IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201300152
Troy B. NORMAN, Sergeant (E-5) U.S. Marine Corps Appellee	)	USCA Dkt. No. 14-0524/MC

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

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INDEX

TABLE OF AUTHORITIES

Page

Issue Presented

WHETHER THE CONVICTION FOR CHILD ENDANGERMENT BY CULPABLE NEGLIGENCE IS LEGALLY INSUFFICIENT WHEN THE ONLY TESTIMONY OFFERED TO PROVE ITS SERVICE DISCREDITING NATURE WAS ADMITTED IN ERROR.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), because Appellant's approved sentence included a dishonorable discharge. This Court has jurisdiction in this case based on Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of child endangerment by culpable negligence in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). The Members sentenced Appellant to reduction to pay grade E—1, sixty days of confinement, and a dishonorable discharge.

The Convening Authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. On February 20, 2014, the lower court affirmed the findings and sentence. *United States v. Norman*, No. 201300152, 2014 CCA LEXIS 88 (N-M. Ct. Crim. App. Feb. 20, 2014). Appellant filed a

Petition for Review, which this Court granted on September 11, 2014.

Statement of Facts

A. Appellant called 911 for help after burning his son in the bath.

On the morning of August 24, 2011, Appellant called the 911 emergency line seeking assistance for his ten-month old son, TBN. (J.A. 113-17.) Appellant told the dispatcher that he had tried to give his son a bath, but the water was too hot and his son's skin was "peeling a little bit." (J.A. 113.) Military police from the Provost Marshall's Office responded to the call. (J.A. 72-73, 80-81.) Upon arrival, the military police observed between six and eight emergency medical personnel that had already responded to the call and were treating the child. (J.A. 73, 81.)

Appellant told the first responders that he was preparing a bath for his son and realized that the water was too hot. (J.A. 82.) Appellant said that he then turned the water to "full cold" for a few minutes before attempting to put his son in the bath. (J.A. 82.) However, Appellant asserted that as he did so, water splashed from the bath and hit TBN, causing the burns. (J.A. 82, 86.) Appellant repeated this version of events at the hospital. (J.A. 83.)

Based on inconsistency between the severity of the burns and the story related by Appellant, military police referred the matter to criminal investigators. (J.A. 74.)

B. TBN was taken to the hospital and treated for severe burns.

TBN was air-lifted to the Maricopa Burn Center. (J.A. 154.) He remained there in treatment for the next fifty days. (J.A. 155.) Doctors determined that TBN suffered third-degree burns over six percent of his body and second-degree burns over twenty-nine percent of his body. (J.A. 160-61, 208-10.) Such burns would be fatal in approximately three percent of cases. (J.A. 161.) They were also very painful. (J.A. 164.)

By the time of Appellant's court-martial, TBN had received seven surgeries, which included the excising of dead tissue, debridement of the wounds, and placement of grafts. (J.A. 158-60, 189-94.) The burns left significant scarring and keloid formation on TBN's back and buttocks and prevented the growth of hair on patches of his scalp. (J.A. 198, 211-12.)

Because of the nature of TBN's injuries, a pediatrician specializing in child abuse also investigated TBN's case. (J.A. 222, 225.) The pediatrician reviewed TBN's medical records and personally examined him. (J.A. 225.)

C. The Naval Criminal Investigative Service investigated Appellant for suspected child abuse.

1. Appellant provided a written statement about his misconduct.

An agent from the Naval Criminal Investigative Service (NCIS) interviewed Appellant the same day as the bathwater incident. (J.A. 93.) Appellant provided a written statement to NCIS. (J.A. 95.) In his statement, Appellant explained that the bathwater incident began when TBN soiled his diaper. (J.A. 116.) Appellant stated that after unsuccessfully trying to clean TBN with baby wipes, he placed TBN in the bathtub and turned the water to the knob's nine o'clock position——halfway between off and the hottest position. (J.A. 116.) Appellant said that he did not plug the drain on the tub, but the water began to pool. (J.A. 116.) Appellant asserted that he sat by the tub and tested the water temperature with his hand three times. (J.A. 116.)

