IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

United States, Appellee v. Vashaun M. Blanks Senior Airman (E-4) U.S. Air Force, Appellant	APPELLANT'S BRIEF IN SUPPORT OF GRANTED ISSUE USCA Dkt. No. 17-0404/AF Crim. App. No. 38891

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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ISSUE PRESENTED

IN LIGHT OF THIS COURT'S DECISION IN *UNITED STATES V. HAVERTY*, 76 M.J. 199 (C.A.A.F. 2017), DID THE MILITARY JUDGE ERR WHEN HE INSTRUCTED THE MEMBERS APPELLANT COULD BE CONVICTED OF NEGLIGENT DERELICTION OF DUTY?

Statement of Statutory Jurisdiction

The lower court had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012). The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

Senior Airman (SrA) Blanks was tried by a general court-martial composed of officer members with enlisted representation between May 12 and 15, 2015. (J.A. 29, 44.) SrA Blanks was acquitted of one specification of willful dereliction of duty by failing to provide adequate financial support to his wife, but he was convicted of the lesser included offense of negligent dereliction of duty in violation of Article 92, UCMJ. 10 U.S.C. § 892 (2012). (J.A. 40, 93.) SrA Blanks was also acquitted of stealing military property of a value of more than $500.00 between June 6, 2011, and May 27, 2012, in violation of Article 121, UCMJ, 10 U.S.C. § 921 (2012). (J.A. 42, 93.) And he was acquitted of signing an official record on July 11, 2012, certifying he provided his wife adequate support in violation of Article 107, UCMJ. 10 U.S.C. § 907 (2012). (*Id.*)

Appellant pleaded guilty to three specifications of making false official statements to his chain of command and investigators, to the effect that his wife and girlfriend were the same person, in violation of Article 107, UCMJ, 10

U.S.C. § 907. (J.A. 42, 49, 93.) Contrary to his plea, he was convicted of signing an official record on August 6, 2014, certifying he provided his wife adequate support from July 12, 2012, to August 6, 2014, in violation of Article 107, UCMJ, 10 U.S.C. § 907. (J.A. 40, 49, 93.) He was also convicted, contrary to his pleas, of one specification of larceny of military property of a value of more than $500.00 between May 28, 2012, and January 21, 2015, and one specification of obstruction of justice in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934 (2012). (J.A. 42-43, 49, 93.)

On May 15, 2015, the members sentenced Appellant to thirty days of confinement, forfeiture of $1,546.00 pay per month for two months, reduction to E-1, and a bad-conduct discharge. (J.A. 94.) On September 1, 2015, the Convening Authority approved the sentence as adjudged and, with the exception of the punitive discharge, ordered it executed. (J.A. 24-28.)

The lower court affirmed the findings and sentence on March 16, 2017. *United States v. Blanks*, 2017 CCA LEXIS 186 (A. F. Ct. Crim. App. 2017). (J.A. 2-23.) SrA Blanks petitioned this Court for review on May 15, 2017. This Court granted review on August 29, 2017. (J.A. 1.)

Statement of Facts

As trial counsel accurately told the members, "this is not the crime of the century[.]" (J.A. 92.) This case began with Appellant's attempt to take ten days of parental leave after the birth of his son. (J.A. 52.) At the time of SrA Blanks'

trial, Air Force Instruction (AFI) 36-3003 authorized commanders to approve ten days of paternity leave for fathers to bond with their children, but only if they were married to the mother of their child. (J.A. 120, Rule 48.) The AFI has since been amended to require commanders to grant fathers parental leave, but continues to apply only if the servicemember's "spouse gives birth to a child." (J.A. 131, Rule 19.)

When SrA Blanks' chain of command informed him that the AFI discriminates against unmarried fathers of children, Appellant made the disastrous decision to claim he was married to the mother of his child, Hazal Ezgi Koyel. (J.A. 46, 48.) In fact, Appellant was married to another woman, Maria Arreola. (J.A. 95-96.)

Appellant's Marriage to Maria Arreola & Spousal Support

Appellant met Maria on Myspace in 2009, and the couple married at a courthouse a day after meeting in person for the first time on April 21, 2011. (J.A. 53-55.) SrA Blanks left for a one-year assignment to Korea the following day. (J.A. 55.) Sometime after Appellant left for Korea, Maria moved in with SrA Blanks' mother. (J.A. 74-84.) Appellant wired money through Western Union to his mother for Maria's support while he was in Korea. (J.A. 77, 83-84.) Although she did not work, Maria used Appellant's car while SrA Blanks was away. (J.A. 80, 82.)

