IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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

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

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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

Appellant was sentenced to a dishonorable discharge and confinement in excess of one year. The sentence has been approved and partially executed. Accordingly, the Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ). Appellant filed a timely petition for grant of review which this court has granted, bringing this case within this Court's statutory jurisdiction under UCMJ Art. 167, 10 U.S.C. § 867(a)(3). Appellant now invokes this Court's jurisdiction under Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On 22-26 October 2012, Appellant was tried at a General Court-Martial composed of officer and enlisted members, at Little Rock Air Force Base, Arkansas. Contrary to his pleas, Appellant was convicted of two specifications of violating Article 120, UCMJ (rape, aggravated sexual assault of a child over 12 but under 16), and two specifications of violating Article 134, UCMJ (adultery, child endangerment). Appellant was sentenced to a dishonorable discharge, 12 years confinement, and reduction to E-

1. J.A. 11. On 4 February 2013, the convening authority approved the sentence, but deferred and waived the automatic forfeitures for six months for the benefit of Appellant's dependents. *Id.*

On 2 July 2014, the AFCCA, affirmed Appellant's findings and sentence. J.A. 9. On 7 July 2014, the Appellate Records Branch notified Appellant via first class mail of the Air Force Court's decision. On 8 December 2014, this court granted Appellant's petition for review on the issue. On 29 December 2014, this court granted Appellant until 23 January 2015 to file this brief.

Statement of Facts

On or about 30 April, Appellant had several guests over to his house for a party. J.A. 90. In the house at the time was his infant son, who was asleep. J.A. 41.

Appellant was accused, but acquitted of charges related to his cocaine use. Testimony of people at the party was ambiguous to Appellant's exact state of intoxication. J.A. 47, 139-140, 170, 320. At least three witnesses indicated Appellant's child was attended to or that Appellant or someone else was able to do so. R. 98, 155, 170, 290. Specifically, in addition to Appellant, Ms. Jessica Martin, who had nothing to drink that night, was able to take care of the child, should the need arise. J.A. 282.

Two witnesses indicated Appellant was not able to look after his child. J.A. 64, 108-09. Of those witnesses, S.S. stated Appellant had very little to drink. J.A. 64. Additionally, Mr.

Micah Jacobs stated, "I would say no [he was not able to look after the child]. But, I mean, I – referring to himself - would not have been able to take care of anyone." (J.A. 108-09), and also stated, "I am sure [the child] was attended to." J.A. 98.

Summary of Argument

The evidence is legally insufficient to show that Appellant endangered his child, and that his conduct was service discrediting. The evidence against Appellant is deficient in two ways. First, the evidence does not support a finding that Appellant's conduct was culpably negligent and that it could lead to a reasonable probability of harm. Second, the evidence fails to support a finding that the conduct was service discrediting.

Argument

The evidence is legally insufficient to support the finding of guilty to child endangerment because it failed to connect Appellant's alcohol consumption in his own home to a substantial and foreseeable risk of harm to his son, who slept quietly throughout the entire night in his crib.[1]

a. ***Standard of review***. The test for legal sufficiency is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Assessment of

[1] *See State v. Chavez*, 211 P.3d 891, 894 (N.M. 2009).

legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A.1993)*; See also*, Steven A. Childress and Martha S. Davis, *Federal Standards of Review*, 9-29 (1999).

b. ***The law***. When deciding whether the evidence is legally sufficient to sustain a conviction, the test is "whether, viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F.2011). To prove a violation of Clause 2 of Article 134, the Government must: 1) prove that the accused committed a certain act; and 2) "introduce sufficient evidence" that the accused's conduct was "of a nature to bring discredit upon the armed forces." *Id.*; UCMJ Art. 134, 10 U.S.C. § 934. To be service discrediting, conduct must either "have 'a tendency to bring the service into disrepute or . . . [have a] tend[ency] to lower it in the public esteem.' *United States v. Caldwell*, 72 M.J. 137, 141 (C.A.A.F. 2013) (quoting MCM, pt. IV, ¶ 60.c(3) (2008))."

Child endangerment was promulgated as an enumerated Article 134, UCMJ offense as of October 2007. *See* Executive Order 13447 (28 September 2007). 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 his child; (2) that his child was under the age of sixteen; (3) that Appellant endangered the child's mental or physical health, safety, or welfare through culpable negligence; and (4) that 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 at 107, ¶ 68a(b). Further:

> The offense of child endangerment under Article 134, UCMJ, includes the requirement that a child's "mental or physical health, safety, or welfare" be endangered by the appellant's culpable negligence. Manual for Courts-Martial, United States (MCM), Part IV, ¶ 68a.b.(3) (2012 ed.). "'Endanger' means to subject one to a *reasonable probability* of harm." MCM, Part IV, ¶ 68a.c.(5). 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." MCM, Part IV, ¶ 68a.c.(3). For this offense, actual harm to the child need not occur as the offense only requires that the appellant's actions *reasonably could have caused physical or mental harm or suffering*. MCM, Part IV, ¶ 68a.c.(4).

United States v. Mitchell, ACM 38254, 2014 CCA LEXIS 348 (A. F. Ct. Crim. App. June 5, 2014)(unpub.)(emphasis added) (Appendix A).

Here, the evidence does not demonstrate (1) that Appellant endangered his child, and (2) that Appellant's conduct was service discrediting.

c. ***The evidence does not show that Appellant endangered his child***.

