No.

In the Supreme Court of the United States

DJOULOU K. CALDWELL, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Elonis v. United States, 135 S. Ct. 2001 (2015), clarified that when a federal criminal statute does not specify a degree of *mens rea*, proof of something greater than negligence is required to convict. Similar to *Elonis*, the statute petitioner was convicted of violating is silent as to *mens rea* and reads in relevant part: "Any person subject to this chapter who is guilty of * * * maltreatment of[] any person subject to his orders shall be punished as a court-martial may direct." 10 U.S.C. § 893. The standard instruction, which was given in this case, uses a negligence standard to define maltreatment. The question presented is:

Whether *Elonis* and its reasoning apply to all similar federal criminal statutes or whether, as the court of appeals here reasoned, *Carter v. United States,* 530 U.S. 255 (2000), creates a class of "general intent" crimes that fall outside the reach of *Elonis* and for which proof of negligence is sufficient to convict.

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PETITION FOR A WRIT OF CERTIORARI

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The opinion of the Army Court of Criminal Appeals (App., *infra*, 18a-19a) is unreported. The opinion of the Court of Appeals for the Armed Forces (App., *infra*, 1a-17a) is reported at 75 M.J. 276 (C.A.A.F. 2016).

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on May 16, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

STATUTORY PROVISIONS INVOLVED

Article 93 of the Uniform Code of Military Justice, 10 U.S.C. § 893, provides:

> Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

STATEMENT

Djoulou Caldwell was a Sergeant First Class in the United States Army. As a senior non-commissioned officer, Caldwell was superior in rank to most of the soldiers with whom he interacted. Based on his interactions with Specialist CH,[1] during a period spanning over two years, Caldwell was charged under Article 93, Uniform Code of Military Justice, with maltreating a subordinate. The Article 93 charge was based entirely on expressive conduct and criminal

[1] In the interest of privacy, the complaining witness was referenced using only the person's initials.

liability was predicated not on any awareness of wrongdoing, but on negligence.

Prior to the start of deliberations, the military judge instructed the jury as follows:

> In order to find [Caldwell] 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, [CH] was a person subject to the orders of [Caldwell]; and
>
> Two, that on divers occasions * * * [Caldwell] maltreated [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 [CH].

App., *infra*, 4a.

The judge defined maltreatment, instructing that Caldwell's conduct should be evaluated using a negligence standard:

> "Maltreatment" refers to treatment, when viewed objectively under all the circumstances, [that] 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.

App., *infra*, 4a.

Caldwell was subsequently convicted of maltreatment by a jury in May 2014. Because Caldwell's sentence included the punishment of discharging him from military service, the Army Court

of Criminal Appeals reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866. In August 2015, the Army Court summarily affirmed the findings and sentence. App., *infra*, 18a.

This Court decided *Elonis* in June 2015. *Elonis* made clear that courts will not "infer that a negligence standard [of *mens rea*] was intended in criminal statutes" absent clear congressional intent to the contrary. 135 S. Ct. at 2011. In light of *Elonis*, and while still pending on direct appeal, Caldwell petitioned the Court of Appeals for the Armed Forces for review under Article 67(a)(3), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3). In November 2015, review was granted on the following issue:

> 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.

App., *infra*, 5a.

On May 16, 2016, the Court of Appeals for the Armed Forces affirmed the decision of the Army Court of Criminal Appeals. The court observed that "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *Id.* at 15a (quoting *United States v. Bailey*, 444 U.S. 394, 403 (1980)). The decision acknowledged that courts must "read into [a] statute 'that mens rea which is necessary to separate' wrongful conduct from innocent conduct." App., *infra*, 8a. In an opinion expressly intended "to provide some guidance" regarding how "judges, going forward, should instruct panels about the [relevant] mens rea requirement," *id.* at 15a, the court nonetheless

concluded that to be convicted of the crime of maltreatment, it was not necessary that the defendant understand that he was maltreating a subordinate. Instead, all that was required was that

> (a) the accused *knew* that the alleged victim was subject to his or her orders; (b) that the accused *knew* that he or she was making statements or engaging in certain conduct in respect to that subordinate; and (c) *when viewed objectively under all the circumstances*, those statements or actions were unwarranted, unjustified, and unnecessary for any lawful purpose and caused, or reasonably could have caused, physical or mental harm or suffering.

Id. at 9a (emphasis in original). The court explicitly held that "a military superior can be held criminally responsible for voluntary conduct that is *later determined to be* 'abusive or otherwise unwarranted'"; "[t]he key question is whether the superior possessed general intent to offer the statements," regardless of whether the superior had any "intent to maltreat." *Id* at 11a. (emphasis added). According to the court of appeals, nothing more was necessary to distinguish between innocent and culpable behavior, based on the "unique and long-recognized importance of the superior-subordinate relationship." *Id.* at 9a. The court thus concluded that there was no error, much less plain error.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Squarely Conflicts With *Elonis*

In a striking parallel to this case, the petitioner in *Elonis* argued that a conviction for communicating a

threat under 18 U.S.C. § 875(c) required proof of a subjective intent to threaten. The Third Circuit rejected that argument, holding that a conviction under 18 U.S.C. § 875(c) may be predicated on how a "reasonable person" would perceive the communication without any regard to the speaker's subjective intent. *Elonis v. United States*, 730 F.3d 321 (3rd Cir. 2013).