The couple's marriage unraveled while SrA Blanks was in Korea. (J.A. 57.) Maria accused him of talking with other women online. (J.A. 56.) But Appellant was determined to make the marriage work, and he asked Maria to accompany him to his next duty assignment in the United Kingdom in the summer of 2012. (J.A. 57-59, 79.) She did not and, when asked why she didn't get a passport to accompany her husband, she testified, "I don't know." (J.A. 59.)

As Appellant's marriage crumbled, so did Maria's relationship with Appellant's mother and sister. She moved out of Appellant's mother's home in Saint Charles, Missouri, in March or April 2012. (J.A. 77, 81.) Appellant's sister testified that Maria was not tidy, and his mother accused her of stealing items from her home. (J.A. 75, 85-86.)

For her part, Maria denied ever living in the home of Appellant's mother. (J.A. 53.) She claimed Appellant only sent her $200 during the couple's marriage. (J.A. 51, 56, 60.) She also denied having a joint bank account with Appellant, or being an authorized user of his American Express card. (J.A. 56, 61.) She also couldn't remember when she entered into a relationship with the putative father of her child, Mr. Joshua Reid. (J.A. 57, 64.) "Ah—like the end of 2012, I think." (J.A. 57.) She testified SrA Blanks did send her paperwork so that she could enroll in the Defense Enrollment Eligibility Reporting System (DEERS). (J.A. 65-66.)

After learning of Maria's relationship with Mr. Reid, a high-school classmate of Appellant's, (J.A. 70), Appellant sent Maria divorce papers in 2013. (J.A. 63.) She testified that he may have sent divorce paperwork twice. (J.A. 63-64.) "I was trying to get it done but I didn't understand some of the questions that it was asking on there." (J.A. 64.) Appellant tried to enlist Mr. Reid's help in having Maria complete the necessary paperwork for their divorce. (J.A. 72-73.) A process server ultimately had to serve Maria with Appellant's petition for divorce. (J.A. 66.) Appellant and Maria were finally divorced on March 31, 2015. (J.A. 97-99.)

Command & Law Enforcement Investigations

By the time Appellant and Maria divorced in 2015, the full prosecutorial power of the United States had been directed at Appellant. SrA Blanks' chain of command began an investigation after SrA Blanks told them that Maria and Hazal were the same person in an effort to obtain ten days of parental leave in August 2014. (J.A. 47-48.) Appellant's first sergeant, Senior Master Sergeant Elizabeth A. Crist, compared his Facebook posts about Hazal and their son with information in DEERS, which indicated Appellant was married to Maria. (J.A. 48.)

Ironically, because Appellant was still married to Maria when she gave birth to Mr. Reid's son in August 2013, (J.A. 72), and because Missouri law continues to hold that "a child born during a marriage is legally presumed to be

the husband's offspring for all purposes," *In re Stix*, 480 S.W. 3d 373, 377 (Mo. Ct. App. 2015), Appellant was entitled to parental leave under the AFI, but not for his biological child. (*But see* J.A. 98.)

Charging Scheme & Trial

By the time of trial, the government was alleging—in addition to allegations of false official statements to his command and dereliction of duty for failing to adequately support Maria—that Appellant had "stole[n] $54,000 from the Air Force in 2011 to 2014," or the entirety of his marriage to Maria. (J.A. 52, 89, 91.) Put another way, the government argued Appellant had *never* provided adequate support to Maria. (J.A. 89.)

