30 October 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
Senior Airman (E-4) VASHAUN M. BLANKS, United States Air Force *Appellant.*	)	Crim. App. No. 38891 USCA Dkt. No. 17-0404/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

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 Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted with one addition. Before the Air Force Court of Criminal Appeals (AFCCA), Appellant raised seven issues for review. Appellant did not challenge the legal or factual sufficiency of

his negligent dereliction of duty conviction. Further, Appellant did not challenge the military judge's instructions related to negligent dereliction of duty or whether the members could convict Appellant of negligent dereliction of duty either before the military judge at trial by objecting or before AFCCA on appeal.[1]

SUMMARY OF ARGUMENT

The Supreme Court's holding in Elonis v United States, 135 S. Ct. 2001 (2015), as well as this Court's opinions in Haverty and Gifford, do not impact this Court's well-established view of Article 92(3). While Elonis does establish an analytical framework to determine *mens rea* in statutes that are silent on the matter, this Court followed such a framework over 30 years before Elonis in United States v. Lawson, 36 M.J 415 (C.M.A. 1993), when it definitively ruled that Congress' intent for *mens rea* as it relates to Article 92(3) included simple negligence. Moreover, this Court has repeatedly found throughout the 60-plus year existence of Article 92(3) that simple negligence was a proper *mens rea* for a dereliction of

[1] While this Court's decision in Haverty had not yet been released, this Court's decision in United States v. Gifford, 75 M.J. 140 (C.A.A.F. 2016), was released three months before Appellant filed his Assignments of Error brief at AFCCA. Moreover, the Supreme Court's opinion in United States v. Elonis, 135 S. Ct. 2001 (2015), which this Court used as a basis for its opinion in both Haverty and Gifford, was released over one year before Appellant's AFCCA Assignments of Error submission. Additionally, while Appellant's trial defense counsel objected to the military judge providing a lesser-included offense instruction for negligent dereliction of duty, the objection was not based on Appellant's current claim that negligent dereliction of duty is not a viable offense under the Uniform Code of Military Justice.

duty offense. As such, this Court should deny Appellant's claim and affirm his convictions and sentence.

ARGUMENT

THE MILITARY JUDGE DID NOT ERR WHEN HE INSTRUCTED THE MEMBERS THAT APPELLANT COULD BE CONVICTED OF NEGLIGENT DERELICTION OF DUTY.

Standard of Review

Whether a military judge instructed a panel of members properly is a question of law this Court reviews *de novo*. United States v. Maynulet, 68 M.J. 374, 376 (C.A.A.F. 2010).

Although panel instructions are reviewed de novo, when there is no objection at trial, this Court reviews for plain error. Haverty, 76 M.J. at 208. Under a plain error analysis, the accused "has the burden of demonstrating that: (1) there was error; (2) the error was plain, or obvious; and (3) the error materially prejudiced a substantial right of the accused." United States v. Tunstall, 72 M.J. 191, 193-94 (C.A.A.F. 2013) (*quoting* United States v. Girouard, 70 M.J. 5, 11(C.A.A.F. 2011)).[2]

[2] As noted above, while Appellant's trial defense counsel objected to the military judge providing a lesser-included offense instruction for negligent dereliction of duty, the objection was not based on Appellant's current claim that negligent dereliction of duty is not a viable offense under the Uniform Code of Military Justice.

Law and Analysis

A. Article 92(3)

Article 92(3) of the Uniform Code of Military Justice (UCMJ) provides that "[a]ny person subject to this chapter who . . . is derelict in the performance of his duties; shall be punished as a court-martial may direct." *See* 10 U.S.C. §892(3). The elements for a negligent dereliction of duty offense are as follows:

> (a) That the accused had certain duties;
> (b) That the accused knew or reasonably should have known of the duties; and
> (c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

Manual for Courts-Martial (MCM) (2012), Part IV., para. 16b(3).

In 1951, the MCM, in Paragraph 171c, explained the offense, in part, as follows:

> *Discussion*. -- A duty may be imposed by regulation, lawful order, or custom of the service. A person is derelict in the performance of his duties when he willfully or negligently fails to perform them, or when he performs them in a culpably inefficient manner. When the failure is with full knowledge of the duty and an intention not to perform it, the omission is willful. When the nonperformance is the result of a lack of ordinary care, the omission is negligent. Culpable inefficiency is inefficiency for which there is no reasonable or just cause.

