No. 06-58

In the Supreme Court of the United States

JOSHUA R. MCKEEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's court-martial in Florida for an offense that occurred in Texas violated the Sixth Amendment's requirement that criminal prosecutions must be tried in the State and district where the crime was committed.

2. Whether petitioner was entitled to transactional immunity based on a promise made by a person who clearly lacked authority to grant immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 63 M.J. 81. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 18-28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2006. The petition for a writ of certiorari was filed on July 13, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, but should have been invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a court-martial by a military judge, petitioner pleaded guilty to indecent assault, in violation of Article 134, Uniform Code of Military Justice (UCMJ or

Code), 10 U.S.C. 934. He was sentenced to a dishonorable discharge, five years of confinement, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority ordered the sentence executed except for the dishonorable discharge, and suspended all confinement in excess of 15 months for 15 months from the date of trial. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. Pet. App. 18-28. The Court of Appeals for the Armed Forces (CAAF) affirmed. *Id.* at 1-17.

1. The military recognizes two forms of immunity: transactional and testimonial immunity. Transaction immunity bars a trial by court-martial for an offense under the Code. Testimonial immunity bars the use of a person's statements, and any information directly or indirectly derived from such statements, at a later court-martial. Courts-Martial Rule (C.M.R.) 704(a). "Only a general court-martial convening authority may grant immunity and may do so only in accordance with this rule." C.M.R. 704(c). The general court-martial convening authority (GCMCA) may not delegate his power to grant immunity. *Id.* R. 704(c)(3).

The UCMJ authorizes a commanding officer to impose nonjudicial punishment (NJP) for offenses under the Code. 10 U.S.C. 815. An NJP imposed on a defendant will not bar a court-martial trial for a serious crime growing out of the same conduct, but the court-martial will consider the NJP in determining punishment if the defendant is found guilty at the court-martial. UCMJ, Article 15(f).

2. On September 3, 2001, petitioner, a sailor in the United States Navy, entered the room of a female shipmate who was lying on her bed intoxicated. Petitioner sexually fondled the woman and penetrated her vagina

with his fingers. At the time of the incident, petitioner and the victim were stationed at Lackland Air Force Base in San Antonio, Texas. Gov't C.A. Br. 2.

On October 3, 2001, an Air Force Office of Special Investigations (OSI) agent obtained petitioner's written admission that he had sexual intercourse with the victim and that she did not have the ability to consent. Pet. App. 5. The chief petty officer (CPO) advised petitioner that if petitioner accepted nonjudicial punishment for the rape and agreed to waive his right to an administrative discharge board, he would not be court-martialed. *Id.* at 5-6. Petitioner accepted that offer and pleaded guilty to rape and other charges. *Id.* at 6. Petitioner's nonjudicial punishment included 45 days of restriction, 45 days of extra duty, forfeiture of one half of his pay for two months, and a reduction in grade. *Ibid.*

Petitioner was processed for an administrative discharge. Pet. App. 6. When the GCMCA received the discharge proceedings paperwork, he refused to approve the discharge and referred petitioner's case to a general court-martial. *Ibid.*

By the time of trial, petitioner and the victim had been restationed to other locations. Pet. App. 20. The court-martial was held at Pensacola, Florida. *Ibid.* The military judge, counsel, and potential jury members were from Pensacola. *Ibid.* Petitioner objected to a trial at that location on the ground that the Sixth Amendment required a trial in the district where the offense occurred. *Ibid.* The military judge overruled the objection. *Id.* at 20-21. Petitioner also unsuccessfully moved to dismiss the charges on the ground that the CPO had granted him immunity. *Id.* at 22.

3. The NMCCA affirmed. Pet. App. 18-28. The NMCCA rejected petitioner's contention that the Sixth

Amendment required the trial to be held in San Antonio, Texas. *Id.* at 20-21. The NMCCA explained that the Sixth Amendment requirement that the crime must be tried in the place where the crime occurred does not apply to military tribunals. *Id.* at 21.

The NMCCA also rejected petitioner's equitable immunity claim. Pet. App. 22-25. The NMCCA reasoned that petitioner had failed to show detrimental reliance on the CPO's unauthorized promise of immunity. *Id.* at 24-25.