The members rejected the government's argument that Appellant never provided adequate support to Maria. The members acquitted Appellant of willful dereliction of duty for signing an official record Air Force Form 594 on 11 July 2012, falsely stating he was providing adequate support to Maria between 28 May 2012 and 11 July 2012. (J.A. 40-43, 93.) The members also acquitted SrA Blanks of theft of military property of a value of more than $500.00 between June 6, 2011, and May 27, 2012. (*Id.*)

However, Appellant also faced an allegation of willful dereliction of duty by negligently signing an official record Air Force Form 594 on August 6, 2014 certifying he "provide[d] adequate support (see AFR 35-18) for the dependents named above," namely, SrA Blanks' wife for the timeframe of 2012 through

2014. (J.A. 103.) Staff Sergeants Bruce Shoffner and Nathanael Wood, comptrollers, testified Air Force Regulation 35-18 had long been rescinded. (J.A. 67-69.) Thus, SrA Blanks was left to determine "adequate support" for his wife who by August of 2014, was living with another man with whom she had conceived a child, (J.A. 72), and despite repeated effort by SrA Blanks, refused to sign divorce paperwork until she was formally served. (J.A. 66.)

The military judge instructed the members that, even if they acquitted SrA Blanks of the offense of willful dereliction of duty, they could still convict him of committing the same dereliction but with the lesser-included *mens rea* of negligence. (J.A. 87-88.) The members, having been instructed that the *mens rea* required for lesser offense was "a lack of care which a reasonably prudent person would have used under the same or similar circumstances," did just that. (J.A. 88.) The sentence that followed cost SrA Blanks an approved medical retirement. (J.A. 20-22.)

Argument

IN LIGHT OF THIS COURT'S DECISION IN *UNITED STATES V. HAVERTY*, 76 M.J. 199 (C.A.A.F. 2017), THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE MEMBERS APPELLANT COULD BE CONVICTED OF NEGLIGENT DERELICTION OF DUTY.

Summary of Argument

Congress has provided no *mens rea* for the crime of dereliction of duty. 10 U.S.C. § 892 (2012). Although this Court's predecessor determined

Congress intended a *mens rea* of simple negligence for Article 92 in *United States v. Lawson*, 36 M.J. 415, 416 (C.M.A. 1993), that conclusion should be overruled because it was grounded in cases applying non-binding provisions in the Manual for Courts-Martial that are undermined by this Court's recent jurisprudence governing *mens rea*, and because *Lawson* relied on legislative history that would no longer govern in light of this Court's decision in *United States v. Tucker*, 76 M.J. 257 (C.A.A.F. 2017) (per curiam).

As such, this Court must construe Article 92 in light of its silence and determine the proper level of *mens rea*. *Haverty*, 76 M.J. 199, 204 (C.A.A.F. 2017). As this Court noted in *Haverty*, the Supreme Court has "long been reluctant to infer that a negligence standard was intended in criminal statutes." *Haverty*, 76 M.J. at 204 (citing *Elonis v. United States*, 135 S. Ct. 2001 (2015)).

Recklessness "is the lowest '*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.'" *Gifford*, 75 M.J. at 147 (internal quotation marks omitted) (quoting *Elonis*, 135 S. Ct. at 2010). Because the members followed the military judge's erroneous instruction and convicted SrA Blanks of negligent dereliction of duty, SrA Blanks' conviction for negligent dereliction of duty must be set aside.

Standard of Review

Because Appellant did not object to the military judge's instructions as to negligent dereliction of duty, the instruction is "analyzed for plain error based

on the law *at the time of appeal*." *Haverty*, 76 M.J. at 208. *De novo* review is employed to consider "[q]uestions pertaining to the substance of a military judge's instructions, as well as those involving statutory interpretation." *United States v. Caldwell*, 75 M.J. 276 (C.A.A.F. 2016).

Law & Analysis

A) Congress Did Not Codify a *Mens Rea* for Dereliction of Duty

Criminal offenses demand proof of two components: the criminal act known as the *actus reus* and the state of mind known as *mens rea*. *United States v. Torres*, 74 M.J. 154, 156-57 (C.A.A.F. 2015) (quotations omitted) (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952); *United States v. Afpelbaum*, 445 U.S. 115, 131 (1980)). "The general rule is that a guilty mind is 'a necessary element of the [charge sheet] and proof of every crime.'" *Caldwell*, 75 M.J. at 280-81 (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)). For most criminal statutes, a certain level of *mens rea* is required: general intent, intentionally, knowingly, recklessly, or negligently. *Haverty*, 76 M.J. at 204 (citing *Elonis*, 135 U.S. at 2010).