MCM (1951), para 171c. *See also* United States v. Powell, 32 M.J. 117 (C.M.A. 1991).

By 1984, the wording in the MCM had changed, but its meaning had not. Now Paragraph 16c(3)(c), the MCM stated:

> (c) *Derelict*. A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. "Negligently" means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. "Culpable inefficiency" is inefficiency for which there is no reasonable or just excuse.

MCM (1984), para. 16c(3)(c). *See also* United States v. Dellarosa, 30 M.J. 255, 259 (C.M.A. 1990); Powell, 32 M.J. at 120. The 2012 version of this paragraph in the Manual remains the same as in 1984.

B. This Court's Historical Interpretation of Article 92(3), UCMJ

From the very beginning of the Uniform Code of Military Justice, this Court and its predecessors have held that negligent dereliction of duty is a crime under Article 92(3). *See* United States v. Grow, 3 U.S.C.M.A. 77, 86-87 (C.M.A. 1953). In 1966, citing to the MCM, this Court stated, "Negligence imports the failure to act as a reasonable, prudent person in like circumstances. That is the normal standard of conduct required of a person in the performance of duty and is the standard discussed in the Manual for Courts-Martial as the basis for a charge of

dereliction of duty." United States v. Kelchner, 16 U.S.C.M.A. 27, 28-29 (C.M.A. 1966) (*citing* MCM (1951), para. 171c.*)*

In 1990, this Court stated that the "applicable legal standard for conviction of negligent dereliction of duty under Article 92(3) . . . was decided long ago" in Kelchner and United States v. Ferguson, 12 CMR 570, 576 (ABR 1953). United States v. Dellarosa, 30 M.J. 255, 259 (C.M.A. 1990). While in dicta, the Court stated that the simple negligence standard was applicable in both nonperformance and faulty performance cases since "over the years, the negligence terminology has been used in the faulty-performance cases, and, accordingly, the previous distinction in language need not be considered significant." Id.

Then, in 1993, this Court definitively held that "the standard of 'negligence' for dereliction of duty is 'simple negligence.'" United States v. Lawson, 36 M.J 415,416, 419 (C.M.A. 1993). In doing so, the Court also embarked on an extensive review of Article 92(3)'s legislative history. There, the Court stated, "The legislative history of Article 92(3) indeed indicates that the offense of dereliction of duty is partially derived from naval law." Lawson, 36 M.J. at 419-20 (citations omitted). In reviewing that naval law, the Court stated:

> In cases where "the act was the principal feature, the existence of the wrongful intent being simply inferable therefrom, as rape, sleeping on watch, drunkenness, *neglect of duty*, etc. . . . it was only necessary to prove the unlawful act." Therefore, it appears that precodal naval law prohibited simple negligence in the

> nonperformance of duty and gross negligence in the malperformance of duty.

Id. at 420. (internal and external citations omitted.)

Further, in noting that "Congress in enacting Article 92(3) did not use the culpable-inefficiency language found in the earlier naval statutes," the Court held that "the more reasonable interpretation of this new codal provision is that Congress rejected an exclusive culpable-negligence standard and intended, instead, to punish both types of negligent-duty conduct under Article 92(3)." Id. at 421. The Court further found that the "new legislative term 'derelict' was broad enough to include both degrees of negligence and incorporate Navy practice with Army and Air Force practice." Id.

The Court then stated that prior to the 1950 enactment of the UCMJ, both the Army and Air Force punished neglect of duty under the general article, Article of War 96, and that that the "Army interpreted the word 'neglect' in the general article as simply as omission of conduct." Id. In noting that this practice was "referred to in the legislative history with a comment that it was now punishable under the new Article 92(3)," the Court held that "it is our conclusion, at the very least, that Congress intended to establish a simple-negligence standard for nonperformance-of-duty derelicts charged under this statute." Id.

Later, citing to Powell, Dellarosa, and Grow, the Court stated that "from the very beginning, we have consistently applied a simple-negligence standard in

judging nonperformance of military duties regardless of the nature of the duty or the status of the person required to perform it." Id. at 422. The Court further added that it also "held that the factfinder must consider the nature and complexity of the duty as part of all the circumstances of the case when applying this simple-negligence standard." Id.

