IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Issue Presented:

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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, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ.

Statement of the Case

On September 23, 2015, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of conspiracy to

obstruct justice, one specification of sexual assault, two specifications of unlawfully providing alcohol to a person under the age of twenty-one, and obstruction of justice in violation of Articles 81, 120, and 134, UCMJ. (JA 14, 58). 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). Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for confinement for thirty-six months and a bad-conduct discharge. (JA 1-2)

On October 28, 2016, the Army Court affirmed the findings of guilty and the sentence. (JA 1-4). Appellant petitioned this court for review on December 27, 2016, with the above stated issue. On February 2, 2017, this court granted appellant's petition for grant of review and ordered briefs on the above stated issue. *United States v. Tucker*, No. 17-0160/AR (C.A.A.F. February 2, 2017) (order). Appellant's brief was submitted on March 9, 2017.

Statement of Facts

During appellant's providence inquiry, the military judge read the elements of Specification 1 of Charge IV, providing alcohol to Private (PV2) TG, a person under the age of twenty-one, in violation of Article 134, UCMJ, as follows:

> One, that on or about 21 June 2014, at or near Fort Knox, Kentucky, you unlawfully provided Private [TG], a person under the age of 21, alcoholic beverages.

> Two, that under the circumstances, your conduct was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(JA 18-19).

Appellant described the night of 21 June 2014 for the military judge. (JA 23). He lived in the barracks in Fort Knox, Kentucky, where there was a party occurring on the first floor. (JA 23, 26). Appellant went to the gas station to purchase alcohol for the party. (JA 27). He purchased Jägermeister and special cups for an alcoholic drink called a "Jägerbomb." (JA 24-25). The cups were shaped as a shot glass surrounded by a larger cup. (JA 25, 65). The purpose of the cups was to pour a shot of Jägermeister into the shot glass and then fill the surrounding cup with an energy drink. (JA 25, 65).

Appellant brought the alcohol and the cups to the party in order to share it with other people. (JA 26-27). He poured three to four "Jägerbombs" for PV2 TG. (JA 29-30). Private TG was nineteen years old. (JA 65). Appellant did not know that PV2 TG was under the age of twenty-one at the time. (JA 30). During the providence inquiry the military judge and the parties discussed whether Specification 1 of Charge IV was a specific or general intent crime. (JA 31-32). The trial counsel stated that the specification was a general intent crime, and under that theory, appellant was provident to the offense. (JA 32). The defense counsel

agreed that the specification was a general intent crime and that appellant could be criminally liable for "deliberate ignorance" of PV2 TG's age. (JA 33).

Appellant stated that he provided the alcohol to PV2 TG and everyone else at the party without asking anyone for their age. (JA 34). Appellant knew that there were people under the age of twenty-one living in the barracks, but he left the alcohol available for anyone at the party. (JA 34-35). The military judge instructed appellant that "negligence is the lack of that degree of care that a reasonably prudent person would have exercised under the same or similar circumstances." (JA 35). Appellant agreed that he was negligent when he provided alcohol to PV2 TG without asking her for her age. (JA 35).

On appeal, appellant argued that he was improvident to his plea to Specification 1 of Charge IV. (JA 2). The Army Court found that the military judge did not abuse his discretion in accepting appellant's plea. (JA 4). In doing so, the Army Court determined that Article 134, UCMJ, is not silent on the requisite mens rea for culpability under the statute, because it "specifically criminalizes 'disorders and neglects' that are prejudicial to good order and discipline, or which tend to discredit the service." (JA 4). The Army Court found that this statutory language proscribes "neglect[ful]" conduct. (JA 3). Therefore, Article 134, UCMJ, "falls outside" the Supreme Court's decision in *Elonis v. United States*, 135 S. Ct. 2001 (2015). (JA 4).

Granted Issue

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*.

Summary of Argument

The term "all disorders and neglects" in Article, 134, UCMJ, is intended to proscribe a wide range of conduct with various mens rea requirements. In comparing the use of the term "neglects" in other UCMJ articles, analyzing the legislative intent, and analogizing to public welfare offenses, it becomes clear that Congress intended Article 134, UCMJ, to encompass negligent and strict liability offenses within its proscription. The Supreme Court's reluctance to infer that a negligence standard was intended in criminal statutes that are silent on the required mental state is not applicable when there is a "clear indication that Congress intended that result." *Elonis*, 135 S. Ct. at 2010 (citing *Liparota v. United States*, 471 U.S. 419, 427 (1985)). Appellant's guilty plea to conduct proscribed by General Article 134, UCMJ, was provident regardless of whether this Court determines negligence or recklessness is the requisite mens rea for the proscribed conduct.

