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

REPLY BRIEF ON BEHALF OF APPELLANT

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UNITED STATES, *Appellee*, v. **JEREMY J. STRADTMANN,** Master Sergeant (E-7), U.S. Air Force, *Appellant.*	**REPLY BRIEF ON BEHALF OF APPELLANT** Crim. App. No. 40237 USCA Dkt. No. 23-0223/AF 30 October 2023

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

Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Jeremy J. Stradtmann, the Appellant, hereby replies to the Government's Brief (hereinafter Gov. Br.), filed on 16 October 2023. Appellant relies on the facts, law, and arguments filed with this Court on 15 September 2023, [Opening Br.] and provides the following additional arguments for this Court's consideration.

ARGUMENT

I. The definition of culpable negligence Appellant was convicted under is not supported by this Court's precedent.

Appellant does not seek to overturn *United States v. Vaughan*, 58 M.J. 29 (C.A.A.F. 2003). Rather, Appellant submits that the President did not follow

Vaughn, and instead redefined culpable negligence to require a lower level of scienter than that defined in *Vaughn*. As the mens rea is an essential element of the crime, changing such an element is a substantive change and beyond the authority of the President. *United States v. Jones*, 68 M.J. 465, 471 (C.A.A.F. 2010)

a. **The definition of culpable negligence has not been consistent over the last 20-years**.

The Government implies that the definition of culpable negligence, and consequently, the level of scienter required to satisfy that definition has been consistent from *Vaughn,* to the President's enumeration of Child Endangerment under Article 134, UCMJ in the MCM, through now with Congress's adoption of the offense under Article 119b, UCMJ. But that is incorrect. It is true that *Vaughn*, the MCMs from 2008 – 2016, and Congress' Article 119b, UCMJ, all use the term "culpable negligence," but each defined culpable negligence very differently. The effect of the variations in definition are changes to the level of scienter required to commit the offense.

While terse, a brief comparison of the definitions demonstrates that the definition of "culpable negligence" has not been consistent over the past 20 years. More importantly, the definition of culpable negligence that Appellant was convicted under is very different from the definition cited with approval by this Court in *Vaughn*.

In *Vaughn*, this Court's defined "culpable negligence" as

> "Culpable negligence" is a degree of carelessness greater than simple negligence. "Simple negligence" is the absence of due care. The law requires everyone at all times to demonstrate due care for the safety of others. And what a reasonably careful person would demonstrate under the same or similar circumstances. That is what due care means.
>
> MJ: Now, culpable negligence, on the other hand, **is a negligent act or failure to act, accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences of your conduct**, results to others, instead of merely a failure to use due care. [1] So it's a grossness.

United States v. Vaughan, 58 M.J. 29, 34 (C.A.A.F. 2003) (emphasis added).

But the President disregarded this Court's definition and redefined the mens rea element by declaring culpable negligence to be:

> 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.**

Manual for Courts-Martial (MCM 2016), Pt IV, Para 68a.c.3 (emphasis added).

Finally, under Article 119b, the MCM 2019 defined culpable negligence as:

> 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.

[1] This definition patterns the instructions for culpable negligence under Article 128, Battery & Involuntary Manslaughter by Culpable Negligence under Article 119, in the Military Judge's Benchbook. *See*, Dep't of the Army Pamphlet 27-9, Military Judge's Benchbook, (2002-08) (incorp changes 1 & 2) pages 212 and 422.

MCM 2019, Article 119b, Pt IV, Para 59.c.2.

Notably, Article 119b's definition eliminated the expansive language found in the MCM 2016 culpable negligence definition, "even though such harm would **not reasonably** be the natural and probable consequence of such acts." This eliminated language substantially decreased the level of scienter required to constitute the offense under the MCM 2016 because it expanded criminal liability to include a broader array of consequences. Putting the label "culpable negligence" aside for a moment, and just looking at the mens rea definitions used, the definition that Appellant was convicted under (MCM 2016) is a far cry from the "gross, reckless, wanton, or deliberate disregard for the foresee consequences of your conduct" that this Court defined as the requisite level of mens rea in *Vaughn*. 58 M.J. at 34.

b. **This Court's definition of culpable negligence in *Vaughn* was akin to recklessness**.

Thinking of mens rea along a spectrum, with recklessness at the left and simple negligence to the right, this Court's definition in *Vaughn* is closer to, if not the same, as recklessness, and the MCM 2016 definition Appellant was convicted under is closer to simple negligence.[2]

[2] Article 119b's definition is not at issue in this case – except to demonstrate the lack of continuity in defining what constitutes culpable negligence.

In *Vaughn,* the mens rea element required "a negligent act or failure to act, accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences of your conduct, [or the] results to others…" *Vaughan*, 58 M.J. at 34. This "gross, reckless, wanton, or deliberate disregard for the foreseeable consequences" of one's actions patterns the definition of recklessness the military judge in *Vaughn* would have been familiar with as it found in other parts of the MCM and the Military Judge's Benchbook.