Finally, in his concurring opinion, Judge Wiss stated, "This Court long and consistently has held that, under a charge of negligent dereliction of duty, the negligence in issue is simple negligence." Judge Wiss continued, "At no time of which I am aware has anyone suggested to Congress that this Court's interpretation of Article 92(3) over the last 4 decades is incorrect. Most surely, Congress has never indicated as much." Id. at 423.

C. This Court's holdings in Haverty, Gifford, and an analysis pursuant to Elonis does not impact this Court's well-established view of Article 92(3), UCMJ.

The Supreme Court's holding in Elonis, as well as this Court's opinions in Haverty and Gifford, do not impact this Court's well-established view of Article 92(3). While Elonis does establish an analytical framework to determine *mens rea* in statutes that are silent on the matter, this Court followed such a framework over 30 years before Elonis in Lawson when it definitively ruled that Congress' intent for *mens rea* as it relates to Article 92(3) included simple negligence. Moreover, as noted above, this Court has repeatedly found throughout the 70-plus year

existence of Article 92(3) that simple negligence was a proper *mens rea* for a dereliction of duty offense.

As noted by this Court in Haverty, the Supreme Court reiterated in Elonis that "Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.'" Elonis, 135 S. Ct. at 2009 (*quoting* United States v. Balint, 258 U.S. 250, 251 (1922)). The Supreme Court further stated, "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.'" Id. at 2010 (*citing* Carter v. United States, 530 U.S. 255, 269 (2000); *quoting* United States v. X-Citement Video, 513 U.S. 64, 72 (1994)).

Citing to Elonis, this Court then stated, "The next important principle is that silence in a criminal statute regarding a *mens rea* requirement does not necessarily prevent such a requirement from being inferred," adding that "Courts must seek to discern any legislative intent about a *mens rea* requirement in a statute that is otherwise silent." Haverty, 76 M.J. at 203-204. This Court then laid out a three-part analysis to discern that intent as follows:

> If a court determines that Congress intended, either expressly or impliedly, to purposefully omit a *mens rea* requirement, then the court must respect that legislative intent. Gifford, 75 M.J. at 143-44. Similarly, if a court determines that Congress intended, either expressly or impliedly, to have a particular *mens rea* requirement apply

> to a certain criminal statute, then the court must construe that statute accordingly. *See* Elonis at 2009-2010; Staples, 511 U.S. at 606. If, however, a statute is silent regarding a *mens rea* requirement, and if a court cannot discern the legislative intent in regard to that statute, then the court will infer a *mens rea* requirement consistent with the "general rule" cited by the Supreme Court in Elonis at 2009 (*quoting* Balint, 258 U.S. at 251).

Haverty, 76 M.J. at 204.

Using such an analysis, this Court found in Gifford that a commander's order which was silent on *mens rea* was not meant to be a strict liability offense and could not divine the commander's intent with regards to *mens rea*. Gifford, 75 M.J. at 144. The Court then turned to the Supreme Court's "general rule" and determined the proper *mens rea* for that particular order under Article 92(1) was "recklessness." Id. at 147.

Similarly, in Haverty, this Court found no indication on the part of the Secretary of the Army that the hazing regulation in question was intended to be a strict liability offense and could not "discern whether the Secretary of the Army intended to have some particular *mens rea* requirement apply to this regulation." Haverty, 76 M.J. at 205. Turning to the Supreme Court's "general rule" and using

the Gifford *mens rea* template, this Court determined "'recklessly' is a sufficient *mens rea* in this instance." Id. at 207.[3]

Turning to an Elonis analysis of Article 92(3), one must first recognize the difference between the statute in question in this case as opposed to the order and regulation at issue in Gifford and Haverty, respectively. Where in this case, this Court is reviewing a 65-plus-year-old statute that has remained virtually unchanged and withstood over six decades of jurisprudence, this Court in Gifford and Haverty was reviewing a Second Infantry Division policy letter regarding alcohol use and a recent Army regulation that, by the time this Court had finished reviewing the case, had already been amended. Whereas the history of Article 92(3) is well-settled in law, the order and regulation in Gifford and Haverty were anything but.