In eight words, Congress set out a criminal violation in clause three of Article 92, UCMJ, authorizing punishment when a person "is derelict in the performance of his duties." 10 U.S.C. § 892. On the face of the statute, none of those words are defined or identify a level of *mens rea*. *Id.*; *see also United States v. Ferguson*, 40 M.J. 823, 830 (N.M.C.M.R. 1994) ("There are only two operative

terms in Article 92(3) . . . Neither is defined by the Code.") Accordingly, the statute is silent.

B) The Court of Military Appeals' Earlier Conclusion that Congress Intended a *Mens Rea* of Negligence Should Be Overruled

When a statute is silent as to *mens rea*, "[c]ourts must seek to discern any legislative intent about a mens rea requirement." *Haverty*, 76 M.J. at 203-04. The analysis then turns on the court's ability to determine the legislature's intent. On the one hand, "if a court determines the Congress intended, either expressly or impliedly, to have a particular mens rea requirement apply to a certain criminal statute, then the court must construe the statement accordingly." *Id.* at 204.

On the other hand, when both the statute is silent and the court cannot discern legislative intent, "then the court will infer a mens rea requirement with the 'general rule' cited by the Supreme Court in *Elonis*, 134 S. Ct. at 2009 (quoting *Balint*, 258 U.S. at 251)." *Id.* That general rule requires a guilty mind, leading to interpretation to "generally . . . 'include broadly applicable scienter requirements, even where the statute by its terms does not contain them.'" *Elonis*, 134 S. Ct. at 2009 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)). Ambiguity about *mens rea* is resolved through the use of the rule of lenity. *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v.*

United States Gypsum Co., 438 U.S. 422, 437 (1978); *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983).

In *United States v. Lawson*, 36 M.J. 415, 416 (C.M.A. 1993), the Court of Military Appeals concluded that the *mens rea* for Article 92(3) is negligence. The negligence discussed in *Lawson* was lower than the *mens rea* of criminal negligence addressed by this Court in its recent decision in *Haverty*, which requires a showing of "substantial and unjustifiable risk." *Haverty*, 76 M.J. at 204 n.8. Instead, *Lawson* affirmed the prosecution's burden was to show the *mens rea* of simple negligence, which is the absence of due care expected of a reasonably prudent person. *Lawson*, 36 M.J. at 419 (citations omitted).

The decision in *Lawson* rested, in part, on a determination that "Congress intended to establish a simple-negligence standard for nonperformance-of-duty derelicts charged under" Article 92(3). *Lawson*, 36 M.J. at 421. Under *Haverty*'s analytical framework, the continued validity of *Lawson* would mean there is no void in the *mens rea* requirement demanding an inference by this Court and, in turn, this Court's inquiry is over. *Haverty*, 76 M.J. at 204.

However, this Court's analysis in the case at bar should not stop at *Lawson* because the conclusion of a simple negligence *mens rea* in *Lawson* should be overruled. In deciding whether to overrule *Lawson*, this Court is guided by the principle of *stare decisis*. *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000). This doctrine is important for stability, "foster[ing] public confidence in

the judicial system and strengthen[ing] reliance upon the judicial branch of the government." *United States v. Boyett*, 42 M.J. 150, 154 (C.A.A.F. 1995) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

"[A] decision should not be overruled without examining intervening events, reasonable expectations of servicemembers, and the risk of undermining public confidence in the law." *Id.* However, the adherence to past decisions "need not be applied when the precedent at issue is 'unworkable or . . . badly reasoned.'" *Tualla*, 52 M.J. 228, 231, (quoting *Payne*, 501 U.S. at 827). "[T]he doctrine does not apply when a statute, executive order, or other basis for a decision changes." *Boyett*, 42 M.J. at 154 (footnotes omitted).

Applying these principles, *Lawson* should be overruled because both of its justifications are flawed and undermined by jurisprudence subsequent to the Supreme Court's decision in *Elonis*. The two main reasons offered in *Lawson* to support its conclusion were that (1) earlier cases had approved of the simple negligence standard, and (2) the legislative history of Article 92(3) was predicated on the *mens rea* of simple negligence. *Lawson*, 36 M.J. at 419-22. Each basis must now yield and, therefore, so must *Lawson*.

