IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. STEVEN M. TUCKER Private (E-1) United States Army, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150634 USCA Dkt. No. 18-0254 / AR

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

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ISSUE PRESENTED

WHETHER THE ARMY COURT ERRED IN HOLDING THAT THE MINIMUM MENS REA REQUIRED UNDER CLAUSES 1 AND 2 OF ARTICLE 134, UCMJ, TO SEPARATE WRONGFUL FROM INNOCENT CONDUCT IS SIMPLE NEGLIGENCE.

ARGUMENT

The government defends the opinion of the Army Court of Criminal Appeals (Army Court) by largely recycling the Army Court's reasoning. And just like the Army Court, the government ignores at least seven cases antithetical to its position.[1] The failure to confront these cases is nothing short of surrender. In

[1] *See, e.g., United States v. Rapert*, 75 M.J. 164, 168 (C.A.A.F. 2016) (negligently communicating a threat does not violate Article 134); *United States v. Vaughan*, 58

each of these decisions, this Court eschewed efforts to criminalize negligent conduct under Article 134, and it thereby rebuffed any claim that "the minimum *mens rea* required in an Article 134, UCMJ, to separate wrongful from innocent conduct, is simple negligence combined with clauses 1 and 2 of the terminal element in the current case." (Gov't Br. 20). The government's failure to acknowledge these adverse precedents is a tacit but telling concession.

Second, the government also fails to substantiate any military custom punishing the negligent provision of alcohol to someone under the age of 21. The most authoritative case on this subject is *United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016), where this Court observed that the "risks that accompany alcohol consumption do not diminish the common experience that distributing alcohol to peers at a social event . . . is typically legal." *Gifford*, 75 M.J. at 146. Sharing a drink is generally an innocent thing to do, and only a mens rea greater than negligence can separate it from wrongful conduct here. *See United States v.*

M.J. 29, 35 (C.A.A.F. 2003) (distinguishing "negligence" from "culpable negligence" and establishing that negligently failing to care for a child does not violate Article 134); *United States v. Webber*, 33 C.M.R. 68, 70-71 (C.M.A. 1963) (negligently departing from "commonsense rules of air traffic," in the absence of statute or regulation, "is not criminal"); *United States v. McArdle*, 27 C.M.R. 1006 (C.M.A. 1959) (negligently failing to pay a debt does not violate Article 134); *United States v. Manos*, 25 C.M.R. 238, 240 (C.M.A. 1958) (negligently exposing oneself does not violate Article 134); *United States v. Downard*, 20 C.M.R. 254, 260-61 (C.M.A. 1955) (negligently bouncing a check does not violate Article 134); *United States v. Lampkins*, 15 C.M.R. 31, 35 (C.M.A. 1954) (negligently possessing narcotics does not violate Article 134).

Haverty, 76 M.J. 199, 208 (C.A.A.F. 2017). The government's effort to limit *Gifford* to a "commander's general order" misses the broader import of the case: recklessness is the minimum threshold for culpability, both as a general matter and in relation to the misuse of alcohol. (Gov't Br. 14); *Gifford*, 75 M.J. at 146.

Furthermore, the government gives no reason to believe "practical men in the navy and army," and "those who have studied the law of courts martial," would believe negligently offering alcohol is a military crime. *Parker v. Levy*, 417 U.S. 733, 747 (1974). If after a court-martial and three appellate court decisions, the government still cannot show a clear customary prohibition on the conduct it wants to criminalize, then it should surprise no one that newly-minted privates do not "stringently regulate" their beverages or treat their libations like loaded firearms. *See Gifford*, 75 M.J. at 146, (Gov't Br. 15).

Gifford also resolves the government's third failure, namely its effort to outdo the Army Court and to cast Article 134, UCMJ as a strict liability statute. (Gov't Br. at 13-17). Article 134 is not a public welfare offense. To support a contrary claim, the government would need to prove Congress wanted to "*purposefully* omit intent from the statute," and the government simply cannot show this. *United States v. Gifford*, 75 M.J. at 144 (emphasis in original). As *Gifford* spelled out plainly, when it comes to providing alcohol to someone under the age of 21, nothing in the "history of alcohol offenses" or the "nature of the

offense" would justify inferring an intent to make this a strict liability crime. *Id.* at 144-46.

Fourth and finally, the government comingles the arguments of trial defense counsel with the pleas of the accused; the two are not the same. (Gov't Br. 22). Even if "appellant's defense counsel understood appellant was liable under a theory of recklessness and argued that appellant was provident to the offense under this theory," counsel's arguments do not supplement, substitute, or supplant a knowing and voluntary plea by the accused.[2] (Gov't Br. 22). The military judge must "accurately inform Appellant of the nature of his offense," which requires "a correct definition of legal concepts." *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004). In this case, there is simply no way to conclude with confidence that Private Tucker understood "how the law related to the facts" of his plea. *United States v. Schell*, 72 M.J. 339, 345-46 (C.A.A.F. 2013). All of the attorneys in Private Tucker's court-martial misunderstood the mens rea controlling Specification 1 of Charge IV. It strains credulity, then, to say that a young soldier, misadvised by a military judge on negligence, nevertheless knew the law actually

[2] As the Army Court previously observed: "The spectacle, where both counsel take hold of appellant's arms while the judge grabs the ankles and together they drag appellant across the providence finish line, is not only troublesome, but, as demonstrated by the result in this appeal, in the end, futile." *United States v. Le*, 59 M.J. 859, 864 (A. Ct. Crim. App. 2004) (citations omitted).

required recklessness when the trained lawyers conducting his trial did not. Private Tucker's plea to Specification 1 of Charge IV was improvident and it should be set aside.

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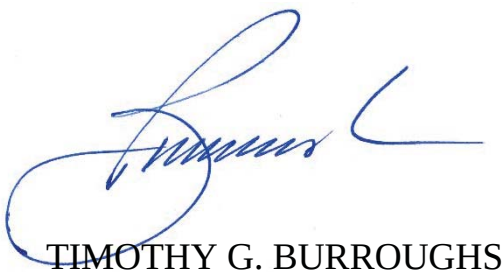
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Tucker*, Crim. App. Dkt. No. 20150634, USCA Dkt. No. 18-0254 / AR, was delivered to the Court and Government Appellate Division on October 1, 2018.



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