IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private First Class (E-3) **CEDRIC L. MCDONALD** United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20160339 USCA Dkt. No. 18-0308/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING THE PANEL THAT A NEGLIGENT MENS REA WAS SUFFICIENT TO MAKE OTHERWISE LAWFUL CONDUCT CRIMINAL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On May 10-13, 2016 at Fort Polk, Louisiana, a panel with enlisted representation sitting as a general court-martial convicted the appellant, Private First Class (PFC) Cedric L. McDonald [hereinafter appellant], contrary to his pleas, of one specification of conspiracy to commit sexual assault, in violation of Article 81, UCMJ, 10 U.S.C. § 881 (2012) and one specification of sexual assault in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012). The panel sentenced the appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for three years, and to be dishonorably discharged from the service. The convening authority approved the sentence as adjudged.[1]

[1] Post-trial sessions under Article 39(a) were held in this case on June 2, 2016 and December 12, 2016.

On May 16, 2018, the Army Court affirmed the findings and sentence. Appellant was notified of the Army Court's decision and in accordance with Rule 19 of this Court's Rules of Practice and Procedure filed a Petition for Grant of Review and Motion for Leave to File Supplement Separately on July 9, 2018. This Court granted counsel's motion granting until July 31, 2018 to file the Supplement to the Petition for Grant of Review. On September 25, 2018, this Court granted appellant's petition for review.

Statement of Facts

Private (PV2) Quantavious Thomas, the appellant's barracks roommate, met DJ, a civilian woman, on the dating website "Plenty of Fish" in June or July 2015. (JA 017). Before the night of the allegations at issue, PV2 Thomas and DJ had met socially at least twice. (JA 018). On one of those previous occasions, the two met at a night club called "Paradise," and the appellant drove PV2 Thomas and DJ home from that club. (JA 019). On August 31, 2015, DJ went to PV2 Thomas's barracks room at approximately 0100. (JA 232). DJ testified that she believed PV2 Thomas was alone in the room. (JA 021).

DJ explained that after some time lying on PV2 Thomas's bed, she began to have sex with him. (JA 022). DJ stated that during the sexual intercourse, PV2 Thomas asked her to stand and bend over the bed; she allowed him to have sexual intercourse with her from behind. (JA 027-28). After having sex in this position

for some time, PV2 Thomas stopped having sex with DJ. (JA 028). DJ stated PV2 Thomas stopped "[b]ecause there was a chair in our way, and I asked him to move it." (JA 028). DJ claimed that PV2 Thomas spent "approximately two to three minutes" moving the chair. (JA 066). She contended that during this entire time, she remained bent over the bed with her head down on a bare mattress in an "uncomfortable" position. (JA 076-77). DJ claimed that after PV2 Thomas moved the chair, and without her knowledge, the appellant approached her from behind and began to have sexual intercourse with her while PV2 Thomas told her to "keep [her] head down." (JA 028-29). DJ asserted that she believed it was still PV2 Thomas who was having sexual intercourse with her, and she was unaware of the appellant's presence at this time. (JA 028-29).

DJ stated that she did not realize the appellant was having sex with her until she reached back and touched a wrist watch, which she knew PV2 Thomas was not wearing. (JA 029-030). She identified it as a black watch, although she also testified she never saw it. (JA 079). She noted a "condom difference," in that the second person was wearing a condom and PV2 Thomas was not. (JA 030). She testified she "kind of freaked out" and then she heard the unidentified person back up as a result. (JA 030). Private Thomas then resumed having sexual intercourse with her, and DJ did not say anything. (JA 030). DJ testified she did not look back

behind her once during this entire time. (JA 078). After some time, PV2 Thomas asked if DJ would perform oral sex on him, and she agreed. (JA 032).

After the oral sex, PV2 Thomas started asking DJ questions about her sister and one of her close friends and indicated he was interested in them sexually. (JA 032). At that point, DJ became upset and left. On the way out, she told PV2 Thomas, "tell your friend his dick game is weak." (JA 081). Shortly thereafter, DJ sent PV2 Thomas a text message with a clarification: "Meaning his dick game was lame." (JA 082). This may have been a specific reference to the appellant's inability to maintain an erection. (JA 229-230). Private Thomas sent DJ a text message in reply indicating he would like to have sexual intercourse with her sister and one of her close friends. (JA 082).

