IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JEREMY J. STRADTMANN,
Master Sergeant (E-7),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0223/AF

Crim. App. Dkt. No. ACM 40237

BRIEF ON BEHALF OF APPELLANT

JARETT MERK, Maj, USAFR
U.S.C.A.A.F. Bar No. 35058
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Jarettt.merk@us.af.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Court of Appeals for the Armed Forces

Service Courts of Criminal Appeals

Statutes, Rules, and Executive Orders

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. **JEREMY J. STRADTMANN,** Master Sergeant (E-7), U.S. Air Force, *Appellant.*	**BRIEF ON BEHALF OF APPELLANT** Crim. App. No. 40237 USCA Dkt. No. 23-0223/AF

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

Issue Presented

WHETHER RECKLESSNESS IS THE REQUISITE *MENS REA* TO SUSTAIN A CONVICTION FOR THE PRESIDENTIALLY PROMULGATED OFFENSE OF CHILD ENDANGERMENT UNDER ARTICLE 134, UNIFORM CODE OF MILITARY JUSTICE (UCMJ) OF THE 2016 MANUAL FOR COURTS-MARTIAL.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter "Air Force Court") had jurisdiction over Appellant's case under Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d). This Court now has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

Master Sergeant Jeremy J. Stradtmann ("Appellant") was tried by general court-martial before a military judge at Peterson Space Force Base, Colorado, on 1 April, 20 May, and 23 July 2020, and 14-18 June 2021. Consistent with his pleas, the military judge found him guilty of one charge and four specifications of assault in violation of Article 128, UCMJ, for striking A.S. with his hand (Charge I, Specification 5), approaching A.S. with a balled fist (Charge I, Specification 6), approaching A.S. in a threatening manner (Charge I, Specification 7), and throwing a wallet at A.S. (Charge I, Specification 12), as well as one charge and six specifications in violation of Article 134, UCMJ, for wrongfully communicating a threat (Charge II, Specifications 2, 3, 4), and endangering the mental health of a child under the age of 16 (Charge II, Specifications 6, 7, and 8).[1] JA 059-060.

Contrary to his pleas, Appellant was convicted of: one charge and six specifications of assault in violation of Article 128, UCMJ, for striking A.S. on the arm with a roll of wrapping paper (Charge I, Specification 2); striking A.S. on the

[1] The charged offenses span a timeframe between 2014 and 2019. JA 025, Entry of Judgement in the Case of *United States v. Master Sergeant Jeremy J. Stradtmann* ("EOJ"). All references to the punitive articles of the UCMJ are to the Manual for Courts-Martial, United States effective at earliest date in the alleged offense: (2012 ed.) [MCM 2012], (2016 ed.) [MCM 2016], and (2019 ed.) [MCM 2019]. All references to the Rules for Courts-Martial (R.C.M.) and the Military Rules of Evidence (Mil. R. Evid.) are to the Manual for Courts-Martial, United States (2019 ed.) [MCM 2019].

body and foot with his hand and foot (Charge I, Specification 8); pointing a dangerous weapon at A.S. (Charge I, Specification 9); pointing a dangerous weapon at M.S., a child under the age of 16 (Charge I, Specification 10); striking A.S. in the head with his hand and pulling A.S. up a set of stairs by her hair (Charge I, Specification 11); and striking M.S., a child under the age of 16, on her buttocks with his hand (Charge I, Specification 13). *Id*.

The military judge sentenced Appellant to be reduced to E-4, to be confined for 54 months, and to a bad conduct discharge. JA 080-082. The Convening Authority took no action on the findings, approved the sentence in its entirety, and waived all automatic forfeitures for a period of six months for the benefit A.S. and their two children. JA 024, Convening Authority Decision on Action – *United States v. MSgt Jeremy J. Stradtmann*, dated 20 August 2021.

On 30 May 2023, the Air Force Court modified the findings by excepting the words "dangerous" and "loaded" from Specification 9 and Specification 10 of Charge I and setting the excepted words aside. *United States v. Stradtmann,* ACM 40237, 2023 CCA LEXIS 238 (A.F. Ct. Crim. App. 30 May 2023) (unpub. op.) (JA 019). The Air Force Court reassessed the sentence but provided no relief, and affirmed the findings, as modified, and sentence, as reassessed. *Id.* Appellant argued below that Charge II, Specifications 6, 7, and 8 failed to state an offense because the offense of child endangerment required recklessness as the minimum

mens rea, not culpable negligence, and thus the military judge's acceptance of his guilty plea was an abuse of discretion. JA 002. But the Air Force Court summarily affirmed these specifications without discussion. *Id.* On 16 August 2023 this Court granted Appellant's petition to review the Air Force Court's decision.

