IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
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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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

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

Granted Issue

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 DITRIBUTING 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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866(b). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

A military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of violating a lawful general order and aggravated sexual assault by substantial incapacitation, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892, 920 (2008 & Supp. IV).[1] The panel sentenced appellant to be reduced to the grade of E-1, forfeiture of all pay and allowances, forty-five days confinement and to be discharged from the service with a bad-conduct discharge.[2] The convening authority approved the sentence adjudged.[3]

On 22 January 2015, the Army Court set aside the finding of guilty to Specification 3 of Charge I, declining to infer the age of a witness.[4] The remaining findings of guilty and the sentence were affirmed, finding the evidence was sufficient to support a conviction.[5] The Army Court found "the military judge needlessly imposed a specific knowledge of age requirement."[6] On 7 May 2015, this Honorable Court granted appellant's petition for review.

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[1] (JA 11-12).
[2] (JA 12).
[3] (JA 10).
[4] (JA 3).
[5] (JA 6).
[6] (JA 4).

Statement of Facts

The military judge instructed the following:

> 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. . .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.[7]

[7] (JA 26-27).

The military judge instructed the panel:

> You may 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.[8]

The relevant portion of the general order in question states, "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 purpose of consumption."[9]

The Army Court rendered an opinion on 22 January 2015, finding appellant "assumed the risk that his behavior fell within the bounds of the proscription," and "declined to read a mens rea with respect to age" into the general order.[10]

Granted Issue

> 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 DITRIBUTING 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.

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[8] (JA 29).
[9] (JA 19).
[10] (JA 5).

Summary of Argument

The commander, through his authority, enacted the general order with the intent to exclude a *mens rea* as to age for the provision in question, having the effect analogous to a public welfare offense. The Army Court correctly found that appellant assumed the risk of violating the general order when he gave alcohol to others and that applying a *mens rea* would constitute a judicial overreach. Furthermore, appellant did not suffer a due process violation as the basis for the conviction as presented to the panel did not change upon the Army Court's decision.

Standard of Review

A court of Criminal Appeals decision is reviewed for an abuse of discretion.[11] "The lower court is deemed to have abused its discretion if its decision is based on an erroneous view of the law."[12]

Law and Analysis

The Army Court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[13] "Although a Court of Criminal Appeals has broad fact finding power, its application

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[11] *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997).
[12] *Id.* (quoting *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)(internal quotations omitted)).
[13] UCMJ art. 66(c), 10 U.S.C. § 866(c).

of the law to the facts must be based on a correct view of the law."[14]

A. The Army Court did not err in determining the general order excluded an element of mens rea with respect to age

The interpretation of a statute "is a question of law subject to de novo review."[15] This court should view the punitive order akin to a statute. The Army Court determined that the 2d Infantry Division Commander excluded a knowledge of age requirement in accordance with the plain language of the provision in question.[16] The principles of statutory interpretation determine whether the commander "intentionally and purposely" intended to exclude the specific knowledge requirement.[17]

Courts should begin their analysis with the specific text in question.[18] Looking at the plain language is the most probative method of interpretation.[19] The provision in question is plain on its face: "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 purpose of consumption."[20] The commander excluded language requiring proof of a guilty mind. This court

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[14] *United States v. Weatherspoon*, 49 M.J. 209, 212 (C.A.A.F. 1998).
[15] *United States v. Steele*, ARMY 20071177, 2011 CCA LEXIS 17, at *7 (Army Ct. Crim. App. 3 Feb. 2011)(mem. op.)(citing *United States v. Martinelli*, 62 M.J. 52, 56 (C.A.A.F. 2005)).
[16] (JA 4).
[17] *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014).
[18] *United States v. Wilson*, 66 M.J. 39, 41 (C.A.A.F. 2008)(citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).
[19] *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006).
[20] (JA 19).

has declined to read in words not contained in the plain language of a statute.[21] Rather, "a fundamental rule of statutory interpretation is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'"[22] In this case, 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.

