IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,	)	FINAL BRIEF ON BEHALF OF
	)	APPELLANT
Appellee	)	
v.	)	
	)	
Sergeant (E-5)	)	Crim. App. Dkt. No. 20130559
JOSEPH R. HAVERTY,	)	
United States Army,	)	USCA Dkt. No. 16-0423/AR
Appellant	)	

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

Issue Presented

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO INSTRUCT THE PANEL ON THE MENS REA REQUIRED FOR AN ARTICLE 92, UCMJ, VIOLATION OF ARMY REGULATION 600-20, WHICH PROHIBITS REQUIRING THE CONSUMPTION OF EXCESSIVE AMOUNTS OF ALCOHOL AS AN INITIATION RITE OF PASSAGE.

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 April 10, May 13, and June 12-14 2013, a panel consisting of officer and enlisted members sitting as a general court-martial tried Sergeant (SGT) Joseph R. Haverty at Fort Bragg, North Carolina. Contrary to his pleas, the panel convicted SGT Haverty of one specification of violating a lawful general regulation, one specification of cruelty and maltreatment, one specification of aggravated sexual contact, one specification of abusive sexual contact, one specification of indecent viewing, one specification of larceny, and one specification of assault consummated by a battery in violation of Articles 92, 93, 120, 120c, 121, 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 893, 920, 920c, 921, 928 (2012) [hereinafter UCMJ]. The panel sentenced SGT Haverty to a bad-conduct discharge, confinement for 120 days, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged.

On January 29, 2016, the Army Court set aside and dismissed the findings of guilty of The Specification of Additional Charge II (abusive sexual contact by making a fraudulent representation that the sexual act served a professional purpose). (JA 004–005). The Army Court also found relief was appropriate for dilatory post-trial processing. (JA 004–005). In reassessing the sentence, the Army Court affirmed only so much of the sentence as providing for a bad-conduct

discharge, confinement for 90 days, forfeiture of all pay and allowances, and reduction to the grade of E-1. (JA 005).

Sergeant Haverty was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Petition for Grant of Review on March 28, 2016, and a Supplement to the Petition for Grant of Review on April 18, 2016. This Honorable Court granted SGT Haverty's petition for review on June 10, 2016.

Statement of Facts

In The Specification of Charge I, SGT Haverty was charged under Article 92, UCMJ, with violating paragraph 4-20(a) of Army Regulation (AR) 600-20, *Army Command Policy* (18 March 2008) (Rapid Action Revision, 4 August 2011) [hereinafter AR 600-20]. Paragraph 4-20(a) relates to hazing, which is defined as "unnecessarily [causing] another military member or employee, regardless of Service or rank, to suffer or be exposed to an activity that is cruel, abusive, oppressive, or harmful." (JA 126, 234). Hazing includes "any form of initiation 'rite of passage' or congratulatory act that involves . . . forcing or requiring the consumption of excessive amounts of food, alcohol, drugs, or other substances." (JA 126, 234). The charge sheet alleged SGT Haverty violated paragraph 4-20(a) of AR 600-20 "by wrongfully requiring Specialist [BB] to consume alcohol." (JA 006).

At trial, Specialist (SPC) BB and SGT Haverty testified about her consumption of alcohol on the date of the charged offense. Specialist BB said SGT Haverty—her squad leader—was in her barracks room and was helping prepare her TA-50 gear for a field exercise. (JA 044). During this process, SPC BB testified SGT Haverty poured alcohol into a shot glass and told her to "take a shot for initiation." (JA 046). When she declined, SPC BB said SGT Haverty told her "he wasn't going to help me put gear together until I took it." (JA 046). Specialist BB drank this first shot. (JA 046).

Later, before they went to purchase more items for the field exercise, SPC BB said SGT Haverty told her to take another shot. (JA 048–050). Again, SPC BB said she declined, but SGT Haverty "said that [he was] not going to take me to get the rest of my things and not help me unless I took it." (JA 049–050). After SPC BB drank the second shot, they put together a list of items she needed and went to the store. (JA 050–051). Upon returning from the store, SPC BB said SGT Haverty poured her a third shot, but she "poured it back into his glass that he was drinking out of." (JA 057). After she poured it out, SPC BB said SGT Haverty "poured it into the cap of the bottle and said, 'That's barely even a shot. You can take that.' And so, I took that." (JA 057).