This Court rejected the Third Circuit's reasoning, holding that "what [Elonis] thinks does matter." *Elonis*, 135 S. Ct. at 2011 (internal quotation marks omitted). *Elonis* emphasized that as a "general rule * * * a guilty mind is a necessary element in the indictment and proof of every crime." *Id.* at 2009 (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922) (internal quotation marks omitted)). "Having liability turn on whether a 'reasonable person' regards" the conduct as culpable, "regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence, and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes.'" *Id.* at 2011 (citations omitted).

At the heart of this Court's decision was its recognition of the "basic principle that wrongdoing must be conscious to be criminal." *Id.* at 2009 (internal quotation marks and citation omitted). Thus, as a matter of statutory construction, the absence of a specified *mens rea* in a criminal statute does not mean that none exists. *Id.* This Court "has repeatedly held that mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it." *Id.* (internal quotations marks and citation omitted).

The decision below dispenses with the requirement that wrongdoing must be conscious to be criminal and is irreconcilable with *Elonis*.

The statutory text of Article 93 contains two elements: (1) [t]hat a certain person was subject to the orders of the defendant; and (2) that the defendant was cruel toward, or oppressed, or maltreated that person. Prior to *Caldwell*, the court of appeals agreed that these were the elements of the offense. *See, e.g., United States v. Harman*, 68 M.J. 325, 328 (C.A.A.F. 2010).

In affirming petitioner's conviction, the court of appeals here held that "general intent" was sufficient to affirm the conviction. App., *infra*, 12a. General intent, however, requires proof "that the defendant possessed knowledge with respect to the *actus reus* of the crime." *Carter v. United States*, 530 U.S. 255, 268 (2000). In the context of Article 93, the *actus reus* is that the defendant maltreated a subordinate. Thus, general intent would require proving petitioner's knowledge or awareness that what he did amounted to maltreatment.

To avoid that conclusion, the court of appeals bifurcated the second element. The court thus held that Article 93, which previously had two elements, would now have three:

> (a) the accused *knew* that the alleged victim was subject to his or her orders; (b) that the accused *knew* that he or she was making statements or engaging in certain conduct in respect to that subordinate; and (c) *when viewed objectively under all the circumstances*, those statements or actions were unwarranted, unjustified, and unnecessary for any lawful purpose and caused, or reasonably

> could have caused, physical or mental harm or suffering.

App., *infra*, 16a (emphasis in original).

This bifurcation of the second element allowed the court of appeals to characterize Article 93 as a general intent offense, where the defendant must knowingly do or say something, while eliminating the requirement that he perceive the wrongful nature of his statements or actions. In other words, "it doesn't matter what [petitioner] thinks." *Elonis*, 135 S. Ct. at 2007.

Elonis, however, expressly rejected the same reasoning, noting that the "presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." *Elonis*, 135 S. Ct. at 2011 (citation omitted) (emphasis in original). While all parties in *Elonis* agreed that a conviction under 18 U.S.C. § 875(c) required proof that a defendant knowingly transmitted a communication, this Court explained that "communicating *something* is not what makes the conduct wrongful." *Id.* (internal quotation marks omitted) (emphasis in original). Under 18 U.S.C. § 875(c), "the crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat." *Id.* (citation and internal quotation marks omitted).

The decision below, on the other hand, only requires proof that a defendant knowingly makes statements to or engages in conduct toward a known subordinate. But that standard requires no proof

whatsoever that the defendant knows of the wrongfulness of his conduct. In the military, as in any other workplace, superiors are constantly communicating with and engaging in conduct toward subordinates for both work related and non-work related purposes. Wrongfulness, however, turns on the nature of those statements and conduct, which only become criminal when they amount to maltreatment, cruelty, or oppression. The nature of the conduct or statements is the crucial element of the offense because it is what separates legal innocence from wrongful conduct. The *mens rea* required for a conviction under Article 93, therefore, must apply to the fact that the conduct or statements amounted to maltreatment, cruelty, or oppression.

The decision of the court of appeals allows the criminalization of "voluntary conduct that is *later* determined to be [wrongful]." App., *infra*, 11a (emphasis added). The decision below explicitly sanctioned jury instructions that allow a conclusion that a defendant engaged in "maltreatment" to be based, not on the defendant's understanding of what he or she was doing, but on the conduct or statements, "when viewed *objectively* under all the circumstances."[2] App., *infra*, 4a, 16a (emphasis

[2] The Manual For Courts-Martial (Manual), pt. IV, ¶ 17c(2) (2012), also specifies an "objective standard." This language is provided by the President to explain the statutory text. It does not evidence a clear intent by Congress to dispense with *mens rea* and neither the court of appeals nor the government assert otherwise. But even if it did, the Manual's language could not overcome the presumption in favor of scienter. Although Congress has delegated specific authority to the President to set forth procedural rules and rules of evidence, "the President's rule making authority does not extend to matters of substantive

added). Thus, the question becomes "whether a reasonable person equipped with [knowledge of the circumstances], not the actual defendant, would have recognized the harmfulness of his conduct." *Elonis*, 135 S. Ct. at 2011. "That is a negligence standard." *Id.*

Such a standard is a "familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct–*awareness* of some wrongdoing." *Id.* (citation and internal quotation marks omitted) (emphasis in original). Accordingly, this Court has "long been reluctant to infer that a negligence standard was intended in criminal statutes." *Id.* (citation omitted). Thus, here, as in *Elonis*, petitioner's conviction cannot stand based on how *others* regarded his conduct without regard to his own perception of his conduct.[3]

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military criminal law." *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010). (citation and internal quotation marks omitted); *accord United States v. Fosler*, 70 M.J. 225, 231 (C.A.A.F. 2011). "Determinations as to what constitutes a federal crime, and the delineation of the elements of such criminal offenses – including those found in the [Uniform Code of Military Justice] – are entrusted to Congress." *Jones*, 68 M.J. at 471.

