

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

U N I T E D S T A T E S,)	BRIEF ON BEHALF OF APPELLEE
Appellee)	
)	
v.)	Crim. App. Dkt. No. 20140425
)	
Sergeant First Class (E-7))	USCA Dkt. No. 16-0091/AR
Djoulou K. Caldwell,)	
United States Army,)	
Appellant)	

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I.

WHETHER THE MILITARY JUDGE COMMITTED PLAIN
ERROR WHEN HE INSTRUCTED THE PANEL USING A
NEGLIGENCE STANDARD FOR MALTREATMENT OF A
SUBORDINATE IN VIOLATION OF ARTICLE 93.

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE
ARMED FORCES:

Granted Issue:

I.

**WHETHER THE MILITARY JUDGE COMMITTED PLAIN
ERROR WHEN HE INSTRUCTED THE PANEL USING A
NEGLIGENCE STANDARD FOR MALTREATMENT OF A
SUBORDINATE IN VIOLATION OF ARTICLE 93.**

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866 (2012). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

On April 17 and May 20-22, 2014, a panel with enlisted representation, sitting as a general court-martial, convicted Sergeant First Class (SFC) Djoulou K. Caldwell (appellant), contrary to his pleas, of maltreatment of a subordinate and

abusive sexual contact, in violation of Articles 93 and 120, UCMJ, 10 U.S.C. §§ 893 and 920 (2012).¹ The panel sentenced appellant to be reduced to the grade of E-1 and discharged with a bad-conduct discharge.² The convening authority approved the sentence as adjudged.³ On August 25, 2015, the Army Court affirmed the findings and sentence.⁴ This Court granted appellant's petition for grant of review of the Army Court's decision on November 9, 2015.⁵

Statement of Facts

A. Background.

Appellant's convictions stem from his continuous sexual harassment of Specialist (SPC) CH⁶ before, during, and after their unit's 2011 deployment.⁷ When appellant met SPC CH, she was married to another junior soldier in the unit and working as "a Human Resource Specialist in the 14th Engineer Battalion."⁸ Although appellant was not her direct supervisor, he was an E-7 in the same battalion, and as her superior noncommissioned

¹ JA 5-6.

² JA 6.

³ JA 6.

⁴ JA 1.

⁵ *United States v. Caldwell*, ARMY 20140425 (C.A.A.F. 9 Nov. 2015)(order).

⁶ At the time of trial, SPC CH served in the rank of Sergeant (SGT), however for consistency with the charge sheet and instructions, this brief uses her rank at the time of the offense.

⁷ JA 91.

⁸ JA 13, 28.

officer (NCO), she had a duty to obey his orders and instructions.⁹

Specialist CH described appellant as "nice at first," but her opinion changed when he started to sexually harass her by looking in her direction as he "licked his lips at [her]."¹⁰ Specialist CH testified, "He took his tongue and rolled it across his bottom lip."¹¹ She testified that she believed appellant's action were sexual in nature because "no other NCO has just walked past [her] and licked their lips at [her] when they see [her]."¹² Specialist CH further testified that she did not say anything to him at the time, but felt uncomfortable "because he was a senior NCO in [her] battalion."¹³

Appellant repeated this sexually harassing gesture during their unit's Rapid Field Issue (RFI) draw.¹⁴ Specialist CH testified, "We were going for our RFI issue and we were standing outside in our PTs and he basically took his head and looked me up and down and licked his lips at me again."¹⁵ As before, she interpreted this gesture to communicate "that he was interested

⁹ JA 12-13, 45.

¹⁰ JA 13.

¹¹ JA 14.

¹² JA 14-15.

¹³ JA 14.

¹⁴ JA 15.

