No. 19-795

In The
Supreme Court of the United States

PAUL D. VOORHEES,
Major, United States Air Force,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Our Nation's service men and women are not second class citizens. Putting on a military uniform does not act as a barrier to the guarantees adopted in the Bill of Rights–with the sole exception of the Fifth Amendment's Grand Jury exclusions. While the Make Rules Clause in Article I, § 8, U.S. Const., gives Congress the power to preserve "good order and discipline" in the military, *cf.* 10 U.S.C. § 934, it does not provide Congress the authority to deprive

servicemembers of their other constitutional rights. In a case relied upon by the government in its *Brief in Opposition* [BIO] herein, *Weiss v. United States,* 510 U.S. 163 (1994), Justice Ginsburg in her concurring opinion observed:

> The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.

510 U.S. at 194 (Ginsburg, J., concurring).

The issue here is not, as the BIO claims, Congressional power to regulate "conduct unbecoming" by military officers, but rather, when they do, must the same *mens rea* principles applicable to civilian crimes, apply to crimes under the *Uniform Code of Military Justice* [UCMJ]? The Make Rules Clause contains no *mens rea* exception nor does the Bill of Rights. CAAF's decision below mistakenly assumed that CAAF has the authority to decide the level of *mens rea* in 10 U.S.C. § 933 from a constitutional perspective without considering the relevant precedents of this Court.

In *United States v. Carll*, 105 U.S. 611, 612-13 (1881), this Court held that a criminal indictment which, while containing the language of the statute (as here), but failed to allege a *mens rea* element, was defective. Here, the Specifications (counts) at issue likewise fail to contain any *mens rea* element.

This Court is the final arbiter of the Constitution. *See, e.g., Dixon v. Duffy,* 344 U.S. 143, 146 (1952). If

CAAF's decision below was correct, this Court respectfully should say so and end the *mens rea* litigation under the UCMJ. But, if CAAF is wrong–as this Court's precedents suggest–this Court must correct it and steer military law on this issue back to its constitutional framework. CAAF denied reconsideration below declining to address the issue specifically raised under *Elonis v. United States,* 135 S.Ct. 2001 (2015). Furthermore, since the service Courts of Criminal Appeals [CCA's] are bound by CAAF's precedents, there is no chance that the issue will percolate in those Courts.

Our Constitution deals in substance, not form, and CAAF cannot simply slap a "general intent" label on a statute where Congress has not included one. That is rank judicial "legislating," which this Court most recently rebuffed in *United States v. Davis,* 139 S.Ct. 2319, 2333 (2019). This Court should grant *certiorari*, vacate the decision and judgment below, and remand the case to CAAF with instructions to address the *mens rea* issue raised in *Elonis*, *Rehaif v. United States,* 139 S.Ct. 2191 (2019), and their antecedents.

I. THE GOVERNMENT MISSTATES THE ISSUE IN ITS REFORMATTING OF PETITIONER'S *QUESTION PRESENTED*.

The issue here is not that 10 U.S.C. § 933, Article 133, UCMJ, "cannot constitutionally be applied without a heightened mens rea" as the government claims. BIO 9. The issue as presented is, where the criminal statute at issue contains no *mens rea* element–such as § 933–must one be read into it? *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 69 (1994)["some form of scienter is to be implied in a

criminal statute even if not expressed. . . ."]; *Rehaif,* 139 S.Ct. at 2197 ["We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question."]

The government complains that "Petitioner does not identify any language in the Fifth or Sixth Amendments requiring an express mens rea provision in all criminal statutes to impose such a requirement." BIO 9. The language of the Amendments speak for themselves, as interpreted and applied by this Court's precedents. It then dismisses the cases referred to as "*mens rea* jurisprudence" claiming that the cited cases "do not . . . hold that such a principle of statutory interpretation is constitutionally mandated." *Id.* The government is simply wrong.

Referring to a case cited by the government, *Weiss, supra,* [BIO 11], demonstrates the error. There Chief Justice Rehnquist, writing for the Court, held:

> Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings.

