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	REPLY 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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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
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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 the Case

On September 25, 2018, this Court granted appellant's petition for review. On October 25, 2018, appellant filed his final brief with this Court. The government responded on December 28, 2018. On January 7, 2019, this Court granted appellant's motion to extend time to reply. This is appellant's reply.

Argument

On brief, the government makes multiple fundamental errors of law. First, Congress has not established a *mens rea* with respect to Article 120(b)(1)(B), UCMJ, and the legislative history of the offense does not indicate Congress

intended for such a minimal *mens rea*. Second, the government erroneously argues for a presumption of general intent for this offense, improperly relying on Rule for Courts-Martial (R.C.M.) 916. Third, the government misunderstands the implications of a general intent for the element of non-consent. Last, the government has failed to establish that the error was harmless beyond a reasonable doubt.

1. Congress has not established a *mens rea* for sexual assault by bodily harm.

a. Congress did not specify a *mens rea* within Article 120(b)(1)(B).

Article 120(b)(1)(B), UCMJ does not specify the minimum *mens rea* required for conviction. "The fact that [a] statute does not specify any required mental state, however, does not mean that none exists." *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015). The government argues that "the plain language, history, and legislative intent of Article 120, UCMJ, indicate that only general intent is required for sexual assault by bodily harm," (Gov't Br.11), and that "Congress intended to require general intent for the element of sexual assault…." (Gov't Br. 16). If the government's argument in this context means[1] general intent

[1] Recognizing that "few areas of the law pose more difficulty than the proper definition of the *mens rea* required for any particular crime," *United States v. Bailey*, 444 U.S. 394 (1980), appellant respectfully requests this court adopt the "movement away from the traditional dichotomy of intent and toward an alternative analysis of *mens rea*…based on…a hierarchy of culpable states of mind…commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *Id*. at 404. Thus, where proof of an

is sufficient to criminalize a sexual act with someone who subjectively did not consent, then the government has ignored the legitimate concern such a scheme would "criminalize[] 'a broad range of apparently innocent conduct….'" *Elonis*, 135 at 2009 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). The government's approach is not sufficient to separate wrongful from innocent conduct because it bases criminality entirely on the internal subjective understanding of the complaining witness, with no requirement that the government prove an accused's guilty mind. This interpretation ignores the mandate that "what [McDonald] thinks does matter." *Id*. at 2011.

b. An affirmative defense cannot provide a *mens rea* for a statute.

It is a basic tenant of criminal law that the government bears the burden of proving every element of an offense beyond a reasonable doubt. *See, e.g. United States v. Cendejas*, 62 M.J. 334, 339 (C.A.A.F. 2006). By contrast, an affirmative defense need not be addressed unless it is raised by the evidence. *See, e.g. United States v. Davis*, 76 M.J. 224, 228-29 (C.A.A.F. 2017). If the evidence does not raise an affirmative defense, the government need not address it. Critically, however, "An affirmative defense may not shift the burden of disproving any

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element does not clearly satisfy the "concerns underlying the presumption in favor of scienter," *see Elonis v. United States*, 135 S. Ct. 2001 (2015), 'general intent'—meaning the intent to perform the act specified—is not only distracting and unhelpful, it is legally deficient.

element of the offense to the defense." *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

The mistake of fact defense is broadly applicable to criminal offenses. The existence of such an affirmative defense, however, does not negate the government's requirement to prove the underlying elements of offenses. A mistake of fact defense could have been applicable to the issue of harmfulness in *Haverty*, or of age in *Gifford*, but the proper *mens rea* in each case was recklessness, not negligence. *See United States v. Haverty*, 76 M.J. 199, 208-09 (C.A.A.F. 2017); *United States v. Gifford*, 75 M.J. 140, 148 (C.A.A.F. 2016). The same is true in this case. The existence of an affirmative defense did not lessen the government's burden to prove every element of the offense, including the applicable *mens rea*, beyond a reasonable doubt.

The elements of the offense appellant allegedly committed are: (1) a sexual act and (2) non-consent.[2] Because the language of the statute is silent as to *mens rea*, and because general intent to commit the sexual act is an insufficient *mens rea* to separate innocent from wrongful conduct, courts must apply a *mens rea* to the elements sufficient to separate ordinarily innocent conduct from criminal conduct. The government further must prove an accused's *mens rea* in its case-in-chief. The

[2] *See* Article 120(g)(3), UCMJ (defining bodily harm to include a nonconsensual sexual act).

existence of an affirmative defense relating to mistake of fact as to consent does not lessen the government's burden of proving the elements of the offense, including the applicable *mens rea*, beyond a reasonable doubt.

c. Rule for Courts-Martial 916(j) does not provide the *mens rea* requirement of the offense.

The government attempts to satisfy the *mens rea* requirement with an affirmative defense not found in the statute by arguing:

> [A]n innocent actor is protected by the Article 120 statutory scheme in three ways…if some evidence is presented that suggests a mistake of fact as to consent, the government must disprove beyond a reasonable doubt that the accused held an honest and reasonable mistake of fact as to the victim's non-consent.

