

**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. 17-0160/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 TERM “DISORDERS AND
NEGLECTS” STATES A NEGLIGENCE STANDARD
FOR MENTAL CULPABILITY UNDER ARTICLE 134,
UCMJ, WHICH PRECLUDES APPLICATION OF
UNITED STATES V. ELONIS.

REPLY ARGUMENT

The proposition that Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (2012) [hereinafter UCMJ], dispenses with mental culpability is so contrary to the law of courts-martial that it took nearly seven decades of military justice before it emerged in a judicial opinion.¹ The Army Court, now joined by

¹ The confusion of “neglects” with “negligence” first appeared in dicta within another Army case a few months earlier: “With regards to Article 134, UCMJ, the

the government, has advanced a position without precedent, one whose novelty underscores its frailty. This Court should reverse the lower court's opinion, and reiterate yet again the simple axiom of justice that "wrongdoing must be conscious to be criminal." *Elonis*, 135 S. Ct. 2001, 2009 (2015).

1. This Court has repeatedly rejected any notion that Article 134 does away with mens rea requirements.

This Court has already determined that offenses charged under Article 134 must satisfy *Elonis*. *United States v. Rapert*, 75 M.J. 164, 167 (C.A.A.F. 2016). The rule of *Elonis*, of course, is nothing new in military justice, it merely restates the law as it has always been: "[n]egligence is not a basis for criminal prosecution unless clearly proscribed by statute." *United States v. Curtin*, 26 C.M.R. 207, 213 n.2 (C.M.A. 1958). A clear proscription should be "sure," "free from doubt," and "unambiguous." *Clear*, Black's Law Dictionary (8th Ed. 2004). There is no statutory language, jurisprudence, legislative history, or mark of military custom that shows Congress surely, undoubtedly, and unambiguously intended to strip Article 134 of a mens rea requirement. The default mens rea, then, for offenses charged under Article 134 must be recklessness, absent some "ancient usage."

statute specifically criminalizes 'disorders and *neglects*' that are prejudicial to good order and discipline or which tend to discredit the service." *United States v. Chance*, No. ARMY 20140072, 2016 CCA LEXIS 241, at *5 (A. Ct. Crim. App. Apr. 18, 2016) (mem. op. on reconsideration)(emphasis in original). The case at bar is the only one to rely on such reasoning.

United States v. Gifford, 75 M.J. 140, 146 (C.A.A.F. 2016); *United States v. Greenwood*, 19 C.M.R. 335, 342 (C.M.A. 1955).

True, Congress has proscribed negligence elsewhere in the UCMJ, using clear statutory language to achieve that end.² Missing movement, misbehaving before the enemy, letting prisoners escape, hazarding vessels, and losing government property are offenses long associated with negligence, and ones which Congress expressly exempted from conscientious criminality. *See* Articles 87, 96, 99, 108, 110, UCMJ. Those offenses show how Congress dispenses with the normal scienter requirements when it wants to be clear. But Congress did not speak clearly in Article 134. Instead it bartered clarity for breadth, couching Article 134 in “such sweeping terms” in order to capture the residuum of customary military law in a single sentence. *United States v. Downard*, 20 C.M.R. 254, 256 (C.M.A. 1955). The nearly unbounded field of conduct to which those sweeping terms could apply precludes a finding that the article “clearly” dispenses

² In these offenses, Congress prohibited actions committed “through neglect,” using this phrase *in seriatim* with other terms of criminality, e.g. “through design,” “through disobedience . . . or intentional misconduct,” and “willfully.” Articles 87, 96, 99, and 108, UCMJ. The use of the word “neglect” inside a prepositional phrase with other prepositional and adverbial phrases connoting mental culpability is fundamentally different than the use of “neglects” as a noun alongside other nouns for actions or the absence thereof: “disorders,” “conduct,” and “crimes.” *See* Article 134, UCMJ.

with any requirement for mental culpability. Simply put, the words of Article 134 are stretched too far to be that clear.

Of course Article 134 is not a normal statute. A “mere recitation” of its statutory elements fails to meet the minimum guarantees of due process and double jeopardy protection. *United States v. Weymouth*, 43 M.J. 329, 335 (C.A.A.F. 1995). Rather, its constitutionality rests on “the narrowing construction developed in military law through the precedents of this Court and limitations within the Manual for Courts-Martial.” *United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008), *citing to Parker v. Levy*, 417 U.S. 733, 752-61 (1974). The article lives and breathes within these realms. That is where its mens rea must lie, and both the Army Court and the government have failed to show anything within military custom, jurisprudence, or authoritative interpretations that puts Article 134 above the constitutional demands of *Elonis*.

a. This Court has repeatedly rejected attempts to criminalize mere negligence under Article 134.

