No. 19-557

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

REPLY BRIEF OF PETITIONER

JEFFREY T. GREEN
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

DAVID A. GOLDENBERG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

STEVEN J. DRAY*
ELIZABETH G. MAROTTA
JONATHAN F. POTTER
CHRISTOPHER D. CARRIER
ZACHARY A. GRAY
BENJAMIN A. ACCINELLI
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0725
Steven.j.dray.mil@mail.mil

Counsel for Petitioner

* Counsel of Record

March 10, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF

I. SEXUAL ASSAULT UNDER THE UNIFORM CODE OF MILITARY JUSTICE REQUIRES A GUILTY MIND

Under the government's flawed argument, the principle underlying this Court's decision in *Elonis* v. *United States*, 135 S. Ct. 2001, 2011 (2015) ("'what [Elonis] thinks' does matter"),[1] does not apply to sexual assault under the Uniform Code of Military Justice ("UCMJ"). Without explaining how it affects this case, the government cites *Parker* v. *Levy*, 417 U.S. 733 (1974) and argues the UCMJ "cannot be equated to a civilian criminal code." Opp. 9. *Parker*, however, did not address common criminal activity under the UCMJ. Rather, *Parker* involved a uniquely military offense—conduct unbecoming an officer—used to criminalize an officer's vocal opposition to the Vietnam War. *Parker*, 417 U.S. at 738, 749. Unlike conduct unbecoming an officer, sexual assault is not unique to the military and does not invoke the singularly military considerations present in *Parker*. There is no principled reason to conclude that *Elonis* does not apply to sexual assault under the UCMJ.[2]

The government's position is also out of step with this Court's recognition of the increasing convergence between civilian and military justice in an era of broad military jurisdiction. In *Ortiz* v. *United States*, this Court emphasized that the military justice system's "essential character" is "judicial." 138 S. Ct.

---

[1] *But compare* Pet. App. 9a ("Consent is to be determined objectively. . . . No reference is made to the accused's perception of consent.").

[2] The CAAF seemingly agrees. It applied *Elonis* in the decision below. *Id.* at 7a.

2165, 2168 (2018). *Ortiz* noted that courts-martial "decide cases in strict accordance with a body of federal law and afford virtually the same procedural protections to service members as those given in a civilian criminal proceeding" and recognized that courts-martial try service members for "garden-variety crimes unrelated to military service, and can impose terms of imprisonment and capital punishment." *Id.*

II. AWARENESS OF ENGAGING IN A SEXUAL ACT DOES NOT DISTINGUISH BETWEEN INNOCENT AND WRONGFUL CONDUCT

The government wrongly identifies sexual assault as a crime in which "a general requirement that a defendant *act* knowingly is itself an adequate safeguard" to separate innocent from wrongful conduct. Opp. 10. The government's error is that the required *act* to commit sexual assault is merely a sexual act. 10 U.S.C. § 920(b)(1)(B) (2012). Alone, this does not establish a guilty mind. But the CAAF held it did: "As a general intent offense, sexual assault by bodily harm has an implied mens rea that an accused intentionally committed the sexual act." Pet. App. 10a.

The government's argument on mens rea and common law rape actually highlights the need for this Court's review. Private McDonald was found guilty of sexual assault, not common law rape. *Id.* at 2a. The government is correct that courts have historically not required proof of a mens rea with regard to consent to find individuals guilty of common law rape. This, however, is because the elements of common law rape required a sex act *accomplished by* an inherently wrongful act such as force, threat, or administration of a substance or act to impair the

ability to consent.[3] The inherently wrongful act sufficiently separates innocent from wrongful conduct without express reference to the lack of consent. See Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1100–01 (1986) (explaining that, historically, mens rea as to consent was eschewed in American courts because the force used to overcome a victim's overt resistance sufficed for mens rea); Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 Va. L. Rev. 1500 (1975) (providing a thorough survey of state rape laws).

The distinction between sexual assault under 10 U.S.C. § 920(b)(1)(B) and common law rape is strikingly similar to that addressed by this Court in *Carter* v. *United States*, 530 U.S. 255 (2000). The statute interpreted in *Carter* prohibited taking money from a bank "by force and violence, or by intimidation." *Id.* at 259 (citing 18 U.S.C. § 2113(a)). In addressing the mens rea necessary to separate lawful from innocent conduct, the Court noted that the element of causal force sufficiently indicated that the defendant possessed a guilty mind. But, the Court noted, were causal force not an element, proof of something more than the fact that an individual took money from a bank would be necessary to separate wrongful from innocent conduct. *Id.* at 269–70. The

---

[3] As did the military: Rape was defined for decades in the *MCM* as the following:

(a) That the accused committed an act of sexual intercourse with a certain female;

(b) That the female was not the accused's wife; and

(c) That the act of sexual intercourse *was done by force and without her consent.*

Manual for Courts-Martial, United States (1984 ed.), pt. IV, ¶ 45(b)(1) (emphasis added).

same analysis applies to the elements of the offense at issue here. But the government ignores it, and compounds its faulty argument by asserting that the UCMJ is *more* favorable to defendants by permitting an affirmative defense of mistake of fact. See Opp. 10. Mens rea is an element of the crime itself (see Wayne R. LaFave, *Substantive Criminal Law* §§ 5.1, 5.6(a) (3d ed. 2019)), and the government's burden shifting argument is therefore improper.

III. THIS CASE IS AN APPROPRIATE VEHICLE

A decision in Private McDonald's favor would not be meaningless. The government asserts that, upon remand, Private McDonald may not obtain relief under the plain error standard. The CAAF's decision, however, rested solely on the first prong of the plain error analysis: that there was no error. The CAAF did not address whether it believed that the error was "plain" or whether the error had an unfair prejudicial impact. The government is incorrect that Private McDonald would necessarily have been convicted had the panel received a heightened mens rea instruction. Taking the facts in the light most favorable to Private McDonald, a properly instructed panel could have determined he was not criminally culpable.

The fact that the Army Court of Criminal Appeals ("ACCA") opined that even under a recklessness standard, Private McDonald would be guilty is a red herring. First, the ACCA's opinion is only relevant if the appropriate mens rea to distinguish innocent from harmful conduct is recklessness. Second, the CAAF did not affirm that portion of the ACCA's opinion. On remand, the CAAF would have the chance to address that portion of the ACCA's opinion and correct it.

Private McDonald was entitled to receive a proper instruction for this offense, as are all service members who by virtue of their service submit themselves to court-martial jurisdiction. Moreover, if this Court denies review of this case, the statutory limitation on military justice petitioners makes it unlikely that the Court will have another chance to correct this mistake as the CAAF will deny further review, and this precedent will control all military sexual assault cases going forward. See 28 U.S.C. § 1259 and 10 U.S.C. § 867(a)(3) (generally precluding this Court's jurisdiction unless the CAAF exercises discretionary review).

CONCLUSION

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

Respectfully submitted,

JEFFREY T. GREEN
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-1486

DAVID A. GOLDENBERG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

STEVEN J. DRAY*
ELIZABETH G. MAROTTA
JONATHAN F. POTTER
CHRISTOPHER D. CARRIER
ZACHARY A. GRAY
BENJAMIN A. ACCINELLI
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0725
Steven.j.dray.mil@mail.mil

Counsel for Petitioner

* Counsel of Record

March 10, 2020