Statement of Facts

Appellant met A.S. online in December 2013 when he was a Master Sergeant with 20 years' service. JA 061, 067. The couple married in October 2014 after a brief courtship, and moved to Colorado Springs, Colorado, where Appellant was assigned to Peterson Air Force Base. JA 062, 068. Appellant and A.S. have two children together: a daughter, M.S., born in 2015; and a son, E.S., born in 2017. JA 039, 064, 066.

In February 2019, Appellant told A.S. that he wanted to end the marriage and was going to seek a divorce. JA 065, 069. Up to that point, A.S. had never alleged or reported abuse by Appellant. JA 069, 077.

In March 2019, Appellant filed for divorce and sought full custody and sole decision-making authority over their children. R. at 435-36, 452. Shortly thereafter, A.S. went to Security Forces and interviewed with investigators about alleged abuse by Appellant. JA 069-071. By 9 April 2019, A.S. had filed for a protection order. JA 072.

A.S. alleged, among other things,[2] that Appellant assaulted her by hitting her with his hand in response to her shoving him as he was walking down the stairs with their daughter. JA 036. A.S. also alleged Appellant threatened her on various occasions in front of their daughter M.S. *Id*. These allegations also formed the basis of the child endangerment charges (Charge II, Specifications 6, 7, and 8) that Appellant ultimately pleaded guilty to at his court-martial on 18 June 2021. JA 034

Appellant's divorce from A.S. became final in June 2020. JA 063. They have been in ongoing civil proceedings related to custody and division of their finances since then. *Stradtmann,* 2023 CCA LEXIS 238, *4. Additional facts necessary to resolve the issue raised are provided below.

Summary of Argument

Whether culpable negligence can sustain the offense of child endangerment under *MCM* 2016 was called into question by *Elonis v. United States,* and this Court's line of cases applying *Elonis* such as *United States v. Haverty*[3], and *United States v. Tucker*.[4] Specifically, in *Tucker*, this Court recognized that while the plain language of Article 134, UCMJ does not contain a mens rea requirement, Congress did not omit mens rea as an element of an offense under Article 134, UCMJ. 78 M.J. at 185. Following *Elonis*, this Court established recklessness as the

[2] *See* "Statement of the Case" *supra*; JA 020, Charge Sheet.
[3] 76 M.J. 199, 208 (C.A.A.F. 2017)
[4] 78 M.J. 183 (C.A.A.F. 2018)

baseline mens rea required to criminalize conduct under Article 134, UCMJ unless statute, precedent, ancient usage, or military custom dictated a different level of scienter. *Id* at 186.

But here, statute, precedent, ancient usage, or military custom does not support lowering the default mens rea for the Article 134, UCMJ offense of child endangerment. Unlike crimes such as negligent dereliction of duty, criminalizing child endangerment is a recent occurrence under military law. Child Endangerment as an enumerated offense did not appear in the *MCM* until 2008, and there it was as a Presidentially promulgated offense under Article 134, UCMJ (same as at issue here). It was not until 2019, after Congress passed and implemented Article 119b, 10 U.S.C. § 919b, that Child Endangerment became a separate statute and Article under the UCMJ. But Appellant's conduct occurred before Article 119b was implemented, so that statute is not at issue here.

Unlike negligent homicide or maltreatment, there no special need by the military or custom which justifies lowering the mens rea requirement for the Child Endangerment offense at issue here. Child endangerment is not a military specific offense, and the military has no greater interest than society in general in protecting the welfare of children by ensuring parents provide a duty of care to their children. See generally, *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (finding military members were properly on notice that conduct amounting

to child neglect through culpable negligence was punishable as a novel offense under the general article in part because 33 states had similar laws).

In the absence of custom, ancient usage, or longstanding precedent there is no justification to deviate from Article 134's Congressionally implied mens rea of recklessness for the enumerated offense of child endangerment under that same Article. Here, as in *Tucker*, the military judge erred by instructing Appellant on the lower mens rea of culpable negligence during the *Care* inquiry. *See Tucker*, 78 M.J. at 186. And as in *Tucker*, this provides a substantial basis in law to question the providency of Appellant's guilty plea to culpably negligent child endangerment, such that this Court should set aside and dismiss Specifications 6, 7, and 8 of Charge II. *Id*.

Argument

CHILD ENDANGERMENT UNDER ARTICLE 134, UCMJ (MCM 2016) REQUIRES RECKLESSNESS AS THE MINIMUM *MENS REA* TO STATE AN OFFENSE. BECAUSE THE MILITARY JUDGE ACCEPTED APPELLANT'S GUILTY PLEA BASED ON THE LESSER *MENS REA* OF CULPABLE NEGLIGENCE, THE MILITARY JUDGE'S ACCEPTANCE OF APPELLANT'S GUILTY PLEA WAS AN ABUSE OF DISCRETION.