Moreover, where this Court was wholly unable to determine any "intent" on the part of either the commander in issuing the policy letter (Gifford) or the Secretary of the Army in issuing the hazing regulation (Haverty), this Court's predecessor specifically found the requisite Congressional intent "to have a particular *mens rea* requirement apply" to Article 92(3) over 30 years ago in Lawson. Moreover, both this Court and its predecessor have found no issue in

[3] Notably, in Haverty, the issue was based on the military judge's instructions at trial. There, the military judge provided no instruction as to *mens rea* regarding the Article 92(1) involving the regulation.

affirming cases involving the negligence mens rea for Article 92(3) offenses for over 60 years. Whereas this Court was left to "infer a *mens rea* requirement" in Gifford and Haverty, no such inference is needed in the present case as the Court in Lawson properly found that "it is our conclusion, at the very least, that Congress intended to establish a simple-negligence standard for nonperformance-of-duty derelicts charged under this statute." Lawson, 36 M.J. at 421. Hence, the analysis under Elonis which requires this Court to "seek to discern any legislative intent about a *mens rea* requirement in a statute that is otherwise silent" is complete, thus satisfying the principles enunciated by the Supreme Court in Elonis.

D. Appellant's arguments are unpersuasive to reverse over 60 years of jurisprudence

i. Stare Decisis

From an opening standpoint, as Appellant rightfully concedes, he must overcome "the principle of *stare decisis*." (App. Br. at 12.) Indeed, the long-standing precedent that negligence is a viable and correct *mens rea* for an Article 92(3) dereliction of duty offense is supported by the doctrine of *stare decisis*. The doctrine of *stare decisis* is "the preferred course because it promotes the even handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." United States v. Rorie, 58 M.J. 399, 406 (C.A.A.F. 2003) (*citing* Payne v. Tennessee, 501 U.S. 808, 827 (1991)). "The doctrine is 'most

compelling' where courts undertake statutory construction." Id. (*citing* Hilton v. South Carolina Public Ry. Comm'n, 502 U.S. 197, 205 (1991); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989)).

As a basis for inviting this Court to overlook *stare decisis* with regards to Article 92(3), Appellant cites to this Court's decision in United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011), where, as Appellant puts it, "this Court jettisoned its historical practice and held that specifications under Article 134 must set out each element either expressly or by necessary implication." (*See* App. Br. at 14-15; *citing* Fosler, 70 M.J. at 228-33.)

Appellant's reliance on Fosler as a basis for this Court to reverse over 60 years of Article 92(3) jurisprudence is misplaced. First, Fosler dealt with a charging and notice issue for an Article 134 offense and the military jurisprudence practice of not charging the terminal element of an Article 134 offense. As this Court stated, "*Stare decisis* does not require that we ignore the fact that the basis for the historical practice of omitting the terminal element when an Article 134 offense is charged has been substantially eroded."[4] Id. at 232-33.

[4] The primary cause of this erosion was the Supreme Court's holding in Schmuck v. United States where, in addressing the relationship between the charged offense and permissible offenses of conviction, the Court explained that the accused's constitutional right to notice "would be placed in jeopardy" if the government were "able to request an instruction on an offense whose elements were not charged in the indictment." *See* Schmuck, 489 U.S. 705, 718 (1989). As this Court noted in Fosler, "This concern led the Supreme Court to adopt the elements test as the

Here, no such "substantial[] ero[sion]" of Article 92(3) jurisprudence has occurred as a result of the Supreme Court's holding in Elonis or this Court's opinions in Haverty or Gifford. In fact, as opposed to Article 134 in Fosler where this Court had addressed "a line of recent cases" concerning Article 134's terminal element, no case has discussed Elonis' application to Article 92(3)'s *mens rea*, let alone "substantially eroded" this Court's 60-plus-year "historical practice" of applying a negligence *mens rea* to an Article 92(3) dereliction of duty offense.

