No. 19-795

In the Supreme Court of the United States

PAUL D. VOORHEES, 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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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces correctly rejected, on plain-error review, petitioner's contention that a mens rea higher than general intent should be inferred into the offense of conduct unbecoming an officer and a gentleman under Uniform Code of Military Justice Article 133, 10 U.S.C. 933.

ADDITIONAL RELATED PROCEEDINGS

United States Air Force Court of Criminal Appeals:

United States v. *Voorhees*, No. ACM 38836 (July 20, 2018)

United States Court of Appeals for the Armed Forces:

United States v. *Voorhees*, No. 18-372 (June 27, 2019)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-27a) is reported at 79 M.J. 5. The opinions of the United States Air Force Court of Criminal Appeals (Pet. App. 28a-45a, Pet. App. 46a-79a) are not published in the Military Justice Reporter but are available at 2018 WL 3629893 and 2016 WL 11410622.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on June 27, 2019. A petition for reconsideration was denied on August 8, 2019 (Pet. App. 80a). On October 23, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 23, 2019, and the petition was filed on December 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of five specifications of conduct unbecoming an officer and a gentleman and one specification of sexual assault, in violation of Articles 120 and 133 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920 (2012) and 10 U.S.C. 933. Pet. App. 2a. Petitioner was sentenced to dismissal, confinement for three years, and forfeiture of all pay and allowances. *Ibid.* The convening authority approved the findings and sentence. *Ibid.*

The United States Air Force Court of Criminal Appeals (AFCCA) set aside the sexual-assault conviction for factual insufficiency, affirmed the remaining convictions, and remanded for resentencing. Pet. App. 46a-79a. On remand, a military judge resentenced petitioner to dismissal and a reprimand. *Id.* at 2a. The convening authority approved the sentence, *ibid.*, and the AFCCA affirmed, *id.* at 28a-45a. The United States Court of Appeals for the Armed Forces (CAAF) granted discretionary review and affirmed. *Id.* at 1a-27a.

1. Before his dismissal, petitioner was a major in the Air Force who served as a pilot, co-pilot, and aircraft commander. Pet. App. 31a. In 2012 and 2013, while on official travel, deployed, and transitioning to and from deployment, he repeatedly made inappropriate sexual comments to three female subordinate Airmen. *Id.* at 30a-31a. The comments, which were conveyed electronically, included telling a female subordinate he wanted to take her back to his hotel room, asking all three women if they cheated on their husbands or "significant other[s]," and asking two of them about the undergarments they were wearing. *Id.* at 31a. He also had sex with one subordinate female, Senior Airman HB, in an

encounter that she later described as non-consensual. *Id.* at 50a-51a.

2. Military authorities initiated court-martial proceedings against petitioner. He was charged with multiple specifications of conduct unbecoming an officer in violation of UCMJ Article 133, 10 U.S.C. 933, and one specification of sexual assault in violation of UCMJ Article 120, 10 U.S.C. 920 (2012). See Pet. 7.

As relevant here, the specifications of conduct unbecoming an officer and a gentleman alleged that petitioner engaged in communications of a sexual nature with military personnel junior in rank to him and that the conduct "u[nd]er the circumstances, was unbecoming an officer and a gentleman." Pet. App. 31a. One specification stated that petitioner asked Senior Airman HB "inappropriate questions": "Have you ever cheated on your husband?"; "Have you ever sent him pictures?"; and "Can I have pictures of you?," or words to that effect. *Ibid.* Another specification stated that petitioner massaged HB's back, *ibid.*; at the time, petitioner was the aircraft commander of a crew in which HB was the only woman and the junior member, *id.* at 4a. A third specification alleged that petitioner made an "inappropriate statement" to HB, akin to "I would like to take you back to my room." *Id.* at 31a. A fourth specification stated that petitioner sent "unprofessional" texts to Captain MQ: "What I want to say could end my career and marriage"; "Your [sic] a very beautiful woman and I would love to be close to you"; "What's your definition of cheating?"; and "So if I asked what color panties you were wearing?" *Id.* at 31a-32a (brackets in original). Finally, a fifth specification stated that petitioner sent "unprofessional" texts to Technical Sergeant BR: "This is about to become a game to see what

else I can say that will slip by you"; "Mind if I ask u [sic] a couple personal questions?"; "What I want to say could end my career so I just want to make sure you can keep what I say between us because you seem really cool?"; "Oh really, what's under there?"; and "I've had a crush on you," or words to that effect. *Id.* at 32a (brackets in original).

