IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Granted Issue:

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

Granted Issue

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army court) reviewed this case pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court exercises jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3), which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has

granted a review." In a case reviewed under subsection (a)(3), "action need be taken only with respect to issues specified in the grant of review." Article 67(c), UCMJ.

Statement of the Case

On 23 September 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, 10 U.S.C. §§ 881, 920, 934 (2012). (JA 27, 71). The military judge sentenced appellant to confinement for forty-two months and a bad-conduct discharge. (JA 76). 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. (Action).

On 28 October 2016, the Army court affirmed the findings and sentence. *United States v. Tucker*, 75 M.J. 872, 875 (Army Ct. Crim. App. 2016). Pursuant to Article 67(d), on 23 May 2017, this Court set aside the Army Court's decision and remanded to the Army court in light of *Elonis v. United States*, 135 S. Ct. 2001 (2015). *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017).

On 27 March 2018, the Army court affirmed the findings and sentence. *United States v. Tucker*, 77 M.J. 696, 705 (Army Ct. Crim. App. 2018); (JA 14). On 19 July 2018, this Court granted appellant's petition for grant of review and ordered briefs on the above stated issue. Appellant's brief was submitted on 20 August 2018.

Statement of Facts

The military judge instructed appellant on the elements of Specification 1 of Charge IV, providing alcohol to Private (PV2) TG, a person under the age of twenty-one:

> 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 31-32).

Appellant explained that on the night of 21 June 2014, there was a party occurring on the first floor of the barracks where he lived. (JA 36, 39). In anticipation of the party, appellant went to the gas station, purchased Jägermeister, and brought the alcohol to the party to share with other people. (JA 37, 40). He poured three to four "Jägerbombs" for nineteen-year-old PV2 TG; appellant did not know she was under the age of twenty-one at the time. (JA 42-43).

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 44-45). The trial counsel stated that the specification was a general intent crime, and under that theory, appellant was provident to the offense. (JA 45). The defense counsel agreed the specification was a general intent crime and appellant could be criminally liable for "deliberate ignorance" of PV2 TG's age. (JA 46).

Appellant stated he provided the alcohol to PV2 TG and everyone else at the party without asking anyone for their age. (JA 47). Appellant knew that there were "quite a few" people under the age of twenty-one living in the barracks, but he left the alcohol available for anyone at the party. (JA 47-48). Appellant went to the store to purchase alcohol for the group of Soldiers with whom he congregated outside the barracks because he was one of the only Soldiers old enough to purchase alcohol. (JA 77). 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 48). Further, appellant believed he had a duty to ascertain PV2 TG's age prior to providing her alcohol and agreed he was negligent when he provided alcohol to PV2 TG without asking her age. (JA 47-49).

On appeal, appellant argued he was improvident to his plea to Specification 1 of Charge IV because the military judge applied a *mens rea* of simple negligence

rather than recklessness, as it relates to Article 134, UCMJ. (JA 2). The Army Court found that the military judge did not abuse his discretion in accepting appellant's plea for negligently providing alcohol to a person under the age of twenty-one in violation of Article 134, UCMJ. *Tucker*, 77 M.J. at 705; (JA 1). In doing so, the Army court determined that Congress intended at a minimum, a simple negligence *mens rea* for an Article 134, UCMJ offense. *Id*. at 701; (JA 7-8). Therefore, "the minimum *mens rea* required to separate wrongful conduct from otherwise innocent conduct is simple negligence when combined with clauses 1 and 2 of the terminal element." *Id*. at 77 M.J. at 705; (JA 14).

Summary of the Argument

In analyzing legislative intent, conducting statutory analysis, and reviewing courts' applications of the *mens rea* requirement, it is clear that Congress intended Article 134, UCMJ, to encompass at least a simple negligence *mens rea*. 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)). The Army court's holding is consistent with the legislative intent regarding Article 134, UCMJ. The Army court accurately considered and distinguished this court's holding in *United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016) and the Supreme

Court's holding in *Elonis* in reaching its holding. *Tucker*, 77 M.J. at 702,704; (JA 9, 11). The court appropriately identified the minimum *mens rea* required under Article 134, UCMJ, to separate criminal conduct from otherwise innocent conduct is at least simple negligence combined with clauses 1 and 2 of the terminal element. The court did not err in holding the minimum *mens rea* required in appellant's case was simple negligence. Even if this court determines that a recklessness is the appropriate *mens rea* in appellant's case, appellant's guilty plea to the Article 134, UCMJ, conduct was provident.

Standard of Review

This court reviews questions of statutory interpretation 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) (citation omitted).

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) (citation omitted). In applying this principle, the Supreme Court instructs, "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)). This Court applied these principles and determined that "silence in a criminal statute . . . does not prevent [*mens rea*] from being inferred." *Gifford*, 75 M.J. at 142. 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 was the lowest *mens rea* necessary to separate wrongful from otherwise innocent conduct. *Id*. at 147.

"[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 a statutory construction analysis 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, 30 C.M.R. 44, 45-47 (1960)).