Finally, while Appellant cites to this Court's opinions in United States v. Caldwell, 75 M.J. 276 (C.A.A.F. 2016), Haverty and Gifford as a "recent development in the law" that should lead this Court to "move on from its historical practice," those cases involved offenses, orders and regulations where this Court had never before examined the particular *mens reas* and intent of that particular offense, order and regulation. In contrast, this Court's predecessor did just that 30 years ago in Lawson using the *mens rea* framework the Supreme Court would eventually lay out in Elonis.

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appropriate method of determining whether an offense is an LIO of the charged offense -- and therefore available as an offense of conviction." Fosler, 70 M.J. at 228 (*citing* Schmuck, 489 U.S. at 718.). This Court continued, "In a line of recent cases drawing on Schmuck, we have concluded that the historical practice of implying Article 134's terminal element in every enumerated offense was no longer permissible." Id.

Here, while Appellant explicitly invites this Court to "overrule Lawson" while also implicitly inviting the Court to reverse over 60 years of jurisprudence involving the offense of negligence dereliction of duty,[5] the history and basis for this Court's affirmation of negligent dereliction of duty offenses since the beginning of the UCMJ should remain undisturbed.

ii. Lawson should not be overruled

Appellant next argues that Lawson should be overruled because, according to Appellant, "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." (App. Br. at 19.) As already discussed, neither the Supreme Court's Elonis opinion nor this Court's case law since Elonis "call[s] into doubt" the Lawson opinion. Moreover, Appellant's claims against this Court's predecessor of "ignor[ing]" Congressional intent and "misconstru[ing] the earlier law on which Article 92(3) was based" is unpersuasive.

a. Article 92(3) Precedent

Appellant first attacks Lawson by stating that the Court's reliance on precedent (to include Dellarosa, Kelchner, and Grow) "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

[5] *See* App. Br. at 12.

Courts-Martial." (App. Br. at 14.) Appellant bases his argument on two things: (1) that the "President's analysis is persuasive authority rather than binding authority;" and (2) Appellant's attempt to equate this case to Fosler. (Id. at 14-16.)

As discussed above, Appellant's Fosler comparison is not persuasive. As to Appellant's argument regarding earlier cases' use of the MCM, Appellant fails to explain why such a reliance by this Court on the MCM in this case is misplaced.

Since its enactment in 1950, Congress has reconstructed or, in some cases, totally revamped portions of the UCMJ in many ways. Yet, since 1950, Article 92 has remained unchanged even though throughout this period both the MCM and every military court has consistently recognized negligence as a proper *mens rea* for an Article 92(3) offense.

Moreover, while the original maximum punishment in 1951 for all Article 92(3) offenses was three months confinement and three months of two-thirds forfeiture of pay, by 1984 the MCM made a distinction between "willful" dereliction of duty and dereliction "through neglect and culpable inefficiency" by raising the maximum punishment for "willful" dereliction to include a bad conduct discharge, forfeiture of all pay and allowances, and confinement for six months. *See* MCM (1951), para. 127c, Table of Maximum Punishments; *see also* MCM (1984), para. 16e.(3). Those punishments remain true today. Thus, since 1984, a clear divergence in punishments was made between willful and negligent

dereliction of duty, further highlighting the different *mens rea* between the two types of Article 92(3) dereliction offenses, and Congress did nothing.

Further, in October 2013, the Secretary of Defense directed the Department of Defense General Counsel to conduct a comprehensive review of the UCMJ "to include an analysis of not only the UCMJ, but also its implementation through the Manual for Courts-Martial and service regulations." *See Report of the Military Justice Review Group, Part I: UCMJ Recommendations* (herein "MJRG Report") (2015) at 5. Headed by a former Chief Judge of this Court, the Military Justice Review Group (MJRG) issued its Report in 2015.

The report recommended sweeping changes to various parts of the UCMJ, including many of its punitive articles. *See* MJRG Report at Appendix E, Table 1. However, the MJRG recommended no changes to Article 92. In noting that "Article 92 derived from Article 96 . . . of the 1948 Articles of War and Article 9 of the 1930 Articles for the Government of the Navy" and that the "statute has remained unchanged since the UCMJ was enacted in 1950," the report stated, "In view of the well-developed case law addressing Article 92's provisions, a statutory change is not necessary." Id. at 729-30. Substantial portions of this report would later be incorporated by Congress into the eventual Military Justice Act of 2016. Notably, Congress made no changes to Article 92.