Petitioner pleaded not guilty, and a general court-martial composed of officers was convened. Pet. App. 2a. The military judge instructed the panel members on the requirements to find petitioner guilty of conduct unbecoming an officer and a gentleman under UCMJ Article 133 as follows:

> "Conduct unbecoming an officer and a gentleman" means behavior in an official capacity which, in dishonoring or disgracing the individual as a commissioned officer, seriously detracts from his character as a gentleman, or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from his standing as a commissioned officer. "Unbecoming conduct" means misbehavior more serious than slight, and of a material and pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste or propriety.

Id. at 22a-23a. Petitioner did not object to those instructions, which "mirror[ed]" the definition of "conduct unbecoming" in the *Manual for Courts-Martial, United States-2012* (*MCM*). Pet. App. 22a-23a & n.9.

The court martial found petitioner guilty of the five specifications of conduct unbecoming an officer and a gentleman described above, and of the sexual assault

charge. See Pet. App. 29a-31a. The court martial found petitioner not guilty of a sixth specification of conduct unbecoming an officer and a gentleman. See Pet. 7.

3. Petitioner appealed to the AFCCA, which affirmed the conduct-unbecoming convictions but set aside the sexual-assault conviction and remanded for resentencing. Pet. App. 46a-79a. As to the sexual-assault conviction, the AFCCA credited petitioner's defense that he had made a reasonable mistake of fact as to HB's consent and determined that acquittal was therefore required. *Id.* at 56a-57a. As to the conduct-unbecoming convictions, the AFCCA rejected petitioner's claims that the specifications did not allege offenses under Article 133 and that the evidence was insufficient to sustain the convictions. *Id.* at 58a-64a.

On remand from the AFCCA, a military judge resentenced petitioner to dismissal and a reprimand. Pet. App. 30a. The AFCCA affirmed, considering only issues relating to petitioner's resentencing. See *id.* at 28a-45a.

4. On discretionary review, the CAAF affirmed. Pet. App. 1a-27a. As relevant here, petitioner contended for the first time to the CAAF that the military judge had erred by failing to require proof of adequate mens rea under Article 133 in its instructions to the court-martial panel. *Id.* at 3a. The CAAF reviewed that claim for plain error, *id.* at 22a, and found none, *id.* at 30a.

The CAAF began by explaining that "Article 133, UCMJ, contains just two elements: 'that the accused did or omitted to do certain acts; and that, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.'" Pet. App. 22a (brackets and citation omitted). The CAAF found

that the statute "contains no explicit mens rea requirement." *Id.* at 23a. Following *United States* v. *Caldwell*, 75 M.J. 276 (C.A.A.F.), cert. denied, 137 S. Ct. 248 (2016), the CAAF stated that when a criminal UCMJ provision lacks a specific mens rea, the CAAF will "only read into the statute that mens rea which is necessary to separate wrongful conduct from innocent conduct." Pet. App. 23a-24a (quoting *Caldwell*, 75 M.J. at 281). Here, the CAAF determined that Article 133's silence as to mens rea is consistent with a "general intent scienter," which requires the "'intent to perform the actus reus'" but not necessarily a "'desire [for] the consequences that result.'" *Id.* at 24a (quoting *United States* v. *Haverty*, 76 M.J. 199, 207 (C.A.A.F. 2017) (brackets, citation, and emphasis omitted)). And the CAAF explained that in this case, "a general intent mens rea would require only that [petitioner] intended to commit the conduct alleged in each specification—i.e., making inappropriate comments and massaging his subordinate's back. It was up to the panel to determine whether [petitioner's] acts constituted conduct unbecoming." *Ibid.* (emphasis omitted).

The CAAF emphasized that a general intent requirement was appropriate under Article 133 because no scenario exists in which conduct like petitioner's, committed intentionally, could be innocent. Pet. App. 24a. The court explained that "[c]onduct unbecoming" is a specialized "'military offense'" that "is intended to help ensure a 'disciplined and obedient fighting force'" by regulating officer behavior. *Id.* at 25a (quoting *Haverty*, 76 M.J. at 205 n.10; *Parker* v. *Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., concurring)). The CAAF additionally observed that Article 133's "foundations were established long before the Republic itself." *Ibid.* The

CAAF explained that because officer behavior is so important to the military mission, the wrongfulness of "'conduct unbecoming does not depend on whether conduct actually effects a harm upon a victim,'" but rather on whether the officer "possessed the general intent to act indecorously, dishonestly, or indecently." *Id.* at 26a (brackets and citation omitted).