(Gov't Br. 19). First, the government's assertion ignores this court's clear precedent that where a statute is silent as to a requisite *mens rea*, one must be applied that separates wrongful from innocent conduct.[3] *See United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016). Second, the government erroneously concludes that the existence of an affirmative defense could satisfactorily establish a *mens rea* for this offense, ignoring the fact that the President, not Congress, promulgates the defenses found in the Rules for Courts-Martial [R.C.M.]. *See* Article 36, UCMJ.

[3] Recognizing there is an exception for "public welfare offense[s]." *Gifford*, 75 M.J. at 143. The government does not dispute appellant's contention that this offense is clearly not a public welfare offense.

The Court in *Elonis* held that the "'mere omission from a criminal enactment of any mention of criminal intent' should not be read as 'dispensing with it.'" *Elonis*, 135 S.Ct. at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)). Yet, the government attempts to avoid this requirement by asserting that Congress somehow intended to incorporate R.C.M. 916(j) into Article 120, UCMJ through Article 120(f), UCMJ. Article 120(f), UCMJ merely offers the truism that "an accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial." Article 120(f), UCMJ. In support of this misguided effort, the government argues that Congress thus specifically intended R.C.M. 916(j) to apply to Article 120(b)(1)(B) because the absence of such an interpretation "frustrates Congress' intent to provide the affirmative defense of mistake of fact under R.C.M. 916(j)." (Gov't Br. 27). The government's argument is particularly unreasonable considering the prior version of Article 120, UCMJ specifically included a mistake of fact as to consent defense. *See* Article 120(r), UCMJ; 10 U.S.C. §920(r) (2007). Yet notably, this provision was omitted from the 2012 version of Article, 120, UCMJ. The specific removal of a mistake of fact defense from the statute in 2012 seemingly suggests the opposite of what the government argues.

d. Congress would not have specified a *mens rea* for Article 120(b)(2) and (3) if Article 120(f) established a *mens rea* of negligence for all Article 120 offenses.

In support of its argument that Congress intended to incorporate a *mens rea* of negligence through Article 120(f) and R.C.M. 916(j), the government asserts that a "statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." (Gov't Br. 28). The conclusion the government draws from this—that 120(f) must serve to draw 916(j) and reasonable mistake into this statute—seems to cut against the government's position. Congress specifically articulated a *mens rea* of negligence for the offenses immediately adjacent to the one at issue here. *Compare* Article 120(b)(2); and Article 120(b)(3).[4] The government's argument would render both statutes entirely superfluous as it would be impossible to satisfy the elements of either without simultaneously satisfying the elements of Article 120(b)(1)(B), UCMJ.

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[4] "…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 act is occurring."
Article 120(b)(2), UCMJ.

"…commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to –
(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person.
(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person…."
Article 120(b)(3), UCMJ.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Elonis*, 135 S. Ct. 2008.

2. When a statute does not specify a *mens rea*, courts must apply the minimum *mens rea* necessary to separate innocent from wrongful conduct.

a. General intent is not sufficient to separate wrongful from innocent conduct for this offense.

On brief, the government asserts that there is a "presumption of general intent" when a statute is silent as to scienter. (Gov't Br. 11-12). In support of this proposition, the government cites *Carter v. United States*, 530 U.S. 255, 268 (2000). However, *Carter* does not stand for this proposition.

In his appeal to the Supreme Court, Carter urged the Court to interpret 18 U.S.C. § 2113(a) to contain an un-written element that Carter have a specific intent to steal when he robbed a bank. *Id*. at 267-69. In its brief in the instant case, the government selectively quoted the Court's opinion. (Gov't Br. 12). The Court held:

> Properly applied to § 2113, however, the presumption in favor of scienter demands only that we read subsection (a) as requiring proof of general intent – that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime (here, the taking of property of another by force and violence or intimidation).

Id. at 268 (parenthetical explanation in the original).

The Supreme Court went on to explain that "The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id. at 269* (*quoting United States v. X-Citement Video*, 513 U.S. 64, 72 (1994)). The Court then explained that general intent is a sufficient *mens rea* to separate innocent from wrongful conduct under 18 U.S.C. § 2113(a)—which required taking property by force and violence from the custody of a bank—because taking by force is not ordinarily innocent. The Court explained that once it is shown that an accused acted with knowledge that he committed a taking by force, "the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of the 'otherwise innocent.'" *Id.* at 269-70. This is why general intent is a sufficient *mens rea* to separate innocent from wrongful conduct with respect to the offense of rape. Although sexual intercourse is ordinarily innocent conduct, sexual intercourse by means of "unlawful force," or by any of the other mechanisms listed in Article 120(a), is not.

Thus, *Carter* does not stand for the proposition that there is a presumption of general intent. Rather, *Carter* reiterates that courts must read into a statute a sufficient *mens rea* to separate wrongful conduct from otherwise innocent conduct." *See id.* at 269. While taking property from a bank by force is not

ordinarily innocent conduct, sexual intercourse is. *See generally Lawrence v. Texas*, 539 U.S. 558 (2003). Where no force related to the sexual act is alleged, negligence is not a sufficient *mens rea* to separate innocent conduct from wrongful conduct. *See Elonis v. United States*, 135 S. Ct. 2001, 2012-13 (2015).

