IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20120545
Specialist (E-4) **RICHARD A. GIFFORD,** United States Army, Appellant	)	USCA Dkt. No. 15-0426/AR

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

Issue Presented

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT SECOND INFANTRY DIVISION POLICY LETTER NUMBER 8 (11 JANUARY 2010), WHICH PROHIBITS SERVICE MEMBERS WHO ARE 21 YEARS OF AGE AND OLDER FROM DISTRIBUTING ALCOHOL TO PERSONS UNDER 21 FOR THE PURPOSES OF CONSUMPTION, DID NOT CONTAIN AN ELEMENT THAT APPELLANT KNEW THAT THE PERSON TO WHOM DISTRIBUTION WAS MADE WAS UNDER 21 YEARS OF AGE, AND THEREFORE IMPOSED STRICT LIABILITY FOR SUCH ACTIONS.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On May 30 - June 1, 2012, Specialist (SPC) Richard A. Gifford, was tried at Camp Humphreys, Korea, before a panel

composed of officer and enlisted members sitting as a general court-martial. Contrary to his pleas, the panel convicted SPC Gifford of failure to obey a lawful general order (three specifications) and aggravated sexual assault, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892 and 920 (2006 & Supp. IV). The panel sentenced SPC Gifford to confinement for forty-five days, reduction to Private (E-1), forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On January 22, 2015, the Army Court set aside and dismissed the finding of guilty to Specification 3 of Charge I. The Army Court affirmed the remaining findings and the sentence. (JA 1). Specialist Gifford was notified of the Army Court's decision and petitioned this Court for review on March 20, 2015. On May 7, 2015, this Honorable Court granted appellant's petition for review.

Statement of Facts

During an Article 39(a), UCMJ, session, the military judge explained the instruction he intended to give to the panel regarding the general order. (JA 23-24).

> There are a few kind of thorny issues about this offense. One is that the way the policy letter reads, it says 'For the purpose of consumption.' That implies to the court that a specific intent, state of mind is implied there. So that's what I'm going to assume. The other state of mind

> issue that's raised by the policy letter is it seems fairly implicitly clear, I guess is one way to put it, that the accused, as an element of the offense, has to have known—it's not only that the person receiving the alcohol was under the age of 21 but he has to have known that.

(JA 23). Both counsel agreed with the military judge's interpretation of the general order. (JA 23-24).

Accordingly, the military judge instructed the panel that it must be convinced beyond a reasonable doubt of the following six elements:

> One, that as of 31 December 2011 there was in existence a certain lawful general order in the following terms: Second Infantry Division Policy Letter Number 8, responsible alcohol use dated 11 January 2010, paragraph 3b, which provided that service members who are under—I'm sorry, who are 21 years of age and over may not distribute or give alcohol to anyone under 21 years of age for the purpose of consumption.
>
> Two, that the accused had a duty to obey this order;
>
> Three, that at or near Camp Humphreys, Republic of Korea, on or about 31 December 2011 the accused failed to obey this lawful general order, in that he gave alcohol to; as to Specification 1, Private E2 [GB]; as to Specification 3, Private First Class [IT]; as to Specification 4, Private First Class [CD].
>
> Four, that the accused failed to obey this lawful general order, in that, he gave the alcohol to the person named in the specification for the purpose of consumption, that is, with the intent that the person named in the specification would consume the alcohol.

> Five, that the person named in the specification as allegedly receiving the alcohol from the accused was, in fact, under 21 years of age at the time; and
>
> Six, that the accused failed to obey this lawful general order, in that, the accused knew that the person named in the specification was under 21 years of age.

(JA 26-27).

Finally, the military judge instructed the panel:

> [Y]ou must be satisfied beyond a reasonable doubt that the accused actually knew at the time of the alleged offense that the person named in a given specification was under the age of 21 years.

(JA 29).