Appellant then went to the bathroom's vanity to get soap. (J.A. 116.) Appellant says he spent between thirty and forty-five seconds getting soap, and heard TBN whimper. (J.A. 117.) Returning to the bathtub, Appellant said that he found TBN lying on his back and attempting to rise. (J.A. 117.) Appellant claimed TBN was screaming and in visible pain. (J.A. 117.) Finally, Appellant says he pulled TBN from the bathtub and

noticed his skin was peeling. (J.A. 117.) Appellant then ran to his wife and called 911. (J.A. 117.)

2. An NCIS investigator tested the water in the bath where TBN was scalded.

The same day, a second NCIS investigator took temperature readings of the water from the faucet in the bathtub where TBN was burned. (J.A. 125-26.) After running thirty seconds at the twelve o'clock position——the hottest setting——the water registered 130 degrees. (J.A. 126.) After forty-five seconds at twelve o'clock, the water was 145 degrees. (J.A. 133.) At nine o'clock, the water registered 115 degrees. (J.A. 127.) The investigator examined the home's water heater, and found it set to heat the water to 140 degrees. (J.A. 128.)

TBN's physician testified that at 130 degrees, it would take an adult approximately thirty seconds to receive a third-degree burn. (J.A. 169.) However, a child would likely receive a third degree burn in less time. (J.A. 175.)

D. The United States called a Marine to testify to his opinion regarding the service discrediting nature of Appellant's misconduct.

The United States called Staff Sergeant Moody, one of the military policemen who had responded to Appellant's 911 call, to offer his opinion about the discrediting nature of Appellant's misconduct. (J.A. 214-17.) Asked if he believed that a Marine who endangered the life of his child brought discredit on the

Marine Corps, Staff Sergeant Moody responded: "I would think somebody who did that would——anybody who would do that would bring discredit upon themselves, but especially a Marine, because of the high opinion that we are——I feel we are held to by the public, sir." (J.A. 218.) The United States' brief before the lower court stated that this testimony was improperly admitted. (J.A. 55-56.) The lower court did not resolve the issue of whether the testimony was improperly admitted, finding that regardless of whether the testimony was erroneous, the evidence was legally sufficient. (J.A 2.)

E. The Military Judge instructed the Members on the terminal element.

The Military Judge instructed the Members on all the elements of child endangerment by culpable negligence, including the Clause 2, Article 134, terminal element. (J.A. 253.) The judge instructed the Members that to find Appellant guilty of child endangerment by culpable negligence, they must find that under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. (J.A. 253.) The Military Judge defined both culpable negligence and service discrediting conduct. (J.A. 255.)

Summary of Argument

The trier of fact may determine whether an accused's conduct is service discrediting by examining the conduct itself

and the circumstances surrounding the misconduct. To prove acts are service discrediting, the United States need prove neither willfulness nor public knowledge. Nor must the United States offer opinion testimony about the discrediting nature of an accused's acts.

Viewed in the light most favorable to the United States, sufficient evidence was introduced that Appellant's acts were of a nature to discredit the armed forces where: (1) Appellant recklessly disregarded his son's welfare when he left him unattended in a bathtub filling with scalding water; and, (2) Appellant's infant son was painfully burned and disfigured as a result of Appellant's neglect. His actions are of a nature to shock the public and call into question the competence and character of Marine noncommissioned officers.

Argument

APPELLANT'S RECKLESS ACTIONS, CAUSING PAIN AND DISFIGUREMENT TO HIS INFANT SON, THAT BECAME KNOWN OUTSIDE THE MARINE CORPS, WERE OF A NATURE THAT TENDED TO DISCREDIT THE ARMED FORCES. A RATIONAL FACTFINDER COULD FIND THAT APPELLANT'S MISCONDUCT, AND THE FACTS AND CIRCUMSTANCES SURROUNDING IT, SUPPORTED THE TERMINAL ELEMENT.

