

NO. 20-

IN THE
Supreme Court of the United
States

NICHOLAS E. DAVIS,

Petitioner,

v.

UNITED STATES,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Armed Forces**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the failure to object to a pattern jury instruction erroneously describing the elements of the offense constitutes affirmative waiver such that it categorically precludes plain error review?

**PARTIES TO THE PROCEEDING AND RULE
29.6 STATEMENT**

Petitioner is Nicholas E. Davis. Respondent is the United States. No party is a corporation.

RULE 14.1(B)(III) STATEMENT

This case arises from a conviction by a panel of officers, sitting as a general court-martial, on January 29, 2016 in *United States v. Davis*, General Court Martial Order No. 4, Department of The Army, Headquarters, U.S. Army Medical Department Center and School, Joint Base San Antonio-Fort Sam Houston, Texas 78234, (November 30, 2016), and the following proceedings in the United States Army Court of Criminal Appeals and the United States Court of Appeals for the Armed Forces:

United States v. Davis, 79 M.J. 329 (C.A.A.F. Feb. 12, 2020)

United States v. Davis, No. ARMY 20160069 (A. Ct. Crim. App. August 16, 2018)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Nicholas E. Davis, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Armed Forces (CAAF).

OPINIONS BELOW

The opinion of the CAAF is reported at 79 M.J. 329 (C.A.A.F. 2020) and is reproduced in the appendix to this petition at Pet. App. a1–a10. The opinion of the Army Court of Criminal Appeals is available at 2018 CCA LEXIS 417 (A. Ct. Crim. App. Aug. 16, 2018) and is reproduced at Pet. App. a11–a34.

JURISDICTION

The CAAF granted a petition for review and issued a final judgment affirming the decision of the Army Court of Criminal Appeals on February 12, 2020. Pet. App. a1. Per Supreme Court Rule 13, as amended by the Courts March 19, 2020 order, the petition is due on Saturday, July 11, 2020. This Court’s jurisdiction is invoked under 28 U.S.C. § 1259(3).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Rule for Courts-Martial (R.C.M.) 920(a) states “The military judge shall give the members appropriate instructions on findings.” R.C.M. 920(a), *United States Manual for Courts-Martial* (2016 ed.). It further goes on to state that “Failure to object to an instruction or to omission of an instruction before the

members close to deliberate constitutes waiver in the absence of plain error.” R.C.M. 920(f).¹

10 U.S.C. § 920c(a)(2) (2012) provides: “Any person subject to this chapter who . . . knowingly photographs, videotapes, films, or records by any means the private area of another person, without that person’s consent and under circumstances in which that other person has a reasonable expectation of privacy . . . is guilty of an offense under this chapter and shall be punished as a court-martial may direct.”

STATEMENT OF THE CASE

A. Factual Background and Court-Martial Proceedings.

Nicholas Davis is a Private in the United States Army and subject to the Uniform Code of Military Justice. Off work the Friday after Thanksgiving, Davis, JE, and several other soldiers rented an off-post motel room to consume alcohol. Pet. App. a13. After consuming various amounts of alcohol, most of the soldiers left the motel room except for Davis, JE, JH, and JS. *Id.* The motel room was located on the first floor with a window and door facing the motel’s parking lot. *Id.* The room had two beds and a separate bathroom behind. *Id.*

¹ Given this confabulation between waiver and plain error, the President has since clarified by amending the language to read “Failure to object to an instruction or omission of an instruction before the members close to deliberate forfeits the objection.” R.C.M. 920(f), *United States Manual for Courts Martial* (2019 ed.). The change was not substantive. Moreover, as detailed below, forfeiting an objection to an instruction is now impossible and thus presents an oft-repeating question. The historical confusion between waiver and forfeiture has bedeviled both the military courts and the circuit courts for generations.

One Soldier, JS, fell asleep on the bed closest to the window. *Id.* The other three—Davis (male), JE (female), and JH (male)—engaged in a variety of sexual acts with one another on the other bed. *Id.* Without seeking JE’s affirmative consent, appellant used his cell phone to record JE’s buttocks as she was bent over and faced away from him while the two engaged in sexual intercourse. *Id.* A few minutes after appellant made the recording, several soldiers from the group returned to the motel room and knocked on the door. Pet. App. a14. When no one answered the door, one of the soldiers walked over to the uncovered window, looked in, saw the group sexual intercourse, and then saw JE jump off the far bed and run into the bathroom. *Id.* JE later claimed the sexual activities were nonconsensual. *Id.* Davis, on the other hand, maintained the activities were consensual. Pet. App. a17. Davis was court-martialed.

