IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	REPLY 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 the Case

On June 10, 2016, this Honorable Court granted appellant's petition for review. On July 11, 2016, appellant filed his final brief with this Court. The government responded on August 9, 2016. This is appellant's reply.

Argument

The government contends the military judge's instructions about violating a lawful general regulation under Article 92, UCMJ sufficiently addressed the need

to consider appellant's *mens rea*, and any error in the instructions remains harmless beyond a reasonable doubt. This is incorrect. Pursuant to *Elonis v. United States* and *United States v. Gifford*, the military judge's instructions in this case constitute plain error and require this offense to be set aside and dismissed.

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.

To distinguish *Elonis* and *Gifford*, the government argues "neither of these cases address the mens rea requirements in a violation of a lawful regulation under Article 92, UCMJ, or the mens rea requirements in AR 600-20." (Gov't. Br. 24). Such a distinction understates the importance of *Gifford* being the first case to apply *Elonis* to an Article 92 offense, overstates the difference between a lawful order and regulation, and ignores the similarities between this case and *Gifford*.

Gifford remains the only case to apply *Elonis* to an Article 92 offense.

Critically, *Gifford* is currently the only case where this Court has applied *Elonis* to a violation of Article 92, UCMJ. *Gifford*, 75 M.J. 140 (C.A.A.F. 2016). Contrary to the government's position, this Court's analysis in *Gifford* provides a clear framework to determine the required *mens rea* for an Article 92 offense where the underlying general order or regulation is silent.

First, in determining a *mens rea* applied with respect to the age of the recipients, *Gifford* outlined three clear bases for the decision: 1) "the fact that a mens rea requirement is the rule rather than the exception in criminal offenses,

even in those instances when a statute is silent on that point"; 2) "the lack of any overt evidence that the commander intended to create a public welfare offense"; and 3) "our refusal to intuit such an intent on the commander's behalf, given thc historical context of alcohol offenses, the underlying character of the offense, and the gravity of the punishment." *Id.* at 146. Additionally, this Court stated "we also disagree with the CCA's apparent contention that . . . 'Congress and the President have adopted a scheme of strict liability in relation to general orders or regulations.'" *Id.* at 143 n.4 (internal citation omitted).

Second, in concluding recklessness was the proper level of *mens rea*, this Court favorably cited to *Elonis*, the Model Penal Code, and statutory language from several states. *Id.* at 146–48. This cited language remains highly instructive. For example, by applying the cited language from *Elonis*, this Court explained "recklessness is the lowest '*mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 147 (quoting *Elonis*, 135 S. Ct. 2001, 2010 (2015)) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)). The Model Penal Code cited in *Gifford* lists four levels of culpability: purposely, knowingly, recklessly, or negligently; however, "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto." *Id.* (citing Model Penal Code § 2.02(3) (1962)).

In its totality, *Gifford* provides a post-*Elonis* framework for analyzing general orders or regulations under Article 92 that are silent as to *mens rea*: in the absence of a clear intent that a general order or regulation is meant to create a public welfare offense,[1] a *mens rea* of at least recklessness should be read into the "crucial element" separating legal innocence from wrongful conduct.

Gifford applies to both lawful general orders and regulations.

By claiming *Gifford* does not "address the mens rea requirements in a violation of a lawful regulation under Article 92" (Gov't. Br. 24), the government overstates the difference between a lawful general order and regulation. There is no distinction between the two in the statute, and *Gifford* rejected the contention that "Congress and the President have adopted a scheme of strict liability in relation to general orders *or* regulations." *Gifford*, 75 M.J. at 143 n.4 (emphasis added). *Gifford* further held "if Congress is expected to speak with a clear voice in [the context of *mens rea*], the same should be expected of a commander." *Id.* at 144. The government did not offer any reason why this expectation would differ for service secretaries publishing general regulations with punitive implications.

The rationale of *Gifford* should apply to the facts of this case.

By stating *Gifford* does not address general regulations, the government fails to address its factual similarities with this case. (Gov't Br. 24–25). Similar to

[1] The government did not argue this case contains a public welfare offense.

Gifford, this case involves an alcohol-related offense under Article 92. More specifically, both cases involve offenses related to alcohol consumption, which is not normally criminalized. There was no dispute Specialist (SPC) Gifford provided alcohol to other people for consumption, and there is similarly no dispute that Sergeant (SGT) Haverty poured a few shots of alcohol for SPC BB to consume. Neither of these actions are inherently criminal.