During his testimony, SGT Haverty provided a different account of what happened. While he admitted drinking with SPC BB in her barracks room, SGT

Haverty testified he "offered" her the shots. (JA 149, 152, 159). For the first shot, SGT Haverty said "I offered her a drink. She kind of giggled and said no. I was like, 'You sure?' She was like, 'Yeah' and I was like, 'All right,' and then she took it." (JA 149).

Contrary to SPC BB's testimony, SGT Haverty said he offered her a second shot after they returned from the store. (JA 152, 158). For this second shot, SGT Haverty explained "I offered her another drink. She declined. Then I offered again and she took it." (JA 152). Furthermore, SGT Haverty disputed the third shot even occurred: "A little while later, I took another shot and I offered her another one. She said no and I asked her again if she was sure. She said yeah and she poured it into my glass, so I let it go." (JA 152). He later testified "[s]he poured her -- initially what had happened was she refused the shot, so I poured some of her shot into the bottle cap, offered her that. She said no, poured it in my glass. I got the point, and I dropped it." (JA 160).

During cross-examination, SGT Haverty denied telling SPC BB that any of the shots were for initiation, but admitted he "lightly pressured" her to take the shots. (JA 156–159). However, SGT Haverty reiterated the drinks were "offered" to SPC BB. (JA 156–160). On re-direct examination, the defense counsel asked SGT Haverty to explain his intent in offering the alcohol:

Q. Okay. Do you do initiations with your soldiers?

> A. No, sir.
>
> Q. What was the purpose behind the offering of alcohol?
>
> A. Me personally, sir, when I'm tedious, mind-numbing tasks, such as putting together my packing list, organizing things, working on my vehicle, mowing the lawn, just things that I just detest but are necessary, I like to drink a little bit. It puts me in a better mood, so I don't focus on how bad it sucks so bad; and I just I wanted to relax a little bit while I was helping her out because I knew it was going to be an ordeal.
>
> Q. Um-hum [indicating positive response].
>
> A. And I wanted – *I offered her alcohol, assuming the same thing; that, you know, she wanted to be relaxed too*.
>
> Q. Did you *intend* to get Specialist [BB] drunk?
>
> A. No, sir.

(JA 168) (emphasis added).

During trial, the military judge granted the government's motion to take judicial notice of paragraph 4-20 of AR 600-20, and the trial counsel published the language of this paragraph to the panel. (JA 126–129). Additionally, the government admitted a counseling statement into evidence that extensively quoted from paragraph 4-20(a) of the regulation. (JA 236–237). This counseling statement went back with the panel for use during deliberation. (JA 172, 214).

Prior to closing arguments, the military judge provided instructions to the panel members for each offense. For this specification, the military judge reminded

the panel "I have taken judicial notice of Army Regulation 600-20, paragraph 4-20. This means that you are permitted to recognize and consider that portion of the regulation without further proof. It should be considered by you as evidence with all other evidence in this case." (JA 189, 223). The military judge further instructed the panel:

> In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:
>
> First, that there was in existence a certain lawful general regulation in the following terms: Army Regulation 600-20, paragraph 4-20(a), dated 18 March 2008, which prohibits requiring the consumption of excessive amounts of alcohol as an initiation rite of passage;
>
> [S]econd, that the accused had a duty to obey such regulation; and
>
> [T]hird, that on or about 28 September 2012, at Fort Bragg, North Carolina, the accused violated this lawful general regulation by wrongfully requiring Specialist [BB] to consume alcohol.
>
> As a matter of law, the regulation in this case as described in the specification, if in fact there was such a regulation, was a lawful regulation.
>
> General regulations are those regulations which are generally applicable to an armed force and which are properly published by the Secretary of Defense or a military department. You may only find the accused guilty of violating a general order only if you are satisfied beyond a reasonable doubt that the regulation was general.

(JA 176–177, 216–217).

Neither party objected to this instruction. (JA 173). During argument, the trial counsel summarized the government's case for this offense by saying "600-20 prohibits hazing . . . [t]he accused had a duty to obey that regulation. You heard his company commander come in and talk about that; that he was bound by that general regulation and we know that the accused did, in fact, order her to drink alcohol." (JA 190–191).