[3] The decision below leaves open the possibility for a "reasonable" mistake of fact defense. App, *infra*, 11a. Such a defense, however, would require the mistaken belief to be both subjectively genuine and objectively reasonable. Thus, no matter how genuine a defendant's belief that his conduct does not amount to maltreatment, the defense would fail if a reasonable person would recognize that the conduct amounts to maltreatment. This defense, then, is merely a restatement of the negligence standard with the added requirement that the belief be genuine to the defendant. It does not require the government to prove the defendant's *mens rea* beyond negligence to obtain a conviction and therefore fails to satisfy the presumption in favor of scienter. Elonis, too, presumably would have been able to raise

In other words, "'what [petitioner] thinks does matter." *Id.*

Indeed, the court of appeals here made no attempt to distinguish Article 93 from 18 U.S.C. § 875(c) in such a way that negligence would be an appropriate standard in the former but not the latter. Rather, the court erroneously believed that its decision was supported by this Court's opinion in *Carter*:

> Ultimately, then, we are faced with a situation far more similar to *Carter* than *Elonis*. Just as an individual who possesses the general intent to take money from a bank by force can be held criminally responsible for his conduct even if the Government does not prove that the individual possessed the intent to actually steal the money, so too can a military superior be held criminally responsible for voluntary conduct that is later determined to be "abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose," even if the Government does not prove that the superior possessed the specific intent to maltreat.[4] The key question is whether the superior possessed general intent to offer the statements, or undertake the conduct, that either caused or could have caused suffering.

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an equivalent mistake defense, but it likewise would have turned on objective considerations rather than on the defendant's own *mens rea*.

[4] Petitioner has never asserted that a conviction under Article 93 requires proof of a "specific intent to maltreat." What petitioner asserts is that the government must prove a conscious awareness – something greater than negligence – that his conduct amounted to maltreatment.

App., *infra*, 11a.

The assertion that petitioner's case is more like *Carter* than *Elonis* is wrong. Both this case and *Elonis* involve whether, absent a showing of clear congressional intent, courts may assign a negligence standard as the sole *mens rea* element separating innocent from culpable conduct. As this Court noted in *Elonis* itself, *Carter* involved the very different question of whether a court should infer an additional *mens rea* requirement into a statute that *already* contained a textual element sufficient to safeguard innocent conduct—the requirement that a defendant take items from a bank "by force or violence." *Elonis*, 135 S. Ct. at 2010 (quoting *Carter*, 530 U.S. at 261). This Court concluded that was "itself an adequate safeguard" to prevent conviction for innocent conduct.

Under the court of appeals decision, by contrast, a service member can be convicted of a crime based *solely on a showing that he knew he spoke to or engaged in conduct with a subordinate*—with no requirement whatsoever to show that the defendant had any reason to believe that his conduct would be offensive to that subordinate in any way. Thus, the decision below does *nothing* to "separate wrongful conduct from otherwise innocent conduct." *Elonis*, 135 S. Ct. at 2010 (quoting *Carter*, 530 U.S. at 269). The court of appeals has thus eliminated the requirement that a guilty mind is a necessary element in the proof of every crime and instead holds that an intentional act that is "*later* determined to be 'abusive or otherwise unwarranted'" under an objective standard is sufficient to impose criminal liability. *See* App., *infra*, 11a. Under this lower standard, what a later fact finder thinks

matters, but the actual defendant's *mens rea* is utterly irrelevant.

B. There Is No Unique Aspect Of Military Life That Necessitates A Departure From The Normal Rules Of Statutory Construction

1. Military Courts Apply Normal Rules Of Statutory Construction

This Court has recognized that some restrictions are permissible within the military community even if no counterpart exists within the civilian community. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733 (1974). This case, however, concerns an issue of statutory construction and the Court of Appeals for the Armed Forces has consistently held it applies "the normal principles of statutory construction." *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (quoting *Carter*, 530 U.S. at 263).

2. *Caldwell* Is Based On An Erroneous Reading Of *Carter*, Not On The Unique Military Nature Of Article 93

Article 93 is, of course, an offense unique to the military. The decision below noted that fact and highlighted the importance of the superior-subordinate relationship. App., *infra*, 9a-11a. But the only legal relevance of that relationship that the court of appeals pointed to is that "criminal liability for maltreatment does not depend on whether the conduct actually effects harm upon the victim * * * [instead] the essence of the offense of maltreatment is abuse of authority. App., *infra*, 11a (citing *United States v. Carson*, 57 M.J. 410, 415 (C.A.A.F. 2002) (internal

quotation marks omitted). In that respect, Article 93 is no different than 18 U.S.C. § 875(c), under which criminality ultimately turns on the nature of the statements, not on the listener's reaction.

