No. 19-0557

IN THE

Supreme Court of the United States

CEDRIC L. MCDONALD,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR AMICUS CURIAE U.S. ARMY TRIAL DEFENSE SERVICE IN SUPPORT OF PETITIONER

TIMOTHY GRAMMEL*
EDWARD J. O'BRIEN
Trial Defense Service
U.S. Army Legal Services Agency
9275 Gunston Road
Building 1450
Fort Belvoir, VA 22060
(703) 693-0362
timothy.grammel.civ@mail.mil

Counsel for Amicus Curiae

November 22, 2019

* Counsel of Record

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INTEREST OF AMICUS CURIAE[1]

The United States Army Trial Defense Service (TDS) consists of approximately 460 Active and Reserve Component judge advocates who provide trial level criminal defense services to American soldiers throughout the world. This case presents a question concerning whether mens rea with regard to consent is required for sexual assault by bodily harm under 10 U.S.C. § 920(b)(1)(B) (2012). The opinion below by the Court of Appeals for the Armed Forces (CAAF) categorized the offense as a "general intent offense" to support its conclusion that "[n]o mens rea is required with regard to consent." This issue is of vital importance to the defense counsel in TDS and to the soldiers they represent in criminal trials. The CAAF opinion put those soldiers at great risk when it judicially amended the statute by adding a burden of obtaining consent on the defendant. This judicial amendment of the statute was necessary for the lower court to circumvent the clear principles enunciated in this Court's precedents, especially *Carter v. United States*, 530 U.S. 255 (2000) and *Elonis v. United States*, 135 S. Ct. 2001 (2015).

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[1] No counsel for a party authored this brief in whole or in part, and no person or party, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of intent to file and have consented to the filing of this brief. Trial Defense Service is distinct and separate from the organization of the appellate defense counsel for the petitioner, because the defense counsel in TDS represent accused soldiers only at the trial level.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The lower court decided that "[n]o mens rea is required with regard to consent" for an offense that requires as its only elements "a sexual act without consent." *United States v. McDonald*, 78 M.J. 376, 379-81 (C.A.A.F. 2019). This result, which is in direct conflict with this Court's precedents on mens rea, required the lower court to usurp legislative power and amend Congress's definition of consent. The lower court created a burden on the actor to obtain consent. Despite the statutory text of 10 U.S.C. § 920(g)(8) (2012), the Court of Appeals for the Armed Forces (CAAF) declared, "[t]he burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." *Id*. at 381. Congress has considered the issue of affirmative consent and amended the definition of consent in 10 U.S.C. § 920 several times over the past fifteen years. Congress apparently rejected any idea of a burden to obtain affirmative consent. With the level of consideration that Congress has given to this issue, the lower court cannot be allowed to do by judicial fiat what Congress has declined to do legislatively.

This Court has held general intent sufficient only when it protects the innocent actor. *See, e.g., Elonis v. United States*, 135 S.Ct. 2001, 2010 (2015); *Carter v. United States*, 530 U.S. 255, 269-70 (2000). Knowingly engaging in a sexual act does not make the actor conscious of any wrongdoing. The element that criminalizes otherwise innocent conduct is the lack of consent. This Court presumes that Congress intends to require a defendant to possess a culpable mental state regarding such an element, and Congress has not clearly commanded otherwise for this

offense. A proper application of this Court's holding in *Elonis* requires a mens rea with regard to consent of at least recklessness.

Judicially amending the statutory definition of consent, which therefore changes the elements of the offense, was necessary for the lower court's general intent analysis, because general intent would be sufficient only if it protects innocent actors. Whether the lower court's invention of a duty to obtain consent even does this is not the point. The point is the impermissibility of judicial amendment of a statute masquerading as a statutory interpretation. Only this Court can reverse the lower court's illegitimate amendment of the Uniform Code of Military Justice (UCMJ) and correct the lower court's application of general intent.

