

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES**

U N I T E D   S T A T E S ,	)	REPLY BRIEF ON BEHALF OF
Appellee	)	APPELLANT
	)	
v.	)	
	)	Crim. App. Dkt. No. 20120545
	)	
Specialist (E-5)	)	USCA Dkt. No. 15-0426/AR
<b>RICHARD A. GIFFORD,</b>	)	
United States Army,	)	
Appellant	)	

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

**Issue Granted**

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 the Case**

On May 7, 2015, this Honorable Court granted appellant's  
petition for review. On May 29, 2015, appellant filed his final  
brief with this Court. The government responded on June 29,  
2015. This is Appellant's reply.

## Argument

The government claims "it is clear from the text of the punitive order that the commander did not intend for a knowledge of age requirement; otherwise, he would have included such language in his order."\* (Gov't. Br. 12). However, this argument overlooks the Supreme Court's long line of precedent incorporating a *mens rea* into statutes where no such language was included.

Indeed, during its just concluded term, the Court decided *Elonis v. United States*, 575 U.S. \_\_\_ (2015), which provides clear guidance to this Court. There, the Court interpreted 18 U.S.C. § 875(c) to include a *mens rea* requirement where one was not expressly included in the statute. *Id.* at slip op. 16. *Elonis* was convicted for violating 18 U.S.C. § 875 under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. *Id.* at slip op. 1. However, the Court held that under the statute an *accused must know* that his communication contained a threat, and "criminal liability generally does not turn solely on the

---

\* The government arrives at its current legal position belatedly, having originally agreed that knowledge as to age was an element both at trial and on appeal. (JA 23-24, 79-87). It was only after the Army Court of Criminal Appeals specified three issues regarding the subject policy letter that the government changed tack and argued it was not an element.

results of an act without considering the defendant's mental state." *Id.* at slip op. 16.

The Court noted "[t]he fact that the statute does not specify any required mental state, however, does not mean that none exists." *Id.* at slip op. 9 (2015). Further, the Supreme Court has "repeatedly held that mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it." *Id.* (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952) (internal quotations omitted)).

When interpreting a criminal statute, the correct analysis is not whether the drafter included *mens rea* language. Instead, this Court, in interpreting the policy letter, should "read into the [policy] only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* at slip op. 12 (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000) (internal quotations omitted)).

Here, the "*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct" is the element that appellant knew that the person to whom distribution was made was under twenty-one years of age. Generally, distributing alcohol to another individual is not wrongful conduct. Additionally, doing so for purpose of consumption is not wrongful. Nor does the policy letter at issue make either unlawful. The "crucial element separating legal innocence from wrongful conduct" is the

age of the individual to whom the alcohol is distributed. See *Id.* slip op. at 13. "The mental state requirement must therefore apply to the fact" that the person receiving the alcohol is under twenty-one years of age. See *Id.*

Lastly, the government argues the "Army Court correctly found that when 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 to be underage or not." (Gov't Br. 17). The government further argues "the commander rendered criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety."

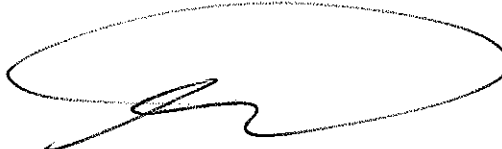
(Gov't Br. 17). However, "having liability turn on whether a reasonable person regards [their conduct as wrongful]—regardless of what the [appellant] thinks—reduces culpability on the all-important element of the crime to negligence, and [the Supreme Court has] long been reluctant to infer that a negligence standard was intended in criminal statutes." *Elonis*, 575 U.S. at \_\_\_, slip op. at 13.

### 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.



HEATHER L. TREGLE  
Captain, Judge Advocate  
Appellate Defense Counsel  
Defense Appellate Division  
U.S. Army Legal Services Agency  
9275 Gunston Road  
Fort Belvoir, Virginia 22060  
(703) 693-0682  
USCAAF No. 36329




JONATHAN F. POTTER  
Lieutenant Colonel, Judge Advocate  
Chief, Complex Litigation  
Defense Appellate Division  
USCAAF No. 26450



CHARLES D. LOZANO  
Lieutenant Colonel, Judge Advocate  
Deputy Chief,  
Defense Appellate Division  
USCAAF No. 36344

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. CGifford, Crim. App. Dkt. No. 20120545, Dkt. No. 15-0425/AR, was delivered to the Court and Government Appellate Division on July 8, 2015.

  
MELINDA J. JOHNSON  
Paralegal Specialist  
Defense Appellate Division  
(703) 693-0736