Instead, in *Gifford*, the general order criminalized providing alcohol based on the age of the recipients. Therefore, as the age of the recipients separated legal innocence from wrongful conduct, this Court concluded a scienter must apply to this "age" element. *Gifford*, 75 M.J. at 146. Critically, by applying scienter to this element, lawful conduct remains separated from the scope of the order. *Id.* at 148.

In this case, as in *Gifford*, there is nothing inherently wrongful about offering or providing alcohol for consumption. Therefore, the wrongfulness turns on whether the consumption of alcohol was *required* as an initiation rite of passage. It is, therefore, this element – the *requirement* to consume alcohol – that separates legal innocence from wrongful conduct. Accordingly, the government was required to prove that SGT Haverty was at a minimum reckless with respect to whether his behavior met this element. *See id.* at 147.

Like *Gifford*, the presumption in favor of scienter is necessary to ensure the separation of innocent and wrongful conduct. Someone who truly intends to *offer*

alcohol for consumption – with no awareness their offer could be construed as compulsory – could still be convicted if the fact finder concludes the recipient believed consumption was *required*. Further muddying the waters, the regulation states "express or implied consent to hazing is not a defense." (JA 128, 234). Therefore, a defendant who believes they are offering alcohol (and then receives express consent) could still be convicted if the fact finder concludes the recipient thought consumption was required. Most troubling, a defendant could even be convicted when *both* the provider and recipient believe alcohol was offered, if the fact finder concludes consumption was required. These scenarios conflict with the general rules that "wrongdoing must be conscious to be criminal" *Gifford*, 75 M.J. at 145 (citations omitted), and "a guilty mind is a 'necessary element in the [charge sheet] and proof of every crime.'" *United States v. Caldwell*, 75 M.J. 276, 280–81 (C.A.A.F. 2016) (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)).

b. This case is distinguishable from this Court's ruling in *Caldwell*.

The government argues this Court's analysis of Article 93, UCMJ, in *Caldwell* should similarly apply to this case. (Gov't. Br. 11, 16, 18–20). Such an approach fails to properly account for *Gifford*, overlooks key facts underlying the decision in *Caldwell*, and overly broadens the actual language of the regulation.

First, as outlined above, *Gifford* already provides the post-*Elonis* framework for analyzing general orders or regulations under Article 92, UCMJ, that are silent

as to *mens rea.* Notably, *Gifford* rejected the Army Court's adoption of a scheme of strict liability for offenses under Article 92. 75 M.J. at 143 n.4.

Second, there are key differences that distinguish *Caldwell* from this case. For example, *Caldwell* outlined the "unique nature of the offense of maltreatment in the military" and concluded "there is no scenario where a superior who engages in the type of conduct prohibited under Article 93, UCMJ, can be said to have engaged in innocent conduct." 75 M.J. at 278, 281. To that extent, this Court based its "conclusion on *the unique and long-recognized importance of the superior-subordinate relationship in the United States armed forces*, and the deeply corrosive effect that maltreatment can have on the military's paramount mission to defend our Nation." *Id.* at 281 (emphasis added).

Despite the government's arguments, this same type of military uniqueness does not apply to all offenses under Article 92, UCMJ. (*See* Gov't. Br. 11, 16). In this case, the regulation applies to any "military member *or employee*" and specifically states "[h]azing is not limited to superior-subordinate relationships." (JA 126, 234) (emphasis added). Additionally, as shown above and below, otherwise innocent conduct can be criminalized through this regulation, especially in circumstances involving alcohol consumption with express or implied consent.

Third, in attempting to make the connection to *Caldwell*, the government imputes a "knowledge requirement" that does not actually exist within the

regulation. (Gov't Br. 18–19). The government asserts "[i]n *Caldwell*, this Court found knowledge requirements within the language of Article 93, UCMJ" and "a similar knowledge requirement can be found in the language of AR 600-20, para. 4-20, in that the government is required to prove that an accused knew of his conduct in relation to the hazed individual." (Gov't Br. 19). The government further states the "regulation provides examples of conduct that could be considered hazing" and concedes "the government must prove *that an accused knew* he was committing" the prescribed conduct, i.e., "*forcing or requiring* the consumption of excessive amounts of food, alcohol, [etc.]" (Gov't Br. 19) (emphasis added). While appellant agrees a *mens rea* should attach to the conduct prohibited by the regulation (i.e. requiring the consumption of excessive amounts of alcohol), there is no such knowledge requirement in the regulation.