A. Standard of Review.

This Court reviews legal sufficiency de novo, asking whether the evidence, viewed in the light most favorable to the prosecution, would be adequate to permit any rational trier of

fact to find the elements of the crime beyond a reasonable doubt. *United States v. Sharpton*, 73 M.J. 299, 301 (C.A.A.F. 2014) (citing *United States v. Kearns*, 73 M.J. 177, 180 (C.A.A.F. 2014)); *United States v. Phillips*, 70 M.J. 161, 165-66 (C.A.A.F. 2011) (citing *Jackson v. Virginia*, 433 U.S. 307, 319 (1979)).

B. The United States was required to prove that Appellant endangered his son through culpable negligence and that his conduct was of a nature to bring discredit upon the armed forces.

To establish a violation of Clause 2 of Article 134, UCMJ, the United States must prove beyond a reasonable doubt that (1) the accused engaged in certain conduct; and, (2) that the conduct was of a nature to bring discredit upon the armed forces. *Phillips*, 70 M.J. at 163.

The President has further provided that the elements of endangering the welfare of a child through culpable negligence are: (1) That Appellant had a duty to care for TBN; (2) that TBN was under the age of sixteen; (3) that Appellant endangered TBN's physical health though culpable negligence; (4) that Appellant's conduct resulted in grievous bodily harm to TBN; and (5) that Appellant's conduct was of a nature to bring discredit upon the armed forces. Manual for Courts-Martial, United States (2012 ed.), Part IV at 107, ¶ 68a(b).

Appellant concedes the first four elements were established, but claims the Government failed to prove the

Clause 2 terminal element——that his misconduct was service-discrediting. (Appellant's Br. at 9-11.)

C. Appellant's conduct, seriously injuring his son, became known outside the Marine Corps. Both the underlying conduct, and the circumstances surrounding his misconduct, discredit the Marine Corps and establish the terminal element.

Conduct of a nature to bring discredit on the armed forces must have "a tendency to bring the service into disrepute or which tends to lower it in the public esteem." *Caldwell*, 72 M.J. at 141 (citing Manual for Courts-Martial, United States (2012 ed.), Part IV at 101, ¶ 60a(c)(3)). To be service discrediting, an appellant's conduct must "tend to bring the service into disrepute if it were known." *Phillips*, 70 M.J. at 166. "Evidence that anyone witnessed or became aware of the conduct has been held to be merely one factor to consider," but is not a requirement. *Caldwell*, 72 M.J. at 146 (internal quotations omitted).

The trier of fact determines whether conduct is service-discrediting. *Phillips*, 70 M.J. at 165. The factfinder determines whether the Clause 2 terminal element is met based on all the facts and circumstances. *Phillips*, 70 M.J. at 165-66. The focus of Clause 2 is on the "nature" of the conduct——whether it would "tend" to bring discredit on the armed forces, *if* it were known. *Id*. (citing *United States v. Saunders*, 59 M.J. 1, 11 (C.A.A.F. 2003)).

Nothing requires the prosecution to tell the factfinder "how" to find the conduct service discrediting. *Id.* Rather, as with any other element of any other prosecution, the Government need only introduce evidence of service discrediting conduct sufficient to support a conviction. *Id*.

1. This Court's precedent indicates that the circumstances surrounding Appellant's misconduct are sufficient to meet the terminal element.

In *Phillips*, this Court considered a conviction for possession of child pornography under Clause 2 of Article 134. *Id*. at 163. The evidence demonstrated the appellant had downloaded child pornography, including images and movies of known child victims, using the LimeWire file sharing service. *Id*. at 166. The appellant's misconduct was discovered when he disclosed it to an NCIS agent investigating him for robbery. *Id*. No witnesses testified the appellant's conduct was service discrediting or that they had become aware of the appellant's misconduct. *Id*. This Court found the evidence legally sufficient to support the terminal element. *Id*.

Appellant makes no claim that *Phillips* is not binding law, but agrees that *Phillips* is "well established precedent." (Appellant's Br. 14.) Instead, Appellant cites to inapposite "lesser included offense" caselaw such as *United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009), where the charged

offense, and instructions given to the Members, failed to include the terminal element. That is not this case.