In any event, this Court's line of cases culminating in *Elonis* demands proof that petitioner acted with some awareness that his actions amounted to maltreatment. At no point did the court of appeals hold or imply that the unique military nature of Article 93 warrants an exception to the general presumption in favor of scienter.[5] In fact, the court of appeals held that this case did not represent an exception, but rather that it "satisfie[d] the key principles enunciated by the Supreme Court in *Elonis*." App., *infra*, 2a. That conclusion rests not on any unique military factors but on the court of appeals' belief that "[u]ltimately, then, we are faced with a situation far more similar to *Carter* than *Elonis."* App, *infra*, 11a. But as explained above, *Caldwell*'s interpretation of *Carter* is erroneous. And the court of appeals identified *nothing* about communications between superiors and subordinates

[5] Historically, maltreatment could only be committed intentionally. Alfred Alvins, *A Military Superior's Duty to His Subordinates,* 31 Mo. L. Rev. 329, 340 (1966). It was not until 1990 that a military court explicitly dispensed with *mens rea* in maltreatment prosecutions. *United States v. Hanson*, 30 M.J. 1198, 1201 (A.F.C.M.R. 1990). *Hanson*, in turn, was adopted by the court of appeals. *Carson*, 57 M.J. at 413. *Hanson* reached its holding based on the reasoning in *United States v. Gilluly*, 13 C.M.A. 458 (C.M.A. 1963) ("[t]he intent which establishes the offense [of communicating a threat] is that expressed in the language of the declaration, not the intent locked in the mind of the declarant."). The reasoning in *Gilluly*, however, has since been expressly rejected by this Court in *Elonis*.

that makes them inherently culpable in the way that forcible bank robbery is inherently culpable.

This, then, is not a case where the Court of Appeals for the Armed Forces held that military necessity warrants an exception to this Court's precedent. Instead, it is a case where that court believed it was faithfully applying *Elonis* and *Carter*. Its interpretation, however, is erroneous and represents a clear departure from this Court's rulings on an important and recurring question of federal law.

C. The Limited Access To This Court On Direct Appeal Granted To Service Members Under 28 U.S.C. § 1259 Means That Service Members May Not Have A Future Opportunity To Seek Review Of The Court Of Appeals' Erroneous Decision, Despite Its Recurring Nature

The court of appeals' erroneous decision has the potential to impact the over 1,300,000 men and women actively serving in the United States Armed Forces who are subject to the Uniform Code of Military Justice, as well as an additional 800,000 members of the National Guard and Reserve Components who are, at times, subject to the UCMJ.

Although 28 U.S.C. § 1259 gives this Court certiorari jurisdiction over court-martial appeals, that jurisdiction is limited. Service members may *only* seek certiorari when the Court of Appeals for the Armed Forces *itself* has decided to hear the case. Pursuant to 10 U.S.C. § 867, that court is only required to hear capital cases and those which have been certified by the government. Review is otherwise discretionary.

Now that the Court of Appeals for the Armed Forces has resolved this certified question, there is no reason to believe it will grant review in future cases on this matter. Thus, this case presents an ideal, and perhaps the *only*, opportunity for this Court to correct the erroneous decision of the court below, which clearly conflicts with this Court's decisions on an important and recurring question of federal law.[6]

This is an issue that is central to *hundreds* of convictions for maltreatment in recent years. As Article 93 is now "[t]he most commonly relied upon UCMJ article for punishing sexual harassment," this issue recurs frequently. *See* Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's* Army, 30 Harv. J. L. & Gender 151, 178 (2007); *accord* Scott A. Liljegren, *Winning the War Against Sexual Harassment Battle By Battle: Why the Military Justice Model Works – A Proposal for Federal and State Statutory Reform,* 38 Washburn L.J. 175, 189 (1998) ("When military personnel conduct themselves in a manner which arguably falls within the DOD's definition of sexual harassment, they most commonly face charges under Article 93 of the UCMJ"). By their nature, convictions in this area frequently impose

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[6] It is no obstacle to review that petitioner failed to object at trial and therefore his claim is subject to plain error review on appeal. The Court of Appeals for the Armed Forces did not rely on the standard of review in denying him relief, but instead concluded that there *was no error* in this case. App., *infra*, 13a. Indeed, the court expressly used this case to "provide some guidance" for judges on how to give instructions in future cases, *id.* at 15a—foreclosing any suggestion that the plain-error standard of review was material to the decision.

criminal liability for the defendant's speech or expressive conduct. The criminalization of "poorly chosen words" based on a hindsight determination of juries, Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 Harv. J.L. & Pub. Pol'y 283 (2001), is fundamentally inconsistent with basic principles of criminal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Djoulou K. CALDWELL, Sergeant First Class
United States Army, Appellant

No. 16-0091
Crim. App. No. 20140425

Argued February 24, 2016—Decided May 16, 2016

Military Judges: David L. Conn and
Robert A. Cohen

For Appellant: *Captain Scott A. Martin* (argued); *Lieutenant Colonel Jonathan F. Potter* and *Captain Heather L. Tregle* (on brief); *Lieutenant Colonel Charles D. Lozano*.