On October 31, 2013, SPC Gifford filed his brief with the Army Court alleging the evidence was factually insufficient to sustain convictions for Specifications 1 and 4 of Charge I because there was no evidence of SPC Gifford's knowledge regarding the age of the individuals charged in the specifications. (JA 30). On September 8, 2014, the Army Court specified the following issues:

I.

> DO THE SPECIFICATIONS 1, 3, AND 4 OF CHARGE I, FAILURE TO OBEY A POLICY LETTER STATING, "SERVICE MEMBERS WHO ARE 21 YEARS OF AGE AND OVER MAY NOT DISTRIBUTE OR GIVE ALCOHOL TO ANYONE UNDER 21 YEARS OF AGE FOR THE PURPOSES OF CONSUMPTION," INCLUDE AN ELEMENT THAT THE APPELLANT KNEW THAT THE PERSON NAMED IN THE SPECIFICATIONS WAS UNDER 21 YEARS OF AGE?

II.

> IF THIS OFFENSE DOES INCLUDE A KNOWLEDGE ELEMENT WITH RESPECT TO AGE, IS SPECIFIC ACTUAL KNOWLEDGE REQUIRED OR IS THE ELEMENT ONE OF GENERAL INTENT OR KNOWLEDGE? *SEE* RULE FOR COURTS-MARTIAL 916(J).

III.

> IF THIS OFFENSE DOES NOT INCLUDE SUCH A KNOWLEDGE ELEMENT BUT IS INSTEAD ONE OF STRICT LIABILITY, THEN WHAT EFFECT DOES THE MILITARY JUDGE'S INCLUSION OF THIS KNOWLEDGE ELEMENT HAVE ON OUR ARTICLE 66, UCMJ, REVIEW?

(JA 101).

On January 22, 2015, the Army Court affirmed Specifications 1 and 4 of Charge I under a strict liability theory.

Summary of Argument

The Army Court affirmed the findings of guilty for Specifications 1 and 4 of Charge I on a different theory than what was presented to the panel. Due process prohibits an appellate court from affirming a conviction on a theory that was not presented to the trier of fact. Additionally, the government promulgated a general order and then interpreted its own order to include a specific knowledge requirement regarding age. The Army Court erred by not deferring to the command's interpretation of its own order and interpreting the order as a strict liability offense. Lastly, if this Court finds that a strict liability offense is not a different theory than what was

presented to the panel, and the command's interpretation of its own order should not be given deference, then this Court should not interpret the general order as a strict liability offense.

Argument

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT SECOND INFANTRY DIVISION POLICY LETTER NUMBER 8 (11 JANUARY 2010), WHICH PROHIBITS SERVICE MEMBERS WHO ARE 21 YEARS OF AGE AND OLDER FROM DISTRIBUTING ALCOHOL TO PERSONS UNDER 21 FOR THE PURPOSES OF CONSUMPTION, DID NOT CONTAIN AN ELEMENT THAT APPELLANT KNEW THAT THE PERSON TO WHOM DISTRIBUTION WAS MADE WAS UNDER 21 YEARS OF AGE, AND THEREFORE IMPOSED STRICT LIABILITY FOR SUCH ACTIONS.

Standard of Review

A Court of Criminal Appeals decision is reviewed for an abuse of discretion. *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997). "The lower court is deemed to have abused its discretion if its decision is based on an erroneous view of the law." *Id.* (quoting *United States v. Sullivan*, 42 M.J. 360, 363 (1995)(internal quotations omitted).

Law and Argument

Article 66(c) review is a substantial right, and in the absence of such a complete and independent review, SPC Gifford has suffered material prejudice to a substantial right. *United States v. Jenkins*, 60 M.J. 27, 31 (C.A.A.F. 2004). "Although a Court of Criminal Appeals has broad fact finding power, its application of the law to the facts must be based on a correct

view of the law." *United States v. Weatherspoon*, 49 M.J. 209, 212 (C.A.A.F. 1998).

a. The Army Court erred by affirming SPC Gifford's convictions for Specifications 1 and 4 of Charge I based on a theory not presented to the panel.