Whether the statutory language is ambiguous is determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[23] In the provision, the commander did not limit the type of recipient of alcohol[24] and the *actus reus* was both to "give" and "distribute."[25] Yet, the commander restricted the criminalized conduct to giving "for the purpose of consumption."[26] Just prior to this provision, the policy reads: "Soldiers who are under 21 years of age...may not distribute

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[21] *McPherson*, 73 M.J. at 395(declining to create a geographical limitation); *see also Wilson*, 66 M.J. at 43(declining to read in a *mens rea* with respect to age).
[22] *James*, 63 M.J. at 221(quoting *Connecticut Nat'l Bank*, 503 U.S. at 253-54).
[23] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).
[24] The provision reads "anyone." (JA 19). The policy applied to persons under twenty-one, regardless of nationality or service affiliation. The policy applied in the Republic of Korea.
[25] (JA 19).
[26] The language allowed lawful sharing of alcohol-based cleaning products and for someone to carry alcohol, as a means of transport, to and from someone's room. (JA 19).

alcohol to other personnel who are under 21 years of age."[27] The distinct language was carefully and consciously crafted, being in some areas broad and others restrictive, but of a consistent scheme.[28] As such, this is the extent of the inquiry as "the statutory language is unambiguous and the statutory scheme is coherent and consistent."[29]

B. The Army Court did not err in interpreting the general order as a strict liability offense

The description of the offense does not end the textual analysis with respect to age, "because it is that fact that likely makes the charged conduct criminal in this case."[30] Courts have "suggested that some indication of congressional intent, express or implied is required to dispense with mens rea as an element of a crime."[31] Otherwise, if not clearly indicated, "an accused would not be placed on fair notice of the threshold for criminal conduct."[32]

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[27] (JA 19).
[28] The language had the effect of a strict regulation of the use of alcohol. Commander's have the authority to enact such measures to ensure good order and discipline, the health, safety, and security of their soldiers, and the furtherance of the mission. Army Reg. 600-20, *Army Command Policy* [hereinafter AR 600-20], para. 4-12c (2014); Field Manual 6-22, *Army Leadership* [hereinafter FM 6-22], para. 2-11 (2006)(Superseded, 6 Nov. 2014).
[29] *McPherson*, 73 M.J. at 395.
[30] *Wilson*, 66 MJ at 42.
[31] *United States v. Staples*, 511 U.S. 600, 606 (1994).
[32] *United States v. Thomas*, 65 M.J. 132, 138 (C.A.A.F. 2007)(Baker, J., dissenting).

1. The Army Court did not err in interpreting the commander's intent of the general order

It is incorrect to replace the commander's interpretation of the general order with the assertions of the trial counsel.[33] However, this court has denied giving analysis on a lawful army regulation as it would "be tantamount to the substitution of private judgment for the judgment of public officers entrusted with carrying out the power of Government."[34] Accordingly, "we must determine the commander's intent based upon all the available evidence."[35] The clear language of the policy controls unless an application of the words "according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."[36]

The starting point is to look to other sections of the policy in *pari materia* with the provision.[37] Throughout the punitive provisions of the order the language is consciously crafted to exclude the *mens rea* requirement. Looking at the policy as a whole, the commander put all division service members on notice[38] of their requirement to take "individual

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[33] (JA 112).
[34] *United States v. Noyd*, 18 U.S.C.M.A. 483, 494 (1969)(adhering to the secretary of the army's decision as the regulation used was lawful).
[35] *United States v. Astley-Teixera*, 2003 CCA LEXIS 246, 246 (A.F. Ct. Crim. App. 2003)(limiting an inspection based on the purpose stated in the installation commander's policy letter and a related training pamphlet).
[36] *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185-89 (1982).
[37] *McPherson*, 73 M.J. at 395.
[38] However, "knowledge of a general order or regulation need not be alleged or proved as knowledge is not an element of this offense and a lack of knowledge

accountability" for responsible alcohol consumption.[39] The purpose of the policy[40] included a regulatory reshaping of the unit's climate.