In Specifications 6, 7, and 8 of Charge II, the Government charged violations of child endangerment by culpable negligence, in violation of MCM 2016, Article 134, UCMJ. JA 020. Defense counsel moved to dismiss Specifications 6, 7, and 8 of Charge II for failure to state an offense. JA 083. The

military judge denied the motion. JA 099.

During Appellant's *Care* inquiry, the military judge indicated the pertinent elements of Charge II, Specifications 6 and 7 required that Appellant "endangered [MS'] mental health through culpable negligence by [assaulting [A.S.] and wrongfully communicating a threat to injure [A.S.] the mother of [M.S.], while [M.S.] was present." JA 037, 047.

He further instructed:

> 'Culpable negligence' is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of the act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not reasonably be the natural and probable consequence of such acts.

JA 038, 048.

Standard of Review

Military judges have broad discretion to accept guilty pleas. *See United States v. Phillips*, 74 M.J. 20, 21 (C.A.A.F. 2008). This Court reviews a military judge's "decision to accept a guilty plea" by applying an abuse of discretion standard. *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012). This Court reviews questions of law arising from the guilty plea de novo. *Id*.

Law

Here, the test for an abuse of discretion is whether the record shows a substantial basis in law or fact for questioning the plea. *United States v. Schell*, 72

M.J. 339, 345 (C.A.A.F. 2013). "For this 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) (quoting *United States v. Care*, 18 C.M.A. 535, 541, 40 C.M.R. 247 (1969).

In cases where the military judge misstates the mens rea element of the charged offense during the plea inquiry, the fact that an accused admits to facts that facially could support the correct mens rea will not save the guilty plea. *United States v. Tucker*, 78 M.J. 183, 186 n.5 (C.A.A.F. 2018). Rather, the record must demonstrate that despite the erroneous explanation of the mens rea by the military judge, the appellant otherwise "knew the [proper] elements, admitted them freely, and pleaded guilty because he was guilty." *Id.* citing *United States v. Murphy*, 74 M.J. 302, 308 (C.A.A.F. 2015) (further citations omitted).

In *Elonis v. United States*, the Supreme Court explained that "recklessness is the lowest '*mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *United States v. Gifford*, 75 M.J. 140, 147 (C.A.A.F. 2016) (quoting *Elonis v. United States*, 575 U.S. 723, 736 (2015)). This Court has "recognized that, under *Elonis*, the existence of a *mens rea* is presumed in the absence of clear congressional intent to the contrary." *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019).

Following *Elonis*, this Court considered several challenges to the requisite *mens rea* for criminalizing conduct pursuant to Article 92, UCMJ and Article 134, UCMJ respectively. *See Gifford*, 75 M.J. at 147 (finding minimum mens rea for Article 92, UCMJ offense of providing alcohol to minors as recklessness); *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017) (recklessness necessary for Article 92 offense involving violation of promulgated regulation); *United States v. Blanks*, 77 M.J. 239, 241 (C.A.A.F. 2018) (negligence appropriate for certain dereliction offenses); *United States v. Tucker*, 78 M.J. 183 (C.A.A.F. 2018) (finding guilty plea improvident because minimum mens rea for Article 134, UCMJ offense of providing alcohol to minors was recklessness).

In 2019, the Supreme Court reiterated the "basic principle underlying the criminal law: the importance of showing [] 'a vicious will.'" *Rehaif v. United States*, 588 U.S. ----, 139 S. Ct. 2191, 2193 (2019). The Court explained "the understanding that an injury is criminal only if inflicted knowingly is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id*. at 2196 (internal quotation and citation omitted). The Court emphasized that "[s]cienter requirements advance this basic principle of criminal law by helping to separate those who understand the wrongful nature of their act from those who do not." *Id* (internal quotation and citation omitted).

Prior to implementation of the Military Justice Act of 2016 on 1 January 2019, child endangerment was a Presidentially promulgated offense which did not appear in the Manual for Courts-Martial until 2008. *See* 72 FR 56179, Executive Order 13447, dated 28 September 2007; *compare MCM* (2016 ed.) ¶68a *with* 10 U.S.C. § 919b (1 January 2019). Before its enumeration, this Court recognized "child neglect through culpable negligence" to be punishable as a novel offense under the general article; however, there was a split between the Army and Air Force Courts of Criminal Appeals regarding whether and how child neglect was a viable offense as a novel Article 134 specification. *See United States v. Vaughan*, 58 M.J. 29, 31-32 (C.A.A.F. 2003).

The Presidentially promulgated explanation of "culpable negligence" provides:

> [I]t is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts.

MCM, pt. IV, ¶68a.c(3) (2016 ed.).

