IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

In re **PAUL D. VOORHEES,** Major (0-4), U.S. Air Force, *Petitioner,* *versus* U N I T E D S T A T E S, *Respondent.*	**DATE:** 16 September 2020 **Misc. Dkt. No. _____** AF Crim.App. Dkt. No. ACM 38836 USCA Dkt. No. 18-0372/AF

PETITION FOR EXTRAORDINARY RELIEF IN THE FORM OF A *WRIT OF ERROR CORAM NOBIS*

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TO THE JUDGES OF THE UNITED STATES
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I. RELIEF REQUESTED.

A. Petitioner, by and through his undersigned counsel, respectfully *Petitions* this Court for an Order granting relief in the form of a Writ of Error *Coram Nobis.* The basis for Relief is that there is an irreconcilable conflict between this Court's decision on the merits herein,[1] and that of *United States v. Gifford,*[2] and other, long-standing precedents of this Court.

In this Court's decision on the merits, the Court–on the issue of what the appropriate *mens rea* was for Article 133, UCMJ, 10 U.S.C. § 933, offenses[3]–held that since Article 133, UCMJ, contains no specific *mens rea* element, that its "silence can be indicative of a general intent scienter."[4] This Court held that it would "infer a general intent scienter from Congress's silence."[5]

In *Torres*[6] however, this Court observed that it "has historically looked to

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[1] *United States v. Voorhees,* 79 M.J. 5 (CAAF 2019), *cert. denied,* 140 S.Ct. 2566 (2020).

[2] 75 M.J. 140 (CAAF 2016).

[3] Petitioner, for ease of reference, will cite to the UCMJ Articles.

[4] 79 M.J. at 15-16; citing *United States v. McDonald,* 78 M.J. 376, 380 (CAAF 2019), *cert. denied*, 140 S.Ct. 2564 (2020).

[5] *Id.* at 16.

[6] *United States v. Torres,* 74 M.J. 154 (CAAF 2016).

external guidance, including the Model Penal Code, as a source of decisional guidance in military justice." [internal quotation marks and citations omitted].[7] That "guidance" was encapsulated in *United States v. Gifford,*[8] which produces the direct conflict with *Voorhees* herein, as *Gifford* held: "recklessness is the lowest *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct."[internal quotation marks omitted].[9] Specifically, this Court stated:

> Specifically, the Model Penal Code, which we have "historically looked to [for] external guidance," [citing *Torres, supra,* at 158] identifies ***recklessness as the lowest possible standard that can be read into a statute that does not set out "the culpability sufficient to establish a material element of an offense,"*** Model Penal Code § 2.02(3) (1962) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or *recklessly* with respect thereto.") (emphasis added).[10]

This Court's decision on the merits herein is in direct conflict with its holding in *Gifford*–both cannot be accurate statements of the law in the context of UCMJ articles which do not contain a *mens rea* element. Extraordinary relief is necessary to correct

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[7] 74 M.J. at 158.

[8] 75 M.J. 140 (CAAF 2016).

[9] *Id.* at 147; citing *Elonis v. United States,* 575 U.S. 723, 135 S.Ct. 2001, 2010 (2015).

[10] *Id.* at 147-48. *See also, United States v. Curtis,* 32 M.J. 252, 267 (CMA 1991) ["Model Penal Code (MPC) . . . has been a source of decisional guidance in military justice. . . ." (Citations omitted)].

a fundamental defect *not* apparent from the Record in *Voorhees.*

B. Petitioner requests as further relief herein, that this Court adhere to its precedents, i.e., *Gifford et al.,* and *reverse* his conviction and remand the case back to the Air Force TJAG for an appropriate disposition, in accordance with *Gifford.*

II. JURISDICTION.

A. Subject-Matter Jurisdiction.

1. Petitioner stands convicted of five Specifications of violating Article 133, UCMJ, "conduct unbecoming an officer."

2. His original sentence included a Dismissal, which triggered jurisdiction in the Air Force Court of Criminal Appeals [AFCCA], under Article 66, UCMJ, and in this Court, pursuant to Article 67, UCMJ.

