IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. Staff Sergeant (E-5) **JOSHUA K. PLANT**, USAF, Appellant.	BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT Crim. App. Dkt. No. 38274 USCA Dkt. No. 15-0011/AF

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT

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

ISSUE PRESENTED

WHETHER THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE FINDING OF GUILTY TO CHARGE V AND ITS SPECIFICATION (CHILD ENDANGERMENT) BECAUSE THE EVIDENCE FAILED TO PROVE APPELLANT'S ALCOHOL USE ALONE AMOUNTED TO CULPABLE NEGLIGENCE THAT ENDANGERED THE WELFARE OF L.P.

STATEMENT OF STATUTORY JURISDICTION

Amicus curiae adopts Appellant's Statement of Statutory Jurisdiction as set forth on page 3 of Appellant's brief.

STATEMENT OF THE CASE

Amicus curiae adopts Appellant's Statement of the Case as set forth on pages 3 and 4 of Appellant's brief.

STATEMENT OF THE FACTS

Amicus curiae adopts Appellant's Statement of the Facts as set forth on pages 4 and 5 of Appellant's brief. Additional facts in the record will be referenced where appropriate.

SUMMARY OF ARGUMENT

The Government alleged that Appellant endangered his child solely through his alcohol use but failed to demonstrate an adequate connection between that alcohol use and an identifiable, threatened harm to Appellant's child. In holding for the Government, the United States Air Force Court of Criminal Appeals misconstrued the Manual for Courts Martial's explanation of culpable negligence by recognizing a separate avenue of conviction based on conduct that the Government never alleged caused child endangerment. As a result, Appellant's conviction on Charge V was improper and should be set aside.

ARGUMENT

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A GUILTY FINDING BECAUSE THE GOVERNMENT FAILED TO SHOW APPELLANT'S ALCOHOL USE, THE SOLE BASIS OF CHARGE V, AMOUNTED TO CULPABLE NEGLIGENCE THAT ENDANGERED THE WELFARE OF L.P.

A. The Law

The Government charged Appellant with child endangerment under Article 134, UCMJ, 10 U.S.C. § 934, by his use of alcohol. In order to establish guilt, the Government was required to prove that: (1) Appellant had a duty to care for L.P.; (2) L.P. was under the age of 16; (3) Appellant endangered L.P.'s mental or physical health, safety, or welfare through culpable negligence by use of alcohol; and (4) Appellant's conduct was of a nature to bring discredit upon the armed forces. Manual for

Courts-Martial (MCM), United States (2012 ed.), Part IV, ¶ 68a.b.

The MCM explains that culpable negligence is:

> a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence.

MCM, Part IV, ¶ 68a.c.(3). The MCM defines "endanger" as "to subject one to a reasonable probability of harm." MCM, Part IV, ¶ 68a.c.(5). But, the MCM does not define "harm." Moreover, while there need not be actual harm, the MCM does require that an "accused's actions reasonably could have caused physical or mental harm or suffering." MCM, Part IV, ¶ 68a.c.(4).

B. The MCM's explanation should not be used to relieve the Government of its burden to show that Appellant's alcohol use caused a danger to L.P.

The Government opted to charge that Appellant endangered L.P. exclusively "by using alcohol and cocaine." Slip Op. at 5. The members acquitted Appellant of cocaine use. *Id.* As a

result, the Government was required to show that the sole basis for the child endangerment conviction was Appellant's alcohol use. *Id.* The Air Force Court of Criminal Appeals (AFCCA) recognized the difficulty in the Government's prosecution theory and was thus forced to labor through the MCM's explanation of culpable negligence to salvage a child endangerment conviction. *See* Slip Op. at 6. The Government continues this endeavor by arguing that Appellant's poor decisions must have been "fueled" by alcohol use. However, even if Appellant engaged in excessive alcohol consumption, which is a matter of factual uncertainty, the Government has failed to show how this alcohol use caused any "reasonable probability of harm" to L.P.

1. The MCM's explanation should not expand consideration beyond the charged conduct.

The Government was free to charge that engaging in sexual misconduct, permitting drug use, or allowing "strangers" into one's home led to child endangerment. It also could have simply charged that Appellant left L.P. unattended for an extended period, just as the MCM's sample specification suggests. MCM, Part IV, ¶ 68a.f. But the Government failed to make such allegations and should not now be permitted to circumvent its decision by claiming alcohol "fueled" all the behavior it could have charged.