And contrary to Appellant's claim, it is not an "unconstitutional presumptive conclusion" to say that proof of the act itself may sometimes be sufficient to also prove the terminal element. (Appellant's Br. 11.) Nor does Appellant's claim that "[t]he quantum of evidence required to prove the terminal element is very high" make any sense outside the context of protected speech, such as *United States v. Moon*, 73 M.J. 382, 387 (C.A.A.F. 2014), and *United States v. Barberi*, 71 M.J. 127, 130-31 (C.A.A.F. 2012). (Appellant's Br. 17.) Rather, the quantum of proof is, as with any other element, "beyond a reasonable doubt."

As in *Phillips,* the result was the same in *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006), where the appellant was convicted of wrongful possession of visual depictions of nude minors in violation of Article 134. The appellant possessed several images of what appeared to be nude minors on his computer, which he inadvertently showed to criminal investigators. *Id.* at 116-17. The appellant also told his neighbor, an Air Force Staff Sergeant, about the images the investigators found on his computer. *Id.* The neighbor became upset by what the appellant told him and contacted the

investigators to determine if the images involved his children. *Id*.

Noting the neighbor's distress, this Court held that the evidence was legally sufficient to establish that the appellant's conduct was service-discrediting. *Id*. at 116-17.

In *United States v. Vaughan*, 58 M.J. 29, 30-31 (C.A.A.F. 2003), this Court considered a conditional guilty plea to "child neglect" charged as a novel specification under Clause 2 of Article 134 before child endangerment was added to the Manual for Courts-Martial. The *Vaughan* appellant left her infant child alone for six hours while she visited a club ninety minutes away. *Id*. at 30. The child was not harmed. *Id*. at 31. The Court decided that the guilty plea was provident to the element of "service discrediting conduct" because, regardless of the absence of harm to the child, the conduct occurred in Germany and could undermine the reputation of the military abroad. *Id*. at 36.

Here, Appellant's son was severely damaged by Appellant's misconduct and that misconduct became known outside the Marine Corps. TBN's injuries were distressing in nature and sparked a child abuse investigation undertaken by a civilian pediatrician. These circumstances are sufficient to establish the service-discrediting nature of Appellant's actions.

2. Appellant's misconduct became known outside the Marine Corps.

The prosecution need not establish that Appellant's conduct was publicly known to establish that it was service-discrediting. *Phillips*, 70 M.J. at 165-66. However, the extent to which his misconduct became known is but one factor considered when the factfinder decides whether the evidence meets the terminal element. *See Id*. at 166; *see also Vaughan,* 58 M.J. at 36 (noting that time, risk, and location all bear on "service discredit" in child neglect cases).

Here, TBN was airlifted to be given medical treatment at a civilian hospital. (J.A. 154.) There, TBN spent fifty days under the care of civilian doctors and support staff. (J.A. 155.) Because of the nature of TBN's injuries, a civilian pediatrician investigated the case for child abuse. (J.A. 222-25.) Moreover, TBN's extensive scarring——on his scalp, back, arms, and legs——were visible to any that encountered him, including all the civilians caring for TBN, and any other members of the public. (J.A. 211-12.)

These facts alone are sufficient to establish acts that tend to bring discredit to the military services due to Appellant's acts.[1]

[1] While not presented as evidence at trial, after Appellant's conviction his conduct was featured in a Marine Corps Times

3. Appellant's misconduct had serious, lasting consequences for TBN that could undermine the public's confidence in Marines' competence.

The Court of Criminal Appeals correctly noted that the terminal element was supported by the extent of the damage to TBN, including his pain and suffering. (J.A. 2.) TBN's physician testified about the painful nature of his burns and the additional pain caused TBN by surgery. (J.A. 158, 164.) It is not irrational for a factfinder to conclude that, beyond a reasonable doubt, pain and suffering inflicted on a minor child by a Marine noncommissioned officer would tend to discredit the reputation of the Marine Corps.

Appellant was a sergeant, expected to set an example in both his behavior and performance. *See* Marine Corps Manual at 1-29, ¶ 1300(1)(b) (1996). Yet, Appellant's reckless neglect for his son, resulting in severe burns, indicates that he was not capable of bathing and supervising his own child without catastrophic results. These aggravating circumstances alone were sufficient to satisfy the terminal element.