For Appellee: *Captain Scott L. Goble* (argued); *Colonel Mark H. Sydenham* and *Major John K. Choike* (on brief); *Major Daniel D. Derner*.

Judge OHLSON delivered the opinion of the Court, in which Chief Judge ERDMANN, Judges STUCKY and RYAN, and Senior Judge COX, joined.

Judge OHLSON delivered the opinion of the Court.

Contrary to his pleas, a panel of officer and enlisted members sitting as a general court-martial convicted Appellant, in relevant part, of maltreatment in violation of Article 93, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 893 (2012). We granted review to determine whether the military judge's instructions were plainly erroneous in light of the Supreme Court's recent holding in Elonis v. United States, 135 S. Ct. 2001 (2015). Based on the two factors outlined below, we conclude they were not.

First, because of the unique nature of the offense of maltreatment in the military, a determination that the Government is only required to prove general intent in order to obtain a conviction under Article 93, UCMJ, satisfies the key principles enunciated by the Supreme Court in *Elonis*. Second, the military judge's instructions sufficiently flagged for the panel the need to consider this general intent mens rea requirement when determining the guilt or innocence of the accused. We therefore conclude that the instructions were not plainly erroneous as a matter of law. As a result, we affirm the decision of the United States Army Court of Criminal Appeals.

I. BACKGROUND

Appellant, a sergeant first class in the United States Army, was accused of maltreating a subordinate, Specialist CH, with whom he worked. The evidence adduced at trial showed that Appellant was "nice at first" to CH, but later began to conduct himself inappropriately. Specifically, Appellant began by making gestures that CH understood to be sexual in nature, such as "look[ing her] body up and down" and "lick[ing] his lips." The situation further deteriorated

when Appellant inappropriately touched CH on more than one occasion when they were stationed together in Afghanistan. For example, CH testified that Appellant brushed his hand against her "behind" while she was walking through a narrow hall and on another occasion rubbed her vaginal area and inner thigh with his hand. In another instance, Appellant walked past CH's desk and "made a comment about how [her] ass looked in [her] multi-cam uniform." CH testified that she did not respond to this comment because she "just wanted it to go away" and was "a little intimidated … because he was a senior NCO."

Appellant continued his abusive conduct upon the unit's return to the United States. CH testified that Appellant approached her while she was on staff duty and, after seeing a slightly revealing photo on her phone, stated that he "could do things to [her] to make [her] fall in love with him."

On September, 3, 2013, CH reported Appellant's conduct in a statement given to the Army's Criminal Investigation Division. After an investigation, Appellant was charged with maltreatment of CH under Article 93, UCMJ, as well as abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2012).

Appellant was tried by a panel of officer and enlisted members sitting as a general court-martial. At trial, the military judge instructed the panel on the elements of maltreatment:[1]

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[1] The military judge's instructions were all taken directly from the Benchbook. *See generally* Dep't of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook, ch. 3, para. 3-17-1 (2014).

> 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, [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, … the accused maltreated [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 [CH].

The military judge then defined "maltreatment" to the panel:

> [M]altreatment must be real, although it does not have to be physical. The imposition of necessary or proper duties on a Servicemember and the requirement that those duties be performed does not establish this offense even though the duties are hard, difficult, or hazardous.

The military judge further instructed that "[a]ssault or sexual harassment may consistute this offense," explaining what qualifies as sexual harassment:

> "Maltreated" refers to treatment, when viewed objectively under all the circumstances, [that] 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.

> 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.

Finally, the military judge instructed the panel that "[a]long with all other circumstances, you must consider[] evidence of the consent or acquiescence of [CH]." "The fact that [CH] … may have consented or acquiesced[] does not alone prove that she was not maltreated …." "[B]ut," the military judge went on, "[consent or acquiescence] is one factor to consider in determining whether the accused maltreated [CH]."

Contrary to his pleas, Appellant was convicted of maltreatment of a subordinate in violation of Article 93, UCMJ, and abusive sexual contact in violation of Article 120, UCMJ.[2] He was sentenced to reduction to E-1 and a bad-conduct discharge. The convening authority approved the sentence as adjudged, and the Army Court of Criminal Appeals summarily affirmed. Appellant subsequently petitioned this Court and we granted review of the following issue:

> 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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[2] This charge is not germane to the present appeal and therefore is not discussed further.

II. ANALYSIS

Article 93, UCMJ, proscribes "cruelty toward, or oppression or maltreatment of, any person subject to [an accused's] orders." We have stated that the elements of this general intent offense are: (1) "[t]hat a certain person was subject to the orders of the accused"; and (2) "[t]hat the accused was cruel toward, or oppressed, or maltreated that person." *Manual for Courts-Martial, United States* pt. IV, para. 17.b (2012 ed.) (*MCM*); *accord United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (citation omitted); *see generally United States v. Hanson*, 30 M.J. 1198, 1201 (A.F.C.M.R. 1990) ("Maltreatment is a general intent crime."), *aff'd* 32 M.J. 309, 309 (C.A.A.F. 1991) ("[T]he decision of the United States Air Force Court of Military Review is affirmed for the reasons stated therein.") (summary disposition). Importantly, "[such] cruelty, oppression, or maltreatment … must be measured by an objective standard." *MCM* pt. IV, para. 17.c.(2). Moreover, such conduct need not result in actual harm to the victim—either mental or physical—because "[t]he essence of the offense is abuse of authority." *United States v. Carson*, 57 M.J. 410, 415 (C.A.A.F. 2002). Key to a court's inquiry are "the specific facts and circumstances of [a given] case" or, stated differently, the fact finder must conduct "an objective evaluation of the totality of the circumstances." *Id.*