510 U.S. at 176.

The issue here, as framed in the *Question Presented*–whether one attaches the label "rule of construction" or the "*mens rea* jurisprudence" of this Court [BIO 9]–is, does this principle (however labeled) apply to criminal statutes under the UCMJ which do not contain any *mens rea* element? The Drafters of the Bill of Rights certainly knew how to exempt military members from rights otherwise granted, as the Grand

Jury Clauses of the Fifth Amendment aptly demonstrate. Pet. 12-13. The government does not dispute this.

What the government ignores is the historical fact that this Court has never addressed the *mens rea* issue raised in the military justice context.[1] Resolving this issue–one way or the other–is especially important herein where CAAF adopted a simple negligence *mens rea* approach for a criminal statute with lifetime consequences–one expressly rejected by this Court in *Elonis,* 135 S.Ct. at 2011.

II. THE GOVERNMENT CONFLATES TWO DIFFERING CONSTITUTIONAL PRINCIPLES AND THUS, MISANALYZES THE ISSUE PRESENTED.

A. This Case is *Not* About the Make Rules Clause.

Petitioner makes no claim as to Congressional power to regulate "a far broader range of the conduct of military personnel than a typical state criminal code regulates the conduct of civilians." BIO 9-10 [quoting *Parker v. Levy,* 417 U.S. 733, 749-50 (1974)], Pet. 2. Congress *can* regulate "conduct unbecoming an officer," 10 U.S.C. § 933. The Make Rules Clause of Article I, § 8, U.S. Const., is simply not at issue here.

The government attempts to justify its position, citing *Parker v. Levy, supra,* by relying on an irrelevant truism:

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[1] Similarly pending *certiorari* in *United States v. McDonald,* Dkt. # 19-557.

> 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.

BIO 10. But, that "pedigree" includes due process, a concept going back to the *Magna Charta.* The government overlooks: "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta.*" *Murray's Lessee v. Hoboken Land & Improvement Co.,* 59 U.S. 272, 276 (1856).

There is nothing inconsistent with holding military officers to a "high standard of conduct," and if the military chooses to prosecute an officer for conduct allegedly violating those standards, to require a *mens rea* element higher than negligence. Or, framed another way, when Congress exercises its powers over the military under the Make Rules Clause, must it do so in a particular manner, consistent with the Constitution? *Compare, Crawford v. Washington,* 541 U.S. 36, 61 (2004)[The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner. . . ."].

Consistent with this premiss, *Murray's Lessee,* teaches one other important principle about Due Process:

> The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress (sic) free to make any process "due process of law" by its mere will.

59 U.S. at 276. That is the government's argument

here, *viz.,* that Congress can make "any process 'due process of law' by its mere will" in the context of military justice. This Court rejected that concept in civilian jurisprudence 165 years ago, and respectfully should do so here in the military context.

III. THE GOVERNMENT FAILS TO ADDRESS THE CLEAR CONGRESSIONAL INTENT OF MAKING MILITARY JUSTICE UNDER THE UCMJ CONSISTENT WITH FEDERAL DISTRICT COURTS.

When Congress enacted the UCMJ in 1950, one of its goals was to reform military justice into the nature of federal criminal practice. Thus, it enacted Article 36, UCMJ, now 10 U.S.C. § 836(a), requiring military justice to generally be consistent with "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States District Courts." As Chief Justice Rehnquist noted in *Weiss,*

> By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system.

510 U.S. at 174.

A. Petitioner Did Not "Err in Suggesting . . . That This Court's Analysis of the UCMJ and *MCM* in *Parker* [*v. Levy*] Is Obsolete . . . ." BIO 11.