At trial, the military judge instructed the members—consistent with the Army’s pattern instruction²—that the government was required to prove beyond a reasonable doubt that the recording was made without JE’s consent and under circumstances in which JE had a reasonable expectation of privacy. Pet. App. a4-5. But also consistent with the existing pattern instructions, the judge did not instruct the members that appellant must have known JE did not consent to the recording.

² See Dep’t of the Army Pamphlet 27-9, Legal Services: Military Judges’ Benchbook, para. 3-45c-1. Indecent Viewing, Indecent Recording, or Broadcasting/Distribution of an Indecent Recording (Article 120c).

The judge asked the defense counsel generally if he had objections or requests for additional instructions. Defense Counsel responded, “No changes, sir.” Pet. App. a5. Neither judge nor counsel ever discussed whether the statutory mens rea of “knowingly” applied to both recording and without consent, or simply recording as the judge instructed. The members convicted Davis of false official statement, indecent recording, and indecent broadcasting. Pet. App. a2. Davis pled guilty to two counts of violating a lawful general order. Pet. App. a2.

B. Appellate Court Proceedings.

Davis received an automatic appeal to the Army Court of Criminal Appeals (Army Court). See 10 U.S.C. § 866. On appeal, among other claims, Davis challenged whether the military judge had properly instructed the members as to the correct mens rea with regard to JE’s consent to record. The Army Court did not address that specific issue, set aside Davis’s conviction for indecent broadcasting on unrelated grounds, and affirmed his conviction for indecent recording. Pet. App. a33-34.

Upon review at the CAAF, Davis again asserted that the military judge erred in instructing the members that a negligence mens rea (reasonably should have known) as to JE’s consent to record was sufficient. The CAAF granted review and affirmed in light of its ruling in *United States v. McDonald*, 78 M.J. 376 (C.A.A.F. 2019), *pet’n denied* 589 U.S. __ (Mar. 30, 2020). Davis then filed a motion for reconsideration in light of this Court’s decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The CAAF granted the motion for reconsideration and ordered additional briefing.

Davis argued that, just as in *Rehaif*, the “knowing” mens rea appearing at the beginning of the statute applied not just to the act of recording, but also to the subsequent element that it was without JE’s consent. Ultimately, however, the CAAF concluded: “Because Appellant affirmatively waived any objection to the military judge’s instructions on the elements of Article 120c(a)(2), we need not reach the granted issue.” Pet. App. a2.

REASONS FOR GRANTING THE PETITION

A. There is a Well-Developed Split between the Circuits.

The CAAF and the Eleventh Circuit are glaringly the only federal courts that conclusively treat counsel’s unknowing failure to object to an instruction as affirmative waiver. These two jurisdictions have functionally precluded plain error review with regard to instructional errors because the parties are always invited to submit proposed instructions to the trial courts.³ This, however, is contrary to Fed. R. Crim. P. 52(b), to R.C.M. 920(a) which explicitly makes instructional error subject to plain error review, and to decades of precedent in the military courts since their modern inception in 1951. *See e.g. United States v. Thompson*, 1 C.M.R. 576 (C.G. C.M.R. 1951)(“Article 59(a) provides for

³ *See* Fed. R. Crim. P. 30(d) (“An opportunity must be given to object out of the jury’s hearing and, on request, out of the jury’s presence.”); Dep’t of the Army Pamphlet 27-9, Legal Services: Military Judges’ Benchbook, para. 2-5-14 Procedural Instructions on Findings (Judge: “Do counsel object to the instructions given or request additional instructions?” Trial Counsel & Defense counsel: “Respond.”); Pet. App. a9, fn. 1 (Maggs, J., concurring).

courts-martial a harmless error rule essentially similar to Rule 52 of the Federal Rules of Criminal Procedure”).

The split between the circuits is clear. The deviation by the CAAF and Eleventh Circuit from the otherwise consistent approach of the majority of jurisdictions warrants correction. Those two courts have drifted from the approach followed by every other United States court. In 2005, the 11th Circuit held that failure to request a jury instruction meant a defendant had “waived that issue absent plain error.” *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1035 (11th Cir. 2005). Today, however, it would find the error waived. *United States v. Feldman*, 931 F.3d 1245, 1260 (11th Cir. 2019) (“when a party agrees with a court’s proposed instructions, the doctrine of invited error applies, meaning that review is waived even if plain error would result.”) This stands in stark contrast to the other circuits and this Court’s rules. The availability of plain error review to something as fundamental as the elements of the offense should not hinge on whether a prosecution occurs in New York, California, Florida, or in the Armed Forces. This Court should grant review and mandate plain error review.