As the Court of Appeals of New Mexico has aptly observed:

> "[I]f imprudent and possibly negligent conduct were sufficient to expose a care giver to criminal liability for child endangerment, undoubtedly the majority of parents in this country would be guilty of child endangering—at least for acts of similar culpability."

State v. Garcia, 315 P.3d 331, 335 (N.M. Ct. App. 2013).

The question presented is a matter of first impression for this court, as there appears to be no controlling authority in the military concerning alcohol use and child endangerment. Prior to the enumeration of child endangerment as an Article 134, UCMJ offense, this Court held that "child neglect" could be recognized as an offense even where no harm resulted to the child. *See United States v. Vaughn*, 58 M.J 29 (C.A.A.F. 2003).

The alleged events happened off-base in Arkansas. Had the allegations been prosecuted in Arkansas state court, it is likely the charge would have been under Annotated Code of Arkansas (A.C.A.) 5-27-207 for endangering the welfare of a minor in the third degree. And the state would have had to prove:

> (a)(1) A person commits the offense of endangering the welfare of a minor in the third degree if the person recklessly engages in conduct creating a *substantial risk* of serious harm to the physical or mental welfare of a person known by the actor to be a minor.
>
> (2) As used in this section, "serious harm to the physical or mental welfare" means physical or mental injury that causes:
>
> (A) Protracted disfigurement;

(B) Protracted impairment of physical or mental health; or

(C) Loss or protracted impairment of the function of any bodily member or organ.

(b) Endangering the welfare of a minor in the third degree is a Class B misdemeanor.

Unlike the Arkansas statute, the Manual for Courts-Martial does not describe a degree of harm to be expected, and case law appears to not define the requisite degree of harm. The definition of "endanger" in the Manual uses the standard, "reasonable probability of harm." MCM, Part IV, ¶68a.c.(5). This phrase, broadly construed, could lead to absurd results, such as holding a caregiver criminally liable for a child's paper cut while working on a school project. This Court must give a reasonable construction of the statute that serves to adequately notify service members of what conduct for which they may be criminally liable.

The state of New Mexico has a case that, while not controlling, may be instructive to help resolve the issue. In *State v. Garcia*, the court followed New Mexico precedent - in essence:

> On three occasions, this Court has upheld a parent's conviction for negligent child abuse based on evidence of inadequate child supervision involving intoxication or substance abuse. *State v. Schaaf*, 2013-NMCA-082, ¶ 18, 308 P.3d 160 (holding that the defendant's admission to the danger presented by a combination of serious risks apparent in the children's living environment along with the defendant's "compromised

> state" arising from ongoing methamphetamine use provided sufficient evidence to prove "an ongoing and pervasive zone of imminent danger" such that it constituted criminal child endangerment); *State v. Chavez*, 2007-NMCA-162, ¶¶ 3, 11, 143 N.M. 126, 173 P.3d 48 (holding that there was sufficient evidence to find the defendant guilty of child abuse where evidence indicated that she was high on methamphetamine, "placed [her c]hild in a sleeping arrangement that was highly and obviously dangerous to an infant and then completely failed to monitor [her child]").

State v. Garcia, 315 P.3d at 334. In each of these cases there has to be more of a serious act or pattern of acts which raises a person's conduct to the level of criminal endangerment. Compare, *United States v. Valdez*, 35 M.J. 555 (A.C.M.R.1992) (Murder, maiming, and neglect charges involved the physical abuse and neglect by her stepmother, her older sister, and two stepsisters. The appellant, who also participated from time to time in the abuse, frequently turned a blind eye to the treatment and to the deteriorating physical condition of the child.). The question arises should the harm be substantial, but something less than death or grievous harm. An additional consideration is how imminent is any harm. The Federal Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106g, as amended by the CAPTA Reauthorization Act of 2010,[2] defines child abuse and neglect as, at minimum:

> Any recent act or failure to act on the part of a parent or caretaker which results in death, serious

[2] CAPTA REAUTHORIZATION ACT OF 2010, 111 P.L. 320, 124 Stat. 3459.

> physical or emotional harm, sexual abuse or exploitation; or
>
> An act or failure to act which presents an imminent risk of serious harm.

Even though this case applies to civil actions, resort to such cases for support is reasonable, for, "it is common for criminal child neglect statutes to look to civil law for definitions and legal standards, or even to have a criminal statute located under a civil chapter. David Pimentel, Criminal Child Neglect And The "Free Range Kid": Is Overprotective Parenting The New Standard Of Care? 2012 UTAH L. REV. 947, 992, n.234 (2012).

New Mexico may have more to teach us, as its Supreme Court wisely observed:

> Taken literally, our endangerment statute could be read broadly to permit prosecution for any conduct, however remote the risk, that "may endanger [a] child's life or health." However, by classifying child endangerment as a third-degree felony, our Legislature anticipated that *criminal prosecution would be reserved for the most serious occurrences, and not for minor or theoretical dangers*. *See* [*Santillanes v. State*, 115 N.M. 215, 222, 849 P.2d 358, 365 (N.M. App. 1993)] (criminal prosecutions are for "conduct that is morally culpable, not merely inadvertent."). Therefore, we have taken a more restrictive view of the endangerment statute, and have interpreted the phrase "may endanger" to require a "reasonable probability or possibility that the child will be endangered." [*State v. Ungarten, 115 N.M. 607, 856 P.2d 569 (N.M. App., 1993)*], *see also State v. McGruder*, 1997-NMSC-023, ¶ 37, 123 N.M. 302, 940 P.2d 150 (applying *Ungarten* "reasonable probability or possibility" test).