For example, the MCM 2005, Pt IV, para 35c.7, Article 111, UCMJ, defined "reckless" as "exhibit[ing] a culpable disregard of foreseeable consequences to others from the act or omission involved." The instruction from the Military Judge's Benchbook provides additional context on this definition by defining reckless as:

> (Reckless) (Wanton) means a degree of carelessness greater than simple negligence. Simple negligence is the absence of due care, that is, (an act) (or failure to act) by a person who is under a duty to use due care which demonstrates a lack of care for the safety of others which a reasonably careful person would have used under the same or similar circumstances. **(Recklessness) (Wantonness), on the other hand, is a negligent (act) (failure to act) combined with a gross or deliberate disregard for the foreseeable results to others."** Dep't of the Army Pamphlet 27-9, *Military Judge's Benchbook*, (2003) (emaphasis added).

Despite being styled as culpable negligence, the definition adopted by this Court in *Vaughn* is virtually identical to that of recklessness as defined above. Further, Article 111, UCMJ states that its definition of recklessness would be

satisfied by the same degree of negligence required under involuntary manslaughter – which in turn requires culpable negligence defined as "a negligent act or failure to act accompanied by a **gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.**" Dep't of the Army Pamphlet 27-9, *Military Judge's Benchbook*, (2003), 3-11-44, Involuntary Manslaughter – Culpable Negligence (emaphsis added); and MCM 2008, Pt IV, Para 35c.7 *Recklessness*.

Regardless of the label, the requisite mens rea defined by this Court in *Vaughn* was tantamount to recklessness and, at bottom, required an appreciably higher level of scienter than "culpable negligence" as defined by the President in the MCM 2016 Article under which Appellant was convicted. Accordingly, Appellant does not argue that this Court should overturn *Vaughn*. Rather Appellant submits that the President exceeded his authority by not following *Vaughn* when he re-defined the elements of child endangerment under Article 134, UCMJ to require a mens rea below that defined by this Court in *Vaughn*.

II. The President did not operate within his authority when he re-defined culpable negligence to require a lower level of scienter than established in *Vaughn*.

a. When interpreting how Article 134 can be charged, the President is bound by the legal framework outlined in *Elonis v. United States*, 575 U.S. 723 (2015)

The Government concedes that the President cannot create substantive law (Gov. Br. at 11), but then fails to recognize that defining the mens rea element **is** creating substantive law. "Determinations as to what constitutes a federal crime, **and the delineation of the elements** of such criminal offenses – including those found in the UCMJ – **are entrusted to Congress**. *Jones*, 68 M.J. at 471 (emphasis added) (citations omitted).

This Court has declined to follow the President's interpretation of substantive law where it deviates or exceeds the statutory language. *See e.g., Jones,* 68 M.J. at 472; *United States v. Czeschin*, 56 M.J. 346, 349 (C.A.A.F. 2002). In such cases, this Court has emphasized that "the President does not have power to redefine the elements of punitive articles and thus change substantive criminal law." Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 Mil. L. Rev. 96, 97 (June 1999).

Here, Appellant does not challenge the President's ability to "suggest ways in which Article 134, UCMJ, might be charged." *Jones*, 68 M.J. at 472. Rather Appellant argues that the President exceeded his authority when he declared his definition of culpable negligence satisfied the mens rea element of the offense. While the President can suggest ways in which Article 134, UCMJ can be charged, he or she must do so within the bounds of the statue itself. It follows that the President is bound by the mens rea established in the statute by Congress.

While Article 134, UCMJ is silent as to mens rea, that does not mean it does not exist. Where, as here, the statute lacks explicit guidance from Congress, the Courts and the President, are required to read into the statute the lowest level of mens rea that "is necessary to separate wrongful conduct from otherwise innocent conduct." *United States v. Tucker*, 78 M.J. 183, 185 (C.A.A.F. 2018), citing *Elonis v. United States*, 575 U.S. 723, 736 (2015) (internal citation omitted).

In short, the President, like the Courts, is bound by the same legal framework outlined in *Elonis* when interpreting Article 134, UCMJ, and suggesting ways in which the Article might be charged. Thus, the President may define a mens rea so long as that mens rea is the lowest level necessary to separate wrongful conduct from otherwise innocent conduct. *Id.* To hold otherwise would be to permit the President to legislate criminal offenses – an authority which has been rejected by this Court. 68 M.J. at 472; and Maggs, 160 Mil. L. Rev. at 97.

b. Recklessness is the lowest mens rea necessary to separate wrongful from innocent conduct for the offense of child endangerment under Article 134.

In the face of Congressional silence, this Court has recognized, similar to other states and the model penal code, that reckless[3] is generally the appropriate mens rea standard to read into a statute. *United States v. Gifford*, 75 M.J. 140, 147

[3] As this Court stated in *Gifford*, "recklessness has been described as morally culpable when applied to other criminal offenses. *United States v. Gifford*, 75 M.J. 140, 147 (C.A.A.F. 2016) (internal quotation omitted) (citation omitted).

