IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. STEVEN M. TUCKER Private (E-1) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150634 USCA Dkt. No. 17-0160/AR

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

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CONTENTS

TABLE OF AUTHORITIES

STATUTES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

OTHER AUTHORITIES

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UNITED STATES, Appellee v. STEVEN M. TUCKER Private (E-1) United States Army, Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150634 USCA Dkt. No. 17-0160/AR

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

ISSUE PRESENTED

WHETHER THE ARMY COURT ERRED IN HOLDING THAT THE TERM "DISORDERS AND NEGLECTS" STATES A NEGLIGENCE STANDARD FOR MENTAL CULPABILITY UNDER ARTICLE 134, UCMJ, WHICH PRECLUDES APPLICATION OF *UNITED STATES V. ELONIS*.

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 September 23, 2015, a military judge sitting as a general court-martial convicted Private Steven M. Tucker, pursuant to his pleas, of conspiring to obstruct justice, sexual assault, two specifications of unlawfully providing alcohol to underage soldiers, and obstructing justice in violation of Articles 81, 120, and 134, UCMJ, 10 U.S.C. §§ 881, 920, 934 (2012). The military judge sentenced appellant to be confined for forty-two months and to be discharged from the service with a bad-conduct discharge. (JA 63). The convening authority approved only so much of the adjudged sentence as provided for thirty-six months of confinement and a bad-conduct discharge. (Action).

On October 28, 2016, the Army Court affirmed the findings of guilty and the sentence as approved by the convening authority. (JA 1-4). Appellant was notified of the Army Court's decision and on December 27, 2016, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, appellant petitioned this honorable Court to review the lower court's decision. On February 2, 2017, this Court granted that petition for review

STATEMENT OF FACTS

Private Steven M. Tucker enlisted in the Army as a transportation management coordinator. On the evening of June 21, 2014, he and some ten other soldiers began socializing in their barracks. (JA 26, 64). Private Tucker was one

of the soldiers who brought alcohol to the gathering, and he offered shots "to everyone that wanted one." (JA 34). He "was not checking IDs," and he had "open liquor available for anybody who entered the room." (JA 34). One of the soldiers to whom he gave alcohol was Private TMG, who was less than 21 years old at the time. (JA 29). Private Tucker had never met Private TMG before, however, and he did not have "any reason to believe she was under the age of 21." (JA 30).

The government charged Private Tucker with several offenses arising out of that evening, including his provision of alcohol to Private TMG. The government charged this latter offense under Article 134, UCMJ and alleged that Private Tucker did:

> unlawfully provide Private [TMG], a person under the age of 21, alcoholic beverages, such conduct being to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(JA 10). Private Tucker pled guilty to this offense, Specification 1 of Charge IV. At court-martial, however, the military judge expressed concerns as to whether Private Tucker was actually provident, given that he did not know her age or believe he had any reason to know. (JA 30). Following an extended colloquy with counsel, the military judge ultimately instructed Private Tucker on the concept of negligence, which he defined as "the lack of that degree of care that a reasonably prudent person would have exercised under the same or similar circumstances."

(JA 35). The military judge asked Private Tucker if he was "negligent" in that he "didn't ask [Private TMG] her age or try to verify her age before serving her?" (JA 35). Private Tucker replied "Yes, sir." The military judge then moved on with the rest of the court-martial. (JA 36).

On appeal, Private Tucker challenged the military judge's acceptance of his guilty plea, noting that he should have been instructed on recklessness, rather than negligence, in accordance with *United States v. Elonis*, 135 S. Ct. 2001 (2015) and *United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016). The government, in response, conceded that the military judge should have instructed appellant on the mens rea of recklessness. (JA 3). The Army Court disagreed with both parties, however, finding "*Elonis* and *Gifford* inapplicable to the facts of this case." (JA 4). Reasoning that Article 134 "specifically criminalizes 'disorders and *neglects*'" and thus "clearly states a negligence standard," the Army Court affirmed Private Tucker's convictions. (JA 4) (emphasis in original).

SUMMARY OF ARGUMENT

Article 134 does not specify a scienter, and so military courts must infer one that will separate wrongful conduct from otherwise innocent conduct. The minimum mens rea that will do this is recklessness, and the military judge who accepted Private Tucker's guilty plea should have instructed him accordingly. He did not, however, and that failure was reversible error. Notwithstanding, the Army

Court declined to set aside Private Tucker's conviction, concluding instead that Article 134 actually states a negligence standard for culpability. That conclusion appears to confound "neglects" with "negligence," pitching itself against the plain meaning of the words, the legal history of the article, the jurisprudence of this Court, and the demands of *Elonis*. The lower court's opinion is untenable. This Court should reverse it, and set aside Private Tucker's conviction.

ARGUMENT

The text of Article 134, UCMJ is "silent on the required mental state" for culpability, and it is therefore subject to *Elonis*, 135 S. Ct. at 2010. *Elonis* requires courts to infer "a mens rea requirement in instances where it [is] necessary to separate wrongful conduct from otherwise innocent conduct," which this Court has interpreted to mean, at a minimum, recklessness. *Gifford*, 75 M.J. at 143, 146 (citations omitted). The military judge should have instructed Private Tucker that his conduct had to have been reckless, and not merely negligent, in order to be criminal. Private Tucker's guilty plea was thus ill-informed, and the military judge's acceptance thereof was reversible error. *United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013). Specification 1 of Charge IV must be set aside.