3. Petitioner has long satisfied the custodial portion of his original sentence, and no other court can grant the relief requested herein.

B. *In Personam* Jurisdiction.

1. Petitioner was an active-duty Major [Maj.] in the USAF at all times relevant herein.

2. Petitioner's case is ***not final*** under Article 71(b), UCMJ, as secretarial action has not yet been completed.

3. Petitioner's court-martial was tried in January of 2015, thus he cannot seek relief via a *Petition for a New Trial* under Article 73, UCMJ.

4. Petitioner is on appellate leave and thus, still subject to the UCMJ.

C. The *All Writs Act* [AWA].[11]

1. This Petition and relief requested is "in aid of [this Court's] respective jurisdiction[] . . . ." AWA, 28 U.S.C. § 1651(a), under which this Court granted review pursuant to Article 67, UCMJ.

2. The requested Writ is both "necessary [and] appropriate" to resolve the *mens rea* or *scienter* conflict issue between this Court's decision in *Voorhees* herein and *Gifford, supra.* It is "necessary" because practitioners and the military judiciary need clear and non-conflicting guidance from this Court as informed by the Supreme Court's jurisprudence in *Elonis* and its progeny on what is the appropriate *mens rea* or *scienter* in cases–such as here–where the UCMJ Article at issue does not contain a *mens rea* element. The matter respectfully needs to be resolved, i.e., if this Court is going to follow the MPC's "guidance" which it had done for 30-some years, then its decision here in *Voorhees* needs to be set aside. Conversely, if this Court is now going to reject its long-standing precedents and "guidance" in *mens rea* issues, then *Curtis, Gifford* and other "MPC" cases, need to be reversed or qualified–both cannot simultaneously exist.

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[11] 28 U.S.C. § 1651. While the AWA does not provide a specific grant or basis for jurisdiction, it provides the *statutory authority* for this Court to issue the Writ and relief requested herein, pursuant to this Court's Article 67, UCMJ, jurisdiction.

3. Relief is "appropriate" here because Petitioner–with both a federal conviction and a Dismissal (both of which carry life-long stigmas and collateral consequences)–was entitled to have the Members in his court-martial correctly instructed on the *mens rea* issue.

4. Upon the denial of *certiorari* by the Supreme Court, Petitioner's direct appeals are over.

5. Because Petitioner is not in any form of custodial status, *habeas corpus* is not available to him, and no Article III, court can grant the relief requested herein.

6. This Petition is timely pursuant to CAAF Rule 19(d).

III. CAAF RULE 4–GOOD CAUSE EXISTS FOR FILING AN *ORIGINAL* PETITION FOR EXTRAORDINARY RELIEF IN THIS COURT.

Counsel for Petitioner are well aware of CAAF Rule 4(b)(1), i.e., "Absent good cause, no such [original] petition shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals." "Good cause" exists here because going to the AFCCA seeking relief would be a futile act. First, the issue is purely an issue of *law*–there are no facts in dispute. Second, the AFCCA lacks any *legal* authority within the military appellate-court system's hierarchy to resolve any conflicts or inconsistencies between decisions of this Court, or between decisions of this Court and the Supreme Court of the United States. Only this Court can remedy the inconsistent approaches to *mens rea* noted above. Indeed, even if AFCCA somehow

found it *within* the scope of their Article 66, UCMJ, jurisdiction to review this issue, any result would be nothing more than a prohibited "advisory opinion."[12]

As such and under the specific circumstances herein, the Court respectfully should entertain and grant this Writ Petition.