Standard of Review

Questions of statutory interpretation are reviewed by this Court de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). "[This court] review[s] a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "There exist strong arguments in favor of giving broad discretion to military judges in accepting pleas, not least because facts are by definition undeveloped in such cases." *Id.* Appellant bears the burden of establishing that the alleged conflict created a "substantial basis in law and fact" to question the guilty plea. *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A 1991)).

Law and Analysis

"It is a fundamental principle of criminal law that 'wrongdoing must be conscious to be criminal.'" *United States v. Caldwell*, 75 M.J. 276, 280 (C.A.A.F. 2016) (quoting *Elonis*, 135 S. Ct. at 2009) (citation omitted and internal quotations omitted). In applying this principle, the Supreme Court instructed, "When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Elonis*, 135 S. Ct. at 2010 (quoting

Carter v. United States, 530 U.S. 255, 269 (2000)) (quotation omitted). This Court in *United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016), applied these principles and determined that "silence in a criminal statute . . . does not prevent mens rea from being inferred." This Court then inferred a mens rea requirement of recklessness into a general order that was silent on mens rea because "[u]nder the circumstances of [that] case" recklessness is the lowest mens rea necessary to separate wrongful from otherwise innocent conduct. *Id.* at 147. "The Supreme Court's decision in *Elonis* and [this Court's] decision in *Gifford* are predicated on the absence of a statutory *mens rea* requirement. The Supreme Court created a 'gap-filling rule' for a *mens rea* requirement when an offense is *otherwise silent*." *United States v. Tucker*, 75 M.J. 872, 875 (Army Ct. Crim. App. 2016) (citing *Elonis*, 135 S. Ct. at 2010-11).

"[W]e have long recognized that determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Staples v. United States*, 511 U.S. 600, 605 (1994) (quoting *United States v. Balint*, 258 U.S. 250, 253 (1922)).

The first step in an analysis of statutory construction is to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *United States*

v. McPherson, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, (2002)). "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.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Congressional intent can be determined through an analysis of "statutory interpretation, comparison to other federal statutes, and review of legislative history." *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010) (citing *United States v. Taylor*, 12 U.S.C.M.A. 44, 45-47, 30 C.M.R. 44, 45-47 (1960)).

This court should look at the UCMJ as a whole and determine that the intent of the term "disorders and neglects" in Article 134, UCMJ, is to proscribe conduct with various mens rea requirements. In order to provide a coherent and consistent scheme within the UCMJ for the term "neglects," this court should find that it includes negligent conduct. In looking at the legislative history of the term "disorders and neglects," conducting a statutory analysis, and analogizing with civilian codes, it is clear that the legislative intent for Article 134, UCMJ, is to include negligent offenses and strict liability offenses within its proscription.

A. In order to provide a coherent and consistent scheme within the UCMJ for the term "neglects," this court should find that it includes negligent conduct.

"Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory

scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). In examining an enactment by Congress, "the act should not be dissected, and its various phrases considered *in vacuo*. It must be presumed that the legislature had a definite purpose in every enactment, and it is the construction that produces the greatest harmony and least inconsistency which must prevail." *United States v. Johnson*, 3 M.J. 361, 362 (C.M.A. 1977).

In 1951, Article 134 was enacted in the UCMJ and was drafted to punish "all disorders or neglects." *Parker v. Levy*, 417 U.S. 733, 746 (1974). At the time, the term "neglect" was also used in four other punitive articles: Articles 87, 96, 99, and 108, UCMJ, (1951). Article 108, UCMJ, has been interpreted by this Court to criminalize "merely negligent conduct." *United States v. Schelin*, 15 M.J. 218, 220 (C.A.A.F. 1983). Article 99, UCMJ, has been interpreted to encompass negligent conduct. *See United States v. Yarborough*, 1 U.S.C.M.A. 678, 5 C.M.R. 106, 114 (1952); *United States v. Payne*, 40 C.M.R. 516, 519 (A.C.M.R. 1969). The term "neglect" as used in Article 87, UCMJ, has been used interchangeably with negligence. *See United States v. Chandler*, 23 U.S.C.M.A. 193, 48 C.M.R. 945, 945 (1974); *United States v. Blair*, 24 M.J. 879, 880 (A.C.M.R. 1987); *United States v. Daggett*, 34 C.M.R. 706, 707-08 (N.B.R. 1964). In order to maintain

consistency throughout the UCMJ, this Court should apply the same meaning to "neglects" in Article 134, UCMJ.