The government further emphasized its misinterpretation of *Carter* as related to the offense of rape and attempted rape. (Gov't Br. 13-15). Rape includes force as an element, thus, the requirement that the government prove an accused's *mens rea* is satisfied if the government proves such force. Where force is an element, "a general intent requirement suffices to separate wrongful from 'otherwise innocent' conduct…but this is accomplished by simply requiring …general intent—*i.e.*, proof of knowledge with respect to the *actus reas* of the crime." *Carter*, 530 U.S. at 269. A sexual act accomplished by force is thus analogous to the forceful taking of property the Court discussed in *Carter*.

Further, the government's reliance on the discussion of "general intent" in *United States v. Langley*, 33 M.J. 278 (C.M.A. 1991), a case involving attempted rape, is misplaced. (Gov't Br. 13). So too is the government's reliance on *United States v. Apilado*, 34 M.J. 773 (A.C.M.R. 1992), where Apilado was convicted of attempted rape and conspiracy to rape.[5] Application of these holdings to this case is

[5] Additionally, after the government filed its brief in this case, the Army Court issued its opinion in *United States v. Peebles*, ARMY 20170044, __ M.J. ___ (A. Ct. Crim. App. 2019) (opinion of the court) (holding that Article 120(b)(1)(B),

inappropriate because Article 120(b)(1)(B), UCMJ does not contemplate the same level of force. The government repeatedly fails to acknowledge this critical difference in its brief.

b. Applying general intent to the bodily harm element of sexual assault, as the government argues, would *increase* the government's burden of proof beyond that required by *Elonis*.

On brief, the government attempts to compare sexual assault and assault consummated by battery and states "only general intent is required for the element of bodily harm." (Gov't Br. 15-16 (quoting *United States v. Gutierrez*, 2007 CCA Lexis 559, *17 (A. Ct. Crim. App. 2007)). First, if general intent were the correct *mens rea* as to the element of bodily harm, then the appellant must have possessed knowledge that his actions constituted bodily harm (i.e., that he engaged in a nonconsensual sexual act). *See Carter*, 530 U.S at 268 (general intent required Carter act with knowledge that he was taking property *by force*). Knowledge as to nonconsent is a higher standard than the *mens rea* of recklessness appellant contends is applicable.

Second, this court has clearly determined that the elements of assault consummated by a battery are:

(a) that the accused did bodily harm to a certain person; and

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UCMJ requires an accused act, at a minimum, with reckless disregard as to a complaining witness's lack of consent).

(b) that the bodily harm was done with unlawful force or violence.

United States v. Armstrong, 77 M.J. 465, 471 (C.A.A.F. 2018); *see also United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000). Thus, the same reasoning behind *Carter* applies to an assault consummated by a battery—if the government proves unlawful force, they have satisfied any concerns related to "otherwise innocent" conduct. *See Carter*, 530 U.S. at 269.

3. The error was not harmless beyond a reasonable doubt.

The appellant agrees with the government's conclusion that the appropriate standard of review for instructional error is harmless beyond a reasonable doubt, yet disagrees with the assertion that any error in this case met that standard. (Gov't Br. 6, 28).

Immediately after noting that the appellant said "I heard Thomas talking about me then he said it was cool," (Gov't. Br. 29), the government argued that the appellant had "no basis for believing that DJ would consent to sex without specifically asking her." (Gov't Br. 29). Discussion of appellant's name accompanied by verbal confirmation indicating consent, albeit from a third party, was a basis for appellant's belief that there was consent. The other facts offered by the government are either irrelevant or unhelpful. The lack of previous conversations or sexual activity are outweighed by a more recent conversation indicating consent. That the appellant wore a condom, (JA 030), kept his unusual

watch on, (JA 073), and would have been aware he had a significantly different body type than PV2 Thomas, (JA 074) indicate he was unconcerned DJ would identify that he was *not* PV2 Thomas. Thus, the military judge's instruction based on an incorrect *mens rea* was not harmless beyond a reasonable doubt.

In sum, the appellant urges this Court to apply the clear mandate of *Elonis* to the facts of this case. To the contrary, the government asks this Court to assume that Congress specifically intended to establish negligence—an exceedingly low *mens rea*—through an unnecessarily complicated statutory scheme that involves bootstrapping widely applicable defenses into a statute that simultaneously specifies negligence in other subsections. Such an overly complicated interpretation of Congress's intent thwarts not only *Elonis* and the cases it relies upon, but also this court's holdings. The only element separating innocent from wrongful conduct in this case was the non-consent of DJ. Under the unusual circumstances of the sexual encounter at issue, the panel could easily have concluded, as instructed by the military judge, that the appellant was merely negligent in determining whether DJ consented. However, as the appellant relied on the statement of PV2 Thomas that DJ was willing to have sex with him, his conduct was not reckless.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and sentence.

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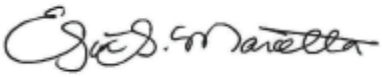

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CERTIFICATE OF FILING AND SERVICE

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 January 17, 2019.

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