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.	REPLY TO APPELLEE'S ANSWER 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

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Senior Airman (SrA) Vashaun Blanks, the Appellant, hereby replies to the government's answer.

Law and 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.

The law concerning *mens rea* "is neither settled nor static." *United States v. Gifford*, 75 M.J. 140, 144 (C.A.A.F. 2016) (quoting *Morissette v. United States*, 342 U.S. 246, 261 (1952)). Even though this Court's predecessor concluded that the *mens rea* for dereliction of duty was satisfied by simple negligence, *United States v. Lawson*,

36 M.J. 415, 421 (C.M.A. 1991), that determination should be revisited in light of more recent decisions of this Court in the wake of *Elonis v. United States*, 135 S. Ct. 2001 (2015).

The government's brief does not appear to dispute the statute at issue is an outlier in that "Article 92(3) does not expressly require scienter or mens rea[.]" *United States v. Ferguson*, 40 M.J. 823, 828 (N.M.C.M.R. 1994). And the parties appear to agree the statute is partially rooted in the Articles for the Government of the Navy (AGN), (Gov't Br. at 6), which did not include a *mens rea* requirement for crimes such as rape, drunkenness, or neglect of duty. *Lawson*, 36 M.J. at 420. But that is where SrA Blanks parts ways with the government.

The long-abandoned AGN, which unlike the Articles of War remained largely unchanged since the summer of 1862,[1] are of little assistance in interpreting statutes in the 21st Century where normally "wrongdoing must be conscious to be criminal." *Gifford*, 75 M.J. at 144 (quoting *Morissette*, 342 U.S. at 252.). And aside from *Lawson's* discussion of that Civil-War-era relic, the Court's discussion of the legislative history of Article 92(3), which the government describes as "an extensive review," (Gov't Br. at 6), is better described as two sentences, one acknowledging the naval origins of Article 92(3) and the other addressing the *actus reus* for "neglect" in Army practice. *Lawson*, 36 M.J. at 419, 421 (citations omitted).

[1] Manuel Supervielle, *Article 31(b): Who Should be Required to Give Warnings?*, 123 Mil. L. Rev. 151, 152 n.7 (1989).

But even this Court's predecessor noted its view of the *mens rea* required for dereliction of duty under the AGN was contradicted by Marine Brigadier General James Snedeker's 1953 treatise on the Uniform Code of Mlitary Justice (UCMJ). *Lawson*, 36 M.J. at 420 (citing JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 626, 621-22 (1953)). General Snedeker authored a number of articles on the AGN,[2] and was a member of the McGuire Commission in 1945, "which recommended a complete revision of the Articles for the Government of the Navy, and included the text thereof as well as proposed rules for court-martial procedure." Felix E. Larkin et al*., Navy Court Martial Proposals for its Reform,* 33 Cornell L. Rev. 1 (1947). That report is among the so-called Morgan Papers that comprise the broader legislative history for both the Elston Act and the UCMJ maintained by the Library of Congress.[3]

Thus, while the *Lawson* Court was right to conclude Article 92(3) was "partially derived from naval law," *id.* at 419, "the architects of the Code,"[4] including Mr. Felix Larkin, were well aware of General Snedeker's work on the AGN both during and after World War II when they drafted it. If anything, the legislative history suggests

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[2] James Snedeker, *Jurisdiction of Naval Courts Martial over Civilians*, 24 Notre Dame L. Rev. 490 (1949); James Snedeker, *Developments in the Law of Naval Justice*, 23 Notre Dame L. Rev. 1 (1947); James Snedeker, *Significant Developments in Naval Law Since Pearl Harbor*, 73 U.S. Naval Inst. Proc. 663 (1943).

[3] http://www.loc.gov/rr/frd/Military_Law/Morgan_Vol-3.html (last visited Nov. 8, 2017).

[4] *United States v. Hooper*, 5 U.S.C.M.A. 391, 395 (C.M.A. 1955).

the architects of the UCMJ may have intended to codify General Snedeker's view of the AGN, but the legislative history provides no basis to conclude "Congress intended to establish a simple-negligence standard for nonperformance-of-duty derelicts charged under this statute." *Lawson*, 36 M.J. at 421.

Regardless, though the *Lawson* Court acknowledged the statutory silence with respect to *mens rea*, its flawed reasoning led to a conclusion that this silence reflected an intent "to punish both types of negligent-duty conduct under Article 92(3)." *Lawson*, 36 M.J. at 421. After *Elonis*, silence cannot constitute the "clear voice" required to avoid application of "broadly applicable scienter requirements." *United States v. Haverty*, 76 M.J. 199, 204 (C.A.A.F. 2017) (quotation marks omitted) (quoting *Elonis*, 135 S. Ct. at 2009).