ARGUMENT FOR GRANTING THE PETITION

I. THE LOWER COURT, CONTRARY TO THE LEGISLATIVE ACTION BY CONGRESS, ADDED TO 10 U.S.C. § 920(g)(8) (2012) A BURDEN TO OBTAIN CONSENT, WHICH IS A POLITICAL DECISION BELONGING TO THE MEMBERS OF CONGRESS AND NOT THE MEMBERS OF THE CAAF.

Nine words towards the end of the lower court's opinion shocked military justice practitioners - "[t]he burden is on the actor to obtain consent." This bold assertion contrary to the plain language of the statute was necessary for the result reached by the lower court. This type of affirmative consent standard was not included in 10 U.S.C. § 920 (2012) by Congress. Congress has reviewed and scrutinized 10 U.S.C. § 920 many times, making significant changes that took effect in 2007, 2012, and 2019. Congress has

never placed a burden on the defendant to obtain consent. Rather, the statute allows the internal agreement of the parties to be determined by a consideration of the circumstances. The definition of sexual consent is a contentious issue in American jurisprudence; hundreds of law review articles have been written about it over the past few decades. Congress has amended 10 U.S.C. § 920 over the past two decades and made significant changes, including some relatively progressive changes, to the definition of consent. However, Congress apparently considered and rejected any requirement to obtain an external manifestation of expressed consent. Further amending the statute in such an aggressive and progressive manner is a policy decision for the elected members of Congress rather than the members of the CAAF.

When amending the statute to include the burden to obtain consent, the CAAF did not cite to 10 U.S.C. § 920, any other statute, or any legal authority. Although an initial reading of the opinion leads one to think the amendment is erroneous but harmless dictum, critical analysis demonstrates that it is a necessary component of the lower court's reasoning and will have signicant ramifications.

The CAAF did not use the common phrase "affirmative consent." That would have raised red-flags and caused appropriate outrage by military justice practicioners and the American public; a military court, depriving service members of their due process rights by judicial fiat is intolerable. The issue is not how Congress should have defined consent but rather how Congress did define consent. Whether or not the members of the CAAF agree with Congress on that policy decision is irrelevant.

The statutory structure for this type of sexual assault by bodily harm is anything but clear. As shown in the petitioner's brief, included within the definition of "bodily harm" is the phrase "nonconsensual sexual act."

At the time of trial, in 10 U.S.C. § 920(g)(8), Congress defined consent as follows.

(8) *Consent*.

(A) The term 'consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistence or submision resulting from the use of force, threat, or placing another person in fear does not constitute consent. A current or previous dating or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(C) Lack of consent may be inferred based on the circumstances of the offense. All the circumstances are to be considered in determining whether a person gave consent, or

> whether a person did not resist or ceased to resist only because of another person's actions.

Although "freely given agreement" may be ambiguous, the rest of the definition makes it clear that there is no burden on the accused to obtain consent. As stated in subpargraph (C), "all the circumstances are to be considered in determining whether a person gave consent."

There is no military case law regarding a burden to obtain consent, because Congress has never adopted such a legal standard.[2] Scholarly literature reflects the common understanding that 10 U.S.C. § 920 does not include a burden to obtain consent. After Congress passed the major amendments to 10 U.S.C. § 920 in the National Defense Authorization Act for Fiscal Year 2006, one author wrote that Congress missed the mark by not adopting affirmative consent. Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW., Aug. 2007, at 1. Major Knies proposed a

[2] There is a recent opinion about voir dire that briefly mentioned the concept of affirmative consent. In an unpublished opinion, the Army Court of Criminal Appeals reversed the convictions in a case involving abusive sexual contact, because the trial judge abused his discretion when he denied a challenge for cause against a juror who appeared unable to put aside his personal belief that there needs to be some signature or action that acknowledges that there is consent. *United States v. Wright*, 2019 CCA LEXIS 324, 2019 WL 3778357, No. ARMY 20170486 (A. Ct. Crim. App. Aug. 9, 2019). If there was a burden to obtain consent, then this juror's beliefs would have been in line with the law, and the convictions would not have been set aside.

further amendment to the statute to add "[t]he requirement that service members obtain affirmative consent from their partners before sex." *Id*. at 38.