State v. Chavez, 211 P.3d 891, 896 (N.M. 2009).

In *Chavez*, the defendant

> woke up [and] discovered that his infant daughter, Shelby, was not breathing. Despite repeated efforts, she could not be revived. A police investigation into her death revealed that Shelby had been placed to sleep in a dresser drawer filled with blankets and padding because her bassinet had broken a day or two earlier. In addition, police inspected Defendant's home and discovered impoverished and dirty living conditions that, in the State's opinion, posed a significant danger to Shelby and her two young brothers, Juan and Leo. As a result, Defendant was charged with two counts of child abuse by endangerment with respect to the two boys based on the living conditions in his home.

The court reversed all of the convictions, finding the conduct there legally insufficient to support the conviction. In *Chavez*, the court made raised this concern, and answered it in a way this court should consider.

> Even more problematic are situations such as the present case, where the probability of harm cannot easily be measured or accurately quantified as a mathematical statistic. Therefore, a standard that requires proof of a strict probability under all circumstances poses too rigid a bar in its application. For these reasons, it is apparent that neither probability nor possibility provides an accurate, universal description of legislative intent.

Chavez, 211 P.3d at 897. The *Chavez* court then went on to adopt a standard that the conduct must create a "*substantial* and foreseeable risk of harm." *Id.* at 894 (emphasis added). This court should consider and find that the amount of probable harm

must be more than speculative and must be substantial to warrant a finding that Appellant's conduct was sufficient.

Based on the prosecution of this case, parents are now liable for child neglect or endangerment if they drink alcohol at home, off-base, and off-duty, and have guests – some who are new to them - at their house - in other words have a party at their house.

Likewise, a New York case may also assist this court in finding that Appellant's conduct is not legally sufficient for a finding of guilt both as to the risk and the service discredit.

> Drinking, standing on its own in the context of family offenses (as opposed to violations of drinking while driving or drinking in public), does not constitute criminal conduct. Courts have consistently held that protective orders may not be issued with conditions that impinge upon Constitutional rights unless there is a clear showing that such conduct threatens, menaces or harasses the alleged victim for whose protection the order is authorized. *Roofeh v. Roofeh*, 138 Misc 2d 889, 525 NYS2d 765 (Nassau County 1988) [request for an order of protection based on a spouse's smoking cigarettes in the presence of the other spouse and their children denied because cigarette smoking is not a crime or violation of the Penal Law and does not constitute harassment, menace, reckless endangerment or assault on other family members]; *Adams v. Tersillo*, 245 AD2d 446, 666 NYS2d 203 (2d Dept. 1997) [protective order prohibiting parents from making derogatory statements about each other in the presence of their children was declared invalid as being a prior restraint on speech and being too broad]. For these same reasons, this court cannot, in good conscience, prohibit Defendant from exercising his right to drink alcohol without proof that such conduct threatens, menaces or harassed the complaining witness.

People v. Chinchilla, 2006 NY Slip Op 51648(U) (N.Y. Crim. Ct. 8/29/2006).

Here, the Air Force Court analyzed legal sufficiency in light of a non-exclusive list of factors set out in the Manual for Courts-Martial.

The court below noted the child "had not yet begun walking, and was somewhat developmentally delayed," based on the testimony of the spouse. Slip. Op. at 5. The testimony was that "he was a little delayed as far as physically." J.A. 397. This was in regard to his mother's opinion of his walking ability, but she noted that despite her concerns "his pediatrician was not worried about that . . . he was growing normally." *Id.* Based on the fact that the child slept in his bed throughout the night, his physical ability was a non-issue and the court below erred in speculating that a child who was within the normal developmental ability curve according to his physician was somehow at a heightened risk of harm while peacefully sleeping in an adjoining room.

The court below suggests Appellant, "allowed illegal drug use to take place directly across the hall from his child and then pursued an agenda of sexually assaulting two young women under the same roof where his child slept." Slip op. at 7. This is essentially an impermissible spillover argument, but it is also not the theory of child endangerment the government

charged. *See* J.A. 23 (Charge Sheet). The government alleged that Appellant endangered his child "by using alcohol and cocaine," and the members acquitted him of the cocaine allegation. Appellant was never accused of exposing the child to drugs through the presence of others.

While important to consider what evidence was introduced, it is equally important to consider what evidence was not produced.

There was no evidence that the child was ill or otherwise known to be suffering some temporary physical ailment - for example, a head-cold or nasal infection that might affect breathing.

There is no evidence anyone at any time heard crying or unusual noises from the room.

There was no evidence of a pattern of alcohol related behavior and associated consequences of which the events of the night alleged might form a pattern, and which could elevate the risk to something beyond mere speculation. *See, e.g.*, *Burnett v. Ark. Dep't of Human Servs.*, 385 S.W.3d 866 (Ark. Ct. App. 2011).

The government, when learning of the alleged behavior, did not contact an appropriate social services agency and report the behavior as a potential issue of child neglect. This failure to act is evidence that the government did not truly believe

Appellant's child was in danger, present or future, and suggests the government did not really believe there was danger or that the conduct could tend to be service discrediting.