The CAAF accordingly determined that the military judge's instructions in this case appropriately "'requir[ed] the panel members to determine whether [petitioner]' knew that he was engaging in certain conduct." Pet. App. 27a (quoting *Caldwell*, 75 M.J. at 283). The CAAF found the "general intent" requirement of Article 133 satisfied, and determined that the "instructions were not erroneous, let alone plainly erroneous." *Ibid.*

In a footnote, the CAAF also rejected petitioner's claim that his Article 133 specifications "omitted words of criminality." Pet. App. 21a n.8. The CAAF explained that the specifications used the terms "'inappropriate'" and "'unprofessional'" and alleged that the conduct was "unbecoming an officer and a gentleman," and therefore sufficiently "contain[ed] words of criminality to state an offense" under CAAF precedent. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 12-27) that the CAAF understated the mens rea required to sustain a conviction for conduct unbecoming an officer and a gentleman under UCMJ Article 133.[1] That contention lacks merit, and further review is in any event unwarranted because

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[1] A related issue, concerning the mens rea for sexual assault by bodily harm, is presented in *McDonald* v. *United States*, No. 19-557 (filed Oct. 28, 2019).

petitioner would not be entitled to relief even if it were correct. The petition for a writ of certiorari should be denied.

1. UCMJ Article 133 provides that "[a]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." Art. 133, 10 U.S.C. 933. The *MCM* specifies that the elements of conduct unbecoming an officer and a gentleman are as follows: "(1) That the accused did or omitted to do certain acts; and (2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman." *MCM* Pt. IV, Art. 133, ¶ 59(b). The *MCM* describes the conduct covered by Article 133 as follows:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.

Id. Art. 133, ¶ 59(c).

2. The CAAF correctly determined that conduct unbecoming an officer and a gentleman is a general intent crime. The language of Article 133 and its explication in the *MCM* indicate that the defendant must intend the unbecoming conduct; otherwise, that conduct could not

"seriously compromise[] [a] person's standing as an officer" or gentleman. *MCM* Pt. IV, Art. 133, ¶ 59(c)(2). But neither the statute nor the *MCM* contains a more specific intent requirement, and petitioner does not purport to locate a heightened mens rea requirement in either source. Instead, petitioner argues (Pet. 14-25) that "mens rea principles in the Fifth and Sixth Amendments" and this Court's precedents require a more demanding mens rea requirement, Pet. 15 (emphasis omitted). Those arguments lack merit.

Petitioner's primary contention (Pet. 12-20) is that UCMJ Article 133 cannot constitutionally be applied without a heightened mens rea. That is incorrect. Petitioner does not identify any language in the Fifth or Sixth Amendments requiring an express mens rea provision in all criminal statutes, nor any cases interpreting the Fifth or Sixth Amendments to impose such a requirement. Instead, petitioner points to this Court's "*mens rea* jurisprudence," Pet. 12, including *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), *Elonis* v. *United States*, 135 S. Ct. 2001 (2015), *United States* v. *X-Citement Video, Inc*., 513 U.S. 64 (1994), and *Morissette* v. *United States*, 342 U.S. 246 (1952). Pet. 14-19, 23-25. Those cases apply a "rule of construction" to civilian criminal statutes 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 (citation omitted). They do not, however, hold that such a principle of statutory interpretation is constitutionally mandated.

This Court has recognized that the UCMJ "cannot be equated to a civilian criminal code," as it "regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of

civilians." *Parker* v. *Levy*, 417 U.S. 733, 749-750 (1974); see also *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983) (stating that the "need for special regulations in relation to military discipline" makes distinctive "demands on [military] personnel 'without counterpart in civilian life'") (citation omitted). Because "military society" differs so significantly from "civilian society," Congress is "permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker*, 417 U.S. at 756.

Article 133 in particular is a law distinct to the military branches that, in and of itself, reflects critical differences between the UCMJ and civilian criminal law. "In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman; in the military world, Art. 133 imposes such a sanction on a commissioned officer." *Parker*, 417 U.S. at 749. Article 133's pedigree stretches back centuries, and its purpose is to promote the military's central mission of fighting wars by holding military officers to a high standard of conduct. See *id.* at 743-749. Article 133 is therefore unlike many of the civilian criminal provisions in which this Court has inferred a mens rea requirement. See, *e.g.*, *Elonis*, *supra* (interpreting federal criminal statute prohibiting the transmission of certain threats); *Rehaif*, *supra* (interpreting federal criminal statute prohibiting the possession of firearms by certain people). Indeed, in many respects Article 133 bears a closer resemblance to a "public welfare" offense—to which no presumption of mens rea applies—than it does to ordinary criminal provisions. See *Morissette*, 342 U.S. at 255-256 (describing "'public welfare offenses'" as "offenses against [the state's] authority, for their occurrence impairs the

efficiency of controls deemed essential to the social order as presently constituted," and noting that "[i]n this respect, whatever the intent of the violator, the injury is the same").