IV. HISTORY OF THE CASE.

Petitioner was convicted, contrary to his pleas, by a general court-martial with Members in January of 2015, for events occurring in 2012-13, of all but one charged offense, not relevant here. The AFCCA reversed and dismissed the Article 120, UCMJ, offense of sexual assault against HB for *factual* insufficiency in its unpublished opinion on 23 November 2016,[13] but *affirmed* the remaining five Specifications under Article 133, UCMJ. That Court then remanded the case to the AF TJAG, who in turn sent the case to a Convening Authority for re-sentencing proceedings.

At re-sentencing by a new GCM, Petitioner who was still serving his original sentence of three years confinement, was re-sentenced to a Dismissal and a Reprimand.[14] Petitioner was thereafter released from custody after having served

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[12] *See, e.g., United States v. Chisholm,* 59 M.J. 151, 152 (CAAF 2003)[prohibition on "advisory opinions"].

[13] *United States v. Voorhees,* 2016 WL 11410622 (AFCCA 2016)[unpub.].

[14] The Convening Authority only approved the Dismissal portion of his sentence.

more than two years of confinement. Upon appeal to the AFCCA, that court affirmed the findings and revised sentence.[15]

This Court granted review and affirmed the decisions of the AFCCA.[16] It denied a timely request for reconsideration.[17] The Supreme Court denied *certiorari.*[18]

Per CAAF R. 27(a)(2)(B)(i), no "prior actions or requests for the same relief have been filed or are pending in this or any other forum."

V. REASONS RELIEF NOT SOUGHT BELOW.

The AFCCA lacks any jurisdiction over the decisions of this Court, that pertain solely to issues of law as interpreted and applied by *this* Court.

VI. ISSUES PRESENTED.

A. Was the Court herein correct in its approach that where a criminal statute such as Article 133, UCMJ, contains no *mens rea* or *scienter* element, it will "infer a general intent *scienter* from Congress's silence?"[19]

B. Alternatively, was this Court's *inferential* approach for criminal statutes which do not contain a *mens rea* or *scienter* element, erroneous as contrary to long-standing precedents and jurisprudence of this Court, where it has consistently turned to the American Law Institute's *Model Penal Code*

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[15] *United States v. Voorhees,* 2018 WL 3629893 (AFCCA 2018)[Unpub.].

[16] *United States v. Voorhees,* 79 M.J. 5 (CAAF 2019).

[17] *United States v. Voorhees*, 79 M.J. 218 (CAAF 2019)[recon. denied].

[18] *Voorhees v. United States,* 140 S.Ct. 2566 (2020).

[19] *Voorhees,* 79 M.J. at 16.

[MPC] for guidance?[20]

and

C. If this Court determines that its *Voorhees,* inferential approach is the correct procedure for determining culpability in criminal statutes not containing *mens rea* or *scienter* elements, does *Voorhees sub silentio* abrogate or overrule the long-standing precedents of this Court using the MPC for guidance?

VII. STATEMENT OF FACTS.

A. The Article 133, UCMJ, Offenses.

As affirmed, Petitioner stands convicted of five Specifications of "*conduct* unbecoming an officer," under Article 133, UCMJ, with an approved sentence to a Dismissal (but noting that he served 2+ years of confinement). However, of those five Specifications, only one involved actual conduct, i.e., Specification 2, of Charge II–that Petitioner gave HB a consensual back rub–the "foreplay" to the Article 120, UCMJ, offense that AFCCA found to be factually insufficient.[21]

The other four Specifications involved only "speech," i.e., no conduct other than spoken words were involved, in private, one-on-one conversations. The First Amendment implications of Petitioner's speech was not–at least from examining the

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[20] *See* MPC § 2.02(1), *General Requirements of Culpability.* Available at: https://www.inazu-crimlaw.com/202 [Last accessed: 14 September 2020].

[21] Neither AFCCA nor this Court addressed the anomaly of Petitioner being acquitted of having sex with HB, but being convicted of the "massage" leading up to that sexual activity.