There is no evidence that the government saw a need to contact the military family advocacy program to determine whether Appellant was in need of counseling and assistance, or other services. This failure to act is evidence that the government did not truly believe Appellant's child was in danger, present or future, and therefore suggests the government did not really believe there was a tendency for his actions to be service discrediting.

There was no evidence that the child was in a "filthy" environment or in any way ill-clothed, lacked appropriate room temperature and coverings, or that the child was out of the crib and exposed to a physical danger. *See e.g.*, *Leonard v. Arkansas Dept. of Human Services*, 377 S.W.3d 511 (Ark. 2010); *Legrand v. Arkansas Department of Health and Human Services*, No. CA08-295 (Ark. App. 6/4/2008) (Ark. App., 2008)(unpub.) (Appendix B).

There was no evidence of any prior complaints or concerns that Appellant did not properly care for his child, which could be relevant to establish knowledge and notice of concerns, and a resultant lack of care on the night in question.

d. ***There is insufficient evidence to show that Appellant's conduct was of a nature to be service discrediting***.

Appellant acknowledges *United States v. Phillips*, as relevant to this case.

Even if this court finds the evidence legally sufficient to prove the element of endangering the child's mental or physical health, the evidence is still not legally sufficient for the element of service discrediting conduct. "[P]oor parenting alone is not [and should not be] sufficient to constitute a crime." 2012 UTAH L. REV. at 996. In *Phillips*, this court cited to *United States v. Parkman*, 4 C.M.R. (A.F.) 270 (A.F.J.C. 1951). 70 M.J. at 165. What this court should consider from *Parkman* is this admonition.

> There are few acts which are either approved or disapproved by all of the societies of the world, or by various segments thereof. Acts regarded as innocent or even laudable by certain fragments of society are most heinous crimes in the eyes of others. It is essential, then, that any discussion of conduct of a nature to bring discredit upon the service be predicated upon the answer to the question: in whose eyes must conduct be "discreditable."[3]

4 C.M.R. (AF), at 281.

In *United States v. Phillips*, this court considered "the necessary quantum of proof to establish" whether conduct is service discrediting under Article 134. This Court rejected the idea that there should be a conclusive presumption that certain conduct is service discredited. *Id.* at 165. Likewise, this

[3] Appellant understands the concern was holding military personnel accountable or unaccountable to standards of conduct and behavior of a foreign countries society and social ideas.

Court rejected a requirement "that the public know of the accused's conduct." *Id.* The fact that certain conduct

> may have been wholly private – [does] not mandate a particular result unless no rational trier of fact could conclude that the conduct was of a "nature" to bring discredit upon the armed forces. For example, the extent to which conduct is constitutionally protected may impact whether the facts of record are sufficient to support a conviction.

Id. at 166.

Appellant takes the position that, while not seeking to do so, the court in *Phillips* has effectively established an unconstitutional presumption, that a charge itself is sufficient to prove service discrediting conduct - and that's all that's needed. Here the government presented some facts but in argument failed to connect them to how the service might be discredited – the statement that "this is service discrediting" is insufficient. J.A. 480. Agreed this is consistent with the *Phillips* majority. *Id.* at 166. This court should adopt the position of Judges Ryan and Erdmann in dissent in *Phillips*, and require proof plus some demonstration to the fact-finder of how those facts tend to discredit.

The statute requires that the nature of the <u>conduct</u> be prejudicial to good order and discipline or service discrediting, not the charge (in this case of child endangerment). UCMJ Art. 134, 10 U. S. Code §938; ¶68a.b.(4),

Manual for Courts-Martial (United States 2012). Or as *Phillips* says, the "nature of the conduct." *Id.* at 166.

If the court accepts that the charge is sufficient, then every allegation of child endangerment becomes per se service discrediting, based on the charge not the conduct.

It seems to Appellant that Judge Ryan was essentially saying we have to be careful and we have to perhaps have some standards. It is unclear on the facts of this case how there can be a distinction with sufficient evidence and a per se crime. That was the approach of the government at Appellant's trial. Appellant agrees with Judge Ryan, writing for herself and Judge Erdmann in *Phillips*, that the government has a duty at trial to articulate how and what evidence does in fact lead to a tendency to discredit. 70 M.J. at 167.

It is of note that, Mrs. Plant testified as a government witness. J.A. 395-420. She was and is a civilian. She was not asked and did not testify about her perception of the military as a result of Appellant's conduct. She was not asked what her civilian co-workers or others thought about Appellant's conduct in relation to their perception of the military. We could speculate that any testimony on that point would not be helpful.

Here, Appellant could not have reasonably contemplated that drinking alcohol while his son slept in his own house would subject him to criminal sanction, and not simply "the moral

condemnation that accompanies bad parenting." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003).

In this case the government offered evidence of alcohol use as well as cocaine use. The government then argued:

> One of them, the child endangerment it's clear. The accused was engaging in alcohol, he explained himself, how he was very inebriated in his interview. He was engaging in cocaine, across the hall from where his son slept.
> And not only is he compromising his ability to care for himself, but he surrounded himself by other people who are inebriated and under the influence of cocaine. Now, when you think about the risk to that child, Deborah Plant said that at that age he could not walk and he was extremely dependent on his caretakers. He's got all of that going on in his house – the accused has all of that going on in his house.
> He's compromising his ability to think straight, and he's got a 13-month child sleeping in the room across from where everybody is using cocaine.
> The most likely – the likelihood of something happening to that child is high. And that's why the accused is guilty beyond a reasonable doubt of child endangerment.