Under these circumstances, there is a clear difference between Article 93 and this regulation under Article 92. *Caldwell* says Article 93 requires the "the accused *knew* that he or she was making statements or engaging in certain conduct in respect to that subordinate" and "a military superior [can] be held criminally responsible for voluntary conduct that is later determined to be abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose." *Caldwell,* 75 M.J. at 281–82 (emphasis in original) (internal quotations omitted). Therefore, the *known* conduct is applied against an outlined standard and there are

no specific types of acts that automatically violate the statute. The explanatory text states even assault or sexual harassment only "may" violate the offense. *Manual for Courts-Martial, United States*, pt. IV ¶ 17.c.2 (2012) [hereinafter MCM].

This is very different from the hazing regulation, which specifically defines certain conduct as automatically violating the regulation, without requiring any awareness by a defendant that he has actually committed this prohibited conduct. Someone who mistakenly believes they are merely offering drinks to a willing participant would not *know* they are requiring the consumption of excessive amounts of alcohol (especially in cases with express or implied consent), but could still be punished under the regulation for doing so. This is exactly the type of strict liability approach for Article 92 offenses that was rejected by this Court in *Gifford,* and a scienter is required to clearly separate innocent from wrongful conduct.

Put another way, this Court in *Caldwell* found the behavior criminalized by Article 93, UCMJ, can *never* be innocent. *Caldwell*, 75 M.J. at 281. For that reason, it was unnecessary to read in any *mens rea* beyond a general intent to make statements or engage in other conduct. *Id.* at 281–83. On the other hand, this Court held in *Gifford* that providing alcohol for consumption, unlike maltreatment, is not inherently wrong. Therefore, here, as in *Gifford*, a *mens rea* must apply to the element separating innocent from wrongful conduct: that a defendant *required* someone to consume excessive amounts of alcohol as an initiation rite of passage.

Therefore, unlike the uniformity of analyzing offenses under Article 93, UCMJ – where *Caldwell* held the conduct can never be innocent – the wide range of potential language and violations for offenses under Article 92, UCMJ, necessitate following the approach from *Gifford*: in the absence of a clear intent that an order or regulation is meant to create a public welfare offense, a *mens rea* of at least recklessness should be read into the "crucial element" separating innocent from wrongful conduct.

Finally, contrary to the government's position, not all violations of Article 92, UCMJ are limited to general intent. (Gov't Br. 11, 13, 16). In fact, paragraph 4-19(a)(1) of the updated version of Army Regulation (AR) 600-20 defines hazing as "any conduct whereby a Servicemember or members, regardless of service, rank, or position, and without proper authority, *recklessly or intentionally* causes a Servicemember to suffer or to be exposed to any activity that is cruel, abusive, humiliating, oppressive, demeaning, or harmful." AR 600-20, *Army Command Policy* (6 November 2014) (emphasis added).

c. Based on the military judge's instructions for this offense, the panel would not have known to consider Sergeant Haverty's *mens rea.*

The government's claim that the "instructions were not erroneous as the term 'wrongful' and the reference to AR 600-20 sufficiently flagged for the panel the need to consider appellant's general intent" is without merit. (Gov't Br. 21). To the contrary, the instructions did not flag anything regarding the *mens rea* for

this offense, much less provide "an accurate, complete, and intelligible statement of the law." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012).

Again, appellant does not dispute the government's contention that a *mens rea* attaches to the specific conduct prohibited by the regulation: "the government must prove *that an accused knew* he was committing" certain actions, including "forcing or requiring the consumption of excessive amounts of food, alcohol, [etc.]" (Gov't Br. 19) (emphasis added). As shown below, the military judge's instructions did not include any such knowledge requirement and would have led the panel to believe SGT Haverty's actual *mens rea* was irrelevant.

The "wrongful" language in this case is distinguishable from *Rapert*.

For this offense, the military judge provided the single and undefined word of "wrongfully" as part of the third element: "That . . . the accused violated this general order by wrongfully requiring Specialist [BB] to consume alcohol." (JA 176, 216). The government cites to *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016) to argue this Court "has found the term 'wrongful' to separate lawful from innocent conduct as it 'relate[s] to mens rea and lack of a defense.'" (Govt. Br. 22). Such an argument fails to account for the full language and context of *Rapert*.