As part of his response, the defense counsel argued:

> The government also alludes to all of the alcohol that Sergeant Haverty used to overcome Specialist [BB]: To haze her; to treat her improperly. I ask that you look very carefully at the regulations that are being pointed at by the government. As was read to you in the instructions, it's very clear that you've got to talk about consumption of excessive amounts of alcohol. *One thing the government couldn't say is that it was excessive.* Why? Because it would be ridiculous. You're looking at about two to three shots from about 1400 to about 1800*; and this was not ordered*. Sergeant Haverty told you what happened.

(JA 208–209) (emphasis added).

Summary of Argument

In *United States v. Gifford*, this Court recently analyzed whether a *mens rea* requirement applied to a general order violation for an alcohol-related offense under Article 92, UCMJ. 75 M.J. 140 (C.A.A.F. 2016). After applying Supreme Court precedent (including *Elonis v. United States*, 135 S. Ct. 2001 (2015)), this

Court concluded "the general order at issue required the Government to prove Appellant's *mens rea*." *Gifford*, 75 M.J. at 141.

This case similarly involves an alcohol-related offense under Article 92, UCMJ. Pursuant to this Court's analysis in *Gifford*, the military judge committed plain error in this case by failing to instruct the panel on the *mens rea* required for this offense.

Argument

WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE FAILED TO INSTRUCT THE PANEL ON THE MENS REA REQUIRED FOR AN ARTICLE 92, UCMJ, VIOLATION OF ARMY REGULATION 600-20, WHICH PROHIBITS REQUIRING THE CONSUMPTION OF EXCESSIVE AMOUNTS OF ALCOHOL AS AN INITIATION RITE OF PASSAGE.

Standard of Review

Although *Elonis* and *Gifford* were decided after SGT Haverty's trial, the "Supreme Court has stated that where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (citing *Johnson v. United States*, 520 U.S. 461, 468 (1997)) (internal quotations omitted).

Whether the members were properly instructed is a question of law reviewed *de novo*. *United States v. Payne*, 73 M.J. 19, 22 (C.A.A.F. 2014). When there is no

objection to an instruction at trial, this Court reviews for plain error. *Id*. Under a plain error standard, an appellant must demonstrate three things: "(1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014).

Law

Failing to specify a required mental state does not mean that none exists. *Elonis*, 135 S. Ct. at 2009. The Supreme Court recently explained "we have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" *Id*. (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)). To that extent, "federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." *Id*. at 2012.

In *Elonis*, the Supreme Court examined whether 18 U.S.C. § 875(c) required a defendant to intend for his communications to contain a threat. *Id*. at 2004. The communications in the case involved Facebook postings with violent language related to Elonis' ex-wife, co-workers, a kindergarten class, and law enforcement officials. *Id*. at 2004–07. However, rather than intending for these postings to contain threats, Elonis claimed they were "therapeutic," helped him "deal with the pain," and provided disclaimers stating these "rap lyrics" were fictitious. *Id*. at 2004–05. He further testified his lyrics emulated the rapper Eminem. *Id*. at 2007.

At trial, Elonis requested the judge instruct the jury "the government must prove that he intended to communicate a threat." *Id*. The judge rejected this request and instructed the jury to apply an objective standard in determining whether the communications amounted to threats. *Id.* Pursuant to these instructions, the government emphasized the irrelevancy of Elonis' intent and even argued "it doesn't matter what he thinks." *Id*. The jury convicted Elonis on multiple counts of communicating a threat and his appeal ultimately reached the Supreme Court. *Id*.

In reversing his convictions, the Supreme Court found this negligence standard was insufficient. *Id*. at 2013. Within their analysis, the Court outlined basic criminal law principles and noted "under these principles, 'what [Elonis] thinks' does matter." *Id*. at 2011. In particular, as the threatening nature of each communication was "the crucial element separating legal innocence from wrongful conduct . . . the mental state requirement must therefore apply to the fact the communication contains a threat." *Id*.

This Court has recently analyzed *Elonis* in a series of cases involving Articles 92, 93, and 134, UCMJ.