Private Thomas testified as a witness for the government under a grant of immunity. (JA 095; JA 152). Private Thomas testified that while he was having sexual intercourse with DJ, he asked her if the appellant could also have sex with her. (JA 107). Specifically, he asked, "can my roommate join in?" (JA 110). Private Thomas admitted that "it was [PV2 Thomas's] idea for [the appellant] to have sex with [DJ]," and he approached the appellant about it. (JA 150). Private Thomas further explained that he told DJ to "keep her head down" because the appellant "didn't want her to know who he was." (JA 107). He reasoned that the appellant did not want her to know exactly who he was because the appellant had

been talking to DJ's friend and he did not want to hurt his chances with her. (JA 126). Private Thomas also testified that DJ made it clear she did not want to know anything about his roommate either. (JA 110). Private Thomas further testified the appellant stopped having sex with DJ "because he just wasn't feeling it" and because he "likes white girls." (JA 108). Private Thomas confirmed that DJ complained the appellant's "dick game was weak." (JA 110). Private Thomas also confirmed that he understood the appellant did not want DJ to find out exactly who he was because the appellant did not want to be teased; DJ knew a lot of people on post, and the appellant had observed others tease PV2 Thomas for previous physical encounters with DJ. (JA 155).

The government also introduced the appellant's statement to CID, wherein the appellant explained the encounter:

> I hear talking and at that time Thomas tells me that she is cool with me coming over and engaging in sexual activities. So that's when Thomas calls me over and that [sic] when I try and get a hard on to put the condom on, I got a half hard on and was able to put the condom on. Went over to his side of the room and then we switched and she grabbed me and then looked at me and that's when I put it in and we did it for like 3-5 mins. But I couldn't get a real hard on and decided that everything didn't feel right and so I told Thomas that I was done and then he got back with her and they had oral sex for like 13 mins.

(JA 229).

Prior to panel deliberations, the military judge instructed the panel on the defense of mistake of fact as to consent.

> The evidence has raised the issue of mistake of fact as to consent in relation to the offense of sexual assault alleged in Specification 2 of Charge II. There's been evidence and testimony attempting to show that at the time of the alleged offense, the accused mistakenly believed that [DJ] consented to the sexual conduct alleged in Specification 2 of Charge II. Mistake of fact as to consent is a defense to that charged offense. "Mistake of fact" as to consent means the accused held, as a result of ignorance or a mistake, an incorrect belief that the other person consented to the sexual conduct as alleged. The ignorance or mistake must have existed in the mind of the accused, and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person, that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. "Negligence" is the absence of due care. "Due care" is what a reasonably careful person would due [sic] under the same or similar circumstances. You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused's age and experience along with the other evidence in this case. The burden is on the prosecution to establish the guilt of the accused. If you are satisfied, beyond a reasonable doubt, that the accused was not under a mistaken belief that the other person consented to the alleged sexual conduct, then the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that the other person consented to the sexual conduct, as alleged, if you are convinced beyond a reasonable doubt that at the time of the charged offense the accused's mistake was unreasonable, the defense does not exist.

(JA 177-78).

The panel acquitted the appellant of sexually assaulting DJ by deceiving her as to his identity but convicted him of conspiracy to do the same, and convicted him of sexually assaulting DJ by causing bodily harm to her, where the bodily harm was the sexual act itself. (JA 009-010).

Summary of Argument

The military judge erred when he instructed the panel that appellant's mistake of fact as to consent could not be based on a negligent failure to discover the true facts as to DJ's consent. Mere proof of the state of mind of the complaining witness does not necessarily indicate criminal wrongdoing on the part of an accused—"what [the appellant] thinks does matter." *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015). Therefore, the government must prove beyond a reasonable doubt that an accused acted recklessly with respect to determining consent. *Id*. Here, the military judge instructed the panel that it could convict the appellant if it believed DJ did not consent to sexual activity. He instructed the panel on a reasonable mistake of fact defense, but this defense improperly shifted the burden to prove the appellant's *mens rea* from the government and also defined an impermissibly low *mens rea* of negligence. Such an instruction materially prejudiced the appellant's substantial rights where the evidence introduced at trial indicated the appellant believed DJ consented to the sexual acts.

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN INSTRUCTING THE PANEL THAT A NEGLIGENT MENS REA WAS SUFFICIENT TO MAKE OTHERWISE LAWFUL CONDUCT CRIMINAL.