Accordingly, the commander's intent for the general order was to regulate the division's environment and for the provision in question to be analogous to a "public welfare offense."[41]

2. The commander had the authority to enact an order analogous to a public welfare offense

A commander is a commissioned or warrant officer, appointed pursuant to statute, and "responsible for developing disciplined and cohesive units sustained at the highest readiness level possible."[42] To do so, commanders have the authority to prohibit soldiers from taking part in activities that the commander "determines will adversely affect good order and discipline or morale" and "that are contrary to good order and discipline or morale of the unit or pose a threat to health, safety, and

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does not constitute a defense." *Manual for Courts-Martial, United States* (2012 ed.)[hereinafter *MCM*], pt. IV, ¶ 16.c.(1)(d).

[39] (JA 19). The commander emphasized "personal behavior" and required division military personnel to always carry a "2ID Alcohol Smart Card."

[40] The command explained prior to implementation of the policy that 2ID soldiers were held to "exemplary" standards, were "cultural ambassadors" and that "incidents involving Soldiers and Korean civilians strains the relationship between the military and the community . . . ." CSM Peter D. Burrowes, *Warrior 7 Notes: Soldiers, Families, readiness top priorities*, INDIANHEAD, Dec. 4, 2009, http://www.2id.korea.army.mil/news/indianhead/pdf/2009/indianhead.20091204.pdf. While not part of the record of trial, such comments by leadership delineate the necessity for commanders to impose strict liability offenses to maintain good order and discipline as well as relations with the host-nation.

[41] (JA 4).

[42] AR 600-20, paras. 1-5(*a*), 1-5*c*.(4)(*c*); 10 U.S.C. §§ 531, 571.

security of military personnel or a military installation."[43] Set apart from civilians, commanders are bestowed a "sacred trust" as "society and the Army look to commanders to ensure that Soldiers and Army civilians receive...care, uphold expected values, and accomplish assigned missions."[44] "Nowhere else do superiors have to answer for how their subordinates live and act beyond duty hours."[45]

It is the Army's policy that "alcohol abuse and resulting misconduct will not be condoned," that "underage drinking is prohibited," and "leaders will...publicize the fact that abuse of alcohol will not be tolerated."[46] The regulation requires that commanders "discipline, as appropriate...Soldiers who provide alcohol to underage Soldiers."[47] The army even forbids the wearing of uniforms in establishments primarily selling alcohol.[48] Further, under 10 U.S.C. § 2683, legislative jurisdiction was relinquished, allowing a commanding officer of an installation in a foreign country to impose a minimum drinking age on an installation.[49]

Here, a commander appropriately used his authority to promulgate a strict alcohol standard through a general order, a

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[43] AR 600-20, para. 4-12*c*.
[44] FM 6-22, para. 2-11.
[45] *Id.*
[46] Army Reg. 600-85, *Alcohol and Drug Abuse Prevention and Control Program* [hereinafter AR 600-85], para. 3-2(a),(c),(e)(2014).
[47] Army Reg. 600-85, Appendix B-3(e).
[48] Army Reg. 670-1, *Wear and Appearance of Uniforms and Insignia*, para. 4-3.c.(1)(2015).
[49] 10 U.S.C. § 2683.

method for which "congress and the President have adopted a scheme of strict liability."[50]

3. Appellant was not deprived due process as he was on notice

"Engrained in our concept of due process is the requirement of notice."[51] But, in the punishment of particular acts, courts have construed that "the State may in the maintenance of a public policy provide 'that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.'"[52] 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."[53] 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."[54]

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[50] *United States v. Leverette*, 9 MJ 627, 631 (A.C.M.R 1980)(internal citation omitted); see also *MCM*, pt. IV, 16.c.(1)(d)("knowledge of a general order or regulation need not be alleged or proved, as knowledge is not an element of this offense and lack of knowledge does not constitute a defense").
[51] *Lambert v. California*, 355 U.S. 225, 228 (1957).
[52] *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69-70 (1910).
[53] (JA 2); *see also In re Jennings*, 34 Cal 4th 254, 268 (2001)(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"); *Funari v. Decatur*, 563 So. 2d 54, 55 (Ala. Crim. App. 1990)("The purpose of the legislation prohibiting the sale of alcohol to minors is to promote and protect the public welfare of minors").
[54] *Liparota v. United States*, 471 U.S. 419, 433 (1985).