Gifford applies *Elonis* to an alcohol-related offense under Article 92, UCMJ.

First, *Gifford* examined a lawful general order over providing alcohol to minors under Article 92, UCMJ. 75 M.J. at 141–47. In finding the Army Court applied the wrong legal standard during its review, this Court explained "consistent

with Supreme Court precedent, we conclude that the general order at issue required the Government to prove Appellant's *mens rea* with respect to the age of the recipients of the alcohol." *Gifford*, 75 M.J. at 141. Furthermore, "the Government was required to prove, at a minimum, that Appellant acted recklessly in this regard." *Id*.

In analyzing whether a *mens rea* requirement applied to the general order in the case, this Court: 1) reiterated "proof of *mens rea* is the rule rather than the exception," 2) outlined public welfare offenses as an exception to this general rule, and 3) found the alcohol-related offense in the general order did not constitute a public welfare offense. *Id*. at 142–46.

Additionally, *Gifford* repeatedly stated the importance of examining congressional intent when a statute is silent over *mens rea*:

> The Supreme Court has acknowledged that, in limited circumstances, Congress may purposefully omit from a statute the need to prove an accused's criminal intent, and courts are then obligated to recognize this congressional intent and conform their rulings accordingly.

75 M.J. at 144.

> The Supreme Court's core inquiry has remained relatively simple and direct: did Congress *purposefully* omit intent from the statute at issue?

Id. (emphasis in original).

> Thus, as the Supreme Court held in *Balint*, "[whether *mens rea* is a necessary facet of the crime] is a question of

> legislative intent to be construed by the court." 258 U.S. at 252. If such an intent can be identified, courts must construe the relevant statute accordingly.

Id. (alteration in original).

Within this context, "Congress is expected to speak with a clear voice." *Id*. Applying this principle to Article 92, UCMJ, this Court found "no justification for holding commanders to a lower standard than a legislature as they exercise their power to issue a general order with punitive consequence, and we take particular note in the instant case that the commander did not explicitly indicate his intention to create a public welfare offense." *Id*. at 144. Furthermore, the "gravity of punishment" and "history, context, and legal traditions" of alcohol-related offenses weighed against finding "that the commander intended to create a public welfare offense." *Id*. at 144–46.

To that extent, "[t]he Supreme Court has long recognized that 'penalties [for public welfare offenses] commonly are relatively small, and conviction does not [do] grave damage to an offender's reputation.'" *Id*. at 146 (citing *Morissette*, 342 U.S. at 256). Therefore, "a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement." *Id*. (quoting *Staples v. United States*, 511 U.S. 600, 618 (1994)). When reviewing the maximum punishment for Article 92, UCMJ—which includes a dishonorable discharge and confinement for up to two years—"[i]t is self-evident that such a punishment is not

'relatively small' and instead represents a 'severe penalty' that can do 'grave damage' to an accused's reputation." *Id*.

Rapert distinguishes *Elonis* for Communicating a Threat under Article 134

United States v. Rapert examined whether a military judge's interpretation of communicating a threat under Article 134, UCMJ, conflicted with *Elonis*. 75 M.J. 164 (C.A.A.F. 2016). This Court concluded the "wrongful" element in communicating a threat under Article 134, UCMJ, requires "the Government to prove the accused's *mens rea* rather than base a conviction on mere negligence," which makes this offense "substantively different than the offense at issue in *Elonis*." *Rapert*, 75 M.J. at 169.

Notably, this Court highlighted how language within the *Manual for Courts-Martial, United States*, pt. IV ¶ 110.b (2012) [hereinafter MCM] and prior jurisprudence outline a *mens rea* requirement for this element of wrongfulness. *Id*. This language within the MCM explains "a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose . . . does not constitute [communicating a threat under Article 134]." *Id*. (citing MCM, pt. IV, ¶ 110.c). Therefore, the requirement "that the Government prove that an accused's statement was wrongful because it was not made in jest or as idle banter, or for an innocent or legitimate purpose, prevents the criminalization of otherwise 'innocent conduct,' and thus requires the Government to prove the accused's *mens rea*." *Id*.

In affirming the conviction, this Court also noted "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary." *Id*. at 170–71 (citing *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007)).