Based on earlier cases, the Court of Military Appeals stressed in *Lawson* that "from the very beginning, we have consistently applied a simple-negligence standard in judging nonperformance of military duties." *Id.* at 416, 419, 422 (citing *United States v. Powell*, 32 M.J. 117, 120 (C.M.A. 1991); *United States v.*

Dellarosa, 30 M.J. 255, 259 (C.M.A. 1990); *United States v. Kelchner*, 16 U.S.C.M.A. 27, 28-29 (C.M.A. 1966); *United States v. Grow*, 3 U.S.C.M.A. 77, 86-87 (C.M.A. 1953)). While these underlying cases remain precedent and did not challenge the simple negligence standard, they and *Lawson* should not control because the primary reason offered in each of these earlier cases to use the simple negligence standard was reliance on the President saying to do so in the Manual for Courts-Martial (MCM). *Powell*, 32 M.J. at 120-21; *Dellarosa*, 30 M.J. at 259; *Kelchner*, 16 U.S.C.M.A. at 28-29; *Grow*, 3 U.S.C.M.A. 86-87. That guidance from the President remains. MCM, United States, pt. IV, para. 16 (2016 ed.)

The President's analysis is persuasive authority rather than binding authority. *United States v. Miller*, 47 M.J. 352, 356 (C.A.A.F. 1997) (citing *United States v. Gonzalez*, 42 M.J. 469, 474 (C.A.A.F. 1995)). Through this exercise of his authority under Article 36, UCMJ, 10 U.S.C. § 836 (2012), the President cannot "decide questions of substantive criminal law." *United States v. Fosler*, 70 M.J. 225, 231 (C.A.A.F. 2011) (citing *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010)). The President's interpretation of the offenses is not binding authority. *Id.* Though courts will apply the MCM's guidance when it reflects "an accurate interpretation of the law," disagreement between the MCM and case law sees case law prevail. *United States v. Mitchell*, 66 M.J. 176, 179-80 (C.A.A.F. 2008).

This was part of the reasoning employed by this Court in *Fosler*, addressing the charging of offenses under Article 134, UCMJ. This Court recognized that its case law had approved of guidance from the MCM indicating that the terminal element of Article 134 offenses did not need to be alleged in specifications. *Fosler*, 70 M.J. at 227-28 (citations omitted). Drawing on a line of its own cases rooted in Supreme Court case law and constitutional guarantees, this Court jettisoned its historical practice and held that specifications under Article 134 must set out each element either expressly or by necessary implication. *Id.* at 228-33.

While *Fosler* was grounded in constitutional origins, *mens rea* derives from the common law tradition. *See Morissette*, 342 U.S. at 265; *Staples v. United States*, 511 U.S. 600, 605-06 (1994). Nonetheless, just as the developments in the law leading up to *Fosler* led this Court to move on from its historical practice, the President's guidance concerning Article 92(3) that was adopted by the cases preceding *Lawson* and, in turn, *Lawson* must give way to the recent developments in the law concerning *mens rea*.

Those recent developments begin with the Supreme Court's decision in *Elonis*. Applying *Elonis*, this Court determined that general intent was a sufficient *mens rea* for maltreatment under Article 93, UCMJ, 10 U.S.C. § 893 (2012), *United States v. Caldwell*, 75 M.J. 276, 280-82 (C.A.A.F. 2016), and

approved of wrongfulness as the *mens rea* for communicating a threat under Article 134, UCMJ, *United States v. Rapert*, 75 M.J. 164, 169 (C.A.A.F. 2016).

But in considering the *mens rea* for an offense under clause 1 of Article 92 last term, this Court noted the Supreme Court's long-standing reluctance to infer a *mens rea* of negligence. *Haverty*, 76 M.J. at 204 (quotation omitted) (quoting *Elonis*, 135 S. Ct. at 2011). The definition of negligence to which this reluctance applied was "criminal negligence," or "[t]he objectively assessed mental state of an actor who should know that there is a substantial and unjustifiable risk that the social harm that the law is designed to prevent will occur but who nevertheless engages in the prohibited action." *Id.* at 204 n.8 (quoting *Black's Law Dictionary* 1197 (10th ed. 2014)). Rather than criminal negligence, "[r]ecklessness is the lowest '*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct."' *Gifford*, 75 M.J. at 147 (internal quotation marks omitted) (quoting *Elonis*, 135 S. Ct. at 2010).