An appellate court may not affirm an offense on a theory not presented to the trier of fact. *Riley*, 50 M.J. at 415 (citing *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *United States v. Standifer*, 40 M.J. 440, 445 (C.M.A. 1994)). "To do so offends the most basic notions of due process, because it violates an accused's right to be heard on the specific charges of which he [or she] is accused." *Riley*, 50 M.J. at 415 (quoting *Dunn v. United States*, 442 U.S. 100, 106 (1979)). "Though the CCA has significant factfinding powers under Article 66, UCMJ, the CCA is not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *United States v. Bennitt*, __ M.J. __, 2015 CAAF LEXIS 325 *8 (C.A.A.F. 2015)(citing *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009)).

The theory presented to the panel was that SPC Gifford's knowledge of the named individual's age must be proved beyond a reasonable doubt. (JA 27). The panel was further instructed that it must also find SPC Gifford *actually* knew that the individuals named in the specifications were under the age of

twenty-one. (JA 29). The offense was not presented to the panel as a strict liability crime, nor was it presented as a general intent crime. Thus, the Army Court erred in affirming SPC Gifford's conviction on strict liability grounds.

Not only was a strict liability or general intent theory not presented to the panel, but all parties to the court-martial and before the Army Court agreed that the theory presented, one of specific intent, was the controlling theory – indeed, the law of the case. (JA 23-4, JA 75-87). "[A]s a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw v. United States*, 554 U.S. 237 (2008) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003)(Scalia, J. concurring in part and concurring in judgment)).

> But if departure from traditional adversarial principles is to be allowed, it should not occur in any situation where there is a risk that the patronized litigant will be harmed rather than assisted by the court's intervention . . . For the overriding rule of judicial intervention must be 'First, do *no harm*.' The injustice caused by letting the litigant's own mistake lie is regrettable, but incomparably less than the injustice of *producing* prejudice through the court's intervention. [1]

[1] This is not similar to *United States v. Budka*, 2015 CAAF LEXIS 69 January 22, 2015 (Summary disposition), in which this Court affirmed the Army Court's refusal to accept a government concession regarding Budka's challenge to the providence

Castro v. United States, 540 U.S. 375, 386-7 (2003) (Scalia, J. concurring in part and concurring in judgment).

At trial, the government was in the best position to decide how to prosecute its case, and due process required that the Army Court apply the same legal theory on appeal. As Justice Scalia reasoned in *Castro*, all parties to this court-martial may have presented the wrong law to the panel, but the Army Court may not now hold that mistake against SPC Gifford. *Id.*

b. The Army Court erred in interpreting the general order in contravention to the command's interpretation of its own order.

Congress granted commanders the authority to issue punitive orders under Article 92, UCMJ. The general order in this case is a lawful exercise of that power. (JA 23). An agency's interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Because an Article 92 offense, by its very nature, is a creation of what the commander believes should be prohibited to serve a military purpose, his interpretation of his own order should be controlling. *See Id.* Indeed, absent the general

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inquiry. In that case, the government's theory at trial was that adopted by the Army Court. Here, the government's theory at trial and appeal was that SPC Gifford had to actually know that individuals he provided alcohol were under twenty-one, and the fact-finder determined his case on that basis.

order in this case the conduct would not be a crime. Thus if the command agrees the order is not violated without the required knowledge, an appellate court cannot step into the role of the commander and import a lesser standard.

The command, represented by the trial counsel, interpreted its policy to include a specific knowledge element. (JA 23-24). Nothing in the record indicates that the command's interpretation is plainly erroneous nor is the interpretation inconsistent with the policy as written. Deference must be given to the command's interpretation of its own policy. *See Kisala*, 64 M.J. at 53. The Army Court's substitution of its interpretation of a command policy over the command's own interpretation was error.

c. The general order should not be interpreted as a strict liability offense

If this Court does not defer to the command's interpretation of its own policy, then general rules for statutory construction should apply. Criminal offenses requiring no *mens rea* are generally disfavored. *Liparota v. United States*, 471 U.S. 419, 426 (1985). "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Some indication of intent, express or implied, is required to dispense with *mens*

rea as an element of a crime. *Staples v. United States*, 511 U.S. 600, 606 (1994). Silence or omission in the law does not necessarily suggest intent to dispense with a conventional *mens rea* element, which requires the accused to know the facts that make his conduct illegal. *Id.* at 605.