Nevertheless, the government's brief attempts to convince this Court that silence, this time by the Military Justice Review Group (MJRG), constitutes the "clear voice" required by *Elonis*. (Gov't. Br. at 17, 24-25) (citing *Report of the Military Justice Review Group, Part I: UCMJ Recommendations* (hereafter "MJRG Report") (2015) at 729-30). While the MJRG recommended no changes to Article 92, UCMJ, the MJRG's parallel recommendation regarding Article 93, UCMJ, similarly failed to acknowledge the months-earlier decision in *Elonis*. Importantly, the MJRG's recommendations did not give this Court pause when subsequently applying the "far broader implications" of *Elonis* to clarify the appropriate *mens rea* for Article 93, UCMJ. *See United States v. Caldwell*, 75 M.J. 276, 280 n.3 (C.A.A.F. 2016).

The same should be true here in light of *Elonis* and the military cases applying *Elonis* to the UCMJ. *Gifford*, 75 M.J. 140, *Caldwell*, 75 M.J. 276, *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016), *Haverty*, 76 M.J. 199, *United States v. Tucker*, 76 M.J. 257 (C.A.A.F. 2017). Taken together, and as set out in Appellant's initial brief, these cases undermine the foundation of the *Lawson* decision and warrant construction applying the long-standing reluctance to infer a criminal negligence *mens rea* standard, let alone simple negligence. (Appellant's Br. at 8-19); *Haverty*, 76 M.J. at 204 (citing *Elonis*, 135 S. Ct. at 2011). Rather, recklessness is the lowest standard that could and should apply to render failures to perform duties criminally liable. *See Gifford*, 75 M.J. at 147.

The government's brief next makes a public policy argument that criminal sanction for negligent dereliction of duty is a "military necessity." (Gov't Br. at 24.) But determinations "as to what constitutes a federal crime, and the delineation of the elements of such criminal offenses—including those found in the UCMJ—are entrusted to Congress." *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010). And, through the UCMJ, Congress has balanced military necessity "against the equally significant interest of ensuring fairness to servicemen charged with military offenses[.]" *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

SrA Blanks does not dispute the importance of discipline to the effective functioning of the military. *Caldwell*, 75 M.J. at 281-82 (quotations and citations omitted). But there is a distinction between discipline and criminal liability. Indeed,

the government's brief points to the numerous "disciplinary actions" taken against SrA Blanks prior to his court-martial and admitted as evidence against him at trial. (Gov't. Br. at 27 n.11); *see also* Rule for Courts-Martial 1001(b)(2). If this Court adopts a recklessness standard, there is nothing preventing negligent actions from being addressed through such disciplinary tools, without resulting in the criminal sanction—and up to three months of confinement here—that gave the Supreme Court pause in *Elonis*. *See Haverty*, 76 M.J. at 204 (citing *Elonis*, 135 S. Ct. at 2011); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 16(e)(3)(A) (2016 ed.).

The *mens rea* of recklessness imposed on the prosecution by *Gifford* and *Haverty* did not relieve servicemembers from carrying out their duties, nor did it preclude disciplinary enforcement. It merely captured the appropriate distinction between unlawful and "otherwise innocent conduct." *Haverty*, 76 M.J. at 205 (citing *Elonis*, 135 S. Ct. at 2010). The same should apply for the Article 92, UCMJ, offense at issue in this case, particularly given the close nexus between failure to obey a lawful order and dereliction of duty: "They are so closely related that no significant difference exists between them." *United States v. Green*, 47 C.M.R. 727, 728 (A.F.C.M.R. 1973).

Finally, the government's brief argues SrA Blanks' was not prejudiced by the error in this case because the members sentenced him to "less than one percent of the maximum confinement" authorized by law. (Gov't Br. at 27.) Of course, this

assumes SrA Blanks' criminal conduct, which can be distilled to lying to his chain of command to obtain ten days of paternity leave the Air Force denies single fathers and failing to provide "adequate support" required by a long-repealed Air Force Regulation, placed him in serious peril of serving more than thirty years in prison.

Long before its brief implied SrA Blanks narrowly escaped such a sentence, the government described this case as "not the crime of the century," (J.A. 52), but in light of *Haverty*, the charge and specification at issue may not even be a crime at all. Under the unique facts of this case, where SrA Blanks' conviction for dereliction of duty may have been the proverbial straw that broke the camel's back, he has met his burden of showing "the error had an unfair prejudicial impact on the members' deliberations." *Haverty*, 76 M.J. at 208.

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

Respectfully submitted,

Brian L. Mizer
Senior Appellate Defense Counsel
C.A.A.F. Bar No. 33030

Allen S. Abrams, Major, USAF
Appellate Defense Counsel

C.A.A.F. Bar No. 35282
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on November 8, 2017, pursuant to this Court's order dated July 22, 2010, and that a copy was served via electronic mail on the Air Force Appellate Government Division on November 8, 2017.

Respectfully submitted,

Allen S. Abrams, Major, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 35282
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770