J.A. 480.

The government did not argue how and why the conduct had a tendency to be discrediting. The government did not argue what "something" could happen to the child.

Unlike *Phillips*, the actions which the government posits as being endangering are not a crime, let alone a serious crime. *See e.g., United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008). They occurred in his private residence without public

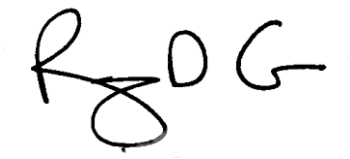
notoriety. *See e.g. United States v. Guerrero*, 33 M.J. 295 (C.M.A. 1991).

No reasonable member of the public should hold the military in lower disregard because a service-member drinks in his private home, while the child is asleep during the evening and night. There is no service connection to the behavior which implicates the military other than Appellant's military affiliation. The actions occurred where the military had no authority or control, during a period of authorized absence from base and duty. Further, as noted above, there was no action by military or civilian authorities to determine if Appellant's actions that night were part of a pattern of neglect that should in fact be investigated.

Conclusion

Appellant requests this Court set aside the specification of child endangerment and return the case for a rehearing on sentence.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because the principal brief does not exceed 14,000 words. This brief contains a total of 5544 words.
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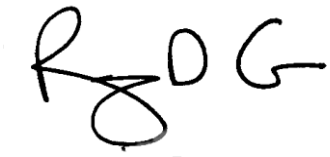
2. This brief complies with the typeface and type style requirements of Rule 37 because this brief has been prepared in a monospaced typeface using 12-point Courier New, using Microsoft Word in Microsoft Office 365 (2013 ed.).

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 23 January 2015.



Philip D. Cave

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **JOSHUA K. PLANT**, USAF, *Appellant*.	**APPENDIX A TO APPELLANT'S BRIEF** Unpublished opinions Crim. App. Dkt. No. 38274 USCA Dkt. No. 15-0011/AF

Legrand v. Arkansas Department of Health and Human Services, No. CA08-295 (Ark. App. 6/4/2008) (Ark. App., 2008)(unpub.)

People v. Chinchilla, 2006 NY Slip Op 51648(U) (N.Y. Crim. Ct. 8/29/2006)

United States v. Mitchell, ACM 38254, 2014 CCA LEXIS 348 (A. F. Ct. Crim. App. June 5, 2014)(unpub.)

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Unpublished Opinion

Arlene LEGRAND, Appellant,
v.
ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES, Appellee.
No. CA08-295.
Court of Appeals of Arkansas.
Division IV.
June 4, 2008.
An Appeal from Craighead County Circuit Court, [No. JV 2005-186], Honorable Larry Boling Judge.
Affirmed.
LARRY D. VAUGHT, Judge.

Appellant Arlene Legrand brings this appeal of an order of the Craighead County Circuit Court terminating her parental rights to her children, T.L., born April 29, 1997; D.L., born April 23, 1999; and M.L., born April 28, 2003. She argues that there was insufficient evidence to support the circuit court's finding that termination was in the children's best interests or that grounds for termination had been proven. We affirm.

The Arkansas Department of Human Services ("DHS") sought emergency custody of the children on April 7, 2005. The affidavit filed in support of the petition stated that two of the children had been left unattended at a store. The affidavit continued that the oven was being used to heat the house, that the house was filthy with a sticky brown substance on the kitchen floor, that a feces-covered sheet was being used as a door, and that roaches were

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present in every room. Legrand was arrested on two counts of child endangerment. The court granted the emergency petition on April 7, 2005. The court later found probable cause for issuance of the emergency order.

On May 23, 2005, the court adjudicated the children dependent-neglected and ordered that they remain in DHS's custody. The court ordered Legrand to comply with the case plan and cooperate with DHS, to submit to random drug screens and a drug and alcohol assessment, and to obtain and maintain stable and appropriate housing and employment.

At a permanency-planning hearing on April 6, 2006, the court found that return of the children to Legrand's custody was not in their best interests and approved DHS's plan for termination of parental rights and adoption, with a concurrent plan for permanent relative placement. The court also found that Legrand had not complied with the case plan in that she had not maintained contact with DHS and had tested positive on her last drug screen.

At a review hearing on September 21, 2006, DHS informed the court that a home study had been completed on Angela Legrand, the children's aunt who lived in Arizona. The court approved the placement at a review hearing held December 21, 2006. The court found that Legrand had completed parenting classes, submitted to a psychological evaluation, and submitted to drug testing; however, she had not visited with the children or obtained stable housing, and some of her drug screens were positive.

At a subsequent permanency-planning hearing on March 8, 2007, the court found it to be in the children's best interests to be in permanent placement with their aunt and that termination of parental rights was not in their

best interests because of this placement. The court found that Legrand had completed parenting classes, submitted to a psychological

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evaluation, and submitted to drug testing. However, she had not visited with the children or obtained stable housing, and some of her drug screens were positive. The court also noted that Legrand had not attended any hearings since April 2006. The placement continued following an August 16, 2007 review hearing.