That is not Petitioner's "suggestion" nor argument. Petitioner pointed out that "Congress has abrogated

many of the foundational pillars *Levy* was based upon." Pet. 22-23. That is and remains true, beginning with its enactment of 10 U.S.C. § 836, as Chief Justice Rehnquist noted above. There can be no confusion as to this as he continued in *Weiss*, "Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice. . . ." Notably, the government cites to and relies upon *Weiss.*

Chief Justice Earl Warren noted in 1962, "The Code [UCMJ] represents a diligent effort by Congress to insure that military justice is administered in accordance with the demands of due process."E. Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. Rev. 181, 188 (1962). The march of military due process has certainly continued since then. *See also,* Sen. Sam Irvin, Jr., *The Military Justice Act of 1968,* 45 Mil. L. Rev. 77, 83 (1969). Lastly, as Justice Douglas aptly observed:

> A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.

Winters v. United States, 89 S.Ct. 57, 59-60 (1968) (Douglas, J., in chambers).

B. CAAF's Utilization of an *Objective,* General Intent *Mens Rea*–a Negligence Standard–Which the Government Argues is Justified Because Military Constitutional Law is "Different," Has Been Rejected in Both Practice and Precedent.

The government paints the issue with too broad of

a brush. To be sure, in some situations there are some differences. The government cites to *Parker,* e.g., but *Parker*, as noted in the Petition herein, does not help the government. Pet. 21-23. In any event, appropriate "words of criminality" were included in the Specifications charging Captain Levy, and the issue before this court was a *vagueness* challenge. The government then turns to *Weiss, supra,* but as noted above, *Weiss* supports Petitioner's position and, in any event, dealt with the issue of whether the Constitution requires Article I, military judges, to have tenure–not a *mens rea* issue. Finally, the government relies upon *Chappell v. Wallace,* 462 U.S. 296 (1983), which again did not address any *mens rea* issue, but rather that military members had no inherent right (absent Congressional authorization) to file *Bivens*-type discrimination complaints against their superiors.

There are some differences in the *application* of constitutional law to military members, *see,* e.g., *Goldman v. Weinberger,* 475 U.S. 503 (1986)[denying First Amendment challenge to military regulation forbidding wearing a yarmulke while in uniform]; *Sec'y of the Navy v. Avrech,* 418 U.S. 676 (1974)(*per curiam*)(vagueness challenge to UCMJ article rejected); and *Loving v. United States,* 517 U.S. 748 (1996)[rejecting argument that only Congress could implement "aggravating factors" in military capital case].

The government relies upon CAAF's decision below claiming that "'there is no scenario where an officer engages in the conduct' [petitioner] engaged in 'can be said to have engaged in innocent conduct.'" BIO 11. Both are in error. If a back rub, consensual by all

accounts, can be deemed criminal without any *mens rea* other than negligence or "general intent," that defies both logic and the law. Here the Air Force CCA, found that having sex with the same woman, in the privacy of the same civilian hotel room, on the same date, was *not* criminal, yet the foreplay leading to the sex–the back rub–was *without a mens rea*, criminal, simply cannot pass Constitutional muster.

Many "innocent scenarios" come to mind–one will suffice. A male military officer who is a licensed physical therapist, gives a therapeutic massage to a female sergeant, is not and cannot be a military crime. And as noted in the Petition, a male officer stating "I would like to take you back to my room," is nothing more than a "wishful fantasy," and cannot be criminal under any reading of Due Process or Freedom of Speech in the military.

In order to affirm Petitioner's convictions herein, CAAF ignored its own jurisprudence. In *United States v. Wilcox,* 66 M.J. 442, 448-49 (CAAF 2008), CAAF reversed a Soldier's conviction for spewing racist KKK viewpoints on the internet and thus, allegedly violating 10 U.S.C. § 934, i.e., violating the statutes "service discrediting" clause. CAAF held:

> This Court has not directly addressed the connection needed between an appellant's statements and the military mission in the context of speech alleged to be "service discrediting." We note that the Government has cited no case in which this Court has upheld a conviction in a contested case based upon a violation of Article 134, UCMJ, for service discrediting speech solely because the

> speech would be offensive to many or most. We conclude that a direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory. If such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive.[2]

In this context, there is no constitutional difference between 10 U.S.C. § 933 and § 934.