B. In looking at the legislative history of the term "disorders and neglects" and conducting a statutory analysis of Article 134, UCMJ, it is clear that the legislative intent is to include negligent offenses.

"When a statute is a part of a larger Act . . . the starting point for ascertaining legislative intent is to look to other sections of the Act in pari materia with the statute under review." *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010) (quoting *United States v. McGuinness*, 35 M.J. 149, 153 (C.M.A. 1992)) (alteration in original). Article 134, UCMJ, was "derived from" the Ninety-Sixth Article of War with the intention that offenses not defined under the punitive articles would still be punishable by court-martial under this general article. *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess., 1235, 1238-39 (1949). Article 92, UCMJ, also comes from the Ninety-Sixth Article of War, as the conduct proscribed in Article 92, UCMJ, was originally proscribed by the Ninety-Sixth Article of War. *Hearings on H.R. 2498* at 1227. This Court has determined that the legislative intent of Article 92, UCMJ, was to encompass acts committed by simple negligence. *United States v. Lawson*, 36 M.J. 415, 420-21 (C.M.A. 1993). Since Article 92, UCMJ, and Article 134, UCMJ, have the same origin, this indicates that

Article 134, UCMJ, has the same legislative intent to encompass negligent conduct.

After the enactment of Article 134, UCMJ, this Court interpreted the meaning of "all disorders and neglects" very broadly as a "comprehensive term" including:

> [A]ll 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, 1 U.S.C.M.A. 461, 4 C.M.R. 53, 56 (1952) (quoting Winthrop, Military Law and Precedents, 2d ed, 1920 Reprint, 722.).

A statutory analysis of Article 134, UCMJ, demonstrates Congress' intent to proscribe negligent conduct. Since the enactment of Article 134, UCMJ, this Court has upheld negligent actions as proscribed by the statute, and the President has specified negligent offenses under this statute. In *United States v. Vaughan*, 58 M.J. 29, 35 (C.A.A.F. 2003), this Court found that a crime of child neglect punished under general Article 134, UCMJ, required culpable negligence. In

United States v. Kirchner, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952), this Court "specifically found that negligent homicide by a service member could be properly punished under Article 134, UCMJ." *United States v. Kick*, 7 M.J. 82, 84 (C.M.A. 1979). In *Kick*, this Court reaffirmed that proof of simple negligence is all that is required for the crime of negligent homicide under Article 134, UCMJ. *Id.*; *see also United States v Darisse*, 17 U.S.C.M.A. 29, 37 C.M.R. 293 (1967) (finding that a conviction under Article 134, UCMJ, could be sustained for discharging a firearm by carelessness and negligence). If simple negligence was not punishable under Article 134, UCMJ, then the President would not have the ability to create the offense of negligent homicide in the UCMJ. *See United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010).[1] The legislative history and statutory analysis indicate the legislative intent to include negligent offenses in the conduct proscribed by Article 134, UCMJ.

C. In analogizing Article 134, UCMJ, with civilian codes, it is clear that the legislative intent for minor offenses proscribed by the statute was to create a public welfare offense in the military and to proscribe strict liability offenses.

Considering the wide range of crimes that were intended to be punished under Article 134, UCMJ, it is only the minor offenses in which no mens rea is specified that this Court should find are analogous to public welfare offenses.

[1] On the opposite side of the spectrum, in *United States v. Fuller*, 9 U.S.C.M.A. 143, 25 C.M.R. 405 (1958) this Court determined that burning with intent to defraud was appropriately charged under Article 134, UCMJ. This demonstrates the wide range of crimes involving various mens rea that were intended to be charged under Article 134, UCMJ.