The currents of military justice have always pulled strongly and swiftly away from strict liability or negligent offenses, even within the context of Article 134. “As a general proposition, the trend seems to be toward the restriction of penal liability to those acts or omissions which are accompanied by at least something in the nature of mens rea.” *Downard*, 20 C.M.R. at 261. Indeed,

“[e]xcept in unusual circumstances, negligent conduct is generally left to the realm of civil law.” *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983). Most recently, this Court made it clear that “a mens rea requirement is the rule rather than the exception.” *Gifford*, 75 M.J. at 146. There is simply no debate that a blanket criminalization of negligence, let alone strict liability, runs counter to military custom, and that custom is the essence of Article 134.

The decisions of this Court dispel any idea that Article 134 sets the bar for general disorders at negligence or strict liability. Negligently possessing narcotics, for instance, does not violate Article 134. *United States v. Lampkins*, 15 C.M.R. 31, 35 (C.M.A. 1954). Negligently bouncing a check does not violate Article 134. *Downard*, 20 C.M.R. at 260. Likewise, negligently failing to pay a debt does not violate Article 134. *United States v. McArdle*, 27 C.M.R. 1006. (C.M.A. 1959). Negligently exposing oneself does not violate Article 134. *United States v. Manos*, 25 C.M.R. 238, 240 (C.M.A. 1958). Negligently departing from “commonsense rules of air traffic,” in the absence of statute or regulation, “is not criminal.” *United States v. Webber*, 33 C.M.R. 68, 70-71 (C.M.A. 1963). Negligently failing to care for a child does not violate Article 134. *United States v. Vaughan*, 58 M.J. 29, 35

(C.A.A.F. 2003).³ Nor does negligently communicating a threat violate Article 134. *Rapert*, 75 M.J. at 168.

In each of these cases, this Court refused to “bottom criminal liability on mere negligence,” a fact it highlighted in each case by noting how the same conduct, if accompanied by a more culpable mind, could have violated Article 134. *Greenwood*, 19 C.M.R. at 342. Each of these cases rejects the idea that Article 134 “specifically criminalizes ‘disorders and neglects’” and thus “clearly states a negligence standard.” (JA 4). Each of these cases rejects the idea that Article 134 creates a strict liability, public welfare offense. (Gov’t Br. at 12). In short, the lower court’s opinion faces a squad of superior adverse authority—and that is to say nothing about the adverse decisions at the Courts of Criminal Appeals.⁴ The lower court’s opinion is alone, outgunned, and defenseless; it cannot stand.

³ The government relies on *Vaughn* as proof of “Congress’ intent to proscribe negligent conduct.” (Gov’t Br. at 11). The case shows the opposite, however, as it expressly excluded “mere negligence” from criminal liability. Instead, the offense of child neglect relies on culpable negligence, which requires “a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences.” *Vaughan*, 58 M.J. at 34. That is a standard akin to recklessness, not simple negligence.

⁴ See, e.g., *United States v. Holmes*, 18 C.M.R. 599, 600-01 (A.F.B.R. 1954) (negligently possessing a forged pass does not violate Article 134); *United States v. Haver*, 22 C.M.R. 808, 809 (A.F.B.R. 1956) (“there is, in military law, no such offense as negligently destroying private property”); *United States v. Jones*, ACM S27674, 1988 CMR LEXIS 559, at *4-6 (A.F.C.M.R. July 5, 1988) (negligent trespasses do not violate Article 134); *United States v. Amazaki*, 67 M.J. 666, 672-73 (A. Ct. Crim. App. 2009) (negligently possessing child pornography does not violate Article 133).

b. This Court has already determined that there is no customary basis for criminalizing anything less than the reckless provision of alcohol to minors.

It is true that Article 134 can punish certain acts of negligence, but those are the exceptions. The three Article 134 offenses to survive without a scienter requirement have done so only because of their firm roots in military custom and necessity.⁵ The proposed prohibition on negligently providing alcohol to minors is no such offense. *Gifford*, 75 M.J. at 145. As this Court has already noted, nothing in the military's "legal traditions" or "centuries of practice" would justify punishing a servicemember for giving alcohol to someone under the age of 21, unless the accused did so recklessly. *Id.* at 146. While *Gifford* addressed Article 92, its conclusions and reasoning inevitably control this case too. The lower court's opinion is simply incompatible with *Gifford*, and it must be reversed.