The Army Court came to a different conclusion, however, declining to apply *Elonis* and *Gifford*, and even rejecting the government's concession that recklessness was the right mens rea here. Instead, the lower court held that,

because Article 134 "specifically criminalizes 'disorders and *neglects,*'" it therefore "clearly states a negligence standard." (JA 4). The Army Court cited no support for its novel understanding, and at best it merely tried to distinguish *Elonis*, *Gifford* and *Rapert*. By all appearances, the Army Court affirmed Private Tucker's conviction simply because it conflated "neglects" with "negligence." That is an error of law for this Court to review de novo. *See United States v. Rapert*, 75 M.J. 164, 168 (C.A.A.F. 2016).

1. Article 134's silence on mental culpability requires this Court to infer a mens rea of recklessness.

Article 134 makes no mention of mens rea. While it proscribes "disorders and neglects," "conduct," and "crimes and offenses not capital," it says nothing as to whether those acts must be committed "wrongfully," "wantonly," "knowingly," or "willfully" to be criminal. 10 U.S.C. § 934. The article addresses conduct, but not mental culpability; it invokes nouns, but omits adverbs; it sets out crimes, but overlooks their subjective criminality. Article 134 is silent as to what mens rea Congress wanted, and it is precisely the kind of statute at which *Elonis* takes aim. That much is clear from the article's plain language, its legal history, this Court's case law, and sensible policy concerns.

a. As a matter of plain English, "disorders and neglects" does not mean "negligence."

The Army Court read into Article 134 a negligence standard that does not exist. That error appears to result from two mistakes. First, the lower court split the word "neglects" from its conjoined partner "disorders." Second, the lower court misapprehended the meaning of "neglects." A "neglect" does not describe a mental state, but rather an absence of action, an objective fact defined as the "omission of proper attention to a person or thing, whether inadvertent, negligent, or willful." *Neglect*, Black's Law Dictionary (8th Ed. 2004). A "neglect" is thus a genre of actus reus. "Negligence," on the other hand, speaks to unawareness, inattention, or "culpable carelessness." *Negligence*, *id.* The two words are separate and distinct; "neglect" does not "generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty or act." *Neglect*, Ballentine's Law Dictionary (3d ed. 1969). Indeed, one can "willfully neglect" one act but "negligently commit" another. The existence of the term "neglects" in Article 134, then, has no more to do with negligence or mental culpability than its companion terms "disorders," "conduct," or "crimes and offenses not capital."

b. As a matter of legal usage, "disorders and neglects" does not mean "negligence."

A historical view of the term "disorders and neglects" further shows that its legal meaning matches its lexical one. With a lineage stretching as far back as the British Articles of War of 1765, the duet of "disorders and neglects" has always represented an effort to reduce the otherwise irreducible customs of military service into one penal provision. *Parker v. Levy*, 417 U.S. 733, 745 (1974). The purpose of this "comprehensive term" remained the same even when reborn in the United States' own Articles of War, its broad reach continuing to include:

> all such insubordination; disrespectful or insulting language or behaviour towards superiors or inferiors in rank; violence; immorality; dishonesty; fraud or falsification; drunken, turbulent, wanton, mutinous, or irregular conduct; violation of standing orders, regulations, or instructions; neglect or evasion of official or routine duty, or failure to fully or properly perform it; in fine all such 'sins of commission or omission,' on the part either of officers or soldiers as, on the one hand, do not fall within the category of the 'crimes' previously designated, and, on the other hand, are not expressly made punishable in any of the other ('foregoing') specific Articles of the code, while yet being clearly prejudicial to good order and military discipline.

United States v. Herndon, 4 C.M.R. 53, 56-57 (C.M.A. 1952); *citing to* William Winthrop, *Military Law and Precedents* 722 (2nd ed, 1920). To Colonel Winthrop in 1920, to the Supreme Court in 1974, and to this Court today, the term "disorders and neglects" has always stood as a general clause prohibiting generalized

offenses, which by its very generality, avoids the finer work of inventorying mental states. To read the word "neglects" as a stand-in for "negligence" misapprehends its operation within Article 134 and assigns it a narrowness discordant with the statute's purpose. *Parker*, 417 U.S. at 754. The prohibition on "disorders and neglects to the prejudice of good order and discipline in the armed forces" is a prohibition on breaching military custom, and as the following section shows, convicting servicemembers for mere negligence is far from customary. Indeed, this Court has already concluded that the act of providing alcohol to minors, taken in its historical context, only constitutes an offense when done recklessly. *Gifford*, 75 M.J. at 146. The Army Court's opinion departs from all of these considerations, and it should be reversed.

c. This Court has repeatedly rejected negligence as the default standard for mental culpability.