¹⁵ JA 15.

in [her] . . . in a sexual way."¹⁶ As with the first time, SPC CH did not say anything to appellant or report his actions.¹⁷

In July 2011, appellant and SPC CH deployed with their unit to Kandahar Air Field (KAF), Afghanistan.¹⁸ Shortly after arrival, appellant moved to Camp Leatherneck and SPC CH did not see him again until she also moved to Camp Leatherneck in April 2012.¹⁹ Specialist CH flew to Camp Leatherneck in the early morning hours to prepare for her promotion board which was scheduled for that day.²⁰ A couple of hours before her board, SPC CH walked past appellant's desk where "he made a comment about how [her] ass looked in [her] multi-cam uniform."²¹ Specialist CH testified that she did not say anything back to appellant because she "just wanted it to go away."²² She testified, "I was shocked and I guess a little intimidated just because he was a senior NCO."²³

Appellant continued to sexually harass SPC CH over the next several months through words, gestures, and unwanted touching.²⁴ On one occasion, appellant walked past SPC CH, "he took his hand

¹⁶ JA 16.

¹⁷ JA 16.

¹⁸ JA 17.

¹⁹ JA 18, 35.

²⁰ JA 18.

²¹ JA 19.

²² JA 20.

²³ JA 20.

²⁴ JA 20-30, 35

between [her] thighs and across [her] vagina."²⁵ Specialist CH testified that as appellant touched her, "[h]e kind of glanced at [her] and then just continued to walk out the door."²⁶

Although appellant did not touch her in a sexual way again, "[h]e made gestures and comments at [her] after that."²⁷

Specialist CH testified that the gestures were "the licking of his lips the majority of the time."²⁸ Specialist CH testified that she did not report appellant's harassing behavior because her husband was also deployed with the unit and she was afraid he "would get in trouble for hurting [appellant]."²⁹

Appellant's sexual harassment did not end on redeployment, but continued until approximately July of 2013.³⁰ Appellant made another sexually offensive comment to her while she worked alone at their battalion's staff duty desk.³¹ Specialist CH testified, "[H]e told me that he could do things to make me fall in love with him. . . . I just felt it was another sexual comment he made towards me to I guess come at me."³² Appellant was subsequently charged with abusive sexual contact for touching

²⁵ JA 30.

²⁶ JA 31.

²⁷ JA 34.

²⁸ JA 34.

²⁹ JA 28.

³⁰ JA 42, 53.

³¹ JA 42-44.

³² JA 44-45.

SPC CH's vagina and maltreatment for the sexually harassing comments and gestures directed toward SPC CH.³³

B. Instructions.

After trial and defense counsel rested, the military judge held a conference with both counsel in his chambers to finalize the panel instructions.³⁴ The military judge summarized that discussion on the record, "I believe I have also tailored the instructions appropriately with regard to the elements, the lesser-included offenses, and all of the other evidentiary considerations"³⁵ In addition to the other offenses, the military judge stated, "I'm going to give the instruction for Article 93 on maltreatment."³⁶ The military judge crafted the instructions relevant to the maltreatment specifications from the Military Judge's Benchbook [hereinafter Benchbook].³⁷

The military judge then asked, "I believe that covers all the appropriate instructions. Have I omitted any?"³⁸ Both trial and defense counsel answered, "No, sir."³⁹ The military judge asked, "Are there any objections?"⁴⁰ Defense counsel answered,

³³ JA 2-4.

³⁴ JA 94.

³⁵ JA 134.

³⁶ JA 134-35.

³⁷ Compare Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (10 Sep. 2014) with JA 168-170.

³⁸ JA 135.

³⁹ JA 135.

⁴⁰ JA 135.