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article discussing the legal consequences of leaving children unattended. Matthew Tully, *Ask the Lawyer: Leaving child alone may be child endangerment*, Marine Corps Times, Sep. 19, 2014, http://www.marinecorpstimes.com/article/20140919/NEWS/309190064/Ask-Lawyer-Leaving-child-alone-may-endangerment. While this obviously does not establish the sufficiency of the evidence placed before the Members, it reinforces the reasonableness of the Members' determination that Appellant's conduct was service discrediting.

4. Appellant's reaction to burning his child was service-discrediting.

While emergency medical personnel treated TBN, Appellant reported that water had splashed on the baby and caused the burns. (J.A. 82-86.) The Court of Criminal Appeals correctly noted that this explanation was "implausible and inconsistent with the medical evidence." (J.A. 3.) It also conflicted with Appellant's later description of the event. (J.A. 116-17.)

Appellant is correct that he told his story after he had already burned his son. (Appellant's Br. at 14.) But his reaction is an important circumstance of the misconduct itself, not merely an ancillary matter that could have supported separate charges. Appellant's "implausible and inconsistent" reaction to questioning immediately after he had severely burned his son indicates a selfish concern for himself, not in keeping with the selflessness for which Marines are esteemed by the public. This evidence alone is sufficient to support the terminal element.

D. In addition, Staff Sergeant Moody properly opined that Appellant's conduct was discrediting, and this Court, if it chooses, may also consider this testimony in its *de novo* review.

Before the Court of Criminal Appeals, the United States stated that Staff Sergeant Moody's opinion was admitted in error. (J.A. 55-56.) This was incorrect. The Court of Criminal Appeals' decision assumed, but did not accept the misstatement,

that Staff Sergeant Moody's testimony was admitted in error. (J.A. 2.) The United States now corrects the Record and its position: there was no error in admitting Staff Sergeant Moody's testimony.

Opinion testimony is admissible at court-martial. *See United States v. Littlewood*, 53 M.J. 349, 352 (C.A.A.F. 2000) (citations omitted). It may be given by witnesses who are not testifying as experts. *Id*. Such testimony is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. *Id.* (citing Mil. R. Evid. 704). Military Rule of Evidence 701 provides that:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness of the determination of a fact in issue.

When service members offer their opinion to help prove the terminal element of an Article 134 charge, the pertinent question is whether the testimony is helpful within the meaning of the Rule. *See Littlewood*, 53 M.J. at 352-53. What will and will not be helpful to the members is a matter in the Military Judge's discretion. *Id*. at 353. Opinion testimony is not helpful where it does no more than instruct the factfinder as to what result it should reach. *Id*. at 353.

Proof of an Article 134, Clause 2 terminal element always involves analysis of whether the conduct itself is service-discrediting. Whether or not others might find the repute of the service lessened by certain acts is both a subjective, and objective analysis.

Staff Sergeant Moody testified that Appellant's actions would discredit anyone, but would particularly bring discredit upon a Marine because of the standard Marines are held to. (J.A. 218.) Staff Sergeant Moody wanted to be a Marine because of a Marine he observed in his youth. (J.A. 216.) His testimony reminded the Members of the high regard in which the United States Marine Corps is held by the American public, and of the damage that could be done by Appellant's actions. The testimony was helpful, provided additional evidence of service-discrediting nature, and was properly admissible.

This Court, conducting its *de novo* legal sufficiency review, may also consider Staff Sergeant Moody's testimony.

E. Appellant's conduct demonstrated recklessness, not merely simple negligence. The United States need not prove willfulness to satisfy the terminal element.

1. Appellant recklessly disregarded serious dangers to his son when he left him unattended in the bath tub.

Appellant repeatedly refers to this incident as a "tragic accident." But culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or

omission accompanied by the foreseeable consequences to others of that act or omission. Manual for Courts-Martial, United States (2012 ed.), Part IV at 107, ¶ 68a(c)(3). The term may also be defined as reckless[ness] or wanton[ness]——showing a disregard for human safety. *United States v. Caplinger*, 20 C.M.A. 306 (C.M.A. 1971). It is "higher in magnitude than simple inadvertence, but falls short of intentional wrong." *Id*. at 306-07 (citation omitted).