A providence inquiry into a guilty plea must establish that the appellant believes that he is guilty of the offense and admits the factual circumstances that objectively support the guilty plea. *United States v. Garcia*, 44 M.J. 496, 497-498 (C.A.A.F. 1996) (citation omitted). In deciding whether a guilty plea is provident, the court may consider the facts admitted by appellant during the providence inquiry and the stipulation of fact. *United States v. Hines*, 73 M.J. 119, 124 (C.A.A.F. 2014) (citing *United States v. Whitaker*, 72 M.J. 292, 293 (C.A.A.F. 2013)). When an appellant's "providence inquiry established the facts necessary to support the elements of the UCMJ offense charged, the plea to that charge is

provident." *United States v. Holbrook*, 66 M.J. 31, 32 (C.A.A.F. 2008) (citation 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).

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 *Garcia*, 44 M.J. at 498). 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 quotes omitted).

A. The Army court did not err in holding that the minimum *mens rea* required under Article 134, UCMJ, to separate wrongful from innocent conduct was simple negligence combined with clauses 1 and 2 of the terminal element.

The Army court applied the proper framework to reach its holding. In looking at the legislative history of Article 134, UCMJ, conducting a statutory analysis, and analogizing how courts have applied a *mens rea* requirement when it has not been specified, it is clear that the legislative intent for Article 134, UCMJ, is to include simple negligence offenses within its proscription.

First, the Army court recognized that Congress did not expressly state a specific *mens rea* within the statutory language of Article 134, UCMJ. *Tucker*, 77 M.J. at 701. Next, the court considered the implied intent of Congress by looking at other offenses enacted without a specified *mens rea* requirement. *Id*. The court found clear Congressional intent for the minimum *mens rea* requirement to be no higher than simple negligence when Article 134, UCMJ is combined with clauses 1 and 2. *Tucker*, 77 M.J. at 701 (recognizing the Supreme Court's guidance in *Parker v. Levy*, 417 U.S. 733 (1974)). The Army court considered precedent from this Court stating, "Congress intended to authorize simple negligence as a *mens rea* for Article 134 offenses." *Id*. In analyzing this Court's precedent, the Army court accurately distinguished this Court's opinion in *Gifford*—identifying the factual similarity but distinguishing the legal question considered by this Court. *Id*. at 702-703.

1. The history of the term "disorders and neglects" indicates Congress intended to include negligent offenses within Article 134, UCMJ.

"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) (alteration in original) (quoting *United States v. McGuinness*, 35 M.J. 149, 153 (C.M.A. 1992)). 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). After the enactment of Article 134, UCMJ, the Court of Military Review 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) (citation omitted).

Congress has not expressly stated in the statutory language its intent to permit a particular *mens rea* for an Article 134, UCMJ, offense. Since the enactment of Article 134, UCMJ, this Court has upheld negligent actions as punished by the statute, and the President has specified negligent offenses under this statute. This Court found that a crime of child neglect punished under general Article 134, UCMJ, required culpable negligence. *United States v. Vaughan*, 58 M.J. 29, 35 (C.A.A.F. 2003). Additionally, 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) (quoting *United States v. Kirchner*, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952)); *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 were 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

[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's predecessor court determined that burning with intent to defraud was

the legislative intent to include negligent offenses in the conduct proscribed by Article 134, UCMJ.

2. Providing alcohol to a minor under Article 134, UCMJ, is a public welfare offense.

Considering the wide range of crimes intended to be punished within Article 134, UCMJ, this Court should find that the offense in the present case, in which no *mens rea* is specified, is analogous to a public welfare offense. "The Supreme Court has acknowledged that, in limited circumstances, 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). "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." *Gifford*, 75 M.J. at 143 (quoting *Balint*, 258 U.S. at 251-253).

In *Gifford*, this Court looked at the history of the offense, the nature of the offense, and the gravity of the punishment to determine whether a general order created a crime analogous to a public welfare offense. *Gifford*, 75 M.J. at 144-146. Ultimately, in recognizing that the commander's intent was controlling in that case,

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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.

this Court found that the commander did not intend to create a public welfare offense in drafting the general order. *Id*. at 140. Appellant's case is distinguishable from *Gifford* in that it does not address the factors listed above in the context of a commander's general order. In applying the *Gifford* framework to Article 134, UCMJ, it is evident that Congress intended to create a public welfare offense.

a. The history of Article 134, UCMJ, evidences legislative intent to create a public welfare offense.

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, 263 (1952). In *Levy*, the Supreme Court traced the origins of the term "disorder and neglects," in Article 134, UCMJ, back to the Articles of the Earl of Essex in 1642 and the British Articles of War of 1765. 417 U.S. at 745. The Supreme Court found that the intent of the term 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 749. The Supreme Court distinguished the broad range of conduct that Congress intended to regulate in the UCMJ from the typically narrow state criminal codes that regulate civilians. *Id.* at 750. Considering the centuries of use of "disorders and neglects" to encompass a broad range of conduct—much wider 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.

b. 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 prejudicial to good order and discipline is subject to stringent regulation.