As discussed previously, Judge Wiss aptly noted in his concurring Lawson opinion that "At no time of which I am aware has anyone suggested to Congress that this Court's interpretation of Article 92(3) over the last 4 decades is incorrect. Most surely, Congress has never indicated as much." Lawson, 36 M.J. at 423. Now nearly a quarter-century after Judge Wiss' statement, over six decades after this Court's initial interpretation of Article 92(3), and after numerous overhauls to both the UCMJ's structure and punitive articles, the same rings true.

b. Lawson's Legislative History Analysis

Appellant next contends this Court's legislative intent analysis in Lawson should be "rejected for three reasons." (App. Br. at 17.) First, Appellant argues the "Lawson court ignored that Congress intended to punish gross and culpable negligence, not simple negligence" and that "[b]ased 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." (Id.)

To start, Appellant's claim that this Court "construed statutes in Haverty and Gifford" is incorrect. As already discussed, this Court in those cases analyzed the intent of a recent Army regulation (Haverty) and a commander's policy letter (Gifford), neither of which had any indication in the record as to the originator's background or intent. In neither case did this Court have what the Lawson court

had before it, that being an over-40-year-old Congressional statute (Article 92(3)) complete with evidence as to the originator's (in this case, Congress) intent in creating the legislation (in this case, the 1949 Articles of War and the Articles for the Government of the Navy, among others). Simply put, the breadth of information upon which the Lawson court had to examine the intent of Congress in enacting Article 92(3) was on a different scale that what this Court had before it in either Haverty or Gifford.

Next, while Appellant makes the broad claim that "the Lawson court ignored indications that Congress intended to punish gross and culpable negligence, not simple negligence,"[6] Appellant fails to cite one instance in Lawson, or anywhere else, where Congress actually gave indications of such an intention regarding gross and culpable negligence. Instead, the only "indications" regarding "gross and culpable negligence" was the fact that, as the Lawson court duly noted, "Prior to enactment of the Code, the Navy apparently required "gross and culpable negligence" to support criminal liability for certain crimes." *See* Lawson 36 M.J. at 420.

Yet, the text of Lawson clearly shows that the court did not ignore a discussion or analysis of this topic. In fact, the Lawson court spent two full paragraphs discussing the Navy's apparent gross and culpable negligence

[6] *See* App. Br. at 17.

requirement for certain crimes, including the Court highlighting that "this high degree of negligence was required only for crimes in which it served as a substitute for a requisite specific intent," before stating a selection of offenses to which this intent applied, including "murder [with malice aforethought], larceny, burglary, desertion, and mutiny, etc.[.]" Id. (*citing* Naval Courts and Boards (1937)).

In noting that Congress "did not use the culpable-inefficiency language found in the earlier naval statutes" when enacting Article 92(3), the Lawson court correctly held that "the more reasonable interpretation of this new codal provision is that Congress rejected an exclusive culpable-negligence standard and intended, instead, to punish both types of negligent-duty conduct under Article 92(3)." Lawson, 36 M.J. at 421. Here, the Lawson court certainly did not ignore a discussion regarding the levels of negligence in earlier Naval statutes. Moreover, it is Appellant who has failed to show Congress ever gave any indication that it intended to punish only gross and culpable negligence, let alone that the Lawson Court ignored such an alleged intention.

Appellant's second source of contention with the Lawson Court is that "the Lawson court misconstrued the earlier law on which Article 92(3) was based" and that the "court's conclusion . . . amounted to a strict liability offense." (App. Br. at 18.) In doing so, Appellant states, "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.; *quoting* Lawson, 36 M.J. at 420.)

Yet a full reading of the passage from which Appellant cites shows this Court did not equate any precodal naval law offenses to "a strict liability offense," but instead simply highlighted the fact that the Navy's heightened "gross and culpable negligence" standard only applied to certain offenses and that others, including the offense of "neglect of duty," did not require such a heightened level of negligence.[7] Moreover, the very next paragraph in Lawson highlights the Lawson court's ultimate conclusion that precodal naval law did not have only one level of negligence (i.e., "gross and culpable negligence), or else Congress would have included that one level of negligence explicitly in the statute.