There is no *mens rea* requirement for an offense directed at protecting the "public welfare."[55] Departing from the presumption favoring inclusion, courts have inferred from silence the intent to exclude *mens rea* "in statutes that regulate potentially harmful or injurious items."[56]

In enacting public welfare offenses, courts have reasoned that congress weighed the possible injustice of convicting an innocent person "against the evil of exposing innocent purchasers to danger from the drug."[57] Courts have analyzed "the statutory text, legislative history, and judicial interpretation" to compel the conclusion that in some instances knowledge of age is not necessary as an element.[58] For public welfare offenses involving minors, legitimate concerns, such as those involving the First Amendment, must be "balanced against the 'surpassing importance of the government's interest in safeguarding the physical and psychological wellbeing of

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[55] *Wilson*, 66 MJ at 42. *See United States v. Freed*, 401 U.S. 601, 607 (1971); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943)("In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger"); *United States v. Behrman*, 258 U.S. 280, 287 (1922); *United States v. Balint*, 258 U.S. 250, 253 (1922).

[56] *Staples*, 511 U.S. at 608.

[57] *Balint*, 258 U.S. at 254. *See also Dotterweich*, 320 U.S. at 284-85 ("[B]alancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless").

[58] *United States v. Malloy*, 568 F.3d 166, 171 (2009)(finding no knowledge requirement for a violation of a sexual exploitation of children statute).

children . . . .'"[59] Here, appellant "had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct."[60] In this case, the commander balanced imposing a strict liability offense with the safety and welfare of junior soldiers who could cause or suffer injury after their inexperienced consumption of alcohol, and determined that the safety of his soldiers and the local nationals outweighed the need for a knowledge of age requirement.

4. History of alcohol regulation as a public welfare offense

There is a long history of the regulation of the depressant drug alcohol. Since the passing of the National Minimum Drinking Age Act in 1984, all states have raised their minimum drinking age to twenty-one.[61] "Alcohol-related offenses...have been found to constitute public welfare offenses, purely regulatory offenses for which the Legislature does not intend any proof of scienter or wrongful intent."[62] Even "the [business of selling intoxicating beverages] has long been considered one peculiarly fraught with danger to the community."[63]

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[59] *United States v. Humphrey*, 608 F.3d 955, 962 (2010)(quoting *Malloy*, 568 F.3d at 175).
[60] *Posters 'n' Things*, 511 U.S. at 522-23.
[61] 23 U.S.C.A. § 158. Congress, encouraging compliance, included in the National Minimum Drinking Age Act a risk of lowered federal funding pursuant to the Federal Highway Act for states that did not comply.
[62] *In re Jennings*, 34 Cal. 4th 254, 268 (Aug. 2004)(citations omitted).
[63] *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 600 (1970)(finding a law granted broad powers to regulate dealings with alcohol, but justifiable state action stopped at refusing to serve women).

Junior soldiers, due to their inexperience with alcohol and its effects, are particularly at risk for alcohol-related destructive and criminal behavior. An inexperienced junior soldier who consumes alcohol may get into fights with other soldiers, local nationals, or otherwise display disparaging and/or violent behavior that negatively impacts the readiness of his unit or the reputation of the U.S. Army in the eyes of the host-nation. Commanders at all levels are wise to impose orders, limitations, and to develop educational programs to make service members aware of the dangers and effects of consuming alcohol.

In the regulation of illegal drug use in certain locations that present an even greater danger than usual, like hostile fire pay zones, the UCMJ allows for heightened punishment.[64] Here, the commander determined that the drug alcohol was of a dangerous character in the environment and its abuse could significantly impact the welfare of his soldiers as well as his unit's mission. Accordingly, the commander took action within his authority to impose punitive provisions of an order for the purpose of maintaining good order and discipline and mission readiness.

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[64] *MCM*, pt. IV, ¶ 37.e. *See United States v. Palomares*, 2007 CCA LEXIS 319, at *5 (N.M.C.M.R. 2007)(allowing testimony of the "deleterious impact on the mission, discipline, and efficiency of the command" in a combat zone as aggravation during sentencing).