In light of these recent developments, *Lawson*'s reliance on cases that were built on the MCM's guidance endorsing a simple negligence *mens rea* is called into question. *Elonis*, *Haverty*, and *Gifford* cast significant doubt on the criminal negligence *mens rea*, which should exclude simple negligence as a viable *mens rea* for a criminal offense altogether. *See Elonis*, 135 S. Ct. at 2011; *Gifford*, 75 M.J. at 147; *Haverty*, 76 M.J. at 204.

Moreover, because the offenses in *Gifford* and *Haverty* could have been charged as dereliction of duty under Article 92(3), the effect of permitting simple negligence as a *mens rea* for Article 92(3) would present a means to get around the recklessness requirement set out in *Gifford* and *Haverty*. Such an alternative would present undue "risk of undermining public confidence in" this Court's decisions in *Gifford* and *Haverty* and therefore also defy the "reasonable expectations of servicemembers." *Boyett* 42 M.J. at 154. Because of jurisprudence since *Elonis*, the foundation of precedent on which *Lawson* was built can no longer stand.

However, *Lawson* was not grounded solely in preceding cases. The *Lawson* court also determined legislative intent based on the application of legislative history. *Lawson*, 36 M.J. at 419-21. Like the rationale grounded in precedent, this conclusion should be rejected for three reasons.

First, the *Lawson* court ignored indications that Congress intended to punish gross and culpable negligence, not simple negligence. *Lawson*, 36 M.J. at 420-21. While the Court correctly noted that Congress did not codify a heightened *mens rea*, the Court used that non-inclusion to determine that Congress intended simple negligence under Article 92(3). *Id.* Based on how this Court has construed statutes in *Haverty* and *Gifford*, the *Lawson* court's determination of legislative intent from overt silence on the subject of *mens rea* should be unpersuasive.

Second, the *Lawson* court misconstrued the earlier law on which Article 92(3) was based. *Id.* at 419-20. Article 92(3) was derived from naval law that prohibited "neglect of duty." *Id.* at 420 (quoting § 151, Naval Courts & Boards at 132 (1937)). The *Lawson* court equated that prohibition to simple negligence because, under the naval law, "'it was only necessary to prove the unlawful act'" to secure a conviction. *Id.* at 420 (quoting § 151, Naval Courts & Boards at 132 (1937)).

The *Lawson* court's conclusion that neglect translated to negligence based on naval law requiring only proof of the unlawful act to support a conviction is faulty because it meant that the offense of "neglect of duty" amounted to a strict liability offense. *Id.*; *see also Gifford*, 75 M.J. at 142 (discussing strict liability offenses). As a matter of logic, if "neglect of duty" were meant to be a strict liability offense, then a *mens rea* of negligence would be out of step of with congressional intent. *See Gifford*, 75 M.J. at 142. Moreover, strict liability offenses are disfavored and cabined to limited circumstances. *Id.*

Third, the determination that "neglect of duty" under the earlier naval law meant Congress intended a *mens rea* of "negligence" was bolstered, in the *Lawson* court's view, because the dictionary definition of "derelict" included "neglectful" and "one guilty of neglect of duty." *Id.* at 421 n.7 (quoting Webster's New Collegiate Dictionary (1949)). The Court reasoned that the use of this term incorporated Army and Air Force use of the word "neglect" under

the general article, Article of War 96. *Id.* at 421 (citing MCM, U.S. Army, at 255, para 183a (1949 ed.)).

This Court's recent decision in *United States v. Tucker*, 76 M.J. 257 (C.A.A.F. 2017) (per curiam), further illustrates the unsupportable leap the *Lawson* court made to find a *mens rea* of negligence embedded in the offense of neglect. The *Lawson* court's citation to the term "neglect" in Article of War 96, for "Disorders and Neglects to the Prejudice of Good Order and Military Discipline," can be traced to what is now Article 134, UCMJ, 10 U.S.C. 134. *Fosler*, 70 M.J. 225, 243 n.4 (Baker, J., dissenting). In the context of Article 134, this Court in *Tucker* noted the distinction between "neglect" and "negligence," and determined that "the term 'neglects' has no connection to the mens rea requirement that the government must prove under the analysis." *Tucker*, 76 M.J. at 258 (per curiam). For that same reason, the *Lawson* court's jump from "neglect" in Army, Air Force, and Navy guidance to "negligence" under Article 92(3) should be deemed misplaced.