"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." *Gifford*, 75 M.J. at 143 (citing *Balint*, 258 U.S. at 252-53, *Staples*, 511 U.S. at 606). "In certain instances, this class of legislation produces what is known as a 'public welfare offense,' *Staples*, 511 U.S. at 606-07, which uniquely focuses on 'social betterment' or 'proper care' rather than punishment, *Balint*, 258 U.S. at 251-53." *Id.* In *Gifford*, this Court looked at the history of the offense, the nature of the offense, and the gravity of the punishment in determining whether a general order created what was analogous to a public welfare offense. *Id.*

1. The history of Article 134, UCMJ, demonstrates the legislative intent to create a public welfare offense in the military.

The Supreme Court has analyzed the historical treatment of a crime to determine whether Congressional silence as to mental elements in a statute was purposeful:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Morissette v. United States, 342 U.S. 246, 262-63 (1952). In *Parker v. Levy*, the Supreme Court traced the origins of the term "disorder and neglects," in Article

134, UCMJ, back to 1642 in the Articles of the Earl of Essex and the British Articles of War of 1765. *Levy*, 417 U.S. at 745. After a thorough analysis of the meaning of this term adopted into the Articles of War and Article 134, UCMJ, the Supreme Court found that the intent was to:

> [R]egulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community.

Id. at 745-49. The Supreme Court clearly distinguished the broad range of conduct that Congress intended to regulate in the UCMJ from the typical narrow state criminal code that regulates civilians. *Id.* at 750. Considering the centuries of use of the term "disorders and neglects," to encompass a broad range of conduct much larger than what is regulated in the civilian sphere, it is clear that Congress intended Article 134, UCMJ, to remain unconstrained by a specific mens rea requirement.

2. The nature of offenses punishable under Article 134, UCMJ, are the type of conduct that a reasonable service member should know is subject to stringent regulation.

In most cases where the Supreme Court has found public welfare offenses, "Congress has 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." *Liparota*, 471 U.S. at 433. Considering the unique military context, service members subject to the UCMJ are aware that conduct that is prejudicial to good order and discipline is subject to stringent regulation.

In *Parker v. Levy*, the Supreme Court recognized that the breadth of Article 134, UCMJ, is narrowed by this Court and by other military authorities to "calls for active opposition to the military policy of the United States." 417 U.S. at 753 (citing *United States v. Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972)). Article 134, UCMJ, "does not make every irregular, mischievous, or improper act a court-martial offense, but its reach is limited to conduct that is directly and palpably -- as distinguished from indirectly and remotely -- prejudicial to good order and discipline." *Id.* (quoting *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 565, 34 C.M.R. 343, 345 (1964) and *United States v. Holiday*, 4 U.S.C.M.A. 454, 456, 16 C.M.R. 28, 30 (1954) (internal quotations marks omitted).

The Supreme Court discussed the difference between military and civilian criminal codes and noted the Court of Claims finding that conduct to the prejudice of good order and discipline "must be gauged by an actual knowledge and experience of military life." *Id.* at 748-49 (quoting *Swaim v. United States*, 28 Ct. Cl. 173, 223 (1893). Because service members have actual knowledge of the type of conduct that is prejudicial to good order and discipline they are also aware that this conduct is subject to regulation. *See Vaughan*, 58 M.J. at 32-33 (military

custom that further defines the scope of conduct proscribed by Article 134, UCMJ, is considered in determining whether an appellant had fair notice that his conduct was subject to regulation).

Service members must be found to have adequate notice that their conduct is subject to criminal sanction before they can be punished under Article 134, UCMJ. *Levy*, 417 U.S. at 755; *Vaughan*, 58 M.J. at 31; *United States v. Saunders*, 59 M.J. 1, 6 (C.A.A.F. 2003). In *Vaughan*, this Court looked at whether the crime was delineated in military case law, whether state statutes criminalize the conduct, and military custom and regulation in determining whether an appellant had adequate notice. *Vaughan*, 58 M.J. at 31-33. Assuming the notice requirements are met, service members are aware of the type of conduct that is prejudicial to good order and discipline and aware that it is subject to stringent regulation in the military.