On October 8, 2007, DHS filed a petition seeking the termination of Legrand's parental rights. DHS alleged four grounds for termination, including that the children had been out of Legrand's custody for over twelve months and the conditions that caused the removal had not been remedied and that the children had been abandoned.

The termination hearing was held in December 2007. Brenda Morton, the DHS caseworker, testified that the department was recommending termination because the children had been in foster care for over two years and needed stability. She related that the children had been placed with their maternal aunt in Arizona but that placement had been disrupted after about six months, and the children had been returned to Arkansas and placed in a foster home. Morton expressed her belief that, despite one child having unspecified issues, the children were adoptable. She further testified that Legrand had not visited the children since before they went to Arizona in December 2006 and that she had sporadic telephone contact with Legrand just prior to the termination hearing. She recounted the parts of the case plan that Legrand had or had not complied with, adding that Legrand did not explain why she did not attend any hearings after the April 2006 permanency-planning hearing. She indicated that some of Legrand's drug screens were positive for marijuana.

On cross-examination, Morton said that she did not notify Legrand or the secondary case worker in Newport when the children were returned to foster care in Arkansas. She did

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not do so, in part, because notification would have been detrimental to the children. Morton also acknowledged that the department did not entertain the prospect of reunification when the children returned to foster care in the summer of 2007 because they had already been in care for two years at that time.

Legrand testified that she was living in Newport, Arkansas, and that she was employed. She said that the last hearing she attended was the April 2006 hearing where the decision was made to attempt to place the children with her sister in Arizona. She did not dispute the testimony of the worker but told the court that she loved her children, and that she had done what was asked of her but had been unable to arrange for transportation to visit her children.

The circuit court announced from the bench that it would grant the petition. The court found that termination was in the children's best interests, that DHS had proven by clear and convincing evidence that the children had been out of appellant's home since April 5, 2005, that she had had no contact with the children or the court since April 6, 2006 and no significant contact with the children since October 2005. In addition, the court found there to be a high degree of likelihood that the children would be adopted and that the mother had abandoned the children because she knew that the children were back in Arkansas. This appeal followed.

We review termination of parental rights cases de novo. *Yarborough v. Ark. Dep't of Human Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006). The grounds for termination of parental rights must be proven by clear and convincing evidence. *Id.* When the burden of proving a disputed fact is by clear and convincing evidence, the question on appeal is whether the circuit court's finding that the disputed fact was proven by clear and convincing evidence

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is clearly erroneous, giving due regard to the opportunity of the circuit court to judge the credibility of the witnesses. *Id.*

In her sole point for reversal, Legrand argues that the circuit court erred in finding that there was sufficient evidence to support the termination of her parental rights. Her argument is divided into two parts: that there is insufficient evidence that termination of her parental rights is in the children's best interests and that there is insufficient evidence of grounds for termination.

In the first part of her argument, Legrand asserts that the circuit court made no finding that return of the children to her custody would be harmful to the children, and, therefore, there was insufficient proof that termination would be in the children's best interests. The plain language of section 9-27-341 provides that the court must find by clear and convincing evidence that termination is in the children's best interests, giving *consideration* to the risk of potential harm. *Carroll v. Ark. Dep't of Human Servs.*, 85 Ark. App. 255, 148 S.W.3d 780 (2004). The risk of potential harm is but a factor for the court to consider in its analysis. *Id.* There is no requirement that every factor considered be established by clear and convincing evidence; rather, after consideration of all factors, the evidence must be clear and convincing that the termination is in the best interest of the child. *McFarland v. Ark. Dep't of Human Servs.*, 91 Ark. App. 323, 210 S.W.3d 143 (2005). Furthermore, the supreme court has directed that the harm analysis be conducted in broad terms, including the harm the child suffers from the lack of stability in a permanent home. *See Bearden v. Ark. Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397 (2001). The DHS case worker testified that the children needed permanency. This lack of permanency is demonstrated by the fact that the children had been out of

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Legrand's custody for more than two years. It is also shown by the fact that Legrand failed to see her children for that period or to remain in contact with DHS.[1]

This leads to the second part of Legrand's argument, where she asserts that DHS failed to prove grounds to terminate her parental rights. DHS alleged multiple grounds for the termination of Legrand's parental rights. The circuit court found that four grounds had been established. Only one ground is necessary to terminate parental rights. *Albright v. Ark. Dep't of Human Servs.*, 97 Ark. App. 277, 248 S.W.3d 498 (2007). Under the juvenile code, abandonment is defined in Ark. Code Ann. § 9-27-303(2) (Repl. 2008) as,

> the failure of the parent to provide reasonable support and to maintain regular contact with the juvenile through statement or contact when the failure is accompanied by an intention on the part of the parent to permit the condition to continue for an indefinite period in the future and failure to support or maintain regular contact with the juvenile without just cause or an articulated intent to forego parental responsibility[.]

Here, Legrand has abandoned her children. First, she testified that she had not seen the children since October 2005. She also indicated that she was willing to let her sister raise the children if she could not have them. This indicates that Legrand wanted the placement with her sister to continue for an indefinite period of time, another of the statutory elements of abandonment. There was no testimony that Legrand was in any way prevented from visiting the children.

We cannot say that the circuit court was clearly erronrous.

Affirmed.

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PITTMAN, C.J., and BIRD, J., agree.