Record of Trial [RoT]–litigated either pretrial by way of motion practice or with respect to Findings Instructions.[22] Petitioner notes–but does not waive–this is an obvious fact from reading the RoT.

B. Strict Liability Here is Unconstitutional.

While the underlying issue is whether private, one-on-one "speech" between two adults rises to the level of constitutionally permissible proscribed crimes, the issue Petitioner raises here under *coram nobis* precepts, focuses on the *mens rea* or *scienter* issue, i.e., about the Court's determining, albeit indirectly, that the Article 133, UCMJ, offenses here are "public welfare offenses,"[23] justifying a no *mens rea* or *scienter* approach. Clearly, under the *Gifford* standard, they are not,[24] citing *Elonis,*[25] if for no other reason than a Dismissal is a significant and life-time penalty.

It is a *fact* that no court in this litigation has addressed, e.g., how Petitioner's private, one-on-one, wishful fantasy statement to HB that "I would like to take you

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[22] *See, e.g., United States v. Hartwig,* 39 M.J. 125 (CMA 1994), adopting the "clear and present danger" standard to "speech" offenses under Article 133, UCMJ.

[23] *See, United States v. Gifford,* 75 M.J. 140, Part II, 142 *et seq.* (CAAF 2016).

[24] *Id.* at 143. As Judge Ohlson, writing for a unanimous court noted: "this case involves [as does *Voorhees* herein] a mistake of fact . . . ." *Id.* at 143, n.4. *See also, United States v. Tucker,* 78 M.J. 183, 185-86 (CAAF 2018), where Judge Ohlson, again writing for a unanimous court noted, as in *Gifford,* stated that "recklessness is the proper *mens rea* . . . ." where the statute [there, Article 134, UCMJ] did not contain a *mens rea* element.

[25] *Elonis v. United States,* 575 U.S. 723, 135 S.Ct. 2001, 2009 (2015). *See also, Rehaif v. United States,* 139 S.Ct. 2191 (2019).

back to my room," *without more*, constitutes a crime, much less rising to the level of "conduct unbecoming," without any *mens rea* or *scienter* element. As this Court stated in *Tucker,* "we conclude that a recklessness *mens rea* does sufficiently separate wrongful conduct from otherwise innocent conduct. In fact, it is the lowest level of *mens rea* that does so."[26] From an analytical perspective, there should be no legal differences in the context of either Articles 133 or 134, UCMJ, not having a *mens rea* or *scienter* element, and thus *Voorhees* and *McDonald*,[27] remain the outliers. Or, as the Supreme Court stated in *Morissette,* there must be an "evil-meaning mind . . . ."[28] In other words, something more than "general intent" is required to satisfy the constitutionally required *mens rea* requirement.[29]

C. The Conundrum of *Gifford.*[30]

This Court in *Gifford* stated, "Proof of *Mens Rea* is the Rule Rather Than the Exception."[31] Thereafter, following *Morissette's* command, the opinion adopted the "gravity of punishment" factor as a pertinent element of a mandated *mens rea*

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[26] 78 M.J. at 186.

[27] *United States v. McDonald,* 78 M.J. 376, 380 (CAAF 2019), *cert. denied*, 140 S.Ct. 2564 (2020).

[28] *Morissette v. United States,* 342 U.S. 246, 251 (1952).

[29] *See also, Elonis, supra,* and *Rehaif, supra.*

[30] 75 M.J. 140 (CAAF 2016).

[31] *Id.* at 142 [capitalization in original].

component–there, a Dishonorable Discharge was sufficient,[32] here it is a Dismissal.

Gifford also holds that, under circumstances similar hereto, that the *minimum* level of *mens rea* was "recklessness,"[33] citing *Elonis.* Here, the Members were not instructed as to any *mens rea* or *scienter*. This Court's decision on the merits here simply cannot be reconciled with its decisions in *Gifford* and *Tucker.* Nor can *Gifford* be distinguished because it was an Article 92, UCMJ, offense because that cannot account for *Tucker's* holding under the other "general article," Article 134, UCMJ. From a *constitutional* perspective, one approach is profoundly wrong, something that this Court respectfully must correct.