The accused need not actually intend or foresee the consequences of his actions——it is only necessary that a reasonable person in such circumstances would have realized the substantial and unjustified danger created by his act. *United States v. Martinez*, 52 M.J. 22, 25-26 (C.A.A.F. 1999) (citation omitted); s*ee also Range v. Douglas*, 763 F.3d 573, 585 (6th Cir. 2014) (citation omitted) (conduct is reckless when committed with knowledge of or with reason to know of facts that would cause a reasonable person to realize that the conduct in question creates an unreasonable risk that is greater than mere negligence).

Culpable negligence includes acts of child endangerment that, when viewed in the light of human experience, foreseeably might result in harm to a child. Manual for Courts-Martial, United States (2012 ed.), Part IV at 107, ¶ 68a(c)(3). The age and maturity of the child, the conditions surrounding the

neglectful conduct, and the nature of the environment in which the child was left, among other things, may be considered in determining whether conduct constitutes culpable negligence. *Id*.

Appellant concedes he was culpably negligent, but calls his misconduct a "tragic accident." (Appellant's Br. at 17.) But contrary to his assertion, (Appellant's Br. 19), his conduct demonstrates more than mere "culpable absence of due care." That simple negligence would not subject Appellant to criminal liability. *See United States v. Riley*, 58 M.J. 305, 311 (C.A.A.F. 2003) (citing Manual for Courts-Martial, United States (2012 ed.), Part IV at 119, ¶ 85(c)(2)).

This Court should reject Appellant's mischaracterization of the required scienter. Appellant recklessly neglected his infant son. He abandoned the ten-month old——alone——in a bathtub filled with scalding water for up to forty-five seconds. (J.A. 117.) TBN was helpless——unable to escape from the water on his own——not only at risk of suffering horrific burns, but also at risk of drowning. It was entirely foreseeable that TBN would suffer injury, much like leaving a child in a closed vehicle in the summer. And, it was reckless to leave him for such a long period.

Members are presumed to follow instructions given by a military judge. *See United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014) (citing *United States v. Thompkins*, 58 M.J. 43,

47 (C.A.A.F. 2003)). The Members here were correctly instructed that only negligence demonstrating culpable disregard for foreseeable consequences to others would satisfy the culpable negligence element. (J.A. 254.) Thus, the Members are presumed to have convicted Appellant based on the recklessness of his acts and not on simple negligence. Nothing in the Record supports a conclusion otherwise.

2. Appellant's actions need not be willful to be service-discrediting.

In *United States v. Caldwell*, 72 M.J. 137 (C.A.A.F. 2013), this Court considered a conviction for self-injury under Article 134. This Court decided that the Care inquiry into the appellant's bona fide suicide attempt did not establish that his conduct was service discrediting. *Id*. at 138. This Court emphasized that the appellant's explanation of the service-discrediting nature of his conduct actually only established that his unit's failures were service-discrediting. *Id*. at 141-42. The Court's decision was not, as Appellant suggests, (Appellant's Br. at 20-21), based on some absence of knowledge or intent. This Court simply determined that the *Caldwell* appellant's providence responses had failed to establish a factual basis to believe his conduct was service-discrediting. *Caldwell*, 72 M.J. at 141-42.

In *United States v. Guerrero*, 33 M.J. 295, 298 (C.A.A.F. 1991), this Court affirmed the appellant's convictions under Article 134 for cross-dressing, finding that his conduct was service discrediting. The appellant had been seen dressed in women's clothing on multiple occasions, including in front of a junior sailor. *Id*. at 296. However, contrary to Appellant's assertion, (Appellant's Br. at 20), this Court did not explain which aspects of the appellant's conduct were service-discrediting. This Court merely noted that the time, place, circumstances, and purpose of the cross-dressing could make it service-discrediting. *Id*. at 298. While it is true that the appellant's purpose was one factor that could indicate service-discredit, it was only one aspect of his conduct to be considered and not "determinative" as Appellant suggests.