"None other than what I stated earlier about the lesser-included."⁴¹ After giving both sides a copy of the final instructions, the military judge recalled the panel.⁴²

As to the elements of maltreatment, the military judge instructed:

In order to find [appellant] guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt:

One, that at the time of the alleged conduct, Specialist [CH] was a person subject to the orders of [appellant]; and

two that on divers occasions between on or about 1 June 2011 and on or about 1 September 2012,⁴³ at or near Joint Base Lewis-McChord, Washington and Camp Leatherneck, Afghanistan, [appellant] maltreated Specialist [CH] by stating: 'I just wanted to see your ass when you walked out of the office[,] I could make you fall in love with me,' or words to that effect, and by licking his lips while leering at the said Specialist [CH].⁴⁴

The military judge next provided definitions and other relevant instructions on those elements.⁴⁵ As to the second element, the military judge instructed, "The maltreatment must

⁴¹ JA 135 (Defense counsel's objection related to the lesser included offenses under Article 120, UCMJ. The military judge did not instruct on a lesser included offense under Article 93, UCMJ.).

⁴² JA 136-38.

⁴³ It appears that the military judge made a typographical error and stated end date was 1 September 2012, neither party objected and the panel convicted of the date range extending until 1 September 2013 as charged and argued at trial. JA 5-7.

⁴⁴ JA 142.

⁴⁵ JA 143-45.

be real, although it does not have to be physical."⁴⁶ Defining maltreatment, the military judge explained, "'Maltreated' refers to treatment, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and that results in physical or mental harm or suffering or reasonably could have caused, physical or mental harm or suffering."⁴⁷

The military judge further instructed, "Assault or sexual harassment may constitute this offense."⁴⁸ The military judge then explained how sexual harassment applied to the maltreatment element under Article 93, UCMJ:

Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors. Sexual harassment also includes deliberate or repeated offensive comments or gestures of a sexual nature. For sexual harassment to also constitute maltreatment, the accused's conduct must, under all of the circumstances, constitute "maltreatment" as I have defined that term for you.⁴⁹

The military judge also specifically instructed the panel that they "must consider, evidence of the consent or acquiescence of Specialist [CH] . . . or lack thereof, to the

⁴⁶ JA 143.

⁴⁷ JA 144.

⁴⁸ JA 144.

⁴⁹ JA 144.

accused's actions."⁵⁰ The military judge explained, "The fact that Specialist [CH] . . . may have consented or acquiesced, does not alone prove that she was not maltreated, but it is one factor to consider in determining whether the accused maltreated Specialist [CH]" ⁵¹

All other facts necessary for the disposition of the granted issue are set forth below.

Granted Issue

I.

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE INSTRUCTED THE PANEL USING A NEGLIGENCE STANDARD FOR MALTREATMENT OF A SUBORDINATE IN VIOLATION OF ARTICLE 93.

Summary of Argument

This Court's statutory analysis of Article 93, UCMJ, reflects that "an objective evaluation of the totality of the circumstances represents the appropriate mode of analysis under Article 93, UCMJ."⁵² The holding in *Elonis v. United States* does not impact this established law, for three reasons: (1) the holding in *Elonis* is limited to interpreting the statute at issue in that case; (2) *Elonis* does not stand for the proposition that criminal liability always requires more than a negligence *mens rea*; and (3) the general intent required in Article 93, UCMJ,

⁵⁰ JA 144.

⁵¹ JA 144-45.

⁵² *United States v. Carson*, 57 M.J. 410, 415 (C.A.A.F. 2002).

sufficiently addresses the underlying concern in *Elonis*: the separation of wrongful from innocent conduct.⁵³ Accordingly, the military judge did not commit plain error by instructing the panel using the standard Benchbook instructions relevant to Article 93, UCMJ. As such, this court should affirm the decision of the Army Court and grant appellant no relief.

Standard of Review

Whether a panel was properly instructed is a question of law and thus reviewed *de novo*.⁵⁴ "When there is no objection to an instruction at trial, [this Court] reviews for plain error."⁵⁵ "Under a plain error analysis, the [appellant] 'has the burden of demonstrating that: (1) there was error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right of the [appellant].'"⁵⁶ Appellant bears the burden of demonstrating he meets all three prongs of the plain error test.⁵⁷

⁵³ See *Elonis v. United States*, 135 S. Ct. 2001 (2015).