3. The gravity of the punishment for minor Article 134, UCMJ, offenses is minimal.

"The 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.'" *Gifford*, 75 M.J. at 146 (quoting *Morissette*, 342 U.S. at 256). In *Parker v. Levy*, the Supreme Court recognized that "a range of minor sanctions for lesser infractions [of Article 134, UCMJ] are often imposed administratively." 417 U.S. at 750. The minor sanctions include the punishments under Article 15, UCMJ, forfeiture of pay, reduction in rank, and dismissal from

the service. *Id.* The minor offenses specified by the President under Article 134, UCMJ, include limited maximum punishments. Additionally, this Court has limited the maximum punishment, stating "offenses not specifically listed, that are not closely related to or included in a listed offense, that do not describe acts that are criminal under the United States Code, and where there is no maximum punishment 'authorized by the custom of the service,' they are punishable as 'general' or 'simple' disorders, with a maximum sentence of four months of confinement and forfeiture of two-thirds pay per month for four months." *United States v. Beaty*, 70 M.J. 39, 45 (C.A.A.F. 2011) (quoting UCMJ art. 134).

Considering the history and origins of Article 134, UCMJ, that service members are on notice as to the type of conduct that is prejudicial to good order and discipline and that it is subject to regulation, and the limited punishment that is available for minor Article 134, UCMJ, offenses, these crimes are analogous to public welfare offenses. This court should find that minor offenses under Article 134, UCMJ, in which no mens rea is specified were intended by Congress to be analogous to public welfare offenses and not subject to the general disfavor for strict liability offenses.

D. The legislative intent for Article 134, UCMJ, provides a clear indication that Congress intended to proscribe a wide range of conduct with various mens rea requirements including negligent and strict liability offenses; therefore, *Elonis* is inapplicable.

"[S]ome indication of congressional intent, express or implied, is required to dispense with mens rea as an element of a crime." *Staples,* 511 U.S. at 606. In *Liparota*, the Supreme Court found Congress could have intended to proscribe a broad range of conduct but declined to adopt such a sweeping interpretation of the statute "given the paucity of material suggesting that Congress did so intend." 471 U.S. at 426-27. *See also Elonis*, 135 S. Ct. at 2010 (the Supreme Court referred to its decision in *Liprota* and stated that it refused to adopt a broad interpretation of the statute "in the absence of a clear indication that Congress intended that result").

In this case, unlike *Elonis* and *Liprota*, there is a clear indication from Congress that it intended the term "all disorders and neglects" to proscribe a broad range of conduct with various mens rea requirements including negligent and strict liability offenses. First, the text of Article 134, UCMJ, is not completely silent on mens rea. This Court and the Courts of Criminal Appeals have treated articles in the UCMJ in which Congress uses the term "neglect" to encompass negligent acts. Second, analysis of the legislative intent provides a clear indication that Congress intended Article 134, UCMJ, to encompass negligent and strict liability offenses. The Congressional intent is demonstrated in the legislative history, statutory analysis, and comparison of Article 134, UCMJ, to public welfare offenses.

The justification for this broad reading of the statute is because military law incorporates the necessity of "obedience in the soldier." *Parker*, 417 U.S. at 744. The Supreme Court explained, "The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Id.* (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)). Therefore, "cases involving 'conduct to the prejudice of good order and military discipline,' . . . '[are] beyond the bounds of ordinary judicial judgement, for they are not measureable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties.'" *Id.* (quoting *Swaim* 28 Ct. Cl. at 228).

As a result of the need for obedience and good order and discipline within the military, Congress is permitted to legislate more broadly in matters of military justice, and it has chosen to do so:

> The differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the [UCMJ]. That Code cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the [UCMJ] essays more varied regulation of a

> much larger segment of the activities of the more tightly knit military community.

Id. at 749. Since *Parker*, this Court has noted Congress' continued intent to legislate more broadly when compared to civilian codes. In *Kick*, the appellant cited civilian precedents to argue that an elevated mental state was required for homicide. *Kick*, 7 M.J. at 83. This Court relied on *Parker*, noted the special need in the military to punish homicide even where the accused acts only with simple negligence, and rejected the appellant's argument. *Id.* at 83-84. In *United States v. Solis*, this Court noted that Article 107, UCMJ, should be construed more broadly than its civilian counterpart. 46 M.J. 31, 33-34 (C.A.A.F. 1997). This Court then explained the reason for the difference is due to the "primary purpose of military criminal law -- to maintain morale, good order, and discipline." *Id.* In *United States v. Neal*, this Court found that Congress has the authority to "define rape and its related offenses in a manner that does not require proof on the subject of consent." 68 M.J. 289, 301 (C.A.A.F. 2010). Again, this Court cited *Parker*, and noted "the broad authority of Congress to regulate the conduct of military personnel" due to the "devastating impact on the good order and discipline essential to the conduct of military operations." *Id.* at 300-01.