Petitioner respectfully suggests that his (and *McDonald's*) cases are the ones erroneously decided because they fail to address the long-standing precedents of this Court in turning to the MPC to resolve issues of statutory ambiguity.[34] While cited

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[32] *Id.* at 146.

[33] *Id.* at 146-47; while again turning to the MPC's *mens rea* standards, *id.* at 147-48.

[34] *See, e.g., United States v. Frederick,* 3 M.J. 230, 234 *et seq.* (CMA 1977) [using MPC insanity standard where Congress was silent]; *United States v. Warren,* 24 M.J. 286, 291 (CMA 1987)[using MPC defense of "abandonment" not addressed in applicable MCM]; *United States v. Curtis,* 32 M.J. 252, 267 (CMA 1991)[the MPC "has been a source of decisional guidance in military justice."]; *United States v. Hayes,* 70 M.J. 454, 463 n.5 (CAAF 2012)[MPC has been "a source of decisional guidance in military justice," quoting *Curtis, supra*]; *United States v. Torres,* 74 M.J. 154, 158 (CAAF 2016)["Court has historically looked to external guidance, including the [MPC]...."]; and *Guifford,* 75 M.J. 140, 147-48 (CAAF 2016)[MPC, citing *Torres,* requires "recklessness" to "be read into a statute" not containing a culpable mental (continued...)

in Petitioner's *Supplement* to his Petition for Review herein, *Gifford* was not mentioned in the Court's decision on the merits. Expressing a private, verbal fantasy to HB, for example, especially where HB made *no mention* of it to anyone for more than six months, simply cannot as a matter of law and logic rise to the level of a federal criminal offense, which includes a life-long punishment of a Dismissal, *without* a *mens rea* or *scienter* element being "read into" it. Nor can a private, consensual "back rub" between two consenting adults, whether consensual foreplay or not to the dismissed sexual intercourse Specification, without any *mens rea* element be deemed criminal.[35]

VIII. REASONS WHY THE WRIT OF *CORAM NOBIS* SHOULD ISSUE HEREIN.

There are two fundamental reasons why the Writ should issue. First, Petitioner was convicted of federal offenses under the UCMJ, i.e., offenses which authorized a Dismissal–a discharge with dishonor–that was imposed. He was convicted and sentenced by Members who received *no* judicial instructions as to any level of *mens rea* or *scienter* required for such convictions. Second, unless and until this Court resolves the inherent conflict between its decisions in *McDonald* and *Voorhees,*

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[34] (...continued)
state].

[35] *See, Lawrence v. Texas,* 539 U.S. 558 (2003)[private sexual conduct between consenting adults is not criminal]. This does not appear to have been challenged by Petitioner's trial defense counsel.

herein versus its decisions in, e.g., *Gifford* and *Tucker* and their antecedents, military justice practitioners and military judges are simply left with two different and inapposite choices on how to address UCMJ violations where the UCMJ article at issue facially does not include a *mens rea* or *scienter* element. Both *Elonis* and *Rehaif* demand, as does *Gifford* and *Tucker*, that a *mens rea* element be read into such statutes in the context of instructing the fact-finder, whether a jury or Members–something that was not done herein–but respectfully, should have been.

CONCLUSION

For the reasons and the authorities cited herein, relief in the form of issuing a Writ of *Coram Nobis* is respectfully warranted herein, reversing and remanding this case to the AFCCA for it to "read into" Article 133, UCMJ, an appropriate *mens rea.*

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. This Pleading contains **2,993** words per WordPerfect's "word count" function; and

2. This Motion complies with the typeface and type style requirements of Rule 37, as it uses 14 point ***Times New Roman*** font.

DATED this 16th day of September, 2020.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on September 16, 2020.

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