The policy at issue here does not explicitly include an element that a servicemember know the person he gives alcohol to is under the age of twenty-one. (JA 19). Nor does the policy contain language indicating that knowledge is not an element. (JA 19). Without an expression as to a knowledge element, the policy should be interpreted in light of the background rules of the common law. *United States v. Gypsum Co.*, 438 U.S. 422, 436 (1978).

The Supreme Court has a long history of interpreting statutes to include a *mens rea* element when one is not expressly included within the statute. *See Dennis*, 341 U.S. 494; *Morissette v. United States*, 342 U.S. 246 (1952)("[M]ere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced."); *Gypsum*, 438 U.S. 422; *Liparota*, 471 U.S. 419; *Staples*, 511 U.S. 600.

In *Staples*, the Supreme Court examined the National Firearms Act which criminalized the possession of unregistered machineguns. 511 U.S. at 602. Staples argued that his

ignorance of the weapon's automatic firing capability should have shielded him from criminal liability for failing to register the weapon. *Id.* at 603. The Court agreed and held that the statute required proof a defendant knew of the characteristics of his weapon that brought it within the scope of the statute. *Id.* at 619.

The Court rejected the government's claim that the case was akin to those "public welfare" cases in which the Court understood Congress to have imposed a form of strict criminal liability. *Id.* at 606. The government relied on *United States v. Balint*, 258 U.S. 250 (1922) and *United States v. Freed*, 401 U.S. 601 (1971), where the Court upheld a strict liability interpretation for narcotics and hand grenades, respectively. *Id.* at 606-09. Yet the Court recognized a tradition of widespread lawful gun ownership in this country not akin to the selling of dangerous drugs and possession of hand grenades. *Id.* 610.

The Court also found unpersuasive the government's argument that guns are subject to an array of regulations at the federal, state, and local levels that put gun owners on notice that they must determine the characteristics of their weapons and comply with all legal requirements. *Id.* at 613. Instead, the Court stated the existence of a regulatory scheme standing alone is not sufficient notice, and questioned whether existing

regulations of guns are sufficiently intrusive that they "impinge upon the common experience that owning a gun is usually licit and blameless conduct." *Id.* at 613. The Court concluded that its holding "depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect." *Id.* at 620.

Here, the Army Court "determine[d] that a provision in a military general order which regulates the distribution of alcohol to underage recipients is analogous to a public welfare offense." (JA 4). However, giving alcohol to an individual, particularly one over the age of eighteen, is not inherently dangerous to the public welfare in the way that hand grenades are inherently dangerous. Nor is giving alcohol to another person similar to selling narcotics or other dangerous drugs. In fact, on military installations where numerous servicemembers may lawfully drink alcohol, it is not the least unusual for servicemembers to lawfully provide alcohol to one another, e.g. the Marine Corps Ball, Dining Ins, etc. Further, the Department of Defense (DOD) allows servicemembers who are at least eighteen years of age and serving overseas, to consume and purchase alcoholic beverages. U.S. Dep't of Def., Instr. 1015.10, Military Morale, Welfare, and Recreation (MWR) Programs

enclosure 9, para. 2.a.(3)(6 May 2011)[hereinafter DoDI 1015.10]. Thus, even the military does not treat the possession of alcohol by individuals under the age of twenty-one as inherently dangerous.

Alcohol, like firearms, is generally subject to a multitude of regulations that still do not bring the policy under a strict liability framework. Much like the regulation of firearms, alcohol regulations are not so intrusive as to "impinge upon the common experience" that drinking alcohol is "usually licit and blameless conduct." *Staples*, 511 U.S. at 613. Thus, this general order should not be understood to impose strict liability.