Standard of Review

In the absence of a defense objection, this Court reviews panel instructions for plain error. *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017). "Panel instructions are analyzed for plain error based on the law at the time of appeal." *Id.* at 208. "Under plain error review, [military courts] will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused." *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011).[2]

[2] While this Court has identified the standard of review in like cases for plain error, instructions that lower the required level of *mens rea* implicate fundamental conceptions of justice under the Due Process Clause. The Supreme Court has made clear that burden-shifting instructions may violate that due process clause protection. *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) ("the question before this Court is whether the challenged jury instruction had the effect of relieving the State of the burden of proof…on the critical question of petitioner's state of mind."). "If instructional error is found [when] there are constitutional dimensions at play, [the appellant's] claims 'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'" *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is 'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" *Id*.

Argument

1. The charging and proof of every crime must include an accused's guilty mind.

"The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. Haverty*, 76 M.J. 199, 203 (C.A.A.F. 2017) (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978) (alteration omitted) (citation omitted) (internal quotation marks omitted)). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette v. United* States, 342 U.S. 246, 250 (1952). "[A]lthough there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime." *United States v. Elonis*, 135 S. Ct. 2001, 2009 (2015).

The exceptions the Supreme Court acknowledged in *Elonis*, namely, strict liability public welfare offenses, which this Court discussed at length in *United States v. Gifford*, are limited in scope and do not apply here. *See Gifford*, 75 M.J. 140, 142-46 (C.A.A.F. 2016). If "the Government is not required to prove that an accused had knowledge of the facts that make his or her actions criminal in order to secure a conviction, then the underlying crime is properly deemed a strict liability offense." *Liparota v. United States*, 471 U.S. 418, 433 n. 7 (1985). "[W]hile strict-liability offenses are not unknown to the criminal law…the limited circumstances in which Congress has created and this Court has recognized such

offenses attest to their generally disfavored status." *United States Gypsum Co.*, 438 U.S. at 437-438. However, it would be unreasonable to criminalize all unwanted sexual acts as strict-liability offenses because sexual interactions are common and the nuance of romantic interactions are open to misinterpretation by either party involved.

Sexual assault by causing bodily harm is not a strict liability offense because it is not a public welfare offense. The Supreme Court acknowledged that, in limited circumstances, Congress may purposefully omit from a statute the need to prove an accused's criminal intent in the name of "social betterment." *See, e.g., United States v. Balint*, 258 U.S. 250, 252-253 (1922); *see also Staples v. United States*, 511 U.S. 600, 606-07 (1994). Notably, adjacent offenses within Article 120 *do* include an explicit *mens rea*. Thus, when Congress intends to, it is capable of prohibiting sexual acts committed with negligent disregard of attendant circumstances, and it has done so twice within the same statute discussed here. Article 120(b)(2) provides:

> Any person subject to this chapter who . . .
>
> > (2) commits a sexual act upon another person when the person *knows or reasonably should know* that the other person is asleep, unconscious, or otherwise unaware that the sexual is occurring . . . is guilty of sexual assault and shall be punished as a court-martial may direct.

UCMJ Art. 120(b)(2) (emphasis added). Similarly, Article 120(b)(3) provides:

> Any person subject to this chapter who . . .
>
> (3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to-
>
> (A) impairment of any drug, intoxicant, or other similar substance, and that condition is *known or reasonably should be known* by the person; or
>
> (B) a mental disease or defect, or physical disability, and that condition is *known or reasonably should be known* by the person; is guilty of sexual assault and shall be punished as a court-martial may direct.

UCMJ Art. 120(b)(3) (emphasis added).

The explicit inclusion of the *mens rea* of negligence in adjacent areas of the statute highlights the absence of any *mens rea* requirement for the section under which the appellant was convicted. Congress could have identified criminal negligence as the appropriate *mens rea* within this subsection, but it did not. Further, it would be illogical to conclude that Congress specifically identified the requisite *mens rea* for the offenses listed immediately after sexual assault by causing bodily harm, but not within sexual assault by causing bodily harm because it assumed such an offense was a public welfare offense.

Sexual assault by causing bodily harm is not a public welfare offense. There is no history of criminalizing non-consensual sexual activities as public-welfare offenses. *Gifford*, 75 M.J. at 145 (noting public welfare offenses are uniquely focused on "social betterment" or "proper care" rather than punishment). Sexual

interactions between adults are commonplace and they do not frequently threaten the community's public health and safety, and they are typically legal. *Id*., at 145-146. Further, the severe penalty for a conviction under Article 120(b)(1)(B) is an additional, significant "factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Id*. (quoting *Staples*, 511 U.S. at 618).

