Office of the Attorney General
Washington, D. C. 20530

June 22, 2011

The Honorable Eric Cantor
Majority Leader
U.S. House of Representatives
Washington, DC 20515

Re: United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011)

Dear Mr. Leader:

In accordance with 28 U.S.C. 530D, I write to advise you of the Department of Justice's decision not to petition the Supreme Court to review the decision of the U.S. Court of Appeals for the Armed Forces (CAAF) in this case. The CAAF held that a provision of the Uniform Code of Military Justice (UCMJ) violates the Due Process Clause because it unconstitutionally shifts to the defendant the burden to disprove an element of the offense. Because the decision is not an unreasonable application of existing law, because the Department of Defense has recommended to Congress that it amend the relevant UCMJ provision to eliminate the problem, and because jury instructions have cured the problem in other pending cases, the issue does not warrant petitioning for a writ of certiorari in this case.

Article 120 of the UCMJ, 10 U.S.C. 920, defines the military offenses of rape, sexual assault, and other sexual misconduct crimes. In particular, Article 120(c)(2) defines aggravated sexual assault as, among other things, engaging in a sexual act with another person "if that person is substantially incapacitated or substantially incapable" of appraising the nature of the sexual act, declining participation in it, or communicating unwillingness to engage in the sexual act. Article 120(r) provides that "consent" is not "an issue," but may be raised as an affirmative defense by the accused. Article 120(t)(14) defines "consent" but provides that a person cannot consent if that person is "substantially incapable" of appraising the nature of the sexual act due to mental impairment or unconsciousness resulting from, among other things, consumption of alcohol or drugs. Article 120(t)(16) provides that the accused "has the burden of proving the affirmative defense by a preponderance of the evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist."

Defendant Stephen Prather, an airman in the United States Air Force, was tried by a general court-martial on charges including aggravated sexual assault, in violation of Article 120(c)(2). The charge alleged that Prather had sexual intercourse with a woman who was substantially incapacitated due to her intoxication. His defense was consent. The court-martial found Prather guilty. He was sentenced to a dishonorable discharge, confinement for two years and six months, forfeiture of all pay and allowances, and reduction in rank.

The CAAF reversed the aggravated sexual assault conviction. It concluded that the "interplay" of the element of substantial incapacity in Article 120(c)(2), the definition of consent in Article 120(t)(14), and the affirmative defense in Article 120(t)(16) "results in an unconstitutional burden shift to the accused." 69 M.J. at 343. The CAAF explained that "[i]f an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault—that the victim was substantially incapacitated." *Ibid.* The CAAF rejected the government's argument that the military judge's instructions cured "any constitutional infirmity in the statutory scheme." *Ibid.*; *see id.* at 343-345. It also concluded that, because the initial burden shift in Article 120(t)(16) was unconstitutional under the circumstances of the case, any question concerning the second burden shift (*i.e.*, providing that once a defendant has met his burden to prove an affirmative defense, the government has the burden to disprove it beyond a reasonable doubt) was "moot." *Id.* at 345. Even if the issue were not moot, however, the CAAF held that the second burden shift is a "legal impossibility." *Ibid.* Separately, the CAAF upheld Prather's conviction for adultery and ordered resentencing. *Ibid.*

Judge Baker, joined by Judge Stucky, dissented in part and concurred in the result. They believed that the first burden shift in Article 120(t)(16) is not unconstitutional on its face and can be applied constitutionally with proper instructions. But they also believed that the second burden shift is unconstitutional on its face. 69 M.J. at 348.

The CAAF applied well-settled due process principles in reaching its conclusion, and its decision breaks no new ground. The Department of Defense has recently transmitted to Congress recommended amendments to Article 120. One aspect of those amendments, if adopted by Congress, would eliminate the constitutional defect identified in this case—in particular, by striking the affirmative-defense provisions, Article 120(r) and (t)(16). And the CAAF's application of due process principles in this context does not have independent jurisprudential significance for military prosecutions. Accordingly, the ability to respond legislatively to the CAAF's decision counsels against seeking Supreme Court review.

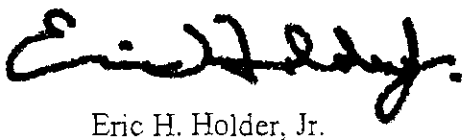
Furthermore, in nearly every other case pending in the military courts, military judges have given an instruction specifying that the government bears the burden of proving the absence of consent beyond a reasonable doubt. *See* 69 M.J. at 340 & n.2. Since deciding this case, the CAAF has affirmed a conviction obtained after such an instruction. *See United States v. Medina*, 69 M.J. 462, 465-466 (C.A.A.F. 2011). The minimal effect on cases beyond Prather's own case, while Congress considers whether to amend the statute, is a further reason why Supreme Court review is not warranted at this time.

In this case, the Department of Defense, which is responsible for litigating before the CAAF, did not advise the Department of Justice of its recommendation with respect to whether to seek certiorari until June 13, 2011, and the Criminal Division of the Department of Justice did not provide the Solicitor General with its recommendation until June 14, 2011. The Solicitor General promptly

sought an extension from the Supreme Court to and including July 15, 2011, and the Chief Justice granted an extension to June 29, 2011. Accordingly, a petition for a writ of certiorari would be due on June 29, 2011.

Please let me know if we can be of further assistance in this matter.

Sincerely,



Eric H. Holder, Jr.
Attorney General

Enclosure