⁵⁴ *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008).

⁵⁵ *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) (citing *United States v. Turnstall*, 72 M.J. 191, 193 (C.A.A.F. 2013)).

⁵⁶ *Id.* (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

⁵⁷ *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

Law and Analysis

The Supreme Court held that an error is "plain" when it is "obvious" or "clear under current law."⁵⁸ "Put another way, an error is 'plain' if it is 'so egregious and obvious' that a trial judge and prosecutor would be 'derelict' in permitting it in a trial held today."⁵⁹ "In reviewing the propriety of an instruction, appellate courts must read each instruction in the context of the entire charge and determine whether the instruction completed its purpose."⁶⁰

"Because the standard Benchbook instructions are based on a careful analysis of the current case law and statute, an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record."⁶¹ A proper statutory analysis of Article 93, UCMJ, shows that there was no reason for the military judge to deviate from those instructions. Accordingly, the military judge did not commit plain error by instructing the panel using the standard Benchbook instructions relevant to Article 93, UCMJ.

⁵⁸ *United States v. Olano*, 507 U.S. 725, 734 (1993).

⁵⁹ *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (quoting *United States v. Gore*, 154 F.3d 34, 43 (2d Cir. 1998)).

⁶⁰ *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012) (citing *Jones v. United States*, 52 U.S. 373, 391 (1999)).

⁶¹ *United States v. Rush*, 54 M.J. 313, 315 (C.A.A.F. 2011) (quotations and citations omitted).

The Benchbook instructions for Article 93, UCMJ, require the military judge to instruct on two elements: (1) that a certain person was subject to the orders of the accused; and (2) that the accused was cruel towards, or oppressed, or maltreated that person.⁶² The government is not required to prove appellant's subjective intent or actual harm to the victim, "[i]t is only necessary to show, as measured from an objective viewpoint in light of the totality of the circumstances, that the accused's actions reasonably could have caused physical or mental harm or suffering."⁶³ However, circumstances relevant to consent or "proof of such harm or suffering may be an important aspect of proving that the conduct meets the objective standard."⁶⁴

This court has consistently found maltreatment to be a general intent crime where the use of an objective standard was appropriate and met Congressional intent.⁶⁵ This Court held,

The essence of the offense is abuse of authority. Whether conduct constitutes "maltreatment" within the meaning of Article 93, UCMJ, in a particular case requires consideration of the specific facts and circumstances of that case. The decisions in *Finch*, *Hanson*, *Rutko*, and *Goddard I*, which employed an objective evaluation of the record, reflect this approach. We conclude

⁶² JA 171; *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter *MCM*], pt. IV, para. 17.c.

⁶³ *United States v. Piatt*, 17 M.J. 442, 445 (C.M.A. 1984).

⁶⁴ *Carson*, 57 M.J. at 415.

⁶⁵ *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

that an objective evaluation of the totality of the circumstances represents the appropriate mode of analysis under Article 93, UCMJ.⁶⁶

Appellant argues that this objective standard for proving the general intent offense of Article 93, UCMJ, is no longer appropriate due to the recent Supreme Court decision in *Elonis v. United States*. However, this holding does not impact this established law for maltreatment under Article 93, UCMJ.⁶⁷

A. The holding in *Elonis* is limited to the interpretation of a federal statute for communicating a threat.

In *Elonis*, the appellant was convicted under 18 U.S.C. § 875(c), which reads, "[A]n individual who transmits . . . any communication containing any threat to kidnap any person or any threat to injure the person of another is guilty of a felony."⁶⁸

⁶⁶ *Carson*, 57 M.J. at 415 (citing *United States v. Finch*, 22 C.M.R. 698, 700 (N.B.R. 1956); *United States v. Hanson*, 30 M.J. 1198, 1200 (A.F.C.M.R. 1990); *United States v. Rutko*, 36 M.J. 798, 798 (A.C.M.R. 1993); *United States v. Harris*, 41 M.J. 890, 891 (Army Ct. Crim. App. 1995); *United States v. Goddard*, 47 M.J. 581, 584 (N.M. Ct. Crim. App. 1997), vacated on other grounds upon reconsideration, 54 M.J. 763 (N.M. Ct. Crim. App. 2000)).