In *Rapert*, which was a judge-alone case, this Court found the "wrongful" element in communicating a threat under Article 134, UCMJ, requires proof of "the accused's *mens rea*," which distinguished the case from *Elonis*. *Rapert*, 75

M.J. at 169. This Court highlighted how language in the MCM and prior jurisprudence specifically outline a *mens rea* requirement for this element. *Id.* Based on this language, this Court actually found the third element of the offense in *Rapert* "could be considered to read as follows . . . That the communication was wrongful [in that the speaker *intended* the statements as something other than a joke or idle banter, or *intended* the statements to serve something other than an innocent or legitimate purpose]." *Id.* (emphasis added) (alteration in original).

The "wrongful" language in the present case is clearly distinguishable from *Rapert*. Unlike the extended guidance related to the "wrongful" element in *Rapert*, the military judge in this case instructed the panel to apply the single and undefined word "wrongfully," which was not contained in the regulation itself. (JA 127–28, 176, 216, 234–35). Therefore, for this offense, the military judge did not provide the type of clarifying language cited by *Rapert* and ultimately failed to notify the panel the government was required to prove appellant's *mens rea.*

However, in addition to arguing the military judge's instructions for this offense were already sufficient, the government further claims the "definitions of 'wrongful' included in The Specifications of Charge III and IV reinforced the message that the panel should consider appellant's state of mind." (Gov't Br. 23). In response, appellant reiterates the arguments from his original brief: 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. 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 such a requirement was inapplicable to the previously instructed offense. (JA 182, 220).

Furthermore, unlike the military judge in *Rapert*, panel members are not presumed to both know and follow the law. Instead, panel members are presumed to follow the instructions given by the military judge. *United States v. Custis,* 65 M.J. 366, 372 (C.A.A.F. 2007). The Supreme Court has held the effect of an instruction is determined by how a "reasonable juror" could have interpreted it, not by an appellate court's interpretation of its legal import. *Sandstrom v. Montana*, 442 U.S. 510, 514, 517 (1979). No "reasonable juror" would have concluded the instructions for this offense mandated consideration of SGT Haverty's *mens rea.*

d. The error materially prejudiced the substantial rights of SGT Haverty and was not harmless.

In arguing that any instructional error was harmless beyond a reasonable doubt, the government recites the two factors outlined by this Court in *United States v. Upham*, 66 M.J. 83 (C.A.A.F. 2008), and asserts "[a]lthough appellant's mens rea was contested, this element was supported by overwhelming evidence." (Gov't Br. 25). This argument improperly characterizes these two factors as being balanced against each other. Instead, contrary to the government's position, this Court has shown both factors must be met before harmless error can be found.

In *Upham*, this Court quoted the Supreme Court's holding in *Neder v. United States*: "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested *and* supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Upham*, 66 M.J. at 86–87 (quoting *Neder*, 527 U.S. 1, 17 (1999) (emphasis added). Notably, in *Upham*, this Court explained the service court "did not expressly address whether Appellant contested the element at trial," which is mandated by *Neder*. *Id.* at 87. Ultimately, this Court found "[t]he defense contested the issues pertinent to aggravated assault, not the offensive touching aspects of assault consummated by a battery. Accordingly, we may affirm the conviction of the lesser included offense under *Neder*." *Id.*

This Court conducted a similar analysis in *United States v. Payne*, 73 M.J. 18 (C.A.A.F. 2014). Even though the military judge omitted instructions for the elements of an offense, this Court found the error to be harmless, as "the omitted elements were *both* 'uncontested and supported by overwhelming evidence.'" *Payne*, 73 M.J. at 25–26 (quoting *Neder*, 527 U.S. at 17) (emphasis added).

If this Court chooses to conduct a harmless error analysis (which was omitted in the majority opinion in *Elonis*), this case is clearly distinguishable from *Neder*, *Upham*, and *Payne*. As the government conceded, the issue of SGT

Haverty's intent was clearly contested. Therefore, the error was not harmless, and the erroneous instruction supports dismissal of the conviction for this offense.

Lastly, SGT Haverty further reiterates his position this Court should not affirm his conviction by finding he acted with a *mens rea* of at least recklessness (as outlined in *Gifford*), because doing so would require this Court to affirm the finding based on a theory that was never presented to the fact-finder at trial. *United States v. Riley*, 50 M.J. 410 (C.A.A.F. 1999).

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 August 19, 2016.

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