4. After granting review on the immunity issue only, Pet. App. 2, the CAAF affirmed. *Id.* at 1-17. The court held that while only the GCMCA has authority to grant immunity, a court may nonetheless grant relief if an unauthorized promise of immunity was made, the accused reasonably believed that the promise was made by a person with authority to do so, and the accused relied on the promise to his detriment. *Id.* at 3-4. The court further held that a bar to prosecution is appropriate only when the accused can show that other steps are inadequate to remedy any detrimental reliance. *Id.* at 4, 7.

Applying those principles, the CAAF assumed that the CPO made the immunity grant with the approval of a special-court martial convening authority and that petitioner reasonably relied on the CPO's grant. Pet. App. 7. The CAAF ruled, however, that petitioner had failed to demonstrate detrimental reliance on the CPO's unauthorized promise. *Id.* at 8. The CAAF explained that the military judge excluded from the court-martial proceeding statements petitioner made during the NJP proceeding, the government did not use any information relating to petitioner's administrative separation against him at the court-martial, and the government agreed that petitioner would be entitled to full sentencing credit

for the punishment that petitioner received at the NJP proceeding. *Id.* at 6-7. The court added that the government had independent evidence of petitioner's crimes before petitioner entered into discussions with the CPO, and that petitioner had not identified any significant statement made during the NJP proceeding or in the administrative discharge packet that would not have been presented to the GCMCA in the absence of the CPO's promise. *Id.* at 7-8.

Judge Erdmann dissented. Pet. App. 8-17. He concluded that detrimental reliance is not an element of a de facto immunity claim and that the government should therefore have been barred from bringing court-martial charges against petitioner. *Id.* at 8-9.

ARGUMENT

1. Petitioner contends (Pet. 2-7) that trying him in Florida for a military offense that occurred in Texas violated the Sixth Amendment's requirement that criminal prosecutions must be tried in the place where the crime was committed. The Court lacks jurisdiction over that claim. In any event, that contention is without merit and does not warrant review.

This Court's authority to review decisions of the CAAF is derived from 28 U.S.C. 1259. Under Section 1259(3), the Court may review cases, such as this one, in which the CAAF has granted a petition for review under 10 U.S.C. 867(a)(3). That authority to review CAAF decisions, however, is expressly qualified by 10 U.S.C. 867a(a), which provides that this Court "may not review by a writ of certiorari under [28 U.S.C. 1259] any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review."

That limitation on review is applicable here. While the CAAF granted a petition for review on petitioner's claim that he was entitled to transactional immunity, it refused to grant a petition to review his Sixth Amendment claim. Under the terms of Section 867a(a), the Court may not review the CAAF's action in refusing to grant review of that claim.

In any event, there is no merit to petitioner's Sixth Amendment claim. In *Ex parte Quirin*, 317 U.S. 1, 39 (1942), the Court made clear that the Sixth Amendment, including the requirement that criminal prosecutions must be brought in the place where the crime occurred, does not apply to proceedings in military tribunals. Consistent with *Quirin*, the CAAF (then the Court of Military Appeals) has held that court martial proceedings are not subject to the Sixth Amendment's requirement that a criminal prosecution must be held in the place where the crime occurred. *Chenoweth* v. *Van Arsdall*, 46 C.M.R. 183, 186 (C.M.A. 1973).

This case illustrates why applying the Sixth Amendment place-of-prosecution requirement to court-martial proceedings would interfere with the functioning of the military without a sufficient countervailing benefit. By the time of trial, neither petitioner nor the victim was stationed in Texas, and many of the witnesses had been transferred from Texas to other parts of the world. Pet. App. 20. Furthermore, the military judge, counsel, and potential members were from Pensacola, Florida, the site of the trial. *Ibid.* And petitioner conceded that he was not aware of any problem in holding the trial in that location. *Ibid.*

Petitioner errs in contending (Pet. 2-3) that *Chenoweth* conflicts with the decisions of federal courts of appeals. The cases petitioner cites hold only that the

Sixth Amendment requires federal criminal prosecutions to be tried in the place where the crime occurred. None of those cases addresses whether court-martials in military tribunals are subject to that Sixth Amendment requirement. There is therefore no conflict between *Chenoweth* and the court of appeals decisions cited by petitioner. Thus, even if the Court had jurisdiction to review petitioner's Sixth Amendment claim, review of that question would not be warranted.

