

**IN THE UNITED STATES COAST GUARD  
COURT OF CRIMINAL APPEALS**

UNITED STATES,	) 13 November 2017
Appellee	)
	) APPELLANT’S REPLY BRIEF (unsealed)
	)
v.	) Dkt. 1448
	) Case No. G 0352
	) Panel 26
Anthony Livingstone	)
Cadet 1/c	) Tried at Norfolk, VA by a general court-martial
U.S. Coast Guard,	) convened by Superintendent, Coast Guard
Appellant	) Academy, on 23 June 2016, 29 July 2016, and 26
	) October - 4 November 2016

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES  
COAST GUARD COURT OF CRIMINAL APPEALS**

**REPLY ARGUMENT**

**ERROR V. INSTRUCTIONAL ERROR**

**THE MILITARY JUDGE REVERSIBLY ERRED BY  
FAILING TO INSTRUCT ON MENS REA WITH REGARD TO THE  
CONDUCT UNBECOMING CHARGES**

**A. There is no Evidence that Congress Intended Article 133, UCMJ to Require a *Mens Rea* of General Intent, and General Intent is Insufficient to Separate Innocent Conduct From Unlawful Conduct with Respect to Article 133.**

The Appellate Government Division does not dispute that Article 133, UCMJ is silent regarding *mens rea*. However, the Division argues that the Court should adopt the reasoning from *United States v. Caldwell*, 75 M.J. 276 (C.A.A.F. 2016) and liken Article 133, UCMJ, to Article 93, UCMJ, which requires only a general intent. Answer at 24-26. We respectfully disagree. There are fundamental differences between Article 93 and Article 133 that justify requiring a *mens rea* in conduct unbecoming cases.

The Court of Appeals for the Armed Forces has not decided whether Article 133, UCMJ, requires a *mens rea* greater than general intent. Additionally, the Appellate Government Division cites to no legislative history or other document purporting to capture congressional intent regarding the *mens rea* of Article 133, UCMJ.

Lastly, there is no compelling reason to apply *Caldwell* to Article 133, UCMJ. The application of *Caldwell* to other articles of the UCMJ, though, was distinguished the following year in *United States v. Haverty*, 76 M.J. 199 (C.A.A.F. 2017). In a footnote, the Court noted that the superior-subordinate relationship means that in no case can objectively abusive conduct directed toward a subordinate ever be done with an innocent mind. *Haverty*, 76 M.J. at 209 n.10. As such, the necessary *mens rea* to separate innocent conduct from unlawful conduct in Article 93, UCMJ, cases would be general intent. In this case, while Cadet 1/c Livingstone was senior to MF, he was not her superior nor was she his subordinate, and the evidence regarding the Academy's class structure did not support that type of relationship.

Furthermore, the criticism in *Haverty* of using a *mens rea* of general intent to a violation of an order prohibiting hazing equally applies to Article 133, UCMJ, offenses. Applying the *mens rea* of general intent to the elements of Article 133, UCMJ, could cause a servicemember to be convicted of conduct unbecoming if he engages in conduct which he honestly believes is not conduct unbecoming, but which, objectively could be conduct unbecoming. *See Haverty*, 76 M.J. at 207-08. Moreover, as the Appellate Government Division recognized, unlike Article 93, UCMJ, offenses, the subjective motivation of an accused is relevant to a charge under Article 133, UCMJ. Answer, citing *United States v. Diaz*, 69 M.J. 127 (C.A.A.F. 2010). In *Diaz*, the court offered an example of a delict an officer driving under the influence of alcohol in order to

rush a gravely injured person to an emergency room. Under a general intent *mens rea*, this individual would be guilty of an Article 133, UCMJ, offense.

A *mens rea* of recklessness is consistent with moral culpability. *Haverty*, 76 M.J. at 208. As such, the members should have been instructed on both specifications to determine whether Cadet 1/c Livingstone consciously disregarded a known risk that his communication was unbecoming.

**B. Conclusion.**

Because the military judge did not instruct the members that it needed to find any *mens rea* at all for Charge III and its specifications, this Court should set aside the findings of guilty to Charge III and its specifications and the sentence.

Respectfully submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing Reply Brief (unsealed) was sent via email to this Honorable Court, Appellate Government Counsel, and Special Victims Counsel on 13 November 2017.



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