The penalty imposed for a violation of a general order also weighs in favor of interpreting it to include a *mens rea* element. Generally, the penalty imposed for an offense has been a significant factor in dispensing with *mens rea*. *Id.* at 616. Penalties for public welfare offenses "commonly are relatively small, and conviction does no grave damage to offender's reputation." *Morissette*, 342 U.S. at 256. The maximum punishment for violating a general order is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. *Manual for Courts-Martial, United States* pt. IV, ¶ 16e(1) (2012) [hereinafter MCM]. This penalty is not minimal. Two years confinement is significant and would generally be

viewed as a felony level punishment in civilian jurisdictions. Further, a sentence to a dishonorable discharge permanently damages the reputation of the offender in both the military and civilian communities.

Citing to *Staples*, the Army Court held that "[w]hen appellant gave alcohol to his colleagues, he assumed the risk that his behavior fell within the bounds of the proscription, regardless of whether he knew them be underage or not." (JA 5). To support that holding, the Army Court cited to two state cases *In re Jennings*, 34 Cal. 4th 254, 268 (2001) and *Funari v. Decatur*, 563 So. 2d 54, 55 (Ala. Crim. App. 1990). In *Jennings*, the California Supreme Court held that a proscription against furnishing an alcoholic beverage to any person under the age of 21 years "falls easily into the category of crimes courts historically have determined to be public welfare offenses for which proof of knowledge or criminal intent is unnecessary." 34 Cal. 4th at 268. In *Funari*, the court held, "[t]he purpose of the legislation prohibiting the sale of alcohol to minors is to promote and protect the public welfare of minors." 563 So. 2d at 55. But both cases are distinguishable from SPC Gifford's case.

In *Jennings*, the court primarily based its holding on the fact that the statute at issue was more regulatory than penal, and found that the "statute's goal of avoiding a broader

societal harm rather than imposing individual punishment is illustrated by the light penalties prescribed for its violation." *Jennings*, 34 Cal. 4th at 269. As explained above, the penalties for violating the general order in SPC Gifford's case are not light, nor can a punitive order be described as "more regulatory than penal."[2]

Further, *Funari* only addressed furnishing alcohol to a minor in a commercial setting. A merchant who enters into an agreement with a state to receive a license to sell alcohol to the public obviously has a higher duty to ensure those to whom he sells alcohol to are of a legal drinking age. If the state did not impose strict liability on merchants selling alcohol, then any merchant could "avoid a conviction by failing to ask for identification." *Funari*, 563 So. 2d at 56. As a result, merchants would have a financial incentive to remain ignorant of their customer's ages and the state law would effectively be meaningless. Here, SPC Gifford is not a merchant and he had no duty to inquire of fellow Soldier's ages before allowing them to drink his alcohol. Without a general order explicitly creating

[2] While nearly every aspect of military life is governed by orders and regulations, comparatively few of these are punitive. By identifying an order or regulation as punitive, a commander or service secretary intentionally transforms the rule from a normal regulation (potentially punishable as a dereliction) to a penal rule punishable as a serious offense.

a duty to inquire, the Army court erred by imposing strict liability.

Lastly, "[w]hen ambiguous, criminal laws are strictly construed in favor of the defendant." *United States v. Miller*, 47 M.J. 352, 357 (C.A.A.F. 1997) (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Application of the rule of lenity here will provide fair warning concerning illegal conduct and strike the appropriate balance between the commander who drafted the policy, the prosecutor, and the court in defining criminal liability. *See Liparota*, 471 U.S. at 427.

Conclusion

Wherefore, SPC Gifford requests that this Honorable Court remand the case to the Army Court to conduct an appropriate Article 66(c) review applying the correct law.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Gifford, Crim. App. Dkt. No. 20120545, Dkt. No. 15-0426/AR, was delivered to the Court and Government Appellate Division on May 29, 2015.

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