Congress has not adopted Major Knies' proposal to add a burden to obtain affirmative consent, and the amendments since then have kept the definition of consent relatively stable. Although Congress had the ability to adopt the more progressive affirmative consent standard that the CAAF created, it did not do so. It is ironic that the lower court was erroneously concerned that requiring mens rea would override statutory provisions in 10 U.S.C. § 920(g)(8) (2012),[3] because the legal standard it adopted for consent conflicts with the definition of consent passed by Congress.

The debate about affirmative consent has been contentious and confusing. "Today, affirmative consent reform is a juggernaut. The rapid proliferation of law, policy, and scholarship defining sexual consent has produced a legal terrain marked by uncertainty, contradiction, and hidden value judgments." Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415 (2016). On August 12, 2019, after a contentious debate during the American Bar Association's Annual Meeting, its House of Delgates decided indefinitely to postpone consideration of a resolution that would urge legislatures to redefine

[3] "Interpreting the statute to require a specific mens rea on the part of the accused with respect to consent, as Appellant suggests, would override these provisions." *United States v. McDonald,* 78 M.J. 376, 380 (C.A.A.F. 2019). This concern is misguided, because mens rea harmoniously coexists with the definition of consent. Mens rea is an evaluation of the defendant's mental state, while consent is an evaluation of the alleged victim's mental state.

the consent standard in sexual assault cases. Amanda Robert, *Contentious resolution seeking to redefine consent in sexual assault cases is postponed*, ABAJOURNAL (Aug. 12, 2019, 10:20 PM CDT), http://www.abajournal.com/news/article/resolution-114. The American Bar Association appreciates that this important policy debate deserves time and that the proper procedures for legislative change must be followed. Congress has fine-tuned the definition of consent in the UCMJ, making some reforms but not others. Given the Congressional action on this complex political issue, the lower court cannot be allowed to usurp the legislative power of Congress.

II. ONLY THIS COURT CAN CORRECT THE LOWER COURT'S ILLEGITIMATE AMENDMENT OF THE STATUTE, WHICH WAS REQUIRED TO CAMOUFLAGE ITS MISAPPLICATION OF GENERAL INTENT THAT CIRCUMVENTED PRINCIPLES CLEARLY ENUNCIATED IN THIS COURT'S PRECEDENTS, INCLUDING *CARTER V. UNITED STATES*, 530 U.S. 255 (2000), AND *ELONIS V. UNITED STATES*, 135 S. CT. 2001 (2015).

As Chief Justice Roberts wrote for the majority of this Court in *Elonis v. United States*, 135 S.Ct. 2001 (2015), "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding 'took deep and early root in American soil.'" *Id.* at 2012 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). Justice Kavanaugh, while serving as a Court of Appeals judge, summarized this Court's precedents insisting

that mens rea is required for each element as follows:

> The Supreme Court's case law demonstrates that the Court has applied the presumption of *mens rea* consistently, forcefully, and broadly. The presumption applies to statutes that are silent as to mens rea. [citations omitted] The presumption also applies to statutes that contain an explicit *mens rea* for one element but are silent or ambiguous about *mens rea* for other elements. [citations omitted] And whether the statute is completely silent as to *mens rea*, or only partially silent, the presumption applies to each *element* of the offense.

United States v. Burwell, 690 F.3d 500, 537 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (emphasis in original).

This Court continues to presume mens rea for each element that separates wrongful from otherwise innocent conduct consistently, forcefully, and broadly. As Justice Breyer wrote in this Court's majority opinion in *United States v. Rehaif*, 139 S.Ct. 2191 (2019) (holding that a conviction under 18 U.S.C. §922(g) and §924(a)(2) requires the Government to prove not only that the defendant knew he possessed the firearm but also that he knew of his status as a person barred from possessing a firearm), "[i]n determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Id.* at 2195.