Basing Appellant's conviction beyond alcohol use poses a very different problem than the one posed in United States v. Vaughn, 58 M.J. 29 (C.A.A.F. 2003). In Vaughn, the appellant argued that she did not have fair notice that leaving a child alone was punishable conduct under Article 134, UCMJ. Here, the due process problem does not arise from Article 134, UCMJ, itself, but rather from the charging decision and application. The Government charged that Appellant endangered L.P. through his alcohol use. But the AFCCA decision does not explain how Appellant's alcohol use was culpably negligent towards L.P.; it only explains why Appellant should be considered culpably negligent for actions beyond his alcohol consumption.

To be sure, this case involves more than just statutory interpretation of the UCMJ. There is a very real question as to whether due process is violated when the Government charges child endangerment based on one type of conduct (alcohol use) but the resulting conviction effectively rests on other conduct. An accused is unable to defend himself if a conviction rests upon non-charged conduct. *See* Jackson v. Virginia, 443 U.S. 307, 314 (1979) (explaining the Fourteenth Amendment requires a "meaningful opportunity to defend"). Upholding a conviction under these circumstances would simply encourage the Government to allege alcohol use–-or prescription medication use--as a

threshold basis for charging child endangerment any time a caregiver has used these legal substances. A prosecutor could then attempt to prove the charge based on other, marginally connected activities. Such an approach would threaten the due process rights of the accused while simultaneously inviting prosecutorial imprecision and manipulation.

2. Appellant's illegal acts do not illustrate that his alcohol use endangered L.P.

Appellant's activities could be considered under the charged conduct of alcohol use, but only to the extent the activities show impairment and thus an inability to care for L.P. But they do not show impairment. At trial, the Government's theory was that Appellant was an "opportunist" who "took full advantage" of the situation. (J.A. at 466.) The Government should not now be allowed to argue this same conduct is also evidence that Appellant was so intoxicated that he was effectively incapacitated as a caregiver.

The AFCCA noted that there was no reason to believe Appellant was unable to telephone for assistance if necessary. Slip Op. at 7. It also acknowledged that opinions were mixed as to what degree Appellant was even intoxicated. *Id.* at 6. Indeed, the record shows that Appellant was fully aware of the events of the night; even at the latest point of the night, Appellant was cognizant enough to lock the door to conceal his

behavior. (J.A. at 117, 242.) Individuals commit crimes for a variety of reasons. The Government's speculation that Appellant would not have acted as he did without alcohol does not establish Appellant's level of intoxication. In turn, it was error to conclude that such speculation could have been the basis under which a reasonable fact finder could have found, beyond a reasonable doubt, that Appellant endangered L.P. through his alcohol consumption.

Moreover, if Appellant's illegal activities were truly being considered only to determine his level of alcohol use, this would invite child endangerment prosecutions of caregivers who arrive home and have a few extra beers or glasses of wine. But that is not what Appellant's conviction rests upon. The AFCCA even acknowledged that "the appellant's alcohol use and the circumstances surrounding that alcohol use might foreseeably result in harm to the child." Slip Op. at 7 (emphasis added). In short, Appellant's conviction was effectively based on conduct that was separate and distinct from alcohol use, which the Government never alleged endangered L.P.

C. The Government failed to show a causal connection between Appellant's alcohol use and any threat to L.P.

The Government's application of culpable negligence loses sight of the basic and palpable necessity of causation. Under Article 134, UCMJ, the Government must show "[t]hat Appellant

endangered LP's mental and physical health, safety, or welfare through culpable negligence by using alcohol." Appellee Br. at 9. However, the language so heavily relied upon to convict Appellant is not the element of the charged offense. The explanation at issue in this case is not an exclusive list of factors: it is merely an example of factors that may aid a court in reviewing whether the charged act rises to the level of culpable negligence. *See* United States v. Miller, 67 M.J. 87, 89 (C.A.A.F. 2008).