2. Petitioner also contends (Pet. 6-16) that his court-martial was barred by his prior immunity agreement. That contention is without merit and does not warrant review.

Under C.M.R. 704(c), only a GCMCA can grant immunity, and he cannot delegate that authority to another person. Consistent with that limitation, a promise of transactional immunity to a military defendant made by anyone other than a GCMCA is not a bar to prosecution. See *United States* v. *Churnovic*, 22 M.J. 401, 404-405 (C.M.A. 1986). Here the GCMCA did not promise petitioner transactional immunity. Rather, petitioner reached his agreement with the CPO. Pet. App. 5. Because the CPO had no authority to offer petitioner immunity, petitioner did not obtain a valid immunity agreement.

Despite the CPO's clear lack of authority to conclude an immunity agreement with petitioner, the CAAF examined whether petitioner had detrimentally relied on the CPO's actions, and, if so, whether barring a prosecution would be an appropriate remedy. Pet. App. 6-8. After a thorough examination of the circumstances, the CAAF concluded that no such detrimental reliance occurred. *Id.* at 7-8. As the CAAF explained, petitioner had already admitted his culpability before having any

discussion with the CPO, and nothing he said after he reached an agreement with the CPO was used in subsequent proceedings against him. *Ibid.*

Petitioner does not challenge the CAAF's determination that he did not rely to his detriment on the CPO's actions. Rather he contends (Pet. 7-8) that review is warranted because the CAAF's reliance on the absence of detrimental reliance conflicts with the Eleventh Circuit's decision in *Rowe* v. *Griffin*, 676 F.2d 524, 528 (1982). There is, however, no conflict.

In *Rowe*, the court of appeals held that a promise of transactional immunity should be enforced when: (1) such an agreement has been made; (2) the defendant has performed his side of the agreement; and (3) the subsequent prosecution directly relates to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government. Applying that standard, the court held that the State was required to honor a transactional immunity agreement it had made with the defendant. Of crucial importance, however, the state official who made the agreement was the State's Attorney General, and he had state-law authority to promise transactional immunity, at least for the duration of his office. In those circumstances, the court concluded that the agreement should be enforced notwithstanding the Attorney General's claim that the agreement was limited by state law to the duration of his office. 676 F.2d at 526 n.4.

The circumstances here are dramatically different. Here, petitioner reached an agreement with a subordinate official who had no authority of any kind to promise immunity. *Rowe* had no occasion to address whether an agreement should be enforced in such circumstances.

There is therefore no conflict between *Rowe* and the decision below.

The other court of appeals decisions cited by petitioner provide even less support for his position. In *United States* v. *McHan*, 101 F.3d 1027 (1996), cert. denied, 520 U.S. 1281 (1997), the Fourth Circuit held that an Assistant United States Attorney had not reached an agreement with the defendant not to prosecute him. That case therefore did not present the question whether a court should enforce an agreement not to prosecute made by a lower-level government official who clearly lacked authority to make the agreement.

In *United States* v. *Liranzo*, 944 F.2d 73 (1991), the Second Circuit held only that the government had not breached an agreement to refrain from introducing statements the defendant had made in discussions with the government. That case did not involve a claim of transactional immunity, much less a claim that a court should enforce an offer of transactional immunity made by a government official who clearly lacked authority to make such an offer.

The cases cited by petitioner are also inapposite for another important reason. None of them involved the military justice system. The military criminal justice system "exists separate and apart" from the federal criminal system. *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). Military courts do not have to follow every rule or procedure that exists in the federal criminal justice system, but can modify them to meet military needs. The CPO's lack of authority is, by itself, sufficient to reject a claim that his actions conferred immunity. Pet. App. 7. But to the extent that any further inquiry is made based on apparent authority, the military's "detrimental reliance" rule strikes an appropriate balance

between the needs of the military and the rights of a military accused because it ensures that no defendant will receive a windfall from a grant of immunity by a person unauthorized to grant immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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