Since *Elonis*, the CAAF has applied the mens rea principles from this Court's precedents to offenses in the UCMJ appropriately in many cases, occasionally making special accomodations for some uniquely military offenses that are not at issue in this case. As the lower court acknowledged, "[t]here is little doubt that, as the Supreme Court has noted, '[f]ew areas of criminal law pose more difficulty than the proper definition of the mens rea required for a particular crime.'" *United States v. Caldwell*, 75 M.J. 276, 284 (C.A.A.F. 2016) (quoting *United States v. Bailey*, 444 U.S. 394, 403 (1980)). The lower court's opinion in this case appears at odds with its own precedents.

In *Caldwell*, the lower court described "general intent" as commission of an act with knowledge of certain facts. *Caldwell,* 75 M.J. at 281. The CAAF noted that *Carter v. United States,* 530 U.S. 255 (2000) was a good example of this formulation of general intent. Applying general intent to the offense of maltreatment, 10 U.S.C. § 893, the CAAF held that the government must prove that the accused knew that the alleged victim was subject to his orders and that the accused knew the he was making statements or engaging in conduct with respect to that subordinate even though no cognate of the word "know" appears in the statute.

In *United States v. Haverty,* 76 M.J. 199 (C.A.A.F. 2017), the CAAF again explains that general intent requires the commission of an act with certain knowledge, in a case involving hazing in violation of 10 U.S.C. § 890. The CAAF held that general intent was insufficient to separate innocent from wrongful conduct because an accused could be convicted even

though the government did not prove the accused had "certain knowledge" -- that the actus reus was cruel, abusive, or harmful to the alleged victim. "Thus, applying the mens rea of general intent to these elements could cause a servicemember to be convicted of hazing if he encourages a new member of his unit to engage in conduct which the servicemember honestly believes is not harmful, but which, objectively, could be considered harmful." *Id.* at 207.

In this case, without discussion of prior legal authority, the CAAF declared that sexual assault by bodily harm is a general intent offense, and, as such, has an implied mens rea that the accused intentionally committed the sexual act. *McDonald*, 78 M.J. at 381. The CAAF does not indicate what certain knowledge must accompany the intent to commit the sexual act. One would expect the "certain knowledge" to be knowledge of fact that made McDonald's conduct wrongful -- the alleged victim's lack of consent. Rather, the CAAF declares that, "[n]o mens rea is required with regard to consent." *Id.*

Contrast this result with the result in *Haverty*. In this case, applying the mens rea of general intent without knowledge of the alleged victim's lack of consent to sexual assault by bodily harm could cause a servicemember to be convicted of sexual assault if he engages in a sexual act which the servicemember honestly believes is consensual, but which, objectively, could be considered non-consensual. This result was intolerable in *Haverty,* and the CAAF found general intent was insufficient to separate innocent from wrongful conduct. Yet, in

this case, the CAAF's application of general intent affirmed a conviction where the accused honestly believed the act of sexual intercourse was consensual. The CAAF "reject[ed] Appellant's contention that general intent is insufficient to separate wrongful from innocent conduct because sexual intercourse is ordinarily innocent conduct." *Id.*

Sexual assault by bodily harm consists of the actus reus (engaging in a sexual act) and an attendant circumstance (lack of consent). The "certain knowledge" component of general intent in *Caldwell* was knowledge of the fact that separated innocent from wrongful conduct: that the alleged victim was subject to Caldwell's orders. The "certain knowledge" component of general intent lacking in *Haverty* was knowledge of the fact that separated innocent from wrongful conduct: that the conduct was cruel, abusive, or harmful to the alleged victim. In this case, identifying the alleged victim's lack of consent as the "certain knowledge" component of general intent would satisfy the "basic principle that 'wrongdoing must be conscious to be criminal,' and that a defendant must be 'blameworthy in mind' before he can be found guilty." *Elonis,* 135 S. Ct. at 2003 (citations omitted). Instead, the CAAF held the government need not prove any mens rea regarding lack of consent. "[S]exual assault by bodily harm has an implied mens rea that an accused intentionally committed a sexual act." *McDonald*, 78 M.J. at 381 (citing a case totally inapposite to this proposition).