In contrast, recklessness is understood to mean acting "[i]n such a manner that the actor knew that there was a substantial and unjustifiable risk that the social harm the law was designed to prevent would occur and ignored this risk when engaging in the prohibited conduct." *Haverty*, 76 M.J. at 204-05 (internal

quotation and citation omitted).

Analysis

The minimum mens rea necessary to separate criminal conduct from innocent conduct for the Presidentially promulgated Article 134, UCMJ charge of child endangerment is recklessness. Without this required element, Specifications 6, 7, and 8 of Charge II fail to state offenses, and Appellant's pleas were improvident.

This Court has recognized "the text of Article 134, UCMJ, does not explicitly contain a mens rea requirement." *Tucker*, 78 M.J. at 185. Thus, consistent with *Elonis*, this Court must read into the statute the "lowest level of mens rea that 'is necessary to separate wrongful conduct from otherwise innocent conduct.'" *Id*. at 185. As this Court has previously recognized, "in the context of Article 134, UCMJ, [] it is inappropriate to infer a negligence *mens rea* in the absence of a statute or ancient usage." *Id*. at 185-86 (quotation and citation omitted)).

In *Tucker*, this Court evaluated the mens rea required for an Article 134, UCMJ offense. There, the appellant was convicted of two specifications of providing alcohol to minors in violation of Article 134, UCMJ, under a negligence mens rea at trial. *Id*. at 184-85. This Court overturned the military judge's ruling, finding "the minimum *mens rea* necessary for the Article 134,

UCMJ offense of providing alcohol to underage individuals is recklessness." *Id*. at 184. Though noting *Tucker* did not stand for the proposition that "negligence can never be a *mens rea* for an Article 134, UCMJ offense[,]" it did so while citing *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979). *Id*. at 186 n. 3. *Kick* explained "that negligent homicide is properly punishable under Article 134, UCMJ, in part because of the 'special need in the military' given 'the extensive use, handling and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles, and the like[.]" 7 M.J. at 84.

As in *Tucker*, here, there is no custom, ancient usage, or post-*Elonis* precedent sufficient to override the general principle that it is inappropriate to infer a negligence mens rea. Child endangerment first appeared in the *MCM* in 2008 as a Presidentially promulgated offense—eight years prior to the Supreme Court's decision in *Elonis*. Though child endangerment has now been adopted by statute[5], that statute is not at issue here as the convicted offense is alleged to have occurred prior to 1 January 2019. Thus, the text of Article 134, UMCJ, provides no guidance, nor is there custom, ancient usage, or longstanding precedent that would place it on par with other offenses—such as negligent dereliction of duty—which have existed since the inception of the *MCM*.

This Court's analysis in *Haverty* is instructive. In *Haverty*, the appellant

[5] 10 U.S.C. § 919b.

was convicted of an Article 92, UCMJ specification for "violating or failing to obey [a] lawful general order or regulation[,]" in this case, an Army regulation prohibiting hazing. 76 M.J. at 202. In reaching the decision that recklessness was the appropriate mens rea, this Court distinguished Article 92 offenses from Article 93 offenses for maltreatment because Article 93 "involved a military offense that was specially created by Congress and prohibited under its own separate article—Article 93, UCMJ—reflecting Congress's particular concern about the deeply corrosive effect that maltreatment can have on the military's paramount mission to defend our Nation." *Id*., at 205 n. 10 (quotation omitted). Thus, as with negligent homicide and negligent dereliction of duty, this Court found that the custom of the service justified a mens rea other than recklessness for maltreatment offenses under Article 93, UCMJ. This same custom, ancient usage, or longstanding precedent is entirely absent from the Article 134, UCMJ, child endangerment offense of which Appellant stands convicted.

Here, as in *Tucker*, the military judge erred by instructing Appellant on a culpable negligence mens rea during the *Care* inquiry. *See Tucker*, 78 M.J. at 186. And as in *Tucker*, this provides a substantial basis in law to question the providency of Appellant's guilty plea to culpably negligent child endangerment, such that this Court should set aside and dismiss Specifications 6, 7, and 8 of Charge II. *Id*.; *see also Simpson*, 77 M.J. at 282 (citation omitted).

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the finding of guilt as to Specifications 6, 7, and 8.

Respectfully Submitted,

JARETT MERK, Maj, USAFR
U.S.C.A.A.F. Bar No. 35058
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Jarettt.merk@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on September 15, 2023.

Respectfully Submitted,

JARETT MERK, Maj, USAFR
U.S.C.A.A.F. Bar No. 35058
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Jarettt.merk@us.af.mil

CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with the type-volume limitation of Rule 24(b) because: This brief contains 3319 words in Times New Roman 14-point font in compliance with Rule 37.

Respectfully Submitted,

JARETT MERK, Maj, USAFR
U.S.C.A.A.F. Bar No. 35058
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Jarettt.merk@us.af.mil