Caldwell distinguishes *Elonis* regarding Maltreatment under Article 93

Most recently, *United States v. Caldwell* analyzed whether a military judge's instructions for an Article 93, UCMJ offense "were plainly erroneous in light of the Supreme Court's recent holding in *Elonis*." 75 M.J. 276, 278 (C.A.A.F. 2016). This Court cited two factors in determining the instructions were not erroneous. First, "because of the unique nature of maltreatment in the military, a determination that the Government is only required to prove general intent . . . satisfies the key principles" of *Elonis*. *Id*. Second, "the military judge's instructions sufficiently flagged for the panel the need to consider this general intent *mens rea* requirement." *Id*.

Argument

a. In light of *Elonis* and *Gifford*, the military judge erred by failing to instruct the panel on the *mens rea* required for this offense.

Similar to *Gifford*, the regulation at issue in this case: 1) involves an alcohol-related offense, 2) does not express a clear intent to dispense with *mens rea*, and 3) carries a maximum penalty of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for up to two years. MCM, pt. IV, ¶ 16.e.(1).

Therefore, pursuant to the rationale in *Gifford*, the military judge should have instructed the panel the government had to prove a *mens rea* of at least recklessness for the "crucial element": whether SGT Haverty violated the regulation by requiring the consumption of excessive amounts of alcohol as an initiation rite of passage.

Essentially, for this offense, the panel was tasked with determining whether SGT Haverty violated a regulation that did not contain any language regarding *mens rea*. However, the military judge did not provide any substantive guidance or instructions to the panel related to *mens rea*. Instead, the military judge used the single word "wrongfully" in the instructions, without any further definition or context. Notably, the word "wrongfully" is not defined (or even located) in the cited paragraph of the regulation, which was published to the panel during trial and extensively quoted in the counseling statement admitted into evidence. (JA 126–129, 236–237).

The military judge did describe the term "wrongful" or "wrongfully" for elements of two later offenses (indecent viewing and larceny). (JA 180–182). The instruction for indecent viewing informed the panel "'wrongful' means without legal justification or lawful authorization." (JA 180, 218). The instruction for larceny did not provide a definition, but told the panel "a taking is wrongful only if

done without the consent of the owner *and with a criminal state of mind*." (JA 182, 220) (emphasis added).

Critically, these explanations came *after* the instructions for the Article 92 offense, and the panel was not instructed to apply this language to any prior offenses. Therefore, the later instructions did not inform the panel that the Article 92 offense required any level of *mens rea*. If anything, the subsequent language in the larceny instruction explicitly requiring "a criminal state of mind" for the taking to be "wrongful" would have led the panel to believe this requirement was inapplicable to the Article 92 offense.

This case is distinguishable from *Rapert* because the military judge's instructions failed to notify the panel the government was required to prove appellant's *mens rea*. For the Article 92 offense, the panel members were instructed with one undefined word: "wrongfully." This is clearly different from the circumstances in *Rapert*, where the MCM clarifies "wrongfulness" requires the government prove the accused's *mens rea* rather than base a conviction on mere negligence. This type of contextual language—"a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose . . . does not constitute [the offense]"—was clearly lacking in this case. There is no similar language or MCM requirement here. Instead, the military judge instructed the panel to apply a single, undefined word that was not in the regulation itself.

Moreover, as a judge-alone case, *Rapert* does not address the circumstances here. Instead of presuming panel members know and follow the law, this Court has repeatedly held "we presume that the panel followed the instructions given by the military judge." *United States v. Custis*, 65 M.J. 366, 372 (C.A.A.F. 2007). *See also United States v. Thompson*, 63 M.J. 228, 232 (C.A.A.F. 2006); *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000); *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991).

In analyzing instructions provided by a military judge, this Court has said "appellate courts must read each instruction in the context of the entire charge and determine whether the instruction completed its purpose." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012) (citing *Jones v. United States*, 527 U.S. 373 (1999)). Ultimately, when providing instructions to panel members, the military judge "has a duty to provide an accurate, complete, and intelligible statement of the law." *Behenna*, 71 M.J. at 232. Therefore, the key issue in this case is whether the military judge's instructions met this standard. As shown above, they did not.