More than sixty years ago, this Court considered the scienter needed to sustain narcotics convictions under Article 134. *United States v. Greenwood*, 19 C.M.R. 335, 337-38 (C.M.A. 1955). Insisting on a culpable mind, and not just a negligent one, this Court held that: "Unless required by statute or ancient custom, we simply hesitate to bottom criminal responsibility as a matter of law on a mere negligent omission." *Id.* at 342. This is the same basic motto, reprised throughout American criminal law and highlighted anew in *Elonis*: "wrongdoing must be

conscious to be criminal." *Elonis*, 135 S. Ct. at 2009. Article 134 presents no general exception to this rule.[1]

The opinion at bar not only runs against this Court's early jurisprudence, but also its more recent decisions. In *United States v. Rapert,* for example, this Court addressed whether the government "was only required to prove negligence in order to secure a conviction for communicating a threat under Article 134, UCMJ." *Rapert*, 75 M.J. at 167-68. If negligence was truly the threshold for culpability under Article 134, as the Army Court now asserts, this Court could have said so and resolved *Rapert* on those grounds. But it did not. Instead, this Court demonstrated why its jurisprudence and the Manual for Courts-Martial required proof of the accused's mental state. *Id.* at 169. The conviction in *Rapert* would not have survived scrutiny under *Elonis* without proof of a "subjective element" that prevented "the criminalization of otherwise innocent conduct." *Id.* at 168. The clear implication, then, is that the text of Article 134 does not diminish the

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[1] There are, of course, two specific and enumerated exceptions: discharging a firearm through negligence and negligent homicide. Manual for Courts-Martial (2012 ed.) [hereinafter MCM], paras 80, 85. The justification for both prohibitions lies in the pronounced military interests they serve and the long-standing customs from which they arise. *See, e.g., United States v. Kick*, 7 M.J. 82, 83-84 (C.M.A. 1979) ("There is a special need in the military to make [negligent homicide] . . . a criminal act . . . because of the extensive use, handling and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles, and the like. The danger to others from careless acts is so great that society demands protection."). Such unique military considerations are absent in this case. *See Gifford*, 75 M.J. at 146.

government's burden to prove "awareness of some wrongdoing" in a criminal trial. *Elonis*, 135 S. Ct. at 2011. To say it more directly, this Court has already rejected the Army Court's reasoning, and it should do so again.

d. Lowering the threshold of culpability for general disorder offenses would invite uncertainty, abuse, and injustice.

Finally, this Court must stave off the obvious dangers invited by the lower court's opinion. Article 134 sits atop a delicately balanced set of statutory, customary, and jurisprudential limitations. Its constitutionality rests on a faith that "practical men in the navy and army" and "those who have studied the law of courts martial" know the article's unwritten limits, and that, somehow, servicemembers acquire these intuitions through military custom and acculturation. *Parker*, 417 U.S. at 747. Legal though they be, the general clauses of Article 134 are still an "uncertain regime," requiring "courts to step inside and say who could be rightfully detained, and who should be set at large." *Id.* at 782 (Stewart, J., dissenting). Article 134 already suffers a heightened vulnerability to abuse; making negligence the new mark of criminality for Article 134 would undam the enduring concerns over its "apparent indeterminateness" and "sizable areas of uncertainty," and suggest that tort liability has overtaken military justice. *Id.* at 747, 754. There is no reason to believe Congress, the President, or this Court have ever desired such a thing.

2. The military judge's failure to instruct Private Tucker on recklessness was reversible error, and Specification 1 of Charge IV must be set aside.

The absence of a mens rea in Article 134 meant the military judge had to impute one that would "separate wrongful conduct from otherwise innocent conduct." *Gifford*, 75 M.J. at 147. As this Court has already established, recklessness was the minimum threshold for criminality here, *id.* at 146, yet the military judge instructed Private Tucker on negligence. (JA 17, 35). The failure to instruct on the right mens rea was reversible error. *See United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013). If it were somehow "clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty," the error would be harmless, but those circumstances are absent here. *Id.*

Private Tucker did not know the elements of his plea because the military judge gave him the wrong mens rea. *See id.* Private Tucker did not admit to recklessly plying Private TMG with alcohol either, as he had no "reason to believe she was under the age of 21." (JA 30). As a result, he could not have "consciously disregard[ed] the known risk" that she was "under twenty-one," because he did not perceive the risk to begin with. *Gifford*, 75 M.J. at 147; (JA 30). Private Tucker may have thought "quite a few people under 21" lived in the barracks, but that does not mean he had a reason to think Private TMG was one of them. (JA 30,

35). His only direct statements on the matter show that he was negligent but unware of the risk; this Court cannot say the record "clearly" establishes that Private Tucker "freely" admitted to recklessly giving Private TMG alcohol. *Schell*, 72 M.J. at 345. Under facts such as these, Private Tucker's conviction must be set aside.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court set aside Specification 1 of Charge IV, and set aside and reassess Private Tucker's sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Tucker,* Crim. App. Dkt. No. 20150634, USCA Dkt. No. 17-0160/AR, was delivered to the Court and Government Appellate Division on March 9, 2017.

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