Questions pertaining to the substance of a military judge's instructions, as well as those involving statutory interpretation, are reviewed de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008); *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999). Appellant argues that the mili-

tary judge erred in instructing the panel at his court-martial. Specifically, he avers that the military judge's instructions, cited above, predicate liability on mere negligence and therefore violate the principles set forth in *Elonis*. For the reasons cited below, we disagree.[3]

A. In the context of a maltreatment offense under Article 93, UCMJ, general intent sufficiently separates lawful conduct from unlawful conduct

It is a fundamental principle of criminal law that "'wrongdoing must be conscious to be criminal.'" *United States v. Rapert,* 75 M.J. 164, 167 n.6 (C.A.A.F. 2016) (quoting *Elonis,* 135 S. Ct. at 2009).[4] Stated differently, the general rule is that a guilty mind is "a necessary element in the [charge sheet] and proof of every crime." *United States v. Balint*, 258 U.S. 250, 251 (1922). Indeed, the Supreme Court has

[3] In reaching this conclusion, we specifically reject the Government's position that "*Elonis* is limited to the interpretation of a federal statute for communicating a threat." True, *Elonis* interpreted 18 U.S.C. § 875(c), which deals only with the communication of threats, but the Supreme Court's holding was based on general "rule[s] of construction" and "basic principle[s]" underlying the common law. *See Elonis* 135 S. Ct. at 2009–11. We therefore conclude that the holding in *Elonis* has far broader implications than the Government acknowledged in its briefs in this case.

[4] This does not mean that an accused must know that his actions constitute criminal conduct. Rather, an accused must have knowledge of "the facts that make his conduct fit the definition of the offense." *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994).

held that even when a mens rea[5] requirement is not explicitly included in a criminal statute, that does not necessarily mean that such a requirement can be "dispens[ed] with." *Morissette v. United States*, 342 U.S. 246, 250 (1952). Rather, generally speaking, criminal statutes should be interpreted by courts as still including "broadly applicable [mens rea] requirements, even where the statute … does not contain them."[6] *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994). However, in inferring a mens rea requirement in a statute that is otherwise silent, courts must only read into the statute "that mens rea which is necessary to separate" wrongful conduct from innocent conduct. *Carter v. United States*, 530 U.S. 255, 269 (2000); *accord Rapert*, 75 M.J. at 167 n.6; *see also Elonis*, 135 S. Ct. at 2010.

Importantly, in some instances, the mere requirement in a statute that a defendant commit an act with knowledge of certain facts—i.e., that the defendant possessed "general intent"—is enough to ensure that innocent conduct can be separated from wrongful conduct. This circumstance is best captured by the facts of *Carter v. United States*. There, the Supreme Court considered whether a conviction under 18 U.S.C. § 2113(a), which criminalizes taking "by force and violence" items of value belonging to or in the care of a bank, requires proof of intent to steal.

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[5] "Mens rea" is the Latin term for "guilty mind" and refers to "[t]he state of mind that the prosecution … must prove that a defendant had when committing a crime." *Black's Law Dictionary* 1134 (10th ed. 2014).

[6] Such an inference of a mens rea requirement by a court is not merited when there is an "indication of congressional intent" to the contrary. *Staples*, 511 U.S. at 606.

Carter, 530 U.S. at 261. The Supreme Court held that once the Government proves that a defendant forcibly took money, "the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of … 'otherwise innocent'" conduct. *Id.* at 269–70. Thus, the Supreme Court held, the general intent requirement contained in the statute was sufficient. We conclude that the same reasoning applies in the instant case.

In analyzing this issue, we hold that in order to obtain a conviction under Article 93, UCMJ, the Government must prove that: (a) the accused *knew* that the alleged victim was subject to his or her orders; (b) the accused *knew* that he or she was making statements or engaging in certain conduct in respect to that subordinate; and (c) *when viewed objectively under all the circumstances*, those statements or actions were unwarranted, unjustified, and unnecessary for any lawful purpose and caused, or reasonably could have caused, physical or mental harm or suffering.

We conclude that there is no scenario where a superior who engages in the type of conduct prohibited under Article 93, UCMJ, can be said to have engaged in innocent conduct. We base our conclusion on the unique and long-recognized importance of the superior-subordinate relationship in the United States armed forces, and the deeply corrosive effect that maltreatment can have on the military's paramount mission to defend our Nation.

As both this Court and the Supreme Court recognized long ago: "'[T]he military must insist upon a re-

spect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history [and] are founded on unique military exigencies as powerful now as in the past.'" *United States v. Heyward*, 22 M.J. 35, 37 (C.M.A. 1986) (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)). Unlike his civilian counterparts, "'it is [the servicemember's] primary business … to fight or be ready to fight wars should the occasion arise.'" *Parker v. Levy*, 417 U.S. 733, 744 (1974) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)). In order to achieve this objective, "[n]o question can be left open as to the right to command [by a superior], or the duty [to obey by a subordinate]." *In re Grimley*, 137 U.S. 147, 153 (1890); *accord Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (noting that "the military must foster instinctive obedience"). The very lifeblood of the military is the chain of command. *United States v. Priest*, 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972) ("The armed forces depend on a command structure that at times must commit men [and women] to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.").