IV. THE GOVERNMENT MISSTATES PETITIONER'S ARGUMENT REGARDING "WORDS OF CRIMINALITY."

The government's argument is at BIO 12, n.2. Petitioner notes:

1. CAAF granted discretionary review on *two* issues: (a) whether the charged § 933 offenses legally stated offenses, and (b) the failure to instruct on any *mens rea* to the Members. Pet.App. 3a.
2. CAAF merged the two issues in its decision. *Id.*
3. Petitioner *did* cite authority, *United States v.*

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[2] Petitioner is not trying to "sneak in" a First Amendment issue–that was not raised or preserved below. He mentions it only in the context of rebutting CAAF's and the government's rationale herein.

Shober, 26 M.J. 501, 503 (AF CMR), *aff'd* 23 M.J. 249 (CMA 1986), which affirmed the Air Force Court's holding that adding "the phrase 'which conduct was unbecoming an officer and a gentleman' adds nothing to the purported misconduct." Pet. 10, n.9.

4. CAAF here attempts to justify its decision on the "words of criminality" issue by boot-strapping the phrase "conduct unbecoming" with the words "*inappropriate* and unprofessional." BIO 12, n.2 [Emphasis added].

5. That conclusion necessitates this Court to resolve the *mens rea* issue because CAAF's holding directly contradicts the legal instruction given to the Members below: "unbecoming conduct" "means conduct morally unfitting and unworthy *rather than merely inappropriate* or unsuitable behavior . . . ." Pet.App. 22a-23a [Emphasis added].

6. Petitioner *did* dispute that the § 933 Specifications failed to state offenses both here and below. Pet. 16-17; Pet.App. 3a.

The government neglects to discuss the fact that every Commander-in-Chief since 1951, has mandated via promulgation of the *Manuals for Courts-Martial* as Executive Orders, to include "words of criminality" when charging offenses under 10 U.S.C. §§ 933 and 934. Pet. 16-20. The failure to draft compliant Specifications against Major Voorhees lies at the feet of the government. *United States v. Carll, supra.* And, the significance of the *MCM* to military prosecutions should have been readily apparent to anyone after this

Court decided *Loving*.

CAAF's jurisprudence regarding "general intent" derailed in *United States v. Caldwell,* 75 M.J. 276, 278 (CAAF), *cert. denied* 137 S.Ct. 248 (2016), when it concluded: "We therefore conclude that general intent sufficiently separates lawful and unlawful behavior in this [§ 933] context." Pet.App. 27a. CAAF nowhere explains its rationale for this conclusion or how lay fact-finders are to do so *without* any *mens rea* instructions whatsoever, or how its conclusion can be reconciled with *Morissette* and its progeny. All three of CAAF's recent "general intent" cases involved sexual assault issues–*Caldwell, McDonald,* and *Voorhees.* Petitioner's case is different only to the extent that the AFCCA reversed and dismissed his sexual assault conviction for *factual* insufficiency. Pet.App. 57a. This demonstrates the prejudice of failing to "read into" the Specification an appropriate *mens rea.*

V. THE FACT THAT CAAF REVIEWED THE *MENS REA* ISSUE UNDER THE "PLAIN ERROR" STANDARD IS IRRELEVANT.

CAAF granted discretionary review of the *mens rea* issue and decided it on the merits. As that Court held in *United States v. Birdsall,* 47 M.J. 404, 409 (CAAF 1998), *Military Rule of Evidence* [MRE] 103(d), permits "plain error" review: "Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge." *MCM* (2012), at III-1.

There is no jurisdictional impediment under 28 U.S.C. § 1259(3), for this Court to review CAAF's

decision below.

CONCLUSION

This Court should grant *certiorari*, vacate the decision and judgment below, and remand the case to CAAF with instructions to address the *mens rea* issue raised in *Elonis*, *Rehaif v. United States,* 139 S.Ct. 2191 (2019), and their antecedents.

Respectfully submitted,

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March 2020