Finally, Appellant claims the Lawson court erred because its "determination that 'neglect of duty' under the earlier naval law meant Congress intended a *mens rea* of 'negligence' was bolstered . . . because of the dictionary definition of 'derelict' included 'neglectful' and 'one guilty of neglect of duty.'" (App. Br. at 18.) Appellant then uses this Court's recent decision in United States v. Tucker, 76 M.J. 257 (C.A.A.F. 2017), to support his ultimate conclusion that "the Lawson

[7] The full passage from which Appellant quotes reads, "In cases where "the act was the principal feature, the existence of the wrongful intent being simply inferable therefrom, as rape, sleeping on watch, drunkenness, neglect of duty, etc. . . . it was only necessary to prove the unlawful act." Lawson, 36 M.J. at 420 (*quoting* Naval Courts and Boards at 132 (1937)).

court's jump from 'neglect' in Army, Air Force, and Navy guidance to 'negligence' under Article 92(3) should be deemed misplaced." (Id. at 19.)

First, this Court's opinion in Tucker is distinguishable from Lawson. In Tucker, the Army Court of Criminal Appeals (ACCA) ruled that Article 134, UCMJ, was not silent on the issue of *mens rea*, but instead specifically had a negligence *mens rea* because based on the term "disorders and neglects." Tucker, 76 M.J. at 257-58. Thus, ACCA determined that Elonis was not relevant to the disposition of the case because there was no absence of a statutory *mens rea* requirement. Id. at 258. In overturning the ACCA opinion, this Court, using a plain language reading of the statute, held that the term "neglects" in Article 134 had no connection to the *mens rea* requirement, i.e., ACCA was in error for finding that Article 134 was not silent on issue of *mens rea*. Based on this essential finding that Article 134 was silent as to the *mens rea* in that case, this Court remanded the case for a new Article 66 review to evaluate the case in light of Elonis and Haverty. Tucker, 76 M.J. at 258.

This case is quite different in that there is no assertion that Article 92(3) has a stated *mens rea*. Instead, the Lawson court, faced with a statute silent on *mens rea*, looked to determine the Congressional intent for *mens rea* for Article 92(3).[8]

[8] Such is the same task this Court found lacking in Tucker and the very reason it remanded the case back to ACCA for further review.

There, the court recognized that Congress, in making Article 92(3), was incorporating the practices of the Navy, Army, and Air Force under one umbrella to create the new Article 92(3) offense of Dereliction of Duty and the "new legislative term 'derelict.'" *See* Lawson, 36 M.J. at 421.

As this Court recognized in Tucker, "As a first step in statutory construction, we are obligated to engage in a 'plain language' analysis of the relevant statute." Tucker, 76 M.J. at 258 (citations omitted). Turning to the dictionary, just as this Court did in Tucker, the Lawson court found "derelict" to mean "neglectful" and "[o]ne guilty of neglect of duty." *See* Lawson, 36 M.J. at 421, fn 7 (*citing* Webster's New Collegiate Dictionary (1949)).

Using this definition, along with its analysis of earlier naval statutes, Article of War 96, and the Army's interpretation of the word "neglect," the Lawson court determined, "at the very least, that Congress intended to establish a simple-negligence standard for nonperformance-of-duty derelicts under this statute." Id. at 421. Such is not in error when viewed in conjunction with Tucker. While Tucker found error in a court using the term "neglect" in its Article 134 context to equate to an explicit statutory *mens rea* requirement, Tucker did not address, let alone find error, in a court simply using the words of prior statutes and definitions to determine Congressional intent for a particular statute.

In fact, Tucker, while in dicta, proves that the Lawson court was correct in its analysis and determination of Congress' intent when it quoted to J.W. Cecil Turner *Kenny's Outlines of Criminal Law* 108 n.1 (16th ed. 1952), for the proposition that "A [person] can 'neglect' his [or her] duty either intentionally or negligently." *See* Tucker, 76 M.J. 258. Likewise, when looking at the offense of dereliction of duty, one derived from multiple "neglect of duty" offenses, this Court did not err in determining that Congress intended for a dereliction of duty to be "either intentionally [i.e. willfully] or negligently."

iii. Inference is not necessary in this case

Elsewhere in his brief, Appellant correctly notes that the Supreme Court has a "long-standing reluctance to infer a *mens rea* of negligence." (App. Br. at 16; *citing* Haverty, 76 M.J. at 204.) However, such a concern is not applicable in this case as Elonis only requires a court to infer a *mens reas* when it is unable to determine Congressional intent. Here, this Court's predecessor was able to determine Congressional intent for Article 92(3)'s *mens rea* long ago. No "infer[ence]" of a negligence *mens reas* was necessary then or now.