A corollary to the principle that subordinates must obey their superiors is the principle that superiors must not maltreat their subordinates. The essence of this latter principle is captured by the provisions of Article 93, UCMJ, which has sought to preserve the integrity of the superior-subordinate relationship. *See United States v. Dickey*, 20 C.M.R. 486, 488 (A.B.R. 1956) (noting that Article 93, UCMJ, finds root in Article 8 of the Articles for the Government of the Navy, which sought to curb "officers mal-

treating enlisted men aboard ship"); *see also United States v. Finch*, 22 C.M.R. 698, 701 (N.B.R. 1956). It is for this reason we have held that criminal liability for maltreatment does not depend on whether conduct actually effects a harm upon the victim, and that "[t]he essence of the offense [of maltreatment] is abuse of authority." *See, e.g.*, *Carson*, 57 M.J. at 415.

Ultimately, then, we are faced with a situation far more similar to *Carter* than *Elonis*. Just as an individual who possesses the general intent to take money from a bank by force can be held criminally responsible for his conduct even if the Government does not prove that the individual possessed the intent to actually steal the money, so too can a military superior be held criminally responsible for voluntary conduct that is later determined to be "abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose," even if the Government does not prove that the superior possessed the specific intent to maltreat. The key question is whether the superior possessed general intent to offer the statements, or undertake the conduct, that either caused or could have caused suffering.[7] *Cf. Carter*, 530 U.S. at 269–70.

Abusive conduct that is *consciously* directed at a subordinate is in no sense lawful. This behavior undermines the integrity of the military's command

[7] This of course would not prevent a defense based on a genuinely held, reasonable mistake of fact. *See* Rule for Courts-Martial (R.C.M.) 916(j)(1); *see also United States v. Zachary,* 63 M.J. 438, 442 (C.A.A.F. 2006) ("[A]n honest and reasonable mistake of fact can negate the mens rea requirement to a general intent crime.").

structure, and as we have repeatedly recognized in the context of dangerous speech in the armed forces, "[t]he hazardous aspect of license in this area is that the damage done may not be recognized until the battle has begun."[8] *Priest*, 21 C.M.A. at 571, 45 C.M.R. at 345. We therefore conclude that general intent sufficiently separates lawful and unlawful behavior in this context, and there is no basis to intuit a mens rea beyond that which we have traditionally required for Article 93, UCMJ.

B. Maltreatment Instructions

Having determined that, in the context of Article 93, UCMJ, the application of a general intent mens rea requirement adequately separates lawful conduct from unlawful conduct, we next turn our attention to the granted issue of whether the military judge in the instant case committed plain error by instructing the panel using a negligence standard. The answer, we conclude, is no.

Even though the relevant instructions were less-than-explicit with respect to mens rea, we do not find a sufficient basis to conclude that the military judge's

[8] Indeed, in the context of freedom of speech in the military, we note that servicemembers do not possess the same broad rights of expression that civilians enjoy. *See generally Parker*, 417 U.S. at 758. This principle holds true even in regard to interactions between superiors and subordinates. The armed forces have the authority to ensure that servicemembers conduct themselves with the level of respect, obedience, and decorum that is required in furtherance of the effective execution of the military mission. Thus, a superior who voluntarily engages in objectively abusive conduct towards a subordinate cannot be heard to complain that his actions were protected by his freedom of speech, or that his actions were lawful in any other sense.

instructions were erroneous in light of their proper emphasis on general intent. Therefore, Appellant fails to meet the burden imposed by the first prong of our plain error analysis. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014) ("Under a plain error analysis, [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 …." (internal quotation marks omitted) (quoting *United States v. Tunstall*, 72 M.J. 191, 193–94 (C.A.A.F. 2011)).

In this case, the military judge defined maltreatment as action that "when viewed objectively under all the circumstances": (a) is "abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose"; and (b) "results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering." The military judge also explained that Article 93, UCMJ, imposes liability for conduct that constitutes "[a]ssault or sexual harassment," defining sexual harassment as "influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors," and further noting that "[s]exual harassment also includes deliberate or repeated offensive comments or gestures of a sexual nature." "For sexual harassment to … constitute maltreatment," the military judge went on, "the accused's conduct must, under all of the circumstances, constitute 'maltreatment' as [was previously] defined."

