. Ct. at 2011. The Court construed Section 875(c) instead to require proof of some awareness of the threatening nature of the communication. *Ibid.*; see *id.* at 2012-2013 (leaving open whether a mens rea of recklessness should apply). The Court explained that "[w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.'" *Id.* at 2010 (citation omitted).

This Court has recognized that the UCMJ "cannot be equated to a civilian criminal code," as it "regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians." *Parker* v. *Levy*, 417 U.S. 733, 749-750 (1974); see also *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983) (stating that the "need for special regulations in relation to military discipline" makes distinctive "demands on [military] personnel 'without counterpart in civilian life'") (citation omitted). Because "military society" differs so significantly from "civilian society," Congress is "permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker*, 417 U.S. at 756.

To the extent that *Elonis* applies to the interpretation of military criminal statutes, the CAAF correctly interpreted UCMJ Article 120(b)(1)(B) as a general-

intent crime. Pet. App. 7a. Under *Elonis*, courts may read in "*only*" the scienter that is "necessary to separate wrongful conduct from 'otherwise innocent conduct.'" 135 S. Ct. at 2010 (emphasis added; citation omitted); see also *Rehaif* v. *United States*, 139 S. Ct. 2191, 2197 (2019) (applying "the presumption in favor of scienter" only to the "'crucial element' separating innocent from wrongful conduct" in criminal statute) (citation omitted). "In some cases, a general requirement that a defendant *act* knowingly is itself an adequate safeguard." *Elonis*, 135 S. Ct. at 2010. This is such a case. As the CAAF explained, intentionally sexually assaulting a victim who did not consent, and whom a reasonable person would not have understood as consenting, is not "innocent conduct," even if the defendant unreasonably believed consent existed. See Pet. App. 10a.

As the CAAF recognized, sexual offenses at common law typically required only general intent, with no specific mens rea as to a victim's consent, and the same is often true of modern civilian criminal law. See Pet. App. 8a; see also 2 Wayne R. LaFave, *Substantive Criminal Law* § 17.2(b), at p. 833 (3d ed. 2018) (noting that "the common law crime of rape was a general intent crime," and that "usually * * * there exists no issue in the prosecution of the crime of rape regarding defendant's perception of the requisite attendant circumstances (e.g., whether or not the woman had given consent)"); Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1096 (1986) ("American courts have altogether eschewed the *mens rea* or mistake inquiry as to consent"). The UCMJ, by incorporating the R.C.M., has modified the traditional rule to be *more* favorable to defendants by permitting a defense based on a reasonable mistake of fact as to consent. See 10 U.S.C. 920(f) (2012); *MCM*, R.C.M. 916(j), at II-113.

And the burden of proof is on the prosecution to rebut that defense beyond a reasonable doubt. *MCM*, R.C.M. 916(j), at II-113. Given that legal context, it would be particularly inappropriate to "read in" a heightened mens rea requirement to Article 120(b)(1)(B). Cf. *Morissette* v. *United States,* 342 U.S. 246, 251 n.8 (1952) (stating that the mens-rea presumption has not been applied to "sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent").

3. In any event, even if the question presented might otherwise warrant this Court's review, further review in this particular case would be unwarranted, for two related reasons.

First, petitioner failed to object to the military judge's instructions on Article 120 at his court martial. Pet. App. 4a. As a result, both the CAAF and the Army CCA reviewed petitioner's claim only for plain error. *Id.* at 4a, 16a. Under the military plain-error doctrine, a military defendant must show (1) an error, (2) that was plain, and (3) that had an unfair prejudicial impact on the members' deliberations. *United States* v. *Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017); see, *e.g.*, *United States* v. *Tovarchavez*, 78 M.J. 458, 467 (C.A.A.F. 2019) (noting differences between the military and civilian plain error tests). Even if petitioner prevails on the question presented in his petition for a writ of certiorari, the plain-error standard could prevent him from obtaining any relief. Indeed, while the CAAF found no error at all, the Army CCA concluded that petitioner could not show prejudice even assuming a plain error occurred. Pet. App. 5a, 17a.

Second, the evidence in petitioner's case demonstrated that he would have been convicted even under

the higher mens rea standard for which he now advocates. As the Army CCA observed, petitioner's conduct was "at the very least reckless, but more likely purposeful" with respect to DJ's non-consent, because he "exploited the cover of darkness to conceal his identity from DJ as he switched places with PV2 Thomas and engaged in nonconsensual sexual intercourse with DJ." Pet. App. 18a. Petitioner's conviction thus did not hinge on the instruction he now challenges, and any error in that instruction was not prejudicial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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