Notes:

1. To the extent that Legrand is arguing that DHS never informed her that the children had returned from Arizona, she bears some responsibility for that failure. She could have contacted the DHS case worker to inquire about the children. She also could have contacted her sister with the same inquiry.

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2006 NY Slip Op 51648(U)
THE PEOPLE OF THE STATE OF NEW YORK,
v.
FREDY CHINCHILLA, Defendant.
2006KN057746
Criminal Court of the City of New York.
Kings County.
Decided August 29, 2006.
People's Counsel: David Cahn.
Defendant's Counsel: Courtney Bryan.
EILEEN N. NADELSON, J.

Defendant is charged with one count of Assault in the Third Degree, one count of Menacing in the Third Degree, and one count of Harassment in the Second Degree. The Complaining Witness is Defendant's daughter.

At arraignment, Defendant was released on his own recognizance, and the matter was adjourned for discovery. The People initially requested the court to issue a full temporary order of protection for the Complaining Witness. Defendant requested that the order of protection be limited, indicating that the Complaining Witness wished her father to return home. The Complaining Witness appeared in court accompanied by her mother, Defendant's wife, and confirmed Defendant's statement regarding a limited order of protection.

The People reported that Defendant abused his daughter when he was drunk. Therefore, the People requested that a directive be included in a limited order of protection that Defendant stay away from the home when he was drinking. Although Defendant was agreeable to this restriction, the court refused to so encroach upon Defendant's activities. Consequently, the People requested a full order of protection, which the court granted. This decision explains the rationale behind the court's refusal to condition a limited order of protection based upon Defendant's drinking habits.

Pursuant to section 530.12(1) of the CPL,

When any criminal action is pending involving a complaint charging any crime of violence between spouses, parent and child...the court... may issue a temporary order of protection....

Further, any order of protection so granted may include a provision requiring the defendant:

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(d) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety, and welfare of a child, family or household member's life or health.

An order of protection is for the benefit of the victim and not a form of punishment for the crime. The primary intent of the Criminal Procedure Law dealing with orders of protection is to protect victims and to encourage their cooperation with law enforcement. To achieve this objective, an order of protection may require the defendant to stay away form the victim and to refrain from harassing the victim, in addition to any other conditions that reasonably relate to the protection of the victim. *People v. Coleman*, 2006 NY Slip Op. 26084 (Kings County 2006)

The difference between a full order of protection and a limited order of protection is the degree of contact a defendant may have with the alleged victim. With a full order of protection, the defendant is prohibited from having any contact whatsoever with the alleged victim, even to the extent of requiring the defendant to quit his or her home. With a limited order of protection, the defendant may remain in contact and live with the alleged victim, but must refrain from harassing, threatening,

menacing or otherwise intimidating the alleged victim. CPL sec. 530.12.

If, as the People allege, Defendant's conduct towards his daughter is the result of a drinking problem, such conduct is more of an illness than the result of purposeful action. If this be true, to issue a limited order of protection grounded on conduct over which Defendant has no control not only vitiates the benefit of protection for the complaining witness, but also sets up Defendant for probable incarceration for violation of such a protective order. For one thing, the People and Defendant proposed that Defendant would be restricted from returning home if he were drinking, but what if Defendant chose to drink while he remained in the home? Also, preventing Defendant from returning home after drinking is rife with challenges as to whether he would or would not violate the proscriptions against harassing or menacing the alleged victim.

Drinking, standing on its own in the context of family offenses (as opposed to violations of drinking while driving or drinking in public), does not constitute criminal conduct. Courts have consistently held that protective orders may not be issued with conditions that impinge upon Constitutional rights unless there is a clear showing that such conduct threatens, menaces or harasses the alleged victim for whose protection the order is authorized. *Roofeh v. Roofeh,* 138 Misc 2d 889, 525 NYS2d 765 (Nassau County 1988) [request for an order of protection based on a spouse's smoking cigarettes in the presence of the other spouse and their children denied because cigarette smoking is not a crime or violation of the Penal Law and does not constitute harassment, menace, reckless endangerment or assault on other family members]; *Adams v. Tersillo,* 245 AD2d 446, 666 NYS2d 203 (2d Dept. 1997) [protective order prohibiting parents from making derogatory statements about each other in the presence of their children was declared invalid as being a prior restraint on speech and being too broad]. For these same reasons, this court cannot, in good conscience, prohibit Defendant from exercising his right to drink alcohol without proof that such conduct threatens, menaces or harassed the complaining witness.

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On the other hand, courts have held that attendance at a domestic violence program may be a proper exercise of a court's discretion in authorizing a protective order in criminal actions between family members. *People v. Bongiovanni,* 183 Misc 2d 104, 701 NYS2d 613 (Kings County 1999). Further, New York courts have traditionally viewed attendance at behavioral modification classes to be legitimate conditions of bail, *Halikipoulos v. Dillion,* 139 F. Supp. 2d 2001 (E.D.NY 2001), even to the extent of holding that, as a bail condition, a defendant may be required to enroll in an alcohol rehabilitation program. *People v. Moquin,* 134 AD2d 764, 521 NYS2d 580 (3d Dept. 1987) [defendant was charged, *inter alia,* with operating a motor vehicle while under the influence]. However, in the instant case, no request was made to condition the protective order on Defendant's enrollment in an alcohol treatment program, which the court might have been willing to do had some connection been demonstrated between Defendant's alleged drinking and his alleged conduct towards his daughter.