Petitioner errs in suggesting (Pet. 22-23) that this Court's analysis of the UCMJ and Article 133 in *Parker*, *supra*, is obsolete because subsequent changes to the UCMJ and the *MCM* have narrowed the differences between the military and civilian justice systems. This Court has continued to recognize the differences between military and civilian justice systems, often applying constitutional provisions differently between them. See, *e.g.*, *Weiss* v. *United States*, 510 U.S. 163, 177-178 (1994); *Chappell*, 462 U.S. at 300.

To the extent that this Court's "rule of construction" for mens rea in criminal statutes applies to the interpretation of Article 133, the CAAF followed that rule here by interpreting Article 133 to require general intent. As this Court has explained, courts may read in to criminal statutes "*only*" the scienter that is "necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Elonis*, 135 S. Ct. at 2010 (emphasis added; citation omitted). That is precisely the rule that the CAAF followed here. Pet. App. 24a (articulating same principle). And "[i]n some cases, a general requirement that a defendant act knowingly is itself an adequate safeguard." *Elonis*, 135 S. Ct. at 2010 (emphasis omitted). This is such a case.

As the CAAF explained, if acting with general intent, "'there is no scenario where an officer who engages in the type of conduct' [petitioner] engaged in 'can be said to have engaged in innocent conduct.'" Pet. App. 24a (brackets and citation omitted). "Abusive conduct that is consciously directed at a subordinate is in no sense

lawful," and such "behavior undermines the integrity of the military's command structure" regardless of whether the actor intends that specific result. *United States* v. *Caldwell*, 75 M.J. 276, 282 (C.A.A.F.), cert. denied, 137 S. Ct. 248 (2016) (emphasis omitted). Article 133, like its longstanding antecedents, reflects the particularized expectations of military life and needs of military discipline. See *Parker*, 417 U.S. at 743-747. Those expectations and needs do not differ based on a defendant's subjective views, and such views do not require the military to tolerate improper and disruptive behavior.[2]

3. In any event, even if the question presented might otherwise warrant this Court's review, further review in this particular case would be unwarranted, for two related reasons.

First, petitioner failed to object to the military judge's instructions on Article 133 at his court martial. Pet. App. 22a. As a result, the CAAF reviewed petitioner's claim only for plain error. *Ibid.* Under the military plain-error doctrine, a military defendant must show (1) an error, (2) that was plain, and (3) that had an unfair prejudicial impact on the members' deliberations. *United States* v. *Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017); see, *e.g.*, *United States* v. *Tovarchavez*,

[2] Petitioner separately contends (Pet. 16-17) that the specifications in his case failed to allege "words of criminality" as required by the *MCM*. The CAAF correctly rejected that claim, explaining that the specifications stated offenses under Article 133 by alleging that petitioner's conduct was unbecoming an officer and a gentleman, inappropriate, and unprofessional. Pet. App. 21a n.8. Petitioner does not dispute that each specification stated the elements of an offense under Article 133, nor does he point to any case law finding similar specifications insufficient. And whether the wording of the particular specifications in petitioner's case was correct is not an issue that warrants this Court's review.

78 M.J. 458, 467 (C.A.A.F. 2019) (noting differences between the military and civilian plain error tests). Even if petitioner prevails on the question presented in his petition for a writ of certiorari, the plain-error standard could prevent him from obtaining any relief.

Second, the evidence in petitioner's case demonstrated that he would have been convicted even under the higher mens rea standard for which he now advocates, which appears to require a defendant's specific knowledge that his conduct was unbecoming of an officer and a gentleman. See Pet. 4, 25 (arguing that it was error to permit a "reasonable person (or juror)" to determine whether "Petitioner's speech and conduct were 'unbecoming an officer'" rather than requiring petitioner himself to intend such a result). Petitioner explicitly and repeatedly told the subordinate women to whom he sent inappropriate communications that his statements could "end [his] career." Pet. App. 31a-32a. Petitioner was aware of the wrongfulness of his actions as a military officer, and his conviction therefore did not hinge on the mens rea issue he now raises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2020