Accordingly, each of the bases on which *Lawson* was built—its reliance on precedent and legislative history—have been called into doubt by this Court's case law since *Elonis*. As such, *Lawson* can no longer be considered good law to speak for legislative intent when it codified Article 92(3), and should be overruled.

C) Recklessness is the Lowest *Mens Rea* to Support Criminal Culpability for Dereliction of Duty

Because *Lawson* should be overruled concerning simple negligence, this Court is left without an explicitly codified *mens rea* for dereliction of duty and without clear legislative intent. Therefore, this Court must infer *mens rea* based on the general guidance set out by the Supreme Court. *Haverty*, 76 M.J. 203-04.

Although *Haverty*, 76 M.J. at 202, addressed the failure to obey a lawful regulation under clause one of Article 92, UCMJ, the same result is required in this case involving dereliction of duty under clause three. Compared to the *mens rea* at issue in *Haverty*, which dealt with expansive language in a regulation, the offense of dereliction of duty is even more broad. *Id.* at 206. Dereliction of duty can make an offense out of any military duty, and any failure to perform that duty.

In the case at bar, the basis of SrA Blanks' conviction is his August 6, 2014, execution of an Air Force Form 594, in which he certified he "provide[d] adequate support (see AFR 35-18) for the dependents named above." (J.A. 103.) Like giving alcohol to a peer at a social event, making a determination to give some money to support an estranged spouse in the absence of a court order is typically legal and involves an exercise of judgment. *See Gifford*, 75 M.J. at 146. As with the hazing at issue in *Haverty*, Appellant could honestly have

believed he was providing adequate support, even if he did not do so objectively. *Haverty*, 76 M.J. 207.

Because general intent only requires the intent to perform the act, "even though the actor does not desire the consequences that result," a general intent *mens rea* could lead to convictions for a member's determination about such support. *Id.* at 207 (emphasis removed) (quoting *Black's Law Dictionary* 931 (10th Ed. 2014). In such circumstances, recklessness "is the lowest 'mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct," and the same *mens rea* should be required for dereliction of duty. *Gifford* 75 M.J. at 147 (citation omitted).

D) Appellant was Prejudiced Because the Panel Followed the Military Judge's Erroneous Negligence Instruction

Because the military judge instructed the members they could convict SrA Blanks based on a simple negligence standard instead of a recklessness standard, the military judge committed plain and obvious error. *Haverty*, 76 M.J. at 208. A panel is presumed to follow the instructions given by the military judge. *United States v. Custis*, 65 M.J. 366, 372 (C.A.A.F. 2007).

Prejudice is evident because the members declined to find Appellant guilty of the greater contested offense of willful dereliction of duty and instead convicted him of negligent dereliction of duty. (J.A. 40, 93.) The charged dereliction of duty came down to Appellant's certification that he provided

"adequate support" for his wife, while his wife was living with another man with whom she had conceived a child. (J.A. 57, 64, 100-03). The regulation meant to guide Appellant had been rescinded, leaving the determination of "adequate support" to Appellant's judgment. (J.A. 67-69.)

The members' findings demonstrate they found Appellant only failed to exercise due care—in other words, made a mistake—and were therefore consistent with the military judge's erroneous instruction concerning the lesser offense of negligent dereliction of duties. (J.A. 87-88, 93.) As such, the military judge's error instructing the members had a materially prejudicial impact on Appellant. *See Haverty*, 76 M.J. at 208. SrA Blanks' conviction for negligent dereliction of duty must be set aside.

Under the unique facts of this case, and in light of the adjudged sentence that cost Appellant a medical retirement, a rehearing as to sentence should be authorized where SrA Blanks can fully present evidence of his approved medical retirement from the Air Force. (J.A. 20-22); *see also United States v. Becker*, 46 M.J. 141, 144 (C.A.A.F. 1997) ("In the case at bar, appellant was literally knocking at retirement's door at the time of his court-martial.")

WHEREFORE, this Honorable Court should set aside the finding of guilty for negligent dereliction of duty and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on September 28, 2017, pursuant to this Court's order dated July 22, 2010, and that a copy was also electronically served on the Air Force Appellate Government Division on the same date.

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