2. The statutory language of Article 120(b)(1)(B), UCMJ, does not identify a *mens rea*.

Article 120(b)(1)(B) reads:

> Any person subject to this chapter who…
>
> (1) commits a sexual act upon another person by…
> (b) causing bodily harm to that other person…
> is guilty of sexual assault and shall be punished as a court-martial may direct.

Article 120(b)(1)(B). "The term 'bodily harm' means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." Article 120(g)(3).

"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 resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship or social 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.

…

> Lack of consent may be inferred based on the circumstances of the offense. All the surrounding 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.

Article 120(g)(8). This statutory scheme has created an offense which includes any non-consensual sexual activity, but which does not explicitly identify the requisite *mens rea* of the accused. Rather, the definitions of bodily harm and consent focus exclusively on the complaining witnesses' state of mind—in short, whether or not that person wanted the sexual activity to occur. At trial, the appellant did not dispute that sexual activity with DJ occurred. DJ testified she did not consent to a second individual's sexual acts. (JA 090).

As charged, the government seemingly established proof of this offense without ever addressing the accused's state of mind at the time of the sexual activity. Yet, this Court has held that such objective standards are inappropriate in the criminal law context. *See Haverty*, 76 M.J. at 207. Indeed, this court's analysis from *Haverty* is appropriate here: "[i]f an objective observer would conclude that the servicemember's conduct constituted a [non-consensual sexual act]—as evidenced by [DJ's testimony that she honestly believed she did not consent]—then the servicemember could be convicted of [sexual assault]"…then such a

general intent threshold would not separate innocent from criminal conduct. *See id*. at 207.

The definition of consent admonishes the fact-finder to establish only whether the complaining witness gave consent, without considering whether the accused was aware that she did not give consent. This impermissibly shifts the requirement of proving the accused's guilty mind away from the government. The absence of an explicitly stated *mens rea* makes this instruction deficient, and so this Court must judicially determine the minimally appropriate standard.

3. Where the statutory language does not identify an accused's *mens rea*, the minimum *mens rea* that can be inferred to distinguish wrongful from innocent conduct is recklessness.

Courts have "long been reluctant to infer that a negligence standard was intended in criminal statutes." *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (citing *Morissette v. United States*, 342 U.S. 246 (1952)). "Recklessness is the lowest *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Gifford*, 75 M.J. at 147 (internal citations omitted) (citing *Elonis*, 135 S. Ct. at 2010). "Intuiting recklessness" into this offense avoids "stepping over the line that separates interpretation from amendment." *Elonis*, 135 S. Ct. at 2015 (Alito, J. concurring in part and dissenting in part). The Model Penal code, which this Court has "historically looked to [for] external guidance," *United States v. Torres*, 74 M.J. 154, 158 (C.A.A.F. 2015),

identifies recklessness as the lowest possible standard that can be read into a statute that does not set out the culpability sufficient to establish a material element of an offense." *Gifford*, 75 M.J. at 147 (internal quotations omitted) (citing the Model Penal Code §2.02(3) and identifying that when the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto). Recklessness is the lowest *mens rea* necessary to separate innocent from criminal conduct, and the government must prove it for all material elements.

4. The "mistake of fact" defense within Rule for Courts-Martial 916 impermissibly removes the government's burden to prove the accused's *mens rea* and identifies an insufficient *mens reas* of negligence.

In *Staples v. United States*, the Supreme Court reversed a conviction for failing to register a firearm, and held that the government was required to prove the accused knew he owned a weapon of the type prohibited by the statute. 511 U.S. 600 (1994). It is instructive that the Supreme Court chose to resolve the case by analyzing the concept of *mens rea* as it applies to the elements of a crime that distinguish innocent from criminal actions, and by requiring the government to prove an appropriate *mens rea* beyond a reasonable doubt as a matter of establishing proof of its case. *See In re Winship*, 397 U.S. 258, 364 (1970). Notably, the Court did not require Staples to offer a mistake of fact defense regarding his understanding of this particular firearm.

The Court's logic is also applicable in the instant case. The government has the burden of proving criminal conduct, which requires establishing not only that appellant committed a criminal act, but also that he did so with a guilty mind. This is different from merely allowing the government to prove its prima facie case—that the appellant failed to register a particular firearm—and then shifting the burden to the appellant to show that he mistakenly believed his weapon did not require registration.