Appellant's analysis of both *Caldwell* and *Guerrero* is mistaken. This Court has upheld other convictions for non-willful conduct under Clause 2 of Article 134. *See*, *e.g*. *United States v. Vaughan*, 58 M.J. 29, 35 (C.A.A.F. 2003) (child neglect by culpable negligence). The United States need not prove any scienter greater than culpable negligence in order to also satisfy the terminal element.

F. The Members convicted Appellant of an offense that was properly charged and instructed on.

Due process demands that an accused must have the opportunity to answer the specific charges against him or her. *See United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (citing *Dunn v. United States*, 442 U.S. 100, 106 (1979)). So too, courts look to the instructions given to the trier of fact to determine whether the factfinder considered a particular theory of culpability. *See, e.g., United States v. Chiarella*, 445 U.S. 222, 235-36 (1980) (reversing federal circuit court's affirmation of a conviction where the jury was not instructed on the theory relied on by the appellate court).

This Court has noted that in the context of Article 134 offenses, a court of criminal appeals cannot affirm a conviction under any clause of the Article on which the Members were not instructed as a possible theory of culpability. Appellant mistakenly believes that the "theory" at issue here is which circumstances of Appellant's conduct made it service-discrediting, rather than which clause of Article 134 he was charged under. *See United States v. Medina*, 66 M.J. 21, 27-28 (C.A.A.F. 2008); *see also United States v. Miller*, 67 M.J. 385, 389 (C.A.A.F. 2009). No charging or instructional error existed: the Members considered and assessed Clause 2 "beyond a

reasonable doubt," and Appellant had notice of, the Clause he had to defend against.

Appellant was charged with, and the Members were instructed to consider, conduct that was "service discrediting." Appellant was charged under Clause 2. (J.A. 21.) The Military Judge instructed the Members that to find Appellant guilty, they must find Appellant's conduct to be service discrediting. (J.A. 253.) Appellant was aware that he must defend his conduct against a charge that the conduct was a Clause 2 service discrediting offense. Appellant knew exactly what he must defend against and his right to due process was not violated when the Court of Criminal Appeals affirmed his conviction under Clause 2 of Article 134.

G. The Members were instructed as to how to evaluate evidence regarding the terminal element.

A military judge must instruct members how to evaluate evidence that particular conduct is service discrediting. *Phillips*, 70 M.J. at 166 (citations omitted). This is consistent with the general requirement that members must be instructed on all elements of an offense. *See Neder v. United States*, 527 U.S. 1, 8-9 (1999). Members are presumed to follow a military judge's instructions. *See United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014) (citing *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003)).

As the *Phillips* court explained, the service-discrediting nature of an accused's conduct must be determined from the facts and circumstances of the conduct itself. 70 M.J. at 166.

Here, the Military Judge instructed that the Members must make an independent factual determination that Appellant's misconduct was service-discrediting. He instructed the Members to make this determination based on the circumstances surrounding Appellant's misconduct. (J.A. 253.) This Court should be confident that the Members evaluated the evidence regarding the terminal element in accordance with the requirement identified in *Phillips* and longstanding military precedent on assessment of legal sufficiency of the terminal element.

Conclusion

WHEREFORE, the United States respectfully requests that this honorable Court affirm the findings adjudged and approved below.

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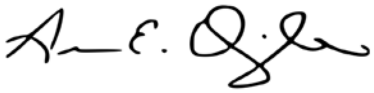

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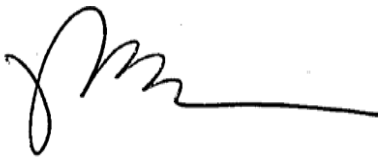

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2. This brief complies with the requirements of Rule 37 because it was prepared in a monospaced typeface using Microsoft Word Version 2010 with 12 point, Courier New font.

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I certify the foregoing was electronically filed with the Court at efiling@armfor.uscourts.gov as well as provided to

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