⁵ The preceding brief has already addressed the offenses of negligent homicide and negligent discharge. The third and final crime of negligence this Court has let stand under Article 134 is failing to deliver mail, as a lesser included offense of stealing, secreting, or destroying it. "Failure to perform one's military duties is a recognized offense of long-standing. And where that duty relates to delivery of mail, a matter of serious—not to say overwhelming—importance to morale in an overseas area, it takes on a significance far in excess of those other duties which might aptly be described as 'routine.'" *United States v. Beach*, 7 C.M.R. 48, 50 (C.M.A. 1953).

This Court has never deemed Article 134 an unrestricted license to punish negligence or impose strict liability, and the perils of the government's request are obvious. Given that "crimes are composed of elements, and they include both a required act (*actus reus*) and a mental state (*mens rea*)," the widening of one aperture should generally tighten the other. *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010). Congress chose to define the *actus reus* of Article 134 expansively, and so this Court must ensure the corresponding *mens rea* stays fixed in the time-tested presumption against negligence and strict liability offenses, otherwise "the forces of narrowing interpretation that saved Article 134, UCMJ, from constitutional challenge in *Parker v. Levy* would fail." *United States v. Wilcox*, 66 M.J. 442, 447 (C.A.A.F. 2008).

2. The government's inconsistent positions undercut its argument that Congress clearly intended to dispense with a *mens rea* requirement for Article 134.

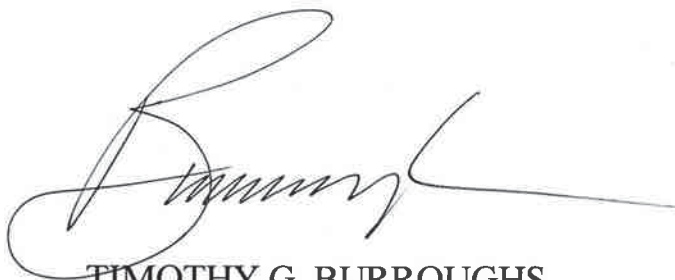
The government urges this Court to find that "Congress intended Article 134, UCMJ, to encompass negligent and strict liability offenses within its proscription." (Gov't Br. at 5). But the government itself has been uncertain on the very point. At trial, government counsel initially stated Private Tucker was improvident, but then changed tracks and argued the question was moot because this was a general intent crime. (JA 31-32). After asserting the provision of alcohol was unlawful regardless of knowledge, the government stated the charge

was a strict liability offense but conceded there was no authority to support that position. (JA 32-33). On appeal, the government correctly abandoned all three positions before the Army Court and acknowledged instead that, under *Gifford*, recklessness was indeed the correct mens rea. (JA 3). But now, before this Court, the government asks for the most expansive interpretation possible of Article 134.

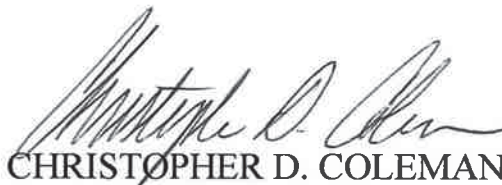
The government's varying interpretations provide another indication that, if Congress intended to make negligence the threshold for guilt under Article 134, it did not legislate clearly enough. Rather, Congress intended Article 134 to reflect customary military law and safeguard against "the possibility of a failure of justice in the army." *United States v. Snyder*, 4 C.M.R. 15, 17 (C.M.A. 1952). To accept the government's position now and recalibrate Article 134 as a negligence or strict liability statute, to "recognize by judicial fiat that which Congress and the executive draftsmen have ignored," would mean casting off the article's constitutionality and subjecting servicemembers to an intolerable regime where criminal sanctions strike even the unwitting and well-intentioned. *Downard*, 20 C.M.R. at 260. That would be an outcome "too severe . . . to bear." *Lambert v. California*, 355 U.S. 225, 229 (1957).

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court set aside Specification 1 of Charge IV, and set aside and reassess Private Tucker's sentence.



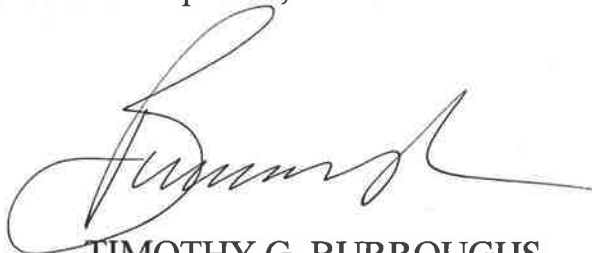
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Tucker*,
Crim. App. Dkt. No. 20150634, USCA Dkt. No. 17-0160/AR, was delivered to the
Court and Government Appellate Division on April 20, 2017.

A handwritten signature in black ink, appearing to read 'Timothy G. Burroughs', with a large, stylized initial 'T' and a long horizontal flourish extending to the right.

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