Contrary to CAAF and the Eleventh Circuit, the Third Circuit has explicitly rejected the argument that acquiescence is the equivalent of waiver CAAF endorsed. *United States v. Ferriero*, 866 F.3d 107, n.10 (3d Cir. 2017) (“if he acquiesced to an instruction, then he forfeited (rather than waived) the argument and we may correct the error if it was ‘plain error . . . affecting substantial rights.’”) (citing Fed. R. Crim. P. 52(b)). The Third Circuit thus reviews for plain error, even when defense counsel repeatedly agrees to the

instructions, because his agreement “stemmed from the circumstance that he was unaware of the correct rule of law or, if aware of it, did not realize that the intent instruction misstated it.” *Gov’t of Virgin Islands v. Rosa*, 399 F.3d 283 (3rd Cir. 2005).

The First Circuit too reviews for plain error. In the case cited by the CAAF, *United States v. Wall*, the defense counsel affirmatively proposed the instruction. 349 F.3d 18, 24 (1st Cir. 2003). That’s waiver. However, the First Circuit clearly reviews for plain error when a defendant neither proposes nor objects to an instruction. *United States v. Latorre-Cacho*, 874 F.3d 299, 303 (1st Cir. 2017). That is precisely what happened here. Similarly, the Second, Fourth, Fifth, Sixth, and Ninth Circuits also review unpreserved objections to the jury instructions for plain error. *United States v. Middlemiss*, 217 F.3d 112, 121 (2d Cir. 2000); *United States v. Santana*, 352 F. App’x 867, 874 (4th Cir. 2009); *United States v. Broadnax*, 601 F.3d 336, 346–47 (5th Cir. 2010); *United States v. Wilkes*, 662 F.3d 524, 544 (9th Cir. 2011).

The Seventh Circuit precedent is muddled and highlights the importance of granting review. In *United States v. Hamilton*, the Seventh Circuit considered a party’s failure to object to one of the instructions proposed by the government and concluded that, because the failure to object was “inadvertent,” it could never be an “intentional relinquishment of a known right.” 499 F.3d 734, 736 (7th Cir. 2007). That court found that, absent affirmative evidence of waiver, “doubts should be resolved against a finding of waiver” that precludes appellate review. *Id.* The Seventh Circuit appears to only find waiver when the defense, rather than prosecution or judge, proposes the instruction. *Id.* Later that same year, however, it

decided *United States v. Griffin*, 493 F.3d 856 (7th Cir. 2007). In that case, the defense proposed an instruction, but the judge believed it inaccurate and proposed an alternative. *Id.* at 863. After further discussion the defense attorney told the judge the instruction was “proper” and “we have no objection.” *Id.* at 863-864. Contrary to *Hamilton*, those actions constituted waiver and precluded appellate review. *Id.* at 864.

Nevertheless, the landscape of the Seventh Circuit continues to shift with no promise of resolution, absent this Court’s intervention. In *United States v. Kirklin*, the Seventh Circuit again considered the scenario where a defense counsel “had no objections to the final instructions before they were read to the jury.” 727 F.3d 711, 716 (7th Cir. 2013). Despite no evidence that the parties at trial identified the instructional defect later asserted on appeal, that court found waiver and refused to reach the issue. *Id.* However, after finding waiver, the court then reviewed for plain error anyways and found none. *Id.* But, if the court found waiver, there was simply no error to consider correcting. *United States v. Olano*, 507 U.S. 725, 733 (1993). The distinction between waiver and plain error apparently remains a vexing one for the federal courts and marks yet one more reason this Court should grant review.

B. The CAAF and Eleventh Circuit Position Conflicts with Supreme Court Precedent.

This Court has long held that waiver, as opposed to forfeiture, requires “an intentional relinquishment or abandonment of a known right.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Olano*, 507 U.S. 725 (1993); *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018). In this case, the right asserted on

appeal below is to have the members instructed that the mens rea in the statutory preface, “knowingly,” applies to both elements. Despite granting review on that issue, the CAAF refused to address this issue because Davis’ counsel “affirmatively declined to object” and “expressly and unequivocally acquiesce[ed]” to the instructions. Pet. App. a7. However, generally declining to object and acquiescing to what was then a standard pattern instruction does not demonstrate that an accused *knew* about the right. In fact, it should be plain and obvious that neither counsel nor the accused would knowingly decline an instruction increasing the government’s burden with respect to a defendant’s mens rea. The intentionality standard was not met in this case. *See Olano, supra*. This Court’s precedent is clear that inadvertent relinquishment of an unknown right constitutes forfeiture rather than waiver. *See Rosales-Mireles, supra*. Most circuits acknowledge this and review for plain error. The Eleventh Circuit and the CAAF do not and must be corrected. This Court should grant this petition and remand for plain error review.