⁶⁷ See *Elonis*, 135 S. Ct. at 2011.

⁶⁸ *Id.* at 2007 (The appellant in *Elonis* created a Facebook profile and began posting lyrics with violent language and imagery. *Id.* at 2005. "Elonis's posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife." *Id.* After viewing his posts, his wife feared for her life. *Id.* Based on the comments on his wall, he was indicted and convicted for making threats to injure his estranged wife, patrons of the park where he had worked, police officers, a kindergarten class, and an FBI agent. *Id.* The appellant argued that to be convicted of communicating a threat, the government must prove he had an intent to inflict harm. *Id.* at 2007).

The text of the statute does not specify a requisite mental state.⁶⁹ However, the jury was instructed that the government need only prove that a reasonable person would regard the communications as a threat, which the Supreme Court found was an inappropriate standard given the absence of proof of what appellant thought.⁷⁰

The Court approached the issue as one of strict statutory interpretation, rather than a constitutional issue.⁷¹ In doing so, the Court found the "reasonable person" instruction, which imposed only a "negligence" *mens rea* as to the threat element, was not within the intent of that particular statute.⁷² As such, the holding in *Elonis* is limited to interpreting the statute at issue in that case.

B. The holding in *Elonis* does not preclude the established objective standard for maltreatment under Article 93, UCMJ.

While "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence," this rule has exceptions and limitations.⁷³

First, "courts obviously must follow Congress' intent as to the

⁶⁹ *Id.*

⁷⁰ *Id.* at 2010.

⁷¹ *Id.* at 2001 ("The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.").

⁷² *Id.* at 2011.

⁷³ *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-437 (1978).

required level of mental culpability for any particular offense.”⁷⁴ Thus, where Congress intended negligence or strict liability for a particular statute, a court cannot and should not impose a higher mental state.⁷⁵ Second, when criminal statutes do not expressly articulate a culpable mental state, courts should not infer a specific intent element, but rather “read into the statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”⁷⁶

In many cases, “the presumption in favor of scienter demands only that [the statute be read] as requiring proof of general intent”⁷⁷ In those cases, even when the statute itself is silent, an objective standard imposing, “a general requirement that a defendant act knowingly is itself an adequate safeguard.”⁷⁸ This is particularly true in military law where certain conduct is proscribed differently than in the civilian

⁷⁴ *United States v. Bailey*, 444 U.S. 394, 406 (1980) (“Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates.”).

⁷⁵ *Staples v. United States*, 511 U.S. 600, 620 (1994) (“our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons . . . it would have spoken more clearly to that effect.”).

⁷⁶ *Elonis*, 135 S. Ct. at 2010 (citing *Carter v. United States*, 530 U.S. 255, 269 (2000)).

⁷⁷ *Carter*, 530 U.S. at 269.

⁷⁸ *Elonis*, 135 S. Ct. at 2010.

law due to "the different character of the military community and of the military mission" ⁷⁹

As discussed above, Article 93, UCMJ, addresses the harm to military order and discipline that occurs whenever a superior objectively maltreats his subordinate.⁸⁰ "The cruelty, oppression, or maltreatment, although not necessarily physical must be measured by an objective standard."⁸¹ "Although the words used by Congress to describe the proscribed conduct— 'cruelty,' oppression,' and 'maltreatment'— depict situations that frequently involve physical or mental suffering on the part of the victim, the legislative history does not indicate that Congress sought to exclude cases meeting an objective standard."⁸² Accordingly, the objective standard used in appellant's case for this military-specific crime where "the essence" was an "abuse of authority" was both appropriate and within Congressional intent.⁸³

⁷⁹ *Parker v. Levy*, 417 U.S. 733, 758 (1974); see also *United States v. Kick*, 7 M.J. 82, 84 (C.M.A 1979) (upholding simple negligence as a proper standard for negligent homicide under Article 134, UCMJ, based on "both the assessment of the history of court-martial practice regarding this negligent disorder offense and the articulation of its necessity for the military community").