Without citing *Carter,*[4] the CAAF treats this case like *Carter*, even though force is not an element of sexual assault by bodily harm. In *Carter,* general intent was a sufficient mens rea for the offense of taking bank property by force. *Carter,* 530 U.S. at 268. This Court noted that taking by force was always wrongful, including when the thief took under a claim of right. *Id.* at 269. Similarly, in this case, the CAAF notes that only consensual sexual intercourse is innocent and that the burden is on the defendant to obtain consent. *McDonald,* 78 M.J. at 381. The lower court's clear implication is that

[4] It is not surprising that the lower court did not cite *Carter*, because another faulty aspect of the lower court's reasoning is the offense of rape, which required force, is the antecedent offense of sexual assault by bodily harm, which does not require force. This creates a situation analogous to Justice Thomas's hypothetical in *Carter*. Sexual assault by bodily harm, like 18 U.S.C. § 2113(b) does not have an element of force. Rape, 10 U.S.C. § 920(a)(1), like 18 U.S.C. § 2113(a), requires force. Since rape and taking bank property by force require force, and the use of force in these contexts is always wrongful, general intent is a sufficient mens rea. However, § 2113(b) does not require force, and as Justice Thomas notes, if § 2113(b) did not have a specific intent element, a mens rea would have to be read into the statute to protect innocent actors. Sexual assault by bodily harm is like § 2113(b) in that it does not require force. Unlike § 2113(b), sexual assault by bodily harm does not require any mental state, so a mens rea must be read into the statute to protect innocent actors. *See Carter*, 530 U.S. at 269. Forcible rape is not the antecedent offense of sexual assault by bodily harm. Until 1 October 2007, rape under the UCMJ was defined as an act of sexual intercourse done by force and without consent. Effective 1 October 2007, Congress enacted a scheme of sexual offenses, some requiring force, *see* 10 U.S.C. § 920(a) (2007), and some requiring lack of consent but not force, *see* 10 U.S.C. § 920(c)(1)(B) (2007). Sexual assault by bodily harm has no antecedent for which general intent would be a sufficient mens rea.

sexual intercourse where the defendant fails to obtain the consent of the alleged victim is always wrongful, and, as in *Carter,* general intent is a sufficient mens rea. Since the defendant would know whether he obtained the consent of the alleged victim, the "certain knowledge" component of general intent would be that the defendant knew he did not obtain the consent of the victim. The CAAF's amendment of the statute to create a burden to obtain affirmative consent was necessary to hold that general intent was a sufficient mens rea for this offense.

Without creating the burden to obtain consent, the general intent applied by the lower court would not have been sufficient to protect the innocent actor. As the Army Court of Criminal Appeals noted in its published opinion on this same issue earlier this year, the general intent standard that Justice Thomas applied in *Carter* would require the prosecution to prove that the defendant acted with knowledge of the circumstance that made the sexual act wrongful, which is non-consent. *United States v. Peebles*, 78 M.J. 658, 666 n.14 (A. Ct. Crim. App.), *vacate*d, 78 M.J. 830 (A. Ct. Crim. App. 2019). After a thorough analysis of the principles enunciated by this Court, the Army court properly applied *Elonis* and inferred a mens rea of recklessness for the element of lack of consent. *Id*. at 664-65. In the Army, *Peebles* was the controlling law on this issue, until the CAAF's opinion in *McDonald*. After *McDonald*, the Army court was forced to vacate its decision in *Peebles*, and the mens rea for lack of consent for sexual assault went from recklessness to no mens rea. The Army court's opinion in *Peebles* is the correct application of this Court's mens rea

precedents to sexual assault by bodily harm under 10 U.S.C. § 920(b)(1)(B) (2012). The CAAF had to invent the burden to obtain consent to make its application of general intent plausible. However, a court violates the separation of powers when it amends a statute under the guise of interpreting it.

CONCLUSION

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

Respectfully submitted,

TIMOTHY GRAMMEL*
EDWARD J. O'BRIEN
Trial Defense Service
U.S. Army Legal Services Agency
9275 Gunston Road
Building 1450
Fort Belvoir, VA 22060
(703) 693-0362
timothy.grammel.civ@mail.mil

Counsel for Amicus Curiae

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