C. Review of Instructions for Plain Error Remains a Necessary Safeguard in Criminal Trials.

Finding waiver here creates the absurd result that, if the military judge errs in describing the elements and defense counsel does not object, then the two of them may rewrite the elements of the criminal offense in an unreviewable manner. Yet, “only the people’s elected representatives in Congress have the power to write new federal criminal laws.” *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). One of the most important duties the judge does in a trial

court is explain the law to laymen who render the verdict. An appellate court's ability to review whether the judge correctly instructed the fact finder as to something so fundamental as the elements of the crime should not be conditioned entirely on whether defense counsel recognizes a defect in the pattern instructions and objects. That rationale was explicitly rejected in *Olano* and it should be rejected again here. *Olano*, 507 U.S. at 733 ("Although in theory it could be argued that 'if the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review,' . . . this is not the theory that Rule 52(b) adopts.").

The President is tasked with promulgating procedural rules in the Armed Forces that "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836. Under this grant of authority, the President has promulgated Rule for Courts-Martial (R.C.M.) 920. This rule puts the initial burden of properly instructing the members on the military judge. R.C.M. 920(a) ("The military judge shall give the members appropriate instructions on findings"). This is reiterated in R.C.M. 920(e) which states in pertinent part "Instructions on findings shall include . . . a description of the elements charged." Implicit, but obvious, is the requirement that the military judge *correctly* provide "a description of the elements charged." *Id.* It then puts a burden on the defense by stating that failure to object "constitutes waiver in the absence of plain error." R.C.M. 920(f). In other words, it expressly established forfeiture as the standard of review when counsel does not object. But, the lower court's decision functionally precludes appellate courts from ever reviewing instructional errors for

plain error. Either defense counsel objects and preserves the issue, or, as here, does not, and the issue is waived and therefore unreviewable.

This is a judicial abrogation of the President's powers under 10 U.S.C. § 836, and the CAAF erred in so holding. The Rules have not changed and prior to this decision (though unacknowledged in this opinion) the CAAF routinely and properly conducted plain error review of instructional issues. *See e.g. United States v. Williams*, 2 C.M.R. 92, 95 (U.S. C.M.A. 1952) (Rule 52 “permits a federal court to notice plain errors of defects affecting substantial rights, even though not brought to the attention of the court. It has also been held by the United States Supreme Court that it is the fundamental obligation of the trial court to advise a jury as to the essential ingredients of the offense whether or not exception is taken.”) (citing *Screws v. United States*, 325 U.S. 91 (1945)); *United States v. Davis*, 32 MJ 166 (C.M.A. 1991); *United States v. Czekala*, 42 MJ 168, 170 (C.A.A.F. 1995) (“There were no objections to the instructions; thus, absent plain error, we hold there was a waiver.”); *United States v. Davis*, 76 MJ 224, 226 (C.A.A.F. 2017) (“Because Appellant failed to object to the omission of a required instruction on a special defense we review the military judge’s instructions for plain error.”).

D. This Case Is an Ideal Vehicle.

This petition does not request that this Court resolve the underlying issue. Instead, it merely asks this Court to find that failure to object to a flawed pattern jury instruction should be reviewed for plain error. Accordingly, the only relevant record is the underlying decision. No further review of the record is required.

Also, this case could be the Court's only opportunity to remedy the CAAF's error. In contrast to other statutes providing for this Court's appellate jurisdiction, 28 U.S.C. § 1259 grants this Court authority to review decisions of the CAAF only in very limited circumstances.⁴ The CAAF will use this precedent to deny review in similar cases, precluding this Court's jurisdiction to review those cases. In short, this case presents an important opportunity for this Court to preserve the fundamental right to plain error review and resolve a circuit court split.

E. Private Davis Was Materially Prejudiced.

The public nature of the sex acts bears upon Davis' subjective belief that JE was not only willing to have sex with him, but also have him record it. Given the open nature of the sexual acts, the members could have believed that Davis subjectively did not know that she consented to open and notorious group sex, but not to its recording, yet still convicted appellant because they felt his decision-making was negligent, as instructed by the military judge. At the time of the recording, JE was in a motel room with three men and having sex with two of them. The room was on the first floor of the motel, and the sex acts were visible to any random person who walked past the unobstructed window. In fact, another soldier looked in the window and saw Davis and JE having sex. Pet. App. a14. This

⁴ The CAAF has unfettered discretion to deny review except in capital cases and those certified by the Judge Advocate General. 10 U.S.C. § 867(a). The CAAF does not often exercise this discretion. The CAAF issued only 32 opinions for the term beginning October 2018. United States Court of Appeals for the Armed Forces, Opinions: October 2018 Term of Court (Oct. 2, 2019), <https://www.armfor.uscourts.gov/opinions/2018OctTerm.htm>.

instructional error as to the elements of the offense was thus not harmless. Davis should be entitled to plain error review of this allegation of legal error.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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