E. Military Necessity of Negligent Dereliction of Duty

As noted by the MJRG in its Report, "Article 92 is a unique military offense with no direct federal civilian counterpart," adding that in "civilian employment practice, misconduct is typically addressed through administrative or employment

related proceedings." MJRG Report at 730.[9] In contrast, and as noted by the Lawson court, dereliction of duty is a "punitive article specifically intended by Congress to ensure the proper performance of duty within the military service." Lawson, 36 M.J. at 422 (*citing generally* to Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.")). Such is due to "the different character of the military community and of the military mission." *See* Parker, 417 U.S. at 758.

Consequently, negligence has been upheld as an appropriate criminal *mens rea* for certain military-specific offenses. *See* United States v. Kick, 7 M.J. 82 (C.M.A. 1979) ("There is a special need in the military to make the killing of another as a result of simple negligence a criminal act"); United States v. Schelin, 15 M.J. 218 (C.M.A. 1983) ("We note that Article 108 criminalizes, *inter alia,* merely negligent conduct.") In this sense, and within this particular offense related directly to military duties, the negligence mens rea is proper.[10]

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[9] In a footnote, the Report cites to 5 C.F.R. §752.603 (2014), which states that federal agencies may take adverse administrative action against an employee for "reasons of misconduct, neglect of duty, ..." *See* MJRG Report at 730, fn 10.

[10] Notably, while Appellant claims that "[d]ereliction of duty can make an offense out of any military duty, and any failure to perform that duty," such a claim is incorrect. (*See* App. Br. at 20.) The "negligence" standard requires "an act or omission of a person who is under a duty to use due care which exhibits a lack of

F. Plain Error Analysis

For the reasons set forth above, the military judge in this case did not commit error, let alone plain error, in providing the member's instructions regarding the offense of negligent dereliction of duty. However, even if this Court were to find the military judge did err in his instructions, Appellant has not been prejudiced in this case, particularly with respect to his sentence.

All told, Appellant stands convicted of four specifications under Article 107 for making multiple false official statements, one specification under Article 121 for "steal[ing] money, military property of a value of more than $500," one specification under Article 134 for impeding a criminal investigation, and one specification of negligent dereliction of duty. (*See* J.A. at 50, 93.) The maximum punishment authorized in the case based on those offenses included a dishonorable discharge, confinement for 30 years and 3 months, forfeiture of all pay and allowances, and a reduction to the grade of E-1. (R. at 788.) Notably, the maximum punishment for a negligent dereliction of duty standing alone is three months confinement and two-thirds forfeiture of pay for three months. *See* MCM (2012), part IV, para. 16e(3)(A).

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that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." Moreover, the MCM also delineates in paragraph 16c(3)(d) the defense of ineptitude.)

Yet, the member panel sentenced Appellant to only 30 days confinement, a reduction to E-1, forfeitures, and a bad conduct discharge. Considering this lenient, yet appropriate sentence, any error regarding Appellant's negligent dereliction of duty conviction did not impact his sentence, especially considering it accounted for less than one percent of the maximum confinement sentence (3 out of 363 months) and would not, when standing alone, even have a bad conduct discharge allowed by law.[11] As such, even if this Court finds error in Appellant's dereliction of duty conviction, this Court should affirm his entire sentence as approved.

[11] In addition to his convictions, the member panel also properly had before it a Letter of Counseling Appellant received for disrespecting a senior non-commissioned officer, two Letters of Reprimand (one of which was for making derogatory statements in violation of the Military Equal Opportunity Program Air Force Instruction), a Nonjudicial Punishment (Article 15) for absenting himself from his unit, and a Vacation of Suspended Nonjudicial Punishment for making a false official statement. (Pros. Exs. 18-22.)

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court deny Appellant's claims and affirm AFCCA's decision.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 30 October 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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