Because the military judge repeatedly made clear that the panel members were required to consider Appellant's conduct "under all the circumstances," these instructions can reasonably be understood as

requiring the panel members to determine whether Appellant *knew* that the alleged victim was subject to his orders and *knew* that he was making statements or was engaging in other conduct in respect to that alleged victim, i.e., whether Appellant possessed the requisite general intent mens rea.[9] *See generally United States v. Bailey*, 444 U.S. 394, 403 (1980) (explaining that "[i]n a general sense, … 'knowledge'

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[9] Case-specific circumstances that bear on an accused's general intent have always been relevant to a properly conducted maltreatment inquiry. The facts of *United States v. Piatt* 17 M.J. 442 (C.M.A. 1984), are instructive in this respect. There, the appellant had been convicted of maltreatment and assault on the basis that he instructed two of his subordinates, whom he designated as his "thumpers," that he would tell other privates to "make a headcall" and that they too were to go into the head and should "not … leave any bruises." *Id.* at 444 (internal quotation marks omitted). According to the appellant, "he understood a 'thumper' to be a person who *verbally* counsels a recruit to improve his performance, but does not employ physical force." *Id.* at 446–47 (emphasis added). The appellant therefore attempted to introduce evidence as to "the common understanding of the term … in the [appellant's] Company." *Id.* at 446. But the military judge refused to allow this testimony, and the appellant was convicted and his sentence affirmed on appeal. *Id.* We reversed. "[T]he critical [issue] before the members was [the] appellant's *state of mind* at the time he caused [his subordinates] to assault and maltreat the victims." *Id.* at 447 (emphasis added). Thus, the Court went on, "the [crucial] question was whether appellant *knew* that [his subordinates] understood 'thumper' to be a person who exercises physical force on another." *Id.* at 446 (emphasis added). If this term was commonly understood to mean a person who verbally—not physically—counsels a recruit, it "could … add some credence to [the appellant's] implied assertion that he honestly believed [the subjects of his orders] shared this … understanding." *Id.* at 447. On this basis, we concluded that such evidence was "clearly relevant" to the offense and held that the military judge's decision to exclude was prejudicial error. *Id.*

corresponds loosely with the concept of general intent"). Accordingly, we do not find a sufficient basis to conclude that the military judge's instructions were erroneous.[10] *Payne*, 73 M.J. at 22.

C. Best practices going forward

There is little doubt that, as the Supreme Court has noted, "[f]ew areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *Bailey*, 444 U.S. at 403. Therefore, we deem it appropriate to provide some guidance regarding how military judges, going forward, should instruct panels about the mens rea requirement for violations of Article 93, UCMJ.

General intent requires "knowledge with respect to the *actus reus*[11] of the crime." *Carter*, 530 U.S. at 268; *see also Bailey*, 444 U.S. at 403 (explaining that

[10] It is of little concern in the instant case that the instructions made no reference to a mistake of fact defense. It is true that an honest and reasonable mistake of fact is a defense to general intent crimes—maltreatment included. *See, e.g.*, *Piatt*, 17 M.J. at 446 (noting that "an honest and reasonable mistake instruction … would have been … appropriate" for the maltreatment charge); *see also Zachary*, 63 M.J. at 442; R.C.M. 916(j)(1). Importantly, however, a military judge only carries a sua sponte duty to instruct on a special defense where it is "reasonably raised by the evidence." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). No such defense was raised by the evidence in Appellant's case. *See id.* (noting that a defense is reasonably raised when "the record contains some evidence to which the court members may attach credit if they so desire"). Therefore, the military judge's omission of this point was not error.

[11] *See generally Black's Law Dictionary* 44 (10th ed. 2014) (defining "actus reus" as "[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability").

"[i]n a general sense, … 'knowledge' corresponds loosely with the concept of general intent"). In the context of maltreatment, this actus reus—that is, the "guilty act"—is the underlying, inappropriate conduct. *See Carson*, 57 M.J. at 415 ("The essence of the offense is abuse of authority."). Thus, a well-constructed maltreatment instruction should not merely refer to general intent implicitly—i.e., through the invocation of the phrase "under all the circumstances." Rather, going forward, a military judge's instructions (in concert with the Benchbook's approach) should more clearly and explicitly state that in order for an accused to be convicted of maltreatment under Article 93, UCMJ, the Government must have proven that: (a) the accused knew that the alleged victim was subject to his or her orders; (b) the accused knew that he or she made statements or engaged in certain conduct in respect to that subordinate; and (c) when viewed objectively under all the circumstances, those statements or actions were abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and caused, or reasonably could have caused, physical or mental harm or suffering.[12]

We conclude that a clarified instruction of this nature will lead to a better informed panel, the value of

[12] It bears repeating that this is not to say that the accused must have known that a reasonable person would conclude that his or her conduct was abusive. Instead, this prong requires consciousness of the underlying action—i.e., the words being offered or the action being undertaken. *See Carter*, 530 U.S. at 268 (noting that general intent requires "knowledge with respect to the *actus reus* of the crime").

which cannot be overstated in the military justice system.

III. Decision

The decision of the United States Army Court of Criminal Appeals is affirmed.

APPENDIX B

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
HAIGHT, PENLAND, and ALMANZA
Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant First Class DJOULOU K. CALDWELL
United States Army, Appellant

ARMY 20140425

Headquarters, 7th Infantry Division
David L. Conn and Robert Cohen, Military Judges
Lieutenant Colonel Michael S. Devine,
Staff Judge Advocate

For Appellant: Lieutenant Colonel Charles D. Lozano, JA; Captain Heather L. Tregle, JA.

For Appellee: Pursuant to A.C.C.A. Rule 15.2, no response filed.

25 August 2015

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ Malcolm H. Squires, Jr.

MALCOLM H. SQUIRES, JR.
Clerk of Court