1. The Government's reading complicates what should be a simple specification and charge.

The MCM suggests that the conditions surrounding the alcohol use be considered, but review of these factors should still be examined within the parameters of the charged conduct. Examples of conditions surrounding alcohol use could include the amount of alcohol consumed or the consumption of alcohol in the child's presence. In other jurisdictions, alcohol use is often reviewed as a contributing factor in otherwise dangerous and grossly neglectful behavior. *E.g.*, In re Lance V., 90 Cal. App. 4th 668, 671, 108 Cal. Rptr. 2d 847, 849 (2001) (walking to store with child while intoxicated); Christopher C. v. State, Dep't of Health & Soc. Servs., 303 P.3d 465, 474 (Alaska 2013) (becoming violent around children when intoxicated). It is not the alcohol use, but rather the other behavior that is the basis

for the child endangerment. The few cases that have relied primarily on alcohol use involved situations where the caregiver consumed alcohol in front of the child or provided alcohol to a child. *E.g.*, State v. Forcum, 646 P.2d 1356, 1357 (Or. Ct. App. 1982); Hunter v. Kemna, 116 F. Supp. 2d 1113, 1118 (E.D. Mo. 2000). Neither of these situations is present in this case.

Amicus believes that the Government has adopted an incorrect reading of how endangerment must be shown. In other jurisdictions, the failure to monitor the child, failure to pick up a child, or failure to provide medical care is the conduct that caused endangerment to the child. There is no reason to believe that the UCMJ or the MCM embodies a uniquely different view of causation. In fact, the MCM's sample specification for child endangerment includes two examples: "by (leaving the said __ unattended in his quarters for over __ hours/days with no adult present in the home) [or] (by failing to obtain medical care for the said __'s diabetic condition)." MCM, Part IV, ¶ 68a.f. In these situations, the causation to endangerment is clear because the conduct directly relates to the child.

The Government's reading loses sight of this causation requirement by focusing exclusively on "the conditions surrounding the neglectful conduct." MCM, Part IV, ¶ 68a.b.(3). At the hearing on the Defense's Motion to Dismiss Charge V, the

Government contended that a caregiver could be culpably negligent if they were using alcohol “500 miles away from their child” provided the caregiver failed to, for example, pick up the child and the child was thus left unsupervised. (J.A. at 29.) But the caregiver is not culpably negligent for drinking alcohol 500 miles from his child; he is culpably negligent because he failed to pick up the child. Similarly, if a caregiver fails to provide insulin to a diabetic child because he is recklessly discharging a firearm in the air 500 miles away, he is not endangering the child through his firearm use. It is the action related to the child--failing to provide medical care--that is the cause of the endangerment.

This principle is also illustrated by Vaughn, 58 M.J. at 30, where a mother left her child alone for six hours while she attended a club over an hour away. If the mother consumed alcohol while she was at the club, we would not say her alcohol consumption caused a danger to her child. It was the act of leaving the child alone and unattended that caused the danger.

The difficulty with the Government’s reading is that the causation relies on conditions that are two or three steps removed from the charged conduct. A review of the Government’s arguments, which rely on factors such as Appellant’s ability to drive, the isolation of the home, and even the weather,

illustrate how this reading of culpable negligence convolutes an otherwise simple charge.

Additionally, even if we accept that Appellant's alcohol use "fueled" the sexual assault and other misconduct, the Government failed to prove causation in terms of an identifiable and meaningful threat to L.P. Though clearly reprehensible, these activities had no impact on L.P. and were not charged as child endangerment by the Government. The AFCCA succinctly stated, "The Government submitted no evidence that the child's safety, health, or welfare was directly endangered by the cocaine use or sexual assaults that took place that evening." Slip Op. at 7. The Government was required to show that Appellant's charged conduct endangered L.P. Because it did not do so, causation was never established and Appellant's conviction should be set aside.

2. The record reveals that the Government failed to connect alcohol use with a danger to L.P.

A review of the record raises substantial questions over what culpable negligence may have arisen from Appellant's alcohol use. Unlike other charges for child endangerment arising from alcohol use, the record does not reflect that Appellant drank in front of L.P. or provided alcohol to L.P.