(C.A.A.F. 2016). Under a recklessness standard, a person would be criminally liable for negligent acts/omissions to a child only when accompanied by a gross or deliberate disregard for the foreseeable consequences of their actions. *See* Reckless under MCM 2008, Para 35.c.7 or culpable negligence as defined by *Vaughn,* 58 M.J. at 35. Harm that is not reasonably the natural and probable consequence of the negligent act would not be criminal. Thus, the law would rightfully punish those who either consciously disregarded, or reasonably should have known, that their conduct would result in harm to a child. But the law would not label as criminal an act or omission by a parent when the harm is not a natural and probably consequence of the act/omission at issue. This level of scienter appropriately separates wrongful from innocent conduct without "stepping over the line that separates interpretation from amendment." *Elonis*, 575 U.S. at 745 (Alito, J., concurring in part and dissenting in part).

c. Finding child endangerment to require a negligent act or omission accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences of your conduct does NOT disturb this Court's prior rulings or interpretation of military custom.

There is no support for the government's argument that thirty years of military custom supports the President's definition of culpable negligence extending criminal liability to cases where the harm is not reasonably the natural and probable consequence of the negligent action. This Court in *Vaughn* approved

a wholly different definition of culpable negligence as supported by military custom. 58 M.J. at 35. Additionally, in *Vaughn*, the focus of this Court's military custom analysis was not on whether military custom dictated a mens rea below recklessness, rather this Court focused on whether military custom provided appellant notice that child neglect without actual harm was punishable under military law. That analysis is in stark contrast to cases where this Court has squarely confronted the issue of whether military custom dictated a lower mens rea than recklessness. *See e.g.*, *United States v. Kick*, 7 M.J. 82, 84 (C.M.A. 1979) (special need in the military to make the killing of another as a result of simple negligence a criminal act because of the extensive use, handling, and operation in the course of official duties of such dangerous instruments as weapons, explosives, aircraft, vehicles, and the like. The danger to others from careless acts is so great that society demands protection.). *See also*, *United States v. Blanks*, 77 M.J. 239, 243 (C.A.A.F. 2018) (holding "dereliction of duty offense promotes good order and discipline in the military. In light of the military nature of the offense and its limited authorized punishment, a negligence mens rea standard is appropriate for certain dereliction offenses.").

Contrary to the government's contention, Appellant's argument supports, rather than seeks to upset, this Court's precedent. In *Vaughn*, this Court found that the military judge properly defined the elements when she defined culpable

negligence as "a negligent act or failure to act, accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences of your conduct." 58 M.J. at 35. As argued above, this definition of culpable negligence is effectively a reckless mens rea. Labels aside, Appellant does not challenge the elements as defined by the military judge and approved by this Court in *Vaughn*.

Neither does Appellant challenge this Court's opinions in *United States v. Plant*, 74 M.J. 297 (C.A.A.F. 2015) or *United States v. Norman*, 74 M.J. 144 (C.A.A.F. 2015). In *Plant*, the requisite mens rea was not at issue, and this Court did not address the definition of culpable negligence. Instead, *Plant* turned on whether the appellant's actions endangered the child within the meaning of MCM pt. IV, para. 68a.c. 74 M.J. at 298. Similarly, in *Norman*, this Court specifically noted that "the only element in contention in this case is the terminal element." 74 M.J. at 149. Neither of these cases addressed the issue of whether culpable negligence as defined by the President, vice this Court in *Vaughn,* was the appropriate mens rea for the offense of child endangerment.

III. <u>There is a substantial basis in law to question Appellant's plea.</u>

Similar to *Tucker*, here the appropriate mens rea element is defined as "a negligent act or failure to act, accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable consequences of your conduct." 58 M.J. at

35. While this definition has been styled as "culpable negligence" it is effectively tantamount to recklessness as defined in Dep't of the Army Pamphlet 27-9, *Military Judge's Benchbook*, (2003) ("a negligent (act) (failure to act) combined with a gross or deliberate disregard for the foreseeable results to others."); see also MCM 2005, Pt IV, para 35c.7. The President's mens rea definition lowers the level scienter required to commit the offense closer to simple negligence by expanding criminal liability to cases where the harm is not reasonably the natural and probable consequence of the action. No military custom or ancient usage supports such lowering of the mens rea threshold in the context of child endangerment.

Because recklessness is the appropriate mens rea, the military judge erred when he instructed Appellant using the President's definition of mens rea as an element of offense during the providence inquiry. As this Court held in *Tucker*, "[t]his error constitutes a substantial basis in law to question the providency of Appellant's guilty plea" because the child endangerment element that Appellant allocated to was not punishable under Article 134, UCMJ, and an accused cannot plead "guilty to conduct that was not criminal." *Tucker*, 78 M.J. at 186 quoting *United States v. Ferguson*, 68 M.J. 431, 433 (C.A.A.F. 2010). Therefore here, as in *Tucker*, the military judge abused his discretion in accepting Appellant's plea. 78 M.J. 186, see also, *United States v. Simpson*, 77 M.J. 279, 282 (C.A.A.F. 2018)

(explaining that "[a] ruling based on an erroneous view of the law is ... an abuse of discretion").

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

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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 30 October 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with the type-volume limitation of Rule 24(b) because: This brief contains 2890 words in Times New Roman 14-point font in compliance with Rule 37.

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