The applicability of Article 134, UCMJ, is narrowed by this Court and by other military authorities. *Levy*, 417 U.S. at 753. 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.* (internal quotes omitted).

Conduct prejudicial to good order and discipline "must be gauged by an actual knowledge and experience of military life." *Id*. at 748-749 (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. Nevertheless, 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. On the issue of notice, this Court has considered military case law's delineation of the crime, state statutes criminalizing the conduct, and military custom and regulation. *Vaughn*, 58 M.J. at 31-33. When 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, they have adequate notice.

c. The gravity of the punishment for a general Article 134, UCMJ, offense 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 (alterations in original) (quoting *Morissette*, 342 U.S. at 256). In *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 included punishments under Article 15, UCMJ, forfeiture of pay, reduction in rank, and discharge from the service. *Id*. The minor offenses specified by the President under Article 134, UCMJ, include limited maximum punishments. In fact, this Court has limited the maximum punishment for general Article 134, UCMJ offenses, stating:

> [O]ffenses 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 Article 134, UCMJ). General Article 134, UCMJ, offenses are analogous to public welfare offenses because of its history, the unique military community where service members are aware of the type of conduct that is prejudicial to good order and discipline, and the light punishments associated with Article 134, UCMJ, offenses.

3. Congress intended for Article 134, UCMJ, to proscribe a wide range of conduct including negligence offenses.

"[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 (in reliance on *Liparota* the court 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 *Liparota*, 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 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." *Levy*, 417 U.S. at 744 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17, (1955)).

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 *Quarles*, 350 U.S. at 17). 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 measurable 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 *Levy*, this Court has noted Congress's continued intent to legislate more broadly when compared to civilian codes.

4. Clauses 1 and 2 of the terminal element in Article 134, UCMJ, adequately separate wrongful from innocent conduct.

The Army court did not err in finding that the terminal element of Article 134, UCMJ sufficiently excludes innocent conduct. As recognized by the Army court in reaching to its holding, "in some instances, the mere requirement in a statute that a defendant commit an act with knowledge of certain facts—i.e., that a

defendant possessed 'general intent'—is enough to ensure that innocent conduct can be separated from wrongful conduct." *Tucker*, 77 M.J. at 704 (quoting *Caldwell*, 75 M.J. at 281). While *Caldwell* was decided in the context of Article 93, UCMJ, the framework is applicable to Article 134, UCMJ. When the *Caldwell* framework is applied to Article 134, UCMJ, the *actus reus* requirements of clauses 1 and 2 combined with the negligent conduct adequately separate wrongful conduct from innocent conduct.

Congress wrote the general Article 134, UCMJ, with the express purpose to regulate "all disorders and neglects to the prejudice of good order and discipline in the armed forces." The Army court correctly interpreted the statute consistently with legal precedent in holding 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. Thus, this Court should look at its precedent and the UCMJ as a whole to determine the intent of Article 134, UCMJ, is to include negligent offenses.

B. During his guilty plea, appellant explained how his conduct was reckless.

Even if this Court is inclined to find that the appellant should have been advised on a *mens rea* of recklessness, the instruction on negligence 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 discussion of appellant's

liability that appellant was aware of the elements of the offense, admitted them freely, and pleaded guilty because he was guilty. "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." *Redlinski*, 58 M.J. at 119 (citations omitted).

This Court can analyze the record based on a recklessness *mens rea* should it determine that to be the correct mental responsibility. In *Gifford*, the court inferred a *mens rea* of recklessness into the general order to mean that "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. Here, the negligence instruction did not create a conflict with the conduct appellant admitted to and his belief in his criminality. Appellant admitted he knew there were "quite a few" people living in the barracks who were under the age of twenty-one. (JA 47-48). Appellant went to the store to purchase alcohol for the group of soldiers with whom he congregated outside of the barracks because he was one of the only soldiers in the group old enough to purchase alcohol. (JA 77). Nonetheless, appellant consciously disregarded the known risk that PV2 TG was under the age of twenty-one when he provided alcohol directly to her without asking for her age. (JA 47-48).

In *Jones*, the appellant was provident despite the military judge's failure to provide a necessary definition of a term because the appellant discussed the issue with defense counsel. 34 M.J. at 272. Similarly, here, the military judge identified the *mens rea* issue, provided a short break so that defense counsel could review the issue, and then allowed defense counsel the opportunity to be heard. (JA 44-45). Defense counsel then confident his client was provident, stated, "deliberate ignorance can create criminal liability," and then cited *United States v. Dougal*, 32 M.J. 863 (N.M.C.M.R. 1991). (JA 46). In *Dougal*, the court explained recklessness was when an accused "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." 32 M.J. at 867-68. Evidenced by his reliance on *Dougal*, 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.

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 the facts that made him guilty. Appellant was provident to his plea of guilty to Specification 1 of Charge IV and the military judge did not abuse his discretion by accepting it. For the foregoing reasons, this Court should affirm the findings and sentence.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court answer the specified question in the negative and affirm the findings and sentence.

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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 September 19th, 2018.

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