The instant complaint contains no allegation that Defendant's conduct was occasioned by his drinking; such assertion was made by the People after meeting with the alleged victim and her mother. This court refuses to act as a surrogate sentinel or to limit a defendant's Constitutional rights that, on the face of the papers presented, bear no relation to the criminal charges which brought him before the court. For this reason, the court refused to condition a limited order of protection on Defendant's not drinking during the term of its enforcement.

This constitutes the decision of the court.

United States v. Mitchell

United States Air Force Court of Criminal Appeals

June 5, 2014, Decided

ACM 38254

Reporter
2014 CCA LEXIS 348; 2014 WL 3045283

UNITED STATES v. Staff Sergeant MICHAEL L. MITCHELL, United States Air Force

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

Subsequent History: Motion granted by *United States v. Mitchell, 2014 CAAF LEXIS 835 (C.A.A.F., Aug. 12, 2014)* Review denied by *United States v. Mitchell, 2014 CAAF LEXIS 1168 (C.A.A.F., Dec. 8, 2014)*

Prior History: [*1] Sentence adjudged 14 September 2012 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Natalie D. Richardson. Approved Sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Core Terms

guilty plea, military, sentence, actual harm, endangering, culpable negligence, child endangerment, substantial basis, mental injury, inlaw, confinement, improvident, substantial rights of appellant, stipulation of facts, maximum sentence, charged offense, factual basis, no error, specifications, bad-conduct, probability, materially, providency, convicted, reduction, adjudged

Counsel: For the Appellant: Major Matthew T. King and Major Grover H. Baxley.

For the United States: Colonel Don M. Christensen; Lieutenant Colonel Nurit Anderson; and Gerald R. Bruce, Esquire.

Judges: Before MARKSTEINER, HECKER, and WEBER, Appellate Military Judges.

Opinion by: HECKER

Opinion

OPINION OF THE COURT

HECKER, Senior Judge:

Consistent with his pleas, the appellant was convicted at a general court-martial of six specifications of child endangerment by culpable negligence, in violation of Article 134, UCMJ, *10 U.S.C. § 934*. A panel of officer and enlisted members sentenced him to a bad-conduct discharge, confinement for 6 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant raises one issue on appeal: whether his guilty plea to four of the specifications of child endangerment was improvident because there was an insufficient factual predicate to demonstrate that those children suffered "actual harm." Finding no error that materially prejudices a substantial [*2] right of the appellant, we affirm.

"[W]e review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)*. In doing so, "we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Id.; United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)* (holding that a guilty plea should not be overturned as improvident unless the record reveals a substantial basis in law or fact to question the plea). "An accused must know to what offenses he is pleading guilty." *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008). A military judge's failure to explain the elements of a charged offense is error. *United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247, 253 (C.M.A. 1969)*. Accordingly, "a military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton, 60 M.J. 62, 64 (C.A.A.F. 2004)* (citing *United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996))*. [*3] If an accused makes statements during trial that are inconsistent with the elements required for the charged offense, the

military judge must resolve those inconsistencies before accepting the plea. *United States v. Bullman, 56 M.J. 377, 382-83 (C.A.A.F. 2002)*.

The offense of child endangerment under Article 134, UCMJ, includes the requirement that a child's ″mental or physical health, safety, or welfare″ be endangered by the appellant's culpable negligence. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 68a.b.(3) (2012 ed.). ″'Endanger' means to subject one to a reasonable probability of harm.″ *MCM*, Part IV, ¶ 68a.c.(5). 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.″ *MCM*, Part IV, ¶ 68a.c.(3). For this offense, actual harm to the child need not occur as the offense only requires that the appellant's actions reasonably could have caused physical or mental harm or suffering. *MCM*, Part IV, ¶ 68a.c.(4). If the appellant's conduct *did* result in harm, the potential maximum sentence to confinement [*4] increases from 1 year to 2 years. *MCM*, Part IV, ¶ 68a.e.(5)-(6). Here, the Government charged the appellant with causing actual harm (″mental injury″) to the children, and the maximum sentence the appellant faced reflected his conviction for that offense.

On appeal, the appellant now contends that his guilty plea to endangering two of the children must be set aside because the guilty plea inquiry failed to elicit sufficient evidence that the children suffered actual harm as a result of his behavior. We disagree. During the providency inquiry, the military judge explained the elements of this offense, including the requirement that the children must have experienced actual mental injury as a result of his conduct. During specific questioning by the military judge and through a stipulation of fact, the appellant admitted on multiple occasions that his actions had caused the two children to suffer mental injury, and we do not find a substantial basis in law or fact to question the providency of his guilty plea. The stipulation of fact itself demonstrates that the elements of this offense are all met. Furthermore, even if his plea was improvident as to the ″actual harm″ element, we would [*5] still affirm the appellant's convictions for endangering these two children and would reassess the sentence to the adjudged and approved sentence: a bad-conduct discharge, confinement for 6 months, and reduction to E-1. *See United States v. Winckelmann, 73 M.J. 11, 12 (C.A.A.F. 2013)*; *United States v. Peoples, 29 M.J. 426, 427-28 (C.M.A. 1990)*.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the approved findings and sentence are AFFIRMED.