Here, the military judge's instructions acted to shift the government's burden to the appellant and forced him to prove a mistake-of-fact defense, and prove it to an improperly high standard of reasonable. Such an instruction ignores the requirements of *Elonis*. Properly understood and applied, *Elonis* required the following language to be inserted in the definition of consent:

> Lack of consent may be inferred based on the circumstances of the offense [*and must include a finding that the accused was reckless in disregarding indications of non-consent*]. All the surrounding circumstances are to be considered in determining whether a person gave consent [*and whether the accused was reckless in determining if the person gave consent*], or whether a person did not resist or ceased to resist only because of another person's actions.

Article 120(g)(8) (emphasis and bracketed language added). Such language would have ensured the government proved a minimally sufficient *mens rea* of

recklessness, rather than allowing the government to shift to the accused the proof of the critical element separating innocent from criminal behavior.

5. The military judge's improperly deficient instruction as to the required *mens rea* materially prejudiced the appellant's substantial rights.

In this case, the military judge should have instructed the panel that in order to find the appellant guilty of sexual assault, the panel had to find not only that the complaining witness did not consent to the sexual acts, but also that the appellant was reckless in determining whether she consented.

A correct instruction with respect to *mens rea* would have changed the nature of the panel's deliberations. The defense theory of the case was that DJ consented to sexual intercourse with the appellant, or at least the appellant believed she consented. In its opinion, the Army Court determined the appellant's mistake was as "at the very least reckless, but more likely purposeful." *United States v. McDonald*, ARMY 20160339, 2018 CCA LEXIS 239, at *5 (A. Ct. Crim. App. May 16, 2018) (mem. op.).

Yet the appellant's statement to the Army Criminal Investigation Command (CID) indicated he asked DJ if he could have sex with her and she said "yeah," and that she moaned and said "harder" while the sexual act was occurring. (JA 230). When CID asked if he thought he did anything wrong, appellant said "there was consent and no alcohol involved." (JA 230). While the Army Court has the statutory authority to "judge the credibility of witnesses," it does not get the

opportunity to see and hear the witnesses. Article 66(c), UCMJ. The Army Court did not have the opportunity to watch DJ's testimony. Yet the "degree to which [the Army Court] 'recognize[s]' or give deference to the trial court's ability to see and hear the witnesses will often depend on the degree to which the credibility of the witnesses is at issue." *United States v. Davis*, 75 M.J. 537, 546 (A. Ct. Crim. App. 2015) (en banc).

Here, the Army Court determined which witnesses it thought should be believed and then concluded the military judge gave an appropriate instruction based on appellant's guilt. The panel could have believed the appellant but convicted him because they felt his decision-making was negligent, as instructed by the military judge. By emphatically concluding that "even applying a scienter of recklessness" that appellant is still guilty, the Army Court substituted its judgement for that of the panel. This ignores the reality that determining guilt or innocence in the first instance is the responsibility of the trial fact-finder, and this particular fact-finder was improperly instructed with regard to the appellant's *mens rea*. Absent other evidence indicting appellant's guilt and rendering the military judge's instructional error harmless, such efforts by the Army Court are improper.

In light of *Elonis*, *Gifford*, and *Haverty*, the military judge's instruction that the panel could convict the appellant based on his negligence was error. As a

matter of law at the time of this court's review, the error is obvious. Thus, the first two prongs of plain error analysis are satisfied. *See Haverty*, 76 M.J. at 208.

With regard to the third prong, the error also had an unfair prejudicial impact on the members' deliberations. The defense theory of the case was that appellant had consensual sex with DJ and was embarrassed at her derision of his sexual prowess. Appellant's defense of actual consent necessarily included an implied defense that he believed DJ was consenting even if she was not. This is supported by PV2 Thomas' and appellant's agreement that PV2 Thomas told the appellant that DJ agreed to have sex with the appellant. (JA 150; JA 229). The panel was erroneously instructed that if such a mistaken belief was merely negligent then appellant's mistake was criminal. This Court "presume[s] that the panel followed the instructions given by the military judge." *Haverty*, 76 M.J. at 208 (citing *United States v. Custis*, 65 M.J. 366, 372 (C.A.A.F. 2007)). In light of *Elonis*, *Gifford*, and *Haverty*, that standard should have been at least reckless, and the military judge should have instructed the panel with the higher standard. Under the unusual circumstances of the appellant's sexual encounter with DJ, the panel could well have determined that his belief was negligent, but not reckless.

Conclusion

Wherefore, PFC McDonald requests this Honorable Court set aside the finding for Specification 2 of Charge II, and set aside the sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. McDonald*, USCA Dkt. No. 18-0308/AR, was delivered to the Court and Government Appellate Division on October 25, 2018.

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