General Article 134, UCMJ, was written by Congress with the express purpose to regulate "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Considering the language of the Article 134,

UCMJ, and the clear legislative intent to legislate broadly, the requirement noted in *Elonis* for courts to infer a *mens rea* is inapplicable. This Court should interpret this statute consistently with *Parker*, *Kick*, *Solis*, and *Neal*, by noting that Congress has the broad authority to regulate the conduct of military personnel due to the necessity of good order and discipline and has chosen to do so here by proscribing a broad range of conduct to include negligent and strict liability offenses.

E. Appellant's guilty plea to Article 134, UCMJ, was provident to negligent and reckless conduct.

The entirety of the record demonstrates that the accused was aware of the elements of the crime of providing alcohol to a person under the age of twenty-one, he admitted them freely, and pleaded guilty because he was guilty. An appellate court "must find 'a substantial conflict between the plea and the [appellant's] statements or other evidence' in order to set aside a guilty plea. The 'mere possibility' of a conflict is not sufficient." *United States v. Watson*, 71 M.J. 54, 58 (C.A.A.F. 2012) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)). For the court to find "a plea of guilty to be knowing and voluntary, the record of trial must reflect that the elements of each offense charged have been explained to the accused by the military judge." *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003) (citing *United States v. Care*, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247 (1969)) (internal quotation marks omitted). "If the military judge fails to [reflect the elements of each offense], he commits reversible error, unless it

is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty." *Id.* (citing *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992)) (internal quotation marks omitted). "Rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." *Id.* (citations omitted).

Appellant argues that the military judge abused his discretion in accepting his plea "because the military judge gave him the wrong mens rea." (Appellant's Br. 12). Even if the military judge erroneously advised appellant on the mens rea of negligence instead of recklessness, this did not create a substantial conflict with the plea.

This Court can infer from appellant's description of his actions and from the defense counsel's theory of liability that appellant was aware of the elements of the offense to which he pleaded guilty. Appellant freely admitted to facts that amounted to recklessness when he said that he knew there were people living in the barracks who were under the age of twenty-one, and he provided alcohol directly to PV2 TG without asking for her age. (JA 34-35). In *Gifford*, this Court explained that reckless conduct in a similar scenario would mean "providing alcohol to individuals for the purpose of consumption while *consciously* disregarding the *known* risk that those individuals are under twenty-one." *Gifford*,

75 M.J. at 147. Appellant described reckless conduct in his conscious disregard of the known risk that individuals at the party were under the age of twenty-one.

Additionally, the defense counsel's theory for why appellant was guilty of the offense was essentially because of appellant's reckless actions. In *Jones*, this Court found a plea to be provident where the military judge failed to provide a necessary definition of a term, because the appellant discussed the issue with defense counsel. *Jones*, 34 M.J. at 272. Similarly, in this case, the military judge identified the mens rea issue and provided the defense counsel a break so that he could research the issue and presumably consult with his client. (JA 30-31). Even after the break, the defense counsel continued to argue in support of appellant's plea being provident. (JA 31-32). The defense counsel stated that the crime was a general intent crime, that "deliberate ignorance can create criminal liability" and then cited *United States v. Dougal*, 32 M.J. 863 (N.M.C.M.R. 1991). (JA 32-33). In *Dougal*, the court essentially explained a reckless theory of liability in that the appellant "purposely avoided learning a fact, was aware there was a high probability the fact existed, and lacked an actual belief in the nonexistence of the fact." *Id.* at 867-68. Therefore, appellant's defense counsel understood that appellant's conduct was reckless and argued that appellant was provident to the offense under this theory.

Appellant freely admitted the facts that made him guilty and pleaded guilty because he was guilty. Appellant was provident to his plea of guilty to Specification 1 of Charge IV and the military judge did not abuse his discretion in accepting it.

Conclusion

WHEREFORE, the Government respectfully requests this Honorable Court affirm the decision of the Army Court.

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CERTIFICATE OF FILING AND SERVICE

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 April 10, 2017.

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