In conclusion, based on the totality of the circumstances, SGT Haverty's conviction under Article 92, UCMJ, violates the principles of *Elonis* and *Gifford*, as the panel members were not clearly instructed to consider the proper level of

mens rea when convicting appellant for this offense. Instead, unlike *Rapert*, the panel was left with the impression it could base a conviction on mere negligence.

b. The error is plain based on the law at the time of appeal.

Even though this case was tried prior to *Elonis* and *Gifford*, panel instructions are analyzed for plain error based on the law at the time of appeal. *United States v. Girouard*, 75 M.J. 5, 11 (C.A.A.F. 2011). Based on *Elonis* and *Gifford*, the error here is clear: the military judge failed to instruct the panel on the *mens rea* required for this offense. As *Elonis* explains, "what [Elonis] thinks" matters. *Elonis*, 135 S. Ct. at 2011. The same principle applies to SGT Haverty.

c. Sergeant Haverty was materially prejudiced when the panel convicted him under an insufficient theory of criminal liability. Affirming his conviction under an alternative theory would deprive him of his right to defend himself.

Pursuant to the flawed instructions provided to the panel, SGT Haverty stands convicted of violating a lawful general regulation. This error was materially prejudicial to his substantial right to be convicted under a sufficient theory of liability.

Regarding harmless error, the Supreme Court's ruling in *Elonis* remains instructive. When rejecting the instructions given in *Elonis*, the Supreme Court held "Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error." *Elonis*, 135 S. Ct. at 2014. Thus,

despite a request from the dissent to remand for a harmless error analysis pursuant to *United States v. Neder*, 527 U.S. 1 (1999), the Court appears to have concluded such a test was unnecessary or unwarranted under the circumstances. *Elonis*, 135 S. Ct. at 2018 (Alito, J. concurring in part and dissenting in part).

This Court has previously followed *Neder's* reasoning in explaining "an instructional error as to the elements of an offense should be tested for harmlessness" and appellate courts should consider "whether the matter was contested, and whether the element at issue was established by overwhelming evidence." *United States v. Upham*, 66 M.J. 83, 86–87 (C.A.A.F. 2008) (citing *Neder v. United States*, 527 U.S. 1 (1999)); *see also United States v. Payne*, 73 M.J. 19 (C.A.A.F. 2014).

In this case, SGT Haverty's intent was clearly contested. During his testimony, SGT Haverty outlined the exact "purpose" of his actions: "I offered her alcohol, assuming the same thing; that, you know, she wanted to be relaxed too." (JA 168). Furthermore, SGT Haverty testified he did not intend to get SPC BB drunk, did not provide the shots as part of an initiation, and repeatedly stated he was only *offering* the shots of alcohol. (JA 156–160). During argument, the defense counsel asserted the quantity of alcohol consumed by SPC BB was not excessive and not ordered by SGT Haverty. (JA 208–209).

This Court cannot affirm the conviction under a recklessness *mens rea* theory because such a decision would deprive SGT Haverty of the right to defend himself. Pursuant to *Elonis* and *Gifford*, affirming SGT Haverty's conviction of violating a lawful general regulation would require this Court to find he acted with a *mens rea* of at least recklessness. Therefore, affirming this conviction would materially prejudice SGT Haverty by depriving him of the right to be tried under the proper standard of liability for this particular offense. Reaching such a finding would be based on a standard not squarely considered by the trier of fact, something which this Court may not do. *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999) (citing *Chiarella v. United States*, 445 U.S. 222, 236 (1980)). "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)). Essentially, SGT Haverty "was never given an opportunity to defend against" the theory, and affirming on an unpresented theory "would violate due process." *Riley*, 50 M.J. at 416.

In sum, plain and obvious error occurred in this case when the military judge failed to instruct the panel over the *mens rea* required for this offense under Article 92, UCMJ, and this error materially prejudiced SGT Haverty's substantial right to be convicted under a sufficient standard of liability.

Conclusion

WHEREFORE, SGT Haverty respectfully requests this Honorable Court set aside and dismiss The Specification of Charge I.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Haverty*, Crim. App. Dkt. No. 20130559, USCA Dkt. No. 16-0423/AR, was delivered to the Court and Government Appellate Division on July 11, 2016.

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