The only surviving theory is that Appellant consumed so much alcohol that he was unable to care for L.P. In its closing

argument, the Government's attorney hypothesized that Appellant was "compromising his ability to think straight." (J.A. at 480.) The AFCCA itself commented on the weakness of the Government's approach:

> Standing alone, we question whether the Government proved beyond a reasonable doubt that the appellant's alcohol use impaired him to the extent that the child was endangered. Witnesses differed on their recall as to the appellant's level of intoxication and his ability to care for the child in an emergency.

Slip Op. at 6. The Government's argument that Appellant was unable to care for L.P. further reveals the difficulty in this theory. The Government first notes Appellant described himself as "inebriated." Appellee Br. at 11. But this statement was merely a remark by Appellant as he tried to remember details five months later. (J.A. at 422, 443.) The Government did not ask Appellant about his ability to care for L.P.

Next, the Government argues that Appellant "was not merely drinking to excess alone" but consumed alcohol with several other people as evidence he was culpably negligent. Appellee Br. at 11. Is it not more responsible to drink with others, where anyone could have heard the child cry? This is akin to drinking in a group with knowledge someone will serve as a designated driver. There was no formal agreement required. Appellant showed the others where the child was sleeping. It

would have been reasonable for him to assume that he would be notified if someone heard the child crying.

The Government then reasons that the area was experiencing flooding and this would have prevented the parties from leaving (presumably in the event aid was needed). *Id.* Then the Government points to the fact Appellant was not in a condition to drive. *Id.* Appellant's inability to drive, which certainly would have been culpable negligence if he had attempted to do so, has no bearing on his or any other guest's ability to summon aid. Surely, if a caregiver did not have a driver's license, a court would not turn to that fact as evidence of culpable negligence because the child could not be driven to aid. Even if a caregiver did not have a phone to call for aid, this would not be culpable negligence. Here, the ability to summon help was present and sufficient. The AFCCA agreed: "[T]here is no reason to believe the appellant could not have telephoned for help." Slip Op. at 7.

The Government attempts to draw a comparison to Vaughn, 58 M.J. 29, for the proposition that Appellant was impaired to such a degree that he was mentally absent. Vaughn presented a far different case. The issue in Vaughn was whether actual harm was necessary to support child endangerment. *Id.* at 35. There, a mother left a 47-day-old child alone for six hours while she

attended a club over an hour away. *Id.* at 30. Unlike a newborn, a thirteen-month-old child can easily and safely sleep through the night. But most importantly, Appellant never left the home. Even the AFCCA seriously questioned the theory that Appellant was unable to care for L.P. Slip Op. at 6.

Finally, the Government attempts to highlight that Appellant did not answer his door for "as much as 30 minutes" and only rarely checked on L.P. Appellee Br. at 12. The Vaughn case also included discussion of potentially being unavailable to a child for a short period. There, the trial court held that leaving the child alone in the home for up to forty-five minutes on several occasions did not rise to the level of child endangerment. Vaughn, 58 M.J. at 29. Noticeably absent from this argument is a clarification on how often the Government would require Appellant to check on L.P. or what assistance should have been offered to the sleeping child in order to avoid culpable negligence. The fact a young child depends on a caregiver has no impact when the child is sleeping. L.P. slept the entire night. A parent would not disturb a sleeping child for no reason.

The Government's approach creates this obscure application: requiring analysis of every fact to determine if that particular detail can tip the scales in favor of culpable negligence.

There is no need for such a convoluted and complicated application. The explanation should aid the court in evaluating if the charged conduct caused a foreseeable risk, not be used to erode the UCMJ's required elements in favor of scouring the record for any and all conditions that can be marginally connected to the charged offense.

CONCLUSION

For the foregoing reasons, Appellant's conviction on Charge V should be set aside and the sentence modified accordingly.

Respectfully submitted this 30th day of March 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) and Rule 26(d) because this brief does not exceed 7,000 words. This brief contains 3,274 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in Microsoft Word Mac Version 2011 with monospaced, typeface 12-point Courier New style.

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30 March 2015

CERTIFICATE OF FILING AND SERVICE

We certify that a copy of the foregoing was electronically mailed to the Court, to Counsel for Appellant (Mr. Philip D. Cave), and to Counsel for Appellee (Lt. Col. Katherine E. Oler, USAF, and Capt. Thomas J. Alford, USAF), on 30 March 2015.

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