⁸⁰ See *Carson*, 57 M.J. at 415.

⁸¹ *MCM*, pt. IV, para. 17.c.(2).

⁸² *Carson*, 57 M.J. at 415.

⁸³ *Carson*, 57 M.J. at 415; see also *United States v. Dellarosa*, 30 M.J. 255, 259 (C.A.A.F. 1990) (holding that under Article 92(3), UCMJ, a person can be criminally liable for dereliction of duty for "an act or omission of a person who is under a duty

C. The objective standard used in Article 93, UCMJ, sufficiently separates wrongful from innocent conduct.

The Supreme Court's primary concern in *Elonis* was the basic principle that "wrongdoing must be conscious to be criminal."⁸⁴ Thus, even if this court applies the holding in *Elonis* to Article 93, UCMJ, the instructions given in this case imposed a general intent requirement that sufficiently addressed the "the crucial element of separating legal innocence from wrongful conduct."⁸⁵ Specifically, the military judge instructed the members that in order to find appellant guilty of maltreatment, he must have knowingly made the sexual comments and gestures to SPC CH which caused or could reasonably have caused physical or mental harm or suffering.⁸⁶

The military judge instructed, "Sexual harassment also includes deliberate or repeated offensive comments or gestures of a sexual nature."⁸⁷ The military judge further limited the criminality of appellant's sexually harassing conduct to that which was "abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and that results in physical

to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances.").

⁸⁴ *Id.* at 2013 (citing *Morrisette v. United States*, 342 U.S. 246, 250 (1952)).

⁸⁵ *United States v. X-Citement Videos*, 513 U.S. 64, 73 (1994).


⁸⁶ JA 142-145.

⁸⁷ JA 144.

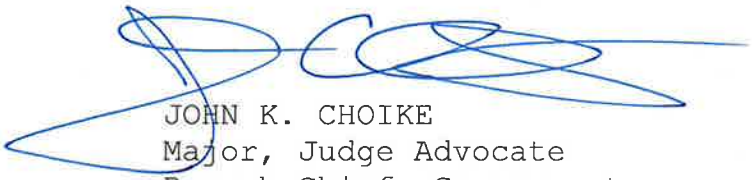
or mental harm or suffering, or reasonably could have caused [the same]."⁸⁸ As such, the general intent required by Article 93, UCMJ, proven by an objective analysis under the totality of the circumstances, squarely addressed the Court's concern in *Elonis*.⁸⁹

Conclusion

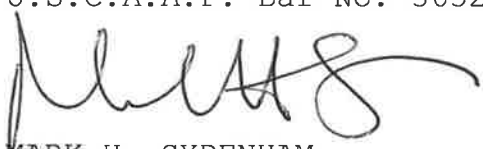
For the above reasons, the Supreme Court's interpretation of the federal threat statute in *Elonis* ultimately does not implicate Article 93, UCMJ, and the military judge did not err in relying on the established instruction as to the element of maltreatment. Accordingly, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.



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⁸⁸ JA 144; see also *Hanson*, 30 M.J. at 1201.

⁸⁹ See *Elonis*, 135 S. Ct. at 2010; see also *Carter*, 530 U.S. at 269 (holding a general intent requirement can suffice "to separate wrongful from 'otherwise innocent' conduct.").


CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on January 8, 2016.

A handwritten signature in black ink, appearing to read 'D. Mann', with a long horizontal flourish extending to the right.

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