5. Strict liability can be imposed notwithstanding a heavier punishment

Although there are criminal sanctions, the primary purpose of this order was "regulation rather than punishment or correction."[65] Appellant asserts penalties for public welfare offenses "commonly are relatively small."[66] Even so, some statutes interpreted as strict liability carry heavy sentences.[67] Here, the commander engendered through the new policy to "set the conditions...to uphold the Army Values and strengthen the U.S.-ROK Alliance."[68] Particular to the military, offenses that threaten discipline and the mission often carry heavier maximum sentences. For example, misbehavior of a sentinel in a time of war, aiding the enemy, misconduct as a prisoner, improper use of a countersign, and misbehavior before an enemy all carry a maximum sentence of life.[69] Additionally, though a heavier maximum sentence is allowed for a violation of a general order, the offense carries no required minimum sentence.

Finally, "nothing in the text, structure, or history of [the provision] warrants importation" of a knowledge of age

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[65] *In re Jennings* at 267.
[66] (JA 111).
[67] *See Balint*, 258 U.S. 250(holding that strict criminal liability could be imposed notwithstanding a possible punishment of five years); see *also Staples*, 511 U.S. at 515 (rejecting a suggestion that a ten-year prison sentence would automatically exclude strict criminal liability).
[68] Major General Michael S. Tucker, *Commander's Corner: Warriors, it's up to you!*, INDIANHEAD, Jan. 29, 2010, http://www.2id.korea.army.mil/news/indianhead/pdf/2010/indianhead.20100129.pdf
[69] *MCM*, App. 12.

requirement into the provision.[70] "Even in its most robust form, [the rule of lenity] only kicks in when, after all legitimate tools of interpretation have been exhausted, a reasonable doubt persists regarding whether Congress has made the defendant's conduct a federal crime."[71] No such doubt exists here. "The rule of lenity, therefore, does not come into play."[72]

Accordingly, the punitive provision within the general order is analogous to a public welfare offense, consistent with the structure of the policy's scheme and the commander's authority and intent. Furthermore, the plain language of the provision favors a strict liability offense as the commander could have modified the provision to impose a *mens rea* with respect to age.

C. The Army Court did not err in affirming SPC Gifford's convictions as the theory presented only unnecessarily allowed an unavailable defense, where appellant presented no credible evidence

Under the circumstances, appellant did not suffer a violation of due process as "there is no federal constitutional right to have the state prove an element that is unnecessary to the crime and a rational trier of fact could have found the necessary elements of the crime beyond a reasonable doubt."[73] "Even if there is some ambiguity, inconsistency, or deficiency

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[70] *Bates v. United States*, 552 U.S. 23, 32-33 (1997).
[71] *United States v. Yates*, 135 S. Ct. 1074, 1098 (2014)(KAGAN, J., dissenting)(quotations omitted).
[72] *Bates*, 552 U.S. at 32-33.
[73] *Austria v. Glebe*, 2009 U.S. Dist. LEXIS 95775 at *30 (W.D.Wash. 2009)(denying a due process claim despite an unnecessary element of intent).

in the instruction, such an error does not necessarily constitute a due process violation" as appellant would have to show "that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt."[74] The Army Court correctly found "the military judge needlessly imposed a specific knowledge of age requirement," and the error was harmless.[75] By requiring the unnecessary element, the government was not relieved of a burden of proving every necessary element of the Article 92 violation.[76] The basis for the offense, as presented to the panel, did not change despite the removal of an element. During trial, the question of *mens rea* as to age was not mentioned during either opening or closing remarks. The *mens rea* as to age was neither an axis point for the case nor a consideration. Knowledge of age was first highlighted by the military judge after the defense rested their case.[77] The Army Court corrected the wrongly imputed element, which had no effect on appellant's right to be heard.

Accordingly, relief is not warranted. Even with the additional element, appellant was found guilty beyond a reasonable doubt of all the elements presented.

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[74] *Waddington v. Sarausad*, 555 U.S. 179, 191 (2009)(quotations omitted).
[75] (JA 6).
[76] (JA 4).
[77] (JA 23-24).

Conclusion

Wherefore, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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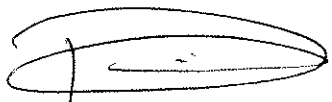

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CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on June 29, 2015.

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